

IN THE SUPREME COURT OF OHIO

NEURO-COMMUNICATION SERVICES, INC.,)	Supreme Court
)	Case No. 2021-0130
)	
Plaintiffs/ Respondents,)	On Review of Certified Questions
)	From the United States District
v.)	Court for the Northern District of
)	Ohio, Eastern Division
)	
THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; AND THE CINCINNATI INDEMNITY COMPANY,)	Case No. 4:20-cv-1275
)	
Defendants/ Petitioners.)	

**MERIT BRIEF OF THE DEFENDANTS/PETITIONERS THE CINCINNATI
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THE CINCINNATI INDEMNITY COMPANY**

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Summary of Argument

Plaintiff/Respondent Neuro-Communication Services, Inc. (“Neuro”) claims financial losses due to the pandemic. Cincinnati sympathizes with Neuro and the many other Ohioans whose businesses have been affected by the Coronavirus and government orders issued to protect the public from it. But, this is purely a contract case and this Court should apply this contract’s meaning based on principles of law. *See Johnson v. Montgomery*, 151 Ohio St.3d 75, 2017-Ohio-7445, 86 N.E.3d 279, ¶¶ 14-15, 17; *Foster Wheeler Enviresponse, Inc. v. Franklin City Convention Facilities Auth.*, 78 Ohio St.3d 353, 362, 678 N.E.2d 519 (1997). The Court’s certified question states the legal issue at hand. That question should be answered in the negative.

The contract at issue here is a commercial property insurance policy issued by Cincinnati to Neuro. Fundamentally, the policy protects Neuro from tangible harm to its property, such as from a fire. As an adjunct to that coverage, the policy includes business income coverage that replaces Neuro’s income in situations where its property must be repaired, rebuilt or replaced following a fire, storm, theft, vandalism, etc.

A basic principle under Ohio contract law is that words in contracts must be given their plain, ordinary meaning and read in context unless a manifestly absurd result would occur. The plain, ordinary meaning of the policy language at issue here requires a direct loss to Neuro’s property. “Loss” as used in the Policy means “accidental physical loss or accidental physical damage.” Those words are the core of this property policy, including the business income coverage. This Court is asked to determine, as a matter of law, the plain, ordinary meaning of these key words that, when read together, fundamentally define the coverage in the context of a property insurance policy.

Firmly cemented principles of contract interpretation and construction in Ohio establish that the questions presented here are legal issues for the Court. Those principles include the

requirement that the Court should apply the plain, ordinary meaning of the phrase at issue unless to do so would lead to a manifestly absurd result. *Sharonville v. Am. Emps. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶ 6; *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph two of the syllabus. Also, it is critical for the Court to apply the plain, ordinary meaning of the words in the phrase in proper context, reading the contract as a whole. *Wohl v. Swinney*, 2008-Ohio-2334, 118 Ohio St.3d 277, 888 N.E.2d 1062, ¶¶ 13-14; *Foster Wheeler*, 78 Ohio St.3d at 361-362, 363, 678 N.E.2d 519.

This Court has not had occasion to address this policy's requirement for direct physical loss or damage to property. However, two Ohio appellate courts have done so. *See Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130 (8th Dist.); *Bethel Village Condominium Assn. v. Republic-Franklin Ins. Co.*, 10th Dist. Franklin No. 06AP-691, 2007-Ohio-546. *Mastellone* and *Bethel* address substantially the same phrase that is at issue here, finding it to be unambiguous. And, both cases hold that these words require that in order to have direct physical loss or damage to property, there must be some tangible, physical alteration to the property or structural damage to it. Both cases hold that their policy language, substantially similar to that here, is clear and unambiguous as a matter of law.

Furthermore, when the policy is read as a whole, the phrase direct physical loss or damage to property harmonizes with an additional provision, but only if the phrase is read to require a physical alteration to property. That additional provision is the period of restoration, the time during which Business Income benefits are to be paid. The period of restoration ends when the property at issue is repaired, replaced or rebuilt. The physical nature of repairing, replacing or rebuilding property dovetails with the requirement that there be physical alteration to property.

Additionally, *Mastellone* and *Bethel* are in step with eleven Ohio state and federal Coronavirus coverage decisions issued in the last year finding that the same or similar policy language as is in Cincinnati's policy requires a physical alteration to property. Those eleven cases are part of a remarkable body of national jurisprudence that involves hundreds of cases from state and federal courts, from coast to coast and from north to south. Those many cases should resonate not because of their number, but because they employ sound judicial reasoning based on fundamental insurance law principles that are the same or similar to those that apply in Ohio. At bottom, there are so many national precedents supporting Cincinnati because the plain language at issue is unambiguous and those rulings' interpretation of the language simply makes common sense.

The Coronavirus has been generally present in Ohio for over a year. It is spread from person to person. Fundamentally, the virus does not physically, tangibly alter property. It hurts people. In order to protect Ohio citizens, the Governor and his Director of the Department of Health issued orders that affected businesses, including Neuro's business. These orders temporarily closed Neuro, then regulated its business by limiting the scope of services it could provide.

Accordingly, this Court should address the certified question by ruling that in order to have direct physical loss or damage to property, there must be physical alteration to that property. The mere presence of a virus in the community generally, at a premises or on surfaces does not satisfy that requirement. Government orders regulating businesses and limiting their income do not satisfy that requirement. Because Neuro alleges no physical alteration to its property, there was no direct physical loss or damage to its property and thus coverage was not triggered. Any other result would inevitably lead to manifestly absurd results. For example, if the policy language is plasticized so that the mere presence of a virus in the community becomes direct physical loss or damage to

property, then all property, everywhere and at all times, has been physically lost or damaged because viruses abound, everywhere and at all times. If government orders regulating businesses are distorted to qualify as direct physical loss or damage to property, then all property is physically lost or damaged at all times because businesses are subject to a wide range of regulations affecting their use of property and operations. These include regulations affecting the occupancy of buildings, traffic flow, noise, permissible hours of operation, the treatment and compensation of employees, the collection of taxes and many, many more. There is simply no principled way to prevent a finding of coverage here from leading to manifestly absurd results.

This Court should answer the certified question in the negative.

Statement of Facts

Neuro is an Ohio company that supplies audiology and related hearing and balance services to patients. (Compl. ¶ 7 at A001).¹ Like all Ohioans, Neuro has been affected by the pandemic. For a time, it did not operate at all, following which it did not operate to its full capacity. (Compl. ¶ 27 at A009). This caused financial loss. Neuro sued Cincinnati seeking coverage for its financial loss under the property policy issued to it by Cincinnati. (Compl. ¶ 34 at A011).

This case came to this Court pursuant to Supreme Court Practice Rule 9.01. Certification was made by Judge Benita Pearson of the U.S. District Court for the Northern District of Ohio. Judge Pearson's certification arose from Cincinnati's motion to dismiss Neuro's complaint. That motion raised a core legal issue about the meaning of a certain phrase in the contract: "direct 'loss,'" where "loss" (when the word appears in quotation) is used in the Policy as a short-hand expression meaning "accidental physical loss or accidental physical damage." Neuro claims coverage under the Cincinnati Policy's Business Income, Extra Expense, Civil Authority and

¹ References to A#### are to the page numbers at the bottom of the Appendix filed with this brief. The documents referenced in this brief are identified in the Appendix Index.

Extended Business Income coverages. (Compl. ¶¶ 15-19 at A005-A006). All of these coverages require that there be direct physical loss or damage to property. The meaning of “direct ‘loss’” (meaning “direct accidental physical loss or accidental physical damage”) in the context of a property insurance policy is the pith of the legal issue certified to this Court.

I. The Cincinnati Policy

Cincinnati issued Policy No. ECP 055 17 19 to Neuro Service d/b/a Hearing Innovations (the “Policy”). The Policy period is from September 14, 2019 to September 14, 2022. (Policy at A031).

The Business Income coverage states as follows:

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.

(Compl. ¶ 15 at A005; Policy at A052, A118) (emphasis supplied). The Policy provides that the term “loss” means “accidental ***physical*** loss or accidental ***physical*** damage.” (Compl. ¶ 13 at A004; Policy at A072, A126) (emphasis supplied).

The Business Income coverage is found in the main form, FM 101 05 16, as a coverage extension, and in the Business Income form, FA 213 05 16. (Compl. ¶¶ 13-19 at A004-A006; Policy at A035-A074, A118-A126). The same relevant language is used in each form. The main form’s Business Income coverage is limited to \$25,000. (Policy at A055). The Business Income Form’s coverage is limited to the amount stated on the Policy’s declarations page, or 12 months All Loss Sustained. (Policy at A033). This means the coverage is for all covered income loss for up to 12 months duration. The business income coverage pays for income losses caused by “the necessary ‘suspension’ of your [Neuro’s] ‘operations’ during the ‘period of restoration’.” (Policy

at A052, A118). “The ‘suspension’ must be caused by direct ‘loss’ to property at a ‘premises’ caused by or resulting from any Covered Cause of Loss.” (Policy at A052, A118). The Policy defines “period of restoration” as the period of time that begins at the time of “loss” and ends at the earlier of:

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

(Policy at A072). The “period of restoration” definition in the Business Income form, FA 213 05 16, is modified by endorsement to add that the “period of restoration” may alternatively end “12 consecutive months after the date of direct ‘loss’,” if that is the earlier of the stated end points. (Policy at A084, A126).

The Extra Expense coverage provides in pertinent part:

(2) Extra Expense

- (a) We will pay Extra Expense you sustain during the “period of restoration”. Extra Expense means necessary expenses you sustain (as described in Paragraphs **(2)(b)**, **(c)** and **(d)**) 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. * * *

(Policy at A053, A118) (emphasis supplied).

The Civil Authority coverage provides:

(3) Civil Authority

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.

This Civil Authority coverage for “Business Income” will begin immediately after the time of that action and will apply for a period of up to 30 days from the date of that action.

This Civil Authority coverage for Extra Expense will begin immediately after the time of that action and will end:

- 1) 30 consecutive days after the time of that action; or
- 2) When your “Business Income” coverage ends; whichever is later.

(Policy at A053, A119) (emphasis supplied).

The Extended Business Income Coverage is the same as the Business Income Coverage described above, except that it can extend for a longer duration. (Policy at A054, A084, A120).²

For any coverage to apply, there must be a Covered Cause of Loss, which is defined by the pervasive requirement of direct physical loss or damage. (Compl. ¶ 13 at A004; *see, e.g.*, Policy at A037, A039, A052, A118). Covered Cause of Loss is defined as “direct ‘loss’ unless the ‘loss’ is excluded or limited in this Coverage Part.” (Compl. ¶ 13 at A004; Policy at A039). Accordingly, direct physical loss or damage is a requirement for there to be a Covered Cause of Loss. (Compl. ¶ 13 at A004; Policy at A039, A072, A126). Nowhere does the Policy provide coverage for loss of business income or loss of use of property at the premises in the absence of a direct physical loss or damage to property. Therefore, each coverage Neuro seeks must be tethered to physical

² There are coverage issues involving these coverages that extend beyond the issue of the contract’s requirement of direct physical loss or damage to property. However, these other issues are outside the scope of the certified question. Accordingly, Cincinnati does not address them here, albeit without waiver of the right to address them at a later time, should that become necessary.

loss or damage to covered property. If there is no direct loss to Neuro's property, there is no coverage.

II. The Ohio Orders

During the pandemic, Neuro was affected by various Ohio state orders. Specifically, Governor DeWine's March 9, 2020 Executive Order No. 2020-01D declared a "state of emergency * * * for the entire State to protect the well-being of the citizens of the Ohio from the dangerous effects of COVID-19." (Exec. Order at A129). Additionally, Director of the Ohio Department of Health Amy Acton's March 17 Order stated that to preserve personal protective equipment "all non-essential or elective surgeries and procedures that utilized PPE should not be conducted." (Dep't of Health Mar. 17, 2020 Order at A131). And, Director Acton's March 22 Order required that "all individuals currently living within the State of Ohio are ordered to stay at home" unless an exception applies, and "[a]ll persons may leave their homes or place of residence only to participate in activities, businesses or operations as permitted in this Order." (Compl. ¶ 25 at A008-A009; Dep't of Health Mar. 22, 2020 Order at A135). Neuro alleges that pursuant to these orders, it ceased most of its operations on March 23, 2020. (Compl. ¶ 27 at A009; Order of Certification at A159). Neuro resumed some operations on May 4, 2020. (Compl. ¶ 27 at A009; Order of Certification at A159).

III. Neuro's Theory of Insurance Coverage

Neuro alleges it suffered a financial loss in the form of lost revenue. (Compl. ¶ 32 at A010). Seeking coverage for this financial loss, Neuro asserts that the general presence of the virus in Ohio is direct physical loss to its property. In this respect, it alleges that "published research suggests that the virus that causes COVID-19 remains stable and transmittable for up to three hours in aerosols, up to four hours on copper, up to twenty-four hours on cardboard, and up to two to

three days on plastic and stainless steel.” (Compl. ¶ 23 at A008). Accordingly, Neuro admits that the presence of the virus on property is a temporary phenomenon. Additionally, Neuro alleges that the presence of COVID-19 in the environment and the government regulatory orders to which it was subject caused it to suffer a direct physical loss to its property because it temporarily suspended most of its operations and “lost access” to its property. (Compl. ¶¶ 29-30 at A010). Neuro does not allege any physical alteration to its property. (Compl. ¶¶ 21-37 at A007-A012). Rather, it asserts that Cincinnati’s policy language should be read to mean that its financial loss is somehow, legally, a direct physical loss to the property. Neuro seeks to represent a national class of Cincinnati policyholders who are allegedly similarly situated. (Compl. ¶ 43 at A013-A014).

Cincinnati maintains that Neuro is wrong about reading coverage for pure economic loss into the policy and thus moved to dismiss the complaint or, in the alternative, to certify relevant questions to this Court.

IV. The Certified Question

On February 18, 2021, Cincinnati and others filed briefs addressing the issue whether this Court should accept Judge Pearson’s Certified Question. In an April 14, 2021 Order, this Court stated that it would answer 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?

04/14/2021 Case Announcements, 2021-Ohio-1202, at 5.

Argument

I. LONG-ESTABLISHED OHIO INSURANCE JURISPRUDENCE ADDRESSING THE SAME OR SIMILAR POLICY LANGUAGE AS IS AT ISSUE HERE MANDATES AN ANSWER OF “NO” TO THE CERTIFIED QUESTION BECAUSE, AS A MATTER OF LAW, THAT POLICY LANGUAGE’S PLAIN AND ORDINARY MEANING REQUIRES PHYSICAL ALTERATION TO PROPERTY IN ORDER TO HAVE COVERAGE

A. General Principles of Ohio Insurance Law Establish that Physical Alteration to Property is Required in Order to have Direct Physical Loss or Damage to Property

This Court has not yet addressed the legal meaning of the relevant phrase, direct physical loss or damage to property, or any substantially similar phrase. However, it has addressed general principles of Ohio insurance coverage law on many occasions. These general principles include the principle that interpretation of an insurance policy is a matter of law for the Court. *See, e.g., Sauer v. Crews*, 140 Ohio St.3d 314, 2014-Ohio-3655, 18 N.E.3d 410; *Sharonville*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, at ¶ 6; *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 797 N.E.2d 1256, 2003-Ohio-5849, ¶ 11; *Alexander*, 53 Ohio St.2d at 245-246, 374 N.E.2d 146.

Another legal principle articulated by this Court is that the core purpose of an insurance contract matters to its interpretation. *Sauer* at ¶¶ 10, 13; *Galatis* at ¶ 20. In *Galatis*, the issue was whether uninsured motorist coverage issued to a corporation should be deemed to cover corporate employees and their families when they were not engaged in company business. In that context, *Galatis* states, “[t]he **general intent** of a motor vehicle insurance policy issued to a corporation is to insure the corporation as a legal entity against liability arising from the use of motor vehicles.” *Galatis* at ¶ 20 (emphasis supplied). It found that such policies could not be construed to cover employees not involved in company business. *Id.* Thus, in interpreting policy language, *Galatis* was grounded in the fundamental nature of the policy at hand.

This Court gave similar attention to a policy’s core purpose in *Sauer*. *Sauer* examines whether a trailer should be treated as an “auto” under a general liability policy that did not apply to claims arising out of the ownership, maintenance, use or entrustment of an auto. The word “auto” was defined to include a trailer. But, the definition of an “auto” expressly excluded anything separately defined as mobile equipment. The definition of mobile equipment listed a number of very specific types of equipment, such as bulldozers and vehicles with crawler treads. *Sauer* at ¶¶ 16-18. That definition also included “vehicles not [specified in the list] maintained primarily for purposes other than the transportation of persons or *cargo*.” *Id.* at ¶ 18. (emphasis in the original).

Crews, the proponent of coverage, argued that the Court should limit its work to an analysis of the word “cargo” and that nothing more need be done. Crews said that looking at that word alone, it was an ambiguous word and thus there was coverage. *Id.* at ¶ 19. But, “[t]he fault in Crews’s analysis is that it fixates upon a single word, ‘cargo’ and *fails to consider the intent of the policy as a whole*.” *Id.* at ¶ 20 (emphasis supplied). The importance of context was that the general description of mobile equipment that included the word cargo was meant to apply to unspecified vehicles of the same subclass of the specifically named vehicles. *Id.* at ¶ 23. A trailer simply did not fit. Accordingly, when looking at the auto exclusion and defined terms as a whole and in context, it was clear that the trailer was not mobile equipment and the auto exclusion applied. *Id.* at ¶ 22.

Here, the core purpose of a commercial property insurance policy is to insure buildings and personal property against physical harm, such as from fire. (Policy at A037); 10A Plitt, *et al.*, *Couch on Ins.*, Section 148:46 (3d Ed. 2020). The Court should focus on that core purpose in its analysis of the legal issue before it. Neuro asserts that nonphysical loss, such as financial loss from limitations on its business operations, should be covered. But to interpret the Policy this way is

contrary to the core purpose of a *property* insurance policy, which is to indemnify property owners for direct physical loss or damage to their property. (Policy at A037). The only interpretation of the phrase direct physical loss or damage to property that is consistent with the Policy’s purpose, and the context in which the phrase is used, requires that there be some tangible, physical alteration to property.

Another basic principle of Ohio insurance law that this Court has established dictates that words in an insurance policy are to be given their plain and ordinary meaning and read in context unless to do so would create a manifestly absurd result. *Sharonville*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, at ¶ 6; *Alexander*, 53 Ohio St.2d at 241, 374 N.E.2d 146, paragraph two of the syllabus. Likewise, when interpreting a contract, a court should read the contract as a whole, giving meaning to each term and should not read a word or phrase in isolation. *Foster Wheeler*, 78 Ohio St.3d at 361-362, 678 N.E.2d 519; *Alexander*, at 245-246. And, a contract term is not ambiguous simply because parties disagree about its meaning. *Shifrin v. Forrest City Enters.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992).

These principles apply here. As established, the Policy’s basic grant of business income coverage requires that there be a suspension of operations caused by a direct “loss,” and “loss” means “accidental physical loss or accidental physical damage.” (Policy at A072, A126). Each of these words has meaning in the context of this phrase, and these words cannot be read together as a whole without giving meaning to the word “physical.” There must be *physical* loss or *physical* damage. Mere financial loss from a temporary stoppage or slowdown of the business lacks the

requisite physicality. Accordingly, this general insurance law principle mandates a finding that there is no coverage in the absence of physical alteration to property.³

A further Ohio insurance law principle is that “[t]he mere absence of a definition in an insurance contract does not make the meaning of the term ambiguous.” *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995). Thus, the absence of a contractual definition for every word in the operative phrase is not pertinent. Indeed, if insurance policies were required to define every word, including the words used in the definitions, there would be no end to the process. Such a policy would be mammoth in size and extraordinarily difficult to read. Instead, this Court’s decisions show that policies should be read sensibly, reasonably and in context. Doing so here requires the conclusion that there needs to be tangible, physical alteration to property in order to fulfill the requirement of direct physical loss or damage to property.

B. Ohio Cases that Address the Same or Substantially Similar Policy Language Support Answering the Certified Question in the Negative

Language that is substantially similar to the policy language here is addressed in two Ohio appellate cases, *Mastellone* and *Bethel*. *Mastellone* involves a range of claims under a property insurance policy. *Mastellone*, 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130, at ¶¶ 1, 56. One of those claims was based on exterior mold staining on a building’s siding. *Id.* at ¶ 56.⁴ In addressing this claim, *Mastellone* begins by quoting the following policy language: “[The insurer] agreed to insure against direct loss to property ‘only if that loss is a physical loss to property.’” *Id.*

³ Furthermore, *Cincinnati* will later show how the policy’s definition of the period of restoration, when read in context with the requirement of direct physical loss or damage to property, supports *Cincinnati*’s position here. This argument is another exposition of the necessity of reading the Policy as a whole.

⁴ Two other issues were addressed. First, whether the contract and bad faith claims should have been bifurcated and second, whether the policy’s one year statute of limitations had been met. *Mastellone* at ¶¶ 10, 51. Those issues are not pertinent to resolution of the certified question here.

at ¶ 60. In addressing the meaning of this language, *Mastellone* turns to *Couch on Insurance*, a leading insurance law treatise:

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.

Id. at ¶ 61 (quoting 10A *Couch on Ins.* Section 148:46 (3d Ed. 1998)).⁵ *Mastellone* holds that the staining was not direct physical loss to the siding, because it was only temporary and did not physically alter the structure of the wood. *Mastellone* at ¶ 63; *see also Mama Jo’s, Inc. v. Sparta Ins. Co.*, S.D.Fla. No. 17-cv-23362-KMM, 2018 WL 3412974, at *9, *aff’d*, 823 Fed.Appx. 868, 879-880 (11th Cir.2020), *cert. denied*, No. 20-998, 2021 WL 1163753 (U.S. Mar. 29, 2021); *Universal Image Prods. Inc. v. Fed. Ins. Co.*, 475 Fed.Appx. 569, 573-575 (6th Cir.2012) (citing *Mastellone*). Indeed, the exterior mold could be cleaned from the siding, making it a temporary condition. Because the wood was not “structurally altered,” there was no direct physical loss to it and thus no coverage. *Mastellone* at ¶ 63.

Furthermore, *Mastellone*’s holding that there was no direct physical loss to the siding is rendered in the context of an appeal from a denial of motions for a directed verdict and JNOV. The relevant evidence was uncontested. *Id.* at ¶ 68. Thus, *Mastellone* considered its holding to address “a question of law,” because “when a motion for a directed verdict is entered, what is being tested

⁵ Ohio courts have long relied on *Couch* as authoritative. This Court appears to have first cited to the “*Couch* Cyclopedic of Insurance Law” in 1930, in *Shields v. Supreme Council of Royal Arcanum*, in which the Court relied on *Couch* to support its ruling. 123 Ohio St. 31, 40-41, 173 N.E. 731 (1930). Thus, *Mastellone* was not the first (nor the last) Ohio court to rely on *Couch* as authoritative. *See also Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121, ¶¶ 33, 35, 40; *Sharonville*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, at ¶ 19; *Covington v. Ohio Gen. Ins. Co.*, 99 Ohio St.3d 117, 2003-Ohio-2720, 789 N.E.2d 213, ¶ 10; *Wallace v. Balint*, 94 Ohio St.3d 182, 186, 2002-Ohio-480, 761 N.E.2d 598 (2002).

is a question of law * * *.” *Id.* at ¶ 43. Relatedly, in interpreting the policy language, *Mastellone* applied the insurance law imperative to give policy language its usual meaning. *Id.* at ¶ 61. In this respect, *Mastellone* relied on *Guman Bros.*, a seminal, oft-cited decision of this Court addressing the fundamental principles of insurance contract interpretation. *Id.* at ¶ 61 (“The term ‘physical injury’ is undefined by the policy, so we give that term its usual meaning. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684.”). *See also Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 35; *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561, ¶¶ 18, 38; *Grange Mut. Ins. Co. v. Patino*, 10th Dist. Franklin No. 19AP-278, 2020-Ohio-466, ¶ 31, *appeal not allowed*, 159 Ohio St.3d 1436, 2020-Ohio-3634, 148 N.E.3d 595; *Burdette v. Bell*, 2019-Ohio-5035, 137 N.E.3d 1236, ¶ 14, *appeal not allowed*, 158 Ohio St.3d 1452, 2020-Ohio-1090, ¶ 14 (12th Dist.); *Fulton RR. Co. v. City of Cincinnati*, 2017-Ohio-9320, 106 N.E.3d 143, ¶ 13 (1st Dist.); *Rubel v. Johnson*, 7th Dist. No. 17 MO 0009, 2017-Ohio-9221, 101 N.E.3d 1092, ¶ 17; *Shaw v. Marion Laborers Local 574*, 3d Dist. Marion No. 9-13-31, 2014-Ohio-3672, ¶ 26; *W. World Ins. Co. v. Spevco, Inc.*, 109 Ohio App.3d 122, 124-125, 671 N.E.2d 1100 (10th Dist.1996).⁶

⁶ *Mastellone* has been widely and often followed. *See, e.g., Evanston Ins. Co. v. Certified Steel Stud Assn., Inc.*, 787 Fed.Appx. 879, 884 (6th Cir.2019); *Universal Image Prods. Inc. v. Fed. Ins. Co.*, 475 Fed.Appx. 569, 573-575 (6th Cir.2012); *Sys. Optics, Inc. v. Twin City Fire Ins. Co.*, N.D. Ohio No. 5:20-CV-1072, 2021 WL 2075501, at *9 (May 24, 2021); *Dharamsi v. Nationwide Mut. Ins. Co.*, S.D. Ohio No. 2:20-CV-2980, 2021 WL 1979085, at *4 (May 18, 2021); *Kim-Chee LLC v. Phila. Indemn. Ins. Co.*, W.D.N.Y. No. 1:20-cv-1136, 2021 WL 1600831, at *5 (Apr. 23, 2021); *Bridal Expressions LLC v. Owners Ins. Co.*, N.D. Ohio No. 1:20 CV 833, 2021 WL 1232399, at *5-*6 (Mar. 23, 2021); *Dakota Girls, LLC v. Phila. Indemn. Ins. Co.*, S.D. Ohio No. 2:20-CV-2035, 2021 WL 858489, at *6 (Mar. 8, 2021); *Equity Planning Corp. v. Westfield Ins. Co.*, N.D. Ohio No. 1:20-cv-01204, 2021 WL 766802, at *12-*13, at *16 (Feb. 26, 2021); *Brunswick Panini's, LLC v. Zurich Am. Ins. Co.*, N.D. Ohio No. 1:20CV1895, 2021 WL 663675, at *7-*8 (Feb. 19, 2021); *Ceres Enters., LLC v. Travelers Ins. Co.*, N.D. Ohio No. 1:20-CV-1925, 2021 WL 634982, at *7 (Feb. 18, 2021); *MIKMAR, Inc. v. Westfield Ins. Co.*, N.D. Ohio No. 1:20-CV-01313, 2021 WL 615304, at *6 (Feb. 17, 2021); *Family Tacos, LLC v. Auto Owners Ins. Co.*, N.D. Ohio No. 5:20-CV-01922, 2021 WL 615307, at *7 (Feb. 17, 2021); *Graspa Consulting, Inc.*

Bethel rules, as a matter of law, on the meaning of the phrase “direct physical loss or damage.” *Bethel*, 10th Dist. Franklin No. 06AP-691, 2007-Ohio-546, at ¶ 13. Bethel’s property was damaged in a hail storm. *Id.* at ¶ 2. Republic insured Bethel’s property. Republic paid Bethel nearly \$1 million, but Bethel sought further payment for ice guards. Republic denied coverage for the ice guards. *Id.* at ¶ 3. Eventually, Bethel sued. Republic moved to dismiss based on the policy’s two-year statute of limitations. *Id.* at ¶ 4. The policy stated that the time to sue began to run on the date when “the direct physical loss or damage occurred.” *Id.* at ¶ 13. Republic argued that the statute began to run when the hail storm happened. If this date applied, Bethel’s suit was too late. Bethel argued that the contractual limitation period began to run when Republic denied coverage for the ice guards. The gist of its argument was that the coverage denial was itself a physical loss and thus was the date when the statute began to run. If the denial date applied, the suit was timely. *Bethel* characterizes this as the sole issue raised on appeal and “a question of law”. *Id.* at ¶¶ 8, 10.

Bethel’s analysis begins with “[t]he first general maxim of interpretation * * * that it is not allowable to interpret what has no need of interpretation.” *Id.* at ¶ 10 (quoting *Lawler v. Burt*, 7 Ohio St. 340, 350 (1857)). Furthermore, *Bethel* recognizes that “if a term is clear and unambiguous * * * this court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties.” *Id.* (quoting *Alexander*, 53 Ohio St.2d at 246, 374 N.E.2d 146).

v. United Natl. Ins. Co., S.D.Fla. No. 20-23245, 2021 WL 199980, at *8 (Jan. 20, 2021); *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, N.D. Ohio No. 1:20-CV-01192, 2020 WL 7490095, at *8 (Dec. 21, 2020); *S. Florida Ent Assocs., Inc. v. Hartford Fire Ins. Co.*, S.D.Fla. No. 20-23677, 2020 WL 6864560, at *9 (Nov. 13, 2020); *Malaube, LLC v. Greenwich Ins. Co.*, S.D.Fla. No. 20-22615, 2020 WL 5051581, at *7 (Aug. 26, 2020); *GMS Mgt., Inc. v. Evanston Ins. Co.*, N.D. Ohio No. 1:14 CV 424, 2016 WL 3460214, at *4, *aff'd sub nom. GMS Mgt. Co., Inc. v. Evanston Ins. Co.*, 689 Fed.Appx. 439 (6th Cir.2017); *Ohio Cas. Ins. Co. v. Hanna*, 9th Dist. Medina No. 07CA0016-M, 2008-Ohio-3203, ¶ 10.

See also Santana v. Auto Owners Ins. Co., 91 Ohio App.3d 490, 494, 632 N.E.2d 1308 (6th Dist.1993).

Bethel argued that the phrase “direct physical loss or damage” was ambiguous because of the use of the word “or” in that phrase. Bethel said the word “or” essentially meant one or the other, but never both. Accordingly, Bethel said “loss” has to be something utterly different from “damage”. This, in turn was argued to mean that loss must encompass purely financial loss in the absence of any physical alteration to the property. Thus, Bethel asserted that a covered loss could be the non-physical denial of a claim. *Bethel* at ¶¶ 17-18. *Bethel* rejects this theory and holds that the phrase “direct physical loss or damage” is unambiguous as a matter of law. *Id.* at ¶ 19. In so holding, it recognizes that “[i]nsurance contracts regularly insure against both total loss and damage to a portion of property.” *Id.* Accordingly, “[u]nder the plain wording of the contract between the parties, appellant was required to file suit against appellee within two years following the hailstorm damage that occurred on April 20, 2003,” *Id.* at 20. Of course, the hail damage was physical and the denial of coverage for the ice guards was not.

Applying *Mastellone* and *Bethel*’s sound legal reasoning to the facts presented here, there is no coverage for Neuro’s pure economic loss claim. Neuro champions a legal meaning of Cincinnati’s policy language that would supply property insurance coverage for the general presence of a virus in society. In this context, Neuro asserts that the virus’ effect on property is that it can temporarily loiter on surfaces, before dying. Additionally, Neuro says that government orders that temporarily closed or slowed its business operations constitute direct physical loss or damage to its property. But, at no point does Neuro allege any actual, tangible physical alteration or structural damage to its property. This is typical of complaints both in Ohio cases and in cases

across the country. This failure to allege tangible, physical alteration to insured property is common to the many cases cited in this brief that support Cincinnati's position.

As established above, *Mastellone* addresses a policy requiring "that loss is a physical loss to property." *Mastellone*, 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130, at ¶ 60. In that context, it requires physical alteration or structural damage to property. *Bethel* holds the same regarding the phrase "direct physical loss or damage." These holdings were made as a matter of law by courts interpreting the meaning of insurance policy language. The language in Cincinnati's policy is substantially similar to that in *Mastellone* and *Bethel*. Accordingly, *Mastellone*'s and *Bethel*'s legal rulings should apply here. As a matter of law, Cincinnati's policy requires physical alteration or structural damage to property for there to be direct physical loss or damage to property. And, based on that legal meaning, Neuro's assertions fall short of what is required for coverage.

C. The Definition of the Period of Restoration Should be Read with the Phrase Direct Physical Loss or Damage to Property so that these Provisions Work Together to Mean that a Physical Alteration to the Property is Required

As shown above, it is a long-established principle that "[i]n construing a written instrument, effect should be given to all of its words, if this can be done by any reasonable interpretation." *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 64 Ohio St.3d 657, 666, 597 N.E.2d 1096 (1992) (quoting *Wadsworth Coal Co. v. Silver Creek Mining & Ry. Co.*, 40 Ohio St. 559 (1884), paragraph one of the syllabus). *Hybud* addresses the meaning of the phrase "sudden and accidental" used in a general liability insurance policy. That policy essentially afforded coverage for accidents, subject to any applicable exclusion. *Id.* at 658. The policy's pollution exclusion applied to property damage arising from pollution discharges. But, an exception to that exclusion reintroduced coverage in situations where the pollution discharge was "sudden and accidental". *Id.*

Hybud asserted that the phrase “sudden and accidental” was ambiguous because “sudden” could mean unexpected as well as fast, or abrupt. Thus, it argued, long term, gradual pollution discharges should be covered despite the fact that they did not happen quickly. *Id.* at 666-667. *Hybud* rejects this argument. One reason why is that the word “sudden” is clear and unambiguous in the context of the entire exclusion. To hold otherwise would mean that the word would add nothing to the phrase “sudden and accidental”. The word “accidental” already picked up the concept of an unexpected pollution discharge. To give “sudden” the exact same meaning would violate the by-then-age-old requirement that effect should be given to all of the policy’s words. *Id.* at 666.

Here, Neuro does not make any claim based on physical alteration to its premises or contents. Rather, it claims loss of income because it temporarily and partially lost the use of its business. In particular, Neuro does not allege that any of its property needed to be repaired, rebuilt or replaced. Yet, the Business Income and Extra Expense coverages apply to “the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration’”. The ‘suspension’ must be caused by direct ‘loss’ to property, meaning accidental physical loss or damage. (Policy at A052, A118). The Policy defines “period of restoration” to end when the property should be repaired, rebuilt or replaced. (Policy at A072-A073, A126).

Thus, the period of restoration consists of the time needed to repair, rebuild or replace the property that is the subject of direct physical loss or damage. “Repair” is what one does to property that is damaged, but repairable. “Rebuild” or “replace” is what one does if the property is beyond repair—a total loss. *See Dakota Girls, LLC v. Phila. Indemn. Ins. Co.*, S.D. Ohio No. 2:20-CV-2035, 2021 WL 858489 *6 (Mar. 8, 2021) (“To interpret the Policies as requiring anything other than that the covered premises be destroyed, ruined, or otherwise materially or perceptibly altered

would make the Period of Restoration definition nonsensical.”); *TRIA WS LLC v. Am. Auto. Ins. Co.*, E.D.Pa. No. CV 20-4159, 2021 WL 1193370, at *5 (Mar. 30, 2021) (“The terms ‘repair,’ ‘rebuild,’ and ‘replace’ strongly suggest that the insured property must have suffered some negative change in its physical condition rendering the property unsatisfactory and requiring restoration.”); *Hillcrest Optical, Inc. v. Cont’l Cas. Co.*, 497 F.Supp.3d 1203, 1213 (S.D.Ala.2020) (“The ‘period of restoration’ expressly assumes repair, rebuild or replacement of property. Read in context with ‘direct physical loss of property,’ a ‘period of restoration’ can occur only by virtue of a repairable, rebuildable, or replaceable physical alteration of covered property.”). The fact that the Policy ties Business Income coverage to a period of restoration ending with repair, rebuilding or replacement squarely harmonizes with the necessity for **physical** loss or **physical** damage to property.

In contrast, Neuro’s theory that physical loss to property can mean “loss of use” or a restriction on the scope of business operations without physical harm to the property is squarely at odds with the period of restoration provision. In the event of a mere loss of use, there is nothing to repair, rebuild or replace. Nor can the lifting of the restrictions on Neuro’s business substitute as an end-point to the period of restoration because there is no sense in which the terms “repair, rebuild or replace” can be understood to mean the abatement or termination of a particular governmental regulation of the business’s operations. *See, e.g., TRIA* at *7 n.5 (Mar. 30, 2021); *Hillcrest* at 1212-1213; *Real Hospitality, LLC v. Travelers Cas. Ins. Co. of Am.*, 499 F.Supp.3d 288, 295-296 (S.D.Miss.2020).

Therefore, to be true to *Hybud*, the Cincinnati policy language should be read as a whole. The definition of period of restoration should not be allowed to lapse into irrelevance – it should be given its only reasonable meaning. To do so, it needs to be applied consistently with the

requirement of direct physical loss or damage. This conclusion does not just result from *Hybud*. It is also grounded in well-reasoned cases, including *Sauer* and numerous Coronavirus coverage cases applying Ohio law to policies substantially similar to the one at issue here. *See, e.g., Sauer*, 140 Ohio St.3d 314, 2014-Ohio-3655, 18 N.E.3d 410, at ¶¶ 20-23; *System Optics, Inc. v. Twin City Fire Ins. Co.*, N.D. Ohio No. 5:20-CV-1072, 2021 WL 2075501, at *3-*4, *7-*10 (May 24, 2021); *Dharamsi v. Nationwide Mut. Ins. Co.*, S.D. Ohio No. 2:20-CV-2980, 2021 WL 1979085, 4-*5 (May 18, 2021); *Bridal Expressions, LLC v. Owners Ins. Co.*, N.D. Ohio No. 1:20 CV 833, 2021 WL 1232399, at *6 (Mar. 23, 2021); *Dakota Girls*, 2021 WL 858489, at *6; *Equity Planning Corp. v. Westfield Ins. Co.*, N.D. Ohio No. 1:20-cv-01204, 2021 WL 766802, at *10 (Feb. 26, 2021); *Brunswick Panini's, LLC v. Zurich Am. Ins. Co.*, N.D. Ohio No. 1:20CV1895, 2021 WL 663675, at *5-*6, *7-*9 (Feb. 19, 2021); *Ceres Enters., LLC v. Travelers Ins. Co.*, N.D. Ohio No. 1:20-cv-1925, 2021 WL 634982, at *5 (Feb. 18, 2021); *MIKMAR Inc. v. Westfield Ins. Co.*, N.D. Ohio No. 1:20-cv-01313-JPC, 2021 WL 615304, at *5 (Feb. 17, 2021); *Family Tacos, LLC v. Auto Owners Ins. Co.*, N.D. Ohio No. 5:20-cv-01922-JPC, 2021 WL 615307, at *5 (Feb. 17, 2021); *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, N.D. Ohio No. 1:20-CV-01192, 2020 WL 7490095, at *10 (Dec. 21, 2020); *Sanzo Enters. v. Erie Indemn. Co.*, Delaware C.P. No. 20 CV H 07 0312 (Apr. 30, 2021) (order attached at A164-A186).

Moreover, well-reasoned cases from around the country reach the same conclusion based on the definition of the period of restoration and the basic insurance law principle that insurance contracts be read as a whole. *See, e.g., Image Dental, LLC v. Citizens Ins. Co. of Am.*, N.D. Ill. No. 1:20-cv-02759, 2021 WL 2399988, at *4 (June 11, 2021) (“The policy is chockfull of textual clues that there must be loss of or damage to a thing, meaning a tangible object.”); *Royal Palm Optical, Inc. v. State Farm Mut. Auto. Ins. Co.*, S.D. Fla. No. 20-80749-CIV, 2021 WL 1220750,

at *5 (Mar. 30, 2021); *Michael Cetta, Inc. v. Admiral Indemn. Co.*, S.D.N.Y. No. 1:20-cv-04612-JPC, 2020 WL 7321405, at *6-*7 (Dec. 11, 2020), *appeal withdrawn*, 2d Cir. No. 21-57, 2021 WL 1408305 (Mar. 23, 2021); *Palmer Holdings & Invs., Inc. v. Integrity Ins. Co.*, S.D.Iowa No. 4:20-cv-154-JAJ, 2020 WL 7258857, at *8 (Dec. 7, 2020); *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.*, E.D.Pa. No. 2:20-CV-03342-JDW, 2020 WL 7024287, at *4 (Nov. 30, 2020); *Water Sports Kauai, Inc. v. Fireman’s Fund Ins. Co.*, 499 F.Supp.3d 670, 673, 678-679 (N.D.Cal.2020); *Real Hospitality, LLC v. Travelers Cas. Ins. Co. of Am.*, 499 F.Supp.3d 288, 295-296 (S.D.Miss.2020); *Uncork and Create LLC v. The Cincinnati Ins. Co.*, 498 F.Supp.3d 878, 883-884 (S.D.W.Va.2020); *Hillcrest*, 497 F.Supp.3d at 1213 (“It is apparent * * * that a ‘direct physical loss of property’ contemplates the tangible alteration of property which would necessitate a party’s absence to fix it or require the party to begin operations elsewhere. The ‘period of restoration’ expressly assumes repair, rebuild or replacement of property.”); *Henry’s Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 495 F.Supp.3d 1289, 1295-1296 (N.D.Ga.2020); *Sandy Point Dental PC v. The Cincinnati Ins. Co.*, 488 F.Supp.3d 690, 693 (N.D.Ill.2020); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F.Supp.3d 834, 838 (N.D.Cal.2020); *Malaube, LLC v. Greenwich Ins. Co.*, S.D.Fla. No. 20-22615-CIV, 2020 WL 5051581, at *9 (Aug. 26, 2020).

Toppers exemplifies this point well. *Toppers* addresses the identical period of restoration provision applicable here and holds:

[T]hese provisions make clear that there must be some sort of physical damage to the property that can be the subject of a repair, rebuilding or replacement. The Covid-19 pandemic does not fall within that definition.

Toppers at *4. *Toppers* concludes that a loss of use claim, like Neuro's, cannot be harmonized with the definition of the period of restoration during which the business income coverage can apply. *Id.*

Therefore, there must be some physical alteration to property in order to have direct physical loss or damage to property. The definition of the period of restoration confirms this core requirement and belies Neuro's theory that economic loss alone can somehow be physical loss or damage to property. If there is nothing to repair, rebuild or replace then there must not have been any direct physical loss or damage to property in the first place.

II. WELL-REASONED CORONAVIRUS COVERAGE CASES FROM OHIO COURTS CORRECTLY APPLY OHIO INSURANCE LAW TO POLICY LANGUAGE THAT IS THE SAME AS OR SUBSTANTIALLY SIMILAR TO CINCINNATI'S POLICY LANGUAGE

Since the pandemic's onset, numerous courts in Ohio have addressed the central issue here. *See e.g. System Optics*, 2021 WL 2075501, at *8-*10; *Dharamsi*, 2021 WL 1979085, at *4-*5; *Bridal Expressions*, 2021 WL 1232399, at *4-*6; *Dakota Girls*, 2021 WL 858489, at *5-*7; *Equity Planning*, 2021 WL 766802, at *8-*16; *Brunswick Panini's*, 2021 WL 663675, at *6-*9; *Ceres*, 2021 WL 634982, at *4-*9; *MIKMAR*, 2021 WL 615304, at *4-*8; *Family Tacos*, 2021 WL 615307, at *4-*8; *Santo's*, 2020 WL 7490095, at *7-*12; *Sanzo*, Delaware C.P. No. 20 CV H 07 0312, at A172-A182.

These cases rely on the well-established principles from this Court that are set out above:

- An insurance policy is a contract whose interpretation is a matter of law for the court. *See, e.g., Equity Planning* at *6; *Santo's* at *6.
- A court must look to the plain and ordinary meaning of the language used in the policy unless to do so would lead to manifestly absurd results. *See, e.g., Dharamsi* at *4; *Bridal Expressions* at *4; *Dakota Girls* at *4; *Equity Planning* at *6;

Brunswick Panini's at *5; *Ceres* at *4; *Family Tacos* at *4; *MIKMAR* at *4; *Santo's* at *6; *Sanzo* at A173.

- A court must examine the insurance contract as a whole. *See, e.g., Equity Planning* at *6; *Brunswick Panini's* at *6; *Ceres* at *4; *Family Tacos* at *4; *MIKMAR* at *4; *Sanzo* at A173.
- Simply because a term in a contract is not defined does not mean that the policy is ambiguous. *See, e.g., Dakota Girls* at *6; *Equity Planning* at *6; *Brunswick Panini's* at *6; *Family Tacos* at *8; *Santo's* at *6; *Sanzo* at A174.
- A contract term is not ambiguous simply because parties disagree about its meaning. *See, e.g., Equity Planning* at *6; *Family Tacos* at *11.

Among this Court's decisions on which these cases rely are the decisions Cincinnati relies on here, including *Galatis*, *Alexander*, *Sharonville*, *Shifrin*, *Foster Wheeler* and *Guman*.

Bridal Expressions is emblematic of the cases applying Ohio law in the Coronavirus pandemic context. The insured, Bridal Expressions, sought business income coverage for a temporary shutdown of its store and an ensuing slowing of business because of occupancy restrictions intended to create social distancing. *Bridal Expressions*, 2021 WL 1232399, at *1. Bridal Expressions alleged the presence of the Coronavirus caused direct physical loss or damage and impaired the property's function. *Id.* at *4 & n.4. All of the coverages that Bridal Expressions sought turned on the requirement of direct physical loss of or damage to property, and whether that phrase requires tangible harm to property. *Id.* at *4.

Bridal Expressions holds that the plain and ordinary meaning of the operative coverage language there requires tangible harm. *Id.* at *4-*5. *Bridal Expressions* relies on "[t]he weight of case law, which the court [found] well-reasoned and persuasive * * *." *Id.* at *5-*6 (citing *Santo's*,

2020 WL 7490095, at *10, *Family Tacos*, 2021 WL 615307, at *10; *Ceres*, 2021 WL 634982, at *5; *Brunswick Panini's*, 2021 WL 663675, at *7; *Dakota Girls*, 2021 WL 858489, at *6; *MIKMAR*, 2021 WL 615304, at *4; *Equity Planning*, 2021 WL 766802, at *12).

Furthermore, *Bridal Expressions* states that its holding is buttressed by the period of restoration language, adopting the analysis discussed above. “Applying the plain meaning of the words ‘repair,’ ‘rebuild,’ and ‘replace’ suggests that the coverage period will not begin until there is some tangible harm to the property. This result is supported by the case law interpreting similar policy language.” *Id.* at *6 (citing *MIKMAR* at *4; *Equity Planning* at *12; *Santo's* at *10).

Because *Bridal Expressions* did not allege any physical, tangible loss or damage, its claim based on the presence of COVID-19 and the loss of the intended use of the property was legally insufficient. *Id.* at *6. Additionally, *Bridal Expressions* relies on *Mastellone*, as do many of the Ohio law Coronavirus coverage cases. *Bridal Expressions* at *5-*6; *see also Dakota Girls* at *6; *Equity Planning* at *12; *Brunswick Panini's* at *7-*8; *Ceres* at *7; *MIKMAR* at *6; *Family Tacos* at *7; *Santo's* at *9; *Sanzo*, Delaware C.P. No. 20 CV H 07 0312, at A177-A179.

III. WELL-REASONED CASES NATIONALLY SUPPORT CINCINNATI HERE; COURTS THROUGHOUT THE COUNTRY CORRECTLY HOLD DIRECT PHYSICAL LOSS OR DAMAGE REQUIRES PHYSICAL ALTERATION TO PROPERTY

The Ohio cases cited above are emblematic of a national onslaught of decisions repeatedly rejecting claims that are the same or analogous to *Neuro's*. A substantial majority of these courts hold that as a matter of law, policies with identical or substantially similar policy language unambiguously require that there be tangible physical alteration to property in order to fulfill the requirement of direct physical loss or damage to property. There are literally hundreds of these decisions, spanning the nation from coast to coast, from north to south. *See, e.g., Image Dental*, 2021 WL 2399988, at *5 (N.D.Ill.); *Nguyen v. Travelers Cas. Ins. Co. of Am.*, W.D.Wash. No.

2:20-cv-00597-BJR, 2021 WL 2184878 (May 28, 2021); *Jeffrey M. Dressel, D.D.S., P.C. v. Hartford Ins. Co. of the Midw., Inc.*, E.D.N.Y. No. 20-CV-2777(KAM)(VMS), 2021 WL 1091711 (Mar. 22, 2021); *Manhattan Partners, LLC v. Am. Guar. & Liab. Ins. Co.*, D.N.J. No. CV2014342SDWLDW, 2021 WL 1016113, at *2 (Mar. 17, 2021); *Restaurant Grp. Mgmt. LLC v. Zurich Am. Ins. Co.*, N.D.Ga. No. 1:20-cv-4782-TWT, 2021 WL 1937314 (Mar. 16, 2021); *Kahn v. Pa. Natl. Mut. Cas. Ins. Co.*, M.D.Pa. No. 1:20-CV-781, 2021 WL 422607 (Feb. 8, 2021); *Town Kitchen, LLC v. Certain Underwriters at Lloyd's, London*, S.D.Fla. No. 20-22832-CIV, 2021 WL 768273 (Feb. 26, 2021); *Crescent Plaza Hotel Owner L.P. v. Zurich Am. Ins. Co.*, N.D.Ill. No. 20 C 3463, 2021 WL 633356 (Feb. 18, 2021); *Café Plaza de Mesilla, Inc. v. Cont'l Cas. Co.*, D.N.M. No. 2:20-cv-354-KWR-KRS, 2021 WL 601880 (Feb. 16, 2021); *Unmasked Mgmt., Inc. v. Century-Natl. Ins. Co.*, S.D.Cal. No. 3:20-CV-01129-H-MDD, 2021 WL 242979 (Jan. 22, 2021); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, W.D.Tex. No. 1:20-CV-665-RP, 2021 WL 972878 (Jan. 21, 2021); *Zwillo V, Corp. v. Lexington Ins. Co.*, W.D.Mo. No. 20-cv-00339-RK, 2020 WL 7137110 (Dec. 2, 2020); *Whiskey River on Vintage, Inc. v. Ill. Cas. Co.*, S.D.Iowa No. 4:20-cv-185-JAJ, 2020 WL 7258575 (Nov. 30, 2020); *Real Hospitality*, 499 F.Supp.3d at 294-296 (S.D.Miss.2020).

Additionally, courts in Alabama, Arizona, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Missouri, New York, North Carolina, Pennsylvania, Texas, Vermont and West Virginia have all recently granted Cincinnati's motions to dismiss Coronavirus coverage complaints like Neuro's. Each of the insurance policies at issue in those cases contained the same or substantively identical language as is in the Policy here. *See Estes v. Cincinnati Ins. Co.*, E.D.Ky. No. 2:20-CV-138 (WOB-CJS), 2021 WL 2292473 (June 4, 2021); *The Brown Jug, Inc. v. The Cincinnati Ins. Co.*, E.D.Mich. No. 2:20-cv-13003-BAF-DRG, 2021 WL 2163604

(May 27, 2021); *MMMMM DP, LLC v. The Cincinnati Ins. Co.*, E.D.Mo. No. 4:20-cv-00867-SEP, 2021 WL 2075565 (May 24, 2021); *Assocs. in Periodontics, PLC v. The Cincinnati Ins. Co.*, D.Vt. No. 2:20-CV-171, 2021 WL 1976404 (May 18, 2021); *Georgetown Dental, LLC v. The Cincinnati Ins. Co.*, S.D.Ind. No. 1:21-cv-00383-TWP-MJD, 2021 WL 1967180 (May 17, 2021); *Seoul Taco Holdings, LLC v. The Cincinnati Ins. Co.*, E.D.Mo. No. 4:20-cv-1249 RLW, 2021 WL 1889866 (May 11, 2021); *Akridge Family Dental, Inc. v. The Cincinnati Ins. Co.*, S.D.Ala. No. 1:20-00427-JB-B, 2021 WL 2020605 (May 6, 2021); *Dukes Clothing, LLC v. The Cincinnati Ins. Co.*, N.D.Ala. No. 7:20-cv-860-GMB, 2021 WL 1791488 (May 5, 2021); *L&J Mattson's Co. v. The Cincinnati Ins. Co., Inc.*, N.D.Ill. No. 20 C 7784, 2021 WL 1688153 (Apr. 29, 2021); *Rye Ridge Corp. v. The Cincinnati Ins. Co.*, S.D.N.Y. No. 20 CIV. 7132 (LGS), 2021 WL 1600475 (Apr. 23, 2021); *The Woolworth LLC v. The Cincinnati Ins. Co.*, N.D.Ala. No. 2:20-cv-01084-CLM, 2021 WL 1424356 (Apr. 15, 2021); *ILIOS Prod. Design, LLC v. Cincinnati Ins. Co., Inc.*, W.D.Tex. No. 1:20-CV-857-LY, 2021 WL 1381148 (Apr. 12, 2021); *Chester Cnty. Sports Arena v. The Cincinnati Specialty Underwriters Ins. Co.*, E.D.Pa. No. 2:20-cv-02021-MMB, 2021 WL 1200444 (Mar. 30, 2021); *Milkboy Ctr. City LLC v. Cincinnati Cas. Co.*, E.D.Pa. No. CV 20-2036, 2021 WL 1200444 (Mar. 30, 2021); *Cornerstone Warrington, Inc. v. The Cincinnati Ins. Co.*, E.D.Pa. No. 2:20-cv-02398-MMB, 2021 WL 1200444 (Mar. 30, 2021); *Stone Soup, Inc. v. The Cincinnati Ins. Co.*, E.D.Pa. No. 2:20-CV-2614-TJS 2021 WL 1200444 (Mar. 30, 2021); *St. Julian Wine Co., Inc. v. The Cincinnati Ins. Co.*, W.D.Mich. No. 1:20-cv-374, 2021 WL 1049875, at *3 (Mar. 19, 2021) (“Put another way, there is no reasonable construction of ‘physical loss’ or ‘physical damage’ that encompasses the presence of a contagious virus in the general population.”); *Bluegrass Oral Health Ctr., PLLC v. Cincinnati Ins. Co.*, W.D.Ky. No. 1:20-cv-00120-GNS, 2021 WL 1069038 (Mar. 18, 2021); *FS Food Grp., LLC v. The Cincinnati Inc. Co.*, W.D.N.C. No. 3:20-cv-00588-

RJC-DSC (Mar. 18, 2021) (report and recommendation attached at A187-A202); *B Street Grill & Bar LLC v. Cincinnati Ins. Co.*, D.Ariz. No. 2:20-cv-01326, 2021 WL 857361 (Mar. 8, 2021); *Summit Hosp. Grp., Ltd. v. The Cincinnati Ins. Co.*, E.D.N.C. No. 5:20-cv-254-BO, 2021 WL 831013 (Mar. 4, 2021); *Gilreath Family & Cosmetic Dentistry, Inc. v. The Cincinnati Ins. Co.*, N.D.Ga. No. 1:20-cv-02248-JPB, 2021 WL 778728 (Mar. 1, 2021); *The Bend Hotel Dev. Co., LLC v. The Cincinnati Ins. Co.*, N.D.Ill. No. 20 C 4636, 2021 WL 271294 (Jan. 27, 2021); *TJBC, Inc. v. The Cincinnati Ins. Co., Inc.*, S.D.Ill. No. 20-CV-815-DWD, 2021 WL 243583 (Jan. 25, 2021); *Riverside Dental of Rockford, Ltd. v. Cincinnati Ins. Co.*, N.D.Ill. No. 20 CV 50284, 2021 WL 346423 (Jan. 19, 2021); *Webb Dental Assocs. DMD PA v. The Cincinnati Indemn. Co.*, N.D.Fla. No. 1:20-cv-250-AW-GRJ, 2021 WL 800113 (Jan. 15, 2021); *Promotional Headwear Internatl. v. The Cincinnati Ins. Co.*, No. 20-cv-23211-JAR-GEB, 2020 WL 7078735 (D. Kan. Dec. 3, 2020); *4431, Inc. v. Cincinnati Ins. Cos.*, E.D.Pa. No. 5:20-cv-04396, 2020 WL 7075318 (Dec. 3, 2020); *T&E Chicago LLC v. Cincinnati Ins. Co.*, 501 F.Supp.3d 647 (N.D.Ill.2020); *Uncork and Create LLC v. The Cincinnati Ins. Co.*, 498 F.Supp.3d 878 (S.D.W.Va.2020); *Vandelay Hosp. Group LP v. Cincinnati Ins. Co.*, N.D.Tex. No. 3:20-CV-1348-D, 2020 WL 5946863 (Oct. 7, 2020), *dismissing Am. Compl. at* N.D.Tex. No. 3:20-CV-1348-D, 2021 WL 462105 (Feb. 9, 2021); *Oral Surgeons, P.C. v. The Cincinnati Ins. Co.*, 491 F.Supp.3d 455 (S.D.Iowa 2020); *Sandy Point Dental PC v. The Cincinnati Ins. Co.*, 488 F.Supp.3d 690 (N.D.Ill.2020), *denying motion for leave to file Second Am. Compl. & to reconsider at* N.D.Ill. No. 20 CV 2160, 2021 WL 83758 (Jan. 10, 2021); *ABT Performing Arts Assn. Inc. v. Cincinnati Ins. Co.*, Az.Super.Ct. No. CV2020-010495 (Mar. 22, 2021) (order attached at A203-A209); *KLOS Enters., LLC v. The Cincinnati Ins. Co.*, Az.Super.Ct. No. CV 2020-010496 (Feb. 12, 2021) (denying reconsideration on February 23, 2021) (order attached at A210-A215); *Catlin Dental, P.A. v. The Cincinnati Indemn. Co.*,

Fla.Cir.Ct. No. 20-CA-004555, 2020 WL 8173333 (Dec. 11, 2020); *Ind. Repertory Theatre, Inc. v. The Cincinnati Cas. Co.*, Ind.Super.Ct. No. 49D01-2004-PL-013137 (Mar. 12, 2021) (order attached at A216-A244).

Promotional Headwear is an example of how exceptionally well-reasoned and heavily researched these decisions are. It rejects a claim based on the loss of use of premises resulting from emergency orders issued by the Governor of Kansas and Johnson County, Kansas. *Promotional Headwear*, 2020 WL 7078735, at *1. It holds that the same Cincinnati policy language involved in the present case did not provide coverage. *Id.* at *2. There was no physical loss or physical damage to property because there was no claim that the property had been physically altered. *Id.* at *7. Moreover, *Promotional Headwear* relies on the same basic insurance law principles that apply in Ohio: the policy must be read as a whole and terms in the policy must be read in context. Compare *id.* at *4-*5 with *Sharonville*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, at ¶ 6; *Alexander*, 53 Ohio St.2d at 245-246, 374 N.E.2d 146; *Guman Bros.*, 73 Ohio St.3d at 108, 652 N.E.2d 684.

Similarly sound in its analysis and application of insurance law principles is *Nguyen*. It applies Washington law to the dismissal of hundreds of consolidated Coronavirus coverage claims. *Nguyen*, 2021 WL 2184878, *1. *Nguyen* recognizes that the numerous commercial property policies at issue there were not identically worded, but “[a]ll policies in this litigation tie coverage to direct physical loss or damage,” as a condition precedent for any coverage under the policies, focusing the court on the requirements of “direct” “physical” “loss” or “damage”. *Id.* at *3.⁷ Before analyzing the specifics of the ten representative cases before it, *id.* at *6, *Nguyen* reviewed relevant

⁷ In addition to the general Business Income coverage, the court also analyzed the extensions for Extra Expense and Civil Authority coverages, which, as is the case here, required that there be direct physical loss or damage to property. *Nguyen* at *3-*4.

principles of Washington insurance law. Those principles are generally consistent with Ohio's. *See id.* at * 8-*9.

Nguyen recognizes, based on the plaintiffs' concessions, that "COVID-19, as an airborne virus that can live only briefly on non-organic surfaces, does not cause damage to those surfaces, such as the buildings, counters, dentist chairs, and other insured property of the businesses at issue." *Id.* at *10. Some plaintiffs argued that COVID-19 damaged property because "the physical presence of COVID-19 * * * contaminates and thereby alters physical surfaces in a way that creates risk of illness" for people. *Id.* *Nguyen* rejects this interpretation of direct physical loss or damage because "[a]s numerous courts have recognized, 'COVID-19 hurts people, not property.'" *Id.* (collecting cases). *Nguyen* also recognizes that when surfaces can be cleaned by wiping the surface with a disinfectant, there is no direct, physical damage to property, as required by a commercial property policy. *Id.*

Nguyen also considers whether COVID-19 causes direct physical *loss* of property and holds that the term cannot reasonably be construed in context to include the loss of use of property. *Id.* "When combined with 'direct' and 'physical' the Court determines that, in its common usage, 'loss' means that the alleged peril must set in motion events which cause the inability to physically own or manipulate the property, such as theft or total destruction." *Id.* Also relevant here, *Nguyen* holds that the common understanding of the words direct physical loss does not encompass "purely economic losses". *Id.* at *11 (citing, *inter alia*, *Equity Planning*, 2021 WL 766802, at *10). "[I]n arguing that direct physical loss covers loss of income in these circumstances, Plaintiffs conflate physical loss with non-physical loss of use. Detrimental economic impact, however, does not trigger coverage under the property insurance here at issue." *Id.* (collecting cases). Moreover, *Nguyen* cites to the same section of *Couch* quoted in *Mastellone* for the proposition that an

insurance policy intended to cover damage to property does not cover economic loss and “that damages resulting from COVID-19 are not covered by the policies at issue in these COVID cases.” *Id.* at *11 n.17 (quoting Generally; “Physical” loss or damage, 10A *Couch on Ins.* Section 148:46 (3d ed. 2020); collecting cases). In this way, *Nguyen* joined innumerable other courts that rely on *Couch*.

Some plaintiffs in *Nguyen* tried to distinguish their claims by asserting “the actual presence of COVID-19 on their premises,” but *Nguyen* finds that presence to be irrelevant. “Given the Court’s conclusion that COVID-19 does not cause physical harm or damage to non-organic surfaces, the Court finds that the pleading of actual presence is immaterial.” *Id.* at *11 (collecting cases).

Recently, a federal court in Illinois put a fine point on why claims like Neuro’s are not covered: “A ‘physical loss’ of property does not mean a mere inability to run a business.” *Image Dental*, 2021 WL 2399988, at *5. Like Neuro, the insured in *Image Dental* had to limit its services during the shutdown and then sought coverage under what it contended was an “all risk” property insurance policy. *Id.* at *4. “But that’s [all risks] not what the policy says.” *Id.* Like the Cincinnati policy, the *Image Dental* policy required loss or damage and “[n]ot just any loss or damage will do. It must be a ‘physical’ loss or damage. * * * The nature of the loss must be *physical*, not intangible immaterial, economic, or regulatory.” *Id.* at *5. *Image Dental*, like Neuro, failed to plead any physical loss or damage to property: “*Image Dental* may have shut its doors, but it does not allege that it suffered so much as chipped paint.” *Id.* Applying Illinois law principles consistent with Ohio law, *Image Dental* states:

Image Dental did not buy “business interruption insurance,” writ large. That is, *Image Dental* did not purchase a policy that covers anything and everything that interrupts its business. It purchased a specific type of policy that covered a specific

type of risk. The policy covered business losses in limited circumstances, and those circumstances do not include a loss of business without a physical harm.

Id. at *4. *Image Dental* also rejects the insured’s attempts to confuse the analysis by putting “forward snippets of the policy in isolation, cutting bits and pieces of the policy and removing them from their broader context.” *Id.* at *6. Rather than focus on these bits and pieces, *Image Dental* says that “the policy is chockfull of textual clues that there must be loss of or damage to a thing, meaning a tangible object.” *Id.* at *4.

Image Dental also argued that “loss” includes “loss of use”. That argument was batted away: “Not so. Loss and loss of use do not mean the same thing. By way of illustration, the loss of a car does not mean the same thing as the loss of *use* of a car. Ask any grounded teenager.” *Id.* Looking at the policy in context and as a whole, including the period of restoration’s repair, rebuild or replace requirements, *id.* (“All of those words reflect hands-on physicality, meaning fixing physical damage or moving elsewhere.”), the claims for economic loss were rejected. This is because “*Image Dental*’s reading would, in effect, rewrite the policy and wipe away the requirement of something physical happening to property.” *Id.* at *5.

