No. 21-55405

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARIBE RESTAURANT & NIGHTCLUB, INC.,
(d/b/a Laz Lauz Ultralounge),
individually and on behalf of all others similarly situated,

Plaintiff-Appellant,
v.
TOPA INSURANCE COMPANY,

Defendant-Appellee

Appeal from the United States District Court
for the Central District of California, No. 2:20-cv-03570
Hon. Otis D. Wright, II

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record for Appellant Caribe Restaurant and Nightclub, Inc. hereby files its corporate disclosure statement as follows:

Caribe Restaurant and Nightclub, Inc. is a nongovernmental corporate party.

No publicly held corporation owns 10% or more of the stock of Caribe Restaurant and Nightclub, Inc.

Date: July 22, 2021.

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STATEMENT REGARDING ORAL ARGUMENT

In California, hundreds of businesses have made claims under their insurance policies for loss of business income resulting from "direct physical loss of or damage to property" caused by COVID-19. The insurers have routinely denied these claims, forcing the businesses to file suit. Some suits, like Appellant's, allege actual COVID-19 infection of the premises, and not just closure orders by civil authorities. But many do not. Federal district courts confronting these issues have reached contradictory results, and have even disagreed on their interpretation of California caselaw. In fact, California courts have not directly addressed the issues presented by this appeal. And confusion and contradiction reigns in court decisions regarding these issues throughout the country.

Appellant requests oral augment because it would assist the Court in: (i) understanding how the policy and facts of this case differ from others that are pending before the Court, (ii) interpreting and applying the relevant California caselaw, and (iii) understanding the rationales of the federal district decisions that have addressed the issues, some of which are sound, but others which are not. Oral argument is merited not just because of the confusing and contradictory lower court caselaw and the novel issues presented by this appeal, but also because California businesses have hundreds of millions of dollars at stake in the COVID-19 class action suits.

In addition to this appeal, there are at least three others involving insurance claims for loss of business income related to COVID-19:

> No. 21-55123, *Selane Products Inc. v. Continental Casualty Company*, and No. 20-16858;
>
> No. 20-16858, *Mudpie, Inc. v. Travelers Casualty Insurance Company of America*; and
>
> No. 20-17422, *Chattanooga Professional Baseball LLC et al v National Casualty Company et al*.

Although these appeals involve some common facts and issues, they also vary in some important respects. Appellant's allegation of the physical presence of COVID-19 in the premises distinguishes its appeal from the *Mudpie* and *Chattanooga* appeals where no such allegation is made. An important difference between this appeal and the *Selane* appeal is that Appellant's dine-in and nightclub facility is open to the general public, whereas Selane's manufacturing facility is not. Therefore, Appellant's appeal presents important issues not presented in *Selane*, *Mudpie*, and *Chattanooga*. Further, the arguments and authorities in the briefs in these appeals vary to some degree. So, the Court would benefit from hearing oral argument from Appellant, as well as the parties to these other appeals.

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JURISDICTIONAL STATEMENT

This is a class action suit. The Class Action Fairness Act ("CAFA") confers jurisdiction on federal courts over class actions when the matter in controversy exceeds $5,000,000 and "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A). Unlike the complete diversity of citizenship generally required by section 1332(a), the CAFA requires only "minimal diversity." *Ehrman v. Cox Communications, Inc*., 932 F.3d 1223, 1226 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2566 (2020).

The District Court properly exercised subject-matter jurisdiction over this CAFA lawsuit because Appellant-Plaintiff's allegations in its First Amended Complaint (Complaint) satisfy these two jurisdictional requirements 28 U.S.C. § 1332(d)(2)(A). 3-ER-205, ¶¶ 16. None of the parties have challenged Plaintiff-Appellant's jurisdictional fact allegations.

On April 9, 2021, the District Court issued an Order granting Appellee's Motion to Dismiss, which disposed of all of Appellant's claims. 1-ER-4–10. On April 23, 2021, Appellant timely filed its Notice of Appeal. FED. R. APP. P. 4(a)(1)(A); 3-ER-285–89. This Court has jurisdiction over this appeal from a final decision of the district court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Appellant Caribe Restaurant & Nightclub, Inc. (d/b/a Laz Luz Ultralounge) (hereafter, "Caribe") purchased an all-risk insurance policy (Policy) that covers the loss of business income and extra expense sustained due to the suspension of operations caused by "direct physical loss of or damage to property" at the covered premises. 3-ER-210–12, ¶ 44; 3-ER-230–284.

Caribe's Complaint alleges it sustained substantial losses of business income and extra expense due to the suspension of its restaurant and nightclub operations caused by: (1) unsafe property and impaired business functions of covered properties, suspension or reduction of business, dangerous physical conditions of covered properties, and suspension of operations, all due to COVID-19, and (2) orders of civil authorities limiting the use of and access to its premises. The Complaint alleges that such infection diminished the functionality and useable space of its facilities that could be used, and therefore constituted a "direct physical loss of or damage to property" under the Policy.

The District Court erred by dismissing the action based on its erroneous conclusion that Caribe failed to allege any plausible claim for coverage under the Policy. The dismissal is predicated on errors that the District Court made in construing the Policy term—"direct physical loss of or damage to property." The specific errors or issues are:

1. The Complaint alleges that COVID-19 was present at Caribe. Did the District Court err by finding that such presence of the deadly virus is not "physical . . . damage to property" because COVID-19 allegedly did not physically alter the facility, even though the virus is material matter that made the facility different and unsafe, and diminished its functionality and useable space?

2. In addition to "damage to property", the Policy also covers "loss of property." Because "loss of" is connected to "damage to" by the disjunctive "or", the terms "loss of" and "damage to" have different meanings. Did the District Court err by equating "loss of property" with "damage to property" and, as a result, erroneously conclude that "loss of property" requires a physical alteration of the property?

3. Did the District Court err by failing to recognize, as many courts have, that a temporary loss of functionality of property caused by a physical force (such as COVID-19 infection) is a "direct physical loss of property"?

4. Did the District Court err by failing to recognize that the loss of use of premises due to civil authority orders is a "direct physical loss of property"?

Lastly, this appeal presents the issue of whether this Court should certify the above-questions of state law to the California Supreme Court pursuant to California Rule of Court 8.548, given the importance of these issues to thousands of California businesses and the absence of California appellate court opinions on these issues.

ADDENDUM

Seven state court orders (not available on Westlaw), statutes, and rules cited in this brief appear in the Addendum at the end of this brief.

STATEMENT OF THE CASE

Caribe operates Laz Luz, a restaurant and nightclub in Bonita, California.

The COVID-19 Pandemic and Closure Orders

In early 2020, both the State of California and San Diego County issued orders in response to the COVID-19 pandemic. 3-ER-209, ¶¶ 35–38. On March 16, 2020, San Diego County issued an order that prohibited dine-in-eating and closed all bars in the county. *Id*. ¶ 36. On March 19, 2020, the State of California issued a civil authority order requiring the closure of bars and banning onsite dining in California. *Id*. ¶ 35. The San Diego County and California closure orders were issued in response to COVID-19's rapid spread throughout California. *Id*. ¶ 37. Violations of the San Diego County and State of California Closure Orders were punishable by fine, imprisonment, or both. *Id.* ¶ 38.

Caribe alleges that it was required to suspend or limit operations because it lost the use of its dine-in and nightclub facility due to unsafe conditions created by the physical presence of COVID-19 and the resulting Closure Orders. Consequently, it sustained substantial loss of business income and extra expense. 3-ER-209, ¶ 33.

Provisions of the Policy under which Caribe Submitted Claims

Caribe purchased an all-risk insurance policy from Topa Insurance Company ("Topa"), including Business Income (and Extra Expense) Coverage, commonly called business interruption insurance. 3-ER-203, 206–207, ¶¶ 2, 20–21. In the Special Property Coverage Form provide to Plaintiff under the heading "Covered Causes

of Loss," Topa agreed to "pay for direct physical loss" to Covered Property "unless the loss is excluded or limited by" the Policy. *Id*. ¶ 21.

At issue in this appeal is the claim Caribe submitted to Topa under four sections of the Special Property Coverage. 3-ER-210; 3-ER-271–79; 3-ER-272; 3-ER-264; 3-ER-275. First, the Business Income section obligates Topa to "pay for the actual loss of Business Income … sustain[ed] due to the necessary 'suspension' of [Caribe's] 'operations' during the "period of restoration." 3-ER-271. This provision states that coverage attaches if the suspension was "caused by direct physical loss of or damage to" the property. *Id*. Second, the Extra Expense section covers extra expense incurred during the "period of restoration" of operations. *Id*. Third, the Civil Authority coverage obligates the insurer to pay for loss caused by the action of a civil authority that prohibits access to the insured premises. 3-ER-272.[1] Last, Caribe's losses are covered under the Policy under the Duties in the Event of Loss provision (commonly known as "Sue and Labor" provision). 3-ER-264; 3-ER-275.

Unlike claims made by the insureds in the *Mudpie* and *Chattanooga* appeals pending before this Court, Caribe alleges that it sustained loss of income and extra expense not just because of the closure orders, but also because COVID-19 was present on its property. 3-ER-210, ¶ 39. Nevertheless, Topa denied its claims.

[1] The District Court also held that Caribe is not entitled to coverage under the Civil Authority section of the Business Income Coverage. Caribe does not challenge that ruling.

The District Court Litigation

Caribe's Complaint alleges that the outbreak and the presence of COVID-19: (i) caused "direct physical loss of or damage to" the Covered Property; (ii) denied Caribe use of the Covered Property; and (iii) caused Caribe to suspend operations. 3-ER-204–10, ¶¶ 10, 11, 14, 39. Caribe's property lost its "normal functionality"; Caribe lost complete use of its property prior to COVID-19 being brought under slight control, and after than only gained limited use of the property. *Id*. ¶¶ 11, 12, 39. In sum, COVID-19's presence in the property and the resulting closure orders caused "direct physical loss of or damage to the property," requiring the suspension of operations. 3-ER-204–10, ¶¶ 10, 11, 14, 39.

Dismissal of Action

Topa moved to dismiss Caribe's Complaint for failure to state a claim. 2-ER 112–200. The District Court granted the motion and dismissed the action. 1-ER-4–10.

SUMMARY OF THE ARGUMENT

The Policy covers the loss of business income and extra expenses sustained due to the suspension of operations caused by "direct physical loss of or damage to property" at the covered premises. 3-ER-271–79. Caribe paid a large premium to Topa expecting that it would be fully protected from business interruption losses caused by the loss of property, regardless of the cause or duration of the loss, because

no such limits were stated in the Policy. Those expectations were dashed by the District Court, which departed from California law by reading the Policy not as layperson based on ordinary meanings of the terms as California law requires, but as a lawyer attempting to decipher inapplicable California caselaw. Consequently, Caribe has wrongly been deprived of its bargained-for protection for loss of income. And, the loss of income Caribe has suffered has been staggering. Even the District Court expressed sympathy and acknowledged that Caribe "is suffering economically from the unprecedented COVID-19 pandemic." 1-ER-10.

Specifically, Caribe's Complaint alleges it sustained substantial losses of business income and extra expenses due to the suspension of its operations caused by: (1) presence of COVID-19 on its property and (2) civil authority orders prohibiting or limiting use of and access to its premises. 3-ER-210, ¶¶ 39–41. Such presence of COVID made the dine-in-facility and nightclub unsafe for use, diminished the functionality and useable space of Caribe, and therefore constituted a "direct physical loss of or damage to property" under its Policy. 3-ER-204–07, ¶¶ 12, 26.

The District Court made four errors in construing the Policy terms—"direct physical loss of or damage to property"—which led it to wrongly conclude that Caribe failed to allege a plausible claim for coverage under the Policy. First, the District Court wrongly found that COVID-19's presence did not physically alter or damage Caribe's nightclub and dine-in facility by making the property unsafe. "Alter" is

defined in Webster's Dictionary as "to make different without changing into something else." The presence of COVID-19 made the facility different—it made it less functional and diminished usable space. The District Court improperly invaded the fact-finding role of the jury by finding that COVID-19 does not, as a factual matter, physically alter the property.

Second, the District Court erred by failing to recognize that: (1) "loss of property" and "damage to property" have separate meanings because they are connected by the disjunctive "or" and (2) even if "damage to property" may require physical alteration, "loss of property" does not. In fact, that holding conflicts with two California court decisions (*Hughes* and *Universal Savings Bank*), two federal court decisions construing California law (*Total Intermodal* and *Mudpie*), and numerous other decisions discussed herein.

Third, the District Court erred by failing to recognize, as many courts have, that a temporary "loss of functionality of property" caused by a physical force (such as COVID-19) is a "direct physical loss of property." For example, in *Studio 417*, the federal district court held that the plaintiff restaurants plausibly alleged a "direct physical loss" under the ordinary meaning of that phrase, based on allegations that COVID-19 was physical present and that COVID-19 attached to and deprived the plaintiffs of their restaurant property by making it unsafe. This holding is supported by many decisions, including *Mudpie* and *Gregory Packaging.*

Fourth, the District Court erred by failing to recognize that orders of civil authorities prohibiting the use of Caribe's dine-in and nightclub facility are a "direct physical loss of property." Such was the interpretation of that policy language of three federal district court decisions, *Kingray*, *Henderson Road*, and *Society Insurance*.

Most important, the District Court violated the California rule that a court must look first to the language of the contract to ascertain the ordinary meaning that a layperson would attach to it. California courts in insurance cases regularly turn to dictionaries to ascertain the ordinary meaning of words. The District Court made no attempt to read the Policy as a layperson or determine the meaning of the Policy terms based on its ordinary meanings as defined by the dictionary. Instead, it read the terms like an attorney determining its meanings based on its misapplication of caselaw.

Had the District Court followed California rules for interpreting insurance policies, it would have found coverage under both provisions of the Policy—"loss of property" and "damage to property."

As to "damage to property," a layperson would not conclude, as the District Court did, that COVID-19's presence at Caribe's dine-in and nightclub property did not alter or make it different.

As to "loss of property," the ordinary meaning of these terms as defined by the dictionary requires only that the insured lost its property or its use for some period of time, regardless of the cause. A layperson would conclude that Caribe's loss of its dine-in-and nightclub facility for several months because of the presence of COVID-19 and the Closure Orders is a "direct physical loss of property." The loss of the dine-in and nightclub facility is "direct" because it has a "causal relationship" to the COVID-19 infection and the Closure Orders. The loss is "physical" because the nightclub and dine-in facility has a "material existence." A layperson would not, as the District Court did, interpret "physical loss or damage" to require a "physical alteration"—terms that the carrier did not bargain to include in the Policy.

Multiple federal district courts, including those in California, presented with the same policy terms, after reviewing their ordinary meanings as defined by the dictionary, have agreed that the policies cover business losses from COVID-19. *See Kingray*, *Henderson Road*, *Studio 417*, *Kern*, and *Elegant Massage*. Further, another California district court has decided that allegations of virus on the premises constitutes physical loss or damage to property. *The Madera Group, LLC v. Mitsui Sumitomo Ins. USA, Inc.*, Case No. 2:20-cv-07132-JAK-AFM, 2021 WL 2658498, at *8-

10 (III.B.2.b) (C.D. Cal. June 25, 2021)[2] ("Constructing the allegations in the Complaint as true, it cannot be determined, as a matter of law, that the 'statistically certain' presence of COVID-19 in Plaintiff's restaurants could not cause a 'direct physical loss of or damage to property.'").

Moreover, many California state courts have also denied motions to dismiss and motions for judgment on the pleadings in other COVID-19 business interruption cases, deciding that allegations of virus on the premises constitutes physical loss or damage to property. *See P.F. Chang's, Goodwill Inds., Boardwalk Ventures*.

So, at a minimum, Caribe's interpretation is reasonable and the Policy is ambiguous as to whether it covers a temporary loss of the dine-in and nightclub facility due to COVID-19 infection or civil authority orders prohibiting its use. The District Court erred by not construing this ambiguity in favor of coverage.

Caribe therefore alleged a plausible claim under the ordinary meaning of the Policy terms.

Finally, this appeal presents novel issues of California state law. This Court therefore should certify the issues to the California Supreme Court.

[2] The Court granted the Motion to Dismiss on other grounds (namely, a virus exclusion) but allowed leave to amend.

ARGUMENT

I. Standard of Review

The Ninth Circuit reviews de novo a district court's dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, accepts all factual allegations in the complaint as true, and construes the pleadings in the light most favorable to the nonmoving party. *Curtis v. Irwin Indus., Inc*., 913 F.3d 1146, 1151 (9th Cir. 2019). A complaint must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Ninth Circuit has clarified that (1) a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively," and (2) "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

"The meaning and interpretation of an insurance contract is a question of law reviewed de novo." *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998). The Ninth Circuit reviews a district court's interpretation of state law under

the same de novo standard as it does questions of federal law. *Premier Commc'ns Network, Inc. v. Fuentes*, 880 F.2d 1096, 1102 (9th Cir. 1989).

II. California Principles for Interpreting Insurance Policies

In this diversity case brought under California state law, this Court "must apply the substantive law of California, as interpreted by the California Supreme Court." *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1016 (9th Cir. 2020).

Under California law, interpretation of an insurance policy is a question of law, subject to the ordinary rules of contractual interpretation. *See Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545 (1992); *Waller v. Truck Ins. Exch., Inc.*, 11 Cal.4th 1, 18, 44 Cal.Rptr.2d 370, 900 P.2d 619 (1995); *AIU Ins. Co. v. Superior Court*, 51 Cal.3d 807, 818, 274 Cal.Rptr. 820, 799 P.2d 1253 (1990). Policy language must be interpreted "in context, with regard to its intended function in the policy," keeping in mind that "[t]he fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." *Bank of the West*, 2 Cal.4th at 1264–65. When the contract is clear, "it governs." *Id.*

Significantly, California law requires courts to read an insurance policy as a layperson would, not as an attorney or insurance expert might analyze it. *E.M.M.I. Inc. v. Zurich Am. Ins. Co.*, 32 Cal.4th 465, 471 (2004). And if there is an ambiguity in the policy, it should be resolved against the insurer and in favor of coverage. *Bank of the West*, 2 Cal.4th at 1264–65.

The Ninth Circuit has recognized the above principles as a correct statement of California law. *See AXIS Reinsurance Co. v. Northrop Grumman Corp.*, 975 F.3d 840, 847 (9th Cir. 2020).

III. The District Court Erred by Dismissing the Action Because the Complaint States Plausible Claims

Caribe's Policy covers the loss of business income and extra expense sustained due to the suspension[3] of operations caused by "direct physical loss of or damage to property" at the covered premises. 3-ER-271. The ultimate question presented here is whether a restaurant's loss of its dine-in restaurant and nightclub (because of unsafe conditions created by COVID-19 infection of the facility and the resulting civil authority orders) is either a "damage to property" or a "loss of property" under the Policy.

The District Court got the answer wrong because it violated the California rule that a court must "look first to the language of the contract in order to ascertain its plain meaning or the meaning a lay person would ordinarily attach to it." *Waller*, 11 Cal.4th at 18.

