

HONORABLE JUDGE BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARK GERMACK DDS, individually and
on behalf of all others similarly situated,

No. 2:20-cv-00661-BJR

Plaintiffs,

**DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**

vs.

THE DENTISTS INSURANCE
COMPANY,

Oral Argument Requested

Defendant.

Defendant The Dentists Insurance Company (“TDIC”) submits the following Motion for Summary Judgment.

I. INTRODUCTION AND RELIEF REQUESTED

This is a putative class action lawsuit brought by Mark Germack, DDS (hereinafter “Germack”)¹ seeking insurance coverage for Business Interruption losses arising from the 2020 COVID-19 global pandemic. Under the policy issued to Germack, the Business Interruption coverages include “Business Income,” “Extended Business Income,” “Extra Expense,” and

¹ TDIC’s named insured is Mark Germack DDS, PLLC. On information and belief, Dr. Germack is the sole owner of Mark Germack DDS, PLLC. Throughout the duration of this Motion, TDIC’s named insured will be referred to as “Germack,” reflecting the entity owned and operated by Dr. Germack.

1 “Civil Authority”² coverages.

2 This motion seeks Rule 56 Summary Judgment dismissal of Germack’s claims for
3 insurance benefits under the Business Interruption coverages. For the reasons discussed herein,
4 there is simply no coverage available to Germack or his purported class.³

5 The Business Income and Extra Expense coverages are triggered only for income losses
6 or expenses incurred due to direct physical loss of or damage to the insured premises. The Civil
7 Authority coverage is triggered only for direct physical loss of or damage to property other than
8 the insured premises. Simply put, there is no basis in law or fact for Dr. Germack or any of the
9 purported class members to claim that the COVID-19 pandemic and/or the actions of the civil
10 authority in response thereto caused any direct physical loss of or damage to any property. As a
11 result, as to each of the Business Interruption coverages, there is no coverage available.

12 Moreover, another element common to each of the Business Interruption coverages is
13 that the direct physical loss of or damage must be caused by a “Covered Cause of Loss.” In the
14 “all-risk” property policies issued by TDIC to its dentists/insureds, the “Covered Cause of Loss”
15 includes all risks except those excluded by the policy. Each and every policy issued by TDIC
16 excludes coverage for the following:

17 The presence, growth, proliferation, spread or any activity of a
18 virus, bacterium or other microorganism that induces or is capable
19 of inducing physical distress, illness or disease, provided that this
exclusion does not apply to “Fungi”, wet or dry rot.

20 As a result, even if Dr. Germack could somehow establish that the virus caused direct
21 physical loss of or damage to the insured premises or some other property, any such loss or
22 damage was caused by an excluded cause of loss and no coverage is available under the policy.

23 _____
² These coverages, where appropriate, are referred to collectively as the “Business Interruption” coverages.

24 ³ Pending before the Court is TDIC’s Motion to Strike or Dismiss Plaintiff’s Class Allegations. See Dkt. 11.

1 The inquiry does not end with these two elements. All of the Business Interruption
2 coverages contain additional requirements for which Dr. Germack bears the burden. For
3 instance, in order to trigger the insuring agreement for the Business Income coverage, Dr.
4 Germack is required to prove that he lost business income due to a “necessary suspension of
5 operations” caused by the direct physical loss of or damage to his dental office. Under clear
6 Washington law, Dr. Germack did not experience a “necessary suspension of operations” due to
7 the COVID-19 pandemic or the governmental response thereto. By the very admissions in his
8 Complaint, Jay Inslee’s Stay Home, Stay Safe” order prohibited dental services, “but for urgent
9 and emergency procedures.” Dkt. 1, p. 3. Under clear Washington law, the Order does not trigger
10 a “necessary suspension of operations.” Because there was no “necessary suspension” of Dr.
11 Germack’s operations, as that term is interpreted under Washington law, there is no coverage
12 available.

13 By way of further example, the “Civil Authority” coverage provides for loss of business
14 income or extra expenses caused by an act of the civil authority that bars “access” to the insured
15 premises due to direct physical loss of or damage to a property other than the insured premises,
16 caused by a “covered cause of loss.” Dr. Germack was not barred access to his dental office.
17 Rather, he was only prohibited from performing non-emergency or non-urgent procedures.

18 Based on the foregoing, TDIC asks that this Court enter an Order Granting Summary
19 Judgment in favor of TDIC and declaring that there is no coverage available to Dr. Germack or
20 his putative class for the claims asserted herein under the TDIC policy.

21 II. STATEMENT OF FACTS

22 A. Background

23 Mark Germack DDS, PLLC is located at 720 Olive Way Ste. 835, Seattle Washington,
24 98101. Mark Germack DDS, PLLC operates under the trade name “Core Endodontics” and

1 specializes in root canal therapy. **Exhibit A** to the Declaration of Jeremy Fullenwider
2 (“Fullenwider Decl.”).

3 As a result of the COVID-19 pandemic, Governor Jay Inslee issued a “Stay Home, Stay
4 Healthy” order requiring the closure of all non-essential business. Dkt. 1 ¶ 13. The purpose of the
5 order was to prevent the spread of COVID-19 and to attempt to control the number of patients in
6 hospitals. Specifically, Proclamation 20-25 stated:

7 **WHEREAS**, models predict that many hospitals in Washington
8 State will reach capacity or become overwhelmed with COVID-19
patients within the next several weeks unless we substantially slow
down the spread of COVID-19 throughout the state [...]

9 **Exhibit 1** to the Declaration of Eric J. Neal (“Neal Decl.”).

10 Proclamation 20-25 went on to state:

11 **NOW, THEREFORE**, I, Jay Inslee, Governor of the state of
12 Washington, as a result of the above-noted situation, [...] impose a
13 Stay Home – Stay Healthy Order throughout Washington State
14 prohibiting all people in Washington State from leaving their
homes or participating in social, spiritual, and recreational
gatherings of any kind regardless of the number of participants,
and all non-essential business in Washington State from
conducting business, the limitations provided herein.

15 **Exhibit 1.**

16 Proclamation 20-25 prohibited dentists from practicing dental services aside from
17 permitted urgent and emergency procedures. Dkt. 1 ¶ 14. By way of separate proclamation,
18 Governor Inslee clarified what constituted urgent and emergency procedures. **Exhibit 2** to Neal
19 Decl. Specifically, the Proclamation 20-24 states:

20 **EXCEPTION:** The above prohibition does not apply to the full
21 suite of family planning services and procedures or to treatment for
22 patients with emergency/urgent needs [...] Hospital and
23 ambulatory surgical facilities may perform any surgery that if
24 delayed or cancelled would result in the patient’s condition
worsening (for example, removal of serious cancerous tumor or
dental care related to the relief of pain and management of
infection.) [...]