As in *Promotional Headwear*, *Nguyen* and *Image Dental*, courts have repeatedly and consistently held that direct physical loss or damage to property requires actual, *physical* alteration or change to property. Nearly all of these cases, like the present case, are decided on motions to dismiss. Their complaints, like *Neuro*’s complaint, do not allege that the Coronavirus causes physical alteration or change to property, whether it is in the community or on surfaces.

Furthermore, the many decisions nationally that support *Cincinnati* rely on fundamental principles of insurance coverage like those applicable in Ohio. They reasonably and soundly assess policy language that is the same or substantially similar to that involved here. *Cincinnati* does not ask this Court to follow those cases because there are so many of them. Instead, *Cincinnati* asks

this Court to follow them because their shared evaluations and results are well-reasoned and legally sound. Accordingly, this Court should apply the same sound reasoning and answer the certified questions in the negative.

IV. TO DIVORCE PROPERTY COVERAGE FROM DIRECT PHYSICAL LOSS OR DAMAGE TO PROPERTY WOULD IMPROPERLY CREATE COVERAGE FOR BUSINESSES' ORDINARY COSTS OF COMPLYING WITH GOVERNMENT REGULATION AND WOULD LEAD TO MANIFESTLY ABSURD RESULTS

Neuro seeks coverage based on the idea that temporary, governmental regulation of business operations is a direct physical loss. But, such coverage would not be anchored in any tangible, physical alteration of property. Rather, applying Neuro's interpretation of the Policy language, financial loss from government regulation, without more, would be covered. Common sense and basic tenets of property insurance coverage make clear that Neuro's proposed breadth of coverage would lead to absurd results because it has no logical end:

Ultimately, the Court finds that Plan Check's interpretation is not a reasonable one because it would be a sweeping expansion of insurance coverage without any manageable bounds. * * * [C]onsider the following scenarios: (1) a city changes its maximum occupancy codes to lower the caps, meaning that a particular restaurant can no longer seat as many customers as it used to; (2) a city amends an ordinance requiring restaurants located in residential zones to cease operations between 1:00 a.m. and 5:30 a.m. to expand the window to 12:00 a.m. to 6:00 a.m.; (3) a city issues a mandatory evacuation order to all of its residents due to nearby wildfires (a consequence of this is that all businesses must suspend operations), but lifts the order three weeks later when the wildfires are extinguished without, fortunately, any destruction of property. Under Plan Check's standard, all of these instances would trigger insurance coverage. While Plan Check may believe that that is an appropriate result, the Court is not persuaded. * * * It offers no way, and the Court does not see any way, to limit this coverage.

Plan Check Downtown III, LLC v. Amguard Ins. Co., 485 F.Supp.3d 1225, 1231-1232 & n.6

(C.D.Cal.2020).⁸ *Henry's* is to the same effect:

⁸ Further, *Plan Check* observes "[t]he manageability issue is not limited to government action, but with anything that interferes with the permitted physical activities on a property. If a building's elevator system had a software bug that temporarily shut down all the elevators, that would clearly interfere with permitted physical activities. Similarly, a snowstorm would interfere with a

[H]olding that the Governor’s Executive Order led to a “physical loss of” the dining rooms **would massively expand the scope of the insurance coverage at issue here. * * * The Plaintiffs’ construction would potentially make an insurer liable for the negative effects of operational changes resulting from any regulation or executive decree, such as a reduction in a space’s maximum occupancy.**

495 F.Supp.3d at 1295 (emphasis added).

Moreover, Neuro’s expansive concept of coverage would not be limited to the effect of government regulations. In *Bridal Expressions*, the covered property included the plaintiff’s outdoor furniture. 2021 WL 1232399, at *7. *Bridal Expressions* states that property coverage in the absence of tangible physical alteration of property:

would result in the Policy being triggered anytime that the rain renders the outdoor furniture unusable. Because contracts must not be interpreted in a manner which leads to an absurd result, the most logical reading of the Policy is that tangible harm to property is necessary to meet the threshold requirement for coverage.

Id.; see also *Hillcrest*, 497 F.Supp.3d at 1211-1212.

Viruses have been around for a long time. Construing the mere presence of a virus in society into a direct physical loss to property would mean that all property is always physically lost or damaged. There are many people, sick with viruses, walking around our communities. Concluding that their mere presence in the community is a direct physical loss to property would mean that all property is always physically lost or damaged, particularly during cold and flu season. In the same vein, government regulation of business is ubiquitous. Construing financial loss caused by compliance with government regulation as a direct physical loss to property would mean that all businesses are always suffering direct physical loss. Businesses are regulated by noise ordinances, age restrictions, capacity limits, and much more. Government regulations limit services and sales to customers and deprive businesses of potential revenue. Interpreting a property

restaurant’s outdoor dining service. And yet Plan Check’s interpretation would cover all of these scenarios.” *Plan Check* at 1232.

insurance policy to cover these financial losses would create an absurd result in contravention of Ohio law.

As *Plan Check*, *Henry's*, *Bridal Expressions* and *Hillcrest* show, a construction of the policy to cover financial losses because of the presence of the virus, the presence of infected people or government regulation is contrary to the policy language and the very purpose of property insurance. The effect would be to make property insurers responsible for any negative change in policyholders' general operating costs caused by government regulation and for other external events that diminish the policyholders' business but do not damage their property. To do so would be unworkable, unreasonable and patently absurd.

Conclusion

This Court has long-established Ohio's principles of insurance law. Application of those principles here mandates a negative answer to the certified question. The plain and ordinary meaning of the phrase direct physical loss or damage to property requires a tangible physical alteration to property. This Court's decisions, such as *Galatis* and *Sauer*, are pole stars that should be used to navigate to outcomes like that in *Bridal Expressions* and the other Ohio law cases Cincinnati relies on. This Court's decision in *Hybud* resonates with the need here to account for the period of restoration definition, harmonizing the Policy's terminology of repair, rebuild or replace with its requirement of direct physical loss or damage to property. Well-reasoned cases nationally further bolster this result. Accordingly, the answer to the certified question should be no.

Respectfully submitted,

**DEFENDANTS, THE CINCINNATI
INSURANCE COMPANY, THE CINCINNATI
CASUALTY COMPANY, AND THE
CINCINNATI INDEMNITY COMPANY**

/s/ Michael K. Farrell

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APPENDIX INDEX

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO**

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

Plaintiff,

v.

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

Defendants.

Case No.: 4:20-cv-1275

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

Plaintiff Neuro-Communications Service d/b/a Hearing Innovations (“Plaintiff” or “Hearing Innovations”) brings this case on behalf of itself and all others similarly situated, against Defendants The Cincinnati Insurance Company, The Cincinnati Casualty Company, and The Cincinnati Indemnity Company (“Defendants”), and alleges as follows:

NATURE OF THE ACTION

1. Hearing Innovations provides comprehensive hearing and balance care for patients of all ages. Hearing Innovations takes pride in meeting the needs of all its patients, including their overall health.

2. Like many audiology practices in Ohio, Hearing Innovations was forced to significantly curtail its practice due to COVID-19 (also known as the “Coronavirus” or “SARS-CoV-2”), and the civil authority orders issued by the Governor of Ohio and the Ohio Department of Health (the “Ohio Civil Authority Orders”), as well as guidance issued by the American Academy of Audiology.

3. Hearing Innovations sought to protect itself – and believed that it had protected itself – in the event that its operations were suspended or reduced for reasons outside of its control beyond just damage to the physical premises (such as fire), by purchasing an “all-risk” property CinciPak Policy through Defendants (the “Building and Personal Property Coverage Form”). *See* Exhibit A. An “all-risk” property policy provides broad coverage for losses resulting from any cause unless expressly excluded.

4. Among other coverages, the Building and Personal Property Coverage Form *specifically* includes coverage for Business Income for twelve (12) months of actual loss sustained and Extra Expenses incurred. The policy also provides “Extended Business Income” coverage for reduction of Business Income and for Extra Expenses even once operations are resumed as well as coverage for action of Civil Authority for thirty (30) days.

5. The Building and Personal Property Coverage Form purchased by Plaintiff do not include, and are not subject to, any exclusion for losses caused by viruses or pandemics. Had Defendants, as the drafters of the policy, wanted to exclude the risks of a virus or a pandemic, and related issues, like civil authority orders and social distancing, it could easily have done so in plain text like other insurance companies purport to do (without trying to retroactively rewrite their policies).

6. Notwithstanding, when Plaintiff suffered an actual loss of Business Income and incurred Extra Expenses as a result of a covered cause of loss, Defendants

wrongfully – and in direct contravention of the policy – denied Plaintiff’s insurance claim. *See* Exhibit B. Plaintiff is not alone. Defendants have systematically refused to pay all its insureds under its Business Income, Extra Expense, Extended Business Income, and Civil Authority coverages for losses suffered related to COVID-19.

PARTIES

7. Plaintiff Hearing Innovations is a corporation registered in Ohio with its principal places of business in Boardman, Ohio and Youngstown, Ohio. Hearing Innovations provides audiology and related hearing and balance services to its patients, many of which are elderly or are at high risk of severe illness from COVID-19.

8. Defendants are all headquartered in, and citizens of, Ohio. Defendants at all relevant times sold and issued insurance policies in the State of Ohio and throughout the country, including, without limitation, to Hearing Innovations.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because (a) the Classes consist of at least 100 members; (b) at least one class members is not a citizen of Ohio; and (c) the amount in controversy exceeds \$5,000,000 exclusive of interest and costs.

10. This Court has personal jurisdiction over Defendants, because a substantial portion the alleged wrongdoing occurred in the state of Ohio, and Defendants have sufficient contacts with the state of Ohio. Venue is proper in this District under 28 U.S.C. § 1391(b)(3) because a substantial portion of the acts and conduct giving rise to the claims occurred within the District.

FACTUAL BACKGROUND

11. Plaintiff pays an annual premium of \$2,279 to Defendants, who issued to Plaintiff a Policy No. ECP 055 17 19 / EBA 055 17 19, for the annual period beginning September 14, 2019. Plaintiff performed all its obligations under the Policy, including the payment of premiums. The covered premises are located at 755 Boardman Canfield Rd Ste C1, Boardman, Ohio, 44512-4387; and 4300 Belmont Ave, Youngstown, Ohio, 44505-1084.

12. Some insurance policies cover specific and identified risks, such as hurricanes or fires. However, most property policies, including those sold by Defendants, are “all-risk” policies. These types of policies cover all risks of loss, and only exclude narrow and specifically enumerated risks.

13. In the Building and Personal Property Coverage Form (the policy issued to Plaintiff), Defendants agreed to pay “for direct ‘loss’ to Covered Property at the ‘premises’ caused by or resulting from any Covered Cause of Loss.” A Covered Cause of Loss is defined as “direct ‘loss’” except those that are expressly and specifically excluded or limited. *See* Exhibit A, Building and Personal Property Coverage Form, at A.3. A “loss” is defined as “accidental physical loss or accidental physical damage.” *Id.* at G.8.

14. Losses due to COVID-19 and the Ohio Civil Authority Orders are a Covered Cause of Loss under Defendants’ policies with the Building and Personal Property Coverage Form because they constitute direct “loss” and are not otherwise excluded.

15. In the Building and Personal Property Coverage Form, apart from general coverage, as part of additional coverages, Defendants agreed to pay for Plaintiff's actual loss of Business Income sustained due to the suspension of Plaintiff's operations. Specifically, the 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.

See Exhibit A, Building and Personal Property Coverage Form, at A.5.b.(1).

16. The Building and Personal Property Coverage Form further includes Extra Expense coverage which covers "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." See Exhibit A, Building and Personal Property Coverage Form, at A.5.b.(2).

17. The Building and Personal Property Coverage Form also includes Civil Authority coverage, under which Defendants agreed to pay for the actual loss of Business Income sustained when access to the scheduled premises is prohibited by

order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area. *See* Exhibit A, Building and Personal Property Coverage Form, at A.5.b.(3) (“[w]hen 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’...”).

18. The Building and Personal Property Coverage Form also provides Extended Business Income coverage which provides that Defendants “will pay for actual loss of ‘Business Income’ you sustain and Extra Expense you incur” after “‘operations’ are resumed[.]” *See* Exhibit A, Building and Personal Property Coverage Form, at A.5.b.(6). This additional coverage has been extended to last for 12 consecutive months after operations are resumed. *See* FORM FCP 206 05 16. Extended Business Income coverage is meant to provide coverage for lost Business Income during the time it takes a business to bounce back from the suspension of its business operations once it restarts.

19. Moreover, not only are Business Income and the related coverages provided for in the Building and Personal Property Coverage Form, but an endorsement entitled Business Income (And Extra Expense) Coverage Form (FORM FA 213 05 16) is also affixed to the Policy and further provides for these coverages. *See also* Exhibit B (“Additionally, the Policy at Form FA 213 05 16 provides separate Business Income and Extra Expense coverage provisions[.]”).

20. As explained below, the proliferation of COVID-19 throughout the State of Ohio and throughout the Mahoning Valley, and the related Ohio Civil Authority Orders issued by local, state, and federal authorities constitute a Covered Cause of Loss triggering the Business Income, Extra Expense, Civil Authority, and Extended Business Income provisions of the Building and Personal Property Coverage Form, and of Form FA 213 05 16.

A. Covered Cause of Loss

1. COVID-19

21. On January 30, 2020, the World Health Organization (“WHO”) declared the COVID-19 outbreak a “Public Health Emergency of International Concern.”¹ Later, on March 11, 2020, the WHO declared COVID-19 a global health pandemic. On March 13, 2020, President Trump declared a national emergency in the face of a growing public health and economic crisis due to the COVID-19 global pandemic.

22. In the State of Ohio alone, there have been over 38,000 confirmed cases of COVID-19, and approximately 2,400 related deaths.² In Mahoning County, where Hearing Innovations is located, there have been over 1,500 confirmed cases of COVID-19, and 195 deaths.³

¹[https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) (last visited June 10, 2020).

²<https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/overview> (last visited June 9, 2020).

³ *Id.*

23. Published research suggests that the virus that causes COVID-19 remains stable and transmittable for up to three hours in aerosols, up to four hours on copper, up to twenty-four hours on cardboard, and up to two to three days on plastic and stainless steel.⁴

2. Ohio Civil Authority Orders

24. The presence and physical spread of this deadly virus and the pandemic have caused civil authorities to issue orders requiring the suspension of businesses, including civil authorities with jurisdiction over Plaintiff's practice, to slow down the deadly and dangerous spread of COVID-19. Nearly every state in the country, including Ohio, has or had an order restricting the operation of non-essential businesses.

25. These Ohio Civil Authority Orders include:

- a. On March 9, 2020, Ohio Governor Mike DeWine issued Executive Order No. 2020-01D, "Declaring A State of Emergency". The March 9 Order declared a "state of emergency...for the entire State to protect the well-being of the citizens of the Ohio from the dangerous effects of COVID-19."
- b. On March 17, 2020, Director of Ohio Department of Health Amy Acton issued the "Director's Order for the Management of Non-essential

⁴<https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days> (last visited June 10, 2020).

Surgeries and Procedures throughout Ohio”.⁵ The March 17 Order stated that “all non-essential or elective surgeries and procedures that utilized PPE should be concluded.”

- c. On March 22, 2020, Director of Ohio Department of Health Amy Acton issued the “Director’s Stay Safe Ohio Order”. Under the March 22 Order “all individuals currently living within the State of Ohio are ordered to stay at home” unless an exception applies, and “[a]ll persons may leave their homes or place of residence only to participate in activities, businesses or operations as permitted in this Order.”

26. In addition, on March 22, 2020, the American Academy of Audiology’s Executive Committee stating that “[a]udiology practices are ‘non-essential’” recommending “[t]he most important thing we can do to protect our patients right now is to shut our physical doors.”⁶ In addition, the Centers for Disease Control and Prevention (“CDC”) have made similar recommendations to postpone elective and non-urgent visits.

27. As a result of COVID-19, the Ohio Civil Authority Orders, the direction from the American Academy of Audiology, as well as information from other sources, including the Ohio Department of Health, Plaintiff ceased almost all its operations on March 23, 2020 and only resumed some operations on May 4, 2020.

3. Impact of COVID-19 and Ohio Civil Authority Orders

⁵ <https://www.wksu.org/post/coronavirus-orders-issued-ohio> (last visited June 10, 2020).

⁶ <https://www.audiology.org/message-academy-executive-committee-0> (last visited June 10, 2020).

28. Hearing Innovations and the proposed Classes defined below have suffered an actual loss of Business Income and incurring Extra Expenses due to the suspension of operations. In the case of Hearing Innovations, it had been forced to almost entirely cease business activities.

29. The presence of COVID-19 and the Ohio Civil Authority Orders (and similar civil authority orders) constitute a Covered Cause of Loss, as they constitute “accidental physical loss or accidental physical damage.”

30. Moreover, the suspension of Plaintiff’s operation 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, and the Ohio Civil Authority Orders and the actual damage in the form of the likely physical presence of COVID-19 on or within the property.

31. Hearing Innovations is aware that at least one of its patients died as a result of COVID-19 shortly after being seen at the premises. Another patient had COVID-19 and had to be treated at the hospital. Plaintiff’s main patient population is over the age of 70 and is in a high-risk category for death due to COVID-19.

32. Plaintiff reopened on May 4, 2020. Plaintiff has incurred expenses such as purchasing masks, gloves, and plexiglass in order to reopen. After reopening, Plaintiff had less than half its normal revenue.

33. COVID-19 and the Ohio Civil Authority Orders also implicated the Civil Authority coverage, because:

- a. COVID-19 caused direct damage to property other than Covered Property at the “premises”;
- b. Access to the area immediately surrounding the damaged property was prohibited (for their business purposes) by civil authority as a result of the damage;
- c. The action of civil authority was taken in response to dangerous physical conditions resulting from COVID-19;
- d. Plaintiff suffered an actual loss of Business Income and sustained Extra Expense caused by the action of the civil authority that prohibited access (for business purposes) to the “premises”.

34. Having suffered a necessary suspension of operations implicating coverage, on or about March 23, 2020, Plaintiff submitted a claim to Defendants under its policy. Without any true investigation, Defendants denied Plaintiff’s claim. *See Exhibit B.*

35. Defendants based this denial primarily on:
 - a. The alleged lack of “direct, physical loss”; and
 - b. A purported lack of “evidence that the [civil authority] order was entered because of direct damage to property at other locations or dangerous physical conditions at other locations” and because “the order does not restrict access to the area immediately surrounding your premises”.
36. As summarized by Defendants:

This claim does not satisfy the Policy’s insuring agreement. The claim does not involve direct, physical loss to property at your premises caused by a Covered Cause of Loss.

37. None of these purported reasons are credible bases for Defendants' denial of Plaintiff's claim. First, as described above, in the context of COVID-19 and the Ohio Civil Authority Orders, there was a suspension of operations caused by direct "loss" to Covered Property at the "premises" caused by or resulting from a Covered Cause of Loss. That is all that is required to compel Defendants to provide Business Income coverage. Second, it strains credibility for Defendants to assert that the Ohio Civil Authority Orders were not entered because of COVID-19 around the premises. Further, the Ohio Civil Authority Orders restricted (business) access to Plaintiff's premises.

38. The simple truth is that Defendants pre-determined its intent to deny coverage for the COVID-19 pandemic (and related civil authority orders), despite the complete absence, in the context of Business Income, Extra Expense, Extended Business Income, or the Civil Authority coverage, of a virus or pandemic exclusion.

39. Defendants, as sophisticated insurance companies, knows how to exclude viruses when they want to. Indeed, the Insurance Services Offices, Inc. ("ISO") developed a virus exclusion in the wake of the outbreak of Severe Acute Respiratory Syndrome or "SARS" in the early 2000s. Defendants' policy does not contain any relevant exclusions for viruses even though such exclusions are now commonplace.

40. In fact, the only reference to "viruses" in the entire policy are computer viruses. *See e.g.*, Ex. A at E.b.7.d.3 ("For the purpose of this Coverage Extension only,

Covered Causes of Loss include a virus, harmful code or similar instruction introduced into or enacted on a computer system...”).

41. Boiled to its essence, the subject matter of this case is simple. Defendants have, on a widespread and class-wide basis, refused to provide Business Income, Extra Expense, Civil Authority, and Extended Business Income coverage for covered losses related to COVID19 and the related orders by civil authorities that have required the suspension of operations ***no matter*** the language or scope of coverage in any particular insurance policy.

CLASS ALLEGATIONS

42. Plaintiff brings this action individually and on behalf of the following similarly situated classes (the “Classes”) pursuant to Rule 23(a), 23(b)(1), 23(b)(2), 23(b)(3), and 23(c)(4) of the Federal Rules of Civil Procedure.

43. Plaintiff seeks to represent nationwide classes defined as follows:

Business Income Breach Class

All persons and entities that: (a) had Business Income coverage under a property insurance policy without a virus exclusion issued by Defendants; (b) suffered a suspension of their operations related to COVID-19 or the Ohio Civil Authority Orders (or other civil authority order related to COVID-19) impacting the premises covered by their property insurance policy; (c) made a claim under their property insurance policy issued by Defendants; and (d) were denied Business Income coverage by Defendants.

Extra Expense Breach Class

All persons and entities that: (a) had Extra Expense coverage under a property insurance policy without a virus exclusion issued by Defendants; (b) suffered a suspension of their operations related to COVID-19 or the Ohio Civil Authority Orders (or other civil authority order related to COVID-19) impacting the premises covered by their

property insurance policy and incurred Extra Expenses; (c) made a claim under their property insurance policy issued by Defendants; and (d) were denied Extra Expense coverage by Defendants.

Civil Authority Breach Class

All persons and entities that: (a) had Civil Authority coverage under a property insurance policy without a virus exclusion issued by Defendants; (b) suffered a loss of Business Income or incurred Extra Expenses caused by an order of a civil authority that prohibited access to the premises covered by their property insurance policy as the result of damage caused by COVID-19 to property in the surrounding area of the insureds covered property; (c) made a claim under their property insurance policy issued by Defendants; and (d) were denied Civil Authority coverage by Defendants for the loss of Business Income.

Extended Business Income Breach Class

All persons and entities that: (a) had Extended Business Income coverage under a property insurance policy without a virus exclusion issued by Defendants; (b) suffered a suspension of their operations related to COVID-19 or the Ohio Civil Authority Orders (or other civil authority order related to COVID-19) impacting the premises covered by their property insurance policy; (c) had a loss of “Business Income” or incurred “Extra Expenses” after reopening; (d) made a claim under their property insurance policy issued by Defendants; and (e) were denied Extended Business Income coverage by Defendants.

44. Plaintiff also seeks to represent nationwide declaratory judgment classes defined as follows:

Business Income Declaratory Judgment Class

All persons and entities with Business Income coverage under a property insurance policy without a virus exclusion issued by Defendants that suffered a suspension of their operations related to COVID-19 or the Ohio Civil Authority Orders (or other civil authority order related to COVID-19) impacting the premises covered by their property insurance policy.

Extra Expense Declaratory Judgment Class

All persons and entities with Extra Expense coverage under a property insurance policy without a virus exclusion issued by Defendants that suffered a suspension of their operations related to COVID-19 or the Ohio Civil Authority Orders (or other civil authority order related to COVID-19) impacting the premises covered by their property insurance policy and incurred Extra Expenses.

Civil Authority Declaratory Judgment Class

All persons and entities with Civil Authority coverage under a property insurance policy without a virus exclusion issued by Defendants that suffered a loss of Business Income or incurred Extra Expense caused by an order of a civil authority that prohibited access to the premises covered by their property insurance policy as the result of damage caused by COVID-19 to property in the surrounding area of the insureds covered property.

Extended Business Income Declaratory Judgment Class

All persons and entities with Extended Business Income coverage under a property insurance policy without a virus exclusion issued by Defendants that suffered a suspension of their operations related to COVID-19 or the Ohio Civil Authority Orders (or other civil authority order related to COVID-19) impacting the premises covered by their property insurance policy and suffered a loss of Business Income or incurred Extra Expense after reopening.⁷

45. Excluded from the proposed Classes are Defendants, any parent companies, subsidiaries, affiliates, officers, directors, legal representatives, employees, co-conspirators, all governmental entities, and any judge, justice, or judicial officer presiding over this matter, as well as members of their staff and immediate families. Plaintiff reserves the right to amend the Class definitions above or add appropriate subclasses during or following discovery.

⁷ The four Declaratory Judgment Classes together will be referred to as the “Declaratory Judgment Classes.”

46. This action is brought and may be properly maintained as a class action. There is a well-defined community of interests in this litigation and the members of the Classes are easily ascertainable.

47. The members in the proposed Classes are so numerous that individual joinder of all members is impracticable, and the disposition of the claims of the members of the Classes in a single action will provide substantial benefits to the parties and the Court.

48. This action involves common questions, which predominate over questions affecting individual members of the Classes, including (without limitation):

- whether members of the Classes suffered a covered cause of loss based on the common policies issued by Defendants;
- whether COVID-19 (and/or an order of a civil authority related to COVID-19) constitutes a Covered Cause of Loss;
- whether Defendants' Business Income coverage applies to a suspension of business operations caused by COVID-19 (and/or by an order of a civil authority related to COVID-19);
- whether Defendants' Extra Expense coverage applies to Extra Expenses caused by COVID-19 (and/or by an order of a civil authority related to COVID-19);
- whether Defendants' Extended Business Income coverage applies to a suspension of business operations caused by COVID-19 (and/or by an order of a civil authority related to COVID-19);
- whether a suspension of business operations caused by COVID-19 (and/or by an order of a civil authority related to COVID-19) qualifies as a suspension of business operations caused by direct loss;

- whether an order by a civil authority related to COVID-19 (including the Ohio Civil Authority Orders) qualifies an insured for Civil Authority coverage;
- whether members of the Classes sustained damages as a result of Defendants denying their claims made under the common policies; and
- whether Defendants breached their contracts of insurance by denying Class members' Business Income, Extra Expense, Extended Business Income, and Civil Authority claims related to COVID-19.

49. Defendants engaged in a course of common conduct that gave rise to the legal rights sought to be enforced by Plaintiff individually and on behalf of the other members of the Classes. Identical business practices and harms are involved. Individual questions, if any, are not prevalent in comparison to the numerous common questions that dominate this action.

50. Plaintiff's claims are typical of those of the members of the Classes because they are based on the same underlying facts, events, and circumstances relating to Defendants' conduct, including the systematic denial of insurance coverage related to Business Income insurance and COVID-19.

51. Plaintiff will fairly and adequately represent and protect the interests of the Classes, has no interests incompatible with the interests of the Class members, and has retained counsel competent and experienced in class action and consumer protection litigation.

52. Class treatment is superior to other options for resolution of the controversy because the relief sought for each member of the Classes is small enough such that, absent representative litigation, it would be infeasible for many members of the Classes to redress the wrongs done to them. Moreover,

individualized litigation would create potential for inconsistent judgments on identical issues and increase the delay and expense to the parties and the Court. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of adjudication by a single court.

53. As a result of the foregoing, class treatment under Federal Rule of Civil Procedure 23(b)(3) is appropriate.

54. Class treatment is also appropriate under Federal Rule of Civil Procedure 23(b)(1). Plaintiff seeks class-wide adjudication related to Defendants' Business Income, Extra Expense, Extended Business Income, and Civil Authority coverages. The prosecution of separate actions by individual members of the Classes would create a risk of inconsistent adjudications.

55. Class treatment is also appropriate under Federal Rule of Civil Procedure 23(b)(2). Defendants acted or refused to act on grounds generally applicable to Plaintiff and the other members of the Classes, thereby making appropriate final injunctive and declaratory relief.

CLAIMS FOR RELIEF

CLAIM I: BREACH OF CONTRACT - Business Income Coverage (Plaintiff Individually and on Behalf of the Business Income Breach Class)

56. Plaintiff hereby realleges and incorporates by reference all allegations raised in the preceding paragraphs as if fully stated herein.

57. Plaintiff brings this claim against Defendants individually and on behalf of the members of the Business Income Breach Class.

58. Plaintiff's insurance policy, as well as those of the members of the Business Income Breach Class, are contracts under which premiums were paid to Defendants in exchange for promises to pay Plaintiff and the Business Income Breach Class Members' losses for claims covered by Defendants' all-risk policy.

59. The Building and Personal Property Coverage Form states that Defendants "will pay for the actual loss of 'Business Income' you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration'. The 'suspension' must be caused by direct 'loss' to the property at 'premises'...caused by or result from a Covered Cause of Loss."

60. "Suspension" means in relevant part: "[t]he slowdown or cessation of ...business activities[.]" and "Operations" is defined as "business activities occurring at the 'premises'" and "tenantability of the 'premises.'"

61. "Business Income" is defined as "Net Income (net profit or loss before income taxes) that would have been earned or incurred" and "[c]ontinuing normal operating expenses sustained, including payroll."

62. Period of Restoration is:

"Period of restoration" means the period of time that:

- a. Begins at the time of direct "loss".
- b. Ends on the earlier of:

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

63. COVID-19, and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders) caused a “direct loss” to property at a covered premises under the Plaintiff’s policy, and the policies of the other Business Income Breach Class members, by denying use of and damaging the property, and by causing a necessary suspension and reduction of operations during a period of restoration.

64. Losses caused by COVID-19, and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders) thus triggered the Business Income provision of Plaintiff’s and the other members of the Business Income Breach Class’ insurance policies.

65. Plaintiff and the members of the Business Income Breach Class have complied with all applicable provisions of their policies.

66. Plaintiff and the members of the Business Income Breach Class made timely claims under their property insurance policies issued by Defendants.

67. Defendants have breached their coverage obligations under Plaintiff and the Business Income Breach Class Members’ policies by denying coverage for any Business Income losses incurred in connection with the COVID-19 and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders).

68. As a direct and proximate result of Defendants’ breaches, Plaintiff and the members of the Business Income Breach Class have sustained damages for which Defendants are liable, in an amount to be established at trial.

**CLAIM II: BREACH OF CONTRACT – Extra Expense Coverage
(Plaintiff Individually and on Behalf of the Extra Expense Breach Class)**

69. Plaintiff hereby realleges and incorporates by reference all allegations raised in the preceding paragraphs as if fully stated herein.

70. Plaintiff brings this claim against Defendants individually and on behalf of the members of the Extra Expense Breach Class.

71. Plaintiff's insurance policy, as well as those of the members of the Extra Expense Breach Class, are contracts under which premiums were paid to Defendants in exchange for promises to pay Plaintiff and the Extra Expense Breach Class Members' losses for claims covered by Defendants' all-risk policy.

72. The Building and Personal Property Coverage Form states that Defendants "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."

73. COVID-19, and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders) caused "direct loss" to the "Covered Property" under the Plaintiff's policy, and the policies of the other Extra Expense Breach Class members, by denying use of and damaging the Covered Property, and by causing a necessary suspension and reduction of operations during a period of restoration.

74. Losses caused by COVID-19, and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders) thus triggered the Extra Expense provision of Plaintiff's and the other members of the Extra Expense Breach Class' insurance policies.

75. Plaintiff and the members of the Extra Expense Breach Class have complied with all applicable provisions of their policies.

76. Plaintiff and the members of the Extra Expense Breach Class made timely claims under their property insurance policies issued by Defendants.

77. Defendants have breached their coverage obligations under Plaintiff and the Extra Expense Breach Class Members' policies by denying coverage for any Extra Expenses incurred in connection with the COVID-19 and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders).

78. As a direct and proximate result of Defendants' breaches, Plaintiff and the members of the Extra Expense Breach Class have sustained damages for which Defendants are liable, in an amount to be established at trial.

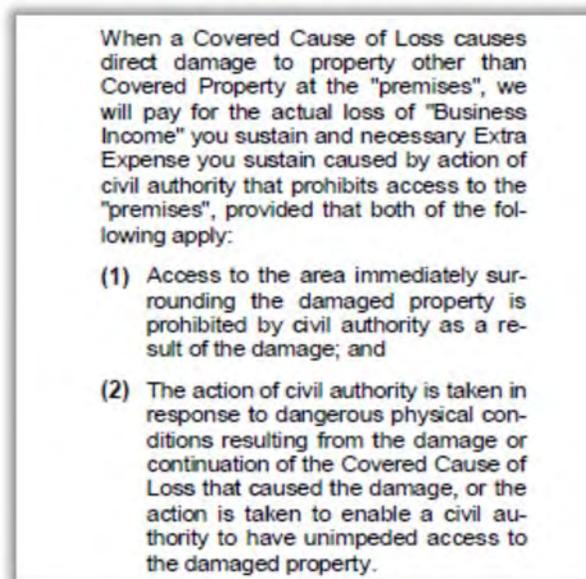
**CLAIM III: BREACH OF CONTRACT – Civil Authority Coverage
(Plaintiff Individually and on Behalf of the Civil Authority Breach
Class)**

79. Plaintiff hereby realleges and incorporates by reference all allegations raised in the preceding paragraphs as if fully stated herein.

80. Plaintiff brings this claim against Defendants individually and on behalf of the members of the Civil Authority Breach Class.

81. Plaintiff's policy, as well as those of the members of the Civil Authority Breach Class, are contracts under which premiums were paid to Defendants in exchange for promises to pay Plaintiff and the Civil Authority Breach Class Members' losses for claims covered by the policy.

82. Plaintiff's policy, as well as those of the members of the Civil Authority Breach Class are extended to apply to:



When a Covered Cause of Loss causes direct damage to property other than Covered Property at the "premises", we will pay for the actual loss of "Business Income" you sustain 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:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
- (2) 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.

83. COVID-19 caused the Governor of the State of Ohio and the Ohio Department of Health to issue the Ohio Civil Authority Orders, which prohibited access to Plaintiff and the Civil Authority Breach Class Members' scheduled premises based on damage to property in the surrounding area of the scheduled premise.

84. Losses caused by COVID-19 thus triggered the Civil Authority provision of Plaintiff and the Civil Authority Breach Class Members' insurance policies.

85. Plaintiff and the Civil Authority Breach Class Members have complied with all applicable provisions of their policies.

86. Plaintiff and the Civil Authority Breach Class Members made timely claims under their property insurance policies issued by Defendants.

87. Defendants have breached their coverage obligations under Plaintiff and the Civil Authority Breach Class Members' policies by denying coverage for any Civil Authority losses incurred in connection with the COVID-19 and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders).

88. As a direct and proximate result of Defendants' breaches, Plaintiff and the Civil Authority Breach Class Members have sustained damages for which Defendants are liable, in an amount to be established at trial.

**CLAIM IV: BREACH OF CONTRACT – Extended Business Income
Coverage
(Plaintiff Individually and on Behalf of the Extended Business Income
Breach Class)**

89. Plaintiff hereby realleges and incorporates by reference all allegations raised in the preceding paragraphs as if fully stated herein.

90. Plaintiff brings this claim against Defendants individually and on behalf of the members of the Extended Business Income Breach Class.

91. Plaintiff's insurance policy, as well as those of the members of the Extended Business Income Breach Class, are contracts under which premiums were paid to Defendants in exchange for promises to pay Plaintiff and the Extended Business Income Breach Class Members' losses for claims covered by Defendants' all-risk policy.

92. The Building and Personal Property Coverage Form states that Defendants will pay for actual loss of “Business Income’ you sustain and Extra Expense you incur” after “operations’ are resumed[.]” COVID-19, and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders) caused actual loss of Business Income and Extra Expenses. Plaintiff and the members of the Extended Business Income Breach Class continue to incur loss of Business Income and to sustain Extra Expenses even once operations are resumed.

93. Losses caused by COVID-19, and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders) thus triggered the Extended Business Income provision of Plaintiff’s and the other members of the Business Income Breach Class’ insurance policies.

94. Plaintiff and the members of the Extended Business Income Breach Class have complied with all applicable provisions of their policies. Plaintiff and the members of the Extended Business Income Breach Class made timely claims under their property insurance policies issued by Defendants.

95. Defendants have breached their coverage obligations under Plaintiff and the Extended Business Income Breach Class Members’ policies by denying coverage for any Extended Business Income losses incurred in connection with the COVID-19 and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders).

96. As a direct and proximate result of Defendants' breaches, Plaintiff and the members of the Extended Business Income Breach Class have sustained damages for which Defendants are liable, in an amount to be established at trial.

**CLAIM V: DECLARATORY JUDGMENT – DECLARATORY JUDGMENT
(Claim Brought on Behalf of the Declaratory Judgment Classes)**

97. Plaintiff hereby realleges and incorporates by reference all allegations raised in the preceding paragraphs as if fully stated herein.

98. Plaintiff brings this claim against Defendants individually and on behalf of the members of the Declaratory Judgment Classes.

99. Plaintiff's policy, as well as those of the members of the Declaratory Judgment Classes, are contracts under which premiums were paid to Defendants in exchange for promises to pay losses for claims covered by their insurance policies.

100. Plaintiff and the members of the Declaratory Judgment Classes have complied with all applicable provisions of the policies.

101. Defendants have denied claims related to COVID-19 and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders) on a uniform and class wide basis, without individual bases or investigations, such that the Court can render declaratory judgment irrespective of whether members of the Declaratory Judgment Classes have filed a claim.

102. An actual case or controversy exists regarding Plaintiff and the Declaratory Judgment Class Members' rights and Defendants' obligations under the policies to provide reimbursements for the full amount of losses incurred by Plaintiff and the Declaratory Judgment Classes Members in connection with COVID-19 and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders).

103. Pursuant to 28 U.S.C. § 2201, Plaintiff and the Business Income Declaratory Judgment Class Members seek a declaratory judgment from this Court declaring the following:

- a. Plaintiff and the Business Income Declaratory Judgment Class Members' Business Income losses incurred in connection with necessary interruption of their businesses due to the presence of COVID-19 and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders) are insured losses under their policies; and
- b. Defendants are obligated to pay Plaintiff and the Business Income Declaratory Judgment Class Members for the full amount of the Business Income losses incurred and to be incurred in connection with the period of restoration and the necessary interruption of their businesses stemming from the presence of COVID-19 and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders).

104. Pursuant to 28 U.S.C. § 2201, Plaintiff and the Extra Expense Declaratory Judgment Class Members seek a declaratory judgment from this Court declaring the following:

- a. Plaintiff and the Extra Expense Declaratory Judgment Class Members' Extra Expenses incurred in connection with necessary interruption of their businesses due to the presence of COVID-19 and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders) are insured losses under their policies; and

- b. Defendants are obligated to pay Plaintiff and the Extra Expense Declaratory Judgment Class Members for the full amount of the Extra Expenses incurred and to be incurred in connection with the period of restoration and the necessary interruption of their businesses stemming from the presence of COVID-19 and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders).

105. Pursuant to 28 U.S.C. § 2201, Plaintiff and the Civil Authority Declaratory Judgment Class Members seek a declaratory judgment from this Court declaring the following:

- a. Plaintiff and the Civil Authority Declaratory Judgment Class Members' Business Income losses caused by an order of a civil authority that prohibited access to the premises covered by their property insurance policy as the result of damage caused by COVID-19 to property in the surrounding area of the insureds covered property are insured losses under their policies; and
- b. Defendants are obligated to pay Plaintiff and the Civil Authority Declaratory Judgment Class for the full amount of the Business Income losses incurred and to be incurred caused by an order of a civil authority that prohibited access to the premises covered by their property insurance policy as the result of damage caused by COVID-19 to property in the surrounding area of the insureds covered property.

106. Pursuant to 28 U.S.C. § 2201, Plaintiff and the Extended Business Income Declaratory Judgment Class Members seek a declaratory judgment from this Court declaring the following:

- a. Plaintiff and the Extended Business Income Declaratory Judgment Class Members' Business Income losses and Extra Expenses during the period when operations resumed incurred in connection with necessary interruption of their businesses due to the presence of COVID-19 and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders) are insured losses under their policies; and

- b. Defendants are obligated to pay Plaintiff and the Extended Business Income Declaratory Judgment Class Members for the full amount of the Business Income losses and Extra Expenses losses incurred and to be incurred during the period when operations resumed in connection with necessary interruption of their businesses stemming from the presence of COVID-19 and/or orders of civil authority related to COVID-19 (like the Ohio Civil Authority Orders).

REQUEST FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the Classes, respectfully requests that the Court enter judgment against Defendants as follows:

- i. Entering an order certifying each of the proposed Classes;
- ii. Entering an order designating Plaintiff as Class Representative, and appointing Plaintiff's undersigned attorneys as Counsel for the Classes;
- iii. Entering judgment on Counts I, II, III, and IV in favor of Plaintiff, the Business Income Breach Class, the Extra Expense Breach Class, Civil Authority Breach Class; and Extended Business Income Breach Class and awarding damages for breach of contract in an amount to be determined at trial;
- iv. Entering declaratory judgments on Count V in favor of Plaintiff and the Declaratory Judgment Classes (as set forth in Count V);
- v. Ordering Defendants to pay both pre- and post-judgment interest on any amounts awarded;
- vi. Ordering Defendants to pay reasonable attorneys' fees and costs of suit; and
- vii. Ordering such other and further relief as may be just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all claims so triable.

Date: June 10, 2020

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*Attorneys for Plaintiff and the putative
classes*



The Cincinnati Insurance Company

A Stock Insurance Company

Headquarters: 6200 S. Gilmore Road, Fairfield, OH 45014-5141

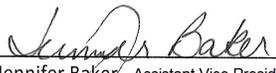
Mailing address: P.O. Box 145496, Cincinnati, OH 45250-5496

www.cinfin.com ■ 513-870-2000

This is a true and certified copy of the complete policy:

NEW

Previous Policy Number


Jennifer Baker, Assistant Vice President

CinciPak™ FOR MEDICAL OFFICES COMMON POLICY DECLARATIONS

Billing Method: **DIRECT BILL**

POLICY NUMBER **ECP 055 17 19 / EBA 055 17 19**

NAMED INSURED **NEURO-COMMUNICATION SERVICE DBA HEARING INNOVATIONS**

755 BOARDMAN CANFIELD RD STE C1

ADDRESS

BOARDMAN, OH 44512-4387

(Number & Street,
Town, County,
State & Zip Code)

Policy Period: At 12:01 A.M., STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE

All coverages except Automobile and / or Garage

Policy number: **ECP 055 17 19**

FROM: **09-14-2019**

TO: **09-14-2022**

Automobile and / or Garage

Policy number: **EBA 055 17 19**

FROM: **09-14-2019**

TO: **09-14-2020**

Agency **MAYFLOWER WOLLAM INSURANCE GROUP, INC. 34-394**

City **NORTH JACKSON, OH**

Legal Entity / Business Description

LIMITED LIABILITY COMPANY

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

FORMS APPLICABLE TO ALL COVERAGE PARTS:

IL0017	11/98	COMMON POLICY CONDITIONS
ICP101	05/11	CINCIPAK™ SUMMARY OF PREMIUMS CHARGED
IA904	04/04	SCHEDULE OF LOCATIONS
IA4236	01/15	POLICYHOLDER NOTICE TERRORISM INSURANCE COVERAGE
IP446	08/01	NOTICE TO POLICYHOLDERS
IA4006	07/10	SPECIAL PER OCCURRENCE DEDUCTIBLE ENDORSEMENT
IA4121OH	01/16	OHIO CHANGES - CANCELLATION AND NONRENEWAL
IA4238	01/15	CAP ON LOSSES FROM CERTIFIED ACTS OF TERRORISM
IA4338	05/11	SIGNATURE ENDORSEMENT
FM502	07/08	COMMERCIAL PROPERTY COVERAGE PART DECLARATIONS
GA532	07/08	COMMERCIAL GENERAL LIABILITY COVERAGE PART DECLARATIONS
GA536OH	03/10	OHIO EMPLOYERS LIABILITY DEFENSE EXPENSES COVERAGE PART DECLARATIONS
MA573	06/07	ELECTRONIC DATA PROCESSING EQUIPMENT COVERAGE FORM DECLARATIONS
CA516	03/09	CRIME AND FIDELITY COVERAGE PART DECLARATIONS (COMMERCIAL ENTITIES)
AA505	03/06	BUSINESS AUTO COVERAGE PART DECLARATIONS
HC502	01/18	CINCINNATI DATA DEFENDER™ COVERAGE PART DECLARATIONS
HC503	01/18	CINCINNATI NETWORK DEFENDER™ COVERAGE PART DECLARATIONS

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SCHEDULE OF LOCATIONS

<u>LOC.</u>	<u>STREET ADDRESS</u>	<u>CITY</u>	<u>STATE</u>	<u>ZIP CODE</u>
1	755 BOARDMAN CANFIELD RD STE C1 BOARDMAN, OH 44512-4387			
2	4300 BELMONT AVE YOUNGSTOWN, OH 44505-1084			

THE CINCINNATI INSURANCE COMPANY

A Stock Insurance Company

COMMERCIAL PROPERTY COVERAGE PART DECLARATIONS

Attached to and forming part of POLICY NUMBER: ECP 055 17 19

Named Insured is the same as it appears on the Common Policy Declarations unless otherwise stated here.

Loc. (address)
REFER TO IA904

Item	Coverage	Limits	Coin- surance	Covered Cause Of Loss	OPTIONAL COVERAGES Applicable only when an entry is made						
					Inflation Guard (%)	Replace- ment Cost (x)	Replace- ment Cost Ind. Stock (x)	Agreed Value (x)	Monthly Limit (fraction)	Maximum Period (X)	Extended Period (Days)
1	BUSINESS INCOME W/EXTRA EXPENSE (a)	12 MONTHS ALS		SPECIAL							
1-1	BUSINESS PERSONAL PROPERTY INCLUDING IMPROVEMENTS AND BETTERMENTS	290,000	90%	SPECIAL	4%		X	X			
2	BUSINESS INCOME W/EXTRA EXPENSE (a)	12 MONTHS ALS		SPECIAL							
2-1	BUSINESS PERSONAL PROPERTY INCLUDING IMPROVEMENTS AND BETTERMENTS	100,000	90%	SPECIAL	4%		X	X			

DEDUCTIBLE: \$500.00 unless otherwise stated \$ 1,000

MORTGAGE HOLDER

Item Name and Address

FORMS AND / OR ENDORSEMENTS APPLICABLE TO THIS COVERAGE PART:

FM101	05/16	BUILDING AND PERSONAL PROPERTY COVERAGE FORM (INCLUDING SPECIAL CAUSES OF LOSS)
FPC405	05/16	CINCIPLUS® CINCIPAK™ MEDICAL / DENTAL OFFICE PROPERTY XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS
FPC201	05/16	CINCIPAK™ COMMERCIAL PROPERTY AMENDATORY ENDORSEMENT
FPC238	09/15	CINCIPAK™ MEDICAL OR DENTAL OFFICE POLLUTANT CLEAN-UP COVERED PROPERTY EXTENSION
FPC206	05/16	CINCIPAK™ MEDICAL OR DENTAL OFFICE ACTUAL LOSS SUSTAINED BUSINESS INCOME ENDORSEMENT
FPC211	05/16	CINCIPAK™ MEDICAL OR DENTAL OFFICE COMMERCIAL PROPERTY COVERAGE ENHANCEMENT
FPC217	05/16	CINCIPLUS® CINCIPAK™ MEDICAL / DENTAL OFFICE PROPERTY XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT
FPC230	05/16	CINCIPAK™ MEDICAL OR DENTAL OFFICE CONDOMINIUM COMMERCIAL UNIT-OWNERS PROPERTY COVERAGE ENHANCEMENT

FORMS AND / OR ENDORSEMENTS APPLICABLE TO THIS COVERAGE PART:

FCP402 05/16 CINCIPAK™ MEDICAL / DENTAL OFFICE BUSINESS INCOME (AND EXTRA EXPENSE)
AMENDATORY ENDORSEMENT

FA4078OH 05/17 OHIO CHANGES - COMMERCIAL PROPERTY

FA450 05/16 COMMERCIAL PROPERTY CONDITIONS

FA480 02/16 LOSS PAYABLE PROVISIONS

FA223 05/16 WATER BACKUP DISCHARGED FROM SEWERS, DRAINS, SEPTIC OR SUMP PUMP
SYSTEMS ENDORSEMENT

FA244 05/11 EQUIPMENT BREAKDOWN COVERAGE (EXCLUDING PRODUCTION MACHINERY)

FA213 05/16 BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM

BUILDING AND PERSONAL PROPERTY COVERAGE FORM (INCLUDING SPECIAL CAUSES OF LOSS)

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BUILDING AND PERSONAL PROPERTY COVERAGE FORM (INCLUDING SPECIAL CAUSES OF LOSS)

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to **SECTION G. DEFINITIONS.**

SECTION A. COVERAGE

We will pay for direct "loss" to Covered Property at the "premises" caused by or resulting from any Covered Cause of Loss.

1. Covered Property

Covered Property, as used in this Coverage Part, means the following types of property for which a Limit of Insurance is shown in the Declarations:

a. Building

Building, means the building or structure described in the Declarations, including:

- (1) Completed additions;
- (2) Fixtures, including outdoor fixtures;
- (3) Permanently installed:
 - (a) Machinery and equipment;
 - (b) Building glass, including any lettering and ornamentation;
 - (c) Signs attached to a building or structure that is Covered Property;
 - (d) Awnings and canopies;
- (4) Personal property owned by you that is used to maintain or service a covered building or its "premises", including:
 - (a) Fire extinguishing equipment;
 - (b) Outdoor furniture;
 - (c) Floor coverings; and
 - (d) Appliances used for refrigerating, ventilating, cooking, dish-washing or laundering;
- (5) If not covered by other insurance:

- (a) Additions under construction, alterations and repairs to a covered building;

- (b) Materials, equipment, supplies and temporary structures, on or within 1,000 feet of the "premises", used for making additions, alterations or repairs to a covered building.

b. Outdoor Signs

Your outdoor signs permanently installed and not attached to a covered building, and located within 1,000 feet of the "premises".

c. Outdoor Fences

Your outdoor fences.

d. Business Personal Property

Your Business Personal Property consists of the following property located in or on the building or structure described in the Declarations or in the open (or in a vehicle or portable storage unit) within 1,000 feet of the building or 1,000 feet of the "premises", whichever distance is greater. Your Business Personal Property consists of the following unless otherwise specified in the Declarations or on the **BUSINESS PERSONAL PROPERTY - SEPARATION OF COVERAGE ENDORSEMENT.**

- (1) Furniture;
- (2) Machinery and equipment;
- (3) "Stock";
- (4) All other personal property owned by you and used in your business;
- (5) The cost of labor, materials or services furnished or arranged by you on personal property of others;
- (6) Your use interest as tenant in improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:
 - (a) Made a part of the building or structure you occupy but do not own; and
 - (b) You acquired or made at your expense but cannot legally remove;

- (7) Leased personal property used in your business for which you have a contractual responsibility to insure. Such leased property is not considered personal property of others in your care, custody or control;
- (8) Personal Property of Others that is in your care, custody or control or for which you are legally liable.
 - (a) This does not include personal effects owned by you, your officers, your partners, or if you are a limited liability company, your members or your managers, or your employees (including leased and temporary workers), except as provided in **5. Coverage Extensions, I. Personal Effects**;
 - (b) This does not include property of others for which you are legally liable as:
 - 1) A carrier for hire; or
 - 2) An arranger of transportation, including car loaders, consolidators, brokers, freight forwarders, or shipping associations; and
- (9) Sales samples.

2. Property Not Covered

Covered Property does not include:

a. Accounts, Deeds, Money or Securities

Except as provided in **SECTION A. COVERAGE, 5. Coverage Extensions, a. Accounts Receivable**, Accounts, bills, currency, deeds, food stamps or other evidences of debt, "money", notes or "securities";

b. Animals

Animals, unless

- (1) Owned by others and boarded by you; or
- (2) Owned by you and covered as "stock" while inside of buildings;

and then only as provided in **3. Covered Causes of Loss, c. Limitations**.

c. Automobiles

Automobiles held for sale;

d. Contraband

Contraband, or property in the course of illegal transportation or trade;

e. Electronic Data

Except as provided in **SECTION A. COVERAGE, 5. Coverage Extensions, d. Electronic Data**, "Electronic data". This Paragraph **e.** does not apply to your "stock" of prepackaged software or to "electronic data" which is integrated in and operates or controls the building's elevator, lighting, heating, ventilation, air conditioning or security system.

f. Excavations, Grading & Backfilling

The cost of excavations, grading, backfilling or filling;

g. Foundations

Foundations of buildings, structures, machinery or boilers, if their foundations are below:

- (1) The lowest basement floor; or
- (2) The surface of the ground, if there is no basement.

h. Land, Water or Growing Crops

Land (including land on which the property is located), water, growing crops or lawns (other than lawns which are part of a vegetative roof);

i. Paved Surfaces

Bridges, roadways, walks, patios or other paved surfaces;

j. Property While Airborne or Waterborne

Personal property while airborne or waterborne;

k. Pilings or Piers

Pilings, piers, bulkheads, wharves or docks;

l. Property More Specifically Insured

Property that is covered under another coverage form of this or any other policy in which it is more specifically described, except as provided in **G. Other Insurance** of the **COMMERCIAL PROPERTY CONDITIONS**;

m. Retaining Walls

Retaining walls that are not part of any building described in the Declarations;

n. Underground Pipes, Flues or Drains

Underground pipes, flues or drains;

o. Valuable Papers & Records and Cost to Research

Except as provided in **SECTION A. COVERAGE, 5. Coverage Extensions, r. Valuable Papers and Records**, the cost to research, replace or restore the information on "valuable papers and records", including those which exist as "electronic data".

This does not apply to "valuable papers and records" held for sale by you.

p. Vehicles or Self-Propelled Machines

Vehicles or self-propelled machines (including aircraft or watercraft) that:

- (1) Are licensed for use on public roads; or
- (2) Are operated principally away from the "premises".

This paragraph does not apply to:

- (1) Vehicles or self-propelled machines or autos you manufacture, process or warehouse;
- (2) Vehicles or self-propelled machines, other than autos, you hold for sale;
- (3) Rowboats or canoes out of water and located at the "premises"; or
- (4) Trailers, but only as provided in **SECTION A. COVERAGE, 5. Coverage Extensions, o. Trailers (Nonowned Detached)**.

q. Property While Outside of Buildings

The following property while outside of buildings (except as provided in **SECTION A. COVERAGE, 5. Coverage Extensions**):

- (1) Grain, hay, straw or other crops;
- (2) Signs, except:
 - (a) Signs attached to a covered building or structure;
 - (b) Signs for which a Limit of Insurance is shown in the Declarations.
- (3) Outdoor fences, except outdoor fences for which a Limit of Insurance is shown in the Declarations;
- (4) Radio antennas, television antennas or satellite dishes; including their lead-in wiring, masts, and towers; and

- (5) Trees, shrubs or plants (other than trees, shrubs or plants that are "stock" or part of a vegetative roof).

3. Covered Causes of Loss

a. Covered Causes of Loss

Covered Causes of Loss means direct "loss" unless the "loss" is excluded or limited in this Coverage Part.

b. Exclusions

- (1) We will not pay for "loss" caused directly or indirectly by any of the following, unless otherwise provided. Such "loss" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "loss".

(a) Ordinance or Law

Except as provided in **SECTION A. COVERAGE, 4. Additional Coverages, g. Ordinance or Law**, the enforcement of or compliance with any ordinance or law:

- 1) Regulating the construction, use or repair of any building or structure; or
- 2) Requiring the tearing down of any building or structure, including the cost of removing its debris.

This exclusion applies whether "loss" results from:

- 1) An ordinance or law that is enforced even if the building or structure has not been damaged; or
- 2) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of any building or structure, or removal of its debris, following a direct "loss" to that building or structure.

(b) Earth Movement

- 1) Earthquake, including tremors and aftershocks and any earth sinking, rising or shifting related to such event;
- 2) Landslide, including any earth sinking, rising or shifting related to such event;

- 3) Mine subsidence, meaning subsidence of a man-made mine, whether or not mining activity has ceased;
- 4) Earth sinking (other than "sinkhole collapse"), rising or shifting including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface.

But if Earth Movement, as described in **(b)1)** through **4)** above, results in fire or explosion, we will pay for the "loss" caused by that fire or explosion.

- 5) Volcanic eruption, explosion or effusion. But if volcanic eruption, explosion or effusion results in fire, building glass breakage or volcanic action, we will pay for the "loss" caused by that fire, building glass breakage or volcanic action.

Volcanic action means direct "loss" resulting from the eruption of a volcano when the "loss" is caused by:

- a) Airborne volcanic blast or airborne shock waves;
- b) Ash, dust or particulate matter; or
- c) Lava flow.

With respect to coverage for Volcanic Action, all volcanic eruptions that occur within any 168-hour period will constitute a single occurrence.

Volcanic action does not include the cost to remove ash, dust or particulate matter that does not cause direct "loss" to the described property.

This Earth Movement exclusion applies regardless of whether any of the above, in paragraphs **1)** through **5)**, is caused by an

act of nature or is otherwise caused.

(c) Governmental Action

Seizure or destruction of property by order of governmental authority. However, we will pay for "loss" caused by or resulting from acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread, if the fire would be covered under this Coverage Part.

(d) Nuclear Hazard

Nuclear reaction or radiation, or radioactive contamination, however caused.

(e) Utility Services

- 1) Except as provided in **SECTION A. COVERAGE, 5. Coverage Extensions, q. Utility Services**, the failure of power, communication, water or other utility services supplied to the "premises", however caused, if the failure:
 - a) Originates away from the "premises"; or
 - b) Originates at the "premises", but only if such failure involves equipment used to supply the utility service to the "premises" from a source away from the "premises".

Failure of any utility service includes lack of sufficient capacity and reduction in supply. "Loss" caused by a surge of power is also excluded if the surge would not have occurred but for an event causing the failure of power.

However, if the failure or surge of power, or the failure of communication, water, wastewater removal or other utility service results in a Covered Cause of Loss, we will pay for that portion of "loss" caused by that Covered Cause of Loss.

Communication services include but are not limited to

service relating to Internet access or access to any electronic, cellular or satellite network.

(f) War and Military Action

- 1) War, including undeclared or civil war;
- 2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- 3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

(g) Water

- 1) Flood, meaning the partial or complete inundation of normally dry land areas due to:
 - a) The unusual or rapid accumulation or runoff of rain or surface waters from any source; or
 - b) Waves, tidal waters, tidal waves (including tsunami); or
 - c) Water from rivers, ponds, lakes, streams, or any other body of water that rises above, overflows from, or is not contained within its natural or man-made boundary;and all whether driven by wind or not, including storm surge.
- 2) Mudslides or mudflows, which are caused by flooding as defined above in Paragraph **(g)1)** above. Mudslide or mudflow involves a river of liquid and flowing mud on the surface of normally dry land areas as when earth is carried by a current of water and deposited along the path of the current;

- 3) Water that has entered and then backs up through and is discharged from a sewer, drain, septic system, sump pump system or related equipment; or
- 4) Water under the ground surface pressing on, or flowing or seeping through:
 - a) Foundations, walls, floors or paved surfaces;
 - b) Basements, whether paved or not; or
 - c) Doors, windows or other openings.
- 5) Waterborne material carried or otherwise moved by any of the water referred to in Paragraphs **(g)1), 3)** or **4)**, or material carried or otherwise moved by mudslide or mudflow as described in Paragraph **(g)2)**.

This exclusion applies regardless of whether any of the above in Paragraphs **(g)1)** through **(g)5)** is caused by an act of nature or is otherwise caused. An example of a situation to which this exclusion applies is the situation where a dam, levee, seawall or other boundary or containment system fails in whole or in part, for any reason, to contain the water.

However, if any of the above, as described in Paragraphs **(g)1)** through **(g)5)**, results in fire, explosion or sprinkler leakage, we will pay for that portion of "loss" caused by that fire, explosion or sprinkler leakage (if sprinkler leakage is a Covered Cause of Loss).

(h) "Fungi", Wet Rot, Dry Rot, and Bacteria

- 1) Presence, growth, proliferation, spread or any activity of "fungi", wet or dry rot or bacteria. But if "fungi", wet or dry rot or bacteria results in a "specified cause of loss", we will pay for the "loss" caused by that "specified cause of loss".

- 2) This exclusion does not apply:
- a) When "fungi", wet or dry rot or bacteria results from fire or lightning; or
 - b) To the extent that coverage is provided in **SECTION A. COVERAGE, 5. Coverage Extensions, g. "Fungi", Wet Rot, Dry Rot and Bacteria - Limited Coverage** with respect to "loss" from a cause of loss other than fire or lightning.

Exclusions **b.(1)(a)** through **b.(1)(h)** apply whether or not the "loss" event results in widespread damage or affects a substantial area.

- (2) We will not pay for "loss" caused by or resulting from any of the following:

(a) Electrical Current

Artificially generated electrical, magnetic or electromagnetic energy that damages, disturbs, disrupts or otherwise interferes with any:

- 1) Electrical or electronic wire, device, appliance, system or network; or
- 2) Device, appliance, system or network utilizing cellular or satellite technology.

For the purpose of this exclusion, electrical, magnetic or electromagnetic energy includes but is not limited to:

- 1) Electrical current, including arcing;
- 2) Electrical charge produced or conducted by a magnetic or electromagnetic field;
- 3) Pulse of electromagnetic energy; or
- 4) Electromagnetic waves or microwaves.

However, if fire results, we will pay for "loss" caused by that fire.

(b) Delay or Loss of Use

Delay, loss of use or loss of market.

(c) Smoke, Vapor, Gas

Smoke, vapor or gas from agricultural smudging or industrial operations.

(d) Miscellaneous Causes of Loss

- 1) Wear and tear;
- 2) Rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;
- 3) Smog;
- 4) Settling, cracking, shrinking or expansion;
- 5) Nesting or infestation, or discharge or release of waste products or secretions, by insects, birds, rodents or other animals;
- 6) Mechanical breakdown, including rupture or bursting caused by centrifugal force. However, if mechanical breakdown results in elevator collision, we will pay for that portion of "loss" caused by that elevator collision; or
- 7) The following causes of loss to personal property:
 - a) Marring or scratching;
 - b) Except as provided in **SECTION A. COVERAGE, 4. Additional Coverages, a. Change in Temperature or Humidity** and **5. Coverage Extensions, q. Utility Services**;
 - i) Dampness or dryness of atmosphere; and
 - ii) Changes in or extremes of temperature.

However, if an excluded cause of loss listed in **(2)(d)1)** through **7)** results in a "specified cause of "loss" or building glass breakage, we will pay for that portion of "loss" caused by that "specified cause of loss" or building glass breakage.

(e) Explosion of Steam Apparatus

Explosion of steam boilers, steam pipes, steam engines or steam turbines owned or leased by you, or operated under your control. However, if explosion of steam boilers, steam pipes, steam engines or steam turbines results in fire or combustion explosion, we will pay for that portion of "loss" caused by that fire or combustion explosion. We will also pay for "loss" caused by or resulting from the explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass.

(f) Water Seepage

Continuous or repeated seepage or leakage of water or the presence or condensation of humidity, moisture, or vapor that occurs over a period of 14 days or more.

(g) Freezing of Plumbing

Water, other liquids, powder or molten material that leaks or flows from plumbing, heating, air conditioning or other equipment (except fire protection systems) caused by or resulting from freezing, unless:

- 1) You did your best to maintain heat in the building or structure; or
- 2) You drained the equipment and shut off the supply if the heat was not maintained.

(h) Dishonest or Criminal Acts

Dishonest or criminal acts (including theft) by you, any of your partners, members (if a limited liability company), officers, managers, employees (including leased workers or temporary employees) directors, trustees, or authorized representatives; whether acting alone or in collusion with each other or with any other party; or theft by any person to whom you entrust the property for any purpose, whether acting alone or in collusion with any other party.

This exclusion applies whether or not an act occurs during the hours of operation.

This **Dishonest or Criminal Acts** exclusion does not apply to acts of destruction by your employees (including leased workers or temporary employees) or by authorized representatives; except theft by employees (including leased workers or temporary employees) is not covered.

(i) Voluntary Parting Under False Pretense

Voluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense.

(j) Exposure to Weather

Rain, snow, ice or sleet to personal property in the open.

(k) Collapse

Collapse, including any of the following conditions of property or any part of the property:

- 1) An abrupt falling down or caving in;
- 2) Loss of structural integrity, including separation of parts of the property or property in danger of falling down or caving in; or
- 3) Any cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion as such condition relates to Paragraph **(k)1)** or **2)** above.

