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F. HEWITT

TAPS & BOURBON ON TERRACE, LLC vs. CERTAIN UNDERWRITERS AT LLOYDS, LONDON And MAIN LINE INSURANCE OFFICES, INC.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY, PA JULY TERM, 2020 NO. 00375

ORDER

AND NOW, this _____ day of _____, 2020, upon consideration of Defendant Certain Underwriters at Lloyds, London's Preliminary Objections to Plaintiff's Amended Complaint, and Plaintiff's Response thereto, it is hereby **ORDERED** and **DECREED** that the Preliminary Objections are **OVERRULED** and **DISMISSED**.

It is further **ORDERED** that Defendant shall file an answer to Plaintiff's Complaint within twenty (20) days hereof.

BY THE COURT:

_____
J.

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Control No.: 20093025

WHEELER, DiULIO & BARNABEI, P.C.
BY: Jonathan Wheeler, Esquire
Attorney I.D. No.: 12649
One Penn Center - Suite 1270
1617 JFK Boulevard
Philadelphia, PA 19103
(215) 568-2900
Email: jwheeler@wdblegal.com

Attorney for Plaintiff

TAPS & BOURBON ON TERRACE, LLC vs. CERTAIN UNDERWRITERS AT LLOYDS, LONDON And MAIN LINE INSURANCE OFFICES, INC.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY, PA JULY TERM, 2020 NO. 00375

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S PRELIMINARY OBJECTIONS TO PLAINTIFF'S AMENDED COMPLAINT

Plaintiff, Taps & Bourbon on Terrace, LLC (hereinafter "Plaintiff"), by and through its attorneys, Wheeler, DiUlio & Barnabei, P.C., hereby submits Response in Opposition to Defendant's, Certain Underwriters at Lloyds, London (hereinafter "Lloyds"), Preliminary Objections to Plaintiff's Amended Complaint, and in support thereof, avers as follows:

1. Admitted.

2. Admitted. By way of further response, Plaintiff's Policy is a document, in writing, the content of which speaks for itself.

3. Admitted. By way of further response, Plaintiff's Amended Complaint is a document, in writing, the content of which speaks for itself. *See* Def. Exhibit "A."

4. Admitted. By way of further response, Plaintiff's Praecipe to Attach Exhibit to Amended Civil Action Complaint is a document, in writing, the content of which speaks for itself. *See* Def. Exhibit "B."

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5. Admitted. Indeed, Lloyds has breached its contract of insurance and violated its duty of good faith and fair dealing by denying coverage and benefits to Taps & Bourbon which are clearly owed under the terms of the Policy.

6. Admitted in part, denied in part. It is admitted that Plaintiff is seeking coverage for loss of income and extra expenses. Yet, importantly, Plaintiff also states in its Amended Complaint that the benefits due and owed as a result of its covered loss include, but are not limited to loss of business income, extra expenses and from its business operations. *See* Def. Exhibit "A" at ¶ 34.

7. Admitted. By way of further response, Plaintiff's Amended Complaint is a document, in writing, the content of which speaks for itself. *See* Def. Exhibit "A" at ¶¶ 18 and 19.

8. Admitted. By way of further response, Plaintiff's Amended Complaint is a document, in writing, the content of which speaks for itself. *See* Def. Exhibit "A" at ¶ 20.

9. Admitted. Defendant has denied Plaintiff's claim for coverage citing the lack of a "direct physical loss or damage" which is required for coverage to attach. However, Plaintiff in this case is relying on clear precedent from the Third Circuit Court of Appeals that inhabitability can constitute a direct physical loss in the era of COVID-19. *See Port Auth. Of New York and New Jersey v. Affiliated FM Inc. Co.*, 311 F.3d 226, 236 (3d Cir. 2002); *Motorists Mutual Ins. Co. v. Hardinger*, 131 F.App'x 823 (3d Cir. 2005).

10. Admitted, with qualification. Plaintiff admits that Defendant Lloyd's is filing the instant Preliminary Objections seeking a demurrer as a result of what Defendant erroneously views as a lack and/or exclusion of coverage for Plaintiff's claims under the Policy. Plaintiff has

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and continues to plead factually plausible claims of breach of contract and bad faith against Defendant.

11. Denied as a conclusion of law to which no response is required.

12. Denied as a conclusion of law to which no response is required.

13. Denied as a conclusion of law to which no response is required.

14. Denied as a conclusion of law to which no response is required.

15. Denied as a conclusion of law to which no response is required.

16. Denied as a conclusion of law to which no response is required.

17. Denied as a conclusion of law to which no response is required.

18. Admitted. Plaintiff alleges a direct physical loss and relies on clear precedent from the Third Circuit Court of Appeals that inhabitability can constitute a direct physical loss in the era of COVID-19. *See Port Auth. Of New York and New Jersey v. Affiliated FM Inc. Co.*, 311 F.3d 226, 236 (3d Cir. 2002); *Motorists Mutual Ins. Co. v. Hardinger*, 131 F.App'x 823 (3d Cir. 2005). Courts applying Pennsylvania law have defined "direct physical loss" under an insurance contract as a loss that results "immediately and proximately from an event." *See Easy Sportswear, Inc., v. Am. Economy Ins. Co.*, No. 05–1183, 2007 WL 4190767, at *6 (W.D. Pa. Nov.21, 2007) (applying Pennsylvania law). Insurance coverage for a "direct physical loss" means that the loss must have "close logical, causal, or consequential relationship" with an earlier event. *See DiFabio v. Centaur Ins. Co.*, 366 Pa.Super. 590, 531 A.2d 1141, 1143–44 (Pa.Super.Ct. 1987) (noting that "direct" means "stemming immediately from a source" and "characterized by close logical, causal or consequential relationship").

19. Admitted. By way of further response, Plaintiff's Policy is a document, in writing, the content of which speaks for itself. *See* Def. Exhibits "B" and "C."

20. Admitted. By way of further response, Plaintiff's Policy is a document, in writing, the content of which speaks for itself. *See* Def. Exhibits "B" and "D."

21. Admitted. By way of further response, Plaintiff's Policy is a document, in writing, the content of which speaks for itself. *See* Def. Exhibit "E."

22. Admitted. By way of further response, Plaintiff's Policy is a document, in writing, the content of which speaks for itself. *See* Def. Exhibit "F."

