Case No. 21-10671-GG

UNITED STATES CIRCUIT COURT OF APPEALS
ELEVENTH CIRCUIT

FIRST WATCH RESTAURANTS, INC.,

Appellant,
v.

ZURICH AMERICAN INSURANCE CO.,

Appellee.
______________________________/

INITIAL BRIEF OF APPELLANT
FIRST WATCH RESTAURANTS, INC.

On appeal from the United States District Court,
Middle District of Florida

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant, FIRST WATCH RESTAURANTS, INC., pursuant to Fed.R.App.P. 26.1 and 11th Cir. R. 26.1-3, hereby submits this Certificate of Interested Persons and Corporate Disclosure Statement, and states as follows:

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Clyde & Co US LLP – Counsel for Appellee

Covington, Virginia C. Hernandez – United States District Judge (Middle District)

Dellecker, Wilson, King, McKenna, Ruffier & Sos, LLP – Counsel for Appellant

E&I Holdings, Inc. – Subsidiary

First Watch E&I Restaurant Group, LLC – Subsidiary

First Watch Franchise Development Co. – Subsidiary

First Watch Restaurant Group, Inc. – Parent corporation

First Watch Restaurants, Inc. – Appellant

First Watch Restaurants Texas, Inc. – Subsidiary

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Segal, Nichole J., Esq. – Counsel for Appellant

TFW-NC, LLC – Subsidiary

Wilson, Thomas G. Hernandez – United States Magistrate Judge (Middle District)

Young, Ryan K., Esq. – Counsel for Appellant

Zurich American Insurance Company – Appellee

Zurich Holding Company of America, Inc. – Wholly owned by Zurich Insurance Company Ltd, a Swiss corporation

Zurich Insurance Company Ltd – Directly owned by Zurich Insurance Group Ltd, a Swiss corporation

Zurich Insurance Group Ltd – Publicly traded parent company, with a listing on the Swiss stock exchange, and a further trading of American Depositary

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that oral argument would benefit the Court. The issue in this appeal is similar to coverage issues being litigated around the country. Because the terms of the Zurich Edge Policy are different from the terms of other policies, oral argument will be the only opportunity to discuss the terms of the subject insurance contract in the context of decisions which will undoubtedly be issued after briefing here has concluded.

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JURISDICTIONAL STATEMENT

This is an appeal from a final order of the United States District Court for the Middle District of Florida. This is a diversity case over which the District Court had jurisdiction pursuant to 28 U.S.C. § 1332.

The final order was entered on February 4, 2021, and disposed of all claims. Appellant timely filed its notice of appeal on February 26, 2021. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUE

The issue in this case is whether the Zurich Edge insurance policy covers losses incurred by First Watch as a result of the COVID-19 pandemic and the associated government mandated closures and limitations on operation.

STATEMENT OF THE CASE AND FACTS[1]

A. First Watch Restaurants

First Watch Restaurants, Inc. ("Plaintiff") is a Florida based restaurant chain operating more than 400 locations in 29 states. (DE1 at 2, ¶2). First Watch restaurants serve breakfast, brunch, and lunch on-site daily and also accommodate take-out and delivery orders. (DE1 at 3, ¶11).

B. The Onset of the COVID-19 Pandemic and the Closure of First Watch Restaurants

In late 2019, a new strain of the coronavirus ("COVID-19") began spreading throughout the world. It is undisputed that COVID-19 is highly contagious and appears to have a higher mortality rate than other more common strains of virus. (DE1 at 3, ¶12).

In the United States, a national state of emergency related to the COVID-19 outbreak was declared on March 13, 2020. (DE1 at

[1] As this is an appeal of a dismissal for failure to state a claim, the facts are presented here as they were presented in the Complaint. *See Luke v. Gulley,* 975 F.3d 1140, 1143 (11th Cir. 2020)(noting that in reviewing an order of dismissal, the court must "accept the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff.")

3, ¶13). After the national state of emergency was declared, state and local governments began issuing orders impacting the ability of restaurants to operate and serve the general public. (DE1 at 3, ¶14).

Initially, where permitted, Plaintiff maintained limited service for takeout and/or delivery at its restaurants. (DE1 at 3, ¶15). However, on April 13, 2020, Plaintiff announced the temporary closure of all company-owned restaurants. (DE1 at 3, ¶15).

Plaintiff began re-opening some of its company-owned restaurants in May 2020 with many re-openings occurring around June 1, 2020, as permitted locally. (DE1 at 3, ¶16). The reopening of some locations, including some in New Jersey and Pennsylvania, was not permitted until late Summer 2020. (DE1 at 3, ¶16). Even after re-opening, many First Watch locations were required to operate with reduced dining room capacity pursuant to state and local orders. (DE1 at 3, ¶17).

C. Florida Restricts Restaurant Operations

On March 1, 2020, Florida Governor Ron DeSantis issued Executive Order No.: 2051, which declared a state of emergency in Florida as a result of COVID-19. (DE1-1).

On March 20, 2020, Governor DeSantis issued Executive

Order No.: 20-71, directly addressing "restaurants and bars." (DE1-2). In that Order, Governor DeSantis required all state licensed restaurants to "suspend on-premises food consumption for customers. . ." (DE1-2 at 4). On April 1, 2020, Governor DeSantis issued Executive Order No.: 20-91 and ordered all persons in Florida to practice "safer at home," including limiting movements and interactions to only those necessary to obtain or provide essential services or conduct essential activities. (DE1-3).

