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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 **DEFENDANT OREGON MUTUAL INSURANCE COMPANY'S MOTION TO DISMISS PURSUANT TO FRCP 12(b)(6)**

RULE 7-1(a)(1) CERTIFICATION

Counsel for defendant Oregon Mutual Insurance Company has conferred telephonically with counsel for plaintiff regarding this motion and the parties have been unable to resolve the subject of this dispute.

I. RELIEF REQUESTED

Defendant Oregon Mutual Insurance Company ("Oregon Mutual") moves to dismiss Plaintiff Dakota Ventures, LLC's complaint pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6). Plaintiff has not alleged any facts that give rise to insurance coverage for its alleged claims.

Plaintiff owns and operates two restaurants that are alleged to have sustained economic loss caused by COVID-19 related governmental orders. Plaintiff's complaint states that Oregon Mutual issued a commercial property policy that provides coverage for Plaintiff's COVID-19

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related losses due to "direct physical loss or damage."[1] Plaintiff admits that this language is "clear and unambiguous."[2] While the Complaint alleges that presence of virus or disease *can* constitute physical damage to property, Plaintiff fails to allege any facts whatsoever to demonstrate that the COVID-19 virus *did* cause physical damage to property. Coverage under each of the policy provisions relied upon by Plaintiff hinges upon whether loss is caused by "direct physical loss or damage." As there is no claim presented in the Complaint of actual "direct physical loss or damage" at "Covered Property" within the plain meaning of the Oregon Mutual coverage grant, Plaintiff's claims fail. Oregon Mutual thus requests that the Court dismiss this action as a matter of law based on the pleadings.

II. STATEMENT OF FACTS

A. The Complaint

On April 17, 2020, Plaintiff Dakota Ventures, LLC dba Kokopelli Grill and Coyote BBQ Pub filed its class action complaint against Oregon Mutual (the "Complaint"). The Complaint states that Plaintiff owns and operates two dining establishments in Port Angeles, Washington including a restaurant and lounge located at 203 E. Front Street and a pub located at 201 E. Front Street.[3] Plaintiff alleges that due to the COVID-19 virus and the resultant state-ordered mandated closure, Plaintiff was forced to suspend or reduce its restaurant business operations, and take necessary steps to prevent further damage and minimize the suspension of business and continue operations.[4]

Plaintiff is now seeking insurance coverage from Oregon Mutual for the economic

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[1] ECF 1 (The "Complaint").

[2] *Id.* at ¶¶ 59, 67, 75, 83, 91, 97, 104, 111, 118, and 125.

[3] ECF 1 at ¶¶1 and 16.

[4] *Id* at ¶10.

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damages resulting from its suspended or reduced business operations. The Complaint alleges that Oregon Mutual issued an insurance policy to Plaintiff, insuring both of Plaintiff's properties and business practices from January 3, 2020 to January 3, 2021.[5] Plaintiff argues that Oregon Mutual Businessowners Property Coverage promised to pay Plaintiff for "direct physical loss" "unless the loss is [e]xcluded or…[l]imited by" the Businessowners Coverage Form.[6] Plaintiff alleges that the presence of virus or disease can constitute physical damage to property.[7] Plaintiff further asserts that losses due to COVID-19 are a "Covered Cause of Loss" under the Policy.[8] Plaintiff also alleges its losses caused by COVID-19 and the related orders issued by governmental authorities triggered the "Business Income," "Civil Authority," "Extra Expense," "Ingress or Egress," and "Sue and Labor" coverage provided by the Oregon Mutual Policy.[9]

Plaintiff avers that a series of certain proclamations and orders issued by Washington Governor Inslee in response to the COVID-19 required the suspension of Plaintiff's business.[10] Plaintiff then alleges that the presence of COVID-19 caused "direct physical loss of or damage to" its "Covered Property" by denying use of and damaging the Covered Property, and by causing a necessary suspension of operations during a period of restoration.[11]

The Complaint alleges ten causes of action against Oregon Mutual for: (1) Breach of Contract, based upon Oregon Mutual's denial of Plaintiff's claim under each of the five Policy

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[5] *Id.* at ¶16.

[6] *Id.* at ¶17.

[7] *Id.* at ¶22 (emphasis added).

[8] *Id.* at ¶19.

[9] *Id.* at ¶27.

[10] ECF 1 at ¶¶28-33.

[11] *Id.* at ¶34.

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provisions Plaintiff claims were triggered by its loss; and (2) Declaratory Judgment, seeking a declaration that Plaintiff's and class members losses and expenses are covered by each of those five provisions of the Policy.[12]

B. The Gubernatorial Emergency Proclamations

The Complaint mentions various orders issued by Washington's Governor Inslee in response to the COVID-19 virus pandemic. By way of judicial notice, these orders were issued pursuant to RCW 43.06.220(1)(h) to "to help preserve and maintain life, health, property or the pubic peace . . ." The orders also state: "Violators of this of this order may be subject to criminal penalties pursuant to RCW 43.06.220(5)."

On March 16, 2020, Governor Inslee issued Proclamation 20-13 which prohibited people from gathering in any public venue in which people congregate for the consumption of food and beverages, through March 31, 2020.[13] It is alleged that this proclamation was issued for the purpose of slowing the spread of the COVID-19 pandemic in public accommodations.[14] Governor Inslee's Proclamation 2013 prohibited only on-site consumption of food and/or beverages in a public venue.[15] The Complaint further asserts that on March 23, 2020, Governor Inslee issued Proclamation 20-25, "Stay Home—Stay Healthy." The proclamation, which amended Proclamation 20-13, prohibited "all non-essential businesses in Washington State from conducting business," and extended the mandatory closure of restaurants, bars and places of public accommodation to the public and on-site consumption."[16] Violators of Proclamation

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[12] *Id.* at ¶¶52-127.

[13] *Id.* at ¶30-31.

[14] *Id.*

[15] *Id.* at ¶31.

