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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

SERENDIPITOUS, LLC/MELT; MELT FOOD TRUCK, LLC D/B/A MELT; and FANCY'S ON FIFTH, LLC D/B/A FANCY'S ON FIFTH,	)	
PLAINTIFFS,	)	**CASE NO: 20-cv-00873-MHH**
V.	)	
THE CINCINNATI INSURANCE COMPANY,	)	
DEFENDANT.	)	

MOTION FOR LEAVE TO APPEAR AS *AMICI CURAE*

Proposed *amici curiae* United Policyholders and National Independent Venue Association ("NIVA") move the Court for an Order permitting them to appear as *amici curiae* in support of Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss (Doc. 30) and to consider the attached brief in connection with that motion.

MEMORANDUM

A. Legal Standard.

The Court has broad discretion to appoint *amicus curiae*. *See In re*

Bayshore Ford Truck Sales, Inc., 471 F.3d 1233, 1249 n.34 (11th Cir. 2006) (district courts have inherent authority and broad discretion to grant leave to file an amicus brief); *Stauart v. Huff*, 706 F.3d 345, 355 (4th Cir. 2013) (same); *Jin v. Ministry of State Sec*., 557 F. Supp. 2d 131, 136 (D. D.C. 2008) (same); *James Square Nursing Home, Inc. v. Wing*, 897 F. Supp. 682, 683 n.2 (N.D. N.Y. 1995) (same).

The classic role of an *amicus curiae* is to assist the Court "in a case of general public interest, supplementing the efforts of counsel [for the parties], and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co., Inc. v. Comm'r of Labor and Indus*., 694 F.2d 203 204 (9th Cir. 1982). *Amici* assist "in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Newark Branch, N.A.A.C.P. v. Town of Harrison, N.J*., 940 F.2d 792, 808 (3d Cir. 1991) (citations omitted).

Courts often grant leave to nonprofit organizations like United Policyholders and the other proposed *amici* with knowledge and perspective that may assist in the resolution of the case. *See Bryant v. Better Bus. Bureau*, 923 F. Supp. 720, 728 (D. Md. 1996); *see also Perry-Bey v. City of Norfolk, Va*., 678 F. Supp. 2d 348, 357 (E.D. Va. 2009).

Although the Federal Rules of Civil Procedure do not contain a rule governing the filing of *amicus* briefs, district courts often look to Federal Rule of Appellate Procedure 29 and United States Supreme Court Rule 37 for guidance. *See, e.g.*, *Am. Humanist Ass'n v. Mid-Nat'l Capital Park & Planning Comm'n*, 147 F. Supp. 3d 373, 389 (D. Md. 2015); *Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1500-01 (S.D. Fla. 1991). Rule 29 provides that a prospective *amicus* must file, along with the proposed brief, a motion that states "the movant's interest" and "the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a)(3).

B. Interest of *Amici* in This Case.

This motion to dismiss is one of a wave of challenges mounted by the insurance industry, and Defendant in particular, nationwide, to a policyholder's ability to state a claim for business interruption insurance coverage stemming from the SARS-CoV-2/COVID-19 pandemic. The nature of the arguments raised by Defendant are sweeping in scope and touch on issues that are raised in similar litigation now pending in virtually every federal judicial district in the country.[1] On information and belief this is one of the first such challenges in this District, making

[1] *See* University of Pennsylvania Carey Law School "Covid Coverage Litigation Tracker," available at https://cclt.law.upenn.edu/ (last visited October 12, 2020).

this case particularly important as a bell-weather as to the legal issues presented by Defendant's motion.

1. United Policyholders

United Policyholders ("UP") is a non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public on insurers' duties and policyholders' rights. UP monitors developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in sales and claim practices. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help), *Roadmap to Preparedness* (disaster preparedness through insurance education), and *Advocacy and Action* (advancing pro-consumer laws and public policy through submission of *amicus curiae*). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage and the claims process at www.uphelp.org.

UP has served Alabama residents after hurricanes and tornadoes and

has directly worked as part of a coalition with faith-based associations working to improve affordability and availability of home insurance in the state. After tornadoes wreaked havoc in Alabama in 2011, UP helped guide small business and home owners on insurance matters during the recovery process. UP also provided oral and written comments to Governor Bentley's Affordable Homeowners Insurance Commission regarding regulatory and legislative reforms to help bring prices down, restore competition and increase consumer choice in Alabama.

