UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BILLY GOAT TAVERN I, INC., BILLY GOAT MIDWEST, LLC, BILLY GOAT NORTH II, INC., BILLY GOAT VI, INC., BILLY GOAT INN, INC., BILLY GOAT TAVERN WEST, LLC, all d/b/a BILLY GOAT TAVERN, and all others similarly situated, Plaintiffs, v. SOCIETY INSURANCE, Defendant.	Court No. 1:20-cv-02068 Hon. Harry D. Leinenweber

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs, BILLY GOAT TAVERN I, INC., BILLY GOAT MIDWEST, LLC, BILLY GOAT NORTH II, INC., BILLY GOAT VI, INC., BILLY GOAT INN, INC., BILLY GOAT TAVERN WEST, LLC, all d/b/a/ BILLY GOAT TAVERN, in Response to the Motion for Summary Judgment filed by Defendant, SOCIETY INSURANCE, state the following:

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

I. INTRODUCTION

The Court should deny Defendant Society Insurance's Motion for Summary Judgment [Doc. 23] because Plaintiffs have demonstrated that they suffered business income losses covered under the policy at issue. Society issued an "all-risk" insurance policy that covers all "direct physical loss" unless excluded. Society's policy does not contain an industry-standard virus exclusion. Indeed, Society does not argue that Plaintiffs' losses are excluded from coverage. Instead, Society's sole argument is that there is no coverage because Plaintiffs did not sustain direct physical damage to the structure of the insured properties. In doing so, Society ignores its own policy language that provides coverage in the event of either "*physical loss of* or damage to" the insured property. Because Plaintiffs have demonstrated that they suffered a "direct physical loss of" their dine-in facilities, the policy provides coverage and Society's Motion for Summary Judgment should be denied. Moreover, because Plaintiffs' interepretation of the policy is reasonable, the Court should deny Society's motion even if it finds Society's interpretation to also be reasonable (which it is not) because Illinois law dictates that if an insurance policy is susceptible to more than one reasonable interpretation, it is ambiguous and must be construed in favor of the insured.

II. BACKGROUND

In 2019, Defendant, Society Insurance ("Society"), sold Plaintiffs, Billy Goat Tavern I, Inc., Billy Goat Midwest, LLC, Billy Goat North II, Inc., Billy Goat VI, Inc., Billy Goat Inn, Inc., and Billy Goat Tavern West, LLC, all doing business as "Billy Goat Tavern" (hereinafter "Billy Goat"), a commercial property and casualty insurance policy ("Policy") with an effective date of coverage of August 26, 2019. [Doc. 32 at ¶ 43]. The Policy consists of various policy forms—

including but not limited to form number "TBP2 (05-15)," the "Businessowners Special Property Coverage Form"— and covers the following restaurants:

> Billy Goat Tavern Michigan Ave.
> 430 N. Michigan Ave.
> Chicago, IL 60611
>
> Billy Goat Tavern Lake Street
> 60 E. Lake St.
> Chicago, IL 60601
>
> Billy Goat Tavern Navy Pier
> 700 E. Grand Ave.
> Chicago, IL 60611
>
> Billy Goat Inn
> 1535 W. Madison St.
> Chicago, IL 60607
>
> Billy Goat Tavern Merchandise Mart
> 222 Merchandise Mart, # Fc-2
> Chicago, IL 60654
>
> Billy Goat Tavern Yorktown
> Yorktown Center Food Court
> 203 Yorktown Center
> Lombard, IL 60148

[Doc. 32 ¶¶ 44-45].

Each of the foregoing restaurants has one or more designated on-site, indoor dining areas—consisting of various real and personal property like tables, chairs, utensils, and dispensers (among other things)—for dine-in customers. [*Id.* at ¶ 58]. Pursuant to the Businessowners Special Property Coverage Form—an "all-risk"[1] property insurance policy that covers all fortuitous losses except those that are expressly excluded—Society agreed to "pay for direct physical loss of or

[1] Although the Businessowners Special Property Coverage Form fails to actually use the term "all-risk," it nonetheless qualifies as an "all-risk" policy because it covers all losses that are not specifically excluded. *See Gulino v. Econ. Fire & Cas. Co.*, 971 N.E.2d 522, 524 (Ill. App. Ct. 2012); *Huntington Chase Condo. Ass'n v. Mid-Century Ins. Co.*, 379 F. Supp. 3d 687, 696 (N.D. Ill. 2019).

damage to Covered Property at the [above-mentioned] premises … caused by or resulting from any Covered Cause of Loss." [Doc. 1-1 at 90]; [Doc. 25 at ¶ 15]. "Covered Causes of Loss" means "Direct Physical Loss unless the loss is excluded or limited under" the Businessowners Special Property Coverage Form. [Doc. 1-1 at 91]; [Doc. 25 at ¶ 16]. Neither the Businessowners Special Property Coverage Form nor the Policy define "Direct Physical Loss." [Doc. 1 at ¶ 35]; [Doc. 1-1].

