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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

DAKOTA VENTURES, LLC d/b/a KOKOPELLI GRILL and COYOTE BBQ PUB, individually and on behalf of all Others similarly situated, Plaintiffs, vs. OREGON MUTUAL INSURANCE CO., Defendant	Civil No. 3:20-CV-00630 HZ PLAINTIFFS' RESPONSE TO OREGON MUTUAL INSURANCE COMPANY'S MOTION TO DISMISS PURSUANT TO FRCP 12(b)(6)

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COME NOW Plaintiffs Dakota Ventures, LLC d/b/a Kokopelli Grill and Coyote BBQ Pub ("the Restaurants") and in Response to the Motion to Dismiss Pursuant to FRCP 12(b)(6) ("the Motion") by Defendant Oregon Mutual Insurance Company ("Oregon Mutual") state as follow:

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Oregon Mutual's Motion to Dismiss turns on five plain and ordinary words: "direct physical loss or damage." Although the words are ordinary, the impact of any decision on the merits by this Court will be extraordinary. Already, over six hundred cases have been filed by small businesses and larger ones seeking recovery of cumulative losses in the hundreds of billions of dollars for business interruption and property damage losses resulting from SARS-CoV-2 and the disease that it causes and that spreads it, COVID-19 (also known as the novel coronavirus).

The physical loss and damage suffered by the Restaurants since the outbreak of COVID-19, in many ways, differs little from the physical loss and damage experienced by innumerable businesses and public entities, including the physical loss or damage experienced by a property with which this Court is intimately familiar—the Mark O. Hatfield U.S. Courthouse. Before March 2020, if argument were heard in this case, it could have been held in Courtroom 15A with multiple lawyers present, a handful of journalists and concerned business owners, a court reporter, a marshal, and perhaps a law clerk. Similarly, a jury could have been selected and seated in Courtroom 15A and a trial could have been conducted there. Papers could have been filed in person because the clerk's office was open to the public. Between March 13 and at least July 15, 2020, however, the Courthouse could not operate in this typical manner.[1] Civil and criminal trials were postponed, grand jury proceedings were postponed, in-person hearings became telephonic or

[1] *See* D. Or. Standing Order 2020-4 (Mar. 13, 2020) (detailing the initial COVID-19 related restrictions affecting the Court in response to the declarations of national and state public health emergencies).

video hearings, the clerk's office was closed to the public, and paper documents had to be dropped into lock boxes "in light of the outbreak of the Coronavirus Disease 19 (COVID-19)."[2] Because of the outbreak of COVID-19, the Mark O. Hatfield U.S. Courthouse was impaired. It lost its functionality. It could no longer serve the administration of justice as it had before. This loss was direct. This loss was physical. The space could not be used.

So, too, with the Restaurants. Not only have the Restaurants pled that they suffered "direct physical loss or damage," (Dkt. 38, ¶ 70) ("COVID-19 caused direct physical loss and damage to Plaintiff's and the other Business Income Breach Class Members' Covered Properties"), which alone should suffice, particularly given the dozen judicially-noticeable legislative and administrative factual determinations that COVID-19 causes physical injury to property.[3] The Restaurants have also pled the details of that direct physical loss or damage. (Dkt. 38, ¶ 46 (the presence of COVID-19 caused denial of use of the property and necessitated the suspension of operations); ¶ 28 (COVID-19 presented a dangerous physical condition on property); ¶ 29 (the presence of COVID-19 renders property impure; that presence changes it substance; that presence contaminates interior building surfaces); ¶ 10 (presence and threat of COVID-19 forced the Restaurants to reduce business on their property to avoid getting people sick); ¶ 94 (COVID-19 physically prevented ingress and egress)).

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[2] *Id.* at 1–2 (restricting in-person proceedings and encouraging telephonic and video proceedings where practical); D. Or. Standing Order 2020-5 (Mar. 17, 2020) (enacting restrictions on the clerk's office, filings, and paper documents); D. Or. Standing Order 2020-7 (Mar. 30, 2020) (authorizing telephonic and video proceedings in criminal proceedings); D. Or. Standing Order 2020-12, at 1–2 (May 21, 2020) (amending details while maintaining public safety principles stated in Standing Orders 2020-5 and 2020-9); D. Or. Standing Order 2020-12 Amended, at 1–2 (June 29, 2020) (authorizing limited in-person proceedings but emphasizing the requirement that they be conducted in compliance with "health advisories, without jeopardizing public health and safety").

[3] *See, e.g.,* N.Y.C. Emergency Exec. Order No. 100, at 2 (Mar. 16, 2020), https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-100.pdf (emphasizing the virulence of COVID-19 and that it "physically is causing property loss and damage").

The upshot of Oregon Mutual's argument is that "direct physical loss or damage" requires structural alteration in the covered property. That, of course, is not what the words say, but as importantly, Oregon Mutual and other insurers have known since at least the early 1960s that many courts do not agree that the term requires structural alteration. *E.g.*, *Hughes v. Potomac Insurance Co.*, 18 Cal. Rptr. 650, 655 (Cal. App. 1962) (rejecting insurer's argument that structural alteration was a *sine qua non* to physical damage under a property insurance policy). It is common knowledge that insurers avidly follow court decisions and change their policy language to avoid outcomes that insurers want to avoid. *E.g.*, *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 64 Wash. App. 838, 860, 827 P.2d 1024 (1992) (citing 7A J. Appleman, Insurance Law and Practice § 4491 (1979)) ("New policy language has been introduced in an attempt to clarify troublesome areas for the underwriters, or where court decisions were counter to insurer intentions."), *aff'd* 126 Wash. 2d 50, 882 P.2d 703 (1994). Here, however, the insurance industry has left this language substantively unchanged for decades, even though insurers, including Oregon Mutual, easily could have changed the term "direct physical loss or damage" to "structural alteration."