D. Other States Restrict Restaurant Operations

In March 2020, governors in every state issued executive orders relating to COVID-19 similar to those issued by Governor DeSantis in Florida. (DE1 at 4, ¶22). Accordingly, Plaintiff was required to close or alter service at all of its restaurants, nationwide. (DE1 at 4, ¶22).

E. The Insurance Policy at Issue

During the time in question, Plaintiff had an "all-risks" commercial insurance policy which was issued by Zurich American Insurance Company ("Defendant"). The policy was known as an Edge policy (the "Zurich Edge Policy"). This policy provided coverage

to Plaintiff's company-owned restaurants located throughout the United States, effective March 1, 2020. (DE1-4).

F. Plaintiff Makes a Claim for Insurance Benefits

As a result of the inability to operate its locations in the manner in which it historically had, Plaintiff suffered significant financial loss of revenue. (DE1 at 8, ¶¶38 & 39). Accordingly, Plaintiff filed an insurance claim with Defendant seeking coverage for the lost business income. (DE1-6).

G. Defendant Denies Plaintiff's Claim

Defendant denied Plaintiff's claim. (DE1-6). Defendant stated that the Zurich Edge Policy requires physical damage to a building or structure in order for there to be coverage. (DE1-6). Defendant claimed, alternatively, that even if the government mandated closures and limitations on operation were sufficient to state a claim under the policy, any damage would be excluded under the "contamination" exclusion. (DE1-6 at 3). Defendant concluded that "any loss resulting from the presence of COVID-19 virus or any 'suspension' of operations as a result of the presence of COVID-19 would be excluded under the Policy." (DE1-6 at 3).

H. Plaintiff Files Suit Against Defendant

Plaintiff filed a two-count Complaint against Defendant. (DE1). In its count for declaratory judgment, it sought a declaration that: it sustained direct physical loss of the ability to operate its individual restaurants; its loss was a covered loss, not excluded by the Zurich Edge Policy; it sustained loss of business income at its individual restaurants; the suspension of operations was caused by direct physical loss of the ability to operate the insured's individual restaurants; it incurred extra expense to avoid or minimize the suspension of business and to continue operations, and; it sustained loss of business income and incurred expense due to the action of civil authority that prohibits access to (and the operation of) its locations. (DE1 at 10-11).

Plaintiff also brought a breach of contract action against Defendant, alleging Defendant breached the insurance policy contract by failing to provide coverage for Plaintiff's losses. (DE1 at 11-12).

I. Defendant Moves to Dismiss Plaintiff's Complaint

Defendant moved to dismiss the Complaint for failure to state a claim. (DE19). Defendant argued that Plaintiff had not established

it had suffered a direct physical loss of or damage to property, as required under the policy because it had not suffered "tangible physical harm to insured property". (DE19 at 9-12). It argued, alternatively, that there was no coverage because any loss suffered as a result of COVID-19 contamination would be excluded under the policy's "contamination exclusion" (DE19 at 17-22). Finally, Defendant argued that the Complaint should be dismissed with prejudice because amendment would be futile. (DE19 at 22-24).

Plaintiff responded, arguing generally that the language of the Zurich Edge Policy was broad enough to encompass the damages suffered by Plaintiff. (DE25). Plaintiff also requested that if the court was inclined to dismiss the Complaint, it do so without prejudice so that it could amend the Complaint. (DE 25 at 19).

Defendant replied to Plaintiff's response, arguing that the Policy was more limited than Plaintiff contended (DE28).

J. The Trial Court Granted the Motion to Dismiss, with Prejudice.

The trial court granted Defendant's Motion to Dismiss without holding oral argument. (DE31). The court found that Plaintiff's inability to operate its restaurants due to mandated government

closures and limitations of operation was not a direct physical loss so as to entitle it to coverage. (DE31). The court dismissed the complaint with prejudice, concluding that any amendment would be futile "based on the facts and circumstances of this case." (DE 31 at 11-12).

K. The Relevant Policy Language

Plaintiff relies on several provisions to support its claim that it is entitled to coverage for the losses it suffered as a result of the COVID-19 pandemic and the related government mandated closures and limitations on operations.

1. The Insuring Agreement

The Zurich Edge Policy "Insuring Agreement" provision describes coverage broadly:

> This Policy Insures against **direct physical loss of or damage caused by a Covered Cause of Loss to Covered Property**, at an Insured Location described in Section II-2.01, all subject to the terms, conditions and exclusions stated in this Policy.

(DE1-4 at 16, §1.01)(emphasis added)[2]. "Covered Cause of Loss" is defined in the policy as "All risks of direct physical loss of or damage from any cause unless excluded." (DE1-4 at 62, §7.11). Critical here, the phrase "direct physical loss of or damage caused by" is not defined in the policy.

Property Damage coverage is detailed in Section III of the policy (DE1-4 at 23-27) and Time Element coverage is detailed in Section IV of the policy (DE1-4 at 28-32). The Civil or Military Authority coverage is a Special Coverage addressed in Section V of the policy. (DE1-4 at 34-35, §5.02.03).

Plaintiff invoked the Time Element and Civil or Military Authority provisions of the policy in making its claim. Both of these provisions contain language similar to Section 1.01 requiring "direct physical loss of or damage to" the insured's property.

2. Time Element Coverage

The Time Element provision provides, in relevant part:

> The Company will pay for the actual Time Element loss the Insured sustains, as provided in the Time Element

[2] In the policy, terms defined within the policy are indicated in bold; Plaintiff has not bolded the defined terms in this brief. All emphasis in quoted provisions of the policy is supplied by Plaintiff.

