UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CATERER'S IN THE PARK LLC t/a NANINA'S IN THE PARK on behalf of itself and all others similarly situated, Plaintiff, v. OHIO SECURITY INSURANCE COMPANY Defendant.	Civil Action No. 20-6867(MCA)(LDW)

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

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PRELIMINARY STATEMENT

Plaintiff Caterer's In The Park LLC t/a Nanina's In The Park ("Nanina's") is a popular wedding and banquet venue located in Branch Brook Park in Belleville. When Governor Murphy issued the Executive Orders directing a shutdown of businesses last March (the "Closure Orders"), Nanina's was particularly hard hit because, as a catering facility, its primary business was hosting events for large crowds of people indoors and was not equipped to handle take-out or delivery orders like a restaurant. As a result of the Closure Orders, Nanina's made a claim under its business interruption insurance policy issued by Defendant Ohio Security Insurance Company ("Ohio Security"), which summarily denied the claim, as have all other insurance companies with COVID-related business interruption claims.

Ohio Security has moved for judgement on the pleadings, contending that Nanina's complaint should be dismissed because its premises did not suffer any physical damage, so, Ohio Security says, its business interruption losses are not covered and also because its claims are barred by the virus exclusion in its policy. Throughout its brief, Ohio Security urges the Court, sometimes in bold and italic type to follow, the countless decisions from across the country that have ruled in favor of insurance companies and against insureds. However, Ohio Security is extraordinarily short on actual application of the rules of insurance policy interpretation to the terms of Nanina's policy. When the actual law is considered, Ohio Security's arguments have as much substance as the murder charges in *My Cousin Vinny*.[1] As Vinny Gambini explained to his cousin Billy early in the movie, demonstrating with a playing card:

> He's going to show you the bricks. He'll show you they got straight sides. He'll show you how they got the right shape. He'll show them to you in a very special way, so that they appear to have everything a brick should have. But there's one thing he's not gonna show you.
> [*turns the card, so that its edge is toward Billy*]

[1] MY COUSIN VINNY (Twentieth Century Fox 1992).

> When you look at the bricks from the right angle, they're as thin as this playing card. His whole case is an illusion, a magic trick.[2]

Ohio Security's arguments are as substantive as Vinny's "bricks". All Ohio Security wants the Court to look at is the outcome of the cases they cite. From that perspective, they have straight sides, they have the right shape, so they look like they have everything a "brick" should have. However, if one drills down and applies the standards for policy interpretation, what the cases actually say, the authorities they rely upon, and the actual language in the policies in those cases, Ohio Security's position is thinner than Vinny's playing card.

First, courts have repeatedly confused virus exclusions with an anti-concurrent cause clause and virus exclusions without an anti-concurrent cause clause. The crucial difference, as explained below, is that an exclusion with an anti-concurrent cause clause will exclude a loss if a virus contributes *in any way* to the loss, or is *anywhere* in the chain of events causing the insured's loss, whereas an exclusion *without* an anti-concurrent cause clause would exclude the loss *only if* a virus was the efficient proximate cause, *i.e.*, the predominant cause, of the loss. Notwithstanding the differences between the two, at the urging of insurers, courts have applied the different types of exclusions interchangeably, even though under most circumstances the different types of exclusions should lead to different results.

The other point revolves around the meaning of the standard coverage phrase "direct physical loss of or damage to" property. Under well-settled rules of contract construction, words separated by the disjunctive conjunction "or" should be considered to be different things, so "loss *or* damage" should be two different things. Nonetheless, courts have construed "direct physical loss of or damage to" as requiring damage, which would make "loss" redundant. Often, as

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[2] My Cousin Vinny Card Scene, YOUTUBE (June 13, 2009), https://www.youtube.com/watch?v=MHzOOMdhAhE (last visited Apr. 12, 2021).

explained below, this is due to insurers mis- or selectively citing cases that say actually stand for the opposite proposition or contain different insuring language.

For the reasons set forth below, Nanina's claim is not barred by the virus exclusion because its losses were caused by the Closure Orders, not by a virus, and there is no anti-concurrent cause clause in the virus exclusion. Nanina's business interruption claim is covered because the language in Nanina's policy covering "direct physical loss of or damage to" property does not require damage to the property. In order to suffer a "loss", all that is necessary is that the property be incapable of being used for its intended purpose.

LEGAL ARGUMENT

PLAINTIFF HAS A BUSINESS INCOME CLAIM BECAUSE IT SUFFERED A DIRECT PHYSICAL LOSS THAT IS NOT EXCLUDED UNDER PLAINTIFF'S POLICY

a) Standard For Motion To For Judgment On the Pleadings

The standards for deciding a motion for judgment on the pleadings under Rule 12(c) is the same as a motion to dismiss under Rule 12(b)(6). *Revell v. Port Auth. of NY, NJ*, 598 F.3d 128, 134 (3d Cir. 2010); Bartkus, Sher, Chewning, *New Jersey Federal Civil Procedure*, § 6-6:3, at 225, n.32 (2021 ed.). On a Rule 12(b)(6) motion, a district court should dismiss a complaint only if it fails to state a claim upon which relief can be granted. To survive such a motion, a plaintiff need only allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. v. Twombly*, 550 U.S. 544, 564, 570 (2007). Under this "facial plausibility" standard, a plaintiff must allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Courts do not require "heightened fact pleading of specifics," but a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555; *see also id.* at 570 (plaintiffs must "nudge[] their claims across the line from conceivable to plausible").

When deciding whether a plaintiff has stated a claim upon which relief can be granted, the court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. *Bistrian v. Levi*, 696 F.3d 352, 357 n.1 (3d Cir. 2012).

b) Rules Of Insurance Policy Interpretation

Because of the vast differences in the bargaining positions between the insured and the insurance company with respect to the drafting of the insurance policy, there are special rules which apply to the interpretation of insurance policies. *Villa v. Short*, 195 N.J. 15, 23 (2008).[3]

> If the policy terms are clear, courts should interpret the policy as written and avoid writing a better insurance policy than the one purchased. However, if the policy language is ambiguous, we construe the language to comport with the reasonable expectations of the insured. That is, if the policy language fairly supports two meanings, one that favors the insurer, and the other that favors the insured, the policy should be construed to sustain coverage. Insurance policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion. On the other hand, clauses that extend coverage are to be viewed broadly and liberally.

Id. at 23-24 (internal citations and quotes omitted).

Words in an insurance policy should be given their ordinary meaning. *Universal Underwriters Grp. v. Heibel*, 386 N.J. Super. 307, 313 (App. Div. 2006). The court will not read one policy provision in isolation when doing so would render another provision meaningless. *Homesite Ins. Co. v. Hindman*, 413 N.J. Super. 41, 47 (App. Div. 2010). An insurance policy is ambiguous if there is more than one possible interpretation of the language. *Sosa v. Mass. Bay Ins. Co.*, 458 N.J. Super. 639, 646-47 (App. Div. 2019). Ambiguity can also arise where the

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[3] Federal courts are bound to follow state law as announced by the highest state court. In the absence of guidance from the state supreme court, the Court is to look to the state's intermediate appellate courts for assistance as to how the Supreme Court would rule. *E.g., McKenna v. Pacific Rail Service*, 32 F.3d 820, 825 (3d Cir. 1994); *see generally Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). There is no "law of the district", so the Court is bound to follow the decisions of other district judges only to the extent that it agrees with their reasoning. *See Threadgill v. Armstrong World Industries, Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991).

language of the policy is so confusing that the average policy holder cannot make out the boundaries of coverage. *Katchen v. GEICO*, 457 N.J. Super. 600, 605 (App. Div. 2019) (quoting *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 247 (1979)).

c) The Virus Exclusion In Plaintiff's Policy Does Not Bar Its Claim

Although Ohio Security's first argument in its brief addresses whether Nanina's has suffered a "direct physical loss," Nanina's will address Ohio Security's virus exclusion argument first, since several courts, including in this one, have dismissed COVID-related business interruption clams without ever reaching the issue of whether the insured suffered a "direct physical loss".

