

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

0300
GEGFARCE AÍ ÁEHFI ÁJT
SQ ÓÁOUWVY
UMÚÖUWÜÁOUWÜVÁÖŠÖS
ÖEÖSÖÖ
ÖEJÖÁKÖFEEI HJĚÁJÖCE

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

13 COINS MANAGEMENT, LLC; M2
MANAGEMENT, LLC; 13 COINS
BELLEVUE, LLC; 13 COINS STADIUM,
LLC; THE LODGE ACQUISITION
MUKILTEO, LLC; THE LODGE
ACQUISITION MILL CREEK, LLC; THE
LODGE ACQUISITION KIRLAND, LLC;
THE LODGE ACQUISITION STADIUM,
LLC; THE LODGE ACQUISITION WEST
SEATTLE, LLC; THE SMOKEHOUSE,
LLC; JOE TO GO, LLC; MIGHTY
MIGHTY, LLC; THE LODGE
ACQUISITION, LLC, Washington limited
liability companies,

Plaintiffs,

vs.

NATIONAL SURETY CORPORATION, an
Illinois corporation,

Defendant.

Case No.

COMPLAINT

INTRODUCTION

Plaintiff 13 Coins Management, LLC, and the other above-named plaintiffs (together, “13 Coins”), own and operate restaurants in and around the Seattle area. After suffering direct

1 physical loss of or damage to covered property due to the presence of the SARS-CoV-2 virus
2 and/or related closure orders, 13 Coins turned to its commercial property insurer, National Surety
3 Corporation (“National Surety”), for payment of policy benefits, including but not limited
4 to, business income loss. In response, National Surety failed to reasonably investigate 13
5 Coins’s claim and then denied 13 Coins all coverage through a denial letter that misstated the
6 policy’s coverage, facts that were both publicly available and specifically related to National
7 Surety, and even its own insured’s name.

8 On July 16, 2020, 13 Coins provided National Surety with statutory notice pursuant to
9 RCW 48.30.015 of its intent to bring this lawsuit unless the basis for 13 Coins’s claim was resolved
10 within 20 days. National Surety responded to 13 Coins’s IFCA Notice and confirmed its denial
11 on August 5, 2020. Having no other option to recover the policy benefits owed to it, 13 Coins
12 brings its Complaint against National Surety Insurance Company, and alleges as follows:

13 **PARTIES**

14 1. 13 Coins Management, LLC is a Washington limited liability company doing
15 business in the State of Washington; its member LLCs’ members are persons domiciled in
16 Washington.

17 2. M2 Management, LLC is a Washington limited liability company doing business
18 in the State of Washington; its member LLCs’ members are persons domiciled in Washington.

19 3. 13 Coins Acquisition, LLC is a Washington limited liability company doing
20 business in the State of Washington; its sole member is 13 Coins Holdings, LLC, a Washington
21 limited liability company doing business in the State of Washington. 13 Coins Holdings, LLC’s
22 members’ domiciles and member LLC’s members’ domiciles are as follows: Washington, Texas,
23 Idaho, and Georgia.

24 4. 13 Coins Acquisition Bellevue, LLC is a Washington limited liability company
25 doing business in the State of Washington; its sole member is 13 Coins Holdings, LLC, a
26 Washington limited liability company doing business in the State of Washington. 13 Coins

1 Holdings, LLC's members' domiciles and member LLC's members' domiciles are as follows:
2 Washington, Texas, Idaho, and Georgia.

3 5. 13 Coins Acquisition Stadium, LLC is a Washington limited liability company
4 doing business in the State of Washington; its sole member is 13 Coins Holdings, LLC, a
5 Washington limited liability company doing business in the State of Washington. 13 Coins
6 Holdings, LLC's members' domiciles and member LLC's members' domiciles are as follows:
7 Washington, Texas, Idaho, and Georgia.

8 6. The Lodge Acquisition, LLC, is a Washington limited liability company doing
9 business in the State of Washington. The Lodge Acquisition, LLC's members' domiciles and
10 member LLC's members' domiciles are as follows: Washington and California.

11 7. The Lodge Acquisition Kirkland, LLC is a Washington limited liability company
12 doing business in the State of Washington; its sole member is The Lodge Acquisition, LLC,
13 discussed above.

14 8. The Lodge Acquisition Mill Creek, LLC is a Washington limited liability
15 company doing business in the State of Washington; its sole member is The Lodge Acquisition,
16 LLC, discussed above.

17 9. The Lodge Acquisition Mukilteo, LLC is a Washington limited liability company
18 doing business in the State of Washington; its sole member is The Lodge Acquisition, LLC,
19 discussed above.

20 10. The Lodge Acquisition Stadium, LLC is a Washington limited liability company
21 doing business in the State of Washington; its sole member is The Lodge Acquisition, LLC,
22 discussed above.

23 11. The Lodge Acquisition West Seattle, LLC is a Washington limited liability
24 company doing business in the State of Washington; its sole member is The Lodge Acquisition,
25 LLC, discussed above.
26

1 22. Joe to Go LLC operates Bungalow Joe, a coffee stand in Kirkland, Washington.

2 23. Mighty Mighty LLC operates JB Bungalow, a Hawaiian themed restaurant in
3 Kirkland, Washington.

4 24. 13 Coins operates insured properties located near Century Link Field and T-Mobile
5 Park (the “Stadiums”) and other “Income Support Properties.” 13 Coins depends on the Stadiums
6 and other Income Support Properties to direct customers to its locations.

7 25. All of these restaurants are insured properties under the policy (together, the
8 “Properties”).

9 **B. The National Surety Policy**

10 26. 13 Coins paid a substantial premium to National Surety in exchange for a
11 commercial property insurance policy from National Surety, numbered MZX 80995707 with a
12 policy period of April 1, 2019 through April 1, 2020 (the “Policy”).

13 27. The Policy is an “all-risk” policy. All-risk policies “provide coverage for all risks
14 unless the specific risk is excluded” and thereby “shift the risk of loss away from [the insured] and
15 place it upon an insurer.”¹

16 28. The Policy contains a “Property Gard” form, numbered 14200 12 88, which covers
17 13 Coins for “direct physical loss of or damage to Covered Property . . . caused by or resulting
18 from any Covered Cause of Loss.”

19 29. The Policy includes “Business Income” coverage in Form CP 00 30 10 91, which
20 provides, “We will pay for the actual loss of Business Income you sustain due to the necessary
21 suspension of your operations during the period of restoration. The suspension must be caused by
22 direct physical loss of *or* damage to property” at a covered location or to personal property within
23 1,000 feet of a covered location. (emphasis added).

24 30. The Policy does not define any of the terms within the phrase “direct physical loss
25

26 ¹ *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 514, 276 P.3d 300, 306 (2012) (internal citations omitted).

1 of or damage to property.” Washington law requires that such undefined terms be interpreted as
2 an ordinary purchaser of insurance would: with reference to the definitions provided in standard
3 American dictionaries.

