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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION AT LOS ANGELES

CARIBE RESTAURANT & NIGHTCLUB, INC., individually and on behalf of all others similarly situated,

Plaintiffs,

v.

TOPA INSURANCE COMPANY,

Defendant.

Case No.: 2:20-cv-3570-ODW-MRW

PLAINTIFF'S BRIEF IN OPPOSITION TO TOPA INSURANCE COMPANY'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. PRO. 12(B)(6)

Date: October 26, 2020
Time: 1:30 p.m.
Judge: Otis D. Wright II
Room: Courtroom 5D

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COME NOW Plaintiff Caribe Restaurant & Nightclub, Inc. (d/b/a Laz Luz Ultralounge) ("Caribe"), individually and on behalf of all others similarly situated, and in Response to the Motion to Dismiss filed by Defendant Topa Insurance Company ("the Motion") states as follows:

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should deny Topa Insurance Company's ("Topa") Motion. Topa's Motion turns on six plain and ordinary words: "direct physical loss of or damage." Although the words are ordinary, the impact of any decision on the merits by this Court will be extraordinary. Already, over one thousand cases have been filed by small businesses and larger ones seeking recovery of cumulative losses in the hundreds of billions of dollars for business interruption and property damage losses resulting from SARS-CoV-2 and the disease that it causes and that spreads it, COVID-19 (also known as the novel coronavirus).

The physical loss and damage suffered by Caribe since the outbreak of COVID-19, in many ways, differs little from the physical loss and damage experienced by innumerable businesses and public entities, including the physical loss or damage experienced by a property with which this Court is intimately familiar—the First Street U.S. Courthouse in Los Angeles. Before March 2020, if argument were heard in this case, it could have been held in Courtroom 5D with multiple lawyers present, a handful of journalists and concerned business owners, a court reporter, a marshal, and perhaps a law clerk. Similarly, a jury could have been selected and seated in Courtroom 5D and a trial could have been conducted there. Papers could have been filed in person at the clerk's office. Beginning on March 23, 2020, however, the Courthouse could not operate in this typical manner.[1] Civil and

[1] *See* https://www.cacd.uscourts.gov/sites/default/files/documents/Order_20-042.pdf

criminal trials and grand jury proceedings were postponed, in-person hearings became telephonic or video hearings, and the clerk's office was closed to the public. Currently, all Courthouses of the Central District of California remain closed to the public until further notice due to the COVID-19 pandemic and the recent surge of COVID-19 cases in the district.[2] Because of the outbreak of COVID-19, the Courthouse was impaired. It lost its functionality. It could no longer serve the administration of justice as it had before. This loss was direct. This loss was physical. The space could not be used.

So, too, with Caribe. Not only has Caribe pled that it suffered "direct physical loss of or damage to the covered property," (Dkt. 57, ¶ 39) ("The threat and presence of COVID-19 caused direct physical loss of or damage to the covered property under the Plaintiff's policies, and the policies of the other Class members"), which alone should suffice, particularly given the dozen judicially-noticeable legislative and administrative factual determinations that COVID-19 causes physical injury to property.[3] Caribe has also pled the details of that direct physical loss or damage. (*See* Dkt. 57, ¶ 26 (COVID-19 caused covered property to become unsafe and impaired business functions of covered properties); ¶ 8 (COVID-19 forced the suspension or reduction of business; ¶ 39 (the threat and presence of COVID-19 caused a necessary suspension of operations); ¶ 40 (COVID-19 presented a dangerous physical conditions on property)).

The upshot of Topa's argument is that "direct physical loss of or damage" requires structural alteration in the covered property.[4] That, of course, is not what

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[2] *See* https://www.cacd.uscourts.gov/news/covid-19-notice-2020-08

[3] *See, e.g.*, N.Y.C. Emergency Exec. Order No. 100, at 2 (Mar. 16, 2020), https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-100.pdf (emphasizing the virulence of COVID-19 and that it "physically is causing property loss and damage").

[4] While Topa does not use the word "structural," it implies such a requirement repeatedly. (Br. at 14-19). Topa completely ignores Caribe's allegation that "[t]he threat and presence of COVID-19 caused direct physical loss of or damage…" (Dkt. 57, ¶ 39). As discussed in detail below, courts

the words say, but as importantly, Topa and other insurers have known since at least the early 1960s that many courts do not agree that the term requires structural alteration. *E.g.*, *Hughes v. Potomac Insurance Co.*, 18 Cal. Rptr. 650, 655 (Cal. App. 1962) (rejecting insurer's argument that structural alteration was a *sine qua non* to physical damage under property insurance policy). It is common knowledge that insurers avidly follow court decisions and change their policy language to avoid certain outcomes. *E.g.*, *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 64 Wash. App. 838, 860, 827 P.2d 1024 (1992) (citing 7A J. Appleman, Insurance Law and Practice § 4491 (1979)) ("New policy language has been introduced in an attempt to clarify troublesome areas for the underwriters, or where court decisions were counter to insurer intentions."), *aff'd* 126 Wash. 2d 50, 882 P.2d 703 (1994). Here, however, the insurance industry has left this language substantively unchanged for decades, even though insurers, including Topa, easily could have changed the term "direct physical loss of or damage" to "structural alteration."

Similarly, insurers have known for almost two decades that viruses and diseases, including coronaviruses, infest property and stick to its surfaces and lead to claims of business interruption losses. *See* "Hotel Chain To Get Payout for SARS-Related Losses," *Business Insurance* (Nov. 2, 2003) ("HONG KONG-Mandarin Oriental International Ltd. will receive $16 million from its insurers to pay for business interruption losses suffered by the group's hotels in Asia as a result of the severe acute respiratory syndrome outbreak.").[5] Through their drafting arm, the Insurance Services Office ("ISO"), insurers communicated that concern to regulators when preparing a so-called "virus" exclusion to be placed in some policies, but not others:

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routinely find that the physical presence of a contaminant, such as a virus, constitutes direct physical loss or damage. There is simply no textual or legal requirement for a structural alteration.

