IN THE SUPREME COURT OF IOWA

Supreme Court No. 21-0623
Polk County Case No. LACL148100

JESSE'S EMBERS, LLC d/b/a JESSE'S EMBERS
Plaintiff-Appellant,

vs.

WESTERN AGRICULTURAL INSURANCE COMPANY d/b/a
FARM BUREAU FINANCIAL SERVICES
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE JEANIE VAUDT, JUDGE

APPELLEE'S BRIEF

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Dated August 30, 2021

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ROUTING STATEMENT

This is an appeal from a final judgment entered on April 13, 2021, by Judge Jeanie Vaudt in the Iowa District Court for Polk County. (*See* Order Granting Motion for Summary Judgment filed Apr. 13, 2021; Appendix at p. 397.) The judgment arises from a ruling granting summary judgment in favor of Western Agricultural Insurance Company on Plaintiff's claims for declaratory relief, breach of contract, and bad faith. (*Id.*) The case involves the application of well-established legal principles and is of the type ordinarily transferred to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case. This case involves an insurance coverage dispute between the Plaintiff Jesse's Embers, LLC ("Jesse's Embers") and its insurer, Western Agricultural Insurance Company (Western Ag"). Jesse's Embers is a restaurant doing business in Des Moines, Iowa. In March 2020, the restaurant had to temporarily suspend its dine-in operations as a result of a state Proclamation and Order issued to combat the coronavirus pandemic. Jesse's Embers sought to recover the economic losses it incurred during the shutdown under the Business Income, Extra Expense, and Civil Authority Provisions in its insurance policy with Western Ag. Western Ag denied it had

any obligation to provide such coverage relying on the express language in its policy. (*See* Amended Petition at ¶¶ 51-52; Appendix at p. 13.) Thereafter, Jesse's Embers initiated this lawsuit seeking declaratory relief and alleging claims for breach of contract and bad faith. (*See* First Amended and Substituted Petition at Law filed Aug. 28, 2020; Appendix at p. 7.) Western Ag moved for summary judgment on all counts. (*See* Defendant's Motion for Summary Judgment, Appendix at p. 21; Defendant's Brief in Support of Motion for Summary Judgment, Appendix at p. 24; and Defendant's Statement of Undisputed Facts filed Jan. 11, 2021, Appendix at p. 214.) The District Court granted summary judgment in favor of Western Ag. (Order Granting Motion for Summary Judgment filed Apr. 13, 2021; Appendix at p. 397.) This appeal followed. (Notice of Appeal, Appendix at. p. 421.)

STATEMENT OF FACTS

Jesse's Embers is a restaurant in Des Moines, Iowa. (Amended Petition at ¶ 12, Appendix at. p. 8.) On March 17, 2020, Governor Kim Reynolds issued a governmental Proclamation and Order (hereinafter "Proclamation") in response to the coronavirus pandemic which placed statewide restrictions on restaurants. (Exhibit B: Proclamation; Appendix at p. 207.) The

Proclamation closed restaurants to dine-in customers but permitted the sale of food and beverages on a carry-out, drive-through, or food delivery basis. (*Id.*)

In compliance with the Proclamation, Jesse's Embers sold carry-out orders until the restriction was lifted and indoor dining was allowed again. (Amended Petition at ¶¶ 41, 43, 48; Appendix at pp. 12-13.) The restaurant claims the Proclamation forced it to suspend its indoor dining operations which caused losses to its business income. (Amended Petition at ¶ 44; Appendix at p. 12.)

Jesse's Embers expressly denied having knowledge of any coronavirus on its premises. (Amended Petition at ¶ 53; Appendix at p. 13.) Despite the lack of a virus, Jesse's Embers claims the state-ordered closure amounted to a "direct physical loss, including physical loss of access, customers, use, and utilization for its intended purposes." (Amended Petition at ¶ 72; Appendix at p. 16.)

Jesse's Embers submitted an insurance claim to Western Ag for its loss of business income based on Governor Reynold's Proclamation. (Amended Petition at ¶ 50.; Appendix at p. 13) In a letter dated June 17, 2020, Western Ag denied the restaurant's claim because there was no direct physical loss of or damage to the business premises as required under the policy, and even if

coverage were established, it would be excluded by operation of the Virus or Bacteria Exclusion. (Amended Petition at ¶¶ 51-52; Appendix at p. 13.)

On June 18, 2020, Jesse's Embers filed the present lawsuit. The operative petition is the First Amended and Substituted Petition filed August 28, 2020, wherein Jesse's Embers seeks coverage under the Business Income, Extra Expense, and Civil Authority provisions in the Western Ag insurance policy. (Amended Petition at ¶ 46; Appendix at p. 12.)

Western Ag Insurance Policy Provisions

1. Business Income Provision. The Western Ag Policy provides Business Income coverage subject to the following provision:

> **5. Additional Coverages**
>
> [. . .]
>
> **f. Business Income**
>
> **(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 physical loss of or damage to property at the described premises.** The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.
>
> [. . .]

> **(b)** We will only pay for loss of Business Income that you sustain during the "period of restoration" and that occurs within 12 consecutive months after the date of direct physical loss or damage. . . .

(Exhibit A: Insurance Policy at pp. 23–24 (emphasis added); Appendix at pp. 73-74.)

2. Extra Expense Provision. The Western Ag Policy provides Extra Expense coverage subject to the following provision:

> **g. Extra Expense**
>
> **(1)** We will pay necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises. . . .

(Exhibit A: Insurance Policy at p. 25; Appendix at p. 75.)

3. Civil Authority Provision. The Western Ag Policy provides Civil Authority coverage subject to the following provision:

> **i. Civil Authority**
>
> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described 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 the described premises are within that area but are not more than one mile from the damaged property; 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.
>
> [. . .]

(Exhibit A: Insurance Policy at p. 26.; Appendix at p. 76) As used in the above-quoted provisions, the term "Covered Cause of Loss" is defined as: "Direct physical loss unless the loss is excluded or limited under Section **I** – Property." (Exhibit A: Insurance Policy at p. 19; Appendix at p. 69.)

4. Virus or Bacteria Exclusion. The Western Ag Policy contains a "Virus or Bacteria" Exclusion which states:

> **B. Exclusions**
>
> **1.** We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.
>
> [. . .]
>
> **j. Virus or Bacteria**

> **(1)** Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.
>
> **(2)** However, the exclusions in Paragraph **(1)** does not apply to loss or damage caused by or resulting from "fungi", wet rot or dry rot. Such loss or damage is addressed in Exclusion **i.**
>
> **(3)** With respect to any loss or damage subject to the exclusion in Paragraph **(1)**, such exclusion supersedes any exclusion relating to "pollutants".

(Exhibit A: Insurance Policy at pp. 34, 36–37; Appendix at pp. 84, 86-87.)

STANDARD OF REVIEW

The issues raised on appeal arise from a proceeding in law. Consequently, this Court's appellate review is for correction of errors at law. Iowa R. App. P. 6.907 (2021).

PRESERVATION OF ERROR

All issues raised by the Appellant on appeal are properly preserved for review. (*See* Plaintiff's Resistance to Motion for Summary Judgment, Appendix at p. 220; Plaintiff's Brief in Support of Resistance to Motion for Summary Judgment; Appendix at p. 222.)

