UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

CHRISTIE JO BERKSETH-ROJAS DDS, individually and on behalf of all others similarly situated, Plaintiff, v. ASPEN AMERICAN INSURANCE COMPANY, Defendant.	Civil Action No. 3:20-cv-00948-D Hon. Senior District Judge Sidney A. Fitzwater

PLAINTIFF'S RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT ASPEN AMERICAN INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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I. INTRODUCTION

AAIC's Motion turns on six plain and ordinary words: "direct physical loss of or damage." Although the words are ordinary, the impact of any decision by this Court will be extraordinary. Already, thousands of cases have been filed by small businesses and larger ones seeking recovery of losses in the hundreds of billions of dollars for business interruption and property damage losses resulting from SARS-CoV-2 and the disease that it causes, COVID-19.[1]

The physical loss and damage suffered by Plaintiff since the outbreak of COVID-19, in many ways, differs little from the physical loss and damage experienced by innumerable businesses and public entities, including courts throughout the country. Before March 2020, hearings in a case such as this case could have been held at a courthouse with multiple lawyers present, a handful of journalists and concerned business owners, a court reporter, a deputy sheriff or marshal, and perhaps a law clerk. Similarly, a jury could have been selected and seated for trial at a courthouse. Papers could have been filed in person at the clerk's office. For many months, however, courthouses around the country have not been deemed safe enough for normal operations. *See, e.g.*, Court Operations Under Exigent Circumstances Created by the Covid-19 Pandemic, U.S. District Court for the Northern District of Texas, Special Order No. 13-5 (Mar. 13, 2020) (initial COVID-19 related restrictions).[2] Civil and criminal trials have been postponed, grand jury proceedings have been limited or postponed, and in-person hearings have become telephonic or video hearings. Because of the outbreak of COVID-19, the Courthouse lost functionality. The loss was direct, and it was physical. The Courthouse could no longer serve the administration of justice as it had before.

[1] "Defendant" is Aspen America Insurance Company ("AAIC"). "Plaintiff" is Christie Jo Berkseth-Rojas DDS.

[2] Available at http://www.txnd.uscourts.gov/sites/default/files/documents/COVID19.pdf.

So, too, with Plaintiff and her facility. Plaintiff has pled "direct physical loss of or damage" to property, (Dkt. 16, ¶¶ 9-14, 52-55, 77, 85) (Plaintiff has suffered "direct physical loss of or damage" to her property), which alone should suffice, particularly given the dozen judicially-noticeable legislative and administrative factual determinations that COVID-19 causes physical injury to property. *Id.*, ¶¶ 34 (determinations that COVID-19 causes property damage), ¶¶ 36-51 (Closure Orders).[3] Plaintiff has also pled the details of her direct physical loss or damage. *See* Dkt. 16, ¶¶ 9-14 (the presence of COVID-19 caused denial of use and reduced use of the property, and necessitated the suspension of operations), ¶¶ 52-55 (COVID-19 presented a dangerous physical condition on property and prohibited access to Plaintiff's property).

The upshot of AAIC's argument is that "direct physical loss of or damage" to property requires structural alteration in the covered property. *E.g.*, Brief at 12-17. That, of course, is not what the words say, but as importantly, AAIC and other insurers have known since at least the early 1960s that many courts do not agree that the term requires structural alteration. *E.g.*, *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Cal. App. 1962) (rejecting argument that structural alteration was a *sine qua non* to physical damage under property insurance policy). It is common knowledge that insurers avidly follow court decisions and change their policy language to avoid outcomes that insurers want to avoid. *E.g.*, *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 827 P.2d 1024, 1036 (Wash. Ct. App. 1992) (citing 7A J. Appleman, Insurance Law and Practice § 4491 (1979)) ("New policy language has been introduced in an attempt to clarify troublesome areas for the underwriters, or where court decisions were counter to insurer intentions."), *aff'd* 882 P.2d 703 (1994). Here, however, the insurance industry has left this

[3] *See, e.g.,* N.Y.C. Emergency Exec. Order No. 100, at 2 (Mar. 16, 2020), https://tinyurl.com/y34t78to (emphasizing the virulence of COVID-19 and that it "physically is causing property loss and damage").

language substantively unchanged for decades, even though insurers, including Defendant, easily could have changed the term "direct physical loss of or damage" to "structural alteration." To address that concern, AAIC could easily have changed "direct physical loss of or damage" to "physical alteration" or "structural alteration," but it did not.

Even if "direct physical loss or damage" requires structural alteration, Plaintiff has pled it in this case. Insurers have known for almost two decades that viruses and diseases, including coronaviruses, infest property and stick to its surfaces, alter the structure of those surfaces and the air within the property, and lead to claims of business interruption losses. *See* "Hotel Chain To Get Payout for SARS-Related Losses," *Business Insurance* (Nov. 2, 2003) ("Mandarin Oriental International Ltd. will receive $16 million from its insurers to pay for business interruption losses suffered by the group's hotels in Asia as a result of the severe acute respiratory syndrome outbreak.").[4] Through their drafting arm, the Insurance Services Office ("ISO"), insurers communicated that concern to regulators when preparing a so-called "virus" exclusion to be placed in some policies, but not others:

> Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case.

Dkt. 16, ¶ 27. To address that concern, AAIC could easily could have added an exclusion for property damages and business interruption losses caused by disease or virus, but it did not.

[4] Available at https://tinyurl.com/y43cc2u9.

AAIC makes much of the fact that some courts have already dismissed COVID-19 business interruption insurance claims by policyholders, but there also have been numerous decisions denying those motions to dismiss. According to the University of Pennsylvania Law School's COVID Coverage Litigation Tracker, as of the date of filing of this brief over 1,200 cases have been filed and there have been 24 motions to dismiss granted with prejudice, 13 motions to dismiss granted without prejudice (permitting leave to amend), and 17 motions to dismiss denied. https://cclt.law.upenn.edu/judicial-rulings Notably, for policies like AAIC's that do not contain a virus exclusion, as of October 29, 2020, more motions to dismiss had been denied than granted. https://cclt.law.upenn.edu/2020/10/29/motion-to-dismiss-box-score-update

AAIC's Motion lacks merit and should be denied.

