AC OCEAN WALK LLC, Plaintiffs-Petitioner, vs. AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY; AIG SPECIALTY INSURANCE COMPANY, NATIONAL FIRE & MARINE INSURANCE COMPANY; and INTERSTATE FIRE & CASUALTY COMPANY, INC., Defendants-Respondents.	SUPREME COURT OF NEW JERSEY DOCKET NO.: 087304 CIVIL ACTION *On Appeal From:* Superior Court of New Jersey Appellate Division Docket No. A-001824-21 Sat Below: Honorable Thomas W. Sumners, Jr. J.A.D.; Honorable Francis J. Vernoia, J.A.D.; Honorable Lisa A. Firko, J.A.D. **ORAL ARGUMENT REQUESTED**

BRIEF OF RESTAURANT LAW CENTER AS *AMICUS CURIAE*

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PRELIMINARY STATEMENT

Restaurant Law Center submits this Brief in support of its Motion for Leave to Appear Amicus Curiae to address the issues on which the Court granted certification.

IDENTITY OF *AMICUS CURIAE* AND INTEREST IN CASE

Amicus Curiae Restaurant Law Center ("RLC") is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. Restaurants and other food service providers are the nation's second-largest private-sector employers. New Jersey is home of over 27,000 restaurants, providing over 300,000 jobs, or roughly 8% of the state's overall employment. RLC provides courts with the industry's perspective on legal issues significantly impacting its members, which include small, family-owned cafés, as well as larger restaurant chains. Specifically, RLC highlights the potential industry-wide consequences of pending cases like this one, through regular participation in amicus briefs on

behalf of the industry. RLC's amicus briefs have been cited favorably by state and federal courts.[1]

RLC can offer a broad perspective to the Court regarding the legal issues involved in this dispute. RLC is well-positioned to highlight the importance of dependable insurance coverage and reliable rules of insurance policy interpretation to the industry. See Neonatology Assocs. v. C.I.R., 293 F.3d 128, 132 (3d Cir. 20 02) ("Even when a party is very well represented, an amicus may provide important assistance to the court," including by "explain[ing] the impact a potential holding might have on an industry or other group.") (internal citation omitted).

STATEMENT OF QUESTIONS PRESENTED AND OF ERRORS COMPLAINED OF

RLC incorporates the Questions presented and statement of errors complained of as set forth by Petitioner AC Ocean Walk LLC and its Petition for Certification.

[1] For example, RLC recently submitted an amicus brief to the Appellate Division in Merck & Co., Inc. v. ACE American Insurance Co., No. A-001879-21 (App. Div.).

SUMMARY OF ARGUMENT

RLC and its members conduct substantial business in New Jersey and, as such, they rely on the fair adjudication of legal claims in the courts of this State. A fundamental principle of jurisprudence is that a claim may survive a dismissal motion if its allegations – accepted as true – suggest a cause of action. Printing Mart-Morristown v. Sharp Electronics, 116 N.J. 739, 746 (1989). In other words, the plaintiff is afforded a liberal pleading standard, and a court is not permitted to disregard the facts as alleged when ruling on a motion to dismiss for alleged failure to state a claim. That is what occurred, however, when the Appellate Division reversed the decision of the trial court. The Appellate Division rejected Petitioner's allegations that it suffered physical loss or damage because of the "actual presence" of Coronavirus on its property and dismissed Petitioner's Complaint.

Furthermore, if a claim is supported by scientific evidence (as is the case here), a court commits plain

error by rejecting such evidence without conducting an evidentiary hearing. N.J.R.E. 104; Kemp v. State of New Jersey, 174 N.J. 412, 432 (2002). Indeed, a court is not permitted to "substitute its judgment for that of the relevant scientific community." In re Accutane Litigation, 234 N.J. 340, 390 (2018). The Appellate Division committed these errors in ruling against Petitioner and, as such, its decision should be reversed.

