Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

NUE LLC d/b/a NUE SEATTLE, individually and on behalf of all others similarly situated, Plaintiff, v. OREGON MUTUAL INSURANCE COMPANY, Defendant.	No. 2:20-cv-00676-RSL PLAINTIFF'S RESPONSE TO OREGON MUTUAL INSURANCE COMPANY'S MOTION TO DISMISS ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Plaintiff Nue LLC ("Nue") operates a Seattle restaurant. In March 2020, it became one of thousands of businesses in Washington and in the country functionally closed as a result of government orders responding to the COVID-19 pandemic. Nue turned to its "Business Income" coverage to cover its losses from the shutdown. Nue's insurer, Oregon Mutual Insurance Company ("OMIC"), had promised to cover business income loss resulting from the "loss of" or "damage to" covered property. OMIC did not define these terms, which means they must be interpreted "as [they] would be understood by the average lay person." *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 876, 784 P.2d 507 (1990). Because Nue experienced a complete loss

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of functionality of covered property, and because it is reasonable to read "loss of" or "damage to" covered property as covering this loss of functionality—as many courts have done—Nue is entitled to coverage. Accordingly, OMIC's Motion to Dismiss ("Motion") should be denied. This is consistent with the only Washington case that has considered the question, *Nautilus Group, Inc. v. Allianz Global Risks US*, No. C11-5281BHS, 2012 WL 760940 (W.D. Wash. Mar. 8, 2012), which held that "loss of" was distinct from "damage to" and required coverage even in the absence of physical alteration of the covered property.

II. STATEMENT OF FACTS

A. Class Action Complaint

Nue filed a Class Action Complaint ("Complaint") on May 5, 2020. Dkt. # 1. The Complaint identifies a national class and Washington subclasses. *Id.* at pp. 6-11. Nue owns and operates a dine-in restaurant and bar in Seattle, Washington, which specializes in "global street food," offering "sit-down" meals from around the world, together with a full bar and menu of creative cocktails. *Id.* at pp. 2, 3. Due to a state-ordered closure, Nue was forced to suspend or dramatically reduce its restaurant business operations. *Id.* at p. 3. Nue intended to rely on its business income insurance to maintain income in case of insured loss. *Id.*

OMIC issued Nue a Businessowners Protector Policy and related endorsements ("the Policy") insuring Nue's property and business with effective dates of November 11, 2019 to November 10, 2020. *Id.* Nue's business property includes property owned and/or leased by Nue and used for the specific purpose of operating a restaurant and other related business activities. *Id.* The Policy provides Business Income Coverage, Extended Business Income Coverage, Extra Expense Coverage, Civil Authority Coverage, and Ingress or Egress Coverage. *Id.* at p. 4.

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In January 2020, the United States saw its first cases of persons affected by COVID-19, which has been designated a worldwide pandemic. *Id*. On February 29, 2020, Washington Governor Jay Inslee issued Proclamation 20-5,[1] declaring a State of Emergency for all Washington counties as a result of COVID-19.[2] Thereafter, he issued a series of proclamations affecting persons and businesses in Washington, whether infected with COVID-19 or not, requiring certain health care precautions. *Id*. Proclamation 20-13 is titled "Statewide Limits: Food and Beverage Services, Areas of Congregation."[3] The proclamation prohibited "any number of people from gathering in any public venue in which people congregate for purposes of . . . food and beverages service[.]" *Id.*

Governor Inslee then issued Proclamation 20-25, titled, "Stay Home – Stay Healthy,"[4] requiring that all persons in Washington immediately cease leaving their homes or place of residence except to participate in essential activities and/or for employment in essential business activities. *Id*. at p. 5. The proclamation provided that restaurants and food services could operate on a very limited basis only, allowing "delivery or take-away services" . . . "so long as proper social distancing and sanitation measures are established and implemented." *Id*. Restaurants including Nue's were prohibited from operating their business except according to the terms of the proclamations. *Id*. As a result, Nue has been unable to use its restaurant for its insured purpose of sit-down dining and full-service bar, and it has been unable to allow customers to enter into its dining room or eat any meals on its premises. *Id*.

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[1] Ex. 1 (All "Ex." citations are to exhibits to the Declaration of Ian S. Birk in Support of Plaintiff's Response to Oregon Mutual Insurance Company's Motion to Dismiss, concurrently filed herewith).

[2] The Court can take judicial notice of public proclamations. *King v. County of Los Angeles*, 885 F.3d 548, 555 (9th Cir. 2018) (Judicial notice of "undisputed and publicly available information displayed on government websites.").

[3] Ex. 2.

[4] Ex. 3.

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OMIC denied Nue's claim for business interruption coverage. *Id.* at p. 6. Nue filed this action, asserting a claim for declaratory judgment declaring that Nue's and class members' losses and expenses resulting from the interruption of their businesses are covered. *Id.* at p. 15. Nue also asserts breach of contract for OMIC's wrongful denial of coverage. *Id.* at pp. 15-16.

B. The Policy Is An "All Risk" Policy Covering All Risks Of Direct Physical Loss

The OMIC Policy provides the following coverage for business income loss:

> **[5.]f. Business Income**
>
> **(1) Business Income**
>
> **(a)** We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the period of "restoration". The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss. . . .
>
> **(2) Extended Business Income**
>
> **(a)** If the necessary suspension of your "operations" produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period that:
>
> (i) Begins on the date property . . . is actually repaired, rebuilt or replaced and "operations" are resumed; and
>
> (ii) Ends on the earlier of:
>
> i. The date you could restore your "operations", with reasonable speed . . .
>
> **(3)** With respect to the coverage provided in this Additional Coverage, suspension means:
>
> **(a)** The partial slowdown or complete cessation of your business activities; and

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> **(b)** That a part or all of the described premises is rendered untenantable, if coverage for Business Income applies.