UP's Executive Director has been selected for eleven consecutive terms to be an official consumer representative to the National Association of Insurance Commissioners where she works with insurance regulators, including Alabama Insurance Commissioner Ridling and his staff.

In furtherance of its mission, UP regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. UP has appeared as amicus curiae in the following Alabama cases: *State Farm Fire and Cas. Co. v. Brechbill* (CV-2010-900034) and *Gilbert v. Alta Health & Life Ins. and Great-West Life & Annuity Ins.* (Case No. 01-10829-GG, 2002, U.S. Court of Appeals, 11th Circuit). UP's *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999).

UP seeks to fulfill the classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that may have escaped consideration. *Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). As commentators have stressed, an *amicus* is often in a superior position to focus the court's attention on the broad implications of various possible rulings. R. Stern, *E. Greggman & S. Shapiro, Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 608 (1984)).

2. National Independent Venue Association

The National Independent Venue Association ("NIVA") is a trade association formed in 2020 just prior to the pandemic, with nearly 2,000 charter members in all 50 states. NIVA's members are independent performing-arts venues, both for- and non-profit, employing thousands of people, and are part of the cultural backbone of their communities. Representative Alabama members include the Alabama Theater (Birmingham); Lyric Theater (Birmingham); Midtown Music Group (Birmingham); Soul Kitchen Music Hall (Mobile); and the Montgomery Performing Arts Centre (Montgomery). Outside of Alabama, well-known members include the 9:30 Club in Washington, D.C.; World Café Live in Philadelphia, Pennsylvania; and the Pabst Theater Group in Milwaukee, Wisconsin; and the Red

River Cultural District in Austin, Texas. More information is available at https://www.nivassoc.org/.

C. The Issues Addressed by the *Amicus* Brief are Useful and Relevant to the Court's Review of Defendant's Motion to Dismiss.

Defendant's motion to dismiss asserts that a party cannot plead COVID-19 related business interruption coverage because "physical loss" or "physical damage" cannot exist without structural alteration and/or visible contamination of property. The public at large has a significant interest in this issue, which is being actively litigated throughout the country. This Court's disposition of Defendant's motion has the potential to affect thousands of policyholders, not only in Alabama, but nationwide.

The Court will benefit by reviewing the perspective of *amicus* UP, who has considerable experience in briefing courts on insurance coverage issues and an interest in ensuring a proper ruling under the doctrines of policy interpretation, and the perspective of hundreds of businesses that are members of proposed *amicus* NIVA. The proposed brief will provide *amici's* broad perspective on how the propensities of the SARS-CoV- 2 virus and its manifestation during this pandemic constitute "physical loss" or "physical damage" under a property insurance policy, under Alabama law and more generally.

CONCLUSION

For the reasons set forth above promised *amici curae* respectfully request that the Court grant this motion and enter an order permitting proposed *amici curae* to appear and accepting the proposed *amici curiae* brief in relation to Defendant's motion to dismiss. A copy of the proposed brief is attached as Exhibit A.

Respectfully Submitted,

/s/ Dylan C. Black

Dylan C. Black (BLA084)
Emily Ruzic (RUZ002)
Bradley Arant Boult Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2119
Tel.: (205) 521-8000
Fax: (205) 521-8800
dblack@bradley.com
druzic@bradley.com
Attorneys for proposed amici curae
United Policyholders and
National Independent Venue Association

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2020, I filed the foregoing using the Court's CM/ECF Electronic Case Filing system which will send notification to the following, registered attorneys:

Augusta S. Dowd
Craig A. Shirley
WHITE ARNOLD & DOWD P.C.
2025 Third Avenue North, Suite 500
Birmingham, AL 35203
T: (205) 323-1888
F: (205) 323-8907
adowd@whitearnolddowd.com
cshirley@whitearnolddowd.com

James S. Williams
Alyse N. Windsor
SIROTE & PERMUTT, P.C.
2311 Highland Avenue South
Post Office Box 55727
Birmingham, AL 35255-5727
Tel.: (205) 930-5100
Fax: (205) 930-5101
jwilliams@sirote.com
awindsor@sirote.com

/s/ Dylan C. Black
Attorneys for proposed amici curae
United Policyholders and
National Independent Venue Association

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
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THE CINCINNATI INSURANCE COMPANY,	)	
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INTRODUCTION

Through this brief, as supplementary to Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss (Doc. 30), *amici curiae* United Policyholders and the National Independent Venue Association ("NIVA") (collectively, *"Amici"*)[1] seek to address the limited issue that certain causes of loss can be alleged to have caused "physical loss" or "physical damage."

