The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VITA COFFEE, LLC, a Washington limited liability company d/b/a CAFFE VITA COFFEE ROASTING CO.,

Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY,

Defendant.

Case No. 2:20-cv-01079-JCC-DWC

UNITED POLICYHOLDERS, NATIONAL INDEPENDENT VENUE ASSOCIATION, AND WASHINGTON HOSPITALITY ASSOCIATION'S MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE* IN SUPPORT VITA COFFEE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

TABLE OF CONTENTS

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

TABLE OF AUTHORITIES

Cases

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

I. INTRODUCTION AND RELIEF REQUESTED

United Policyholders ("UP"), National Independent Venue Association ("NIVA"), and Washington Hospitality Association ("WHA") move the Court for an Order permitting them to appear as *amici curiae* in support of Plaintiff's response to Defendant's Motion to Dismiss and to consider the brief attached as Exhibit A in connection with that motion.

II. ARGUMENT

A. Legal Standard

The Court has broad discretion to appoint *amicus curiae*. *See Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds* by *Sandin v. Conner*, 515 U.S. 472 (1995); *see also 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); *Stuart 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).

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

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.

The pending motion to dismiss is one of the earliest challenges in Washington 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]

The Washington Supreme Court has recognized the broad impact of judicial policy interpretation, remarking, that "once [a] court construes the standard form coverage clause as a matter of law, the court's construction will bind policyholders throughout the state . . ." *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 883, 784 P.2d 507, 514 (1990). Vita Coffee's business income loss and civil authority insuring clauses are identical, or substantially similar, to the insuring clauses in *Amici*'s members' business income insurance policies. Defendant's proposed judicial rewriting of these clauses to eviscerate coverage would have devastating impact on *Amici*'s member businesses inside and outside of the COVID-19 context. The magnitude of the Court's ruling on the issues raised in Defendant's brief to *Amici's* members, and Washington policyholders generally, cannot be overstated.

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

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

1. 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 educates consumers and advocates for fairness in sales and claim practices toward preserving the integrity of the insurance system. Grants, donations, and volunteers support the organization's work. UP does not accept funding from insurance companies. UP works with Washington residents and interfaces with the Washington Office of the Insurance Commissioner related to rate, policy form, and claim issues via the proceedings of the National Association of Insurance Commissioners, where UP's Executive Director, Amy Bach, Esq., participates as an official consumer representative. Washington courts have granted UP leave to appear *amicus curiae* in the several insurance matters, including, among others: *McLaughlin v. Travelers Commercial Ins. Co.*, 446 P.3d 654 (Wash. Ct. App. 2019), *review granted*, 194 Wn.2d 1016, 455 P.3d 139 (2020), and *Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 793, 363 P.3d 587 (2015) (answering certified question from the United States District Court for the Western District of Washington).

2. 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. Nationally, through arts and culture organizations, including venues, NIVA members contributed over $800 billion to the nation's GDP.[2] The cities in which NIVA members are located benefit from the cultural connection and from community fostered through independent performance venues. Seattle NIVA members, all within a few minutes of the Courthouse, include Paramount Theatre, Jazz Alley, El Corazon,

[2] *See* https://www.arts.gov/news/2020/during-economic-highs-and-lows-arts-are-key-segment-us-economy (last visited August 23, 2020).

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

Neumos, The Moore, The Neptune Theater, The Triple Door, and the Woodland Park Zoo Amphitheater.

The pandemic and related civil authority orders have devastated performing arts and cultural organizations, including those of NIVA's members who rely on in-person performances for revenue. In Washington, 57.3 percent of adults attended live music, theater, or dance performances in 2019.[3] Like the restaurant industry, the performing arts sector has been almost completely shut down by the pandemic.[4] Locally, NIVA members such as the Paramount, Moore, and Neptune theatres have cancelled or delayed hundreds of performances, incurring substantial business income losses and putting their businesses in jeopardy.[5]