Moreover, RLC and its members rely significantly upon best-in-class "All-Risks" insurance policies to provide coverage for their various risks. An essential feature of "all-risks" policies is coverage for business income losses when a physical peril renders property unusable or unsafe. While policyholders like RLC's members could not have foreseen the scope of the COVID-19 pandemic, this was precisely the type of unexpected physical peril causing business income and interruption losses for which policyholders purchase insurance and reasonably expected coverage. Years of precedent and this Court's established canons of insurance policy interpretation

confirm that a policy covering all risks of "direct physical loss or damage" covers loss when a deadly physical substance like SARS-CoV-2 is present at or around property, rendering it partially or wholly unusable, unsafe, or unfit for its intended purpose ("physical loss"), or alters the surfaces or air of property ("physical damage").

RLC respectfully submits this brief to address important issues of New Jersey law (both procedural and substantive) impacting its members, other corporate and individual policyholders, the public interest, and the efficient management of coverage litigation before our courts. Rules of insurance interpretation have far-reaching impact on the many insurance products that policyholders buy to protect themselves from risks in this and other states.

POINT I

The Appellate Division Deviated From Applicable Standards When It Rejected The Complaint's Well-Pled Allegations (Refusing to Accept Them As True)in Deciding to Dismiss The Plaintiff-Appellants' Complaint For An Alleged Failure To State A Cause of Action

The Appellate Division reviewed the Law Division's ruling on a dismissal motion; the Respondent insurers moved to dismiss the complaint pursuant to Rule 4:6-2(e). On a motion to dismiss a complaint for failure to state a claim, the court applies an indulgent standard. "[T]he plaintiff is entitled to a liberal interpretation of [the] contents [of the complaint] and to the benefits of all its allegations and the most favorable inferences which may be reasonably drawn" therefrom. Burg v. State, 147 N.J. Super. 316, 319 (App. Div. 1977) (quoting Rappaport v. Nichols, 31 N.J. 188, 193, (1959), cert. denied, 75 N.J. 11 (1977)). Every reasonable inference is accorded the plaintiff, Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989), and the motion is "granted only in rare instances and

ordinarily without prejudice." Pressler, Current N.J. Court Rules, comment 4.1.1 on R. 4:6-2(e) (2009).

While the court's "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint," Printing Mart-Morristown, supra, 116 N.J. at 746, the reviewing court must "view the allegations with great liberality and without concern for the plaintiff's ability to prove the facts alleged in the complaint." Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005), cert. denied, 185 N.J. 297(2005). The court "may not consider anything other than whether the Complaint states a cognizable cause of action." Rieder v. State Dept. of Transportation, 221 N.J. Super. 547, 522 (App. Div. 1987). Accordingly, "the test for determining the adequacy of a pleading [is] whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown, supra, 116 N.J. at 746 (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)).

In applying this test, a court treats the plaintiff's version of the facts as set forth in his or her complaint as uncontradicted and accords it all legitimate inferences. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005). On appeal, the Court's standard of review is the same as that of the trial court. Donato v. Moldow, 374 N.J. Super. 475, 483 (App. Div. 2005).

The Appellate Division deviated from the applicable standard because it disregarded the Petitioner's allegations, which set forth a cause of action. Specifically, the pleading included the following allegations:

- Petitioner incurred losses "caused by the actual presence at its property of Coronavirus." (Da24) (emphasis added);

- "Coronavirus is a highly contagious and easily transmitted human pathogen that is present in viral fluid particles in the air, as well as on surfaces (e.g., walls, furniture, doors, fixtures, countertops and touch screens. Through these particles, Coronavirus can be easily transmitted from person to person or from surface to person." (Da39);

- "Respiratory droplets expelled from infected individuals land on, attach, and adhere to surfaces and objects. In doing so, they

physically change the property and its surface by becoming a part of that surface. As a result of this physical alteration, contact with those previously safe, inert surfaces (e.g., walls, tables, countertops) has been made unsafe." (Da41);

- "Numerous scientific studies have documented that Coronavirus can physically remain on and alter property for extended periods of time. For example:

  a. A study documented in the New England Journal of Medicine found that Coronavirus is detectable in aerosols (i.e., fine solid particles in air) for up to three hours, on copper for up to four hours, on cardboard up to 24 hours and on plastic or stainless steel for up to two to three days.[2]

  b. Another study found that human coronaviruses, such as SARS-CoV and MERS-CoV, can remain infectious on inanimate surfaces and objects at room temperature for up to nine days.[3] Such surfaces, materials and objects are common in properties offering public accommodations and entertainment to the public and include

[2] See News Release, New Coronavirus Stable for Hours on Surfaces, NAT'L INSTS. OF HEALTH (Mar. 17, 2020), available at https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces.

