IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 21-0374

POLK COUNTY NO. LACL148208

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WAKONDA CLUB,
Plaintiff-Appellant-Appellant,

v.
SELECTIVE INSURANCE OF AMERICA,
Defendant-Appellee.

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APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY
THE HONORABLE CELENE GOGERTY

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FINAL PROOF BRIEF OF APPELLANT

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PROOF OF SERVICE & CERTIFICATE OF FILING

On August 30, 2021, I served this proof brief on all other parties by EDMS to their respective counsel.

I further certify that I did file this final proof brief with the Clerk of the Iowa Supreme Court by EDMS on August 30, 2021.

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ROUTING STATEMENT

Retention of his case before the Iowa Supreme Court is appropriate under Iowa R. App. P. 6.1101(2)(c) and (f).

STATEMENT OF THE CASE

This case involves interpretation and construction of undefined terms contained within an "all-risk" business interruption insurance policy. The dispute centers on whether Wakonda's business income losses arising out of Governor Kim Reynolds' March 17, 2020 Proclamation ordering the closure of all bars and restaurants is a "covered loss" under the "all-risk" insurance policy Selective sold to Wakonda. The dispute also centers on whether a "Virus Exclusion" within the all-risk policy excludes losses arising out of Governor Kim Reynold's March 17, 2020 Proclamation and subsequent proclamations allowing for the partial re-opening of these facilities.

Pursuant to the policy, Selective agreed to pay

> [F]or the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration'. The 'suspension' must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss….

The text of the all-risk policy is such that Selective agreed to pay for loss of business income caused by loss of ***or*** damage to property. The use of the disjunctive "or" necessarily means loss or damage is required, and that "loss" and "damage" are distinct concepts with different meanings. Applying well-established principles of insurance contract interpretation, at best an

ambiguity exists as to whether the Proclamation constitutes a "direct physical loss of or damage to" Wakonda's property for which Selective agreed to compensate. This appeal centers on whether Wakonda sustained such a "direct physical loss of or damage to" its property sufficient to trigger coverage under its Policy with Selective.

On August 21, 2020, Wakonda filed its First Amended and Substituted Petition, alleging Selective breached the insurance policy it sold to Wakonda by failing to compensate Wakonda for loss of business income Wakonda sustained as a result of Governor Reynolds' March 17, 2020 Proclamation ordering the closure of all bars and restaurants. (8/21/20 Am. Pet. P. 80, 86)(App. at 7). Wakonda also sought a declaratory judgment seeking an affirmative order that the policy at issue provided Wakonda coverage for its business income losses under the circumstances. On October 30, 2020, Selective filed an Answer to Wakonda's First Amended and Substituted Petition denying Wakonda's claims, and further asserting a host of affirmative defenses purportedly excluding Wakonda's claim for coverage.

On December 15, 2020, Selective filed a Motion for Summary Judgment and Brief in Support asserting Wakonda did not sustain a direct physical loss or damage to its property to trigger coverage under the all-risk policy. (12/15/20 Def's Brief in Support of Summary Judgment (App. at 486-

518). Selective also asserted Wakonda's claims for insurance benefits were excluded by the Virus Exclusion and Ordinance or Law Exclusion within the policy. (12/15/20 Def's Brief in Support of Summary Judgment (App. at 486-518). Lastly, Selective claimed Wakonda could not present a viable claim for bad faith denial of coverage. (12/15/20 Def's Brief in Support of Summary Judgment (App. at 486-518). Wakonda filed a Resistance to Selective's Motion, which included a Brief in Support, Expert Witness Affidavits, Statement of Disputed Facts, and Fact Witness Affidavits. (1/18/21 Wakonda Resistance, Brief in Support and Appendix)(App. at 933-934, 935-967, 973-974). The parties each filed subsequent briefs with additional authorities. (Following a hearing on the motion, the district court granted Selective's Motion for Summary Judgment. (3/3/21 Ruling on Def's Motion for Summary Judgment)(App. at 1251-1257. Wakonda timely filed a notice of appeal. (3/16/21 Notice of Appeal)(App. at 1258-1260).