1 **Exhibit 2.**

2 As a result of Governor Inslee’s Order, Dr. Germack alleges that he was prohibited from
3 practicing dental services except for urgent and emergency procedures. Dkt. 1 ¶ 14. Dr. Germack
4 also alleges that no COVID-19 virus has been detected on his business premises. Dkt. 1 ¶ 16. As
5 a result of COVID-19 and/or Governor Inslee’s Proclamation, Dr. Germack alleges that he
6 suffered business income losses and that those losses are covered under the Business Interruption
7 coverages in the TDIC policy. Dkt. 1 ¶ 18.

8 **B. The TDIC Policy**

9 TDIC issued a policy of insurance to Germack numbered WA 5252081, effective from
10 September 8, 2019 to September 8, 2020. The policy’s declarations list Mark Germack DDS
11 PLLC as the named insured. Mark Germack DDS PLLC’s mailing address is listed as 720 Olive
12 Way Suite 835, Seattle, WA 98101. **Exhibit B** to Fullenwider Decl.

13 The TDIC policy contains the following provision regarding Business Income Coverage:

14 **C. Business Income**

15 We will pay for the actual loss of “Business Income” you sustain
16 because of the necessary suspension of your “Operations” during
17 the “Period of Restoration”. The suspension must be caused by
18 direct physical loss of or damage to property at the described
premises, including personal property in the open (or in a vehicle)
within 1,000 feet, caused by or resulting from a “Covered Cause of
Loss”.

19 . . .

20 “Business Income” does not apply to the loss of “Business Income”
21 incurred as a result of unfavorable business conditions caused by
the impact of the “Covered Cause of Loss”.

22 **Exhibit B**, Policy Form NDBPCF (01/2019), p. 8.

23 The TDIC policy contains the following definitions applicable to the Business Income
24 coverage:

I. PROPERTY DEFINITIONS

...

C. “Business Income” means:

- Net income (net profit or loss before income taxes) that would have been earned or incurred
- Continuing normal operating expenses incurred, including payroll
- Loss of rental income you incur as building owner

...

M. “Operations” means:

- Your business activities occurring at the described premises

N. “Period of Restoration” means the period of time that”

- Begins with the date of direct physical loss or damage caused by or resulting from any “Covered Cause of Loss” at the described premises
- Ends on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable and similar quality

Exhibit B, Policy Form NDBPCF (01/2019), pp. 4-6.

The TDIC policy contains the following Extra Expense coverage:

D. Extra Expense

We will pay necessary Extra Expense you incur during the “Period of Restoration” that you would not have incurred if there had been no direct physical loss or damage to property at the described premises, including personal property in the open (or in a vehicle) within 1,000 feet, caused by or resulting from a “Covered Cause of Loss”.

...

“Extra Expense” means expense incurred:

3. To avoid or minimize the suspension of business and to continue “Operations”:

- a)** At the described premises
- b)** At replacement premises or at temporary locations,

1 including:

- 2 i. Relocation expenses
3 ii. Costs to equip and operate at the replacement
4 or temporary locations

4 4. To minimize the suspension of business if you cannot
5 continue “Operations”

6 5. To repair or replace any property including relocation
7 expenses and cost to equip and operate at the replacement or
8 temporary locations. Business personal property purchased
9 or leased that replaces the property damaged by a “Covered
10 Cause of Loss” will be considered replacement Business
11 Personal Property and will reduce the available Business
12 Personal Property limit accordingly.

13 **Exhibit B**, Policy Form NDBPCF (01/2019), p. 9

14 The TDIC policy contains the following Extended Business Income coverage:

15 **E. Extended Business Income**

16 We will pay the actual loss of “Business Income” you sustain
17 caused by any “Covered Cause of Loss” that results in direct
18 physical loss of or damage to property at the described premises
19 which occurs between the periods described below:

- 20 1. Beginning on the date your “Operations” are resumed after
21 the “Period of Restoration”
22 2. Ending on the earlier of:
23 a) The date your “Business Income” could have been restored,
24 at reasonable speed, to the same level that your “Business
Income” would have been had there been no direct physical
loss of or damage to property at the described premises
b) Thirty consecutive days after the date your “Operations” are
resumed after the “Period of Restoration”

Extended Business Income does not apply to the loss of “Business
Income” incurred as a result of unfavorable business conditions
caused by the impact of the “Covered Cause of Loss”.

Exhibit B, Policy Form NDBPCF (01/2019), p. 9

The TDIC policy contains the following Civil Authority coverage:

1 **F. Civil Authority**

2 We will pay for the actual loss of “Business Income” and necessary
3 Extra Expense caused by an action of Civil Authority that prohibits
4 access to the described premises because of direct physical loss of
 or damage to property, other than at the described premises, caused
 by or resulting from a “Covered Cause of Loss”.

5 We will pay for the actual loss of “Business Income” and Extra
6 Expense beginning 24 hours after the action of Civil Authority that
7 prohibits access to the described premises, provided both of the
 following apply:

- 8 1. Access to the area immediately surrounding the damaged
 property is prohibited by civil authority as a result of the
 damage and the described premises are within that area but
9 are not more than one mile from the damaged property
10 2. The action of civil authority is taken in response to
 dangerous physical conditions resulting from the damage or
11 continuation of the “Covered Cause of Loss” that caused the
 damage, or the action is taken to enable a civil authority to
12 have unimpeded access to the damaged property
 ...

13 **Exhibit B**, Policy Form NDBPCF (01/2019), p. 10.

14 The TDIC Policy defines the term “Covered Cause of Loss” as follows:

15 F. “Covered Causes of Loss” means:

- 16 • All risk or direct physical loss, unless the loss is limited
17 in section IV, Limitations or excluded in VII,
 EXCLUSIONS

18 **Exhibit B**, Policy Form NDBPCF (01/2019), p. 5.

19 In addition, the TDIC policy contains the following Virus or Bacteria exclusion:

20 **VIII. EXCLUSIONS**

21 We will not pay for loss or damage caused by any of excluded
22 events described below. Loss or damage will be considered to have
 been caused by an excluded event if the occurrence of that event:

- 23 1. Directly or solely results in loss or damage; or
24 2. Initiates a sequence of events that results in loss or damage,
 regardless of the nature of any intermediate or final event in
 that sequence.

1 ...

2 **AA. Virus or Bacteria**

3 The presence, growth, proliferation, spread or any activity of
4 a virus, bacterium or other microorganism that induces or is
5 capable of inducing physical distress, illness or disease,
provided that this exclusion does not apply to “Fungi”, wet
or dry rot.

6 **Exhibit B**, Policy Form NDBPCF (01/2019), p. 27, as modified by WABPCHG (01/2019), p. 1.