Similarly, insurers have known for almost two decades that viruses and diseases, including coronaviruses, infest property and stick to its surfaces and lead to claims of business interruption losses. *See* "Hotel Chain To Get Payout for SARS-Related Losses," *Business Insurance* (Nov. 2, 2003) ("HONG KONG-Mandarin Oriental International Ltd. will receive $16 million from its insurers to pay for business interruption losses suffered by the group's hotels in Asia as a result of the severe acute respiratory syndrome outbreak.").[4] Through their drafting arm, the Insurance

[4] https://www.businessinsurance.com/article/20031102/story/100013638/hotel-chain-to-get-payout-for-sars-related-losses.

Services Office ("ISO"), insurers communicated that concern to regulators when preparing a so-called "virus" exclusion to be placed in some policies, but not others:

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

(Dkt. 38 ¶ 29). To address that concern, Oregon Mutual could easily have changed "direct physical loss or damage" to "structural alteration," but it did not.

If a civil jury were charged with applying the term "direct physical loss or damage" to the facts of this case, it could do so without any legal interpretation in the same manner that juries routinely decide whether a person has suffered injury or a property has suffered damage. Oregon Mutual apparently fears that a civil jury might get "lost" in the common sense of the term's plain and ordinary meaning, though, and provide Oregon Mutual exactly the answer Oregon Mutual does not want: that COVID-19 resulted in direct physical loss or damage to the Restaurants' property. So, Oregon Mutual has filed its motion seeking to have this Court determine that the plain and ordinary meaning of "direct physical loss or damage" is something other than what it says. The Motion lacks legal and factual merit and should be denied.

II. FACTUAL BACKGROUND

As stated more fully in the First Amended Complaint (and incorporated herein), the Restaurants have alleged basic facts concerning their businesses, the impact of COVID-19 on their businesses (including as detailed in the introduction), the physical loss or damage that they have suffered, and Oregon Mutual's response. In short, Plaintiff Dakota Ventures, LLC operates the

Restaurants: Kokopelli Grill, a waterfront restaurant and lounge on Puget Sound in Port Angeles, Washington, and its next-door neighbor, Coyote BBQ Pub, a bar-b-que restaurant. (Dkt. 38, ¶¶ 1-2). The Restaurants purchased insurance coverage from Oregon Mutual, including Specialty Property Coverage through a Businessowner's Protector Policy, as set forth in Oregon Mutual's Businessowner's Coverage Form (Form BP 00030302) ("Businessowner's Coverage Form"). (Dkt. 38, ¶ 3). Unlike many policies that provide Business Income (also referred to as "business interruption") coverage, Oregon Mutual's Businessowner's Coverage Form does not include, and is not subject to, any exclusion for losses caused by viruses or communicable diseases. (Dkt. 38, ¶ 9).

The Restaurants were forced to suspend or reduce business at their restaurants and lounge due to COVID-19 and the resultant Executive Orders issued by the Governor of Washington mandating the closure of businesses like the Restaurants for on-site services, as well as in order to take necessary steps to prevent further damage and minimize the suspension of business and continue operations. (Dkt. 38, ¶ 10). Oregon Mutual has, on a widescale and uniform basis, refused to pay its insureds under its property insurance policies for losses suffered due to COVID-19, any executive orders by civil authorities that have required the necessary suspension of business, and any efforts to prevent further property damage or to minimize the suspension of business and continue operations. (Dkt. 38, ¶ 17). Indeed, Oregon Mutual advised the Restaurants that they could not submit a claim under the Policy because there had been no covered loss under the terms of the Policy. (Dkt. 38, ¶ 17).

III. PROCEDURAL BACKGROUND

The Restaurants commenced this lawsuit on April 17, 2020, by filing their complaint, (Dkt. 1), and Oregon Mutual answered on May 15, 2020. (Dkt. 11). The Answer included a

counterclaim. (Dkt. 11). On June 12, 2020, Oregon Mutual filed a motion to dismiss (Dkt. 17), purportedly seeking to dismiss this action under FRCP 12(b)(6), even though the Motion was filed almost a month after its Answer. On June 17, 2020, the Restaurants moved for a more definite statement with respect to Oregon Mutual's Counterclaim. (Dkt. 18). On July 9, 2020, the Restaurants moved for leave to amend their complaint. (Dkt. 26). The Court granted the Restaurants' motion and dismissed as moot Oregon Mutual's original motion to dismiss on July 29, 2020. (Dkt. 36). On July 30, 2020, the Restaurants filed their First Amended Complaint. (Dkt. 38). Two weeks later, on August 13, 2020, Oregon Mutual filed the Motion, once again seeking to dismiss this action under FRCP 12(b)(6). (Dkt. 40).