Ohio Security contends that Nanina's claims are barred by the virus exclusion in its policy, which provides:

> We will not pay for loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of causing physical distress, illness, or disease.

1) The Closure Orders Were The Efficient Proximate Cause Of Plaintiffs' Loss

The efficient proximate cause of Nanina's losses was the Closure Orders, not a virus. This is made plain by the fact that, had the Closure Orders never existed, but the virus still did, Nanina's would never have closed. Proximate cause has a different meaning in insurance coverage cases than in tort cases. In insurance cases, the only issue is the nature of the injury and how it happened. *Owens v. Prudential Prop. & Cas. Ins. Co. of N.J.*, 336 N.J. Super. 79, 85 (App. Div. 2000). The majority of states, including New Jersey, apply the efficient proximate cause doctrine, also known as the Appleman Rule, that a loss will be covered if a covered risk is the last step in a chain of events set in motion by an uncovered risk or if a covered risk sets in motion an unbroken series of events that causes a loss, even if the last step in the chain was an excluded risk. *Auto Lenders Acceptance Corp. v. Genteli Ford, Inc.*, 181 N.J. 245, 256-57 (2004) (*quoting* 5 Appleman,

Insurance Law & Practice §3083, at 309-11). This rule applies even where the policy requires a "direct loss". *Id.* at 257-58. Losses caused by precautionary measures taken to avoid an excluded peril are not caused by the excluded peril itself. *See Newman Myers Kreines Gross Harris P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 333-34 (S.D.N.Y. 2014) (shutdown of electric grid in anticipation of flooding from Hurricane Sandy was not caused by flooding for purposes of flood exclusion); *McKinley Development Leasing Co. Ltd. v. Westfield Ins. Co.*, 2021 WL 506266, at *5-6 (Ohio Ct. C.P. Feb. 9, 2021) (virus exclusion inapplicable because losses caused by pandemic, *i.e.*, societal changes and closure orders, rather than virus); *accord United Airlines, Inc. v. Ins. Co. of the State of Pa.*, 439 F.3d 128, 134-35 (2d Cir. 2006) (business interruption losses at Washington National Airport after 9/11 attacks were caused by government orders to prevent future terrorism, not crash of airliner at nearby Pentagon). Disputes relating to the causation of a potentially insured loss are generally questions of fact, particularly when more than one cause has contributed to the injury. 7 Couch on Insurance, § 101:59.

An anti-concurrent cause clause is intended to contract around the efficient proximate cause doctrine. This clause has language such as "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 or in any sequence to the loss." *See, e.g.*, *Hemispherx Biopharma, Inc. v. Valley Forge Ins. Co.*, 2012 WL 1219389, at *7 (D.N.J. Sept. 1, 2013) (emphasis added). Where an exclusion includes an anti-concurrent cause clause, a loss will be excluded if the excluded peril is anywhere in the chain of causation. "Caused by or resulting from" language does not exclude other or concurrent causes, so the efficient proximate cause rule would still apply. *See Franklin Packaging Co. v. Calif. Union Ins. Co.*, 171 N.J. Super. 188, 189-90 (App. Div. 1979) (provision excluding losses "caused by, resulting from, contributed to or aggravated by" peril subject to Appleman Rule); *Ariston Airline & Catering Supply Co., Inc. v.*

Forbes, 211 N.J. Super. 472, 485-88 (Law Div. 1986) (same); *Hemispherx* 2013 WL 12129389, at *7 (exclusions for loss "caused by or resulting from" were not intended to avoid Appleman Rule).

A paradigm application of the efficient proximate cause rule appears in *Album Realty Corp. v. Am. Home Assur. Co.*, 80 N.Y.2d 1008 (1992). There, a sprinkler head in the insured's basement froze and burst, causing water to fill the subbasement, which damaged mechanical and electrical equipment and caused structural damage to the building. The insured's policy excluded losses caused by freezing, but covered losses from water damage. 80 N.Y.2d at 1009-10. The court held that the loss was covered. Even though the loss would not have occurred but for the freezing, the ordinary business person would conclude that the loss was caused by water damage, and look no further as to cause. *Id*. at 1010.

Here, critically, the virus exclusion in Nanina's policy does *not* have an anti-concurrent cause clause. Thus, the efficient proximate cause rule applies. While the Closure Orders limiting use of Nanina's property were intended to prevent the spread of coronavirus, the virus is like the frozen sprinkler head in *Album Realty*. It may have started the chain of events moving, but the reason that Nanina's closed its business is that it was ordered to do so by the State, not because of the existence of coronavirus. The coronavirus existed in the environment for weeks prior to the intervention by the State. Neither Nanina's nor any other business closed and suffered business interruption losses via the mere existence of coronavirus and Nanina's would not have closed but for the Closure Orders. It cannot reasonably be said that the primary cause of Nanina's loss was anything other than the Closure Orders.

More to the point, in a case where a policy includes a virus exclusion with an anti-concurrent cause clause, a court might reasonably conclude that an insured could not plausibly allege that a virus was nowhere in the chain of causation for losses suffered as a result of being

closed by governmental orders designed to minimize the spread of COVID-19. *See Iqbal*, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). On the other hand, where, as here, there is no anti-concurrent cause clause, the efficient proximate cause rule would apply and, as is explained above, efficient proximate cause is generally a question of fact. 7 Couch on Insurance, § 101:59. The allegation that the efficient proximate cause of Nanina's loss was the Closure Orders, not a virus, must be accepted as true, since it is not a bare legal conclusion. *Iqbal*, 550 U.S. at 678-79. "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Twombly*, 550 U.S. at 556 (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)).

Ohio Security relies upon *Causeway Automotive LLC v. Zurich Am. Ins. Co.*, 2021 WL 486917 (D.N.J. Feb. 20, 2021), and cases following *Causeway Automotive*[4] in support of its contention that Nanina's claim is barred by its virus exclusion. In *Causeway Automotive*, the court held that coronavirus, not the Closure Orders, were the predominant cause of the insured's losses. *Causeway Automotive*, 2021 WL 486917 at *6. However, the cases the court relied upon contain the mix and mismatch reasoning explained in the Preliminary Statement where, directly or indirectly, courts relied on cases with exclusions containing anti-concurrent cause clauses and

[4] *Quakerbridge Early Learning, LLC v. Selective Ins. Co. of Am*., 2021 WL 1214758, at *3-4 (D.N.J. Mar. 31, 2021); *Body Physics v. Nationwide Ins.* 2021 WL 912815, at *5-6 (D.N.J. Mar. 10, 2021); *Colby Rest. Grp. Inc. v. Utica Nat'l Ins. Grp.*, 2021 WL 1137994, at *4-5 (D.N.J. Mar. 12, 2021); *Garmany of Red Bank, Inc. v. Harleysville Ins. Co.*, 2021 WL 1040490, at *6 (D.N.J. Mar. 18, 2021); *Chester C. Chianese DDS LLC v. Travelers Cas. Ins. of Am.*, 2021 WL 1175344, at *3 (D.N.J. Mar. 27, 2021); *Carpe Diem Spa, Inc. v. Travelers Cas. Ins. Co. of Am..*, 2021 WL 1153171, at *3 (D.N.J. Mar. 26, 2021); and *Benamax Ice LLC v. Merchant Mutual Ins. Co.*, 2021 WL 11711633, at *5 (D.N.J. Mar. 29, 2021) all rely upon *Causeway Automotive* for the proposition that a virus exclusion like the one in Nanina's policy bar a Closure Order-related business interruption, regardless of whether the exclusion contains an anti-concurrent cause clause. Thus, the viability of the reasoning in those cases turns on the viability of the reasoning in *Causeway Automotive*.