ARGUMENT

I. The District Court Properly Granted Summary Judgment in Favor of Western Ag on the Breach of Contract and Declaratory Judgment Claims Based on the Business Income, Extra Expense, and Civil Authority Provisions in the Western Ag Policy as well as the Virus or Bacteria Exclusion.

The Western Ag Policy does not provide insurance coverage for three reasons. First, the Business Income and Extra Expense coverages are not implicated because Jesse's Embers experienced no physical loss or damage to property. Second, the Civil Authority coverage is not triggered because there was no nearby property damage resulting in a civil order prohibiting access to the restaurant. And third, even if Jesse's Embers could establish Business Income, Extra Expense, or Civil Authority coverage, the claim still would be excluded by operation of the "Virus or Bacteria" exclusion.

A. Legal Standards for Interpreting and Construing Insurance Policies.

"The controlling consideration in the construction of insurance policies is the intent of the parties." *Farm Bureau Life Ins. Co. v. Holmes Murphy & Assoc., Inc.,* 831 N.W.2d 129, 133 (citing *Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678, 681 (Iowa 2008)). Except in the case of ambiguity, intent is determined based on the language of the policy. *Id.* (citing *A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 618 (Iowa

1991)). Mere disagreement about the meaning of terms does not establish an ambiguity. *Id.* at 134. An ambiguity exists only when the language of the insurance policy is susceptible to more than one reasonable interpretation. *Id.* (citing *First Newton Nat'l Bank v. Gen. Cas. Co. of Wis.*, 426 N.W.2d 618, 628 (Iowa 1988)). Words or phrases are not to be strained "in order to find liability that the policy did not intend and the insured did not purchase." *Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 501 (Iowa 2013). "Undefined insurance policy terms are given their ordinary and reasonable connotations." *Milligan v. Grinnell Mut. Reinsurance Co.*, No. 00-1452, 2001 WL 427642, at *2 (Iowa Ct. App. Apr. 27, 2001) (citing *A.Y. McDonald*, 475 N.W.2d at 619)). "An undefined policy term does not automatically equate to an ambiguous term . . . ." *Id.* Courts "may not refer to extrinsic evidence in order to create ambiguity." *Bituminous Cas. Corp. v. Sand Livestock Systems, Inc.*, 728 N.W.2d 216, 222 (Iowa 2007) (quoting *North Star Mut. Ins. Co. v. Holty*, 402 N.W.2d 452, 454 (Iowa 1987)).

B. The Business Income and Extra Expense Coverages Are Not Triggered Because the Insured Sustained No Direct Physical Loss of or Damage to Property.

To trigger coverage, the Business Income and Extra Expense provisions require Jesse's Embers to prove "direct physical loss of or damage to property at the described premises." (Exhibit A: Insurance Policy at pp. 23–24

(Business Income coverage), Appendix at pp. 73-74; Exhibit A: Insurance Policy at p 25 (Extra Expense coverage), Appendix at p. 75.) The central tenet running through both coverages is a requirement that there be *physical* loss of or *physical* damage to property. Loss of use is not equivalent to physical loss or damage. A tangible or material alteration of property is required. Because Jesse's Embers does not allege *physical* loss, coverage under the Business Income and Extra Expenses provisions is not triggered.

1. Physical Loss or Physical Damage Requires a Tangible or Material Alteration of Property.

The phrase "direct physical loss or damage" has been discussed extensively by Iowa courts. In 2001, the Iowa Court of Appeals addressed the phrase in *Milligan v. Grinnell Mutual Reinsurance Co.* Like this case, the phrase and terms were undefined in the policy. Accordingly, the court looked to the ordinary meaning of "loss" and "damage." The court found that the term "loss" means "damage or destruction," and the term "damage" means "injury to property." *Milligan v. Grinnell Mut. Reinsurance Co.*, No. 00-1452, 2001 WL 427642, at *2 (Iowa Ct. App. Apr. 27, 2001) (citing Black's Law Dictionary 945 (6th ed. 1990)). Consequently, the court held that "loss or damage" requires injury to or destruction of property owned by an insured. *Id.* Read as a whole, the court held the phrase "direct physical loss or

damage" unambiguously requires the alleged loss or destruction to be "***physical*** in nature." *Id.* (emphasis added). The court underscored that the phrase was not open to interpretation on any other basis. *Id.*

"Direct physical loss" has also been interpreted by the Southern District of Iowa on several occasions. In 2015, the court determined "physical loss or damage generally requires some sort of physical invasion, however minor." *Phoenix Ins. Co. v. Infogroup, Inc.*, 147 F. Supp. 3d 815, 823–25 (S.D. Iowa Nov. 30, 2015) (collecting cases) (rejecting claim that loss of use due to threat of flooding constituted direct physical loss or damage). The court reasoned that the common usage of the word "physical" requires something material or perceptible on some level. *Id.* Mere loss of use is not physical loss or damage. *Id.* To hold otherwise would render the word "physical" meaningless. *Id.*

In 2016, the court again interpreted the meaning of the phrase "direct physical loss." *Dean Snyder Const. Co. v. Travelers Prop. & Cas. Co. of Am.*, 173 F. Supp. 3d 837, 844 (S.D. Iowa 2016) (rejecting claim that arbitration decision constituted direct physical loss or damage). Looking to the commonly understood meanings of the terms "loss" and "physical," the court reiterated the holdings in *Milligan* and *Phoenix Insurance Co. Id.* at 843 (quoting *Phoenix Ins. Co.*, 147 F. Supp. 3d at 823) ("The common usage of

physical in the context of a loss . . . means the loss of something material or perceptible on some level.").

Iowa cases are not outliers. "The requirement that the loss be 'physical' . . . 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." 10A Couch on Insurance § 148:46 (Westlaw June 2020). Government orders, like Governor Reynolds' Proclamation, do not cause direct ***physical*** loss.

Source Food Technology, Inc. v. United States Fidelity & Guaranty Co. provides a highly analogous decision from the Eighth Circuit. 465 F.3d 834, 838 (8th Cir. 2006) (applying Minnesota law). There, the United States Department of Agriculture placed an embargo on Canadian beef after a cow tested positive for mad cow disease. *Id.* at 835. Due to the embargo, Source Food's order of beef was not shipped into the United States. *Id.* Source Foods made an insurance claim under the business income and civil authority coverages in its insurance policy. *Id.* at 835–36. While there was no evidence the beef product was contaminated, Source Foods argued that the embargo caused a direct physical loss to the beef because it was treated as though it

were physically contaminated with mad cow disease. *Id.* On review, the Eighth Circuit rejected the argument that "impairment of function and value of [property] caused by government regulation is a direct physical loss to insured property." *Id.* at 836. The court emphasized that "[o]nce physical loss or damage is established, loss of use or function is certainly relevant in determining the amount of loss, particularly a business interruption loss." *Id.* at 838 (quoting *Pentair, Inc. v. American Guar. and Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005)). But the court "refused to adopt the position that 'direct physical loss or damage is established whenever property cannot be used for its intended purpose.'" *Id.* Otherwise, Source Food's argument would render the word "physical" in the policy meaningless. *Id* Because there was no evidence the Source Food beef was contaminated, there was no direct physical loss. *Id.* The court affirmed the district court's grant of summary judgment and held that Source Food could not recover under the policy.

