R. Lind Stapley, OSB No.: 030531
Email stapley@sohalang.com
Jillian M. Henderson, OSB No. 083623
Email henderson@sohalang.com
Jennifer P. Dinning, OSB No. 162794
Email dinning@sohalang.com
Soha & Lang, P.S.
1325 Fourth Ave., Ste 2000
Seattle, WA 98101-2570
(206) 624-1800
(206) 624-3583 (fax)

Jay W. Beattie, OSB #871631
Email: jbeattie@lindsayhart.com
Michael J. Estok, OSB # 090748
Email: mestok@lindsayhart.com
LINDSAY HART, LLP
1300 SW Fifth Avenue, Suite 3400
Portland, Oregon 97201-5640
Phone: 503-226-7677
Fax: 503-226-7697

Clarke B. Holland, California Bar No. 76805
Pacific Law Partners LLP
2000 Powell Street, Suite 950
Emerville, CA 94608
Email cholland@plawp.com
(510) 841-7777
(501) 841-7776 (fax)

Attorneys for Defendant Oregon Mutual Ins. Co.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

DAKOTA VENTURES, LLC d/b/a KOKOPELLI GRILL and COYOTE BBQ PUB, individually and on behalf of all others similarly situated, Plaintiffs, vs. **OREGON MUTUAL INSURANCE CO.** Defendant.	Civil No. 3:20-CV-00630 HZ **DEFENDANT OREGON MUTUAL INSURANCE COMPANY'S MOTION TO DISMISS PURSUANT TO FRCP 12(b)(6)**

RULE 7-1(a)(1) CERTIFICATION

Counsel for defendant Oregon Mutual Insurance Company has conferred with counsel for plaintiff regarding this motion and the parties have been unable to resolve the subject of this dispute.

I. RELIEF REQUESTED

Defendant Oregon Mutual Insurance Company ("Oregon Mutual") moves to dismiss Plaintiff Dakota Ventures, LLC's First Amended Class Action Complaint pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6). Plaintiff has not alleged any facts that give rise to insurance coverage for its alleged claims.

Plaintiff owns and operates two restaurants that are alleged to have sustained economic loss caused by COVID-19 related governmental orders. Plaintiff's operative complaint states that Oregon Mutual issued a commercial property policy that provides coverage for Plaintiff's

SOHA & LANG, P.S.
ATTORNEYS AT LAW
1325 FOURTH AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98101-2570
(206) 624-1800/FAX (206) 624-3585

COVID-19 related losses due to "direct physical loss or damage."[1] Plaintiff admits that this language is "clear and unambiguous."[2] While the Complaint alleges that presence of virus or disease *can* constitute physical damage to property, Plaintiff fails to allege any facts whatsoever to demonstrate that the COVID-19 virus *did* cause physical damage to property.[3] Coverage under each of the policy provisions relied upon by Plaintiff hinges upon whether loss is caused by "direct physical loss of or damage" to Plaintiff's covered property. As there is no claim presented in the Complaint of actual "direct physical loss of or damage" at "Covered Property" within the plain meaning of the Oregon Mutual coverage grant, Plaintiff's claims fail. Oregon Mutual thus requests that the Court dismiss this action as a matter of law based on the pleadings.

II. STATEMENT OF FACTS

A. The First Amended Complaint

On July 30, 2020, Plaintiff Dakota Ventures, LLC dba Kokopelli Grill and Coyote BBQ Pub filed its First Amended Class Action Complaint against Oregon Mutual (the "Operative Complaint"). The Operative Complaint states that Plaintiff owns and operates two dining establishments in Port Angeles, Washington including a restaurant and lounge and an adjacent pub.[4] Plaintiff alleges that due to the COVID-19 virus and the resultant state-ordered mandated closure, Plaintiff was forced to suspend or reduce its restaurant business operations, and take necessary steps to prevent further damage and minimize the suspension of business and

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[1] ECF 38 (The "Operative Complaint").

[2] *Id.* at ¶¶71, 79, 87, 95, 103, 109, 116, 123, 130 and 137.

[3] *Id.* at ¶15 (the "probability of illness" prevents Plaintiff from using its space in the certain ways.)

[4] *Id.* at ¶¶1 and 2.

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ATTORNEYS AT LAW
1325 FOURTH AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98101-2570
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continue operations.[5]

Plaintiff is now seeking insurance coverage from Oregon Mutual for the economic damages resulting from its suspended or reduced business operations. The Operative Complaint alleges that Oregon Mutual issued an insurance policy to Plaintiff, insuring both of Plaintiff's properties and business practices from January 3, 2020 to January 3, 2021.[6] Plaintiff argues that Oregon Mutual Businessowners Property Coverage agreed to pay Plaintiff for "direct physical loss" "unless the loss is [e]xcluded or…[l]imited by" the Businessowners Coverage Form.[7] Plaintiff alleges that the presence of virus or disease *can* constitute physical damage to property, by making it unsafe and causing sickness.[8] Plaintiff further asserts that losses due to COVID-19 are a "Covered Cause of Loss" under the Policy.[9] Plaintiff also alleges its losses caused by COVID-19 and the related orders issued by governmental authorities triggered the "Business Income," "Civil Authority," "Extra Expense," "Ingress or Egress," and "Sue and Labor" coverage provided by the Oregon Mutual Policy.[10]

Plaintiff avers that a series of certain proclamations and orders issued by Washington Governor Inslee in response to the COVID-19 required the suspension of Plaintiff's business.[11] Plaintiff then alleges that the presence of COVID-19 caused "direct physical loss of or damage to" its "Covered Property" by impairing the function of it property and by causing a necessary

[5] ECF 38 at ¶10.
[6] *Id.* at ¶22.
[7] *Id.* at ¶23.
[8] *Id.* at ¶12 and 29 (emphasis added).
[9] *Id.* at ¶25.
[10] *Id.* at ¶35.
[11] *Id.* at ¶¶39-45.

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suspension of operations during a period of restoration.[12] Plaintiff alleges to have suffered direct physical loss and damage because COVID-19 has impaired Plaintiff's property by "making it unusable in the way that it had been used before COVID-19."[13] Notably, Plaintiff admits to being able to use it premises for some restaurant functions including takeout services and seating a limited number of customers in its restaurants.[14] Plaintiff further admits that it is the *probability of illness* to people which prevents the full functioning of its physical space.[15] Plaintiff also admits that its economic loss is caused by alleged loss of functionality for certain business purposes due to COVID-19, and not because of any actual known presence of the COVID-19 virus on Plaintiff's covered property.[16]

The Operative Complaint alleges ten causes of action against Oregon Mutual for: (1) Breach of Contract, based upon Oregon Mutual's denial of Plaintiff's claim under each of the five Policy provisions Plaintiff claims were triggered by its loss; and (2) Declaratory Judgment, seeking a declaration that Plaintiff's and class members losses and expenses are covered by each of those five provisions of the Policy.[17]

B. The Gubernatorial Emergency Proclamations

The Operative Complaint mentions various orders issued by Washington's Governor Inslee in response to the COVID-19 virus pandemic. By way of judicial notice, these orders were issued pursuant to RCW 43.06.220(1)(h) to "to help preserve and maintain life, health,

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[12] ECF 38 at ¶46.

[13] *Id.* at ¶12.

[14] *Id.* at ¶13.

[15] *Id.* at ¶15.

[16] *Id.* at ¶14 and 28 ("If they were to conduct business as usual, the disease and virus would show up and get people sick.").

[17] *Id.* at ¶¶64-140.

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1 property or the pubic peace . . ." The orders also state: "Violators of this of this order may be
2 subject to criminal penalties pursuant to RCW 43.06.220(5)."
3 On March 16, 2020, Governor Inslee issued Proclamation 20-13 which prohibited
4 people from gathering in any public venue in which people congregate for the consumption of
5 food and beverages, through March 31, 2020.[18] It is alleged that this proclamation was issued
6 for the purpose of slowing the spread of the COVID-19 pandemic in public accommodations.[19]
7 Governor Inslee's Proclamation 20-13 prohibited only on-site consumption of food and/or
8 beverages in a public venue.[20] The Operative Complaint further asserts that on March 23, 2020,
9 Governor Inslee issued Proclamation 20-25, "Stay Home—Stay Healthy." The proclamation,
10 which amended Proclamation 20-13, prohibited "all non-essential businesses in Washington
11 State from conducting business," and extended the mandatory closure of restaurants, bars and
12 places of public accommodation to the public and on-site consumption."[21] Violators of
13 Proclamation 20-25 are alleged to be subject to criminal penalties pursuant to RCW
14 43.06.220(5).[22] The Operative Complaint also states that Governor Inslee extended the closure
15 of restaurants for on-site services through June 1, 2020, after which restaurants, including
16 Plaintiff's, were permitted to operate on-site dining services at fifty percent capacity.[23]
17 **C. The Policy**
18 Oregon Mutual issued commercial property insurance policy no. BSP 354948 to
19 "Dakota Ventures, LLC," effective 1/30/2020 to 1/3/ 2021 (the "Policy"). The Policy classified
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[18] ECF 38 at ¶40-41.

[19] *Id.*

[20] *Id.* at ¶41.

[21] *Id.* at ¶42

[22] *Id.*

[23] *Id.* at ¶¶43 and 44-45.

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1 the named insured as a "Other Organization" and described the business as "Restaurants Casual
2 with Lounge."[24] The scheduled insured locations are 201 and 203 E. Front Street, Port Angeles,
3 Washington 98362.[25]
4 The Businessowners Coverage Form of the Policy provides the following coverage
5 grant:
6 **SECTION I -PROPERTY**
7 **A. Coverage**
8 We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.[26]
9
10 "Covered Property" includes the following: (1) buildings, (2) fixtures and permanently installed
11 machinery and equipment, (3) personal property furnished by the insured as a landlord, (4)
12 personal property used to maintain or service the buildings, and (6) Business Personal Property,
13 including property used in the business or that is in the care, custody or control of the insured.[27]
14 Covered Cause of Loss" is defined in the form as:
15 Risks of direct physical loss unless the loss is:
16 **a.** Excluded in Paragraph **B.** Exclusions in Section **I;** or
b. Limited in Paragraph **4.** Limitations in Section I.[28]
17 The Policy also provides additional coverage for certain enumerated losses including: (1)
18 Business Income, (2) Extra Expense, and (3) Civil Authority as follows:
19 **f. Business Income**
20 **(1) Business Income**

21 [24] ECF 38-2 at 2 (Dakota Policy Declarations page).
22 [25] *Id.*
[26] *Id.* at 6 (Dakota Policy Businessowners Coverage Form).
23 [27] *Id.*
[28] *Id.* at 7.

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> **(a)** We will pay for the actual loss of Business Income you sustain you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from any Covered Cause of Loss.[29]

* * *

> **g. Extra Expense**
>
> **(1)** We will pay necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.[30]

* * *

> **i. Civil Authority**
>
> We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.[31]

Plaintiff also alleges coverage under the Policy's Ingress or Egress additional coverage which applies to loss caused when ingress or egress is physically prevented due to direct physical loss or damage to property other than at the described premises.[32] Plaintiff further alleges coverage under the Policy's "Duties in the Event of Loss or Damage" provision.[33] Plaintiff repeatedly admits that these Policy provisions are "clear and unambiguous."[34]

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[29] ECF 38-2 at 10.

[30] *Id.* at 11.

[31] *Id.* at 12.

[32] *Id.* at 66 (Dakota Policy Businessowner Xtreme Cluster Endorsement).

[33] *Id.* at 20.

[34] ECF 38 at ¶¶71, 79, 87, 95, 103, 109, 116, 123, 130 and 137.

SOHA & LANG, P.S.
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1325 FOURTH AVENUE, SUITE 2000
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(206) 624-1800/FAX (206) 624-3585

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III. EVIDENCE RELIED UPON

Oregon Mutual relies upon the pleadings and records on file with the Court and the argument and authority herein.

IV. AUTHORITY AND ARGUMENT

A. Legal Standards

1. Standard for Dismissal Under FRCP 12(b)(6)

Fed. R. Civ. P. 12(b)(6) permits a court to dismiss a complaint for failure to state a claim. The rule requires the court to assume the truth of the complaint's factual allegations and credit all reasonable inferences arising from those allegations. *Sanders v. Brown*, 504 F3d 903, 910 (9th Cir 2007). However, "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' . . . Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 US 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 US 544, 557 (2007)). Accordingly, a complaint may be dismissed based on: (1) absence of a cognizable legal theory, or (2) insufficient facts under a cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F2d 530, 534 (9th Cir 1984).

Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion to dismiss. *Lee v. City of L.A.*, 250 F3d 668, 688 (9th Cir 2001) (citations omitted). The Ninth Circuit, however, carves out certain exceptions to this rule. For example, a court may consider "documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading[.]" *Branch v. Tunnell*, 14 F3d 449, 454 (9th Cir 1994), *overruled on other grounds by Galbraith v Cty. of Santa Clara*, 307 F3d 1119, 1127 (9th Cir 2002). *See also Friedman v. AARP, Inc.,* 855

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1325 FOURTH AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98101-2570
(206) 624-1800/FAX (206) 624-3585

1 F3d 1047, 1051 (9th Cir 2017); *Swartz v. KPMG LLP,* 476 F3d 756, 763 (9th Cir 2007). This
2 standard would allow the court to review and incorporate the language of the Policy into this
3 motion.

4 **2. Choice of Law**

5 This case involves an Oregon insurance company and a Washington insured. "Federal
6 courts sitting in diversity look to the law of the forum state . . . when making choice of law
7 determinations." *Nguyen v. Barnes & Noble Inc.*, 763 F3d 1171, 1175 (9th Cir 2014). This
8 court should therefore apply Oregon "choice of law rules to determine the controlling
9 substantive law." *Patton v. Cox*, 276 F3d 493, 495 (9th Cir 2002). "The threshold question in a
10 choice-of-law problem is whether the laws of the different states actually conflict." *Spirit*
11 *Partners, LP v. Stoel Rives LLP*, 212 Or App 295, 301, 157 P3d 1194, 1198 (2007). "The
12 proponent of applying a different state's law has the obligation to identify a material difference
13 between Oregon law and the law of the other state." *Portfolio Recovery Assocs., LLC v.*
14 *Sanders*, 292 Or App 463, 468, 425 P3d 455, 459 (2018) (citing *Spirit Partners*, 212 Or App at
15 301, 157 P3d at 1198). "Where no material difference exists between Oregon law and the law
16 of the proposed alternative forum, Oregon courts will apply Oregon law without regard to the
17 relative significance of the relationship between the dispute and the proposed alternative
18 forum." *Powell v. System Transp., Inc.*, 83 FSupp3d 1016, 1022 (D Or 2015).

19 As noted by this court in *Great American Alliance Ins. Co. v. Sir Columiba Knoll*
20 *Associates Limited Partnership*, 416 FSupp3d 1098, 1104-1105 (D Or 2019), there is no
21 material difference between the law of Oregon and Washington regarding the interpretation of
22 admitted "clear and unambiguous" policy language. Further, as demonstrated below, there is no
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SOHA & LANG, P.S.
ATTORNEYS AT LAW
1325 FOURTH AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98101-2570
(206) 624-1800/FAX (206) 624-3585

conflict between Oregon and Washington as to the application of the Oregon Mutual policy language to the allegations of the Complaint. Under both states' laws, Oregon Mutual prevails.

3. Rules of Policy Construction

The plain language of the Policy controls the court's analysis. Interpretation of an insurance contract is a question of law. *Hoffman Constr. Co. v. Fred S. James & Co.,* 313 Or 464, 469, 836 P2d 703 (1992); *Woo v. Fireman's Fund Ins. Co.*, 161 Wn2d 43, 52, 164 P3d 454 (2007). An insurance policy, construed as a contract, is to be given a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Xia v. ProBuilders Specialty Ins. Co.*, 188 Wn2d 171, 181 (2017), *as modified* (Aug. 16, 2017) (quoting *Key Tronic Corp., Inc. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn2d 618, 627 (1994) (quoted citations omitted)). The court must construe the text of the policy as a whole, rather than view particular parts of the policy in isolation. *Bresee Homes, Inc. v. Farmers Ins. Exch.,* 353 Or 112, 122, 293 P3d 1036, 1041-42 (2012); *Key Tronic Corp., Inc. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn2d 618, 627, (1994).

Plaintiff's Operative Complaint admits that the provisions of the Oregon Mutual coverage are "clear and unambiguous."[35] "If the language is clear and unambiguous, a court must enforce it as written and may not modify it or create ambiguity where none exists." *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn2d 654, 15 P3d 115, 122 (2000); *Hoffman*, 313 Or at 469.

B. Plaintiff has failed to allege any "direct physical loss or damage" which would trigger coverage under the Policy

Distilled to its very essence, the basis of Plaintiff's Complaint is that the economic loss

[35] ECF 38 at ¶¶71, 79, 87, 95, 103, 109, 116, 123, 130 and 137.

SOHA & LANG, P.S.
ATTORNEYS AT LAW
1325 FOURTH AVENUE, SUITE 2000
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(206) 624-1800/FAX (206) 624-3585

caused by Governor Inslee's COVID-19 orders at its restaurants constitutes "direct physical damage or loss" to "Covered Property."[36] Plaintiff, however, fails to allege any factual allegations that demonstrate that the COVID-19 virus was actually present on or actually did cause physical damage to Plaintiff's restaurant premises, or any other property. Rather, Plaintiff argues that the "probability of illness" to people has caused Plaintiff the *loss of use and function* of its physical space.[37] This argument admits that there has been no physical loss or damage to Plaintiff's premises caused by the physical presence of the COVID-19 virus at those locations. Without direct physical loss or damage to property, there is no coverage under the Policy. Dismissal is thus proper.

