IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FOUNTAIN ENTERPRISES, LLC d/b/a ANYTIME FITNESS – WEST POINT, VITA GRATA LLC d/b/a ANYTIME FITNESS – SPOKANE VALLEY, KZONE SPORTS, FITNESS, AND WELLNESS LLC d/b/a ANYTIME FITNESS – SCHUYLKILL HAVEN, B FIT B YOU, LLC d/b/a ANYTIME FITNESS – DANVILLE, EWT ENTERPRISES INC. d/b/a ANYTIME FITNESS – IRWIN, GMT FITNESS ENTERPRISES LLC d/b/a ANYTIME FITNESS – GLENSHAW, and NORTHWEST WELLNESS & FITNESS LLC d/b/a ANYTIME FITNESS LLC d/b/a ANYTIME FITNESS REDMOND, Individually and behalf of all others similarly situated, Plaintiffs, v. **MARKEL INSURANCE COMPANY,** Defendant.	§ §	**CLASS ACTION** Case No. 2:21-cv-00027-AWA-LRL

PLAINTIFFS' OPPOSITION TO MARKEL'S MOTION TO DISMISS

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I. INTRODUCTION

When the COVID-19 pandemic hit the nation, local, state and federal government officials acted to preemptively control the spread of the novel coronavirus. In these states and across the country, Governors and local politicians issued executive orders requiring retailers to cease physical operations at their business locations. The initial orders required the complete shutdown of these businesses for upwards of six months in some regions, while subsequent orders permitting reopening imposed – and continue to impose – significant physical restrictions on the manner and degree to which these businesses can physically use their properties.

Plaintiffs and the other proposed Class members were required to abide by these orders and did so. In anticipation that one day such a closure might occur causing them to suffer business interruption losses, Plaintiffs and the proposed Class purchased "all risk" insurance policies ("the Policies") from Markel Insurance Company ("Markel" or "Defendant"). These businesses purchased this insurance coverage specifically to help them weather any closure or suspension of operations regardless of the cause, and they reasonably expected that Markel would honor its word to cover their losses unless their Policies expressly and clearly excluded a particular event.

Plaintiffs are just a few of the over 4,000 Anytime Fitness® franchises throughout the nation that trusted Markel to stand by them in times of financial need and hardship like the COVID-19 pandemic, only to find that Markel does not believe these crippling shutdowns constitute "direct physical loss of or damage to property." Indeed, despite accepting untold amounts of premiums from the proposed Class in exchange for this insurance coverage, Markel now contends that these businesses are owed nothing. To support this position, Markel relies almost exclusively on two provisions it drafted and chose to incorporate in the Polices – provisions that can, and have recently been, deemed ambiguous and interpreted as reasonably providing coverage for business losses as the result of these government shutdown orders.

Against this backdrop, Markel now moves for dismissal of Plaintiffs' claims. This request fails as a matter of law at the pleadings stage because of the uncertainty Markel itself created in the way it decided to bind and issue the Policies. For these reasons, and the reasons set forth more fully below, Plaintiffs, individually and on behalf of the proposed Class, respectfully submit that the Motion to Dismiss should be denied.

II. FACTUAL BACKGROUND

Plaintiffs and the other Class Members are all Anytime Fitness® franchises insured under commercial property insurance policies issued by Markel that are identical in all material respects. ECF No. 9 at ¶104. The Policies provide, in relevant part, coverage for business income loss and extra expense, including coverage for losses attributable to orders of state and local governments. *Id*. at ¶¶ 105-133. Coverage for business income losses is triggered when Plaintiffs' and the Class Members' operations are suspended due to "direct physical loss of or damage to property." *Id*. Extra expense coverage is triggered when Plaintiffs and the Class Members incur expenses "that [they] would not have incurred if there had been no direct physical loss of … property. ECF No 9-1 at 95. Markel raises an endorsement to the Policies entitled "Exclusion of Loss Due to Bacteria or Virus" (CP 01 40 07 06) – the so-called "Virus Exclusion" – which purports to exclude coverage "for loss or damage caused by or resulting from any virus." *Id*., ECF 9-1 at 253. Unlike other versions of the Virus Exclusion, the form used in the Policies does not contain any language regarding its application to multiple or concurrent causes of loss, nor does it extend to losses caused "indirectly" by events or actions that are "related to" a virus. *Id*.

III. LEGAL STANDARD

In considering a motion to dismiss, the court must accept all factual allegations in the complaint as true, construe the pleadings in the light most favorable to the nonmoving party, and draw all reasonable inferences in favor of the plaintiff. *Edwards v. City of Goldsboro*, 178 F.3d

231, 243 (4th Cir. 1999). A plaintiff succeeds in stating a claim for relief by pleading "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

IV. CHOICE OF LAW

It is well settled that federal courts in Virginia sitting in diversity must apply Virginia's choice of law rules to determine the substantive law applicable to the matter under consideration. *Bilancia v. General Motors Corp.*, 538 F.2d 621, 623 (4th Cir. 1976). Under the law of this state, interpretation of an insurance contract is governed by the law of the place where the contract was delivered. *Woodson v. Celina Mut. Ins. Co*., 177 S.E.2d 610, 613 (Va. 1970). "When an insurer mails a contract of insurance to its agent for unconditional delivery to the insured, delivery is effected when deposited in the mail" rendering the law of that state controlling of the controversy. *Rose v. Travelers Indem. Co*., 167 S.E.2d 339, 342 (Va. 1969) (*See also Essex Ins. Co. v. Y&J Constr., Inc.*, 2016 WL 8254921, at *6 (E.D. Va. 2016) (citations omitted)).[1]

Here, Plaintiffs allege the Policies were mailed from Markel's Virginia headquarters to the broker, Markel Insurance Services, for unconditional delivery to Plaintiffs and all of the other proposed Class Members. ECF No. 9 at ¶¶101-103. At the moment Markel transmitted the Policies

[1] To be sure, Markel has not shown that there is an actual conflict of laws regarding insurance contact interpretation between Virginia and the states where each Plaintiff operates that would require this Court to apply any law other than that of Virginia. *See Erie Ins. Exch. V. EPC MD 15, LLC*, 822 S.E.2d 351, 355, n. 5 (Va. 2019) ("In the absence of a showing to the contrary, we presume that foreign law – whether applicable because of a choice-of-law clause or because of nonconsensual choice-of-law principles – is the same as the law of the forum."). In fact, the issues presented by Plaintiffs' First Amended Complaint relate solely to basic matters of insurance contact interpretation which turn on "well-known, well-established, definite and uniform standards" that are nearly ubiquitous across all of the states. 2 Couch on Ins. § 21:4: Applying Uniform Standards of Construction.

