No. 20-14812

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SA PALM BEACH LLC, Individually and on Behalf of All Others Similarly Situated

Plaintiff/Appellant,

vs.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, *et al.*,

Defendants/Appellees.

Appeal from the United States District Court
for the Southern District of Florida
Miami Division
Case No. 9:20-cv-80677-UNGARO

PLAINTIFF-APPELLANT'S OPENING BRIEF

ROBBINS GELLER RUDMAN & DOWD LLP
PAUL J. GELLER
STUART A. DAVIDSON
120 East Palmetto Park Road
Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000

CARELLA, BYRNE, CECCHI, OLSTEIN, BRODY & AGNELLO, P.C.
JAMES E. CECCHI
LINDSEY H. TAYLOR
5 Becker Farm Road
Roseland, NJ 07068
Telephone: 973/994-1700

Counsel for Plaintiff/Appellant

[Additional counsel listed in signature block]

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and the 11th Circuit Rules 26.1-1 through 26.1-3, undersigned counsel for Plaintiff-Appellant SA Palm Beach LLC certify that the following is a list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that may have an interest in the outcome of the case:

1. Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C. (Counsel for Plaintiff-Appellant)
2. Cecchi, James E. (Counsel for Plaintiff-Appellant)
3. Certain Underwriters at Lloyd's, London (Defendant-Appellee)
4. Davidson, Stuart A. (Counsel for Plaintiff-Appellant)
5. Fields Howell LLP (Counsel for Defendants-Appellees)
6. Geller, Paul J. (Counsel for Plaintiff-Appellant)
7. Lloyd's Syndicate ACS 1856 (Defendant-Appellee)
8. Lloyd's Syndicate AFB 623 (Defendant-Appellee)
9. Lloyd's Syndicate AFB 2623 (Defendant-Appellee)
10. Lloyd's Syndicate AGR 3268 (Defendant-Appellee)
11. Lloyd's Syndicate AMA 1200 (Defendant-Appellee)
12. Lloyd's Syndicate APL 1969 (Defendant-Appellee)

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13. Lloyd's Syndicate AXS 1686 (Defendant-Appellee)

14. Lloyd's Syndicate BRT 2987 (Defendant-Appellee)

15. Lloyd's Syndicate BRT 2988 (Defendant-Appellee)

16. Lloyd's Syndicate CHN 2015 (Defendant-Appellee)

17. Lloyd's Syndicate CNP 4444 (Defendant-Appellee)

18. Lloyd's Syndicate DUW 1729 (Defendant-Appellee)

19. Lloyd's Syndicate HDU 382 (Defendant-Appellee)

20. Lloyd's Syndicate NEO 2468 (Defendant-Appellee)

21. Lloyd's Syndicate MSP 318 (Defendant-Appellee)

22. Lloyd's Syndicate PPP 9981 (Defendant-Appellee)

23. Lloyd's Syndicate QBE 1886 (Defendant-Appellee)

24. Lloyd's Syndicate SAM 727 (Defendant-Appellee)

25. Lloyd's Syndicate TAL 1183 (Defendant-Appellee)

26. Lloyd's Syndicate WBC 5886 (Defendant-Appellee)

27. Lloyd's Syndicate XIS H4202 (Defendant-Appellee)

28. Robbins Geller Rudman & Dowd LLP (Counsel for Plaintiff-Appellant)

29. Rubio, Armando P. (Counsel for Defendant-Appellee)

30. Rudman, Samuel H. (Counsel for Plaintiff-Appellant)

31. SA Palm Beach LLC (Plaintiff-Appellant)

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32. Sacks, Michael J. (Counsel for Plaintiff-Appellant)

33. Seeger, Christopher A. (Counsel for Plaintiff-Appellant)

34. Seeger Weiss LLP (Counsel for Plaintiff-Appellant)

35. Taylor, Lindsey H. (Counsel for Plaintiff-Appellant)

36. The Honorable Ursula Ungaro, District Judge, United States District Court for the Southern District of Florida

37. The Sacks Firm (Counsel for Plaintiff-Appellant)

38. Weiss, Stephen A. (Counsel for Plaintiff-Appellant)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant SA Palm Beach LLC, which is not a corporation, states that it has no parent corporation, and that there is no publicly held corporation that owns 10% or more of its stock (of which there is none).

s/Stuart A. Davidson
Stuart A. Davidson

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant respectfully requests that the Court hold oral argument on this matter. This case involves the important – and timely – question about whether, under Florida law, an "all-risk" commercial insurance policy covering business-interruption losses must cover losses small businesses sustained due to government-issued stay-at-home or shelter-in-place orders issued to stem the tide of the COVID-19 pandemic, which caused a direct physical loss by detrimentally reducing the capabilities of small businesses, including Plaintiff-Appellant's business, for months, but did not cause any physical damage to the insured property. In its Order dismissing Plaintiff-Appellant's complaint, the district court construed the phrase "direct physical loss of or damage to property" as requiring actual "physical damage," a holding that cannot be squared with the plain language of the policy and is directly at odds with well-settled rules of insurance policy interpretation and Florida precedent – which the district court was bound to follow but never even addressed. The district court's ruling threatens to cause grave and in many cases irreparable harm to Florida's small business community already suffering from the pandemic's impact. Plaintiff respectfully submits that oral argument will aid the Court's review of these issues.

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I. STATEMENT OF JURISDICTION

The district court had diversity jurisdiction over this action for breach of contract and declaratory relief under 28 U.S.C. §1332(d). (Appellant's Appendix ("APP") 21) Plaintiff timely filed its notice of appeal as to the Order dismissing Plaintiff's complaint with prejudice and the Final Judgment entered. (APP562) This Court has jurisdiction to review a final judgment. 28 U.S.C. §1291.

II. STATEMENT OF THE ISSUES

The issues presented on appeal in this diversity action are as follows:

1. Whether, under Florida law, an "all-risk" commercial insurance policy that provides coverage for business interruption losses caused by a "direct physical loss of or damage to property" requires actual "physical damage," as the district court held, or whether the phrase "direct physical loss" "includes ***more than*** losses that harm the structure of the covered property,"[1] as Florida precedent holds.

2. Whether this Court should certify the above question regarding the interpretation of Florida law to the Florida Supreme Court.

[1] Citations, internal quotations, and footnotes omitted and emphasis added unless otherwise noted.

III. STATEMENT OF THE CASE

A. Nature of the Case

This insurance action seeks coverage for business losses directly caused by government "stay-at-home" or "shelter-in-place" orders ("Closure Orders") enacted to stop the spread of the COVID-19 pandemic. The Closure Orders – enacted in nearly all states across the nation – caused an incredible amount of damage to the U.S. economy, most notably to the small business community. Small businesses such as plaintiff-appellant SA Palm Beach LLC ("Plaintiff") are the lifeblood of the American economy, but due to the Closure Orders, all small businesses deemed "non-essential" were shut down, many completely and some for limited purposes. Months went by while the COVID-19 pandemic raged across the country, during which small businesses struggled to make payroll, pay rent to landlords, pay utility bills and vendors, and feed owners' and employees' families. Many of these businesses never reopened. Prior to the surge in new coronavirus cases in the fall and winter of 2020, it was estimated that upwards of 100,000 small businesses that temporarily shut down at the beginning of the pandemic were closed permanently.[2]

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[2] Ann Sraders, et al., *Nearly 100,000 establishments that temporarily shut down due to the pandemic are now out of business*, FORTUNE (Sept. 28, 2020), https://fortune.com/2020/09/28/covid-buisnesses-shut-down-closed/.

Thousands of these affected small businesses submitted claims to their commercial insurance carriers under their "all-risk" policies, specifically for losses covered by their business interruption coverage provisions. Nearly all claims by insured businesses were denied, resulting in hundreds of lawsuits filed in state and federal courts across the nation. Plaintiff was one of those businesses denied coverage by its insurer, defendants-appellees Certain Underwriters at Lloyd's, London, *et al.* ("Lloyd's"), generating this breach-of-contract and declaratory-judgment suit.

The district court granted Lloyd's motion to dismiss, holding that, notwithstanding Plaintiff's policy providing coverage for business interruption losses caused by a "direct physical loss of ***or*** damage to property" (APP550), Plaintiff's "Amended Complaint falls short of alleging that Plaintiff's property sustained ***any physical damage***." (APP555) In so doing, the district court ignored several well-established principles of insurance-contract interpretation and, even more importantly, Florida law enunciated by Florida's intermediate appellate courts that the district court was bound to follow in the absence of a persuasive indication that the Florida Supreme Court would decide the issue differently.

First, as made plain by the district court's conclusion that the Amended Complaint failed to allege "any physical damage," the district court clearly erred in

ignoring the plain language of the policy, including how an ordinary "man-on-the-street" would interpret the policy and the policy's use of the disjunctive word "or" rather than a conjunctive connector in the phrase "direct physical loss of or damage to." Had the district court properly read the policy under governing Florida law, it would have concluded that "loss" and "damage" are wholly distinct terms with different meanings. So, too, are the words "of" and "to."[3] Because the complaint allegations adequately pled that Plaintiff suffered a "direct physical loss of" its property, it matters not that there was no "physical damage" to its property, as the district court erroneously required.