The phrase "direct physical loss of or damage to" is "unambiguous," as confirmed by this court in *Columbiaknit, Inc. v. Affiliated FM Ins. Co.,* 1999 WL 619100, at *4 (D Or Aug. 4, 1999) and admitted by Plaintiff in its Operative Complaint.[38] "Direct" means "direct", "without any intervening agency or step: without any intruding or diverting factor", *Pinnacle Processing Group, Inc. v. Hartford Casualty Ins. Co.*, 2011 WL 5299557 *5, *6 (WD Wash), as "distinguished from a remote cause." *Moeller v. Farmers Ins. Co. of Wa.,* 155 Wn App 133, 143, 229 P3d 857 (2010), *aff'd on other grnds,* 173 Wn2d 264, 267 P3d 998 (2011). The word "physical" is also unambiguous. As explained in the most recent edition of *Couch on Insurance*: "The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude losses that are intangible or incorporeal, and, thereby to preclude any claim against the property insurer when the insured merely suffers a detrimental

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[36] ECF 38 at ¶¶46-38; *see also* ECF 38 n. 1 (Plaintiff's business "has decreased because of the impairment of its business space, and Dakota Ventures is seeking the loss of business income..").

[37] *Id.* at ¶15 (emphasis added).

[38] *Id.* at ¶¶ 71, 79, 87, 95, 103, 109, 116, 123, 130 and 137.

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1325 FOURTH AVENUE, SUITE 2000
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(206) 624-1800/FAX (206) 624-3585

1 economic impact unaccompanied by a distinct, demonstrable, physical alteration of the
2 property." 10A *Couch on Insurance* § 148.46 (3d Ed. 2019). "Damage" in the first-party
3 property context also means actual injury to property. *North Pac. Ins. Co. v. Travelers Cas. Ins.*
4 *Co. of Am.,* 2016 WL 69819 *5 (WD Wash Jan. 6, 2016).

5 Following the admittedly "clear and unambiguous"[39] terms of the Policy, Oregon and
6 Washington courts require evidence of actual physical damage to covered property for property
7 coverage to be triggered. For example, in *Villella v. Public Employees Mut. Ins. Co.,* 106 Wn2d
8 806, 725 P2d 957 (1986), the insured sought to recover under two homeowners policies for
9 damage to a dwelling that occurred when the foundation of the house sank. The insured
10 claimed that the foundation problem was caused by a defective drainage system, which caused
11 progressive destabilization of the soil during the effective period of the first policy issued by
12 Pemco. Although the actual damage to the structure occurred after the Pemco policy expired,
13 the insured claimed that the Pemco policy covered the loss because the soil destabilization
14 occurred during the policy period. *Id.* at 810-11. The Washington Supreme Court rejected this
15 argument because the residence itself sustained no damage prior to the expiration date of the
16 first policy. *Id.* at 811-12. In so holding, the court emphasized that for coverage to be triggered
17 under a policy the insured must sustain an actual physical injury or loss, however minute,
18 during the effective period of the policy. *Id.* at 814.

19 A similar ruling was made in *Fujii v. State Farm Fire & Cas. Co.,* 71 Wn App 248, 857
20 P.2d 1051 (1993), *review den*, 123 Wn2d 1009 (1994), where heavy rainfall caused a landslide
21 on a hillside above the insureds' home. *Id.* at 249**.** The insureds requested coverage under their
22 homeowner's policy to cover the costs of preventive measures after a landslide. Based on an
23

[39] *Id.*

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1325 FOURTH AVENUE, SUITE 2000
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1 expert's opinion that the landslide damaged the "integrated engineering unit" of the home, the
2 insureds claimed they had suffered a "direct physical loss" under the coverage provision of
3 their policy. *Id.* at 249. Citing *Villella*, the court however held that under the plain terms of the
4 policy, coverage would only be triggered by direct physical loss to the dwelling. Accordingly,
5 even though damage may be imminent, there must be some "discernible" damage during the
6 effective policy period.

7 Support for dismissal in this case is also found in *Borton & Sons, Inc. v. Travelers Ins.*
8 *Co.,* 99 Wn App 1010 (2000), where the court addressed whether apples were "physically
9 injured" after a roof collapsed in an apple storage facility. The apples were not physically
10 damaged in the event, however, the insured claimed that the fact that the apples had been in the
11 damaged building "eroded confidence" in the quality of the apples and thus there was physical
12 loss. The insured cited several out-of-state cases to support its claim. The Washington Court of
13 Appeals, however, distinguished these cases as being in conflict with Washington law, citing to
14 *Fujii* and *Villella.* The court concluded that because there was no physical damage to the
15 apples, there was no "direct physical loss" covered under the policy. The court thus expressly
16 rejected Borton's (and now Plaintiff's) argument that its loss was covered because it lost the
17 functionality of its apples for their intended sue as saleable goods. *Id.* at *5 (holding Borton's
18 inability to sell the apples was not a 'direct physical loss' covered under the policy).

19 Similarly, in *Washington Mut. Bank v. Commonwealth Ins. Co.*, 133 Wn App 1031
20 (2006), the court held that an insured's mistaken belief that a building was about to collapse did
21 not constitute direct physical loss. Because no actual "peril insured against" existed, coverage
22 under the policies was not triggered. *See also Wolstein v. Yorkshire Ins. Co.,* 97 Wn App 201,
23 211–12, 985 P2d 400 (1999).

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ATTORNEYS AT LAW
1325 FOURTH AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98101-2570
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1 Oregon courts also require evidence of actual physical damage to covered property for
2 property coverage to be triggered. In *Columbiaknit*, 1999 WL 61900 at *7 (1999), Judge Hubel
3 found that "physical damage or alteration of property may occur at the microscopic level does
4 not obviate the requirement that physical damage need be *distinct and demonstrable*." *Id.* at * 7
5 (emphasis added). Applied to this case, there are no allegations of the distinct and demonstrable
6 presence of the COVID-19 virus at Plaintiff's property or other property. The *Columbiaknit*
7 standard has not been met.

8 Similarly, in *Great Northern Ins. Co. v. Benjamin Franklin Fed. Sav. and Loan Ass'n.,*
9 793 F Supp 259, (D Or 1990), this court held that the removal of non-friable asbestos at a
10 building owner's discretion was not a loss resulting from "a direct physical loss or damage by a
11 Covered Cause of Loss[ ]", defined as "direct physical loss or damage ..." *Id.* at 261. In so
12 holding, the court stated that:

13 > There is no evidence here of physical loss, direct or otherwise. The building has remained physically intact and undamaged. The only loss is economic. The
14 > policy, by its own terms, covers only direct physical loss. The inclusion of the terms "direct" and "physical" could only have been intended to exclude indirect,
15 > nonphysical losses.

16 *Id.* at 263. The court thus rejected the argument that economic loss absent any direct and
17 physical losses to property constitute "direct physical loss or damage."

18 The issue in *Great Northern* and *Columbiaknit* is the same as the issue here - whether
19 the policy language was intended to include consequential or intangible damages such as
20 depreciation in value. Both courts answered the question in the negative, as this court shall as
21 well. "The inclusion of the terms 'direct' and 'physical' could only have been intended to
22 exclude indirect, nonphysical losses." *Great Northern,* 793 F Supp at 263. Here, Plaintiff
23 alleges that its loss is a consequential economic loss, caused by the effect of the COVID-19

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1 virus and related governmental orders on the use or functionality of its physical space.[40]
2 Plaintiff's loss is thus admittedly, as a matter of law, not "direct physical loss of or damage to"
3 its covered property.

4 *Farmers Ins. Co. of Oregon v. Trutanich,* 123 Or App 6, 858 P.2d 1332 (1993) and
5 *Largent v. State Farm Firs & Cas. Co.,* 116 Or App 595, 842 P.2d 445 (1992) also support this
6 point. These cases involved odor from methamphetamine "cooking" that was held to constitute
7 "direct physical loss" to structures. As commented on by Judge Hubel, both cases recognized
8 that the fact that distinct and demonstrable evidence of physical damage is required to trigger
9 coverage. *Columbiaknit, Inc. v. Affiliated FM Ins. Co.,* 1999 WL 619100, at *7 (D. Or. Aug. 4,
10 1999). The mere allegation of the possible adherence of molecules to porous surfaces, without
11 more, does not equate physical loss or damage. *Id.*

12 Applying the above cases to the allegations of the Operative Complaint and the Policy
13 requirements, there is no evidence of actual "direct physical loss or damage" to Covered
14 Property stated in the Complaint. The Policy defines "Covered Property" to include buildings,
15 fixtures, and property used in the business.[41] The Policy specifically states that "money" is not
16 included in "Covered Property".[42] While the Complaint alleges that "the probability of illness"
17 from a virus causes the loss of functionality of property, the Complaint fails to allege even a
18 single factual allegation with respect to the actual physical condition of Plaintiff's "Covered
19 Property" itself.[43] Plaintiff's failure to allege any facts whatsoever regarding any physical
20 alteration of its property itself makes abundantly apparent that Plaintiff's property was not
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[40] ECF 38 at ¶¶12-16.

[41] ECF 38-2 at 6.

[42] ECF 38-2 at 6.

[43] ECF 38 at ¶15.

SOHA & LANG, P.S.
ATTORNEYS AT LAW
1325 FOURTH AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98101-2570
(206) 624-1800/FAX (206) 624-3585

1 directly physically lost or damaged. The Operative Complaint undeniably alleges only a forced
2 reduction of business for reasons exogenous to the restaurant premises themselves.[44]
3 Furthermore, Plaintiff admits that *even if* COVID-19 showed up on its premises no physical
4 damage to property would occur - rather *people* would get sick.[45] Accordingly, it is impossible
5 to reasonably infer that Plaintiff's "Covered Property" suffered any "distinct" or
6 "demonstrable" physical damage. *Columbiaknit.* at *7; *see also Fujii,* 71 Wn App at 249;
7 *Borton & Sons, Inc. v. Travelers Ins. Co.,* 99 Wn App 1010 (2000).

8 Plaintiff's claim is admittedly a claim for financial loss.[46] By the clear and unambiguous
9 terms of the Policy's insuring agreement, the Policy only covers loss due to *physical* loss of or
10 damage to Plaintiff's restaurant premises and business personal property. Nonphysical
11 economic loss does not constitute "direct physical loss or damage" to Plaintiff's "Covered
12 Property". *See See Fujii,* 71 Wn App at 249; *Great Northern*, at 263. Plaintiff's financial losses
13 are not covered. Dismissal is thus warranted based on the pleadings and Oregon law. *See*
14 *Ashcroft v. Iqbal*, 556 US at 677-78. Case law from around the country is in accord. *See, e.g.,*
15 *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, at *9 (SD Fla June 11, 2018) (quoting
16 *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal App 4th 766, 779
17 (2010)).

18 Recent federal and state decisions regarding similar COVID-19 related insurance claims
19 also support dismissal of the complaint. On May 14, 2020, U.S. District Judge Valerie Caproni
20 of the Southern District of New York denied a preliminary injunction seeking to compel the

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22 [44] *Id.* at ¶12 and 14.

[45] *Id.* at ¶28.

23 [46] ECF 38 n. 1 (Plaintiff's business "has decreased because of the impairment of its business space, and Dakota Ventures is seeking the loss of business income..").

SOHA & LANG, P.S.
ATTORNEYS AT LAW
1325 FOURTH AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98101-2570
(206) 624-1800/FAX (206) 624-3585

defendant insurer to pay the plaintiff's business interruption claim pending resolution of the lawsuit. Judge Caproni stated that the COVID-19 virus did not cause direct physical loss or damage to the property, which was required to trigger the subject policy's business interruption coverage. *See Social Life Magazine, Inc. v. Sentinel Ins. Co.*, No. 1:20-cv- 3311, Tr. at 15 (S.D.N.Y. May14, 2020).[47] Likewise, on August 6, 2020, a District of Columbia court granted an insurer's summary judgment motion because loss due to governmental orders related to the COVID-19 virus did not constitute "direct physical loss" or damage *Rose's 1, LLC, et. al. v. Erie Insurance Exchange*, No. 2020 CA 002424 B (DC Superior Court Aug 6, 2020) at 9-10.[48] In so doing, the court held that there was no physical loss or damage because: (a) Plaintiffs offered no evidence that COVID-19 was actually present on their insured properties at the time they were forced to close, (b) the governmental orders did not have any effect on the material or tangible structure of the insured properties, and (c) pursuant to dictionary definitions offered by the plaintiff, 'loss of use' must be caused by a direct physical intrusion on to the insured property and the governmental orders were not such an intrusion. *Id.* at 5. Here, dismissal of the Operative Complaint is proper for the very same reasons.

Similarly, in *Gavrilides Management Co. v. Michigan Ins. Co.*, No. 20-258-CB (Mich Cir Ct, Ingham July 1, 2020)[49], a Michigan court granted the insurer's motion for summary disposition because loss due to governmental orders related to the COVID-19 virus did not constitute direct physical loss or damage. *Id.* at 23:16-18. In examining the meaning of the words "direct physical loss of or damage to property," the *Gavrilides* court held that the plaintiff could not avoid the requirement that there "has to be something that physically alters

[47] A copy of the transcript from *Social Life Magazine* is attached as Exhibit A to this motion.

[48] A copy of the order from *Rose's 1* is attached as Exhibit B to this motion.

[49] A copy of the transcript from *Gavrilides* is attached as Exhibit C to this motion.

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1325 FOURTH AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98101-2570
(206) 624-1800/FAX (206) 624-3585

the integrity of the property…[T]here has to be something that physically alters the integrity of the property…[T]here has to be some tangible, i.e., physical damage to the property." *Id.* at 19:24-20:9. Thus, the court rejected the argument, that the physical requirement is met because people were physically restricted for dine-in services, as coming "nowhere close" to meeting the requirement that there has to be some physical alteration to or physical damage or tangible damage to the integrity of the building. *Id.* at 20:10-18. In another recent decision, in *Diesel Barbershop, LLC, et. al. v. State Farm Lloyds* No. 5:20-CV-461-DAE (WD TX, San Antonio Div August 13, 2020)[50], Senior U.S. District Judge David Alan Ezra of the Western District of Texas agreed that absent tangible injury to property, loss due to governmental orders related to the COVID-19 virus does not constitute a direct physical loss, citing to *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686 (5th Cir. 2011); *United Air Lines, Inc. v. Ins. Co. of State of PA,* 439 F.3d 128, 134 (2d Cir. 2006); *Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co.,* 181 F. App'x 465, 470 (5th Cir. 2006); and *Ross v. Hartford Lloyd Ins. Co.,* 2019 WL 2929761, at *6–7 (N.D. Tex. July 4, 2019) ("direct physical loss" requires "a distinct, demonstrable, physical alteration of the property" (citing 10A Couch on Ins. § 148:46 (3d ed. 2010)).) *Diesel Barbershop* at *12-15. The finding is consistent with the Washington and Oregon case law cited above with the finding that the plaintiffs therein failed to plead a direct physical loss. *Id.* at *15.

The same reasoning applies to Plaintiff's claims for Business Income and Extra Expense coverage, particularly where both have the same explicit requirement of direct physical loss or damage. The additional coverage grants for Business Income and Extra Expense apply only when the insured has sustained "direct physical loss or damage." The

[50] A copy of the order from *Diesel Barbershop* is attached as Exhibit D to this motion.

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1325 FOURTH AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98101-2570
(206) 624-1800/FAX (206) 624-3585

"Business Income" coverage explicitly states it is applicable only where a suspension of operations is "caused by direct physical loss of or damage to property at the described premises."[51] Similarly, the "Extra Expense" coverage specifically applies only where such extra costs would not have been incurred "if there had been no direct physical loss or damage to property at the described premises."[52] Plaintiff readily admits that the cause of its reduced or suspended business operations is Governor Inslee's emergency proclamations, issued in response to the COVID-19 virus and pandemic.[53] As discussed above, such outside, nonphysical factors do not constitute "direct physical loss or damage" to Plaintiff's property at the described premises.

The pairing of a "period of restoration" to "Business Income" and "Extra Expense" coverage buttresses Oregon Mutual's position from a policy interpretation standpoint.[54] The Policy defines "period of restoration" as the period of time that begins "72 hours after the time of direct physical loss or damage…" or "immediately after the time of direct physical loss for Extra Expense Coverage", and ends on the earlier of the date when "the property at the described premises should be *repaired, rebuilt or replaced*…" or "when the business is resumed at a new permanent location."[55] To allow coverage for losses that are not physical, and thus do not require physical repair, rebuilding, or replacement, would render that definition—and as a result, the entire coverage part—not only nonsensical, but infinitely indeterminate. As recognized in *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F Supp 2d 280, 287 (SDNY

[51] ECF 38-2 at 10.

[52] *Id.* at 11.

[53] ECF 38 at ¶10.

[54] ECF 38-2 at p. 10.

[55] *Id.* at 27-28 (emphasis added).

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(206) 624-1800/FAX (206) 624-3585

2005), the terms "'rebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature."

Additionally, the Policy definition of "period of restoration" specifically does *not* include any *increased* period required due to the enforcement of any ordinance or law that regulates the use of any property.[56] Thus, the Policy excludes from "period of restoration" any amount of time in which the suspension of operations is due to enforcement of an ordinance or law, rather than direct physical damage to the property.

Plaintiff acknowledges that coverage under the "Business Income" and "Extra Expense" provisions of the Policy is tied to the "period of restoration" that occurs after the date of direct physical loss or damage.[57] However, the Complaint is devoid of any allegations which would show that Plaintiff is repairing, rebuilding or replacing its premises or resuming its business at a new permanent location. Plaintiff admits that it is "the presence of COVID-19," generally, and Governor Inslee's orders related thereto that are causing its suspension of operations "during a period of restoration."[58] To adopt Plaintiff's definition of "period of restoration," which according to the Operative Complaint is the period of time during which its operations are reduced or suspended because of the COVID-19 virus and related governmental orders, would require complete ignorance of the admittedly clear and unambiguous language of the policy which defines the end of the "period of restoration" as the earlier of the date when "the property at the described premises should be *repaired, rebuilt or replaced*…" or "when the business is resumed at a new permanent location."[59] It would further require complete disregard

[56] ECF 38-2 at 28 (emphasis added).

[57] ECF 38 at ¶¶26 and 32.

[58] ECF 38 at ¶¶46-48.

[59] ECF 38-2 at 27-28 (emphasis added).