from its headquarters in Virginia, to the broker in Virginia, the Policies were "delivered" for the purposes of a choice of law analysis and Virginia law therefore applies at this stage of proceedings.[2]

V. PRINCIPLES OF INSURANCE CONTRACT INTERPRETATION

The core tenets of insurance contract interpretation in Virginia provide that "ambiguous terms in a policy are construed against the insurer, who wrote the policy and presumably could have written it more clearly and doubts over coverage are typically to be resolved in favor of the policyholder and against a limitation of coverage." *CACI Intern., Inc. v. St. Paul Fire and Marine Ins. Co.*, 566 F.3d 150, 159 (4th Cir. 2009). "Under Virginia law, an insurance policy is ambiguous when it can reasonably have more than one meaning given its context, where two constructions are equally possible, or reasonable persons may reach reasonable, but opposite, conclusions based on a policy's language." *SunTrust Morgt., Inc. v. AIG United Guar. Corp.*, 784 F.Supp.2d 585, 592 (E.D. Va. 2011) (quotations omitted) (*citing Salzi v. Virginia Farm Bureau Mut. Ins. Co.*, 263 Va. 52, 55 (Va. 2002) and *Spence-Parker v. Maryland Ins. Group*, 937 F.Supp. 551, 556 (E.D. Va. 1996); *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company*, 2020 WL 7249624, at *4 (E.D. Va. 2020) ("[Insurance] companies bear the burden of making their contracts clear. Accordingly, if an ambiguity exists, it must be construed against the insurer. A policy provision is ambiguous when, in context, it is capable of more than one reasonable meaning. In

[2] Plaintiffs note that to the extent the choice of law analysis in this matter is fact dependent upon when, where and how Markel delivered the Policies to Class Members as required by Virginia law, such an inquiry itself renders Markel's request for dismissal premature in the absence of any discovery and a factual record. *Hopeman Bros., Inc. v. Cont'l Cas. Co.*, 2017 WL 1381665, at *6 (E.D. Va. Apr. 17, 2017) ("… identifying when and where the 'last act' occurred is an issue for discovery").

determining whether the provisions are ambiguous, we give the words employed their usual, ordinary, and popular meaning.") (citations omitted).

At bottom, Virginia courts consistently apply two rules in construing the language of insurance policies. "First, where language in an insurance policy is susceptible of two constructions, it is to be construed liberally in favor of the insured and strictly against the insurer. Second, where two interpretations equally fair may be made, the one which permits a greater indemnity will prevail." *Atkinson Dredging Co. v. St. Paul Fire & Marine Ins. Co.*, 836 F.Supp. 341, 344 (E.D. Va. 1993) (citing *Joseph P. Bornstein, Ltd. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 828 F.2d 242, 245 (4th Cir. 1987) ("Where an insurance policy is susceptible of two constructions, one of which would effectuate coverage and the other not, it is the court's duty to adopt that construction which will effectuate coverage.") *Id.*

VI. LEGAL ARGUMENT

A. The "Virus Exclusion" Markel Chose to Use in the Policies Is Ambiguous and Insufficient to Bar Plaintiffs' Claims at the Pleadings Stage.

It is well established that where, as here, a defense is based on an exception or exclusion in an insurance policy, the burden is on the insurer to prove its application. *Hanover Insurance Co. v. Castle Hill Studios, LLC*, 401 F.Supp.3d 733, 737 (W.D.Va., 2019) (quoting *Granite State Ins. Co. v. Bottoms*, 415 S.E.2d 131, 134 (Va. 1992)). Stated differently, any ambiguous terms within the insurance policy – especially those in exclusionary language – must be resolved in favor of the insured and consistent with its reasonable expectations for coverage. *Builders Mut. Ins. Co. v. Parallel Design & Development LLC*, 785 F.Supp.2d 535, 543 (E.D. Va. 2011) (quoting *Granite* at 134) ("[D]oubtful, ambiguous language in an insurance policy will be given an interpretation which grants coverage, rather than one which withholds it.")); *Norfolk & Western Ry. Co. v. Accident & Cas. Ins. Co. of Winterthur*, 796 F.Supp. 929, 933 (W.D.Va.,1992) ("Where two

constructions of a policy provision are equally plausible, the one which would maximize indemnity is to be given effect.").

In this case, Markel's defense relies, in large part, on the supposed operation of a standalone exclusion to the Policies added by an endorsement entitled "Exclusion of Loss Due to Virus or Bacteria" (CP 01 40 07 06). The endorsement states, in paragraph "B" that Markel:

> "… will not pay for loss or damage **caused by or resulting from** any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease."

ECF No. 9-1 at 253. (emphasis added)

While Markel, and indeed many insurers in this context, claims that this endorsement is dispositive of coverage for losses caused by the government shutdowns alleged in the First Amended Complaint, a close and careful inspection of the language included – and omitted – from this version of the endorsement reveals it is simply not the cudgel Markel believes it to be because it lacks several critical elements allowing it to reasonably, clearly and definitively apply to such losses.

1. Markel Fails to Show that Plaintiffs' Losses Were "Caused by or Resulting from" a Virus.

The most comprehensive discussion of the language, construction and elements needed for the "Virus Exclusion" to apply to losses caused by government shutdown orders can be found in the recent decision of *N&S Restaurant LLC v. Cumberland Mut. Fire Ins*. Co., 2020 WL 6501722 (D.N.J. Nov. 5, 2020). In *N&S*, the plaintiff policyholder sued its insurer for failure to indemnify losses caused by government shutdown orders designed to slow the spread of COVID-19. *N&S Restaurant LLC*, 2020 WL 6501722, * 3. When the insurer moved to dismiss on the basis of that policy's virus exclusion, the policyholder countered that it did not apply "because the cause of [p]laintiff's loss was the Closure Orders, not the coronavirus." *Id*. In considering these arguments,

the trial court first looked to the specific language of the version of the virus exclusion at issue in that policy, which stated that the insurer "… will not pay for loss or damage caused directly or indirectly by … any virus …". *Id.* (emphasis added). Based on the insurer's use of this particular language in that version of the exclusion, the trial court stated:

