UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MOHAVE GC, LLC; CORRAL FIVE, LLC, d/b/a GOLDEN CORRAL; GOLDEN CORRAL FOUR, LLC, d/b/a GOLDEN CORRAL; CORRAL THREE, LLC, d/b/a GOLDEN CORRAL; CORRAL ONE, LLC, d/b/a GOLDEN CORRAL, Plaintiff, v. DEPOSITORS INSURANCE COMPANY, ALLIED INSURANCE CO. OF AMERICA and NATIONWIDE MUTUAL INSURANCE COMPANY, Defendants.	Case No. 4:21-CV-00119-RP-CFB **PLAINTIFFS CORRAL THREE, LLC, CORRAL FIVE, LLC, and MOHAVE GC, LLC's BRIEF IN RESISTANCE TO DEFENDANT ALLIED INSURANCE COMPANY OF AMERICA'S MOTION TO DISMISS**

COME NOW Plaintiffs, Corral Three, LLC ("Corral Three"), Corral Five, LLC ("Corral Five"), and Mohave GC, LLC ("Mohave") by and through their undersigned counsel, and hereby submit their Resistance to Defendants Allied Insurance Company of America's ("Allied") Motion to Dismiss, and further Request Oral Argument.

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I. INTRODUCTION

Defendants have drafted an insurance policy that fails to define critical terms, while at the same time interpreting the policy in a self-serving manner that denies coverage for their insureds. It must be noted that the policies in each case of all Plaintiffs are identical; the denial letters are also all essentially identical. It is well recognized that insurance contracts are considered contracts of adhesion. Defendants' arguments ignore both Illinois and Arizona's well-established principles of insurance contract interpretation, the language of the Policy as a whole, Plaintiffs' reasonable interpretation, and Plaintiffs' reasonable expectations for coverage under these circumstances. Defendants' interpretation ignores well-recognized principles of the English language and grammar. Plaintiffs have plausibly stated claims for coverage under the Business Income provision. At the very least a more expanded record is needed regarding multiple ambiguities which will require the Court to consider extrinsic evidence. This Court should deny Defendants' motion to dismiss, accordingly.

II. FACTUAL BACKGROUND

Plaintiff manages multiple restaurants located in the State of Kansas. On March 24, 2020, the businesses suffered a direct physical loss as a result of government closure orders which rendered the property nonfunctional for its intended purpose. (Complaint, ¶¶38, 39, 42, 48, 66, 71l Dckt. 1-1). Fortunately, to protect the businesses in the event they suddenly had to suspend operations for reasons outside of their control, Plaintiff purchased Business Income insurance. (Complaint, ¶23; Dckt. 1-1). In return for the payment of premiums, Defendants issued Plaintiff Corral Three Policy No. ACP BPFL3028304861, Corral Five Policy Po. ACP BPFL 3028582916, and Mohave Policy No. ACP BPFL 3038007165. (Complaint, ¶5, 9, 11). The policies essentially cover all covered causes of loss except for those risks that are expressly and specifically excluded.

These policies are considered "all risk" policies which are intended to provide the broadest policy coverage. Defendants' Businessowner's Policy is a form essentially policy drafted by the Insurance Services Office, Inc. ("ISO") and adopted for use by the Defendants. (*Id.;* Complaint, ¶27). The provisions and exclusions were not the product of discussions or negotiations between Defendants and Plaintiff. Rather, the provisions and exclusions of the "all-risk" Policy consist of standardized language and terms developed by the insurance industry through its trade association, ISO. (Complaint, ¶27; Dckt. 1-1).

The Policy language for each entity is identical and provides in relevant part:

PREMIER BUSINESSOWNERS
PROPERTY COVERAGE FORM
*****

A. Coverages

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

*****

3. Covered Causes of Loss
This Coverage Form insured against direct physical loss unless the loss is:

a. Excluded in Section B. EXCLUSIONS;
b. Limited in Paragraph A.4. LIMITATIONS or Section F. PROPERTY GENERAL CONDITIONS

*****

(Mohave Policy, Attachment A, p. 15).

5. Additional Coverages
g. Business Income
(1) Business Income with Ordinary Payroll Limitation
(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….

*****

h. Extra Expense

> **(1)** We will pay necessary "extra expense" you incur during the "period of restoration" that you would not have incurred had there been no direct physical loss of or damage to the property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss….
>
> *****
>
> **j. Civil Authority**
>
> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises…
>
> *****

(Mohave Policy, Attachment A, p. 19-21).

B. EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.
****

> **i. Virus Or Bacteria**
>
> (1) Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease;
>
> (2) However, the exclusion in paragraph (1) does not apply to loss or damage caused by or resulting from "fungi", wet rot or dry rot. Such loss or damage is addressed in Exclusion h;
>
> (3) With respect to any loss or damage subject to the exclusion in paragraph (1), such exclusion supersedes any exclusion relating to "pollutants".

(Mohave Policy, Attachment A, p. 34, 36).

