Lloyd Bernstein, OSB #002030
E-mail: lloyd.bernstein@bullivant.com
Richard Williams, OSB #144638
E-mail: richard.williams@bullivant.com
BULLIVANT HOUSER BAILEY PC
One SW Columbia Street, Suite 800
Portland, Oregon 97204-4022
Telephone: 503.228.6351
Facsimile: 503.295.0915

G. David Rubin, *pro hac vice pending*
E-mail: rubin@litchfieldcavo.com
Andrew K. Aaronian, *pro hac vice pending*
E-mail: aaronian@litchfieldcavo.com
LITCHFIELD CAVO LLP
2 North Lake Ave., Ste. 400
Pasadena, CA 91101
Telephone: 626.683.1100
Facsimile: 626.683.1113

Attorneys for Defendant
The Cincinnati Insurance Company

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PAPI, LLC, an Oregon limited liability company, dba Papi Chulo's Restaurant, individually and on behalf of all others similarly situated,

Plaintiff,

v.

THE CINCINNATI INSURANCE COMPANY, an Ohio corporation,

Defendant.

Case No.: 3:21-cv-00405-JR

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

(ORAL ARGUMENT REQUESTED)

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I. RULE 7-1 CERTIFICATION

In compliance with L.R. 7-1(a), the parties made a good faith effort through a telephone conference to resolve the dispute and have been unable to do so.

II. RULE 7-2 CERTIFICATION

This brief complies with the applicable word-count limitation under L.R. 7-2(b) because it does not exceed 35 pages, when including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

III. MOTION

In compliance with L.R. 7-1(b) and pursuant to Fed. R. Civ. P. 12(b)(6), defendant The Cincinnati Insurance Company ("Cincinnati") moves to dismiss the complaint filed by plaintiff Papi, LLC dba Papi Chulo's Restaurant ("Plaintiff"), with prejudice, because the complaint fails to state a claim on which relief may be granted.

IV. OVERVIEW AND SUMMARY OF ARGUMENT

Cincinnati issued a commercial property insurance policy to Plaintiff. The policy provides coverage and indemnity of lost business income when, as relevant here, Plaintiff sustains "direct physical loss or damage" to insured property resulting in the suspension of its business operations. The central issue here is the proper interpretation of "direct physical loss or damage" — a prerequisite to coverage.

Plaintiff alleges that "direct physical loss or damage" to property includes temporary, limited loss of use of property. On this theory, Plaintiff alleges that it sustained a "physical loss" to property because the Oregon Governor issued executive orders in response to the COVID-19 pandemic which temporarily suspended its business operations.

Conversely, Cincinnati submits that "direct physical loss or damage" to property requires the insured to show an actual, permanent, physical alteration of property. Plaintiff has not alleged and cannot allege facts showing that the government shutdown orders altered insured property in this manner and therefore cannot allege facts showing "direct physical loss or damage" to property. Cincinnati's position is supported by the policy language, Oregon law, and the overwhelming majority of courts to have considered this issue in the context of COVID-19 government shutdown orders.

As such, Plaintiff cannot establish coverage and this Court should grant Cincinnati's motion to dismiss.

V. STATEMENT OF FACTS

A. Allegations of the Complaint

The Complaint alleges in pertinent part as follows:

- Plaintiff is an Oregon limited liability company that owns and operates a restaurant — Papi Chulo's Restaurant — located at 611 NW 13th Avenue, Portland, Oregon 97209. Compl. ¶ 2.[1]
- Plaintiff purchased an insurance policy from Cincinnati with a policy period of August 6, 2019 to August 6, 2020. Compl. ¶ 7; *see* Ex. B at 1 (the policy's declarations page). The policy promised to pay Plaintiff for losses caused by "direct physical loss or damage to covered property." Compl. ¶ 10.

[1] A true and correct copy of the Complaint filed in this lawsuit is attached as Exhibit A to the accompanying declaration of Lloyd Bernstein. All other exhibits referenced herein are likewise attached to Mr. Bernstein's declaration.

- On March 8, 2020, Oregon Governor Kate Brown issued Executive Order 20-03, declaring a state of emergency in response to the spread of the Coronavirus. Ex. C; *see* Compl. ¶ 12.
- On March 17, 2020, Governor Brown issued Executive Order 20-07, prohibiting restaurants and other similar establishments from offering food or drink for "on-premises consumption." Ex. D, p. 2; *see* Compl. ¶ 12. This executive order permitted such establishments to offer food or drink for "off-premises consumption (*e.g.*, take-out or drive-through) or for delivery" so long as social distancing protocols were maintained. *Ibid.*
- On March 23, 2020, Governor Brown issued Executive Order 20-12, prohibiting the operation of certain businesses such as theaters and malls. Ex. E, p. 4; *see* Compl. ¶ 12. This closure of certain businesses did "not apply to restaurants … or other similar establishments that offer food or drink." *Ibid.*
- These government shutdown orders forced Plaintiff to suspend business operations in whole or in part. Compl. ¶¶ 12-13.
- Plaintiff submitted a claim to Cincinnati for lost business income sustained as a result of the shutdown orders. Compl. ¶¶ 15, 18. Cincinnati denied the claim. Compl. ¶ 23. Cincinnati found that the policy did not provide coverage for Plaintiff's lost business income and related expenses because Plaintiff had not sustained direct physical loss or damage to property. *See* Compl. ¶¶ 23-24, 28.
- Plaintiff challenges this coverage denial in this action. Compl. ¶¶ 44-47, 49-51. Plaintiff alleges that the government shutdown orders caused it to sustain direct physical loss or damage within the meaning of the policy. Compl. ¶¶ 10, 12, 17, 44-

47. Plaintiff alleges that coverage for its lost business income is available under the Policy's Business Income, Extra Expense, and Civil Authority coverages. Compl. ¶¶ 10, 17, 45-47.

- Plaintiff asserts two causes of action: (1) declaratory relief and (2) breach of contract. Compl. ¶¶ 42-52. In its declaratory relief cause of action, Plaintiff seeks a judicial declaration regarding coverage. Compl. ¶ 43. In its breach of contract cause of action, Plaintiff alleges that Cincinnati breached the policy by denying coverage. Compl. ¶¶ 49, 51.
- Plaintiff also seeks certification of a statewide class. Compl. ¶¶ 27-41.[2]

B. The Plaintiff's Policy.

1. The Insurance Policy.

Cincinnati issued Policy No. ECP 054 80 10 to Plaintiff for the policy period of August 6, 2019 to August 6, 2020 (the "Policy").[3] For present purposes, the pertinent forms of the Policy are the Building and Personal Property Coverage Form (FM 101 05 16) (Ex. B, Policy at pp. 23-62) and the Business Income (and Extra Expense) Coverage Form (FA 213 05 16) (Ex. B, Policy at pp. 95-103).

The Building and Personal Property Coverage Form is the main property coverage form. The Business Income (and Extra Expense) Coverage Form provides only business income and extra expense coverage. Using similar language, both forms supply Business Income, Extra

[2] Cincinnati has not separately addressed Plaintiff's "Class Action Allegations" in this motion because the Complaint does not state any claim on which relief may be granted in the first instance. Cincinnati reserves the right to dispute the class action allegations and to dispute class certification in the event this Court denies Cincinnati's motion to dismiss.

[3] A true and correct copy of the Policy, with highlighting and bates numbering added for the Court's ease of reference, is attached hereto as Exhibit B.