The question presented is whether Selective's insurance contract of adhesion was unambiguous and failed to provide coverage, or otherwise excluded Wakonda's loss of business income resulting from Governor Reynolds' March 17, 2020 Proclamation ordering the closure of all bars and restaurants, and her subsequent proclamations limiting the capacity of these businesses. Wakonda asserts the all-risk policy provides coverage under these

circumstances, and otherwise does not exclude such coverage. As shown below, the ordinary and common interpretation of the direct physical loss of or damage to property requirement makes clear Wakonda has suffered a coverable loss under these circumstances. At the very least, Wakonda's interpretation of the applicable policy provisions is reasonable, which renders the contract ambiguous. *Lucy v. Platinum Servs.*, 2018 Iowa App. LEXIS 1015 at *8 (Iowa Ct. App. Nov. 7, 2018) ("A contract is ambiguous if more than one interpretation is reasonable"). Resolution of an ambiguous contract inherently is a question of fact to be resolved by the jury. *Walsh v. Nelson*, 622 N.W.2d 499, 503 (Iowa 2001). Accordingly, the Court should reverse the decision below.

STATEMENT OF THE FACTS

Wakonda Club operates a golf and country club in Des Moines. In March 2020, the business suffered a "direct physical loss of" its property as a result of government closure orders, which physically impaired and detrimentally altered the property and rendered it nonfunctional for its intended purpose. (Affidavits of Kinney, Roth, and Schneider)(App. at 987-989, 994-998, 1007-1010). Fortunately, to protect the businesses in the event it suddenly had to suspend operations for reasons outside of his control, Wakonda purchased Business Income insurance from Selective Insurance of

America. (Policy)(App. at 22). In return for the payment of premiums, Selective issued Policy No. S190583610 to Wakonda providing these coverages. (Policy)(App. at 22). The Policy essentially covers all covered causes of loss except for those risks that are expressly and specifically excluded. Requiring an exclusion to be expressly and specifically stated in the policy is one of the bedrock principles of Iowa insurance law. The Policy includes Selective's Business Income (and Extra Expense) Coverage Form, CP 00 30 10 12. (Policy)(App. at 613). Selective's Businessowner's Policy is a form policy based upon provisions drafted by the Insurance Services Office, Inc. ("ISO"). (See reference to "Copyright, Insurance Services Offices, Inc., 2011" at the bottom of each page of Form CP 00 30 12)(App. at 613-621). The provisions and exclusions of the ISO Policy were not the product of discussions or negotiations between Selective and the Wakonda. Rather, the provisions and exclusions of the "all-risk" Policy consist of standardized language and terms developed by the insurance industry through its trade association, ISO, and are used by the industry nationwide. An "all-risk" policy provides the broadest coverage available to an insured.

A. Relevant Policy Provisions

The Policy language provides in relevant part:

BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM

*****

1. Business Income…

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of ***or*** damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss….

(Policy)(App. at 613). "Operations" are defined in pertinent part as "business activities occurring at the described premises. . . ." (Policy)(App. at 621).

The Extra Expense provision required Selective to pay reasonable and necessary expenses incurred during the period of restoration. Specifically:

2. Extra Expense

b. Extra Expense means necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or damage to the property caused by or resulting from a Covered Cause of Loss.

We will pay Extra Expense (other than the expense to repair or replace property) to:

(1) Avoid or minimize the 'suspension' of business and to continue operations at the described premises. . . .

(2) Minimize the 'suspension' of business if you cannot continue 'operations.'

(Policy)(App. at 613).

The Policy contains an **Exclusion of Loss Due to Virus or Bacteria** provision, which states:

A. The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.

However, this exclusion does not apply to loss or damage caused by or resulting from 'fungus', wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.
…

(Policy)(App. at 179).

