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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN-N-OUT BURGERS, a California corporation,
Plaintiff,

vs.

ZURICH AMERICAN INSURANCE COMPANY,
Defendant.

Case No. 8:20-CV-01000-JLS-ADS

IN-N-OUT BURGERS' OPPOSITION TO ZURICH AMERICAN INSURANCE COMPANY'S MOTION FOR JUDGMENT ON THE PLEADINGS

Date: June 25, 2021
Time: 10:30 a.m.
Courtroom: 10A

Judge: Hon. Josephine L. Staton
Mag. Judge: Hon. Autumn D. Spaeth

Fact Discovery Cutoff: July 30, 2021
Pretrial Conference Date: Dec. 3, 2021
Trial Date: Not Set

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I. INTRODUCTION

In-N-Out's First Amended Complaint ("FAC") seeks contract damages based on Zurich's denial of insurance coverage for COVID-19 related business interruption losses, and for bad faith based on the fact that Zurich conducted no investigation before denying the claim. Zurich answered the FAC last July, and now moves for judgment on the pleadings on the premise that the Court should decide that the factual allegations of loss of or damage to In-N-Out's property in the FAC are only legal conclusions, and that the Court should make a factual determination that onsite presence of the novel coronavirus cannot constitute direct physical loss or damage.

Zurich's Motion for Judgment on the Pleading misstates California law and relies heavily on inapposite trial court decisions, many from other states, not involving the Zurich policy at issue here. Nearly all of the trial court decisions to which Zurich cites are distinguishable because they do not allege the presence of the virus on the insured property – unlike In-N-Out's allegations – and involve policies containing virus exclusions, unlike Zurich's policy here which explicitly deleted its virus exclusion. Zurich also ignores the growing number of cases in California and beyond that find coverage in similar COVID-19 cases.

Zurich asserts the same argument regarding physical loss or damage in relation to coverage provisions for Civil Authority, Ingress/Egress, Contingent Time Element and Decontamination Costs. Zurich's arguments on these separate insuring provisions add nothing to its analysis, as they merely restate their conclusion on physical loss or damage. Zurich also argues that the bad faith claim should be dismissed, but again assumes its first argument on physical loss or damage.

Finally, Zurich argues that there is no possibility that the FAC could be successfully amended, again relying on the same inapposite decisions. On this last point, In-N-Out advised the Court in the joint status conference statement last summer that infection counts at In-N-Out stores had skyrocketed as the pandemic progressed. In-N-Out firmly believes that its FAC easily meets the standard for notice pleadings.

But, if there is any doubt concerning the prospect that evidence could establish property loss and damages at In-N-Out stores, In-N-Out refers the Court to its complaint filed March 3, 2021 in the related proceeding [Case No. 8:21-CV-406], which reflects the virus at all of its stores, and refers to the extensive developments in science since In-N-Out's initial May, 2020 filing in this case, which was filed near the beginning of the pandemic. To the extent that Zurich continues to dispute the science of the virus, In-N-Out further submits declarations of epidemiologists from Yale University and the University of California at Berkeley whose testimony abundantly demonstrates that if there is a need to amend the FAC regarding the presence of the virus or how it impacts property such amendment can readily be accomplished.

II. FACTUAL BACKGROUND

A. In-N-Out Uses Its Restaurants for In-Restaurant Dining

In-N-Out is a 70 year old highly successful quick-service restaurant chain specializing in selling the highest quality hamburgers. FAC ¶ 7. It operates approximately 360 locations, the vast majority of which have dining rooms and outdoor eating areas. FAC ¶¶ 8, 11.

B. In-N-Out Alleged The Physical Presence of the Virus on Its Properties

There is an ongoing pandemic caused by a novel coronavirus named SARS-CoV-2 and its resulting disease COVID-19. FAC ¶¶ 13-15. The virus spread quickly throughout the world during the first months of 2020. FAC ¶ 14. The virus is highly contagious, uniquely resilient and deadly. FAC ¶ 16. The virus spreads, among other ways, through droplets expelled when an infected person coughs, speaks, or breathes, which can infect others through the air or when they land on surfaces. FAC ¶ 17. Droplets attach to and persist on surfaces, such as tables, doorknobs and handrails, infecting someone who touches these surfaces and then touches their eyes, nose or mouth. FAC ¶¶ 17-19. Scientific studies show the virus can survive for extended periods, on surfaces. FAC ¶¶ 18-21. Droplets carrying the virus may be invisible to the naked eye, but they are physical objects that travel to other objects and cause

harm. FAC ¶ 23.

In-N-Out alleged that individuals infected with the virus have been at its insured locations. FAC ¶ 26. This is confirmed, at a minimum, by the ever-growing number of In-N-Out Associates (its term for employees) diagnosed with COVID-19: over 30 as of June 2020 and over 800 as of September 2020. *Id*; In-N-Out's Request for Judicial Notice ("RJN") Ex. A (Rule 26(f) Report) at 6:17-19. As a result of the coronavirus and COVID-19, the property damage caused by the virus, and in an effort to limit that property damage by limiting the presence of the virus at or in its restaurants, and help protect human life, In-N-Out was forced to close or limit its operations. FAC ¶ 41. In-N-Out has been partially or wholly deprived of the full use of its properties since at least March 2020 for one of their primary intended purposes: in-restaurant dining. FAC ¶¶ 27-41.

C. Necessary Measures Were Taken to Mitigate the Accumulation of the Virus in the Indoor Air and On Physical Surfaces

In an effort to stop the spread of the virus, and specifically because the virus is causing property loss or damage everywhere, local and state governments across the country issued shutdown or "shelter-in-place" orders that had a severe impact on the restaurant industry. FAC ¶¶ 27-41, 52. Many of these orders expressly recognized that the virus is physically causing property loss or damage. *See e.g.,* FAC ¶¶ 31-32. These orders required In-N-Out to shut down its restaurant dining rooms. FAC ¶¶ 28, 30, 41. Compliance with the government shut-down orders and closures to prevent the spread of the virus not only affected In-N-Out's own properties, but also other neighboring properties on which In-N-Out depends to run its operations. FAC ¶¶ 53, 59, 27-39. As a result of the coronavirus and COVID-19, the property damage caused by the virus, and related mitigation measures, including civil orders, In-N-Out has suffered and continues to suffer significant losses from the closures of its dining rooms and related losses. FAC ¶ 41.