4 31. In standard American dictionaries, “Direct” is defined as “characterized by a close,
5 logical, causal, or consequential relationship.”²

6 32. In standard American dictionaries, “Physical” is defined as something “having
7 material existence,” or “of or relating to that which is material.”³

8 33. In standard American dictionaries, “Loss” is defined as the “state of not having
9 something that you had” and “deprivation.”⁴

10 34. Washington law requires courts to interpret terms that are subject to more than one
11 reasonable interpretation (and thus ambiguous) against the insurer-drafter. Because the undefined
12 terms “direct physical of or damage to property” are, at a minimum, ambiguous they must be
13 interpreted with reference to the above definitions.

14 35. “Suspension” is defined in the Policy as “the slowdown or cessation of [the
15 insured’s] business activities” or “that a part or all of the covered premises is rendered
16 untenable.” This definition demonstrates that the Policy does not require complete destruction
17 of the insured premises or the cessation of all economic activity before business income loss
18 coverage is owed.

19 36. The term “untenantable” is not defined in the Policy. Definitions of untenantable
20

21 ² “Direct.” Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/direct> (last accessed
22 Jan. 12, 2021).

23 ³ “Physical,” Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/physical> (last
24 accessed Aug. 30, 2020); Dictionary.com, <https://www.dictionary.com/browse/physical?s=t> (last accessed Aug. 30,
25 2020).

26 ⁴ “Loss,” Merriam-Webster Online Dictionary, www.merriam-webster.com/dictionary/loss;
<https://dictionary.cambridge.org/us/dictionary/essential-americanenglish/loss> (last accessed Aug. 30, 2020) *see also*
Hill and Stout v. Mutual of Enumclaw Ins. Co., Case No. 20-2-07925-1 SEA, Order Denying Defendants’ Motion
to Dismiss at *4 (Wash. Sup. Ct.) (Nov. 13, 2020) (“In applying the ordinary meaning of “deprivation”, the Court
finds that the Plaintiff’s position that the dental practice had a “direct physical deprivation” of its property when they
were unable to see patients and practice dentistry is a reasonable interpretation by the average lay person.”).

1 include “unfit to be tenanted,” or “[not] fit to be rented.”⁶

2 37. The Policy provides “Extended Business Income” that “begins on the date that . . .
3 operations are resumed; and ends on the earlier of the date [the insured] could restore [its] property
4 with reasonable speed, to the condition that would have existed if no direct physical loss or damage
5 occurred,” up to 180 consecutive days after operations are resumed.

6 38. The Policy provides coverage for “Extra Expense,” which means “necessary
7 expenses [incurred] during the period of restoration” that the insured “would not have incurred if
8 there had been no direct physical loss or damage to property caused by or resulting from a Covered
9 Cause of Loss.” This coverage is provided for costs incurred to, among other things, “avoid or
10 minimize the suspension of business and to continue operations . . .”

11 39. The Policy provides “Income Support Properties” coverage, which insures against:
12 “[T]he actual loss of business income [the insured] sustain[s]
13 resulting from a reduction in [its] operations at the locations
14 described in the declarations of this policy due to direct physical loss
15 at the premises of an income support property not described in the
16 declarations caused by or resulting from any covered cause of loss.”

17 40. An “Income Support Property” is defined as a “tourist attraction, such as a theme
18 or amusement park, a sporting facility, a zoo, aquarium, or museum operated by others on whom
19 you depend to attract customers to your business.”

20 41. The Policy includes “Civil Authority” coverage for the “actual loss of Business
21 Income” sustained and “necessary Extra Expense caused by action of a civil authority that
22 prohibits access to the described premises due to direct physical loss of or damage to property,
23 other than at the described premises, caused by or resulting from any Covered Cause of Loss.”

24 42. The Policy also contains a “Crisis Management Coverage Extension Endorsement,”
25 under Form 143623 06 05, which covers “the actual loss of crisis event business income [the
26 insured] sustains due to the necessary suspension of [its] operations during the crisis event period

⁶ “Untenantable,” Collins English Dictionary, Complete and Unabridged, 12th Edition (2014) Harper Collins Publishers, <https://www.thefreedictionary.com/untenantable> (last accessed Jan. 12, 2021).

1 of restoration,” which “must be caused by or result from a covered crisis event at [the insured’s]
2 covered premises.”

3 43. A covered crisis event includes “Premises Contamination,” which is defined as the
4 “necessary closure of [the insured’s] covered premises due to any sudden, accidental and
5 unintentional contamination or impairment of the covered premises or other property on the
6 covered premises which results in clear, identifiable, internal or external visible symptoms of
7 bodily injury, illness, or death of any person(s).” “Covered premises” means “that part of the
8 location [the insured occupies] which is covered by this policy including the area within 100 feet
9 thereof.”

10 44. Premises Contamination includes contamination by “Communicable Disease,”
11 which is defined as “any disease or any related or resulting diseases, viruses, complexes,
12 symptoms, manifestations, effects, conditions, or illnesses.”

13 45. The Policy contains a “Causes of Loss Form” numbered 141035 12 88. The Causes
14 of Loss form contains two sub-forms: the “Basic Causes of Losses” form and the “Special Causes
15 of Loss” form (the “Special Causes Form”).

16 46. The Policy is subject to the Special Causes Form, which states, “covered causes of
17 loss means the Basic Causes of Loss and Risks of Direct Physical Loss not covered by the Basic
18 Causes of Loss unless the loss is excluded or limited as stated in Sections B and C that follow.”

19 47. Section B.2 of the Special Causes Form, titled “Exclusions,” provides that National
20 Surety “will not pay for loss or damage caused by or resulting from” among other exclusions,
21 “2.d.(3). Disease” (the “Disease Exclusion”). However, National Surety intentionally removed
22 the Disease Exclusion through the “Washington Changes” endorsement, numbered
23 CP 01 26 08 08 (the “Endorsement”), which amends the Special Causes Form by removing the
24 Disease Exclusion as follows: “Exclusion 2.d. of the Causes of Loss—Special Form is replaced by
25 the following . . .” The Endorsement then provides a replacement exclusion list that does not
26 contain the Disease Exclusion.

1 48. Because insurers commonly include disease or virus exclusions in all-risk policies,
2 National Surety demonstrated its intent to cover losses of, or damage to, property caused by
3 diseases when it removed the Disease Exclusion.

4 49. In its denial letter, National Surety asserted that 13 Coins's Policy contains a
5 "disease" exclusion and cited this exclusion as grounds for the denial of 13 Coins's claim. This
6 assertion was false and National Surety eventually admitted the same.

7 **C. SARS CoV-2 and COVID-19's Spread and Transmission**

8 50. In December of 2019, a novel coronavirus referred to as SARS-CoV-2 began to
9 spread in China. The World Health Organization (the "WHO") later named the disease caused by
10 SARS-CoV-2, "COVID-19."

11 51. In January of 2020, health officials reported that a Washington State resident about
12 30 miles north of Seattle became the first-known U.S. resident infected by the virus. The first
13 reported COVID-19 death in the United States occurred in King County, Washington, on or around
14 February 28, 2020.

