

NITE, NITE LLC D/B/A CITY BAR
AND CENTRAL TACO

VERSUS

CERTAIN UNDERWRITERS AT
LLOYD'S LONDON, INDIAN HARBOR
INSURANCE COMPANY, ET AL.

SUIT NUMBER 698068, SECTION 23

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

JUDGMENT

The *Motion for Summary Judgment* filed by Defendants, Certain Underwriters at Lloyd's, London Subscribing to Policy No. PRP000396/2000, HDI Global Specialty SE, and XL Catlin Insurance Company UK, Ltd (improperly named as "Indian Harbor Insurance Company") (collectively the "Insurers"), came for hearing before this Court on Monday, February 1, 2021.

Present in Court (via secure video conference) were:

Virginia Y. Dodd — Counsel for the Insurers; and

D. Blayne Honeycutt — Counsel for Plaintiff, Nite, Nite LLC d/b/a City Bar and Central Taco ("City Bar").

The Court, having considered the filings, evidence, and the argument of counsel, has concluded as follows:

IT IS ORDERED that the Insurers' *Motion for Summary Judgment* is **GRANTED**;

IT IS FURTHER ORDERED that all claims raised in City Bar's Petition for Declaratory Judgment be and are hereby **DISMISSED WITH PREJUDICE**; and .

IT IS FURTHER ORDERED that all costs of these proceedings, including the filing of the *Motion for Summary Judgment*, to be assessed against City Bar.

JUDGMENT RENDERED in Open Court in Baton Rouge, Louisiana on February 1, 2021.

JUDGMENT SIGNED in Chambers in Baton Rouge, Louisiana on the 09 day of February, 2021.

William A. Morvant

Honorable William A. Morvant
Judge, 19th Judicial District Court
Parish of East-Baton Rouge

(Counsel to be notified next page)

I HEREBY CERTIFY THAT ON THIS DAY A COPY OF
THE WRITTEN REASONS FOR JUDGMENT /
JUDGMENT / ORDER / COMMISSIONER'S
RECOMMENDATION WAS MAILED BY ME WITH
SUFFICIENT POSTAGE AFFIXED.
SEE ATTACHED LETTER FOR LIST OF RECIPIENTS.

DONE AND MAILED ON February 11, 2021

Kandee Kuen
DEPUTY CLERK OF COURT

Virginia Y. Dodd
Heather S. Duplantis
Kevin W. Welsh
PHELPS DUNBAR LLP
II City Plaza
400 Convention Street • Suite 1100
Baton Rouge, Louisiana 70802-5618

*Attorneys for Insurers, Certain Underwriters at Lloyd's, London Subscribing
to Policy No. PRP000396-2000, HDI Global Specialty SE, and XL
Catlin Insurance Company UK, Ltd.*

D. Blayne Honeycutt
Hannah Honeycutt Calandro
FAYARD & HONEYCUTT
519 Florida Avenue SW
Denham Springs, Louisiana 70726

Attorneys for Plaintiff, Nite, Nite LLC d/b/a City Bar and Central Taco

UNIFORM DISTRICT COURT RULE 9.5 CERTIFICATE

I certify that I circulated this proposed judgment to counsel for Nite, Nite LLC d/b/a City Bar and Central Taco by electronic mail and U.S. Mail on February 2, 2021, and that:

no opposition was received; or
 the following opposition was received:

I further certify that I have allowed at least five (5) working days before presentation to the Court.

Certified this 8th day of February, 2021.

Respectfully submitted,

PHELPS DUNBAR LLP

BY: 

Virginia Y. Dodd, Bar Roll No. 25275
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ATTORNEYS FOR DEFENDANTS
CERTAIN UNDERWRITERS AT LLOYD'S,
LONDON SUBSCRIBING TO POLICY NO.
PRP000396-2000, HDI GLOBAL SPECIALTY
SE, AND XL CATLIN INSURANCE COMPANY
UK, LTD.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 8th day of February, 2021, delivered a copy of the foregoing to all known counsel of record *via* electronic mail and/or facsimile.


Kevin W. Welsh

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NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
CIVIL DIVISION "E"

.....
NITE, NITE LLC D/B/A CITY BAR AND CENTRAL TACO
VERSUS C698068
CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL
.....

DEFENDANT INSURER'S MOTION FOR SUMMARY JUDGMENT OBO
DEFENDANTS

MONDAY, FEBRUARY 01, 2021

THE HONORABLE WILLIAM A. MORVANT, JUDGE PRESIDING

APPEARANCES: FOR:
MR. D. BLAYNE HONEYCUTT PLAINTIFF
MS. VIRGINIA Y. DODD DEFENDANTS

REPORTED AND TRANSCRIBED BY:
PANSY M. ALLEN, C.C.R. #24024, R.P.R. #69388

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MONDAY, FEBRUARY 01, 2021

REPORTER'S NOTE: NITE, NITE LLC D/B/A CITY
BAR AND CENTRAL TACO VS CERTAIN UNDERWRITERS AT
LLOYD'S LONDON, ET AL, C698068:

THE COURT: I HAVE TO SAY THIS WINS THE AWARD TODAY FOR THE MOST INTERESTING, THOUGHT-PROVOKING MOTION OR EXCEPTION THAT I HAD BEFORE ME. THIS IS THE KIND OF THING THAT MAKES ME LOVE COMING TO WORK WHEN I GET TO GO THROUGH THIS TYPE OF LEGAL GYMNASTICS. ALL RIGHT. LET'S GO AHEAD AND MAKE OUR APPEARANCES.

MR. HONEYCUTT: BLAYNE HONEYCUTT HERE ON BEHALF OF PLAINTIFF, YOUR HONOR.

THE COURT: ALL RIGHT.

THE REPORTER: SHE'S STILL MUTED.

THE COURT: AND MS. DODD, YOU'RE STILL --

MS. DODD: FOR DEFENDANTS --

THE COURT: -- THERE YOU GO. ALL RIGHT.

MS. DODD: IS IT MUTED?

THE COURT: WE CAN HEAR YOU NOW.

MS. DODD: THANK YOU, JUDGE. VIRGINIA DODD FOR CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, HDI GLOBAL SPECIALTY SE, AND XL CATLIN INSURANCE COMPANY UK.

THE COURT: I'M READY WHENEVER Y'ALL ARE.

MS. DODD: THANK YOU, JUDGE. AS YOU KNOW, WE'RE HERE FOR THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO COVERAGE RISING OUT OF THE GLOBAL PANDEMIC DUE TO CORONA VIRUS. I KNOW YOUR HONOR HAS READ THE BRIEFS SO I'M NOT GOING TO GO THROUGH THE MULTITUDE OF ARGUMENTS. BUT THERE

