UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PAPI, LLC, an Oregon limited liability company, dba Papi Chulo's Restaurant, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

THE CINCINNATI INSURANCE COMPANY, an Ohio corporation,

Defendant.

3:21-cv-00405-JR

FINDINGS & RECOMMENDATION

RUSSO, Magistrate Judge:

Plaintiff Papi, LLC, individually and behalf of all others similarly situated, brings this action against defendant Cincinnati Insurance Company, alleging claims for declaratory relief and breach of contract related to losses or damages incurred following certain COVID-related orders and directives issued by Oregon Governor Kate Brown and local civil authorities beginning in March 2020. Defendant filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (doc. 9). The motion should be granted.

INTRODUCTION

Plaintiff is an Oregon limited liability company which owns and operates Papi Chulo's Restaurant located in Portland, Oregon. Compl. at ¶ 2 (doc. 1). Defendant Cincinnati Insurance Company ("CIC") is an Ohio corporation having its principal place of business in Fairfield, Ohio. *Id.* at ¶ 3. Plaintiff purchased an insurance policy (the "Policy") from CIC with a policy period of August 6, 2019 to August 6, 2020. *Id*. at ¶ 7; Bernstein Decl., Ex. B at 1 (doc. 10). The Policy obliges CIC to pay plaintiff for direct physical loss or damage to covered property. Compl. at ¶ 10 (doc. 1).

In March 2020, Oregon Governor Kate Brown issued three executive orders in response to the COVID-19 pandemic. *See* Bernstein Decl., Ex.s C, D at 2, E at 4 (doc. 10). Plaintiff alleges such orders and other directives of local civil authorities (the "COVID-related orders") restricted access to and operation of plaintiff's business, limited groups of people, curtailed travel, and generally limited commercial activity, causing plaintiff to suffer loss or damage. Compl. at ¶ 12 (doc. 1). Plaintiff maintains the COVID-related orders also compelled plaintiff to undertake costly alterations to its business premises and operations. *Id.* at ¶ 13.

Plaintiff submitted a claim to CIC for loss or damage sustained as a result of the COVID-related orders. *Id.* at ¶¶ 15, 18. CIC denied the claim. *Id.* at ¶ 23. Plaintiff challenges that coverage denial in this action. *Id.* at ¶¶ 44–47, 49–51. Plaintiff alleges the COVID-related orders caused it to sustain direct physical loss or damage within the meaning of the Policy. *Id*. at ¶¶ 10, 12–17, 44–47.

Plaintiff alleges coverage for its loss or damage is available under the Policy's Business Income, Extra Expense, and Civil Authority coverages. *Id*. at ¶¶ 10, 17, 45–47. These coverage provisions are in the "Building and Personal Property Coverage Form" and the "Business Income (and Extra Expense) Coverage Form" sections of the Policy. Bernstein Decl., Ex. B at 23–62, 95–

103 (doc. 10). Using similar language, both sections oblige CIC to compensate the policyholder only if the requisite elements for coverage are satisfied. *Id.* at 40–41, 95–96.

> The Business Income coverage provisions state in pertinent part:
>
> We will pay for the actual loss of "Business Income" and "Rental Value" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss.

Id. at 40; *accord id.* at 95.

> The Extra Expense coverage provisions state in pertinent part:
>
> We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain … during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.

Id. at 41; *accord id.* at 95.

> The Civil Authority coverage provisions state in pertinent part:
>
> When a Covered Cause of Loss causes damage to property other than Covered Property at a "premises," we will pay for the actual loss of "Business Income" and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the "premises", provided that both of the following apply:
> (a) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
> (b) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Id. at 41; *accord id.* at 96.

Plaintiff asserts two causes of action: (1) declaratory relief; and (2) breach of contract. *Id.* at ¶¶ 42–52. First, plaintiff asks this Court to declare whether plaintiff is entitled to coverage under the Policy for loss or damage caused by the COVID-related orders. *Id.* at ¶ 43. Second, plaintiff alleges defendant breached the Policy by denying coverage. *Id.* at ¶¶ 49, 51. Plaintiff also seeks certification of a statewide class of similarly situated companies. *Id.* at ¶¶ 27–41. Defendant moves

to dismiss plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(6) and reserves the right to dispute the class action allegations and class certification. Def. Mot. at 1, 4 n. 2 (doc. 9).

