IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RHONDA HILL WILSON and THE LAW OFFICE OF RHONDA HILL WILSON, P.C.

v.

HARTFORD CASUALTY CO.,

No. 20-3124

LH DINING L.L.C. D/B/A RIVER TWICE

v.

ADMIRAL INDEMNITY COMPANY,

No. 21-1038

NEWCHOPS RESTAURANT COMCAST LLC D/B/A CHOPS

v.

ADMIRAL INDEMNITY COMPANY,

No. 21-1039

ATCM OPTICAL, INC., OMEGA OPTICAL, INC., OMEGA OPTICAL AT COMCAST CENTER LLC

v.

TWIN CITY FIRE INSURANCE COMPANY,

No. 21-1107

ADRIAN MOODY AND ROBIN JONES D/B/A MOODY JONES GALLERY v. THE HARTFORD FINANCIAL GROUP, INC. AND TWIN CITY FIRE INSURANCE CO.	**No. 21-1106**
4431, INC., *et al.* v. CINCINNATI INS. COMPANIES.	**No. 20-3594**
INDEPENDENCE RESTAURANT GROUP D/B/A/ INDEPENDENCE BEER GARDEN ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON;	**No. 21-1175** E.D. Pa. No. 2:20-CV-02365 CFK (Appeal filed on Jan. 28, 2021, no number assigned yet)
1 S.A.N.T., INC. (a/k/a 1 SAINT, INC.) d/b/a TOWN & COUNTRY and d/b/a GATHERINGS BANQUET & EVENT CENTER, individually and on behalf of all others similarly situated, v. BERKSHIRE HATHAWAY, INC.' and NATIONAL FIRE & MARINE INSURANCE COMPANY	**No. 21-1109**

MOTION OF PLAINTIFFS-APPELLANTS TO CONSOLIDATE APPEAL

Pursuant to Federal Rules of Appellate Procedure 3(b)(2) and 27, plaintiffs appellants[1] move the Court to consolidate the eight above-captioned and related appeals (the Appeals). Consolidation will achieve significant efficiencies for the Court and the parties and facilitate certification to the Supreme Court of Pennsylvania the novel and determinative questions of Pennsylvania law that are at issue in each of the Appeals.[2]

Each of the Appeals arises out of claims by Pennsylvania businesses seeking insurance coverage for business-interruption losses resulting from the COVID-19 pandemic. The language in the governing insurance policies in the underlying cases is similar (and, in some instances, identical); each of the cases is governed by Pennsylvania law; and each case turns on the resolution of issues of Pennsylvania law that the Supreme Court of Pennsylvania has not specifically addressed in the

---

[1] The plaintiffs-appellants in the Appeals proposed for consolidation are (1) Rhonda Hill Wilson, The Law Office of Rhonda Hill Wilson, (2) Newchops Restaurant Comcast LLC d/b/a Chops, (3) LH Dining LLC d/b/a River Twice, (4) ATCM Optical, Inc., Omega Optical, Inc., Omega Optical at Comcast Center LLC, (5) Adrian Moody and Robin Jones d/b/a Moody Jones Gallery, (6) 4431, Inc., (7) Independence Restaurant Group d/b/a Independence Beer Garden, and (8) 1 S.A.N.T. Inc.

[2] The Court has already consolidated two of these Appeals *sua sponte—Newchops Rest. Comcast LLC d/b/a Chops v. Admiral Indem. Co*., No. CV 20-1869, 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020); *LH Dining L.L.C. d/b/a River Twice v. Admiral Indemnity Company*, No. CV 20-1949, 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020). *See* Nos. 21-1038, 1039, Order Consolidating Appeals (Jan. 8, 2021).

context of the COVID-19 pandemic. Accordingly, consolidation of the Appeals for briefing, argument, and disposition will achieve significant efficiencies in the consideration and disposition of the Appeals—including potentially through certification of the common legal questions at the core of the Appeals to the Supreme Court of Pennsylvania. For these reasons and those outlined further below, the Court should grant plaintiffs' motion to consolidate the above-captioned appeals.

I. PROCEDURAL BACKGROUND

The plaintiffs in the above-captioned appeals each brought suit against the defendant insurance companies providing their respective business interruption and business income loss coverage seeking to recover for losses they sustained as a result of the COVID-19 pandemic and subsequent government closure orders. The material provisions in the insurance policies at issue in each case use similar if not identical language, providing coverage for losses caused by "physical loss of or physical damage to" property. *See, e.g.*, *1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc.*, No. 2:20-cv-862, 2021 U.S. Dist. LEXIS 8590, at *20 (W.D. Pa. Jan. 15, 2021) ("There is not coverage because there was no direct physical loss of or damage to the covered property."); *Newchops*, 2020 WL 7395153, at *4 ("The business income provision is triggered when there is a suspension of the insureds' operations caused by direct physical loss of or damage to the insured's property."); *ATCM Optical, Inc. v. Twin City Fire Ins. Co.*, No. 20-4238, 2021 U.S. Dist. LEXIS 7251, at *9 (E.D.

Pa. Jan. 14, 2021) ("The business income and extra expense provisions apply when business losses are caused by 'direct physical loss of or damage to property' of the insured.'"). Plaintiffs' claims for coverage thus turn on the correct interpretation of the disparate terms "physical loss" or "physical damage" to property in the governing policies.[3]

Additionally, many of the policies in these cases contain so-called "virus exclusions" that defendants raised as an alternative basis for their motions to dismiss. Some of the district courts in these cases based their rulings in whole or in part on those similarly worded "virus exclusions." *See*, *e.g.*, *Wilson et al. v. Hartford Cas. Ins. Co.*, No. 20-3384, 2020 WL 5820800 (E.D. Pa. Sept. 30, 2020) ("It is not necessary for the court to decide whether Plaintiffs' claims fall within the scope of coverage, because even assuming that it does, a virus exclusion applies here."). *See also LH Dining*, 2020 WL 7395153 (concluding "even if the insureds had suffered covered losses . . . the virus exclusion precludes coverage"); *ATCM Optical, Inc.*, 2021 U.S. Dist. LEXIS 7251 (concluding same); *Moody v. Hartford Fin. Grp., Inc.*,

[3] In opposing the motions to dismiss, plaintiffs generally argued that fact questions were present, but no discovery occurred in these cases. The district courts dismissed the cases based not only on their interpretations of the policies but also on their perceptions of disputed facts, without a record having been developed.