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SEATTLE, WASHINGTON 98101-2570
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for the admittedly clear and unambiguous language of the Policy, which excludes from "period of restoration" any time during which the use of the property is regulated by the enforcement of an ordinance or law.[60]

In sum, Plaintiff is asking this Court to rewrite the admitted "clear and unambiguous"[61] terms of the Policy to allow for coverage when there are no factual allegations to show Plaintiff suffered any loss that was "physical in nature". A simple, plain reading of the Policy makes it clear that Plaintiff contracted with Oregon Mutual for coverage only where the loss is attributable to direct *physical* loss or damage to Plaintiff's insured property, and not consequential or intangible damage. The Operative Complaint fails to allege any facts whatsoever to suggest that Plaintiff sustained physical loss or damage to its restaurant premises. Plaintiff alleges consequential economic impacts caused by outside events non-physical in nature - reduced business operations stemming from Washington Governor Inslee's orders issued to slow the spread of COVID-19. While Plaintiff makes bald assertions that it sustained direct physical loss or damage to its property, the Operative Complaint fails to allege any facts from which the Court could draw a reasonable inference that Plaintiff's loss was caused by any direct physical loss or damage to its insured premises. *See Ashcroft v. Iqbal,* supra, 556 US at 678 (quoting *Bell Atl. Corp. v. Twombly*, supra, 550 US at 557). Devoid of further factual enhancement, Plaintiff's formulaic statements that it sustained "physical damage or loss" is insufficient to state a claim against Oregon Mutual. *Id.*

While the COVID-19 pandemic has created an economic hardship for many, a court may not rewrite the policy to force insurers to pay for losses they have not contracted to

[60] *Id.* at 28.

[61] ECF 38 at ¶¶71, 79, 87, 95, 103, 109, 116, 123, 130 and 137.

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insure. *Weyerhaeuser*, 15 P3d at 122 (2000). Based upon the clear and unambiguous terms and conditions of the policy, economic damages caused by outside factors, completely unrelated to any physical damage of Plaintiff's restaurant premises, are not what Oregon Mutual, nor Plaintiff, intended to insure. *See Polygon Northwest Co.*, 143 Wn App at 775; *see also English Cove Ass'n*, 121 Wn App at 363; *Hoffman*, 313 Or at 469. Since the Operative Complaint fails to allege any facts that fall within the Policy's coverage provisions, including the additional coverages, Plaintiff's claims fail as a matter of law.

C. Plaintiff has failed to allege any other viable theory for coverage arising out of the Governor's orders or COVID-19

It is likewise apparent that Plaintiff cannot formulate any other basis for coverage of economic loss arising out of the COVID-19 pandemic and the related emergency proclamations issued by Washington Governor Inslee.

1. Neither COVID-19 nor the Washington Governor's orders rendered Plaintiff's premises uninhabitable or unusable

Plaintiff erroneously attempts to manufacture a claim of physical loss by alleging a loss of functionality or use of its property for business purposes due to COVID-19.[62] Oregon Mutual anticipates Plaintiff will look to cases from outside of Oregon and Washington dealing with uninhabitable or unusable structures to support its claim, such as *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F3d 226 (3d Cir 2002). Decisions in that vein hold that, if a substance permeates a building without actually damaging it, but the presence of that substance renders the entire structure uninhabitable or unusable, the structure may be considered to have sustained a physical loss. The rationale is that the building is damaged as a whole, because it has completely lost its physical utility or functionality as such.

[62] ECF 38 at ¶¶12-16.

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Once again, Plaintiff's failure to provide any factual allegations to show any physical damage to its business premises negates any application of *Port Authority* and its progeny to this matter. The *Port Authority* claim related to airborne asbestos particles, and the court explained the threshold inquiry as follows: "When the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner." *Id.* at 236. "However, if asbestos is present in components of a structure, but is not in such form or quantity as to make the building unusable, the owner has not suffered a loss. The structure continues to function—it has not lost its utility." *Id.* "The fact that the owner may choose to seal the asbestos or replace it with some other substance as part of routine maintenance does not bring the expense within first-party coverage." *Id.*

In this case, Plaintiff's Complaint does not state any factual allegations which would demonstrate any intrusion of the COVID-19 virus into the building structure of its premises. Rather, Plaintiff claims its loss is caused by the general "presence" of COVID-19 somewhere, and the resultant proclamations issued by Governor Inslee which mandate closure of its premises to the public and *on-site* services.[63] Notably, Plaintiff does not allege that it was prohibited from providing *off-site* services such as food delivery or take-away services, or from providing some on-site services beginning on June 1, 2020. To the contrary, Plaintiff admits to being able to use it premises for some restaurant functions including takeout services and, later, seating a limited number of customers in its restaurants.[64] Plaintiff also neglects to provide any details which would show the presence of the COVID-19 virus in its business premises, as opposed to it generally being present elsewhere in the world. As such, the allegations in the

[63] ECF 38 at ¶¶10-11, 13, 28, 34 and 42 (emphasis added).

[64] *Id.* at ¶13.

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1 Operative Complaint fail to support any argument that Plaintiff's premises are not inhabitable
2 or usable, and thus *Port Authority* does not apply.

3 Aside from Plaintiff's failure to allege that its restaurant premises are, in fact,
4 uninhabitable or unusable, courts have only applied the *Port Authority* theory to situations
5 where uninhabitability is caused by something within the physical structure of the insured
6 property. *See e.g. Widder v. Louisiana Citizens Property Ins. Corp.*, 82 So 3d 294, 296 (LA
7 App 2011) (excessive levels of lead dust that migrated through the house contaminated
8 contents). If the cause is an external or extrinsic force that merely prevents access to the
9 building, coverage does not apply. That follows the policy language, because impeded access to
10 the property is not a direct physical loss *to* the insured property itself. *See e.g. Roundabout*
11 *Theatre Co., Inc. v. Cont'l Cas. Co.*, 302 AD 2d 1, 3 (NY App Div 2002) (no direct physical
12 loss when the city closed an area following a large scaffolding collapse, making a Broadway
13 theatre inaccessible to the public, because the theatre itself was undamaged); *Harry's Cadillac-*
14 *Pontiac-GMC Truck Co., Inc. v. Motors Ins. Corp.*, 126 NC App. 698, 702 (NC App 1997) (no
15 direct physical loss where an extreme weather event made the property inaccessible, but did not
16 damage it). The only logical conclusion that can be drawn from Plaintiff's failure to allege
17 either that the COVID-19 virus was detected on its business premises, or that its business
18 premises are uninhabitable and unusable for delivery or take-away services, or some on-site
19 services beginning June 1, 2020, is that Plaintiff's business premises are in fact inhabitable and
20 usable. Accordingly, the Operative Complaint is devoid of any allegations which would support
21 Plaintiff's position on direct physical loss.

22 The court's decision in *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*,
23 17 F Supp 3d 323 (SD NY 2014) is instructive on this point. That lawsuit arose out of the

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1 widespread power outages that occurred in and around New York City during "Superstorm"
2 Hurricane Sandy. *Id.* at 324. As the storm approached, utility provider Con Ed preemptively
3 shut off certain service networks to preserve their integrity. *Id.* at 325. As a result, a lower
4 Manhattan building that housed the Newman Myers law firm had no power and was closed to
5 tenants for several days. *Id.* Newman Myers' claimed coverage under its commercial property
6 insurance policy because its employees could not access their office. *Id.*

7 The law firm conceded that its office did not sustain actual structural damage, but
8 argued that the "the policy term 'direct physical loss or damage' is met by the preemptive
9 closure of its building in preparation for a coming storm . . . because the property at issue was
10 rendered unusable or unsatisfactory for its intended purpose." *Id.* at 329. Rejecting that claim,
11 the court distinguished cases involving issues such as asbestos or ammonia infiltration in
12 properties by recognizing they implicate "some compromise to the physical integrity of the
13 workplace." *Id.* But in the case before it, Con Ed's actions were completely external and did
14 not directly or physically compromise Newman Myers' office. *Id.* at 331. The court thus
15 rejected the claim, stating: "The words 'direct' and 'physical,' which modify the phrase 'loss or
16 damage,' ordinarily connote actual, demonstrable harm of some form to the premises itself,
17 rather than forced closure of the premises for reasons exogenous to the premises themselves, or
18 the adverse business consequences that flow from such closure." *Id.*

19 The Eighth Circuit reached a similar conclusion in *Source Food Tech., Inc. v. U.S. Fid.*
20 *& Guar. Co.*, 465 F3d 834 (8th Cir 2006). Source Food was a supplier of beef products that
21 sourced meat from Ontario, Canada. *Id.* at 835. In May of 2003, the USDA closed the border to
22 beef importation from Canada after a Canadian cow tested positive for "mad cow" disease. *Id.*
23 As a result, a truck load of Source Food's product, which was not itself contaminated, was

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(206) 624-1800/FAX (206) 624-3585

denied entry into the U.S. *Id.* Source Food submitted a claim for business interruption coverage to its insurer which denied the claim because Source Food's suspension of operations "must be caused by direct physical loss to Property." *Id.* The Eighth Circuit rejected Source Food's argument, reasoning that "[A]lthough Source Food's beef product in the truck could not be transported to the United States due to the closing of the border to Canadian beef products, the beef product on the truck was not—as Source Foods concedes—physically contaminated or damaged in any manner." *Id.* at 838. Because the "embargo on beef products" did not in any way cause a "direct physical loss to [Source Food's] property," it did not fall within the coverage provisions. *Id.*

In Plaintiff's case, even if Governor Inslee had somehow completely blocked all access to Plaintiff's properties—which he did not—that action would not constitute a direct and physical loss to the insured property itself. Nor does the existence of the COVID-19 virus elsewhere in the world, other than inside Plaintiff's property, constitute a direct physical damage or loss to Plaintiff's property. In the words of *Newman Myers*, it would be something "exogenous to the premises" causing its closure, but it would not be—in the words of the Policy—a "direct physical loss" to property on the insured premises. *See also Altru Health Sys. v. Am. Prot. Ins. Co.*, 238 F3d 961, 963 (8th Cir 2001) ("Because flood waters did not damage the insured building, [the Hospital's] loss occurred when health authorities closed the Hospital for three weeks. This was a business interruption or time element loss, not a property loss.").

Plaintiff admits that in determining whether the presence of a virus constitutes physical damage to property, "*the nature of the property itself would have a bearing on whether there is actual property damage.*"[65] In other words, it is the physical nature of Plaintiff's premises

[65] ECF 38 at ¶29 (emphasis added).

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(206) 624-1800/FAX (206) 624-3585

themselves that are determinative of whether there is actual property damage. Yet Plaintiff fails entirely to make any allegation about the physical nature of its own restaurant premises. Plaintiff has not alleged that it is unable to access and use its premises, for delivery and take-away restaurant services, or later some on-site services, or that there is a known presence of the COVID-19 virus inside or on its insured premises. The Operative Complaint is noticeably devoid of any reference at all to the physical nature of Plaintiff's restaurant premises. Accordingly, Plaintiff's argument that Governor Inslee's orders or the COVID-19 virus itself have caused direct physical loss or damage to its property is both disingenuous and implausible.

2. The Policy's Civil Authority Coverage similarly requires damage to property and an action of civil authority that prohibits access

Plaintiff's claim that there is coverage for its business loss under the Policy's Civil Authority additional coverage also fails as a matter of law. This additional coverage is triggered only when the insured sustains a loss caused by an action of civil authority which "prohibits access to the premises due to direct physical loss of or damage to property, other than at the described premises." The discussion above on "direct physical loss" has direct application to this provision. The Civil Authority provision provides that the relevant loss is loss is to property "other than at the described premises."[66]

Other case law supporting the "direct physical loss" requirement for "Civil Authority" coverage is *54th St. Ltd. Partners, L.P. v. Fid. & Guar. Ins. Co.,* 306 AD 2d 67, (NY App Div 2003), which held there was no coverage where "vehicular and pedestrian traffic in the area was diverted, [but] access to the restaurant was not denied; the restaurant was accessible to the

[66] ECF 38-2 at 12.

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public, plaintiff's employees and its vendors." In *Syufy Enter. v. Home Ins. Co. Of Indiana,* 1995 WL 129229, at *2-3 (ND Cal 1995) (unpublished), the policy required that access to plaintiff's premises be specifically prohibited by order of civil authority, and as a direct result of damage to or destruction of property adjacent to the premises. The court rejected the insured's claim for business interruption coverage for losses sustained during curfews imposed after the Rodney King verdict because curfews were imposed to prevent potential looting and rioting and not as a result of adjacent property damage.

Courts addressed this issue following 9/11 and rejected claims arising from the FAA's closure of airspace. In *United Air Lines, Inc. v. Insurance Co. of the State of Pennsylvania*, 439 F3d 128, 134 (2d Cir 2006), the court determined that the government's order to shut down all air traffic was not the direct result of property damage, but rather was "based on the fear of future attacks." "The Airport was reopened when it was able to comply with more rigorous safety standards; the timetable had nothing to do with repairing, mitigating, or responding to the damage caused by the attack on the Pentagon." *Id.* at 135. Based on this, the court determined the insured's loss was not the "direct result" of damage to adjacent premises.

In locations subject to damaging weather events, such as hurricanes, courts have applied policies as written, and rejected insureds' attempts to seek coverage when orders are issued before property damage occurs. In *Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP v. Chubb Corp.*, No. CIV.A. 09-6057, 2010 WL 4026375, at *3 (ED La Oct 12, 2010), the court held:

> The Policy's plain language requires that the civil authority prohibit access as a "direct result of direct physical loss or damage to property" within one mile of the [insured's] premises. The Policy does not insure against impairment of operations that occurs simply because a civil authority prohibits access unless the civil authority order meets the requirements of the policy—one of those requirements is a nexus between the order and certain physical damage.

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1325 FOURTH AVENUE, SUITE 2000
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In *Dickie Brennan & Co. v. Lexington Ins. Co.,* 636 F3d 683, 685 (5th Cir 2011), New Orleans restaurateurs sought business interruption coverage for losses sustained in the wake of the mayor's August 30, 2008, mandatory evacuation order, which was issued as Hurricane Gustav approached Louisiana. The insurer argued that the policy's civil authority provision did not provide coverage as the order was not issued "due to direct physical loss of or damage to property." The insureds countered that since the hurricane had already damaged property in the Caribbean when the order was issued, this policy requirement was satisfied. The court held that because there was no evidence of any nexus between the order and physical damage in the Caribbean or elsewhere, coverage was not available. *Id.*

For Plaintiff to state a claim for applicability of the policy's Civil Authority additional coverage, Plaintiff would be required to allege facts which show that Plaintiff's economic loss is the result of a civil authority, such as Governor Inslee: (1) prohibiting Plaintiff's access to its premises, and (2) that such prohibition is due to direct physical damage or loss to property *other than* Plaintiff's insured property. However, Plaintiff does not allege that Governor Inslee's orders prohibit its *own* access to its property. Rather, Plaintiff admits that the orders allow it to access its own premises to serve takeout and/or serve a certain number of customers at a time.[67] Thus, Plaintiff itself has not been prohibited from accessing its premises.

Further, the Operative Complaint neglects to make any allegations of direct physical loss or damage to other property. The Complaint makes a self-serving assertion that Governor Inslee's Proclamations prohibited access to Plaintiff's premises and the immediately surrounding property in response to "dangerous physical conditions."[68] However, Plaintiff

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[67] ECF 38 at ¶13.

[68] *Id.* at ¶47.

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cannot and does not assert any facts to show that Governor Inslee's orders were issued because of "dangerous physical conditions" on any other property. The Complaint asserts exactly the opposite – that Governor Inslee's orders were issued as a result of the COVID-19 virus outbreak and confirmed *person-to-person* spread of COVID-19 in Washington State.[69] Thus, Plaintiff alleges the "dangerous physical conditions" which lead to Governor Inslee's orders were dangerous to *people* rather than *property*. Accordingly, Plaintiff has failed to allege any facts which would establish a claim that the Policy's Civil Authority coverage is applicable to its loss.

3. The Policy's Ingress or Egress additional coverage similarly requires direct physical loss or damage to property other than Plaintiff's insured property

Plaintiff's assertion that there is coverage for its business loss under the Policy's Ingress or Egress additional coverage also fails as a matter of law. The additional coverage for Ingress or Egress requires: (1) physical prevention of ingress or egress to Plaintiff's premises, and (2) that such physical prevention is due to direct physical damage or loss to property *other than* Plaintiff's insured property.[70] Thus, like the "Civil Authority" coverage discussed above, this coverage is contingent upon the finding of "direct loss or damage to property" other than at the described premises. Absent any "distinct" or "demonstrable" physical damage to Plaintiff's Covered Property, the Ingress or Egress coverage does not apply. *See Columbiaknit.* at *7.

The Washington Court of Appeals addressed this provision in *Washington Mut. Bank v. Commonwealth Ins. Co.*, 2006 WL 1731318 (2006). The case involved bank losses based on an erroneous engineering report stating that the building was in danger of collapse. The policy at issued included the following in its "Perils Insured Against" section:

[69] *Id.* at ¶39 (emphasis added).

[70] ECF 38-2 at 66.

SOHA & LANG, P.S.
ATTORNEYS AT LAW
1325 FOURTH AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98101-2570
(206) 624-1800/FAX (206) 624-3585

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23

> Ingress/Egress: This policy is extended to cover the loss sustained during the period of time when, in connection with or following a peril insured against, access to or egress from real or personal property is impaired. This extension is limited to a maximum period of 30 days.

Id., at *2. Initially, the court found:

> The plain language of the "perils insured against" clause requires a direct physical loss of or damage to insured property. The language of this clause specifies that the loss must be "direct physical loss." The clause does not use the word "loss" in the abstract.

Id., at *3. The court held that even though evacuation was recommended, "there was no actual physical loss to the property and no actual damage to the property", citing to *Wolstein v. Yorkshire Ins. Co.,* 97 Wn App 201, 211–12, 985 P.2d 400 (1999) (noting that language in a similar "all risks" policy required the insured property to sustain actual damage or physical loss to invoke coverage). The court then concluded that the ingress/egress provision did not apply because there was no direct physical loss or damage at play: "Thus, although the 'in connection with or following' causation language in the ingress/egress provision may be broad, coverage under that provision was not triggered absent a peril insured against." *Commonwealth Ins.* at *3.

