U.S. Court of Appeals Case No. 21-55123
Lower District Court Case No. 2:20-cv-07834-MCS-AFM

IN THE UNITED STATES COURT OF APPEALS
THE NINTH CIRCUIT

SELANE PRODUCTS, INC.,
on behalf of itself and all others similarly situated,

Plaintiff and Appellant,

v.

CONTINENTAL CASUALTY COMPANY,

Defendant and Respondent.

Appeal from the United States District Court
For the Central District of California, Los Angeles
Hon. Mark C. Scarsi

APPELLANT'S OPENING BRIEF

Kirk Pasich, SBN 94242
kpasich@pasichllp.com
PASICH LLP
10880 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90024

Shaun H. Crosner, SBN 259065
scrosner@pasichllp.com
Michael S. Gehrt, SBN 246450
mgehrt@pasichllp.com
Jacquelyn M. Mohr, SBN 278337
jmohr@pasichllp.com
PASICH LLP
1230 Rosecrans Avenue, Suite 690
Manhattan Beach, CA 90266
Telephone: (424) 313-7860
Facsimile: (424) 313-7890

Raymond C. Silverman
rsilverman@yourlawyer.com
Jay L.T. Breakstone
jbreakstone@yourlawyer.com
PARKER WAICHMAN LLP
6 Harbor Park Drive
Port Washington, NY 11050
Telephone: (516) 723-4611
Facsimile: (516) 723-4711

Attorneys for Plaintiff and Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Appellant Selane Products, Inc. ("Selane") is a California Corporation. No publicly held corporation owns 10% or more of Selane's stock.

Dated: February 25, 2021

PASICH LLP

By: */s/ Shaun H. Crosner*
Shaun H. Crosner

Attorneys for Plaintiff and Appellant Selane Products, Inc.

JURISDICTIONAL STATEMENT

The district court had original jurisdiction over this action pursuant to 28 U.S.C. section 1332(d) because (a) at least one member of the proposed Class is a citizen of a state different from that of Respondent Continental Casualty Company ("Continental"), (b) the amount in controversy exceeds $5,000,000, exclusive of interest and costs, (c) there are at least 100 class members, and (d) none of the exceptions under 28 U.S.C. section 1332(d) apply.

Appellate jurisdiction is based on Federal Rule of Appellate Procedure 4(a) and Title 28 of the United States Code section 1291. This appeal is from a final judgment following an order granting Continental's motion to dismiss Selane's First Amended Complaint with prejudice. Excerpts of Record (hereafter, "ER") 1-ER-013. The district court's order granting Continental's motion to dismiss was entered on February 8, 2021. The district court's judgment dismissing the case was entered on February 10, 2021. Selane timely filed its notice of appeal on February 12, 2021, pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A). 2-ER-014.

STATEMENT OF ISSUES

1. Did the district court err in holding that, notwithstanding the well-pled allegations in Selane's First Amended Complaint, the presence of the SARS-CoV-2 virus on, in, or around property does not cause "direct

physical loss of or damage to property" as that phrase is used in the policy Continental issued to Selane?

2. Did the district court err in holding that Selane had not adequately alleged "direct physical loss of or damage to property" when Selane's First Amended Complaint alleged that SARS-CoV-2, COVID-19 and the resulting civil authority orders and actions caused substantial impairment of Selane's property and precluded Selane from using its property for its intended purpose?
3. Did the district court err in granting Continental's motion to dismiss without considering whether Selane was entitled to recovery pursuant to California's mitigation doctrine?
4. Did the district court err in granting Continental's motion to dismiss without affording Selane the opportunity to pursue discovery and develop extrinsic evidence bearing on the parties' understanding and interpretation of the pertinent policy terms?
5. Did the district court err in granting Continental's motion to dismiss as to Selane's claims for breach of the implied covenant of good faith and fair dealing, declaratory relief, and violations of California's Unfair Competition laws, as well as Selane's demand for punitive damages?

STATEMENT OF AUTHORITY

Pursuant to Circuit Rule 28-2.7, all applicable statutes, etc., are contained in the brief or Addendum filed by Selane.

STATEMENT OF THE CASE

I. OVERVIEW

This appeal concerns insurance coverage for the substantial financial losses suffered by Selane Products, Inc. ("Selane") and other putative class members as a result of SARS-CoV-2, COVID-19, and the resulting civil authority orders. Respondent Continental Casualty Company ("Continental") issued to Selane and the other putative class members "CNA Connect" business owner's insurance policies. These "all risk" property insurance policies cover all risks of physical loss and damage except those conspicuously, plainly, clearly, and expressly excluded. In addition to insuring against physical loss of or damage to covered property, the CNA Connect policies provide broad "all risk" coverage for economic and financial losses.

After the outbreak of the COVID-19 pandemic, Selane and the putative class members—all of which are small businesses operating in California—turned to Continental. They reasonably expected Continental to pay for their financial losses under their CNA Connect insurance policies. After all, Continental had for years

marketed its policies specifically to small businesses like Selane, touting the broad coverage they provide and promising California's small businesses "superior protection in an unpredictable business environment." 4-ER-458 (First Am. Compl. ("FAC") ¶ 2). However, instead of honoring its promises to Selane and the putative class members, Continental wrongfully withheld the policy benefits that these businesses are entitled to receive, forcing Selane to file a putative class action on behalf of itself and other similarly situated small businesses insured by Continental.

Although Selane's First Amended Complaint asserted claims falling squarely within its policy's coverage, the district court erroneously granted Continental's motion to dismiss, ignoring relevant binding authority and the reasonable expectations of Selane and the putative class members. Specifically, the district court held that Selane did not include allegations of "direct physical loss of or damage to property" sufficient to trigger coverage under Selane's policy. The district court reached this conclusion even though the First Amended Complaint expressly alleged such loss or damage and included numerous factual allegations making clear that the presence of the SARS-CoV-2 virus on, in, and around property causes "direct physical loss of or damage to property." 4-ER-459,472-474 (FAC ¶¶ 4, 51-59). In fact, Selane expressly alleged that there is such "direct physical loss or damage" because SARS-CoV-2 is a physical

substance that spreads through aerosolized droplets, physically attaches to and rests on surfaces of property, and physically lingers in the air and airspace of buildings, thereby causing distinct, demonstrable, physical alterations to property. The district court also disregarded Selane's well-pled allegations that, by early March 2020, the SARS-CoV-2 virus was ubiquitous throughout the California, creating a highly dangerous and imminent threat to people and (by spread, property). The ubiquitous presence of SARS-CoV-2 and the threat it presented prompted state and local civil authorities to issue a series of closure and "stay-at-home" orders prohibiting access to the business properties of Selane and the other putative class members, substantially impairing their insured properties and rendering them incapable of fulfilling their intended function.

In reaching its decision, the district court disregarded key California appellate authority, including a California Supreme Court decision, holding that even if property is not physically or structurally altered, it is still damaged by the presence of a hazardous substance. The district court also failed to consider a California Court of Appeal decision expressly holding that if property's use or function is impaired, there is "direct loss or damage to property" even if there is no physical alteration of property.

The district court further erred in failing to adequately consider that Selane's reasonable interpretation of the phrase "direct physical loss of or damage to

property" is supported by other terms in the Selane's policy, including the policy's "Microbe" exclusion (an exclusion that would be wholly unnecessary and surplusage if substances not visible to the human eye were incapable, as Continental contends, of causing "direct loss or damage to property). Under California's governing rules of policy interpretation, the district court was required to give due consideration to these other terms and read Selane's policy in context in interpreting the key policy language. It did not do so.

Moreover, the district court erroneously failed to consider that Continental has long known about the risks that pandemics present—even disclosing the potential catastrophic risk of pandemics to its investors in its filings with the Securities and Exchange Commission—but deliberately chose not to incorporate standard virus or pandemic exclusions that have been widely used and available to insurers since 2006. Indeed, the First Amended Complaint includes allegations that Continental routinely employs standard-form virus exclusions on other insurance policies it issues, making it all the more telling that Continental issued policies to Selane and the class members without any such exclusions.

In short, Selane proffered below a reasonable interpretation of the key phrase "direct physical loss of or damage to property" that was informed by the policy's plain terms (or at least a reasonable interpretation in light of the policy's ambiguity), the governing authority and policy interpretation principles, and the

facts concerning the nature of SARS-CoV-2 and its impact on property. Under California's rules of policy interpretation, the district court was obligated to adopt Selane's reasonable interpretation of the phrase "direct physical loss of or damage to property." *See MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 655 (2003).

Because the district court's ruling was contrary to the law and facts, Selane respectfully asks this Court to reverse the district court's order and judgment and remand this case for further proceedings.

II. RULING PRESENTED FOR REVIEW

Selane seeks review of the district court's February 8, 2021, Order Granting Continental's Motion to Dismiss (1-ER-3-13) and its entry of judgment in favor of Continental (1-ER-1-2).

STATEMENT OF FACTS

I. THE "CNA CONNECT" POLICY ISSUED BY CONTINENTAL

Continental issued Selane a "CNA Connect" business owner's policy, Policy No. B 4024035722, for the period of August 6, 2019, to August 6, 2020 (the "Policy"). 4-ER-501-675. In advance of issuing the Policy to Selane, Continental engaged in, or had reasonable opportunities to engage in, extensive underwriting investigation, and became familiar and knowledgeable regarding the nature and scope of Selane's business and the nature of the risks that it was insuring against. 4-ER-462 (FAC ¶ 16). The Policy is an "all risk" property insurance policy—that

is, a policy that covers all risks of physical loss and damage except those conspicuously, plainly, clearly, and expressly excluded. 4-ER-521. Unlike "enumerated perils" property insurance policies, which cover only certain causes of loss, "all risk" property insurance policies provide broad coverage for unprecedented and unanticipated risks of loss. *See, e.g.*, *Travelers Cas. & Sur. Co. v. Superior Court*, 63 Cal. App. 4th 1440, 1454 (1998). The Policy insures, among other things, Selane's interests in the real and personal property at its business premises in Chatsworth, California. 4-ER-509.

The Policy is comprised of various forms and endorsements that define the scope of coverage. Like most commercial property insurance policies, the Policy insures not only against physical loss of or damage to covered property, but also for resulting economic and financial losses. This coverage is referred to in the Policy as "Business Income and Extra Expense" coverage. 4-ER-543 ("Business Income and Extra Expense" Endorsement).

The Policy's Business Income and Extra Expense coverage is designed, understood, stated, and intended to provide coverage to insureds, like Selane, for economic losses, including losses from the interruption and/or reduction of its business, suffered as a result of "direct physical loss of or damage to property." 4-ER-543-46. Under this coverage, Continental agreed to pay for Selane's actual loss of Business Income sustained due to the necessary "suspension" of its

business operations. 4-ER-543. The term "suspension" is defined in the Policy to mean a "partial or complete cessation" of business activities at the insured's covered location. 4-ER-540.

The Policy also covers "Extra Expense," which is the "reasonable and necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss of or damage to property . . . ." 4-ER-544. The Policy also obligates Continental to pay for the "Extra Expense" incurred to "(1) [a]void or minimize the 'suspension' of business and to continue 'operations' . . . or (2) [m]inimize the 'suspension' of business if [the insured] cannot continue 'operations.'" 4-ER-544.

The Policy extends coverage for Business Income losses suffered and Extra Expense incurred as a result of an action of a civil authority. 4-ER-569 ("Civil Authority" Endorsement). Specifically, the Policy obligates Continental to pay for "the actual loss of Business Income [Selane] sustain[s] and reasonable and necessary Extra Expense [Selane] incur[s] caused by action of civil authority that prohibits access to the described premises." 4-ER-569. The Policy further provides that this "civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises, caused by or resulting from a Covered Cause of Loss," which is defined to include all causes except those subject to an exclusion or limitation in the Policy. 4-ER-569.

The civil authority coverage provided in the Policy and other CNA Connect policies is unique in its breadth. While the vast majority of policies affording this coverage require that civil authority actions be taken in response to loss or damage within a specified distance of the insured's location (often as little as a mile), the Policy's civil authority coverage has no such mileage limitations. 4-ER-569. Put differently, the Policy's civil authority coverage applies so long as the civil authority's action is taken in response to loss or damage ***anywhere***—regardless of geographical proximity to Selane's insured location.

Moreover, unlike many policies that provide Business Income and civil authority coverage, the Policy and other CNA Connect policies do not include, and are not subject to, any exclusion for losses caused by or resulting from the spread of viruses, communicable diseases, or pandemics. 4-ER-464 (FAC ¶ 23). Because losses caused by or resulting from viruses, communicable diseases, and pandemics are not expressly excluded under the Policy, they constitute Covered Causes of Loss under the Policy.

Additionally, well before Continental sold its CNA Connect policy to Selane, Continental knew of the likelihood of a pandemic and the potential losses that could be associated with a pandemic. In fact, Continental's corporate parent, CNA Financial Corp., explicitly warned its investors about the potential of "material losses" to CNA and its subsidiaries from "pandemics" and other "catastrophe

events" in its 2018 Form 10-K annual report filed with the U.S. Securities and Exchange Commission, acknowledging that such losses are "an inevitable part of [CNA's] business." 4-ER-465 (FAC ¶ 26). Other resources available to Continental further warned Continental of the massive losses that its insureds, including Selane, could face from a virus-related pandemic. 4-ER-465-66 (FAC ¶¶ 27-29).

Indeed, in a public earning call with investors on May 4, 2020, Dino Robusto—the Chairman and Chief Executive Officer of CNA Financial Corp., Continental's corporate parent—acknowledged the prevalence of virus exclusions, claiming (falsely) that ***all*** policies issued by CNA and its affiliates have exclusions barring coverage for viruses. 4-ER-479-80 (FAC ¶¶ 71-72). Mr. Robusto also stated that because of these exclusions, CNA and its affiliates had no exposure to claims for business interruption losses. *Id.* ("So with respect to business interruption, our ***property policy exclusionary language*** does not provide coverage for COVID-19." (emphasis added)).

In so stating, Mr. Robusto at least implicitly admitted that the policies sold by Continental cover losses caused by SARS-CoV-2 and COVID-19, ***unless they contain a virus exclusion***. And, notwithstanding Mr. Robusto's representations, not all Continental policies contain such exclusions. Quite the contrary, Continental sold hundreds or thousands of "CNA Connect" policies to Selane and other California small businesses without such exclusions, leading them to

reasonably believe that they had broad coverage for losses such as those resulting from a viral pandemic.

II. THE COVID-19 PANDEMIC AND ENSUING CIVIL AUTHORITY ORDERS

After it was first discovered in Wuhan, China, in late 2019, the virus known as SARS-CoV-2, and COVID-19, the disease it causes, have become a part of the global population's daily lexicon. 4-ER-466-68 (FAC ¶¶ 30-33). As has been well-documented, SARS-CoV-2 spreads by aerosolized droplets exhaled by normal breathing, which can travel significant distances and stay suspended in air for hours until gravity ultimately forces them to the nearest surface. 4-ER-466-68 (FAC ¶¶ 30-33). Studies suggest that the SARS-CoV-2 virus can remain on some surfaces for at least 28 days. 4-ER-467-68 (FAC ¶¶ 32-34).

In March 2020, in response to the pandemic and the worldwide spread of SARS-CoV-2, civil authorities throughout the United States began issuing "stay at home" and "shelter in place" orders that required the suspension of non-essential business operations (collectively, "Closure Orders"). 4-ER-469 (FAC ¶ 36). To help create a framework for the implementation of such orders in California, Governor Gavin Newsom ordered that all California residents "heed any orders and guidance of state and local public health officials, including but not limited to the

imposition of social distancing measures, to control the spread of COVID-19." 4-ER-469 (FAC ¶ 37).

Following Governor Newsom's order, on March 19, 2020, the State of California issued an Order of the State Public Health Officer, which required all individuals living in the state to stay at home or at their place of residence "except as needed to maintain operations of the federal critical infrastructure sectors." That same day, Governor Newsom issued an Executive Order expressly requiring California residents to follow the March 19, 2002, Order of the State Public Health Officer. 4-ER-470 (FAC ¶ 41).

Also on March 19, 2020, the County of Los Angeles issued a Closure Order mandating the closure of all businesses operating in the County, subject to certain exceptions for "essential" businesses and business activities. 4-ER-469 (FAC ¶ 40). The County stated that this order was issued in direct response to the "continued rapid spread of COVID-19 and the need to protect the most vulnerable members of our community," adding that the order was "based upon scientific evidence and best practices, as currently known and available, to protect members of the public from avoidable risk of serious illness and death resulting from the spread of COVID-19 . . . ." 4-ER-469 (FAC ¶ 40). The County's March 19, 2020, Order further recognized that, as of that date, there were "at least 231 cases of COVID-19 and 2 deaths reported in Los Angeles County," noting that "[t]here remains a strong

likelihood of significant and increasing number of suspected cases of community transmission." 4-ER-469 (FAC ¶ 40).

On the same day, Los Angeles Mayor Eric Garcetti issued a Public Order Under City of Los Angeles Emergency Authority with the subject "Safer at Home." 4-ER-470 (FAC ¶ 42). Mayor Garcetti's Order stated that "all persons living within the City of Los Angeles are hereby ordered to remain in their homes" and "all businesses within the City of Los Angeles are ordered to cease operations that require in-person attendance by workers at a workplace . . . ." 4-ER-470 (FAC ¶ 42).

On April 1, 2020, April 10, 2020, April 27, 2020, May 4, 2020, and May 8, 2020, Mayor Garcetti issued additional updates to his "Safer at Home" Order. 4-ER-471 (FAC ¶¶ 44-47). In relevant part, these Orders all required Los Angeles citizens to stay at home and mandated the continued closure of all non-essential in-person businesses. 4-ER-471 (FAC ¶¶ 45-47). Moreover, these Orders explicitly recognized that SARS-CoV-2 can spread easily from person to person and "it is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time." 4-ER-471 (FAC ¶¶ 44).

The Closure Orders were issued due to the presence of SARS-CoV-2 throughout the State of California and the County of Los Angeles and the desire to avoid the further spread of the virus. Specifically, these civil authority actions were

taken due to the highly contagious nature of SARS-CoV-2 and the ways in which it physically alters tangible property—including airspace, furniture, and other personal property in and around buildings located throughout the State of California and the County of Los Angeles. 4-ER-472 (FAC ¶ 51). Indeed, in March 2020, based on the spread patterns of SARS-CoV-2 and the insidious nature of the disease, California residents were instructed to assume SARS-CoV-2 was everywhere and cautioned only to leave their homes for essential or life-sustaining purposes. 4-ER-474 (FAC ¶ 58). Accordingly, since March 2020, SARS-CoV-2 has been ubiquitous throughout the State of California, causing physical loss of and damage to airspace and other property. 4-ER-474 (FAC ¶ 59).

Due to the Closure Orders and the ubiquitous presence of SARS-CoV-2, Selane was forced to suspend its business operations. 4-ER-471 (FAC ¶¶ 49-50). The Closure Orders also prohibited access to Selane's business premises in Chatsworth. Specifically, the Closure Orders prohibited employees of Selane from accessing Selane's place of business, in addition to prohibiting customers, clients, and other third parties from accessing Selane's business location. 4-ER-471 (FAC ¶¶ 49-50).

III. CONTINENTAL'S WRONGFUL DENIAL OF COVERAGE

Selane sustained covered Business Income losses as defined in the Policy. 4-ER-474 (FAC ¶ 60). These Business Income losses were sustained due to the

"necessary 'suspension'" of business operations and caused by the Closure Orders, which constitute "action(s) of civil authority." 4-ER-474 (FAC ¶ 60). Because of the suspension of its business operations, Selane also incurred "reasonable and necessary Extra Expense," as defined by the Policy. 4-ER-475 (FAC ¶ 61).

Moreover, given how SARS-CoV-2 lingers in the air and on surfaces and its manner of transmission, Selane's business property was not capable of performing its essential function. 4-ER-475 (FAC ¶ 63). The Closure Orders, which were issued due to the presence of SARS-CoV-2 and the desire to avoid its spread, substantially impaired the functionality of Selane's insured location and property by, among other things, preventing and/or impairing the ability of Selane from being able to utilize its property for its intended purpose. 4-ER-475 (FAC ¶ 63). Therefore, the threat of SARS-CoV-2 and the associated Closure Orders have resulted in "direct physical loss of or damage to property" as that phrase is used in the Policy. 4-ER-475 (FAC ¶ 63).

Although Selane sustained Business Income losses and incurred Extra Expense falling squarely within the coverage afforded by the Policy, Continental refused to acknowledge coverage for its losses. In denying coverage, Continental incorrectly asserted that Selane's losses did not result from civil authority action taken in response to "direct physical loss of or damage to property" caused by a covered peril. 4-ER-476 (FAC ¶¶ 64-65). Continental took this position despite the

fact that the Closure Orders were issued in response to the presence of SARS-CoV-2 in California and Los Angeles, and even though Continental knows the presence of SARS-CoV-2 on, in, or around property causes "direct physical loss of or damage to property" under the governing rules of insurance policy interpretation and California law. 4-ER-476-77 (FAC ¶¶ 65-66).

IV. PROCEDURAL HISTORY

On August 27, 2020, Selane filed this action on behalf of itself and a putative class of California small businesses, asserting causes of action for breach of contract, tortious breach of the implied covenant of good faith and fair dealing, declaratory relief, and violations of California Business & Professions Code Section 17200. On October 21, 2020, Continental filed a motion to dismiss the complaint. On November 24, 2020, the district court granted Continental's motion to dismiss, but provided Selane leave to amend.

On December 8, 2020, Selane filed its First Amended Complaint. 4-ER-457. On January 12, 2021, Continental filed its motion to dismiss. 3-ER-271-456. On January 26, 2021, Selane filed its opposition. 2-ER-079-270. On February 1, 2021, Selane filed a notice of supplemental authority, attaching a January 28, 2021, order issued by the court in *Goodwill Industries v. Philadelphia Indemnity Insurance Co.*, Case No. 30-2020-01169032-CU-IC-CXC, wherein a state court overruled an insurer's demurrer in a factual pattern remarkably similar to the one

here. 2-ER-072. On February 8, 2021, the district court granted Continental's motion with prejudice. 1-ER-003-13. On February 10, 2021, final judgment was entered dismissing the action. 1-ER-001-02.

SUMMARY OF ARGUMENT

The district court's order and subsequent judgment in favor of Continental are premised on the mistaken notion that the presence of SARS-CoV-2 and the substantial impairment to businesses caused by its imminent threat and the resulting Closure Orders do not cause "physical loss of or damage to property" within the meaning of the Policy.

In reaching this incorrect conclusion, the district court made five errors—any one of which requires reversal of its order and judgment.

First, in dismissing Selane's lawsuit, the district court erroneously held that the presence of SARS-CoV-2 cannot cause "direct physical loss of or damage to property" as that phrased is used in the Policy. The district court's holding ignored Selane's many allegations that the presence of SARS-CoV-2 causes a distinct, demonstrable, and physical alteration to property, including to the surfaces to which it attaches and the airspace it occupies. Rather than accepting these allegations as true (as required under the standard governing motions to dismiss), the district court made impermissible factual determinations, without the assistance of experts, as to whether viruses can cause structural alterations to property. The

district court's holding also disregarded controlling California precedent and decades of cases holding that the presence of harmful substances causes physical loss or damage to property. In departing from this authority, and in failing to properly consider other provisions in the Policy that support Selane's reasonable interpretation and Continental's conscious choice not to include a virus exclusion despite its knowledge of pandemic risks, the district court erred.