II. FACTUAL BACKGROUND

Plaintiff has alleged basic facts concerning her business, the impact of COVID-19 on her business (including as detailed above), the physical loss or damage that her business has suffered, and AAIC's response. In short, Plaintiff delivers dental care to patients at Rojas Family Dental in Minneapolis, Minnesota. Dkt. 16, ¶ 1. To protect her business in the event that she suddenly had to suspend operations outside of her control, and in order to prevent further property damage, Plaintiff purchased "all risk" property insurance from AAIC, including Practice Income, Civil Authority, Extra Expense, and Sue and Labor coverage. *Id.*, ¶¶ 2-6, 22.

Plaintiff was forced to suspend or reduce business at her location due to COVID-19 and the resultant Closure Orders issued by authorities in Minnesota, as well as in order to take necessary steps to prevent further damage and minimize the suspension of business and continue operations. Dkt. 16, ¶¶ 9-14, 36-55. Specifically, Plaintiff alleges that (1) COVID-19 presented a dangerous physical condition on the property, (Dkt. 16, ¶¶ 27-28, 55, 85), (2) the presence of COVID-19 renders property impure, (*id.* ¶¶ 27-28), (3) the presence changes the property's

substance and contaminates interior building surfaces, (*id.* ¶¶ 8-13, 27-28), and (4) the presence and threat of COVID-19 forced Plaintiff to reduce business on her property to avoid further harm, (*id.* ¶¶ 8, 52, 54).

AAIC has, on a widescale and uniform basis, refused to pay its insureds, including Plaintiff, under their property insurance policies for losses suffered due to COVID-19, Closure Orders that have required the necessary suspension of business, and efforts to prevent further property damage or to minimize the suspension of business and continue operations. *Id.*, ¶¶ 15, 58-59, 70, 108, 115.

III. ARGUMENT AND AUTHORITIES

AAIC's Motion fails on the merits, as detailed below. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Highland Capital Mgmt., L.P. v. Bank of Am., Nat. Ass'n*, 698 F.3d 202, 205 (5th Cir. 2012) (internal quotes omitted). To state a cognizable claim under federal notice pleading, the plaintiff is required to provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In considering a Rule 12(b)(6) motion, the Court is required to accept well-pleaded facts as true and view those facts in the light most favorable to the plaintiff. *Highland Capital Mgmt.*, 698 F.3d at 205.

A. Minnesota Rules of Insurance Policy Interpretation

"The extent of an insurer's liability is governed by the language of the insurance policy." *Eng'g & Const. Innovations, Inc. v. L.H. Bolduc Co., Inc.,* 825 N.W.2d 695, 704 (Minn. 2013). When interpreting an insurance contract, the court is to "ascertain and give effect to the intentions of the parties as reflected in the terms of the insuring contract." *Id.* (internal quotes omitted). "Unambiguous words will be given their 'plain, ordinary, and popular meaning.'" *Gen.*

Cas. Co. of Wisconsin v. Wozniak Travel, Inc., 762 N.W.2d 572, 575 (Minn. 2009); *Eng'g Const.*, 825 N.W.2d at 704-05. "Ambiguous words, however, will be construed against the insurer according to the 'reasonable expectations' of the insured." *Wozniak Travel,* 762 N.W.2d at 575; *Eng'g Const.*, 825 N.W.2d at 704-05. "If undefined terms are reasonably susceptible to more than one interpretation, the terms must be interpreted liberally in favor of finding coverage." *Wozniak Travel,* 762 N.W.2d at 575.

"'[R]ecovery under an 'all-risk' policy will, as a rule, be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage.'" *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 299 (Minn. Ct. App. 1997) (quoting 13A George E. Couch, *Couch on Insurance 2d* §48:141 (rev. ed. 1982)). "An occurrence is fortuitous if the outcome of the event is not known in advance by the insured." *Id.* (internal quotes and brackets omitted).

"Because most insurance policies are preprinted forms drafted solely by insurance companies—basically contracts of adhesion—policy words of inclusion will be broadly construed, and words of exclusion are narrowly considered." *Id.* "[T]he Minnesota rules of insurance policy interpretation require policies to be read in favor of finding coverage, and require courts to look past the legal nomenclature to the underlying allegations." *Id.*

B. Plaintiff has Adequately Alleged a Covered Loss within the Scope of the Policy

AAIC moves for dismissal of Plaintiff's claims, contending she has failed to allege "direct physical damage," as required by all four provisions of the policy under which she seeks coverage: the Practice Income, Civil Authority, Extra Expense, and Sue and Labor provisions. (Brief at 9-22). However, "direct physical loss of or damage" is not limited to structural alteration. And even if it were, Plaintiff has adequately pled structural alteration.

1. "Direct Physical Loss of or Damage" Is Not Limited to Structural Alteration

The basic rules of insurance policy interpretation alone defeat AAIC's position in this case. There is nothing about the plain and ordinary meaning of the words "direct physical loss of or damage" that requires structural alteration. Far from it.

"Direct," as an adjective, is often defined as something "characterized by close logical, causal or consequential relationship" or something "marked by absence of an intervening agency, instrumentality, or influence" or something "proceeding from one point to another in time or space without deviation or interruption." *Direct*, Merriam-Webster.com.[5]

Not surprisingly, courts have held that "common sense suggests that [direct] is meant to exclude situations in which an intervening force plays some role in the damage." *Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F.3d 743, 746 (7th Cir. 2015). *See also Ashland Hosp. Corp. v. Affiliated FM Ins. Co.*, 2013 WL 4400516, at *5 (E.D. Ky. Aug. 14, 2013) (holding that the damage to plaintiff's data network caused by overheating is "direct" because "the harm flows immediately or proximately from the heat exposure"); *Prudential Property & Cas. Ins. Co. v. Lillard-Roberts,* 2002 WL 31495830, at *8 (D. Or. June 18, 2002); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, 1999 WL 619100 (D. Or. Aug. 4, 1999). Simply absent from any meaning of the term "direct" is the notion that direct loss or damage requires *structural alteration* of covered property. *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997) ("Direct physical loss also may exist in the absence of structural damage to the insured property.").