No. 20-2856, 2021 U.S. Dist. LEXIS 7264 (E.D. Pa. Jan. 14, 2021) (concluding same).[4]

The Appeals arise out of the same operative facts. In each case, the plaintiff purchased and paid for business interruption coverage in their all-risk property insurance policies. Each plaintiff similarly was required to shut down, suspend and/or substantially modify its business operations by the entry of government closure orders issued by Pennsylvania Governor Wolf and local authorities. Each plaintiff thereafter submitted claims for coverage to one of the defendant-insurers, and the defendant-insurers uniformly rejected their claims based upon the insurers' coverage-defeating interpretation of the undefined policy term "physical loss" of property.[5] Defendants moved to dismiss plaintiffs' complaints in the underlying

---

[4] Further, in several of these cases, the district courts foreclosed application of Pennsylvania's regulatory estoppel doctrine (as adopted in *Sunbeam Corp. v. Liberty Mutual Insurance Co.*, 781 A.2d 1189 (Pa. 2011)) to prevent enforcement of virus exclusions obtained through misrepresentations to insurance regulators on the basis that *Sunbeam* requires an insured to show its insurer took a position in litigation inconsistent with those misrepresentations. *See, e.g.*, *Newchops*, 2020 WL 7395153 at *10; LH Dining, 2020 WL 7395153, at *10 ("Even if [the Insurance Services Office's] statement [to regulators] was fraudulent or misleading, the insureds have not identified how Admiral's position contradicts ISO's earlier statements. . . . Therefore, the insureds have not stated a claim for regulatory estoppel."). The plaintiffs-appellants read no such "change in position" requirement in *Sunbeam*.

[5] To be sure, there are some differences among the underlying cases in these appeals—plaintiffs include a number of different businesses, and the insurance policies at issue are not identical in every respect. But the material aspects of the record—the relevant policy language and the facts giving rise to plaintiffs' alleged losses—are for all intents and purposes the same.

actions on various grounds, including—uniformly—that plaintiffs' losses were not caused by "physical loss" or "physical damage" to property, as those terms should be construed under Pennsylvania law.

The district courts in the underlying cases acknowledged that the proper interpretation of the policy terms "physical loss" and "physical damage" in the relevant insurance policies was determinative of defendants' dismissal motions. *See*, *e.g.*, *Wilson v. Hartford Cas. Co.*, No. 20-3384, 2020 WL 5820800, at *4 (E.D. Pa. Sept. 30, 2020) ("[T]he suspension must be caused by direct physical loss of or physical damage to property at the scheduled premises, caused by or resulting from a Covered Cause of Loss."). And in each case, predicting under *Erie* how the Supreme Court of Pennsylvania would decide the "physical loss" issue, the district courts agreed with the respective defendants and granted their motions to dismiss. *See*, *e.g.*, *4431, Inc. v. Cincinnati Ins. Co.*, No. 5:20-cv-04396, 2020 WL 7075318, at *19 (E.D. Pa. Dec. 3, 2020) ("The Court finds that Plaintiffs are not entitled to coverage under the Policies, because their premises have not suffered a direct 'loss' as that term is unambiguously defined in the Policies: '[a]ccidental physical loss or accidental physical damage.'"); *Newchops*, 2020 WL 7395153 at *11; *LH Dining*, 2020 WL 7395153, at *11 ("[B]ecause they have not alleged facts showing damage to others' properties or 'a direct physical loss of or damage to' their own properties,

the insureds have not established coverage under the civil authority or the business income provisions.").

Plaintiffs appealed the district judges' rulings in favor of the defendant-insurers. Each plaintiff intends to challenge on appeal the district courts' uniform interpretation of "physical loss" under Pennsylvania law. In connection with their Appeals, plaintiffs anticipate asking the Court in short course to certify novel questions of Pennsylvania law (or questions like them) to the Supreme Court of Pennsylvania—questions that are determinative in these Appeals:

1. Whether loss of the ability to use one's business property for its intended business purposes caused by a government order mandating the closure of property constitutes a covered "physical loss" within the meaning of an "all-risk" insurance policy?

2. Whether loss of the ability to use one's business property for its intended business purposes caused by the suspected or actual presence of a potentially fatal and highly contagious virus such as the novel coronavirus constitutes a covered "physical loss" within the meaning of an "all-risk" insurance policy?

3. Whether, in light of the various complaints' factual allegations that the government closure orders are the sole cause (or, alternatively, a concurrent cause) of the losses at issue, a purported "virus exclusion" nevertheless bars coverage?

4. Whether the doctrine of regulatory estoppel as adopted in *Sunbeam Corp. v. Liberty Mutual Insurance Co.*, 781 A.2d 1189 (Pa. 2001) requires an insurer to take a position in litigation that is inconsistent with misrepresentations made by the insurance industry to a regulatory body in order to apply, as certain district courts have ruled, or whether the doctrine of regulatory estoppel precludes application of an insurance policy's exclusion of coverage where an insurer, or others on its behalf, misrepresents to insurance regulators the nature and scope of coverage under a policy in order to gain approval for a new exclusion

limiting the scope of that coverage, without a commensurate reduction in premiums?[6]

II. ARGUMENT

The Appeals implicate the same novel and controlling issues of Pennsylvania law regarding the proper interpretation of "physical loss" and "virus exclusions" in the context of the COVID-19 pandemic and associated government closure orders, including the viability of regulatory estoppel arguments for coverage in this setting. Consolidation is appropriate so that one panel of this Court can efficiently and authoritatively decide (i) whether to certify these novel and controlling questions to the Supreme Court of Pennsylvania and (ii) resolve the merits of plaintiffs' related appeals. Consolidation will achieve significant efficiencies both for the Court and the parties and help ensure a uniform resolution of the dispositive legal issues in these related appeals.

"When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by" this Court. Fed. R. App. P. 3(b)(2). In "'assessing whether consolidation is appropriate in given circumstances,' a court 'should consider both equity and judicial economy.'" *Chem One, Ltd. v. M/V Rickmers Genoa*, 660 F.3d 626, 642 (2d Cir. 2011) (citation and internal quotation marks

---

[6] The case for certification is compelling given the determinative nature of these novel questions of law in the extraordinary context of a global pandemic and a virus of still-largely unknown nature. The importance of the issues in these cases, for Pennsylvania businesses and their insurers alike, speaks for itself.

omitted). This Court consolidates appeals raising the same issues where consolidation will achieve efficiencies for the Court and the parties. *See, e.g.*, *United States v. Hird*, 913 F.3d 332, 337 (3d Cir. 2019) (consolidating multiple appeals in the interests of "efficiency"); *United States v. Grieme*, 128 F.2d 811, 813 (3d Cir. 1942); *Chem One*, 660 F.3d at 642 ("'[C]onsolidation should be considered when savings of expense and gains of efficiency can be accomplished without sacrifice of justice.'") (citation and internal quotation marks omitted).

As noted, the Appeals here implicate the same dispositive legal issues concerning the scope of insurance coverage for business losses caused by a "physical loss" and further involve the same basic operative facts regarding the nature and cause of those losses, *i.e.*, the occurrence of the COVID-19 pandemic and the entry of government shutdown orders. *Supra*. Consolidation for briefing, oral argument, and decision—as well as plaintiffs' impending request for certification to the Supreme Court of Pennsylvania—therefore will significantly reduce the burden of decision on this Court and achieve efficiencies for the parties as well.