Second, the district court disregarded Selane's well-pled allegations that the imminent and pervasive threat posed by SARS-CoV-2 and the resulting Closure Orders issued by state and local civil authorities substantially impaired Selane's property and rendered it unsuitable for its intended function. California law is clear that when a dangerous condition renders property unusable, there is a covered loss. *See, e.g.*, *Hughes v. Potomac Ins. Co.*, 199 Cal. App. 2d 239 (1962).

Third, the district court erred in dismissing the First Amended Complaint because the necessary suspension of Selane's business avoided covered property damage, as well as potential claims by others that Selane contributed to the spread of SARS-CoV-2. Accordingly, Selane's losses are necessary mitigation expenses, the recoverability of which is recognized by both the common law and the Policy's provisions.

Fourth, the district court erred in dismissing the First Amended Complaint without providing Selane the opportunity to develop extrinsic evidence bearing on

the parties' understanding and interpretation of the Policy. Under California law, courts are required to review at least preliminarily extrinsic evidence whenever that evidence could bear on the contracting parties' intent, including whether Selane's interpretation of the relevant policy provisions is reasonable. Here, given (1) Continental's knowledge of pandemic risks, (2) Continental's decision not to include a standard-form virus exclusion it commonly uses, and (3) Mr. Robusto's statements to the effect that SARS-CoV-2 damages are presumptively covered under property policies without such an exclusion, the district court erred by refusing to allow Selane to develop extrinsic evidence on these critical issues.

Fifth, the district court erred in dismissing Selane's bad faith, declaratory relief, and Unfair Competition Law ("UCL") claims by erroneously concluding that Selane had not alleged a covered loss under the Policy. Because Selane's breach of contract claim is adequately alleged, the district court should not have dismissed Selane's bad faith, declaratory relief, and UCL claims.

In short, Selane's FAC sufficiently pled claims for coverage under the Policy's Civil Authority Endorsement and Business Income and Extra Expense Endorsements. Therefore, Selane respectfully requests that this Court reverse the district court's judgment and remand this case for further proceedings.

ARGUMENT

I. STANDARD OF REVIEW

On appeal, the district court's order granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is reviewed *de novo*. *Carlin v. DairyAmerica, Inc.*, 705 F.3d 856, 866 (9th Cir. 2013); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030 (9th Cir. 2008); *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 526 (9th Cir. 2008). In undertaking this review, this Court must accept Selane's well-pled allegations as true, construe all factual allegations in the light most favorable to Selane, and reverse the district court's judgment unless the Court determines that Selane's complaint fails to "'state a claim to relief that is plausible on its face.'" *Carlin*, 705 F.3d at 866-67 (citations omitted). "Dismissal for failure to state a claim is proper only 'if it appears beyond doubt' that the non-moving party 'can prove no set of facts which would entitle him to relief.'" *Leadsinger*, 512 F.3d at 526 (citations omitted).

This Court also reviews *de novo* the district court's interpretation of state law. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991); *Wash. Pub. Power Supply Sys. v. Pittsburgh-Des Moines Corp.*, 876 F.2d 690, 692 (9th Cir. 1989). Thus, this Court should independently analyze the facts and the law, as well as the district court's application of California law to the facts. *Premier Commc'ns Network, Inc. v. Fuentes*, 880 F.2d 1096, 1102 (9th Cir. 1989); *see also Stanford*

Univ. Hosp. v. Fed. Ins. Co., 174 F.3d 1077, 1083 (9th Cir. 1999) (California state law applies to California contract dispute). In conducting a *de novo* review, no form of appellate deference to the district court's decision is acceptable. *Salve*, 499 U.S. at 238; *Rabkin v. Ore. Health Scis. Univ.*, 350 F.3d 967, 970 (9th Cir. 2003).

II. THE DISTRICT COURT ERRED IN GRANTING CONTINENTAL'S MOTION TO DISMISS SELANE'S FIRST AMENDED COMPLAINT.

In granting Continental's motion to dismiss, the district court erroneously held that the presence of SARS-CoV-2 and resulting substantial impairment caused by the imminent threat of the virus and resulting civil authority orders do not constitute "direct physical loss of or damage to property" as that phrase is used in the Policy. In so ruling, the district court disregarded governing California precedent, ignored Selane's well-pled allegations, and made impermissible factual determinations as to whether viruses can cause structural alterations to property. As explained below, the district court's conclusions are contrary to the facts and the law.

Under California law, the fundamental goal of interpreting insurance policies, as with all contract interpretation, is to ascertain and effectuate the intention of the parties. Cal. Civ. Code § 1636; *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 821 (1990); *accord Karen Kane Inc. v. Reliance Ins. Co.*, 202 F.3d

1180, 1188 n.3 (9th Cir. 2000) (objectively reasonable expectations of parties are touchstone for interpreting insurance contracts under California law); *see also* Cal. Civ. Proc. Code § 1859. Under California law, an insured under an all-risk property insurance policy, such as the Policy at issue here, has the threshold burden of proving a loss within the policy's insuring clause. *See Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 406 (1989) (insured bears burden of showing "that an event falls within the scope of basic coverage under the policy"). "The burden on the insured in this situation is usually minimal, typically requiring proof only that the insured suffered a 'direct physical loss' (or 'accidental direct physical loss') while the policy was in effect." Croskey, et al., *California Practice Guide: Insurance Litigation* § 6:253.1 (2020). Indeed, one California court has even stated that an insured under an all-risk policy "*has no burden of proof*," adding that "[i]n effect, there is a presumption of coverage, which the insurer has the burden to rebut by proving that the claim falls within a specific policy exclusion." *Travelers*, 63 Cal. App. 4th at 1454.

If contractual language is clear and explicit, it governs. Cal. Civ. Code § 1638. However, if the policy's language is ambiguous, its words are to be construed in the insured's favor, consistent with the insured's reasonable expectations. *Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal. 4th 758, 763 (2001); *AIU*, 51 Cal. 3d at 822. Furthermore, coverage grants in insurance policies are

interpreted broadly to afford the greatest possible protection to insureds. *See Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 406 (1989).

Consistent with these principles, even if there are conflicting interpretations of a policy provision, an insured's reasonable interpretation controls. *MacKinnon*, 31 Cal. 4th at 655 ("even if [an insurer's] interpretation is considered reasonable, it would still not prevail, for in order to do so it would have to establish that its interpretation is the *only* reasonable one"); *see also State Farm Mut. Auto. Ins. Co. v. Jacober*, 10 Cal. 3d 193, 202-03 (1973) ("we must nonetheless affirm the trial courts' finding of coverage so long as there is any other reasonable interpretation under which recovery would be permitted in the instant cases"); *accord Ticketmaster, LLC v. Ill. Union Ins. Co.*, 524 F. App'x 329, 331-32 (9th Cir. 2013). "This rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded." *MacKinnon*, 31 Cal. 4th at 648.

Furthermore, in interpreting insurance policies, "[t]he 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. Civ. Code § 1641; *Atl. Mut. Ins. Co. v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1036 (2002) (applying "the very fundamental principle that policy language be so construed as to give effect to every term").

Also, an insurer's "failure to use available [exclusionary] language … gives rise to the inference that the parties intended not to so limit coverage." *Fireman's Fund Ins. Cos. v. Atl. Richfield Co.*, 94 Cal. App. 4th 842, 852 (2001). Thus, exclusions—and the absence thereof—must be considered.

Instead of applying the governing policy interpretation principles, the district court incorrectly construed the phrase "direct physical loss of or damage to property" narrowly and rejected Selane's reasonable contrary interpretations. In so doing, the district court erred.

A. Because the Presence of SARS-CoV-2 Causes "Direct Physical Loss of or Damage to Property," the District Court Erred in Ruling that Selane Failed to Assert a Viable Claim for Civil Authority Coverage.

Selane seeks coverage under the Policy's Civil Authority Endorsement. In pertinent part, this coverage obligates Continental to pay for "the actual loss of Business Income [Selane] sustain[s] and reasonable and necessary Extra Expense [Selane] incur[s] caused by action of civil authority that prohibits access to the described premises." 4-ER-569. This "civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises." *Id.*

In dismissing Selane's claim for coverage under the Civil Authority Endorsement, the district court focused on the requirement that the "civil authority action must be due to direct physical loss of or damage to property." In opposing Continental's motion to dismiss, Selane reasonably posited that the presence of SARS-CoV-2 in, on, and around property causes "direct physical loss or damage," and that the Closure Orders were issued in direct response to the presence of the virus throughout the State of California and County of Los Angeles—thus satisfying the requirements under the Policy's Civil Authority endorsement. Nevertheless, the district court erroneously ruled that "Selane's Complaint did not adequately allege 'direct physical loss of or damage to property' as those terms appear in the Policy." 1-ER-009.

In so ruling, the district court disregarded Selane's allegations of the ways in which SARS-CoV-2 causes physical loss and damage to property by attaching to surfaces, lingering in air and airspace of buildings, and otherwise altering property and impermissibly reached factual determinations not proper at the pleadings stage. The district court also disregarded a wide body of case law supporting Selane's reasonable interpretation of the phrase "direct physical loss of or damage to property," including controlling decisions issued by the California Supreme Court and the California Court of Appeal. Furthermore, in rejecting Selane's reasonable interpretation, the district court failed to account for the significance of other terms

in the policy—including the Policy's Microbe Exclusion—and gave no weight to Continental's conscious decision to omit from the policies it sold to Selane and the putative class members the standard virus exclusion it widely used in most policies (if Mr. Robusto's statements are believed). Instead, the district court placed far too much stock in other district court opinions that misapplied California law and the governing rules of policy interpretation.

Because these errors led the district court to reach an incorrect conclusion regarding the viability of Selane's claim for Civil Authority losses, this Court should reverse the district court's judgment and remand this case for further proceedings.

1. The District Court Erroneously Disregarded Selane's Factual Allegations Regarding the Physical Nature and Spread of SARS-CoV-2 Sufficient to Trigger Coverage and Made Impermissible Factual Determinations.

In granting Continental's motion to dismiss, the district court incorrectly held that Selane had not adequately alleged that the Closure Orders were issued in response to "direct physical loss of or damage to property." However, in considering Continental's motion, the district court was obligated to accept Selane's well-pled facts as true and view the factual allegations in the light most favorable to Selane. *See Nat'l Ass'n for Advancement of Psychoanalysis v. Cal.*

Bd. of Psychology, 228 F.3d 1043, 1049 (9th Cir. 2000). The district court plainly failed to do so.

In this regard, Selane's First Amended Complaint is replete with allegations regarding the physical nature of SARS-CoV-2 and its destructive, insidious effect on property. Indeed, the First Amended Complaint explains that though microscopic, SARS-CoV-2 is a highly contagious, mobile, and dangerous physical substance. 4-ER-472 (FAC ¶ 52). Aerosolized droplets containing the virus, when exhaled by normal breathing, can travel significant distances and stay suspended in air for hours until gravity forces them to the nearest surface. 4-ER-468 (FAC ¶ 34). SARS-CoV-2 physically rests on and attaches to property and can remain on surfaces for more than 28 days. 4-ER-468,472 (FAC ¶¶ 34, 51-52). The virus also physically alters the space in which it is present and the surfaces on which they attach. 4-ER-471-73 (FAC ¶¶ 44, 52-54).

As Selane alleged, once SARS-CoV-2 is physically present on, in, or around property, the property becomes highly dangerous and can serve as vehicles of transmission. 4-ER-472-73 (FAC ¶¶ 52-53). In this regard, SARS-CoV-2's presence renders property unusable for its intended purpose and function. 4-ER-475 (FAC ¶ 63).

Indeed, human contact with surfaces can transmit SARS-CoV-2, making it very dangerous for individuals to come in contact with property contaminated by

SARS-CoV-2. 4-ER-472 (FAC ¶ 52). SARS-CoV-2 spreads by surface-to-person transmission when an uninfected person touches an object or surface that has come into contact with the discharges of an infected person and the uninfected person then touches their eyes, nose, or mouth. 4-ER-467,472 (FAC ¶¶ 33, 52). This is a particular concern for business centers and other places open to the public, which contain many common touchpoints and areas, such as door handles and bathrooms, with surfaces touched by multiple people every day. 4-ER-473 (FAC ¶ 53). The ubiquitous aerosolized droplets of the virus are analogous to smoke, present long after the source of its dissemination has gone. 4-ER-473 (FAC ¶ 53). Thus, entering a building or other location where SARS-CoV-2 is physically present poses an imminent and severe risk to human health. 4-ER-473 (FAC ¶ 53). SARS-CoV-2 changes buildings, surfaces, and personal property into dangerous transmission mechanisms, rendering the affected property unsafe, unfit, and uninhabitable. 4-ER-472-73 (FAC ¶¶ 52-53).

Although Selane alleged numerous facts demonstrating that the presence of the SARS-CoV-2 virus physically alters property and causes "direct physical loss of or damage to property," the district court disregarded these allegations and determined that "COVID-19 and its impacts do not constitute 'direct physical loss of or damage to property." 1-ER-010. In so doing, the district court apparently made an impermissible ***factual*** determination that, contrary to Selane's allegations,

SARS-CoV-2 cannot physically alter property—a finding contrary to the allegations and science. However, in ruling on a motion to dismiss, the district court was obligated to accept Selane's factual allegations as true and was not permitted to reach any factual determinations regarding the validity of Selane's allegations. *See National Ass'n*, 228 F.3d at 1049. The district court's findings in this regard were particularly erroneous because the factual questions at issue—i.e., those concerning the nature of SARS-CoV-2 and the manner in which it can alter and impair property—necessarily turn on expert opinion and scientific evidence. *See Miller v. Los Angeles Cty. Flood Control Dist.*, 8 Cal. 3d 689, 702 (1973) (expert testimony required when subject matter "is one within the knowledge of experts *only* and not within the common knowledge of laymen").

As explained by the United States Supreme Court, at this stage, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). In failing to do so, and instead reaching contrary (and incorrect) factual determinations, the district court erred.

2. The District Court Erroneously Disregarded Substantial Case Law Holding that Microscopic Substances Can Cause Loss or Damage to Property.

In opposing Continental's motion, Selane reasonably proffered that, given the way SARS-CoV-2 physically alters and impairs property, the presence of SARS-CoV-2 in, on, or around property causes "direct physical loss or damage to property" as that phrase is used in the Policy. Selane's position is grounded in substantial case law.

Indeed, courts in California (and elsewhere) have routinely recognized that microscopic substances invisible to the naked eye can cause loss or damage to property. For instance, as recognized by the California Supreme Court over 30 years ago, the presence of environmental contaminants satisfies the requirement of property damage. *See AIU*, 51 Cal. 3d at 842 ("[c]ontamination of the environment satisfies" requirement of property damage in general liability policy). Similarly, the Court of Appeal held that the presence of asbestos fibers in a building's air supply and on building surfaces amount to property damage under a general liability policy. *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 103 (1996).

Although *AIU* and *Armstrong* are controlling pronouncements of California insurance law, the district court dismissed these two decisions as distinguishable—

stating that, "unlike Selane's Policy, the commercial general liability policies in *AIU* and *Armstrong* expressly included the 'loss of use' of tangible property." 1-ER-10. However, the policy at issue in *AIU* included coverage for "damages for . . . loss of use of property ***resulting from property damage***"—meaning that, without property damage, there could be no coverage for "loss of use of property." *See AIU*, 51 Cal. 3d at 815 n.3 (emphasis added). Furthermore, although the policies at issue in *Armstrong* defined property damage to include both "physical injury to . . . tangible property" and "loss of use of tangible property," the court's ruling was couched in terms of the "physical injury to tangible" property aspect of the definition—not "loss of use." *Armstrong*, 45 Cal. App. 4th at 88 ("we have upheld the trial court's decision and have concluded that installation of ACBM and releases of asbestos fibers do qualify as 'physical injury to tangible property'"). *Id.* at 109. Thus, *AIU* and *Armstrong* did not turn on "loss of use" coverage. Rather, both held that the presence of contaminants and other hazardous materials cause physical damage to property.

The district court also disregarded numerous other persuasive decisions, including the court's opinion in *Cooper v. Travelers Indemnity Co. of Illinois,* 2002 WL 32775680 (N.D. Cal. Nov. 4, 2002). In *Cooper*, the policy insured "direct physical loss of or damage to Covered Property . . . ." *Id.*, at *2. When a water well located at the insured's tavern was determined to contain high amounts of

bacteria, the county health authorities closed the tavern. *Id*., at *1. The court held that the necessary suspension of the insured's business operations "resulted from direct physical damage" from the bacterial and E-coli contamination of the well. *Id*., at *5.

Numerous courts outside of California likewise have recognized "direct physical loss of or damage to property" exists when bacteria, smoke, asbestos fibers, fumes, vapors, odors, chemical contaminants, mold, and the like are present—all of which, like SARS-CoV-2, may be invisible to the naked eye but can physically alter and damage property.

For example, in *Gregory Packaging, Inc. v. Travelers Property Casualty Co.*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014), an accidental release of ammonia into a packaging facility caused its shutdown until the ammonia dissipated. *Id*. at *3. The necessary remedy was to "air the property." *Id*. at *4. The court noted that "structural alteration provides the most obvious sign of physical damage" but reaffirmed that "property can sustain physical loss or damage without experiencing structural alteration." *Id*. at *5.

Gregory was, in turn, found to be "extremely persuasive" by the court in *Oregon Shakespeare Festival Ass'n v. Great American Insurance Co.*, 2016 WL 3267247, at *8 (D. Ore. June 7, 2016). In *Oregon*, festival theater performances were cancelled due to air quality and health concerns from smoke infiltration

caused by wildfires. *Id.* at *2. The court held that "the smoke that infiltrated the theater caused direct property loss or damage by causing the property to be uninhabitable and unusable for its intended purpose." *Id.*, at *9. It explained that this loss was "physical" because it was "not mental or emotional, nor is it theoretical." *Id.*, at *5.[1]

Several state and federal courts have applied these very principles to find that the presence of SARS-CoV-2 causes "direct physical loss or damage to property."[2]

---

[1] Many other courts have reached similar conclusions. *See, e.g., Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) ("contamination by asbestos may constitute a direct, physical loss to property"); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (property sustained a direct physical loss due to presence of asbestos fibers); *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 405 (1st Cir. 2009) (odor from carpet and adhesive "*can* constitute physical injury to property"); *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 800 N.Y.S.2d 356, at * 5 (N.Y. Sup. Ct. Mar. 4, 2005) ("the presence of noxious particles, both in the air and on surfaces . . . , would constitute property damage under the terms of the policy").

[2] *See Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 798 (W.D. Mo. 2020) (allegation that virus "is a physical substance" that "live[s] on" and is "active on inert physical surfaces" and "emitted into the air" adequately alleged direct physical loss or damage); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 2020 WL 5637963, at *4 (W.D. Mo. Sept. 21, 2020) (allegation that "'the presence of COVID-19 on and around the insured property deprived Plaintiffs of the use of their property and also damaged it'" deemed sufficient); *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, 2020 WL 7190023, at *2 (Clark Cty., Nev. Nov. 30, 2020) (direct physical loss or damage sufficiently alleged because the complaint "alleges the physical presence and known facts about the coronavirus, including that it spreads through infected droplets that 'are physical

In light of these decisions and the governing rules of policy interpretation, the district court was incorrect to reject Selane's proffered interpretation of the phrase "direct physical loss of or damage to property." Selane's proffered interpretation was at least reasonable, and the district court was bound to accept it. *See MacKinnon*, 31 Cal. 4th at 655; *Ticketmaster*, 524 F. App'x at 331-32. In failing to do so, the district court erred.

3. In Rejecting Selane's Reasonable Interpretation, the District Court Overlooked the Significance of the Policy's Microbe Exclusion.

The district court further erred in refusing to consider other sections of the Policy that reinforce Selane's reasonable interpretation of the phrase "direct physical loss of or damage to property." Indeed, in interpreting an insurance policy, California law requires that provisions be read in context and in light of other terms in the policy, with "each clause helping to interpret the other." Cal. Civ. Code § 1641; *see also Atlantic*, 100 Cal. App. 4th at 1036.

---

objects that attach to and cause harm to other objects' based on its ability to 'survive on surfaces' and then infect other people"); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, 2020 WL 7258114, at *1 (Ohio Ct. Co. Pl. Nov. 17, 2020) ("Here, not only do Plaintiffs allege that Covid-19—a physical substance—was *likely* on their premises, but that it was physically present and that it caused physical loss and damage. Accordingly, the Court finds that Plaintiffs have sufficiently alleged that Covid-19 existed on their premises, and that it caused direct physical loss and damage.").

In this regard, the Policy's Microbe Exclusion is particularly instructive and bears directly on the reasonableness of Selane's proffered interpretation of the phrase "direct physical loss of or damage to property." The Microbe Exclusion bars coverage for physical loss or damage caused by the "[p]resence [of] 'microbes,'" which the policy defines to include any "organism" or "microorganism" that "causes infection or disease." ER 36-1 at 110. Because the Microbe Exclusion only concerns "organisms" and "microorganisms" (and not viruses[3]), it has no direct bearing on Selane's claim—and Continental never contended otherwise. Still, Continental's decision to include the exclusion in the Policy is telling.

The purpose of exclusions is to remove coverage that would otherwise exist under an insurance policy. *See Van Ness v. Blue Cross*, 87 Cal. App. 4th 364, 373-74 (2001) ("Insurance policies have two parts: (1) the insuring agreement which defines the type of risks covered under the policy; and (2) the exclusions, which

---

[3] Unlike organisms and microorganisms, viruses are not alive, are not made out of cells, cannot reproduce, and cannot sustain themselves without a host. 2-ER-096 (fn. 4.) (quoting *Encyclopedia Britannica Online* for the proposition that "Viruses occupy a special taxonomic position: they are not plants, animals, or prokaryotic bacteria . . and they are generally placed in their own kingdom. In fact, ***viruses should not even be considered organisms***, in the strictest sense, because they are not free-living—i.e., they cannot reproduce and carry on metabolic processes without a host cell." (emphasis added)). "For these and other reasons, viruses do not constitute 'organisms' or 'micro-organisms' as those phrases are commonly understood."

remove coverage for certain risks which initially fall within the insuring clause."). After all, "'exclusions serve to limit coverage granted by an insuring clause and thus apply only to hazards *covered* by the insuring clause.'" *Essex Ins. Co. v. City of Bakersfield*, 154 Cal. App. 4th 696, 709 (2007) (citation omitted); *see also Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 268 Wis. 2d 16, 43 (2004) ("If the insuring agreement never confers coverage for this type of liability as an original definitional matter, then there is no need to specifically exclude it. Why would [an insurer] exclude [a type of damage] if the damage could never be considered [covered] in the first place?").

Thus, in choosing to exclude coverage for loss or damage caused by the "presence" of harmful "organisms" and "microorganisms," Continental confirmed its view that such loss or damage would have been covered in the absence of an exclusion. Indeed, if such loss or damage would not have been otherwise covered by the policy, Continental would have had no reason to include the Microbe Exclusion. If the presence of harmful organisms and microorganisms can cause "direct physical loss of or damage to property," it is at least reasonable for Selane to conclude that the presence of harmful viruses can likewise cause "direct physical loss of or damage to property." *See* Cal. Civ. Code § 1641.

Thus, the Policy's Microbe Exclusion serves as further support for Selane's reasonable interpretation of the phrase "direct physical loss of or damage to

property." And, again, Selane's reasonable interpretation of this key language necessarily controls. *See MacKinnon*, 31 Cal. 4th at 655; *Ticketmaster*, 524 F. App'x at 331-32.

