UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

ASSOCIATES IN PERIODONTICS, PLC, Plaintiff, v. THE CINCINNATI INSURANCE COMPANY, Defendant.	)))))))))))	Case No. 2:20-cv-00171-wks **ORAL ARGUMENT REQUESTED**

PLAINTIFF ASSOCIATES IN PERIODONTICS, PLC's MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT THE CINCINNATI INSURANCE COMPANY'S MOTION TO DISMISS

Plaintiff Associates in Periodontics, PLC ("Plaintiff"), hereby responds in opposition to Defendant The Cincinnati Insurance Company's ("Cincinnati" or "Defendant") motion to dismiss Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) (the "Motion").

INTRODUCTION

This lawsuit presents the Court with an important issue of first impression in Vermont: whether the widespread presence of the COVID-19 virus and resulting governmental closure orders constitute a fortuitous loss causing direct physical loss to insured property owners' properties. Plaintiff owns and operates a dental office in South Burlington, Vermont. Plaintiff's property insurance company, Cincinnati, issued Plaintiff an "all-risk" policy providing Business Income coverage, Extra Expense coverage, coverage for loss due to the actions of a Civil Authority, and Business Income from Dependent Properties, and contains no provision excluding losses caused by viruses. These coverages insure all risks that result in "accidental physical loss or accidental physical damage to property." Plaintiff alleges that it experienced "direct physical loss of and/or damage" to its property (resulting in major losses in revenue) due to the outbreak of COVID-19—a deadly virus which was undoubtedly present at and around Plaintiff's premises—and due to government closure orders that required Plaintiff to close for a period of several months. Although Plaintiff submitted a valid claim for coverage to Cincinnati based on the damages resulting from its physical loss of property, the insurance company denied the claim. Plaintiff's class action complaint (the "Complaint" [Doc. 1]) alleges that Cincinnati is denying all similar COVID-19 business interruption claims and, therefore, Plaintiff and similarly situated insureds are entitled to a declaratory judgment concerning the correct interpretation of Cincinnati's standard form insurance policies.

The Court should deny Cincinnati's Motion because Plaintiff sufficiently alleges coverage based on the plain language of the insurance policy. Plaintiff's policy insures against ***all*** *risks* that are not specifically excluded and, unlike other insurers, Cincinnati specifically decided *not* to include the standard form virus exclusion in Plaintiff's policy. Thus, losses caused by the virus are covered by the policy. Further, although the policy limits coverage to business income losses resulting from "accidental physical loss or accidental physical damage" to property, that limitation does not apply here because the COVID-19 pandemic clearly results in Plaintiff's physical loss of its property. Applying Vermont law, there is coverage for direct physical loss for the time period that Plaintiff's property was changed by an external event from an initial satisfactory state (when the air was safe to breathe and ordinary business on premises could be conducted) into an unsatisfactory state (when the premises were so unsafe that ordinary business on premises could not be conducted as normal). This common-sense conclusion is further supported by the plain meaning of "physical loss," a term Cincinnati left undefined. Under settled principles of Vermont insurance law, this undefined term must be interpreted consistent with the objectively reasonable expectations of the policyholder and in the specific context of this claim. Here, an objectively reasonable policyholder operating a dental office reliant on patients appearing in person reasonably expects that the term "physical loss" means the inability to physically use its premises for its intended purpose: a dental office. The Court should conclude, in accordance with a growing body of state and federal case law from across the country, that Plaintiff's allegation that it lost the physical use of its office space because of the Closure Orders and COVID-19 constitutes a "physical loss" of property triggering coverage under the policy.

Finally, even if an objectively reasonable policyholder could *also* interpret the policy to exclude virus losses despite the lack of an exclusion, under clear Vermont law, the tie goes to the

insured when the policy (which the insurer drafted and refused to negotiate the terms of) is ambiguous. The Court should deny the Motion because Plaintiff advances a credible interpretation of the policy that affords coverage.

STATEMENT OF FACTS THAT MUST BE ACCEPTED AS TRUE

Plaintiff is the owner of a dental practice in South Burlington, Vermont. Compl., ¶¶ 2, 4. Plaintiff obtained and paid premiums for an insurance policy from Cincinnati, which included business interruption coverage. *Id.*, ¶ 2. Under this coverage, Cincinnati promised to pay for Plaintiff's actual business income loss so long as the suspension of business operations was during the "period of restoration" due to "loss" to Covered Property resulting from a Covered Cause of Loss." *Id.*, ¶15.

"Loss" means "accidental physical loss or accidental physical damage." *Id.*, ¶17. "Covered Causes of Loss," with respect to the "Loss of Business Income and Extra Expense" coverage, means "'direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." Compl., Ex. A, D.E. 1-3 at 35 and 132. "Suspension" is defined in the Policies as "[t]he slowdown or cessation of your business activities" and "[t]hat a part or all of the 'premises' is rendered untenantable." Compl., Ex. A, D.E. 1-3 at 70. Cincinnati also agreed to pay for "Extended Business Income" (loss of business income beyond the Period of Restoration) and "Extra Expense" (necessary expenses sustained during the Period of Restoration). Compl., ¶¶ 19-20.

The Policy also provides for "Civil Authority" coverage, which requires Cincinnati to "pay for the actual loss of 'Business Income' and necessary Extra Expense" Plaintiff sustained "caused by action of civil authority that prohibits access to" Plaintiff's property when (1) a Covered Cause of Loss causes damage to property other than Plaintiff's property, (2) the civil authority prohibits

access to property immediately surrounding the damaged property; and (3) Plaintiff's Covered Property is within the prohibited area." Compl., ¶¶ 23-24.

Thus, the damages and losses claimed in the Complaint are covered under the policy if a Covered Cause of Loss can be shown. A "Covered Cause of Loss" is defined as "'direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." Compl., Ex. A at 35 and 132. The term "loss" is defined under the policy to include "accidental physical loss or accidental physical damage." *Id*., ¶ 17. The meanings of "physical loss" and "physical damage" are not defined in the Policy. *Id*., ¶ 29.

The presence of COVID-19 caused civil authorities throughout the country to issue orders requiring the suspension of business at a wide range of establishments, including civil authorities with jurisdiction over Plaintiff's business (the "Closure Orders"). Compl., ¶¶ 39, 47. When Vermont issued Closure Orders to prevent the spread of COVID-19, Plaintiff was forced to suspend its business operations. *Id.*, ¶ 39. Specifically, on Friday, March 13, 2020, the Governor of Vermont issued Executive Order 01- 20, Declaration of State of Emergency in Response to COVID-19 and National Guard Call-Out ("March 13th Order"), declaring a state of emergency for the State of Vermont in response to COVID-19. *See* **Exhibit 1.** One week later, on March 20, 2020, the Governor of Vermont issued Addendum 3 to Executive Order 01-20, Suspension of all Non-Essential Adult Elective Surgery and Medical and Surgical Procedures ("March 20th Order") and "determined it is necessary to suspend all non-essential adult elective surgery and medical and surgical procedures, including all dental procedures. *See* **Exhibit 2.** This suspension of all non-essential (elective) dental care was the lifeblood of Plaintiff's business. *Id*., ¶ 42. Additional executive orders issued by the Vermont Governor extended the period that Plaintiff could not operate its business for many more weeks. *Id.* As a result of these Closure Orders, Plaintiff had to

close its office. Plaintiff's office did not reopen until June 1, 2020. *Id.*, ¶ 49; *see also* http://www.vermontperio.com/ (last accessed December 9, 2020) (indicating business was shut down until June 1, 2020). Plaintiff's business suffered a suspension of business operations as that term is defined in the Policy. *Id*., ¶ 45. Plaintiff's premises and premises in the surrounding areas were prohibited from allowing customers and patients full access to the premises as a result of these Closure Orders. *Id.*

As a result of these accidental and fortuitous events, Plaintiff pleads that it suffered various types of "accidental physical loss" or "accidental physical damage". *Id*., ¶¶ 45,47. First, Plaintiff alleges that it suffered accidental physical loss or accidental physical damage in that it lost the physical use of its premises. *Id*. In this regard, Plaintiff's patients and customers were prohibited from accessing their physical premises at all or only on an emergency basis. *Id*., ¶¶42. 45. Indeed, the COVID-19 pandemic rendered Plaintiff's premises unfit for the purposes for which they were used by customers and patients and thus untenantable. *Id*., ¶ 45. This suspension of operations was caused by fortuitous events and resulted in direct physical loss to the premises. *Id*., ¶¶45, 47.

Plaintiff alleges it has also sustained business income losses due to direct physical loss or physical damage at the premises of dependent properties, because as a Periodontal specialist, most of Plaintiff's monthly new patients are referred to its office from all the general dental offices and because those offices were shut down, Plaintiff's office lost all sources of referral. *Id.*, ¶ 47.

Despite the interruptions caused by the Closure Orders, and notwithstanding that Plaintiff paid significant premiums for precisely this type of coverage, Cincinnati denied Plaintiff's coverage claims. *Id.*, ¶¶ 3, 52, 68, 75, 82.

ARGUMENT

I. Legal Standard under Rule 12(b)(6)

A motion to dismiss for failure to state a claim under Rule 12(b)(6) is designed "merely to assess the legal feasibility of a complaint, not to assay the weight of evidence which might be offered in support thereof." *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158 (2d Cir. 2003) (internal citations omitted). In evaluating a motion to dismiss under Rule 12(b)(6), the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the Plaintiff. *See Walker v. Schult*, 717 F.3d 119, 124 (2d Cir. 2013). A complaint survives a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *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." *Id.*

II. Key Principles of Insurance Contract Interpretation

In Vermont, the rules of interpretation of insurance contracts are well established:

> Vermont law "requires that policy language be accorded its plain, ordinary meaning consistent with the reasonable expectation of the insured, and that terms that are ambiguous or unclear be construed broadly in favor of coverage." *Towns v. N. Sec. Ins.*, 2008 VT 98, ¶ 21, 184 Vt. 322, 964 A.2d 1150; *see also Shriner [v. Amica Mutual Ins. Co.]*, 2017 VT 23, ¶ 6,204 Vt. 321, 167 A.3d 326 ("We give effect to the terms in an insurance policy according to their plain, ordinary and popular meaning, and our interpretation of an insurance policy is guided by a review of the language from the perspective of what a reasonably prudent person applying for insurance would have understood it to mean." (quotation and alteration omitted)). "Words or phrases in an insurance policy are ambiguous if they are fairly susceptible to more than one reasonable interpretation." *Whitney v. Vt. Mut. Ins.*, 2015 VT 140, ¶ 16, 201 Vt. 29, 135 A.3d 272. Further, "[w]hen a provision is ambiguous or may reasonably be interpreted in more than one way, then we will construe it according to the reasonable expectations of the insured, based on the policy language." *Vt. Mut. Ins. v. Parsons Hill P'ship*, 2010 VT

44, ¶ 21, 188 Vt. 80, 1 A.3d 1016.

Rainforest Chocolate, LLC v. Sentinel Ins. Co., Ltd., 204 A.3d 1109, 111 (Vt. 2018). Furthermore, "[a]n insurance policy "is to be strictly construed against the insurer." *Id.* (quoting *Simpson v. State Mut. Life Assurance Co. of Am.*, 382 A.2d 198, 199 (1977)). "Because a policy is prepared by the insurer with little effective input from the insured, [Vermont courts] construe insurance policies in favor of the insured, in accordance with the insured's reasonable expectations for coverage based on the policy language." *Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co.*, 869 A.2d 82, 90 (Vt. 2004). In other words, ambiguity is construed against the insurer. *Brillman v. New England Guar. Ins. Co., Inc.*, 228 A.3d 636, 640-41 (Vt. 2020).

III. Under Vermont Law, Plaintiff Sufficiently Alleges Accidental Physical Loss or Accidental Physical Damage Triggering Coverage

Cincinnati argues, pursuant to the only circuit court opinion interpreting the terms "physical loss" or "physical damage" to property under Vermont law, that these terms require a physical alteration to covered property. Mot. at 9 (citing *City of Burlington v. Indemnity Ins. Co. of North America*, 332 F.3d 38 (2nd Cir. 2003)). Not only does *City of Burlington* ***not*** impose a physical alteration requirement for coverage, its interpretation of the term "physical loss" actually *supports* Plaintiff's position that its losses are covered because the COVID-19 pandemic transformed its property from an initial satisfactory state into an unsatisfactory state.