Dkt. # 8 at pp. 12-13. Thus, the Policy covers Nue's loss of income for any interruption of business, whether a "partial slowdown" or "complete cessation" of business.

The business income coverage is tied to "direct physical loss of or damage to" covered property from a "Covered Cause[] of Loss." The term "Covered Cause[] of Loss" is defined as "Risks of direct physical loss" unless the loss is excluded or limited in the Policy. *Id.* at p. 9. "Covered Property" includes "buildings and structures at the premises described in the Declarations" and "Property you own that is used in your business." *Id.* at p. 8. The Policy classified the intended use of the property as "Restaurants Casual w/o Lounge." *Id.* at p. 5.

Nue lost all functionality of certain covered property, including its dining room, bar, tables and chairs, and serving ware. Despite this, OMIC contends Nue did not suffer any "'direct physical loss or damage' at 'Covered Property,'" in OMIC's paraphrase. Dkt. # 7 at p. 2. OMIC's view is untenable. The Policy's key undefined terms—"loss of," "damage to," and "direct physical loss"—are individually and collectively broad enough to capture Nue's loss of functionality. And if there is any doubt as to their meaning, then the terms are at least ambiguous as to Nue's loss and therefore must be construed in favor of coverage.

III. ANALYSIS

A. Legal Standards

1. Motions to dismiss under Fed. R. Civ. P. 12(b)(6) are subject to high standards which OMIC fails to meet.

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a complaint, which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Johnson v. Allstate Ins. Co.*, 845 F. Supp. 2d 1170, 1174 (W.D. Wash. 2012) (citation

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omitted). "The notice pleading standard set forth in Rule 8 establishes 'a powerful presumption against rejecting pleadings for failure to state a claim.'" *Id.* A claim cannot be dismissed on a Rule 12(b)(6) motion when the complaint contains sufficient factual matter to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citation omitted).

2. A policy provides coverage when it can be reasonably interpreted to do so.

Determining insurance coverage is a two-step process. First, the insured must show that the loss falls within the scope of the policy's insured losses. Second, to avoid coverage the insurer must show that specific policy language excludes the loss. *Churchill v. Factory Mut. Ins. Co.*, 234 F. Supp. 2d 1182, 1186 (W.D. Wash. 2002) (citing *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992)).

Insuring provisions must be interpreted liberally to provide coverage whenever possible. *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 694, 186 P.3d 1188 (2008). Insurance policies are construed in favor of coverage because: "the purpose of insurance is to insure." *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983).

The Policy does not define any of the key terms, "loss of" or "damage to" covered property, nor "direct physical loss." When terms are undefined, Washington requires courts to use their "plain, ordinary, and popular" meaning. *Boeing*, 113 Wn.2d at 877. Courts *may* refer to dictionaries for undefined words. In *Boeing*, the court reviewed three dictionary definitions of the term "damages"—among a host of other authorities—in determining that insurers covering liability for "damages" could not, based on a narrow interpretation of that term, exclude coverage for liability for pollution clean-up costs. 113 Wn.2d at 878.

Turning to dictionaries is only one component of interpreting an insurance policy. A term in an insurance contract may be subject to multiple, reasonable definitions. In *Holden v. Farmers*

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Insurance Co. of Washington, 169 Wn.2d 750, 756-57, 239 P.3d 344 (2010), the undefined term "fair market value" was subject to more than one reasonable definition because it had been *applied* differently in different claims. Because the term was "at least ambiguous," the court concluded the "[policyholder's] reasonable interpretation of the policy must be accepted." *Id.* at 760. In *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 410-11, 229 P.3d 693 (2010), the lack of Washington authority together with out-of-state case law supporting coverage meant that an exclusion was ambiguous and was construed in favor of coverage.

One reasonable interpretation of the terms "loss of" or "damage to" covered property and "direct physical loss" is that the suspension of Nue's business operations as a result of the proclamations was a direct physical loss of or damage to Nue's property because the property could not physically be used for its primary function as a full on-site dining establishment.[5]

B. Impairment Of Functionality Is A Physical Loss Of Property Triggering Coverage.

Nue's loss was the "direct" result of the governmental proclamations, and Nue's property was unusable for "physical" sit-down dining. OMIC argues "there must be some actual direct damage to the covered property, in this case the insured building, for coverage to be triggered." Dkt. # 7 at p. 8. This paraphrase misrepresents the Policy, inventing a pre-condition for coverage.

OMIC's argument fails in three ways. First, the Policy covers either "loss of" or separately "damage to" covered property. This means Nue is covered for a loss of property even

[5] Because courts look to extrinsic documents to interpret undefined policy terms, the Court should not dismiss Nue's claims under Rule 12(b)(6) before discovery. Discovery concerning the interpretation of policies, custom and usage evidence, and internal claims guidance is relevant to determine whether terms are ambiguous and whether a particular construction is reasonable. *See Holden*, 169 Wn.2d at 756 (insurer's internal practices); *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 86, 882 P.2d 703 (1994) (drafting history); *Am. Star Ins. Co. v. Grice*, 121 Wn.2d 869, 879-80, 854 P.2d 622 (1993) (explanatory memorandum from Insurance Services Office); *Certain Underwriters at Lloyd's v. Nat'l R.R. Passenger Corp.*, No. 14-CV-4717 (FB), 2016 WL 2858815, at *11 (E.D.N.Y. May 16, 2016) (claims manuals).

