No. 21-16557

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Menominee Indian Tribe of Wisconsin, et al.,

Plaintiffs-Appellants,

v.

Lexington Insurance Company, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 3:21-cv-00231
Hon. William H. Orrick

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

On March 12, 2021, Plaintiff-Appellants Menominee Indian Tribe of Wisconsin ("Menominee Tribe"), Menominee Indian Gaming Authority d/b/a Menominee Casino Resort ("MCR"), and Wolf River Development Company ("Wolf River") (together with MCR and Menominee Tribe, "the Menominee" or "Appellants"), filed their First Amended Class Action Complaint ("Amended Complaint") against Defendant-Appellees Lexington Insurance Company, *et al.*[1] (collectively, "Appellees" or the "Insurers"). The Insurers moved to dismiss the

[1] Defendant-Appellees are: (1) Lexington Insurance Company; (2) Underwriters at Lloyd's – Syndicates: ASC1414, TAL 1183, MSP 318, ATL1861, KLN 510, AGR 3268; (3) Underwriters at Lloyd's - Syndicate: CNP 4444; (4) Underwriters at Lloyd's - Aspen Specialty Insurance Company; (5) Underwriters at Lloyd's - Syndicates: KLN 0510, ATL 1861, ASC 1414, QBE 1886, MSP 0318, APL 1969, CHN 2015; (6) Underwriters at Lloyd's – Syndicate: BRT 2987; (7) Underwriters at Lloyd's - Syndicates: KLN 0510, TMK 1880, BRT 2987, BRT 2988, CNP 4444, ATL 1861, Neon Worldwide Property Consortium, AUW 0609, TAL 1183, AUL 1274; (8) Homeland Insurance Company of New York; (9) Hallmark Specialty Insurance Company; (10) Endurance Worldwide Insurance Ltd t/as Sompo International; (11) Arch Specialty Insurance Company; (12) Evanston Insurance Company; (13) Allied World National Assurance Company; (14) Liberty Mutual Fire Insurance Company; (15) Landmark American Insurance Company; (16) XL Catlin Insurance Company UK Ltd; and (17) SRU Doe Insurers 1-20.

Menominee's Amended Complaint under Federal Rule of Civil Procedure 12(b)(6) (the "Motion to Dismiss").

The United States District Court for the Northern District of California had subject-matter jurisdiction over the case under 28 U.S.C. § 1332 because at least one member of the proposed class is a "citizen of a State different from any defendant" or "a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State." Menominee Indian Tribe is a federally recognized Indian Tribe located in Keshena, Wisconsin; MCR and Wolf River hold business charters from the Tribal Government of the Menominee Tribe; Lexington is organized under the laws of the State of Delaware. Additionally, the purported Class consists of at least 100 members, the amount in controversy exceeds $5,000,000 exclusive of interest and costs, and no relevant exceptions apply to this claim.

On August 23, 2021, the District Court granted Lexington's Motion to Dismiss with prejudice. On September 20, 2021, Appellants filed a timely notice of appeal under Federal Rules of Appellate Procedure 3(a) and 4(a)(1)(A). This Court has jurisdiction under 28

U.S.C. §§ 1291 and 1294 because the appeal is from a final order of judgment that disposes of all of Appellants' claims.

STATEMENT OF THE ISSUES

1. Along with thousands of businesses across the country, the Menominee Indian Tribe purchased insurance to protect the businesses it operates against business interruption losses resulting from "direct physical loss or damage" to its properties. The Menominee have alleged that COVID-19 and the resulting civil closure orders damaged their property, diminished the functional space of those properties by drastically reducing operations, and prevented the use of many properties for several months. Did the District Court err by interpreting the term "direct physical loss or damage" to require perceptible and "corporeal" loss, rather than a tangible physical presence that resulted in the diminishment and loss of use of functional space?

2. The Menominee have also alleged that COVID-19 infested their properties and physically altered property surfaces and ambient air, making those surfaces and ambient air unsafe and harmful to human health. Even if the District Court properly interpreted the term "direct physical loss or damage" to exclude loss of use, did the District

Court err and impermissibly invade the province of the jury—in granting the Motion to Dismiss—by ignoring those allegations and determining that COVID-19 does not sufficiently cause physical loss or damage to property surfaces and ambient air?

3. The Menominee have also alleged that COVID-19 caused damage to other properties within ten miles of the insured premises and that damage resulted in the issuance of closure orders prohibiting access to the insured premises, including closure orders issued by the government of the Menominee Tribe itself. Did the District Court err in holding that the Menominee did not state a claim under the civil authority and ingress/egress coverages because they failed to allege a sufficient connection between COVID-19 property damage and the closure orders even though the Menominee Tribe itself issued the orders and alleged those orders were due to COVID-19 property damage?

STATEMENT OF THE CASE

Appellants alleged facts in the Amended Complaint describing the impact of COVID-19 on their insured properties, which include both businesses and public facilities. The District Court correctly found that the Menominee alleged that there was COVID-19 virus exposure at

these properties. However, it erred in concluding that neither direct exposure to the virus nor the closure orders issued because of the pandemic at large—and presence of the virus on Menominee properties—could constitute "direct physical loss or damage" under Appellants' insurance policy.

I. The Insured Properties

The Menominee Tribe, a federally recognized Indian Tribal Entity, operates tribal businesses and facilities on its approximately 235,000-acre reservation within northern Wisconsin. 2-ER-68, ¶ 1. Among these businesses and facilities are the Menominee Casino Resort ("MCR"), which itself includes a casino, lounge, entertainment venue, gift shop, RV park, hotel, and convention center; the Thunderbird Complex, which includes a mini-casino, restaurant, bar, and outdoor entertainment venue; and the Menominee Tribal Clinic (collectively with MCR and the Thunderbird Complex, the "Businesses"), which provides a range of medical, dental, and other health services for the community. 2-ER-69–70, ¶¶ 5–7. These and other businesses generate business and tax revenue for the Tribe, 2-ER-70, ¶ 8, and provide services for Tribal citizens. 2-ER-69–70, ¶¶ 4–8.

II. The Tribal Property Insurance Program

Appellants purchased insurance coverage for their properties through the Tribal Property Insurance Program prepared by Tribal First (the "Policy"). 2-ER-70, ¶ 9; *see* 2-ER-124. Tribal First is a specialized program of Alliant Underwriting Services, a California-based insurer. 2-ER-70, ¶ 9. The Policy covered the policy period July 1, 2010, through July 1, 2020, and comprised various layers of coverage through more than a dozen insurers (the "Insurers"). 2-ER-70, ¶ 10. Tribal First insured not only Menominee, but other tribes and tribal entities throughout the United States, all of whom were subject to the same overall aggregate policy limits for each layer of coverage. 2-ER-71, ¶ 11.

The Policy provided coverage for "loss resulting directly from interruption of business, services, or rental value caused by direct physical loss or damage, as covered by this Policy to real and/or personal property insured by this Policy, occurring during the terms of this Policy." 2-ER-71, ¶ 12. The Policy provided "all risk" property coverage to protect Appellants' property and businesses in the event that they needed to suspend operations at any covered property for

reasons outside of Appellants' control, or in order to prevent further property damage. 2-ER-72–73, ¶ 19. The Policy included insurance for Protection and Preservation of Property, as well as "Time-Element" coverages for Business Interruption, Extra Expense, Ingress/Egress, Interruption by Civil Authority ("Civil Authority"), Contingent Time Element, and Tax Revenue Interruption. *Id.*

Unlike many policies that provide business interruption coverage, the Policy does not include, and is not subject to, an exclusion for losses caused by the spread of viruses or communicable diseases. 2-ER-80–81, ¶¶ 55–58. The absence of such an exclusion is notable because the insurance industry has recognized since at least 2006 that the presence of a virus or disease can constitute physical damage to property. When preparing so-called "virus exclusions," the drafting arm of the insurance industry, the Insurance Services Offices, Inc. ("ISO"), circulated a statement to state insurance regulators that included the following passage:

> Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of

> decontamination (for example, interior building surfaces), and business interruption (time element) losses. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case.

2-ER-82–83. Insurers could have narrowed the definition of the phrase "direct physical loss or damage" or added an explicit virus provision to exclude claims like those brought by Appellants. For example, Insurers did exclude losses caused by or arising from "fungus, mold(s), mildew or yeast" or spores or toxins created therefrom, as well as losses "directly or indirectly caused by, resulting from or in connection with the actual or threatened malicious use of pathogenic or poisonous biological or chemical materials." 2-ER-192–93, § IV.B. Exclusions. Appellees included no comparable provision in the Policy to exclude losses caused by a virus.