15 52. Since January of 2020, COVID-19 has quickly spread across the United States; the
16 Centers for Disease Control (the "CDC") reports that over 16,000,000 people have contracted
17 COVID-19 and over 375,000 have died from the disease.⁷ The Washington Department of Health
18 reported over 250,000 confirmed cases and nearly 4,000 deaths in Washington State at the time of
19 filing.⁸

20 53. COVID-19 reportedly has an incubation period of 2–14 days, during which time
21 any person can spread the disease even before symptoms develop.⁹

22 54. The WHO reports that around 40% of those infected with COVID-19 are
23

24 ⁷ Centers for Disease Control and Prevention, *CDC COVID Data Tracker*. https://covid.cdc.gov/covid-data-tracker/#cases_deathsper100klast7days (last accessed Jan. 13, 2021).

25 ⁸ Washington State Department of Health, *COVID-19 Data Dashboard*.

<https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard> (last accessed Jan. 13, 2021).

26 ⁹ Centers for Disease Control and Prevention, *Similarities and Differences between Flu and COVID-19*.
(<https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm>) (last accessed Dec. 19, 2020).

1 asymptomatic or pre-symptomatic during the incubation period but are still capable of transmitting
2 the disease.¹⁰

3 55. The WHO has explained that COVID-19 is transmitted in three ways: contact
4 (person-to-person) transmission, droplet transmission (from a person or property to a person), and
5 airborne transmission.¹¹

6 56. Contact transmission occurs when an infected person talks, sneezes, or coughs and
7 releases relatively large nasal or oral virus-laden droplets, which come into contact with another
8 person or an object.¹²

9 57. Airborne transmission occurs when droplets “dry very quickly in the airstream” and
10 can “remain suspended” in the air and travel “far from the source on air currents” such as HVAC
11 systems and natural airflow.¹³

12 58. Non-medical buildings, like 13 Coins’s restaurants, do not have HVAC or air
13 filtration systems designed to remove virus particles from the air, and therefore cannot prevent the
14 airborne spread of the virus.¹⁴

15 59. Transmission also occurs from property to person when virus-containing droplets
16 land on surfaces creating a “fomite,” (the term used to describe property affected by COVID-19),
17 and a person comes into contact with the property and then touches their eyes, nose, or mouth.¹⁵

18 60. SARS-CoV-2 can survive on surfaces for hours, days, or weeks, depending on the
19

20 ¹⁰ World Health Organization, *Coronavirus disease 2019 (COVID-19) Situation Report 73: Subject in Focus: The*
21 *routes of transmission from COVID-19 patients.* (Apr. 2, 2020) [https://www.who.int/docs/default-](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2)
22 [source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2) (last accessed Dec. 19,
2020).

23 ¹¹ World Health Organization, *Situation Report 73, supra* Note 5.

24 ¹² *Id.*

25 ¹³ Centers for Disease Control and Prevention, *Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission*
26 (Oct. 5, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html> (last
accessed Dec. 17, 2020).

¹⁴ Adrian Covaci, *How can airborne transmission of COVID-19 be minimised?* (Sep. 20, 2020)
<https://www.sciencedirect.com/science/article/pii/S0160412020317876?via%3Dihub> (last accessed Dec. 17, 2020).

¹⁵ Stephanie A. Boone and Charles P. Gerba, *Significance of Fomites in the Spread of Respiratory and Enteric Viral*
Disease, American Society for Microbiology (Mar. 13, 2007) <https://aem.asm.org/content/73/6/1687> (last accessed
Dec. 20, 2020).

1 type of surface affected by the virus.¹⁶

2 61. COVID-19's presence in the air inside its insured premises or on surfaces causes
3 an observable change to property, rendering it dangerous, noxious, and/or harmful.¹⁷

4 62. COVID-19's presence in the air and/or on surfaces impairs, harms, damages and/or
5 renders useless any property intended to be inhabited by humans.

6 **D. Government Orders Addressing the COVID-19 Pandemic**

7 63. Local, state, and federal government officials issued a series of orders in an effort
8 to stop or slow the transmission of COVID-19 via person-to-person and property-to-person
9 transmission (the "Orders").

10 64. On February 29, 2020, Washington State Governor Jay Inslee issued Proclamation
11 20-05, proclaiming that a State of Emergency existed in all Washington counties due to the rapid
12 transmission of COVID-19 between Washington residents.

13 65. On March 1, 2020, King County, Washington Executive Dow Constantine
14 proclaimed a state of emergency in King County, Washington due to COVID-19.

15 66. On March 3, 2020, City of Seattle Mayor Jenny A. Durkan issued a "Mayoral
16 Proclamation of Civil Emergency" due to COVID-19.

17 67. On March 11, 2020, the Director of the WHO declared the rapidly spreading
18 COVID-19 disease a worldwide pandemic.

19 68. On March 11, 2020, Governor Inslee issued Proclamation 20-07, which among
20 other things, amended Proclamation 20-05, and established "community mitigation strategies" due
21 to COVID-19, including prohibiting gatherings of 250 people or more for specified activities,
22

23 ¹⁶ Riddell, S., Goldie, S., Hill, A. et al., *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*,
24 *Virol J* 17, 145 (Oct. 7, 2020) <https://doi.org/10.1186/s12985-020-01418-7> ("These findings demonstrate SARS-CoV-
25 2 can remain infectious for significantly longer time periods than generally considered possible. These results could
26 be used to inform improved risk mitigation procedures to prevent the fomite spread of COVID-19"); National
Institutes of Health, *New coronavirus stable for hours on surfaces* (Mar. 17, 2020) [https://www.nih.gov/news-
events/news-releases/new-coronavirus-stable-hours-surfaces](https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces) (last accessed Dec. 20, 2020).

¹⁷ Boris Pastorino, et al., *Prolonged Infectivity of SARS-CoV-2 in Fomites*, 26 *Emerging Infectious Diseases* 9 (Sep.
2020) <https://wwwnc.cdc.gov/eid/article/26/9/20-1788> (last accessed Dec. 20, 2020).

1 including “recreational activities.”

2 69. On March 16, 2020, Governor Inslee issued Proclamation 20-13, which prohibited
3 in-person dining in restaurants and stated that COVID-19 “remains a public disaster affecting life,
4 health, [and] property.”

5 70. Through Proclamation 20-13, Governor Inslee ordered restaurants to suspend dine-
6 in food and beverage service, stating:

7 “... COVID-19 remains a public disaster affecting life, health, [and]
8 property. I hereby prohibit the onsite consumption of food and/or
9 beverages in a public venue . . . including . . . restaurants.

10 * * *

11 This Proclamation does not apply to a broad range of businesses and
12 services, including but not limited to grocery stores, pharmacies . . .”

