IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
THIRD DISTRICT

CASE NO. 3D21-0671
L.T. Case NO. 20-10334

COMMODORE, INC. D/B/A GREENSTREET CAFÉ, INC.,

Appellant,

v.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, KNOWN AS SYNDICATE AXS 1686, NEO 2468, ENH 5151, XLC 2003, TAL 1183, AGR 3268, and ACS 1856, and XL CATLIN INSURANCE COMPANY UK LTD., HDI GLOBAL SPECIALTY SE, and ENDURANCE WORLDWIDE INSURANCE,

Appellees.

BRIEF OF RESTAURANT LAW CENTER AND FLORIDA RESTAURANT AND LODGING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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STATEMENT OF INTEREST

Amicus Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the world's largest foodservice trade association. The industry is comprised of over one million establishments that represent a broad and diverse group of owners and operators—from large national outfits, to small family-run neighborhood locations, and everything in between. The industry employs over 15 million people and is the nation's second-largest private-sector employer. Through regular participation in *amicus* briefs, the Restaurant Law Center provides courts with the industry's perspective on legal issues in cases that may have industry-wide implications.

Amicus Florida Restaurant and Lodging Association is the leading business association for the restaurant and hospitality industry in Florida. A statewide, non-profit trade association originally founded in 1946, it advocates for businesses and employees in the industry, including public lodging establishments, restaurants, and thousands of suppliers to the industry, which serve as the cornerstone of the state economy. Its mission is to protect, educate, and promote the hospitality industry.

Amici and their members have a significant interest in the issues in this case. Many in the restaurant industry have sought business interruption coverage under "all risk" commercial insurance policies for the physical loss or damage they suffered as a direct result of unprecedented state and local shutdown orders. Those restaurants have been unreasonably and categorically denied coverage because they supposedly have not incurred physical loss or damage even though their properties have been rendered non-functional, detrimentally altered, and physically impaired as a result of the orders.

Whether Plaintiff-Appellant ("GreenStreet") has stated a claim depends on the specific factual allegations in its pleadings. Still, *amici* and their members have a strong interest in highlighting why issues in this appeal are important to the restaurant industry. Roughly half of the state courts to decide these issues—which of course arise under state law—have found policyholders stated a claim or were entitled to summary judgment. Accordingly, *amici* also have a strong interest in emphasizing that, depending on a complaint's specific allegations, restaurants may be entitled to coverage for shutdown orders that caused direct physical loss or damage to property.

SUMMARY OF ARGUMENT

I. The restaurant industry is a significant sector of the Florida economy and drives economic activity across the country. The industry creates employment and entrepreneurship opportunities, including for women, minorities, and immigrants. It supports local businesses, draws tourists, produces significant tax revenue, and is an integral part of the cultural fabric in Florida and beyond.

For years, restaurants have paid substantial premiums for business interruption coverage under "all risk" commercial property insurance policies. These policies cover any and all risks, even unforeseen and unprecedented ones, unless specifically excluded. Restaurants bought this insurance believing it would cover income lost as a result of physical "loss of or damage to" their property, as they understood those plain, ordinary, everyday words to mean.

Yet when officials issued shutdown orders that caused precisely what these restaurant owners believed to be physical "loss of or damage to" property—by detrimentally altering physical property, imposing physical changes, and materially impairing physical spaces that rendered property nonfunctional for its intended purposes—insurers denied coverage without legitimate justification. Facing

catastrophic losses, thousands of restaurants have already closed and countless more will be forced to close—*permanently*. Restaurants have turned to the courts for the coverage they are entitled to receive.

II. These are issues of first impression arising in an unprecedented context. This Court applies *de novo* review, considering the state-law issues independently and without according the decision below any deference. That is especially appropriate here. The court below committed some of the same interpretive and analytical errors as the cases it relied on and failed to construe the policy's terms according to the natural meaning a reasonable policyholder would ascribe to them.

By contrast, many other trial courts across the country have found in well-reasoned decisions that a plaintiff stated a claim for business interruption coverage by alleging it suffered physical loss or damage as a result of executive shutdown orders. Indeed, roughly half of state courts to decide these state-law questions have found policyholders stated a claim or were entitled to summary judgment. That strongly supports the conclusion that the court below erred.

