NO. 21-10190

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EMERALD COAST RESTAURANTS, INC.,

Plaintiff-Appellant,

vs.

ASPEN SPECIALTY INSURANCE COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Florida, Pensacola Division District Court Case No. 3:20-cv-5898

PLAINTIFF-APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Plaintiff-Appellant, Emerald Coast Restaurants, Inc. hereby states the following individuals and entities may have an interest in the outcome of this appeal:

1. Aspen Specialty Insurance Company (Defendant-Appellee)
2. Barr, Chad (Counsel for Plaintiff-Appellant)
3. Berk, William (Counsel for Defendant-Appellee)
4. Berk, Merchant and Sims, PLC (Counsel for Defendant-Appellee)
5. Chiappetta, Nicholas (Counsel for Plaintiff-Appellant)
6. Emerald Coast Restaurants, Inc. (Plaintiff-Appellant)
7. Law Office of Chad A. Barr, PA (Counsel for Plaintiff-Appellant)
8. Marten Chiappetta (Counsel for Plaintiff-Appellant)
9. Ostolaza, Yvette (Counsel for Defendant-Appellee)
10. Sidley Austin LLP (Counsel for Defendant-Appellee)
11. Swindoll, Alan (Counsel for Defendant-Appellee)
12. The Honorable T. Kent Wetherell, II (District Judgment, United States District Court for the Middle District)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant is a corporation and there is no parent corporation or publicly held corporation that owns more than 10% of its stock (of which there is none).

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant respectfully requests this Court hold oral argument on this matter. This case involves the important – and timely – question about whether, under Florida law, an "all-risk" commercial insurance policy covering business interruption losses must cover physical losses sustained due to government issued "stay-at-home" or "shelter-in-place" orders issued to stem the tide of the COVID-19 pandemic. These orders caused direct physical loss of property by detrimentally reducing the capabilities and function of Plaintiff-Appellant's business for months but did not cause any physical damage to the insured property.

In its Order dismissing Plaintiff-Appellant's amended complaint, the district court construed the phrase "direct physical loss ***of or*** damage to property" as requiring actual "physical damage," a holding that cannot be squared with the plain language of the Policy and is at odds with well-settled rules of contract interpretation and Florida precedent – which the district court was bound to follow but never even addressed. The district court's ruling threatens to cause grave, and in many cases, irreparable harm to

Florida's small business community already suffering from the pandemic's impact. Plaintiff-Appellant respectfully submits oral argument will aid the Court's review of these issues.

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I. STATEMENT OF JURISDICTION.

Diversity jurisdiction existed below pursuant to 28 U.S.C. §1332(d). (APP011) Plaintiff-Appellant timely filed its notice of appeal as to the district court's Order dismissing Plaintiff's Amended Complaint and Final Judgment. (APP277) This Court has jurisdiction to review the Final Judgment pursuant to 28 U.S.C. §1291.

II. STATEMENT OF THE ISSUES.

The issues presented in this appeal are:

1. Whether an "all-risk" commercial insurance policy that provides coverage for business interruption losses caused by a "direct physical loss of *or* damage to property" requires "actual physical damage ***to*** property," as the district court held, or whether the phrase "direct physical loss ***of*** property" "includes ***more than*** losses that harm the structure of the covered property," as Florida precedent holds.

2. Whether spoiled perishable food stock constitutes "physical damage ***to***" personal property under Aspen's Policy.

3. Whether this Court should certify the questions *infra* regarding the interpretation of Florida law to the Florida Supreme Court.

III. STATEMENT OF THE CASE.

A. Nature of the Case.

Plaintiff seeks coverage under the policy's Business Income and separate Spoilation coverage caused by mandatory government "stay-at-home" or "shelter-in-place" orders (hereinafter "Closure Orders") enacted to stop the spread of COVID-19. Nationwide, state Closure Orders caused an incredible amount of damage to the U.S. economy, most notably to the small business community.

Small businesses such as Plaintiff-Appellant ("Plaintiff") are the lifeblood of the American economy. Due to state Closure Orders, all small businesses deemed "non-essential" were shut down, many completely and some for limited purposes. Months went by while COVID-19 raged across the country, during which time small businesses struggled to make payroll, pay bills, and feed owners' and employees' families. It is estimated that upwards of 100,000 small businesses temporarily shut down never reopened.[1]

Thousands of these affected small businesses submitted claims to their commercial insurance carriers under "all-risk" policies, specifically for losses covered by their Business Income coverage provisions. Nearly all such claims were

[1] Ann Sraders, et al., *Nearly 100,000 establishments that temporarily shut down due to the pandemic are now out of business*, FORTUNE (Sept. 28, 2020), https://fortune.com/2020/09/28/covid-buisnesses-shut-down-closed/.

denied, resulting in hundreds of lawsuits filed in state and federal courts across the nation. Plaintiff was one of those small businesses denied coverage by its insurer, Defendant-Appellee Aspen Specialty Insurance Company ("Aspen"), resulting in this breach-of-contract and declaratory-judgment suit.

In this case, the district court dismissed Plaintiff's complaint concluding that, although the Policy provides coverage for Business Income losses caused by a "direct physical loss ***of or*** damage to property", "the losses claimed by Plaintiff are not covered" because the Policy "clearly and unambiguously requires actual physical damage ***to*** the property." (APP272)(Emph. added). In reaching its conclusion, the district court ignored the plain language of the policy, ignored binding principles of contract interpretation in Florida, and ignored Florida caselaw enunciated by Florida's intermediate appellate courts whose holdings are contrary to the district court's holding in this case.

First, in concluding that the Amended Complaint failed to allege "actual physical damage to property," the district court erred in ignoring the plain language of the policy, including use of the disjunctive word "or" rather than a conjunctive connector in the phrase "direct physical loss of or damage to." Had the district court interpreted the Policy as required under Florida law it would have concluded "loss" and "damage" are distinct terms with different meanings. So, too, are the words "of"

and "to."[2] Because the Amended Complaint adequately pled "direct physical loss of" Plaintiff's property, including use of its property, and "actual damage to" its perishable food stock, the motion to dismiss should have been denied.

Second, in diversity actions, federal courts "are 'bound' to follow an intermediate state appellate court[s] 'unless there is persuasive evidence that the highest state court would rule otherwise.'" *Bravo v. United States*, 577 F.3d 1324, 1326 (11th Cir. 2009). The Florida Supreme Court has not weighed in on the issues presented in this appeal. However, at least three Florida intermediate appellate courts have, and they have each held that "direct physical loss" does not require "actual physical damage to the property". (APP272) *See Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d600 (Fla. Dist. Ct. App. 1995); *Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067 (Fla. Dist. Ct. App. 2017); and *Peek v. Am. Integrity Ins. Co. of Florida*, 181 So. 3d 508, 511 (Fla. Dist. Ct. App. 2015). In *Azalea*, Florida's First District Court of Appeal held that "direct physical loss" occurs even where there is "no damage to the structure." *Azalea*, 656 So. 2d at 602.

[2] As explained below, the policy's use of the words "of" and "to" matter because, in one of the principal cases several courts have relied on in denying coverage, including this Court's unpublished decision in *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868 (11th Cir. 2020), the policy at issue there provided coverage for "direct physical loss ***to*** business personal property[.]" *See MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co*., 187 Cal. App. 4th 766, 115 Cal. Rptr. 3d 27 (2010).

In *Maspons*, Florida's Third District Court of Appeal held that "the failure of the [property] ***to perform its function*** constituted a 'direct' and 'physical' loss to the property within the meaning of the policy." *Maspons*, 211 So. 3d at 1069. Similarly, in *Peek* the Second District Court of Appeal concluded the insured established a direct physical loss due to dangerous toxic gases that emanated from drywall requiring the insured to temporarily vacate the property. *Peek*, 181 So. 3d at 511.The district court ignored *Azalea*, *Maspons*, and *Peek*. (APP271)

Third, even if Aspen's interpretation of the Policy is reasonable so is Plaintiff's, and that itself renders the Policy ambiguous. As such, the district court was required to construe the Policy against Aspen as the drafter and in favor of coverage.

Under binding insurance-contract-interpretation principles Florida law, Plaintiff adequately alleged a "direct physical loss of" its property due to Covid-19 and the Closure Orders. Accordingly, this Court should reverse the Judgment entered in this action or the issues herein should be certified to the Florida Supreme Court.

B. Statement of Facts.

1. Aspen's "All-Risk" Policy Issued to Plaintiff.

Aspen issued to Plaintiff an "all-risk" insurance policy ("Policy"), policy number PB7221719, covering policy period November 15, 2019 through November 15, 2020. (APP055) Among the coverages provided by the Policy was business

interruption coverage (hereinafter "Business Income" coverage), which indemnifies a policyholder for lost income and profits if its business is shut down. (APP114)

The Business Income Coverage Form, CP 00 30 10 12 in the Policy provides:

> 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".[3] The "suspension" must be caused by direct physical ***loss of*** or damage to property at the premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. 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.

(APP114)(Emph. added) The Business Income Coverage Form states that Aspen will pay the:

> …actual loss of Business Income you sustain due to the necessary "suspension" of your "operation" during the "period of restoration".