LEGAL STANDARD

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). When evaluating the sufficiency of a complaint's factual allegations, the court must accept all material facts alleged in the complaint as true and construe them in the light most favorable to the non-moving party. *Wilson v. Hewlett-Packard Co*., 668 F.3d 1136, 1140 (9th Cir. 2012). The court will grant a motion to dismiss under Rule 12(b)(6) if a plaintiff alleges the "grounds" of her "entitlement to relief" with nothing "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]" *Id*. (citations and footnote omitted).

To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. In other words, a complaint must state a plausible claim for relief and contain "well-pleaded facts" that "permit the court to infer more than the mere possibility of misconduct[.]" *Id*. at 679. "Taken together, *Iqbal* and *Twombly* require well-pleaded facts, not legal conclusions, that plausibly give rise to an entitlement to relief. *Whitaker v. Tesla Motors, Inc*., 985 F.3d 1173, 1176 (9th Cir. 2021) (citations and internal quotations omitted).

DISCUSSION

Defendant moves to dismiss plaintiff's complaint arguing that plaintiff misinterprets what qualifies as a covered loss or damage under the Policy. Plaintiff alleges it suffered a "direct physical loss or damage" to covered property as defined by the Policy. Compl. at ¶ 44 (doc. 1). Plaintiff acknowledges that each of the applicable coverage provisions of the Policy "is predicated on the policyholder sustaining direct 'physical loss' or 'physical damage' to its covered property." Pl. Resp. at 4 (doc. 21). Plaintiff also clarified its position that it alleges it suffered a "physical loss" as the term is used in the Policy. *Id.* at 1. Thus, the threshold issue is whether plaintiff's alleged loss or damage constitutes a covered "physical loss" under the Policy.

A. Applicable Law

A federal court sitting in diversity applies the forum state's substantive law and federal procedural law. *Hyan v. Hummer*, 825 F.3d 1043, 1046 (9th Cir. 2016). Generally, when parties to a contract clearly express in the contract the law that applies, "the contractual rights and duties of the parties are governed by the law or laws that the parties have chosen." Or. Rev. Stat. § 15.350(1)–(2). The Policy at hand insures an Oregon company and contains various modifications catered to Oregon law. Bernstein Decl., Ex. B at 13–17 (doc. 10). Further, while the Policy contains no separate choice of law provision, both parties assume Oregon law applies here. Def. Mot. at 8–14 (doc. 9); Pl. Resp. at 6–20 (doc. 21). Therefore, this Court applies Oregon contract law in interpreting the Policy.

The framework for interpreting insurance policies is well-established under Oregon case law; the Court's primary task is to answer questions of law and to ascertain the parties' intentions. *Hoffman Construction Co. v. Fred S. James & Co.*, 313 Or. 464, 469 (1992). "We determine the intention of the parties based on the terms and conditions of the insurance policy," *id.*, as

interpreted from the perspective of the "ordinary purchaser of insurance." *Totten v. New York Life Ins. Co.*, 298 Or. 765, 771 (1985); *see also Hunters Ridge Condo. Ass'n v. Sherwood Crossing, LLC*, 285 Or. App. 416, 422 (2017). To understand the intentions and reasonable expectations of an ordinary insurance policyholder, Oregon courts conduct the following analysis.

> If an insurance policy explicitly defines the phrase in question, we apply that definition. If the policy does not define the phrase in question, we resort to various aids of interpretation to discern the parties' intended meaning. Under that interpretive framework, we first consider whether the phrase in question has a plain meaning, *i.e.*, whether it is susceptible to only one plausible interpretation. If the phrase in question has a plain meaning, we will apply that meaning and conduct no further analysis. If the phrase in question has more than one plausible interpretation, we will proceed to the second interpretive aid. That is, we examine the phrase in light of the particular context in which that phrase is used in the policy and the broader context of the policy as a whole. If the ambiguity remains after the court has engaged in those analytical exercises, then any reasonable doubt as to the intended meaning of such a term will be resolved against the insurance company.