Recent decisions also reinforce that a complaint's allegations and applicable substantive state law—not the current scorecard of

non-binding federal decisions—are what really matter in determining whether a plaintiff has stated a claim. Consistent with those important principles, this Court should make clear that a restaurant may state a claim by alleging that it suffered physical loss or damage when shutdown orders dispossessed the restaurant of its tangible physical space by mandating real, material, detrimental physical alterations to the premises. As courts have done in other hotly contested insurance coverage cases, this Court should review the allegations of the complaint and the policy language, apply basic principles of policy interpretation, and resolve this case based on the unprecedented factual circumstances under which it arises.

III. This Court should reverse the decision below. Bedrock canons of insurance policy interpretation require that undefined terms be given their "plain and ordinary" meaning. *Gov't Emps. Ins. Co. v. Macedo*, 228 So.3d 1111, 1113 (Fla. 2017) ("*GEICO*"). A court should not inject extrinsic terms or conditions into the policy. If a provision is susceptible to more than one reasonable interpretation, it is ambiguous and should be construed in accordance with a policyholder's reasonable expectations of coverage. "[T]erms utilized in an insurance policy should be given their plain and unambiguous

meaning as understood by the 'man-on-the-street'" when construed by a court. *State Farm Fire & Cas. Co. v. Castillo*, 829 So.2d 242, 244 (Fla. 3d DCA 2002). The policy's terms require no judicial redefinition: they should be construed according to what a reasonable policyholder would expect. And reasonable policyholders reasonably expect a policy that covers "loss" or "damage" would include protection if the property's function was forcibly altered by a state or local shutdown order.

Many other courts have found that shutdown-order-mandated physical alterations and impairments to property, qualify as direct physical loss or damage for purposes of stating a claim. Those rulings are consistent with longstanding precedent holding that property may suffer physical loss or damage when rendered nonfunctional for its intended purpose or when its appearance or form is altered.

ARGUMENT

I. Restaurants Are Critical To Florida's Economy And Culture, And Sought Insurance Coverage To Help Survive Unprecedented Hardship.

A. The Restaurant Industry, Which Drives Billions In Revenue And Employs Millions, Is Working Hard To Stay Afloat.

The restaurant industry is the lifeblood of Florida's economy. In 2019, the industry accounted for an estimated $52.5 billion in sales across 42,275 locations in Florida. It employed 1,090,800 in 2020 and is expected to employ 14.1% more people over the next decade.[1]

Consumer spending at restaurants has a multiplier effect too. Every dollar spent at table-service restaurants—those most threatened by shutdown orders—returns approximately two dollars to the state's economy and boosts state tax revenue.[2] A restaurant contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses. That is the case in Florida, where ample and diverse dining opportunities drive tourism.

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[1] Nat'l Restaurant Ass'n, *Factbook*: *2020 State of the Restaurant Industry* 7, 77 (2020).

[2] Nat'l Restaurant Ass'n, Florida *Restaurant Industry at a Glance* (2019).

Restaurants are also cultural centers, creating unique neighborhood identities and driving commercial revitalization. Restaurants bring stability and an interest in seeing their neighborhoods grow and thrive. That is true of the many small (often family-owned) restaurants that make up the vast majority of the industry and are a vibrant part of the communities where they operate.

The restaurant industry remains a shining example of upward mobility. Eight in ten owners say their first industry job was an entry-level position. Even more managers say the same.[3] Restaurants also provide opportunities for historically disadvantaged communities. More women and minorities are managers in the restaurant industry than in any other industry, and restaurants provide immigrants with opportunities to work and own their own businesses.[4]

The past successes of the industry are not guaranteed in the future. In the past year, nationwide restaurant and foodservice sales were "down $270 billion from expected levels" and industry

[3] *Factbook*, *supra* note 1.
[4] *Id.*; Americas Soc'y et al., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015).

employment has decreased in every state and the District of Columbia.[5] As of late 2020, more than 110,000 establishments—on average in business over sixteen years—were closed permanently or long-term.[6]