Specifically, consolidation will significantly reduce the briefing submitted to the Court and avoid the submission of overlapping and even redundant briefing addressing the "physical loss" and other coverage issues under Pennsylvania law. Consolidation likewise will ensure that only one three-judge panel will need to invest resources in reviewing the scaled-down briefing, hearing any argument, and

deciding these similar Appeals, and it will minimize the prospect of different panels reaching inconsistent rulings on the dispositive coverage issues.

The prospect of inconsistent rulings is heightened in these Appeals, as evidenced by the rapidly evolving landscape of decisions on "physical loss"/business-interruption coverage issues across the country. Some courts have dismissed claims for coverage in these at the pleadings stage, *see*, *e.g.*, *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, No. 1:20-CV-275-JB-B, 2020 WL 6163142, at *8 (S.D. Ala. Oct. 21, 2020), while others have denied motions to dismiss, *see*, *e.g.*, *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020). And some courts have granted summary judgment for insurers, *see*, *e.g.*, *BA LAX, LLC v. Hartford Fire Ins. Co.*, No. 20-cv-06344, 2021 U.S. Dist. LEXIS 10919 (C.D. Cal. Jan. 12, 2021), while others have granted summary judgment for policyholders. *See*, *e.g.*, *Henderson Road Restaurant Sys., Inc. v. Zurich Am. Ins. Co.*, No. 1:20-CV-1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021); *North State Deli, LLC v. The Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507 (Super. Ct., Durham Co., NC, Oct. 9, 2020).

At the same time, with respect to certification in particular, consolidation will prevent piecemeal motions for certification to the Supreme Court of Pennsylvania in these appeals—and thereby prevent the possibility of different panels of this Court certifying similar questions to the Supreme Court of Pennsylvania, and the Supreme

Court having to field those multiple certification requests. It also will give the Supreme Court a fuller opportunity to address the coverage questions proposed for certification—including those relating to the "virus" exclusion and regulatory estoppel—and will, by operation of L.A.R. 110.1, stay each of the eight Appeals pending disposition by the Supreme Court. Moreover, if accepted by the Supreme Court, a consolidated certification request likewise would reduce the decision costs for this Court by eliminating the need for an *Erie* prediction of unsettled principles of Pennsylvania law in each of the consolidated Appeals.

The impending request for certification in these Appeals is far from novel in the context of COVID-19 business-interruption coverage litigation—indeed, just last week, a federal district court in Ohio certified a question concerning the meaning of "physical loss" to property in a coverage case to the Supreme Court of Ohio, noting that the "question certified is the primary question driving resolution of this case." *See Neuro-Communication Services Inc. v. The Cincinnati Ins. Co.*, No. 4:20-CV-1275 (N.D. Ohio, Jan. 19, 2021) ("Under established Ohio principles of insurance policy interpretation, can the presence of SARS-CoV-2 cause direct physical loss or damage to property under [the policy]?") (Order of Certification to the Supreme Court of Ohio, attached hereto as Exhibit 1). And, as noted, the case for certification is compelling here, particularly since, as Judge Dubois recently noted in declining to exercise jurisdiction in a declaratory judgment action, "Pennsylvania state courts

have not yet developed a body of case law applicable to the state law issues presented in this case." *V&S Elmwood Lanes, Inc. v. Everest Nat'l. Ins. Co.*, Case No. 20-03444, 2021 WL 84066 (E.D. Pa. Jan. 8, 2021) (DuBois, J.); *see also i2i Optique LLC v. Valley Forge Insurance*, No. 20-3360 (E.D. Pa. Jan. 27, 2021) (McHugh, J.) (Memorandum attached hereto as Exhibit 2).

Accordingly, consolidation would not result in any meaningful delay in the Appeals and would not prejudice the defendants, who have obtained dismissals of these suits against them. No briefing schedule has been issued in most of the Appeals and if this motion is granted, plaintiffs expect the Court to issue a briefing schedule in the consolidated cases forthwith.

III. CONCLUSION

The eight above-captioned Appeals are ideally suited for consolidation given their legal and factual similarities. In turn, consolidation of such a large number of cases indisputably will serve the interests of judicial economy and conserve the resources of the parties, while at the same time not prejudicing the parties or leading to any undue delay. The Court accordingly should grant this motion and consolidate the Appeals for briefing, argument, and disposition.

Respectfully Submitted,

/s/ Richard Golomb

Richard M. Golomb, Esquire
Kenneth J. Grunfeld, Esquire
GOLOMB & HONIK, P.C.
1835 Market Street, Suite 2900
Philadelphia, Pennsylvania 19103
Telephone: (215) 346-7338
Facsimile: (215) 985-4169
rgolomb@GolombHonik.Com
KGrunfeld@GolombHonik.Com

Arnold Levin, Esquire
Laurence S. Berman, Esquire
Frederick S. Longer, Esquire
Daniel C. Levin, Esquire
Keith J. Verrier, Esquire
LEVIN SEDRAN & BERMAN LLP
510 Walnut Street, Suite 500
Philadelphia, PA 19106-3697
Telephone: (215) 592-1500
Facsimile: (215) 592-4663
alevin@lfsblaw.com
lberman@lfsblaw.com
flonger@lfsblaw.com
dlevin@lfsblaw.com
kverrier@lfsblaw.com

W. Daniel "Dee" Miles, III
Rachel N. Boyd
Paul W. Evans
BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.
P.O. Box 4160
Montgomery, Alabama 36103
Telephone: (334) 269-2343
Facsimile: (334) 954-7555
Dee.Miles@BeasleyAllen.com
Rachel.Boyd@BeasleyAllen.com
Paul.Evans@BeasleyAllen.com

Counsel for Plaintiffs Newchops Restaurant Comcast LLC d/b/a Chops, LH Dining, LLC d/b/a River Twice Restaurant, Adrian Moody and Robin Jones d/b/a Moody Jones Gallery, ATCM Optical, Inc., Omega Optical, Inc., and Omega Optical at Comcast Center LLC

Gary F. Lynch, Esquire
Kelly K. Iverson, Esquire
CARLSON LYNCH, LLP
1133 Penn Ave., Fl. 5

James C. Martin, Esquire
George L. Stewart, Esquire
Colin E. Wrabley, Esquire
Matthew J. Louik, Esquire

Pittsburgh, PA 15222
Telephone: (412) 322-9243
Facsimile: (412) 231-0246
glynch@carlsonlynch.com
kiverson@carlsonlynch.com

Elizabeth L. Taylor, Esquire
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222
Telephone: (412) 288-3131
Facsimile: (412) 288-2063
jcmartin@reedsmith.com
gstewart@reedsmith.com
cwrabley@reedsmith.com
mlouik@reedsmith.com
etaylor@reedsmith.com

Counsel for Plaintiff 1 S.A.N.T. (a/k/a 1 SAINT, Inc.) d/b/a Town & Country and d/b/a Gatherings Banquet & Event Center

Rhonda Hill Wilson, Esq.
Law Office of Rhonda Hill Wilson, P.C.
1500 John F. Kennedy Blvd.
Two Penn Center, Suite 820
Philadelphia, Pa 19102
Rhwilson@Philly-Attorney.Com

Counsel for Plaintiffs Rhonda H. Wilson, Esq. and Law Offices of Rhonda Hill Wilson

Robert Freedberg, Esq.
Christian M. Perrucci, Esq.
Florio Perrucci Steinhardt Cappelli Tipton & Taylor LLC
60 W. Broad Street, Suite 102
Bethlehem, PA 18018
(610) 691-7900 (phone)
(610) 691-0841 (fax)

rfreedberg@floriolaw.com
cperrucci@floriolaw.com

Counsel for Plaintiffs 4431 Inc.