Pursuant to Businessowners Special Property Coverage Form Section A.5.g, Society further agreed to:

> 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. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises. With respect to the requirements set forth in the preceding paragraph, if you occupy only part of the site at which the described premises are located, your premises means:
>
> **(i)** The portion of the building which you rent, lease or occupy;
>
> **(ii)** Any area within the building or at the described premises if that area services, or is used to gain access to, the portion of the building which you rent lease or occupy.

[Doc. 1-1 at 94-95]; [Doc. 25 at ¶ 17].

For decades, agencies including the Center for Disease Control ("CDC") and the World Health Organization ("WHO") have been cautioning against the possibility and, in many instances, the inevitability of a global viral pandemic. [Doc. 1 at ¶ 17]. Concerned about the CDC and WHO's warnings and the Severe acute respiratory syndrome (SARS) and avian flu outbreaks of the late 1990's/early 2000's, Insurance Services Office, Inc. ("ISO")—a nonprofit corporation composed of about 1,400 domestic property and casualty insurance companies that "develops standard policy

forms and files or lodges them with each State's insurance regulators"—authored and sought widespread approval for an "Exclusion For Loss Due To Virus or Bacteria" endorsement (ISO form CP 01 40 07 06) in 2006. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993). *See also Great Cent. Ins. Co. v. Ins. Servs. Office, Inc.*, 74 F.3d 778, 780 (7th Cir. 1996); [Doc. 32 at ¶ 46]. Most insurers subsequently included ISO form CP 01 40 07 06 or a version thereof in their "all-risk" commercial property insurance policies. *See* [Doc. 1 at ¶ 37]. Neither the Businessowners Special Property Coverage Form nor the Policy contained any virus or bacteria exclusion. [Doc. 32 at ¶ 47].

On December 31, 2019, Chinese health authorities notified the WHO about a cluster of pneumonia of unknown etiology in Wuhan, China. [*Id.* at ¶ 48]. A few days later, the same authorities identified a novel Coronavirus ("COVID-19") as the cause of the outbreak. [*Id.* at ¶ 49]. Since its discovery, COVID-19—a highly contagious airborne virus—has rapidly spread around the globe, infecting more than 1,920,904 people in the United States and more than 126,000 in the State of Illinois. [*Id.* at ¶ 50]. *See also* [Doc. 22 at ¶ 18]; [Doc. 25 at ¶ 19].

A public health crisis of epic proportions, the COVID-19 pandemic has profoundly impacted all aspects of American society, including the public's ability to congregate in bars and restaurants. [Doc. 1 at ¶¶ 19-20]; [Doc. 22 at ¶¶ 19-20]. In response to this pandemic, federal and state authorities have mandated "social distancing" and limited the number of people that can gather in any setting. *See* [Doc. 1 at at ¶ 21]; [Doc. 22 at ¶ 21]; [Doc. 25-1]; [Doc. 25-2].

On March 16, 2020, in direct response to the COVID-19 outbreak, and pursuant to the Illinois Emergency Management Agency Act, 20 ILCS 3305/1, *et seq.*, Illinois Governor J.B. Pritzker issued Executive Order 2020-07, ordering "all businesses in the State of Illinois that offer food or beverages for on-premises consumption—including restaurants, bars, grocery stores, and

food halls—[to] suspend service for and … not permit on-premises consumption." [Doc. 1 at ¶ 22]; [Doc. 22 at ¶ 22]; [Doc. 25-1].

On March 20, 2020, Governor Pritzker issued Executive Order 2020-10: (1) directing Illinois residents to stay in their homes except when performing "essential" activities; (2) prohibiting gatherings of 10 or more people; and (3) requiring "non-essential" businesses to cease operations. [Doc. 1 at ¶ 23]; [Doc. 22 at ¶ 23]; [Doc. 25-2].

Governor Pritzker subsequently extended Executive Orders 2020-07 and 2020-10 through May 29, 2020. [Doc. 32 at ¶¶ 54-56].

On or about March 16, 2020, and in compliance with Executive Order 2020-07, Billy Goat suspended all of its restaurants' dine-in services and began losing Business Income.[2] [Doc. 1 at ¶ 38]; [Doc. 22 at ¶ 38]. Billy Goat submitted a claim to Society for its lost Business Income on March 16. [Doc. 22 at ¶ 39]; [Doc. 25 at ¶ 42]. Less than a week later, Society denied coverage for Billy Goat's claim. [Doc. 32 at ¶ 60]; [Doc. 25 at ¶ 42].