(APP114) The Policy defined "Business Income" as:

> a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
>
> b. Continuing normal operating expenses incurred, including payroll.

(APP114)

[3] "Suspension" is defined as "the slowdown or cessation of your business activities; or [t]hat a part or all of the described premises is rendered untenantable ...." Untenantable is defined as "not fit for occupancy." Black's Law Dictionary, (10th E.d. 2014)

The Policy also provided "Extra Expense" coverage which is described as:

> 2. Extra Expense
>
> a. Extra Expense Coverage is provided at the premises described in the Declarations only if the Declarations show that Business Income Coverage applies at that premises.
>
> b. Extra Expense means necessary expenses you incur during the "period of restoration" that you would have not incurred if there had been no ***direct physical loss or damage to property*** caused by or resulting from a Covered Cause of Loss.
>
> We will pay Extra Expense (other than the expense to repair or replace property) to:
>
> (1) Avoid or minimize the "suspension" of business and to continue operations at the described premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.
>
> (2) Minimize the "suspension" of business if you cannot continue "operations".
>
> We will also pay Extra Expense to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable under this Coverage Form.

(APP114-15)(Emph. added)

Notably, the Business Income Coverage Form contains "loss of" language, whereas the Extra Expense provision contains "loss or damage to property" language. This slight deviation in verbiage connotes an express intent to change coverage. This distinction in deviating policy language cannot be ignored. (APP114-15).

The phrase "period of restoration" as used in the Business Income and Extra Expense coverage is defined as:

> 3. "Period of restoration" means the ***period of time*** that:
>
> a. Begins:
>
> (1) 72 hours after the time of direct physical loss or damage for Business Income Coverage; or
>
> (2) Immediately after the time of direct physical loss or damage for Extra Expense Coverage;
>
> caused by or resulting from any Covered Cause of Loss at the described premises; and
>
> b. Ends on the earlier of:
>
> (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
>
> (2) The date when business is resumed at a new permanent location.

(APP122)(Emph. added)

The Business Income Coverage Form further provides coverage for "Extended Business Income":

> c. Extended Business Income
>
> (1) Business Income Other Than "Rental Value"
>
> If the necessary "suspension" of your "operations" produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period that:
>
> (a) Begins on the date property (except "finished stock") is actually repaired, rebuilt or replaced and "operations" are resumed; and
>
> (b) Ends on the earlier of:
>
> (i) The date you could restore your "operations", with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage had occurred; or
>
> (ii) 60 consecutive days after the date determined in (1)(a) above.
>
> However, Extended Business Income does not apply to loss of Business Income incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.
>
> Loss of Business Income must be caused by ***direct physical loss or damage*** at the described premises caused by or resulting from and Covered Cause of Loss.

(APP116)

The Policy also provides Spoilage coverage which covers perishable stock located at the insured premises. Commercial Property Extension form ASPPR174 0418 in the Policy provides:

> 7. SPOILAGE
>
> You may extend the insurance that applies to Your Business Personal Property for Covered Causes of Loss shown in the Declarations, but only with respect to coverage provided by this endorsement.
>
> a. Covered Property
>
> (1) Covered Property means "perishable" stock" at the premises described in the Declarations owned by you or by others in your care, custody or control.

(APP063)

Covered Cause of Loss is defined under the Policy in a separate form, Causes of Loss – Special Form, Form 10 30 10 12:

> Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy.

(APP091) The Causes of Loss Form also provides exceptions to excluded causes of loss:

> 3. We will not pay for loss or damage caused by or resulting from any of the following, 3.a through 3.c. But if an excluded cause of loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, we will pay for the loss or damage by that Covered Cause of Loss.
>
> …

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

(APP094)

Unlike some policies that provide Business Income coverage, this Policy does not expressly exclude losses caused by viruses or communicable diseases, pandemic coverage, communicable disease coverage or anything similar. (APP055)

2. Florida Governor Ron Desantis' Closure Orders.

On March 1, 2020, the Florida Surgeon General and Florida Health Officer declared a Public Health Emergency existed in Florida because of COVD-19. (APP225, APP231) In March of 2020, the World Health Organization ("WHO") declared COVID-19 a worldwide pandemic. President Trump declared the COVID-19 pandemic to be a national emergency. On March 9, 2020, the Centers for Disease Control and Prevention ("CDC"), issued "15 days to Slow the Spread" guidance advising the American public to adopt far-reaching social distancing measures, including working from home, avoiding shopping trips, gatherings of more than ten people, staying away from bars, restaurants, food courts, gyms and other indoor and outdoor venues. (APP225, APP231)

Following this advice, many state governments recognized the need to take steps to protect the health and safety of their residents from the human-to-human and surface-to-human spread of COVID-19. On March 9, 2020, Florida

Governor Ron Desantis declared a state of emergency for all of Florida and began issuing a series of Closure Orders, by way of Executive Order, relating to coronavirus protection, including:

- **Executive Order 20-51 (Mar. 1, 2020):** Governor Desantis issued a proclamation declaring a local state of civil emergency, stating that the continued spread of COVID-19 presents an imminent threat of widespread illness and a threat to public health. (APP021, APP226, APP231)
- **Executive Order 20-52 (Mar. 9, 2020):** Governor Desantis issued an Executive Order declaring the continued spread of COVID-19 presents an imminent threat to the entire State of Florida. (APP021, APP225, APP231)
- **Executive Order 20-68 (Mar. 17, 2020):** Governor Desantis issued an Executive Order providing that restaurants were to operate at 50% capacity, maintain 6-foot distances between parties, and prohibited employees from working if they exhibit any COVID-19 symptoms. (APP021, APP225)
- **Executive Order 20-71 (Mar. 20, 2020):** Governor Desantis issued an Executive Order requiring the closure of all Florida bars. Restaurants can only provide takeout and delivery except for alcoholic beverages.

(APP022, APP225)

- **Executive Order 20-83 (Mar. 20, 2020):** Governor Desantis issued an Executive Order directing state officials to issue a public health advisory and to limit social gatherings. (APP022, APP225)
- **Executive Order 20-91 (Apr. 1, 2020):** Governor Desantis issued Executive Order 20-91, requiring all persons in Florida to limit their movements and personal interactions outside of their home to only those necessary to obtain or provide essential services or conduct essential activities. (APP022, APP231)

In total, Governor Desantis has issued over sixty Executive Orders related to COVID-19.[4]

Like most municipalities, the City of Destin declared a State of Emergency in response to COVID-19 and closed all beaches within the city limits on March 20th, 2020. (APP021) The City of Fort Walton Beach, which borders Destin also declared a State of Emergency and closed it beaches. (APP021) Four days later, ***all*** gulf-front beaches in Okaloosa County were closed. (APP021)

[4] Governor Desantis' COVID-19 Executive orders may be found at: https://www.flgov.com/covid-19-executive-orders/

3. The Complaint's "Direct Physical Loss" Allegations.

Plaintiff operated a popular sports bar in Destin Florida (Okaloosa County) named O'Quigley's Seafood Steamer & Oyster Sports Bar which successfully operated until March 2020. (APP007, APP178) As a direct result of COVID-19 and the Closure Orders, Plaintiff was forced to suspend its business operations for months. (APP225, APP231) In March of 2020, Plaintiff had in place an "all risk" insurance policy (the "Policy") issued by Aspen to protect from this type of direct physical loss of property that resulted in lost income and other damage. (APP178)

Destin, Florida is a popular tourist destination and tourists from around the world patron Plaintiff's establishment. (APP020) Therefore, it is believed that customers, employees, tourists, or other visitors to the insured property prior to the closure in March of 2020 were infected with, or exposed to, COVID-19 and thereby infected or contaminated the insured property with COVID-19.[5] As a result of COVID-19 and the Closure Orders Plaintiff sustained "loss of" business income and "damage to" perishable food stock. (APP007, APP178)

[5] "[A]ny location where two more people can congregate is within the disaster area." *Friends of Danny Devito v. Wolf*, 227 A3d 872, 889-90 (Pa. 2020)(the virus spreads primarily through person-to-person contact)

Plaintiff submitted a claim to Aspen for its losses under the Policy's Business Income and separate Spoilation coverages. (APP007) Aspen denied the claim asserting that: (i) no direct physical loss of or damage to property at the described premise; and (ii) the government's use of its civil authority to close businesses, access to the described premises was not prohibited due to direct physical loss or damage to property other than at the described premises. (APP027) Aspen failed to explain why spoilage of perishable food stock was not covered under the Policy. (APP027)

C. Course of Proceedings.

Plaintiff filed suit against Aspen seeking a declaration of coverage for its losses and damages for breach of the Policy. (APP007) Consistent with the Policy and Florida law, Plaintiff made specific, non-conclusory allegations in its Amended Complaint that it suffered a direct physical loss of its property due to COVID-19 and the Closure Orders. (APP007) The Plaintiff alleged:

- Temporary or partial dispossession of property that has not been physically altered constitutes "physical loss of property" for purposes of first-party property insurance. (APP024)
- The presence of COVID-19 caused direct physical loss of or damage to the covered property or "premises" under the Plaintiff's Policy, by prohibiting access, limiting use, damaging covered property, and

causing a necessary suspension of operations during a period of restoration. (APP024)