IV. ARGUMENT & AUTHORITIES

A. FRCP 12(b)(6) Standard

Under the governing standards for a motion to dismiss, Oregon Mutual's Motion must fail. "A motion to dismiss under Federal Rule of Civil Procedure Rule 12(b)(6) tests the sufficiency of the claims." *Federal Ins. Co. v. Royal Auto Trans. Inc.*, 2019 WL 4920874, at *1 (D. Or. Oct. 4. 2019). Although factual allegations must be sufficient to raise a right of relief above the speculative level, all allegations of material fact are presumed true and construed in the light most favorable to the plaintiff. *Id.* "In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP,* 476 F.3d 756, 763 (9th Cir. 2007).

B. Rules of Insurance Policy Interpretation

The parties agree on a number of things: First, any differences in common law contractual rules between Oregon and Washington do not impact the rule of decision here. As Professor Farnsworth pointed out in his landmark treatise on Contract Law, "[m]ost of what we usually think

of as 'contract law' consists of a legal framework within which parties may create their own rights and duties by agreement." 2 E. Allan Farnsworth, *Farnsworth on Contracts* 218 (3d ed. 2004). And, "society confers upon contracting parties wide power to shape their relationship. In this country more than in most, parties tend to take advantage of their power to define their relationships by written agreements that are detailed and prolix." *Id.* The various state laws provide the framework for the relationship, governing, for example, what constitutes offer and acceptance in forming the contract or what type of mistake can avoid the contract, but these framework issues will not be litigated in this case. Insurance coverage cases hinge on what the insurance policy says. *Dewsnup v. Farmers Ins. Co.*, 349 Or. 33, 39–40, 239 P.3d 493 (2010).

Of course, rules of interpretation are rules of law, but Oregon Mutual broaches no conflict between these Oregon rules of insurance policy interpretation and their Washington counterparts. The interpretation of an insurance policy is a question of law that seeks the "intention of the parties". *Id.* To this end, the interpreting court first examines the terms and conditions of a policy, using the plain meaning of any undefined terms. *Id.* at 40; *see also Portland Sch. Dist. No. 1J v. Great Am. Ins. Co.*, 241 Or. App. 161, 167, 249 P.3d 148 (2011). Courts have used a variety of sources to interpret the plain meaning of language, including dictionaries, case law, statutes, and other sources. *E.g.*, *Hunters Ridge Condo. Ass'n v. Sherwood Crossing, LLC*, 285 Or. App. 416, 424, 395 P.3d 892 (2017).

Second, the parties agree that for there to be coverage under any of the provisions under which the Restaurants seek coverage, there must have been "direct physical loss or damage" either to the Restaurants' property in the case of the Business Income insuring agreement of the Policy, or other property in the case of the Civil Authority insuring agreement of the Policy.

C. "Direct Physical Loss or Damage" Is Not Limited to Structural Alterations

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

"Direct," when used as an adjective, is often defined as something "characterized by close logical, causal or consequential relationship" or something "marked by absence of an intervening agency, instrumentality, or influence" or something "proceeding from one point to another in time or space without deviation or interruption." *Direct*, Merriam-Webster Online Dictionary, (July 10, 2020). Not surprisingly, the case law in this district has treated the term "direct" in an all-risk insurance policy as a means to exclude "consequential and intangible damages such as loss in value." *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts,* No. CV–01–1362–ST, 2002 WL 31495830, at *8 (D. Or. June 18, 2002); *see also Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. Civ. 98–434–HU, 1999 WL 619100 (D. Or. Aug. 4, 1999). ¡Simply absent from any meaning of the term "direct" is the notion that direct loss or damage requires structural alteration of covered property.

"Physical," too, does not suggest any requirement for structural alteration. Pertinent definitions of "physical" make clear that the term describes something "having material existence" or something "perceptible especially through the senses." *Physical*, Merriam-Webster Online Dictionary, (July 10, 2020). Many "physical" losses do not require structural change. An event or condition that prevents persons from inhabiting or operating a room in their home or business is no less "physical" of a loss under these definitions than an event that destroys that room. Oregon Mutual is confusing the term "physical" with "structural." But, those terms are not synonyms. *See physical*, Thesaurus.com (July 10, 2020). "Physical" is a word of much greater breadth and

denotes a much broader sphere than "structural." Indeed, in this Court's view, the word "physical" limits coverage only in the sense that it "'negates any possibility that the policy was intended to include 'consequential or intangible injury,' such as depreciation in value, within the term 'property damage.'"" *Lillard-Roberts,* 2002 WL 31495830, at *7 (quoting *Wyoming Sawmills, Inc. v. Transportation Ins. Co.,* 282 Or. 401, 406, 578 P.2d 1253 (1978)).

"Loss" also carries no requirement of structural alteration. Definitions of "loss" include not only "destruction" and "ruin," but also "deprivation." *Loss*, Merriam-Webster Online Dictionary, (July 10, 2020). Synonyms for "loss" include "deprivation," "dispossession," and "impairment." *Loss*, Thesaurus.com (July 10, 2020).

Even the term "damage" does not require a physical alteration. Damage is often defined simply as "loss or harm resulting from injury," but it also is defined as expense and cost. *Damage*, Merriam-Webster Online Dictionary, (July 10, 2020). Synonyms for "damage" include "contamination," "impairment," "deprivation," and "detriment"—all terms with a physical aspect, but not necessarily a structural aspect. *Damage*, Thesaurus.com (July 20, 2020). Quoting dictionaries, one court explained the term "damage" as follows:

> One dictionary defines "damage" as "injury or harm that reduces value or usefulness." *Random House Dictionary of the English Language*, 504 (2nd ed.1987). Another defines it as "injury or harm to a person or thing, resulting in a loss in soundness, value, etc." *Webster's New World Dictionary*, 356 (2nd ed.1980). A legal dictionary defines "damage" in part as "every loss or diminution" of a person's property. *Black's Law Dictionary* 389 (6th ed.1990). Clearly, without qualification, the term "damage" encompasses more than physical or tangible damage.