23. Admitted.

24. Denied. To the contrary, Plaintiff clearly states a direct physical loss triggering coverage under the Policy. In its Amended Complaint Plaintiff alleges that it "immediately closed the Restaurant Premises insured under the Lloyds Policy and ceased all business operations . . . As a result of this closure Business Income from this location ceased and Taps & Bourbon has spent and incurred substantial Extra Expenses to maintain these premises to minimize the suspension of operations and continue business when possible." *See* Def. Exhibit "A" ¶¶ 18 and 19.

25. Denied. Plaintiff is alleging that the inability to inhabit the Properties at issue, and the prohibition of Plaintiffs to collect revenue/income, equates to a direct physical loss for insurance purposes.

26. Admitted, with qualification. Plaintiff admits that there is no proof that the COVID-19 virus was present at the insured premises. It is precisely because there is no proof of the virus being present at the Property that the virus exclusion cannot apply.

27. Denied as a conclusion of law to which no response is required.

28. Denied as a conclusion of law to which no response is required.

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29. Denied as a conclusion of law to which no response is required. By way of further response, Plaintiff is not alleging that the need to clean equates to a direct physical loss, nor damage. Rather, Plaintiff clearly states in its Amended Complaint that it immediately closed the insured premises and ceased *all* business operations. During this cessation of business, there was periodic maintenance to disinfect the premises, but the direct physical loss was Plaintiff's inability to inhabit or utilize its Property as a result of the closure orders. *See Studio 417, Inc. v. Cincinnati Insurance Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385 at *6 (W.D. Mo. Aug. 12, 2020) (denying insurance company's motion to dismiss because, *inter alia*, plaintiffs adequately alleged that their lack of access to the properties were adequate claims to trigger civil authority coverage); *see also Ridley Park Fitness, LLC v. Philadelphia Indemnity Insurance Co*., No. 200501093 (Pa. Ct. Com. Pl. Aug. 13, 2020) (striking down insurer's motion to dismiss stating that it would be premature for the court to resolve factual determinations); *Optical Services USA/JC1 v. Franklin Mutual Ins. Co.*, No. BER-L-3681-20 (N.J. Super. Ct. Law Div. Aug. 13, 2020) (denying the insurance company's motion to dismiss reasoning that "[t]here 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 change to the property"); Order, *K.C. Hopps, Ltd. v. The Cincinnati Ins. Co.*, No. 20-cv-00437-SRB (W.D. Mo. Aug. 12, 2020) (denying the insurers motion to dismiss); *Francois, Inc. v. The Cincinnati Insurance Co.*, No. 20CV201416 (Ohio C.P. Sept. 29, 2020) (insurer's motion to dismiss was denied because discovery was needed, and the insured's complaint stated claims which arguably fit the terms and conditions of the policy).

30. Admitted in part, denied in part. It is admitted that Defendant accurately states the language of the Policy. It is denied that Defendant's conclusion is further supported by the fact

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that loss of business income under the Policy is covered only during a "period of restoration."

The term "period of restoration" is defined in the Policy as a period of time that:

> a. Begins:
>
> (1) 72 hours after the time of direct physical loss or damage to Business Income Coverage; or
> (2) Immediately after the time of direct physical loss or damage for Extra Expense Coverage;
>
> Caused by or resulting from any Covered Cause of Loss at the described premises.

See Def. Exhibit "B."

Plaintiff has adequately alleged that it suffered a direct physical loss suspending its operation.

31. Admitted. By way of further response, Plaintiff's Policy is a document, in writing, the content of which speaks for itself. *See* Def. Exhibit "D."

32. Denied as a conclusion of law to which no response is required.

33. Denied as a conclusion of law to which no response is required. By way of further response, Plaintiff is entitled to coverage under the Policy. *See Studio 417, Inc. v. Cincinnati Insurance Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385 at *6 (W.D. Mo. Aug. 12, 2020); *Ridley Park Fitness, LLC v. Philadelphia Indemnity Insurance Co.*, No. 200501093 (Pa. Ct. Com. Pl. Aug. 13, 2020); *Francois, Inc. v. The Cincinnati Insurance Co.*, No. 20CV201416 (Ohio C.P. Sept. 29, 2020); *Optical Services USA/JC1 v. Franklin Mutual Ins. Co.*, No. BER-L-3681-20 (N.J. Super. Ct. Law Div. Aug. 13, 2020); Order, *K.C. Hopps, Ltd. v. The Cincinnati Ins. Co.*, No. 20-cv-00437-SRB (W.D. Mo. Aug. 12, 2020).

34. Admitted in part, denied in part. It is admitted that Plaintiff is seeking coverage for loss of income and extra expenses. Yet, importantly, Plaintiff also states in its Amended Complaint that the benefits due and owed as a result of its covered loss include, but are not

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limited to loss of business income, extra expenses and from its business operations. *See* Def. Exhibit "A" at ¶ 34.

35. Admitted. By way of further response, Plaintiff's Policy is a document, in writing, the content of which speaks for itself. *See* Def. Exhibits "B" and "D."

36. Admitted, with qualification. The pandemic has been declared to constitute a "Disaster Emergency" which has affected all property located in the Commonwealth of Pennsylvania, including the premises insured under the Lloyd's Policy. The Cause of Loss under the Policy is "…Risk of Direct Physical Loss." *See* Def. Exhibit "B."

37. Denied. Plaintiff clearly states a direct physical loss triggering coverage under the Policy. In its Amended Complaint Plaintiff alleges that it "immediately closed the Restaurant Premises insured under the Lloyds Policy and ceased all business operations . . . As a result of this closure Business Income from this location ceased and Taps & Bourbon has spent and incurred substantial Extra Expenses to maintain these premises to minimize the suspension of operations and continue business when possible." Further, Plaintiff states that Defendant's "assertion that there has been no direct physical damage to [the] insured property . . . is plainly untrue since the pandemic has been declared to constitute a "Disaster Emergency" which has affected all property located in the Commonwealth of Pennsylvania, including the premises insured under Lloyd's Policy. This is especially true since the Cause of Loss under the Policy is '…Risk of Direct Physical Loss.'" *See* Def. Exhibit "A" ¶¶¶ 18, 19, 26.

38. Admitted, with qualification. Access to the area immediately surrounding the damaged Property was prohibited by civil authority. Specifically, Governor Wolf's Order.

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39. Denied. To the contrary, Plaintiff's Amended Complaint alleges direct physical loss *and* a prohibition of access to an area surrounding the Property. *See* Def. Exhibit "A" at ¶¶¶ 18, 19, 26.

40. Admitted. The action of civil authority *was* taken in response to dangerous physical conditions resulting from the damage or continuation of a Covered Cause of Loss that caused the damage.

