IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

FRANCOIS, INC. dba CHEZ FRANCOIS RESTAURANT Plaintiff vs. THE CINCINNATI INSURANCE COMPANY Defendant	Case No. 20CV201416 Judge James Miraldi **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

Plaintiff Francois, Inc., doing business as Chez Francois Restaurant ("Chez Francois"), submits this Brief In Opposition to the Motion to Dismiss (the "Motion") filed by Defendant, the Cincinnati Insurance Company ("CIC"). CIC cannot meet its burden under Civil Rule 12(B)(6). Accordingly, and for all of the reasons set forth herein, Plaintiff respectfully requests the Court deny CIC's Motion.

I. INTRODUCTION

Chez Francois has long been a premiere restaurant in northeast Ohio. To protect its business, including its employees, Chez Francois purchased and paid premiums for what is commonly called business interruption insurance. When Chez Francois suffered losses because its business was interrupted by the physical presence of the coronavirus (SARS-CoV-2) at its business premises and in the community, Chez Francois sought the insurance for which it had paid. CIC refused to honor the claim based on a tortured and self-serving interpretation of the terms of the insurance Policy at issue. Chez Francois had no choice but to file this action.

II. SUMMARY OF ARGUMENT

CIC's Motion should be denied for the same reasons a CIC's substantively identical motion to dismiss was denied in *Studio 417, Inc. v. The Cincinnati Insurance Company*, Case No.

6:20-cv-03127 (W.D. Mo. 2020) (attached as Exhibit 1), a case alleging the same declaratory judgment claim under the same policy language at issue. CIC's motion filed in Columbus against an insured's declaratory judgment claim under the same policy language was likewise recently denied by the Honorable Judge Holbrook in Franklin County in *SSF II, INC v. The Cincinnati Insurance Company* and *780 Short North LLC, v. The Cincinnati Insurance Company*. *See* Exhibit 2. Finally, the Honorable Judge Nancy Fuerst of the Cuyahoga County Court of Common Pleas recently refused to grant a substantively similar motion to dismiss in *SOMCO v. Lightning Rod Mut. Ins. Co.*, Case No. CV 20 931763, a case, like the one before the Court, alleging coronavirus-related losses under a business interruption coverage insurance policy with nearly identical coverage terms to those in CIC's policy at issue.[1]

In *Studio 417*, Judge Bough recognized that the CIC's argument "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." *Id.* at 9. Judge Bough overruled CIC's motion to dismiss, finding that numerous courts had decided "that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose." *Id.* at 10.

The same rationale applies here. Plaintiff has alleged that it sustained direct physical loss or damage to its covered property due to the presence of SARS-CoV-2 (commonly referred to as "coronavirus") particles in, on, or about its insured premises. Complaint, ¶¶ 14-33, 52-57. For purposes of CIC's motion, these allegations must be accepted as true. These allegations mirror the coverage-triggering language of the Policy.

[1] The Lightning Rod and CIC policies both use of Insurance Services Office, Inc. ("ISO") copyrighted forms. Accordingly, the language is nearly identical.

Nowhere does the Policy use the term "physical alteration." So, physical alteration of insured property is not required. Rather, the ordinary and plain meaning of the phrases "direct physical loss to property" and "direct physical damage to property," neither of which are defined in the Policy, do not exclusively require structural alteration of property as CIC argues. Indeed, Ohio cases and the overwhelming majority of cases around the country confirm that CIC's primary argument is wrong. If CIC wanted to limit coverage only under circumstances where property underwent a structural alteration, it could, would and should have stated as much in its Policy. But CIC did not include any such limitation and elected not to include an industry standard ISO virus exclusion specifically excluding losses stemming from the direct physical loss or damage to property caused by a virus. Complaint, ¶¶ 9-13.

III. THE ALLEGATIONS IN THE COMPLAINT MIRROR THE POLICY PROVISIONS.

CIC issued Chez Francois a commercial property insurance policy with business interruption coverage, Policy No. ECP 038 92 72 (the "Policy"). (Complaint, ¶ 3.) The pertinent Policy forms are the BUILDING AND PERSONAL PROPERTY COVERAGE FORM (FM101 05 16 (starting at PDF page 22 of 331[2])) and the BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM (FA 213 05 (starting at page 105 of 331). These forms provide coverage for: (1) Business Income loss, (2) Extra Expense, and (3) loss due to a Civil Authority order.

The BUSINESS INCOME COVERAGE FORM states on page 105 under Section A.1.

Business Income:

> We will pay for the actual loss of 'Business Income' you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration'. The 'suspension' must be caused by direct 'loss' to property at 'premises' which are

[2] Page references are to the pdf version of the Policy attached to Plaintiff's Complaint.

> described in the Declarations. The 'loss' must be caused by or result from a Covered Cause of Loss.

The complaint's allegations mirror this language.

The term "Covered Causes of Loss" means "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." (Policy, page 26 of 331.) "Loss" means "accidental physical loss or accidental physical damage." (Policy, page 59 of 331.) Neither the exclusions nor the limitations in the Coverage Part include a virus exclusion or any other applicable exclusion or limitation. So, virus is a Covered Cause of Loss.

Chez Francois' business activities and operations at their premises have been suspended in whole or in part during the period of restoration due to a direct loss to property at its locations caused by or resulting from direct, accidental physical loss or accidental physical damage to property. (Complaint ¶¶ 7, 52-57.) As a result, Chez Francois has suffered actual Business Income losses. (*Id*.)

The BUSINESS INCOME COVERAGE FORM states on page 106 of 331 under Section A.5.b. **Civil Authority**:

> When a Covered Cause of Loss causes direct damage to property other than Covered Property at the 'premises', we will pay for the actual loss of 'Business Income' you sustain and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the 'premises', provided that both of the following apply:
>
> (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
> (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

The allegations in the Complaint mirror these coverage provisions. (Complaint, ¶¶ 8, 14-36, 38-46, 57.)

A direct, accidental physical loss or accidental physical damage caused damage to property (e.g., neighboring buildings and surrounding public spaces) other than covered property at Chez Francois' business. (*Id*.) Chez Francois suffered Business Income losses and necessary Extra Expenses caused by the Civil Authority Orders (as defined in the Complaint) that prohibited access to its restaurant significantly reducing its operations. (*Id*. at ¶ 43.) The Civil Authority Orders were issued in response to dangerous physical conditions resulting from the damage or continuation of the direct, accidental physical loss or accidental physical damage that caused the damage. (*Id*. at ¶¶ 41-42, 44.)

Chez Francois has made allegations which, when taken as true, state a claim for declaratory relief under the Policy that is plausible on its face against CIC for its Business Income losses, Extra Expenses sustained, and losses due to the orders of the Ohio civil authorities.