[16] *Id.* at ¶32

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20-25 are alleged to be subject to criminal penalties pursuant to RCW 43.06.220(5).[17] The Complaint further states that Governor Inslee extended Proclamation 20-25 through May 4, 2020.[18]

C. The Policy

Oregon Mutual issued commercial property insurance policy no. BSP 354948 to "Dakota Ventures, LLC," effective 1/30/2020 to 1/3/ 2021 (the "Policy"). The Policy classified the named insured as a "Other Organization" and described the business as "Restaurants Casual with Lounge."[19] The scheduled insured locations are 1201 and 203 E. Front Street, Port Angeles, Washington 98362.[20]

The Businessowners Coverage Form of the Policy provides the following coverage grant:

> **SECTION I -PROPERTY**
>
> **A. Coverage**
>
> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.[21]

"Covered Property" includes the following: (1) buildings, (2) fixtures and permanently installed machinery and equipment, (3) personal property furnished by the insured as a landlord, (4) personal property used to maintain or service the buildings, and (6) Business Personal Property, including property used in the business or that is in the care, custody or control of the insured.[22]

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[17] *Id.*

[18] *Id.* at ¶33.

[19] ECF 1-1 at 2 (Dakota Policy Declarations page).

[20] *Id.*

[21] ECF 1-1 at 6 (Dakota Policy Businessowners Coverage Form).

[22] *Id.*

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Covered Cause of Loss" is defined in the form as:

> Risks of direct physical loss unless the loss is:
>
> **a.** Excluded in Paragraph **B.** Exclusions in Section **I;** or
>
> **b.** Limited in Paragraph **4.** Limitations in Section I.[23]

The Policy also provides additional coverage for certain enumerated losses including: (1) Business Income, (2) Extra Expense, and (3) Civil Authority as follows:

> **f. Business Income**
>
> **(1) Business Income**
>
> **(a)** We will pay for the actual loss of Business Income you sustain you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from any Covered Cause of Loss.[24]
>
> * * *
>
> **g. Extra Expense**
>
> **(1)** We will pay necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.[25]
>
> * * *
>
> **i. Civil Authority**
>
> We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.[26]

Plaintiff also alleges coverage under the Policy's Ingress or Egress additional coverage

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[23] *Id.* at 7.

[24] *Id.* at 10.

[25] *Id.* at 11.

[26] ECF 1-1 at 12.

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which applies to loss caused when ingress or egress is physically prevented due to direct physical loss or damage to property other than at the described premises.[27] Plaintiff further alleges coverage under the Policy's "Duties in the Event of Loss or Damage" provision.[28] Finally, the policy includes an Ordinance or Law exclusion which precludes coverage for loss caused by the enforcement of an ordinance or law regulating the use of any property.[29] Plaintiff repeatedly admits that these Policy provisions are "clear and unambiguous."[30]

III. EVIDENCE RELIED UPON

Oregon Mutual relies upon the pleadings and records on file with the Court and the argument and authority herein.

IV. AUTHORITY AND ARGUMENT

A. Legal Standards

1. Standard for Dismissal Under FRCP 12(b)(6)

Fed. R. Civ. P. 12(b)(6) permits a court to dismiss a complaint for failure to state a claim. The rule requires the court to assume the truth of the complaint's factual allegations and credit all reasonable inferences arising from those allegations. *Sanders v. Brown*, 504 F3d 903, 910 (9th Cir 2007). However, "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' . . . Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 US 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 US 544, 557 (2007)). Accordingly, a complaint may be dismissed based on: (1) absence of a cognizable legal theory,

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[27] *Id.* at 66 (Dakota Policy Businessowner Xtreme Cluster Endorsement).

[28] *Id.* at 20.

[29] *Id.* at 16.

[30] ECF 1 at ¶¶ 59, 67, 75, 83, 91, 97, 104, 111, 118, and 125.

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or (2) insufficient facts under a cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F2d 530, 534 (9th Cir 1984).

Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion to dismiss. *Lee v. City of L.A.*, 250 F3d 668, 688 (9th Cir 2001) (citations omitted). The Ninth Circuit, however, carves out certain exceptions to this rule. For example, a court may consider "documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading[.]" *Branch v. Tunnell*, 14 F3d 449, 454 (9th Cir 1994), *overruled on other grounds by Galbraith v Cty. of Santa Clara*, 307 F3d 1119, 1127 (9th Cir 2002). *See also Friedman v. AARP, Inc.,* 855 F3d 1047, 1051 (9th Cir 2017); *Swartz v. KPMG LLP,* 476 F3d 756, 763 (9th Cir 2007). This standard would allow the court to review and incorporate the language of the Policy into this motion.

2. Choice of Law

This case involves an Oregon insurance company and a Washington insured. "Federal courts sitting in diversity look to the law of the forum state . . . when making choice of law determinations." *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014). This court should therefore apply Oregon "choice of law rules to determine the controlling substantive law." *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir. 2002). "The threshold question in a choice-of-law problem is whether the laws of the different states actually conflict." *Spirit Partners, LP v. Stoel Rives LLP*, 212 Or. App. 295, 301, 157 P.3d 1194, 1198 (2007). "The proponent of applying a different state's law has the obligation to identify a material difference between Oregon law and the law of the other state." *Portfolio Recovery Assocs., LLC v. Sanders*, 292 Or. App. 463, 468, 425 P.3d 455, 459 (2018) (citing *Spirit Partners*, 212 Or. App.

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at 301, 157 P.3d at 1198). "Where no material difference exists between Oregon law and the law of the proposed alternative forum, Oregon courts will apply Oregon law without regard to the relative significance of the relationship between the dispute and the proposed alternative forum." *Powell v. System Transp., Inc.*, 83 F. Supp. 3d 1016, 1022 (D. Or. 2015).

As noted by this court in *Great American Alliance Ins. Co. v. Sir Columiba Knoll Associates Limited Partnership*, 416 F.Supp.3d 1098, 1104-1105 (D. Or. 2019), there is no material difference between the law of Oregon and Washington regarding the interpretation of admitted "clear and unambiguous" policy language. Further, as demonstrated below, there is no conflict between Oregon and Washington as to the application of the Oregon Mutual policy language to the allegations of the Complaint. Under both states' laws, Oregon Mutual prevails.