> [t]he [c]ourt finds [p]laintiffs' arguments unpersuasive … [because the] clause specifically states that loss caused directly or **indirectly** by a virus is excluded … There is no doubt that COVID-19, a virus, caused Governor Murphy to issue the Executive Order mandating closure of Plaintiff's restaurant. Therefore, COVID-19 is still a cause of the closure **because the Virus Exclusion specifically provides for such indirect causation.**"

Id. (emphasis in original). The *N&S* court's conclusion was supported by its national survey of other decisions regarding the virus exclusion, which were based on language in the exclusion barring coverage for losses caused "directly or indirectly" by COVID-19. *Id.*, * 4 (*citing Wilson v. Hartford Casualty Co.*, 2020 WL 5820800 (E.D. Pa. Sept. 30, 2020) (holding that coverage was barred by a Virus Exclusion that stated the insurer "will not pay for loss or damage caused directly or indirectly by … virus …"); *Franklin EWC, Inc. v. Hartford Financial Servs. Group*, 2020 WL 5642483 (N.D. Cal. Sept. 22, 2020) (holding that coverage was barred by Virus Exclusion stating that "[w]e will not pay for loss or damage caused directly or indirectly by [virus] …").

The reasoning in *N&S* has guided courts to find that other versions of the virus exclusion do not apply to losses caused by government shutdown orders because their more limited scope requires the virus to be the direct and immediate cause of loss. *See Elegant Massage LLC* at *11-13; *Henderson Rd. Rest. Sys., Inc.*, 2021 WL 168422 at *15 (N.D. Ohio Jan. 19, 2021). In those cases, courts interpreting versions of the virus exclusion similar to that at issue here have explained that:

> … in applying the Virus Exclusion **there must be a direct connection between the exclusion and the claimed loss and not, as the [Insurers] argue, a tenuous connection anywhere in the chain of causation**. That is, although the Virus

> Exclusion does require that the virus be the cause of the policyholder's loss, **the connection must be the immediate cause in the chain.**

Elegant Massage LLC at * 12 (emphasis added); *see also Henderson Rd. Rest. Sys., Inc.* at *14 ("Here, Plaintiffs' argument prevails because the [virus] exclusion does not clearly exclude loss of property caused by a government closure. Plaintiffs' restaurants were not closed because there was an outbreak of COVID-19 at their properties; they were closed as a result of governmental orders."). Thus, where "[p]laintiff is neither alleging that there is a presence of a virus at the covered property nor that a virus is the direct cause of the property's physical loss", the insurer has "failed to meet its burden to show that the Virus Exclusion applies to [p]laintiff's claim." *Id*. at *13.

These divergent decisions regarding the application of "Virus Exclusions" illustrate the fatal lack of precision in the Policies at issue here. In short, by using the phrase "caused by or resulting from" in the version of the "Virus Exclusion" it decided to insert in the Policies, Markel must show that the novel coronavirus was the factual and legal cause of Plaintiffs' alleged losses. However, Markel is unable to make this showing at the present stage of litigation because Plaintiffs have specifically pleaded that the various government shutdown orders – not the actual presence of COVID-19 at its premises – caused their losses. *See, e.g.*, ECF No. 9 at ¶¶ 1, 16-21, 32-4, 43-5, 54-6, 65-7, 76-8, 164-8, 269-256.[3] Stated differently, if Markel intended the "Virus Exclusion" it included in the Policies to apply whenever a virus played a role, regardless of degree, in the occurrence of a loss, it could have easily used more expansive policy language to crystalize its intent, including forms available at the time it bound these policies disclaiming coverage for any loss: (1) "caused directly or indirectly by … presence, growth, proliferation, spread or any activity

[3] Plaintiffs explicitly stated that they are not making claim for viral contamination of their properties. ECF No. 9 at ¶¶ 146-9.

of … virus"; (2) "directly or indirectly caused by or resulting from" a virus; or (3) "caused by, resulting from, or related to" a virus. *See, e.g.*, *N&S*, supra; *Henderson Rd. Rest. Sys., Inc*. at *15 (noting that the insurer's ability to use a more specific exclusion militates against applying the "Virus Exclusion"); *see also* Insurance Services Offices ("ISO") Form BP 00 03 07 13, attached as **Exhibit A**. Absent this more expansive language, construing the "Virus Exclusion" here to require only a minimal showing of factual association between the virus and the loss would produce absurd results that this Court simply should not countenance at this stage of proceedings.

2. Statements Made by the Drafters of this Version of the "Virus Exclusion" Create a Question of Fact Regarding its Applicability to Plaintiffs' Losses.

Of significance to the question of the "Virus Exclusion's" applicability, ISO – the organization responsible for drafting the standardized language in the Policies – itself stated that the CP 01 40 07 06 endorsement was intended to apply only to losses caused by actual contamination events. *See* ISO 2006 Circular Regarding the Form CP 01 40 07 06, attached as **Exhibit B**. Specifically, the version of the "Virus Exclusion" used in the Policies was developed by ISO in response to the SARS outbreak that occurred in or around 2005-2006, which was not an uncontrollable global event like the COVID-19 pandemic, and was therefore never intended to exclude coverage for government responses to slow the spread of a virus. *See* **Exhibit B**. According to ISO's 2006 Circular, policies at the time this version of the "Virus Exclusion" was released contained exclusions "**that encompass[] contamination** …", prompting ISO to offer additional language clarifying that the same disclaimer applied to "**viral and bacterial contamination** … that appear[ed] to warrant particular attention at [that] point in time." *Id*. at 1 (emphasis added). In submitting this version of the "Virus Exclusion" for approval by insurance regulators throughout the United States, ISO noted that "… property policies have not been a source of recovery for **losses involving contamination by disease-causing agents**", but the

growing emergence of novel viruses "… raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery **for such losses**, contrary to policy intent." *Id*. at 6 (emphasis added). As a result, ISO advised insurers and regulators that it was "… **presenting an exclusion relating to contamination** …" *Id*. (emphasis added).[4]

At bottom, these statements by ISO undermine Markel's argument that the "Virus Exclusion" was intended to reach losses where there is no evidence or allegation of viral contamination at the insured property, and raise significant questions of fact regarding how the Policies were underwritten, represented, marketed and interpreted in this respect. Further, ISO and its adopting insurers, like Markel, cannot now be allowed to publicly renege on their official representations that this version of the "Virus Exclusion" was drafted only to apply to losses caused by actual viral contamination.