[5] https://www.businessinsurance.com/article/20031102/story/100013638/hotel-chain-to-get-payout-for-sars-related-losses

> Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case.

(Dkt. 57, ¶ 27). To address that concern, Topa could easily have changed "direct physical loss or damage" to whatever term it believed would serve to exclude whatever is was seeking to exclude, but Topa did not.

Moreover, even if structural alteration were a prerequisite to coverage, the First Amended Complaint adequately states a claim because Caribe pled structural alteration in two ways: (1) infestation by a harmful agent; and (2) diminishment of functional space and loss of functionality of covered property. *E.g.*, Dkt. 57, ¶¶ 10-14, 26-27. The Motion lacks legal and factual merit and should be denied.

II. FACTUAL BACKGROUND

As stated more fully in the Amended Complaint (and incorporated herein), Caribe alleged basic facts concerning its business, the impact of COVID-19 on its business (as detailed in the introduction), the physical loss or damage that it has suffered, and Topa's response.

In short, Caribe purchased insurance coverage from Topa, including special property coverage, as set forth in Topa's Businessowner's Business Income (and Extra Expense) Coverage Form (Form CP 00 30 10 02) ("Special Property Coverage Form"). (Dkt. 57, ¶ 2). Unlike many policies that provide Business Income (also referred to as "business interruption") coverage, Topa's Special Property Coverage

Form does not include, and is not subject to, any exclusion for losses caused by the spread of viruses or communicable diseases. (Dkt. 57, ¶ 7).

Caribe was forced to suspend or reduce business at its location due to COVID-19 and the resultant closure orders issued by civil authorities in California mandating the closure of businesses like Caribe for on-site services or severely limiting the number of customers at any one time, in order to take necessary steps to prevent further damage and minimize the suspension of business and continue operations. (Dkt. 57, ¶¶ 8-11). Topa has, on a widescale and uniform basis, refused to pay its insureds under its Business Income, Civil Authority, Extra Expense and Sue and Labor coverages for losses suffered due to COVID-19, any executive orders by civil authorities that have required the necessary suspension of business, and any efforts to prevent further property damage or to minimize the suspension of business and continue operations. (Dkt. 57, ¶ 15). Indeed, Topa has denied Caribe's claim under its Topa policy. (Dkt. 57, ¶ 15).

III. ARGUMENT & AUTHORITIES

A. The FRCP 12(b)(6) Standard Requires Denial of Motion to Dismiss as Plaintiff has Sufficiently Stated a Claim

Topa's Motion fails on the merits, as detailed below. The function of a Rule 12(b)(6) motion is to test the legal sufficiency of the claims stated in the complaint. *Twin City Fire Ins. Co., Inc. v. Mitsubishi Motors Credit of Am., Inc.*, SA CV 04-43-GLTMLGX, 2004 WL 5496230, at *1 (C.D. Cal. June 17, 2004). To state a cognizable claim under federal notice pleading, the plaintiff is required to provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

In reviewing a motion to dismiss, a court should accept as true a plaintiff's well-pleaded factual allegations and construe all factual inferences in the light most

favorable to the plaintiff. *Inland Pac. Advisors, Inc. v. Markel Ins. Co.*, 818CV01497DOCADSX, 2018 WL 6588548, at *4 (C.D. Cal. Oct. 30, 2018), report and recommendation adopted, 818CV01497DOCADSX, 2018 WL 6822613 (C.D. Cal. Nov. 20, 2018). Further, the Court should draw all possible inferences in plaintiff's favor. *Id.; see Brown v. Garcia*, 17 Cal. App. 5th 1198, 1204, 225 Cal. Rptr. 3d 910, 914 (2017) ("Generally, in entertaining a motion to dismiss, the district court must accept the allegations of the complaint as true, and construe all inferences in the plaintiff's favor.").

B. Coverage Exists Under the Policy Because COVID-19 Caused Direct Physical Loss or Damage to Caribe

1. Rules of Insurance Policy Interpretation

As Professor Farnsworth pointed out in his landmark treatise on Contract Law, "[m]ost of what we usually think of as 'contract law' consists of a legal framework within which parties may create their own rights and duties by agreement." 2 E. Allan Farnsworth, *Farnsworth on Contracts* 218 (3d ed. 2004). And, "society confers upon contracting parties wide power to shape their relationship. In this country more than in most, parties tend to take advantage of their power to define their relationships by written agreements that are detailed and prolix." *Id.* The state's laws provide the framework for the relationship, governing, for example, the formation of a contract or what type of mistake can avoid the contract, but these framework issues will not be litigated in this case.

Generally, the interpretation of an insurance policy is a question of law that is decided under settled rules of contract interpretation. *Scottsdale Ins. Co. v. Hudson Specialty Ins. Co.*, 15-CV-02896-HSG, 2017 WL 1065132, at *4 (N.D. Cal. Mar. 21, 2017), aff'd, 738 Fed. Appx. 402 (9th Cir. 2018). While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply. *Bank of the W. v. Superior Court*, 2 Cal. 4th 1254, 1264, 833

P.2d 545, 551–52 (1992). The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. *Id.* If contractual language is clear and explicit, it governs. *Id.* The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage,' controls judicial interpretation. *Scottsdale*, 2017 WL 1065132, at *4.

2. "Direct Physical Loss or Damage" Is Not Limited to Structural Alterations

Those basic rules of insurance policy interpretation alone defeat Topa's position in this case. There is nothing about the plain meaning of the words "direct physical loss of or damage" that requires structural alteration. Far from it.