applied those cases to exclusions without anti-concurrent cause clauses. In *7th Inning Stretch LLC v. Arch Ins. Co.*, 2021 WL 800595 (D.N.J. Jan. 19, 2021)[5], the insureds' policies did not contain an anti-concurrent cause clause, but the cases the *7th Inning Stretch* court relied upon did. *See 7th Inning Stretch*, at *3 (*citing Mac Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co.*, 2020 WL 742237, at *8 (N.J. Super. Ct., Nov. 5, 2020); *N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co*, 2020 WL 6501722, at *3-4 (D.N.J. Nov. 5, 2020)). In *Chattanooga Prof'l Baseball LLC v. Nat'l Cas. Co.*, 2020 WL 6699480, at *2 (D. Ariz. Nov. 13, 2020)[6] the virus exclusions did not appear to have an anti-concurrent cause clause. *Chattanooga Baseball*, at *2. However, the cases the *Chattanooga Baseball* court relied upon in holding that the coronavirus rather than government orders was the cause of their losses did include anti-concurrent cause clauses. *See Chattanooga Baseball*, at *3 (citing *Diesel Barbershop LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 360-62 (W.D. Tex. 2020); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp.*, 2020 WL 5642483, at *2 (N.D. Cal. Sept. 22, 2020)). Likewise in *Edison Kennedy LLC v. Scottsdale Ins. Co.*, 2021 WL 22314 (M.D. Fla. Jan. 4, 2012)[7], the insured's policy did not have an anti-concurrent cause clause, *Edison Kennedy*, at *2, but the two cases *Edison Kennedy* relied upon to find that the virus exclusion barred the insured's claim did. *See Edison Kennedy*, at *8 (citing *Raymond H. Nahmad DDS PA v. Hartford Cas. Ins. Co.*, 2020 WL 6392841, at *9 (S.D. Fla. Nov. 2, 2020); *Mauricio Martinez DDS v. Allied Ins. Co. of Am.*, 2020 WL 5240218, at *2 (M.D. Fla. Sept. 2, 2020)). *AFM Mattress Co. LLC v. Motorists Commercial Mut. Ins. Co.*, 2020 WL 6940984 (N.D. Ill. Nov. 25, 2020)[8] is distinguishable in that the insured alleged that its losses had been caused by a virus. *AFM Mattress*, at *3. The insured argued that the virus exclusion did not bar its claim because the

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5 *Causeway Automotive*, at *6.
6 *Id.*
7 *Id.*
8 *Id.*

exclusion only applied to viruses that existed as of the time the policy was issued. *Id.* at *4. *Mattdogg, Inc. v. Phil. Indem. Ins. Co.*, 2020 WL 7702634 (N.J. Super. Ct., Nov. 17, 2020)[9] involved no analysis whatsoever. The court simply made the pronouncement that the virus exclusion barred the insured's claim. *Mattdogg*, at *4.

In the Park Savoy Caterers LLC v. Selective Ins. Grp., 2021 WL 1138020, at *3 (D.N.J. Feb. 25, 2021), primarily relied upon cases cited in *Causeway Automotive*, but relied upon *Causeway Automotive* itself.[10] As explained above, *7th Inning Stretch* did not have an anti-concurrent cause clause, but the cases it relied upon, *Mac Property Group* and *N&S Restaurants*, which are also relied upon by *Park Savoy* contained anti-concurrent cause clauses. The other case relied upon by *Park Savoy*, *The Eye Care Center of New Jersey v. Twin City Fire Ins. Co.*, 2021 WL 457890, at *1 (D.N.J. Feb. 8, 2021) likewise contained an anti-concurrent cause clause.[11]

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[9] *Id.*

[10] The Court also found that exclusion language "relating to" negated the Appleman Rule, but the case the Court relied upon that "related to is commonly understood to be a broad term", *Gladstone v. Westport Ins. Corp.*, 2011 WL 582985, at *9 (D.N.J. Nov. 16, 2011) had nothing to do with efficient proximate cause. In any event, the language in Ohio Security's virus exclusion, losses "caused by or resulting from" a virus, falls squarely within the language that *is* subject to the Appleman Rule under New Jersey law. *See Franklin Packaging*, 171 N.J. Super. at 189-90; *Ariston*, 211 N.J. Super. at 485-88.

[11] *Park Savoy* includes a footnote with a string cite of cases dismissing business interruption claims based upon a virus exclusion. *Park Savoy*, at *3, n. 4. The Court cited to three cases holding the virus exclusion did not bar the insureds' claims, but referred to those cases as "outliers". Just because those cases might be "outliers" does not mean that they are wrong, nor does it mean that the cases holding to the contrary are correct. The majority of the cases cited in footnote 4 of *Park Savoy* are discussed above in connection with *Causeway Automotive* and ultimately apply virus exclusions with anti-concurrent cause clauses to policies without anti-concurrent cause clauses. With respect to the remaining cases, in *Kessler Dental Ass. P.C. v. Dentists Ins. Co.*, 2020 WL 7181057, at *3 (E.D. Pa. Dec. 7, 2020), the insured argued that its COVID-related expenses were not a "loss" or "damage" to which the virus exclusion applied. In *Hajer v. Ohio Sec. Ins. Co.*, 2020 WL 7211636, at *4 (N.D. Tex. Dec. 7, 2020), *Turek Enterprises Inc. v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 5258484, at *2 (E.D. Mich. Sept. 3, 2020), and *Part Two LLC v. Owners Ins. Co.*, 2021 WL 135319, at *3 (N.D. Ala. Jan. 14, 2021), each virus exclusion contained an anti-concurrent cause clause. In *Natty Greene's Brewing Co., LLC v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 7024882, at *3-4 (M.D.N.C. Nov. 30, 2020), there were a number of different virus exclusions in the policy, but the court treated them all as if they

Delaware Valley Plumbing Supply, Inc. v. Merchants Mutual Ins. Co., 2021 WL 567994 (D.N.J. Feb. 16, 2020) involved a virus exclusion with an anti-concurrent cause clause. *See Delaware Valley*, at *3 (insurer "will not pay for loss or damage *caused directly or indirectly* by . . . any virus") (emphasis added). Thus, since the language of the exclusion in *Delaware Valley* was different, its reasoning is inapplicable here.

Ohio Security sums up that no case has found the virus exclusion in Nanina's policy to not bar the insured's Closure Order business interruption claim. Ohio Security's "bricks" might have the right shape and size and it would have the Court believe these "bricks" are real. However, an intellectually honest assessment of the legal landscape demonstrates that all of Ohio Security's authority ultimately rely upon cases where courts have erroneously applied the reasoning for policies *with* anti-concurrent cause clauses to policies *without* anti-concurrent cause clauses. If the Court weeds out all of the cases that ultimately rely upon decisions based upon policies *with* anti-concurrent cause clauses, which is every case cited by Ohio Security, Ohio Security's position falls completely apart. For the reasons set forth above, applying insurance policy construction rules and the efficient proximate cause doctrine, which Ohio Security could have, but did not, write out have the policy, Nanina's has appropriately pleaded a claim that is not excluded by the virus exclusion.