Courts' interpretation has not changed during the coronavirus pandemic. In fact, several Iowa courts have denied business interruption claims based on material facts that are identical to this case. *See Whiskey River on Vintage, Inc. v. Illinois Cas. Co.*, 503 F. Supp. 3d 884 (S.D. Iowa 2020) (dismissing claim that Governor Reynolds' Proclamation restricting dine-in

restaurant services constituted physical loss under the Business Income, Extra Expense, and Civil Authority coverage); *Gerleman Management, Inc. v. Atlantic States Ins. Co.,* 506 F. Supp. 3d 663 (S.D. Iowa 2020) (same); *Lisette Enters, Ltd. v. Regent Ins. Co.,* No. 4:20-cv-00299-SMR-CFB, 2021 WL 1804618 (S.D. Iowa May 6, 2021) (same); *Palmer Holdings & Investments, Inc. v. Integrity Ins. Co.*, 505 F. Supp. 3d 842 (S.D. Iowa 2020) (same); *see also Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, No. 491 F. Supp. 3d 455 (S.D. Iowa 2020) (dismissing claim that Governor Reynolds' Proclamation restricting non-emergency dental procedures constituted physical loss). In fact, the courts in *Whiskey River* and *Palmer Holdings* firmly stated: **"it is a settled matter in Iowa law that direct physical loss or damage requires tangible alteration of property and that loss of use alone is insufficient."** *Whiskey River on Vintage, Inc.*, 503 F. Supp. 3d at 899; *Palmer Holdings & Investments, Inc.*, 505 F. Supp. 3d at 856. While Governor Reynolds' Proclamation may have limited the use of Plaintiff's restaurant, it did not cause direct physical loss or damage.

Courts across the country have also denied business interruption claims stemming from government coronavirus orders. The following quote aptly summarizes and dispenses with the argument that government orders cause direct physical loss:

First, Plaintiffs argue that the loss of use of their restaurant properties was "direct" because the closures were the direct result of the mayor's orders without intervening action. But those orders were governmental edicts that commanded individuals and businesses to take certain actions. Standing alone and absent intervening actions by individuals and businesses, the orders did not effect any direct changes to the properties.

Second, Plaintiffs argue that their losses were "physical" because the COVID-19 virus is "material" and "tangible," and because the harm they experienced was caused by the mayor's orders rather than "some abstract mental phenomenon such as irrational fear causing diners to refrain from eating out." But Plaintiffs offer no evidence that COVID-19 was actually present on their insured properties at the time they were forced to close. And the mayor's orders did not have any effect on the material or tangible structure of the insured properties.

Third, Plaintiffs argue that by defining "loss" in the policy as encompassing either "loss" or "damage," Defendant must treat the term "loss" as distinct from "damage," which connotes physical damage to the property. In contrast, Plaintiffs argue, "loss" incorporates "loss of use," which only requires that Plaintiffs be deprived of the use of their properties, not that the properties suffer physical damage. But under a natural reading of the term "direct physical loss," the words "direct" and "physical" modify the word "loss." As such, pursuant to Plaintiffs' dictionary definitions, any "loss of use" must be caused, without the intervention of other persons or conditions, by something pertaining to matter—in other words, a direct physical intrusion on to the insured property. Mayor Bowser's orders were not such a direct physical intrusion.

Further, none of the cases cited by Plaintiffs stand for the proposition that a governmental edict, standing alone, constitutes direct physical loss under an insurance policy.

Rose's 1, LLC v. Erie Ins. Exchange, No. 2020 CA 002424 B, 2020 WL 4589206, at *2–3 (D.C. Sup. Ct. Aug. 6, 2020) (collecting cases) (granting summary judgment for insurer).[1]

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[1] *See also Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 362 (W.D. Tex. 2020) (granting motion to dismiss because government's coronavirus orders did not cause tangible injury to property); *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIV, 2020 WL 5051581, at *8 (S.D. Fla. Aug. 26, 2020) ("Plaintiff merely claims that two Florida Emergency Orders closed his indoor dining. But, for the reasons already stated, this cannot state a claim because the loss must arise to actual damage. And it is not plausible how two government orders meet that threshold when the restaurant merely suffered economic losses—not anything tangible, actual, or physical."); *Plan Check Downtown III, LLC v. Amguard Ins. Co.*, 485 F. Supp. 3d 1225, 1229-30 (C.D. Cal. 2020) (granting motion to dismiss because government's coronavirus orders did not cause physical alteration to the properties); *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, 487 F. Supp. 3d 937, 944-45 (S.D. Cal. 2020) (same); *10E, LLC v. Travelers Indem. Co. of Conn.*, 483 F. Supp. 3d 828, 837 (C.D. Cal. 2020) (same) ("[W]hile public health restrictions kept the restaurant's 'large groups' and 'happy-hour goers' at home instead of in the dining room or at the barn, Plaintiff remained in possession of its dining room, bar, flatware, and all of the accoutrements of its 'elegantly sophisticated surrounding.'"); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp 3d 834, 843 (N.D. Cal. 2020) (granting motion to dismiss because insured did not allege "intervening physical force beyond the government's closure orders"); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690, 694 (N.D. Ill. 2020) ("In essence, plaintiff seeks insurance coverage for financial losses as a result of the closure orders. The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property. Consequently, plaintiff has failed to plead a direct physical loss—a prerequisite for coverage."); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London*, 489 F. Supp. 3d 1303, 1304 (M.D. Fla. 2020) (granting motion to dismiss because government's coronavirus orders did not cause direct physical loss or damage); *Mark's Engine Co. No. 28 Restaurant, LLC v. Travelers Indem. Co. of Conn.*, 492 F. Supp. 3d 1051, 1055-56 (C.D. Cal 2020) (court found that neither the Mayor's order nor the coronavirus itself caused direct loss of or damage to property under the Civil Authority coverage); *Seifert v. IMT Ins. Co.*, 495 F. Supp. 3d 747, 752 (D. Minn 2020) ("[G]overnmental action prohibiting the use of property, by itself, is not enough."); *Travelers Cas. Ins. Co. v. Geragos & Geragos*, 495 F. Supp. 3d 848, 853 (C.D. Cal. 2020) (rejecting claim that deprivation "of the typical foot traffic, visibility, and ability to interface with clients" constitutes direct physical loss or damage); *Hillcrest Optical, Inc. v. Continental Cas. Co.*, 497 F. Supp. 3d 1203, 1210 (S.D. Ala. 2020) ("Court has required some tangible alteration or disturbance to property to demonstrate physicality"; *Kahn v. Penn. Nat'l Mut. Ins. Co.*, No. 1:20-cv-

2. Direct Physical Loss or Damage Is Not Present.

Jesse's Embers, much like the plaintiffs in *Whiskey River*, *Gerleman Management*, *Lisette Enterprises*, and *Palmer Holdings*, has not established direct physical loss of or damage to property on its premises. Jesse's Embers, expressly denies having knowledge of any coronavirus on its premises. (Amended Petition at ¶ 53; Appendix at p. 13.) Instead, the restaurant contends:

> The proclamation caused "direct physical loss of or damage to" Plaintiff's covered property under the Policy by precluding Plaintiff from conducting its operations, precluding customers from patronizing the business, and otherwise frustrating the intended purpose of Plaintiff's businesses [sic], all thereby causing the necessary suspension of operations during a period of restoration.