In *City of Burlington*, the Second Circuit interpreted the meaning of the term "direct physical loss or damage to the property insured" in the context of a property insurance policy. *Id.* at 41. After explaining that Vermont had not yet defined the term "direct physical loss," the Second Circuit cited a Fifth Circuit opinion for the proposition that the language "strongly implies that

there was an initial satisfactory state that was changed ... into an unsatisfactory state." *Id*. (citing *Trinity Industries, Inc. v. Ins. Co. of N. America*, 916 F.2d 267, 270–71 (5th Cir. 1990)).[1]

Both *City of Burlington* and *Trinity* distinguish defects in property, which do not constitute physical loss or physical damage to property, from accidents caused by those defects, for which the policies provide coverage. The limitations on coverage identified in those cases certainly do not apply here, where Plaintiff makes no allegation that its property suffered from any defect. Instead, as in *Trinity*, the policy provides coverage for Plaintiff's losses because, as a consequence of the COVID-19 pandemic, "there was an initial satisfactory state that was changed by some external event into an unsatisfactory state." *Trinity*, 916 F.2d at 270-71. Specifically, before civil authorities issued the Closure Orders, Plaintiff had property which could be operated under an assumption that the air was safe to breathe and surfaces safe to touch (enough to conduct ordinary business). Once the Closure Orders were entered, the premises were transformed into an "unsatisfactory state" where, as a matter of law, governmental authorities concluded that the air and surfaces in the premises were so unsafe that ordinary business on premises could no longer be conducted. The all-risk policy Cincinnati issued covers Plaintiff's losses for the period in which its premises were transformed into this "unsatisfactory state."

Cincinnati also mischaracterizes the holding in *Hamil v. Pawtucket Mut. Ins. Co.*, 892 A.2d 226 (Vt. 2005), to incorrectly argue that "physical loss" requires "tangible damage to property." Mot. at 9. *Hamil* did *not* involve the interpretation of the term "physical loss" in an insurance

[1] The Second Circuit noted that it was not aware of any contrary interpretation of the term "physical loss" and found it "likely" that the Vermont Supreme Court would interpret it the same way. *City of Burlington*, 332 F.3d at 44. Although the court certified unrelated questions to the Supreme Court of Vermont, it did not certify the question of whether "direct physical loss" is interpreted the same way it is in *Trinity Industries*. *Id.* at 44 n.3. While the court welcomed the Vermont Supreme Court's guidance on that question, *id.*, the Vermont Supreme Court denied certification.

policy; instead, it merely distinguished between economic loss and direct physical loss for purposes of applying the economic loss rule, a common law doctrine which prevents plaintiffs from recovering in tort for purely economic losses. *Hamil*, 892 A.2d at 228. The Vermont Supreme Court concluded that a homeowner's negligence claim against an independent adjuster was barred by the economic loss rule because it "sought recovery for losses stemming from the failure of his expectations regarding insurance coverage." *Id.* at 229. Here, by contrast, Plaintiff alleges that it lost the physical use of its office space and ability to provide services to its patients as a direct result of the presence of COVID-19 and the issuance of the Closure Orders. Thus, Plaintiff's property was unusable for "physical" endodontic procedures. This is accidental "physical loss" or "physical damage" triggering coverage under the policy.

IV. Many COVID-19 Decisions Outside of Vermont Support a Finding of Coverage

While Cincinnati touts some rulings around the country that have found no coverage for losses related to COVID-19, it ignores many contrary rulings that not only allowed similar claims to proceed, but also granted summary judgment in favor of insureds. Under Vermont law, out-of-state decisions favoring coverage support a conclusion that "physical loss" includes loss of functionality and, at the very least, that the undefined terms "physical loss" and "physical damage" in the policy may be ambiguous and must therefore be construed in favor of coverage. *Parsons Hill P'ship*, 1 A.3d at 1023. As discussed in greater detail below, a growing body of case law from across the United States concludes that the terms "physical loss" or "physical damage" are not limited to physical alterations to property. These courts conclude that the COVID-19 virus, though invisible to the naked eye, is analogous to things such as ammonia, E.coli and/or carbon monoxide, which can cause loss of functionality, use, or access to a property and thereby constitute a direct physical loss of property regardless of structural damage.

Recent orders granting coverage for COVID-19 business interruption claims are grounded in a diverse body of federal case law the provide a broader definition of "physical loss to property" than that advanced by Cincinnati. For example, in *Port Authority of New York & New Jersey v. Affiliated FM Insurance Co.*, 311 F.3d 226, 231 (3d Cir. 2002), the insured sought coverage for asbestos abatement in buildings that were in continuous use. The Third Circuit held that coverage for "physical loss or damage" would apply if "an actual release of asbestos fibers" contaminated a building "such that *its function is nearly eliminated or destroyed*, or the structure *is made useless or uninhabitable*, or if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such *loss of utility*." *Id.* at 236 (emphasis added). *Port Authority* thus concluded that coverage for "physical loss or damage" is not limited to structures rendered uninhabitable and instead extends to property whose "function is nearly eliminated or destroyed." *Id.*

Similarly, in *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, No. 2:12-cv-04418 (WHW)(CLW), 2014 WL 6675934 (D.N.J. Nov. 25, 2014), a property insurance policy provided coverage for "'direct physical loss of or damage to Covered Property caused by or resulting from a Covered Cause of Loss."' *Id.* at *1 (citation omitted). After ammonia was released into the insured's facility, it sought business interruption coverage for the time to get back into the building and resume its intended use. *Id.* at *2. In denying coverage, the insurance company claimed that there was no physical loss or damage because there was no "'physical change or alteration to insured property requiring its repair or replacement."' *Id.* (citation omitted). The insurer also argued that the insured's "inability to use the plant … as it might have hoped or expected" did not constitute direct physical loss or damage. *Id.* (citation omitted). Rejecting these arguments, the district court concluded that "property can be physically damaged, without undergoing structural alteration, when it loses its essential functionality." *Id.* at *5. Because the

facility was unusable for a period of time, there was direct physical loss of or damage to property, triggering coverage. *Id.* at *6. *Gregory Packaging* relied on *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.*, 968 A.2d 724 (N.J. Super. Ct. App. Div. 2009), a case in which the district court found coverage for a grocery store that lost power when an electrical grid and transmission lines "were physically incapable of performing their essential function of providing electricity," even though they were not necessarily damaged. *Id.* at 734. The court held that the term "physical damage" was "ambiguous" under the circumstances, accepting "the view that 'damage' includes loss of function or value." *Id.* at 734, 736.

Indeed, courts across the country conclude, in accordance with the foregoing cases, that loss of functionality constitutes "physical loss" and affords coverage under a property insurance policy.[2] Based on the principles espoused in these cases, courts in the COVID-19 business-

[2] *See, e.g., 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."); *Travco Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010) (noting that the majority of cases nationwide find that physical damage to property is not necessary where the property has been rendered unusable by a covered cause of loss); *Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 250 F. Supp. 2d 1357, 1364 (M.D. Fla. 2003), *aff'd*, 362 F.3d 1317 (11th Cir. 2004) (finding "'direct physical loss' includes more than losses that harm the structure of the covered property"); *Prudential Prop. & Cas. Ins. Co. v. Lilliard-Roberts*, No. CV-01-1362- ST, 2002 WL 31495830, at * 9 (D. Or. June 18, 2002) (citing case law for the proposition that "the inability to inhabit a building [is] a 'direct, physical loss' covered by insurance"); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (gasoline saturation under and around a church rendering occupancy unsafe constituted a "direct physical loss within the meaning of that phrase"); *Cook v. Allstate Ins. Co.*, Case No. 48D02-0611-PL-01156 *9-10 (Ind. Super. Nov. 30, 2007) ("even where *some utility remains*" in a business operation, a physical condition that renders a property unusable for its intended use constitutes physical loss or damage."); *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) ("[D]irect physical loss can exist without actual destruction of property or structural damage to property."); *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (coverage applied without physical alteration because the covered properties "no longer performed the function for which they were designed"); *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

interruption context have denied insurers' motions to dismiss and found that a direct physical loss may occur absent visible, tangible, physical alteration—including multiple orders entered *against Cincinnati*. *See* Order, *North State Deli LLC et al. v. Cincinnati Insurance Co. et al.*, No. 20-cvs-02569, *order issued* (N.C. Super. Ct., Durham Cty. Oct. 9, 2020) (***granting summary judgment for plaintiff*** based on finding that closure orders triggered coverage because "physical loss" can reasonably be read to mean "the inability to utilize or possess something" without any physical alteration) (attached as **Exhibit 3**); Order, *Francois Inc. v. Cincinnati Ins. Co.*, No. 20CV201416 (Ohio Cnty. Ct. Sept. 29, 2020) ("The complaint states claims which arguably fit the terms and conditions of the insurance policy[.]") (attached as **Exhibit 4)**; Order, *K.C. Hopps, Ltd. v. Cincinnati Ins. Co., Inc.*, No. 20-cv-00437-SRB, 2020 WL 6483108, at *1 (W.D. Mo. Aug. 12, 2020) (denying defendant's motion to dismiss for "the same reasons as those in [] *Studio 417*[.]").

For example, in *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), the court explained, "Defendant conflates 'loss' and 'damage' in support of its argument that the Policies require a tangible, physical alteration. However, the Court must give meaning to both terms." 2020 WL 4692385, at *5. The *Studio 417* court relied on this principled distinction between loss and damage to deny a motion to dismiss holding that plaintiffs had pleaded an inference that through the spread of COVID-19 and in addition to governmental closure orders, they had plausibly pleaded loss resulting from property damage. 2020 WL 4692385, at *6 ("Although Plaintiffs allege economic harm, that harm is tethered to their alleged physical loss caused by COVID-19 and the Closure Orders."). The court

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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"); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W.Va. 1998) (losses that rendered insured property "unusable or uninhabitable, may exist in the absence of structural damage to the insured property").

concluded plaintiffs had "adequately alleged a direct physical loss under the Policies" after noting that "[o]ther courts have similarly recognized that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose." *Id.*

Similarly, in New Jersey, a state court recently denied an insurer's motion to dismiss a business interruption claim asserted by a group of optometry practices arising out of New Jersey's closure orders. *See* **Exhibits 5 and 6,** Transcript of Oral Hearing and Order in *Optical Svcs. USA v. Franklin Mut. Ins. Co.*, No. 1:20-cv-080690-JHR-KMW (N.J. Super. Ct. Aug. 13, 2020). Describing the "pivotal issue" as "whether direct physical loss and direct physical damage encompasses closure for businesses that bears no specific – relationship to a specific condition on the property pursuant to an executive order," *id.* at 27:1-11, the court ruled "the plaintiff should be afforded the opportunity to develop their case and prove before this Court that the event of the Covid-19 closure may be a covered event under" the policy. *Id.* at 29:8-13. The court recognized the policyholder had stated a claim as to whether "physical damage occurs where a policyholder loses functionality of their property and by operation of civil authority such as the entry of an executive order results in a change to the property." *Id.* at 29:15-20.

Numerous federal courts have held that loss of functionality of property triggers coverage, even in the absence of physical or structural alteration. *See, e.g., Elegant Massage, LLC v. State Farm Mut. Auto, Ins. Co.*, No. 2:20-cv-00265-RAJ-LRL (E.D. Va. Dec. 9, 2020) (concluding insured in COVID-19 business interruption case "established a plausible claim for a fortuitous 'direct physical loss' under the policy"); *Independence Barbershop, LLC v. Twin City Fire Ins. Co.*, No. A-20-CV-00555-JRN, 2020 WL 6572428 (W.D. Tex. Nov. 4, 2020) ("The Court holds that Plaintiff has plead a plausible claim for relief pertaining to coverage"); *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd.*, No. 6:20-cv-01174-ACC-EJK, 2020 WL 5939172,

at *4 (M.D. Fla. Sept. 24, 2020) ("Plaintiff has stated a plausible claim at this juncture."); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637863, at *4 (W.D. Mo. Sept. 21, 2020) (finding policyholder dental practices had "adequately alleged a claim for a direct physical loss" and denying insurer's motion to dismiss business interruption claims arising out of COVID-19 closure orders). Many state courts have also reached this same conclusion. *See, e.g.*, Order, *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, No. A-20-816628-B (Nev. Dist. Ct. Nov. 30, 2020) ("The Court finds that JGB's Complaint sufficiently alleges losses stemming from the direct physical loss and/or damage to property from COVID-19 to trigger Starr's obligations under the property and TIME ELEMENT coverage provisions in the Policy, including coverage for general business interruption and Interruption by Civil or Military Authority") (attached as **Exhibit 7**); Order, *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, No. 20-CVS-02569 (Pa. Ct. Com. Pl., Philadelphia Cnty. Oct. 26, 2020) (finding loss of use constitutes "physical loss" under the policy) (attached as **Exhibit 8**). Order, *Ridley Park Fitness, LLC v. Phil. Indem. Ins. Co.*, No. 01093 (Pa. Dist. Ct. Aug. 31, 2020) (overruling defendant's demurrer and finding "plaintiff successfully pled to survive this stage of the proceedings") (attached as **Exhibit 9**).