As aforementioned with respect to the Civil Authority additional coverage, Plaintiff has failed to allege any actual physical loss or damage to other property. Moreover, Plaintiff fails to allege that its own ingress or egress to its premises has been "physically prevented" as required by the plain language of the Policy's Ingress or Egress additional coverage provision. To the contrary, Plaintiff admittedly was permitted ingress or egress to its premises for takeout services and/or on-site services to a certain number of people.[71] Thus, Plaintiff has failed to state a claim for coverage based upon the Ingress or Egress additional coverage provision of the

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[71] ECF 38 at ¶13.

SOHA & LANG, P.S.
ATTORNEYS AT LAW
1325 FOURTH AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98101-2570
(206) 624-1800/FAX (206) 624-3585

Policy.

4. The Policy's "Sue and Labor" Provision Only Applies Where there is Damage to Covered Property from a Covered Cause of Loss

The so-called "Sue and Labor" provision of the Policy, entitled "Duties in the Event of Loss or Damage," provides certain actions an insured must take in the event of loss or damage to "Covered Property".[72] By its plain title, this provision does not create coverage of any type of loss, rather it specifies certain obligations and responsibilities of Plaintiff in the event of loss or damage to Covered Property. Further, the provision specifically states that there will be no coverage for "any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss."[73] Thus, by its plain, ordinary language the "Sue and Labor" clause provides a mechanism for an insured to recover expenses incurred to minimize or prevent loss or damage to Covered Property due to a Covered Cause of Loss. But expenses incurred to minimize or prevent losses for which there is no coverage are not recoverable.

Here, the discussions above regarding Plaintiff's failure to allege any direct physical loss or damage to its restaurant premises due to a Covered Cause of Loss are applicable. Plaintiff asserts that Oregon Mutual "agreed to give due consideration in settlement of claim to expenses incurred in taking all reasonable steps to protect Covered Property from *further* damage."[74] Plaintiff thus recognizes that in order for the "Sue and Labor" provision to apply, there must first have been damage to its restaurant premises. However, Plaintiff has failed wholly to allege any facts whatsoever regarding any physical damage to its restaurant premises. Accordingly, Plaintiff's claims related to the "Sue and Labor" provision necessarily fail.

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[72] ECF 38-2 at 20.

[73] *Id.* at 20.

[74] ECF 38 at ¶101 (emphasis added).

SOHA & LANG, P.S.
ATTORNEYS AT LAW
1325 FOURTH AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98101-2570
(206) 624-1800/FAX (206) 624-3585

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V. CONCLUSION

The Operative Complaint contains no allegations, or set of facts, that if proven, would entitle Plaintiff to any relief against Oregon Mutual. The allegations demonstrate exactly the opposite – Plaintiff's claimed economic losses do not fall within the provisions of the Policy granting Business Income, Extra Expense, Civil Authority, Ingress and Egress, or any other coverage. Because Plaintiff's complaint provides no evidence of any physical loss or damage to its covered property, Plaintiff is unable to prove that its property suffered any direct physical loss from either the imposition of the governmental orders or the COVID-19 virus. Thus, Plaintiff does not meet its burden to show that its claims satisfy the requirements for coverage under the Policy, based upon the facts presented to the Court. The unambiguous language of the Policy, and controlling case law, require the Court to dismiss this action in accordance with FRCP 12 (b)(6).

DATED this 13th day of August, 2020.

SOHA & LANG, P.S.

By: */s/Lind Stapley*
R. Lind Stapley, OSB No.: 030531
Attorneys for Defendant Oregon Mutual Insurance Company

SOHA & LANG, P.S.
ATTORNEYS AT LAW
1325 FOURTH AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98101-2570
(206) 624-1800/FAX (206) 624-3585

EXHIBIT A

1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
2 ------------------------------x
3 SOCIAL LIFE MAGAZINE, INC.,
4 Plaintiff, New York, N.Y.
5 v. 20 Civ. 3311(VEC)
6 SENTINEL INSURANCE COMPANY
LIMITED,
7
Defendant.
8
------------------------------x Teleconference
9 Order to Show Cause
10
May 14, 2020
11 10:00 a.m.
12 Before:
13 HON. VALERIE E. CAPRONI,
14 District Judge
15
16
APPEARANCES
17
18 GABRIEL J. FISCHBARG
Attorney for Plaintiff
19
20 STEPTOE & JOHNSON, LLP
Attorneys for Defendant
21 BY: CHARLES A. MICHAEL
SARAH D. GORDON
22
23
24
25

1 THE COURT: Good morning, everybody.
2 Do I have a court reporter on the line?
3 THE COURT REPORTER: Good morning, your Honor.
4 Kristen Carannante.
5 THE COURT: Good morning.
6 Okay. Do I have Mr. Fischbarg for the plaintiff?
7 MR. FISCHBARG: Yes, Judge. Hi.
8 THE COURT: Mr. Fischbarg, is anyone else on the line
9 for the plaintiff?
10 MR. FISCHBARG: Yes. The plaintiff is on a separate
11 phone available if you need evidence or --
12 THE COURT: The principal of Social Life?
13 MR. FISCHBARG: Yes. He is in my office, you know,
14 more than six feet away, and --
15 THE COURT: Okay.
16 And who do I have for the defendant?
17 MR. MICHAEL: Good morning, your Honor. This is
18 Charles Michael, from Steptoe & Johnson, for the defendant.
19 With me is my partner Sarah Gordon, who was just admitted *pro*
20 *hac vice*, and who will be doing the presentation today.
21 THE COURT: Terrific.
22 All right --
23 MS. GORDON: Good morning, your Honor.
24 THE COURT: Good morning.
25 Only people who are speaking need to note their

1 appearances, and I have got those, Mr. Fischbarg and
2 Ms. Gordon. Everybody else, please mute your telephone.
3 Also, if you hear that sound that sounds like someone
4 has dropped off the line once we get started, I need you to
5 stop talking so that I can make sure that I have still got the
6 court reporter and your adversary on the line.
7 So, Mr. Fischbarg, this is your motion, so you get to
8 go first.
9 MR. FISCHBARG: Yes. So I submitted a reply
10 memorandum, you know, in the afternoon yesterday. I was just
11 wondering if --
12 THE COURT: Yes. I saw that. Thank you.
13 MR. FISCHBARG: Okay, so you were also able to read
14 it, I suppose?
15 THE COURT: Yes, yes.
16 MR. FISCHBARG: Okay.
17 So I guess the only other thing I want to add that's
18 not in the papers, and then I don't know if your Honor has any
19 issues that you want to talk about, is I mentioned that Liberty
20 Mutual had this exclusion for viruses and it is also evident
21 that other insurance companies have the same exclusion,
22 including Travelers Insurance Company, and they filed the --
23 they actually filed a federal lawsuit for declaratory judgment
24 in California, Docket No. 20 Civ. 3619, to preempt such claims,
25 I guess to enforce their exclusion for viruses. So to the

1 extent that the defendant is claiming some kind of overreach by
2 the plaintiff here, I don't think it is proper. There are
3 several insurance companies who are capable of putting in a
4 virus exclusion in their policies, and in this case there is
5 none. So --
6 THE COURT: Let me ask you something. First off, I
7 want to start with basics. Do you agree that New York law
8 applies?
9 MR. FISCHBARG: Yes.
10 THE COURT: All right. So the -- is it the *Roundabout*
11 *Theatre* case?
12 MS. GORDON: Yes, your Honor.
13 THE COURT: First Department case?
14 MS. GORDON: Yes, your Honor. This is Ms. Gordon on
15 behalf of Sentinel.
16 THE COURT: Thank you.
17 Mr. Fischbarg, it would seem to me that the *Roundabout*
18 case is a real problem for your position.
19 Would you like to explain to me why it doesn't
20 preclude your claim?
21 MR. FISCHBARG: Yes. That case applies to off-site
22 property damage rendering the premises at issue inaccessible.
23 So in this case, you don't have off-site property damage. You
24 have on-site property damage.
25 THE COURT: What is the damage? There is no damage to

1 your property.

2 MR. FISCHBARG: Well, the virus exists everywhere.

3 THE COURT: It damages lungs. It doesn't damage

4 printing presses.

5 MR. FISCHBARG: Right. Well, that's a different

6 issue, whether or not -- that's a different issue than the

7 *Roundabout* case that had to do with accessibility. Now we are

8 jumping to the topic of whether a virus can cause physical

9 damage to a printing press, as your Honor mentioned. So that's

10 a separate issue, and there are a lot of cases that we have

11 cited where this type of material, a virus, does cause physical

12 damage.

13 THE COURT: What's your best case? What do you think

14 is your best case under New York law?

15 MR. FISCHBARG: Well, the problem is, under New York

16 law, there isn't much law. The New Jersey federal court, in

17 *TRAVCO*, citing other cases, including from other circuits,

18 where physical damage had a broader interpretation that

19 includes loss of use and not just, you know, something where

20 you take a hammer and break an item.

21 THE COURT: With loss of use, I mean, loss of use from

22 things like mold is different from you not being able to,

23 quote, use your premises because there is a virus that is

24 running amuck in the community.

25 MR. FISCHBARG: Okay. I would disagree with that. I

1 would say virus and mold are equivalent. They are both
2 physical items which, if they land on a surface or are on a
3 surface, just like spores that are also listed in the policy,
4 mold is also listed in the policy. I would say that the virus,
5 mold spores --
6 THE COURT: Hang on --
7 MR. FISCHBARG: -- anything --
8 THE COURT: A second.
9 Do I still have the court reporter?
10 THE COURT REPORTER: Yes, your Honor.
11 THE COURT: Do I have I still have, Ms. Gordon?
12 MS. GORDON: Yes, your Honor.
13 THE COURT: All right. Go ahead.
14 MR. FISCHBARG: Mold spores, bacteria, virus, all
15 those are physical items which damage whatever they are on,
16 whatever they land on. And in this case, the virus, when it
17 lands on something and you touch it, you could die from it.
18 So --
19 THE COURT: That damages you. It doesn't damage the
20 property.
21 MR. FISCHBARG: But you are not able to use the
22 property because it damages you. So it's a corollary. In
23 other words, this policy, by the way, mentions the word "virus"
24 and "bacteria" in it in two places.
25 THE COURT: Where does it mention it?

1 MR. FISCHBARG: It mentions it in the PDF as well as
2 Exhibit 9, page 36 and 37, which is page 7 of 25 of the special
3 property coverage form under additional coverages, section
4 5(j), where the insured would cover certain law enforcement
5 orders requiring you to -- requiring remediation. But it
6 contains an exclusion for bacteria and viruses, and it uses the
7 word "bacteria" and it uses the word "virus."
8 So what this is really referring to is the *Legionella*
9 bacteria, which is causes Legionnaires' disease typically.
10 That's the bacteria. Virus is obviously something else. So
11 this is obviously referring to when there is a Legionnaires'
12 outbreak in a building, which could happen in New York pretty
13 often, every few years, and then the building gets shut down
14 and they have to do remediation. Either they -- at least as a
15 bacteria, *Legionella* bacteria only occurs in water or pipes or
16 in mist. So the building is shut down, and then you might have
17 to -- and now there is a new code where the buildings have to
18 test their cooling systems for *Legionella* bacteria. So that's
19 an example where a bacteria causes property loss, or loss of
20 use, or damage, physical damage to property. And I would say
21 the virus is equivalent to that bacteria. So --
22 THE COURT: But it's not. This is different. The
23 virus is not specifically in your property that is causing
24 damage. It is everywhere. The Legionnaire example is very
25 different. Because it's not like Legionnaire is running

1 rampant throughout the city, and therefore your office building
2 can get closed. It is that the Legionnaire bacteria is in that
3 building causing --
4 MR. FISCHBARG: Yes.
5 THE COURT: -- that building to be shut down.
6 MR. FISCHBARG: Yes. Yes.
7 So this virus is everywhere, including this office in
8 particular, this office. In other words, they just did a
9 random survey of people going into a grocery store in New York,
10 and 20 percent tested positive. So, Judge, that's just a
11 one-sample test. So if the infection rate in New York City is
12 20 percent, then the virus is literally everywhere. So if
13 it --
14 THE COURT: That's what --
15 MR. FISCHBARG: -- is --
16 THE COURT: That is what has caused the damage is that
17 the governor has said you need to stay home. It is not that
18 there is any particular damage to your specific property.
19 MR. FISCHBARG: Well, okay, that's --
20 THE COURT: You may not even have the virus in your
21 property.
22 MR. FISCHBARG: Well, okay, that's -- I would
23 disagree. The virus not just causes -- it lands on equipment,
24 it lands everywhere. That's why all of these -- all of the
25 health guidelines from the World Health Organization and

1 elsewhere talk about wearing gloves, talk about wiping things
2 down, because it lands on surfaces. It doesn't just get
3 transmitted through the air. Another way of getting it is
4 through contact --
5 THE COURT: Right, but what --
6 MR. FISCHBARG: -- when it touches your --
7 THE COURT: What evidence do you have that your
8 premises are infected with the COVID bug.
9 MR. FISCHBARG: Well, the plaintiff is here. He got
10 COVID. So that's evidence there.
11 THE COURT: Well, it's not evidence that he got it in
12 his office.
13 MR. FISCHBARG: Yes, but, okay, it's not -- we're
14 not -- I don't know what burden of proof we are looking at,
15 whether it is beyond a reasonable doubt --
16 THE COURT: No, it's --
17 MR. FISCHBARG: -- or more likely than not, more
18 likely than not, he can testify where he was and more likely
19 than not he either got it from his office or he got it from his
20 home. So that's a different burden of proof. If you are
21 looking for some kind of burden of proof to show that he got it
22 from his office, I mean, that's an evidentiary question, and we
23 can get an epidemiologist to testify and get an expert to
24 testify on that, which I understand is going to happen in the
25 other lawsuits that have been filed across the country

1 regarding --
2 THE COURT: Okay.
3 MR. FISCHBARG: -- this issue.
4 THE COURT: Okay.
5 MR. FISCHBARG: So . . .
6 THE COURT: Anything further, Mr. Fischbarg?
7 MR. FISCHBARG: No, I guess that's all for now. Thank
8 you.
9 THE COURT: Okay. Thanks.
10 Ms. Gordon.
11 MS. GORDON: Thank you, your Honor. This is Sarah
12 Gordon on behalf of Sentinel, and we agree with your Honor's
13 thoughts here.
14 The property policy has two distinct requirements
15 here. There has to be direct physical loss or physical damage
16 to the property and the cause of the business interruption
17 damages they are seeking has to be direct physical loss or
18 damage, and the cause here is not physical damage.
19 We think, you know, as your Honor rightly pointed out,
20 *Roundabout* controls. It is under New York law. It's a First
21 Department case from 2002. There are no subsequent decisions
22 that have disagreed or overturned it here in New York; and, if
23 anything, it has been confirmed by this . . .
24 THE COURT: Hang on. Did I lose my court reporter?
25 THE COURT REPORTER: No, Judge. I'm here.

1 THE COURT: Did I lose Mr. Fischbarg?
2 MR. FISCHBARG: No, I'm here.
3 THE COURT: Okay.
4 MS. GORDON: This court, your Honor, in *Newman Myers*,
5 adopted the exact same rationale for a law firm that was trying
6 to assert damages where there were no -- business interruption
7 damages, where there was no physical harm to the property.
8 And, you know --
9 THE COURT: Let me interrupt you for a second.
10 So Judge Engelmayer in *Newman* went out of his way to
11 talk about a case where there was a bunch of -- there was a
12 rock slide which didn't actually hit the house or the premises,
13 and yet they got coverage and coverage for the invasion of
14 fumes.
15 MS. GORDON: Yes, your Honor.
16 So for most of the cases, there are a number of them,
17 there is -- what has happened is something physically has
18 happened to the property that prevents people from being on the
19 property. So, for example, in *Gregory Packaging*, in New
20 Jersey, there was ammonia leaked out and they couldn't be on
21 the property, so something physically happened. You couldn't
22 necessarily see it or touch it, but there were fumes and it was
23 unsafe to be there. The same thing with *Motorists*, where there
24 was *E. coli* in the well. You couldn't be in that house because
25 you were exposed to other things that had the *E. coli*.