Lastly, the Policy contains an Ordinance or Law exclusion which states in part:

Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

a. Ordinance Or Law

The enforcement of or compliance with any ordinance or law:
(1) Regulating the construction, use or repair of any property; or
(2) Requiring the tearing down of any property, including the cost of removing its
debris.

This exclusion, Ordinance Or Law, applies whether the loss results from:

(a) An ordinance or law that is enforced even if the property has not been

damaged; or

(b) The increased costs incurred to comply with an ordinance or law in the

(c) course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.

(Policy)(App. at 180).

The policy defines a "Covered Cause of Loss": "Covered Cause of Loss means direct physical loss unless the loss is excluded or limited in this policy." (Policy)(App. at 180). The Policy **does not define** the phrase "direct physical loss of or damage to". Likewise, it does not define specific terms such as "loss," "direct," "physical," or "damage."

B. March 17, 2020 Proclamation

In 2019, an outbreak of illness known as COVID-19 was first identified in China, which subsequently spread to the United States. Beginning in early-March 2020, many state and local governments began issuing orders suspending or severely curtailing the operations of all non-essential or high-risk businesses, including Plaintiff's in-person dining and bar business. The impact on businesses whose livelihoods depend on foot-traffic, such as Plaintiff's business, has been particularly staggering. On March 17, 2020, Iowa Governor Kim Reynolds issued a Proclamation closing all bars and restaurants from dine-in or in-person service. (3/17/20 Proclamation)(App. at 694-707). Section 3A of the proclamation states:

> **Restaurants and Bars:** All Restaurants and Bars are hereby closed to the general public except that to the extent permitted by applicable law, and in accordance with any recommendations of the Iowa Department of Public Health, food and beverages may be sold if such food or beverages are promptly taken from the premises, such as on a carry-out or drive-through basis, or if the food or beverage is delivered to customers off the premises.

(Proclamation)(App. at 699). The Proclamation caused "**direct physical loss of or damage to**" Wakonda's covered property under the Policy by precluding Wakonda from conducting its operations, precluding customers from patronizing the business, and otherwise frustrating the intended purpose of Wakonda's business, all thereby causing the necessary suspension of operations during a period of restoration. (Affidavits of Kinney, Roth, and Winterbottom)(App. at 987-989, 994-998, 1003-1006). Indeed, failing to adhere to the Proclamation could have resulted in criminal charges and loss of Wakonda's license.

C. Wakonda's Claim for Insurance Benefits

Losses caused by COVID-19 and/or the Governor Reynolds Proclamation triggered the Business Income and Civil Authority provisions of the Policy. Wakonda, in an effort to mitigate its income losses, attempted to sell carry-out orders from March 28 to May 21, 2020. Wakonda also opened dining facilities at 50 percent capacity as allowed by the Governor's subsequent modification of the March 17 Proclamation. Wakonda under its

business owner's policy submitted a claim to Selective for loss of business income as a result of the Governor of the State of Iowa issuing an Order closing all restaurants and food and beverage businesses throughout the state of Iowa. (Claim Denial Letter)(App. at 475-482). Wakonda received a letter denying the claim for business income loss based upon the review of the policy. (Claim Denial Letter)(App. at 475-482). The purported reason for the denial of coverage as set forth in the declination letter was that there is a policy exclusion of loss due to a virus; that the business income loss must be caused by direct physical damage to the premises, and that the Civil Authority provision of the policy was not applicable. (Claim Denial Letter)(App. at 476-482). Further, the denial letter stated suspension of business was not caused by direct physical loss of or damage to property. (Claim Denial Letter)(App. at 477-482). An additional purported reason for denial of coverage was that an "Ordinance or Law" exclusion precluded coverage. (Claim Denial Letter)(App. at 478).