But if collapse results in a Covered Cause of Loss at the "premises", we will pay for "loss" caused by that Covered Cause of Loss.

This exclusion **Collapse** does not apply:

- 1) To the extent that coverage is provided under the **SECTION A. COVERAGE, 5. Coverage Extensions, c. Collapse**; or
- 2) To collapse caused by one or more of the following:

- a) The "specified causes of loss";
- b) Breakage of building glass;
- c) Weight of rain that collects on a roof; or
- d) Weight of people or personal property.

(l) Pollutants

Discharge, dispersal, seepage, migration, release, escape or emission of "pollutants" unless the discharge, dispersal, seepage, migration, release, escape or emission is itself caused by any of the "specified causes of loss". But if the discharge, dispersal, seepage, migration, release, escape or emission of "pollutants" results in a "specified cause of loss", we will pay for the "loss" caused by that "specified cause of loss".

This exclusion does not apply to "loss" to glass caused by chemicals applied to the glass.

m) Loss or Damage to Product

We will not pay for "loss" to Covered Property consisting of merchandise, goods or other product caused by or resulting from error or omission by any person or entity (including those having possession under an arrangement where work or a portion of the work is outsourced) in any stage of the development, production or use of the product, including planning, testing, processing, packaging, installation, maintenance or repair. This exclusion applies to any effect that compromises the form, substance or quality of the product. But if such error or omission results in a Covered Cause of Loss, we will pay for "loss" caused by that Covered Cause of Loss.

(n) Neglect

Neglect of an insured to use all reasonable means to save and preserve property from further damage at and after the time of "loss".

- (3)** We will not pay for "loss" caused by or resulting from any of the following in Paragraphs **(3)(a)** through **(3)(c)**. However, if an excluded cause of loss that is listed in Paragraphs **(3)(a)** through **(3)(c)** results in a Covered Cause of Loss, we will pay for that portion of "loss" caused by that Covered Cause of Loss:

(a) Weather Conditions

Weather conditions, but this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in **SECTION A. COVERAGE, 3. Covered Causes of Loss, b. Exclusions, (1)(a)** through **(1)(h)** to produce the "loss".

(b) Acts or Decisions

Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

(c) Defects, Errors, and Omissions

- 1)** An act, error, or omission (negligent or not) relating to:

- a) Land use;
- b) Design, specifications, construction, workmanship;
- c) Planning, zoning, development, surveying, siting, grading, compaction; or
- d) Maintenance, installation, renovation, repair, or remodeling

of part or all of any property on or off the "premises";

- 2)** A defect, weakness, inadequacy, fault, or unsoundness in materials used in construction or repair of part or all of any property on or off the "premises"; or
- 3)** The cost to make good any error in design.

(4) Special Exclusions

The Special Exclusions apply only to **SECTION A. COVERAGE, 5. Coverage Extensions, b. Business Income and Extra Expense**; and if attached to this policy, the following coverage forms: **BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM, BUSINESS INCOME (WITHOUT EXTRA EXPENSE) COVERAGE FORM, and EXTRA EXPENSE COVERAGE FORM.**

We will not pay for:

(a) Any "loss" caused by or resulting from:

- 1) Damage or destruction of "finished stock"; or
- 2) The time required to reproduce "finished stock".

This Exclusion (4)(a) does not apply to Extra Expense.

(b) Any "loss" caused by or resulting from damage to radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers.

(c) Any increase of "loss" caused by or resulting from:

- 1) Delay in rebuilding, repairing or replacing the property or resuming "operations", due to interference at the location of the rebuilding, repair or replacement by strikers or other persons; or
- 2) Suspension, lapse or cancellation of any license, lease or contract. However, if the suspension, lapse or cancellation is directly caused by the "suspension" of "operations", we will cover such "loss" that affects your "Business Income" during the "period of restoration" and any extension of the "period of restoration" in accordance with the terms of the Extended Business Income Additional Coverage and the Extended Period of Indemnity Optional Coverage or any variation of these.

(d) Any Extra Expense caused by or resulting from suspension, lapse

or cancellation of any license, lease or contract beyond the "period of restoration".

(e) Any other indirect "loss".

c. Limitations

The following limitations apply to all policy forms and endorsements shown on the **COMMERCIAL PROPERTY COVERAGE PART DECLARATIONS**, unless otherwise stated:

(1) Limitations - Various Types of Property

We will not pay for "loss" to property as described and limited in this section. In addition, we will not pay for any "loss" that is a consequence of "loss" as described and limited in this section.

(a) Steam Apparatus

Steam boilers, steam pipes, steam engines or steam turbines caused by or resulting from any condition or event inside such equipment. But we will pay for "loss" to such equipment caused by or resulting from an explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass.

(b) Hot Water Boilers

Hot water boilers or other water heating equipment caused by or resulting from any condition or event inside such boilers or equipment, other than an explosion.

(c) Building Interiors

The interior of any building or structure, or to personal property in the building or structure, caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not, unless:

- 1) The building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the rain, snow, sleet, ice, sand or dust enters; or
- 2) The "loss" is caused by or results from thawing of

snow, sleet or ice on the building or structure.

(d) Theft of Building Materials

Building materials and supplies not attached as part of the building or structure, caused by or resulting from theft.

However, this limitation does not apply to:

- 1) Building materials and supplies held for sale by you; or
- 2) "Business Income" coverage or Extra Expense coverage.

(e) Missing Property

Property that is missing, where the only evidence of the "loss" is a shortage disclosed on taking inventory, or other instances where there is no physical evidence to show what happened to the property.

(f) Transferred Property

Property that has been transferred to a person or to a place outside the "premises" on the basis of unauthorized instructions.

(g) Vegetative Roofs

Lawns, trees, shrubs or plants which are part of a vegetated roof, caused by or resulting from:

- 1) Dampness or dryness of atmosphere or of soil supporting the vegetation;
- 2) Changes in or extremes of temperature;
- 3) Disease;
- 4) Frost or hail; or
- 5) Rain, snow, ice or sleet.

(2) Limitations - Various Property for Specified Causes

We will not pay for "loss" to the following types of property unless caused by the "specified causes of loss" or building glass breakage:

- (a) Animals, and then only if they are killed or their destruction is deemed necessary.

- (b) Contractors equipment, machinery and tools owned by you or entrusted to you, provided such property is Covered Property.

However, this limitation does not apply:

- 1) If the property is located on or within 1,000 feet of the "premises"; or
- 2) To Business Income coverage or to Extra Expense coverage.

(3) Limitation - Personal Property Theft

This Limitation does not apply to "Business Income" coverage or to Extra Expense coverage. For each category described in Paragraph **c.(3)(a)** through **(3)(d)** below, the most we will pay for "loss" in any one occurrence of theft to all property in that category, regardless of the types or number of articles for that category that are lost or damaged in that occurrence, are the following special limits:

- (a) \$2,500 for Furs, fur garments and garments trimmed with fur.
- (b) \$2,500 for Jewelry, watches, watch movements, jewels, pearls, precious and semi-precious stones, bullion, gold, silver, platinum and other precious alloys or metals. This limitation does not apply to jewelry and watches worth \$100 or less per item.
- (c) \$2,500 for Patterns, dies, molds and forms.
- (d) \$250 for Stamps, tickets, including lottery tickets held for sale, and letters of credit.

These special limits are not additional Limits of Insurance.

(4) Limitation - System or Appliance Defects

- (a) We will not pay the cost to repair any defect to a system or appliance from which water, other liquid, powder or molten material escapes; and
- (b) We will not pay to replace the substance that escapes as described in Paragraph **c.(4)(a)** above.

But we will pay the cost to repair or replace damaged parts of fire extinguishing equipment if the damage results in discharge of any substance from an automatic fire protection system, or is directly caused by freezing.

However, this Limitation **c.(4)(a)** does not apply to "Business Income" Coverage or to Extra Expense Coverage.

4. **Additional Coverages**

Unless stated otherwise, **SECTION C. DEDUCTIBLE** does not apply to Paragraph 4. **Additional Coverages**.

Unless stated otherwise, these Paragraph 4. **Additional Coverages** apply on a per location basis.

a. **Change in Temperature or Humidity**

We will pay for direct "loss" to your covered Business Personal Property caused by a change in temperature or humidity or contamination by refrigerant resulting from damage by a Covered Cause of Loss to equipment used for refrigerating, cooling, humidifying, dehumidifying, air conditioning, heating, generating or converting power (including their connections and supply or transmission lines and pipes) when located on the "premises".

This Coverage is included within the Limits of Insurance shown in the Declarations.

b. **Debris Removal**

(1) Subject to Paragraphs **b.(2)**, **(3)** and **(4)** of this Additional Coverage, we will pay your expense to remove debris of Covered Property and other debris that is on the "premises", when such debris is caused by or results from a Covered Cause of Loss that occurs during the "coverage term". The expenses will be paid only if they are reported to us in writing within 180 days of the date of direct "loss".

(2) Debris Removal does not apply to costs to:

- (a) Extract "pollutants" from land or water;
- (b) Remove, restore or replace polluted land or water;
- (c) Remove debris of property of yours that is not insured under this Coverage Part, or property in your possession that is not Covered Property;

(d) Remove debris of property owned by or leased to the landlord of the building where your "premises" are located, unless you have a contractual responsibility to insure such property and it is insured under this Coverage Part;

(e) Remove any property that is Property Not Covered, including property addressed under **5. Coverage Extensions, k. Outdoor Property**.

(f) Remove property of others of a type that would not be Covered Property under this Coverage Part;

(g) Remove deposits of mud or earth from the grounds of the "premises".

(3) Subject to the exceptions in Paragraph **b.(4)** below, the following provisions apply:

(a) The most we will pay for the total of direct "loss" plus debris removal expense is the Limit of Insurance applicable to the Covered Property that has sustained "loss".

(b) Subject to Paragraph **b.(3)(a)**, the amount we will pay for debris removal expense is limited to 25% of the sum of the deductible plus the amount that we pay for direct "loss" to the Covered Property that has sustained "loss".

(4) We will pay up to an additional \$10,000 for debris removal expense for each "premises", in any one occurrence of direct "loss" to Covered Property, if one or both of the following circumstances apply:

(a) The total of the actual debris removal expense plus the amount we pay for direct "loss" exceeds the Limit of Insurance on the Covered Property that has sustained "loss".

(b) The actual debris removal expense exceeds 25% of the sum of the deductible plus the amount that we pay for direct "loss" to the Covered Property that has sustained "loss".

Therefore, if Paragraph **b.(4)(a)** and/or **(4)(b)** apply, our total payment for direct

"loss" and debris removal expense may reach but will never exceed the Limit of Insurance on the Covered Property that has sustained "loss", plus \$10,000.

(5) Examples

The following examples assume that there is no coinsurance penalty.

Example #1

Limit of Insurance	\$90,000
Amount of Deductible	\$500
Amount of "Loss"	\$50,000
Amount of "Loss" Payable (\$50,000 - \$500)	\$49,500
Debris Removal Expense	\$10,000
Debris Removal Expense Payable (\$10,000 is 20% of \$50,000)	\$10,000

The debris removal expense is less than 25% of the sum of the "loss" payable plus the deductible. The sum of the "loss" payable and the debris removal expense (\$49,500 + \$10,000 = \$59,500) is less than the Limit of Insurance. Therefore, the full amount of debris removal expense is payable in accordance with the terms of Paragraph (3).

Example #2

Limit of Insurance	\$90,000
Amount of Deductible	\$500
Amount of "Loss"	\$80,000
Amount of "Loss" Payable (\$80,000 - \$500)	\$79,500
Debris Removal Expense	\$30,000
Debris Removal Expense Payable	
Basic Amount	\$10,500
Additional Amount	\$10,000

The basic amount payable for debris removal expense under the terms of Paragraph (3) is calculated as follows: \$80,000 (\$79,500 + \$500) x .25 = \$20,000; capped at \$10,500. The cap applies because the sum of the "loss" payable (\$79,500) and the basic amount payable for debris removal expense (\$10,500) cannot exceed the Limit of Insurance (\$90,000).

The additional amount payable for debris removal expense is provided in accordance with the terms of Paragraph (4), because the debris removal expense (\$30,000) exceeds 25% of the "loss" payable plus the deductible (\$30,000 is 37.5% of \$80,000), and because the sum of the "loss" payable and debris removal expense (\$79,500 + \$30,000 = \$109,500) would exceed the Limit of Insurance (\$90,000). The additional amount of covered debris removal expense is \$10,000, the maximum payable under Paragraph (4). Thus the total payable for debris removal ex-

pense in this example is \$20,500; \$9,500 of the debris removal expense is not covered.

c. Fire Department Service Charge

When the fire department is called to save or protect Covered Property from a Covered Cause of Loss, we will pay up to \$5,000 in any one occurrence for your liability, which is determined prior to the direct "loss", for fire department service charges:

- (1) Assumed by contract or agreement; or
- (2) Required by local ordinance.

Such limit is the most we will pay regardless of the number of responding fire departments or fire units, and regardless of the number or type of services performed. This Coverage is in addition to the Limits of Insurance shown in the Declarations.

d. Fire Protection Equipment Recharge

- (1) We will pay for the expenses you incur to recharge your automatic fire suppression system or portable fire extinguishers when the equipment is discharged:
 - (a) To combat a covered fire to which this insurance applies;
 - (b) As a result of another covered Cause of Loss other than fire; or
 - (c) As a result of an accidental discharge.
- (2) We will not pay your expenses to recharge fire protection equipment as a result of a discharge during testing or installation.
- (3) If it is less expensive to do so, we will pay your costs to replace your automatic fire suppression system or portable fire extinguishers rather than recharge that equipment.

The most we will pay in any one occurrence under this Additional Coverage is \$25,000. This Coverage is in addition to the Limits of Insurance shown in the Declarations.

e. Inventory or Appraisal

- (1) We will pay the necessary expenses you incur to prepare claim information as required by this Coverage Part. Expenses must result from:
 - (a) Taking inventories;
 - (b) Making appraisals; and

- (c) Preparing a statement of loss and other supporting exhibits.
- (2) We will not pay for any expenses:
 - (a) Incurred to prove that "loss" is covered;
 - (b) Incurred under **SECTION D. LOSS CONDITIONS, 2. Appraisal**;
 - (c) Incurred for examinations under oath;
 - (d) Billed by and payable to independent or public adjusters; or
 - (e) To prepare claims not covered by this Coverage Part.

The most we will pay for any one occurrence under this Additional Coverage is \$10,000. This Coverage is in addition to the shown in the Declarations.

f. Key and Lock Expense

- (1) If a key or master key is lost, stolen, or damaged, we will pay for:
 - (a) The actual expense of the new keys; and
 - (b) The adjustment of locks to accept new keys; or
 - (c) If required, new locks, including the expense of their installation;
 but only for locks at buildings or structures covered by this Coverage Part.
- (2) This Coverage does not apply to keys that were given to former employees.

The most we will pay in any one occurrence under this Additional Coverage is Limit of Insurance \$1,000. This Coverage is in addition to the Limit of Insurance shown in the Declarations.

g. Ordinance or Law

- (1) If a covered building or structure sustains direct "loss" from a Covered Cause of Loss, resulting in the enforcement of or compliance with an ordinance or law that is in force at the time of "loss" and regulates the demolition, construction or repair of buildings or structures, or establishes zoning or land use requirements at the "premises", then subject to **SECTION D, LOSS CONDITIONS, 4. Loss Payment**, we will pay:

(a) Loss of Use of Undamaged Parts of Buildings

The costs you incur to rebuild at the same "premises" any undamaged portion of your building or structure caused by enforcement of or compliance with an ordinance or law requiring demolition of undamaged parts of the same building or structure. We will only pay the costs to satisfy the minimum requirements of the ordinance or law. Losses and costs incurred in complying with recommended actions or standards that exceed actual requirements are not covered.

(b) Demolition Costs

The costs you incur to demolish and clear the site of undamaged parts of the same building or structure as a result of Paragraph **g.(1)(a)** above.

(c) Increased Costs of Construction

- 1) For buildings or structures to which **SECTION F. OPTIONAL COVERAGES, 3. Replacement Cost** applies, the increased costs to comply with the minimum standards of an ordinance or law to:
 - a) Repair or reconstruct damaged portions of that building or structure; and
 - b) Reconstruct or remodel undamaged portions of that building or structure whether or not demolition is required;

However, this increased cost of construction applies only if the building or structure is repaired, reconstructed or remodeled and is intended for occupancy similar to the building or structure it replaces, unless such occupancy is not permitted by zoning or land use ordinance or law.

- 2) For this Paragraph **g.(1)(c)** only, the increased costs to repair or reconstruct the following:

- a) The cost of excavations, grading, backfilling and filling;
- b) Foundation of the building;
- c) Pilings;
- d) Underground pipes, flues and drains.

The items listed in Paragraphs **g.2a)** through **g.2d)** above are deleted from **SECTION A. COVERAGE, 2. Property Not Covered;**

(2) We will not pay for:

- (a) Enforcement of or compliance with any ordinance or law which requires the demolition, repair, replacement, reconstruction, remodeling or remediation of property due to contamination by "pollutants" or due to the presence, growth, proliferation, spread or any activity of "fungi", wet or dry rot or bacteria; or
- (b) The costs associated with the enforcement of or compliance with any ordinance or law which requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants", "fungi", wet or dry rot or bacteria.

(3) We will not pay for "loss" due to any ordinance or law that:

- (a) You were required to comply with before the "loss", even if the building or structure was undamaged; and
- (b) With which you failed to comply.

(4) The terms of this Additional Coverage apply separately to each building or structure covered by this Coverage Part.

The most we will pay under this Additional Coverage is \$10,000 per building. This is in addition to the Limit of Insurance shown in the Declarations for the building suffering "loss".

h. Pollutant Clean Up and Removal

We will pay your expenses to extract "pollutants" from land or water at the "premises" if the discharge, dispersal, seepage,

migration, release, escape or emission of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the "coverage term". The expenses will be paid only if they are reported to us in writing within 180 days of the date on which the Covered Cause of Loss occurs.

This Additional Coverage does not apply to costs to test for, monitor or assess the existence, concentration or effects of "pollutants". But we will pay for testing which is performed in the course of extracting the "pollutants" from the land or water.

The most we will pay under this Additional Coverage for each "premises" is \$10,000 for the sum of all covered expenses arising out of Covered Causes of Loss during each "coverage term". This Coverage is in addition to the Limit of Insurance shown in the Declarations.

i. Preservation of Property

If it is necessary to move Covered Property from the "premises" to preserve it from imminent "loss" by a Covered Cause of Loss, we will pay for any direct "loss" to that property:

- (1) While it is being moved or while temporarily stored at another location; and
- (2) Only if the "loss" occurs within 60 days after the property is first moved.

This Coverage is included within Limit of Insurance shown in the Declarations for such Covered Property.

j. Rewards

We will pay to provide a reward for information that leads to a conviction for arson, theft, vandalism, or burglary. The conviction must involve a covered "loss" caused by arson, theft, vandalism, or burglary.

The most we will pay for "loss" in any one occurrence under this Additional Coverage is \$10,000. This Coverage is in addition to the Limit of Insurance shown in the Declarations.

5. Coverage Extensions

Unless amended within a particular Coverage Extension, each Extension applies to property located in or on the building described in the Declarations or in the open (or in a vehicle or portable storage unit) within 1,000 feet of the "premises".

The limits applicable to the Coverage Extensions are in addition to the Limit of Insurance shown in the Property Declarations. Limits of Insurance specified in these Extensions apply per location unless stated otherwise.

SECTION E. ADDITIONAL CONDITIONS, 1. Coinsurance, does not apply to these Coverage Extensions.

a. Accounts Receivable

SECTION C. DEDUCTIBLE does not apply to this Coverage Extension.

(1) When you sustain direct "loss" to your accounts receivable records caused by a Covered Cause of Loss, we will pay:

- (a) All amounts due from your customers that you are unable to collect;
- (b) Interest charges on any loan required to offset amounts you are unable to collect pending our payment of these amounts;
- (c) Collection expenses in excess of your normal collection expenses that are made necessary by the "loss"; and
- (d) Other reasonable expenses that you incur to re-establish your records of accounts receivable.

(2) Coverage does not apply to:

- (a) Records of accounts receivable in storage away from the "premises"; or
- (b) Contraband, or property in the course of illegal transportation or trade.

(3) We will extend coverage to include:

(a) Removal

If you give us written notice within 30 days of removal of your records of accounts receivable because of imminent danger of direct "loss" from a Covered Cause of Loss, we will pay for "loss" while they are:

- 1) At a safe place away from your "premises"; or
- 2) Being taken to and returned from that place.

This Removal coverage is included within the Limit of Insurance applicable to this Coverage Extension.

(b) Away From Your Premises

The most we will pay in any one occurrence is \$5,000, regardless of the number of locations, for "loss" caused by a Covered Cause of Loss to Accounts Receivable while they are away from your "premises".

This Away From Premises Limit is in addition to the Limit of Insurance applicable to this Coverage Extension.

(4) **SECTION A. COVERAGE, 3. Covered Causes of Loss, b. Exclusions** does not apply to this Coverage Extension, except as follows:

- (a) **Exclusion (1)(c) Governmental Action;**
- (b) **Exclusion (1)(d) Nuclear Hazard;**
- (c) **Exclusion (1)(f) War and Military Action.**

(5) In addition to Paragraph **a.(4)** of this Coverage Extension, we will not pay for "loss" resulting from any of the following:

(a) Dishonest or criminal acts by:

- 1) You, your partners, employees, directors, trustees or authorized representatives;
- 2) A manager or a member if you are a limited liability company;
- 3) Anyone else with an interest in the records of accounts receivable, or their employees or authorized representatives; or
- 4) Anyone else entrusted with the records of accounts receivable for any purpose.

This Paragraph **a.(5)(a)** applies whether or not such persons are acting alone or in collusion with other persons or such act occurs during the hours of employment.

However, this Paragraph **a.(5)(a)** does not apply to dishonest acts of a carrier for hire or to acts of destruction by your employees. However, theft by employees is still not covered.

(b) Alteration, falsification, concealment or destruction of records of

accounts receivable done to conceal the wrongful giving, taking or withholding of "money", "securities" or other property.

This exclusion applies only to the extent of the wrongful giving, taking or withholding.

- (c) Bookkeeping, accounting or billing errors or omissions.
- (d) Electrical or magnetic injury, disturbance or erasure of "electronic data" that is caused by or results from:
 - 1) Programming errors or faulty machine instructions;
 - 2) Faulty installation or maintenance of data processing equipment or component parts;
 - 3) An occurrence that took place more than 100 feet from your "premises"; or
 - 4) Interruption of electrical power supply, power surge, blackout or brownout if the cause of such occurrence took place more than 100 feet from your "premises".

But we will pay for direct "loss" caused by lightning.

- (e) Voluntary parting with any property by you or anyone entrusted with the property if induced to do so by any fraudulent scheme, trick, device or false pretense.
- (f) A "loss" that requires any audit of records or any inventory computation to prove its factual existence.

(6) Determination of Receivables:

- (a) If you cannot accurately establish the amount of accounts receivable outstanding as of the time of direct "loss", the following method will be used:
 - 1) Determine the total of the average monthly amounts of accounts receivable for the 12 months immediately preceding the month in which the direct "loss" occurs; and
 - 2) Adjust that total for any normal fluctuations in the amount of accounts receiv-

able for the month in which the direct "loss" occurred or for any demonstrated variance from the average for that month.

- (b) The following will be deducted from the total amount of accounts receivable, however that amount is established:
 - 1) The amount of the accounts for which there is no direct "loss"; and
 - 2) The amount of the accounts that you are able to re-establish or collect; and
 - 3) An amount to allow for probable bad debts that you are normally unable to collect; and
 - 4) All unearned interest and service charges.

The most we will pay for "loss" in any one occurrence under this Coverage Extension is \$25,000.

b. Business Income and Extra Expense

SECTION C. DEDUCTIBLE does not apply to this Coverage Extension.

(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.

With respect to the requirements of the preceding paragraph, if you are a tenant and occupy only part of the site at which the "premises" are located, for the purpose of this Coverage Extension only, your "premises" is the portion of the building that you rent, lease or occupy, including:

- (a) Any area within the building or on the site at which the "premises" are located if that area ser-

vices or is used to gain access to the "premises"; and

- (b) Your personal property in the open (or in a vehicle or portable storage unit) within 1,000 feet of the building or 1,000 feet of the "premises", whichever is greater.

(2) Extra Expense

- (a) We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain (as described in Paragraphs **(2)(b)**, **(c)** and **(d)**) 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.
- (b) If these expenses reduce the otherwise payable "Business Income" "loss", we will pay expenses (other than the expense to repair or replace property as described in Paragraph **(2)(c)**) to:
 - 1) Avoid or minimize the "suspension" of business and to continue "operations" either:
 - a) At the "premises"; or
 - b) At replacement "premises" or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location; or
 - 2) Minimize the "suspension" of business if you cannot continue "operations".
- (c) We will also pay expenses to:
 - 1) Repair or replace property; or
 - 2) Research, replace or restore the lost information on damaged "valuable papers and records";

but only to the extent this payment reduces the otherwise payable "Business Income" "loss". If any property obtained for temporary use during the "period of restoration" remains after the resumption of normal

"operations", the amount we will pay under this Coverage will be reduced by the salvage value of that property.

- (d) Extra Expense does not apply to "loss" to Covered Property as described in the **BUILDING AND PERSONAL PROPERTY COVERAGE FORM**.

(3) Civil Authority

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.

This Civil Authority coverage for "Business Income" will begin immediately after the time of that action and will apply for a period of up to 30 days from the date of that action.

This Civil Authority coverage for Extra Expense will begin immediately after the time of that action and will end:

- 1) 30 consecutive days after the time of that action; or
- 2) When your "Business Income" coverage ends;

whichever is later.

(4) Alterations and New Buildings

We will pay for the actual loss of "Business Income" you sustain and Extra Expense you incur due to direct "loss" at the "premises" caused by or resulting from any Covered Cause of Loss to:

- (a) New buildings or structures, whether complete or under construction;
- (b) Alterations or additions to existing buildings or structures; and
- (c) Machinery, equipment, supplies or building materials located on or within 1,000 feet of the "premises" and:
 - 1) Used in the construction, alterations or additions; or
 - 2) Incidental to the occupancy of new buildings.

If such direct "loss" delays the start of "operations", the "period of restoration" for "Business Income" Coverage will begin on the date "operations" would have begun if the direct "loss" had not occurred.

(5) Newly Purchased or Leased Locations

We will pay the actual loss of "Business Income" you sustain and Extra Expense you incur due to direct "loss" to Covered Property at any location you purchase or lease caused by or resulting from a Covered Cause of Loss. This coverage for the Newly Purchased or Leased Locations will end when any of the following first occurs:

- (a) This policy expires;
- (b) You report values to us;
- (c) 90 days pass from the date you acquire or begin to construct the Covered Property.

(6) Extended Business Income

- (a) For "Business Income" Other Than "Rental Value", if the necessary "suspension" of your "operations" produces a "Business Income" or Extra Expense "loss" payable under this Coverage Part, we will pay for the actual loss of "Business Income" you sustain and Extra Expense you incur during the period that:
 - 1) Begins on the date property (except "finished stock") is actually repaired, rebuilt or replaced and "operations" are resumed; and
 - 2) Ends on the earlier of:

- a) The date you could restore your "operations", with reasonable speed, to the level which would generate the business income amount that would have existed if no direct "loss" had occurred; or
- b) 60 consecutive days after the date determined in **b.(6)(a)1)** above.

However, Extended Business Income does not apply to loss of "Business Income" sustained or Extra Expense incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the "premises" are located.

Loss of "Business Income" must be caused by direct "loss" at the "premises" caused by or resulting from any Covered Cause of Loss.

- (b) For "Rental Value", if the necessary "suspension" of your "operations" produces a "Rental Value" "loss" payable under this Coverage Part, we will pay for the actual loss of "Rental Value" you incur during the period that:
 - 1) Begins on the date property is actually repaired, rebuilt or replaced and tenantability is restored; and
 - 2) Ends on the earlier of:
 - a) The date you could restore tenant occupancy, with reasonable speed, to the level which would generate the "Rental Value" that would have existed if no direct "loss" had occurred; or
 - b) 60 consecutive days after the date determined in **b.(6)(b)1)** above.

However, Extended Business Income does not apply to loss of "Rental Value" incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of

Loss in the area where the "premises" are located.

Loss of "Rental Value" must be caused by direct "loss" at the "premises" caused by or resulting from any Covered Cause of Loss.

(7) Interruption of Computer Operations

- (a) Subject to all provisions of this Coverage Extension, you may extend the insurance that applies to "Business Income" and Extra Expense to apply to a "suspension" of "operations" caused by an interruption in computer operations due to destruction or corruption of "electronic data" as described in **SECTION A. COVERAGE, 5. Coverage Extensions, d. Electronic Data.**
- (b) Paragraph **b.(7)(a)** does not apply to "loss" sustained or expense incurred after the end of the "period of restoration", even if the amount of insurance stated in Paragraph **b.(7)(c)** has not been exhausted.
- (c) The most we will pay under Paragraph **b.(7)** of this Coverage Extension is \$2,500 for all "loss" sustained and expense incurred in the "coverage term", regardless of the number of interruptions or the number of "premises" or computer systems involved. If loss payment relating to the first interruption does not exhaust this amount, then the balance is available for subsequent interruptions in that "coverage term". A balance remaining at the end of a "coverage term" does not carry over to the next "coverage term". With respect to an interruption that begins in a "coverage term" and continues or results in additional "loss" or expense in a subsequent "coverage term", all "loss" and expense is deemed to be sustained in the "coverage term" in which the interruption began.

This \$2,500 coverage for Interruption of Computer Operations does not increase the Limit of Insurance provided in this Coverage Extension.

The most we will pay for "loss" in any one occurrence under this "Business Income" and Extra Expense Coverage Extension is \$25,000.

c. Collapse

The coverage provided under this Coverage Extension applies only to an abrupt collapse as described and limited in Paragraphs **c.(1)** through **c.(7)** below.

- (1) For the purpose of this Coverage Extension only, abrupt collapse means an abrupt falling down or caving in of a building or structure or any part of a building or structure with the result that the building or structure or part of the building or structure cannot be occupied for its intended purpose.
- (2) We will pay for direct "loss" to Covered Property, caused by abrupt collapse of a building or structure or any part of a building or structure insured under this Coverage Part, or that contains Covered property insured under this Coverage Part, if such collapse is caused by one or more of the following:
 - (a) Building or structure decay that is hidden from view, unless the presence of such decay is known or should reasonably have been known to an insured prior to collapse;
 - (b) Insect or vermin damage that is hidden from view, unless the presence of such damage is known or should reasonably have been known to an insured prior to collapse;
 - (c) Use of defective material or methods in construction, remodeling, or renovation if the abrupt collapse occurs during the course of the construction, remodeling, or renovation.
 - (d) Use of defective materials or methods in construction, remodeling, or renovation if the abrupt collapse occurs after construction, remodeling, or renovation is complete but only if the collapse is caused in part by:
 - 1) A cause of loss listed in Paragraph **c.(2)(a)** or **c.(2)(b)** of this Coverage Extension;
 - 2) One or more of the "specified causes of loss";

- 3) Breakage of building glass;
 - 4) Weight of people or personal property; or
 - 5) Weight of rain that collects on a roof.
- (3) This Coverage Extension does not apply to:
- (a) A building or structure or any part of a building or structure that is in danger of falling down or caving in;
 - (b) A part of a building or structure that is standing, even if it has separated from another part of the building or structure; or
 - (c) A building or structure that is standing or any part of a building or structure that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.
- (4) With respect to the following property:
- (a) Outdoor radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers;
 - (b) Awnings, gutters and downspouts;
 - (c) Yard fixtures;
 - (d) Outdoor swimming pools;
 - (e) Fences;
 - (f) Piers, wharves and docks;
 - (g) Beach or diving platforms; including their appurtenances;
 - (h) Retaining walls; and
 - (i) Walks, roadways and other paved surfaces;

if an abrupt collapse is caused by a cause of loss listed in Paragraph **c.(2)(a)** through **c.(2)(d)**, we will pay for "loss" to that property only if:

- (a) Such "loss" is a direct result of the abrupt collapse of a building or structure insured under this Coverage Part; and
 - (b) The property is Covered Property under this Coverage Part.
- (5) If personal property abruptly falls down or caves in and such collapse

is **not** the result of abrupt collapse of a building or structure, we will pay for direct "loss" to Covered Property caused by such collapse of personal property only if:

- (a) The collapse of personal property was caused by a Cause of Loss listed in **c.(2)(a)** through **c.(2)(d)** of this Coverage Extension;
- (b) The personal property that collapses is inside a building; and
- (c) The property that collapses is not of a kind listed in Paragraph **c.(4)** above of this Coverage Extension, regardless of whether that kind of property is considered to be personal property or real property.

The coverage stated in this Paragraph **c.(5)** does not apply to personal property if marring and/or scratching is the only damage to that personal property caused by the collapse.

- (6) This Coverage Extension does not apply to personal property that has not abruptly fallen down or caved in, even if the personal property shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.
- (7) This Coverage Extension shall not increase the Limit of Insurance provided in this Coverage Part.
- (8) The term Covered Cause of Loss includes Collapse as described and limited in Paragraphs **c.(1)** through **c.(7)**.

d. Electronic Data

- (1) This Coverage Extension does not apply to your "stock" of prepackaged software, or to "electronic data" which is integrated in and operates or controls the building's elevator, lighting, heating, ventilation, air conditioning or security system.
- (2) We will pay for the cost to replace or restore "electronic data" which has been destroyed or corrupted by a Covered Cause of Loss that applies to **SECTION A. COVERAGE, 1. Covered Property, d. Business Personal Property**. To the extent that "electronic data" is not replaced or restored, the "loss" will be valued at the cost of replacement of the me-

dia on which the "electronic data" was stored with blank media of substantially identical type.

- (3) For the purposes of this Coverage Extension only, Covered Causes of Loss include a virus, harmful code or similar instruction introduced into or enacted on a computer system (including "electronic data") or a network to which it is connected, that is designed to damage or destroy any part of the system or disrupt its normal operation. However, there is no coverage for "loss" caused by or resulting from manipulation of a computer system (including "electronic data") by any employee, including a temporary or leased employee, or by an entity retained by you or for you to inspect, design, install, modify, maintain, repair or replace that system or "electronic data".
- (4) The most we will pay for all direct "loss" under this Coverage Extension, regardless of the number of "premises" or computer systems involved, is \$2,500. This limit is the most we will pay for the total of all direct "loss" arising out of all occurrences that take place in the "coverage term". If loss payment on the first occurrence does not exhaust this amount, then the balance is available for subsequent "loss" sustained in the "coverage term". A balance remaining in a "coverage term" does not carry over to the next "coverage term". With respect to an occurrence which begins in the "coverage term" and continues or results in additional "loss" in a subsequent "coverage term", all "loss" is deemed to be sustained in the "coverage term" in which the occurrence began.

e. Exhibitions, Fairs or Trade Shows

We will pay for direct "loss" caused by a Covered Cause of Loss to your Covered Property, including covered property of others, while it is located at exhibitions, fairs or trade shows. This Coverage Extension does not apply while Covered Property is in transit to or from the exhibition, fair or trade show.

The most we will pay for "loss" in any one occurrence is \$10,000.

The Limit of Insurance provided under this Coverage Extension does not apply per location.

f. Fences

We will pay for direct "loss" caused by a Covered Cause of Loss to your outdoor fences that are located within 1,000 feet of the "premises" and not otherwise insured as Covered Property in this Coverage Part.

The most we will pay for "loss" in any one occurrence under this Coverage Extension is \$5,000.

g. Fungi, Wet Rot, Dry Rot, and Bacteria - Limited Coverage

- (1) The coverage described in Paragraphs **g.(2)** and **g.(3)** of this Coverage Extension only apply when the "fungi", wet or dry rot or bacteria is the result of a Covered Cause of Loss that occurs during the "coverage term" and only if all reasonable means were used to save and preserve the property from further damage at the time of and after that occurrence.
- (2) We will pay for "loss" by "fungi", wet or dry rot or bacteria. As used in this Coverage Extension, the term "loss" means:
 - (a) Direct "loss" to Covered Property caused by "fungi", wet or dry rot or bacteria, including the cost of removal of the "fungi", wet or dry rot or bacteria;
 - (b) The cost to tear out and replace any part of the building or other property as needed to gain access to the "fungi", wet or dry rot or bacteria; and
 - (c) The cost of testing performed after removal, repair, replacement or restoration of the damaged property is completed, provided there is a reason to believe that "fungi", wet or dry rot or bacteria are present.
- (3) For the coverage described under Paragraph **g.(2)** of this Coverage Extension, the most we will pay for "loss", regardless of the number of claims, is \$15,000. This limit is the most we will pay for the total of all "loss" arising out of all occurrences that take place in the "coverage term". With respect to a particular occurrence of "loss" which results in "fungi", wet or dry rot or bacteria, we will not pay more than a total of \$15,000 even if the "fungi", wet or dry rot or bacteria continues to be pre-

sent or active, or recurs, in a subsequent "coverage term".

- (4) The coverage provided under this Coverage Extension does not increase the applicable Limit of Insurance on any Covered Property. If a particular occurrence results in "loss" by "fungi", wet or dry rot or bacteria, and other "loss", we will not pay more, for the total of all "loss" than the applicable Limit of Insurance on the affected Covered Property.

If there is covered "loss" to Covered Property, not caused by "fungi", wet or dry rot or bacteria, loss payment will not be limited by the terms of this Coverage Extension, except to the extent that "fungi", wet or dry rot or bacteria causes an increase in the "loss". Any such increase in the "loss" will be subject to the terms of this Coverage Extension.

- (5) The terms of this Coverage Extension do not increase or reduce the coverage provided under:

(a) **SECTION A. COVERAGE, 5. Coverage Extensions, c. Collapse;**

(b) **SECTION A. COVERAGE, 5. Coverage Extensions, s. Water, Other Liquids, Powder or Molten Material Damage**

- (6) The following (6)(a) or (6)(b) apply only if "Business Income", "Rental Value", or Extra Expense Coverage applies to the "premises" and only if the "suspension" of "operations" satisfies all terms and conditions of the applicable "Business Income", "Rental Value", or Extra Expense Coverage.

(a) If the "loss" which resulted in "fungi", wet or dry rot or bacteria does not in itself necessitate a "suspension" of "operations", but such "suspension" is necessary due to "loss" to property caused by "fungi", wet or dry rot or bacteria, then our payment under "Business Income" and/or Extra Expense is limited to the amount of "loss" and/or expense sustained in a period of not more than 30 days. The days need not be consecutive.

(b) If a covered "suspension" of "operations" was caused by "loss" other than "fungi", wet or dry rot or bacteria but remedia-

tion of "fungi", wet or dry rot or bacteria prolongs the "period of restoration", we will pay for "loss" and/or expense sustained during the delay (regardless of when such a delay occurs during the "period of restoration"), but such coverage is limited to 30 days. The days need not be consecutive.

- (7) This Coverage Extension does not apply to lawns, trees, plants or shrubs that are part of any vegetative roof.

h. Glass

- (1) If a Covered Cause of Loss occurs to building glass that is Covered Property, we will also pay necessary expenses you incur to:

(a) Put up temporary plates or board up openings if repair or replacement of damaged glass is delayed;

(b) Repair or replace encasing frames;

(c) Remove or replace obstructions (except expenses to remove or replace window displays); and

(d) Repair or replace alarm tapes.

- (2) If you are a tenant at a covered "premises" and:

(a) The building you occupy is not Covered Property; and

(b) You are legally liable for direct "loss" to the building glass in that building;

such building glass, for the purposes of this Paragraph h.(2), is Covered Property. The most we will pay for "loss" in any one occurrence is \$5,000. This building glass is subject to the building deductible as described in **SECTION C. DEDUCTIBLE**.

- (3) For the purposes of this Coverage Extension only, **SECTION A. COVERAGE, 3. Covered Causes of Loss, b. Exclusions** does not apply except as follows:

(a) **Exclusion (1)(b) Earth Movement;**

(b) **Exclusion (1)(c) Governmental Action;**

- (c) **Exclusion (1)(d) Nuclear Hazard;**
- (d) **Exclusion (1)(f) War and Military Action;**
- (e) **Exclusion (2)(d)1** Wear and tear; and
- (f) As listed in **Exclusion (2)(d)2**: Rust or other corrosion, hidden or latent defect or any quality in property that causes it to damage or destroy itself.

i. **Newly Purchased, Leased or Constructed Property**

(1) Buildings

If buildings are Covered Property in this Coverage Part, we will pay for direct "loss" caused by a Covered Cause of Loss to:

- (a) Your new buildings or additions while being built on the "premises";
- (b) Buildings you newly purchase or become newly required to insure by written contract that are:
 - 1) Intended for use by you as a warehouse; or
 - 2) Similarly used by you as buildings insured under this Coverage Part.

The most we will pay for "loss" in any one occurrence to a building under this Coverage Extension is 1,000,000 for each building.

(2) Business Personal Property

- (a) If business personal property is Covered Property in this Coverage Part, we will pay for direct "loss" caused by a Covered Cause of Loss to business personal property you newly purchase or are required to insure by written contract:
 - 1) While located at buildings described in Paragraph **a.(1)** of this Coverage Extension; or
 - 2) While located in a leased building or space therein that you are not required to insure. Such lease must be for a period of 12 consecutive months or longer.

- (b) Paragraph **a.(2)(a)** of this Coverage Extension does not apply to:

- 1) Any business personal property covered under **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions, e. Exhibitions, Fairs, or Trade Shows or m. Property Off Premises;**
- 2) Any business personal property that is covered under **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions, p. Transportation** or is otherwise considered to be in-transit to or from a "premises".
- 3) Business personal property of others that is temporarily in your possession in the course of installing or performing work on such property, or temporarily in your possession in the course of your manufacturing or wholesaling activities.

The most we will pay for "loss" in any one occurrence to your Business Personal Property under this Coverage Extension is \$500,000 at each building.

(3) Period of Coverage

Coverage provided under this Coverage Extension will end when any of the following first occurs:

- (a) This policy expires,
- (b) For buildings described in Paragraph **(1)(a)** of this Coverage Extension, 90 days pass from the date you begin construction on that part of the building that would qualify as Covered Property;
- (c) For business property described in Paragraph **(1)(b)** and Paragraph **(2)(a)1**, 90 days after your purchase or lease;
- (d) For business personal property described in Paragraph **(2)(a)2**, 90 days from the effective date

of the lease of the building space in the building; or

(e) You report values to us.

We will charge you additional premium for values reported from the date you lease or purchase the property, or begin construction on that part of the building that would qualify as Covered Property.

j. Nonowned Building Damage

If you are a tenant at a covered "premises" and:

- (1) The building you occupy is not Covered Property; and
- (2) You are legally liable for direct "loss" to that building;

We will pay for direct "loss" to that building caused by burglary, robbery, theft or attempted theft.

This Coverage Extension does not apply to:

- (1) Glass, including lettering and ornamentation, and also necessary:
 - (a) Repair or replacement of encasing frames or alarm tapes; and
 - (b) Expenses incurred to board up openings or remove or replace obstruction.
- (2) Building materials and equipment removed from the "premises".

This Coverage Extension does not apply if you have purchased other insurance in your name on the building you occupy as required by the lease.

The most we will pay for "loss" in any one occurrence under this Coverage Extension is \$25,000.

k. Outdoor Property

We will pay for direct "loss" caused by a Covered Cause of Loss to the following types of your Covered Property:

- (1) Radio antennas, television antennas or satellite dishes (including their lead-in wiring, masts and towers);
- (2) Trees, shrubs or plants (other than trees, shrubs or plants which are "stock" or part of a vegetative roof), including debris removal ; and
- (3) If you are a tenant, to your awnings that are attached to a building you occupy;

but only if caused by or resulting from any of the following causes of loss if they are included as Covered Causes of Loss under this Coverage Part:

- (1) Fire;
- (2) Lightning;
- (3) Explosion;
- (4) Riot or Civil Commotion;
- (5) Aircraft; or
- (6) Falling objects.

We will pay for the debris removal expenses of the above type property that are not your Covered Property if such debris is on your "premises" due to the Covered Causes of Loss described in this Coverage Extension. If you are a tenant, we do not pay debris removal expenses for trees, plants or shrubs owned by the landlord or owner of the building you occupy.

No other coverage for debris removal expenses provided in this Coverage Part applies to this Outdoor Property Coverage Extension.

The most we will pay for "loss" in any one occurrence under this Coverage Extension is \$5,000, but not more than \$1,000 for any one tree, shrub or plant.

l. Personal Effects

If business personal property is Covered Property in this Coverage Part, we will pay for direct "loss" caused by a Covered Cause of Loss to personal effects owned by:

- (1) You, your officers, or your partners, or if you are a limited liability company, your members or your managers; or
- (2) Your employees (including temporary and leased employees), including tools owned by your employees that are used in your business. However, employee tools are not covered for theft.

This Coverage Extension does not apply to "money" or "securities".

If theft is included as a Covered Cause of Loss under this Coverage Part, then this Coverage Extension has a \$500 per occurrence limitation for direct "loss" by theft.

The most we will pay for "loss" in any one occurrence under this Coverage Extension is \$10,000.

m. Property Off Premises

(1) We will pay for direct "loss" caused by a Covered Cause of Loss to your Covered Property, including covered personal property of others, while it is away from the "premises", if it is:

- (a) Temporarily at a location you do not own, lease or operate; or
- (b) In storage at a location you lease, provided the lease was executed for the first time after the beginning of the current "coverage term".

(2) This Coverage Extension does not apply to Covered Property at exhibitions, fairs, trade show, or in transit.

The most we will pay for "loss" in any one occurrence under this Coverage Extension is \$10,000.

The Limit of Insurance provided by this Coverage Extension does not apply per location.

n. Signs

We will pay for direct "loss" caused by a Covered Cause of Loss, including debris removal expense, to signs not otherwise insured by this Coverage Part.

The most we will pay for "loss" in any one occurrence under this Coverage Extension is \$5,000.

The Limit of Insurance provided by this Coverage Extension does not apply per location.

o. Trailers (Nonowned Detached)

(1) If business personal property is Covered Property in this Coverage Part, we will pay for direct "loss" caused by a Covered Cause of Loss to trailers that you do not own, provided that:

- (a) The trailer is used in your business;
- (b) The trailer is temporarily in your care, custody or control at the "premises"; and
- (c) You have a contractual responsibility to pay for "loss" to the trailer.

(2) We will not pay for any direct "loss" that occurs:

(a) While the trailer is attached to any motor vehicle or motorized conveyance, whether or not the motor vehicle or motorized conveyance is in motion;

(b) During hitching or unhitching operations, or when a trailer becomes accidentally unhitched from a motor vehicle or motorized conveyance.

(3) This insurance is excess over the amount due, whether you can collect on it or not, from any other insurance covering such property.

(4) This Coverage Extension does not apply to any property inside or on the trailer.

The most we will pay for "loss" in any one occurrence under this Coverage Extension is \$5,000.

p. Transportation

We will pay for direct "loss" caused by a Covered Cause of Loss to your Covered Property, including covered personal property of others while it is in or on a vehicle, including loading and unloading of the property.

The most we will pay for "loss" in any one occurrence is \$10,000.

The Limit of Insurance provided by this Coverage Extension does not apply per location.

q. Utility Services

We will pay for:

(1) Direct "loss" to Covered Property at your "premises" except for direct "loss" resulting from the partial or complete failure of Wastewater Removal Services; and

(2) Loss of "Business Income" you sustain and Extra Expenses you incur as provided in **SECTION A. COVERAGE, 5. Coverage Extensions, b. Business Income and Extra Expense;**

caused by or resulting from the partial or complete failure of utility services to the "premises".

The partial or complete failure of the utility services listed below must be caused by direct "loss" caused by a Covered Cause of Loss to the following property:

(1) Power Supply Property, meaning the following types of property supplying

electricity, steam or natural gas to the "premises":

- (a) Utility generating plants;
 - (b) Switching stations;
 - (c) Substations;
 - (d) Transformers; and
 - (e) Transmission, distribution, service, or similar lines, excluding all such overhead lines of any type.
- (2) Water Supply Property, meaning the following types of property supplying water to the "premises":
- (a) Pumping stations; and
 - (b) Water mains.
- (3) Wastewater Removal Property, meaning a utility system for removing wastewater and sewage from the "premises", other than a system designed primarily for draining storm water. The utility property includes sewer mains, pumping stations and similar equipment for moving the effluent to a holding, treatment or disposal facility, and includes such facilities. Coverage under this Coverage Extension does not apply to interruption in service caused by or resulting from a discharge of water or sewage due to heavy rainfall or flooding.
- (4) Communication Supply Property, meaning property supplying communication services, including service relating to Internet access or access to any electronic, cellular or satellite network; telephone, radio, microwave or television services to the "premises", such as:
- (a) Communication transmission, distribution, service or similar lines, including fiber optic lines, excluding all such overhead lines of any type;
 - (b) Coaxial cables; and
 - (c) Microwave radio relays, excluding satellites.

This Coverage Extension does not apply to "loss" to "electronic data", including destruction or corruption of "electronic data".

The most we will pay for all direct "loss" and loss of "Business Income" and Extra Expense in any one occurrence is \$25,000.

r. **Valuable Papers and Records**

SECTION C. DEDUCTIBLE does not apply to this Coverage Extension.

(1) Subject to Paragraph r.(3) of this Coverage Extension, we will pay necessary costs you incur to research, replace or restore lost or damaged information on "valuable papers and records" that are your property or the property of others in your care, custody or control; resulting from direct "loss" caused by a Covered Cause of Loss.

(2) Coverage does not apply to:

- (a) Property that cannot be replaced with other property of like kind and quality;
- (b) Property held as samples or for delivery after sale;
- (c) Property in storage away from the "premises", except as provided in Paragraph r.(4)(b) of this Coverage Extension;
- (d) Contraband, or property in the course of illegal transportation or trade;
- (e) "Valuable papers and records" in the form of "electronic data", including the materials on which the "electronic data" is recorded.

(3) The most we will pay for "loss" is the least of the following amounts:

- (a) The cost of reasonably restoring the damaged property to its condition immediately before the "loss";
- (b) The cost of replacing the damaged property with substantially identical property; or
- (c) The actual cash value of the damaged property at the time of "loss".

However, we will not pay for "loss" unless or until the damaged property is actually replaced or restored; and then only if such replacement or restoration occurs within 36 months from the date of direct "loss".

(4) We will extend coverage to include:

(a) **Removal**

If you give us written notice within 30 days of removal of your "valuable papers and records"

because of imminent danger of direct "loss" from a Covered Cause of Loss, we will pay for direct "loss" while they are:

- 1) At a safe place away from your "premises"; or
- 2) Being taken to and returned from that place.

This Removal coverage is included within the Limits of Insurance applicable to this Coverage Extension.

(b) Away From Your Premises

We will pay up to \$5,000 in any one occurrence, regardless of the number of locations, for direct "loss" caused by a Covered Cause of Loss to "valuable papers and records" while they are away from your "premises".

This Away From Premises limit is in addition to the Limit of Insurance applicable to this Coverage Extension.

(5) SECTION A. COVERAGE, 3. Covered Causes of Loss, b. Exclusions does not apply to this Coverage Extension except as follows:

- (a) **Exclusion (1)(c) Governmental Action;**
- (b) **Exclusion (1)(d) Nuclear Hazard; and**
- (c) **Exclusion (1)(f) War and Military Action.**

(6) In addition to Paragraph **r.(5)** of this Coverage Extension, we will not pay for direct "loss" resulting from any of the following:

- (a) Dishonest or criminal acts by:
 - 1) You, your partners, employees, directors, trustees or authorized representatives;
 - 2) A manager or a member if you are a limited liability company;
 - 3) Anyone else with an interest in the records of accounts receivable, or their employees or authorized representatives; or
 - 4) Anyone else entrusted with the records of accounts receivable for any purpose.

This Paragraph **r.(6)(a)** applies whether or not such persons are acting alone or in collusion with other persons or such act occurs during the hours of employment.

However, this Paragraph **r.(6)(a)** does not apply to dishonest acts of a carrier for hire or to acts of destruction by your employees. However, theft by employees is still not covered.

- (b) Errors or omissions in processing or copying. However, we will pay for that portion of direct "loss" caused by resulting fire or explosion if these causes of loss would be covered by this Coverage Part.
- (c) Electrical or magnetic injury, disturbance or erasure of electronic recordings. But we will pay for direct "loss" caused by lightning.
- (d) Voluntary parting with any property by you or anyone entrusted with the property if induced to do so by any fraudulent scheme, trick, device or false pretense.

The most we will pay for "loss" in any one occurrence is \$25,000.

s. Water Damage, Other Liquids, Powder or Molten Material Damage

If a covered direct "loss" to which this insurance applies was caused by or resulted from water or other liquid, powder or molten material damage, we will also pay the cost to tear out and replace any otherwise undamaged part of the building or structure to repair damage to the system or appliance from which the water or other substance escapes.

SECTION B. LIMITS OF INSURANCE

The most we will pay for "loss" in any one occurrence is the applicable Limit of Insurance shown in the Declarations, except as amended in **SECTION A. COVERAGE, 3. Covered Causes of Loss, c. Limitations, 4. Additional Coverages, and 5. Coverage Extensions.**

SECTION C. DEDUCTIBLE

Except as otherwise provided; in any one occurrence of direct "loss" we will first reduce the amount of "loss" if required by **SECTION E. ADDITIONAL CONDITIONS, 1. Coinsurance** or **SECTION F. OPTIONAL COVERAGES, 1. Agreed Value.** If the adjusted amount of direct "loss" is less than or equal to the Deductible, we will not pay for that direct "loss". If the adjusted amount of direct "loss" exceeds the Deductible, we will then

subtract the Deductible from the adjusted amount of direct "loss", and will pay the resulting amount or the Limit of Insurance, whichever is less.

When the occurrence involves direct "loss" to more than one item of Covered Property and separate Limits of Insurance apply, the losses will not be combined in determining application of the Deductible. But the Deductible will be applied only once per occurrence.

1. Deductible Examples

Example No. 1:

(This example assumes there is no coinsurance penalty as outlined in **SECTION E. ADDITIONAL CONDITIONS, 1. Coinsurance**).

Deductible:	\$250
Limit of Insurance - Bldg. 1:	\$60,000
Limit of Insurance - Bldg. 2:	\$80,000
"Loss" to Bldg. 1:	\$60,100
"Loss" to Bldg. 2:	\$90,000

The amount of "loss" to Bldg. 1 (\$60,100) is less than the sum (\$60,250) of the Limit of Insurance applicable to Bldg. 1 plus the Deductible.

The Deductible will be subtracted from the amount of "loss" in calculating the "loss" payable for Bldg. 1:

$$\$60,100 - \$250 = \$59,850 \text{ "Loss" Payable - Bldg. 1}$$

The Deductible applies once per occurrence and therefore is not subtracted in determining the amount of "loss" payable for Bldg. 2. "Loss" payable for Bldg. 2 is the Limit of Insurance of \$80,000.

$$\text{Total amount of "loss" payable: } \$59,850 + \$80,000 = \$139,850.$$

Example No. 2:

(This example also assumes there is no coinsurance penalty).

The Deductible and Limits of Insurance are the same as those in Example No. 1:

"Loss" to Bldg. 1: \$70,000 (Exceeds Limit of Insurance plus Deductible)

"Loss" to Bldg. 2: \$90,000 (Exceeds Limit of Insurance plus Deductible)

"Loss" Payable - Bldg. 1: \$60,000 (Limit of Insurance)

"Loss" Payable - Bldg. 2: \$80,000 (Limit of Insurance)

$$\text{Total amount of "loss" payable: } \$140,000.$$

2. Glass Deductible

When direct "loss" to the building you occupy only involves building glass, the Deductible for that "loss" will be the lesser of:

- a. \$500; or
- b. The Deductible shown in the Declarations for that Covered Property.

SECTION D. LOSS CONDITIONS

The following conditions apply in addition to the **COMMON POLICY CONDITIONS** and the **COMMERCIAL PROPERTY CONDITIONS**.

1. Abandonment

There can be no abandonment of any property to us.

2. Appraisal

If we and you disagree on the value of the property, the amount of Net Income and operating expense, or the amount of "loss", either may make written demand for an appraisal of the "loss". In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property, the amount of Net Income and operating expense, and amount of "loss". If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we still retain our right to deny the claim.

3. Duties in the Event of Loss or Damage

- a. In the event of "loss" to Covered Property, you must see that the following are done in order for coverage to apply:
 - (1) Notify the police if a law may have been broken.
 - (2) Give us prompt notice of the "loss". Include a description of the property involved.
 - (3) As soon as possible, give us a description of how, when and where the "loss" occurred.
 - (4) Take all reasonable steps to protect the Covered Property from further damage. If feasible, set the damaged property aside and in the best possible order for examination. Keep a

record of your expenses necessary to protect the Covered Property for consideration in the settlement of the claim. This will not increase your limit of insurance. However, in no event will we pay for any subsequent "loss" resulting from a cause of loss that is not a Covered Cause of Loss.

- (5) At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of "loss" claimed.
- (6) As often as may be reasonably required, permit us to inspect the property proving the "loss" and examine your books and records.

Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis and permit us to make copies from your books and records.

- (7) Submit a signed sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.
 - (8) Cooperate with us in the investigation or settlement of the claim.
 - (9) If you intend to continue your business, you must resume all or part of your "operations" as quickly as possible.
- b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

4. Loss Payment

- a. In the event of "loss" insured by this Coverage Part, at our option, we will either:
- (1) Pay the value of lost or damaged property;
 - (2) Pay the cost of repairing or replacing the lost or damaged property;
 - (3) Take all or any part of the property at an agreed or appraised value; or
 - (4) Repair, rebuild or replace the property with other property of like kind and quality.

We will determine the value of lost or damaged property, or the cost of its repair or replacement, in accordance with the applicable terms of **SECTION D. LOSS CONDITIONS, 7. Valuation** or any applicable provision that amends or supercedes this valuation condition.

- b. The cost of repair or replacement does not include the increased cost attributable to enforcement of or compliance with any ordinance or law regulating the construction, use or repair of any property, except as provided in **SECTION A. COVERAGE, 4. Additional Coverages, g. Ordinance or Law.**
- c. We will give notice of our intentions within 30 days after we receive the sworn proof of loss.
- d. We will not pay you more than your financial interest in the Covered Property.
- e. We may adjust "losses" with the owners of lost or damaged property if other than you. If we pay the owners, such payments will satisfy your claims against us for the owners' property. We will not pay the owners more than their financial interest in the Covered Property.
- f. Our payment for "loss" to personal property of others and personal effects will only be for the account of the owner of the property.
- g. We may elect to defend you against suits arising from claims of owners of property. We will do this at our expense.
- h. We will pay for insured "loss" within 30 days after we receive the sworn proof of loss if you have complied with all of the terms of this Coverage Part; and
 - (1) We have reached agreement with you on the amount of "loss"; or
 - (2) An appraisal award has been made.

i. **Loss Payment - Ordinance or Law.**

With respect to **SECTION A. COVERAGE, 4. Additional Coverages, g. Ordinance or Law:**

(1) **Loss of Use of Undamaged Parts of Building**

When there is a loss in value of an undamaged portion of a building or structure to which this coverage applies, the loss payment for that building, including damaged and undamaged portions, will be determined as follows:

(a) If **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION F. OPTIONAL COVERAGES, 3. Replacement Cost** applies and the property is repaired or replaced, on the same "premises" or another "premises"; we will not pay more than the lesser of:

- 1) The amount you actually spend to repair, rebuild or reconstruct the building, but not for more than the amount it would cost to restore the building on the same "premises" and to the same height, floor area, style and comparable quality of the original property insured; or
- 2) The limit of insurance indicated in **SECTION A. COVERAGE, 4. Additional Coverages g. Ordinance or Law for Loss of Use of Undamaged Parts of Building** for the building that has suffered "loss".

(b) If **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION F. OPTIONAL COVERAGES, 3. Replacement Cost** applies and the property is not repaired or replaced, or if the Replacement Cost Coverage Option does not apply, we will not pay more than the lesser of:

- 1) The "actual cash value" of the building at the time of "loss"; or
- 2) The limit of insurance indicated in **SECTION A. COVERAGE, 4. Additional Coverages, g. Ordinance or Law for Loss of Use of Undamaged Parts of Building** for the building that has suffered "loss".

(2) Demolition Costs

Loss payment for Demolition Costs will be determined as follows:

We will not pay more than the lesser of the following:

- (a) The amount you actually spend to demolish and clear the site of the "premises"; or

(b) The limit of insurance indicated in **SECTION A. COVERAGE, 4. Additional Coverages, g. Ordinance or Law for Demolition Costs** for the building that has suffered "loss".

(3) Increased Costs of Construction

Loss payment for **Increased Costs of Construction** will be determined as follows:

(a) We will not pay for the increased cost of construction until the property is actually repaired or replaced, at the same "premises" or another location and unless the repairs or replacement are made as soon as reasonably possible after the direct "loss", not to exceed two years. We may extend this period in writing during the two years.

(b) If the building is repaired or replaced at the same "premises", or if you elect to rebuild at another "premises", the most we will pay for the **Increased cost of construction** is the lesser of:

- 1) The increased cost of construction at the same "premises"; or
- 2) The limit of insurance indicated in **SECTION A. COVERAGE, 4. Additional Coverages, g. Ordinance or Law for Increased Costs of Construction** for the building that has suffered "loss".

(c) If the ordinance or law requires relocation to another location the most we will pay for the increased cost of construction is the lesser of:

- 1) The increased cost of construction at the new location; or
- 2) The limit of insurance indicated in **SECTION A. COVERAGE, 4. Additional Coverages, g. Ordinance or Law for Increased Costs of Construction** for the building that has suffered "loss".

(4) Proportional Payments

If the building or structure sustains both direct "loss" that is covered un-

der this Coverage Part and direct "loss" that is not covered under this Coverage Part; and as a result of the direct "loss" in its entirety you are required to comply with the ordinance or law, we will not pay the full amount of direct "loss" otherwise payable under the terms of **SECTION A. COVERAGE, 4. Additional Coverages, g. Ordinance or Law**. Instead, we will pay a proportion of such direct "loss"; meaning the proportion that the covered direct "loss" bears to the total direct "loss".

j. Loss Determination - Business Income and Extra Expense

With respect to **SECTION A. COVERAGE, 5. Coverage Extensions, b. Business Income and Extra Expense**,

- (1) The amount of "Business Income" and "Rental Value" "loss" will be determined based on:
 - (a) The Net Income of the business before the direct "loss" occurred;
 - (b) The likely Net Income of the business if no direct "loss" had occurred, but not including any Net Income that would likely have been earned as a result of an increase in the volume of business due to favorable business conditions caused by the impact of the Covered Cause of Loss on customers or on other businesses;
 - (c) The operating expenses, including payroll expenses, necessary to resume "operations" with the same quality of service that existed just before the direct "loss"; and
 - (d) Other relevant sources of information, including:
 - 1) Your financial records and accounting procedures;
 - 2) Bills, invoices and other vouchers; and
 - 3) Deeds, liens or contracts.
- (2) The amount of Extra Expense will be determined based on:
 - (a) All expenses that exceed the normal operating expenses that would have been incurred by "operations" during the "period of restoration" if no direct "loss"

had occurred. We will deduct from the total of such expenses:

- 1) The salvage value that remains of any property bought for temporary use during the "period of restoration", once "operations" are resumed; and
 - 2) Any Extra Expense that is paid for by other insurance, except for insurance that is written subject to the same plan, terms, conditions and provisions as this insurance; and
- (b) Necessary expenses that reduce the "Business Income" and "Rental Value" "loss" that otherwise would have been incurred.