"Direct," when used as an adjective, is often defined as something "characterized by close logical, causal or consequential relationship" or something "marked by absence of an intervening agency, instrumentality, or influence" or something "proceeding from one point to another in time or space without deviation or interruption." *Direct*, Merriam-Webster Online Dictionary, (Sept. 24, 2020). Caselaw in various jurisdictions has held that the term "direct" in an all-risk insurance policy means to exclude "consequential and intangible damages such as loss in value." *Ashland Hosp. Corp. v. Affiliated FM Ins. Co.*, No. CIV.A. 11-16-DLB-EBA, 2013 WL 4400516, at *5 (E.D. Ky. Aug. 14, 2013) (holding that the damage to plaintiff's data network caused by overheating is "direct" because "the harm flows immediately or proximately from the heat exposure."); *Prudential Property & Cas. Ins. Co. v. Lillard-Roberts*, No. CV–01–1362–ST, 2002 WL 31495830, at *8 (D. Or. June 18, 2002); *see also Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. Civ. 98–434–HU, 1999 WL 619100 (D. Or. Aug. 4, 1999).

Simply absent from any meaning of the term "direct" is the notion that direct loss or damage requires *structural alteration* of covered property. *See Sentinel Mgmt.*

Co. v. N.H. Ins. Co., 563 N.W.2d 296 (Minn. Ct. App. 1997) ("Direct physical loss also may exist in the absence of structural damage to the insured property."); *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB (KSX), 2018 WL 3829767, at *3-4 (C.D. Cal. July 11, 2018).

"Physical," too, does not suggest any requirement for structural alteration. Pertinent definitions of "physical" make clear that the term describes something "having material existence" or something "perceptible especially through the senses." *Physical*, Merriam-Webster Online Dictionary, (Sept. 24, 2020). Many "physical" losses do not require structural change. An event or condition that prevents persons from inhabiting or operating a room in their home or business is no less "physical" of a loss under these definitions than an event that destroys that room. Topa is confusing the term "physical" with "structural." But, those terms are not synonyms. *See Physical*, Thesaurus.com (Sept. 24, 2020). "Physical" is a word of much greater breadth and denotes a much broader sphere than "structural."

Physical loss may take place even if the structure of covered property remains unchanged. "Where a general all-risk commercial or homeowner's policy insures against both 'loss' or 'damage' to an existing structure, 'physical' damage may take the form of loss of use of otherwise undamaged property, which in turn suffices as a covered loss." *One Place Condo., LLC v. Travelers Prop. Cas. Co. of Am.*, No. 11 C 2520, 2015 WL 2226202, at *9 (N.D. Ill. Apr. 22, 2015). The word "physical" limits coverage only in the sense that it "'negates any possibility that the policy was intended to include 'consequential or intangible injury,' such as depreciation in value, within the term 'property damage.'" *Lillard-Roberts*, 2002 WL 31495830, at *7 (quoting *Wyoming Sawmills, Inc. v. Transportation Ins. Co.*, 282 Or. 401, 406, 578 P.2d 1253 (1978)).

"Loss" carries no requirement of structural alteration. Definitions of "loss" include not only "destruction" and "ruin," but also "deprivation." *Loss*, Merriam-

Webster Online Dictionary, (Sept. 24, 2020). Synonyms for "loss" include "deprivation," "dispossession," and "impairment." *Loss*, thesaurus.com (Sept. 24, 2020).

In *Total Intermodal*, this Court reasoned that physical loss without physical damage is sufficient to trigger business interruption coverage where the property at issue was lost during shipment but was not structurally altered or damaged. *Total Intermodal Servs. Inc.*, 2018 WL 3829767, at *3-4. As here, the insurer in that case argued that "physical loss or damage" is covered only if the property is physically damaged. *Id.* at *4. The Court, however, interpreted that "direct physical loss of or damage to" encompassed "loss of use" of the property and ultimately held that property that was lost but not physically damaged still constituted physical loss of insured property. *See id.* at *3-4. Thus, "direct physical loss" does not require structural alteration of property. *See id.*

Even the term "damage" does not require a structural alteration. Damage is often defined simply as "loss or harm resulting from injury," but it is also defined as expense and cost. *Damage*, Merriam-Webster Online Dictionary, (Sept. 24, 2020). Synonyms for "damage" include "contamination," "impairment," "deprivation," and "detriment"—all terms with a physical aspect, but not necessarily a structural aspect. Quoting dictionaries, one court explained the term "damage" as follows:

> One dictionary defines "damage" as "injury or harm that reduces value or usefulness." *Random House Dictionary of the English Language*, 504 (2nd ed.1987). Another defines it as "injury or harm to a person or thing, resulting in a loss in soundness, value, etc." *Webster's New World Dictionary*, 356 (2nd ed.1980). A legal dictionary defines "damage" in part as "every loss or diminution" of a person's property. *Black's Law Dictionary* 389 (6th ed.1990). Clearly, without qualification, the term "damage" encompasses more than physical or tangible damage.

Dundee Mut. Ins. Co. v. Marifjeren, 587 N.W.2d 191, 194 (N.D. 1998).

But even if the term "damage" did suggest a requirement of structural alteration, that would only drive home the lack of such a requirement in the term

"direct physical loss of or damage" as a whole. Otherwise, why would insurers, including Topa, use *both* "loss of **or** damage." If "damage" were given a structure-altering meaning, "loss" would have to be given a meaning not carrying that requirement. Otherwise, loss would be rendered redundant and thus violate a cardinal rule of insurance policy interpretation. *E.g., Total Intermodal Servs. Inc.*, 2018 WL 3829767, at *3 ("[T]o interpret 'physical loss of' as requiring 'damage to' would render meaningless the 'or damage to' portion of the same clause, thereby violating a black-letter canon of contract interpretation—that every word be given a meaning."); *Veto v. Am. Family Mut. Ins. Co.*, 2012 WI App 56, ¶ 18, 341 Wis. 2d 390, 401, 815 N.W.2d 713, 718 ("[W]e construe insurance contracts so that 'none of the language [is] discarded as superfluous or meaningless.'") (internal citations omitted); *see also Nautilus Grp., Inc. v. Allianz Glob.l Risks US*, No. C11-5281BHS, 2012 WL 760940, at *7 (W.D. Wash. Mar. 8, 2012) ("If 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous.").