3. Plaintiffs Also Reasonably Believed the Policies Would Cover Any Loss Caused By A Covered Event Regardless of Whether an Excluded Causes of Loss Also Contributed to the Claim.

In recognition that these "Virus Exclusions" require the loss to be directly and immediately caused by viral contamination at the insured property, and that other forces may be the predominating cause of a policyholder's claim, insurers have traditionally included clauses in these endorsements, which state that "such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *N&S Restaurant, LLC* at * 3.

[4] This observation was endorsed by the court in *Henderson Rd. Rest. Sys., Inc., supra,* where Judge Polster noted that the insurance industry represented it was "seeking to avoid coverage for 'viral and bacterial contamination' of properties" when it put forward these exclusions. *Henderson Rd. Rest. Sys., Inc.*, 2021 WL 168422 at 15. Judge Polster concluded that these representations in 2006 "show the insurers' intent … **They were attempting to exclude coverage for property damage caused by the contamination of viruses and bacteria on insureds' premises, not the loss of business income caused by a government closure**." *Id*. (emphasis added).

When read in conjunction with the more expansive language discussed above extending these exclusions to losses caused "directly or indirectly" by a virus, certain courts have found:

> [t]he Policy does not provide coverage for losses caused directly or indirectly by a virus, regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

Id., * 4; *see also Wilson v. Hartford Casualty Co.*, 492 F.Supp.3d 417, 428 (E.D. Pa., 2020) (holding that coverage was barred by a virus exclusion that stated it applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss"); *Diesel Barbershop, LLC v. State Farm Lloyd's*, 2020 WL 4724305 (W.D. Tex., Aug. 13, 2020) (holding that coverage was barred by a virus exclusion stating the insurer "does not insure for a loss regardless of whether other causes acted concurrently or in any sequence within the excluded event to produce the loss"); *Franklin EWC, Inc. v. Hartford Financial Services Group, Inc.*, 488 F.Supp.3d 904, 908 (N.D. Cal., 2020) (holding that coverage was barred by a virus exclusion that stated "such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss")); *see also Turek Enterprises*, 2020 WL 5258484 (E.D. Mi. Sept. 3, 2020) (finding that the inclusion of an anti-concurrent causation clause in the virus exclusion extends the exclusion to all losses where a virus is part of the causal chain).

In this case, however, Markel – as the drafter of the Policies – not only failed to extend the virus exclusion to losses caused "directly or indirectly" by a virus, but also neglected to include any language regarding concurrent causation in the endorsement. *See* ECF 9-1 at 253. Further, as the foregoing decisions indicate, there is no dispute that such language was readily available to Markel at the time it bound the Policies, and that including the same would have definitively notified Plaintiffs that all losses involving a virus, to whatever degree, are excluded from coverage. *See N&S, Wilson, Diesel Barbershop, Franklin EWC, Inc.* and *Turek, supra*. Without this

language, Plaintiffs reasonably believed that they would be entitled to coverage for losses where state and local governments denied them the physical use of their insured premises, even if those orders were related to a virus that had not actually contaminated their properties. ECF No. 9 at ¶¶ 12, 28, 39, 50, 61, 72. Indeed, Plaintiffs allege throughout the First Amended Complaint that the immediate, predominating and proximate cause of their losses were the government shutdown orders, which forced them to suspend the physical use of their insured premises. *Id*. at ¶¶ 1, 16-21, 32-4, 43-5, 54-6, 65-7, 76-8, 164-8, 269-256. Stated differently, without the government shutdown orders, Plaintiffs would have been free to continue operating their businesses using such precautions as would be necessary to avoid viral contamination, and it is unknown whether they would have suffered any losses "caused by or resulting from" the coronavirus under those circumstances. [5]

To be sure, even if Markel had included anti-concurrent causation language in this version of the "Virus Exclusion", it still would not be enough to extend the endorsement to losses caused solely and exclusively by government shutdown orders. As Judge Jackson explained in *Elegant Massage*, *supra* – a case from this very district with similar facts and applying the same law – these clauses do little more than expose insurers' post-hoc efforts to bootstrap otherwise covered claims into exclusionary provisions that should have been clearly and definitively drafted in the first instance. In that case, Judge Jackson noted that "to be enforceable, the insurer 'must draft the language of an exclusion conspicuously, plainly and clearly set forth any limitation on coverage

[5] Plaintiffs' circumstances should be contrasted with those of businesses deemed "essential" under the government shutdown orders. Many of these businesses were allowed to continue the physical use of their premises despite the omnipresence of the coronavirus, yet have experienced limited, or in many cases, no business losses. As alleged in the First Amended Complaint, the only difference between these businesses and Plaintiffs is that Plaintiffs were subject to the government shutdown orders and therefore sustained insured losses.

to the insured."' *Id.* (quoting *Waste Management, Inc. v. Great Divide Insurance Company*, 381 F.Supp.3d 673, 683 (E.D. Va. 2019)). Thus, even if Markel could argue under the Policies that the "Virus Exclusion" somehow extends to all losses in which a virus is involved, this contention would run contrary to Virginia's public policy against vague and ambiguous insurance language, which is specifically intended to prevent policyholders like those in *Elegant Massage* and here from being blindsided by their insurers' opportunistic and retrospective attempts to avoid liability. *Elegant Massage* at *12 (Insurers argue, that expansive anti-concurrent causation clauses apply where an excluded cause has a "tenuous connection anywhere in the chain of causation.")

B. Markel Cannot Meet Its Burden of Showing the Loss of Use, Ordinance or Law, or Acts or Decisions Exclusions Apply to Plaintiffs' Losses.

"Generally, an insurer must raise or reserve its rights and defenses; otherwise, an insurer will be considered to have waived other defenses when denying coverage on a specific ground." 14 Couch on Ins. § 198:53. In this case, however, Markel has cited three separate and specific exclusions in its motion to dismiss which were never identified, raised or cited in the disclaimers of coverage that forced Plaintiffs to file this action in the first instance. ECF No. 9 at ¶¶ 24, 82. Although these exclusions are waived as a matter of law and should not be considered by this Court as a basis to dismiss the First Amended Complaint, Plaintiffs nevertheless address how each untimely provision fails to clearly, definitively and unambiguously disclaim coverage for the losses caused by the government shutdown orders.