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if there has not been any damage to it. OMIC contends that "loss of" and "damage to" are synonymous, and that both require physical damage. This violates a fundamental tenet of insurance coverage law. In construing insurance policies, a court must give meaning to every word in a policy, and not render a word or phrase "mere surplusage." *Boeing*, 113 Wn.2d at 898 (quotation omitted). OMIC's construction violates this rule by assigning no independent meaning to "loss of," and instead claiming that it requires damage, just like the phrase it precedes: "damage to." *Nautilus*, 2012 WL 760940, at *7 ("if 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous."); *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908AB (KSx), 2018 WL 3829767, at *3 (C.D. Cal. July 11, 2018) ("[T]o interpret 'physical loss of' as requiring 'damage to' would render meaningless the 'or damage to' portion of the same clause, thereby violating a black-letter canon of contract interpretation—that every word be given a meaning.").

Second, Nue suffered a physical loss of covered property, including access to its dining room for its intended purpose, and also its furnishings, tables and chairs, and glassware and place settings, which cannot be used for either gathering or public food consumption.

Third, the caselaw demonstrates that Nue's inability to access and use its covered property due to the government order renders that property useless and is a form of covered "loss" or "damage." OMIC's argument that there is no coverage unless there is some alteration to the building housing Nue's restaurant is unsupportable under both the Policy and caselaw.[6]

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[6] OMIC cites *Couch on Insurance* for an interpretation of the word "physical" purporting to summarize the legal authority as requiring physical alteration. Dkt. # 7 at p. 9. This is not an accurate portrayal of the case law, and it is inconsistent with Washington law to use a restrictive definition from a technical publication to avoid coverage. *Boeing*, 113 Wn.2d at 877. Courts have used much broader definitions of "physical": "The word 'physical' is defined as 'of or relating to material nature, or to the phenomenal universe perceived by the senses; pertaining to or connected with matter; material; opposed to *psychical*, *mental*, *spiritual*.' Oxford English Dictionary 744 (2nd ed.2001) (emphasis in original). *See also* Merriam Webster's Collegiate Dictionary 935 (11th ed.2003) (defining

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The only Washington case addressing this issue found coverage for a business interruption because of a "loss of" covered property despite the absence of any "damage to" it. In *Nautilus*, the insured attempted to terminate the employment of its Shanghai director, who refused to leave the workplace and retained certain documents, the company's business license, and its "chop," a stamp necessary for financial transactions in China. 2012 WL 760940 at *2. The director "acknowledged that he had the items in his possession, but he refused to provide them." *Id*. The insurer argued that there had to be "physical damage to the covered property," just as OMIC does. *Id.* at *6; Dkt. # 7 at pp. 8-9. The court rejected this argument, holding, "if 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous. The fact that they are both included in the grant of coverage evidences an understanding that physical loss means something other than damage." *Nautilus*, 2012 WL 760940, at *7.

This conclusion is consistent with Washington law. The terms of the Policy establish that there are two alternative triggers of coverage: one, if there is "*loss of*" property or two, if there is "*damage to*" property. *Garcia v. Dep't of Soc. & Health Servs.*, 10 Wn. App. 2d 885, 911, 451 P.3d 1107 (2019) (term "or" is disjunctive and employed to indicate an alternative).[7]

The average lay person purchasing the OMIC Policy would understand this insuring language to cover loss of the functionality of the covered property as *physical loss of* or *damage to* property. This is particularly true under the well settled law that a grant of coverage in an insurance policy must be construed broadly in favor of coverage. *Phil Schroeder*, 99 Wn.2d at

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physical as 'having a material existence: perceptible esp. through the senses and subject to the laws of nature' and 'of or relating to material things')." *Patel v. Am. Econ. Ins. Co.*, 12-CV-04719-WHO, 2014 WL 1862211, at *5 (N.D. Cal. May 8, 2014) (emphases in original).

[7] Other courts have held that the terms "loss" and "damage" are not synonymous. *Mangerchine v. Reaves*, 63 So.3d 1049, 1056 (La. Ct. App. 2011) ("Physical damage is only one cause of 'physical loss' of property; for example, a person can suffer the physical loss of property through theft, without any actual physical damage to the property.") (citing *Corban v. United Servs. Auto. Ass'n*, 20 So.3d 601, 612 n.17 (Miss. 2009)).

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68; *Bordeaux*, 145 Wn. App. at 694. Dictionary definitions of "loss," include "'destruction' 'ruin' or 'deprivation.'"[8] Nue has had a "deprivation" of its property. It invested in the property, insured the property, insured the income it derives from the property, but has been deprived of its functionality because of the proclamations. This is a "loss" in the most basic sense.

Even the term "damage" is not limited to the physical alteration of property, but includes any reduction in its "value or usefulness." One court explained the term "damage" as follows:

> One dictionary defines "damage" as "injury or harm that reduces value or usefulness." *Random House Dictionary of the English Language*, 504 (2nd ed.1987). Another defines it as "injury or harm to a person or thing, resulting in a loss in soundness, value, etc." *Webster's New World Dictionary*, 356 (2nd ed.1980). A legal dictionary defines "damage" in part as "every loss or diminution" of a person's property. *Black's Law Dictionary* 389 (6th ed.1990). Clearly, without qualification, the term "damage" encompasses more than physical or tangible damage.