3. Plaintiff Has Adequately Alleged Direct Physical Loss or Damage Even If That Term Were Limited to Structural Alteration

Moreover, even if structural alteration were a prerequisite to coverage, the First Amended Complaint adequately states a claim because Caribe pled structural alteration in two ways: (1) infestation by a harmful agent; and (2) diminishment of functional space and loss of functionality of covered property. *E.g.*, Dkt. 57, ¶¶ 10-14, 26-27.

a. Infestation By Harmful Agents Constitutes Structural Alteration And Direct Physical Loss or Damage

The presence of COVID-19 constitutes direct physical loss or damage to property, even if that term requires a structural alteration. COVID-19 particles, though unseen, physically alter their property surfaces in a manner that causes loss and damage by rendering affected premises dangerous to human health.

Accordingly, on multiple occasions, courts have held that infestation of covered property by microscopic entities that are harmful to human health constitutes "direct physical loss or damage."

In *Cooper v. Travelers Indemnity Co.*, the Northern District of California held that the presence of e-coli bacteria in a restaurant's well, which forced the restaurant's closure, constituted direct physical damage to the property. C-01-2400-VRW, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002). Specifically, the Court noted that any other type of physical damage or structural alteration of property was not required by the terms of the insured's "all-risks" policy to trigger coverage of loss of business income. *See id.* at *4-5.

Courts around the country have reached similar results. *See General Mills, Inc. v. Gold Medal Insurance Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (finding that cereal oats infested by pesticide constituted direct physical loss); *Stack Metallurgical Services, Inc. v. Travelers Indem. Co. of Connecticut*, CIV. 05-1315-JE, 2007 WL 464715, *6–9 (D. Or. Feb. 7, 2007) (finding that contamination of a furnace by lead particles constituted direct physical loss or damage); *Lillard-Roberts*, 2002 WL 31495830, at *7–10 (holding that the presence of mold in covered property and the risk of systemic fungal disease constituted "direct physical loss to property"); *Columbiaknit*, 1999 WL 619100, at *6 (noting that "physical damage can occur at the molecular level and can be undetectable in a cursory inspection" and holding that the presence of microbial mold and fungi constituted "direct physical loss."); *Farmers Insurance. Co. of Oregon v. Trutanich*, 123 Or. App. 6, 10-11, 858 P.2d 1332, 1335-36 (1993) (holding that a pervasive odor which "infiltrated" a home as a result of tenants' cooking of methamphetamine physically damaged the house, causing "direct physical loss"); *see also Largent v. State Farm Fire & Cas. Co.*, 116 Or. App. 595, 597-98, 842 P.2d 445, 446 (1992) (holding that airborne vapors and particulates discharged during the cooking of methamphetamine damaged a rental house,

resulting in direct physical loss); *Oregon Shakespeare Festival Ass'n v. Great American Insurance Co.*, No. 1:15-CV-01932-CL, 2016 WL 32674227, at *9 (D. Or. June 7, 2016), *vacated by stipulation of the parties*, No. 1:15-CV-01932-CL, 2017 WL 1034203 (D. Or. Mar. 6, 2017) (finding that smoke infiltration of an outdoor theater that resulted in the cancellation of performances because the air contained an "unhealthy level of particulates" constituted "direct physical loss or damage"); *Gregory Packaging, Inc. v. Travelers Property Casualty Co.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *3, *6 (D.N.J. Nov. 25, 2014) (holding that the discharge of ammonia gas inflicted direct physical loss of or damage); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (holding that church building sustained physical loss when it was rendered uninhabitable and dangerous because of the accumulation of gasoline under and around the church); *Sentinel*, 563 N.W.2d at 300–01 (holding that contamination by asbestos fibers released from asbestos containing materials constituted a fortuitous, direct physical loss covered under an all-risk, first-party property insurance policy).

In its Complaint, Caribe has alleged that (1) COVID-19 presented a dangerous physical condition on property, (Dkt. 57 ¶ 40), (2) the presence of COVID-19 rendered the property unsafe, (*id.* ¶ 9), (3) COVID-19 has impaired Caribe's property by making it unusable in the way it was previously used (*id.* ¶ 10) and (4) the presence and threat of COVID-19 forced Caribe to suspend or reduce business on its property to avoid further harm (*id.* ¶¶ 8-10; 85). Accordingly, Caribe sufficiently alleged "direct physical loss of or damage" to property.

b. Impairment of Function Constitutes "Direct Physical Loss or Damage" And Is Also Structural Alteration

California courts have held that properties sustained direct physical loss or damage when they lose habitability or functionality, including commercial

functionality. *See Thee Sombrero, Inc. v. Scottsdale Ins. Co.*, 28 Cal. App. 5th 729, 734, 239 Cal. Rptr. 3d 416, 420 (2018).

In *Thee Sombrero*, a policyholder sought coverage for "property damage" when the policyholder was required to operate his nightclub only as a banquet hall following a shooting at the premises that resulted in the revocation and replacement of the policyholder's permit to operate the nightclub. *See Thee Sombrero, Inc.*, 28 Cal. App. 5th at 734, 239 Cal. Rptr. 3d at 420. In its reasoning, the California appellate court in this case pointed out that the loss of functionality or loss of any significant use of the insured's tangible property constituted property damage. *See id.* at 734-37, 420-23. The Court further reasoned:

> If your leased apartment was rendered uninhabitable by some noxious stench, you would conclude that you had lost the use of tangible property; and if the lawyer said no, actually you had merely lost the use of your intangible lease, you would goggle in disbelief.

Id. at 738, 423. Ultimately, the Court held that the loss of the policyholder's ability to use the property as a nightclub, as it did prior to the shooting event, constituted physical damage to property covered under the policy. *See id.* at 742, 426.