On March 31, 2020, Billy Goat filed a putative class action lawsuit against Society, alleging breach of contract and seeking a declaratory judgment of coverage pursuant to 28 U.S.C. § 2201. Society has since moved for summary judgment, arguing only that Billy Goat did not suffer the "direct physical loss of or damage to covered property" necessary to trigger the Businessowners Special Property Coverage Form's Business Income coverage.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "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). "In ruling on a motion for summary judgment, a court must view the record and all

[2] Business Income as used herein means "Business Income" as defined in Businessowners Special Property Coverage Form Section A.5.g.1.c. [Doc. 1-1 at 95].

inferences to be drawn from it in the light most favorable to the non-movant." *Resolution Tr. Corp. v. Aetna Cas. & Sur. Co. of Illinois*, 831 F. Supp. 610, 616 (N.D. Ill. 1993), *aff'd*, 25 F.3d 570 (7th Cir. 1994) (citing *Griffin v. Thomas,* 929 F.2d 1210, 1212 (7th Cir. 1991)). Summary judgment should be granted only "[i]f, after viewing the facts and the reasonable inferences therefrom in the light most favorable to the non-moving party, it is clear that no reasonable jury could return a verdict in its favor." *Harris v. Bellin Mem'l Hosp.*, 13 F.3d 1082, 1083 (7th Cir. 1994) (internal citation omitted). *See also Donald v. Liberty Mut. Ins. Co.*, 18 F.3d 474, 482 (7th Cir. 1994).

"Because [insurance policies] are interpreted as a matter of law, claims that turn on the interpretation and construction of [an insurance policy], rather than on disputed material facts, are suitable for resolution on a motion for summary judgment." *Urban 8 Fox Lake Corp. v. Nationwide Affordable Hous. Fund 4, LLC*, 431 F. Supp. 3d 995, 998 (N.D. Ill. 2020) (internal citation omitted). *See also BASF AG v. Great Am. Assur. Co.*, 522 F.3d 813, 818–19 (7th Cir. 2008) (internal citations omitted). Summary judgment should be granted if the relevant policy language is unambiguous, and the movant's interpretation of the policy is the only reasonable one. *See Ryan v. Chromalloy Am. Corp.*, 877 F.2d 598, 602 (7th Cir. 1989) (citing *Metalex Corp. v. Uniden Corp. of America,* 863 F.2d 1331, 1333 (7th Cir.1988)); *Moriarty v. Svec*, 164 F.3d 323, 330 (7th Cir. 1998) (internal citation omitted).

Summary judgment must be denied: (1) if the relevant policy language is susceptible to more than one reasonable interpretation; or (2) the court finds the non-moving party's interpretation of the policy is the only reasonable one. *See Zemco Mfg., Inc. v. Navistar Int'l Transp. Corp.*, 270 F.3d 1117, 1127–28 (7th Cir. 2001); *BP Amoco Chem. Co. v. Flint Hills Res., LLC*, 600 F. Supp. 2d 976, 980 (N.D. Ill. 2009) (citing *Springer v. Durflinger,* 518 F.3d 479, 486

(7th Cir. 2008)) ("Summary judgment is inappropriate if the evidence would permit a jury to find in favor of the nonmoving party").

IV. ARGUMENT

A. Businessowners Special Property Coverage Form Section A.5.g covers the Business Income Billy Goat lost as a result of Executive Order 2020-07

Because Businessowners Special Property Coverage Form Section A.5.g covers the Business Income Billy Goat lost as a result of Executive Order 2020-07, the Court should deny Society's motion for summary judgment.

"Generally, an 'all risk' insurance policy creates a special type of coverage extending to risks not usually covered under other insurance, and recovery under an 'all risk' policy will, as a rule, be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage." *Bd. of Educ. of Maine Twp. High Sch. Dist. 207 v. Int'l Ins. Co.*, 684 N.E.2d 978, 981 (Ill. App. Ct. 1997) (internal citations omitted).

"To withstand a motion for summary judgment in a lawsuit involving an insurer's failure to pay a claim under an all-risk insurance policy, the insured bears the initial burden of presenting sufficient facts establishing a *prima facie* case." *Gulino*, 971 N.E.2d at 527 (internal citation omitted). *See also Huntington Chase Condo. Ass'n*, 379 F. Supp. 3d at 696. "To satisfy his burden, the insured must show that (1) a loss occurred, (2) the loss resulted from a fortuitous event, and (3) an all-risk policy covering the property was in effect at the time of the loss." *Gulino*, 971 N.E.2d at 527 (internal citation omitted). *See also St. Michael's Orthodox Catholic Church v. Preferred Risk Mut. Ins. Co.*, 496 N.E.2d 1176, 1178 (Ill. App. Ct. 1986) (internal citations omitted). "Once the insured establishes a *prima facie* case, the burden shifts to the insurer to affirmatively demonstrate that the loss resulted from a peril expressly excluded from coverage." *Gulino*, 971

N.E.2d at 527 (internal citation omitted). *See also Huntington Chase Condo. Ass'n*, 379 F. Supp. 3d at 697; *St. Michael's Orthodox Catholic Church*, 496 N.E.2d at 1178 (internal citations omitted) ("Once the insured has brought himself within the terms of his policy, then the insurer must prove the applicability of an exception in the coverage if it wishes to escape liability").