[3] "Suspension" is defined in the Policy as "the slowdown or cessation of your business activities. 3-ER-279. Thus, suspension includes a slowdown of activities.

A. Caribe Has Adequately Alleged That COVID-19 Damaged Its Property

1. The Complaint Alleges a Physical Alteration of the Property

The District Court interpreted *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779-80, 115 Cal.Rptr.3d 27 (2010), as requiring a "physical alteration" to the property for coverage to attach under the provision of Caribe's Policy, "direct physical loss of or damage to property." 1-ER-8. While Caribe disagrees with that interpretation of *MRI Healthcare* or that it applies here to different policy language and facts, Caribe's Complaint meets that physical alteration requirement.

Caribe alleged structural alteration in two ways: (1) infestation by a harmful agent; and (2) diminishment of functional space and loss of functionality of covered property. *E.g.*, 3-ER-204–208, ¶¶ 10-14, 26-27.

Due to COVID-19, the covered property "has become unsafe . . ." 3-ER-207, ¶ 26.

Webster's dictionary defines "alter" as "to make different without changing into something else."[4] Similar to Webster's definition, *MRI Healthcare* equates alteration with a "physical change in the condition of the property." 187 Cal.App.4th at 778. COVID-19 altered or made Caribe's property different by adding a harmful

[4] https://www.merriam-webster.com/dictionary/alter (last accessed July 20, 2021).

agent that was not there before. The Policy does not state that the damage must be perceptible to sight. In fact, the Policy covers expenses to extract pollutants, which is defined to include any contaminant, vapor, or fumes. 3-ER-257–259, 279. Many contaminants, vapors, and fumes are not perceptible to sight.

2. Infestation By Harmful Agents Constitutes Physical Alteration and Direct Physical Loss

The presence of COVID-19 constitutes direct physical loss or damage to property, even if that term requires a structural alteration. COVID-19 particles, though unseen, physically alter their property surfaces in a manner that causes loss and damage by rendering affected premises dangerous to human health. Accordingly, on multiple occasions, courts have held that infestation of covered property by microscopic entities that are harmful to human health—including COVID-19—constitutes "direct physical loss or damage."

Multiple California Superior Court cases have decided that allegation of virus on the premises constitutes physical loss of or damage to property. For example, in *P.F. Chang's China Bistro, Inc. v. Certain Underwriters at Lloyds London*, the court denied the motion for judgment on the pleadings in the policyholder's favor in a COVID-19 business interruption case and held that the requirement of "physical loss or damage to property" was met in one or more ways, including by the: 1) "actual or potential presence of the virus in the air" at the covered property; 2) "the necessity

of modifying physical behaviors through manners such as social distancing, avoiding confined indoor spaces" whether or not those practices were mandated by government order; 3) government orders that required physical spaces to be shut down; and/or 4) "the need to mitigate the threat or actual physical presence of virus on door-handles, tables, silverware. . .". No. 20STCV17169, 2021 WL 818659, at *1 (Cal. Super. Ct., Los Angeles Cnty, Feb 4. 2021). Similarly, the court in *Goodwill Indus. of Orange Cnty. v. Philadelphia Indem. Ins. Co.*, overruled the insurer's general demurrer and ruled in the policyholder's favor, holding that it could not determine as a matter of law that the complaint's allegations do not show a "direct physical loss" where the complaint alleged COVID-19 was present on the covered property and caused direct physical loss and damage to the property. No. 30-2020-01169032-CU-IC-CXC, 2021 WL 476268, at *2-3 (Cal. Super. Ct. Jan. 28, 2021 (Wilson, J.). Likewise, in *Boardwalk Ventures CA, LLC v. Century-Nat'l Ins. Co.*, the court denied the insurer's motion for judgment on the pleadings where the policyholder's complaint alleged that COVID-19 caused physical loss or damage to the property. No. 20STCV2759, 2021 WL 1215892, at *4 (Cal. Super. Ct. Mar. 18, 2021).

Holdings related to infestation causing physical loss or damage to property are not just limited to California state courts. In *Cooper v. Travelers Indemnity Co.*,

the Northern District of California held that the presence of e-coli bacteria in a restaurant's well, which forced the restaurant's closure, constituted direct physical damage to the property. C-01-2400-VRW, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002). Specifically, the Court noted that any other type of physical damage or structural alteration of property was not required by the terms of the insured's "all-risks" policy to trigger coverage of loss of business income. *See id.* at *4-5.

Courts around the country have reached similar results. *See General Mills, Inc. v. Gold Medal Insurance Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (finding that cereal oats infested by pesticide constituted direct physical loss); *Stack Metallurgical Services, Inc. v. Travelers Indem. Co. of Connecticut*, CIV. 05-1315-JE, 2007 WL 464715, at *6–9 (D. Or. Feb. 7, 2007) (finding that contamination of a furnace by lead particles constituted direct physical loss or damage); *Prudential Property & Cas. Ins. Co. v. Lillard-Roberts*, No. CV–01–1362–ST, 2002 WL 31495830, at *7–10 (D. Or. June 18, 2002) (holding that the presence of mold in covered property and the risk of systemic fungal disease constituted "direct physical loss to property"); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. Civ. 98–434–HU, 1999 WL 619100, at *6 (D. Or. Aug. 4, 1999) (noting that "physical damage can occur at the molecular level and can be undetectable in a cursory inspection" and holding that the presence of microbial mold and fungi constituted "direct physical loss."); *Farmers Insurance. Co. of Oregon v. Trutanich*, 123 Or. App. 6, 10-11,

858 P.2d 1332, 1335-36 (1993) (holding that a pervasive odor which "infiltrated" a home as a result of tenants' cooking of methamphetamine physically damaged the house, causing "direct physical loss"); *see also Largent v. State Farm Fire & Cas. Co.*, 116 Or. App. 595, 597-98, 842 P.2d 445, 446 (1992) (holding that airborne vapors and particulates discharged during the cooking of methamphetamine damaged a rental house, resulting in direct physical loss); *Oregon Shakespeare Festival Ass'n v. Great American Insurance Co.*, No. 1:15-CV-01932-CL, 2016 WL 32674227, at *9 (D. Or. June 7, 2016), *vacated by stipulation of the parties*, No. 1:15-CV-01932-CL, 2017 WL 1034203 (D. Or. Mar. 6, 2017) (finding that smoke infiltration of an outdoor theater that resulted in the cancellation of performances because the air contained an "unhealthy level of particulates" constituted "direct physical loss or damage"); *Gregory Packaging, Inc. v. Travelers Property Casualty Co.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *3, *6 (D.N.J. Nov. 25, 2014) (holding that the discharge of ammonia gas inflicted direct physical loss of or damage); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (holding that church building sustained physical loss when it was rendered uninhabitable and dangerous because of the accumulation of gasoline under and around the church); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300–01 (Minn. Ct. App. 1997) (holding that contamination by asbestos fibers released from

asbestos containing materials constituted a fortuitous, direct physical loss covered under an all-risk, first-party property insurance policy).

In its Complaint, Caribe alleged that (1) COVID-19 presented a dangerous physical condition on property (3-ER-210, ¶ 40), (2) the presence of COVID-19 rendered the property unsafe (*id.* ¶ 9), (3) COVID-19 has impaired Caribe's property by making it unusable in the way it was previously used (*id.* ¶ 10), and (4) the presence and threat of COVID-19 forced Caribe to suspend or reduce business on its property to avoid further harm (*id.* ¶¶ 8-10; 85). Accordingly, Caribe sufficiently alleged "direct physical loss of or damage" to property.

3. Impairment of Function Constitutes "Direct Physical Loss or Damage" And Is Also Structural Alteration

California courts have held that properties sustained direct physical loss or damage when they lose habitability or functionality, including commercial functionality. *See Thee Sombrero, Inc. v. Scottsdale Ins. Co.*, 28 Cal. App. 5th 729, 734, 239 Cal. Rptr. 3d 416, 420 (2018).

In *Thee Sombrero*, a policyholder sought coverage for "property damage" when the policyholder was required to operate his nightclub only as a banquet hall following a shooting at the premises that resulted in the revocation and replacement of the policyholder's permit to operate the nightclub. *See Thee Sombrero, Inc.*, 28 Cal. App. 5th at 734, 239 Cal. Rptr. 3d at 420. In its reasoning, the California ap-

pellate court in this case pointed out that the loss of functionality or loss of any significant use of the insured's tangible property constituted property damage. *See id.* at 734-37, 420-23. The Court further reasoned:

> If your leased apartment was rendered uninhabitable by some noxious stench, you would conclude that you had lost the use of tangible property; and if the lawyer said no, actually you had merely lost the use of your intangible lease, you would goggle in disbelief.

Id. at 738, 423. Ultimately, the Court held that the loss of the policyholder's ability to use the property as a nightclub, as it did prior to the shooting event, constituted physical damage to property covered under the policy. *See id.* at 742, 426.

Furthermore, courts across the nation have also routinely held that properties sustained "direct physical loss or damage" when they lose habitability or functionality of the insured's property(ies). *See Brown's Gym, Inc. v. The Cincinnati Insurance Company,* No. 20-CV-3113, 2021 WL 2953039 at *2, *4 (C.P. Lacka. Co. July 13, 2021 Nealon, J.) (overruling insurer's preliminary objections in COVID-19 case and holding that allegations of the "continuous presence" of virus on the property and allegations that property was unfit for intended use were adequate to allege direct physical loss or damage); *Gen. Mills, Inc.,* 622 N.W.2d at 152 (holding that a direct physical loss had occurred when an insured's property—cereal oats—was infested by an unapproved pesticide); *Stack Metallurgical Services, Inc.*, 2007 WL 464715, at *8 (holding that industrial furnace sustained "direct physical loss or dam-

age" when contamination prevented it from being used for ordinary commercial purposes); *Gregory Packaging, Inc.*, 2014 WL 6675934, at *6 (holding that the discharge of ammonia gas inflicted direct physical loss of or damage to an insured's facility); *see Motorists Mutual Ins. Co. v. Hardinger,* 131 F. App'x. 823, 825–27 (3d Cir. 2005) (finding that contamination of a home's water supply that rendered the home uninhabitable to constitute "direct physical loss"); *Essex v. BloomSouth Flooring Corp.,* 562 F.3d 399, 406 (1st Cir. 2009) (finding that an unpleasant odor rendering property unusable constituted physical injury to the property); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp. 2d 699, 709 (E.D.Va.2010), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013) (finding "direct physical loss" where a home was "rendered uninhabitable by the toxic gases" released by defective drywall).

Though Topa's briefing in the underlying action cited some COVID-19 insurance decisions that it contends support its position, these decisions involve different policies, issued by different insurers, to different policyholders, primarily in different states. Moreover, in its motion to dismiss in the lower court, Topa did not address the following COVID-19 insurance decisions that have denied insurers' motions to dismiss under FRCP 12(b)(6) or its state equivalent. *E.g., Studio 417, Inc. v. Cincinnati Ins. Co*., 478 F. Supp. 3d 794 (W.D. Mo. 2020) (denying insurer's motion to dismiss); *K.C. Hopps, Ltd. V. Cincinnati Ins. Co.*, No. 20-cv-00437-SRB (W.D. Mo. August 12, 2020) (same); *Optical Services USA JC1 v. Franklin Mut. Ins. Co*., No.

BER-L-3681-20 (Sup. Ct. N.J. Aug. 13, 2020) (oral decision denying insurer's motion to dismiss); *Ridley Park Fitness, LLC v. Philadelphia Indem. Ins. Co.*, No. 01093 (Philadelphia Cty. C.P. Aug. 31, 2020) (denying insurer's preliminary objections under Pa. R.C.P. 1028(a)(4), the state equivalent of a motion to dismiss); *Blue Springs Dental Care, LLC, v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020) (denying insurer's motion to dismiss); *Urogynecology Specialist of Florida LLC v. Sentinel Ins. Co., Ltd.*, No. 20-cv-1174-Orl-22EJK (M.D. Fla. Sept. 24, 2020) ("Denying coverage for losses stemming from COVID-19, however, does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses.").

These decisions are instructive here. For example, in *Studio 417*, the court held that the plaintiffs adequately alleged a claim under policies providing very similar Business Income, Civil Authority, and Sue and Labor coverages compared to those at issue in this matter. *Studio 417*, 478 F. Supp. 3d at 800-805. Just as in this case, "physical loss" or "physical damage" was at issue as it related to COVID-19's impact on small business operations. *Id*. at 800-801. The court emphasized, relying on dictionary definitions, that the plaintiffs alleged a "direct physical loss." *Id*. at 800. Indeed, the *Studio 417* court cited case law: that "*even absent a physical alteration*, a physical loss may occur when the property is uninhabitable or unusable for

its intended purpose." *Id*. at 801 (emphasis added). The court therefore denied the insurer's motion to dismiss. *Id*. at 805.

In *Blue Springs Dental Care* the insurer argued that because the plaintiffs did not allege that their properties must be repaired, rebuilt, or replaced, they had not alleged a "period of restoration." No. 20-CV-00383-SRB, 2020 WL 5637963, at *6 (W.D. Mo. Sept. 21, 2020). As the court explained, however, the plaintiffs' allegations were more than sufficient at the motion to dismiss stage:

> The Court finds Plaintiffs have met their burden at this stage of the proceeding. ***Plaintiffs plausibly allege their dental clinics ceased operations, entirely or in part, "on or about March 17, 2020, and have remained at that limited operational capacity through the date of this Complaint."*** (Doc. #1, ¶ 16.) Discovery will ultimately show whether Plaintiffs' alleged closure date was the actual date when the alleged physical loss occurred, the duration of that alleged physical loss, at what point in time the insured properties could or should have been repaired, rebuilt, or replaced, and whether Plaintiffs took those restoration measures. For now, Plaintiffs have done enough to survive dismissal on this point.

Id. Here, too, Caribe alleged that it was required to suspend or reduce operations as a result of the Closure Orders in March 2020. (3-ER-204–210, ¶¶ 8, 40, 41). As explained in *Blue Springs Dental Care*, that is more than sufficient to survive a motion to dismiss on this point. 2020 WL 5637963, at *6.

Because Caribe has alleged that (1) COVID-19 caused the loss of functionality of Caribe's property (3-ER-204–205 ¶¶ 10-14), (2) COVID-19 has impaired Caribe's property by making it unusable in the way it was previously used (3-ER-204–

210, ¶ 10, 39), (3) the threat and presence of COVID-19 caused a necessary suspension of operations (*id.* ¶ 39), and (4) the presence and threat of COVID-19 forced Caribe to suspend or reduce business on its property to avoid further harm, (*id.* ¶¶ 8-10), Caribe sufficiently alleged "direct physical loss of or damage" to property.

4. "Physical Damage to Property" Is Not Limited to Physical Alteration but Includes Any Harm Caused by an External Force

MRI Healthcare did not address the "serious question" of coverage when there is a physical change in the property that cannot be seen by the "naked eye." *MRI Healthcare*, 187 Cal. App. 4th at 779. It had no need to reach that question because the property there, an MRI machine, was not damaged from the fortuitous event (roof damage from a rainstorm). Thus, the court did not address the remainder of 10A Couch on Ins. § 148:46, which discusses a case holding that damage to air triggers coverage when the property became dangerous "due to the fact that gasoline vapors from adjacent property had infiltrated and saturated the insured building …."[5]

A careful reading of *MRI Healthcare* shows that the court offered three different formulations of the "alteration" rule, and those formulations are broader than requiring an observable structural alteration of the property. The court explained that

[5] 10A Couch on Ins. § 148:46 (discussing *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52 (1968) (holding that such circumstances, combined with a government declaration of uninhabitability, amounted to a direct physical loss)).

for coverage to attach, "some *external force* must have acted upon the insured property to cause a *physical change* in the condition of the property." *Id*. at 780. And the court further stated that direct physical loss "contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." *Id*. at 779. These two restatements of the rule make it clear that the legal analysis is not confined to structural changes. And clearly COVID-19's damage to Caribe's property was an "actual change" and "physical change" and satisfies these two alternative formulations of the rule.

The facts in *MRI Healthcare* are also distinguishable and show that the case should not be read too broadly. The disputed property in that case was an MRI machine that would not "ramp up" after the insured intentionally turned it off during roof repairs. *Id*. There was no external force that changed the MRI machine. The plaintiff therefore failed to show "physical loss" to the machine. *Id*. In contrast to *MRI Healthcare*, there was an external force (infection of the property with COVID-19) that changed the condition of Caribe's dine-in and nightclub facility by making it unsafe for use.

"While structural alteration provides the most obvious sign of physical damage," courts "have also found that property can sustain physical loss or damage with-

out experiencing structural alteration." *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, 2:12-CV-04418 WHW, 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014). For example, in *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, the court considered a case where physical damage was temporary and non-structural: the dispute turned on whether an electrical grid had experienced "physical damage" during a blackout. 968 A.2d 724, 727 (N.J.Super.Ct.App.Div. 2009). The court determined that the electrical grid "was 'physically damaged' because, due to a physical incident, the grid and its components were physically incapable of performing their function of providing electricity." *Id.* at 734. "The *Wakefern* decision indicates that property's temporary and non-structural loss of function is recognized as direct physical loss or damage under New Jersey law." *Gregory Packaging*, 2014 WL 6675934, at *5.

Likewise, regardless of whether any structural alteration occurred, Caribe's dine-in and nightclub facility was physically damaged because the infection of its property with COVID-19 substantially interfered with its function and diminished its useable space, resulting in the loss of business income and extra expense.

B. "Physical Loss of Property" Does Not Require a "Physical Alteration" That Damages the Property

1. The Ordinary Meaning of "Loss of Property" Is Not Alteration, but Deprivation of Property

"[W]ords used in an insurance policy are construed in their ordinary and popular sense and the policy 'should be read as a lay [person] would read it and not as

it might be analyzed by an attorney or an insurance expert.'" *De May v. Interinsurance Exch.*, 32 Cal.App.4th 1133, 1139, 38 Cal.Rptr.2d 581 (1995) (quoting *Crane v. State Farm Fire & Cas. Co.*, 5 Cal. 3d 112, 115, 485 P.2d 1129 (1971)). "In seeking to ascertain the ordinary sense of words, courts in insurance cases regularly turn to general dictionaries." *Scott v. Cont'l Ins. Co.*, 44 Cal.App.4th 24, 29 (1996). "[D]ictionary definitions are an appropriate consideration in evaluating the ordinary meaning of terms in an insurance contract." *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 563 F.3d 777, 784 n.4 (9th Cir. 2009).

The District Court made no attempt to read the Policy as a layperson would or determine the meaning of the terms based on dictionary definitions. Instead, it read the terms like an attorney.