Although it ignored these authorities in its initial Motion, Cincinnati will likely argue on reply that the foregoing orders represent a minority view and that, as a statistical matter, more courts have issued rulings rejecting claims for business interruption coverage resulting from closure orders. The Court should distinguish these orders because they do not apply Vermont law and were mostly decided in jurisdictions or under policies that impose a physical alteration requirement. Cincinnati admits that Vermont courts have never imposed such a requirement. Moreover, under Vermont law, courts "will not will not rewrite contract or construe contract to

alter rights of parties, but will enforce it according to its terms." *Phillips v. Phillips*, 664 A.2d 272, 274 (Vt. 1995).

Consequently, this Court should join the growing body of orders across the country denying motions to dismiss similar claims based on physical loss caused by the COVID-19 pandemic. The many state and federal courts endorsing Plaintiff's view that loss of functionality constitutes direct physical loss or damage while rejecting insurers' claims that physical alteration is required demonstrate that Plaintiff advances a reasonable construction of the policy that Cincinnati sold to Plaintiff. Finally, even if Cincinnati presents a reasonable interpretation to defeat coverage, where two reasonable interpretations exist, the policy must be interpreted to provide coverage. *Parsons Hill P'ship*, 1 A.3d at 1018.

V. Plaintiff's All-Risk Policy Covers Loss or Damage Caused by Virus When Cincinnati Failed to Insert a Virus Exclusion.

If a property insurer wishes to exclude the peril of virus from the scope of coverage, it has a ready means of doing so—namely, an express exclusion for losses caused by viruses. Here, Plaintiff's policy, which covers "all risks" of accidental physical loss or accidental physical damage unless expressly excluded, contains no virus exclusion. And when a policyholder like Plaintiff purchases an "all risks" policy that does not carve out the risk of virus-related losses, it has a reasonable expectation of insurance coverage for such losses if and when they materialize.

The policy utilizes, in part, policy forms and language published by the Insurance Services Office, Inc. ("ISO"), which publishes policy forms for use by the insurance industry—as evidenced by the ISO copyright designation at the bottom of some pages of the policy. Compl., ¶ 26. Even though, prior to the effective date of the policy, ISO published and made available for use a standard virus exclusion form, Cincinnati chose not to include the ISO standard virus exclusion form in the policy. *Id.*, ¶ 27. Insurers like Cincinnati have been well aware for some time that

viruses can cause physical loss or damage, as evidenced by the creation of a virus exclusion endorsement by the ISO, an organization that develops standard policy language for the insurance industry. *Id.*, ¶¶ 26-27. While the presence of an exclusion in a policy does not automatically preclude coverage, Cincinnati's decision to not include the virus exclusion undermines its attempt to rewrite its existing policies, post-loss, to deny claims involving viruses. If Cincinnati had wanted protective language exempting virus from coverage, it was the insurer's obligation to insert clear exclusionary language into the policy. *See, e.g.*, *Sperling v. Great Am. Indem. Co.*, 7 N.Y.2d 442, 447, 199 N.Y.S.2d 465, 469 (1960) ("[t]he court is not at liberty to inject a clause into the policy or to make a new contract for the protection of the insurance company . . . It is the insurer's responsibility to make such [an] intention clearly known").

Finally, the Court should reject Cincinnati's argument that the absence of a virus exclusion is irrelevant because, as shown above, Plaintiff has alleged physical loss of property. Moreover, because Plaintiff's policy admittedly does not include a virus exclusion, the Court should disregard the orders cited by Cincinnati that dismiss business interruption claims based on a virus exclusion.[3]

VI. Plaintiff Plausibly Alleges a Claim for Civil Authority Coverage

The Court should conclude that Plaintiff adequately states a claim for Civil Authority coverage. The elements for triggering civil authority coverage require that the insured suffer a loss of business income (1) caused by an action of a civil authority that (2) prohibits access to the described premises (3) due to a direct physical loss or damage to property other than at the

[3] *See* Mot at 20-21; *Real Hospitality, LLC d/b/a Ed's Burger Joint v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 6503405 (S.D. Miss. November 4, 2020); *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. CV 20-3198, 2020 WL 6545893 (E.D. Pa. Nov. 6, 2020); *Raymond H. Nahmad DDS PA v. Hartford Cas. Ins.* Co., No. 1:20-cv-22833-BB, slip op. (S.D. Fla. Nov. 2, 2020); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Companie*s, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020); *Diesel Barbershop, LLC. v. State Farm Lloyds*, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020).

described premises, and (4) the loss of or damage to the property other than at the described premises must be caused by or result from a "covered cause of loss." *Narricot Indus., Inc. v. Fireman's Fund Ins. Co.*, No. 01-cv-4679, 2002 WL 31247972, at *4 (E.D. Pa. Sept. 30, 2002).

The Complaint satisfies all of elements. Cincinnati does not argue that the Closure Orders (Compl., ¶39) are not actions of civil authority, so there is no dispute as to the first element. Second, the Closure Orders prohibited access to Plaintiff's business property by its patients, the source of Plaintiff's business income. *Id.* Third, Plaintiff alleges the Closure Orders were issued as a result of COVID-19 proliferation near and around its office. *Id.*, ¶¶ 45-46. Finally, much like how Plaintiff's losses should be covered under the policy, the losses by surrounding businesses amount to "accidental physical loss or accidental physical damage" under the policy. *Id.*

The *Studio 417* court reached the same conclusion, holding that the plaintiffs' allegations of actual loss were "applicable to other property" and that the civil authority orders included "property other than" the plaintiffs' premises. *Studio 417*, 2020 WL 4692385, at *7. Other courts also have found non-structural damage sufficient to trigger civil authority coverage. *See, e.g.*, *Sloan v. Phoenix of Hartford Ins. Co.*, 207 N.W.2d 434, 437 (Mich. Ct. App. 1973) (concluding that physical damage to the premises was not a prerequisite for the payment of benefits under the business-interruption policy).

Rulings cited by Cincinnati on pages 23-24 of its Motion are distinguishable because not only were they issued at the summary judgment stage—not on a motion to dismiss—they involve facts where the civil authority orders made it more difficult to access the property.[4] Unlike in *Syufy*

[4] See *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-cv-756, 1995 WL 129229 at *1–*2 (N.D. Cal. Mar. 21, 1995) (where plaintiff closed its theaters after riots, court found no civil authority coverage because the city curfew was a preemptive measure to prevent a future threat—looting and riots—that had not yet happened.); *Brothers, Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611, 614 (D.C. 1970) (business hours and alcohol sales were restricted pursuant to a curfew and

and *Brothers*, COVID-19 was not a "potential threat" at the time of the Closure Orders, but an active pandemic that had already spread throughout Plaintiff's community, state and the entire country. Compl., ¶¶ 34–43. Specific Closure Orders prohibited Plaintiff's patients from entering their office, which is apparent on the face of the Closure Orders. *See* Exs. 1 and 2. Plaintiff sufficiently alleges that access to its premises was prohibited by a governmental order and Cincinnati's Motion should be denied.

2. The Policy Does Not Require a Complete Prohibition of Access.

In *Studio 417*, the court found that the closure orders sufficiently triggered the subject policy's civil authority provision by mandating "'that all inside seating is prohibited in restaurants,' and that 'every person in the State of Missouri shall avoid eating or drinking at restaurants,' with limited exceptions for 'drive-thru, pickup, or delivery options.'" *Studio 417*, 2020 WL 4692385, at *7. Plaintiff alleges similar restrictions as it was ordered to suspend all non-essential (elective) dental care, the lifeblood of Plaintiff's business, and while Plaintiff did completely shut down its operations until June 1, 2020, it need not plead an absolute prohibition on business operation or entry to invoke the policy's civil authority coverage, especially considering the devastating and permanent impact on its business. Compl., ¶ 42, 47.

The circumstances in *Narricot* also were analogous, where local civil authorities prohibited operation of an industrial plant in the wake of Hurricane Floyd. *Narrciot,* 2002 WL 31247972, at

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municipal regulations during riots and no damage was alleged to adjacent property); *Schultz Furriers, Inc. v. Travelers Cas. Ins. Co. of Am*., 2015 WL 13547667 (N.J. Super. L. July 24, 2015) (traffic issues following Superstorm Sandy made it difficult, but not impossible, to access a store where there were alternate routes available); *Ski Shawnee, Inc. v. Commonwealth Ins. Co*., No. 3:09-CV-02391, 2010 WL 2696782 (M.D. Pa. July 6, 2010) (bridge collapse made access to ski resort more difficult but there was also another available and accessible route to the resort); *Goldstein v. Trumbull Ins. Co., 2*016 WL 1324197 (N.Y. Sup. Ct. April 5, 2016) (evacuation order did not specifically prohibit access to plaintiff's premises as required under the policy where mandatory evacuation pertained to residents in Zone A and plaintiffs were in Zone C).

*4. As in *Narricot*, the phrase "prohibits access" does not require that the civil authority completely forbid occupancy of the premises or even all business operation; once again, the policy terms are subject to reasonable interpretation based on their "plain and ordinary meaning." *Estate of Neff*, 271 F. App'x at 226. To "prohibit" does not just mean to "forbid"; it can also mean to "hinder," or "to cause delay, interruption, or difficulty in," or "to be an obstacle or impediment." Prohibit, https://www.dictionary.com/browse/prohibit; Hinder, https://www.dictionary.com/browse/hinder. The policy does not require a *complete* prohibition on access to Plaintiff's business property, which is why the policy's "Extra Expense" provision provides coverage to "avoid or minimize the suspension of business," and "suspension" is explicitly defined as "the *slowdown or* cessation of your business activities." Doc. 1-3 at 70 ¶19(a), and 139 ¶12(a)(emphasis added).

The Court should reject Cincinnati's contention that "the Orders permitted Plaintiff's employees and patients to continue to access the premises for essential dental care treatment." Mot. at 23. This ignores the language of the March 20th Order "[determining] it is necessary to suspend all non-essential adult elective surgery and medical and surgical procedures, including all dental procedures. *See* Ex. B. To the extent the Court believes the clause is susceptible to Cincinnati's proposed construction, then it is faced with two reasonable constructions establishing ambiguity. *Parsons Hill P'ship*, 1 A.3d at 1018. It is well established under Second Circuit law that such ambiguity must be resolved by construing the clause strictly against the drafter, Cincinnati. *See Brillman*, 228 A.3d at 640 ("Because a policy is prepared by the insurer with little effective input from the insured, we construe insurance policies in favor of the insured.").

VII. Plaintiff Plausibly Alleges a Claim for Dependent Property Coverage

Cincinnati argues Plaintiff's claim for dependent property coverage should be dismissed because Plaintiff does not show direct physical loss at a dependent property. Dependent property

is defined as "property operated by other whom [the insured] depend[s] on to ... deliver materials or services to [the insured] ... [a]ccept [the insured's] products or services ... [or] [a]ttract customers to [the insured's] business." Compl., ¶ 21; Ex. A, Doc. 1-3 at 89. Plaintiff, which operates a dental practice, alleges it sustained business income losses due to direct physical loss or physical damage at the premises of dependent properties." *Id*., ¶ 47. Further, "as a Periodontal specialist, most of Plaintiff's monthly new patients are referred to its office from all the general dental offices and because those offices were shut down, Plaintiff's office lost all sources of referral." *Id.* These allegations must be accepted as true for purposes of a motion to dismiss. Further, as shown above, Plaintiff's policy affords coverage for physical loss or damage to property. *See Studio 417, Inc.* 2020 WL 4692385, at *7–8 (holding insured plausibly alleged claim for dependent property coverage). Thus, this claim should not be dismissed.