III. The COVID-19 Pandemic, Closure Orders, and Direct Physical Loss or Damage

COVID-19 is a highly contagious respiratory virus that is expelled by infected individuals and travels through the air in aerosolized droplets. 2-ER-85–86, ¶¶ 78–80. Individuals may become infected directly through inhaling airborne, aerosolized particles. 2-ER-89, ¶¶

94–95. Additionally, once those particles land on a physical surface, the virus can survive there for anywhere between several hours and several days, rendering that surface unsafe. 2-ER-87–88, ¶¶ 85–91. Individuals who touch a surface that has been contaminated by the virus may then become infected through indirect "fomite transmission," or they may carry the virus to another location, rendering additional surfaces unsafe. 2-ER-87, ¶¶ 86–87; 2-ER-90, ¶ 100. The various modes of transmission led to the rapid spread of COVID-19 across the globe and a once-in-a-century pandemic.

In direct response to the potential and actual dangers posed by the virus, both the State of Wisconsin and Menominee Tribal Legislature issued Emergency Orders and Executive Orders (collectively, "Closure Orders") designed to reduce the spread of the virus within their jurisdictions. *Id.*, ¶¶ 103–18. The Tribal Legislature issued its Emergency Orders in conjunction with its Moving Safer Forward Plan, which, like the state orders, severely restricted business operations in order to contain the virus' spread. 2-ER-91–98, ¶¶ 105–18, 120–34. These Closure Orders paralleled those issued by state, local, and Tribal governments across the country. 2-ER-98, ¶¶ 135–37. The Closure

Orders prohibited access to interior spaces of businesses like the MCR and Thunderbird and restricted the use of the Clinic and healthcare facilities for all but the most essential services. 2-ER-100, ¶¶ 144–45.

The virus' presence on the Properties made them immediately uninhabitable, thereby impairing—or damaging—their structure and function and interrupting business. 2-ER-98, ¶ 138. Despite limited available testing, hundreds of cases of COVID-19 were reported on the reservation in 2020, including 42 employees of the Properties. 2-ER-98–99, ¶ 139. The resulting Closure Orders caused further loss of the use of the properties because customers and clients were no longer able to enter the buildings and access their facilities and services. 2-ER-100, ¶¶ 144–45. Some businesses, including the MCR, were completely closed for a lengthy period and were only able to reopen at significantly reduced capacity and with modifications to both spaces and operations to mitigate the virus' spread. *Id.*, ¶¶ 145–46. Appellants submitted a claim for coverage under the Protection and Preservation of Property, Business Interruption, Extra Expense, Ingress/Egress, Civil Authority, Contingent Time Element, and Tax Revenue Interruption provisions of the Policy, which Appellees denied. 2-ER-100–01, ¶¶ 151–52.

SUMMARY OF THE ARGUMENT

This is an insurance coverage case—one of more than 1,500 such cases filed in courts around the country seeking recovery under property insurance policies for business interruption losses caused by COVID-19 and the resulting civil closure orders. Like most of the other COVID-19 insurance lawsuits, this case and the District Court's decision hinge on five or six words that trigger most of the insurance coverage available under the voluminous policy: "direct physical loss of or damage." Although the words are ordinary, the impact of their interpretation has been extraordinary.

"Under Wisconsin law, the words of an insurance policy are given their common and ordinary meaning." *State Farm Mut. Auto. Ins. v. Gillette*, 641 N.W.2d 662, 671 (Wis. 2002). An insurance policy is interpreted as a "reasonable person of ordinary intelligence in the position of the insured" would understand it. *Id.* When, from the perspective of the reasonable insured, the policy is susceptible to more than one interpretation, the policy must be interpreted against the insurer and in favor of coverage. *Id.* Despite these principles, the District Court nonetheless employed an interpretation of "direct

physical loss or damage to" property that would effectively foreclose any ability of *any* insured under *any* Policy to receive coverage for this type of (explicitly covered) loss.

Rather than focus on the plain meaning of the contract terms themselves, the District Court interpreted the Policy based on other analysis the similar phrase "direct physical loss of or damage to" in other cases considering COVID-19 business interruption claims under other policies. 1-ER-11–16. Moreover, the court did not apply a consistent standard to cases it would select to represent Wisconsin law. *Compare* 1-ER-12 (relying on a case the court acknowledges did not rely on Wisconsin case law for the meaning of "direct physical loss") *with* 1-ER-15 (refusing to consider a case because it was "not apparent that the . . . court relied on any Wisconsin law" in its holding). The District Court then used this unreliable "spectrum" of Wisconsin case law to determine that "direct physical loss or damage" requires some "physical event" causing the loss. 1-ER-15. The District Court incorrectly determined, with only minimal analysis, that neither closure orders issued due to COVID-19, *nor the presence of COVID-19*, were "physical events." *Id.* In making that determination, the court ignored the

definition of "physical" it had acknowledged only pages earlier in its opinion. 1-ER-11 ("The common and ordinary meaning of the word 'physical' is 'of or related to natural or material things as opposed to things mental, moral, spiritual, or imaginary.").

Pre-COVID-19 case law from Wisconsin and elsewhere demonstrates that courts have long recognized that "direct physical loss or damage" to property encompasses a loss of use, a loss of function, or damage caused at the microscopic level. These cases stand in contrast to the District Court's newfound requirement of a "tangible" physical event, as they found coverage for losses caused by odors, gases, and other imperceptible matter that deprive an insured of its ability to use the covered property, even though such causes would be incapable of satisfying the District Court's standard. *See infra*, Argument § II.B.

Moreover, even under the District Court's restrictive interpretation of the key policy language, the Menominee should prevail. The Menominee *have* alleged the presence of the virus and physical alterations to property surfaces at their Businesses. Despite these express allegations, the District Court found that Menominee had not alleged "direct physical loss or damage" to its property, and it

dismissed the case with prejudice. 1-ER-26. The District Court appears to believe that COVID-19 is *not capable* of causing the "tangible" or "corporeal" loss that the court posits is required for coverage regardless of what was or could be pleaded—otherwise amendment could have cured the supposed deficiencies in the Amended Complaint. 1-ER-20. This conclusion is tantamount to a factual finding, and, of course, under the Federal Rules of Civil Procedure, the District Court may not decide factual issues on a motion to dismiss. The Menominee are prepared to provide expert testimony and other evidentiary support for their allegations that coronavirus caused direct physical loss or damage to property and that the resulting closures and other changes to the property caused substantial business income losses. These issues must be submitted to a jury under our legal system, and the District Court's precipitous dismissal of Appellants' claims, before any evidence can be heard, mandates reversal.

Because the Menominee suffered direct physical loss and damage to their Businesses, the District Court further erred in holding that the Plaintiffs are not entitled to Civil Authority coverage under the relevant policy provisions. The Menominee alleged that civil authorities issued

orders prohibiting access to their covered properties. Under the array of Closure Orders, access to the Businesses ranged from totally prohibited to partially prohibited. Because no language in the Policy limits Civil Authority coverage to situations in which access is totally prohibited to every single individual who would attempt to access the properties, the Menominee alleged facts sufficient to defeat a motion to dismiss.

Contrary to the District Court's conclusion, the Closure Orders were not issued preemptively—rather, the Menominee Tribe itself issued Closure Orders "[i]n response to the growing incidence of COVID-19 in the State of Wisconsin, confirmed cases in Menominee, and the ***presence of the coronavirus on properties in Menominee.***" 2-ER-95, ¶ 122. The District Court disregarded such allegations and made an improper factual determination that facts pled in the Amended Complaint were false—despite the requirement under the Federal Rules that courts take well-pled factual allegations as true. Fed. R. Civ. P. 12(b)(6).

The impact of COVID-19 on the Menominee cannot be overstated. The Menominee alleged in detail how the MCR, Thunderbird, and the Tribal Clinic were repeatedly forced to close on the orders of civil

authorities, denying the Menominee business income and tax revenue that are critical to their operations. This is precisely the type of loss that the Insurers promised to cover in the Policy. The District Court's dismissal of the Menominee's Civil Authority coverage should be reversed.

The Menominee further stated a claim for coverage under the Ingress and Egress, Contingent Time Element, Tax Revenue Interruption, and Protection and Preservation of Property provisions of the Policy. The Menominee *specifically and repeatedly alleged* that many of its insured premises were entirely closed for their intended purposes. *E.g.*, 2-ER-95, ¶ 123 (The Menominee issued Emergency Order 2, "closing 'casino gaming operations, bars and restaurants, and farmers markets,' including gaming operations at MCR and Thunderbird. All bars were closed, and restaurants within the gaming establishments were closed except for takeout."). As with Civil Authority coverage, there is no provision of the Policy that requires a *total* prevention of access to trigger Ingress and Egress coverage. Drawing all inferences on behalf of the non-moving party, as the District Court should, these allegations of total closure satisfy any

requirement that ingress was prohibited for certain properties for a time.