7 The above exclusion precludes coverage for loss caused by the “presence, growth,
8 proliferation, spread or any activity of a virus.” It is now axiomatic that the COVID-19 pandemic
9 and resulting governmental orders limiting certain dental operations were caused by the presence
10 and spread of the virus known as SARS-CoV-2.⁴

11 **III. LEGAL AUTHORITY**

12 **A. Summary Judgment Standard**

13 Summary judgment is appropriate when the pleadings, affidavits, depositions, and
14 admissions indicate that there are no genuine issues of material fact and a party is entitled to
15 judgment as a matter of law. FRCP 56. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L.Ed. 2d
16 265, 106 S.Ct. 2548 (1986). The party that brings a motion for summary judgment bears the
17 burden of establishing the absence of an issue of material fact. Once the moving party has made
18 the requisite showing, the non-moving party then bears the burden of establishing that there is a
19 question of fact pertinent to an essential element of his case. *Celotex, supra*.

20 Summary judgment should be granted if the non-moving “fails to make a showing
21 sufficient to establish the existence of an element essential to that party’s case, and on which that
22 party will bear the burden of proof at trial.” *Celotex, supra*. “In such a situation, there can be ‘no

23 _____
24 ⁴ As a technical matter, COVID-19 is the disease caused by the virus known as SARS-CoV-2. [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it) (visited July 30, 2020).

1 genuine issue as to any material fact,’ since a complete failure of proof concerning an essential
 2 element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex*,
 3 *supra*, at 322-23.

4 **B. Policy Construction & Burden of Proof**

5 The interpretation of insurance policy language is a question of law. *State Farm Gen. Ins.*
 6 *Co. v. Emerson*, 102 Wn.2d 477, 480 (1984). A reviewing court examines the policy terms to
 7 determine whether or not under the plain meaning of the contract there is coverage. *Kitsap Cty.*
 8 *v. Allstate Ins. Co.*, 136 Wn.2d 567, 575 (1998). If the language is clear and unambiguous, the
 9 court must enforce the policy as written and may not modify it or create ambiguity where none
 10 exists. *American Nat’l Fire Ins. Co. v. B & L Trucking and Const. Co.*, 134 Wn.2d 413, 428
 11 (1998). A clause or phrase is only ambiguous when, on its face, it is fairly susceptible of two
 12 different interpretations, both of which are reasonable. *Weyerhaeuser Co. v. Commercial Union*
 13 *Ins. Co.*, 142 Wn.2d 654, 666 (2000); *Kitsap Cty.*, 136 Wn.2d at 575. Courts may not strain to
 14 find an ambiguity in an insurance contract where none exists. *Farmers Home Mut. Ins. Co. v.*
 15 *Ins. Co. of N. America*, 20 Wn. App. 815, 820 (1978). Courts cannot create ambiguity or doubt
 16 where language of an insurance policy is not susceptible of more than one reasonable
 17 interpretation. *Truck Ins. Exch. v. Aetna Cas. Ins.*, 13 Wn. App. 775, 778 (1975).

18 Germack has the burden to prove that the alleged “loss is within the scope of the policy’s
 19 insured losses.” *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731 (1992). Only if
 20 this burden is met by Germack does TDIC have the burden to show that an exclusion applies. *Id.*

21 **C. The Covid-19 Pandemic and Governmental Response Thereto Did Not Cause Direct**
 22 **Physical Loss of or Damage to the Insured Premises or any other Property.**

23 Germack admits that no COVID-19 virus has been detected on his business premises.
 24 Dkt. 1 ¶ 16. There are no other allegations or evidence of any direct physical loss of or damage
 to property in this case. This is fatal to Germack’s claim for coverage under the TDIC policy.

1 “Direct physical loss of or damage to property” is required for coverage under the TDIC Policy’s
2 Business Income, Extended Business Income, Extra Expense, and Civil Authority coverages. *See*
3 **Exhibit B**, Policy Form NDBPCF (01/2019), pp. 8-10.

4 Washington Courts have upheld and strictly enforced the requirement that the insured
5 prove a loss caused by “direct physical loss of or damage to” the insured premises or other
6 property for Business Interruption coverages to apply. *See Keetch v. Mut. of Enumclaw Ins. Co.*,
7 66 Wn. App. 208 (1992). Washington courts have held that coverage based on “direct physical
8 loss” requires some “discernible physical damage.” *Fujii v. State Farm Fire & Cos. Co.*, 71 Wn.
9 App. 248, 250-251 (1993). Other courts agree that loss cannot be solely economic in nature to
10 trigger coverage:

11 The requirement that the loss be ‘physical,’ given the ordinary definition of that
12 term, is widely held to exclude alleged losses that are intangible or incorporeal
13 and, thereby, to preclude any claim against the property insurer when the insured
merely suffers a detrimental economic impact unaccompanied by a distinct,
demonstrable, physical alteration of the property.

14 *See, e.g., Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 17-cv-23362-KMM, 2018 US Dist LEXIS
15 201852 at *9 (S.D. Fla. June 11, 2018) (quoting 10A Couch on Ins. § 148:46 (3d. Ed. West
1998)).

16 Courts have also held “direct” and “physical” modify both “loss of” and “damage to” in
17 policies that cover loss caused by “direct physical loss of or damage to property.” *See, e.g., Ward*
18 *Gen. Ins. Services, Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 554-556 (2003) (held
19 loss of electronic data did not qualify as “direct physical loss or damage” due to lack of physical
20 alteration to storage media). In *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*,
21 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014), the Court adopted this interpretation and held that a
22 precautionary electricity shutdown to an insured’s office building in advance of Superstorm
23 Sandy was not covered because “forced closure of the premises for reasons exogenous to the
24 premises themselves [and/or] the adverse business consequences that flow from such closure”

1 did not constitute “direct physical loss or damage.” In an unpublished decision, the Washington
2 Court of Appeals held that “direct physical loss of or damage to property” was not ambiguous
3 and rejected the argument that direct physical damage was not required due the placement of the
4 disjunctive “or.” *Wash. Mut. Bank v. Commonwealth Ins. Co.*, 2006 Wash. App. LEXIS 1316 at
5 *7-8.

6 Likewise, Courts have interpreted “direct physical loss” to require “the permanent
7 dispossession of something” as opposed to a temporary restriction of the use of property. *10E*,
8 *LLC v. Travelers Indem. Co.*, 2020 US Dist LEXIS 165252, at *13-15 (C.D. Cal. Sept. 2, 2020)
9 (discussing *Total Intermodal Servs. v. Travelers Prop. Cas. Co. of Am.*, 2018 US Dist LEXIS
10 216917 at *4 (C.D. Cal. July 11, 2018)); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 2020
11 US Dist LEXIS 166808, at *13 (S.D. Cal. Sep. 11, 2020) (adopting *10E*). Similarly, the “mere
12 adherence of molecules to porous surfaces, without more, does not equate [to] physical loss or
13 damage.” *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, Civil No. 98-434-HU, 1999 US Dist
14 LEXIS 11873 at *18 (D. Or. Aug. 4, 1999). In addition, cleaning property with typical cleansing
15 agents does not qualify as direct physical loss or damage sufficient to trigger coverage. *Universal*
16 *Image Prods. v. Fed. Ins. Co.*, 475 F App'x 569, 574, n. 8 (6th Cir. 2012); *see also Mama Jo's*,
17 *supra*, 2018 US Dist LEXIS 201852 at *24.