Expense, and Civil Authority coverages, but only if the requisite elements for coverage are satisfied. Ex. B, Policy at pp. 40-41, 95-96.

The Business Income coverage provisions state in pertinent part:

> We will pay for the actual loss of "Business Income" and "Rental Value" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss.

Ex. B, Policy at p. 40 (emphasis added); *accord* Policy at p. 95.

The Extra Expense coverage provisions state in pertinent part:

> "We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain … during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.

Ex. B, Policy at p. 41 (emphasis added); *accord* Policy at p. 95.

The Civil Authority coverage provisions state in pertinent part:

> When a Covered Cause of Loss causes damage to property other than Covered Property at a "premises," we will pay for the actual loss of "Business Income" and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the "premises", provided that both of the following apply:
>
> (a) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
>
> (b) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Ex. B, Policy at p. 41 (emphasis added); *accord* Policy at p. 96.

2. The Policy's Direct Physical Loss or Damage to Property Requirement.

The requirement of direct physical loss or damage to property is a core element in property insurance policies like the Policy. This requirement ensures that benefits due under the Policy are

triggered by actual changes in the physical condition of the insured property. This requirement is included in the Policy's Business Income, Extra Expense, and Civil Authority coverages because each of these coverages requires Plaintiff to sustain "direct 'loss' to property."[4] *See* Compl. ¶ 10 (conceding same). The Policy defines "loss" as "accidental physical loss or accidental physical damage." Ex. B, Policy at pp. 60, 103. Accordingly, Plaintiff must establish direct physical loss or damage to property in order to establish coverage in this action.

3. The Policy's Additional Requirements for Civil Authority Coverage.

The Policy's Civil Authority coverage has additional requirements pertinent to this motion. First, Civil Authority coverage requires that the direct loss or damage to property affect property "other than Covered Property," *i.e.*, other than Plaintiff's property. Ex. B, Policy at pp. 41, 96. Second, Civil Authority coverage requires that access to the insured premises be prohibited by action of civil authority. *Ibid.* Third, Civil Authority coverage requires that access to the area immediately surrounding the damaged property be prohibited by civil authority as a result of damage to other property. *Ibid.*

VI. LEGAL STANDARD

A motion to dismiss under Federal Rules of Civil Procedure Rule 12(b)(6) for failure to state a claim upon which relief can be granted tests the legal sufficiency of claims stated in the complaint. *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011). Dismissal on this basis is proper if there is a "lack of a cognizable theory or the absence of sufficient facts alleged under a cognizable legal theory." *Ibid.*

[4] The Policy defines Covered Cause of Loss as "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." Ex. B, Policy at 27, 96.

To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 566, 127 S. Ct. 1955, 1971, 167 L. Ed. 2d 929 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, *supra*, 556 U.S. at 678. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Ibid.*

This action presents questions of contract interpretation, specifically, whether Plaintiff suffered a covered loss under the terms of the Policy. Questions of contract interpretation are questions of law to be decided by a court. *Hoffman Const. Co. of Alaska v. Fred S. James & Co. of Oregon* ("*Hoffman*"), 313 Or. 464, 469 (1992). The questions raised in this action may therefore be resolved in a motion to dismiss. *See Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (noting that Rule 12(b)(6) "authorizes a court to dismiss a claim on the basis of a dispositive issue of law").

In ruling on a motion to dismiss, a court may consider documents incorporated by reference in the complaint without converting the motion to dismiss into a motion for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003); *see also Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (noting that "[a] court may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion"); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (noting that a court may consider "sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"); *see also Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir.

1994) (noting that a court may consider a document, the contents of which are alleged in a complaint, so long as no party disputes its authenticity), *overruled on other grounds* by *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). In this case, the Policy and the Oregon Governor's Executive Orders are referenced in the Complaint and central to Plaintiff's causes of action. *See, e.g.*, Compl. ¶¶ 7, 10, 12-13. Accordingly, the Court may consider these documents without converting this motion into a summary judgment motion.

Where, as here, the Complaint's allegations are inconsistent with the terms of the Policy, the terms of the Policy control. *Ott v. Home Sav. & Loan Ass'n*, 265 F.2d 643, 648 n. 1 (9th Cir. 1958) ("[W]here the allegations of a pleading are inconsistent with the terms of a written contract attached as an exhibit, the terms of the latter, fairly construed, must prevail over the averments differing therefrom"); *see also* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1327 & n. 22 (4th ed.) (Wright & Miller) ("It appears to be well settled that when a disparity exists between the written instrument annexed to the pleadings and the allegations in the pleadings, the terms of the written instrument will control, particularly when it is the instrument being relied upon by the party who made it an exhibit") (collecting cases).

VII. OREGON CONTRACT LAW

Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law. *Hyan v. Hummer* 825 F.3d 1043, 1046 (9th Cir. 2016). As such, this Court must apply Oregon contract law in interpreting the Policy.

Under Oregon contract law, the initial burden of establishing coverage is on the insured. *Employers Ins. of Wausau, A Mut. Co. v. Tektronix, Inc.*, 211 Or. App. 485, 509 (2007). If the insured meets this burden, the insurer has the burden of establishing an exclusion to coverage. *Ibid.* Conversely, if the insured cannot meet this burden, the coverage analysis ends. *Sony Computer Entm't Am. Inc. v. Am. Home Assur. Co.*, 532 F.3d 1007, 1017 (9th Cir. 2008). "The

exclusions are no longer part of the analysis because 'they cannot expand the basic coverage granted in the insuring agreement.'" *Ibid.*

"The primary and governing rule of the construction of insurance contracts is to ascertain the intention of the parties." *Hoffman, supra*, 313 Or. at 469. Courts determine the parties' intention "based on the terms and conditions of the insurance policy," not "evidence extrinsic to the policy itself." *Ibid.*; *see Andres v. Am. Standard Ins. Co. of Wisconsin*, 205 Or. App. 419, 424 (2006). Courts cannot rewrite insurance policies to avoid harsh consequences. *See Headley v. United Fid. Hosp. Assur. Co.*, 235 Or. 302, 306 (1963) (holding that courts cannot rewrite insurance policies); *Wheeler v. White Rock Bottling Co. of Oregon*, 229 Or. 360, 367-68 (1961) (explaining that courts cannot rewrite agreement terms even to avoid harsh consequences).

Oregon law prescribes a three-step process for interpreting disputed terms in an insurance policy. *Coos Cty. Airport Dist. v. Special Districts Ins. Servs. Tr. of Special Districts Ass'n of Oregon*, 291 Or. App. 829, 834 (2018). First, a court examines the disputed term in its particular context, applying any definitions supplied by the policy and otherwise presuming that words carry their plain, ordinary meanings. *See Oregon State Bar Prof'l Liab. Fund v. Benfit*, 225 Or. App. 409, 415 (2009). Second, if a disputed term has no plain meaning, a court examines the disputed term "within the context of the policy as a whole." *Coos, supra*, 291 Or. App. at 834. Third, if a disputed term remains ambiguous, a court "construe[s] the term against the drafter and in favor of the insured." *Ibid.*

According to the Oregon Supreme Court, this analytical framework for interpreting insurance policies requires "more than a showing of two plausible interpretations." *Hoffman, supra*, 313 Or. at 470 ("[G]iven the breadth and flexibility of the English language, the task of suggesting plausible alternative meanings is no challenge to capable counsel."). Competing

plausible interpretations simply necessitates "some interpretive act by the court" to resolve the ambiguity. *Ibid.* Ultimately, "a term is ambiguous in a sense that justifies application of the rule of construction against the insurer *only* if two or more plausible interpretations of that term withstand scrutiny, *i.e.*, continues to be reasonable, after the interpretations are examined in the light of, among other things, the particular context in which that term is used in the policy and the broader context of the policy as a whole." *Ibid.* (emphasis in original).