IV. LAW

A. Rule 12(B)(6) standard of review

A Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is a procedural mechanism that tests the sufficiency of the complaint. *Fletcher v. Univ. Hosps. Of Cleveland*, 120 Ohio St.3d 167, 170 (2008), *quoting State ex rel. Hanson v Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). To dismiss a complaint under 12(B)(6), "it must appear beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle the plaintiff to relief." *Ghaster v. City of Rocky River*, 2013 WL 6730925, *5 (Ohio App. 8th Dist.), citing *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491 (2006). "In resolving a Civ.R. 12(B)(6) motion, a court's factual review is confined to the four corners of the complaint. Within those confines a court presumes all factual allegations in the complaint are true, and all reasonable inferences from those facts are made in favor of the non-moving party." *Grady*

v. Lenders Interactive Servs., 2004 WL 1799178 (Ohio App. 8th Dist.), *citing Fahnbulleh v. Strahan*, 73 Ohio St.3d 666 (1995). If there is any set of facts, consistent with the allegations of the Complaint, which would allow the plaintiff to recover, a court may not grant a 12(B)(6) motion to dismiss. *Ghaster*, 2013 WL at *6, *citing York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145 (1991); *Data Mfg., Inc. v. United Parcel Services, Inc.*, 557 F.3d 849, 851 (8th Cir. 2009) ("[t]he factual allegations of a complaint are assumed true and construed in favor of the plaintiff, even if it strikes a savvy judge that actual proof of those facts is improbable.").

B. The law governing the construction of an insurance contract

When confronted with an issue of contractual interpretation, the court should give effect to the intent of the parties as reflected in the language used in the policy. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256; *Alexander v. Buckeye Pipeline Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978).

The court must look to the plain and ordinary meaning of the language used in the policy, and when the language is clear, the court may look no further than the writing itself to find the intent of the parties. *Galatis*, *supra*. Courts routinely turn to a dictionary to determine the plain and ordinary meaning of a word. *See Olmstead v. Lumbermens Mutual Ins. Co.*, 22 Ohio St.2d 212, 259 N.E.2d 123 (1970), (using dictionary to determine definition of landslide); *Collins v. Auto-Owners Ins. Co.*, 2017-Ohio-880, 80 N.E.3d 542 (4th District), (referring to *Black's Law Dictionary* and *Merriam-Webster's Online: Dictionary and Thesaurus*); *World Harvest Church v. Grange Mutual Cas. Co.*, 2013-Ohio05707, 2013 WL 6843615 (10th District), (referring to both *Black's* and *Webster's Encyclopedic Unabridged Dictionary* for definition of "abuse").

Ohio follows the doctrine of *contra proferentem*. *Buckeye Union Ins. Co. v. Price*, 39 Ohio St.2d 95, 311 N.E.2d 844 (1974) held in its syllabus:

> Language in a contract of insurance reasonably susceptible of more than one meaning will be construed liberally in favor of the insured and strictly against the insurer.

Under this doctrine, undefined terms within a policy are always resolved in favor of the insured. *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 519 N.E.2d 1380 (1988); *Bobier v. Natl. Cas. Co.*, 143 Ohio St. 215, 54 N.E.2d 798 (1944).

Furthermore, when a policy can be reasonably interpreted in more than one way, the reviewing court **should not review the choices and pick the most reasonable interpretation**. Rather, as stated in Kalis, *Policyholders Guide to Insurance Coverage*, § 20.02, the doctrine of *contra proferentem* **requires** the court to adopt the most liberal interpretation of the policy that is reasonably possible. See also *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 549, 757 N.E.2d 329 (2001)("[I]n order to defeat coverage, the insurer must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is the only one that can fairly be placed on the language in question.")

Accordingly, a court must adopt *any* reasonable interpretation of the policy resulting in coverage for the insured. *Butche v. Ohio Casualty Ins. Co.*, 174 Ohio St. 144, 187 N.E.2d 20 (1962); *Akins v. Harco Insurance Company*, 158 Ohio App.3d 292, 2004-Ohio-4267, ("[A]ny reasonable construction which results in coverage of the insured must be adopted by the trial court."); *Sterling Merchandise Co. v. Hartford Insurance Co.*, 30 Ohio App.3d 131, 506 N.E.2d 1192 (1986).

The test to be applied by the court to determine whether there is an ambiguity is not what CIC intended the words to mean, but what a reasonably prudent person applying for insurance would have understood. Thus, the standard is ambiguity from the standpoint of a layperson, not a lawyer. *Snedegar v. Midwestern Ind. Co.*, 64 Ohio App.3d 600, 582 N.E.2d 617 (1989).

V. LEGAL ANALYSIS AND ARGUMENT

A. Virus is a Covered Cause of Loss under the Policy

Since the Policy is an all risk policy, all risks of loss are covered unless excluded. Virus is a Covered Cause of Loss because, unlike most insurers, CIC elected not to incorporate an industry-wide ISO standard virus exclusion form excluding the risk of loss or damage from virus into the Policy. *See, e.g., Sentinel Ins. Co., Ltd. v. Monarch Med Spa, Inc.*, 105 F.Supp.3d 464, 466-67 (E.D. Pa. 2015) (business policy contained ISO "**EXCLUSION – FUNGI, BACTERIA AND VIRUSES**" form excluding "damage arising out of or relating to the presence of… Viruses"); *Travelers Indemn. Co. of America v. L.H.R. Farms, Inc.*, 2010 WL 11603, n. 3 (N.D. Ga.) ("Policy exlude[d] coverage for "loss or damage caused by or resulting from any virus…""); *Udinsky v. State Farm Fire and Cas. Co.*, 2019 WL 1017606, *1, 4 (N.D. Cal.) (policy with "businessowners coverage form" included ISO exclusion "for "Fungi, Virus or Bacteria."").[3]

The Policy contains over eight pages of exclusions and limitations on pages 26-34 of 331, but it does not contain the standard virus exclusion. If CIC wanted to exclude coverage for losses resulting from the risk of virus and/or a pandemic, it could, should and would have included, among its other highly specific exclusions, as CIC does in some policies it issues, the exclusion for virus-related losses and damage. Because virus is not excluded, however, to the extent CIC claims the language "direct physical loss or damage to" property is exclusionary of Plaintiff's claims, it must be presumed the Policy includes coverage for virus-related losses and damage, and