D. The Zurich Policy Covers "All Risks" Unless Specifically Excluded

The Policy provides coverage for "direct physical loss of or damage caused by a

Covered Cause of Loss to Covered Property," with "Covered Cause of Loss" defined as "[a]ll risks of direct physical loss of or damage from any cause unless excluded." FAC ¶ 44. Neither "physical loss" nor "damage" is defined in the Policy. Under the Policy's Time Element coverage, Zurich promised to pay for business income loss resulting from the "necessary Suspension" (including any "slowdown" or "cessation") of In-N-Out's business activities at an Insured Location. Declaration of Shari Klevens ("Klevens Decl.") Ex. C (policy) § 4.01.01. This coverage is triggered by "physical loss of" property of the type "insurable" under the Policy, including "Dependent" properties and "Attraction" properties. *Id.* at §§ 4.01.01, 5.02.05.

The Policy also pays for "loss sustained by [In-N-Out] . . . resulting from necessary Suspension of [In-N-Out's] business activities at an Insured Location if the Suspension is caused by order of civil . . . authority that prohibits access to the Location." FAC ¶ 52. This coverage is available when the order results from "a civil authority's response to direct physical loss of or damage . . . to property not owned, occupied, leased or rented" by In-N-Out. *Id.*

The Policy explicitly recognizes that contamination of property constitutes "direct physical loss or damage," including providing coverage for radioactive contamination, ammonia contamination, and certain other types of contamination--including virus, bacteria, pathogen, disease causing or illness causing agent, all of which were excluded in the main policy form but deleted from the exclusion via an endorsement issued at the inception of coverage.[1] FAC ¶ 45.

[1] In its Motion, Zurich incorrectly cites to an inoperative version of the contamination exclusion (Mot. 4 n.5), as it was amended by endorsement (FAC ¶ 45(c)). Zurich appears to claim that the endorsement deleting "virus" only applies to certain locations despite the fact the policy states nothing of the sort and any argument based on the title of the endorsement violates the Policy's requirement that titles "are solely for reference and shall not in any way affect the provisions to which they relate." Policy § 6.20. Regardless, Zurich did not raise the contamination exclusion as a basis for its Motion so it would be improper for it to do so for the first time in its reply brief.

E. In-N-Out's Complaint in the Related Case Contains Additional Allegations Regarding the Presence of the Virus on Insured Property and How it Causes Physical Loss of or Damage to Property

The present lawsuit was filed near the end of the Policy period, and the Policy was renewed on June 1, 2020 without material changes for the 2020-21 policy period. Action 2 Compl. ¶¶ 5-6. In-N-Out sought Zurich's agreement to amend the FAC in this action to address the now approximately **5,000 cases of Associates who have been at In-N-Out locations who had the virus**, along with the opening of numerous stores after the Policy period expired. *Id.* at ¶¶ 3-4, 48, 55, 92. Zurich refused to agree to stipulate, and so In-N-Out filed a second lawsuit (Case No. 8:21-cv-00406 "Action 2") that this Court ordered related. [Action 2 Dkt. No. 12]. Between the original May 2020 filing in this case and the March 3, 2021 filing in the related lawsuit, the world's scientific knowledge concerning the coronavirus, how it persists inside buildings and leads to infections, has developed significantly. Those developments as of March 2021 are reflected in the related Action 2 Complaint, and underscore the scientific reality that there has been loss of and damage to property.[2] Action 2 Compl. ¶¶ 18-56.

III. STANDARD ON MOTION FOR JUDGMENT ON THE PLEADINGS

To survive a motion for judgment on the pleadings "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the…claim is and the grounds upon which it rests." *Erikson v. Pardus*, 551 U.S. 89, 93 (2007). The allegations of the non-moving party must be accepted as true and are to be construed in the light most favorable to that party. *General Conference Corp. v. Seventh-Day Adventist Church*, 887 F.2d 228, 230 (9th Cir. 1989).

IV. ARGUMENT

A. In-N-Out's First Amended Complaint Adequately Alleges Direct Physical Loss of or Damage to In-N-Out's Covered Properties.

Zurich argues that In-N-Out has not alleged any "direct physical loss of or damage" to qualifying property under the Policy. Mot. at 7-14. Zurich's arguments

[2] Zurich filed a Motion to Dismiss in Action 2 that largely duplicates the present motion, [Dkt. No. 44].

lack merit as they disregard the express language of the Policy and California's well-established rules for interpreting insurance policies. Zurich's arguments also rely on cases that are easily distinguishable and/or not binding on this Court.

Zurich also misconstrues In-N-Out's allegations, ignoring that the interactions between the virus, people, and property have resulted in the loss of In-N-Out's dining rooms and/or damage to its property (either of which alone is sufficient for coverage). Zurich's Motion should be denied.

1. The Plain Language of the Policy Demonstrates That Zurich Cannot Meet Its Burden to Show Its Interpretation is the Only Reasonable One

In California, insurance coverage is determined by "the language of the policy itself, not upon 'general' rules of coverage[.]" *Am. Cyanamid Co. v. Am. Home Assur. Co.*, 30 Cal. App. 4th 969, 978 (1994). The Policy language promising to cover "physical loss of or damage to" property must be "interpreted broadly so as to afford the greatest possible protection to the insured."*MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 648 (2003) (citations omitted). In contrast, "'any exception to [this] basic underlying obligation must be so stated as clearly to apprise the insured of its effect.'" *Id.* Thus, any exclusion or purported limitation Zurich relies upon must have been stated "in clear and unmistakable language.'" *Id.*; *see also Haynes v. Farmers Ins. Exch.*, 32 Cal. 4th 1198, 1204-05 (2004) (limiting language must "be placed and printed [within the policy] so that it will attract the reader's attention"). These rules must be applied "with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded," *MacKinnon*, 31 Cal. 4th at 648 (citations omitted), as In-N-Out did here.