13 71. On March 23, 2020, Governor Inslee issued Proclamation 20-25, known as the
14 “Stay Home—Stay Healthy Order,” prohibiting Washington residents from leaving their homes
15 except for essential functions such as getting groceries and seeking medical care. Governor
16 Inslee’s Proclamation 20-25 also ordered that all non-essential businesses in Washington State
17 cease performing all but “minimum basic operations” necessary to “maintain the value of the
18 business’ inventory, preserve the condition of the business’ physical plant and equipment, [and]
19 ensure security,” among other things.

20 72. On April 2, 2020, Governor Inslee issued Proclamation 20-25.1, which, among
21 other things, extended Proclamation 20-25’s restrictions to at least May 4, 2020. On May 4, 2020,
22 Governor Inslee extended Proclamations 20-25 and 20-25.1 through May 31, 2020.

23 73. On November 15, 2020, Governor Inslee issued Proclamation 20-25.8, entitled
24 “Rollback of County-by-County Phased Reopening Responding To A Covid-19 Outbreak Surge.”
25 As part of the Governor’s efforts in “preserve and maintain life, health, [and] property,” he again
26 prohibited restaurants from allowing any customers into their insured premises for indoor dining.

74. The Orders prohibited the general public’s access to the Properties, rendering 13

1 Coins’s restaurants useless for their intended purpose—fine dining.

2 **E. 13 Coins’s Response to the Pandemic**

3 75. On or about March 16, 2020, in response to the government orders requiring the
4 same, and due to the statistic certainty that its restaurants were being dangerously contaminated
5 by SARS-CoV-2 and/or COVID-19, 13 Coins closed its restaurants for in-person dining.

6 76. 13 Coins’s restaurants have remained closed because (1) the Orders have required
7 the Properties to remain closed for their intended purpose, in whole or in part, since March of 2020
8 and (2) the statistic certainty of dangerous SARS-CoV-2 and/or COVID-19 re-contamination
9 occurring if 13 Coins reopened its restaurants for fine dining.

10 77. 13 Coins has never had access to testing kits that would allow it to test its air or
11 surfaces for SARS-CoV-2 and/or COVID-19. On information and belief, no such testing kits
12 approved by the CDC have ever existed at any time relevant to this lawsuit.

13 78. Notwithstanding the impossibility of testing the Properties for SARS-CoV-2 and/or
14 COVID-19, it is statistically certain (or near certain) that 13 Coins’s Properties were contaminated
15 by SARS-CoV-2 and/or COVID-19. As evidence, several 13 Coins employees have tested
16 positive for COVID-19.

17 79. 13 Coins has attempted to mitigate its losses and protect its Properties from further
18 damage/re-contamination by offering limited take-out options and, at times, limited, socially
19 distanced outdoor food service at some of its Properties. These mitigation efforts were required
20 by the Policy, which instructs 13 Coins to “[t]ake all reasonable steps to protect the Covered
21 Property from further damage by a Covered Cause of Loss,” which, here, is a lethal and contagious
22 virus that spreads through the air and on the surfaces of the Properties.

23 **F. 13 Coins’s Losses, Caused by Physical Loss of or Damage to the Properties from**
24 **COVID-19 and the Orders, are Covered Under the Policy**

25 80. COVID-19 is inherently noxious and harmful. Its statistically certain presence at,
26 in, and around the Properties contaminated the air inside 13 Coins’s restaurants, making it

1 dangerous to breathe, and also attached as “fomites” to the Properties’ walls, tables, and counters.
2 This damaged the Properties and caused the physical loss of the restaurants to 13 Coins: it impaired
3 the restaurants and rendered them physically unfit, unsafe, and unusable for their intended purpose
4 of fine dining.

5 81. The Orders also caused the physical loss of 13 Coins’s Properties. As a direct result
6 of the Orders, 13 Coins’s restaurants were unusable for “physical” dining. Put differently, the
7 Orders deprived 13 Coins of the restaurants that 13 Coins had invested for years in, restaurants it
8 had insured at great expense but that had lost their functionality and, therefore, had stopped
9 providing 13 Coins any income stream.

10 82. Because 13 Coins has suffered direct physical loss of or damage to its Properties
11 by non-excluded causes of loss, multiple coverages under the Policy are triggered. These include,
12 but are not limited to, business income, extra expense, extended business income, income property,
13 civil authority, and crisis management coverages.

14 83. 13 Coins’s covered losses increase every day. At the date of filing, 13 Coins
15 estimates that its losses exceed \$5,993,469.21. 13 Coins’s losses are catastrophic to its business.

16 **G. National Surety’s Denial of Policy Benefits**

17 84. On or about March 18, 2020, 13 Coins notified National Surety of its claim under
18 the Policy for business income coverage.

19 85. National Surety assigned Conrad Knoten to adjust 13 Coins’s claim.

20 86. On March 19, 2020, Al Moscatel, a 13 Coins’s owner, participated in a call with
21 Mr. Knoten regarding 13 Coins’s claims. Mr. Moscatel answered Mr. Knoten’s questions, which
22 focused on Washington State government orders and whether people with COVID-19 had been in
23 or around 13 Coins’s covered locations.

24 87. Mr. Moscatel explained to Mr. Knoten that he did not have enough information to
25 answer Mr. Knoten’s questions regarding confirmed cases of COVID-19 at or around 13 Coins’s
26 properties and that he was awaiting test results.

1 88. On May 11, 2020, without speaking with Mr. Moscatel again, Mr. Knoten notified
2 13 Coins that National Surety had wholly denied 13 Coins’s claim.

3 89. National Surety’s denial letter incorrectly referred to 13 Coins by another
4 restaurant’s name (“Hitchcock Restaurant Group”) that is not in any way related to 13 Coins.

5 90. Perhaps even more egregiously, National Surety represented in its denial letter that
6 the Policy contains a Disease exclusion. It does not. The Washington Changes endorsement
7 removes the disease exclusion, as stated above, a fact later admitted by National Surety in its
8 August 5, 2020 response to 13 Coins’s IFCA notice (the “Response Letter”).

9 91. Both National Surety’s denial letter and its Response Letter grossly
10 mischaracterized what coverage National Surety owes 13 Coins under the Policy. For example,
11 National Surety falsely asserted in its Response Letter that a “distinct, demonstrable, and physical
12 alteration” to 13 Coins Properties was a prerequisite to coverage. The Policy says no such thing
13 and National Surety’s contention that such prerequisites should be “interpreted” into business
14 income loss insuring grants has been rejected by multiple Washington courts. *See Perry Street*
15 *Brewing Co. v. Mutual of Enumclaw Ins. Co.*, No. 20-2-02212-32 (Wash. Super. Ct. Nov. 23,
16 2020) (attached as **Exhibit A**); *Hill and Stout v. Mutual of Enumclaw Ins. Co.*, No. 20-2-07925-1-
17 SEA (Wash. Super. Ct. Nov. 13, 2020) (attached as **Exhibit B**); *Nautilus Grp., Inc. v. Allianz Glob.*
18 *Risks US*, No. C11-5281BHS, 2012 WL 760940, at *4 (W.D. Wash. Mar. 8, 2012).