3. We will not pay for loss or damage caused by or resulting from any of the following B.3.a. through B.3.c. But if an excluded cause of loss that is listed in B.3.a. through B.3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.
****

> **b. Acts Or Decisions**
>
> Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

(Mohave Policy, Attachment A, p. 38-39).

Significantly, the Policy **does not define** the phrase "direct physical loss of or damage to." Likewise, it does not define specific terms such as "loss," "direct," "physical," or "damage." These are essential key terms that should have been defined. We are now left with a disparity of decisions resulting from the failure of insurers to define key terms – insurers such as Defendants.

This Court must be extremely cautious in being persuaded by the Defendants' list cases cited in support of its motion. For example, *Diesel Barber Shop* and *Sandy Point Dental* involved policies that only covered "accidental direct physical loss to", etc. *Diesel Barbershop, LLC v. State Farm Lloyds*, 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co*., No. 20 CV 2160, 2020 WL 5630465 (N.D. Ill. Sept 21, 2020). *10E* and *Pappy's Barber Shop* imposed a permanent dispossession requirement that was not based on any language in the relevant policies. *10E, LLC v. Travelers Indemn. Co. of Conn*., No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020); *Pappy's Barber Shops, Inc. v. Farmers Group, Inc*., No. 20-CV-907-CAB-BLM, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020).

Ultimately, nearly half of state courts, as compared to federal courts, ruling on business interruption claims and applying state law have been decided in favor of the insured. (Summary of Case Results from Baker Report). Out of the many federal court decisions ruling in favor of insurers, over one hundred of them are based in a mere five states, those states being California, Florida, Illinois, Ohio and Texas. (Summary of Case Results from Baker Report). The fact that over 50 federal and state courts have found that governmental shutdown orders have constituted "physical loss of property" is a "plausible" interpretation of that language means that the Policy language is, at a minimum, ambiguous. (Summary of Case Results from Baker Report). Indeed,

the late Chief Justice of the Iowa Supreme Court, Justice Cady, stated that although disparate opinions do not by themselves establish an ambiguity, disagreements of the courts does tend to show that there is "strong indication" of an ambiguity. *Am. Fam. Mut. Ins. Co. v. Petersen*, 679 N.W.2d 571, 578 (Iowa 2004), amended on denial of reh'g (May 6, 2004). And, of course, under both Illinois and Arizona law, ambiguous policy language must be construed liberally in favor of coverage. Accordingly, the only proper interpretation of the Policy in these circumstances is that the suspension of Plaintiffs' operations was caused by "direct physical loss of or damage to property" — Plaintiffs' loss of the ability to use the Insured Premises for its intended purpose due to the Proclamation.

A. COVID-19[1]

In 2019, an outbreak of an illness known as COVID-19 was first identified in China.[2] In an event that has not occurred in more than a century, a pandemic of global proportions ensued with the virus quickly spreading to the United States. From the first reported case in the United States in January 2020, to the present, the impact of the virus has been staggering on life and property. On February 26, 2020, the Centers for Disease Control and Prevention (the "CDC") warned that community transmission of the disease existed in the United States. The virus was spreading with no ability to trace the origins of new infections.[3] Per the CDC and World Health Organization ("WHO"), a person may become infected by: (1) coming into close contact (about 6 feet) with a person who has COVID-19; (2) absorbing respiratory droplets when an infected person

[1] The facts and citations within this subsection are directly set forth and embraced in the Complaint.
[2] About COVID-19, https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/about-COVID-19.html (last accessed October 8, 2020).
[3] CDC Confirms Possible Instance of Community Spread of COVID-19 in U.S., Centers for Disease Control and Prevention, https://www.cdc.gov/media/releases/2020/s0226-Covid-19-spread.html (last accessed October 8, 2020).

talks, sneezes, or coughs; or (3) touching surfaces or objects that have the virus on them and then touching his or her mouth, eyes, or nose.[4]

Besides being deadly, the virus is challenging to contain because infected individuals can be asymptomatic, and thus unaware that they might be spreading the virus through the mere touching of objects and surfaces. Early studies estimated that more than 40% of infected individuals may never develop any symptoms.[5] Even individuals who appear healthy and present no identifiable symptoms will still spread the virus by merely breathing, speaking, or touching surfaces. Though droplets carrying the virus are not visible, they are nonetheless physical objects that attach to and cause harm to property. Unlike many other viruses that are unable to survive for long periods of time outside the body, the novel coronavirus can survive on surfaces for days.[6]

On March 11, 2020, the WHO declared COVID-19 a pandemic.[7] On March 13, 2020, the federal government declared a national emergency. Three days later, the CDC and members of the national Coronavirus Task Force issued public guidance ("30 Days to Slow the Spread") advocating far-reaching social-distancing measures, such as avoiding shopping trips and gatherings of more than 10 people; and staying away from bars and restaurants. *Id.* The presence of COVID-19 has caused civil authorities throughout the country to issue orders requiring the suspension of business at a wide range of establishments, including Plaintiffs' business.