The Policy covers both "direct physical loss of" property and "damage to property" at the covered premises. 3-ER-271. This section focuses on "direct physical loss of property." Caribe has coverage under the ordinary meaning these terms, as defined by Merriam-Webster's Dictionary. "Direct" is "characterized by close,

logical, causal, or consequential relationship."[6] "Physical" is defined as "having material existence."[7] "Loss" is defined as "the act of losing possession" or "deprivation."[8] Synonyms for "loss" include "dispossession" and "deprivation."[9] *See also Kingray Inc. v. Farmers Group Inc.*, No. EDCV20963JGBSPX, 2021 WL 837622 (C.D. Cal. Mar. 4, 2021) ("Dispossession is a form of loss.").

Under these definitions, the ordinary meaning of the terms—"direct physical loss of property"—requires only that the insured lost its property or its use for some period of time, regardless of the cause. Interpreting "loss" to mean only a "physical alteration" conflicts with the ordinary meaning of "loss," because neither "dispossession" nor "deprivation" imply a "physical alteration." A layperson would conclude that Caribe's loss of its dine-in and nightclub facility for several months because of the most dangerous public health crisis this country has experienced in decades is a "direct physical loss of property." The loss of the dine-in facility and nightclub is "direct" because it has a "causal relationship" to the COVID-19 infestation of the facility and the closure orders. The loss of the dine-in facility and nightclub is also "physical" because the facility has a "material existence." A layperson would

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[6] www.merriam-webster.com/dictionary/direct (last accessed July 20, 2021).

[7] www.merriam-webster.com/dictionary/physical (last accessed July 20, 2021).

[8] www.merriam-webster.com/dictionary/loss (last accessed July 20, 2021).

[9] https://www.thesaurus.com/browse/loss (last accessed July 20, 2021).

not, as the District Court did, interpret "loss of property" to require a "physical alteration" or that the loss be permanent, especially given that no such requirements are stated in the Policy.

2. "Loss of Property" Is Distinct From "Damage to Property"

Because the Policy uses the disjunctive "or" to connect "loss of" property and "damage to" property, either "loss of property" or "damage to property" invokes coverage. "In its ordinary sense, the function of the word 'or' is to mark an alternative such as 'either this or that.'" *In re Jesusa V.*, 32 Cal.4th 588, 622, 85 P.3d 2, 24–25 (2004). The use of "or" is "almost always disjunctive, that is, the words it connects are to be given separate meanings." *United States v. Woods*, 571 U.S. 31, 45 (2013). The District Court implicitly equated "loss of property" with "damage to property" and did not give them separate meanings. This error, along with its misapplication of California caselaw, led the Court to conclude that "physical loss of property" requires a "distinct, demonstrable, physical alteration" of the property. 1-ER-8.

Interpreting "loss of" to mean the same as "damage to" violates California's statutory requirement that effect must be given to every part of the contract. *See* Cal. Civ. Code § 1641. Courts should "give effect to all of a contract's terms, and avoid interpretations that render any portion superfluous ...". *United Farmers Agents Assn., Inc. v. Farmers Grp., Inc.*, 32 Cal.App.5th 478, 495 (2019). "[I]f 'physical loss' was

interpreted to mean 'damage,' then one or the other would be superfluous. The fact that they are both included in the grant of coverage evidences an understanding that physical loss means something other than damage." *Nautilus Grp., Inc. v. Allianz Global Risks US*, 2012 WL 760940, at *7 (W.D. Wash. Mar. 8, 2012).

That "loss of property" is distinct from "damage to property" is precisely what the California district court held in *Kingray,* 2021 WL 837622, another COVID-19 case. The insured, a hair style salon, made a claim under its policy which contained the same coverage terms as Caribe's Policy. *Id*. at *4. The salon alleged that as a result of COVID-19 civil authority orders, it suffered "direct physical loss of and damage to" its property. *Id*. Like Caribe, the salon alleged it was unable to use its property and was forced to suspend and curtail operations. *Id*. at *5. The insured physically altered its floor plan to comply with COVID-19 orders, which limited capacity and required modifications like plexiglass shields, removing tables and chairs, and adding hand sanitizing stations. *Id*.

The *Kingray* court held that the insured plausibly stated a claim that either the coronavirus or the "stay at home" orders caused "direct physical loss" to the insured. *Id*. at *7. The court reasoned that the pandemic forced the insured to shutter, making its property unusable for its only purpose—the operation of a business. *Id*. Because the insured "was not allowed to operate or invite others onto its property, it was dispossessed in some way. Dispossession is a form of loss." *Id*.

The *Kingray* court concluded that the policy distinguished "loss of" from "damage to," and that a contrary construction would violate the canon that every word be given meaning. *Kingray,* 2021 WL 837622, at *8. Because the policy uses the disjunctive "or," "physical loss" is different from "physical damage." *Id*. *7. The policy covers both "physical loss" of property *and* "physical damage" to property. *Id*. Thus, the court rejected the carrier's argument that there was no coverage because there was no physical alteration of the property. *Id*.

The *Kingray* court noted that, under California law, "physical alteration to property is not necessary to constitute a physical loss." *Id*. at *7.[10] As an example, the court cited *Hughes v. Potomac Insurance Co.*,[11] a California case where the insured purchased a policy that provided coverage for "physical loss of and damage to their dwelling." *Id*. After a landslide, the insured house was undamaged. The California Court of Appeals found that 'common sense' required coverage because the house had been rendered unusable to its owners, "even though its paint was intact and its walls still adhered to one another." *Id*.

[10] This is not contrary to *MRI Healthcare* because the policy there had different language—"loss to property," not "loss of property."

[11] 199 Cal.App.2d 239, 242 (1962), *abrogated on other grounds*, *La Bato v. State Farm Fire & Cas. Co*., 215 Cal.App.3d 336 (1989).

Therefore, the *Kingray* court held "it is plausible that 'direct physical loss of' property includes physical dispossession because of dangerous conditions (a virus in the air) or a civil authority" closure order. *Id*. at *8. The *Kingray* court got it right. The District Court here did not.

3. The California Case on Which the District Court Relied Is Inapplicable to These Alleged Facts

The District Court mistakenly relied on *MRI Healthcare* to conclude that "only a 'distinct, demonstrable, physical alteration' of property will amount to physical loss or damage that may trigger coverage." *See* 1-ER-8. That decision does not support the District Court's interpretation of the Policy.

MRI Healthcare involved property that was not actually damaged by the underlying event, rainstorms. Those storms necessitated repairs to the roof over the room housing MRI Healthcare Center's (MHC) magnetic resonance imaging machines (MRIs). 187 Cal.App.4th at 770. These repairs required the MRIs to be ramped down. After the repairs, MHC was unable to restart the MRIs. *Id*. MHC made a claim on its policy for damage to the MRIs. *Id*. MHC's policy covered an "accidental direct physical loss to" property. *Id*. at 777. The court stated, "A direct physical loss 'contemplates an actual change in insured property then in a satisfactory state .... For loss to be covered, there must be a 'distinct, demonstrable, physical alteration' of the property." *Id.* at 778–779. The court held there was no coverage

because the MRIs' failure to restart "emanated from the inherent nature of the machine itself rather than actual physical 'damage' without any "'physical alteration' of the MRI machine." *Id*. at 779. Here, there was nothing inherent about the nature of the Caribe's dine-in and nightclub facility that created the loss.

Moreover, the language in *MRI Healthcare* requires "physical loss *to* property," whereas Caribe's Policy requires "physical loss *of* property." (emphasis added). Because of this difference in the policy language, the holdings of those courts are inapplicable. Contract interpretation turns on variations in contract language. For this reason—the policy's use of "to" instead of "of"—the court in *Mudpie, Inc. v. Travelers Casualty Insurance Co. of America*, 487 F. Supp. 3d 834, 839 (N.D. Cal. 2020) held that *MRI Healthcare* did not apply to facts similar to those here. *See also Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB (KSx), 2018 WL 3829767 (C.D. Cal. July 11, 2018) (holding that *MRI Healthcare* did not apply because the policy language was "damage to property," not "loss of property," which the court interpreted as covering a loss without regard to whether the property was damaged).

In accord with this reasoning, a California state superior court judge correctly found that *MRI Healthcare* is distinguishable for the reasons discussed above, and held that "direct physical loss of or damage to property" did not always require a

"physical alteration of the property."[12] The California state court judge correctly applied California law, whereas the District Court did not.

In *Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Ins. Co. d/b/a Kern & Co. ("Kern")*, CV 20-2832, 2021 WL 1837479, at *8 (E.D. Pa. May 7, 2021), a federal district court similarly applied California law and distinguished *MRI Healthcare* because:

> Here, the Policy covers losses due to "direct physical loss of or damage to property", whereas in MRI Healthcare, the policy covered only "accidental direct physical loss". If "direct physical loss" in this Policy were synonymous with damage, then the disjunctive language of the Business Income Additional Coverage—"direct physical loss of or damage to"—would be redundant. The language used in this Policy, and specifically the coverages at issue here, arguably provides broader coverage than the policy considered in MRI Healthcare.

The court also held that the allegations in plaintiff's complaint could plausibly constitute a "direct physical loss of … property," in that plaintiff lost the ability to physically operate its business. *Id*. at *9. The court concluded that the phrase "direct physical loss of or damage to property" is ambiguous. *Id*. The court denied the motion to dismiss. *Id*. at *11.

[12] *See* Order Denying Motion for Judgment on the Pleadings in *Boardwalk Ventures CA, LLC v. Century-National Insurance Co*., No.20STCV27359, Superior Court of California.

In addition, in *Derek Scott Williams PLLC v. Cincinnati Insurance Co.,* 2021 WL 767617 (Feb. 28, 2021), the court saw no substantive difference in the distinction between "loss to" and "loss of" property, and nevertheless held that COVID-19 government orders deprived a dental office of the use of property and thus caused direct physical "loss to" property. According to the district court, insurer's distinction "is simply another way of attempting to read the terms 'loss' and 'damage' as meaning the same thing, which they plainly do not." *Id.*

4. The District Court's Interpretation Conflicts With Two California Court Decisions

The District Court's interpretation—that "loss of property" requires "physical alteration"—conflicts with two California court decisions. First, as the court in *Kingray* recognized, it conflicts with *Hughes v. Potomac Insurance*, which held that "direct physical loss of property" can occur without physical alteration to a property. 199 Cal.App.2d at 243. There, heavy rains caused, the insured's house to slide and partially overhang a cliff, but the house itself suffered no structural injury. The court of appeal held, "Despite the fact that a 'dwelling building' might be rendered completely useless to its owners, appellant would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected." *Id*. at 248–49. Absent a provision specifically limiting coverage in this manner, the court refused to adopt that interpretation *Id*. at 249.

Second, in *Universal Savings Bank v. Bankers Standard Insurance Co.*, No. B159239, 2004 WL 3016644, at *5–6 (Cal. Ct. App. Dec. 30, 2004) (unpublished),[13] the court rejected the carrier's argument that "direct physical loss or damage" encompasses only physical damage or destruction of property, and therefore did not cover a manufacturer's inventory that disappeared. Foreshadowing what many COVID-19 cases have recognized, the court stated that "the ordinary meaning of 'direct physical loss' is not the same as that of 'direct physical damage,' and the use of the terms 'loss' and 'damage' in the context of the insuring clause does not suggest that the terms are synonymous." *Id*. at *6. The court therefore held that the physical loss of personal property was covered, even though the property was not damaged. *Id*.

Therefore, California law is clear that "physical loss of property" may occur even in the absence of damage to the property's physical structure. The District Court erred by not following California caselaw.

[13] Even though unpublished California Courts of Appeal decisions have no precedential value under California law, the Ninth Circuit is not precluded from considering such decisions as a possible reflection of California law. *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1223 n.3 (9th Cir. 2015).

5. Many Federal and State Courts Have Held That "Physical Loss of Property" Does Not Require Alteration, but Covers the Loss of Use of Property Caused by COVID-19

The critical distinction between "loss of" and "damage to" property caused a federal district court to recently hold that "physical loss of property" did not require physical alteration, and there was coverage for lost income caused by a company's loss of the use of its nightclub and dine-in facility due to COVID-19. *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co*., No. 1:20 CV 1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021). The policy there had the same terms as Caribe's. *Id*. at *10. The court concluded that "physical loss of" property means something different than "damage to" property. *Id*. "Otherwise, why would both phrases appear side-by-side separated by the disjunctive conjunction 'or'?" *Id*. Accordingly, the policy is susceptible to the interpretation that plaintiffs "lost their real property when the state governments ordered that the properties could no longer be used for their intended purposes—as dine-in restaurants." *Id*.

For the same reasons, in *Cherokee Nation v. Lexington Insurance Co*., 2021 WL 506271 (Okl. Dist. Jan. 28, 2021), the court granted the insured's partial summary judgment that it had business interruption coverage when it closed and repaired its casino and dining facilities due to the COVID-19 pandemic. The court rejected the carrier's interpretation that "direct physical loss of or damage to property" always requires a physical alteration of the property because that interpretation does

not give "loss" a meaning distinct from "damage"; in fact, it divests the term "loss" of any meaning. *Id*. at *7.

The carrier also argued that the insured's claim was excluded by the policy provision that the carrier would not pay for loss or damage caused by "loss of use." *Id*. at *12. The court rejected this argument because by the policy's plain terms, the carrier cannot assert that all forms of loss of use are excluded. *Id*. "[B]usiness interruption coverage as contemplated by [the Policy] necessary only results from some loss of use—i.e., from some interruption of business. Thus, if all loss of use was excluded, the business interruption coverage would be illusory." *Id*. For that reason, the court held that when a dangerous condition like the pandemic causes loss of use, the loss-of-use exclusion would not apply. *Id*.

This distinction was recognized even more recently in *In re Society Insurance Co. COVID-19 Business Interruption Protection Insurance Litigation*, MDL No. 2964, 2021 WL 679109, at *8–9 (N.D. Ill. Feb. 22, 2021). The court denied the insurer's motion for summary judgment because the COVID-19 closure orders could reasonably be interpreted to cause "direct physical loss" of the insureds' restaurants. The policy's text—"direct physical loss of or damage to"—is the same as Caribe's. *Id*. at *8. The court concluded "[t]he disjunctive 'or' in that phrase means that 'physical loss' must cover something different from 'physical damage.'" *Id*. "It would be one thing if coverage were limited to direct physical 'damage.' But coverage extends

to direct physical 'loss of' property as well. So the Plaintiffs need not plead or show a change to the property's physical characteristics." *Id*. The court concluded, "A reasonable jury can find that the Plaintiffs did suffer a direct 'physical' loss of property on their premises. … [T]he pandemic-caused shutdown orders do impose a physical limit: the restaurants are limited from using much of their physical space." *Id*. at *9.

The *Society Insurance* court also rejected the carrier's argument that reading the coverage provision in light of the definition of the "Period of Restoration" should change the result. *Id*. at *9. The definition of "Period of Restoration" states that coverage for loss of business income "ends on the earlier of" "the date when the property at the described premises should be *repaired*, *rebuilt*, or *replaced* with reasonable speed and similar quality; or the date when business is resumed at a new permanent location." *Id*. (emphasis added). The carrier argued, "repaired, rebuilt, or replaced" implies that "physical loss or damage" requires a physical injury to the property rather than mere loss of use. *Id*. The court disagreed, holding that there was nothing in the provision that required structural alteration of property:

> First and foremost, the "Period of Restoration" describes a time period during which loss of business income will be covered, rather than an explicit definition of coverage. Instead, the explicit definition of coverage is that direct physical "loss of" property is covered—not just "damage to" property, as explained earlier. Second, the limit on the Period of Restoration does include the words "repaired" and "replaced," that is, the restoration period ends when the property at the premises is "repaired" or "replaced." There is nothing inherent in the meanings of

> those words that would be inconsistent with characterizing the Plaintiffs' loss of their space due to the shutdown orders as a physical loss.

Id. at *9.

Several state courts have also found coverage for loss of the use of property caused by COVID-19 or civil authority orders. In *North State Deli, LLC, v. Cincinnati Ins. Co*., No. 20 CVS 02569, 2020 WL 6281507 (N.C. Super. Ct. Oct. 7, 2020), the court granted a declaratory judgment that the policy covered plaintiff restaurants' lost business income caused by COVID-19 related government decrees. "These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a 'direct physical loss,' and the Policies afford coverage." *Id*. at *3. The court rejected the carrier's interpretation that "physical loss" requires a physical alteration because "[t]he use of the conjunction 'or' means—at the very least—that a reasonable insured could understand the terms 'physical loss' and 'physical damage' to have distinct and separate meanings." *Id*. "Finally, nothing in the Policies excludes coverage for Plaintiffs' losses. Notably, it is undisputed that the Policies do not exclude virus-related causes of loss." *Id*. at *4.

Further, the court in *MacMiles LLC d/b/a Grant Street Tavern v. Erie Insur. Exchange*, No. GD-20-7753 (Allegheny Cty. C. C.P. May 25, 2021) granted partial summary judgment for the policyholder in part because "off" and "damage" were separated by the disjunctive "or," signifying to the court that the terms must have

different meaning. In that case, the court reasoned that the "most reasonable definition of 'loss' is one that focuses on the act of losing possession and/or deprivation of property instead of one that encompasses various forms of damage to property, i.e., destruction and ruin." *Id.*

Finally, a Washington state court recognized the distinction between "loss of" and "damage to" property and granted partial summary judgment to a brewery with an all-risk policy like Caribe's. *Perry Street Brewing Co., v. Mut. of Enumclaw Ins. Co.*, No. 20-2-02212-32, 2020 WL 7258116, at *2–3 (Wash. Super. Nov. 23, 2020). The court concluded, "an average lay person would understand" that "the interruption of [plaintiff's] business operations as a result of the [public health] proclamations was a direct physical loss of [plaintiff's] property because [plaintiff's] property could not physically be used for its intended purpose, *i.e.*, [plaintiff] suffered a loss of its property because it was deprived from using it." *Id*. at *3. "[T]he undefined phrases 'loss of' and 'damage to' have popular meanings distinct from one another," so interpreting both to require damage would render one or the other superfluous. *Id*.

6. The District Court's Interpretation Leads to an Absurd Result—"Loss of Property" Would Not Cover the Theft of Property

Moreover, "[courts] must interpret a contract in a manner that is reasonable and does not lead to an absurd result." *Roden v. AmerisourceBergen Corp.*, 186

Cal.App.4th 620, 113 Cal.Rptr.3d 20, 46 (2010). The District Court's interpretation is unreasonable and leads to an absurd result. Under it, "loss of property" would not cover unaltered property that is stolen or misplaced. But "loss of" property includes property that is misplaced, regardless of whether it was damaged. *Total Intermodal*, 2018 WL 3829767, at *3. An insured "can suffer a physical loss of property through theft, without any actual physical damage to the property." *Mangerchine v. Reaves*, No. 10-1052 (La.App.1 Cir.3/25/11), 63 So.3d 1049, 1056.