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ARE SEVERAL CRITICAL PIECES, YOUR HONOR, THAT ARE ABSOLUTELY FATAL TO PLAINTIFF'S CLAIMS IN OUR OPINION, AND I THINK IT'S WORTHWHILE TO GO THROUGH SOME OF THOSE AND EXPAND ON SOME OF THE CONCEPTS THAT ARE IN THE BRIEFS TO SHOW THAT IF WE STRETCH THE WORDINGS AS THE PLAINTIFF IS REQUESTING, IT WOULD JUST LEAD TO, NOT ONLY INCONSISTENT RESULTS, BUT WHAT'S ACTUALLY IN THE POLICY BUT ABSURD RESULTS WHEN WE THINK OF PRACTICAL SCENARIOS WHERE THIS COULD BE EXTENDED EVEN FURTHER IF WE ACCEPT THE ARGUMENTS THAT ARE BEING PUT FORTH. AND THE FIRST IS THIS, YOUR HONOR, THE PLAINTIFF IS RELYING ON THE CIVIL AUTHORITY SECTION OF THE POLICY EXCLUSIVELY TO SUPPORT ITS CLAIMS. AND IT CITES TO A SERIES OF WHAT I CALL "SO-CALLED LOSS OF USE CASES." AND I CALLED THEM SO-CALLED LOSS OF USE BECAUSE I THINK THEY'RE ACTUALLY ANYTHING BUT THAT, AND I'LL TALK ABOUT THAT A LITTLE BIT LATER. BUT THERE ARE LOSS OF USE CASES, CHINESE DRYWALL, ROSS AND WIDDER. AND THOSE CASES EXAMINED THE MEANING OF THE PHRASE "DIRECT PHYSICAL LOSS." AND THE PLAINTIFF RELIES ON THOSE CASES PRETTY HEAVILY. PLAINTIFF ALSO RELIES ON THE FIRST CIRCUIT CASE OF MANGERCHINE. AND FOR THE CONCEPT THAT DIRECT PHYSICAL LOSS AND DIRECT PHYSICAL DAMAGE MEAN DIFFERENT THINGS. AND THE FIRST CIRCUIT DID ACKNOWLEDGE THAT CONCEPT IN MANGERCHINE AND SAID, "LOSS AND DAMAGE ARE NOT NECESSARILY SYNONYMOUS TERMS." AND IT GAVE THE EXAMPLE OF A THEFT AS AN EXAMPLE OF A LOSS THAT WOULD NOT BE DAMAGE. THINK ANOTHER SCENARIO COULD BE LOSS OF PROPERTY WOULD BE SOMETHING THAT'S

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TOTALLY DESTROYED BECAUSE THEN THE INSURED NO
LONGER HAS IT. I THINK THAT'S ANOTHER EXAMPLE OF
SOMETHING THAT'S LOSS OF, NOT NECESSARILY DAMAGE
TO. THE PROBLEM WITH THE RELIANCE ON DIRECT
PHYSICAL LOSS IN THOSE CASES, SPECIFICALLY, IS THE
CIVIL AUTHORITY PROVISION REQUIRES DAMAGE, YOUR
HONOR, WHEN A COVERED COST OF LOSS CAUSES DAMAGE
TO THE PROPERTY OTHER THAN THE INSURED PROPERTY.
AND THAT'S THE CRITICAL COMPONENT BECAUSE WE DON'T
HAVE AN ALLEGATION OF DAMAGE HERE. WE DON'T HAVE
EVIDENCE OF DAMAGE HERE. SO, RELIANCE ON THE LOSS
OF USE CASES IS ENTIRELY INAPPROPRIATE TO
ESTABLISH DAMAGE. THE SECOND FAILURE I THINK OF
THE CLAIMS, YOUR HONOR, IS THAT THE ARGUMENT THAT
THE PRESENCE OF THE VIRUS ALONE CAN EQUATE TO
DIRECT PHYSICAL LOSS OF OR DAMAGE TO PROPERTY.
THE INSURANCE SUBMITS AN AFFIDAVIT FROM A
DR. MAYER OR DR. MEYER, AND THERE'S JUST ONE
PARAGRAPH, WHICH FRANKLY WE'VE INCLUDED AN
EVIDENTIARY OBJECTION AS TO THE SUFFICIENCY OF
THAT SUPPORTING AFFIDAVIT, BUT ALL HE DOES, YOUR
HONOR, IS MAKE A STATEMENT THAT HE BELIEVES THAT
THERE'S EVIDENCE OF THE PRESENCE OF THE VIRUS
WITHIN ONE MILE OF THE INSURED'S PROPERTY. HE
MAKES ABSOLUTELY NO STATEMENT AT ALL THAT THE
VIRUS, BEING PRESENT, AFFECTS PROPERTY IN ANY WAY,
THAT THERE'S ANY DAMAGE TO PROPERTY IN ANY WAY,
JUST THAT IT'S WITHIN THE AIR. SO, EVEN IF WE
ACCEPT THAT CONCEPT, YOUR HONOR, THE VIRUS IS
EVERYWHERE. WE KNOW THAT. THAT'S WHY WE'VE SHUT
DOWN THE WORLD ECONOMY. THAT'S WHY WE'RE WEARING
MASKS. THAT'S WHY WE'RE ON ZOOM HERE TODAY

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INSTEAD OF BEING ACROSS THE STREET IN THE COURT
HOUSE. THERE IS NOTHING UNIQUE ABOUT 333 3RD
STREET OR ANYTHING WITHIN A MILE OF THAT PROPERTY
IN THE SENSE OF WHAT THE VIRUS DOES IN TERMS OF
THE AIR OR THE ATMOSPHERE OR PROPERTY. YOUR HONOR
IS STILL USING YOUR DESK. I'M USING THIS
CONFERENCE TABLE HERE. OPPOSING COUNSEL IS
SITTING IN HIS OFFICE. AS MUCH AS THIS VIRUS IS
AFFECTING HUMAN LIFE, AND UNDERSTANDABLY IT IS,
IT'S NOT AFFECTING PROPERTY. AND IT IS AN
EMPATHETIC SITUATION, YOUR HONOR, AND I DO HIGHLY
SYMPATHIZE WITH THE OWNERS OF CITY BAR AND OTHER
BUSINESSES THAT HAVE COMPLETELY SHUDDERED.
THERE'S NO QUESTION THAT THERE'S BEEN A
DISPROPORTIONATE IMPACT OF THIS VIRUS ON CERTAIN
BUSINESSES, BUT IT'S NOT BECAUSE OF THE UNIQUENESS
OF THAT PROPERTY, IT'S BECAUSE OF THE TYPE OF
BUSINESS THAT OPERATES AT THAT PROPERTY. AND
THAT'S WHY OUR GOVERNMENT FELT THAT IT WAS
APPROPRIATE FOR SOME BUSINESSES TO CLOSE DURING
THIS PANDEMIC. YOUR HONOR, I WANT TO CIRCLE BACK
TO THOSE LOSS OF USE CASES. AND I CALL THEM
SO-CALLED LOSS OF USE CASES BECAUSE IN EACH OF
THOSE CASES, THERE WAS ACTUAL DEMONSTRABLE
PHYSICAL DAMAGE. THE COURTS USE LOSS OF USE TO
SHOW EVIDENCE OF THAT ACTUAL DAMAGE. IN CHINESE
DRYWALL AND ROSS, THE CLAIMS ARE FOR CHINESE
DRYWALL AND THE DEFECTIVE NATURE OF THAT. IT WAS
SO BAD THAT IT CORRODED METAL PROPERTY. IT CAUSED
ELECTRICAL WIRING TO DETERIORATE AND CAUSE A
NOXIOUS ODOR, NONE OF WHICH IS ANYTHING REMOTELY
SIMILARLY PRESENT HERE. AND IN WIDDER, THE LEAD