Zurich asks the Court to construe the phrase "direct physical loss of or damage to" property narrowly to require "that a substance so permeates an insured property that it compromises its physical integrity or renders the entire structure uninhabitable." Mot. at 8:9-11. In doing so, Zurich seeks to add language and define on a post hoc basis terms not defined in the Policy. Under California law, even if Zurich's proposed

interpretation reasonably comported to the words actually used in the Policy (which it does not), under settled principles of contract interpretation Zurich could only prevail if its interpretation was "the *only* reasonable one." *MacKinnon*, 31 Cal. 4th at 655 (citations omitted). The Court's role is not to "select one 'correct' interpretation from the variety of suggested readings," instead it must find "coverage so long as there is any . . . reasonable interpretation under which recovery would be *permitted*." *Id.* (citations omitted) (emphasis added). And if the Court finds any ambiguity, it must again be resolved in favor of the insured. *Montrose Chem. Corp. v. Super Ct.*, 9 Cal. 5th 215, 230 (2020).

Zurich issued In-N-Out an "all risks" policy, which is the broadest form of property insurance available. *See* J. Walter Croskey, *et al*., *Cal. Prac. Guide: Ins. Litig.* ¶ 1:59 (Rutter Group 2020) ("all risks" policies are the broadest available). Its coverage extends to any external, fortuitous peril unless "specifically excluded." *Id.*; *see also* Steven Plitt, *et al.*, *Couch on Insurance 3d.* § 148:46 (2020) (fortuitous, external perils are subject to coverage under an "all risks" policy even if not explicitly addressed by its terms). The waves of coronavirus and COVID-19 that have broken upon our shores are external, fortuitous perils. They have resulted in, among other things, a "loss of" In-N-Out's in-restaurant dining rooms and also damage to In-N-Out's property. Each of these independently is a "physical loss of or damage to" property. This is a "reasonable interpretation under which recoverywould be permitted," so it is the interpretation that controls. *MacKinnon*, 31 Cal. 4th at 655.

a. Zurich's Tortured Interpretation Is Not Supported by the Plain Language of the Policy

Taking the first part of Zurich's argument, that the "physical integrity" of the property must be compromised for coverage to trigger, the Policy expressly belies such a conclusion. The Policy here contains express and sublimited coverage provisions for two invisible types of contamination, radioactive and ammonia (among many others, such as bacteria discussed below). Policy at §§ 5.02.25, 5.02.02. Both of these contaminants are invisible to the naked eye, do not rupture pipes, do not destroy

drywall, and do not otherwise impact the structural integrity of a building. While the parties could agree that where a building suffers a loss of physical integrity there is property damage, that is not the only manner in which property can be damaged or lost within the meaning of the Policy language.

Zurich's purported "physical integrity" requirement also ignores that the Policy affords coverage not only for "damage to" property, but also for "loss of" property. The disjunctive "or" signals that "loss of" and "damage to" property must be two distinct concepts: if "physical loss" required "physical damage" as Zurich argues, then one term or the other would be superfluous. *See e.g., Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co.,* No. CV 17-04908 AB (KSx) 2018 WL 3829767, at * (C.D. Cal. July 11, 2018) (rejecting interpretation of "physical loss" or "damage" in a clause to mean the same thing as violating the rule that every word be given meaning); *Henderson Road Rest. Sys., Inc. v. Zurich Am. Ins. Co*., No. 1:20 CV 1239, 2021 WL 168422, at *10 (N.D. Ohio Jan. 19, 2021) (same). Zurich's interpretation conflating "loss of" property with "damage to" property renders the first term redundant, which violates a basic rule requiring courts to "avoid interpretations that would create redundancy in policy language." *Great W. Drywall, Inc. v. Interstate Fire & Cas. Co*., 161 Cal. App. 4th 1033, 1042 (2008); *see Baker v. Nat'l Interstate Ins. Co.*, 180 Cal. App. 4th 1319, 1336 (2009) (use of disjunctive in policy must be given meaning). Therefore, the Policy cannot be interpreted as being limited to situations where the property's "physical integrity" is"compromised."

Neither can the Policy's "all risk" coverage be limited to where "the entire structure" becomes "uninhabitable." *First*, the coverage in the policy expressly contradicts this interpretation. Specifically, the Policy provides coverage for losses due to any "slowdown" in In-N-Out's business. Klevens Decl. Ex. C § 4.01.01 (providing coverage for a "Suspension" of the business); *see also id.* § 7.56.01 (defining "Suspension" to include the "slowdown or cessation of the Insured's business activities"). If a complete cessation of In-N-Out's business at a particular

restaurant is required to trigger coverage, as Zurich argues, its express promise to provide coverage for a "slowdown" would be rendered meaningless, which would violate the black letter law for interpreting insurance policies. *See, e.g.*, *AIU Ins. Co.*, 51. Cal. 3d at 837 (rejecting argument that would render provision "meaningless"). *Second*, the argument that coverage under such a policy is only available when property is "uninhabitable" was rejected by the Court of Appeal decades ago. *Strickland v. Federal Ins. Co.*, 200 Cal. App. 3d 792, 799 (1988). *Third*, there are any number of examples where partial damage to property would trigger coverage for property damage, including a fire burning less than all of the property, a car crashing into a wall in the drive through lane, or the palm trees on the property being stolen or vandalized. These simple examples belie Zurich's argument that property damage must impact the "entire" structure.

Zurich's argument that for coverage to attach a substance must "so permeate[ ] an insured property" to render it entirely uninhabitable also fails. The Policy does not contain the word "permeate," and there is no basis for Zurich to seek to graft it into the Policy. Regardless, the FAC allegations easily make the point that the virus has spread throughout In-N-Out's buildings, as do the allegations in the related Action 2 Complaint in greater and more informed detail as the science of coronavirus as developed. FAC ¶¶ 16-26, Action 2 Compl. ¶¶18-56. The smallest of droplets containing virus are aerosols that persist in the air within buildings. Action 2 Compl. ¶ 24-29. And if the FAC allegations are not deemed adequate on this point, the accompanying declarations of Dr. Vinetz and Dr. Lewnard make clear that an amended pleading could abundantly satisfy the pleading standard.

Zurich's narrow interpretation of the coverage it issued also violates "the fundamental principle that in interpreting contracts, including insurance contracts, courts are not to insert what has been omitted." *Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal. 4th 758, 764 (2001). The Policy says nothing of compromise of "physical integrity." Nor does it state that a structure must be "uninhabitable" to trigger

coverage, let alone entirely "uninhabitable." Likewise, the Policy does not state it requires that loss must be "permanent dispossession" for coverage to apply. Zurich is engaging in an impermissible post hoc attempt to rewrite the contract by requesting the Court to add these words to the Policy. *Id.; cf. Thee Sombrero, Inc. v. Scottsdale Ins. Co.,* 28 Cal. App. 5th 729, 737 (2018) (rejecting insurer's argument that there must be a "loss of all uses" of the property, holding instead that "loss of any significant use" was sufficient; also noting insurer's failure to "specify the extent of the loss of use, whether complete uselessness or diminishment in value for a particular purpose" meant the provision was ambiguous and must be construed against the insurer).