Second, it is axiomatic that the district court and this Court "are 'bound' to follow an intermediate state appellate court 'unless there is persuasive evidence that the highest state court would rule otherwise.'"[4] The Florida Supreme Court has not weighed in on the question presented in this appeal. However, at least two Florida

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[3] As explained below, the policy's use of the words "of" and "to" matter because, in one of the principal cases several courts have relied on in denying coverage, including this Court's unpublished decision in *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868 (11th Cir. 2020), *pet. for certiorari pending*, No. 20-998 (Jan. 15, 2021), the policy at issue there provided coverage for "direct physical loss ***to*** business personal property[.]" *See MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 771, 115 Cal. Rptr. 3d 27, 31 (2010).

[4] *Bravo v. United States*, 577 F.3d 1324, 1326 (11th Cir. 2009).

intermediate appellate courts have, in *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600 (Fla. Dist. Ct. App. 1995), and *Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067 (Fla. Dist. Ct. App. 2017). In *Azalea*, Florida's First District Court of Appeals held that "direct physical loss" occurs even where there is "no damage to the structure."[5] In *Maspons*, Florida's Third District Court of Appeals held that "the failure of the [property] ***to perform its function*** constituted a 'direct' and 'physical' loss to the property within the meaning of the policy."[6] The district court ignored *Azalea* completely, and simply cited *Maspons* for the unremarkable proposition that the words "direct" and "physical" modify the word "loss." (APP553)

Under recognized insurance-contract-interpretation principles and binding Florida law, Plaintiff adequately alleged a "direct physical loss of" its property as a direct result of the Closure Orders. Accordingly, this Court should reverse the Judgment entered in this action.

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5 *Azalea*, 656 So. 2d at 602.

6 *Maspons*, 211 So. 3d at 1069.

B. Statement of Facts

1. Lloyd's "All-Risk" Policy Issued to Plaintiff

Lloyd's issued to Plaintiff an "all-risk" insurance policy, No. PXA0001184-00 ("Policy"), covering the policy period December 12, 2019 through December 12, 2020. (APP57, APP138) Among the coverages provided by the Policy was business interruption insurance, which, generally, would indemnify Plaintiff for lost income and profits in the event that its business was shut down. (APP66)

The Business Income (And Extra Expense) Coverage Form, CP 00 30 04 02, in Plaintiff's Policy provides:

> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical ***loss of*** or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of the site at which the described premises are located.

(APP66, APP194)

The Business Income (And Extra Expense) Coverage Form defines Business Income as:

> a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and

b. Continuing normal operating expenses incurred, including payroll.

(APP194)

The Business Income (And Extra Expense) Coverage Form further provides:

Extra Expense

a. Extra Expense coverage is provided at the premises described in the Declarations only if the Declarations show that Business Income coverage applies at that premises.

b. Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical ***loss of*** or damage to property caused by or resulting from a Covered Cause of Loss. We will pay Extra Expense (other than the expense to repair or replace property) to:

(1) Avoid or minimize the "suspension" of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.

(2) Minimize the "suspension" of business if you cannot continue "operations".

We will also pay Extra Expense to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable under this Coverage Form.

(APP194)

Covered Cause of Loss is defined under the Policy in a separate form, Causes of Loss – Special Form, Form 10 30 10 12:

> Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy.

(APP170)

2. The Government Shut-Down Orders to Stem the Tide of the COVID-19 Pandemic

On March 11, 2020, World Health Organization ("WHO") Director General Tedros Adhanom Ghebreyesus declared the COVID-19 outbreak a worldwide pandemic: "WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction. We have therefore made the assessment that COVID-19 can be characterized as a pandemic." (APP18-19)

On March 13, 2020, President Trump declared the COVID-19 pandemic to be a national emergency. (APP54) Three days later, the Centers for Disease Control and Prevention ("CDC"), and members of the national Coronavirus Task Force issued to the American public guidance, styled as "30 Days to Slow the Spread," for stopping the spread of COVID-19. (APP54) This guidance advised individuals to adopt far-reaching social distancing measures, such as working from home, avoiding shopping trips and gatherings of more than ten people, and staying away from bars, restaurants, and food courts. (APP54)

Following this advice for individuals to socially distance, many state government administrations across the nation recognized the need to take steps to

protect the health and safety of their residents from the human-to-human and surface-to-human spread of COVID-19. (APP54) As a result, many governmental entities entered Closure Orders suspending or severely curtailing business operations of non-essential businesses that interact with the public. (APP54) Eventually, almost all states within the United States issued some sort of Closure Order, and ordered private, non-essential business operations to close. (APP55)

Such Closure Orders are or were in effect in all but five states: 35 states closed all non-essential businesses with other states enacting measures to curtail business operations; all 50 states closed schools; and all but one state closed restaurants and bars for services other than take-out and delivery. (APP65)

In Florida, Governor DeSantis issued a series of Closure Orders, by way of Executive Orders, relating to coronavirus protection, including:

- **Executive Order 20-51 (Mar. 1, 2020):** Directing the State Health Officer and Surgeon General to declare a public health emergency. (APP65)
- **Executive Order 20-52 (Mar. 9, 2020):** Declaring a state of emergency in Florida because of COVID-19. (APP65)
- **Executive Order 20-68 (Mar. 17, 2020):** Providing that restaurants were to operate at 50% capacity, maintain 6-foot

distances between parties, and prohibit any employees from working if they exhibited any listed symptoms of COVID-19. (APP65)

- **Executive Order 20-70 (Mar. 20, 2020):** Ordering all bars and food-serving establishments in Broward and Palm Beach Counties closed except for delivery and take-out service. (APP65)
- **Executive Order 20-71 (Mar. 20, 2020):** Imposing a similar restriction on restaurants state-wide in Florida. (APP65)
- **Executive Order 20-89 (Mar. 30, 2020):** Closing all non-essential businesses in Palm Beach County in accordance with guidelines previously established by Miami-Dade County. (APP65)
- **Executive Order 20-91 (Apr. 1, 2020):** Directing that all persons in the State of Florida stay at home except for trips relating to essential services. (APP65-66)

3. Plaintiff's Claim and Lloyd's Denial of Coverage

Plaintiff operates Sant Ambroeus Palm Beach, a fine-dining restaurant in Palm Beach, Florida. (APP97) As a direct result of Governor DeSantis' Closure

Orders, Plaintiff was forced to suspend its business operations for months. (APP69, APP80) Accordingly, on April 8, 2020, Plaintiff provided notice to Lloyd's of its business income losses and extra expenses incurred as required by Policy provisions. (APP69) Pursuant to section 627.70131(5)(a), Florida Statutes, an insurer shall pay or deny a claim within 90 days after receiving notice. Despite the expiration of the 90 day deadline imposed by Florida law, Lloyd's failed to pay or deny Plaintiff's claim. (APP69) Instead, by letter dated July 10, 2020, Lloyd's informed Plaintiff that the claim will be investigated, and identified several policy exclusions they contend may apply. (APP69)[7]

4. The Complaint's "Direct Physical Loss" Allegations

Consistent with its Policy and Florida law, Plaintiff made specific, non-conclusory allegations in its Amended Complaint that Plaintiff suffered a direct physical loss of its property as a result of the Closure Orders. Specifically, Plaintiff alleged that it:

- "operates a restaurant operating under the name Sant Ambroeus Palm Beach at 340 Royal Poinciana Way, Suite 304, Palm Beach, Florida." (APP57)

[7] After briefing on Lloyd's motion to dismiss was completed, Lloyd's formally denied coverage by letter dated December 1, 2020.

- "suffered a direct physical loss of [its] property because [it has] been unable to use [its] property for its intended purpose." (APP69)
- "abided by the Closure Orders and, as a result, lost the physical use of its property and was forced to suspend and curtail business operations." (APP69)
- "suffered a direct physical loss to the property in the form of diminished value, lost business income, and forced physical alterations during a period of restoration." (APP69)

C. Course of Proceedings

On April 22, 2020, Plaintiff filed its initial complaint against Lloyd's, alleging breach-of-contract and declaratory-judgment claims based on Lloyd's effective denial of coverage under the Policy. (APP18) On June 29, 2020, Lloyd's filed a motion to dismiss Plaintiff's initial complaint. (ECF No. 20)

Plaintiff filed an Amended Complaint on July 13, 2020. (APP53) Plaintiff alleged that Lloyd's improperly denied coverage for Plaintiff's claim under the Business Income, Extra Expense, and Civil Authority coverage provisions of its Policy. (APP53)[8] More specifically, Plaintiff alleged that, as a direct result of

[8] Although Plaintiff believes the district court erred in granting of Lloyd's motion to dismiss based on its interpretation of the Policy's Civil Authority coverage provision, Plaintiff does not appeal that part of the decision because Plaintiff

Governor DeSantis' Closure Orders, Plaintiff's property could not be used "for its intended purpose," Plaintiff "lost the physical use of its property and was forced to suspend and curtail business operations," and Plaintiff "suffered a direct physical loss to the property in the form of diminished value, lost business income, and forced physical alterations during a period of restoration." (APP69) Plaintiff also alleged that the Closure Orders were "the sole proximate cause of Plaintiff's" losses. (APP70)

Lloyd's moved to dismiss the Amended Complaint on July 27, 2020. (APP95) There, Lloyd's argued that the "Amended Complaint is devoid of any mention of . . . how the physical [loss] occurred" (APP95), and that the "[Closure] [O]rders were not issued as a result of any 'direct physical loss of or damage to' property, as required under the Policy to trigger coverage" (APP105) Lloyd's further argued that Plaintiff failed to allege any "direct physical loss" because its property was not "physically alter[ed]," (APP107), and that the phrase "repaired, rebuilt, or replace" appearing in the "period of restoration" definition in Plaintiff's Policy demonstrates that there must be "physical alteration" of the insured property to trigger coverage. (APP108-109)

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believes that reversal of the district court's ruling on the Business Income and Extra Expense provisions provides Plaintiff with sufficient coverage for its losses.