VIII. Cincinnati's Cited Cases are Distinguishable

Cincinnati primarily relies upon the Eleventh Circuit's decision in *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 Fed. App'x 868 (11th Cir. 2020), for the proposition that that there is no direct physical loss or damage where an item or structure merely needs to be cleaned. Mot. at 13. In support of this flawed argument, Cincinnati also cites *Mastellone v. Lightening Rod Mut. Ins. Co.*, 884 N.E. 2d 1130 (Ohio App. Ct. Jan. 31, 2008). Neither the *Mama Jo's* nor the *Mastellone* opinion are relevant to the facts alleged here because both of those cases concerned nuisances which courts concluded, based upon a fully developed factual record, did not cause physical loss or physical damage to property.

In *Mama Jo's*, as dust and debris from nearby road construction settled on the surfaces in the plaintiff's restaurant, the plaintiff took additional cleaning measures and experienced a decline in customers. *Id*. at 871-72. The plaintiff made a claim to its insurer for loss of business income. *Id*.

On a motion for summary judgment based on a factual record—not on a 12(b)(6) motion to dismiss—the Southern District of Florida found that the dust did not make the restaurant "'uninhabitable' or unusable.'" *See Mama Jo's Inc. v. Sparta Ins. Co.*, No. 17-cv-23362, 2018 WL 3412974 (S.D. Fla. June 11, 2018). Further, the district court held that "[t]he fact that the restaurant needed to be cleaned more frequently does not mean Plaintiff suffered a direct physical loss or damage. . . " *Id.* The Eleventh Circuit affirmed the district court's summary judgment ruling and held that, "under Florida law, an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'" *Mama Joe's*, 823 Fed. App'x at 878-79.

Similarly, in *Mastellone*, the issue was whether mildew on the exterior of a building constituted "physical loss." *Mastellone*, 844 N.E. 2d at 1142-45. The policy in that case excluded coverage for losses caused by mold, and the court relied heavily on expert testimony that mildew (or mold) on the building's exterior is an aesthetic issue and did not present harm to the insured or its visitors such that the moldy siding would need to be replaced for health concerns. *Id*. at 1143-44. Considering the evidence that was presented at trial—not challenges to allegations made in a pre-discovery motion to dismiss—the court reversed the award of damages for exterior loss to the house. *Id*. at 1144-45.

Mama Jo's acknowledges that "a slowdown caused by closing parts of the [premises] . . . could be attributed to a "period of restoration" where there is "physical loss of or damage to property." *Id.* at 880. In that case, there was no physical loss of property because dust and debris from nearby construction did not cause an "actual change in insured property." *Id.* at 879. Similarly, in *Mastellone*, there was no "physical loss" because the exterior mold was a mere aesthetic issue. *Mastellone*, 844 N.E. 2d at 1142-45. By contrast, Plaintiff here experienced a change from a property free from the risk of COVID-19 in the air and on surfaces (a satisfactory

state) to one where the presence of the virus in all public spaces was legally presumed (an unsatisfactory state), thereby necessitating a shutdown of all nonessential businesses.

Mama Jo's and *Mastellone* also reviewed final judgments based on highly developed factual records. Here, by contrast, the Court is required to accept Plaintiff's factual allegations as true. Plaintiff alleges the COVID-19 virus is airborne and carries a highly transmittable disease, rendering Plaintiff's' premises unsafe, untenantable, and unfit for their intended use. Compl., ¶¶ 31, 33-38. And unlike the dust at issue in *Mama Jo's* or the mildew in *Mastellone* that had no other impact on the plaintiffs' premises, Plaintiff alleges the COVID-19 virus rendered Plaintiff's property unusable, untenantable and uninhabitable. *Id.*, ¶¶ 37-38.[5] The COVID-19 virus and pandemic present a risk of death, as evidenced by the deaths of hundreds of thousands of citizens, including residents in the Vermont county where Plaintiff's property is located. *Id.*, ¶¶ 30-31. Cincinnati admits in its Motion that COVID-19 "hurts people." Mot. at 1-2. The dust in *Mama Jo's* and mildew in *Mastellone* did not kill people. Thus, either Cincinnati is taking the position that these lives are merely "aesthetic" to make these decisions analogous, or the facts are non-comparable. Cincinnati's argument utterly fails to recognize the unique and life-threatening circumstances posed by COVID-19.

In addition, the fact that dust or mildew can be wiped away and COVID-19 allegedly can be wiped away does not make this case analogous to *Mama Jo's* and *Mastellone*. In reality, because the COVID-19 virus exists both on surfaces and in the air, it cannot simply be cleaned.[6] As

[5] For similar reasons, *Universal Image Prods., Inc. v. Chubb Corp.*, 703 F. Supp. 705 (E.D. Mich. 2010), cited by Defendant on page 9 of its Motion, is also distinguishable. *Id.* at 710 (granting summary judgment in favor of the defendant and finding that the plaintiff did not show a direct physical loss where its expert opined that the occupants of the building did not need to vacate it while a ventilation system was being cleaned).

[6] The epidemiology of the spread of COVID-19 is evolving, and most recent analyses show that in fact it is not spread by surface contact, but by airborne aerosol particles that remain in

a pandemic, COVID-19 presents a novel and ongoing condition that is not wiped away like mildew from dirty siding or dust on a counter. These courts did not, as Cincinnati suggests, hold that any time a property could be cleaned it could not also be physically damaged. Thus, neither *Mama Jo's* nor *Mastellone* present the same issue as this case: a physical substance that can be present throughout the insured's property without people even knowing it, and that can cause physical illness and death to those present.

Cincinnati cites other recent decisions, outside Vermont, involving COVID-19 insurance coverage to support its argument that physical loss requires tangible or structural alteration to the property. Mot. at 11. These cases are distinguishable and deal with different policies than Plaintiff's policy. Cincinnati's citations to *10E, LLC v. Travelers Indem. Co. of Connecticut*, 2:20-CV-004418-SVW-AS, 2020 WL 5095587 (C.D. Cal. Aug. 28, 2020), *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020), and *Gavrilides Mgmt Co. v. Michigan Ins*. Co., No. 20-258-CB-C30 (Mich. Cir. Ct. July 1, 2020),[7] are all unavailing. The plaintiffs in these cases alleged the physical loss or damage occurred due solely to their inability to access their premises because of civil authority orders.[8] Unlike the plaintiff here, the plaintiffs in those cases did not allege the presence of the virus on their property.

Other cases Cincinnati cites do not provide that civil authority coverage requires direct physical damage. Mot. at 22. See *United Air Lines v. Ins. Co. of the State of Pa.*, 439 F.3d 128 (2d

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suspension, like cigarette smoke. *See* Prather et al., Airborne transmission of SAR-CoV-2, Science, Oct. 5, 2020, (https://science.sciencemag.org/content/early/2020/10/02/science.abf0521 (last visited Dec. 10, 2020). If this is a distinction, Plaintiff requests leave to provide further explanation of this issue, as it is relevant to explaining how the virus can remain present in Plaintiff's premises and cannot, as Cincinnati contends, be "wiped away."

[7] *See* Exhibit V to Defendant's Motion.

[8] The Court in *10E* relied on specific California law that the inability to use property alone is not considered "direct physical loss of or damage to property." *10E*, 2020 WL 5095587. at *4. No Vermont court has adopted a similar limitation.

Cir. 2006) (involving a terrorism coverage issue in which the policy required the loss be "caused by damage to or destruction of Insured Locations."); *Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, 440 F. Supp. 3d 520 (D.S.C. 2020) (noting that policy required the loss must be due to "damage or destruction of property"). Additionally, these cases primarily address causation issues, rather than whether there was civil authority coverage.

Cincinnati is not aided by its citations to either *Rose's 1, LLC. v. Erie Ins. Exchange*, No. 2020 CA 002424 B, 2020 WL 4589206 (D.C. Super. Aug. 6, 2020), decided on summary judgment, or *The Inns by the Sea v. California Mut. Ins. Co.*, Case No. 20-CV-001274 (Cal. Super. Ct., Monterey Cty. Aug. 6, 2020). In both cases there were no allegations or evidence regarding the presence of COVID-19 at the premises. Here, Plaintiff alleges COVID-19 was physically present at its premises, and Plaintiff's property sustained physical loss or damage due to the presence of COVID-19. Compl., ¶¶45, 47, 49.

MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co., 187 Cal.App.4th 766, 779 (2010) further supports Plaintiff's argument: physical loss is "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." The court held that "for there to be a 'loss' within the meaning of the policy, some *external force* must have acted upon the insured property[.]" *Id.* at 780 (emphasis in original). Here, the external force is the COVID-19 virus. There can be no dispute that the COVID-19 pandemic is an accidental and fortuitous event.[9]

[9] Cincinnati's other case citations are likewise distinguishable as the plaintiffs in these cases did not allege the presence of an intervening physical force, such as a virus, that caused loss or damage to the covered properties. *See Phila. Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 287-88 (S.D.N.Y. 2005) (plaintiff failed to allege loss due to business interruption after September 11 attacks); *City of Burlington v. Indem. Ins. Co. of N. Am.*, 332 F.3d 38, 44 (2d Cir. 2003) (finding welds that failed, as opposed to those that did not fail, were covered under the "direct physical loss or damage" provision and certifying question as to whether exclusion of latent defects applied);

An insured business should not be required to remain open such that its customers and employees first must get sick and possibly die before insurance benefits are due and owing. This would implicate a public policy concern and lead to an absurd result. *See Grievance of Gorruso*, 549 A.2d 631, 634 (Vt. 1988) (citing *Town of Royalton v. Royalton & Woodstock Turnpike Co.*, 14 Vt. 311, 322 (1842)) ("In construing a contract, courts must endeavor to avoid what is unequal, unreasonable, and improbable, if this can be done consistently with the words of the contract"). Accepting Cincinnati's argument would subvert the purpose of business interruption insurance. *See Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, No. CV 05–08444 DDP (PLAx), 2013 WL 3946103, at *12 (C.D. Cal. July 31, 2013) (noting the purpose of business interruption insurance is to "indemnify the insured against losses arising from [its] inability to continue the normal *operations and functions* of [its] business") (emphasis added).

CONCLUSION

For all the reasons set forth above, Plaintiff respectfully requests that the Court deny Cincinnati's Motion to Dismiss in its entirety.

Dated: December 14, 2020

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AFLAC Inc. v. Chubb & Sons, Inc., 581 S.E. 2d. 2d 317, 319 (Ga. App. Ct. 2003) (costs associated with Y2K-related software upgrades not a direct physical loss). Cincinnati cites *Social Life Magazine, Inc. v. Sentinel Ins. Co., Inc.*, 1:20-cv-03311-VEC (S.D.N.Y. May 20, 2020). See Mot. at 12. Yet, Cincinnati attaches as Exhibit S, a transcript from a teleconference order to show cause in that case, 1:20-cv-03311-VEC (S.D.N.Y. May 14, 2020), during which there was a discussion whether New York law requires that there be damage to property in order to trigger business interruption insurance. This citation is wholly inapposite.