19 92. National Surety’s assertions regarding the Policy’s standalone coverages were no
20 better. With regards to civil authority coverage, National Surety’s denial argued that the Orders
21 did not prevent access to 13 Coins’s restaurants even though the Orders explicitly prohibited the
22 general public from accessing 13 Coins’s restaurants to dine. National Surety also disclaimed any
23 coverage for Crisis Management Extension Endorsement despite this coverage clearly being
24 applicable: 13 Coins necessarily closed its restaurants because of premises contamination and
25 impairment to its Properties by COVID-19, which was present at the Properties and, as is common
26 knowledge, causes identifiable internal or external symptoms of illness or death. Other coverages,

1 like the Income Properties Coverage (triggered by the closure of multiple income support
2 properties to due to COVID-19 and/or related closure orders), are not even considered by National
3 Surety, despite also providing coverage for 13 Coins's losses as well.

4 93. National Surety's treatment of 13 Coins is consistent with how National Surety has
5 treated other Washington policyholders making business income loss claims for losses caused by
6 COVID-19 and related closure orders. National Surety routinely misrepresents policy provisions,
7 fails to conduct reasonable investigations, fails to consider the applicable law, attempts to foist
8 impossible burdens onto its insureds (e.g. an obligation to employ non-existent COVID-19
9 premises testing kits in order to obtain coverage), unreasonably denies claims, and in all respects
10 places its financial interests ahead of its insureds'.

11 94. In bringing this lawsuit, 13 Coins has relied on the bases for denial stated in
12 National Surety's denial letter.

13 **FIRST CLAIM FOR RELIEF: BREACH OF CONTRACT**

14 95. 13 Coins realleges and incorporates by reference each and every preceding
15 paragraph.

16 96. 13 Coins, the named insured on the Policy, paid valuable premiums in consideration
17 for the Policy.

18 97. 13 Coins complied with all conditions precedent to coverage under the Policy,
19 except any obligations that were waived or excused.

20 98. National Surety breached its express and implied duties under the Policy by, among
21 other things, unreasonably investigating and denying all coverage.

22 99. By breaching the terms of the Policy, National Surety has caused and continues to
23 cause 13 Coins damages in an amount to be proven at trial, not less than \$5,993,469.21.

24 **SECOND CLAIM FOR RELIEF: COMMON LAW BAD FAITH**

25 100. 13 Coins realleges and incorporates by reference each and every preceding
26 paragraph.

1 101. National Surety owes 13 Coins a duty of good faith and fair dealing under
2 Washington law.

3 102. National Surety committed bad faith through multiple acts and omissions,
4 including, but not limited to: failing to conduct a reasonable investigation; unreasonably failing to
5 connect the controlling law and language of the Policy to the facts of its insured's loss; failing to
6 put 13 Coins's economic interests on par with its own; and unreasonably denying 13 Coins any
7 and all insurance benefits. National Surety's unreasonable acts and omissions constitute bad faith
8 under Washington law.

9 103. National Surety's bad faith acts and omissions directly and proximately caused and
10 continue to cause 13 Coins to suffer damages in an amount to be proven at trial. These include,
11 but are not limited to, the deprivation of benefits owed to 13 Coins under the Policy and the costs
12 associated with bringing this action for coverage, including court costs and attorney fees.

13 **THIRD CLAIM FOR RELIEF: PER SE AND NON PER SE CONSUMER**
14 **PROTECTION ACT VIOLATIONS**

15 104. 13 Coins realleges and incorporates by reference each and every preceding
16 paragraph.

17 105. National Surety's acts and omissions as described above violated multiple
18 provisions of WAC 284-30-330 including, but not limited to, subsections (4), (7), and (13); such
19 violations are per se violations of RCW 19.86, Washington's Consumer Protection Act (the
20 "CPA").

21 106. National Surety's acts and omissions also constitute non per se violations of the
22 CPA: as pled above, such unreasonable acts and omissions were unfair or deceptive; occurred in
23 trade or commerce; and affected Washington's policyholders and the public interest.

24 107. Such unfair or deceptive acts omissions directly and proximately caused and
25 continue to cause 13 Coins to suffer damages in an amount to be proven at trial. These damages
26 include, but are not limited to, the deprivation of benefits owed to 13 Coins under the Policy and

1 the costs associated with bringing this action for coverage, including court costs and attorney fees.

2 108. 13 Coins is entitled to recovery of its actual damages, attorney fees, litigation costs,
3 and treble damages up to \$25,000, pursuant to RCW 19.86.090.

4 **FOURTH CLAIM FOR RELIEF: INSURANCE FAIR CONDUCT ACT**
5 **VIOLATION**

6 109. 13 Coins realleges and incorporates by reference each and every preceding
7 paragraph.

8 110. Pursuant to RCW 48.30.015(8), 13 Coins sent notice to National Surety of 13
9 Coins's intent to assert a cause of action against National Surety under the Insurance Fair Conduct
10 Act ("IFCA") on November 25, 2020.

11 111. National Surety failed to resolve 13 Coins's claim within the 20-day statutory
12 period.

13 112. As such, 13 Coins has met its statutory obligations under IFCA.

14 113. National Surety is liable under IFCA for, among other things, failing to conduct a
15 reasonable investigation into 13 Coins's claim, compelling 13 Coins to initiate litigation to recover
16 amounts due to it under the Policy, failing to reasonably connect controlling law and the Policy
17 language on which the denial relies to the facts of 13 Coins's claim, and for unreasonably denying
18 13 Coins's claim and all policy benefits.

19 114. National Surety's acts and omissions in violation of IFCA have proximately and
20 directly caused and continue to cause 13 Coins to suffer damages in an amount to be proven at
21 trial.

22 115. 13 Coins is entitled to recovery for its actual damages, attorney fees, litigation costs,
23 and expert witness fees pursuant to RCW 48.30.015(3).

24 116. The Court may award up to three times 13 Coins's actual damages pursuant to
25 RCW 48.30.015(3).
26

1 **FIFTH CLAIM FOR RELIEF: DECLARATORY JUDGMENT**

2 117. 13 Coins realleges and incorporates by reference each and every preceding
3 paragraph.

4 118. A clear and present dispute exists between 13 Coins and National Surety
5 concerning their respective rights and obligations as to coverage under the Policy. Accordingly,
6 13 Coins seeks declaratory judgment that:

- 7 a. National Surety's investigation was unreasonable;
- 8 b. National Surety unreasonably denied coverage;
- 9 c. National Surety is limited to asserting the bases for denial that it set forth in
10 its denial letter dated May 11, 2020;
- 11 d. National Surety committed per se and non per se violations of the
12 Washington Consumer Protection Act by its conduct set forth in this Complaint;
- 13 e. National Surety breached the Insurance Fair Conduct Act by its conduct
14 handling 13 Coins's claim, and by unreasonably denying 13 Coins's claim for coverage and by
15 unreasonably denying 13 Coins payment of benefits; and
- 16 f. Any other declaratory relief as the court may deem appropriate.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, 13 Coins prays for judgment in its favor against National Surety as
19 follows:

- 20 1. For damages in an amount to be proven at trial but not less than \$5,993,469.21;
- 21 2. For declaratory relief;
- 22 3. For an award of attorney fees, expert costs, and other costs incurred in bringing this
23 action;
- 24 4. For prejudgment interest accruing until the date judgment is entered; plus post-
25 judgment interest at the statutory rate;
- 26

EXHIBIT A

CN: 2020221232

SN: 12

PC: 7

The Honorable Michelle Szambelan

FILED

NOV 23 2020

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SPOKANE COUNTY

PERRY STREET BREWING COMPANY,
LLC, a Washington limited liability company,

Plaintiff,

v.