Coverages, during the Period of Liability. The Time Element loss must result from the necessary Suspension of the Insured's business activities at an Insured Location. **The Suspension must be due to direct physical loss of or damage to Property (of the type insurable under this Policy other than Finished Stock) caused by a Covered Cause of Loss at the Location**, or as provided in Off Premises Storage for Property Under Construction Coverages.

(DE1-4 at 28, §4.01.01)(emphasis added).

3. Civil or Military Authority Coverage

The Civil or Military Authority provision provides:

The Company will pay for the actual Time Element loss sustained by the Insured, as provided by this Policy, resulting from the necessary Suspension of the Insured's business activities at an Insured Location if the Suspension is caused by order of civil or military authority that prohibits access to the Location. **That order must result from a civil authority's response to direct physical loss of or damage caused by a Covered Cause of Loss to property not owned, occupied, leased or rented by the Insured or insured under this Policy and located within the distance of the Insured's Location as stated in the Declarations**. The Company will pay for the actual Time Element loss sustained, subject to the deductible provisions that would have applied had the physical loss or damage occurred at the Insured Location, during the time the order remains in effect, but not to exceed the number of consecutive days following such order as stated in the Declarations up to the limit applying to this Coverage.

(DE1-4 at 34-35, §5.02.03)(emphasis added).

4. The Contamination Exclusion

In denying coverage, Defendant relied, in part, on the Contamination exclusion of the policy, which provides:

> Contamination, and any cost due to Contamination including the inability to use or occupy property or any cost of making property safe is suitable for use or occupancy, except, as provided by the radioactive Contamination Coverage of this Policy.

(DE1-4 at 25, §3.03.01.01).

Contamination is defined is defined as:

> Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, Fungus, mold or mildew.

(DE1-4 at 62, §7.09).

SUMMARY OF THE ARGUMENT

The district court erred in its analysis of the Zurich Edge Policy because it did not give full force and effect to every word in the policy. By concluding that "direct physical loss of or damage to covered property" meant "direct physical loss of or direct physical loss to Covered Property," the district court added words to the language chosen by Defendant.

Under Florida law, the district court was required to give effect to every word in the phrase, "direct physical loss of or damage caused by a Covered Cause of Loss to Covered Property." It was prohibited from adding words and concluding that the phrase should be read as "direct physical loss of or direct physical damage to" covered property. It was also prohibited from concluding that the word "damage" was redundant to the word "loss" and added no meaning to the policy.

Florida law does not allow the court to interpret insurance policy terms to be redundant, repetitive or meaningless. Defendant chose to add "or damage by a Covered Cause of Loss to" to the sentence, and it must mean something different from "direct physical loss." If Defendant intended to limit coverage to "direct

physical loss" it would not have added the other words.

The only reasonable interpretation is that the phrase "or damage caused by a Covered Cause of Loss to" must mean a bad effect other than direct physical loss. The only other possibility is that the policy is ambiguous and must be read in favor of coverage.

The order dismissing the case must be reversed.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT BY IMPROPERLY ASSUMING THE ZURICH EDGE POLICY LANGUAGE "OR DAMAGE TO" PROPERTY WAS EQUIVALENT TO THE PHRASE "DIRECT PHYSICAL LOSS OF" INSTEAD OF GIVING EFFECT AND PURPOSE TO EVERY WORD AS REQUIRED BY FLORIDA LAW

A. Standard of Review

This Court reviews "an order granting a motion to dismiss with prejudice de novo, applying the same standards the district court used." *Young Apartments, Inc. v. Town of Jupiter, FL*, 529 F.3d 1027, 1037 (11th Cir. 2008). Likewise, interpretation of an insurance contract, including determination and resolution of ambiguity, is a matter of law to be reviewed de novo. *Dahl-Eimers v. Mut. of Omaha Life Ins. Co.*, 986 F.2d 1379, 1381 (11th Cir. 1993).

B. Motion to Dismiss Standards

In ruling on a motion to dismiss, the relevant standards are as follows:

> All of the factual allegations in the complaint must be accepted and construed in the light most favorable to the plaintiff. A motion to dismiss does not test the merits of a case, but only requires that the plaintiff's factual

> allegations, when assumed to be true, must be enough to raise a right to relief above the speculative level.

Young Apartments, 529 F.3d at 1037 (cleaned up).

C. Merits

"In interpreting insurance contracts, the Florida Supreme Court has made clear that 'the language of the policy is the most important factor.'" *James River Ins. Co. v. Ground Down Eng'g, Inc.,* 540 F.3d 1270, 1274 (11th Cir. 2008)(quoting *Taurus Holdings, Inc. v. United States Fid. and Guar. Co.*, 913 So. 2d 528, 537 (Fla.2005)). Insurance policies must be construed according to their plain meaning. *James River*, 540 F.3d at 1274. Further, "courts must construe an insurance contract in its entirety, striving to give every provision meaning and effect." *Dahl-Eimers v. Mut. of Omaha Life Ins. Co.*, 986 F.2d 1379, 1381 (11th Cir. 1993); *see also Pub. Risk Mgmt. of Florida v. One Beacon Ins. Co.*, 569 Fed. Appx. 865, 870 (11th Cir. 2014)(recognizing it would be improper to read an insurance provision so as to render part of it superfluous); *Westport Ins. Corp. v. Tuskegee Newspapers, Inc.,* 402 F.3d 1161, 1166 (11th Cir. 2005) ("It being presumed that every condition was intended to accomplish some purpose, it is not to be considered that idle provisions

were inserted. Each word is deemed to have some meaning, and none should be assumed to be superfluous. All portions of a policy should be considered in construing it. Accordingly, a court will attempt to give meaning and effect, if possible, to every word and phrase in the contract in determining the meaning thereof, and a construction which neutralizes any provision of a contract should never be adopted if the contract can be so construed as to give effect to all the provisions ....” (quoting J. Appleman, *Insurance Law and Practice* § 7383 (1981))). This rule of insurance policy analysis is the crux of the district court’s error here.