[4] How COVID-19 Spreads, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last accessed October 8, 2020).
[5] Erika Edwards, Asymptomatic COVID-19 Cases May Be More Common Than Suspected, NBC News, https://www.nbcnews.com/health/health-news/asymptomatic-covid19-cases-may-be-more-common-suspected-n1215481 (last accessed October 8, 2020).
[6] How Long will Coronavirus Survive on Surfaces?, https://health.clevelandclinic.org/how-long-will-coronavirus-survive-on-surfaces/; https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces (last accessed October 8, 2020).
[7] https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline/#! (last accessed October 8, 2020).

B. March 16, 2020, and March 19, 2020, Proclamations

Beginning in March 2020, state and local governments throughout the United States began to act to stem the tide of the virus by issuing orders suspending or severely curtailing operations of non-essential businesses. The impact on businesses whose livelihoods depend on foot-traffic has been particularly staggering.

On March 16, 2020, Illinois Governor JB Pritzker issued a Proclamation closing all salad bars and buffets in restaurants, such as those which Plaintiff Mohave operates and relies on for business income. The Proclamation issued by Governor Pritzker stated as follows:

> Section 1. Beginning March 16, 2020 at 9 p.m. through March 30, 2020, all businesses in the State of Illinois that offer food or beverages for on-premises consumption—including restaurants, bars, grocery stores, and food halls—must suspend service for and may not permit on-premises consumption. Such businesses are permitted and encouraged to serve food and beverages so that they may be consumed off-premises, as currently permitted by law, through means such as in-house delivery, third-party delivery, drive-through, and curbside pick-up. In addition, customers may enter the premises to purchase food or beverages for carry-out However, establishments offering food or beverages for carry-out, including food trucks, must ensure that they have an environment where patrons maintain adequate social distancing. Businesses located in airports, hospitals, and dining halls in colleges and universities are exempt from the requirements of this Executive Order. Hotel restaurants may continue to provide room service and carry-out. Catering services may continue.

On March 19, 2020, Arizona Governor Doug Ducey issued a Proclamation closing all bars and restaurants in counties with confirmed cases of COVID-19, such as those which Plaintiffs Corral Three and Corral Five operate and rely on for business income. Governor Ducey's Proclamation stated as follows:

> 2. Beginning at the close of business on Friday, March 20, 2020, all restaurants in counties of the State with confirmed cases of COVID-19 shall close access to on-site dining until further notice. Restaurants may continue serving the public through pick up, delivery, and drive-thru operations.

The Proclamations caused "direct physical loss of or damage to" Plaintiffs' covered property by precluding Plaintiff from conducting their operations, precluding customers from patronizing the business, and otherwise frustrating the intended purpose of Plaintiffs' business, and thereby causing the necessary suspension of operations during a period of restoration. (Complaint, ¶¶66, 71). The period of restoration under these circumstances would be the lifting of restrictions. The loss was every bit as tangible as any classic loss due to flood or fire, and in some ways worse because the loss could not be readily repaired.

III. LEGAL STANDARD

A. Rule 12(b) Motions

In a diversity action the Court applies federal procedural law and state substantive law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Zink v. Lombardi*, 783 F.3d 1089, 1098 (8th Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A claim has facial plausibility when its allegations rise above the "speculative" or "conceivable," *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007),* and where "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the Defendants are liable for the misconduct alleged." *Id*. A complaint will be liberally construed in the light most favorable to the plaintiff. E*ckert v. Titan Tire Corp.*, 514 F.3d 801, 806 (8th Cir. 2008). "Finally, the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Braden v. Wal-Mart Stores, Inc*., 588 F.3d 585, 594 (8th Cir. 2009).

The Court may "consider matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the

case, and exhibits attached to the complaint whose authenticity is unquestioned." *Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1021 (8th Cir. 2013). Likewise, the Federal Rule contemplates the Court considering additional matters outside the pleading, thereby treating the motion as one for summary judgment under Rule 56. Fed. R. Civ. P. 12(d).

B. Principles of Insurance Contract Construction and Interpretation

The challenge before this court is to give true meaning to Illinois and Arizona's well-established principles of interpreting adhesive insurance contracts. Under Illinois and Arizona law the party seeking coverage under an insurance policy generally bears the burden of demonstrating that the claim falls within the policy's terms. *Aguilera v. Sannes*, 1 CA-CV 19-0029, 2020 WL 290418, at *6 (Ariz. App. 1st Div. Jan. 21, 2020); *Old Second Nat. Bank v. Indiana Ins. Co*., 29 N.E.3d 1168, 1176 (Ill. App. 1st Dist. 2015). The insurer, however, bears the burden of demonstrating a coverage exclusion applies. *See generally, id.* The principles of interpretation and construction of insurance contracts in Arizona and Illinois are well established. The rules governing policy interpretation in both Illinois and Arizona require us to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it. *Outboard Marine Corp. v. Liberty Mut. Ins. Co*., 607 N.E.2d 1204, 1216 (Ill. 1992); *Thomas v. Liberty Mut. Ins. Co*., 842 P.2d 1335, 1339 (Ariz. App. 1st Div. 1992). Specifically, the Illinois Supreme Court in *Outboard Marine Corp.* relied on the following principles in determining coverage exists:

> If a term in the policy is subject to more than one reasonable interpretation within the context in which it appears, it is ambiguous. (*Wilkin*, 144 Ill.2d at 74, 161 Ill.Dec. 280, 578 N.E.2d 926.) Ambiguous terms are construed strictly against the drafter of the policy and in favor of coverage. (*Wilkin*, 144 Ill.2d at 74, 161 Ill.Dec. 280, 578 N.E.2d 926; *Maryland Casualty Co*., 126 Ill.App.3d at 152, 81 Ill.Dec. 289, 466 N.E.2d 1091.) This is especially true with respect to exclusionary clauses. (*Reliance Insurance Co. v. Martin* (1984), 126 Ill.App.3d 94, 96, 81 Ill.Dec. 587, 467 N.E.2d 287; see *Wilkin*, 144 Ill.2d at 80, 161 Ill.Dec. 280, 578 N.E.2d 926.)

> This is so because there is little or no bargaining involved in the insurance contracting process (*Canadian Radium & Uranium Corp. v. Indemnity Insurance Co. of North America* (1952), 411 Ill. 325, 335, 104 N.E.2d 250), the insurer has control in the drafting process, and the policy's overall purpose is to provide coverage to the insured (see *United States Fidelity & Guaranty Co. v. Specialty Coatings Co*. (1989), 180 Ill.App.3d 378, 384, 129 Ill.Dec. 306, 535 N.E.2d 1071).

Outboard Marine Corp., 607 N.E.2d at 1217.

The Arizona Supreme Court made similar determinations in *Teufel* and stated:

> If a policy is subject to "conflicting reasonable interpretations," it is ambiguous, State Farm Mut. Auto. Ins. v. Wilson, 162 Ariz. 251, 258, 782 P.2d 727, 734 (1989), and we interpret it by examining, as pertinent here, the "transaction as a whole," First Am. Title Ins. v. Action Acquisitions, LLC, 218 Ariz. 394, 397 ¶ 8, 187 P.3d 1107, 1110 (2008). If an ambiguity remains, we construe it against the insurer, id., particularly when the ambiguity involves an exclusionary clause, see Sec. Ins. Co. of Hartford v. Andersen, 158 Ariz. 426, 428, 763 P.2d 246, 248 (1988); 2 Couch on Insurance § 22:31 (3d ed.) (stating that exceptions to coverage are "strictly construed against the insurer").

Teufel v. Am. Fam. Mut. Ins. Co., 419 P.3d 546, 548 (Ariz. 2018).

"If an insurance policy is subject to conflicting reasonable interpretations, it is ambiguous, and the Supreme Court interprets it by examining the transaction as a whole." *Id*. the same is true in Illinois. *Illinois Emcasco Ins. Co. v. Tufano*, 63 N.E.3d 985 (Ill. App. 1st Dist. 2016) (holding that "[i]nsurance policy provisions are considered ambiguous if they are subject to more than one reasonable construction"). **Even if the insurer's interpretation is reasonable, the court must interpret the policy in the insured's favor if any other reasonable interpretation would permit coverage for the claim.** This principle is known as the Doctrine of Contra Proferentem. *See General Mills v. Gold Medal Ins. Co*., 622 N.W.2d 147 (Minnesota Ct. App. 2001).

A thorough discussion of the Doctrine of Contra Proferentem is contained in *Pan Am World Airways Inc. v. Aetna Cas. & Sur. Co*., 505 F.2d 989 (1974). In *Pan Am*, the all-risk insurers lodged at least six reasons for the court to not apply the Doctrine of Contra Proferentem. The court noted in its extensive findings covering four pages that the all-risk insurers overstated their claims

of having been "extensive judicial interpretation" of various terms. The court further noted that the plausibility of several different interpretations is convincing evidence of the ambiguity of the exclusions and a compelling reason for applying contra proferentem against the all-risk insurers. The *Pan Am* case is completely apropos for the Court's review of the instant case.

The Restatement of the Law of Liability Insurance, Section 4 (2019), provides additional insight regarding the rule that an ambiguous contract term should be interpreted against the drafter. The comment contained in the Restatement of Law of Liability Insurance, Section 4, states:

> (1) An insurance policy term is ambiguous if there is more than one meaning to which the language of the term is reasonably susceptible when applied to the facts of the claim at issue in the context of the entire insurance policy.
> (2) When an insurance policy term is ambiguous as defined in subsection (1), the term is interpreted against the party that supplied the term, unless that party persuades the court that a reasonable person in the policyholder's position would not give the term that interpretation.

Id.

"This rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded." *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1213 (Cal. 2003), as modified on denial of reh'g (Sept. 17, 2003) Ultimately, if an insured's interpretation of the relevant policy provisions is reasonable and different from the insurer's interpretation, an ambiguity exists.