1. Markel's Interpretation of the Loss of Use Exclusion Renders the Policies Meaningless.

In raising the "Loss of Use Exclusion", Markel relies on decisions from other jurisdictions, including *Mudpie, Inc. v. Travelers Casualty Insurance Company of America*, 487 F.Supp.3d 834

(N.D. Cal., 2020)[6] which have held – without any textual or other analysis – that "[t]he separate provision for loss of use suggests that the 'direct physical loss of … property' clause was not intended to encompass a loss where the property was rendered unusable without an intervening physical force." *Mudpie at* 842. However, if Markel's interpretation were accepted, the exclusion would **always** bar business interruption insurance coverage whenever an insured loses business income from the inability to use their property. In other words, if the exclusion operated the way that Markel suggests under *Mudpie*, it would create illusory coverage for business interruption and no policyholder would ever be permitted to recover for losses caused by the inability to use or operate their business premises. This is precisely what Judge Polster concluded in his post-*Mudpie* decision in *Henderson Rd. Rest. Systm.*:

> Zurich argues that this provision would not bar coverage when there is physical damage caused by a covered peril, such as a fire, that closes a restaurant while it is being repaired.... **But that is not at all clear from a plain reading of the Loss of Market or Delay exclusion**. In fact, this exclusion could be argued to exclude coverage if an insured lost the use of property. The Business Income Coverage provides that Zurich will pay for "loss of business income" sustained "due to the necessary suspension of operations caused by direct physical loss of or damage to property". **Here, the Loss of Use exclusion would vitiate the Loss of Business Income coverage. … Because the Policy must be read in its entirety and disputed terms interpreted in a manner calculated to give the agreement its intended effect, the "Loss of Use" exclusion does not exclude coverage under the Business Income coverage of the Policy.**

2021 WL 168422, at *16 (emphasis in bold added).

In short, the insurers have not met their burden of proof that the "delay, loss of use or loss of market" exclusion applies to any of the losses alleged by Plaintiffs.

[6] *appeal filed*, No. 20-16858 (9th Cir. Sept. 24, 2020).

2. The Ordinance or Law Exclusion Is Inapplicable to Emergency Restrictions Pursuant to State Laws that Regulate a Governor's Emergency Powers.

Markel also invokes the "Ordinance or Law Exclusion" in the Policies, which states:

> We will not pay for damage caused directly or indirectly by any of the following. Such damage is excluded regardless of any other cause or event that contributes concurrently in any sequence to the damage.
>
> 1. Ordinance or Law
>
> The 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, including the cost of removing its debris.

ECF No. 9-1 at 64.[7]

As an initial matter, this "Ordinance or Law Exclusion" references only that – ordinances and laws which are distinguishable from executive orders and proclamations made by Governors pursuant to their emergency powers. These executive orders and proclamations are not the "enforcement" of any "ordinance or law" that regulates the "construction, use or repair" of property; rather, they are themselves the creation of new, emergent restrictions and limitations that exist separate and apart from any legislative statutes, codes or regulations enacted in the ordinary course of government affairs. Indeed, the Court need not look beyond the Policies' Civil Authority provisions to find that Markel understands government shutdown orders are actions that are distinct from "ordinance or law" as used in this exclusion because if Markel truly believed all

[7] Notably, the use of the more expansive "directly or indirectly" language in connection with this portion of the Policies demonstrates Markel could have easily used the same in connection with the "Virus Exclusion" it actually raised as the basis for denying coverage to Plaintiffs in the first instance.

government actions constitute "ordinance or law", it would once again render coverages granted by the Policies illusory. ECF No. 9-1 at 95.

3. Markel's Interpretation of the Acts or Decision Exclusion would "Leave the Polic[ies] Practically Worthless."

Finally, if the "Acts or Decision Exclusion" is read as Markel proposes, it would negate the very purpose of these Policies as coverage for "all risks" of loss. "Acts or Decisions" clauses "cannot be taken literally" because "… it would exclude coverage from all acts or decisions of any character of all persons, groups, or entities … leav[ing] the insurance policy practically worthless." *Jussim v. Massachusetts Bay Ins. Co.*, 33 Mass. App. Ct. 235, 238 (Mass.App.Ct.,1992). Put a different way, if these provisions were to be interpreted literally, they "would exclude coverage from all acts and decisions of any character of all persons, or entities" thus creating a situation where the policy never provides coverage for any loss or expense. *Mettler v. Safeco Ins. Co. of America*, 2013 WL 231111, at *6 (W.D. Wash. 2013). Markel's reference to *Whiskey River on Vintage, Inc. v. Illinois Casualty Company*, 2020 WL 7258575, at *18 (S.D. Iowa 2020) does nothing to alleviate that concern or carry its burden in proving the exclusion applies because that decision neither considered any decisional law regarding the "Acts or Decision Exclusion" nor considered the fact that—if applied literally—such an exclusion would render an "all-risk" policy meaningless. *Id*. at *19.[8] This Court should not countenance such a blatant attempt to subvert the entire purpose of these Policies by endorsing Markel's attempt to apply the "Acts or Decision Exclusion" to the losses alleged in the First Amended Complaint.

[8] The absurdity of this exclusion and Markel's argument in support of the same is perhaps best illustrated by the example of a fire that burned down an insured's building. If Markel's interpretation were to stand, it could disclaim coverage for this type of loss simply because a third-party played some role in causing the fire, the fire department decided to take one action to suppress the fire as opposed to another or even the architect chose to adopt less rigorous fire-prevention designs in the initial construction of the property.

C. Plaintiffs' Sufficiently Allege "Direct Physical Loss of" Access to, and the Use of, the Insured Premises as a Result of the Government Shutdown Orders.

1. The Phrase "Direct Physical Loss of or Damage to" Insured Property Demands a Distinction Between "Loss" and "Damage" that Renders the Policies Ambiguous.