Florida restaurants have not been spared. As of January, restaurant employment in Florida was down more than 140,000 jobs.[7] The numbers for independent restaurants are even starker.[8] These closures can devastate neighborhoods as the harm from closures reverberates, impacting other local businesses and industries. "Virtually every kind of restaurant is suffering: the corner diner, the independents, the individual owners of full-service restaurant chains."[9]

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[5] Nat'l Restaurant Ass'n, *Restaurant sales pulled back from a healthy January* (Mar. 16, 2021); Nat'l Restaurant Ass'n, *Forty states and DC lost restaurant jobs in January* (Mar. 15, 2021).
[6] Nat'l Restaurant Ass'n, *Restaurant Industry in Free Fall; 10,000 Close in Three Months* (Dec. 7, 2020).
[7] Nat'l Restaurant Ass'n, *Forty states and DC lost restaurant jobs in January* (Mar. 15, 2021).
[8] Heather Lalley, *Report: Up To 85% of Independent Restaurants Could Close Due To Pandemic*, Rest. Bus. (June 11, 2020).
[9] Nat'l Restaurant Ass'n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020).

B. Insurers Have Wrongfully Denied Restaurants Business Interruption Coverage Under "All Risk" Insurance Policies.

Faced with unprecedented losses caused by executive orders forcing restaurants to severely alter and restrict their physical premises, restaurants turned to their insurers for coverage under "all risk" property insurance policies that included protection for business interruption.

"All risk" property policies insure against losses from unexpected and unprecedented circumstances, and provide coverage for "all risks" of any kind or description, unless specifically excluded. "Business interruption" insurance provides coverage—often up to a year or more—to replace business income lost as a result of a covered cause of loss. Under industry-standard "all risk" policies procured by restaurants, business interruption coverage is triggered when a policyholder suffers direct "physical loss of or damage to" its premises. These policies provide businesses with comfort knowing they have coverage for even unforeseeable or unlikely risks that may physically impair or alter their property.

Due to the breadth of coverage, restaurants paid substantial premiums for "all risk" policies with business interruption coverage.

In doing so, restaurants reasonably understood, expected, and believed their policies would cover business income losses from any and all non-excluded risks. Those risks, to a reasonable policyholder, include shutdown orders causing direct physical "loss of or damage to," as policyholders understood those words to mean.

The physical design of a restaurant is an essential element of its success. In a business known for tight margins, restaurant owners and operators thoughtfully utilize their physical space to maintain the level of revenue necessary to support their staff and other operational costs. Table service restaurants, for example, were not designed to operate as a hub for take-out or delivery. They have far larger dining areas than a take-out only operation, and most have proportionally smaller kitchens than a restaurant designed only to produce food. Those dining areas are built out, often at significant expense, to create the warm, inviting ambience that draws guests in. Restaurant dining is an experience, not just a financial transaction. Physical space and layout play a crucial role in that experience.

Insurers know this. They price and charge premiums based on the policyholder's properties operating in a fully functional manner and based on the available square footage at the outset of the policy

period. Insurers also account for the prospect of having to pay claims for lost business at levels commensurate with the policyholder being a fully operational business. Business interruption coverage thus insures against the risk that a business-owner's property will not be able to function as intended.

That kind of interruption is precisely what happened when executive orders required restaurants to make physical, detrimental alterations that materially impaired the functionality of their premises. In barring or limiting on-premises dining, those orders caused the loss of millions of square feet of vital physical space. The orders dispossessed restaurants of their tangible spaces and forced very real, material detrimental physical changes and alterations to their premises. Dining rooms closed or limited. Areas blocked off. Seating areas eliminated. Barriers erected and dividers installed. Layouts altered. Fixtures and furniture removed. Self-service stations gone. Spaces shuttered. Floors marked. Plexiglass mounted. These are but a few of the physical manifestations of the direct physical loss and damage that restaurants have suffered.

Yet insurance carriers have refused coverage and issued blanket denials without just cause. Those denials are frequently

rapid, featuring boilerplate language asserting that coverage is excluded because the restaurant supposedly has not satisfied the industry-standard "loss of or damage to" requirement. Those denials followed the telegraphed statements by insurers and trade groups, and were frequently issued without meaningful (if any) investigation.