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INDEX OF EXHIBITS

PLAINTIFF ASSOCIATES IN PERIODONTICS, PLC'S

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT THE CINCINNATI INSURANCE COMPANY'S MOTION TO DISMISS

Civil Action No. 2:20-cv-00171-wks

EX. #	DOCUMENT
1	Executive Order 01- 20, Declaration of State of Emergency in Response to COVID-19 and National Guard Call-Out
2	Addendum 3 to Executive Order 01-20, "Suspension of all Non-Essential Adult Elective Surgery and Medical and Surgical Procedures,"
3	Order, *North State Deli LLC et al. v. Cincinnati Insurance Co. et al.*, No. 20-cvs-02569, *order issued* (N.C. Super. Ct., Durham Cty. Oct. 9, 2020)
4	Order, *Francois Inc. v. Cincinnati Ins. Co.*, No. 20CV201416 (Ohio Cnty. Ct. Sept. 29, 2020)
5	Transcript of Oral Hearing in *Optical Svcs. USA v. Franklin Mut. Ins. Co.*, No. 1:20-cv-080690-JHR-KMW (N.J. Super. Ct. Aug. 13, 2020).
6	Order, *Optical Servs. USA v. Franklin Mut. Ins. Co.*, *No*. BER-L-3681-20 (N.J. Super. Ct. Aug. 13, 2020)
7	Order, *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co*., No. A-20-816628-B (Nev. Dist. Ct. Nov. 30, 2020)
8	Order, *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, No. 20-CVS-02569 (Pa. Ct. Com. Pl., Philadelphia Cnty. Oct. 26, 2020)
9	Order, *Ridley Park Fitness, LLC v. Phil. Indem. Ins. Co*., No. 01093 (Pa. Dist. Ct. Aug. 31, 2020)

Exhibit “1”

STATE OF VERMONT

EXECUTIVE DEPARTMENT

EXECUTIVE ORDER NO. 01-20

Declaration of State of Emergency in Response to COVID-19 and National Guard Call-Out

WHEREAS, since December 2019, Vermont has been working in close collaboration with the national Centers for Disease Control and Prevention (CDC) and with the United States Health and Human Services Agency to monitor and plan for the potential for an outbreak of respiratory illness due to a novel coronavirus (a disease now known as COVID-19), in the United States; and

WHEREAS, this rapidly evolving global situation required the Governor to direct the Vermont Department of Health (VDH) to activate the Health Operations Center in February 2020 when VDH began to monitor and later, test Vermonters who may have been exposed to COVID-19; and

WHEREAS, in March 2020, the Governor directed Vermont Emergency Management (VEM) to assemble an interagency taskforce, and later to activate the Vermont State Emergency Operations Center (SEOC), in accordance with the State Emergency Management Plan, to organize prevention, response, and mitigation efforts and share information with local and state officials; and

WHEREAS, on March 7, 2020 and March 11, 2020, VDH detected the first two cases of COVID-19 in Vermont; and

WHEREAS, on March 11, 2020 the World Health Organization made the assessment that COVID-19 can be characterized as a pandemic; and

WHEREAS, we now know that while most individuals affected by COVID-19 will experience mild flu-like symptoms, some individuals, especially those who are elderly or already have severe underlying chronic health conditions will have more serious symptoms and require hospitalization; and

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been detected in the region and this transmission is expected to continue; and

WHEREAS, if no mitigation steps are taken, COVID-19 would likely spread in Vermont at a rate similar to the rate of spread in other states and countries, and the number of persons requiring medical care could exceed locally available resources; and

WHEREAS, it is critical we take steps to control outbreaks of COVID-19, particularly among those who are elderly or already have underlying chronic health conditions, to minimize the risk

to the public, maintain the health and safety of Vermonters, and limit the spread of infection in our communities and within our healthcare facilities; and

WHEREAS, Vermonters must come together as we have before in a crisis, to do our part to protect the very ill and elderly by preventing and slowing the spread of this virus and ensure those who experience the most severe symptoms have access to the care they need.

NOW THEREFORE, I, Philip B. Scott, by virtue of the authority vested in me as Governor of Vermont and Commander-in-Chief, Vermont National Guard, by the Constitution of the State of Vermont, Chapter II, Section 20 and under 20 V.S.A. §§ 8, 9 and 11 and Chapter 29, hereby declare a State of Emergency for the State of Vermont.

IT IS HEREBY ORDERED:

1. All State licensed nursing homes (as defined in 33 V.S.A. § 7102(7)), the Vermont Psychiatric Care Hospital (VPCH) and Middlesex Therapeutic Community Residence shall prohibit visitor access to reduce facility-based transmission. This prohibition shall not apply to medically necessary personnel or visitors for residents receiving end of life care. Any visitors will be screened in accordance with recommendations by the Commissioner of the Vermont Department of Health.

2. All State licensed assisted living residences (as defined in 33 V.S.A. § 7102(1)), Level III residential care homes (33 V.S.A. 7102(10)(A)), and intermediate care facilities for individuals with intellectual disability (ICF/ID) (42 C.F.R. § 440.150), shall prohibit visitor access to reduce facility-based transmission. This prohibition shall not apply to two designated visitors, medically necessary personnel or visitors for residents receiving end of life care. Any visitors will be screened in accordance with recommendations by the Commissioner of the Vermont Department of Health.

3. All State therapeutic community residences (as defined in 33 V.S.A. § 7102 (11)), and Level IV residential care homes (33 V.S.A. § 7102 (10)(B)), shall restrict visitor access as necessary to reduce facility-based transmission. This restriction shall not apply to medically necessary personnel or visitors for residents receiving end of life care. Any visitors will be screened in accordance with recommendations by the Commissioner of the Vermont Department of Health.

4. All hospitals (as defined in 18 V.S.A. § 1902), except VPCH, shall develop visitation policies and procedures that conform to a minimum standard which shall be developed by the Agency of Human Services to restrict visitor access to reduce facility-based transmission.

5. In order to limit exposure and protect state employees, all non-essential out-of-state travel by State employees for State business is hereby suspended. The Secretary of Administration shall, in consultation with the Commissioner of Health, develop guidance

for employees returning from out-of-state travel. The Secretary of Administration shall also, in consultation with the Commissioner of Human Resources, encourage and facilitate telework among those State employees with the capacity to work remotely.

6. To help preserve and maintain public health, I hereby prohibit all large non-essential mass gatherings of more than 250 people in a single room or single space at the same time for social and recreational activities, such as an auditorium, stadium, arena, large conference room, meeting hall, cafeteria, theater, or any other confined indoor or confined outdoor space.

   A "non-essential mass gathering" does not include normal operations at airports, bus or railway stations where 250 or more persons may be in transit. It also does not include typical office environments or retail or grocery stores where large numbers of people are present, but where it is unusual for them to be within arm's length of one another. Questions from commercial recreational entities, event sponsors and others shall be directed to the SEOC which shall provide appropriate guidance.

7. In preparing for and responding to COVID-19, all agencies of the state shall use and employ state personnel, equipment, and facilities or perform any and all activities consistent with the direction of VDH and the Department of Public Safety (DPS)/VEM in accordance with the State Emergency Management Plan.

8. I hereby authorize and direct the Adjutant General to call into Active State Service, for the purpose of assisting and supporting the State of Vermont, in its efforts to respond to the conditions created or caused by COVID-19 in order to alleviate hardship and suffering of citizens and communities and in order to preserve the lives and property of the State, any and all units of the National Guard of the State of Vermont as he, in consultation with DPS/VEM, may deem appropriate to carry out the purposes of this Order.

9. The Department of Financial Regulation shall, in consultation with the Departments of Labor, Tax, and Finance and Management, collect data on the state’s demographics and analyze the potential and actual impacts of a COVID-19 outbreak on the state’s population, the labor force and the economy, including state revenues.

10. In order to limit the spread of COVID-19 through community contacts, DPS shall, in consultation with VDH, coordinate the allocation of statewide investigatory resources to enhance VDH capacity for contact tracing.

11. The Commissioner of Motor Vehicles is hereby directed to develop a plan to extend DMV licensing and registration renewal deadlines and other statutory and regulatory DMV requirements to mitigate contagion risk by reducing customer traffic throughout all DMV district offices.

12. While many are concerned about the welfare of their children in the pre-K-through-12 schools, suspension of school at this time is not recommended by the Commissioner of Health as of the date of this Order. The Secretary of Education is hereby directed to develop a contingency plan for school closings necessitated by COVID-19 for such time as this may be recommended by VDH and VEM.

13. I hereby direct that no school superintendent or school board shall cause a student or parent to be penalized for student absences that are the result of following medical advice or the guidance of VDH or arising from the concerns of parents or guardians relating to COVID-19.

14. The Commissioner of Health shall oversee the investigation, coordination and mitigation efforts for the duration of this Order. All local boards of health shall consult with and abide by the recommendations of the Commissioner of Health prior to taking any action regarding isolation or quarantine of an individual(s). Town health officers shall work with and assist the Department as directed by the Commissioner of Health.

15. Relevant rules governing medical services shall be suspended to the extent necessary to permit such personnel to provide paramedicine, transportation to destinations including hospitals and places other than hospitals or health care facilities, telemedicine to facilitate treatment of patients in place, and such other services as may be approved by the Commissioner of Health.

16. Relevant rules governing nursing services shall be suspended to the extent necessary to permit such personnel to provide medical care, including but not limited to administration of medicine, prescribing of medication, telemedicine to facilitate treatment of patients in place, and such other services as may be approved by the Secretary of State in consultation with the Commissioner of Health.

17. The Agency of Commerce and Community Development shall work with U.S. Small Business Administration (SBA) and Vermont Small Business Development Center (SBDC) to survey businesses to determine the economic impact of losses for the disaster period as compared to the same period of the preceding year for the purpose of applying to the U.S. Small Business Administration (SBA) for SBA Economic Injury Disaster Loans.

18. To ensure that workers affected by COVID-19 have access to wage replacement programs, I hereby direct the Department of Labor to extend unemployment insurance to those Vermonters following the instructions of their healthcare providers to self – isolate or quarantine; to remove the work search requirement for those workers affected by temporary closure of a business; and to temporarily suspend any mechanisms that would delay the release of funds to claimants. Further, I hereby direct the Commissioner of Labor to work with the Legislature on other opportunities to extend benefits to workers affected by COVID – 19.

19. Pursuant to the powers granted to the Governor in 20 V.S.A. §§ 8, 9 and 11 and other provisions of law, I shall from time to time issue recommendations, directives and orders as circumstances may require.

This Executive Order shall take effect upon signing and shall continue in full force and effect until April 15, 2020, at which time the Governor, in consultation with VDH and DPS/VEM, shall assess the emergency and determine whether to amend or extend this Order.

Philip B. Scott
Governor

By the Governor:

Brittney L. Wilson
Secretary of Civil and Military Affairs

Executive Order No. 01-20

Exhibit “2”

STATE OF VERMONT

EXECUTIVE DEPARTMENT

ADDENDUM 3 TO EXECUTIVE ORDER 01-20

Suspension of all Non-Essential Adult Elective Surgery and Medical and Surgical Procedures

WHEREAS, on Friday, March 13, 2020, the Governor issued Executive Order 01-20,Declaration of State of Emergency in Response to COVID-19 and National Guard Call-Out ("Executive Order"), declaring a state of emergency for the State of Vermont in response to COVID-19; and

WHEREAS, since that time, additional cases of COVID-19 have been tested as presumptively positive in the State; and

WHEREAS, the Executive Order expressly recognized the critical need to take steps to control outbreaks of COVID-19, particularly among those who are elderly or already have underlying chronic health conditions, to minimize the risk to the public, maintain the health and safety of Vermonters, and limit the spread of infection in our communities and within our healthcare facilities; and

WHEREAS, in consultation with the Commissioner of the Department of Health, the Governor has directed a number of mitigation strategies for the State in order to protect individuals at risk for severe illness; and

WHEREAS, to aggressively address COVID-19, conservation of critical resources such as ventilators and Personal Protective Equipment (PPE) is essential, as well as limiting exposure of patients and staff to COVID-19; and

WHEREAS, after receiving updated recommendations from the U.S. Surgeon General and the U.S. College of Surgeons, the Centers for Medicare & Medicaid, and in consultation with the Commissioner of the Department of Health and the Vermont Association of Hospitals and Health Systems, the Governor has determined it is necessary to suspend all non-essential adult elective surgery and medical and surgical procedures, including all dental procedures; and

WHEREAS, the suspension of all non-essential adult elective surgery and medical and surgical procedures, including all dental procedures will be critical in helping to protect patients, reduce exposure to healthcare providers and preserve critical personal protective equipment (PPE), which is in critical demand around the country; and

WHEREAS, it is important for all Vermonters to recognize additional reductions or prohibitions may be implemented as needed to the extent there is a growing trend of confirmed COVID-19 in Vermont.

NOW THEREFORE, I, Philip B. Scott, by virtue of the authority vested in me as Governor of Vermont by the Constitution of the State of Vermont, the emergency powers set forth in 20 V.S.A. §§ 8, 9 and 11 and other laws, hereby order all clinicians in Vermont to expedite postponement of

all non-essential adult elective surgery and medical and surgical procedures, including all dental procedures in the safest but most expedient way possible.