[1] Pursuant to Fed. R. App. Procedure 29(a)(4), *Amici* affirm that no party's counsel authored this brief, that no party or party's counsel contributed money to any *Amicus Curiae* party that was intended to fund preparing or submitting this brief, and no person contributed money that was intended to fund preparing or submitting the brief.

I. INTEREST OF *AMICI* IN THIS MATTER

Plaintiffs correctly contend that the current pandemic can cause "physical loss" or "physical damage" to property. The interpretation of this language—located in the coverage grant of Plaintiffs' policy—is at the forefront of COVID-19-related business-interruption litigation in Alabama and nationwide. This Court's treatment of this issue has the potential to affect a multitude of other claims made by policyholders not only in Alabama, but across the nation. As concepts in Plaintiffs' coverage grant (e.g., "physical loss" and "physical damage") are found in most property insurance policies, this Court's ruling on Defendant's motion to dismiss will likely be cited in future cases in Alabama and elsewhere and will influence negotiation of claims that are not yet in litigation.

Amici includes a collective of insureds – United Policyholders[2] – and a trade organization – NIVA[3] – with members across the country and in Alabama that employ tens of thousands of people and contribute enormously to their local economies.

Nationally, arts and culture organizations, including venues like the members of NIVA, contributed over $800 billion to the nation's GDP.[4] Like the restaurant

[2] Information available at https://www.uphelp.org/ (last visited October 15, 2020).

[3] Information available at https://www.nivassoc.org/ (last visited October 12, 2020).

[4] *See* https://www.arts.gov/news/2020/during-economic-highs-and-lows-arts-are-key-segment-

industry, the performing-arts sector has been almost completely shut down by the pandemic.[5] Nationally, the live-music industry is predicted to lose almost $8 billion in revenue if performances cannot resume in 2020.[6] Locally, NIVA members have had to cancel performances and lay off employees, incurring substantial business income losses and putting their businesses in jeopardy.

Plaintiffs are among the many restaurants whose existence has been jeopardized by the pandemic. According to the National Restaurant Association, the restaurant industry is one of the nation's largest private sector employers, providing jobs to 15.6 million Americans with a total economic impact of over $2.6 trillion.[7] Restaurants have suffered the most significant job losses since the pandemic began, with 2 out of every 3 employees having lost their jobs and over 8 million restaurant employees laid off or furloughed.[8] Four out of every 10 restaurants nationally are

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us-economy (last visited July 1, 2020).

[5] *See* https://www.wyden.senate.gov/imo/media/doc/2020.05.21%20-%20Wyden-Merkley%20Letter%20to%20leadership%20on%20live%20event%20venues_final_updated.pdf (letter from United States Senators regarding aid to live music venues) (last visited July 1, 2020).

[6] *See* https://www.pollstar.com/article/pollstar-projects-2020-total-box-office-would-have-hit-122-billion-144197 (last visited July 1, 2020).

[7] *See* https://www.restaurant.org/downloads/pdfs/research/soi/2020-state-of-the-industry-factbook.pdf (last visited July 1, 2020).

[8] *See* https://restaurant.org/manage-my-restaurant/business-operations/covid19/research/industry-research (last visited July 1, 2020).

or have been completely closed.[9] Locally, forty percent of restaurant employees have lost their jobs.[10]

Restaurants and venues nationwide have made business interruption claims—including many on policies with language similar to that found in Plaintiffs' policy—and have had their claims denied, to disastrous effect. Courts have explained that "[t]he purpose of business interruption insurance cannot be clearer – to ensure that [the policyholder] had the financial support necessary to sustain its business in the event disaster occurred… Certainly, many business policyholders… lack the resources to continue business operations without insurance proceeds." *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of New York*, 886 N.E.2d 127, 131–32 (N.Y. 2008) ("[T]he purpose of the contract was not just to receive money, but to receive it promptly so that in the aftermath of a calamitous event, as [the insured] experienced here, the business could avoid collapse and get back on its feet as soon as possible.").