C. Principles of Determining Intent of the Parties – Extrinsic Evidence

"The cardinal principle pertaining to the construction and interpretation of insurance contracts is that the intention of the parties should control." *D.M.A.F.B. Fed. Credit Union v. Employers Mut. Liab. Ins. Co. of Wis*., 396 P.2d 20, 22–23 (Ariz. 1964). Virginia Sur. Co., Inc. v. N. Ins. Co. of New York, 866 N.E.2d 149, 153 (Ill. 2007) (holding that "[t]he cardinal rule is to give effect to the parties' intent, which is to be discerned from the contract language").

In *Connie's Const. Co., Inc. v. Fireman's Fund Ins. Co*., 227 NW2d 2007 (Iowa 1975), the Iowa Supreme Court interpreted a contractor's liability insurance policy. In doing so, the Court stated that "interpretation, the meaning of contractual words, is an issue of the court unless it depends upon extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence." The Court in Connie's Const. Co. cited *Hamilton v. Wosepka,* 261 Iowa 299, 154 NW2d 164 (1967) in which Justice Mason in Hamilton engaged in a powerful analysis of the purpose of interpretation always being the discovery of actual intention. An in-depth review of *Corbin on Contracts, Williston on Contracts* and numerous insurance cases led the court to conclude that the "ambiguity-on-its-face" rule is a vestigial remain of a notion prevailing in "primitive law." Justice Mason adopted the position of *U.S. v. Lennox Metal Mfg. Co*., 225 F.2d 302, 310 (2d Cir. 1955) in recognizing the fallacy in interpreting contractual language in a manner that would preclude the court from considering surrounding circumstances unless the language is "patently ambiguous." Both Illinois and Arizona's well-established principles of insurance contract interpretation ring hollow if, when interpreting a policy and determining the parties' intent, the Court does not consider the situation of parties, the attendant circumstances and intentions giving rise to the purchase of the policy, and the objects a party is striving to obtain in entering into the contract.

The challenge before the Court is to determine the true "intent of the parties" at the time an adhesion contract was entered. The outcome is predetermined and fixed, unless the court engages or allows the parties to engage in discovery of the actual intention as suggested in *Hamilton*. In this business interruption claim, the clear intent of the insureds was that Corral Three, Corral Five, and Mohave each purchased an "all-risk" policy that covered their business losses under these circumstances.

IV. ARGUMENT

A. The Exclusions Contained in the Policy Do Not Apply to Preclude Coverage

Defendants assert that even if Plaintiffs can demonstrate physical loss, their claims are barred entirely by various Policy exclusions, including: (1) loss due to virus or bacteria, and (2) act or decisions. Neither of the exclusions apply under these circumstances. When it comes to exclusions, the fact that the policies are contracts of adhesion is especially significant.

i. The Virus Exclusion does not Apply

Governor Ducey and Governor Pritzker's Proclamations in and of themselves constitute a direct physical loss to Plaintiffs' covered property and the immediate surrounding area. That is, COVID-19 was not a "but-for" cause of the Plaintiffs' loss. Indeed, but for the Governor's Proclamation, Plaintiff would and could have continued operating its businesses despite the COVID-19 pandemic. This is clearly evident from the fact that other stores and business, including gas stations, grocery stores, drug stores, and golf courses continued to operate notwithstanding the virus. Section B.1.j. of Allied's Policy provides it "will not pay for loss or damage cause directly or indirectly" by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (Policy). Plaintiffs' claim, however, was not caused by or resulting from COVID-19. In fact, there is no claim or allegation that Plaintiffs' Insured Premises was closed as the result of the known or confirmed presence of SARS-CoV-2 or COVID-19 or that there were no known or presumed infected persons with COVID-19 at any of the Insured Premises at any time. Rather, Plaintiffs' claim was based solely on the forced closure of their restaurants in response to the Proclamation, which is most certainly not a "virus". Plaintiffs would have faced criminal sanctions or lost their business licenses for violating the proclamations.

Allied argues the COVID-19 pandemic, not the Proclamation, is the real cause of Plaintiffs' losses and damage. That argument is belied by what is actually happening today. The COVID-19 pandemic continues to persist. In-person dining in Illinois and Arizona has been allowed for months while the pandemic continued to explode. Governor Ducey and Governor Pritzker lifted restrictions for dine-in restaurants, despite the ever-present existence of the virus. Likewise, many businesses never closed or otherwise limited their capacity (e.g., grocery stores, gas stations, and golf courses) despite wide-spread presence of the virus. If the virus was the cause of Plaintiffs' closure, it would still be closed. **The circumstances of Plaintiffs' closure and reopening are absolute proof that COVID-19 did not cause Plaintiffs' restaurants to close — the Proclamation did.** In each state the Plaintiffs operate, they immediately re-opened despite the virus still raging on. Common sense speaks volumes. If the virus was the cause of closure then the restaurants would have remained closed when the restrictions were lifted. The *Henderson* case provides the proper analysis to an insurer's attempt to rely on the virus exclusion to preclude coverage for government closure orders:

> Zurich argues that COVID-19 "indirectly" caused Plaintiffs to close their restaurants. But this is not entirely accurate. There was "no known or presumed infected person(s) with COVID-19 at any of the Insured Premises at any time from March 15, 2020 to April 27, 2020." Thus, it was clearly the government's orders that caused the closures.
>
> Ironically, Zurich later argued in its motion for summary judgment that the government orders "responded to a public health crisis," and were not related to any damage at the plaintiffs' properties. This argument seems to undermine the purpose of the Microorganism exclusion which was plainly to exclude coverage for damage caused by microorganisms at the Plaintiffs' properties.
>
> The insurer, being the one who selects the language in the contract, must be specific in its use; an exclusion from liability must be clear and exact in order to be given effect. Here, Plaintiffs' argument prevails because the Microorganism exclusion does not clearly exclude loss of property caused by a government closure. Plaintiffs' restaurants were not closed because there was an outbreak of COVID-19 at their properties; they were closed as a result of governmental orders. Because Zurich's Microorganism exclusion did not identify the possibility that, even absent "the presence, growth, proliferation, spread, or any

> activity of "microorganisms" damaging the Plaintiffs' properties, the Plaintiffs may be required to close their dine-in restaurants due to government orders responding to a public health crisis, the Microorganism Exclusion does not apply.

Henderson v. Road Restaurant Systems, Inc. v. Zurich American Ins. Co., 1:20-CV-1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021) (internal citations omitted).

Similarly, in *McKinley Development Leasing Company, Ltd. et al. v. Westfield Insurance Company,* Case No. 2020CV00815, 2021 WL 506266, (Stark County Ohio, Feb. 9, 2021), with policy language identical or materially identical to the present policy, a state court judge in Ohio stated that "the Court can only surmise that with these differing opinions, the policy is ambiguous." The *McKinley* court goes on to state that "[it] is obvious to the Court that a virus is not the same as a pandemic." *Id*.

As the court noted in *Urogynecology Specialist of Florida, LLC v. Sentinel Insurance Company, Ltd.,* Case No. 6:20-cv-1174 (M.D. Fl. Sept. 24, 2020, in reviewing the "virus exclusion" none of the cases dealing with exclusions related to pollution, mold, illness or disease "**dealt with the unique circumstances of the effect COVID-19 has had on our society—a distinction this Court considers significant. Thus, without any binding case law on the issue of the effects of COVID-19 on insurance contracts virus exclusions, this Court finds that Plaintiff has stated a plausible claim at this juncture**." *Id.* (emphasis added). The Virus Exclusion is simply inapplicable to what happened in this case.

Notwithstanding the above, Defendants should be estopped from enforcing the Virus Exclusion on principles of regulatory estoppel, unclean hands, breach of good faith and fair dealing, and general public policy. The issue of regulatory estoppel was recently discussed in *Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, 2020 N.J. Super. (Unpub. Lexis 1982). In this case, the New Jersey court stated, "…we do have a big case called *Morton International*…where our courts created this concept of regulatory estoppel where essentially the insurance industry

lobbied to insert a particular form of coverage within a policy with an exclusion." *Id.* The inclusion of the Virus Exclusion in these types of policies was done under duplicitous pretenses. Likewise, the circumstances of how the Virus Exclusion came to be part of the Policies demonstrate another example of why further development of the record is necessary in this matter.

Specifically, in 2006, the two major insurance industry trade groups, Insurance Services Office, Inc. ("ISO") and the American Association of Insurance Services ("AAIS") represented hundreds of insurers in a national effort to seek approval from state insurance regulators for the adoption of the Virus Exclusion. (Complaint, ¶57). The policies at issue in this lawsuit were specifically written by ISO. In their filings with the various state regulators, on behalf of insurers, ISO and AAIS represented that the adoption of the Virus Exclusion was only meant to "clarify" that coverage for "disease-causing agents" has never been in effect and was never intended to be included in property policies. (Complaint, ¶58). The inclusion of the virus exclusion in a Businessowners' policy such as in this case is especially egregious in a regulatory deemer state such as Arizona or Illinois, in which the Arizona or Illinois Department of Insurance will not strike a provision unless specifically objected to at the time the insurer notifies the State it will be included in a policy. In this instance, in its "ISO Circular" dated July 6, 2006, entitled "New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria," ISO represented to state regulatory bodies that:

> While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage to create sources of recovery for such losses, contrary to policy intent.

https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf (last accessed August 16, 2020).

Similarly, AAIS, in its "Filing Memorandum" in support of the Virus Exclusion, represented:

> Property policies have not been, nor were they intended to be, a source of recovery for loss, cost or expense caused by disease-causing agents. With the possibility of a pandemic, there is concern that claims may result in efforts to expand coverage to create recovery for loss where no coverage was originally intended….This endorsement clarifies that loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress is excluded.