18 Courts across the United States have already held that business income loss related to
19 COVID-19 does not qualify as loss caused by “physical loss of or damage to property.” *See, e.g.*,
20 *10E, supra*, 2020 US Dist LEXIS 165252 (granting Motion to Dismiss claims for Business
21 Interruption coverage caused by governmental orders restricting restaurants to take-out and
22 delivery due to COVID-19); *Pappy's, supra*, 2020 US Dist LEXIS 166808 (Barber Shop); *Turek*
23 *Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2020 US Dist LEXIS 161198 (E.D. Mich.
24 Sept. 3, 2020) (Chiropractic Office).

1 In *Gavrilides Management Co. v. Michigan Insurance Co.*, Case No. 20-258-CB-C30
2 (July 1, 2020), the Circuit Court of Ingham County in Michigan granted a motion to dismiss after
3 finding that a loss of income due to orders limiting a restaurant’s operations to take-out and
4 delivery in response to COVID-19 did not satisfy the requirement of physical loss of or damage
5 to property. Specifically, the *Gavrilides* court stated:

6 [I]t is clear from the policy coverage provision only direct physical
7 loss is covered. Under their common meanings and under federal
8 case law as well, that the plaintiff has cited that interprets this
9 standard form of insurance, direct physical loss of or damage to
10 property has to be something with material existence. Something
11 that is tangible. Something...that alters the physical integrity of the
12 property. The complaint here does not allege any physical loss of
13 or damage to the property. The complaint alleges a loss of business
14 due to executive orders shutting down the restaurants for dining in
15 the restaurant due to the Covid-19 threat.

16 Then the plaintiff in the briefing, at least, seems to make a second
17 argument that and this is not 100% clear, but, it seems like the
18 plaintiff is saying that the physical requirement is met because
19 people were physically restricted from dine-in services. But, that
20 argument is nonsense. And it comes nowhere close to meeting the
21 requirement that there’s some, there has to be some physical
22 alteration to or physical damage or tangible damage to the integrity
23 of the building.

24 **Exhibit 3** at pp. 18-20.

Likewise, in *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-Civ, 2020 US Dist
LEXIS 156027 (S.D. Fla. August 26, 2020), Magistrate Judge Edwin Torres recommended
granting Greenwich Insurance Company’s Motion to Dismiss COVID-19 Business Interruption
claims brought by restaurant. **Exhibit 4**. In that case, Judge Torres engaged in an exceedingly
thorough and well-reasoned analysis to demonstrate that governmental orders restricting business
operations due to the threat of COVID-19 do not constitute “direct physical loss of or damage to
property” to trigger Business Interruption coverage. Judge Torres then succinctly concluded:

Plaintiff only alleges that the government forced it to close its

1 indoor dining to contain the spread of COVID-19. The government
2 permitted Plaintiff to continue its takeout and delivery services.
3 While Plaintiff never makes clear whether it undertook either of
4 these options, the government never made the restaurant
uninhabitable or substantially unusable. Therefore, under no
definition of “direct physical loss or damage” has Plaintiff stated a
claim where coverage exists under this insurance policy.

5 **Exhibit 4** at p. 21.

6 In *Rose’s I, LLC v. Erie Ins. Exch.*, No. 2020 CA 002424 B, the District of Columbia
7 Superior Court granted summary judgment after finding that government orders restricting
8 business operations do not constitute “direct physical loss.” **Exhibit 5**. The Western District of
9 Texas also granted a Motion to Dismiss, based on similar allegations, after finding that the
10 plaintiffs did not plead any direct physical loss and, even if they did, the virus exclusion applies.
11 **Exhibit 6** (Order Granting Motion to Dismiss in *Diesel Barbershop, LLC, v. State Farm Lloyds*,
12 Case No. 5:20-CV-461-DAE (W.D. Tex. August 13, 2020)). Finally, the Southern District of
13 New York denied a motion for preliminary injunction because COVID-19 does not cause
14 physical damage to property; it damages a person’s lungs. **Exhibit 7** (Transcript in *Social Life*
15 *Magazine, Inc. v. Sentinel Ins. Co. Ltd.*, No. 20 Civ. 3311 (VEC) (S.D.N.Y. May 22, 2020)).

16 Here, the Complaint makes no mention of any physical loss or damage to the insured
17 premises or any other property. Like the plaintiffs in *Gavrilides* and *Malaube*, Germack does not
18 allege that the COVID-19 virus was present at the insured property. **Exhibit 3**, p. 10; Dkt. 1, ¶
19 16. Rather, they all rely on governmental orders limiting certain operations or services. There is
20 no evidence that Germack’s property suffered any physical loss, damage or tangible alteration
21 whatsoever. Germack also did not lose possession of any of his property. As a result, no
22 coverage is owed to Germack under the TDIC Policy.

23 This conclusion is further supported by the remaining language of the policy. Business
24 income coverage only applies to losses sustained during necessary suspension of “Operations”

1 during the “Period of Restoration.” **Exhibit B**, Policy Form NDBPCF (01/2019), p. 8. The
2 “Period of Restoration” begins on the date the physical loss or damage occurred and ends the
3 date the premises should have been “repaired, rebuilt or replaced.” **Exhibit B**, Policy Form
4 NDBPCF (01/2019), pp. 4-6. Here, because is no physical loss or damage to proper, there is no
5 “Period of Restoration” over which any losses could have been sustained. As a result, no
6 Business Interruption coverage is owed under the TDIC Policy. *Compare Kut Suen Lui v. Essex*
7 *Ins. Co.*, 185 Wn.2d 703, 710 (2016) (“Where possible, we harmonize clauses that seem to
8 conflict in order to give effect to all of the contract's provisions.”) *with Malaube, LLC*, 2020 US
9 Dist LEXIS 156027 at *25-26 (requiring actual physical harm to trigger Business Interruption
10 coverage under policy is supported because it gives meaning to “period of restoration”
11 provisions.)

12 Moreover, to the extent Germack chose not to resume operations due to government-
13 mandated limitations on his services, or believes he was unable to access or use his clinic due to
14 COVID-19 or governmental orders, his losses would not be caused by any direct physical loss of
15 or damage to property. *See N. River Ins. Co. v. Clark*, 80 F.2d 202, 203 (9th Cir. 1935) (No
16 coverage when claimed loss of property caused by insured’s “unwillingness or inability” to
17 access the property following a fire that damaged the bridge allowing access to the property).
18 The threat of a microscopic virus spreading to and infecting people and resulting orders limiting
19 business activities to prevent the spread of such virus simply do not constitute physical loss or
20 damage to any property.