(Amended Petition at ¶ 44, *see also id.* at ¶ 72; Appendix at pp. 12, 16.) In so doing, Jesse's Embers wrongly equates loss of use to physical loss or damage. *See Phoenix Ins. Co.*, 147 F. Supp. 3d at 825; *Lisette Enters.*, 2021 WL 1804618, at *5-6. Governor Reynolds' proclamation did not *physically* invade, *physically* harm, or *physically* alter the insured's business premises in any way. The order was merely a regulatory restriction that limited restaurant

781, 2021 WL 422607 (M.D. Penn. Feb. 8, 2021) (dismissing lawsuit because emergency orders did not cause physical alteration of property).

operations to carry-out or delivery services. (Exhibit B: Proclamation at pp. 2–3 (Section Three); Appendix at pp. 208-09.) Under Iowa law, the restaurant's lawsuit does not allege direct physical loss or damage. *See, e.g.*, *Milligan*, 2001 WL 427642, at *2.

From a practical perspective, the insured's interpretation is entirely unworkable. Under its reasoning, direct physical loss would exist any time a legislature, governor, or any regulatory authority issued new restrictions that impacted businesses. For example, if occupancy limits were lowered and Jesse's Embers could no longer seat as many customers, the restaurant's reasoning would allow for a business interruption claim. Similarly, if the City of Des Moines limited the hours that Jesse's Embers and other restaurants could operate their businesses, the restaurant's reasoning would allow for a business interruption claim. The restaurant's reasoning would also render the entire Civil Authority coverage entirely superfluous because any loss of use would trigger Business Income coverage. *E.g.*, *United Airlines, Inc. v. Ins. Co. of State of Pa.*, 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005) ("[The] argument that the word 'damage' was intended to include economic as well as physical damage . . . would appear to render the Civil Authority clause of the Policy inexplicable.").

In sum, Governor Reynolds' Proclamation did not cause direct *physical* loss. A tangible or material alteration to the insured's property is required – not merely loss of use. To accept Jesse's Ember's argument would unworkably expand insurance coverage. In accordance with Iowa law, and the scores of cases from across the country addressing this very issue, the district court properly dismissed the claims for Business Income and Extra Expense coverage.

C. The Civil Authority Coverage Is Not Triggered Because the Governor's Proclamation Did Not Prohibit Access to the Insured's Restaurant Due to any Dangerous Condition Caused by Damage to Property at a Nearby Premises.

To trigger Civil Authority Coverage, a Covered Cause of Loss must cause damage to property other than the insured property. (Exhibit A: Insurance Policy at p. 26; Appendix at p. 76.) Then, there must also be an "action of civil authority that prohibits access" to the insured's property. (*Id.)* The government action must be "in response to dangerous physical conditions" resulting from property damage at a premises located within one mile of the insured's property. (*Id.*)

The requirements for Civil Authority coverage are not met in this case. First, Jesse's Embers has not alleged physical loss, either at its premises or elsewhere; and certainly, there are no allegations its premises are within one

mile of a damaged property. Second, access to the insured's premises was not prohibited by the Proclamation. Third, the Proclamation was not issued in response to any property damage, instead it was issued to lower the risk of transmission of COVID-19.

1. <u>There is No Damage to Other Property.</u>

Under the terms of the policy, Civil Authority coverage is only triggered "[w]hen a Covered Cause of Loss causes damage to property other than property at" the insured's premises. (Exhibit A: Insurance Policy at p. 26; Appendix at p. 76.) The requisite property damage must also be within the area immediately surrounding the insured's property, but not more than one mile away. (*Id.*)

Courts across the country have rejected civil authority claims where adjacent property damage was absent. *E.g.*, *Source Food Technology, Inc. v. U.S. Fidelity & Guar. Co.*, 465 F.3d 834, 836–37 (8th Cir. 2006); *United Airlines, Inc. v. Insurance Co. of State of Pa.*, 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005) (holding physical damage, not just economic damage, is required to invoke business interruption and civil authority coverage); *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-0756 FMS, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995) ("The requisite causal link between damage to adjacent property and denial of access to a Syufy theater is absent."); *Brothers,*

Inc. v. Liberty Mut. Fire Ins. Co., 268 A.2d 611, 613 (D.C. 1970) (rejecting civil authority claim for government order imposing a riot-related curfew and municipal regulations that restricted business hours because no damage to restaurant's adjacent premises).

Numerous cases involving coronavirus orders have denied civil authority coverage because of the absence of adjacent property damage. *E.g.*, *West Coast Hotel Mgmt. v. Berkshire Hathaway Guard Ins.*, 498 F. Supp. 3d 1233, 1240 (C.D. Cal. 2020); *Seifert v. IMT Ins. Co.*, 495 F. Supp. 3d 747, 752 (D. Minn. 2020); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London*, 489 F. Supp. 3d 1303, 1304 (M.D. Fla. 2020); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690, 694 (N.D. Ill. 2020) ("Just as the coronavirus did not cause direct physical loss to plaintiff's property, the complaint has not (and likely could not) allege that the coronavirus caused physical loss to other property."); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 843-44 (N.D. Cal. 2020).

In Iowa, the courts in *Palmer Holdings, Whiskey River, Gerleman Management, and Lisette Enterprises* rejected identical claims for civil authority coverage because there was no damage to another property. *See e.g.*, *Palmer Holdings*, 505 F. Supp. 3d at 857 ("Plaintiffs have failed to plead facts sufficient to qualify for coverage under the Civil Authority provision. They

point generally to the physical form COVID-19 may take; however, Plaintiffs have not alleged damage to another property."); *see also Whiskey River on Vintage,* 503 F. Supp. 3d at 900; *Gerleman Management,* 506 F. Supp. 3d 663, 671 (S.D. Iowa 2021); *Lisette Enters.,* 2021 WL 1804618, at *6.

Like these cases, Jesse's Embers does not identify any physical property damage. Anywhere. The insured claims the

> Proclamation caused 'direct physical loss of or damage to' [its] covered property under the Policy by precluding Plaintiff from conducting its operations, precluding customers from patronizing business, and otherwise frustrating the intended purposed [sic] of Plaintiff's businesses [sic], all thereby causing the necessary suspension of operations during a period of restoration.

(Amended Petition at ¶ 44; *see also id.* at ¶ 72; Appendix at pp. 12, 16.) The insured's allegations describe loss of use, not property damage. Furthermore, the Governor Reynolds' March 17, 2020 Proclamation makes no mention of property damage. (Exhibit B: Proclamation at p. 1. Appendix at p. 207). The Proclamation is about mitigating the risk of person-to-person transmission of the coronavirus by "restricting the movement of persons." (*Id.*) Nothing in the Proclamation indicates property damage of any kind, and certainly not property damage within one mile of the insured's business premises. As a consequence, Jesse's Embers cannot establish Civil Authority coverage.