[3] See G. Kampf et al., Persistence of Coronaviruses on Inanimate Surfaces and Their Inactivation with Biocidal Agents, J. HOSPITAL INFECTION (Feb. 6, 2020), available at https://www.journalofhospitalinfection.com/article/S0195-6701(20)30046-3/fulltext.

high-traffic items such as door knobs, countertops, and window treatments.

c. A peer-reviewed article published in Virology Journal on October 7, 2020, found that Coronavirus can survive on surfaces for up to 28 days at ambient temperature and humidity (20°C [68°F] and 50% RH). The article concludes that Coronavirus 'can remain infectious for significantly longer time periods than generally considered possible.'"

(Da41-42);

- "Accordingly, because an individual with no symptoms can spread Coronavirus simply by breathing or talking, and because droplets containing Coronavirus can land and remain infectious on surfaces for many days, the risks posed by Coronavirus are not transient or short-term, but instead are a fundamental altering of the environment, including both the physical surfaces of and the air within, a covered location until such time as that location is either quarantined or disinfected." (Da42);

- "Moreover, even when the air and surfaces inside a building are thoroughly and effectively cleaned, each time an infected person enters that space the cycle renews such that infectious Coronavirus is likely (if not certain) to be present wherever people are located or congregate." (Da42);

- "[T]his actual and/or threatened presence of Coronavirus particles at the Ocean Casino Resort rendered physical property within the premises damaged, unusable, uninhabitable, unfit for its intended function, dangerous, and unsafe. In

> doing so, Coronavirus impaired and diminished the value, utility, and normal function of Ocean Walk's premises (including the physical property contained within)." (Da43).

The Appellate Division wholly disregarded Petitioner's allegations, including those cited above, and – instead – made its own (erroneous) factual determination that "COVID-19 virus's presence in Ocean's air and on its surfaces did not physically alter the property's physical structure such that it qualifies as a direct physical loss of or damage to Ocean's property." (PETa36). The Appellate Division further disregarded conclusions from the scientific community, as alleged in the pleading, and instead found "the COVID-19 virus can be eliminated from surfaces with household cleaning products and dissipates on its own." (PETa37). The Appellate Division also referred (generally) to the "record," which it found supported "the conclusion there was no damage to equipment or property on- or off-site that caused Ocean to lose its physical capacity to operate, and there was no physical alteration that made the casino resort too dangerous to enter." (PETa37). In

sum, the Appellate Division's holding rests on disputed "facts" that were asserted by the insurers in their dismissal motion.

None of the conclusions reached by the Appellate Division were appropriate in considering and ruling on a Rule 4:6-2(e) motion to dismiss for failure to state a cause of action. The Court was bound to accept the well-pled allegations as uncontroverted, and as such, find that Petitioner set forth a legally sufficient cause of action. In view of these errors, the decision of the Appellate Division must be reversed and the case remanded to the Law Division for further proceedings, including discovery.

POINT II

The Appellate Division Deviated From Applicable Standards When It Rejected (At The Pleading Stage) Scientific Evidence Without A Rule 104 Hearing

The Appellate Division also deviated from New Jersey precedent when it rejected scientific evidence – at the pleading stage - in the absence of an evidentiary hearing pursuant to New Jersey Rule of Evidence 104. Indeed, in

Kemp v. State of New Jersey, 174 N.J. 412, 432 (2002), this Court held it was plain error for the trial court not to conduct an evidentiary hearing in order to determine the reliability of plaintiffs' expert testimony. On this basis, the Court reversed the judgment of the Appellate Division and remanded the matter to the trial court for a Rule 104 hearing. The Court provided "in cases in which the scientific reliability of an expert's opinion is challenged and the court's ruling on admissibility may be dispositive of the merits, the sounder practice is to afford the proponent of the expert's opinion an opportunity to prove its admissibility at a Rule 104 hearing." Id. at 432-433.

Furthermore, with respect to a "new and evolving area of medical causation," this Court has cautioned that although the court maintains a gatekeeping role aimed at preventing a jury from considering unsound science, "the trial court should not substitute its judgment for that of the relevant scientific community." In re Accutane

Litigation, 234 N.J. 340, 390 (2018) (internal quotations and citation omitted) (emphasis added).