(3) Resumption of Operations

We will reduce the amount of your:

- (a) "Business Income" and "Rental Value" "loss", other than Extra Expense, to the extent you can resume your "operations", in whole or in part, by using damaged or undamaged property (including merchandise or "stock") at the "premises" or elsewhere.
 - (b) Extra Expense "loss" to the extent you can return "operations" to normal and discontinue such Extra Expense.
- (4) If you do not resume "operations", or do not resume "operations" as quickly as possible, we will pay based on the length of time it would have taken to resume "operations" as quickly as possible.

k. Party Walls

A party wall is a wall that separates and is common to adjoining buildings that are owned by different parties. In settling covered losses involving a party wall, we will pay a proportion of the "loss" to the party wall based on your interest in the wall in proportion to the interest of the owner of the adjoining building. However, if you elect to repair or replace your building and the owner of the adjoining building elects not to repair or replace that building, we will pay you the full value of the "loss" to the party wall, subject to all applicable policy provisions all other provisions of this **SECTION D. LOSS CONDITIONS, 4. Loss Payment** including:

- (1) Limit of Insurance shown in the Declarations;
- (2) **SECTION D. LOSS CONDITIONS, 7. Valuation**; and
- (3) **SECTION E. ADDITIONAL CONDITIONS, 1. Coinsurance**.

Our payment under the provisions of this paragraph does not alter any right of subrogation we may have against any entity, including the owner or insurer of the adjoining building, and does not alter the terms of **COMMERCIAL PROPERTY CONDITIONS, I. Transfer Of Rights Of Recovery Against Others To Us** in this Coverage Part.

5. Recovered Property

If either you or we recover any property after loss settlement, that party must give the other prompt notice. At your option, the property will be returned to you. You must then return to us the amount we paid to you for the property. We will pay recovery expenses and the expenses to repair the recovered property, subject to the Limit of Insurance.

6. Vacancy

a. Description of Terms

- (1) As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in **(1)(a)** and **(1)(b)** below:
 - (a) When this Coverage Part is issued to a tenant, and with respect to that tenant's interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations.
 - (b) When this Coverage Part is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant unless at least 31% of its total square footage is:
 - 1) Rented to a lessee or sublessee and used by them to conduct their customary operations; or
 - 2) Used by the building owner to conduct customary operations.

- (2) Buildings under construction or renovation are not considered vacant.

b. Vacancy Provisions

If the building where direct "loss" occurs has been vacant for more than 60 consecutive days before that "loss", we will:

- (1) Not pay for any "loss" caused by any of the following, even if they are Covered Causes of Loss:
 - (a) Vandalism;
 - (b) Sprinkler leakage, unless you have protected the system against freezing;
 - (c) Building glass breakage;
 - (d) Water damage;
 - (e) Theft; or
 - (f) Attempted theft.
- (2) Reduce the amount we would otherwise pay for the "loss" by 15% with respect to Covered Causes of Loss other than those listed in **b.(1)(a)** through **b.(1)(f)** of this Loss Condition.

7. Valuation

We will determine the value of Covered Property in the event of direct "loss" as follows:

- a. At "Actual Cash Value" as of the time of direct "loss", except as provided in **b.**, **c.**, **d.**, and **e.** below.
- b. If the Limit of Insurance for Building satisfies **SECTION E. ADDITIONAL CONDITIONS, 1. Coinsurance**, and the cost to repair or replace the damaged building property is \$2,500 or less, we will pay the cost of building repairs or replacement.

The cost of building repairs or replacement does not include the increased cost attributable to enforcement of or compliance with any ordinance or law regulating the construction, use or repair of any property. However, the following property will be valued at actual cash value even when attached to the building:

- (1) Awnings or floor coverings;
- (2) Appliances for refrigerating, ventilating, cooking, dishwashing or laundering; or
- (3) Outdoor equipment or furniture.
- c. "Stock" you have sold but not delivered at the selling price less discounts and expenses you otherwise would have had.

- d. Glass at the cost of replacement with safety glazing material if required by law.
- e. Tenant's Improvements and Betterments at:
 - (1) Replacement Cost of the lost or damaged property if you make repairs promptly.
 - (2) A proportion of your original cost if you do not make repairs promptly. We will determine the proportionate value as follows:
 - (a) Multiply the original cost by the number of days from the "loss" or damage to the expiration of the lease; and
 - (b) Divide the amount determined in (a) above by the number of days from the installation of improvements to the expiration of the lease.

If your lease contains a renewal option, the expiration of the renewal option period will replace the expiration of the lease in this procedure.
 - (3) Nothing if others pay for repairs or replacement.
 - (4) For the purposes of valuation, tenants' improvements and betterments are not considered to be the personal property of others.

SECTION E. ADDITIONAL CONDITIONS

The following conditions apply in addition to the **COMMON POLICY CONDITIONS** and the **COMMERCIAL PROPERTY CONDITIONS**.

1. Coinsurance

If a Coinsurance percentage is shown in the Declarations, the following condition applies.

- a. We will not pay the full amount of any "loss" if the value of Covered Property at the time of direct "loss" times the Coinsurance percentage shown for it in the Declarations is greater than the Limit of Insurance for the property.

Instead, we will determine the most we will pay using the following steps:

- (1) Multiply the value of Covered Property at the time of direct "loss" by the Coinsurance percentage;
- (2) Divide the Limit of Insurance of the property by the figure determined in step (1);

- (3) Multiply to the total amount of "loss", before the application of any deductible, by the figure determined in step (2); and
- (4) Subtract the deductible from the figure determined in step (3).

We will pay the amount determined in step (4) or the Limit of Insurance, whichever is less. For the remainder, you will either have to rely on other insurance or absorb the "loss" yourself.

Example No. 1 (Underinsurance):

The value of the property is:	\$250,000
The coinsurance percentage is:	80%
The Limit of Insurance is:	\$100,000
The Deductible is:	\$250
The amount of "loss" is:	\$40,000

Step (1):

$\$250,000 \times 80\% = \$200,000$ (the minimum amount of insurance to meet your Coinsurance requirements)

Step (2):

$\$100,000$ divided by $\$200,000 = .50$

Step (3):

$\$40,000 \times .50 = \$20,000$

Step (4):

$\$20,000 - \$250 = \$19,750$.

We will pay no more than \$19,750. The remaining \$20,250 is not covered.

Example No. 2 (Adequate Insurance):

The value of the property is:	\$250,000
The coinsurance percentage is:	80%
The Limit of Insurance is:	\$200,000
The Deductible is:	\$250
The amount of "loss" is:	\$40,000

Step (1):

$\$250,000 \times 80\% = \$200,000$ (the minimum amount of insurance to meet your Coinsurance requirements)

Step (2):

$\$200,000 : \$200,000 = 1.00$

Step (3):

$\$40,000 \times 1.00 = \$40,000$

Step (4):

$\$40,000 - \$250 = \$39,750$.

We will pay no more than \$39,750 "loss" in excess of the Deductible. No penalty applies.

- b. If one Limit of Insurance applies to two or more separate items, this condition will apply to the total of all property to which the limit applies.

Example No. 3:

The values of the property are:

Bldg. at Location No. 1:	\$75,000
Bldg. at Location No. 2:	\$100,000
Personal Property at Location No. 2:	<u>\$75,000</u>
	250,000

The coinsurance percentage is: 90%
The Limit of Insurance for Buildings and Personal

Property at Location Nos. 1 and 2 is:	\$180,000
The Deductible is:	\$1,000
The amount of "loss" is:	
Bldg. at Location No. 2:	\$30,000
Personal Property at Location No. 2:	<u>\$20,000</u>
	\$50,000

Step (1):

$\$250,000 \times 90\% = \$225,000$
(the minimum amount of insurance to meet your Coinsurance requirements and to avoid the penalty shown below)

Step (2):

$\$180,000 : \$225,000 = .80$

Step (3):

$\$50,000 \times .80 = \$40,000$

Step (4):

$\$40,000 - \$1,000 = \$39,000.$

We will pay no more than \$39,000. The remaining \$1,000 is not covered.

2. Mortgage Holders

- a. The term "mortgage holder" includes trustee.
- b. We will pay for covered "loss" to buildings or structures to each mortgage holder shown in the Declarations in their order of precedence, as interests may appear.
- c. The mortgage holder has the right to receive loss payment even if the mortgage holder has started foreclosure or similar action on the building or structure.
- d. If we deny your claim because of your acts or because you have failed to comply

with the terms of this Coverage Part, the mortgage holder will still have the right to receive loss payment if the mortgage holder:

- (1) Pays any premium due under this Coverage Part at our request if you have failed to do so;
- (2) Submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so; and
- (3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the mortgage holder.

All of the terms of this Coverage Part will then apply directly to the mortgage holder.

- e. If we pay the mortgage holder for any "loss" and deny payment to you because of your acts or because you have failed to comply with the terms of this Coverage Part:

- (1) The mortgage holder's rights under the mortgage will be transferred to us to the extent of the amount we pay; and
- (2) The mortgage holder's right to recover the full amount of the mortgage holder's claim will not be impaired.

At our option, we may pay to the mortgage holder the whole principal on the mortgage plus any accrued interest. In this event, your mortgage and note will be transferred to us and you will pay your remaining mortgage debt to us.

- f. If we cancel this policy, we will give written notice to the mortgage holder at least:
 - (1) 10 days before the effective date of cancellation if we cancel for your nonpayment of premium; or
 - (2) 30 days before the effective date of cancellation if we cancel for any other reason.
- g. If we elect not to renew this policy, we will give written notice to the mortgage holder at least ten days before the expiration date of this policy.

SECTION F. OPTIONAL COVERAGES

If shown as applicable in the Declarations, the following Optional Coverages apply separately to each item.

1. Agreed Value

- a. The Additional Condition, Coinsurance, does not apply to Covered Property to which this Optional Coverage applies. We will pay no more for direct "loss" to that property than the proportion that the Limit of Insurance under this Coverage Part for the property bears to the Limit of Insurance indicated in the most current Statement of Values that applies to this Coverage Part.
- b. If the Agreed Value Optional Coverage is deleted from the policy, the Additional Condition, Coinsurance, is reinstated and this Optional Coverage does not apply.
- c. The terms of this Optional Coverage apply only to "loss" that occurs:
 - (1) On or after the effective date of this Optional Coverage; and
 - (2) Before the policy expiration date.
- d. This Agreed Value Optional Coverage does not apply to **SECTION A. COVERAGE, 5. Coverage Extensions, b. Business Income and Extra Expense.**

2. Inflation Guard

- a. The Limit of Insurance for property to which this Optional Coverage applies will automatically increase by the annual percentage shown in the Declarations.
- b. The amount of increase will be:
 - (1) The Limit of Insurance that applied on the beginning of the current "coverage term" or any other Coverage Part change amending the Limit of Insurance, multiplied by
 - (2) The percentage of annual increase shown in the Declarations, expressed as a decimal (example: 8% is .08), multiplied by
 - (3) The number of days since the beginning of the current "coverage term" or the effective date of the most recent policy change amending the Limit of Insurance, divided by 365. In the event of "loss", this number of days ends at the original date of "loss".

Example:

If: The applicable Limit of Insurance is: \$100,000

The Annual percentage increase is: 8%

The number of days since the beginning of the policy year (or last policy change) is: 146

The amount of increase is
 $\$100,000 \times .08 \times (146/365) = \$3,200$

3. Replacement Cost

- a. Replacement Cost (without deduction for depreciation) replaces "Actual Cash Value" in **SECTION D. LOSS CONDITIONS, 7. Valuation** of this **BUILDING AND PERSONAL PROPERTY COVERAGE FORM**.
- b. This Optional Coverage does not apply to:
 - (1) Personal Property of others, except leased personal property as described in **SECTION A. COVERAGE, 1. Covered Property, d.(7)**. The valuation of such leased personal property will be based on the amount for which you are liable under the lease, but not to exceed the replacement cost of the leased item.
 - (2) Personal effects;
 - (3) Contents of a residence;
 - (4) Manuscripts;
 - (5) Works of art, antiques or rare articles, including etchings, pictures, statuary, marbles, bronzes, porcelains and bric-a-brac;
 - (6) "Stock" unless the Replacement Cost including "Stock" option is shown in the Declarations; or
 - (7) Property, that at the time of "loss":
 - (a) Is outdated, or obsolete and is stored or not being used; or
 - (b) Has no practical value to you.
- c. You may make a claim for "loss" covered by this insurance on an "Actual Cash Value" basis instead of on a replacement cost basis. In the event you elect to have "loss" settled on an "Actual Cash Value" basis, you may still make a claim for the additional coverage this Optional Coverage provides if you notify us of your intent to do so within 180 days after the "loss".
- d. We will not pay on a replacement cost basis for any "loss":
 - (1) Until the lost or damaged property is actually repaired or replaced with other property of generally the same construction and used for the same

purpose as the lost or damaged property; and

- (2) Unless the repairs or replacement have been completed or at least underway within 2 years following the date of "loss".

e. We will not pay more for "loss" on a replacement cost basis than the least of:

- (1) The Limit of Insurance applicable to the lost or damaged property;

- (2) The cost to replace, on the same "premises", the lost or damaged property with other property:

(a) Of comparable material and quality; and

(b) Used for the same purpose; or

- (3) The amount you actually spend that is necessary to repair or replace the lost or damaged property.

f. The cost of repair or replacement does not include the increased cost attributable to enforcement of or compliance with any ordinance or law regulating the construction, use, or repair of any building or structure except as provided in **SECTION A. COVERAGE, 4. Additional Coverages, g. Ordinance or Law.**

SECTION G. DEFINITIONS

1. "Actual cash value" means replacement cost less a deduction that reflects depreciation, age, condition and obsolescence.

2. "Business Income" means the:

a. Net Income (net profit or loss before income taxes) that would have been earned or incurred; and

b. Continuing normal operating expenses sustained, including payroll.

3. "Computer programs" means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data.

4. "Coverage term" means the following individual increment, or if a multi-year policy period, increments, of time, which comprise the policy period of this Coverage Part:

a. The year commencing on the Effective Date of this Coverage Part at 12:01 A.M. standard time at your mailing address shown in the Declarations, and if a multi-year policy period, each consecutive annual period thereafter, or portion thereof if

any period is for a period of less than 12 months, constitute individual "coverage terms". The last "coverage term" ends at 12:00 A.M. standard time at your mailing address shown in the Declarations on the earlier of:

(1) The day the policy period shown in the Declarations ends; or

(2) The day the policy to which this Coverage Part is attached is terminated or cancelled.

b. However, if after the issuance of this Coverage Part, any "coverage term" is extended for an additional period of less than 12 months, that additional period of time will be deemed to be part of the last preceding "coverage term".

5. "Electronic data" means information, facts or "computer programs" stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment.

6. "Finished stock" means stock you have manufactured, except "stock" you have manufactured that is held for sale on the "premises" of any retail outlet insured under this Coverage Part.

7. "Fungi" means any type or form of fungus, and includes, but is not limited to, any form or type of mold, mushroom or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

8. "Loss" means accidental physical loss or accidental physical damage.

9. "Money" means:

a. Currency, coins and bank notes whether or not in current use; and

b. Travelers checks, registered checks and money orders held for sale to the public.

10. "Operations" means:

a. Your business activities occurring at the "premises"; and

b. The tenantability of the "premises", if coverage for "Business Income" including "Rental Value" or "Rental Value" applies.

11. "Period of restoration" means the period of time that:

a. Begins at the time of direct "loss".

b. Ends on the earlier of:

- (1) The date when the property at the "premises" should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
 - (2) The date when business is resumed at a new permanent location.
- c. "Period of restoration" does not include any increased period required due to the enforcement of or compliance with any ordinance or law that:
- (1) Regulates the construction, use or repair, or requires the tearing down of any property; or
 - (2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to or assess the effects of "pollutants".
- d. The expiration date of the policy will not cut short the "period of restoration".
12. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, asbestos, chemicals, petroleum, petroleum products and petroleum by-products, and waste. Waste includes materials to be recycled, reconditioned or reclaimed. "Pollutants" include but are not limited to substances which are generally recognized in industry or government to be harmful or toxic to persons, property, or the environment regardless of whether injury or damage is caused directly or indirectly by the "pollutants" and whether:
- a. You are regularly or otherwise engaged in activities which taint or degrade the environment; or
 - b. You use, generate or produce the "pollutant".
13. "Premises" means the Locations and Buildings described in the Declarations.
14. "Rental Value" means "Business Income" that consists of :
- a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred as rental income from tenant occupancy of the "premises" described in the Declarations as furnished and equipped by you, including fair rental value of any portion of the "premises" which is occupied by you; and
 - b. Continuing normal operating expenses incurred in connection with that "premises", including:
 - (1) Payroll; and
 - (2) The amount of charges, which are the legal obligation of the tenant(s) but would otherwise be your obligations.
15. "Securities" means negotiable and non-negotiable instruments or contracts representing either "money" or other property and includes:
- a. Tokens, tickets, revenue and other stamps whether or not in current use; and
 - b. Evidences of debt issued in connection with credit or charge cards, which are not of your own issue; but does not include "money". Lottery tickets held for sale are not "securities" or evidences of debt.
16. "Sinkhole collapse" means the sudden settlement or collapse of earth supporting the Covered Property into subterranean voids created by the action of water on a limestone or similar rock formation. This does not include:
- a. The cost of filling sinkholes;
 - b. Sinking or collapse of land into man-made subterranean cavities; or
 - c. The value of the land.
17. "Specified causes of loss" means fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; "sinkhole collapse"; volcanic action; falling objects; weight of snow, ice or sleet; and water damage.
- a. Falling objects does not include "loss" to:
 - (1) Personal property in the open; or
 - (2) The interior of a building or structure, or property inside a building or structure, unless the roof or an outside wall of the building or structure is first damaged by a falling object.
 - b. Water damage means:
 - (1) Accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of any part of a system or appliance (other than a sump system including its related equipment and parts) containing water or steam; and
 - (2) Accidental discharge or leakage of water or waterborne material as the direct result of the breaking apart or cracking of a water or sewer pipe that is located off the "premises" and is part of a municipal potable water supply system or municipal sanitary sewer system, if the breakage or cracking is caused by wear and tear.

But water damage does not include "loss" otherwise excluded under the terms of **BUILDING AND BUSINESS PERSONAL PROPERTY, SECTION A. COVERAGE, 3. Covered Causes of Loss, (g) Water**. Therefore, for example, there is no coverage under this Coverage Part in the situation in which discharge or leakage of water results from the breaking apart or cracking of a pipe which was caused by or related to weather-induced flooding, even if wear and tear contributed to the breakage or cracking. As another example, and also in accordance with the terms of the Exclusion **(g) Water**, there is no coverage for "loss" caused by or related to weather-induced flooding which follows or is exacerbated by pipe breakage or cracking attributable to wear and tear.

To the extent that accidental discharge or leakage of water falls within the criteria set forth in **18.b.(1)** or **18.b.(2)** of this definition of "Specified causes of loss", such

water is not subject to the provisions of Exclusion **(g) Water**.

18. "Stock" means merchandise held in storage or for sale, raw materials and in-process or finished goods, including supplies used in their packing or shipping.
19. "Suspension" means:
 - a. The slowdown or cessation of your business activities; and
 - b. That a part or all of the "premises" is rendered untenable.
20. "Valuable papers and records" means inscribed, printed or written documents, manuscripts or records, including abstracts, books, card index systems, deeds, drawings, films, maps, mortgages, or proprietary information.

But "valuable papers and records" does not mean "money" or "securities" or "electronic data", including the materials on which the "electronic data" is recorded.

CinciPlus[®]
CinciPak[™]
MEDICAL/DENTAL OFFICE
PROPERTY XC+[®] (EXPANDED COVERAGE PLUS)
ENDORSEMENT
SUMMARY OF COVERAGE LIMITS

This is a summary of the Coverages and the Limits of Insurance provided by the CinciPlus[®] CinciPak[™] Medical/Dental Office Property XC+[®] (Expanded Coverage Plus) Endorsement, **FCP 217**, in combination with the Commercial Property Coverage Form, **FM 101**, which are included in this policy. **No coverage is provided by this summary.** Refer to endorsement **FCP 217** and the Commercial Property Coverage Form, **FM 101**, to determine the scope of your insurance protection.

<u>Blanket Coverages:</u>	<u>Blanket Coverage Limit:</u>	Page No. FCP217
	\$ 150,000 in total for all loss arising from all Blanket Coverages arising from a single occurrence, except as noted otherwise in the form.	
Accounts Receivable		1
Debris Removal		6
Electronic Data Processing Property (EDP):		2
Duplicate and Backup Electronic Data		2
Newly Purchased EDP		2
In Transit or Away From Premises		3
Worldwide Laptop Coverage		3
Ordinance or Law (Increased Construction Costs and Demolition)		4
Peak Season		5
Personal Property of Others		5
Tenant Move Back Expenses		5
Valuable Papers and Records		4
Water Backup from Sewers, Drains or Sump Pumps		10

<u>Other Coverages</u> <u>(not subject to Blanket Coverage Limit):</u>	<u>Limit of Insurance:</u>	Page No. FCP217
Brands and Labels	\$25,000	8
Business Income and Extra Expense:		
Interruption of Computer Operations	\$25,000 (sub-limit, subject to a 24 hour deductible)	1

<u>Other Coverages</u> (not subject to Blanket Coverage Limit):	<u>Limit of Insurance:</u>	Page No. FCP217
Inflation Guard	4% on all Building Property referenced in the Declarations	8
Lessor's Leasehold Interest	Actual loss sustained up to \$25,000	9
Limitation - Personal Property Theft:		8
Furs, fur garments and garments trimmed with fur	\$2,500	8
Jewelry, watches, watch movements, jewels, pearls and precious and semi-precious stones.	\$5,000 (Limitation not applicable to watches and jewelry worth \$500 or less per item.)	8
Bullion, gold, silver, platinum and other precious alloys or metals	\$25,000	8
Patterns, dies, molds and forms	\$2,500	9
Nonowned Building Damage:		7
Loss caused by theft, burglary or robbery	Up to the Business Personal Property (BPP) Limit of Insurance	8
Loss by any other Covered Cause of Loss	\$25,000 or the BPP Limit of Insurance (whichever is less)	8
Ordinance or Law (other than Increased Construction Costs and Demolition)	Subject to the Building Limit of Insurance	4
Ordinance or Law - Increased Period of Restoration	\$50,000	10
Outdoor Property	\$25,000 (\$1,000 for any one tree, shrub or plant)	5
Temperature Change	\$50,000	6
Unauthorized Business Card Use	\$5,000	9

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

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COMMERCIAL PROPERTY AMENDATORY ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART

- I. **SECTION A. COVERAGE**, Paragraph 2. **Property Not Covered** is amended as follows:
- Subparagraphs **f., g., i., j., k., m.** and **n.** are deleted in their entirety.
- II. **SECTION A. COVERAGE**, Paragraph 3. **Covered Causes of Loss, b. Exclusions, (4) Special Exclusions** is amended as follows:
- Special Exclusions **(a)** and **(b)** are deleted in their entirety.
- III. **SECTION A. COVERAGE**, Paragraph 3. **Covered Causes of Loss, c. Limitations** is amended as follows:
- A. Subparagraph **(1) Limitations - Various Types of Property** is amended as follows:
1. Limitation **(c) Building Interiors** is deleted in its entirety and replaced by the following:

(c) Building Interiors

The interior of any building or structure caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not, unless:

 - 1) The building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the rain, snow, sleet, ice, sand or dust enters; or
 - 2) The "loss" is caused by or results from thawing of snow, sleet or ice on the building or structure.
 2. Limitation **(d) Theft of Building Materials** is deleted in its entirety.
- B. Subparagraph **(3) Limitation - Personal Property Theft**, item **(d)** is deleted in its entirety.
- IV. **SECTION A. COVERAGE**, Paragraph 4. **Additional Coverages** is amended as follows:
- A. The following **Additional Coverages** are amended as follows:
1. The Limit of Insurance referenced in Subparagraph **(4)** of **b. Debris Removal** is amended to \$25,000.
 2. The Limit of Insurance referenced in **c. Fire Department Service Charge** is amended to \$25,000.
 3. **Fire Protection Equipment Recharge - Actual Expenses Incurred**
- For this endorsement only, the last paragraph in **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 4. Additional Coverages, d. Fire Protection Equipment Recharge** is deleted in its entirety and replaced by the following:
- The most we will pay in any one occurrence under this Additional Coverage is the reasonable and necessary expenses you incur to recharge your automatic fire suppression system or portable fire extinguishers. This coverage is in addition to the Limits of Insurance shown in the Declarations.
4. **g. Ordinance or Law** is amended as follows:
 - a. The Limit of Insurance referenced in the last paragraph is amended to \$25,000; and
 - b. Paragraph **(1)** is amended to include the following:

(d) Cost to Repair, Rebuild or Reconstruct Tenants Improvements and Betterments

The increased cost to repair, rebuild or reconstruct tenant's improvements and betterments, as described in **SECTION A. COVERAGE; 1. Covered Property, d.**

Business Personal Property, Subparagraph (6), caused by enforcement of building, zoning or land use ordinance or law.

5. The Limit of Insurance referenced in **h. Pollutant Clean Up and Removal** is amended to \$25,000.
6. The number of days referenced in Subparagraph (2) of **i. Preservation of Property** is amended to 90.

B. The following **Additional Coverages** are added:

1. Peak Season Limit Increase

- a. The Limit of Insurance for Business Personal Property will automatically increase by 25% to provide for seasonal variations.
- b. This increase will apply only if the Limit of Insurance shown for Business Personal Property in the Declarations is at least 100% of your average monthly values during the lesser of:
 - (1) The 12 months immediately preceding the date the "loss" occurs; or
 - (2) The period of time you have been in business as of the date the "loss" occurs.

2. Leasehold Improvements

If your lease is cancelled in accordance with a valid lease provision as the direct result of a Covered Cause of Loss to property at the location in which you are a tenant, and you cannot legally remove Tenant Improvements and Betterments, as described in **SECTION A. COVERAGE; 1. Covered Property, d. Business Personal Property**, Subparagraph (6), we will extend Business Personal Property coverage to apply to the unamortized value of Tenant Improvement and Betterment that remain and that you were forced to abandon.

The most we will pay for "loss" in any one occurrence under this Additional Coverage is \$25,000.

3. Lease Assessment

Your Business Personal Property is extended to apply to your share of any assessment charged to all tenants by the building owner as a result

of direct physical damage caused by or resulting from a Covered Cause of Loss to building property you occupy as agreed to in your written lease agreement.

The most we will pay for "loss" in any one occurrence under this Additional Coverage is \$2,500.

4. Temporary Relocation of Property

- (1) If Covered Property is removed from the "premises" and stored temporarily at a location you own, lease or operate while the "premises" is being renovated or remodeled, we will pay for direct "loss" of that stored property:
 - (a) Caused by or resulting from a Covered Cause of Loss;
 - (b) Up to \$50,000 at each temporary location in any one occurrence; and
 - (c) During the storage period of up to 90 consecutive days but not beyond the expiration of this policy.
- (2) This Additional Coverage does not apply if the stored property is more specifically insured.

V. SECTION A. COVERAGE, Paragraph 5. **Coverage Extensions** is amended as follows:

A. The following **Coverage Extensions** are amended as follows:

1. Coverage Extension a. Accounts Receivable is amended as follows:

- a. The Limit of Insurance referenced in Subparagraph (3)(b) **Away From Your Premises** is amended to \$25,000; and
- b. The last Paragraph is deleted in its entirety and replaced by the following:

The most we will pay for "loss" in any one occurrence under this Coverage Extension is \$50,000.

2. Coverage Extension b. Business Income and Extra Expense is amended to include the following:

- (9) Business Income From Dependent Properties
 - (a) We will pay for the actual loss of "Business Income" you sustain due to the necessary "suspension" of your

"operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to "dependent property" caused by or resulting from any Covered Cause of Loss.

However, this Coverage Extension does not apply when the only "loss" to "dependent property" is "loss" to "electronic data", including destruction or corruption of "electronic data". If the "dependent property" sustains "loss" to "electronic data" and other property, coverage under this Coverage Extension will not continue once the other property is repaired, rebuilt or replaced.

The most we will pay for "loss" in any one occurrence for each "dependent property" location is \$10,000. This \$10,000 of coverage for Business Income From Dependent Properties does not increase the Limit of Insurance provided in this Coverage Extension.

(b) We will reduce the amount of your "Business Income" loss, other than Extra Expense, to the extent you can resume "operations", in whole or in part, by using any other available:

- 1) Source of materials; or
- 2) Outlet for your products.

(c) If you do not resume "operations", or do not resume "operations" as quickly as possible, we will pay based on the length of time it would have taken to resume "operations" as quickly as possible.

(d) **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION G. DEFINITIONS** is amended to include the following definition:

"Dependent property" means property operated by others whom you depend on to:

1) Deliver materials or services to you, or to others for your account (Contributing Locations). But, any property which delivers the following services is not a Contributing Location with respect to such services:

- a) Water supply services;
- b) Power supply services;
- c) Communication supply services, including services relating to internet access or access to any electronic network;

2) Accept your products or services;

3) Manufacture products for delivery to your customers under contract for sale; or

4) Attract customers to your business.

The "dependent property" must be located in the coverage territory of this Coverage Part.

(e) In **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION G. DEFINITIONS**, the "Period of restoration" Definition, with respect to "dependent property", is replaced by the following:

"Period of restoration" means the period of time that:

1) Begins twenty-four (24) hours after the time of direct "loss" caused by or resulting from any Covered Cause of Loss at the premises of the "dependent property"; and

2) Ends on the date when the property at the premises of the "dependent property" should be repaired, re-

built or replaced with reasonable speed and similar quality.

"Period of restoration" does not include any increased period required due to the enforcement of any ordinance or law that:

- 1) Regulates the construction, use or repair, or requires the tearing down of any property; or
- 2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants".

The expiration date of this Coverage Part will not cut short the "period of restoration".

3. The Limit of Insurance referenced in **f. Fences** is amended to \$10,000.
4. The Limit of Insurance referenced in **h. Glass** Subparagraph **(2)** is amended to \$25,000
5. In Coverage Extension, **i. Newly Purchased, Leased, or Constructed Property**, Paragraphs **(3)(b)**, **(3)(c)** and **(3)(d)** the number 90 is deleted and replaced by the number 180.
6. The last paragraph of **j. Nonowned Building Damage** is deleted in its entirety and replaced by the following:

The most we will pay for "loss" in any one occurrence under this Coverage Extension is your Business Personal Property Limit of Insurance for the "premises" where the "loss" occurs.

7. Coverage Extension **k. Outdoor Property** is deleted in its entirety and replaced by the following:

k. Outdoor Property

We will pay for direct "loss" caused by a Covered Cause of Loss to the following types of your Covered Property:

- (1) Radio antennas, television antennas or satellite dishes

(including their lead-in wiring, masts and towers); and

- (2) Trees, shrubs or plants (other than trees, shrubs or plants which are "stock" or part of a vegetative roof), including debris removal;

but only if caused by or resulting from any of the following causes of loss if they are included as Covered Causes of Loss under this Coverage Part:

- (a) Fire;
- (b) Lightning;
- (c) Explosion;
- (d) Riot or Civil Commotion;
- (e) Aircraft;
- (f) Falling objects;
- (g) Theft; or
- (h) Vehicle; and

- (3) Awnings that are attached to a building that you occupy as a tenant.

We will pay for the debris removal expenses of the above type property that are not your Covered Property if such debris is on your "premises" due to the Covered Causes of Loss described in this Coverage Extension. If you are a tenant, we do not pay debris removal expenses for trees, plants, or shrubs owned by the landlord or owner of the building you occupy.

No other coverage for debris removal expenses provided in this Coverage Part applies to this Outdoor Property Coverage Extension.

The most we will pay for "loss" in any one occurrence under the Coverage Extension is \$10,000, but not more than \$1,000 for any one tree, shrub or plant.

8. **SECTION A, COVERAGE 5. Coverage Extensions I. Personal Effects** is deleted in its entirety and replaced by the following:

I. Personal Effects

If business personal property is Covered Property in this Cover-

age Part, we will pay for direct "loss" caused by a Covered Cause of Loss to personal effects owned by:

- (1) You, your officers, or your partners, or if you are a limited liability company, your members or your managers; or
- (2) Your employees (including temporary and leased employees), including tools owned by your employees that are used in your business.

This Coverage Extension does not apply to "money" or "securities".

The most we will pay for "loss" in any one occurrence under this Coverage Extension is \$25,000.

9. The Limit of Insurance referenced in **n, Signs** is amended to \$10,000.
 10. The Limit of Insurance referenced in **r. Valuable Papers and Records Subparagraph (4)(b) Away From Your Premises** is amended to \$25,000.
- B. The following **Coverage Extensions** are added:

1. Appurtenant Buildings and Structures

- a. When a Limit of Insurance is shown in the Declarations for Building at the "premises", you may extend that insurance to apply to direct "loss" of incidental appurtenant buildings or structures, within 1,000 feet of that "premises", caused by or resulting from a Covered Cause of Loss.
- b. When a Limit of Insurance is shown in the Declarations for Business Personal Property at the "premises", you may extend that insurance to apply to direct "loss" of Business Personal Property within incidental appurtenant buildings or structures within 1,000 feet of that "premises", caused by or resulting from a Covered Cause of Loss.
- c. Incidental appurtenant buildings or structures include:
 - (1) Storage buildings;

- (2) Carports;
- (3) Garages;
- (4) Pump houses; or
- (5) Above ground tanks;

which have not been specifically described in the Declarations.

- d. The most we will pay for "loss" in any one occurrence under this Coverage Extension for any combination of "loss" to Building and Business Personal Property is \$50,000, regardless of the number of "premises" involved.

2. Fine Arts

For the purposes of this endorsement only:

- a. You may extend the insurance provided by this Coverage Part to apply to paintings, etchings, pictures, tapestries, art glass windows, and other bona fide works of art of rarity, historical value, or artistic merit. The direct "loss" must be caused by or result from a Covered Cause of Loss.

- b. **SECTION D. LOSS CONDITIONS, 7. Valuation** is deleted in its entirety and replaced by the following:

We will determine the value of Covered Property in the event of "loss" at the market value at the time of direct "loss".

- c. The most we will pay for "loss" in any one occurrence under this Coverage Extension is \$25,000.

3. Ordinance or Law - Increased Period of Restoration

- a. When:
 - (1) A Covered Cause of Loss occurs to property at the "premises"; and
 - (2) The Declarations show that you have coverage for Business Income and Extra Expense;

you may extend that insurance to apply to the amount of actual loss of "Business Income" you sustain and reasonable Extra Expense you incur during the increased period of "suspension"

of "operations" caused by or resulting from the enforcement of any ordinance or law that:

- (1)** Regulates the construction, repair or replacement of any property;
 - (2)** Requires the tearing down or replacement of any parts of property not damaged by a Covered Cause of Loss; and
 - (3)** Is in force at the time of "loss".
- b.** This Coverage Extension applies only to the period that would be required, with reasonable speed, to reconstruct, repair or replace the property to comply with the minimum requirements of the ordinance or law.
- c.** This Coverage Extension does not apply to:

(1) Loss due to an ordinance or law that:

- (a)** You were required to comply with before the "loss", even if the property was undamaged; and
 - (b)** You failed to comply with; or
- (2)** Costs associated with the enforcement of any ordinance or law that requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants".
- d.** The most we will pay for "loss" under this Coverage Extension in any one occurrence is \$25,000 at each "premises".

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

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**MEDICAL OR DENTAL OFFICE POLLUTANT CLEAN-UP
COVERED PROPERTY EXTENSION**

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART

For this endorsement only, **SECTION A - COVERAGES, COVERAGE 4. Additional Coverages, h. Pollutant Clean Up and Removal**, is deleted in its entirety and replaced with the following:

We will pay your expenses to extract "pollutants" from Covered Property and land or water at the "premises" if the discharge, dispersal, seepage, migration, release, escape or emission of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the "coverage term". The expenses will be paid only if they are reported to us in writing within 180 days of the date on which the Covered Cause of Loss occurs.

This Additional Coverage does not apply to costs to test for, monitor or assess the existence, concentration or effects of "pollutants". But we will pay for testing which is performed in the course of extracting the "pollutants" from the land or water.

The most we will pay under this Additional Coverage for each "premises" is \$10,000 for the sum of all covered expenses arising out of Covered Causes of Loss during each "coverage term". This is in addition to the Limits of Insurance shown in the Declarations.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CinciPak™

MEDICAL OR DENTAL OFFICE ACTUAL LOSS SUSTAINED BUSINESS INCOME ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART

- A.** This endorsement applies to the following Coverage Forms:
- BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM**
- BUSINESS INCOME (WITHOUT EXTRA EXPENSE) COVERAGE FORM**
- B.** For the purposes of this endorsement only, **SECTION A. COVERAGE, 5. Additional Coverages, c. Extended Business Income, (1), (b), (ii)** is deleted in its entirety and replaced by the following, and **(iii)** is added:
- (ii)** 12 consecutive months after the date determined in **c.(1)(a)** above; or
 - (iii)** 12 consecutive months after the date of direct "loss".
- C.** For the purposes of this endorsement only, **SECTION A. COVERAGE, 5. Additional Coverages, c. Extended Business Income, (2), (b), (ii)** is deleted in its entirety and replaced by the following, and **(iii)** is added:
- (ii)** 12 consecutive months after the date determined in **c.(2)(a)** above; or
 - (iii)** 12 consecutive months after the date of direct "loss".
- D.** For the purposes of this endorsement only, **SECTION F. DEFINITIONS, 9., b.** is deleted in its entirety and replaced by the following:
- b.** Ends on the earlier of:
- (1)** The date when the property at the "premises" should be repaired, rebuilt or replaced with reasonable speed and similar quality;
 - (2)** The date when business is resumed at a new permanent location; or
 - (3)** 12 consecutive months after the date of direct "loss".
- E.** When 12 months ALS (an acronym of Actual Loss Sustained) is shown in the Declarations as the Limit of Insurance for Business Income for a specific item, **SECTION B. LIMITS OF INSURANCE** is deleted in its entirety for that item.

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MEDICAL OR DENTAL OFFICE COMMERCIAL PROPERTY COVERAGE ENHANCEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART

- I. **SECTION A. COVERAGE**, Paragraph 3. **Covered Causes of Loss**, **b. Exclusions**, is amended as follows:

Exclusions **(1)(b) Earth Movement** and **(1)(g) Water** do not apply to:

- A. Covered Business Personal Property, or
- B. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions, b. Business Income and Extra Expense.**

- II. **SECTION A. COVERAGE**, Paragraph 5. **Coverage Extensions** is amended as follows:

- A. The following **Coverage Extensions** are amended as follows:

1. **a. Accounts Receivable** is amended as follows:

- a. The Limit of Insurance referenced in Subparagraph **(3)(b) Away From Your Premises** is amended to \$25,000

- b. The last Paragraph is deleted in its entirety and replaced by the following:

The most we will pay for "loss" in any one occurrence under this Accounts Receivable Coverage Extension is \$100,000.

This amendment of the Accounts Receivable Coverage Extension replaces, and is not in addition to, the amendment of the Accounts Receivable Coverage Extension in CinciPak™ Commercial Property Amendatory Endorsement.

2. The Limit of Insurance referenced in **e. Exhibitions Fairs or Trade Shows** is amended to \$25,000.

SECTION A, COVERAGE, 5. Coverage Extensions, i. Personal Effects is deleted in its entirety and replaced by the following:

I. **Personal Effects**

If business personal property is Covered Property in this Coverage Part, we will pay for direct "loss" caused by a Covered Cause of Loss to personal effects owned by:

- (1) You, your officers, or your partners, or if you are a limited liability company, your members or your managers; or
- (2) Your employees (including temporary and leased employees), including tools owned by your employees that are used in your business.

This Coverage Extension does not apply to "money" or "securities".

This amendment of the Personal Effects Coverage Extension replaces, and is not in addition to, the amendment of the Personal Effects Coverage Extension in the CinciPak™ Commercial Property Amendatory Endorsement.

- 4. The Limit of Insurance referenced in **m., Property Off Premises** is amended to \$25,000.
- 5. The Limit of Insurance referenced in **p., Transportation** is amended to \$25,000.
- 6. **q. Utility Services** is deleted in its entirety and replaced by the following:

q. Utility Services

We will pay for direct "loss" to Covered Property at your "premises" caused by or resulting from the partial or complete failure of utility services to the "premises".

The partial or complete failure of the utility services listed below must be caused by direct "loss" caused by a Covered Cause of Loss to the following property:

- (1) Power Supply Property, meaning the following types of property supplying electricity, steam or natural gas to the "premises":
 - (a) Utility generating plants;
 - (b) Switching stations;
 - (c) Substations;
 - (d) Transformers; and
 - (e) Transmission, distribution, service, or similar lines, excluding all such overhead lines of any type.
- (2) Water Supply Property, meaning the following types of property supplying water to the "premises":
 - (a) Pumping stations; and
 - (b) Water mains.
- (3) Communication Supply Property, meaning property supplying communication services, including service relating to internet access or access to any electronic, cellular, or satellite network; telephone, radio, microwave, or television services to the "premises", such as:
 - (a) Communication transmission, distribution, service, or similar lines including fiber optic lines, excluding all such overhead lines of any type;
 - (b) Coaxial cables; and
 - (c) Microwave radio relays, excluding satellites.

This Coverage Extension does not apply to "loss" to

"electronic data", including destruction or corruption of "electronic data".

7. r. Valuable Papers and Records is amended as follows:

- a. The following is added to Paragraph (2):
 - (f) Two year old x-rays, and x-rays in excess of two years of age.
- b. The Limit of Insurance referenced in Subparagraph (4)(b) Away From Your Premises is amended to \$25,000.
- c. The last Paragraph is deleted in its entirety and replaced by the following:

The most we will pay for "loss" in any one occurrence under this Valuable Papers and Records Coverage Extension is \$100,000.

This amendment of the Valuable Papers and Records Coverage Extension replaces, and is not in addition to, the amendment of the Valuable Papers and Records Coverage Extension in the CinciPak™ Commercial Property Amendatory Endorsement.

B. The following Coverage Extensions are added:

1. Tenant's Glass

For the purposes of this endorsement only,

- a. It is agreed and understood that Paragraph (2) of Coverage Extension **h. Glass** is deleted in its entirety and replaced by the following.
- b. If you are a tenant at a covered "premises" and:
 - (1) The building you occupy is not Covered Property; and
 - (2) You are legally liable for direct "loss" to the building glass in that building;

such building glass, for the purposes of this Paragraph **h.(2)** is Covered Property. We will pay for direct "loss" to that building glass, including lettering and ornamentation.

c. If a Covered Cause of Loss occurs to building glass, as provided for under this Coverage Extension, we will also pay necessary expenses you incur to:

- (1) Put up temporary plates or board up openings if repair or replacement of damaged glass is delayed;
- (2) Repair or replace encasing frames;
- (3) Remove or replace obstructions when repairing or replacing glass that is part of a building. This does not include expenses to remove or replace window displays; and
- (4) Repair or replace alarm tapes.

d. **SECTION A. COVERAGE, 3. Covered Causes of Loss, b. Exclusions** does not apply, except for:

- (1) Exclusion (1)(b) **Earth Movement**;
- (2) Exclusion (1)(c) **Governmental Action**;
- (3) Exclusion (1)(d) **Nuclear Hazard**;
- (4) Exclusion (1)(f) **War and Military Action**;
- (5) Exclusion (2)(d)1 **Wear and tear**; and
- (6) As listed in Exclusion (2)(d)2:

Rust or other corrosion, hidden or latent defect or any quality in property that causes it to damage or destroy itself.

2. **Water Backup Discharged from Sewers, Drains, Septic or Sump Pump Systems**

For the purposes of this endorsement only:

a. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 3. Covered Causes of Loss, b. Exclusions (1)(g) Water, Paragraph 3)** is deleted in its entirety and replaced by the following:

3) Except as provided in **SECTION A. COVERAGE, 5. Coverage Extensions, Water Backup Discharged from Sewers, Drains, Septic or Sump Pump Systems**, water that has entered and then backs up through and is discharged from a sewer, drain, septic system, sump pump system or related equipment; or

b. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 3. Covered Causes of Loss, b. Exclusions (1)(g) Water, Paragraph 5)** is deleted in its entirety and replaced by the following:

5) Except as provided in **SECTION A. COVERAGE, 5. Coverage Extensions, Water Backup Discharged from Sewers, Drains, Septic or Sump Pump Systems**, waterborne material carried or otherwise moved by any of the water referred to in Paragraphs 1), 3) or 4), or material carried or otherwise moved by mudslide or mudflow as described in Paragraph 2).

c. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions** is amended to include the following:

Water Backup Discharged From Sewers, Drains, Septic or Sump Pump Systems

We will pay for "loss" caused by or resulting from water or waterborne material that has entered and then backs up through and is discharged from a sewer, drain (including roof drains and related fixtures), septic system, sump pump systems or related equipment.

d. **SECTION C. DEDUCTIBLE** is amended by adding the following:

Water Backup Deductible

We will not pay for "loss" in any one occurrence caused by or resulting from water or waterborne

material which backs up through and is discharged from a sewer, drain, septic system, sump pump system or related equipment, until the amount of "loss" exceeds the Deductible shown in the Declarations, or \$1,000, whichever is greater. We will then pay the amount for "loss" in excess of that deductible, up to the applicable limit indicated in Para-

graph **e.** of this Coverage Extension.

- e.** The most we will pay for "loss" in any one occurrence, including any applicable "Business Income", "Rental Value" and "Extra Expense", under this Coverage Extension is \$25,000.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CinciPlus[®]
CinciPak[™]
MEDICAL/DENTAL OFFICE
PROPERTY XC+[®] (EXPANDED COVERAGE PLUS)
ENDORSEMENT

This endorsement modifies insurance provided under the following:

BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE PART
COMMERCIAL PROPERTY COVERAGE PART

The insurance coverage and Limits of Insurance provided by this endorsement are excess of, and apply in addition to, any similar or identical coverage provided by any other endorsement attached to the above referenced Coverage Parts, or by any other Coverage Part forming a part of the policy of insurance of which the above referenced Coverage Parts form a component.

SCHEDULE

Blanket Coverage Limit	The Limit of Insurance stated in the Summary of Coverage Limits
Applicable only to those coverages subject to the Blanket Coverage Limit, as indicated in this endorsement	

A. Accounts Receivable

For the purposes of this endorsement only:

1. In **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions, a. Accounts Receivable**, the second paragraph in **(3)(b) Away From Your Premises** is deleted in its entirety and replaced by the following:

This limit of insurance for **Away From Your Premises** coverage is not included within the Blanket Coverage Limit and is separate and in addition to the Blanket Coverage Limit.

2. In **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions, a. Accounts Receivable**, the last paragraph is deleted in its entirety and replaced by the following:

The most we will pay for "loss" in any one occurrence under this Accounts Receivable Coverage Extension is the Blanket Coverage Limit as provided in Section **T.** of this endorsement.

B. Business Income and Extra Expense

Interruption of Computer Operations

For the purposes of this endorsement only, in **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions, b. Business Income and Extra Expense**, is modified as follows:

1. For **Interruption of Computer Operations**, all references to \$2,500 in **b. Business Income and Extra Expense**, Paragraph **(7)(c)** are deleted and replaced with the Limit of Insurance indicated in the **MEDICAL/DENTAL OFFICE PROPERTY XC+[®] (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS** for Interruption of Computer operations.
2. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION G. DEFINITIONS** is amended as follows:

With respect to a "suspension" of "operations" caused only by an interruption in computer operations due to the destruction or corruption of "electronic da-

ta" as described in **SECTION A. COVERAGE, 5. Coverage Extensions, d. Electronic Data**, Paragraph **a.** of Definition **12.** "Period of restoration" is deleted and replaced by the following:

- a.** Begins 24 hours after the time of direct "loss".

C. Electronic Data Processing Property

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions** is amended by adding the following:

Electronic Data Processing Property

(1) Covered Property

You may extend the Coverage provided by this Coverage Part to apply to direct "loss" to Covered Property consisting of your:

- (a)** Data processing equipment;
- (b)** Air conditioning and other electrical equipment, used exclusively with your data processing equipment;
- (c)** Programming documentation and instruction manuals;
- (d)** "Electronic data", but only as excess over what is valid and collectible under **SECTION A. COVERAGE, 5. Coverage Extensions, d. Electronic Data**;
- (e)** Media, meaning materials on which "electronic data" is recorded, such as magnetic tapes, disc packs, paper tapes and cards, floppy discs and compact discs used in processing units; and
- (f)** Property of others in your care, custody or control that is similar to property described in **(1)(a)** through **(e)** above.

(2) Property Not Covered

This Coverage Extension does not apply to:

- (a)** Accounts, records, documents and other "valuable papers and records" unless they are programming documentation or instruction manuals.

However, we will cover these items once they are converted to "electronic data" form.

- (b)** "Electronic data" or media that cannot be replaced with similar property of equal quality.

- (c)** Your property that you have rented or leased to someone else and that property is not at your "premises".
- (d)** Any machine or apparatus that is used for research, medical, diagnostic, surgical, dental or pathological purposes.
- (e)** "Production equipment".

(3) Exclusions

- (a) BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 3. Covered Causes of Loss, b. Exclusions** does not apply except as follows:

- 1) Exclusion (1)(c) Governmental Action;**
- 2) Exclusion (1)(d) Nuclear Hazard;**
- 3) Exclusion (1)(f) War and Military Action;**
- 4) Exclusion (2)(b) Delay or Loss of Use;**
- 5) Exclusion (2)(d) Miscellaneous Causes of Loss, 1) Wear and tear;**
- 6) Exclusion (2)(h) Dishonest or Criminal Acts;**
- 7) Exclusion (3)(b) Acts or Decisions; and**
- 8) Exclusion (3)(c) Defects, Errors and Omissions.**

- (b)** In addition to Paragraph **(3)(a)** of this Coverage Extension, we will not pay for the following:

Hidden or latent defect, gradual deterioration, and depreciation. However, if direct "loss" by a Covered Cause of Loss results, we will pay for that resulting "loss".

(4) Duplicate and Backup "Electronic Data"

We will pay for direct "loss" resulting from any of the Covered Causes of Loss to duplicate and backup "electronic data" that you store at a premises not described in the Declarations providing such "electronic data" is not covered by another policy.

(5) Newly Purchased Electronic Data Processing Property

BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions, i. Newly Purchased, Leased or Constructed Property is deleted in its entirety and replaced by the following:

- (a) We will pay for direct "loss" from a Covered Cause of Loss to newly purchased or leased Covered Property described in Paragraph (1) of this Coverage Extension while at:
- 1) Locations that are newly purchased or leased;
 - 2) Your newly constructed buildings or additions at a "premises"; or
 - 3) Any "premises" described in the Declarations.
- (b) Insurance under this Coverage Extension for such newly acquired property, or Covered Property already insured by this Coverage Extension which is moved to a newly acquired location, will end when any of the following first occurs:
- 1) This Coverage Part expires;
 - 2) 90 days pass from the date you acquire your new property or move Covered Property to a newly acquired location; or
 - 3) You report values to us.

(6) In Transit or Away From Premises

SECTION A. COVERAGE, 5. Coverage Extensions, e. Exhibitions, Fairs or Trade Shows, m. Property Off Premises and p. Transportation are deleted in their entirety and replaced by the following:

- (a) You may extend the insurance provided by this Coverage Extension to apply to Covered Property as described in Paragraph (1):
- 1) While in or on a vehicle, including loading and unloading; or
 - 2) While at a location that is not your "premises".
- (b) This **In Transit or Away From Premises** coverage does not apply per location.

(7) Worldwide Laptop Coverage

- (a) You may extend the insurance provided by this Coverage Extension to apply to your laptops, notebooks and similar highly portable personal computers, including their peripherals and accessories, while such specific Covered Property is:
- 1) In your or your employee's care, custody and control;
 - 2) Not located at a premises you own or lease; and
 - 3) Not located in the coverage territory stated in Paragraph 2. of the Commercial Property Condition **H. Policy Period, Coverage Territory**, provided that location is not under a United States Department of State trade or travel restriction at the time of "loss".

(b) This **Worldwide Laptop Coverage** does not apply per location.

(8) Electronic Data Processing Property Deductible

SECTION C. DEDUCTIBLE is amended to include the following:

We will not pay for direct "loss" in any one occurrence unless the amount of "loss" exceeds the Deductible shown in the Declarations. We will then pay the amount of "loss" in excess of the Deductible, up to the Limit of Insurance provided by this Coverage Extension.

However, direct "loss" caused by or resulting from any of the following Causes of Loss will have the greater of the Deductible shown in the Declarations or \$1,000 as the applicable deductible:

- a. "Loss" caused by faulty construction, error in design or processing, or service or work upon the data processing system;
- b. "Loss" resulting in mechanical breakdown, short circuiting, blowout, or other electrical damage, unless caused by lightning; or
- c. "Loss" caused by or resulting from interruption of power supply, power surge, blackout or brownout.

(9) Electronic Data Processing Property Valuation

SECTION D. LOSS CONDITIONS, 7. Valuation is deleted in its entirety and replaced by the following:

7. Valuation of Electronic Data Processing Property

In the event of direct "loss", we will determine the value of Covered Property as described in Paragraph (1) of this Coverage Extension as follows:

- a. Except for "electronic data"
 - (1) If you repair or replace this Electronic Data Processing property within a reasonable time following the "loss", the property will be valued at the full cost of repair or replacement.

However, the most we will pay is the least of the following:
 - (a) The actual cost to repair or restore the property with materials of like kind and quality;
 - (b) The cost of replacing that property with property of similar quality and function;
 - (c) The amount you actually and necessarily spend to repair or replace the property; or
 - (d) The Limit of Insurance applicable to the property.
 - (2) If you do not repair or replace this property within a reasonable time following a "loss", the most we will pay will be the least of the following:
 - (a) "Actual cash value" of the property;
 - (b) "Actual cash value" of repairs with material of like kind and quality; or
 - (c) The Limit of Insurance applicable to the property.

We reserve the right to repair or replace the property or to pay for the property in money.

In the event of "loss", the value of property will be

determined at the time of "loss".

- b. For "electronic data"

We will not pay more than the actual reproduction costs of your "electronic data". If you do not replace or reproduce your "electronic data" following the "loss", the most we will pay is the cost of blank media as described in Paragraph C.(1)(e) of this Coverage Extension.

(10) Electronic Data Processing Property Additional Definition

The following definition is added to **SECTION G. DEFINITIONS** of the **BUILDING AND PERSONAL PROPERTY COVERAGE FORM**:

"Production equipment" means any machinery and related components, including any integrated or dedicated computer system, which is used, or can be used, to produce or process other tangible property.

The most we will pay for "loss" in any one occurrence under this Electronic Data Processing Property Coverage Extension is the Blanket Coverage Limit as provided in Section T. of this endorsement.

D. Ordinance or Law

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 4. Additional Coverages, g. Ordinance or Law**, the last paragraph is deleted in its entirety and replaced by the following:

The most we will pay for "loss" in any one occurrence under Paragraph (a) **Loss of Use of Undamaged Parts of the Building** is the Limit of Insurance shown in the **COMMERCIAL PROPERTY COVERAGE PART DECLARATIONS** as applicable to the covered building or structure incurring "loss". This Coverage is included within, and not in addition to, that applicable Limit of Insurance.

The most we will pay for all "loss" in any one occurrence under Paragraph (b) **Demolition Costs** and Paragraph (c) **Increased Costs of Construction** is the Blanket Coverage Limit as provided in Section T. of this endorsement per building or structure suffering "loss". This is an additional Limit of Insurance applicable to the building or structure suffering "loss".

E. Valuable Papers and Records

For the purposes of this endorsement only:

1. In the **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions, r. Valuable Papers and Records**, the second paragraph in **(4)(b) Away From Your Premises** is deleted in its entirety and replaced by the following:

The limit of insurance for **Away From Your Premises** is not included within the Blanket Coverage Limit and is separate and in addition to the Blanket Coverage Limit.

2. In the **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions, r. Valuable Papers and Records**, the last paragraph is deleted in its entirety and replaced by the following:

The most we will pay for "loss" in any one occurrence under this Valuable Papers and Records Coverage Extension is the Blanket Coverage Limit as provided in Section **T.** of this endorsement.

F. Outdoor Property

For the purposes of this endorsement only, in **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions, k. Outdoor Property**, the last paragraph is deleted in its entirety and replaced by the following:

The most we will pay for "loss" in any one occurrence under this Outdoor Property Coverage Extension is the Limit of Insurance stated in the **MEDICAL/DENTAL OFFICE PROPERTY XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS** for Outdoor Property, but not more than the Limit of Insurance stated in the **MEDICAL/DENTAL OFFICE PROPERTY XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS** for any one tree, shrub, or plant.

G. Tenant Move Back Expenses

For purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions** is amended to include the following:

Tenant Move Back Expenses

1. We will reimburse you for expenses you pay for Covered Move Back Expenses of your tenants who temporarily vacate a portion of the building at a "premises". The vacancy must have occurred while the portion of the building rented by your tenant could not be occupied due to di-

rect "loss" to your Covered Property caused by or resulting from a Covered Cause of Loss during the "coverage term". The move back must be completed within 60 calendar days after the portion of the building rented by your tenant has been repaired or rebuilt and is ready for occupancy.

2. Covered Move Back Expenses means only documented, reasonable and necessary expenses of:
 - a. Packing, insuring and transporting business personal property;
 - b. Re-establishing electric utility and communication services, less refunds from discontinued services;
 - c. Assembling and setting up fixtures and equipment; or
 - d. Unpacking and re-shelving stock and supplies.
3. If your tenants have valid and collectible insurance for Covered Move Back Expenses, we will pay only for the amount of Covered Move Back Expenses in excess of the amount payable from such other insurance.
4. The most we will pay for "loss" in any one occurrence under this Tenant Move Back Expenses Coverage Extension is the Blanket Coverage Limit as provided in Section **T.** of this endorsement.

H. Peak Season

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions** is amended to include the following:

Peak Season

1. In the event that the limit of insurance stated in the Declarations for Business Personal Property is insufficient to fully insure a covered "loss" due to a Peak Season Demand for your inventory, we will pay up to the Blanket Coverage Limit as provided in Section **T.** of this endorsement to that "loss".
2. Peak Season Demand means a temporary (90 consecutive days or less) increase in your inventory to meet a seasonal demand as verified by:
 - a. Your previous inventory records for that historical period of time; and
 - b. Custom and practice in your industry.

I. Personal Property of Others

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions** is amended to include the following:

Personal Property of Others

In the event that the limit of insurance stated in the **COMMERCIAL PROPERTY COVERAGE DECLARATIONS** for Business Personal Property is insufficient to fully insure a covered "loss" to both your Covered Personal Property and property described in Paragraph (8) of **SECTION A. COVERAGE, 1. Covered Property, d. Business Personal Property**, we will pay up to the Blanket Coverage Limit in any one occurrence as provided in Section T. of this endorsement for such property.

J. Debris Removal

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions** is amended to include the following:

In the event that the limits of insurance stated in **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 4. Additional Coverages, b. Debris Removal** are insufficient to fully cover a "loss" insured thereunder, we will pay up to the Blanket Coverage Limit in any one occurrence as provided in Section T. of this endorsement.

K. Temperature Change

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions** is amended to include the following:

Temperature Change

1. Coverage

- a. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 1. Covered Property** is deleted in its entirety and replaced by the following:

Covered Property means "perishable stock" located in a building at a "premises".

- b. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 2. Property Not Covered** is deleted in its entirety and replaced by the following:

Covered Property does not include:

"Perishable Stock" Not in Buildings

"Perishable stock" located on buildings, in or on vehicles, or otherwise in the open.

2. Covered Causes of Loss

BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 3. Covered Causes of Loss, a. Covered Causes of Loss is deleted in its entirety and replaced by the following:

a. Covered Causes of Loss

Covered Causes of Loss means direct "loss" from "temperature change" to Covered Property unless "loss" is excluded or limited in this Coverage Part.

3. Excluded Causes of Loss

- a. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM SECTION A. COVERAGE, 3. Covered Causes of Loss, b. Exclusions** does not apply to this Coverage Extension, except as follows:

- (1) Exclusion (1)(b) **Earth Movement**;
- (2) Exclusion (1)(c) **Governmental Action**;
- (3) Exclusion (1)(d) **Nuclear Hazard**;
- (4) Exclusion (1)(f) **War and Military Action**;
- (5) Exclusion (1)(g) **Water**; or
- (6) Exclusion (1)(h) **"Fungi", Wet Rot, Dry Rot, and Bacteria**.

- b. In addition to Paragraph 3.a. of this Coverage Extension, we will not pay for direct "loss" caused by or resulting from any of the following:

- (1) The disconnecting of any heating, refrigerating, cooling or humidity control system from the source of its power;
- (2) The deactivation of electrical power caused by the manipulation of any switch or other device (on "premises") used to control the flow of electrical power or current;

- (3) The inability of an Electrical Utility Company or other power source to provide sufficient power due to:
 - (a) Lack of fuel, or
 - (b) Governmental order;
- (4) The inability of a power source at the "premises" to provide sufficient power due to the lack of generating capacity to meet demand; or
- (5) Breaking of any glass that is a permanent part of any heating, refrigeration, cooling or humidity control unit.

4. Limits of Insurance

BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION B. LIMITS OF INSURANCE is deleted in its entirety and replaced by the following:

SECTION B. LIMITS OF INSURANCE

- a. The most we will pay for all "loss" in any one occurrence, including any applicable "Business Income", "Rental Value" and Extra Expense loss, is the Limit of Insurance indicated in the **MEDICAL/DENTAL OFFICE PROPERTY XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS** for Temperature Change.
- b. The Limit of Insurance for Temperature Change is not an additional amount of insurance and will not increase the Limit of Insurance shown in the **COMMERCIAL PROPERTY COVERAGE PART DECLARATIONS** for Business Personal Property or "stock".

5. Duties in the Event of Loss

BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION D. LOSS CONDITIONS, 3. Duties in the Event of Loss or Damage, a.(2) is deleted in its entirety and replaced by the following:

- (2) All claims under this Temperature Change Coverage Extension should be reported immediately upon occurrence. Include a description of the damaged "stock". All damaged "stock" must be available for inspection and verification.

6. Coinsurance

BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION E. ADDITIONAL CONDITIONS, 1. Coinsurance does not apply to the coverage provided by this endorsement.

7. Definitions

BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION G. DEFINITIONS is amended to include the following definitions:

- a. "Perishable stock" means personal property:
 - (1) Preserved and maintained under controlled conditions; and
 - (2) Susceptible to "loss" if the controlled conditions change.
- b. "Temperature change" means:
 - (1) The fluctuation or total interruption of electrical power, either on or off "premises", resulting from conditions beyond your control.
 - (2) Mechanical breakdown of any refrigerating or cooling apparatus or equipment (on "premises") including the blowing of any fuse, fuses, or circuit breakers.
 - (3) Contamination by refrigerant.
 - (4) The freezing of "perishable stock" resulting from the faulty operation of any stationary heating plant, when such "perishable stock" is contained within a building at the "premises".

L. Nonowned Building Damage

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions, j. Nonowned Building Damage** is deleted in its entirety and replaced by the following:

If you are a tenant, you may extend the insurance provided by this Coverage Part for Business Personal Property to direct "loss" that occurs to the building at a "premises" you occupy but do not own.

This Coverage Extension applies only if your lease makes you legally responsible for that part of the building sustaining "loss".

- 1. This Coverage Extension does not apply to:

- a. Glass, including lettering and ornamentation, and also necessary:
 - (1) Repair or replacement of encasing frames or alarm tapes; and
 - (2) Expenses incurred to board up openings or remove or replace obstruction.
- b. Building materials and equipment removed from the "premises".

2. The most we will pay for "loss" in any one occurrence under this Nonowned Building Damage Coverage Extension is:

- a. The actual "loss" sustained up to the applicable Limit of Insurance for Business Personal Property for direct "loss" caused by theft, burglary or robbery, or the attempt of the foregoing; or
- b. The applicable Limit of Insurance for Business Personal Property or the Limit of Insurance stated in the **MEDICAL/DENTAL OFFICE PROPERTY XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS** for Nonowned Building Damage, whichever is less, for "loss" caused by any other Covered Cause of Loss, not referenced in 2.a. above.

M. Inflation Guard

For the purposes of this endorsement only, the **COMMERCIAL PROPERTY COVERAGE PART DECLARATIONS** is amended to show the percentage (%) shown in the **MEDICAL/DENTAL OFFICE PROPERTY XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS** for Inflation Guard in the **OPTIONAL COVERAGE - Inflation Guard** column for each scheduled Building Property. If an Inflation Guard percentage is already indicated on the Commercial Property Coverage Part Declarations for that Building Property, this percentage is excess of that Inflation Guard percentage for that Building Property.

