IN THE SUPREME COURT OF OHIO

NEURO-COMMUNICATION SERVICES, INC. d/b/a HEARING INNOVATIONS, individually and on behalf of all others similarly situated,

Plaintiff/Respondent,

v.

THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; and THE CINCINNATI INDEMNITY COMPANY,

Defendants/Petitioners.

Supreme Court
Case No. 2021-0130

On Review of Certified Questions From the United States District Court, Northern District of Ohio, Eastern Division, Case No. 4:20-cv-1275

PRELIMINARY MEMORANDUM OF PLAINTIFF/RESPONDENT IN OPPOSITION TO ACCEPTANCE OF CERTIFIED QUESTIONS

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INTRODUCTION

Pursuant to Ohio Supreme Court Practice Rule 9.05, Respondent Neuro Communication Services, Inc. d/b/a Hearing Innovations submits this preliminary memorandum addressing the question certified by the Honorable Benita Y. Pearson, District Judge for the Northern District of Ohio to this Court. Respondent respectfully requests that the Court should either reject certification at this juncture as prematurely addressing contested factual issues, or, in the alternative, answer questions that are less fact-intensive and have broader utility (as proposed below).

This case is one of hundreds of "business interruption insurance" cases filed against Petitioners. These cases are brought by businesses whose operations were severely impacted, if not entirely shut-down, due to the novel coronavirus known as SARS-CoV-2, the virus that causes the disease COVID-19, and the related orders of civil authorities which ordered business to close or drastically reduce operations. These businesses purchased "all-risk" commercial property insurance policies (which cover losses for all covered causes of loss unless specifically excluded) from Petitioners. The policies at issue include, among other coverages, Business Income coverage, a standard coverage issued in commercial property policies to insure against business interruption losses. Respondent, along with myriad of other businesses in Ohio, made claims under their policies for SARS-CoV-2 and pandemic-related losses, but were denied coverage by Petitioners. As noted by Judge Pearson in her certification order, "[d]ozens, if not hundreds of cases seeking coverage for losses related to the pandemic under policies similar or identical to that at issue in this case have been filed in both federal and state courts in Ohio." (N.D. Ohio, Case No. 4:20-cv-1275, Dkt. No. 43 at PageID #: 1009.) This case comes to this Court at the pleadings stage with no discovery having been taken.

The Court should decline to accept the certified questions. Judge Pearson certified to this Court the questions of whether "the general presence in the community, or on surfaces at a

premises, of…SARS-CoV-2", or "the presence on a premises of a person infected with COVID-19" constitute direct physical loss or damage to property. These questions, however, do not involve pure questions of law. Rather, as framed they contemplate mixed questions of law and fact and are better decided (if they need be decided at all) after discovery and with a factual record regarding the physical and epidemiological properties of SARS-CoV-2 (a physical substance), its transmissibility, and the level of spread in the community. This is especially true given the importance and wide-ranging impact any decision of this Court would have on the dozens of pending cases related to Business Income (business interruption) coverage in the context of COVID-19. Lower courts, and ultimately, potentially this Court, should have all the pertinent facts available before rendering any binding decision(s) on these questions.

The certified questions are too broad. While the COVID-19 pandemic is unprecedented, this case is a breach of contract action involving an insurance policy. Ohio law has well-established and long-settled legal doctrines and interpretative principles for construing insurance policy contracts. The policies must be construed as a whole, undefined terms are given their plain and ordinary meaning, and ambiguities and/or provisions capable of more than one reasonable interpretation are resolved in favor of the insured (at which point extrinsic evidence may or may not be implicated). Because of these well-established interpretative rules, certification is simply unnecessary. Indeed, a request for this Court to interpret the policy language at issue, because there is more than one reasonable interpretation, itself mandates application of Ohio's *contra proferentem* rules governing insurance policy contract construction. Moreover, the utility of resolving the proposed certified questions is uncertain, because insurance policies do not all share common form language. Indeed, Petitioners have indicated that there are potentially 29 different forms at issue in pending litigation involving insurance claims for pandemic-related losses just

from their policies alone. *In re: Cincinnati Insurance Company COVID-19 Business Interruption Insurance Litigation*, MDL No. 2962 (J.P.M.L) (ECF No. 63-1.).