"The proper construction of [insurance policy] provisions … is a question of law." *Sanders v. Illinois Union Ins. Co.*, 2019 IL 124565, ¶ 22. "An insurance policy is a contract, and the general rules governing the interpretation of other types of contracts also govern the interpretation of insurance policies." *Hobbs v. Hartford Ins. Co. of the Midwest*, 823 N.E.2d 561, 564 (Ill. 2005) (internal citations omitted). "A court's primary objective in construing the language of [an insurance] policy is to ascertain and give effect to the intentions of the parties as expressed in their agreement." *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 75 (Ill. 1997) (internal citation omitted). "In performing that task, the court must construe the policy as a whole, taking into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract." *Nicor, Inc. v. Associated Elec. & Gas Ins. Servs. Ltd.*, 860 N.E.2d 280, 286 (Ill. 2006) (internal citation omitted).

"All of the [terms and] provisions in a policy must be viewed together to give meaning and effect to each." *One Place Condo., LLC v. Travelers Prop. Cas. Co. of Am.*, No. 11 C 2520, 2015 WL 2226202, at *3 (N.D. Ill. Apr. 22, 2015) (citing *National Cas. Co. v. Jewel's Bus Co.*, 880 F.Supp.2d 914, 916 (N.D. Ill. 2012)). *See also Pekin Ins. Co. v. Wilson*, 930 N.E.2d 1011, 1023 (Ill. 2010) (citing *Cincinnati Ins. Co. v. Gateway Const. Co.*, 865 N.E.2d 395, 399 (Ill. App. Ct. 2007)) ("a reviewing court will not interpret an insurance policy in such a way that any of its terms are rendered meaningless or superfluous"); *Atwood v. St. Paul Fire & Marine Ins. Co.*, 845 N.E.2d 68, 71 (Ill. App. Ct. 2006) (collecting cases).

"If the terms of the policy are clear and unambiguous, they must be [applied as written and] given their plain and ordinary meaning." *American States Ins. Co.*, 687 N.E.2d at 75 (internal citation omitted). *See also Hobbs*, 823 N.E.2d at 564 (internal citation omitted). "However, if the words in the policy are susceptible to more than one reasonable interpretation, they are ambiguous and will be construed in favor of the insured and against the insurer who drafted the policy." *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1212 (Ill. 1992) (internal citations omitted). "In addition, provisions that limit or exclude coverage are to be construed liberally in favor of the insured and 'most strongly against the insurer.'" *Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Glenview Park Dist.*, 632 N.E.2d 1039, 1042 (Ill. 1994) (internal citation omitted). "[A] policy provision that purports to exclude or limit coverage will be read narrowly and will be applied only where its terms are clear, definite, and specific." *Gillen v. State Farm Mut. Auto. Ins. Co.*, 830 N.E.2d 575, 582 (Ill. 2005) (internal citation omitted).

To recover under a business interruption insurance policy like the one in Businessowners Special Property Coverage Form Section A.5.g, an insured must prove: (1) that it suffered the "direct physical loss of or damage to covered property at the … premises" listed in the declaration; (2) the property "loss or damage" was caused by or resulted from a "Covered Cause of Loss;" (3) the property "loss or damage" caused the insured to "suspen[d] its "operations;" (4) the insured lost Business Income during the "period of restoration;" and (5) the "suspension of operations" actually caused the insured's lost Business Income. *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 958 F. Supp. 594, 602 (S.D. Fla. 1997) (internal citations omitted). *See also* [Doc. 1-1 at 94].

Society's sole argument in opposing coverage is that Billy Goat fails to satisfy the first two requirements, claiming Billy Goat did not suffer "direct physical loss of or damage to covered property" as a result of a "Covered Cause of Loss."

Society is wrong. Because (1) Billy Goat suffered the "direct physical loss of … covered property" as a result of Executive Order 2020-07; and (2) Executive Order 2020-07 is a "Covered Cause of Loss," Billy Goat readily satisfies both requirements. Thus, Billy Goat's lost Business Income falls within the Businessowners Special Property Coverage Form's terms.

i. As a result of Executive Order 2020-07, Billy Goat suffered the "direct physical loss of … covered property at the described premises"

1. *As a result of Executive Order 2020-07, Billy Goat suffered the "direct physical loss of" its in-restaurant dining areas*

According to the Businessowners Special Property Coverage Form, Business Income coverage cannot be triggered without a "direct physical loss of or damage to covered property at the described premises." [Doc. 1-1 at 94]. Although the coverage form fails to define the phrases "direct physical loss of" and "damage to," the placement of the word "or" between them means "that each is 'separate and distinct' and 'must be considered separately as a trigger of coverage.'" *Gulino*, 971 N.E.2d at 528 (internal citation omitted). *See also Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F.3d 743, 747 (7th Cir. 2015); *Fountain Powerboat Indus., Inc. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552, 557 (E.D.N.C. 2000) (interpreting a business interruption policy in which coverage was predicated on "loss, damage, or destruction" and holding "[a] 'loss' is not predicated on physical damage but is one category of recovery along with damage and destruction as indicated by the use of the alternative coordinating conjunction 'or'").