3. Rules of Policy Construction

The plain language of the Policy controls the court's analysis. Interpretation of an insurance contract is a question of law. *Hoffman Constr. Co. v. Fred S. James & Co.,* 313 Or 464, 469, 836 P2d 703 (1992); *Woo v. Fireman's Fund Ins. Co.*, 161 Wn2d 43, 52, 164 P3d 454 (2007). An insurance policy, construed as a contract, is to be given a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Xia v. ProBuilders Specialty Ins. Co.*, 188 Wn2d 171, 181 (2017), *as modified* (Aug. 16, 2017) (quoting *Key Tronic Corp., Inc. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn2d 618, 627 (1994) (quoted citations omitted)). The court must construe the text of the policy as a whole, rather than view particular parts of the policy in isolation. *Bresee Homes, Inc. v. Farmers Ins. Exch.,* 353 Or 112, 122, 293 P3d 1036, 1041-42 (2012); *Key Tronic Corp., Inc. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn2d 618, 627, (1994).

Plaintiff's Complaint admits that the provisions of the Oregon Mutual coverage are

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"clear and unambiguous."[31] "If the language is clear and unambiguous, a court must enforce it as written and may not modify it or create ambiguity where none exists." *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn2d 654, 15 P3d 115, 122 (2000); *Hoffman*, 313 Or at 469.

B. Plaintiff has failed to allege any "direct physical loss or damage" which would trigger coverage under the Policy

Distilled to its very essence, the basis of Plaintiff's Complaint is that the economic losses of its restaurants caused by Governor Inslee's COVID-19 orders constitute "direct physical damage or loss" to "Covered Property."[32] While Plaintiff alleges that a virus *can* constitute direct physical loss or damage, it fails to provide any factual allegations which would demonstrate that the COVID-19 virus actually did cause physical damage to Plaintiff's restaurant premises, or any other property.[33] With this omission, Plaintiff fails to state any support for its formulaic allegation that its property has been directly physically damaged by the COVID-19 virus. Without direct physical loss or damage, there is no coverage under the Policy. Dismissal is thus proper.

The phrase "direct physical loss of or damage to" is "unambiguous," as confirmed by this court in *Columbiaknit, Inc. v. Affiliated FM Ins. Co.,* 1999 WL 619100, at *4 (D Or Aug. 4, 1999) and admitted by Plaintiff in its Complaint.[34] . "Direct" means "direct", "without any intervening agency or step: without any intruding or diverting factor", *Pinnacle Processing Group, Inc. v. Hartford Casualty Ins. Co.*, 2011 WL 5299557 *5, *6 (WD Wash), as "distinguished from a remote cause." *Moeller v. Farmers Ins. Co. of Wa.,* 155 Wn App 133, 143, 229 P3d 857 (2010), *aff'd on other grnds,* 173 Wn2d 264, 267 P3d 998 (2011). The word

[31] ECF 1 at ¶¶ 59, 67, 75, 83, 91, 97, 104, 111, 118, and 125.

[32] *Id.* at ¶34-36

[33] ECF 1 at ¶22 (emphasis added).

[34] *Id.* at ¶¶ 59, 67, 75, 83, 91, 97, 104, 111, 118, and 125.

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"physical" is also unambiguous. As explained in the most recent edition of *Couch on Insurance*: "The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude losses that are intangible or incorporeal, and, thereby to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." 10A *Couch on Insurance* § 148.46 (3d Ed. 2019). "Damage" in the first-party property context also means actual injury to property. *North Pac. Ins. Co. v. Travelers Cas. Ins. Co. of Am.,* 2016 WL 69819 *5 (WD Wash Jan. 6, 2016).

Following the "clear and unambiguous"[35] terms of the Policy, Oregon and Washington courts require evidence of actual physical damage to covered property for property coverage to be triggered. For example, in *Villella v. Public Employees Mut. Ins. Co.,* 106 Wn2d 806, 725 P2d 957 (1986), the insured sought to recover under two homeowners policies for damage to a dwelling that occurred when the foundation of the house sank. The insured claimed that the foundation problem was caused by a defective drainage system, which caused progressive destabilization of the soil during the effective period of the first policy issued by Pemco. Although the actual damage to the structure occurred after the Pemco policy expired, the insured claimed that the Pemco policy covered the loss because the soil destabilization occurred during the policy period. *Id.* at 810-11. The Washington Supreme Court rejected this argument because the residence itself sustained no damage prior to the expiration date of the first policy. *Id.* at 811-12. In so holding, the court emphasized that for coverage to be triggered under a policy the insured must sustain an actual physical injury or loss, however minute, during the effective period of the policy. *Id.* at 814.

[35] *Id.*

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A similar ruling was made in *Fujii v. State Farm Fire & Cas. Co.,* 71 Wn App 248, 857 P.2d 1051 (1993), *review den*, 123 Wn2d 1009 (1994), where heavy rainfall caused a landslide on a hillside above the insureds' home. *Id.* at 249**.** The insureds requested coverage under their homeowner's policy to cover the costs of preventive measures after a landslide. Based on an expert's opinion that the landslide damaged the "integrated engineering unit" of the home, the insureds claimed they had suffered a "direct physical loss" under the coverage provision of their policy. *Id.* at 249. Citing *Villella*, the court however held that under the plain terms of the policy, coverage would only be triggered by direct physical loss to the dwelling. Accordingly, even though damage may be imminent, there must be some "discernible" damage during the effective policy period.

Support for dismissal in this case is also found in *Borton & Sons, Inc. v. Travelers Ins. Co.,* 99 Wn App 1010 (2000), where the court addressed whether apples were "physically injured" after a roof collapsed in an apple storage facility. The apples were not physically damaged in the event, however, the insured claimed that the fact that the apples had been in the damaged building "eroded confidence" in the quality of the apples and thus there was physical loss. The insured cited several out-of-state cases to support its claim. The Washington Court of Appeals, however, distinguished these cases as being in conflict with Washington law, citing to *Fujii* and *Villella.* The court concluded that because there was no physical damage to the apples, there was no "direct physical loss" covered under the policy.