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contained anti-concurrent cause clauses. In the virus exclusion contained an anti-concurrent cause clause. In *10E LLC v. Travelers Indem. Co. of Conn*, 2020 WL 6749361, at *2 (C.D. Cal. Nov. 13, 2020), the virus exclusion did not have an anti-concurrent cause clause, one of the cases it relied upon did. *See West Coast Hotel Mgmt. LLC v. Berkshire Hathaway Guard Ins. Co.*, 2020 WL 644037, at *5 (C.D.Cal. Oct. 27, 2020). For the other cases relied upon in *10E*, in *Mark's Engine Co. No. 28 Restaurant, LLC v. Travelers Indemnity Co. of Conn.*, 2020 WL 5938689, at *4 (C.D. Cal. Oct. 2, 2020), the insured's claim was barred by the virus exclusion because it alleged its losses were caused by coronavirus contamination. *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, 2020 WL 6156584, at * (C.D. Cal. Oct. 19, 2020) followed *Marks's Engine*, and *Turek Enterprises* which are discussed above and *Marricio Martinez* and *Diesel Barbershop* which are discussed in connection with *Causeway Automotive*.

d) Plaintiff's Business Interruption Losses Are Covered Because Plaintiff Suffered A Direct Physical Loss[12]

1) "Loss" and "Damage" Are Different

As a starting point, Nanina's Ohio Security policies cover business interruption losses caused by "direct physical loss of or damage to" the insured's property. The Court should not read an insurance policy in such a way that another provision would be meaningless. *Homesite Ins.*, 413 N.J. Super. at 47 (citing *Hardy v. Abdul-Matin*, 298 N.J. 95, 103-04 (2009)). "Or" is "used as a function word to indicate an alternative." *Or*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/or. The disjunctive "or" should not be read in such a way that other words or phrases in the policy become surplusage. *See Minkov v. Reliance Ins. Co. of Philadelphia*, 54 N.J. Super. 509, 517-18 (App. Div. 1959). Properly read, "physical loss" must be something different than "physical damage" when they are joined by the disjunctive "or".

> As noted, the policy covered physical losses in addition to physical damage, and if a physical loss could not occur without physical damage, then the policy would contain surplus language. However, a contract must, where possible, be interpreted so as to give reasonable meaning to each provision without rendering any portion superfluous. Thus, "direct physical loss" must mean something other than "direct physical damage." Indeed, if "direct physical loss" required physical damage, the policy would not cover theft, since one can steal property without physically damaging it.

Manpower, Inc. v. Ins. Co. of the State of Penn., 2009 WL 3738099, at *5 (E.D. Wis. Nov. 3, 2009); *see also Kingray, Inc. v. Farmers Grp. Inc.*, 2021 WL 837622, at *7 (C.D. Cal. Mar. 4, 2021) ("Nora's most compelling argument surrounds the disjunctive 'or.' It argues that 'or'

[12] Nanina's pleaded that its losses were covered, in the alternative, both under its Business Income, *i.e.*, business interruption, coverage and its Civil Authority coverage. The Business Income coverage focuses on loss or damage to the insured's own property, whereas Civil Authority coverage focuses on loss or damage to someone else's property that, in turn, affects the insured's property. Since Nanina's suffered "direct physical loss of or damage to" its own property as a result of the Closure Orders, its losses should be covered under the Business Income coverage and the alternative theory, the Civil Authority coverage, would be superfluous.

demonstrates that 'physical loss' is different from 'physical damage.' This is obviously true." (applying N.Y. law) (citation omitted)); *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617, at *4 (N.D. Ill. Feb. 28, 2021) ("Specifically, even though the term loss is defined in the policy to mean *either* physical loss *or* physical damage, Cincinnati contends that it requires physical damage. This interpretation writes the term 'loss' out of the definition, which contradicts the basic principle that 'each word [in a contract] has some significance and meaning.'" (applying Texas law) (emphasis in original)); *In re Society Ins. Co. COVID-19 Business Interruption Protection Ins. Lit.*, 2021 WL 679109, at *8 (N.D. Ill. Feb. 22, 2021)[13] ("Remember here that the operative text is 'direct physical loss of or damage to covered property.' The disjunctive 'or' in that phrase means that 'physical loss' must cover something different from 'physical damage.' '[I]t is axiomatic that courts interpret contracts so as to give effect to all of their provisions.'" (citations omitted)); *Studio 417, Inc., v. Cincinnati Ins. Co.*, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020) ("Defendant conflates 'loss' and 'damage' in support of its argument that the Policies require a tangible, physical alteration. However the Court must give meaning to both terms."); *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767, at *3 (C.D. Cal. Jul. 11, 2018) ("to interpret 'physical loss of' as requiring 'damage to' would render meaningless the 'or damage to' portion of the same clause, thereby violating a black-letter canon of contract interpretation—that every word be given a meaning").

2) <u>"Loss *or* Damage" Does Not Require Damage</u>

Ignoring binding New Jersey law, Ohio Security contends that there must be some physical alteration of the property in order for there to be "physical loss or damage". Reading the policy

[13] What is also notable about *Society* is the insurer's turn-about as to the cause of the insureds' losses depending upon what suits the convenience of the insurer. In *Society*, the insurer argued that the insured's losses were caused by governmental shut-down orders, not by coronavirus, because its policies arguably had coverage for contamination by a virus. *Society*, at *7-8, *11.

that way would read "loss" out of the policy, since Ohio Security is attempting to make "loss" and "damage" the same thing when, under the fairly read terms of the policy, they are not. *See Advance Cable Co. LLC v. Cincinnati Ins. Co.*, 788 F.3d 743, 747 (7th Cir. 2015)[14]. In fact, it is not necessary for there to be a physical change in the property for there to be a "physical loss". As the Third Circuit explained in construing New Jersey insurance law, an insured suffers a "physical loss" if the structure is uninhabitable or unusable, even in the absence of physical damage. *See, e.g.*, *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002).

Ohio Security argues that *Port Authority* holds that some physical alteration of the property is necessary in order to constitute "physical loss or damage". (Ohio Security Brief at 12) This is another "brick" in Ohio Security's wall because *Port Authority* says no such thing. *Port Authority* does state: "In ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure." 311 F.3d at 235. However, it continues that there are instances where property can suffer "physical loss or damage" without visibly altering the property, citing *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968). *Port Authority* also explained that the insured's policy covered "loss" in addition to "damage".

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[14] In *Advance Cable*, the insured's metal roof was dented in a hail storm. The insurer denied coverage, arguing that the insured had suffered no "loss" because the dents did not affect the functionality or value of the roof. The Seventh Circuit rejected this position. "Cincinnati urges us to define 'loss or damage' to mean 'harm.' It then makes the assumption that the dents caused by the hail did not harm the roof enough to diminish its function or value. No harm, no foul, it says: if this is the case, then it believes that the policy does not require it to pay to replace the roof. The problem with this analysis is that it bears no relation to the language of the policy." 788 F.3d at 747. *Advance Cable* underscores the concept that "loss" relates to the functionality of the property, not whether it was physically altered. *Advance Cable* also underscores how insurers twist policy language to suit their immediate convenience. In *Advance Cable*, the insured's property suffered "damage" but the insurer argued there was no coverage because the insured had suffered no "loss" because there was no loss of functionality. Now, with business interruption losses resulting from Closure Orders, insurers argue that there is no coverage because there is no "damage", even though the insureds have suffered a "loss" as a loss in functionality of their property.

> In the case before us, the policies cover "physical loss," as well as damage. 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. However, if asbestos is present in components 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.

Port Authority, 311 F.3d at 236. This dovetails into the Seventh Circuit's reasoning (and the insurance company's argument) in *Advance Cable* that "loss" relates to the functionality of the insured property. Ohio Security omits the reason that the Third Circuit held that there had been no "physical loss or damage" to the Port Authority's property was because there had been no loss of use of the insured buildings, not because there had been no physical alteration of the property. "Although the plaintiffs demonstrated that many of its structures used asbestos-containing substances, those buildings had continuous and uninterrupted usage for many years. The mere presence of asbestos or the general threat of its future release is not enough to survive summary judgment or to show a physical loss or damage to trigger coverage under a first-party 'all risks' policy." 311 F.3d at 236.[15]

Ohio Security cites a string of Judge Wigenton's decisions, *7th Inning Stretch v Arch Ins. Co.* 2021 WL 1153147 (D.N.J. Mar. 26, 2021) ("*Whitecaps"*), *Arash Emami, M.D. P.C. v. CAN*

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[15] Other cases are in accord with this rule. *Kingray*, 2021 WL 837622, at *7 ("At various points during the pandemic, Nora's was forced to shutter, rendering its property unusable for its only purpose—the operation of a business. If Plaintiff was not allowed to operate or invite others onto its property, it was disposed in some way. Dispossession is a form of loss."); *Derek Scott Williams*, 2021 WL 767617, at *4 ("the Court is persuaded that a reasonable factfinder could find that the term 'physical loss' is broad enough to cover, as Williams argues, a deprivation of the use of its business premises. That's the common meaning of loss, and there is no basis to believe that the Cincinnati policy uses the term any differently.") (citations omitted); *Studio 417*, 2020 WL 4692385, at *5 ("Other courts have similarly recognized that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose.") (citing, *inter alia*, *Port Authority, id.*); *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 493 (1998) ("Direct physical loss may also exist in the absence of structural damage to the insured property.") (quoting *Sentinel Mgmt. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. App. 1997)).