The thrust of the District Court's analysis on the remaining claims, covering Contingent Time Element Coverage, Tax Revenue Interruption Coverage, and Protection and Preservation of Property Coverage is that "the presence of COVID-19 cannot cause physical damage," and thus the Menominee's repairs to their property "protected people from COVID-19 transmission, not property from physical damage." 1-ER-26. For all the reasons set forth above, including that COVID-19 is capable of causing "direct physical loss or damage" to property, this Court should reverse the District Court's dismissal of the Menominee's claims under these coverage grants.

ARGUMENT

I. Standard of Review

This Court reviews *de novo* a district court's dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, accepting "all factual allegations in the complaint as true and construe[ing] the pleadings in the light most favorable to the nonmoving party." *Curtis v. Irwin Industries, Inc.*, 913 F.3d 1146, 1151 (9th Cir. 2019). To state a

cognizable claim under federal notice pleading, the plaintiff is required to provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). When considering a motion to dismiss, the court "must accept all well-pleaded material facts as true and draw all reasonable inferences in favor of the plaintiff." *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016). The standard at the motion-to-dismiss stage "is not that plaintiff's explanation must be true or even probable. The factual allegations in the complaint need only 'plausibly suggest an entitlement to relief.'" *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 681).

Federal courts exercising diversity jurisdiction apply the choice of law rules of the state in which they sit. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *First Intercontinental Bank v. Ahn*, 798 F.3d 1149, 1153 (9th Cir. 2015). The District Court applied California's choice of law rule for policy interpretation, Cal. Civ. Code § 1646, and

concluded that Wisconsin law governs the interpretation of the Policy. 1-ER-9–10. The court did not, however, meaningfully address the question of § 1646 as applied to a class action like this one. *Id.* As the Menominee contend below, the class action "implicates dozens of places of performance across the nation." *Id.* The court, however, considered only the Menominee Tribe because no class had yet been certified. *Id.* Therefore, the court concluded "only the allegations that Menominee pleaded as to itself are relevant," citing only *Lierboe v. State Farm Mutual Automobile Insurance Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003). *Lierboe*, however, addressed standing, not choice of law. The District Court cited *Lierboe* for the holding that "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." 1-ER-11.

The question here is markedly different from that in *Lierboe*—it is axiomatic that the class representative must have standing to bring a case on behalf of a class before a class may be certified. But in a case seeking a nationwide class certification, it is rare, and arguably inappropriate, for a court to disregard class claims at the pleading stage

as part of its choice-of-law analysis because the facts have not yet been developed. *Forcellati v. Hylands, Inc.*, 876 F. Supp. 2d 1155, 1159 (C.D. Cal. 2012). This Court should remand for consideration of class allegations in the context of its choice-of-law analysis.

II. The District Court Erred in Granting the Motion to Dismiss Because the Complaint States Plausible Claims for Relief

A. Wisconsin Rules of Policy Interpretation Favor Menominee

Even assuming Wisconsin law applies to the entire class, Wisconsin law favors reversal of the District Court. Insurance policies in Wisconsin are "governed by the same rules of interpretation and construction that govern other contracts." *Peace v. Northwestern Nat'l Ins. Co.*, 596 N.W.2d 429, 435 (Wis. 1999); *Kremers–Urban Co. v. American Emp'rs Ins.*, 351 N.W.2d 156, 163 (Wis. 1984). Courts interpret policies according to their "plain and ordinary meaning," with the primary objective of construing a contract to "ascertain and carry out the true intent of the parties." *Frost ex rel. Anderson v. Whitbeck*, 654 N.W.2d 225, 229–30 (Wis. 2002). When the language of an insurance policy is ambiguous, or "susceptible to more than one reasonable construction," the policy is construed against the insurer

and "in favor of coverage." *Id.* at 230; *see also Folkman v. Quamme*, 665 N.W.2d 857, 864 (Wis. 2003) ("If there is an ambiguous clause in an insurance policy, we will construe that clause in favor of the insured."). Similarly, exclusions are narrowly construed against the insurer. *Frost*, 654 N.W.2d at 230. Policies are interpreted as understood by a reasonable policyholder rather than as intended by the insurer; thus, the "reasonable expectations of coverage of an insured should be furthered by the interpretation given." *Id.* at 230.

B. COVID-19 Can Cause "Direct Physical Loss or Damage" Under the Policy

The words "direct," "physical," and "loss" are not defined in the Policy and thus take their "plain and ordinary" meaning. *Frost*, 654 N.W.2d at 230. In determining the plain and ordinary meaning of policy language "as understood by a reasonable insured," *Preisler v. General Cas. Ins. Co.*, 857 N.W.2d 136, 142 (Wis. 2014), Wisconsin courts look to definitions in non-legal dictionaries. *Id.* at 147. Under the principle of interpreting policy language from the perspective of the insured, not the insurer, Wisconsin courts also hold that words in an insurance policy

must be read in context of the policy as a whole[2] and as applied to the facts before them[3]—leading to an individualized, fact- and policy-specific analysis. Thus, the District Court erred—just as courts across the country have erred—by turning immediately to and relying only on case law interpreting language from other policies to determine what "direct physical loss or damage" means. Rather, courts should start with common usages and dictionary definitions of the words "direct," "physical," "loss," and "damage" to assess whether the Menominee's claims plausibly state a claim for coverage.

1. The "ordinary meaning" of the words "direct physical loss or damage" supports coverage.

"Direct," when used as an adjective, connotes something "characterized by close logical, causal, or consequential relationship" or something "marked by absence of an intervening agency, instrumentality, or influence" or something "proceeding from one point to another in time or space without deviation or interruption." *Direct*,

[2] *Frost*, 654 N.W.2d at 230 ("A construction of an insurance policy that gives reasonable meaning to every provision of the policy is preferable to one leaving part of the language useless or meaningless.").

[3] *Windridge of Naperville Condo. Ass'n v. Philadelphia Indem. Ins. Co.*, 932 F.3d 1035, 1039 (7th Cir. 2019).

Merriam-Webster Online Dictionary, https://www.merriamwebster.com/dictionary/direct (last visited Dec. 29, 2021). As Wisconsin courts have explained, "direct" means "'[i]mmediate; proximate; by the shortest course; operating by an immediate connection or relation, instead of operating through a medium; the opposite of indirect.'" *Whirlpool Corp. v. Ziebert*, 539 N.W.2d 883, 886 (Wis. 1995) (citing Black's Law Dictionary 459 (6th ed. 1990)).

Contrary to the District Court's reasoning, the word "physical" does not suggest any requirement for "tangible" alteration or "alteration in appearance." Pertinent definitions of "physical" make clear the term describes something "of or relating to natural science," "characterized or produced by the forces and operations of physics," or "having material existence." *Physical*, Merriam-Webster Online Dictionary, https://www.merriamwebster.com/dictionary/physical (last visited Dec. 29, 2021). As the District Court acknowledged, the term "physical" encompasses "natural or material things as opposed to things mental, moral, spiritual, or imaginary." 1-ER-9. What the District Court failed to address, however, is that this broad definition of "physical" necessarily includes the presence and impact of COVID-19—a tangible

and material virus, existing on surfaces and in the air, that can be "characterized . . . by the forces and operations of physics" and could never reasonably be characterized as "mental, moral, spiritual, or imaginary." The District Court thus erred in concluding that the presence of COVID-19 is not a "physical event." 1-ER-20. A physical presence that prevents persons from safely inhabiting or operating a room—even one not visible to the human eye—is no less "physical" than a structural defect that makes that room dangerous to occupy. The word "physical" perhaps suggests that the "loss or damage" cannot be financial or emotional. But a loss of usable physical space caused by the physical presence of coronavirus' is precisely the type of loss that a reasonable policyholder, seeking to ensure the physical space from which they operate a business, would contemplate given the words "direct" and "physical."

"Loss" also carries no requirement of physical alteration to the property. Definitions of "loss" include not only "destruction" and "ruin," *Loss*, Merriam-Webster Online Dictionary, https://www.merriam webster.com/dictionary/loss (last visited Dec. 29, 2021), but also "deprivation." "Loss" is elsewhere defined as "the state of being deprived

of or being without something that one has had," for example, "the loss of old friends." *Loss*, Dictionary.com, https://www.dictionary.com/browse/losses (last visited Dec. 29, 2021). Synonyms for "loss" include "deprivation," "dispossession," and "impairment." *Loss*, Thesaurus.com, https://www.thesaurus.com/browse/loss (last visited Dec. 29, 2021); *see also Manpower Inc. v. Insurance Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *5 (E.D. Wis., Nov. 3, 2009). Accordingly, something that is "lost" need not be tangibly altered or stolen under the ordinary use of the word, but rather, *impaired* in such a way that its owner is *deprived* of its use, as in "memory loss" or "temporary loss of taste and smell." *Loss*, Merriam-Webster Online Dictionary, https://www.merriamwebster.com/dictionary/loss (last visited Dec. 29, 2021).