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

Consistent with this popular understanding of the term "damage," the Policy itself defines "Property damage" as "Loss of use of tangible property that is not physically injured." Dkt. # 8 at p. 43. The fact that the Policy itself defines "Property damage" as including "Loss of use" *even without physical injury* supports the conclusion that the average purchaser of insurance would read the Policy as providing coverage for a loss of functionality. *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709-10 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) ("When read in the context of the precedent discussed above, this definition suggests that the parties intended to define 'direct physical loss' to include total loss of use."). Indeed, many proclamations around the country imposing restrictions in response to COVID-19 recognize the

[8] *Loss*, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss (last visited June 15, 2020).

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massive disruptions in commerce as property damage.[9]

OMIC concedes that caselaw supports coverage, even without physical alteration, when property "has completely lost its physical utility." Dkt. # 7 at p. 14. But OMIC ignores the mandate of Washington law to make "a balanced analysis of the case law," which "should have revealed at least a legal ambiguity" in the application of the Policy. *Am. Best Food*, 168 Wn.2d at 411. Instead, OMIC (1) argues for an unreasonably restrictive reading of caselaw finding coverage for loss of functionality, and (2) advances Washington cases that are distinguishable or concerned different issues. Neither approach is consistent with Washington insurance law.

1. Out-of-state authorities support a finding of coverage when covered property has lost its functionality even in the absence of physical alteration.

Despite OMIC's concession that caselaw finds coverage when property "has completely lost its physical utility," it argues this rule applies only when "a substance permeates a building" and "renders the entire structure uninhabitable." Dkt. # 7 at p. 14. OMIC's characterization is overly narrow: no case limits the loss of functionality analysis in this manner.

In *Port Authority of New York & New Jersey v. Affiliated FM Insurance Co.*, 311 F.3d 226, 231 (3d Cir. 2002), relied upon by OMIC, the insured sought coverage for asbestos abatement in buildings that were in continuous use. The court held that coverage for "physical loss or damage" would apply if "an actual release of asbestos fibers" contaminated a building "such that *its function is nearly eliminated or destroyed*, or the structure *is made useless or*

[9] Ex. 4 at p. 2 (pandemic affecting "life, health, *property*, or the public peace"); Ex. 5 at p. 1 (directing State agencies to "take appropriate action . . . [in] preparing for, responding to and recovering from this state disaster emergency, to protect state and *local property*"); Ex. 6 at pp. 1, 2 ("the COVID-19 virus can spread easily from person to person and it is *physically causing property loss or damage* due to its tendency to attach to surfaces for prolonged periods of time") (justifying emergency action for "protection of life and *property*"); Ex. 7 at p. 2 (justifying emergency action based on "occurrence and threat of widespread and severe damage, injury, and *loss of life and property*"); Ex. 8 at p. 2 (justifying emergency action for "protection of life and *property*") (all emphases added).

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uninhabitable, or if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such *loss of utility*." *Id.* at 236 (emphasis added). *Port Authority* is not limited to uninhabitable structures, but governs any property whose "function is nearly eliminated or destroyed." *Id.* This is what happened to Nue's dining room and associated on-site service on its property as a result of the state proclamations. Thus, Nue's loss is covered.

Hoping to distinguish *Port Authority,* OMIC argues that because Nue was allowed to provide "delivery or take-away services," its "*premises* [were] not uninhabitable or unusable." Dkt. # 7 at p. 14 (emphasis added). The plain language of the Policy refutes this argument, as the Policy expressly provides business income coverage not merely for a complete shutdown, but also for a "partial slowdown." Dkt. # 8 at p. 13. Further, "Covered Property" as defined in the Policy includes more than just the "premises"; it extends to all the property Nue uses in its business. Dkt. # 8 at p. 8. The fact Nue could use some covered property for some purposes does not change the fact that the utility of the rest of its property was completely lost, and constitutes—at a minimum—a "partial slowdown" covered by the Policy. *Id.* at p. 13.

Cases from other jurisdictions hold, based on similar insuring language, that loss of functionality of property triggers coverage, even in the absence of physical or structural alteration. For example, in *Total Intermodal*, the court found coverage for a misdirected shipping container which became irretrievable, rejecting the insurer's insistence that physical alteration was required, and holding that "physical loss of" was an additional, and different, basis for coverage beyond "damage to" property. 2018 WL 3829767, at *3 (C.D. Cal. July 11, 2018). In *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of American*, No. 2:12-cv-04418 (WHW)(CLW), 2014 WL 6675934 (D.N.J. Nov. 25, 2014), business interruption coverage provided coverage for "'direct physical loss of or damage to Covered Property caused by or

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resulting from a Covered Cause of Loss.'" *Id.* at *1 (citation omitted). After ammonia was released into the facility, the insured sought business interruption coverage for the time to get back into the building and resume its intended use. *Id.* at *2. The insurer claimed that because there was no "'physical change or alteration to insured property requiring its repair or replacement'" there was no physical loss or damage. *Id.* (citation omitted). It also argued that the insured's "inability to use the plant . . . as it might have hoped or expected" did not constitute direct physical loss or damage. *Id.* (citation omitted). The court rejected these arguments, holding that "property can be physically damaged, without undergoing structural alteration, when it loses its essential functionality." *Id.* at *5. Because the facility was unusable for a period of time, there was direct physical loss of or damage to property, triggering coverage. *Id.* at *6.