21 Germack’s Business Income and Extended Business Income claims are also precluded
22 under the provision in the TDIC Policy stating that such coverage “does not apply to the loss of
23 “Business Income” incurred as a result of unfavorable business conditions caused by the impact
24 of the ‘Covered Cause of Loss.’” **Exhibit B** at Form NDBPCF (01/2019), pp. 8 and 9. Governor

1 Inslee’s orders limiting dental operations to urgent and emergent procedures plainly constituted
2 unfavorable business conditions and nothing more.

3 Germack cannot show he suffered any direct physical loss of or damage to property in
4 this case. Neither the insured premises nor any other property was lost, damaged or otherwise
5 physical altered in any way by the COVID-19 virus or Governor Inslee’s resulting orders. As a
6 result, there is no coverage available to Germack under the Business Income, Extended Business
7 Income, Extra Expense, and Civil Authority coverage grants contained in the TDIC policy.

8 **D. Any Purported “Direct Physical Loss of or Damage To” Property Conceivably**
9 **Caused by COVID-19 Is Excluded.**

10 Even if Germack was somehow able to establish that one of the Business Interruption
11 coverages was triggered, the TDIC Policy’s Virus or Bacteria Exclusion would operate to
12 preclude coverage. The TDIC policy provides as follows:

13 **VIII. EXCLUSIONS**

14 We will not pay for loss or damage caused by any of excluded
15 events described below. Loss or damage will be considered to have
16 been caused by an excluded event if the occurrence of that event:

- 17 1. Directly or solely results in loss or damage; or
- 18 2. **Initiates a sequence of events that results in loss or**
19 **damage, regardless of the nature of any intermediate or**
20 **final event in that sequence.**

21 ...

22 **AA. Virus or Bacteria**

23 The **presence, growth, proliferation, spread or any activity of a**
24 **virus**, bacterium or other microorganism that induces or is capable
of inducing physical distress, illness or disease, provided that this
exclusion does not apply to “Fungi”, wet or dry rot.

25 **Exhibit B** at NDBPCF (01/2019), p. 27, as modified by WABPCHG (01/2019), p. 1. (emphasis
added).

26 **1. The Virus or Bacteria Exclusion is Unambiguous and Plainly Applies Here**

1 Under Washington law, the Virus or Bacteria Exclusion must be enforced based on its
2 plain and ordinary meaning. *Kitsap Cty.*, 136 Wn.2d at 575. *B & L Trucking*, 134 Wn.2d at 428;
3 *B & L Trucking*, 134 Wn.2d at 428. *Britton*, 104 Wn.2d at 528; *W. American Ins. Co.*, 80 Wn.2d
4 at 44. While this specific exclusion has not been addressed by Washington Courts, courts in
5 other jurisdiction have upheld and enforced similar provisions to preclude coverage in analogous
6 contexts. *See, e.g., Sentinel Ins. Co., Ltd. v. Monarch Med. Spa, Inc.*, 105 F. Supp. 3d 464, 472
7 (E.D. Pa. 2015) (Court enforced a virus/bacteria exclusion with similar language to preclude
8 coverage of a loss caused by Group A Streptococcus infection); *Alexis v. Southwood L.P.*, 732
9 So. 2d 100, 102 (La. Ct. App. July 18, 2001) (communicable disease exclusion barred coverage
10 for diseases transmitted from exposure to raw sewage.); *Paternostro v. Choice Hotel Int'l Servs.*
11 *Corp.*, No. 13-0662, 2014 US Dist LEXIS 161157, at *73-75 (E.D. La. Nov. 14, 2014)
12 (dismissing coverage claims under policies containing bacteria exclusions for loss caused by
13 transmission of Legionella and Pseudomonas, which are known to be bacteria).

14 Multiple courts have also confirmed that virus exclusions are not ambiguous and apply to
15 preclude coverage for Business Interruption claims related to COVID-19. *See, e.g., Exhibit 3*
16 (*Gavrilides, supra*) at pp. 10, 20-21; **Exhibit 6** (*Diesel Barbershop, LLC, supra*) at pp. 15-18.

17 In *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of America*, 2020 US Dist LEXIS
18 165140 (M.D. Fla. September 2, 2020), the Court granted Allied Insurance Company of
19 America's Motion to dismiss COVID-19 Business Interruption coverage claims brought by a
20 Florida dentist based on the application of a virus exclusion with nearly identical language as the
21 language used in the TDIC Policy. The Court rejected the dentist's argument that his losses were
22 really caused by the governmental orders restricting his operations to emergency procedures:

23 Accepting all allegations as true, the dental practice's argument
24 still fails because the loss or damage asserted was not due to a
"Covered Cause of Loss." In fact, the policy expressly excludes

1 insurer liability for loss or damage caused “directly or indirectly”
2 by any virus. (Doc. 4-1 at 23) (excluding coverage from “[a]ny
3 virus, bacterium or other microorganism that induces or is capable
4 of inducing physical distress, illness or disease”). Because
5 Martinez’s damages resulted from COVID-19, which is clearly a
6 virus, neither the Governor’s executive order narrowing dental
7 services to only emergency procedures nor the disinfection of the
8 dental office of the virus is a “Covered Cause of Loss” under the
9 plain language of the policy’s exclusion. Because, as a matter of
10 law, the plain language of the insurance policy excludes coverage
11 of the dental practice’s purported damages, the breach-of-contract
12 claim (Count I) is dismissed.

13 *Id.* at *5-6.

14 Likewise, in *Turek Enterprises, supra*, the Eastern District of Michigan granted State
15 Farm’s Motion to Dismiss Business Interruption coverage claims brought by a chiropractic office
16 based, in part, on the virus exclusion contained in the policy. 2020 US Dist LEXIS 161198 at
17 *21-25. The plaintiff argued that the governmental orders requiring suspension of all operations
18 due to COVID-19 was the sole and proximate cause of the claimed losses. The Court rejected
19 that argument and held that the virus exclusion precluded coverage:

20 The Order expressly states that it was issued to “suppress the
21 spread of COVID-19” and accompanying public health risks. ECF
22 No. 16-4 at PageID.424. The only reasonable conclusion is that the
23 Order—and, by extension, Plaintiff’s business interruption
24 losses—would not have occurred but for COVID-19.

Id. at *22.

25 The language of the Virus or Bacteria Exclusion is clear and simple. There is no plausible
26 alternative interpretation of the exclusion. It applies to preclude coverage for losses caused by
27 the presence, growth, proliferation, spread or activity of a virus. SARS-CoV-2 is unquestionably
28 a virus. This virus directly caused the COVID-19 pandemic giving rise to the losses alleged
29 herein. Accordingly, as the Courts held in *Martinez* and *Gavrilides*, the exclusion applies and
30 Germack is not entitled to any coverage under the TDIC Policy.