& Trans. Ins. Co., 2021 WL 1137997 (D.N.J. Mar. 11, 2021), *Manhattan Partners LLC v. Am. Guarantee & Liab. Ins. Co.*, 2021 WL 1016113 (D.N.J. Mar. 17, 2021), *Boulevard Carroll* and *7th Inning Stretch*, all of which are substantially identical. In each case, the insureds' policies covered "direct physical loss of or damage to" property. In each case, the court dismissed the insured's claim because the insured had failed to allege physical damage, without consideration of whether the insured had suffered a physical loss. *Whitecaps*, at *2; *Arash Emani*, at *2; *Manhattan Partners*, at *2; *Boulevard Carroll*, 2020 WL 7338081, at *2; *7th Inning Stretch*, 2021 WL 800595, at *3. Essentially, the court read "loss" out of the policy, contrary to insurance interpretation rules that terms should not be rendered meaningless. *See Homesite Ins.*, 413 N.J. Super. at 47.

Curiously, Ohio Security includes *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934 (D.N.J. Nov. 24, 2014) in its list of cases holding that some physical alteration of the property is necessary for there to be "direct physical loss". However, *Gregory Packaging* specifically rejected this position. In *Gregory Packaging*, there was an ammonia leak that rendered a juice plant inoperable, but did not cause any physical alteration to the plant. The court found that the insured had suffered "direct physical loss or damage." "While structural alteration provides the most obvious sign of physical damage, both New Jersey courts and the Third Circuit have also found that property can sustain physical loss or damage without experiencing structural alteration." *Id.* at *5. "Travelers argues that *Port Authority* held that physical loss or damage cannot occur without physical alteration and urges this Court to adopt its interpretation of the *Port Authority* holding as the proper enunciation of New Jersey law. The Court rejects this invitation because Travelers' reading of *Port Authority* contradicts the opinion's plain text." *Id.* (internal citations omitted)

Ohio Security contends that *Wakefern Food Corp. v. Liberty Mut. Firs Ins. Co.*, 460 N.J. Super. 524 (App. Div. 2005) also supports its position that there is no coverage for loss of use

without physical damage. (Ohio Security Brief at 13-14) This is another brick in Ohio Security's wall. The coverage at issue in *Wakefern* covered only "physical damage", but Ohio Security glosses over the fact that *Wakefern* held that the insured's losses were covered because loss of use without a physical change constituted "property damage" under the terms of the policy.

In *Wakefern*, Shop Rite stores suffered lost stock and business interruption as a result of a blackout caused by the failure of the power grid in August 2003. Wakefern had insurance for consequential damages resulting from an interruption of power caused by "physical damage by a peril insured against." 460 N.J. Super. at 532. The insurer contended that there was no "physical damage" to the power grid because the grid had shut itself down as a safety measure, so, by design, there was no physical damage to the power lines and other equipment. 460 N.J. Super. at 533-38.

The *Wakefern* court found that "physical damage" in the policy was ambiguous.[16] 460 N.J. Super. at 540-41. Construing the policy in accordance with the reasonable expectations of the insured, that court relied upon *Western Fire* (which was cited in *Port Authority*) and *Hughes*[17],

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[16] The *Wakefern* court did not discuss "loss" because that was not part of the applicable coverage. In a cryptic footnote, the *Wakefern* court said that its reasoning would be different if the electric grid had been shut down as a result of a governmental order to save electricity. 460 N.J.Super at 540 n. 7 (citing *Source Food Tech, Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834 (8th Cir. 2006)). In *Source Food*, the insured's beef being imported from Canada was barred because of a risk of mad cow disease. The policy insured "direct loss to" property, 465 F.3d at 835-36, which is generally interpreted as requiring some actual damage to the insured property. *See* n. 19, *infra*.

[17] In *Hughes v. Potomac Ins. Co. of D.C.*, 199 Cal. App. 2d 239 (1962), a landslide left the insured's home on the precipice of a 30-foot cliff, leaving the home undamaged, but uninhabitable. The insurer denied coverage, claiming that the home had suffered no physical damage. The California Court of Appeals rejected this position, holding:

> To accept appellant's interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been 'damaged' so long as its paint remains intact and its walls still adhere to one another. Despite the fact that a 'dwelling building' might be rendered completely useless to its owners, appellant would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so

among other cases, to come to the conclusion that "'damage' includes loss of function or value". *Id.*. at 543. It also noted that *Port Authority* was consistent with this reasoning. *Id.* at 544-45.

In *Mac Property Group LLC v. Selective Fire & Cas. Ins. Co.*, 2020 WL 7422374 (N.J. Law Div. Nov. 5, 2020), relying upon *Wakefern*, the court found that the insured had suffered no direct physical loss or damage to property, notwithstanding the fact that, as was explained above, *Wakefern* held that "damage" to property could include loss of function without physical alteration of the property.[18] *See Mac*, at *9. The other cases the *Mac Property* court relied upon do not support its conclusion that the insured suffered no loss or damage to property. In *Harry's Cadillac-Pontiac-GMC Truck Co., Inc. v. Motors Ins. Corp.*, 126 N.C. App. 698 (1997), *Mac*, at *7, the insured's policy covered business interruptions "caused by direct physical loss of or damage to property at the premises," *Harry's Cadillac*. 126 N.C. App. at 700, but the court read the policy as requiring the loss to be "due to damage to or the destruction of the property." *Id.* at 700-01. Thus, the language the *Harry's Cadillac* court interpreted, as opposed to the language in the actual policy, necessarily required some damage to the insured property. For *Southeast Mental Health Center, Inc. v. Pacific Ins. Co.*, 439 F. Supp. 2d 831 (W.D. Tenn. 2006), the *Mac Property* court recognized that *Southeast Mental Health* found that the loss of data from the insured's computer system was covered, *Mac*, at *7, but ignored the reason, which was that it interpreted "physical

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> interpreted in the absence of a provision specifically limiting coverage in this manner.

Hughes, 199 Cal. App. 2d at 248-49.

[18] The New Jersey state court COVID business interruption cases that rely on *Wakefern* are not necessarily helpful in interpreting "direct physical loss of or damage to" property because *Wakefern* only interpreted "damage". That being said, if "damage" includes loss of functionality without physical change, as *Wakefern* held, it does not matter whether "loss" also includes loss of functionality because "damage" covers that ground under New Jersey law. However, Ohio Security's argument that a loss of use insurance claim requires "damage" is more slight-of-hand because it ignores New Jersey case law holding that "damage" includes loss of functionality without physical change.

damage" to include "loss of access, loss of use, and loss of functionality." 439 F. Supp. 2d at 838. This was exactly the claim the *Mac Property* plaintiffs were making. *See Mac*, at *1 ("Plaintiffs assert that they suffered direct physical loss and damage to property as a result of being unable to use their property for its intended purpose.") In *Protection Mut. Ins. Co.*, 992 P.2d 479 (Or. App. 1999) *Mac*, at *7, the issue was whether the insured's loss fell within the policy's flood coverage, not whether the insured suffered "direct physical loss of or damage to" property. 992 P.2d at 482-486.