1 The property has to be entirely unusable or
2 uninhabitable for physical loss or damage to constitute a loss
3 of use. We don't think that's the law in New York in any
4 circumstance, but even in those other cases, there is nothing
5 equivalent here. Mr. Fischbarg's client can go to his
6 premises. There is no ammonia or mold or anything in the air
7 that's not going to allow him on to the property. In fact, the
8 governor's orders explicitly allow him to go to the property
9 and get his mail or do routine business functions. The only
10 rule is that he has to stay six feet apart from other people.
11 So those cases are entirely distinguishable.
12 And when a business, a property is allowed to remain
13 open or people can still occupy the premises, there is no
14 direct physical loss or damage. That was the case -- that's
15 what the court said in *Port Authority*, that's what happened in
16 *Mama Jo's*, where the restaurant was allowed to be open. The
17 cases where there is direct physical loss or damage, you
18 literally cannot be on the premises because there is something
19 there that is making it uninhabitable, and here that just isn't
20 true.
21 THE COURT: Okay. Mr. Fischbarg I will give you the
22 last word.
23 MR. FISCHBARG: All right. So I would disagree that
24 he is allowed to go to the premises. In fact, the opposite is
25 true. The executive order 202.8 says it requires 100 percent

1 reduction. So he can't go there, and he is not allowed to go
2 there, and that is a separate claim. It is the civil authority
3 claim besides the breach of contract claim.
4 THE COURT: Doesn't the executive order say -- I'm
5 sorry, which executive order are you talking about?
6 MR. FISCHBARG: It is . . .
7 It is Exhibit 3 of the declaration, and then on page
8 2, "Each employer shall reduce the in-person workforce at any
9 work locations by 100 percent no later than March 22 at 8p.m."
10 And then it says --
11 THE COURT: Right, but that doesn't mean the boss
12 can't go to the work location.
13 MR. FISCHBARG: I would say he is -- he is an employee
14 and he can't go. I think it does. In my building here in New
15 York, there is nobody here. I'm the only one. There is no
16 bosses in any of the offices.
17 THE COURT: There is nothing about the governor's
18 order that prohibits a small businessperson or a big
19 businessperson from going into their office to pick up mail, to
20 water the plants, to do anything like --
21 MR. FISCHBARG: Your Honor --
22 THE COURT: -- that, including employees that are
23 working.
24 MR. FISCHBARG: Sorry.
25 MS. GORDON: Your Honor, this is Sarah Gordon. Oh, go

1 ahead, Mr. Fischbarg.
2 MR. FISCHBARG: Okay.
3 Again, I would disagree. I think the order is pretty
4 clear that 100 percent means that you are not supposed to go to
5 work, and that's what people have been doing in New York. They
6 are not going into the office. And to the extent they are
7 getting mail, I mean, there is work-arounds where the workers
8 in the building have been leaving it downstairs for people to
9 pick up, but the way it's been implemented is that 100 percent
10 means no one is going to any office.
11 THE COURT: You are in your office.
12 MR. FISCHBARG: Yeah, I'm not -- I'm considered, by
13 the way -- lawyers are considered essential, and if you are a
14 sole practitioner, you are considered essential. So I have the
15 exclusion, and that's why I am here, but otherwise I wouldn't
16 be here. So . . .
17 MS. GORDON: Your Honor, if I may? We submitted with
18 Mr. Michael's affidavit, Exhibit D, a printout from the Empire
19 State Development website. And on question 13, it addresses
20 exactly this issue. It says, "What if my business is not
21 essential but a person must pick up mail or perform a similar
22 routine function each day?" And the answer provided by the
23 Empire State is, "A single person attending a nonessential
24 closed business temporarily to perform a specific task is
25 permitted so long as they will not be in contact with other

1 people."
2 THE COURT: I thought I had read that somewhere.
3 MS. GORDON: Yes. It is in Mr. Michael's declaration,
4 and I think it's ECF 18-4, page 304.
5 THE COURT: Okay.
6 MR. FISCHBARG: Right, but I think the executive order
7 supersedes that is what I would argue.
8 THE COURT: Okay.
9 Mr. Fischbarg, you have got to demonstrate a
10 probability of success on the merits. I feel bad for your
11 client. I feel bad for every small business that is having
12 difficulties during this period of time. But New York law is
13 clear that this kind of business interruption needs some damage
14 to the property to prohibit you from going. You get an A for
15 effort, you get a gold star for creativity, but this is just
16 not what's covered under these insurance policies.
17 So I will have a more complete order later, but your
18 motion for preliminary injunction is going to be denied.
19 Anything further for the plaintiff?
20 MR. FISCHBARG: I guess just a housekeeping thing. We
21 filed an amended complaint. Are we going to deem it served or
22 does it have to be re-served?
23 THE COURT: Has the defendant -- does the defendant
24 want to be reserved or will you take the amended complaint?
25 MR. MICHAEL: Your Honor, this is Charles Michael.

1 We have entered a notice of appearance, and so I think
2 once they filed it on ECF, that service, we are happy to
3 consider it served. That's fine. And he does have one
4 amendment as of right.
5 THE COURT: Correct.
6 MR. MICHAEL: That was within his right to file it.
7 THE COURT: Does defendant plan to move or answer?
8 MR. MICHAEL: Probably to move. We would have to
9 discuss it with our client, but I believe so.
10 THE COURT: Okay. What are the parties' position on
11 discovery while the motion to dismiss is pending?
12 MR. FISCHBARG: Well, I would say there are two
13 motions filed -- there is one in the Eastern District of
14 Pennsylvania and one in, I think, the Northern District of
15 Illinois -- for an MDL, multi-district litigation, involving a
16 lot of lawsuits combining, so I think this might be happening
17 in each state until that motion is decided, and I think the
18 briefing schedule is in June --
19 MS. GORDON: We -- your Honor --
20 MR. FISCHBARG: -- so I think --
21 MS. GORDON: Sorry, Mr. Fischbarg.
22 MR. FISCHBARG: So I would say that this case might be
23 transferred to the multi-district panel at some point.
24 THE COURT: Okay. So, Mr. Fischbarg, what I am
25 hearing you say is that you are perfectly happy to have the

1 defendants not move until we find out whether or not your case
2 is going to get scooped up into the MDL?
3 MR. FISCHBARG: Yes, correct.
4 THE COURT: All right. I presume that the defendants
5 are perfectly happy to do nothing until you hear back from the
6 MDL.
7 MS. GORDON: Your Honor, I need to consult with my
8 client on that. I'm not sure that that's true. We don't think
9 these cases are appropriate for consolidation in the MDL for
10 many of the reasons which were evident today, given the
11 different states' conclusions on these laws. So I need to
12 consult with my client on the motion practice. We may intend
13 to want to move in any event.
14 THE COURT: Okay. Well, you could move, but if there
15 is a likely -- if there is some likelihood that they are going
16 to get scooped into the MDL, I'm not likely to decide it until
17 that decision is made. So it is entirely -- I guess from my
18 perspective I don't really care, but from your client's
19 perspective, they may be making a motion to dismiss that's
20 unnecessary. If you are right, and you may well be right, that
21 they are not going to MDL these kinds of cases, then all that's
22 happening is this is just being delayed into the summer for you
23 to incur fees making a motion to dismiss.
24 So why don't you talk to your client, figure out what
25 you want to do. One way or the other, it does not seem to me

1 to make sense to proceed with discovery in this matter,
2 certainly under the circumstances that everyone is in, and
3 particularly the plaintiff is in, strapped for revenue, until
4 we figure out whether a lawsuit is going to go forward.
5 So talk to your client, figure out whether -- the
6 defendant should talk to Sentinel. Figure out whether you are
7 happy staying this case pending a decision on the MDL or not,
8 and just write me a letter and let me know.
9 MS. GORDON: Yes, your Honor. Thank you.
10 MR. MICHAEL: Your Honor --
11 THE COURT: Anything further from the plaintiff?
12 MR. MICHAEL: Just one housekeeping matter. This is
13 Charles Michael, again, for the defendant.
14 THE COURT: Okay.
15 MR. MICHAEL: I just wondered if there was any special
16 procedures for ordering the transcript or if we go just through
17 the normal Southern District website? I didn't know, under the
18 COVID circumstances, if there is something different we should
19 do.
20 THE COURT: I don't think there is anything different,
21 but we have got the court reporter on.
22 So, Madam Court Reporter, is there anything different
23 they need to do?
24 THE COURT REPORTER: At the end of this proceeding, I
25 am going to email the parties with their instructions.

1 THE COURT: Okay.
2 MR. MICHAEL: Terrific. Thank you so much.
3 THE COURT: Anything further from the plaintiff,
4 Mr. Fischbarg?
5 MR. FISCHBARG: No. Thank you, Judge.
6 THE COURT: Anything further from the insurance
7 company? Ms. Gordon?
8 MS. GORDON: No. Thank you, your Honor.
9 THE COURT: All right. Thank you, all.
10 MR. FISCHBARG: Okay. Bye, Judge.
11 MR. MICHAEL: Thank you, your Honor.
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EXHIBIT B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION—CIVIL ACTIONS BRANCH

ROSE'S 1, LLC, et al.,	*	
	*	
Plaintiffs,	*	Civil Case No. 2020 CA 002424 B
	*	Civil II, Calendar I
v.	*	Judge Kelly A. Higashi
	*	
ERIE INSURANCE EXCHANGE,	*	
	*	
Defendant.	*	

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Motion") and Defendant's Cross-Motion for Summary Judgment ("Defendant's Motion"). While the Court is sympathetic to the plight of Plaintiffs, it must grant summary judgment to Defendant as a matter of law.

I. FACTS

Plaintiffs own and operate a number of prominent restaurants in the District of Columbia. They all purchased "Ultrapack Plus Commercial Property Coverage" from Defendant Erie Insurance Exchange. Included in this policy is coverage for "loss of 'income' and/or 'rental income'" sustained "due to partial or total 'interruption of business' resulting directly from 'loss' or damage" to the property insured. Rose's 1 Ultrapack Plus Commercial Property Coverage ("Coverage") at 3. The coverage document further states that the "policy insures against direct physical 'loss'" with the exception of several exclusions that are not relevant to this matter. *Id.* at 4.

This case comes in the context of the COVID-19 pandemic. COVID-19 is "a novel severe acute respiratory illness that has killed … more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be

infected but asymptomatic, they may unwittingly infect others." *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring). On March 11, 2020, D.C. Mayor Muriel Bowser declared a state of emergency and a public health emergency due to the "imminent hazard of or actual occurrence of widespread exposure" to COVID-19. Plaintiffs' Statement of Material Facts ("SMF") ¶3. On March 16, Mayor Bowser issued an order prohibiting table seating at restaurants and bars in D.C. SMF ¶4. On March 20, Mayor Bowser extended this ban to "standing customers at restaurants, bars, taverns, and multi-purpose facilities." SMF ¶5. On March 24, Mayor Bowser ordered the closure of all non-essential businesses. SMF ¶6. On March 30, she ordered all D.C. residents to stay in their residences except for limited "essential" reasons, a restriction that continued for several months. SMF ¶¶7-8.

As a result of Mayor Bowser's orders, the restaurant Plaintiffs were forced to close their businesses and suffered serious revenue losses. SMF ¶¶21-22. To cover those losses, they filed insurance claims with Defendant pursuant to insurance policies that "are substantively identical in all ways relevant to this action." SMF ¶78. When Defendant denied their claims, Plaintiffs filed this lawsuit seeking a declaratory judgment that their claims were covered by the express language of their insurance contracts with Defendant. Both sides subsequently moved for summary judgment.

II. SUMMARY JUDGMENT STANDARD

D.C. Superior Court Rule of Civil Procedure 56 allows a court to grant summary judgment to a party when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. D.C. Super. Ct. Civ. R. 56(a); *Perkins v. District of Columbia*, 146 A.3d 80, 84 (D.C. 2016). In considering a motion for summary judgment, the

court must view the evidence "in the light most favorable to the nonmoving party, who is entitled to all favorable inferences which may reasonably be drawn from the evidentiary materials." *Phelan v. City of Mt. Rainier*, 805 A.2d 930, 936 (D.C. 2002) (internal quotation marks omitted). The Court "may not resolve issues of fact or weigh evidence at the summary judgment stage." *Fry v. Diamond Construction, Inc.*, 659 A.2d 241, 245 (D.C. 1995) (internal quotation marks omitted). Even if no material dispute of fact exists, the moving party must still establish that it is entitled to judgment as a matter of law. D.C. Super. Ct. Civ. R. 56(a).

III. ANALYSIS

Under District of Columbia law, "[c]ontract principles are applicable to the interpretation of an insurance policy." *Carlyle Inv. Mgmt. LLC v. Ace Am. Ins. Co.*, 131 A.3d 886, 894 (D.C. 2016). "The proper interpretation" of an insurance contract, "including whether [the] contract is ambiguous, is a legal question." *Id.* (internal quotation mark omitted) (quoting *Tillery v. D.C. Contract Appeals Bd.*, 912 A.2d 1169, 1176 (D.C. 2006)). "[A]n insurance policy is to be . . . enforced in accordance with the real intent of the parties as expressed in the language employed in the policy." *Redmond v. State Farm Ins. Co.*, 728 A.2d 1202, 1205 (D.C. 1999) (internal quotation marks omitted) (quoting *Peerless Ins. Co. v. Gonzalez*, 697 A.2d 680, 682 (Conn. 1997)). A court must "give the words used in an insurance contract their common, ordinary, and . . . popular meaning," *Id.* (omission in original) (internal quotation marks omitted) (quoting *Quadrangle Dev. Corp. v. Hartford Ins. Co.*, 645 A.2d 1074, 1075 (D.C. 1994)), and must interpret the contract "as a whole, giving reasonable, lawful, and effective meaning to all its terms, and ascertaining the meaning in light of all the circumstances surrounding the parties at the time the contract was made," *Carlyle Inv. Mgmt.*, 131 A.3d at 895 (internal quotation mark omitted) (quoting *Debnam v. Crane Co.*, 976 A.2d 193, 197 (D.C. 2009)).

"[I]f the provisions of the contract are ambiguous, the correct interpretation becomes a question for a factfinder." *Carlyle Inv. Mgmt.*, 131 A.3d 886 at 895 (internal quotation marks omitted) (quoting *Debnam*, 976 A.2d at 197-98). "Where," however, "insurance contract language is not ambiguous, summary judgment is appropriate because a written contract duly signed and executed speaks for itself and binds the parties without the necessity of extrinsic evidence." *Fogg v. Fidelity Nat. Title Ins. Co.*, 89 A.3d 510, 514 (D.C. 2014) (internal quotation marks omitted) (quoting *Stevens v. United Gen. Title Ins. Co.*, 801 A.2d 61, 66 (D.C. 2002)). Indeed, the Court "should not seek out ambiguity where none exists." *Athridge v. Aetna Cas. & Sur. Co.*, 351 F.3d 1166, 1172 (D.C. Cir. 2003) (citing *Medical Serv. of Dist. of Columbia v. Llewellyn*, 208 A.2d 734, 736 (D.C. 1965)).

At the most basic level, the parties dispute whether the closure of the restaurants due to Mayor Bowser's orders constituted a "direct physical loss" under the policy. Plaintiffs start with dictionary definitions to support their case. For example, they cite the American Heritage Dictionary definition of "direct" as "[w]ithout intervening persons, conditions, or agencies; immediate." Plaintiffs' Motion at 9-10. They also cite the Oxford English Dictionary definition of "physical" as pertaining to things "[o]f or pertaining to matter, or the world as perceived by the senses; material as [opposed] to mental or spiritual." *Id*. at 10. As for "loss," it is defined by the coverage document as "direct and accidental loss of or damage to covered property." Coverage at 36.

Plaintiffs use these definitions to make three primary arguments. *First*, Plaintiffs argue that the loss of use of their restaurant properties was "direct" because the closures were the direct result of the mayor's orders without intervening action. Plaintiffs' Motion at 9-10. But those orders were governmental edicts that commanded individuals and businesses to take certain

actions. Standing alone and absent intervening actions by individuals and businesses, the orders did not effect any direct changes to the properties.

Second, Plaintiffs argue that their losses were "physical" because the COVID-19 virus is "material" and "tangible," and because the harm they experienced was caused by the mayor's orders rather than "some abstract mental phenomenon such as irrational fear causing diners to refrain from eating out." Plaintiffs' Motion at 11. But Plaintiffs offer no evidence that COVID-19 was actually present on their insured properties at the time they were forced to close. And the mayor's orders did not have any effect on the material or tangible structure of the insured properties.

Third, Plaintiffs argue that by defining "loss" in the policy as encompassing either "loss" or "damage," Defendant must treat the term "loss" as distinct from "damage," which connotes physical damage to the property. Plaintiffs' Motion at 11-12. In contrast, Plaintiffs argue, "loss" incorporates "loss of use," which only requires that Plaintiffs be deprived of the use of their properties, not that the properties suffer physical damage. *Id*. at 12-13. But under a natural reading of the term "direct physical loss," the words "direct" and "physical" modify the word "loss." As such, pursuant to Plaintiffs' dictionary definitions, any "loss of use" must be caused, without the intervention of other persons or conditions, by something pertaining to matter—in other words, a direct physical intrusion on to the insured property. Mayor Bowser's orders were not such a direct physical intrusion.

Further, none of the cases cited by Plaintiffs stand for the proposition that a governmental edict, standing alone, constitutes a direct physical loss under an insurance policy. In *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, the court found that the release of ammonia into a juice cup packaging factory was a "direct physical loss" because it constituted

"an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event *directly upon the property* causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." 2014 U.S. Dist. LEXIS 165232 at *13-19 (D.N.J. Nov. 25, 2014) (quoting *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 319-20 (Ga. Ct. App. 2003)) (internal quotation marks omitted) (emphasis added). Similarly, in *Western Fire Insurance Co. v. First Presbyterian Church*, the Colorado Supreme Court found a "direct physical loss" when gasoline fumes from an unknown source entered an insured church and the fire department ordered the church's closure. 437 P.2d 52, 55 (Colo. 1968). The court based its reasoning on the fact that the church "became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous." *Id.* At the same time, the Court noted that "[i]t is perhaps quite true" that the fire department's closure order, "*standing alone*, does not in and of itself constitute a 'direct physical loss.'" *Id*. (emphasis added). All of the other cases cited by Defendant involved some compromise to the physical integrity of the insured property. *See Port Authority v. Affiliated FM Insurance Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (presence of asbestos in building was not "physical loss" because building owner could not show real or imminent "contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable"); *Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 826-27 (3d Cir. 2005) (presence of bacterium on property could constitute "direct physical loss" if it "reduced the use of the property to a substantial degree"); *TRAVCO Insurance Co. v. Ward*, 715 F. Supp. 2d 699, 709-10 (E.D. Va. 2010), *aff'd* 504 F. Appx. 251 (4th Cir. 2013) (home rendered uninhabitable by toxic gases released by defective drywall constituted "direct physical loss"); *Mellin v. Northern Security Insurance Company, Inc.*, 115 A.3d 799, 805 (N.H. 2015) (cat urine odor from neighboring apartment may constitute "direct

physical loss" if plaintiff could show "distinct and demonstrable alteration to the unit"); *Murray v. State Farm Fire & Casualty Co.*, 509 S.E.2d 1, 16-17 (W.Va. 1998) (landslide rendering homes uninhabitable, due to either actual physical damage or palpable future risk of physical damage from a follow-on landslide, was a "direct physical loss"); *Sentinel Management Co. v. New Hampshire Insurance Co.*, 563 N.W.2d 296, 300-01 (Minn. Ct. App. 1997) (asbestos contamination in building was "direct physical loss" when "property rendered useless").