[3] CIC does utilize the ISO virus exclusion in some policies, including, for example, policies issued by its Cincinnati Specialty Underwriters Insurance Company (under the CIC umbrella of insurance companies). But CIC did not include this exclusion in the Policy at issue. If CIC's arguments set forth in its Motion – that a virus cannot cause direct physical loss or damage to property, or otherwise constitute a covered cause of loss – then the insurance industry, including CIC in some policies, is routinely including superfluous and meaningless virus exclusion forms in policies that do not require any such exclusion because, according to CIC, the Policy without any such exclusion "clearly and unambiguously" does not cover virus. The law forbids such an interpretation – that entire exclusion forms are meaningless and superfluous in a contract. Such an argument should not be countenanced by the Court, particularly not before any discovery is undertaken on these issues.

it must be construed strictly against CIC and in favor of coverage. *See Florists Mut. Ins. Co. v. Ludy*, 521 F.Supp.2d 661, 671 (S.D. Ohio 2007); *Fireman's Fund Ins. Co. v. Atlantic Richfield Co.*, 94 Cal. App. 4th 842, 852 (2001) ("[w]ith respect to the words used to express the intent of the parties, several courts have observed an insurance company's failure to use available language to exclude certain types of liability gives rise to the inference that the parties intended not to so limit coverage.").

B. A Covered Cause of Loss can cause physical loss or physical damage.

Just as CIC did in *Studio 417*, CIC conflates "loss" and "damage to" and argues as if they mean the same thing. But they do not; in fact, under well-accepted rules of insurance policy construction, they *cannot* mean the same thing.

The two phrases are stated in the disjunctive ("or") as separate triggers of coverage – for: 1) "loss" to property; and; 2) "damage to" property. *Security Ins. Co. of Hartford v. Kevin Tucker & Associates, Inc.*, 64 F.3d 1991, 1007 (6th Cir. 1995); *Fountain Powerboat Indus., Inc. v. Reliance Ins. Co.*, 119 F.Supp.2d 552, 557 (E.D.N.C. 2000) (Interpreting a business interruption policy in which coverage was predicated on "loss, damage, or destruction" and holding "[a] 'loss' is not predicated on physical damage but is one category of recovery along with damage and destruction as indicated by the use of the alternative coordinating conjunction 'or'"). Just as Judge Bough noted in *Studio 417*, this Court "must give meaning to both terms."

Ohio courts have addressed the meaning of the word "loss" in insurance policies. "When used in an insurance policy, the word "loss" is given its ordinary meaning of "injury; forfeiture; deprivation; damage; [or] deficiency." *Polk v. Landings of Walden Condo. Assoc*, 2005 WL 1862126, *7 (Ohio App. 11th Dist.), *quoting* Gilbert's Law Dictionary (1994) 156; *see also Downwyn Farms v. Ohio Ins. Guar. Ass'n.*, 1990 WL 7991, *3 (9th Dist.), (because "physical loss"

"may [reasonably] be defined as "material deprivation,"" coverage was afforded under policy to insured who "was materially deprived" of property for a period of time).[4]

Accordingly, under Ohio law, "loss," when used in an insurance policy, means deprivation – "the state of being kept from possessing, enjoying, or using something"[5] – and deficiency – "the quality or state of being defective or of lacking some necessary quality or element."[6] A "physical loss" to property then, within the context of a business interruption policy, includes and contemplates a situation where, as here, insured businesses are physically ***deprived*** of their business property because a physical substance had a physical impact on the property that rendered the property ***deficient or lacking in some quality rendering it unfit for its intended use***.

CIC likewise offers no explanation of the difference between "physical loss" and "physical damage", but the terms must mean something different. Otherwise the terms would be repetitive, superfluous, and rendered meaningless – an outcome a court will not endorse when interpreting an insurance contact. *See Gotham v. Basement Care, Inc*., 2019-Ohio-3872, ¶ 10 (9th Dist.) (Contracts should not be interpreted in a way that renders words or phrases "superfluous or meaningless" because to do so would result in an "unreasonable interpretation.") (citing numerous cases); *Nautilus Group, Inc. v. Allianz Global Risks US*, 2012 WL 760940, at *7 (W.D. Wash.), ("If 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous."); *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767, at *3 (C.D. Cal.) ("[T]o interpret 'physical loss of' as requiring 'damage to' would

[4] CIC offers no definition or interpretation of the word "physical" as used in the Policy. The ordinary definition includes: "of or relating to natural science; having material existence; perceptible especially through the senses and subject to the laws of nature; of or relating to material things. https://www.merriam-webster.com/dictionary/physical. *See also Oregon Shakespeare Festival Assoc. v. Great American Ins. Co.*, 2016 WL 3267247, *5 (D. Or.) (citing Webster's dictionary defining "physical" as "of or belonging to all created existence; relating to or in accordance with the laws of nature; of or relating to natural or material things as opposed to things mental, moral, or spiritual.")

[5] https://www.merriam-webster.com/dictionary/deprivation

[6] https://www.merriam-webster.com/dictionary/deficiency

render meaningless the 'or damage to' portion of the same clause, thereby violating a black-letter canon of contract interpretation"); *Wohl v. Swinney*, 118 Ohio St.3d 277, 888 N.E.2d 1062, ¶ 22 (2008) ("When interpreting a contract, we will presume that words are used for a specific purpose and will avoid interpretations that render portions meaningless or unnecessary.").

C. This Court should follow the rationale of *Studio 417, K.C. Hobbs, SOMCO, SSF II, Inc.,* and *780 Short North, LLC.*

On August 12, 2020, the United States District Court for the Western District of Missouri issued a detailed order denying a CIC motion to dismiss a COVID-19-related business interruption insurance claim under nearly identical policy language. A copy of the Order in the matter of *Studio 417, Inc., et al. v. The Cincinnati Ins. Co.*, Case No. 6:20-cv-03127 (W.D. Mo. 2020) is attached hereto as Exhibit 1. Also, on August 12, 2020, the United States District Court for the Western District of Missouri issued a written order and opinion in *K.C. Hopps, LTD v. The Cincinnati Insurance Company, Inc.*, Case No. 20-cv-00437-SRB (W.D. Mo. Aug, 12, 2020), denying CIC's motion to dismiss in that COVID-19 business interruption case "for substantially the same reasons as those in the *Studio 417* Order." A copy of the opinion is attached hereto as Exhibit 3.

The *Studio 417* court analyzed the policy language at issue under Missouri law, which is indistinguishable from Ohio law for purposes of the issues before the Court. *See* Ex. 1 at p. 6-7.