ARGUMENT

THE DISTRICT COURT'S INTERPRETATION OF THE DIRECT PHYSICAL LOSS REQUIREMENT, VIRUS EXCLUSION AND ORDINANCE EXCLUSION MISREADS THE CONTRACTUAL TEXT AND IGNORES SEVERAL WELL-ESTABLISHED PRINCIPLES OF INSURANCE CONTRACT INTERPRETATION

Preservation of Error

Error has been preserved by virtue of Selective's motion to dismiss, Wakonda's resistance, and the district court's ruling. (12/15/20 Def's Brief in Support of MSJ; 1/18/21 Pl's Brief in Resistance and Appendix; 3/3/21 Ruling) (App. at 486-518, 935-967, 973-974).

Standard of Review

This Court reviews a district court's ruling on a motion for summary judgment for correction of errors at law. *Slaughter v. Des Moines University College of Osteopathic Medicine*, 925 N.W.2d 793, 799 (Iowa 2019)

Analysis

A. Applicable Legal Principles

1. Summary Judgment standard

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P.

1.981(3). The trial court must look at the whole record in the light most favorable to the one against whom the motion is made. *Tasco, Inc. v. Winkel*, 281 N.W.2d 280, 282 (Iowa 1979). The moving party has the burden to show the absence of a fact issue. *Id.* Even if the facts are undisputed, summary judgment is not appropriate if reasonable minds may draw different inferences from them. *Id.*

2. Principles of insurance contract construction and interpretation

The Iowa Supreme Court provided a comprehensive discussion of insurance policy interpretation and construction under Iowa law in *Boelman v. Grinnell Mutual Reinsurance Company*, 826 N.W.2d 494 (Iowa 2013). In *Boelman*, the Iowa Supreme Court recognized the distinction between contract interpretation and contract construction. Specifically, interpretation requires the court to give meaning to contractual words in the policy. *Id.* In contrast, "[c]onstruction is the process of giving legal effect to a contract." *Id.*

As the Iowa Supreme Court explained in *Boelman*, "Policy interpretation is always an issue for the court, unless [the court is] required to rely upon extrinsic evidence or choose between reasonable inferences from extrinsic evidence." *Id.* The court then identified several rules of "interpretation." First, "[i]f the policy does not define a term, [the court must] give the word its ordinary meaning." *Id.*; *accord Farm Bureau Life Ins. Co. v.*

Holmes Murphy & Assocs., Inc., 831 N.W.2d 129, 134 (Iowa 2013) ("When words are left undefined in a policy, we give them their ordinary meanings—meanings which a reasonable person would give them."). When searching for the ordinary meanings of undefined terms in an insurance policy, Iowa courts commonly refer to dictionaries. *Holmes Murphy & Assocs., Inc*., 831 N.W.2d at 13.

Second, "[t]he plain meaning of the insurance contract generally prevails." *Boelman*, 826 N.W.2d at 501 (citing *Thomas v. Progressive Cas. Ins. Co*., 749 N.W.2d 678, 682 (Iowa 2008)). Third, the court must read the policy as a whole. *Id.; accord Holmes Murphy & Assocs., Inc.*, 831 N.W.2d at 134 ("We read the insurance contract in its entirety, rather than reading clauses in isolation, to determine whether a policy provision is subject to two equally proper interpretations."). Fourth, the court "will not interpret an insurance policy to render any part superfluous, unless doing so is reasonable and necessary to preserve the structure and format of the provision." *Boelman*, 826 N.W.2d at 502. Fifth, the court must "interpret the policy language from a reasonable rather than a hypertechnical viewpoint." *Id.*; *accord Holmes Murphy & Assocs., Inc.*, 831 N.W.2d at 134 ("We do not typically give [undefined terms] meanings only specialists or experts would understand.").