Dundee Mut. Ins. Co. v. Marifjeren, 587 N.W.2d 191, 194 (N.D. 1998).

But even if the term "damage" did suggest a requirement of structural alteration, that would only drive home the lack of such a requirement in the term "direct physical loss or damage" as a whole. Otherwise, why would insurers, including Oregon Mutual, use *both* "loss **or** damage." If

"damage" were given a structure-altering meaning, "loss" would have to be given a meaning not carrying that requirement. Otherwise, loss would be rendered redundant and thus violate a cardinal rule of insurance policy interpretation. *Nautilus Group, Inc. v. Allianz Global Risks US*, 2012 WL 760940, at *7 (W.D. Wash. Mar. 8, 2012) ("If 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous."); *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908AB (KSx), 2018 WL 3829767, at *3 (C.D. Cal. July 11, 2018) ("[T]o interpret 'physical loss of' as requiring 'damage to' would render meaningless the 'or damage to' portion of the same clause, thereby violating a black-letter canon of contract interpretation—that every word be given a meaning.").

D. Infestation By Harmful Agents Constitutes "Direct Physical Loss or Damage"

The presence of COVID-19 constitutes direct physical loss or damage to property. COVID-19 particles, though unseen, physically alter their environment in a manner that causes loss and damage by rendering affected premises dangerous to human health. On multiple occasions, this Court, and many other courts, have held that infestation of covered property by microscopic entities that are harmful to human health constitutes "direct physical loss or damage."

In *Stack Metallurgical Services, Inc. v. Travelers Indemnity Co. of Connecticut*, this court held that contamination of a furnace by lead particles constituted direct physical loss or damage. CIV. 05-1315-JE, 2007 WL 464715, *6-9 (D. Or. Feb. 7, 2007). In *Stack*, a hammer disintegrated inside the insured's furnace, causing the furnace to become contaminated with lead particles. *Id*., at *1. As a result, the insured could not utilize the furnace for any commercial purpose for more than a year and could not use the furnace for its primary commercial purpose for some time after that. *Id*. The defendant insurer argued that the only "direct physical damage" sustained to plaintiff's property was the loss of the hammer itself. *Id*., at *8. The court disagreed, holding that

the presence of lead particle contamination and their obvious health effects that "prevented the furnace from being used for its ordinary expected purpose" was "fairly characterized as a 'direct physical loss of or damage to' the furnace." *Id*. Like the lead particles in *Stack*, the presence of COVID-19 prevents the Restaurants from using their premises because of grave public health dangers.

Similarly, in *Lillard-Roberts*, this court rejected the insurer's argument concerning the necessity of structural alteration, and held that the presence of mold in covered property and the risk of systemic fungal disease constituted "direct physical loss to property." 2002 WL 31495830, at *7-10. Property damage can occur even when unobserved by the naked eye. *See Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, CIV. 98-434-HU, 1999 WL 619100, at *6 (D. Or. Aug. 4, 1999) (noting that "physical damage can occur at the molecular level and can be undetectable in a cursory inspection" and holding that the presence of microbial mold and fungi constituted "direct physical loss."). Odors, vapors, or similar unseen agents can cause property damage and direct physical loss. In *Farmers Ins. Co. of Oregon v. Trutanich*, the court held that a pervasive odor which "infiltrated" a home as a result of tenants' cooking of methamphetamine physically damaged the house, causing "direct physical loss." 123 Or. App. 6, 10-11, 858 P.2d 1332, 1335-36 (1993); *see also Largent v. State Farm Fire & Cas. Co.*, 116 Or. App. 595, 597-98, 842 P.2d 445, 446 (1992) (holding that airborne vapors and particulates discharged during the cooking of methamphetamine damaged a rental house, resulting in direct physical loss).

Further, in *Oregon Shakespeare Festival Ass'n v. Great American Ins. Co.*, smoke infiltration of an outdoor theater that resulted in the cancellation of performances because the air contained an "unhealthy level of particulates" constituted "direct physical loss or damage." No. 1:15-CV-01932-CL, 2016 WL 32674227, at *9 (D. Or. June 7, 2016), *vacated by stipulation of*

the parties, No. 1:15-CV-01932-CL, 2017 WL 1034203 (D. Or. Mar. 6, 2017). The court dismissed the insurer's contention that damage to air quality was not "physical," noting that "air is not mental or emotional, nor is it theoretical;" thus, the plain meaning of the term "direct physical loss or damage" favored coverage, because the air within the theater which was harmed was "physical." *Id*., at *5. The court found no evidence within the policy to support the insurer's argument that to be "physical" the loss or damage must be structural to the building itself. *Id*.