VIII. ARGUMENT

A. Plaintiff Cannot Establish Business Income or Extra Expense Coverage.

Plaintiff cannot establish Business Income or Extra Expense coverage because Plaintiff cannot allege facts showing the core prerequisite to such coverage — direct physical loss or damage to property.

1. Under Oregon Law, Physical Loss or Damage to Property Requires Physical Change to that Property.

Under Oregon law, no physical loss or damage to property exists when the property remains physically unchanged. *See Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n* ("*Great Northern*"), 793 F. Supp. 259 (D. Or. 1990), *aff'd*, 953 F.2d 1387 (9th Cir. 1992) (unpublished table decision); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.* ("*Columbiaknit*"), 1999 WL 619100 (D. Or. Aug. 4, 1999).

In *Great Northern*, the insured made a claim under its property insurance policy to recover costs for removing asbestos-containing insulation from an insured building. *Great Northern*, *supra*, 793 F. Supp. at 260-61. The insurer rejected the claim, and the insured brought a lawsuit. *Ibid.* The threshold issue faced by the Oregon district court was whether the insured had sustained a "direct physical loss" within the meaning of the policy. *Id.* at 263. The district court found *Wyoming Sawmills, Inc. v. Transportation Ins. Co.* ("*Wyoming Sawmills*"), 282 Or. 401 (1978) to

be "most helpful" in concluding it had not. *Ibid.* In *Wyoming Sawmills*, the Oregon Supreme Court concluded that the word "physical" as used in the policy term "physical injury" could only have been intended to exclude "consequential or intangible damages such as depreciation in value." *Ibid.* By the same reasoning, the district court concluded that "the inclusion of the terms 'direct' and 'physical' could only have been intended to exclude indirect, nonphysical loss." *Ibid.* Because the asbestos-containing insulation of the insured building did not physically alter the building — the building "remained physically intact and undamaged" — the district court concluded that the insured had not suffered a "direct physical loss" within the meaning of the policy. *Ibid.* Indeed, the insured's "only loss [was] economic." *Ibid.*

In *Columbiaknit*, an Oregon district court examined a property insurance policy which, similar to the Policy here, required the insured to sustain "direct physical loss of or damage to the property insured." *Columbiaknit, supra*, 1999 WL 619100, at *4. The district court found this language to be "unambiguous." *Ibid.* The policy covers "only direct, physical loss of or damage to covered property," not "consequential or intangible damage." *Ibid.* Moreover, the district court repeatedly emphasized that the physical loss or damage to property necessary to trigger coverage must be "distinct and demonstrable." *Id.*, at *7. According to the district court, there could be no covered loss "in the absence of distinct and demonstrable physical change to the [insured property] necessitating some remedial action." *Ibid.*

In this case, Plaintiff claims that the Oregon Governor's shutdown orders caused a temporary suspension of its business operations and therefore caused Plaintiff to sustain direct physical loss or damage to property. Compl. ¶¶ 12, 15. This claim is irreconcilable with the Policy language and Oregon case law because a temporary suspension of business operations is not a "distinct and demonstrable physical change" to the property that "necessitat[es] some remedial

action." *Columbiaknit, supra*, 1999 WL 619100, at *7.[5] To the contrary, a temporary suspension of business operations is plainly an intangible and economic harm that the Policy excluded by using the word "physical." *See Great Northern, supra*, 793 F. Supp. at 260-61. Accordingly, Plaintiff cannot show physical loss or damage to property and cannot establish coverage.

Cincinnati anticipates that Plaintiff will cite the following Oregon cases to controvert this interpretation of physical loss or damage: (1) *Largent v. State Farm Fire & Cas. Co.* ("*Largent*"), 116 Or. App. 595 (1992), (2) *Farmers Ins. Co. of Oregon v. Trutanich* ("*Trutanich*"), 123 Or. App. 6 (1993), and (3) *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.* (*"Oregon Shakespeare*"), 2016 WL 3267247 (D. Or. June 7, 2016), *vacated by the parties' stipulation*, 2017 WL 1034203 (D. Or. Mar 6, 2017). None of these cases are apt.

Largent and *Trutanich* involved alleged damage to insured rental properties resulting from the operation of illegal methamphetamine laboratories. In *Largent*, the appellate court addressed the applicability of an exclusion, not compliance with a policy's "physical loss" requirement, because the insurer had acknowledged that an "argument can be made that when chemicals from the production of methamphetamine permeate porous materials such as drapes, carpets, walls, and woodwork, the damage caused thereby constitutes an 'accidental direct physical loss.'" *Largent, supra*, 116 Or. App. at 598. In *Trutanich*, the appellate court concluded "physical loss" was present because a "pervasive" odor from the methamphetamine cooking "persist[ed]" in the rental property. *Trutanich, supra*, 123 Or. App. at 10. According to the *Trutanich* court, this "odor was 'physical,' because it damaged the house." *Ibid*.

[5] Put another way, Plaintiff's claim is untenable because, like the insured building examined in *Great Northern*, its property remained "physically intact and undamaged" before and after the government shutdown orders.

As explained in *Columbiaknit*, *Largent* and *Trutanich* stand for the limited proposition that "physical damage can occur at the molecular level and can be undetectable in a cursory inspection." *Columbiaknit*, 1999 WL 619100, at *6. Importantly, the *Columbiaknit* court ruled that this limited proposition "that physical damage or alteration of property may occur at the microscopic level does not obviate the requirement that physical damage need be distinct and demonstrable. In the methamphetamine odor damage cases, the physical damage is demonstrated by the persistent, pervasive odor. In the absence of such odor, no physical damage could be found." *Id.*, at *7.

In this case, Plaintiff cannot allege facts showing physical alteration or damage to property which is remotely analogous to a pervasive methamphetamine odor that permeated insured property. Indeed, the shutdown orders had no impact on the physical condition of Plaintiff's insured property at all. Accordingly, *Largent* and *Trutanich* do not support Plaintiff's interpretation of the Policy.

Oregon Shakespeare is an unpublished case subsequently vacated by stipulation of the parties and therefore entitled to no weight or consideration here. Nonetheless, because it will likely be raised by Plaintiff, Cincinnati submits that *Oregon Shakespeare* provides no reason to deny this motion. In that case, wildfire smoke permeated the interior of the insured's open-air theater and caused the insured to cancel performances and lose business income. *Oregon Shakespeare*, 2016 WL 3267247, at *1. The insured claimed that it sustained "physical loss or damage to property" because "the wildfire smoke caused injury or harm to the interior of the theater, which includes the air within the theater." *Id.*, at *5. The district court concluded that the insured "sustained 'physical loss or damage to property' when the wildfire smoke infiltrated the theater and rendered it unusable for its intended purpose." *Id.*, at *7, *9.