Certification is not needed to determine that Respondent has stated a claim for insurance coverage that should survive a motion to dismiss. Under a straightforward application of settled interpretative tools and principles, Respondent has stated a claim for insurance coverage under the policy at issue and has alleged at the pleading stage that it has suffered direct physical loss or physical damage due to SARS-CoV-2 and the related closure orders. Petitioners have maintained, however, that under Ohio law, "physical loss" requires structural alteration (or something similar) for coverage to be implicated and relies on an Eighth District Court of Appeals decision in *Mastellone v. Lightning Rod Mut. Ins. Co.*, 8th Dist. No. 88783, 175 Ohio App. 3d 23, 2008-Ohio-311, 884 N.E.2d to support its position. Lower courts have disagreed about the reach, meaning, and applicability of *Mastellone*. The type of coverage and policy language at issue in *Mastellone* is dissimilar from the policy and language at issue here. If the Court is to take up a certified question, it should take a question that would resolve whether structural alteration to property is required to have a direct accidental physical loss or accidental physical damage under the policies at issue. This is the legal question that should be certified, if any.

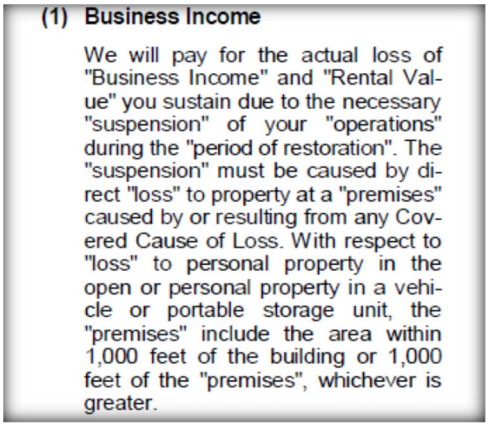
BACKGROUND

Respondent is an audiology practice with offices in Boardman and Youngstown, Ohio and provides services to mostly older patients. (N.D. Ohio No. 4:20-cv-1275, Dkt. No. 1 ("Compl.") ¶ 7.) Respondent was forced to drastically curtail its operations because of the likely presence of SARS-CoV-2 at its properties and the related shut-down orders issued by Ohio civil authorities. (*Id.* ¶¶ 20-30.) At least two patients with COVID-19 were present on Respondent's premises and one patient died shortly after being seen. (*Id.* ¶ 31.)

Petitioners sold Respondent an all-risk property insurance policy that provided Business Income, Extra Expense, Extended Business Income, and Civil Authority coverages. (*Id.* ¶¶ 3-4, 15-19.) This type of coverage, commonly included in commercial property coverage policies, is referred to as "business interruption" coverage because it protects an insured business from periods of interruption during which it cannot generate typical levels of revenue on account of the interruption. Business interruption coverage is literally a backstop lifeline for businesses to pay landlords, employees, and vendors, and to survive a shutdown and/or reduction in operations.

An insurer issuing an all-risk policy must set forth exclusions in the policy for any causes of loss for which it does not promise to cover. Relevant here, the insurance industry uses and has used a widely adopted form purportedly excluding coverage for losses resulting from a virus, including business interruption losses. The policy at issue, however, unlike many all-risk insurance policies in the industry, does not contain the standard industry-wide virus exclusion form, or any purported exclusion for coverage due to losses caused by or as the result of any virus. (*Id.* ¶¶ 38-40.) The specific forms at issue in the policy sold to Respondent are Form Nos. FM 101 05 16 and FA 213 05 16, which are common forms used by Respondents. (N.D. Ohio No. 4:20-cv-1275, Dkt. No. 1-1 at PageID ##: 52-91, 135-143.)

The Business Income coverage in Respondent's Policy provides:



(1) Business Income

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. With respect to "loss" to personal property in the open or personal property in a vehicle or portable storage unit, the "premises" include the area within 1,000 feet of the building or 1,000 feet of the "premises", whichever is greater.