Relying on the same plain and ordinary meaning of the phrase "direct physical loss" discussed above, the *Studio 417* court held that the complaint before it sufficiently alleged "direct physical loss" under the policy to avoid dismissal under Civil Rule 12. *See Id*. at p. 7-9. ("Applying these definitions, Plaintiffs have adequately alleged a direct physical loss." "Based on these allegations, the Amended Complaint plausibly alleges a "direct physical loss" based on "the plain and ordinary meaning of the phrase""). The allegations in the *Studio 417* complaint that "adequately alleged a direct physical loss" are substantially identical to those set forth in

Plaintiff's Complaint concerning the presence of SARS-CoV-2 particles and the propensity of the virus to cause physical loss within the context of the business interruption insurance at issue.

Likewise, Judge Holbrook in Franklin County denied CIC's motion to dismiss and ordered discovery to commence and the motions held in abeyance. *See* Exhibit 2. Judge Fuerst did the same in Cuyahoga County in response to a motion making the same arguments against the same claims under nearly identical policy language in the *SOMCO, LLC* case.

D. CIC's proposed definition of "direct physical loss or damage to property" is not contained in the Policy, is at odds with Ohio and the overwhelming body of law around the country, and is inconsistent with the ordinary definition of those terms, including as set forth in the Policy itself.

1. The Policy's definition of "property damage" in the liability section of the Policy provides one reasonable definition of the term "damage to property."

The Policy does not define "damage to property," but it does define "property damage." For example, in the Policy's "NETWORK DEFENDER COVERAGE FORM," CIC defines "property damage" as meaning, "**a.** Physical injury to or destruction of tangible property, including all resulting loss of use; or **b.** Loss of use of tangible property that is not physically injured." *See* Policy at page 329 of 331. The definition does not mention or require "structural alteration." CIC defines "property damage" the same way in the Policy's "COMMERCIAL GENERAL LIABILITY FORM," "COMMERCIAL UMBRELLA LIABILITY COVERAGE FORM" and "EMPLOYMENT PRACTICES LIABILITY COVERAGE FORM" without including any "structural alteration" to property requirement. *Id*. at p. 134, 283 and 174 of 331, respectively. To the contrary CIC defines "property damage" to include "loss of use of tangible property that is not physically injured." In the "BUSINESS AUTO COVERAGE FORM" of the Policy CIC defines "property damage" to "mean[] damage to ***or loss of use of tangible property***."

(Emphasis added). *Id*. at p. 256 of 331. CIC's own definitions of "property damage" throughout the Policy are expressly at odds with the interpretive argument it now sets forth.

CIC will argue its own definitions of "property damage" are irrelevant because they appear in different sections of the Policy, and not the property section. However, the point is not that these definitions, by a strict reading of the Policy, necessarily define terms used in the property section. Rather, the presence of these definitions demonstrates **one reasonable construction/interpretation**, consistent with the ordinary and plain meaning of the phrase "physical loss or damage to property." After all, CIC can hardly argue that the definitions it uses throughout its Policy (in at least four different places) are unreasonable. These definitions *must* be reasonable, otherwise CIC would not have included them in the policy. CIC will wordsmith its response or ask the Court to look the other way as to these definitions in its Policy. The unavoidable reality, however, is that CIC's Motion necessarily argues that its own definitions of "property damage" throughout its Policy must be unreasonable. Of course, those definitions are not. They are consistent with the ordinary and plain meaning of that phrase/terms.

So, what is unreasonable about plaintiff asking the Court to construe the term "physical loss or damage to property" in the property section of the Policy in the same manner as CIC has agreed is reasonable elsewhere in the Policy? CIC's definition of "property damage" throughout the Policy demonstrates conclusively that this is *one* reasonable interpretation of the term "physical loss or damage to property."

The Policy, read as a whole as required, includes loss of use of property as a form of and within the definition of "property damage." "Property damage" is synonymous with "damage to property." One court explained "damage" as follows:

> One dictionary defines "damage" as "injury or harm that reduces value or usefulness." *Random House Dictionary of the English Language*, 504 (2nd

> ed.1987). Another defines it as "injury or harm to a person or thing, resulting in a loss in soundness, value, etc." *Webster's New World Dictionary,* 356 (2nd ed.1980). A legal dictionary defines "damage" in part as "every loss or diminution" of a person's property. *Black's Law Dictionary* 389 (6th ed.1990). Clearly, without qualification, the term "damage" encompasses more than physical or tangible damage.

Dundee Mut. Ins. Co. v. Marifjeren, 587 N.W.2d 191, 194 (N.D. 1998).

Accordingly, per the Policy's own language, one reasonable definition of "property damage" includes the loss of use of that property. If loss of use is included within a reasonable definition/meaning of "property damage," per the terms of the Policy itself, then "damage to property," particularly within the context of a business interruption claim, must be reasonably interpreted to include loss of use. *In re Chinese Drywall Products Liability Litigation,* 759 F.Supp.2d 822, 832 (E.D. La 2010) (Court must read insurance contract as a whole, and because policy defined "property damage" "to include loss of use of tangible property," the court found loss of use of homes due to defective drywall to be a covered physical loss). Otherwise, CIC will be forced to take the position that its definitions of "property damage" throughout the Policy are unreasonable.

Plaintiffs have sufficiently alleged a physical loss of, including, but not limited to, loss of use, of its premises and property due to the presence and physical characteristics of a physical substance (SARS-CoV-2), including the physical impact that substance had on Plaintiffs' property and property other than at Plaintiffs' premises (for purposes of **Civil Authority** coverage).

2. "Physical loss or damage to" property, as used within insurance contracts, does not require structural alteration of property.

The overwhelming majority of cases from around the country specifically reject the argument CIC asserts here – that the plain and ordinary meaning of "direct physical loss or damage to property," as used within an insurance policy, is susceptible of only one reasonable

interpretation that necessarily requires structural alteration of the property. Furthermore, the reason virus exclusions exist and have been adopted by other insurers and the insurance industry is because a virus *can* cause direct physical loss or damage to property according to the plain meaning of that phrase. Otherwise, the standard virus exclusion would be mere surplusage. The following non-exhaustive listing exemplifies the settled status of the law on this issue.

***Oregon Shakespeare Festival Assoc. v. Great American Ins. Co.*, 2016 WL 3267247 (D. Or.)** – Plaintiff, a partially open-air theatre, sustained "direct physical loss or damage to property" within meaning of insurance policy when wildfire smoke infiltrated the theater and rendered it unusable for its intended purposes thereby entitling insured to lost business income. Defendant implied that, "in order to be "physical," the loss or damage must be *structural* to the building itself." No evidence from within the policy, however, showed that the plain meaning of the term "physical" "includes such a limitation." Defendant gave no "sufficient explanation for why air is not physical. Certainly, air is not mental or emotional, nor is it theoretical. For example, if the dispute were over the theater's reputation or its fair market value, the Court might be inclined to agree with the Defendant. By contrast, while air may often be invisible to the naked eye, surely the fact that air has physical properties cannot reasonably be disputed." "The Court finds that defendant's interpretation, which would add the word "structural," and exclude the air within the building, is not a plausible plain meaning of the term "direct physical loss of or damage to property."

***Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, 1991 WL 619100 (D. Or.)** – Physical damage or alteration of property may occur at the microscopic level. "In making the determination [whether physical loss of or damage has occurred], courts consider the nature and intended use of the property itself and the purpose of the insurance contract."

***Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934 (D.N.J.)** – Accidental release of ammonia gas into packaging facility caused it to be closed for one week while ammonia dissipated. Travelers denied coverage arguing lack of structural alteration to property. Court disagreed, noting that "while structural alteration provides the most obvious sign of physical damage," various courts have found "that property can sustain physical loss or damage without experiencing structural alteration." ***See also Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002)** (asbestos in building of such quantity and condition as to make the structure unusable constitutes "physical loss or damage" within meaning of policy.

***Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524 (App. Div. 2009)** – Holding that property can be physically damaged without undergoing structural alteration for purposes of triggering coverage under insurance contract for "physical loss or damage to" property, when property loses its essential function.

***Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34 (1968)** – Where gasoline vapors penetrated the foundation of the insured church and accumulated, rendering building uninhabitable, the property was held to have suffered a "direct physical loss."

***One Place Condominium, LLC v. Travelers Property Cas. Co. of Am.*, 2015 WL 2226202, *9 (N.D. Ill.)** – "Where a general all-risk commercial or homeowner's policy insures against both "loss" and "damage" to an existing structure, "physical" damage may take the form of loss of use of otherwise undamaged property, which in turn suffices as a covered loss."

***Matzner v. Seaco Ins. Co.*, 1998 WL 566658 (Mass. Super. 1998)** – Carbon monoxide levels in apartment building sufficient to render building uninhabitable were a "direct physical loss."

***Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823 (3d Cir. 2005)** – Bacteria contamination of home's water supply constituted "direct physical loss." Whether functionality of insured's property was nearly eliminated or destroyed, or whether property was made useless or uninhabitable for purposes of rising to the level of physical loss in insurance policy may be question of fact.

***Essex v. Bloom South Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009)** – Unpleasant odor rendering property unusable for intended purposes constituted physical injury to property.

***Mellin v. Northern Security Ins. Co., Inc.*, 167 N.H. 544 (2015)** – Cat urine odor emanating into condo unit caused direct physical loss under insurance policy. "Physical loss" as used in insurance policy "need not be read to include only tangible changes to property that can be seen or touched but can also encompass changes that are perceived by the sense of smell and in the absence of structural damage." Insured not required to demonstrate tangible physical alteration to the condo unit. "Rather, to demonstrate a physical loss" under the policy, the insured "must establish a distinct and demonstrable alteration to the unit."

***AFLAC, Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306 (2003)** – Physical loss contemplates a change that causes the insured property, which was "in a satisfactory state… to become unsatisfactory for future use or requiring repairs be made to make it so" but does not require structural alteration.

***Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Connecticut*, 2007 WL 464715, *8 (D. Or.)** – Insured suffered "direct physical loss of or damage to" covered property when the property could not be used for its "ordinary expected purpose" even though the property could still be used for other income-generating purposes."

***Sentinel v. New Hampshire Ins.*, 563 N.W.2d 296 (Minn. Ct. App. 1997)** – Physical loss "may exist in the absence of structural damage to the insured property." Presence of asbestos fibers in building at levels that present a health hazard to building's tenants seriously impairs the building's function and therefore constitutes a direct physical loss entitling insured to coverage.

***TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699 (E.D. Va. 2010)** – Toxic gasses released by Chinese drywall rendered home uninhabitable resulting in direct physical loss or damage under insurance policy even in the absence of structural alteration.

***Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477 (1998)** – Home rendered unusable by increased risk of rockslide suffered direct physical loss for purposes of triggering coverage under policy even in the absence of structural damage.

***In re Chinese Manufactured Drywall Products Liab. Lit.*, 759 F.Supp.2d 822 (E.D. La. 2010)** – While the mere presence of a potentially injurious material in a home may not qualify as a covered physical loss, "when these types of materials are activated, for example by releasing gases or fibers [and posing danger to inhabitants and rendering property unfit or unusable for its intended purposes], courts have held there exists a physical loss."

***Board of Educ. V. Int'l Ins. Co.*, 308 Ill. App.3d 597 (1999)** – Release of harmful asbestos fibers in a building constitutes physical loss within meaning of insurance contract.

***Gen. Mills, Inc. v. Gold Medal Ins. Co*, 622 N.W. 2d 147 (Minn. Ct. App. 2001)** – Food manufacturer suffered "direct physical loss or damage to" cereal when oats used in product were treated with a non-hazardous pesticide that was not FDA-approved rendering it unsaleable. Even though oats were safe for human consumption and had not been destroyed, insured suffered covered "physical loss of or damage to" covered property.

***Farmers Ins. Co. v. Trutanich*, 123 Or. App. 6 (1993)** – Saturation of insured dwelling by methamphetamine fumes constituted a loss for purposes of insurance policy in the absence of any structural alteration of insured property.

***American Guarantee & Liability Ins. Co. v. Ingram Micro*, 2000 WL 726789 (D. Ariz.)** – Where insured's loss of custom computer programming configurations prevented insured from conducting business ""physical damage" is not restricted to the physical destruction or harm of computer circuitry, but includes loss of access, loss of use and loss of functionality."

***Three Palms Pointe, Inc. v. State Farm Fire and Cas. Co.*, 250 F.Supp.2d 1357 (M.D. Fla 2003)** – "[D]irect physical loss" includes more than losses that harm the structure of the covered property."

***Cook v. Allstate Ins. Co.*, 48D02-0611-PL-01156 (Ind. Super. 2007)** – House infested with spiders that rendered house unsuitable for occupancy constitutes a direct physical loss even when house's structural integrity remains intact.

***Midwest Specialties, Inc. v. Westfield Ins. Co.*, 1994 WL 107192 (Ohio Ct. App. Mar. 30, 1994** – Vapor from an accidental chemical reaction caused rust in different parts of the building, producing direct physical loss.

***Libbey Inc. v. Factory Mut. Ins. Co.*, 2007 WL 9757792 (N.D. Ohio, June 21, 2007)** – The plaintiff used an oil that contained excessive calcium, leaving deposits and impairing machine operation. The court found potential coverage for physical damage even though the policyholder discovered the problem, switched oils, and removed the deposits.