When a phrase in an insurance policy is undefined, courts afford that phrase "its plain and ordinary meaning." *Gulino*, 971 N.E.2d at 527–28 (citing *Fremont Cas. Ins. Co. v. Ace-Chicago Great Dane Corp.*, 739 N.E.2d 85, 91 (Ill. App. Ct. 2000)). A phrase's "plain and ordinary meaning" is "that meaning which the particular language conveys to the popular mind, to most people, to the average, ordinary, normal [person], to a reasonable [person], to persons with usual and ordinary understanding, to a business [person], or to a lay[person]," *Travelers Ins. Co. v. Eljer*

Mfg., Inc., 757 N.E.2d 481, 496 (Ill. 2001) (internal citation and quotation marks omitted), and "can be derived from a dictionary." *Gulino*, 971 N.E.2d at 527–28 (internal citation omitted). *See also Travelers Ins. Co.*, 757 N.E.2d at 496; *State Farm Mut. Auto. Ins. Co. v. Rodriguez*, 987 N.E.2d 896, 900–01 (Ill. App. Ct. 2013) (internal citations omitted).

An average, ordinary, and reasonable person would interpret the meaning of "direct physical loss of … covered property" to include the sudden inability to use property that was previously usable. Numerous courts interpreting "direct physical loss of" in the insurance policy context have reached similar conclusions. *See, e.g., Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB (KSX), 2018 WL 3829767, at *3-4, n.4 (C.D. Cal. July 11, 2018) (The "ordinary and popular meaning" of "direct physical loss of" "includes physical dispossession in the absence of physical damage"); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Connecticut*, No. CIV. 05-1315-JE, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) (insured suffered "direct physical loss of or damage to" the covered property when the property could not be used for its "ordinary expected purpose" even though the property could still be used for other income-generating purposes); *accord Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) (insured suffered "direct physical loss of or damage to" the covered premises when an ammonia discharge "rendered the facility unusable," even though the premises was not structurally altered); *Manpower Inc. v. Ins. Co. of the State of Pennsylvania*, No. 08C0085, 2009 WL 3738099 (E.D. Wis. Nov. 3, 2009) (insured suffered a "direct physical loss of" the insured premises and the property therein when it was forced to evacuate for safety reasons, even though the premises itself was not physically damaged). *See also Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 149 (Minn. Ct. App. 2001) (food manufacturer suffered "direct physical loss or damage to" cereal

product when oats used in the product were treated with a non-hazardous pesticide that was not FDA-approved—and may therefore be unsaleable—even though the oats were safe for human consumption); *Western Fire Ins. Co. v. First Presbyterian Church,* 437 P.2d 52, 54-55 (Colo. 1968) (church suffered the "direct physical loss" of a church building after gasoline vapors rendered it uninhabitable).

Dictionary definitions of the terms "physical" and "loss" further support the abovementioned interpretation. Black's law dictionary defines "physical" as "1. Of, relating to, or involving the material universe and its phenomena; relating to the physical sciences … [and] 2. Of, relating to, or involving material things; pertaining to real, tangible objects." Physical, Black's Law Dictionary (11th ed. 2019). Collins English Dictionary similarly defines "physical" as "of nature and all matter; natural; material." Physical, Collins Online English Dictionary, https://www.collinsdictionary.com/us/dictionary/english/physical.

Black's law dictionary defines "loss" as "[a]n undesirable outcome of a risk; the disappearance or diminution of value, usu. in an unexpected or relatively unpredictable way[;] … [and] [t]he failure to maintain possession of a thing." Loss, Black's Law Dictionary (11th ed. 2019). Collins English Dictionary similarly defines "loss" as "the fact of no longer having something or having less of it than before." Loss, Collins Online English Dictionary, https://www.collinsdictionary.com/us/dictionary/english/loss.

Based on the foregoing dictionary definitions, the plain and ordinary meaning of "direct physical loss of … covered property" encompasses the sudden dispossession of tangible property and/or the sudden disappearance or diminution of tangible property's value.

By prohibiting Billy Goat from using its in-restaurant dining areas (which consist of various real and personal property at the premises listed in the Policy's declaration form),

Executive Order 2020-07 (and any subsequent executive orders extending it and/or its prohibition of on-premises dining) dispossessed Billy Goat of said dining areas and caused their economic value to abruptly disappear. The "loss" of Billy Goat's in-restaurant dining areas was undoubtedly "physical" as the dining rooms are composed of square footage and material, physical, tangible objects (like chairs, tables, dispensers and utensils) that are perceptible to the senses and interactive. Courts in this district have recognized this unconstroversial conclusion. *See, e.g., One Place Condo., LLC,* 2015 WL 2226202, at *9 ("where a general all-risk commercial or homeowner's policy insures against both 'loss' and 'damage' to an existing structure, 'physical' damage may take the form of loss of use of otherwise undamaged property").