41. Denied. By Defendant's own admission, damage to the Property is not the sole requirement. Rather, there must be a direct physical loss of *or* damage to the Covered Property. The BUILDING AND PERSONAL PROPERTY COVERAGE FORM, form CP 00 10 06 07 of the Policy states:

> A. Coverage
>
> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

See Def. Exhibit "B" at form CP 00 10 06 07.

42. Denied as a conclusion of law to which no response is required. By way of further response, Plaintiff is entitled to coverage under the Civil Authority coverage of the Policy. *See Studio 417, Inc. v. Cincinnati Insurance Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385 at *6 (W.D. Mo. Aug. 12, 2020); *Ridley Park Fitness, LLC v. Philadelphia Indemnity Insurance Co*., No. 200501093 (Pa. Ct. Com. Pl. Aug. 13, 2020); *Francois, Inc. v. The Cincinnati Insurance Co.*, No. 20CV201416 (Ohio C.P. Sept. 29, 2020); *Optical Services USA/JC1 v. Franklin Mutual Ins. Co.*, No. BER-L-3681-20 (N.J. Super. Ct. Law Div. Aug. 13, 2020); Order, *K.C. Hopps, Ltd. v. The Cincinnati Ins. Co.*, No. 20-cv-00437-SRB (W.D. Mo. Aug. 12, 2020).

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43. Denied. Although Defendant correctly reiterates the Policy language, the virus exclusion is subject to more than one reasonable interpretation and the COVID-19 virus was not a direct cause of the property damage at issue. The State issued its Order to ensure the absence of the virus, or persons carrying the virus. There is no evidence whatsoever that the virus entered Plaintiffs' Property. *See* Exhibit "B" at form CP 01 40 07 06; *see also* EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA, form CP 01 40 07 06 of the Policy, Def. Exhibit "G."

44. Admitted. By way of further response, Plaintiff's Policy is a document, in writing, the content of which speaks for itself.

45. Denied. Plaintiff has suffered a direct physical loss as understood under Pennsylvania law. Plaintiff was not permitted to utilize the functionality of its Property because of a close logical, causal, or consequential relationship with an earlier event – **the closure orders**. The business operation of Plaintiff's businesses ceased because of the act of "Civil Authority." The inability to inhabit the Property at issue, and the prohibition of Plaintiff to collect revenue/income, equates to a direct physical loss for insurance purposes.

46. Denied. Plaintiff has suffered a direct physical loss as understood under Pennsylvania law. Plaintiff was not permitted to utilize the functionality of its Property because of a close logical, causal, or consequential relationship with an earlier event – **the closure orders**. The business operation of Plaintiff's businesses ceased because of the act of "Civil Authority." The inability to inhabit the Property at issue, and the prohibition of Plaintiff to collect revenue/income, equates to a direct physical loss for insurance purposes.

47. Admitted.

48. Denied. the virus exclusion was removed from the Policy under the ISO Restaurant and Platinum Enhancement Endorsement (DTWCP-D000 10 (9/18)) which states,

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"[w]ith regard to this Additional Coverage, the **CAUSES OF LOSS—SPECIAL FORM CP 10 30,** Paragraph **B. Exclusions** is amended to delete all of the exclusions except for the following: (list of Exclusions which does NOT include the Virus Exclusion)." *See* Def. Exhibit "H."

49. Denied. the virus exclusion was removed from the Policy under the ISO Restaurant and Platinum Enhancement Endorsement (DTWCP-D000 10 (9/18)) which states, "[w]ith regard to this Additional Coverage, the **CAUSES OF LOSS—SPECIAL FORM CP 10 30,** Paragraph **B. Exclusions** is amended to delete all of the exclusions except for the following: (list of Exclusions which does NOT include the Virus Exclusion)." *See* Def. Exhibit "H."

50. Denied. Plaintiff's Amended Complaint is not required to allege the claims listed by Defendant.

51. Denied. the virus exclusion was removed from the Policy under the ISO Restaurant and Platinum Enhancement Endorsement (DTWCP-D000 10 (9/18)) which states, "[w]ith regard to this Additional Coverage, the **CAUSES OF LOSS—SPECIAL FORM CP 10 30,** Paragraph **B. Exclusions** is amended to delete all of the exclusions except for the following: (list of Exclusions which does NOT include the Virus Exclusion)." *See* Def. Exhibit "H."

52. Denied. the virus exclusion was removed from the Policy under the ISO Restaurant and Platinum Enhancement Endorsement (DTWCP-D000 10 (9/18)) which states, "[w]ith regard to this Additional Coverage, the **CAUSES OF LOSS—SPECIAL FORM CP 10 30,** Paragraph **B. Exclusions** is amended to delete all of the exclusions except for the following: (list of Exclusions which does NOT include the Virus Exclusion)." *See* Def. Exhibit "H."

53. Denied as a conclusion of law to which no response is required.

54. Admitted, with qualification. The Virus Exclusion does contain the language "cause by or resulting from." Yet, importantly, the Virus Exclusion does not apply to this case.

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There is no proof that the COVID-19 virus was present at the insured premises which caused the damage at issue. There must be some limitation on the Virus Exclusion, otherwise these exclusions could theoretically apply to every "direct physical loss" caused directly or indirectly by the *suspected* presence of a virus.

55. Denied as a conclusion of law to which no response is required.

56. Denied. Plaintiff was not permitted to utilize the functionality of its Property because of a close logical, causal, or consequential relationship with an earlier event – **the closure orders**. The business operation of Plaintiff's businesses ceased because of the act of "Civil Authority." The inability to inhabit the Property at issue, and the prohibition of Plaintiff to collect revenue/income, equates to a direct physical loss for insurance purposes.

57. Admitted, with qualification. Although the Executive Order cites COVID-19, this does not change the fact that Plaintiff has adequately alleged that the Orders were what prohibited access to its business premises to such a degree as to trigger civil authority coverage. *See* Def. Exhibit "A" at Exhibit 2.

58. Denied. Plaintiff has adequately alleged that the Orders were what prohibited access to its business premises to such a degree as to trigger civil authority coverage. *See* Def. Exhibit "A."

59. Denied as a conclusion of law to which no response is required. By way of further response, Plaintiff's coverage is not precluded by the virus exclusion or any other exclusion within the Policy. *See Ridley Park Fitness, LLC v. Philadelphia Indemnity Insurance Co*., No. 200501093 (Pa. Ct. Com. Pl. Aug. 13, 2020) (denying insurer's motion to dismiss based on, *inter alia*, the insurer's citing the orders as an alternate theory of loss, thus circumnavigating the virus exclusion).