Here, the pleading is replete with citations to scientific and medical information that supports Petitioner's claim. As noted above, Petitioner cited to specific scientific studies documenting "that Coronavirus can physically remain on and alter property for extended period of time," including, without limitation, a study documented in the New England Journal of Medicine, as well as a peer-reviewed article published in Virology Journal. Petitioner also cited at length to findings of the World Health Organization and the Center for Disease Control and Prevention. However, the Appellate Division disregarded the relevant, substantiated findings of the scientific community out of hand.

In sum, Petitioner alleges its claims are supported by scientific evidence. Yet, without conducting an evidentiary hearing as required (or accepting the well-pled allegations as true), the Appellate Division

rejected such evidence. This constitutes clear error under Kemp and, therefore, requires reversal.

POINT III

"All-Risks" Policies Provide Coverage When A Physical Peril Renders A Policyholder Unable To Use Covered Property For Its Intended Purpose Or Affects The Surfaces Or Air Of Property.

RLC's members, like Petitioner, pay more significant premiums to purchase broad "All-Risks" insurance that would cover unanticipated perils like SARS-CoV-2. New Jersey courts have long recognized the significant and important protections offered by an "All-Risks" policy (as opposed to a "Named" or "Specific peril" policy). E.g., Victory Peach Grp. v. Greater N.Y. Mut. Ins. Co., 310 N.J. Super. 82, 87 (App. Div. 1998). It is well recognized that an All-Risks policy provides coverage "for all losses arising from all fortuitous causes except those that are specifically and expressly excluded by the insurance contract." 1 NEW APPLEMAN INS. LAW PRAC. GUIDE § 1.13 (2022). In contrast, "'named perils' insurance policies cover only losses arising out of causes that are

expressly encompassed by a policy's insuring agreement." Id.

All-Risks policies commonly insure against all risks of "physical loss or damage." Policyholders' interpretation of "physical loss or damage," as applied to pandemic-related loss, is consistent with decades of pre-pandemic court decisions in New Jersey and around the country.

Indeed, there is a long line of New Jersey authority supporting the proposition that "physical loss or damage" does not require physical alteration of property. In Customized Distribution Services v. Zurich Insurance Co., 373 N.J. Super. 480 (App. Div. 2004), the Campbell Soup Company brought action against the policyholder, a warehouse operator. Id. at 482. The claimant alleged the policyholder failed to locate and ship its beverage product in a timely manner. Ibid. The policyholder sought coverage under its policy covering "risks of direct, physical loss to covered property." Id. at 486. The insurer denied the claim on the basis there was no

direct physical loss. Ibid. The Appellate Division, however, found there could be coverage even if there was no material or chemical alteration to the product. Id. at 488. Specifically, although the beverage did not undergo a change in material composition, the undue passage of time affected how the product was perceived by claimant's customers. Id. at 490. Such a change was the "functional equivalent" of damage of a material nature of an alteration in physical composition. Ibid. The Court found the term "physical" can mean more than material alteration or damage. Id. at 491. Finally, the Court found if the insurer intended to exclude such coverage, it could have done so clearly in the policy. Ibid.

Similarly, in Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co., 406 N.J. Super. 524, 529 (App. Div. 2009), the New Jersey Appellate Division held physical alteration of property was not required to constitute physical damage for insurance coverage purposes. In that case, the policyholder (a group of supermarkets) suffered

losses due to food spoilage during the Northeast blackout. Ibid. The policy covered damage due to loss of electrical power, and applied in case of "physical damage" to off-premises electrical plant and equipment. Ibid. Although the power grid was physically incapable of supplying power, the insurer denied coverage on the grounds that the transmission lines and equipment allegedly had not suffered "physical damage." They supposedly shut themselves off during the cascading power outage to prevent catastrophic damage, much like a circuit breaker trips off. Ibid. In the coverage action that ensued, the trial court agreed with the insurer and dismissed the complaint. Ibid. The Appellate Division reversed, finding the term "physical damage" in the policy was ambiguous, and the trial court should not have narrowly construed the term in favor of the insurer. Ibid. at 540. Further, the Appellate Division found the grid was "physically damaged" because the grid, its component generators and transmission lines were "physically incapable of performing their essential

function of providing electricity." Ibid. The Court found this to be physical damage to the off-premises electrical structure, which could not function or supply electricity – i.e., incapacity of grid was direct physical damage under the policy. Id. at 541. This Court declined to accept certification. Ibid., cert. denied, 200 N.J. 209 (2009).