Any ambiguities in insurance contract language “‘are construed against the insurer’ in favor of coverage.” *James River*, 540 F.3d at 1274 (quoting *Deni Assocs. of Fla. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1140 (Fla. 1998)). A contract provision is considered ambiguous if the “relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage.” *James River*, 540 F.3d at 1274 (cleaned up).

1. The Zurich Edge Policy Mandates Coverage

The Zurich Edge Policy is not a form used by most or all insurers. Defendant drafted its own unique language and coverages. The Zurich Edge Policy inserts causation into its insuring agreement, and very clearly contains two separate coverages: 1) direct physical loss of property, and 2) damage to Covered Property.

The policy does not define either "Direct physical loss of" or "damage caused by a Covered Cause of Loss." "When a term in an insurance policy is undefined, it should be given its plain and ordinary meaning, and courts may look to legal and non-legal dictionary definitions to determine such a meaning." *Botee v. S. Fid. Ins. Co.*, 162 So. 3d 183, 186 (Fla. 5th DCA 2015).

a. "Direct Physical Loss of"

Merriam-Webster dictionary defines "direct", in part, as "characterized by close logical, causal, or consequential relationship."[3] "Physical" is defined as "having material existence:

[3] Merriam-Webster, www.merriam-webster.com/dictionary/direct (last visited Apr. 26, 2021).

perceptible especially through the senses and subject to the laws of nature."[4] "Loss" is "the act of losing possession" and "deprivation."[5]

Boiled to its essence, the phrase "direct physical loss" means being deprived of property as a consequence of something perceptible through senses. It is hard to imagine how a business being deprived of its property is not a direct physical loss.

The Court in *Studio 417, Inc. v. Cincinnati Ins. Co.*, 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), supports Plaintiff in this case. In *Studio 417*, the court went through a lengthy analysis to conclude that there is no policy language requiring tangible damage to qualify as "direct physical loss to or damage of" property. In addition, the court noted that there is a difference between damage and loss. The court concluded that Civil Authority coverage had been adequately alleged and denied the motion to dismiss.

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[4] Merriam-Webster, www.merriam-webster.com/dictionary/physical (last visited Apr. 26, 2021).

[5] Merriam-Webster, www.merriam-webster.com/dictionary/loss (last visited Apr. 26, 2021).

b. “Damage Caused by a Covered Cause of Loss”

While Plaintiff believes that the injuries it suffered were a direct physical loss, as noted above, its primary argument is that coverage is provided here under the second type of loss: damage caused by a Covered Cause of Loss. As noted above, the words “direct physical” modify “loss” and not “damage” in the Zurich Edge Policy. While every word must be given meaning, the absence of the qualifier “direct physical” as to “damage” must mean something and must be assumed to be intentional. Here, Defendant’s decision in formulating its policy means that a loss must be direct physical loss but damage does not need to be direct and physical.

One definition of “damage” is “any bad effect on something.” Black’s Law Dictionary (11th ed. 2019). Utilizing that definition in the policy language, Defendant insures for any bad effect on covered property by a covered loss or, in the case of Civil Authority coverage, for any bad effect to non-covered property. Again, the presence of COVID-19 in the general public, including Plaintiff’s customers and employees, and the resulting closure orders, certainly had “a bad effect” on the insured premises.

The applicable state and county orders essentially made a finding of fact that the virus was in a sufficient percentage of the population that mitigation steps were required to stop the spread of the disease. That mitigation – preventing customers and employees from congregating at Plaintiff's restaurants – caused a bad effect on covered property.

In the trial court, Defendant argued, and the District Court agreed, that there must be "direct physical loss of or direct physical damage to" the covered property. This position makes "direct physical" a modifier of both "loss" and "damage." But that is not the policy language here and applying it that way is inconsistent with Florida's rules of insurance contract interpretation. Under Florida law, a court may not ignore words in the policy or rewrite the policy to resolve an ambiguity. Here, the Zurich Edge Policy contains two distinct phrases: "direct physical loss of" and "damage caused by a Covered Cause to…" Defendant meant something different, something more, than "direct physical loss" when it added a second category "or damage caused by a Covered Cause of Loss to" or Defendant would not have included the extra words in its policy. The two phrases each be given their own meaning. The trial court

was not free to ignore the phrase "or damage to" to give the phrase a different meaning.

While many courts have addressed the requirement of "direct physical loss of" and decided that the COVID-19 pandemic closures do not qualify, no court, other than the trial court here, has considered the separate category of "or damage caused by a covered cause of loss" in the context of the claims being made in this case where the policy contains no limitation to damages "during the period of restoration." The district court's error was to ignore this second category of loss, concluding that the words "direct physical" modifies both "loss" and "damage," and ignoring the disjunctive "or" in between those two phases.