Nor does the term "damage" necessarily require a physical alteration. Damage may be defined simply as "loss or harm resulting from injury," but it is also defined as expense and cost. *Damage*, Merriam-Webster Online Dictionary, https://www.merriamwebster.com/dictionary/damage (last visited Aug. 15, 2021). Synonyms for "damage" include "contamination," "impairment," "deprivation," and

"detriment"—all terms relating to the physical world, but not necessarily requiring tangible alteration perceptible to the human eye. *Damage*, Thesaurus.com, https://www.thesaurus.com/browse/damage (last visited Aug. 15, 2021).

While *one* definition of "loss" includes "destruction" among other terms, this Court should decline to interpret that term as "strictly requiring physical alteration, damage, or destruction of the insured property." *Snoqualmie Entm't Auth. v. Affiliated FM Ins. Co.*, No. 21-2-03194-0 SEA, 2021 WL 4098938, at *5 (Wash. Super. Sept. 3, 2021) ("[T]he Court finds that one reasonable interpretation of the disjunctive phrase 'all risks of physical loss' is that it includes the risk that [the insured] be deprived of the ability to physically use, operate, or manipulate its property because of the COVID-19 closure orders and Tribal resolutions."); *see also Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F.3d 743, 746–47 (7th Cir. 2015) (recognizing that, under Wisconsin law, the term "direct physical loss or damage" encompassed a broad swath of injury, including loss of functionality and cosmetic damage). An equally valid and acceptable definition of "loss" includes "deprivation," which an ordinary purchaser of insurance could

reasonably interpret as including being physically deprived of using the insured property, in whole or in part. *See Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (finding that a loss of use "equates to a direct physical loss" in the context of an "all risk" insurance policy). Under Wisconsin law, a court may not simply decide to restrict the policy terms to one unusually narrow meaning, particularly when the policyholder has offered a reasonable alternative. As this Court has recognized, an insured's plausible and reasonable interpretation governs "regardless of whether the insurer offers a different interpretation that is also plausible and reasonable." *Alkemade v. Quanta Indem. Co.*, 687 F. App'x 649, 651 (9th Cir. 2017).

Moreover, even if the term "damage" were given a structure-altering meaning, then "loss" would have to contain a meaning distinct from that requirement. As recently observed by a court applying Wisconsin law, the disjunctive "or" in that phrase means that "physical loss" must cover something different from "physical damage." *In re Society Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, 521 F. Supp. 3d 729, 741 (N.D. Ill. 2021), *mot. to cert. appeal denied,* No. 20 C 02005, 2021 WL 2433666 (N.D. Ill. June 15, 2021).

Despite the broad spectrum of meanings of the phrase "direct physical loss or damage"—and the requirements under Wisconsin (and California) law that courts construe policies in favor of coverage—the District Court here concluded the plain meaning of those terms requires at least a "causal physical event," which cannot include the presence of COVID-19 because it can supposedly be "eliminated through cleaning and disinfecting." 1-ER-22. This conclusion, of course, accepts facts asserted by the Insurers that have not yet been subject to discovery and violates the obligation to accept as true all factual allegations in the complaint. *See, e.g.*, 2-ER-88, ¶ 92 ("Merely cleaning surfaces may reduce but does not altogether eliminate the risk of transmission amongst people. There may be surfaces with residual infectious virus, and aerosolized infectious particles. In other words, disinfection is temporary at best . . ."). Moreover, an "ordinary purchaser of insurance" would never interpret the Policy language in the same, crabbed way as the District Court. Rather, an "ordinary purchaser of insurance" would expect its all-risk insurance policy—promising broad coverage for any "direct physical loss of or damage to Covered Property"—to cover those

losses directly caused by the real and material presence of a virus such as COVID-19.

2. The Policy's language anticipates that "direct physical loss or damage" may result from a virus or pandemic.

Wisconsin courts emphasize that policy language is to be interpreted in the context of the policy "as a whole." *Folkman*, 665 N.W.2d at 866. As the Wisconsin Supreme Court stated in *Folkman*, "[t]he principle of contextual ambiguity is established precedent. As a general matter, it has long been a rule of contract construction in Wisconsin that 'the meaning of particular provisions in the contract is to be ascertained with reference to the contract as a whole.'" *Id.* (quoting *Tempelis v. Aetna Cas. & Sur. Co.*, 485 N.W.2d 217 (Wis. 1992)). The *Folkman* court went on to say that if insurers wish to "prevent contextual ambiguity," insurers should draft policies without "provisions that build up false expectations[] and provisions that produce reasonable alternative meanings." *Id.* at 869.

Read as a whole, the Policy makes clear—or at the very least, it is not *unreasonable* for an ordinary insured to conclude—that this type of loss is within its reach. As an initial matter, the Policy states that it "provides insurance against *all risk* of direct physical loss or damage."

2-ER-192, § IV.A. Perils Covered. A reasonable reading of that statement, whether by a policyholder or a court, suggests that "direct physical loss or damage" should be construed broadly. Further, policies of this kind insure the physical space against business interruption losses, meaning they ensure that the physical space can be used for a particular purpose—incurring revenue. If loss of use were not encompassed by this meaning, the policies might only cover the cost of the repairs needed to make the structure habitable. However, that is decidedly *not* what the Policy covers: it insures against business interruption losses for the length of time required to "resume operations of the Name Insured with the same quality of service which existed immediately preceding the loss." 2-ER-187, § III.A.1. The Policy thus expressly contemplates that limited operations—ones without the same quality or quantity of service available—may generate a covered Loss.

3. The case law the District Court relied upon does not support such a narrow interpretation of the policy language.

i. The District Court improperly relied on case law for the meaning of "direct physical loss or damage."

The District Court relies solely on Wisconsin case law for the meaning of "direct physical loss or damage," but it did so in error—Wisconsin rules of policy interpretation *require* that courts interpret

policy language *in the context of the policy as a whole*. *See, e.g.*, *Folkman*, 665 N.W.2d at 866. Thus, cases interpreting "direct physical loss or damage" in other policies are not controlling. A court may reasonably interpret those words in one policy to mean one thing, while in another policy in which they are contextualized or defined differently they would reasonably mean something else. For example, the District Court examined *Biltrite Furniture, Inc. v. Ohio Security Insurance Co.*, No. 20-CV-656-JPS-JPS, 2021 WL 3056191 (E.D. Wis. July 20, 2021), to determine the meaning of "direct physical loss or damage" under Wisconsin law. 1-ER-12. The policy in *Biltrite*, however, insured against suspension of operations "caused by direct physical loss of or damage to property," which itself had to be caused by "direct physical loss." *Biltrite*, 2021 WL 3056191, at *2. The additional provision limiting coverage in *Biltrite* should not be superimposed on this Policy—the words are different, the context is different, and the facts of the claim are different.

The District Court could have, consistent with Wisconsin principles of insurance policy interpretation, looked to the cases analyzing the precise policy at issue here, *Cherokee Nation v. Lexington*

Insurance Co., No. 20-CV-150, 2021 WL 506271 (D. Okla. Jan. 28, 2021). That court found that Cherokee Nation's inability to "physically utilize its property because of the Pandemic" a form of "direct physical loss" with the policy terms. *Id.* at *5. The court even held that the direct physical loss under this Policy was satisfied "through the closure itself"—without even necessarily requiring express allegations that the virus had been physically present on the property (though of course the Menominee have made those allegations here). *Id.* at *6. The court further found that the interpretation of the policy advanced by the insurer conflicted with Oklahoma's rule against superfluity—the same rule that Wisconsin courts apply to insurance policies. *Id.* at *7.

ii. Even the case law relied upon by the District Court does not support its finding.