3. Washington Hospitality Association

WHA, a trade association with roots stretching back to the 1920s, has over 6,000 members across the state of Washington, comprised of restaurants, lodging companies, and other hospitality-focused businesses. The hospitality industry employs nearly 300,000 people across Washington, which amounts to over 10 percent of the State's workforce—and makes it Washington's "largest private employment sector."[6] WHA advocates for its members' interests through state and local government engagement. Additionally, WHA creates content on industry-specific topics, including regulations, training, and business management. Many of WHA's members are

[3] *See* "Washington Fact Sheet" from National Endowment for the Arts. https://www.arts.gov/sites/default/files/2020_StateFactSheet_WA.pdf (last visited August 23, 2020).

[4] *See See* Letter from U.S. Senators to Senators McConnell and Schumer dated May 21, 2020, https://www.wyden.senate.gov/imo/media/doc/2020.05.21%20-%20Wyden-Merkley%20Letter%20to%20leadership%20on%20live%20event%20venues_final_updated.pdf (last visited August 26, 2020).

[5] *See* Megan Burbank, "Seattle Theatre Group announces staff cuts in wake of corona virus shutdown," The Seattle Times, https://www.seattletimes.com/entertainment/seattle-theatre-group-announces-staff-reductions/ (last visited August 23, 2020).

[6] *See* Mark Stiles, "Layoffs start as Seattle hotel occupancy rates tumble as much as 60%, Puget Sound Business Journal, https://www.bizjournals.com/seattle/news/2020/03/11/layoffs-start-as-seattle-hotel-occupancy-declines.html#:~:text=The%20hospitality%20industry%20employs%20296%2C600,state's%20largest%20private%20employment%20sector (last visited August 24, 2020).

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

restaurants, most of them small businesses: at least 80 percent of Washington restaurants have less than 20 employees.[7]

Between May 2019 and May 2020, over 40 percent of Washington restaurant jobs were lost with over 150,000 jobs lost between February and May 2020.[8] Washington hotels' occupancy rates have declined 40 percent to 60 percent, eliminating both revenue and jobs.[9] That the hospitality industry has been devastated by COVID-19 is understatement. Many of WHA's members now face not only permanent closure but the bleak choice of either accepting wrongful denials or instituting litigation against their business income loss insurers, insurers who are part of industry that spends over $1 billion a year fighting their customers in court.[10]

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 "direct physical loss of or damage" cannot exist without structural alteration and/or what Defendant terms "tangible, physical alteration." 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 Washington 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 and WHA. *Amici*'s brief focuses on framing

---

[7] Washington Hospitality Association, "2020 Restaurant Profile, Washington State."

[8] *See* Paxtyn Merten, "Hospitality industry continues to post layoffs as some Washington jobs return," Puget Sound Business Journal, https://www.bizjournals.com/seattle/news/2020/08/20/hospitality-industry-struggles-washington-recovery.html (last visited August 26, 2020).

[9] *See supra* note 6.

[10] *See Brief of Amicus Curiae American Ins. Assoc*. at 3, *Affiliated FM Ins. Co. v. Constitution Reinsurance Corp.*, No. SJC-06165, 626 N.E.2d 878 (Mass. 1994) (stating that "insurers spend (conservatively) a billion dollars a year in so-called 'coverage litigation'").

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

Defendant's arguments in light of Washington's controlling principles and rules of policy interpretation and construction as well as highlighting to the Court both Washington and national precedent that may otherwise go overlooked or be underemphasized.

III. CONCLUSION

For the reasons set forth above, this Court should enter an order granting this motion for leave to file an *amici curiae* brief and accepting the proposed *amici curiae* brief in consideration of Defendant's motion to dismiss. A copy of the proposed *amici curiae* brief is attached to this motion as Exhibit A.