At all times, the supply of personal protective equipment (PPE), hospital and intensive care unit beds, and ventilators should be considered, even in areas that are not currently dealing with COVID-19 infections. While case-by-case evaluations will be made by clinicians, the following factors are to be considered as to whether planned surgery should proceed:

- Current and projected COVID-19 cases in the facility and region
- Supply of PPE to the facilities in the system
- Staffing availability
- Bed availability, especially intensive care unit (ICU) beds
- Ventilator availability
- Health and age of the patient, especially given the risks of concurrent COVID-19 infection during recovery
- Urgency of the procedure

This Addendum to the Executive Order shall take effect upon signing and shall continue in full force and effect until April 15, 2020, at which time the Governor, in consultation with the Vermont Department of Health and Agency of Human Services, the Department of Public Safety/Division of Emergency Management shall assess the emergency and determine whether to amend or extend this Order as it relates to the suspension of adult elective surgery and medical and surgical procedures, including all dental procedures.

By the Governor:

Philip B. Scott
Governor

Brittney L. Wilson
Secretary of Civil and Military Affairs

Executive Order No. 01-20 – Addendum 3

March 20, 2020

Exhibit “3”

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 20-CVS-02569

2020 OCT -9 P 3:14

..., C.S.C.

NORTH STATE DELI, LLC d/b/a LUCKY'S DELICATESSEN, MOTHERS & SONS, LLC d/b/a MOTHERS & SONS TRATTORIA, MATEO TAPAS, L.L.C. d/b/a MATEO BAR DE TAPAS, SAINT JAMES SHELLFISH LLC d/b/a SAINT JAMES SEAFOOD, CALAMARI ENTERPRISES, INC. d/b/a PARIZADE, BIN 54, LLC d/b/a BIN 54, ARYA, INC. d/b/a CITY KITCHEN and VILLAGE BURGER, GRASSHOPPER LLC d/b/a NASHER CAFE, VERDE CAFE INCORPORATED d/b/a LOCAL 22, FLOGA, INC. d/b/a KIPOS GREEK TAVERNA, KUZINA, LLC d/b/a GOLDEN FLEECE, VIN ROUGE, INC. d/b/a VIN ROUGE, KIPOS ROSE GARDEN CLUB LLC d/b/a ROSEWATER, and GIRA SOLE, INC. d/b/a FARM TABLE and GATEHOUSE TAVERN,

Plaintiffs,

v.

THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; MORRIS INSURANCE AGENCY INC.; and DOES 1 THROUGH 20, INCLUSIVE,

Defendants.

ORDER GRANTING PLAINTIFFS' RULE 56 MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER was heard on September 23, 2020, before Senior Resident Superior Court Judge Orlando F. Hudson, Jr., with Gagan Gupta appearing for the plaintiff-restaurants (including Vin Rouge, Parizade, Mateo Bar de Tapas, Rosewater, Mothers & Sons Trattoria, Saint James Seafood, Lucky's Delicatessen, Bin 54, City Kitchen, Village Burger, Nasher Cafe,

Local 22, Kipos Greek Taverna, Golden Fleece, Farm Table, and Gatehouse Tavern[1]), and Brian Reid and Drew Vanore appearing for defendant-insurers The Cincinnati Insurance Company and The Cincinnati Casualty Company (collectively, "Cincinnati"). Plaintiffs brought a Motion for Partial Summary Judgment ("Motion") with respect to Count I of their Second Amended Complaint, seeking a declaratory judgment that Cincinnati must replace Plaintiffs' lost business income and extra expenses under insurance policy contracts entered into between the parties.[2]

THE COURT, having considered the pleadings, the Motion, the briefs filed in support of and in opposition to the Motion, the oral arguments of counsel at the hearing on the Motion, the declaration of Gagan Gupta, the affidavit testimony of the Plaintiffs and their supporting affidavits of Giorgios Nikolaos Bakatsias, Matthew Raymond Kelly, and Djafar "Jay" Mehdian, the applicable law, and other appropriate matters of record, GRANTS Plaintiffs' Motion.

Upon a review of the entire record, the Court holds there are no genuine issues as to any material fact and Plaintiffs are entitled to partial summary judgment against Cincinnati as a matter of law on the issue of liability under Count I of the Second Amended Complaint. To that end, the Court sets forth its primary reasoning herein.

---

[1] The parent companies of these restaurants, and the entities bringing this lawsuit, are Vin Rouge, Inc. d/b/a Vin Rouge; Calamari Enterprises, Inc. d/b/a Parizade; Mateo Tapas, L.L.C. d/b/a Mateo Bar de Tapas; Kipos Rose Garden Club LLC d/b/a Rosewater; Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria; Saint James Shellfish LLC d/b/a Saint James Seafood; North State Deli, LLC d/b/a Lucky's Delicatessen; Bin 54, LLC d/b/a Bin 54; Arya, Inc. d/b/a City Kitchen and Village Burger; Grasshopper LLC d/b/a Nasher Cafe; Verde Cafe Incorporated d/b/a Local 22; Floga, Inc. d/b/a Kipos Greek Taverna; Kuzina, LLC d/b/a Golden Fleece; and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern (collectively, "Plaintiffs").

[2] The operative pleading to which this Order applies is the Second Amended Complaint.

I. BACKGROUND[3]

Plaintiffs, which operate sixteen restaurants in the North Carolina counties of Durham, Wake, Orange, Chatham, and Buncombe, purchased "all risk" property insurance policies ("Policies") from Cincinnati to cover their restaurants. All risk policies cover all risks of loss unless those risks are expressly excluded or limited. Plaintiffs' Policies were effective during all relevant time periods and contain the same relevant language.

The Policies include a Building and Personal Property Coverage Form and a Business Income (and Extra Expense) Coverage Form. These forms provide that Cincinnati will pay for business interruption coverage as follows:

> (1) **Business Income**
> We will pay for the actual loss of "Business Income" and "Rental Value" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss.
>
> . . .
>
> (2) **Extra Expense**
> We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain . . . during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.

Under the Policies, "Covered Cause of Loss" means "direct 'loss' unless the 'loss' is excluded or limited" therein. The Policies define "loss" to mean "accidental physical loss or accidental physical damage." Therefore, absent an exclusion or limitation, the Policies provide

[3] The Court has not resolved any disputed issues of fact, as findings of fact are unnecessary for adjudicating Plaintiffs' Motion for Partial Summary Judgment. Rather, the Court offers an overview of key undisputed facts underlying the ultimate disposition.

coverage under these provisions where the policyholder shows (i) direct "accidental physical loss" to property, ***or*** (ii) direct "accidental physical damage" to property. The Policies do not define "direct," "accidental," "physical loss," or "physical damage."

Plaintiffs seek coverage under the Policies for losses arising out of the response to the SARS-CoV-2 ("COVID-19") pandemic. Beginning in March 2020, governmental authorities across North Carolina entered civil authority orders mandating the suspension of business operations at various establishments, including Plaintiffs' restaurants (hereafter, "Government Orders"). The orders also prohibited, via stay-at-home mandates and travel restrictions, all non-essential movement by all residents.

On August 3, 2020, Plaintiffs filed their Motion for Partial Summary Judgment ("Motion"), seeking a declaratory judgment against Cincinnati under Count I that the Government Orders constitute covered perils under the Policies that caused "direct 'loss' to property" at the described premises, and that therefore Cincinnati must pay for the resulting lost Business Income and Extra Expenses as defined by the Policies. Plaintiffs' primary contention is that the Government Orders forced Plaintiffs to lose the physical use of and access to their restaurant property and premises, which constitutes a non-excluded "direct physical loss."

II. STANDARDS OF INTERPRETATION FOR INSURANCE POLICIES

The meaning of an insurance policy is a question of law, *Accardi v. Hartford Underwriters Ins. Co.*, 373 N.C. 292, 295, 838 S.E.2d 454, 456 (2020), and it is black-letter law that an undefined policy term is to be given its "ordinary meaning"; in doing so, North Carolina courts have determined that it is "appropriate to consult a standard dictionary." *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 94-95, 518 S.E.2d 814, 817 (N.C. Ct. App. 1999). If the term is nevertheless "reasonably susceptible to more than one interpretation," then it is ambiguous and

only then is the contract subject to judicial construction. *Id.*; *see also Joyner v. Nationwide Ins.*, 46 N.C. App. 807, 809, 266 S.E.2d 30, 31 (1980) ("[I]n deciding whether the language is plain or ambiguous, the test is what a reasonable person in the position of the insured would have understood it to mean, and not what the insurer intended."). "[A]ny ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary." *Accardi*, 373 N.C. at 295, 838 S.E.2d at 456.

III. DISCUSSION

As an initial matter, the Policies do not define the terms "direct," "physical loss," or "physical damage."[4] The Court must therefore turn first to the ordinary meaning of those terms. Merriam-Webster defines "direct," when used as an adjective, as "characterized by close logical, causal, or consequential relationship," as "stemming immediately from a source," or as "proceeding from one point to another in time or space without deviation or interruption." *Direct*, Merriam-Webster (Online ed. 2020). Merriam-Webster defines "physical" as relating to "material things" that are "perceptible especially through the senses." *Physical*, Merriam-Webster (Online ed. 2020). The term is also defined in a way that is tied to the body: "of or relating to the body." *Id.* Webster's Third New International Dictionary defines physical as "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary." *Physical*, Webster's Third New International Dictionary (2020). The definition from Black's Law Dictionary comports: "Of, relating to, or involving material things; pertaining to real, tangible objects." *Physical*, Black's Law Dictionary (11th ed. 2019). Finally, "loss" is defined as "the act of losing possession," "the harm of privation resulting from loss or separation," or the "failure to gain, win, obtain, or utilize." *Loss*, Merriam-Webster (Online ed.

[4] Cincinnati does not contest whether Plaintiffs' losses were "accidental."

2020). Another dictionary defines the term as "the state of being deprived of or of being without something that one has had." *Loss*, Random House Unabridged Dictionary (Online ed. 2020).

Applying these definitions reveals that the ordinary meaning of the phrase "direct physical loss" includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions. In the context of the Policies, therefore, "direct physical loss" describes the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders. Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a "direct physical loss," and the Policies afford coverage.

The parties sharply dispute the meaning of the phrase "direct physical loss." Cincinnati argues that "the policies do not provide coverage for pure economic harm in the absence of direct physical loss to property, which requires some form of physical alteration to property." Even if Cincinnati's proffered ordinary meaning is reasonable, the ordinary meaning set forth above is also reasonable, rendering the Policies at least ambiguous. Accordingly, in giving the ambiguous terms the reasonable definition which favors coverage, the phrase "direct physical loss" includes the loss of use or access to covered property even where that property has not been structurally altered. *See Accardi*, 373 N.C. at 295, 838 S.E.2d at 456 ("[A]ny ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary.").

Moreover, it is well-accepted that "[t]he various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect." *See C. D. Spangler Constr. Co. v. Industrial Crankshaft & Engineering Co.*, 326 N.C. 133, 142, 388 S.E.2d 557, 563 (1990). Here, the Policies provide coverage for "accidental physical loss ***or*** accidental physical damage." Cincinnati's argument that the Policies require physical alteration conflates "physical loss" and "physical damage." The use of the conjunction "or" means—at the very least—that a reasonable insured could understand the terms "physical loss" and "physical damage" to have distinct and separate meanings. The term "physical damage" reasonably requires alteration to property. *See Damage*, Merriam-Webster (Online ed. 2020) ("loss or harm resulting from injury to person, property, or reputation"). Under Cincinnati's argument, however, if "physical loss" also requires structural alteration to property, then the term "physical damage" would be rendered meaningless. But the Court must give meaning to both terms.

Finally, nothing in the Policies excludes coverage for Plaintiffs' losses. Notably, it is undisputed that the Policies do not exclude virus-related causes of loss. Cincinnati instead contends that three other exclusions apply: the "Ordinance or Law" exclusion, the "Acts or Decisions" exclusion, and the "Delay or Loss of Use" exclusion. Upon a review of the entire record, the Court concludes that these exclusions, based on their terms and the undisputed facts, do not apply to Plaintiffs' losses as a matter of law.

For these primary reasons, the Court concludes that the Policies provide coverage for Business Income and Extra Expenses for Plaintiffs' loss of use and access to covered property mandated by the Government Orders as a matter of law.

IV. CONCLUSION

Accordingly, Plaintiffs' Motion for Partial Summary Judgment is GRANTED. This Court certifies, pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, that this Order represents a final judgment as to Count I of the Second Amended Complaint and is immediately appealable as there is no just reason for delay of any such appeal. **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS**: That partial summary judgment is hereby granted in favor of Plaintiffs and against Cincinnati, jointly and severally, on Count I (Declaratory Judgment).