The insurance industry's wholesale, across-the-board denial of all claims for business interruption losses related to the 2020 pandemic[11] has produced exactly the

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[9] *Id.*

[10] *See* https://www.wsfa.com/2020/10/01/ala-restaurants-still-feeling-impact-covid-restrictions/ (last visited October 15, 2020).

[11] *See* https://www.reuters.com/article/us-health-coronavirus-chubb-wiesenthal/simon-wiesenthal-center-sues-chubb-to-ensure-coronavirus-insurance-coverage-idUSKBN22B2NP (quoting a Chubb executive as saying that "The industry will fight this tooth and nail."); *see also* https://www.washingtonpost.com/business/2020/04/22/businesses-insurance-coverage-

kind of calamity predicted by the *Bi-Economy* court. According to an ongoing study sponsored by the University of Pennsylvania, more than a thousand lawsuits have been filed across the country against insurers for business interruption losses, most (over 380) filed by food-related companies.[12] There are reportedly over 225 motions to dismiss filed in these cases.[13]

This Court's ruling has the potential to impact the Alabama members of the *Amici*, as well as the claims of hundreds of other members of NIVA, and the claims of the thousands of other restaurants and businesses in Alabama and elsewhere that have had their business interruption claims denied.

II. SUMMARY OF ARGUMENT

Courts have widely rejected Defendant's interpretation of the coverage grant. Defendant chose not to define the phrase "accidental physical loss or accidental physical damage to" in the policy issued to Plaintiffs. Under governing principles of Alabama law, the presence of a noxious or disease-causing agent in and around the insured property, such as the SARS-CoV-2 virus, can constitute "accidental physical loss or accidental physical damage" to property, and business interruption coverage may be triggered where infiltration into insured property causes a

coronavirus/ (last visited July 2, 2020).

[12] *See* https://cclt.law.upenn.edu/ (last visited October 12, 2020).

[13] *Id.*

necessary suspension (either completely or in part) of the insured business's operations. Additionally, the allegations of a loss of functionality due to the imminent or threatened presence of the virus is also sufficient to trigger the coverage grant, as numerous courts have held.

ANALYSIS

I. THE ALLEGED PRESENCE OF SARS-COV-2 IN OR ON INSURED PREMISES STATES A CLAIM FOR "PHYSICAL LOSS" OR "PHYSICAL DAMAGE"

Allegations of the presence of the novel coronavirus are sufficient to state a claim that insured property has suffered direct physical loss or damage. Defendant's argument that "accidental physical loss or accidental physical damage" under its Policy requires visible or structural alteration of an insured structure has been rejected by many courts, as Plaintiffs' brief points out. There is no commercial method to test for the presence of SARS-CoV-2 on property; many infected by SARS-CoV-2 are asymptomatic yet able to transmit the virus; and as hundreds use restaurants daily, it is statistically certain that the virus was and continues to be present in high-trafficked restaurants. Physical loss or damage is therefore presumed, and if alleged (as Plaintiffs have done here), that is clearly enough to pass muster at the motion to dismiss stage.

The physical loss or damage caused by the prevalence of the virus is heightened in restaurants, where air is recirculated, space is limited, surfaces are

touched by multiple people, and tables turn over frequently. A July 2020 study published by the U.S. Centers for Disease Control illustrates this point—describing how one asymptomatic patron, at an air-conditioned restaurant in Guangzhou, China, infected nine other diners from three different tables.[14]

As is the case in most property insurance policies, Plaintiffs' policy was composed of standardized forms that were entirely within Defendant's control to draft or revise. Defendant chose not to include the word "structural," "visible," or any other term as a modifier to the terms "physical loss" or "physical damage." As in most states, under Alabama law the insurer must bear the consequences of poor drafting and the choices that the insurer made in crafting its own policy language. *See American States Inc. Co. v. Martin*, 662 So. 2d 245 (Ala. 1995); *Cook v. Aetna Ins. Co.*, 661 So. 2d 1169 (Ala. 1995). The insurer may not re-word its policy or insert terms that are not present to effectuate what the insurer now claims was its intent. *Id.* Having failed to narrow "physical loss" or "physical damage" to "structural" or even "visible" damage, let alone defining what the difference is between "loss" and "damage," Defendant cannot now be heard to contend that it *meant* to include those terms.