DATED this 27th day of August, 2020.

s/ Tristan N. Swanson
Tristan N. Swanson, WSBA No. 41934
s/ Carolyn A. Mount
Carolyn A. Mount, WSBA No. 55527
Miller Nash Graham & Dunn LLP
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121
Telephone: (206) 624-8300
Fax: (206) 340-9599
Email: tristan.swanson@millernash.com
Email: carolyn.mount@millernash.com

Attorneys for *Amici* United Policyholders, National Independent Venue Association, and Washington Hospitality Association

EXHIBIT A

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VITA COFFEE, LLC, a Washington limited liability company d/b/a CAFFE VITA COFFEE ROASTING CO.,

Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY,

Defendant.

Case No. 2:20-cv-01079-JCC-DWC

BRIEF OF *AMICI CURIAE* UNITED POLICYHOLDERS, NATIONAL INDEPENDENT VENUE ASSOCIATION, AND WASHINGTON HOSPITALITY ASSOCIATION IN SUPPORT OF VITA COFFEE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

TABLE OF CONTENTS

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

TABLE OF AUTHORITIES

Cases

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

I. INTRODUCTION

Whether an insurer who has promised to pay for business income loss arising from "direct physical loss or damage to" property can shirk all financial responsibility for its policyholder's COVID-19 related business income loss is a matter of first impression in the state of Washington. The Court's ruling on this issue is (1) of the utmost importance to *Amici* organizations and their members, almost all of whom are insured by business income loss policies with insuring language similar to that of Vita Coffee's, and (2) likely to impact the disposition of thousands of claims made by policyholders in Washington; policyholders who have collectively paid many billions of dollars in insurance premiums for the very coverage that they are being denied en masse.

Amici offer perspective on the critical role of business income insurance to restaurants, performance venues, and other Washington businesses, and urge the Court to reject Defendant's request to write new, restrictive requirements into the instant policy's coverage grants. Defendant may now wish to have defined direct "physical loss or damage" as requiring "structural alteration" or to have mandated that a civil order authority prohibit "all" access to insured premises before coverage is owed. But this is not what is written in Defendant's policy and hindsight affords Defendant no relief. Washington courts have uniformly rejected similar attempts by insurers to obtain post-hoc, judicial rewrites of their policy forms.

Amici respectfully request that the Court deny Defendant's motion (Dkt. No. 10). Defendant does violence to Washington's well-established rules of policy interpretation/construction, makes arguments previously rejected by Washington's courts, and urges the Court to ignore the national precedent most likely to be found compelling by this State's Supreme Court. For these and all the following reasons, Defendant's motion should be denied.

II. INTERESTS OF *AMICI* IN THIS CASE

As explained by one court in 2008, "[t]he purpose of business interruption insurance cannot be clearer—to ensure that [the policyholder] had the financial support necessary to sustain its

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

business in the event disaster occurred." *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of New York*, 10 N.Y.3d 187, 194, 886 N.E.2d 127, 131 (2008). Like *Amici*'s members and countless businesses across Washington, "many business policyholders . . . lack the resources to continue business operations without insurance proceeds." *Id.* The insurance industry's wholesale, across-the-board denial of all claims for business interruption losses related to the COVID-19 pandemic[1] has produced exactly the kind of calamity predicted by the *Bi-Economy* court.

Amici include trade organizations—the Washington Hospitality Association and National Independent Venue Association—whose constituent members have been economically devastated by COVID-19 and then abandoned by their insurers as they tried to survive. The insurance industry's principal justification for abandoning their policyholders is as follows: words the insurers *did not* write into their "all risk" policies somehow restrict the coverage otherwise afforded under the plain language of the policies' insuring grants. Indeed this is precisely what Fireman's Fund argues here that: (1) an unwritten requirement of "distinct, demonstrable physical or structural alteration" modifies Fireman's Fund's promise to pay for "direct physical loss or damage" to property and (2) an unwritten requirement that a civil authority prohibit "all" access to insured premises modifies insuring language, which states no such thing. If these types of fallacious arguments are accepted, the fallout will be staggering. At a minimum, hundreds if not thousands of *Amici's* members in Washington alone will be forced into financial ruin, which will also lead to loss of jobs for all those they employ.

III. ARGUMENT

A. Washington rules of insurance contract interpretation do not allow exclusionary language to be read into coverage grants.