The District Court relied on the "spectrum" of Wisconsin COVID-19 insurance cases to determine that "direct physical loss or damage" under Wisconsin law must be caused by some kind of "physical event." However, the court misconstrued several of those cases and categorically omitted from its analysis several cases finding coverage. The court correctly noted a significant range of Wisconsin cases addressing the question of "direct physical loss or damage" as applied to

COVID-19 business interruption claims. Skeptical courts like *Biltrite* and *Al Johnson's Swedish Restaurant & Butik, Inc. v. Society Insurance Mutual Co.* are balanced by favorable decisions like *In re Society*. *See Biltrite*, 2021 WL 3056191; *Al Johnson's*, No. 20-CV-52, 2020 WL 9424451 (Wis. Cir. Ct. Dec. 4, 2020). *But see In re Society*, 2021 WL 2433666 (N.D. Ill. June 15, 2021). Thus, while the *Biltrite* court determined that "'direct physical loss' does not encompass 'loss of use' due to pandemic-related closure orders," 1-ER-11 (citing *Biltrite*, 2021 WL 3056191, at *4), the *In re Society* court held that a reasonable jury could find that "physical loss" included the physical limit on business' space due to pandemic-related closure orders. 1-ER-14–15 (citing *In re Society*, 2021 WL 2433666, at *9).

The District Court, however, did not apply its own framework fairly. The District Court observed that *Biltrite* "relied on cases that applied Illinois or New York law, not Wisconsin law" in reaching its conclusion as to the meaning of "direct physical loss." 1-ER-12. Yet the Court relied heavily on *Biltrite*'s statements about the meaning of "direct physical loss or damage." *E.g.*, 1-ER-12–13. The District Court also (erroneously) suggested that the *In re Society* court did not rely on

Wisconsin law to reach its conclusion, either. 1-ER-15. In fact, the *In Re Society* court cites and discusses Wisconsin law throughout its opinion, *e.g.*, 521 F. Supp. 3d at 738–39, and the District Court even acknowledged that "the only Wisconsin law case that addresses whether the presence of COVID-19 constitutes 'direct physical loss or damage' is *In re Society*, 2021 WL 679109." 1-ER-20 n.9.

However, the District Court declined to include *In re Society* in its analysis while focusing extensively on *Biltrite*. In effect, the District Court arbitrarily eliminated one end of the "spectrum" and then concluded that Wisconsin law was weighted toward the other end. *Id.*

Wisconsin case law does not, as the District Court held, require proof of a *tangible* physical event for a policyholder to establish "direct physical loss." 1-ER-5. Rather, it demonstrates that insurers very much contemplated that loss of use due to something like a pandemic could constitute direct physical loss or damage years prior to this pandemic. In *Advance Cable Co., LLC v. Cincinnati Insurance Co.*, the Seventh Circuit's analysis of "direct physical loss" foreshadowed the later determination by the *In re Society* court that "direct physical loss" encompasses loss of use. 788 F.3d 743 (7th Cir. 2015) (applying

Wisconsin law). The *Advance Cable* court recognized that the term "direct physical loss or damage" encompassed a broad swath of injury, including loss of functionality and cosmetic damage, and certainly was not limited to structural alteration. *Id.* at 747; *see also Donaldson v. Urban Land Interests, Inc.*, 564 N.W.2d 728, 732–33 (Wis. 1997) (finding coverage under a commercial general liability policy where faulty construction causing "inadequately ventilated carbon dioxide from human respiration" resulted in poor air quality for occupants of the building).

Among the recent COVID-19 cases, in *In re Society*, one of the two multi-district litigations in the United States to address the issue, the court rejected the insurer's argument that tangible or structural alteration was required for coverage. *In re Society*, 2021 WL 679109, at *8. The court emphasized the distinction: "It would be one thing if coverage were limited to direct physical 'damage.' But coverage extends to direct physical 'loss of' property as well." *Id.* If "damage" were given a structure-altering meaning, "loss" would have to be given a meaning not carrying that requirement. Otherwise, loss would be rendered redundant and thus violate a cardinal rule of insurance policy

interpretation. *Id.* Other courts across the country have similarly held in the COVID-19 context that "physical loss" and "physical damage" differ. *E.g.*, *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 800 (W.D. Mo. 2020).

The *In re Society* court emphasized that a plaintiff that has alleged a loss of functional space or functionality has, in fact, alleged a direct physical loss of property. 2021 WL 679109 at *9. In explaining how the shutdown orders impose a physical limit, the court wrote that:

> [A] reasonable jury can find that the Plaintiffs did suffer a "physical" loss of property on their premises. First, viewed in the light most favorable to the Plaintiffs, the pandemic-caused shutdown orders do impose a *physical* limit: the restaurants are limited from using much of their physical space. It is not as if the shutdown orders imposed a *financial* limit on the restaurants by, for example, capping the dollar-amount of daily sales that each restaurant could make. No, instead the Plaintiffs cannot use (or cannot fully use) the physical space.

Id.

This sentiment was echoed in another Wisconsin trial court decision, *Colectivo Coffee Roasters, Inc. v. Society Insurance Mutual Co.*, No. 2020-CV-002597 (Wis. Cir. Ct. Jan. 29, 2021).[4] There, the court denied the insurer's motion to dismiss, finding that the plaintiffs had

[4] Hearing transcript appears at 2-ER-237–87.

alleged that COVID-19 caused "a physical loss" of "especially the dining area," and that COVID-19 "created a physical danger in and around the plaintiffs' premises." 2-ER-280, *Colectivo* Hr'g Tr. at 43:3–6. The *Colectivo* court further rejected the insurer's claims that the allegations were speculative because "the plaintiff included several pages of scientific and factual allegation to support that allegation, that, in fact, Covid [sic] was widespread and likely was present in the plaintiffs' restaurants and the plaintiffs' premises at the time of the governor's March 2020 orders in this case." *Id.* at 43:10–17. Plaintiffs here have done the same. The District Court did not rely on a sound analysis of Wisconsin law.

iii. Courts and treatises have long recognized that "direct physical loss or damage" encompasses loss of functionality and cosmetic damage.

Prior to the recent COVID-19 cases, courts generally rejected an interpretation of "direct physical loss or damage" that narrowly required "physical alteration." In fact, courts routinely held that properties sustain "direct physical loss or damage" when they lose habitability or functionality, including commercial functionality. *See Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. 01-CV-1362-ST,

2002 WL 31495830, at *9 (D. Or. June 18, 2002) ("[A]lthough not involving mold, at least two courts have deemed the inability to inhabit a building as a 'direct physical loss' covered by insurance. This court perceives no analytical difference between these cases and the case here where a house has allegedly been rendered uninhabitable by mold.") (internal citations omitted).[5]

Similarly, in *Murray v. State Farm Fire & Casualty Co.*, the policyholder sought coverage for "direct physical loss to the property" when the policyholder's home was rendered uninhabitable by the threat of falling rocks. 509 S.E.2d 1 (W. Va. 1998). The court rejected the insurance companies' argument that structural alteration was required:

> The policies in question provide coverage against "sudden and accidental loss" and "accidental direct physical loss" to property. "'Direct physical loss' provisions require only that a covered property be injured, not destroyed. *Direct physical*

[5] *See also Advance Cable Co.*, 788 F.3d at 747 (finding "loss" to mean diminution in value or functionality, as well as cosmetic damage); *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (holding that a direct physical loss had occurred when an insured's property—cereal oats—was infested by an unapproved pesticide because "function [was] seriously impaired"); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 12-CV-04418, 2014 WL 6675934, *6 (D.N.J. Nov. 25, 2014) (holding that the discharge of ammonia gas inflicted direct physical loss of or damage to an insured's facility because it "physically transformed" the facility's air, leaving it "unfit for normal human occupancy and continued use").

> *loss also may exist in the absence of structural damage to the insured property*." . . .
>
> We therefore hold that an insurance policy provision providing coverage for a "sudden and accidental" loss or an "accidental direct physical loss" to insured property requires only that the property be damaged, not destroyed. *Losses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property*.

Id. at 17 (quoting *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997)) (emphasis added). Accordingly, events—like the presence or suspected presence of COVID-19—that make it too dangerous to use property as it was designed to be used, cause physical loss or damage to that property. *E.g.*, *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 825–27 (3d Cir. 2005) (finding that contamination of a home's water supply that rendered the home uninhabitable constituted "direct physical loss").

Similarly, multiple courts have held that infestation of covered property by microscopic particles that are harmful to human health constitute "direct physical loss or damage." In *General Mills, Inc. v. Gold Medal Insurance Co.*, the insured's property, cereal oats, was infested by an unapproved pesticide, rendering the insured unable to lawfully distribute its products. 622 N.W.2d 147, 152 (Minn. Ct. App.