This was also the court's interpretation in *Manpower Inc. v. Insurance Company of the State of Pennsylvania*, No. 08C0085, 2009 WL 3738099 (E.D. Wis. Nov. 3, 2009). The insured leased an office in a building where a collapse of part of the building damaged the garage and the courtyard, but not the insured's office space. *Id*. at *1. Same as Caribe's, the policy covered "direct physical loss of or damage to" covered property. *Id*. The insured argued that the collapse rendered its office inaccessible and therefore resulted in a "direct physical loss" of such property. But the insurer argued that the insured did not sustain a covered loss because the collapse did not physically damage or alter the insured's property. *Id*. at *5. The federal district court held that the policy covered physical losses in addition to physical damage because if a physical loss could not occur without physical damage, then the policy

would contain surplus language. *Id*. "Indeed, if 'direct physical loss' required physical damage, the policy would not cover theft, since one can steal property without physically damaging it." *Id*.

Here, just as "loss of property" covers theft, it covers loss due to the presence of a deadly virus because the consequence of both is the same—the use of the property is lost.

C. Alternatively, Many Courts Have Recognized That a Temporary "Loss of Functionality of Property" Caused by a Physical Force, Such as COVID-19, Is a "Direct Physical Loss of Property"

Several federal and state cases have held that even a temporary loss of functionality of property is a "direct physical loss of property" if an intervening physical force made the premises uninhabitable or unusable. The *Mudpie* court discussed many of these cases. *See Mudpie, Inc.*, 487 F. Supp. 3d at 840–41.

One such case is *Gregory Packaging, Inc.*, 2014 WL 6675934, at *2, where the court found coverage for ammonia infiltration, even though there was no permanent structural damage to the property and the loss of the use of the premises caused by the ammonia lasted only one week. The court held that the ammonia inflicted "direct physical loss of or damage to" the insured's facility because "the ammonia physically rendered the facility unusable *for a period of time*." *Id*. at *6 (emphasis added). The court noted, "courts considering non-structural property damage claims have found that buildings rendered uninhabitable by dangerous gases or bacteria

suffered direct physical loss or damage." *Id*. (citing *Motorists Mutual Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 825–27 (3d Cir. 2005) (finding that bacterial infection of a home's water supply constituted a "direct physical loss" because it rendered the home uninhabitable); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709 (E.D. Va. 2010), aff'd, 504 F. App'x. 251 (4th Cir. 2013) (finding "direct physical loss" where "home was rendered uninhabitable by the toxic gases" released by drywall)). *See also Cooper v. Travelers Indem. Co. of Ill.,* No. C-01-2400-VRW, 2002 WL 32775680 at *3 (N.D. Cal., 2002) (finding that the presence of bacteria absent any other damage to the property is sufficient to constitute direct physical loss).

Mudpie also relied on a 2020 federal court decision finding business interruption coverage for a restaurant. *Mudpie*, 487 F. Supp. 3d at 842 (citing *Studio 417, Inc. v. Cincinnati Ins. Co*., 478 F. Supp. 3d 794 (W.D. Mo. 2020)). The plaintiffs in *Studio 417* were a hair salon and several restaurants that sought coverage for losses from COVID-19. *Id*. at 797. Plaintiffs in that case alleged that business closure orders issued by civil authorities required them to cease or reduce their operations. *Id*. at 798. They also alleged that COVID-19 inside their premises made them unusable. *Id*. The *Studio 417* court found that "Plaintiffs have adequately alleged a direct physical loss." *Id*. at 800. The court noted, Plaintiffs allege a causal relationship between COVID-19 and their losses, and that COVID-19 "is a physical substance," that "live[s] on" and is "active on inert physical surfaces," and is also "emitted into the

air." *Id*. "COVID-19 allegedly attached to and deprived Plaintiffs of their property, making it 'unsafe and unusable, resulting in direct physical loss to the premises and property.'" *Id*. The court held the complaint plausibly alleges a "direct physical loss" based on "the plain and ordinary meaning of the phrase." *Id*.[14]

In yet a third decision, the federal court held that COVID-19 causes a loss of the functional use of the property. *See Blue Springs Dental Care, LLC v. Owners Ins. Co*., 488 F. Supp. 3d 867, 874 (W.D. Mo. 2020). That court followed its prior holding in *Studio 417* that that even "absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purposes." The court denied the carrier's motion to dismiss because "Plaintiffs plausibly allege that COVID-19 had physically occupied and infected their dental clinics and thereby deprived them of their use of those clinics by making them unusable." *Id*. at 876–77. *See also Kern*, 2021 WL 1837479, at *20–21.

Caribe's allegations are similar to the allegations that the court in *Studio 417* and *Blue Springs* held stated a plausible claim. Caribe alleges that due to "the presence of COVID-19, their Covered Property has become unsafe …". 3-ER-207, ¶ 26.

[14] The court in *Mudpie* did not dispute that *Studio 417* correctly stated and applied the law, but distinguished it because Mudpie did not allege that "the presence of the COVID-19 virus in its store created a physical loss"; rather, Mudpie's sole focus was on the shelter-in-place orders. *Mudpie*, 488 F. Supp. 3d at 842.

State courts have reached similar results under analogous facts. For example, a Minnesota appellate court has held that asbestos, which did not cause any "tangible injury to the physical structure of [the] building," nonetheless constituted "direct physical loss" under an all-risk policy because a building's function may be seriously impaired by the presence of asbestos. *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. App. 1997) (citing *Farmers Ins. Co. v. Trutanich*, 123 Or. App. 6, 858 P.2d 1332, 1335 (1993) (finding pervasive odor from methamphetamine lab was a "direct physical loss" because it damaged the house)).

Mudpie relied on the Colorado Supreme Court holding a "direct physical loss" occurred under the policy when the insured, acting on the fire department's orders, closed its building because gasoline and vapors had contaminated the building, making its use "highly dangerous." *Mudpie*, 487 F. Supp. 3d at 841 (discussing *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52, 5455 (1968)).

A layperson would reasonably interpret "direct physical loss" to include a temporary "loss of functionality of property" if an intervening physical force, such as COVID-19, made the premises unsafe, just as the courts in *Mudpie*, *Studio 417*, *Blue Springs*, and many other courts have done.

D. Caribe's Loss of Its Dining-Room and Nightclub Facility Due to Civil Authority Orders Is a "Direct Physical Loss of Property"

The ordinary meaning of "direct physical loss of property" includes any loss, regardless of what caused the loss. It therefore would include a "loss of property"

caused by a civil authority order requiring the closure or limiting the use of the property. Such has been recognized by multiple federal district courts. "[I]t is plausible that 'direct physical loss of' property includes physical dispossession because of . .. a civil authority order requiring [the business] to close." *Kingray*, 2021 WL 837622, at *8. Likewise, the *Henderson Road* court sustained plaintiff restaurants' argument that "direct physical loss of" includes an inability to possess something in the material world, and that the government orders prohibiting dine-in services caused the restaurants to lose use of their property. 2021 WL 168422, at *5, 10–12. And the *Society Insurance* court held that a reasonable jury could find that the plaintiff-restaurants suffered a "direct 'physical' loss of property" because the pandemic-caused shutdown orders limited them from using much of their physical space. 2021 WL 679109, at *8–9. *See also Kern*, 2021 WL 1837479, at *12.

Caribe alleges, "On or about March 19, 2020, the State of California issued a civil authority order requiring the closure of bars and banning onsite dining in California." 3-ER-209, ¶ 35. Caribe alleges the Closure Orders prohibited access to its property and that as a result of the Closure Orders, it lost business income and incurred extra expense. 3-ER-210, ¶¶ 40–41. As the courts in *Kingray*, *Henderson Road*, and *Society Insurance* held, these allegations are sufficient to state a plausible claim because they allege that the Closure Orders dispossessed Caribe of its dine-in and nightclub facility.

E. At a Minimum, the Policy Is Ambiguous and Must Be Construed in Caribe's Favor

Courts resolve policy ambiguities in favor of finding coverage because insurance contracts are usually written by the insurer, with no meaningful opportunity for an insured to bargain for modifications. *AIU Ins. Co.*, 51 Cal.3d at 822.

A policy provision is ambiguous when it is capable of two or more constructions, both of which are reasonable. *Waller*, 11 Cal.4th at 18. "To prevail, the insurer must establish its interpretation of the policy is the only reasonable one." *Reg'l Steel Corp. v. Liberty Surplus Ins. Corp.*, 226 Cal.App.4th 1377, 1390, 173 Cal.Rptr.3d 91, 100 (2014). "Even if the insurer's interpretation is reasonable, the court must interpret the policy in the insured's favor if any other reasonable interpretation would permit coverage for the claim." *Id*.

In a recent decision involving a spa's losses from COVID-19, a federal district court concluded that the policy phrase "direct physical loss" was ambiguous because it "has been subject to a spectrum of interpretations … ranging from direct tangible destruction of the covered property to impacts from intangible noxious gasses or toxic air particles that make the property uninhabitable or dangerous to use." *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624, at *8-10 (E.D. Va. Dec. 9, 2020); *see also Kern*, 2021 WL 1837479, at *9 ("The Court concludes that the phrase 'direct physical loss of or damage to property at the described premises', in the context of Business Income and Extra Expense

insurance, is ambiguous.") "Therefore, given the spectrum of accepted interpretations, the Court interprets the phrase 'direct physical loss' in the Policy in this case most favorably to the insured to grant more coverage." *Elegant Massage*, 2020 WL 7249624, at *10. Accordingly, the court held, "while the … Spa was not structurally damaged, it is plausible that Plaintiff's experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus." *Id*.

Even assuming the District Court's interpretation of the Policy is reasonable, so too is Caribe's. A layperson could reasonably interpret "direct physical loss of or damage to" as including the loss of the use of a dine-in-facility and nightclub caused by COVID-19 infestation or civil authority orders, regardless of whether there is a "physical alteration." That this interpretation is reasonable is confirmed by the fact that at least seven federal courts have agreed with it. *See Kingray*, *Henderson Road*, *Studio 417*, *Elegant Massage*, *Kern*, and *Society Insurance.*

Therefore, the District Court erred by failing to construe policy ambiguities in favor of coverage. An insurer "must draft its policy to avoid any misinterpretation by the average lay person." *De May*, 32 Cal.App.4th at 1139. An insured who purchases an all-risk policy should be notified through clear, unambiguous policy lan-

guage that it will not be covered for losses of business income caused by virus infestation and closure orders, which Topa could have easily done. The Policy provides no such notice.

At a minimum, the Policy's ambiguity creates a fact issue. When "the terms of the contract are ambiguous or uncertain, determining the contract's terms is a question of fact for the trier of fact (the jury), based on all credible evidence concerning the parties' intentions." *Indigo Grp. USA, Inc. v. Polo Ralph Lauren Corp.*, 2012 WL 12884634, at *2 (C.D. Cal. Aug. 29, 2012) (cleaned up). At a minimum, the Policy is ambiguous as to whether the parties intended the term "physical loss of or damage to property to the property" to cover the property at Caribe that has been altered and made unsafe by the presence of COVID-19. Therefore, the District Court improperly invaded the jury's fact-finding role by finding that COVID-19 does not, as a factual matter, alter the property. An Ohio trial court recently issued orders denying motions to dismiss in two actions because it concluded that whether COVID-19 caused property damage is a question of fact for the jury.[15]

[15] *See* Order Denying Motion to Dismiss entered Jan. 7, 2021 in *Queens Tower Restaurant, Inc. v. Cincinnati Financial Corp.*, No. A 200174.

IV. If the Court Has Any Serious Doubt That Caribe Has Alleged a Plausible Claim, It Should Certify the Questions Presented by This Appeal to the California Supreme Court

On request of a United States Court of Appeals, the California Supreme Court may decide a question of California law if: (1) the decision could determine the outcome of a matter pending in the requesting court; and (2) there is no controlling precedent. Cal. R. Ct. 8.548. In deciding whether to exercise its discretion to certify a question, the Ninth Circuit considers: (1) whether the question presents important public policy ramifications yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) the spirit of comity and federalism. *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1072 (9th Cir. 2019) (en banc). If the questions presented by the appeal are unsettled and the answers are likely to affect a large number of businesses, then "'[c]omity and federalism counsel that the California Supreme Court, rather than this court, should answer' the certified question." *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 939 F.3d 1045, 1049 (9th Cir. 2019).

There is no controlling precedent because the questions presented by this appeal have not been decided by the California Supreme Court or any California Court of Appeal. The California Supreme Court's answers to these questions would determine this appeal and there is no reason to believe that the Court's caseload would preclude it from doing so. As evidenced by the multitude of COVID-19 insurance litigation that has been filed in the state and federal courts located in California, there

are thousands of businesses that will be affected by the answers to the questions presented by this appeal. Because thousands of businesses may be on the brink of financial collapse in COVID-19's wake, because uncertainty and delay exacerbate their plight, and because only the California Supreme Court can provide certainty, the questions presented by this appeal should be certified. Based on comity and federalism, the California Supreme Court, rather the Ninth Circuit, should answer these unsettled questions. *See Vazquez*, 939 F.3d at 1049. Caribe therefore respectfully requests that the Court certify the following questions pursuant to California Rule of Court 8.548.

The broad question of California law that the Court should certify is:

> Whether an insured's loss of the use of all or part of its premises due to unsafe conditions created by COVID-19 or civil authority orders is a "direct physical loss of or damage to property" under an all-risk policy?

More specific questions that should be certified include:

1. Whether infestation of a restaurant and nightclub's facility with COVID-19 physically alters or damages the property, and therefore is a "direct physical loss of or damage to property" under the Policy?
2. Whether the Policy's term—"direct physical loss of property"—requires a "physical alteration" that damages the property?
3. Whether a temporary loss of use of property caused by COVID-19 infestation or civil authority orders is a "direct physical loss of property" under the Policy?
4. Whether the Policy's term—"direct physical loss of or damage to property"—is ambiguous as to whether it includes a company's temporary loss of its dine-in and nightclub facility due to either COVID-19 infestation or civil authority orders prohibiting its use?

CONCLUSION

Caribe respectfully asks the Court to reverse the District Court's order dismissing its action. Alternatively, Caribe asks the Court to certify the questions presented by this appeal to the California Supreme Court.

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Attorneys for Appellant

CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number(s): No. 21-55405

I am the attorney or self-represented party.

This brief contains 12,779 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with FED. R. APP. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[**x**] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature */s/ Timothy W. Burns* **Date** July 22, 2021

ADDENDUM

Cal. Civ. Code § 1641:
The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.

Cal. R. Ct. 8.548(a):
On request of the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, the Supreme Court may decide a question of California law if:
(1) The decision could determine the outcome of a matter pending in the requesting court; and
(2) There is no controlling precedent.

Cal. R. Ct. 8.548(f):
In exercising its discretion to grant or deny the request, the Supreme Court may consider whether resolution of the question is necessary to secure uniformity of decision or to settle an important question of law, and any other factor the court deems appropriate.

28 U.S.C. § 1291:
The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1332(d)(2):
The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

Order Denying Motion to Dismiss entered Aug. 12, 2020 in *K.C. Hopps, Ltd. V. Cincinnati Ins. Co.*, No. 20-cv-00437-SRB:

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

K.C. HOPPS, LTD.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 20-cv-00437-SRB
	)	
THE CINCINNATI INSURANCE COMPANY, INC.,	)	
	)	
	)	
Defendant.	)	

ORDER

Before the Court is Defendant The Cincinnati Insurance Company's ("Defendant") Motion to Dismiss. (Doc. #8.) For the reasons set forth below, the motion is DENIED.

In this case, Plaintiff K.C. Hopps, Ltd. ("Plaintiff") seeks insurance coverage related to COVID-19 under an all-risk property insurance policy it purchased from Defendant. On June 22, 2020, Defendant filed the pending motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). On July 22, 2020, this case was transferred from Judge Roseann Ketchmark to the undersigned. (Doc. #22.)

The undersigned is also presiding over a case captioned *Studio 417, Inc., et al. v. The Cincinnati Insurance Company*, Case No. 20-cv-03127-SRB. *Studio 417* involves the same Defendant, similar insurance provisions, and similar factual allegations as those asserted in this case. Defendant also moved to dismiss *Studio 417* under Rule 12(b)(6) based on similar legal arguments that it presents in this case. On August 12, 2020, the Court denied Defendant's motion to dismiss in *Studio 417*.

For substantially the same reasons as those in the *Studio 417* Order, the Court finds that Plaintiff's claims against Defendant are adequately stated. Consequently, Defendant's Motion to

Dismiss (Doc. #8) is DENIED. It is further ORDERED that Defendant's Motion to Stay Discovery pending a ruling on its Motion to Dismiss (Doc. #26) is DENIED AS MOOT.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: August 12, 2020

Order Denying Motion to Dismiss entered Aug. 13, 2020 in *Optical Services USA JC1 v. Franklin Mut. Ins. Co.*, No. BER-L-3681-20:

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Our File No. 89286 ELH

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO.: BER-L-3681-20

Civil Action

OPTICAL SERVICES USA/JCI, OPTICAL SERVICES USA, LLC, OPTICAL SERVICES USA-WO, RE & LE HOLDING LLC, STONG OD EWING NJ, LLC

Plaintiffs,

V.

FRANKLIN MUTUAL INSURANCE COMPANY

Defendant.

ORDER

THIS MATTER having been brought before the Court by way of Motion of Methfessel & Werbel, attorneys for defendant(s), Franklin Mutual Insurance Company, seeking an Order for Dismissal, and the Court having reviewed the moving papers, any opposition thereto, oral argument having been heard, and for other good cause having been shown;

IT IS on this **13th day** of **August, 2020;**

ORDERED ~~that plaintiff's Complaint and any and all Crossclaims be and is hereby dismissed~~ **DENIED*;** and it is further

ORDERED that the Court provides a copy of this Order to all counsel of record on this date via eCourts Civil. Movant is directed to serve a copy of this Order within seven (7) days of the date hereof on all parties not served electronically via regular and certified mail return receipt requested.

Hon. Michael N. Beukas, J.S.C.

OPPOSED

*** The Motion is denied for the reasons stated at length on the record.**

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___ Appeal
___ Non-Appeal

LOWER COURT DOCKET TYPE
___ Indictment ___ Accusation ___ Complaint

LOWER COURT NUMBER
3681-20

Transcript Request Date:
8/13/2020

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COUNTY
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COURT
Michael Beukas

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CIVIL PART
BERGEN COUNTY
(HEARD VIA ZOOM)
DOCKET NO: BER-L-3681-20
A.D. #_____

OPTICAL SERVICES USA/ JC1, OPTICAL SERVICES USA, LLC, OPTICAL SERVICES USA-WO, RE & LE HOLDINGS, LLC, STONG OD EWING NJ, LLC,	TRANSCRIPT OF MOTION
Plaintiffs,	
vs.	
FRANKLIN MUTUAL INSURANCE COMPANY,	
Defendant.	

Place: Bergen County Justice Center
10 Main Street
Hackensack, New Jersey 07601

Date: August 13, 2020

BEFORE:

HONORABLE MICHAEL N. BEUKAS, J.S.C.

TRANSCRIPT ORDERED BY:

AMINA RANA, (Paul Weiss Rifkind Wharton Garrison)

APPEARANCES:

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Attorney for Plaintiffs

ERIC L. HARRISON, ESQ. (Methfessel & Werbel)
Attorney for Defendant

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I N D E X

(Proceeding commenced at 9:30:49 a.m.)