***Prudential Property & Cas. Ins. Co v. Lillard-Roberts*, 2002 WL 31495830, at *710 (D. Ore. 2002)** – The presence of mold in covered property and the risk of systemic fungal disease was "direct physical loss to property."

***Cooper v. Travelers Ind. Co.*, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002)** – The presence of e-coli bacteria in a restaurant's well, which forced the restaurant's closure, was direct physical damage to the property.

3. Plaintiff has alleged that its property was damaged by coronavirus.

CIC argues that Plaintiff has not alleged that coronavirus caused direct physical loss or damage to its property. This is wrong, as a plain reading of the Complaint demonstrates. For purposes of this motion, these allegations must be accepted as true.

CIC's real accusation is that the Complaint does not allege that the coronavirus has *structurally altered* Chez Francois' property. But, as discussed above and below, the Policy does not state that there must be structural alteration, nor does the case law support this position. Plaintiff's well-plead allegations state a claim to relief that is plausible on its face.

4. CIC misreads and misplaces reliance on *Mastellone* as the basis for including a "structural alteration" requirement into the Policy's "physical loss or damage to" property language.

Even though no such requirement or definition is included in the Policy, and despite the Policy's definitions of "property damage," CIC claims that "direct physical loss or damage to property" can reasonably contemplate losses only by something that actually alters the structural integrity of property." CIC cites and relies almost exclusively on *Mastellone v. Lightning Rod Mutual Ins. Co.*, 175 Ohio App.3d 23 (8th District 2008), a case involving exterior and interior mold claims under a homeowner's policy, for this interpretation. It should be noted that *Mastellone* was decided after a fully developed factual record, not on a Rule 12(B)(6) motion. It is also important to note that *Mastellone* interpreted a different kind of insurance policy – a

homeowner's policy offering coverage for dwellings and structures – as opposed to a business interruption policy.

Furthermore, we do not know what the terms of the *Mastellone* policy were; we do not have the entire policy and do not know what the language of that policy states. For example, the *Mastellone* court references a "definition of "property damage"" within the homeowner's policy but does not set forth that definition in the opinion. Accordingly, we have no way of knowing how the *Mastellone* policy defined "property damage." This is critical because the *Mastellone* court ultimately "construed the term "physical injury,"" – a phrase not included in the Policy at issue – within the "context [of] the other terms used in the definition of "property damage"" in the *Mastellone* policy. *Id.* at 40. But we do not even know what those other terms are that gave context to the court's interpretation.

Another distinguishing fact is that the *Mastellone* policy included a mold exclusion. *Id*. The Policy here, by contrast, has no virus exclusion. All of this is to say that *Mastellone's* interpretation of the term "physical injury," within the context of an unknown definition of "property damage," in a homeowner's policy with a mold exclusion, for purposes of evaluating mold claims, cannot be transposed onto different language, under a different Policy, within the context of very different claims.

CIC relies on the following excerpt from *Mastellone*:

> The term "physical injury" is undefined by the policy, so we give that term its usual meaning. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St. 107, 108, 1995-Ohio-214, 652 N.E.2d 684. Read in context with the other terms used in the definition of "property damage," we construe the term "physical injury" to mean a harm to the property that adversely affects the structural integrity of the house.

Id. at 40. From this passage CIC argues that direct "physical loss or damage to," a phrase not addressed by the excerpt above, necessarily requires structural alteration to the insured property.

It is not clear how CIC gets from "physical injury," construed within the context of other unknown terms within the definition of "property damage," to structural alteration as a clear and indispensable, albeit silent, component of direct "physical loss or damage to" property.

Furthermore, CIC fails to explain that there were two different mold claims at issue in *Mastellone*: 1) a claim for mold on the exterior of the house; and 2) a claim for "interior loss to the house occasioned by mold around a skylight." *Id*. at 27, 36. The quote relied upon by CIC for the "structural integrity" requirement, however, addressed only the mold claim for "property damage" ***to the exterior of the house***. Unlike the exterior mold claim for "physical damage" (definition unknown), the *Mastellone* insureds' claim for loss as to the interior mold was predicated on them "vacat[ing] the house" over "health concerns for one of their children." *Id*. at 29. CIC fails to acknowledge that ***as to the "claim for interior loss to the house occasioned by mold***," the trial court "concluded that the ***insurance policy predicate of "physical loss" required mold levels within the house to rise to dangerous levels***." *Id*. at 36 (emphasis added).

That is, the trial court interpreted the *Mastellone* policy as providing coverage (the "insurance policy predicate of "physical loss"") for direct physical loss to the insured property – the house – if the mold inside the house would have risen to "dangerous levels." *Id.* The evidence in *Mastellone,* however, did not demonstrate dangerous levels of interior mold, and the court also concluded that the insureds failed to bring the interior mold claim timely. *Id*. at 36. Significant to the claims at issue here, the appellate court left undisturbed the trial court's ruling, and recognition under the terms of the *Mastellone* policy, that coverage (for "physical loss") is triggered where interior mold, which causes no structural alteration of property, rises to dangerous levels requiring the insureds to vacate, thereby suffering a covered "physical loss" ("deprivation" or "forfeiture") of covered property – the house.

Consistent with the overwhelming majority of cases (*see infra*), *Mastellone*, applying Ohio law, recognizes that a physical substance can cause a covered physical loss to property without causing structural alteration of the insured property. In distinguishing the nature of the exterior mold claim, however, including the absence of any allegation that it required the insureds to move out, or stop using, or otherwise deprived them of the use or function of their house, and that, after hearing all of the evidence, it was agreed the exterior mold could be washed off without any damage or harm or injury to the wood, the *Mastellone* court properly focused on the phrase "physical injury" within the "property damage" definition, as the basis for denying the exterior mold claim. *Id.* at 23.

Mastellone involved different coverage and different claims and did not set forth the complete policy language governing its holding. That *Mastellone* recognizes that the "predicate of "physical loss" within an insurance policy is met when an insured is deprived of, or required to forfeit, or loses the use of or utility or function of its insured property on account of the presence of a dangerous physical substance, is consistent with the overwhelming body of law around the country and with the plain and clear meaning of the Policy language at issue. In this regard *Mastellone* serves as applicable governing precedent this court must follow.

5. The virus cases relied on by CIC do not involve allegations that virus caused direct physical loss or damage to property, but only allegations that civil shutdown orders caused direct physical loss or damage to property.