2001). The Minnesota Court of Appeals held that a direct physical loss had occurred because the oats' "function [was] seriously impaired." *Id.* The court relied on a consistent line of Minnesota cases holding that loss resulting from the infestation of property by harmful, unseen agents constitutes a direct physical loss. *See Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 98 N.W.2d 280, 293–94 (Minn. 1959) (holding that it was not necessary that a merchant's food items, which were rejected by the government due to exposure to smoke from a nearby fire, be "intrinsically damaged so long as [their] value was impaired in order to support a claim for either loss or property damage"). And in *Netherlands Insurance Co. v. Main Street Ingredients, LLC*, the Eighth Circuit held that instant oatmeal products recalled due to potential salmonella infestation caused property damage under a general liability policy, even though it was not certain that the products actually contained salmonella. 745 F.3d 909, 916–17 (8th Cir. 2014). In fact, the parties agreed that there was no factual finding that either the dried milk or instant oatmeal actually contained salmonella. *Id.* at 916. Nonetheless, the appellate court upheld the district court's finding that "property damage is present" because the oatmeal was "physically

affected, as it includes instant milk that was manufactured in insanitary conditions." *Id*. *Netherlands* thus supports the proposition that property damage exists when property may have been infested with harmful agents, rendering it effectively unusable for its intended purpose, even in the absence of a factual finding that the property actually *was* infested.

A leading treatise on insurance law also supports a broader application of the phrase "direct physical loss or damage." A clear statement of the more prevalent, broader interpretation was articulated in Allan Windt's *Insurance Claims & Disputes* (6th ed. 2013): "[W]hen an insurance policy refers to physical loss of or damage to property, the 'loss of property' requirement can be satisfied by *any* 'detriment,' and a 'detriment' can be present *without there having been a physical alteration of the object*." *Id.* § 11:41 (emphasis added) (collecting illustrative cases).[6] The District Court relied on a different treatise, *Couch on Insurance* (3d ed. 2019) for the requirement that a loss be

[6] *See also* Richard P. Lewis et al., Couch's *"Physical Alteration" Fallacy: Its Origins and Consequences*, 56:3 Tort Trial & Ins. Prac. L.J. 621, 625–27 (Fall 2021) (collecting treatises that highlight that "courts are not looking for physical alteration, but for loss of use").

accompanied by a "distinct, demonstrable, physical alteration to property," *id.* at § 148.46. The rule cited by Couch, however, was a distinct minority view among courts when the language was first included in the treatise. *See* Lewis, Couch's *"Physical Alteration" Fallacy*, at 624–27.[7] Indeed, it appears that the primary support for *Couch's* "distinct, demonstrable, physical alteration" rule when it was first published in 1995 was *Great Northern Insurance Co. v. Benjamin Franklin Federal Savings & Loan Ass'n*, 793 F. Supp. 259 (D. Or. 1990). The Oregon Court of Appeals, however, later expressly limited that case's application to asbestos cases. *See Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 n.4 (Or. Ct. App. 1993); *see also* Lewis, Couch's *"Physical Alteration" Fallacy*, at 625–27. The 2021 update to *Couch* fails to acknowledge this error, and in support of its assertion that a

[7] In fact, the principal author of *Couch 3d*, Steven Plitt, acknowledged in 2013 that "[t]he modern trend signals that courts are not looking for physical alteration, but for loss of use. This is the trend of where the law is going." Steven Plitt, *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration*, Claims J. (Apr. 15, 2013), https://amp.claimsjournal.com/magazines/ideaexchange/2013/04/15/226666.htm. It remains unclear why the 2021 update to *Couch 3d* does not align with what its principal author understands the law to be.

"physical alteration" rule is "widely held," *Couch* cites mostly to cases that themselves cite to *Couch* (or to cases citing *Couch*).[8]

In line with established case law, and as recognized by many secondary sources, this Court should interpret the terms "physical loss" or "physical damage" to include a loss of use or functionality of the insured premises. The Menominee have shown that "direct physical loss of or damage" to property, whether the words are examined together or individually, are at a minimum reasonably susceptible to more than one interpretation. Accordingly, the Policy language is ambiguous and must be construed strictly against the insurer. *Casey v. Smith*, 846 N.W.2d 791, 796 (Wis. 2014).

III. The Menominee Have Pled Direct Physical Loss or Damage Sufficiently to State a Claim for Coverage Under the Business Interruption and Extra Expense Provisions of the Policy

Menominee pled factual allegations that would, if proven, establish that COVID-19 caused "direct physical loss or damage" even

[8] Lewis et al., Couch's *"Physical Alteration" Fallacy*, at 632–33. As observed by a recent legal journal article on the subject, "[t]his is a remarkable feat: state *ipse dixit* you wish was true, convince courts to cite it, and then cite *those* cases as establishing that the rule is 'widely held.'" *Id.* at 632.

under a more restrictive reading of that phrase than is warranted. The Amended Complaint expressly alleged structural alteration of the Businesses by the presence of the virus. 2-ER-98–100, ¶¶ 139–143. Menominee also alleged that the actual presence of COVID-19 has denied it the use of its space, causing massive restrictions on business activities. 2-ER-100–01, ¶¶ 144–146. Menominee alleged that the physical presence of the virus rendered the functional spaces in its properties unusable for normal purposes, leaving them functional at best only in a severely diminished capacity. 2-ER-98–101, ¶¶ 139–146. The Menominee further alleged that their business operations were severely impacted, and significant changes were needed to be made to make their properties safe for human occupation. 2-ER-100–01, ¶¶ 146–47. Thus, the Menominee alleged the presence of COVID-19 altered the Properties and caused physical loss or damage by rendering the Properties unsafe, impairing the function of, and damaging the Covered Properties, and causing necessary suspension of operations. 2-ER-98–102, ¶ 138–152.

As the District Court agreed, the Menominee sufficiently pled presence of COVID-19 on the Properties. 1-ER-17. The Menominee pled

that 42 employees of the Properties tested positive for COVID-19, 2-ER-98–99, ¶ 139, and that "individuals with COVID-19 . . . entered Plaintiffs' properties, including MCR, Thunderbird, and the Tribal Clinic." *Id.* Further, the Menominee alleged it was "statistically certain," given the number of employees, visitors, and patrons entering the Properties and the number of confirmed cases in Wisconsin and Menominee, that "the virus has been present for some period of time since the COVID-19 outbreak began and that the virus continues to pose an actual imminent threat to Plaintiffs." 2-ER-101, ¶ 148. Because the District Court was, and this Court is, required to accept as true all well-pleaded facts in the Amended Complaint, *Eclectic Props. East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014), for present purposes this Court must accept that the virus was present on the property and posed a threat to persons and property.

This Court should hold Insurers to their coverage obligations under the Policy. Insurers promised to cover "loss resulting directly from interruption of business, services or rental value caused by direct physical loss or damage, as covered by this Policy to real and/or personal property insured by this Policy, occurring during the term of

this Policy." 2-ER-187, § III.A.1. They likewise promised to pay for the "necessary and reasonable extra expenses occurring during the term of this Policy at any location as hereinafter defined, incurred by the Named Insured in order to continue as nearly as practicable the normal operation of the Named Insured's business following . . . a covered peril." 2-ER-187, § III.A.2. The Menominee have shown that their losses resulting from the structural alteration and deprivation of use of their properties by COVID-19 and the resulting civil authority orders constitute "direct physical loss of or damage" and are thus a "Covered Cause of Loss."

Later in this litigation, Insurers will have an opportunity to contest these factual claims or to argue before a jury that these circumstances do not constitute damage to property, but at this point the Menominee have stated a claim for relief—even under the District Court's overly restrictive definition of direct physical loss or damage. This Court should reverse the District Court's holding that the Menominee are not entitled to coverage under the Business Income and Extra Expense provisions of the Policy, in addition to any related losses that fall under the Sue and Labor provisions.

IV. The Menominee Have Stated a Claim for Coverage Under the Civil Authority Provision

The District Court also erred in holding that the Menominee are not entitled to Civil Authority coverage under the relevant policy provision. The Insurers agreed to pay for the actual losses suffered by the Businesses when access to covered property is specifically prohibited by order of a civil authority due to property damage at another nearby property. 2-ER-188, § III.B.2. Interruption by Civil Authority. In full, the Civil Authority provision reads:

> This Policy is extended to include the actual loss sustained by the Named Insured, as covered hereunder during the length of time, not exceeding 30 days, when as a direct result of damage to or destruction of property by a covered peril(s) occurring at a property located within a 10 mile radius of covered property, access to the covered property is specifically prohibited by order of a civil authority.

Id. Thus, proving an initial grant of coverage under the Civil Authority provision requires a showing that: (1) a civil authority order "specifically prohibited" access to a covered property, (2) the civil authority's order is the "direct result of damage to or destruction of property by a covered peril," (3) the civil authority's order was issued in response to damage to a property within ten miles of the covered property, and (4) there is an actual loss by the Named Insured. *See id.*

The Menominee have alleged facts sufficient to support their claim on each of those points.