Further, case law from around the country has long supported the proposition

[14] *See* https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article.

that infiltration of a property, or the surrounding area, by a disease-causing or noxious agent causes physical loss or damage when it is present in/around the property and/or permeates the interior of insured property. *See Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332 (Or. 1993) (pervasive odor from a methamphetamine lab in a rental home was "accidental direct physical loss" despite the insurer's argument that odor is not "physical"); *Western Fire Ins. Co. v. First Presbyterian Church,* 437 P.2d 52 (Colo. 1968) (church closed due to gasoline vapors infiltrating the building had not merely suffered "loss of use" but had suffered "direct physical loss."); *Oregon Shakespeare Festival Assoc. v. Great Am. Ins. Co*., No. 15-01932, 2016 WL 3267247, *5 (D. Or. June 7, 2016), *order vacated by stipulation*, 2017 WL 1034203 (Mar. 6, 2017) (business suffered "direct physical loss of or damage to" its property when wildfire smoke in the air led to closures of outdoor theater due to health concerns, rejecting insurer's argument that air is not covered or not physical: "[c]ertainly, air is not mental or emotional, nor is it theoretical."); *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 800 N.Y.S.2d 356 (N.Y. Sup. Ct. 2005) (noxious particles present in the insured property constituted property damage under the terms of the policy); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995) (physical loss and damage where unknown substance adhered to surfaces of insured property); *Am. All. Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925

(6th Cir. 1957) (contamination of property with radioactive dust and radon gas were present in property thereby causing physical loss and damage).

Moreover, the insurance industry knows viruses can cause physical loss or damage as evidenced by the creation of a virus exclusion endorsement following the SARS pandemic in the early 2000s, as Plaintiffs' brief points out. *See* Insurance Services Office ("ISO") form CP 01 40 07 06 "Exclusion of Loss Due to Virus or Bacteria." While the presence of such an exclusion does not necessarily preclude coverage, the failure to include such an exclusion: (1) undermines an insurer's attempt to re-write an existing policy post-loss to deny claims involving viruses; and (2) confirms that viruses are covered causes of loss that can cause physical loss and damage under an all-risk policy, like Plaintiffs' policy.

II. THE INABILITY TO USE A RESTAURANT FOR ITS INTENDED PURPOSE DUE TO THE PANDEMIC, EVEN WITHOUT THE ACTUAL PRESENCE OF SARS-COV-2, ALSO CONSTITUTES "PHYSICAL LOSS"

Although Plaintiffs here have alleged the actual presence of the virus on their premises, including alleging that several employees who had been at the premises tested positive for infection by the virus, not all policyholders make such allegations or have such evidence readily available for purposes of their initial pleadings. Therefore, *Amici* suggest that the Court consider a broader perspective reflected in the case law discussed below: that coverage may still available without an allegation

of the actual presence of the virus on the insured's premises, based on a loss of functionality.

A recent decision from a New Jersey state court adopted just this position. In *Optical Services USA/JCI v. Franklin Mutual Insurance Co.*, No. BER-L-3681-20, pending in the Superior Court of New Jersey, Law Division, Bergen County, the insurer argued that because there was no known instance of the virus's presence within the plaintiff's premises there was no "direct physical loss."[15] The court denied the insurer's motion to dismiss, holding that the plaintiff could proceed on a theory that "where a policyholder loses functionality of their property" due to a non-excluded cause of loss, it has met the coverage grant.[16] In so holding the *Optical Services* court relied on *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.*, 406 N.J. Super. 524 (App. Div. 2009), which held that a grocery chain's business income loss was covered where the store had lost power, and thus the functionality of its premises, because the electrical grid and transmission lines were not physically capable of providing electricity. *Wakefern*, 406 N.J. Super. at 542. This "loss of functionality" approach to covered loss is fully consistent with Alabama law.

[15] The *Optical Services* court's order and the transcript of the oral argument, which includes the court's explanation of its holding from the bench, are attached as Exhibit A.

[16] *Id.* at 29.

A. Threatened, Imminent Physical Presence of SARS-CoV-2 That Impacts Usability Is Sufficient to Constitute "Physical Loss of or Damage"

Courts have also held there does not have to be actual infiltration of a substance onto property, so long as a physical cause imminently threatens a property's function or habitability. *See, e.g., Port Auth. v. Affiliated FM Ins. Co*., 311 F.3d 226, 236 (3d Cir. 2002) (physical loss or damage results "if an actual release of asbestos fibers from asbestos-containing materials has resulted in contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable, or if there exists an *imminent threat* of the release of a quantity of asbestos fibers that would cause such loss of utility") (emphasis added); *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (policyholder could claim business income coverage where risk of collapse necessitated abandonment of grocery store).