Finally, Billy Goat's losses are "direct" because Billy Goat lost part of its insured presmises, as opposed to simply losing the use of an insured presmises due to "loss of" or "damage to" some other unowned and/or uninsured property—like an adjacent street, sidewalk or building—which would arguably be "indirect." *See Roundabout Theatre Co., Inc. v. Cont'l Cas. Co.*, 751 N.Y.S.2d 4, 8 (N.Y. App. Div. 2002). Thus, Billy Goat suffered the "direct physical loss of" its in-restaurant dining areas as a result of Executive Order 2020-07.

In its summary judgment motion, Society argues that "'[d]irect physical loss' requires damage to the structural integrity of Plaintiffs' restaurants." [Doc. 24 at 13]. However, Society's "direct physical loss of" interpretation ignores the Businessowners Special Property Coverage Form's plain language and multiple canons of contract interpretation which dictate that "physical loss" does not require physical "damage." Because the disjunctive "or" separates "physical loss of" and "damage to," each phrase is "separate and distinct … and must be considered separately as a trigger of coverage." *Zurich Ins. Co. v. Northbrook Excess & Surplus Ins. Co.*, 494 N.E.2d

634, 642 (Ill. App. Ct. 1986), *aff'd sub nom. Zurich Ins. Co. v. Raymark Indus., Inc.*, 514 N.E.2d 150 (Ill. 1987).

Furthermore, to interpret "physical loss of" as requiring "damage to" would render meaningless the "or damage to" portion of the same clause, thereby violating the canon of contract interpretation that every word be given a meaning. *See, e.g., Regency Commercial Assocs., LLC v. Lopax, Inc.*, 869 N.E.2d 310, 316 (Ill. App. Ct. 2007) (internal citation omitted) (a contract "is to be interpreted as a whole, giving meaning and effect to every provision when possible, and a court will not interpret the agreement in a way that would nullify provisions or render them meaningless"). Thus, "physical loss of" covered property cannot require "damage to" covered property.

Instead of construing the Businessowners Special Property Coverage Form's "plain and ordinary meaning" in accordance with Illinois law, Society points to inapposite case law in an attempt to support its argument that "direct physical loss of or damage to covered property" requires structural damage to the covered property.

However, Society's reliance on *Mutlu v. State Farm Fire & Casualty Company*, 785 N.E.2d 951 (Ill. App. Ct. 2003), *Pentair, Inc. v. American Guarantee & Liability Insurance Company*, 400 F.3d 613 (8th Cir. 2005), *Roundabout Theatre Company, Inc.*, 751 N.Y.S.2d 4, and *Source Food Technology, Inc. v. United States Fidelity & Guaranty Company*, 465 F.3d 834 (8th Cir. 2006), is misguided because each of those cases interpret insurance policy language different than the Policy's. The words and phrases and the context in which they are written are unique to each insurance policy. That uniqueness is the foundation for the established rules of contract and policy interpretation. *See, e.g., Regency Commercial Assocs., LLC*, 869 N.E.2d at 316. For example, in *Mutlu*, coverage was triggered by "property damage" (which the policy defined as

"physical damage to or destruction of tangible property, including loss of use") and not "direct physical loss of or damage to covered property." *Mutlu*, 785 N.E.2d at 956. That the specific language of the *Mutlu* policy tied tangible damage to "loss of use" has no bearing on the interpretation of completely different lanauge in the Businessowners Special Property Coverage Form.

The business interruption coverage at issue in *Pentair, Inc.* similarly required "damage" to specific property. *Pentair, Inc.*, 400 F.3d at 614. *See also Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.*, No. CIV.02-3696(DWF/JGL), 2003 WL 21804874, at *2 (D. Minn. July 31, 2003), *aff'd*, 400 F.3d 613 (8th Cir. 2005). Therefore, *Pentair, Inc.*, 400 F.3d 61, is inapposite as to the meaning of "direct physical loss of."

Furthermore, the business interruption policies in *Roundabout Theatre Company, Inc.* and *Source Food Technology, Inc.* both required "direct physical loss *to*" covered property (as opposed to "direct physical loss *of*" covered property), and are therefore inapposite. *Roundabout Theatre Co., Inc.*, 751 N.Y.S.2d at 8; *Source Food Tech., Inc.*, 465 F.3d at 835. Although the *Roundabout Theatre Co., Inc.* and *Source Food Technologies, Inc.* courts held that "direct physical loss to" covered property required the covered property be damaged or contaminated, *Roundabout Theatre Co., Inc.*, 751 N.Y.S.2d at 8, *Source Food Tech., Inc.*, 465 F.3d at 838, "it stands to reason that ['direct physical loss of' and 'direct physical to'] … differ in meaning, such that 'direct physical loss *of*' should be construed differently from 'direct physical loss *to*' or 'direct physical loss.'" *Total Intermodal Servs. Inc.*, 2018 WL 3829767, at *4. *See also One Place Condo., LLC*, 2015 WL 2226202, at *3 (internal citation omitted).