Holloway v. Rep. Indem. Co. of Am., 341 Or. 642, 649–50 (2006) (internal quotation marks, citations, and brackets omitted).

An Oregon court will conclude "a term is ambiguous *only* if two or more plausible interpretations of that term withstand scrutiny, *i.e.*, continue[] to be reasonable[.]" *Id.* (quoting *Hoffman*, 313 Or. at 469) (emphasis in original). In addition, the insured bears the initial burden of establishing coverage. *ZRZ Realty Co. v. Beneficial Fire & Cas. Co.*, 222 Or. App. 453, 465 (2008). If the insured meets this burden, the insurer then has the burden of establishing an exclusion to coverage. *Id*.

B. Application of Oregon Law to the Policy

The crux of this case is the accurate meaning of "physical loss" under the Policy. Plaintiff, bearing the burden of establishing coverage, argues the COVID-related orders caused it to suffer a covered "physical loss" by restricting access to and operation of its restaurant, hampering social and commercial activity, and compelling plaintiff to undertake costly alterations to its premises

and business operations. Plaintiff also alleges similarly situated businesses suffered comparable harm.

Oregon rules of policy interpretation provide that "[i]f an insurance policy defines the phrase in question, [then the court] applies that definition." *Holloway*, 341 Or. at 650, 147 P.3d 329. If the insurance policy does not define the phrase, the court first considers whether it has a plain meaning. *Id*. If so, the court applies that meaning and conducts no further analysis. *Id*. Only where a court finds a phrase ambiguous, will it examine "the phrase in light of the particular context in which that [phrase] is used in the policy and the broader context of the policy as a whole." *Id.* (quotation marks and citation omitted).

1. Policy Term Definitions and Plain Meaning

Here, the key term in the Policy is "loss" defined as "accidental physical loss or accidental physical damage." Bernstein Decl., Ex. B at 60, 103 (doc. 10). The Policy also defines the term "Covered Causes of Loss" as "direct 'loss' unless the 'loss' is excluded or limited in this [Policy]." *Id.* at 27. Under the Business Income and Extra Expense coverage provisions, payments for a covered "loss" depends on the length of the "period of restoration." This is defined as a period beginning "at the time of direct 'loss'" and ending "on the earlier of (1) [t]he date when the property at the 'premises' should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) [t]he date when business is resumed at a new permanent location." *Id.* at 60–61, 103. Because the Policy does not define any of the above terms and phrases, this Court determines whether undefined words have a plain meaning by "reference to the usual source of ordinary meaning, the dictionary." *Phillips v. State Farm Fire & Cas. Co.*, 302 Or. App. 500, 506 (2020).

According to the Policy definitions above, a covered "loss" must be "direct," "accidental," and "physical." First, "direct" means "characterized by or giving evidence of a close esp. logical,

causal, or consequential relationship." Webster's Third New Int'l Dictionary 640 (unabridged ed. 2002); *see Summit Real Est. Mgmt. v. Mid-Century Ins. Co.*, 298 Or. App. 164, 177 (2019) (holding that "direct loss" means "loss resulting immediately and proximately from an event"). The COVID-related orders impacted plaintiff in a general, rather than direct, sense. These rules and regulations were implemented in the context of a global pandemic, and their impact on plaintiff was indirect and ancillary to public health prerogatives. Plaintiff does not allege its covered property was directly lost, destroyed, or physically changed by the COVID-related orders.

Second, the dictionary definition of the term "accidental" is "arising from or produced by extrinsic, secondary, or additional causes or forces." Webster's Third New Int'l Dictionary 11. Black's Law Dictionary defines the term "accident" as "an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental." Black's Law Dictionary 16 (9th ed. 2009) (citing John F. Dobbyn, Insurance Law in a Nutshell 128 (3d ed. 1996)). Issuance of COVID-related orders in response to the COVID pandemic was no accident. Such orders were justified reactions by policymakers to a public health crisis. Further, the economic losses directly caused by the COVID-related orders were not "accidental"—they did not occur by chance, and they arose from widely-known government actions in response to COVID cases in the State of Oregon. Given the severity and prevalence of associated public health challenges, the issuance of the COVID-related orders was at least reasonably foreseeable, and the orders' impact on Oregon businesses is more fairly categorized as incidental, not accidental.