On December 9, 2020, the district court entered an Order granting Lloyd's' motion to dismiss with prejudice. (APP546) First, the district court held that "the Amended Complaint falls short of alleging that Plaintiff's property sustained any physical damage." (APP555) The district court relied for its conclusion on the lower court decision and this Court's unpublished opinion in *Mama Jo's*, a magistrate judge's report and recommendation, and several recent business-interruption coverage decisions, both within and outside of this Circuit. (APP578) The district court did not analyze any Florida state appellate law in its analysis of Plaintiff's actual Policy, including *Azalea*, other than to note that that this Court cited to *Maspons* in *Mama Jo's*, albeit for an unremarkable proposition. (APP579) The district court also found that Plaintiff was not entitled to coverage under the Policy's Civil Authority provision because "Plaintiff fails to allege any physical damage to any property in the immediate area." (APP582)

On December 21, 2020, Plaintiff filed an unopposed motion for entry of a separate judgment under Federal Rule of Civil Procedure 58(d) (ECF No. 45), which the district court granted the following day and entered Final Judgment. (APP559). The Final Judgment

> declares the Plaintiff's losses incurred in connection with the Closure Order are not insured losses under the Defendants' Policies and Defendants are not obligated to pay Plaintiff for any business income

> losses incurred in connection with the Closure Order with any of the allegations in Plaintiff's Amended Complaint.

(APP559)

IV. SUMMARY OF THE ARGUMENT

The district court was bound to follow Florida law. That much is not in dispute. However, while Florida law requires courts interpreting insurance policies to, *inter alia*: (a) construe the policy in the broadest possible manner to affect the greatest extent of coverage; (b) examine the natural and plain meaning of a policy's language as understood by the proverbial "man-on-the-street"; (c) look to the dictionary for the plain and ordinary meaning of words; (d) give effect to all words in the policy; and (d) treat words separated by the disjunctive "or" separately, the district court ignored each of these principles in concluding that the phrase "direct physical loss of or damage to" requires "physical damage" or "physical alter[ation]." (APP555)

What's more, the district court's conclusion that an insured is required to plead "physical damage" or "physical alter[ation]" to be entitled to coverage for "direct physical loss of" its property cannot be squared with binding Florida precedent which holds that "'direct physical loss' includes ***more than*** losses that harm the structure of the covered property." *Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 250 F. Supp. 2d 1357, 1364 (M.D. Fla. 2003) (citing *Azalea*, 656

So. 2d at 600); *see also Maspons*, 211 So. 3d at 1069 (holding that, despite the lack of "damage," "it is clear that the failure of the drain pipe ***to perform its function*** constituted a 'direct' and 'physical' loss to the property within the meaning of the policy."). In granting Lloyd's motion to dismiss, the district court ignored Florida appellate law that it was "bound to follow." *Bravo*, 577 F.3d at 1326. That decision should be reversed.

This Court's recent unpublished decision in *Mama Jo's* does not compel a different result. There, putting aside that the plaintiff's business never shut down, both the district court and this Court: (a) failed to address *Azalea*; and (b) expressly relied on a California appeals court decision that concerned wholly distinguishable policy provisions. Nonetheless, this Court affirmed summary judgment for the insurer in *Mama Jo's* where the district court held that "direct physical loss" "requires a showing that the property be rendered uninhabitable ***or unusable***." *Mama Jo's*, 823 F. App'x at 875. Plaintiff here does allege that its property was rendered unusable – and was required to cease operations – by the Closure Orders. (APP44, APP80, APP84) Thus, *Mama Jo's* also supports reversal.

All that being said, Plaintiff submits that it would be beneficial to hear from the Florida Supreme Court on this fundamental issue of Florida insurance law affecting thousands of small businesses across the state, and that this Court should

therefore certify the issue to the Florida Supreme Court under Article V, Section 3(B)(6) of the Florida Constitution, which this Court often does in matters of insurance policy interpretation under state law.

V. STANDARD OF REVIEW

This Court "review[s] *de novo* an order granting a Rule 12(b)(6) motion to dismiss for failure to state a claim. The allegations in the complaint must be accepted as true and construed in the light most favorable to the plaintiff." *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 694 (11th Cir. 2016).

VI. ARGUMENT

A. Applicable Florida Law Governing Insurance Policy Interpretation

"In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 . . . (1938), the Supreme Court held that federal courts sitting in diversity jurisdiction must apply substantive state law." *Bravo*, 577 F.3d at 1325. As such, in diversity actions, federal courts "are 'bound' to follow an intermediate state appellate court 'unless there is persuasive evidence that the highest state court would rule otherwise.'" *Id.* at 1326. "Where, as here, an action is based on diversity, [Florida]'s substantive law governs the interpretation of an insurance policy." *Great Am. All. Ins. Co. v. Anderson*, 847 F.3d 1327, 1331 (11th Cir. 2017). The parties to this action agreed in the district court

that Florida law governed the interpretation of Plaintiff's Policy. (APP103-104, APP472, APP475-476)

Under Florida law, "insuring or coverage clauses are construed in the broadest possible manner to affect the greatest extent of coverage." *McCreary v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 758 So. 2d 692, 695 (Fla. Dist. Ct. App. 1999). When "construing an insurance contract" in Florida, a court "examine[s] the natural and plain meaning of a policy's language." *Anderson v. Auto-Owners Ins. Co.*, 172 F.3d 767, 769 (11th Cir. 1999). "[T]erms utilized in an insurance policy should be given their plain and unambiguous meaning as understood by the 'man-on-the-street.'" *State Farm Fire & Cas. Co. v. Castillo*, 829 So. 2d 242, 244 (Fla. Dist. Ct. App. 2002).

When words are undefined in a policy, "'[o]ne looks to the dictionary for the plain and ordinary meaning of words.'" *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1024 (11th Cir. 2014) (quoting *Beans v. Chohonis*, 740 So. 2d 65, 67 (Fla. Dist. Ct. App. 1999)); *see also Hegel v. First Liberty Ins. Corp.*, 778 F.3d 1214, 1221 (11th Cir. 2015) ("In construing insurance-policy terms, Florida courts 'commonly adopt the plain meaning of words contained in legal and non-legal dictionaries.'").

Of course, it is well-settled that if the "relevant policy language is susceptible to multiple reasonable interpretations, one providing coverage and another denying it, the insurance policy is ambiguous[,]" *Anderson*, 172 F.3d at 769, and "must be construed against the insurer and in favor of coverage." *Washington Nat'l Ins. Corp. v. Ruderman*, 117 So. 3d 943, 945 (Fla. 2013). Finally, "in any dispute over insurance coverage, the Court begins by examining the source of coverage itself—the general promises of coverage made in the insurance policy." *Mindis Metals, Inc. v. Transp. Ins. Co.*, 209 F.3d 1296, 1298 (11th Cir. 2000).

Here, the source of coverage is the "all-risk" Policy Lloyd's issued to Plaintiff. (APP66, APP103-104) "An all-risk policy provides coverage for all fortuitous loss or damage other than that resulting from willful misconduct or fraudulent acts – [u]nless the policy expressly excludes the loss from coverage." *S.O. Beach Corp. v. Great Am. Ins. Co. of N.Y.*, 791 F. App'x 106, 108 (11th Cir. 2019) (alteration in original) (quoting *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1085 (Fla. 2005)).

To recover under an all-risk policy, an insured must identify: (1) a fortuitous loss; (2) that occurred during the policy period. *Great Lakes Reinsurance (UK) PLC v. Kan-Do, Inc.*, 639 F. App'x 599, 601 (11th Cir. 2016) ("A fortuitous event . . . is an event which so far as the parties to the contract are aware, is dependent on chance.

It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, as the loss of a vessel, provided that the fact is unknown to the parties.").