Gregory Packaging relied on *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.*, 968 A.2d 724 (N.J. Super. Ct. App. Div. 2009), a decision which completely undercuts OMIC's contention that only an uninhabitable structure can be covered based on loss of functionality. In *Wakefern*, the court found coverage for a grocery store that lost power when an electrical grid and transmission lines "were physically incapable of performing their essential function of providing electricity," even though they were not necessarily damaged. *Id.* at 734. The court held that the term "physical damage" was "ambiguous" under the circumstances, accepting "the view that 'damage' includes loss of function or value." *Id.* at 734, 736.

Thus, while contamination of a building may cause a covered loss of functionality, courts do not hold that this, alone, is covered. Rather, in finding coverage, courts have held that the *loss of functionality* is what is covered. *Am. Guarantee & Liab. Ins. Co. v. Ingram Micro, Inc.*, No. 99-185 TUC ACM, 2000 WL 726789, at *2 (D. Ariz. Apr. 18, 2000) ("'physical damage' is not restricted to the physical destruction or harm of computer circuitry but includes loss of access,

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loss of use, and *loss of functionality*") (emphasis added); *Dundee*, 587 N.W.2d at 194 (finding coverage in the absence of physical alteration because the properties "*no longer performed the function for which they were designed*") (emphasis added); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (losses that render insured property "*unusable or uninhabitable*, may exist in the absence of structural damage to the insured property") (emphasis added); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) ("the church building was *rendered uninhabitable* and the continued *use thereof highly dangerous* because of the infiltration and contamination of the church building") (emphasis added); *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 806 N.Y.S.2d 709, 711 (App. Div. 2005) (rejecting argument that "demonstrable alteration" was required, holding instead that coverage is triggered when the "function and value [of the property] have been seriously impaired"); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding coverage for asbestos contamination that did not result in tangible injury to the physical structure of a building, holding that "a building's function may be *seriously impaired or destroyed and the property rendered useless* by the presence of contaminants" (emphasis added); *Hughes v. Potomac Ins. Co. of D.C.*, 18 Cal. Rptr. 650, 655 (Ct. App. 1962) (coverage found because nearby landslides rendered a dwelling "*completely useless* to its owners") (emphasis added).

Coverage has been found also where the impairment of function occurred by operation of law. In *General Mills, Inc. v. Gold Medal Insurance Co.*, 622 N.W.2d 147, 150 (Minn. Ct. App. 2001), a routine inspection discovered that oats had been treated with a pesticide that was used for other food products and presented no danger to consumers, but technically was not FDA-approved for oats. The court found coverage for the undamaged oats, holding, "[w]hether or not the oats could be safely consumed, they legally could not be used in General Mills' business. The

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district court did not err in finding this to be *an impairment of function and value* sufficient to support a finding of physical damage." *Id.* at 152 (emphasis added).

Given the courts holding that loss of functionality constitutes direct physical loss or damage while rejecting insurers' claims that physical alteration is required, this is a reasonable construction of the Policy that OMIC sold to Nue. Even if OMIC presented a reasonable interpretation to defeat coverage, where two reasonable interpretations exist, the Policy must be interpreted to provide coverage. *Am. Best Food*, 168 Wn.2d at 410-11.

2. OMIC's Washington cases do not address whether a loss of functionality is covered as direct physical loss or damage.

OMIC acknowledges authority it "anticipates" NUE will rely on to support coverage, and argues that Washington law rejects these authorities. Dkt. # 7 at pp. 13-14. But OMIC misstates the holdings and rationales of these cases, defeating its argument against coverage.

OMIC principally relies on *Villella v. Public Employees Mutual Insurance Co.*, 106 Wn.2d 806, 725 P.2d 957 (1986). *Villella* does not help determine the outcome here for at least three reasons. First, there was no allegation of loss of functionality. In *Villella*, the insured had a policy effective through August 26, 1982, under which he sought coverage for a foundation settlement which occurred over a year later on November 20, 1983. *Id.* at 808. The insured hoped to trigger coverage by arguing that improper drainage installed by the homebuilder during the policy period constituted damage, thereby claiming that some damage occurred while the policy was in force. *Id.* But unlike here, it was undisputed that alleged improper drainage did not have any effect on functionality of the property before November 20, 1983, and in fact, the insured continued to use the property until April 1984. *Id.* at 809.[10]

[10] Even in cases of loss of functionality, coverage is triggered when the loss occurs. *W. Fire Ins. Co.*, 437 P.2d at 55.

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Second, the policy language in *Villella* is different from the language in the Policy. The *Villella* policy covered "all risks of physical loss to the [insured dwelling]." 106 Wn.2d at 808 (alteration in original). By contrast, Nue's Policy and those considered in the authorities Nue cites covered the loss *of* property. This is a critical distinction. As the Eighth Circuit observed, "the policy's use of the word 'to' in the policy language 'direct physical loss *to* property' is significant. Source Food's argument might be stronger if the policy's language included the word 'of' rather than 'to,' as in 'direct physical loss *of* property' or even 'direct loss *of* property.' But these phrases are not found in the policy." *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006); *see also Total Intermodal*, 2018 WL 3829767, at *3 (distinguishing between loss "of" and loss "to").

Third, even if *Villella* did stand for the proposition that the insurer could use broad terms in a coverage grant such as *loss of* or *damage to* property and *direct physical loss* to stand "exclusionary guard" for major business interruptions, any such doctrine was repudiated in *Boeing*: "The industry knows how to protect itself and it knows how to write exclusions and conditions. The words 'as damages' do not stand exclusionary guard for the industry and represent a vast exclusion from coverage." 113 Wn.2d at 887.