Similarly, in *Washington Mut. Bank v. Commonwealth Ins. Co.*, 133 Wn App 1031 (2006), the court held that an insured's mistaken belief that a building was about to collapse did not constitute direct physical loss. Because no actual "peril insured against" existed, coverage under the Policies was not triggered. *See also Wolstein v. Yorkshire Ins. Co.,* 97 Wn App 201,

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211–12, 985 P2d 400 (1999).

Oregon courts also require evidence of actual physical damage to covered property for property coverage to be triggered. *See Columbiaknit, Inc. v. Affiliated FM Ins. Co.,* 1999 WL 619100, at *4 (D Or Aug. 4, 1999). In *Wyoming Sawmills, Inc. v. Transp. Ins. Co.,* 282 Or 401, 404 578 P2d 1253 (1978), the Oregon Supreme Court interpreted liability insurance language requiring an insurance company to indemnify an insured for damages from "physical injury to or destruction of tangible property ..." In holding that the installation of warped studs in a building did not constitute "physical injury to or destruction of tangible property," the Oregon Supreme Court declared that use of the word "physical" within a comprehensive liability policy indicated that the policy was not intended to afford coverage for consequential or intangible damage. *Id.* at 406.

Similarly, in *Great Northern Ins. Co. v. Benjamin Franklin Fed. Sav. and Loan Ass'n.,* 793 F Supp 259, (D Or 1990), the court held that the removal of non-friable asbestos at a building owner's discretion was not a loss resulting from "a direct physical loss or damage by a Covered Cause of Loss[ ]", defined as "direct physical loss or damage ..." *Id.* at 261. In so holding, the court stated that:

> There is no evidence here of physical loss, direct or otherwise. The building has remained physically intact and undamaged. The only loss is economic. The policy, by its own terms, covers only direct physical loss. The inclusion of the terms "direct" and "physical" could only have been intended to exclude indirect, nonphysical losses.

Id. at 263.

The issue in *Great Northern* and *Wyoming Sawmills* is the same as the issue here - whether the policy language was intended to include consequential or intangible damages such as depreciation in value. Both courts answered the question in the negative, as this court shall

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as well. "The inclusion of the terms 'direct' and 'physical' could only have been intended to exclude indirect, nonphysical losses." *Great Northern,* 793 F Supp at 263.

Farmers Ins. Co. of Oregon v. Truitanich, 123 Or App 6, 858 P.2d 1332 (1993) and *Larget v. State Farm Firs & Cas. Co.,* 116 Or App 595, 842 P.2d 445 (1992) also support this point. These cases involved odor from methamphetamine "cooking" that was held to constitute "direct physical loss" to structures. As commented on by Judge Hubel, both cases recognized that the fact that "physical damage or alteration of property may occur at the microscopic level does not obviate the requirement that physical damage need be distinct and demonstrable." *Columbiaknit, Inc. v. Affiliated FM Ins. Co.,* 1999 WL 619100, at *7 (D. Or. Aug. 4, 1999). The mere adherence of molecules to porous surfaces, without more, does not equate physical loss or damage. *Id.*

Applying the above cases to the allegations of the Complaint and the Policy requirements, there is no evidence of actual "direct physical loss or damage" to Covered Property stated in the Complaint. The Policy defines "Covered Property" to include buildings, fixtures, and property used in the business.[36] The Policy specifically states that "money" is not included in "Covered Property".[37] While the Complaint alleges that a virus *can* constitute physical damage to property, the Complaint fails to allege even a single factual allegation with respect to the actual physical condition of Plaintiff's "Covered Property". At the most, the Complaint only alleges forced reduction of business for reasons exogenous to the restaurant premises themselves. Accordingly, it is impossible to reasonably infer that Plaintiff's "Covered Property" suffered any "distinct" or "demonstrable" physical damage. *Columbiaknit.* at *7; *see*

[36] ECF 1-1 at 6.

[37] *Id.*

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also Fujii, 71 Wn App at 249; *Borton & Sons, Inc. v. Travelers Ins. Co.,* 99 Wn App 1010 (2000);

Plaintiff's claims boil down to a claim for financial loss. By the clear and unambiguous terms of the Policy's insuring agreement, the Policy only covers loss due to *physical* damage to Plaintiff's restaurant premises and business personal property. Nonphysical economic loss does not constitute "direct physical loss or damage" to Plaintiff's "Covered Property". *See See Fujii,* 71 Wn App at 249; *Great Northern*, at 263. Plaintiff's financial losses are not covered. Dismissal is thus warranted based on the pleadings and Oregon law. *See Ashcroft v. Iqbal*, 556 US at 677-78. Case law from around the country is in accord. *See, e.g., Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, at *9 (SD Fla June 11, 2018) (quoting *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal App 4th 766, 779 (2010)).

The same reasoning applies to Plaintiff's claims for Business Income and Extra Expense coverage, particularly where both have the same explicit requirement of direct physical loss or damage. It would be untenable for an insurer to extend coverage to businesses for every economic "slowdown" attributable to an outside cause. Nor is that the type of insurance which Plaintiff purchased or pays its premiums for. The additional coverage grants for Business Income and Extra Expense apply only where the insured has sustained "direct physical loss or damage." The "Business Income" coverage explicitly states it is applicable only where a suspension of operations is "caused by direct physical loss or damage to property at the described premises."[38] Similarly, the "Extra Expense" coverage specifically applies only where such extra costs would not have been incurred "if there had been no direct physical loss

[38] ECF 1-1 at 10.

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or damage to property at the described premises."[39]

Here, Plaintiff readily admits that the cause of its reduced or suspended business operations is Governor Inslee's emergency proclamations, issued in response to the COVID-19 virus and pandemic.[40] As discussed above, such outside, nonphysical factors do not constitute "direct physical loss or damage" to Plaintiff's property at the described premises.

The pairing of a "period of restoration" to "Business Income" and "Extra Expense" coverage buttresses this argument from a policy interpretation standpoint.[41] The Policy defines "period of restoration" as the period of time that begins "72 hours after the time of direct physical loss or damage…" or "immediately after the time of direct physical loss for Extra Expense Coverage", and ends on the earlier of the date when "the property at the described premises should be *repaired, rebuilt or replaced*…" or "when the business is resumed at a new permanent location."[42] To allow coverage for losses that are not physical, and thus do not require physical repair, rebuilding, or replacement, would render that definition—and as a result, the entire coverage part—not only nonsensical, but infinitely indeterminate. As recognized in *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F Supp 2d 280, 287 (SDNY 2005), the terms "'rebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature."