"Physical," too, does not suggest any requirement for structural alteration. Pertinent definitions of "physical" make clear that the term describes something "having material existence" or something "perceptible especially through the senses." *Physical*, Merriam-

[5] All online dictionary and thesaurus cites herein are as of November 6, 2020.

Webster.com. AAIC also quotes Merriam-Webster.com for "defining 'physical' as 'of or related to material things'" (Brief at 9), but AAIC does not acknowledge that many "physical" losses do not require structural change. An event or condition that prevents persons from inhabiting or operating a room in their home or business is no less "physical" of a loss under these definitions than an event that destroys that room. AAIC purports to adhere to plain meaning, but confuses the term "physical" with "structural." However, those terms are not synonyms. *See Physical*, Thesaurus.com. "Physical" is a word of much greater breadth and denotes a much broader sphere than "structural."

Physical loss may take place even if the structure of covered property remains unchanged. "Where a general all-risk commercial or homeowner's policy insures against both 'loss' or 'damage' to an existing structure, 'physical' damage may take the form of loss of use of otherwise undamaged property, which in turn suffices as a covered loss." *One Place Condo., LLC v. Travelers Prop. Cas. Co. of Am.*, 2015 WL 2226202, at *9 (N.D. Ill. Apr. 22, 2015). The word "physical" limits coverage only in the sense that it "'negates any possibility that the policy was intended to include 'consequential or intangible injury,' such as depreciation in value, within the term 'property damage.'"' *Lillard-Roberts,* 2002 WL 31495830, at *7, quoting *Wyoming Sawmills, Inc. v. Transp. Ins. Co.,* 578 P.2d 1253, 1256 (Or. 1978).

The Minnesota Court of appeals has repeatedly held "that direct physical loss can exist without actual destruction of property or structural damage to property," reasoning that "it is sufficient to show that insured property is injured in some way." *Gen. Mills, Inc. v. Gold Medal Ins. Co.,* 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (contamination of raw oats by application of an unauthorized pesticide, although not hazardous for human consumption, rendered oats unusable in General Mill's oat products such that General Mills was entitled to coverage for

"direct physical loss or damage to property"); *Sentinel Mgmt.*, 563 N.W.2d at 300 (asbestos contamination, even absent structural damage, is a direct, physical loss to property).

The word "physical" limits coverage only in the sense that it "'negates any possibility that the policy was intended to include 'consequential or intangible injury,' such as depreciation in value, within the term 'property damage.'" *Lillard-Roberts,* 2002 WL 31495830, at *7, quoting *Wyoming Sawmills, Inc. v. Transp. Ins. Co.,* 578 P.2d 1253, 1256 (Or. 1978). *See Sentinel Mgmt.*, 563 N.W.2d at 300 ("Although asbestos contamination does not result in tangible injury to the physical structure of a building, a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants.").

"Loss" also carries no requirement of physical or structural alteration. Definitions of "loss" include not only "destruction" and "ruin," but also "deprivation." *Loss*, Merriam-Webster.com. Synonyms for "loss" include "deprivation," "dispossession," and "impairment." *Loss*, Thesaurus.com. Indeed, physical loss without physical damage is sufficient to trigger business interruption coverage where the insured was forced to evacuate insured premises for safety reasons, although the insured premises were not structurally altered. *See Manpower Inc. v. Ins. Co. of the State of Pennsylvania*, 2009 WL 3738099, at *5 (E.D. Wis. Nov. 3, 2009).

Even the term "damage" does not require a structural alteration. Damage is often defined simply as "loss or harm resulting from injury," but it is also defined as expense and cost. *Damage*, Merriam-Webster.com. Synonyms for "damage" include "contamination," "impairment," "deprivation," and "detriment"—all terms with a physical aspect, but not necessarily a structural aspect. *Damage*, Thesaurus.com. "Clearly, without qualification, the term "damage" encompasses more than physical or tangible damage." *Dundee Mut. Ins. Co. v.*

Marifjeren, 587 N.W. 2d 191, 194 (N.D. 1998), quoting *Black's Law Dictionary* 389 (6th ed.1990).

But even if the term "damage" did suggest a requirement of structural alteration, that would only drive home the lack of such a requirement in the term "direct physical loss of or damage" as a whole. Otherwise, why would insurers, including AAIC, use *both* "loss of **or** damage." If "damage" were given a structure-altering meaning, "loss" would have to be given a meaning not carrying that requirement. Otherwise, loss would be rendered redundant and thus violate a cardinal rule of insurance policy interpretation. *E.g., Eng'g & Const.,* 825 N.W.2d at 705 (Courts "read the terms of an insurance contract in the context of the entire contract and do not construe terms so strictly as to lead to a harsh and absurd result. [They] will not adopt construction of an insurance policy which entirely neutralizes one provision if the contract is susceptible of another construction which gives effect to all its provisions and is consistent with the general intent." (internal quotes and ellipses omitted)); *Washington Nat. Ins. Corp. v. Ruderman*, 117 So. 3d 943, 948 (Fla. 2013) ("In construing insurance contracts, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect.") (internal quotation omitted)*; Veto v. Am. Family Mut. Ins. Co.*, 815 N.W.2d 713, 718 (Wisc. Ct. App. 2012) ("[W]e construe insurance contracts so that 'none of the language [is] discarded as superfluous or meaningless.'") (internal citations omitted); *see also Nautilus Grp., Inc. v. Allianz Global Risks US*, 2012 WL 760940, at *7 (W.D. Wash. Mar. 8, 2012) ("If 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous."); *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767, at *3 (C.D. Cal. July 11, 2018) ("[T]o interpret 'physical loss of' as requiring 'damage to' would render

meaningless the 'or damage to' portion of the same clause, thereby violating a black-letter canon of contract interpretation—that every word be given a meaning.").