N. Brands and Labels

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions** is amended to include the following:

Brands and Labels

If branded or labeled merchandise that is Covered Property is damaged by a Covered

Cause of Loss, we may take all or any part of the property at an agreed or appraised value. If so, you may:

1. Stamp 'salvage' on the merchandise or its containers, if the stamp will not physically damage the merchandise; or
2. Remove the brands or labels, if doing so will not physically damage the merchandise. You must relabel the merchandise or its containers to comply with the law.

The most we will pay for "loss" in any one occurrence under this Brands and Labels Coverage Extension is the Limit of Insurance stated in the **MEDICAL/DENTAL OFFICE PROPERTY XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS** for Brands and Labels.

O. Limitation - Personal Property Theft

For the purposes of this endorsement only, in **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 3. Covered Causes of Loss, c. Limitations, (3) Limitation - Personal Property Theft** is deleted in its entirety and replaced by the following:

(3) Limitation - Personal Property Theft

This Limitation does not apply to Business Income coverage or to Extra Expense coverage. The special limit shown for each category, **(3)(a)** through **(3)(d)**, is the most we will pay for direct "loss" to all property in that category. The special limit applies to any one occurrence of theft, regardless of the types or number of articles that are lost or damaged in that occurrence. The special limits are:

- (a) The Limit of Insurance stated in the **MEDICAL/DENTAL OFFICE PROPERTY XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS** for furs, fur garments and garments trimmed with fur.
- (b) The Limit of Insurance stated in the **MEDICAL/DENTAL OFFICE PROPERTY XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS** for jewelry, watches, watch movements, jewels, pearls and precious and semi-precious stones. This limit does not apply to jewelry and watches worth \$500 or less per item.
- (c) The Limit of Insurance stated in the **MEDICAL/DENTAL OFFICE**

PROPERTY XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS for bullion, gold, silver, platinum and other precious alloys or metals.

- (d) The Limit of Insurance stated in the **MEDICAL/DENTAL OFFICE PROPERTY XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS** for patterns, dies, molds and forms.

These special limits are part of, not in addition to, the Limit of Insurance applicable to the Covered Property.

P. Lessor's Leasehold Interest

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 4. Additional Coverages** is amended to include the following:

Lessor's Leasehold Interest

1. We will pay for the cost of Covered Leasehold Interest you sustain due to the cancellation of lease contracts by your tenants. The cancellation must result from direct "loss" to your Covered Property at the "premises" caused by or resulting from a Covered Cause of Loss during the "coverage term".
2. Covered Leasehold Interest:
 - a. Means the difference between the:
 - (1) Rent you were collecting at the "premises" prior to the direct "loss"; and
 - (2) "Rental Value" of the "premises" after the direct "loss" has been repaired or rebuilt; and
 - b. Does not mean refunds or rebates of:
 - (1) Prepaid rent;
 - (2) Security or other deposits made by your tenants; or
 - (3) Insurance, taxes or other payments made on your behalf by tenants.
3. The most we will pay for "loss" in any one occurrence under this Lessor's Leasehold Interest Additional Coverage is the least of:
 - a. Your Covered Leasehold Interest for the 12 months immediately following

the "period of restoration" plus the 90 days of Extended Business Income but ending with the normal expiration date of each cancelled lease; or

- b. The Limit of Insurance stated in the **MEDICAL/DENTAL OFFICE PROPERTY XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS** for all Covered Leasehold Interest of all your tenants canceling their leases arising out of an occurrence at a "premises".

Q. Unauthorized Business Card Use

1. For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 4. Additional Coverages** is amended to include the following:

Unauthorized Business Card Use

We will pay for your loss of "money" or charges and costs you incur that result directly from the unauthorized use of credit, debit or charge cards issued in your business name, including:

- a. Fund transfer cards;
- b. Charge plates; or
- c. Telephone cards.

The most we will pay in any one occurrence under this Unauthorized Business Card Use Additional Coverage is the Limit of Insurance stated in the **MEDICAL/DENTAL OFFICE PROPERTY XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS**.

2. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 2. Property Not Covered** is amended by deleting Paragraph a. in its entirety and replacing it with the following:

Covered Property does not include:

- a. **Accounts, Deeds, Money or Securities**

Except as provided in **SECTION A. COVERAGE:**

- (1) **4. Additional Coverages, Unauthorized Business Card Use;** and

(2) 5. Coverage Extensions, a. Accounts Receivable,

Accounts, bills, currency, deeds, food stamps or other evidences of debt, "money", notes or "securities";

R. Ordinance or Law - Increased Period of Restoration

For the purposes of this endorsement only, in **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions, Ordinance or Law - Increased Period of Restoration**, Paragraph **d.** is deleted in its entirety and replaced by the following:

- d. The most we will pay for loss of "Business Income", "Rental Value" and Extra Expense in any one occurrence under this Ordinance or Law - Increased Period of Restoration Coverage Extension is the Limit of Insurance stated in the **MEDICAL/DENTAL OFFICE PROPERTY XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS** at each "premises".

S. Water Backup Discharged from Sewers, Drains or Sump Pump Systems

BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions is amended by adding the following:

Water Backup from Sewers, Drains or Sump Pump Systems

For the purposes of this endorsement only:

1. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 3. Covered Cause of Loss, b. Exclusions, (1)(g) Water**, Paragraph **3)** is deleted in its entirety and replaced by the following:
 - 3) Except as provided in **SECTION A. COVERAGE, 5. Coverage Extensions, Water Backup Discharged from Sewers, Drains, Septic or Sump Pump Systems**, water that has entered and then backs up through and is discharged from a sewer, drain, septic system, sump pump system or related equipment; or
2. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 3. Covered Causes of Loss, b. Exclusions, (1)(g) Water**, Paragraph **5)** is deleted in its entirety and replaced by the following:

- 5) Except as provided in **SECTION A. COVERAGE, 5. Coverage Extensions, Water Backup Discharged from Sewers, Drains, Septic or Sump Pump Systems**, waterborne material carried or otherwise moved by any of the water referred to in Paragraphs **1), 3) or 4)**, or material carried or otherwise moved by mudslide or mudflow as described in Paragraph **(g)2)**.

3. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions**, is amended to include the following:

Water Backup Discharged From Sewers, Drains, Septic or Sump Pump Systems

We will pay for "loss" caused by or resulting from water or waterborne material that has entered and then backs up through and is discharged from a sewer, drain (including roof drains and related fixtures), septic system, sump pump system or related equipment.

4. **SECTION C. DEDUCTIBLE** is amended by adding the following:

Water Backup Deductible

We will not pay for "loss" in any one occurrence caused by or resulting from water or waterborne material which backs up through and is discharged from a sewer, drain, septic system, sump pump system or related equipment, until the amount of "loss" exceeds the Deductible shown in the Declarations, or \$1,000, whichever is greater. We will then pay the amount for "loss" in excess of that deductible, up to the applicable limit indicated in Paragraph **5.** of this Coverage Extension.

5. The most we will pay for "loss" in any one occurrence, including any applicable "Business Income", "Rental Value" and Extra Expense, under this Water Backup Discharged From Sewers, Drains, Septic or Sump Pump Systems Coverage Extension is the Limit of Insurance shown in the **MEDICAL/DENTAL OFFICE PROPERTY XC+® (EXPANDED COVERAGE PLUS) ENDORSEMENT SUMMARY OF COVERAGE LIMITS** for Water Backup from Sewers, Drains, Septic or Sump Pump Systems.

T. Blanket Coverage Limit

We will pay up to the Limit of Insurance stated in the Schedule of this endorsement in total in any one occurrence for the sum of all

"loss" insured under coverages provided in this endorsement which are subject to the Blanket Coverage Limit. You may apportion

this Limit among these coverages as you choose.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CinciPak™
**MEDICAL OR DENTAL OFFICE CONDOMINIUM COMMERCIAL
UNIT-OWNERS PROPERTY COVERAGE ENHANCEMENT**

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART

Schedule of Optional Coverages

Coverage	Loc. Number	Bldg. Number	Limit of Insurance
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Loss Assessment

Miscellaneous Real Property

Deductibles

Loss Assessment: \$500 deductible per occurrence

Miscellaneous Real Property: \$500 unless otherwise indicated as \$ _____

A. Covered Property

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 1. Covered Property** is deleted in its entirety and replaced by the following:

1. Covered Property

Covered Property, as used in this Coverage Part, means the following types of property described in this Section **A.1.**, and limited in **A.2. Property Not Covered**, for which a Limit of Insurance is shown in the Declarations:

a. Business Personal Property

Your Business Personal Property consists of the following property located in or on the building or structure described in the Declarations or in the open (or in a vehicle or portable storage unit) within 1,000 feet of the building or 1,000 feet of the "premises", whichever distance is greater. Your Business Personal Property consists of the following unless otherwise specified in the Declarations or in the **BUSINESS PERSONAL PROPERTY - SEPARATION OF COVERAGE ENDORSEMENT**.

- (1) Furniture;
- (2) Machinery and equipment;
- (3) "Stock";
- (4) All other personal property owned by you and used in your business;
- (5) Your use interest as unit-owner in fixtures, improvements, installations, additions and alterations making up a part of the building and owned by you;
- (6) The cost of labor, materials or services furnished or arranged by you on personal property of others;
- (7) Leased personal property used in your business for which you have a contractual responsibility to insure. Such leased property is not considered personal property of others in your care, custody or control;
- (8) Personal Property of Others that is in your care, custody or control or for which you are legally liable;
- (9) Sales samples; and

- (10) If contained within a unit, whether owned by you or the Condominium Association, appliances, such as those used for refrigerating, ventilating, cooking, dishwashing, laundering, security or housekeeping.

Business personal property does not include personal effects owned by you, your officers, your partners, or if you are a limited liability company, your members or your managers, or your employees (including leased and temporary workers), except as provided in **5. Coverage Extensions, I. Personal Effects.**

B. Amendment to Property Not Covered

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 2. Property Not Covered** is amended to include the following:

Any of the following types of property contained within a unit, regardless of ownership, provided your Condominium Association agreement requires the Association to insure it:

- (1) Fixtures, improvements, installations, additions, and alterations that are a part of the building; and
- (2) Appliances, such as those used for refrigerating, ventilating, cooking, dishwashing, laundering, security or housekeeping.

C. Insurance Trustee

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION D. LOSS CONDITIONS, 4. Loss Payment** is amended to include the following:

For direct "loss" covered by this policy, if you name an insurance trustee, we will adjust losses with you, but we will pay the insurance trustee. If we pay the trustee, the payments will satisfy your claims against us.

D. Mortgage Holders

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION E. ADDITIONAL CONDITIONS, 2. Mortgage Holders** is deleted in its entirety and replaced by the following:

- a. The term "mortgage holder" includes trustee.
- b. We will pay for covered "loss" to Covered Property to each mortgage holder shown on the Declarations in their order of precedence, as their interests may appear.
- c. The mortgage holder has the right to receive loss payment even if the mortgage

holder has started foreclosure or similar action on Covered Property.

- d. If we deny your claim because of your acts or because you have failed to comply with the terms of this Coverage Part, the mortgage holder will still have the right to receive loss payment if the mortgage holder:

- (1) Pays any premium due under this Coverage Part at our request if you have failed to do so;
- (2) Submits a signed, sworn Proof of Loss within 60 days after receiving notice from us of your failure to do so; and
- (3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the mortgage holder.

All of the terms of this Coverage Part will then apply directly to the mortgage holder.

- e. If we pay the mortgage holder for any "loss" and deny payment to you because of your acts or because you have failed to comply with the terms of this Coverage Part:

- (1) The mortgage holder's rights under the mortgage will be transferred to us to the extent of the amount we pay; and
- (2) The mortgage holder's right to recover the full amount of the mortgage holder's claim will not be impaired.

At our option, we may pay to the mortgage holder the whole principal on the mortgage plus any accrued interest. In this event, your mortgage and note will be transferred to us and you will pay your remaining mortgage debt to us.

- f. If we cancel this Coverage Part, we will give written notice to the mortgage holder at least 30 days before the effective date of cancellation.
- g. If we elect not to renew this Coverage Part, we will give written notice to the mortgage holder at least 30 days before the expiration date of this Coverage Part.

E. Amendment of Coverage Part Conditions

For the purposes of this endorsement only, **COMMERCIAL PROPERTY CONDITIONS, G. Other Insurance** is deleted in its entirety and replaced by the following:

1. The Condominium Association may have other insurance covering the same property as this Coverage Part. In such case, the coverages provided by this Coverage Part are excess of that Condominium Association insurance and will not contribute with such other insurance.

2. You may have other insurance subject to the same plan, terms, conditions and provisions as the insurance under this Coverage Part. If you do, we will pay our share of the covered "loss". Our share is the proportion that the applicable Limit of Insurance under this Coverage Part bears to the Limits of Insurance of all insurance covering on the same basis.
3. If there is other insurance covering the same "loss", other than that described in 1. and 2. above, we will pay only for the amount of covered "loss" in excess of the amount due from that other insurance, whether you can collect on it or not. However, we will not reimburse any deductible or difference between Actual Cash Value and Replacement Cost valuations. We will not pay more than the applicable Limit of Insurance.

F. Loss Assessment Coverage

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions** is amended to include the following:

Loss Assessment

When a Limit of Insurance is shown on the Schedule of this endorsement for Loss Assessment Coverage:

- (1) We will pay for your share of an assessment charged to all unit-owners by the Condominium Association, when the assessment is made;
 - (a) During the policy period shown in the Declarations; and
 - (b) As a result of direct "loss" to property in which each unit-owner has an undivided interest, if such "loss" is caused by a Cause of Loss covered under this policy.
- (2) The most we will pay for each assessment is the Loss Assessment Limit of Insurance for the applicable unit shown in the Schedule of this endorsement.
- (3) We will not pay for "loss" in any one occurrence until the amount of "loss" exceeds the Loss Assessment deductible shown in the Schedule of this endorsement.

G. Miscellaneous Real Property

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 5. Coverage Extensions** is amended to include the following:

Miscellaneous Real Property

When a Miscellaneous Real Property Limit of Insurance is shown on the Schedule of this endorsement:

- (1) The following is added to **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 1. Covered Property:**

Miscellaneous Real Property

Miscellaneous real property means condominium property that is not included under your Business Personal Property provided that:

- (a) The condominium property pertains to your condominium unit only; or
 - (b) You have a duty to insure the condominium property according to the Condominium Association agreement.
- (2) The most we will pay for "loss" in any one occurrence is the Miscellaneous Real Property Limit of Insurance shown in the Schedule of this endorsement.
 - (3) We will not pay for a "loss" in any one occurrence until the amount of "loss" exceeds the lesser of:
 - (a) \$500 deductible; or
 - (b) The Deductible shown in the Schedule of this endorsement.

We will then pay the amount of "loss" in excess of that Deductible, up to the applicable Limit of Insurance. No other deductible in this Coverage Part applies to Miscellaneous Real Property.

- (4) The Condominium Association may have other insurance covering the same property as this Coverage Part. If it does, we will only pay the excess over what should have been received from that other property insurance. We will pay the excess whether the other insurance can be collected or not.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CinciPak™
MEDICAL/DENTAL OFFICE BUSINESS INCOME
(AND EXTRA EXPENSE) AMENDATORY ENDORSEMENT

This endorsement modifies insurance provided under the following:

BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE PART

SCHEDULE

Valued Daily Loss of Income			
Location	Building	Limit Per Day	Number of Days
1	1	500	30
2	1	500	30

I. **SECTION A. COVERAGE**, Paragraph 5. **Additional Coverages** of the Business Income (and Extra Expense) Coverage Part is amended to include the following:

f. Utility Services

We will pay for the actual loss of "Business Income" you sustain and Extra Expense you incur caused by or resulting from the partial or complete failure of the utility services listed below. The partial or complete failure of the utility services listed below must be caused by direct "loss" caused by a Covered Cause of Loss to the following property.

(1) Communications Supply Property, meaning property supplying communication services, including service relating to Internet access or access to any electronic, cellular, or satellite network; telephone, radio, microwave, or television services to the "premises", such as:

(a) Communication transmission, distribution, service, or similar lines including fiber optic transmission lines, excluding all such overhead lines of any type;

(b) Coaxial cables; and

(c) Microwave radio relays, excluding satellites.

(2) Power Supply Property, meaning the following types of property supplying electricity, steam or natural gas to the "premises":

(a) Utility generating plants;

(b) Switching stations;

(c) Substations;

(d) Transformers; and

(e) Transmission, distribution, service or similar lines, excluding all such overhead lines of any type.

(3) Wastewater removal Property, meaning a utility system for removing wastewater and sewage from the "premises", other than a system designed primarily for draining storm water. The utility property includes sewer mains, pumping stations and similar equipment for moving the effluent to a holding, treatment or disposal facility, and includes such facilities. Coverage under this Additional Coverage does not apply to interruption in service caused by or resulting from a discharge of water or sewage due to heavy rainfall or flooding.

(4) Water Supply Property, meaning the following types of property supplying water to the "premises":

- (a) Pumping Stations; and
- (b) Water mains.

This Additional Coverage does not apply to "loss" to "electronic data" including destruction or corruption of "electronic data".

g. Valued Daily Loss of Income

- (1) We will pay the stated Limit Per Day indicated in the Schedule of this endorsement for loss of income due to the necessary "suspension" of your "operations" during the "period of restoration" caused by or resulting from any Covered Cause of Loss, up to the Number of Days indicated in the Schedule of this endorsement.
- (2) A day is defined as a period of twenty-four hours, beginning at midnight, and during which the "operations" of the insured were or normally would be performed. We shall pay the Limit Per Day indicated in the Schedule of this endorsement for each full day of total "suspension" of business conducted by you at the "premises" where the "loss" occurred.
- (3) For each day, during which there is a partial "suspension" of your "operations", a part of the Limit Per Day indicated in the Schedule of this en-

dorsement will be paid. That part of the Limit Per Day will be calculated by determining the ratio of reduced hours of "operations" compared to normal hours of "operations", times the Limit Per Day indicated in the Schedule of this endorsement.

- (4) You agree that if you could resume complete or partial "operations" at your "premises" or at another location, the amount we pay you shall be determined as if such complete or partial "operations" had been resumed.

II. SECTION F. DEFINITIONS of the Business Income (and Extra Expense) Coverage Part is amended as follows:

With respect to a "suspension" of "operations" insured under **SECTION A. COVERAGE**, Paragraph **5. Additional Coverages, f. Utility Services** of the Business Income (and Extra Expense) Coverage Part, Paragraph **a.** of Definition **9.** "Period of restoration" is deleted and replaced by the following:

- a.** Begins 24 hours after the time of direct physical "loss".

III. SECTION A. COVERAGE, 3.b. Exclusions of the Commercial Property Coverage Part is amended as follows:

- A.** Exclusions **(1)(b) Earth Movement** and **(1)(g) Water** do not apply to Business Income and Extra Expense Coverage.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

OHIO CHANGES - COMMERCIAL PROPERTY

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART

A. Paragraphs **c.** and **h.** of the **Loss Payment** Condition are replaced by the following, except as provided in Paragraph **B.**:

c. We will give you notice, within 21 days after we receive a properly executed proof of loss, that we:

- (1)** Accept your claim;
- (2)** Deny your claim; or
- (3)** Need more time to investigate your claim.

If we need more time to investigate your claim, we will provide an explanation for our need for more time. We will continue to notify you again in writing, at least every 45 days, of the status of the investigation and of the continued time needed for the investigation.

h. Provided you have complied with all the terms of this Coverage Part, we will pay for covered "loss" or damage within:

- (1)** 10 days after we accept your claim if such acceptance occurs within the first 21 days after we receive a properly executed proof of loss, unless the claim involves an action by a probate court or other extraordinary circumstances as documented in the claim file; or
- (2)** Five days after we accept your claim if such acceptance occurs more than 21 days after we receive a properly executed proof of loss, and
 - (a)** An appraisal award has been made; or
 - (b)** We have reached an agreement with you on the amount of "loss" that was in dispute.

B. Paragraph **A.** does not apply to the **Loss Payment** Loss Condition in the following forms:

1. Business Income (And Extra Expense) Coverage Form;
2. Business Income (Without Extra Expense) Coverage Form;

3. Extra Expense Coverage Form; and
4. Leasehold Interest Coverage Form; and
5. Mortgage Interest Coverage Form.

In the forms listed above, the **Loss Payment** Loss Condition is replaced by the following:

LOSS PAYMENT

a. We will give you notice, within 21 days after we receive a properly executed proof of loss, that we:

- (1)** Accept your claim;
- (2)** Deny your claim; or
- (3)** Need more time to investigate your claim.

If we need more time to investigate your claim, we will provide an explanation for our need for more time. We will continue to notify you again in writing, at least every 45 days, of the status of the investigation and of the continued time needed for the investigation.

b. Provided you have complied with all the terms of this Coverage Part, we will pay for covered "loss" or damage within:

- (1)** 10 days after we accept your claim if such acceptance occurs within the first 21 days after we receive a properly executed proof of loss, unless the claim involves an action by a probate court or other extraordinary circumstances as documented in the claim file; or
- (2)** Five days after we accept your claim if such acceptance occurs more than 21 days after we receive a properly executed proof of loss, and

(a) An appraisal award has been made; or

(b) We have reached an agreement with you on the amount of "loss" that was in dispute.

COMMERCIAL PROPERTY CONDITIONS

This Coverage Part is subject to the following conditions, the Common Policy Conditions and applicable Loss Conditions and Additional Conditions in Commercial Property Coverage Forms.

A. Concealment, Misrepresentation or Fraud

This Coverage Part is void in any case of fraud by you as it relates to this Coverage Part at any time. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning:

1. This Coverage Part;
2. The Covered Property;
3. Your interest in the Covered Property; or
4. A claim under this Coverage Part.

B. Control of Property

Any act or neglect of any person other than you beyond your direction or control will not affect this insurance.

The breach of any condition of this Coverage Part at any one or more locations will not affect coverage at any location where, at the time of direct "loss", the breach of condition does not exist.

C. Insurance Under Two or More Coverages

If two or more of this policy's coverages apply to the same "loss", we will not pay more than the actual amount of the "loss".

D. Legal Action Against Us

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all of the terms of this Coverage Part; and
2. The action is brought within 2 years after the date on which the direct "loss" occurred.

E. Liberalization

If, within 60 days prior to the beginning of this Coverage Part or during the policy period, we make any changes to any forms or endorsements of this Coverage Part for which there is currently no separate premium charge, and that change provides more coverage than this Coverage Part, the change will be considered as included until the end of the current policy period. We will make no additional premium charge for this additional coverage during the interim.

F. No Benefit to Bailee

No person or organization, other than you, having custody of Covered Property will benefit from this insurance.

G. Other Insurance

1. You may have other insurance subject to the same plan, terms, conditions and provisions as the insurance under this Coverage Part. If you do, we will pay our share of the covered "loss". Our share is the proportion that the applicable Limit of Insurance under this Coverage Part bears to the Limits of Insurance of all insurance covering on the same basis.
2. If there is other insurance covering the same "loss", other than that described in **1.** above, we will pay only for the amount of covered "loss" in excess of the amount due from that other insurance, whether you can collect on it or not. **However, we will not reimburse any deductible or difference between Actual Cash Value and Replacement Cost valuations.** We will not pay more than the applicable Limit of Insurance.

H. Policy Period, Coverage Territory

Under this Coverage Part:

1. We cover "loss" commencing:
 - a. During the policy period shown in the Declarations; and
 - b. Within the coverage territory.
2. The coverage territory:
 - a. The United States of America (including its territories and possessions);
 - b. Puerto Rico; and
 - c. Canada.

I. Transfer of Rights of Recovery Against Others to Us

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after direct "loss" to impair them. But you may waive your rights against another party in writing:

1. Prior to a direct "loss" to your Covered Property or Covered Income.
2. After a direct "loss" to your Covered Property or Covered Income only if, at time of direct "loss", that party is one of the following:
 - a. Someone insured by this insurance;

- b. A business firm:
 - (1) Owned or controlled by you; or
 - (2) That owns or controls you; or
- c. Your tenant.

This will not restrict your insurance.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LOSS PAYABLE PROVISIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART

SCHEDULE

Loc	Bldg	Loss Payee Name and Address:	Applicable Clause (Enter B, C, D or E):
1	1	LEAF CAPITAL FUNDING, LLC ISAOA / ATIMA C/O: INSURANCE SERVICING CENTER PO BOX 979127 MIAMI, FL 33197-9127	B

A. Nothing in this endorsement increases the applicable Limit of Insurance. We will not pay any Loss Payee more than their financial interest in the Covered Property, and we will not pay more than the applicable Limit of Insurance on the Covered Property.

For the purposes of this endorsement only, the following are added to **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION D. LOSS CONDITIONS, 4. Loss Payment**, as indicated in the Schedule of this endorsement.

B. Loss Payable

For Covered Property in which both you and a Loss Payee shown in the Schedule of this endorsement have an insurable interest, we will:

1. Adjust losses with you; and
2. Pay any claim for "loss" jointly to you and the Loss Payee, as interests may appear.

C. Lender's Loss Payable

1. The Loss Payee shown in the Schedule of this endorsement is a creditor, including a mortgageholder or trustee, whose interest in Covered Property is established by such written instruments as:

- a. Warehouse receipts;
- b. A contract for deed;

- c. Bills of lading;
- d. Financing statements; or
- e. Mortgages, deeds of trust, or security agreements.

2. For Covered Property in which both you and a Loss Payee have an insurable interest:

- a. We will pay for covered "loss" to each Loss Payee in their order of precedence, as interests may appear.
- b. The Loss Payee has the right to receive loss payment even if the Loss Payee has started foreclosure or similar action on the Covered Property.
- c. If we deny your claim because of your acts or because you have failed to comply with the terms of the Coverage Part, the Loss Payee will still have the right to receive loss payment if the Loss Payee:

(1) Pays any premium due under this Coverage Part at our request if you have failed to do so;

(2) Submits a signed, sworn proof of loss within 60 days after receiving notice from us of your failure to do so; and

- (3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the Loss Payee.

All of the terms of this Coverage Part will then apply directly to the Loss Payee.

- d. If we pay the Loss Payee for any "loss" and deny payment to you because of your acts or because you have failed to comply with the terms of this Coverage Part:

- (1) The Loss Payee's rights will be transferred to us to the extent of the amount we pay; and

- (2) The Loss Payee's rights to recover the full amount of the Loss Payee's claim will not be impaired.

At our option, we may pay to the Loss Payee the whole principal on the debt plus any accrued interest. In this event, you will pay your remaining debt to us.

3. If we cancel this policy, we will give written notice to the Loss Payee at least:
 - a. 10 days before the effective date of cancellation if we cancel for your non-payment of premium; or
 - b. 30 days before the effective date of cancellation if we cancel for any other reason.

4. If we elect not to renew this policy, we will give written notice to the Loss Payee at least 10 days before the expiration date of this policy.

D. Contract of Sale

1. The Loss Payee shown in the Schedule of this endorsement is a person or organization you have entered a contract with for the sale of Covered Property.
2. For Covered Property in which both you and the Loss Payee have an insurable interest we will:
 - a. Adjust losses with you; and
 - b. Pay any claim for "loss" jointly to you and the Loss Payee, as interests may appear.
3. For Covered Property that is the subject of a contract of sale, the word "you" includes the Loss Payee.

E. Building Owner Loss Payable Clause

1. The Loss Payee shown in the Schedule of this endorsement is the owner of the building in which you are a tenant.
2. We will adjust losses to the building with the Loss Payee. Any loss payment made to the Loss Payee will satisfy your claims against us for the owner's property.
3. We will adjust losses to tenants' improvements and betterments with you, unless the lease provides otherwise.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LOSS PAYABLE PROVISIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART

SCHEDULE

Loc	Bldg	Loss Payee Name and Address:	Applicable Clause (Enter B, C, D or E):
2	1	LEAF CAPITAL FUNDING, LLC ISAOA / ATIMA C/O: INSURANCE SERVICING CENTER PO BOX 979127 MIAMI, FL 33197-9127	B

A. Nothing in this endorsement increases the applicable Limit of Insurance. We will not pay any Loss Payee more than their financial interest in the Covered Property, and we will not pay more than the applicable Limit of Insurance on the Covered Property.

For the purposes of this endorsement only, the following are added to **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION D. LOSS CONDITIONS, 4. Loss Payment**, as indicated in the Schedule of this endorsement.

B. Loss Payable

For Covered Property in which both you and a Loss Payee shown in the Schedule of this endorsement have an insurable interest, we will:

1. Adjust losses with you; and
2. Pay any claim for "loss" jointly to you and the Loss Payee, as interests may appear.

C. Lender's Loss Payable

1. The Loss Payee shown in the Schedule of this endorsement is a creditor, including a mortgageholder or trustee, whose interest in Covered Property is established by such written instruments as:

- a. Warehouse receipts;
- b. A contract for deed;

- c. Bills of lading;
 - d. Financing statements; or
 - e. Mortgages, deeds of trust, or security agreements.
2. For Covered Property in which both you and a Loss Payee have an insurable interest:
- a. We will pay for covered "loss" to each Loss Payee in their order of precedence, as interests may appear.
 - b. The Loss Payee has the right to receive loss payment even if the Loss Payee has started foreclosure or similar action on the Covered Property.
 - c. If we deny your claim because of your acts or because you have failed to comply with the terms of the Coverage Part, the Loss Payee will still have the right to receive loss payment if the Loss Payee:
 - (1) Pays any premium due under this Coverage Part at our request if you have failed to do so;
 - (2) Submits a signed, sworn proof of loss within 60 days after receiving notice from us of your failure to do so; and

- (3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the Loss Payee.

All of the terms of this Coverage Part will then apply directly to the Loss Payee.

- d. If we pay the Loss Payee for any "loss" and deny payment to you because of your acts or because you have failed to comply with the terms of this Coverage Part:

- (1) The Loss Payee's rights will be transferred to us to the extent of the amount we pay; and

- (2) The Loss Payee's rights to recover the full amount of the Loss Payee's claim will not be impaired.

At our option, we may pay to the Loss Payee the whole principal on the debt plus any accrued interest. In this event, you will pay your remaining debt to us.

3. If we cancel this policy, we will give written notice to the Loss Payee at least:
 - a. 10 days before the effective date of cancellation if we cancel for your non-payment of premium; or
 - b. 30 days before the effective date of cancellation if we cancel for any other reason.

4. If we elect not to renew this policy, we will give written notice to the Loss Payee at least 10 days before the expiration date of this policy.

D. Contract of Sale

1. The Loss Payee shown in the Schedule of this endorsement is a person or organization you have entered a contract with for the sale of Covered Property.
2. For Covered Property in which both you and the Loss Payee have an insurable interest we will:
 - a. Adjust losses with you; and
 - b. Pay any claim for "loss" jointly to you and the Loss Payee, as interests may appear.
3. For Covered Property that is the subject of a contract of sale, the word "you" includes the Loss Payee.

E. Building Owner Loss Payable Clause

1. The Loss Payee shown in the Schedule of this endorsement is the owner of the building in which you are a tenant.
2. We will adjust losses to the building with the Loss Payee. Any loss payment made to the Loss Payee will satisfy your claims against us for the owner's property.
3. We will adjust losses to tenants' improvements and betterments with you, unless the lease provides otherwise.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

WATER BACKUP DISCHARGED FROM SEWERS, DRAINS, SEPTIC OR SUMP PUMP SYSTEMS ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART

SCHEDULE

(Enter an "x" in one of the OPTION boxes to activate coverage.)

OPTION I

Coverage applies at all "premises" indicated on the Declarations page.

OPTION II

Coverage applies only at "premises" scheduled below:

Loc	Bldg	Address
1	1	755 BOARDMAN CANFIELD RD STE C1 BOARDMAN, OH 44512-4387
2	1	4300 BELMONT AVE YOUNGSTOWN, OH 44505-1084

Limit of Insurance Per "Premises": \$ 25,000

Deductible Per Occurrence: \$ 1,000

This endorsement applies only to the "premises" indicated in the Schedule of this endorsement.

A. Modified Water Exclusion

For the purposes of this endorsement only:

1. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 3. Covered Causes of Loss, b. Exclusion (1)(g) Water**, Paragraph 3) is deleted in its entirety and replaced by the following:

3) Except as provided in **SECTION A. COVERAGE, 5. Coverage Extensions, Water Backup Discharged from Sewers, Drains, Septic or Sump Pump Systems**, water that has entered and then backs up through and is discharged from a sewer, drain, septic system, sump pump system or related equipment; or

2. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 3. Covered Causes of Loss, b. Exclusion (1)(g) Water**, Paragraph 5) is deleted in its entirety and replaced by the following:

5) Except as provided in **SECTION A. COVERAGE, 5. Coverage Extensions, Water Backup Discharged from Sewers, Drains, Septic or Sump Pump Systems**, waterborne material carried or otherwise moved by any of the water referred to in Paragraphs (g)1), (g)3) or (g)4), or material carried or otherwise moved by mudslide or mudflow as described in Paragraph (g)2).

B. Coverage - Water Backup Discharged From Sewers, Drains, Septic or Sump Pump Systems

With respect to the "premises" identified in the Schedule of this endorsement, and for the purposes of this endorsement only:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 3. Covered Causes of Loss, a. Covered Causes of Loss is deleted in its entirety and replaced by the following:

a. Covered Cause of Loss

Covered Causes of Loss means water or waterborne material that has entered and then backs up through and is discharged from a sewer, drain (including roof drains and related fixtures), septic system, sump pump system or related equipment located on a "premises" identified in the Schedule of this endorsement;

C. Exclusions

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 3. Covered Causes of Loss, b. Exclusions, Paragraph (2)** is amended to include the following:

1. The coverage provided by this endorsement does not apply if discharge as described in Paragraph **B.** is caused by or results from:
 - a. Failure to perform routine maintenance or repairs necessary to keep a sewer, drain, septic or sump pump system or similar equipment free from obstruction and in proper working condition;
 - b. Sump pump system failure due to the failure of power or other utility services supplied to a "premises" identified in the Schedule of this endorsement; or
 - c. Equipment breakdown of any sump pump system or similar equipment.
2. We will not pay the cost of repairing or replacing a sewer, drain, septic or sump pump system or any related parts or equipment.
3. This endorsement does not apply if discharge as described in Paragraph **B.** is caused by or results from flood, meaning the partial or complete inundation of normally dry land areas due to:

- a. The unusual or rapid accumulation or runoff of rain or surface waters from any source; or
- b. Waves, tidal waters, tidal waves (including tsunami); or
- c. Water from rivers, ponds, lakes, streams, or any other body of water that rises above, overflows from, or is not contained within its natural or man-made boundary; and

All whether driven by wind or not, including storm surge.

D. Coinsurance

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION E. ADDITIONAL CONDITIONS, 1. Coinsurance** is deleted in its entirety.

E. Limit of Insurance

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION B. LIMITS OF INSURANCE** is amended to include the following:

1. The most we will pay for all "loss" to Covered Property, including loss of "Business Income", "Rental Value" and Extra Expense, in any one occurrence caused by or resulting from water or waterborne material that has entered and then backs up through and is discharged from a sewer, drain, septic system, sump pump system or related equipment is the applicable Limit of Insurance shown in the Schedule of this endorsement.
2. The Limit of Insurance described in Paragraph **E.1.** is not an additional amount of insurance, and is included in the total Limit of Insurance referenced in the Declarations for the Coverages and "premises" indicated in the Schedule of this endorsement.

F. Deductible

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION C. DEDUCTIBLE** is amended to include the following:

Water Backup Discharged From Sewers, Drains, Septic or Sump Pump Systems

1. The deductible indicated in the Schedule of this endorsement is the only deductible that applies to each direct "loss" caused by water or waterborne material that backs up through and is discharged

from a sewer, drain, septic system, sump pump or related equipment.

2. We will not pay for "loss" in any one occurrence until the amount of "loss" exceeds the deductible shown in the Declarations or the Schedule of this endorsement, whichever is greater. We will then pay the amount of "loss" in excess of the deductible, up to the applicable Limit of Insurance in the Schedule of this endorsement.

G. Other Insurance

For the purposes of this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION D. LOSS CONDITIONS, 4. Loss Payment** is amended to include the following:

The Coverage provided by this endorsement is excess over any other valid insurance, whether you can collect from it or not.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EQUIPMENT BREAKDOWN COVERAGE

(Excluding Production Machinery)

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE FORM

A. COVERAGE

1. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE** is amended by adding the following:

We will pay for direct damage to Covered Property caused by or resulting from an "accident" at the "premises".

2. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 3. Covered Causes of Loss, b. Exclusions** is amended by:

- a. Adding the following to **(1)(e) Utility Services, (1)(g) Water 1, (2)(a) Electrical Current, (2)(d) Miscellaneous Causes of Loss, (2)(j) Exposure to Weather, (3)(a) Weather Conditions, (3)(b) Acts or Decisions, and (3)(c) Defects, Errors, and Omissions:**

However, this exclusion does not apply if these causes of loss are caused by, or result from, an "accident" to Covered Property at the "premises".

- b. Deleting in its entirety **(2)(e) Explosion of Steam Apparatus.**

3. **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 3. Covered Causes of Loss, c. Limitations** is amended:

- a. By deleting in its entirety:

- (1) **(1)(a) Steam Apparatus; and**
(2) **(1)(b) Hot Water Boilers,**

- b. And by adding the following:

The following limitations apply only to "loss" covered by this endorsement. The sublimits provided in Paragraphs **(1), (2)** and **(3)** below are included within, and are not in addition to, the Limit of Insurance shown in the Declarations as applicable to the Covered Property. These limits, or the applicable Limit of Insurance shown in the Declarations as applicable to the Covered Property, whichever is less,

apply. These limits apply to direct damage only.

- (1) **Ammonia Contamination Limitation**

If Covered Property is contaminated by ammonia as a result of an "accident" to Covered Property at the "premises", the most we will pay for this kind of damage, including salvage expense, is \$50,000 per location.

- (2) **Data, Media and Software Restoration**

If "electronic data" is destroyed or corrupted as a result of an "accident" to covered equipment, the most we will pay for the expenses incurred by you for the restoration of that "electronic data" is \$50,000 for all loss sustained in the "coverage term", regardless of the number of "accidents" or the number of "premises" involved.

- (3) **"Hazardous Substance" Limitation**

The following applies despite the operation of the Ordinance or Law Exclusion.

If Covered Property is damaged, contaminated or polluted by a "hazardous substance" as a result of an "accident" to Covered Property at the "premises", the most we will pay for any additional expenses incurred by you for clean up, repair, replacement or disposal of that property is \$50,000. As used here, additional expenses mean expenses incurred beyond those for which we would be liable if no "hazardous substance" had been involved.

B. Additional Coverages

For the purposes of the coverages in this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION**

A. COVERAGE, 4. Additional Coverages is amended as follows:

1. The first paragraph is deleted in its entirety and replaced with the following:

All other terms and conditions of this Coverage Part, including Limits of Insurance and deductibles, apply to these Additional Coverages.

2. The following is added:

a. Drying Out

If electrical equipment included in Covered Property requires "drying out" as a result of a "flood", the reasonable expense incurred for the "drying out" will be covered. This Additional Coverage is included within the Limit of Insurance shown in the Declarations as applicable to the Covered Property.

b. Expediting Expenses

With respect to "loss" covered by this endorsement, and with respect to your damaged Covered Property, we will pay the reasonable extra cost to:

- (1) Make temporary repairs;
- (2) Expedite permanent repairs; and
- (3) Expedite permanent replacement.

c. Non-Owned Utility Service Equipment

We will pay for indirect loss resulting from an "accident" to non-owned utility equipment described in **E. Definitions, 1.a.(6)** but we will not pay for any expense to repair or replace direct damage to non-owned utility equipment that:

- (1) You do not own, lease or rent, or
- (2) That is not in your care custody and control.

This Additional Coverage is included within the Limit of Insurance shown in the Declarations as applicable to the Covered Property.

C. Deductible

For the purposes of the coverages in this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION C. DEDUCTIBLE** is amended by adding the following:

The deductible applicable to "loss" covered by this endorsement is \$500, or the deductible indicated in the Declarations as being applicable

to the lost or damaged Covered Property, whichever is greater.

D. Conditions

For the purposes of the coverages in this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION E. ADDITIONAL CONDITIONS** is amended by adding the following:

1. Suspension

Whenever any covered equipment is found to be in, or exposed to, a dangerous condition, any of our representatives may immediately suspend the insurance against "loss" from an "accident" to that covered equipment. This can be done by delivering or mailing a written notice of suspension to:

- a. Your last known address; or
- b. The address where the covered equipment is located.

Once suspended in this way, your insurance can be reinstated only by written notice from us.

If we suspend your insurance, you will get a pro rata refund of premium for that covered equipment. However, the suspension will be effective even if we have not yet made or offered a refund.

2. Inspection

If any Covered Property requires inspection to comply with state or municipal boiler and pressure vessel regulations, we agree to perform such inspection on your behalf.

E. Definitions

For the purposes of the coverages in this endorsement only, **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION G. DEFINITIONS** is amended by adding the following:

1. a. "Accident" means a sudden and accidental breakdown of the following covered equipment:

- (1) Any boiler;
- (2) Any fired or unfired pressure vessel subject to vacuum or internal pressure other than the static pressure of its contents;
- (3) Any piping and its accessory equipment;
- (4) Any refrigeration or air conditioning system; or

- (5) Any mechanical or electrical machine or apparatus used for the generation, transmission or utilization of mechanical or electrical power.
- (6) Equipment of a type described in definition a.(1) through (5) above which you do not own, lease or rent and is not in your care, custody or control that is on or within one mile of a covered "location", and is supplying you with electricity, gas, water, steam, heat, refrigeration, air conditioning or communication services.

At the time the breakdown occurs, it must become apparent by physical damage that requires repair or replacement of the covered equipment or part thereof.

- b. None of the following is an "accident":
 - (1) Depletion, deterioration, corrosion or erosion, wear and tear;
 - (2) Leakage at any valve, fitting, shaft seal, gland packing, joint or connection;
 - (3) The functioning of any safety or protective device; or
 - (4) The breakdown of any structure or foundation.
- c. None of the following are covered equipment:
 - (1) Any sewer piping, underground gas piping, or piping forming a part of a sprinkler system;
 - (2) Water piping other than boiler feed water piping, boiler condensate return piping or water piping forming a part of a refrigeration or air conditioning system;
 - (3) Insulating or refractory material;
 - (4) Vehicle, elevator, escalator, conveyor, hoist or crane;
 - (5) Felt, wire, screen, die, extrusion plate, swing hammer, grinding disc, cutting blade, non-electrical cable, chain, belt, rope, clutch plate, brake pad, nonmetallic part, or any part or tool subject to periodic replacement; or
 - (6) "Production Machinery".
- d. If a strike, riot, civil commotion, act of sabotage or vandalism results in an "accident", this insurance applies. However, the War and Military Action Exclusion and the conditions of this Coverage Part still apply.

- 2. "Drying out" means restoration of electrical equipment to service following a "flood" by removal of excess moisture from that equipment including:
 - a. Application of heat or controlled electrical current, circulation of air, or use of dehumidification equipment, after rinsing the electrical equipment with clean fresh water if necessary to flush away "flood" debris;
 - b. "Drying out" can be done in place or equipment can be disconnected and removed to a repair facility for drying if necessary.
 - c. "Drying out" does not include or apply to:
 - (1) Replacement or repair of any electrical equipment or parts thereof; or
 - (2) Any expense related to deconstruction, demolition, or reconstruction of any building component, structure or part thereof to gain access to electrical equipment.
- 3. "Flood" means a general and temporary condition of partial or complete inundation of normally dry land areas due to:
 - a. The overflow of inland or tidal waters;
 - b. The unusual or rapid accumulation or runoff of surface waters from any source; or
 - c. Mudslides or mudflows, which are caused by flooding as defined above in Paragraph 3.b. For the purpose of this Covered Cause of Loss, a mudslide or mudflow involves a river of liquid and flowing mud on the surface of normally dry land areas as when earth is carried by a current of water and deposited along the path of the current.

All flooding in a continuous or protracted event will constitute a single "flood".
- 4. "Hazardous Substance" means a substance declared to be hazardous to health by a governmental agency.
- 5. "Production Machinery" means:
 - a. Production or process machine or apparatus that processes, forms, cuts, shapes grinds or conveys raw material, material in process or finished products, and the computers and their peripherals that control or operate such a machine or apparatus.
 - b. Machine or apparatus used for research, medical, diagnostic, surgical, dental or pathological purposes, and computers and their peripherals that control or operate such a machine or apparatus.

BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to **SECTION F. DEFINITIONS**.

SECTION A. COVERAGE

Coverage is provided as described and limited below for one or more of the following options for which a Limit of Insurance is shown in the Declarations:

- a. "Business Income" including "Rental Value".
- b. "Business Income" other than "Rental Value".
- c. "Rental Value".

If option **a.** above is selected, the term "Business Income" will include "Rental Value". If option **c.** above is selected, the term "Business Income" will mean "Rental Value" only.

If Limits of Insurance are shown under more than one of the above options, the provisions of this Coverage Part apply separately to each.

1. Business Income

- a. We will pay for the actual loss of "Business Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at "premises" which are described in the Declarations and for which a "Business Income" Limit of Insurance is shown in the Declarations. The "loss" must be caused by or result from a 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 distance is greater.
- b. With respect to the requirements set forth in the preceding paragraph, if you are a tenant and occupy only part of the site at which the "premises" are located, for the purposes of this Coverage Part only, your "premises" is the portion of the building which you rent, lease or occupy, including:
 - (1) Any area within the building or on the site at which the "premises" are lo-

cated if that area services or is used to gain access to the described "premises".

- (2) Your personal property in the open (or in a vehicle or portable storage unit) within 1,000 feet of the building or 1,000 feet of the "premises", whichever distance is greater.

2. Extra Expense

- a. Extra Expense coverage is provided at the "premises" described in the Declarations only if the Declarations show that "Business Income" coverage applies at that "premises".
- b. Extra Expense means necessary expenses you sustain (as described in Paragraphs **2.c.**, **d.** and **e.**) 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.
- c. If these expenses reduce the otherwise payable "Business Income" "loss", we will pay expenses (other than the expense to repair or replace property as described in Paragraph **2.d.**) to:
 - (1) Avoid or minimize the "suspension" of business and to continue "operations" either:
 - (a) At the "premises"; or
 - (b) At replacement "premises" or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location; or
 - (2) Minimize the "suspension" of business if you cannot continue "operations".
- d. We will also pay expenses to:
 - (1) Repair or replace property; or

- (2) Research, replace or restore the lost information on damaged "valuable papers and records";

but only to the extent this payment reduces the otherwise payable "Business Income" "loss". If any property obtained for temporary use during the "period of restoration" remains after the resumption of normal "operations", the amount we will pay under this Coverage Form will be reduced by the salvage value of that property.

- e. Extra Expense as described in Paragraphs 2.a. thru 2.d. does not apply to "loss" to Covered Property as described in the **BUILDING AND PERSONAL PROPERTY COVERAGE FORM**.

3. Covered Causes of Loss

See **BUILDING AND PERSONAL PROPERTY COVERAGE FORM, SECTION A. COVERAGE, 3. Covered Causes of Loss**.

4. Limitation for Electronic Data

- a. Coverage for "Business Income" does not apply when a "suspension" of "operations" is caused by destruction or corruption of "electronic data", or any "loss" to "electronic data", except as provided under **SECTION A. COVERAGE, 5. Additional Coverages, d. Interruption of Computer Operations**.
- b. Coverage for Extra Expense does not apply when action is taken to avoid or minimize a "suspension" of "operations" caused by destruction or corruption of "electronic data", or any "loss" to "electronic data", except as provided under **SECTION A. COVERAGE, 5. Additional Coverages, d. Interruption of Computer Operations**.
- c. This Limitation does not apply when "loss" to "electronic data" involves only "electronic data" which is integrated in and operates or controls a building's elevator, lighting, heating, ventilation, air conditioning or security system.

5. Additional Coverages

The Additional Coverages in Paragraphs 5.a. through 5.e. are included within and not additional "Business Income" and Extra Expense Limits of Insurance.

a. Alterations and New Buildings

We will pay for the actual loss of "Business Income" you sustain and necessary Extra Expense you sustain due to direct "loss" at the "premises" caused by or re-

sulting from any Covered Cause of Loss to:

- (1) New buildings or structures, whether complete or under construction;
- (2) Alterations or additions to existing buildings or structures; and
- (3) Machinery, equipment, supplies or building materials located on or within 1,000 feet of the "premises" and:
 - (a) Used in the construction, alterations or additions; or
 - (b) Incidental to the occupancy of new buildings.

If such direct "loss" delays the start of "operations", the "period of restoration" for "Business Income" coverage will begin on the date "operations" would have begun if the direct "loss" had not occurred.

b. Civil Authority

When a Covered Cause of Loss causes direct damage to property other than Covered Property at the "premises", we will pay for the actual loss of "Business Income" you sustain 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:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
- (2) 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.

Civil Authority coverage for "Business Income" will begin immediately after the time of the first action of civil authority that prohibits access to the "premises" and will apply for a period of up to 30 consecutive days from the date on which such coverage began.

Civil Authority coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the "premises" and will end 30 consecutive days after the date of that action; or when your Civil Authority coverage for "Business income" coverage ends, whichever is later.

c. Extended Business Income

(1) "Business Income" Other Than "Rental Value"

If the necessary "suspension" of your "operations" produces a "Business Income" "loss" payable under this Coverage Part, we will pay for the actual loss of "Business Income" you sustain during the period that:

- (a)** Begins on the date property (except "finished stock") is actually repaired, rebuilt or replaced and "operations" are resumed; and
- (b)** Ends on the earlier of:
 - (i)** The date you could restore your "operations", with reasonable speed, to the level which would generate the "Business Income" amount that would have existed if no direct "loss" had occurred; or
 - (ii)** 60 consecutive days after the date determined in **c.(1)(a)** above.

However, Extended Business Income does not apply to loss of "Business Income" sustained as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the "premises" are located.

Loss of "Business Income" must be caused by direct "loss" at the "premises" caused by or resulting from any Covered Cause of Loss.

(2) "Rental Value"

If the necessary "suspension" of your "operations" produces a "Rental Value" loss payable under this Coverage Part, we will pay for the actual loss of "Rental Value" you sustain during the period that:

- (a)** Begins on the date property is actually repaired, rebuilt or replaced and tenantability is restored; and
- (b)** Ends on the earlier of:
 - (i)** The date you could restore tenant occupancy, with reasonable speed, to the level which would generate the "Rental Value" that would have existed if no direct "loss" had occurred; or

- (ii)** 60 consecutive days after the date determined in **c.(2)(a)** above.

However, Extended Business Income does not apply to loss of "Rental Value" sustained as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the "premises" are located.

Loss of "Rental Value" must be caused by direct "loss" at the described "premises" caused by or resulting from any Covered Cause of Loss.

d. Interruption of Computer Operations

- (1)** Subject to all provisions of this Additional Coverage - **Interruption of Computer Operations**, you may extend the insurance that applies to "Business Income" and Extra Expense to apply to a "suspension" of "operations" caused by an interruption in computer operations due to destruction or corruption of "electronic data" due to a Covered Cause of Loss. This Additional Coverage - **Interruption of Computer Operations** does not apply when "loss" to "electronic data" only involves "loss" to "electronic data" which is integrated in and operates or controls a building's elevator, lighting, heating, ventilation, air conditioning or security system.
- (2)** The Covered Causes of Loss include a virus, harmful code or similar instruction introduced into or enacted on a computer system (including "electronic data") or a network to which it is connected, designed to damage or destroy any part of the system or disrupt its normal operation. But there is no coverage for an interruption related to manipulation of a computer system (including "electronic data") by any employee, including a temporary or leased employee, or by an entity retained by you or for you to inspect, design, install, maintain, repair or replace that system.
- (3)** The most we will pay under this Additional Coverage - **Interruption of Computer Operations** is \$2,500 for all "loss" sustained and expense sustained in any "coverage term", regardless of the number of interruptions or the number of "premises", locations or computer systems involved. If loss payment relating to the first interruption does not exhaust this

amount, then the balance is available for "loss" or expense sustained as a result of subsequent interruptions in that "coverage term". A balance remaining at the end of a "coverage term" does not increase the amount of insurance in the next "coverage term". With respect to any interruption which begins in one "coverage term" and continues or results in additional "loss" or expense in that subsequent "coverage term", all "loss" and expense is deemed to be sustained in the "coverage term" in which the interruption began.

- (4) This Additional Coverage - **Interruption in Computer Operations** does not apply to "loss" sustained or expense sustained after the end of the "period of restoration", even if the amount of insurance stated in Paragraph **d.(3)** of this Additional Coverage has not been exhausted.

e. Ingress and Egress

We will pay for the actual loss of "Business Income" you sustain and necessary Extra Expense you sustain caused by the prevention of existing ingress or egress at a "premises" shown in the Declarations due to direct "loss" by a Covered Cause of Loss at a location contiguous to such "premises". However, coverage does not apply if ingress or egress from the "premises" is prohibited by civil authority.

Ingress and egress coverage for "Business Income" will begin immediately after the time of the direct "loss" and will continue for a period up to 30 consecutive days.

Ingress and egress coverage for Extra Expense will begin at time of the direct "loss" and will continue for 30 consecutive days or whenever your Ingress and Egress "business income" coverage ends, whichever occurs first.

6. Coverage Extension

The limit applicable to the Coverage Extension is in addition to the Limit of Insurance. **SECTION D. ADDITIONAL CONDITION, 1. Coin-surance** does not apply to this Coverage Extension.

Newly Purchased or Leased Locations

- a. You may extend your "Business Income" and Extra Expense coverages to apply to property located at:
- (1) New buildings or additions while being built on a "premises";

- (2) Buildings you newly purchase or become required to insure by written contract; or
- (3) Leased buildings or space therein that you are not required to insure. Such lease must be for a period of 12 consecutive months or longer.

This does not apply to property situated at trade shows, fairs or exhibitions.

- b. The most we will pay in total for "Business Income" and Extra Expense "loss" under this Coverage Extension is \$100,000 at each location described in Paragraph **6.a**.
- c. Insurance under this Coverage Extension will end when any of the following first occurs:
- (1) This policy expires;
- (2) 90 days pass from the date you begin construction on that part of the building that would qualify as Covered Property;
- (3) 90 days pass from the date you purchase, lease, or become contractually required to insure property described in Paragraphs **6.a.(2)** and **(3)**; or
- (4) You report values to us when you acquire your new building or business personal property.

We will charge you additional premium for values reported from the date you purchase or lease the property or begin construction on that part of the building that would qualify as Covered Property.

SECTION B. LIMITS OF INSURANCE

The most we will pay for "loss" in any one occurrence is the applicable Limit of Insurance shown in the Declarations.

SECTION C. LOSS CONDITIONS

The following conditions apply in addition to the **COMMON POLICY CONDITIONS** and the **COMMERCIAL PROPERTY CONDITIONS**.

1. Appraisal

If we and you disagree on the amount of "Business Income" or Extra Expense "loss", either may make written demand for an appraisal of the "loss". In this event, each party will select a competent and impartial appraiser.

The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separate-

ly the amount of "Business Income" or Extra Expense "loss". If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

2. Duties in the Event of Loss

a. You must see that the following are done in the event you have a "Business Income" or Extra Expense "loss":

- (1) Notify the police if a law may have been broken.
- (2) Give us prompt notice of the direct "loss". Include a description of the property involved.
- (3) As soon as possible, give us a description of how, when, and where the direct "loss" occurred.
- (4) Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. This will not increase the Limit of Insurance. However, we will not pay for any subsequent "loss" resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged property aside and in the best possible order for examination.
- (5) As often as may be reasonably required, permit us to inspect the property proving the "loss" and examine your books and records.

Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.

- (6) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.
- (7) Cooperate with us in the investigation or settlement of the claim.
- (8) If you intend to continue your business, you must resume all or part of

your "operations" as quickly as possible.

- b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

3. Loss Determination

a. The amount of "Business Income" "loss" will be determined based on:

- (1) The Net Income of the business before the direct "loss" occurred;
- (2) The likely Net Income of the business if no direct "loss" had occurred, but not including any Net Income that would likely have been earned as a result of an increase in the volume of business due to favorable business conditions caused by the impact of the Covered Cause of Loss on customers or on other businesses;
- (3) The operating expenses, including payroll expenses, necessary to resume "operations" with the same quality of service that existed just before the direct "loss"; and
- (4) Other relevant sources of information, including:
 - (a) Your financial records and accounting procedures;
 - (b) Bills, invoices and other vouchers; and
 - (c) Deeds, liens or contracts.

b. The amount of Extra Expense will be determined based on:

- (1) All expenses that exceed the normal operating expenses that would have been sustained by "operations" during the "period of restoration" if no direct "loss" had occurred. We will deduct from the total of such expenses:
 - (a) The salvage value that remains of any property bought for temporary use during the "period of restoration", once "operations" are resumed; and
 - (b) Any Extra Expense that is paid for by other insurance, except for insurance that is written subject to the same plan, terms, conditions and provisions as this insurance; and

- (2) Necessary expenses that reduce the "Business Income" "loss" that otherwise would have been incurred.

c. Resumption of Operations

We will reduce the amount of your:

- (1) "Business Income" "loss", other than Extra Expense to the extent you can resume your "operations", in whole or in part, by using damaged or undamaged property (including merchandise or stock) at the "premises" or elsewhere.
- (2) Extra Expense "loss" to the extent you can return "operations" to normal and discontinue such Extra Expense.

- d. If you do not resume "operations", or do not resume "operations" as quickly as possible, we will pay based on the length of time it would have taken to resume "operations" as quickly as possible.

4. Loss Payment

We will pay for insured "loss" within 30 days after we receive the sworn proof of loss, if you have complied with all of the terms of this Coverage Part and:

- a. We have reached agreement with you on the amount of "loss"; or
- b. An appraisal award has been made.

SECTION D. ADDITIONAL CONDITION

1. Coinsurance

If a Coinsurance percentage is shown in the Declarations, the following condition applies in addition to the **COMMON POLICY CONDITIONS** and the **COMMERCIAL PROPERTY CONDITIONS**.

We will not pay the full amount of any "Business Income" "loss" if the Limit of Insurance for "Business Income" is less than:

- a. The Coinsurance percentage shown for "Business Income" in the Declarations; times
- b. The sum of:
- (1) The Net Income (Net Profit or Loss before income taxes), and
- (2) Operating expenses, including payroll expenses,

that would have been earned or incurred (had no direct "loss" occurred) by your "operations" at the "premises" for the 12 months following the inception, or last previous anniversary date, of this Coverage Part (whichever is later).

Instead, we will determine the most we will pay using the following steps:

1. Multiply the Net Income and operating expense for the 12 months following the inception, or last previous anniversary date, of this Coverage Part by the Coinsurance percentage;
2. Divide the Limit of Insurance for the described "premises" by the figure determined in Step 1.; and
3. Multiply the total amount of "loss" by the figure determined in Step 2.

We will pay the amount determined in Step 3. or the limit of insurance, whichever is less. For the remainder, you will either have to rely on other insurance or absorb the loss yourself.

In determining operating expenses for the purpose of applying the Coinsurance condition, the following expenses, if applicable, shall be deducted from the total of all operating expenses:

1. Prepaid freight - outgoing;
2. Returns and allowances;
3. Discounts;
4. Bad debts;
5. Collection expenses;
6. Cost of raw stock and factory supplies consumed (including transportation charges);
7. Cost of merchandise sold (including transportation charges);
8. Cost of other supplies consumed (including transportation charges);
9. Cost of services purchased from outsiders (not employees) to resell, that do not continue under contract;
10. Power, heat and refrigeration expenses that do not continue under contract (if Form **CP 15 11** is attached);
11. All payroll expenses or the amount of payroll expense excluded (if Form **FA 465** is attached); and
12. Special deductions for mining properties (royalties unless specifically included in coverage; actual depletion commonly known as unit or cost depletion - not percentage depletion; welfare and retirement fund charges based on tonnage; hired trucks).

Example No. 1 (Underinsurance):

When: The Net Income and operating expenses for the 12 months follow-

ing the inception, or last previous anniversary date of this Coverage Part at "premises" would have been \$400,000.

The Coinsurance percentage is 50%

The Limit of Insurance Is \$150,000

"Business Income" "loss" is \$80,000

Step 1: $\$400,000 \times 50\% = \$200,000$
(the minimum amount of insurance to meet your Coinsurance requirements)

Step 2: $\$150,000 \div \$200,000 = .75$

Step 3: $\$80,000 \times .75 = \$60,000$

We will pay no more than \$60,000. The remaining \$20,000 is not covered.

Example No. 2 (Adequate Insurance):

When: The Net Income and operating expenses for the 12 months following the inception, or last previous anniversary date of this Coverage Part at the "premises" would have been \$400,000.

The Coinsurance percentage is 50%

The Limit of Insurance Is \$200,000

"Business Income" "loss" is \$80,000

The minimum amount of insurance to meet your Coinsurance requirement is \$200,000 ($\$400,000 \times 50\%$). Therefore, the Limit of Insurance in this example is adequate and no penalty applies. We will pay no more than \$80,000 (amount of "loss").

This condition does not apply to Extra Expense.

SECTION E. OPTIONAL COVERAGES

If shown as applicable in the Declarations, the following Optional Coverages apply separately to each item.

1. Maximum Period of Indemnity

a. **SECTION D. ADDITIONAL CONDITIONS, 1. Coinsurance** does not apply to this Coverage Part at the "premises" to which this Optional Coverage applies.

b. The most we will pay in total for "Business Income" and Extra Expense "loss" is the lesser of:

- (1) The amount of "Business Income" and Extra Expense "loss" sustained during the 120 days immediately following the beginning of the "period of restoration"; or

- (2) The Limit of Insurance shown in the Declarations.

2. Monthly Limit of Indemnity

a. **SECTION D. ADDITIONAL CONDITIONS, 1. Coinsurance** does not apply to this Coverage Part at the "premises" to which this Optional Coverage applies.

b. The most we will pay for "Business Income" "loss" in each period of 30 consecutive days after the beginning of the "period of restoration" is:

- (1) The Limit of Insurance; multiplied by
- (2) The fraction shown in the Declarations for this Optional Coverage.

Example:

When: The "Business Income" Limit of Insurance is \$120,000

The fraction shown in the Declarations for this Optional Coverage is 1/4

The most we will pay for "loss" in each period of 30 consecutive days is: $\$120,000 \times 1/4 = \$30,000$.

If, in this example, the actual amount of "Business Income" "loss" is:

Days	1-30	\$40,000
Days	31-60	20,000
Days	61-90	30,000
		<u>\$90,000</u>

We will pay:

Days	1-30	\$30,000
Days	31-60	20,000
Days	61-90	30,000
		<u>\$80,000</u>

The remaining \$10,000 is not covered.

3. Business Income Agreed Value

a. To activate this Optional Coverage:

(1) A Business Income Report/Work Sheet must be on file with the Company and must show financial data for your "operations":

- (a) During the 12 months prior to the date of the Work Sheet; and
- (b) Estimated for the 12 months immediately following the inception of this Optional Coverage.

(2) The Declarations must indicate that the Business Income Agreed Value Optional Coverage applies. The "Business Income" Limit of Insurance indicated on the Declarations should

be at least equal to the Agreed Value, which is determined by:

- (a) The Coinsurance percentage shown in the Declarations; multiplied by
- (b) The amount of Net Income and Operating Expenses for the following 12 months you report on the Work Sheet.

b. Except as noted in c. below, the **ADDITIONAL CONDITION Coinsurance** is suspended until the expiration date of this Coverage Part.

c. We will reinstate the **ADDITIONAL CONDITION Coinsurance** automatically if you do not submit a new Work Sheet and Agreed Value:

- (1) When you request a change in your "Business Income" Limit of Insurance; or
- (2) When you request the coinsurance percentage be changed on the Work Sheet.

d. If the "Business Income" Limit of Insurance is less than the Agreed Value, we will not pay more of any loss than the amount of loss multiplied by:

- (1) The "Business Income" Limit of Insurance; divided by
- (2) The Agreed Value.

Example:

When: The Limit of Insurance is \$100,000

The Agreed Value is \$200,000

"Business Income" "loss" is \$80,000

Step (a): $\$100,000 \div \$200,000 = .50$

Step (b): $.50 \times \$80,000 = \$40,000$

We will pay \$40,000. The remaining \$40,000 is not covered.