/s/ Alan M. Feldman
Alan M. Feldman
Daniel J. Mann
Edward S. Goldis
FELDMAN SHEPHERD WOHLGELERNTER TANNER WEINSTOCK & DODIG, LLP
1845 Walnut Street, 21st Floor
Philadelphia, PA 19103
T: (215) 567-8300
F: (215) 567-8333
afeldman@feldmanshepherd.com
dmann@feldmanshepherd.com
egoldis@feldmanshepherd.com

Counsel for Independence Restaurant Group d/b/a Independence Beer Garden o/b/o itself and all others similarly situated

James A. Francis
John Soumilas
FRANCIS MAILMAN SOUMILAS, P.C.
1600 Market Street, Suite 2510
Philadelphia, PA 19103
T: (215) 735-8600
F: (215) 940-8000
jfrancis@consumerlawfirm.com
jsoumilas@consumerlawfirm.com

Dated: February 1, 2021

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of February, 2021, I caused a true and correct copy of the foregoing Motion to Consolidate Appeal to be served via ECF upon all counsel of record.

/s/ Alan M. Feldman

Alan M. Feldman
Daniel J. Mann
Edward S. Goldis
FELDMAN SHEPHERD WOHLGELERNTER TANNER WEINSTOCK & DODIG, LLP
1845 Walnut Street, 21st Floor
Philadelphia, PA 19103
T: (215) 567-8300
F: (215) 567-8333
afeldman@feldmanshepherd.com
dmann@feldmanshepherd.com
egoldis@feldmanshepherd.com

Counsel for Independence Restaurant Group d/b/a Independence Beer Garden o/b/o itself and all others similarly situated

EXHIBIT 1

PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NEURO-COMMUNICATION SERVICES, INC., *etc.*,	CASE NO. 4:20-CV-1275
Plaintiffs,	JUDGE BENITA Y. PEARSON
v.	[Resolving ECF No. 10]
THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; AND THE CINCINNATI INDEMNITY COMPANY,	
Defendants.	

ORDER OF CERTIFICATION TO THE SUPREME COURT OF OHIO

Pursuant to Section 9 of the Rules of Practice of the Supreme Court of Ohio, the United States District Court for the Northern District of Ohio, Eastern Division, hereby certifies a question of state law to the Supreme Court of Ohio. No controlling precedent of the Supreme Court of Ohio answers this question. For reasons explained in more detail below, the Court requests that the Supreme Court of Ohio answer the certified question of state law asked in this Certification Order.

I. Name of the Case

The name of the case is *Neuro-Communication Services, Inc. v. Cincinnati Insurance Company*, No. 4:20-CV-1275 (N.D. Ohio filed June 10, 2020).

(4:20-CV-1275)

II. The Certified Question of Law

Does the general presence in the community, or on surfaces at a premises, of the novel coronavirus known as SARS-CoV-2, constitute direct physical loss or damage to property; or does the presence on a premises of a person infected with COVID-19 constitute direct physical loss or damage to property at that premises?

III. Statement of Facts

A. The Facts and Procedural History of the Instant Case

Plaintiff purchased an "all-risk" CinciPak Insurance Policy from Defendants. The policy covers "direct 'loss' to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss." A Covered Cause of Loss is defined as a "direct 'loss'" except those that are expressly and specifically excluded or limited. A "loss" is defined as "accidental physical loss or accidental physical damage." The policy also provides civil authority coverage for business income interruption caused by a Covered Cause of Loss to property other than Plaintiff's which results in a civil authority order prohibiting access to Plaintiff's premises. The policy does not contain any specific exclusion for losses caused by viruses or pandemics.

As a result of the COVID-19 pandemic and civil authority orders issued in response, Plaintiff ceased almost all of its operations on March 23, 2020, and resumed some operations on May 4, 2020, leading to significant business income interruptions. Plaintiff submitted a claim to Defendants on March 23, 2020. Defendants denied the claim, arguing, "[t]he claim does not involve direct, physical loss to property at your premises caused by a Covered Cause of Loss."

Plaintiff then filed the instant suit, seeking to certify a nationwide class of insureds holding similar policies who have also been denied coverage for losses related to the pandemic.

B. This Is an Important Question of State Law Implicating Many Cases

Dozens, if not hundreds of cases seeking coverage for losses related to the pandemic under policies similar or identical to that at issue in this case have been filed in both federal and state courts in Ohio. These cases have been filed against the Defendants in this case and against other insurers who offer similar products. As these cases wend through the various court systems, differing interpretations of Ohio contract law by different courts threaten to undermine the uniform application of that law to similarly situated litigants.

C. The Supreme Court of Ohio Should Have The First Opportunity To Decide This Question Of State Law

Pursuant to Ohio S. Ct. Prac. R. 9.01(A), the Rule may be "invoked if the certifying court, in a proceeding before it, issues a certification order finding there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court." The decision to certify is within the sound discretion of this federal Court, and is most beneficial when there is a novel question of state law and no guidance from state courts. *Gascho v. Global Fitness Holdings, LLC*, 918 F. Supp. 2d 708, 713 (S.D. Ohio 2013). The Supreme Courts of Ohio and the United States have each instructed on the virtues of certification. "The state's sovereignty is unquestionably implicated when federal courts construe state law." *Scott v. Bank One Trust Co., N.A.*, 577 N.E.2d 1077, 1080 (Ohio 1991). "[C]ertification of novel or unsettled questions of state law for authoritative answers by a

(4:20-CV-1275)

State's highest court . . . may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)).

As noted above, dozens, if not hundreds of cases implicating the question certified here are currently making their way through both the state and federal courts in Ohio. The certification procedure invoked here will allow the Supreme Court of Ohio to decide these questions and bring uniformity to the application of state law to these policies. Accordingly, this federal Court defers the opportunity to address this unresolved question of Ohio law to the Supreme Court of Ohio.