B. The District Court Committed Reversible Error in Holding that "Physical Damage" Is Required to Allege a "Direct Physical Loss of" Property

As recounted above, the district court agreed with Lloyd's' argument that insured property must be "physically alter[ed]" for a "direct physical loss" to occur, dismissing Plaintiff's case on the ground that "the Amended Complaint falls short of alleging that Plaintiff's property sustained any physical damage." (APP555) This erroneous decision violated several principles of Florida common law. First, the district court did not consider how the proverbial "man-on-the-street" would interpret the phrase "direct physical loss of" property. Second, the district court improperly conflated "loss" and "damage" to mean the same thing when separated by the disjunctive "or," and ignored the important fact that the word "of" modifies "loss," while the word "to" modifies "damage." Third, the district court failed to follow binding law from Florida's intermediate appellate courts. Each error, independently, compels reversal.

1. The Plain Meaning of "Direct Physical Loss of" Property – As Understood by the Ordinary "Man-on-the-Street" – Includes Loss of Use or Loss of Functionality

Plaintiff respectfully submits that it defies common sense to conclude that an ordinary "man-on-the-street" would interpret the phrase "direct physical loss of" property to require ***either*** "physical alteration" of the structure (as Lloyd's expressly argued), when that phrase does not appear anywhere in the Policy, ***or*** "physical damage" (as the district court concluded), which would be entirely superfluous to the rest of the phrase, and the Policy would then read as requiring: "direct physical damage of or damage to property."

In this case, the Policy does not define the words "physical," "loss," or "damage." Accordingly, turning to the dictionary to ascertain "the plain and ordinary meaning" of these words is appropriate. *Winn-Dixie Stores, Inc.*, 746 F.3d at 1024.

Dictionaries define "loss" as "the act of losing possession: deprivation,"[9] or "[a]n undesirable outcome of a risk; the disappearance or diminution of value, usu. in an unexpected or relatively unpredictable way."[10] "Physical" means "having

[9] *Loss*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/loss.

[10] *Loss*, Black's Law Dictionary (11th ed. 2019).

material existence: perceptible especially through the senses and subject to the laws of nature."[11] "Damage" is defined as "injury to a person or property."[12]

These definitions illustrate an ordinary "man-on-the-street" would not only believe that "loss" and "damage" are distinct concepts, but that a "physical loss" would occur when one is "deprived" of using property with a material existence for its intended purpose or where one's property disappears or diminishes in value. Here, Plaintiff alleges that it was deprived of the use and functionality of its restaurant, including having to make structural alterations to its property, as a direct result of the Closure Orders. (APP69) Such allegations are sufficient to plead a plausible claim for coverage under the Policy.

The district court's failure to interpret the Policy as an ordinary "man-on-the-street" would is further shown by the court's reliance, in part, on a legal treatise, Couch on Insurance, to bestow a hyper-technical definition upon "physical loss" – a source an ordinary layperson would undoubtedly never consult. (APP553)[13] This

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[11] *Physical*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical.

[12] *Damage*, Black's Law Dictionary (11th ed. 2019).

[13] It is noteworthy that the same treatise relied upon by the district court also recognizes that "the opposite result has been reached" and coverage has been allowed "based on physical damage despite the lack of physical alteration of the property." 10A Couch on Insurance, §148.46 (3d ed. 2020).

reversible error is compounded when considering that the district court also judicially manufactured a "physical alteration" requirement into the Policy that simply does not exist. *See Anderson*, 172 F.3d at 769 ("courts must avoid 'adding hidden meanings, terms, conditions, or unexpressed intention' to policy provisions[.]").

The ***reasonable*** interpretation of the Policy, when viewed through the lens of an average person, conflicts with the interpretation advanced by Lloyd's and accepted by the district court, which, at a minimum, creates an ambiguity that must be construed in favor of Plaintiff as the insured. *Ruderman*, 117 So. 3d at 945.

2. "Loss" and "Damage" are Different Terms With Different Definitions

The district court also erred by failing to differentiate between the meanings of "loss of" and "damage to." The Policy's "use of the disjunctive word 'or' rather than a conjunctive connector" in the phrase "direct physical loss of ***or*** damage to" likewise demonstrates that an ordinary person would believe ***either*** a loss ***or*** damage would trigger coverage. *Foremost Ins. Co. v. Medders*, 399 So. 2d 128, 130 (Fla. Dist. Ct. App. 1981); *see also Landrum v. Allstate Ins. Co.*, 811 F. App'x 606, 609 (11th Cir. 2020) ("Use of the disjunctive 'or' in the policy indicates alternatives and requires that those alternatives be treated separately . . . ."); *see also Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 1:20 CV 1239, 2021 WL 168422, at *10

(N.D. Ohio Jan. 19, 2021) (granting summary judgment to plaintiffs as to coverage in COVID-19 context and noting, "Plaintiffs argue that physical loss of the real property means something different than damage to the real property, and this is a valid argument. Otherwise, why would both phrases appear side-by-side separated by the disjunctive conjunction 'or'?")

Florida law also supports this reasonable interpretation. *See Widdows v. State Farm Fla. Ins. Co.*, 920 So. 2d 149, 150 (Fla. Dist. Ct. App. 2006) (finding an "abnormality in the pipe itself was such a '***loss***'" and "it was ***not necessary*** for Appellant to establish any resulting ***damage*** from this condition").

Nevertheless, Lloyd's argued, and the district court agreed, that property must be "physically altered" in order for property to suffer a "direct physical loss." (APP105-107, APP530-531, APP555) This erroneous conclusion improperly collapses "loss" and "damage" into the same meaning. While "damage" indisputably includes structural injuries, "loss" does not. The Policy covers physical loss ***of*** property ***in addition to*** physical damage ***to*** property, "and if a physical loss could not occur without physical damage, then the policy would contain surplus language." *Manpower Inc. v. Ins. Co. of the State of Penn.*, No. 08C0085, 2009 WL 3738099, at *5 (E.D. Wis. Nov. 3, 2009). Such a result would subvert a cardinal principle of construction requiring that courts interpret insurance contracts to give

meaning to each provision without rendering any portion superfluous. *See Westport Ins. Corp. v. Tuskegee Newspapers, Inc.*, 402 F.3d 1161, 1166 (11th Cir. 2005) ("Each word [in an insurance contract] 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").

Indeed, if Lloyd's "wanted to limit liability of 'direct physical loss' to strictly require structural damage ***to*** property, then [Lloyd's], as the drafter[] of the policy, [was] required to do so explicitly." *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624, at *9 (E.D. Va. Dec. 9, 2020) (denying motion to dismiss in COVID-19 business interruption coverage case); *see also Henderson Rd.*, 2021 WL 168422, at *10 ("Here, Zurich's policy does not expressly limit coverage to physical loss ***to*** property; it extends coverage to direct physical loss ***of*** property as well.") (emphasis in original). However, Lloyd's did not. The Policy, therefore, "may be construed in favor of more coverage based on plausible interpretations." *Id.*

This Court's decision in *Hegel*, 778 F.3d at 1214, is instructive. There, the insureds made a claim on their homeowner's insurance policy for "sinkhole loss," which the policy defined as "structural damage to the building, including the foundation, caused by sinkhole activity." *Id.* at 1216. On summary judgment, the insurer argued that the damage to the insureds' residence does not qualify as "structural damage," *id.*, but the district court rejected that position, holding "that the term 'structural damage' should be interpreted to mean any 'damage to the structure.'" *Id.* at 1219. As such, the district court concluded that the insureds' claim for "damage to their home, including, but not limited to, progressive physical damage to the walls and floors of the residence," was covered under the policy, *id.* at 1217, and entered summary judgment for the insureds. *Id.* at 1219.

This Court reversed. *Id.* at 1222. In doing so, the Court explained that "structural damage to the building" could ***not*** mean the same thing as "physical damage to [the insureds'] home" because "[s]uch a construction would render the word 'structural' meaningless because all property damage is physical, thereby violating a foundational rule of contract construction that every word be given effect." *Id.* at 1221.

Here, it is the insurer – Lloyd's – that is attempting to rewrite the Policy to give the same meaning to the words "loss" and "damage." However, if "loss"

required "physical damage," as the district court held (APP555), it would, like in *Hegel*, "violat[e] a foundational rule of contract construction that every word be given effect." *Hegel*, at 778 F.3d at 1221.

Indeed, numerous courts in the COVID-19 context have reviewed the same policy language and concluded that "loss" and "damage" are distinct terms that require different meanings, and that, therefore, physical or structural alteration to the property is not required to suffer a "physical loss."

Recently, in *Elegant Massage*, the insured, like Plaintiff here, alleged the Closure Orders in Virginia caused it to suffer a direct physical loss. 2020 WL 7249624, at *8. The Eastern District of Virginia explained that "direct physical loss" had three accepted interpretations: (i) structural damage; (ii) distinct and demonstrable physical alteration; and (iii) when property is rendered uninhabitable, inaccessible, or dangerous to use. *Id.* *8-9.