It is important to recognize that the *Oregon Shakespeare* court discussed *Columbiaknit* and *Great Northern* and expressed no disagreement with their interpretations of physical loss or damage. *Id.*, at *8-*9. In the *Oregon Shakespeare* court's view, the theater filled with smoke was analogous to the home infiltrated by a methamphetamine odor in *Trutanich* which had been "physically damaged by the odor that persisted in it" (*id.*, at *8-*9), but distinguishable from the asbestos-containing insulation examined in *Great Northern* because "the smoke particles were present in the air, not trapped, harmless in the walls" (*id.*, at *9). While Cincinnati does not agree with the reasoning and conclusions rendered in *Oregon Shakespeare*, the reasons for this disagreement are immaterial here because *Oregon Shakespeare* is easily distinguishable from the case at bar.

The most prominent distinction is that the purported physical loss in *Oregon Shakespeare* was based on the alleged physical contamination of the insured premises, namely, wildfire smoke which permeated the theater's interior. *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, 497 F. Supp. 3d 1203, 1209 (S.D. Ala. 2020) (distinguishing *Oregon Shakespeare* on this basis); *Colgan v. Sentinel Ins. Co., Ltd.*, 2021 WL 472964, at *3, n. 4 (N.D. Cal. Jan. 26, 2021) (same). The *Oregon Shakespeare* court makes this conclusion plain by concluding physical loss or damage to property was present "when the wildfire smoke infiltrated the theater and rendered it unusable for its intended purpose." *Oregon Shakespeare*, 2016 WL 3267247, at *9 (emphasis added). Because Plaintiff's alleged injury is based on the government shutdown orders, and the actions it took in response thereto, but not any physical changes to Plaintiff's insured property, any comparison to *Oregon Shakespeare* is simply wrong.

2. Consistent with Oregon Law, Other Jurisdictions Have Long Held — Prior to the COVID-19 Pandemic — that Direct Physical Loss or Damage to Property Requires Physical Alteration of Property.

For some time, numerous courts have held that direct physical loss requires actual, tangible, permanent, physical alteration of property. *See, e.g.*, *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x. 868 (11th Cir. 2020); *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.* ("*Source Food*"), 465 F.3d 834 (8th Cir. 2006); *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.* ("*Pentair*"), 400 F.3d 613 (8th Cir. 2005); *City of Burlington v. Indem. Ins. Co. of N. Am.*, 332 F.3d 38, 44 (2nd Cir. 2003) (explaining that the requirement of direct physical loss "strongly implies that there was an initial satisfactory state that was changed . . . into an unsatisfactory state"); *NE. Georgia Heart Ctr., P.C. v. Phoenix Ins. Co.*, 2014 WL 12480022, at *5 (N.D. Ga. May 23, 2014) ("The court will not expand 'direct physical loss' to include loss-of-use damages when the property has not been physically impacted in some way. To do so would be equivalent to erasing the words 'direct' and 'physical' from the policy."); *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.* ("*Newman*"), 17 F. Supp. 3d 323, 330 (S.D. N.Y. 2014); *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.* ("*MRI Healthcare*"), 187 Cal. App. 4th 766 (2010); *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 556-57 (2003), *as modified on denial of reh'g* (Jan. 7, 2004); 10A Couch on Ins. § 148:46 ("The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.").

For example, in *Source Food*, the insured was a U.S.-based supplier of beef products that sourced its beef production from a single supplier in Canada. *Source Food*, *supra*, 465 F.3d at 835. The U.S. government imposed an embargo prohibiting the importation of Canadian beef

and beef product after a cow in Canada tested positive for mad cow disease. *Ibid.* Due to the embargo, the insured lost a truckload of uncontaminated beef product when its Canadian supplier's truck could not cross the border into the United States. *Ibid.* As a result, the insured could not fulfill its orders and lost its most valuable customer. *Ibid.*

To recover lost business income under its insurance policy, the insured had to show "direct physical loss to property." To this end, the insured argued that "the closing of the border caused direct physical loss to its beef product because the beef product was treated as though it were physically contaminated by mad cow disease and lost its function." *Id.* at 836. The Eighth Circuit Court of Appeals rejected this argument: "Although [the insured's] beef product in the truck could not be transported to the United States due to the closing of the border to Canadian beef products, the beef product on the truck was not—as [the insured] concedes—physically contaminated or damaged in any manner. To characterize [the insured's] inability to transport its truckload of beef product across the border and sell the beef product in the United States as direct physical loss to property would render the word 'physical' meaningless." *Id.* at 838.

In *Newman,* the insured law firm lost business income after a widespread power outage left its offices without electricity for several days. *Newman*, *supra,* 17 F. Supp. 3d at 325-26. Similar to the Policy in this case, the law firm's property insurance policy required the law firm to show "direct physical loss or damage by a covered peril to property." *Id.* at 326. The district court concluded that the policy's "direct physical loss or damage" requirement "unambiguously[] requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage." *Id.* at 331. The district court based this conclusion on the policy terms' plain meaning: "The words 'direct' and 'physical,' which modify the phrase 'loss and damage,' ordinarily connote actual, demonstrable harm of some form to the premises itself,

rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure." *Ibid.* Pursuant to this interpretation, the district court held that the law firm had not sustained physical loss or damage to property as a result of its inability to access its offices or the utility provider's decision to shut off power to its offices. *Ibid.*

In *MRI Healthcare*, the California Court of Appeal rejected an insured's showing of "physical loss" predicated on an MRI machine's inability to "ramp up." *MRI Healthcare, supra,* 187 Cal. App. 4th at 769. Citing the Couch treatise, the appellate court concluded: "For loss to be covered, there must be a 'distinct, demonstrable, physical alteration' of the property." *Id.* at 779. Put another way, "some *external force* must have acted upon the insured property to cause a *physical change* in the condition of the property, i.e., it must have been 'damaged' within the common understanding of that term." *Id.* at 780 (emphasis in original). The appellate court found that such physical alteration or damage was not present because the MRI machine's defect "emanated from the inherent nature of the machine itself rather than actual physical 'damage.'" *Ibid.*

In this case, the shutdown order did not cause any physical alteration of property, let alone a distinct and demonstrable one. Like the embargo examined in *Source Foods* or the power outage in *Newman,* the shutdown orders may have prevented Plaintiff from conducting business as usual but the orders did not physically contaminate or damage any insured property. As such, Plaintiff cannot show physical loss or damage to property and cannot establish coverage under its property policy.

In truth, Plaintiff's policy interpretation conflates loss of use with "physical loss." As explained by the Eighth Circuit in *Pentair,* loss of use or function is relevant in determining the

amount of loss **only after an insured first establishes direct physical loss or damage to property**. *Pentair*, *supra*, 400 F.3d at 616. If physical loss or damage were established "*whenever* property cannot be used for its intended purpose" (*ibid.* (emphasis in original)), then the term "physical" would have no meaning. *See Source Food*, *supra*, 465 F.3d at 838.

This longstanding, pre-pandemic national body of case law is relevant here because it is consistent with established Oregon case law on the same key points. As shall be explained in the section that follows, courts throughout the country have overwhelmingly concluded that there is no coverage for COVID-19 business interruption claims because the Coronavirus and the related government shutdown orders do not physically alter or change property. The outcome should be no different here in Oregon.

3. The Overwhelming Majority of COVID-19 BI Cases Have Ruled that Direct Physical Loss or Damage to Property Requires Physical Alteration of Property.