2. Even if Structural Alteration were Required, Plaintiff has Pled It

Even if structural alteration were required for coverage, Plaintiff has adequately alleged infestation by a harmful agent, and diminishment of functional space and loss of functionality of covered property. *E.g.*, Dkt. 16, ¶¶ 8-13, 27-33, 53-54.

a. Infestation by Harmful Agents Constitutes Structural Alteration

The presence (and even the threat) of COVID-19 constitutes direct physical loss or damage to property, even if that term requires a structural alteration. COVID-19 particles, though unseen, physically alter their environment in a manner that causes loss and damage by rendering a premises dangerous to human health. Accordingly, on multiple occasions, courts have held that infestation of property by microscopic entities that are harmful to human health constitutes "direct physical loss or damage."

For example, in *General Mills, supra,* the Minnesota Court of Appeals rejected the same type of argument that AAIC advances here. In that case, the insured's property, cereal oats, was infested by an unapproved pesticide, rendering the insured unable to lawfully distribute its products. 622 N.W.2d at 152. The Minnesota Court of Appeals held that a direct physical loss had occurred because the oats' "function [was] seriously impaired." *Id.* The court relied on a consistent line of Minnesota cases holding that losses resulting from the infestation of property by harmful, unseen agents constitutes a direct physical loss.

Similarly, the Eighth Circuit held in *Netherlands Ins. Co. v. Main St. Ingredients, LLC*, that oatmeal recalled due to potential salmonella infestation sustained property damage under a general liability policy, even though it was not certain that the products actually contained

salmonella. 745 F.3d 909, 916–17 (8th Cir. 2014). There, the parties agreed that there was no factual finding that either the dried milk or instant oatmeal actually contained salmonella. *Id*. at 916. Nonetheless, the appellate court upheld the district court's finding that "property damage is present" because the oatmeal was "physically affected, as it includes instant milk that was manufactured in unsanitary conditions." *Id*. *Netherlands* thus supports the proposition that property damage exists when the credible threat that property is infested with harmful agents—even with no factual finding that it actually *was* so infested—leads it to become legally unusable for its intended purpose.

In *Sentinel Mgmt., supra*, the insured brought suit under an all-risk policy seeking coverage for release of asbestos fibers and resultant contamination of its apartment buildings. 563 N.W.2d at 298. The Minnesota Court of Appeals affirmed the district court's denial of the insurer's motion for summary judgment. The court reasoned, "[a]lthough asbestos contamination does not result in tangible injury to the physical structure of a building, a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants." *Id*. at 300. It concluded that asbestos contamination, even absent structural damage, constitutes a direct, physical loss to property. *Id*. at 301. The court noted that "[the insurer's] characterization of [the insured's] loss as the cost of abating the contamination rather than the contamination itself does not transform the loss from physical to economic." *Id*.

Likewise, in *U.S. Fidelity & Guaranty. Co. v. Wilkin Insulation Co*., 578 N.E.2d 926, 931 (Ill. 1991), the insurers contended that the presence of asbestos did not amount to physical injury to tangible property, but instead constituted only "intangible economic loss." *Id*. at 931. The court, however, disagreed, explaining that "asbestos fiber contamination constitutes physical injury to tangible property, *i.e*., the buildings and their contents … [i]t would be incongruous to

argue there is no damage to other property when a harmful element exists throughout a building or an area of a building which by law must be corrected." *Id.* (internal citations omitted).

Further supporting Plaintiff's position, in *Stack Metallurgical Services, Inc. v. Travelers Indem. Co. of Connecticut*, the court held that contamination of a furnace by lead particles constituted direct physical loss or damage. 2007 WL 464715, *6–9 (D. Or. Feb. 7, 2007). In *Stack*, a hammer disintegrated inside a furnace, causing the furnace to become contaminated with lead particles. *Id.* at *1. As a result, the insured could not utilize the furnace for any commercial purpose for more than a year. *Id.* The insurer argued that the only "direct physical damage" was the loss of the hammer itself. *Id.* at *8. The court disagreed, holding that the presence of lead particles and their obvious health effects that "prevented the furnace from being used for its ordinary expected purpose" was "fairly characterized as a 'direct physical loss of or damage to' the furnace." *Id.* Like the lead particles in *Stack*, the presence of COVID-19 prevents Plaintiff from using her premises for their ordinary expected purposes because of grave public health dangers.

Also, in *Lillard-Roberts*, *supra,* the court rejected the necessity of structural alteration, and held that the presence of mold in covered property and the risk of systemic fungal disease constituted "direct physical loss to property." 2002 WL 31495830, at *7–10. Property damage can occur even when unobserved by the naked eye. *See Columbiaknit,* 1999 WL 619100, at *6 ("physical damage can occur at the molecular level and can be undetectable in a cursory inspection" and holding that the presence of microbial mold and fungi constituted "direct physical loss."). Odors, vapors, or similar unseen agents can cause property damage and direct physical loss. In *Farmers Ins. Co. of Oregon v. Trutanich*, for example, the court held that a pervasive odor which "infiltrated" a home as a result of tenants' cooking of methamphetamine

physically damaged the house, causing "direct physical loss." 858 P.2d 1332, 1335-36 (Or. Ct. App. 1993); *see also Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. Ct. App. 1992) (holding that airborne vapors and particulates discharged during the cooking of methamphetamine damaged a rental house, resulting in direct physical loss).