Markel essentially argues that Plaintiffs can never recover their losses under the Policies because the First Amended Complaint does not allege the insured properties were "physically damaged" or "physically altered" in any way. However, Markel drafted the Policies to use the disjunctive "or" in this pivotal phrase of the insuring agreement, grammatically separating those portions of the clause covering "physical loss" of an insured premises from the portions covering "physical damage" to the same.

In contrast to the cases cited by Markel, courts in this District and others construing this disjunctive policy language in the context of COVID-19 government shutdown orders have given full effect to this text by concluding that "loss of" and "damage to" insured property must be separate and distinct bases for coverage. *See, e.g.*, *Elegant Massage LLC*, 2020 WL 7249624, at 10 (finding that, under Virginia law, "Plaintiff's experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19."); *Henderson Rd. Rest. Sys.*, 2021 WL 168422, at 10 (finding physical loss of real property meant something different than damage to real property, which was valid argument, because phrases appeared side-by-side separated by disjunctive conjunction "or."); *Kingray Inc. v. Farmers Group Inc*., 2021 WL 837622, at 7-8 (C.D. Cal. March 4, 2021) ("[I]t is possible that the … 'stay at home' orders caused 'direct physical loss' … At various points during the pandemic, [plaintiff] was forced to shutter, rendering its property unusable for its only purpose – the operation of a business. If plaintiff was not allowed to operate or invite others onto its property, it was disposed in some way. Dispossession is a form of loss.").

McKinley Development Leasing Co. Ltd. v. Westfield Ins. Co., 2021 WL 506266 (Ohio Com. Pl. Feb. 9, 2021) ("The bottom line is simply this. Both sides provided reasonable interpretations of the policy language.... There is no question that the court has been bombarded with cases falling on both sides of the aisle. However, [the insurer] had the benefit of writing the policy with the ability to consider consequences in this ever-changing world. That is not the case here. They had an obligation to use terminology easily understood by layperson. That is not the case here. The Court can only surmise that with these differing opinions, that the policy is ambiguous."); *In Re: Society Ins. Co. Covid-19 Business Interruption Ins. Litigation* (MDL No. 2964), 2021 WL 679109 at 8 (N.D. Ill. Feb. 22, 2021) ("The disjunctive 'or' in that phrase means that 'physical loss' must cover something different from "physical damage.'"); *Derek Scott Williams PLLC, et al. v. The Cincinnati Ins. Co.*, 2021 WL 767617 at 4 (N.D. Ill. Feb. 28, 2021) ("Specifically, even though the term loss is defined in the policy to mean *either* physical loss *or* physical damage, Cincinnati contends that it requires physical damage. This interpretation writes the term 'loss' out of the definition, which contradicts the basic principle that 'each word [in a contract] has some significance and meaning.'"); *Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Insurance Company*, 2021 WL 1837479 (E.D. PA., May 7, 2021) (finding that the language "direct physical loss of or damage to property at the described premises" in the context of Business Income and Extra Expense insurance is ambiguous, and the former may plausibly occur as the result of government shutdown orders limiting the physical use of insured property). *Timothy A. Ungarean d/b/a Smile Savers Dentistry P.C. v. CNA and Valley Forge Insurance Co.*, Case No. GD20-006544, (Pa. Com. Pl. Allegheny Cty. March 22, 2021) (finding that closure orders could cause "direct physical loss of or damage to" property at a premise because the policyholder lost the ability to use its property for its intended purpose. The court determined it is "reasonable to

interpret the phrase 'direct physical loss of … property' to encompass the loss of use of Plaintiff's property due to the spread of COVID-19 absent any actual damage to property."), attached as **Exhibit C**; *Macmiles, LLC v. Erie Insurance Exchange*, Case No. GD20-007753 (Pa. Com. Pl. Allegheny Cty. May 25, 2021) (finding that "loss" and "damage" are not interchangeable under a commercial property insurance policy, and the former may plausibly occur as the result of government shutdown orders limiting the physical use of insured property), attached as **Exhibit D**; *Perry Street Brewing Company, LLC v. Mutual of Enumclaw Insurance Company*, No. 20-2-02212-32, 2020 WL 7258116, (Superior Ct. Wa. Spokane Cty. November 23, 2020) (finding that because of the closure orders, the insured suffered "direct physical loss of or damage to" its property and lost the ability to use its property for its intended purpose) *Seifert v. IMT Insurance Company*, 495 F.Supp.3d 747, 751 (D. Minn. June 2, 2021) (Rejecting arguments that "physical damage" must be "tangible" and concluding that covered injury "may be something less than structural damage or some other tangible injury."); *North State Deli v. The Cincinnati Insurance Company*, 2020 WL 6281507 at 3 (N.C. Super Ct. Oct. 9, 2020). In those cases, courts have reasoned:

> **[t]he use of the conjunction "or" means – at the very least – that a reasonable insured could understand the terms "physical loss" and "physical damage" to have distinct and separate meanings. The term "physical damage" reasonably requires alteration to property. Under [the insurer's] argument, however, if "physical loss" also requires structural alteration to property, then the term "physical damage" would be rendered meaningless. But the Court must give meaning to both terms.**

North State Deli, 2020 WL 6281507 at 3 (emphasis added).

As the foregoing decisions illustrate, the disjunctive "or" is commonly used to "express[] an alternative, contrast, or opposition between the meanings of the words or word groups that it connects" such that its use in connecting the phrases "direct physical loss of" and "damage to" in

the Policies necessitates a distinction between the two. Where neither "direct physical loss" nor "damage" is defined under the Policies, any interpretation conflating "loss" with "damage" would render the actual language of the Policies superfluous and meaningless. The specific wording and construction of the language Markel chose to use in this threshold portion of the contract is therefore facially ambiguous, and Markel's parochial characterization of its insuring obligations as applying only to "damage" to Plaintiffs' properties fails to satisfy the burden of dismissal requiring it to show its reading of the Policies is the only reasonable interpretation.

2. "Direct Physical Loss of" Insured Property Occurs in the Absence of Structural Damage or Alteration Where There Is Nevertheless a Loss of Access, Use or Utility.

Where "loss" and "damage" in the Policies must have different meanings, recent decisions from a variety of jurisdictions across the nation – including this very District – have disagreed with the reasoning in Markel's cited decisions and rejected insurers' arguments that the phrase "direct physical loss of … property" requires the insured to plead and prove a physical, tangible change to insured property. Rather, these decisions explain that the policyholder's loss of physical use of insured property for its intended function – and specifically as a result of government shutdown orders – is sufficient to trigger coverage.

