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13 **UNITED STATES DISTRICT COURT**  
14 **NORTHERN DISTRICT OF CALIFORNIA**  
15 **SAN FRANCISCO DIVISION**

17 STEVEN BAKER AND MELANIA KANG  
18 D/B/A CHLOE'S CAFE, a California general  
19 partnership, individually and on behalf of  
20 themselves and all others similarly situated,

Plaintiff,

vs.

22 OREGON MUTUAL INSURANCE  
23 COMPANY, an Oregon Corporation,

Defendant.

Case No. 3:20-cv-05467-LB

**PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS COMPLAINT  
UNDER RULE 12(B)(6), AND IN THE  
ALTERNATIVE, MOTION FOR  
SUMMARY JUDGMENT UNDER  
RULE 56**

[Filed Concurrently with Plaintiffs' Request  
for Judicial Notice and Declaration of  
Victor J. Jacobellis re Evidence Offered In Support  
of Plaintiffs' Opposition]

Date: December 3, 2020  
Time: 9:30 a.m.  
Location: Magistrate Judge  
Laura Beeler, Via Webinar

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23 **STATUTES and REGULATIONS**

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25 Federal Rule 56 ..... 7, 9, 30

26 Fed. R. Civ. Proc. 56(a) ..... 9

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28 Insurance Code § 2051..... 16

1 Plaintiffs, Steven Baker and Melania Kang d/b/a Chloe's Cafe ("Plaintiffs" or "Chloe's  
2 Cafe") submit this Memorandum of Points and Authorities In Opposition to Defendant Oregon  
3 Mutual Insurance Company's ("Defendant" or "Oregon Mutual) Motion to Dismiss Complaint  
4 under Rule 12(b)(6), and in the alternative, Motion for Summary Judgment under Rule 56 (the  
5 "Motion") [Doc. 10].

## 6 7 **I. INTRODUCTION**

8 Plaintiffs Steven Baker and Melania Kang own and operate Chloe's Cafe, a decades-old  
9 San Francisco restaurant. Chloe's Cafe's property insurance company, Oregon Mutual, issued  
10 Chloe's Cafe an all-risk policy providing Business Interruption, Extra Expense, and Civil  
11 Authority coverages. These coverages insure risks resulting in "physical loss of or damage to  
12 property." Chloe's Cafe alleges that it experienced a "physical loss of . . . property" (resulting in  
13 major losses in revenue) due to the outbreak of COVID-19, a deadly virus which was  
14 undoubtedly present at and around Chloe's Cafe, and due to government closure orders that  
15 required Chloe's Cafe to close its dining room. Although Chloe's Cafe submitted a valid claim  
16 for coverage to Oregon Mutual based on the damages resulting from its physical loss of property,  
17 the insurance company denied the claim. Chloe's Cafe's class action complaint (the "Complaint"  
18 [Doc. 1]) alleges that Oregon Mutual is denying all similar COVID-19 business interruption  
19 claims and, therefore, Chloe's Cafe and similarly situated insureds are entitled to a declaratory  
20 judgment concerning the correct interpretation of Oregon Mutual's standard form insurance  
21 policies.

22 The Court should deny Oregon Mutual's motion to dismiss (or, in the alternative, motion  
23 for summary judgment regarding) Chloe's Cafe's Complaint because it sufficiently alleges  
24 coverage based on the plain language of the insurance policy. Chloe's Cafe's policy insures  
25 against *all risks* that are not specifically excluded and, unlike other insurers, Oregon Mutual  
26 specifically decided *not* to include the standard form virus exclusion in Chloe's Cafe's policy.  
27 Thus, losses caused by the virus are covered by the policy. Further, although the policy only  
28

1 covers business income losses resulting from “physical loss of *or* damage to” property, Oregon  
2 Mutual left those terms undefined. Under settled principles of California insurance law, these  
3 undefined terms must be interpreted consistent with the objectively reasonable expectations of  
4 the policyholder and in the specific context of this claim. Here, an objectively reasonable  
5 policyholder operating a restaurant reliant on on-premises dining reasonably expects that the  
6 term “loss of . . . property” means the inability to use its premises for its intended purpose: on-  
7 premises dining. This interpretation is further supported by common dictionary definitions that  
8 define “loss of” to include loss of use.

9       The Court should reject Oregon Mutual’s attempt to improperly limit claims for business  
10 interruption losses to situations where the property suffers physical damage. Because the policy  
11 affords coverage for physical loss *or* damage to property, an objectively reasonable insured  
12 would expect “loss of” to have a different meaning than “damage to,” particularly given the broad  
13 nature of the term “physical damage,” which the policy expressly defines to “[l]oss of *use* of  
14 tangible property *that is not physically injured*.” Nothing in the policy informs the insured that  
15 coverage will be limited when a covered cause of loss, such as a deadly pandemic, causes the  
16 insured to experience a physical loss of its property. And Chloe’s Cafe even alleges that the  
17 presence of the virus did cause physical damage to its property resulting in the loss. Thus, the  
18 policy covers the loss.

19       Finally, even if Oregon Mutual could persuade the court that an objectively reasonable  
20 policyholder could *also* interpret the policy to exclude virus losses despite the lack of an  
21 exclusion, under clear California law, the tie goes to the insured when the policy (which the  
22 insurer drafted and refused to negotiate the terms of) is ambiguous. The Court should deny the  
23 motion because Chloe’s Cafe advances a credible interpretation of the policy that affords  
24 coverage.

25       Based on the foregoing arguments, all of which are derived from allegations in the  
26 Complaint that must be taken as true, the Court should conclude that Plaintiff adequately states  
27 a claim for declaratory judgment under the insurance contract Defendant issued to Chloe’s Cafe.



1 **II. STATEMENT OF FACTS THAT MUST BE ACCEPTED AS TRUE**

2 Plaintiffs are co-owners of Chloe’s Cafe restaurant in San Francisco, California. Compl.  
 3 1, ¶4. Plaintiffs obtained and paid premiums for an insurance policy from Defendant, which  
 4 included business interruption coverage. *Id.* Under this coverage, Oregon Mutual promised to pay  
 5 for Chloe’s Cafe’s actual business income loss so long as the suspension of business operations  
 6 was “caused by direct physical loss of . . . property at the described premises.” *Id.*, ¶¶ 15, 17, 18,  
 7 64, 71. When California and San Francisco issued Closure Orders to prevent the spread of  
 8 COVID-19, Plaintiff was forced to suspend its business operations. *Id.*, ¶¶ 34, 45–46. Despite the  
 9 interruptions caused by the Closure Orders, and notwithstanding that Chloe’s Cafe paid  
 10 significant premiums for precisely this type of coverage, Defendant improperly denied Chloe’s  
 11 Cafe’s claims for coverage. *Id.*, ¶¶ 3, 50, 66, 73, 80.

12  
 13 **III. ARGUMENT**

14 **A. Legal Standard Under Rule 12(b)(6) and Rule 56.**

15 To survive a Rule 12(b)(6) motion, “a complaint must contain sufficient factual matter,  
 16 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556  
 17 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Thus,  
 18 the Court “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in  
 19 the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*,  
 20 519 F.3d 1025, 1031 (9th Cir. 2008).