Zurich's interpretation aimed at eliminating coverage also ignores that the Policy was originally drafted to exclude coverage for certain losses resulting from any "pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent." Zurich, however, chose to delete both the word "virus" and the reference to biological agents from that same exclusion by its endorsement (*i.e.* amendment) to the Policy. By making that change, Zurich removed the virus exclusion from the Policy. This change is critical. First, the fact that Zurich originally excluded viruses evidences that "loss of" property from a virus would be otherwise covered. *Am. Bldg. Maint. Co. v. Indemnity Ins. Co. of N.A.,* 214 Cal. 608, 613 (1932) ("The very fact that the [insurer] thought it necessary . . . to eliminate this coverage indicates a belief on its part that loss arising from the [excluded risk] was included in the policy."). And secondly, by deleting "virus" and other agents from the exclusion, Zurich affirmatively demonstrated its intent to reinstate coverage for these perils. Having done this, Zurich has no basis to deny coverage for In-N-Out's loss of its dining rooms. *Safeco*, 26 Cal. 4th at 764.

Zurich cannot meet its burden of demonstrating that its interpretation of "physical loss of or damage to" property is the "only reasonable one." *MacKinnon*, 31 Cal. 4th at 655.

2. Under California Law, the Phrase "Physical Loss of or Damage To" Property Is Reasonably Interpreted As Including the Loss of In-N-Out's Dining Rooms

Zurich's interpretation of "physical loss of or damage to" contradicts the plain policy language and California law. The settled law in California—on which Zurich itself relies—is that property suffers physical "loss" or "damage" under an insurance policy whenever an **external** peril frustrates the property's intended use. *See MRI Healthcare Ctr. of Glendale Inc. v. State Farm Gen. Ins. Co.,* 187 Cal. App. 4th 766, 779 (2010) (explaining that "direct physical loss" or "damage" occurs when there is an "actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property *causing it to become unsatisfactory for future* use[.]") (emphasis added). This standard fulfills the established purpose of the business interruption coverage Zurich sold to In-N-Out: "to indemnify the insured against losses arising from [its] inability to continue the normal operation and functions of [its] business." *Pac. Coast Eng'g Co. v. St. Paul Fire & Marine Ins. Co.,* 9 Cal. App. 3d 270, 275 (1970).

Consistent with this sweeping standard, other California cases – which Zurich omitted from its Motion – have found physical loss or damage exists where "there is no tangible injury to the physical structure itself." *Hughes v. Potomac Ins. Co.,* 199 Cal. App. 2d 239, 248-49 (1962) (physical loss existed where the insured structure suffered no physical injury but became unfit for occupancy); *Strickland,* 200 Cal. App. 3d at 800 (finding coverage where building was no longer "safe" despite there being no structural damage and it had not been rendered "uninhabitable"). In *Hughes*, the land next to the insureds' home washed away leaving their home intact but dangerous to use. 199 Cal. App. 2d at 24243. The insurer denied coverage on the basis there was no physical loss or damage. *Id.* at 248. The Court rejected that argument, holding that "[c]ommon sense requires that a policy should not be [] interpreted" such that an insured home "might be rendered completely useless to its owners, [yet] [the insurer] would deny that any loss or damage had occurred unless some tangible injury

to the physical structure itself could be detected." *Id.* at 248-49; *accord Strickland,* 200 Cal. App. 3d at 801.

Courts in California (and beyond) have long recognized that the presence of dangerous substances – including microscopic ones invisible to the naked eye – constitute physical loss or damage to property. *See e.g., AIU*, 51 Cal. 3d at 842 ("[c]ontamination of the environment satisfies" requirement of property damage in a general liability policy*); Armstrong World. Indus., Inc. v. Aetna Cas. & Sur. Co.,* 45 Cal. App. 4th 1, 103 (1995) (holding presence of asbestos fibers in building's air and on its surfaces was property damage under general liability policy); *Cooper v. Traveler's Indem. Co. of Ill.,* No. C-01-2400-VRW, 2002 WL 32775680, at *1, *5 (N.D. Cal. Nov. 4, 2002) (holding that loss of use of tavern "resulted from direct physical damage" from the bacterial and E-Coli contamination of well on property).

Coverage has been found to exist where a structure cannot be used for its intended purpose because of the presence of a harmful substance in the air. *Western Fire Ins. Co. v. First Presbyterian Church,* 165 Colo. 34, 39 (1968) (finding "accumulation of gasoline around and under the church building" that infiltrated the premises, "making further use of the building highly dangerous" constituted direct physical loss) (cited approvingly by *Ward Gen. Ins. Servs., Inc.* v. *Emps. Fire Ins. Co., 114* Cal. App. 4th 548, 558 (2003)); *see also Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 841 n.7 (N.D. Cal. 2020) (recognizing that the virus "is no less a 'physical force' than the 'accumulation of gasoline' in *Western Fire* or the 'ammonia release [which] physically transformed the air' in *Gregory Packing*[.]").

Numerous other cases have found coverage where airborne substances, including smoke, methamphetamine vapors, mold and chemicals—many of which, like the virus, are invisible to the naked eye—impair the use of an insured's property. *See, e.g., Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) ("[C]ourts considering non-structural property damage claims have found that buildings rendered uninhabitable by dangerous gases

or bacteria suffered direct physical loss or damage."); *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *6-7 (D. Or. June 7, 2016) (wildfire smoke inside premises constituted "physical loss or damage"); *Farmers Ins. Co. of Or. v. Trutanich*, 858 P.2d 1332, 1335 (Or. App. 1993) (strong, persistent odor from an illegal methamphetamine laboratory "physically damaged" the house); *Sullivan v. Standard Fire Ins. Co.*, 2008 WL 361141, at *3 (Del. 2008) (unpublished) (mold contamination was "physical loss"). Accordingly, the actual or potential presence of the deadly coronavirus in the indoor air in In-N-Out's restaurants and other relevant properties constitutes "physical loss of or damage to" property that triggers coverage.