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CONTAMINATION WAS SO BAD THAT THE INSURED HAD TO
GUT AND REMEDIATE ITS HOME BEFORE IT COULD BE
OCCUPIED AND USED AS A PROPERTY. JUDGE FALLON
NOTED THAT IN CHINESE DRYWALL IN THE EASTERN
DISTRICT OF LOUISIANA AND CITED COUCH ON
INSURANCE, WHICH MANY OF THESE CASES AROUND THE
COUNTRY ON THESE ISSUES RELATED HERE ABOUT COVID
AND INSURANCE COVERAGE FOR THAT, THEY ALL CITE TO
COUCH ON INSURANCE. THE OVERWHELMING MAJORITY OF
CASES THAT HAVE GONE IN THE INSURER'S FAVOR, THAT
THERE HAS TO BE DISTINCT DEMONSTRABLE DAMAGE TO
SHOW DIRECT PHYSICAL LOSS OF OR DAMAGE TO
PROPERTY. NOW, YOUR HONOR, I WANT TO TURN NOW TO
A COUPLE OF SCENARIOS THAT, IF WE ACCEPT
PLAINTIFF'S THEORIES, WHAT COULD HAPPEN IN THE
FUTURE. AT BEST, THIS IS A TEMPORARY LOSS OF USE.
THERE IS NO PERMANENT DISPOSSESSION OF PROPERTY.
WHEN THE CIVIL AUTHORITY ORDERS ARE LIFTED, THE
INSURED CAN UNLOCK ITS DOOR AND FLIP ITS LIGHTS
AND RESUME OPERATIONS AS CAN ANY OTHER BUSINESS
THAT'S BEEN AFFECTED BY THIS PANDEMIC. A PIECE OF
JEWELRY THAT IS STOLEN IS A PERMANENT
DISPOSSESSION OF PROPERTY. THAT IS A LOSS OF
PROPERTY THAT WOULD BE RECOVERABLE. BUT IF WE
ALLOW TEMPORARY DISPOSSESSION TO SUFFICE, IF THAT
STOLEN PIECE OF JEWELRY IS RETURNED, IS THAT
COVERED? ANOTHER SCENARIO THAT COMES TO MIND,
YOUR HONOR, IS A ZONING REGULATION. FOR EXAMPLE,
IF THE GOVERNMENT COMES AND SAYS, "CITY BAR CAN'T
OPERATE AS A BAR ANYMORE BECAUSE IT'S BEEN REZONED
AS RESIDENTIAL," THE INSURED WOULD CERTAINLY HAVE
A LOSS OF USE IN THAT SITUATION, AND, FRANKLY, A

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STRONGER LOSS OF USE BECAUSE THAT WOULD BE PRESUMABLY PERMANENT. BUT WE WOULD NEVER CONSIDER A ZONING REGULATION CHANGE TO BE A DIRECT PHYSICAL LOSS OF OR DAMAGE TO PROPERTY, AND THAT'S EXACTLY WHAT'S GOING ON HERE. THE GOVERNMENT'S TELLING THE INSURED WHAT IT CAN DO WITH ITS PROPERTY. NOW, THE INSURED HASN'T ACTUALLY ALLEGED THIS, JUDGE, BUT IF WE GO A STEP FURTHER AND ACCEPT THAT MAYBE THEY MEANT TO ALLEGE IT, THAT THE VIRUS ACTUALLY ATTACHES TO PROPERTY, THE CDC TELLS US, WE CAN LOOK ON ITS WEBSITE AND WE KNOW, THE VIRUS DIES WITHIN MINUTES OR HOURS. IT CAN BE ELIMINATED JUST BY WAITING, OR IF YOU NEED TO DO IT FASTER THAN THAT, YOU CAN USE HOUSEHOLD CLEANERS TO DO SO. I THINK THE MAMA JO'S CASE OUT OF THE 11TH CIRCUIT AS WELL AS A MULTITUDE OF MOLD CASES AROUND THE COUNTRY, IF YOU CAN CLEAN IT, IT'S NOT DAMAGE. AND THE REAL WORLD SCENARIO I THINK OF, JUDGE, I HAVE ONE SIDE OF MY HOUSE THAT DOESN'T GET ENOUGH SUN. I GET MILDEW ON IT EVERY YEAR. I HAVE TO GO CLEAN IT. THAT'S NOT DIRECT PHYSICAL LOSS OF OR DAMAGE TO PROPERTY. HOSPITALS THAT CLEAN TO PREVENT DISEASE SPREAD CERTAINLY BUT BEYOND COVID, BUT PARTICULARLY DURING COVID, CLEANING IN THAT SCENARIO IS NOT DIRECT PHYSICAL LOSS OF OR DAMAGE TO PROPERTY. SAME WITH RESTAURANTS WHO HAVE TO ROUTINELY CLEAN THEIR WORK SURFACES TO MAKE SURE THAT POULTRY OR BEEF RAW PRODUCT DOES NOT CONTAMINATE ITS PROPERTY. IF WE ACCEPT THAT CLEANING IS ENOUGH TO SUSTAIN DIRECT PHYSICAL LOSS OF OR DAMAGE TO PROPERTY, THOSE ARE VERY REAL WORLD SCENARIOS WHERE THAT COULD HAPPEN.

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YOUR HONOR, THERE'S BEEN NO EVIDENCE PRODUCED THUS FAR TO SHOW THAT THE VIRUS WAS PRESENT ANYWHERE. WE FRANKLY CAN'T KNOW THAT. AT BEST, THERE'S A THREATENED PRESENCE OF THE VIRUS. THERE'S THE POSSIBLE THREATENED PRESENCE OF THE VIRUS. AND WE KNOW, FROM LOOKING AT THE CIVIL AUTHORITY CASES THAT WE HAVE AVAILABLE TO US UNDER LOUISIANA LAW, FOR EXAMPLE, DICKIE BRENNAN FROM THE FIFTH CIRCUIT, THAT THE THREAT OF DAMAGE IS NOT ENOUGH TO TRIGGER CIVIL AUTHORITY COVERAGE. YOU MUST HAVE ACTUAL DAMAGE AND WE JUST DON'T HAVE ANY EVIDENCE OF THAT. THERE IS SOME OTHER CASES AROUND THE COUNTRY ABOUT FOOD CONTAMINATION, AND THOSE ARE VERY CONSISTENT WITH THE FIFTH CIRCUIT ON THESE ISSUES. IN GENERAL MILLS, THE PRODUCT WAS ACTUALLY CONTAMINATED AND COULDN'T BE USED AND THE GOVERNMENT TOLD THEM SO. AND THE COURT FOUND IN THAT CASE THAT CIVIL AUTHORITY COVERAGE WAS TRIGGERED THERE. IN THE SOURCE FOOD TECH CASE, I BELIEVE IT WAS DECIDED UNDER THE SAME STATE LAW. I THINK IT WAS MINNESOTA BUT I COULD BE WRONG ON THAT. IT WAS NOT ACTUALLY CONTAMINATED. IT WAS BEEF PRODUCT THAT WAS BEING BROUGHT INTO THE COUNTRY AND THE GOVERNMENT TOLD THE OWNER OF THAT PROPERTY IT COULDN'T BE USED BECAUSE IT MIGHT BE CONTAMINATED. IT WAS EVEN PRESUMED TO BE CONTAMINATED. BUT THE COURT FOUND THERE THAT CIVIL AUTHORITY COVERAGE WAS NOT TRIGGERED BECAUSE THERE WAS NO SHOWING OF ACTUAL DAMAGE. AND, YOUR HONOR, THIS IS IMPORTANT, BECAUSE IT ALL COMES DOWN TO CAUSATION, WHY DID THE GOVERNMENT ISSUE ITS ORDER? THE ORDERS HAVE TO BE ISSUED BECAUSE