Additionally, the Policy definition of "period of restoration" specifically does *not* include any *increased* period required due to the enforcement of any ordinance or law that

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[39] *Id.* at p. 11.

[40] ECF 1 at ¶10.

[41] *Id.* at p. 10-11.

[42] *Id.* at 27-28 (emphasis added).

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regulates the use of any property.[43] Thus, the Policy excludes from "period of restoration" any amount of time in which the suspension of operations is due to enforcement of an ordinance or law, rather than direct physical damage to the property.

Plaintiff acknowledges that coverage under the "Business Income" and "Extra Expense" provisions of the Policy is tied to the "period of restoration" that occurs after the date of direct physical loss or damage.[44] However, the Complaint is devoid of any allegations which would show that Plaintiff is repairing, rebuilding or replacing its premises or resuming its business at a new permanent location. Plaintiff admits that it is "the presence of COVID-19," generally, and Governor Inslee's orders related thereto that are causing its suspension of operations "during a period of restoration."[45] To adopt Plaintiff's definition of "period of restoration," which according to the Complaint is the period of time during which its operations are reduced or suspended because of the COVID-19 virus and related governmental orders, would require completely ignoring the admittedly clear and unambiguous language of the policy which defines the end of the "period of restoration" as the earlier of the date when "the property at the described premises should be *repaired, rebuilt or replaced*…" or "when the business is resumed at a new permanent location."[46] It would further require complete disregard for the admittedly clear and unambiguous language of the Policy, which excludes from "period of restoration" any time during which the use of the property is regulated by the enforcement of an ordinance or law.[47]

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[43] *Id.* at 28 (emphasis added).

[44] ECF 1 at ¶20 and 24.

[45] ECF 1 at ¶34-36.

[46] ECF 1-1 at 27-28 (emphasis added).

[47] *Id.* at 28.

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In sum, Plaintiff is asking this Court to rewrite the admitted "clear and unambiguous"[48] terms of the Policy to allow for coverage when there are no factual allegations to show Plaintiff suffered any loss that was "physical in nature". A simple, plain reading of the Policy makes it clear that Plaintiff contracted with Oregon Mutual for coverage only where the loss is attributable to direct *physical* loss or damage to Plaintiff's insured property, and not consequential or intangible damage. *See Sawmills,* 282 Or at 406. The Complaint fails to allege any facts whatsoever to suggest that Plaintiff sustained physical loss or damage at its restaurant premises. Plaintiff alleges economic impacts caused by outside events non-physical in nature - reduced business operations stemming from Washington Governor Inslee's orders issued to slow the spread of COVID-19. While Plaintiff infers that it sustained direct physical loss or damage to its property, the Complaint fails to allege any facts from which the Court could draw a reasonable inference that Plaintiff's loss was caused by any direct physical loss or damage to its insured premises. *See Ashcroft v. Iqbal,* supra, 556 US at 678 (quoting *Bell Atl. Corp. v. Twombly*, supra, 550 US at 557). Devoid of further factual enhancement, Plaintiff's formulaic statements that it sustained "physical damage or loss" is insufficient to state a claim against Oregon Mutual. *Id.*

While the COVID-19 pandemic has created an economic hardship for many, a court may not rewrite the policy to force insurers to pay for losses they have not contracted to insure. *Weyerhaeuser*, 15 P3d at 122 (2000). Based upon the clear and unambiguous terms and conditions of the policy, economic damages caused by outside factors, completely unrelated to any physical damage of Plaintiff's restaurant premises, are not what Oregon Mutual, nor Plaintiff, intended to insure. *See Polygon Northwest Co.*, 143 Wn App at 775; *see*

[48] ECF 1 at ¶¶ 59, 67, 75, 83, 91, 97, 104, 111, 118, and 125.

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also English Cove Ass'n, 121 Wn App at 363; *Hoffman*, 313 Or at 469. Since the Complaint fails to allege any facts that fall within the Policy's coverage provisions, including the additional coverages, Plaintiff's claims fail as a matter of law.

C. Plaintiff has failed to allege any other viable theory for coverage arising out of the Governor's orders or COVID-19

It is likewise apparent that Plaintiff cannot formulate any other basis for coverage of economic loss arising out of the COVID-19 pandemic and the related emergency proclamations issued by Washington Governor Inslee.

1. Neither COVID-19 nor the Washington Governor's orders rendered Plaintiff's premises uninhabitable

Oregon Mutual anticipates that Plaintiff will attempt to manufacture a claim of physical loss by looking to cases from outside of Oregon and Washington dealing with uninhabitable structures, such as *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F3d 226 (3d Cir 2002). Decisions in that vein hold that, if a substance permeates a building without actually damaging it, but the presence of that substance renders the entire structure uninhabitable, the structure may be considered to have sustained a physical loss. The rationale is that the building is damaged as a whole, because it has completely lost its physical utility as such.

Once again, Plaintiff's failure to provide any factual allegations to show any physical damage to its business premises negates any application of *Port Authority* and its progeny to this matter. The *Port Authority* claim related to airborne asbestos particles, and the court explained the threshold inquiry as follows: "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 loss to its owner." *Id.* at 236. "However, if asbestos is present in components

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of a structure, but is not in such form or quantity as to make the building unusable, the owner has not suffered a loss. The structure continues to function—it has not lost its utility." *Id.* "The fact that the owner may choose to seal the asbestos or replace it with some other substance as part of routine maintenance does not bring the expense within first-party coverage." *Id.*

In this case, Plaintiff's Complaint does not state any factual allegations which would demonstrate any intrusion of the COVID-19 virus into the building structure of its premises. Rather, Plaintiff claims its loss is caused by the general "presence" of COVID-19 and the resultant proclamations issued by Governor Inslee which mandate closure of its premises to the public and *on-site* services.[49] Notably, Plaintiff does not allege that it is prevented prohibited from providing *off-site* services such as food delivery or take-away services. Plaintiff also neglects to provide any details which would show the presence of the COVID-19 virus in its business premises, as opposed to it generally being present elsewhere in the world. As such, the allegations in the Complaint fail to support any argument that Plaintiff's premises are not inhabitable or usable, and thus *Port Authority* does not apply.