Federal court cases support the same analysis. In Gregory Packaging Co., Inc. v. Travelers' Property Casualty Co. of America, 2014 WL 6675934, at *1 (D.N.J. Nov. 25, 2014) (ACa16),[4] for example, the court considered an insurance claim involving ammonia that was released into the air at the policyholder's facility. The policyholder alleged the ammonia rendered the facility unfit for occupancy; the structure of the building was not altered. Id. at *2. The court noted that "both New Jersey courts and the Third Circuit have … found that property can sustain physical loss or damage without

[4] Reference to "ACa" refer to RLC's appendix that is submitted herewith.

experiencing structural alteration." Id. at *5 (citing Wakefern and Port Authority v. Affiliated FM Ins. Co., 311 F.3d 226, 230 (3d Cir. 2002)) (emphasis added). The court found "the ammonia release physically transformed the air within [the] facility so that it contained an unsafe amount of ammonia or that the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated." Id. at *6. Therefore, the court held the ammonia discharge inflicted "direct physical loss of or damage to" the facility. Ibid.

Thus, under New Jersey precedent, the availability of coverage does not rest on physical alteration to property. This determination is consistent with decades-long case law around the country finding "physical loss or damage" in a myriad of situations in which the insured suffered a loss of use or function of its premises, even though there was no structural change to property, including:

- Poor air quality from surrounding forest fires;[5]

[5] Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co., 2016 WL 3267247, at *2 (D. Or. June 7, 2016) (ACa62),

- Unpleasant odor making premises uninhabitable (e.g., smell of a locker room, cat urine, or meth lab);[6]
- Toxic gas released from drywall;[7]
- Lead dust;[8]
- Carbon monoxide;[9]
- Radon gas;[10]
- Buildup of gasoline vapor beneath a church rendering it uninhabitable;[11]
- Loss of soil leaving home overhanging a cliff, even though the structure itself was not damaged;[12]
- Loss of use of the inventory housed in building at risk of imminent collapse.[13]

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vacated on parties' request, 2017 WL 1034203 (D. Or. Mar. 6, 2017) (ACa72).

[6] Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399 (1st Cir. 2009) (unwanted odor described as that of a locker room, playdough and sour chemicals); Mellin v. N. Sec. Ins. Co., 115 A.3d 799, 805 (N.H. 2015) (odor of cat urine); Farmers Ins. Co. of Or. v. Trutanich, 858 P.2d 1332 (Or. 1993) (meth lab odor).

[7] TRAVCO Ins. Co. v. Ward, 715 F. Supp. 2d 699, 709 (E.D. Va. 2010).

[8] Widder v. La. Citizens Prop. Ins. Corp., 82 So. 3d 294, 296 (La. App. 2011).

[9] Matzner v. Seaco Ins. Co., 1998 WL 566658, at *4 (Mass. Super. Ct. Aug. 12, 1998) (ACa53).

[10] Am. Alliance Ins. Co. v. Keleket X-Ray Corp., 248 F.2d 920, 925 (6th Cir. 1957).

[11] W. Fire Ins. Co. v. First Presbyterian Church, 437 P.2d 52, 54 (Colo. 1968).

[12] Hughes v. Potomac Ins. Co., 199 Cal. App. 2d 239, 248 (1962).

[13] Hampton Foods, Inc. v. Aetna Cas. & Sur. Co., 787 F.2d 349, 352 (8th Cir. 1986).

Indeed, "[t]he modern interpretive trend is liberalizing the meaning of direct physical loss to focus upon loss of use as opposed to direct physical loss involving physical alteration." Steven Plitt, Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration, Claims Journal (Aug. 15, 2013).