2. Access to Plaintiff's Business Premises Was Not Prohibited.

Second, Jesse's Embers has not shown that access to its property was "prohibited" by the Proclamation. Access is not prohibited when a government order merely renders the premises less accessible. Jesse's Embers must be completely prevented from accessing the premises. *E.g.*, *Brothers, Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611, 614 (D.C. 1970) (holding civil authority coverage inapplicable where curfew and municipal regulations imposed after riots merely restricted business hours and the sale of alcoholic beverages); *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-0756 FMS, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995) (holding civil authority coverage inapplicable where curfews imposed after Rodney King riots did not prohibit any individual from entering movie theaters); *St. Paul Mercury Ins. Co. v. Magnolia Lady, Inc.*, No. 2:97-cv-153BB, 1999 WL 33537191, at *3 (N.D. Miss. Nov. 4, 1999) (holding civil authority coverage inapplicable where bridge closure made access to the premises more difficult).

Limiting access to the premises is not enough. Repeatedly, this has been one of the rationales for denying Civil Authority coverage stemming from coronavirus-related government orders. *E.g.*, *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, 499 F. Supp. 3d 1178, 1188 (S.D. Fla. 2020); *Seifert v. IMT Ins. Co.*, 495 F. Supp. 3d 747, 752 (D. Minn. 2020); *Sandy*

Point Dental, PC v. Cincinnati Ins. Co., 488 F. Supp. 3d 690, 694 (N.D. Ill. 2020) ("[W]hile coronavirus orders have limited plaintiff's operations, no order issued in Illinois prohibits access to plaintiff's premises.").

Access to the insured's business premises was only limited; it was never prohibited. Under the Proclamation, employees and customers were permitted to visit the premises. (Exhibit B: Proclamation at pp. 2–3 (Section 3); Appendix at pp. 208-09.) The Proclamation only limited the insured's operations to carry-out, drive-through, and delivery services. (*Id.*) Jesse's Embers, including its customers and employees, were expressly allowed to visit the premises throughout the pandemic. Because access to the business was never prohibited, the policy's Civil Authority coverage was not triggered.

3. The Proclamation Was Not Issued in Response to Any Property Damage.

Finally, even if access were prohibited and property damage within one mile was established, Governor Reynolds' Proclamation was not taken in response to any property damage or the dangerous physical conditions associated with the property damage. (Exhibit A: Insurance Policy at p. 26; Appendix at p. 76.) The policy requires:

> The action of civil authority [must be] taken in response to dangerous physical conditions resulting from 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.

(Exhibit A: Insurance Policy at p. 26; Appendix at p. 76.)

The Governor's Proclamation was taken in response to a viral outbreak (*i.e.*, the coronavirus pandemic). (Exhibit B: Proclamation at p. 1; Appendix at p. 207.) The Proclamation makes no mention of property damage, much less indicate that the Proclamation was issued "in response to dangerous physical conditions" resulting from the property damage. (*Id.*) The entire Proclamation is designed to keep people distant from one another to slow the spread of the virus and prevent future illness. This does not satisfy the coverage requirement. *Cf. The Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, No. 1:03-cv-3154-JEC, 2004 WL 5704715, at *6–7 (N.D. Ga. Dec. 15, 2004) (grounding of planes after terrorist attacks about preventing future attacks, not a result of property damage). Because the Proclamation is designed to lower the risk of ***future*** transmission of COVID-19, it is not a result of property damage or taken in response to any property damage within the immediate vicinity of Plaintiff's business.

The courts in *Palmer Holdings* and *Whiskey River*, applying the same language, directly rejected identical argument. *E.g.*, *Palmer Holdings*, 505 F. Supp. 3d at 857 ("Plaintiffs have failed to plead facts sufficient to qualify for

coverage under the Civil Authority provision . . . Reynolds's proclamation was not issued in response to a dangerous physical condition that resulted from a Covered Cause of Loss. Rather, the proclamation was issued to limit the spread of COVID-19."); *Whiskey River on Vintage*, 503 F. Supp. 3d at 900 (same). Under the same facts and rationale, Jesse's Embers has not established a necessary element for Civil Authority coverage.

D. Even if Coverage Could Be Established under the Business Income, Extra Expense, or Civil Authority Provisions, the Insured's Claim Remains Excluded under the Policy's Virus or Bacteria Exclusion.

Even if Jesse's Embers could establish coverage, its claim still would be excluded by the policy's Virus or Bacteria exclusion. Quoted in full, the exclusion states:

> **C. Exclusions**
>
> **2.** We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.
>
> [. . .]
>
> **k. Virus or Bacteria**
>
> **(1)** Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

> **(2)** However, the exclusions in Paragraph **(1)** does not apply to loss or damage caused by or resulting from "fungi", wet rot or dry rot. Such loss or damage is addressed in Exclusion **i.**
>
> **(3)** With respect to any loss or damage subject to the exclusion in Paragraph **(1)**, such exclusion supersedes any exclusion relating to "pollutants".

(Exhibit A: Insurance Policy at pp. 34, 36–37; Appendix at pp. 84, 86-87.)

The provision begins with a standard anti-concurrent causation clause, which "unambiguously excludes coverage for damages that are concurrently caused by a covered cause . . . and an uncovered cause . . . by its language, 'Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.'" *Salem United Methodist Church of Cedar Rapids v. Church Mut. Ins. Co.*, No. 13-2086, 2015 WL 1546431, at *3 (Iowa Ct. App. Apr. 8, 2015); *see also Amish Connection, Inc. v. State Farm Fire & Cas. Co.*, 861 N.W.2d 230, 241–42 (Iowa 2015). Therefore, if a virus contributed in any way to the alleged physical loss, there would not be any coverage for the claim. *E.g.*, *Diesel Barbershop,* LLC v. State Farm Lloyds, 479 F. Supp. 3d 353, 363-62 (W.D. Tex. 2020) (holding the policy's virus exclusion applies when insured contended COVID-19 emergency order caused their losses).

Unquestionably, there is a nexus between the coronavirus and the insured's alleged loss. In fact, Jesse's Embers' own admission conclusively establishes the Virus or Bacteria exclusion applies. Paragraph 46 of the Amended Petition states:

> **Losses caused by COVID-19 and/or the Governor Reynolds' proclamation triggered the Business Income, Extra Expense, and Civil Authority provisions of the Policy.**

(Amended Petition at ¶ 46 (emphasis added); Appendix at p. 12.) Jesse's Embers cannot argue that a virus did not cause or contribute to their alleged loss when its own petition claims a virus triggered coverage under the policy. Even if the Court were to ignore the pleadings, the Proclamation establishes that a virus contributed to the proclamation and, therefore, the insured's claimed loss. The very first clause of Governor Reynolds' Proclamation confirms that it was issued following an outbreak of the coronavirus that causes "illness and deaths." (Exhibit B: Proclamation at p. 1; Appendix at p. 207.) The entire Proclamation is designed to lower the risk of transmission of COVID-19 by restricting the movement of persons and implementing community containment strategies, including the restrictions imposed on the insured's restaurant. (*Id.*).