Washington insurance law is premised on the foundational principle that "the purpose of insurance is to insure." *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68 (1983).

[1] *See* https://www.reuters.com/article/us-health-coronavirus-chubb-wiesenthal/simonwiesenthal-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-coveragecoronavirus/ (last visited July 2, 2020).

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

Courts "liberally construe inclusionary clauses, providing coverage whenever possible." *Moeller v. Farmers Ins. Co. of Washington*, 155 Wn. App. 133, 141 (2010), Thus, Washington courts have consistently rejected attempts by insurers to read exclusionary language into other portions of a policy, particularly coverage grants. *See, e.g.*, *Prudential Prop. & Cas. Ins. Co. v. Lawrence,* 45 Wn. App. 111, 724 P.2d 418 (1986) ("Had [the insurer] intended to restrict the scope of the 'property damage' definition [in the umbrella policy] it easily could have done so by adopting the same definition contained in the Homeowner's policy."); *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877 (1990) (finding that a coverage grant is "an odd place to look for exclusions of coverage").

Washington courts' uniform refusal to read unwritten restrictions into insurance policies is anchored in another tenet of Washington policy interpretation: that a court should give a policy the construction that an "average [person] purchasing insurance" would give. *See Morgan v. Prudential Ins. Co. of Am.*, 86 Wn.2d 432, 434 (1976). The "proper inquiry is not whether a learned judge or scholar can, with study, comprehend the meaning of an insurance contract" but instead what "would be meaningful to the layman." *Boeing* 113 Wn.2d at 881. Thus, when undefined terms are used in an insurance policy they "must be given their plain, ordinary, and popular meaning" and this is done by looking to "standard English dictionaries." *Id*. at 877. Employing these rules of policy interpretation, Washington courts have continually refused to read into insurance policies unwritten restrictions at odds with the actual policy language and/or a dictionary. *See, e.g.*, *Am. Nat. Fire Ins. Co. v. B & L Trucking & Const. Co., Inc.*, 134 Wn.2d 413, 428 (1998); *Safeco Ins. Co. of Am. v. Davis*, 44 Wn. App. 161 (1986).

Further, even if policy language could be plausibly read to contain a restriction eviscerating coverage *but could also be reasonably read not to*, coverage is owed. This is because "ambiguity exists if the language is fairly susceptible to two different reasonable interpretations [and] ambiguities in insurance contracts are construed against the insurer." *Am. Star Ins. Co. v. Grice*, 121 Wn.2d 869, 875 (1993). This rule is enforced irrespective of whether the insurer intended

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

another meaning. *See, e.g.*, *Riley v. Viking Ins. Co. of Wisconsin*, 46 Wn. App. 828, 830 (1987) (holding the most favorable meaning to the insured is applied "even though the insurer may have intended another meaning").

B. Defendant's request that its coverage grants be rewritten to contain exclusionary language must be rejected as inconsistent with Washington's rules of policy interpretation.

At its core, Defendant's motion is based on the wishful but erroneous premise that its policy contains exclusionary language that it does not. The business income insuring clause of the applicable Vita Coffee policy provides:

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your operations during the period of restoration arising from direct physical loss or damage to property at a location . . . caused by or resulting from a covered cause of loss.

Dkt. No. 11-1 at 30. Defendant now asks the Court to add the bolded language below to the insuring clause:

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your operations during the period of restoration arising from direct physical loss or damage to property **which causes a distinct, demonstrable physical or structural alteration of the property** at a location . . . caused by or resulting from a covered cause of loss.

See generally Dkt. No. 10.

Defendant also urges a similar re-writing of the policy's civil authority coverage grant, requesting the Court to insert the word "all" shown in bold below:

> We will pay for the actual business income and necessary extra expense you sustain due to the necessary suspension of your operations caused by actions of civil authority that prohibits **all** access to a location.