21 A court shall only grant summary judgment under Rule 56 where (1) there is no genuine  
 22 dispute as to any material fact; and (2) the movant is *entitled to judgment as a matter of*  
 23 *law*. Fed. R. Civ. Proc. 56(a). *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex*  
 24 *Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Co.*, 475 U.S.  
 25 574 (1986). The moving party bears the burden of making this initial showing and must identify  
 26 for the Court “the basis for its motion, and [] those portions of ‘the pleadings, depositions,  
 27 answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it  
 28

1 believes demonstrate the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 323  
 2 (quoting Fed. R. Civ. Proc. 56(c)). In ruling on a motion for summary judgment, the court must  
 3 draw all reasonable references in favor of the party against whom summary judgment is  
 4 sought. *Matsushita Elec. Indus.*, 475 U.S. at 587; *Intel Corp. v. Hartford Accident & Idem. Co.*,  
 5 952 F. 2d 1551, 1558 (9th Cir. 1991). Therefore, the court must regard as true the opposing  
 6 party's evidence, if supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at  
 7 324 (emphasis added); *Eisenberg v. Ins. Co. of N. Am.*, 815 F. 2d 1285, 1289 (9th Cir. 1987).

8 **B. Key Principles of Insurance Contract Interpretation.**

9 California’s “well-established rules on interpretation of insurance agreements” are  
 10 designed to “protect the insured’s reasonable expectation of coverage in a situation in which the  
 11 insurer-draftsman controls the language of the policy.” *White v. Western Title Ins. Co.*, 40 Cal.  
 12 3d 870, 881 (1985). Thus, the insured’s objectively “[r]easonable expectations control even if  
 13 the parties had no actual mutual understanding regarding the disputed policy provision.” *Cooper*  
 14 *Cos. v. Transcontinental Ins. Co.*, 31 Cal. App. 4th 1094, 1104 (1995). These rules exist because  
 15 an insurance policy has “consequences that extend beyond orthodox implications.” *Gray v.*  
 16 *Zurich Ins. Co.*, 65 Cal.2d 263, 269 (1966). They are contracts “entered into between two parties  
 17 of unequal bargaining strength, expressed in the language of a standardized contract, written by  
 18 the more powerful bargainer to meet its own needs, and offered to the weaker party on a ‘take it  
 19 or leave it basis[.]’” *Id.* Thus, “in view of the disparate bargaining status of the parties, [courts]  
 20 must ascertain that meaning of the contract which the insured would reasonably expect.” *Id.*

21 Applying these canons, “[i]f the meaning a layperson would ascribe to the language of a  
 22 contract of insurance is clear and unambiguous, a court will apply that meaning.” *Montrose Chem.*  
 23 *Corp. of Calif. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 666–667 (1995). As a corollary, insurance  
 24 companies are required to interpret coverage provisions “broadly so as to afford the greatest  
 25 possible protection to the insured,” and to interpret exclusionary clauses “narrowly against the  
 26 insurer.” *Id.*; *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 647-48 (2003). “This rule applies  
 27 with particular force when the coverage portion of the insurance policy would lead an insured to  
 28

1 reasonably expect coverage for the claim purportedly excluded.” *McKinnon*, 31 Cal. 4th at 648.  
 2 In the situation where a “reasonable person in the position of the insured” could interpret a policy  
 3 provision both for and against coverage, the ambiguity is “construed against the party who caused  
 4 the uncertainty to exist (i.e., the insurer) in order to protect the insured’s reasonable expectation  
 5 of coverage.” *State of California v. Continental Ins. Co.*, 55 Cal.4th 186, 195 (2012).

6 **C. Chloe’s Cafe Sufficiently Alleges Coverage Falls Within the Business Income**  
 7 **Insuring Agreement.**

8 **1. Chloe’s Cafe Plausibly Alleges a Covered Cause of Loss.**

9 Chloe’s Cafe’s policy is an “all-risk” policy. Compl., ¶ 13. In accordance with the policy’s  
 10 all-risk nature, Defendant agreed to pay for all losses caused by a “Covered Cause of Loss,” which  
 11 is defined as any “risk of direct physical loss” unless the loss is excluded or limited in the policies.  
 12 *Id.*, ¶ 14. Here, Chloe’s Cafe sufficiently pled that it suffered physical loss due to its loss of  
 13 business income caused by the mandatory COVID-19 closure orders issued in response to  
 14 COVID-19’s presence in public spaces.

15 It is well-settled that an “all-risk” policy “creates a special type of coverage extending to  
 16 risks not usually covered under other insurance[.]” *C.H. Leavell & Co. v. Fireman’s Fund Ins.*  
 17 *Co.*, 372 F.2d 784, 787 (9th Cir. 1967). “[R]ecovery under an ‘all-risk’ policy will be allowed for  
 18 **all** fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific  
 19 provision expressly excluding the loss from coverage.” *Id.*; *see also Int’l Multifoods Corp. v.*  
 20 *Com.Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir. 2002) (“All risk coverage covers all losses which  
 21 are fortuitous no matter what caused the loss[.]”).

22 Chloe’s Cafe alleges “[a]s a result of the presence of COVID-19 and the Closure Orders.  
 23 Plaintiff[s] . . . sustained a suspension of business operations, sustained losses of business income,  
 24 and incurred extra expenses” and further alleges they, “sustained business income losses due to  
 25 direct physical loss or physical damage at the premises of dependent properties.” Compl., ¶ 46.  
 26 Nothing in the policies excludes or limits losses caused by those orders (*id.*, ¶ 24), and the  
 27 fortuitous character of the loss is not in dispute. The Closure Orders, therefore, constitute a  
 28

1 “Covered Cause of Loss” as defined in the policy.

2 Further, the policy utilizes, in part, policy forms and language published by the Insurance  
3 Services Office, Inc. (“ISO”), which publishes policy forms for use by the insurance industry—  
4 as evidenced by the ISO copyright designation at the bottom of some pages of the policy. *Id.*, ¶  
5 22. Despite the fact that, prior to the effective date of the policy, ISO published and made available  
6 for use a standard virus exclusion form, Oregon Mutual chose not to include the ISO standard  
7 virus exclusion form in the policy. *Id.*, ¶ 22. Indeed, the word “virus” only appears in the policy  
8 when discussing *computer* viruses. *Id.*

9 Defendant suggests the Closure Orders are not a Covered Cause of Loss, reasoning that  
10 the Closure Orders “were not issued due to any direct physical loss to property.” Mot. at 16. This  
11 argument is belied by the fact that Defendant’s policies exclude the “seizure or destruction of  
12 property *by order of governmental authority*.” Doc. 11-5 at 48. If governmental orders were not  
13 a Covered Cause of Loss, no exclusion would be necessary. Therefore, by drafting the exclusion,  
14 Defendant acknowledges that governmental orders represent a Covered Cause of Loss. If  
15 Defendant wanted to exclude losses other than seizure or destruction caused by governmental  
16 orders, such as for the closure or limitation on use of property, it could have done so—but it did  
17 not. *See Julian v. Hartford Underwriters Ins. Co.*, 35 Cal. 4th 747, 759 (2005) (“[A]n insurer is  
18 not absolutely prohibited from drafting and enforcing policy provisions that provide or leave  
19 intact coverage for some, but not all, manifestations of a particular peril.”).

20 More importantly, Defendant’s argument ignores that “the limits of coverage [in an all-  
21 risk policy] are defined by the exclusions,” *Vardanyan v. AMCO Ins. Co.*, 243 Cal. App. 4th 779,  
22 792 n.3 (2015), and that coverage clauses, such as the Civil Authority provision, do not purport  
23 to define the nature of the risks covered. The Covered Cause of Loss focuses solely on whether  
24 the *cause* of the loss is a covered peril. In an “all-risk” policy this analysis is simple. If the loss is  
25 fortuitous, the cause is covered unless specifically excluded. Because the Closure Orders are not  
26  
27  
28

1 excluded,<sup>1</sup> Chloe’s Café plausibly alleges a Covered Cause of Loss.<sup>2</sup>

2 Further, Chloe’s Cafe plausibly alleges direct physical loss of its property. “The presence  
3 of COVID-19 caused direct physical loss of and/or damage to the [property] . . . by . . . , damaging  
4 the property, denying access to the property, preventing customers and patients from physically  
5 occupying the property, causing the property to be physically uninhabitable by customers . . .  
6 causing its function to be nearly eliminated or destroyed, and/or causing a suspension of business  
7 operations on the premises.” *Id.*, ¶ 44.