4. Extended Period of Indemnity

In **SECTION A. COVERAGE, 5. Additional Coverages, c. Extended Business Income**, the number "60" in Subparagraphs (1)(b) and (2)(b) is replaced by the number shown in the Declarations for this Optional Coverage.

SECTION F. DEFINITIONS

1. "Business Income" means the:

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

b. Continuing normal operating expenses sustained, including payroll.

2. "Computer programs" means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data.

3. "Coverage term" means the following individual increment, or if a multi-year policy period, increments, of time, which comprise the policy period of this Coverage Part:

- a. The year commencing on the Effective Date of this Coverage Part at 12:01 A.M. standard time at your mailing address shown in the Declarations, and if a multi-year policy period, each consecutive annual period thereafter, or portion thereof if any period is for a period of less than 12 months, constitute individual "coverage terms". The last "coverage term" ends at 12:00 A.M. standard time at your mailing address shown in the Declarations on the earlier of:

- (1) The day the policy period shown in the Declarations ends; or
- (2) The day the policy to which this Coverage Part is attached is terminated or cancelled.

b. However, if after the issuance of this Coverage Part, any "coverage term" is extended for an additional period of less than 12 months, that additional period of time will be deemed to be part of the last preceding "coverage term".

4. "Electronic data" means information, facts or "computer programs" stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment.

5. "Finished stock" means stock you have manufactured.

"Finished stock" also includes whiskey and alcoholic products being aged, unless there is a coinsurance percentage shown for "Business Income" in the Declarations.

"Finished stock" does not include stock you have manufactured that is held for sale on the "premises" of any retail outlet insured under this Coverage Part.

6. "Loss" means accidental physical loss or accidental physical damage.
7. "Operations" means:
- a. Your business activities occurring at the "premises"; and
 - b. The tenantability of the "premises", if coverage for "Business Income" including "Rental Value" or "Rental Value" applies.
8. "Period of restoration" means the period of time that:
- a. Begins at the time of direct "loss".
 - b. Ends on the earlier of:
 - (1) The date when the property at the "premises" should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
 - (2) The date when business is resumed at a new permanent location.
 - c. "Period of restoration" does not include any increased period required due to the enforcement of or compliance with any ordinance or law that:
 - (1) Regulates the construction, use or repair, or requires the tearing down of any property; or
 - (2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to or assess the effects of "pollutants".
 - d. The expiration date of the Coverage Part will not cut short the "period of restoration".
9. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, asbestos, chemicals, petroleum, petroleum products and petroleum by-products, and waste. Waste includes materials to be recycled, reconditioned or reclaimed. "Pollutants" include but are not limited to substances which are generally recognized in industry or government to be harmful or toxic to persons, property, or the environment regardless of whether injury or damage is caused directly or indirectly by the "pollutants" and whether:
- a. You are regularly or otherwise engaged in activities which taint or degrade the environment; or
 - b. You use, generate or produce the "pollutant".
10. "Premises" means the Locations and Buildings described in the Declarations.
11. "Rental Value" means "Business Income" that consists of:
- a. Net income (Net Profit or Loss before income taxes) that would have been earned or incurred as rental income from tenant occupancy of the "premises" described in the Declarations as furnished and equipped by you, including fair rental value of any portion of the "premises" which is occupied by you; and
 - b. Continuing normal operating expenses incurred in connection with that "premises", including:
 - (1) Payroll; and
 - (2) The amount of charges, which are the legal obligation of the tenant(s) but would otherwise be your obligations.
12. "Suspension" means:
- a. The slowdown or cessation of your business activities; and
 - b. That a part or all of the "premises" is rendered untenable if coverage for "Business Income" including "Rental Value" or "Rental Value" applies.
13. "Valuable papers and records" means inscribed, printed or written documents, manuscripts or records, including abstracts, books, card index systems, deeds, drawings, films, maps, mortgages, or proprietary information. But "valuable papers and records" does not mean "money" or "securities" or "electronic data", including the materials on which the "electronic data" is recorded.



MIKE DEWINE
GOVERNOR
STATE OF OHIO

Executive Order 2020-01D

Declaring a State of Emergency

WHEREAS, COVID-19 is a respiratory disease that can result in serious illness or death, is caused by the SARS-CoV-2 virus, which is a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person. The virus is spread between individuals who are in close contact with each other (within about six feet) through respiratory droplets produced when an infected person coughs or sneezes. It may be possible that individuals can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose or eyes; and

WHEREAS, currently, the Centers for Disease Control and Prevention (CDC) lists over 79 countries with confirmed cases of COVID-19. The CDC reports over 98,000 diagnosed cases worldwide with 3,380 deaths reported worldwide. The CDC has announced 164 confirmed and presumptive positive cases, with eleven deaths reported from the disease in the United States; and

WHEREAS, on January 23, 2020, the Ohio Department of Health issued a Director's Journal Entry making COVID-19 a Class A reportable disease in Ohio; and

WHEREAS, on January 28, 2020, the Ohio Department of Health hosted the first statewide call with local health departments and healthcare providers regarding COVID-19; and

WHEREAS, on January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization declared the outbreak of COVID-19 a public health emergency of international concern; and

WHEREAS, on January 31, 2020, Health and Human Services Secretary, Alex M. Azar II, declared a public health emergency for the United States to aid the nation's healthcare community in responding to COVID-19; and

WHEREAS, on February 1, 2020, the Ohio Department of Health issued a statewide Health Alert Network to provide local health departments and healthcare providers with updated guidance for COVID-19 and revised Person Under Investigation (PUI) criteria; and

WHEREAS, on February 3, 2020, the Ohio Department of Health trained over 140 personnel to staff a call center for COVID-19, in the event it was needed; and

WHEREAS, on February 5, 2020, the Ohio Department of Health began updating and notifying the media of the number of PUIs in Ohio every Tuesday and Thursday; and

WHEREAS, on February 6, 2020, the Ohio Department of Health updated all agency assistant directors and chiefs of staff on COVID-19 preparedness and status during the Governor's cabinet meeting; and

WHEREAS, on February 7, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency met to conduct advance planning for COVID-19; and

WHEREAS, on February 13, 2020, the Ohio Department of Health conducted a Pandemic Tabletop Exercise with State agencies to review responsive actions should there be a pandemic in Ohio; and

WHEREAS, on February 14, 2020, the Ohio Department of Health held a conference call with health professionals across the state. The purpose of the call was to inform and engage the healthcare community in Ohio. Presentations were provided by the Department of Health, Hamilton County Public Health, and the Ohio State University; and

WHEREAS, on February 27, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency briefed the directors of State agencies during the Governor's cabinet meeting regarding preparedness and the potential activation of the Emergency Operations Center; and

WHEREAS, on February 28, 2020, the "Governor DeWine, Health Director Update COVID-19 Prevention and Preparedness Plan" was sent to a broad range of associations representing healthcare, dental, long-term care, K-12 schools, colleges and universities, business, public transit, faith-based organizations, non-profit organizations, and local governments; and

WHEREAS, on March 2, 2020, the Ohio Department of Health activated a Joint Information Center to coordinate COVID-19 communications; and

WHEREAS, on March 5, 2020, the Ohio Department of Health hosted the Governor's Summit on COVID-19 Preparedness, a meeting with the Governor, cabinet agency directors, local health department commissioners, and their staff; and

WHEREAS, on March 6, 2020, the Ohio Department of Health opened a call center to answer questions from the public regarding COVID-19; and

WHEREAS, on March 09, 2020, testing by the Department of Health confirmed that three (3) patients were positive for COVID-19 in the State of Ohio, creating a potentially dangerous condition which may affect the health, safety and welfare of citizens of Ohio; and

WHEREAS, on March 09, 2020, the Ohio Emergency Management Agency activated the Emergency Operations Center; and

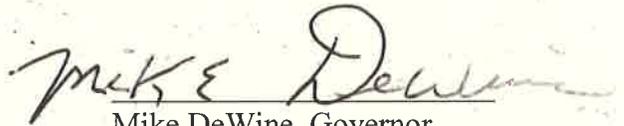
WHEREAS, in accordance with Ohio Revised Code section 5502.22, this Executive Order is necessary to authorize previously-alerted state departments and agencies to prepare to respond to this public health emergency as needed;

NOW THEREFORE, I, Mike DeWine, Governor of the State of Ohio, by virtue of the authority vested in me by the Constitution, the laws of this State and in accordance with Section 5502.22 of the Ohio Revised Code do hereby order and direct that:

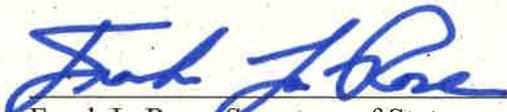
1. A state of emergency is declared for the entire State to protect the well-being of the citizens of the Ohio from the dangerous effects of COVID-19, to justify the authorization of personnel of State departments and agencies as are necessary, to coordinate the State response to COVID-19, and to assist in protecting the lives, safety, and health of the citizens of Ohio.
2. I hereby further request the Department of Administrative Services and other departments and agencies of the State to suspend purchasing and contracting requirements contained in Chapters 125 and 153 of the Revised Code, pursuant to Section 125.061 of the Revised Code, during the period of the emergency for the Ohio Emergency Management Agency and any other State agency participating in emergency assistance under this declaration; in order to procure any necessary resources or supplies to protect the health, safety, and welfare of the citizens of Ohio.
3. After consultation with the appropriate medical experts, the Department of Health shall create and require the use of diagnostic and treatment guidelines and provide those guidelines to health care providers, institutions and providers.
4. The Department of Health issue guidelines for private businesses regarding appropriate work and travel restrictions, if necessary.
5. State agencies shall develop and implement procedures, including suspending or adopting temporary rules within an agency's authority, consistent with recommendations from the Department of Health designed to prevent or alleviate this public health threat.
6. This Proclamation does not require the implementation of the Department of Administrative Services Directive HR-D-11. Accordingly, State employees' obligations to travel to and from work is not to be limited as a result of this proclamation.
7. All citizens are urged to heed the advice of the Department of Health and other emergency officials regarding this public health emergency in order to protect their health and safety.

8. Persons who believe that they have been subjected to excessive prices for essential consumer goods during this public health emergency should contact the office of the Ohio Attorney General at 800-282-0515.

I signed this Executive Order on March 09, 2020, in Columbus, Ohio, and it shall take effect immediately and remain in full force and effect until the emergency no longer exists, such time to be determined by the Director of Health and the Executive Director of the Emergency Management Agency in consultation with the Governor, who will coordinate State response efforts and terminate the emergency upon the recommendation of appropriate officials of the other responding State departments and agencies.


Mike DeWine, Governor

ATTEST:


Frank LaRose, Secretary of State



Filed on MARCH 10, 2020
Per Timothy M. Zander
In the Office of the Secretary
of State at Columbus, OH
FRANK LaROSE
Secretary of State



RE: Director’s Order for the Management of Non-essential Surgeries and Procedures throughout Ohio

I, Amy Acton, MD, MPH, Director of the Ohio Department of Health (ODH), pursuant to the authority granted to me in R.C. 3701.13 to “make special orders...for preventing the spread of contagious or infectious diseases” and for the purposes of preserving personal protective equipment (PPE) and critical hospital capacity and resources within Ohio, **ORDER** the following:

1. Effective 5:00 p.m. Wednesday March 18, 2020, all non-essential or elective surgeries and procedures that utilized PPE should not be conducted.
2. A non-essential surgery is a procedure that can be delayed without undue risk to the current or future health of a patient. Examples of criteria to consider include:
 - a. Threat to the patient’s life if surgery or procedure is not performed;
 - b. Threat of permanent dysfunction of an extremity or organ system;
 - c. Risk of metastasis or progression of staging; or
 - d. Risk of rapidly worsening to severe symptoms (time sensitive)
3. Eliminate non-essential individuals from surgery/procedure rooms and patient care areas to preserve PPE. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required.
4. Each hospital and outpatient surgery or procedure provider, whether public, private, or nonprofit, shall establish an internal governance structure to ensure the principles outlined above are followed.
5. This action is taken to protect our healthcare workforce during this unprecedented event. This Order shall remain in full force and effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies this Order.

This Order takes into consideration and is consistent with the Ohio Hospital Association’s *Implementing Guidelines for the Management of Non-Essential Surgeries and Procedures Throughout Ohio* dated March 16, 2020.

COVID-19 is a respiratory disease that can result in serious illness or death, is caused by the SARS-CoV-2 virus, which is a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person. The virus is spread between individuals who are in close contact with each other (within about six feet) through respiratory droplets produced when an infected person

coughs or sneezes. It may be possible that individuals can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose or eyes.

On January 23, 2020, the Ohio Department of Health issued a Director's Journal Entry making COVID-19 a Class A reportable disease in Ohio.

On January 28, 2020, the Ohio Department of Health hosted the first statewide call with local health departments and healthcare providers regarding COVID-19.

On January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization declared the outbreak of COVID-19 a public health emergency of international concern.

On January 31, 2020, Health and Human Services Secretary, Alex M. Azar II, declared a public health emergency for the United States to aid the nation's healthcare community in responding to COVID-19.

On February 1, 2020, the Ohio Department of Health issued a statewide Health Alert Network to provide local health departments and healthcare providers with updated guidance for COVID-19 and revised Person Under Investigation (PUI) criteria.

On February 3, 2020, the Ohio Department of Health trained over 140 personnel to staff a call center for COVID-19, in the event it was needed.

On February 5, 2020, the Ohio Department of Health began updating and notifying the media of the number of PUIs in Ohio every Tuesday and Thursday.

On February 6, 2020, the Ohio Department of Health updated all agency assistant directors and chiefs of staff on COVID-19 preparedness and status during the Governor's cabinet meeting.

On February 7, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency met to conduct advance planning for COVID-19.

On February 13, 2020, the Ohio Department of Health conducted a Pandemic Tabletop Exercise with State agencies to review responsive actions should there be a pandemic in Ohio.

On February 14, 2020, the Ohio Department of Health held a conference call with health professionals across the state. The purpose of the call was to inform and engage the healthcare community in Ohio. Presentations were provided by the Department of Health, Hamilton County Public Health, and the Ohio State University.

On February 27, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency briefed the directors of State agencies during the Governor's cabinet meeting regarding preparedness and the potential activation of the Emergency Operations Center.

On February 28, 2020, the "Governor DeWine, Health Director Update COVID-19 Prevention and Preparedness Plan" was sent to a broad range of associations representing healthcare, dental, long-term

care, K-12 schools, colleges and universities, business, public transit, faith-based organizations, non-profit organizations, and local governments.

On March 2, 2020, the Ohio Department of Health activated a Joint Information Center to coordinate COVID-19 communications.

On March 5, 2020, the Ohio Department of Health hosted the Governor's Summit on COVID-19 Preparedness, a meeting with the Governor, cabinet agency directors, local health department commissioners, and their staff.

On March 6, 2020, the Ohio Department of Health opened a call center to answer questions from the public regarding COVID-19.

On March 9, 2020, testing by the Department of Health confirmed that three (3) patients were positive for COVID-19 in the State of Ohio. This confirms the presence of a potentially dangerous condition which may affect the health, safety and welfare of citizens of Ohio.

On March 9, 2020, the Ohio Emergency Management Agency activated the Emergency Operations Center.

On March 9, 2020, the Governor Declared a State of Emergency in Executive Order 2020-01D.

On March 11, 2020, the head of the World Health Organization declared COVID-19 a pandemic.

On March 11, 2020, testing by the Ohio Department of Health confirmed that one (1) more patient was positive for COVID-19 in the State of Ohio.

On March 11, 2020, the Ohio Departments of Health and Veterans Services issued a Joint Directors' Order to limit access to Ohio nursing homes and similar facilities.

On March 15, 2020, the Ohio Department of Health issued a Director's Order to limit access to Ohio's jails and detention facilities.

On March 15, 2020, the Ohio Department of Health issued a Director's Order to limit the sale of food and beverages, liquor, beer and wine to carry-out and delivery only.

On March 15, 2020, the CDC issued Interim Guidance for mass gatherings or large community events, stating that such events that consist of 50 or more people should be cancelled or postponed.

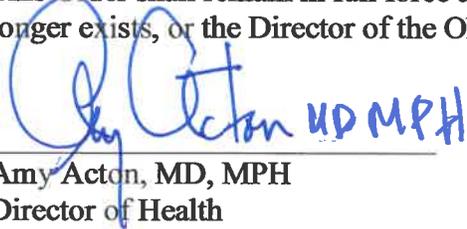
On March 15, 2020, the Ohio Department of Health issued a Director's Order closing polling stations.

Multiple areas of the United States are experiencing "community spread" of the virus that causes COVID-19. Community spread, defined as the transmission of an illness for which the source is unknown, means that isolation of known areas of infection is no longer enough to control spread.

The CDC reports that people are most contagious when they are most symptomatic (the sickest) however some spread might be possible before people show symptoms although that is not the main way the virus spreads.

Mass gatherings (50 or more persons) increase the risk of community transmission of the virus COVID-19.

Accordingly, upon guidance from the U.S. Surgeon General, American College of Surgeons and numerous other public health experts, I hereby **ORDER**, beginning at 5:00 p.m. Wednesday, March 18, 2020 all non-essential surgeries and procedures are cancelled. A non-essential surgery is a procedure that can be delayed without undue risk to the current or future health of a patient. Examples of criteria to consider include: threat to the patient's life if surgery or procedure is not performed; Threat of permanent dysfunction of an extremity or organ system; risk of metastasis or progression of staging; or risk of rapidly worsening to severe symptoms (time sensitive). Eliminate non-essential individuals from surgery/procedure rooms and patient care areas to preserve PPE. Only individuals essential to conducting the surgery or procedure shall be in the surgery or procedure suite or other patient care areas where PPE is required. Each hospital and outpatient surgery or procedure provider shall establish an internal governance structure to ensure the principles outlined above are followed. The Order is issued for the purposes of preserving personal protective equipment (PPE) and critical hospital capacity and resources within Ohio. This action is taken to protect our healthcare workforce during this unprecedented event. This Order shall remain in full force and effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies this Order.



Amy Acton, MD, MPH
Director of Health

March 17, 2020



DIRECTOR'S STAY AT HOME ORDER

Re: Director's Order that All Persons Stay at Home Unless Engaged in Essential Work or Activity

I, Amy Acton, MD, MPH, Director of the Ohio Department of Health (ODH), pursuant to the authority granted to me in R.C. 3701.13 to "make special orders...for preventing the spread of contagious or infectious diseases" **Order** the following to prevent the spread of COVID-19 into the State of Ohio:

- 1. Stay at home or place of residence.** With exceptions as outlined below, all individuals currently living within the State of Ohio are ordered to stay at home or at their place of residence except as allowed in this Order. To the extent individuals are using shared or outdoor spaces when outside their residence, they must at all times and as much as reasonably possible, maintain social distancing of at least six feet from any other person, with the exception of family or household members, consistent with the Social Distancing Requirements set forth in this Order. All persons may leave their homes or place of residence only for Essential Activities, Essential Governmental Functions, or to participate in Essential Businesses and Operations, all as defined below.

Individuals experiencing homelessness are exempt from this Order, but are strongly urged to obtain shelter, and governmental and other entities are strongly urged to make such shelter available as soon as possible and to the maximum extent practicable (and to use in their operation COVID-19 risk mitigation practices recommended by the U.S. Centers for Disease Control and Prevention (CDC) and the Ohio Department of Health (ODH)). This order does not apply to incarcerated individuals, they are to follow the guidance of the facility in which they are confined. Individuals whose residences are unsafe or become unsafe, such as victims of domestic violence, are permitted and urged to leave their home and stay at a safe alternative location. For purposes of this Order, homes or residences include hotels, motels, shared rental units, shelters, and similar facilities.

- 2. Non-essential business and operations must cease.** All businesses and operations in the State, except Essential Businesses and Operations as defined below, are required to cease all activities within the State except Minimum Basic Operations, as defined below. For clarity, businesses, including home-based businesses, may also continue operations consisting exclusively of employees or contractors performing activities at their own residences (i.e., working from home).

All Essential Businesses and Operations are encouraged to remain open. Essential Businesses and Operations shall comply with Social Distancing Requirements as defined in this Order, including by maintaining six-foot social distancing for both employees and members of the public at all times, including, but not limited to, when any customers are standing in line.

- 3. Prohibited activities.** All public and private gatherings of any number of people occurring outside a single household or living unit are prohibited, except for the limited purposes permitted by this Order. Any gathering of more than ten people is prohibited unless exempted by this Order. This is

in accordance with President Trump's coronavirus guidelines issued March 16, 2020. Nothing in this Order prohibits the gathering of members of a household or residence.

All places of public amusement, whether indoors or outdoors, including, but not limited to, locations with amusement rides, carnivals, amusement parks, water parks, aquariums, zoos, museums, arcades, fairs, children's play centers, playgrounds, funplexes, theme parks, bowling alleys, movie and other theaters, concert and music halls, and country clubs or social clubs shall be closed.

4. **Prohibited and permitted travel.** Only Essential Travel and Essential Activities as defined herein, are permitted. People riding on public transit must comply with Social Distancing Requirements to the greatest extent feasible. This Order allows travel into or out of the State to maintain Essential Businesses and Operations and Minimum Basic Operations.
5. **Leaving the home for Essential Activities is permitted.** For purposes of this Order, individuals may leave their residence only to perform any of the following Essential Activities:
 - a. **For health and safety.** To engage in activities or perform tasks essential to their health and safety, or to the health and safety of their family or household members or persons who are unable or should not leave their home (including, but not limited to, pets), such as, by way of example only and without limitation, seeking emergency services, obtaining medical supplies or medication, or visiting a health care professional.
 - b. **For necessary supplies and services.** To obtain necessary services or supplies for themselves and their family or household members or persons who are unable or should not leave their home, or to deliver those services or supplies to others, such as, by way of example only and without limitation, groceries and food, household consumer products, supplies they need to work from home, automobile supplies (including dealers, parts, supplies, repair and maintenance), and products necessary to maintain the safety, sanitation, and essential operation of residences.
 - c. **For outdoor activity.** To engage in outdoor activity, provided the individuals comply with Social Distancing Requirements, as defined below, such as, by way of example and without limitation, walking, hiking, running, or biking. Individuals may go to public parks and open outdoor recreation areas. However, public access playgrounds may increase spread of COVID-19, and therefore shall be closed.
 - d. **For certain types of work** To perform work providing essential products and services at Essential Businesses or Operations (which, as defined below, includes Healthcare and Public Health Operations, Human Services Operations, Essential Governmental Functions, and Essential Infrastructure) or to otherwise carry out activities specifically permitted in this Order, including Minimum Basic Operations.
 - e. **To take care of others.** To care for a family member, friend, or pet in another household, and to transport family members, friends, or pets as allowed by this Order. This includes attending weddings and funerals.
6. **Elderly people and those who are vulnerable as a result of illness should take additional precautions.** People at high risk of severe illness from COVID-19, including elderly people and those who are sick, are urged to stay in their residence to the extent possible except as necessary

to seek medical care. Nothing in this Order prevents the Department Health or local health departments from issuing and enforcing isolation and quarantine orders.

- 7. Healthcare and Public Health Operations.** For purposes of this Order, individuals may leave their residence to work for or obtain services through Healthcare and Public Health Operations.

Healthcare and Public Health Operations includes, but is not limited to: hospitals; clinics; dental offices; pharmacies; public health entities, including those that compile, model, analyze and communicate public health information; pharmaceutical, pharmacy, medical device and equipment, and biotechnology companies (including operations, research and development, manufacture, and supply chain); organizations collecting blood, platelets, plasma, and other necessary materials; licensed medical marijuana dispensaries and licensed medical marijuana cultivation centers; obstetricians and gynecologists; eye care centers, including those that sell glasses and contact lenses; home healthcare services providers; mental health and substance use providers; other healthcare facilities and suppliers and providers of any related and/or ancillary healthcare services; and entities that transport and dispose of medical materials and remains.

Specifically included in Healthcare and Public Health Operations are manufacturers, technicians, logistics, and warehouse operators and distributors of medical equipment, personal protective equipment (PPE), medical gases, pharmaceuticals, blood and blood products, vaccines, testing materials, laboratory supplies, cleaning, sanitizing, disinfecting or sterilization supplies, and tissue and paper towel products.

Healthcare and Public Health Operations also includes veterinary care and all healthcare services provided to animals.

Healthcare and Public Health Operations shall be construed broadly to avoid any impacts to the delivery of healthcare, broadly defined. Healthcare and Public Health Operations does not include fitness and exercise gyms, spas, salons, barber shops, tattoo parlors, and similar facilities.

- 8. Human Services Operations.** For purposes of this Order, individuals may leave their residence to work for or obtain services at any Human Services Operations, including any provider funded by the Ohio Department of Aging, Department of Developmental Disabilities, Department of Health, Department of Job and Family Services, Department of Medicaid, Department of Mental Health and Addiction Services, Opportunities for Ohioans with Disabilities, Department of Veterans Services, and Department of Youth Services that is providing services to the public and including state-operated, institutional, or community-based settings providing human services to the public.

Human Services Operations includes, but is not limited to: long-term care facilities; day care centers, day care homes, group day care homes; residential settings and shelters for adults, seniors, children, and/or people with developmental disabilities, intellectual disabilities, substance use disorders, and/or mental illness; transitional facilities; home-based settings to provide services to individuals with physical, intellectual, and/or developmental disabilities, seniors, adults, and children; field offices that provide and help to determine eligibility for basic needs including food, cash assistance, medical coverage, child care, vocational services, rehabilitation services; developmental centers; adoption agencies; businesses that provide food, shelter, and social

services, and other necessities of life for economically disadvantaged individuals, individuals with physical, intellectual, and/or developmental disabilities, or otherwise needy individuals.

Human Services Operations shall be construed broadly to avoid any impacts to the delivery of human services, broadly defined.

- 9. Essential Infrastructure.** For purposes of this, individuals may leave their residence to provide any services or perform any work necessary to offer, provision, operate, maintain and repair Essential Infrastructure.

Essential Infrastructure includes, but is not limited to: food production, distribution, fulfillment centers, storage facilities, marinas, and sale; construction (including, but not limited to, construction required in response to this public health emergency, hospital construction, construction of long-term care facilities, public works construction, school construction, essential business construction, and housing construction); building management and maintenance; airport operations; operation and maintenance of utilities, including water, sewer, and gas; electrical (including power generation, distribution, and production of raw materials); distribution centers; oil and biofuel refining; roads, highways, railroads, and public transportation; ports; cybersecurity operations; flood control; solid waste and recycling collection and removal; and internet, video, and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services, business infrastructure, communications, and web-based services).

Essential Infrastructure shall be construed broadly to avoid any impacts to essential infrastructure, broadly defined.

- 10. Essential Governmental Functions.** For purposes of this Order, all first responders, emergency management personnel, emergency dispatchers, legislators, judges, court personnel, jurors and grand jurors, law enforcement and corrections personnel, hazardous materials responders, child protection and child welfare personnel, housing and shelter personnel, military, and other governmental employees working for or to support Essential Businesses and Operations are categorically exempt from this Order.

Essential Government Functions means all services provided by the State or any municipality, township, county, political subdivision, board, commission or agency of government and needed to ensure the continuing operation of the government agencies or to provide for or support the health, safety and welfare of the public, and including contractors performing Essential Government Functions. Each government body shall determine its Essential Governmental Functions and identify employees and/or contractors necessary to the performance of those functions.

This Order does not apply to the United States government. Nothing in this Order shall prohibit any individual from performing or accessing Essential Governmental Functions.

- 11. Businesses covered by this Order.** For the purposes of this Order, covered businesses include any for-profit, non-profit, or educational entities, regardless of the nature of the service, the function it performs, or its corporate or entity structure.

12. Essential Businesses and Operations. For the purposes of this Order, Essential Businesses and Operations means Healthcare and Public Health Operations, Human Services Operations, Essential Governmental Functions, and Essential Infrastructure, and the following:

- a. **CISA List.** On March 19, 2020, the U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency (CISA), issued a *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*. The definition of Essential Businesses and Operations in this Order includes all the workers identified in that Memorandum.
- b. **Stores that sell groceries and medicine.** Grocery stores, pharmacies, certified farmers' markets, farm and produce stands, supermarkets, convenience stores, and other establishments engaged in the retail sale of groceries, canned food, dry goods, frozen foods, fresh fruits and vegetables, pet supplies, fresh meats, fish, and poultry, prepared food, alcoholic and non-alcoholic beverages, any other household consumer products (such as cleaning and personal care products), and specifically includes their supply chain and administrative support operations. This includes stores that sell groceries, medicine, including medication not requiring a medical prescription, and also that sell other non-grocery products, and products necessary to maintaining the safety, sanitation, and essential operation of residences and Essential Businesses and Operations;
- c. **Food, beverage, and licensed marijuana production and agriculture.** Food and beverage manufacturing, production, processing, and cultivation, including farming, livestock, fishing, baking, and other production agriculture, including cultivation, marketing, production, and distribution of animals and goods for consumption; licensed medical marijuana use, medical marijuana dispensaries and licensed medical marijuana cultivation centers; and businesses that provide food, shelter, and other necessities of life for animals, including animal shelters, rescues, shelters, kennels, and adoption facilities;
- d. **Organizations that provide charitable and social services.** Businesses and religious and secular nonprofit organizations, including food banks, when providing food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities;
- e. **Religious entities.** Religious facilities, entities and groups and religious gatherings, including weddings and funerals.
- f. **Media.** Newspapers, television, radio, and other media services;
- g. **First amendment protected speech.**
- h. **Gas stations and businesses needed for transportation.** Gas stations and auto supply, auto-repair, farm equipment, construction equipment, boat repair, and related facilities and bicycle shops and related facilities;
- i. **Financial and insurance institutions.** Bank, currency exchanges, consumer lenders, including but not limited, to pawnbrokers, consumer installment lenders and sales finance lenders, credit unions, appraisers, title companies, financial markets, trading and futures

exchanges, payday lenders, affiliates of financial institutions, entities that issue bonds, related financial institutions, and institutions selling financial products. Also insurance companies, underwriters, agents, brokers, and related insurance claims and agency services;

- j. Hardware and supply stores.** Hardware stores and businesses that sell electrical, plumbing, and heating material;
- k. Critical trades.** Building and Construction Tradesmen and Tradeswomen, and other trades including but not limited to plumbers, electricians, exterminators, cleaning and janitorial staff for commercial and governmental properties, security staff, operating engineers, HVAC, painting, moving and relocation services, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, Essential Activities, and Essential Businesses and Operations;
- l. Mail, post, shipping, logistics, delivery, and pick-up services.** Post offices and other businesses that provide shipping and delivery services, and businesses that ship or deliver groceries, food, alcoholic and non-alcoholic beverages, goods, vehicles or services to end users or through commercial channels;
- m. Educational institutions.** Educational institutions-including public and private pre-K-12 schools, colleges, and universities-for purposes of facilitating distance learning, performing critical research, or performing essential functions, provided that social distancing of six-feet per person is maintained to the greatest extent possible. This Order is consistent with and does not amend or supersede prior Orders regarding the closure of schools;
- n. Laundry services.** Laundromats, dry cleaners, industrial laundry services, and laundry service providers;
- o. Restaurants for consumption off-premises.** Restaurants and other facilities that prepare and serve food, but only for consumption off-premises, through such means as in-house delivery, third-party delivery, drive-through, curbside pick-up, and carry-out. Schools and other entities that typically provide food services to students or members of the public may continue to do so under this Order on the condition that the food is provided to students or members of the public on a pick-up and takeaway basis only. Schools and other entities that provide food services under this exemption shall not permit the food to be eaten at the site where it is provided, or at any other gathering site due to the virus's propensity to physically impact surfaces and personal property. This Order is consistent with and does not amend or supersede prior Orders regarding the closure of restaurants;
- p. Supplies to work from home.** Businesses that sell, manufacture, or supply products needed for people to work from home;
- q. Supplies for Essential Businesses and Operations.** Businesses that sell, manufacture, or supply other Essential Businesses and Operations with the support or materials necessary to operate, including computers, audio and video electronics, household appliances; IT and telecommunication equipment; hardware, paint, flat glass; electrical, plumbing and heating material; sanitary equipment; personal hygiene products; food, food additives, ingredients and components; medical and orthopedic equipment; optics and photography equipment; diagnostics, food and beverages, chemicals, soaps and detergent; and firearm and ammunition suppliers and retailers for purposes of safety and security;

- r. **Transportation.** Airlines, taxis, transportation network providers (such as Uber and Lyft), vehicle rental services, paratransit, marinas, docks, boat storage, and other private, public, and commercial transportation and logistics providers necessary for Essential Activities and other purposes expressly authorized in this Order;
 - s. **Home-based care and services.** Home-based care for adults, seniors, children, and/or people with developmental disabilities, intellectual disabilities, substance use disorders, and/or mental illness, including caregivers such as nannies who may travel to the child's home to provide care, and other in-home services including meal delivery;
 - t. **Residential facilities and shelters.** Residential facilities and shelters for adults, seniors, children, pets, and/or people with developmental disabilities, intellectual disabilities, substance use disorders, and/or mental illness;
 - u. **Professional services.** Professional services, such as legal services, accounting services, insurance services, real estate services (including appraisal and title services);
 - v. **Manufacture, distribution, and supply chain for critical products and industries.** Manufacturing companies, distributors, and supply chain companies producing and supplying essential products and services in and for industries such as pharmaceutical, technology, biotechnology, healthcare, chemicals and sanitization, waste pickup and disposal, agriculture, food and beverage, transportation, energy, steel and steel products, petroleum and fuel, mining, construction, national defense, communications, as well as products used by other Essential Businesses and Operations.
 - w. **Critical labor union functions.** Labor Union essential activities including the administration of health and welfare funds and personnel checking on the well-being and safety of members providing services in Essential Businesses and Operations - provided that these checks should be done by telephone or remotely where possible.
 - x. **Hotels and motels.** Hotels and motels, to the extent used for lodging and delivery or carry-out food services.
 - y. **Funeral services.** Funeral, mortuary, cremation, burial, cemetery, and related services.
13. **Minimum Basic Operations.** For the purposes of this Order, Minimum Basic Operations include the following, provided that employees comply with Social Distancing Requirements, to the extent possible, while carrying out such operations:
- a. The minimum necessary activities to maintain the value of the business's inventory, preserve the condition of the business's physical plant and equipment, ensure security, process payroll and employee benefits, or for related functions.
 - b. The minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences.
14. **Essential Travel.** For the purposes of this Order, Essential Travel includes travel for any of the following purposes. Individuals engaged in any Essential Travel must comply with all Social Distancing Requirements as defined in this Section.
- a. Any travel related to the provision of or access to Essential Activities, Essential Governmental Functions, Essential Businesses and Operations, or Minimum Basic Operations.

- b. Travel to care for elderly, minors, dependents, persons with disabilities, or other vulnerable persons.
- c. Travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, and any other related services.
- d. Travel to return to a place of residence from outside the jurisdiction.
- e. Travel required by law enforcement or court order, including to transport children pursuant to a custody agreement.
- f. Travel required for non-residents to return to their place of residence outside the State. Individuals are strongly encouraged to verify that their transportation out of the State remains available and functional prior to commencing such travel.

15. Social Distancing Requirements. For purposes of this Order, Social Distancing Requirements includes maintaining at least six-foot social distancing from other individuals, washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not hands), regularly cleaning high-touch surfaces, and not shaking hands.

- a. **Required measures.** Essential Businesses and Operations and businesses engaged in Minimum Basic Operations must take proactive measures to ensure compliance with Social Distancing Requirements, including where possible:
 - i. **Designate six-foot distances.** Designating with signage, tape, or by other means six-foot spacing for employees and customers in line to maintain appropriate distance;
 - ii. **Hand sanitizer and sanitizing products.** Having hand sanitizer and sanitizing products readily available for employees and customers;
 - iii. **Separate operating hours for vulnerable populations.** Implementing separate operating hours for elderly and vulnerable customers; and
 - iv. **Online and remote access.** Posting online whether a facility is open and how best to reach the facility and continue services by phone or remotely.

16. Intent of this Order. The intent of this Order is to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent feasible, while enabling essential services to continue, to slow the spread of COVID-19 to the greatest extent possible. When people need to leave their places of residence, whether to perform Essential Activities, or to otherwise facilitate authorized activities necessary for continuity of social and commercial life, they should at all times and as much as reasonably possible comply with Social Distancing Requirements. All provisions of this Order should be interpreted to effectuate this intent.

17. Enforcement. This Order may be enforced by State and local law enforcement to the extent set forth in Ohio law. To the extent any public official enforcing this Order has questions regarding what services are prohibited under this Order, the Director of Health hereby delegates to local health departments the authority to answer questions in writing and consistent with this Order.

18. COVID-19 Information and Checklist for Businesses/Employers. Business and employers are to take the following actions:

- a. Allow as many employees as possible to work from home by implementing policies in areas such as teleworking and video conferencing.
- b. Actively encourage sick employees to stay home until they are free of fever (without the use of medication) for at least 72 hours (three full days) AND symptoms have improved for at least 72 hours AND at least seven days have passed since symptoms first began. Do not require a healthcare provider's note to validate the illness or return to work of employees sick with acute respiratory illness; healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way.
- c. Ensure that your sick leave policies are up to date, flexible, and non-punitive to allow sick employees to stay home to care for themselves, children, or other family members. Consider encouraging employees to do a self-assessment each day to check if they have any COVID-19 symptoms (fever, cough, or shortness of breath).
- d. Separate employees who appear to have acute respiratory illness symptoms from other employees and send them home immediately. Restrict their access to the business until they have recovered.
- e. Reinforce key messages — stay home when sick, use cough and sneeze etiquette, and practice hand hygiene — to all employees, and place posters in areas where they are most likely to be seen. Provide protection supplies such as soap and water, hand sanitizer, tissues, and no-touch disposal receptacles for use by employees.
- f. Frequently perform enhanced environmental cleaning of commonly touched surfaces, such as workstations, countertops, railings, door handles, and doorknobs. Use the cleaning agents that are usually used in these areas and follow the directions on the label. Provide disposable wipes so that commonly used surfaces can be wiped down by employees before each use.
- g. Be prepared to change business practices if needed to maintain critical operations (e.g., identify alternative suppliers, prioritize customers, or temporarily suspend some of your operations).

19. No limitation on authority. Nothing in this Order shall, in any way, alter or modify any existing legal authority allowing the State or any local health department from ordering (1) any quarantine or isolation that may require an individual to remain inside a particular residential property or medical facility for a limited period of time, including the duration of this public health emergency, or (2) any closure of a specific location for a limited period of time, including the duration of this public health emergency.

20. Savings clause. If any provision of this Order or its application to any person or circumstance is held invalid by any court of competent jurisdiction, this invalidity does not affect any other provision or application of this Order, which can be given effect without the invalid provision or application. To achieve this purpose, the provisions of this Order are declared to be severable.

21. Previous Orders superseded. This Order supersedes, only to the extent that it conflicts, and amends any previous Order which conflicts with the provisions of this Order.

22. Duration. This Order shall be effective at 11:59 p.m. on March 23, 2020 and remain in full force and effect until 11:59 p.m. on April 6, 2020, unless the Director of the Ohio Department of Health rescinds or modifies this Order at a sooner time and date.

COVID-19 is a respiratory disease that can result in serious illness or death, is caused by the SARS-CoV-2 virus, which is a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person. The virus is spread between individuals who are in close contact with each other (within about six feet) through respiratory droplets produced when an infected person coughs or sneezes. It may be possible that individuals can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose or eyes.

On January 23, 2020, the Ohio Department of Health issued a Director's Journal Entry making COVID-19 a Class A reportable disease in Ohio.

On January 28, 2020, the Ohio Department of Health hosted the first statewide call with local health departments and healthcare providers regarding COVID-19.

On January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization declared the outbreak of COVID-19 a public health emergency of international concern.

On January 31, 2020, Health and Human Services Secretary, Alex M. Azar II, declared a public health emergency for the United States to aid the nation's healthcare community in responding to COVID-19.

On February 1, 2020, the Ohio Department of Health issued a statewide Health Alert Network to provide local health departments and healthcare providers with updated guidance for COVID-19 and revised Person Under Investigation (PUI) criteria.

On February 3, 2020, the Ohio Department of Health trained over 140 personnel to staff a call center for COVID-19, in the event it was needed.

On February 5, 2020, the Ohio Department of Health began updating and notifying the media of the number of PUIs in Ohio every Tuesday and Thursday.

On February 6, 2020, the Ohio Department of Health updated all agency assistant directors and chiefs of staff on COVID-19 preparedness and status during the Governor's cabinet meeting.

On February 7, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency met to conduct advance planning for COVID-19.

On February 13, 2020, the Ohio Department of Health conducted a Pandemic Tabletop Exercise with State agencies to review responsive actions should there be a pandemic in Ohio.

On February 14, 2020, the Ohio Department of Health held a conference call with health professionals across the state. The purpose of the call was to inform and engage the healthcare community in Ohio. Presentations were provided by the Department of Health, Hamilton County Public Health, and the Ohio State University.

On February 27, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency briefed the directors of State agencies during the Governor's cabinet meeting regarding preparedness and the potential activation of the Emergency Operations Center.

On February 28, 2020, the "Governor DeWine, Health Director Update COVID-19 Prevention and Preparedness Plan" was sent to a broad range of associations representing healthcare, dental, long-term care, K-12 schools, colleges and universities, business, public transit, faith-based organizations, non-profit organizations, and local governments.

On March 2, 2020, the Ohio Department of Health activated a Joint Information Center to coordinate COVID-19 communications.

On March 5, 2020, the Ohio Department of Health hosted the Governor's Summit on COVID-19 Preparedness, a meeting with the Governor, cabinet agency directors, local health department commissioners, and their staff.

On March 6, 2020, the Ohio Department of Health opened a call center to answer questions from the public regarding COVID-19.

On March 9, 2020, testing by the Department of Health confirmed that three (3) patients were positive for COVID-19 in the State of Ohio. This confirms the presence of a potentially dangerous condition which may affect the health, safety and welfare of citizens of Ohio.

On March 9, 2020, the Ohio Emergency Management Agency activated the Emergency Operations Center.

On March 9, 2020, the Governor Declared a State of Emergency in Executive Order 2020-01D.

On March 11, 2020, the head of the World Health Organization declared COVID-19 a pandemic.

On March 11, 2020, testing by the Ohio Department of Health confirmed that one (1) more patient was positive for COVID-19 in the State of Ohio.

On March 11, 2020, the Ohio Departments of Health and Veterans Services issued a Joint Directors' Order to limit access to Ohio nursing homes and similar facilities.

On March 15, 2020, the Ohio Department of Health issued a Director's Order to limit access to Ohio's jails and detention facilities.

On March 15, 2020, the Ohio Department of Health issued a Director's Order to limit the sale of food and beverages, liquor, beer and wine to carry-out and delivery only.

On March 15, 2020, the CDC issued Interim Guidance for mass gatherings or large community events, stating that such events that consist of 50 or more people should be cancelled or postponed.

On March 16, 2020 the Ohio Department of Health issued a Director's Order closing polling locations for the March 17, 2020 primary election.

On March 17, 2020 the Ohio Department of Health issued a Director's Order for the management of non-essential surgeries and procedures throughout Ohio.

On March 17, 2020 the Ohio Department of Health issued an Amended Director's Order to limit and/or prohibit mass gatherings and the closure of venues in the State of Ohio.

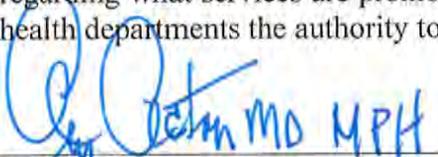
On March 19, 2020, the Ohio Department of Health issued a Director's Order closing hair salons, nail salons, barber shops, tattoo parlors, body piercing locations, and massage therapy locations.

Multiple areas of the United States are experiencing "community spread" of the virus that causes COVID-19. Community spread, defined as the transmission of an illness for which the source is unknown, means that isolation of known areas of infection is no longer enough to control spread.

The CDC reports that people are most contagious when they are most symptomatic (the sickest) however some spread might be possible before people show symptoms although that is not the main way the virus spreads.

Mass gatherings (10 or more persons) increase the risk of community transmission of the virus COVID-19.

Accordingly, to avoid an imminent threat with a high probability of widespread exposure to COVID-19 with a significant risk of substantial harm to a large number of people in the general population, including the elderly and people with weakened immune systems and chronic medical conditions, I hereby **ORDER** effective at 11:59 p.m. on March 23, 2020, all persons are to stay at home or their place of residence unless they are engaged in Essential Activities, Essential Governmental Functions, or to operate Essential Businesses and Operations as set forth in this Order. This Order shall remain in full force and effect until 11:59 p.m. on April 6, 2020, unless the Director of the Ohio Department of Health rescinds or modifies this Order at a sooner time and date. To the extent any public official enforcing this Order has questions regarding what services are prohibited under this Order, the Director of Health hereby delegates to local health departments the authority to answer questions in writing and consistent with this Order.


Amy Acton, MD, MPH
Director of Health

March 22, 2020



March 19, 2020

**MEMORANDUM ON IDENTIFICATION OF ESSENTIAL CRITICAL
INFRASTRUCTURE WORKERS DURING COVID-19 RESPONSE**

FROM: Christopher C. Krebs
Director
Cybersecurity and Infrastructure Security Agency (CISA)

As the Nation comes together to slow the spread of COVID-19, on March 16th, the President issued updated Coronavirus Guidance for America. This guidance states that:

"If you work in a critical infrastructure industry, as defined by the Department of Homeland Security, such as healthcare services and pharmaceutical and food supply, you have a special responsibility to maintain your normal work schedule."

The Cybersecurity and Infrastructure Security Agency (CISA) executes the Secretary of Homeland Security's responsibilities as assigned under the Homeland Security Act of 2002 to provide strategic guidance, promote a national unity of effort, and coordinate the overall federal effort to ensure the security and resilience of the Nation's critical infrastructure. CISA uses trusted partnerships with both the public and private sectors to deliver infrastructure resilience assistance and guidance to a broad range of partners.

In accordance with this mandate, and in collaboration with other federal agencies and the private sector, CISA developed an initial list of "Essential Critical Infrastructure Workers" to help State and local officials as they work to protect their communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security. The list can also inform critical infrastructure community decision-making to determine the sectors, sub-sectors, segments, or critical functions that should continue normal operations, appropriately modified to account for Centers for Disease Control (CDC) workforce and customer protection guidance.

The attached list identifies workers who conduct a range of operations and services that are essential to continued critical infrastructure viability, including staffing operations centers, maintaining and repairing critical infrastructure, operating call centers, working construction, and performing management functions, among others. The industries they support represent, but are not necessarily limited to, medical and healthcare, telecommunications, information technology systems, defense, food and agriculture, transportation and logistics, energy, water and wastewater, law enforcement, and public works.

We recognize that State, local, tribal, and territorial governments are ultimately in charge of implementing and executing response activities in communities under their jurisdiction, while the Federal Government is in a supporting role. As State and local communities consider COVID-19-related restrictions, CISA is offering this list to assist prioritizing activities related to continuity of operations and incident response, including the appropriate movement of critical infrastructure workers within and between jurisdictions.

Accordingly, this list is advisory in nature. It is not, nor should it be considered to be, a federal directive or standard in and of itself.

In addition, these identified sectors and workers are not intended to be the authoritative or exhaustive list of critical infrastructure sectors and functions that should continue during the COVID-19 response. Instead, State and local officials should use their own judgment in using their authorities and issuing implementation directives and guidance. Similarly, critical infrastructure industry partners will use their own judgment, informed by this list, to ensure continued operations of critical infrastructure services and functions. All decisions should appropriately balance public safety while ensuring the continued delivery of critical infrastructure services and functions.

CISA will continue to work with you and our partners in the critical infrastructure community to update this list as the Nation's response to COVID-19 evolves. We also encourage you to submit how you might use this list so that we can develop a repository of use cases for broad sharing across the country.

Should you have questions about this list, please contact CISA at CISA.CAT@cisa.dhs.gov.

Attachment: "Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response"



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DEFEND TODAY, SECURE TOMORROW



Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response

Version 1.0 (March 19, 2020)

THE IMPORTANCE OF ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS

Functioning critical infrastructure is imperative during the response to the COVID-19 emergency for both public health and safety as well as community well-being. Certain critical infrastructure industries have a special responsibility in these times to continue operations.

This guidance and accompanying list are intended to support State, Local, and industry partners in identifying the critical infrastructure sectors and the essential workers needed to maintain the services and functions Americans depend on daily and that need to be able to operate resiliently during the COVID-19 pandemic response.

This document gives guidance to State, local, tribal, and territorial jurisdictions and the private sector on defining essential critical infrastructure workers. Promoting the ability of such workers to continue to work during periods of community restriction, access management, social distancing, or closure orders/directives is crucial to community resilience and continuity of essential functions.

CONSIDERATIONS FOR GOVERNMENT AND BUSINESS

This list was developed in consultation with federal agency partners, industry experts, and State and local officials, and is based on several key principles:

1. Response efforts to the COVID-19 pandemic are locally executed, State managed, and federally supported
2. Everyone should follow guidance from the CDC, as well as State and local government officials, regarding strategies to limit disease spread.
3. Workers should be encouraged to work remotely when possible and focus on core business activities. In-person, non-mandatory activities should be delayed until the resumption of normal operations.
4. When continuous remote work is not possible, businesses should enlist strategies to reduce the likelihood of spreading the disease. This includes, but is not necessarily limited to, separating staff by off-setting shift hours or days and/or social distancing. These steps can preserve the workforce and allow operations to continue.

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Essential Critical Infrastructure Workforce

5. All organizations should implement their business continuity and pandemic plans, or put plans in place if they do not exist. Delaying implementation is not advised and puts at risk the viability of the business and the health and safety of the employees.
6. In the modern economy, reliance on technology and just-in-time supply chains means that certain workers must be able to access certain sites, facilities, and assets to ensure continuity of functions.
7. Government employees, such as emergency managers, and the business community need to establish and maintain lines of communication.
8. When government and businesses engage in discussions about critical infrastructure workers, they need to consider the implications of business operations beyond the jurisdiction where the asset or facility is located. Businesses can have sizeable economic and societal impacts as well as supply chain dependencies that are geographically distributed.
9. Whenever possible, jurisdictions should align access and movement control policies related to critical infrastructure workers to lower the burden of workers crossing jurisdictional boundaries.

IDENTIFYING ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS

The following list of sectors and identified essential critical infrastructure workers are an initial recommended set and are intended to be overly inclusive reflecting the diversity of industries across the United States. CISA will continually solicit and accept feedback on the list (both sectors/sub sectors and identified essential workers) and will evolve the list in response to stakeholder feedback. We will also use our various stakeholder engagement mechanisms to work with partners on how they are using this list and share those lessons learned and best practices broadly. We ask that you share your feedback, both positive and negative on this list so we can provide the most useful guidance to our critical infrastructure partners. **Feedback can be sent to CISA.CAT@CISA.DHS.GOV.**



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HEALTHCARE / PUBLIC HEALTH

- Workers providing COVID-19 testing; Workers that perform critical clinical research needed for COVID-19 response
- Caregivers (e.g., physicians, dentists, psychologists, mid-level practitioners, nurses and assistants, infection control and quality assurance personnel, pharmacists, physical and occupational therapists and assistants, social workers, speech pathologists and diagnostic and therapeutic technicians and technologists)
- Hospital and laboratory personnel (including accounting, administrative, admitting and discharge, engineering, epidemiological, source plasma and blood donation, food service, housekeeping, medical records, information technology and operational technology, nutritionists, sanitarians, respiratory therapists, etc.)
- Workers in other medical facilities (including Ambulatory Health and Surgical, Blood Banks, Clinics, Community Mental Health, Comprehensive Outpatient rehabilitation, End Stage Renal Disease, Health Departments, Home Health care, Hospices, Hospitals, Long Term Care, Organ Pharmacies, Procurement Organizations, Psychiatric Residential, Rural Health Clinics and Federally Qualified Health Centers)
- Manufacturers, technicians, logistics and warehouse operators, and distributors of medical equipment, personal protective equipment (PPE), medical gases, pharmaceuticals, blood and blood products, vaccines, testing materials, laboratory supplies, cleaning, sanitizing, disinfecting or sterilization supplies, and tissue and paper towel products
- Public health / community health workers, including those who compile, model, analyze and communicate public health information
- Blood and plasma donors and the employees of the organizations that operate and manage related activities
- Workers that manage health plans, billing, and health information, who cannot practically work remotely
- Workers who conduct community-based public health functions, conducting epidemiologic surveillance, compiling, analyzing and communicating public health information, who cannot practically work remotely
- Workers performing cybersecurity functions at healthcare and public health facilities, who cannot practically work remotely
- Workers conducting research critical to COVID-19 response
- Workers performing security, incident management, and emergency operations functions at or on behalf of healthcare entities including healthcare coalitions, who cannot practically work remotely
- Workers who support food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals, such as those residing in shelters
- Pharmacy employees necessary for filling prescriptions
- Workers performing mortuary services, including funeral homes, crematoriums, and cemetery workers
- Workers who coordinate with other organizations to ensure the proper recovery, handling, identification, transportation, tracking, storage, and disposal of human remains and personal effects; certify cause of death; and facilitate access to mental/behavioral health services to the family members, responders, and survivors of an incident

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LAW ENFORCEMENT, PUBLIC SAFETY, FIRST RESPONDERS

- Personnel in emergency management, law enforcement, Emergency Management Systems, fire, and corrections, including front line and management
- Emergency Medical Technicians
- 911 call center employees
- Fusion Center employees
- Hazardous material responders from government and the private sector.
- Workers – including contracted vendors – who maintain digital systems infrastructure supporting law enforcement and emergency service operations.

FOOD AND AGRICULTURE

- Workers supporting groceries, pharmacies and other retail that sells food and beverage products
- Restaurant carry-out and quick serve food operations - Carry-out and delivery food employees
- Food manufacturer employees and their supplier employees—to include those employed in food processing (packers, meat processing, cheese plants, milk plants, produce, etc.) facilities; livestock, poultry, seafood slaughter facilities; pet and animal feed processing facilities; human food facilities producing by-products for animal food; beverage production facilities; and the production of food packaging
- Farm workers to include those employed in animal food, feed, and ingredient production, packaging, and distribution; manufacturing, packaging, and distribution of veterinary drugs; truck delivery and transport; farm and fishery labor needed to produce our food supply domestically
- Farm workers and support service workers to include those who field crops; commodity inspection; fuel ethanol facilities; storage facilities; and other agricultural inputs
- Employees and firms supporting food, feed, and beverage distribution, including warehouse workers, vendor-managed inventory controllers and blockchain managers
- Workers supporting the sanitation of all food manufacturing processes and operations from wholesale to retail
- Company cafeterias - in-plant cafeterias used to feed employees
- Workers in food testing labs in private industries and in institutions of higher education
- Workers essential for assistance programs and government payments
- Employees of companies engaged in the production of chemicals, medicines, vaccines, and other substances used by the food and agriculture industry, including pesticides, herbicides, fertilizers, minerals, enrichments, and other agricultural production aids
- Animal agriculture workers to include those employed in veterinary health; manufacturing and distribution of animal medical materials, animal vaccines, animal drugs, feed ingredients, feed, and bedding, etc.; transportation of live animals, animal medical materials; transportation of deceased animals for disposal; raising of animals for food; animal production operations; slaughter and packing plants and associated regulatory and government workforce
- Workers who support the manufacture and distribution of forest products, including, but not limited to timber, paper, and other wood products
- Employees engaged in the manufacture and maintenance of equipment and other infrastructure necessary to agricultural production and distribution

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ENERGY

Electricity industry:

- Workers who maintain, ensure, or restore the generation, transmission, and distribution of electric power, including call centers, utility workers, reliability engineers and fleet maintenance technicians
- Workers needed for safe and secure operations at nuclear generation
- Workers at generation, transmission, and electric blackstart facilities
- Workers at Reliability Coordinator (RC), Balancing Authorities (BA), and primary and backup Control Centers (CC), including but not limited to independent system operators, regional transmission organizations, and balancing authorities
- Mutual assistance personnel
- IT and OT technology staff – for EMS (Energy Management Systems) and Supervisory Control and Data Acquisition (SCADA) systems, and utility data centers; Cybersecurity engineers; cybersecurity risk management
- Vegetation management crews and traffic workers who support
- Environmental remediation/monitoring technicians
- Instrumentation, protection, and control technicians

Petroleum workers:

- Petroleum product storage, pipeline, marine transport, terminals, rail transport, road transport
- Crude oil storage facilities, pipeline, and marine transport
- Petroleum refinery facilities
- Petroleum security operations center employees and workers who support emergency response services
- Petroleum operations control rooms/centers
- Petroleum drilling, extraction, production, processing, refining, terminal operations, transporting, and retail for use as end-use fuels or feedstocks for chemical manufacturing
- Onshore and offshore operations for maintenance and emergency response
- Retail fuel centers such as gas stations and truck stops, and the distribution systems that support them

Natural and propane gas workers:

- Natural gas transmission and distribution pipelines, including compressor stations
- Underground storage of natural gas
- Natural gas processing plants, and those that deal with natural gas liquids
- Liquefied Natural Gas (LNG) facilities
- Natural gas security operations center, natural gas operations dispatch and control rooms/centers natural gas emergency response and customer emergencies, including natural gas leak calls
- Drilling, production, processing, refining, and transporting natural gas for use as end-use fuels, feedstocks for chemical manufacturing, or use in electricity generation
- Propane gas dispatch and control rooms and emergency response and customer emergencies, including propane leak calls
- Propane gas service maintenance and restoration, including call centers

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- Processing, refining, and transporting natural liquids, including propane gas, for use as end-use fuels or feedstocks for chemical manufacturing
- Propane gas storage, transmission, and distribution centers

WATER AND WASTEWATER

Employees needed to operate and maintain drinking water and wastewater/drainage infrastructure, including:

- Operational staff at water authorities
- Operational staff at community water systems
- Operational staff at wastewater treatment facilities
- Workers repairing water and wastewater conveyances and performing required sampling or monitoring
- Operational staff for water distribution and testing
- Operational staff at wastewater collection facilities
- Operational staff and technical support for SCADA Control systems
- Chemical disinfectant suppliers for wastewater and personnel protection
- Workers that maintain digital systems infrastructure supporting water and wastewater operations

TRANSPORTATION AND LOGISTICS

- Employees supporting or enabling transportation functions, including dispatchers, maintenance and repair technicians, warehouse workers, truck stop and rest area workers, and workers that maintain and inspect infrastructure (including those that require cross-border travel)
- Employees of firms providing services that enable logistics operations, including cooling, storing, packaging, and distributing products for wholesale or retail sale or use.
- Mass transit workers
- Workers responsible for operating dispatching passenger, commuter and freight trains and maintaining rail infrastructure and equipment
- Maritime transportation workers - port workers, mariners, equipment operators
- Truck drivers who haul hazardous and waste materials to support critical infrastructure, capabilities, functions, and services
- Automotive repair and maintenance facilities
- Manufacturers and distributors (to include service centers and related operations) of packaging materials, pallets, crates, containers, and other supplies needed to support manufacturing, packaging staging and distribution operations
- Postal and shipping workers, to include private companies
- Employees who repair and maintain vehicles, aircraft, rail equipment, marine vessels, and the equipment and infrastructure that enables operations that encompass movement of cargo and passengers
- Air transportation employees, including air traffic controllers, ramp personnel, aviation security, and aviation management
- Workers who support the maintenance and operation of cargo by air transportation, including flight crews, maintenance, airport operations, and other on- and off- airport facilities workers

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PUBLIC WORKS

- Workers who support the operation, inspection, and maintenance of essential dams, locks and levees
- Workers who support the operation, inspection, and maintenance of essential public works facilities and operations, including bridges, water and sewer main breaks, fleet maintenance personnel, construction of critical or strategic infrastructure, traffic signal maintenance, emergency location services for buried utilities, maintenance of digital systems infrastructure supporting public works operations, and other emergent issues
- Workers such as plumbers, electricians, exterminators, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences
- Support, such as road and line clearing, to ensure the availability of needed facilities, transportation, energy and communications
- Support to ensure the effective removal, storage, and disposal of residential and commercial solid waste and hazardous waste

COMMUNICATIONS AND INFORMATION TECHNOLOGY

Communications:

- Maintenance of communications infrastructure- including privately owned and maintained communication systems- supported by technicians, operators, call-centers, wireline and wireless providers, cable service providers, satellite operations, undersea cable landing stations, Internet Exchange Points, and manufacturers and distributors of communications equipment
- Workers who support radio, television, and media service, including, but not limited to front line news reporters, studio, and technicians for newsgathering and reporting
- Workers at Independent System Operators and Regional Transmission Organizations, and Network Operations staff, engineers and/or technicians to manage the network or operate facilities
- Engineers, technicians and associated personnel responsible for infrastructure construction and restoration, including contractors for construction and engineering of fiber optic cables
- Installation, maintenance and repair technicians that establish, support or repair service as needed
- Central office personnel to maintain and operate central office, data centers, and other network office facilities
- Customer service and support staff, including managed and professional services as well as remote providers of support to transitioning employees to set up and maintain home offices, who interface with customers to manage or support service environments and security issues, including payroll, billing, fraud, and troubleshooting
- Dispatchers involved with service repair and restoration

Information Technology:

- Workers who support command centers, including, but not limited to Network Operations Command Center, Broadcast Operations Control Center and Security Operations Command Center
- Data center operators, including system administrators, HVAC & electrical engineers, security personnel, IT managers, data transfer solutions engineers, software and hardware engineers, and database administrators
- Client service centers, field engineers, and other technicians supporting critical infrastructure, as well as

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manufacturers and supply chain vendors that provide hardware and software, and information technology equipment (to include microelectronics and semiconductors) for critical infrastructure

- Workers responding to cyber incidents involving critical infrastructure, including medical facilities, SLTT governments and federal facilities, energy and utilities, and banks and financial institutions, and other critical infrastructure categories and personnel
- Workers supporting the provision of essential global, national and local infrastructure for computing services (incl. cloud computing services), business infrastructure, web-based services, and critical manufacturing
- Workers supporting communications systems and information technology used by law enforcement, public safety, medical, energy and other critical industries
- Support required for continuity of services, including janitorial/cleaning personnel

OTHER COMMUNITY-BASED GOVERNMENT OPERATIONS AND ESSENTIAL FUNCTIONS

- Workers to ensure continuity of building functions
- Security staff to maintain building access control and physical security measures
- Elections personnel
- Federal, State, and Local, Tribal, and Territorial employees who support Mission Essential Functions and communications networks
- Trade Officials (FTA negotiators; international data flow administrators)
- Weather forecasters
- Workers that maintain digital systems infrastructure supporting other critical government operations
- Workers at operations centers necessary to maintain other essential functions
- Workers who support necessary credentialing, vetting and licensing operations for transportation workers
- Customs workers who are critical to facilitating trade in support of the national emergency response supply chain
- Educators supporting public and private K-12 schools, colleges, and universities for purposes of facilitating distance learning or performing other essential functions, if operating under rules for social distancing
- Hotel Workers where hotels are used for COVID-19 mitigation and containment measures

CRITICAL MANUFACTURING

- Workers necessary for the manufacturing of materials and products needed for medical supply chains, transportation, energy, communications, food and agriculture, chemical manufacturing, nuclear facilities, the operation of dams, water and wastewater treatment, emergency services, and the defense industrial base.