IV. The Parties

Neuro-Communication Services, Inc. — Plaintiff
755 Boardman Canfield Road, Ste. C1
Boardman, Ohio 44512

Cincinnati Insurance Company — Defendant
6200 S. Gilmore Road
Fairfield, Ohio 45014

Cincinnati Casualty Company — Defendant
6200 S. Gilmore Road
Fairfield, Ohio 45014

Cincinnati Indemnity Company — Defendant
6200 S. Gilmore Road
Fairfield, Ohio 45014

V. Counsel for the Parties

Plaintiff is represented by:

Shanon J. Carson (PA Bar # 85957)

(4:20-CV-1275)

Y. Michael Twersky (PA Bar # 312411)
Berger & Montague
1818 Market Street
Philadelphia, Pennsylvania 19103
(215) 875-3052

William A. Ladnier (TN Bar # 034316)
Greg Frederic Coleman (TN Bar # 014092)
Law Office of Greg Coleman
800 S. Gay Street, Ste. 1100
Knoxville, Tennessee 37929
(865) 247-0080

Defendants are represented by:

Daniel M. Kavouras (OH Bar # 89773)
Michael K. Farrell (OH Bar # 40941)
Baker & Hostetler — Cleveland
127 Public Square, Ste. 2000
Cleveland, Ohio 44114
(216) 861-7099

Rodger L. Eckelberry (OH Bar # 71207)
Baker & Hostetler — Columbus
200 Civic Center Drive, Ste. 1200
Columbus, Ohio 43215
(614) 462-5189

Laurence J. Tooth (IL Bar # 6314153)
Litchfield Cavo — Chicago
303 West Madison Street, Ste. 300
Chicago, Illinois 50505
(312) 781-6663

Marisa A. Pocci (OH Bar # 77889)
Litchfield Cavo — Las Vegas
3993 Howard Hughes Parkway, Ste. 100
Las Vegas, Nevada 89109
(702) 949-3100

Paul G. Roche (CT Bar # 423912)

(4:20-CV-1275)

Litchfield Cavo — Connecticut
82 Hopmeadow Street, Ste. 210
Simsbury, Connecticut 06089
(860) 413-2800

VI. Designation of Moving Party

The Court designates Defendant Cincinnati Insurance Company as the moving party. This designation is made because Defendant moved for certification.

INSTRUCTIONS TO THE CLERK

In accordance with Ohio S.Ct.Prac.R. 9.03(A), the Clerk of the United States District Court for the Northern District of Ohio is directed to serve copies of this Certification Order upon counsel for the parties and to file this Certification Order under the seal of this Court with the Supreme Court of Ohio, along with appropriate proof of service.

IT IS SO ORDERED.

January 19, 2021
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

i2i Optique LLC	:	
	:	
v.	:	**CIVIL ACTION NO. 20-3360**
	:	
VALLEY FORGE INSURANCE COMPANY, d/b/a CNA	:	

McHUGH, J. **JANUARY 27, 2021**

MEMORANDUM

This is another in a series of cases pertaining to what, if any, insurance coverage exists to protect businesses from income losses and expenses sustained during state-ordered shutdowns resulting from the COVID-19 pandemic. Plaintiff here, an Arizona business, seeks a declaration that coverage exists under its policy with a Pennsylvania insurer. No other claim is before the court. The parties agree that Arizona law controls, but no Arizona court has ever construed the controlling language here in any relevant context, let alone in the context of the current pandemic. Rather than decide this case based on general insurance principles from other jurisdictions, the most prudent course is to exercise my discretion under the Declaratory Judgment Act to decline jurisdiction and dismiss the case without prejudice.

I. Factual Background

Plaintiff, i2i Optique LLC, is an Arizona company that operates, manages, and owns an optical goods store in Scottsdale, Arizona. Compl. ¶ 9, ECF 1. Defendant, Valley Forge Insurance Company d/b/a CNA, a Pennsylvania corporation whose principal place of business is Pennsylvania, issued an insurance policy ("the Policy") to Plaintiff for the period of August 31, 2019 to August 31, 2020. Compl. ¶¶ 10-11. Plaintiff's optical goods store is covered under the Policy. Compl. ¶ 13.

In mid-March 2020, Plaintiff's store shut down to customers as a result of a string of executive orders issued by Arizona Governor Doug Ducey, which declared a Public Health Emergency in response to the COVID-19 pandemic, limited the operation of certain businesses, and mandated that non-essential businesses cease in-person operations. Compl. ¶¶ 2, 50-52, 59. As a result of these Orders, Plaintiff has incurred substantial loss of business income and additional expenses. Compl. ¶ 72. Plaintiff alleges such losses are covered under its "all-risk" Policy. Compl. ¶¶ 17, 72.

The Policy covers "loss of Business Income" when sustained under the following circumstances: (1) "due to the necessary 'suspension' of 'operations' during the "period of restoration'" ("Business Income Coverage" provision); and (2) due to action of a civil authority ("Civil Authority" provision).[1] Def's Mot. Dismiss, Ex. A, at 36, 62, ECF 9. The applicability of both provisions depends upon a single triggering event: the losses and/or extra expenses must be caused by "direct physical loss of or damage to property." *Id.*

Based on its reading of these provisions, Plaintiff contacted its insurance agent to make a claim under the Policy but was informed that the Defendant would reject the claim. Compl. ¶ 39. Thereafter, Plaintiff brought this action, seeking a declaration "that the Orders trigger coverage under this Policy" and a declaration "that the Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the Plaintiff's Insured Property or the immediate area of the Plaintiff's Insured Property." Compl. ¶ 76.

[1] At oral argument on January 12, 2021, the parties agreed that I may take judicial notice of the Policy under Federal Rule of Civil Procedure 201.

In their briefs and at oral argument, both parties agreed that Arizona law governs this matter. *See* Def.'s Mot. to Dismiss 9-10 n.2; Pl.'s Resp. 7 n.3, ECF 11.[2]

II. Governing Legal Standard

Plaintiff's sole claim arises under the Declaratory Judgment Act. *See* 28 U.S.C. § 2201(a); Compl. ¶ 76. The Declaratory Judgment Act provides that district courts "*may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *Id.* (emphasis added). Given the statute's explicit "textual commitment to discretion," "[t]he Supreme Court has long held that this confers discretionary . . . jurisdiction upon federal courts." *Reifer v. Westport Ins. Corp.*, 751 F.3d 129, 134, 139 (3d Cir. 2014) (citing *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286-87 (1995) and *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494 (1942)). District courts therefore "possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites." *Wilton,* 515 U.S. at 282. As part of that discretion, "Congress has afforded the federal courts a freedom not present in ordinary diversity suits to consider the state interest in having the state courts determine questions of state law." *State Auto Ins. Companies v. Summy*,

[2] I agree that Arizona law would govern this matter if I chose to exercise jurisdiction. Where the parties are diverse, the district court must apply the choice of law rules of the state in which it sits with regard to the substantive law at issue in this case, the law of insurance contracts. See *Huber v. Taylor*, 469 F.3d 67, 73 (3d Cir. 2006) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)). This Court sits in Pennsylvania. Pennsylvania conflict of laws principles dictate that an insurance contract is guided by the law of the state in which it was made. *Crawford v. Manhattan Life Ins. Co.*, 221 A.2d 877, 880 (Pa. Super. Ct. 1966); *see also Meyer v. CUNA Mut. Ins. Soc.*, 648 F.3d 154, 162 (3d Cir. 2011). The place of making an insurance contract is the place of delivery. *Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co.*, 193 F.3d 742, 745-46 (3d Cir. 1999). In the absence of proof as to the place of delivery, there is a presumption of delivery at the residence of the insured. *Crawford,* 221 A.2d at 881 (citation omitted). Here, Plaintiff was domiciled in Arizona when the policy was issued. *See* Compl. ¶ 9. ("Plaintiff is owned by Sabrina Krasnov and Joseph Krasnov, citizens of Arizona"); *see Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 420 (3d Cir. 2010) (Limited liability companies are citizens of the states in which its members are citizens).