In contrast, courts have rejected coverage when a business's closure was not due to direct physical harm to the insured premises. In *Roundabout Theatre Co. v. Continental Casualty Co.*, the City of New York ordered the closure of a theater after a portion of a neighboring building under construction collapsed onto the street and adjacent buildings. 302 A.D.2d 1, 2-3 (N.Y. App. Div. 2002). The theater itself sustained minor damage that was repaired in one day. *Id.* at 3. Nonetheless, the court found that the theater did not suffer a "direct physical loss" as a result of the city-mandated closure. *Id.* at 7. It found that "[t]he plain meaning of the words 'direct' and 'physical'" narrowed the scope of coverage and mandated "the conclusion that losses resulting from off-site property damage do not constitute covered perils under the policy." *Id.* Similarly, in *Newman Myers Kreines Gross, P.C. v. Great Northern Insurance Co.*, a federal district court found that a law firm did not suffer a "direct physical loss" when an electric utility preemptively shut off power in advance of Hurricane Sandy. 17 F. Supp. 3d 323 (S.D.N.Y. 2014). The court distinguished the cases cited by the law firm (several of which were also cited by Plaintiffs in this case) as either "involv[ing] the closure of a building due to either a physical change for the worse in the premises … or a newly discovered risk to its physical integrity." *Id.* at 330. Citing *Roundabout*, the Court reasoned:

> The critical policy language here—"direct physical loss or damage"—similarly, and unambiguously, requires some form of actual, physical damage to the insured premises to

> trigger loss of business income and extra expense coverage. Newman Myers simply cannot show any such loss or damage to the 40 Wall Street Building as a result of either (1) its inability to access its office from October 29 to November 3, 2012, or (2) Con Ed's decision to shut off the power to the Bowling Green network. The words "direct" and "physical," which modify the phrase "loss or damage," ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure.

Id. at 331; *see also United Airlines, Inc. v. Insurance Co. of State of Pa*., 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005), *aff'd* 439 F.3d 128 (2d Cir. 2006) ("The inclusion of the modifier 'physical' before 'damages' . . . supports [defendant's] position that physical damage is required before business interruption coverage is paid."); *Philadelphia Parking Auth. v. Federal Insurance Co.,* 385 F. Supp. 2d 280, 287-88 (S.D.N.Y. 2005) (noting that "'direct physical' modifies both loss and damage," and therefore "the interruption in business must be caused by some physical problem with the covered property . . . which must be caused by a 'covered cause of loss'").

While the Court can find no published cases in this jurisdiction analyzing the exact term "direct physical loss," cases addressing similar issues do not help Plaintiffs. Most relevantly, in *Bros., Inc. v. Liberty Mutual Fire Insurance Co.*, the District of Columbia Court of Appeals considered whether a restaurant could recover on its claim after it lost business due to a curfew imposed by the D.C. government as a result of the riots following the assassination of Dr. Martin Luther King, Jr. in 1968. 268 A.2d 611 (D.C. 1970). The insurance contract included this relevant language:

> In consideration of the premium for this coverage shown on the first page of this policy [Building and Contents] . . . the coverage of this policy is extended to include direct loss by . . . Riot . . . [and] Civil Commotion . . . .
>
> When this Endorsement is attached to a policy covering Business Interruption, . . . the term "direct," as applied to loss, means loss, as limited and conditioned in such policy, *resulting from direct loss to described property from perils insured against*; . . . .

Id. at 613 (emphasis in original).[1] The Court of Appeals interpreted the term "direct loss" in the contract to mean "a loss proximately resulting from physical damage to the property or contents caused by a riot or civil commotion." *Id*. Under that definition, the Court found that the restaurant was unable to recover, since, "at the most," the restaurant's lost business due to the curfew "was an indirect, if not remote, loss resulting from riots" and there was no "physical damage to the property." *Id.* Accordingly, while the Court agrees with Plaintiffs that *Bros., Inc.* is not directly on point, the case does support the proposition that, in the context of property insurance, the term "direct loss" implies some form of direct physical change to the insured property.

With both dictionary definitions and the weight of case law supporting Defendant's interpretation of the term "direct physical loss," Plaintiffs' additional arguments are unconvincing. First, Plaintiffs argue that because the insurance contract has specific exclusions for "loss of use" under some coverage lines but not for Income Protection coverage, the Court should infer that the Income Protection coverage covers losses such as Plaintiffs'. Plaintiffs' Motion at 13-14. But as already discussed, even if "loss of use" was covered, Plaintiffs would still have to show that the loss of use was a "direct physical loss" similar to those in the cases discussed *supra* at 5-7. And for the reasons explained in this order, there was no "direct physical loss" to Plaintiffs. Second, Plaintiffs argue that, unlike some similar insurance policies, their policies do not include a specific exclusion for pandemic-related losses. *Id.* at 19-20. But again,

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[1] This Court notes that the phrase at issue in the *Bros., Inc.* contract was "direct loss," as opposed to "direct physical loss," at issue in the present case, and that in the *Bros., Inc.* case, there was an issue as to whether the "Building and Contents" Form, which was mistakenly attached to the policy at the time of signing, or the "Business Interruption" Form, which the insurance company later substituted, was construed by the trial court. However, the Court of Appeals found it "unnecessary to ascertain which of the two forms was construed by the trial court," 268 A.2d at 612, as the Court found that the insurance company prevailed under both forms.

even in the absence of such an exclusion, Plaintiffs would still be required to show a "direct physical loss." Because they cannot do so, the Court grants summary judgment to Defendant.

Accordingly, it is this **6th** day of **August, 2020**, hereby

ORDERED that Plaintiffs' Motion for Summary Judgment is **DENIED**; and it is further

ORDERED that Defendant's Cross-Motion for Summary Judgment is **GRANTED**; and it is further

ORDERED that judgment is **ENTERED** in favor of Defendant Erie Insurance Exchange and against Plaintiffs, the initial scheduling conference is **VACATED**, and the case is **CLOSED**.

Kelly A. Higashi
Associate Judge
(Signed in Chambers)

COPIES TO:
David L. Feinberg
Michael C. Davis
George E. Reede, Jr.
Jessica Pak
Via CaseFileXpress

EXHIBIT C

1 STATE OF MICHIGAN

2 IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

3 ____

4 GAVRILIDES MANAGEMENT COMPANY,
5 Plaintiff,
6 vs. File No. 20-258-CB
7
8 MICHIGAN INSURANCE COMPANY,
9 Defendant.

10 ____/

11
12 DEFENDANTS MOTION FOR SUMMARY DISPOSITION
13 BEFORE THE HONORABLE JOYCE DRAGANCHUK, CIRCUIT COURT JUDGE
14 LANSING, MICHIGAN - WEDNESDAY, JULY 01, 2020
15
16

17 APPEARANCES:
18 For the Plaintiff: Matthew J. Heos-P73786
19 3452 East Lake Lansing Road
20 East Lansing, Michigan 48823
21 517-256-4240
22
23
24 For the Defendant: Henry Emrich-P29948
25 2025 East Beltline Avenue SE-#600
26 Grand Rapids, Michigan 49546
27 616-285-0143
28
29
30 Recorded/transcribed by: Susan C. Melton, CER 7548
31 Certified Electronic Reporter
32 (517) 483-6500 x6703
33
34
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WITNESSES PAGE

None.

EXHIBITS

None admitted.

1 Lansing, Michigan
2 Wednesday, July 01, 2020
3 2:58:57 PM
4 THE COURT: This is, pardon me if I massacre
5 this, Gavri--, Gavrilides Management Company, et al versus
6 Michigan Insurance Company, docket number 20-258-CB. And
7 this is the time set for Defendant Michigan Insurance
8 Company's Motion for Summary Disposition. And just for the
9 record, could I have your appearances, please?
10 MR. HEOS: Yes, your Honor. Matthew Heos and Nick
11 Gavrilides is here in the courtroom also with me. He is
12 the owner of the immediate plaintiff company's.
13 MR EMRICH: Henry Emrich on behalf of Michigan
14 Insurance Company, your Honor and my assistant Chenney
15 Ward.
16 THE COURT: Okay, thank you. And your motion, Mr.
17 Emrich, if you wish to go ahead.
18 MR. EMRICH: Thank you, your Honor. I am going to
19 assume that the Court has read all of the pleadings in
20 this case, so I'll try not to belabor some of the points.
21 I think the, the key fact that we need to focus on is that
22 as we've argued is that there's no question here but the
23 policies that insure Mr. Gavrilides properties against,
24 against direct physical loss or damage to the property and
25 contrary, any claim with the policy benefits in question

1 this business income coverage is illusory, the policy in
2 question here clearly provides that for the business
3 coverage, the business income coverage to apply and, and
4 most of the other primary coverages under their policy,
5 there must be a direct physical loss of or damage to the
6 insured property in order for it to apply.
7 And I think it's important as we'll discuss
8 later in our argument depending on what Mr. Heos has to
9 say, why this is important, we must focus on the fact that
10 there must be direct physical loss or damage to the
11 insured property and not direct physical loss of use of or
12 damage to the property as has been suggested by Mr.
13 Gavrilides and his attorney in order for the coverage at
14 issue to apply.
15 While I acknowledge, your Honor, that this is a
16 somewhat unique, extraordinary if you will, matter to be
17 filing at this point in the proceedings as our initial
18 pleading; I think it's important to understand that when
19 we look at Mr. Gavrilides complaint, it does not contain
20 one single allegation that this insured property has in
21 any way been damaged or lost. To the contrary, the
22 allegations in the complaint affirmatively allege that the
23 plaintiff business interruption claim is based on the
24 "Stay at Home" orders of Governor Whitmer. There is no
25 allegation of any kind that the property in question has

1 in any way been damaged, lost or anything of the sort.
2 Given that this motion has been brought under
3 2.116(c)(10), plaintiff must produce some evidence to
4 contradict the uncontroverted facts that have been alleged
5 not only in the complaint, but in the affidavit submitted
6 Mr. Gavrilides and in any of the other materials that Mr.
7 Heos has attached to his response as, as indicated, most
8 importantly, the affidavit of Mr. Gavrilides that
9 reiterates the admissions in the complaint that there has
10 not been any loss of or damage to either of the properties
11 for which they seek coverage.
12 The insureds property today exists in the very
13 same condition as it existed the day prior to the
14 effective date of the "Stay at Home" order. They have not
15 been lost, they have not been damaged, they have not
16 required any repairs because of any damage to those
17 properties. The business operation, its, its operation as
18 a restaurant today is, is the same as the day prior to the
19 effective date of the order, albeit with some modifi-
20 cations that had been required to avoid grouping and to
21 maintain social distancing in, in a sense improvements to
22 the real estate. Not repairs, you know, and, and it's
23 been maintained as a take-out, take-out operation at least
24 until recently when they resumed the dining operation.
25 There has been no loss of or damage to either building

1 that has prevented the plaintiff from operating as a
2 restaurant or entering it for that matter if--, as they
3 have. If plaintiffs wanted to sell either building today,
4 they could do so. And while plaintiffs have provided some
5 speculative evidence about the decreased value of that
6 property, although, as I read Mr.--, as I read the
7 materials that Mr. Heos kindly attached to his response,
8 the fact of the matter is it pointed out in that article
9 was that while they operation of a commercial property may
10 get harder, it's not impossible to operate it in the
11 future under our new normal.
12 Because plaintiffs complaint, the affidavit, the
13 other information that has been provided to your Honor
14 provides no evidence of any damage to that property.
15 Plaintiffs could never prove that either property suffered
16 any direct physical loss from the imposition of Governor
17 Whitmer's emergency order. And thus, could never recover
18 business interruption coverage under this policy based on
19 the facts that have been presented to the Court. The same
20 holds true under the business cover, income coverage, if a
21 civil authority prevents or prohibits access to either
22 property because of direct physical damage to an adjacent
23 or nearby property for the very same reason. There has
24 been no direct physical loss or damage to any adjacent
25 property that has been alleged, that has been provided to

1 the Court in Mr. Heos response. And frankly, when you look
2 at the order that they have, that is at issue in this
3 case, there's nothing there that prevents access to Mr.
4 Gavrilides properties whatsoever.
5 In summary, your Honor, there are no facts
6 alleged in the complaint or in any of the materials that
7 I've looked at, including Mr. Gavrilides affidavit, that
8 shows there has been direct physical loss of or damage to
9 the insured property. And for those reasons, your Honor,
10 we believe that our motion--, for those reasons alone, we
11 believe our motion for summary disposition should be
12 granted.
13 I'd just like to make a couple of additional
14 points before I shut up. I really believe summary
15 disposition is warranted on this basis alone and I would
16 turn the Court to the case that we've discussed in our, in
17 our brief, your Honor, that's referred to Universal
18 Insurance Production versus Chubb. And that's the decision
19 of the Eastern District of Michigan involving a claim that
20 involved insured property. It was damaged by a pervasive
21 odor that developed in the property as a result of mold
22 that grew in the property because of some water seepage.
23 And why that case is important is because it discusses the
24 Michigan Rules of Contract Interpretation, that still
25 apply today, policy language is clear and unambiguous on

1 its face, which we believe is clearly the case here that
2 states that the words and the terms of the policy should
3 be enforced utilizing plain and commonly understood
4 meanings.
5 And when I said earlier that that's important
6 when we talk about what direct physical loss of or damage
7 to property means, it means we look at those words. We
8 don't add words such as loss of use, that Mr. Heos and Mr.
9 Gavrilides have added in order to understand what we're
10 talking about here. We look at the language in the policy.
11 Every case that Mr. Heos produced your Honor, says the
12 very same thing. In Univer--, Universal, like here, the
13 policy was an 'all-risk' policy that required, like here,
14 direct physical loss or damage to the insured property in
15 order to trigger coverage unless that coverage was
16 excluded.
17 As Universal pointed out, applying a dictionary
18 meaning of direct and physical as meaning something
19 immediate or proximate as a premise to something that is
20 distant or incidental and physical meaning something that
21 has a material existence meant in the context of a loss
22 involving a contaminant that, unlike here, per the uncon-
23 troverted allegations of the complaint and other evidence
24 produced by plaintiff in response to this motion. That in
25 order for direct physical loss of the property in this

1 context, the contaminant must actually alter the structure
2 integrity of the property in order to trigger coverage
3 under language that is at issue in this case. And it
4 didn't happen in Universal, as the Court denied coverage
5 there, granted affirmed summary disposition. And
6 importantly your Honor, it hasn't even been alleged in
7 this case. Regardless of any authority to the contrary,
8 anywhere else in the country, this remains the law in our
9 courts when interpreting policy terms at issue. There is a
10 requirement that there be direct physical loss of or
11 damage to property. And the allegations produced here in
12 the complaint and the evidence that's been attached have
13 specifically acknowledged no such contamination and no
14 such damage to the property as a result of that contami-
15 nation.
16 As in Universal, your Honor, the mere presence
17 of odor or even mold was not any evidence of structural or
18 tangible damage to the insured property. And as such, no
19 direct physical loss or damage to the property had-, was
20 occurred. Here, your Honor, we have the very same thing
21 except that we have not even had any allegations of any
22 damage to the property caused by this unfortunate, this
23 horrible virus.
24 Finally, and although we do not believe the
25 Court even has to get to this point, even if we assume for

1 purposes of this motion that contamination occurred on
2 each premises and that somehow effected the structural
3 integrity of either building, again, neither scenario is
4 alleged. And even if it were, we do not believe under the
5 circumstances and the science that exists that it would
6 necessarily constitute direct physical loss over damage to
7 the property. The buyer's exclusion of the policy, which
8 clearly and unequivocally states that it applies to all
9 coverages and endorsement and that the company will not
10 pay for loss or damages caused by or resulting from any
11 virus, bacteria or other microorganism that induces or is,
12 is capable of inducing physical distress, illness or
13 disease. And Lord knows, that that has certainly been the
14 case with what's happened with Covid-19 throughout our
15 country.
16 Clearly, your Honor, that exclusion, again, I
17 don't believe you even have to get there, but that
18 exclusion would clearly exclude any claim here even if
19 plaintiff's could prove direct physical loss of or damage
20 to the insured property or any nearby property that
21 resulted in a civil authority issuing an order prohibiting
22 access to the property. As of eight days ago, your Honor,
23 they have only been few jurisdictions in this country,
24 Florida and Pennsylvania, that have discussed and applied
25 this, a similar exclusion as at issue in this case and in

1 every one of those cases, the Court has enforced that
2 exclusion as written because it's clear and unambiguous.
3 Again, your Honor, for all the reasons that we've set
4 forth here today and the brief that we filed and our
5 reply, we request that the Court grant our Motion for
6 Summary Disposition at this time. Thank you.
7 THE COURT: Thank you. Mr. Heos?
8 MR. HEOS: Thank you, your Honor and may it
9 please the Court. And obviously Mr. Emrich and I have a
10 different interpretation of direct physical loss of or
11 damage to covered properties because here the loss comes
12 from the issue of the executive order restricting use of
13 property. Physically you cannot use for, for dine-in
14 services any of the interior of the building for a period
15 of time. And a complete prohibition isn't contemplated by
16 the language of the contract, I think a limited
17 restriction also falls within the coverage. And I think
18 that if you're gonna accept the defendants argument you
19 would have to limit the meaning to destruction of the
20 physical building itself, but we know that the coverage
21 extends to non-destructive loss, civil authority being
22 one.
23 I put in example in the brief subterranean
24 pollution, you can look at asbestos or a computer virus is
25 something that would occur that there would be no physical

1 destruction to the property itself. The fact of the matter
2 is that Mr. Gavrilides can't use the covered properties
3 because of or he's lost rather the use of those properties
4 because of the order and it looks like that will continue
5 in some form for a while. So, I think that counsel is
6 wrong in trying to limit the scope even with the case law
7 he cited, most of which is persuasive and not binding.
8 That's number one, Judge.
9 And as for the virus exclusion itself, the only
10 case law we have relates to person to person transmission
11 of a virus at the covered property. And I think that fits
12 more with what's going on. We see in the news that Harpers
13 in East Lansing and even the Hotcat in Kalamazoo is making
14 headlines of people contracting Covid there. But, the
15 impetus of the order was to protect public health and
16 welfare, which is the governor's duty. It's not caused by
17 a virus. It would be the same order as with the damn in
18 Midland being issued to protect public health and welfare.
19 It wasn't caused by a flood. It was caused by the
20 Governor's duty to act and protect the people she's
21 charged with protecting and I think that's what happening.
22 Or it's distinguishable from the case and I
23 think it's Bowler, the case cited regarding the virus. And
24 I think that if you go further in accepting defendant's
25 position, then we get into the illusory promise of well if