60. Admitted.

61. Admitted.

62. Denied. Plaintiff alleges that it was forced to perform periodic maintenance to disinfect the premises and clean surfaces potentially infected with the disease. Food was clearly present at the insured premises warranting a suspicion of an incident of food contamination by the virus. The Policy's language for "Food Contamination" states that if, "your business at the described premises is ordered closed by the Board of Health or any other governmental authority as a result of the discovery or suspicion of food contamination" Defendant will pay the actual loss of business income and various extra expenses. *See* Def. Exhibit "B."

63. Denied. Food was clearly present at the insured premises warranting a suspicion of an incident of food contamination by the virus. The Policy's language for "Food Contamination" states that if, "your business at the described premises is ordered closed by the Board of Health or any other governmental authority as a result of the discovery or suspicion of food contamination" Defendant will pay the actual loss of business income and various extra expenses. *See* Def. Exhibit "B."

64. Denied. Plaintiff plainly states a direct physical loss triggering coverage under the Policy. In its Amended Complaint Plaintiff alleges that it "immediately closed the Restaurant Premises insured under the Lloyds Policy and ceased all business operations . . . As a result of this closure Business Income from this location ceased and Taps & Bourbon has spent and incurred substantial Extra Expenses to maintain these premises to minimize the suspension of operations and continue business when possible." Further, Plaintiff states that Defendant's "assertion that there has been no direct physical damage to [the] insured property . . . is plainly untrue since the pandemic has been declared to constitute a "Disaster Emergency" which has

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affected all property located in the Commonwealth of Pennsylvania, including the premises insured under Lloyd's Policy. This is especially true since the Cause of Loss under the Policy is '…Risk of Direct Physical Loss.'" *See* Def. Exhibit "A" ¶¶¶ 18, 19, 26.

65. Denied. Defendant deprived Plaintiff of the benefit of its bargained for benefits due and owing as a result of its covered loss.

66. Admitted.

67. Denied. As Plaintiff has stated above, there was a direct physical loss to Plaintiff's Property and the virus exclusion is inapplicable.

68. Denied as a conclusion of law to which no response is required.

69. Denied. Defendant engaged in bad faith conduct because it lacked any objectively reasonable basis for denying benefits and it knew or recklessly disregarded its lack of such reasonable basis.

WHEREFORE, for all of the foregoing reasons, Plaintiff, Taps & Bourbon on Terrace, LLC, respectfully requests that this Honorable Court deny Defendant, Certain Underwriters at Lloyds, London's Preliminary Objections and sign the Order in the form attached hereto.

Respectfully submitted,

WHEELER, DiULIO & BARNABEI, P.C.

BY: */s/ Jonathan Wheeler*
Jonathan Wheeler, Esquire
Attorney for Plaintiff

Date: October 19, 2020

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WHEELER, DiULIO & BARNABEI, P.C.
BY: Jonathan Wheeler, Esquire
Attorney I.D. No.: 12649
One Penn Center - Suite 1270
1617 JFK Boulevard
Philadelphia, PA 19103
(215) 568-2900
Email: jwheeler@wdblegal.com

Attorney for Plaintiff

TAPS & BOURBON ON TERRACE, LLC vs. CERTAIN UNDERWRITERS AT LLOYDS, LONDON And MAIN LINE INSURANCE OFFICES, INC.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY, PA JULY TERM, 2020 NO. 00375

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS RESPONSE IN OPPOSITION TO DEFENDANT, CERTAIN UNDERWRITERS AT LLOYD'S, LONDON'S PRELIMINARY OBJECTIONS TO PLAINTIFF'S AMENDED COMPLAINT

Plaintiff, Taps & Bourbon on Terrace, LLC ("Plaintiff"), by and through its attorneys, Wheeler, DiUlio & Barnabei, P.C., hereby files this Memorandum of Law in Support of Its Response in Opposition to Defendant, Certain Underwriters at Lloyds' ("Lloyds" or "Defendant") Preliminary Objections to Plaintiff's Amended Complaint.

I. INTRODUCTION AND BACKGROUND

Plaintiff has insurance to protect it not only from actual loss to its property, but from the *risk* of direct physical loss. That insurance also provided protections against loss caused by any actions of civil authority. As we all know, the COVID-19 pandemic has caused global social and economic disruption, including the largest global recession since the Great Depression. In Pennsylvania and Philadelphia specifically, government officials attempted to control the spread of COVID-19 by issuing orders that required restaurants to close their doors. The first orders

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required a complete and total shutdown of the restaurants, and later orders permitted limited services. Plaintiff was forced to comply with these orders and did so. However, restaurant owners are struggling to keep up with utility bills, rent payments, labor costs and other expenses all while traversing reduced dining capacity. The survival of independent restaurants is being threatened as the daily traffic dropped precipitously resulting in layoffs of workers and severe loss of income.

As a result, Plaintiff and other business owners have turned to their insurance companies to cover these unanticipated losses. Plaintiff holds an "all-risk" business interruption policy from Defendant to cover every loss occasioned by a fortuitous event, such as this pandemic. However, Defendant predictably asserts that it owes Plaintiff no benefits under the "all-risk" Policy despite Plaintiff consistently paying its premium payments to ensure coverage for this exact type of loss. Defendant erroneously contends that: (1) Plaintiff's temporary inability to access its property for its intended use does not qualify as a "direct physical loss" or "damage to" the Property as required by the policy because there is no physical damage[1]; (2) the civil authority provision is inapplicable due to the lack of a covered cause of loss and/or damage to the Property; (3) the virus exclusion bars coverage because the losses were caused by COVID-19, and not the government closure orders aimed at slowing the spread of the virus; and (4) there is no coverage for food contamination due to a lack of an incidence of food poisoning of a patron. *See* Defendant's Preliminary Objections. Critically, the insurance policy at issue in this particular case not only protects from "direct physical loss," it also protects against the "risk of direct physical loss."

[1] Insurers have historically covered nonstructural "direct physical losses of" property and during discovery Plaintiff intends to examine the history of claims paid by Defendant to demonstrate that this insurer has covered nonstructural losses.

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Defendant is clearly denying coverage based on fallacious policy interpretation and its objections should be dismissed, or at a minimum, a decision on the objections should be stayed pending an opportunity for Plaintiff to take discovery to address the myriad of factual issues that the Preliminary Objections raise, regardless of Defendant's determination to designate the instant issues as pure questions of law.