Further, under California law there is no requirement that a building is rendered uninhabitable or unusable for insurance coverage to apply. The presence— or even *threatened* future presence— of any level of toxic substance causes physical loss or damage when the insured is forced to take action to mitigate potential future harm. *See Armstrong World Indus., Inc.,* 45 Cal. App. 4th at 91 ("the release of asbestos fibers, whatever the level of contamination," or even the "health hazard [] of the potential for *future* releases," causes an "injury to the buildings [that] is a physical one") (emphasis in original); *see also Strickland,* 200 Cal. App. 3d at 800 (holding that coverage is triggered by a "significant risk" of the property being damaged or becoming uninhabitable).

a. The Few California Cases Zurich Relies On Do Not Support Its Position

The three published California cases Zurich relies on for its illogical interpretation of "physical loss of or damage" do not support Zurich's position. As discussed above, *MRI Healthcare* held there is coverage for impairment of a property's use by an external force. The court there, however, held this principle was not met by the facts of that case because the impaired machine suffered a defect "inherent" in "the machine itself" that caused it to not "ramp up" after it was intentionally turned off. 187 Cal. App. 4th at 780. The *MRI Healthcare* court therefore found there was no coverage because the machine failed due to an internal defect

brought about by an intentional act, not by a fortuitous external force. *Id.* Conversely, In-N-Out's loss resulted from a peril that was both external and fortuitous: an unforeseen pandemic that caused the loss of In-Out's use of its dining rooms.

Further, courts have refused to apply *MRI Healthcare* on the ground that it interpreted narrower policy language (*i.e.,* accidental physical loss to property) than "physical loss of or damage to" property which is at issue here. *Total Intermodal Servs. Inc.,* 2018 WL 3829767, at *4; *Susan Spaeth Hegedus, Inc. d/b/a Kern & Co. v. Ace Fire Underwriters Ins. Co.,* No. 20-2832, 2021 WL 1837479, *9 (E.D. Pa. May 7, 2021) (applying Cal. law).

Likewise, the two other published California cases Zurich relies on are materially distinguishable and inapplicable. As recognized by a California court, the application of these cases to whether the presence of the virus that causes COVID-19 constitutes "physical loss" is not clear.

> Nor is the application straightforward when considering a case in which a database did not suffer "physical loss" because a database— unlike a restaurant location— cannot "be said to have a material existence, be formed out of tangible matter, or be perceptible to the sense of touch." (*Ward General Ins. Services, Inc. v. Employer's Fire Ins. Co.* (2003) 114 Cal.App. 4th 548, 556). Likewise, the insured in *Doyle v. Fireman's Fund Ins. Co.* (2018) 21 Cal. App. 5th 33 did not allege any harm whatsoever to the property at issue (counterfeit wine), in contrast to Plaintiff's allegations here [that the virus is transmitted and active on items of property for a period of time].

Boardwalk Ventures CA, LLC v. Century-Nat'l Ins. Co., No. 20STCV27359, 2021 WL 1215892 at *4 (Cal. Super. Ct. Mar. 18, 2021).

Similarly, Zurich's reliance on the unpublished trial court case *Total Intermodal* for its proposition that "direct physical loss of" property requires total and permanent dispossession of property also fails. That case holds only that direct physical loss "includes" permanent dispossession in the absence of physical damage, which was at issue in that case. 2018 WL 3829767, at *4. The court expressly noted that the phrase could mean something different in a different situation and "the Court therefore uses 'includes' to make clear its construction is non-limiting." *Id.* at 4 n.4; *see also*

Henderson, 2021 WL 168422, at *11-12 (rejecting insurer's attempt to so limit the holding of *Total Intermodal*).

3. Courts in California and Nationwide Find In Favor of Coverage in Similar COVID-19 Cases

Finding no California cases to support its position, and ignoring contrary California cases, instead Zurich cites 189[3] trial court orders from across the country that are easily distinguishable and moreover non-binding. Zurich claims that these orders all recognize that the coronavirus does not constitute physical loss or damage, *see, e.g.,* Mot. at 1 n.1, but that is a gross mischaracterization. First of all, not one of those cases involved a complaint with the level of detailed scientifically supported allegations in the FAC (which must be taken as true for the purposes of this motion), let alone the Action 2 Complaint, both: (1) demonstrating how the virus causes physical loss of or damage to property; and (2) directly trying the virus to the covered property through, among other things, the allegations of hundreds (now thousands) of COVID-19 positive employees.

Moreover, among other dispositive differences in the allegations and policies, at least 160 involved no allegations of coronavirus on the premises and 97 of the cases Zurich cites involved policies with specific virus exclusions. *See, e.g., Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co*., No. 20-CV-03750-WHO, 2020 WL 6562332, at * 3 (N.D. Cal. Nov. 9, 2020) ("[d]efendants do not dispute that actual presence of a contaminant at a covered property might trigger coverage."); *Pappy's Barber Shops, Inc. et al. v. Farmers Grp., Inc.,* No. 20-CV-907-CAB-BLM, 2020 WL 5500221, *5 n.2 (S.D. Cal. Sept. 11, 2020) (Plaintiff did not allege virus on site to plead around a virus exclusion); *see also* In-N-Out's Objections to Zurich's Request for Judicial Notice. A California court recognized that the cases relied on by Zurich "are largely distinguishable" from a case where virus is alleged on the insured property. *Goodwill*

[3] This number includes the trial court orders Zurich cites in its Motion to Dismiss related Action 2. [Action 2 Dkt No. 17 at 2 n.1].

Indus. of Orange Cty Cal., No. 30-2020- 01169032-CU-IC-CXC, WL 476268, at *3 (Cal. Super Ct. Jan. 28, 2021) (Wilson, J.).

Zurich ignores all decisions that have found in favor of coverage. These include several **California** decisions denying pleading motions in COVID-19 coverage cases with factual allegations similar to In-N-Out's (*i.e.*, alleging virus present on insured property), one of them being on the **same Zurich Edge policy** at issue here. *P.F. Chang's China Bistro, Inc. v. Certain Underwriters at Lloyd's, London*, No. 20STCV17169, 2021 WL 818659, at *1 (Cal. Super. Ct., Los Angeles Cnty, Feb. 4, 2021) (denying the Motion for Judgment on the Pleading on **Zurich's Edge policy** based on allegations of presence of the virus and government orders); *Goodwill Indus. of Orange Cnty. v. Philadelphia Indem. Ins. Co*., 2021 WL 476268, at *2-3 (Wilson, J.) (overruling demurrer in accordance with *MRI Healthcare*); *Boardwalk Ventures CA, LLC v. Century-Nat'l Ins. Co.,* No. 20STCV27359, 2021 WL 1215892 at *4 (Cal. Super. Ct. Mar. 18, 2021) (denying a Motion for Judgment on the Pleadings due to allegations of presence of the virus).