For example, in *North State Deli v. The Cincinnati Insurance Company*, the insured sought the same coverage as here under nearly identical circumstances – government orders prohibiting or limiting physical use of its insured spaces. 2020 WL 6281507 at 2-3. When the policyholder moved for summary judgment, the insurer responded that "direct physical loss" is not intended to "provide coverage for pure economic harm in the absence of direct physical loss to property, which requires some form of physical alteration to property." *Id.* at 2. However, the court entered declaratory judgment against the insurer on the basis that the government shutdown orders forced

plaintiffs to lose the physical use of, and access to, their restaurant property, which constituted a non-excluded "direct physical loss." *Id*. at 3. More specifically, the court explained that:

> [a]s an initial matter, the Policies do not define the terms "direct", "physical loss," or "physical damage." The Court must therefore turn first to the ordinary meaning of those terms … Applying these definitions reveals that the ordinary meaning of the phrase "direct physical loss" includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions. **In the context of the Policies, therefore, "direct physical loss" describes the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders. Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a "direct physical loss," and the Policies afford coverage.**

Id. (emphasis added). Further, the *North State Deli* court noted that "[e]ven if [the insurer's] proffered ordinary meaning is reasonable, the ordinary meaning set forth above is also reasonable, rendering the Policies at least ambiguous." *Id*. As a result, the court entered judgment in favor of the policyholder, holding that "in giving the ambiguous terms the reasonable definition which favors coverage, the phrase "direct physical loss" includes the loss of use or access to covered property even where that property has not been structurally altered." *Id*.

This same reasoning has led federal courts in multiple jurisdictions applying various states' laws to reach similar conclusions. For instance, in *Elegant Massage*, *supra*, the court was likewise asked to dismiss a policyholder's complaint on the basis that COVID-19 government shutdown orders do not constitute "direct physical loss of … property." *Elegant Massag*e, 2020 WL 7249624, at *7. Despite the insurers' argument that "direct physical loss unambiguously requires that there be structural damage to covered property for the [p]laintiff to recover", the judge found that this core clause of the insuring agreement has "[a] spectrum of legal definitions." *Id*. Indeed,

the *Elegant Massage* court noted "… **that it is plausible that a fortuitous 'direct physical loss' could mean that the property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural sources** …", and therefore "… **it is plausible that [p]laintiff's [sic] experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders** …" *Id*. at *10-11 (emphasis added).

More recently, in *In Re: Society Ins. Co. Covid-19 Business Interruption Ins. Litigation* (MDL No. 2964), 2021 WL 679109 (N.D. Ill. Feb. 22, 2021), the policyholders, a variety of small businesses from several states, sought the same coverage as here under nearly identical circumstances – government orders prohibiting or limiting the physical use of their insured spaces. Like Markel here, Society Insurance moved for dismissal of three bellwether cases arguing that, among other things, "physical loss" is synonymous or interchangeable with "physical damage" under an all-risk policy. 2021 WL 679109 at 21. The MDL judge disagreed, denying Society Insurance's motion on the basis that the government shutdown orders forced plaintiffs to lose the physical use of, and access to, their business properties. *Id*. at 23. Specifically, the MDL court explained that:

> **a reasonable jury can find that the Plaintiffs did suffer a direct "physical" loss of property on their premises.** First, viewed in the light most favorable to the Plaintiffs, the pandemic-caused shutdown orders do impose a **physical** limit: the restaurants are limited from using much of their physical space. It is not as if the shutdown orders imposed a **financial** limit on the restaurants by, for example, capping the dollar-amount of daily sales that each restaurant could make. No, instead the Plaintiffs cannot use (or cannot fully use) the physical space. Indeed, the policy defines "covered property" to include buildings at the premises, not just personal property or movable items … If the restaurant could expand its **physical** space, then the restaurant could serve more guests and the loss would be mitigated (at least in part). **The loss is physical – or at the very least, a reasonable jury can make that finding.**

Id. at 22 (first and last emphasis added).

Likewise, in *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, the policyholder also sought coverage for business interruption losses when its operations were suspended by executive orders designed to slow the spread of COVID-19. The defendant insurer moved to dismiss the complaint on the grounds that loss of use of the policyholder's properties "is insufficient to trigger coverage." 2021 WL 767617 at 5. Again, the court rejected the insurers' position, holding that:

> Cincinnati's contention that the term direct loss requires physical damage to the insured's property runs afoul of these principles of construction. Specifically, even though the term loss is defined in the policy to mean either physical loss or physical damage, Cincinnati contends that it requires physical damage. This interpretation writes the term "loss" out of the definition, which contradicts the basic principle that "each word [in a contract] has some significance and meaning." More specifically, a court presumes that when different words are used together, they have different meanings, in other words, that they are not redundant. In short, "loss" – as used in the policy definition that "Loss means accidental physical loss or accidental physical damage" – cannot simply mean "damage."

Id. at 8 (emphasis added) (internal citations omitted).

Faced with the inherent ambiguity of using the phrase "direct physical loss of or damage to" insured property in the Policies, Markel takes the same flawed approach here, arguing that "loss" and "damage" have essentially the same meaning – structural injury or alteration of the premises. ECF No. 12 at 17. Yet, as illustrated by the contrasting interpretations of the "direct physical loss" requirement between these decisions and those cited by Markel at length in its motion to dismiss, Markel's artificially narrow interpretation of the "direct physical loss" requirement is, at best, susceptible to alternative readings and, at worst, contrary to the plain and ordinary language and construction of the Policies. As the foregoing decisions from state and federal courts around the country, including Virginia, demonstrate, "direct physical loss of" insured property can be reasonably understood to mean uninhabitability, inaccessibility or loss of use of insured property independent of, and distinct from, any structural alteration, especially in the context of the government shutdown orders.

3. The Policies' "Period of Restoration" Provision Does Not Define the Terms "Direct Physical Loss of or Damage to" Property, Nor Restrict the Trigger of Coverage.

Markel's argument that the "period of restoration" language in the Policies implicitly requires physical damage for coverage to apply is equally misplaced and shows that the Policies are riddled with inconsistencies this Court is bound to resolve in favor of policyholders.