MUTUAL OF ENUMCLAW INSURANCE
COMPANY, a Washington insurance
company,

Defendant.

NO. 20-2-02212-32

**ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT RE: COVERAGE GRANT**

THIS MATTER came before the Court on Plaintiff's Motion for Partial Summary Judgment Re: Coverage Grant ("Motion"). The Court has duly considered the oral argument of the parties, the files and records herein, and the below-listed pleadings, papers, declarations, and exhibits submitted by the parties:

1. Plaintiff's Motion;
2. Declaration of Ben Lukes;
3. Declaration of John Cadagan;

ORDER GRANTING PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT RE: COVERAGE
GRANT - 1

GORDON	600 University Street
TILDEN	Suite 2915
THOMAS	Seattle, WA 98101
CORDELL	206.467.6477

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

4. Defendant Mutual of Enumclaw Insurance Company’s Opposition to Plaintiff’s Motion for Partial Summary Judgment;

5. Declaration of Steven Caplow in Support of Defendant Mutual of Enumclaw Insurance Company’s Opposition to Plaintiff’s Motion for Partial Summary Judgment;

6. Plaintiff’s Reply.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. Plaintiff’s Motion is GRANTED.

2. Pursuant to CR 56, the Court enters the following undisputed facts relevant to its subsequent conclusions of law.

3. Plaintiff Perry Street Brewing Company LLC (“PSBC”) owns and operates a brewery and bar with dining business with its principal place of business located at 1025 S. Perry St. # 2, Spokane, WA 99202.

4. Defendant Mutual of Enumclaw Insurance Company (“MOE”) is an insurer authorized to write, sell, and issue business insurance policies in Washington to policyholders, including PSBC.

5. MOE issued a businessowners policy and related endorsements (“the Policy”) with Commercial Property Coverage.

6. PSBC’s business property includes property owned and/or leased by PSBC and used by PSBC primarily for operating a brewery and bar with dining services.

7. On or about January 2020, the United States of America saw its first cases of persons infected by COVID-19, which has been designated a worldwide pandemic.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

8. In light of this pandemic, on February 29, 2020, Washington Governor Jay Inslee issued Proclamation 20-5, declaring a State of Emergency for all counties in the state of Washington as the result of COVID-19.

9. Thereafter, Governor Inslee issued a series of certain proclamations and orders affecting many persons and businesses in Washington, whether infected with COVID-19 or not, requiring certain public health precautions.

10. On March 13, 2020, Governor Inslee issued Proclamation 20-11, "Statewide Limits on Gatherings," which prohibited all gatherings of 250 people or more in all Washington counties, including Spokane County.

11. On March 16, 2020, Governor Inslee issued Proclamation 20-14, "Reduction of Statewide Limits on Gatherings," which prohibited all gatherings of 50 people or more in all Washington counties, including Spokane County, and further prohibited gatherings of fewer people unless organizers of those activities complied with certain social distancing and sanitation measures.

12. Also on March 16, 2020, Governor Inslee issued Proclamation 20-13, "Statewide Limits: Food and Beverage Services, Areas of Congregation," which prohibited the onsite consumption of food and/or beverages in a public venue, including restaurants, bars, or other similar venues in which people congregate for the consumption of food or beverages.

13. By order of Governor Inslee effective October 6, 2020, for counties in "Phase Two," including Spokane County, although some indoor dining is allowed, dining and consumption of beverages are still curtailed compared to pre-pandemic. For example, restaurant table group sizes remain limited, the number of diners is capped at no more than 50 percent of capacity, hours remain restricted, and bar counters remain closed. *See*

1 <https://www.governor.wa.gov/sites/default/files/COVID19%20Phase%20%20and%203%20Res>
2
3 [taurant%20and%20Tavern%20Guidance.pdf?utm_medium=email&utm_source=govdelivery.](https://www.governor.wa.gov/sites/default/files/COVID19%20Phase%20%20and%203%20Res)
4

5 14. Under the Business Income (and Extra Expense) Coverage Form of the Policy,
6
7 MOE promised to pay PSBC for “direct physical loss of or damage to property at premises
8
9 which are described in the Declarations” “caused by or resulting from any Covered Cause of
10
11 Loss.”
12

13 15. Whether the above undisputed facts establish coverage with the Business Income
14
15 (and Extra Expense) Coverage Form as a matter of law for “direct physical loss of or damage to”
16
17 property at premises—an issue on which PSBC bears the burden of proof—is the threshold issue
18
19 for determination on PSBC’s Motion under CR 56.
20

21 16. Determining insurance coverage is a two-step process. First, the insured must
22
23 show that the loss falls within the scope of the policy’s insured losses. Second, to avoid coverage
24
25 the insurer must show that specific policy language excludes the loss. *McDonald v. State Farm*
26
27 *Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992).
28

29 17. PSBC’s Motion is directed toward the first step. It does not seek a CR 56
30
31 summary judgment determination as to any exclusions of coverage or the amount of relief to be
32
33 issued.
34

35 18. The Court finds that PSBC has established that PSBC’s claimed loss falls within
36
37 the grant of coverage of the Business Income (and Extra Expense) Coverage Form of the Policy
38
39 as a matter of law, because as a result of the proclamations and orders issued by Governor Inslee,
40
41 PSBC suffered direct physical loss of its property at premises.
42

43 19. The Policy issued by MOE does not define the terms “direct physical loss of or
44
45 damage to” property at premises.