Zurich also ignores that **Federal Courts in California** have recognized that allegations of the virus on the insured property constitute "physical loss of or damage to" property. *See e.g.*, *Pez Seafood DTLA, LLC v. The Travelers Indem. Co.*, Case No. CV 20-4699-DMG (GJSx), 2021 WL 234355 at *5 (C.D. Cal. Jan. 20, 2021) (Gee, J.) (holding that the "COVID-19 virus physically attaching to or entering the insured property would constitute a 'direct physical loss'"); *Mudpie Inc. v. Travelers Cas. Ins. Co. of Am*., 847 F. Supp. 3d 834, 841 & n.7 (N.D. Cal. 2020) (holding no direct physical loss of property where policyholder did not allege virus on the property, but noting that if virus was alleged on the property its conclusion would be different).

Zurich also ignores the growing number of cases across the country finding in favor of coverage on COVID-19 claims. *See e.g., Studio 417, Inc. v. Cincinnati Ins. Co.,* 478 F. Supp. 3d 794, 800 (W.D. Mo. 2020) (holding that allegations that the virus is likely on premises were sufficient to allege direct physical loss); *N. State Deli, LLC*

v. The *Cincinnati Ins. Co.,* No. 20-CVS-02569, 2020 WL 6281507, at *3 (N.C. Super. Oct. 9, 2020) ("direct physical loss" found where policyholders "lose the full range of rights and advantages of using or accessing their business property"); *Elegant Massage, LLC* v. *State Farm Mut. Auto. Ins. Co.,* No. 2:20-CV-265, 2020 WL 7249624, *9-10 (E.D. Va. Dec. 9, 2020) ("if [insurer] wanted to limit [coverage to] structural damage to property, then [insurer was] required to do so explicitly."); *accord Perry St. Brewing Co., LLC* v. *Mut. of Enumclaw Ins. Co,* No. 20-2-02212-32, 2020 WL 7258116, at *2-3 (Wash. Super. Nov. 23, 2020).

One important example is *Henderson*, 2021 WL 168422, where a federal judge rejected the identical arguments to those Zurich advances here, instead granting summary judgment for the policyholder finding that losses to its restaurants due to the coronavirus and COVID-19 are covered under similar Zurich insurance policy language. The court rejected Zurich's plea to follow the purported "growing consensus among federal courts" finding that there is no coverage for COVID-19 losses (2021 WL 168422, at *6), and instead held that the court must look to the "plain meaning of the words, not persuasive authority from other courts." *(id.* at *12). The court also rejected Zurich's argument that to trigger coverage there must be a "permanent 'loss of property,' explaining, 'permanency is not embodied in the definition of loss.'" *Id.* Rather, the court held that the "word loss does not always involve permanency, and real property can be lost and later returned or restored" (*id.*) and that the insured "experienced a loss of their real property - property which they had been using for dine-in customers" (*id.* at *11). Under the plain language of the Policy, and the facts alleged, In-N-Out has stated a valid claim.

4. In-N-Out's Factual Allegations of How the Virus Impacts Property Must Be Taken as True on a Pleading Motion

Some of the decisions cited by Zurich make the factual determination in response to pleadings motions that the virus can simply be cleaned up and therefore does not cause loss of or damage to property. These Courts have been misguided in

their approach, where factual allegations must be accepted as true. *Cahill v. Liberty Mut. Ins. Co.*, 80 F. 3d 336, 337-38 (9th Cir. 1996). Common sense is in accord with the law in this instance: Would the average person want to get into an Uber in front of a hospital where the immediate last passenger had just gotten sick? Where the last passenger was known to be infected with the Ebola virus? Where the last passenger was known to be infected with the novel coronavirus? Would the new passenger want the car cleaned first? Aired out? Would the new passenger want to wear a mask or disinfect their hands, or have the windows rolled down? The answers to these real world questions may depend on the individual as well as knowing how long does the virus remain viable in the air and on surfaces or whether the car can be effectively cleaned with a disinfectant? These are all *scientific* factual questions about how virus impacts property that are not properly determined on the pleadings.

A determination that the virus cannot cause loss of use of, impair or alter property is contrary to In-N-Out's factual allegations (and science), which must be accepted as true on a pleading motion. In-N-Out makes sufficient factual allegations that presence of the virus in and on property, including in indoor air and depositing on surfaces and on objects, causes direct physical loss of or damage to property by physically invading the property, attaching to the property and altering the property and otherwise making it incapable of being used for its intended purpose. FAC ¶¶ 16-26, 55. It would be especially improper to make a determination on these factual questions at the pleading stage since they necessarily turn on expert opinion and scientific evidence. *Miller v. Los Angeles*, 8 Cal. 3d 689, 702 (1973)(requiring expert testimony when the subject matter "is one within the knowledge of experts *only* and not within the common knowledge of laymen.").

If the Court would require further factual allegations, In-N-Out could amend based on its Action 2 Complaint and declarations of recognized epidemiologists that reflect the evolving science regarding the virus and how it cannot effectively be eliminated from property. Action 2 Compl. ¶¶ 18-46; Dr. Vinetz Decl.; Dr. Lewnard

Decl. With the proper beyond-ordinary materials and protocols, a surface may be cleaned, but that does not eliminate the aerosol particles, lingering and accumulating in indoor air, which simply reattach to the previously cleaned surfaces. *Id.* Further, so long as anyone infected with the virus is present inside the building they continue to shed virus particles adding to the existing virus. *Id*.