Id. Defendant's demands for the insertion of forgoing exclusionary language turn Washington rules of policy interpretation on their head. Inclusionary language cannot be reasonably interpreted to contain restrictions that are plainly not there, and no reasonable insured would read restrictive modifications into coverage grants.[2] Likewise, there is no case to be made

[2] Defendant also suggests that a normal person would read a *durational measurement*—the period of restoration—to mean that the promise to pay "physical loss or damage to" property was subject to Defendant's proposed, unwritten

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

in a dictionary that, for example, direct physical loss means that a property must be structurally altered or be said to have "distinct, demonstrable, physical alteration" (whatever this means). To the contrary, turning to a standard English dictionary reveals that the promise to pay for business income loss arising from "physical loss or damage to property" means that coverage is required when something "of or relating to that which is material"[3] causes/creates, among other things, "a detriment or disadvantage"[4] to insured property. Indeed, this reasonable reading of similar policy language is why thousands of insureds like Vita Coffee have made claims to insurers like Fireman's Fund.

Defendant's request that the policy's civil authority insuring clause be rewritten is even less defensible. This coverage grant simply does not require that a civil authority order prohibit "all" access to the insured premises. Not only is this restriction entirely missing but it would render the promise to pay for the "necessary suspension" of Vita Coffee's operations meaningless. Suspension is defined in the policy to mean a "slowdown or cessation of your operations" but under Defendant's interpretation, a compensable slowdown of operations could never occur because coverage is only allowed if a civil authority prohibition results in complete economic cessation at the insured premises. *See* Dkt. Nos. 10 at 29; 11-1 at 82. This type of nonsensical interpretation must be rejected.

Vita Coffee's policy was composed of standardized forms that were entirely within Defendant's control to draft or revise. Defendant chose not to include the words it now asks the Court to write into its business income and civil authority insuring clauses. Defendant must bear the consequences of how it chose to craft its own policy language—including its poor drafting

---

exclusionary language. This is so attenuated and wildly unreasonable that *Amici* has chosen to not address it in the limited space afforded them. Needless to say, *Amici* believe that a layman would, at a minimum, read "period of *restoration*" to refer to the time it took their insured property to be *restored* after becoming, in whole or in part, physically lost, impaired, or less useful. Such a reading becomes even more reasonable when considering the period of restoration includes the time to "repair" the insured property, i.e., "*to remedy*; make good; make up for" or, alternatively "*to restore to a sound or healthy state*." "*Repair*," Merriam-Webster, https://www.merriam-webster.com/dictionary/repair (last visited June 15, 2020).

[3] "*Physical*," Dictionary, https://www.dictionary.com/browse/physical?s=t (last visited August 24, 2020).

[4] "*Loss*," Dictionary, https://www.dictionary.com/browse/loss?s=t (last visited August 24, 2020).

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

choices. Washington case law is overwhelmingly in accord with this outcome. *See, e.g.*, *Prudential Prop. & Cas. Ins. Co, supra; Boeing v. Aetna, supra; B & L Trucking & Const.,* 134 Wn.2d at 428 (finding that a court "will not add language to the policy that the insurer did not include" and holding that because the insurer "drafted the policy language; it cannot now argue its own drafting is unfair"); *Safeco Ins. Co. of Am. v. Davis*, 44 Wn. App. 161, 166 (1986) ("If Safeco intended to simply exclude coverage for unlicensed and underage[] drivers, it could have done so in clear terms."); *Smith & Chambers Salvage v. Ins. Mgmt. Corp.,* 808 F. Supp. 1492, 1502 (E.D. Wash. 1992) ("If the insurer desired, it could have written into the policy an express exclusion of coverage . . . the insurer has a duty to clearly express any policy limitations before they will be given full effect.").

C. Defendant's arguments have already been rejected by Washington courts who, instead, have held that "direct physical loss or damage to property" occurs when insured property becomes physically lost, impaired, or less useful.