Aside from Plaintiff's failure to allege that its restaurant premises are, in fact, uninhabitable, courts have only applied the *Port Authority* theory to situations where uninhabitability is caused by something within the physical structure of the insured property. *See e.g. Widder v. Louisiana Citizens Property Ins. Corp.*, 82 So 3d 294, 296 (LA App 2011) (excessive levels of lead dust that migrated through the house contaminated contents). If the cause is an external or extrinsic force that merely prevents access to the building, coverage does not apply. That follows the policy language, because impeded access to the property is not a direct physical loss *to* the insured property itself. *See e.g. Roundabout Theatre Co., Inc. v.*

[49] ECF 1 at ¶¶10 and 34 (emphasis added).

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Cont'l Cas. Co., 302 AD 2d 1, 3 (NY App Div 2002) (no direct physical loss when the city closed an area following a large scaffolding collapse, making a Broadway theatre inaccessible to the public, because the theatre itself was undamaged); *Harry's Cadillac-Pontiac-GMC Truck Co., Inc. v. Motors Ins. Corp.*, 126 NC App. 698, 702 (NC App 1997) (no direct physical loss where an extreme weather event made the property inaccessible, but did not damage it). The only logical conclusion that can be drawn from Plaintiff's failure to allege either that the COVID-19 virus was detected on its business premises, or that its business premises are uninhabitable and unusable for delivery or take-away services, is that Plaintiff's business premises are in fact inhabitable and unusable. Accordingly, the Complaint is devoid of any allegations which would support Plaintiff's anticipated position on direct physical loss.

The court's decision in *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F Supp 3d 323 (SD NY 2014) is instructive on this point. That lawsuit arose out of the widespread power outages that occurred in and around New York City during "Superstorm" Hurricane Sandy. *Id.* at 324. As the storm approached, utility provider Con Ed preemptively shut off certain service networks to preserve their integrity. *Id.* at 325. As a result, a lower Manhattan building that housed the Newman Myers law firm had no power and was closed to tenants for several days. *Id.* Newman Myers' claimed coverage under its commercial property insurance policy because its employees could not access their office. *Id.*

The law firm conceded that its office did not sustain actual structural damage, but argued that the "the policy term 'direct physical loss or damage' is met by the preemptive closure of its building in preparation for a coming storm . . . because the property at issue was rendered unusable or unsatisfactory for its intended purpose." *Id.* at 329. Rejecting that claim, the court distinguished cases involving issues such as asbestos or ammonia infiltration in

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properties by recognizing they implicate "some compromise to the physical integrity of the workplace." *Id.* But in the case before it, Con Ed's actions were completely external and did not directly or physically compromise Newman Myers' office. *Id.* at 331. The court thus rejected the claim, stating: "The words 'direct' and 'physical,' which modify the phrase 'loss or damage,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure." *Id.*

The Eighth Circuit reached a similar conclusion in *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F3d 834 (8th Cir 2006). Source Food was a supplier of beef products that sourced meat from Ontario, Canada. *Id.* at 835. In May of 2003, the USDA closed the border to beef importation from Canada after a Canadian cow tested positive for "mad cow" disease. *Id.* As a result, a truck load of Source Food's product, which was not itself contaminated, was denied entry into the U.S. *Id.* Source Food submitted a claim for business interruption coverage to its insurer which denied the claim because Source Food's suspension of operations "must be caused by direct physical loss to Property." *Id.* The Eighth Circuit rejected Source Food's argument, reasoning that "[A]lthough Source Food's beef product in the truck could not be transported to the United States due to the closing of the border to Canadian beef products, the beef product on the truck was not—as Source Foods concedes—physically contaminated or damaged in any manner." *Id.* at 838. Because the "embargo on beef products" did not in any way cause a "direct physical loss to [Source Food's] property," it did not fall within the coverage provisions. *Id.*

In Plaintiff's case, even if Governor Inslee had somehow completely blocked all access to Plaintiff's properties—which he did not—that action would not constitute a direct and

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physical loss to the insured property itself. Nor does the existence of the COVID-19 virus elsewhere in the world, other than inside Plaintiff's property, constitute a direct physical damage or loss to Plaintiff's property. In the words of *Newman Myers*, it would be something "exogenous to the premises" causing its closure, but it would not be—in the words of the Policy—a "direct physical loss" to property on the insured premises. *See also Altru Health Sys. v. Am. Prot. Ins. Co.*, 238 F3d 961, 963 (8th Cir 2001) ("Because flood waters did not damage the insured building, [the Hospital's] loss occurred when health authorities closed the Hospital for three weeks. This was a business interruption or time element loss, not a property loss.").

Plaintiff admits that while the presence of a virus *can* constitute physical damage to property, "*the nature of the property itself would have a bearing on whether there is actual property damage.*"[50] In other words, it is the physical nature of Plaintiff's premises themselves that have bearing on whether there is actual property damage. Yet Plaintiff fails entirely to make any allegation about the physical nature of its own restaurant premises. Plaintiff has not alleged that it is unable to access and use its premises, for delivery and take-away restaurant services, or that there is a known presence of the COVID-19 virus inside or on its insured premises. The Complaint is noticeably devoid of any reference at all to the physical nature of Plaintiff's restaurant premises. Accordingly, Plaintiff's argument that Governor Inslee's orders or the COVID-19 virus itself have caused direct physical loss or damage to its property is both disingenuous and implausible.

2. The policy's Civil Authority Coverage similarly requires damage to property and an action of civil authority that prohibits access

Plaintiff's claim that there is coverage for its business loss under the Policy's Civil

[50] ECF 1 at ¶22 (emphasis added).