Many restaurants have challenged these wrongful denials. Without judicial relief, many restaurants will be out of business entirely, many restaurant-industry employees will remain out of work, and many residents will be robbed of the neighborhood places and spaces they treasure.

II. This Is An Important Case Of First Impression Where The Court Applies *De Novo* Review.

This Court should closely scrutinize the policy language, apply well-established principles of policy interpretation, and resolve this case of first impression based on the unprecedented circumstances under which it arises. That is particularly so in light of other pending cases involving claims by restaurants, for three reasons.

First, "[i]nsurance policy construction is a question of law subject to de novo review." *GEICO,* 228 So.3d at 1113. The *de novo* standard of review is properly applied when "no deference is given to

the judgment of the lower courts." *D'Angelo v. Fitzmaurice*, 863 So.2d 311, 314 (Fla. 2003). The issue is "whether the plaintiff has stated a cause of action, not whether the plaintiff will prevail at trial." *Lonestar Alternative Sol., Inc. v. Leview-Boymelgreen Soleil Devs., LLC.*, 10 So.3d 1169, 1171 (Fla. 3d DCA 2009).

Second, this Court's review comes at a time when shutdown-related business interruption litigation is in its early stages and no appellate court has yet weighed in. Among trial-level decisions to date in state courts—where the judiciary is well-versed at applying the state law that governs insurance policies—roughly half have found a plaintiff stated a claim for business interruption coverage or granted summary judgment to the plaintiff on that claim.[10] Many federal

[10] *See, e.g.*, *Johnston Jewelers, Inc. v. Jewelers Mut. Ins. Co., S.I.*, 2020 WL 6556842 (Fla., Pinellas Cnty. Sept. 22, 2020); Order and opinion, *Cherokee Nation v. Lexington Ins. Co.*, 2021 WL 506271 (Okla. Dist. Ct. Jan. 28, 2021); *North State Deli, LLC v. The Cincinnati Ins. Co.*, 2020 WL 6281507 (N.C. Super. Ct. Oct. 9, 2020); *McKinley Dev. Leasing v. Westfield Ins. Co.*, 2021 WL 506266 (Ohio Ct. C.P. Feb. 9, 2021); *Timothy A. Ungarean, Dmd D/B/A Smile Savers Dentistry, PC v. CNA*, No. GD-20-00654 (Pa. Ct. C.P. Mar. 22, 2021); *Scott Craven DDS v. Cameron Mut. Ins. Co.,* 2021 WL 1115247 (Mo. Cir. Ct. Mar. 9, 2021); *Queens Tower Rest. Inc. v. Cincinnati Fin. Corp.*, 2021 WL 456378 (Ohio Ct. C.P. Jan. 7, 2021); *Goodwill Indus. of Orange Cnty. v. Phila. Indemnity Co.*, 2021 WL 476268 (Cal. Super. Ct. Jan. 28, 2021); *Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, 2020 WL 5806576 (N.J. Super. Ct. Law Div. Aug. 13, 2020); Order,

district courts, applying state law, have reached the same conclusion.[11]

While other decisions have favored insurers, many turn on the specific facts or circumstances alleged. Others fail to apply the reasonable-interpretation rule and other basic policy interpretation principles—including by redefining the policy based on extrinsic case law or arcane publications that ordinary people would never consult.

Most troubling, many decisions may be the result of a reflexive self-fulfilling feedback loop in which federal trial courts appear to effectively treat other federal trial courts as establishing a sort of

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Lombardi's, Inc. v. Indem. Ins. Co. of N. Am., No. DC-20-05751-A (Tex. Dist. Ct. Oct. 15, 2020); *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, 2020 WL 6380449 (Pa. Ct. C.P. Oct. 26, 2020); *Perry Street Brewing Co., LLC v. Mut. of Enumclaw Ins.*, 2020 WL 7258116 (Wash. Super. Ct. Nov. 23, 2020); *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, 2020 WL 7190023 (Nev. Dist. Ct. Nov. 30, 2020).