To avoid the consequences of its drafting, Defendant asserts that the re-writing of Vita Coffee's policy is judicial *fait accompli*. Defendant proclaims "Washington courts have already determined" that Vita Coffee's losses do not constitute "direct physical loss of (sic) or damage to property" because "tangible and physical alteration of the property" is required. *See* Dkt. No. 10 at 19. This is demonstrably false: the Western District of Washington *has held the exact opposite*—and did so after considering the two cases that Defendant now alleges make an unwritten "tangible or physical alteration" requirement settled law.

Nautilus Grp., Inc. v. Allianz Glob. Risks US concerned the interpretation of an all-risks policy issued by Defendant's parent company, Allianz. 2012 WL 760940 (W.D. Wash. Mar. 8, 2012). After an employee stole covered property, which rendered the policyholder unable to conduct business in China, the policyholder made a claim for its losses to Allianz. *Id.* at *1. Like here, the applicable policy covered "physical loss or damage to property" and, like Defendant here, Allianz denied coverage on the grounds that this included an unwritten requirement that the

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

"property at issue has been physically altered." *Id.* at *6. The basis for Allianz's argument, like here, was *Wolstein v. Yorkshire Ins. Co., Ltd.*, 97 Wn.App. 201, 985 P.2d 400 (1999) and *Fujii v. State Farm Fire & Cas. Co.*, 71 Wn.App. 248, 857 P.2d 1051 (1993). *See id.* at *6–*7.

After reciting the same Washington rules of policy interpretation discussed above and reviewing *Wolstein* and *Fujii*, Judge Settle flatly rejected Allianz's arguments that either case adopted an unwritten physical alteration requirement:

> Allianz argues that Nautilus must show "direct physical loss or damage to" covered property to state a valid claim and that this **"requires proof that the property at issue has been physically altered."** Allianz even contends that "a 'theft' or misappropriation of property cannot constitute 'physical loss or damage.'" The nonbinding case law cited by Allianz does not stand for this extremely narrow interpretation of the grant of coverage. With regard to the binding law on this issue, Allianz cites *Wolstein v. Yorkshire Ins. Co., Ltd.,* 97 Wash.App. 201, 985 P.2d 400 (1999) and *Fujii v. State Farm Fire & Cas. Co.* 71 Wash.App. 248, 857 P.2d 1051 (1993). In *Wolstein,* the court adopted a conclusion from the Fifth Circuit Court of Appeals that "[t]he language 'physical loss or damage' strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state [.]" *Wolstein,* 97 Wash.App. at 213, 985 P.2d 400. The Court relied on this altered "state" logic in concluding that damages for delay in repair to covered property was not a covered loss. *Id.* **The instant case is factually distinguishable because Nautilus alleges that the covered property was physically lost. On this issue, the *Wolstein* court stated that "the insured object must sustain actual damage or be physically lost to invoke . . . coverage."** *Id.* at 212, 985 P.2d 400. **Therefore, the *Wolstein* case does not support Allianz's position**.
>
> In *Fujii,* the court found that there was no physical loss to the covered "dwelling" when a landslide caused nearby soil destabilization. *Fujii,* 71 Wash.App. at 251, 857 P.2d 1051. The court stated that "[w]hile there was agreement that such damage was likely to occur in the near future unless expensive preventative measures were taken, each professional concluded that no physical damage had yet occurred." *Id.* at 249, 857 P.2d 1051. While this case may have been applicable if Mr. Xu had conveyed that he was likely to steal or misappropriate the Property, it is factually distinguishable and inapplicable to the alleged facts.

Id. at *6–*7. Washington law, Judge Settle held, required interpreting "direct physical loss to property" to cover losses caused by the physical deprivation of insured property even if the property itself was not physically altered. "[I]f 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous. The fact that they are both included in the grant of coverage evidences an understanding that physical loss means something other than damage." *Id.*

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

at *6–7.

Judge Settle's opinion in *Nautilus* is consistent with decisions from the Supreme Court of Washington finding, albeit in a different context, that the insured property's loss of function is actual, physical "loss." For example, in *Neer v. Fireman's Fund American Life Ins. Co.*, the Supreme Court of Washington held that coverage for "loss" may be triggered by loss of functionality. 103 Wn.2d 316, 319, 692 P.2d 830, 832–33 (1985). In *Neer*, the insured made a claim for coverage when his spinal cord was severed and he lost muscle and nerve function below the waist. *Id.* at 317. The policy provided coverage for the "loss of both feet." Fireman's Fund argued that coverage was not triggered absent the "complete separation of the feet from the body," despite the policy containing no such requirement. *Id.* at 318.