The district court relied on this Court's unpublished opinion in *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 Fed. Appx. 868 (11th Cir. 2020)(which is discussed in the section below), *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIV, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020) and *Rococo Steak, LLC v. Aspen Specialty Ins. Co.*, 8:20-CV-2481-VMC-SPF, 2021 WL 268478, at *3 (M.D. Fla. Jan. 27, 2021)(DE31 at 8-9). Those decisions expressly concluded that "direct physical" modifies both "loss" and "damage," thereby

ignoring the word "or" and rendering the "damage" alternative language meaningless.

Each of those decisions relied on *Homeowners Choice Prop. & Cas. v. Miguel Maspons*, 211 So.3d 1067, 1069 (Fla. 3d DCA 2017). There, the court discussed the meaning a homeowner's insurance policy which provided, "We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property." *Id.* at 1069. In that provision, "direct" and "physical" expressly modify "loss." No interpretation was necessary. Direct and physical both modify loss in that policy because the words appear next to each other. The Third District in Homeowners Choice was simply reading the words written in the policy.

It is also important to note that the insuring language in *Homeowners Choice* insured "against risk of loss to property" (not "loss of" property) and did not include the separate category of coverage for "damage caused by a Covered Cause to" property. The wording of that policy was completely different than the wording of the Zurich Edge policy.

Courts relying on *Homeowners Choice* have made an analytical error of adopting the analysis applied by that court to completely different language in other insurance policies. That is precisely what the district court below did in this case. The district court erred by using the analysis of a different policy and applying it here when the language was not equivalent. The court was required to interpret the words chosen by Zurich. Under Florida law, courts cannot rewrite the policy or decide coverage by substituted the words used in a different policy.

This precise point was made by the court in *Total Intermodal Services Inc. v. Travelers Prop. Cas. Co. of Am.*, CV 17-04908 AB (KSX), 2018 WL 3829767, at *3 (C.D. Cal. July 11, 2018), in which the court held that it was improper to consider "or damage to" as meaning the same thing as "direct physical loss of:"

> 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.

In *Total Intermodal*, the court properly applied the rule of insurance policy interpretation that every word used must have

meaning. That decision was later relied on by the court in *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 20-CV-03213-JST, 2020 WL 5525171, at *3 (N.D. Cal. Sept. 14, 2020), to reach the same conclusion – that the policy language did not require tangible physical loss of property. While in *Mudpie* the court eventually decided there was no coverage, it did so because the "period of restoration" requirement for Business Income coverage in that case suggested the loss had to be tangible and physical.

Pappy's Barber Shops, Inc. v. Farmers Group, Inc., 20-CV-907-CAB-BLM, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020), which distinguishes *Total Intermodal*, does not support Defendant's argument here because the issue there involved the permanent vs. temporary deprivation of property. There is nothing in the Zurich Edge Policy which requires the loss of property to be permanent, nor that the damage be permanent. In fact, most tangible injury to property can be repaired, so the policy must cover temporary as well as permanent injury.

Moreover, while concepts such as temporary or permanent may have application to property damage coverage, those concepts are inapplicable to claims for lost income. The very nature of the

Time Element and Civil Authority coverages is that the business losses will be temporary. It would illogical to conclude that loss or damage that qualifies for Time Element or Civil Authority coverage must be permanent loss or damage.

The Southern District's decision in *S. Fla. ENT Associates, Inc. v. Hartford Fire Ins. Co*., 20-23677-CIV, 2020 WL 6864560, at *4 (S.D. Fla. Nov. 13, 2020), is helpful here because it highlights policy language which actually supports Defendant's position here; unfortunately for Defendant, the language in that case is not the language it included in its policy. The policy in that case expressly limited coverage to "direct physical loss of or direct physical damage to" property. The insurance was clearly limited to direct physical loss and direct physical damage because that is what the policy actually provides.

That conclusion highlights the error in this case. The district court in this case reached the same conclusion as the court in *S. Fla. ENT* even though Zurich did not word the policy to limit coverage to **direct physical loss** or **direct physical damage**. Because courts are required to apply the words used, the outcome in these two cases cannot be the same. The district court's decision

in this case essentially means that the inclusion of "direct physical" before the word "damage" by S. Fla. ENT's insurer meant nothing because the outcome is the same whether or not the words are included.

c. This Court's unpublished decision in *Mama Jo's* is not controlling.

The trial court here relied heavily upon the Middle District's decision in *Rococo Steak, LLC v. Aspen Specialty Ins. Co.*, 8:20-CV-2481-VMC-SPF, 2021 WL 268478 (M.D. Fla. Jan. 27, 2021). The court in *Rococo Steak*, in turn relied upon this Court's **unpublished** decision in *Mama Jo's*, calling it "binding … precedent." 2021 WL 268478 at *4.

In fact, *Mama Jo's* was not binding precent and is not controlling here because it was an unpublished opinion. According to this Court's Rules, "[u]npublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. Rule 36-2. Further, this Court has held that "unpublished opinions are persuasive only insofar as their legal analysis warrants." *United States v. Riley*, 706 F. App'x 956, 963 (11th Cir. 2017) (emphasis added); *see also Bonilla v. Baker Concrete Constr.*,

Inc., 487 F.3d 1340, 1345 n.7 (11th Cir. 2007) (explaining that an unpublished opinion of the Court was not persuasive "because its facts are materially different than this one.").

Even if *Mama Jo's* was a published opinion, it would not be controlling here because it is not a Covid-19 related case, has different policy language than we have here, and did not give meaning to every word in the policy. In *Mama Jo's*, the plaintiff owned and operated a restaurant. During road construction in the area, significant amounts of dust and debris from the construction migrated into the restaurant. The restaurant stayed open during the period of the construction but the restaurant's traffic decreased during the roadwork.