[11] *See, e.g.*, *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, 2020 WL 5939172 (M.D. Fla. Sept. 24, 2020); *Kenneth Seifert d/b/a The Hair Place v. IMT Ins. Co.*, 2021 WL 2228158 (D. Minn. June 2, 2021); *Legacy Sports Barbershop LLC v. Continental Cas. Co.*, 2021 WL 2206161 (N.D. Ill. June 1, 2021); *In re Society Insurance Co.*, MDL 2964, 2021 WL 679109 (N.D. Ill. Feb. 22, 2021); *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617 (N.D. Ill. Feb. 28, 2021); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F.Supp.3d 794 (W.D. Mo. 2020); *Henderson Rd. Rest. Sys. Inc. v. Zurich Am. Ins. Co.*, 2021 WL 168422 (N.D. Ohio Jan, 19, 2021); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020).

federal common law on business interruption insurance. For example, early yet unremarkable decisions have been cited dozens of times by other courts, even though the decisions are not particularly detailed or persuasive, did not arise after an amended complaint, and have not been subject to appellate review. *See, e.g.*, *10E, LLC v. Travelers Indem. Co.*, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020), *appeal pending* No. 20-56206 (9th Cir.).

Rather than tally decisions by other courts in other cases, each court must focus on a complaint's allegations, liberally construed in plaintiff's favor, and determine whether those specific allegations satisfy the applicable standard. *See Seifert*, 2021 WL 2228158, at *3 (denying motion to dismiss amended complaint that adequate alleged shutdown orders caused physical loss, after granting motion to dismiss initial complaint); *Legacy Sports*, 2021 WL 2206161, at *2-3 (denying motion to dismiss and distinguishing allegations from cases where the same judge had granted dismissal).

The current disagreement among trial courts about whether plaintiffs have stated a claim—and the fact that roughly half of state courts have concluded that plaintiffs have—reinforces that this Court is on solid ground in reversing the decision below. This Court should

conclude that the plain meaning of the undefined, disjunctive terms physical "loss or damage"—as a normal layperson would understand them—applies to cover losses caused by shutdown orders that imposed material physical alterations on restaurants.

III. Policy Language, Interpretation Principles, And Precedent Support Finding Shutdown Orders Caused Physical Loss Or Damage.

Appellee, like other insurers, has insisted that the orders that impaired policyholders' property have not caused physical "loss of or damage to" because only events like hurricanes and fires can trigger business interruption coverage. That position is inconsistent with the policy's language, foundational policy-interpretation principles, and both recent and historical precedent.

A. Policy Language And Policy-Interpretation Principles Support Reversal.

"Insurance contracts are construed in accordance with the plain language of the policies" and "ambiguities are interpreted liberally in favor of the insured and strictly against the insurer." *McCreary v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 758 So.2d 692, 694-95 (Fla. 4th DCA 1999). An insurance contract "provision is ambiguous if it is 'susceptible to two reasonable

interpretations, one providing coverage and the other excluding coverage.'" *GEICO*, 228 So.3d at 1113.

"[I]nsuring or coverage clauses are construed in the broadest possible manner to affect the greatest extent of coverage." *McCreary*, 758 So.2d at 695. Conversely, "strict construction is required of exclusionary clauses" such that "the insurer is required to make clear precisely what is excluded from coverage." *State Farm Fire & Cas. Ins. Co. v. Deni Assocs. of Fla., Inc.*, 678 So.2d 397, 401 (Fla. 4th DCA 1996). "[T]erms utilized in an insurance policy should be given their plain and unambiguous meaning as understood by the 'man-on-the-street.'" *Castillo,* 829 So.2d at 244. "When a term in an insurance policy is undefined … courts may look to legal and non-legal dictionary definitions to determine such a meaning." *GEICO*, 228 So.3d at 1113.

Here, the plain language of the policy supports finding coverage for loss or damage caused by shutdown orders that physically impaired property. Appellees agreed to pay for "loss or damage" to property. As many courts have recently held in the business

interruption context, to read those terms as requiring the same thing would improperly collapse the meaning of the two terms.[12]

Had the insurer wanted "loss" and "damage" to mean the same thing, or to narrow their meaning, it was obligated to do either explicitly in clear and unmistakable language. The insurers chose not to do so. Those terms must be given their plain and ordinary meanings consistent with the expectations of a reasonable consumer, and construed in favor of coverage.