Although the Coronavirus was "novel" upon its discovery in 2019, for decades, courts predictably and consistently adjudicated insurance coverage disputes concerning analogous fact patterns. In New Jersey and elsewhere, courts interpreted the "physical loss or damage" coverage grant in property insurance policies as covering loss of use of the insured premises, including where the premises was unsafe for human occupancy due to a non-visible substance in the air.[14]

[14] The Appellate Division erroneously suggested that "New Jersey courts have found that losses of business income were not covered where the link between the insured premises and physical damage to property elsewhere was more attenuated." (PETa30). This statement misses the mark; the issue here involves business income loss where the insured property cannot be used as intended due to

Furthermore, policyholders' interpretation of the "direct physical loss or damage" provision in All-Risk policies is supported by various principles of New Jersey insurance law. New Jersey courts give special scrutiny to insurance policies because of the imbalance between insurance companies and policyholders in their respective understanding of the terms and conditions of insurance policies, and in their respective bargaining power in respect of those terms and conditions. Gibson v. Callaghan, 158 N.J. 662, 669 (1999). As contracts of adhesion, insurance policies are subject to special rules of interpretation. Ibid. New Jersey courts "assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992).

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unsafe air and surfaces of such property. Indeed, the lone case cited by the Appellate Division is inapposite. See Arthur Andersen LLP v. Fed. Ins. Co., 416 N.J. Super. 334, 348-349 (App. Div. 2010) (insured did not show business income loss was caused by property damage – i.e., at the World Trade Center and the Pentagon – that prevented the flow of goods or services to or from the insured).

See also Sparks v. St. Paul Ins. Co., 100 N.J. 325, 335 (1985) (noting that terms of insurance policies are subject to "careful judicial scrutiny to avoid injury to the public").

A policy's coverage grants must be interpreted broadly in favor of the policyholder, while coverage exclusions "must be narrowly construed" and "the burden is on [the insurance company] to bring the case within the exclusion." Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997). Additionally, "[w]hen an insurance policy's language fairly supports two meanings, one that favors the insurer, and the other that favors the insured, the policy should be construed to sustain coverage." President v. Jenkins, 180 N.J. 550, 563 (2004). See Doto v. Russo, 140 N.J. 544, 556 (1995) (New Jersey courts construe policy ambiguities "in favor of the insured and against the insurer"). The above principles apply especially to policy exclusions, which New Jersey courts construe narrowly and strictly against

the insurer. Flomerfelt v. Cardiello, 202 N.J. 432, 442 (2010).

New Jersey law recognizes the insurer must accept the consequences of its drafting decisions, particularly where the insurer could have drafted and used alternative language placing a matter beyond doubt. DEB Assocs. v. Greater N.Y. Mut. Ins. Co., 407 N.J. Super. 287, 301 (App. Div. 2009) ("If the insurer intended to exclude coverage in such situations, it could have specifically so provided."); Kook v. Am. Sur. Co. of N.Y., 88 N.J. Super. 43, 51 (App. Div. 1965) (recognizing that when evaluating disputed policy language, courts must consider whether the insurer could have drafted more precise language which "would have put the matter beyond reasonable question.").

This principle is particularly significant here because – prior to the COVID-19 pandemic – the New Jersey Appellate Division held the undefined term "physical damage," which is part of the coverage grant at issue, is ambiguous. Wakefern Food Corp. v. Liberty Mut. Fire

Ins. Co., 406 N.J. Super. 524, 540 (App. Div. 2009). Respondents had approximately ten years to resolve the ambiguity in the All-Risk policy; they failed to do so, and now must live with the consequences.

Importantly, "when interpreting an insurance policy, courts should give the policy's words their plain, ordinary meaning." Nav–Its, Inc. v. Selective Ins. Co. of Am., 183 N.J. 110 (2005) (internal citations and quotation marks omitted). Here, the plain policy language supports the Petitioner's and other policyholders' expectation of coverage for loss in this instance. The All-Risk policy does not define "physical," "loss," or "damage." In the absence of a policy definition, courts consider the dictionary definition of words to determine the policyholder's reasonable expectations concerning the same. See Boddy v. Cigna Prop. & Cas. Cos., 334 N.J. Super. 649, 657 (N.J. Super. Ct. App. Div. 2000) (a thesaurus can help a court to ascertain the ordinary meaning of a word); Priest v. Roncone, 370 N.J. Super. 537, 544 (App. Div.