1 20. As a result, the Court is mindful of Washington’s rules for interpreting insurance
2 policies.
3

4 21. In Washington, insuring provisions must be interpreted liberally to provide
5 coverage whenever possible. *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 694, 186
6 P.3d 1188 (2008).
7
8

9 22. Insurance policies are construed in favor of coverage because: “the purpose of
10 insurance is to insure.” *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d
11 509 (1983).
12
13

14 23. When a term in an insurance policy is subject to multiple, reasonable definitions,
15 the “[policyholder’s] reasonable interpretation of the policy must be accepted.” *Holden v.*
16 *Farmers Insurance Co. of Washington*, 169 Wn.2d 750, 760, 239 P.3d 344 (2010).
17
18

19 24. When terms are undefined, Washington requires courts to use their “plain,
20 ordinary, and popular” meaning – how an “average lay person” would understand them. *Boeing*
21 *Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 876-77, 784 P.2d 507 (1990).
22
23

24 25. The Court may be aided by dictionary definitions, as the Washington Supreme
25 Court so relied upon in *Boeing v. Aetna*.
26
27

28 26. Dictionary definitions of “loss,” include “‘destruction’ ‘ruin’ or ‘deprivation.’”
29 *Loss*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/loss>.
30
31

32 27. At minimum, PSBC had a “deprivation” of its business property.
33
34

35 28. The undefined phrases “loss of” property and “damage to” property also are
36 distinct from one another. *Nautilus Group, Inc. v. Allianz Global Risks US*, No. C11-5281BHS,
37 2012 WL 760940 (W.D. Wash. Mar. 8, 2012). In *Nautilus*, the Court reasoned that “if ‘physical
38 loss’ was interpreted to mean ‘damage,’ then one or the other would be superfluous. The fact that
39
40
41
42
43
44
45

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

they are both included in the grant of coverage evidences an understanding that physical loss means something other than damage.” *Nautilus*, 2012 WL 760940, at *7.

29. The Court agrees with the rationale in *Nautilus*, especially since the undefined phrases “loss of” and “damage to” have popular meanings distinct from one another.

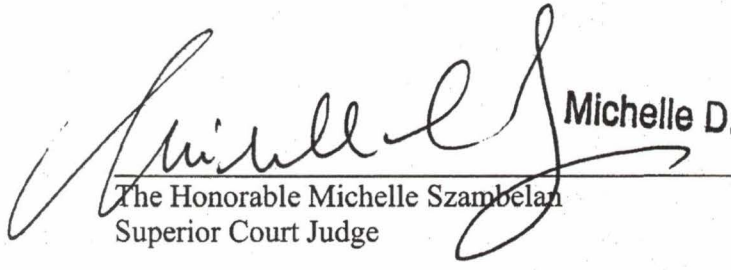
30. Accordingly, one reasonable interpretation of “direct physical loss of” property at premises is that the interruption of PSBC’s business operations as a result of the proclamations was a direct physical loss of PSBC’s property because PSBC’s property could not physically be used for its intended purpose, i.e., PSBC suffered a loss of its property because it was deprived from using it.

31. The Court finds that this is an interpretation that an average lay person would understand by the phrase “loss of” property in the Policy. *See also Boeing*, 113 Wn.2d at 876.

32. In sum, the Court concludes as a matter of law that PSBC suffered a loss of its property at premises when PSBC lost the ability to use its property at premises for its intended purpose.

33. The Court, therefore, grants Plaintiff’s Motion.

DATED this 23rd day of November 2020.


Michelle D. Szambelan
The Honorable Michelle Szambelan
Superior Court Judge

HORTON TILDEN THOMAS & CORDELL LLP

Attorneys for Plaintiff



6 Mark Wilner, WSBA #31550
7 John D. Cudigan, WSBA #47996
8 600 University Street, Suite 2915
9 Seattle, Washington 98101
10 206-467-6477
11 twilner@hortontilden.com
12 jdcudigan@hortontilden.com

HELLER ROHRBACK LLP

Attorneys for Plaintiff

 10/1/2013

19 Jim S. Birk, WSBA #31431
20 1201 Third Avenue, Suite 3200
21 Seattle, WA 98101
22 206-623-1900
23 www.hellerrohrback.com

25 Agreed as to Form Only
26 Notice and Presentation Waived by:

DAVIS WRIGHT TREMAINE LLP

Attorneys for Defendant

By: 

32 Steven P. Caplow, WSBA #19843
33 920 Fifth Avenue, Suite 1300
34 Seattle, WA 98104
35 206-622-3450
36 www.dwt.com

38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100

GORDON
THOMAS
CORDELL
600 University Street
Suite 2915
Seattle, WA 98101
206-467-6477
www.gordonthomascordell.com

EXHIBIT B

0300
GEGEÁ UXÁFHÁEJKEÁDE
S@ŌÁŌUWŮVŸ
ÙWÚŌŪŪÁŌUWŪVÁŌŠŌŪS
ŌÈZŠŌŌ
ŌŌÈJŌÁKŌÈÈĪ JĠ ÈÁŪŌĀ

SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

HILL AND STOUT PLLC, a Washington
company,

Plaintiff,

v.

MUTUAL OF ENUMCLAW INSURANCE
COMPANY, a Washington insurance company,

Defendant.

No. 20-2-07925-1 SEA

**ORDER DENYING
DEFENDANT MUTUAL OF
ENUMCLAW'S MOTION TO
DISMISS**

This matter came before the Court on Defendant's Motion to Dismiss, and the Court having considered the pleadings submitted by the parties in support and in opposition of the motion including the following:

1. Plaintiffs' Amended Complaint;
2. Defendant's Motion to Dismiss
3. Declaration of Steven P. Caplow in support of Defendant's Motion;
4. Plaintiffs' Response in opposition
5. Declaration of Ian S. Birk in support of Plaintiff's Response;
6. Defendant's Reply; and

And having heard the oral argument of the parties, makes the following Findings:

Undisputed Facts:

- Plaintiff Hill and Stout PLLC ("HS") is a dental practice with offices in Oak Harbor and Anacortes, Washington.

- 1 • Mutual of Enumclaw Insurance Company (“MOE”) issued a Business Owner’s policy
2 (“Policy”) policy to the Plaintiff covering the Plaintiff’s property and business for
3 calendar years 2019 and 2020. The Policy covered the equipment and supplies used in
4 the business.
- 5 • On March 19, 2020, due to the COVID-19 pandemic and shortage of the Personal
6 Protective Equipment (“PPE”), Governor Inslee issued Proclamation 20-24 which
7 prohibited medical professionals including dentists from performing non-emergency
8 routine procedures that required the use of the PPE.
- 9 • No COVID-19 virus has been detected on HS’s business premises.

10 HS brought the current law suit against MOE for declaratory judgment and for breach of
11 contract; claiming HS incurred losses and expenses resulting from the interruption of its
12 business due to the Governor’s Proclamation and that such losses and expenses are covered by
13 the Policy issued by MOE and further alleging that MOE’s denial of coverage for loss of
14 business income and related expenses was breach of the insurance contract by MOE.

15 MOE argues that HS has failed to allege “direct physical loss” which are the required elements
16 for coverage under the Policy. MOE then argues that the Complaint only alleges “indirect”
17 rather than “direct” loss and therefore must be dismissed under CR 12(b)(6).

18 **Legal Standard**

19 Dismissal pursuant to CR 12(b)(6) motion is appropriate only when it appears beyond doubt
20 that the claimant can prove no set of facts, consistent with the complaint, which would justify
21 recovery. See *Hipple v. McFadden*, 161 Wn. App 550, 556, 255 P.3d 730 (2011). In reviewing
22 a CR 12(b)(6) motion, the Court presumes all factual allegations in the complaint to be true and
23 also considers any hypothetical facts, consistent with the complaint, proffered by the Plaintiff.
24 *Gorman v. Garlock, Inc.* 155 Wn.2d 198, 214, 118 P.3d 311 (2005).