- The Closure Orders expressly prohibited access to and use of Plaintiff's Covered Property, and the area immediately surrounding damaged property, in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage. (APP024)
- The presence of COVID-19 and the Closure Orders caused a direct loss to locations contiguous to Plaintiffs' premises, preventing existing ingress and/or egress at Plaintiffs' premises and caused a loss of Business Income sustained and necessary Extra Expense incurred. (APP025)
- As a result of the presence of COVID-19 and the Closure Orders, the Plaintiff lost Business Income, incurred Extra Expense, and sustained losses due to spoilage of food. (APP027)

Aspen moved to dismiss the Amended Complaint arguing principally that the meaning of "Direct Physical Loss of or Damage to" requires "actual, tangible, permanent, physical alteration" to the insured premises and does not extend to temporary loss of use caused by the Closure Orders. (APP146)

Plaintiff filed a response to the motion to dismiss asserting it had experienced and sufficiently plead covered losses under the policy. (APP171) Plaintiff asserted that the Policy was either ambiguous or did not require actual, tangible, permanent, or physical alteration to the insured premises to invoke coverage under the Policy. (APP171) Plaintiff filed a notice of supplemental authority attaching orders finding coverage under policies with "direct physical loss of or damage" language where there is no physical damage. (APP252)

On December 18, 2020, the district court dismissed the Amended Complaint concluding that the Policy "clearly and unambiguously requires ***actual physical damage to*** the property." (APP272)(Emph. added) The clerk of court subsequently entered a Final Judgment. (APP276). This appeal timely followed. (APP278)

IV. SUMMARY OF THE ARGUMENT.

Because this case is based on diversity jurisdiction, the district court was bound to follow Florida substantive law which requires courts interpreting an insurance policy to, *inter alia*: (a) construe the policy in the broadest possible manner to affect the greatest extent of coverage; (b) examine the natural and plain meaning of a policy's language as understood by the proverbial "man-on-the-street"*;* (c) look to the dictionary for the plain and ordinary meaning of words; (d) give effect to all words in the policy; and (d) treat words separated by the disjunctive "or" separately. The district court ignored each of these principles in

concluding that the Policy's phrase "direct physical loss of or damage to" requires "physical damage".

The district court's conclusion that "direct physical loss of" requires "actual physical damage" to be entitled to coverage cannot be squared with the Policy language or binding Florida precedent holding that "'direct physical loss' includes ***more than*** losses that harm the structure of the covered property." *Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 250 F. Supp. 2d 1357, 1364 (M.D. Fla. 2003) (*citing Azalea*, 656 So. 2d at 600). *See also Maspons*, 211 So. 3d at 1069 (holding that, despite the lackof "damage," "it is clear that the failure of the drainpipe ***to perform its function*** constituted a 'direct' and 'physical' loss to the property within the meaning of the policy."); *Peek*, 181 S. 3d at 511 (finding emission of dangerous gases from Chinese drywall constituted a "loss" despite no actual damage to property).

The issue presented in this case is a fundamental state law issue affecting hundreds of thousands of small businesses throughout Florida and this Court should therefore certify this issue to the Florida Supreme Court under Article V, Section 3(B)(6) of the Florida Constitution, which this Court often does in matters of insurance policy interpretation under state law.

V. STANDARD OF REVIEW.

This Court "review[s] *de novo* an order granting a Rule 12(b)(6) motion to dismiss for failure to state a claim. The allegations in the complaint must be accepted as true and construed in the light most favorable to the plaintiff." *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 694 (11th Cir. 2016).

VI. ARGUMENT.

A. Applicable Florida Law Governing Interpretation of Insurance Policies.

In this diversity jurisdiction matter Florida substantive law applies. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 . . . (1938) (holding that federal courts sitting in diversity jurisdiction "must apply substantive state law.") As such, Florida's substantive law governs the interpretation of the subject Policy. *Great Am. All. Ins. Co. v. Anderson*, 847 F.3d 1327, 1331 (11th Cir. 2017).

Under Florida law, "insuring or coverage clauses are construed in the broadest possible manner to affect the greatest extent of coverage." *McCreary v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 758 So. 2d 692, 695 (Fla. Dist. Ct. App. 1999). When "construing an insurance contract" in Florida, a court "examine[s] the natural and plain meaning of a policy's language." *Anderson v. Auto-Owners Ins. Co.*, 172 F.3d 767, 769 (11th Cir. 1999). "[T]erms utilized in an insurance policy should be given their plain and unambiguous meaning as

understood by the 'man-on-the-street.'" *State Farm Fire & Cas. Co. v. Castillo*, 829 So. 2d 242, 244 (Fla. Dist. Ct. App. 2002).

When words are undefined in a policy, "'[o]ne looks to the dictionary for the plain and ordinary meaning of words.'" *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1024 (11th Cir. 2014) (*quoting Beans v. Chohonis*, 740 So. 2d 65, 67 (Fla. Dist. Ct. App. 1999)). *See also Hegel v. First Liberty Ins. Corp.*, 778 F.3d 1214, 1221 (11th Cir. 2015) ("In construing insurance-policy terms, Florida courts 'commonly adopt the plain meaning of words contained in legal and non-legal dictionaries.'").

It is also well-settled that if the "relevant policy language is susceptible to multiple reasonable interpretations, one providing coverage and another denying it, the insurance policy is ambiguous[,]" *Anderson*, 172 F.3d at 769, and "must be construed against the insurer and in favor of coverage." *Washington Nat'l Ins. Corp. v. Ruderman*, 117 So. 3d 943, 945 (Fla. 2013).

Finally, "in any dispute over insurance coverage, the Court begins by examining the source of coverage itself— the general promises of coverage made in the insurance policy." *Mindis Metals, Inc.v. Transp. Ins. Co.*, 209 F.3d 1296, 1298 (11th Cir. 2000).

Here, the source of coverage is the "all-risk" Policy issued by Aspen to Plaintiff. (APP055) "An all-risk policy provides coverage for all fortuitous loss or damage other than that resulting from willful misconduct or fraudulent acts – [u]nless the policy expressly excludes the loss from coverage." *S.O. Beach Corp. v.Great Am. Ins. Co. of N.Y.*, 791 F. App'x 106, 108 (11th Cir. 2019) (alteration in original) (*quoting Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1085 (Fla. 2005)).

To recover under an all-risk policy, an insured must identify: (1) a fortuitous loss; (2) that occurred during the policy period. *Great Lakes Reinsurance (UK) PLC v. Kan-Do, Inc.*, 639 F. App'x 599, 601 (11th Cir. 2016) ("A fortuitous event . . . is an event which so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, as the loss of a vessel, provided that the fact is unknown to the parties.").

B. The District Court Erred in Holding that Actual Physical Damage to the Property is Required to Allege a "Direct Physical Loss of" Property.

In dismissing the Amended Complaint, the district court concluded that for a "direct physical loss" to occur there must be "actual physical damage to the property." (APP272) This erroneous decision violates several principles of Florida common law.

First, the district court did not consider how the proverbial "man-on-the-street" would interpret the phrase "direct physical loss of" property. Second, the district court improperly conflated "loss" and "damage" to mean the same thing when separated by the disjunctive "or," and ignored the important fact that the word "of" modifies "loss," while the word "to" modifies "damage." Third, the district court failed to follow binding law from Florida's intermediate appellate courts. Each error, independently, compels reversal.

1. The Plain Meaning of "Direct Physical Loss of" Property – As Understood by the Ordinary "Man-on-the-Street" – Includes Loss of Use or Loss of Functionality.

Plaintiff respectfully submits that it defies common sense to conclude that an ordinary "man-on-the-street" would interpret the phrase "direct physical loss of" property to require physical damage, which would be entirely superfluous to the rest of the phrase, and the Policy would then read as requiring: "direct physical damage of or damage to property."

Aspen's Policy does not define the words "physical," "loss," or "damage." Accordingly, turning to the dictionary to ascertain "the plain and ordinary meaning" of these words is appropriate. *Winn-Dixie Stores, Inc.*, 746 F.3d at 1024. Dictionaries

define "loss" as "the act of losing possession: deprivation,"[6] or "[a]n undesirable outcome of a risk; the disappearance or diminution of value, in an unexpected or relatively unpredictable way."[7] "Physical" means "having material existence: perceptible especially through the senses and subject to the laws of nature."[8] "Damage" is defined as "injury to a person or property."[9]

These definitions illustrate an ordinary "man-on-the-street" would not only believe that "loss" and "damage" are distinct concepts, but that a "physical loss" would occur when one is "deprived" of using property with a material existence for its intended purpose or where one's property disappears or diminishes in value.[10] Here, Plaintiff alleges it was deprived of the use and functionality of its restaurant, because the property, was rendered unsuitable for its intended use as a directresult of Covid-19 and the Closure Orders. (APP69) Such allegations are sufficient to plead a plausible claim for coverage under the Policy.

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[6] *Loss*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/loss.

[7] *Loss*, Black's Law Dictionary (11th ed. 2019).

[8] *Physical*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical.

[9] *Damage*, Black's Law Dictionary (11th ed. 2019).

[10] The definition of the term "loss" does not require permanency.

The reasonable interpretation of the Policy, when viewed through the lens of an average person, conflicts with the interpretation advanced by Aspen and accepted by the district court. *Ruderman*, 117 So. 3d at 945.