8 **2. The Plain and Ordinary Meaning of “Direct,” “Physical,” and “Loss**  
9 **of” Support Coverage When Viewed Through the Eyes of the**  
10 **Objectively Reasonable Policyholder.**

11 The policy’s plain language supports coverage in the absence of tangible alteration to  
12 insured property. “The rules governing policy interpretation require us to look first to the language  
13 of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily  
14 attach to it.” *Travelers Property Casualty Co. of Am. v. KLA-Tencor Corp.*, 45 Cal. App. 5th 156,  
15 163 (2020). Here, Chloe’s policy insures against “direct physical loss of or damage to” insured  
16 property. Doc. 11-5 at 118. An average person reading this language would expect coverage was  
17 triggered in this case for several reasons.

18 **a. The Policy’s Key Terms Are Undefined, and Dictionary Definitions**  
19 **Support Chloe’s Cafe’s Interpretation.**

20 The words “physical,” “loss,” and “damage” are undefined in the policy. “[C]ourts in  
21 insurance cases regularly turn to general dictionaries” to ascertain the plain meaning of undefined  
22 words. *Laurel v. Allstate Ins. Co.*, No. CV 09–3990 SVW (CTx), 2010 WL 11235326, at \*8 (C.D.  
23 Cal. Feb. 3, 2010). The dictionary defines “loss” as “destruction, ruin” *or* “the act of losing

24 <sup>1</sup> The virus exclusion only applies when the virus contaminates the property (Compl., ¶23), and Chloe’s Cafe’s policy  
25 admittedly does not include a virus exclusion. The exclusion for “enforcement of any ordinance of law” also has no  
26 bearing on this dispute.

27 <sup>2</sup> The same analysis applies for Chloe’s Cafe’s alternative claim that the physical presence of the virus caused  
28 physical loss of or damage to insured property. Because no exclusions apply, the virus, too, is a Covered Cause of  
Loss.

1 possession: deprivation.”<sup>3</sup> “Physical” means “having material existence: perceptible especially  
 2 through the senses and subject to the laws of nature.”<sup>4</sup> And “damage” is defined as “injury to a  
 3 person or property.”<sup>5</sup> These definitions illustrate a layperson would expect “physical loss” occurs  
 4 when an insured is “deprived” of using property with a material existence for its intended purpose.

5 **b. The Policy Term “Physical Loss” Cannot Have an Equivalent**  
 6 **Meaning to “Physical Damage” Given the Policy’s Use of the**  
 7 **Disjunctive “Or.”**

8 The use of the disjunctive “or” demonstrates that “physical loss” is different from  
 9 “physical damage.” “The ordinary and popular meaning of the word ‘or’ is well settled.” *Acosta*  
 10 *v. City of Costa Mesa*, 718 F.3d 800, 816 (9th Cir. 2013). “In its ordinary sense, the function of  
 11 the word ‘or’ is to mark an alternative such as ‘either this or that.’” *Id.* Therefore, a reasonable  
 12 interpretation of Chloe’s Cafe’s policy is that *either* physical loss *or* physical damage triggers  
 13 coverage.

14 Although Defendant asserts that coverage is only triggered when the insured property is  
 15 “physically damaged” (Mot. at 10), this is a flawed reading of the policy. Defendant’s erroneous  
 16 position improperly collapses “loss” and “damage” into the same meaning—which not only  
 17 ignores the plain meaning of the word “or,” but violates a cardinal principle of contract  
 18 interpretation as Defendant’s reading would render the term “loss” redundant surplusage. *See*  
 19 *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 17 Cal. App. 4th 1773, 178 (1993)  
 20 (explaining that “in California, however, contracts – even insurance contracts – are construed to  
 21 avoid rendering terms surplusage[,]” and that “defining terms in contracts to render them  
 22 redundant is contrary to established principles of contract interpretation as laid down by our  
 23 Supreme Court”).

24 \_\_\_\_\_  
 25 <sup>3</sup> Loss, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/loss> (last visited Nov. 11, 2020).

26 <sup>4</sup> Physical, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/physical> (last visited Nov.  
 27 11, 2020).

28 <sup>5</sup> Damage, Black’s Law Dictionary (11th ed. 2019).

1 Persuasive orders in California’s district courts support Chloe’s Cafe’s argument. For  
 2 example, in *Total Intermodal Services Inc. v. Travelers Property Casualty Company of America*,  
 3 No. CV 17-04908 AB (KSx), 2018 WL 3829767, at \*3–4 (C.D. Cal. July 11, 2018), the district  
 4 court rejected an interpretation of the same policy language identical to that proposed by Oregon  
 5 Mutual. The court found that interpreting “‘physical loss of’ as requiring ‘damage to’ would  
 6 render meaningless the ‘*or* damage to’ portion of the same clause, *thereby violating a black-letter*  
 7 *cannon of contract interpretation—that every word be given meaning.*” *Id.* at \*3 (emphasis  
 8 added).<sup>6</sup>

9 Other district courts, both within and outside this Circuit, are in accord. *See Nautilus*  
 10 *Group, Inc. v. Allianz Global Risks US*, No. C11-5281BHS, 2012 WL 760940, at \*7 (W.D. Wash.  
 11 Mar. 8, 2012) (“[I]f ‘physical loss’ was interpreted to mean ‘damage,’ then one or the other would  
 12 be superfluous. The fact that they are both included in the grant of coverage evidences an  
 13 understanding that physical loss means something other than damage.”); *Manpower, Inc. v. Ins.*  
 14 *Co. of the State of Penn.*, No. C11-5281BHS, 2009 WL 3738099, at \*5 (E.D. Wis. Nov. 3, 2009)  
 15 (“[I]f a physical loss could not occur without physical damage, then the policy would contain  
 16 surplus language.”); *Studio 417, Inc., v. Cincinnati Ins. Co.*, No. 20-cv-03127-SRB, 2020 WL  
 17 4692385, at \*5 (W.D. Mo. Aug. 12, 2020) (“Defendant conflates ‘loss’ and ‘damage’ in support  
 18 of its argument that the Policies require a tangible, physical alteration. However, the Court must  
 19 give meaning to both terms.”). Indeed, the *Studio 417* court relied on this principled distinction

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20  
 21 <sup>6</sup> In *Mudpie, Inc. v. Travelers Casualty Insurance Company of America*, No. 20-cv-03213-JST, 2020 WL 5525171  
 22 (N.D. Cal. Sept. 14, 2020), another court in this district correctly found, “[i]n accordance with the reasoning in *Total*  
 23 *Intermodal*,” that “the language of this provision, alone, does not require a ‘physical alteration of the property’ or a  
 24 physical change in the condition of the property.” *Id.* at \*4. Nevertheless, the *Mudpie* court dismissed the business  
 25 interruption claim because the plaintiff had not been “permanently dispossessed” of its property. *Id.* at \*4–\*5. This  
 26 Court should reject this aspect of *Mudpie*’s interpretation of “physical loss of . . . property” because it inserts a  
 27 requirement of “permanent dispossession” into the policy where one does not exist. *See Forecast Homes, Inc. v.*  
*Steadfast Ins. Co.*, 181 Cal. App. 4th 1466, 1476 (2010) (explaining the court’s “function is to determine what, in  
 terms and substance, is contained in the contract, *not to insert what has been omitted*. [The court] do[es] not have the  
 power to create for the parties a contract that they did not make and *cannot insert language that one party now wishes*  
*were there*”) (emphases added); *see also infra* at 13–14. The Court should distinguish orders that repeat this error.  
*See, e.g., 10E, LLC v. Travelers Indemnity Co. of Connecticut*, No. 2:20-CV-04418-SVW-AS, 2020 WL 5359653,  
 at \*5 (C.D. Cal. Sept. 2, 2020) (erring by granting motion to dismiss business interruption case based on plaintiff’s  
 inability to allege that its dispossession of its premises was not permanent).