II. QUESTION PRESENTED

Should this Court deny Defendant's Preliminary Objections when Plaintiff has pled factually plausible claims of breach of contract and bad faith against Defendant?

Suggested Answer: Yes

III. APPLICABLE LEGAL STANDARDS

Preliminary objections in the nature of a demurrer should be granted where the contested pleading is legally insufficient. *Cardenas v. Schober*, 783 A 2.d 317, 321 (Pa. Super. 2001) (citing Pa.R.C.P. 1028 (a)(4)). Because sustaining a demurrer results in the denial of a pleader's claim or dismissal of his or her suit, a preliminary objection in the nature of a demurrer should be sustained only where the pleading objected to fails to state a claim for which relief can be granted. *Willet v. Pennsylvania Medical Catastrophe Loss Fund*, 549 Pa. 613, 702 A.2d 850 (1997); *Clark v. Beard*, 918 A.2d 155 (Pa. Commw. Ct. 2007).

"Preliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer." *Hess v. Fox Rothschild, LLP*, 925 A.2d 798, 805 (Pa.Super. 2007) (quoting *Cardenas*, 783 A.2d 317 at 321). All material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true. *Id.* "The question presented by the demurrer is whether, on the facts averred, the law says

with certainty that no recovery is possible." *Ham v. Sulek*, 422 Pa.Super. 615, 620 A.2d 5, 8 (1993).

IV. LEGAL ARGUMENT

A. Plaintiff's Losses are Covered by Defendant's Policy

1. Structural Damage is Not Required to Trigger Coverage for Business Interruption Losses Under the Policy

The losses contemplated in this case are not "physical" losses in the sense promoted by Defendant, but rather they encompass losses that deprive the insured of the Property's intended use. Importantly, neither "direct physical loss" nor "damage" is defined in the Policy, yet there is a clear distinction between "damage to" the Property and a "direct physical loss" because the two phrases are stated in the disjunctive. In the absence of a definition, Courts will use the plain and ordinary meaning of the words to interpret the provision. *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 557 Pa. 595, 735 A.2d 100, 108 (1999)). Courts applying Pennsylvania law have defined "direct physical loss" under an insurance contract as a loss that results "immediately and proximately from an event." *See Easy Sportswear, Inc., v. Am. Economy Ins. Co.*, No. 05–1183, 2007 WL 4190767, at *6 (W.D. Pa. Nov.21, 2007) (applying Pennsylvania law). Insurance coverage for a "direct physical loss" means that the loss must have "close logical, causal, or consequential relationship" with an earlier event. *See DiFabio v. Centaur Ins. Co.*, 366 Pa.Super. 590, 531 A.2d 1141, 1143–44 (Pa.Super.Ct. 1987) (noting that "direct" means "stemming immediately from a source" and "characterized by close logical, causal or consequential relationship").

Recently, a Pennsylvania trial court denied an insurer's early attempt to avoid covering the business interruption losses of a fitness center, stating that it would be premature for the court to resolve factual determinations raised by the insurance company in its demurrer. *Ridley Park*

Fitness, LLC v. Philadelphia Indemnity Insurance Co., No. 200501093 (Pa. Ct. Com. Pl. Aug. 13, 2020). Similarly, an Ohio state court denied an insurance company's motion to dismiss on September 29, 2020, reasoning that discovery was needed and that the insured's complaint stated claims which arguably fit the terms and conditions of the insurance policy. *Francois, Inc. v. The Cincinnati Insurance Co.*, No. 20CV201416 (Ohio C.P. Sept. 29, 2020). Also, on August 13, 2020, the Honorable Michael N. Beukas of the Superior Court of the State of New Jersey ruled in favor of the insured on this exact issue and denied the insurers motion to dismiss. A true and correct copy of the Transcript of Motion relating to *Optical Services USA/JC1 v. Franklin Mutual Ins. Co.*, No. BER-L-3681-20 (N.J. Super. Ct. Law Div. Aug. 13, 2020) is attached hereto as Exhibit "1"; *See also* Order, *K.C. Hopps, Ltd. v. The Cincinnati Ins. Co.*, No. 20-cv-00437-SRB (W.D. Mo. Aug. 12, 2020) (denying the insurers motion to dismiss), a true and correct copy of the Order is attached hereto as Exhibit "2."

In *Optical Services*, the insurer argued that plaintiffs' business did not qualify for purposes of coverage because the closure was not a direct physical loss. *See* Transcript of Motion at p. 26. The court rejected this argument stating that it 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 could provide guidance to the Court with respect to a Motion to Dismiss . . . the plaintiff should be permitted to engage in issue-oriented discovery . . . such a motion is premature at best." *Id.* The court further stated, "[t]here 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 change to the property." *Id.* at 29. Plaintiffs' novel theory of insurance coverage warranted a denial of the motion to dismiss. *Id.*

Similarly, in *Studio 417, Inc. v. Cincinnati Insurance Co.*, the plaintiffs operated hair salons and dining restaurants in metropolitan areas of Missouri and purchased "all risk" property insurance policies from the Defendant for both the hair salons and the restaurants. No. 20-CV-03127-SRB, 2020 WL 4692385 at *1 (W.D. Mo. Aug. 12, 2020). The policies provided that Defendant would pay for "direct 'loss' unless the 'loss' is excluded or limited" therein. *Id.* Plaintiffs sought coverage for their losses and alleged that the Closure Orders caused a direct physical loss or physical damage to the properties "by denying use of and damaging the covered property, and by causing a necessary suspension of operations during a period of restoration." *Id.* at *2. Defendant argued that the plaintiffs had not adequately pled a "physical loss" as required by the policy because the loss must be an "actual, tangible, permanent, physical alteration of the property. *Id.* at *3. The Court disagreed and reasoned that plaintiffs had indeed alleged a causal relationship between COVID-19, a physical substance that is "active on inert physical surfaces," and their alleged losses. *Id.* Although plaintiffs alleged economic harm, said harm was "tethered to their alleged physical loss caused by COVID-19 pandemic and Closure Orders." *Id.* at *6. The Court further opined that plaintiffs adequately alleged that their access to the properties were prohibited to trigger civil authority coverage. *Id.* at *6. The Order stated that the plaintiffs made adequate claims for coverage under the policy provisions for Business Income, Extra Expense, Ingress and Egress, and Sue and Labor. *Id.* at *5-8. Defendant's motion to dismiss was denied and the Court held that plaintiffs pled enough facts to proceed with discovery. *Id.* at *7.