Courts throughout the country have reached similar conclusions. In *Gregory Packaging, Inc. v. Travelers Property Cas. Co.*, the court held that the discharge of ammonia gas inflicted direct physical loss of or damage to an insured's facility because it "physically transformed" the facility's air, leaving it "unfit for normal human occupancy and continued use." No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *3, *6 (D.N.J. Nov. 25, 2014). In *Cooper v. Travelers Ind. Co.*, the Northern District of California held that the presence of e-coli bacteria in a restaurant's well, which forced the restaurant's closure, was direct physical damage to the property. C-01-2400-VRW, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002). The Colorado Supreme Court has also held that a church building sustained physical loss when it was rendered uninhabitable and dangerous because of the accumulation of gasoline under and around the church. *W. Fire Ins. Co. v. First Presbyterian Church,* 437 P.2d 52, 55 (Colo. 1968). And, in *Sentinel Management*, the court concluded that contamination by asbestos fibers released from asbestos containing materials constituted a fortuitous, direct physical loss covered under an all-risk, first-party property insurance policy. *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 298, 300-01 (Minn. Ct. App. 1997).[5]

[5] Oregon Mutual's reliance on *Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n,* 793 F. Supp. 259 (D. Or. 1990), in which the insured made the discretionary decision to remove asbestos, is misplaced. In *Benjamin Franklin,* the court found no coverage for the cost to remove asbestos, loss of use,

In its Motion, Oregon Mutual attempts to distinguish some of this case law, but it does so through a purposeful misreading of the Restaurants' complaint. Oregon Mutual contends that the Restaurants "fail[] to allege any facts whatsoever regarding any physical alteration of its property," which, Oregon Mutual argues "makes it abundantly apparent that Plaintiff's property was not directly physically lost or damaged." Br. at 16-17; *see also id.* at 12 ("Plaintiff, however, fails to allege any factual allegations that demonstrate that the COVID-19 virus was actually present on or actually did cause physical damage to Plaintiff's premises, or any other property.").

Oregon Mutual's assertions, however, are not even remotely accurate. Among many other allegations, the Restaurants allege that "[t]he presence of COVID-19 on property *damages the property*. It makes it unsafe," (Dkt. 38 ¶ 11) (emphasis added), and that "due to COVID-19, Plaintiff's property at Kokopelli Grill and Coyote BBQ Pub has suffered *direct physical loss and damage* under the plain meaning of those words. *COVID-19 has impaired Plaintiff's property* by making it unusable in the way that it had been used before COVID-19." (*Id.* ¶ 12) (emphasis added).

Indeed, the First Amended Complaint continues with several specific paragraphs detailing explicitly the physical loss suffered by the Restaurants:

- Instead of being able to pack in patrons, Kokopelli Grill and Coyote BBQ Pub can now, at most, only ***(1) serve takeout or (2) serve a severely limited number of customers at any one time, provided that tables are spaced for six feet social distancing. To do anything else would lead to the emergence or reemergence of COVID-19 at the restaurants***. Until COVID-19 was brought even slightly under control, even such limited use as this was not possible. (Dkt. 38 ¶ 13) (emphasis added).

- The loss is "direct." Dakota Ventures is not, for example, asking Oregon Mutual to

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and other expenses after the insured's tenant discovered asbestos. *Id.* at 263. The court reasoned that the building remained physically intact and unchanged, and the loss occasioned by the insured's choice to remove the asbestos was only economic, so the policy (which, unlike the policy at issue in this case, was not an all-risk policy) excluded this indirect, non-physical loss. *Id.* at 261, 263.

reimburse Dakota Ventures after someone obtained a judgment against Dakota Ventures for getting them sick. ***Rather, Dakota Ventures directly lost the functionality of its property for business purposes due to COVID-19***. (*Id.* ¶ 14) (emphasis added).

- The loss is "physical." The physical space of Plaintiff's property is unable to function in the manner in which it had previously functioned. ***The probability of illness prevents the functioning of the physical space in no different of a way than how, on a rainy day, an open roof caused by a tornado would make the interior space of a business unusable***. (*Id.* ¶ 15) (emphasis added).

- The loss is a "loss." ***Dakota Ventures has lost the use and function of physical space***. While its properties could once accommodate many, now they can physically only accommodate a few. (*Id.* ¶ 15) (emphasis added).

Because the Restaurants have alleged that (1) COVID-19 presented a dangerous physical condition on property, (Dkt. 38 ¶¶ 11, 15, 29), (2) the presence of COVID-19 renders property impure, (*id.* ¶ 29), (3) the presence changes the property's substance and contaminates interior building surfaces, (*id.* ¶ 29), and (4) the presence and threat of COVID-19 forced the Restaurants to reduce business on their property to avoid getting people sick, (*id.* ¶ 10), the Restaurants sufficiently allege "direct physical loss or damage."

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

Courts across the country, including this court, have held that properties sustained "direct physical loss or damage" when they lose habitability or functionality, including commercial functionality. *See Stack Metallurgical Services, Inc.*, 2007 WL 464715, at *8 (holding that industrial furnace sustained "direct physical loss or damage" when contamination prevented it from being used for ordinary commercial purposes); *Gregory Packaging, Inc.*, 2014 WL 6675934, at *6 (holding that the discharge of ammonia gas inflicted direct physical loss of or damage to an insured's facility because it "physically transformed" the facility's air, leaving it "unfit for normal human occupancy and continued use.").