CIC relies, or will rely in its Reply, on five recent decisions in virus cases as support for its motion. However, none of these cases contained an allegation that virus particles themselves caused direct physical loss or damage to the insured's property. Rather, the complaints simply alleged that the civil shutdown orders, in and of themselves, constituted direct physical loss or damage to covered property. In each case, the courts rejected this argument, but such rejection

does not impact the very different allegations made in this case. Indeed, most of the courts in the cases cited to by CIC recognize, expressly or implicitly, that had the plaintiff insureds alleged the physical presence of SARS-CoV-2 particles at their insured premises as the cause of loss (direct physical loss or damage to property) the analysis and outcome would be different under the policies.

The first case cited by CIC is *Gavrilides Management Co. v. Michigan Ins. Co.*, Case No. 20-258, (Mic. Cir. Ct., July 1, 2020), a case arising out of a Michigan circuit court. The *Gavrilides* hearing transcript highlights the differences between the claims and the policy language at issue in *Gavrilides*:

- "The complaint here [in *Gavrilides*] does not allege any physical loss of or damage to the property." Document 13.3, page 19:4-5.

- "[T]he complaint [in *Gavrilides*] also states that a[t] no time has Covid-19 entered the Soup Spoon or the Bistro [insured premises] through any employee or customer and in fact, ***states that it [SARS-CoV-2] has never been present in either location. So, there simply are no allegations of direct physical loss of or damage to either property.***" Document 13.3, page 19:9-14.

- "There is a virus exclusion [in the *Gavrilides* policy] even if plaintiff was alleging, was alleging, even if there were allegations in the complaint alleging actual physical loss or damage, which the complaint does not do. But, there is a virus exclusion that would also apply." Document 13.3, page 22:10-14.

The claims in *Gavrilides* did not allege the presence of SARS-CoV-2 at insured premises. To the contrary, the *Gavrilides* complaint expressly denied that SARS-CoV-2 had ever been physically present. Michigan Judge Joyce Draganchuk's statement at the relevant hearing in that case that the *Gavrilides* complaint states SARS-CoV-2 "***has never been present in either [insured] location. So, there simply are no allegations of direct physical loss of or damage to either property***" is telling. *Id.* at p. 19 (emphasis added). Indeed, had the *Gavrilides* complaint

alleged, as opposed to denied, the presence of SARS-CoV-2 at the insured premises, ***it would have alleged direct physical loss of or damage to property***.

The gravamen of the *Gavrilides* court's ruling was that government shut down orders do not, in and of themselves, constitute direct physical loss or damage to property because "there has to be something that affects the integrity of the property." *Id*. Plaintiff's allegations in the Complaint, however, are very different. Indeed, to suggest that the presence of a deadly physical substance at, in and on the insured's business premises and property cannot, as a matter of law without any discovery or expert opinions, "affect the integrity of [that business's] property," is radically off-base. The numerous cases cited *supra*, addressing the presence of deadly or unsafe fumes, gasses and other "physical" conditions at, on or in an insured's premises, confirms that those conditions cause direct physical loss and/or damage to property for purposes of the coverage language at issue.

Finally, the *Gavrilides* policy had the commonly used, industry-wide standard virus exclusion excluding losses, including direct physical loss and damage to property, caused by viruses, an exclusion that, according to CIC's arguments, is apparently meaningless because CIC claims a virus cannot cause direct physical loss or damage to property.

The next case that CIC relies on is *Social Life Magazine, Inc. v. Sentinel Ins. Co.,* 1:20-cv-03311-VEC (S.D.N.Y. 2020). In this case, the insured moved for a preliminary injunction to prevent the insurer from denying coverage for virus-related losses. There is no written order in this case, just a transcript of a hearing. (See CIC's Exhibit E) *Social Life* was controlled by New York law. The policy contained a virus exclusion. The court denied the motion for a preliminary injunction, saying that a "more complete order" would be issued later. Exhibit E, page 15:17-18. No such order is on the docket. The court referred to the decision in *Roundabout Theatre Company*

v. Continental Casualty Co., 302 A.D.2d 1 (2002), in which the insured sought coverage as a result of a civil order closing the insured's street because of property damage to a neighboring building. The court noted that "the theatre sustained only minor damage to its roof and air conditioning system, which was repaired within one day." *Id.* at *3. Also, the insured had no coverage for civil authority, which was the clear cause of the loss of business. The court held that there was no coverage because the insured's building had not suffered any direct physical loss or damage. There was no discussion concerning whether physical alteration was necessary for there to be direct physical loss or damage because there admittedly was nothing—no mold, virus, bacteria, etc.—on the insured's property.

Here, Plaintiff has pled that its building *did* sustain direct physical loss or damage and that virus particles were on the premises, so *Roundabout*, and by extension *Social Life*, do not apply.

The third virus case cited by CIC is *Rose's 1, LLC v. Erie Insurance Exchange*, 2020 WL 4589206 (D.C. Super.) However, *Rose* did not involve a motion to dismiss, but dealt with cross-motions for summary judgment where the parties conceded there were no material issues of fact, and the holding actually supports Plaintiff's position that CIC's Motion to Dismiss should be denied.

The issue framed by the court was, "[A]t the most basic level, the parties dispute whether the closure of the restaurants due to Mayor Bowser's orders constituted a "direct physical loss" under the policy." The court answered this question by holding that "[N]one of the cases cited by Plaintiff stand for the proposition that a governmental edict, standing alone, constitutes a direct physical loss under an insurance policy." *Id*. at *3.

This is not the issue before this Court. Here, Plaintiff is not relying solely on the governmental orders as direct physical loss; to the contrary, the issue is whether the invasion and

presence of the *virus* on Plaintiff's insured property constitutes direct physical loss or damage. That is precisely why Plaintiff's Complaint alleges that SARS-CoV-2 particles were physically present at and inside its premises, both in the air and on the surfaces of other "Covered Property" during the Policy period, as were people carrying these particles. Therefore, because *Rose* dealt with a separate issue it does not support CIC's position.

The fourth and fifth virus cases cited by CIC are *10E, LLC v. Travelers Indem. Co.*, Case No. 2:20-cv-04418 (C.D. Cal.) (Sept. 2, 2020) and *Malaube v. Greenwich Ins. Co.*, Case No. 20-22615 (S.D. Fla.) (Aug. 26, 2020). These decisions were published after CIC filed its Motion, but it has cited them in other cases and will do so in its reply. Because of the presence of a virus exclusion, the insureds in *10E* and *Malaube*, unlike Plaintiffs here, did not allege the presence of SARS-CoV-2 on their covered property or premises as the cause of any lost business income or extra expense. Rather, in both cases, the insureds claimed that governmental shut down/restriction orders ***alone*** caused "physical loss" or "physical damage" within the meaning of the policy language. Unlike the *10E* and *Malaube* insureds, however, Plaintiffs ***do allege the presence of SARS-CoV-2 particles at their premises and on their covered property***. Specifically, Plaintiffs allege that the physical presence of a dangerous physical substance (the coronavirus) that physically infiltrated, contaminated, altered, etc… their premises caused direct physical loss and/or damage to property resulting in lost business income and extra expense. Absent the industry-wide virus exclusion, losses sustained as the result of the physical presence of a virus are covered. Indeed, the cases cited to by CIC seem to recognize this fact.