Again, the recent Iowa decisions in *Whiskey River, Palmer Holdings, Gerleman Management,* and *Lisette Enterprises* address and reject identical

arguments. *See e.g., Palmer Holdings*, 505 F. Supp. 3d at 858 ("Plaintiffs' contention that it was the proclamation that caused their losses rather than the virus because they would have remained open does not save their claims from the Virus Exclusion. Plaintiffs' losses were directly or indirectly caused by or resulted from COVID-19, rather than strictly the proclamation. The proclamation was issued in response to the COVID-19 pandemic as referenced in the proclamation itself. The Virus Exclusion is therefore triggered, and coverage is excluded even if Plaintiffs could establish coverage under the Business Income, Extra Expense, or Civil Authority provisions of the insurance policy." (citation omitted)).[2]

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[2] *See also Whiskey River,* 503 F. Supp. 3d at 901-02 ("the Virus Exclusion unambiguously states it will not pay for loss or damage that is directly or indirectly caused by any virus, regardless of any other cause or event that contributes to the loss"); *Gerleman Management,* 506 F. Supp. 3d 663, 671 ("Plaintiff's contention that it was the proclamation that caused their losses rather than the virus . . . does not save their claims from the Virus Exclusion"); *Lisette Enterprises,* 2021 WL 1804618, at *6 ("even if coverage extends under the Business Interruption or Civil Authority Provisions, Plaintiff's claim is rendered non-compensable by the Virus Exclusion); *Dye Salon, LLC v. Chubb Indemn. Ins. Co.,* No. 20-cv-11801, 2021 WL 493288, at *5 (E.D. Mich. Feb. 10, 2021) (dismissing lawsuit because, even if the insured could establish coverage, the virus exclusion is "plainly applicable" to the claim); *Causeway Automotive v. Zurich American Ins. Co.,* No. 20-8393, 2021 WL 486917, at *7 (D. N. J. Feb. 10, 2021) (dismissing lawsuit, because even if insured could establish coverage, the virus exclusion "unambiguously" bars coverage); *Salon XL Color & Design Grp. v. West Bend Mut. Ins. Co.,* No. 20-11719, 2021 WL 391418 at *3 (E.D. Mich. Feb. 4, 2021) ("[t]he Virus or Bacteria

In conclusion, a virus contributed to the insured's claimed loss. Consequently, even if Jesse's Embers could establish coverage under the policy, the alleged loss remains excluded by operation of the Virus or Bacteria exclusion.

E. The Reasonable Expectations Doctrine Does Not Apply.

Jesse's Embers attempts to invoke the reasonable expectations doctrine to create coverage where none exists. Under Iowa law, the reasonable expectations doctrine will operate to reform an insurance policy when a provision "(1) is bizarre or oppressive, (2) eviscerates terms explicitly agreed to, or (3) eliminates the dominate purpose of the transaction." *Lisette Enters., Ltd. v. Regent Insurance Co.,* 2021 WL 1804618 at *7 (quoting *Chicago Ins. Co. v. City of Council Bluffs,* 713 F.3d 963, 972 (8th Cir. 2013)). The doctrine is narrowly circumscribed. It only applies after a threshold showing that "an ordinary layperson would misunderstand its coverage, or there are circumstances attributable to the insurer which would foster coverage expectations." *Clark-Peterson Co. v. Independent Ins. Assoc., Ltd.,* 492 N.W.2d 675, 677 (Iowa 1992). No such showing exists in this case.

Exclusion is clearly written to exclude "any virus" from the Business Income, Extra Expense, and Civil Authority coverages").

The policy language is plain and unambiguous. Notably, Jesse's Embers does not argue the Virus or Bacteria exclusion is ambiguous or impossible to understand. Nor does it argue circumstances attributable to the insurer fostered coverage expectations. Instead, the insured targets the "physical loss of or damage" language in the Business Income and Extra Expense provisions of the policy carefully removing the word "direct" immediately preceding the phrase. (Appellant's Brief at p. 51.) Several Iowa federal courts, however, have already held that the "direct physical loss of or damage to property" language is unambiguous and clearly requires something more than a mere loss of use or threat of loss. *See e.g. Whiskey River on Vintage, Inc. v. Illinois Cas. Ins. Co.,* 503 F. Supp. 884 (S.D. Iowa 2020); *Palmer Holdings & Invs., Inc. v. Integrity Ins. Co.,* 505 F. Supp. 3d 842 (S.D. Iowa 2020); *Gerleman Management, Inc. v. Atlantic States Ins. Co.,* 506 F. Supp. 3rd 663, 670 (S.D. Iowa 2020); *Dean Snyder Constr. Co. v. Travelers Prop. Cas. Co. of Am.,* 173 F. Supp. 3rd 837, 842-43 (S.D. Iowa 2016); *see also Lisette Enters., Ltd. v. Regent Ins. Co.,* No. 4:20-cv-00299-SMR-CFB, 2021 WL 1804618 at *7 (S.D. Iowa May 6, 2021) (holding virus exclusion is clear and "an ordinary layperson should have no difficulty understanding the scope of the exclusion").

Accordingly, the insured's reliance on the reasonable expectations doctrine is without merit and cannot be used to create coverage where none exists.

II. Recent Iowa Cases – *Whiskey River, Palmer Holdings, Gerleman Management,* and *Lisette Enterprises* – Provide a Roadmap for Affirming the District Court's Ruling.

Iowa federal courts recently issued several decisions directly on point. *See Whiskey River on Vintage, Inc. v. Illinois Cas. Co.,* 503 F. Supp. 3d 884 (S.D. Iowa 2020); *Palmer Holdings & Investments, Inc. v. Integrity Ins. Co.*, 505 F. Supp. 842 (S.D. Iowa Dec. 7, 2020); *Gerleman Management, Inc. v. Atlantic States Ins. Co.,* 506 F. Supp. 3d 663 (S.D. Iowa 2020); *Lisette Enters., Ltd. v. Regent Ins. Co.,* No. 4:20-cv-00299-SMR-CFB, 2021 WL 1804618 (S.D. Iowa May 6, 2021). These cases provide sound legal precedent for this Court to affirm the ruling of the District Court.

All four cases arose out of the pandemic and involve similarly situated plaintiffs advancing the exact same claims and theories of recovery as Jesse's Embers. All involve similar facts and insurance policy provisions. In each case, the federal court ruled in favor of the insurance company and dismissed the plaintiffs' claims.

The earliest decision is the *Whiskey River* case. The subsequent cases – *Palmer Holdings, Gerleman Management,* and *Lisette Enterprises* –

employ the same legal analysis as the court in *Whiskey River* court and therefore come to similar conclusions. It is for this reason that *Whiskey River* is discussed at length herein, but any of the four cases could just as easily provide the roadmap for this Court to affirm the district court's grant of summary judgment.