OMIC's reliance on *Fujii v. State Farm Fire & Casualty Co.*, 71 Wn. App. 248, 857 P.2d 1051 (1993), suffers from the same problems. The insured in *Fujii* argued that soil destabilization threatened "likely" damage to his property, but made no argument that there was a current, actual loss of functionality, *id.* at 249, and, once again, the policy only covered loss "to" property, not loss "of" property. *Id.* at 250. Indeed, *Nautilus*, in holding that Washington allowed coverage for loss "of" property without physical alteration, distinguished *Fujii* on the same grounds. 2012 WL 760940, at *7. And, in the present case, Washington's Governor did not

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1 announce that closures were merely "likely"; instead, he actually imposed them.

2 Nor do the two unpublished Washington decisions cited by OMIC support denial of

3 coverage here.[11] In *Borton & Sons v. Travelers Insurance Co.*, 99 Wn. App. 1010, No. 18100-6-

4 III, 2000 WL 60028 (Jan. 25, 2000) (unpublished), the insured sought coverage for undamaged

5 apples after the roof of an apple shed collapsed. The apples had been stored in other buildings,

6 but the insured complained it could not sell them because the market for the apples was in its

7 infancy and the damaged building "eroded confidence" in the apples. *Id.* at *1. The court relied

8 on *Villella* to conclude there was no coverage, but did not address whether a loss of functionality

9 would be covered by a policy covering both "loss of" and "damage to" property. *Id.* at *4-5.

10 Moreover, Nue does not rely on an erosion of "confidence" for coverage, it relies on its physical

11 loss of property.

12 In *Washington Mutual Bank v. Commonwealth Insurance Co.*, 133 Wn. App. 1031, No.

13 56396-3-I, 2006 WL 1731318 (June 26, 2006) (unpublished), the insured vacated a building

14 based on a mistaken report by an engineer that it was in danger of collapse. The court held there

15 was no coverage "[b]ecause no actual 'peril insured against' arose." *Id.* at *3. Here, an insured

16 peril—physical loss of property—has arisen. Neither of these cases address the central issue

17 here: whether the Washington proclamations eliminated the functionality of Nue's property and

18 constitute a physical loss.

19 If OMIC wanted to ensure that payment for business interruption benefits had to be

20 accompanied by a distinct physical alteration of property, it had the burden to draft its Policy to

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[11] Under Washington General Rule 14.1, an unpublished opinion of the Court of Appeals may be cited only if it was filed on or after March 1, 2013 and, even then, it may be cited only for persuasive value and must be identified as unpublished. GR 14.1(a). Federal courts follow GR 14.1 "as a matter of comity." *Cont'l W. Ins. Co. v. Costco Wholesale Corp.*, No. C10-1987 RAJ, 2011 WL 3583226, at *4 (W.D. Wash. Aug. 15, 2011).

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unambiguously require specific physical alteration. Having failed to do so, it cannot now claim that this is what the Policy was intended to do.

3. The "period of restoration" provision does not define the terms "direct physical loss of or damage to" property, nor restrict the trigger of coverage.

OMIC's argument that the Policy's "period of restoration," which provides coverage through the time that the property "should be repaired, rebuilt, or replaced," requires a physical alteration of property to trigger business income coverage, fails for two reasons.

First, inserting a restriction on coverage in this fashion is prohibited by Washington law. In *Boeing*, the Washington Supreme Court rejected the insurer's claim that the policy restricted coverage when the language purportedly restricting coverage was not found where a reasonable policyholder would expect to find such a restriction. 113 Wn.2d at 877 (citing *Dairyland Ins. Co. v. Ward*, 83 Wn.2d 353, 358-59, 517 P.2d 966 (1974)). Just as in *Boeing*, here too, no reasonable policyholder would expect that the "period of restoration," which sets the duration of business income coverage, would impose a requirement to coverage in the first instance—that the property has to be physically altered to trigger coverage. Other language in the Policy indicates that coverage will run through "Resumption of Full Operations." Dkt. # 8 at p. 57. Nor would the average policyholder look at the "period of restoration" section of the Policy for that purpose. As a result, OMIC cannot rely on the period of restoration language, which clarifies the *duration* of coverage, to impose a limitation on the *trigger* of coverage.

Second, even if the period of restoration could be interpreted to limit property loss or damage to that which "should be repaired, rebuilt, or replaced," Nue's business income coverage has nonetheless been triggered.

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The term "repair" is defined to mean "to restore to a good or sound condition after decay or damage; mend," "to restore or renew by any process of making good, strengthening, etc." and "to remedy; make good; make up for."[12] Similarly, it is defined to mean: "to restore to a sound or healthy state: RENEW; to make good: compensate for: REMEDY."[13] The term "rebuild" is defined to mean "to restore to a previous state."[14] It is also defined to mean: "to replace, restrengthen, or reinforce" and "to revise, reshape, or reorganize."[15] The term "replace" is defined to mean "to restore to a former place or position,"[16] and similarly to mean "[t]o put back into a former position or place" and "[t]o restore or return."[17] None of these dictionary definitions require or impose a physical alteration component.

Moreover, the loss of functionality and loss of utility that occurred here can be repaired, rebuilt, or replaced. Each of these three terms are defined in terms of restoring that which was lost, and each applies to the facts of this case. The loss of functionality and utility must be repaired—it must be restored to a good or sound condition; it must be rebuilt—restored to its previous state; and it must be replaced—restored to its previous position or put back to its former place. That which has been lost has to be repaired, rebuilt or replaced. Therefore, no language within the period of restoration provision limits recovery for Nue's business income loss. Rather, this interpretation fulfills the Policy's intent to provide coverage until the "Resumption of Full Operations" after a state of lost functionality has been repaired or replaced. Dkt. # 8 at p. 57.