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OF ACTUAL DAMAGE TO OTHER PROPERTY UNDER THE CIVIL
AUTHORITY PROVISION. IT'S ACTUALLY IN REVERSE,
RIGHT? WHAT THE INSURED IS ALLEGING IS THAT LOSS
OF USE IS THE PROPERTY DAMAGE, BUT THE LOSS OF USE
ISN'T WHAT TRIGGERED THE CIVIL AUTHORITY ORDER.
IT'S THE CIVIL AUTHORITY ORDER THAT CAUSED THE
LOSS OF USE. SO, AGAIN, THAT DOESN'T WORK WITH
THE POLICY WORDING OF THE CIVIL AUTHORITY
PROVISION. LOUISIANA LAW REQUIRES SUFFICIENT
PROXIMATE CAUSE FOR CIVIL AUTHORITY COVERAGE. THE
FIRST CIRCUIT HASN'T DEALT WITH THESE ISSUES VERY
MUCH. THE CLOSEST CASE I COULD FIND WAS MAGEE
VERSUS NATIONAL FIRE OUT OF THE FIRST CIRCUIT.
AND IN THAT CASE, THE COURT DID ACKNOWLEDGE THAT
ALL FOUR ELEMENTS OF CIVIL AUTHORITY COVERAGE MUST
BE SATISFIED. IT MUST BE PROVEN BY THE INSURED TO
BE SUSTAINED. SO, THAT ISSUE OF BEING REQUIRED TO
SHOW EACH ELEMENT IS CONSISTENT WITH THE OTHER
CASES IN LOUISIANA ON EFFICIENT PROXIMATE CAUSE,
THE NEXUS THAT MUST BE SHOWN BETWEEN THE CAUSATION
ORDER AND THE DAMAGE AS WELL AS THE INSURED'S OWN
PROHIBITED ACCESS, ALL OF THAT MUST BE PROVEN.
AND WE JUST DON'T HAVE ANY EVIDENCE OF THAT HERE.
AND IT MIGHT BE HARSH, IT WAS HARSH IN MY OWN
MIND, YOUR HONOR, TO SAY THAT A BAR, WHO'S
COMPLETELY PROHIBITED FROM OPERATING AS A BAR IS
NOT PROHIBITED ACCESS TO ITS PROPERTY. I
UNDERSTAND THAT THAT MIGHT BE A HARSH VIEW.
THAT'S EXACTLY WHAT THE FIFTH CIRCUIT DID IN
DICKIE BRENNAN. IT'S WHAT THE OTHER FEDERAL
COURTS THAT HAVE CONSIDERED THESE ISSUES. WE JUST
DON'T HAVE MUCH IN STATE COURT ON THESE ISSUES BUT

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THAT'S WHAT THEY HAVE DONE THERE. BUT WHAT'S MORE
IMPORTANT THAN THAT, YOUR HONOR, IT'S NOT ONLY THE
INSURED'S PROPERTY THAT MUST HAVE ITS ACCESS
PROHIBITED, THE AREA IMMEDIATELY AROUND IT MUST
ALSO HAVE ITS ACCESS PROHIBITED DUE TO THE
DANGEROUS CONDITIONS TO THE PROPERTY THAT'S BEEN
DAMAGED DUE TO RECOVERY CAUSE OF LOSS. WE DON'T
HAVE THAT HERE. THIS PROPERTY IS LOCATED ON 3RD
STREET. I THINK THE COURT HOUSE IS WITHIN A MILE
OF IT. MY OFFICE IS WITHIN A MILE OF IT. I'VE
WALKED DOWN 3RD STREET MULTIPLE TIMES TO GO TO
MATHERNE'S TO GET MY LUNCH SUPPLY. THERE IS NO
PROHIBITED ACCESS TO THE AREA IMMEDIATELY AROUND
THE INSURED'S PROPERTY. IT JUST DOES NOT EXIST.
I WANT TO TOUCH BRIEFLY, YOUR HONOR, ON THE
BUSINESS INCOME SECTION OF THE POLICY TO THE
EXTENT THAT THE INSURED CHANGES ITS VIEW AND SEEKS
TO RECOVER UNDER THAT POLICY. HE ALLEGED THAT
THERE WAS THE PRESENCE OF THE VIRUS AT ITS
PREMISES BUT DIDN'T GO SO FAR AS TO SEEK COVERAGE
UNDER THAT PARTICULAR PROVISION. AND I THINK THE
REASON IS THIS, LOSS OF USE CAN POSSIBLY BE A
SUSPENSION OF OPERATIONS, I'LL CONCEDE THAT FOR
PURPOSES OF THIS AGREEMENT. BUT THE SUSPENSION OF
OPERATIONS HAS TO ALSO BE DUE TO DIRECT PHYSICAL
LOSS OF OR DAMAGE TO PROPERTY. IT CAN'T BE BOTH.
IT CAN'T BE THE SUSPENSION AND THE DIRECT PHYSICAL
LOSS. IT WOULD HAVE TO BE ONE OR THE OTHER, AND
EACH ONE HAS TO BE REQUIRED UNDER THOSE POLICY
PROVISIONS. AND, YOUR HONOR, I'LL END WITH THIS,
THE POLICY HAS TO BE READ AS A WHOLE. THE
INSURED'S ARGUMENTS ARE WITH RESPECT TO DIRECT

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PHYSICAL LOSS, IGNORE CERTAIN PROVISIONS SUCH AS THE PERIOD OF RESTORATION, WHICH DISTINCTLY REQUIRES A REPAIR, IT IGNORES THE VALUATION PROVISION WHICH TALKS ABOUT HOW YOU VALUE THAT LOSS. AS WELL, IT WOULD ABSOLUTELY OBLITERATE BOTH THE BUSINESS INCOME AND THE CIVIL AUTHORITY PROVISIONS THEMSELVES BECAUSE THE DAMAGE TO PROPERTY SECTION, THE INSURED'S PROPERTY, WHEN YOU'RE TALKING ABOUT THE BUILDING AND ITS COVERAGE, ALL IT REQUIRES IS DAMAGE DUE TO DIRECT PHYSICAL LOSS OF COVERAGE OF DAMAGE TO PROPERTY. HOW WOULD YOU VALUE A TEMPORARY LOSS OF USE? YOU WOULD VALUE IT IN TERMS OF INCOME. THAT WOULD OBLITERATE THE NEED FOR THE BUSINESS INCOME IN CIVIL AUTHORITY SECTIONS OF THE POLICY. OBVIOUSLY, IT HAS TO BE, EACH ONE STANDS ON ITS OWN, AND WE CAN'T READ THEM TO THE EXCLUSION OF THE OTHERS. THEY ALL HAVE TO GO TOGETHER. AND AS SYMPATHETIC AS THIS SITUATION IS AROUND THE COUNTRY, WHICH WE'RE ALL LIVING, WE'RE ALL DEALING WITH IT, OUR GOVERNMENTS HAVE SHUT THINGS DOWN BECAUSE OF IT, AND IN NO REASONABLE CONTEMPLATION IN MY MIND CAN IT BE THAT A GOVERNMENT SHUT DOWN THE WORLD ECONOMY TO SAVE BARSTOOLS AND DRYWALL. THEY DID IT TO SAVE HUMAN LIFE. AND AT THE END OF THE DAY, THAT'S WHAT ALL OF THIS IS ABOUT. AND FOR THAT REASON, YOUR HONOR, WE WOULD RESPECTFULLY REQUEST THAT SUMMARY JUDGMENT BE GRANTED IN FAVOR OF THE DEFENDANTS.

THE COURT: MR. HONEYCUTT?

MR. HONEYCUTT: GOOD MORNING, YOUR HONOR, BLAYNE HONEYCUTT HERE ON BEHALF OF CITY BAR.

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FIRST, WE WOULD LIKE TO OFFER, INTRODUCE, AND FILE INTO EVIDENCE OUR OPPOSITION AND ALL ATTACHMENTS HERETO. AND I'M GLAD WE CAN MAKE YOUR DAY WITH AN INTERESTING ARGUMENT. BEFORE I RESPOND TO A COUPLE MY OPPONENT'S ISSUES, I DO WANT TO POINT OUT THAT THEY HAD RAISED AN OBJECTION IN THEIR REPLY MEMORANDUM TO P-6, THE SAMPLE VIRUS EXCLUSION. AND TO BE HONEST WITH YOU, JUDGE, THAT'S THE EASIEST ARGUMENT. THEY HAD A VIRUS EXCLUSION IN THEIR TOOL BAG. THEY COULD HAVE ATTACHED IT TO THE POLICY. THEY COULD HAVE EXCLUDED THIS VIRUS COVERAGE AND THEY DIDN'T. IF THEY'RE SERIOUSLY ARGUING THAT THAT'S NOT AUTHENTICATED OR HEARSAY, I DID PUT MY OPPOSITION TO THE SUMMARY JUDGMENT THAT THIS IS AT THE PRELIMINARY STAGES. WE'VE DONE NO DISCOVERY. AT A MINIMUM, I WOULD ASK THAT YOU DENY THE MOTION FOR SUMMARY JUDGMENT AND GRANT ME PERMISSION TO DO DISCOVERY. LET ME TAKE SOME CORPORATE DEPOSITIONS AND ASK THEM: ISN'T IT TRUE YOU HAD A VIRUS EXCLUSION AVAILABLE TO YOU? ISN'T IT TRUE YOU DIDN'T INCLUDE IT IN THIS POLICY? ISN'T IT TRUE THAT WOULD HAVE TAKEN CARE OF EVERYTHING? SO, THAT'S WHAT MY BACKUP ARGUMENT IS, AT A MINIMUM, IT'S AT THE PRELIMINARY STAGES OF THIS MATTER AND IT SHOULD BE NOT DENIED FOR THAT PURPOSE. CONCERNING EXHIBIT P-5, THE OBJECTION THAT THE DEFENSE PUTS IN THEIR REPLY MEMORANDUM, AGAIN, IS THAT, DR. MAYER DOESN'T STATE A FACT. I WOULD RESPECTFULLY ARGUE THAT, IN FACT, IT IS A FACT THAT HE STATED THAT THE CORONA VIRUS EXISTED WITHIN ONE MILE OF THE CITY BAR AND THAT THAT WAS