The court interprets ambiguous policy provisions in favor of the insured because insurance policies are in the nature of adhesion contracts. *A.Y. McDonald Industries, Inc. v. Insurance Co. of North America,* 475 N.W.2d 607, 619 (Iowa 1991); *see also C&J Fertilizer v. Allied Mut. Ins. Co.,* 227 N.W.2d 169 (Iowa 1975). Under Iowa law "[a]mbiguity exists if, after the application of pertinent rules of interpretation to the policy, a genuine uncertainty results as to which one of two or more meanings is the proper one." *Id.* at 618; *see also Kibbee v. State Farm Fire & Cas. Co.,* 525 N.W.2d 866, 868 (Iowa 1994) (stating that a policy is ambiguous when the policy language is susceptible to two reasonable interpretations). Although "interpretation" is an issue for the court in most circumstances, "construction"—determining the "legal effect" of policy language, as interpreted—"is always a matter of law for the court." *Boelman,* 826 N.W.2d at 501. A key axiom of insurance policy interpretation states, "**[i]f the policy is ambiguous, we adopt the construction most favorable to the insured.**" *Id.* at 502. (emphasis added). An insured's failure to clearly and explicitly define a covered loss creates an ambiguity. *See Cairnes v. Grinnell Mutual Reinsurance Co.*, 398 N.W.2d 821, 824 (Iowa 1987). As to "exclusions" of coverage in insurance policies, an insurer assumes a duty to define any limitations or exclusionary clauses in **clear** and **explicit** terms. *Boelman,* 826

N.W.2d at 502. This key axiom takes on heightened importance when the undefined terms at issue go to the heart of determining coverage.

The Iowa Supreme Court most recently reaffirmed these principles interpretation and construction of insurance contracts in *T.H.E. Insurance Company v. Glen and Estate of Booher*, 944 N.W.2d 665 (Iowa 2020). Specifically, the Iowa Supreme Court relied on the following principles in determining coverage existed in a claim for gross negligence:

> (1) An insurance contract is to be interpreted from the standpoint of an ordinary person and not a specialist or expert.
>
> (2) Insurance policies are adhesive contracts and are to be construed in the light most favorable to the insured.
>
> (3) Ambiguities in an insurance contract are to be interpreted against the insurer.
>
> (4) When a policy is subject to two reasonable interpretations, the court will find an ambiguity.

See generally, Id.

The Restatement of the Law of Liability Insurance, Section 4 (2019), provides additional insight regarding ambiguities and the rule that an ambiguous contract term should be interpreted against the party that supplied the term. The comment contained in the Restatement of Law of Liability Insurance, Section 4, states:

> (1) An insurance policy term is ambiguous if there is more than one meaning to which the language of the term is reasonably

> susceptible when applied to the facts of the claim at issue in the context of the entire insurance policy.
>
> (2) When an insurance policy term is ambiguous as defined in subsection (1), the term is interpreted against the party that supplied the term, unless that party persuades the court that a reasonable person in the policyholder's position would not give the term that interpretation.

Id.

Based on above, "[i]t is therefore incumbent upon an insurer to define clearly and explicitly any limitations or exclusions to coverage expressed by broad promises." *Cairns v. Grinnell Mut. Reins. Co.*, 398 N.W.2d 821, 824 (Iowa 1987); *See also, Dirgo v. Associated Hospitals Services, Inc.*, 210 N.W.2d 647, 650 (Iowa 1973) (stating exclusions are strictly construed against the insurer).

Ultimately, if an insured's interpretation of the relevant policy provisions is reasonable and different from the insurer's interpretation, an ambiguity exists.

3. Principles of determining intent of the parties – extrinsic evidence

The cardinal rule in interpretation and construction of contracts—insurance policies is to determine the intent of the parties. In *Connie's Const. Co., Inc. v. Fireman's Fund Ins. Co.*, 227 NW2d 2007 (Iowa 1975), the Iowa Supreme Court interpreted a contractor's liability insurance policy. In doing so, the Court stated that "interpretation, the meaning of contractual words, is