234 F.3d 131, 135 (3d Cir. 2000), *as amended* (Jan. 30, 2001) (citing *Mitcheson v. Harris*, 955 F.2d 235, 238 (4th Cir. 1992)).

Courts may decline jurisdiction *sua sponte* under the Declaratory Judgment Act. *See Reifer,* 751 F.3d at 148 (affirming district court's *sua sponte* determination to decline jurisdiction for claim arising under the Declaratory Judgment Act given the nature of the state law issues raised); *see also V&S Elmwood Lanes, Inc. v. Everest Nat'l Ins. Co.*, No. CV 20-3444, 2021 WL 84066, at *3-4 (E.D. Pa. Jan. 11, 2021) (DuBois, J.) (declining jurisdiction under the Declaratory Judgment Act for COVID-related insurance claims *sua sponte* due to the public interest in resolution of novel state law issues and the existence of pending litigation in state courts).

III. Discussion

A threshold question is whether there are "parallel state proceedings" between the parties in this matter, and here there are not.[3] *See Kelly v. Maxum Specialty Ins. Grp.*, 868 F.3d 274, 282 (3d Cir. 2017). The absence of parallel state proceedings is a significant factor weighing in favor of exercising jurisdiction. *Id.* When there are none, a district court must consider whether the lack of parallel state proceedings is outweighed by other non-exhaustive factors outlined in *Reifer* and *Summy. Id.* at 282-83; *Reifer*, 751 F.3d at 144, 146-47. "[S]ome factors may be weighed heavier than others based on the circumstances of each case." *Mattdogg, Inc. v. Philadelphia Indem. Ins. Co.*, No. CV206889FLWLHG, 2020 WL 6111038, at *4 (D.N.J. Oct. 16, 2020) (citing *Reifer*, 751 F.3d at 146). For example, the "nature of the state law issue raised" may itself be sufficient to decline jurisdiction. *Reifer*, 751 F.3d at 148 ("We conclude that

[3] "The Supreme Court has described a 'parallel' proceeding as 'another proceeding ... pending in a state court in which all the matters in controversy between the parties could be fully adjudicated.'" *Reifer*, 751 F.3d at 137 (citing *Brillhart,* 316 U.S. at 495). More recently, in *Kelly*, the Third Circuit instructed that "there must be a substantial similarity in issues and parties between contemporaneously pending proceedings" to make those proceedings parallel. 868 F.3d at 284.

declining jurisdiction was proper because the lack of pending parallel state proceedings was outweighed by another relevant consideration, namely, the nature of the state law issue raised").

A. The *Reifer* and *Summy* factors

In *Reifer*, the Third Circuit explained that "a district court should guide its exercise of sound and reasoned discretion by giving meaningful consideration to the following factors to the extent they are relevant":

> (1) the likelihood that a federal court declaration will resolve the uncertainty of obligation which gave rise to the controversy;
>
> (2) the convenience of the parties;
>
> (3) the public interest in settlement of the uncertainty of obligation;
>
> (4) the availability and relative convenience of other remedies;
>
> (5) a general policy of restraint when the same issues are pending in a state court;
>
> (6) avoidance of duplicative litigation;
>
> (7) prevention of the use of the declaratory action as a method of procedural fencing or as a means to provide another forum in a race for *res judicata*; and
>
> (8) (in the insurance context), an inherent conflict of interest between an insurer's duty to defend in a state court and its attempt to characterize that suit in federal court as falling within the scope of a policy exclusion.

751 F.3d at 146. In *Reifer*, The Third Circuit reiterated the caution it had previously expressed in *Summy*:

> [W]hen applicable state law is 'uncertain or undetermined, district courts should be particularly reluctant' to exercise DJA jurisdiction . . . Rather, the proper relationship between federal and state courts requires district courts to 'step back' and permit state courts to resolve unsettled state law matters.

Id. at 141 (citing *Summy*, 234 F.3d at 135-36). Moreover, "the state's interest in resolving its own law must not be given short shrift simply because [parties] perceive some advantage in the federal forum." *Id.* (citing *Summy*, 234 F.3d at 136).

B. Unsettled Arizona law relating to insurance coverage for COVID-19-related losses weighs against exercising jurisdiction.

Plaintiff contends that "'incorporeal' damage . . . trigger[s] property damage and civil authority coverage" under the provisions of the Policy. Pl.'s Resp. 11. It further argues that "physical loss does not require structural damage," but rather, the "inability to use the business is sufficient." Pl.'s Resp. 12. Meanwhile, in support of its motion to dismiss, Defendant argues that "courts around the country have roundly rejected such 'loss of use' claims due to government health orders in response to the pandemic." Def.'s Mot. Dismiss 2. Yet there is no controlling state court precedent in Arizona. That is true both with respect to the proper construction of the contractual terms generally, and their applicability to cover losses resulting from the COVID-19 related shutdowns. In ruling, I could only predict what Arizona courts might do, bringing this case squarely within the heart of *Reifer*: "The fact that district courts are limited to predicting—rather than establishing—state law requires 'serious consideration' and is 'especially important in insurance coverage cases.'" 751 F.3d at 148 (citing *Summy* at 135).

Given this lack of precedential authority, the parties have submitted extensive case law from other jurisdictions, including a number of courts in the Eastern District of Pennsylvania, which have resolved similar insurance coverage issues involving similar policy provisions during the COVID-19 pandemic. *See, e.g.*, *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. CV 20-3198, 2020 WL 6545893 at *5 (E.D. Pa. Nov. 6, 2020) (Slomly, J.). However, comparatively few of these cases have solely involved claims for declaratory relief. Typically, breach of contract claims were also raised, requiring a broader assertion of jurisdiction. *See Rarick v. Federated Serv. Ins. Co.*, 852 F.3d 223, 229 (3d Cir. 2017) ("[w]hen a complaint contains claims for both legal and declaratory relief, a district court must determine whether the legal claims are

independent of the declaratory claims; if so, the court has a 'virtually unflagging obligation' to hear those claims") (internal citations omitted).[4]

In contrast, when plaintiffs' insurance law claims have arisen solely under the Declaratory Judgment Act, numerous district courts, stressing the public import of such decisions during the COVID-19 pandemic, have followed the guidance of *Reifer* and *Summy* to "permit state courts to resolve unsettled state law matters," and declined jurisdiction.[5] *Reifer*, 751 F.3d at 141 (citing *Summy*, 234 F.3d at 136); *see Greg Prosmushkin, P.C. v. Hanover Ins. Grp.*, No. CV 20-2561, 2020 WL 4735498, at *5-6 (E.D. Pa. Aug. 14, 2020) (Jones, J.); *Venezie Sporting Goods, LLC v. Allied Ins. Co. of Am.*, No. 2:20-CV-1066, 2020 WL 5651598, at *5 (W.D. Pa. Sept. 23, 2020); *Dianoia's Eatery, LLC v. Motorists Mut. Ins. Co.*, No. CV 20-787, 2020 WL 5051459, at *4 (W.D. Pa. Aug. 27, 2020); *Mattdogg, Inc. v. Philadelphia Indem. Ins. Co.*, No. CV206889FLWLHG, 2020 WL 6111038, at *6 (D.N.J. Oct. 16, 2020); *V&S Elmwood Lanes*, 2021 WL 84066, at *4 (DuBois, J.).