Further, in *Oregon Shakespeare Festival Ass'n v. Great American Ins. Co.*, smoke infiltration of an outdoor theater that resulted in the cancellation of performances because the air contained an "unhealthy level of particulates" constituted "direct physical loss or damage." 2016 WL 3267247, at *9 (D. Or. June 7, 2016), *vacated by stipulation*, 2017 WL 1034203 (D. Or. Mar. 6, 2017). The court dismissed the contention that damage to air quality was not "physical," noting that "air is not mental or emotional, nor is it theoretical;" thus, the plain meaning of the term "direct physical loss or damage" favored coverage, because the air within the theater which was harmed was "physical." *Id*. at *5. The court found no evidence within the policy to support the insurer's argument that to be "physical" the loss or damage must be structural to the building itself. *Id*.

Additionally, in *Gregory Packaging, Inc. v. Travelers Property Cas. Co.*, the court held that the discharge of ammonia gas inflicted direct physical loss of or damage to an insured's facility because it "physically transformed" the facility's air, leaving it "unfit for normal human occupancy and continued use." 2014 WL 6675934, at *3, *6 (D.N.J. Nov. 25, 2014). In *Cooper v. Travelers Indem. Co.*, the court held that the presence of e-coli bacteria in a restaurant's well, which forced the restaurant's closure, was direct physical damage to the property. 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002). The Colorado Supreme Court has also held that a church building sustained physical loss when it was rendered uninhabitable and dangerous

because of the accumulation of gasoline under and around the church. *W. Fire Ins. Co. v. First Presbyterian Church,* 437 P.2d 52, 55 (Colo. 1968).

b. Plaintiff has Pled Structural Alteration through Diminishment and Loss of Functionality

AAIC contends that Plaintiff does not allege "any tangible, discernible alteration" to property (Brief at 12), but that is inaccurate. Among other allegations, Plaintiff alleges that "COVID-19 impaired her family dental office and made the property *unusable in the way it had been used before*" (Dkt. 16, ¶ 9); she "is unable to use her interior space *in the way she had previously used that space*" because "[t]he *probability of illness* prevents the use of [the] property" (*Id.* ¶ 12); she "was required to drastically reduce operations at her office, and even to close entirely" because "[t]o do anything else would lead to the *emergence or reemergence of COVID-19 at the property*" (*Id.* ¶ 10); "[b]ecause of the spread of COVID-19, the air in *Plaintiff's property has become unsafe*, necessitating repairs" (*Id.* ¶ 53); "the functional space in the building has been diminished by the spread or presence of COVID-19 (*Id.* ¶ 54).

AAIC contends that these allegations "relate to purely economic losses that are not the result of a direct physical loss of or damage to the insured property." Brief at 6. AAIC's argument, of course, is circular because a policyholder would experience an "economic loss" (according to AAIC) whenever they suffered "direct physical loss of or damage to" their property—but that is why the policyholder purchased business interruption insurance in the first place. If AAIC could exclude a business interruption loss caused by "direct physical loss of or damage" to covered property as what it deems a "mere economic loss," which is not a term from the Policy, the business interruption insurance would be illusory, which is impermissible. Under Minnesota's illusory-coverage doctrine, "insurance contracts should, if possible, be construed so as not to be a delusion to the insured." *Jostens, Inc. v. Northfield Ins. Co.*, 527 N.W.2d 116, 118

(Minn. Ct. App. 1995) (internal quotes omitted); *see also Crum & Forster Specialty Ins. Co. v. DVO, Inc.*, 939 F.3d 852, 858 (7th Cir. 2019) ("When a policy's purported coverage is illusory, the policy may be reformed to meet an insured's reasonable expectation of coverage."). In this case, Plaintiff is seeking to recover the loss of her business income as a result of impairment of her business property. Dkt. 16, ¶ 8-13.

Because Plaintiff alleges that (1) COVID-19 presented a dangerous physical condition on the property, (Dkt. 16, ¶¶ 27-28, 55, 85), (2) the presence of COVID-19 renders property impure, (*id*. ¶¶ 27-28), (3) the presence changes the property's substance and contaminates interior building surfaces, (*id*. ¶¶ 8-13, 27-28), and (4) the presence and threat of COVID-19 forced Plaintiff to reduce business on her property to avoid further harm, (*id*. ¶¶ 8, 52, 54), Plaintiff sufficiently alleges "direct physical loss of or damage" to property, even if that term requires structural alteration.

3. Impairment of Function Constitutes "Direct Physical Loss of or Damage"

Courts have routinely held that properties sustained "direct physical loss or damage" when they lose habitability or functionality, including commercial functionality. *See Gen. Mills,* 622 N.W.2d at 152 (direct physical loss occurred when cereal oats were infested by an unapproved pesticide because "function [was] seriously impaired"); *Stack Metallurgical Services*, 2007 WL 464715, at *8 (industrial furnace sustained "direct physical loss or damage" when contamination prevented it from being used for ordinary commercial purposes); *Gregory Packaging*, 2014 WL 6675934, at *6 (discharge of ammonia gas inflicted direct physical loss of or damage to an insured's facility because it "physically transformed" the facility's air, leaving it "unfit for normal human occupancy and continued use").

In *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998), the policyholder alleged "direct physical loss" when their home was rendered uninhabitable by the threat of falling rocks. The court rejected the argument that structural damage was required. "Direct physical loss also may exist in the absence of structural damage to the insured property." *Id.* at 17 (quoting *Sentinel Management*, 563 N.W.2d at 300). "Losses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property." *Id*.

Accordingly, events—like the presence or suspected presence of COVID-19—which make it too dangerous to use property as it was designed to be used, cause physical loss or damage to that property. *See also Motorists Mutual Ins. Co. v. Hardinger,* 131 F. App'x. 823, 825–27 (3d Cir. 2005) (a contaminated water supply rendered a home uninhabitable, causing a "direct physical loss"); *Essex v. BloomSouth Flooring Corp.,* 562 F.3d 399, 406 (1st Cir. 2009) (an unpleasant odor rendered property unusable, causing a physical injury to the property); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp. 2d 699, 709 (E.D. Va. 2010), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013) (toxic gases released by defective drywall rendered a home uninhabitable, causing a "direct physical loss"). Here, Plaintiff reduced operations and even closed entirely due to COVID-19 and the Closure Orders. Dkt. 16, ¶ 10. Plaintiff's facility could not remain open for business as usual because that "would lead to the emergence or reemergence of COVID-10 at the property." *Id*.