an issue of the court unless it depends upon extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence." The Court in *Connie's Const. Co.* cited *Hamilton v. Wosepka,* 261 Iowa 299, 154 N.W.2d 164 (1967) in which Justice Mason in *Hamilton* engaged in a powerful analysis of the purpose of interpretation always being the discovery of actual intention. An in-depth review of *Corbin on Contracts, Williston on Contracts* and numerous insurance cases led the court to conclude that the "ambiguity-on-its-face" rule is a vestigial remain of a notion prevailing in "primitive law." Justice Mason adopted the position of *U.S. v. Lennox Metal Mfg. Co.*, 225 F.2d 302, 310 (2d Cir. 1955) in recognizing the fallacy in interpreting contractual language in a manner that would preclude the court from considering surrounding circumstances unless the language is "patently ambiguous." Iowa's well-established principles of insurance contract interpretation ring hollow if, when interpreting a policy and determining the parties' intent, the Court does not consider the situation of parties, the attendant circumstances and intentions giving rise to the purchase of the policy, and the objects a party is striving to obtain in entering into the contract.

The challenge before the Court is to determine the true "intent of the parties" at the time an adhesion contract was entered. The outcome is predetermined and fixed, unless the court engaged in discovery of the actual

intention as suggested in *Hamilton*. In this business interruption claim, the clear intent of the insured, as stated in the affidavits and exhibits, was that Wakonda purchased an "all-risk" policy that covered its business losses under these circumstances.

B. The District Court Erred in Determining that the Policy did not Provide Coverage.

The District Court erred in determining that the Policy did not provide coverage. Ambiguities in the Policy preclude summary judgment with respect to Business Income coverage. The Policy provides for Business Income coverage in pertinent part as follows:

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss…

(Policy)(App. at 613). Thus, to be entitled to coverage, Wakonda must show that (1) it necessarily suspended its operations, (2) it suffered a loss of business income due to the suspension of its operations, and (3) the suspension was caused by direct physical loss of or damage to property at the described premises, which in turn directly caused the loss.

1. Wakonda necessarily suspended its operations

Wakonda clearly pleads and demonstrates a "suspension" of its "operations." The Policy defines "suspension", in pertinent part, as "[t]he slowdown or cessation of your business activities; or [t]hat a part or all of the described premises is rendered untenable, if coverage for Business Income… applies." (Policy)(App. at 621). The Policy defines "operations," in pertinent part, as "your business activities occurring at the described 'premises'". (Policy)(App. at 621).

Governor Reynolds' Proclamation closed Wakonda's operations. Quite obviously, Wakonda's unfortunate closure of its restaurant and bar operations constitutes a "cessation of [its] business activities." The restaurant, bar and party venue were initially closed and not doing any business at all for several months. Likewise, Wakonda's operations at the Insured Premises prior to the issuance of the Proclamation constituted operation of dine-in restaurants. Accordingly, when Wakonda closed its restaurant and bar in response to the Proclamation, there was a "suspension" of its "operations" as defined by the plain language of Policy. Moreover, Wakonda's suspension of operations was "necessary". While the term "necessary" is not defined by the Policy, Webster's Unabridged Dictionary ("Webster's") defines it as "required," "determined or produced by the previous condition of things," "logically

unavoidable," and "compulsory." https://www.merriam-webster.com/dictionary/necessary. Here, the Proclamation prohibited in-person dining, among other things. In-person dining, bar service and party venues ***are*** Wakonda's business — which it was unable to operate. Accordingly, Wakonda closed its operations as required by the Proclamation and as the unavoidable result of the same.

2. Wakonda suffered a loss of business income

At best a material fact dispute exists as to whether Wakonda suffered a loss of business income. Wakonda clearly alleges a loss of "business income" due to the suspension of its operations, and Selective does not appear to challenge that position in its motion. The Policy defines "business income" as "'[n]et income' (Net Profit or Loss before income taxes) that would have been earned or incurred and (c)ontinuing normal operating expenses incurred, including payroll. (Policy)(App. at 613). Upon closure of the restaurant and bar, Wakonda suffered a loss of profits, and continued to suffer loss of profits even after it was allowed to re-open on take-out basis, and then re-open for dine-in service at a 50% capacity. (Kinney Affidavit)(App. at 987). Accordingly, under the Policy's plain language, Wakonda suffered a loss of "business income" as a result of the necessary suspension of its operations.