The defined terms for Business Income coverage are:

- A "Covered Cause of Loss" is defined as a "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." (*Id.* at PageID #: 56.)

- "[L]oss" is defined as "accidental physical loss or accidental physical damage." (*Id.* at PageID #: 89.)

- "Business Income" means "Net Income (net profit or loss before income taxes) that would have been earned or incurred; [and] Continuing normal operating expenses sustained, including payroll." (*Id.*)

- "Operations" means the insureds "business activities occurring at the 'premises'[.]" (*Id.*)

- "Period of restoration" as is relevant here "Begins at the time of direct 'loss' [and ends] [t]he date when the property at the 'premises' should be repaired, rebuilt or replaced with reasonable speed and similar quality[.]" (*Id.* at PageID ##: 89-90.)

- "Premises" means the "Locations and Buildings described in the Declarations." (*Id*. at PageID #: 90.)

- "Suspension" means: "The slowdown or cessation of [the insured's] business activities[.]" *Id.* at PageID #: 91.)

The policy also includes Civil Authority coverage which is triggered "when a Covered Cause of Loss causes damage to property other than Covered Property." (Compl. ¶ 17.) The policy also provides for Extended Business Income covering actual loss of "Business Income" sustained and Extra Expense incurred after "operations" resume. (*Id.* ¶ 18.)

After shutting down its operations in response to SARS-CoV-2, as well as orders issued by Governor DeWine and the Ohio Department of Health, Respondent submitted a claim to Petitioners under the business interruption policy it purchased from Petitioners. (Compl. ¶ 34.) Petitioners denied the claims because Respondent had not "shown direct physical loss to property, as required by the Policy." (N.D. Ohio No. 4:20-cv-1275, Dkt. No. 1-2 at PageID #: 296.) Moreover, Petitioners denied the Civil Authority coverage claim, because: "[a]lthough [Respondent] closed [its] business in response to a governmental order, there is no evidence that

the order was entered because of direct damage to property at other locations or dangerous physical conditions at other locations. Moreover, the order does not restrict access to the area immediately surrounding [Respondent's] premises." (*Id.* at PageID #: 300.)

Respondent filed a class action complaint in the Northern District of Ohio which was assigned to the Honorable Judge Benita Pearson. Petitioners moved to dismiss under Fed. R. Civ. P. 12(b)(6) and also, in the alternative, asked Judge Pearson to certify the case to the Ohio Supreme Court. (N.D. Ohio No. 4:20-cv-1275, Dkt. Nos. 9-10.) No discovery has been taken in the case.

In the motion to dismiss, Petitioners argued there was no "direct physical loss" to Respondent's property (or premises), because SARS-CoV-2 did not affect the "structural integrity of the buildings, and it could be removed by cleaning." (N.D. Ohio No. 4:20-cv-1275, Dkt. No 9-1 at PageID ##: 345-347.) Petitioners relied heavily on the Eighth District Court of Appeals decision in *Mastellone*, 175 Ohio App. 3d 23 to argue that the Respondent's property/premises did not suffer "direct physical loss" because the virus does not "physically alter the structure of the property." (N.D. Ohio No. 4:20-cv-1275, Dkt. No. 9-1 at PageID #: 347.)

Respondent opposed Petitioners' motion to dismiss arguing that under the plain and ordinary language of the insurance policy here, Respondent's complaint properly pled that the virus and the related shut-down orders had caused "accidental physical loss or accidental physical damage" to the Respondent's property. (N.D. Ohio No. 4:20-cv-1275, Dkt. No. 22.) Respondent further distinguished *Mastellone*, arguing that it was not a decision of the Ohio Supreme Court, was decided after discovery and trial, and was largely limited to the facts and specific type of coverage, policy language and claims present in that case, which are markedly different from the coverages, policy language and claims here. *Id.*

Respondent also opposed the motion to certify arguing that factual development was needed in order to decide the issues that Petitioners moved to certify. Specifically, Respondent argued that the principles of contract interpretation with insurance contracts were settled in Ohio and that discovery to determine the physical properties of SARS-CoV-2 and its effect on property along with the extent of the spread of SARS-CoV-2 within the community was potentially needed to answer the questions that Petitioners were proposing, assuming those questions are even relevant based on the plain and ordinary meaning of the undefined terms ("direct accidental physical loss or accidental physical damage") in the policy. (N.D. Ohio No. 4:20-cv-1275, Dkt. No. 21.)