Furthermore, courts across the nation have also routinely held that properties sustained "direct physical loss or damage" when they lose habitability or functionality of the insured's property(ies). *See Gen. Mills, Inc.*, 622 N.W.2d at 152 (holding that a direct physical loss had occurred when an insured's property—cereal oats—was infested by an unapproved pesticide); *Stack Metallurgical Services, Inc.*, 2007 WL 464715, at *8 (holding that industrial furnace sustained "direct physical loss or damage" when contamination prevented it from being used for ordinary commercial purposes); *Gregory Packaging, Inc.*, 2014 WL 6675934, at *6 (holding that the discharge of ammonia gas inflicted direct physical loss of or damage to an insured's facility); *see Motorists Mutual Ins. Co. v. Hardinger*, 131 F. App'x. 823, 825–27 (3d Cir. 2005) (finding that contamination of a home's water supply that

rendered the home uninhabitable to constitute "direct physical loss"); *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (finding that an unpleasant odor rendering property unusable constituted physical injury to the property); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp. 2d 699, 709 (E.D.Va.2010), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013) (finding "direct physical loss" where a home was "rendered uninhabitable by the toxic gases" released by defective drywall).

Though Topa cites some COVID-19 insurance decisions that it contends support its position, (Br. at 17-19), these decisions involve different policies, issued by different insurers, to different policyholders, primarily in different states. Moreover, Topa does not address the following COVID-19 insurance decisions that have denied insurers' motions to dismiss under FRCP 12(b)(6) or its state equivalent. *E.g., Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020) (denying insurer's motion to dismiss); *K.C. Hopps, Ltd. V. Cincinnati Ins. Co.*, No. 20-cv-00437-SRB (W.D. Mo. August 12, 2020) (Ex. 1) (same); *Optical Services USA JC1 v. Franklin Mut. Ins. Co*., No. BER-L-3681-20 (Sup. Ct. N.J. Aug. 13, 2020) (Ex. 2) (oral decision denying insurer's motion to dismiss); *Ridley Park Fitness, LLC v. Philadelphia Indem. Ins. Co*., No. 01093 (Philadelphia Cty. C.P. Aug. 31, 2020) (Ex. 3) (denying insurer's preliminary objections under Pa. R.C.P. 1028(a)(4), the state equivalent of a motion to dismiss); *Blue Springs Dental Care, LLC, v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020) (denying insurer's motion to dismiss); *Urogynecology Specialist of Florida LLC v. Sentinel Ins. Co., Ltd.*, No. 20-cv-1174-Orl-22EJK (M.D. Fla. Sept. 24, 2020) (Ex. 4) ("Denying coverage for losses stemming from COVID-19, however, does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses.").

These decisions are instructive here. For example, in *Studio 417*, the court held that the plaintiffs adequately alleged a claim under policies providing very similar Business Income, Civil Authority, and Sue and Labor coverages compared to those at issue in this matter. *Studio 417*, 2020 WL 4692385, at *4-8. Just as in this case, "physical loss" or "physical damage" was at issue as it related to COVID-19's impact on small business operations. *Id*. at *4-5. The court emphasized, relying on similar dictionary definitions as used by Topa here, that the plaintiffs alleged a "direct physical loss." i. at *4. Indeed, the *Studio 417* court cited case law in support of the very proposition that Topa would have this court discount: that "*even absent a physical alteration*, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose." *Id*. at *5 (emphasis added). The court therefore denied the insurer's motion to dismiss. *Id*. at *8.

In *Blue Springs Dental Care* the insurer argued that because the plaintiffs did not allege that their properties must be repaired, rebuilt, or replaced, they had not alleged a "period of restoration." No. 20-CV-00383-SRB, 2020 WL 5637963, at *6 (W.D. Mo. Sept. 21, 2020). As the court explained, however, the plaintiffs' allegations were more than sufficient at the motion to dismiss stage:

> The Court finds Plaintiffs have met their burden at this stage of the proceeding. ***Plaintiffs plausibly allege their dental clinics ceased operations, entirely or in part, "on or about March 17, 2020, and have remained at that limited operational capacity through the date of this Complaint."*** (Doc. #1, ¶ 16.) Discovery will ultimately show whether Plaintiffs' alleged closure date was the actual date when the alleged physical loss occurred, the duration of that alleged physical loss, at what point in time the insured properties could or should have been repaired, rebuilt, or replaced, and whether Plaintiffs took those restoration measures. For now, Plaintiffs have done enough to survive dismissal on this point.

Id. Here, too, Caribe alleged that it was required to suspend or reduce operations as a result of the Closure Orders in March 2020. (Dkt. 57, ¶¶ 8, 11). As explained in *Blue*

Springs Dental Care, that is more than sufficient to survive a motion to dismiss on this point. 2020 WL 5637963, at *6.

Because Caribe has alleged that (1) COVID-19 presented a dangerous physical condition on property (Dkt. ¶ 40), (2) COVID-19 caused the loss of functionality of Caribe's property (*id.* ¶¶ 10-14), (3) COVID-19 has impaired Caribe's property by making it unusable in the way it was previously used (*id.* ¶ 10), (4) the threat and presence of COVID-19 caused a necessary suspension of operations (*id.* ¶ 54), and (5) the presence and threat of COVID-19 forced Caribe to suspend or reduce business on its property to avoid further harm, (*id.* ¶¶ 8-10; 85), Caribe sufficiently alleged "direct physical loss of or damage" to property.