5. California's Mitigation Doctrine Extends Coverage to Costs Incurred to Lessen or Prevent the Novel Coronavirus from Causing Loss to or Damaging Property

Zurich argues that "there is no coverage for community-wide orders meant to prevent potential future harm or injury." Mot. at 16:8-9. Zurich is wrong. To the contrary, under California law, codified by statute, "[a]n insurer is liable: . . .If a loss is caused by efforts to rescue the thing insured from a peril insured against." Cal. Ins. Code § 531(b); *see also State v. Allstate Ins. Co.,* 45 Cal. 4th 1008, 1026 (2009) (costs of mitigating or preventing a covered loss also constitute covered damages); *see also AIU Ins. Co.* v. *Super. Ct.,* 51 Cal. 3d 807, 833 (1990) (costs of mitigating or preventing a covered loss also constitute covered damages).[4]

In-N-Out took steps to limit or prevent the novel coronavirus from invading its restaurants, contaminating their indoor air, and attaching to their surfaces. These mitigation measures include closing all of its restaurant dining rooms "[a]s a result of the COVID-19 pandemic, the property damage caused by the novel coronavirus, and in compliance with the government shutdown orders." FAC ¶ 41; *see also id.* at ¶¶ 27-40 (alleging examples of government orders describing the need to mitigate the spread of the virus, which harms property). In-N-Out's additional mitigation measures include performing deep disinfection, changing air filtration systems, redesigning interior spaces, limiting the number of staff, using staff "cohorts," and using a detailed contract tracing program for associates who may have the virus. Action 2 Compl. ¶¶

[4] Zurich asserts the opposite is true, relying on the unpublished case *Syufy Enters.* v. *Home Ins. Co. of Indiana, 1995* WL 129229 (N.D. Cal. Mar. 21, 1995). Beyond the language in that policy being materially different from the policy language here (*id.* at *2-3), that decision, as well as one Zurich cites from the Second Circuit, carry little weight in light of a California statute and multiple California Supreme Court decisions.

46-48. Thus, for the purposes of coverage, the losses incurred for mitigation measures are treated as though the damage they were designed to prevent had occurred. *State,* 45 Cal. 4th at 1026.

Zurich appears to argue that there is no coverage because the mitigation measures were taken to save human lives, but that argument fails. The Policy does not exclude measures taken with the goal of saving lives. For the purposes of coverage, it is irrelevant whether the mitigation measures had a dual purpose to also save lives. Zurich's argument to the contrary is a false dichotomy.

6. In-N-Out Suffered Direct Physical Loss of or Damage to Property due to the Actual or Potential Presence of SARS-CoV-2 in and Around Its Restaurants

In-N-Out sufficiently alleged physical loss of or damage to its properties, triggering coverage under the Policy, including through the following allegations: **(1)** the virus was physically present at In-N-Out's properties, confirmed at a minimum by the ever growing number of its associates diagnosed with COVID-19 who had been on property while infected (FAC ¶ 26; RJN Ex. A at 6:17-19); **(2)** the coronavirus is an external force, in that it has a material, physical existence and is contained in respiratory droplets that accumulate in the air and attach to surfaces (FAC ¶¶ 17, 23); **(3)** the virus adheres to and persists on surfaces, which are physically changed to dangerous and potentially deadly COVID-19 transmission devices (FAC ¶¶ 16-21); **(4)** the virus deprived In-N-Out restaurant dining rooms of their intended use (FAC ¶ 41); and **(5)** the government "shut-down" orders are designed to mitigate damage (*see e.g.*, FAC ¶¶ 27, 35-36, 38), and the measures In-N-Out took served the same purpose (FAC ¶ 41). Based on the plain language of the Policy and the authorities discussed above, In-N-Out has sufficiently alleged a covered loss of its in-restaurant dining and damage to its properties.

If any further allegations are necessary, In-N-Out's Action 2 Complaint and expert declarations of Dr. Vinetz and Dr. Lewnard show In-N-Out can allege virus present at all its stores, and that virus accumulates in indoor air making it impossible

to eliminate. *Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, No. 4:21-cv-00011, 2021 U.S. Dist. LEXIS 90124, at *7 (E.D. Tex. May 5, 2021) (construing detailed and scientifically supported allegations regarding how the coronavirus damages property, and holding they sufficiently alleged the virus was present and "actually damaged the property by changing the content of the air.")

7. Zurich Failed to Demonstrate as a Matter of Law That In-N-Out Is Not Entitled to Time Element and Civil Authority Coverage

a. Time Element Coverages

In-N-Out is entitled to Time Element coverage under the Policy. FAC ¶¶ 42-43, 47-53, 57, 59. Zurich claims that In-N-Out's allegations are insufficient because In-N-Out has not identified each of the specific third-party properties, or the exact physical loss of or damage to those properties that resulted in a suspension or slowdown of its business at its 360+ covered restaurants. Mot. at 21. However, that level of detail is not required to survive a pleading motion. *Erikson v. Pardus,* 551 U.S. 89, 93 (2007); *see also McKinley Dev. Leasing Co. v. Westfield Ins. Co.,* No. 2020 CV 00815, 2021 Ohio Misc. LEXIS 17, at *11-12 (Ohio Ct. Com. Pl. Feb. 9, 2021) (rejecting argument that policyholder did not point to any particular third-party properties finding that surrounding properties were damaged due to COVID-19). In-N-Out has pleaded the essential facts of its case for time element coverage by alleging that it was forced to suspend, slowdown, and/or cease its operations because of the direct physical loss of or damage to In-N-Out's own properties, or direct physical loss of or damage to "Dependent" or "Attraction" properties relevant to coverage, irrespective of the "stay at home" orders. FAC ¶¶ 28, 41, 48, 52-53.

b. Civil Authority Coverage

In-N-Out alleges that it is entitled to coverage under the Civil or Military Authority provision of the Policy because the coronavirus pandemic has resulted in government shutdown orders that have harmed its business. FAC ¶¶ 27-41, 52, 64. Zurich argues that In-N-Out's pleadings are insufficient because In-N-Out has not

shown that the orders were "in response to" any direct physical loss or damage caused by a covered cause of loss to any third-party property. Mot. at 14. Zurich's arguments fail on all fronts.

As discussed above, In-N-Out sufficiently alleged that the coronavirus caused direct physical loss or damage to both In-N-Out's restaurants and other qualifying properties. Moreover, contrary to Zurich's argument, the civil authority orders were indeed issued "in response to" the loss or damage to property caused by SARS-CoV-2 more generally. *See e.g.*, FAC ¶ 31 (Los Angeles Safer at Home Order issued because "COVID-19 virus … is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time."); FAC at ¶ 32 (Dallas County Order issued because "the COVID-19 virus causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time…").