The District Court held a hearing on the motions on January 4, 2021 and decided to grant certification. The District Court instructed the Parties to submit language for the proposed questions to certify. Respondent and Petitioners were unable to agree on the questions to certify and made separate proposals. (N.D. Ohio No. 4:20-cv-1275, Dkt. No. 42.)

Petitioners submitted the following proposed questions.

1. Does the general presence in the community of a virus, such as the novel coronavirus known as SARS-CoV-2, constitute direct physical loss or damage to property?

2. Does the presence on a premises of a person infected with COVID-19 constitute direct physical loss or damage to property at that premises?

3. Does the presence on surfaces of a virus, such as the novel coronavirus known as SARS-CoV-2, constitute direct physical loss or damage to property at that premises?

4. Does the loss of use of a property, whether a partial or full loss of use, caused by a government order and not accompanied by any physical alteration to the property constitute direct physical loss or damage to that property?

Respondent submitted the following competing proposed questions for certification:

1. Under established Ohio principles of insurance policy interpretation, can the presence of SARS-CoV-2 cause direct physical loss or damage to property under Cincinnati Insurance Company policy form no. FM 101 05 16 and FA 213 05 16?

2. Under established Ohio principles of insurance policy interpretation, is the phrase "direct physical loss or damage" susceptible to more than one reasonable interpretation within the context of the claims being made in this action?

3. Under established Ohio principles of insurance policy interpretation, can the absence of a virus exclusion in Cincinnati Insurance Company policy form no. FM 101 05 16 and FA 213 05 16 bear on whether the Cincinnati Insurance Company policy form no. FM 101 05 16 and FA 213 05 16 provide coverage for business interruption and/or property damage losses allegedly caused by COVID-19?

4. Under established principles of Ohio insurance policy interpretation, must it be completely impossible to access insured premises for the civil authority coverage under Cincinnati Insurance Company policy form no. FM 101 05 16 and FA 213 05 16 to apply?

(*Id.*) The District Court ordered certification of the following question:

> Does the general presence in the community, or on surfaces at a premises, of the novel coronavirus known as SARS-CoV-2, constitute direct physical loss or damage to property; or does the presence on a premises of a person infected with COVID-19 constitute direct physical loss or damage to property at that premises?

(N.D. Ohio No. 4:20-cv-1275, Dkt. No. 43.)

DISCUSSION

While this case presents important questions implicated in numerous lawsuits, the questions actually certified are mixed questions of law and fact better resolved on a developed factual record. If the Court decides to take up a certified question in this matter, Respondent respectfully suggests that its proposed questions are more appropriately tailored to answer the questions of law while minimizing the import of any factual issues.

The general principles used to interpret insurance contracts under Ohio law are well-settled and do not need to be revisited. Also, any question answered by this Court must consider the policy forms that are at issue in this case. Under the plain and ordinary terms of the policy language here, Respondent has stated a claim for insurance coverage because it has suffered direct physical loss or physical damage. Petitioners' argument against coverage depends on its assertion that Ohio law requires "structural alteration" to property in order to have "direct physical loss" and wrongly

relies heavily on *Mastellone* (which is distinguishable). Thus, if the Court is to take up any certified question in this matter, the focus should be on whether using established principles of Ohio insurance contract interpretation, the presence of SARS-CoV-2 *can* cause direct physical loss or damage as used in Petitioners' Form Nos. FM 101 05 16 and FA 213 05 16.