Given the spectrum of accepted interpretations, the *Elegant Massage* court noted that if the insurer wanted to limit liability of "direct physical loss" to a specific definition, then it was incumbent on the insurer, as the drafter of the policy, to do so explicitly. *Id.* Ultimately, the court denied the insurer's motion to dismiss and held "it is plausible that Plaintiff experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive

Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus." *Id.* at *10. The court found the facts of the case "similar [to] those where courts found that asbestos, ammonia, odor from methamphetamine lab, or toxic gasses from drywall, which caused properties uninhabitable, inaccessible, and dangerous to use, constituted a direct physical loss." *Id.*

The Northern District of Ohio reached a similar result just days ago. In *Henderson Rd.*, the court granted summary judgment in favor of four restaurants and against Zurich as to insurance coverage – under an identical policy as here – for losses sustained by the Closure Orders. 2021 WL 168422, at *1, *17. Zurich's motion for summary judgment was a virtual mirror image to Lloyd's motion to dismiss here. *Id.* at *4-8.

In granting summary judgment to the plaintiffs, the *Henderson Rd.* court carefully analyzed Zurich's arguments and cited authorities and: (a) concluded that "the Policy's language ***is*** susceptible to [the] interpretation" that restaurants ***do*** suffer a "direct physical loss of" their properties when they are "no longer be[ing] used for their intended purposes – as dine-in restaurants[,]" *id.* at *10; (b) distinguished cases interpreting different policy language, noting that "Zurich's policy does not expressly limit coverage to physical loss ***to*** property; it extends coverage to direct physical loss ***of*** property as well[,]" *id.* at *10-11; (c) rejected Zurich's argument

that the plaintiffs suffered no loss because "they were still permitted to use [their restaurants] for take out [sic] orders[,]" where it was undisputed that the restaurants "were mostly used for dine-in customers[,]" *id.* at *11; (d) rejected Zurich's contention, and cited authorities holding, that "loss" required "***permanent*** dispossession[,]" because "real property can be lost and later returned or restored" and "Zurich's Policy did not require a permanent 'loss of' property and permanency is not embodied in the definition of loss[,]" *id.* at *12 (emphasis in original); and (e) concluded that "[b]ecause Zurich's Policy is susceptible of more than one interpretation, it must be construed liberally in favor of the insureds, i.e., Plaintiffs[,]" and "when the Policy is liberally construed in Plaintiffs' favor, it provides coverage for Plaintiffs' lost business income." *Id.*[14]

Further, in *Hill & Stout v. Mutual of Enumclaw*, the insured argued it suffered a direct physical loss when it could not use its dental office or equipment for their intended purpose in light of the executive orders in Washington. Order, *Hill & Stout v. Mutual of Enumclaw*, No. 20-2-07925-1, at 3 (Wash. Super. Ct. Nov. 13, 2020). The court denied the insurer's motion to dismiss, recognizing that an ordinary definition of "loss" includes "deprivation," *id.* at 4, and that an "average lay person"

[14] The court also certified for interlocutory review its summary judgment ruling on coverage. *Id.* at *17.

interpreting the policy would find that the insured suffered a "direct physical deprivation" because it was "unable to see patients and practice dentistry," because "[i]f 'physical loss of' was interpreted to mean 'damage to' then one or the other would be surplusage." *Id.* at 4-5.

In *North State Deli v. Cincinnati Ins. Co.*, the North Carolina Superior Court granted summary judgment for the insureds, holding that coverage was triggered because the insureds were deprived of the normal use of their property. No. 20-CVS-02569 (N.C. Super. Ct. Oct. 9, 2020). There, the insured argued government Closure Orders constituted a "direct physical loss" to covered property. The court agreed, reasoning that "direct physical loss" includes "the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions." *Id.* at 6.

In *Studio 417, Inc. v. Cincinnati Ins. Co.*, the Western District of Missouri found that the insured adequately pled its entitlement to business-interruption coverage in COVID-19 circumstances, explaining, "Defendant conflates 'loss' and 'damage' in support of its argument that the Policies require a tangible, physical alteration. However the Court must give meaning to both terms," and noting that "[o]ther courts have similarly recognized that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its

intended purpose." No. 20-CV-03127-SRB, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020).

Several other courts across the country have decided in favor of policyholders on the same or similar interpretive bases that Plaintiff set forth before the district court.[15] If these numerous court decisions tell us anything, it is that, while some, but

[15] *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, No. 620CV1174ORL22EJK, 2020 WL 5939172, at *4 (M.D. Fla. Sept. 24, 2020); *Studio 417*, 2020 WL 4692385, at *4; *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963, at *4 (W.D. Mo. Sept. 21, 2020); *K.C. Hopps, Ltd. v. Cincinnati Ins. Co.*, No. 20-CV-00437-SRB, 2020 WL 6483108, at *1 (W.D. Mo. Aug. 12, 2020); Entry Denying Motion to Dismiss, *Johansing Fam. Enters. LLC v. Cincinnati Specialty Underwriters Ins.*, No. A 2002349 (Ohio Ct. C.P. Jan. 8, 2021); Entry Denying Motion to Dismiss, *Queens Tower Rest. Inc. v. Cincinnati Fin. Corp.*, No. A 2001747 (Ohio Ct. C.P. Jan. 7, 2021); Order, *Francois Inc. v. Cincinnati Ins. Co.*, No. 20CV201416 (Ohio Ct. C.P. Sept. 29, 2020); Minute Order, *Best Rest Motel, Inc. v. Sequoia Ins. Co.*, No. 37-2020-00015679 (Cal. Super. Ct. Sept. 30, 2020); Order Denying Motion to Dismiss, *Lombardi's, Inc. v. Indem. Ins. Co. of N. Am.*, No. DC-20-05751-A (Tex. Dist. Ct. Oct. 15, 2020); Order, *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, No. 00375 (Pa. Ct. C.P. Oct. 26, 2020); Order Granting Motion for Partial Summary Judgment, *Perry St. Brewing Co. LLC v. Mut. of Enumclaw Ins.*, No. 2020221232 (Wash. Super. Ct. Nov. 23, 2020); Order, *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, No. A20-816628-B (Nev. Dist. Ct., Clark Cnty. Dec 1, 2020); Journal Entry, *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, No. CV-20-932117 (Ohio Ct. C.P. Nov. 17, 2020); Order Denying Motion to Dismiss, *Johnston Jewelers, Inc. v. Jewelers Mut. Ins. Co., S.I.*, No. 20-002221-CI (Fla. Cir. Ct. Sept. 22, 2020); Order, *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, No. 2020-02558 (La. Civ. Dist. Ct. Nov. 4, 2020); *Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, No. BER-L-2681-20, 2020 WL 5806576 (N.J. Super. Ct. Law Div. Aug. 13, 2020).

certainly not all, federal district courts have dismissed similar claims under Fed. R. Civ. P. 12(b)(6), countless state court judges interpreting their state's own insurance laws regarding what are quintessentially state-law issues, have denied motions to dismiss.

In addition, numerous courts, outside of the COVID-19 context, have also established that structural alteration to property is not required to suffer a "physical loss."

In *Western Fire Ins. Co. v. First Presbyterian Church*, for example, the insured property suffered an infiltration of gasoline and gasoline vapors, making the building uninhabitable. The insurer denied coverage, arguing that the building had suffered no "direct physical loss." 437 P.2d 52, 54 (Colo. 1968). The Colorado Supreme Court disagreed, holding that there was a "direct physical loss" even though there was no physical alteration in the church building. It found *Hughes v. Potomac Ins. Co. of D.C.*, 199 Cal. App. 2d 239, 18 Cal. Rptr. 650, 655 (Cal. Ct. App. 1962), to be the most analogous authority. In *Hughes*, a landslide left the insured's home on the precipice of a 30-foot cliff, but the home itself was undamaged. The insurer denied coverage, claiming that the home had suffered no physical damage. The California Court of Appeals rejected this position, holding:

> To accept appellant's interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in

> such a position as to overhang a steep cliff has not been "damaged" so long as its paint remains intact and its walls still adhere to one another. Despite the fact that a "dwelling building" might be rendered completely useless to its owners, appellant would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.

W. Fire, 437 P.2d at 56 (quoting *Hughes*, 199 Cal. App. 2d at 249, 18 Cal. Rptr. at 655).

Similarly, in *Gatti v. Hanover Ins. Co.*, the owners of an apartment complex noticed a rapidly spinning water meter, and determined that large amounts of water were leaking into the ground from underground pipes. 601 F. Supp. 210, 210 (E.D. Pa. 1985). The insurer denied the owners claim, arguing that "leakage of water into the ground is not a 'direct physical loss' and is therefore not covered by the policy." *Id.* at 211. The district court rejected the insurer's argument because it "ignore[d] the common-sense meaning of the phrase 'physical loss.'" *Id.* The court reasoned that if "damage" includes loss of use stemming from theft, "then 'physical loss' presents a stronger case for coverage." *Id.*

On the other side of the coin, in *Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F.3d 743 (7th Cir. 2015), the insured's metal roof was dented in a hail storm. The insurer denied coverage, arguing that the insured had suffered no "loss"

because the dents did not affect the functionality or value of the roof. The Seventh Circuit rejected this position.