Though AAIC cites some COVID-19 insurance decisions that it contends support its position, (Brief at 14-17), these decisions involve different policies issued by different insurers, to different policyholders, primarily in different states. Notably, none of the cases cited by AAIC

were decided under Minnesota law. The decisions also prematurely resolve factual disputes on a motion to dismiss.

Moreover, AAIC includes no discussion of the COVID-19 insurance decisions that have *denied* insurers' motions to dismiss.[6] These decisions are instructive here.

For example, in *Studio 417*, the court held that the plaintiffs adequately alleged a claim under policies providing very similar business interruption coverages compared to those at issue in this matter. *Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385 at *4-8 (W.D. Mo. Aug. 12, 2020). Just as in this case, "physical loss" ***or*** "physical damage" was at issue as it related to COVID-19's impact on small business operations. *Id.* at *4-5. The court emphasized, relying on similar dictionary definitions as used by Plaintiff here, that the plaintiffs alleged a "direct physical loss." *Id.* at *4. Indeed, the *Studio 417* court cited case law in support of the very proposition AAIC would have this court discount: that "*even absent a physical alteration*, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose." *Id.* at *5 (emphasis added). The court denied the motion to dismiss. *Id.* at *8.

[6] *See Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020); *Blue Springs Dental Care, LLC, v. Owners Ins. Co.*, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020); *K.C. Hopps, Ltd. v. Cincinnati Ins. Co.*, No. 20-cv-00437-SRB (W.D. Mo. August 12, 2020) (Ex. 1); *Somco, LLC v. Lightning Rod Mut. Ins. Co.*, No. CV-20-931763 (Cuyahoga Cty. C.P. Aug. 12, 2020) (Ex. 2); *Optical Services USA JC1 v. Franklin Mut. Ins. Co.*, No. BER-L-3681-20 (Sup. Ct. N.J. Aug. 13, 2020) (oral decision) (Ex. 3); *Ridley Park Fitness, LLC v. Philadelphia Indem. Ins. Co.*, No. 01093 (Philadelphia Cty. C.P. Aug. 31, 2020) (Ex. 4); *SSF II, Inc. v. The Cincinnati Ins. Co.*, No. 20CV-04-2644 (Franklin Cty. C.P. Sept. 8, 2020) (Ex. 5); *Urogynecology Specialist of Florida LLC v. Sentinel Ins. Co.*, Ltd., 2020 WL 5939172 (M.D. Fla. Sept. 24, 2020); *Francois Inc. v. The Cincinnati Ins. Co.*, No. 20CV201416 (Lorain Cty. C.P. Sept. 29, 2020) (Ex. 6); *Best Rest Motel, Inc. v. Sequoia Ins. Co.*, No. 37-2020-00015679-CU-IC-CTL (San Diego Cty. Super. Ct. Sept. 30, 2020) (overruling demurrer) (Ex. 7); *North State Deli, LLC, et al. v. The Cincinnati Ins. Co., et. al.*, No. 20-CVS-02569) (Sup. Ct. N.C. Oct. 9. 2020) (granting policyholder motion for partial summary judgment) (Ex. 8); *Lombardi's Inc. v. Indem. Ins. Co. of North America*, No. DC-20-05751-A (Dallas Cty. Dist. Ct. Oct. 15, 2020) (Ex. 9); *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, No. 00375 (Pa. Dist. Ct. Oct. 26, 2020) (Ex. 10).

Similarly, after denying a motion to dismiss, the Superior Court in Durham County, North Carolina granted partial summary judgment for the policyholder, holding that property policies "provide coverage for Business Income and Extra Expense for Plaintiffs' loss of use and access to covered property mandated by the Government Orders as a matter of law." *North State Deli, LLC, et al. v. The Cincinnati Ins. Co., et. al.*, No. 20-CVS-02569 (Sup. Ct. N.C. Oct. 9. 2020) (Ex. 8, at 7).

Of particular importance is the decision in *Blue Springs Dental Care, LLC, v. Owners Ins.* Co., 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020). There, as in this case (Brief at 18-19), the insurer argued that because the plaintiffs did not allege that their properties must be repaired, rebuilt, or replaced, they had not alleged a "period of restoration." 2020 WL 5637963, at *6. As the court explained, however, the plaintiffs' allegations were more than sufficient:

> The Court finds Plaintiffs have met their burden at this stage of the proceeding. ***Plaintiffs plausibly allege their dental clinics ceased operations, entirely or in part, "on or about March 17, 2020, and have remained at that limited operational capacity through the date of this Complaint."*** (Doc. #1, ¶ 16.) Discovery will ultimately show whether Plaintiffs' alleged closure date was the actual date when the alleged physical loss occurred, the duration of that alleged physical loss, at what point in time the insured properties could or should have been repaired, rebuilt, or replaced, and whether Plaintiffs took those restoration measures. For now, Plaintiffs have done enough to survive dismissal on this point.

Id. Here, too, Plaintiff has alleged that she was required to drastically reduce operations or close entirely as a result of COVID-19 and the Closure Orders. Dkt. 16, ¶ 10. As in *Blue Springs Dental Care*, that defeats the present motion on this point. 2020 WL 5637963, at *6.