Mama Jo's had an all-risk commercial insurance policy, which included, in relevant part, a Building and Personal Property Coverage Form and a Business Income (and Extra Expense) Coverage Form. The Building and Personal Property Coverage Form contained in the policy covered "direct physical loss of or damage to Covered Property ... caused by or resulting from any Covered Cause of Loss." *Id.* at 871. The policy defined "Covered Causes of Loss" as "**Risks of Direct Physical Loss** unless the loss is" excluded or

limited. *Id.* (emphasis added). The defendant insurance company ultimately denied the claim, determining that it was not covered under the policy because there was no physical damage to the property.

The restaurant brought suit against the insurer for the damages alleged in its claim and also for several other elements of damages, including replacement and repair of some physical components of the premises. The trial court entered summary judgment against the restaurant, finding that the restaurant had not sustained a "direct physical loss", as that term was used in the operative policy. The district court determined that direct physical loss refers to "tangible damage to property, which causes it to become unsatisfactory for future use or requires repairs." *Id.* at 875. Finally, the trial concluded that the lost income was not covered because the restaurant "could not establish that it suffered a 'necessary 'suspension'' of its 'operations' as the result of a 'direct physical loss.'" *Id.*

On appeal, this Court focused on the meaning of "direct physical loss," explaining that the definition of "the phrase is "A loss is the diminution of value of something." *Id.* at 879 (cleaned up).

Applying that definition, this Court concluded that "under Florida law, an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'" *Id.* The Court did not construe or discuss the alternative "or damage" phrase in the policy. Because the issue in this appeal centers on the alternative "or damage" language in the Zurich Edge policy, *Mama Jo's* has no application.

As discussed above, the policy in question in *Mama Jo's* was similar to the instant policy in that it provided coverage for: (1) direct physical loss of, or (2) damage to Covered Property caused by or resulting from any Covered Cause of Loss. However, a critical distinction is that "**Covered Causes of Loss**" was defined as "**Risks of Direct Physical Loss** unless the loss is" excluded or limited. *Mama Jo's*, 823 Fed. Appx. at 871 (emphasis added). Here, on the other hand, Covered Cause of Loss is defined as "**All risks of direct physical loss of or damage from any cause unless excluded**." (DE1-4 at 62, §7.11)(emphasis added).

Thus, while the insuring language in *Mama Jo's* appeared consistent with the language here, there is a critical distinction based on the definition of the term "covered cause of loss." In *Mama*

Jo's, the "covered cause of loss" was "direct physical loss" while here, it is "direct physical loss of **or damage** caused by …" Here, again, "direct physical" modifies loss, not damage.

Mama Jo's is not controlling here because the relevant policy language is not the same. Based on the language of the policy in *Mama Jo's*, this Court addressed only the "direct physical loss" language and did not engage in a discussion of the alternative "damage caused by…" language. Florida law requires that the policy be read as a whole, giving effect to every word. *See Washington Nat. Ins. Corp. v. Ruderman*, 117 So. 3d 943, 948 (Fla. 2013). The phrase "or damage caused by a Covered Cause of Loss…" must mean something different than "direct physical loss of." See *Studio 417*, 478 F. Supp. 3d at 800 (recognizing that under basic contract interpretation principles, the words "loss and "damage" must have different meanings when used as alternatives in the insurance policy). Courts cannot ignore a third of the coverage provision as redundant or meaningless language.

d. The other cases relied on by Defendant are inapplicable here because they are inconsistent with Florida law.

As noted above, courts throughout the country have applied this Court's decision in *Mama Jo's* to support the denial of coverage based on loss of business income as a result of the COVID-19 pandemic. Defendant cited several of these cases in support of its Motion to Dismiss. Many of these cases expressly disregard the maxim that the policy must be read as a whole and every word given effect.

The decisions cited by Defendant in the trial court concluded the second portion of the insuring clause covering damage by a Covered Cause of Loss to property did not mean anything different than the first part of the sentence providing coverage for "direct physical loss." Either the policy language must be read to have meaning or there is an ambiguity as to what is meant by "damage to" property. If there is an ambiguity, it must be resolved in favor of coverage.

The decisions cited by Defendant essentially decide any ambiguity created by the policy language in favor of Defendant by interpreting "direct physical loss of or damage caused by a Covered

Cause to" as meaning "direct physical loss or damage," thereby making "direct physical" a modifier of both "loss" and "damage." But that is not the policy language here, nor is that conclusion consistent with Florida's rules of insurance contract interpretation.

Other cases concluding there is no coverage discuss policies with language different than the language in the Zurich Edge Policy at issue here. In *Diesel Barbershop, LLC v. State Farm Lloyds*, 5:20-CV-461-DAE, 2020 WL 4724305, at *2 (W.D. Tex. Aug. 13, 2020), the policy provided coverage only for "accidental direct physical loss to that Covered Property" and had no separate category "or damage to." The policy in *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 20 CV 2160, 2020 WL 5630465, at *1 (N.D. Ill. Sept. 21, 2020) had similar language. In addition, the plaintiff in *Sandy Point* brought a claim only for business income which was limited to the "period of restoration," which also indicates an intention to apply only to physical injury. That the policy limited business income coverage to the "period of restoration" was also a factor in the analysis in *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000*, 8:20-CV-1605-T-30AEP, 2020 WL 5791583, at *1 (M.D. Fla. Sept. 28, 2020)). The Zurich Edge Policy

does not limit Time Element to the "period of restoration" so it does not imply the same connection to tangible physical injury to property as the cases on which Defendant relies.