Nevertheless—and in clear error—the district court dismissed the Microbe Exclusion as irrelevant, refusing to consider its significance as it relates to the reasonableness of Selane's interpretation of the key policy language. Indeed, in dismissing the significance of the Microbe Exclusion, the district court stressed that exceptions to policy exclusions cannot create coverage that does not otherwise exist under an insurance policy. 1-ER-011. However, as explained above, Selane's point was and is very different. Because the Microbe Exclusion is part of the Policy, it necessarily informs how the other policy terms—including the phrase "direct physical loss of or damage to property"—must be interpreted and understood. *See* Cal. Civ. Code § 1641. And, again, if the presence of harmful organisms and microorganisms causes "direct physical loss of or damage to property" under the Policy (the only reasonable interpretation, given Continental's decision to include the Microbe Exclusion), then it was at least reasonable for Selane to similarly conclude that the presence of a harmful virus would likewise cause "direct physical loss of or damage to property." Thus, the district court failed to appreciate the significance of the Microbe Exclusion as it relates to Selane's reasonable interpretation of the key policy language.

4. The District Court Erred in Disregarding Continental's Knowledge of Pandemics and Conscious Decision Not to Exclude the Risk.

As noted above, the objectively reasonable expectations of parties are the touchstone for interpreting insurance contracts under California law. *See Karen*, 202 F.3d at 1188; Cal. Civ. Code § 1636. Yet, despite these clearly defined tenets, the district court did not consider Continental's knowledge of pandemic risks—and its conscious choice not to exclude such risks—in assessing the Policy.

The Policy promises coverage for "direct physical loss of or damage to property," a phrase that Continental has known for decades extends to (1) losses caused by the presence of a hazardous substance in a building's airspace and on or around property and (2) losses that result when the use or function of property is substantially impaired, even if the property has not been structurally altered. Indeed, as explained above, the California Supreme Court and Court of Appeal have reiterated these principles several times in recent decades. *See, e.g.*, *AIU*, 51 Cal. 3d at 842; *Armstrong*, 45 Cal. App. 4th at 103.

Notably, the district court ignored the California Court of Appeal's decision in *Hughes*, which clearly applies here. In *Hughes*, a landslide left the insureds' house partially overhanging a cliff. 199 Cal. App. 2d at 243. Although the house

suffered no physical damage, the court rejected the insurer's argument that there was no "direct physical loss" to their dwelling:

> [Although] a "dwelling building" might be rendered completely useless to its owners, [the insurer] would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner. [The insureds] correctly point out that a "dwelling" or "dwelling building" connotes a place fit for occupancy, a safe place in which to dwell or live. It goes without question that [the insured's] "dwelling building" suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff.

Id. at 248-49.

Given *AIU*, *Armstrong*, *Hughes*, and dozens of other decisions issued by courts throughout the country, it should come as no surprise that the insurance industry acknowledged in 2006 that viruses can cause property damage and developed a "virus and bacteria" exclusion that is now found in the vast majority of property insurance policies sold in the United States. 4-ER-477 (FAC ¶ 68). Continental deliberately chose not to include such an exclusion in the Policy—even though it and its affiliates issued other policies with "virus" exclusions and even though Continental's 2018 public filings expressly acknowledge the potential of "material losses" from "pandemics" and other "catastrophe events." 4-ER465-67 & 477-78 (FAC ¶¶ 26-29 & 68-69).

Simply put, Continental's understanding of pandemic risks when it sold Selane the Policy cannot be disregarded because it directly bears on Continental's understanding that viruses can cause "direct physical loss of or damage to property" under its Policy. *See Bartlome v. State Farm Fire & Cas. Co.*, 208 Cal. App. 3d 1235, 1239 (1989) ("If . . . a term in an insurance policy has been judicially construed, it is not ambiguous and the judicial construction of the term should be read into the policy unless the parties express a contrary intent."). Nor can it be ignored that Continental consciously decided to issue the Policy without including a standard form "virus" exclusion. *See Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal. 4th 758, 764 (2001) ("[W]e cannot read into the policy what [the insurer] has omitted. To do so would violate the fundamental principle that in interpreting . . . insurance contracts, courts are not to insert what has been omitted."). Indeed, contrary to the district court's ruling, Continental's "failure to use available [exclusion] gives rise to the inference that the parties intended not to so limit coverage." *Fireman's Fund*, 94 Cal. App. 4th at 852.

Reinforcing this notion, as noted above, Dino Robusto, the Chairman and Chief Executive Officer of CNA Financial Corp., made public statements that constitute admissions that Continental's policies cover losses caused by SARS-CoV-2 in the absence of a virus exclusion. *See* 4-ER-479 (FAC ¶¶ 71-72).

Specifically, during a May 4, 2020, earnings call, Mr. Robusto stated to CNA's investors:

> [O]ur property policies, whether issued in the U.S. or international, all have exclusions barring coverage for viruses. ***There are a very few policies where coverage may exist*** on small participations in our Lloyd's operation, but the total limit exposed is de minimis. So with respect to business interruption, our ***property policy exclusionary language*** does not provide coverage for COVID-19.

4-ER-479 (FAC ¶ 72) (emphasis added). Indeed, implicit in Mr. Robusto's statement is the fact that, ***absent*** an exclusion for viruses, their property policies ***do*** cover property damage attributable to SARS-CoV-2.

Of course, contrary to Mr. Robusto's representations, the policies Continental issued to Selane and the other putative class members do not contain virus exclusions. It stands to reason, therefore, that these policies cover financial losses caused by viruses and pandemics. Indeed, this conclusion is all but confirmed by Mr. Robusto's May 2020 statements to CNA's investors, and it is reinforced by Continental's decision to include virus exclusions in other policies that it issues.

The district court erred in failing to consider this patently germane evidence, which directly bears on the parties' mutual intent and the reasonableness of Selane's proffered interpretation of the phrase "direct physical loss of or damage to property."

5. The District Court Relied on Cases that Misapply California Law.

In granting Continental's motion to dismiss, the district court put considerable stock in what it called the "voluminous authority from California district courts finding that COVID-19 and its impacts do not constitute 'direct physical loss of or damage to property.'" 1-ER-010. However, these district courts made decisions based on different factual allegations, typically different briefing, different policies, and the misreading of (or failure to consider) applicable California appellate authority.

Many of the district court decisions addressing the interpretation of "direct physical loss of or damage to property" in this context are rooted in a misunderstanding and misapplication of the California Court of Appeal's decision in *MRI Healthcare Center, Inc. v. State Farm General Insurance Co.*, 187 Cal. App. 4th 766 (2010). The issue in *MRI* was whether the inability to turn on a machine after turning it off constituted a covered loss under a property policy. The court held that because the machine caused its own damage, the loss was caused by an internal defect, not an external factor. *Id.* at 780. Although the *MRI* court remarked that the policy required that "some *external force* must have acted upon the insured property to cause a *physical change* in the condition of the property," *id.*, that statement does not undercut the conclusion that the presence of SARS-

CoV-2 can cause "direct physical loss of or damage to property." Indeed, in sharp contrast with the loss at issue in *MRI*, SARS-CoV-2 is, by definition, an external force that caused the losses and that physically alters and changes the condition of property.

Moreover, the policy in *MRI* required "direct physical loss ***to*** property," not "direct physical loss ***of*** or damage to property." *Id*. at 771. As one district court concluded before Continental sold the policies at issue and before the pandemic, these clauses are markedly different and, therefore, "it stands to reason that they also differ in meaning." *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co.*, 2018 WL 3829767, at *4 (C.D. Cal. July 11, 2018). Reasonably interpreted, physical loss ***of*** property includes loss of use or functionality. For this very reason, the *Total* court declined to follow *MRI* because "'direct physical loss *of*' should be construed differently from 'direct physical loss *to*' or 'direct physical loss.'" *Id.*

Recently, in *Goodwill Industries v. Philadelphia Indemnity Insurance Co.*, Case No. 30-2020-01169032-CU-IC-CXC (Ca. Super. Ct. Orange Cnty. January 28, 2021), the Orange County Superior Court overruled an insurer's demurrer, expressly departing from the holdings of district courts that have relied on *MRI*:

> The Court recognizes that California federal cases have interpreted *MRI Healthcare* to require a physical change in the property or permanent dispossession of the property to qualify as "direct physical loss" and have generally rejected arguments that business losses due to coronavirus and Covid-19 are covered under Business

> Income, Extra Expenses and Civil Authority provisions. . . . However, these federal California cases are not binding on this Court and were decided under a different standard. While these cases are instructive, the allegations in those cases are largely distinguishable from those alleged here.

The district court's reliance on *West Coast Hotel Management, LLC v. Berkshire Hathaway Guard Insurance Cos.*, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020), and *10E, LLC v. Travelers Indemnity Co.*, No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020), is misplaced for similar reasons. These cases rely on the inapplicable reasoning of *MRI,* and thus, have limited value.

Furthermore, these decisions hinge on the legally incorrect statement that "[u]nder California law, losses from inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase." *10E*, 2020 WL 5359653 at *3-*4; *see also W. Coast Hotel Mgmt,* 2020 WL 6440037, at *4 ("While 'direct physical loss of or damage to property' is not defined in the Policy, it plainly requires, at minimum, that the loss or damage be physical in nature. . . . Under California law . . . a "detrimental economic impact" alone—as Plaintiffs have alleged—is not compensable under a property insurance contract."). As discussed above, under California law, the loss of use of property ***does*** constitute "direct physical loss of or damage to property," even if structural damage or physical alteration occurred. *See, e.g.*, *Hughes,* 199

Cal. App. 2d at 249; *see also Strickland v. Fed. Ins. Co.*, 200 Cal. App. 3d 792, 801 (1988).

Finally, other courts in California have likewise acknowledged that the presence of SARS-CoV-2 can constitute "direct physical loss or damage to property." In *Mudpie, Inc. v. Travelers Casualty Insurance Co.*, 2020 WL 5525171 (N.D. Cal. Sept. 14. 2020), *appeal pending*, the court granted an insurer's motion to dismiss but allowed the insured leave to amend its complaint. In so ruling, the court remarked that its decision would have been different if the insured's complaint included allegations of the presence of the virus. *Id.* at *5 n.7. The court stressed that "SARS-CoV-2 . . . which is transmitted either through respiratory droplets or through aerosols which can remain suspended in the air for prolonged periods of time—is no less a 'physical force' than the 'accumulation of gasoline' in [*Western Fire Insurance Co. v. First Presbyterian Church*, 165 Colo. 34 (1968)] or the 'ammonia release [which] physically transformed the air' in *Gregory Packaging*." *Id.*

Thus, in relying on district court opinions that misconstrue and misapply California law, and in disregarding Selane's well-pleaded allegations and reasonable interpretation of the key language, the district court erred. Because Selane's claim for Civil Authority coverage is viable, the district court's judgment in favor of Continental should be reversed.

B. The District Court Erred in Ruling that Selane Did Not Allege "Direct Physical Loss of or Damage to Property" Sufficient to Trigger Coverage under the Policy's Business Income and Extra Expense Endorsement.

In addition to its claims under the Civil Authority Endorsement, Selane seeks coverage under the Policy's Business Income and Extra Expense Endorsement because its insured property was substantially impaired and incapable of serving its intended purpose. The district court seemingly misconstrued Selane's argument on this point, stating that "Selane alleges that the restrictive orders *themselves* caused a 'direct physical loss of or damage to property.'" 1-ER-011. However, Selane does not contend that these orders alone caused direct physical loss of or damage to property. Rather, Selane is entitled to coverage because the real and imminent threat of SARS-CoV-2 attaching to Selane's property, coupled with and underscored by the civil authorities' decision to issue the Closure Orders, made it impossible for Selane to operate its business and use its property for its intended purpose.

As discussed above, by March 2020, SARS-CoV-2 was ubiquitous throughout California and posed a very serious and real threat to the health and safety of California's citizens. 4-ER-474 (FAC ¶ 58-59). Given the imminence of this threat and the highly-contagious nature of the virus, it simply was not safe for

Selane and the other putative class members to operate their businesses. Indeed, the various civil authorities issued the Closure Orders for this very reason. 4-ER-469-71 (FAC ¶¶ 40-47).

In opposing Continental's motion to dismiss, Selane reasonably posited that the functional impairment of its property and its inability to use its property for its intended function constituted "direct physical loss of or damage to property" as required under the Policy's Business Income and Extra Expense Endorsement. Contrary to the district court's ruling, nothing about the phrase "direct physical loss of or damage to property" undercuts Selane's proffered interpretation.

Because the phrase is undefined, it must be understood in accord with the plain meaning a layperson would attach. *See* Cal. Civ. Code § 1644; *Martin Marietta Corp. v. Ins. Co. of N. Am.*, 40 Cal. App. 4th 1113, 1124 (1995). "It is well settled that in order to construe words in an insurance policy in their 'ordinary and popular sense,' a court may resort to a dictionary." *Jordan v. Allstate Ins. Co.*, 116 Cal. App. 4th 1206, 1216 (2004).

As leading dictionaries make clear, none of the pertinent terms—"direct," "physical," "loss," or "damage"—suggest a requirement of structural or physical alteration. *See Direct*, Merriam-Webster Online Dictionary (Feb. 19, 2021) ("characterized by close logical, causal or consequential relationship"); *Physical*, *id.*, (Feb. 19, 2021) ("having material existence" or something "perceptible

especially through the senses"); *Loss*, *id.* (Nov. 3, 2020) (includes not only "destruction" and "ruin," but also "deprivation"); *Damage*, *id.* (Feb. 19, 2021) ("loss or harm resulting from injury").

Indeed, many "physical" losses do not require an alteration to the insured property. Courts have held that "direct physical loss of or damage to" encompasses "loss of use" of property that has not been physically damaged. *See, e.g.*, *Total*, 2018 WL 3829767, at *3-4. As another court put it, "Clearly, without qualification, the term 'damage' encompasses more than physical or tangible damage." *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998). However, even if the term "damage" only could be read to require physical alteration, that only underscores the lack of such a requirement in the phrase "direct physical loss of ***or*** damage to property." If "damage" requires physical alteration, then "loss" would have to be given a meaning not carrying that requirement. Otherwise, "loss" would be rendered impermissibly redundant. *See Total*, 2018 WL 3829767, at *3 ("[T]o interpret 'physical loss of' as requiring 'damage to' would render meaningless the 'or damage to' portion of the same clause, thereby violating [the interpretive rule] that every word be given a meaning.").

In keeping with the plain meaning of "direct physical loss of or damage to property," California law is clear that when a dangerous condition renders property

unusable, there is a covered loss. *See Hughes*, 199 Cal. App. 2d at 248-49; *see also Strickland v. Fed. Ins. Co.*, 200 Cal. App. 3d 792, 801 (1988).

Numerous decisions across the country are in accord. For example, in *General Mills, Inc. v. Gold Medal Insurance Co.*, 622 N.W.2d 147 (Minn. Ct. App. 2001), the insured suffered a loss when cereal oats were treated by a pesticide that was not approved by the FDA. *Id.* at 150. Like Continental here, the insurer argued that there was no "direct physical loss or damage" because the loss was only caused by government regulation and the oats were still fit for human consumption. *Id.* at 152. The court disagreed, using reasoning that is directly applicable to this case:

> General Mills was unable to sell its products or use the contaminated oats, because of legal regulations. The business of manufacturing food products requires conforming to the appropriate FDA regulations. Whether or not the oats could be safely consumed, they legally could not be used in General Mills' business. The district court did not err in finding this to be ***an impairment of function and value sufficient to support a finding of physical damage***.

Id. (emphasis added).

Similarly, in *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.*, 968 A.2d 724 (N.J. App. Div. 2009), the insureds suffered financial losses because of food spoilage at their supermarkets during an electrical blackout. *Id.* at 727. The policy extended coverage for an interruption of electrical power to the

insureds' supermarkets, provided the interruption was caused by "physical damage" to specified electrical equipment. *Id.* at 727. The court rejected the insurer's argument that the insured sustained no "property damage" because of the outage. The court first concluded that "the undefined term 'physical damage' was ambiguous." *Id.* at 734. It then explained that "the electrical grid was 'physically damaged' because . . . the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity." *Id.* The court then held, in words applicable here:

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

Id. at 735. Rejecting the insurer's argument that a "narrowly-parsed definition of 'physical damage'" should be adopted, the court held that "from the perspective of the millions of customers deprived of electric power for several days, the system certainly suffered physical damage, because it was incapable of providing electricity." *Id.*[4]

---

[4] *See also Dundee*, 587 N.W.2d at 194 ("The function of the Marifjeren storage facility is to protect the potato crop from the elements . . . . When the electrical power was interrupted . . . , the storage facilities were 'damaged' in the sense they no longer performed the function for which they were designed. In other words, the interruption of electrical power 'damaged' the storage facilities by impairing their value or usefulness."); *Am. Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.*,

Decades ago, the Colorado Supreme Court explained that the key consideration is not whether property damage exists, but rather ***whether property has become unsafe or uninhabitable for use***. In *Western Fire Insurance Co. v. First Presbyterian Church*, the court found that a church had physical loss of its property when gasoline accumulation around the church building made its premises uninhabitable and its continued use dangerous, determining that loss of use of property satisfied the requirement of physical loss or damage. 165 Colo. 34, 39-40 (1968).

Numerous courts have applied this same logic to losses arising out of the response to SARS-CoV-2 and COVID-19. In *North State Deli, LLC v. Cincinnati Insurance Co.*, 2020 WL 6281507 (N.C. Super. Oct. 9, 2020), the court held that "'direct physical loss' describes the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property." *Id.*, at *3. Applying standard dictionary definitions to the undefined phrase, the court held

---

2000 WL 726789, at *2 (D. Ariz. April 18, 2000) (when power outage rendered insured's computer systems inoperable, insured suffered "direct physical loss or damage" to property; "'physical damage' . . . includes loss of access, loss of use, and loss of functionality"); *Nat'l Ink & Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.*, 435 F. Supp. 3d 679, 686 (D. Md. 2020) (requirement of "direct physical loss of or damage to" covered property satisfied when ransomware attack left insured "unable to access a significant portion of software and stored data" on its computer system).

"that the ordinary meaning of [] 'direct physical loss' includes the inability to utilize or possess something in the real, material, or bodily world . . . ." *Id.* The court also observed that under the insurer's argument, "if 'physical loss' also requires structural alteration to property, then the term 'physical damage' would be rendered meaningless." *Id.* Accordingly, the court held that "the phrase 'direct physical loss' includes the loss of use or access to covered property even where that property has not been structurally altered." *Id.* The court also added that even if the insurer's "proffered ordinary meaning [of direct physical loss] is reasonable," it was not the only reasonable interpretation. *Id.* For these reasons and because the policies at issue did not include any virus exclusions, the court granted summary judgment in the insured's favor. *Id.* at *4.

Similarly, in *Perry Street Brewing Company, LLC v. Mutual of Enumclaw Insurance Co.*, No. 20-2-02212-32 (Wash. Super. Ct. Nov. 23, 2020), the court granted summary judgment in favor of the insured, a brewery and bar. Looking to the undefined phrases "loss of" and "damage to," the court concluded that the phrases cannot mean the same thing and, thus, "direct loss of property" could reasonably be interpreted to mean the interruption of the insured's business due to government orders. Per the court, the orders caused a direct physical loss because the property "could not physically be used for its intended purpose, i.e., [the

insured] suffered a loss of its property because it was deprived from using it." *Id*. ¶ 30.

Likewise, in *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.*, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021), the court granted summary judgment to a group of restaurants in several states. It held that "direct physical loss of or damage to" was plausibly triggered as the insureds "lost their real property when the state government ordered that the properties could no longer be used for their intended purposes – as dine-in restaurants." *Id*., at *10. The court added that the "Policy's language *is* susceptible to this interpretation."

In *Cherokee Nation v. Lexington Insurance Co.*, Case No. CV-20-150 (Okla. Dist. Ct. Jan. 29, 2021), the court granted summary judgment to the insureds, agreeing that the phrase "direct physical loss of or damage to property" could reasonably be construed to encompass losses caused by closure orders that rendered property unusable for its intended purpose. Slip Op. at 6-7. In fact, the court rejected the insurer's contrary interpretation—that the phrase "direct physical loss of or damage to property" required physical alteration of property—as patently unreasonable and violative of numerous rules of policy interpretation. *Id*. at 7-9. The court stressed that the phrases "direct physical loss" and "direct physical damage" must be read to have distinct meanings under the governing rules of policy interpretation, observing that the insurer's proffered interpretation

incorrectly equated the two phrases and impermissibly rendered one of them superfluous. *Id.* at 8-9.

Even more recently, the multi-district litigation court in *In Re: Society Insurance Co. COVID-19 Business Interruption Protection Insurance Litigation,* MDL Case No. 2964 (N.D. Ill. Feb. 22, 2021), denied the insurer's motion for summary judgment, finding that Closure Orders issued in response to SARS-CoV-2 could be reasonably interpreted to inflict "direct physical loss" to the insureds' restaurants. The court explained that "[i]t 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*. at 20. In concluding that loss of functionality constitutes a "direct physical loss," the court reasoned that:

> [a] reasonable jury can find that the Plaintiffs did suffer a direct "physical" loss of property on their premises. First, viewed in the light most favorable to the Plaintiffs, the pandemic-caused shutdown orders do impose a *physical* limit: the restaurants are limited from using much of their physical space. It is not as if the shutdown orders imposed a *financial* limit on the restaurants by, for example, capping the dollar-amount of daily sales that each restaurant could make. No, instead the Plaintiffs cannot use (or cannot fully use) the physical space.

Id. at 21-22.

Pursuant to the above authority, and interpreting the Policy broadly in favor of coverage (as is required), Selane's loss of use and functionality of the insured

premises due to the imminent threat of SARS-CoV-2 at its property and the resulting Closure Orders constitutes "direct physical loss of or damage to property" under the Policy. Selane's operations were clearly interrupted because, as the Closure Orders made clear, Selane could not safely operate its business without running the risk that it would introduce SARS-CoV-2 at its property. A lay person interpreting the Policy could reasonably understand the phrase "direct physical loss of or damage to property" to include the loss of use and functionality of insured property. *See MacKinnon*, 31 Cal. 4th at 655.

Thus, contrary to the district court's ruling, Selane has stated a cognizable claim under the Policy's Business Income and Extra Expense Endorsement. In holding otherwise, the district court erred.

C. The District Court Erred in Ignoring Selane's Right to Recovery Under California's Mitigation Doctrine.

The district court also erred in dismissing Selane's First Amended Complaint because the losses Selane suffered as a result of the necessary suspension of its business would still be recoverable as necessary mitigation expenses. 4-ER-486-88 (FAC ¶¶ 91, 94.b., & 98.b).

"An insurer is liable . . . [i]f a loss is caused by efforts to rescue the thing insured from the peril insured against." Cal. Ins. Code § 531(b). This statute codifies "the duty implied in law on the part of the insured to labor for the recovery

and restitution of damaged or detained property … and it contemplates a correlative duty of reimbursement separate from and supplementary to the basic insurance contract." *Young's Mkt. Co. v. Am. Home Assur Co.*, 4 Cal. 3d 309, 313 (1971).

Indeed, "the insured has the duty of ***preventing a threatened*** insurable loss and mitigating such loss when it does occur." *S. Cal. Edison Co. v. Harbor Ins. Co.*, 83 Cal. App. 3d 747, 757 (1978) (emphasis added); *see also AIU*, 51 Cal. 3d at 832–33 & n.15 (rejecting argument that actions "prophylactic in nature" "cannot be the subject of insurance"). When an insured prevents a threatened loss, it "acts for the benefit of the insurer," giving rise to the insurer's duty "to reimburse the insured for prevention and mitigation expenses." *S. Cal. Edison*, 83 Cal. App. 3d at 757.