In *Murray v. State Farm Fire & Casualty Co.*, 509 S.E.2d 1 (W. Va. 1998), the policyholder sought coverage for "direct physical loss to the property" when the policyholder's home was rendered uninhabitable by the threat of falling rocks. The court rejected the insurance companies' argument that structural alteration was required:

> The policies in question provide coverage against "sudden and accidental loss" and "accidental direct physical loss" to property. "'Direct physical loss' provisions require only that a covered property be injured, not destroyed. **Direct physical loss also may exist in the absence of structural damage to the insured property.**" *Sentinel Management Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. App. 1997) (citations omitted). . . .
>
> We therefore hold that an insurance policy provision providing coverage for a "sudden and accidental" loss or an "accidental direct physical loss" to insured property requires only that the property be damaged, not destroyed. **Losses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property.**

Id. at 17 (emphasis added).

Accordingly, events—like the presence or suspected presence of COVID-19—which make it too dangerous to use property as it was designed to be used, cause physical loss or damage to that property. *See also Motorists Mutual Ins. Co. v. Hardinger,* 131 F. App'x. 823, 825-27 (3d Cir. 2005) (finding that contamination of a home's water supply that rendered the home uninhabitable to constitute "direct physical loss"); *Essex v. BloomSouth Flooring Corp.,* 562 F.3d 399, 406 (1st Cir. 2009) (finding that an unpleasant odor rendering property unusable constituted physical injury to the property); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp. 2d 699, 709 (E.D.Va. 2010), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013) (finding "direct physical loss" where a home was "rendered uninhabitable by the toxic gases" released by defective drywall).

Though Oregon Mutual references a small number of COVID-19 insurance decisions that it contends support its position, these decisions are readily distinguishable from the present case

as they involve different policies, issued by different insurers, to different policyholders, in different states—and, critically, most of these cases were not decided on a motion to dismiss under Rule 12(b)(6). *See* Br. at 17-19 (citing *Rose's 1, LLC v. Erie Insurance Exchange*, Case No. 1010 CA 00242 B (Superior Court of the District of Columbia, August 6, 2020) (state trial court decision granting insurer's motion for *summary judgment* and applying District of Columbia law); *Social Life Magazine, Inc. v. Sentinel Ins. Co.*, No. 1:20-cv-3311 (S.D.N.Y.) (denying policyholder's motion seeking *preliminary injunction* and applying New York law); *Gavrilides Management Co., LLC v. Michigan Ins. Co*., Case No. 20-000258-CB (Ingham Cty. Circuit Court, Mich., July 1, 2020) (oral decision by state trial court granting insurer's motion for *summary disposition* under MCR 2.116(c)(8) and applying Michigan law); *Diesel Barbershop, LLC, et. al. v. State Farm Lloyds*, No. 5:20-CV-461-DAE (W.D. Tex.) (granting motion to dismiss, but applying Texas law and interpreting policy that, unlike the Oregon Mutual policy, contained a specific virus exclusion).

Tellingly, however, Oregon Mutual fails to cite two recent federal district court decisions involving COVID-19 business interruption claims that *denied* the insurers' motion to dismiss. *See Studio 417, Inc., et al., v. Cincinnati Ins. Co.*, No. 20-cv-03127-SRB (W.D. Mo. August 12, 2020);[6] *K.C. Hopps, Ltd. V. Cincinnati Ins. Co.*, No. 20-cv-00437-SRB (W.D. Mo. August 12, 2020).[7] In *Studio 417*, the court held that the plaintiffs adequately alleged a claim under policies providing very similar Business Income, Civil Authority, Ingress and Egress, and Sue and Labor coverages compared to those at issue in this matter. Ex. A at 7-17. Just as in this case, "physical loss" ***or*** "physical damage" was at issue as it related to COVID-19's impact on small business operations.

[6] A copy of the Order is attached as Exhibit A to this opposition.
[7] A copy of the Order is attached as Exhibit B to this opposition.

Id. at 8-9. The court emphasized, relying on similar dictionary definitions as used by the Restaurants here, that the plaintiffs alleged a "direct physical loss." *Id.* at 8. Indeed, the *Studio 417* court cited *Lillard-Roberts* from the District of Oregon in support of the very proposition that Oregon Mutual would have this court discount: that "*even absent a physical alteration*, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose." *Id.* at 10 (emphasis added) (citing *Lillard-Roberts*, 2002 WL 31495830, at *9). The court therefore denied the insurer's motion to dismiss. *Id.* at 17.

Because the Restaurants have alleged that (1) the presence of COVID-19 caused the denial of use of the property and necessitated the suspension of operations, (Dkt. 38 ¶ 46), (2) that COVID-19 presented a dangerous physical condition on property, (*id.* ¶ 38), and (3) that the presence and threat of COVID-19 forced the Restaurants to reduce business on their property to avoid getting people sick, (*id.* ¶ 46), the Restaurants have sufficiently alleged "direct physical loss or damage" to property.

F. Legislative and Executive Enactments Establishing that the Outbreak of COVID-19 is "Direct Physical Loss or Damage" Further Confirm That the Restaurants Have Sufficiently Stated a Claim