Although the same "direct physical loss of or damage by a Covered Cause of Loss to property" language appeared in *Dime Fitness, LLC v. Markel Ins. Co.*, Case No. 20-CA-5467, 2020 WL 6691467, at *3 (Fla. Cir. Ct. Nov. 10, 2020), the court in that case noted that a "covered cause of loss" in that policy required "direct physical loss", just as in *Mama Jo's*. *Dime Fitness,* at *3. The same is true of *Mudpie, supra.*

Contrary to *Dime Fitness*, the definition of "Covered Cause of Loss" in the Zurich Edge Policy contains a link to both "direct physical loss" and "damage to" property from any cause not excluded. In other words, this provision is consistent with, and just as broad as, its insuring agreement, Time Element and Civil Authority language.

e. Other provisions of the Zurich Edge Policy support Plaintiff's interpretation.

On the question of what Defendant meant by its description of coverage, and whether the policy applies only to tangible

destruction of property, it is interesting to note Defendant's own policy language. In a section titled Decontamination Costs, the policy provides:

> If Covered Property **is Contaminated from direct physical loss of or damage caused by** a Covered Cause of Loss to Covered Property and there is in force at the time of the loss any law or ordinance regulating Contamination due to the actual not suspected presence of Contaminant(s), then this Policy covers, as a direct result of enforcement of such law or ordinance, the increased cost of decontamination and/or removal of such Contaminated Covered Property in a manner to satisfy such law or ordinance.

(DE1-4 at 37, §5.02.07)(emphasis added).

The Decontamination Costs provision's language would make absolutely no sense if actual destruction of property was required for there to be "direct physical loss of or damage caused by a Covered Cause of Loss to Covered Property" because it contemplates that the presence of a virus alone would qualify as contamination from a direct physical loss of or damage to property. This provision quite clearly states that coverage is for contamination "from direct physical loss of or damage to," meaning that the virus is the direct physical loss or damage. The

requirement of tangible physical damage cannot be squared with the wording of this coverage provision.

The requirement of physical tangible injury also cannot be squared with the Computer Systems Damage provision:

> The Company **will pay for direct physical loss of or damage to the Insured's Electronic Data, Programs, Software** and the actual Time Element loss sustained, as provided by this Policy, during the Period of Interruption directly **resulting from mysterious disappearance of code**, any failure, malfunction, deficiency, deletion, fault, **Computer Virus** or corruption to the Insured's Electronic Data, Programs, Software at an Insured Location.

(DE1-4 at 35, §5.02.04)(emphasis added).

There is no dispute that electronic data and software are neither tangible nor physical, yet Defendant would have this Court read the Computer Systems Damage coverage to pay only for actual physical injury to software and data. The digital code described in this coverage exists as a series of magnetic ones and zeroes on computer memory chips. Defendant's argument that "direct physical loss of or damage to" property requires that there be physical injury to property is contradicted by the Computer Systems Damage coverage, which states that the loss of magnetic ones and zeroes on a silicon computer chip, and intangible damage

to that magnetic data **by a computer virus** is direct physical loss of or damage to property. The policy cannot be reasonably read to provide coverage for Time Element damages for direct physical loss of or damage to computer data by a virus, while not providing coverage for Time Element damages caused by a real virus.

The Zurich Edge Policy phrase "damage caused by a Covered Cause to" is susceptible to at least two meanings, one which requires physical damage and the other that requires only a bad effect on property. Where policy language is capable of two meanings, one of which supports coverage, then the policy must be construed in favor of coverage. *Anderson*, at 34. Here, without a clear definition of "damage" that requires actual physical destruction of the property, this Court must construe the policy to provide coverage for the bad effect on property caused by the Covid-19 pandemic.

Florida law does not require actual harm to a building structure for there to be coverage for direct physical loss to a business. In *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So.2d 600, 602 (Fla. 1st DCA 1995), for instance, vandals dumped an unknown substance into a sewage treatment facility and caused the water to

turn green. The facility was shut down by the City of Jacksonville until the substance was tested and determined to be nonhazardous. During the weeklong testing, the chemical residue destroyed the bacteria colony the sewage treatment system relied on to process the sewage and the entire system was shut down until it was cleaned.

The insurer in *Azalea* denied the claim because there was no direct physical loss to the facility. The court rejected that argument, holding that destruction of the bacteria was a direct physical loss because the facility could not operate until the bacteria was replaced. The only evidence of "physical loss" to the facility was that the facility had to be cleaned.

Here, given Defendant's unique policy language, the damage suffered by Plaintiff is covered by the policy. Plaintiff is therefore entitled to coverage under both Time Element and Civil Authority.

2. Time Element Coverage

In addition to the unique wording of the coverage language, the Zurich Edge Policy's Time Element coverage is uniquely worded making the decisions cited by Defendant inapplicable. The decisions cited by Defendant all include policy language that provides only

business income or business interruption coverage "during the period of restoration" of the property after damage. As discussed above, the Zurich Edge Policy does not limit coverage to a "period of restoration" but, rather, qualifies the coverage by providing the "loss must result from the necessary suspension of insured's business activities. The suspension must be due to direct physical loss of or damage to property…". (DE1-4 at 28, §4.01.01). It is yet another policy condition indicating that Time Element coverage is not limited to loss of revenue after tangible physical injury to property but, instead, to other circumstances which would encompass non-physical damage to the property.