4. Legislative and Executive Enactments Establishing that the Outbreak of COVID-19 is Direct Physical Loss or Damage Further Confirm That Caribe Has Sufficiently Stated a Claim

In deciding a motion to dismiss, this Court may consider any evidence that is the proper subject of judicial notice. Courts may look to administrative rules, records of administrative agencies, court filings, and other matters of public record. *See Gregory v. Fresno County*, 118CV00524LJOSAB, 2019 WL 2420548, at *5-6 (E.D. Cal. June 10, 2019), *report and recommendation adopted*, 118CV00524LJOSAB, 2019 WL 7601832 (E.D. Cal. Aug. 8, 2019). Statutes, enactments, and laws, of course, fall within this category. *See id.*

Federal courts, in particular, often recognize the superior fact-finding capabilities of legislative bodies and executive agencies compared to courts. *See e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Here, numerous legislative and executive bodies have issued fact-based determinations that make clear that COVID-19 results in direct physical loss or damage. *See* Napa Cty. Cal. Health & Human Service Agency, Order of the Napa Cty. Health Officer (Mar. 18, 2020) (issuing restrictions based on evidence of the spread of COVID-19 within the Bay

Area and Napa County "and the physical damage to property caused by the virus.");[6] N.Y.C. Emergency Exec. Order No. 100, at 2 (Mar. 16, 2020) (emphasizing the virulence of COVID-19 and that it "physically is causing property loss and damage") (discussed above);[7] N.Y.C. Emergency Executive Order No. 103, at 1 (Mar. 25, 2020) (action taken to prevent the spread of COVID-19 "have led to property loss and damage");[8] Broward Cty. Fla. Administrator's Emergency Order No. 20-01, at 2 (Mar. 22, 2020) (noting that COVID-19 "constitutes a clear and present threat to the lives, health, welfare, and safety of the people of Broward County.");[9] Harris Cty. Tex. Office of Homeland Security & Emergency Mgmt., Order of Cty. J. Lina Hidalgo, at 2 (Mar. 24, 2020) (emphasizing that the COVID-19 virus can cause "property loss or damage" due to its contagious nature and transmission through "person-to-person contact, especially in group settings");[10] City of Key West Fla. State of Local Emergency Directive 2020-03, at 2 (Mar. 21, 2020) (COVID-19 is "causing property damage due to its proclivity to attach to surfaces for prolonged periods of time.");[11] City of Oakland Park Fla. Local Public Emergency Action Directive, at 2 (Mar. 19, 2020) (COVID-19 is "physically causing property damage");[12] Panama City Fla. Resolution No. 20200318.1 (Mar. 18, 2020), (stating that the resolution is necessary because of COVID-19's propensity to spread person to person and because the "virus physically is causing property damage");[13] Exec. Order of the Hillsborough Cty. Fla. Emergency Policy Group, at 2 (Mar. 27, 2020) (in addition to COVID-19's creation of a "dangerous physical condition", it also

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[6] https://www.countyofnapa.org/DocumentCenter/View/16687/3-18-2020-Shelter-at-Home-Order.
[7] https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-100.pdf.
[8] https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-103.pdf
[9] https://www.broward.org/CoronaVirus/Documents/BerthaHenryExecutiveOrder20-01.pdf.
[10] https://www.taa.org/wp-content/uploads/2020/03/03-24-20-Stay-Home-Work-Safe-Order_Harris-County.pdf.
[11] https://www.cityofkeywest-fl.gov/egov/documents/1584822002_20507.pdf.
[12] https://oaklandparkfl.gov/DocumentCenter/View/8408/Local-Public-Emergency-Action-Directive-19-March-2020-PDF.
[13] https://www.pcgov.org/AgendaCenter/ViewFile/Item/5711?fileID=16604.

creates "property or business income loss and damage in certain circumstances");[14] Colorado Dep't of Pub. Health & Env't, Updated Public Health Order No. 20-24, at 1 (Mar. 26, 2020) (emphasizing the danger of "property loss, contamination, and damage" due to COVID-19's "propensity to attach to surfaces for prolonged periods of time");[15] Sixth Supp. to Mayoral Proclamation Declaring the Existence of a Local Emergency, 26 (Mar. 27, 2020), ("This order and the previous orders issued during this emergency have all been issued . . . because the virus physically is causing property loss or damage due to its proclivity to attach to surfaces for prolonged periods of time.");[16] and City of Durham NC, Second Amendment to Declaration of State of Emergency, at 8 (effective Mar. 26, 2020) (prohibiting entities that provide food services from allowing food to be eaten at the site where it is provided "due to the virus's propensity to physically impact surfaces and personal property.").[17]

Given these legislative and executive findings, by simply alleging that Caribe suffered "direct physical loss of or damage" to property—and, as explained above, it did much more than that—Caribe adequately stated a claim for relief.

C. Coverage Exists Under the Civil Authority Coverage Clause Because COVID-19 Damaged Other Properties and Because a Complete Prohibition is Not Required under the Policy

1. COVID-19 Damaged Other Properties

Under the Topa policy, Civil Authority coverage applies when a Covered Cause of Loss causes damage to property other than property at the described premises, (*i.e.*, a third party's property), and the action of a civil authority prohibits access to the insured's premises as a result.

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[14] https://www.hillsboroughcounty.org/library/hillsborough/mediacenter/documents/administrator/epg/saferathomeorder.pdf.

[15] https://www.pueblo.us/DocumentCenter/View/26395/Updated-Public-Health-Order---032620.

[16] https://sfgov.org/sunshine/sites/default/files/sotf_061020_item3.pdf.

[17] https://durhamnc.gov/DocumentCenter/View/30043/City-of-Durham-Mayor-Emergency-Dec-Second-Amdmt-3-25-20_FINAL.

Topa contends there was no 'direct physical loss' to any property—either the insured's property or the property of others, (Br. at 22-23), but Topa has it backwards. As described above, for the same reasons COVID-19 caused physical loss or damage to Caribe, COVID-19 caused physical loss or damage to *all* restaurants and bars in California, including those establishments located in the area immediately surrounding Caribe's property.

Caribe's Amended Complaint alleged that there was damage to Caribe's property, properties of other Class members, and other establishments in California due to COVID-19, which is why the shutdown orders were issued. (Dkt. 57 ¶¶ 26, 31, 33-34). That necessarily includes those restaurants, bars, and mass gathering establishments immediately surrounding Caribe. As described above, that damage constitutes physical loss or damage alleged due to COVID-19, and thus is of the type included within a Covered Clause of Loss. For similar reasons, Topa is mistaken when it suggests that the Amended Complaint fails to state a claim because Caribe did not plead a prohibition of access to its property or a prohibition of access to the area immediately surrounding damaged property. The policy requirement on which Topa bases this contention is on its face designed just to ensure that the policyholder's business was located in a place subject to the civil authority orders. (Dkt. 7, at at 43) ("Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within the area"). Here, Caribe has plainly pled that its business was subject to the civil authority orders. (Dkt. 57, at 7-8).