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

See N.Y.C. Emergency Exec. Order No. 100, at 2 (Mar. 16, 2020) (emphasizing the virulence of COVID-19 and that it "physically is causing property loss and damage");[8] Broward Cty. Fla. Administrator's Emergency Order No. 20-01, at 2 (Mar. 22, 2020) (noting that COVID-19 "constitutes a clear and present threat to the lives, health, welfare, and safety of the people of Broward County");[9] Harris Cty. Tex. Office of Homeland Security & Emergency Mgmt., Order of Cty. J. Lina Hidalgo, at 2 (Mar. 24, 2020) (emphasizing that the COVID-19 virus can cause "property loss or damage" due to its contagious nature and transmission through "person-to-person contact, especially in group settings");[10] Napa Cty. Cal. Health & Human Service Agency, Order of the Napa Cty. Health Officer (Mar. 18, 2020) (issuing restrictions based on evidence of the spread of COVID-19 within the Bay Area and Napa County "and the physical damage to property caused by the virus");[11] City of Key West Fla. State of Local Emergency Directive 2020-03, at 2 (Mar. 21, 2020) (COVID-19 is "causing property damage due to its proclivity to attach to surfaces for prolonged periods of time.");[12] City of Oakland Park Fla. Local Public Emergency Action Directive, at 2 (Mar. 19, 2020) (COVID-19 is "physically causing property damage");[13] Panama City Fla. Resolution No. 20200318.1 (Mar. 18, 2020) (stating that the resolution is necessary because of COVID-19's propensity to spread person to person and because the "virus physically is causing property damage");[14] Exec. Order of the Hillsborough Cty. Fla. Emergency Policy Group, at 2 (Mar. 27, 2020) (in addition to COVID-19's creation of a "dangerous physical

[8] https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-100.pdf
[9] https://www.broward.org/CoronaVirus/Documents/BerthaHenryExecutiveOrder20-01.pdf
[10] https://www.taa.org/wp-content/uploads/2020/03/03-24-20-Stay-Home-Work-Safe-Order_Harris-County.pdf
[11] https://www.countyofnapa.org/DocumentCenter/View/16687/3-18-2020-Shelter-at-Home-Order
[12] https://www.cityofkeywest-fl.gov/egov/documents/1584822002_20507.pdf
[13] https://oaklandparkfl.gov/DocumentCenter/View/8408/Local-Public-Emergency-Action-Directive-19-March-2020-PDF
[14] https://www.pcgov.org/AgendaCenter/ViewFile/Item/5711?fileID=16604

condition", it also creates "property or business income loss and damage in certain circumstances");[15] Colorado Dep't of Pub. Health & Env't, Updated Public Health Order No. 20-24, at 1 (Mar. 26, 2020) (emphasizing the danger of "property loss, contamination, and damage" due to COVID-19's "propensity to attach to surfaces for prolonged periods of time");[16] Sixth Supp. to San Francisco Mayoral Proclamation Declaring the Existence of a Local Emergency, 26-27 (Mar. 27, 2020) ("This order and the previous orders issued during this emergency have all been issued . . . because the virus physically is causing property loss or damage due to its proclivity to attach to surfaces for prolonged periods of time.");[17] City of Durham NC, Second Amendment to Declaration of State of Emergency, at 8 (effective Mar. 26, 2020) (prohibiting entities that provide food services from allowing food to be eaten at the site where it is provided "due to the virus's propensity to physically impact surfaces and personal property").[18]

Given these legislative and executive findings, by simply alleging that the Restaurants suffered "direct physical loss or damage"—and, as explained above, they did much more than that—the Restaurants adequately stated a claim for relief.

G. Coverage Exists Under the Civil Authority Coverage Clause

Under the Oregon Mutual Policy, Civil Authority coverage applies when a Covered Cause of Loss causes damage to property other than property at the described premises, (i.e. a third party's property), and the action of a civil authority prohibits access to the insured's premises as a result. Oregon Mutual contends that "the Operative Complaint neglects to make any allegations of direct physical loss or damage to other property." (Br. at 30). However, that's simply not true. The

[15]https://www.hillsboroughcounty.org/library/hillsborough/mediacenter/documents/administrator/epg/saferathomeorder.pdf
[16] https://www.pueblo.us/DocumentCenter/View/26395/Updated-Public-Health-Order---032620
[17] https://sfgov.org/sunshine/sites/default/files/sotf_061020_item3.pdf
[18] https://durhamnc.gov/DocumentCenter/View/30043/City-of-Durham-Mayor-Emergency-Dec-Second-Amdmt-3-25-20_FINAL

First Amended Complaint specifically alleges that "COVID-19 caused damage to property *near* Plaintiff's Covered Property and the Covered Property of the other Class Members in the same manner described above that it did so with Plaintiff's Covered Property." (Dkt. 38 ¶ 31) (emphasis added).[19] Though Oregon Mutual may disagree with these allegations, they must be accepted as true at the motion to dismiss stage. As described above, for the same reasons COVID-19 caused physical loss or damages to the Restaurants, COVID-19 caused physical loss or damage to all restaurants in Washington, including those restaurants located within the area surrounding Plaintiffs' property.

In its Motion, Oregon Mutual acknowledges that civil authorities imposed restrictions on dine-in services, (Br. at 6), but contends that those restrictions are not sufficient to trigger coverage because the Restaurants were not *completely* barred from accessing their premises. (*Id.* at 30). The plain language of the Oregon Mutual Policy, however, make clears that a complete prohibition of access to the insureds' premises is not required in order to trigger coverage. By its terms, the Policy does not require a complete closure as Oregon Mutual maintains; rather, the Policies merely require that access be "prohibit[ed]" by a civil authority. Though "prohibited" is sometimes defined to mean "forbid" it is also defined to mean "hinder." *Prohibit*, Dictionary.com (July 18, 2020). "Hinder," in turn, means "to cause delay, interruption, or difficulty in" and "to be an obstacle or impediment." *See Hinder*, Dictionary.com (July 18, 2020). Oregon Mutual cannot seriously argue that the relevant civil authority orders, which greatly impacted restaurant