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Authority additional coverage also fails as a matter of law. This additional coverage is triggered only when the insured sustains a loss caused by an action of civil authority which "prohibits access to the premises due to direct physical loss of or damage to property, other than at the described premises." The discussion above on "direct physical loss" has direct application to this provision. The Civil Authority provision provides that the relevant loss is loss is to property "other than at the described premises."[51]

Other case law supporting the "direct physical loss" requirement for "Civil Authority" coverage is *54th St. Ltd. Partners, L.P. v. Fid. & Guar. Ins. Co.,* 306 AD 2d 67, (NY App Div 2003), which held there was no coverage where "vehicular and pedestrian traffic in the area was diverted, [but] access to the restaurant was not denied; the restaurant was accessible to the public, plaintiff's employees and its vendors." In *Syufy Enter. v. Home Ins. Co. Of Indiana,* 1995 WL 129229, at *2-3 (ND Cal 1995) (unpublished), the policy required that access to plaintiff's premises be specifically prohibited by order of civil authority, and as a direct result of damage to or destruction of property adjacent to the premises. The court rejected the insured's claim for business interruption coverage for losses sustained during curfews imposed after the Rodney King verdict because curfews were imposed to prevent potential looting and rioting and not as a result of adjacent property damage.

Courts addressed this issue following 9/11 and rejected claims arising from the FAA's closure of airspace. In *United Air Lines, Inc. v. Insurance Co. of the State of Pennsylvania*, 439 F3d 128, 134 (2d Cir 2006), the court determined that the government's order to shut down all air traffic was not the direct result of property damage, but rather was "based on the fear of future attacks." "The Airport was reopened when it was able to comply with more rigorous

[51] ECF 1-1 at 12.

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safety standards; the timetable had nothing to do with repairing, mitigating, or responding to the damage caused by the attack on the Pentagon." *Id.* at 135. Based on this, the court determined the insured's loss was not the "direct result" of damage to adjacent premises.

In locations subject to damaging weather events, such as hurricanes, courts have applied policies as written, and rejected insureds' attempts to seek coverage when orders are issued before property damage occurs. In *Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP v. Chubb Corp.*, No. CIV.A. 09-6057, 2010 WL 4026375, at *3 (ED La Oct 12, 2010), the court held:

> The Policy's plain language requires that the civil authority prohibit access as a "direct result of direct physical loss or damage to property" within one mile of the [insured's] premises. The Policy does not insure against impairment of operations that occurs simply because a civil authority prohibits access unless the civil authority order meets the requirements of the policy—one of those requirements is a nexus between the order and certain physical damage.

In *Dickie Brennan & Co. v. Lexington Ins. Co.,* 636 F3d 683, 685 (5th Cir 2011), New Orleans restaurateurs sought business interruption coverage for losses sustained in the wake of the mayor's August 30, 2008, mandatory evacuation order, which was issued as Hurricane Gustav approached Louisiana. The insurer argued that the policy's civil authority provision did not provide coverage as the order was not issued "due to direct physical loss of or damage to property." The insureds countered that since the hurricane had already damaged property in the Caribbean when the order was issued, this policy requirement was satisfied. The court held that because there was no evidence of any nexus between the order and physical damage in the Caribbean or elsewhere, coverage was not available. *Id.*

For Plaintiff to state a claim for applicability of the Policy's Civil Authority additional coverage, Plaintiff would be required to allege facts which show that Plaintiff's economic loss is the result of a civil authority, such as Governor Inslee: (1) prohibiting Plaintiff's access to its

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premises, and (2) that such prohibition is due to direct physical damage or loss to property *other than* Plaintiff's insured property. However, Plaintiff does not allege that Governor Inslee's orders prohibit its *own* access to its property. Rather, Plaintiff alleges that the orders prevent the *public* from accessing its premises.[52] Thus, Plaintiff itself has not been prohibited from accessing its premises.

Further, the Complaint neglects to make any allegations of direct physical loss or damage to other property. The Complaint makes a self-serving assertion that Governor Inslee's Proclamations prohibited access to Plaintiff's premises and the immediately surrounding property in response to "dangerous physical conditions."[53] However, Plaintiff cannot and does not claim that Governor Inslee's orders were issued because of "dangerous physical conditions" on any other property. The Complaint asserts exactly the opposite – that Governor Inslee's orders were issued as a result of the COVID-19 virus outbreak and confirmed *person-to-person* spread of COVID-19 in Washington State.[54] Thus, Plaintiff alleges the "dangerous physical conditions" which lead to Governor Inslee's orders were dangerous to *people* rather than *property*. Accordingly, Plaintiff has failed to allege any facts which would establish a claim that the Policy's Civil Authority coverage is applicable to its loss.

3. The policy's Ingress or Egress additional coverage similarly requires direct physical loss or damage to property other than Plaintiff's insured property

Plaintiff's assertion that there is coverage for its business loss under the Policy's Ingress or Egress additional coverage also fails as a matter of law. The Policy provides additional coverage on a limited basis as follows:

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[52] ECF 1 at ¶32.

[53] ECF 1 at ¶35

[54] *Id.* at ¶29 (emphasis added).

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> A. We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused 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, caused by or resulting from any Covered Cause of Loss.[55]

Like the "Civil Authority" coverage discussed above, this coverage is contingent upon the finding of "direct loss or damage to property" other than at the described premises. Thus, absent any "distinct" or "demonstrable" physical damage to Plaintiff's Covered Property, the Ingress or Egress coverage does not apply. *See Columbiaknit.* at *7.

The Washington Court of Appeals addressed this provision in *Washington Mut. Bank v. Commonwealth Ins. Co.*, 133 Wn App 1031 (2006). The case involved bank losses based on an erroneous engineering report stating that the building was in danger of collapse. The policy at issued included the following in its "Perils Insured Against" section:

> Ingress/Egress: This policy is extended to cover the loss sustained during the period of time when, in connection with or following a peril insured against, access to or egress from real or personal property is impaired. This extension is limited to a maximum period of 30 days.

Id., at *2. Initially, the court found:

> The plain language of the "perils insured against" clause requires a direct physical loss of or damage to insured property. The language of this clause specifies that the loss must be "direct physical loss." The clause does not use the word "loss" in the abstract.