Many courts have found that structural damage is not required to show "physical loss or damage" where the insured property cannot be used for or is unsafe for its intended purpose. *Travco Ins. Co. v. Ward*, No. 715 F. Supp. 2d 699, 708 (E.D. Va. 2010) (noting that the majority of cases nationwide find that physical damage to property is not necessary where, at least, the property has been rendered unusable by a covered cause of loss); *see also Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) ("Direct physical loss also

may exist in the absence of structural damage to the insured property." (citations omitted)). This is so because:

> To accept [the insurance company's] interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such position as to overhang a steep cliff has not been "damaged" so long as its paint remains intact and its walls adhere to one another. Despite the fact that 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.*

Hughes v. Potomac Ins. Co., 18 Cal. Rptr. 650, 655 (Cal. Dist. Ct. App. 1962) (emphasis added).

Under a property insurance policy, the diminution of value of something, including through the failure of something to sustain its "essential functionality," can constitute a physical loss. *Oregon Shakespeare Festival*, 2016 WL 3267247, at *9.

B. A Property's Unsuitability for an Intended Purpose Constitutes "Physical Loss" or "Physical Damage"

"In determining damage covered by insurance, [a] court must consider the nature and intended use of property, and the purpose of the insurance contract." *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *28 (D. Or. June 18, 2002). A dine-in restaurant's intended purposes include providing a safe *physical* environment for its occupants (employees and

customers), and the use and enjoyment of that physical property by its customers without being placed in a dangerous situation.

The inability to use the property or a portion of the property for its intended use constitutes a direct physical loss. *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) (loss of income from damage to furnace was covered, although furnace could still be used, because damage rendered it unusable to treat medical products for which it had been specially certified); *see also Matzner v. Seaco Ins. Co.*, No. 96-0498-B, 1998 WL 566658 (Mass. Super. Aug. 26, 1998) (holding the loss of use of apartment building, rendered uninhabitable by carbon monoxide, constituted a direct physical loss); *Western Fire Ins. Co.*, 165 Colo. at 40, 437 P.2d 5243 (holding the loss of use of church, rendered uninhabitable by gasoline vapors, constituted a direct physical loss).

Defendant's citation to cases like *Mama Jo's, Inc. v. Sparta Ins. Co*., No. 17-CV-23362-KMM, 2018 WL 3412974, at *1 (S.D. Fla. June 11, 2018), *aff'd*, No. 18-12887, 2020 WL 4782369 (11th Cir. Aug. 18, 2020), is misplaced. In *Mama Jo's* the insured attempted to recover for construction dust entering its restaurant, but "the restaurant remained open every day, customers were always able to access the restaurant, and there is no evidence that dust had an impact on the operation other

than requiring daily cleaning." *Id.* at *25.

By contrast, the SARS-CoV-2 virus is inherently noxious and even its presumed presence or imminently threatened presence renders a restaurant unusable or unsafe for its intended purpose. *See, e.g., Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *29 ("Although the mere adherence of molecules to porous surfaces, without more, is not physical loss or damage, this case involves more, namely the inability . . . to enjoy the personal property because of the mold spores adhering to it."); *Cooper & Olive Indus. v. Travelers Indem. Co*., No. C-01-2400, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002) (policyholder could claim business income and losses from contamination of well with E. coli bacteria); *Pillsbury Co. v. Underwriters at Lloyd's*, 705 F. Supp. 1396, 1401 (D. Minn. 1989) (creamed corn products suffered physical loss or damage where product was under-processed, causing contamination and its eventual destruction).

Nor is it dispositive that the threat creating the loss of utility may be temporary. Better reasoned decisions find "physical loss or damage" where the loss is temporary, or the reduction in utility is partial. For example, in *Gregory Packaging, Inc. v. Travelers Property Casualty Co*., No. 2:12-cv-04418, 2014 WL 6675934 (D. N.J. Nov. 25, 2014), the insurance company argued that a manufacturing plant that was evacuated following the release of ammonia had not

suffered physical loss or damage because the ammonia was remediated over the course of a week. The court rejected this rationale, holding "the property [could] sustain physical loss or damage without experiencing structural alteration," and there was physical loss or damage to the plant from ammonia because "the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated." *Id*. at *16-*17. Similarly, "even where some utility remains" in a business operation, a physical condition that renders a property unusable for its intended use constitutes physical loss or damage. *Cook v. Allstate Ins. Co*., No. 48D02-0611-PL-01156, at *9-*10 (Ind. Super. Nov. 30, 2007); *see also Stack,* 2007 WL 464715, at *8.