The *Neer* court rejected Fireman's Fund's argument, holding that the policy provided coverage because "the term 'loss' as described by the policy does not require dismemberment or amputation." *Id.* at 317. "Washington has adopted a definition of loss, loss of use or function . . . [t]his definition of loss incorporates within it the idea that by purchasing coverage" the insured intended to "provide for financial security in the event of the loss of use." *Id.* at 319 (internal quotations and citations omitted). The Supreme Court of Washington concluded with a statement highly applicable to what the Court should find here: the "policy language provides broader coverage than Fireman's Fund would have us find." *Id.* at 320.

Likewise, in *Morgan v. Prudential Ins. Co. of Am.*, the Supreme Court of Washington interpreted a policy provision that granted coverage for "the loss by severance of both hands at or above the wrists." 86 Wn.2d 432, 435, 545 P.2d 1193, 1195 (1976). Despite the majority of the policyholder's hands being severed by a bookbinding machine, the insurer denied coverage. *Id.* As in *Neer*, the Court found that that the policy language was ambiguous and, therefore, that coverage was owed for the policyholder's loss. *Id.* at 437. In doing so, the Court noted that purpose of purchasing the policy was, "to provide for financial security in the event of the loss of use of [the insured's] hands, thus precluding him from pursuing his livelihood." *Id.* at 436 (noting that a

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

"strictly literal interpretation" without regard for the purpose of the insurance policy is not helpful).

D. A court following Washington precedent has already held that COVID-19 and related closure orders trigger coverage under policy language virtually identical to that at issue here.

At least one federal court has already rejected a near carbon copy of Defendant's motion to dismiss and *done so while citing Judge Settle's Nautilus decision*. In that case, *Studio 417 v. Cincinnati Insurance Company* ("Cincinnati"), the relevant Cincinnati policy insured against "accidental [direct] physical loss or accidental [direct] physical damage" but like here, did not define "physical loss" or "physical damage." Case No. 20-cv-03127-SRB, WL 4692385 (W. D. Mo., Aug. 12, 2020). Like Defendant, Cincinnati moved to dismiss by arguing that COVID-19 could not cause physical loss to insured premises because, allegedly, the insuring clause required "tangible physical alteration." *Id.*at *4. Judge Bough of the Eastern District of Missouri refused to dismiss:

> Upon review of the record, the Court finds that Plaintiffs have adequately stated a claim for direct physical loss. First, because the Policies do not define a direct "physical loss" the Court must "rely on the plain and ordinary meaning of the phrase." *Vogt*, 963 F.3d at 763; *Mansion Hills Condo. Ass'n v. Am. Family Mut. Ins. Co.*, 62 S.W.3d 633, 638 (Mo. App. E.D. 2001) (recognizing that standard dictionaries should be consulted for determining ordinary meaning). The Merriam-Webster dictionary defines "direct" in part as "characterized by close logical, causal, or consequential relationship." "Physical" is defined as "having material existence: perceptible especially through the senses and subject to the laws of nature." "Loss" is "the act of losing possession" and "deprivation."
>
> . . .
>
> Second, the Court "must give meaning to all [policy] terms and, where possible, harmonize those terms in order to accomplish the intention of the parties." *Macheca Transp. v. Philadelphia Indem. Ins. Co.*, 649 F.3d 661, 669 (8th Cir. 2011) (applying Missouri law). Here, the Policies provide coverage for "accidental physical loss ***or*** accidental physical damage." Defendant conflates "loss" and "damage" in support of its argument that the Policies require a tangible, physical alteration. However, the Court must give meaning to both terms. *See Nautilus Grp., Inc. v. Allianz Global Risks US*, No. C11-5281BHS, 2012 WL 760940, at * 7 (W.D. Wash. Mar. 8, 2012) (stating that "if 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous").