2. "Loss" and "Damage" are Different Terms With Different Definitions.

The district court also erred by failing to differentiate between the meanings of "loss of" and "damage to." The Policy's "use of the disjunctive word 'or' rather than a conjunctive connector" in the phrase "direct physical loss of ***or*** damage to" likewise demonstrates an ordinary person would believe ***either*** a loss ***or*** damage would trigger coverage. *Landrum v. Allstate Ins. Co.*, 811 F. App'x 606, 609 (11th Cir. 2020) ("Use of the disjunctive 'or' in the policy indicates alternatives and requires that those alternatives be treated separately"); *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 1:20 CV 1239, 2021 WL 168422, at *10 (N.D. Ohio Jan. 19, 2021) (granting summary judgment to plaintiffs as to coverage in COVID-19 context and noting, "Plaintiffs argue that physical loss of the real property means something different than damage to the real property, and this is a valid argument. Otherwise, why would both phrases appear side-by-side separated by the disjunctive conjunction 'or'?")

Binding Florida precedent also supports this reasonable interpretation. In *Widdows v. State Farm Fla. Ins. Co.*, 920 So. 2d 149 (Fla. Dist. Ct. App. 2006), the court considered whether a back pitched sewer pipe impeding the flow of water was a covered loss under a Policy that covered "accidental direct physical loss" to the property. The trial court dismissed the case because there was no evidence of damage to the property. Florida's Fifth District Court of Appeal reversed and held "it was ***not necessary*** for Appellant to establish any resulting ***damage*** from [the] condition" *Id.* at 150(Emph. added).

In *Cent. Cold Storage, Inc. v. Lexington Ins. Co*., 452 So. 2d 1014 (Fla. Dist. Ct. App. 1984), the issue was whether the loss of stored goods due to an ammonia leak in a refrigeration unit was covered under a policy that insured "against all risk of direct physical loss or damage to the insured property". *Id.* at 1015. There was no claim for damage to the insured premises. In reversing the trial court's summary judgment in favor of the insurer, Florida's Third District Court of Appeal determined the ammonia leak was external to the goods in storage and "the proper construction of the insurance contract in the instant case is to extend coverage for the loss." *Id.*

In *Peek*, Florida's Second District Court of Appeal determined an insured established a "loss" to insured property on a drywall claim when the walls emanated odiferous, toxic or dangerous gases, forcing the Peeks to vacate the home. *Peek*, 181 So. 3d at 511. Even though the court ultimately found the drywall was manufactured

defective and upheld a policy exclusion, the court implicitly acknowledged that intangible gas, that caused harm to people – not property – was in fact a covered loss under a homeowners insurance policy. *Id*.

In *St. George v. Harris*, 440 So. 2d 62 (Fla. Dist. Ct. App. 1983), Florida's First District Court of Appeal considered the theft of an insured airplane and the value of damages under a policy that insured against "direct physical loss of or damage to the aircraft." *Id.* at 64. *St. George* stands for the unmistakable proposition that a temporary loss of use, dispossession or deprivation of an insured item constitutes a "direct physical loss" under Florida law regardless of whether there is damage.

Nevertheless, the district court held there must be "actual physical damage to property" for there to be a "direct physical loss." (APP272) This erroneous conclusion improperly collapses "loss" and "damage" into the same meaning. While "damage" indisputably includes structural injuries, "loss" does not. The Policy covers physical loss ***of*** property ***in addition to*** physical damage ***to*** property, "and if a physical loss could not occur without physical damage, then the policy would contain surplus language." *Manpower Inc. v. Ins. Co. of the State of Penn.*, No. 08C0085, 2009 WL3738099, at *5 (E.D. Wis. Nov. 3, 2009)(Emph. added). Such a result would subvert a cardinal principle of construction requiring courts to interpret insurance contracts in a way that gives meaning to each provision without

rendering any portion superfluous. *Super Cars of Miami, LLC v. Webster*, 300 So. 3d 752, 755 (Fla. Dist. Ct. App. 2020)(courts must "give reasonable meaning and effect to all … provisions"). *See also Westport Ins. Corp. v. Tuskegee Newspapers, Inc.*, 402 F.3d 1161, 1166 (11th Cir. 2005) ("Each word [in an insurance contract] is deemed to have some meaning, and none should be assumed to be superfluous. All portions of a policy should be considered in construing it. Accordingly, a court will attempt to give meaning and effect, if possible, to every word and phrase in the contract in determining the meaning thereof, and a construction which neutralizes any provision of a contract should never be adopted if the contract can be so construed as to give effect to all the provisions").

If Aspen "wanted to limit liability of 'direct physical loss' to strictly require structural damage ***to*** property, then [Aspen], as the drafter[] of the policy, [was] required to do so explicitly." *Elegant Massage, LLC v. State Farm Mut. Auto.Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624, at *9 (E.D. Va. Dec. 9, 2020) (denying motion to dismiss in COVID-19 business interruption coverage case). *See also Henderson Rd.*, 2021 WL 168422, at *10 ("Here, Zurich's policy does not expressly limit coverage to physical loss ***to*** property; it extends coverage to direct physical loss ***of*** property as well.")(Emph. in original). However, Aspen did not. The Policy, therefore, "may be construed in favor of more coverage based on plausible interpretations." *Id.*

This Court's decision in *Hegel* is instructive. 778 F.3d at 1214. There, the insureds made a claim under their homeowner's insurance policy for "sinkhole loss," which the policy defined as "structural damage to the building, including the foundation, caused by sinkhole activity." *Id.* at 1216. On summary judgment, the insurer argued the damage to the insureds' residence does not qualify as"structural damage…" *Id.* In rejecting that position, the district court held "the term 'structural damage' should be interpreted to mean any 'damage to the structure.'" *Id.* at 1219. As such, the district court concluded the insureds' claim for "damage to their home, including, but not limited to, progressive physical damage to the walls and floors of the residence," was covered under the policy, and entered summary judgment for the insureds. *Id.* at 1217-19.

This Court reversed explaining "structural damage to the building" could ***not*** mean the same thing as "physical damage to [the insureds'] home" because "[s]uch a construction would render the word 'structural' meaningless because all property damage is physical, thereby violating a foundational rule of contract construction that every word be given effect." *Id.* at 1221(Emph. added).

Here, it is the insurer – Aspen – that is attempting to rewrite the Policy to give the same meaning to the words "loss" and "damage." However, if "loss" required "physical damage," as the district court held (APP273), it would, like in *Hegel*, "violat[e] a foundational rule of contract construction that every word be given

effect." *Hegel*, at 778 F.3d at 1221.

Indeed, numerous courts in the COVID-19 context have reviewed the same policy language and concluded that "loss" and "damage" are distinct terms with different meanings, and therefore, physical or structural alteration to the property is not required to suffer a "physical loss."

In *Elegant Massage*, the insured alleged COVID-19 Closure Orders in Virginia caused it to suffer a direct physical loss. In denying the insurer's motion to dismiss, the district court explained that "direct physical loss" had three accepted interpretations: (i) structural damage; (ii) distinct and demonstrable physical alteration; and (iii) ***when property is rendered uninhabitable, inaccessible, or dangerous to use***. 2020 WL 7249624 at *8-9. (Emph. added). In denying the insurer's motion to dismiss, the court held "it is plausible that Plaintiff experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus." *Id.* at *10. The court found the facts of the case "similar [to] those where courts found that asbestos, ammonia, odor from methamphetamine lab, or toxic gasses from drywall, which caused properties uninhabitable, inaccessible, anddangerous to use, constituted a direct physical loss." *Id.* The *Elegant Massage* court noted if the insurer wanted to limit liability of "direct physical loss" to a specific definition, then it was incumbent on the insurer, as the

drafter of the policy, to do so explicitly." *Id.*

The Northern District of Ohio reached a similar result in *Henderson Rd.* where the court granted summary judgment in favor of four restaurants – under an identical policy as here – for losses sustained by COVID-19 Closure Orders. 2021 WL 168422, at *1, *17. The *Henderson Rd.* court carefully analyzed the insurer's arguments and authorities and: (a) concluded "the Policy's language ***is*** susceptible to [the] interpretation" and that restaurants ***do*** suffer a "direct physical loss of" their properties when they are "no longer be[ing] used fortheir intended purposes – as dine-in restaurants[,]" *id.* at *10; (b) distinguished cases interpreting different policy language, noting "[the] policy does not expressly limit coverage to physical loss ***to*** property; it extends coverage to direct physical loss ***of*** property as well[,]" *id.* at *10-11; (c) rejected the insurer's argument that the plaintiffs suffered no loss because "they were still permitted to use [their restaurants] for takeout [sic] orders[,]" where it was undisputed the restaurants"were mostly used for dine-in customers[,]" *id.* at *11; (d) rejected the insurer's contention, and cited authorities holding a "loss" required "***permanent*** dispossession[,]" because "real property can be lost and later returned or restored" and "[the] Policy did not require a permanent 'loss of' property and permanency is not embodied in the definition of loss[,]" *id.* at *12(Emph. in original); and (e) concluded "[b]ecause [the] Policy is susceptible of more than one interpretation, it must be construed liberally in favor of the insureds,

i.e., Plaintiffs[,]" and "when the Policy is liberally construed in Plaintiffs' favor, it provides coverage for Plaintiffs' lost business income." *Id.*[11]

Further, in *Hill & Stout v. Mutual of Enumclaw*, No. 20-2-07925-1, at 3 (Wash. Super. Ct. Nov. 13, 2020), the insured argued it suffered a direct physical loss when it could not use its dental office or equipment for their intended purpose in light of Washington's Closure Orders. The court denied the insurer's motion to dismiss, recognizing that an ordinary definition of "loss" includes "deprivation," *id.* at 4, and an "average lay person" interpreting the policy would find the insured suffered a "direct physical deprivation" because it was "unable to see patients and practice dentistry," because"[i]f 'physical loss of' was interpreted to mean 'damage to' then one or the other would be surplusage." *Id.* at 4-5.