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ON OR BEFORE MARCH 16TH, 2020. INITIALLY, THE VIRUS WAS AN AIRBORNE VIRUS THAT EASILY MIGRATES TO DIFFERENT PHYSICAL LOCATIONS AND ATTACHED ITSELF TO THESE PHYSICAL LOCATIONS. HAD DR. MAYER SAID, "IN MY EXPERT OPINION, THERE IS COVERAGE IN THIS CASE," THAT WOULD BE A CONCLUSION. BUT INSTEAD, HE SAID A FACT, "IN MY EXPERT OPINION, IT EXIST," WHICH MAKES IT A GENUINE ISSUE OF MATERIAL FACT AS A REASON YOU SHOULD DENY THE MOTION FOR SUMMARY JUDGMENT. THE CASE CITED BY DEFENSE IN THIS CASE WAS AN AFFIDAVIT WHERE A WITNESS TESTIFIED THAT TWO INDIVIDUALS WERE INVOLVED IN A CONSPIRACY. HE DIDN'T TESTIFY TO ANY UNDERLYING FACTS THAT WOULD SUPPORT THAT CONSPIRACY. YOU KNOW, IT'S THE SAME EXAMPLE THAT, IF SOMEBODY GETS ON THE STAND AND SAYS, "THE DEFENDANT'S NEGLIGENT," WELL YOU GOT TO ESTABLISH UNDERLYING FACTS TO ESTABLISH THE DEFENDANT'S NEGLIGENCE. IN THIS CASE, DR. MAYER STATES A FACT THAT THE VIRUS WAS LOCATED WITHIN ONE MILE OF THE CITY BAR ON OR BEFORE MARCH 16TH, 2020. ADDITIONALLY, ALL THE CASES CITED BY THE DEFENSE CONCERNING THE VIRUS, NONE OF THOSE ARE LOUISIANA CASES, YOUR HONOR. NONE OF THEM CONTAIN THE SAME REQUIREMENTS OF CONTRACT INTERPRETATION, ET CETERA, THAT LOUISIANA COURTS DO. IN FACT, EVEN AS RECENTLY, AND IT WAS AFTER I FILED MY OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT, THE SUPREME COURT, LET ME SEE, HAD A FEDERAL JUDGE IN THE MATTER OF HENDERSON ROAD RESTAURANT SYSTEM'S, INC. D/B/A HYDE PARK GRILLE VERSUS ZURICH RULED IN FAVOR OF COVERAGE. SO, IT'S NOT LIKE WE'RE ASKING YOU TO JUMP OUT ON

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A LIMB AND RULE THAT NO OTHER JUDGE ANYWHERE IN THE NATION, THIS CASE HAS GONE IN BOTH WAYS ON THIS ISSUE. AND IMPORTANTLY, THIS LAW FIRM, MS. DODD AND THIS COMPANY HAS ALREADY TRIED A CASE IN LOUISIANA. IT'S MY UNDERSTANDING THERE'S BEEN NO JUDGMENT RULED ON THAT CASE. BUT THE EXACT SAME POLICY, EXACT DEFENDANT, EXACT DEFENSE LAW FIRM HAS ALREADY TRIED THIS CASE IN LOUISIANA AND THEY'RE JUST WAITING ON A DECISION. NOW, WITH THE VIRUS AND ALL, I'VE BEEN LUCKY, I HAVEN'T CAUGHT THE VIRUS BUT I HAVEN'T GOT THE VACCINE YET EITHER, SO I'M JUST HOLDING ON. I MIGHT WOULD SUGGEST THAT, AS A PRACTICAL MATTER, THIS CASE, MAYBE JUST STAY THIS CASE PENDING THE OUTCOME OF THE OTHER CASE BECAUSE THEY'RE GOING TO APPEAL THIS TO THE LOUISIANA SUPREME COURT. WE'LL HAVE A DECISION SOONER OR LATER. SO, AS A PRACTICAL STANDPOINT, THAT MAY BE THE BEST THING TO DO IN THIS CASE, YOUR HONOR. OF COURSE, IF YOU HAVE ANY QUESTIONS, I'D BE HAPPY TO ANSWER THEM. I WOULD JUST POINT OUT THAT THE KEAN MILLER CASE, AND ALL THOSE, WERE A THREAT TO LOSS OF USE NOT ACTUAL LOSS OF USE. AND THAT DR. MAYER'S DEPOSITION CLEARLY ESTABLISHES THAT THE VIRUS WAS LOCATED WITHIN ONE MILE OF THE CITY BAR ON OR BEFORE MARCH 16TH, 2020, WHICH WOULD JUSTIFY YOU DENY THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

THE COURT: MS. DODD, ANYTHING FURTHER?

MS. DODD: YES, YOUR HONOR, JUST A FEW RESPONSES. BUT FIRST, LET ME ADDRESS THE ARGUMENT ABOUT INCLUSION OF THE VIRUS EXCLUSION. EXCLUSION -- I MEAN, A CONSIDERATION OF PAROLE

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EVIDENCE OF COURSE IS ONLY ALLOWED IF AND WHEN THE COURT DETERMINES THAT THE POLICY IS AMBIGUOUS ON SOME PARTICULAR TERM, THEN IT CAN CONSIDER PAROLE EVIDENCE WITH RESPECT TO THAT PARTICULAR TERM. THE PHRASES WE'RE DEALING WITH, "DIRECT PHYSICAL LOSS OF OR DAMAGE TO," AREN'T DEFINED BY A VIRUS EXCLUSION. SO, FIRST OF ALL, A VIRUS EXCLUSION THAT IS NOT PART OF THIS POLICY IS NOT GOING TO HELP THE COURT DEFINE THOSE TERMS. I THINK THOSE TERMS ARE VERY WELL-DEFINED. I THINK THE FIRST CIRCUIT IN MANGERCHINE DID A GOOD JOB OF IT. I THINK THE OTHER CASES THAT ARE AVAILABLE OUT THERE EXPLAIN IT. AND I DON'T THINK INCLUSION OR CONSIDERATION OF THAT EVIDENCE IS APPROPRIATE IN THIS CASE. LET ME ALSO ADDRESS THE ISSUE OF HIS STATEMENT THAT THERE'S BEEN NO DISCOVERY. THAT'S BEEN BY HIS CHOICE. HE FILED THIS CASE IN JULY. THIS MOTION HAS BEEN PENDING FOR AT LEAST A COUPLE OF MONTHS. I THINK WE FILED IT IN NOVEMBER IF I REMEMBER CORRECTLY.

THE COURT: OCTOBER.