Id., at *3. The court held that even though evacuation was recommended, "there was no actual physical loss to the property and no actual damage to the property", citing to *Wolstein v. Yorkshire Ins. Co.,* 97 Wn App 201, 211–12, 985 P.2d 400 (1999) (noting that language in a similar "all risks" policy required the insured property to sustain actual damage or physical loss to invoke coverage). The court then concluded that the ingress/egress provision did not apply

[55] ECF 1-1 at 66.

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because there was no direct physical loss or damage at play: "Thus, although the 'in connection with or following' causation language in the ingress/egress provision may be broad, coverage under that provision was not triggered absent a peril insured against." *Commonwealth Ins.* at *3.

As aforementioned with respect to the Civil Authority additional coverage, Plaintiff has failed to allege any actual physical loss or damage to other property. Moreover, Plaintiff has failed 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. As aforementioned, Plaintiff has alleged only that the public is prohibited from accessing its premises and that its premises may not be used for on-site consumption of prepared food or consumption.[56] Plaintiff does not, and cannot, allege that Plaintiff itself is physically prevented ingress and egress into its restaurants premises so as to operate its business with respect to preparation of food for *off-site* consumption, such as delivery or take-out services. Thus, Plaintiff has failed to state a claim for coverage based upon the Ingress or Egress additional coverage provision of the Policy.

4. The policy's "Sue and Labor" Provision Only Applies Where there is Damage to Covered Property from a Covered Cause of Loss

The so-called "Sue and Labor" provision of the Policy, entitled "Duties in the Event of Loss or Damage," provides as follows:

> **3. Duties In The Event Of Loss Or Damage**
>
> a. You must see that the following are done in the event of loss or damage to Covered Property:
>
> * * *

[56] ECF 1 at ¶30-31.

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> **(2)** Give us prompt notice of the loss or damage. Include a description of the property involved.
>
> **(3)** As soon as possible, give us a description of how, when and where the loss or damage occurred.
>
> **(4)** Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. This will not increase the Limits of Insurance of **Section I -Property.** However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged property aside and in the best possible order for examination.[57]

By its plain title, this provision does not create coverage of any type of loss, rather it specifies certain obligations and responsibilities of Plaintiff in the event of loss or damage to Covered Property. Further, the provision specifically states that there will be no coverage for "any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss."[58] Thus, by its plain, ordinary language 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. But expenses incurred to minimize or prevent losses for which there is no coverage are not recoverable.

Here, the discussions above regarding Plaintiff's failure to allege any direct physical loss or damage to its restaurant premises due to a Covered Cause of Loss is applicable. Plaintiff asserts that Oregon Mutual "agreed to give due consideration in settlement of claim to expenses incurred in taking all reasonable steps to protect Covered Property from *further* damage."[59] Plaintiff thus recognizes that in order for the "Sue and Labor" provision to apply,

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[57] ECF 1-1 at 20.

[58] ECF 1-1 at 20.

[59] ECF 1 at ¶89 (emphasis added).

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there must first have been damage to its restaurant premises. However, Plaintiff has failed wholly to allege any facts whatsoever regarding any physical damage to its restaurant premises. Accordingly, Plaintiff's claims related to the "Sue and Labor" provision necessarily fail.

D. Even if there was otherwise coverage under the Policy, such coverage would be precluded by the Policy's Ordinance or Law Exclusion

Even if Plaintiff had stated a claim with respect to any of the aforementioned Policy provisions, such coverage for Plaintiff's loss would be excluded by applicable exclusions in the Policy. Covered Cause of Loss" is defined in the form as:

> Risks of direct physical loss unless the loss is:
> **a.** Excluded in Paragraph **B.** Exclusions in Section **I;** or
> **b.** Limited in Paragraph **4.** Limitations in Section I.[60]

The Policy then includes the following exclusionary language:

> **1.** We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.
>
> **a. Ordinance or Law**
>
> **(1)** The enforcement of any ordinance or law:
>
> **(a)** Regulating the construction, *use*, or repair *of any property*;…[61]

Courts have upheld the viability of similar exclusions. *See Allemand v. State Farm Ins. Cos.,* 160 Wn App 366, 248 P3d 111 (2011); *Norman v. Allstate Ins.*, 956 F2d 275 (9th Cir 1992). Applied to this matter, the Complaint alleges that both Kokopelli Grill and Coyote BBQ Pub were forced to suspend or reduce business due to COVID-19 and "the resultant Executive

[60] ECF 1-1 at 7.

[61] ECF 1-1 at p. 16 (emphasis added).

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Orders issued by the Governor of Washington."[62] Governor Inslee's emergency proclamations plainly constitute an "ordinance or law…regulating the…use…of any property" within the terms of the exclusion. The orders explicitly state that they are issued in accordance with RCW 43.06.220(1)(h), which provides that the governor after proclaiming a state of emergency may…*issue an order prohibiting*…such other activities as he or she reasonably believes should be prohibited…" *See* RCW 43.06.220(1)(h) (emphasis added). Additionally, as Plaintiff admits, Governor Inslee's orders state that "[V]iolators of this order may be subject to criminal penalties pursuant to RCW 43.06.220(5). RCW 43.06.220(5) provides that "[A]ny person willfully violating any provision of any order issued by the governor under this section is guilty of a gross misdemeanor."[63] Plaintiff also alleges that Governor Inslee's orders prohibited it from opening to the public for on-site consumption, which allegedly impacts Plaintiff's use of the property.[64] Plaintiff further alleges that Governor Inslee's orders prohibited access to its Covered Property.[65] To the extent this is the case, the "Ordinance or Law" exclusion applies.

Thus, even if Plaintiff's Complaint stated a claim for coverage under the Policy's main insuring agreement or its additional coverages for Business, Income, Extra Expense, or Civil Authority, such coverage would be precluded by the Policy's Ordinance or Law Exclusion.

V. CONCLUSION

The Complaint contains no allegations, or set of facts, that if proven, would entitle Plaintiff to any relief against Oregon Mutual. Therefore, dismissal of this action is appropriate in accordance with FRCP 12 (b)(6).

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[62] ECF 1 at ¶10.

[63] *Id.* at ¶¶31-33.

[64] ECF 1 at ¶31.

[65] *Id.* at ¶35.

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DATED this 12th day of June, 2020.

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