THE COURT: Superior Court of the State of New Jersey, Bergen County Vicinage, clerk recording, Alexa D'Angelo law clerk, docket number BER-L-3681-20, caption is Optical Services USA/JCI (sic), Optical Services USA, LLC, Optical Services USA-WO, and Re and Le Holdings, LLC, Stong OD Ewing NJ, LLC versus Franklin Mutual Insurance Company. Judge Michael N. Beukas, chambers 453. The time is approximately 9:32 a.m. May I have the appearances of counsel for the record, please, starting with the plaintiff?

MR. ROSE: Good morning, Your Honor. Sean Rose from the law firm of Olender Feldman on behalf of plaintiff, Optical Services USA/JC1, Optical Services USA, LLC, Optical Services USA-WO, Re and Le Holdings, LLC, and Stong OD Ewing NJ, LLC, collectively plaintiffs, Your Honor.

THE COURT: Good morning, Counsel.

MR. ROSE: Good morning.

MR. HARRISON: Good morning, Judge. Eric Harrison, Methfessel and Werbel, on behalf of Franklin Mutual Insurance Company.

THE COURT: Good morning, Counsel. Okay, gentlemen, just a -- a couple of --

RECORDING: (Indiscernible) --

THE COURT: -- reminders before we --

RECORDING: -- is now in the conference.

MR. HARRISON: Your Honor, this is Eric Harrison speaking. As a courtesy, I should let the Court know I do have a few folks dialing in. They've all been instructed to keep their phones on mute. Various FMI representatives and a colleague of mine will be listening in but will not be participating.

THE COURT: Okay, very good.

For purposes of our established record here today, gentlemen, when you do speak at oral argument, I do need you to identify yourself in between oral arguments so that the transcription service can clearly identify which attorney is speaking.

When you are referencing an oral argument to any specific controlling case, I need you to identify that case for the record and pursuant to Rule 1:36-3, I need you to identify for the record whether that is a published opinion in the State of New Jersey versus an unpublished opinion and whether or not you are citing to any law of any other jurisdiction including the US Supreme Court so that I can identify for the record as to whether or not any of the law is controlling in this case for purposes of oral argument.

In addition, we are on a Polycom speaker

today and at times it may be difficult for you to hear me and I may need to interject to pose a question to either attorney so I may have to elevate my voice so that you can hear me clearly. So please don't misconstrue me elevating my --

RECORDING: (Indiscernible) --

THE COURT: -- voice --

RECORDING: -- is now in the conference.

THE COURT: Okay, gentlemen, I -- if I need to elevate my voice, it's for purposes of the Polycom picking up my voice so that you can hear it, okay.

So I have before me a Motion to Dismiss the Complaint for failure to state a claim upon which relief can be granted pursuant to Rule 4:6-2(e) filed by the defendant, Franklin Mutual Insurance Company. So, Mr. Harrison, this is your Motion. You may proceed.

MR. HARRISON: Yes, sir. Thank you, Your Honor. We are all aware, I know plaintiffs' counsel is aware, certainly my firm as an insurance defense firm is well aware of the fast-moving nature of developments in insurance litigation and other litigation over Covid-19. Two significant events happened yesterday and they're both worthy of mention. The first is, and this is not within the record, but the Court -- it's

not important to the Court's decision on the policy language, but it's -- it's significant background. The multi-district litigation panel of the United States District Court denied a nation-wide Motion to Consolidate these business interruption litigations that are venued in various Federal Courts around the country essentially on the basis that the policy language differs from policy to policy. Even though a lot of insurers use (indiscernible) income and would other insurers, there is still significant differences between those forms and the facts of particular cases also can determine whether there would be coverage and to what extent.

The second significant thing to happen yesterday was the issuance of the decision that Mr. Rose brought to the Court's attention, and I don't have any objection to his filing it yesterday because it didn't come out until yesterday and I have had ample time to review it. It's the Studio 417 case from U.S. District Court, Western District of Missouri, Southern Division. This opinion, which I'm not going to significantly disagree with, demonstrates the wisdom of the MDO panel in refusing to consolidate because the denial of the Motion to Dismiss based on the allegations in that complaint bespeaks the importance

of policy language differing from policy to policy and alleged facts differing from complaint to complaint.

I should ask as a courtesy whether the Court has any objection to me talking about this case that Mr. Rose sent yesterday.

THE COURT: What I would like you to do, Counsel, is argue your Motion to Dismiss. This Court is bound by the implications of Rule 1:36-3. While the parties felt compelled to cite to numerous other jurisdictions with respect to their arguments, their respective arguments both on the Motion and in the Opposition, this Court is bound by legal precedent within the State of New Jersey, namely the Appellate Division, and the New Jersey Supreme Court. With respect to the US Supreme Court, this -- this Court also takes precedent from the US Supreme Court for controlling decisions. So this Court will give whatever weight is necessary to whatever arguments reflect in the controlling legal precedent set forth in this state as opposed to other states. So you may proceed with the argument.

MR. HARRISON: Okay, thank you, Your Honor. I just -- I just wanted to make sure that the Court didn't want me to completely disregard this decision. But I'm going to highlight it simply to contrast it

with a case we're looking at in order to argue my position under New Jersey law.

The Studio 417 decision describes a policy which defines a covered cause of loss, and that's at page 2 of the opinion, as follows, "Accidental direct physical loss or accidental direct physical damage." It goes on to say on the same page, "The policies do not include and are not subject to any exclusion for losses caused by viruses or communicable diseases."

Now, I want to be clear about something. I want to be clear about a point of agreement that Franklin Mutual has with the plaintiffs in this case. At paragraph 36 of the Complaint filed in this case, plaintiffs recite as follows, "There is no known instance of Covid-19 transmission or contamination within the premises of plaintiffs' businesses." Now, the declamation of coverage letter that FMI issued prior to the Complaint being filed in this case because the Complaint challenges that declamation of coverage find it among relevant policy provisions the exclusion of 12(c) for contamination by any virus, et cetera. Because the complaint expressly asserts that there was no contamination and because it is our universal duty to read as accurate all facts alleged in the complaint and I agree that the contamination exclusion would not

apply to this case. If the complaint had alleged that there was contamination on the premises, then there probably would be direct physical loss, but there would also be exclusion of coverage under that virus exclusion. So what we're really focused on is the policy language. In Studio 417, the definition of loss there was physical loss or physical damage.

THE COURT: Okay, but we're concerned about New Jersey. We're not concerned about the Western District of Missouri; correct?

MR. HARRISON: That is true, Your Honor, but we are concerned about policy language defining direct physical loss, --

THE COURT: Okay, but the --

MR. HARRISON: -- but I'm -- I'm happy to take it --

THE COURT: -- definition (indiscernible) --

MR. HARRISON: -- to our policy language.

THE COURT: -- definition has not been established by any court in this state with the exception of the Wakefern case; correct?

MR. HARRISON: I think that is absolutely correct.

THE COURT: Okay, I just want to establish that for purposes of the record.

MR. HARRISON: Okay, so back to our policy. The business interruption loss that -- of which plaintiffs seek to avail themselves governs loss of income resulting from direct covered loss. We go to page 9 of the policy form which expressly defines direct covered loss as follows, "The fortuitous direct physical loss as described in Part 1(c), General Cause of Lost Conditions, Coverages A, B, C, which occurs at described premises occupied by you." Now, the definition is (indiscernible) if it didn't refer -- if it didn't cross-reference another definition, then we'd be fighting over whether the closure of a business because of a risk of virus spread would constitute a fortuitous direct physical loss.

However, because it cross-references the description of direct covered loss that's also in the policy at page 8. We go to the more detailed definition. Covered loss, "Means fortuitous direct physical damage to or destruction of covered property by a covered cause of loss." The requirement of direct physical damage to or destruction of (indiscernible) --

RECORDING: (Indiscernible).

MR. HARRISON: -- requirement of direct physical damage to or destruction of covered property distinguishes this case from the Studio 417 case in

that there is the physical damage or destruction requirement that was absent in that case which also had --

RECORDING: (Indiscernible) is now in the conference.

MR. HARRISON: -- I apologize -- which also had the open-ended concept of loss which was not defined. Our policy defines loss as requiring that physical impact.

The Court has reviewed Wakefern I know and the -- the cases -- the New Jersey cases discussed in our brief I agree that there is no case directly on point construing the -- this precise policy language in the context a claim where there was a closure of a business because of the risk of contamination by a virus. But I think that the application of loss that's set forth in New Jersey and in the other jurisdictions we've cited as persuasive, although not binding, compels the conclusion that this did not meet the policy definition of direct covered loss to satisfy coverage.

THE COURT: Counsel, let me pose -- let me pose one question to you. Why didn't the policy then have specific exclusions for an event such as this? Meaning for virus proliferation.

MR. HARRISON: Well, it -- it precisely has an exclusion for virus proliferation. It does not have an exclusion for a closure of business based on the risk of virus proliferation. I can't speak to the drafters of the policy other than to say this is an unprecedented event. First in my lifetime. First in my parents and our parents. So, yeah, in -- in an ideal world all potential cataclysmic risks could be underwritten and determined in advance as to what we're going to cover and to what extent or whether there should be any coverage at all, but before we get to the absence of an exclusion, and I agree there is no exclusion that would apply on the facts as alleged in this Complaint, we have to satisfy the coverage definition first.

THE COURT: You can proceed, Counsel. Thank you.

MR. HARRISON: I -- Your Honor, to -- to be candid, I know you've reviewed the papers. I'm happy to address any further questions the Court may have or simply reserve an opportunity to respond to my colleague. I -- I think between our papers and what I've had to say this morning that I've stated our case.

THE COURT: Thank you, Counsel. Okay, Mr. Rose, your response?

MR. ROSE: Thank you, Your Honor. And just to try to make sure that there's a clean record virtually, this is again Sean Rose, Olender Feldman, on behalf of plaintiff.

So contrary to the insurance industry's well rehearsed talking points and -- and Mr. Harrison has a very good brief and very good argument, the simple fact is that plaintiff and the many other in the -- and (indiscernible) plaintiffs purchased business owners policies to insure against, among other things, unexpected business interruptions. And what happened back in March, as we all know because we all lived through it, that's about as unexpected as you get. Plaintiffs were forced to close their businesses because the executive order issued by the State -- well, the State pertinent to here, but issued across the country in emergency response to the pandemic found that there is a dangerous condition on plaintiffs' property. As a result of those orders, the plaintiffs closed. All residents were told to stay at home and (indiscernible) claims (indiscernible).

Now, as Mr. Harrison pointed out, the briefing reflects that there are really two main points of argument that -- that I'll hit quickly because they are recited at length in the brief is the first

(indiscernible) on the direct physical loss issue. We know from, and just to again bide by Your Honor's directive, we know that under the Gregory Packaging, Inc. versus Travelers Property Casualty Company of America case, which is an unpublished case, but from the District of New Jersey and cited in both Mr. Harrison's and our brief, we know that a dangerous condition on the property can constitute a physical loss. Now, here, we have an executive order that found that plaintiffs' businesses were deemed unfit and unsafe because of a dangerous condition. Plaintiffs' loss of income caused by the closure orders concluding that there was a dangerous condition on the property is a direct physical loss. Alternatively, if we wanted to get into the legal standard, at a minimum, it is plausible the plaintiffs have alleged a direct physical loss here which should defeat a (indiscernible) Motion and allow plaintiffs to pursue discovery, among other things, to discern the true intent behind policy terms which, in some cases, points to coverage but in other cases it may be ambiguous.

The second point would be the civil authority coverage and I -- I think here, the Western District of Missouri case has instructed, and I'll get to that in a second, here we -- we, again, we know what happened.

We all lived through it. The closure orders forced plaintiffs to close and banned occupancy of all non-essential businesses. In doing so, the closure orders necessarily not only affected plaintiffs' businesses, but they affected all -- all properties around plaintiffs. It was a stay-at-home order. Unless it was an essential business, everything was closed. It's alleged -- it -- it's in the Motion and, you know, beyond that, Your Honor, we all lived through it. We were all there. So, again, at a minimum, it is plausible that plaintiffs are entitled to (indiscernible) coverage here. And unless Your Honor has any questions, I know the briefing was fairly detailed.

THE COURT: Thank you, Mr. Rose. You know, at the outset, gentlemen, I do commend the both of you with respect to a very, very difficult topic and concept in the State of New Jersey with regard to the interpretation of insurance law. I did find that the respective briefs were very well drafted.

Mr. Harrison, do you have a reply at this point?

MR. HARRISON: Briefly, Your Honor, yes. Mr. Rose says the executive order for -- forced closure based on a finding that there was a dangerous condition

on plaintiffs' property. That's -- that's simply not the case. The -- the Complaint does not allege that. I understand what he's saying. It -- it's a -- it's a directive closing down non-essential businesses based on the risk that putting people in proximity to each other indoors could result in transmission of the virus, could -- it could result in the virus sitting on a piece of equipment in one of the plaintiffs' examining rooms, but the Complaint in this case expressly alleges that there has been no known instance of Covid-19 transmission or contamination.

I -- I get it that this is business interruption insurance and to quote one of the judges I appeared before in my first year arguing coverage motion, he said, Mr. Harrison, before we turn to the policy terms, everybody knows that when an insured buys insurance for something, their reasonable expectation is that they're going to be covered for whatever might befall them, but then we got to go to the policy language and if indeed coverage was determined by the name of the coverage, business interruption, well, then the insurance industry loses and FMI loses this case because we're not disputing that there was business interruption. Although if we were to have to dig deeper, we would probably have a dispute over whether

plaintiffs were non-essential businesses, but that's not what this Motion is about. The law requires that we look carefully at the policy language. And with reference to Gregory Packaging, we're talking about the release of ammonia into the air, talking about something physically occurring and I think it's -- it's clear from the plain policy language and the meaning of the terms, which are precisely defined in the policy, that in this instance under this policy based on these allegations there is no direct covered loss.

In -- in asking for discovery to determine the true intent behind policy terms, right, that's something you need to speak about briefly. When policy language is clear, I am not aware of any precedent which would support denial of a Motion to Dismiss on the basis that the plaintiff is entitled to conduct discovery to see what the drafter of the document, who I can tell the Court was not -- is not an employee of FMI, had in mind when defining direct covered loss or covered loss.

There -- there is -- in New Jersey we do have a -- a big case called Morton International which has to do with pollution exclusions and that's where our courts created this -- the concept of regulatory estoppel where essentially the insurance industry

lobbied to insert a particular form of coverage within a policy with an exclusion for -- that applied to environmental losses and essentially the courts found, hey, you came to the Department of Banking and Insurance putting forth this policy language suggesting it would do something and then you went to court and suggested otherwise. There is no such allegation in this case. I haven't seen any such allegation even made in the press or -- or by the various (indiscernible) or -- or in any case that's being litigated that I'm aware of. When the plain policy terms apply plainly and directly to the facts asserted, I'm not aware of any legitimate basis for denying a Motion based on the facts accepted as true in the pleading on the basis that plaintiff wishes to take discovery to see what the defendant meant by policy language that somebody else wrote which the defendant adopted if the plain language controls and is unambiguous and I submit that it does control and it is unambiguous here.

THE COURT: Thank you. Gentlemen, thank you, very much. I'm prepared to rule on this Motion.

This matter comes before the Court on a Motion Seeking Dismissal of the plaintiffs' Complaint with prejudice pursuant to Rule 4:6-2(e). The Court

begins with a few general observations concerning the standards governing dismissal motions under Rule 4:6-2(e) by citing Flinn v. -- Flinn v. Amboy National Bank, 40 -- 436 N.J.Super. 274 (App. Div. 2014), "In reviewing a complaint dismissed under Rule 4:6-2(e), the inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint," citing Printing Mart-Morristown versus Sharp Electronics Corp., 116 N.J. 739 at page 746 (1989) and Rieder versus Department of Transportation, 221 N.J.Super. 547 at page 552 (App. Div. 1987).

The essential test as set forth in Green versus Morgan Properties, 215 N.J. 431 at page 451 (Sup. Ct. 2013) is, "Whether a cause of action is 'suggested' by the facts," citing Printing Mart-Morristown versus Sharp Electronics Corp., 116 N.J. at 746 quoting Velantzas versus Colgate-Palmolive Co., 109 N.J. 189 at page 192 (1988).

"A reviewing court searches the complaint in depth and with liberality to ascertain whether the fundamental of a cause of action may be gleaned, even from an obscure statement of claim, opportunity being given to amend if necessary," citing Di Cristofaro versus Laurel Grove Memorial Park, 43 N.J.Super. 244 at page 252 (App. Div. 1957).

In the case of Rule 4:6-2(e), Dismissals, "The Court is not concerned with the ability of the plaintiffs to prove the allegation contained in the complaint," citing Somers Construction Co. versus Board of Education, 198 F.Supp. 732, 734 (Dis. NJ. 1961). Instead,

"The plaintiffs are entitled to every reasonable inference of fact and the examination of a complaint's allegations of fact required by the aforestated principle should be one that is at once painstaking and undertaken with a generous and hospitable approach,"

citing Green versus Morgan Properties, 215 N.J. 431 at page 452 quoting Printing Mart-Morristown versus Sharp Electronics Corp., 116 N.J. at 746.

Notwithstanding this indulgent standard, "A pleading should be dismissed if it states no basis for relief and discovery would not provide one," citing Rezem Family Associates, LP versus Borough of Millstone, 423 N.J.Super. 103 at page 113 (App. Div. 2011), cert. denied and the appeal was dismissed at 208 N.J. 366 (2011). See also Sickles versus Cabot Corp. 379 N.J.Super. 100 at page 106 (App. Div. 2005) cert. denied at 185 N.J. 297 (2005).

In those rare instances, as cited in Smith

versus SBC Communications, Inc., 178 N.J. 265 at page 282 (2004), a motion to dismiss pursuant to Rule 4:6-2(e) ordinarily is granted without prejudice. See Hoffman versus Hampshire Labs Incorporated, 405 N.J.Super. 105, 116 (App. Div. 2009).

The defendant, Franklin Mutual Insurance Company, hereinafter FMI, issued a business owners policy to plaintiff, Optical Services USA/JC1 under policy number SBP2598006 with effective dates of October 5, 2019 to October 5, 2020. FMI issued the business owners policy to the plaintiff, Stong OD Ewing NJ, LLC, hereinafter Stong OD, bearing policy number SBP2613680 with effective dates of April 1, 2020 to April 1, 2021. Optical Services USA/JC1 and Stong OD filed separate claims seeking loss of business income caused by the closure mandated by Governor Murphy's March 21, 2020 Executive Order Number 107 suspending the operation of non-essential retail businesses on the account of the Covid-19 pandemic. Plaintiffs closed their businesses on March 20, 2020 and have not reopened to date. Plaintiffs allege that Executive Order Number 107 mandated the closure of their businesses. FMI issued letters dated April 6, 2020 and April 14, 2020 to Optical Services USA/JC1 and Stong OD denying their claims for business income and related

expenses. Plaintiffs, Optical Services USA, LLC, Optical Services USA-WO, Re and Le Holdings, LLC were not named insureds on either policy.