MS. DODD: HE COULD HAVE PICKED UP THE PHONE THEN AND SAID, "I WANT TO DO DISCOVERY." HE DID NOT. HE COULD HAVE ISSUED SUBPOENAS TO EVERY PROPERTY OWNER ON 3RD SHEET HAD HE CHOSEN TO. HE CHOSE NOT TO DO THAT. I'M GLAD HE MENTIONED THE HENDERSON CASE, YOUR HONOR. THE HENDERSON CASE HAS DISTINCTLY DIFFERENT WORDING THAN WE HAVE HERE. SPECIFICALLY, THE PERIOD OF RESTORATION TALKED ABOUT THE CONCEPT OF RESTORE. WE DON'T HAVE THAT WORDING HERE. THAT WAS PART OF THE COURT'S REASONING FOR GRANTING THE SUMMARY

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JUDGMENT FOR THE INSURED IN THAT CASE AS WELL THE CIVIL AUTHORITY PROVISION WAS ENTIRELY DIFFERENT. IT ONLY REQUIRED SUSPENSION NOT PROHIBITED ACCESS. THOSE WORDS WEREN'T IN THERE. IT'S ENTIRELY DIFFERENT WORDING THAN WHAT WE HAVE HERE. THE CASES THAT ARE MORE ANALOGOUS, YOUR HONOR, AND THERE ARE CASES, IT STATES WHERE LOUISIANA COURTS ROUTINELY LOOK TO. AND LOUISIANA AND MISSISSIPPI, OUR NEIGHBORS ON BOTH SIDES, HAVE GRANTED 12(B)(6) MOTIONS IN THE FEDERAL COURT SYSTEM. FOR EXAMPLE, IN THE DIESEL CASE CITED IN OUR BRIEFS, THAT WAS A BARBER SHOP, ALSO COMPLETELY SHUT DOWN BY THE GOVERNMENT ORDERS, AND 12(B)(6) MOTION WAS GRANTED IN FAVOR OF THE INSURERS IN THAT CASE. AND THE SOUTHERN DISTRICT OF MISSISSIPPI, REAL HOSPITALITY VERSUS TRAVELERS, AGAIN, 12(B)(6), AND I THINK THAT CASE IS REALLY CRITICAL BECAUSE ONE OF THE THINGS THE COURT NOTED IN THAT CASE WAS A DISPROPORTIONATE IMPACT ISN'T ENOUGH. AND WHAT WE HAVE HERE IS, SURE, IT'S A BAR, IT IS DISPROPORTIONATELY IMPACTED THAN OTHER BUSINESSES SUCH AS, SAY, A LAW FIRM. I UNDERSTAND THAT. WHAT THE COURT DID IN SOUTHERN HOUSE -- REAL HOSPITALITY IS ACKNOWLEDGE THE PRINCIPAL THAT COMMERCIAL PROPERTY INSURANCE INSURES THE PROPERTY. IT DOESN'T INSURE THE BUSINESS ENTERPRISE ITSELF. AND THAT'S THE CRITICAL ISSUE IN THIS CASE AND I THINK IT'S SOMETHING THAT, IT CERTAINLY THAT NEEDS TO BE FACTORED AND CONSIDERED. AND, LASTLY, YOUR HONOR, DR. MAYER'S AFFIDAVIT, AGAIN, ALL HE SAYS IS THE PRESENCE OF THE VIRUS IS THERE. HE GOES NO STEPS FURTHER TO

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TALK ABOUT FACTS. I'M NOT TALKING ABOUT LEGAL CONCLUSIONS, BUT HE DOESN'T MAKE ANY STATEMENT WHATSOEVER AS TO ANYTHING THAT CAN BE CONSTRUED UNDER THE LAW AS DAMAGE. LASTLY, YOUR HONOR, I'LL OFFER AND INTRODUCE INTO EVIDENCE OUR BRIEFS AND EXHIBITS.

THE COURT: IT'S ALL --

MS. DODD: I DON'T KNOW THAT THAT'S REQUIRED APPARENTLY.

THE COURT: THIS IS A SUMMARY JUDGMENT. THIS IS A SUMMARY JUDGMENT SO IT'S ALREADY IN THERE.

MS. DODD: YES.

THE COURT: ANYTHING -- WITH THE EXCEPTION OF ANY DOCUMENTS --

MS. DODD: YES.

THE COURT: -- THAT WERE OBJECTED TO. AND STARTING WITH THAT --

MS. DODD: WE ACTUALLY OBJECTED TO TWO.

THE COURT: I KNOW.

MS. DODD: OKAY. SORRY.

THE COURT: I'M GOING TO ADDRESS THOSE WHEN Y'ALL ARE DONE. ALL RIGHT.

MS. DODD: DOES YOUR HONOR HAVE ANY QUESTIONS?

THE COURT: NO. AND I'M GOING TO ADDRESS FIRST, P-5, WHICH IS THE AFFIDAVIT OF DR. MAYER. I'M GOING TO DENY THE MOTION TO STRIKE, BUT I AM GOING TO SAY THAT I DON'T THINK THAT DR. MAYER'S AFFIDAVIT REALLY RAISES ANY QUESTION OF FACT. AT PARAGRAPH FIVE, HE STATES, "IT'S MY EXPERT OPINION THAT ON MARCH 16TH, 2020 AND BEFORE, THE COVID-19 VIRUS WAS LOCATED WITHIN A MILE OF CITY BAR ON 333

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3RD STREET." BASED ON WHAT FACTS? I MEAN, WAS IT
SOMEBODY DRIVING BY IN A VEHICLE? IT COULD HAVE
BEEN SOMEBODY IN PORT ALLEN, WHICH IS WITHIN A
MILE, THAT HAD THE VIRUS. AND THEN HE SAYS,
PARAGRAPH SIX, "THE VIRUS IS AIRBORNE, EASILY
MIGRATES TO DIFFERENT LOCATIONS." EVEN IF IT'S
EXISTING, THERE'S NO SHOWING THAT IT WAS IN THE
PLAINTIFF'S BUSINESS OR ANY BUSINESSES WITHIN ONE
MILE. SO, I DON'T THINK HIS AFFIDAVIT SERVES TO
RAISE A QUESTION OF FACT. AND P-6, THE EXCLUSION
FROM ANOTHER POLICY, UNDER 966(A)(4), I'M REQUIRED
TO GRANT THAT MOTION TO STRIKE BECAUSE IT'S NOT
WITHIN THOSE LISTED. IT WAS NOT ATTACHED TO AN
AFFIDAVIT, AND IT'S NOT PART OF THE POLICY HERE IN
QUESTION. NOW, TURNING TO THE MERITS, THE
DECLARATORY JUDGMENT, AT LEAST IN MY OPINION,
WANTS TO ANSWER TWO QUESTIONS: FIRST, WHETHER THE
VIRUS CONSTITUTES DAMAGE TO PROPERTY OR A LOSS OF
PROPERTY; AND WHETHER THERE'S COVERAGE UNDER THE
POLICY BECAUSE OF THAT? AND I'M OF THE OPINION
THE ANSWER TO THE FIRST QUESTION IS "NO." I DON'T
THINK THAT THE GOVERNOR'S ORDER OR THE VIRUS
ITSELF CONSTITUTES DAMAGE TO PROPERTY SO I DON'T
THINK THAT THERE'S COVERAGE UNDER THE POLICY. AND
THIS IS WHY: I LOOK AT THE MARCH 16TH, 2020
SHUTDOWN ORDER, ISSUED A PUBLIC HEALTH EMERGENCY,
SECTION TWO CLOSED CASINOS, MOVIE THEATERS, BARS,
BOWLING ALLIES, GYMS UNTIL AT LEAST APRIL 12TH AND
THEN THAT WAS EXTENDED. THE BASIS OF THE SUMMARY
JUDGMENT IS, FIRST OF ALL, THERE'S NO PROPERTY
LOSS OR NO DAMAGE THAT OCCURRED, ONLY THE SHUTDOWN
ORDER, AND ONLY ECONOMIC IMPACT WITHOUT ANY DAMAGE