The foregoing representations made by the insurance industry justifying the inclusion of the Virus Exclusion were false. By 2006, the time of the state applications to approve the Virus Exclusion, courts had repeatedly found that property insurance policies covered claims involving disease-causing agents. See *Cooper v. Travelers Indem. Co.*, No. C-01-2400, 2002 WL 32775680, at 5 (N.D. Cal. Nov. 4, 2002); *American Alliance Ins. Co. v. Keleket X-Ray Corp*., 248 F.2d 920, 925 (6th Cir. 1957*); Schlamm Stone & Dolan, LLP v. Seneca Ins. Co*., No. 603009/2002 2005 WL 600021, at *3-5 (N.Y. Sup. Mar. 16, 2005); *Yale Univ. v. CIGNA Ins. Co*., 224 F.Supp.2d 402, 413 (D. Conn. 2002); and *Yale Univ. v. CIGNA Ins. Co*., 224 F.Supp.2d 402, 413 (D. Conn. 2002); *Board of Educ. V. International Ins. Co*., 720 N.E.2d 622, 625-26 (Ill. App. 1999); *Sentinel Mgmt Co. v. Aetna Cas & Sur. Co*., 615 N.W.2d 819, 825-26 (Minn. 2000). Regardless, the circulars demonstrate the insurance industry clearly contemplated the possibility of a pandemic to give rise to claims.

In securing approval for the adoption of the Virus Exclusion by misrepresenting to the state regulators that the Virus Exclusion would not change the scope of coverage, but rather just clarify existing coverage, the insurance industry effectively narrowed the scope of the insuring agreement without a commensurate reduction in premiums charged. The Court should not permit the Defendants and the insurance industry to benefit from this type of duplicitous conduct, which the

record will further develop if the case is allowed to proceed. They could have met the requirements of Illinois and Arizona law that an insurance company clearly and explicitly define exclusions in its policies. They did not do so, but rather created even more ambiguity regarding coverage under these circumstances. *Id.* The virus exclusion at issue in this policy essentially mirrors the ISO form language. The Court should not permit the Defendants or the insurance industry to benefit from the ambiguities with the "virus exclusion."

ii. The Acts or Decisions Exclusion does not Apply

Defendants asserts the Acts or Decisions exclusion also precludes coverage. The exclusion reads:

> We will not pay for loss or damage caused by or resulting from any of the following Paragraphs (1) through (3). But if an excluded cause of loss that is listed in Paragraphs (1) through (3) results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.
>
> *****
>
> (2) Acts or Decisions
> Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

(Mohave Policy, Attachment A, p. 38-39).

According to Defendants, this exclusion precludes coverage arising out of Governor Ducey and Governor Pritzker's proclamations because the proclamation was an act or decision of a governmental body. Defendants' reliance on the Acts or Decisions exclusion under these circumstances is misplaced. The Acts or Decisions exclusion specifically states it will pay for the loss or damage if an act or decision of a governmental body results in a Covered Cause of Loss. Accordingly, the "Acts or Decisions" exclusion specifically does not apply to government closure orders that result in a direct physical loss or damage to property, which are explicitly covered causes of losses under the policy. A contrary holding would render completely meaningless the provision of the Acts or Decisions exclusion which states, "[b]ut if an excluded cause of loss that

is listed in Paragraphs (1) through (3) results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss. Likewise, the exclusion would create a nonsensical situation in which Plaintiff paid for a policy providing Civil Authority coverage (as was the case here) that at the same time excludes coverage for actions of a Civil Authority.

The Acts or Decisions exclusion explicitly does not apply when the Acts or Decision results in a Covered Cause of Loss. To the extent the government closure orders resulted in a Covered Cause of Loss, Plaintiff is entitled to coverage notwithstanding the exclusion.

B. Plaintiffs Have a Reasonable Expectation That the Loss of Business Income Would Cover These Losses

Illinois and Arizona law recognizes the doctrine of Reasonable Expectations of the insureds. *Posing v. Merit Ins. Co*., 629 N.E.2d 1179, 1183 (Ill. App. 3d Dist. 1994) and *Maricopa County v. Arizona Prop. & Cas. Ins. Guar. Fund*, 2 CA-CV 98-0076, 2000 WL 35937314, at *4 (Ariz. App. 2d Div. Apr. 27, 2000). The doctrine has become a vital part of Illinois and Arizona law interpreting insurance policies, as well as in other jurisdictions. S*ee* 2 Couch on Ins. section 22:11 (2020). The Court may employ the doctrine if the insurance coverage eviscerates terms explicitly agreed to or is manifestly inconsistent with the purpose of the transaction for which the insurance was purchased.

While it may be true that terms of the policy, its coverages and exceptions, are clear and unambiguous to a sophisticated reader of insurance policies, we believe that the public policy of this State, as demonstrated by the court's opinion in *Wilkin*, requires that insurance contracts be construed and enforced to accord with the objectively reasonable expectations of the insured. *Posing*, 629 N.E.2d at 1183.