Merriam-Webster defines physical as "of or relating to material things" that are "perceptible especially through the senses."[13] Loss is defined as "the act of losing possession," "deprivation," and the "failure to gain, win, obtain, or utilize."[14]

Put together, the ordinary meaning of "physical loss" includes when a property can no longer function as intended in the real,

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[12] *See, e.g.*, *Urogynecology Specialist,* 489 F.Supp.3d at 1302-03; *Cherokee Nation*, 2021 WL 506271, at *6-7; *North State Deli*, 2020 WL 6281507, at *3; *Seifert*, 2021 WL 2228158, at *3; *In re Society*, 2021 WL 679109, at *8-10; *Henderson Rd.*, 2021 WL 168422, at *11-12; *Studio 417*, 478 F.Supp.3d at 800-03.

[13] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical (last accessed June 7, 2021).

[14] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/loss (last accessed June 7, 2021).

material world. For many restaurants, that was exactly what happened when executive orders imposed real, detrimental, physical alterations to their spaces—closing or limiting dining rooms, blocking off areas, erecting barriers, and altering layouts, among other direct physical changes. The executive orders "deprived" restaurants of property in a way that is perceptible through the senses because they no longer possessed the same rights to their property and large swaths of their property was rendered non-functional.

No reasonable policyholder would have understood "loss" to require physical alteration to the structure of the premises, much less closely read judicial decisions to discern the supposed true meaning of the policy's language. Reasonable policyholders would, however, understand that interposing barriers, blocking off physical space, and detrimentally changing property in other material physical ways constitute physical alterations.

Policyholders should not have to hire lawyers to understand what the word "loss" means. They should not have to guess whether a judge will require a loss to involve something beyond what the policy describes. A policy term's meaning is determined by common speech and reasonable expectations of ordinary business owners.

Plain policy terms require no judicial redefinition or clarification. The plain language of the policy—in conjunction with settled policy-interpretation principles that honor a reasonable policyholder's expectations—dictates that GreenStreet has sufficiently alleged as a matter of fact that the executive orders have caused "physical loss" by dispossessing it of its property and rendering that property nonfunctional. GreenStreet should be able to test whether it can offer evidentiary support to obtain a jury verdict in its favor.

B. Recent and Longstanding Precedent Supports Reversal.

In reversing the judgment below, this Court will be squarely within the mainstream of recent coverage decisions that have found restaurants and other businesses adequately alleged that they suffered physical "loss or damage" as a result of state and local shutdown orders.

Several powerful examples come from the Northern District of Illinois, where district courts denied motions to dismiss and found that plaintiffs "need not plead or show a change to the property's physical characteristics" where policies cover "loss" in addition to "damage." *In re Society*, 2021 WL 679109, at *8; *Derek Scott Williams*

PLLC, 2021 WL 767617, at *1, *3-4 (noting broad agreement on the basic principle that "each word [in a contract] has some significance and meaning."). Two courts further reasoned that a jury could find plaintiffs suffered physical losses because the shutdown orders "impose a *physical* limit: the restaurants are limited from using much of their physical space." *Society* at *8-9; *see Williams* at *3-4 (finding a reasonable factfinder could determine that "physical loss" includes "a deprivation of the use of … business premises").

A third district court concluded that, although "loss of or damage to" property required "physical damage or alteration," policyholders had satisfied that standard by alleging they were required to "build a new outdoor patio, install social distancing barriers and germ sanitation stations, and remove work stations in order to promote proper social distancing." *Legacy Sports*, 2021 WL 2206161, at *2-3. In so finding, and distinguishing its own prior decisions dismissing business interruption claims in other cases, the court made clear that whether a plaintiff has stated a claim turns on the individual allegations in each case.