As demonstrated by the hundreds of cases cited in this brief's Appendix, "the overwhelming majority of cases to consider business income claims stemming from COVID-19 with [the same or] similar policy language hold that 'direct physical loss or damage' to property requires some showing of actual or tangible harm to or intrusion on the property itself." *Promotional Headwear Int'l v. Cincinnati Ins. Co.* ("*Promotional Headwear*"), 2020 WL 7078735 (D. Kan. Dec. 3, 2020). Because the government shutdown orders do not physically alter or harm property, "[t]he overwhelming majority of courts have concluded that neither COVID-19 nor the governmental orders associated with it cause or constitute property loss or damage for purposes of insurance coverage." *Out W. Rest. Grp. Inc. v. Affiliated FM Ins. Co.*, 2021 WL 1056627 (N.D. Cal. Mar. 19, 2021).

In *Promotional Headwear*, the Kansas district court examined the physical loss or damage requirement in an identical insurance policy issued by Cincinnati. Considering the plain meaning

of the pertinent terms in context and in the policy as a whole, the court concluded that "the words 'direct' and 'physical' limit the words 'loss' and 'damage' and unambiguously require that the loss be directly tied to a material alteration to the property itself or an intrusion onto the insured property." *Id.*, at *7. The court held that the insured could not establish coverage resulting from government shutdown orders issued in response to the spread of COVID-19 because the orders caused a "temporary loss of use, not a direct, physical change or intrusion onto the property." *Ibid.*

In *Sandy Point*,[6] the Illinois district court found that the "direct physical loss" requirement in Cincinnati's property insurance policy "unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage. The words 'direct' and 'physical,' which modify the word 'loss,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure." *Id.* at 693. The court rejected the insured's coverage claim because the insured "simply cannot show any such loss as a result of [its] inability to access its own office." *Ibid.*

In *10E*,[7] the California district court found that "losses from inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase." *Id.*, at *4. Instead, "physical loss or damage occurs only when property undergoes a 'distinct, demonstrable, physical alteration.'" *Ibid.* Pursuant to this interpretation, the court rejected the insured's loss-of-use arguments predicated on in-person dining restrictions

[6] *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690, 693 (N.D. Ill. 2020), *recons. den.*, 2021 WL 83758 (N.D. Ill. Jan 10, 2021).

[7] *10E, LLC v. Travelers Indem. Co. of Connecticut*, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020).

because those restrictions only plausibly "interfered with the use or value of its property" but did not cause "direct physical loss or damage." *Id.*, at *4-*5.

In *Nguyen*,[8] the Washington district court granted insurers' dispositive motions in a consolidated COVID-19 business interruption action brought by "hundreds of businesses from across the Western Washington State." *Id.*, at *1. Critically, *Nguyen* applied Washington state law to its analysis, but not before first conducting a choice of law analysis and determining that the outcome of the case would have been no different under Oregon law. *Id.*, at *21. Aligned with "the overwhelming consensus that has formed," the court concluded that "COVID-19 does not cause the physical loss or damage to property required as a condition precedent to trigger coverage in all the relevant policies." *Id.*, at *1. In reaching this conclusion, the court rejected the insureds' argument that "direct physical loss" includes "the loss of the ability to use property." *Id.*, at *10. According to the court, "[i]n order to trigger coverage under a direct physical loss theory, an outside peril must cause the inability to interact with the property because of an alteration to its physical status. COVID-19, and more specifically the Governor's Proclamations, may have limited the uses of the property by preventing certain indoor activities previously conducted on the premises, but they did not cause dispossession of the buildings, chairs, dental tools, etc. As other courts have adeptly summarized, the 'property did not change. The world around it did.'" *Id.*, at *11.

In *Michael Cetta*,[9] the New York district court found that "the plain meaning of the phrase 'direct physical loss of or damage to' [] connotes a negative alteration in the tangible condition of property." *Id.*, at *6. The district court provided an apt analogy:

[8] *Nguyen, et al. v. Travelers Cas. Ins. Co. of Am., et al.*, 2021 WL 2184878 (W.D. Wash. May 28, 2021).

[9] *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405 (S.D. N.Y. Dec. 11, 2020).

> The idea that "loss of use" does not constitute a "direct physical loss of or damage to" property resonates in ordinary experience outside the context of insurance coverage. Say, for example, a teenager broke curfew, and his parents punished him by taking away the keys to his car. The teen undoubtedly lost the ability to use the car. However, we would not say that there had been a "direct physical loss of or damage to" the car. The teenager was precluded from driving it. But the car's physical condition remained unchanged, and its presence likely remained at the residence. Similarly, imagine a fisherman visits a public pond each day to cast his line. One morning he arrived and found that the pond was closed for fishing because a nearby town was hosting its annual swim race. Did the fisherman lose the use of the pond for the day? Yes. He could not enjoy the premises for his intended use (*i.e.*, to fish). But could anyone reasonably conclude there was a "direct physical loss of or damage to" the pond because he could not fish? No. The condition of the pond was not altered physically.

Ibid. Pursuant to this interpretation, the court rejected the insured's argument that "its inability to fully use its restaurant satisfies the loss or damage to property prerequisite of the business income coverage provision." *Id.*, at *5.

In *Henry's*,[10] the Georgia district court found that "loss of" and "damage to" property require "a change in the insured property resulting from an external event rendering the insured property, initially in a satisfactory condition, unsatisfactory." *Id.*, at *4-*5. The court held that the insured suffered no physical loss to property because the government shutdown orders "did not represent an external event that changed the property. Every physical element of the dining rooms — the floors, the ceilings, [etc.] — underwent no physical change as a result of the Order." *Id.*, at *5. In addition, the court rejected the insured's claim that this interpretation of physical loss rendered the words "damage to" surplusage. *Ibid.* "These definitions can support two meanings — that loss is the 'disappearance of value' or 'the act of losing possession' by complete destruction, while damage is any other injury requiring repair. As an illustrative example, a

[10] *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 2020 WL 5938755 (N.D. Ga. Oct. 6, 2020).

tornado that destroys the entirety of the restaurant results in a 'loss of' the restaurant, while a tree falling on part of the kitchen would represent 'damage to' the restaurant." *Ibid.*; *see also Michael Cetta, supra,* 2020 WL 7321405, at *9 (noting that "loss" means "the complete destruction of property," whereas "damage" contemplates "a lesser injury").

In *Real Hospitality,*[11] the Mississippi district court sensibly observed that the insured had entered into "a commercial property policy, not a stand-alone business interruption policy" under which "[the insured's] *operations* are not what is insured — the building and the personal property in or on the building are." *Id.*, at *8. The district court further explained:

> One does not buy simply "business interruption insurance." Policyholders are not insuring against "all risks" to their income—they are insuring against "all risks" to their property—that is, the building and its contents…. Based on the definition of Covered Property, should a covered peril befall the building or personal property located in or on the building, the insured can make a claim. As a subset of this coverage, should such a loss of or damage to the building or any personal property cause a disruption to a policyholder's business such that it suspends operations, then there is coverage for that income loss during the time of repair, rebuilding or replacement in order to get, for lack of a better phrase, "back to normal."

Id. at n. 10. Similar to *Henry*'s, the court found that "physical loss or damage" to property means "the property is either physically lost, *i.e.,* the insured suffers a permanent dispossession of the property, or it is damaged." *Id.*, at *6. Because the insured failed to allege damage to or permanent dispossession of insured property, the court rejected the insured's coverage argument. *Ibid.*

[11] *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 2020 WL 6503405, at *5 (S.D. Miss. Nov 4, 2020).