I am persuaded that the absence of a settled body of case law in Arizona weighs heavily in favor of declining jurisdiction.[6] On a general level, neither party has presented this court with controlling Arizona case law construing the controlling language of the policy, such as "physical

---

[4] As stated above, the Plaintiff here solely seeks declaratory relief, and therefore the "independent claim" test set forth in *Rarick* is not relevant here. 852 F.3d at 229.

[5] I am aware of five cases in this district in which the court exercised jurisdiction under the Declaratory Judgment Act in the absence of any other claim for relief. *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, No. 20-1869, 2020 WL 7395153, at *10 (E.D. Pa. Dec. 17, 2020) (Savage, J.); *Humans & Res., LLC v. Firstline Nat'l Ins. Co.*, No. 20-CV-2152, 2021 WL 75775, at *10 (E.D. Pa. Jan. 8, 2021) (Joyner, J.); *ATCM Optical, Inc. v. Twin City Fire Ins. Co.*, No. CV 20-4238, 2021 WL 131282, at *8 (E.D. Pa. Jan. 14, 2021) (Kenney, J.); *Adrian Moody & Robin Jones d/b/a Moody Jones Gallery v. The Hartford Financial Group, Inc. et al.*, No. CV 20-2856, 2021 WL 135897, at *11 (E.D. Pa. Jan. 14. 2021) (Kenney, J.); *Indep. Rest. Grp. v. Certain Underwriters at Lloyd's, 2021 U.S. Dist. LEXIS 7256, No. 20-2365*, at *23 (E.D. Pa. Jan. 14, 2021) (Kenney, J.). Significantly, however, all these cases were decided under Pennsylvania law.

[6] The Court of Appeals instructs district courts to "squarely address" the novelty of the state law claims at issue. *Reifer*, 751 F.3d at 149.

loss," which is critical to the outcome here.[7] In that regard, no Arizona court has addressed Plaintiff's contention that "loss of use" is encompassed within the controlling provisions. At a more granular level, the parties have provided no Arizona precedent dealing with insurance coverage for COVID-19 related losses,[8] as these issues were working their way through the Arizona courts. Significantly, the Arizona Supreme Court has held that "[i]f a clause appears ambiguous, we interpret it by looking to legislative goals, social policy, and the transaction as a whole." *First American Title Ins. Co. v. Action Acquisitions, LLC*, 218 Ariz. 394, 397 (Az. 2008). The parties were asked to address that standard in supplemental briefing, but upon review, the parties' submissions simply underscored why the issue is more properly decided by Arizona courts.

As stated recently by one district court, "[g]eneral principles of insurance contract interpretation . . . may provide tools for the Court to address insurance disputes; however, those tools, as applied to the scenario presently before the Court, are of limited utility in light of the

---

[7] Defendant relies on a federal district court case arising out of a forest fire. *White Mountain Communities Hosp. Inc. v. Hartford Cas. Ins. Co.*, No. 3:13-CV-8194 JWS, 2015 WL 1755372, at *2-3 (D. Ariz. Apr. 17, 2015). The insured's property was damaged by smoke, and income losses were covered by the carrier for a period but then stopped. *Id.* In holding that the carrier acted properly in ceasing such payment, the court made a broad statement about its understanding of the scope and purpose of Business Income Loss Coverage. *Id.* In doing so, however, *White Mountain* did not cite any Arizona precedent, and is therefore weak authority for present purposes. *See generally, id.*

[8] The Plaintiff provided a Magistrate Judge's Report and Recommendations in a federal Arizona district court as supplementary authority for its position. *See* ECF 24; *Cibus LLC v. Eagle West Ins. Co.*, No. CV-20-00277-TUC-JGZ (DTF), slip op. (D. Ariz. Jan. 21, 2021) (report and recommendation). But aside from the fact that the relevant language constitutes *dicta,* the Report cites no Arizona law. *Id.* at 9-11.

Other federal district court cases applying Arizona law to COVID-related insurance claims have ruled based upon provisions not at issue here. *See London Bridge Resort LLC v. Illinois Union Ins. Co. Inc.*, No. CV-20-08109-PCT-GMS, 2020 WL 7123024, at *1 (D. Ariz. Dec. 4, 2020) (analyzing whether COVID-19 falls within the policy definition of "pollution condition"); *Border Chicken AZ LLC v. Nationwide Mut. Ins. Co.*, No. CV-20-00785-PHX-JJT, 2020 WL 6827742, at *2 (D. Ariz. Nov. 20, 2020) (analyzing whether COVID-19 falls within policy's explicit virus exclusion).

recency of the COVID-19 pandemic and its intersection with insurance coverage issues governed by . . . state law." *Venezie Sporting Goods*, 2020 WL 5651598, at *4.

In sum, the consideration of this important factor weighs significantly against the exercise of jurisdiction.

C. *Reifer* Factor Three: The public interest in the resolution of the issues weighs against exercising jurisdiction.

I must also consider "the public interest in settlement of the uncertainty of obligation." *Reifer*, 751 F.3d at 146. As stated by another district court, this case "does not involve a run-of-the-mill insurance coverage dispute. Rather, this dispute emanates from a once-in-a-lifetime pandemic" with "implications of important state public policy." *Mattdogg*, 2020 WL 6111038, at *5. The Arizona public has a strong interest in seeing a resolution to the uncertainty of insurers' obligations regarding coverage for COVID-19 losses under these and similar provisions. "Whether . . . certain language in insurance policies creates coverage . . . will impact a significant portion of the population operating businesses of all kinds." *Greg Prosmushkin*, 2020 WL 4735498, at *5 (E.D. Pa. Aug. 14, 2020).

Importantly, the interpretation of the Policy will require an inquiry into Arizona legislative goals and public policy, for which Arizona courts are better equipped. *See First American Title Ins. Co.*, 218 Ariz. At 397 (outlining a three-pronged legal test for analyzing ambiguous insurance contracts under Arizona law, which includes looking to legislative goals, social policy, and the transaction as a whole). Undeniably, it was the state of Arizona that issued the shutdown order resulting in Plaintiff's losses. Compl. ¶ 36; *see Mattdogg,* 2020 WL 6111038, at *5 ("the public interest in resolving the uncertainty of obligation is best served by . . . allow[ing] the New Jersey courts the opportunity to determine the impact of Governor Murphy's Orders on insurance coverage"); *see also Summy*, 234 F.3d at 136 ("The desire of

insurance companies and their insureds to receive declarations in federal court on matters of purely state law has no special call on the federal forum.").