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OF PHYSICAL LOSS TO PROPERTY. SECOND OF ALL,
PLAINTIFF WAS NOT PROHIBITED ACCESS TO THE INSURED
PROPERTY. AND, FINALLY, IT WAS NOT ISSUED IN
RESPONSE TO A DANGEROUS PHYSICAL CONDITION OR
RESULTING DAMAGE TO PROPERTY WITHIN A MILE. AND I
STARTED WITH THE CIVIL AUTHORITY COVERAGE ISSUE.
AND IT'S PRETTY CLEAR, "WHEN A COVERED CAUSE OF
LOSS CAUSES DAMAGE TO PROPERTY OTHER THAN THE
INSURED'S WILL PAY ACTUAL LOSS OF BUSINESS INCOME
SUSTAINED PROVIDED THAT BOTH OF THESE APPLY:
FIRST, ACCESS TO THE AREA IMMEDIATELY SURROUNDING
THE DAMAGED PROPERTY AS PROHIBITED BY THE CIVIL
AUTHORITY AS A RESULT OF DAMAGE AND THE INSURED'S
PREMISES, THIS IS WITHIN A MILE OF THE DAMAGED
PROPERTY, AND THE ACTION OF THE CIVIL AUTHORITY IS
TAKEN IN RESPONSE TO A DANGEROUS PHYSICAL
CONDITION RESULTING FROM DAMAGE OR FROM ACTION
TAKEN TO ENABLE CIVIL AUTHORITIES TO HAVE
UNIMPEDED ACCESS TO OUR AREA." AND WHEN I READ
THAT PROVISION, THE FIRST THING THAT POPPED INTO
MY HEAD IS PROBABLY THE MOST CURRENT EXAMPLE. I
THOUGHT ABOUT THE HARD ROCK CAFE ON CANAL STREET
IN NEW ORLEANS, THAT WHEN IT COLLAPSED, THE CITY
PARISH AND THE STATE CLOSED OFF SEVERAL BLOCKS IN
EVERY DIRECTION FOR PROTECTION. THEY DIDN'T WANT
ANYBODY ACCESSING BUILDINGS AROUND THE HARD ROCK
CAFE BECAUSE OF THE FACT THAT THERE WAS A DANGER
TO THE SURROUNDING AREAS, AND THEY NEEDED ACCESS
TO ASSESS THE DAMAGE AND TO FIGURE OUT THE BEST
COURSE OF ACTION TO ATTEMPT TO RETRIEVE THE BODIES
THAT WERE STILL CONTAINED IN THERE. HERE, I DON'T
THINK EITHER OF THOSE PROVISIONS, THOSE CONDITIONS

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APPLY. WE'VE GOT NO DAMAGE TO PROPERTY, EITHER THE PLAINTIFF'S PROPERTY, OR TO ANY OTHER PROPERTY WITHIN ONE MILE. AND, AGAIN, IT WAS NOT A DISASTER EMERGENCY ORDER THAT WE HAVE WITH HURRICANES OR OTHER NATURAL DISASTERS, THE FLOODS. THIS WAS A PUBLIC HEALTH DISASTER. IT WAS CAUSED BY THE PANDEMIC. AND I DON'T THINK IT INVOLVED ANY PHYSICAL DAMAGE CAUSED TO ANY PROPERTY; RATHER, IT WAS SIMPLY THE SPREAD OF A CONTAGIOUS DISEASE. AND EVEN PLAINTIFF ACKNOWLEDGES, IN THE OPPOSITION, THEY DON'T KNOW IF THEIR PROPERTY HAS BEEN CONTAMINATED OR IF ANY OTHER BUILDINGS WITHIN A MILE. AND EVERYBODY WILL CONCEDE, THIS COURT HOUSE IS WITHIN A MILE OF THE BAR, BUT IT'S BEEN CONSISTENTLY OPEN. AND PLAINTIFF DOESN'T CONTEND THAT THEY HAVE NOT BEEN GIVEN ACCESS TO THE PROPERTY. IN FACT, THEY SAID THEY HAVE GONE IN. AND THE GOVERNOR'S EMERGENCY ORDER EVEN ALLOWS THE EFFECTIVE BUSINESSES THAT WERE CLOSED DOWN TO GO IN, TO HANDLE PAYROLL, TO DO REGULAR MAINTENANCE AND UPKEEP, TO CLEAN THE PREMISES. THEY CAN COME AND GO. THEY SIMPLY CANNOT CONDUCT CERTAIN BUSINESSES DURING THE SHUTDOWN. AND, AGAIN, I LOOK AT THIS RECORD AND IT'S SIMPLY VOID OF ANY EVIDENCE TO ESTABLISH ANY PHYSICAL DAMAGE OR ANY PHYSICAL LOSS THAT WAS CAUSED TO ANY PROPERTY. AND I THINK EVERYBODY ACKNOWLEDGES, YOU KNOW, COVID DAMAGES PEOPLE NOT PROPERTY. AND THE PLAINTIFF HAS NOT SHOWN, ALSO, THAT THIS PROPERTY IS EITHER USELESS OR UNINHABITED. IT JUST CLAIMS THAT THE POSSIBLE PRESENCE OF THE VIRUS ON THE PREMISES, ALTHOUGH NEITHER PLAINTIFF NOR THE

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EXPERTS SHOW THAT IT'S THERE, AND THEY ACKNOWLEDGE THAT, "HEY, IT'S NOT UNINHABITABLE. WE'VE HAD ACCESS TO GO IN IT." AND THEN I STARTED LOOKING AT THE POLICY IN QUESTION, OTHERS -- I MEAN, THE OTHER PROVISIONS, IT EXCLUDES DAMAGE CAUSED BY LOSS OF USE OR LOSS OF MARKET, WHICH IS PRECISELY WHAT WE HAVE HERE; IS THAT, BECAUSE OF THIS ORDER, WE'VE LOST SOME BUSINESS, AND THAT'S OUR LOSS OF USE. AND THE POLICY DEFINES COVERED COSTS OF LOSS TO MEAN DIRECT PHYSICAL LOSS UNLESS THE LOSS IS EXCLUDED OR LIMITED IN THE POLICY. AND HERE, WE DON'T HAVE DIRECT PHYSICAL LOSS; RATHER, SIMPLY ECONOMIC LOSS DUE TO THE SHUTDOWN. AND, IN FACT, ONCE THE STAY-AT-HOME ORDER WAS LIFTED, THE PROPERTY WAS STILL IN THE EXACT SAME CONDITION, THOUGH IT MAY BE CLEANER THAN IT WAS PRIOR TO THE GOVERNOR'S OFFICE. AND WHEN I STARTED LOOKING AT THE COVERED LOSS SECTION, WHEN IT REFERS TO PHYSICAL LOSS OR DAMAGE TO TANGIBLE ITEMS OF PROPERTY INCLUDING BUILDING, FIXTURES, MACHINERY, EQUIPMENT, ONE OF THE THINGS IT COVERS IS DEBRIS REMOVAL, WHICH, AGAIN, GOES TO THAT ARGUMENT THAT COVERED LOSS OR COVERED DAMAGE IS PHYSICAL ITEMS. AND I FOUND IT INTERESTING THAT THE POLICY WOULD COVER A VIRUS TO THE COMPUTER SYSTEM BUT NOT ONE THAT'S HARMFUL TO PEOPLE. AND ONE OF THE OTHER EXCLUSIONS THAT WAS IN THE POLICY IS THE ORDINANCE OF LAW, THEY'RE NOT GOING TO PAY ANY LOSS OF DAMAGE CAUSED DIRECTLY OR INDIRECTLY BY ENFORCEMENT OR COMPLIANCE WITH AN ORDINANCE OR LAW. AND THAT APPLIES WHETHER THE LOSS RESULTS FROM AN ORDINANCE OR LAW THAT WAS ENFORCED EVEN IF