In *North State Deli v. Cincinnati Ins. Co.*, No. 20- CVS-02569 (N.C. Super. Ct. Oct. 9, 2020), the North Carolina Superior Court granted summary judgment for the insureds, concluding coverage was triggered because the insureds were deprived of the normal use of their property. There, the insured argued government Closure Orders constituted a "direct physical loss" to covered property. The court agreed, reasoning "direct physical loss" includes "the inability to utilize or possess

[11] The court also certified for interlocutory review its summary judgment ruling on coverage. *Id.* at *17.

something in the real, material, or bodily world, resulting from a given causewithout the intervention of other conditions." *Id.* at 6.

In *Timothy A. Ungarean, DMD d/b/a Smile Savers Dentistry, PC v. CAN and Valley Forge Ins. Co.*, No. GD-20-006544 (P.A. Ct. Allegheny Cty. Mar. 22, 2021), the Pennsylvania court assessed an insurance policy containing "direct physical of or damage to" language. Upon review of dictionary definitions and application of contract interpretation, the court determined "the term 'loss' reasonably encompasses … losing possession, [and] deprivation" "absent … harm to property." *Id.* Applying this finding, the court determined (a) "[a]ny economic losses were secondary to the businesses' physical loss", (b) the term "period of restoration" is not inconsistent with "direct physical loss of", (c) the "period of restoration" does not require repair, replacement or relocation for coverage to apply; (d) the term "prohibited access" encompasses Covid-19 losses and does not have to be permanent; (e) and the policy language is ambiguous. *Id.* Accordingly, Summary judgment was granted in favor of Plaintiff. *Id.*

In *Studio 417, Inc. v. Cincinnati Ins. Co*., No. 20-CV-03127-SRB, 2020 WL 4692385, at *1 (W.D. Mo. Aug. 12, 2020), the Western District of Missouri found the insured adequately pled its entitlement to business-interruption coverage in COVID-19 circumstances, explaining, "[d]efendant conflates 'loss' and 'damage' in support of its argument that the Policies require a tangible, physical alteration." *Id.*

at *5. The court took the approach Plaintiff urges here: "loss" and "damage" should not be conflated when they are separated by the word "or." Instead, the court had to "give meaning to both terms" to avoid the other from being superfluous. *See also K.C. Hopps, LTD., v. Cincinnati Ins. Co*., No. 20- cv-00437-SRB (W.D. Mo., Aug. 12, 2020).

In *Blue Springs Dental Care, LLC v. Owners Ins. Co*., No. 20-CV-00383-SRB (W.D. Mo. September 21, 2020), the Western District of Missouri rejected arguments that the insured had failed to state sufficient allegations to demonstrate physical loss because of the "period of restoration" language found in the policy. *Id*. at 12-13. The court also rejected arguments that the insured had failed to state claims related to civil authority coverage on the basis that the insureds successfully pled they suffered a "physical loss" of their property. *Id*.

In *Optical Services USA/JC1, et al. v. Franklin Mutual Ins. Co*., No. BER-L-3681 (N.J. Superior Ct. August 13, 2020), the New Jersey Superior Court denied a motion to dismiss for failure to state a claim. The policy at issue contained a virus exclusion. *Id*. at 8:16-21. The policy at issue also defined loss as "requiring physical impact," which the insurer used to argue its motion to dismiss *Id*. at 11:8-9. The insured noted the policy "has an exclusion for virus proliferation" but not "for closure of a business based on the risk of virus proliferation." *Id*. at 11:22-12:15. The insured argued its business was forced to close due to the executive order issued

by the state. *Id*. at 13:5-21. The insured pled physical loss occurred because the executive order classified the businesses as "unfit and unsafe because of a dangerous condition." *Id*. The insured further argued "[t]he closure orders forced plaintiffs to close and banned occupancy of all non-essential businesses. In doing so, the closure orders necessarily not only affected plaintiffs' businesses, but they affected…all properties around plaintiffs." *Id*. at 15:1-6. The court ultimately denied the motion to dismiss, in part due to the lack of discovery taken in the case. *Id*. at 26:19-25. The court noted a lack of controlling legal authority, *Id*. at 25:23-26:4, and the "interesting" argument made regarding "where a policy holder loses functionality of their property and by operation of civil authority such as the entry of an executive order results in a change to the property." *Id*. at 29:15-20. The court elaborated further that the plaintiffs were advancing "a novel theory of insurance coverage in this matter that warrants a denial of the Motion to Dismiss at this early stage of the litigation." *Id*. at 29:21- 24.

The list does not end there. Many other courts across the country have decided in favor of policyholders on the same or similar interpretive bases that Plaintiff set forth before the district court.[12]

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[12] *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co*., No. 620CV1174ORL22EJK, 2020 WL 5939172, at *4 (M.D. Fla. Sept. 24, 2020); *Johansing Fam. Enters. LLC v. Cincinnati Specialty Underwriters Ins.*, No. A 2002349 (Ohio Ct. C.P. Jan. 8, 2021); Entry Denying Motion to Dismiss, *Queens Tower Rest. Inc.*

These cases all support Plaintiff's interpretation of the Policy's language. Like these other insureds, Plaintiff lost, or was otherwise deprived of, the physical space from which it obtained its primary source of revenue. The district court's order is contrary to Florida law regarding surplusage in contracts because it effectively reads out "physical loss of" property as a possible coverage under the Policy. It also contradicts Florida law holding that ambiguities are construed strictly against the insurer. As seen by courts within other jurisdictions, many with similar law to Florida as to policy interpretation, such interpretation cannot and should not be borne where state law does not support it.

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v. Cincinnati Fin. Corp., No. A 2001747 (Ohio Ct. C.P. Jan. 7, 2021); Order, *Francois Inc. v. Cincinnati Ins. Co.*, No. 20CV201416 (Ohio Ct. C.P. Sept. 29, 2020); Minute Order, *Best Rest Motel, Inc. v. Sequoia Ins. Co.*, No. 37-2020-00015679 (Cal. Super.Ct. Sept. 30, 2020); Order Denying Motion to Dismiss, *Lombardi's, Inc. v. Indem. Ins. Co. of N. Am.*, No. DC-20-05751-A (Tex. Dist. Ct. Oct. 15, 2020); Order, *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, No. 00375 (Pa. Ct. C.P. Oct. 26, 2020); Order Granting Motion for Partial Summary Judgment, *Perry St. Brewing Co. LLC v. Mut. of Enumclaw Ins.*, No. 2020221232 (Wash. Super. Ct. Nov. 23, 2020); Order, *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, No. A20-816628-B (Nev. Dist. Ct., Clark Cnty. Dec 1, 2020); Journal Entry, *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, No. CV-20-932117 (Ohio Ct. C.P. Nov. 17, 2020); Order Denying Motion to Dismiss, *Johnston Jewelers, Inc. v. Jewelers Mut. Ins. Co., S.I.*, No. 20-002221-CI (Fla. Cir. Ct. Sept. 22, 2020); Order, *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, No. 2020- 02558 (La. Civ. Dist. Ct. Nov. 4, 2020).

3. Florida Law Holds that Coverage for "Physical Loss of" Property Does Not Require "Actual Damage".

Plaintiff's reading of the Policy is entirely consistent with Florida common law, as expressed by Florida's intermediate appellate courts. Aspen's and the district court's reading is not.

In *Azalea*, an unknown substance was released into a sewage treatment plant causing the plant to shut down, even though the structure of the plant was not visibly altered. *Azalea*, 656 So. 2d at 601. The city of Jacksonville closed the plant pending testing and remediation. *Id.* As a result of the unknown substance and the city's order, the plant could not be used for its intended purpose. *Id.* The insurer denied coverage arguing "there was no direct physical loss to the" plant and "the structure was not damaged." *Id.* The trial court agreed with the insurer and found "that when the policy is viewed in its entirety, the . . . loss of use did not constitute direct physical loss." *Id.* at 602. Florida's First District Court of Appeal reversed, rejecting the insurer's arguments as "not supported by either the facts or the law" and relying on other Florida cases all of which found "loss of use" constitutes a "direct physical loss". *Id.*

Citing to *Azalea*, the Middle District of Florida has correctly pronounced that, "under Florida law 'direct physical loss' includes ***more than*** losses that harm the structure of the covered property." *Three Palms*, 250 F. Supp. 2d at 1364 (noting

Azalea provided recovery for "non-structural items integral to a covered property.").