On this point, the decision in *Mudpie* is helpful. There, the court held, consistent with the decision in *Total Intermodal, supra*, that the policy "does not require a 'physical alteration of the property' or 'a physical change in the condition of the property' for there to be coverage. Nevertheless, the court concluded that the period of restoration requirement for Business Income coverage prevented that claim because "there is nothing to fix, replace, or even disinfect for Mudpie to regain occupancy of its property." *Mudpie*, at *4. Because the Zurich Edge Policy does not limit Time

Element coverage to the "period of restoration," the decision in *Mudpie* supports Plaintiff's claim.

3. Civil Authority Coverage

The Civil Authority coverage has the same terminology as the Insuring Agreement and the Time Element coverage. It is therefore just as broad. The coverage requires the regulatory order to have certain characteristics:

> That order must result from a civil authority's response **to direct physical loss of or damage caused by a Covered Cause of Loss to property** not owned, occupied, leased or rented by the Insured or insured under this Policy and located within the distance of the Insured's Location as stated in the Declarations.

(DE1-4 at 34, §5.02.03).

The only difference is that the damage referred to is not Covered Property, and cannot be owned or leased by the insured. The coverage is otherwise not limited in any way that would support denial of Plaintiff's claim. The damage to other property need only be intangible because requiring tangible damage nullifies the policy language.

4. The Exclusions Defendant Relies on are Inapplicable

In its Motion to Dismiss, Defendant argued that even if Plaintiff's claims fell within the Zurich Edge Policy coverage provisions, the claims would be excluded (DE19 12-13, 17-21). These exclusions do not apply here.

a. The contamination exclusion is inapplicable.

Defendant argued that if Plaintiff's damages were caused by the presence of COVID-19 in its restaurants, the contamination exclusion would bar coverage. (DE19 17-21). This argument evinces a misunderstanding of Plaintiff's claims.

The Zurich Edge Policy provides for multiple exclusions which apply unless stated elsewhere in the policy. (DE1-4 at 25-27). One such exclusion is the "contamination exclusion," which provides:

> Contamination, and any cost due to Contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy, except as provided by the by the Radioactive Contamination Coverage of this Policy.

(DE1-4 at 25, §3.03.01.01).

Contamination is defined in the Zurich Edge Policy as:

> **Any condition of property due to the actual presence** of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic

> organism, bacteria, **virus**, disease causing or illness causing agent, Fungus, mold or mildew.

(DE1-4 at 62, §7.09)(emphasis added).

This provision excludes coverage only where there has been contamination of the insured property. This exclusion does not apply here because Plaintiff has not alleged that it suffered loss as a result of actual physical contamination in its restaurants.

It is undisputed that Plaintiff's restaurants were not closed because of a "condition of property due to the actual presence of…a virus." Instead, the restaurants were closed because of the presence of a virus in the general population. Closure was necessary to prevent infected people from congregating and transmitting the virus. Thus, the contamination exclusion does not apply. *See Elegant Massage, LLC v. State Farm Mut. Auto. Ins.* Co., 2:20-CV-265, 2020 WL 7249624, at *12 (E.D. Va. Dec. 9, 2020)(holding that a contamination exclusion did not bar the insureds claim for damages resulting from COVID-19 closures where there were no allegations of COVID-19 on the plaintiff's premises).

b. Loss of Use and Indirect or Remote Loss of Damage Exclusions Are Inapplicable

Defendant also argued that the Zurich Edge Policy "confirms" that the types of losses suffered by Plaintiff are not covered "through express exclusions for 'loss or damage arising from delay, loss of market, or loss of use' and 'indirect remote loss or damage.'" (DE19 at 12-13). It argues that these exclusions "separately and independently bar coverage for First Watch's pure loss of use claim." (DE19 at 13). To the contrary, these exclusions, like the contamination exclusion, do not apply here.

The exclusions section of the Zurich Edge Policy provides that the following are excluded:

- Loss or damage arising from delay, loss of market, or loss of use.
- Indirect or remote loss or damage

(DE1-4 at 25, §§3.03.03.01 & .02)

These exclusions apply only to Property Damage coverage and do not apply to the Time Element or the Civil Authority coverages. Although the policy states that these exclusions apply to the entire policy, the Civil Authority and Time Element coverages explicitly provide coverage for the loss of use. Interpreting these exclusions

literally would mean Time Element and Civil Authority coverages are both excluded even though they are specifically provided for and Defendant charged a premium for them.

As to the exclusion of remote or indirect losses, the policy does not define those terms, and Defendant did not attempt to explain how the loss claimed by Plaintiff is indirect or remote. The exclusion appears to apply only to speculative or far-fetched links between a loss and the claim. There is nothing far-fetched here about the losses claimed by Plaintiff.

Defendant relied on *Mudpie*, *supra*, to support its argument that the loss of use exclusion applies. (DE19 at 13). This reliance is misplaced. The court in *Mudpie* never applied the "loss of use" exclusion because it found there was no coverage.

CONCLUSION

For the reasons discussed above, the Order granting Defendant's Motion to Dismiss should be reversed and this case remanded for further proceedings.

CERTIFICATE OF COMPLIANCE WITH RULE 32(g)

Appellant hereby certifies that the Initial Brief of Appellant complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 7941words.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was electronically filed with this Court via CM/ECF, and was furnished to all counsel on the attached service list, by email, on April 26, 2021.

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SERVICE LIST

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