In fact, the Eighth Circuit Court of Appeals explicitly recognized "direct physical loss of" and "direct physical loss to['s]" different meanings in *Source Food Technology, Inc.*—in which it

held that an insured beef wholesaler (who was barred from importing uncontaminated and undamaged Canadian beef product it purchased because of a United States Department of Agriculture embargo aimed at preventing the spread of "mad cow disease") did not suffer the "direct physical loss ***to*** [p]roperty" necessary to trigger "business interruption" coverage. *Source Food Tech., Inc.*, 465 F.3d at 834-38 (***emphasis added***). Finding that the plaintiff's "inability to transport … beef product across the border and sell the beef product in the United States" failed to qualify as a "direct physical loss to property," the court explicitly noted that the "policy's use of the word 'to' in the policy language 'direct physical loss *to* property' [was] significant" and that the plaintiff's argument "might [have been] stronger if the policy's language included the word 'of' rather than 'to,' as in 'direct physical loss *of* property' or even 'direct loss *of* property.'" *Id.* at 838.

Additionally, despite Society's assertions to the contrary, Billy Goat's interpretation of "direct physical loss of" fails to render the Businessowners Special Property Coverage Form's "period of restoration" provision meaningless. In fact, Billy Goat's interpretation fits perfectly with the "period of restoration" provision's plain language.

The Businessowners Special Property Coverage Form provides coverage for Business Income lost during the "period of restoration," which is defined as "the period of time that ... [b]egins immediately after the time of direct physical loss or damage for Business Income or Extra Expense coverage caused by or resulting from any covered Cause of Loss at the described premises; and ... [e]nds on the earlier of: (1) [t]he date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) [t]he date when business is resumed at a new permanent location." [Doc. 1-1 at 95, 120].

Neither the Policy nor the Businessowners Special Property Coverage Form defines "repaired" or "replaced"—which will therefore be given their "plain and ordinary meanings." The "plain and meaning" of "repair" is "to restore to a sound or healthy state." Repair, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/repair. The "plain and ordinary meaning" of "replace" is "to restore to a former place or position." Replace, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/replace. Based on the foregoing definitions, the "period of restoration" (unsurprisingly) ends when "the [lost or damaged] property at the described premises" should be "restored" (that is, brought "back into existence or use"). Restore, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/restore. Courts around the country have interpreted similar policy language in accordance with the foregoing plain and ordinary meaning. *See, e.g, Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *6 (D. Or. June 7, 2016), *vacated on other grounds*, No. 1:15-CV-01932-CL, 2017 WL 1034203 (D. Or. Mar. 6, 2017) (when the "described premises" does not need structural repairs, the "period of restoration" ends when the insured can resume normal operations at the "described premises"). Property of which one has been dispossessed can be brought back into "use" without ever having been "damaged." Thus, the "period of restoration" provision contemplates the dispossession of covered property in the absence of physical damage and is consistent with Billy Goat's interpretation of "direct physical loss of."

In sum, Billy Goat has demonstrated that it sustained a "direct physical loss" in accordance with the Businessowners Special Property Coverage Form.

2. *Billy Goat's in-restaurant dining areas are "covered property at the described premises"*

The Businessowners Special Property Coverage Form covers the buildings and structures at each of Billy Goat's restaurants (identified above); personal property used to maintain those buildings and structures; "fixtures, alterations, installations [and] additions" to those buildings and structures; and personal property Billy Goat uses in its business. [Doc. 1-1 at 90, 94].

Billy Goat's in-restaurant dining areas consist of portions of physical restaurants containing various personal property Billy Goat uses in its dine-in business. Thus, Billy Goat's in-restaurant dining areas are "covered property at the described premises."

Therefore, Billy Goat suffered the "direct physical loss of … covered property at the described premises" as a result of Executive Order 2020-07.

ii. Executive Order 2020-07 is a "Covered Cause of Loss" under Businessowners Special Property Coverage Form Section A.5.g

Regarding "Covered Causes of Loss," Businessowners Special Property Coverage Form Section A.3 states:

> **3. Covered Causes of Loss**
>
> Direct Physical Loss unless the loss is excluded or limited under this coverage form.

[Doc. 1-1 at 91].

Both the Businessowners Special Property Coverage Form and the Policy fail to define "Direct Physical Loss" as used in Section A.3. Thus, the Businessowners Special Property Coverage Form is silent on the "Causes" covered and only addresses the result—a "Direct Physical Loss." Put another way, a "cause" of loss is not and cannot be a "Direct Physical Loss" (e.g., a fire is a "cause" but the burned walls or destroyed contents are the "loss"). Moreover, the Businessowners Special Property Coverage Form only identifies the causes that are excluded or

limited, and fails to delineate the specific causes that are covered. Consequently, Section A.3 can only be read to cover all causes of "direct physical loss" unless the specific loss is excluded or limited under the Businessowners Special Property Coverage Form.