The Supreme Court in Arizona summarized the reasonable expectations in Noble, where it stated:

> In securing the reasonable expectations of the insured under the insurance policy there is usually an unequal bargaining position between the insured and the insurance company. *Craft v. Economy Fire & Casualty Co*., 572 F.2d 565, 569 (7th Cir. 1978). When the loss insured against occurs the insured expects to have the protection provided by his insurance. Often the insured is in an especially vulnerable economic position when such a casualty loss occurs. The whole purpose of insurance is defeated if an insurance company can refuse or fail, without jurisdiction, to pay a valid claim.

Noble v. Natl. Am. Life Ins. Co., 624 P.2d 866, 867–68 (Ariz. 1981).

The Iowa Supreme Court in *C&J Fertilizer, Inc.*, 227 N.W.2d 169 (Iowa 1975) bluntly stated that "[w]e would be derelict in our duty to administer justice if we were not to judicially know that modern insurance companies have turned to mass advertising to sell 'protection'. *Id.* at 178. The reasonable consumer depends on an insurance company to sell him a policy that works for its intended purpose. *Id.* (*citing* W. Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv.L.Rev. 529 (1971). In this instance, Plaintiffs purchased all risks policies for the explicit purpose of insuring their loss of profits in the event of the suspension of the business operations. An ordinary layperson would not easily understand Defendants' Virus Exclusion vis-à-vis the Civil Authority and the Business Income provisions. Indeed, Defendants' application of the Virus Exclusion eviscerates the Civil Authority coverage for which Defendants collected premiums under these circumstances. What is the point of purchasing Business Income or Civil Authority coverage that does not cover the acts of a Civil Authority under these circumstances?

Likewise, the Policy's use of "physical loss of or damage" creates the inference to a layperson that there does not have to be actual destruction of property for coverage to apply. This is particularly the case when (1) elsewhere in the Policy "damage" is defined to include loss of use despite no physical injury and (2) the Business Income provision provides coverage for "loss or damage," while the Civil Authority provision specifically requires "damage." For Defendants to

argue that the contract is an unambiguous manifestation of the intent of the parties is fictitious. At the very least Plaintiffs have plausibly stated a reasonable expectation of coverage sufficient to survive a Rule 12(b) motion.

C. Plaintiffs Have Plausibly Stated a Claim of Bad Faith

In this instance, the basis for Defendants' denial of the claims is its own self-serving conclusion that Plaintiffs did not suffer a physical loss or damage to their property. Defendants' Policy, however, does not define the phrase "direct physical loss of or damage to . . .," nor does it define specific terms such as "loss," "direct," "physical," or "damage." Defendants cannot point to any provision of the Policy that purports to define "loss" to require an actual alteration of property. To the contrary, Policy language clearly states that "loss" and "damage" are separate and distinct concepts. Likewise, various portions of the Policy, when read as a whole, demonstrate unequivocally that "damage" can include loss of use. Defendants' argument is further hamstrung by the very existence of the Virus Exclusion which explicitly recognizes that viruses can cause physical loss or damage.

Defendants cannot point to any actual evidence justifying the denial of Plaintiffs' claims. Defendants' denial letters did not address any science regarding the propensity for COVID-19 to attach to physical property – they are simply verbatim letters sent without conducting an investigation of any kind. It did not purport to have made any inquiry with local, State or Federal health departments regarding the physical characteristics of COVID-19. It did not address any of the precautions and restoration methods Plaintiffs needed to utilize to ensure COVID-19 was not living and spreadable within their buildings. Literally, Defendants' argument rests entirely on its conclusion that a physical loss to Plaintiffs' property did not occur simply because Defendants

said so. Significant factual issues remain regarding Defendants' denial of Plaintiffs' claim, thereby precluding summary judgment at this time.

V. CONCLUSION

Governor Ducey and Governor Pritzker's Proclamations caused "direct physical loss of" Plaintiffs' covered property resulting in the necessary suspension of operations during a period of restoration. Likewise, the Governors' Proclamations were an act of a Civil Authority prohibiting access to Plaintiffs' premises. The "Virus Exclusion" simply does not apply to these circumstances. Accordingly, losses related to the Proclamations trigger the Business Income and/or Civil Authority provisions of the Plaintiffs' Policy. At the very least, Plaintiffs have adequately and plausibly stated causes of action for these coverages, as well as a claim for reasonable expectation of coverage to survive Defendants' motion to dismiss. Further development of the record is necessary for the Court to perform a comprehensive interpretation of the Policy and to resolve multiple ambiguities contained therein.

Plaintiffs respectfully requests Oral Argument regarding these matters.

Respectfully submitted,

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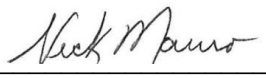
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon one of the attorneys of record for all parties to the above-entitled cause by serving the same on such attorney at his/her email address as disclosed by the pleadings of record herein and via the courts CM/ECF filing service, on June 24, 2021 by:

Carney & Appleby Law Firm

CARNEY & APPLEBY LAW FIRM



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