HAZARDOUS MATERIALS

- Workers at nuclear facilities, workers managing medical waste, workers managing waste from pharmaceuticals and medical material production, and workers at laboratories processing test kits
- Workers who support hazardous materials response and cleanup
- Workers who maintain digital systems infrastructure supporting hazardous materials management operations

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FINANCIAL SERVICES

- Workers who are needed to process and maintain systems for processing financial transactions and services (e.g., payment, clearing, and settlement; wholesale funding; insurance services; and capital markets activities)
- Workers who are needed to provide consumer access to banking and lending services, including ATMs, and to move currency and payments (e.g., armored cash carriers)
- Workers who support financial operations, such as those staffing data and security operations centers

CHEMICAL

- Workers supporting the chemical and industrial gas supply chains, including workers at chemical manufacturing plants, workers in laboratories, workers at distribution facilities, workers who transport basic raw chemical materials to the producers of industrial and consumer goods, including hand sanitizers, food and food additives, pharmaceuticals, textiles, and paper products.
- Workers supporting the safe transportation of chemicals, including those supporting tank truck cleaning facilities and workers who manufacture packaging items
- Workers supporting the production of protective cleaning and medical solutions, personal protective equipment, and packaging that prevents the contamination of food, water, medicine, among others essential products
- Workers supporting the operation and maintenance of facilities (particularly those with high risk chemicals and/or sites that cannot be shut down) whose work cannot be done remotely and requires the presence of highly trained personnel to ensure safe operations, including plant contract workers who provide inspections
- Workers who support the production and transportation of chlorine and alkali manufacturing, single-use plastics, and packaging that prevents the contamination or supports the continued manufacture of food, water, medicine, and other essential products, including glass container manufacturing

DEFENSE INDUSTRIAL BASE

- Workers who support the essential services required to meet national security commitments to the federal government and U.S. Military. These individuals, include but are not limited to, aerospace; mechanical and software engineers, manufacturing/production workers; IT support; security staff; security personnel; intelligence support, aircraft and weapon system mechanics and maintainers
- Personnel working for companies, and their subcontractors, who perform under contract to the Department of Defense providing materials and services to the Department of Defense, and government-owned/contractor-operated and government-owned/government-operated facilities

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PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NEURO-COMMUNICATION SERVICES,)
INC., *etc.*,)

CASE NO. 4:20-CV-1275

Plaintiffs,)

JUDGE BENITA Y. PEARSON

v.)

[Resolving [ECF No. 10](#)]

THE CINCINNATI INSURANCE)
COMPANY; THE CINCINNATI)
CASUALTY COMPANY; AND THE)
CINCINNATI INDEMNITY COMPANY,)

Defendants.)

ORDER OF CERTIFICATION TO THE SUPREME COURT OF OHIO

Pursuant to [Section 9 of the Rules of Practice of the Supreme Court of Ohio](#), the United States District Court for the Northern District of Ohio, Eastern Division, hereby certifies a question of state law to the Supreme Court of Ohio. No controlling precedent of the Supreme Court of Ohio answers this question. For reasons explained in more detail below, the Court requests that the Supreme Court of Ohio answer the certified question of state law asked in this Certification Order.

I. Name of the Case

The name of the case is *Neuro-Communication Services, Inc. v. Cincinnati Insurance Company*, No. 4:20-CV-1275 (N.D. Ohio filed June 10, 2020).

(4:20-CV-1275)

II. The Certified Question of Law

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?

III. Statement of Facts

A. The Facts and Procedural History of the Instant Case

Plaintiff purchased an “all-risk” CinciPak Insurance Policy from Defendants. The policy covers “direct ‘loss’ to Covered Property at the ‘premises’ caused by or resulting from any Covered Cause of Loss.” A Covered Cause of Loss is defined as a “direct ‘loss’” except those that are expressly and specifically excluded or limited. A “loss” is defined as “accidental physical loss or accidental physical damage.” The policy also provides civil authority coverage for business income interruption caused by a Covered Cause of Loss to property other than Plaintiff’s which results in a civil authority order prohibiting access to Plaintiff’s premises. The policy does not contain any specific exclusion for losses caused by viruses or pandemics.

As a result of the COVID-19 pandemic and civil authority orders issued in response, Plaintiff ceased almost all of its operations on March 23, 2020, and resumed some operations on May 4, 2020, leading to significant business income interruptions. Plaintiff submitted a claim to Defendants on March 23, 2020. Defendants denied the claim, arguing, “[t]he claim does not involve direct, physical loss to property at your premises caused by a Covered Cause of Loss.”

(4:20-CV-1275)

Plaintiff then filed the instant suit, seeking to certify a nationwide class of insureds holding similar policies who have also been denied coverage for losses related to the pandemic.

B. This Is an Important Question of State Law Implicating Many Cases

Dozens, 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. These cases have been filed against the Defendants in this case and against other insurers who offer similar products. As these cases wend through the various court systems, differing interpretations of Ohio contract law by different courts threaten to undermine the uniform application of that law to similarly situated litigants.

C. The Supreme Court of Ohio Should Have The First Opportunity To Decide This Question Of State Law

Pursuant to [Ohio S. Ct. Prac. R. 9.01\(A\)](#), the Rule may be “invoked if the certifying court, in a proceeding before it, issues a certification order finding there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court.” The decision to certify is within the sound discretion of this federal Court, and is most beneficial when there is a novel question of state law and no guidance from state courts. [Gascho v. Global Fitness Holdings, LLC, 918 F. Supp. 2d 708, 713 \(S.D. Ohio 2013\)](#). The Supreme Courts of Ohio and the United States have each instructed on the virtues of certification. “The state’s sovereignty is unquestionably implicated when federal courts construe state law.” [Scott v. Bank One Trust Co., N.A., 577 N.E.2d 1077, 1080 \(Ohio 1991\)](#). “[C]ertification of novel or unsettled questions of state law for authoritative answers by a

(4:20-CV-1275)

State’s highest court . . . may save ‘time, energy, and resources and hel[p] build a cooperative judicial federalism.’” [*Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 \(1997\)](#) (quoting [*Lehman Bros. v. Schein*, 416 U.S. 386, 391 \(1974\)](#)).

As noted above, dozens, if not hundreds of cases implicating the question certified here are currently making their way through both the state and federal courts in Ohio. The certification procedure invoked here will allow the Supreme Court of Ohio to decide these questions and bring uniformity to the application of state law to these policies. Accordingly, this federal Court defers the opportunity to address this unresolved question of Ohio law to the Supreme Court of Ohio.

IV. The Parties

Neuro-Communication Services, Inc. — Plaintiff
755 Boardman Canfield Road, Ste. C1
Boardman, Ohio 44512

Cincinnati Insurance Company — Defendant
6200 S. Gilmore Road
Fairfield, Ohio 45014

Cincinnati Casualty Company — Defendant
6200 S. Gilmore Road
Fairfield, Ohio 45014

Cincinnati Indemnity Company — Defendant
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Fairfield, Ohio 45014

V. Counsel for the Parties

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(4:20-CV-1275)

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(4:20-CV-1275)

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VI. Designation of Moving Party

The Court designates Defendant Cincinnati Insurance Company as the moving party.

This designation is made because Defendant moved for certification.

INSTRUCTIONS TO THE CLERK

In accordance with [Ohio S.Ct.Prac.R. 9.03\(A\)](#), the Clerk of the United States District Court for the Northern District of Ohio is directed to serve copies of this Certification Order upon counsel for the parties and to file this Certification Order under the seal of this Court with the Supreme Court of Ohio, along with appropriate proof of service.

IT IS SO ORDERED.

January 19, 2021
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

SANZO ENTERPRISES LLC, :
 :
 Plaintiff, :
 :
 -vs- : Case No. 20 CV H 07 0312
 :
 ERIE INDEMNITY COMPANY, :
 :
 Defendant. :

**Judgment Entry Granting Erie Indemnity Company's
10/20/2020 Motion for Judgment on the Pleadings**

This matter is before this Court on Defendant Erie Indemnity Company's October 20, 2020 motion for judgment on the pleadings.

I. Factual and Procedural Background

This case involves a dispute over the interpretation of a commercial insurance policy. Sanzo Enterprises, LLC ("Sanzo") is an Ohio limited liability company with its principal place of business in Westerville, Ohio. (7/28/2020 Compl. ¶ 10). Sanzo operates a Play It Again Sports store in Westerville that sells sports equipment and apparel. (Compl. ¶ 1). Erie Indemnity Company and Erie Insurance Exchange ("Erie")¹ have a principal place of business in Erie, Pennsylvania. (8/26/2020 Answer ¶ 5). Erie issued Ultrapack Plus Policy No. Q97-1896473 ("the Policy") to Sanzo. (Compl. ¶ 21, Ex.

¹ Sanzo named "Erie Indemnity Company a/k/a Erie Insurance Company" as the Defendant in its complaint. The Defendant asserted in its answer that Erie Indemnity Company and Erie Insurance Exchange are the proper defendants, but there has not been a substitution of parties and Sanzo has not amended its complaint. Based upon the briefing regarding the Defendant's motion for judgment on the pleadings, it appears that both parties treat Erie Insurance Exchange and Erie Indemnity Company as the same entity despite the fact that the Defendant's answer refers to them in the plural. Accordingly, throughout this judgment entry the Court refers to Erie Indemnity Company and Erie Insurance Exchange as a combined single entity.

A; Answer ¶ 2). That policy provided commercial insurance coverage to Sanzo for the period of July 31, 2019 to July 31, 2020. (Compl. ¶ Answer ¶ 8).

In March 2020, Governor DeWine declared a state of emergency by Executive Order 2020-01D in response to the COVID-19 pandemic. (Compl. ¶ 15). The Ohio Director of Health directed all businesses that were not deemed “Essential Businesses and Operations” to “cease all activities within the State except Minimum Basic Operations” (Compl. ¶ 16). The Ohio Director of Health further directed Ohio residents to remain at their place of residence except to perform activities allowed under the order. (Compl. ¶ 16). As a result of these orders, Sanzo was required to close its store to customers for almost two months. (Compl. ¶ 17). Sanzo also suffered a decline in inventory for its used goods because it depended in part on customers selling used sports equipment to the store for resale. (Compl. ¶ 18).

Sanzo made a claim under the Policy for the losses it sustained to comply with the Governor and Ohio Director of Health’s orders (“the Orders”) on April 15, 2020. (Compl. ¶ 36). Erie sent Sanzo a letter denying coverage on April 21, 2020 (Compl. ¶ 37, Ex. B). Sanzo alleges that the Policy provides coverage for Sanzo’s claimed losses that resulted from the Orders. (Compl. ¶ 46). Sanzo claims that it is entitled to relief for breach of contract and Erie’s alleged bad-faith conduct. (Compl. ¶¶ 57-69, 79-88). Further, Sanzo claims that it is also entitled to a declaratory judgment stating that the income-protection and civil-authority provisions of the Policy were triggered by the closure of Sanzo’s store in response to the Orders. (Compl. ¶¶ 70-78). Erie, however, denies that Sanzo is entitled to coverage under the Policy, and Erie maintains that it did not act in bad faith when it denied Sanzo’s insurance claim. (Answer ¶¶ 11, 21).

Sanzo filed its complaint on July 28, 2020. Erie and Erie Indemnity Company filed their answer on August 26, 2020. Erie then filed a motion for judgment on the pleadings on October 20, 2020. Sanzo filed a memorandum in opposition on November 3, 2020, and Erie filed its reply on November 10, 2020. Both parties also filed notices of supplemental authority.

II. The Relevant Law

Civ. R. 12(C) states, “[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” The standard of review for a motion for judgment on the pleadings is the same as for a motion to dismiss. “Judgment on the pleadings may be granted where no material factual issue exists. However it is axiomatic that a motion for judgment on the pleadings is restricted solely to the allegations contained in those pleadings.” *Gessner v. Gregg’s Pawn Shop, Inc.*, 181 Ohio App.3d 217, 2009-Ohio-713, ¶ 11 (5th Dist.).

A motion for judgment on the pleadings presents only questions of law. *Id.* “The determination of a motion under Civ. R. 12(C) is restricted solely to the allegations in the pleadings and the nonmoving party is entitled to have all material allegations in the complaint, with all reasonable inferences to be drawn therefrom, construed in her favor.” *Id.*, citing *Peterson v. Teodosio*, 34 Ohio St.2d 161, 165-166, 297 N.E.2d 113 (1973).

Civ.R. 10(C) provides that “[a] copy of any written instrument attached to a pleading is a part of the pleading for all purposes.”

III. The Policy Language at Issue

At the outset, the Ultrapack Plus Commercial Property Coverage Part (“Property Coverage Part”) of the Policy states:

Throughout this policy the words “you” and “your” refer to the Named Insured [Sanzo] shown in the “Declarations”. The words “we”, “us”, and “our” refer to the company providing the insurance [Erie].

Other words and phrases that appear in quotation marks have special meaning. Refer to **Section XI – Definitions and Section VIII – Extensions of Coverage**.

(Compl. Ex. A, Property Coverage Part, p. 1) (emphasis in original). Section XI –

Definitions in turn defines the following terms that are relevant to the Court’s analysis:

“Interruption of business” means the period of time that your business is partially or totally suspended and it:

1. Begins with the date of direct “loss” to covered property caused by a peril insured against; and
2. Ends on the date when the covered property should be repaired, rebuilt, or replaced with reasonable speed and similar quality.

“Loss” means direct and accidental loss of or damage to covered property.

(Compl. Ex. A, Property Coverage Part, p. 36)

Section I of the Property Coverage Part states that “we will pay for direct physical ‘loss’ of or damage to Covered Property at the premises described in the ‘Declarations’ caused by or resulting from a peril insured against.” (Compl. Ex. A, Property Coverage Part, p. 1). Also within the Property Coverage Part, Section II – Perils Insured Against provides that “[t]his policy insures against direct physical ‘loss’, except ‘loss’ as excluded or limited in this policy.” (Compl. Ex. A, Property Coverage Part, p. 4).

The Income Protection – Coverage 3 portion of Section I is divided into three sub-sections: Income Protection Coverage, Extra Expense Coverage, and Additional Coverages. (Compl. Ex. A, Property Coverage Part, pp. 1-4). The income-protection sub-section provides:

Income Protection means loss of “income” and/or “rental income” you sustain due to partial or total “interruption of business” resulting directly from “loss” or damage to property on the premises described in the “Declarations” from a peril insured against. “Loss” or damage also includes covered property in the open, or in a vehicle, on the premises described in the “Declarations” or within 1,500 feet thereof.

(Compl. Ex. A, Property Coverage Part, p. 3). Next, the extra-expense coverage subsection states:

“Extra expense” coverage is provided at the premises described in the “Declarations”.

“Extra expense” means necessary expenses you incur due to partial or total “interruption of business” resulting directly from “loss” or damage to property on the premises described in the “Declarations” from a peril insured against. “Loss” or damage also includes property in the open, or in a vehicle, on the premises described in the “Declarations” or within 1,500 feet thereof.

(Compl. Ex. A, Property Coverage Part, p. 3). That same sub-section further states:

We [Erie] will pay the cost to repair or replace your covered property and the amount to research, replace, or restore the lost information on damaged valuable papers and records or “electronic data” to the extent it reduces the amount of loss that would have been payable under loss of “income” and/or “rental income.”

(Compl. Ex. A, Property Coverage Part, pp. 3-4). Lastly, the Additional Coverages subsection discusses civil authority. (Compl. Ex. A, Property Coverage Part, p. 4). That subsection provides:

1. Civil Authority

When a peril insured against causes damage to property other than property at the premises described in the “Declarations”, we will pay for the actual loss of “income” and/or “rental income” you sustain and necessary “extra expense” caused by action of civil authority that prohibits access to the premises described in the “Declarations” 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 the premises described in the “Declarations” are within that area but are not more than one mile from the damaged property; and
- b. The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the peril insured against that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

(Compl. Ex. A, Property Coverage Part, p. 4) (emphasis in original).

Finally, there are two sub-sections within Section III – Exclusions that warrant the Court’s attention. Those sub-sections state as follows:

D. Coverage 2

We do not cover under **Business Personal Property and Personal Property of Others – Coverage 2** “loss” or damage caused:

...

6. By delay, loss of use, or loss of market.

E. Coverage 3

We do not cover under **Income Protection – Coverage 3**:

...

4. Loss due to delay or loss of market.

(Compl. Ex. A, Property Coverage Part, p. 8) (emphasis in original).

IV. Erie is entitled to judgment on the pleadings on all of Sanzo's claims.

a. Breach of Contract and Declaratory Judgment

Sanzo raises claims for breach of contract and declaratory judgment in its Complaint. Since all of these claims are based on the parties' competing interpretations of the language in the Policy that triggers coverage, I address them together.

First, Sanzo contends that Erie breached its contract with Sanzo by denying Sanzo's insurance claims under the income-protection and extra-expense provisions and the civil-authority provision of the Policy. (Sanzo Compl. ¶¶ 57-69). A contract is a "promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369, 575 N.E.2d 134 (1991) (citation omitted). A valid, enforceable contract requires mutual consent to the contract's terms, a meeting of the minds, and definite and certain terms. *Id.* The essential elements of a contract "include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16 (citation omitted). To establish a breach-of-contract claim, a party must show "the existence of a contract, performance by the [party], breach by the [opposing party], and damage or loss to the [party]." *Powell v. Grant Med. Ctr.*, 148 Ohio App.3d 1, 2002-Ohio-443, 771 N.E.2d 874 ¶ 27 (10th Dist.) (citations omitted).

Here, the parties agree that there was an insurance contract between Erie and Sanzo. (Compl. ¶¶ 5, 21; Answer ¶¶ 2, 8). Sanzo asserts that it performed under the

insurance contract by paying insurance premiums. (Compl. ¶ 23). Further, Sanzo alleges that it experienced economic losses when it had to close its store in response to the Orders. (Compl. ¶¶ 14-20). Erie, however, contends that it did not breach the contract by denying Sanzo's insurance claim because Sanzo did not allege that it or any of its neighbors experienced property damage. (Erie Mot. for J. on the Pleadings pp. 7, 14).

Next, Sanzo seeks a declaratory judgment that states that the income-protection and civil-authority provisions of the Policy were triggered by "direct physical loss of and damage to Plaintiff's property and the surrounding property, and no exclusions apply." (Compl. ¶¶ 70-78). The Ohio Supreme Court has held that "the three elements necessary to obtain a declaratory judgment as an alternative to other remedies are: (1) that a real controversy between adverse parties exists; (2) which is justiciable in character; (3) and that speedy relief is necessary to the preservation of rights which may be otherwise impaired or lost." *Fairview General Hospital v. Fletcher*, 63 Ohio St.3d 146, 148-149, 586 N.E.2d 80 (1992), citing *Herrick v. Kosydar*, 44 Ohio St.2d 128, 130, 339 N.E.2d 626, 627 (1975), and *Buckeye Quality Care Centers, Inc. v. Fletcher*, 48 Ohio App.3d 150, 154, 548 N.E.2d 973, 976 (10th Dist. 1988). "A declaratory judgment action provides a means by which parties can eliminate uncertainty regarding their legal rights and obligations." *Mid-American Fire and Cas. Co. v. Heasley*, 113 Ohio St. 3d 113, 136, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 8, citing *Travelers Indemn. Co. v. Cochrane*, 155 Ohio St. 305, 312, 98 N.E.2d 840 (1951). For there to be a justiciable question, however, "the danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events . . . and the threat to his position must be actual and genuine and not merely possible or remote." *Mid-American Fire and Cas. Co.*, 2007-Ohio-1248, ¶ 9, quoting *League for Preservation of Civil Rights v. Cincinnati*, 64

Ohio App. 195, 197, 28 N.E.2d 660 (1st Dist. 1940) (additional citation and internal quotations omitted).

Chapter 2721 of the Ohio Revised Code further addresses the issuance of declaratory judgments:

[C]ourts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter. The declaration may be either affirmative or negative in form and effect. The declaration has the effect of a final judgment or decree.

R.C. 2721.02(A). In matters involving contracts, “a contract may be construed by a declaratory judgment or decree before or after there has been a breach of contract.” R.C. 2721.04. “Courts of record may refuse to render or enter a declaratory judgment or decree under this chapter if the judgment or decree would not terminate the uncertainty or controversy giving rise to the action or proceeding in which the declaratory relief is sought.” R.C. 2721.07.

Sanzo’s claim for declaratory judgment and its claims for breach of contract all require this Court to interpret what “direct physical ‘loss’ of or damage to” property means under the Policy. Accordingly, that is where I begin my analysis to determine if Sanzo is entitled to judgment on these claims.

i. The plain meaning of the Policy language requires tangible or material deprivation of or harm to the covered property to trigger income-protection coverage.

This dispute is centered on the meaning of the phrase “direct physical ‘loss’ of or damage to” the covered property. Sanzo argues that it suffered “direct physical ‘loss’ of or damage to” its store because the Orders “physically separated Sanzo (and its customers) from its premises, deprived it of the full use and value of its property, and

impaired the value, usefulness, and normal function of the property.” (11/3/2020 Sanzo Mem. Opp’n p. 9).

Erie, on the other hand, contends that the Orders did not trigger coverage for Sanzo’s store because “the pleading contains no plausible allegation that the COVID-19 virus – or the governmental orders resulting from the virus – caused any physical alteration or change in the structural integrity of insured property.” (10/20/2020 Sanzo Mot. J. on the Pleadings p. 7).

The construction of written contracts is a matter of law. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus. In a case involving contractual interpretation, the Court’s role “is to give effect to the intent of the parties to the agreement.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 219, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11, citing *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 714 N.E.2d 898 (1999). Ohio courts must presume that the intent of the parties is reflected in the language that they chose to include in their agreement. *Kelly v. Medical Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411 (1987), paragraph one of the syllabus.

Further, “[c]ourts must also read the insurance policy as a whole, giving meaning to each term and construing the provisions within the context of the entire policy.” *Family Tacos, LLC v. Auto Owners Insurance Co.*, ___ F.Supp.3d ___, 2021 WL 615307 (N.D. Ohio Feb. 17, 2021). Common words are to be given their ordinary meaning “unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument.” *Alexander*, 53 Ohio St.2d at paragraph two of the syllabus.

Accordingly, I turn first to the language of the Policy to determine whether the meaning of the phrase in question is ambiguous. The Policy defines “Loss” as “direct and accidental loss of or damage to covered property.” (Compl. Ex. A, Property Coverage Part, p. 36). That circular definition, however, adds little meaning to the phrase “direct physical ‘loss’ of or damage to” the store. Further, the Policy does not offer a definition of “direct,” “physical,” or “damage.” The absence of a definition in an insurance contract, however, does not make a term ambiguous. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995). “A court must give undefined words used in an insurance contract their plain and ordinary meaning.” *Id.*, citing *Miller v. Marrocco*, 28 Ohio St.3d 438, 439, 504 N.E.2d 67 (1986).

Black’s Law Dictionary defines “direct” as “straight; undeviating,” “straightforward,” and “[f]ree from extraneous influence; immediate.” *Black’s Law Dictionary* (11th Ed.2019). See also *Brunswick Panini’s, LLC v. Zurich American Insurance Company*, ___ F.Supp.3d ___, 2021 WL 663675, *7 (N.D. Ohio Feb. 19, 2021) (“The Merriam-Webster definition of ‘direct’ includes: ‘proceeding from one point to another in time or space without deviation or interruption: STRAIGHT;’ ‘stemming immediately from a source; direct result;’ ‘marked by absence of an intervening agency, instrumentality, or influence;’ ‘characterized by close logical, causal, or consequential relationship’”). “Physical” is also defined in relevant part as “[o]f, relating to, or involving the material universe and its phenomena . . . Of, relating to, or involving material things; pertaining to real, tangible objects.” *Black’s Law Dictionary* (11th Ed.2019). See also *Family Tacos, LLC v. Auto Owners Insurance Co.*, ___ F.Supp.3d ___, 2021 WL 615307, *5 (N.D. Ohio Feb. 17, 2021), quoting *Merriam-Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/physical> (“‘Physical’ means

‘having material existence: perceptible especially through the senses and subject to the laws of nature”); *Bridal Expressions, LLC, individually and on behalf of all others similarly situated, v. Owners Insurance Company*, N.D.Ohio No. 1:20 CV 833, 2021 WL 1232399, *4 (March 23, 2021) (same); *Dakota Girls, LLC v. Philadelphia Indemnity Insurance Co.*, S.D.Ohio No. 2:20-cv-2035, 2021 WL 858489, *6 (March 8, 2021) (same).

Likewise, “loss” is defined in pertinent part as “[t]he amount of financial detriment caused by . . . an insured property’s damage, for which the insurer becomes liable . . . The failure to maintain possession of a thing.” *Black’s Law Dictionary* (11th ed. 2019). See also *Family Tacos*, 2021 WL 615307 at *5, quoting *Merriam-Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/loss> (“‘Loss’ means ‘destruction, ruin’ or ‘the act of losing possession; deprivation’”); *Dakota Girls*, 2021 WL 858489 at *6 (same); *Bridal Expressions*, 2021 WL 1232399 at *4 (same). Finally, “damage” is defined as “[l]oss of or injury to person or property; esp., physical harm that is done to something or to part of someone’s body . . . By extension, any bad effect on something” *Black’s Law Dictionary* (11th ed. 2019). See also *Family Tacos*, 2021 WL 615307 at *5, quoting *Merriam-Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/damage> (“‘Damage’ means ‘loss or harm resulting from injury to person, property, or reputation’”); *Dakota Girls*, 2021 WL 858489 at *6 (same); *Bridal Expressions*, 2021 WL 1232399 at *4 (same).

Considering these words together with their ordinary meanings, “direct physical loss of or damage to” the insured property means immediate, material, tangible harm to or deprivation of the insured property. See, e.g., *Family Tacos*, 2021 WL 615307 at *5; *Bridal Expressions*, 2021 WL 1232399 at *5; *Dakota Girls*, 2021 WL 858489, *6.

Additional text in the Policy supports this interpretation. For example, the extra-expense coverage sub-section states that coverage is triggered by “‘loss’ or damage to property on the premises described in the ‘Declarations’ from a peril insured against.” (Compl. Ex. A, Property Coverage Part, p. 3). As part of that coverage, Erie promised to “pay the cost to repair or replace your covered property and the amount to research, replace, or restore the lost information on damaged valuable papers and records or ‘electronic data’ to the extent it reduces the amount of loss that would have been payable under loss of ‘income’ and/or ‘rental income.’” (Compl. Ex. A, Property Coverage Part, pp. 3-4).

As the U.S. District Court for the Northern District of Ohio has observed, reading an extra-expense provision to include loss of intended use of the property would render that section “nonsensical or meaningless because no repair . . . or replacement of the covered property will occur.” *Family Tacos*, 2021 WL 615307 at *5. See also *Mikmar, Inc. v. Westfield Insurance Co.*, ___ F.Supp.3d ___, 2021 WL 615304, *5 (N.D. Ohio Feb. 17, 2021) (“Reading ‘direct physical loss of or damage to’ property to include loss of intended use . . . would render the Period of Restoration nonsensical or meaningless because no repair, rebuilding, or replacement of the covered property will occur”); *Dakota Girls*, 2021 WL 858489, *6 (same); *Ceres Enterprises, LLC v. Travelers Insurance Company*, ___ F.Supp.3d ___, 2021 WL 634982, *5 (N.D. Ohio Feb. 18, 2021) (same).

Further, Section III – Exclusions indicates that the Policy does not cover “‘loss’ or damage caused directly or indirectly by any of the following . . . By the enforcement of or compliance with any law or ordinance regulating the construction, use, or repair of any property” (Compl. Ex. A, Property Coverage Part, pp. 4-5). Examining nearly

identical exclusion language, the U.S. District Court for the Northern District of Ohio observed:

Expressly excluding certain losses due to regulated construction, use, or repair of property ties the insurance to physical or material events. And where the loss arises from an ordinance or law – in other words, something non-physical or intangible – the policies do not provide coverage.

Mikmar, Inc., 2021 WL 615304 at *5. Likewise – as was the case in *Mikmar, Inc.* – the Policy also excludes “[l]oss due to delay or loss of market” from income-protection coverage. (Compl. Ex. A, Property Coverage Part, p. 8). See *Mikmar, Inc.*, 2021 WL 615304 at *5.

Here, the Orders directly regulated the use of Sanzo’s store, which is the covered property under the Policy. (Compl. ¶¶ 14-17). Sanzo’s market for buying and selling used sports equipment was also delayed and potentially even lost as a result of the Orders, which forced Sanzo to close its store for a period of time and compelled potential patrons to stay at home. (Compl. ¶¶ 16-20). According to the Policy, however, both of these impacts appear to be excluded from coverage. The exclusionary language therefore supports Erie’s interpretation of “direct physical ‘loss’ of or damage to” Sanzo’s store as not encompassing the loss of Sanzo’s intended use of the store.

ii. The case law applying Ohio law to similar commercial insurance policies supports Erie’s interpretation of the Policy language at issue.

Erie correctly points out that the Eighth District has thus far provided the best indication of how Ohio appellate courts are likely to interpret “direct physical ‘loss’ of or damage to” covered property in *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130 (8th Dist.). The insurance policy at issue in *Mastellone*, however, was a homeowner’s insurance policy rather than a commercial

insurance policy. *Id.* at ¶ 1. Nonetheless, federal courts have consistently looked to *Mastellone* when interpreting commercial insurance policies under Ohio law to determine whether businesses are entitled to coverage as a result of the Orders. See, e.g., *Family Tacos, LLC v. Auto Owners Insurance Co.*, ___ F.Supp.3d ___, 2021 WL 615307, *7 (N.D. Ohio Feb. 17, 2021); *Ceres Enterprises, LLC v. Travelers Insurance Company*, ___ F.Supp.3d ___, 2021 WL 634982, *7 (N.D. Ohio Feb. 18, 2021); *Mikmar, Inc. v. Westfield Insurance Co.*, ___ F.Supp.3d ___, 2021 WL 615304, *6-7 (N.D. Ohio Feb. 17, 2021); *Dakota Girls, LLC v. Philadelphia Indemnity Insurance Co.*, S.D. Ohio No. 2:20-cv-2035, 2021 WL 858489, *6 (March 8, 2021); *Brunswick Panini's, LLC v. Zurich American Insurance Company*, ___ F.Supp.3d ___, 2021 WL 663675, *7-8 (N.D. Ohio Feb. 19, 2021); *Henderson Road Restaurant Systems, Inc. v. Zurich American Ins. Co.*, ___ F.Supp.3d ___, 2021 WL 168422, *10 (N.D. Ohio Jan. 19, 2021); *Santo's Italian Café LLC v. Acuity Insurance Company*, ___ F.Supp.3d ___, 2020 WL 7490095, *8 (N.D. Ohio Dec. 21, 2020).

In *Mastellone*, the plaintiff homeowners filed a claim with their homeowner's insurance company – Lightning Rod Mutual Insurance Company (“Lightning Rod”) – for mold that developed on the interior and exterior of their home. *Mastellone* at ¶ 4. Both Lightning Rod and the Mastellones hired environmental specialists to examine the mold, and those specialists agreed that the mold was not at dangerous levels. *Id.* at ¶¶ 5-7. As a result, Lightning Rod denied coverage, and the Mastellones sued Lightning Rod for breach of contract and bad faith. *Id.* at ¶¶ 8-9. On appeal, Lightning Rod contended that the trial court should have entered a directed verdict in Lightning Rod's favor on the Mastellones' claims for exterior mold damage because that damage did not constitute “physical injury” to the siding. *Id.* at ¶ 57.

The relevant policy language stated that the homeowner’s insurance policy provided coverage for “direct loss to property ‘only if that loss is a physical loss to property.’” *Id.* at ¶ 60. The Eighth District – in an opinion by Judge Melody Stewart, who is now serving on the Supreme Court of Ohio – interpreted “physical injury” to mean “a harm to the property that adversely affects the structural integrity of the house.” *Id.* at ¶ 61, citing 10A Couch on Insurance (3d Ed. 1998), Section 148:46. (“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 property”).

As Sanzo rightfully points out, the language at issue in *Mastellone* was “physical loss to” rather than “physical loss of,” and the Policy here contains the latter language. (11/3/2020 Sanzo Mem. Opp’n p. 16). The key modifier in both phrases, however, is “physical.” Since “physical” modifies “loss” in the Policy, the Eighth District’s holding in *Mastellone* that a “physical injury” requires some form of structural harm to the insured premises indicates that “physical loss” under the Policy also requires some form of tangible, material, or structural harm to trigger coverage. Indeed, such an interpretation is consistent with the plain meaning of the Policy language at issue. See *Family Tacos, LLC v. Auto Owners Insurance Co.*, ___ F.Supp.3d ___, 2021 WL 615307, *7 (N.D. Ohio Feb. 17, 2021); *Mikmar, Inc. v. Westfield Insurance Co.*, ___ F.Supp.3d ___, 2021 WL 615304, *6 (N.D. Ohio Feb. 17, 2021).

Sanzo has not alleged that the Orders caused any material, tangible, or structural harm to its store. Instead, Sanzo contends that it suffered “direct physical ‘loss’ of” its

property because the Orders “physically separated Sanzo (and its customers) from its premises, deprived it of the full use and value of its property, and impaired the value, usefulness, and normal function of the property.” (Sanzo Mem. Opp’n p. 9). The Orders did not, however, physically deprive Sanzo of access to its store. Rather, the Orders prohibited Sanzo from conducting its usual business during the relevant time period and ordered potential customers to stay at home unless performing certain activities outlined in the Orders. (Compl. ¶¶ 14-18). None of these consequences of the Orders caused material, tangible harm to or deprivation of Sanzo’s store. Instead, the Orders limited how Sanzo could utilize the store.

Sanzo also argues that the disjunctive “or” that separates “‘loss’ of or damage to” the covered property indicates that “loss” must mean something different from “damage to” the covered property. (Sanzo Mem. Opp’n pp. 3, 19). The Court does not disagree, but Sanzo’s argument ignores how “physical” modifies both “‘loss’ of” and “damage to” the covered property. As the U.S. District Court for the Northern District of Ohio stated in response to a similar argument, “Plaintiff was not physically, tangibly, materially deprived of their property, and therefore did not suffer a ‘physical loss.’ Nor did they sustain material or physical harm from injury to their property that constitutes ‘physical damage.’” *Family Tacos, LLC*, 2021 WL 615307 at *6. Sanzo certainly could not operate its store the way it wanted to while the Orders were in place. Nonetheless, Sanzo maintained possession of the insured store premises during the relevant time period, and Sanzo has not alleged that there were any material or tangible changes in the store’s condition. Accordingly, Sanzo did not suffer “direct physical ‘loss’ of or damage to” its covered property.

Finally, Sanzo contends that the lack of a virus exclusion in the Policy suggests that the impacts of the Orders in response to the COVID-19 pandemic must be covered under the Policy. (Sanzo Mem. Opp'n p. 20). I disagree. Several courts that have applied Ohio law to commercial insurance policies that contain a virus exclusion have independently found that "direct physical loss of or damage to" insured property requires material, physical harm to the covered property. See *Santo's Italian Café, LLC v. Acuity Insurance Company*, ___ F.Supp.3d ___, 2020 WL 7490095, *12-13 (N.D. Ohio Dec. 21, 2020) (holding that Santo's failed to meet the threshold for business-income and extra-expense coverage under its policy because "Ohio law construes 'direct physical loss of or damage to' insured property to require that the plaintiff-insured plead distinct, demonstrable, physical alteration of the insured property" before a court may consider *arguendo* the impact of the virus exclusion in the policy); *Mikmar, Inc. v. Westfield Insurance Co.*, ___ F.Supp.3d ___, 2021 WL 615304, (N.D. Ohio Feb. 17, 2021) (finding that "physical loss of property means material, perceptible destruction or deprivation of possession . . . In other words, the phrase intends a tangible loss of or harm to the insured property, in whole or in part" before any consideration by a court of the effect of the virus exclusion "[e]ven if the policies otherwise provided coverage"); *Brunswick Panini's, LLC v. Zurich American Insurance Company*, ___ F.Supp.3d ___, 2021 WL 663675 (N.D. Ohio Feb. 19, 2021) (concluding that the plaintiff's allegation that it could not make full use of its covered property because of the actual or suspected presence of COVID-19 did not satisfy the triggering language requiring "direct physical loss of or damage to" the covered property before considering the microorganism exclusion in the alternative).

As the above-mentioned cases demonstrate, whether a plaintiff has alleged sufficient facts to demonstrate “direct physical ‘loss’ of or damage to” the covered property is a separate matter from whether a virus exclusion – if one is present in the insurance policy at issue – applies to the facts alleged in the complaint. Accordingly, I am not persuaded by Sanzo’s argument that the lack of a virus exclusion in the Policy demonstrates that the effects of the COVID-19 pandemic are automatically covered by the Policy.

I therefore conclude that Sanzo has not alleged sufficient facts that demonstrate it has suffered the kind of tangible, material, or structural deprivation of or harm to its store that would trigger coverage under the Policy for “direct physical ‘loss’ of or damage to” the covered property. Erie is therefore entitled to judgment on the pleadings with respect to Sanzo’s claim for declaratory judgment and Sanzo’s claim for breach of contract for coverage of loss of income or extra expenses.

iii. The civil-authority provision of the Policy was not triggered by the Orders.

Sanzo further contends that it has alleged sufficient facts to trigger coverage under the civil-authority provision of the Policy. (11/3/2020 Sanzo Mem. Opp’n p. 21).

The civil-authority provision reads as follows:

When a peril insured against causes damage to property other than property at the premises described in the “Declarations”, we will pay for the actual loss of “income” and/or “rental income” you sustain and necessary “extra expense” caused by action of civil authority that prohibits access to the premises described in the “Declarations” 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 the premises described in the “Declarations”

are within that area but are not more than one mile from the damaged property; and

- b. The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the peril insured against that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

(Compl. Ex. A, Property Coverage Part, p. 4). Section II of the Policy covers Perils Insured Against. Under Income Protection – Coverage 3, the Policy states that a “Covered Cause of Loss” is “direct physical ‘loss’, except ‘loss’ as excluded or limited by this policy.” (Compl. Ex. A, Property Coverage Part, p. 4).

As discussed above, the language “direct physical ‘loss’” requires some tangible, material, or structural deprivation of or harm to the covered property. The language of the second condition for civil-authority coverage to apply further supports this interpretation. See *Mikmar, Inc. v. Westfield Insurance Co.*, ___ F.Supp.3d ___, 2021 WL 615304, *9 (N.D. Ohio Feb. 17, 2021) (finding that policy language that conditioned coverage on civil authorities limiting access to the area surrounding “damaged property” or civil authorities responding to “dangerous physical conditions” provided additional support that the policy at issue covered “material, physical, tangible damage to property”). The second condition for civil-authority coverage under the Policy requires that “[t]he action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the peril insured against that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.” Sanzo has not alleged that the Orders were issued in response to dangerous structural, material, or tangible conditions at a nearby property,

nor has Sanzo alleged that the purpose of the Orders was to enable a civil authority to have access to one or more damaged properties.

Further, Sanzo does not allege that it or the owners of surrounding properties were prohibited from accessing their properties or the areas surrounding them. Although the surrounding properties may have also housed businesses that were deemed “non-essential” under the Orders and therefore required to close, that does not mean that Sanzo or the owners of those businesses were denied access to the physical premises. See *Santo’s Italian Café LLC v. Acuity Insurance Company*, ___ F.Supp.3d ___, 2020 WL 7490095 (N.D. Ohio Dec. 21, 2020) (observing that the same Orders at issue in the present case “did not prevent Santo’s from accessing its premises altogether,” and concluding that Santo’s failed to allege facts that met the threshold for civil-authority coverage under its policy).

In short, Sanzo’s complaint demonstrates only that the Orders restricted its ability – and potentially that of neighboring property owners – to engage in the ordinary use of their respective properties. Such a limitation on the use of Sanzo’s property or that of neighboring property owners is not a tangible deprivation of that property, nor does it present a dangerous physical condition. Accordingly, Sanzo has not alleged sufficient facts to trigger coverage under the civil-authority provision of the Policy. Erie is therefore entitled to judgment on the pleadings in regard to Sanzo’s breach of contract claim for civil-authority coverage.

b. Bad Faith

i. Erie did not act in bad faith when it denied Sanzo's claim under the Policy.

Lastly, Sanzo alleges that Erie acted in bad faith when it denied Sanzo's claim. (Compl. ¶¶ 79-87). The Ohio Supreme Court has recognized that "an insurer has the duty to act in good faith in the handling and payment of the claims of its insured. A breach of this duty will give rise to a cause of action in tort against the insurer." *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 452 N.E.2d 1315 (1983), paragraph one of the syllabus. "An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor." *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 644 N.E.2d 397 (1994), paragraph one of the syllabus.

Based upon the foregoing analysis, Sanzo did not present facts in its complaint that demonstrate it sustained "direct physical 'loss' of or damage to" its covered property to trigger coverage under the Policy. Accordingly, Erie's justification for denying coverage on those grounds was per se reasonable, and Erie did not, as a matter of law, act in bad faith when it denied Sanzo's claim.

c. Conclusion

After considering all of the allegations in the complaint, and construing any inferences to be drawn from those allegations in favor of Sanzo, I conclude that Sanzo has failed to plead sufficient facts that would entitle it to coverage under the Policy. Erie's motion for judgment on the pleadings with regard to all of Sanzo's claims is therefore GRANTED. Any court costs must be paid by Plaintiff Sanzo.

THIS IS A FINAL APPEALABLE ORDER.
THERE IS NO JUST CAUSE FOR DELAY.



DAVID M. GORMLEY, JUDGE

The Clerk of this Court is hereby Ordered to serve a copy of this Judgment Entry upon all parties or their counsel through the Clerk's e-filing system, by regular mail, or by fax.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO. 3:20-CV-00588-RJC-DSC**

FS FOOD GROUP LLC *et al.*,)
)
 Plaintiffs,)
)
 v.)
)
 THE CINCINNATI INSURANCE)
 COMPANY,)
)
 Defendant.)

**MEMORANDUM
AND
RECOMMENDATION**

THIS MATTER is before the Court on “Defendant The Cincinnati Insurance Company’s Rule 12(b)(6) Motion to Dismiss Plaintiffs’ Amended Complaint,” Doc. 15, and the parties’ briefs and exhibits.

The Motion has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and is now ripe for the Court’s consideration.

Having fully considered the arguments, the record, and the applicable authority, the undersigned respectfully recommends that Defendant’s Motion be granted as discussed below.

I. PROCEDURAL AND FACTUAL BACKGROUND

Accepting the factual allegations of the Amended Complaint, Doc. 12, as true, Plaintiffs¹ own and operate restaurants and catering companies in North and South Carolina. Doc. 12 at 1-2. Plaintiffs entered into an insurance contract with The Cincinnati Insurance Company

¹ Plaintiffs include FS Food Group, LLC, Plate Perfect Catering LLC, Mama Ricotta’s Kingspointe, LLC, Midwood Smokehouse Holdings, LLC, Midwood Smokehouse of Ballantyne, LLC, Midwood Smokehouse of Birkdale, LLC, Midwood Smokehouse of Cross Hill, LLC, Midwood Smokehouse of Park Road, LLC, Midwood Smokehouse, LLC, PTT, LLC, Yafo Central, LLC, Yafo East, LLC, Yafo Morrison, LLC, and Yafo Restaurant Holdings, LLC. Doc. 12 at 1.

(“Cincinnati”) on August 3, 2019, policy number ECP 054 61 56 (“Policy”), with a policy period effective August 3, 2019 to August 3, 2022. Doc. 12 at 6; Doc. 1-2 at 3. The Policy provides that Defendant will indemnify Plaintiffs for covered losses, “including, but not limited to, business income losses at the Covered Properties, which are owned, managed, and/or controlled by Plaintiff.” Doc. 12 at 6. Covered properties are defined by the Policy to include Plaintiffs’ business locations. Doc. 1-1 at 25; Doc. 12 at 3-5.

The Policy is an “all risk” policy, which “provides coverage for all non-excluded business losses.” Doc. 12 at 2. Section A of the Policy provides that Defendant “will pay for direct ‘loss’ to Covered Property at the ‘premises’ caused by or resulting from any Covered Cause of Loss.” Doc. 1-1 at 25. The Policy defines “loss” as “accidental physical loss or accidental physical damage.” Doc. 1-1 at 60. The Policy defines “premises” as “the Locations and Buildings described in the Declarations.” *Id.* at 61. The Policy does not define “damage” or include a virus exclusion provision. Doc. 12 at 8.

On March 10, 2020, Governor Roy Cooper declared a state of emergency in response to the COVID-19 pandemic. Doc. 1-3. On March 17, 2020, the Governor issued Executive Order No. 118 limiting the “sale of food and beverages to carry-out, drive-through, and delivery only[.]” Doc. 1-4 at 4. On March 27, 2020, Governor Cooper issued a “Stay at Home” Order, which permitted restaurants to serve food “for consumption off-premises.” Doc. 1-5 at 10. All indoor dining services were suspended until May 20, 2020, when North Carolina commenced Phase 2 of its reopening plan. Doc. 1-7 at 8. Under Phase 2, restaurants could operate indoor dining at fifty percent occupancy. *Id.*

South Carolina Governor Henry McMaster issued similar executive orders. Doc. 12 at 2. In response to the executive orders issued by Governors Cooper and McMaster, Plaintiffs

suspended or reduced their business operations. Doc. 12 at 2. On June 10, 2020, FS Food Group submitted claims for its ten locations and its catering company. Doc. 1-2 at 2. The claims were for “business interruption, civil authority and/or extra expense coverage to recoup substantial, ongoing financial losses directly attributed to a series of COVID-19 closure orders.” Doc. 12 at 2.

The Policy’s Coverage Extensions section includes provisions for Business Income, Extra Expense, and Civil Authority, as follows:

(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.”² The “suspension” must be caused by direct “loss” to the property at a “premises” caused by or resulting from any Covered Cause of Loss.

With respect to the requirements of the preceding paragraph, if you are a tenant and occupy only part of the site at which the "premises" are located, for the purpose of this Coverage Extension only, your "premises" is the portion of the building that you rent, lease or occupy, including:

- (a) Any area within the building or on the site at which the "premises" are located if that area services or is used to gain access to the "premises"; and
- (b) Your personal property in the open (or in a vehicle or portable storage unit) within 1,000 feet of the building or 1,000 feet of the "premises", whichever is greater.

(2) Extra Expense

(a) We will pay Extra Expense you sustain during the “period of restoration.” Extra expense means necessary expenses you sustain (as described in Paragraphs (2)(b), (c) and (d) during the “period of restoration” that you would not have sustained if there no direct “loss” to property caused by or resulting from a Covered Cause of Loss.

(b) If these expenses reduce the otherwise payable "Business Income" "loss", we will pay expenses (other than the expense to repair or replace property as described in Paragraph (2)(c)) to:

² Under the Policy, “Period of Restoration” means the period of time that either (a) begins at the time of direct “loss” or (b) ends on the earlier of: (1) The date when the property at the “premises” should be repaired, rebuilt, or replaced with reasonable speed and similar quality; or (2) The date when business is resumed at a new permanent location. Doc. 1-1 at 60-61.

- 1) Avoid or minimize the "suspension" of business and to continue "operations" either:
 - a) At the "premises"; or
 - b) At replacement "premises" or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location; or
- 2) Minimize the "suspension" of business if you cannot continue "operations".

(c) We will also pay expenses to:

- 1) Repair or replace property; or
- 2) Research, replace or restore the lost information on damaged "valuable papers and records";

but only to the extent this payment reduces the otherwise payable "Business Income" "loss". If any property obtained for temporary use during the "period of restoration" remains after the resumption of normal "operations", the amount we will pay under this Coverage will be reduced by the salvage value of that property.

(d) Extra Expense does not apply to "loss" to Covered Property as described in the BUILDING AND PERSONAL PROPERTY COVERAGE FORM.

(3) Civil Authority

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 its 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.

This Civil Authority coverage for "Business Income" will begin immediately after the time of that action and will apply for a period of up to 30 days from the date of that action.

This Civil Authority coverage for Extra Expense will begin immediately after the time of that action and will end:

- 1) 30 consecutive days after the time of that action; or
- 2) When your "Business Income" coverage ends; whichever is later.

Doc. 1-1 at 40-41. The Policy provides separate Business Income, Extra Expense, and Civil Authority coverage provisions. See Doc. 1-1 at 93-94.

On September 14, 2020, Defendant notified Plaintiffs by letter that their losses were not covered under the Policy, explaining that:

The Cincinnati policy provides coverage for direct physical loss or damage to Covered Property at the premises. This direct physical loss or direct physical damage must be to property at the covered premises. Cincinnati's investigation has found no evidence of direct physical loss or damage at your premises. Similarly, there is no evidence of damage to property at other locations, precluding coverage for orders of civil authority.

Doc. 1-2 at 2. On October 26, 2020, Plaintiffs filed this action seeking a declaratory judgment that the Policy provides coverage for their "covered losses caused by loss of access to the Insured Premises, including business income, extra expense, contamination, civil authority." Doc. 12 at 20. Plaintiffs also brought a Breach of Contract claim "on the basis that Defendant's denial of coverage runs afoul of the language of the policy and/or the public policy." Doc. 12 at 3, 16-18.

On January 22, 2021, Plaintiffs filed an Amended Complaint. Doc. 12. On February 5, 2021, Cincinnati filed its Motion to Dismiss for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). Doc. 15.

II. DISCUSSION

A. Standard of Review

In reviewing a Rule 12(b)(6) motion, "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993). The plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Id. at 563. A complaint attacked by a Rule 12(b)(6) motion to dismiss will survive if it contains enough facts to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.

662, 678 (2009) (quoting Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id.

In Iqbal, the Supreme Court articulated a two-step process for determining whether a complaint meets this plausibility standard. First, the court identifies allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Id. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Id. (citing Twombly, 550 U.S. at 555) (allegation that government officials adopted challenged policy “because of” its adverse effects on protected group was conclusory and not assumed to be true). Although the pleading requirements stated in “Rule 8 [of the Federal Rules of Civil Procedure] mark [] a notable and generous departure from the hyper-technical, code-pleading regime of a prior era ... it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” Id. at 678-79.

Second, to the extent there are well-pleaded factual allegations, the court should assume their truth and then determine whether they plausibly give rise to an entitlement to relief. Id. at 679. “Determining whether a complaint contains sufficient facts to state a plausible claim for relief “will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Id. “Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not ‘show[n]’-‘that the pleader is entitled to relief,’” and therefore should be dismissed. Id. (quoting Fed. R. Civ. P. 8(a)(2)).

The sufficiency of the factual allegations aside, “Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law.” Sons of Confederate Veterans v. City

of Lexington, 722 F.3d 224, 228 (4th Cir. 2013) (quoting Neitzke v. Williams, 490 U.S. 319, 327 (1989)). Indeed, where “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations, a claim must be dismissed.” Neitzke v. Williams, 490 U.S. at 328; see also Stratton v. Mecklenburg Cnty. Dept. of Soc. Servs., 521 Fed. Appx. 278, 293 (4th Cir. 2013)). The court must not “accept as true a legal conclusion couched as a factual allegation.” Anand v. Ocwen Loan Servicing, LLC, 754 F.3d 195, 198 (4th Cir. 2014).

B. Insurance Coverage Under the Policy

Plaintiffs contend coverage under the Policy exists “as a direct result of the COVID-19 pandemic” and the executive orders issued by the Governors of North and South Carolina that limited access to restaurants and closed in-person dining. Doc. 12 at 16. Specifically, Plaintiffs allege that they “have incurred, and continue to incur [] direct physical loss of or damage to property, a substantial loss of business income and additional expenses covered under the Policy.” Id.

a. North Carolina Law

The parties agree that the Court applies North Carolina law to interpret the language in the Policy. See Fortune Ins. Co. v. Owens, 526 S.E.2d 463, 465 (N.C. 2000) (“the substantive law of the state where the last act to make a binding contract occurred, usually delivery of the policy, controls the interpretation of the contract”); Stahle v. CTS Corp., 817 F.3d 96, 99-100 (4th Cir. 2016); Twin City Fire Ins. Co. v. Ben Arnold–Sunbelt Beverage Co. of S.C., 433 F.3d 365, 369 (4th Cir. 2005). Under North Carolina law, “[t]he party seeking coverage under an insurance policy bears the burden “to allege and prove coverage.” N. Carolina Farm Bureau Mut. Ins. Co. v. Martin by & through Martin, 851 S.E.2d 891, 895 (N.C. 2020). The plain language of the insurance policy governs its interpretation. Id. “Where no definition for a term is contained in

the policy, unambiguous terms will be given the meaning afforded them in ordinary speech unless the context indicates that another meaning was intended.” Guyther v. Nationwide Mut. Fire Ins. Co., 428 S.E.2d 238, 241 (N.C. Ct. App. 1993).

Ambiguities in the terms of the policy are construed against the insurer. See Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C., 692 S.E.2d 605, 612 (N.C. 2010). The provision must be “fairly and reasonably susceptible to multiple constructions” to be ambiguous. N. Carolina Farm Bureau Mut. Ins. Co., 851 S.E.2d at 895 (internal quotations and citation omitted). An ambiguity does not exist simply because “plaintiff makes a claim based upon a construction of [the policy] language which the company asserts is not its meaning.” Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co., 172 S.E.2d 518, 522 (N.C. 1970). Lastly, the insured bears the burden of showing that its claim fits within the policy. See Hobson Const. Co. v. Great Am. Ins. Co., 322 S.E.2d 632, 635 (N.C. Ct. App. 1984).

b. Business Income and Extra Expense Coverage Provisions

Under Section A of the Building and Personal Property Coverage Form, coverage exists for “direct ‘loss’ to Covered Property at the ‘premises’ caused by or resulting from any Covered Cause of Loss.” Doc. 1-1 at 25. Covered Property includes buildings, structures, signs, and business personal property. Id. There is no dispute that Plaintiffs’ properties are covered locations. Plaintiffs base their claims on the Business Income, Extra Expense, and Civil Authority coverage provisions of the Policy.

For Business Income coverage to exist, the suspension of business operations “must be caused by direct loss to property at a premises caused by or resulting from any Covered Cause of Loss.” Doc. 1-1 at 40, 93 (internal quotation marks omitted). “Loss” is defined as “accidental physical loss or accidental physical damage.” Doc 1-1 at 60. Likewise, for Extra Expense

coverage to exist, there must be “direct loss to property caused by or resulting from a Covered Cause of Loss.” Doc 1-1 at 41, 93.

Plaintiffs contend there is ambiguity in the Policy terms, such that the Court should construe the phrase “direct physical loss or damage” as providing for coverage caused by (1) direct physical loss or (2) direct damage. Doc. 17-2 at 7. Plaintiffs assert that because the policy provision separates “physical loss” from “physical damage” by the word “or,” they must have entirely different meanings. Doc. 16 at 19. But the Court disagrees. The plain language of the Policy requires direct physical loss or damage to Plaintiffs’ properties in order for coverage to apply under either the Business Income or Extra Expense provisions. These provisions are not ambiguous.

The majority of courts interpreting similar policy language have found that “direct physical loss” contemplates actual physical damage or loss to property. See, e.g., Summit Hospitality Group, LTD v. Cincinnati Ins. Co., No. 5:20-CV-254-BO, 2021 WL 831013, at *3 (E.D.N.C. Mar. 4, 2021) (finding that policy required direct physical loss or damage be incurred to trigger coverage under the Income Endorsement³ provision); Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co., No. 1:20-cv-02248-JPB, 2021 WL 778728, at *5 (N.D. Ga. March 1, 2021) (applying Georgia law to interpret Cincinnati Policy, which included Business Income, Civil Authority, and Extra Expense provisions with same language at issue here, to hold that “direct physical loss” requires “actual, physical damage to the covered premises” such that dentist office’s suspension of non-emergency procedures did not constitute actual, physical

³ The Income Endorsement provision provides: “We provide the coverages shown below in Paragraphs b. through e. during the “restoration period” when your “business” is necessarily totally or partially interrupted. This “interruption” must be caused by direct physical loss or damage from a covered peril to a building or business personal property at “covered locations” or in the open (or in vehicles) within 1,000 feet thereof.” Summit, 2021 WL 831013, at *3.

damage for coverage to exist); Mama Jo's Inc. v. Sparta Ins. Co., 823 F. App'x 868, 879 (11th Cir. 2020) (finding that the words “direct” and “physical” modify “loss” and “impose the requirement that the damage be actual,” such that summary judgment in favor of insurer was proper because the insured could not demonstrate actual physical loss⁴); Town Kitchen, LLC v. Certain Underwriters at Lloyd’s, et. al., No. 20-22832-CIV, 2021 WL 768273, at *4-7 (S.D. Fla. Feb. 26, 2021) (applying Florida law to interpret similar “direct physical loss or damage to” language) (“The harm from COVID-19 stems from having living, breathing human beings inside one's business—it is not damage done to the physical business itself, it is damage done to other living, breathing human beings. To the extent it is a physical harm, such as COVID-19 particles present on surfaces in the restaurant, those can be easily cleaned.”).

In summary, although the Policy does not define “direct physical loss” or “physical damage,” the Court finds that the plain and ordinary meaning requires actual, physical damage to the covered premises. There is no ambiguity in the policy language here. Therefore, the Court concludes its analysis at this step. See N. Carolina Farm Bureau Mut. Ins. Co., 851 S.E.2d at 895-96 (“If the language is not ‘fairly and reasonably susceptible’ to multiple constructions, then we ‘must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay.’”) (quoting Harleysville Mut. Ins. Co., 692 S.E.2d at 612)).

Plaintiffs’ reliance on Studio 417, Inc. v. Cincinnati Ins. Co., 478 F. Supp. 3d 794, 796 (W.D. Mo. 2020) and Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co., No. 1:20 CV 1239, 2021 WL 168422, at *13 (N.D. Ohio Jan. 19, 2021) is misplaced. Those cases do not apply

⁴ The Court acknowledges that Mama Jo’s Inc. involved Florida law. However, the Eleventh Circuit’s definition did not depend on an interpretation of Florida law. Therefore, the case is instructive here.

North Carolina law. Further, this Court disagrees with the expansive definition of “direct physical loss” in N. State Deli, LLC v. Cincinnati Ins. Co., which includes the “inability to possess something in the real, material or bodily world, resulting from a given cause without the intervention of other conditions.” No. 20-CVS-02569, 2020 WL 6281507, at *3 (N.C. Super. Oct. 9, 2020).

Rather, the Court looks to Summit Hospitality Group, LTD v. Cincinnati Ins. Co., a recent case from the Eastern District of North Carolina, for guidance on how to apply North Carolina law to COVID-19 insurance coverage cases. No. 5:20-CV-254-BO, 2021 WL 831013 (E.D.N.C. Mar. 4, 2021). In Summit, a hotel and restaurant management firm sought a declaration that Cincinnati’s policy provided business interruption coverage because executive orders issued in response to the COVID-19 pandemic interrupted access to their business locations as a “result of loss or damage to the property at non-plaintiff locations by COVID-19.” 2021 WL 831013, at *1-2 (internal quotations omitted). In determining whether business interruption coverage existed, the court applied Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp., 486 S.E.2d 249 (N.C. Ct. App. 1997).

In Harry’s Cadillac, the North Carolina Court of Appeals interpreted a business interruption coverage provision, which required that loss of income be caused by a direct physical loss. 486 S.E.2d at 251. Plaintiff auto dealership claimed it lost profits because customers could not access its property due to a snowstorm. Id. at 250. The court held there could be no business interruption coverage where the loss of income was caused by a snowstorm that only prevented access to the dealership – but did not cause any physical loss or damage to the property. Id. at 250-52 (“Plaintiff neither alleged nor offered proof that its lost business income was due to damage to or the destruction of the property, rather all the evidence shows

that the loss was proximately caused by plaintiff's inability to access the dealership due to the snowstorm . . . the loss incurred by plaintiff as a result of the inaccessibility of its dealership due to the snowstorm cannot be considered a covered cause of loss.”).

As in Summit and Harry's Cadillac, “the same result is dictated here by the plain and unambiguous terms of the policy.” Summit, 2021 WL 831013, at *4. This Court, in applying the definition of “direct physical loss” to the facts here, finds that the Amended Complaint fails to allege facts showing the direct physical damage or loss which is required for coverage under the Policy. And as in Harry's Cadillac, Plaintiffs' claimed business interruption was caused by a reduction in business from customers and not actual physical damage to the covered premises. Plaintiffs seek to recoup business losses incurred due to the diminished operational capacity mandated by the executive orders. But diminished capacity does not equate to actual physical damage or loss. See Skillets, LLC v. Colony Ins. Co., No. 3:20CV678-HEH, 2021 WL 926211, at *5 (E.D. Va. Mar. 10, 2021).

Even accepting the factual allegations as true and viewed in the light most favorable to Plaintiffs, the allegations fall far short of alleging actual, physical damage to their premises. There are no factual allegations that show COVID-19 was present at Plaintiffs' premises; that the covered properties were contaminated; or that Plaintiffs sustained any direct physical loss or damage. Likewise, public health officials never revoked the authorization for employees to be present and prepare food for take-out or to have customers enter to pick up food. Plaintiffs' allegation that the “risk of COVID-19 entering the Covered Property and contaminating the surfaces is direct physical loss of and damage to the Covered Property” has been rejected by other federal courts. See Kessler Dental Assocs., P.C. v. Dentists Ins. Co., No. 2:20-cv-03376-JDW, 2020 WL 7181057, at *4 (E.D. Pa. Dec. 7, 2020); K D Unlimited Inc. v. Owners Ins. Co.,

No. 1:20-CV-2163-TWT, 2021 WL 81660, at *5 (N.D. Ga. Jan. 5, 2021); Uncork & Create LLC v. Cincinnati Ins. Co., No. 2:20-CV-00401, 2020 WL 6436948 at *5 (S.D.W. Va. Nov. 2, 2020) (“There is a similar risk of exposure to the virus in any public setting, regardless of artful pleading as to the likelihood of the presence of the virus.”).

This Court joins the majority of courts finding that COVID-19 and related executive orders which reduce or suspend business operations to slow the spread of the virus do not cause physical damage or loss to insured property. See e.g., Summit, 2021 WL 831013, at *4; Uncork & Create LLC, 2020 WL 6436948, at *4; Skillets, LLC, 2021 WL 926211, at *6; TJBC, Inc. v. Cincinnati Ins. Co., No. 20-cv-815-DWD, 2021 WL 243583, at *5 (S.D. Ill. Jan. 25, 2021) (dismissing complaint “because Covid-19 does not cause tangible loss or damage to the physical dimension of Plaintiff’s property, and Plaintiff has not alleged that Covid-19 physically altered the appearance, or some material dimension of its property[.]”); Unmasked Mgmt., Inc. v. Century-Nat’l Ins. Co., No. 3:20-cv-01129-H-MDD, 2021 WL 242979, at *6 (S.D. Cal. Jan. 22, 2021) (“The Court agrees with Defendant that allegations showing the alleged presence of COVID-19 in or on the covered property are not sufficient to trigger coverage when direct physical loss of or damage to property is required.”).

The Court is sympathetic to the difficult and unprecedented circumstances facing Plaintiffs and similar businesses. But at face value, COVID-19 harms people and not property. “The novel coronavirus has no effect on the physical premises of a business. Non-essential businesses were ordered to shut down to prevent people from exposing one another.” Uncork & Create LLC, 2020 WL 6436948, at *4. Plaintiffs here have failed to allege physical loss or damage caused by COVID-19. For these reasons, the undersigned respectfully recommends that

Defendant's Motion to Dismiss with respect to coverage under the Business Income and Extra Expense provisions be granted.

c. Civil Authority Coverage Provision

Plaintiffs contend that the executive orders “prohibited access to the Covered Properties” and “COVID-19 caused direct physical loss of or damage to property in the area immediately surrounding and within one (1) mile of the Covered Premises.” Doc. 12 at 14. But for coverage to exist under the Civil Authority provision, there must be: (1) a government order prohibiting (not limiting) access to the insured premises and (2) the government order must be in response to direct physical damage to property other than the insured premises. Doc. 1-1 at 41, 94.

Therefore, this provision requires, at minimum, that access be denied at covered locations. Id.

Here, “[a]lthough the executive orders identified in the complaint may have restricted access to plaintiff's business locations, for example by preventing or restricting in-person dining, restricted access is not the same as denied access.” See Summit, 2021 WL 831013, at *4. See also Skilletts, LLC, 2021 WL 926211, at *7 (“The closure orders restricted the services Skilletts could provide to customers, but “[m]erely restricting access ... does not trigger coverage under [a] Civil Authority provision.”). Governor Cooper's Stay at Home Order encouraged the public to stay home but did not prohibit access to Plaintiffs' premises. Doc. 1-5. Rather, the Orders permitted anyone to access the premises for carry-out, drive-through, and delivery. Doc. 12 at 12. Moreover, Governor Cooper and Governor McMaster issued their Orders to reduce the spread of COVID-19 and limit people from gathering, and not because of any direct physical loss or damage to any property. See Uncork & Create LLC, 2020 WL 6436948, at *5 (“COVID-19 poses a serious risk to people gathered in proximity to one another, and the governmental orders closing certain businesses were designed to ameliorate that risk.”); Henry's Louisiana Grill, Inc.

v. Allied Ins. Co. of Am., No. 1:20-CV-2939, 2020 WL 5938755, at *5 (N.D. Ga. Oct. 6, 2020) (holding that an Executive Order that prompted closure of restaurant dining room “merely recognized an existing threat” and “did not represent an external event that changed the insured property”)).