Further, in *Maspons*, a broken drainpipe under a kitchen floor caused plaintiffs' sink to drain slowly, but there were no allegations "that the broken drainpipe caused any water damage to the interior of the home[.]" *Maspons*, 211 So. 3d at 1068. Despite the lack of "damage," Florida's Third District Court of Appeal held, "the failure of the drainpipe ***to perform its function*** constituted a 'direct' and 'physical' loss to the property within the meaning of the policy." *Id.* at 1069.[13]

In *Widdows*, Florida's Fifth District Court of Appeal answered the question "whether [the insurer] has an obligation to repair a plumbing abnormality under a provision in the insurance policy that covers 'accidental direct physical loss'to the property." *Widdows*, 920 So. 2d. at 150. The Court concluded "that the abnormality in the pipe itself was such a 'loss'. Under the language of the policy, it was not necessary for [the insured] to establish any resulting damage from this condition."

[13] The court ultimately reversed the trial court's finding of coverage because "[a]t the time of the summary judgment proceeding, the [kitchen] slab had not been opened[,]" thus "[t]here was no evidence that the water exiting the pipe had caused any damage to its surroundings" which would have triggered coverage under the separate "ensuing loss" provision. *Maspons*, 211 So. 3d at 1069-70. The issue before the court was whether plaintiffs were "entitled to indemnity under the 'ensuing loss' provision ofa homeowners' insurance policy for the cost of tearing up and replacing a portion of the foundation or slab on which their home sits, necessary to reach and replace a sanitary drain line, the repair and replacement of which is not covered under the policy." *Id.* at 1068. These considerations are not present in the instant case.

Id.

Although the district court was "bound to follow" *Azalea*, *Maspons*, *Widdows*, *St. George* and *Peek*, it did not. Instead, it relied on other federal district court orders, which, like the order below, did not cite to or attempt to distinguish *Azalea*, *Maspons*, *Widdows, St. George or Peek*. The district court's conclusion simply cannot be squared with the language of the Policy and *Azalea, Maspons*, *Widdows*, *St. George* or *Peek* which universally hold "loss of use" constitutes a "direct physical loss" of property and should be reversed.

In addition, numerous courts across the country have also concluded that damage to property is not required to suffer a "physical loss." In *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968), for example, the insured property suffered an infiltration of gasoline and gasoline vapors, making the building uninhabitable. The insurer denied coverage, arguing the building had suffered no "direct physical loss." The Colorado Supreme Court disagreed, holding there was a "direct physical loss" even though there was no physical damage to the church building. It found *Hughes v. Potomac Ins. Co. of D.C.*, 199 Cal. App. 2d 239, 18 Cal. Rptr. 650, 655 (Cal. Ct. App. 1962), to be the most analogous authority.

In *Hughes*, a landslide left the insured's home on the precipice of a 30-foot cliff, but the home itself was undamaged. The insurer denied coverage claiming the home had suffered no physical damage. The California Court of Appeal rejected

this position:

> To accept appellant's interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been "damaged" solong as its paint remains intact and its walls still adhere to one another.Despite the fact that a "dwelling building" might be rendered completely useless to its owners, appellant would deny that any loss ordamage had occurred unless some tangible injury to the physicalstructure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.

W. Fire Ins. Co. v. First Presbyterian Church, 437 P.2d 52, 56 (Colo. 1968) (*quoting Hughes*, 199 Cal. App. 2d at 249, 18 Cal. Rptr. at 655).

Similarly, in *Gatti v. Hanover Ins. Co.*, 601 F. Supp. 210, 210 (E.D.Pa. 1985), the owners of an apartment complex noticed a rapidly spinning water meter and concluded a large amount of water was leaking into the ground from underground pipes. The insurer denied the claim arguing "leakage of water into the ground is not a 'direct physical loss' and is therefore not covered by the policy." *Id.* at 211. The district court rejected the insurer's argument because it "ignore[d] the common-sense meaning of the phrase 'physical loss.'" *Id.* The court reasoned if "damage" includes loss of use stemming from theft, "then 'physical loss' presents a stronger case for coverage." *Id.*

The Seventh Circuit in *Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F.3d 743 (7th Cir. 2015) considered whether a roof dented in a hailstorm but not otherwise damaged was a covered "loss". The insurer denied coverage, arguing the insured suffered no "loss" because the dents did not affect the functionality or value of the roof. The Seventh Circuit rejected this position.

> Cincinnati urges us to define "loss or damage" to mean "harm." It then makes the assumption that the dents caused by the hail did not harm theroof enough to diminish its function or value. No harm, no foul, it says:if this is the case, then it believes that the policy does not require it to pay to replace the roof. The problem with this analysis is that it bears no relation to the language of the policy.

Id. at 747. *Advance Cable* underscores the concept that "loss" relates to the functionality of the property, not whether it was physically altered. In accordance with the language of the policy, the insured is covered if it suffers "loss" or "damage."[14]

[14] *See also Motorists Mut. Ins. Co. v. Hardinger* 131 F. App'x 823, 826 (3d Cir. 2005) (finding loss of use constitutes "physical loss," and questions of fact remained about the functionality of the property); *Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71, 76 (3d Cir. 1989) ("[A]n absence of possession and control falls within the plain meaning of 'loss.'"); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17(W. Va. 1998) ("Direct physical loss may also exist in the absence of structural damage to the insured property."); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (same); *Manpower*, 2009 WL 3738099, at *6 ("[Theinsured] suffered a "loss" of its interest in this property when the collapse prevented it from using the property for its intended purposes.").

The bottom line is "physical loss of" property must have a different meaning than "physical damage to" property. The only natural reading of the Policy is the meaning an ordinary "man-on-the-street" would ascribe to it, and the district court's contrary interpretation – *i.e.*, that "physical damage" is required to allege a "physical loss of" – cannot stand.

4. Plaintiff alleged COVID-19 was physically present on the premises and the premises was rendered unusable.

In its motion to dismiss, Aspen relied on *Malaube, LLC v. Greenwich Ins. Co*., No. 20-22615-CIV, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020) to support its claim that "direct physical loss or damage . . . unambiguously requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage" (APP137) The district court agreed and stated, "the amended complaint fails to state a plausible claim for relief." (APP274) In so ruling, the district court ignored the specific allegations of the Amended Complaint.

In finding the complaint in *Malube* failed to state a cause of action, the court distinguished *Studio 417* because *Malaube* failed to allege the presence of Covid-19 or that the restaurant was unusable in the Complaint. *Maluabe*, 2020 WL 5051581 at *7. Unlike *Malaube*, ***Plaintiff alleged both***, the presence of Covid-19 ***and*** substantially unusable property. (APP024)

Beyond the context of COVID-19, there is a plethora of cases that have concluded that coverage exists under an all-risk policy where offensive airborne particles render an establishment useless. *See e.g. Port Auth. v. Affiliated FM Ins. Co.,* 311 F.3d 226 (3d Cir. 2002) (the presence of airborne asbestos in building made structure uninhabitable and unusable - physical loss occurred); *Manpower Inc.*, 2009 WL 3738099 at *5 (insured suffered a "direct physical loss" covered by all-risk insurance policy when forced to evacuate insured premises for safety reasons, even though the premises themselves were not physically damaged); *Prudential Prop. & Cas. Co. v. Lillard- Roberts*, No. CV-0 1-1362-ST, 2002 WL 31495830, at *9 (D. Or. June 18, 2002) (holding there may be a "direct physical loss" when property is "rendered uninhabitable by mold"); *W. Fire Ins. Co.*, 437 P.2d at 55 (policyholder suffered "'direct physical loss' when 'the accumulation of gasoline around and under the [building caused] the premises to become so infiltrated and saturated as to be uninhabitable…'"); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418 (WHW)(CLW), 2014 WL 6675934, at *6-7 (D.N.J. Nov. 25, 2014) (finding ammonia discharge inflicted "direct physical loss of or damage to" property where "there [was] no genuine dispute that the ammonia release physically transformed the air" within the premises and rendered it unusable); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-03213-JST, 2020 WL 5525171, at *6 (N.D. Cal. Sept. 14, 2020) (Plaintiffs adequately alleged

a direct physical loss).

Suspected contamination of property by COVID-19 is enough to establish a physical loss of property. Because Plaintiff alleged COVID-19 was present in its establishment, the establishment was rendered unusable, and that the Plaintiff's perishable stock spoiled, the district erred in dismissing the Amended Complaint.

5. Plaintiff Alleged a Claim Under the Policy's Spoilage Coverage.

The district court further ignored the Plaintiff's claim for Spoilage coverage. Plaintiff also submitted a claim under the Policy's Spoilage coverage. This coverage protects "'perishable stock' at the premises described in the Declarations owned by you or by others in your care, custody or control." (APP063) The Spoilage coverage form excludes certain causes of loss, but there is no exclusion applicable to loss or damage caused by a virus or government Closure Orders directed at non-essential business operations. Thus, Spoilage is an expressly covered loss; not subject to any enumerated concurrent loss exclusion.

If the lack of an appropriate exclusion were not enough, the Spoilage coverage form goes on to explain that:

> 3. We will not pay for loss or damage caused by or resulting from any of the following, 3.a. through 3.c. **But if an excluded cause of loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss**
>
> …

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

(APP094) Here section B.3.b. clearly provides an ensuing loss provision, which also provides coverage Plaintiff's claim for spoilage of perishable food stock.