> Cincinnati urges us to define "loss or damage" to mean "harm." It then makes the assumption that the dents caused by the hail did not harm the roof enough to diminish its function or value. No harm, no foul, it says: if this is the case, then it believes that the policy does not require it to pay to replace the roof. The problem with this analysis is that it bears no relation to the language of the policy.

Id. at 747. *Advance Cable* underscores the concept that "loss" relates to the functionality of the property, not whether it was physically altered. In accordance with the language of the policy, the insured is covered if it suffers "loss" or "damage."[16]

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[16] *See also Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014) ("While structural alteration provides the most obvious sign of physical damage, . . . property can sustain physical loss or damage without experiencing structural alteration."); *Motorists Mut. Ins. Co. v. Hardinger* 131 F. App'x 823, 826 (3d Cir. 2005) (finding loss of use constitutes "physical loss," and that questions of fact remained about the functionality of the property); *Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71, 76 (3d Cir. 1989) ("[A]n absence of possession and control falls within the plain meaning of 'loss.'"); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) ("Direct physical loss may also exist in the absence of structural damage to the insured property."); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (same); *Manpower*, 2009 WL 3738099, at *6 ("[The insured] suffered a "loss" of its interest in this property when the collapse prevented it from using the property for its intended purposes."); *Total Intermodal*, 2018 WL 3829767, at *3 ("[T]he 'loss of' property contemplates that the property is misplaced and unrecoverable, without regard to whether it was damaged.").

The bottom line is that "physical loss of" property must have a different meaning than "physical damage to" property. That is the only natural reading of the Policy, is the meaning an ordinary "man-on-the-street" would ascribe to it, and the district court's contrary interpretation – *i.e.*, that "physical damage" is required to allege a "physical loss" – cannot stand.

3. Under Binding Florida Law "Direct Physical Loss" Includes More than Structural Alterations or Physical Damage

Plaintiff's reading of the Policy is entirely consistent with Florida common law, as expressed by Florida's intermediate appellate courts. Lloyd's and the district court's reading is not.

In *Azalea*, an unknown substance was released into a sewage treatment plant causing the plant to shut down, even though the structure of the plant was not visibly altered. 656 So. 2d at 601. The city of Jacksonville subsequently closed the plant pending testing and remediation. *Id.* As a result of the unknown substance and the city's order, the plant could not be used for its intended purpose. *Id.*

The insurer in *Azalea* denied coverage arguing, as Lloyd's did here, "there was no direct physical loss to the" plant and "the structure was not damaged." *Id.* The trial court agreed with the insurer and found "that when the policy is viewed in its entirety, the . . . loss of use did not constitute direct physical loss." *Id.* at 602.

Florida's First District Court of Appeals reversed, rejecting the insurer's arguments as "not supported by either the facts or the law" and relying on *Hughes*, *Western Fire*, and *Gatti*, cases that found loss of use constitutes a direct physical loss. *Id.*

In light of (and citing to *Azalea*), the Middle District of Florida correctly pronounced that, "under Florida law 'direct physical loss' includes ***more than*** losses that harm the structure of the covered property." *Three Palms*, 250 F. Supp. 2d at 1364 (noting that *Azalea* provided recovery for "non-structural items integral to a covered property."). Although Plaintiff cited to *Three Palms* in opposing Lloyd's' motion to dismiss, the district court made no mention of it.

Further, in *Maspons*, a broken drain pipe under a kitchen floor caused plaintiffs' sink to drain slowly, but there were no allegations "that the broken drain pipe caused any water damage to the interior of the home[.]" 211 So. 3d at 1068. Despite the lack of "damage," Florida's Third District Court of Appeals held, "it is clear that the failure of the drain pipe ***to perform its function*** constituted a 'direct' and 'physical' loss to the property within the meaning of the policy." *Id.* at 1069.[17]

[17] The court ultimately reversed the trial court's finding of coverage because "[a]t the time of the summary judgment proceeding, the [kitchen] slab had not been opened[,]" thus "[t]here was no evidence that the water exiting the pipe had caused any damage to its surroundings" which would have triggered coverage under the separate "ensuing loss" provision. *Id.* at 1069-70. The issue before the court was whether plaintiffs were "entitled to indemnity under the 'ensuing loss' provision of a homeowners' insurance policy for the cost of tearing up and replacing a portion of

Finally, in *Widdows*, Florida's Fifth District Court of Appeals answered the question "whether [the insurer] has an obligation to repair a plumbing abnormality under a provision in the insurance policy that covers 'accidental direct physical loss' to the property." 920 So. 2d. at 150. The Court concluded "that the abnormality in the pipe itself was such a 'loss'. Under the language of the policy, it was not necessary for [the insured] to establish any resulting damage from this condition." *Id.*

Although the district court was undoubtedly "bound to follow" *Azalea*, *Maspons*, and *Widdows*, *see Bravo*, 577 F.3d at 1326, it did not. Instead, it relied on other federal district court and magistrate court orders, which, like the order below, did not cite either *Azalea* or *Widdows*, and only discussed *Maspons* in reference to a general proposition of Florida law. (APP553) The district court's conclusion that Plaintiff's "Amended Complaint falls short of alleging that Plaintiff's property sustained ***any physical damage***" (APP555), simply cannot be squared with *Azalea*, *Maspons*, or *Widdows*, which universally hold that "loss of use" constitutes a "direct physical loss" of property, and should be reversed.

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the foundation or slab on which their home sits, necessary to reach and replace a sanitary drain line, the repair and replacement of which is not covered under the policy." *Id.* at 1068. These considerations are not present in the instant case.

4. This Court's Unpublished Decision in *Mama Jo's* Supports Reversal

This Court recently recognized in *Mama Jo's* that "[*Maspons*] has addressed the definition of 'direct physical loss.'" *Mama Jo's*, 823 F. App'x at 879. However, *Maspons* was cited for the proposition that "direct" and "physical" modify "loss" and require that the loss must be "actual." *Id.* This definition provides no clarity on the specific manifestations needed to trigger coverage for "direct physical loss of . . . property," *id.*, which is the precise issue in this case. To answer that narrow question, as explained above, this Court must interpret *Azalea*. *See Strasser v. Nationwide Mut. Ins. Co.*, No. 09-60314-CIV, 2010 WL 667945, at *1 (S.D. Fla. Feb. 22, 2010) (noting *Azalea* "addressed what constituted a direct physical loss under the policy[.]").

To the extent this Court finds the *Maspons'* definition dispositive, Plaintiff satisfies that test. The loss in this case is "actual" because it is not theoretical, intangible, or incorporeal.[18] Rather, Plaintiff alleges it lost the functional use of tangible property with a material existence and was dispossessed of the physical space from which it obtained its primary source of income.

[18] "Actual," while not a term in the Policy, is defined as "existing in fact or reality" or "not false or apparent." *See Actual*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/actual.

Nevertheless, in *Mama Jo's*, this Court ultimately concluded that the insured "failed to show it suffered a 'direct physical loss'" on its claims "for cleaning the restaurant, and . . . for Business Income Loss." *Id.* Putting aside that there is no way to clean or sanitize a governmental shutdown order, should this Court find *Mama Jo's* persuasive,[19] it is not hostile to Plaintiff's interpretation of the Policy at issue.

Mama Jo's involved a restaurant that ***never shut down*** and asserted construction dust from nearby roadwork constituted "direct physical loss" to the property, claiming the responsive cleaning measures represented the scope of loss. 823 F. App'x at 871. Following summary judgment briefing, the district court held "cleaning is not considered direct physical loss." *Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 17-cv-23362-KMM, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018),), *aff'd*, 823 F. App'x 868 (11th Cir. 2020), *pet. for certiorari pending*, No. 20-998 (Jan. 15, 2021). The district court relied for its holding on a California appellate court decision to conclude that

> [a] direct physical loss contemplates 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 or requiring that repairs be made to make it so.

[19] "Unpublished decisions of this [C]ourt are not binding precedent." *Moore v. Barnhart*, 405 F.3d 1208, 1211 n.3 (11th Cir. 2005); *see also* 11th Cir. R. 36-2.

Id. (quoting *MRI Healthcare*, 187 Cal. App. 4th at 779, 115 Cal. Rptr. 3d at 37). The district court concluded that the restaurant suffered no loss not because the "restaurant was not 'uninhabitable' or 'unusable,'" but instead "remained open every day, customers were always able to access the restaurant, and there [was] no evidence that dust had an impact on the operation other than requiring daily cleaning." *Id.*

This Court affirmed. *Mama Jo's*, 823 F. App'x at 880. In doing so, the Court

> conclude[d] that the district court correctly granted summary judgment on [the insured's] cleaning claim because, 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. at 879 (citing, among other cases, *Maspons*, 211 So. 3d at 1069; *MRI Healthcare*, 187 Cal. App. 4th at 779, 115 Cal. Rptr. 3d at 37). The Court reached the same conclusion with respect to the insured's Business Income Loss claim. *Id.*

Mama Jo's supports reversal here for two reasons. First, unlike the restaurant in *Mama Jo's*, the Closure Orders, as alleged, entirely disrupted Plaintiff's operations, causing portions of the property to be "unusable" by prohibiting customers from entering and using the restaurant. (APP69) Second, focusing on the "function" of the covered property supports Plaintiff's position as it indicates that "physical loss" is not dependent on physical alteration, but rather can be shown when a property's functionality or use is impaired, which is exactly the type of loss

Plaintiff alleges. Put simply, the Closure Orders induced a detrimental change in the property's capabilities.