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THE PROPERTY HAS NOT BEEN DAMAGED. AND, AGAIN, I
LOOK AT THAT, THIS WOULD BE ALMOST MORE AKIN TO A
SITUATION WHERE THE ABC BOARD CITES THEM FOR, YOU
KNOW, SELLING UNDERAGE PATRONS AND ISSUES A 30-DAY
SHUTDOWN. YOU'VE LOSS THE USE OF IT BUT IT'S NOT
BEEN ANY PHYSICAL DAMAGE OF PHYSICAL LOSS. AND I
LOOKED AT THE LIST OF CASES Y'ALL CITED AND THERE
WERE SOME INTERESTING ONES. BUT THE ONES THAT I
FOUND WERE THE MOST PERSUASIVE BASED ON THE FACTS
OF OUR CASE IS THE U.S. DISTRICT COURT IN FLORIDA
IN THE MALAUBE CASE THAT WAS, AGAIN, DEALING WITH
THE COVID-19 SHUTDOWN. IT GRANTED THE DEFENDANT
INSURER'S SUMMARY JUDGMENT, AND THE COURT NOTED,
AND I NOTE THAT THIS APPLIES HERE, "PLAINTIFF HAS
NOT ALLEGED ANY PHYSICAL HARM. NO ALLEGATIONS
THAT COVID-19 WAS PHYSICALLY PRESENT IN THE
PREMISES; RATHER, ONLY ALLEGES THAT TWO FLORIDA
EMERGENCY ORDERS REQUIRED SHUTDOWN OF THE
RESTAURANT, AND THAT THIS IS INSUFFICIENT BECAUSE
THERE MUST BE SOME ALLEGATIONS OF ACTUAL HARM,
SOME ACTUAL PHYSICAL DAMAGE TO THE PREMISES." AND
HERE, PLAINTIFF ALLEGED THEIR ALLEGATIONS ARE
REALLY ON ALL FOURS WITH THE MALAUBE CASE. AND
THAT COURT ALSO REJECTED THE UNINHABITABLE OR
SUBSTANTIAL UNUSABLE ARGUMENT BECAUSE THERE IS NO
ALLEGATION THAT IT WAS UNINHABITABLE OR
SUBSTANTIALLY UNUSABLE, ONLY THAT, BECAUSE OF THE
SPREAD OF COVID, IT WAS TEMPORARILY SHUT DOWN.
AND I LOOKED AT WHAT THE DISTRICT COURT IN
CALIFORNIA DID IN THE PAPPY'S BARBER SHOP CASE.
SAME THING, IT GRANTED A MOTION TO DISMISS. NO
PHYSICAL LOSS OR DAMAGE TO THE PROPERTY; RATHER,

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ONLY A GOVERNMENT ORDERED COVID SHUTDOWN, AND THAT PHYSICAL LOSS OR DAMAGE OCCURS ONLY WHEN THE PROPERTY UNDERGOES A DISTINCT DEMONSTRABLE, PHYSICAL ALTERATION AND THAT DETRIMENTAL ECONOMIC IMPACT DOESN'T SUFFICE. THAT DOESN'T MEET THAT LEVEL. AND THE COURT WENT ON TO STATE THAT THE TEMPORARY IMPAIRMENT TO ECONOMICAL VALUABLE USE OF THE PROPERTY DOES NOT EQUATE, IT DOES NOT CONSTITUTE PHYSICAL LOSS OF DAMAGE. AND I THINK THE SAME RESULT IS REACHED HERE. THE PLAINTIFF HAS NOT SHOWN THAT COVID DID OR CAN CAUSE PROPERTY DAMAGE, THAT ANY BUSINESS WITHIN A MILE WAS RENDERED USELESS OR UNINHABITABLE OR WAS OTHERWISE PHYSICALLY DAMAGED THAT CAUSED PLAINTIFF TO NOT BE ABLE TO ACCESS HIS, AND THAT THERE'S BEEN NO EVENT THAT'S TRIGGERED THE APPLICATION OF THE CIVIL AUTHORITY PROVISION UNDER THE POLICY, OR THAT THEY'RE ENTITLED TO RECOVER UNDER ANY OTHER PROVISION OF THE POLICY. SO, I THINK, BASED ON THE RECORD THAT'S BEFORE THE COURT, I DON'T SEE WHERE, UNDER THESE FACTS, THIS POLICY PROVIDES COVERAGE, AND I'LL GRANT THE SUMMARY JUDGMENT, DISMISSING PLAINTIFF'S CASE WITH PREJUDICE AT PLAINTIFF'S COSTS. AND MS. DODD, I WOULD ASK THAT, IN ACCORDANCE WITH UNIFORM RULE 9.5, YOU UNDERTAKE PREPARATION OF A JUDGMENT IN ACCORDANCE WITH THE COURT'S RULING, CIRCULATE SAME TO MR. HONEYCUTT TO REVIEW FOR FORM AND SUBSTANCE. ASSUMING IT MEETS ALL COUNSELS' APPROVAL, IT CAN THEN BE SUBMITTED TO THE COURT. I WILL THEN EXECUTE IT UPON RECEIPT. ANYTHING FURTHER?

MR. HONEYCUTT: THANK YOU, YOUR HONOR.

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THE COURT: THANK YOU, COUNSEL.

MS. DODD: YOUR HONOR --

THE COURT: YES?

MS. DODD: -- ONE QUESTION, WILL YOU ALSO BE
ISSUING WRITTEN REASONS?

THE COURT: YOU CAN REQUEST A COPY OF THE
LAST 15 MINUTES OF MY GIVING EXTENSIVE REASONS AND
I'LL BE GLAD --

MS. DODD: PERFECT. WE'LL DO THAT.

THE COURT: -- TO HAVE THAT TRANSCRIBED FOR
YOU. BUT I WOULD THINK THAT THAT SORT OF
ALLEVIATES THE NEED FOR WRITTEN REASONS.

MS. DODD: YES, YOUR HONOR. THANK YOU.

THE COURT: YOU'RE WELCOME.

MS. DODD: WE WILL DO SO. THANK YOU.

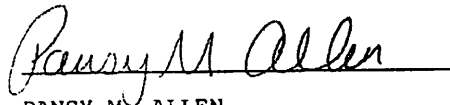
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C E R T I F I C A T E

THIS CERTIFICATE IS VALID ONLY FOR A TRANSCRIPT ACCOMPANIED BY MY ORIGINAL SIGNATURE AND ORIGINAL REQUIRED SEAL ON THIS PAGE. I, PANSY M. ALLEN, C.C.R. #24024, R.P.R. #69388, OFFICIAL COURT REPORTER, IN AND FOR THE STATE OF LOUISIANA AND EMPLOYED AS AN OFFICIAL COURT REPORTER BY THE NINETEENTH JUDICIAL DISTRICT COURT, DO HEREBY CERTIFY THAT THIS PROCEEDING WAS REPORTED BY ME IN THE STENOTYPE METHOD, THAT THIS TRANSCRIPT OF THE FOREGOING 24 PAGES WAS PREPARED BY ME AND IS A TRUE AND CORRECT TRANSCRIPT TO THE BEST OF MY ABILITY AND UNDERSTANDING, THAT THE TRANSCRIPT HAS BEEN PREPARED IN COMPLIANCE WITH TRANSCRIPT FORMAT GUIDELINES REQUIRED BY STATUTE OR BY RULES OF THE BOARD OR BY THE SUPREME COURT OF LOUISIANA, AND THAT I AM NOT RELATED TO COUNSEL OR TO THE PARTIES HEREIN, NOR AM I OTHERWISE INTERESTED IN THE OUTCOME OF THIS MATTER.

WITNESS MY HAND THIS 5TH DAY OF FEBRUARY, 2021.



PANSY M. ALLEN

OFFICIAL COURT REPORTER

19TH JUDICIAL DISTRICT COURT

C.C.R. #24024, R.P.R. #69388