1 between loss and damage to *deny* a motion to dismiss similar business interruption claims. *Studio*  
 2 *417*, 2020 WL 4692385, at \*5 (concluding “that Plaintiffs have adequately stated a claim for  
 3 direct physical loss”). This Court should do the same here.

4 **c. The Policy’s Use of the Prepositions “Of” and “To” Require the**  
 5 **Policy to Be Read in Favor of Coverage.**

6 Not only are “loss” and “damage” distinct concepts, but the use of the prepositions “of”  
 7 and “to” are distinct modifiers as well. The California Court of Appeals, when discussing the  
 8 phrase “total loss *to* the structure” as used in section 2051 of the Insurance Code, observed the  
 9 following:

10 [I]n the statute the object phrase—‘total loss’—operates upon the subject phrase—  
 11 ‘a structure’—by way of the preposition ‘to.’ ***Had the Legislature used the word***  
 12 ***‘of’, or used a different sort of construction***, such as ‘where a structure is a total  
 13 loss’, ***there might be some ambiguity***. But total loss *to* a structure unmistakably  
 14 contemplates a quantum of physical damage[.]  
 15 *California Fair Plan Assn. v. Garnes*, 11 Cal. App. 5th 1276, 1289 (2017).

16 Similarly, a California federal district court has recognized that coverage clauses using  
 17 the prepositions “of” and “to” are materially distinguishable. In *Total Intermodal*, the insurer, like  
 18 Oregon Mutual, claimed that some “damage or alteration to the property” was required to trigger  
 19 coverage, 2018 WL 3829767 at \*3–4, but relied on cases interpreting coverage clauses that  
 20 “omit[ted] the preposition ‘of.’” *Id.* at 4. Based on the divergent policy language the court rejected  
 21 the insurer’s argument and held “that ‘direct physical loss of’ should be construed differently  
 22 from ‘direct physical loss to” (*id.* at \*4), and that the plain meaning of “loss of” contemplates  
 23 property which is “misplaced and unrecoverable, *without regard to whether it was damaged.*” *Id.*  
 24 at \*3 (emphasis added).<sup>7</sup>

25 \_\_\_\_\_  
 26 <sup>7</sup> See also *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins.*, No. 20-11655, 2020 WL 5258484, at \*6 (E.D. Mich.  
 27 Sept. 3, 2020) (“Plaintiff’s interpretation [that ‘physical loss to Covered Property includes inability to use Covered  
 28 Property’] would be plausible if, instead, the term at issue were “accidental direct physical loss *of* Covered Property.”) (emphasis in original).



1 Defendant relies on *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins.*  
 2 *Co.*, 187 Cal. App. 4th 766 (2010), for the proposition that “physical loss” of property requires  
 3 physical alteration to the property. Mot. at 11–13. In *MRI Healthcare*, however, the policy  
 4 covered “direct physical loss *to* property,” 187 Cal. App. 4th at 771, not the “direct physical loss  
 5 *of*” property language here. See *Total Intermodal*, 2018 WL 3829767, at \*3–4. The court in *MRI*  
 6 *Healthcare* also cited *Couch on Insurance* to support its finding that “physical loss” requires  
 7 physical alteration. 187 Cal. App. 4th at 778–79. But that treatise recognizes that “the opposite  
 8 result has been reached” and coverage has been allowed “based on physical damage despite the  
 9 lack of physical alteration of the property.” 10A *Couch on Insurance*, §148.46 (3d ed. 2020).  
 10 Thus, *MRI Healthcare* actually *supports* Chloe’s Café’s argument that the use of different  
 11 prepositions in these clauses makes a material difference to their interpretations.

12 Courts relying on *MRI Healthcare* to dismiss business interruption cases have missed the  
 13 critical distinction between loss *to* property and loss *of* property. For example, in *IOE, LLC*, 2020  
 14 WL 5359653 at \*4 (see Mot. at 21–22), the court relied on *MRI Healthcare* for the proposition  
 15 that “physical loss of or damage to property” requires some physical alteration to the property.  
 16 As discussed above, however, “loss” and “damage” are not synonymous, and construing them to  
 17 be the same would make one of the terms meaningless. See *supra* at 7-8.<sup>8</sup> Further, the court’s  
 18 analysis in *IOE* does not cite or discuss several decisions cited herein recognizing that “physical  
 19 loss” includes the loss of use of property, or when property has become useless, uninhabitable,  
 20 and unfit for occupancy, irrespective of any related physical damage. See *infra* at 16. In light of  
 21 these cases, requiring a permanent displacement or dispossession for a “physical loss” would be  
 22 an unachievable condition that would render Chloe’s coverage illusory.

23  
 24 \_\_\_\_\_  
 25 <sup>8</sup> Defendant relies upon two other cases that incorporate the reasoning of *IOE*, which are therefore equally  
 26 distinguishable. See *Pappy’s Barbershop, Inc. v. Farmers Group Inc.*, No. 20-CV-907-CAB-BLM, 2020 WL  
 27 5500221, at \*1 (S.D. Cal. Sept. 11, 2020) (granting defendant’s motion to dismiss “[f]or all the same reasons” set  
 forth in *IOE*); *Mark’s Engine Co. No. 28 Restaurant, LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-cv-04423-AB-  
 SK, 2020 WL 5938689, at \*3 (C.D. Cal Oct. 2, 2020) (“The Court finds persuasive the reasoning [in *IOE*] of the  
 Honorable Steven V. Wilson.”).

1                                    **d.        The Policy Explicitly Defines “Property Damage” as a Loss of Use**  
 2                                    **Without Physical Injury to Property.**

3                    In construing an insurance contract, a court must give effect to the instrument as a whole  
 4 and, if possible, to every part thereof. *See Maxconn Inc. v. Truck Ins. Exch.*, 74 Cal. App. 4th  
 5 1267, 1273 (1999), *as modified on denial of reh’g* (Oct. 15, 1999). Chloe’s Cafe’s policy defines  
 6 “property damage” as both “[p]hysical injury to tangible property, including all resulting loss of  
 7 use of that property” *and* “[l]oss of *use* of tangible property *that is not physically injured.*” Doc.  
 8 No. 11-5 at 153. For the terms “physical loss” and “physical damage” to have consistent  
 9 meanings, “physical loss of or damage to property” must include situations where property is  
 10 rendered functionally unusable, even when that property is “not physically injured.” *Maxconn,*  
 11 *Inc*, 74 Cal. App. 4th at 1273 (explaining that courts should “interpret the language in context,  
 12 with regard to its intended function in the policy”). A contrary interpretation of “physical loss of  
 13 . . . property” ignores the policy’s definition of “physical damage” and therefore subverts the  
 14 “insured’s objectively reasonable expectations.” *Id.*

15                    Accordingly, the plain language of Chloe’s Cafe’s policy establishes coverage.

16                                    **3.        “Direct Physical Loss or Damage” Is Not Limited to Physical**  
 17                                    **Alterations.**

18                    Defendant contends Chloe’s Cafe’s business interruption losses are not covered because  
 19 they suffered no demonstrable, physical change to their property, and, therefore, no “direct  
 20 physical loss.” Mot. at 13–15. Putting aside that “physical alteration” (or words to that effect) is  
 21 found nowhere in and not required by the policy, Defendant’s incorrect assertion ignores that,  
 22 under California law, physical alteration to the property is *not* necessary to constitute a “physical  
 23 loss.”