Moreover, there are several reasons to conclude that *Mama Jo's* is not persuasive authority. *See Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 (11th Cir. 2007) ("Unpublished opinions are not controlling authority and are persuasive only insofar as their legal analysis warrants."). First, neither the district court nor this Court analyzed the case in light of *Azalea*, which is on point.[20] Second, both the district court and this Court's reliance on *MRI Healthcare* was misplaced. *MRI Healthcare* does not support the Court's conclusion that "[a] direct physical loss contemplates an actual change in insured property[.]" *Mama Jo's*, 2018 WL 3412974, at *9. Unlike here, where the Policy covers losses caused by a "direct physical loss ***of*** . . . property" (APP194), the policy at issue in *MRI Healthcare* covered losses caused by an "accidental direct physical loss ***to*** business personal property at the premises," without the disjunctive "or" preceding "damage to." 187 Cal. App. 4th at 771, 115 Cal. Rptr. 3d at 37; *accord Henderson Rd.*, 2021 WL

[20] To be sure, in *Azalea*, the court held that the insured suffered a "direct physical loss" because "the substance" at the insured property "adhered to the interior of the facility which had to be chiseled and steamed off." 656 So. 2d at 601. This finding appears to conflict with the conclusion in *Mama Jo's* that the insured's claim for cleaning the "dust and debris generated by the construction" that had "migrated into the restaurant" was not a "direct physical loss." *Mama Jo's*, 823 F. App'x at 871.

168422, at *10 ("Here, Zurich's policy does not expressly limit coverage to physical loss ***to*** property; it extends coverage to direct physical loss ***of*** property as well.") (emphasis in original). Thus, it was error for the Court in *Mama Jo's* to rely on *MRI Healthcare* in deciding the coverage issue before it.

As the Central District of California explained in *Total Intermodal*, where the policy was identical to Plaintiff's Policy here, "the '***loss of***' property," given its ordinary and popular meaning, contemplates" property that "is misplaced and unrecoverable, without regard to whether it was damaged." 2018 WL 3829767, at *3 (emphasis in original). The court noted the operative language in *MRI Healthcare* was "direct physical loss ***to***" property, while the language in the *Total Intermodal* policy was "direct physical loss ***of***" property. *Id.* at *4 (emphasis in original). Because of the critical distinction between the prepositions "of" and "to," the court found that "'direct physical loss ***of***' should be construed differently from 'direct physical loss ***to***[.]'" *Id.* (emphasis in original).

Accordingly, the court in *Total Intermodal* held that the "loss of" property was "irreconcilable with [the insurer's] position requiring damage." *Id.* In the COVID-19 context, the Northern District of California relied on *Total Intermodal* and found that this same policy language "does ***not*** require a 'physical alteration of the property' or 'a ***physical change*** in the condition of the property." *Mudpie, Inc.*

v. Travelers Cas. Ins. Co. of Am., No. 20-cv-03213-JST, 2020 WL 5525171, at *4 (N.D. Cal. Sept. 14, 2020).[21]

Thus, the district court's and this Court's reliance on *MRI Healthcare* in *Mama Jo's* was misplaced as the policy language is distinguishable.

5. The District Court Erred in Relying on Inapt, Unpersuasive, or Wrongly Decided "COVID-19" Cases

In concluding that Plaintiff was required to allege "physical damage" to obtain coverage for "direct physical loss of" its property, the district court relied on *Mama Jo's* as well as several decisions from other courts (APP552-555), each of which is either inapt, unpersuasive, or wrongly decided.

The district court relied on a magistrate judge's report and recommendation to dismiss the complaint in *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIV, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020). (APP553-554) *Malaube* was wrongly decided. After analysis of what it believed to be the relevant law, the

[21] Although the *Mudpie* court gave separate effect to "loss" and "damage," and determined the insured had been "dispossessed of its storefront," it denied coverage based on an erroneous interpretation that *Total Intermodal* required a "permanent" dispossession of property. *Id.* at *4. In a footnote, the *Total Intermodal* court went out of its way to explain that permanent dispossession was meant to be an example, not the definition, of "loss of property." *Total Intermodal*, 2018 WL 3829767, at *4 n.4; *see also Henderson Rd.*, 2021 WL 168422, at *12 (discussing *Total Intermodal* court's important footnote caveat). *Mudpie* is currently on appeal to the Ninth Circuit.

magistrate judge determined that being closed as a result of the Closure Orders was not physical loss or damage because there was no physical alteration of the property.[22] 2020 WL 5051581, at *5-9. Despite the court's seemingly thorough analysis, it did not cite, much less discuss, binding Florida precedent holding that "under Florida law 'direct physical loss' includes ***more than*** losses that harm the structure of the covered property." *Three Palms Pointe*, 250 F. Supp. 2d at 1364.

The district court also relied on *Raymond H. Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 20-cv-22833, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020). (APP554) *Nahmad* is distinguishable. There, the "loss" the insured claimed was caused by the Closure Orders was solely its own "business income." *Nahmad*, 2020 WL 6392841, at *1. Unlike Plaintiff here, the plaintiff-dentistry in *Nahmad* made no allegations that its ***property*** suffered a "direct physical loss of or damage to" it, which is necessary for coverage. As such, it is unsurprising that the district court concluded that the plaintiff's "Complaint does not allege any physical harm to

[22] The *Malaube's* court's decision appears to have been influenced by the insured's failure to properly articulate its arguments. 2020 WL 5051581 at *5 (finding the insured's response "unhelpful because it is conclusory and fails to put forth any substantive reasons in support of its position," included "string cite[s] of parentheticals with no explanation as to how any of the cases are relevant," and "fails to offer any analysis whatsoever" for various cases).

Plaintiffs' Covered Property much less 'direct physical loss of or physical damage' caused by or resulting from a 'Covered Cause of Loss.'" *Id.* at *8. That being said, had the plaintiff in *Nahmad* alleged actual physical loss of use or functionality of its property, as Plaintiff does here, Plaintiff submits that the result should have been different in light of *Azalea*, *Maspons*, and *Widdows*.

The district court also relied on *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000*, No. 8:20-CV-1605-T-30AEP, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020), which rejected the plaintiff's argument "that economic damage is synonymous with 'physical loss' and is therefore covered under the Policies." *Id.* at *3. The court found that "Florida law and the plain language of the Policies reflect that actual, concrete damage is necessary." *Id.* However, *Infinity Exhibits* suffers from the same flawed reasoning as *Malaube*, *Nahmad*, and *Mama Jo's*, failing to consider and analyze Florida law that cuts against any "physical harm," "physical alteration," or "physical damage" requirement to plead coverage for "direct physical loss of" property.

The out-of-circuit authorities the district court relied on are equally unpersuasive. The district court cited a California district court decision for the proposition that "direct physical loss of" property requires a "distinct, demonstrable, physical alteration." (APP555) (citing *Travelers Cas. Ins. Co. of Am. v. Geragos &*

Geragos, No. CV 20-3619, 2020 WL 6156584 (C.D. Cal. Oct. 19, 2020)). *Geragos*, in turn, relied on *10E, LLC v. Travelers Indem. Co. of Conn.*, No. 20-CV-04418, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020). That "distinct, demonstrable, physical alteration" requirement, however, emanates from *MRI Healthcare*, 187 Cal. App. 4th at 779, 115 Cal. Rptr. 3d at 37, which, as explained above, concerned completely different policy language than the plaintiff's policy in both *Geragos* and *10E*, as well as Plaintiff's Policy in this case. *See Total Intermodal*, 2018 WL 3829767, at *4 (explaining that "*MRI* . . . cut[s] against Travelers: because the clauses on those cases differ from the Coverage clause here, it stands to reason that they also differ in meaning, such that 'direct physical loss of' should be construed differently from 'direct physical loss to' or 'direct physical loss.' The Court therefore rejects Travelers's proposed construction. Instead, the phrase 'loss of' includes the permanent dispossession of something.").[23]

Finally, the district court relied on *Hillcrest Optical, Inc. v. Continental Cas. Co.*, No. 20-CV-275, 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020), and *Seifert v. IMT Ins. Co.*, No. 20-1102, 2020 WL 6120002 (D. Minn. Oct. 16, 2020). In *Hillcrest Optical*, the court, interpreting Alabama law, found that "physical loss" required

[23] The *Traveler's* court made crystal clear that its use of the word "includes" conveyed that permanency of the dispossession was not required. *Id.* at *4 n.4.

some physical alteration of the insured property. 2020 WL 6163142, at *7. In so finding, the court attempted to distinguish contrary case law Plaintiff analyzed above, which squarely support Plaintiff's interpretation of the Policy; *to-wit*: *Murray*, 509 S.E.2d at 16; *Sentinel Mgmt.*, 563 N.W.2d at 300; and *W. Fire*, 437 P.2d at 55. In addition, the *Hillcrest Optical* court purported to rely on *Total Intermodal*, 2020 WL 6163142, at *4, but that case does not say what the *Hillcrest Optical* court claimed it said. Put simply, aside from the fact that it interprets a different state's common law, the analysis in *Hillcrest Optical* is significantly flawed.