Third, "physical" means "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary: material, natural[.]" Webster's Third New Int'l Dictionary 1706; *see also* 10A Couch on Insurance § 148.46 (3d ed. 2019) ("The requirement that the loss be

'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property."). Plaintiff, like many companies, experienced business disruption during the COVID pandemic. While the COVID-related orders may have required plaintiff to make alterations to its premises and business model, such alterations are not a loss in the "physical" sense. The orders were generally applicable rules, not wrecking balls. Plaintiff does not allege the COVID-related orders themselves removed, destroyed, or tangibly altered any of plaintiff's property. Plaintiff's alleged losses are more appropriately considered financial, and not physical, in nature. Thus, the plain meaning of the term "physical loss" does not encompass the plaintiff's business losses in the wake of the COVID-related orders.[1]

Further, the critical flaw in plaintiff's interpretation of "physical loss" is that it gives no actual meaning to the word "physical." *See Dakota Ventures v. Or. Mut. Ins. Co.,* 2021 WL 3572657, 6 (D. Or. 2021) ("The selective definition of 'loss' that [p]laintiff urges the Court to apply would render the word 'physical' surplusage…."). "We assume that parties to an insurance contract do not create meaningless provisions." *Hoffman*, 313 Or. at 472. A mere loss of use of insured property does not equate to a physical loss. *See, e.g., Dakota Ventures*, 2021 WL 3572657 at 9 ("The plain meaning of the policy language and the multitude of cases interpreting identical

[1] *See Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co*., 2016 WL 3267247, at 5 (D. Or. 2016) ("physical loss or damage" means "any injury or harm to a natural or material thing"), vacated by stipulation of the parties, 2017 WL 1034203 (2017); *Columbiaknit v. Affiliated FM Ins. Co.*, 1999 WL 619100, at 5 ("'The inclusion of the terms "direct" and "physical" could only have been intended to exclude indirect, nonphysical losses.'" (quoting *Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. and Loan Ass'n*, 793 F. Supp. 259, 263 (D. Or. 1990))). *Cf. Wy. Sawmills v. Transp. Ins. Co*., 282 Or. 401, 406, (1978) (Including the word "'physical' in the phrase 'physical injury to … tangible property' … negates any possibility that the policy was intended to include 'consequential or intangible damage,' such as depreciation in value, within the term 'property damage.'").

and similar language make clear that 'direct physical loss of or damage to property' does not include a 'loss of functionality' of undamaged property for its intended purpose.").

Plaintiff argues that "physical loss" does not require physical alteration or damage, and, in support of its position, points to a recent decision of this Court. *James W. Fowler Co. v. QBE Ins. Corp.*, 474 F.Supp.3d 1149 (D. Or. 2020), *rev'd and remanded*, 2021 WL 4922552 (9th Cir. Oct. 21, 2021). *Fowler* analyzed similar policy language in a dispute about whether Fowler suffered a "direct physical loss," for purposes of insurance coverage when a drill was immobilized some hundred feet below the surface of the ground. *Id.* at 1153–54. The insurer denied coverage, arguing there was no "direct physical loss" because the drill, although irretrievably lost, suffered no physical damage or alteration. *Id.* at 1155–56. This Court, however, rejected the insurance company's argument, reasoning the disjunctive policy phrase "loss or damage" indicated "'loss' must mean something more than just 'damage.'" *Id*. at 1158 (emphasis in original). The court went on to conclude the policyholder was entitled to coverage because there was a "direct physical loss" of the drill. *Id.* at 1163.

Plaintiff relies on *Fowler* to argue loss of use of covered property also constitutes a "loss" as the term is used in the Policy. However, *Fowler* stressed the alleged loss of the drill was "neither speculative nor intangible[,]" because the drill was irretrievably buried underground. *Id.* at 1157. Further, *Fowler* emphasized the "alleged loss is not intangible or incorporeal, *nor a mere detrimental economic effect*." *Id.* 1158 (emphasis added). The facts of the immediate case are readily distinguishable from *Fowler*—plaintiff's alleged loss due to the COVID-related orders are a far cry from the loss of a physical piece of equipment trapped underground. In addition, *Fowler* clarified that its holding was based on the physical loss of a tangible item of insured property and not on a "mere detrimental economic effect." *Id.* Thus, plaintiff's reliance on *Fowler* is misplaced.