Another example is *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.*, 2021 WL 168422 (N.D. Ohio Jan. 19,

2021). The district court granted summary judgment for the policyholder and found that executive orders caused "physical loss" under the plain language of the policy at issue because "the properties could no longer be used for their intended purposes—as dine-in restaurants." *Id.* at *10.

Courts around the country have come to similar conclusions. In *Kenneth Seifert d/b/a The Hair Place v. IMT Ins. Co.*, the Chief Judge of the District of Minnesota denied a motion to dismiss and "conclude[d] that a plaintiff would plausibly demonstrate a direct physical loss of property by alleging that shutdown orders forced a business to close because the property was deemed dangerous to use and its owner was thereby deprived of lawfully occupying and controlling the premises to provide services within it." 2021 WL 2228158, at *4-5. In *North State Deli, LLC*, the state court reasoned that "the ordinary meaning of the phrase 'direct physical loss' includes the inability to utilize or possess something in the real, material, or bodily world." 2020 WL 6281507, at *3. And these are just some recent examples of the conclusions that numerous other courts have reached. *See, e.g.*, *supra* notes 10-11.

The cases favoring policyholders are consistent with longstanding precedent. For example, nearly sixty years ago, a California appellate court considered a case involving a home left "standing on the edge of and partially overhanging a newly formed 30-foot cliff" resulting from a landslide. *Hughes v. Potomac Ins. Co. of District of Columbia*, 199 Cal. App. 2d 239, 243 (1962). The insurer argued the policy only insured the house itself, which had not been damaged. *Id.* at 245-46.

The court rejected that argument, reasoning that it would "render the policy illusory" because the insurer's position "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' so long 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," the insurer "would deny that any loss or damage had occurred unless some tangible injury to the physical structure 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." *Id.* at 248-49.

Similarly, in *Murray v. State Farm Fire & Cas. Co.*, large boulders had fallen onto two homes, leaving two other plaintiffs' homes at risk of further rockfalls. 203 W.Va. 477, 492-93 (1998). The insurer argued that the policies "do not cover any losses occasioned by the potential damage that could be caused by future rockfalls." The West Virginia Supreme Court disagreed, reasoning that "'[d]irect physical loss' provisions require only that a covered property be injured, not destroyed."

The court continued: until the risk of rockfalls abates "plaintiffs' houses could scarcely be considered 'homes' in the sense that rational persons would be content to reside there." The court thus held that "direct physical loss[es]" covered by the policy, "including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property."[15]

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[15] *See also, e.g.*, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014) ("property can sustain physical loss or damage without experiencing structural alteration"); *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (finding coverage where properties "no longer performed the function for which they were designed"); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *9 (D. Ore. June 7, 2016) (finding "direct property loss or damage" when property

Focusing exclusively on structural damage ignores the well-reasoned analysis suggesting that a business suffers cognizable physical loss even if it is not physically damaged. Just like a home suffers physical loss when it is uninhabitable, a restaurant suffers physical loss when it becomes non-functional and cannot serve customers as intended.

This Court should conclude that GreenStreet has stated a claim by alleging the executive orders caused "physical loss" of property and rendered the property non-functional for its intended purpose. This Court should also remind district courts to properly apply policy-interpretation principles and to liberally construe a plaintiff's allegations, especially when plaintiffs like restaurants and hospitality companies allege physical loss or damage caused by executive shutdown orders that imposed material, detrimental, physical alterations to property.

CONCLUSION

The judgment below should be reversed.

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became "uninhabitable and unusable for its intended purpose"); *Sentinel Mgt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding "direct, physical loss" when "a building's function may be seriously impaired or destroyed").

June 14, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.370, I certify that this brief complies with the word count limitation of that rule because this brief contains 4,998 words, excluding the items listed in Rule 9.045(e), based on the word-count function of Microsoft Word 2016.

Pursuant to Rule 9.210(b), this brief complies with the line spacing, typeface, and type style requirements of Rule 9.045(b) and has been prepared using Microsoft Word 2016 in Bookman Old Style 14-point font.

Dated: June 14, 2021

/s/ Gabriel K. Gillett
Gabriel K. Gillett

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 14, 2021, a true and correct copy of the foregoing has been served via the Court's electronic filing system upon the following:

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