The plaintiffs in *Whiskey River* were restaurants or bars that claimed coverage under the Business Income, Extra Expense, and Civil Authority coverages of an insurance policy issued by Illinois Casualty Company. *Whiskey River,* 503 F. Supp. 3d at 888. Like here, the plaintiffs claimed that the insurer should be estopped from invoking the policy's virus exclusion. *Id.* at 901. The plaintiffs asserted causes of action for declaratory judgment, breach of contract, and bad faith. *Id.* at 890-92. The facts and legal theories were identical to the allegations in this case. *Id.* Analyzing Iowa law and caselaw from across the country, the court drafted an authoritative opinion that directly refutes every issue raised in Jesse's Embers' lawsuit.

A. No Business Income or Extra Expense Coverage Because Governor Reynolds' Proclamation Did Not Cause Direct Physical Loss.

At the outset, the court rejected the plaintiffs' claim for Business Income and Extra Expense coverage because there was **no direct physical**

loss. After an extensive discussion of the *Milligan*, *Phoenix Insurance*, and *Dean Snyder* cases, the court reasoned:

> [T]he phrase "direct physical loss of or damage to property" requires a physical invasion and loss of use is insufficient to trigger coverage without physical damage to the insured properties.
>
> Even if the Court assumes loss and damage are distinct concepts that can independently trigger coverage, the terms are unambiguous, and Plaintiffs have failed to allege facts sufficient to qualify for Business Income coverage. Plaintiffs allege that the proclamation caused them direct physical loss or damage by precluding customers from patronizing their business, precluding them from conducting business, and frustrating the intended purpose of their businesses. Although Plaintiffs attempt to paint their losses as physical, they have essentially pleaded loss of use, which is insufficient to establish a direct physical loss. Even if loss and damage are distinct, the physicality requirement of the loss or damage remains, and Plaintiffs have failed to allege a tangible loss or alteration to property that is sufficient to trigger coverage under the Business Income provision.
>
> The Extra Expense provision requires "direct physical loss or damage" to the insured property to trigger coverage. For the same reasons identified above, Plaintiffs have failed to plausibly allege direct physical loss or damage to the insured property within the meaning of the Extra Expense provision. Because Plaintiffs have failed to allege direct physical loss or damage to the insured property as required by the policy, they are not entitled to coverage under the Business Income or Extra Expense provisions.

Id. at 897-98 (citations omitted). The opinion then goes on to summarize cases from across that country that have considered similar claims during the

pandemic and reached the same conclusion. *Id.* at 898-99. Ultimately, the court held:

> that it is a settled matter in Iowa law that direct physical loss or damage requires tangible alteration of property and that loss of use alone is insufficient. The Court further concludes that Plaintiffs have not alleged a direct physical loss or damage that is sufficient under the policy or Iowa law. Because a direct physical loss or damage to the insured property is a prerequisite to trigger coverage under the Business Income and Extra Expense provisions of the policy, Plaintiffs have failed to plausibly plead an entitlement to coverage under these provisions. No material issue of fact remains unresolved, and Defendant is entitled to judgment as a matter of law.

Id. at 899 (citations omitted).

B. No Civil Authority Coverage Because No Property Damage.

The court also rejected the plaintiffs' claim for Civil Authority coverage, interpreting the same policy language at issue in this case. The court stated:

> Here, the Civil Authority provision unambiguously requires that an order of civil authority be issued in response to a dangerous physical condition created by damage to another property and that the insured property be within a one-mile radius of the damaged property. Plaintiffs have failed to plead facts sufficient to qualify for coverage under the Civil Authority provision. They point generally to the physical form COVID-19 may take; however, Plaintiffs have not alleged damage to another property. Further, Reynolds's proclamation was not issued in response to a dangerous physical condition that resulted from a Covered Cause of Loss. Rather, the proclamation was issued to limit the spread of COVID-19. Because Plaintiffs have failed to

> allege facts sufficient to trigger the Civil Authority provision, the Court need not address whether a civil authority order must completely prohibit access. However, the Court is skeptical that the prohibits access prong would be satisfied when the Plaintiffs were able to conduct delivery and take-out services from their properties but chose not to do so. *See Phoenix Ins. Co.*, 147 F. Supp. 3d at 824 (concluding the court could not find a loss of use of the insured property when the insured party still stored data and had employees at the property at the time of the alleged loss of use). Regardless, Plaintiffs have failed to allege facts sufficient to state a claim for coverage under the Civil Authority provision.

Id. at 900 (citation omitted). Again, the opinion goes on to summarize recent caselaw from across the country that address similar circumstances and came to the same conclusion. *Id.* Ultimately, the court held that the plaintiffs had not made any allegations that could demonstrate coverage under the Civil Authority provision. *Id.* at 901.

C. Regardless, the Virus Exclusion Would Have Barred Coverage.

Even if the Whiskey River plaintiffs could have established coverage under the Business Income, Extra Expense, or Civil Authority provisions, the court found that the claim still would have been excluded by the policy's Virus or Bacteria Exclusion—the same exclusion at issue in this lawsuit. The court reasoned:

> The Virus Exclusion unambiguously states it will not pay for loss or damage that is directly or indirectly caused by any virus, regardless of any other cause or event that contributes to the loss.

> Plaintiffs' alleged losses were caused by or resulted from a virus, specifically, COVID-19. Plaintiffs' Amended Complaint states their losses were "caused by COVID-19 and/or the Governor Reynolds's proclamation . . . ." Plaintiffs thereby recognize their alleged losses were caused by COVID-19, which triggers the Virus Exclusion. Plaintiffs also recognize their losses resulted from COVID-19 in their resistance to Defendant's Motion for Judgment on the Pleadings. In their resistance, Plaintiffs state, "The threat and ubiquitous presence of COVID-19 . . . resulted in Governor Reynolds' proclamation, which in turn caused 'direct physical loss' to Plaintiffs' covered property."
>
> Plaintiffs' contention that it was the proclamation that caused their losses rather than the virus because they would have remained open does not save their claims from the Virus Exclusion. Plaintiffs' losses were directly or indirectly caused by or resulted from COVID-19, rather than strictly the proclamation. The proclamation was issued in response to the COVID-19 pandemic as referenced in the proclamation itself. Office of the Governor of Iowa Kim Reynolds, *Gov. Reynolds Issues a State of Public Health Disaster Emergency*, iowa.gov, https://governor.iowa.gov/press-release/gov-reynolds-issues-a-state-of-public-health-disaster-emergency (Mar. 17, 2020).

Id. at 901-02 (citations omitted). Again, the opinion goes on to summarize cases from across the country where the virus exclusion was applicable to similar coronavirus related claims. *Id.* at 902. The court held the virus exclusion was triggered and coverage was excluded, even if the plaintiffs could have established coverage under the Business Income, Extra Expense, or Civil Authority provisions of the insurance policy. *Id.*

D. The Court Also Rejected the Plaintiffs' Reasonable Expectations Claims Related to the Virus Exclusion.

The plaintiffs in *Whiskey River* advanced a reasonable expectations argument that "the Virus Exclusion was included in these types of policies under false pretenses." *Id.* They claimed "the insurance industry misrepresented to states that the virus exclusion would not alter the scope of coverage when it actually did without lowering premiums." *Id.* "They contend[ed the insurance company] directly or indirectly 'participated in the insurance industry's efforts to effect Insurance Commissioners, including the State of Iowa's Insurance Commissioner, to approve the suggested virus exclusion." *Id.*

The court rejected the plaintiffs' arguments in their entirety.