2. A Complete Prohibition Is Not Required Under the Plain Language of the Policy and No Other Grounds Exist to Avoid Coverage

Topa contends that the ordinances issued by civil authorities "limit[ed] business uses for a particular premises" but was "not in any sense 'prohibit[ing] access' to that premise." (Br. At 22). As such, Topa posits that those limitations are

not sufficient to trigger coverage because Caribe was not *completely* barred from accessing its premises. *Id.* at 22-23. The plain language of the Topa policy, however, makes clear that a complete prohibition of access to the insured's premises is not required to trigger coverage. Rather, the policy merely requires that access be "prohibited" by a civil authority. (Dkt. 7, at 43). Though "prohibited" is sometimes defined to mean "forbid" it is also defined to mean "hinder." *Prohibit*, Dictionary.com (Sept. 24, 2020). "Hinder," in turn, means "to cause delay, interruption, or difficulty in" and "to be an obstacle or impediment." *See Hinder*, Dictionary.com (Sept. 24, 2020). Topa cannot seriously argue that the relevant civil authority orders, which greatly impacted restaurant operations (including substantial restrictions on in-person dining), have not caused "interruption," "difficulty," or presented an "obstacle" for innumerable restaurants across the country, including Caribe.

Moreover, the pretextual "requirement" of *complete* prohibition in Topa's Motion—a "requirement" that is *not* in the policies—is belied by the fact that the policy's Civil Authority clause specifically provides coverage for Extra Expense. (Dkt. 7, at 43) ("we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority"). The policy defines "Extra Expense" as expenses "to avoid or minimize the 'suspension' of business and to continue operations." (Dkt. 7, at 42). Further, under the policy, the term "suspension" means "the slowdown *or* cessation of [the insured's] business activities." (Dkt. 7, at 50) (emphasis added).

In its Motion, Topa cites a California case to support its claim that "prohibit[ing] access" means "to forbid by authority or command." (Br. 30-31). However, Topa misinterprets this case. There, the policyholder, a tour operator, sought coverage for business income damages stemming from the FAA's order grounding all civil air traffic following the terrorist attacks of September 11, 2001.

See Backroads Corp. v. Great Nothern Ins., C 03-4615 VRW, 2005 WL 1866397, at *1 (N.D. Cal. Aug. 1, 2005). The central issue was whether air travel providers, namely the World Trade Center and Pentagon, constituted "dependent business premises" to trigger coverage provided by the "civil authority" provision. *See Backroads Corp.*, 2005 WL 1866397, at *4. The court refused to find that air travel providers constituted dependent businesses within the meaning of the policy, and based on this conclusion, the court further concluded that the insured's claim for "civil authority" failed. *See id.* at *6. The FAA's order did not—because it could not—prohibit access to the policyholder's "dependent business premises." *See id.* at *6. Absent is the court's discussion or ruling that "prohibition of access" under a "civil authority" provision means "to forbid by authority or command."

Topa also cites *United Air Lines, Inc. v. Ins. Co. of State of PA*, 439 F.3d 128, 129 (2d Cir. 2006), but that case is inapposite. Importantly, the "Property Terrorism & Sabotage" policy at issue in *United* included limiting language not present in the Topa policy. Under the *United* policy, the insured needed to show that "access to the Insured Locations is prohibited by order of civil authority as a *direct result* of damage to *adjacent* premises." *Id.* at 129 (emphasis added). United, however, could not show that the relevant civil authority order (which grounded flights out of Reagan National Airport in Washington, DC) was the "direct result" of damage to an "adjacent property" (which United claimed was the Pentagon) because the FAA had already grounded flights *before* the Pentagon was struck based on the attack at the World Trade Center. *Id.* at 134-35. Here, the Topa policy does not contain any of the narrowly worded causation-based requirements like the one the court focused on in *United*. *E.g.*, Dkt. 7, at 43 (using the term "result" instead of "direct result" and "within the area" instead of "adjacent").

In addition, Topa's brief omits any mention of the many cases in which courts concluded that non-structural damage is sufficient to trigger coverage based on

actions of civil authorities. *E.g.*, *Sloan v. Phoenix of Hartford Ins. Co.*, 46 Mich. App. 46, 51, 207 N.W.2d 434, 437 (1973) (concluding that physical damage to the premises was not a prerequisite for the payment of benefits under the business-interruption policy); *Allen Park Theatre Co. v. Michigan Millers Mut. Ins. Co.*, 48 Mich. App. 199, 201, 210 N.W.2d 402, 403 (1973) ("If the insurer wanted to be sure that the payment of business interruption benefits had to be accompanied by physical damage it was its burden to say so unequivocally.").

At the very least, the language of the Civil Authority coverage in the Topa policy is ambiguous and must be construed against the insurer. *State of California v. Cont'l Ins. Co.*, 55 Cal. 4th 186, 195, 281 P.3d 1000, 1005 (2012), as modified (Sept. 19, 2012) ("ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured's reasonable expectation of coverage").

D. Coverage Exists Under the Sue and Labor Clause because Topa Required Caribe to Incur these Expenses and Topa Benefited from these Expenses

In the event of loss or damage to the insured properties, the Topa policy requires policyholders to "[t]ake all reasonable steps to protect the Covered Property from further damage, and keep a record of [the insured's] expenses necessary to protect the Covered Property, for consideration in the settlement of the claim." (Dkt. 7 at 36). This provision, of course, protects Topa against even greater losses, and therefore, Topa must reimburse policyholders for these mitigation expenses.