1
2 **2. Coverage is Excluded Because the Presence, Spread and Activity of the**
3 **COVID-19 Virus is the Efficient Proximate Cause of the Claimed Loss**

4 In Washington, the application of coverage exclusions in an all-risk policy is governed by
5 the efficient proximate cause rule where more than one potential cause of loss is at issue. *See,*
6 *e.g., Graham v. Public Employees Mut. Ins. Co.*, 98 Wn.2d 533, 538 (1983). “The efficient
7 proximate cause rule states that where a peril specifically insured against sets other causes into
8 motion which, in an unbroken sequence, produce the result for which recovery is sought, the loss
9 is covered, even though other events within the chain of causation are excluded from coverage.”
10 *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731 (1992) (citing *Graham, supra*).
11 In *Graham*, the Court noted that “[i]t is the efficient or predominant cause which sets into motion
12 the chain of events producing the loss which is regarded as the proximate cause, not necessarily
13 the last act in a chain of events.” *Graham*, 98 Wn.2d at 538 (emphasis added); *see also Xia v.*
14 *ProBuilders Specialty Ins. Co.*, 188 Wn.2d 171, 183 (2017).

15 When an insurance policy contains what has been described as “inverse EPC” language,
16 as the TDIC policy does (Form WABPCHG (01/2019)), coverage is excluded when the efficient
17 proximate cause of the claimed loss is excluded under the policy. *See Findlay v. United Pac.*
18 *Ins.*, 129 Wn.2d 368, 376 (1996) (explaining the Court’s statement in *Safeco Ins. Co. v.*
19 *Hirschmann*, 112 Wn.2d 621, 631 (1989)); *see also Greenlake Condo. Ass’n v. Allstate Ins. Co.*,
20 No. C14-1860 BJR, 2015 US Dist LEXIS 184729, at *28-29 (W.D. Wash. Dec. 23, 2015).

21 Germack alleges that Governor Inslee’s “Stay Home, Stay Healthy” orders restricting his
22 operations to emergent and urgent dental procedures caused his claimed losses. Dkt. 1, ¶¶ 13-20.
23 These orders were plainly issued in direct response to the presence and spread of COVID-19 in
24 State of Washington. In fact, Governor Inslee’s orders, by their express terms, were issued for

1 the exact purpose of limiting the proliferation and spread of the COVID-19 virus. **Exhibits 1 and**
 2 **Exhibit 2.** There would be no justifiable purpose for such draconian and economically damaging
 3 restrictions without the presence, spread and activity of a dangerous virus amongst the
 4 community. Accordingly, a reasonable juror could only conclude that the “predominant,”
 5 “initiating” or “efficient proximate” cause of the losses alleged by Germack is the presence,
 6 spread and activity of the SARS-CoV-2 virus.⁵ There is no debating that this virus resulted in the
 7 need for Governor Inslee’s orders limiting dental procedures and other business activities.

8 Because the efficient proximate cause of the losses alleged by Germack is the presence,
 9 spread and activity of a virus, Business Interruption coverage for Germack’s claim is precluded
 10 under the TDIC Policy and Washington law. *See also Diesel Barbershop, LLC, supra* at pp. 15-
 11 18 (**Exhibit 5**). Therefore, TDIC’s Motion for Summary Judgment should be granted.

12 **E. The State of Washington’s Stay Safe/Stay Home Order Did Not Cause a “Necessary**
 13 **Suspension of Operations” as that Term is Defined Under Washington Law**

14 Even if Germack can show that his claimed losses were caused by physical loss of or
 15 damage to property and avoid application of the Virus or Bacteria Exclusion, he must also show
 16 lost income or extra expenses because he sustained a necessary suspension of his business
 17 operations to be entitled to coverage. He cannot make such a showing in this case under because
 18 Governor Inslee’s orders did not require Germack to cease all business operations. *See, e.g.,*
 19 *Buxbaum v. Aetna Life & Cas. Co.*, 103 Cal. App. 4th 434, 449 (2002) (and cases cited therein

20 ⁵ TDIC anticipates that, in an attempt to avoid the Virus or Bacteria Exclusion and establish a direct physical loss of
 21 or damage to property, Germack may argue that Governor Inslee’s orders and proclamations were the efficient
 22 proximate cause of his loss because they prevented him from using the insured premises where his dental practice is
 23 conducted. TDIC submits that this argument plainly mischaracterizes Governor Inslee’s orders because those orders
 24 merely restricted certain types of dental procedures. They did not prevent Dr. Germack from using his building or
 other property. Nevertheless, even if this argument had factual merit, which it does not, the TDIC Policy excludes
 coverage for loss caused by “[t]he enforcement of any code, ordinance, law, or decree that regulates the construction
 use, or repair of any building or structure.” **Exhibit B** at Form NDBPCF (01/2019), p. 20, as modified by
 WABPCHG (01/2019), p. 1. *See also See Brothers, Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611, 612 (D.C.
 1970) (insured’s business interruption losses resulting from curfew and municipal regulations in response to rioting
 were not covered where there was no physical damage to premises); *Newman Myers Kreines Gross Harris, supra.*

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1 requiring complete cessation of business operations for business interruption coverage to apply).

2 **1. Germack Was Not Required to Suspend His Operations.**

3 The Court in *Keetch* described Business Interruption coverage as follows:

4 The essential nature and purpose of a business interruption policy
 5 is to protect the earnings which an insured would have enjoyed had
 6 there been no interruption of business. *Northwestern States
 Portland Cement Co. v. Hartford Fire Ins. Co.*, 360 F.2d 531 (8th
 7 Cir. 1966). Business interruption coverage indemnifies an insured
 for losses sustained because of his or her **inability to continue to
 use specified premises**.

8 *Keetch v. Mut. of Enumclaw Ins. Co.*, 66 Wn. App. 208, 210-211 (1992) (emphasis added). The
 9 Court then held that Business Interruption coverage was not available when an insured's business
 10 operations were merely limited, as opposed to completely shut down, due to direct physical loss
 11 or damage. *Id.* at 212-213.

12 *Keetch* arose from a business interruption claim by the owners of a motel in Ritzville,
 13 Washington impacted by the 1980 eruption of Mt. St. Helens. *Keetch*, 66 Wn. App. at 209.
 14 Following the eruption, the motel, like much of central and eastern Washington, was blanketed in
 15 volcanic ash. *Id.* The motel did not cease operations, but its revenue was significantly impacted
 16 by the event as the Keetches incurred cleanup and repair expenses. *Id.* The Washington Court of
 17 Appeals held that business interruption coverage was not available because the motel did not
 18 suspend operations and the loss of revenue was not directly related to property damage.