24                    For example, in *Hughes v. Potomac Ins. Co. of District of Columbia*, 199 Cal. App. 2d  
 25 239, 242 (1962), *abrogated on other grounds*, *La Bato v. State Farm Fire and Casualty Co.*, 263  
 26 Cal.Rptr. 382 (1989), the insureds’ purchased a policy that provided coverage for “all risks of  
 27 physical loss of and damage to their dwelling.” Later, a landslide left the insureds’ home on the  
 28

1 precipice of a 30-foot cliff, but the home itself was undamaged. The insurer denied coverage,  
2 claiming that the home suffered no physical damage. The California Court of Appeals rejected  
3 this position, holding:

4 To accept appellant’s interpretation of its policy would be to conclude that a  
5 building which has been overturned or which has been placed in such a position  
6 as to overhang a steep cliff has not been ‘damaged’ so long as its paint remains  
7 intact and its walls still adhere to one another. *Despite the fact that a ‘dwelling*  
8 *building’ might be rendered completely useless to its owners, appellant would*  
9 *deny that any loss or damage had occurred unless some tangible injury to the*  
10 *physical structure itself could be detected. **Common sense requires that a policy***  
11 *should not be so interpreted in the absence of a provision specifically limiting*  
12 *coverage in this manner.* Respondent’s correctly point out that a ‘dwelling’ or  
13 ‘dwelling building’ connotes a place fit for occupancy, a safe place in which to  
14 dwell or live.

15 *Id.* at 248–49.

16 Similarly, in *Cooper v. Travelers Indemnity Company of Illinois*, No. C-01-2400-VRW,  
17 2002 WL 32775680, at \*5 (N.D. Cal. Nov. 4, 2002), *aff’d*, 113 F. App’x 198 (9th Cir. 2004), this  
18 Court found that structural damage was unnecessary to trigger coverage. There, a health  
19 department forced a tavern to close when its source of water became contaminated with E. coli.  
20 *Id.* at \*1. The insured, like Plaintiffs, had an all-risk policy that provided coverage for “direct  
21 physical loss of or damage to Covered Property” *Id.* at \*1–2. Although this Court found coverage  
22 was triggered because E. coli caused physical damage to the property, it also explained that  
23 “[d]amage to ‘covered’ property’ is not required by the terms of the policy to trigger coverage  
24 of loss of business income.” *Id.* at 5 (emphasis added).

25 The court reached a similar result in *Total Intermodal*. There, the insured picked up two  
26 containers of printing equipment at the Port of Los Angeles, but mistakenly marked one of the  
27 containers empty and it was shipped back to China. 2018 WL 3829767, at \*1. The insured argued  
28 the claim was covered because the container was “lost” in that it was unrecoverable from China,  
while the insurer contended no coverage existed because the property had to be physically  
damaged. *Id.* at \*1. Thus, the parties disputed “whether the coverage for ‘direct physical loss’  
applies when property is merely lost, or whether it also—or instead—requires that the property  
be physically damaged.” *Id.* at \*3. This Court found the “plain language” of the policy, providing

1 coverage for “loss of property,” was “irreconcilable” with the insurer’s “position requiring  
2 damage” (*id.* at \*4), and concluded that “the phrase ‘loss of’ includes . . . permanent  
3 dispossession[.]” *Id.* In reaching this decision, the court clarified that the permanency of the  
4 dispossession was immaterial, as the issue resolved was “simply whether the phrase ‘loss of’  
5 includes physical dispossession in the absence of physical damage.” 2018 WL 3829767, at \*4 n.4  
6 (emphasis added). Thus, the permanent nature of the loss in *Total Intermodal* merely reflected the  
7 facts of the case. Had the property eventually made its way back to the insured, the result would  
8 have been the same.<sup>9</sup> Permanent dispossession was meant to be an *example*, not the *definition*, of  
9 “loss of” property, which is established by the court’s pronouncement that it used the word  
10 “includes” to “make clear that its construction is *non-limiting*.” *Id.* (emphasis added).

11 Likewise, the California Court of Appeals has held that the “plain meaning of ‘direct  
12 physical loss’ encompasses physical displacement or loss of physical possession.” *Universal Sav.*  
13 *Bank v. Bankers Standard Ins. Co.*, 2004 WL 515952, at \*6 (Cal. Ct. App. Mar. 17, 2004),  
14 *vacated*, 2004 WL 3016644 (Cal. Ct. App. Dec. 30, 2004).<sup>10</sup> The court further noted that the  
15 “terms ‘loss’ and ‘damage’ in the context of the insuring clause does *not* suggest that the terms  
16 are synonymous.” *Id.* (emphasis added).

17 The discussion of “property damage”<sup>11</sup> in *Three Sombrero, Inc. v. Scottsdale Ins. Co.*, 28  
18 Cal. App. 5th 729 (2018) is also instructive. There, the insured lost its license to operate a  
19 nightclub following a shooting at the premises. *Id.* at 733. The insurer argued the loss of the  
20 license was a loss of an intangible right to use property in a certain way, as opposed to the loss of  
21 use of tangible property. *Id.* at 734. The trial court agreed, finding the insured only suffered an

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23 <sup>9</sup>See, e.g., *Nationwide Brokers Inc. v. C&G Trucking Corp.*, No. 87 C 5770, 1988 WL 116827, at \*3 (N.D. Ill Oct.  
24 21, 1988) (holding magazines that were lost in transit for several weeks, but were eventually found, qualified as a  
“physical loss” because the policy was not limited to “*permanent* physical losses”) (emphasis in original).

25 <sup>10</sup> Although this case is unpublished, and therefore has no precedential value under California law, the Ninth Circuit  
26 recognizes that it “is not precluded from considering such decisions as a possible reflection of California law.” *Daniel*  
*v. Ford Motor Co.*, 806 F.3d 1217, 1223 n.3 (9th Cir. 2015).

27 <sup>11</sup> *In re Chinese Manufactured Drywall Products Liab. Litig.*, 759 F. Supp. 2d 822, 832 (E.D. La. 2010) (using  
property damage definition from liability section to help define physical loss in the first-party homeowners policy).

1 economic loss. *Id.* The California Court of Appeals reversed, finding the loss of the ability to use  
2 the property as a nightclub constituted a covered loss. *Id.* at 734–35. After explaining that a “lessee  
3 in possession has a tangible property interest in the leased premises,” the court noted:

4       If your leased apartment was rendered uninhabitable by some noxious stench, you  
5       would conclude that you had lost the use of tangible property; and if the lawyer  
6       said no, actually you had merely lost the use of your intangible lease, you would  
7       goggle in disbelief.

8 *Id.* at 738.

9       These cases establish that the plain meaning of “direct physical loss” encompasses  
10 physical displacement or loss of physical possession of insured property. That the “physical loss”  
11 is unaccompanied by “physical damage” is irrelevant. *See Cooper*, 2002 WL 32775680, at \*5.  
12 Here, there are no contractual provisions in Chloe’s Cafe’s policy limiting coverage to instances  
13 where the insured property suffered a distinct, demonstrable, physical alteration. To give credence  
14 to Defendant’s fabricated pre-conditions to coverage would improperly “create for the parties a  
15 contract that they did not make” by “inserting language that [Defendant] now wishes were there.”  
16 *Forecast Homes*, 181 Cal. App. 4th at 1476.