Both policies contained the BU04010110 Business Owners Policy Form. The plaintiffs allege that the -- the plaintiffs allege that Optical Services USA/JC1, Optical Services USA, LLC, Optical Services USA-WO, Re and La -- and Le Holding, LLC and Stong OD Ewing NJ, LLC purchased business interruption insurance from insurers to protect their business from an -- an unanticipated crisis. The plaintiffs further allege that the policies issued by FMI provide coverage for loss of income resulting from a necessary interruption of plaintiffs' businesses caused by direct covered losses and temporary closures required by orders of a civil authority.

A Complaint for a Declaratory Judgment in this action was filed on June 25, 2020. The Complaint also included a Demand for Trial by Jury. No answer has been filed by the defendant, FMI. Therefore, the discovery end date has not been established in this case.

On July 15, 2020, the defendant, FMI, filed a Motion Seeking Dismissal of the Complaint pursuant to Rule 4:6-2(e). Within days of filing the Complaint,

the defendant, FMI, filed the within Motion to Dismiss. It is clear that there is no established record in this case and there has been no discovery presented to the Court for consideration with respect to the arguments and events by respective legal counsel. Notwithstanding same, the defendants argued three points before this Court. The first legal argument is that the Court should dismiss the complaint for failure to state a legally cognizable claim. The second legal argument is that the plaintiffs did not sustain direct physical loss or direct physical damage to or destruction of covered property precluding coverage for business income or extra expenses under the FMI policy. Lastly, the defendants argue that the plaintiffs occupancy of their respective properties was not prohibited by civil authorities because of a loss at a local premises not owned or occupied by the plaintiffs precluding civil authority coverage under the FMI policies.

The plaintiffs argue before this Court that they state claims for coverage under the policies because they suffered a direct covered loss and were forced to close their business by order of a civil authority. Plaintiffs further allege that they state claims for loss of income coverage because they

suffered a direct covered loss under the policy and they state claims for civil coverage because the closure order prohibited the plaintiffs from accessing their business.

Naturally, each of the respective arguments advanced by the parties requires a fact-sensitive analysis wherein the respective parties have failed to present a sufficient record before this Court for a legal determination of their respective positions. There has been no discovery produced to the Court for consideration, no affidavits, no certifications, or sworn testimony derived from depositions. In fact, discovery has not been undertaken by the parties with respect to the declaratory relief sought in the Complaint. Notwithstanding these deficiencies, the Court will endeavor to address the legal arguments advanced by the respective parties on the extremely limited record provided to the Court.

The defendant, FMI, concedes that the plaintiffs' business operations were interrupted by an executive order based on the risk of the Covid-19 virus transmission throughout the State of New Jersey. The pivotal issue before this Court is the parties' interpretation of the subject policy language and FMI's claim denial premised on a narrow interpretation of the

terms of the subject policies. The issue before this Court is the interpretation of a direct covered loss under the policy and whether or not there was physical damage to the plaintiffs' business.

The plaintiffs argue that the loss of physical functionality and the use of their business constitutes a covered loss under the policies. The plaintiffs argue that Governor Murphy's executive order prohibited access to the plaintiffs' premises.

FMI argues that the plaintiffs failed to state a claim for civil authority coverage because the complaint does not allege that property damage occurred elsewhere leading to the loss of access to plaintiffs' business. The defendant acknowledged in their moving papers that presumably the plaintiffs will argue that while their properties were not physically damaged, they sustained a physical loss by operation of the Governor's executive order. FMI argues that the plaintiffs' loss of use of their respective properties does not constitute a direct physical loss and therefore is not a direct covered loss defined by the policies.

A simple review of the moving papers indicates that the defendant has not provided this Court with any controlling legal authority to support

their version of the interpretation of the defined terms in the policy. In fact, there is limited legal authority in the State of New Jersey addressing this issue. This is not surprising to the Court as the State of New Jersey was recently faced with a historic event which was unprecedented with respect to the losses sustained by businesses across the State of New Jersey due to the proliferation of the Covid-19 pandemic. The defendant argues that there is a plain meaning of "direct physical loss" and the closure of the plaintiffs' business does not qualify for business -- I'm sorry, qualify for purposes of coverage. This is a blanket statement unsupported by any common law in the State of New Jersey or by a blanket review of the policy language. Moreover, there has been no discovery taken in this matter which would provide guidance to the Court with respect to a Motion to Dismiss filed under Rule 4:6-2(e).

Pursuant to the legal authority recited by this Court with regard to the standards associated with filing such a motion, the plaintiff should be permitted to engage in issue-oriented discovery and also be permitted to amend its complaint accordingly prior to an adjudication on the merits of any policy language. Such a motion is premature at best.

It is noteworthy to mention that the plaintiffs' argument set forth to this Court that the loss of use of their business because the State of New Jersey deemed all non-essential businesses unsafe constitutes a direct covered loss under the policy is the pivotal issue in the absence of any issue-oriented discovery on this topic is whether direct physical loss and direct physical damage encompasses closure for businesses that bears no specific -- relationship to a specific condition on the property pursuant to an executive order. The plaintiffs counter that argument by alleging that the executive order of the Governor deemed all non-essential businesses unsafe given the risk of transmission of Covid-19 thus the closure order had a specific relationship to a specific condition within the plaintiffs' business.

The plaintiffs provide a citation from Wakefern Food Corp. versus Liberty Mutual Fire Insurance Company, 406 N.J.Super. 524 (App. Div. 2019) to support their argument. Their argument based on the holding of Wakefern is that there was a finding of coverage for a grocery store that lost power when an electrical grid and transmission lines were physically incapable of performing their essential function of providing electricity even though they were not

necessarily damaged. The Court in Wakefern did hold that,

"Since the term "physical" can mean more than material alteration or damage, it is incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided."

Citing Wakefern versus Liberty Mutual Insurance Company, 406 N.J.Super. at 542. Also citing Customized Distribution Services versus Zurich Insurance Co., 373 N.J.Super. 480 at page 491 (App. Div. 2004), cert. denied at 183 N.J. 214 (2005).

The Court finds such an argument compelling for purposes of surviving a Motion to Dismiss pursuant to Rule 4:6-2(e) in the absence of any complete record for disposition. Again, the Court notes in the absence of the legal precedent set forth in Wakefern, there is a lack of controlling legal authority presented to the Court for consideration in this regard.

"When interpreting insurance contracts, the intention of the parties must be determined from the language of the policy," citing Stone v. Royal Insurance Company, 211 N.J.Super. 246 at page 248 (App. Div. 1986). "When the terms of the contract are clear and unambiguous, the Court must enforce the contract as written." That is an incitation at page 248.

The language which forms the basis of the complaint and the filing of a Motion to Dismiss is subject to further analysis and interpretation. By operation of the distinct and opposite interpretations of the language set forth before the Court by the parties with no other clarity from the record having been established to date, which the Court notes is largely non-existent, this Court reaches the inevitable conclusion solely for purposes of disposition of this Motion that the plaintiff should be afforded the opportunity to develop their case and prove before this Court that the event of the Covid-19 closure may be a covered event under the Coverage C, Loss of Income, when occupancy of the described premises is prohibited by civil authorities. There is an interesting argument made before this Court that physical damage occurs where a policy holder loses functionality of their property and by operation of civil authority such as the entry of an executive order results in a change to the property.

The plaintiffs are offering in advancing in a novel theory of insurance coverage in this matter that warrants a denial of the Motion to Dismiss at this early stage of the litigation. As such, this Court must afford the plaintiffs an opportunity to engage in

issue-oriented discovery with FMI in order to fully establish the record with respect to direct covered losses and to amend the Complaint accordingly if required. To that end, the Motion to Dismiss is denied.

Gentlemen, I will have an order prepared and most likely uploaded by this afternoon. Again, I want to thank you for your briefs and I thank you for your legal arguments here today.

MR. HARRISON: Thank you, Your Honor. Have a good weekend.

THE COURT: Thank you, gentlemen.

(Proceeding concluded at 10:08:29 a.m.)

* * * * *

CERTIFICATION

I, Laura Scicutella, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart, Index No. from 9:30:49 to 10:08:29, is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings, as recorded.

/s/ Laura Scicutella
Laura Scicutella

AD/T 685
AOC Number

Phoenix Transcription LLC
Agency Name

8/18/2020
Date

Order Denying Preliminary Objections entered Aug. 31, 2020 in *Ridley Park Fitness, LLC v. Philadelphia Indem. Ins. Co.*, No. 01093:

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

RIDLEY PARK FITNESS, LLC	:	**MAY TERM, 2020**
Plaintiff	:	**NO. 01093**
v.	:	**COMMERCE PROGRAM**
PHILADELPHIA INDEMNITY INSURANCE COMPANY	:	**CONTROL NO. 20080358**
Defendants	:	

ORDER

AND NOW, this 31st day of August, 2020, upon consideration of the preliminary objections filed by defendant Philadelphia Indemnity Insurance Company to plaintiff's amended complaint, and any response thereto, it is hereby

ORDERED

that the preliminary objections are **OVERRULED, without prejudice.**[1]

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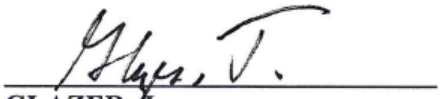
[1] Pursuant to Pa. R.C.P. 1028(a)(4), a party may raise a preliminary objection due to legal insufficiency of a pleading (demurrer). When considering preliminary objections, all material facts and reasonable inferences set forth in the challenged complaint must be admitted as true. Haun v. Cmty. Health Sys. Inc., 14 A.3d 120, 123 (Pa. Super. 2011) (citation omitted). A court may not consider facts that are not contained within the challenged pleading. See Detweiler v. School Dist. Of Borough of Hatfield, et al., 104 A.2d 110, 113 (Pa. 1954). Additionally, a court need not accept conclusions of law. See Dominski v. Garrett, 419 A.2d 73, 75 (Pa. Super. 1980).

This litigation arises from the denial of insurance coverage for business losses at a fitness center as a result of the COVID-19 pandemic and the resulting state and local orders mandating that all non-essential businesses be temporarily closed. Defendant alleges in the instant preliminary objections that plaintiff's failure to attach the insurance agreement in total constitutes a failure to plead, which defendant has cured by attaching the agreement in full, that certain clauses including a virus exclusion and "direct physical loss" bar coverage, and finally, that plaintiff is not entitled to a declaratory judgment.

At this very early stage, it would be premature for this court resolve the factual determinations put forth by defendants to dismiss plaintiff's claims. Taking the factual allegations made in plaintiff's complaint as true, as this court must at this time, plaintiff has

BY THE COURT:



GLAZER, J.

successfully pled to survive this stage of the proceedings. As such, the preliminary objections are overruled.

Order Denying Motion to Dismiss entered Sept. 24, 2020 in *Urogynecology Specialist of Florida LLC v. Sentinel Ins. Co.*, Ltd., No. 20-cv-1174-Orl-22EJK:

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UROGYNECOLOGY SPECIALIST OF FLORIDA LLC,

Plaintiff,

v. **Case No: 6:20-cv-1174-Orl-22EJK**

SENTINEL INSURANCE COMPANY, LTD.,

Defendant.

ORDER

This cause comes before the Court on the Motion to Dismiss filed by Defendant Sentinel Insurance Company, LTD. (Doc. 6). Plaintiff Urogynecology Specialist of Florida, LLC filed a Response in Opposition (Doc. 16) and Sentinel filed a Memorandum in Support of its Motion (Doc. 19). For the following reasons, the Motion will be denied.

I. BACKGROUND[1]

The dispute in this case arises from an insurance contract and the alleged breach of that contract. Sentinel issued Plaintiff an all-risk insurance policy[2] ("the Policy") to cover its gynecologist practice for the period of June 19, 2019 to June 19, 2020. (Doc. 5-1). In early March 2020, the Governor of Florida issued an executive order declaring a state of emergency in Florida due to the COVID-19 pandemic. *See Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, No. 2:20-cv-00401-FTM-66NPM, 2020 WL 5240218, at *1 (M.D. Fla. Sept. 2, 2020). As a result of the nationwide and ongoing pandemic, Plaintiff was forced to close its doors for a period of time in March 2020 and could not operate as intended. (Doc. 1-1 at ¶ 13-15). While Plaintiff's business

[1] For the purposes of this Motion, the Court will consider as true all of the allegations in Plaintiff's Complaint.

[2] Plaintiff is a named insured under Policy No. 21 SBA BX5636. (Doc. 1-1 at ¶ 18).

was shut down, Plaintiff suffered numerous losses including loss of use of the insured property, loss of business income, and loss of accounts receivable. (*Id.* at ¶ 12). Plaintiff also incurred additional business expenses to minimize the suspension of the business and continue its operations. (*Id.* at ¶ 15).

Plaintiff notified Sentinel of its losses associated with the medical office closing due to the ongoing pandemic and Sentinel denied coverage. (*Id.* at ¶ 20-23). As a result, Plaintiff filed this suit in the Ninth Judicial Circuit, in and for Orange County, Florida on June 2, 2020. (Doc. 1). The relevant Policy provisions upon which Plaintiff's suit relies are as follows:

> **A. COVERAGE**
> We will pay for direct physical loss of or physical damage to Covered Property at the premises described in the Declarations (also called "scheduled premises" in this policy) caused by or resulting from a Covered Cause of Loss.
>
> . . . .
>
> **3. Covered Causes of Loss**
> RISKS OF DIRECT PHYSICAL LOSS unless the loss is:
> a. Excluded in Section B., EXCLUSIONS; or
> b. Limited in Paragraph A.4. Limitations; that follow.
>
> . . . .
>
> **5. Additional Coverages**
>
> . . . .
>
> **o. Business Income**
> **(1)** We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by a direct physical loss of or physical damage to property at the "scheduled premises", including personal property in the open (or in a vehicle) within 1,000 feet of the "scheduled premises", caused by or resulting from a Covered Cause of Loss.
>
> . . . .
>
> **p. Extra Expense**
> **(1)** We will pay reasonable and necessary Extra Expense you incur during the "period of restoration" that you would not have incurred

> if there had been no direct physical loss or physical damage to property . . .
>
> . . . .
>
> **q. Civil Authority**
>
> **(1)** This insurance is extended to apply to the actual loss of Business Income you sustain when access to your "scheduled 7 premises" is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your "scheduled premises".
>
> . . . .
>
> **6. Coverage Extensions**
>
> . . . .
>
> **a. Accounts Receivable**
>
> **(1)** You may extend the insurance that applies to your Business Personal Property, to apply to your accounts receivable.
>
> We will pay for:
>
> **(a)** All amounts due from your customers that you are unable to collect;
> **(b)** Interest charges on any loan required to offset amounts you are unable to collect pending payment of these amounts;
> **(c)** Collection expenses in excess of your normal collection expenses that are made necessary by the physical loss or physical damage; and
> **(d)** Other reasonable expenses that you incur to reestablish your records of accounts receivable.

(Doc. 5-1 at 36-48).

In Count I, Plaintiff asserts a claim for breach of contract for failure to adequately reimburse Plaintiff for its losses. (Doc. 1-1 at ¶ 24). In Count II, Plaintiff seeks a declaration of the parties' rights under the insurance contract. (*Id.* at ¶ 30). Sentinel was served on June 4, 2020, and timely removed to this Court on July 1, 2020. (*Id.*). Sentinel alleged in its Notice of Removal that this Court has subject matter jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332; the Notice of Removal stated that (1) Sentinel is a foreign corporation and citizen of

Connecticut, (2) all members of Plaintiff's LLC are citizens of Florida, and (3) Plaintiff's claims supported a conclusion that damages were in excess of $75,000. (Doc. 1 at 2-6).

II. LEGAL STANDARD

When deciding a motion to dismiss based on failure to state a claim upon which relief can be granted, the court must accept as true the factual allegations in the complaint and draw all inferences derived from those facts in the light most favorable to the plaintiff. *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010). "Generally, under the Federal Rules of Civil Procedure, a complaint need only contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). However, the plaintiff's complaint must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 556). Thus, the Court is not required to accept as true a legal conclusion merely because it is labeled a "factual allegation" in the complaint; it must also meet the threshold inquiry of facial plausibility. *Id.*

III. ANALYSIS

Sentinel moves to dismiss Plaintiff's Complaint arguing that the plain language of the policy excludes coverage for Plaintiff's losses. Specifically, Sentinel argues that the Policy expressly excludes losses caused by a virus. Plaintiff responds that the Policy is ambiguous, and any ambiguity should be read in favor of coverage.

A. Breach of Insurance Contract

The issues surrounding whether insurance policy virus exclusions apply to losses caused by COVID-19 are novel and complex. Courts considering these issues have applied basic contract

principles to determine whether such virus-related clauses exclude coverage. *See Mauricio Martinez, DMD, P.A.*, 2020 WL 5240218, at *2 (analyzing virus exclusions under state law contract interpretations); *see also Turek Enterprises, Inc., v. State Farm Mutual Automobile Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *5 (E.D. Mich. Sept. 3, 2020) (same); *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-cv-04418-SVW-AS, 2020 WL 5095587, at *4 (C.D. Cal. Aug. 28, 2020) (same).

In Florida, to state a claim for breach of contract, a plaintiff must allege "(1) the existence of a contract, (2) a breach of the contract, and (3) damages resulting from the breach." *Beck v. Lazard Freres & Co.*, LLC, 175 F.3d 913, 914 (11th Cir. 1999). Here, Plaintiff alleges that Sentinel breached the insurance contract by failing to pay for covered losses. Sentinel argues that the plain language of the insurance contract excludes coverage for the cause of Plaintiff's loss. Sentinel relies on the following language from the Policy under the "Limited Fungi, Bacteria or Virus Coverage" provision which states that Sentinel

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

(Doc. 5-1 at 141).

Under Florida law, the "construction of an insurance policy is a question of law for the court." *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 877 (Fla. 2007). "The scope and extent of insurance coverage is determined by the language and terms of the policy." *Ernie Haire Ford, Inc. v. Universal Underwriters Ins. Co.*, 541 F. Supp. 2d 1295, 1298 (M.D. Fla. 2008) (quoting *Bethel v. Sec. Nat'l Ins. Co.*, 949 So. 2d 219, 222 (Fla. 3d DCA 2006)). An insurance policy is a

contract that is construed according to its plain meaning. *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007). When construing the plain meaning of phrases in an insurance contract, Florida courts "may consult references commonly relied upon to supply the accepted meanings of words." *Id.* (relying on Merriam Webster's Collegiate Dictionary to supply the plain meaning of language in an insurance contract). Finally, the Florida Statutes provide, "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy." Fla. Stat. § 627.419.