THE QUESTIONS CERTIFIED BY THE DISTRICT COURT ARE MIXED QUESTIONS OF LAW AND FACT THAT ARE BETTER RESOLVED AFTER DISCOVERY AND WITH A FACTUAL RECORD.

Questions certified to this Court are meant to be questions of law. Sup. Ct. Prac. R. 9.01(A) ("The Supreme Court may answer a question of law certified to it by a court of the United States.") When a certified question is mixed with unresolved factual issues, the proper recourse is to deny answering the question. *See Copper v. Buckeye Steel Castings*, 67 Ohio St. 3d 563, 563, 621 N.E.2d 396, 396 (1993) ("The court declines to answer the question pursuant to S.Ct.R.Prac. XVI(9) because it is not appropriate for this court to answer certified questions of state law that are so factually specific in nature.") The questions certified here are not pure questions of law; they are mixed questions of law and fact. Because this case is at the pleadings stage and no discovery has been taken, there is no factual record to apply to the dispositive legal standards.

The questions certified by the District Court potentially implicate factual issues regarding the physical and epidemiological characteristics of SARS-CoV-2, a physical substance that interacts with and upon other elements in any given environment, including the air into which particles are emitted and the myriad kinds of physical property upon which particles are deposited. For example, there is no record to consult regarding the physical, chemical or molecular interaction of SARS-CoV-2 particles with any given property, chemical, substance, or molecules, the transmissibility of SARS-CoV-2, the length of time SARS-CoV-2 remains biochemically active on surfaces or in the air, and the extent to which one contagious individual may spread the virus to property. The resolution to these factual issues may bear on whether there has been direct

physical loss or damage to property under Respondent's insurance policy. Of course, there are some facts about SARS-CoV-2 that cannot be readily disputed such as that it is a virus, is a physical substance, can be spread, and that is causes COVID-19 which is a deadly disease. But, even under Petitioners' "structural alteration" interpretation, whether SARS-CoV-2 "*does*" cause or constitute direct physical loss or damage to property may depend on the physical and epidemiological qualities of SARS-CoV-2. Scientific testimony and evidence may be required in order to make the robust factual record needed to ensure the appropriate application of law to facts in this matter.

The questions certified are important but are not pure questions of law and should not be decided in a factual vacuum. Especially given the importance of any ruling that the Court would make on the certified question, the more appropriate course would be to decide any such questions only after discovery has been taken.

OHIO LAW'S CONTROLLING PRINCIPLES OF INSURANCE CONTRACT INTERPRETATION ARE WELL SETTLED.

The COVID-19 pandemic has had unprecedented effects on the country and the economy. But at its heart, this case is a breach of contract dispute about the meaning of an insurance policy. The principles of law that are used to interpret contracts under Ohio law, as expressed by this Court, are well-settled. A court must first "examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy . . . [and] look to the *plain and ordinary meaning of the language used in the policy* unless another meaning is clearly apparent from the contents of the policy." *Westfield Ins. Co. v. Galatis,* 100 Ohio St. 3d 216, 219 797 N.E.2d 1256, 2003-Ohio-5849, ¶ 11 (emphasis added). For terms not expressly defined by the insurer in the policy, their plain and ordinary meaning can be determined using dictionaries. *William Powell Co. v. OneBeacon Ins. Co.*, 1st Dist. Hamilton No. C-190199, 2020-Ohio-5325, ¶ 37.

Importantly, "where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured." *King v. Nationwide Ins. Co.,* 35 Ohio St. 3d 208, 211, 519 N.E.2d 1380, 1383 (Ohio 1988). "It is not the responsibility of the insured to guess whether certain occurrences will or will not be covered based on nonspecific and generic words or phrases that could be construed in a variety of ways." *Andersen v. Highland House Co.*, 93 Ohio St. 3d 547, 549, 2001-Ohio-1607. "Thus, in order to defeat coverage, the insurer must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is the ***only one*** that can fairly be placed on the language in question." *Id.* (emphasis added) (internal quotations omitted).