17       This Court should distinguish cases which ignore both the language of the policy and  
18 California insurance law to impose a “physical change” requirement. For example, in *Mark’s*  
19 *Engine*, the court observed that the policy “would be without any ‘manageable bounds’ if “direct  
20 physical loss of” encompassed “deprivation of property without physical change in the condition  
21 of the property.” *Mark’s Engine*, 2020 WL 5938689, at \*4 (citing *Plan Check Downtown III,*  
22 *LLC v. AmGuard Ins. Co.*, No. Cv 20-6954-GW-SKx, 2020 WL 5742712, at \*6 (C.D. Cal. Sept.  
23 10, 2020)). The *Plan Check* court concluded that “[plaintiff]’s interpretation is not a reasonable  
24 one because it would be a sweeping expansion of insurance coverage without any manageable  
25 bounds.” The orders overlook that, to trigger coverage under an “all-risk” policy, the loss must  
26 still be *fortuitous*. *See Waller v. Truck Ins. Exch., Inc.*, 900 P. 2d 619, 626 (Cal. 1995) (“This  
27 concept of fortuity is basic to insurance law.”). “All risk” policies insure against “contingent or  
28 unknown risks of harm,” but not risks, such as alterations to an occupancy code or amendments

1 to an ordinance, which are “certain or expected.” *Id.* The Court should reject the reasoning of  
2 these cases because they improperly transform Plaintiff’s “all risk” policy into an “all loss”  
3 policy.

4 Defendant may also cite to the Court’s recent ruling in *Water Sports Kauai, Inc. v.*  
5 *Fireman’s Fund Ins. Co. et al*, No. 3:20-cv-03750, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020),  
6 to argue that the “mere threat of coronavirus” does not cause a direct physical loss of or damage  
7 to covered properties. But an insured business should not be required to remain open such that  
8 its customers and employees first must get sick and possibly die before insurance benefits are  
9 due and owing. This would implicate a public policy concern and lead to an absurd result. See  
10 *Gemini Ins. Co. v. Delos Ins. Co.*, 211 Cal. App. 4th 719, 724 (2012) (refusing to adopt  
11 interpretation of policy exclusion that would lead to an absurd result). Moreover, accepting  
12 Defendant’s argument would subvert the purpose of business interruption insurance. See  
13 *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, No. CV 05–08444 DDP (PLAx), 2013 WL  
14 3946103, at \*12 (C.D. Cal. July 31, 2013) (noting the purpose of business interruption insurance  
15 is to “indemnify the insured against losses arising from [its] inability to continue the normal  
16 *operations and functions* of [its] business”).

17 Precedent and plain policy language demonstrate that when property is rendered useless  
18 to its owners and no longer remains fit for occupancy, there has been a “physical loss.” See  
19 *Hughes*, 199 Cal. App. 2d at 248-49. So, too, when an insured with a tangible interest in property  
20 loses the ability to use that property. See *Total Intermodal*, 2018 WL 3829767 at \*3-4; *Thee*  
21 *Sombrero*, 28 Cal. App. 5th at 738. This is the exact type of “physical loss” Plaintiffs allege here.  
22 Compl, ¶¶ 44–46. Thus, California law firmly supports coverage. Moreover, Courts outside of  
23 California also widely agree that the loss of functionality, use, or access to a property constitutes

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1 a direct physical loss of property regardless of structural damage.<sup>12</sup>

2 Additionally, several courts in the COVID-19 business-interruption context have denied  
 3 insurers' motions to dismiss and found that a direct physical loss may occur absent physical  
 4 alteration. *See Order, North State Deli LLC et al. v. Cincinnati Insurance Co. et al.*, No. 20-cvs-  
 5 02569, *order issued* (N.C. Super. Ct., Durham Cty. Oct. 9, 2020) (finding closure orders triggered  
 6 coverage because "physical loss" can reasonably be read to mean "the inability to utilize or  
 7 possess something" without any physical alteration) (attached as **Exhibit A**); *Order, Taps &*  
 8 *Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, No. 20-CVS-02569 (Pa. Ct. Com.  
 9 Pl., Philadelphia Cnty. Oct. 26, 2020) (finding loss of use constitutes "physical loss" under the  
 10 policy) (attached as **Exhibit B**).<sup>13</sup>

11 \_\_\_\_\_  
 12 <sup>12</sup> *See Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W.Va. 1998) (losses that rendered insured property  
 13 "unusable or uninhabitable, may exist in the absence of structural damage to the insured property"); *Manpower*, 2009  
 14 WL 3738099, at \*5–7 (inaccessibility of personal property constituted a physical loss); *Gregory Packaging, Inc. v.*  
 15 *Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418 (WHW)(CLW), 2014 WL 6675934, at \*5 (D.N.J. Nov. 25,  
 16 2014) ("[P]roperty can be physically damaged, without undergoing structural alteration, when it loses its essential  
 17 functionality."); *Dundee Mut. Ins. Co. v. Mariffjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (coverage applied without  
 18 physical alteration because the covered properties "no longer performed the function for which they were designed");  
 19 *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968); (gasoline saturation under and around  
 20 a church rendering occupancy unsafe constituted a "direct physical loss within the meaning of that phrase"); *Travco*  
 21 *Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010) (noting that the majority of cases nationwide find that  
 22 physical damage to property is not necessary where, at least, the property has been rendered unusable by a covered  
 23 cause of loss); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) ("Direct physical  
 24 loss also may exist in the absence of structural damage to the insured property."); *Three Palms Pointe, Inc. v. State*  
 25 *Farm Fire & Cas. Co.*, 250 F. Supp. 2d 1357, 1364 (M.D. Fla. 2003), *aff'd*, 362 F.3d 1317 (11th Cir. 2004) (finding  
 26 "'direct physical loss' includes more than losses that harm the structure of the covered property"); *Prudential Prop.*  
 27 *& Cas. Ins. Co. v. Lilliard-Roberts*, No. CV-01-1362- ST, 2002 WL 31495830, at \* 9 (D. Or. June 18, 2002) (citing  
 28 case law for the proposition that "the inability to inhabit a building [is] a 'direct, physical loss' covered by  
 insurance"); *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) ("[D]irect physical  
 loss can exist without actual destruction of property or structural damage to property."); *Port Auth. of N.Y. & N.J. v.*  
*Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) ("When the presence of large quantities of asbestos in the  
 air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct [physical]  
 loss to its owner"); *Cook v. Allstate Ins. Co.*, Case No. 48D02-0611-PL-01156 \*9-10 (Ind. Super. Nov. 30, 2007)  
 ("even where *some utility remains*" in a business operation, a physical condition that renders a property unusable for  
 its intended use constitutes physical loss or damage.)

<sup>13</sup> *See also Studio 417*, 2020 WL 4692385, at \*5-6 (finding plaintiffs "adequately alleged a direct physical loss under  
 the Policies" after noting that "[o]ther courts have similarly recognized that even absent a physical alteration, a  
 physical loss may occur when the property is uninhabitable or unusable for its intended purpose."); *Blue Springs*  
*Dental Care, LLC v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020) (same);  
*Order, K.C. Hopps, Ltd. v. Cincinnati Ins. Co., Inc.*, No. 20-cv-00437-SRB, 2020 WL 6483108, at \*1 (W.D. Mo.  
 Aug. 12, 2020) (denying defendant's motion to dismiss for "the same reasons as those in [ ] *Studio 417* . . ."); *see*  
 also Transcript and Order, *Optical Servs. USA v. Franklin Mut. Ins. Co.*, No. BER-L-3681-20 (N.J. Super. Ct. Aug.

1 Thus, Defendants’ argument that physical alteration to property is required to allege a  
2 “direct physical loss of” property is without merit.

3 **4. The Policy’s “Period of Restoration” Provision Does Not Define the**  
4 **Terms “Direct Physical Loss of or Damage to” Property, Nor Restrict**  
5 **the Trigger of Coverage.**

6 Defendant’s argument that the policy’s “period of restoration” provision (which provides  
7 coverage through the time that the property “should be repaired, rebuilt, or replaced”) requires a  
8 physical alteration of property to trigger business income coverage, fails for two reasons.