4. Government Orders Establish that COVID-19 Causes Property Damage.

Federal courts often recognize the superior fact-finding capabilities of legislative bodies and executive agencies compared to courts. *See e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Here, numerous legislative and executive bodies have issued fact-based

determinations that make clear that COVID-19 results in direct physical loss or damage. *See* Dkt. 16, ¶ 34 (citing twelve Closure Orders). For example, New York City issued an order based on "the physical damage to property caused by the virus," (*id.*), the City of Durham, North Carolina issued an order prohibiting entities that provide food services from allowing food to be eaten at the site where it is provided "due to the virus's propensity to physically impact surfaces and personal property," (*id.*), and the State of Colorado emphasized the danger of "property loss, contamination, and damage" due to COVID-19's "propensity to attach to surfaces for prolonged periods of time." *Id.* These legislative and executive findings confirm that Plaintiff suffered "direct physical loss of or damage" to property due to the presence of coronavirus and, as a result, that Plaintiff has adequately stated a claim for relief.

5. Plaintiff has Pled a Loss within the Extra Expense Provision

Referencing its previous arguments, AAIC contends that Plaintiff has not alleged a loss within the extra expense provision because she has alleged no direct physical damage and no property in need of restoration. (Brief at 19-20). But as demonstrated *supra*, Plaintiff has sufficiently alleged "direct physical loss of or damage" to the property (Dkt. 16, ¶¶ 8-13, 27-28, 52, 54, 55, 85), and she has alleged that she was required to drastically reduce operations or close entirely as a result of COVID-19 and the Closure Orders (Dkt. 16, ¶ 10).

6. Plaintiff has Pled a Loss within the Civil Authority Provision

a. COVID-19 Damaged Other Properties

Under the Policy, Civil Authority coverage applies when a covered cause of loss causes damage to property other than the insured's premises, and the action of a civil authority prohibits access to the insured's premises as a result. AAIC contends that Plaintiff does not allege direct physical damage to property other than the insured premises (Brief at 20-22), but that is not

correct. Plaintiff specifically alleged that "COVID-19 caused direct physical loss of or damage to property near the Covered Property in the same manner described above that it caused direct physical loss of or damage to the Covered Property." Dkt. 16, ¶ 85. Indeed, for the same reasons COVID-19 caused physical loss or damage to Plaintiff's premises, COVID-19 caused physical loss or damage to the premises of other businesses. That damage constitutes a covered cause of loss.

Moreover, non-structural damage is sufficient to trigger coverage based on actions of civil authorities. *See Sloan v. Phoenix of Hartford Ins. Co.*, 207 N.W.2d 434, 437 (Mich. 1973) ("Here one of the perils insured against was riot. A riot ensued, the governor imposed a curfew, and all places of amusement were closed, thus preventing access to plaintiffs' place of business…[P]hysical damage to the premises was not a prerequisite for the payment of benefits under the business-interruption policy."); *Allen Park Theatre Co. v. Michigan Millers Mut. Ins. Co.*, 210 N.W.2d 402, 403 (Mich. Ct. App. 1973) ("If the insurer wanted to be sure that the payment of business interruption benefits had to be accompanied by physical damage it was its burden to say so unequivocally."). In short, Plaintiff alleges she was subject to civil authority orders issued in response to dangerous physical conditions resulting from direct physical loss or damage to properties other than their own premises, and that the orders prohibited access to her premises. Dkt. 16, ¶¶ 52-56, 81-87.

b. A Complete Prohibition is Not Required by the Policy

AAIC contends that the civil authority restrictions are not sufficient to trigger coverage because Plaintiff was not *completely* barred from accessing her premises. Brief at 20-21. AAIC offers no Minnesota law to support its position. Despite this, AAIC argues that because the Closure Orders purportedly permitted Plaintiff to access her facility to provide permitted

emergency care, somehow no prohibition occurred. *Id*. That contention is inappropriate for consideration on a motion to dismiss.

Moreover, the plain language of the Policy makes clear that a complete prohibition of access to the insured's premises is not required in order to trigger coverage. Rather, the Policy merely requires access be "prohibit[ed]" by a civil authority. Though "prohibit" is sometimes defined to mean "forbid" it is also defined to mean "hinder." *Prohibit*, Dictionary.com. "Hinder," in turn, means "to cause delay, interruption, or difficulty in" and "to be an obstacle or impediment." *See Hinder*, Dictionary.com. The relevant civil authority orders, which required Plaintiff to close some or even all of her business operations, have caused "interruption," "difficulty," and presented an "obstacle" for Plaintiff. As the *Studio 417* court explained, "At the motion to dismiss stage, these allegations plausibly allege that access was prohibited to such a degree as to trigger the civil authority coverage…This is particularly true insofar as the Policies require that the "civil authority prohibits access," but does not specify "all access" or "any access" to the premises." *Studio 417,* 2020 WL 4692385, at *7. *See also Blue Springs* 2020 WL 5637963, at *8 (denying motion to dismiss civil authority coverage where dental clinics closed three locations but left a fourth open for emergency dental services, where "the insurance policy did not specify that 'all access' or 'any access' to the insured property had to be prohibited.").

Further, the pretextual "requirement" of *complete* prohibition—which is *not* in the Policy—is belied by the fact that the Policy specifically provides coverage for "suspension of [Plaintiff's] practice." Dkt. 16-1 at 51. And the Policy contains daily value limits depending on whether Plaintiff's "practice is totally suspended" or if Plaintiff's "practice is partially suspended." *Id*. at 65. *See also Blue Springs* 2020 WL 5637963, *6 ("[T]o only provide coverage

for a total cessation of operations would contradict other parts of the Policy or render them superfluous.").

7. The "Sue and Labor" Coverage is Applicable, and Plaintiff has Pled a Loss Under that Provision

Plaintiff has also stated a claim for Sue and Labor costs. AAIC argues that because Plaintiff has not alleged physical loss or damage, no amount can be recovered under this provision. Brief at 22. AAIC, however, has it backwards.

As explained above, Plaintiff has sufficiently alleged direct physical loss or damage. Moreover, Plaintiff has alleged that "[i]n complying with the Closure Orders and otherwise suspending or limiting operations, Plaintiff … *incurred expenses* in connection with reasonable steps to protect Covered Property." Dkt. 16, ¶ 101 (emphasis added). Consequently, Plaintiff has adequately stated a claim for Sue and Labor coverage.