Sentinel argues that the unambiguous policy terms exclude coverage for any losses caused by a virus, including COVID-19. Plaintiff argues that ambiguity in the insurance policy requires the Court to construe the Policy in favor of coverage. Policy language is ambiguous if it "is susceptible to more than one reasonable interpretation, one providing coverage and another limiting coverage." *Garcia*, 969 So. 2d at 291 (citing *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000)). "A provision is not ambiguous simply because it is complex or requires analysis." *Id.* In addition, "[t]he fact that both sides ascribe different meanings to the language does not mean the language is ambiguous." *Kipp v. Kipp*, 844 So. 2d 691, 693 (Fla. 4th DCA 2003). An ambiguity exists only if a "genuine inconsistency, uncertainty, or ambiguity in meaning . . . remains after the application of the ordinary rules of construction." *Am. Strategic Ins. Co. v. Lucas-Solomon*, 927 So. 2d 184, 186 (Fla. 2d DCA 2006) (internal quotation marks omitted).

Here, several arguably ambiguous aspects of the Policy make determination of coverage inappropriate at this stage. Notably, the Policy provided does not exist as an independent document. For example, the "Limited Fungi, Bacteria or Virus Coverage" section of the Policy (Doc. 5-1 at 141) starts by stating that it modifies certain coverage forms. Those forms are not provided in the Policy itself, nor were they provided to the Court. Additionally, the second paragraph states that the virus exclusion "is added to paragraph B.1 Exclusions of the Standard

Property Form and the Special Property Coverage Form" which was similarly not provided to the Court. Without the corresponding forms which are modified by the exclusions, this Court will not make a decision on the merits of the plain language of the Policy to determine whether Plaintiff's losses were covered. Additionally, it is not clear that the plain language of the policy unambiguously and necessarily excludes Plaintiff's losses. The virus exclusion states that Sentinel will not pay for loss or damage caused directly or indirectly by the presence, growth, proliferation, spread, or any activity of "fungi, wet rot, dry rot, bacteria or virus." (*Id.*). Denying coverage for losses stemming from COVID-19, however, does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses.

In arguing that the plain language of the Policy excludes coverage for Plaintiff's losses, Sentinel cites a number of cases which uphold similar virus exclusions. The cases, however, are nonbinding and distinguishable. In arguing that Florida courts routinely enforce policy provisions excluding coverage for viruses, Sentinel cites a case in which a policyholder sought coverage when a third-party asserted a claim against him for the transmission of a sexually transmitted virus. *See Clarke v. State Farm Florida Ins.*, 123 So. 3d 583, 584 (Fla. 4th DCA 2012). In arguing that the Court should give the virus exclusion a straightforward application to exclude coverage for losses caused by COVID-19, Sentinel cites cases dealing with pollution exclusions and sewage backups, damage caused by mold, and claims resulting from illness or disease, all of which fell under policy exclusions. (Doc. 6 at 11-12). Importantly, none of the cases dealt with the unique circumstances of the effect COVID-19 has had on our society—a distinction this Court considers significant. Thus, without any binding case law on the issue of the effects of COVID-19 on insurance contracts virus exclusions, this Court finds that Plaintiff has stated a plausible claim at this juncture. Plaintiff alleged the existence of the insurance contract, losses which may be covered under the insurance

contract, and Sentinel's failure to pay for the losses. These allegations, when read in the light most favorable to Plaintiff, are facially plausible. *See Twombly*, 550 U.S. at 555 (holding that a complaint "attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations").

Based on the foregoing, it is ordered as follows:

1. Defendant's Motion to Dismiss (Doc. 6) will be **DENIED.**

2. Defendant **IS ORDERED TO FILE** an Answer to the Complaint within fourteen days of the date of this Order.

DONE and **ORDERED** in Chambers, in Orlando, Florida on September 24, 2020.

ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record

Order Granting in Part Motion for Partial Summary Judgment entered May 25, 2021 in *MacMiles LLC d/b/a Grant Street Tavern v. Erie Insur. Exchange*, No. GD-20-7753:

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MACMILES, LLC D/B/A GRANT STREET TAVERN 310 Grant Street, Ste. 106 Pittsburgh, PA 15219-2213,	:	
Plaintiff,	:	No.: GD-20-7753
vs.	:	
	:	Hon. Christine Ward
ERIE INSURANCE EXCHANGE 100 Erie Insurance Place Erie, PA 16530,	:	**Memorandum and Order of Court**
Defendant.	:	

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MACMILES, LLC D/B/A GRANT STREET TAVERN 310 Grant Street, Ste. 106 Pittsburgh, PA 15219-2213,	:	
Plaintiff,	:	No.: GD-20-7753
vs.	:	
ERIE INSURANCE EXCHANGE 100 Erie Insurance Place Erie, PA 16530,	:	
Defendant.	:	

MEMORANDUM AND ORDER OF COURT

I. The Parties

MacMiles, LLC d/b/a Grant Street Tavern (hereinafter "Plaintiff") is a restaurant and bar located in the Downtown neighborhood of Pittsburgh, Allegheny County, Pennsylvania.

Erie Insurance Exchange (hereinafter "Defendant") is a reciprocal insurance exchange organized under the laws of Pennsylvania with its principal place of business in Erie, Pennsylvania.

II. Introduction

Defendant issued Plaintiff an Ultra Plus Commercial General Liability Policy for the policy period between September 12, 2019 to September 12, 2020 (hereinafter "the insurance contract"). The insurance contract is an all-risk policy, which provides coverage for any direct physical loss or direct physical damage unless the loss or damage is specifically excluded or limited by the insurance contract.

In March and April of 2020, in order to prevent and mitigate the spread of the coronavirus disease "COVID-19," Governor Tom Wolf ("Governor Wolf") issued a series of mandates restricting the operations of certain types of businesses throughout the Commonwealth of Pennsylvania (the "Governor's orders"). On March 6, 2020, Governor Wolf issued an order declaring a Proclamation of Disaster Emergency. On March 19, 2020, Governor Wolf issued an order requiring all non-life sustaining businesses in Pennsylvania to cease operations and close physical locations. On March 23, 2020, Governor Wolf issued an order directing Pennsylvania citizens in particular counties to stay at home except as needed to access life sustaining services. Then, on April 1, 2020, Governor Wolf extended the March 23, 2020 order, and directed all of Pennsylvania's citizens to stay at home. As of April 1, 2020, at least 5,805 citizens of Pennsylvania contracted COVID-19 in sixty counties across the Commonwealth, and seventy-four (74) citizens died.[1] Unfortunately, since April 1, 2020, the number of positive cases and deaths from COVID-19 has increased dramatically.[2]

As a result of the spread of COVID-19 and the Governor's orders, Plaintiff suspended its business operations. Plaintiff thereafter submitted a claim for coverage under its insurance contract with Defendant. Defendant denied Plaintiff's claim.

On September 29, 2020, Plaintiff filed a complaint in the Court of Common Pleas of Allegheny County. In its complaint, Plaintiff asserted the following counts: [a] count one is for declaratory judgment in regards to the business income protection provision of the insurance contract; [b] count two is for breach of contract in relation to the business income protection

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[1] *See* Governor Tom Wolf, *Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home*, (April 1, 2020), https://www.governor.pa.gov/wp-content/uploads/2020/04/20200401-GOV-Statewide-Stay-at-Home-Order.pdf.

[2] As of May 14, 2021, 993,915 citizens of Pennsylvania have contracted COVID-19 and 26,724 citizens have died. *See* Pennsylvania Department of Health, COVID-19 Data for Pennsylvania, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx.

provision of the insurance contract; [c] count three is for declaratory judgment with regard the civil authority provision of the insurance contract; [d] count four is for breach of contract in regards to the civil authority provision of the insurance contract; [e] count five is for declaratory judgment with regard to the extra expense provision of the insurance contract; and [f] count six is for breach of contract in regards to the extra expense provision of the insurance contract. All of Plaintiff's claims require this Court's determination as to whether Plaintiff is entitled to coverage under various provisions of the insurance contract with Defendant for losses Plaintiff sustained in relation to the spread of COVID-19 and the Governor's orders.

On December 22, 2020, Plaintiff filed a Motion for Partial Summary Judgment as to Plaintiff's claims for declaratory judgment with regard to the business income protection and civil authority provisions of the insurance contract. On March 10, 2021, Defendant filed a Cross Motion for Judgment on the Pleadings. On March 31, 2021, this Court heard oral argument on Plaintiff's Motion for Partial Summary Judgment and Defendant's Cross Motion for Judgment on the Pleadings. For the reasons set forth herein, this Court grants Plaintiff's Motion for Partial Summary Judgment, in part, and denies Defendant's Cross Motion for Judgment on the Pleadings.

III. The Contract Provisions

Plaintiff's and Defendant's dispute involves the following provisions regarding coverage under the insurance contract.

> **Section 1 - Coverages**
>
> **Insuring Agreement**
>
> We will pay for direct physical "loss" of or damage to Covered Property at the premises described in the "Declarations" caused by or resulting from a peril insured against.

Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 61, Exhibit A.

> **Section II – Perils Insured Against**
>
> * * * * *
>
> **Income Protection – Coverage 3**
>
> **Covered Cause of Loss**
>
> This policy insures against direct physical "loss", except "loss" as excluded or limited in this policy.[3]

Id. at 64.

> **Income Protection – Coverage 3**
>
> **A. Income Protection**
>
> Income Protection means loss of "income" and/or "rental income" you sustain due to partial or total "interruption of business" resulting directly from "loss" or damage to property on the premises described in the "Declarations" or to your food truck or trailer when anywhere in the coverage territory from a peril insured against.[4]

---

[3] "Loss" means direct and accidental loss of or damage to covered property. Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 96, Exhibit A.

[4] The insurance contract defines "interruption of business" as "the period of time that your business is partially or totally suspended and it: 1. Begins with the date of direct "loss" to covered property caused by a peril insured against: and 2. Ends on the date when the covered property should be repaired, rebuilt, or replaced with reasonable speed and similar quality." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 96, Exhibit A. The insurance contract defines "income" as "the sum of net income (net profit or loss before income taxes) that would have been earned or incurred and necessary continuing operating expenses incurred by the business such as payroll expenses, taxes, interest, and rents." *Id.* The insurance contract defines "rental income" as the following:

> 1. The rents from the tenant occupancy of the premises described in the "Declarations";
>
> 2. Continuing operating expenses incurred by the business such as:
>
> a. Payroll; and
>
> b. All expenses for which the tenant is legally responsible and for which you would otherwise be responsible;
>
> 3. Rental value of the property described in the "Declarations" and occupied by you; or

Id. at 63.

C. Additional Coverages

1. Civil Authority

When a peril insured against causes damage to property other than property at the premises described in the : Declarations", we will pay for the actual loss of "income" and/or "rental income" you sustain and necessary "extra expense" caused by action of civil authority that prohibits access to the premises described in the "Declarations" or access to your food truck or trailer anywhere in the coverage territory provided that both of the following apply:

a. Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the premises described in the "Declarations" or your food truck or trailer are within that area but are not more than one mile from the damaged property; and

b. The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the peril insured against that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Id. at 64.

Section III. Exclusions

A. Coverages 1, 2, and 3

We do not cover under Building(s) – Coverage 1; Business Personal Property and Personal Property of others – Coverage 2; and Income Protection – Coverage 3 "loss" or damaged caused directly or indirectly by any of the following. Such a "loss" or damage is excluded regardless of any cause or event that contributes concurrently or in any sequence to the "loss":

* * * * *

10. By the enforcement of or compliance with any law or ordinance regulating the construction, use, or repair of any property, or requiring the tearing down of any

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4. Incidental income received from coin-operated laundries, hall rentals, or other facilities on the premises described in the "Declarations".

Id. at 97. Finally, "Declarations" is defined as "the form which shows your coverages, limits of protection, premium charges, and other information." *Id.* at 96.

> property, including the cost of removing its debris, except as provided in Extensions of Coverage – **B.3., B.7.,** and **B.8.**

Id. at 66.

IV. Standard of Review

It is well-settled that, after the relevant pleadings are closed, a party may move for summary judgment, in whole or in part, as a matter of law. Pa. R.C.P. 1035.2. Summary judgment "may be entered only where the record demonstrates that there are no genuine issues of material fact, and it is apparent that the moving party is entitled to judgment as a matter of law." *City of Philadelphia v. Cumberland County Bd. of Assessment Appeals*, 81 A.3d 24, 44 (Pa. 2013). Furthermore, appellate courts will only reverse a trial court's order granting summary judgment where it is "established that the court committed an error of law or abused its discretion." *Siciliano v. Mueller*, 149 A.3d 863, 864 (Pa. Super. 2016).

The interpretation of an insurance contract is a matter of law, which may be decided by this Court on summary judgment. *Wagner. V. Erie Insurance Company*, 801 A.2d 1226, 1231 (Pa. Super. 2002). When interpreting an insurance contract, this Court aims to effectuate the intent of the parties as manifested by the language of the written instrument. *American and Foreign Insurance Company v. Jerry's Sport Center*, 2 A.3d 526, 540 (Pa. 2010). When reviewing the language of the contract, words of common usage are read with their ordinary meaning, and this Court may utilize dictionary definitions to inform its understanding. *Wagner*, 801 A.2d at 1231; *see also AAA Mid-Atlantic Insurance Company v. Ryan*, 84 A.3d 626, 633-34 (Pa. 2014). If the terms of the contract are clear, this Court must give effect to the language. *Madison Construction Company v. Harleysville Mutual Insurance Company*, 735 A.2d 100, 106 (Pa. 1999). However, if the contractual terms are subject to more than one reasonable interpretation, this Court must find that the contract is ambiguous. *Id.* "[W]hen a provision of

a[n insurance contract] is ambiguous, the [contract] provision is to be construed in favor of the [the insured] and against the insurer, as the insurer drafted the policy and selected the language which was used therein." *Kurach v. Truck Insurance Exchange*, 235 A.3d 1106, 1116 (Pa. 2020).

V. Discussion

a. Coverage Provisions

Plaintiff bears the initial burden to reasonably demonstrate that a claim falls within the policy's coverage provisions. *State Farm Cas. Co. v. Estates of Mehlman*, 589 F.3d 105, 111 (3d Cir. 2009) (applying Pennsylvania law). Then, provided that Plaintiff satisfies its initial burden, Defendant bears "the burden of proving the applicability of any exclusions or limitations on coverage." *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996) (applying Pennsylvania law). In order to prevail, Defendant must demonstrate that the language of the insurance contract regarding exclusions is "clear and unambiguous: otherwise, the provision will be construed in favor of the insured." *Fayette County Housing Authority v. Housing and Redevelopment Ins. Exchange*, 771 A.2d 11, 13 (Pa. Super. 2001).

First, this Court will address whether Plaintiff is entitled to coverage under the Income Protection provision of the insurance contract for losses Plaintiff sustained in relation to the public health crises and the spread of the COVID-19 virus. With regard to Income Protection coverage, the insurance contract provides that:

> **Section 1 - Coverages**
>
> **Insuring Agreement**
>
> We will pay for *direct physical "loss" of or damage to* Covered Property at the premises described in the "Declarations" caused by or resulting from a peril insured against.

Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 61, Exhibit A (emphasis added).

> **Section II – Perils Insured Against**
>
> * * * * *
>
> **Income Protection – Coverage 3**
>
> **Covered Cause of Loss**
>
> This policy insures against direct physical "loss", except "loss" as excluded or limited in this policy.[5]

Id. at 64.

> **Income Protection – Coverage 3**
>
> **A. Income Protection**
>
> Income Protection means loss of "income" and/or "rental income" you sustain due to partial or total "interruption of business" resulting *directly from "loss" or damage to property* on the premises described in the "Declarations" or to your food truck or trailer when anywhere in the coverage territory from a peril insured against.[6]

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[5] "Loss" means direct and accidental loss of or damage to covered property. Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 96, Exhibit A.

[6] The insurance contract defines "interruption of business" as "the period of time that your business is partially or totally suspended and it: 1. Begins with the date of direct "loss" to covered property caused by a peril insured against: and 2. Ends on the date when the covered property should be repaired, rebuilt, or replaced with reasonable speed and similar quality." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 96, Exhibit A. The insurance contract defines "income" as "the sum of net income (net profit or loss before income taxes) that would have been earned or incurred and necessary continuing operating expenses incurred by the business such as payroll expenses, taxes, interest, and rents." *Id.* The insurance contract defines "rental income" as the following:

> 1. The rents from the tenant occupancy of the premises described in the "Declarations";
>
> 2. Continuing operating expenses incurred by the business such as:
>
> a. Payroll; and
>
> b. All expenses for which the tenant is legally responsible and for which you would otherwise be responsible;
>
> 3. Rental value of the property described in the "Declarations" and occupied by you; or

Id. at 63 (emphasis added).

In order to state a reasonable claim for coverage under the Income Protection provision of the insurance contract, Plaintiff must show that it suffered "direct physical loss of or damage to" its property. The interpretation of the phrase "direct physical loss of or damage to" property is the key point of the parties' dispute. Defendant contends that "direct physical loss of or damage to" property requires some physical altercation of or demonstrable harm to Plaintiff's property. Plaintiff contends that the "direct physical loss of . . . property" is not limited to physical altercation of or damage to Plaintiff's property but includes the loss of use of Plaintiff's property. Plaintiff further asserts that, because its interpretation is reasonable, this Court must find in Plaintiff's favor.

The insurance contract does not define every term in the phrase "direct physical loss of or damage to" property.[7] As previously noted, Pennsylvania courts construe words of common usage in their "natural, plain, and ordinary sense . . . and [Pennsylvania courts] may inform [their] understanding of these terms by considering their dictionary definitions." *Madison Construction Company,* 735 A.2d at 108. Four words in particular are germane to the determination of this threshold issue: "direct," "physical," "loss," and "damage." "Direct" is

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4. Incidental income received from coin-operated laundries, hall rentals, or other facilities on the premises described in the "Declarations".

Id. at 97. Finally, "Declarations" is defined as "the form which shows your coverages, limits of protection, premium charges, and other information." *Id.* at 96.

[7] Although the insurance contract does define the term "loss" as meaning "direct and accidental loss of or damage to covered property," this definition is essentially meaningless because it is repetitive of the phrase "direct physical loss of or damage to." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 96, Exhibit A. Accordingly, when interpreting the term "loss," this Court relies upon the term's the ordinary dictionary definition as it does with the other terms in this phrase, which the insurance contract did not define.

defined as "proceeding from one point to another in time or space without deviation or interruption . . . [and/or] characterized by close logical, causal, or consequential relationship . . ."[8] "Physical" is defined as "of or relating to natural science . . . having a material existence . . . [and/or] perceptible especially through the senses and subject to the laws of nature . . . ."[9] "Loss" is defined as "DESTRUCTION, RUIN . . . [and/or] the act of losing possession [and/or] DEPRIVATION . . . ."[10] "Damage" is defined as "loss or harm resulting from injury to person, property, or reputation . . . ."[11]

Before analyzing the definitions of each of the above terms to determine whether Plaintiff's interpretation is reasonable, it is important to note that the terms, in addition to their ordinary, dictionary definitions, must be considered in the context of the insurance contract and the specific facts of this case. *See Madison Construction Company,* 735 A.2d at 106 (clarifying that issues of contract interpretation are not resolved in a vacuum). While some courts have interpreted "direct physical loss of or damage to" property as requiring some form of physical altercation and/or harm to property in order for the insured to be entitled to coverage, this Court reasonably determined that any such interpretation improperly conflates "direct physical loss of" with "direct physical . . . damage to" and ignores the fact that these two phrases are separated in the contract by the disjunctive "or."[12] It is axiomatic that courts must "not treat the words in the

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[8] Direct, Merriam-Webster, https://www.merriam-webster.com/dictionary/direct.