9 First, inserting a restriction on coverage in this fashion is prohibited by California law.  
10 An insurer has an affirmative obligation to bring to the policyholder’s attention provisions which  
11 would restrict coverage in a manner inconsistent with a policyholder’s expectation. See *Paper*  
12 *Savers, Inc. v. NASCA*, 51 Cal. App. 4th 1090 (1996) (rejecting an insurer’s contention that, as a  
13 result of a policyholder’s obligation to read its policy, a policyholder was automatically bound  
14 by all of the terms of a later-delivered policy). Here, no reasonable policyholder would expect  
15 that the “period of restoration,” which sets the duration of business income coverage, would  
16 impose a requirement to coverage in the first instance—that the property has to be physically  
17 altered to trigger coverage. In fact, other language in the Policy indicates that coverage will run  
18 through “Resumption of Operations.” Doc. 11-5 at 135. Nor would the average policyholder look  
19 at the “period of restoration” section of the Policy for that purpose. As a result, Defendant cannot  
20 rely on the period of restoration language, which clarifies the *duration* of coverage, to impose a  
21 limitation on the *trigger* of coverage.  
22

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23 13, 2020) at 26:10-15 (finding defendant’s “blanket statement” that “the closure of the plaintiff’s business does not  
24 qualify . . . for purposes of coverage” is “unsupported by” the “common law in the State of New Jersey” and the  
25 “policy language”) (attached as **Exhibit D** and **Exhibit E**, respectively); Order, *Ridley Park Fitness, LLC v. Phil.*  
26 *Indem. Ins. Co.*, No. 01093 (Pa. Dist. Ct. Aug. 31, 2020) (overruling defendant’s demurrer and finding “plaintiff  
27 successfully pled to survive this stage of the proceedings”) (attached as **Exhibit F**); *Urogynecology Specialist of Fla.*  
28 *LLC v. Sentinel Ins. Co., Ltd.*, No. 6:20-cv-01174-ACC-EJK, 2020 WL 5939172, at \*4 (M.D. Fla. Sept. 24, 2020)  
29 (“Plaintiff has stated a plausible claim at this juncture.”); Order, *Francois Inc. v. Cincinnati Ins. Co.*, No.  
30 20CV201416 (Oh. Cnty. Ct. Sept. 29, 2020) (“The complaint states claims which arguably fit the terms and  
31 conditions of the insurance policy[.]”) (attached as **Exhibit G**).



1           Second, even if the period of restoration could be interpreted to limit property loss or  
 2 damage to that which “should be repaired, rebuilt, or replaced,” Chloe’s Cafe’s business income  
 3 coverage has nonetheless been triggered. The term “repair” is defined to mean “to restore to a  
 4 good or sound condition after decay or damage; mend,” “to restore or renew by any process of  
 5 making good, strengthening, etc.” and “to remedy; make good; make up for.”<sup>14</sup> Similarly, it is  
 6 defined to mean: “to restore to a sound or healthy state: RENEW; to make good: compensate for:  
 7 REMEDY.”<sup>15</sup> The term “rebuild” is defined to mean “to restore to a previous state.”<sup>16</sup> It is also  
 8 defined to mean: “to replace, restrengthen, or reinforce” and “to revise, reshape, or reorganize.”<sup>17</sup>  
 9 The term “replace” is defined to mean “to restore to a former place or position,”<sup>18</sup> and similarly  
 10 to mean “[t]o put back into a former position or place” and “[t]o restore or return.”<sup>19</sup> None of  
 11 these dictionary definitions require or impose a physical alteration component.

12           The definition of “period of restoration,” is not evidence that the insured property must be  
 13 physically altered. It is merely the time period from when the insured suffered the loss or damage  
 14 until the insured’s business resumed or should have resumed. *Ingenico Holdings LLC v. Ace Am.*  
 15 *Ins. Co.*, 921 F.3d 803, 820-21 (9th Cir. 2019). Thus, it addresses the measure of the insured’s  
 16 losses, not whether the insured suffered “loss” or “damage.” That the government, not Plaintiffs,  
 17 controls the repair date is irrelevant. Further, if “period of restoration” was intended to mean that  
 18 “direct physical loss of or damage to” property requires physical alteration of the property, that  
 19 would be evidence that the policy is ambiguous. If Defendant intended for “loss of” property to  
 20 require physical alteration to property, it should have written a definition for “physical loss” into  
 21 \_\_\_\_\_

22 <sup>14</sup> *Repair*, Dictionary, <https://www.dictionary.com/browse/repair?s=t> (last visited November 10, 2020).

23 <sup>15</sup> *Repair*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/repair> (last visited November 10, 2020).

24 <sup>16</sup> *Rebuild*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/rebuild> (last visited November 10, 2020).

25 <sup>17</sup> *Rebuild*, Dictionary, <https://www.dictionary.com/browse/rebuild?s=t> (last visited November 10, 2020).

26 <sup>18</sup> *Replace*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/replace> (last visited November 10, 2020).

27 <sup>19</sup> *Replace*, Free Dictionary, <https://www.thefreedictionary.com/replace> (last visited November 10, 2020).

1 the policy, not slipped a definition or qualification upon “loss” through the back door in the  
2 definition of a separate term in the policy.

3 Moreover, the loss of functionality and loss of utility that occurred here can be repaired,  
4 rebuilt, or replaced. Each of these three terms are defined in terms of restoring that which was  
5 lost, and each applies to the facts of this case. The loss of functionality and utility must be  
6 repaired: it must be restored to a good or sound condition; it must be rebuilt: restored to its  
7 previous state; and it must be replaced: restored to its previous position or put back to its former  
8 place. That which was lost—on-premises dining—had to be repaired, rebuilt or replaced.  
9 Therefore, no language within the period of restoration provision limits recovery for Chloe’s  
10 Cafe’s business income loss. Rather, this interpretation fulfills the policy’s intent to provide  
11 coverage until the “Resumption of Operations” after a state of lost functionality has been repaired  
12 or replaced. Doc. 11-5 at 135.

13 **5. Legislative and Executive Enactments Establishing that the Outbreak**  
14 **of COVID-19 is “Direct Physical Loss or Damage” Further Confirm**  
**Plaintiff Has Sufficiently Stated a Claim**

15 As noted above, in deciding a motion to dismiss, this Court may consider any evidence  
16 that is the proper subject of judicial notice. Statutes, enactments, and laws, of course, fall within  
17 this category. Courts also look to statutes, enactments, and law to determine the meaning of  
18 insurance policy terms. *See, e.g., Factory Mut. Ins. Co. v. Peri Formworks Sys.*, 223 F. Supp. 3d  
19 1133, 1138 (D. Or. 2016). Federal courts in particular, often recognize the superior fact-finding  
20 capabilities of legislative bodies and executive agencies compared to courts. *See e.g., United*  
21 *States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

22 Here, numerous legislative and executive bodies in the states of California, New York,  
23 Florida, Texas, Colorado and North Carolina issued fact-based determinations that make clear  
24 that COVID-19 results in direct physical loss or damage. See Composite **Exhibit C**. Given these  
25 legislative and executive findings, by alleging that the Plaintiffs suffered “direct physical loss or  
26 damage”—and, as explained above, they did much more than that—the Plaintiffs adequately  
27 state a claim for relief.

1           **D.     Chloe’s Cafe’s Claims Are Covered by the Policy’s “Civil Authority”**  
 2           **Provision**

3           **1.     Chloe’s Cafe Sufficiently Alleges Entitlement to its “Civil Authority”**  
 4           **Coverage**

5           The elements for triggering civil authority coverage require that the insured suffer a loss  
 6 of business income: (1) caused by an action of a civil authority that (2) prohibits access to the  
 7 described premises (3) due to a direct physical loss or damage to property other than at the  
 8 described premises, and (4) the loss of or damage to the property other than at the described  
 9 premises must be caused by or result from a “covered cause of loss.” *Narricot Indus., Inc. v.*  
 10 *Fireman’s Fund Ins. Co.*, No. 01-cv-4679, 2002 WL 31247972, at \*4 (E.D. Pa. Sept. 30, 2002).