In *FAFB LLC v. Blackboard Ins. Co.*, No. MER-L-892-20 (N.J. Super. Nov. 4, 2020), the court found the insured suffered no "direct physical loss" because there was no alteration of the property, and because it was barred by the virus exclusion with an anti-concurrent cause clause. The *FAFB* court relied upon *Wakefern* for the proposition that there is no coverage for loss of use without some physical impact to the property. (*FAFB*, at Tr. 6:15-24). However, the *FAFB* court misread *Wakefern*, because, as is explained above, *Wakefern* held that "'damage' includes loss of function or value". 460 N.J. Super. at 543.

Notably, Ohio Security omits *Optical Services USA v. Franklin Mutual Ins. Co.*, No. BER-L-3681-20 (N.J. Super. Ct. Aug. 13, 2020) (Ex. A hereto). There, the court denied the insurer's motion to dismiss, who made the same argument Ohio Security makes here. "The defendant argues that there is a plain meaning of 'direct physical loss' and the closure of plaintiffs' business does not qualify for . . . purposes of coverage. This is a blanket statement unsupported by any common law in the State of New Jersey or a blanket review of the policy language." (Tr. 26:9-15)

> The plaintiffs provide a citation from Wakefern Food Corp. versus Liberty Mutual Fire Insurance Company, 406 N.J.Super. 524 (App. Div. 2019) to support their argument. Their argument based on the holding of Wakefern is that there was a finding of coverage for a grocery store that lost power when an electrical grid and transmission lines were physically incapable of performing their essential function of providing electricity even though they were not necessarily damaged. The Court in Wakefern did hold that,

> "Since the term "physical" can mean more than material alteration or damage, it is incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided."
>
> Citing Wakefern versus Liberty Mutual Insurance Company, 406 N.J.Super. at 542. Also citing Customized Distribution Services versus Zurich Insurance Co., 373 N.J.Super. 480 at page 491 (App. Div. 2004), cert. denied at 183 N.J. 214 (2005).
>
> The Court finds such an argument compelling for purposes of surviving a Motion to Dismiss pursuant to Rule 4:6-2(e) in the absence of any complete record for disposition.

Optical Services, Tr. 27:17 to 28:15.

Ohio Security urges the Court to follow "the overwhelming majority of courts" that have dismissed Closure Order business interruption claims where there has been no allegation of physical damage to the property. Again, Ohio Security wants the Court to decide its motion based upon insureds' Won-Lost records in other cases, not on legal reasoning. If the Court digs down, which is the last thing Ohio Security wants the Court to do, the Court would discover that cases holding that business interruption claims require physical damage have either misinterpreted "physical loss of or damage to" property as requiring physical damage, contrary to well settled policy interpretation rules that words separated by "or" are to be interpreted as different things, or are interpreting "physical loss *to*" property, which is interpreted to provide different coverage than "physical loss of or damage to" property.[19] For example, the three cases cited by Ohio Security,

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[19] *See, e.g., Turek Enters. Inc. v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 5258484, at *7 (E.D. Mich. Sept. 3, 2020) (distinguishing "direct physical loss of or damage to" property from "direct physical loss to" property); *Kingray*, 2021 WL 837622, at *8 ("If the contract between Nora's and Defendant specified only that 'direct physical damage to' property warranted coverage, it would be without a claim. However, it is plausible that 'direct physical loss of' property includes physical dispossession because of dangerous conditions (a virus in the air) or a civil authority order requiring Nora's to close."). "Direct physical loss *to*" property is generally interpreted as requiring some damage to the property. *See, e.g., MRI Healthcare Center of Glendale v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 771 (2010). However, courts have taken the holding from *MRI Healthcare*, and mistranslated it into policies covering "direct physical loss of or damage to" property, resulting in holdings that "direct physical loss" requires "damage" even when used together with "damage" in the phrase "direct physical loss of or damage to" property. *E.g.*, *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 2020 WL 5500221, at *4 (C.D. Cal. Sept. 11,

Kessler Dental, *Michael Cetta, Inc. v. Admiral Ins. Co.*, 2020 WL 7321405 (S.D.N.Y. Dec. 22, 2020) and *Zwillo V. Corp v. Lexington Ins. Co.*, 2020 WL 7137110 (W.D. Mo. Dec. 2 2020) were all cases where the insured's policy covered "physical loss of or damage to" property, but the courts held that that language required physical damage. *See Kessler Dental*, 2020 WL 7181057 at *4 ("These provisions make clear that there must be some sort of physical damage to the property."; *Michael Cetta*, at *6 ("The plain meaning of the phrase 'direct physical loss of or damage to' therefore connotes a negative alteration in the tangible condition of the property."); *Zwillo V*, at *5 (following cases holding that "direct physical loss of or damage to" property required alteration of the property). [20] Each and every one of these cases is contrary to law.

Ohio Security also relies upon policy language by which Nanina's losses are measured, the "period of restoration" as implying "physical loss of or damage to" property requires damage to the property. That is not the case because the "period of restoration" is a measurement of time, not a definition of coverage.

> First and foremost, the "Period of Restoration" describes a *time* period during which loss of business income will be covered, rather than an explicit definition of coverage. Instead, the explicit definition of coverage is that direct physical "loss of" property is covered—not just "damage to" property, as explained earlier. Second, the limit on the Period of Restoration does include the words "repaired" and "replaced," that is, the restoration period ends when the property at the premises is "repaired" or "replaced." There is nothing inherent in the meanings of those words that would be inconsistent with characterizing the Plaintiffs' loss of their space due to the shutdown orders as a physical loss."

Society Insurance, 2021 WL 679109, at *9. (emphasis in original).

2020) ("Physical loss or damage occurs only when property undergoes a 'distinct, demonstrable, physical alteration.'") (citing *MRI Healthcare*.) This is a "brick" that Ohio Security does not want the Court to look at edge-on because it runs contrary to the policy interpretation rules that words separated by "or" are different and that redundancy should be avoided.

[20] By contrast, *Studio 417,* which was decided in the same district, recognized that "loss" and "damage" are different things when joined by "or". *Studio 417*, 2020 WL 4692385 at *4. Following *Port Authority*, among other cases, the *Studio 417* court agreed that "physical loss" can occur when the property is uninhabitable or unusable for its intended purpose. *Id.* at *5.

> "Repair," however, is not inherently physical; one need only consider common references to repairing a relationship or repairing one's health. *See* "Repair," *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/repair (last viewed Feb. 28, 2021). In a situation like the one at issue here, the "loss" would be "repaired" if and when orders by governmental authorities permitted full use of the property.

Derek Scott Williams, 2021 WL 767716, at *4; *see also Henderson Road Rest. Sys. v. Zurich Am. Ins. Co.*, 2021 WL 168422, at *13 (N.D. Ohio Jan. 19, 2021) ("Plaintiffs have also shown, applying a plain reading of the definition of 'period of restoration,' that the period ended or will end on the dates the states' restrictions are lifted because that will constitute the 'date when the location where the loss or damage occurred could have been physically capable of resuming the level of 'operations' which existed prior to the loss or damage.')

The argument that the defined term "period of restoration" somehow aids in interpreting "direct physical loss of or damage to" property is a *post hoc* rationalization that forgets that the insurers have complete control over the drafting of their policies. If insurers wanted to define "direct physical loss" in the policy, they should have done it directly rather than trying to sneak it in through the definition of a completely different term.