1 the government issues an order, we're not gonna cover it
2 because any decision of a government body or group of
3 people is excluded. And so then, you get into the circle
4 in the contract where if you're going to buy into counsels
5 logic, it would make that provision illusory. And for
6 those reasons, I think that the motion should actually
7 roll back on the defendants because the language to
8 support the claim, to the extent that the Court thinks
9 there's a deficiency in my pleading and is gonna grant
10 defendants motion, I'd like Leave to Amend the Complaint.
11 But, I don't think that's the case here. And with that,
12 I'll leave it, if the Court would like to ask any
13 questions, I'm happy to take them.
14 THE COURT: I don't have any. Thank you. I'll
15 give Mr. Emrich rebuttal time.
16 MR. EMRICH: Thank you, your Honor. Your Honor,
17 what I would say is that when we talk about these cases
18 that Mr. Heos has mentioned that might provide coverage in
19 certain situations, I read those cases a little while ago
20 and I'm kind of tired reading some of these cases about
21 insurance coverage. But, the point in every one of those
22 cases is that the condition she referred to actually
23 caused damage to the property.
24 In this case, there has not been any such
25 damage. And if we look at what the coverage for business

1 loss or business--, the business income loss that they're
2 seeking says, it says that if the business, the coverage
3 would apply if the business operation is suspended
4 provided the suspension must be caused by the direct
5 physical loss of or damage to property. In this case, that
6 hasn't occurred. Nothing prevents Mr. Gavrilides from
7 using that property. It has been used as such. The fact
8 that there may be other coverages that may provide some
9 limited coverage, they're against what Mr. Heos is arguing
10 because clearly, if those coverages were covered under
11 this language, then why have a special coverage that
12 provides certain conditions for its application.
13 The point is, in each of those civil authority
14 cases that he talked about, the property actually
15 sustained damage. Here it didn't sustain damage. As to his
16 claim in this case, that he wants an opportunity to amend
17 his complaint if the Court feels compelled to grant my
18 motion, what is that going to accomplish? He's already
19 alleged in his complaint and his client has already signed
20 an affidavit where he no doubt put his hand up and swore
21 to the contents of that affidavit in which he said there
22 has been no damage to that property.
23 We don't create coverage by-, because somebody
24 thinks they ought to have coverage. But, that, that, that
25 whole line of cases Roy versus Continental Insurance and

1 some of the other cases in our, in our brief that we
2 cited, clearly supports the notion that the reasonable
3 expectation concept doesn't apply in Michigan. It just
4 doesn't cut it. There is no coverage here, your Honor.
5 That exclusion is clear. If the Court feels that there may
6 be or that there may be a situation that would give rise
7 to, but again, you have to come forward at the time that
8 you, that you respond to this motion with some evidence
9 that suggests that. That hasn't happened here. I mean even
10 when you look at the response that he's filed, he talks
11 about scenario's that have absolutely no bearing to this
12 case.
13 And you know, I'll just make one last point,
14 your Honor, you know, when I was a young Prosecutor, I had
15 the benefit of being able to argue a number of cases to
16 juries that required me to prove the defendant's guilt
17 beyond a reasonable doubt. And in those cases, I was
18 trained to listen closely to the defendant's argument and
19 had been the case where the facts were particularly
20 egregious, a defense attorney would often not even talk
21 about those facts and talk about the law. And he talked
22 about how that law was somehow created this reasonable
23 doubt in hopes of creating some confusion on the part of
24 one juror who might then find in his clients favor because
25 reasonable doubt existed. And, and in those cases, I would

1 make sure that when I got up in rebuttal, just as I have
2 been given the opportunity to here, I would point that out
3 to the jury and indicate to them that there's a reason for
4 that. And that's because they didn't want you to talk
5 about the facts that clearly supported conviction.
6 On the other hand, if it was a case where the
7 law, you know, or the facts may have been murky, but the
8 law was clear, the defense attorney would only focus on,
9 you know, on those facts and not talk about the law. And
10 again, I point that out to the jury there. But, in this
11 case, you know, and there were cases back then to, like
12 our case here that were neither supported by the facts or
13 the law. Which I believe is clearly the case in this case.
14 And the defense attorney would get up and argue something
15 that to the jury that had absolutely nothing to do with
16 the case in hopes of confusing them. Just like Mr. Heos
17 has suggested by talking about these asbestos cases or
18 some of these other cases that have nothing to do with
19 this.
20 Well in this case, when you look at his
21 responsive pleading, he talks about an accident situation
22 that has absolutely no application here. Nothing to do
23 with this case. While in his argument, he starts out
24 talking about a discussion of the virus of racism and as
25 there, as there, we would point out, if we were in front

1 of a jury, just like I'd point out to them and I'm
2 pointing out to you, it hasn't got anything to do with
3 this case. Your Honor, the reason for that and the reason
4 for the topic of that is that he knows that neither the
5 facts or the law support his claim and nothing he could
6 file as an amendment would change that.
7 He is hoping to somehow create this little bit
8 of possibility, some scintilla that some evidence is gonna
9 pop up that shows that the property has been damaged in
10 hopes that he could trigger coverage. And as this Court
11 knows under the cases we've discussed in our brief, that
12 is not sufficient to deny summary disposition in a case
13 that clearly warrants it even at this early stage.
14 Thank you your Honor for your patience. Thank
15 you Mr. Heos, we've never met. I've heard a lot of good
16 things about you. Mr. Gavrilides, nice to have met you,
17 very sorry for the situation you're in. It's just crazy
18 all the way around. And just like having to argue this
19 case on TV is really just disconcerting for me. But, in
20 any event, thank you your Honor for your patience.
21 THE COURT: Thank you. You're on Youtube not TV.
22 But--
23 MR. EMRICH: I meant screen. Yeah, whatever.
24 THE COURT: Right.
25 MR. EMRICH: The screen.

1 THE COURT: I, I did read the briefs. I studied
2 them very carefully and I've listened to the argument of
3 counsel today. And taking all the-, that together I, I
4 note that the plaintiff speaks of and focuses on arguments
5 about access to the property, use of the property and
6 definitions of loss and damage. But, the first inquiry has
7 to start with a full look, not just isolating some words
8 or phrases from the policy. But, a full look at the
9 coverage that's provided under the policy.
10 Coverage is provided for actual loss of business
11 income sustained during a suspension of operations. The
12 policy goes on to provide the 'suspension must be caused
13 by direct physical loss of or damage to property.' And it
14 also provides 'the loss or damage must be caused by or
15 result from a covered cause of loss. The causes of loss
16 special form provides that a covered cause of loss means
17 risks of direct physical loss.'
18 So, whether we're talking about the cause for
19 the suspension of the business or the cause for the loss
20 or the damage, it is clear from the policy coverage
21 provision only direct physical loss is covered. Under
22 their common meanings and under federal case law as well,
23 that the plaintiff has cited that interprets this standard
24 form of insurance, direct physical loss of or damage to
25 the property has to be something with material existence.

1 Something that is tangible. Something according to the one
2 case that the plaintiff has cited from the Eastern
3 District, that alters the physical integrity of the
4 property. The complaint here does not allege any physical
5 loss of or damage to the property. The complaint alleges a
6 loss of business due to executive orders shutting down the
7 restaurants for dining, for dining in the restaurant due
8 to the Covid-19 threat.
9 But, the complaint also states that a no time
10 has Covid-19 entered the Soup Spoon or the Bistro through
11 any employee or customer and in fact, states that it has
12 never been present in either location. So, there simply
13 are no allegations of direct physical loss of or damage to
14 either property. The plaintiff seems to make in the
15 briefing, at least, two arguments about the language in
16 the coverage provision and what it means.
17 The first argument is that the plaintiff says
18 coverage applies to "direct physical loss or damage to
19 property." Even if that were the wording of the coverage
20 provision, it wouldn't save the plaintiff from the
21 requirement that the loss or damage must be physical and
22 the analysis could end right there. But, I have to go on
23 to say that this is not even the wording of the coverage
24 provision. Coverage according to the policy applies to a
25 suspension caused by "direct physical loss of or damage to

1 property." So, I'm not going to get into a detailed
2 analysis of the rules of grammar. But, common rules of
3 grammar would apply to make that phrase a short-cut way of
4 saying "direct physical loss of property or direct
5 physical damage to property." So, again, the plaintiff
6 just can't avoid the requirement that there has to be
7 something that physically alters the integrity of the
8 property. There has to be some tangible, i.e., physical
9 damage to the property.
10 Then the plaintiff in the briefing, at least,
11 seems to make a second argument that and this is not 100%
12 clear, but, it seems like the plaintiff is saying that the
13 physical requirement is met because people were physically
14 restricted from dine-in services. But, that argument is
15 just simply nonsense. And it comes nowhere close to
16 meeting the requirement that there's some, there has to be
17 some physical alteration to or physical damage or tangible
18 damage to the integrity of the building.
19 So, the next argument that the plaintiff makes
20 is that the virus and bacteria exclusion is vague and
21 can't apply here. The plaintiff has not adequately
22 explained how the term virus is vague. And in fact,
23 supplies a completely workable, understandable, usable
24 definition of the word virus. The argument in this regard
25 really seems to be more that the virus exclusion doesn't

1 apply. And it goes something like this as far as I can
2 tell, first, a virus can't cause physical loss or damage
3 to property because virus' harm people, not property.
4 Second, the damage caused here was really caused by
5 actions of the civil authority to protect public health.
6 And then third, therefore, coverage for acts of any
7 person, group, organization or governmental body applies.
8 But, that argument bring us right back to the direct
9 physical loss or damage requirement. Again, going back to
10 the cause of loss special form B, as in boy, exclusions
11 provides that acts of government are only covered when
12 they result in a covered cause of loss. A covered cause
13 of loss, again, is direct physical loss. So, even if the
14 virus exclusion did not apply, which the plaintiff has not
15 supported that it doesn't apply, I only argue that it's
16 vague, which I reject. But, even if it did not apply, it
17 could only be coverage for governmental actions that
18 resulted in direct physical loss or damage.
19 And then, finally, the plaintiff argues that the
20 policy has a contradiction in it that renders it illusory.
21 So, the plaintiff says that the policy extends coverage
22 for governmental acts. But, then, it takes it away in the
23 causes of loss special form. But, that's simply not true.
24 Coverage is provided for actual loss of business income
25 sustained during the suspension of operations. However,

1 according to the coverage provision, the suspension must
2 be caused by direct physical loss of or damage to
3 property. And governmental acts are likewise covered if
4 it results in a covered cause of loss, which is again, a
5 direct physical loss. There is no granting of coverage
6 and then excluding the same coverage in the policy. As a
7 matter of fact, the policy is consistent throughout and
8 consistent with federal law cited by the plaintiff. It
9 requires physical loss or damage.
10 There is a virus exclusion even if plaintiff was
11 alleging, was alleging, even if there were allegations in
12 the complaint alleging actual physical loss or damage,
13 which the complaint does not do. But, there is a virus
14 exclusion that would also apply. And governmental action
15 that results in direct physical loss is covered. But
16 again, there is no direct physical loss alleged here.
17 Now, I have to address a little bit this, that
18 it was brought as a (c)(10) motion. The actually the
19 defendant hasn't provided any support by way of factual
20 support, depositions, affidavits, et cetera, for a (c)(10)
21 motion. So, if the defendant doesn't do that, then the
22 plaintiff has no burden under Maiden versus Rosewood. So,
23 there's no shifting burden until the moving party first
24 does it. But, I don't think it properly is labeled a
25 (c)(10) motion. I think it's a (c)(8) motion. Because this

1 is the motion that can be decided as a matter of law. Take
2 all the allegations in the complaint as true and examine
3 nothing more than the contract upon which the complaint is
4 based, the policy of insurance and as a matter of law, the
5 plaintiffs complaint cannot be sustained. And although the
6 plaintiff has requested a chance to amend without any
7 indication of how they would do that, there actually is no
8 factual development that could change the fact that the
9 complaint is complaining about the loss of access or use
10 of the premised due to executive orders and the Covid-19
11 virus crisis. So, there's no factual development that
12 could possibly change that or amendment to the complaint
13 that could possibly change that those things do not
14 constitute the direct physical damage or injury that's
15 required under the policy as I've outlined.
16 So, for those reasons, I am granting the
17 Defendant's Motion for Summary Disposition. I'm doing it
18 under MCR 2.116 (c)(8). And Mr.—
19 MR. EMRICH: Thank you, your Honor.
20 THE COURT: Mr. Emrich, will you submit an order?
21 MR. EMRICH: Certainly will, your Honor.
22 THE COURT: Okay.
23 MR. EMRICH: Thank you.
24 THE COURT: Thank you.
25 MR. HEOS: Thank you very much.

1 THE COURT: That will conclude our hearing.
2 (Hearing concludes at 3:32:35 PM.)
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9
10 STATE OF MICHIGAN)
11)
12 COUNTY OF INGHAM)
13
14
15
16 I certify that that this transcript, consisting of 24
17 pages, is a complete, true, and correct transcript of the
18 proceedings and testimony taken in this case on Wednesday,
19 July 01, 2020.
20
21
22 July 09, 2020
23 Susan C. Melton-CER 7548
24 30th Circuit Court
25 313 West Kalamazoo Avenue
26 Lansing, Michigan 48901
27 517-483-6500 ext. 6703
28

EXHIBIT D

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DIESEL BARBERSHOP, LLC; WILDERNESS OAKS CUTTERS, LLC; DIESEL BARBERSHOP BANDERA OAKS, LLC; DIESEL BARBERSHOP DOMINION, LLC; DIESEL BARBERSHOP ALAMO RANCH, LLC; AND HENLEY'S GENTLEMEN'S GROOMING, LLC,	§	No. 5:20–CV–461–DAE
Plaintiffs,	§	
vs.	§	
STATE FARM LLOYDS,	§	
Defendant.	§	

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Before the Court is a Motion to Dismiss filed by State Farm Lloyds ("Defendant" or "State Farm") on May 8, 2020. (Dkt. # 9.) Plaintiffs Diesel Barbershop, LLC; Wilderness Oak Cutters, LLC; Diesel Barbershop Bandera Oaks, LLC; Diesel Barbershop Dominion, LLC; Diesel Barbershop Alamo Ranch, LLC; and Henley's Gentlemen's Grooming, LLC (collectively "Plaintiffs") responded on May 22, 2020 (Dkt. # 14), and Defendant filed a reply on May 29, 2020 (Dkt. # 17). The Court presided over a virtual hearing on July 29, 2020, during which Shannon Loyd, Esq., represented Plaintiffs and Neil Rambin, Esq. and Susan Egeland, Esq. represented Defendant. After careful consideration of the

memorandum filed in support of and against the motion and after hearing arguments from counsel, the Court—for the reasons that follow—**GRANTS** Defendant's Motion to Dismiss.

FACTUAL BACKGROUND

On February 11, 2020, the World Health Organization identified the 2019 Coronavirus ("COVID-19") as a disease. Since then, COVID-19 has spread across the world, and health organizations, including the Center for Disease Control ("CDC"), characterize COVID-19 as a global pandemic. (See Dkt. # 8.) The outbreak in the United States is a rapidly evolving situation, and the state of Texas saw an exponential increase in COVID-19 cases. To stop "community spread" of COVID-19, state and local governments have issued executive orders that limit the opening of certain businesses and require social distancing. Bexar County Judge Nelson Wolff and Texas Governor Greg Abbott have issued executive orders throughout this crisis, and below are the relevant orders (the "Orders") for the purposes of this case.

a. The Bexar County Orders

County Judge Wolff issued multiple executive orders pertaining to the "state of local disaster . . . due to imminent threat arising from COVID-19." (Dkt. # 8, Exh. B.) On March 23, 2020, County Judge Wolff issued an order requiring "all businesses operating within Bexar County" save for those "exempted" to

"cease all activities" at any business located in Bexar County from March 24, 2020 until April 9, 2020. (Id.) The order defines exempted businesses as those pertaining to: (a) healthcare services, (b) government functions, (c) education and research, (d) infrastructure, development, operation and construction, (e) transportation, (f) IT services, (g) food, household staples, and retail, (h) services to economically disadvantaged populations, (i) services necessary to maintain residences or support exempt businesses, (j) news media, (k) financial institutions and insurance services, (l) childcare services, (m) worship services, (n) funeral services, and (o) CISA sectors. (Id.) County Judge Wolff notes that he is authorized "to take such actions as are necessary in order to protect the health, safety, and welfare of the citizens of Bexar County" and "has determined that extraordinary emergency measures must be taken to mitigate the effects of this public health emergency and to facilitate a cooperative response" in line with Governor Abbott's "declaration of public health disaster." (Id.)

In a supplemental executive order dated April 17, 2020, County Judge Wolff emphasizes that "the continued spread of COVID-19 by pre- and asymptomatic individuals is a significant concern in Bexar County and on April 3, 2020, the [CDC] recommended cloth face coverings be worn by the general public to slow the spread of COVID-19 and implementing this measure would assist in reducing the transmission of COVID-19 in San Antonio and Bexar County." (Id.)

The goal of the supplemental order was to "reduce the spread of COVID-19 in and around Bexar County" and to "continue to protect the health and safety of the community and address developing and the rapidly changing circumstances when presented by the current public health emergency." (Id.)

b. The State of Texas Order

On March 31, 2020, Texas Governor Greg Abbott signed an executive order closing all "non-essential" businesses from April 2, 2020 until April 30, 2020. (Dkt. # 8, Exh. C.) Governor Abbott's order provides the following:

> NOW, THEREFORE, I, Greg Abbott, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order the following on a statewide basis effective 12:01 a.m. on April 2, 2020, and continuing through April 30, 2020, subject to extension based on the status of COVID-19 in Texas and the recommendations of the CDC and the White House Coronavirus Task Force:
>
>> In accordance with guidance from DSHS Commissioner Dr. Hellerstedt, and to achieve the goals established by the President to reduce the spread of COVID-19, every person in Texas shall, except where necessary to provide or obtain essential services, minimize social gatherings and minimize in-person contact with people who are not in the same household.
>>
>> "Essential services" shall consist of everything listed by the U.S. Department of Homeland Security in its Guidance on the Essential Critical Infrastructure Workforce, Version 2.0, plus religious services. . . .
>>
>> In accordance with the Guidelines from the President and the CDC, people shall avoid eating or drinking at bars, restaurants, and food courts, or visiting gyms, massage

> establishments, tattoo studios, piercing studios, or cosmetology salons; provided, however, that the use of drive-thru, pickup, or delivery options for food and drinks is allowed and highly encouraged throughout the limited duration of this executive order.