Had Selane not suspended its operations in accordance with the government orders, it almost certainly would have allowed the virus to come onto property insured by Continental. As discussed above, the presence of the virus constitutes covered property damage. By closing down, Selane avoided covered property damage, as well as potential claims by others that Selane contributed to the spread of the virus onto other property. *See Globe Indem. Co. v. State*, 43 Cal. App. 3d 745, 748 (1974) (fire suppression costs incurred to prevent fire from spreading to others' property covered as mitigation); *accord AIU*, 51 Cal. 3d at 833

(environmental response costs "incurred largely to prevent damage previously confined to the insured's property from spreading . . . are 'mitigative' in character"); *Watts Indus., Inc. v. Zurich Am. Ins. Co.*, 121 Cal. App. 4th 1029, 1043 (2004) (removal of parts to stop leaching of lead into water supply covered as "reasonable" "remediation and mitigation").

D. The District Court Erred in Granting Continental's Motion Without Permitting Selane to Develop Extrinsic Evidence.

The district court further erred by not giving Selane the opportunity to develop extrinsic evidence in support of its proffered interpretation of the relevant policy terms. If there was any doubt as to whether Selane's interpretation was correct, or at least reasonable, then Selane should have been permitted to pursue discovery concerning the parties' understanding and interpretation of those provisions. Indeed, under California law, courts are required to review extrinsic evidence whenever that evidence could bear on the contracting parties' intent. *See Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 39–40 (1968) ("[R]ational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties."); *Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 391 (2006) ("'Even if a contract appears unambiguous [], a latent ambiguity may be exposed by extrinsic evidence . . . .'").

Here, extrinsic evidence is necessary and would include evidence of the Policy's drafting, including with respect to the Microbe Exclusion, as well as how Continental understood the critical provisions. Moreover, given Mr. Robusto's statements and Continental's decision to issue other policies with virus exclusions, Selane is entitled to develop extrinsic evidence regarding Continental's understanding of the import of virus exclusions.

Because Selane is entitled to have the district court consider extrinsic evidence, it must be given a reasonable chance to develop such evidence. *See Aragon-Haas v. Family Sec. Ins. Servs., Inc.*, 231 Cal. App. 3d 232, 238–41 (1991) (error to dismiss complaint without allowing plaintiff to develop extrinsic evidence in support of interpretation). Thus, the district court erred in dismissing Selane's First Amended Complaint with prejudice without first giving Selane the opportunity to develop extrinsic evidence bearing on the interpretation of the disputed policy terms.

E. The District Court Erred in Dismissing Selane's Bad Faith, Declaratory Relief, and UCL Claims and Selane's Demand for Punitive Damages.

The district court based its dismissal of Selane's bad faith, declaratory relief, and UCL claims, and Selane's associated demand for punitive damages, solely on its erroneous conclusion that Selane had not alleged a covered loss under the

Policy. However, because the district court's ruling regarding coverage was erroneous, so, too, was the district court's determination that Selane's bad faith, declaratory relief, and UCL claims must necessarily fail. Because Selane's breach of contract claim is viable, there was no reasonable basis for the district court to grant judgment in favor of Continental on Selane's bad faith, declaratory relief, and UCL claims. *See Manzarek*, 519 F.3d at 1034 (when insured's breach of contract claim remained viable, the district court "erred by summarily dismissing the claim for breach of the implied covenant"); *S. Cal. Pizza Co., LLC v. Certain Underwriters*, 40 Cal. App. 5th 140, 155 (2019) (when underlying suit was potentially subject to coverage under liability insurance policy, dismissal of insured's bad faith claim was error).

CONCLUSION

For the foregoing reasons, the district court's basis for granting Continental's motion to dismiss—that neither the presence of SARS-CoV-2 nor the substantial impairment of property constitute "direct physical loss of or damage to property" as that phrase is used in the Policy—is contrary to California law and Selane's reasonable expectations of coverage. Accordingly, Selane's breach of contract claim is viable, and Continental was not (and is not) entitled to judgment.

Furthermore, the district court's only basis for dismissing Selane's bad faith, declaratory relief, and UCL claims was its erroneous conclusion that Selane had

not alleged a covered loss under the Policy. Because that conclusion is erroneous, so, too, was the district court's order dismissing Selane's bad faith, declaratory relief, and UCL claims and Selane's demand for punitive damages.

Therefore, the district court's judgment should be reversed, and the case should be remanded to the district court for further proceedings.

Dated: February 25, 2021

Respectfully submitted,

PASICH LLP

By: */s/ Shaun H. Crosner*

Kirk Pasich
Shaun H.Crosner
Michael S. Gehrt
Jacquelyn M. Mohr
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,859 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word (Version 2010) Times New Roman, font size 14.

Dated: February 25, 2021

Respectfully submitted,

PASICH LLP

By: */s/ Shaun H. Crosner*
Shaun H. Crosner

Attorneys for Appellant

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2 plaintiff and appellant is not aware of any related cases currently pending before this Court.

Dated: February 25, 2021

Respectfully submitted,

PASICH LLP

By: */s/ Shaun H. Crosner*
Shaun H. Crosner

Attorneys for Appellant

ADDENDUM

ADDENDUM

West's Annotated California Codes
Insurance Code (Refs & Annos)
Division 1. General Rules Governing Insurance (Refs & Annos)
Part 1. The Contract (Refs & Annos)
Chapter 6. Loss
Article 2. Causes of Loss

West's Ann.Cal.Ins.Code § 531

§ 531. Rescue from peril insured against

Currentness

An insurer is liable:

(a) Where the thing insured is rescued from a peril insured against, and which would otherwise have caused a loss, if, in the course of such rescue, the thing is exposed to a peril not insured against, and which permanently deprives the insured of its possession, in whole or in part.

(b) If a loss is caused by efforts to rescue the thing insured from a peril insured against.

Credits
(Stats.1935, c. 145, p. 510.)

West's Ann. Cal. Ins. Code § 531, CA INS § 531
Current with urgency legislation through Ch. 3 of 2021 Reg.Sess

End of Document

West's Annotated California Codes
Civil Code (Refs & Annos)
Division 3. Obligations (Refs & Annos)
Part 2. Contracts (Refs & Annos)
Title 3. Interpretation of Contracts (Refs & Annos)

West's Ann.Cal.Civ.Code § 1636

§ 1636. Mutual intention to be given effect

Currentness

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.

Credits
(Enacted in 1872.)

Notes of Decisions (576)

West's Ann. Cal. Civ. Code § 1636, CA CIVIL § 1636
Current with urgency legislation through Ch. 3 of 2021 Reg.Sess

End of Document

West's Annotated California Codes
Civil Code (Refs & Annos)
Division 3. Obligations (Refs & Annos)
Part 2. Contracts (Refs & Annos)
Title 3. Interpretation of Contracts (Refs & Annos)

West's Ann.Cal.Civ.Code § 1638

§ 1638. Ascertainment of intention; language

Currentness

The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

Credits
(Enacted in 1872.)

Notes of Decisions (383)

West's Ann. Cal. Civ. Code § 1638, CA CIVIL § 1638
Current with urgency legislation through Ch. 3 of 2021 Reg.Sess

End of Document

West's Annotated California Codes
Civil Code (Refs & Annos)
Division 3. Obligations (Refs & Annos)
Part 2. Contracts (Refs & Annos)
Title 3. Interpretation of Contracts (Refs & Annos)

West's Ann.Cal.Civ.Code § 1641

§ 1641. Whole contract, effect to be given

Currentness

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.

Credits
(Enacted in 1872.)

Notes of Decisions (275)

West's Ann. Cal. Civ. Code § 1641, CA CIVIL § 1641
Current with urgency legislation through Ch. 3 of 2021 Reg.Sess

End of Document

West's Annotated California Codes
Civil Code (Refs & Annos)
Division 3. Obligations (Refs & Annos)
Part 2. Contracts (Refs & Annos)
Title 3. Interpretation of Contracts (Refs & Annos)

West's Ann.Cal.Civ.Code § 1644

§ 1644. Sense of words

Currentness

The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

Credits
(Enacted in 1872.)

Notes of Decisions (249)

West's Ann. Cal. Civ. Code § 1644, CA CIVIL § 1644
Current with urgency legislation through Ch. 3 of 2021 Reg.Sess

End of Document

West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 4. Miscellaneous Provisions (Refs & Annos)
Title 1. Of the General Principles of Evidence

West's Ann.Cal.C.C.P. § 1859

§ 1859. Construction of statutes or instruments; intent

Currentness

In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.

Credits
(Enacted in 1872.)

Notes of Decisions (1930)

West's Ann. Cal. C.C.P. § 1859, CA CIV PRO § 1859
Current with urgency legislation through Ch. 3 of 2021 Reg.Sess

End of Document

CN: 2020221232
SN: 12
PC: 7

The Honorable Michelle Szambelan

FILED
NOV 23 2020
Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SPOKANE COUNTY

PERRY STREET BREWING COMPANY, LLC, a Washington limited liability company,

Plaintiff,

v.

MUTUAL OF ENUMCLAW INSURANCE COMPANY, a Washington insurance company,

Defendant.

NO. 20-2-02212-32

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: COVERAGE GRANT

THIS MATTER came before the Court on Plaintiff's Motion for Partial Summary Judgment Re: Coverage Grant ("Motion"). The Court has duly considered the oral argument of the parties, the files and records herein, and the below-listed pleadings, papers, declarations, and exhibits submitted by the parties:

1. Plaintiff's Motion;

2. Declaration of Ben Lukes;

3. Declaration of John Cadagan;

GORDON TILDEN THOMAS CORDELL
600 University Street
Suite 2915
Seattle, WA 98101
206.467.6477

4. Defendant Mutual of Enumclaw Insurance Company's Opposition to Plaintiff's Motion for Partial Summary Judgment;

5. Declaration of Steven Caplow in Support of Defendant Mutual of Enumclaw Insurance Company's Opposition to Plaintiff's Motion for Partial Summary Judgment;

6. Plaintiff's Reply.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. Plaintiff's Motion is GRANTED.

2. Pursuant to CR 56, the Court enters the following undisputed facts relevant to its subsequent conclusions of law.

3. Plaintiff Perry Street Brewing Company LLC ("PSBC") owns and operates a brewery and bar with dining business with its principal place of business located at 1025 S. Perry St. # 2, Spokane, WA 99202.

4. Defendant Mutual of Enumclaw Insurance Company ("MOE") is an insurer authorized to write, sell, and issue business insurance policies in Washington to policyholders, including PSBC.

5. MOE issued a businessowners policy and related endorsements ("the Policy") with Commercial Property Coverage.

6. PSBC's business property includes property owned and/or leased by PSBC and used by PSBC primarily for operating a brewery and bar with dining services.

7. On or about January 2020, the United States of America saw its first cases of persons infected by COVID-19, which has been designated a worldwide pandemic.

GORDON TILDEN THOMAS CORDELL
600 University Street
Suite 2915
Seattle, WA 98101
206.467.6477

8. In light of this pandemic, on February 29, 2020, Washington Governor Jay Inslee issued Proclamation 20-5, declaring a State of Emergency for all counties in the state of Washington as the result of COVID-19.

9. Thereafter, Governor Inslee issued a series of certain proclamations and orders affecting many persons and businesses in Washington, whether infected with COVID-19 or not, requiring certain public health precautions.

10. On March 13, 2020, Governor Inslee issued Proclamation 20-11, "Statewide Limits on Gatherings," which prohibited all gatherings of 250 people or more in all Washington counties, including Spokane County.

11. On March 16, 2020, Governor Inslee issued Proclamation 20-14, "Reduction of Statewide Limits on Gatherings," which prohibited all gatherings of 50 people or more in all Washington counties, including Spokane County, and further prohibited gatherings of fewer people unless organizers of those activities complied with certain social distancing and sanitation measures.

12. Also on March 16, 2020, Governor Inslee issued Proclamation 20-13, "Statewide Limits: Food and Beverage Services, Areas of Congregation," which prohibited the onsite consumption of food and/or beverages in a public venue, including restaurants, bars, or other similar venues in which people congregate for the consumption of food or beverages.

13. By order of Governor Inslee effective October 6, 2020, for counties in "Phase Two," including Spokane County, although some indoor dining is allowed, dining and consumption of beverages are still curtailed compared to pre-pandemic. For example, restaurant table group sizes remain limited, the number of diners is capped at no more than 50 percent of capacity, hours remain restricted, and bar counters remain closed. *See*

GORDON TILDEN THOMAS CORDELL
600 University Street
Suite 2915
Seattle, WA 98101
206.467.6477

https://www.governor.wa.gov/sites/default/files/COVID19%20Phase%202%20and%203%20Restaurant%20and%20Tavern%20Guidance.pdf?utm_medium=email&utm_source=govdelivery.

14. Under the Business Income (and Extra Expense) Coverage Form of the Policy, MOE promised to pay PSBC for "direct physical loss of or damage to property at premises which are described in the Declarations" "caused by or resulting from any Covered Cause of Loss."

15. Whether the above undisputed facts establish coverage with the Business Income (and Extra Expense) Coverage Form as a matter of law for "direct physical loss of or damage to" property at premises—an issue on which PSBC bears the burden of proof—is the threshold issue for determination on PSBC's Motion under CR 56.

16. Determining insurance coverage is a two-step process. First, the insured must show that the loss falls within the scope of the policy's insured losses. Second, to avoid coverage the insurer must show that specific policy language excludes the loss. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992).

17. PSBC's Motion is directed toward the first step. It does not seek a CR 56 summary judgment determination as to any exclusions of coverage or the amount of relief to be issued.

18. The Court finds that PSBC has established that PSBC's claimed loss falls within the grant of coverage of the Business Income (and Extra Expense) Coverage Form of the Policy as a matter of law, because as a result of the proclamations and orders issued by Governor Inslee, PSBC suffered direct physical loss of its property at premises.

19. The Policy issued by MOE does not define the terms "direct physical loss of or damage to" property at premises.

20. As a result, the Court is mindful of Washington's rules for interpreting insurance policies.

21. In Washington, insuring provisions must be interpreted liberally to provide coverage whenever possible. *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 694, 186 P.3d 1188 (2008).

22. Insurance policies are construed in favor of coverage because: "the purpose of insurance is to insure." *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983).

23. When a term in an insurance policy is subject to multiple, reasonable definitions, the "[policyholder's] reasonable interpretation of the policy must be accepted." *Holden v. Farmers Insurance Co. of Washington*, 169 Wn.2d 750, 760, 239 P.3d 344 (2010).

24. When terms are undefined, Washington requires courts to use their "plain, ordinary, and popular" meaning – how an "average lay person" would understand them. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 876-77, 784 P.2d 507 (1990).

25. The Court may be aided by dictionary definitions, as the Washington Supreme Court so relied upon in *Boeing v. Aetna*.

26. Dictionary definitions of "loss," include "'destruction' 'ruin' or 'deprivation.'" *Loss*, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss.

27. At minimum, PSBC had a "deprivation" of its business property.

28. The undefined phrases "loss of" property and "damage to" property also are distinct from one another. *Nautilus Group, Inc. v. Allianz Global Risks US*, No. C11-5281BHS, 2012 WL 760940 (W.D. Wash. Mar. 8, 2012). In *Nautilus*, the Court reasoned that "if '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*, 2012 WL 760940, at *7.

29. The Court agrees with the rationale in *Nautilus*, especially since the undefined phrases "loss of" and "damage to" have popular meanings distinct from one another.

30. Accordingly, one reasonable interpretation of "direct physical loss of" property at premises is that the interruption of PSBC's business operations as a result of the proclamations was a direct physical loss of PSBC's property because PSBC's property could not physically be used for its intended purpose, i.e., PSBC suffered a loss of its property because it was deprived from using it.

31. The Court finds that this is an interpretation that an average lay person would understand by the phrase "loss of" property in the Policy. *See also Boeing*, 113 Wn.2d at 876.

32. In sum, the Court concludes as a matter of law that PSBC suffered a loss of its property at premises when PSBC lost the ability to use its property at premises for its intended purpose.

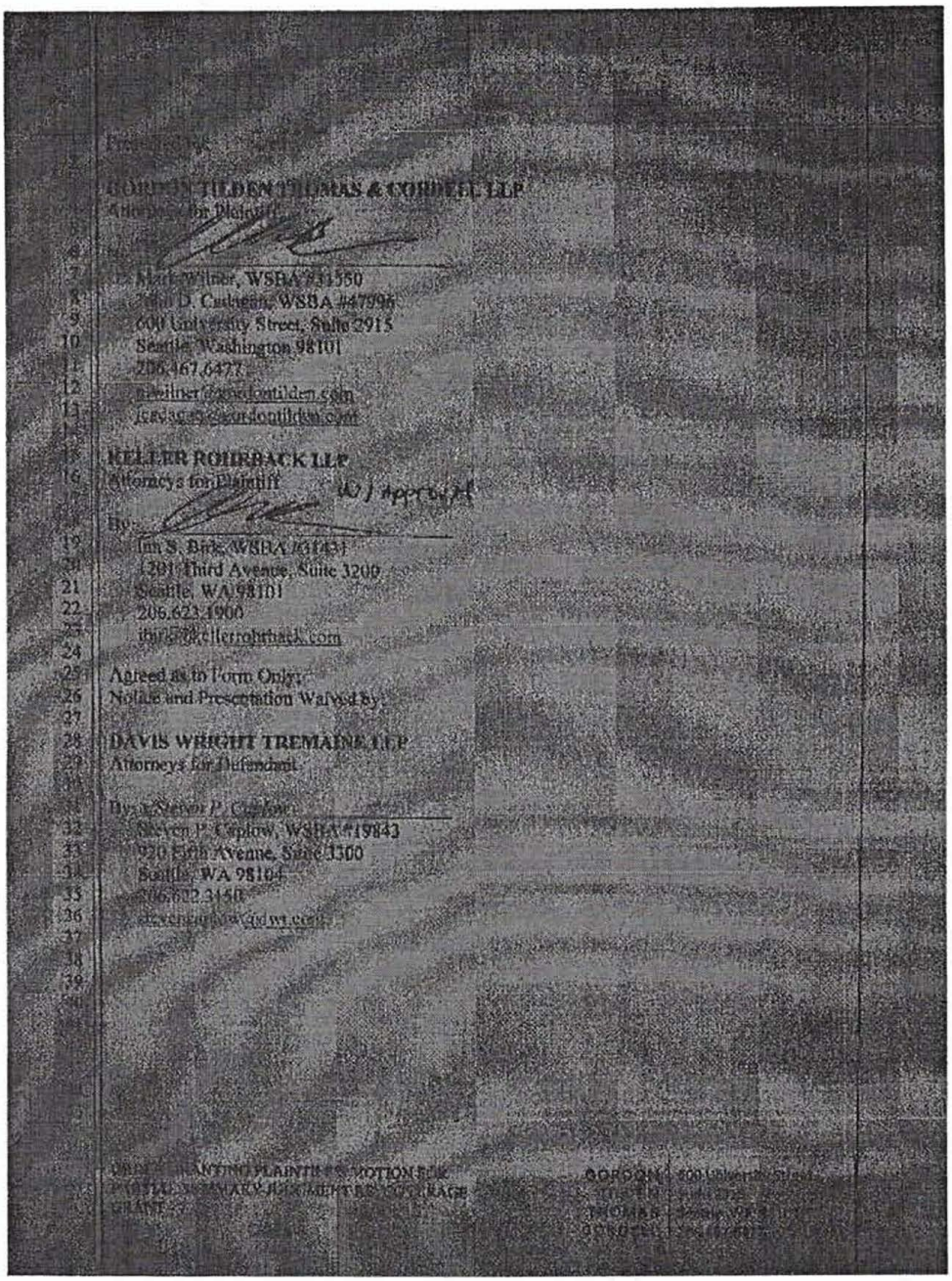
33. The Court, therefore, grants Plaintiff's Motion.

DATED this 23rd day of November 2020.

Michelle D. Szambelan

The Honorable Michelle Szambelan
Superior Court Judge

GORDON TILDEN THOMAS CORDELL
600 University Street
Suite 2915
Seattle, WA 98101
206.467.6477



GORDON TILDEN THOMAS & CORDELL LLP
Attorneys for Plaintiff

By: _____
Mark Wilner, WSBA #31550
John D. Cashean, WSBA #47995
600 University Street, Suite 2915
Seattle, Washington 98101
206.467.6477
mwilner@gordontilden.com
jcashean@gordontilden.com

KELLER ROHRBACK L.L.P.
Attorneys for Plaintiff

By: _____
Ian S. Birk, WSBA #31431
1201 Third Avenue, Suite 3200
Seattle, WA 98101
206.623.1900
ibirk@kellerrohrback.com

Agreed as to Form Only;
Notice and Presentation Waived by:

DAVIS WRIGHT TREMAINE LLP
Attorneys for Defendant

By: _____
Steven P. Caplow, WSBA #19843
920 Fifth Avenue, Suite 3300
Seattle, WA 98104
206.622.3150
stevencaplow@dwt.com

ORDER GRANTING PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION AND CLASS
CERTIFICATION - 1

GORDON TILDEN THOMAS & CORDELL LLP
600 University Street
Suite 2915
Seattle, WA 98101
(206) 467-6477

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER

MINUTE ORDER

DATE: 01/28/2021 TIME: 02:00:00 PM DEPT: CX102

JUDICIAL OFFICER PRESIDING: Peter Wilson
CLERK: Virginia Harting
REPORTER/ERM: Lisa Suzanne Rouly CSR# 9524
BAILIFF/COURT ATTENDANT: Raquel Wangsness

CASE NO: **30-2020-01169032-CU-IC-CXC** CASE INIT.DATE: 11/06/2020
CASE TITLE: **Goodwill Industries of Orange County, California vs. Philadelphia Indemnity Insurance Company**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Insurance Coverage

---

EVENT ID/DOCUMENT ID: 73432648

EVENT TYPE: Demurrer to Complaint
MOVING PARTY: Philadelphia Indemnity Insurance Company
CAUSAL DOCUMENT/DATE FILED: Demurrer to Complaint, 12/23/2020

EVENT ID/DOCUMENT ID: 73450761

EVENT TYPE: Status Conference

APPEARANCES

Appearances noted by way of CourtCall Appearance Calendar, attached hereto and incorporated herein by reference.

Defendant Philadelphia Indemnity Insurance Company's ("Philadelphia") general demurrer to the First, Third and Fifth Causes of Action

Tentative Ruling posted on the Internet.

The Court hears oral argument and confirms the tentative ruling as follows:

Defendant Philadelphia Indemnity Insurance Company's ("Philadelphia") general demurrer to the First, Third and Fifth Causes of Action is OVERRULED. Defendant is ordered to file its answer within 10 days.

A general demurrer challenges the legal sufficiency of a complaint on the ground that it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc. § 430.10(e).) The allegations in the complaint as a whole must be reviewed to determine whether a set of alleged facts constitutes a cause of action. *(People v. Superior Court (Cahuenga's the Spot)* (2015) 234 Cal.App.4th 1360, 1376.) A complaint need only meet fact-pleading requirements, which requires a statement of facts constituting a cause of action in ordinary and concise language, and should allege ultimate facts that, as a whole, apprise defendant of the factual basis of the claim. (Code Civ. Proc. §425.10(a)(1); *Navarrete v. Meyer* (2015) 237 Cal.App.4th 1276, 1284.)

In ruling on a demurrer, the court is guided by the following long-settled rules: The court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. The court may also consider matters which may be judicially noticed. Further, the court gives the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

In a demurrer based on insurance policy language, the insurer "must establish conclusively that this language unambiguously negates beyond reasonable controversy the construction alleged in the body of the complaint." (*Columbia Casualty Co. v. Northwestern Nat. Ins. Co.* (1991) 231 Cal.App.3d 457, 468–473, 282 Cal.Rptr. 389.) To meet this burden, an insurer is required to demonstrate that the policy language supporting its position is so clear that parol evidence would be inadmissible to refute it. (*Id.* at p. 469, 282 Cal.Rptr. 389.) Absent this showing, the court must overrule the demurrer and permit the parties to litigate the issue in a context that permits the development and presentation of a factual record, e.g., summary judgment or trial." (*Palacin v. Allstate Ins. Co.* (2004) 119 Cal. App. 4th 855, 862.)