What is notably lacking from Ohio Security's motion is an application of policy interpretation rules to the terms of Nanina's policy. The policy insures "direct physical loss of or damage to" property. Ohio Security contends that this language requires some damage to the property. However, that cannot be because "loss" and "damage" are separated by "or", so they must be different things. On the other hand, if "direct physical loss of or damage to" requires damage, why is "loss" even in the sentence, since "damage" would cover the necessary ground. Since "loss" is in the policy, it must mean something, and it must mean something other than "damage" since "loss" and "damage" are separated by "or", but Ohio Security does not offer an explanation as to what "loss" is supposed to mean separate and apart from "damage". Ohio

Security's "analysis" is that it should win because other insurers in other cases have won. In short, the policy language cannot be reasonably read as Ohio Security contends consistent with insurance policy interpretation rules. As is set forth above, "direct physical loss" *is* reasonably interpreted under applicable case law as the insured being unable to use the property for its intended purpose. This is exactly what Nanina's has alleged here, that as a result of the Closure Orders, Nanina's cannot use its premises for its intended purposes, which is holding large gatherings for events such as weddings, banquets and the like.

e) Plaintiff's Business Interruption Losses Should Be Covered Because "Physical Loss or Damage" Is Ambiguous

Plaintiff submits, for the reasons set forth above, that they suffered "direct physical loss" when their businesses were curtailed as a result of the Closure Orders. The more persuasive authority supports this result. However, even if the Court disagrees as to which line of authority is more persuasive, Plaintiffs' loss should still be covered because "direct physical loss or damage" is ambiguous.

The parties have both provided the Court with decisional authorities supporting or rejecting the argument that "physical loss" requires some physical alteration of the property in question. Binding Third Circuit law holds that where there are contrary authorities construing the same insurance policy language differently, such conflict is a strong indication that the language is ambiguous. *New Castle Co., Del. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 174 F.3d 338, 347 (3d Cir. 1999); *see also, e.g.*, *Amerada Hess Corp. v. Zurich Ins. Co.*, 29 Fed. Appx. 800, 805 (3d Cir. 2002) ("The very fact that HOVIC and Zurich were able to offer conflicting, yet 'compelling' interpretations establishes the essential ambiguity in this policy."); *Stroehmann v. Mutual Life Ins. Of N.Y.*, 300 U.S. 435, 439 (1937) ("Examination of the words relied upon to show an exception to the incontestability clause of the policy discloses ample cause for doubt

concerning their meaning. The arguments of counsel have emphasized the uncertainty. The District Court and the Circuit Court of Appeals reached different conclusions, and elsewhere there is diversity of opinion."); *St. Paul Mercury Ins. Co. v. FDIC*, 774 F.3d 702, 709 (11th Cir. 2014) ("an important indication of ambiguity in a policy is whether nearly identical or similar language has been construed differently by other courts."); *Federal Ins. Co. v. P.A.T. Homes*, 547 P.2d 1050, 1052-53 (Ariz. 1976) ("We follow the principle of construction that where various jurisdictions reach different conclusions as to the meaning, intent, and effect of the language of an insurance contract ambiguity is established. 'If Judges learned in the law can reach so diametrically conflicting conclusions as to what the language of the policy means, it is hard to see how it can be held as a matter of law that the language was so unambiguous that a layman would be bound by it.'" (quoting *Alvis v. Mutual Benefit Health & Accident Assn.*, 297 S.W. 2d 643, 645-46 (Tenn. 1956)).

Judge Polster's opinion in *Henderson Road* is instructive. As with most of the other cases cited above, the insureds policies covered "direct physical loss of or damage to" property. *Henderson Road*, 2021 WL 168422, at *2. After reviewing the parties' arguments, *id*. at *4-9, the court found that "direct physical loss" was ambiguous because it was reasonably susceptible to more than one interpretation.

> Plaintiffs argue that physical loss *of* the real property means something different than damage to the real property, and this is a valid argument. Otherwise, why would both phrases appear side-by-side separated by the disjunctive conjunction "or"? Plaintiffs argue that they lost their real property when the state governments ordered that the properties could no longer be used for their intended purposes – as dine-in restaurants. The Policy's language <u>*is*</u> susceptible to this interpretation.

Henderson Road, at *10 (emphasis in original)

The court then went on to discuss the insurer's arguments. *Id.* at *10-12. In the end, the court concluded that adopting the insurer's interpretation of "direct physical loss" would

essentially be construing ambiguous policy language in favor of the insurer rather than the insured.

> If a term is not defined in the policy, the Court must look to the plain meaning of the words, not persuasive authority from other courts. Zurich's Policy did not require a permanent "loss of" property and permanency is not embodied in the definition of loss. Adding this requirement would only be interpreting an ambiguous term in favor of the insurer – something Ohio law does not permit.[21]
>
> Zurich correctly argues that the Court must apply Ohio law to the interpretation of its Policy. Ohio law provides that if a policy is reasonably susceptible of more than one interpretation, it must be construed strictly against the insurer and in favor of the insured. Here, because Zurich's Policy is susceptible of more than one interpretation, it must be construed liberally in favor of the insureds, i.e., Plaintiffs. Zurich has not cited any Ohio law constraining this Court to its interpretation of the Policy. And because there is more than one interpretation, the Policy must be construed liberally in Plaintiffs' favor. As further explained below, when the Policy is liberally construed in Plaintiffs' favor, it provides coverage for Plaintiffs' lost business income.

Id. at *12.**Error! Bookmark not defined.**

McKinley Development followed *Henderson Road* and placed responsibility for the ambiguity for the policy language at the insurer's feet.

> The bottom line is simply this. Both sides provided reasonable interpretations of the policy language. Westfield argues that physical loss means some type of tangible, physical damage must alter the structural integrity. McKinley counters that it has plead sufficient facts that would entitle it to recovery and that the terms drafted by Westfield in their policy are ambiguous and susceptible to more than one interpretation. There is no question that the Court has been bombarded with cases falling on both sides of the aisle. However, Westfield had the benefit of writing the policy with the ability to consider consequences in this ever changing world. They had an obligation to use terminology understood by the layperson. That is not the case here. The Court can only surmise that with these differing opinions, that the policy is ambiguous.

McKinley Development, 2021 WL 506266 at *3 (citations omitted).

In determining whether Nanina's policy is ambiguous, the issue is whether Nanina's interpretation of its policy is *a* reasonable interpretation, not necessarily *the only* reasonable interpretation. Nanina's interpretation of "direct physical loss of or damage to" property is in

[21] New Jersey law is in accord. *See Villa*, 195 N.J. at 23.

accord with the insured's interpretation of the same language in *Henderson Road*, and is supported by substantial case law, as is set forth above. Indeed, the fact that numerous courts from all over the country have reached different conclusions in interpreting the same policy language demonstrates that "direct physical loss" is ambiguous. As a result, Nanina's respectfully suggests that its interpretation is *a* reasonable interpretation of the policy language, inasmuch as it is supported by substantial case law from New Jersey and elsewhere. Since Nanina's interpretation of "loss or damage" is a reasonable one, then its decision-making process is far easier. The Court does not need to wade into the thicket of which line of cases are more persuasive or correct, or reject one line of cases or the other as incorrectly decided. Since Nanina's interpretation of the policy language is one of several reasonable interpretations of the policy language, then the policy is ambiguous. Since one reasonable interpretation provides coverage to Nanina's, New Jersey law requires the Court to construe the policy in Nanina's favor to provide coverage.

Moreover, this is not an instance where Nanina's is arguing the policy is ambiguous because *the parties* disagree on interpretation of policy language. This is an instance where different *courts* disagree on the interpretation of the same policy language. Some courts have read "direct physical loss of or damage to" property as covering losses caused by the insured being unable to use the property for its intended purpose. Others have read the same language as requiring damage to the property. If learned judges cannot agree on what these words mean, then certainly there is more than one reasonable meaning for "direct physical loss or damage", which makes the language ambiguous. As the *Henderson Road* court observed, this is not an issue of counting up how many courts have ruled one way or another and going with the majority, which is how Ohio Security argues the case should be decided. The question is whether Nanina's reading is a reasonable one. Since the language is ambiguous, and *a* reasonable reading of the policy language supports coverage, it must be construed in favor of the insured, and thus, in favor of

coverage. *Villa*, 195 N.J. at 23.