19 As stated in *Pacific Coast Eng'g Co. v. St. Paul Fire & Marine Ins.
 20 Co.*, *supra* at 275, the purpose of business interruption insurance is
 21 to indemnify for loss due to inability to continue to use specified
 22 premises. Here, the Colwell Motel did not suspend its business
 activity; its business was not interrupted as provided for in the loss
 of earnings endorsement.

23 The Keetches attempt to distinguish the authorities cited by Mutual
 24 on the basis that here the court found the motel sustained actual
 damage. The policy, however, is clear -- it "insure[s] against loss of
 earnings resulting *directly* from necessary interruption of business

1 caused by the perils insured against..." (Italics ours.) The damage to
 2 landscape or shrubbery did not directly result in a business
 3 interruption loss. The motel had the same number of rooms
 4 available both before and after the eruption; none of the motel
 5 rooms were unavailable because of ash damage.

6 Nor does the endorsement afford coverage because the motel's
 7 quality of service was reduced during the cleanup period. Paragraph
 8 2(a) of the loss of earnings endorsement provides: "Due
 9 consideration shall be given to the continuation of normal charges
 10 and expenses,...to the extent necessary to resume operations of the
 11 insured with the same quality of service which existed immediately
 12 preceding the loss". Quality of service is merely one factor for
 13 Mutual to consider in determining the amount it is ultimately
 14 obligated to pay. The endorsement does not provide that coverage
 15 exists because the motel's quality of service may be diminished by
 16 an occurrence.

17 *Keetch*, 66 Wn. App. at 211-212.

18 *Keetch* is consistent with the law in numerous jurisdictions, which require a total cessation
 19 of business operations before coverage is triggered. *Ramada Inn v. Ramogreen, Inc. v. The*
 20 *Travelers Indem. Co. Of Am.*, 835 F.2d 812, 814 (11th Cir. 1988) (denying a hotel's business
 21 interruption claim because, while destruction of the restaurant caused business to slow, the intact
 22 hotel rooms allowed the hotel to remain open); *Royal Indem. Ins. Co. v. Mikob Props., Inc.*, 940
 23 F.Supp. 155, 159 (S.D. Tex. 1996) (business interruption coverage not triggered when a building
 24 complex lost one building and common amenities in a fire because two buildings remained and
 the complex did not shut down entirely); *The Home Indem. Co. v. Hyplains Beef*, 893 F. Supp.
 987, 991-92 (D. Kan. 1995) (holding that a "necessary suspension" of business means a complete
 cessation); *Buxbaum v. AETNA Life & Casualty Co.*, 103 Cal. App. 4th 434, 444, 126 Cal. Rptr.
 2d 682 (2002) (finding the use of the term "necessary suspension" clearly indicated coverage
 could only be triggered by a total shutdown); *54th St. Ltd. Partners v. Fid. & Guar. Ins. Co.*, 306
 A.D.2d 67 (N.Y. Ct. App. 2003) ("Contrary to plaintiff's contention, the language of the subject
 policy clearly and unambiguously provides that for business interruption coverage to be

1 triggered, there must be a 'necessary suspension,' i.e., a total interruption or cessation."); *Howard*
2 *v. Foremost Ins. Co.*, 82 A.D.2d 398, 401 (N.Y. Ct. App. 1981) (ruling that, because there was no
3 cessation of business, a store could not recover after water damaged some of its merchandise).

4 The principle set forth in *Keetch* also makes logical sense when applied to the language
5 of the TDIC Policy. Under the policy, Business Income Loss and Extra Expense coverages apply
6 to loss and expenses incurred during the "period of restoration." **Exhibit B** at pp. 8-9. Extended
7 Business Income provides coverage for loss sustained when "operations are resumed" after the
8 "period of restoration" ends. **Exhibit B** at Form NDBPCF (01/2019), p. 9. The distinction
9 between these two coverages inherently assumes and requires that the insured's business actually
10 be suspended for at least some period of time for any coverage to apply. *See Shaw Mortg. Corp.*
11 *v. Peerless Ins. Co.*, 615 F. Supp. 2d 1172 (S.D. CA 2009) (explaining purpose and function of
12 extended business income coverage when operations have been suspended due to a direct
13 physical loss in light of related business interruption coverages).

14 Here, as in *Keetch*, there is no evidence that Germack was forced to suspend operations at
15 any point in time for any reason. Rather, as established above, Governor Inslee's Stay Home,
16 Stay Healthy orders and proclamations expressly allowed Germack to continue to perform
17 emergent and urgent dental procedures on his patients to relieve pain or manage infections. As
18 with the motel in *Keetch*, Germack's premises remained fully intact and able to accommodate
19 clients. No direct physical loss or damage prevented Germack from doing anything with regard
20 to his business.

21 Germack was only restricted in his ability to perform procedures for patients based on the
22 severity and/or urgency of the patient's dental condition. Given his focus on performing root
23 canals, which often arise on an emergency basis, it would be highly disingenuous for Germack to
24 argue that Governor Inslee's orders preventing him from continuing to treat patients. Germack

1 was not forced to suspend business operations as required by the TDIC Policy and Washington
2 law. Again, if Germack chose to suspend all operations, despite the ability to continue
3 performing emergent and urgent procedures, his resulting loss of income would not be caused by
4 direct physical loss or damage. *See N. River Ins. Co. v. Clark*, 80 F.2d 202, 203 (9th Cir. 1935).
5 For these reasons, Germack is not entitled to the coverage he seeks in this case and summary
6 judgment in favor of TDIC should be granted.

7 **2. Germack Did Not Incur Any Extra Expenses to Avoid or Minimize**
8 **Suspension of Operations**

9 The TDIC Policy defines Extra Expense as expenses incurred to avoid or minimize the
10 suspension of business and to continue operations. **Exhibit B** at Form NDBPCF (01/2019), p. 9.
11 For the reasons established above, Germack was never faced with a suspension of his business or
12 operations under Washington law. Therefore, he could not have incurred expenses to avoid or
13 minimize the suspension of business operations and he is not entitled to Extra Expense coverage.

14 Courts across the country have rejected claims similar to those asserted by Germack. In
15 *GBP v. Md. Cas. Co.*, 505 Fed. Appx. 389 (5th Cir. 2013), GBP owned and rented a shopping
16 center space near Galveston, Texas. *GBP* at 390. GBP had no employees and contracted with a
17 3rd party to manage the property. In September 2008, Hurricane Ike made landfall near
18 Galveston, devastating the Texas coastline and becoming the costliest hurricane in Texas history.
19 *Id.* The hurricane damaged the shopping center owned by GBP. Specifically, the Hurricane
20 damaged the building's roof and electricity. As a result, the mall physically closed for 2 weeks,
21 but some tenants continued to pay rent. *GBP* at 391. Shortly after the hurricane, GBP entered a
22 new management agreement with its property manager. *GBP* at 394. The new agreement raised
23 the management company's compensation for work on insurance claims. *GBP* at 394.