C. AAIC Cannot Meet its Burden of Establishing the Applicability of Any Exclusion

In a last-ditch effort to avoid its coverage obligations, AAIC raises the "ordinance or law" and "loss of use" exclusions (Brief at 22-23), but those exclusions do not apply to this case. "[T]he insurer carries the burden of establishing the applicability of exclusions." *Grinnell Mut. Reinsurance Co. v. Villanueva*, 37 F. Supp. 3d 1043, 1046 (D. Minn. 2014), *aff'd*, 798 F.3d 1146 (8th Cir. 2015). "[E]xclusions are construed narrowly and strictly against the insurer...and, like coverage, in accordance with the expectations of the insured." *Id.*

AAIC's conclusory assertion that the Closure Orders "constitute such ordinances" is insufficient to warrant application of the "Ordinance or Law" exclusion. (Brief at 22). The Ordinance or Law exclusion applies to "[t]he enforcement of any ordinance or law: (a) regulating the construction use or repair of any property; or (b) requiring the tearing down of any

property[.]" (Brief at 6). AAIC's proposed use of the Ordinance and Law exclusion is plainly improper.

The Ordinance or Law exclusion is directed toward excluding coverage for extra costs of rebuilding or replacing property based on the enforcement of building and land use codes, and that is the sole context in which courts apply it to exclude coverage. *See, e.g., Sierra Pacific Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.,* 490 Fed. Appx. 871, 876-77 (9th Cir. 2012) (holding exclusion applied to the peril of building ordinances); *Corner v. Farmers Ins. Exchange,* 899 F.2d 1224 (9th Cir. 1990) (applying exclusion in light of a zoning ordinance that prevented the rebuilding of the policyholder's house); *SR Business Ins. Co., Ltd. v. World Trade Center Properties LLC*, No. 01 Civ. 9291(HB), 2006 WL 3073220, at *11 (S.D.N.Y. 2006) ("The only sensible interpretation of the 'ordinance or law' exclusion is that it serves to eliminate the primary ambiguity that courts have found in replacement costs policies-namely, whether a policyholder can be reimbursed for the costs required to bring the reconstructed property up to code."); *Ira Stier, DDS, P.C. v. Merchants Ins. Group,* 127 A.D.3d 922, 923 (N.Y. App. Div. 2015) (applying exclusion to bar coverage for losses resulting from enforcement of a building code); *Reichert v. State Farm Gen. Ins. Co.,* 152 Cal. Rptr. 3d 6, 10-11 (Cal. Ct. App. 2012) ("There is a small but consistent body of cases that have routinely applied the law or ordinance exclusion (or its predecessor, the civil authority exclusion) to losses caused by enforcement of a local building ordinance or law); *Bischel v. Fire Ins. Exchange,* 2 Cal. Rptr. 575 (Cal. Ct. App. 1991) (applying exclusion to losses relating to new municipal standards for dock construction); *Garnett v. Transamerica Ins. Serv.,* 800 P.2d 656, 666 (Idaho 1990) (holding "if some safety improvement of a building to which no other loss had occurred were required by ordinance or law, [the insurer] would not be liable").

Moreover, AAIC's interpretation would render the Civil Authority Coverage illusory. That coverage applies only in cases of "action" of "civil authority" that "prohibits access" to the premises. (Brief at 5). But if the Ordinance or Law exclusion eliminated coverage for any governmental action that merely affected "use" of premises, it would entirely eliminate this civil authority coverage.

The "loss of use" exclusion also does not apply in this case. Plaintiff's complaint makes clear that she "is not seeking recovery for her loss of use"; she "is seeking coverage for her loss of business income." Dkt. 16, at 3, n.1. As demonstrated above, Plaintiff has alleged that COVID-19 and the Closure Orders caused direct physical loss or damage to the property and Plaintiff suffered loss of business income.

Here's the difference between seeking recovery for "loss of use" and seeking recovery for the loss of business income resulting from direct physical loss of or damage to covered property: some businesses have lost the use of their physical space because of COVID-19, but nevertheless have seen an increase of their busines income. Those businesses do not have a claim for coverage for loss of business income (because they have not suffered such a loss) and their loss of use claims are not covered. Here, Plaintiff has suffered a loss of business income that is compensable under AAIC's policy.

Moreover, as one federal court has explained, the exclusion limits coverage to losses flowing from a covered cause of loss and not losses caused by other factors: "to the extent any loss claimed to be a loss of business income by [the insured] was not lost as a direct result of [the covered cause of loss] but rather as a consequence of any other reason, then such loss is excluded from coverage and there can be no recovery … for such loss." *Dictiomatic, Inc. v. U.S. Fid.& Guar. Co*., 958 F. Supp. 594, 604 (S.D. Fla. 1997). In other words, the loss of use exclusion does

not apply to business-interruption losses that are tied to a covered event. Here, Plaintiff's business-interruption losses are tied to a covered event—the direct physical loss or damage to Plaintiff's facilities caused by COVID-19.

Further, application of the exclusions as urged by AAIC contradicts Minnesota law requiring that exclusions be narrowly and strictly construed, it frustrates Plaintiff's expectations in securing the Policy, and it renders other Policy provisions meaningless. Plaintiff secured the subject Policy to protect her business in the event that she suddenly had to suspend operations outside of her control, and in order to prevent further property damage. Dkt. 16, ¶¶ 2-6, 22. That Policy specifically includes coverage for "loss of practice income…sustain[ed] by action of civil authority that prohibits access to the described premises." Dkt. 16-1, at 55. AAIC has not met its burden of establishing the applicability of any coverage exclusions.

IV. CONCLUSION

For the reasons stated above, AAIC's Motion should be denied.

Dated: November 6, 2020

Respectfully submitted,

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* Applications for admission *pro hac vice* to be filed

CERTIFICATE OF SERVICE

I certify that on November 6, 2020, I filed the foregoing document with the Clerk of Court via the CM/ECF system, causing it to be served electronically on the following counsel of record:

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