The purpose of business interruption insurance is to return to the insured the profits it would have earned had the casualty not occurred. *See Pennbarr Corp. v. Ins. Co. of North Am.*, 976 F.2d. 145, 154 (3d Cir. 1992). Nanina's business was interrupted by the Closure Orders. They had a reasonable expectation that if their business was interrupted by fortuitous events, Ohio Security would make them whole. The Closure Orders are just such a fortuitous event. Under the circumstances, Ohio Security should honor Plaintiffs' claim.

f) <u>The Closure Orders Are A Covered Cause Of Loss</u>

Ohio Security also contends that Nanina's claim is not covered because the Closure Orders are not a covered cause of loss under the policy. This argument is based upon an obtuse ruling in *Downs Ford, Inc. v. Zurich Am. Ins. Co.*, 2021 WL 1138141 (D.N.J. Mar. 25, 2021), that the Closure Orders were not a Covered Cause Of Loss for purposes of Civil Authority coverage in the policy at issue. *Downs Ford*, at *4. The reasoning in *Downs Ford* has nothing to do with whether the Closure Orders are a Covered Cause Of Loss for purposes of Nanina's Business Income coverage. Ohio Security sold Nanina's an all risk policy.[22] Governmental orders such as the Closure Orders are not an excluded risk. Therefore, they are a Covered Cause of Loss. Ohio Security does not examine the language of Nanina's policy. Rather, it simply makes the bald statement that the Closure Orders are not a Covered Cause of Loss.[23]

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[22] "All risk" is in contrast to "named peril" coverage, in which only perils specified in the policy are covered. 10A Couch on Insurance, § 148:48.

[23] Ohio Security also cites *Prime All. Grp. Ltd. v. Hartford Fire Ins. Co.*, 2007 WL 9703576 (S.D. Fla. Oct. 19, 2007), for the proposition that the Closure Orders are not a covered risk. In *Prime Alliance* the policy provided: "This policy insures against risk of direct physical loss or damage to property described herein including general average, salvage, and all other charges on shipments covered hereunder, except as hereinafter excluded." *Id.* at *2. This is the language for an "all risk" policy, but the court interpreted the policy as a "named perils" policy. *See id.* at *4 ("At its most fundamental level, the insurance policy at issue here insures Plaintiffs against certain perils and provides coverage for certain categories of losses suffered by Plaintiffs as a result of

An all-risk policy is a policy that extends to risks not usually contemplated and losses of a fortuitous nature will be covered, in the absence of fraud or other intentional misconduct by the insured, unless there is a specific exclusion for the loss. *Victory Peach Grp. Inc. v. Greater N.Y. Mut. Ins. Co.*, 310 N.J. Super. 82, 87 (App. Div. 1998) (compiling cases). Nanina's policy is an "all risk" policy because it covers any losses unless the loss is caused by an excluded peril.

Nanina's policy provides:

> 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.

Ex. 1, at p. 113 of 240. The policy then defines what is and what is not "Covered Property." *Id.* at 113-115 of 240. "Covered Causes of Loss" then references the "Causes of Loss" shown in the Declarations. *Id.* at 115 of 240. The Causes of Loss form defines "Covered Causes of Loss" as

> When Special is shown in the Declarations, Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy.

Id. at 153 of 240. The policy then lists a number of exclusions from coverage, *id.* at 153-158 of 240. However, there are no exclusions that encompass the Closure Orders.[24] Since the Closure Orders are not an excluded peril, they are a Covered Cause of Loss.

Nanina's Business Income coverage provides:

> We will pay for the actual loss of Business Income 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 physical damage to property at the premises which are described in the Declarations and for which Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from of a Covered Cause of Loss.

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perils."). The *Prime Alliance* court's interpretation that a governmental order was not a covered risk was not based upon some existential judgment as to what can or cannot be a "peril." Rather, it was based upon its belief that since a governmental order was not included as a named peril in the policy, it was not covered.

[24] In a footnote, Ohio Security halfheartedly argues that Nanina's claims are barred by the "loss of use" exclusion and/or the "acts or decisions" exclusions in the policy. Those exclusions are addressed in the next section.

Ex. 1, at p. 130 of 240. Nanina's operations were suspended by a direct physical loss of property at the insured's premises caused by or resulting from a Covered Cause of Loss, the Closure Orders. As a result, it is entitled to coverage.

g) The Other Exclusions Relied Upon By Ohio Security Do Not Bar Nanina's Claim

1) The Loss of Use Exclusion Is Ambiguous

Ohio Security also contends that Nanina's loss is not covered because of the exclusion for [d]elay, loss of use or loss of market. This exclusion is ambiguous. An exclusion is enforceable where it is "specific, plain, clear, prominent, and not contrary to public policy." *Princeton Ins. Co. v. Chunmaung*, 151 N.J. 80, 95 (1997). The purposed "loss of use" exclusion is hardly "specific", "plain" or "clear" because this exclusion does not say "delay, loss of use or loss of market" of what. Generally, the "delay, loss of use or loss of market" exclusion has been applied to exclude consequential damages arising from the insured's inability to deliver product or otherwise perform a contract. *See e.g.*, *Customized Distribution Servs., Inc. v. Zurich Ins. Co.*, 273 N.J. Super. 480, 490-91 (App. Div. 2004); *see generally Witcher Const. Co. v. St. Paul Fire & Marine Ins. Co.*, 550 N.W.2d 1, 6 (Minn. 1996) (compiling cases) Reading "delay, loss of use or loss of market" to exclude Nanina's business interruption claims would negate that coverage, having one's business interrupted, whether by physical loss or damage, includes the inability of the insured to use its property for its intended use. *See Henderson Road*, 2021 WL 168422, at *16. Since insurance policies must be read as a whole, the "loss of use" exclusion cannot be read to exclude Nanina's business claim because to do so would read the business interruption coverage out of the policy. *Id.*

2) The Acts or Decisions Exclusion Is Inherently Ambiguous

The Acts or Decisions exclusion is inherently ambiguous because, if read literally, "it

would exclude all acts and decisions of any character of all persons, groups, or entities. Such an interpretation would leave the insurance policy practically worthless." *Jussim v. Mass. Bay Ins. Co.*, 597 N.E.2d 1379, 1382 (Mass. App.), *aff'd as amended*, 415 Mass. 24 (1993). The acts and decisions exclusion "appears to be overly broad, ambiguous, and irreconcilable with other policy provisions and the very concept of an all-risk insurance policy." *Mettler v. Saveco Ins. Co. of Am.*, 2013 WL 231111, at *6 (W.D. Wash. Jan. 22, 2013) (citing *Jussim*).

> Under St. Paul's reading of the provision, any time a human or an organization of humans had any role in a loss, no matter how tangential, the policy would exclude coverage. Presumably, the "any act or decision" provision, under St. Paul's analysis, would still provide coverage for an act of God, such as a fire caused by a bolt of lightning. However, St. Paul could still argue that a fire caused by lightening should be excluded because the fire department, a unit of government, failed to "act appropriately" or "respond appropriately" when alerted to the fire. Given the amorphous and expansive language in the provision, the court finds that it does not speak with the clarity required for it to effectively exclude the loss of the vaccines.

Cincinnati Holding Co., LLC v. Firemans Fund Ins. Co., 2020 WL 635655, at *9 (S.D. Ohio Feb. 11, 2020)

The Acts or Decisions exclusion must be read in light of another provision in the policy, which states: "Any act or neglect of any person other than you beyond your direction or control will not affect this insurance." (Ex. 1 at 140 of 240) Read together, the Acts or Decisions exclusion would apply only to acts or decisions made by the insured or persons under the insured's control. *Sentience Studios, Inc. v. Travelers Ins. Co.*, 102 Fed. Appx 77, 81 (9th Cir. 2004). Since the Closure Orders were not made by the Plaintiff or persons within Plaintiff's control, the Acts or Decisions exclusion would not apply.

CONCLUSION

For the reasons set forth above, Ohio Security' motion for judgment on the pleadings should be denied.

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