Id. at *4–*5. Judge Gough's reliance on Washington law when refusing to dismiss a COVID-19 business income complaint is no coincidence: Washington's rules of interpretation are

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

in accord with Missouri's. *See, e.g.*, *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. 2007) (finding that policy language should be provided "[t]he meaning which would be attached by an ordinary person of average understanding if purchasing insurance"; "an insurance policy must be enforced according to its terms"; ambiguity "must be construed against the insurer"). Given the harmony between Washington's and Missouri's rules of policy interpretation, the rejection of Defendant's leading arguments by a Missouri federal district court is highly probative to how these arguments would fare in front of the Supreme Court of Washington.

E. The weight of national authority—and the national authority most likely to be found compelling by the Supreme Court of Washington—has found that insured property's loss of function or suitability for an intended purpose, whether temporary or permanent, can constitute "direct physical loss or damage."

In accord with Washington's *Nautilus*, *Neer*, and *Morgan* decisions, the bulk of nationwide authority has found that temporary loss or partial reduction in utility can constitute "direct physical loss or damage." These courts have also either explicitly or implicitly rejected the structural or visibility requirements that Defendant proposes be written into Vita Coffee's policy. *See, e.g.*, *Gregory Packaging, Inc. v. Travelers Property Casualty Co.*, No. 2:12-cv-04418, 2014 WL 6675934, *16 (D. N.J. Nov. 25, 2014 ("The property [could] sustain physical loss or damage without experiencing structural alteration."); *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); *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 covered although furnace could still be used, because damage rendered it unusable to treat medical products for which it had been specially

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

certified); *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. 34 at 40; 437 P.2d 52 (holding the loss of use of church, rendered uninhabitable by gasoline vapors, constituted a direct physical loss); *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); *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."); *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); *See, e.g., Port Auth. v. Affiliated FM Ins. Co*., 311 F.3d 226, 236 (3d Cir. 2002) (coverage owed if asbestos 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.").

There to no reason to believe the Supreme Court of Washington would break with this better-reasoned, more voluminous national case law. As set forth herein, doing so would be contrary to existing Washington precedent and upend black-letter rules of Washington policy interpretation.

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121

IV. CONCLUSION

Amici respectfully request that this Court consider these issues, ubiquitous in nearly every COVID-19 business interruption case in Washington and nationwide, and that it apply Washington's long-settled rules of construction in denying Defendant's motion.

DATED this 27th day of August, 2020.

s/ Tristan N. Swanson
Tristan N. Swanson, WSBA No. 41934
s/ Carolyn A. Mount
Carolyn A. Mount, WSBA No. 55527
Miller Nash Graham & Dunn LLP
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121
Telephone: (206) 624-8300
Fax: (206) 340-9599
Email: tristan.swanson@millernash.com
Email: carolyn.mount@millernash.com

Attorneys for *Amici* United Policyholders, National Independent Venue Association, and Washington Hospitality Association

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Chase Christian Alvord, WSBA No. 26080
Lauren Hillemann, WSBA No. 54423
Tousley Brain Stephens
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101
Email: calvord@tousley.com
lhillemann@tousley.com

Attorneys for Plaintiff

Anthony Todaro, WSBA No. 30391
Joseph Davison, WSBA No. 51264
DLA Piper LLP (US)
701 Fifth Avenue, Suite 6900
Seattle, WA 98104
Email: Anthony.todaro@us.dlapiper.com
Joseph.davison@us.dlapiper.com

Attorneys for Defendant

DATED this 27th day of August, 2020.

s/ Nikki Kunz
Nikki Kunz, Legal Assistant

MILLER NASH GRAHAM & DUNN LLP
ATTORNEYS AT LAW
T: 206.624.8300 | F: 206.340.9599
PIER 70
2801 ALASKAN WAY, SUITE 300
SEATTLE, WASHINGTON 98121