2. Concept of "Loss" in Relation to the "Period of Restoration"

The Policy's definition of "period of restoration" also supports this Court's interpretation that physical loss or damage to tangible property must occur to invoke coverage. Pursuant to the Business Income and Extra Expense coverage provisions of the Policy, the amount of compensable loss depends on the length of the "period of restoration." The period ends either "when the property at the 'premises' should be repaired, rebuilt or replaced" or "when business is resumed at a new permanent location." Bernstein Decl., Ex. B at 60–61, 103 (doc. 10). This description implies that, to invoke coverage, plaintiff must lose or suffer physical damage to its tangible property which requires repair or replacement. Here, the COVID-related orders in question do not require the insured property to be repaired, rebuilt, or replaced, or the plaintiff's business to be permanently relocated. Plaintiff, like countless other businesses responding to the pandemic, has adjusted to a world indefinitely shaped by COVID. No repair, rebuilding, replacement, or relocation can offer a clear end to plaintiff's ersatz "period of restoration."

3. Civil Authority Coverage Provision

Finally, the Policy's Civil Authority coverage provisions also imply that plaintiff must suffer physical damage to its tangible property to receive compensation. These provisions oblige defendant to pay plaintiff if a "Covered Cause of Loss causes damage" to non-covered property at the "premises" and plaintiff suffers a loss "caused by action of civil authority that prohibits access to the 'premises[.]'" To trigger coverage under this provision, (1) access to the area immediately surrounding the "damaged property" must be prohibited by civil authority "as a result of the damage;" and (2) the civil authority's action must be "taken in response to dangerous physical conditions" or "taken to enable a civil authority to have unimpeded access to the damaged property." *Id.* at 41; *accord id.* at 96. However, plaintiff does not allege specific facts explaining

how the COVID-related orders were issued in response to dangerous physical conditions at its restaurant or to provide authorities with unimpeded access to the allegedly damaged property. Thus, the Civil Authority coverage provisions do not give credence to plaintiff's claims.

4. Conclusion

In sum, construing plaintiff's allegations in the light most favorable to plaintiff, the losses plaintiff alleges are purely economic and not the result of any "physical loss" or "physical damage" to covered property. Plaintiff attempts to characterize the harmful effects of the COVID-related orders as a "physical loss," yet fails to allege facts that enable the Court to plausibly conclude the orders caused a direct, accidental, physical loss of or damage to covered property. As such, plaintiff's interpretation of "physical loss" is not reasonable and the term is not ambiguous under the Policy. *See Hoffman*, 313 Or. at 469 (precluding the *contra proferentem* step of the insurance policy analysis under Oregon law where a disputed term is unambiguous). Because plaintiff's economic loss cannot constitute "physical loss" or "physical damage" under the Policy, plaintiff's argument fails at its threshold issue.

Numerous courts in this circuit and around the country have reached a similar conclusion.[2] Further, within the last few months, several cases brought in the District of Oregon have analyzed

[2] *See, e.g., Protégé Rest. Partners v. Sentinel Ins. Co.*, 517 F.Supp.3d 981, 987 (N.D. Cal. 2021) (finding "direct physical loss of or physical damage to" unambiguous, finding that it requires a "distinct, demonstrable, physical alteration of the property" to invoke coverage, and noting that every California court to address COVID-19 business interruption claims to date has concluded that "government orders that prevent full use of a commercial property or that make the business less profitable do not themselves cause or constitute 'direct physical loss of or physical damage to' the insured property."); *Pappy's Barber Shops v. Farmers Grp*., 491 F. Supp. 3d 738, 740 (S.D. Cal. 2020) (finding that even assuming presence of virus at the plaintiffs' business premises, business income losses were directly caused by precautionary measures taken by the state to prevent the spread of COVID-19 rather than by direct physical loss of or damage to property); *Uncork and Create v. Cincinnati Ins. Co.*, 498 F. Supp. 3d 878, 883 (S.D. W. Va. 2020) (no coverage because "COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant."); *Johnson v. Hartford Fin. Servs. Grp*., 510 F.Supp.3d 1326, 1337 (N.D. Ga. 2021) ("COVID-19 hurts people, not property[.]"); *Circus Circus LV, LP v. AIG Spec. Ins. Co*., 525 F. Supp. 1269, 1275 (D. Nev. 2021) (ruling "pure, economic losses caused by COVID-19 closures do not trigger policy coverage predicated on "direct physical loss or damage"); *Levy Ad Grp. v. Chubb Corp*., 519 F.Supp.3d 832, 836–37 (D. Nev. 2021) (same); *Nguyen v. Travelers Cas. Ins. Co. of Am*., —— F. Supp. 3d ——, —— – – ——, 2021 WL 2184878, at *10–11 (W.D. Wash. May 28, 2021) (granting insurer's dispositive motions in