[12] *Repair*, Dictionary, https://www.dictionary.com/browse/repair?s=t (last visited June 15, 2020).
[13] *Repair*, Merriam-Webster, https://www.merriam-webster.com/dictionary/repair (last visited June 15, 2020).
[14] *Rebuild*, Merriam-Webster, https://www.merriam-webster.com/dictionary/rebuild (last visited June 15, 2020).
[15] *Rebuild*, Dictionary, https://www.dictionary.com/browse/rebuild?s=t (last visited June 15, 2020).
[16] *Replace*, Merriam-Webster, https://www.merriam-webster.com/dictionary/replace (last visited June 15, 2020).
[17] *Replace*, Free Dictionary, https://www.thefreedictionary.com/replace (last visited June 15, 2020).

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C. Nue Has Properly Alleged Claims For Civil Authority And Ingress Or Egress Coverages.

OMIC argues that Nue's claims for Civil Authority Coverage and Ingress or Egress Coverage should be dismissed for failing to allege that (1) Governor Inslee's orders prohibited access to Nue's property; and (2) that the inability to access the property was due to direct physical loss of or damage to property other than at Nue's premises. These coverages turn on the existence of property loss or damage elsewhere leading to loss of access to Nue's property. Because Nue's Complaint supports the conclusion that loss or damage also occurred elsewhere and led to a loss of access to Nue's property, the Court should not dismiss these claims.

The Complaint alleges that Nue was prohibited from operating its business except according to the terms of the Governor's proclamations and orders. Dkt. # 1 at pp. 4-5. Those proclamations "prohibit[] 'any number of people from gathering in any public venue in which people congregate for purposes of . . . food and beverage service'" and they "prohibit[] 'the onsite consumption of food and/or beverages in a public venue.'" *Id.* at p. 4. The proclamations "prohibited access" to Nue's premises—patrons were prohibited from accessing the dining or beverage service areas in the restaurant, and from entering the premises and accessing in-service, sit-down dining.

The Complaint also alleges facts that the proclamations prohibiting access were due to direct physical loss of or damage to property other than at Nue's premises: it alleges that COVID-19 has been deemed a pandemic, and that Governor Inslee declared a State of Emergency in Washington as a result of COVID-19. Dkt. # 1 at p. 4. Further, Governor Inslee has recognized the existence of property damage resulting from the pandemic. Ex. 1 at 2 (pandemic affecting "life, health, *property*, or the public peace) (emphasis added). The

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Complaint alleges further proclamations were subsequently issued, including the proclamation prohibiting public access to Nue's property. *Id.* at pp. 4-5. The Court can take judicial notice that COVID-19 is not only spread through airborne droplets, but that it can also survive for days on hard surfaces such as plastic and stainless-steel. The Court can take judicial notice that the virus has hit properties across Washington and beyond.[18] Nue has therefore satisfied its burden for purposes of Rule 12(b)(6), and it would be improper to dismiss the claim for Civil Authority Coverage and the claim for Ingress or Egress Coverage.[19]

D. The Ordinance Or Law Exclusion Does Not Apply.

Although not cited in its letter denying coverage, for the first time in its Motion, OMIC cites to the Ordinance or Law exclusion as a basis to deny coverage. Dkt. # 7 at pp. 21-23. Having failed to rely on the exclusion in its denial letter, OMIC may not rely on it now. *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 520, 174 Wn.2d 501 (2012).

Further, the Ordinance or Law exclusion does not apply. The Ordinance or Law exclusion applies to "[t]he enforcement of any ordinance or law: (a) Regulating the construction,

[18] *See Study Suggests New Coronavirus May Remain on Surfaces for Days*, U.S. Dep't of Human Health & Servs., Nat'l Insts. of Health, (Mar. 24, 2020), https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days; *see also United States v. Sanford*, No. CR19-0172JLR, 2020 WL 2114402, at *3 n.3 (W.D. Wash. May 4, 2020) (Recognizing that the Court may "'take judicial notice of the undisputed and publicly available information displayed on government websites.'") (citation omitted).

[19] Notably, too, none of the cases OMIC relies on to argue that Nue's claim for Civil Authority Coverage should be dismissed under Rule 12(b)(6) involved a motion to dismiss pursuant to Rule 12(b)(6); instead, the cases were decided on summary judgment after the parties had fully engaged in discovery. *See 54th St. Ltd. Partners, L.P. v. Fid. & Guar. Ins. Co.*, 306 A.D.2d 67, 763 N.Y.S.2d 243 (N.Y. App. Div. 2003) (ruling on summary judgment that coverage existed when access to plaintiff's restaurant was denied for two days, but coverage did not extend beyond that time because public access was thereafter allowed); *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-0756 FMS, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995) (coverage denied on summary judgment because general curfews did not prohibit access to plaintiff's theatre, instead, plaintiff chose to close its business); *Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP v. Chubb Corp.*, No. 09-6057, 2010 WL 4026375, at *4 (E.D. La. Oct. 12, 2010) (finding on summary judgment that while coverage was not triggered for an evacuation order issued before any adjacent damage occurred, subsequent order prohibiting access after such damage had occurred did trigger coverage); *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686 (5th Cir. 2011) (finding on summary judgment that plaintiff failed to prove a direct causal link between any prior property damage and the evacuation order).