In *Seifert*, the court, interpreting Minnesota law, found that "direct physical loss" did ***not*** require "structural damage or some other tangible injury," 2020 WL 6120002, at *3, but nevertheless concluded that "governmental action prohibiting the use of property, by itself, is not enough." *Id.* at *3. *Seifert* is unhelpful as it conflicts with governing Florida law.

In any event, this Court has held that "differing interpretations of the same provision is evidence of ambiguity, particularly when a term is not explicitly defined or clarified by the policy." *Dahl–Eimers v. Mut. of Omaha Life Ins. Co.*, 986 F.2d 1379, 1382 (11th Cir. 1993); *see also State Farm Fire & Cas. Ins. Co. v. Deni Assocs. of Fla., Inc.*, 678 So. 2d 397, 407 (Fla. Dist. Ct. App. 1996) (explaining that

divergent conclusions reached by different courts studying essentially the same language is an indicator that an insurance policy's language is ambiguous). If anything can be said about the federal and state court decisions construing "all-risk" insurance policies, including in the COVID-19 context, it is that learned judges from all corners of the nation have reached "differing interpretations of the same provision." Such a divergent set of views shows that reasonable minds can differ concerning the interpretation of the Policy language, which militates in favor of supporting coverage, not excluding it. *See Anderson*, 172 F.3d at 769 (noting that if the "relevant policy language is susceptible to multiple reasonable interpretations, one providing coverage and another denying it, the insurance policy is ambiguous.").

6. The "Period of Restoration" Provision Does Not Demonstrate that Structural Alteration or Physical Damage Is Required

Relying on the "period of restoration" provision in the Policy, the district court also reasoned that the words "repair" and "replace" in the definition of "period of restoration" connoted some "physical damage" requirement. (APP555). However, that provision is not evidence that "physical loss" requires structural alterations or physical damage of insured property. Indeed, there is no reference to structural alterations anywhere in this provision.

The Policy provides coverage for Business Income and Extra Expense losses during the "period of restoration," which begins with the "direct physical loss or damage" and ends on the earlier of:

> (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; ***or***
>
> (2) The date when business is resumed at a new permanent location.

(APP202)

The Policy also provides the following:

> We will pay Extra Expense (***other than the expense to repair or replace property***) to:
>
> (1) Avoid or minimize the "suspension" of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.
>
> (2) Minimize the "suspension" of business if you cannot continue "operations".

(APP194)

The district court concluded that the phrase "repaired, rebuilt, or replace" appearing in the "period of restoration" definition indicates there ***must be*** physical alteration of the insured property. (APP551, APP554-555) This interpretation disregards the legal maxim that "[e]ach word [in an insurance contract] is deemed

to have some meaning, and none should be assumed to be superfluous." *Westport*, 402 F.3d at 1166.

Here, the district court focused solely on ***one*** definition from the "period of restoration" section for its entire coverage rationale. The Policy's alternative end-date definition confirms that the "period of restoration" may also conclude "when business is resumed at new permanent location," which reinforces that no physical damage is necessary. This is consistent with a typical "period of restoration" timeframe, which encompasses the period from when the insured suffered the loss or damage (*i.e.*, when the Closure Orders went into effect) until the insured's business resumed or should have resumed business. *See, e.g.*, *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 958 F. Supp. 594, 602 (S.D. Fla. 1997) ("Under the terms of the policy, Dictiomatic is entitled to recover its actual loss of business income during the period of time necessary to restore the business operation."); *see also Henderson Rd.*, 2021 WL 168422, at *13 ("applying a plain reading of the definition of 'period of restoration,'" to reject insurer's argument that "period of restoration" supported a damage-to-property requirement). Moreover, the district court ignored the Policy's grant of coverage for Extra Expense ***other than repairing or replacing*** property to

avoid the "suspension" of business.[24] Thus, the district court's narrow interpretation was flawed as it improperly rendered other Policy provisions useless.

C. Certification to the Florida Supreme Court Is Appropriate

As explained above, Plaintiff submits that Florida law – as articulated by Florida's intermediate appellate courts – favors a finding of coverage in this case. Nevertheless, because there is no controlling Florida Supreme Court law on the pure legal question of whether loss of use or loss of functionality constitutes a "direct physical loss of" covered property, this Court would benefit from the Florida Supreme Court's resolution of the issue. *See Brinson v. Providence Cnty. Corr.*, 785 F. App'x 738, 740-41 (11th Cir. 2019) (recognizing that "the views of the state's highest court with respect to state law are binding on the federal courts."); *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) ("A State's highest court is unquestionably the ultimate expositor of state law.").

As this Court has explained, where there is "an unsettled issue of Florida law as to insurance policy coverage [that] controls the disposition of [a] case," and a "pure legal question of the interpretation of widely used language in commercial

[24] "Repair" is also not defined in the Policy. The common definition of "repair" means not only to fix what is broken, but also "to restore to a sound or healthy state." *Repair*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/repair.

liability insurance is at issue[,]" certification of a "question to the state supreme court to avoid making unnecessary *Erie* guesses and to offer the state court the opportunity to interpret or change existing law" is appropriate. *Penzer v. Transp. Ins. Co.*, 545 F.3d 1303, 1311 (11th Cir. 2008), *certified question answered*, 29 So. 3d 1000 (Fla. 2010) (quoting *Tobin v. Mich. Mut. Ins. Co.*, 398 F.3d 1267, 1274 (11th Cir. 2005)); *see also Pruco Life Ins. Co. v. Wells Fargo Bank, N.A.*, 780 F.3d 1327, 1336 (11th Cir. 2015), *certified question answered*, 200 So. 3d 1202 (Fla. 2016) ("When substantial doubt exists about the answer to a material state law question upon which the case turns, our caselaw indicates that it is appropriate to certify the particular question to the state supreme court in order to avoid making unnecessary state law guesses and to offer the state court the opportunity to explicate state law.").

Accordingly, this Court should certify the following question to the Florida Supreme Court under Article V, Section 3(B)(6) of the Florida Constitution:

> WHETHER, UNDER FLORIDA LAW, AN "ALL-RISK" COMMERCIAL INSURANCE POLICY THAT PROVIDES COVERAGE FOR BUSINESS INTERRUPTION LOSSES CAUSED BY A "DIRECT PHYSICAL LOSS OF OR DAMAGE TO PROPERTY" REQUIRES ACTUAL PHYSICAL DAMAGE THAT HARMS THE STRUCTURE OF THE COVERED PROPERTY.

VII. CONCLUSION

For all of the foregoing reasons, the Order and Judgment dismissing this action with prejudice should be reversed.

DATED: February 2, 2021

ROBBINS GELLER RUDMAN
& DOWD LLP
PAUL J. GELLER
STUART A. DAVIDSON

s/Stuart A. Davidson
Stuart A. Davidson

120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000
561/750-3364 (fax)
pgeller@rgrdlaw.com
sdavidson@rgrdlaw.com

ROBBINS GELLER RUDMAN
& DOWD LLP
SAMUEL H. RUDMAN
58 South Service Road, Suite 200
Melville, NY 11747
Telephone: 631/367-7100
631/367-1173 (fax)
srudman@rgrdlaw.com

CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO, P.C.
JAMES E. CECCHI
LINDSEY H. TAYLOR
5 Becker Farm Road
Roseland, NJ 07068
Telephone: 973/994-1700
973/994-1744 (fax)
jcecchi@carellabyrne.com
ltaylor@carellabyrne.com

SEEGER WEISS LLP
CHRISTOPHER A. SEEGER
STEPHEN A. WEISS
55 Challenger Road, 6th Floor
Ridgefield Park, NJ 07660
Telephone: 212/584-0700
212/584-0799 (fax)
cseeger@seegerweiss.com
sweiss@seegerweiss.com

THE SACKS FIRM
MICHAEL J. SACKS
Florida Bar No. 0065625
7210 Wisteria Avenue
Parkland, FL 33076
Telephone: 954/575-8691
954/445-2527 (fax)
msacks@bellsouth.net

Attorneys for Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Eleventh Circuit Rule 28-1. This brief contains 11,829 words and uses a Times New Roman 14 point font.

s/Stuart A. Davidson
Stuart A. Davidson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 2, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

s/Stuart A. Davidson
Stuart A. Davidson