The true legal questions at issue in this case include whether the plain and ordinary meaning of direct physical loss or physical damage, as used in form nos. FM 101 05 16 and FA 213 05 16, ***unambiguously*** requires a permanent or structural alteration to property; and whether the phrase direct physical loss or physical damage is susceptible to more than one reasonable interpretation within the context of the claims being made in this action.[1] These are significant questions. But the answers to these questions are sufficiently guided by well-established precedent. Thus, certification is not required. *Lutz v. Chesapeake Appalachia, L.L.C.,* 2016-Ohio-7549, 148 Ohio

[1] This Court is likely aware or will likely be provided with listings of cases from around the country interpreting the language at issue, and similar language, differently. Respondent respectfully suggests that this fact alone – that courts around the country have ascribed more than one reasonable interpretation to the language at issue – is powerful proof that the language is indeed capable of more than one reasonable interpretation. *See George H. Olmsted & Co. v. Metropolitan Life Is. Co.*, 118 Ohio St. 421, 428 161 N.E. 276, 278 (1928) (differing interpretations of the same policy clause language by courts of multiple jurisdictions "presents… [a] persuasive argument of the ambiguity of the clause").

St. 3d 524, 71 N.E.3d 1010 (declining to answer certified question where rights and remedies of parties are controlled by well-established rules of contract construction).

UNDER SETTLED PRINCIPLES OF OHIO LAW GOVERNING THE INTERPRETATION OF INSURANCE CONTRACTS, RESPONDENT HAS STATED A CLAIM FOR COVERAGE UNDER THE POLICY AT ISSUE AT THE MOTION TO DISMISS STAGE.

Here, under straightforward and settled principles of Ohio insurance law, Respondent has stated a claim for insurance coverage under the plain and ordinary language of the Petitioners' insurance policy. Respondent has alleged that the suspension of its operations was caused by "accidental physical loss or accidental physical damage" in the form of both a loss of access to the property for business purposes caused by COVID-19, the Ohio Civil Authority Orders, and the actual damage and loss in the form of the likely physical presence of SARS-CoV-2 particles and/or COVID-19 on or within the property/premises. (Compl. ¶ 30.)

The plain and ordinary meanings of the terms, "physical loss" *or* "physical damage" include loss of access to property and loss due to the physical presence of SARS-CoV-2 and/or COVID-19 even absent physical alteration. The Merriam-Webster dictionary defines "physical" as "having material existence: perceptible especially through the senses and subject to the laws of nature."[2] Further, Merriam-Webster defines "Loss" as not only, "destruction" and "ruin", but also the "act of losing possession" or "deprivation."[3] *See also Jurenovich v. Trumbull Mem'l Hosp.*, 11th Dist. Trumbull No. 2018-T-0037, 2020-Ohio-2667, ¶ 30 ("Loss means '[t]he failure to maintain possession of a thing.'") (citation omitted). Synonyms for "loss" include "deprivation," "dispossession," and "impairment." *Loss*, thesaurus.com. Respondent has thus suffered a "physical loss" in two ways. First, Respondent has been deprived of and impaired in use of its property both by the actual or imminent presence of SARS-CoV-2, and by related Ohio civil authority orders.

[2] www.merriam-webster.com/dictionary/physical.
[3] www.merriam-webster.com/dictionary/loss.

Second, Respondent has suffered a physical (or measurable) impairment by the likely or imminent presence of SARS-CoV-2 at its premises.

Further, the term "Damage" does not "plainly" require physical alteration. Definitions of "Damage" include "expense", "cost", "stop[ping] [something from] working properly", or "to cause [something] to become less good".[4] None of these definitions require actual, tangible, permanent, physical alteration of property. As one Court noted:

> 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. Marifferen, 587 N.W.2d 191, 194 (N.D. 1998).