Other courts have found that allegations of the persuasive nature of the virus and COVID-19 that led to the government orders are sufficient to sustain civil authority coverage on a pleading motion. *See, e.g., Pez Seafood DTLA*, 2021 WL 234355, at *6-7 (C.D. Cal. Jan. 20, 2021) (Gee, J.)(finding sufficient allegations of coverage under civil authority provision because the government orders were caused by direct physical loss and prohibit access to restaurants); *Serendipitous, LLC/MELT, et al. v. Cincinnati Ins. Co*., No. 2:20-cv-00873, 2021 U.S. Dist. LEXIS 86998, at *12-12 (N.D. Ala. May 6, 2021)(accepting argument that government orders were issued because restaurants "were so likely to have the presence of the COVID-19 virus that their operation needed to be restricted").

8. Zurich's Arguments Regarding "Loss of Use" and "Period of Liability" Fail

Contrary to Zurich's argument, it is well-settled that the "Loss of Use" exclusion does not apply. Mot. at 10. Read in context, this exclusion "only makes sense . . . when a delay *external* to the damage causes a loss of use," otherwise it would void the entire purpose of the policy" (which promises to pay for revenue losses and other expenses resulting from impairment of the insured's use of its

premises), an interpretation that would be "unreasonable." *Or. Shakespeare Festival,* 2016 WL 3267247, at *6 (emphasis added); *see also Henderson,* 2021 WL 168422, *16 (rejecting Zurich's argument that "loss of use" exclusion applied to restaurant's COVID-19 claim).

Zurich also argues that the "Period of Liability" cannot be calculated (and there is allegedly therefore no coverage) because "there is no allegation that any insured property needed to be repaired or replaced," Mot. at 13:1-2. However, that does not mean there is no covered loss. The Period of Liability provision is not an exclusion (it is in a section of the Policy separate and apart from the "Exclusions," section 4.02.05). Rather, it is merely a tool for ascertaining the amount of money payable by the insurer, and is not mandatory: if it does not apply, then it is supplanted by the more generous 365-day period provided by the "Extended Period of Liability," section 4.02.02.02 (referencing section 2.03.08). Thus, this provision cannot be a stealth exclusion or other limitation on coverage. *See, e.g., Haynes, 32* Cal. 4th at 1211 ("Conspicuous placement of exclusionary language is only one of two rigid drafting rules required of insurers to exclude or limit coverage. The language itself must be plain and clear. . . . Precision is not enough. Understandability is also required.") (internal quotations and citations omitted).

Other courts have rejected similar attempts to interpret the period of liability as supporting no coverage for COVID-19 losses. *Ungarean, DMD v. CNA*, No. GD-20-006544, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2, at *17-18 (Pa. Ct. Com. Pl. Mar. 25, 2021)(holding "period of restoration" does not require repairs or replacement to be entitled to coverage, instead it "merely imposes a time limit on available coverage"); *Henderson*, 2021 U.S. Dist. LEXIS 9521 at *37 (under a plain reading, the period of restoration ends on the dates the states restrictions are lifted); *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2964, 2021 U.S. Dist. LEXIS 32351, at *41-42 (N.D. Ill. Feb. 22, 2021) (period of restoration is "a time period during which loss of business income will be covered, rather than an explicit

definition of coverage," and the terms "repair[]" or "replace[]" are not inconsistent with plaintiffs' "loss of their space due to shutdown orders as a physical loss").

B. In-N-Out's Allegations Trigger Ingress/Egress Coverage

Zurich concludes that there cannot be coverage under the Ingress/Egress provision because, allegedly, no "physical obstruction" exists that "prevented [In-N-Out's] access to an insured location." Mot. at 17:10-12. Ingress means "the power or liberty of entrance or access" and to obstruct means "to hinder passage, action, or operation." *See* https://www.merriam-webster.com/dictionary (last visited May 20, 2021). In-N-Out alleged that the physical presence of the COVID-19 virus forced it to suspend operations of its dining rooms. *See e.g.*, FAC ¶ 41. As a result, employees and customers were denied access to the property.[5]

C. In-N-Out Alleged a Valid Bad Faith Cause of Action

Zurich does not contest the adequacy of In-N-Out's bad faith allegations. Rather, it contends that the bad faith claim fails merely because the breach of contract claim fails. Mot. at 18. But In-N-Out has a valid breach of contract claim, as discussed above; Zurich's argument therefore fails.

D. In-N-Out Should Be Provided Leave to Amend If Zurich's Motion Is Granted

Zurich's Motion should be denied. But to the extent the Court determines additional allegations are necessary, In-N-Out should be permitted leave to allege those facts. *United States v. Corinthian Colleges,* 655 F.3d 984, 995, 997 (9th Cir. 2011)(leave to amend liberally granted after pleading challenge). In-N-Out already made additional allegations in its Action 2 Complaint alleging that the virus is present at all of its stores (known, in part, by nearly **5,000** Associates being on the premises

[5] Zurich's argument regarding Decontamination Costs Coverage fails because In-N-Out alleges that virus on the premises caused "direct physical loss of or damage" to property. The government orders, closing indoor dining, were an acknowledgement of the widespread presence of virus in the community. In addition, numerous state and local ordinances and federal government agencies, such as the CDC and OSHA, promulgated regulations specifying workplace safety requirements for operating during the pandemic, mandating repeated and rigorous decontamination efforts.

while infected with the virus) and extensive scientific facts regarding how the virus impacts property – both in the air and on surfaces – physically changing and physically altering it and causing it to be unsafe and unfit for normal usage, as well as how virus cannot be removed with routine cleaning. Action 2 Compl. ¶¶ 18-49.

Additionally, to the extent any further allegations are necessary to show how the virus causes physical loss or damage, In-N-Out's declarations of epidemiologists show that can be accomplished. Dr. Lewnard, also a biostatistician, testifies as to the presence of the virus at all In-N-Out's stores based on data of (1) In-N-Out employees diagnosed with COVID-19 and (2) the presence of the virus in the community. Dr. Vinetz testifies that (1) aerosols (the primary transmission mode of the virus) cannot be effectively eliminated with disinfectant, and even if a surface is cleaned it can be reinfected from the aerosols, (2) infected people continually reintroduce virus into the building, (3) mask wearing cannot eliminate the spread of the virus, and (4) the virus was present at all In-N-Out locations.

V. CONCLUSION

In-N-Out respectfully asks the Court to deny Zurich's Motion.

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