Plaintiffs fail to allege that civil authority orders denied access to their premises. Therefore, Plaintiffs have failed to state a claim that the interruption by Civil Authority provision provides coverage. The undersigned respectfully recommends that Defendant’s Motion to Dismiss with respect to coverage under the Civil Authority provision be granted.

Since Plaintiffs cannot show that they are entitled to a declaration of coverage, the undersigned respectfully recommends that their remaining breach of contract claim be dismissed.

III. ORDER

IT IS ORDERED that all further proceedings in this action, including all discovery, are **STAYED** pending the District Judge’s ruling on this Memorandum and Recommendation and Order.

IV. RECOMMENDATION

FOR THE FOREGOING REASONS, the undersigned respectfully recommends that “Defendant The Cincinnati Insurance Company’s Rule 12(b)(6) Motion to Dismiss Plaintiffs’ Amended Complaint,” Doc. 15, be **GRANTED**.

V. NOTICE OF APPEAL RIGHTS

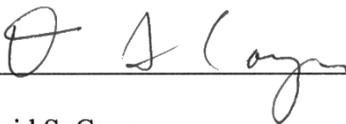
The parties are hereby advised that pursuant to 28 U.S.C. §636(b)(1)(c), written objections to the proposed findings of fact and conclusions of law and the recommendation contained in this Memorandum must be filed within fourteen days after service of same. Failure to file objections to this Memorandum with the District Court constitutes a waiver of the right to

de novo review by the District Judge. Diamond v. Colonial Life, 416 F.3d 310, 315-16 (4th Cir. 2005); Wells v. Shriners Hosp., 109 F.3d 198, 201 (4th Cir. 1997); Snyder v. Ridenour, 889 F.2d 1363, 1365 (4th Cir. 1989). Moreover, failure to file timely objections will also preclude the parties from raising such objections on appeal. Thomas v. Arn, 474 U.S. 140, 147 (1985); Diamond, 416 F.3d at 316; Page v. Lee, 337 F.3d 411, 416 n.3 (4th Cir. 2003); Wells, 109 F.3d at 201; Wright v. Collins, 766 F.2d 841, 845-46 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

The Clerk is directed to send copies of this Memorandum and Recommendation to the parties' counsel and to the Honorable Robert J. Conrad, Jr.

SO ORDERED AND RECOMMENDED.

Signed: March 18, 2021



David S. Cayer
United States Magistrate Judge



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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-010495

03/22/2021

HONORABLE DANIELLE J. VIOLA

CLERK OF THE COURT
K. Cabral
Deputy

A B T PERFORMING ARTS ASSOCIATION
INC

RYAN W ANDERSON

v.

CINCINNATI INSURANCE COMPANY, THE,
et al.

SANFORD K GERBER

JILL ANN HERMAN
JUDGE VIOLA

UNDER ADVISEMENT RULINGS RE
MOTION TO DISMISS AND MOTION FOR LEAVE TO AMEND

Motion to Dismiss

The Court has reviewed and considered Defendant The Cincinnati Insurance Company's Motion to Dismiss and Memorandum in Support of Its Motion to Dismiss Pursuant to Ariz. R. Civ. P. Rule 12(b)(6), the Response, the Reply, and the Four Supplemental Citation of Authorities In Support of Defendant's Motion to Dismiss including the Responses filed by ABT.¹ The Court has further considered the arguments of counsel presented on March 2, 2020.

Defendant asks the Court to dismiss Plaintiff's Complaint in its entirety because the property insurance policy at issue does not apply to damages caused by COVID 19. In particular, Defendant asserts that the policy's Business Income, Extra Expense, Civil Authority, and Ingress

¹ The Court expects a supplemental citation to authorities to be limited to the citation of authority without argument. To the extent that either the supplemental citations or responses contained argument, the Court disregarded the argument for purposes of ruling on the pending Motion to Dismiss.

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and Egress coverages only protect for income losses related to physical damage to property. Plaintiff has failed to allege physical damage.

Overview

Plaintiff, ABT, operates a Broadway style theater. In or around January 2020, Defendant, Cincinnati, issued and renewed an all risk commercial insurance policy for Plaintiff for the 2020 calendar year. In March, Arizona's Governor issued an executive order requiring certain businesses to close to slow the spread of COVID-19. ABT was one of those businesses that closed as a result of the executive order. At least one of ABT's employees tested positive for the virus. ABT asserts the risk of the virus rendered ABT's property unsafe. ABT alleges that the harm caused by the virus on ABT's property, along with the executive orders preventing ingress and egress establishes a direct accidental physical loss or direct accidental physical damage to property triggering coverage under the Cincinnati policy. Plaintiff presented a claim in March 2020 and alleges coverage applies under the Business Income, Extra Expense, Civil Authority and Ingress and Egress coverages. The policy has no explicit virus exclusion. As a result, ABT claims it had a reasonable expectation of coverage for losses related to a virus pandemic.

Analysis

Insurance Policy

Arizona courts interpret insurance contracts according to their plain and ordinary meaning. *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43, 46 (App. 2000). Ambiguities are construed against the insurer, however, this rule only applies to provisions that are "actually ambiguous." *Id.* The Insured bears the burden to establish coverage under an insuring clause, and the insurer bears the burden to establish the applicability of any exclusion. *Id.* at ¶ 13. In this case, no exclusions are alleged or applicable.

The relevant policy provisions for this dispute include the following:

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.

Motion at Ex. E at 38 (emphasis added).

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We will pay for the actual loss of “Business Income” you sustain due to the necessary “suspension” of your “operations” during the “period of restoration”. The “suspension” must be caused by direct “loss” to property at “premises” which are described in the Declarations and for which a “Business Income” Limit of Insurance is shown in the Declarations. The “loss” must be caused by or result from a Covered Cause of Loss.

Motion at Ex. E at 89 (emphasis added). “Loss” is defined, in part, as “accidental physical loss or accidental physical damage.” Motion at Ex. E at 58, 97.

Covered Cause of Loss is defined as “direct ‘loss’ unless the ‘loss’ is excluded or limited in this Coverage Part.” Motion at Ex. E at 25, 90. As discussed above, loss means direct physical loss or damage. Accordingly, there is no Covered Cause of Loss unless the insured first establishes, among other things, that there is direct physical loss or damage.

To the extent ABT seeks coverage under Extra Expense, Civil Authority, or Ingress and Egress, direct physical loss or damage to property is required. *See* Motion at Ex. E at 39, 89-90, 92. The Civil Authority coverage also requires that access to the insured’s property be prohibited by an order from a civil authority. Motion at Ex. E at 39; 90. Similarly, the Ingress and Egress coverage only applies if the insured sustains actual loss of business income or extra expense “caused by the prevention of existing ingress or egress at [an insured premises] due to direct ‘loss’ by a Covered Cause of Loss at a location contiguous to such ‘premises.’” Motion at Ex. E at 92. As a result, the Ingress and Egress coverage requires both direct physical loss or damage at a location contiguous to ABT’s premises, and the prevention of access to ABT’s premises as a result of that direct physical loss.

ABT’s Allegations

The initial burden to establish coverage is on the insured. *Keggi*, 199 Ariz. at 46. ABT alleges it sustained a loss of business income from the following: 1) harm to the property by the virus located on surfaces in ABT’s premises; 2) shutdown orders; and 3) prevention of ingress/egress due to presence of the virus and risk of COVID at ABT’s premises. ABT seeks coverage for economic damages under its “all risk” property insurance policy. ABT alleges the virus was present at the premises and one of ABT’s employees had COVID-19.

Both parties cite authority from state and federal trial courts across the country that have addressed the issues presented. Neither party presented the Court with appellate authority from Arizona or elsewhere. Notwithstanding the number of recent cases reaching opposite conclusions,

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The overwhelming majority of cases to consider business income claims stemming from COVID-19 with similar policy language hold that “direct physical loss or damage” to property requires some showing of actual or tangible harm to or intrusion on the property itself.

Promotional Headwear International v. Cincinnati Insurance Company, 2020 WL 7078735 (D. Kan. December 3, 2020); see *Klos Enterprises, LLC v. The Cincinnati Insurance Company, et al.*, Superior Court, Maricopa County, Cause No. CV2020-010496, Hon. Roger Brodman (2/10/2021) and (02/25/2021) (motion for reconsideration denied) and *Street Grill and Bar LLC et al v. Cincinnati Insurance Company*, 2:20CV01326 (D. Arizona, March 8, 2021). The Court has reviewed and considered the reasoning in the cases presented by both parties.² Ultimately, the Court finds the reasoning requiring a showing of actual or tangible harm to the property to be more persuasive. See *id.*; see also *Promotional Headwear*, 2020 WL 7078735 at *5-6 (citing multiple federal circuit court decisions addressing business income claims under policies that required “direct physical loss to property” and noting that “other circuit court decisions support the interpretation that ‘physical damage requires actual, tangible damage.’”).

While *Promotional Headwear* evaluated the policy under Kansas law, the analysis is consistent with Arizona law. See e.g., *White Mountain Communities Hospital, Inc. v. Hartford Casualty Insurance Co.*, 2015 WL 1755372 (D. Ariz. 2015). In *White Mountain*, the Arizona federal district court evaluated language similar to that in the ABT policy and concluded that “coverage only applies to business income loss that results from physical property damage.” *Id.* at *4. In *White Mountain*, the insured hospital alleged economic losses as a result of a nearby fire. *Id.* at *2. The hospital failed to show that the lost income was a result of physical damage to the property as opposed to “unfavorable business conditions in the area as a result of the fire.” *Id.* at *4. As in *White Mountain*, the language in the ABT policy refers to a loss to property rather than a loss of property. The policy language is unambiguous. The policy requires direct physical loss or physical damage to property.

Based on the above, the Court concludes that coverage applies if there is direct physical loss or damage to the property. The Court’s conclusion is supported by other decisions around the country evaluating similar provisions. See e.g., *Mama Jo’s Inc. v. Sparta Ins. Co.*, 823 Fed.Appx. 868, 879 (11th Cir. 2020) (finding that an item or structure that merely need to be cleaned had not suffered a “direct physical loss”); *Pentair, Inc. v. Am. Guarantee & Liab. Ins Co.*, 400 F.3d 613,

² The Court considered the four notices of supplemental authorities filed by Cincinnati and the corresponding responses filed by ABT. As noted during oral argument, counsel for the parties should be commended for their efforts in briefing and arguing the issues as well as tracking daily changes in courts around the country.

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616 (8th Cir. 2005) (affirming the district court’s ruling that a supplier’s inability to function after the loss of power did not constitute direct physical loss or damage under an insurance contract); *Source Food Tech, Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) (finding that a company’s inability to transport its beef products to the United States as a result of a beef embargo did not constitute “direct physical loss to property”). ABT has not alleged such loss or damage.³

Even if the virus was present or an employee had COVID-19, such risks are present in any public setting. See *Uncork and Create LLC v. Cincinnati Insurance Co.*, 2020 WL 6436948 (S.D.W.Va. 11/2/2020) (noting similar risk of exposure in any public setting and lack of threat to inanimate structures due to ability to eliminate virus on surfaces); *Mama Jo’s Inc.*, 823 Fed.Appx. at 879 (“under Florida law, an item or structure that merely needs to be cleaned has not suffered a ‘loss’ which is both ‘direct’ and ‘physical.’”). As explained in *Uncork and Create*, “[n]o repairs or remediation to the premises are necessary for its safe occupation in the event the virus is controlled and no longer poses a threat. In short, the pandemic impacts human health and human behavior, not physical structures.” *Id.* at *5.

Lack of Virus Exclusion

ABT asserts that the policy has no virus exclusion. Even if that is true, the initial burden to establish coverage is on ABT. *Keggi*, 199 Ariz. at 46. As discussed above, ABT has failed to establish coverage in the absence of physical loss to property or physical damage. As a result, the lack of a virus exclusion is irrelevant if coverage does not apply. See e.g., *Henry’s Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, No. 1:20-CV-2939-TWT, 2020 WL 5938755 at 16, n. 3 (N.D. Ga. Oct. 6, 2020).

Civil Authority Coverage

As discussed above, Civil Authority coverage applies for purposes of this case if there is a Covered Cause of Loss – direct physical loss to property, other than at ABT’s premises and access to the property was prohibited by the civil authority. The virus is the underlying basis for ABT’s claims. If the virus cannot cause physical loss to property or physical damage to property at ABT’s premises, the same is true for other property. There is no question that the government shut down orders and related restrictions required modification or elimination of certain business operations. A change in operation is distinguishable from physical loss to property or physical damage.

³ The Court does not mean to suggest that ABT did not suffer economic damage as a result of the virus – only that the harm was not the result of physical damage to ABT property giving rise to coverage under the policy at issue.

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Even if the restrictions imposed resulted in direct physical loss to property or physical damage, ABT was not prohibited from accessing its property. ABT does not allege that it was prohibited from accessing its property as opposed to being restricted in the way it operated its business on the property. *See Pappy's Barber Shops, Inc. et al. v. Farmers Group, Inc., et al.*, No. 20-CV-907-CAB-BLM, 2020 WL 5500221 at *6 (S.D. Cal. Sept. 11, 2020).

Ingress and Egress Coverage

As discussed above, the Ingress and Egress Coverage requires both a direct physical loss at a location contiguous to the insured's property and the prevention of access to the insured's property as a result of that direct physical loss. *See Motion, Ex. E.* at 91. ABT has not alleged direct physical loss nor prevention of access. *See Promotional Headwear*, 2020 WL 7078735 at *10 (explaining that plaintiff insured failed to allege direct physical loss or damage to a location contiguous to the property).

IT IS ORDERED granting Cincinnati's Motion to Dismiss with prejudice as to Plaintiff's claims asserting coverage under the language of the insurance policy.

Motion for Leave to Amend

Pending before the Court is Plaintiff's Rule 15 Motion for Leave to Amend filed January 20, 2021, the Response, and Reply. The Court has reviewed and considered the briefing and further considered the arguments of counsel.

Rule 15(a)(2) provides that "[l]eave to amend must be freely given when justice requires." Here, Cincinnati does not identify any prejudice or delay as a basis for objecting to the proposed amended complaint. Cincinnati instead asserts that the amendments are futile. To the extent that the amendments relate to whether coverage applies, the Court agrees. To the extent ABT seeks to further clarify its allegations supporting its bad faith or negligent misrepresentation claims, the Court concludes futility is not a basis to deny the Motion.

Accordingly,

IT IS ORDERED granting Plaintiff's Rule 15 Motion for Leave to Amend filed January 20, 2021 as to the bad faith and negligent misrepresentation claims.

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02/10/2021

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

K L O S ENTERPRISES L L C

RYAN W ANDERSON

v.

CINCINNATI INSURANCE COMPANY, THE,
et al.

SANFORD K GERBER

JILL ANN HERMAN
JUDGE BRODMAN

RULING ON MOTION TO DISMISS

The Court reviewed the Motion to Dismiss filed by Cincinnati Insurance Company, the response and reply. The Court held oral argument on February 5, 2021.

At issue is a property insurance policy issued by Cincinnati to KLOS Enterprises, LLC (“KLOS”) concerning “Building and Personal Property Coverage.” The facts are not in dispute. KLOS’s business was significantly impacted by COVID-19 and the accompanying orders issued by Governor Ducey. Plaintiff made a claim to Cincinnati for business losses under the policy. Cincinnati denied the claim. Litigation ensued.

Interpretation of an insurance contract is a question of law. *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43, 46, ¶ 11 (App. 2000). Courts construe provisions in insurance contracts according to their plain and ordinary meaning. *Id.* Ambiguity in an insurance policy will be construed against the insurer; however, this rule applies only to provisions that are “actually ambiguous.” *Id.*

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The insured bears the burden to establish coverage under an insuring clause, and the insurer bears the burden to establish the applicability of any exclusion. *Id.* at ¶ 13.

Plaintiff argues that the COVID-19 pandemic has triggered coverage for economic damages under an “all risk” property insurance policy. Numerous trial courts from across the country have addressed this or similar issues. Neither party cites any appellate authority addressing COVID-19, but this court is certain that published opinions will soon follow. There are trial court decisions on both sides of the issue. However, as noted by the United States District Court in *Promotional Headwear International v. Cincinnati Insurance Company*, 2020 WL 7078735 (D.Kans. 12/03/2020):

The overwhelming majority of cases to consider business income claims stemming from COVID-19 with similar policy language hold that “direct physical loss or damage” to property requires some showing of actual or tangible harm to or intrusion on the property itself.

Id. at* 6.¹

This court reviewed decisions on both sides of the issue. The logic in *Promotional Headwear* is more persuasive. The court cited multiple federal circuit court decisions addressing business income claims under policies that required “direct physical loss to property.” The court noted that “other circuit court decisions support the. . . interpretation that ‘physical damage’ requires actual, tangible damage.” *See* discussion on p. 5-6.

Promotional Headwear is particularly persuasive because it involved the identical insurance policy as the instant case. The Federal District Court dismissed the plaintiff’s complaint with prejudice.

This court sees no significant difference between Kansas law and Arizona law. If anything, Arizona law is more favorable to Cincinnati because *White Mountain Communities Hospital, Inc. v. Hartford Casualty Insurance Co.*, 2015 WL 1755372 (D.Ariz. 2015), a non-binding decision of the Arizona federal district court, addresses language similar to that in instant policy and concludes that the “coverage only applies to business income loss that results from physical property damage.” *Id.* at *4. Like the instant situation, the policy in *White Mountain* described a covered loss as loss *to* property (as opposed to loss *of* property). (Emphasis added.)

1. Plaintiffs argue that ambiguity is established because different trial courts have reached different results. This argument does not change unambiguous policy language to ambiguous language. More importantly, this court predicts that appellate courts will trend toward *Promotional Headware* when faced with interpreting the instant policy.

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In conclusion, the court finds that in order for there to be coverage, there must be direct physical loss or damage to the property. Plaintiff has not alleged any such loss here.

Plaintiff argues that *Keggi* establishes that an E. coli contamination of drinking water is similar to a virus. The case is distinguishable. *Keggi* was a third-party claim for personal injury damages arising out of the consumption of contaminated water. The case does not involve interpretation of a property insurance policy or whether direct physical loss or damage to the property is required to trigger coverage.

Nor is this court persuaded by plaintiff's argument that the virus caused property damage by contaminating the property. This argument was rejected by *Promotional Headwear and Uncork and Create LLC v. Cincinnati Insurance Co.*, 2020 WL 6436948 (S.D.W.Va. 11/2/2020). In *Uncork*, the court rejected the same argument, concluding:

There is a similar risk of exposure to the virus in any public setting, regardless of artful pleading as to the likelihood of the presence of the virus. Secondly, even when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies, in its presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to property. Because routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover, and a covered "loss" is required to invoke the additional coverage for loss of business income under the Policy.

Id. at *5. The virus has a limited life on surfaces, and the Governor's order extended beyond a residual viral life. The allegation that one of plaintiff's employees had COVID-19 does not establish physical damage to plaintiff's property. "Physical damage" requires actual, tangible damage." *Promotional Headwear*, 2020 WL 2028735 at *5. The (wholly speculative) presence of the virus at plaintiff's facility was not the reason plaintiff's business was shut down.

Like the court in *Promotional Headwear*, this court rejects plaintiff's argument that the "Civil Authority" provision provides coverage. The Complaint fails to allege damage to surrounding property for the same reasons discussed above. *See Promotional Headwear* at *9.

Similarly, plaintiff fails to state a claim under the Ingress/Egress provision. Coverage under the ingress/egress provision requires "direct" loss by a Covered Cause of Loss at a location contiguous to" plaintiff's property. It also requires "the prevention of existing ingress or egress," from the Covered Cause of Loss. Like the plaintiff in *Promotional Headwear*, KLOS

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fails to identify a contiguous property and fails to allege that there was direct physical loss or damage to a location contiguous to the property. *Id.*

Plaintiff argues that the insurance policy should be interpreted against Cincinnati because Cincinnati had the opportunity and rejected a virus exclusion. However, exclusions are not relevant unless there is underlying coverage. Here, plaintiff failed to establish coverage under the insuring clause, so exclusions do not come into play.

Accordingly, Cincinnati's Motion to Dismiss is granted on any count of the complaint arising from the claim that the instant property insurance policy provides coverage.

Plaintiff recently filed a motion to file an amended complaint. At oral argument, plaintiff's counsel seemed to suggest that there were claims arising out of representations made by Cincinnati to plaintiff. Frankly, the court is uncertain as to the status of these other claims, and whether they are affected by the legal ruling that the Cincinnati property insurance policy does not provide coverage for plaintiff's COVID-19 damages.

In *Wigglesworth v. Maudlin*, 195 Ariz. 432, 439, ¶ 26 (App. 1999), the court held that before granting a Rule 12(b)(6) motion to dismiss, the non-moving party should be given an opportunity to amend the complaint if such an amendment cures its defects. This court is uncertain as to whether plaintiff's complaint could be amended to cure its defects. Accordingly, the court will provide plaintiff an opportunity to amend its complaint to clarify its other claims against Cincinnati.

The court wants to be clear about what this ruling is and what it is not. The court grants Cincinnati's motion to dismiss the claim that, by itself, Cincinnati's property insurance policy provided coverage to plaintiff arising out of the COVID-19 pandemic. The court is not ruling that plaintiff has no other claims, at least to the extent those claims are based on conduct other than the language in the insurance policy.

IT IS ORDERED that Cincinnati's Motion to Dismiss is granted on plaintiff's claim that the language of the insurance policy provides coverage.

IT IS FURTHER ORDERED that plaintiff may file an amended complaint within 10 days from the filed date of this order. Plaintiff's motion to amend is denied as moot, subject to the soon-to-be filed amended complaint. Nothing in this ruling prevents defendant from filing a motion to dismiss or motion for summary judgment against the amended complaint. If no amended complaint is filed, the court will enter a Rule 54(b) judgment dismissing the case against Cincinnati with prejudice and the parties can take their coverage dispute to the Arizona Court of Appeals.

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HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

K L O S ENTERPRISES L L C

RYAN W ANDERSON

v.

CINCINNATI INSURANCE COMPANY, THE,
et al.

SANFORD K GERBER

JILL ANN HERMAN
JUDGE BRODMAN

RULING ON MOTION FOR RECONSIDERATION

The Court reviewed Plaintiff KLOS Enterprises, LLC's motion for reconsideration.

Motions for reconsideration are not to be used to make new arguments. *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). A motion for reconsideration is not an opportunity for a party to make a better argument than it did the first time. Nor is a motion for reconsideration to be used to ask the court merely to rethink what it has already thought through, rightly or wrongly. *United States v. Rezzonico*, 32 F.Supp.2d 1112, 1116 (D. Ariz. 1998); *Bryan v. Murphy*, 246 F.Supp.2d 1256, 1259 (N.D.Ga. 2003) (stating that a motion for reconsideration should not be used "to present the court with arguments already heard and dismissed or to repackage familiar arguments to test whether the court will change its mind"). Plaintiff had the opportunity to fully brief and argue its legal positions.

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The Court does not believe that alleging an infected person was on the property results in actual, physical damage to the property. The allegation that a key employee became ill with COVID-19 is not a loss to property triggering property insurance coverage. The motion for reconsideration is denied.

Cross-Motion for Summary Judgment and Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment on August 28, 2020. On November 2, 2020, the Plaintiff filed a Combined Response and Reply in Support of its Motion for Partial Summary Judgment. On November 27, 2020, Cincinnati filed a Reply in Support of its Cross-Motion for Summary Judgment. A remote hearing, due to COVID-19, was held on Plaintiff's Motion for Partial Summary Judgment and Cincinnati's Cross-Motion for Summary Judgment on December 3, 2020. At the conclusion of the hearing, the Court took the matter under advisement. Following the hearing, both the Plaintiff and Cincinnati submitted a number of Supplemental Authorities for the Court to review. The most recent Supplemental Authority from Cincinnati was submitted on March 9, 2021 (Seventh Motion to Supplement Authority) and from IRT on March 2, 2021.¹

Having been fully briefed on the issues set forth in this matter, the Court finds now as follows:

I. UNDISPUTED RELEVANT FACTS

A. The Insurance Policy

1. This is an insurance-coverage matter arising out of a commercial property insurance policy (the "Policy"), issued by Cincinnati to IRT and effective for the period of August 30, 2018 through August 30, 2021. [IRT Ex. 13 ("Policy"), at IRT_000001.] The 379-page Policy includes several coverages (called "forms" in the Policy).

¹ The Court recognizes and appreciates the excellent advocacy and arguments by both counsel for Plaintiff and counsel for Defendant at the hearing on these matters as well as in their briefs and supplemental authority.

2. The Policy contains a Building and Personal Property Coverage Form (the “Building Form”), which states that Cincinnati “will pay for direct ‘loss’ to Covered Property at the ‘premises’ caused by or resulting from any Covered Cause of Loss.” [Policy at IRT_000025.]
3. The Building Form defines “premises” as the Location and Buildings described in the Declarations. [Policy at IRT_000051.] The Declarations lists the property located at 140 W. Washington St., Indianapolis, Indiana, which is IRT’S theatre. [Policy at IRT_000001.]
4. The Building Form defines “loss” to mean “accidental physical loss or accidental physical damage.” [Policy at IRT_000060.]
5. The Building Form defines Covered Cause of Loss to mean “direct ‘loss’ unless the ‘loss’ is excluded or limited in this Coverage Part.” [Policy at IRT_000027.]
6. The Building Form contains exclusions:

(1) We will not pay for “loss” caused directly or indirectly by any of the following, unless otherwise provided. Such “loss” is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the “loss”:

(a) Ordinance or Law

Except as provided in **SECTION A. COVERAGE, 4. Additional Coverages, g. Ordinance or Law**, the enforcement of or compliance with any ordinance or law:

- 1) Regulating the construction, use or repair of any building or structure; . . .

This exclusion applies whether “loss” results from:

- 1) An ordinance or law that is enforced even if the building or structure has not been damaged; or
- 2) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of any building or structure, or removal of its debris, following a direct “loss” to that building or structure.

* * *

(2) We will not pay for "loss" caused by or resulting from any of the following

(b) **Delay or Loss of Use**

Delay, loss of use or loss of market.

* * *

(3) We will not pay for "loss" caused by or resulting from any of the following

(b) **Acts or Decisions**

Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

[Policy at IRT_000027, -30, -32.]

7. The Policy also contains a Business Income (And Extra Expense) Coverage Form. This form includes the following coverage grant for a business income loss:

1. Business Income

a. We [Cincinnati] will pay for the actual loss of "Business Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at "premises" which are described in the Declarations.... The "loss" must be caused by or result from a Covered Cause of Loss.

[Policy at IRT_000106.]

8. The Business Income Form references and incorporates the Building Form's Covered Cause of Loss section, which contains the Building Form's definition of Covered Cause of and exclusions. [Policy at IRT_000107.]

9. The Policy defines "loss" as "accidental physical loss or accidental physical damage." [Policy at IRT_000114.]

10. The Policy defines "period of restoration" as the period of time that:

- a. Begins at the time of direct “loss”.
- b. Ends on the earlier of:
 - i. The date when the property at the “premises” should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
 - ii. The date when business is resumed at a new permanent location.

[Policy at IRT_000114.]

11. The Policy defines “suspension” as:

- a. The slowdown or cessation of your business activities; and
- b. That a part or all of the “premises” is rendered untenable if coverage for “Business Income” including “Rental Value” or “Rental Value” applies.

[Policy at IRT_000114.]

12. The Policy defines “premises” as “the Locations and Buildings described in the Declarations.” [Policy at IRT_000051.] The Declarations lists the property located at 140 W. Washington St., Indianapolis, Indiana, which is IRT’S theatre. [Policy at IRT_000001.]

13. For the meaning of “Covered Causes of Loss,” the Policy refers to the Building and Personal Property Coverage Form. [Policy at IRT_000107.]

14. The Building and Personal Property Coverage Form defines “Covered Cause of Loss” as “direct ‘loss’ unless the ‘loss’ is excluded or limited in this Coverage Part.” [Policy at IRT_000027.]

15. Cincinnati’s Policy does not contain any “virus” exclusion. [See Policy.]

B. COVID-19

16. In January 2020, the first known case of a U.S. resident infected by the novel SARS-COV-2 Virus (the “Coronavirus” or “COVID-19”) was reported in the State of Washington. [Declaration of Dr. Richard Feldman (“Feldman Decl.”) ¶ 13, Attachment 11.] The Virus quickly spread across the United States. [*Id.*]
17. The first case in Indiana was confirmed on March 6, 2020, and the first death occurred on March 16, 2020. [*Id.*; Leagre Aff., Ex. 1, Indiana Executive Order (“E.O.”) 20-31, at 1.]
18. COVID-19, the disease caused by SARS-CoV-2, is a “severe respiratory illness” caused by “a rapidly spreading virus that is transmitted from human-to-human” and which “results in symptoms ranging from fever, cough, acute respiratory distress, pneumonia, and even death.” [Leagre Aff. ¶ 5, Exhibit 2, Ind. E.O. 20-02, at 1.]
19. Within twelve weeks, SARS-CoV-2 infected tens of thousands of Indiana residents [Ex. 1, Ind. E.O. 20-31, at 1] and nearly two million people in the United States. [See *United States Covid-19 Cases and Deaths by State*, U.S. Ctr. for Disease Control & Prevention (<https://www.cdc.gov/covid-data/tracker/index.html>).] As of December 3, 2020, more than 5,000 persons in Indiana and more than a quarter million Americans had died from the disease.
20. The SARS-CoV-2 Virus is extremely dangerous for several reasons:
 - a. It is highly contagious, spreading through respiratory droplets (including during human speech) and contaminated surface where it can survive for days;

- b. It can be spread by asymptomatic and pre-symptomatic carriers, who appear to represent 86% of all actual infections;
- c. It has an incubation period of at least 2-12 days, allowing people to spread the virus long before they know they are infected;
- d. Symptoms are wide-ranging and include fever, cough, shortness of breath, chills, malaise, sore throat, confusion, congestion, myalgia, dizziness, headache, nausea, pneumonia, cardiac arrhythmias, coagulopathy, shock, dyspnea, hypoxemia and silent hypoxia, lung edema, and organ failure; and
- e. “[H]ealthy persons of any age can become critically ill with Covid-19,” and the mortality rate appears to be fairly high (1-5% of the infected population and over 10% of patients needing hospitalization).

[Feldman Decl. ¶¶ 14-27.]

21. The first vaccine for the disease was approved for emergency use while this motion was under advisement. Deaths and hospitalizations, including those in Indiana, have continued to rise.

C. Closure Orders Due to COVID-19 and IRT’s Response

22. In March 2020, world, federal, state, and local leaders declared emergencies and began issuing restrictions to slow the spread of the virus. [Leagre Aff., Ex. 3, Ind. E.O. 20-26, at 1-3.] The purpose of the restrictions was to “treat, prevent, or reduce the spread of this dangerous virus” by requiring people to remain in their homes “in order to reduce their likelihood of contracting this virus and/or transmitting it to others.” [Leagre Aff., Ex. 4, Ind. E.O. 20-06, at 1.]

23. This led to a series of executive orders and other actions:

- a. On March 6, 2020, Governor Eric Holcomb issued Executive Order 20-02, which declared that a public health emergency existed throughout the State of Indiana. [IRT Ex. 2, Ind. E.O. 20-02, at 1-2].]
- b. On March 11, 2020, the World Health Organization declared COVID-19 to be a global pandemic. [IRT Ex. 7, Ind. E.O. 20-08, at 1.]
- c. On March 12, 2020, Indianapolis Mayor Joe Hogsett and the Marion County Health Department ordered a 30-day suspension of all non-essential gatherings of more than 250 individuals. [IRT Ex. 8, March 12, 2020 Press Release, at 1.]
- d. On March 13, 2020, the President of the United States declared a national emergency. [IRT Ex. 9, Presidential Proclamation 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020).]
- e. On March 16, 2020, Mayor Hogsett and the Marion County Health Department issued a series of orders for Marion County prohibiting all public gatherings of 50 or more people and closing bars, nightclubs, movie theatres, entertainment venues, gyms, and fitness facilities. [IRT Ex. 6, Marion Cnty. E.O. No. 1, 2020, at 4-5; IRT Ex. 10, Marion Cnty. Health Dep't Order No. 1, at 1.]
- f. On March 23, 2020, Governor Holcomb issued Executive Order 20-08, which ordered all individuals living in the State of Indiana to stay at home through at least April 6, 2020, and ordered all non-essential businesses to close, with limited exceptions. [IRT Ex. 7, Ind. E.O. 20-08, at 2-3.]

Governor Holcomb extended the stay-at-home order until May 23, 2020.

[IRT Ex. 11, Ind. E.O. 20-18, at 3 (extension to April 20, 2020); IRT Ex. 12, Ind. E.O. 20-22, at 2 (extension to May 1, 2020); IRT EX. 3, Ind. E.O. 20-26, at 1-3 (extension to May 23, 2020, as to Marion County).]

24. After Mayor Hogsett's March 12 Order prohibiting gatherings of more than 250 individuals, IRT announced that its current performances of *Murder on the Orient Express* would continue, but that capacity would be limited to 250 people.

[Affidavit of Suzanne Sweeney ¶ 4.]

25. In his role as a volunteer member of the board of directors of IRT, Dr. Richard Feldman advised IRT leadership just prior to March 16, 2020, that in his professional opinion, "live performances should be suspended." [Feldman Decl. ¶ 29.] Dr. Feldman is an Indiana-licensed physician who served as the Indiana State Commissioner of Health from 1997 to 2001 and in other public health roles, including as a member of the Marion County Health Department Scientific Advisory Committee for Pandemic Flu. [Feldman Decl. ¶¶ 2-3.] He testified in his affidavit that this suspension "was the only responsible course of action available to the IRT." [Feldman Decl. ¶ 29.]

26. Dr. Feldman's opinion was based on several factors about the virus, including its: (1) ability to spread through respiratory droplets and aerosolization [*Id.* ¶¶ 15-16]; (2) the rate of asymptomatic and pre-symptomatic spread [*Id.* ¶¶ 17-19]; and (3) the potentially severe consequences for an infected person [*Id.* ¶¶ 21-28.]

27. Dr. Feldman stated that a theater establishment like IRT'S presents the most dangerous situation for person-to-person transmission:

The most dangerous situation is a large gathering in an enclosed place, such as a basketball game, a movie theatre, or a live production theatre. In such environments, the droplets exhaled by infected persons recirculate in the air with little ability to dissipate. The longer the same people are in the confined area, the higher the concentration of infected particles in the air, and thus the greater the risk that persons will inhale the virus and become infected.

[Feldman Decl. ¶ 20.]

28. On March 16, IRT announced its decision to close its doors for the rest of the 2019-2020 season. [*Id.* ¶ 5.] IRT made this decision after considering state, city, and county orders and guidelines and to protect the health and well-being of IRT'S patrons, staff, and artists. [*Id.* ¶ 6.] IRT made this decision before Mayor Hogsett and the Marion County Health Department ordered all entertainment venues closed. [Second Sweeney Aff. ¶ 4.]
29. On March 18, 2020, the IRT and WFYI Indianapolis taped a live performance of *Murder on the Orient Express* "in front of a small house of IRT staff, designers, Board members, and actors' families." [Cincinnati Br., Ex. D at 2.] The performance was made available online for the public to purchase. [Cincinnati Br., Ex. D; Second Sweeney Aff. ¶ 7.]
30. On March 23, 2020, IRT announced, "Effective 3.23.20, the IRT is closed due to the State of Indiana's COVID-19 orders." [Cincinnati, Ex. C at 1.]
31. While the theatre was closed to the public, IRT employees made improvements to the theatre's physical plant and equipment.
32. The State of Indiana began to ease its business restrictions in June 2020. Effective June 19, 2020, Marion County's "Cultural, entertainment, and tourism

sites may reopen at 50% capacity indoors and 50% capacity outdoors.”

[Cincinnati Ex. G, Marion Cnty. Health Dep’t Order No. 16, at 4.]

33. IRT has remained closed to in-person performances, even after state and local authorities lifted some restrictions on venues like IRT’S theatre. [*Id.* ¶¶ 5-6.] For its 2020-2021 season, IRT intends to produce a virtual season in order to safely accommodate staff, actors and patrons. [Second Sweeney Aff. ¶¶ 5-6.]

D. IRT’s Claim to Cincinnati

34. On March 20, 2020, IRT submitted a claim to Cincinnati for lost business income and extra expense coverage as a result of the COVID-19 pandemic under its commercial property insurance policy. [IRT Br. 8-9; Cincinnati Br. 7.]

35. On March 23, 2020, Cincinnati sent IRT a letter seeking information about IRT’s claim and reserving Cincinnati’s rights under the Policy as its investigation continued. [IRT Ex. 16.] The information requested included a description of loss or damage at the premises by the Coronavirus, inspection and test reports referring to or relating to actual or suspected presence of Coronavirus at the premises and any other documentation referring or relating to the presence of Coronavirus among employees or visitors to the premises. [IRT Ex. 16 at 9.]

36. IRT did not respond to Cincinnati’s letter or provide any of the information requested. [Cincinnati Br. 7 (citing Affidavit of Chad Dowdy, Aug. 28, 2020, (Dowdy Aff.), ¶ 4).]

37. A few days later, Cincinnati stated that its initial conclusion was that there was no coverage because there had been no “physical loss”:
At the threshold, there must be direct physical loss or damage to Covered

Property caused by a covered cause of loss in order for the claim to be covered. . . Direct physical loss or damage generally means a physical effect on Covered Property, such as deformation, permanent change in physical appearance or other manifestation of a physical effect. Your notice of claim indicates that your claim involves Coronavirus. However, the fact of the pandemic, without more, is not direct physical loss or damage to property at the premises.

[IRT Ex. 16.]

38. On April 3, 2020, IRT filed this lawsuit against Cincinnati, seeking declaratory relief.

II. STANDARD ON MOTION FOR SUMMARY JUDGMENT

Under Indiana Trial Rule 56, “summary judgment is precluded by any “genuine” issue of material fact – that is, any issue requiring the trier of fact to resolve the parties’ differing accounts of the truth.” *Hughley v. State*, 15 N.E.3d 1000, 1002 (Ind. 2014). “Summary judgment should not be granted when it is necessary to weigh the evidence.” *Bochnowski v. Peoples Fed. Sav. & Loan Ass’n*, 571 N.E.2d 282, 285 (Ind.1991). “Even though Ind. R. Trial P. 56 is nearly identical to Fed. R. Civ. P. 56, the Supreme Court of Indiana has long recognized that Indiana's summary judgment procedure diverges from federal summary judgment practice.” *Id.* at 1003 (citing *Jarboe v. Landmark Cmty. Newspapers of Ind., Inc.*, 644 N.E.2d 118, 123 (Ind. 1994)). In particular, while federal practice permits the moving party to merely show that the party carrying the burden of proof lacks evidence on a necessary element, the court imposes a more onerous burden: to affirmatively negate an opponent's claim. *Id.*

Summary judgment “shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Ind. Trial Rule 56(C). “A fact is material

if its resolution would affect the outcome of the case, and an issue is genuine if a trier of fact is required to resolve the parties' differing accounts of the truth . . . , or if the undisputed facts support conflicting reasonable inferences." *Hoosier Mt. Bike Ass'n v. Kaler*, 73 N.E.3d 712, 716 (Ind. Ct. App. 2017) (quoting *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009)). "The initial burden is on the summary-judgment movant to demonstrate the absence of any genuine issue of fact as to a determinative issue, at which point the burden shifts to the non-movant to come forward with contrary evidence showing an issue for the trier of fact." *Gaff v. Indiana-Purdue Univ. of Fort Wayne*, 51 N.E.3d 1163, 1165 (Ind. 2016) (quoting *Hughley*, 15 N.E.3d at 1003).

III. DISCUSSION

In its Motion for Partial Summary Judgment, IRT asserts that it is entitled to recover for losses resulting from the Coronavirus pandemic. IRT claims it lost the use of its theatre due to the Coronavirus pandemic and that this loss of use satisfies the Policy's direct physical loss or damage requirement. IRT affirmatively states that it need not prove the virus was actually at its theatre. But, if the Court determines that evidence of the virus' presence at IRT's premises is required to demonstrate direct physical loss or damage, IRT seeks additional time to produce such evidence. (IRT Br. 23 n.15 (citing T.R. 56(f) Affidavit of Peter Racher). IRT also argues that no exclusion in the Policy precludes coverage for its claim. IRT is requesting that this Court grant IRT partial Summary Judgment and declare that IRT has suffered a "direct physical loss" under the Policy, no Policy exclusions bar coverage for the cause of loss, and that IRT's economic losses are covered by the Policy.

In its Cross-Motion for Summary Judgment, Cincinnati asserts that IRT has failed to demonstrate direct physical loss or damage to Covered Property at the premises,

caused by or resulting from any Covered Cause of Loss, which is required by the Policy's insuring agreements, including the Business Income Form. Cincinnati argues that this requirement is only satisfied if there is some physical alteration to property, not the mere loss of use of property. In the alternative, if loss of use alone satisfies the Policy's insuring agreements, then exclusions apply to preclude coverage for IRT's loss of use. Cincinnati identifies the Policy's Ordinance or Law, Delay or Loss of Use, and Acts or Decisions exclusions apply here. Cincinnati opposes granting IRT additional time to produce evidence that the virus was present at its theatre. Cincinnati requests that this Court grant its Cross-Motion for Summary Judgment, declare there is no coverage under the Policy for IRT's claims, and deny IRT's Motion for Partial Summary Judgment.

A. Indiana Law on Insurance-Policy Contractual Interpretation

In accordance with Indiana law, “[a] contract for insurance is subject to the same rules of interpretation as other contracts.” *Cent. Mut. Ins. Co. v. Motorists Mut. Ins. Co.*, 23 N.E.3d 18, 21 (Ind. Ct. App. 2014). The “disparity in bargaining power, which is characteristic of the parties to insurance contracts, has led courts to develop distinct rules of construction for those contracts.” *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1283 (Ind. 2006) (citing *Beam v. Wausau Ins. Co.*, 765 N.E.2d 528, 528 (Ind. 2002)). “When construing the meaning of a contract, a court's primary task is to determine and effectuate the intent of the parties.” *Ind. Ins. Guar. Ass'n v. Smith*, 82 N.E.3d 383, 386 (Ind. Ct. App. 2017). The meaning of an insurance contract can only be gleaned from a consideration of all its provisions, not from an analysis of individual words or phrases. *Adkins v. Vigilant Ins. Co.*, 927 N.E.2d 385, 389 (Ind. Ct. App. 2010).

Courts must accept an interpretation of the contract that harmonizes its provisions.

Smith, 82 N.E.3d at 386. An insurance policy should be construed to further the policy's basic purpose of indemnity. *Tate v. Secura Ins.*, 587 N.E.2d 665, 668 (Ind. 1992).

The standard for interpreting contract provisions is well established: "unless the terms of the contract are ambiguous, they will be given their plain and ordinary meaning." *State Farm Fire & Cas. Co. v. Riddell Nat. Bank*, 984 N.E.2d 655, 657 (Ind. Ct. App. 2013). Stated another way, if a contract is clear and unambiguous, its language is given its plain meaning. *Auto-Owners Ins.*, 842 N.E.2d at 1283. If a provision is ambiguous, however, its meaning is to be determined by extrinsic evidence. *State Farm Fire & Cas. Co.*, 984 N.E.2d at 657. Also, if there is ambiguity, the contract is construed strictly against the insurer, and the language of the policy is viewed from the insured's perspective. *Auto-Owners Ins.*, 842 N.E.2d at 1283 (citing *Bosecker v. Westfield Ins. Co.*, 724 N.E.2d 241, 244 (Ind.2000)).

"An ambiguity exists where a provision is susceptible to more than one interpretation and reasonable persons would differ as to its meaning." *Auto-Owners Ins.*, 842 N.E.2d at 1283. When reasonable minds can interpret policy provisions differently, those provisions are ambiguous, and are strictly construed against the insurance company. *Id.* "This strict [construction] . . . is driven by the fact that the insurer drafts the policy and foists its terms upon the customer. 'The insurance companies write the policies; we buy their forms, or we do not buy insurance.'" *Id.* (quoting *American Economy Ins. Co. v. Liggett*, 426 N.E.2d 136, 142 (Ind. Ct. App. 1981)). A division between courts as to the meaning of the language in an insurance contract is evidence of ambiguity. *Travelers Indem. Co. v. Summit Corp. of Am.*, 715 N.E.2d 926, 936 (Ind. Ct. App. 1999).

However, this does not establish conclusively that a particular clause is ambiguous and [Indiana courts] are not obliged to agree that other courts have construed the policy correctly. *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243, 248 (Ind. 2005).

If any ambiguity exists in a policy term, and particularly in an exclusion, the term must be interpreted in favor of the policyholder and in favor of coverage. *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 947 (Ind. 1996). A policyholder need not prove that its interpretation of a policy term is the *only* reasonable interpretation—only that it is a reasonable interpretation. *Liggett*, 426 N.E.2d at 144. Indiana law is clear that when the policyholder has offered a reasonable construction of the policy language, it must be applied as a matter of law. *See Everett Cash Mut. Ins. Co. v. Taylor*, 926 N.E.2d 1008, 1014 (Ind. 2010) (“A reasonable construction that supports the policyholder’s position must be enforced as a matter of law”).

In addition, there are special rules for interpreting insurance policies, as they are contracts of adhesion construed in favor of coverage with exclusions construed narrowly. Indiana law holds that insurance policy terms are to be interpreted in the way that the insured understands them in the ordinary course of business. *See, e.g., Tate*, 587 N.E.2d at 668 (“By failing to clearly express a contrary meaning, [the insurer] is bound by the plain and ordinary meaning of its words as viewed from the standpoint of the insured.”); *Masonic Temple Ass’n of Crawfordsville v. Indiana Farmers Mut. Ins. Co.*, 779 N.E.2d 21, 27-28 (Ind. Ct. App. 2002) (“Because insurance contracts are contracts of adhesion construed against the drafter, the insurer is bound by the plain, ordinary meaning of the words as viewed from the perspective of the insured.”). When the policy language can be given more than one reasonable interpretation, then the language is to be construed in

the policyholder's favor and in favor of coverage. *Cincinnati Ins. Co. v. BACT Holdings, Inc.*, 723 N.E.2d 436, 440 (Ind. Ct. App. 2000) ("The insurer is [] bound by the plain, ordinary meaning of the words as viewed from the perspective of the insured. . . . We conclude that an ambiguity does exist in the policy language. . . . Reasonable persons [] could disagree about whether the policy exclusion for a 'production machine' also applies to drum tires. Consequently, we must attempt to give effect to the reasonable expectations of the insured and construe the policy to further its basic purpose of indemnifying the insured for its loss.").

Any undefined terms must be interpreted from the perspective of an ordinary policyholder of average intelligence. *Summit Corp. of Am.*, 715 N.E.2d at 936. It also is appropriate to consider dictionary definitions of a policy term to understand it. *OmniSource Corp. v. NCM Americas, Inc.*, 313 F. Supp. 2d 880, 890 (N.D. Ind. 2004) ("[A] court must give the term [in an insurance policy] its plain and ordinary meaning [if it is undefined and unambiguous]. For this purpose, courts may properly consult English language dictionaries"); *Smith v. Allstate Ins. Co.*, 681 N.E.2d 220, 223 (Ind. Ct. App. 1997) (using Webster's dictionary to define terms in insurance policy).

"The interpretation of an insurance policy is primarily a question of law for the court, and thus is particularly well-suited for disposition on summary judgment." *Adkins*, 927 N.E.2d at 389 (citing *Am. Family Life Assur. Co. v. Russell*, 700 N.E.2d 1174, 1177 (Ind. Ct. App. 1998), *trans. denied.*). If, however, [an insurance policy] is ambiguous, the parties may introduce extrinsic evidence of its meaning, and the interpretation becomes a question of fact. *Broadbent v. Fifth Third Bank*, 59 N.E.3d 305, 311 (Ind. Ct. App. 2016), *trans. denied.* When extraneous facts and circumstances are necessary to

explain an ambiguous or uncertain contract, . . . the facts on which that construction rests must be determined by the jury. *Indiana Broadcasting Corp. v. Star Stations of Indiana*, 388 N.E.2d 568, 572 (Ind. Ct. App. 1979).

B. Whether IRT has Suffered a Direct Physical Loss or Damage to Covered Property

The Cincinnati Policy is a commercial property insurance policy. As a commercial property policy, the Cincinnati Policy's primary purpose is to protect against loss or damage to property. The Business Income Form does provide insurance for lost business income, but first requires direct physical loss or damage to property as a prerequisite. Therefore, the insured property must first sustain direct physical loss before any income coverage is available.

IRT does not dispute that it must establish that there has been a direct physical loss to its property to obtain the coverage it seeks. IRT contends that it has suffered a "direct" "physical loss" because of its inability to safely use and fully operate its theatre due to the COVID-19 pandemic and the rapidly spreading virus. IRT asserts that its loss of use of its theatre alone satisfies the direct physical loss or damage requirement. IRT supports its argument by applying the dictionary definitions of those key terms, which are either not defined in the Policy or are defined ("loss") in a circular fashion. IRT notes that, because these terms are in the insuring clause, they are to be given a broad, coverage-enhancing construction. IRT directs the court to dozens of pre-COVID-19 cases around the country stretching back over many years where courts have found a "physical loss" in the absence of damage or physical alteration to property. IRT points out that Cincinnati took no steps, despite all these cases, to add any clarifying or limiting

words to the Policy. IRT concludes that the ordinary policyholder of average intelligence—the standard in Indiana—would look at the actual Policy terms, including the absence of a virus exclusion when one was widely available, and reasonably conclude that a loss of the sort IRT sustained is covered.

Cincinnati counters by arguing that “physical loss” requires physical “alteration,” and that the presence of the virus does not alter the property. Cincinnati accuses IRT of dissecting the Policy and failing to harmonize Policy provisions. Cincinnati contends that while Indiana courts do look to dictionaries to understand the plain meaning of undefined words in insurance policies, *Allgood*, 836 N.E.2d at 247, the terms must still be read together and in context to ascertain their meaning. *Mahan v. Am. Std. Ins. Co.*, 862 N.E.2d 669, 676 (Ind. Ct. App. 2007); *Briles v. Wausau Ins. Cos.*, 858 N.E.2d 208, 213 (Ind. Ct. App. 2006). Cincinnati argues that IRT’s use of separate definitions from multiple dictionaries demonstrates that this exercise can create confusion rather than clarify the Policy’s terms. For example, IRT asserts that dictionaries define “loss” to include “dispossession” or “deprivation.” (IRT Br. 19.) Cincinnati claims that those definitions have no application here. Cincinnati contends that IRT never lost possession of its theatre and was not deprived of it by the pandemic as it asserts. In fact, the evidence shows that it continued to use its theatre even after the pandemic was declared. Cincinnati also directs the Court to its own set of cases that support its interpretation, including recent COVID-19 insurance cases. Cincinnati also argues that IRT has failed to allege the presence of the virus in the theatre, and that, at a minimum, there is a question of fact as to whether IRT lost the use of its theatre.

IRT responds by noting that the division in authority, for both non-COVID-19 and COVID-19 cases, is wide and deep. IRT notes that under Indiana law this division of authority is strong evidence of ambiguity. *Hartford Accident & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285, 295-98. IRT claims that its interpretation is, at the very least, reasonable, and that any reasonable construction in favor of coverage must be adopted. *Liggett*, 426 N.E.2d at 142; *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 471 (Ind. 1985).

Both parties direct the Court to pre-COVID-19 cases from around the country that have endorsed their dueling proposed interpretations of “physical loss.” IRT’s pre-COVID-19 cases from other jurisdictions include: (1) a theatre forced to cancel performance due to smoke from nearby wildfires, *Oregon Shakespeare Festival Ass’n v. Great Am. Ins. Co.*, 2016 U.S. Dist. LEXIS 74450, at *13-15 (D. Or. June 7, 2016), *vacated as a condition of settlement*, 2017 U.S. Dist. LEXIS 33208 (D. Or. 2017), (2) a home that could not be safely occupied due to the risk of a rockfall, *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1,17 (W. Va. 1998), (3) a home rendered unsafe for occupation due to nearby erosion, *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Cal. Ct. App. 1962), *abrogated on other grounds*, (4) a church rendered unsafe due to infiltration of gasoline fumes from the ground, *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968), and (5) a power grid that could not be safely used, *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724 (NJ. Ct. App. 2009), among many others. IRT pointed out that in each of these instances, there was no structural alteration or deformation to the property. While these cases are all from other jurisdictions, the Court notes that this issue has reached Indiana. In fact, both

parties have cited to *Cook v. Allstate Insurance Co.*, 48D02-0611-PL-01156 (Madison Cnty. Super. Ct., Nov. 30, 2007).

In *Cook*, Cook's home was infested with brown recluse spiders. Despite repeated attempts, the spiders could not be exterminated. *Cook*, 48D02-0611-PL-01156 at 1-2. The *Cook* court held that the permanent spider infestation rendered the home uninhabitable for its intended use, which constituted direct physical loss. *Cook*, 48D02-0611-PL-01156 at 7-8. Cincinnati argues that this case does not support IRT's assertion that the temporary loss of use alone is sufficient to establish direct physical loss to property. Cincinnati claims that the facts of *Cook* are materially different. Cincinnati points out that *Cook* involved (1) a physical impact (the actual presence of the spiders); (2) the physical impact could not be remedied (extermination attempted and failed); and (3) the property was completely uninhabitable or unusable. The Court agrees with Cincinnati that this case is distinguishable from our case.

The Court also notes that IRT and Cincinnati cite to a number of cases addressing insurance coverage for COVID-19. Although neither IRT nor Cincinnati cite to any Indiana cases addressing insurance coverage for COVID-19 related to business income losses (as this is an issue of first impression in Indiana), these claims have been addressed by courts across the country. The vast majority of these courts have held that there is no coverage because the direct physical loss requirement is not satisfied.

First looking to IRT's COVID-19 cases which it cites to in support of its loss of use argument. Of the cases IRT cites, all but a few were decided under a motion to dismiss standard. The courts denied the insurer's motions to dismiss based primarily on allegations that the virus was likely on the premises and caused direct physical loss.

See, e.g., *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at *6 (W.D. Mo. Aug. 12, 2020); *K.C. Hopps, Ltd v. The Cincinnati Ins. Co., Inc.*, No. 20-CV-00437-SRB, 2020 WL 6483108, at *1 (W.D. Mo. Aug. 12, 2020). The Court points out that IRT makes no such allegations that the virus was likely on the premises and has supplied no evidence that the virus was in the theatre or caused any damage.

The Court notes that there are not as many decisions which IRT relies on that were decided as a matter of summary judgment. One case in particular is *North State Deli v. The Cincinnati Insurance Co.*, Case No. 20-CVS-02569 (N.C. Durham Sup. Ct. Oct. 9, 2020). There, the insured sought partial summary judgment that it was entitled to coverage where the North Carolina government orders forced the insured to lose the physical use and access to their property and premises. *North State Deli*, Case No. 20-CVS-02569, at 4. The court found in favor of the insured. The court found that Cincinnati's argument focused too narrowly on damage to the property, which the Court found was not the only way to define "physical loss." The Court notes, as Cincinnati points out, that *North State Deli* ignored controlling North Carolina precedent holding that loss of use without physical alteration is not covered. *Harry's Cadillac-Pontiac-GMC Truck Co., Inc. v. Motors Ins.*, 486 S.E.2d 249, 251-252 (N.C. App. 1997). For this reason, the Court finds that *North State Deli* is not persuasive.

Some of the COVID-19 cases (just to discuss a few) which support Cincinnati's position include *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.* In that case, the court granted the Defendant's Motion to Dismiss. The court held that "when all of the provisions are read together it makes logical sense that the property that is insured, i.e.,

the building and/or personal property in or on the building, must first be lost or damaged before Business Income coverage kicks in.” No. 2:20-CV-00087-KS-MTP, 2020 WL 6503405, at *6 (S.D. Miss. Nov. 4, 2020). Another case is *Uncork & Create LLC v. Cincinnati Ins. Co.* In that case, the court granted the Defendant’s Motion to Dismiss. The court held that “property, including the physical location of Uncork and Create, is not physically damaged or rendered unusable or uninhabitable. If people could safely congregate anywhere without risk of infection, the Plaintiff has alleged no facts to suggest any impediment to Uncork and Create's operation. The court noted that no repairs or remediation to the premises are necessary for its safe occupation in the event the virus is controlled and no longer poses a threat. The Court found that, in short, the pandemic impacts human health and human behavior, not physical structures.” No. 2:20-CV-00401, 2020 WL 6436948, at *5 (S.D.W. Va. Nov. 2, 2020). One other case is *Sandy Point Dental, PC v. Cincinnati Ins. Co.* In that case, the court granted the Defendant’s Motion to Dismiss. The court held that “the critical policy language here— ‘direct physical loss’—unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage. The words ‘direct’ and ‘physical,’ which modify the word ‘loss,’ ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure.” No. 20 CV 2160, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020). One last case is *Nite, LLC v. Certain Underwriters at Lloyd’s London.* In that case, the court granted summary judgment in favor of the Defendant. The court held that “the Governor’s Order nor the virus itself constitutes damage to the property, thus there’s no coverage under

the policy. The court noted that the record was simply void of any evidence to establish any physical damage or any physical loss that was caused to any property. The court pointed out that the plaintiff had not shown that the property was either useless or uninhabited. The court also noted that once the stay-at-home order was lifted, the property was still in the exact same condition. The court concluded that under those facts, the policy did not provide coverage.” No. 698068, Section 23 (Feb. 9, 2021 East Baton Rouge Parish, La.).

The Court finds that, although none of these cases apply Indiana law and are not binding, the Court is persuaded by their reasoning and analysis. The Court points out that each of these cases contain the same policy language as that in our case and apply law which is similar to Indiana’s law on insurance contract interpretation. The Court finds these cases to be persuasive in supporting the Court’s interpretation of the Policy.

IRT argues that the existence of a split of authority indicates that the Policy is ambiguous and therefore must be construed in favor of coverage. (IRT Resp. at 11). The Court disagrees with IRT’s view. First, there does not appear to be a “split of authority.” The majority of courts have dismissed these claims. Those that have not have merely allowed the insured to try and prove them. The weight of authority establishes a majority view. In addition, the Indiana Supreme Court has recognized that a disagreement among courts may be evidence of ambiguity, but “[i]t does not establish conclusively that a particular clause is ambiguous and [Indiana courts] are not obliged to agree that other courts have construed the policy correctly. *Allgood*, 836 N.E.2d at 248.

The Court's independent review of the Policy leads the Court to find that the language at issue is not ambiguous.

The Court finds that when read together and in context, the Policy's requirement of direct physical loss or damage to property is not ambiguous. The Court points out that IRT must demonstrate that its insured property underwent some type of direct and physical loss or damage. Here, IRT has asserted that it lost the use of its theatre for its intended purpose. The inquiry is whether this loss of use is a direct physical loss to property. The Court finds that it is not. IRT's loss of use does not have any physical impact on its property. No evidence suggests that the theatre was physically different on March 23, 2020 when IRT announced "the IRT is closed due to the State of Indiana's COVID-19 orders." (Cincinnati, Ex. C at 1). To properly construe the Policy, the Court must give effect to the "physical" requirement, which is also consistent with the law of Indiana and other jurisdictions that have dealt with this issue. If loss of use alone qualified as direct physical loss to property, then the term "physical" would have no meaning. The Court cannot interpret the Policy in a way that nullifies one of its terms. *Briles*, 858 N.E.2d at 213. The Court finds that the Policy requires physical alteration to the premises to trigger the business income coverage.

Other provisions of the Policy also support the conclusion that there is no business income coverage without structural alteration to property. The business income coverage applies to the "period of restoration." The "period of restoration" begins with the date of loss and ends on the date when "the property at the 'premises' should be repaired, rebuilt or replaced" or "business is resumed at a new permanent location." (Policy at IRT_0000114). The Court notes that there is nothing to "repair,"

“rebuild” or “replace” if the premises have not been damaged. The Court further notes that COVID-19 has not physically harmed or changed the theatre. IRT has produced no evidence that the virus was ever present at its theatre. In addition, the evidence shows that IRT undertook projects at the theatre during the pandemic, demonstrating that the theatre was not uninhabitable. This evidence defeats any conclusion that the loss of use IRT experienced had a physical impact on the theatre premises or that the theatre was completely unusable. Because there is nothing to repair, replace or rebuild; there has been no direct physical loss.

IRT asserts that its interpretation that loss of use alone, without physical impact or alteration to property, is reasonable and, therefore, the Court must construe the Policy in its favor and find coverage. The Court disagrees. The Court finds that IRT’s interpretation is not reasonable. The Court points out, as discussed above, that IRT fails to give meaning to the Policy’s requirement that the loss to the property must be “physical.” The Court also points out that IRT’s interpretation fails to construe the Policy as a whole and to give all its terms effect. The Court cannot accept that interpretation.

As for the arguments regarding the delay or loss of use exclusion, the ordinance exclusion, the acts or decisions exclusion, and the absence of a virus exclusion. The Court finds these arguments to be moot. The Court points out that, in interpreting an insurance policy, an insured must first demonstrate that it satisfies the policy’s insuring agreement. Only after the insured satisfies this burden are exclusions relevant. Here, IRT has failed to satisfy the insuring agreement. Specifically, the theatre has not suffered a direct physical loss to property. The Court, therefore, finds the arguments regarding these exclusions to be moot.

Based on the evidence currently before the Court, the Court finds that there are no genuine issues of material fact that would preclude the granting of summary judgment in Cincinnati's favor as to the meaning of "direct physical loss or damage".

For the foregoing reasons, the Court DENIES Plaintiff's Motion for Partial Summary Judgment as to Count 1: Declaratory Relief against Cincinnati only and GRANTS Defendant's Cross-Motion for Summary Judgment.

C. The Presence of the Coronavirus at IRT & Rule 56(F) Affidavit

IRT attaches to its Reply brief an affidavit pursuant to Indiana Trial Rule 56(F) seeking additional time to develop evidence regarding the presence of the SARS-CoV-2 virus inside its theatre.

Pursuant to Indiana Trial Rule 56(F), should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. Ind. Trial Rule 56(F).

The Court points out that in its Amended Complaint, IRT alleged the Coronavirus could attach to surfaces and later infect people. (IRT Am. Compl. ¶ 48). IRT attached to its motion for partial summary judgment the declaration of Dr. Richard Feldman and various scientific publications, to support its allegations. Cincinnati filed the affidavit of Dr. Wayne Thomann on August 28, 2020, who opined that the virus could exist on surfaces, but for no more than seven days. (Thomann Aff. ¶ 9). Based on this information, the Court can only conclude that IRT should have the opportunity to demonstrate the presence of the virus at the theatre and that the virus caused physical

alteration or was at least capable of doing so. Accordingly, the Court will grant additional time to IRT to obtain that evidence.

For the foregoing reasons, the Court GRANTS Plaintiff's Request for additional time to develop evidence pursuant to Indiana Trial Rule 56(F).

The Court points out that this Order that it is issuing is merely the Court's interpretation of the Policy language as to the meaning of the language "direct physical loss or damage" to property. The Court notes that should IRT obtain evidence regarding the presence of the SARS-CoV-2 virus inside the theatre in March 2020 (when the shutdown occurred) and if IRT believes that this new evidence demonstrates that the virus caused physical alteration or at least was capable of doing so, IRT may file a motion with the Court.

IV. ORDER

The Court hereby **DENIES** Plaintiff's Motion for Partial Summary Judgment as to Count 1: Declaratory Relief against Cincinnati only and **GRANTS** Defendant's Cross-Motion for Summary Judgment. The Court also hereby **GRANTS** Plaintiff's Request for additional time to develop evidence pursuant to Indiana Trial Rule 56(F).

SO, ORDERED, ADJUDGED, AND DECREED this 12th day of March 2021.



Hon. Heather A. Welch
Judge, Marion Superior Court
Marion County Commercial Court

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CERTIFICATE OF SERVICE

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