11           The Complaint satisfies all of these elements. Defendant does not argue that the Closure  
 12 Orders (Compl., ¶ 45) are not actions of civil authority, so there is no dispute as to the first  
 13 element. Second, those orders prohibited access to Chloe’s Cafe’s business property by its  
 14 customers, the source of Chloe’s Cafe’s business income. *Id.* Third, Chloe’s Cafe alleges that the  
 15 orders were issued as a result of COVID-19 proliferation near and around their restaurant. *Id.*  
 16 Finally, much like how Chloe’s Cafe’s losses should be covered under the policy, the losses by  
 17 surrounding businesses amount to “direct physical loss” under the policy. *Id.*

18           The *Studio 417* court reached the same conclusion, holding that the plaintiffs’ allegations  
 19 of actual loss were “applicable to other property” and that the civil authority orders included  
 20 “property other than” the plaintiffs’ premises. 2020 WL 4692385, at \*7. Other courts also have  
 21 found non-structural damage sufficient to trigger civil authority coverage. *See, e.g., Sloan v.*  
 22 *Phoenix of Hartford Ins. Co.*, 207 N.W.2d 434, 437 (Mich. Ct. App. 1973) (concluding that  
 23 physical damage to the premises was not a prerequisite for the payment of benefits under the  
 24 business-interruption policy).

25           Defendant’s authority against civil authority coverage is distinguishable on the facts or  
 26 the applicable policy language. For example, in *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-  
 27 cv-756, 1995 WL 129229 (N.D. Cal. Mar. 21, 1995), the court found no civil authority coverage  
 28 because the city curfew was a preemptive measure to prevent a future threat—looting and riots—

1 that had not yet happened. *Id.* at \*1–\*2. Here, by contrast, COVID-19 was not a “potential threat”  
2 at the time of the civil authority orders, but an active pandemic that had already spread throughout  
3 Chloe’s community, state and the entire country. Compl., ¶¶ 34–42.

4 Defendant’s reliance on *United Air Lines, Inc. v. Ins. Co. of Pa.*, 439 F.3d 128 (2d Cir.  
5 2006), suffers from similar flaws. There, the airline was not entitled to civil authority coverage  
6 when the government grounded flights following the 9/11 terrorist attacks. *Id.* at 130. Not only  
7 are these circumstances factually distinguishable like in *Syufy Enterprises*, but the policy  
8 language in *United Air Lines* also materially differed: that civil authority provision required the  
9 insured’s loss to be the “direct result of damage to adjacent premises” *Id.* at 129. Here, the  
10 policy’s Civil Authority provision is much broader, providing Chloe’s Café coverage for their  
11 losses “due to direct physical loss of or damage to property, other than at the described premises.”  
12 Doc. 11-5 at 124.

13 Defendant’s reliance on *Philadelphia Parking Authority v. Federal Ins. Co.*, 385 F. Supp.  
14 2d 280 (S.D.N.Y. 2005), is also unavailing. There, the FAA’s post-9/11 emergency order  
15 grounding air traffic did not prohibit any access to parking structures; the plain language of the  
16 FAA’s order showed that it was directed to aircraft operators, not parking garages. *Id.* Here, by  
17 contrast, the Closure Orders directly prohibited customers and workers from accessing Chloe’s  
18 Café’s own premises, a situation that falls squarely within the coverage provided by the policy’s  
19 Civil Authority provision. Moreover, while the plaintiff’s claims in *Philadelphia Parking* were  
20 premised solely on the economic losses from the slowdown in business from flight stoppage, *id.*  
21 at 285, here Chloe’s Café’s losses are a direct consequence of the Covered Causes of Loss.

22 Notably, too, none of the cases Defendant relies on to argue that Chloe’s Café’s claim for  
23 Civil Authority Coverage should be dismissed involved a Rule 12(b)(6) motion to dismiss;  
24 instead, the cases were decided on summary judgment after the parties had fully engaged in  
25 discovery. *See Syufy Enters.*, 1995 WL 129229, at \*2 (denying coverage on summary judgment  
26 because general curfews did not prohibit access to plaintiff’s theatre and, instead, plaintiff  
27 voluntarily chose to close its business); *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d  
28

1 683, 686 (5th Cir. 2011) (finding on summary judgment that plaintiff failed to prove a direct  
 2 causal link between any prior property damage and the evacuation order). Here, the parties have  
 3 not fully engaged in discovery and summary judgment is premature.

4 **2. The Policy Does Not Require a Complete Prohibition of Access.**

5 In *Studio 417*, the court found that the closure orders sufficiently triggered the subject  
 6 policy’s civil authority provision by mandating “‘that all inside seating is prohibited in  
 7 restaurants,’ and that ‘every person in the State of Missouri shall avoid eating or drinking at  
 8 restaurants,’ with limited exceptions for ‘drive-thru, pickup, or delivery options.’” *Studio 417*,  
 9 2020 WL 4692385, at \*7. Chloe’s Café alleges identical restrictions on their restaurant in  
 10 California’s Closure Orders and they need not plead an absolute prohibition on business  
 11 operation or entry to invoke the policy’s civil authority coverage, especially considering the  
 12 devastating and permanent impact on their business. Compl., ¶ 44.

13 The circumstances in *Narricot* also were analogous, where local civil authorities  
 14 prohibited operation of an industrial plant in the wake of Hurricane Floyd. *Narricot*, 2002 WL  
 15 31247972, at \*4. As held in *Narricot*, the phrase “prohibits access” does not require that the civil  
 16 authority completely forbid occupancy of the premises or even all business operation; once again,  
 17 the policy terms are subject to reasonable interpretation based on their “plain and ordinary  
 18 meaning.” *Estate of Neff*, 271 F. App’x at 226. To “prohibit” does not just mean to “forbid”; it  
 19 can also mean to “hinder,” or “to cause delay, interruption, or difficulty in,” or “to be an obstacle  
 20 or impediment.”<sup>20</sup> No language in the policy requires a *complete* prohibition on access to Chloe’s  
 21 business property, which is why the policy’s “Extra Expense” provision provides for  
 22 “minimiz[ing] the suspension of business,” and “suspension” is explicitly defined as “the  
 23 *slowdown or* cessation of business activities.” Doc. 11-5 at 123, ¶ g(3)(a) (emphasis added).  
 24  
 25

26 \_\_\_\_\_  
 27 <sup>20</sup> Prohibit, <https://www.dictionary.com/browse/prohibit>; Hinder,  
 28 <https://www.dictionary.com/browse/hinder>.

1 To the extent the Court believes the clause is susceptible to Defendant’s proposed  
2 construction, then it is faced with two reasonable constructions establishing ambiguity. *Bay*  
3 *Cities Paving & Grading, Inc. v. Lawyers’ Mut. Ins. Co.*, 5 Cal. 4th 854, 867 (1993). It is well  
4 established under Ninth Circuit law that such ambiguity must be resolved by construing the  
5 clause strictly against the drafter, here Defendant. *See, e.g., Blankenship v. Liberty Life Assur.*  
6 *Co. of Bos.*, 486 F.3d 620, 625 (9th Cir. 2007); *Lang v. Long-Term Disability Plan of Sponsor*  
7 *Applied Remote Tech., Inc.*, 125 F.3d 794, 799 (9th Cir. 1997) (explaining that “[a]mbiguities in  
8 ordinary insurance contracts are construed against the insurance company”).

9  
10 **CONCLUSION**

11 For the reasons set forth herein, Defendant’s Motion to Dismiss Complaint under Rule  
12 12(b)(6), and in the alternative, Motion for Summary Judgment under Rule 56, should be  
13 denied.

14  
15 Dated: November 16, 2020

Respectfully submitted,

16  
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