Philadelphia demurrers to the 1st, 3rd and 5th causes of action on the ground that Plaintiff has not alleged sufficient facts to show "direct physical loss" under the Business Income and Extra Expenses and Civil Authority provisions in its insurance policy because coronavirus and COVID-19 do not physically alter the structure. In response Plaintiff contends (a) that "direct physical loss" does not require physical tangible alteration of the property and that allegations of loss of use are sufficient, and (b) that if physical tangible alteration is required, Plaintiff has satisfied this requirement.

Whether Plaintiff has alleged sufficient facts to overcome Philadelphia's demurrer depends on the interpretation of "direct physical loss". The interpretation of an insurance policy is a question of law and applies the well-settled rules of contract interpretation. (*Waller v. Truck Ins. Exch.* (1995) 11 Cal. 4th 1, 18; *Vardanyan v. AMCO Ins. Co.* (2015) 243 Cal. App. 4th 779, 792.)

"The mutual intention of the parties as it existed at the time of contracting governs interpretation. (Civ. Code, § 1636.) " 'Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.] The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" [citation], controls judicial interpretation.' " (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18, 44 Cal.Rptr.2d 370, 900 P.2d 619.) " 'Any ambiguous terms are resolved in the insureds' favor, consistent with the insureds' reasonable expectations.' " (*Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, 763, 110 Cal.Rptr.2d 844, 28 P.3d 889.) Policy exclusions are strictly construed; exceptions to exclusions are broadly construed in favor of the insured. (*E.M.M.I.*, at p. 471, 9 Cal.Rptr.3d 701, 84 P.3d 385.)

(*Vardanyan v. AMCO Ins. Co.*, *supra*, 243 Cal. App. 4th at 792.)

In *MRI Healthcare Center of Glendale v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766 ("*MRI Healthcare*"), on cross-motions for summary judgment, the court considered whether plaintiff insured suffered "direct physical loss" to an MRI (magnetic resonance imaging) machine within the meaning of a business insurance policy. (*Id.* at 769–770, 777–778.) The *MRI Healthcare* court stated: "A 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.' [Citation.] ... **For loss to be covered, there must be a 'distinct, demonstrable, physical alteration' of the property.**" (*Id.* at 779, emphasis added.) The *MRI Healthcare* court further explained: "For there to be a 'loss' within the meaning of the policy, some **external force** must have acted upon the insured property to cause a **physical change in the condition of the property**, i.e., it must have been 'damaged' within the common understanding of that term." (*Id.* at 780, emphasis added.) Thus, the MRI machine did not suffer any "actual physical 'damage' " by virtue of the fact that it was turned off and could not be turned back

on. (*Ibid.*)

Neither party has cited to any California state cases that have resolved the question whether coronavirus or COVID-19 may cause "direct physical loss" to property.

Here, the Complaint expressly alleges the coronavirus and COVID-19 caused direct physical loss and damages to its property. The Complaint makes the following specific factual allegations: coronavirus and COVID-19 are contained in respiratory droplets called aerosols that stay on surfaces and in the air for up to a month, physically alters the air and surfaces to which it attaches and causes them to be unsafe, deadly and dangerous (Complaint, at ¶¶2, 20, 22-26); that "[r]ecognizing the ability of the coronavirus to attach onto surfaces," researchers have begun to develop technology to test for the presence of COVID-19 on the surfaces of buildings (Complaint, at ¶21); and that coronavirus and COVID-19 were present at its properties at the time of the State and County closure orders, that when Plaintiff reopened its properties, its employees tested positive, and that it was required to conduct "additional cleaning and sanitization to respond to and remove the coronavirus and COVID-19 from physical surfaces in its insured premises and properties in accordance with public health orders that require such measures to protect against the coronavirus and COVID-19 (Complaint, at ¶¶42-44).

Construing these allegations as true as the Court must on a demurrer, the Court cannot determine as a matter of law that these allegations do not show a "direct physical loss" in accordance with *MRI Healthcare*. (See *Studio 417, Inc. v. Cincinnati Insurance Company* (W.E. Mo. August 12, 2020, Case No. 20-cv-03127-SRB) ___ F. Supp.3d ___, 2020 WL 4692385, 4-5 [plaintiff adequately plead a claim for "direct physical loss" by alleging COVID-19 is a physical substance that lives on surfaces and in the air making its property unsafe and unusable and resulting in direct physical loss].)

The Court recognizes that California federal cases have interpreted *MRI Healthcare* to require a physical change in the property or permanent dispossession of the property to qualify as "direct physical loss" and have generally rejected arguments that business losses due to coronavirus and Covid-19 are covered under Business Income, Extra Expenses and Civil Authority provisions. See Amended Mem. Supp., at pp. 12 -14. However, these federal California cases are not binding on this Court and were decided under a different standard. While these cases are instructive, the allegations in those cases are largely distinguishable from those alleged here. (See e.g, *10E, LLC v. Travelers Indemnity Co. of Connecticut (C.D. Cal. September 2, 2020, Case No. 2:20-cv-04418-SVW-AS)* ___ *F.Supp.2d* ___, *2020 WL 5359653, 1, 5 [no allegations of physical alteration]; Mudpie, Inc. v. Travelers Casualty Ins. Co. of America* (N.D. Cal. September 14, 2020) 2020 WL 5525171, *1, 4-5 [no allegations of any external physical force that induced detrimental change; *West Coast Hotel Management, LLC v. Berkshire Hathaway Guard Insurance Companies* (C.D. Cal. October 27, 2020, Case No. 2:20-cv-05663-VAP-DFMx) ___ F. Supp.3d ___, 2020 WL 6440037 *4-5 [no allegations of physical transformation or requiring that anything needed to be repaired, rebuilt or replaced]; *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.* (S.D. Cal. September 11, 2020, Case No. 20-cv-907-CAB-BLM) 2020 WL 5500221, *1,5 [no factual allegations to support arguments of physical damages].)

More importantly, given the high standard that must be met to prevail on a demurrer on an insurance policy, any doubts must be resolved in favor of the Plaintiff. The Court is not satisfied that there is a sufficiently full record at this demurrer stage to make the determination as a matter of law that the coronavirus and COVID-19 have not, in some manner, caused physical damage to property.

Accordingly, the demurrer is overruled.

The Court overrules Plaintiff's objections to Exhibits B -G and grants Philadelphia's request for judicial notice.

Status Conference

CASE TITLE: Goodwill Industries of Orange County, California vs. Philadelphia Indemnity Insurance

CASE NO: **30-2020-01169032-CU-IC-CXC**

Status Conference continued to April 2, 2021 at 9 AM in this department pursuant to Court's motion.

The parties are ordered to file a joint status report not later than March 26, 2021.

Moving Party is ordered to give notice.

CourtCall® Appearance Calendar

January 2021

28 Thursday

CX102Video **Judge Peter Wilson (Video Only)**

Orange County Superior Court-Santa Ana

02:00 PM PT **Dial: (855) 268-7844** **Code: 8191402#** **PIN: 0135149**

Time	Case Information	Attorney Information
	Case #: 04-2020-01169032 **Case Name:** Goodwill Industries of Orange County Cali. vs. Philadelphia Indemnity Insurance Co. **Proceeding Type:** Court Approved Video Hearing	Firm: Dentons US, LLP Phone: (213) 623-9300 ext. Contact: Ronald D. Kent For: Defendant(s), Philadelphia Indemnity Insurance Co CCID: 11061256
		Firm: Dentons US, LLP Phone: (312) 876-3156 ext. Contact: April Elkovitch For: Defendant(s), Philadelphia Indemnity Insurance Co. CCID: 11062184
		Firm: Dentons US, LLP Phone: (312) 876-3156 ext. Contact: Jeffrey Zachman For: Defendant(s), Philadelphia Indemnity Insurance Co. CCID: 11051155
		Firm: Dentons US, LLP Phone: (312) 876-3156 ext. Contact: John Kirby For: Defendant(s), Philadelphia Indemnity Insurance Co. CCID: 11062176
		Firm: Denton US, LLP - St. Louis Phone: (314) 259-5807 ext. Contact: Richard Fenton For: Defendant(s), Philadelphia Indemnity Insurance Co. CCID: 11051154
		Firm: Dentons US, LLP Phone: (949) 732-3700 ext. Contact: Justin Martin For: Defendant(s), Philadelphia Indemnity Insurance Co. CCID: 11051153

Crystal Castillo ext. 867

CourtCall® Appearance Calendar

January 2021

Same Day Jan 28 2021 12:22PM

28 Thursday

CX102 **Judge Peter Wilson (VC)**

Orange County Superior Court-Santa Ana

02:00 PM PT

Time	Case Information	Attorney Information

Case #: 04-2020-01169032

Case Name:

Goodwill Industries of Orange County Cali. vs. Philadelphia Indemnity Insurance Co.

Proceeding Type:

Status Conference

Firm:	Robins Kaplan LLP
Phone:	(310) 229-5405 ext.
Contact:	Sean R. O'Connor
For:	Defendant(s), Certain Underwriters at Lloyd's
CCID:	11013053

Firm:	Robins Kaplan LLP
Phone:	(310) 552-0130 ext. 5881
Contact:	Amy Churan
For:	Defendant(s), Def. Certain Underwriters at Lloyd's
CCID:	11012869

Firm:	Covington & Burling LLP
Phone:	(415) 591-6016 ext.
Contact:	Joan Li
For:	Plaintiff(s), Goodwill Industries of Orange County, California
CCID:	11039047

Firm:	Cheri Violette-Makino, CSR, Inc.
Phone:	(562) 225-3431 ext.
Contact:	Cheri Violette-Makino - 3584
For:	Court Reporter, Cheri Violette-Makino
CCID:	11037955

Firm:	Covington & Burling LLP
Phone:	(650) 632-4727 ext.
Contact:	Rani Gupta
For:	Plaintiff(s), Goodwill Industries of Orange County Ca.
CCID:	11037941

Firm:	Unrouly Reporting Inc.
Phone:	(714) 319-1139 ext.
Contact:	Lisa Rouly
For:	Court Reporter, Lisa Rouly
CCID:	11072109

Crystal Castillo ext. 867

IN THE DISTRICT COURT OF CHEROKEE COUNTY
STATE OF OKLAHOMA

FILED
JAN 21 2021 08:18
By _____ Deputy

CHEROKEE NATION, CHEROKEE NATION BUSINESSES, LLC, & CHEROKEE NATION ENTERTAINMENT, LLC	)	Case No. CV-20-150
Plaintiff,	)	Hon. Douglas Kirkley
v.	)	
LEXINGTON INSURANCE COMPANY, et al.	)	
Defendants.	)	

COURT'S ORDER AND OPINION AS TO PLAINTIFF CHEROKEE NATION, CHEROKEE NATION BUSINESSES, LLC, & CHEROKEE NATION ENTERTAINMENT, LLC'S FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT ON BUSINESS INTERRUPTION COVERAGE
(Filed on 1/29, 2021)

On December 28, 2020, this matter came on for consideration of Plaintiff Cherokee Nation, Cherokee Nation Businesses, LLC, & Cherokee Nation Entertainment, LLC's (collectively the "Nation") First Motion for Partial Summary on Business Interruption Coverage (the "Motion"). The Court reviewed the briefs, heard the argument of counsel, and after taking the matter under advisement, the Court finds and orders:

Since late 2019,[1] the United States has endured the COVID-19 Pandemic (the "Pandemic"). In response, the Nation, like many other businesses in the State of Oklahoma, temporarily closed its business operations on March 16, 2020 to implement mitigation protocols and modifications to allow its businesses to operate safely. In July 2020, the Nation asked the Court to interpret the Tribal Property Insurance Program ("TPIP") Policy that provided business interruption insurance to the Nation's covered properties from July 1, 2019, through July 1, 2020. Defendant Insurers[2] responded in September 2020, arguing that that the Nation did not suffer *direct physical loss or damage* as contemplated by the TPIP Policy and that various exclusions bar coverage. The Court, having read the TPIP Policy to interpret its plain and ordinary meaning, now finds for the Nation, **GRANTS** the Nation's First Motion for Partial Summary Judgment on

[1] *U.S. Covid Cases Found as Early as December 2019, Says Study,* BLOOMBERG NEWS (Dec. 1, 2020) https://www.bloomberg.com/news/articles/2020-12-01/covid-infections-found-in-u-s-in-2019-weeks-before-china-cases.

[2] Defendant Insurers refers to all Defendants in the above-styled case.

Business Interruption Coverage and **DENIES** Defendant Insurers' request for Summary Judgment.[3]

FINDINGS OF FACT

Both parties request the Court interpret the TPIP Policy and issue summary judgment in their favor.[4] The parties also assert—and the Court agrees—that the interpretation of insurance contracts is a question of law;[5] consequently, there are no facts that would prevent the Court from determining coverage.[6] Based on review of the briefs, the evidence submitted, and the argument of the parties, the Court finds the following undisputed material facts for purposes of summary judgment:

1. The Nation purchased the Tribal Property Insurance Property Policy (Policy Nos. 017471589/06 (Dec 37) 9109; (Dec 31) 9497; an (Dec 15) 9110) with all-risk business interruption coverage from July 1, 2019 through July 1, 2020. The Nation's Motion at 3 (Material Fact No. 1; *Ex.* 5 – the TPIP Policy [hereinafter also simply referenced to as the "TPIP" or "TPIP Policy"]); Defendant Insurers' Opposition to the Motion at 3 (Response to Material Fact No. 1 and Additional Material Fact Nos. 1-7).

2. Defendant Insurers issued several excess policies which incorporated the language of the TPIP Policy but also included various exclusions to coverage provided by the TPIP Policy.[7]

---

[3] Because the question before the Court is the question of coverage provided by the TPIP Policy's business interruption provision, the Court does not make a determination concerning damages and Defendant Insurers' status as excess carriers is not relevant. The TPIP Policy is attached as exhibit 5 to the Nation's Motion.

[4] The Nation's Motion at 4; Defendant Insurers' Opposition to the Nation's Motion at 20.

[5] The Nation's Motion at 3 (*citing e.g., Oklahoma Attorneys Mut. Ins. Co. v. Cox*, 2019 OK CIV APP 25, ¶ 8 ("The interpretation of an insurance policy, with its exclusions, is a question of law.")); Defendant Insurers' Opposition to the Nation's Motion at 6-7 (*citing May v. Mid-Century Ins. Co*, 2006 OK 100, ¶ 22).

[6] Because this is not a motion to compel, the Court has not seen Defendant Insurers' discovery requests or the Nation's responses, and consequently the Court cannot speak to the substance of Defendant Insurers' discovery dispute claim, except to say they are not relevant to the matter at hand. As a preliminary matter, the Court finds that if Defendant Insurers had specific material facts it could dispute with additional discovery, they should have stated as much and taken advantage of the right to file an affidavit granted to them pursuant to District Court Rule 13(d) and 12 O.S. § 2056(f). *McClain v. Riverview Vill., Inc.*, 2011 OK CIV APP 57, ¶ 7; *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1236 (10th Cir. 2007); *Dreiling v. Peugeot Motors of Am., Inc.*, 850 F.2d 1373, 1376 (10th Cir. 1988). Having waived that right—after being advised by the Nation of that procedure and filing a sur-reply where such an affidavit could have been attached—the Court will not do the work for Defendant Insurers to figure out what facts could, in theory, or possibly, be disputed.

[7] For purposes of summary judgment, the Court has taken Defendant Insurers at their word and assumed the various excess policies' exclusions are binding on the TPIP Policy. The Nation asserted that various fact-based defenses, such as the reasonable expectation doctrine and lack of

Defendant Insurers' Opposition the Nation's Motion at 3 (Response to Material Fact No. 1 and Additional Material Fact No. 1).

3. The Nation closed its covered properties due to the Pandemic. The Nation's Motion at 3-4, 11-13 (Material Fact No. 2; *Ex. 3* – Principal Chief Chuck Hoskins Executive Order); Defendant Insurers' Opposition to the Nation's Motion at 5-6 (Additional Material Fact Nos. 10-12); K. Querry, *Cherokee Nation Suspends Casino, Hotel Operations*, KFOR (Mar. 16, 2020), https://kfor.com/news/coronavirus/cherokee-nation-suspends-casino-hotel-operations/.[8]

4. While closed, the Nation repaired its covered property by implementing various mitigation protocols and modifications, such as installing acrylic barriers and sanitation stations, staggering seating and gaming machines, replacing air filters, etc. Defendant Insurers' Opposition to the Nation's Motion at 6 (Additional Material Fact Nos. 12 & 13); The Nation's Reply to Defendant Insurers' Opposition to the Nation's Motion for Partial Summary Judgment on Business Interruption Coverage (the "Reply") at 12-13 (*See also Ex.* 8, D. Sean Rowley, *Cherokee Nation Businesses gives reopening date for its casinos*, CHEROKEE PHOENIX (June 5, 2020); *and Ex.* 9, Cherokee Nation Businesses, Responsible Hospitality at 10).

5. In June 2020, the Nation reopened its covered properties. Defendant Insurers' Opposition to the Nation's Motion at 6 (Additional Material Fact No. 12); The Nation's Reply at 10-11 (*See also Ex.* 8, D. Scan Rowley, *Cherokee Nation Businesses gives reopening date for its casinos*, CHEROKEE PHOENIX (June 5, 2020); *and see generally Ex.* 9, Cherokee Nation Businesses, Responsible Hospitality).

6. The Pandemic is a fortuitous event. The Nation's Motion at 3 (Material Fact No. 3); *Texas E. Transmission Corp Texas E. Transmission Corp. v. Marine Office–Appleton & Cox Corp.*, 579 F.2d 561, 564 (10th Cir. 1978) (interpreting Oklahoma insurance law).[9]

---

consideration, bar application of the individual excess exclusions to its claim and reserved those arguments. Because the Court grants the Nation's First Motion for Partial Summary Judgment on Business Interruption Coverage for the reasons stated herein, those arguments are now moot.

[8] The Court also takes judicial notice of Findings of Fact Nos. 3-5 provided herein, as it is common knowledge within the territorial jurisdiction of the Court that the Nation closed its businesses due to the Pandemic in March 2020, implemented safety protocols and modifications and has since reopened. 12 O.S. § 2202.

[9] As the Tenth Circuit observed when interpreting Oklahoma law:

> A fortuitous event . . . is an event which so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, as the loss of a vessel, provided that the fact is unknown to the parties.

CONCLUSIONS OF LAW

I. THE NATION SUFFERED A COVERED LOSS

The central issue before the Court is whether the Nation's businesses closures due to the Pandemic constitute a covered loss under the TPIP Policy.[10] The TPIP Policy provides coverage for *all risk of direct physical loss or damage*. **Defendant Insurers did not define that important phrase within the TPIP Policy.** The Nation argues that *direct physical loss* occurs when covered property is "rendered unusable for its intended purpose."[11] Defendant Insurers say that *direct physical loss or damage* is a phrase-of-art, which means there must be "distinct, demonstrable, physical alteration to the property."[12] Though this appears to present a first-impression question in Oklahoma, the interpretation of "direct physical loss" is something that courts around the country have struggled with for some time – and that is subject to particularly intense, widespread litigation now in light of the numerous other business closures precipitated by the current Pandemic. Other courts wrestling with this question have come down on both sides.

The Court must the read the TPIP policy "as a whole giving the language its ordinary and plain meaning." *Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 22. But where an insurance provision "is susceptible to two interpretations from the standpoint of a reasonably prudent layperson, then the language is ambiguous." *Id.* In such a circumstance: "the court should construe the terms against the insurer and in favor of the insured." *Oklahoma Attorneys Mut. Ins. Co. v. Cox*, 2019 OK CIV APP 25, ¶ 9; *Serra v. Estate of Broughton*, 2015 OK 82, ¶ 10 (When an insurance term or phrase is ambiguous, "words of inclusion will be construed liberally in the insured's favor, and words of exclusion will be construed strictly.").

With these cannons in mind, the Court agrees with the Nation that the central issue—the interpretation of *direct physical loss or damage*---could have been preempted if Defendant Insurers would have simply defined the phrase within the TPIP Policy. Carriers have utilized the phrase *direct physical loss* for over fifty (50) years and courts have begged carriers to define the phrase to avoid the precise issue before the Court now. *E.g., W. Fire Ins. Co. v. First Presbyterian Church,*

Texas E. Transmission Corp., 579 F.2d at 564 (omission in original). The Pandemic is an event that neither the Nation nor Defendant Insurers were aware would occur in 2020, rendering it a fortuitous event.

[10] Oklahoma law is clear: under an all-risk policy the Nation must only show (1) it suffered a covered loss and (2) the loss was fortuitous. *Oklahoma Sch. Risk Mgmt. Tr. v. McAlester Pub. Sch.*, 2019 OK 3, ¶ 16 ("An 'all-risk' policy [covers] a loss when caused by any fortuitous peril not specifically excluded by the policy."); *Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 564 (10th Cir. 1978). It appears the standard for all-risk policies is intentionally a low bar for the Nation to clear because it is "a special type of insurance extending to risks not usually contemplated." *Texas E. Transmission Corp.*, 579 F.2d at 564; *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F. Supp. 1396, 1399 (D. Minn. 1989) (All-risk policies were "developed to protect the insured in eases where loss or damage to property is difficult or impossible to explain.").

[11] The Nation's Motion at 8-12.

[12] Defendant Insurers' Opposition to the Nation's Motion at 9-13.

165 Colo. 34, 40–41, 437 P.2d 52, 56 (1968) ("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. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner."); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709–10 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013). Despite these pleas and the known confusion surrounding the phrase "direct physical loss," Defendant Insurers made no attempt to clarify or define that phrase within the TPIP policy to avoid the Nation's interpretation that losses such as the closure of a business in response to the Pandemic would be covered—at least, not until it was too late.

The day after the Chickasaw Nation and Cherokee Nation of Oklahoma filed this same action under this same policy, Defendant Insurers added a new Communicable Disease exclusion to the TPIP Policy that preempted coverage due to the fear or threat of viruses. This action on the part of the Defendant Insurers can mean one of two things. Either the exclusion was added to provide clarity for Defendants' interpretation—*i.e.*, that Pandemic-related closures like the one at issue here are *not* covered—which underscores the confusion surrounding the existing policy language and the conclusion that the TPIP is ambiguous. Or the exclusion was added because the Nation's interpretation is correct—*i.e.*, that Pandemic-related closures like the one at issue here *are* covered—and Defendant Insurers needed to create a truly new exclusion in order to avoid liability for such claims. In either event—even assuming the Defendant Insurer's interpretation of the existing language is reasonable—Oklahoma law would require the Court to adopt the Nation's interpretation.

This is the same result reached in *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company*. No. 2:20-CV-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020). There, the court compared the same interpretations of *direct physical loss or damage* forwarded by the Nation and Defendant Insurers respectively to determine coverage resulting from the Pandemic. The Eastern District of Virginia—invoking the same cannons of construction utilized in Oklahoma—reviewed many of the cases cited to the Court and reached the same conclusion:

> 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. *See Virginia Farm Bureau Mut. Ins. Co. v. Williams*, 278 Va. 75, at 81 (2009) ("[I]f disputed policy language is ambiguous ... we construe the language in favor of coverage and against the insurer."). Based on the case law, the Court finds that it is plausible that a fortuitous "direct physical loss" could mean that the property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural, sources. *See US Airways, Inc. v. Commonwealth Ins. Co.*, 2004 WL 1094684, at *5 (Va. Cir. Ct. May 14, 2004) (holding FAA order grounding flights at Reagan National Airport could constitute direct physical loss when "nothing in the Policy ... requires that [there] be damage to [the insured's] property."). Here, while the Light Stream 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. That is, the facts of this case are similar those where courts found that asbestos, ammonia, odor from methamphetamine lab, or toxic gasses from drywall,

> which caused properties uninhabitable, inaccessible, and dangerous to use, constituted a direct physical loss.

Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co., No. 2:20-CV-265, 2020 WL 7249624, at *8 (E.D. Va. Dec. 9, 2020). Defendant Insurers could have avoided this outcome if they had defined *direct physical loss or damage* as they (and others before them) have argued it should be interpreted. *See infra* fn. 17. But Defendants did not do so.

As explained in more detail below, the Court finds the Nation's interpretation of the TPIP is reasonable. Thus, even if the Defendant Insurers interpretation was also reasonable, the Court would be left with two competing interpretations—a result commensurate with the conclusions of other courts around the country. Under Oklahoma law, such patent ambiguity must be interpreted in the Nation's favor. *Oklahoma Attorneys Mut. Ins. Co. v. Cox*, 2019 OK CIV APP 25, ¶ 9; *Serra v. Estate of Broughton*, 2015 OK 82, ¶ 10. Ultimately, however, the Court also finds that Defendant's interpretation of "direct physical loss" is unreasonable, and the Nation's interpretation is correct. Under either rationale, the Nation has a covered loss.

A. The Nation presented the only reasonable interpretation.

The Court finds that the Nation's interpretation is the correct interpretation and Defendant Insurers have forwarded an unreasonable interpretation of *direct physical loss or damage* in the context of the TPIP Policy.

First, the Nation cites to several cases where *direct physical loss* has been interpreted to include property rendered unusable for its intended purpose. *E.g., Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52 (1968); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *7-9 (D. Or. June 7, 2016); *see also* the Nation's Motion at fn. 11. This includes several cases evaluating closures due to the Pandemic. *Harrison v. Optical Services, USA et al.*, BER-L-3681-20, at 27 (Bergen Cnty., N.J. Aug. 13, 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020); *Elegant Massage, LLC*, No. 2:20-CV-265, 2020 WL 7249624, at *8 (E.D. Va. Dec. 9, 2020). Defendant Insurers characterize the Nation's argument as coverage for all loss of use, regardless of the terms in the TPIP Policy. But this argument appears to be misplaced, as the Nation's interpretation accounts for direct physical loss through the closure itself, as another court observed:

> As an initial matter, the Policies do not define the terms 'direct,' 'physical loss,' or 'physical damage.' The Court must therefore turn first to the ordinary meaning of those terms. Merriam-Webster defines 'direct,' when used as an adjective, as 'characterized by close logical, causal, or consequential relationship,' as 'stemming immediately from a source,' or as 'proceeding from one point to another in time or space without deviation or interruption.' *Direct*, Merriam-Webster (Online ed. 2020). Merriam-Webster defines 'physical' as relating to 'material things' that are 'perceptible especially through the senses.' *Physical*, Merriam-Webster (Online ed. 2020). The term is also defined in a way that is tied to the body: 'of or relating to the body.' *Id.* Webster's Third New International Dictionary defines physical as 'of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary.' Physical, Webster's Third New International Dictionary (2020). The

> definition from Black's Law Dictionary comports: 'Of, relating to, or involving material things; pertaining to real, tangible objects.' *Physical*, Black's Law Dictionary (11th ed. 2019). Finally, 'loss' is defined as 'the act of losing possession,' 'the harm of privation resulting from loss or separation,' or the 'failure to gain, win, obtain, or utilize.' *Loss*, Merriam-Webster (Online ed. 2020). Another dictionary defines the term as 'the state of being deprived of or of being without something that one has had.' *Loss*, Random House Unabridged Dictionary (Online ed. 2020). ***Applying these definitions reveals that the ordinary meaning of the phrase 'direct physical loss' includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions.***

E.g., North State Deli, LLC, et al. v. Cincinnati Insurance Co., et al., 20-CVS-02569 (Durham Cnty., N.C. Oct. 9, 2020) (emphasis added) (Granting plaintiff-insured summary judgment for business interruption coverage due to the COVID Pandemic). In fact, it was undisputed that the Nation could not physically utilize its property because of the Pandemic.

Surrounding provisions of the TPIP Policy also demonstrate that requiring a physical alteration of the property is inconsistent with the policy before the Court. For example, several exclusions within the TPIP Policy exclude losses that do not require physical alteration to the property, such as infidelity, loss of market, and inventory shortage. *TPIP Policy* at 24-25. There is simply no explanation as to why Defendant Insurers would exclude causes of loss that would not meet the interpretation of *direct physical loss* regardless.

The same is true of the new Communicable Disease exclusion that was added to the TPIP policy language ***one day after*** other tribes filed the same declaratory action concerning the same policy as the Nation:

ENDORSEMENT 5

COMMUNICABLE DISEASE EXCLUSION

1. This policy, subject to all applicable terms, conditions and exclusions, covers losses attributable to direct physical loss or physical damage occurring during the period of insurance. Consequently and notwithstanding any other provision of this policy to the contrary, this policy does not insure any loss, damage, claim, cost, expense or other sum, directly or indirectly arising out of, attributable to, or occurring concurrently or in any sequence with a Communicable Disease or the fear or threat (whether actual or perceived) of a Communicable Disease.

The Nation's Motion (*Ex. 11* – New TPIP Policy Endorsement 5 (Mar. 25, 2020) ("Communicable Disease Exclusions")).[13] This new exclusion concerns the "fear or threat (whether actual or

[13] The Court would find the Nation's interpretation reasonable even in the absence of this exclusion. The Court considers this exclusion and the fact that it was added one day after considering the "patent ambiguity" created by Defendant Insurers failure to define *direct physical*

perceived) of a Communicable Disease." If pandemics as a cause of loss were clearly not covered by the 2019-2020 TPIP Policy, then the new exclusion would be superfluous.[14] *Compare Wynn v. Avemco Ins. Co.*, 1998 OK 75, ¶ 9 ("[I]t is presumed, unless a contrary intention appears, that the parties intended that the renewal policy cover the same terms, conditions, and exceptions as the original policy.") *with Orren v. Phoenix Ins. Co.*, 288 Minn. 225, 229-30 (1970) ("Moreover, in our opinion, the change in language made in the revised policy persuasively illustrates the ambiguity."). As discussed above, the addition of the exclusion only makes sense where the Nation's interpretation applies and pandemics can constitute a covered cause of loss.

The "all risk" nature of the TPIP policy also cuts against Defendant Insurers' interpretation. First, the true triggering language of coverage under the TPIP Policy is *all risk of direct physical loss or damage*. As the Nation highlighted within its Motion and Reply, "*all risk of*" expands coverage to include losses from anticipated harms or danger. The Nation's Motion at 14-15; The Nation's Reply at 10. Indeed, the Nation notes that the TPIP Policy provides coverage specifically for ***imminent*** physical loss:

> In case of actual or ***imminent physical loss*** or damage of the type insured against by this Policy, the expenses incurred by the Named Insured in taking reasonable and necessary actions for the temporary protection and preservation of property insured hereunder shall he added to the total physical loss or damage otherwise recoverable under the Policy and be subject to the applicable deductible and without increase in the limit provisions contained in this Policy.

TPIP Policy at 13 (Protection and Preservation of Property) (emphasis added). Common sense dictates that the Policy cannot require the insured to demonstrate physical alteration to the property while also promising coverage for anticipated loss as well. This is consistent with the only Oklahoma law available on the issue as well, as the Oklahoma Court of Civil Appeals has stated that "risks of direct physical loss" includes "anticipated damage" to property. *Gutkowski v. Oklahoma Farmers Union Mut. Ins. Co.*, 2008 OK CIV APP 8, ¶ 11. Defendant Insurers' failed to dispute the Nation's interpretation of *all risk of* and did not submit their own interpretation.

Defendant Insurers' interpretation of *direct physical loss or damage* also fails to abide by Oklahoma law for construing insurance policies—specifically, the rule against superfluity. "The rule of construction is that some particular operation, effect, and meaning must be assigned to each sentence, phrase, and word used, and when this may fairly and properly be done, no part of the language used can be rejected as superfluous or unmeaning." *Kingkade v. Cont'l Cas. Co.*, 1912 OK 807, 35 Okla. 99, 128 P. 683, 685 (internal quotation omitted). Applying this foundational

---

loss or damage. Hensley v. State Farm Fire & Cas. Co., 2017 OK 57, ¶ 36. "The presence of patent ambiguity allows for the conduct of the parties to be used to determine the meaning of the contract." *Id.*

[14] Defendant Hallmark utilizes virtually identical language but goes one step further to specifically identify pandemics in its new "Pandemic and Epidemic Exclusion," further illustrating the purpose of these recent efforts. *See* the Nation's Reply to Defendant Hallmark Specialty Insurance Company's Supplemental Opposition to Nation's Motion for Partials Summary Judgment on Business Interruption Coverage at 6; *see supra* fn. 13.

canon to the TPIP Policy, the Court would entertain that *direct physical damage* may be shown by "distinct, demonstrable, physical alteration to the property;" however, *direct physical loss* must have a distinct meaning. Because the policy provides for *direct physical loss or damage*, the Court must place value in the disjunction "*or*." *See Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020) (citing *Nautilus Grp., Inc. v. Allianz Global Risks US*, No. C11-5281BHS, 2012 WL 760940, at * 7 (W.D. Wash. Mar. 8, 2012) ("if 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous")). The word *loss* is divested of any meaning under Defendant Insurers' interpretation. Tellingly, Defendant Insurers never explain the difference between *direct physical loss* and *direct physical damage* under their interpretation. Therefore, the TPIP Policy must contemplate two categories of covered loss: *direct physical damage*, which may exist under Defendant Insurers' interpretation; and *direct physical loss*, which includes the Nation's interpretation. The Court finds additional support for this interpretation because the policy uses *physical damage* and *physical loss* separately throughout its other provisions, demonstrating the phrases have distinct meanings.[15] The Nation's Motion at 7 (citing the TPIP Policy at 10, 11, 20, 23); *Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 24 ("[W]hen an insurer creates specificity in one clause of a policy and then omits it in a similar context, the omission is considered purposeful and should be given meaning.").[16] Looking at the plain and ordinary meaning of the TPIP Policy, the Court is convinced that the Nation's interpretation gives meaning to each and every word in the TPIP Policy and is the only reasonable interpretation before the Court.

B. Goodwill and the other ISO supplemental cases are distinguishable

When the TPIP Policy is "read as a whole" as required by the Court, it is clear that neither *Goodwill* nor the other Insurance Services Office ("ISO") policy cases listed in Defendant Insurers' Notices of Supplemental Authority are applicable. *Oklahoma Sch. Risk Mgmt.* Tr., 2019 OK 3, ¶ 22. Simply put, the policy language is not the same. *See Goodwill Indus. of Cent. Oklahoma, Inc. v. Philadelphia Indem. Ins. Co.*, No. CV-20-511-R at *1 (W.D. Okla. Nov. 9, 2020).

The policy at issue in *Goodwill* and the vast majority of cases relied upon by Defendant Insurers utilize standardized ISO form policy language. Hearing Tr. 33:3-17 (Oct. 27, 2020) (A. Vance); *see e.g., Goodwill Indus. of Cent. Oklahoma, Inc.*, No. CV-20-511-R, at *1; *see also Colony Ins. Co. v. Jackson*, No. 09-CV-780-TCK-TLW, 2011 WL 2118728, at *3 (N.D. Okla. May 27, 2011) ("ISO is a national insurance policy drafting organization that develops standard

[15] Defendant Insurers rely on the Period of Restoration provision of the TPIP Policy to support its interpretation, but as the Nation showed, the provision relates to the length of time coverage is afforded; it is not a trigger of coverage. The Nation's Reply at 9-11. Moreover, the webpages provided in Defendant Insurers' additional facts demonstrated that the Nation made repairs as contemplated by the Period of Restoration provision. *Id.*

[16] It is also notable that since at least 1968, several courts have rejected Defendant Insurers' interpretation and instructed carriers to clearly limit *direct physical loss or damage* within their policies for it to have the meaning Defendants advance here. *E.g., W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 40–41, 437 P.2d 52, 56 (1968); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709–10 (E.D. Va. 2010), aff'd, 504 F. App'x 251 (4th Cir. 2013). Defendant Insurers failed to do so.

policy forms and files them with each state's insurance regulators. *See French v. Assurance Co. of Am.*, 448 F.3d 693, 697 & n. 1 (4th Cir.2006)."). The TPIP Policy, however, does not utilize the same language, definitions, or provisions as the ISO form policies. First and foremost, the triggering language within the ISO Policies and the TPIP Policy is simply not the same. Courts cited by Defendant Insurers have assigned special meaning to "direct physical loss *of property*" in the ISO Policies. *E.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-cv-03213-JST, 2020 WL 5525171, at *3-4 (N.D. Cal. Sept. 14, 2020) (finding "loss of" requires property be permanently misplaced or unrecoverable); *see also Karen Trihn, DDS, Inc. v. State Farm Gen. Ins. Co.*, No. 5:20-CV-04265-BLF, 2020 WL 7696080, at *4 (N.D. Cal. Dec. 28, 2020) ("In other words, the term 'loss of' contemplates that the property is unrecoverable."). But "*all risk of direct physical loss*"—the triggering language within the TPIP Policy—neither has "property" as the object of the clause nor includes "of" modifying the scope of *loss*. And as previously discussed, the Nation dedicated substantial argument to demonstrate that "all risk of" within the triggering language of the TPIP broadens the scope of coverage contemplated therein.

Further, the *Goodwill* court noted numerous other provisions in the ISO policies that are absent from the TPIP Policy. The *Goodwill* policy required "actual loss" due to a "suspension" of "operation," but such words and requirements are absent from the TPIP Policy. *See Goodwill Indus. of Cent. Oklahoma, Inc.*, No. CV-20-511-R, at *1-2. Meanwhile, the TPIP Policy provides coverage for "imminent loss." *See supra* at 8. To interpret these policies the same would render those different words, definitions, and provisions meaningless, which this Court will not do. *Supra Kingkade*, 1912 OK 807.

Defendant Insurers had the option to adopt ISO language, which the vast majority of carriers in cases cited by Defendant Insurers did; however, the Tribal Property Insurance Program Policy was clearly drafted with more expansive language, presumptively in the hopes of cornering the tribal casino market. But regardless of the motivation behind the chosen language, the triggering language of the TPIP Policy (particularly when interpreted in light of other provisions therein) plainly covers more than the ISO Policies. Accordingly, the *Goodwill* case and other ISO authority is distinguishable and simply not persuasive to the Court.

* * *

For the foregoing reasons, the Court finds that the Nation's is the only reasonable interpretation of the TPIP Policy. However, even assuming Defendant Insurers' interpretation was also reasonable, the result would be a patent ambiguity, which Oklahoma law requires be resolved in favor of coverage. Either way, the Nation's reading would control.

II. THE EXCLUSIONS DO NOT APPLY

"[I]f an insurer desires to limit its liability under a policy, it must employ language that clearly and distinctly reveals its stated purpose." *First United Methodist Church of Stillwater, Inc. v. Philadelphia Indem. Ins. Co.*, 2016 OK CIV APP 59, ¶ 34. "[I]n cases of doubt . . . words of exclusion are strictly construed against the insurer." *Max True Plastering Co.*, 1996 OK 28, 912

P.2d at 865.[17] Utilizing these canons, the Court finds the various exclusions forwarded by Defendant Insurers do not clearly and distinctly apply to the Pandemic as a cause of loss.

To be clear, the only loss shown to the Court was the Pandemic. And a pandemic is a loss distinct from a virus; regardless of whether there was definitive proof that the COVID-19 virus *was* or *was not* on the Nation's property, the property was still rendered useless due to the reasonable precautionary measures implemented in response to the Pandemic. *See Friends of Danny DeVito*, 227 A.3d 872 (Pa. 2020). Thus, because actual presence of the virus was not relevant to the closure of Nation's properties, it is not relevant to the Court's determination that *direct physical loss* occurred. The Nation's Reply at 13 (quoting *Urogynecology Specialist of Florida LLC, v. Sentinel Insurance Company, Ltd.,* 6:20-01174-ACC-EJK (Sep. 24, 2020)).

Turning to the exclusions provided, the Court takes "all inferences and conclusions to be drawn from the evidentiary materials . . . in the light most favorable to" Defendant Insurers. *See Carmichael v. Beller*, 1996 OK 48, 914 P .2d 1051, 1053. The Court assumes, for purposes of summary judgment, that the exclusions included within the TPIP Policy and various excess policies are valid additions to the TPIP Policy.[18] But even with that assumption, the Court finds that Defendant Insurers failed to clearly and distinctly exclude the Nation's loss.

The Nation demonstrated through various examples that insurance carriers are aware of the risk of pandemics as a peril, regularly exclude them with clear and distinct language, but that these Defendant Insurers failed to do so here. The Nation's Reply to Defendant Hallmark Reply to Defendant Hallmark Specialty Insurance Company's Supplemental Opposition to Nation's Motion for Partial Summary Judgment on Business Interruption Coverage at 6 [hereafter the "Nation's Reply to Hallmark"]; *see also Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F. Supp. 3d 1034, 1038 (D. Neb. 2016). For example, in 2008 Lloyds published *Pandemic: Potential Insurance Impacts*, where is stated business interruption coverage needed to be carefully drafted by carriers because a "pandemic is inevitable." The Nation's Reply at 17, fn. 27 (*Ex. 10*). That was a known risk to these Defendant Insurers as well:

---

[17] For all-risk policies specifically, "the insurer has a burden to show the loss is excluded by the policy." *Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 16. Indeed, it is the carrier that must prove a particular and excluded cause of loss is the source of the insured's claim to bar coverage under an all-risk policy. *Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 564–65 (10th Cir. 1978). Alternatively stated, the carrier must show that the language itself clearly and distinctly excludes the cause of loss, and separately that the excluded cause of loss is the source of the insured's claim.

[18] Again, the Court does not address the fact-based defenses raised by the Nation, as those arguments are rendered moot by the Court's finding that the TPIP Policy's exclusions lack that clear and distinct language to make them applicable to the Nation's claim. *See supra* fn. 3.

A. GROUP A EXCLUSIONS

We will not pay for loss or damage caused by or resulting from any of the following, regardless of any other cause or event, including a peril insured against, that contribute to the loss at the same time or in any other sequence:

. . .

4. Fungus, bacteria, wet or dry rot, decay.

. . .

5. Pollution.

. . .

10. The actual or suspected presence or threat of any virus, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, including but not limited to any epidemic, pandemic, Influenza, plague, SARS, or Avian Flu.

Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co., 218 F. Supp. 3d 1034, 1038 (D. Neb. 2016) (Demonstrating Defendant Liberty Mutual previously excluded "suspected presence or threat or any virus" and specifically expanded the exclusion to include "pandemic.").

PANDEMIC AND EPIDEMIC EXCLUSION

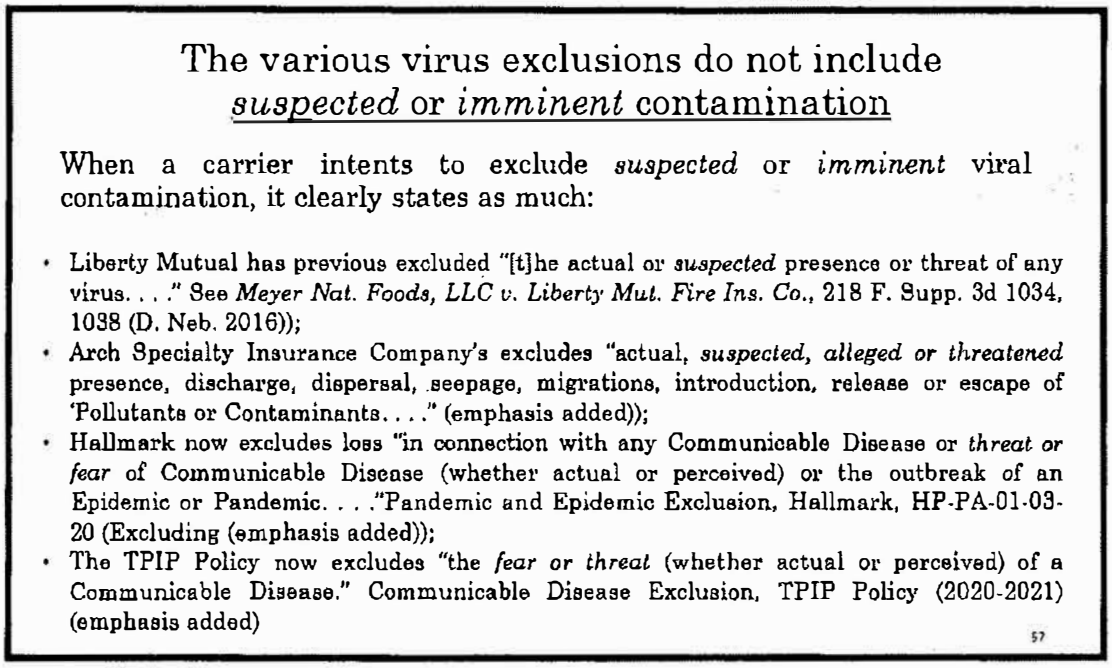
THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Notwithstanding any provision to the contrary within this policy or any endorsements thereto, it is understood and agreed,

This Contract shall exclude any loss, damage, liability, cost or expense or any other amount incurred by the (re)insured directly or indirectly arising out of, originating from, resulting from, caused by and or contributed to and or a consequence of and by, regardless of any other cause contributing concurrently or in sequence to the loss or otherwise, in connection with any Communicable Disease or threat or fear of Communicable Disease (whether actual or perceived) or the outbreak of an Epidemic or Pandemic, whether declared as such or not by any person or entity, including foreign and domestic governments and their representatives, agencies, and courts, the United Nations and its representatives and agencies, and similar persons and entities responsible for managing public health, or any action taken by any party, person, entity, company, agency, and/or government to treat or prevent the spread thereof.

Pandemic and Epidemic Exclusion, Hallmark, form HP PA 01 03 20 (Demonstrating Defendant Hallmark has expressly excluded "pandemic" and "epidemic" losses elsewhere but did not within the TPIP Policy). When carriers fail to use clear and distinct language to exclude a cause of loss known in the market, they "act at their own peril." *Pan American World Airways, Inc. v. Aetna Casusalty & Surety Co.* 505 F.2d 989, 1001 (2d Cir. 1974). As with the definition of *direct physical loss*, the Defendant Insurers could have included language that would have clarified any ambiguity regarding pandemic coverage, but they chose not to do so. Indeed, Defendant Insurers' choice to add the "Communicable Disease Exclusion" (discussed above) underscores the conclusion that the policy at issue does not clearly and distinctly exclude pandemics.