In *ILIOS*,[12] the Texas district court found that "accidental direct physical loss is an unambiguous term that requires a 'distinct, demonstrable, physical alteration' of [the insured's] property to trigger coverage." *Id.*, at *7. Pursuant to this interpretation, the court rejected the insured's argument that "its inability to use its property constitutes a direct physical loss" because "the civil authority orders did not cause any tangible alteration to Plaintiff's property; rather, Plaintiff was temporarily precluded from operating its business while the orders were in effect." *Ibid.* Furthermore, the district court pointed out that the shutdown orders did not cause the insured to suffer a complete physical dispossession of its property because the insured "had complete access to the premises even after the civil authority orders were issued." *Ibid.*

More recently, in *Image Dental*,[13] the Illinois district court explained why claims like the one involved here are not covered: "A 'physical loss' of property does not mean a mere inability to run a business." *Id.*, at *5. The district court explained that "[n]ot just any loss or damage will do. It must be a 'physical' loss or damage…. The nature of the loss must be *physical*, not intangible immaterial economic, or regulatory." *Id.*, at *7-*8. The insured in *Image Dental*, like Plaintiff here, failed to plead any physical loss or damage to property: "Image Dental may have shut its doors, but it does not allege that it suffered so much as chipped paint." *Id.*, at *9.

Apart from advancing this interpretation of the "physical loss or damage" requirement, many courts across the nation have also concluded that a "loss of use" interpretation of this requirement is unworkable. *See, e.g., Plan Check Downtown III, LLC v. Amguard Ins. Co.*,

[12] *ILIOS Production Design, LLC v. Cincinnati Ins. Co., Inc.*, 2021 WL 1381148 (W.D. Tex. Apr. 12, 2021) (Magistrate Recommendations and Report).

[13] *Image Dental, LLC v. Citizens Ins. Co. of Am.*, 2021 WL 2399988 (N.D. Ill. June 11, 2021).

2020 WL 5742712, at *6 and n. 6 (C.D. Cal. Sep. 10, 2020); *Henry's*, *supra*, 2020 WL 5938755, at *5; *Hillcrest Optical, Inc. v. Cont'l Cas. Co*., 2020 WL 6163142, at *7 (S.D. Ala. Oct. 21, 2020). As one district court has lamented: "[The insured's] interpretation is not a reasonable one because it would be a sweeping expansion of insurance coverage without any manageable bounds." *Plan Check, supra*, 2020 WL 5742712, at *6 and n .6. For example, such an interpretation "would potentially make an insurer liable for the negative effects of operational changes resulting from any regulation or executive decree, such as a reduction in a space's maximum occupancy." *Henry's*, *supra*, 2020 WL 5938755, at *5.

Consistent with the Policy language and this majority view of coverage for business interruptions caused by COVID-19 government shutdown orders, Cincinnati denied Plaintiff's lost business income claim because Plaintiff did not sustain direct physical loss or damage to property. In keeping with the Policy language and this case law, the Court must grant this motion to dismiss because Plaintiff cannot allege facts to support this core coverage prerequisite.

4. Construing the Policy Language as a Whole Further Confirms that Physical Loss or Damage Requires Physical Alteration of Property.

As discussed *ante*, Oregon contract law requires a court to examine a disputed term within the context of the policy as a whole prior to declaring a term ambiguous. *Coos*, *supra*, 291 Or. App. at 834. In doing so, "[a]ll parts and clauses of the policy must be construed to determine if and how far one clause is modified, limited, or controlled by others." *Leach v. Scottsdale Indemn. Co.*, 261 Or. App. 234, 241 (2014) (internal quotations omitted). An interpretation of the policy that disregards any provision of the policy is unreasonable as a matter of law. *Id.* at 242.

An additional reason for rejecting Plaintiff's interpretation of the physical loss or damage requirement is that it fails to account for the Policy's "period of restoration." The Policy's "period of restoration" is the length of time for which business income and extra expenses are owed if

Business Income and Extra Expense coverages are triggered. *See* Ex. B, Policy at pp. 60-61, 103. The Policy defines the "period of restoration" by its beginning and end dates: the "period of restoration" begins "at the time of direct 'loss'" and ends "on the earlier of (1) The date when the property at the 'premises' should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) The date when business is resumed at a new permanent location." *Ibid.*

Because the Policy's definition of "period of restoration" ends when the insured property is "repaired, rebuilt, or replaced" or when the insured's business is "resumed at a new permanent location," the "loss" triggering this "period of restoration" necessarily must be an alteration or damage to property which requires the insured premises be "repaired, rebuilt or replaced" or the insured's business be "resumed at a new permanent location." *See, e.g., Newman, supra,* 17 F. Supp. 3d at 332 (explaining that "repair" and "replace" in the period of restoration clause "contemplate physical damage to the insured premises as opposed to loss of use of it"); *Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp.*, 126 N.C. App. 698, 702 (1997) (explaining that business interruption coverage applies only to "those losses requiring repair, rebuilding, or replacement"); *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 287 (S.D. N.Y. 2005) (explaining that the terms "rebuild," "repair" and "replace" strongly indicate that the loss contemplated is "physical in nature"); *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 751 N.Y. S. 2d 4, 8 (2002) (explaining that, absent a physical damage requirement, a provision limiting coverage to the time necessary to "rebuild, repair, or replace" would "be meaningless").

The government shutdown orders in question do not require the insured property to be repaired, rebuilt, or replaced or the insured's business to be permanently relocated. In fact, Executive Order 20-07 makes it clear that Plaintiff may continue to operate its business at the same locations on a take-out, delivery, and drive-through basis. *See* Ex. D, p. 2. As such, Plaintiff's

interpretation of the "physical loss or damage" requirement is inconsistent with the Policy's "period of restoration" definition.

COVID-19 business interruption case law confirms this conclusion.

In *Ceres,*[14] an Ohio district court examined the ordinary meaning of the phrase "physical loss or damage to" property and concluded that the phrase required a "tangible loss of or harm to the insured property." *Id.*, at *5. The district court found further support for this interpretation in the policy's definition of "period of restoration." *Ibid.* "Reading 'direct physical loss of or damage to' property to include loss of intended use, as [the insured] urges, would render the Period of Restoration nonsensical or meaningless because no repair, rebuilding, or replacement of the covered property will occur. Under basic principles of contract interpretation, the Court may not give this language such a reading. A Period of Restoration ending with repair, rebuilding, or replacement makes sense following and contemplates a material (physical) loss, not a loss of use with no impact to the property's structure." *Ibid.*

In *Tria,*[15] the Pennsylvania district court examined the ordinary meaning of the phrase "direct physical loss of" property and concluded that the phrase "requires that the property be rendered unusable by some physical force… such as where a fire burns down an insured restaurant…." *Id.*, at *4. Assuming *arguendo* that this phrase was ambiguous when considered in isolation, the district court found the insured's "loss of use" theory was untenable "when the phrase is considered in its broader context." *Id.*, at *5. The district court cited the Policy's definition of the "period of restoration" and found the terms "repair, "rebuild," and "replace" "strongly suggest

[14] *Ceres Enterprises, LLC v. Travelers Ins. Co.*, 2021 WL 634982 (N.D. Ohio Feb. 18, 2021)

[15] *Tria WS LLC v. Am. Auto. Ins. Co.*, 2021 WL 1193370 (E.D. Pa. Mar. 30, 2021).

that the insured property must have some negative change in its physical condition rendering the property unsatisfactory and requiring restoration." *Ibid.*

In *Henry's*, the district court cited the "period of restoration" as further evidence that "loss of" means total destruction whereas "damage to" means some amount of harm or injury to property. *Henry's*, *supra*, 2020 WL 5938755, at *6.