The United States Court of Appeals for the Third Circuit has held that a physical loss may occur when the property is uninhabitable or unusable for its intended purpose. *See Port Auth. Of New York and New Jersey v. Affiliated FM Inc. Co.*, 311 F.3d 226, 236 (3d Cir. 2002). Further, the Third Circuit has ruled in *Motorists Mutual Ins. Co. v. Hardinger* that there existed a

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genuine issue of material fact as to whether the presence of Escherichia coli ("E. coli") at a covered property impacted its functionality, or made the property otherwise useless or uninhabitable, sufficient to establish physical loss or damage to the property. 131 F.App'x 823 (3d Cir. 2005). *See also Prudential Prop. & Cas. Ins. Co. v. Lilliard-Roberts*, CV-01-1362-ST, 2002 WL 31495830, at *9 (D. Or. June 18, 2002) ("[T]he inability to inhabit a building as a 'direct, physical loss' covered by insurance."); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W.Va. 1998) (holding that losses that rendered insured property "unusable or uninhabitable, may exist in the absence of structural damage to the insured property."); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418 (WHW)(CLW), 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014) ("[P]roperty can be physically damaged, without undergoing structural alteration, when it loses its essential functionality."); *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (holding that coverage applied without physical alteration because the covered properties "no longer performed the function for which they were designed.").

Defendant argues that Plaintiff has not alleged a direct physical loss or damage to the property in the Amended Complaint that triggers policy coverage. Yet, Plaintiff clearly states a direct physical loss triggering coverage under the Policy by stating in its Amended Complaint Plaintiff that it "immediately closed the Restaurant Premises insured under the Lloyds Policy and ceased all business operations . . . [a]s a result of this closure Business Income from this location ceased and Taps & Bourbon has spent and incurred substantial Extra Expenses to maintain these premises to minimize the suspension of operations and continue business when possible." Further, Plaintiff states that Defendant's "assertion that there has been no direct physical damage to [the] insured property . . . is plainly untrue since the pandemic has been declared to constitute

a ‘Disaster Emergency’ which has affected all property located in the Commonwealth of Pennsylvania, including the premises insured under Lloyd's Policy. This is especially true since the Cause of Loss under the Policy is '…Risk of Direct Physical Loss.'" *See* Def. Exhibit "A" ¶¶¶ 18, 19, 26. Plaintiff in this case is relying on clear precedent from the Third Circuit Court of Appeals that inhabitability can constitute a direct physical loss in the era of COVID-19. *See Port Auth. Of New York*, 311 F.3d at 236; *Motorists Mutual*, 131 F.App’x at 823.

Plaintiff has clearly suffered a direct physical loss as understood under Pennsylvania law. Plaintiff was not permitted to utilize the functionality of its Property because of a close logical, causal, or consequential relationship with an earlier event – the closure orders. The business operation of Plaintiff’s businesses ceased because of the act of “Civil Authority.” The inability to inhabit the Property at issue, and the prohibition of Plaintiff to collect revenue/income, equates to a direct physical loss for insurance purposes. Importantly, if Defendant intended “direct physical loss of or damage to” property to include *only* structural damage, it could have drafted its policies to cover only business income losses caused by structural damage. Defendant chose not to do so. Further, Defendant has failed to cite any caselaw within Pennsylvania’s jurisdiction stating inhabitability of property, and the inability of Plaintiff to earn revenue/income, does not constitute a direct physical loss, yet Plaintiff has cited to authorities within the Third Circuit that support its contention. The insurance contract, in tandem with existing Pennsylvania jurisprudence, supports Plaintiff’s argument that loss of functionality, the physical loss of revenue and income, and inhabitability constitutes a direct physical loss under the Policy.

B. The Covid-19 Virus Is A Direct Physical Loss

A virus is physical - that fact is truly beyond dispute. A virus is made up of atoms just like water, smoke, asbestos, or, even, a tree that may have fallen during the last storm. Just like

smoke, water, asbestos, or that tree, as soon as it lands on a surface, it alters that surface. While any of these items can be cleaned from that surface, its effect is nevertheless physical in nature. Courts applying Pennsylvania law have defined "direct physical loss" under an insurance contract as a loss that results "immediately and proximately from an event." *See, Easy Sportswear, Inc., v. Am. Economy Ins. Co.*, No. 05-1183, 2007 WL 4190767, at *6 (W.D.Pa. Nov.21, 2007) (applying Pennsylvania law). Here, there can be little debate that a "loss" – the loss of business income – occurred immediately and proximately from an event, the state and local shutdown orders resulting from COVID-19, a physical thing.

What's more, to trigger coverage in the policy at issue, there simply needs to be the risk of direct physical loss. Plaintiff sustained a loss, i.e. the loss of access to the property and the loss of income. The loss was physical in nature in that it was the result of a virus, a physical entity. The loss is direct to the insured business entity, and there was certainly a risk of that loss because of the nature of the Pandemic, the possibility of COVID-19 being spread to Plaintiff's Property, and the civil authority shut downs that were issued to lessen those risks.

In fact, a policy of insurance itself demonstrates that the loss at issue here was, in fact, a direct physical loss. The Policy specifically excludes certain types of direct physical losses – losses that would be covered but for a specific exclusion. For example, the policy does not cover bodily injury or damage that occurs as a result of war, certified acts of terrorism, smoke from a hostile fire, specific pollutants, etc. These items are specifically excluded by the Defendant because if it did not, they would otherwise be covered as a direct physical loss. Conversely, the Policy does not need to provide an exclusion for loss that stemmed from, for example, a bad review. Defendant has no reason to list any exclusion that did not stem from a "physical loss."

Here, the fact that Defendant has felt a need to provide an entire endorsement related to a virus is evidence that a virus would be considered a "direct physical loss" under the terms of the Policy. At the very least, it is evidence of a valid legal claim from which relief can be granted such that Defendant's Objections to be denied. With this clear distinction, we must next look to why the virus exclusion does not apply to this loss.