Moreover, even when not specifically excluding "pandemics," carriers regularly utilize words like *suspected, threatened,* and *fear of* to expand virus exclusions beyond actual viruses present on covered property:



Court's *Ex.* 1, The Nation's PowerPoint at 59; *see* The Nation's Reply to Hallmark at 4, fn. 5. But no applicable virus exclusions used such language here. Absent such language, the Nation has shown the various virus exclusions require proof that the COVID virus is actually on the premises to be applicable. The Nation's Motion at 13-14 (explaining *Duensing v. Traveler's Companies*, 257 Mont. 376 (1993)); *Elegant Massage, LLC.*, 2:20-CV-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020). Except for the exclusion from Defendant Arch Specialty Insurance, [19] the Court agrees

[19] Defendant Arch Specialty Insurance Company's Pollution and Contamination exclusion does exclude "suspected, alleged, or threatened presence" of viruses. *Ex.* A-1 to Defendant Arch Specialty Insurance Company's Supplemental Opposition to Plaintiff's Motion for Partial Summary Judgment. But the exclusion is limited to claims "caused by, contributed to or aggravated by any *physical damage,*" without reference to *physical loss. Id.* (emphasis added). Defendant Arch acknowledged that it incorporated the TPIP Policy as the basis for the excess policy. Defendant Insurers' Undisputed Material Fact No. 1. Consequently, and as explained above, *physical damage* and *physical loss* have distinct meanings within the TPIP Policy and thus Defendant Arch must have intended to provide coverage for physical loss.

with the Nation that the viral exclusions, by their language, only apply where there is proof of actual viral presence:

- The TPIP Policy's Pollution and Contamination exclusion requires a showing of "seepage and/or pollution and/or contamination" of a virus to be applicable;[20]
- Defendant Hallmark's Excess Policy's exclusion requires there be a showing of "dispersal, application, release of or exposure to" a virus;
- Defendant Landmark's Excess Policy's exclusion requires "discharge, dispersal, seepage, migration, release, escape or application of" a virus;
- Defendant XL's Excess Policy's exclusion requires "presence" of a virus; and,
- Defendant Liberty Mutual's Excess Policy exclusion requires the virus is "capable of inducing physical distress, illness or disease," but to be capable of inducing such an effect the virus would need to be on the premises.

Because none of these exclusions contemplate *pandemics*, or *suspected*, *imminent*, *threatened*, or *fear of* viruses—common language utilized by carriers to exclude such losses clearly and distinctively—these exclusions do not clearly and distinctly apply to the Nation's loss.[21]

Finally, Defendant Liberty Mutual asserts its loss-of-use exclusion with its excess policy bars coverage. But by the plain terms of the TPIP Policy, Defendant Liberty Mutual cannot assert that all forms of loss of use are excluded. As the Nation has shown, business interruption coverage as contemplated by the TPIP Policy necessary only results from some loss of use—*i.e.*, from some *interruption* of *business*. The Nation's Reply to Defendant Liberty Mutual Fire Insurance Company's Supplemental Opposition to the Nation's Motion at 5-6. Thus, if all loss of use was excluded, the business interruption coverage would be illusory. *Id.* For that reason, the Court accepts the proposition that when a dangerous condition like a fire, tornado, or the Pandemic causes loss of use, the exclusion would not apply. *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 38-39.

* * *

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Court **GRANTS** the Nation's First Motion for Partial Summary Judgment on Business Interruption Coverage and **DENIES** Defendant Insurers request for Summary Judgment. Pursuant to this order, the Nation is

---

[20] Moreover, the Court agrees with the Nation that the Pollution and Contamination exclusion is ambiguous because the TPIP Policy covers *all risk of direct physical loss or damage*, which meets the exception provided in the third paragraph of the exclusion. The Nation's Reply at 11-12.

[21] In its Replies, the Nation also pointed out that the Defendant Insurers' duty to investigate and prove actual presence of a virus is consistent with Oklahoma law, citing *Buzzard v. Farmers Insurance Company* to argue Defendant Insurers should have swabbed or otherwise tested the covered properties to prove the existence of a virus if it intended the various viral exclusions to apply. The Nation's Reply at 14-15, fn. 23 (*quoting* 1991 OK 127, 824 P.2d 1105, 1109 ("To determine the validity of the claim, the insurer must conduct an investigation reasonably appropriate under the circumstances.")). But Defendant Insurers did not do so.

entitled to indemnity under the terms of the TPIP Policy for the losses sustained due to the Pandemic under its business interruption coverage.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that because the Court grants the Nation's Motion finding coverage, the question of whether Civil Authority, Ingress/Egress, or any other provision of the TPIP Policy provides for coverage due to the Pandemic is hereby rendered moot. Pursuant to 12 O.S. § 952(b)(3), this Court certifies that this order substantially affects a substantial part of the merits of the controversy and an immediate appeal of this issue would materially advance the ultimate termination of this litigation.

Now, on this 28 day of Jan 2021,
IT IS SO ORDERED!

Douglas Kirkley, District Judge
15th Judicial District of Oklahoma

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: SOCIETY INSURANCE CO. COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION	)	MDL No. 2964 Master Docket No. 20 C 5965 Judge Edmond E. Chang Magistrate Judge Jeffrey I. Cummings
This Document Relates to the Following Cases:	)	
VALLEY LODGE CORP., Plaintiff, v. SOCIETY INSURANCE, a Mutual Company, Defendant.	)	No. 20 C 02813
RISING DOUGH, INC. (d/b/a MADISON SOURDOUGH), *et al.* individually and on behalf of all others similarly situated, Plaintiffs, v. SOCIETY INSURANCE, Defendant.	)	No. 20 C 05981
BIG ONION TAVERN GROUP, LLC, *et al.*, Plaintiffs, v. SOCIETY INSURANCE, INC., Defendant.	)	No. 20 C 02005

MEMORANDUM OPINION AND ORDER

This multi-district litigation addresses Society Insurance's broad-based denials of business-interruption coverage for a variety of restaurants and other businesses in the hospitality industry whose operations have been affected by the COVID-19 pandemic.

This Opinion decides dispositive motions in each of the three bellwether cases selected by the Court. R. 69. Those cases are: *Big Onion Tavern Group, LLC, et al. v. Society Insurance*, No. 1:20-cv-02005; *Valley Lodge Corp. v. Society Insurance*, No. 1:20-cv-02813; and *Rising Dough, Inc., et al. v. Society Insurance*, No. 1:20-cv-05981. Society has filed a motion to dismiss for failure to state a claim in the *Rising Dough* action, R. 20, No. 20 C 05981, Society's Br. in Support of Mot. to Dismiss; and a motion to dismiss for failure to state a claim or, in the alternative, for summary judgment in the *Big Onion* and *Valley Lodge* actions. R. 113, No. 20 C 2005, Society Mem. of Law; R. 17, No. 20 C 02813, Society Mem. of Law.

As detailed in this Opinion, Society's motions to dismiss and summary judgment motions are denied to the extent that they target the claims for business-interruption coverage. Those claims do survive. Also, the Section 155 claims survive in *Big Onion* and *Valley Lodge*. But the summary judgment motions in the *Big Onion* and *Valley Lodge* actions are granted as to the coverage theories under the Civil Authority and the Contamination provisions, and in the *Rising Dough* case as to the Sue and Labor clause.

I. Background

As readers of this Opinion know all too well, the novel coronavirus has generated a global pandemic lasting almost an entire year. Many government agencies around the world have responded by closing (at least in part) businesses of all kinds and by restricting activities, particularly group gatherings.

At issue here are the impacts of those closures on the plaintiffs in those three cases: specifically, businesses in the hospitality industry in Illinois (the *Big Onion* and *Valley Lodge* plaintiffs), and Wisconsin, Minnesota, and Tennessee (the *Rising Dough* plaintiffs). All have been forced to modify their normal business operations due to the pandemic—for example, suspending in-person dining and relying only on take-out orders—and all allege that they have lost significant revenue as a result. R. 1, 20 C 2813, *Valley Lodge* Compl. ¶¶ 3-4, 33-42; R. 14, 20 C 5981, *Rising Dough* Am. Class Action Compl. ¶¶ 50–80; R. 29, No. 20 C 2005, *Big Onion* First Am. Compl. ¶¶ 6, 97–108. All plaintiffs—indeed, all the plaintiffs in all the cases within this MDL, by definition—are insured by Society Insurance against certain interruptions to their business. The fundamental questions at stake in this litigation are how properly to classify the interruption that has happened here, and whether this particular interruption is covered under the policy. Beyond following state and local government orders and guidance, the *Rising Dough* plaintiffs also allege that the losses to their businesses occurred as a direct result of the actual presence of the coronavirus itself on the premises. R. 26, 20 C 5981, *Rising Dough* Pls.' Resp. at 8; R. 14, 20 C 5981, Am. Class Action Compl. ¶ 80 ("As a result of the presence of COVID-19 *and* the

Closure Orders, Plaintiffs and the other Class members lost Business Income and incurred Extra Expense.") (emphasis added). The *Big Onion* plaintiffs have similarly alleged that the "continuous presence of the coronavirus on or around Plaintiffs' premises has created a dangerous condition and rendered their premises unsafe and unfit for their intended use and therefore caused physical property damage or loss under the Policies." R. 29 ¶ 100.

For its part, Society counters that these losses, whether caused by the coronavirus directly or by the government orders, simply do not fall within the plain language of the policy invoked by the Plaintiffs. In particular, the Plaintiffs allege that coverage applies under the following policy provisions, common to all plaintiffs (although each group of plaintiffs has sought recovery under different subsets of these provisions)[1]:

- Business Income coverage, on the Businessowners Special Property Coverage Form, section 5, Additional Coverages:

  g. Business Income

  (1) Business Income

  (a) 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 direct physical loss of or damage to covered property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss….

[1]The contested policy language is identical to all plaintiffs, and thus will be cited according to the policy's own labeling of sections and subsections. Full copies of the policies can be found, *e.g.*, at R. 14, 20 C 5981, Exh. A; R. 1, 20 C 2813, Exh. B; R. 29, 20 C 2005, Exh. D.

(b) We will only pay for loss of Business Income that you sustain during the "period of restoration" and that occurs within 12 consecutive months after the date of direct physical loss or damage.

- Civil Authority coverage, on the Businessowners Special Property Coverage Form, section 5, Additional Coverages:

k. Civil Authority

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within the area; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority coverage for Business Income will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage begins.

Civil Authority coverage for necessary Extra Expense will begin immediately after the time of first action of civil authority that prohibits access to the described premises and will end:

(1) Four consecutive weeks after the time of that action; or

(2) When your Civil Authority coverage for Business Income ends; whichever is later.

The definitions of Business Income and Extra Expense contained in the Business Income and Extra Expense Additional Coverages also apply to this Civil Authority Additional Coverage. The Civil Authority Additional Coverage is not subject to the Limits of Insurance.

- Contamination coverage, on the Businessowners Special Property Coverage Form, section 5, Additional Coverages:

m. Contamination

If your "operations" are suspended due to "contamination":

(1) We will pay for your costs to clean and sanitize your premises, machinery and equipment, and expenses you incur to withdraw or recall products or merchandise from the market. We will not pay for the cost or value of the product.

The most we will pay for any loss or damage under this Additional Coverage arising out of the sum of all such expenses occurring during each separate policy period is $5,000; and

(2) We will also pay for the actual loss of Business Income and Extra Expense you sustain caused by

(a) "Contamination" that results in an action by a public health or other governmental authority that prohibits access to the described premises or production of your product.

(b) "Contamination threat"

(c) "Publicity" resulting from the discovery or suspicion of "contamination."

Coverage for the actual loss of Business Income under this section will begin immediately upon the suspension of your business operations and will continue for a period not to exceed a total of three consecutive weeks after coverage begins.

Coverage for necessary Extra Expense under this section will likewise begin immediately upon the suspension of your business operations and will continue only for a total of three consecutive weeks after coverage begins, or until the loss of Business Income coverage ends, whichever is longer. The coverages under this section may not be extended nor repeated. The definitions of Business Income and Extra Expense, contained in the Business Income and Extra Expense Additional Coverages section shall also apply to the additional coverages under this section.

(3) Contamination Exclusions

All exclusions and limitations apply except Exclusions **B.2.j.(2)** and **B.2.j.(5)**

(4) Additional Definitions:

(a) "Contamination" means a defect, deficiency, inadequacy or dangerous condition in your products, merchandise or premises.

(b) "Contamination threat" means a threat made by a third party against you to commit a "malicious contamination" unless the third party's demand for money or other consideration is met.

(c) "Malicious contamination" means an intentional, malicious and illegal altercation or adulteration of your products.

(d) "Publicity" means a publication or broadcast by the media, of the discovery or suspicion of "contamination" at a described premise.

- Extra Expense coverage, on the Businessowners Special Property Coverage Form, section 5, Additional Coverages:

h. Extra Expense

(1) We will pay 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 damage to covered property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss….

(4) We will only pay for Extra Expense that occurs within 12 consecutive months after the date of direct physical loss or damage. This Additional Coverage is not subject to the Limits of Insurance.

- the Sue and Labor provision, on the Businessowners Special Property Coverage Form, part E, Property Loss Conditions:

3. Duties in the Event of Loss or Damage

> a. You must see that the following are done in the event of loss or damage to Covered Property: …
>
> (4) Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. This will not increase the Limit of Insurance. However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged property aside and in the best possible order for examination.

It is worth pausing here to note that the policy does *not* contain a specific exclusion of coverage for losses due to a virus or pandemic, which is now—the Plaintiffs allege—a standard exclusion in the insurance industry. *See, e.g.*, R. 124-1, 20 C 2005, *Big Onion* Pls.' Resp. at 23-24.

Society denied the Plaintiffs' claims for coverage in several ways. First, it did so preemptively and *en masse*, circulating a memorandum, on March 16, 2020, to its insurance agency partners, observing that "a quarantine of any size, or brought about by a governmental action without a Covered Cause of Loss, would likely not trigger Business Income or Extra Expense coverages under our policies"; "A widespread governmental imposed shutdown due to COVID-19 (coronavirus) would likely not trigger the additional coverage of Civil Authority"; COVID-19 "would be unlikely to trigger" Contamination coverage because it "is spread through human contact and is not seen as a foodborne illness"; and "Any alleged COVID-19 (coronavirus) exposures or spoilage from the extended shelf life of a product is not a Spoilage Covered Cause of Loss." R. 29-1, 20 C 2005, Exh. A, Email from Society CEO Rick Parks re: COVID-19 &

Insurance Coverage, at 2-3. Nonetheless, the memorandum "encourage[d] any policyholder or third-party claimant who wishes to present a claim to do so." *Id.* at 2.

Second, Society denied individual claims that various Plaintiffs filed. For example, in a letter to Plaintiff Legacy Hospitality LLC (which does business as The Vig), Society asserted that "A slowdown in business due to the public's fear of the coronavirus or a suspension of business because a governmental authority (i.e. the governor or the mayor) has ordered or recommended all or certain types of businesses to close is not a direct physical loss. In addition, the actual or alleged presence of the coronavirus is not a Covered Cause of Loss." R. 29-2, 20 C 2005, Exh. B, Letter from Society to Legacy Hospitality LLC, at 3.

Third, Society issued another memorandum on March 27, 2020, this time to all of its policyholders, entitled "A Message From our CEO on Pandemic Crisis." That memorandum does not explicitly say that Society has denied or will deny all claims resulting from pandemic-related shutdowns, but Society asserted that "pandemic events" are generally excluded from insurance coverage:

> Insurance has always identified and excluded coverage for loss events that are so large, or are so unpredictable, that they outstrip the capacity of the industry to fund losses, or even price the exposure accurately. Exclusions for acts of war, nuclear incidents and flood are part of insurance policies for these reasons. These are the same reasons that coverages for pandemic events are excluded. The insurance industry combined does not have enough assets to fund these losses and still be able to meet past and future obligations. Only government has the financial power to respond to these types of events.

R. 29-3, 20 C 2005, Exh. C, Mem. from Society CEO Rick Parks, at 2. Certainly, at this point in the litigation, all parties agree that Society has not paid, and does not

intend to pay, the Plaintiffs' pandemic-related claims. *See* R. 29, 20 C 2005, *Big Onion* First Am. Compl., ¶ 19; R. 113, 20 C 2005, Society's Mem. of Law at 3.

The Plaintiffs filed these lawsuits shortly after these denials of coverage. Valley Lodge and the *Big Onion* plaintiffs filed their complaints in the Northern District of Illinois. R. 1, 20 C 2813; R. 1, 20 C 2005. The *Rising Dough* plaintiffs filed in the Eastern District of Wisconsin. R. 1, 20 C 5981. In October 2020, the Judicial Panel on Multidistrict Litigation issued a transfer order centralizing all pandemic-related litigation against Society Insurance in this Court. R. 1. After appointing counsel to lead the litigation on the Plaintiffs' behalf, and after conferring with the parties on which motions to use as bellwethers, the Court picked these three cases. R. 69. To repeat, Society has filed a motion to dismiss for failure to state a claim in the *Rising Dough* action, and a motion to dismiss or, in the alternative, for summary judgment in the *Big Onion* and *Valley Lodge* actions. R. 20, 20 C 5981; R. 113, 20 C 2005; R. 17, 20 C 2813. Because the key interpretive question that cuts across all of the motions is primarily a question of law, the Court first will address that issue, and then discuss the remainder of the dismissal motions and the summary judgment motions.

II. Standards of Review

A. Motion to Dismiss

Under Federal Rule of Civil Procedure 8(a)(2), a complaint generally need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This short and plain statement must "give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Bell*

Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (alteration in original) (internal quotation marks and citation omitted). The Seventh Circuit has explained that this rule "reflects a liberal notice pleading regime, which is intended to 'focus litigation on the merits of a claim' rather than on technicalities that might keep plaintiffs out of court." *Brooks v. Ross*, 578 F.3d 574, 580 (7th Cir. 2009) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)).

"A motion under Rule 12(b)(6) challenges the sufficiency of the complaint to state a claim upon which relief may be granted." *Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). These allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. The allegations that are entitled to the assumption of truth are those that are factual, rather than mere legal conclusions. *Iqbal*, 556 U.S. at 678-79.

B. Summary Judgment Motion

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating summary judgment motions, courts must view the facts and draw reasonable inferences

in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). The Court may not weigh conflicting evidence or make credibility determinations, *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 704 (7th Cir. 2011), and must consider only evidence that can "be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). The party seeking summary judgment has the initial burden of showing that there is no genuine dispute and that they are entitled to judgment as a matter of law. *Carmichael v. Village of Palatine*, 605 F.3d 451, 460 (7th Cir. 2010); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Wheeler v. Lawson*, 539 F.3d 629, 634 (7th Cir. 2008). If this burden is met, the adverse party must then "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256.

III. Analysis

A. Elements of a Coverage Claim

Before getting to the big-ticket dispute over the coverage provision, it is worth noting that the Plaintiffs have otherwise adequately stated a claim for coverage under the policy. First, each plaintiff has sought a declaratory judgment from this Court pursuant to 28 U.S.C. § 2201. R. 1, 20 C 2813, *Valley Lodge* Compl., ¶¶ 43-48; R. 14, 20 C 5981, *Rising Dough* Am. Compl., ¶¶ 144-178; R. 29, 20 C 2005, *Big Onion* First Am. Compl., ¶¶ 109-114. The appropriate substantive body of law in the *Big Onion* and *Valley Lodge* actions is Illinois state law. Under Illinois law, the "essential elements of a breach of contract claim are: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4)

resultant injury to the plaintiff." *Pepper Const. Co. v. Palmolive Tower Condominiums, LLC*, 59 N.E.3d 41, 66 (Ill. App. 1st 2016). Both the *Big Onion* and *Valley Lodge* plaintiffs have alleged—and Society does not contest—that the insurance policies that the Plaintiffs held are valid and enforceable contracts; the Plaintiffs have performed their obligations under those contracts by paying premiums; the Plaintiffs have suffered losses of business income and sought payment from Society under the policies; and Society has denied coverage. R. 29, 20 C 2005, *Big Onion* First Am. Compl., ¶¶ 116-119; R. 1, 20 C 2813, *Valley Lodge* Compl., ¶¶ 49-53.

In the *Rising Dough* action, the laws of Wisconsin, Minnesota, and Tennessee govern (depending on the particular Plaintiff), although the analysis is nearly identical. R. 14, 20 C 5981, *Rising Dough* Am. Compl., ¶¶ 99–178. Again, setting aside the coverage question itself, these claims otherwise adequately state a claim for relief. "The complaint pleads a contract (duty), a breach of that contract and damages flowing reasonably from that breach and that totally states a cause of action." *Northwestern Motor Car, Inc. v. Pope*, 187 N.W.2d 200, 203 (Wis. 1971); *accord Lyon Financial Services, Inc. v. Illinois Paper and Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014) ("The elements of a breach of contract claim are (1) formation of a contract, (2) performance by plaintiff of any conditions precedent to his right to demand performance by the defendant, and (3) breach of the contract by defendant.") (cleaned up)[2]; *Federal Ins. Co. v. Winters*, 354 S.W.3d 287, 291 (Tenn. 2011) ("In a breach of contract action,

[2]This opinion uses (cleaned up) to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 Journal of Appellate Practice and Process 143 (2017).

claimants must prove the existence of a valid and enforceable contract, a deficiency in the performance amounting to a breach, and damages caused by the breach."). To repeat, here the Plaintiffs have pleaded, and Society does not contest, that the insurance policies constitute a valid and enforceable contract, and that Society has not paid on the Plaintiffs' requests for coverage. It is time to move on to the key interpretive question of coverage.

B. "Caused" by "Direct Physical Loss"

As a threshold matter, generally speaking "the interpretation of an insurance policy and the respective rights and obligations of the insurer and the insured [are] questions of law that the court may resolve summarily." *Roman Catholic Diocese of Springfield in Ill. v. Maryland Cas. Co.*, 139 F.3d 561, 565 (7th Cir. 1998) (applying Illinois law). The Court proceeds first by "examin[ing] the facts of the insured's claim to determine whether the policy's insuring agreement makes an initial grant of coverage." *American Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65, 73 (Wis. 2004). If coverage applies, then the Court "next examine[s] the various exclusions to see whether any of them preclude coverage of the present claim. Exclusions are narrowly or strictly construed against the insurer if their effect is uncertain." *Id.*; *accord Blaine Const. Corp. v. Insurance Co. of North America*, 171 F.3d 343, 349 (6th Cir. 1999) (applying Tennessee law); *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006). Having said all that, although "contract interpretation is often a question of law well suited for disposition on summary judgment … the trier of fact, not [the] court, must resolve the conflicting interpretations

of the agreement" "when a contract contains ambiguities that the parties must explain through extrinsic evidence." *Zemco Mfg., Inc. v. Navistar Intern. Transp. Corp.*, 270 F.3d 1117, 1127 (7th Cir. 2001). Just so here.[3]

The key text setting forth the business-interruption coverage requires that the loss in business be caused by "direct physical loss" of covered property:

> 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 direct physical loss of or damage to covered property* at the described premises. The loss or damage *must be caused by or result from a Covered Cause of Loss*.

Businessowners Special Property Coverage Form, A.3 (emphasis added). In turn, the policy defines a "Covered Cause of Loss" as a "Direct Physical Loss unless the loss is excluded or limited under this coverage form." *Id.* The parties dispute whether the coronavirus itself, the pandemic, or the government shutdown orders (or some combination of those three things) trigger coverage under this provision.

1. Causation

To start untangling the policy's text: first, the policy requires that the business suspension must be *caused by* direct physical loss of (or damage to) covered property. So far, simple enough: the insured must be able to point to a direct physical loss of property as the cause of the business's suspension. But then the policy goes on to say

[3]Strictly speaking, Society has only moved for summary judgment in the *Big Onion* and *Valley Lodge* actions. But the parties have treated Society's motion to dismiss the *Rising Dough* action under Federal Rule of Civil Procedure 12(b)(6) more like a Rule 12(c) motion for judgment on the pleadings. Because Society's motions for summary judgment rely, and the Court has decided them on, legal rather than factual arguments, the Court has also addressed the relevant legal standards under the controlling state law in the *Rising Dough* case.

that the loss of property that is the cause of the suspension must, in turn, be caused by or result from a *Covered Cause of Loss*. One would expect that, in defining what is a Covered *Cause* of Loss, the policy would set forth a definition that describes a *cause* of loss—not the loss itself. Instead, the policy turns back on itself and defines Covered Cause of Loss only as a "Direct Physical Loss." Businessowners Special Property Coverage Form, A.3. So putting the coverage text together with the definition, a covered business suspension must be caused by direct physical loss of covered property—and then the loss itself must be caused by or result from a direct physical loss.