C. The Suspension of Wakonda's Operations was Caused by a "Direct Physical Loss of" Property at the Insured Premises

The critical coverage issue in this case ultimately centers on whether the necessary suspension of Wakonda's operations was caused by a direct physical loss of or damage to property. Selective's Policy provides coverage for actual loss of Business Income that an insured sustains due to a necessary suspension of operations where the suspension is caused by "direct physical loss of **or** damage to covered property at the described premises." (Policy)(App. at 170). The Policy does not define the phrase "direct physical loss of **or** damage to . . .," nor does it define specific terms such as "loss," "direct," "physical," or "damage." Accordingly, the Court interprets undefined words in the context of the policy as a whole, and avoids interpreting the policy in such a way as to render parts of the contract "surplusage." *See Fashion Fabrics of Iowa, Inc. v. Retail Inv'rs Corp.*, 266 N.W.2d 22, 26 (Iowa 1979) ("Because an agreement is to be interpreted as a whole, it is assumed in the first instance that no part of it is superfluous; an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect").

Selective cannot point to any provision of the Policy that purports to define "loss" to require an actual alteration of property. To the contrary,

Section V.17 of the Commercial General Liability and Medical Expenses Definitions that is part of the Policy in fact defines "property damage" to include: **"[l[oss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it."** (Policy)(App. at 1040). Literally, the only section of the Policy discussing loss of use states that property damage includes loss of use of tangible property that is not physically injured. Likewise, the Business Income coverage requires "loss of" or "damage to" property to trigger coverage, while the Civil Authority provision requires actual damage to property ("When a Covered Cause of Loss causes damage to property…." (Policy)(App. at 614). Again, reading the Policy as a whole demonstrates "loss of" property is different than "damage to" property. Simply reviewing the Policy as a whole demonstrates "loss of" property does not require property to be physically injured or altered. Selective's attempt to argue the contrary and to ignore the Policy as a whole is an attempt to re-write the Policy. If Selective wanted to exclude loss of "use" as a covered cause of loss, or require a physical alteration to property, it could have easily done so.

With respect to the specific Policy language at issue, the use of the disjunctive "or" in the phrase "direct physical loss of or damage to" means that coverage is triggered if either a physical loss of property **or** damage to

property occurs.[1] The concepts are clearly separate and distinct. The Policy's use of the disjunctive "or" between the terms "physical loss of" and "damage" necessarily means that either a "loss of" or "damage to" qualifies for coverage and that "loss of" is distinct from "damage to". *See Denison Municipal Utilities v. Iowa Worker's Compensation Commissioner,* 857 N.W.2d 230, 236 (Iowa 2014) (noting that use of the disjunctive "or" necessitated conclusion that statute set forth a list of alternatives). In *Manpower, Inc. v. Ins. Co. of the State of Penn.*, No 08C0085, 2009 U.S. Dist. LEXIS 108626, at 6 (E.D. Wis. Nov. 3, 2009), the insured, like Wakonda in this case, held an insurance policy covering damage for "direct physical loss of or damage to property." The court recognized that if such language required physical damage, then the policy would contain surplus language, and therefore, "'direct physical loss' must mean something other than 'direct physical damage'". *Id*. at 19. (*See also* Affidavits of Susan Voss and Professor Robertson)(App. at 975-981, 1011-1016).[2]

[1] A very basic tenant of the English language is the distinction between conjunctive and disjunctive construction of sentences. Disjunctive is defined as separate from alternatives. Black's Law Dictionary defines a disjunctive term as "One which is placed between two contraries by the affirming of one of which the other is taken away; it is usually expressed by the word 'or.'" Conjunctive is defined as when two parts are read together. Black's Law Dictionary defines conjunctive as "[c]onnecting in a manner denoting union. A grammatical term for particles which serve for joining or connecting together. Thus, the word "and" is called a "conjunctive," and "or" a "disjunctive," conjunction."