Courts in Ohio and across the country have denied insurers' motions to dismiss or affirmatively granted summary judgment for insureds making claims for pandemic-related losses using these straightforward tools of contractual interpretation, including in cases involving Petitioners' insurance policies, and including under Ohio law. *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 1:20 CV 1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021) (granting summary judgment to insured for business income and civil authority coverages); *McKinley Development Leasing Co. Ltd., v. Westfield Ins. Co.,* Stark C.P. No. 2020 CV 00815 (Feb. 9. 2021) (slip op. at 4-5) (denying under Ohio law an insurer's motion to dismiss a COVID-19 business income coverage insurance case); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F.Supp.3d 794, 800-801 (W.D.Mo. 2020) (denying motion to dismiss business income and civil authority coverage

[4] https://www.merriam-webster.com/dictionary/damage; https://www.collinsdictionary.com/us/dictionary/english/damage

claims); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963, at *1 (W.D.Mo. Sept. 21, 2020) (denying motion to dismiss business income and civil authority coverage claims); *North State Deli, LLC et al., v. Cincinnati Ins. Co.*, No. 20-CVS-025698, (N.C. Super. Ct. (Durham County) Oct. 7, 2020 (granting summary judgment to insureds against Petitioners and finding "direct physical loss" to include "inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions."); *Francois Inc. v. Cincinnati Ins. Co.,* Lorain C.P. No. 20 CV 201416 (Feb. 9. 2021).

These opinions are consistent with a well-established body of case law finding that microscopic or intangible particles can cause physical loss even without structural alteration. *See*, *e.g.*, *Farmers Ins. Co. of Oregon v. Trutanich*, 123 Or. App. 6, 9, 858 P.2d 1332, 1335 (1993) (finding odors from methamphetamine to constitute direct physical loss); *Essex Ins. Co. v. BloomSouth Flooring Corp*., 562 F.3d 399, 405–406 (1st Cir. 2009) (an odor that permeates the building and results in a loss of use of the building constitutes a claim of physical damage); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826 (3d Cir. 2005) (presence of e-coli bacteria in well stated claim for physical loss).

Significantly, both federal and state courts in Ohio, analyzing Ohio law have found *Mastellone* does not control the outcome of pandemic-related claims for business income coverage like those here. *See Henderson Rd. Rest. Sys., Inc.*, 2021 WL 168422, at *10 (distinguishing *Mastellone* because *Mastellone* and the policy at issue "used different language and were applied to different facts" and finding "*Mastellone* decision offers little guidance in interpreting [defendant's] Policy"); *McKinley Development Leasing Co. Ltd., v. Westfield Ins. Co*., Stark C.P.

No. 2020 CV 00815 (Feb. 9. 2021) (distinguishing *Mastellone* because of different policy language and because it did not provide business income coverage).[5]

Petitioners' argument is not grounded in the language of the policies at issue, which Petitioners drafted. Petitioners could have defined direct physical loss or physical damage to include a structural alteration requirement or could have included an industry-wide virus exclusion, a widely used exclusion rendered entirely superfluous under Petitioners' proffered interpretation. But Petitioners chose not to do so. At a minimum, Petitioners' policy is susceptible to multiple interpretations and Respondent's claim for coverage is based on a reasonable interpretation of the policy language. As such, the policy must be construed in favor of coverage.

If the Court is to address the issues raised by this case, a question that would resolve whether direct physical loss or damage as set forth in the policy at issue requires structural alteration, and for how long, is the question that should be addressed. This question, although straightforward, would provide critical guidance to the application of Ohio law to the many cases now pending about Business Income losses connected with the current pandemic.

CONCLUSION

The Court should decline to decide the important issues of insurance law implicated by the certified question without the benefit of a fulsome record. If the Court chooses to take up this case, any opinion should be limited to an interpretation of the policy forms at issue under established principles of Ohio insurance law.

[5] At least one court, however, has disagreed. *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, No. 1:20-CV-01192, 2020 WL 7490095, at *8-10 (N.D. Ohio Dec. 21, 2020) (relying on *Mastellone* and finding that direct physical loss under Ohio law requires "a physical force that destroyed, compromised, or injured . . . property.").

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of February, 2021, I electronically filed the foregoing with the Clerk of Court by using the Court's electronic filing system. Copies will be served upon counsel of record via electronic mail to the following addresses, and may be obtained through, the Court's electronic filing system.

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