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use or repair of any property; or (b) Requiring the tearing down of any property[.]" Dkt. # 8 at p. 18. OMIC argues that the Governor's proclamations regulated the "use" of property and so fall within the meaning of this exclusion. But the the Governor's proclamations are not instances of "enforcement" of any "law" that regulates the "construction, use or repair" of property. Rather, the proclamations imposed emergency restrictions pursuant to Chapters 38.08, 38.52, and 43.06 RCW, and specifically RCW 43.06.220(1)(h). These laws regulate the Governor's emergency powers. They do not regulate the "construction, use or repair of any property." RCW 43.06.220(1)(h) provides that, "[t]he governor after proclaiming a state of emergency . . . may, in the area described by the proclamation issue an order prohibiting: . . . [s]uch other activities as he or she reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace." *Id.*

The Ordinance or Law exclusion, in contrast, is directed toward the enforcement of building and land use codes. The Court must construe the term "use" in the context of the exclusion for enforcement of laws regulating the "construction, use or repair" of property, as well as the "tearing down" of property—terms that OMIC again did not define in the Policy. In *Queen City Farms*, the insurer sought to exclude pollution damage from a landfill based on an exclusion addressed to the "discharge, dispersal, release or escape" of pollutants. 126 Wn.2d at 77. The insurer argued that the insured's initial deposit of waste into the landfill was an excluded "discharge" of pollutants. *Id*. The court rejected this analysis, reading the listed terms together based on popular meanings of all listed terms: "which have in common the notion of an escape or release from confinement, or the dispersal from a fixed place." *Id.* at 78. This was the proper construction, because "[a]ll of these terms carry the connotation of the issuance of a substance from a state of containment; none of the terms is normally used to describe the placement of a

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substance into an area of confinement." *Id.* at 79. The connotation that "construction, use or repair" all have in common is the enforcement of building and land use codes, not the Governor's exercise of emergency powers, and not any governmental action merely affecting use of property. Thus, the exclusion does not apply to Nue's loss. *Cf. Polygon Nw. Co. v. Am. Nat'l Fire Ins. Co.*, 143 Wn. App. 753, 785-86, 189 P.3d 777 (2008) (terms "costs" and "taxed" construed in context rather than in isolation leading to conclusion that supplementary payments coverage for "costs taxed against the insured" meant taxable costs, not merely any legal costs incurred in defense of suit).[20]

There are additional problems with OMIC's reliance on the Ordinance or Law exclusion. First, OMIC's interpretation of the term "use" is so broad, that it would leave "construction" and "repair" meaningless. OMIC argues that any exercise of lawful authority which merely affects "use" of property is excluded. This would embrace both construction activities and repair activities without the need to additionally mention them. Nue's interpretation properly gives meaning to all three terms. Second, OMIC's interpretation would render the Civil Authority Coverage illusory. That coverage applies only in cases of "action" of "civil authority" that "prohibits access" to the premises. Dkt. # 8 at p. 14. But if the exclusion eliminated coverage for any governmental action that merely affected "use" of premises, it would entirely eliminate this coverage. Third, throughout the Policy the phrase "ordinance or law" is used in the context of building and land use codes. *Id.* at pp. 14-15 (coverage for increased cost of construction for "zoning or land use requirements"); pp. 65-66 (costs resulting from "building, zoning, or land

[20] As noted above, *Queen City Farms* also relied on extrinsic evidence to address the intended meaning of the pollution exclusion. 126 Wn.2d at 86. Here too, Nue should be entitled to similar discovery on the Ordinance or Law exclusion before a dispositive ruling is considered by the Court.

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use ordinance or law"). The exclusion does not reach the emergency proclamations.

This analysis faithfully applies the rules for interpreting insurance exclusions. "Exclusions from insurance coverage are contrary to the fundamental protective purpose of insurance," and courts "will not extend them beyond their clear and unequivocal meaning." *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 272, 267 P.3d 998 (2011) (quotation omitted). "[E]xclusionary clauses are to be most strictly construed against the insurer." *Am. Best Food*, 168 Wn.2d at 406 (alteration in original) (citation omitted). Because the Ordinance or Law exclusion must be limited to its stated meaning, which signals to the average lay person building and land us codes, not gubernatorial emergency powers, the exclusion does not apply.[21]

IV. CONCLUSION

OMIC has failed to satisfy its high burden to dismiss under Rule 12(b)(6). Nue's Complaint properly alleges claims for Business Income, Extra Expense Income, Civil Authority and Ingress or Egress Coverages under the Policy for its business losses related to COVID-19 and the proclamations. OMIC's Motion should be denied.

Alternatively, if the Court believes that the Motion should be granted in whole or in part, Nue requests leave to amend the Complaint.

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[21] OMIC cites no authority interpreting or applying its exclusion nor any similar exclusion, but consistent with the language covering "construction, use or repair," the majority of cases applying the exclusion appear to do so in the context of building and land use codes. *See, e.g.*, *Estopinal v. Par. of St. Bernard*, 32 So.3d 991 (La. Ct. App. 2010) (housing code requiring demolition of parish); *Dlugokenski v. Hartford Ins. Co. of Ill.*, No. HHBCV095012898, 2010 WL 5644849 (Conn. Super. Ct. Dec. 14, 2010) (condemnation order to demolish vacated and unsafe property); *Sweeney v. City of Shreveport*, 584 So.2d 1248, 1250-51 (La. Ct. App. 1991) (housing authority ordered demolition of dilapidated house).

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DATED this 15th day of June, 2020.

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CERTIFICATE OF SERVICE

I certify that on the date below I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following:

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