Spoilage of food in the restaurant industry is not only plausible, but likely when forced to close. Plaintiff's spoilage claim is a result of the Closure Orders - passage of time coupled with forced closure caused the loss. Aspen argues "Covered Causes of Loss" are somehow limited. This is also not true. The Policy adds additional "Covered Causes of Loss[es]" by stating "[w]hen Special is shown in the Declarations, Covered Causes of Loss **includes**[.]" The term "includes" is not a term of limitation.

Although Plaintiff plead it sustained "actual physical damages to property" covered by the Policy's Spoilage Coverage, the district court concluded "the Amended Complaint fails to state a plausible claim for relief." (APP274) Because Plaintiff has sufficiently plead a cause of action under the policy's separate Spoilage coverage, the district court erred in dismissing the Amended Complaint.

6. This Court's Unpublished Decision in *Mama Jo's* Supports Reversal.

This Court recently recognized in *Mama Jo's* that "[*Maspons*] has addressed the definition of 'direct physical loss.'" *Mama Jo's*, 823 F. App'x at 879. However,

Maspons was cited for the proposition that "direct" and "physical" modify "loss" and require the loss must be "actual." *Id.* This definition provides no clarity on the specific manifestations needed to trigger coverage for "direct physical loss of ... property," *id.*, which is the precise issue in this case. To answer that narrow question, this Court must interpret *Azalea, Maspons, Widdows, St. George* and *Peek*. *See e.g. Strasser v. Nationwide Mut. Ins. Co.*, No. 09-60314-CIV, 2010 WL 667945, at *1 (S.D. Fla. Feb. 22, 2010) (noting *Azalea* "addressed what constituted a direct physical loss under the policy[.]").

To the extent this Court finds the *Maspons'* definition dispositive, Plaintiff satisfies that test. The loss in this case is "actual" because it is not theoretical, intangible, or incorporeal.[15] Rather, Plaintiff alleges it lost the functional use of tangible property with a material existence and was dispossessed of the physical space from which it obtained its primary source of income.

Nevertheless, in *Mama Jo's*, this Court ultimately concluded the insured "failed to show it suffered a 'direct physical loss'" on its claims "for cleaning the restaurant, and . . . for Business Income Loss." *Id.* Putting aside that there is no way to clean or sanitize a governmental shutdown order, should this Court find *Mama*

[15] "Actual," while not a term in the Policy, is defined as "existing in fact or reality" or "not false or apparent." See Actual, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/actual.

Jo's persuasive,[16] it is not hostile to Plaintiff's interpretation of the Policy at issue.

Mama Jo's involved a restaurant that ***never shut down*** and asserted ***construction dust*** from nearby roadwork constituted "direct physical loss" to the property, claiming the responsive cleaning measures represented the scope of loss. *Mama Jo's*, 823 F. App'x at 871. Following summary judgment briefing, the district court held "cleaning is not considered direct physical loss." *Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 17-cv-23362-KMM, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018), *aff'd*, 823 F. App'x 868 (11th Cir. 2020). The district court relied for its holding on a California appellate court decision to conclude that:

> [a] direct physical loss contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.

Id. (*quoting MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 115 Cal. Rptr. 3d 27 (2010)). The district court concluded the restaurant suffered no loss not because the "restaurant was not 'uninhabitable' or 'unusable,'" but instead "remained open every day, customers were always able to access the restaurant, and there [was] no evidence that dust had an impact on the operation other than requiring dailycleaning." *Id.* This Court affirmed. *Mama Jo's*,

[16] "Unpublished decisions of this [C]ourt are not binding precedent." *Moore v Barnhart*, 405 F.3d 1208, 1211 n.3 (11th Cir. 2005). *See also* 11th Cir. R. 36-2.

823 F. App'x at 880. In doing so, this Court reasoned:

> the district court correctly granted summary judgment on [the insured's] cleaning claim because, under Florida law, an item or structure that merely needs to be cleaned has not suffered a "loss" which is both "direct" and "physical."

Id. at 879 (*citing* among other cases, *Maspons*, 211 So. 3d at 1069; *MRI Healthcare*, 187 Cal. App. 4th at 779, 115 Cal. Rptr. 3d at 37). This Court reached the same conclusion with respect to the insured's Business Income Loss claim. *Id.*

Mama Jo's supports reversal here for several reasons. First, unlike the restaurant in *Mama Jo's*, the Closure Orders at issue here, as alleged, entirely disrupted Plaintiff's operations, causing portions of the property to be "unusable" by prohibiting customers access to the restaurant. Second, focusing on the "function" of the covered property supports Plaintiff's position as it indicates "physical loss" is not dependent on physical alteration, but rather can be shown when a property's functionality or use is impaired, which is exactly the type of loss Plaintiff alleged. Put simply, the Closure Orders induced a detrimental change in the function or utility of the premises. Third, Florida law supports finding a "direct physical loss of property" when intangible material causes or threatens to cause physical harm to humans; not just property. *See Peek*, 181 So. 3d at 511. Fourth, construction dirt is an inert material - not dangerous to humans. Fifth, *Mama Jo's* reliance on *Maspons* is unwarranted as the *Maspons* policy language differs from the policy language in

this case.

In *Maspons,* the court interpreted a homeowners insurance policy where the operative provision did not contain the term "damage." *Maspons*, 211 So. 3d at 1069 (policy defined "loss is a **physical loss** to property."). The definition applied by the *Maspons* court did not violate a "cardinal principle" or conflate the term "loss" with "damage." Thus, the distinct difference in policy language at issue in this case warrants a different interpretation.

Similarly, *Henderson Rd.* rejected Zurich's application of *Mastellone v. Lightning Rod Mut. Ins. Co.*, 2008-Ohio-311, 175 Ohio App. 3d 23, 884 N.E.2d 1130 which suffered the same defect – policy defined "loss as physical loss to property." WL 168422, at *10. The *Henderson Rd.* court acknowledged the *Mastellone* homeowner's insurance policy did not contain "direct physical loss of or damage to" language and thus found *Mastellone* inapplicable. *Id.*

Moreover, there are several reasons to conclude *Mama Jo's* is not persuasive authority. *See Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 (11th Cir. 2007) ("Unpublished opinions are not controlling authority and arepersuasive only insofar as their legal analysis warrants."). First, neither the district court nor this Court analyzed the case in light of *Azalea*, *Maspons*, *Widdows*, *St. George*, or *Peek*.[17]

[17] The findings in *Azalea* and *Peek* appear to conflict with *Mama Jo's* application of *Maspons*. *Mama Jo's*, 823 F. App'x at 879.

Second, both the district court and this Court's reliance on *MRI Healthcare* was misplaced. *MRI Healthcare* does not support the Court's conclusion that "[a] direct physical loss contemplates an actual change in insured property[.]" *Mama Jo's*, 2018 WL 3412974 at *9. Unlike here, where the Policy covers losses caused by a "direct physical loss ***of*** . . . property", the policy at issue in *MRI Healthcare* covered losses caused by an "accidental direct physical loss ***to*** business personal property at the premises," without the disjunctive "or" preceding "damage to." *MRI Healthcare*, 187 Cal. App. 4th at 771, 115 Cal. Rptr. 3d at 37; *accord Henderson Rd.*, 2021 WL 168422 at *10 ("Here, Zurich's policy does not expressly limit coverage to physicalloss ***to*** property; it extends coverage to direct physical loss ***of*** property as well.")(Emph. in original). Thus, it was error for the Court in *Mama Jo's* to rely on *MRI Healthcare* in deciding the coverage issue before it.

As the Central District of California explained in *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB (KSX), 2018 WL 3829767 (C.D. Cal. July 11, 2018), where the policy was identical to the Policy here, "the '***loss of***' property," given its ordinary and popular meaning, contemplates" property that "is misplaced and unrecoverable, without regard to whether it was damaged." 2018 WL 3829767, at *3(Emph. in original). The court noted the operative language in *MRI Healthcare* was "direct physical loss ***to***" property, while the language in the *Total Intermodal* policy was "direct physical loss ***of***" property. *Id.* at *4(Emph. in

original). Because of the critical distinction between the prepositions "of" and "to," the court found that "'direct physical loss ***of***' should be construed differently from 'direct physical loss ***to***[.]'" *Id.*(Emph. in original).

Accordingly, the court in *Total Intermodal* held that the "loss of" property was "irreconcilable with [the insurer's] position requiring damage." *Id.* In the COVID-19 context, the Northern District of California relied on *Total Intermodal* and found that this same policy language "does ***not*** require a 'physical alteration of the property' or 'a ***physical change*** in the condition of the property." *Mudpie, Inc.* 2020 WL 5525171 at *4.[18]

Thus, reliance on *MRI Healthcare* in *Mama Jo's* was misplaced as the policy language is distinguishable.