24 GBP made a claim for its new management fees. Maryland Casualty denied, reasoning

1 that the fees were not an “extra expense” because there was no suspension of operations. *Id.*
2 Specifically, Maryland Casualty argued that the new agreement was not necessary to obtain the
3 repairs or negotiate insurance matters. *GBP* at 394. The *GBP* court held that the management
4 fees were not covered extra expenses:

5 First, the Policy only covers “[c]ontinuing normal operating
6 expenses incurred,” if there is a suspension of operations. Because
7 no suspension of operations occurred, the recurring management
8 fees cannot be fully recoverable.

9 Second, *GBP* offered no evidence explaining what portion of the
10 fees directly related to making emergency repairs and securing
11 recovery from insurance claims...*GBP* can recover as extra expense
12 *only* costs necessary to avoid a suspension of operations.

13 *GBP* at 394 (emphasis original) (internal citation omitted).

14 The decision in *GBP* is on point. Here, there is no evidence of any expenses directly
15 related to making emergency repairs or incurring costs to avoid a suspension of operations. This
16 is because there was no direct physical loss or damage to property or suspension of business
17 operations. There was nothing for Germack to fix and his business was not suspended by any
18 order or other event. As a result, there is no coverage available to Germack under the Extra
19 Expense coverage contained in the TDIC Policy.

20 **F. The Civil Authority Did Not Prohibit “Access” to any Property**

21 Civil Authority coverage provides coverage for business income and extra expenses
22 caused by an action of a Civil Authority that prohibits access to the insured premises “because of
23 direct physical loss of or damage to property” other than the insured premises.

24 The purpose of the civil authority policy provision is to provide coverage to insureds who
suffer losses caused by government action prohibiting access to the insured’s property because of
direct physical losses or damage to nearby property other than the insured property. *See Dickie
Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683 (2011); *see also United Air Lines v. Ins. Co.*

1 *of the State of Pa., infra*, 439 F.3d 128. Here, there is no evidence or allegation that Germack's
2 business was forced to cease operations because of direct physical loss of or damage to property
3 of another. There is no evidence of physical loss or damage to any property causing any loss to
4 Germack. Further, there is no evidence that Governor Inslee issued his order because of direct
5 physical loss or damage to any property. Rather, the orders were plainly designed to curb the
6 potential spread of COVID-19 and reduce potential impact on hospitals. *See* Exs. 1 and 2.

7 The Civil Authority coverage has not been addressed by Washington Courts. However,
8 similar policy language has been upheld in other jurisdictions. In *United Air Lines v. Ins. Co. of*
9 *the State of Pa.*, 439 F.3d 128 (2nd Cir. 2006), Ronald Reagan Washington National Airport (the
10 "Airport") was temporarily shut down by government order following the September 11, 2001
11 terrorist attacks on the Pentagon. *Id.* at 129. United's facilities at the Airport were not physically
12 damaged by terrorist attacks. *Id.* United sought coverage under its civil authority provisions for
13 its loss of gross earnings resulting from the government suspension of flights in and out of the
14 Airport. *Id.* at 130.

15 The court found that United Air Lines was not entitled to coverage because the Airport
16 was not shut down "as a direct result of damage" to the Pentagon. Instead, the shutdown "was
17 based on **fears** of future attacks" and "had nothing to do with repairing, mitigating, or responding
18 to the damage caused by the attack on the Pentagon." *Id.* at 134-135 (emphasis added).

19 The reasoning and holding in *United Air Lines* have been adopted in several other
20 jurisdictions. Specifically, in an unpublished decision out of the Southern District of Texas, *S.*
21 *Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, H-06-4041, 2008 U.S. Dist. LEXIS 11460 (S.D. Tex.
22 Feb. 15, 2018), the Court explained:

23 In United Air Lines, **the court determined that if a civil**
24 **authority order is "caused by fears of future attacks," not by**
the need to "repair, mitigate, or respond" to physical damage

1 **inflicted on property other than the insured's, there is no**
2 **coverage. There is no causal relationship between the physical**
3 **damage to other property and the civil authority order.** Although the civil authority coverage provision in United Air
4 Lines required the civil authority order to be the "direct result" of
5 damage to other property, and the policy at issue here requires the
6 civil authority order to be "due to" the damage to other property,
7 that distinction does not make United Air Lines inapplicable. The
8 court's causation analysis in United Air Lines cannot be explained
9 solely by the difference between "due to" or "direct result of."
10 **Rather, the court in United Air Lines held that when the civil**
11 **authority order is caused by the fear of future harm to the area**
12 **where the insured property is located, not by the actual**
13 **physical damage inflicted on other property, there is no causal**
14 **relationship between the civil authority order and the damage**
15 **to other property, as required for coverage.**

16 2008 U.S. Dist. LEXIS 11460 at *27-29 (emphasis added). The Southern District of Texas then
17 held that civil authority coverage did not apply where a government shut-down was based on fear
18 of hurricane damage as opposed to actual physical loss or damage that had occurred. *Id.* at *34.

19 These holdings are clear. The purpose of Civil Authority coverage is to allow insureds to
20 recover lost business income resulting from a government ordered business shutdown due to
21 direct physical loss or damage to other property. For example, when firefighting efforts at one
22 building precludes access to neighboring properties. Civil Authority coverage does not apply
23 when business is shut down for reasons unrelated to actual physical loss or damage.

24 *United Air Lines* and *South Texas* are directly applicable. In both cases, there was no
actual physical loss of or damage to property. Rather, the business shutdown was caused by the
fear of future attacks or hurricanes. Likewise, Governor Inslee's order shutting down nonessential
business operations was not the result of physical loss or damage to any property. Rather, these
orders were caused by the **fear** of COVID-19 impacts on public health. These orders were
expressly issued to prevent the spread of the COVID-19 virus to the citizens of the State of
Washington and protect them from illness and possible death.

1 Again, the threat of a microscopic virus spreading to and infecting people and resulting
2 orders limiting business activities to prevent the spread of such virus do not constitute physical
3 loss of or damage to property. **There can be no reasonable debate on this point.** As a result,
4 there is no coverage available to Germack under the Civil Authority coverage provisions, or any
5 of the other coverage grants contained in the TDIC policy.

6 **IV. CONCLUSION**

7 There is no coverage for the insurance claims asserted by Germack because (1) the
8 alleged losses were not caused by direct physical loss of or damage to any property, (2)
9 Germack's operations were never suspended by the COVID-19 virus or resulting government
10 orders and (3) Germack's claims are excluded by the Virus or Bacteria Exclusion. TDIC
11 respectfully requests that the Court grant this Motion for Summary Judgment and enter a ruling
12 stating it does not owe Germack any Business Interruption coverage under the TDIC Policy.

13 DATED this 18th day of September, 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing on the parties mentioned below as indicated:

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Dated this 18th day of September, 2020 at Seattle, Washington.

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