C. The Court Should Not Enforce Defendant's Virus Exclusion

1. The Virus Exclusion Must be Strictly Construed Against the Insurer

In general, exclusions from insurance coverage are to be narrowly construed. *Rother v. Erie Ins. Exchange*, 57 A.3d 116, 118 (Pa.Super. 2012). When interpreting an insurance policy, a court must not resort to a strained contrivance or distort the meaning of the language in order to find an ambiguity. *Tenos v. State Farm Ins. Co*., 716 A.2d 626 (Pa. Super. Ct. 1998). However, it must find that contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a certain set of facts. *Maisano v. Avery*, 2019 PA Super 43, 204 A.3d 515 (2019), appeal denied, 217 A.3d 210 (Pa. 2019); *Michael v. Stock*, 2017 PA Super 99, 162 A.3d 465 (2017); *Ramalingam v. Keller Williams Realty Group, Inc*., 2015 PA Super 172, 121 A.3d 1034 (2015); *WMI Group, Inc. v. Fox*, 2015 PA Super 25, 109 A.3d 740 (2015); *Commonwealth by Shapiro v. UPMC*, 208 A.3d 898 (Pa. 2019); *Com. ex rel. Kane v. UPMC*, 634 Pa. 97, 129 A.3d 441 (2015). Even if there is a clearly worded and conspicuously displayed limitation on coverage in an insurance policy, the court must nevertheless consider the factual circumstances of a particular case. *Motorists Mut. Ins. Co. v. Kulp*, 668 F. Supp 1033 (E.D. Pa. 1988). Indeed, Courts must strictly construe an exclusion against the insurer attempting to rely upon it. *Swarner v. Mut. Ben. Grp.*, 72 A.3d 641, 645 (Pa. Super. Ct. 2013).

2. *The Virus Exclusion is Not Only Subject to More Than One Reasonable Interpretation, but it was Removed from the Policy*

In pertinent part, the language of Defendant's Virus Exclusion provides that Lloyd's, "will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." *See* Def. Objections at p. 11. Defendant argues that the virus is the only cause of loss, yet even if it were not the Virus Exclusion would still bar coverage. However, the COVID-19 virus was not a direct cause of the property damage at issue. The State did not order Plaintiffs to suspend their operations because their premises needed to be de-contaminated from the COVID-19 virus. Quite the opposite, the State issued its Order to ensure the absence of the virus, or persons carrying the virus. *There is no evidence whatsoever that the virus entered Plaintiffs' Property.*

Here, there is no proof that the COVID-19 virus was present at the insured premises which caused the damage at issue. There must be some limitation on the Virus Exclusion, otherwise these exclusions could theoretically apply to every "direct physical loss" caused directly or indirectly by the *suspected* presence of a virus. The Sixth and Seventh Circuits of the United States Court of Appeals have explained the reasoning behind limiting the application of pollution exclusions, "[w]ithout some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results. *Meridian Mut. Ins. Co. v. Kellman*, 197 F.3d 1178, 1182 (6th Cir. 1999) (quoting *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992). Moreover, other insurers have been much more specific in drafting and specifically using the pandemic language. *See, e.g, Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F. Supp. 3d 1034, 1038 (D. Neb. 2016) ("The actual or suspected presence or threat of any virus, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise,

including but not limited to any epidemic, **pandemic**, influenza, plague, SARS, or Avian Flu.") (emphasis added). Moreover, the virus exclusion was removed from the Policy under the ISO Restaurant and Platinum Enhancement Endorsement (DTWCP-D000 10 (9/18)) which states, "[w]ith regard to this Additional Coverage, the **CAUSES OF LOSS—SPECIAL FORM CP 10 30,** Paragraph **B. Exclusions** is amended to delete all of the exclusions except for the following: (list of Exclusions which does NOT include the Virus Exclusion)." *See* Def. Exhibit "H."

D. Plaintiffs are Entitled to Coverage under the Civil Authority Provision of the Policy

The allegations put forth by Plaintiff sufficiently establishes access to the insured premises was prohibited to such a degree that the Civil Authority provision should be invoked. Beginning on March 20, 2020, the business operation of Plaintiffs' businesses ceased as a result of the act of Civil Authority. The Orders caused the suspension of non-essential businesses, and limited ingress and egress into the insured Properties. Courts have found that claimants continue to adequately allege that stay-at-home orders have prohibited access to their business premises to such a degree as to trigger the civil authority coverage. *See Studio 417*, 2020 WL 4692385, at *7; *Blue Springs Dental Care, LLC, et al., v. Owners Insurance Co.*, 2020 WL 5637963, at *7.

Under Pennsylvania law, in order to trigger civil authority coverage there must be loss of business income caused by: (1) an action of 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 described premises, and (4) the loss 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. CIV.A.01-4679, 2002 WL 31247972, at *4 (E.D. Pa. Sept. 30, 2002). Here, there has been a clear action of civil authority which unarguably prohibited Plaintiff access to the insured Property. This lack of access was due to the Orders issued in response to

direct physical losses or damage to property surrounding the insured Property at issue. Lastly, the losses caused by the virus are covered losses under the Policy.

Defendant argues that Plaintiff has failed to allege a direct physical loss when Plaintiff has clearly argued that its lack of access to the insured premises in concert with the loss of essential functionality constitutes a direct physical loss. There are businesses that can continue to thrive even when denied access to the physical premises, Plaintiff's Property is not one of those businesses. The Orders constituted prohibition of access to Plaintiff's insured premises. The moment the state and local orders went into effect, Plaintiff was unable to access its insured Property, the businesses were no longer able to properly function, and Plaintiff sustained a direct physical loss as understood under the Policy.

E. Plaintiff is Entitled to Coverage for Food Contamination

Plaintiff's Amended Complaint references the Policy's inclusion of coverage for "Food Contamination" which states:

> 1. Food Contamination
>
>> a. If your business at the described premises is offered closed by the Board of Health or any other governmental authority as a result of the discovery **or suspicion of food contamination,** we will pay:
>> 1. The actual loss of Business Income you sustain due to the necessary "suspension" of your "operation;"

See Def. Exhibit "A" at ¶ 14.

Defendant erroneously avers that Plaintiff's Amended Complaint does not allege any discovery or suspicion of an incidence of food poisoning. *See* Def. Objections at p. 15. However, Plaintiff alleges in its Amended Complaint that it was forced to perform periodic maintenance to disinfect the premises and clean surfaces potentially infected with the disease. *See* Def. Exhibit "A" at ¶ 19. The Policy's language for "Food Contamination" coverage applies to Plaintiff's business

closure because food was present at the insured premises warranting a suspicion of an incident of food contamination by the virus.