(Dkt. # 8, Exh. C.)

c. Plaintiffs' Insurance Policies

Plaintiffs run barbershop businesses; a type of business deemed non-exempt and non-essential under the Orders. (Dkt. # 8.) State Farm issued insurance policies (the "Policies")[1] to Plaintiffs regarding the insured properties (the "Properties") that are subject of this dispute. (See Dkt. # 9, Exhs. A-1–A-6.)

The Policies state, in relevant part, the following:

> When a Limit Of Insurance is shown in the Declarations for that type of property as described under Coverage A – Buildings, Coverage B – Business Personal Property, or both, we will pay for accidental direct physical loss to that Covered Property at the premises described in the Declarations caused by any loss as described under SECTION I — COVERED CAUSES OF LOSS.

(Id.) The Policies note in Section I–Covered Causes of Loss that State Farm will "insure for accidental direct physical loss to Covered Property" unless the loss is excluded under Section I–Exclusions or limited in the Property Subject to Limitations provision. (Id.) The Policies further contain a "Fungi, Virus, or

[1] Defendant attaches each Plaintiff's policy and endorsement to the policy to the motion to dismiss. (See Dkt. # 9, Exhs. A-1–A-6.) Defendant asserts that "the relevant provisions of the policies are identical" (Dkt. # 9), and thus this Court shall cite the policies together without analyzing each Plaintiff's policy separately.

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Bacteria" exclusion (the "Virus Exclusion"), which contains lead-in language and states the following:

> 1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
>
> . . .
>
> **j. Fungi, Virus Or Bacteria**
>
> . . .
>
> (2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease.

(Id.) The Policies also contain an endorsement modifying the businessowners coverage form, including a Civil Authority provision which states in relevant part:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual "Loss of Income" you sustain and necessary "Extra Expense" caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> 1. Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> 2. The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause Of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

(Id.) There are various other exclusions within the Policies including for example, the "Ordinance or Law," the "Acts or Decisions" and the "Consequential Loss" exclusions. (Dkt. # 9.)

PROCEDURAL HISTORY

Plaintiffs assert that due to the COVID-19 outbreak and the Orders, Plaintiffs "have sustained and will sustain covered losses" under the terms of the Policies. (Dkt. # 8.) Plaintiffs filed a claim with State Farm seeking coverage for business interruption to the Properties pursuant to the Policies in March 2020. (Id.) Without seeking additional documentation or information, and without further investigation, State Farm denied Plaintiffs' claims. (Dkt. # 8, Exh. D.) In the denial letter, State Farm asserted that Plaintiffs' claims are not covered as the "policy specifically excludes loss caused by enforcement of ordinance or law, virus, and consequential losses." (Id.) State Farm argued that there is a requirement "that there be physical damage, within one mile of the described property" and "that the damage be the result of a Covered Cause of Loss" which, State Farm asserted, a "virus is not." (Id.)

Plaintiffs sued State Farm in state court on April 8, 2020, after State Farm denied Plaintiffs coverage. (Dkt. # 1, Exh. C.) Defendant timely removed the action to this Court on April 13, 2020. (Dkt. # 1.) In their second amended complaint, Plaintiffs bring claims of breach of contract, noncompliance with the

Texas Insurance Code, and breach of the duty of good faith and fair dealing. (Dkt. # 8.) Attached to Plaintiffs' second amended complaint are the Policies, Orders, and State Farm's letter denying coverage.

On May 8, 2020, State Farm filed a motion to dismiss for failure to state a claim. (Dkt. # 9.) The Court granted the parties' joint motion to stay discovery pending a ruling on the motion to dismiss on May 18, 2020. (Dkt. # 12.) Plaintiffs responded to the motion to dismiss on May 22, 2020 (Dkt. # 14), and a week later, Defendant filed its reply (Dkt. # 17). Defendant filed a notice of supplemental authority on July 14, 2020 (Dkt. # 21), and Plaintiffs filed a notice of supplemental authority on July 28, 2020 (Dkt. # 22). The Court held a virtual hearing on this matter on July 29, 2020. Defendant filed an additional notice of supplemental authority on August 7, 2020 (Dkt. # 25), and Plaintiffs filed another notice of supplemental authority on August 12, 2020 (Dkt. # 27). Defendant filed its third notice of supplemental authority on August 13, 2020 (Dkt. # 28), notifying the Court of the United States Judicial Panel on Multidistrict Litigation's decision to deny the creation of an industry-wide multidistrict litigation. (Id., Exh. A.)

TEXAS CONTRACT-INTERPRETATION STANDARDS

"Insurance policies are contracts and are governed by the principles of interpretation applicable to contracts." Amica Mut. Ins. Co. v. Moak, 55 F.3d 1093, 1095 (5th Cir. 1995). Under Texas contract-interpretation standards, the

"paramount rule is that courts enforce unambiguous policies as written" such that court must "honor plain language, reviewing policies as drafted, not revising them as desired." Pan Am Equities, Inc. v. Lexington Ins. Co., 959 F.3d 671, 674 (5th Cir. 2020). Importantly, an "ambiguity" is "more than lack of clarity"; a court should find an insurance contract ambiguous only if "giving effect to all provisions, its language is subject to two or more reasonable interpretations." Id. (internal quotation marks and citation omitted). To determine ambiguity, which is a question of law, a court must "examine the entire contract in order to harmonize and give effect to all provisions so that none will be meaningless." Id. (internal quotation marks and citation omitted); see also Provident Life & Acc. Ins. Co. v. Knott, 128 S.W.3d 211, 216 (Tex. 2003) ("In interpreting these insurance policies as any other contract, we must read all parts of each policy together and exercise caution not to isolate particular sections or provisions from the contract as a whole."); State Farm Lloyds v. Page, 315 S.W.3d 525, 527 (Tex. 2010) ("The fact that the parties may disagree about the policy's meaning does not create an ambiguity." (citations and internal quotation marks omitted)). "The goal in interpreting . . . [language within the contract] is to ascertain the true intentions of the parties as expressed in the writing itself." Richards v. State Farm Lloyds, No. 19-0802, 2020 WL 1313782, at *5 (Tex. Mar. 20, 2020) (citation and internal quotation marks omitted).

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RULE 12(b)(6) LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In analyzing whether to grant a Rule 12(b)(6) motion, a court accepts as true "all well-pleaded facts" and views those facts "in the light most favorable to the plaintiff." United States ex rel. Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 346 (5th Cir. 2013) (citation omitted). A court need not "accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678. Furthermore, in assessing a motion to dismiss under Rule 12(b)(6), a court's review is generally limited to the complaint, documents attached to the complaint, and any documents attached to the motion to dismiss that are referred to in the complaint and are central to the plaintiff's claims. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007); see also Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC, 594 F.3d 383, 387 (5th Cir. 2010).

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DISCUSSION

State Farm argues that for business income coverage to apply, the Policies explicitly require (1) an accidental direct physical loss to the insured property and (2) that the loss is not excluded. (Dkt. # 9.) Defendant asserts that Plaintiffs fail to properly plead direct physical loss to the Properties as Plaintiffs argue that the Orders are the reason for the business interruption claim and fail to show that the Properties have been tangibly "damaged" per se. (Dkts. ## 9, 17.) Defendant also argues that regardless, Plaintiffs fail to overcome the Virus Exclusion hurdle that is unambiguously within the Policies and was added to these Policies in response to the SARS pandemic in the early 2000s. (Id.)

In response, Plaintiffs assert that the language in the Policies does not require a tangible and complete physical loss to the Properties, but rather allows for a partial loss to the Properties, which includes the loss of use of the Properties due to the Orders restricting usage of the Properties. (Dkt. # 14.) Plaintiffs also argue that it is not COVID-19 within Plaintiffs' Properties that caused the loss directly, but rather that it was the Orders that caused the direct physical loss and thus the Virus Exclusion should not apply. (Id.) Plaintiffs also argue that the Orders were issued to protect public health and welfare, and that Plaintiffs claims thus fall under the Civil Authority provision within the Policies. (Id.)

Based on the parties' filings, plain language of the Policies in question, and argument at the hearing, as much as the Court sympathizes with Plaintiffs' situation, the Court determines that the motion to dismiss must be granted for the following reasons.

a. Accidental Direct Physical Loss

This Court is mandated to "honor plain language, reviewing policies as drafted, not revising them as desired." Pan Am Equities, 959 F.3d at 674. The Court looks at the coverage provided by the Policies as a whole in order to determine the plain language. Id. Here, the Policies are explicit that there has to be an accidental, direct physical loss to the property in question. The Court agrees with Plaintiffs that some courts have found physical loss even without tangible destruction to the covered property. See e.g., TRAVCO Ins. Co. v. Ward, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010), aff'd, 504 F. App'x 251 (4th Cir. 2013) (noting that "physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces"); Murray v. State Farm Fire & Cas. Co., 203 W. Va. 477, 493 (1998) ("'Direct physical loss' provisions require only that a covered property be injured, not destroyed. Direct physical loss also may exist in the absence of structural damage to the insured property." (citation omitted)). The Court also agrees that a virus like COVID-19 is not like a hurricane or a hailstorm, but rather more like ammonia, E. coli, and/or carbon

monoxide (i.e. cases in which the loss is caused by something invisible to the naked eye), and in such cases, some courts have found direct physical loss despite the lack of physical damage. See e.g., Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226, 236 (3d Cir. 2002) (holding that while mere installation of asbestos was not loss or damage, the presence or imminent threat of a release of asbestos would "eliminate[] or destroy[]" the function of the structure, thereby making the building "useless or uninhabitable"); Lambrecht & Assocs., Inc. v. State Farm Lloyds, 119 S.W.3d 16, 24–26 (Tex. App. 2003) (noting that while State Farm argued that the losses were not "physical" as they were not "tangible," the court found that under the "direct language" of the policy allowed for coverage to "electronic media and records" and the "data stored on such media" as "such property is capable of sustaining a 'physical' loss"); Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399, 406 (1st Cir. 2009) ("We are persuaded both that odor can constitute physical injury to property . . . and also that allegations that an unwanted odor permeated the building and resulted in a loss of use of the building are reasonably susceptible to an interpretation that physical injury to property has been claimed.").

Even so, the Court finds that the line of cases requiring tangible injury to property are more persuasive here and that the other cases are distinguishable. See Dickie Brennan & Co. v. Lexington Ins. Co., 636 F.3d 683, 686 (5th Cir.

2011) (affirming summary judgment and holding that there was no coverage under the civil authority provision of the policy as plaintiffs "failed to demonstrate a nexus between any prior property damage and the evacuation order" when the city issued a mandatory evacuation order prior to the arrival of a hurricane and plaintiffs allegedly suffered business interruption losses); United Air Lines, Inc. v. Ins. Co. of State of PA, 439 F.3d 128, 134 (2d Cir. 2006) (determining that United could not show that its lost earnings resulted from physical damage to its property or from physical damage to an adjacent property when the government shut down the airport after the 9/11 terrorist attacks). For instance, unlike Essex Ins. Co., COVID-19 does not produce a noxious odor that makes a business uninhabitable. It appears that within our Circuit, the loss needs to have been a "distinct, demonstrable physical alteration of the property." Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co., 181 F. App'x 465, 470 (5th Cir. 2006) ("The requirement that the loss be "physical," given the ordinary definition of that term is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." (citation omitted)); see also Ross v. Hartford Lloyd Ins. Co., 2019 WL 2929761, at *6–7 (N.D. Tex. July 4, 2019) ("direct physical loss" requires "a distinct, demonstrable, physical alteration

of the property" (citing 10A Couch on Ins. § 148:46 (3d ed. 2010)).) Thus, the Court finds that Plaintiffs fail to plead a direct physical loss.

b. The Virus Exclusion

Even if the Court had found that the language within the Policies was ambiguous and/or that Plaintiffs properly plead direct physical loss to the Properties, the Court finds that the Virus Exclusion bars Plaintiffs' claims. The language in the lead-in of the Virus Exclusion (also called the anti-concurrent causation ("ACC") clause) expressly states that State Farm does not insure for a loss regardless of "whether other causes acted concurrently or in any sequence within the excluded event to produce the loss." (See Dkt. # 9, Exhs. A-1–A-6.) Here, Plaintiffs allege that the loss of business occurred as a result of the Orders that mandated non-essential businesses to discontinue operations for a set period of time to help staunch community spread of COVID-19. (Dkts. ## 8, 14.) Plaintiffs also assert that the Court should find that the Virus Exclusion does not apply because COVID-19 was not present at the Properties. (Id.)

The Court notes that the parties vehemently dispute how to read the lead-in language to the Virus Exclusion. Defendant cites Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346 (5th Cir. 2007) in support of the argument that the lead-in language to the Virus Exclusion bars Plaintiffs' claims and that the lead-in language is unambiguous and enforceable. Meanwhile, Plaintiffs cite Stewart

Enterprises, Inc. v. RSUI Indem. Co., 614 F.3d 117 (5th Cir. 2010) in support of their assertion that the lead-in language does not exclude coverage here.

The Court finds the facts in Stewart Enterprises distinguishable from the facts here. There, the ACC clause was within a policy provided by Lexington Insurance Company and contained different language than the ACC clause in State Farm's Policies here. See Stewart Enterprises, 614 F.3d at 125 (noting in the ACC clause that "this policy does not insure against loss or damage caused directly or indirectly by any of the excluded perils" as "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss"). In addition, the issue in Stewart Enterprises was that the insurer was seeking "to use the ACC clause to bar recovery for damage caused by two included perils." Id. at 126 (emphasis added). The Fifth Circuit rightly decided there that it would be absurd to "read the policy to force Stewart to prove a windless flood." Id. at 127.

But here, the Court can read the Policies objectively and without "creating difficult causation determination where none otherwise exist." Id. Like the Fifth Circuit in Tuepker, the Court finds that here, the State Farm ACC clause within the Policies is unambiguous and enforceable. See Tuepker, 507 F.3d at 356. The Policies expressly state that State Farm does not "insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or

(c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these[.]" (See Dkt. # 9, Exhs. A-1–A-6.) Guided by the plain language of the Policies, the Court finds that Plaintiffs have pleaded that COVID-19 is in fact the reason for the Orders being issued and the underlying cause of Plaintiffs' alleged losses. While the Orders technically forced the Properties to close to protect public health, the Orders only came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community. Thus, it was the presence of COVID-19 in Bexar County and in Texas that was the primary root cause of Plaintiffs' businesses temporarily closing. Furthermore, while the Virus Exclusion could have been even more specifically worded, that alone does not make the exclusion "ambiguous." See In re Katrina Canal Breaches Litig., 495 F.3d 191, 210 (5th Cir. 2007) ("The fact that an exclusion could have been worded more explicitly does not necessarily make it ambiguous.").

Thus, the Court finds that the Policies' ACC clause excluded coverage for the losses Plaintiffs incurred in complying with the Orders. See, e.g., JAW The Pointe, L.L.C. v. Lexington Ins. Co., 460 S.W.3d 597, 610 (Tex. 2015) ("Because the covered wind losses and excluded flood losses combined to cause the

enforcement of the ordinances concurrently or in a sequence, we agree with the court of appeals that the policy's anti-concurrent-causation clause excluded coverage for JAW's losses."). Thus, even if the Court found direct, physical loss to the Properties, the Virus Exclusion applies and bars Plaintiffs' claims.

c. The Civil Authority Provision

In light of the foregoing, the Court also finds that the Civil Authority provision within the Policies is not triggered. Plaintiffs' recovery remains barred due to the unambiguous nature of the events that occurred, causing the Virus Exclusion to apply such that Plaintiffs fail to allege a legally cognizable "Covered Cause of Loss." See Dickie Brennan, 636 F.3d at 686–87 ("[C]ivil authority coverage is intended to apply to situations where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property.").

CONCLUSION

The Court finds merit in Defendant's arguments and determines that Plaintiffs' breach of contract, Texas Insurance Code,[2] and breach of duty of good faith and fair dealing claims all fail. While there is no doubt that the COVID-19 crisis severely affected Plaintiffs' businesses, State Farm cannot be held liable to

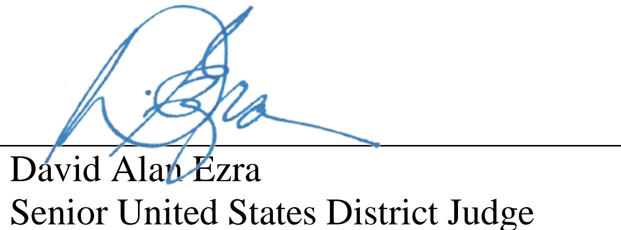
[2] Plaintiffs expressly seek to drop their allegation of misrepresentation pending further discovery in light of this Court's ruling in Brasher v. State Farm Lloyds, 2017 WL 9342367, at *7 (W.D. Tex. Feb. 2, 2017). (Dkt. # 14.)

pay business interruption insurance on these claims as there was no direct physical loss, and even if there were direct physical loss, the Virus Exclusion applies to bar Plaintiffs' claims. Given the plain language of the insurance contract between the parties, the Court cannot deviate from this finding without in effect re-writing the Policies in question. That this Court may not do.

For the reasons stated above, the Motion to Dismiss (Dkt. # 9) is **GRANTED**. Because allowing Plaintiffs leave to amend their claims would be futile, the Court **DISMISSES** Plaintiffs' claims. The Clerk's office is instructed to **ENTER JUDGMENT** and **CLOSE THIS CASE**.

IT IS SO ORDERED.

DATE: San Antonio, Texas, August 13, 2020.



David Alan Ezra
Senior United States District Judge