As a preliminary matter, and to reiterate the cannons of policy interpretation, trial courts considering insurance policies must give effect to every word that can be given effect. Yet, Markel's overtures regarding the "period of restoration" turn the cannons of interpretation on their head by asking this Court to resolve inconsistencies between the undefined term of "direct physical loss of … property" and the definition of "period of restoration" in its favor and against Plaintiffs. To reach Markel's preferred conclusion, the Court would have to choose to give effect to Markel's favored language while disregarding others, effectively resolving the tension of internal ambiguities and inconsistencies in favor of the insurer, rather than the policyholder, as required by the law.

Using the correct analysis – which again looks at the policy from the perspective of a lay policyholder's reasonable expectations – courts have rejected nearly identical arguments by insurers. For instance, in *In Re Society Insurance*, supra, the insurer asserted that the terms "'repaired, rebuilt[,] or replaced' [in the] 'period of restoration' implies that covered 'physical loss or damage' is necessarily tangible, requiring a physical injury to the covered property rather than mere loss of use." *Id*. at 9. Although "[t]his argument did give the [c]ourt some pause … too many textual clues point the other way." *Id*. As the MDL court observed:

> **[f]irst and foremost, the "Period of Restoration" describes a time period during which loss of business income will be covered, rather than an explicit definition of coverage.** Instead, the explicit definition of coverage is that direct physical "loss of" property is covered—not just "damage to" property, as explained earlier. Second, the limit on the Period of Restoration does include the words

> "repaired" and "replaced," that is, the restoration period ends when the property at the premises is "repaired" or "replaced." **There is nothing inherent in the meanings of those words that would be inconsistent with characterizing the Plaintiffs' loss of their space due to the shutdown orders as a physical loss.** If, for example, the coronavirus risk could be minimized by the installation of partitions and a particular ventilation system, then the restaurants would be expected to "repair" the space by installing those safety features. As another example, if a restaurant could mitigate the loss caused by a percentage-capacity limit by "replacing" some of its dining-room space by opening its adjacent banquet-hall room to increase the number of guests it could serve, then the restaurant would be expected to "replace" the loss of space by doing so. **So, the definition of the Period of Restoration is consistent with interpreting direct physical loss of property to include the loss of physical use of the covered property imposed by the shutdown orders.**

Id. (emphasis added).

The MDL court therefore denied summary judgment, finding that "the scope of the term 'direct physical loss' is genuinely in dispute" and "[a] reasonable jury could find for either side based on the arguments and factual record presented so far in the litigation." *Id*. at p. 10; *see also Derek Scott Williams* PLLC, 2021 WL 767617, at 12 (rejecting the insurer's "period of repair" argument because repair "is not inherently physical" and "[i]n a situation like the one at issue here, the 'loss' would be 'repaired' if and when orders by governmental authorities permitted full use of the property.").

D. Plaintiffs have Properly and Plausibly Stated a Claim for Civil Authority Coverage.

To defeat Civil Authority Coverage under the Policies, Markel erroneously argues that Plaintiffs have not alleged that they were prohibited from accessing their respective properties and have not alleged closures within the immediate area of the insured property. ECF No. 12 at 26. This is a mischaracterization of Plaintiffs' First Amended Complaint on both counts. Plaintiffs have alleged that they were forced to close their business properties and were prohibited from physically using the premises at length. ECF No. No. 9 at ¶¶ 1, 16-21, 32-4, 43-5, 54-6, 65-7, 76-8, 164-8, 269-2. Moreover, the First Amended Complaint details the state-wide effects of the

relevant government shutdown orders, which caused wide-scale physical loss of property in the vicinity of Plaintiffs' respective business premises and beyond. *Id*. at ¶¶ 154-168, 169-176, 177-183, 184-192, 193-208.

Further, Markel's arguments against coverage are based solely foreign authority and fail to consider the Policies do not state anywhere that Civil Authority coverage is available only when action of a civil authority prohibits "any" or "all" access. Had Markel intended to limit Civil Authority coverage to instances when "all access" is completely barred—as opposed to merely key, business-critical access—it "could easily have done so" by simply saying so—drafting the policy so it would read "prohibits all access." *See Studio 417, Inc. v. Cincinnati Insurance Company*, 478 F.Supp.3d 794, 804 (W.D. Mo. 2020) (sufficiency of pleading regarding access "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"); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co*., No. CV-20-932117, 2020 WL 7258114, at *5 (Ohio Com. Pl., Cuyahoga County Nov. 17, 2020) ("[T]he policy here does not specify that all access to the premises be absolutely prohibited. Plaintiffs have adequately stated a claim under the civil authority section of their policies.").[9]

[9] Inasmuch as Markel's arguments with respect to Civil Authority coverage rely on the "direct physical loss" issue discussed above, Plaintiffs will avoid restating their points in opposition here for the sake of brevity and instead incorporate the same by reference. Plaintiffs do note, however, that Markel's same arguments raise significant questions of fact regarding the reasons for and purpose of the government shutdown orders that require discovery from each of these government authorities and the compilation of a factual record before a dispositive motion can be properly entertained. *See, e.g., Cajun Conti LLC v. Certain Underwriters at Lloyd's London*, 2020 WL 8484870, at *1 (La.Civil D.Ct., Orleans Parish Nov. 04, 2020) (whether COVID-19 orders "prohibited access" to insured premises was a genuine issue of fact because "[t]he restaurant had to drastically change its operations to exclude sit down patrons, which was previously the heart of its business, because the Orders restricted their presence in the building"); *Johansing Family Enterprises LLC v. Cincinnati Specialty Underwriters Ins.*, 2021 WL 145416, at *1 (Ohio Com.Pl., Hamilton County Jan. 08, 2021)

VII. CONCLUSION

For the foregoing reasons, Plaintiffs, individually and on behalf of all others similarly situated, respectfully requests that this Court deny Markel's Motion to Dismiss. In the alternative, should the Court be inclined to grant Markel's Motion in whole or in part, Plaintiffs respectfully request leave to amend the First Amended Complaint in order to cure any technical deficiencies in the pleading the Court may identify.

Dated: June 7, 2021

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CERTIFICATE OF SERVICE

I, William H. Monroe, Jr., certify that, on this date, the foregoing document was filed electronically via the Court's CM/ECF system, which will send notice of the filing to all counsel of record, and parties may access the filing through the Court's system.

Dated: June 7, 2021

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