2004) (considering dictionary definition of an undefined term in an insurance policy to determine the plain, ordinary meaning).

"Physical" is defined as "of or relating to material things. . ."[15] The definition of "Loss" includes "the act or fact of being unable to keep or maintain something[;] . . . absence of a physical capability or function[;] . . . the harm or privation resulting from losing or being separated from . . . something[.]"[16] "Damage" is defined as "loss or harm resulting from injury to person, property, or reputation . . . ."[17] Thus, by their plain meanings, "loss" (absence of function; harm from being separated from property) is distinguishable from "damage" (harm to property).[18]

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

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

[17] Damage, Merriam Webster, https://www.merriam-webster.com/dictionary/damage.

[18] In Coast Restaurant Group, Inc. v. Amguard Insurance Co., 2023 WL 2850023, at *5 (Cal. App. Ct. Apr. 10, 2023) (ACa8), the California Court of Appeal recently considered the dictionary definitions of these terms and held governmental closure orders during the pandemic

Additionally, the All-Risk Policy uses the disjunctive "or," which separates "loss" from "damage" in the coverage grant. Courts routinely acknowledge the word "or" is used to "express an alternative or to give a choice of one among two or more things." Feldman v. Urban Commercial, Inc., 78 N.J. Super. 520, 531 (Ch. Div. 1963) (citing Black's Law Dictionary (4th ed. 1951) (noting the "plain meaning" and the "legal meaning" of the word "or" are "disjunctive"); see Meyer v. CUNA Mut. Ins. Soc., 648 F.3d 154, 166 (3d Cir. 2011) (policyholder's interpretation was reasonable based on "analysis of a plain reading of the language and common, disjunctive meaning of the word 'or'"). For this reason (and others), courts distinguish "loss" from "damage,"[19]

"physically affected the property because they affected how the physical space of the property and the physical objects (chairs, tables, etc.) in that space could or could not be used" and, as such, "[a] governmental order that temporarily deprives the insured of possession and use of covered property can qualify as a 'direct physical loss.'"

[19] See Coast Rest. Grp., 2023 WL 2850023, at *6 ("where 'loss' and 'damage' are both included in the insuring clause, as in the policy here, 'loss' must mean something different from 'damage'").

holding the insuring agreements' language regarding "direct physical loss" may be satisfied if the insured property becomes unusable for its intended purpose, whether or not the property is physically altered.[20]

Furthermore, the "fundamental principle of insurance law is to fulfill the objectively reasonable expectations of the parties." Werner Indus. v. First State Ins. Co., 112 N.J. 30, 35 (1988). If a policy's language is clear,

[20] For example, the Vermont Supreme Court rejected insurers' attempt to conflate "physical loss" with "physical damage," holding that while "physical damage" may require physical alteration, "physical loss" plainly does not. Huntington v. Ace Am. Ins. Co., 2022 WL 4396475, at *6—*9, n.10 (Vt. Sept. 23, 2022) (ACa23)(noting Couch on Insurance wrongly concluded physical alteration was required for physical loss and physical damage). The Court held that holding otherwise would render at least one of those phrases a nullity, violating the rule against surplusage. Id. at *6. See also Baylor Coll. of Medicine v. XL Ins. Am., Inc., No. 2020-53316-A (Tex. Dist. Ct. Harris Cty. Aug. 31, 2022) (ACa1) (Texas jury finding SARS-CoV-2/COVID-19 at Baylor University Medical College caused physical loss or damage to its property, awarding Baylor a verdict against its insurers); Coast Rest. Grp., 2023 WL 2850023, at *6 ("while physical alteration to covered property could trigger coverage under a 'physical loss or damage' insuring provision, that is not the only possible trigger for coverage[;] ... deprivation or dispossession also would trigger coverage, even if the property has not been physically altered.").

the policy should be enforced as written to fulfill the reasonable expectations of the parties. Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co., 206 N.J. 596, 608 (2011). As this Court explained over fifty years ago:

> When members of the public purchase policies of insurance they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. They should not be subjected to technical encumbrances or to hidden pitfalls and their policies should be construed liberally in their favor to the end that coverage is afforded "to the full extent that any fair interpretation will allow."

Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 482 (1961) (citation omitted). Thus, New Jersey courts reject policy interpretations that contravene policyholders' reasonable coverage expectations. Sparks v. St. Paul Ins. Co., 100 N.J. 325, 338–39, 341 (1985). See Matchaponix Estates, Inc. v. First Mercury Ins. Co., 2017 WL 2920612, at *4–5 (N.J. Super. Ct. App. Div. July 10, 2017) (ACa48)(recognizing New Jersey courts extend coverage notwithstanding unambiguous policy exclusions where "the denial of coverage would frustrate the

insured's reasonable expectations," and finding inapplicable an unambiguous policy exclusion that did not "align[] with the indemnity coverage that [the policyholders] believed they procured").[21]

Coverage for economic losses resulting from inability to use insured property due to a physical peril is precisely what policyholders seek when purchasing their "all-risks" policies.[22] Broad "all-risks" policies provide at least two major categories of coverage: (1) Property and (2) Business Income. Property coverage

[21] Notably, some insurers' briefing invites the Court to commit additional error at the pleading stage, raising the alleged sophistication of a policyholder – even though there has been no discovery regarding the insurers' drafting history as relates to the policy provisions at issue. The longstanding principles of insurance law described above "apply to commercial entities as well as individual insureds, so long as the insured did not participate in drafting the insurance provision at issue." Wakefern, 406 N.J. Super. at 540 (emphasis added). By reading standard-form language with the same interpretive rules irrespective of the identity of the insured, New Jersey courts incentivize clear drafting across the board and ensure that identical language is construed consistently and predictably.

[22] Erik S. Knutsen & Jeffrey W. Stempel, Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic, 27 Conn. Ins. L.J. 185, 199 (2020).

generally insures loss or damage to the buildings and structures of the property. "Business Income" coverage, by contrast, provides coverage for economic losses resulting from the inability to use property for its intended purpose.

For many policyholders, Business Income (or Business Interruption) coverage is often the more valuable, and an essential reason for purchasing "all-risks" policies.[23] For example, the foodservice and hospitality industries, among others, in New Jersey rely upon a business model that depends on large groups congregating in and using property for specific purposes, such as dining and entertainment. Because of their venue-driven, group-centric model, any physical peril rendering those properties unsafe or unusable for their intended purposes could deal a significant financial blow, whether or not that peril physically damaged structures.[24] SARS-CoV-2

[23] See Knutsen & Stempel, supra n.22 at 198-99.

[24] Christopher C. French, COVID-19 Business Interruption Insurance Losses: The Cases for and Against Coverage, 27 Conn. Ins. L.J. 1, 20-23 (2020) ("all-risks" policyholders reasonably expect business interruption

is just such a peril. The presence of the Coronavirus rendered property unsafe and unusable, especially for group congregation.[25]

In this case, Petitioner alleged both physical loss and damage. As noted above, Petitioner alleged the "actual presence" of the Coronavirus at its property; a virus that is highly contagious and present in "viral fluid particles in the air, as well as on surfaces." (Da24, Da39). In fact, such respiratory droplets expelled from infected individuals "land on, attach, and adhere to surfaces and objects" and in doing so, "they physically change the property and its surface" and make previously safe, inert surfaces unsafe. (Da41). These are allegations of physical damage sufficient to trigger

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coverage "when their business operations are interrupted due to catastrophic events beyond their control," "even if the properties do not have tangible, physical damage").

[25] See French, supra n.24 at 23 ("In the COVID-19 context ... [t]he risk of people getting sick and dying from being in the policyholders' business premises was so high that the business premises were rendered uninhabitable and unusable. That is enough to trigger coverage.").

coverage. Furthermore, Petitioner alleged a loss of use of its property, in that its operations were suspended by the "ongoing and increasingly dangerous conditions created by the Coronavirus pandemic." (Da22).

For these reasons, the Appellate Division deviated from well-established precedent when it held "COVID-19's presence and/or the government-mandated shutdown does not constitute a direct physical loss of or damage to Ocean as required under the policies." (PETa39). As such, the Appellate Division's decision must be reversed and the case remanded to the Law Division for further proceedings.

CONCLUSION

For the foregoing reasons, Restaurant Law Center requests that this Court reverse the Appellate Division decision reversing the Trial Court's decision denying the Respondents' Motions to Dismiss.

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