As noted above, numerous legislative and executive bodies have determined that COVID-19 results in direct physical loss or damage. As a result, governmental authorities across the United States issued closure orders affecting restaurants, hotels, and other businesses. Such closure orders also impacted Caribe, and Caribe dutifully complied with its obligations under the policy to protect its property from further

damage and to keep a record of its expenses. Caribe's actions were reasonable. Caribe's actions were required under the policies. Caribe's actions minimized loss for which Topa would otherwise be liable. Topa, therefore, should pay for these expenses.

Not only has Caribe pled the details of how it suffered "direct physical loss of or damage" to property caused by COVID-19 (*See* Dkt. 57, ¶¶ 8, 26, 39, 40), Caribe has also pled that it incurred expenses in connection with taking reasonable steps to protect the insured property (*See id.* ¶ 85). As such, Caribe has sufficiently identified loss for which Topa is liable. Nevertheless, Topa continues to ignore all of these allegations by claiming otherwise. (Br. 31).

Additionally, in *Grebow*, a California appellate court concluded that an insurer is obligated to reimburse an insured for costs to prevent an imminent loss if the Sue and Labor clause provides for such reimbursement. *See Grebow v. Mercury Ins. Co.*, 241 Cal. App. 4th 564, 576, 194 Cal. Rptr. 3d 259, 267 n.3 (2015), *as modified on denial of reh'g* (Oct. 26, 2015). Accordingly, the Topa policy required Caribe to take "all reasonable steps" to protect its property from further damages, which it did, and the policy provides for reimbursement to Caribe for costs incurred to prevent further damage. (Dkt. 7, at 46). Caribe's actions benefited Topa and reduced what could have been even greater liability. Either under policy or principles of law, Topa must pay these expenses.

E. Topa Cannot Meet Its Burden of Establishing That an Exclusion Applies

To avoid its coverage obligations, Topa raises two exclusions, but neither applies here. First, Topa raises the "Nuclear, Biological, Bio-Chemical and Radiation Exclusion" and argues that this exclusion bars coverage for any COVID-19-virus-related activities. (Br. 12). However, Topa's incredibly broad interpretation of this

exclusion is incorrect. Rather, this exclusion applies only to "NBCR *Activity*," which is explicitly defined as "any *act* that includes, involves or is associated with the use, alleged use, or threatened use, exposure, release, discharge, transmission, dissemination, migration, escape, spreading by contagion, inhalation or absorption . . . of a Nuclear, Biological, Bio-Chemical, Chemical or Radioactive agent, substance, material, device or weapon." (*See* Dkt. 7, at 12) (emphasis added). From the plain and ordinary reading of the definition of "NBCR Activity," requires an "act" to set it in motion. An "act" generally refers to "the doing of a thing" or "something done voluntarily." *Act*, Merriam-Webster Online Dictionary, (Sept. 28, 2020). Based on its plain choice of words, this exclusion isn't concerned with the natural spread of a communicable disease; it is concerned with the conscious, voluntary and intentional dissemination by a human of a harmful substance. If Topa had intended to exclude coverage for the natural spread of a virus by disease, there would have been no need to preface this exclusion with the phrase "any act that includes, involves or is associated with" or to call it an "NBCR *Activity*" exclusion.

Finally, the "Ordinance or Law" exclusion does not apply. That exclusion purportedly bars coverage for loss or damage caused directly or indirectly by … [i] *compliance with* [ii] *any ordinance or law*: (1) [iii] [r]egulating the [construction,] *use* [or repair] of any property." (Br. 20, modified by adding back in the actual words of the exclusion in brackets). The Ordinance or Law exclusion is directed toward excluding coverage for extra costs of rebuilding or replacing property based on the enforcement of building and land use codes, and that is the sole context in which courts apply it to exclude coverage. *See, e.g., Sierra Pacific Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 490 Fed. Appx. 871, 876-77 (9th Cir. 2012) (holding exclusion applied to the peril of building ordinances); *Corner v. Farmers Ins. Exchange*, 899 F.2d 1224 (9th Cir. 1990) (applying exclusion in light of a zoning ordinance that prevented the rebuilding of the policyholder's house); *SR Business Ins.*

Co., Ltd. v. World Trade Center Properties LLC, No. 01 Civ. 9291(HB), 2006 WL 3073220, at *11 (S.D.N.Y. 2006) ("The only sensible interpretation of the 'ordinance or law' exclusion is that it serves to eliminate the primary ambiguity that courts have found in replacement costs policies-namely, whether a policyholder can be reimbursed for the costs required to bring the reconstructed property up to code."); *Ira Stier, DDS, P.C. v. Merchants Ins. Group*, 127 A.D.3d 922, 923 (N.Y. App. Div. 2015) (applying exclusion to bar coverage for losses resulting from enforcement of a building code); *Reichert v. State Farm Gen. Ins. Co.*, 152 Cal. Rptr. 3d 6, 10-11 (Cal. Ct. App. 2012) ("There is a small but consistent body of cases that have routinely applied the law or ordinance exclusion (or its predecessor, the civil authority exclusion) to losses caused by enforcement of a local building ordinance or law); *Bischel v. Fire Ins. Exchange*, 2 Cal. Rptr. 575 (Cal. Ct. App. 1991) (applying exclusion to losses relating to new municipal standards for dock construction); *Garnett v. Transamerica Ins. Serv.*, 800 P.2d 656, 666 (Idaho 1990) (holding "if some safety improvement of a building to which no other loss had occurred were required by ordinance or law, [the insurer] would not be liable").

Moreover, Topa's interpretation of the term "use" is so broad that it would leave "construction" and "repair" meaningless. If any exercise of lawful authority which merely affects "use" of property is excluded, that would embrace both construction activities and repair activities without the need to additionally mention them.

IV. CONCLUSION

For the reasons stated above, the Motion should be denied.

Dated: September 28, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby attests that, on September 28, 2020, he served a true and accurate copy of the foregoing on all parties through this Court's ECF filing system.

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