25 Furthermore, where a case involves a dispute regarding the coverage provisions of an insurance
26 policy, the insured bears the burden of showing that coverage exists, and the insurer bears the
27 burden of showing that an exception applies. *Mut. of Enumclaw Ins. Co. v. T & G Const., Inc.*,
165 Wash. 2d 255, 268, 199 P.3d 376, 383 (2008).

1
2 **MOE’s motion to dismiss for failure to state a claim under CR 12(b)(6):**

3 MOE brought the current motion for dismissal against HS for failure to state a claim for “direct
4 physical loss of or damage to” the covered property.

5 In its motion MOE argues that the core coverage issue under the Policy is the requirement for
6 the Plaintiff to show that the loss of income is related to “direct physical loss of or damage to”
7 the covered property. MOE argues that the Additional Coverage provision in the Policy refers
8 to Covered Cause of Loss (which requires a showing of “direct physical loss of or damage to”)
9 and applies during a period that the covered property is being repaired, rebuilt, or replaced.

10 MOE further argues that the Plaintiff has failed to state a claim for Civil Authority provision of
11 the Policy.

12 In response, HS argues that the terms of the Policy are to be given a liberal interpretation and
13 that the insurance policies are to be construed in favor of the insureds. HS argues that the terms
14 “direct physical loss of” or “damage to” the covered property are ambiguous and that HS
15 suffered a direct physical loss of the covered property when the dental office and dental
16 equipment could not be used for their intended use of dentistry services. HS further argues that
17 pursuant to the wide spread of COVID-19 and the Governors’ orders, there is a triable issue as
18 to their access to the property by reason of property damage occurring at locations other than
19 their business.

20 **Legal Analysis:**

21 Washington courts examine the terms of an insurance contract to determine whether under the
22 plain meaning of the contract there is coverage. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113
23 Wash.2d 869, 876, 784 P.2d 507 (1990).¹

24 In interpreting the insurance policies, the Court considers the Policy as a whole and applies a
25 fair, sensible and reasonable meaning to its construction. *Capelouto v. Valley Forge Ins. Co.*,
26 98 Wash.App. 7, 13, 990 P.2d 414 (1999).

27 ¹ See also *Nautilus Grp., Inc. v. Allianz Glob. Risks US*, No. C11-5281BHS, 2012 WL 760940, at *4 (W.D. Wash.
Mar. 8, 2012)

1 Washington Supreme Court has held that a policy provision is ambiguous when, on its face, it
2 is fairly susceptible to two different interpretations, both of which are reasonable and that
3 where a clause is ambiguous, a meaning and construction most favorable to the insured must be
4 applied. *Washington Restaurant Corp. v. General Ins. Co. of America*, 64 Wash.2d 150, 390
5 P.2d 970 (1964); *American Star Ins. Co. v. Grice*, 121 Wash.2d 869, 874, 854 P.2d 622 (1993),
6 supplemented by 123 Wash.2d 131, 865 P.2d 507 (1994); and *Morgan v. Prudential Ins. Co. of
America*, 86 Wash.2d 432, 435, 545 P.2d 1193 (1976).

7 The Coverage paragraph in MOE's Policy provides: "*We will pay for direct physical loss of or
8 damage to Covered Property ...*". The Policy does not define "direct physical loss". Similarly,
9 the Policy does not define the terms "loss of" or "damage to" but both terms are included in the
10 Policy language. The Policy language uses "or" to separates the "direct physical loss of" and
11 "damage to" providing for an *alternative* means of coverage. The Court therefore has to
12 consider these terms as alternative means for coverage.

13 When the terms are undefined, the courts are required to use their "*plain, ordinary, and
14 popular*" meaning and may refer to dictionaries for undefined words. *Boeing Co. v. Aetna Cas.
& Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990).

15 The Court first considers the term "loss". The dictionary definition for "loss" includes
16 "destruction", "ruin", "deprivation"² . In applying the ordinary meaning of "deprivation", the
17 Court finds that the Plaintiff's position that the dental practice had a "direct physical
18 deprivation" of its property when they were unable to see patients and practice dentistry is a
19 reasonable interpretation by the average lay person.

20 The Court finds that MOE in its motion applies identical meaning to the terms "loss of" and
21 "damage to" and in this way argues that the coverage does not apply because the Plaintiff has
22 not shown any physical damage such as damage to a property caused by fire.

23 While there is no factual allegation of physical alteration of the property, MOE's narrow
24 reading of the Policy is silent as to the Policy's language providing "physical loss of" as an
25 alternative basis for coverage. Clearly the language in the Policy intended to provide alternative
26 means for coverage, otherwise the Policy would use one or the other term and not both as

27 ² www.merriam-webster.com

1 alternative means. If “physical loss of” was interpreted to mean “damage to” then one or the
2 other would be surplusage. The Court has to give meaning to the whole language and to every
3 word in a policy³ and cannot ignore the alternative means of coverage provided in the Policy.
4 The fact that both terms were included in the coverage provision shows that the drafters of the
5 Policy meant the term “physical loss of” to mean something other than “damage to”.

6 MOE’s argument that gives the same exact meaning to both terms contradicts and ignores the
7 clear intent of the Policy. Such narrow reading is not supported by the appellate decisions in
8 Washington.

9 The Court therefore finds that the phrase “physical loss of” is ambiguous because it is fairly
10 susceptible to two reasonable interpretations and dismissal under CR 12(b)(6) is not
11 appropriate.

12 Applying the legal standard to MOE’s motion for dismissal on other noted grounds, the Court
13 further finds that dismissal on all other grounds is not appropriate pursuant to CR 12(b)(6).

14 MOE has not shown that under the specific facts in this case, beyond doubt, HS can prove no
15 set of facts, consistent with the complaint, which would justify recovery.

16 It is hereby ORDERED that that:
17 Defendant’s Motion to Dismiss Plaintiff’s claims is DENIED.

18 IT IS SO ORDERED.

19 ENTERED this 12th day of November, 2020.

20
21
22 _____
23 Susan Amini
24 SUPERIOR COURT JUDGE
25

26
27 _____
³ *Boeing, supra* at 898.

King County Superior Court
Judicial Electronic Signature Page

Case Number: 20-2-07925-1
Case Title: HIT & STOUT VS MUTUAL OF ENUMCLAW INS CO

Document Title: ORDER

Signed by: Susan Amini
Date: 11/13/2020 9:00:00 AM



Judge/Commissioner/ProTem: Susan Amini

This document is signed in accordance with the provisions in GR 30.

Certificate Hash: 159415225D6BB8EE7A492D186C59A47D27019585

Certificate effective date: 7/16/2018 2:40:04 PM

Certificate expiry date: 7/16/2023 2:40:04 PM

Certificate Issued by: C=US, E=kcscefiling@kingcounty.gov, OU=KCDJA,
O=KCDJA, CN="Susan Amini:
nrHJ/QrS5hGYRNT2AFk6yQ=="