CONCLUSION

The presence, suspected presence, or the imminent threat of the presence of the deadly SARS-CoV-2 virus that results in the suspension of business operations can constitute "direct" "accidental physical loss" or "accidental physical damage" under Defendant's property insurance policy. Neither structural alteration nor permanent alteration of the property are required for "physical loss" or "physical damage," where the property can no longer serve, or is unsafe for, its intended purpose.

Amici respectfully request that this Court consider these issues, ubiquitous in

nearly every COVID-19 business interruption and civil authority case nationwide, in denying Defendant's motion to dismiss.

Respectfully Submitted,

/s/ Dylan C. Black

Dylan C. Black (BLA084)
Emily M. Ruzic (RUZ002)
Bradley Arant Boult Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2119
Tel.: (205) 521-8000
Fax: (205) 521-8800
dblack@bradley.com
druzic@bradley.com

Attorneys for proposed amici curae United Policyholders and National Independent Venue Association

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2020, I filed the foregoing using the Court's CM/ECF Electronic Case Filing system which will send notification to the following, registered attorneys:

Augusta S. Dowd
Craig A. Shirley
WHITE ARNOLD & DOWD P.C.
2025 Third Avenue North, Suite 500
Birmingham, AL 35203
T: (205) 323-1888
F: (205) 323-8907
adowd@whitearnolddowd.com
cshirley@whitearnolddowd.com

James S. Williams
Alyse N. Windsor
SIROTE & PERMUTT, P.C.
2311 Highland Avenue South
Post Office Box 55727
Birmingham, AL 35255-5727
Tel.: (205) 930-5100
Fax: (205) 930-5101
jwilliams@sirote.com
awindsor@sirote.com

/s/ Dylan C. Black
Attorney for proposed *amici curae*
United Policyholders and National
Independent Venue Association

EXHIBIT A

Eric L. Harrison - ID #033381993
METHFESSEL & WERBEL, ESQS.
2025 Lincoln Highway, Suite 200
PO Box 3012
Edison, New Jersey 08818
(732) 248-4200
1(732) 248-2355
harrison@methwerb.com
Attorneys for Franklin Mutual Insurance Company
Our File No. 89286 ELH

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

Civil Action

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

Plaintiffs,

V.

FRANKLIN MUTUAL INSURANCE COMPANY

Defendant.

ORDER

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

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

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

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

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

OPPOSED

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

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

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

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

Date: August 13, 2020

BEFORE:

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

TRANSCRIPT ORDERED BY:

AMINA RANA, (Paul Weiss Rifkind Wharton Garrison)

APPEARANCES:

SEAN E. ROSE, ESQ. (Olender Feldman, LLP)
Attorney for Plaintiffs

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

Transcriber: Laura Scicutella
Phoenix Transcription, LLC
796 Macopin Rd.
West Milford, NJ 07480
(862)248-0670

Audio Recorded
Recording Opr: Alexa D'Angelo

I N D E X

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

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

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

THE COURT: Good morning, Counsel.

MR. ROSE: Good morning.

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

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

RECORDING: (Indiscernible) --

THE COURT: -- reminders before we --

RECORDING: -- is now in the conference.

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

THE COURT: Okay, very good.

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

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

In addition, we are on a Polycom speaker

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

RECORDING: (Indiscernible) --

THE COURT: -- voice --

RECORDING: -- is now in the conference.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay, but the --

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

THE COURT: -- definition (indiscernible) --

MR. HARRISON: -- to our policy language.

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

MR. HARRISON: I think that is absolutely correct.

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

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

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

RECORDING: (Indiscernible).

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

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

RECORDING: (Indiscernible) is now in the conference.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In those rare instances, as cited in Smith

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

necessarily damaged. The Court in Wakefern did hold that,

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

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

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

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

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

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

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

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

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

THE COURT: Thank you, gentlemen.

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

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CERTIFICATION

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

/s/ Laura Scicutella
Laura Scicutella

AD/T 685
AOC Number

Phoenix Transcription LLC
Agency Name

8/18/2020
Date