A. The Menominee Alleged That Civil Authorities Issued Orders That Prohibited Access to Their Covered Properties

As for the first requirement, the Menominee expressly alleged that civil authorities issued orders that specifically prohibited access to covered properties. *E.g.*, 2-ER-95, ¶ 123 (Menominee Emergency Order 2 closed "'casino gaming operations, bars and restaurants, and farmers markets,' including gaming operations at MCR and Thunderbird"); *see also* 2-ER-91–94, ¶¶ 105–10, 113, 117 (Wisconsin orders); 2-ER-94–98, ¶¶ 120–34 (Menominee orders). Some of these orders resulted in ***total prohibitions*** on access to covered properties. *E.g.*, 2-ER-95, ¶ 123 (Menominee Emergency Order 2, closing casino gaming operations, bars and restaurants, and farmers markets); *Id.* ¶ 125 (Menominee Emergency Order 4, closing MCR and Thunderbird casinos and all bars); 2-ER-95–96, ¶¶ 126–29 (Menominee Emergency Orders 5–8, extending the complete shutdown of the casino); 2-ER-92, ¶ 108 (Wisconsin Emergency Order 12, closing all non-essential businesses). Even more of these orders were ***partial specific prohibitions*** on the

use of or access to property for specific operations or customer access. *E.g.*, 2-ER-95–96, ¶ 126 (closing all restaurants and bars except for "curbside food service").

Civil Authority coverage encompasses both *total* and *partial* prohibitions on the use of property. The District Court does not address this issue in the context of civil authority coverage, but nothing in the Policy would limit the phrase "access to the covered property is specifically prohibited" to situations in which access is totally prohibited for each and every individual. *See* 2-ER-188, § III.B.2. Interruption by Civil Authority; *see also Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, 507 F. Supp. 3d 616, 623 n.23 (E.D. Pa. 2020) ("Nothing in the policy requires total inaccessibility. . . . Because it is unclear whether access need be total or substantially prohibited, the policy language is ambiguous."). Here, at times total access to the Businesses for customers was specifically prohibited (when they were limited to curbside pickup); at times access to portions of the property was specifically prohibited (when strict capacity limits were in place); and at times access was specifically prohibited for everyone (when the Businesses were forced to close). Accordingly, this Court should

consider the full measure of all the closure orders when weighing whether the Menominee have stated facts sufficient to show an initial grant of coverage.

B. The Menominee Alleged That the Civil Authority Orders Were the "direct result of damage to or destruction of property by a covered peril"

As for the second requirement, the Menominee clearly and specifically alleged that the civil authority orders were the "direct result of damage to or destruction of property by a covered peril." The District Court erred in two respects with regard to this provision: first, by relying on the assertion that "the presence of COVID-19 cannot constitute 'damage to property'," and second, by asserting that "Menominee claims that the Closure Orders were issued "to mitigate the spread of COVID-19"; they were not issued due to damage to one of Menominee's insured properties." 1-ER-23.

As has been argued at length above, the physical infestation of property by a harmful contaminant—for instance, the coronavirus that causes COVID-19—can cause "direct physical loss or damage" to property. Courts interpreting Wisconsin law have understood similar pleadings to state a claim for coverage, whether by the ambiguity

inherent in those undefined terms or through the application of Wisconsin principles of insurance policy interpretation favoring definitions that can be understood by the reasonable policyholder. 2-ER-279–81, *Colectivo* Hr'g Tr. at 42:18–44:17 (denying insurer motion to dismiss, including as to civil authority coverage, on the grounds that COVID-19 has the potential to cause direct physical loss or damage to property); *In re Society*, 521 F. Supp. 3d at 741 (analyzing Wisconsin law on summary judgment, the court held that "a reasonable jury can find that the Plaintiffs did suffer a direct 'physical' loss of property on their premises"). The District Court should have read "direct physical loss or damage" to encompass damage from the coronavirus at nearby properties and allow this claim to move forward.

The District Court's second assertion both misstates the policy language and is objectively incorrect. The District Court asserted that the Closure Orders need to be issued "due to damage to one of [the] Menominee's insured properties" for civil authority coverage to lie, 1-ER-23, which materially misstated the Policy language. *See* 2-ER-188. The Policy merely requires that the order be the "direct result of damage to or destruction of property . . . occurring at a property located

within a 10 mile radius of covered property." 2-ER-188. The required damage to property under the civil authority provision is damage to *another* property within ten miles. There is no requirement that the damaged property belong to the Menominee, and the District Court misstated the contractual requirements.

The Menominee did allege, expressly, that nearby property was damaged, which is sufficient to satisfy this condition of civil authority coverage. *See* 2-ER-101–02, ¶ 149 (noting that "area restaurants within ten miles of Plaintiffs' property" were forced to close); 2-ER-102, ¶ 150 (noting "Property damage caused by the presence of the coronavirus at other businesses and households in the Menominee area" and the "Closure Orders that resulted from that property damage"); 2-ER-110, ¶ 201 (alleging that "COVID-19 caused direct physical loss or damage to property within a ten-mile radius of covered property in the same manner that it caused direct physical loss or damage to covered property"). These allegations are sufficient to meet the *actual* Civil Authority policy requirements, which the District Court did not analyze properly.

C. The Menominee Alleged That the Civil Authority's Order Was Issued in Response to Damage to a Property Within Ten Miles of the Covered Property

The Menominee have also satisfied the third requirement for coverage. Indeed, the District Court misstated the allegations in the Complaint when it concluded that the Amended Complaint did not satisfy this requirement. The District Court cited the Amended Complaint for the proposition that "the Closure Orders were issued 'to mitigate the spread of COVID-19'; they were not issued due to damage to one of Menominee's insured properties." 1-ER-23 (citing 2-ER-91–92, 97, ¶¶ 105, 108, 131). In doing so, it ignored Emergency Order 1, issued by the Menominee Tribe itself, that was "[i]n response to the growing incidence of COVID-19 in the State of Wisconsin, confirmed cases in Menominee, and the ***presence of the coronavirus on properties in Menominee***." 2-ER-95, ¶ 122. Some of the Menominee's insured premises, MCR and Thunderbird, were ordered to close two days later. *Id.* ¶ 123. In addition, the Menominee repeatedly alleged that the Closure Orders were issued "in response to the growing incidence of COVID-19 and *the presence of the coronavirus on properties in Menominee*." *Id.* ¶ 125 (emphasis added); *see also* 2-ER-95–96, ¶ 126

(Emergency Order 5 issued due to the "physical spread of the virus on the Menominee reservation"); 2-ER-96, 97, ¶¶ 127–29, 132 (Emergency Orders 6–8 and 11 issued due to the "continuing physical spread of the virus"). In addition to the above, the Menominee pled that numerous properties throughout the Menominee Reservation, within ten miles of insured premises, suffered property damage due to COVID-19 and that this damage prompted many of the Closure Orders. 2-ER-83–84, ¶ 72.

The District Court's rejection of Plaintiffs' well-pleaded allegations was an improper determination of a quintessential fact question: the scope, intent of, and basis for the Menominee's Closure Orders. Despite numerous allegations setting forth the cause of the Closure Orders—including those issued by the Menominee Tribal government, giving the Menominee plaintiffs a strong basis to know the reasons behind them—the District Court simply *assumed* that the Closure Orders were issued for the sole purpose of "mitigat[ing] the spread of COVID-19." 1-ER-23. Here, the District Court again reads the Amended Complaint selectively, ignoring specific allegations that the Menominee Tribe's Closure Orders were issued due to the presence of COVID-19 on its properties. *See, e.g.*, 2-ER-95, ¶ 122 ("In response to the growing

incidence of COVID-19 in the State of Wisconsin, *confirmed cases in Menominee,* ***and the presence of the coronavirus on properties in Menominee***," the Menominee Tribe issued emergency orders resulting in business closures.). But "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. The court did not do so here.

Accepting the well-pleaded factual allegations as true, as the District Court must do on a motion to dismiss, the Menominee's allegations satisfy the requirement that the civil authority orders were issued as the "direct result of damage to or destruction of property by a covered peril" at property within ten miles of insured premises.

D. The Menominee Have Suffered an Actual Loss

The impact of COVID-19 on the Menominee cannot be overstated. The Amended Complaint sets forth in detail how the MCR, the Thunderbird, and the Tribal Clinic were repeatedly forced to close on the orders of civil authorities, denying the Menominee business income and tax revenue that is critical to their operations. This is precisely the type of loss that the Insurers promised to cover in the Policy. The

District Court's dismissal of the Menominee's civil authority coverage should be reversed.

V. The Menominee Have Stated a Claim for Coverage Under the Ingress and Egress, Contingent Time Element, Tax Revenue Interruption, and Protection and Preservation of Property Provisions of the Policy

Just as with the Business Income, Extra Expense, and Civil Authority coverages addressed above, the District Court applied its mistaken interpretation of "direct physical loss or damage" to each of the Ingress/Egress, Contingent Time Element, Tax Revenue Interruption, and Protection and Preservation of Property provisions. This Court should reverse and remand on each of these coverages.