As demonstrated by this case law, Plaintiff's interpretation of the Policy is untenable because the Policy's "period of restoration" requires some negative change in the physical condition of the property which does not occur when government shutdown orders cause a temporary suspension of business operations. Moreover, Plaintiff's interpretation of the Policy makes the Policy's definition of "period of restoration" superfluous and impossible to determine. At bottom, the only interpretation of the Policy's "physical loss or damage" requirement that takes into account all its provisions is one that requires the insured to sustain distinct, demonstrable, physical alteration of the property necessitating at least some repairs.

5. Changes Adopted by Plaintiff to Reopen Business are Irrelevant to Coverage.

Plaintiff alleges in Paragraph 13 of the Complaint that "[w]hen Plaintiff and other similarly situated businesses were permitted to re-open, they could only do so with significant alterations to their premises and business models at great cost, including, among other things, loss of use of space, installation of barriers, increased cleaning and sanitation protocols, changing business hours and employee hours, decreased customer traffic, and generally more expensive operations in order to comply with the Orders." Plaintiff fails to make clear in the Complaint how these changes allegedly adopted to re-open its business pertain to coverage under the Policy. Case law makes clear that these changes are irrelevant.

In *Café La Trova*,[16] the Florida district court rejected the insured's argument that "damage caused by moving furniture and installing partitions is sufficient to trigger coverage for its business income losses" because the insured's policy required the purported property damage cause the suspension of business operations. *Id.*, at *9. The insured could not satisfy this causation requirement. *Ibid.* "For instance, [the insured] does not argue it closed its restaurant and bar because of broken chairs, scratched floors, and holes drilled for installing partitions. [The insured] instead argues its economic losses were caused by the COVID-19 pandemic and related government orders." *Ibid*.

The *Café La Trova* court also rejected the insured's argument that "rearranging of furniture and installation of partitions" marked the end of the "period of restoration" because such measures "cannot reasonably be described as repairing, rebuilding, or replacing." *Ibid.* (internal quotations omitted); *see also Indep. Rest. Grp. v. Certain Underwriters at Lloyd's, London*, 2021 WL 131339 (E.D. Pa. Jan. 14, 2021) (same).

Finally, the *Café La Trova* court observed that these purported changes cannot logically serve as both "the physical damage" necessary to trigger coverage and the "repairs" undertaken to remediate that damage. "Remarkably, under [the insured']s logic, the 'repair[s]' it undertook while its operations were suspended caused the very 'damage' it now asserts is sufficient to invoke coverage in the first instance under the Business Income provision. Such a construction is nonsensical." *Ibid.*; *see also L&J Mattson's Co. v. Cincinnati Ins. Co., Inc.*, 2021 WL 1688153, at n. 3 (N.D. Ill. Apr. 29, 2021) (finding that "additions such as Plexiglas[s], hand sanitizer, air purifiers or improved HVAC systems do not constitute repairs to damaged property where a plaintiff has not alleged damage to property").

[16] *Café La Trova LLC v. Aspen Specialty Ins. Co.*, 2021 WL 602585 (S.D. Fla. Feb. 16, 2021).

In *Geragos*,[17] the California district court found that installation of sanitizing stations and rearranging office spaces at the premises might be "physical *changes* to the property" but the insured could not reasonably explain how the property was "physically *damaged* in any way" and therefore could not establish coverage on this basis. *Id.*, at *5 (emphasis in original).

In this case, Plaintiff cannot show physical loss or damage to property based on the changes it allegedly made in order to reopen for business. Compl. ¶ 13.

First, most of these changes — loss of use of space, increased cleaning and sanitation protocols, changing business hours and employee hours, decreased customer traffic, and more expensive operations — are not physical alterations of property and therefore would clearly not qualify as physical loss or damage to property.

Second, like in *Café La Trova*, none of these alleged changes satisfy the causation requirement contained within the Policy's Business Income and Extra Expense coverages. Ex. B, Policy at p. 40 ("The 'suspension' must be caused by direct 'loss' to property at a 'premises'…."); *accord* Ex. B, Policy at 95. As Plaintiff concedes (Compl. ¶ 12), the Oregon Governor's shutdown orders (not these alleged changes) caused the purported suspension of its business.

Third, this coverage interpretation makes the Policy's definition of the "period of restoration" nonsensical. Under this interpretation, the "period of restoration" commences when the alleged changes were made or, in other words, when Plaintiff's business has reopened and is no longer losing business income. Further, under this interpretation, the "period of restoration" ends at no conceivable point in time because these alleged changes necessitate no repairs, rebuilding, or replacement of property or a permanent relocation of the business.

[17] *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, 2020 WL 6156584 (C.D. Cal. Oct. 19, 2020).

Fourth, the physical loss or damage to property must be "direct." Ex. B, Policy at pp. 40, 95. "Direct" means "proximate" or "immediate," as distinguished from "remote" or "incidental." *See Columbiaknit, supra*, 1999 WL 619100, at *4; *Fred Meyer, Inc. v. Cent. Mut. Ins. Co.*, 235 F. Supp. 540, 543 (D. Or. 1964). Plaintiff cannot plausibly allege that the Oregon Governor's shutdown orders proximately or immediately caused the installation of barriers at the premises. Plaintiff decided, of its own volition, to purchase and install these barriers.

Likewise, Plaintiff cannot show that these alleged changes constitute "restoration" because these changes "cannot reasonably be described as repairing, rebuilding, or replacing." *Café La Trova, supra*, 2021 WL 602585, at *9 (internal quotations omitted). For the changes to be repairs, Plaintiff must first show property damage. *See L&J Mattson's, supra*, 2021 WL 1688153, at n. 3; *Tria, supra*, 2021 WL 1193370, at n. 5 (rejecting argument that installation of partitions and the like are repairs: "In ordinary parlance, we repair what is broken, and [the insureds] have not alleged any unsatisfactory condition on the insured properties in need of fixing.").

B. Plaintiff Cannot Establish Civil Authority Coverage.

To allege a covered claim under the Policy's Civil Authority coverage, Plaintiff must establish, among other things, (1) direct physical loss or damage to property other than insured property, (2) access to the insured premises was prohibited by a civil authority, and (3) access to the area immediately surrounding the damaged property was prohibited by a civil authority as a result of the damage.[18] *See* Ex. B, Policy at pp. 41, 96.

1. Plaintiff Cannot Establish Direct Physical Loss or Damage to Other Property.

Direct physical loss or damage to property other than Plaintiff's property is necessary for

[18] There are additional requirements for the Civil Authority coverage which are not germane to this motion and therefore not discussed here. Cincinnati does not waive the right to raise those requirements at a later juncture.

Civil Authority coverage. *See Not Home Alone, Inc. v. Philadelphia Indem. Ins. Co.*, 2011 WL 13214381, at *6 (E.D. Tex. Mar. 30, 2011). Just as the government shutdown orders do not cause direct physical loss or damage to Plaintiff's insured property, those orders do not cause direct physical loss or damage to other property. Because there was no direct physical loss or damage to *any* property, the Policy's Civil Authority coverage does not apply.