This the 7th day of October, 2020.

ORLANDO F. HUDSON, JR.
SENIOR RESIDENT SUPERIOR COURT JUDGE

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing Order in the above captioned action on all parties by depositing a copy hereof in a postpaid wrapper in a post office depository under the exclusive care and custody of the United Postal Service, addressed as follows:

STUART M. PAYNTER
GAGAN GUPTA
106 S. Churton Street, Suite 200
Hillsborough, NC 27278
Counsel for Plaintiffs

ANDREW A. VANORE III
Post Office Box 1729
Raleigh, NC 27602-1729
Counsel for Defendant, The Cincinnati Insurance Company

KENDRA STARK
JUSTIN M. PULEO
421 Fayetteville Street, Suite 330
Raleigh, NC 27601
Counsel for Defendant Morris Insurance Agency, Inc.

This the 9th day of October, 2020.

Sina B. mack

ASSISTANT CLERK OF COURT
DURHAM COUNTY

Exhibit “4”

LORAIN COUNTY COURT OF COMMON PLEAS

LORAIN COUNTY, OHIO

TOM ORLANDO, Clerk
JOURNAL ENTRY
James L. Miraldi, Judge

Date 09/29/20 Case No. 20CV201416

FRANCOIS INC
Plaintiff

JEREMY A TOR
Plaintiff's Attorney (216)696-3232

VS

THE CINCINNATI INSURANCE COMPANY
Defendant

SCOTT STEPHENSON
Defendant's Attorney ()-

This matter came before the Court upon the motion of Defendant Cincinnati Insurance Company to dismiss.

Based upon the briefs, the defendant's 12(b)(6) Motion is denied. Before a court may dismiss an action under Civ. R. 12 (B)(6) for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *O'Brien v. University Community Tenants Union*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. To make this determination, the court is required to interpret all material allegations in the complaint as true and admitted. *Phung v. Waste Management, Inc*, 23 Ohio St.3d 100,102, 491 NE.2d 1114 (1986).

The complaint states claims which arguably fit the terms and conditions of the insurance policy and therefore the claims and defenses need to be developed with a record. The parties should proceed with discovery on liability/coverage while the damages issues are bifurcated. Discovery on damages is held in abeyance until a decision has been made on coverage as the court anticipates Summary Judgment motions will be filed at the conclusion of discovery on the liability/coverage issues. A telephone status call is set for October 27, 2020 at 11:30a.m. Plaintiff shall initiate the telephone conference to all other counsel and then to the court at (440) 328-2393 or (440) 328-2390 at which time the discovery framework and briefing schedule can be determined by agreement.

James L. Miraldi

James L Miraldi, Judge

Journal 1325 Page 1807

EXHIBIT G

Exhibit “5”

REPORTERS/TRANSCRIBERS TRANSCRIPT TRANSMITTAL

INSTRUCTIONS: Forward original to the requesting party with completed original transcript.
Send copies to:
1) Supervisor of Court Reporters with copy of Transcript
2) Administration Office of the Courts, Attn: Chief, Reporting Svs., CN-988, Trenton, NJ 08625
3) Attornies and/or Pro Se (if known)
4) Other _____

Sent("x")

TO: REQUESTOR'S NAME/ADDRESS
Eric Harrison 3 Ethel Road Suite 300 Eidson, NJ 08818

CASE NAME (Plaintiffs)	v	(Defendants)	___ Appeal ___ Non-Appeal
Optical Services, USA, et al Insurance Co		Franklin Mutual	

LOWER COURT DOCKET TYPE	LOWER COURT NUMBER	Transcript Request Date:
___ Indictment ___ Accusation ___ Complaint	3681-20	8/13/2020

DOCKET NUMBER	COUNTY	COURT	Transcript Request Receipt Date
A-	Bergen County	Michael Beukas	8/13/2020

TRANSCRIPTS FILED HEREWITH

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6				

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8928 elh

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

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

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

Date: August 13, 2020

BEFORE:

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

TRANSCRIPT ORDERED BY:

ERIC L. HARRISON, ESQ. (Methfessel & Werbel)

APPEARANCES:

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

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

Transcriber: Laura Scicutella
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Audio Recorded
Recording Opr: Alexa D'Angelo

I N D E X

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

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

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

THE COURT: Good morning, Counsel.

MR. ROSE: Good morning.

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

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

RECORDING: (Indiscernible) --

THE COURT: -- reminders before we --

RECORDING: -- is now in the conference.

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

THE COURT: Okay, very good.

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

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

In addition, we are on a Polycom speaker

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

RECORDING: (Indiscernible) --

THE COURT: -- voice --

RECORDING: -- is now in the conference.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay, but the --

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

THE COURT: -- definition (indiscernible) --

MR. HARRISON: -- to our policy language.

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

MR. HARRISON: I think that is absolutely correct.

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

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

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

RECORDING: (Indiscernible).

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

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

RECORDING: (Indiscernible) is now in the conference.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In those rare instances, as cited in Smith

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

necessarily damaged. The Court in Wakefern did hold that,

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

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

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

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

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

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

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

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

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

THE COURT: Thank you, gentlemen.

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

* * * * *

CERTIFICATION

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

/s/ Laura Scicutella
Laura Scicutella

AD/T 685
AOC Number

Phoenix Transcription LLC
Agency Name

8/14/2020
Date

Exhibit “6”

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OPTICAL SERVICES USA/JCI, OPTICAL SERVICES USA, LLC, OPTICAL SERVICES USA-WO, RE & LE HOLDING LLC, STONG OD EWING NJ, LLC Plaintiffs, V. FRANKLIN MUTUAL INSURANCE COMPANY Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-3681-20 Civil Action **ORDER**

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

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

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

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

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

OPPOSED

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

Exhibit “7”

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DISTRICT COURT

CLARK COUNTY, NEVADA

JGB VEGAS RETAIL LESSEE, LLC,

Plaintiff,

v.

STARR SURPLUS LINES INSURANCE COMPANY,

Defendant.

Case No.: A-20-816628-B
Dept. No.: XIII

ORDER DENYING DEFENDANT STARR SURPLUS LINES INSURANCE COMPANY'S MOTION TO DISMISS COMPLAINT WITHOUT PREJUDICE

ORDER DENYING MOTION TO DISMISS

On June 16, 2020, Plaintiff JGB Vegas Retail Lessee, LLC ("Plaintiff" or "JGB") filed its Complaint against Defendant Starr Surplus Lines Insurance Company ("Defendant" or "Starr") asserting four causes of action arising from its insurance claim for coverage under Policy No. SLSTPTY11245819 issued by Starr to JGB (the "Policy"). JGB alleged causes of action for: (1) Breach of Contract; (2) Declaratory Judgment; (3) Violations of the Nevada Unfair Claims Practices Act, N.R.S. 686A.310; and (4) Breach of the Covenant of Good Faith and Fair Dealing.[1] On September 16, 2020, Starr moved to dismiss the entire Complaint with prejudice ("Motion to Dismiss"). JGB filed its opposition to the Motion to Dismiss on October 14, 2020, and Starr filed a Reply in support of the Motion ("Reply") on November 4, 2020. Pursuant to its Minute Order on November 9, 2020, the Court vacated the scheduled hearing due to the continuing coronavirus situation and deemed the matter submitted on the briefs and under advisement as of November 12, 2020. The Court, having reviewed the pleadings and the parties' filings related to the Motion to Dismiss (excluding the supplemental filings of Plaintiff on October 26 and November 10, 2020, which have not been reviewed or considered by the Court), rules as follows.[2]

The Court first rejects the argument in Starr's Motion to Dismiss that the Policy designates New York as the sole and exclusive venue to resolve any and all disputes arising out of the Policy, and therefore, that Nevada is not the proper forum to adjudicate this action. As Starr contends, the Policy form "General Conditions" provides that "[a]ny suit, action, or proceeding against the COMPANY [*i.e.* Starr] must be brought solely and exclusively in a New York state court or a federal district court sitting within the State of New York." Policy, Property Coverage, General Conditions, § 12(e). However, at Endorsement #27, the Policy also includes a "Service of Process Clause Endorsement," which provides, in part, that:

[1] On July 23, 2020, Starr removed this action to the United States District Court for the District of Nevada, on the basis of diversity of citizenship. On September 1, 2020, the United States District Court entered the parties' stipulation and order to remand the action to this Court based on a lack of complete diversity between the parties.

[2] The Court provides no opinion regarding which state's law is applicable in denying Starr's Motion to Dismiss.

> In the event of failure of the Insurer to pay any amount claimed to be due hereunder, the Insurer, at the request of the Insured, will submit to the jurisdiction of a court of competent jurisdiction within the United States. Nothing in this condition constitutes or should be understood to constitute a waiver of the Insurer's rights to commence an action in any court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek transfer of a case to another court as permitted by the laws of the United States or any state in the United States. It is further agreed . . . that [for] any suit instituted against the Insurer upon this policy, the Insurer will abide by the final decision of such court or of any appellate court in the event of an appeal.

Policy, Endt. 27. The Service of Process Clause Endorsement continues, that "pursuant to any statute of any state, territory, or district of the United States," Starr "designates the Superintendent, Commissioner or Director of Insurance, or other officer specified for that purpose in the statute" as its agent for service of process. *Id.* The Court finds that there is a conflict between these two provisions and, as an endorsement, the Service of Process Clause Endorsement governs over the forum selection clause in the Policy's form. *See Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co.*, 88 F. Supp. 3d 1156, 1162-65 (S.D. Cal. 2015) (holding that the Service of Suit Endorsement "changed the original insurance agreement" that contained a forum selection clause and "unambiguously permits Plaintiff to bring suit in a forum of its choosing."); *Wayne Cnty. Airport Auth. v. Allianz Glob. Risks U.S. Ins. Co.*, No. 11-15472, 2012 WL 3134074, at *3 (E.D. Mich. Aug. 1, 2012) ("[Insurers] seek dismissal and enforcement of the forum selection clause that was bargained away. The [insurers] are not entitled to enforce the forum selection clause in the policy over that in the endorsement."). Moreover, Starr has failed to show that Nevada is an inconvenient forum to justify dismissal. *See* N.R.S. 13.050(2)(c); *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 131 Nev. 296, 300-07, 350 P.3d 392, 396-400 (2015). Accordingly, this action is properly within the jurisdiction of this Court, and Starr's Motion to Dismiss on forum is denied.

The Court next analyzes Starr's arguments for dismissal under NRCP 12(b)(5). When a court considers a motion to dismiss under NRCP 12(b)(5), the "court will recognize all factual allegations in [the] complaint as true and draw all inferences in its favor." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). "A complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and relief sought." *W. States Constr., Inc. v. Michoff*, 108

Nev. 931, 936, 840 P.2d 1220, 1223 (1992). Thus, the complaint "should be dismissed only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

On the first cause of action, JGB states a ~~valid~~ claim for relief for breach of the Policy. The Policy's initial coverage grant provides that it "covers the property insured hereunder against all risks of direct physical loss or damage to covered property while at INSURED LOCATIONS occurring during the Term of this POLICY, except as hereinafter excluded or limited." Policy, Property Coverage, General Conditions, § 1; *see* Compl. ¶¶ 30-32. The Policy also provides certain "TIME ELEMENT" coverages for business interruption losses; the main section provides coverage for "[l]oss directly resulting from necessary interruption of the Insured's NORMAL business operations caused by direct physical loss or damage to real or personal property covered herein[.]" Policy, Business Interruption, § 1; *see* Compl. ¶¶ 33-40. Also included in the TIME ELEMENT COVERAGE is "Interruption by Civil or Military Authority."[3]

JGB's Complaint alleges the physical presence and known facts about the coronavirus, including that it spreads through infected droplets that "are physical objects that attach to and cause harm to other objects" based on its ability to "survive on surfaces" and then infect other people. Compl. ¶¶ 16-20. JGB also alleges that by March 11, 2020, COVID-19 was present at the Mirage casino, within one mile from JGB's Grand Bazaar Shops. *Id.* ¶ 21. JGB alleges that based on these facts and the location and characteristics of the Grand Bazaar Shops, that it was "highly likely that the novel coronavirus that causes COVID-19 has been present on the premises of the Grand Bazaar Shops, thus damaging the property JGB had leased to its tenants." *Id.* ¶ 26; *see also id.* ¶ 7. The Complaint also states that because the presence of COVID-19 at or near the Grand Bazaar Shops and

[3] The coverage part for "Interruption by Civil or Military Authority" provides that:

> This POLICY is extended to include, starting at the time of physical loss or damage, the actual loss sustained by the Insured, resulting directly from an interruption of business as covered hereunder, during the length of time, not exceeding the number of days shown under TIME LIMITS stated in the Declarations, when, as a direct result of damage to or destruction of property within one (1) statute mile of an INSURED LOCATION by the peril(s) insured against, access to such described premises is specifically prohibited by order of civil or military authority.