F. Further Investigation is Appropriate Based on Plaintiff's Theory of Regulatory Estoppel

Regulatory estoppel is "a form of equitable estoppel whereby insurers are prevented, or 'stopped,' from asserting an interpretation of an insurance policy provision that is contrary to the insurer's explanation of that policy provision to state insurance regulators when the insurer originally sought approval of the policy form from the state department of insurance. International Risk Management Inst. (IMRI), Regulatory Estoppel. *See, e.g.*, *Simon Wrecking Co., Inc. v. AIU Ins. Co.*, 530 F. Supp. 2d 706, 714 (E.D. Pa. 2008) (holding that genuine issue of material fact existed as to regulatory estoppel and reserving issue for trial); *Morton Int'l, Inc. v. Gen. Accident Ins. Co. of Am.*, 134 N.J. 1, 75–76, 629 A.2d 831, 874 (1993) (applying regulatory estoppel to bar insurers from applying qualified pollution exclusion inconsistently from representations to insurance regulators). If an insurer profits from a nondisclosure by maintaining pre-existing rates for substantially reduced coverage, the industry justly should be required to bear the burden of its omission by providing coverage at a level consistent with its representations to regulatory authorities. *Morton Intern, Inc.*, 134 N.J. 1, 79–80, 629 A.2d at 831; *See also Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co.*, 89 F.3d 976, 44 Fed. R. Evid. Serv. 1292, 88 A.L.R.5th 759 (3d Cir. 1996) (holding that regulatory estoppel applies to nonstandard forms submitted to insurance regulators).

Even if an insured's regulatory estoppel argument is unsuccessful, it may be enough to defeat an insurer's motion for summary judgment or motion to dismiss the complaint. In *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, the Pennsylvania Supreme Court first acknowledged that regulatory estoppel was a valid legal theory upon which a party could seek recovery. 785

A.2d 1189 (Pa. 2001). The *Sunbeam* Court opined that regulatory estoppel "[i]n essence . . . prohibits parties from switching legal positions to suit their own ends." *Id.* at 1192. The court held that it was an error to dismiss the complaint without applying the doctrine of regulatory estoppel. *Id.* at 1192-1193. In *Hussey Copper, Ltd. v. Royal Ins. Co. of Am.,* the Court permitted discovery regarding plaintiff's theory of regulatory estoppel. 567 F.Supp. 2d 774, 786 (W.D. Pa.2008). The Court noted that, "[o]nce the facts come in, counsel may raise anew their arguments for and against coverage given the regulatory estoppel doctrine. At that time, the parties and court will have greater context within which to conduct their analyses." *Id.* at 787. This directly parallels what Plaintiff is asking from the Court in the instant case. Like in *Hussey*, discovery on what Defendant said to Pennsylvania regulators to get the Virus Exclusion approved should be permitted.

V. CONCLUSION

For the reasons set forth above, Plaintiff, Taps & Bourbon on Terrace, LLC, respectfully requests that this Honorable Court deny Defendant, Certain Underwriters at Lloyd's, London's ("Lloyds" or "Defendant") Preliminary Objections to Plaintiff's Amended Complaint and sign the Order in the form attached hereto.

WHEELER, DIULIO & BARNABEI, P.C.

BY: __*/s/ Jonathan Wheeler*_____
JONATHAN WHEELER, ESQUIRE
Attorney I.D. No.: 12649
One Penn Center – Suite 1270
1617 JFK Boulevard
Philadelphia, PA 19103
(215) 568-2900

Attorney for Plaintiff

Date: October 19, 2020

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Exhibit “1”

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

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

Civil Action

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

Plaintiffs,

V.

FRANKLIN MUTUAL INSURANCE COMPANY

Defendant.

ORDER

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

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

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

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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.**

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

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

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

Date: August 13, 2020

BEFORE:

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

TRANSCRIPT ORDERED BY:

AMINA RANA, (Paul Weiss Rifkind Wharton Garrison)

APPEARANCES:

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

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

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

Audio Recorded
Recording Opr: Alexa D'Angelo

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I N D E X

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(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) --

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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

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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

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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

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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

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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

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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.

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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.

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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?

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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

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(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.

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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

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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

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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

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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

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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).

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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

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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,

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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

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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

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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

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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.

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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

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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.

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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

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

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

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

THE COURT: Thank you, gentlemen.

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

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CERTIFICATION

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

/s/ Laura Scicutella
Laura Scicutella

AD/T 685
AOC Number

Phoenix Transcription LLC
Agency Name

8/18/2020
Date

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Exhibit “2”

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

K.C. HOPPS, LTD., Plaintiff, v. THE CINCINNATI INSURANCE COMPANY, INC., Defendant.	)	Case No. 20-cv-00437-SRB

ORDER

Before the Court is Defendant The Cincinnati Insurance Company's ("Defendant") Motion to Dismiss. (Doc. #8.) For the reasons set forth below, the motion is DENIED.

In this case, Plaintiff K.C. Hopps, Ltd. ("Plaintiff") seeks insurance coverage related to COVID-19 under an all-risk property insurance policy it purchased from Defendant. On June 22, 2020, Defendant filed the pending motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). On July 22, 2020, this case was transferred from Judge Roseann Ketchmark to the undersigned. (Doc. #22.)

The undersigned is also presiding over a case captioned *Studio 417, Inc., et al. v. The Cincinnati Insurance Company*, Case No. 20-cv-03127-SRB. *Studio 417* involves the same Defendant, similar insurance provisions, and similar factual allegations as those asserted in this case. Defendant also moved to dismiss *Studio 417* under Rule 12(b)(6) based on similar legal arguments that it presents in this case. On August 12, 2020, the Court denied Defendant's motion to dismiss in *Studio 417*.

For substantially the same reasons as those in the *Studio 417* Order, the Court finds that Plaintiff's claims against Defendant are adequately stated. Consequently, Defendant's Motion to

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Dismiss (Doc. #8) is DENIED. It is further ORDERED that Defendant's Motion to Stay Discovery pending a ruling on its Motion to Dismiss (Doc. #26) is DENIED AS MOOT.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: August 12, 2020

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TAPS & BOURBON ON TERRACE, LLC vs. THOSE CERTAIN UNDERWRITERS AT LLOYDS, LONDON And MAIN LINE INSURANCE OFFICES, INC.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY, PA JULY TERM, 2020 NO. 00375

CERTIFICATE OF SERVICE

I, Jonathan Wheeler, Esquire, hereby certify that a true and correct copy of the foregoing Response to Defendant's Objections to Plaintiff's Amended Complaint has been served, via the Court's ECF system, upon:

Noah Shapiro, Esquire
Zarwin, Baum, DeVito, Kaplan, Schaer & Toddy, P.C.
2005 Market Street, 16th Floor
Philadelphia, PA 19103

Respectfully submitted,
WHEELER, DiULIO & BARNABEI, P.C.

BY: */s/ Jonathan Wheeler*
Jonathan Wheeler, Esquire
Attorney for Plaintiff

Date: October 19, 2020

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