[9] Physical, Merriam-Webster, https://www.merriam-webster.com/dictionary/physical.

[10] Loss, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss.

[11] Damage, Merriam Webster, https://www.merriam-webster.com/dictionary/damage.

[12] *See Fayette County Housing Authority v. Housing and Redevelopment Ins. Exchange*, 771 A.2d 11, 15 (Pa. Super. 2001) (explaining that merely accepting the non-binding decisions of other courts "by the purely mechanical process of searching the nations courts for conflicting decisions" amounts to an abdication of this Court's judicial role).

[contract] as mere surplusage . . . [and] if at all possible, [this Court must] construe the [contract] in a manner that gives effect to all of the [contract's] language." *Indalex Inc. v. Nation Union Fire Ins. Co. Pittsburgh, PA*, 83 A.3d 418, 420-21 (Pa. Super. 2013). Based upon this vital principle of contract interpretation, this Court concluded that, due to the presence of the disjunctive "or," whatever "direct physical 'loss' of" means, it must mean something different than "direct physical . . . damage to."

In order to determine what the phrase "direct physical loss of . . . property" reasonably means, this Court looked to the ordinary, dictionary definitions of the terms "direct," "physical," "loss," and "damage." This Court began its analysis with the terms "damage" and "loss," as these terms are the crux of the disputed language. As noted above, "damage" is defined as "loss or harm resulting from injury to person, property, or reputation . . . ,"[13] and "loss" is defined as "DESTRUCTION, RUIN . . . [and/or] the act of losing possession [and/or] DEPRIVATION . . . ."[14]

Based upon the above-provided definitions, it is clear that "damage" and "loss," in certain contexts, tend to overlap. This is evident because the definition of "damage" includes the term "loss," and at least one definition of "loss" includes the terms "destruction" and "ruin," both of which indicate some form of damage. However, as noted above, in the context of this insurance contract, the concepts of "loss" and "damage" are separated by the disjunctive "or," and, therefore, the terms must mean something different from each other. Accordingly, in this instance, the most reasonable definition of "loss" is one that focuses on the act of losing possession and/or deprivation of property instead of one that encompasses various forms of

[13] Damage, Merriam Webster, https://www.merriam-webster.com/dictionary/damage.

[14] Loss, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss.

damage to property, i.e., destruction and ruin. Applying this definition gives the term "loss" meaning that is different from the term "damage." Specifically, whereas the meaning of the term "damage" encompasses all forms of harm to Plaintiff's property (complete or partial), this Court concluded that the meaning of the term "loss" reasonably encompasses the act of losing possession [and/or] deprivation, which includes the loss of use of property absent any harm to property.

In reaching its conclusion, this Court also considered the meaning and impact of the terms "direct" and "physical." Ultimately, this Court determined that the ordinary, dictionary definitions of the terms "direct" and "physical" are consistent with the above interpretation of the term "loss." As noted previously, "direct" is defined as "proceeding from one point to another in time or space without deviation or interruption . . . [and/or] characterized by close logical, causal, or consequential relationship . . . ,"[15] and "physical" is defined as "of or relating to natural science . . . having a material existence . . . [and/or] perceptible especially through the senses and subject to the laws of nature . . . ."[16] Based upon these definitions it is certainly reasonable to conclude that Plaintiff could suffer "direct" and "physical" loss of use of its property absent any harm to property.

Here, Plaintiff's loss of use of its property was both "direct" and "physical." The spread of COVID-19, and a desired limitation of the same, had a close logical, causal, and/or consequential relationship to the ways in which Plaintiff materially utilized its property and physical space. *See* February 22, 2021 Court Order of the United States District Court, N.D. Illinois, Eastern Division case *In re: Society Insurance Co. COVID-19 Business Interruption*

[15] Direct, Merriam-Webster, https://www.merriam-webster.com/dictionary/direct.

[16] Physical, Merriam-Webster, https://www.merriam-webster.com/dictionary/physical.

Protection Insurance Litigation, Civil Case No. 1:20-CV-05965 at 21 (stating that government shutdown orders and COVID-19 *directly* impacted the way businesses used *physical* space) (emphasis added). Indeed, the spread of COVID-19 and social distancing measures (with or without the Governor's orders) caused Plaintiff, and many other businesses, to *physically* limit the use of property and the number of people that could inhabit *physical* buildings at any given time, if at all. Thus, the spread of COVID-19 did not, as Defendant contends, merely impose economic limitations. Any economic losses were secondary to the businesses' *physical* losses.

While the terms "direct" and "physical" modify the terms "loss" and "damage," this does not somehow necessarily mean that the entire phrase "direct physical loss of or damage to" property requires actual harm to Plaintiff's property in every instance. Any argument that the terms "direct" and "physical," when combined, presuppose that any request for coverage must stem from some actual impact and harm to Plaintiff's property suffers from the same flaw noted in this Court's above discussion regarding the difference between the terms "loss" and "damage:" such interpretations fail to give effect to all of the insurance contract's terms and, again, render the phrase "direct physical loss of" duplicative of the phrase "direct physical . . . damage to."

Defendant also contends that the insurance contract's Amount of Insurance provision supports the conclusion that the contract necessitates the existence of tangible damage in order for Plaintiff to be entitled to Income Protection coverage. According to Defendant, because the Amount of Insurance provision contemplates the existence of damaged or destroyed property, and the need to rebuild, repair, or replace property, Plaintiff's argument regarding loss of use in the absence of any tangible damage or destruction to property is untenable.

Although this Court agrees with Defendant on the general principle that the insurance contract's provisions must be read as a whole so that all of its parts fit together, this Court is not persuaded that the Amount of Insurance provision is inherently inconsistent with an interpretation of "direct physical loss of . . . property" that encompasses Plaintiff's loss of use of its property in the absence of tangible damage. The insurance contract provides that:

> We will pay the actual income protection loss for only such length of time as would be required to resume normal business operations. We will limit the time period to the shorter of the following periods:
>
> 1. The time period required to rebuild, repair, or replace such part of the Building or Building Personal Property that has been damaged or destroyed as a direct result of an insured peril; or
>
> 2. Twelve (12) consecutive months from the date of loss.

Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 64, Exhibit A. Upon review of the above language, this Court determined that the Amount of Insurance provision does not limit coverage only to instances where Plaintiff needed to rebuild, repair, or replace damaged or destroyed property. Indeed, the relevant part of the Amount of Insurance provision starts by generally stating that the insurer will pay for income protection loss for only such length of time as would be required to resume normal business operations. Thereafter, the Amount of Insurance provision further explains that this time period for coverage will be limited to either (a) the length of time needed to rebuild, repair, or replace damaged or destroyed property; *or* (b) twelve (12) months from the initial date of loss.

Although Defendant is correct to point out that the Amount of Insurance provision expressly contemplates some circumstances in which Plaintiff's property is actually damaged or destroyed, this provision does not necessitate the existence of damaged or destroyed property,

and does not require repairs, rebuilding, or replacement of damaged or destroyed property in order for Plaintiff to be entitled to coverage. The Amount of Insurance provision merely imposes a time limit on available coverage, which ends whenever any required rebuilding, repairs, or replacements are completed to any damaged or destroyed property that might exist, *or* twelve (12) months after the initial date of the loss. To put this another way, the Amount of Insurance provision provides that coverage ends when Plaintiff's business is once again operating at normal capacity after damaged or destroyed property is fixed or replaced, *or* within twelve (12) months from the initial date of loss in circumstances where it is not necessary to fix or replace damaged or destroyed property, or it is not feasible to do so within a twelve (12) month time frame. The Amount of Insurance provision does not somehow redefine or place further substantive limits on types of available coverage.

As this Court determined that it is, at the very least, reasonable to interpret the phrase "direct physical loss of . . . property" to encompass the loss of use of Plaintiff's property due to the spread of COVID-19 absent any actual damage to property, and because Plaintiff established that there are no genuine issues of material fact regarding its right to coverage under the Income Protection provision of the insurance contract, this Court grants Plaintiff's Motion for Partial Summary Judgment in relation to Plaintiff's claim for declaratory judgment and the income protection provision of the insurance contract.

Second, this Court will address whether Plaintiff is entitled to coverage under the Civil Authority provision of the insurance contract for losses Plaintiff sustained in relation to the Governor's orders, which were issued to help mitigate the spread of the COVID-19 virus. With regard to Civil Authority coverage, the insurance contract provides that:

> When a peril insured against causes damage to property other than property at the premises described in the : Declarations", we will pay for the actual loss of

> "income" and/or "rental income" you sustain and necessary "extra expense" caused by action of civil authority that prohibits access to the premises described in the "Declarations" or access to your food truck or trailer anywhere in the coverage territory provided that both of the following apply:
>
> a. Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the premises described in the "Declarations" or your food truck or trailer are within that area but are not more than one mile from the damaged property; and
>
> b. The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the peril insured against that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Id. at 64.

With regard to Civil Authority coverage, Plaintiff must, as a threshold matter, demonstrate that COVID-19 caused damage to property other than Plaintiff's property. Unlike the Income Protection provision, under the Civil Authority provision there is no coverage for the loss of use of property other than Plaintiff's property. Accordingly, this Court's above analysis with regard Income Protection coverage and loss of use is inapplicable, as it does not address whether COVID-19 separately caused damage to property.

Again, as noted above, "damage" is defined as "loss or harm resulting from injury to person, property, or reputation . . . ."[17] Based upon this definition, this Court determined that, at the very least, in order for COVID-19 to damage property, COVID-19 must come into contact with property and cause harm. Presently, it is contested whether COVID-19 can live on the surfaces of property for some period of time. Additionally, while this might be one way by which individuals contract COVID-19, it is not the primary means by which COVID-19 spreads. *See Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 892 (Pa. 2020) (holding that COVID-19

[17] Damage, Merriam Webster, https://www.merriam-webster.com/dictionary/damage.

does not spread because the virus is present on any particular surface or at any particular location, rather COVID-19 spreads because of person-to-person contact). Indeed, person-to-person transmission of COVID-19, as opposed to property damage, was the primary reason for the Governor's orders, social distancing measures, and resultant changes in the ways business utilized property. With or without COVID-19 contacting the surface of any given property in the Commonwealth, businesses throughout the Commonwealth shutdown, at least partially, and suffered the loss of use of property due to the risk of person-to-person COVID-19 transmission. Thus, in the above discussion regarding the Income Protection provision, this Court determined that there are no genuine issues of material fact as to whether Plaintiff suffered the loss use of property due to COVID-19. The same is, however, not as clear with regard to the question of whether COVID-19 caused damaged to property throughout the Commonwealth.

Even if this Court were to accept that COVID-19 could and did cause damage to property under the theory presented by Plaintiff, whether Plaintiff is entitled to coverage under the Civil Authority provision depends upon whether Plaintiff can demonstrate that COVID-19 was actually present on property other than Plaintiff's property. Additionally, Plaintiff must show that any such damaged property was within one mile of Plaintiff's property, and that the actions of civil authority (in this case the Governor's orders) were "taken in response to dangerous physical conditions resulting from the *damage* or continuation of the peril insured against that caused the *damage*, or the action is taken to enable a civil authority to have unimpeded access to the *damaged* property." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 64, Exhibit A (emphasis added). At this time, genuine issues of material fact remain in dispute as to the following: [a] whether COVID-19 caused damage to property; [b] whether COVID-19

was actually present at any particular property; and [c] the extent to which the Governor's orders were issued in response to property damaged by COVID-19. Accordingly, this Court denies Plaintiff's Motion for Partial Summary Judgment in relation to its claim for declaratory judgment and the Civil Authority provision of the insurance contract without prejudice.[18]

b. Exclusions

Having determined that Plaintiff provided a reasonable interpretation demonstrating that Plaintiff is entitled to coverage under the Income Protection provision of the insurance contract, this Court turns to the question of whether Defendant demonstrated "the applicability of any exclusions or limitations on coverage." *Koppers Co.*, 98 F.3d at 1446 (applying Pennsylvania law). As discussed previously, in order to prevail, Defendant must show that the language of the insurance contract regarding an exclusion is "clear and unambiguous: otherwise, the provision will be construed in favor of the insured." *Fayette County Housing Authority*, 771 A.2d at 13.

Defendant argues that the insurance contract's exclusion regarding the enforcement of or compliance with laws and ordinances prevents coverage for income protection. The insurance contract states that the insurer will not pay for loss or damage caused "[b]y the enforcement of or compliance with any law or ordinance regulating the construction, use, or repair, of any property, or requiring the tearing down of any property, including the cost of removing its debris . . . ." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 66, Exhibit A.

According to Defendant, coverage is precluded by the above exclusion because Plaintiff's alleged losses are due solely to the Governor's orders. This, however, is not the case. In its complaint, Plaintiff states that its claim for coverage is based upon losses and expenses Plaintiff

[18] As this Court is not convinced that, as a matter of law, Plaintiff cannot prevail on its damage theory, this Court also denies Defendant's Cross Motion for Judgment on the Pleadings.

suffered in relation to both "*the COVID-19 pandemic* . . . and the orders of civil authorities enacted in response to this natural disaster." Plaintiff's Complaint at 13 (emphasis added). As this Court explained earlier in this memorandum, COVID-19 and the related social distancing measures (with and without government orders) directly forced businesses everywhere to physically limit the use of property and the number of people that could inhabit physical buildings at any given time. The Governor's orders only came into consideration in the context of Plaintiff's claim for coverage under the Civil Authority provision of the contract.[19] Accordingly, Defendant failed to demonstrate that the exclusion regarding the enforcement of or compliance with laws and ordinances clearly and unambiguously prevents coverage.

VI. Conclusion

As this Court determined that [a] Plaintiff's interpretation of the Income Protection provision of the insurance contract is, at the very least, reasonable, [b] that there are no genuine issues of material fact regarding Plaintiff's loss of use, and [c] that none of the insurance contract's exclusions clearly and unambiguously prevent coverage, Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's claim for declaratory judgment with regard to Income Protection coverage is GRANTED. In contrast, because this Court determined that there are genuine issues of material fact remaining as to the Civil Authority provision and whether COVID-19 caused damage to property, Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's claim for declaratory judgment with regard to Civil Authority coverage is DENIED

[19] Certainly, the exclusion regarding the enforcement of or compliance with laws and ordinances could not have been intended to exclude coverage under the Civil Authority provision of the contract, as this would make any extended coverage for the actions of Civil Authority illusory. *See Heller v. Pennsylvania League of Cities and Municipalities*, 32 A.3d 1213, 1228 (Pa. 2011) (holding that where an exclusionary provision of an insurance contract operates to foreclose expected claims, such a provision is void as it renders coverage illusory).

without prejudice. Finally, Defendant's Cross Motion for Judgement on the Pleadings is DENIED.

By the Court:

Christine Ward, J.

Christine Ward, J.

Dated: 5/25/2021

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MACMILES, LLC D/B/A GRANT STREET TAVERN 310 Grant Street, Ste. 106 Pittsburgh, PA 15219-2213,	:	
Plaintiff,	:	No.: GD-20-7753
vs.	:	
ERIE INSURANCE EXCHANGE 100 Erie Insurance Place Erie, PA 16530,	:	
Defendant.	:	

ORDER OF COURT

And now, this 25 day of May, 2021 it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's claim for declaratory judgment with regard Income Protection coverage is GRANTED;
2. Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's claim for declaratory judgment with regard to Civil Authority coverage is DENIED without prejudice; and
3. Defendant's Cross Motion for Judgement on the Pleadings is DENIED.

By the Court:

Christine Ward, J.

Christine Ward, J.

Dated: 5/25/2021

Order Denying Motion to Dismiss entered Jan. 7, 2021 in *Queens Tower Restaurant, Inc. v. Cincinnati Financial Corp.*, No. A 200174:

D130757328

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ENTER
JAN 07 2021
THOMAS O. BERIDON, JUDGE

QUEENS TOWER RESTAURANT INC DBA PRIMAVISTA,

Plaintiff,

-vs.-

CINCINNATI FINANCIAL CORPORATION, et al,

Defendants.

Case No.: A 2001747

Judge Thomas O. Beridon

Entry Denying Motion to Dismiss

ENTERED
JAN 08 2021

This matter comes to the Court upon Defendants Cincinnati Financial Corporation, The Cincinnati Insurance Company, The Cincinnati Casualty Company, and Cincinnati Indemnity Company's ("Cincinnati Insurance") Motion to Dismiss Plaintiff Queens Tower Restaurant Inc Dba Primavista's ("Primavista") complaint. The motion is denied.

Cincinnati Insurance issued Primavista an all-risk insurance policy, which covers all losses except those specifically excluded. As such, the policy covered losses due to business interruption, extra expense, and actions of a civil authority. The policy did not contain a virus exclusion.

The State of Ohio declared a state of emergency in March 2020 and issued an order closing certain businesses, including Primavista, thus prohibiting patrons' access to the building.

Primavista made a claim for coverage; Cincinnati Insurance refused to cover Primavista's losses caused by Ohio's orders.

Primavista sued on behalf of itself and similarly-situated entities. Cincinnati Insurance moves to dismiss. In short, Cincinnati Insurance argues that there wa

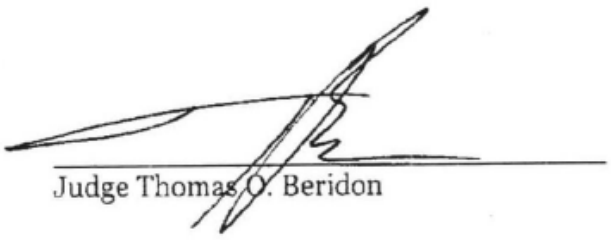
VERIFY RECORD

property damage—which is a threshold issue under the policy—and therefore, there is no coverage.

This Court may not grant a motion to dismiss unless it "appear[s] beyond doubt from the complaint that the plaintiff can prove no set of facts entitling [it] to recovery." *O'Brien v. University Community Tenants Union*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. This Court must take all material allegations in Primavista's complaint as true, drawing all reasonable inferences in its favor. *Byrd v. Faber*, 57 Ohio St.3d 56, 60, 565 N.E.2d 584 (1991).

This Court finds that whether Covid-19 and/or Ohio's orders caused property damage is a question of fact. As such, a reasonable jury could find that Primavista was entitled to coverage. Accordingly, Cincinnati Insurance's Motion to Dismiss is Denied.

So Ordered.



Judge Thomas O. Beridon

PRAECIPE TO THE CLERK: Please provide copies to all counsel and unrepresented parties.