> Plaintiffs have not plausibly stated a claim to invoke the reasonable expectations doctrine. The reasonable expectations doctrine only applies to prevent the application of an exclusion in an insurance policy when the exclusion "(1) is bizarre or oppressive, (2) eviscerates terms explicitly agreed to, or (3) eliminates the dominant purpose of the transaction." *Clark-Peterson Co. v. Indep. Ins. Assocs., Ltd.*, 492 N.W.2d 675, 677 (Iowa 1992) (citations omitted). Before a court even considers these elements, the insured party bears the burden of proving either "circumstances attributable to the insurer which would foster coverage expectations" or that the policy is "such that an ordinary lay person would misunderstand its coverage." *Id.* The reasonable expectations doctrine is not intended to expand coverage on a purely equitable basis. *Id.*

> Plaintiffs have failed to plead facts that are sufficient to invoke the reasonable expectations doctrine and to generate an issue of material fact. The language of the virus exclusion is clear; it explicitly states Defendant "will not pay for loss or damage caused by or resulting from any virus . . . ." Based on the plain language of the exclusion, Plaintiffs could not have reasonably expected their alleged losses to be covered. *See Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 504 (Iowa 2013). The Virus Exclusion provision is not one "where only 'painstaking study of the policy provisions would have" revealed an exclusion or neutralized an otherwise reasonable expectation." *Phoenix Ins. Co.*, 147 F. Supp. 3d at 832 (quoting *Farm Bureau Mut. Ins. Co. v. Sandbulte*, 302 N.W.2d 104, 112 (Iowa 1981) (citations omitted)). Even if Plaintiffs had pleaded sufficient facts to make out a claim for the prerequisite, the reasonable expectations doctrine remains inapplicable because they have failed to allege sufficient facts to demonstrate that the policy language is bizarre or oppressive, that the exclusion eviscerates terms explicitly agreed to, or sufficient facts that demonstrates applying the exclusion would eliminate the dominant purpose for coverage.

Id. at 903. Consequently, the court held that the plaintiffs were not entitled to coverage under the insurance policy and held that the insurance company was entitled to judgment as a matter of law on the breach of contract and declaratory judgment claims. *Id.*

E. The Court Dismissed the Bad Faith Claim Because the Insurer had a Reasonable Basis to Deny the Claim.

Finally, the court dismissed the plaintiffs' bad faith claim, which was similarly premised on allegations that the insurer failed to investigate the claim. *Id.* at 903-04. The court reasoned that the insurer had a reasonable basis

to deny the claim because the coverage issues demonstrated that the plaintiffs had not alleged facts "that [were] sufficient to demonstrate [the insurer] lacked a reasonable basis to deny their claims for coverage under the Business Income, Extra Expense, and Civil Authority provisions." *Id.* at 904. Regardless, the bad faith claim failed because the plaintiffs did not allege facts that were "sufficient to prevent application of the Virus Exclusion." *Id.* Therefore, the plaintiffs did not demonstrate the insurer lacked a reasonable basis to the claims. *Id.* Accordingly, the court dismissed the plaintiffs' bad faith claim because the insurer was entitled to judgment as a matter of law. *Id.*

In conclusion, *Whiskey River* provides an on-point roadmap for this Court. It directly addresses the issues involved in this case, including the same policy provisions, factual allegations, causes of action, and arguments. As *Whiskey River* very thoroughly demonstrated, the allegations are not sufficient to demonstrate coverage under the insurance policy. This Court should adopt the same rationale and affirm the District Court's grant of summary judgment.

F. Recent Cases Relied Upon by the Insured Are Inapposite or Easily Distinguishable.

Jesse's Embers cherry picks several poorly reasoned or inapposite cases in support of its position. Among those are:

> *Henderson v. Road Restaurant Syss., Inc. v. Zurich Am. Ins. Co.*, 1:20-cv-1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021);

Studio 417 v. Cincinnati Ins. Co., 478 F. Supp. 3d 794 (W.D. Mo. 2020);

North State Deli, LLC v. Cincinnati Ins. Co., No. 20-CVS-02569, 2020 WL 6281507 (N.C. Super. Oct. 9, 2020);

Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co., 484 F. Supp. 3d 492 (E.D. Mich. 2020).

These cases involve similar claims for business interruption losses arising out of the coronavirus pandemic.

The *Henderson* case is a poorly-reasoned decision, yet it is easily distinguishable as the insurance policy in that case contained no Virus or Bacteria exclusion which would bar coverage outright. The policy also contained different policy language. The policy defined the term "period of restoration" quite differently which the court then used to implicate possible coverage. *Henderson* at 2021 WL 168422 at *13.

Likewise, *Studio 417* is distinguishable for multiple reasons. First, the insurance policy in that case contained materially different language that provided business interruption coverage for "accidental direct physical loss or accidental direct physical damage" – language not appearing in the Western Ag. policy. *Studio 417,* 478 F. Supp. 3d at 797. Second, the policy in *Studio 417*, lacked a Virus or Bacteria exclusion which again would bar coverage outright. And third, the plaintiffs in *Studio 417* alleged the COVID-19 virus

was physically present on the premises – a material fact that is absent in the *Jesse's Embers* case. *Id.* at 798.

The *North State Deli* decision relied upon by Plaintiff is likewise inapposite. That case involved significantly different policy language and contained no Virus or Bacteria exclusion. *North State Deli, LLC,* 2020 WL 6281507 at *2 (N.C. Super. Oct. 9, 2020).

Finally, Plaintiff's reliance on the *Turek Enterprises* case is grossly misplaced. The court in *Turek* actually ruled in favor of the insurance company and held the policy's "direct physical loss" language required some showing of tangible injury to property. *Turek,* 484 F. Supp. 3d at 500-501. The court found that even if the plaintiff could establish a direct physical loss, the policy's Virus exclusion would still negate any coverage. *Id.* at 504.

CONCLUSION

In conclusion, the Appellate Court should affirm the District Court's Ruling which granted summary judgment to Western Ag. The Western Ag policy unambiguously requires a direct physical loss to trigger coverage. Jesse's Embers' claim does not allege a direct *physical* loss. It only claims loss of business income resulting from Governor Reynolds' March 17, 2020 Proclamation; a claim that is not covered by the insurance policy. Regardless,

the Virus or Bacteria exclusion would exclude coverage for the insured's claims. Accordingly, this Court should affirm the ruling of the District Court granting summary judgment in favor of Western Ag.

REQUEST FOR ORAL ARGUMENT

Counsel for the Appellee Western Agricultural Insurance Company d/b/a Farm Bureau Financial Services respectfully requests an opportunity to be heard in oral argument.

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CERTIFICATE OF FILING AND PROOF OF SERVICE

I, Karl Olson, attorney for the Appellee herein, hereby certify that I filed this Proof Brief with the Clerk of the Iowa Supreme Court by EDMS on August 5, 2021. I further certify that I served this Proof Brief on all other parties by EDMS on August 30, 2021 through their respective counsel as listed below:

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I, Karl T. Olson, attorney for the Appellee herein, hereby certify that the actual cost of printing this Proof Brief was $0. Copies were served via EDMS.

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