2. Plaintiff Cannot Establish that Access to the Insured Premises was Prohibited by a Civil Authority.

While Plaintiff alleges that the shutdown orders prohibited access to the insured premises (Compl. ¶¶ 12-13), Plaintiff alleges no facts showing this conclusory allegation to be remotely plausible. Executive Order 20-07 has not mandated the closure of all restaurants for the remainder of the COVID-19 pandemic. Executive Order 20-07 permits restaurants to continue offering food and drinks for off-premises consumption, *e.g.*, via take-out, drive-through, or delivery. Ex. D, p. 2. In other words, this executive order permits customers or delivery services to access the premises to pick up food and necessarily permits Plaintiff's employees to be on premises to prepare customers' orders. Because Plaintiff has not and cannot cite a civil authority that prohibited access to its premises, Plaintiff cannot establish Civil Authority coverage.

Indeed, for Civil Authority coverage to apply, "access to the property must actually be specifically prohibited by civil order, not just made more difficult or less desirable." 11A Couch on Ins. § 167:15. For example, in *Southern Hospitality, Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137 (10th Cir. 2004), the insured managed a number of hotels throughout the country. *Id.* at 1138. The insured's profits plummeted when the FAA grounded all flights in the United States following 9/11. *Ibid.* The Tenth Circuit Court of Appeals held that the insured was not entitled to civil authority coverage because the civil authority orders in question prohibited flights, not access to the insured's hotels. *Id.* at 1139-40.

Similarly, in *Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, 2010 WL 2696782, at *4 (M.D. Pa. July 6, 2010), the Pennsylvania Department of Transportation initiated bridge repairs which hindered or dissuaded many customers from visiting an insured's ski resort. The district court found no civil authority coverage available to the insured because the transportation department did not force the ski resort to close and the bridge repairs did not cause "a complete inability to access the premises." *See also, e.g., Syufy Enterprises v. Home Ins. Co. of Indiana*, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995) (riot-related curfew prevented insured's customers from being outside but did not prohibit access to the insured's premises); *Bros., Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611, 614 (D.C. 1970) (same); *Schultz Furriers, Inc. v Travelers Cas. Ins. Co. of Am.*, 2015 WL 13547667, at *6 (N.J. Super. L. July 24, 2015) (despite serious traffic issues in lower Manhattan following Superstorm Sandy, it was not "completely impossible for the public to access the [insured] store"); *Goldstein v Trumbull Ins. Co.*, 2016 WL 1324197, at *12 (N.Y. Sup. Ct. Apr. 05, 2016); *TMC Stores, Inc. v. Federated Mut. Ins. Co.*, 2005 WL 1331700, at *4 (Minn. Ct. App. June 7, 2005).

Courts have reached the same conclusion with respect to shutdown orders issued by the government to reduce the transmission of COVID-19. For example, in *Pappy's*,[19] COVID-19 shutdown orders temporarily prevented the insured from operating its barbershop. The district court held that the insured was not entitled to civil authority coverage because the orders did not prohibit access to the insured premises:

> [T]he complaint does not allege that any COVID-19 Civil Authority Orders prohibited Plaintiffs from access to their business premises. Rather, it only alleges that Plaintiffs were prohibited from operating their businesses at their premises. Plaintiffs fail to make any distinction

[19] *Pappy's Barber Shops, Inc. et al. v. Farmers Group, Inc. et al.*, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020).

> between their place of business (*i.e.*, the physical premises where they operate their business), and the business itself, but this distinction is relevant to coverage under the Policy. The Policy insures property, in this case Plaintiffs' property and physical places of business, and not Plaintiff's business itself. To that end, the civil authority coverage provision only provides coverage to the extent that access to Plaintiff's physical premises is prohibited, and not if Plaintiff's are simply prohibited from operating their business. The government orders alleged in the complaint prohibit the operation of Plaintiff's business; they do not prohibit access to Plaintiffs' place of business.

Pappy's, *supra*, 2020 WL 5500221, at *6.

In short, because the executive orders in question did not prohibit access to Plaintiff's place of business, Civil Authority coverage does not apply.

3. Plaintiff Cannot Establish that as a Result of Damage to Property Other than the Insured Property a Civil Authority Prohibited Access to the Area Immediately Surrounding the Damaged Property.

Civil Authority coverage also requires the insured to show that as a result of damage to property other than property at the insured's premises, access to the area immediately surrounding the damaged property was prohibited by a civil authority as a result of the damage. *See, e.g.*, *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686 (5th Cir. 2011) (holding that civil authority coverage requires a "causal link between prior property damage and the civil authority order"). This causal connection between the civil authority action and property damage has been recognized and upheld by many courts throughout the nation.

For example, in *Syufy*, the insured theater owner had to suspend business operations as a result of curfew orders imposed by California civil authorities following the Rodney King verdict. *Id.*, at *1. The district court found the insured was not entitled to civil authority coverage because the curfew orders were not imposed "because of damage to adjacent property" but instead "to

prevent 'potential' looting, rioting, and resulting property damage." *Id.*, at *2-*3; *see also United Air Lines, Inc. v. Ins. Co. of State of Pennsylvania.*, 439 F.3d 128, 129, 134 (2d Cir. 2006) (finding no civil authority coverage where the government's order to halt airport operations following the September 11 terrorist attacks was as a result of "fears of future attacks" and not physical damage to an adjacent property); *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, 2008 WL 450012, at *10 (S.D. Tex. Feb. 15, 2008) (finding no civil authority coverage where the evacuation order "was issued due to the anticipated threat of damage to the county and not due to property damage that had occurred").

In this case, the Oregon Governor's executive orders were not issued as a result of any property damage to adjacent property. The executive orders were issued to protect public health. Executive Orders 20-07 and 20-12 explicitly state that the orders' purpose is to "reduce person-to-person interaction with the goal of restricting transmission." Ex. D, p. 2; Ex. E, p. 2. Moreover, the orders are designed "to slow the spread of COVID-19, to protect Oregonians who are at highest risk for contracting the disease, and to help avoid overwhelming local and regional healthcare capacity." *Ibid.*

Plaintiff cannot allege facts showing that these executive orders were issued as the result of any property damage. As noted above, Plaintiff's "loss of use" allegations simply do not suffice to satisfy its threshold burden. As such, Plaintiff cannot establish the property damage prerequisite to Civil Authority coverage.

IX. CONCLUSION

There is no coverage because the Coronavirus and the related government shutdown orders do not cause direct physical loss or damage to property. This is supported by an overwhelming number of cases both nationally and in the Ninth Circuit, including cases applying Cincinnati's policy language. Furthermore, courts throughout the country have roundly rejected attempts to

premise coverage on loss of use alone. For that and the other reasons discussed above, Plaintiff has not alleged a claim on which relief can be granted.

As such, Cincinnati respectfully requests that this Court grant its motion and dismiss the Complaint with prejudice.

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BULLIVANT HOUSER BAILEY PC

By s/ Lloyd Bernstein

Lloyd Bernstein, OSB #002030
Richard Williams, OSB #144638
Telephone: 503.228.6351

LITCHFIELD CAVO LLP
G. David Rubin, *pro hac vice pending*
Andrew K. Aaronian, *pro hac vice pending*
Telephone: 626.683.1100

Attorneys for Defendant
The Cincinnati Insurance Company