7. The District Court Erred in Relying on Inapt, Unpersuasive, or Wrongly Decided "COVID-19" Cases.

In concluding that Plaintiff was required to allege "actual physical damage" to

[18] Although the *Mudpie* court gave separate effect to "loss" and "damage," and determined the insured had been "dispossessed of its storefront," it denied coverage based on an erroneous interpretation that *Total Intermodal* required a "permanent" dispossession of property. *Id.* at *4. In footnote 4, the *Total Intermodal* court went out of its way to explain that permanent dispossession was meant to be an example, not the definition, of "loss of property." *Total Intermodal*, 2018 WL 3829767, at *4 n.4. *See also Henderson Rd.*, 2021 WL 168422, at *12 (discussing *Total Intermodal* court's important footnote caveat). *Mudpie* is currently on appeal to the Ninth Circuit Court of Appeals.

obtain coverage for "direct physical loss of" its property, the district court relied on *MamaJo's* as well as several decisions from other courts (APP273), most of which relied on *Mama Jo's*. The remaining decisions are either inapt, unpersuasive, or wrongly decided.

The district court relied on *El Novillo Restaurant v. Certain Underwriters at Lloyd's London*, No. 1:20-CV-21525-UU, 2020 WL 7251362 (S.D. Fla. Dec. 7, 2020) and *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000*, No. 8:20-CV-1605-T-30AEP, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020), both of which rejected the Plaintiff's argument that economic damage is synonymous with "physical loss" and is therefore covered under the policies. Those courts applied *Mama Jo's* and concluded that Florida law and the plain language of the policy requires actual, concrete damage. These orders however failed to consider and analyze Florida law that cuts against any "physical harm," "physical alteration," or "physical damage" requirement to plead coverage for "direct physical loss of" property.

8. Aspen's Reliance on the Policy's "Period of Restoration" Provision is Flawed.

Although the district court did not reference the "period of restoration" in its order, it is anticipated that Aspen will. (APP155) According to Aspen, the words "repair" and "replace" in the definition of "period of restoration" connoted some

"physical damage" requirement. (APP155) However, that provision is not evidence that "physical loss" requires physical damage to insured property.

The Policy provides coverage for Business Income and Extra Expense losses during the "period of restoration," which ***"means the time period"***, and begins with the "direct physical loss or damage" and ends on the earlier of:

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

(APP114, APP122)(Emph. added)

Aspen focused solely on ***one temporal component*** defining the "time period" for restoration as its entire coverage rationale. (APP155) However, the Policy's alternative end-date confirms that the "period of restoration" ***may also conclude*** "when business is resumed at new permanent location," which reinforces that no physical damage is necessary. (APP122) This is consistent with a typical "period of restoration" timeframe, which encompasses the period from when the insured suffered the loss or damage (*i.e.*, when the Closure Orders went into effect) until the insured's business resumed or should have resumed.[19] *See e.g. Dictiomatic, Inc. v.*

[19] The term "restoration" has been defined as a bringing back to a former position or condition or restoring to an unimpaired or improved condition. Merriam-Webster Dictionary online available at https://www.merriam webster.com/dictionary/restoration.

U.S. Fid. & Guar. Co., 958 F. Supp. 594, 602 (S.D. Fla. 1997) ("Under the terms of the policy, Dictiomatic is entitled to recover its actual loss of business income during the period of time necessary to restore the business operation."). *See also Henderson Rd.*, 2021 WL 168422, at *13 ("applying a plain reading of the definition of 'period of restoration,'" to reject insurer's argument that "period of restoration" supported damage-to-property requirement).

Aspen's fractured application of the "period of restoration" ignores the Policy's grant of coverage for Extra Expense "***other than repairing or replacing***" property to avoid the "suspension" of business. (APP114)[20] Similarly, Aspen's repair regulating ordinance provision applies "even if the property has ***not*** been damaged." (APP. 208-09) Thus, Aspen's express policy terms recognize that coverage is not solely dependent upon "physical alteration" or "actual damage." Therefore, Aspen's narrow interpretation is flawed and improperly renders other Policy provisions useless.

[20] "Repair" is also not defined in the Policy. The common definition of "repair" means not only to fix what is broken, but also "to restore to a sound or healthy state." *Repair*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/repair.

C. The Subject Policy Language is Ambiguous.

In dismissing the Amended Complaint, the district court held the Policy "clearly and unambiguously requires actual physical damage to the property." (APP272) While Plaintiff's position is that Aspen's interpretation of the Policy is not a reasonable interpretation, even if it were, because Plaintiff's interpretation of the Policy is also reasonable the policy is ambiguous, and the district court erred in holding otherwise.

The key phrase in the Policy requires "direct physical loss ***of or*** damage to property at premises". (APP114) Aspen could have, but did not, define the phrases "direct physical loss of," "physical loss," and "direct physical damage to" anywhere in the Policy. (APP055) The phrase "physical loss of" necessarily must have a different interpretation than "damage to" property, or it would constitute surplusage.

This Court has held that "differing interpretations of the same provision is evidence of ambiguity, particularly when a term is not explicitly defined or clarified by the policy." *Dahl–Eimers v. Mut. of Omaha Life Ins. Co.*, 986 F.2d 1379, 1382 (11th Cir. 1993). *See also State Farm Fire & Cas. Ins. Co. v. Deni Assocs. of Fla., Inc.*, 678 So. 2d 397, 407 (Fla. Dist. Ct. App. 1996) (explaining that divergent conclusions reached by different courts studying essentially the same language is an indicator that an insurance policy's language is ambiguous). If anything can be said about the federal and state court decisions construing "all-risk"insurance policies,

including in the COVID-19 context, it is that learned judges from all corners of the nation have reached "differing interpretations of the same provision." Such a divergent set of views shows that reasonable minds can differ concerning the interpretation of the Policy language, which militates in favor of supporting coverage, not excluding it. *See Anderson*, 172 F.3d at 769 (noting that if the "relevant policy language is susceptible to multiple reasonable interpretations, one providing coverage and another denying it, the insurance policy is ambiguous."); *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, 20 C 02005, 2021 WL 679109, at *10 (N.D. Ill. Feb. 22, 2021)("[R]easonable people could come to different conclusions" regarding the phrase "direct physical loss of").

Plaintiff's interpretation is reasonable, but even giving Aspen the benefit of the doubt that its interpretation is also reasonable, then it remains true that Emerald and Aspen have alternative reasonable interpretations of the policy language. Where an insurance policy can be construed in two reasonable ways, it will be interpreted *contra proferentem*. *See Ruderman*, 117 So. 3d at 948. Therefore, even if Aspen's interpretation is reasonable, because Plaintiff's interpretation is also reasonable, then the policy is ambiguous. *Id*. And under Florida law, ambiguous policy language must be resolved in favor of Plaintiff. *Id.*

D. Certification to the Florida Supreme Court is Appropriate.

As explained above, Plaintiff submits that Florida law – as articulated by Florida's intermediate appellate courts – favors a finding of coverage in this case. Nevertheless, because there is no controlling Florida Supreme Court law on the pure legal question of whether loss of use or functionality constitutes a "direct physical loss of" covered property, this Court would benefit from the Florida Supreme Court's resolution of the issue. *See Brinson v. Providence Cnty. Corr.*, 785 F. App'x 738, 740-41 (11th Cir. 2019) (recognizing that "the views of the state's highest court with respect to state law are binding on the federal courts."); *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) ("A State's highest court is unquestionably the ultimate expositor of state law.").

As this Court has explained, where there is "an unsettled issue of Florida law as to insurance policy coverage [that] controls the disposition of [a] case," and a "pure legal question of the interpretation of widely used language in commercial liability insurance is at issue[,]" certification of a "question to the state supreme court to avoid making unnecessary *Erie* guesses and to offer the state court the opportunity to interpret or change existing law" is appropriate. *Pruco Life Ins. Co. v. Wells Fargo Bank, N.A.*, 780 F.3d 1327, 1336 (11th Cir. 2015), *certified question answered*, 200 So. 3d 1202 (Fla. 2016) ("When substantial doubt exists about the answer to a material state law question upon which the case turns, our case law indicates that it

is appropriate to certify the particular question to the state supreme court in order to avoid making unnecessary state law guesses and to offer the state court the opportunity to explicate state law.").

Accordingly, this Court should certify the following questions to the Florida Supreme Court under Article V, Section 3(B)(6) of the Florida Constitution:

> WHETHER, UNDER FLORIDA LAW, AN "ALL-RISK" COMMERCIAL INSURANCE POLICY THAT PROVIDES COVERAGE FOR BUSINESS INTERRUPTION LOSSES CAUSED BY A "DIRECT PHYSICAL LOSS OF OR DAMAGE TO PROPERTY" IS LIMITED TO ACTUAL PHYSICAL DAMAGE TO COVERED PROPERTY; AND
>
> WHETHER, UNDER FLORIDA LAW, THE PHRASE "DIRECT PHYSICAL LOSS OF PROPERTY" INCLUDES A TEMPORARY PROHIBTION, DISPOSSESSION, LOSS OF USE OR DEPRIVATION PROPERTY WHEN THE PROPERTY IS RENDERED UNSUITABLE FOR ITS INTENDED USE.

VII. CONCLUSION.

For all the foregoing reasons, the district court's Order dismissing the Plaintiff's Amended Complaint and the resulting Final Judgment should be reversed.

DATED: March 31, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Eleventh Circuit Rule 28-1. This brief contains 12878 words and uses a Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record listed below.

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