Billy Goat suffered the "direct physical loss of" its in-restaurant dining areas as a result of Executive Order 2020-07. Society does not argue that the "direct physical loss of" Billy Goat's in-restaurant dining areas is subject to any of the Businessowners Special Property Coverage Form's exclusions or limitations.[3] Because "it is the insurer's burden to affirmatively demonstrate the applicability of an exclusion," *Johnson Press of Am., Inc. v. N. Ins. Co. of New York*, 791 N.E.2d 1291, 1298 (Ill. App. Ct. 2003), "an insured covered by an all-risk insurance policy need not … disprove any excluded perils in order to establish a *prima facie* case" of coverage." *Wallis v. Country Mut. Ins. Co.*, 723 N.E.2d 376, 380 (Ill. App. Ct. 2000).

Because the "direct physical loss of" Billy Goat's in-restaurant dining areas is not excluded or limited under the Businessowners Special Property Coverage Form, Executive Order 2020-07 is a "Covered Cause of Loss."

Because Billy Goat suffered the "direct physical loss of … covered property at the described premises" as a result of a "Covered Cause of Loss," Businessowners Special Property Coverage Form Section A.5.g covers the Business Income Billy Goat lost due to Executive Order 2020-07. Therefore, the Court should deny Society's motion for summary judgment.

[3] Society has waived any argument that the Businessowners Special Property Coverage Form excludes the "direct physical loss of" Billy Goat's in-restaurant dining areas from coverage by failing to assert any applicable exclusion in its summary judgment motion. *See United States v. Desotell*, 929 F.3d 821, 826 (7th Cir. 2019) ("In most instances, litigants waive any arguments they make for the first time in a reply brief"); *Shales v. T. Manning Concrete, Inc.*, 847 F. Supp. 2d 1102, 1114 (N.D. Ill. 2012).

B. Even if the Court finds Society's interpretation of Businessowners Special Property Coverage Form Section 5.A.g to be reasonable, it should nonetheless deny Society's motion for summary judgment because Billy Goat's interpretation is also reasonable

Because Billy Goat's interpretation of Businessowners Special Property Coverage Form Section A.5.g is undoubtedly reasonable, the Court should deny Society's motion for summary judgment even it if finds Society's interpretation to also be reasonable.

If a provision in an insurance policy is susceptible to more than one reasonable interpretation, it is ambiguous "and will be construed in favor of the insured and against the insurer who drafted the policy." *Outboard Marine Corp.*, 607 N.E.2d at 1212 (internal citations omitted). When determining whether insurance "coverage is appropriate," courts may "consider a policyholder's reasonable expectations and the coverage intended by the insurance policy." *Cummins v. Country Mut. Ins. Co.*, 687 N.E.2d 1021, 1027 (Ill. 1997) (internal citation omitted).

"All-risk" insurance policies—like the Businessowners Special Property Coverage Form—cover "all risks or perils except for those that are specifically excluded." *Huntington Chase Condo. Ass'n*, 379 F. Supp. 3d at 696. Thus, a policyholder would reasonably expect an "all-risk" insurance policy to cover all losses that are not explicitly excluded. Considering Businessowners Special Property Coverage Form Section A.5.g's plain language (discussed above), "all-risk" insurance policies' broad coverage, a policyholder's reasonable expectations, and the absence of any applicable exclusion, the only reasonable interpretation of "direct physical loss of … covered property" includes the sudden inability to use undamaged property that was previously usable.

At the very best, Society has posited one possible interpretation of Businessowners Special Property Coverage Form Section A.5.g (albeit one that numerous courts around the country have rejected) in its motion for summary judgment. Even if the Court somehow finds that Society's interpretation is reasonable (and the policy is therefore ambiguous in light of Billy Goat's equally

reasonable interpretation), it must nonetheless deny Society's summary judgment motion as ambiguities are construed against the insurer.

V. CONCLUSION

For all the foregoing reasons, Plaintiffs, BILLY GOAT TAVERN I, INC., BILLY GOAT MIDWEST, LLC, BILLY GOAT NORTH II, INC., BILLY GOAT VI, INC., BILLY GOAT INN, INC., BILLY GOAT TAVERN WEST, LLC, all d/b/a/ BILLY GOAT TAVERN, respectfully request that this Court deny Defendant, SOCIETY INSURANCE's Motion for Summary Judgment and provide all other appropriate relief.

Dated: June 22, 2020

Respectfully submitted,

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The undersigned hereby certifies that on this 22nd day of June, 2020 he caused a true and correct copy of the foregoing PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT to be served upon the persons listed above via the Court's Electronic Filing System.

By: /s/ Robert R. Duncan

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