In resisting coverage, Society first argues that the Plaintiffs' businesses have been interrupted by the various state and local shutdown orders—not by the coronavirus itself. *See, e.g.*, R. 113, 20 C 2005, Society's Mem. of Law at 9. To Society's way of thinking, even if the coronavirus and the resulting pandemic could qualify as a "direct physical loss," it is really the governmental *orders* that caused the suspensions of business, and those orders—as the superseding cause of the suspensions—do not qualify as a "direct physical loss" under the policy. *Id.* at 10-11.

But Society's characterization of the cause of the business interruptions is not supported by the governing law of the pertinent States, none of which impose such a strict causation requirement. *See, e.g.*, *Manpower, Inc. v. Ins. Co. of the State of Pennsylvania*, No. 08-C-0085, 2009 WL 3738099, at *6 (E.D. Wis. Nov. 3, 2009) (Wisconsin law); *Phillips v. Parmelee*, 840 N.W.2d 713, 717-19 (Wis. 2013); *Fandrey ex rel. Connell v. American Family Mut. Ins. Co.*, 680 N.W.2d 345 (Wis. 2004); *Friedberg v. Chubb & Son, Inc.*, 691 F.3d 948, 952-53 (8th Cir. 2012) (Minnesota law); *State Bank*

of Bellingham v. BancInsure, Inc., 823 F.3d 456, 461 (8th Cir. 2016) (Minnesota law); *Capitol Indemnity Corp. v. Braxton*, 24 Fed. Appx. 434, 440-41 (6th Cir. 2001) (Tennessee law); *Planet Rock, Inc. v. Regis Ins. Co.*, 6 S.W.3d 484, 491-92 (C. App. Tenn. 1999); *For Senior Help, LLC v. Westchester Fire Ins. Co.*, 451 F. Supp. 3d 837 (M.D. Tenn. Mar. 31, 2020) (Tennessee law); *see also Clark v. Sputniks, LLC*, 368 S.W.3d 431, 440-41 (Tenn. 2012). Indeed, during the oral argument on January 14, 2021, R. 118, both sides seemed to agree that a proximate-causation standard applies under Illinois, Wisconsin, and Minnesota law, and implied as applicable under Tennessee law (which has a somewhat different concurrent-causation analysis).

The State most up for debate on this point is Illinois. At least some cases disavow a proximate-cause standard under Illinois law in deciding insurance-policy coverage questions. *See, e.g.*, *Sports Arena Mgmt., Inc. v. Great Am. Ins. Group*, No. 06 C 788, 2007 WL 684003, at *3 (N.D. Ill. Mar. 1, 2007) (citing *Transamerica Ins. Co. v. South*, 125 F.3d 392, 398 (7th Cir. 1997)). But more recent Illinois cases (or cases interpreting Illinois law) appear to endorse the proximate-cause analysis, or at least view it as available if the policy language so specifies. *See, e.g.*, *Parker v. Allstate Indemnity Co.*, 427 F. Supp. 3d 1006, 1011 (S.D. Ill. Dec. 16, 2019) (citing *Heuer v. N.W. Nat'l Ins. Co.*, 33 N.E. 411, 412 (Ill. 1893)); *Bozek v. Erie Ins. Group*, 46 N.E.3d 362, 367–69 (Ill. App. Ct. 2015) (explaining the need for anti-concurrent causation provisions because "it appears that Illinois favors the efficient-or-dominant-proximate-cause rule in the absence of contrary language"); *Moda Furniture, LLC v. Chicago Title Land Trust Co.*, 35 N.E.3d 1139, 1147, 1154–55 (Ill. App. Ct. 2015). Indeed,

in Illinois insurance-coverage cases, the proximate-cause standard traces back over a century to *Heuer v. N.W. National Insurance*. In that case, an unlucky storeowner bought an insurance policy covering loss or damage caused by fire. 33 N.E. at 411. But the policy excluded coverage for any loss caused by an explosion. *Id.* In the basement of the store, a lit match sparked an explosion of illuminating gas; the explosion in turn caused the floor of the store to collapse, and the goods were damaged in the collapse. *Id.* Although the Illinois Supreme Court refused to characterize the fire as the cause of the damage, *Heuer* applied a proximate-cause standard: "It is a well-settled principle in the law of insurance that the *proximate*, and not the remote, cause of the loss must be regarded, in order to ascertain whether the loss is covered by the policy or not." *Id.* at 412 (emphasis added). The goods had not been damaged or burned by any fire, but instead were damaged by the floor's collapse. *Id.* So, although the storeowner lost the coverage claim there, the key point is that the Illinois Supreme Court applied the proximate-cause standard to determine the cause of the loss.

Here, the Society policy does not purport to alter the proximate-cause standard—or at least a reasonable jury could so find. The policy does *not* say that the business suspension must be *directly* caused by a Covered Cause of Loss; the text simply says that the business suspension must be "caused by" a Covered Cause of Loss. Businessowners Special Property Coverage Form, A.3. It is true that Covered Cause of Loss is defined as "direct physical loss," but that definition does not purport to impose a stricter causation standard than proximate cause. Instead, the proximate-causation standard applies both to the adjective "direct" in the term "direct physical loss," and

to the "caused by" and "caused by or result from" language preceding the loss and damage terms and definitions. As to "caused by" and "result from," these are precisely the kinds of open-ended causal terms that imply the default causal standard under State law, without further constraint by any other language in the policy.

With proximate cause as the governing causation standard, a reasonable jury could find (at least on the factual record so far) that the novel coronavirus and the resulting pandemic proximately caused the business interruptions. "A proximate cause is one that produces an injury through a natural and continuous sequence of events unbroken by any effective intervening cause." *Cleveland v. Rotman*, 297 F.3d 569, 573 (7th Cir. 2002). Even if the government shutdown orders (and not the pandemic itself) played a causal role in the Plaintiffs' losses, and even if those orders cannot be construed as a "direct physical loss," the shutdown orders were proximately caused by the pandemic. At least a reasonable jury could so find given the policy's ambiguity, in which case the policy language must be construed in favor of the Plaintiffs. *See Berg v. N.Y. Life Ins. Co.*, 831 F.3d 426, 429 (7th Cir. 2016); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1212 (Ill. 1992).

2. Direct Physical Loss

This leaves the question of whether the Plaintiffs' loss is "physical" in nature—whether it is caused by the coronavirus itself, the coronavirus pandemic, or government shutdown orders.[4] Remember here that the operative text is "direct physical

[4]Contrary to Society's arguments, the Plaintiffs have in fact pleaded that their losses were caused by the virus, the pandemic, and the shutdown orders—not only the shutdown orders. *See* R. 29, 20 C 2005, *Big Onion* First Am. Compl. ¶ 6; R. 14, 20 C 5981, *Rising Dough* Am. Compl., ¶ 12; R. 1, 20 C 2813, *Valley Lodge* Compl. ¶¶ 36, 40.

loss of or damage to covered property." The disjunctive "or" in that phrase means that "physical loss" must cover something different from "physical damage." "[I]t is axiomatic that courts interpret contracts so as to give effect to all of their provisions." *In re Airadigm Communications, Inc.*, 616 F.3d 642, 657 (7th Cir. 2010). That interpretive principle refuses Society's first argument: that the coronavirus could not constitute "direct physical loss of or damage to" the covered property because the virus "does not cause a tangible change to the physical characteristics of property." *See* R. 113, 20 C 2005, Society's Mem. of Law at 5-6.[5] 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.

The more challenging interpretive question is whether the restrictions imposed on the Plaintiffs' use of their premises count as *physical* loss. Society observes, and the Plaintiffs do not contest, that most of the restaurants have been able to use their kitchens and thus continue to operate on a take-out and delivery order basis during much (if not all) of the pandemic period. *See, e.g.*, R. 114, 20 C 2005, Def.'s LR

[5]The Plaintiffs dispute that there has been no physical "damage" to their property. According to the Plaintiffs, the coronavirus particles themselves have in fact rendered, or could render, physical harm to their property given that the virus lingers on surfaces and remains in the air even after decontamination efforts. *See, e.g.*, R. 32, 20 C 2813, Pls.' Resp. at 2–3. In particular, Valley Lodge has introduced evidence as to the coronavirus' persistence on surfaces, arguing that the virus physically interacts with surfaces in restaurants, such as tables and chairs, so as to qualify as "direct physical loss or damage" under the policy. *See* R. 34-1, 20 C 2813, Decl. of Erik Dubberke. Society disputes these facts. *See* R. 47, Def.'s Resp. to Pls.' St. of Additional Facts. At this stage of the case, there is no need to definitively decide that issue because, at least in the context of this dispute, "loss of" property provides for a broader scope of coverage.

56.1 St. of Undisputed Mat. Facts, ¶¶ 39–78. But the Plaintiffs have not been able to use their premises as they did for indoor, sit-down service before the pandemic. Depending on the particulars of applicable shutdown orders and the Plaintiffs' premises, some have not been able to offer on-site service at all, while others have only been able to do so at limited capacity. *See, e.g.*, R. 125, 20 C 2005, Pls.' Resp. and Obj. to Def.'s LR 56.1 St. of Undisputed Mat. Facts, ¶¶ 39–78. These on-site service restrictions have caused most of the Plaintiffs' losses for which they seek business-interruption coverage. According to Society, these losses are not "physical" because tables and chairs, walls and floors, stovetops and sinks remain in good working order; indeed, the Plaintiffs have been able to use the premises to conduct some amount of business. R. 113, 20 C 2005, Society's Mot. at 9–10.

But a reasonable jury can find that the Plaintiffs did suffer a direct "physical" loss of property on their premises. First, viewed in the light most favorable to the Plaintiffs, the pandemic-caused shutdown orders do impose a *physical* limit: the restaurants are limited from using much of their physical space. It is not as if the shutdown orders imposed a *financial* limit on the restaurants by, for example, capping the dollar-amount of daily sales that each restaurant could make. No, instead the Plaintiffs cannot use (or cannot fully use) the physical space. Indeed, the policy defines "covered property" to include buildings at the premises, not just personal property or movable items. Businessowners Special Property Coverage Form, A.1.

Another way to understand the physical nature of the loss inflicted by the shutdown orders is to consider how a restaurant might mitigate against the suspension

of operations caused by, say, a 25%-capacity limitation on the number of guests inside the restaurant. If the restaurant could expand its *physical* space, then the restaurant could serve more guests and the loss would be mitigated (at least in part). The loss is physical—or at the very least, a reasonable jury can make that finding.

Against this, Society also argues that the Court should "construe the policy as a whole," R. 20, 20 C 5981, Society's Br. in Support of Mot. to Dismiss, at 17, and read the coverage provision in light of the later definition of the "Period of Restoration." Remember that Society promised to pay only for loss of business income during the "period of restoration" (with a cap of 12 months after the date of direct physical loss). Businessowners Special Property Coverage Form, A.5.g(1)(b); H.12. The definition of "Period of Restoration" says 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). In Society's view, "repaired, rebuilt[,] or replaced" implies that covered "physical loss or damage" is necessarily tangible, requiring a physical injury to the covered property rather than mere loss of use.

This argument did give the Court some pause; after all, it is generally true that the policy language must be considered as a whole so that all of its parts fit together. But too many textual clues point the other way. 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. If, for example, the coronavirus risk could be minimized by the installation of partitions and a particular ventilation system, then the restaurants would be expected to "repair" the space by installing those safety features. As another example, if a restaurant could mitigate the loss caused by a percentage-capacity limit by "replacing" some of its dining-room space by opening its adjacent banquet-hall room to increase the number of guests it could serve, then the restaurant would be expected to "replace" the loss of space by doing so. So the definition of the Period of Restoration is consistent with interpreting direct physical loss of property to include the loss of physical use of the covered property imposed by the shutdown orders.

Here, the scope of the term "direct physical loss" is genuinely in dispute. A reasonable jury could find for either side based on the arguments and factual record presented so far in the litigation. The Court's "function [at summary judgment] is not to weigh the evidence but merely to determine if there is a genuine issue for trial." *Zemco Mfg.*, 270 F.3d at 1122–23 (cleaned up). "[R]easonable people could come to different conclusions" on the coverage provision and "resort to extrinsic evidence will

be appropriate." *See id.* at 1127.[6] Society's motion for summary judgment is denied as to the policy's business-interruption coverage.

C. Civil Authority Coverage & Contamination Coverage

Although the business-interruption coverage is sufficient, at this stage of the litigation, for the coverage cases to move forward, it is worth addressing the other coverage theories advanced by the Plaintiffs. A decision now makes sense because, as it turns out, the other coverage theories can be decided on the current record and because it is worth streamlining discovery upfront and eliminating discovery disputes now rather than later.

First, Society has moved for summary judgment against the Plaintiffs' claims brought under the policy's Civil Authority coverage. The Civil Authority coverage pays for loss of income caused by action of a civil authority that "prohibits access" to the insured's premises and to the "area immediately surrounding" the property:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority *that prohibits access to the described premises*, provided that both of the following apply:
>
> (1) *Access* to the area immediately surrounding the damaged property is *prohibited* by civil authority as a result of the damage, and the described premises are within the area; and

[6]On the issue of extrinsic evidence, it is worth noting that the parties dispute the implication of the absence of a virus or pandemic exclusion in the policy. According to the Plaintiffs, those exclusions have been common in the insurance industry since the SARS epidemic of 2003. R. 118. The Plaintiffs say that this fact alone, given that Society would or should have known of this industry best practice, implies that the policy necessarily encompasses business interruption due to viruses and pandemics. R. 124, 20 C 2005, Pls.' Resp. at 7–8. No doubt that this issue will be the proper subject of discovery, both factual and perhaps expert.

> (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Businessowners Special Property Coverage Form, 5.k (emphases added). The Plaintiffs argue that, in essence, the government shutdown orders in their various jurisdictions count as a covered "action of civil authority." *See, e.g.*, R. 124, 20 C 2005, Pls. Resp. to Society's Mot. to Dismiss or Alt. for Summary Judgment, at 18-20. But even if that were right, the problem for the Plaintiffs is that the action of the civil authority must "prohibit[] access" to the premises and the surrounding area. Specifically, the policy's text requires that the civil authority "prohibit[] access to the described premises," *and* that "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within the area." Businessowners Special Property Coverage Form, 5.k. As Society correctly observes, even if the general public is prohibited from congregating in the covered premises, there is no allegation that employees are outright prohibited from accessing the premises—or from accessing the immediately surrounding areas, for that matter. Indeed, for some of the Plaintiffs, take-out customers and in-room dining guests may access the premises (and the immediately surrounding areas). The Civil Authority coverage is not triggered by mere "loss of" property; there must be "prohibited" "access." The Plaintiffs' claims for coverage under this provision must be dismissed.

The analysis of the Contamination coverage provision is much the same. The Plaintiffs present two theories of coverage under the Contamination provision. First, the policy provides for cleaning and sanitizing the premises, machinery, and equipment due to contamination:

> If your "operations" are suspended due to "contamination":
>
> (1) We will pay for your costs to clean and sanitize your premises, machinery and equipment, and expenses you incur to withdraw or recall products or merchandise from the market. We will not pay for the cost or value of the product.

Businessowners Special Property Coverage Form, 5.m. The text of this coverage provision requires, first and foremost, that the Plaintiffs' "operations" be "suspended" due to "contamination." *Id.* "Contamination" is defined as "a defect, deficiency, inadequacy, or dangerous condition in your products, merchandise[,] or premises." *Id.* § 5.m(4)(a). As Society notes, the Plaintiffs have maintained operations during the pandemic, and the suspensions of business have not been caused by contamination of the premises, machinery, or equipment *themselves*. R. 114, 20 C 2005, Def.'s LR 56.1 St. of Undisputed Mat. Facts, ¶¶ 39-78. And the Plaintiffs have not made a particularized factual argument that one or more of them has been closed due to actual COVID-19 contamination of the premises, machinery, or equipment. R. 125, 20 C 2005, Pls.' Resp. to Def.'s LR 56.1 St. of Facts, ¶¶ 39-78.

The Plaintiffs also rely on a second subsection of Contamination coverage, but again, that coverage requires the suspension of operations due to contamination:

> If your "operations" are suspended due to "contamination":
>
> …

> (2) We will also pay for the actual loss of Business Income and Extra Expense you sustain caused by
>
> (a) "Contamination" that results in an action by a public health or other governmental authority that prohibits access to the described premises or production of your product.
>
> (b) "Contamination threat[.]"
>
> (c) "Publicity" resulting from the discovery or suspicion of "contamination."

Businessowners Special Property Coverage Form, 5.m. Again, the text of this coverage provision requires that the Plaintiffs' "operations" be "suspended" due to "contamination." *Id.* And again, the suspensions of business have not been caused by contamination of the premises, machinery, or equipment themselves. What's more, the listed causes in this second subsection impose additional requirements that are not met here. Like the flaw in the Civil Authority coverage theory, there has been no "action by a public health or other governmental authority that *prohibits* access to the described premises or production of your product." (emphasis added). *Id.* § 5.m(2)(a). The Plaintiffs have not been prohibited from accessing the premises, and many have continued to produce food for take-out and delivery purposes. R. 114, 20 C 2005, Def.'s LR 56.1 St. of Facts, ¶¶ 39–78; R. 125, 20 C 2005, Pls.' Resp. to Def.'s LR 56.1 St. of. Facts, ¶¶ 39–78. And given the definition of "contamination," there is no loss of income due to "contamination threat" or "publicity" from contamination, Businessowners Special Property Coverage Form, 5.m(2)(b), (c), because it is not the premises, machinery, or equipment themselves that have been contaminated. For

these reasons, neither the Civil Authority nor the Contamination provisions are viable theories of coverage under the policy.[7]

D. Sue and Labor Provision

The final coverage theory is advanced only by the *Rising Dough* plaintiffs. Those plaintiffs have pleaded that their losses are covered under the policy's Sue and Labor clause, *see* R. 14, 20 C 05981, *Rising Dough* Am. Compl. ¶¶ 16, 48, 49, 136–143, 172–178. Society seeks to dismiss this claim on the grounds that the Sue and Labor clause is "not a coverage grant," but rather "a Condition that the Insured is required to comply with." R. 20, 20 C 05981, Society's Mot. to Dismiss, at 24–25.

Society is right: the Sue and Labor clause does not independently describe coverage, but instead sets forth what the insured must do *if* there is coverage. Specifically, the clause is found in Section E.3(a)(4) of the Businessowners Special Property Coverage Form and explains to the insured what steps it must take to mitigate the loss and keep track of expenses: "in the event of loss or damage to Covered Property," the insured must "[t]ake all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of a claim." § E.3(a)(4). Nothing about the clause sets forth a duty to pay on Society's part. Indeed, Section E of the policy is entitled, "Property Loss Conditions," and is thus distinct from Section A, "Coverage," which actually contains the grants of coverage. On this issue, the plain language of

[7]If the Plaintiffs' wish to revive the coverage claims under the Civil Authority or the Contamination provisions, then they will need to file a motion seeking leave to do so, explaining how they can plead around this rationale.

the policy is unambiguous: the Sue and Labor clause does not provide coverage. The counts invoking this clause in the *Rising Dough* complaint (Counts 5 and 10) are dismissed. This dismissal is with prejudice because there is no conceivable way of fixing this particular claim.

E. Section 155 (Illinois)

Lastly, Society targets the Illinois Insurance Code claims, 215 ILCS 5/155, advanced by the *Big Onion* and *Valley Lodge* plaintiffs, alleging that Society denied coverage in bad faith. Section 155 provides for fee-shifting and potential penalties against insurers if they are "vexatious and unreasonable" in denying a claim or in delaying the settlement of a claim. 215 ILCS 5/155(1). Section 154.6 sets forth a list of "improper" claims practices, and the Plaintiffs in the Illinois bellwether actions have each alleged a modestly different set of specific violations of that section. *See* R. 29, 20 C 2005, *Big Onion* First Am. Compl., ¶¶ 120–128; R. 1, 20 C 2813, *Valley Lodge* Compl., ¶¶ 54–61. But all of the allegations are anchored by the same fundamental set of facts. Specifically, according to the Plaintiffs, the March 16 and March 27, 2020 memoranda issued by Society, which denied coverage across-the-board, allegedly misrepresented the true scope of the insurance policies; Society failed to investigate individual claims, as required, and instead issued hasty denials not based on individual claims; and Society's actions have caused an improper and lengthy delay in receiving payment.

Society argues that, as a matter of law, claims under Section 155 must be dismissed if there is a bona-fide dispute over coverage. R. 17, 20 C 2813, Society's Mem.

of Law at 17; R. 113, 20 C 2005, Society's Mem. of Law at 19. In support of this contention, Society primarily relies on two Illinois cases as examples of a bona-fide dispute over coverage as fatally undermining Section 155 claims. *Uhlich Children's Adv. Network v. Nat'l Union Fire Ins. Co.*, 929 N.E.2d 531, 543 (Ill. App. Ct. 2010); *Am. Family Mut. Ins. Co. v. Fisher Dev., Inc.*, 909 N.E.2d 274, 284 (Ill. App. Ct. 2009). But in those cases, the decisions on the Section 155 theories were made only after a definitive finding on the coverage question. For example, the insured in *Uhlich Children's Advantage Network* alleged that the insurer had unreasonably refused to fulfill its duty to defend the insured. 929 N.E.2d at 543. The Illinois Appellate Court reversed the trial court, holding that the insurer did indeed have a duty to defend. *Id.* at 542–53. Only then did the appellate court also hold that there was a genuine dispute over the duty to defend, so the Section 155 theory was not viable. *Id.* at 543–54. Similarly, in *Fisher Development*, the insured contended that the insurer breached its duty to defend; when the insurer definitively won on that point, the appellate court affirmed—in one sentence—the dismissal of the Section 155 claim too. 909 N.E.2d at 284. In the specific factual settings of each those cases, there was no reason to opine on whether an ultimate finding that there is no coverage always means that there can be no viable Section 155 claim. And, more importantly for purposes of this case, the cases had reached the ultimate conclusion on the underlying coverage dispute.

Here, it might very well be that, ultimately, no reasonable jury could help but find that there is a bona-fide dispute over coverage. But no discovery has taken place and the case is, for purposes of this issue, at the pleading stage. To be sure, there

might be cases in which a coverage-dispute complaint sets forth allegations that make it crystal clear that there is a bona-fide dispute over coverage, thus precluding a Section 155 claim. Here, however, the need for more factual development prevents a pleading-stage dismissal of the claim.

IV. Conclusion

Society's motions to dismiss and summary judgment motions are denied to the extent that they target the claims for business-interruption coverage. Those claims survive. Also, the Section 155 claims survive in *Big Onion* and *Valley Lodge*. But the summary judgment motions in the *Big Onion* and *Valley Lodge* actions are granted as to the coverage theories under the Civil Authority and the Contamination provisions, and in the *Rising Dough* case as to the Sue and Labor clause.

To give the parties time to confer over the proposed next steps of the case, including an efficient and speedy discovery schedule, the status hearing of February 24, 2021, is reset to March 9, 2021, at 11 a.m. The Co-Lead Counsel team and Society shall confer and file a Joint Scheduling Report on March 5, 2021, setting forth the areas of agreement and any competing proposals.[8]

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: February 22, 2021

[8]One topic of consideration is whether certification for interlocutory appeal under 28 U.S.C. § 1292(b) is warranted, although the fact-bound nature of the key interpretive issue might prevent the propriety of certification.