In addition to the fact that Arizona courts are better equipped to address the legal issues which implicate these important public policy considerations, it also clear that they are better positioned to do so, given that "a federal district court's predictive decision . . . will have no binding effect on [state] courts." *Ewart v. State Farm Mut. Auto. Ins. Co.*, 257 F. Supp. 3d 722, 725 (E.D. Pa. 2017) (alteration in original). That is one reason why "[i]t is counterproductive for a district court to entertain jurisdiction over a declaratory judgment action that implicates unsettled questions of state law" and why "[s]uch matters should proceed in normal fashion through the state court system." *Summy*, 234 F.3d at 135. Regardless of whatever ruling I might make as to insurance coverage between these two parties, as a general matter insurance coverage for COVID-19 related losses will remain unsettled until Arizona state courts resolve it.

D. *Reifer* Factors Five and Six: The existence of pending litigation in Arizona state courts, as well as the potential for duplicative litigation, weigh in favor of declining jurisdiction.

Reifer also instructs that district courts should adhere to "a general policy of restraint when the same issues are pending in a state court" and "avoid[] duplicative litigation." 751 F.3d at 146 (alteration in original). Given the unique circumstances of this "once-in-a-lifetime" COVID-19 pandemic discussed above, the aforementioned *Summy* and *Reifer* factors are sufficient on their own to decline jurisdiction. *See, e.g.*, *Greg Prosmushkin*, 2020 WL 4735498, at *5-6. However, my decision is further buttressed by the fifth and sixth factors of the *Reifer* analysis.

There are a number of cases pending in Arizona state courts where the same issues—based on "standardized language" found in insurance contracts—are in play. Compl. ¶¶ 22, 24;

see, e.g., KLOS Enterprises LLC v. the Cincinnati Ins. Co. et al., CV 2020-010496 (Ariz. Super. 2020) (seeking coverage per "all-risk" insurance policy for losses relating to COVID-19 pandemic under Business Income provisions and Civil Authority provisions); *ABT Performance Arts Assoc. Inc.* v. *the Cincinnati Ins. Co. et al.*, CV 2020-010495 (Ariz. Super. 2020) (same). Both cases cited above involve the interpretation of insurance contracts where coverage is triggered by "accidental physical loss or accidental damage to" property and, as is exactly the case here, the "suspension of operations" during a "period of restoration."[9]

The pendency of those cases highlights another risk in proceeding with this case. "Were this Court to step in and exercise jurisdiction over this matter, it could potentially issue a decision inconsistent with that of the state courts. Such an outcome would upend uniformity at a time when businesses need clarity and consistency in law." *Mattdogg*, 2020 WL 6111038, at *5.[10] *See Venezie*, 2020 WL 5651598, at *5; *Dianoia's Eatery*, 2020 WL 5051459, at *3-4; *V&S Elmwood Lanes,* WL 84066, at *4.

E. Remaining *Reifer* Factors

[9] I may take judicial notice of these pending cases under Fed. Rule of Civil Proc. 201(b)(2).

[10] The Third Circuit has strongly indicated that the fifth *Reifer* factor is separate and distinct from the question of "parallel state proceedings" discussed as a preliminary factor *supra.* Again, a "parallel state proceeding" is a matter "*involving the same parties* and presenting [the] opportunity for ventilation of the same state law issues," *Kelly*, 868 F.3d at 284 (emphasis added), whereas the fifth *Reifer* factor is a broader inquiry that focuses on whether "the same *issues* are pending in state court." *Reifer*, 751 F.3d at 146 (emphasis added). That is why "[c]ourts should first determine whether there is a 'parallel state proceeding' . . . [and] then weigh other factors"—namely, the *Reifer* factors. *Kelly*, 868 F.3d at 282-83. And such is why the analysis of the fifth *Reifer* factor in *Kelly* focused primarily on the lack of identity of the issues between the state action, which sought "to determine a defendant's liability for an alleged harm," and the federal action, which sought "only a declaratory judgment on an insurer's obligation to defend and indemnify the defendant." 868 F.3d at 279. I note that the danger of "upending" uniformity existing in the instant case, which involves "standardized" insurance provisions subject to pending state law litigation, was not present in the federal court proceeding in *Kelly*, and that *Kelly* did not involve an "unsettled question of state law or important policy" considerations. Compl. ¶¶ 22, 24; *Mattdogg*, 2020 WL 6111038, at *5; *Kelly*, 868 F.3d at 288.

Among the remaining *Reifer* factors, I find that some do not point significantly in one direction or another, and others are irrelevant. Therefore, they do not impact my conclusion that the aforementioned *Summy* and *Reifer* factors counsel strongly towards declining jurisdiction.

Regarding factors one, two, and four, although there is a strong likelihood that a federal court declaration will resolve the uncertainty of obligation which gave rise to the present controversy between these parties, it will not inconvenience the parties to litigate this case in Arizona. That venue is readily available to the Arizona-based Plaintiff, and issuance of the policy in dispute in this case demonstrates that Defendant conducts business there. *Williams v. Lakeview Co.*, 13 P.3d 280, 282 (2000) ("Arizona's long-arm rule confers jurisdiction over non-resident defendants to the fullest extent permitted by the Due Process Clause"). Moreover, the parties have been involved in the instant litigation for only six months.[11] And finally, it is clear that the declaratory relief sought by Plaintiff is available in Arizona courts.

Regarding factors seven and eight, I find that they are irrelevant here, and therefore need not consider them. *See Reifer*, 751 F.3d at 146 (district courts should consider the eight factors only "to the extent that they are relevant").

IV. Conclusion

In the final analysis, the importance of the issues, the complete absence of relevant Arizona law, and the pendency of cases there that will provide definitive guidance weigh heavily against assumption of jurisdiction, where all this Court could do is predict what Arizona law might prove to be. I therefore join the numerous district courts in this circuit that have found it most appropriate to "step back" and allow state courts to decide these critical issues. *Reifer*, 751

[11] In *Reifer*, the Third Circuit, although affirming the district court's *sua sponte* determination not to retain jurisdiction after twelve months of litigation, instructed district courts to do so in a timely fashion. 751 F.3d 149 n.25. This matter has been addressed in less than four months after the case was re-assigned, and less than a month after the final submission of the parties.

F.3d at 141 (quoting *Summy*, 234 F.3d at 136); *see Venezie*, 2020 WL 5651598, at *5; *Dianoia's Eatery*, 2020 WL 5051459, at *4; *V&S Elmwood Lanes,* WL 84066, at *4; *Mattdogg*, 2020 WL 6111038, at *6; *Greg Prosmushkin*, 2020 WL 4735498, at *5-6.

An appropriate order follows.

/s/ Gerald Austin McHugh
United States District Judge