Policy, Business Interruption, § 7.

Governor Sisolak's March 20, 2020 Order restricting and prohibiting access to non-essential business, the Grand Bazaar Shops were forced to close and the few restaurants that remained open were severely limited in their operations, resulting in significant losses. *Id.* ¶¶ 26-28.

The Court finds that JGB's Complaint sufficiently alleges losses stemming from the direct physical loss and/or damage to property from COVID-19 to trigger Starr's obligations under the property and TIME ELEMENT coverage provisions in the Policy, including coverage for general business interruption and Interruption by Civil or Military Authority. *See, e.g.*, *Studio 417, Inc. v. Cincinnati Ins. Co*., No. 20-cv-03127, 2020 WL 4692385, at *2, *4 (W.D. Mo. Aug. 12, 2020) (complaint alleged direct physical loss, because it alleged that the virus "is a physical substance," which "live[s] on" and is "active on inert physical surfaces," and that "it is likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus" and "the presence of COVID-19 'renders physical property in their vicinity unsafe and unusable'").[4]

Starr also moves to dismiss JGB's claim for breach of contract (and related claims) on the basis that any loss or damage suffered by JGB is nonetheless excluded by the Policy's "Pollution and Contamination Exclusion." Motion to Dismiss at 24-26; Reply at 24-27. The Pollution and Contamination Exclusion provides:

b. Pollution and Contamination Clause:

> This POLICY does not insure against loss or damage caused by or resulting from any of the following regardless of any cause or event contributing concurrently or in any other sequence to the loss:
>
> 1. contamination;
> 2. the actual or threatened release, discharge, dispersal, migration or seepage of POLLUTANTS at an INSURED LOCATION during the Term of this POLICY unless the release, discharge, dispersal, migration, or seepage is caused by fire, lightning, leakage from fire protective equipment, explosion, aircraft, vehicles, smoke, riot, civil commotion or vandalism. This POLICY does not insure off premises cleanup costs arising from any cause and the coverage afforded by this clause shall not be construed otherwise.

[4] *See also Optical Servs. USA/JCI v. Franklin Mut. Ins. Co*., No. BER-L-3681-20, 2020 WL 5806576 (N.J. Super. L. Aug. 13, 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co*., No. 20-cv-00383, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020).

Policy, Property Coverage, General Conditions, § 7(b). The Policy does not define "contamination," but defines "POLLUTANT or CONTAMINANTS" as:

> any solid, liquid, gaseous or thermal irritant or CONTAMINANT including, but not limited to, smoke, vapor, soot, fumes, acids, alkalis, chemicals, virus, waste, (waste includes materials to be recycled, reconditioned or reclaimed) or hazardous substances as listed in the Federal WATER Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act, or as designated by the U.S. Environmental Protection Agency.

Policy, Property Coverage, General Conditions, § 13(T).

Starr contends that the Pollution and Contamination Exclusion clearly and unambiguously applies on its face to exclude JGB's claims. Reply at 24-25. As the insurer, Starr bears the burden to prove any clause excludes coverage. *See Nat'l Auto. & Cas. Ins. Co. v. Havas*, 75 Nev. 301, 303, 339 P.2d 767, 768 (1959). "[I]f an insurer wishes to exclude coverage by virtue of an exclusion in its policy, it must (1) write the exclusion in obvious and unambiguous language in the policy, (2) establish that the interpretation excluding covering under the exclusion is the only interpretation that could fairly be made, and (3) establish that the exclusion clearly applies to this particular case." *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 164, 252 P.3d 668, 674 (2011) (citing *Alamia v. Nationwide Mut. Fire Ins. Co.*, 495 F. Supp. 2d 362, 367 (S.D.N.Y. 2007)); *see also Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383 (2003) (stating "policy exclusions are given a strict and narrow construction"). Starr has not shown that it is unreasonable to interpret the Pollution and Contamination Exclusion to apply only to instances of traditional environmental and industrial pollution and contamination that is not at issue here,[5] where JGB's losses are alleged to be the result of a naturally-occurring, communicable disease. This is the case, even though the Exclusion contains the word "virus." *See, e.g.*, *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, No. 6:20-cv-1174, 2020 WL 5939172, at *4 (M.D. Fla. Sept. 24, 2020) ("Denying coverage for losses stemming from COVID-19, however, does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these

[5] *See, e.g.*, *Century Surety Co. v. Casino W., Inc.*, 130 Nev. 395, 398-401, 329 P.3d 614, 616-18 (2014); *Belt Painting*, 100 N.Y.2d at 383-88.

kinds of business losses."). Accordingly, the Court finds that the Pollution and Contamination Exclusion does not apply to exclude JGB's claims.

On the second cause of action for declaratory relief, for the reasons stated above (*supra* at 2-5), the Court finds that JGB's Complaint sufficiently alleges facts to state a claim upon which relief can be granted for declaratory relief under Nevada law. *See* N.R.S. 30.010 *et seq*. Accordingly, Starr's Motion to Dismiss this cause of action is denied.

On the third cause of action, an insurer violates the Unfair Claims Practices Act for, *inter alia*, "[m]isrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue" or "[f]ailing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear." N.R.S. 686A.310(1)(a) & (e). Regarding the fourth cause of action, "an implied covenant of good faith and fair dealing [is] in every contract." *Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 792-93, 858 P.2d 380, 382 (1993). "[W]ith respect to the covenant of good faith and fair dealing . . . '[w]hen one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, damages may be awarded against the party who does not act in good faith.'" *Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d 335, 338 (1995) (citing *Hilton Hotels v. Butch Lewis Prods.*, 107 Nev. 226, 234, 808 P.2d 919, 923 (1991)); *see also Pemberton*, 109 Nev. at 793, 858 P.2d at 382 ("An insurer fails to act in good faith when it refuses 'without proper cause' to compensate the insured for a loss covered by the policy."); *D.K. Prop., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 92 N.Y.S.3d 231, 232-34 (App. Div. 1st Dep't 2019).

The Complaint alleges that Starr denied the claim, did so unreasonably, and did so with knowledge that denial was unreasonable. Compl. ¶¶ 10, 46, 61. JGB also alleged that Starr misrepresented the facts of the claim by asserting that "there [wa]s no mention of the [Nevada] orders having been issued because of physical loss or damage" and that it did "not appear that the [Nevada] orders in question prohibited access to the insured premises[.]" *Id*. ¶¶ 45-47. Moreover, JGB alleged that Starr misrepresented the scope of the Policy by citing the Pollution and Contamination Exclusion to apply to coverage, and by requiring that JGB be "physical prevent[ed]" from the premises in order to trigger the TIME ELEMENT coverages. *Id.* ¶¶ 48, 49, 52. Finally, JGB

alleged consequential damages from Starr's allegedly unreasonable denial of coverage. *See, e.g.*, *id.* ¶ 83. The Court finds that JGB's Complaint sufficiently alleges facts to state claims upon which relief can be granted for violation of the Nevada Unfair Claims Practices Act and for breach of the implied covenant of good faith and fair dealing.

Lastly, Starr's request to deny Plaintiff leave to amend the Complaint is denied as moot.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss **IS DENIED IN ITS ENTIRETY** without prejudice.

November 30, 2020.

Respectfully submitted,

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Exhibit “8”

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

TAPS & BOURBON ON TERRACE, LLC *Plaintiff*	:	**JULY TERM, 2020**
	:	**NO. 00375**
v.	:	**COMMERCE PROGRAM**
UNDERWRITERS AT LLOYDS LONDON and MAIN LINE INSURANCE OFFICES, INC.	:	**CONTROL NO. 20093025**
Defendants	:	

ORDER

AND NOW, this 26th day of October, 2020, upon consideration of defendant Certain Underwriters at Lloyd's, London's, improperly identified as "Those Certain Underwriters at Lloyd's London" preliminary objections to plaintiff's complaint, and any response thereto, it is hereby

ORDERED

that the preliminary objections are **OVERRULED.**[1]

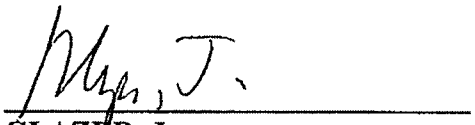
Taps & Bourbon On Terra-ORDER
20070037500035

[1] Pursuant to Pa. R.C.P. 1028(a)(4), a party may raise a preliminary objection due to legal insufficiency of a pleading (demurrer). When considering preliminary objections, all material facts and reasonable inferences set forth must be admitted as true. Haun v. Cmty. Health Sys. Inc., 14 A.3d 120, 123 (Pa. Super. 2011) (citation omitted). A court may not consider facts that are not contained within the challenged pleading. See Detweiler v. School Dist. Of Borough of Hatfield, et al., 104 A.2d 110, 113 (Pa. 1954).

This litigation arises from the denial of insurance coverage for business losses as a result of the COVID-19 pandemic and the resulting state and local orders mandating that all non-essential businesses be temporarily closed. In the instant preliminary objections, defendant alleges that plaintiff's claim is not covered under the policy because, *inter alia*, there is no "direct physical loss" or "damage to" the property, the civil authority coverage provision does not apply, and the virus exclusion provision precludes coverage. Additionally, defendant alleges that since the claim is not covered, a bad faith claim cannot survive.

At this very early stage, it would be premature for this court resolve the factual determinations put forth by defendant to dismiss plaintiff's claims. Taking the factual allegations made the plaintiff's complaint as true, as this court must at this time, plaintiff has successfully

BY THE COURT:



GLAZER, J.

pled to survive this stage of the proceedings. Moreover, the law and facts are rapidly evolving in the area of COVID-19 related business losses. Accordingly, the preliminary objections are overruled.

Exhibit “9”

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

RIDLEY PARK FITNESS, LLC	:	**MAY TERM, 2020**
Plaintiff	:	**NO. 01093**
v.	:	**COMMERCE PROGRAM**
PHILADELPHIA INDEMNITY INSURANCE COMPANY	:	**CONTROL NO. 20080358**
Defendants	:	

ORDER

AND NOW, this 31st day of August, 2020, upon consideration of the preliminary objections filed by defendant Philadelphia Indemnity Insurance Company to plaintiff's amended complaint, and any response thereto, it is hereby

ORDERED

that the preliminary objections are **OVERRULED, without prejudice.**[1]

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[1] Pursuant to Pa. R.C.P. 1028(a)(4), a party may raise a preliminary objection due to legal insufficiency of a pleading (demurrer). When considering preliminary objections, all material facts and reasonable inferences set forth in the challenged complaint must be admitted as true. Haun v. Cmty. Health Sys. Inc., 14 A.3d 120, 123 (Pa. Super. 2011) (citation omitted). A court may not consider facts that are not contained within the challenged pleading. See Detweiler v. School Dist. Of Borough of Hatfield, et al., 104 A.2d 110, 113 (Pa. 1954). Additionally, a court need not accept conclusions of law. See Dominski v. Garrett, 419 A.2d 73, 75 (Pa. Super. 1980).

This litigation arises from the denial of insurance coverage for business losses at a fitness center as a result of the COVID-19 pandemic and the resulting state and local orders mandating that all non-essential businesses be temporarily closed. Defendant alleges in the instant preliminary objections that plaintiff's failure to attach the insurance agreement in total constitutes a failure to plead, which defendant has cured by attaching the agreement in full, that certain clauses including a virus exclusion and "direct physical loss" bar coverage, and finally, that plaintiff is not entitled to a declaratory judgment.

At this very early stage, it would be premature for this court resolve the factual determinations put forth by defendants to dismiss plaintiff's claims. Taking the factual allegations made in plaintiff's complaint as true, as this court must at this time, plaintiff has

BY THE COURT:

GLAZER, J.

successfully pled to survive this stage of the proceedings. As such, the preliminary objections are overruled.