Critically, *Malaube* discusses the distinguishable facts in *Studio 417* – wherein the Court denied CIC's Motion to Dismiss – and states that this case is "materially different ***because Plaintiff has not alleged any physical harm. There is no allegation, for example, that COVID-***

19 was physically present on the premises." *Id*. at p. 15. (Emphasis added). Therefore, the Court in *Maluabe* agrees that allegations such as those in *Chez Francois* and in *Studio 417* are "enough to survive a motion to dismiss." *Id*.

The cases cited by CIC are materially different and do not support its Motion. To the contrary, they support Plaintiff's claims. None of these cases do anything to negate *Studio 417, Inc.* and *SSF II, INC*, the only rulings addressing CIC's Policy.

E. The fact that the Policy covers a "period of restoration" does not mean that only losses attributable to tangible physical damage to plaintiff's restaurant are covered.

First, the physical presence of a deadly physical substance on property can and does amount to "tangible physical damage" to that property. Nevertheless, CIC's last argument on this point is that the fact that the Policy covers losses during a "period of restoration" (during which the Covered Property is being "repaired, rebuilt, or replaced") must mean that physical damage (some structural alteration) to the property is required. But the word "repair" does not require the fixing of physical damage to something that has been structurally altered. To "repair" is simply to restore to a sound condition, a definition that easily embraces waiting until the threat from the coronavirus passes, and Plaintiff's premises are restored to a safe, working condition. As one court has observed, when interpreting identical policy language, an interpretation that requires restoration to include only "structural" repairs or restoration impermissibly adds new limitations on coverage not found in the text of the insurance contract. *Ore. Shakespeare Festival Ass'n*, 2016 WL 3267247, at 6. Thus, the time needed for smoke from a nearby fire to dissipate so an outdoor theater could be used was a covered "period of restoration." *Id.* Or, as the court noted in *Gregory Packaging*, "[an] ammonia release physically changed the facility's condition to an unsatisfactory state needing repair." *Gregory Packaging*, 2014 WL 6675934, at 7. That "repair" was the

abatement of the ammonia, just as in this case it would be the abatement of the exponential growth of coronavirus such that it is safe to restore full operations.

In sum, Chez Francois has suffered a direct physical loss to its premises, triggering coverage under the Policy. At the very least, it has alleged a reasonable interpretation of "direct physical loss," making the phrase sufficiently ambiguous to construe in favor of coverage.

F. The Complaint sufficiently alleges a claim for declaratory judgment under the Civil Authority coverage provision of the Policy.

1. The Complaint alleges that direct physical loss or damage to property resulted in the civil authority order.

Again, CIC argues that the Complaint does not say what it clearly says. CIC argues that "The complaint contains no alleged facts asserting any direct physical loss." But the civil authority coverage requires direct physical damage "to property other than property" owned by the insured.

Plaintiff does allege that such loss or damage occurred. And that the civil authority order resulted from the pandemic, including the loss and damage to property caused by the presence of SARS-CoV-2 in the community. *See* Complaint.

As alleged in the Complaint, SARS-CoV-2 causes physical property loss and damage wherever it is present. Accordingly, regardless of the specific reasons articulated at any given point in time for the civil authority orders at issue, the fact is that those orders issued in response to the presence of a virus that necessarily causes physical loss and damage to property, in satisfaction of the Civil Authority insuring provision in the Policy.

2. The civil authority orders barred Plaintiff from accessing its property.

Raising yet another factual argument, and refusing to accept the allegations in the Complaint, in violation of Rule 12(B)(6), CIC claims the shutdown orders did not "prohibit access" to Plaintiff's business premises because the orders state proprietors may still access their

property to do things like preserve the condition of the business's physical plant and equipment, maintain the value of inventory, process payroll, and other necessary functions to reduce, as opposed to increase, losses, a duty imposed by the Policy itself.

Civil Authority coverage is entirely or nearly illusory under CIC's "interpretation" of the "prohibited access to the property" language. According to CIC, so long as the owner (or anyone presumably) can get access to the insured premises for any reason at any point in time, for any duration, even if normal business income generating operations are suspended by civil order (the reason the business purchased business interruption civil authority coverage in the first place) the Policy offers no coverage. Presumably, even if an owner (or anyone else) went back into her premises once for five minutes, to retrieve her wallet, or turn off the gas, or retrieve and salvage insured property (which she has a duty to do to mitigate losses), access has not been prohibited and no business interruption coverage is available. Such an outrageous argument and interpretation of the Policy should not be countenanced by the Court. The clear intent and language of the **Civil Authority** business interruption coverage is to reimburse a business for lost income when, by way of civil order, access to its business, ***for purposes of conducting normal business operations to generate business income*** is prohibited.

As noted in *Studio 417*, "these allegations plausibly allege that access was prohibited to such a degree as to trigger the civil authority coverage." *Id.* at 14.

3. Access to the insured premises is prohibited by the civil authority orders.

The Complaint alleges prohibited access. That allegation must be accepted as true. Furthermore, the shutdown orders on their face require that access to the insured premises, for purposes of conducting business operations, was/is prohibited.

4. Access to the area surrounding the damaged property is prohibited by civil authority as a result of the damage to the other property.

CIC's characterizations as to the motivations behind the civil shutdown orders at issue cannot be resolved at the motion to dismiss stage and must otherwise be read in favor of Plaintiff's opportunity to prove a plausible set of facts to state a claim for declaratory judgment under the **Civil Authority** coverage provision in the Policy.

Furthermore, whether one could read or interpret the shutdown orders at issue to be intended to stop or slow the spread of COVID-19, there is no dispute that the orders were issued in response to the physical presence of SARS-CoV-2 in the community, including at and on property other than at the insured's premises. That physical substance is alleged to and does cause direct physical loss and damage to property. Accordingly, regardless of how the shutdown orders are characterized in terms of their intent, the Complaint alleges, and it cannot be refuted, they were issued in response to the physical presence of SARS-CoV-2 particles.

VI. CONCLUSION

For all of the reasons set forth herein, Plaintiffs respectfully request the Court deny CIC's Motion to Dismiss in its entirety and permit this matter to proceed with discovery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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