A. The Menominee Have Stated a Claim for Ingress and Egress Coverage

As the District Court acknowledges, many of the same issues that determine coverage under the Civil Authority provisions also bear on the Ingress/Egress provisions. The Policy provides that:

> This Policy is extended to insure the actual loss sustained during the period of time not exceeding 30 days, when as a direct result of physical loss or damage caused by a covered peril(s) specified by this Policy and occurring at property located within a 10 mile radius of covered property, ingress to or egress from the covered property covered by this Policy is prevented. Coverage under this extension is subject to a 24-hour waiting period.

2-ER-188, § III.B.1. Ingress/Egress. The core difference from the Civil Authority coverage discussed above is the requirement that "ingress to or egress from the covered property covered by this Policy is prevented." *See id.*

In response to this particular requirement, the District Court asserted that the "Menominee's allegations that it did not have access to its insured property are implausible." 1-ER-24. Specifically, the District Court emphasized that the "Menominee's insured property was still accessible; in fact, Menominee admits that its gift shop, convenience store, gas station, clinic, and restaurant remained open. Therefore, employees had physical access to Menominee's businesses even if patrons were 'prohibited' from entering." *Id.* (citing 2-ER-95–96, 100–01, ¶¶ 123, 125–29, 146) (internal citations omitted). As a result, the District Court held that the "Menominee cannot state a plausible claim for Ingress/Egress coverage." *Id.* (citing *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 504 F. Supp. 3d 1191, 1206 (D. Kan. 2020)).

But again, as with its analysis of the civil authority coverage issues, the District Court omitted critical allegations from its analysis. The Menominee *specifically and repeatedly alleged* that many of its

insured premises were entirely closed for their intended purposes. *E.g.*, 2-ER-95, ¶ 123 (The Menominee issued Emergency Order 2, "closing 'casino gaming operations, bars and restaurants, and farmers markets,' including gaming operations at MCR and Thunderbird. All bars were closed, and restaurants within the gaming establishments were closed except for takeout."). Drawing all inferences on behalf of the non-moving party, as the District Court should, these allegations of total closure satisfy any requirement that ingress was prohibited for certain properties for a time.

Moreover, contrary to the District Court's assertion, there is no authority in the policy language for the assertion that the prevention of access must be absolute with respect to every insured property and every employee and customer. For example, even if some Businesses were accessible to certain employees at times, 1-ER-24, other Businesses were closed completely for a time. *See* 2-ER-100–01, ¶ 146 ("MCR closed completely on March 19, 2020, and only partially reopened with restricted capacity on May 27, 2020."). According to the District Court, "Menominee admits that its gift shop, convenience store, gas station, clinic, and restaurant remained open," 1-ER-24, but the

Amended Complaint alleges that the gift shop remained closed for well over a month. 2-ER-100–01, ¶ 146 (noting that, after closing on March 19, 2020, "[t]he affiliated gift shop opened slighter earlier, on May 1, 2020"). Nor does the Policy at any point specify that *every single person* who may wish to access the property be prevented from doing so in order to trigger coverage. Here, customers were *prevented* from entering the restaurants that were forced to operate with take-out only, while at *other* businesses, including the casinos, employees, and customers *both* were prevented from accessing the property. *See, e.g.*, 2-ER-95–96, ¶¶ 123, 125–29.

The Policy's language is at a minimum ambiguous as to the scope of prevention necessary under the Ingress/Egress coverage, and the "objectively reasonable interpretations" of the parties fairly encompass this situation where patrons are denied access to a property, preventing it from functioning as a business. *See Wilson Mut. Ins. Co. v. Falk*, 857 N.W.2d 156, 164 (Wis. 2014). Wisconsin law *mandates* that where policy language is ambiguous, the contract "be narrowly construed against the insurer as its drafter." *Id.* The Menominee have thus stated a claim for Ingress/Egress coverage.

B. The Menominee Have Also Stated a Claim for Contingent Time Element Coverage, Tax Revenue Interruption Coverage, and Protection and Preservation of Property Coverage

The thrust of the District Court's analysis on the remaining claims, covering Contingent Time Element Coverage, Tax Revenue Interruption Coverage, and Protection and Preservation of Property Coverage is that "the presence of COVID-19 cannot cause physical damage," and thus the Menominee's repairs to its property "protected people from COVID-19 transmission, not property from physical damage." 1-ER-25–26. For all the reasons set forth above, including that COVID-19 is capable of causing "direct physical loss or damage" to property, this Court should reverse the District Court's dismissal of the Menominee's claims under these coverage grants.

The Policy's Contingent Time Element Coverage provision provides, in the relevant part, that:

> Business interruption, rental income, and extra expense coverage provided by this Policy is extended to cover loss directly resulting from physical damage to property of the type not otherwise excluded by this Policy at direct supplier or direct customer locations that prevents a supplier of goods and/or services to the Named Insured from supplying such goods and/or services, or that prevents a recipient of goods and/or services from the Named Insured from accepting such goods and/or services.

2-ER-188, § III.B.4. Contingent Time Element Coverage. The Policy thus requires that COVID-19 cause "loss directly resulting from physical damage" and that "direct supplier or direct customer locations" are impacted in a way that affects their ability to supply or receive goods. *See* 1-ER-25.

As addressed above, the coronavirus can cause physical damage to property. As for suppliers and customers, the Menominee specifically alleged that businesses that supplied customers to insured premises were directly and materially impacted by physical damage due to COVID-19. 2-ER-101–02, ¶ 149. In light of the allegations regarding closure orders in the rest of the Amended Complaint, it is a reasonable inference that "area hotels, restaurants, and other businesses" in the area "experienced exposure to physical damage from the coronavirus" in a way that materially impacted the "ability of customers to travel to Plaintiffs' establishments in order to enjoy the services offered." *Id.* This includes, for example, the War Bonnet Bar & Grill, a restaurant within ten miles of the Businesses forced to close its dining room and resort to carry-out only practices as of September 2020. *Id.* The Menominee have

alleged facts sufficient to support their claim for Contingent Time Element Coverage.

The Policy's Tax Revenue Interruption Coverage provision provides, in the relevant part, that:

> [T]his Policy insures against loss resulting directly from necessary interruption of sales, property or other tax revenue including, but not limited to Tribal Incremental Municipal Services Payments collected by or due the Named Insured caused by damage, or destruction by a peril not excluded from this Policy to property which is not operated by the Named Insured and which wholly or partially prevents the generation of revenue for the account of the Named Insured.

2-ER-189, § III.B.5. Tax Revenue Interruption. The critical interpretive issue is, again, whether COVID-19 causes "damage" within the meaning of the Policy. The District Court's analysis, as above, hinges on its flawed interpretation of "direct physical loss or damage" under Wisconsin law. *See* 1-ER-18–20. Notwithstanding the District Court's interpretation of policy terms, Menominee have clearly pled that COVID-19 caused direct physical loss or damage throughout its properties, impairing their ability to function to the extent that they were wholly or partially prevented from generating tax revenue. *E.g.*, 2-ER-82, 84–85, 112, ¶¶ 66, 76, 218. These are facts sufficient to support their claim for Tax Revenue Interruption Coverage.

Finally, the Policy's Protection and Preservation of Property provision provides, in the relevant part, that:

> In case of actual or imminent physical loss or damage of the type insured against by this Policy, the expenses incurred by the Named Insured in taking reasonable and necessary actions for the temporary protection and preservation of property insured hereunder shall be added to the total physical loss or damage otherwise recoverable under the Policy and be subject to the applicable deductible and without increase in the limit provisions contained in this Policy.

2-ER-181, § II.B.16. Protection and Preservation of Property. The District Court's argument—that COVID-19 harms people, not property—echoes its unsupported position that COVID-19 cannot cause direct physical loss or damage. 1-ER-18. In reality, the Insurers agreed to pay the loss of insureds who take steps to protect or preserve covered property in the face of "actual or imminent" "physical loss or damage." Here, the Menominee alleged that they made substantial, material repairs to mitigate the impact of COVID-19 on their business operations and remediate its presence on their physical property. *E.g.*, 2-ER-101, ¶ 147. These facts are sufficient to support a claim for coverage under the Protection and Preservation of Property provision.

CONCLUSION

This Court should reverse the District Court's dismissal and remand for further proceedings consistent with its opinion.

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Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument because, in Appellants' view, oral argument would be helpful to the Court in resolving the important contract and insurance issues raised in this appeal that have serious implications beyond the parties themselves.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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