[19] *See also id.* at ¶ 36 ("The threat of and presence of COVID-19 with respect to *other property* has caused civil authorities throughout the country to issue orders requiring the suspension of business at a wide range of establishments, including civil authorities with jurisdiction over Plaintiff's business[.]") (emphasis added); *id.*at ¶ 47 ("The Closure Orders, including the issuance of Washington Proclamation Nos. 20- 13, 20-25, 20-25.1, and 20-25.13, prohibited access to Plaintiff's and the other Class Members' Covered Property, and the area *immediately surrounding Covered Property*, in response to dangerous physical conditions described above resulting from a Covered Cause of Loss.") (emphasis added).

operations (including substantial restrictions on in-person dining), have not caused "interruption," "difficulty," or presented an "obstacle" for innumerable restaurants across the country, including the Restaurants. As the *Studio 417* court explained:

> ***Upon review of the record, the Court finds that Plaintiffs have adequately alleged that their access was prohibited***. With respect to Studio 417's hair salons, the Amended Complaint alleges that a Closure Order "required hair salons and all other businesses that provide personal services to suspend operations." (Doc. #16, ¶ 67.) ***With respect to Plaintiffs' restaurants, the Closure Orders mandated "that all inside seating is prohibited in restaurants," and that "every person in the State of Missouri shall avoid eating or drinking at restaurants," with limited exceptions for "drive-thru, pickup, or delivery options."*** (Doc. #16, ¶¶ 71-80.)
>
> ***At the motion to dismiss stage, these allegations plausibly allege that access was prohibited to such a degree as to trigger the civil authority coverage.*** *Compare TMC Stores, Inc. v. Federated Mut. Ins. Co.*, No. A04-1963, 2005 WL 1331700, at * 4 (Minn. Ct. App. June 7, 2005) ("Because access remained and the level of business was not dramatically decreased, the civil authority section of the insurance policy is inapplicable and the district court did not err in granting summary judgment."). ***This is particularly true insofar as the Policies require that the "civil authority prohibits access," but does not specify "all access" or "any access" to the premises.*** For these reasons, Plaintiffs have adequately stated a claim for civil authority coverage.

Studio 417, Inc. v. Cincinnati Ins. Co., No. 20-CV-03127-SRB, at 14 (W.D. Mo. Aug. 12, 2020) (attached as Ex. A) (emphasis added).

The Restaurants have therefore stated a claim for civil authority coverage.

H. Coverage Exists Under the Ingress and Egress Coverage Clause

The Oregon Mutual Policy provides ingress and egress coverage when ingress or egress to the described premises is physically prevented due to direct loss or damage to property, other than at the described premises (i.e. a third party's property), caused by or resulting from any Covered Cause of Loss. Oregon Mutual claims that no coverage is provided under this clause because (1) "Plaintiff has failed to allege any actual physical loss or damage to other property" (Br. at 32); and (2) "Plaintiff fails to allege that its own ingress or egress to its premises has been 'physically

prevented' as required by the plain language of the Policy's Ingress or Egress additional coverage provision." (*Id.*). Like its argument with respect to Civil Authority coverage, however, Oregon Mutual's position is misplaced.

The Restaurants specifically alleged that "COVID-19 caused damage to property *near* Plaintiff's Covered Property and the Covered Property of the other Class Members in the same manner described above that it did so with Plaintiff's Covered Property." (Dkt. 38 ¶ 31) (emphasis added). Likewise, they alleged that "[t]he Closure Orders resulting from the COVID-19 pandemic *physically prevented ingress or egress* to Plaintiff's and the Class Members' described premises due to direct loss or damage to property, other than at the described premises, caused by or resulting from a Covered Cause of Loss." (*Id.* ¶ 94) (emphasis added). For substantially the same reasons that the Restaurants stated a claim under the Civil Authority coverage clause, they have also stated a claim under the ingress and egress clause. *See also Studio 417*, No. 20-CV-03127-SRB, at 15 (attached as Ex. A) (concluding that allegations of suspended or reduced business adequately stated a claim for ingress and egress coverage).

I. The Policy Provides Coverage Under the Sue and Labor Clause

The Restaurants have also stated a claim for relief under the Policy's Sue and Labor clause. Oregon Mutual argues that this clause is not an additional coverage, but instead imposes certain obligation and duties on the policyholder in the event of loss or damage to Covered Property. (Br. at 33). According to Oregon Mutual, because the Restaurants have not alleged physical loss or damage, no amount can be recovered under this provision. Oregon Mutual, however, has it backwards.

Oregon Mutual admits that the Sue and Labor clause "provides a mechanism for an insured to recover expenses incurred to minimize or prevent loss or damage to Covered Property due to a

Covered Cause of Loss." (*Id.*). As explained at length above, the Restaurants have sufficiently alleged direct physical loss or damage. Moreover, the Restaurants have alleged that "[i]n complying with the Closure Orders and otherwise suspending or limiting operations, Plaintiff and other members of the Sue and Labor Breach Class *incurred expenses* in connection with reasonable steps to protect Covered Property." (Dkt. 38 ¶ 102) (emphasis added). Consequently, the Restaurants have adequately stated a claim for sue and labor coverage.

V. CONCLUSION

For the reasons stated above, the Motion should be denied.

Dated: August 27, 2020

Respectfully submitted,

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