the meaning of "direct physical loss of or damage to property" in the context of COVID-related business disruption. Chief Judge Hernández has concluded "[t]he plain meaning of those terms requires a Covered Cause of Loss to directly cause property to be lost or physically damaged for coverage to exist." *Dakota Ventures*, 2021 WL 3572657 at 6. Further, the court noted the insureds had not alleged and could not allege that their "restaurants or the business personal property located inside them was lost, destroyed, or physically changed in any manner" by COVID-related orders. *Id*. at 8–9.[3] Although Chief Judge Hernández was interpreting a different insurance contract than the contract at issue here, his analysis particularly regarding the plain meaning of "direct physical loss of or damage to property,"[4] is persuasive.

Ultimately, plaintiff's complaint does not "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). Plaintiff misconstrues the Policy coverage provisions so that its conclusory allegations that it has suffered direct physical loss are insufficient to state a claim. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009) ("conclusory allegations of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal"). Therefore, plaintiff fails to carry

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consolidated actions against ten groups of insurers brought by hundreds of Washington businesses and finding that COVID-19 does not cause "direct physical damage to" or "direct physical loss of" property); *Newman Myers Kreines Gross Harries v. Great N. Ins. Co*., 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) (finding that the phrase "direct physical loss or damage ... unambiguously[] requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage"); *Ass'n of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co*., 939 F. Supp. 2d 1059, 1069 (D. Haw. 2013) (concluding "direct physical loss or damage" means "that an event had a direct impact and proximately caused a loss related to the physical matter of the Property").

[3] Even "[c]onstruing the allegations in the light most favorable to [the insureds], the losses alleged by [the insureds] are purely economic and not the result of any 'direct physical loss of or damage to property.'" *Dakota Ventures*, 2021 WL 3572657 at 6; *accord Nue v. Or. Mut. Ins. Co.*, 2021 WL 4071862, 8–9 (D. Or. 2021); *Nari Suda v. Or. Mut. Ins. Co.*, 2021 WL 4067684, 7–8 (D. Or. 2021); *HILLBRO v. Or. Mut. Ins. Co.*, 2021 WL 4071864, 9–10 (D. Or. 2021); *N. Pac. Mgmt. v. Liberty Mut. Fire Ins. Co*., 2021 WL 4073278, 6–7 (D. Or. 2021); *RV Agate Beach v. Hartford Fire Ins. Co.*, 2021 WL 4851304, 2 (D. Or. 2021).

[4] "[T]he plain meaning of the phrase "direct physical loss of or damage to property" is direct (without intervening space or time) physical (of or relating to natural or material things) loss of (the act or fact of losing) or damage (injury or harm) to property." *Dakota Ventures*, 2021 WL 3572657 at 6.

its burden of establishing coverage and the Court should grant defendant's motion to dismiss with prejudice.

C. Leave to Amend

For the reasons stated above, plaintiff cannot recharacterize its alleged economic losses caused by the COVID-related orders as a "physical loss" covered by the Policy. Because the Court should find plaintiff's Complaint cannot be amended to plausibly allege a claim under the terms of the Policy, the Court should deny any leave to amend. *Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1059 (9th Cir. 2018) ("Leave to amend may be denied if amendment would be futile[.]").

CONCLUSION

Defendant's motion to dismiss (doc. 9) should be granted with prejudice and judgment should be entered accordingly.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 10th day of November, 2021.

/s/ Jolie A. Russo
Jolie A. Russo
United States Magistrate Judge