[2] Ms. Robertson is currently in Scotland and unable to provide a notarized affidavit. Wakonda's counsel makes a professional statement that Ms. Robertson has authorized the filing of the unsigned affidavit reflecting her opinions.

Selective could have defined "physical loss" and "physical damage," but failed to do so. (Voss Affidavit)(App. at 977-978). Courts searching for the ordinary meanings of undefined terms in policies commonly refer to dictionaries. Webster's defines "physical" as "of or relating to material things." https://www.merriamwebster.com/dictionary/physical. Webster's defines "loss" as follows: "detriment, disadvantage or deprivation from failure to keep, have or get; something that is lost…the state of being deprived of or being without something one has had." https://www.merriam-webster.com/dictionary/loss. Webster's defines "damage" as follows: "injury or harm that reduces value or usefulness." https://www.merriam-webster.com/dictionary/damage. Webster's defines "property" as including intangible property: "something owned or possessed," "***the exclusive right to possess, enjoy, and dispose of a thing: OWNERSHIP,"*** *and "something to which a person or business has a legal title."* https://www.merriam-webster.com/dictionary/property (Emphasis added).

The Court should further note, because the Policy provides coverage for "direct physical loss ***of*** . . . property" as opposed to "direct physical loss ***to*** property," the Insured Premises themselves do not need to have suffered a direct physical loss. Rather, all that is required to trigger coverage is that Wakonda incur a direct physical loss of property at the Insured Premises. *See*

Turek Enters. v. State Farm Mut. Auto Ins. Co., No. 20-11655, 2020 WL 5258484 at *6 (E.D. Mich. Sept. 3, 2020)(explaining that plaintiff's claim that its inability to use the covered property due to the Michigan Orders constituted "physical loss to covered property" would have been plausible had the policy covered "physical loss of covered property" instead of "physical loss to covered property"). And that is exactly what happened here. As a result of the Proclamation, Wakonda was deprived (i.e., a "loss") of its rights of enjoyment of the Insured Premises (i.e., "property") because it was prohibited from using the Insured Premises for its intended purpose — dine-in restaurant and bar.

Simply applying these definitions to the well-established general principles of insurance contract interpretation under Iowa law demonstrates the Proclamation constitutes "physical loss of or damage to property" under the Policy. Wakonda suffered a "physical loss of . . . property," as the Proclamation "deprived" Wakonda of its ability to use the Insured Premises for in-person dining, which is the essence of its business. Because Wakonda could not operate the Insured Premises as a restaurant with in-person dining as it did prior to the issuance of the Proclamation — patrons were prevented from physically dining in the restaurants — Wakonda was "without something they once had." Wakonda "lost" its property including, without

limitation, the right to "enjoy" operating the Insured Premises as restaurants with in-person dining.

The district court's 6-page ruling apparently placed a great deal of emphasis on *Milligan v. Grinnell Reins. Co.*, No. 1-050 / 00-1452 (Iowa Ct. App. Apr. 27, 2001). The district court's heavy reliance on *Milligan* is an error. The *Milligan* two-and-a-half-page unpublished opinion deals specifically with a fire insurance policy interpreting the suit-limitation provision for bringing a claim. *Id.* The language at issue in *Milligan* dealt with a different and more restrictive definition of "loss" so as to require damage or destruction. The limited opinion does not purport to interpret or construct an "all-risk" business interruption policy as applied to government closure orders amidst a pandemic the likes which this Country has not seen in over a hundred years. Other than reciting some well-established interpretation principles, *Milligan* has no bearing on the issues at hand.

At the very least, Wakonda's interpretation of the Policy is reasonable with respect to what constitutes a "direct physical loss of…property" for purpose of triggering coverage. Accordingly, an ambiguity exists that must be resolved in Wakonda's favor, thereby precluding Selective's motion. Selective's attempt require physical alteration is yet another example of Defendant trying to re-write its Policy.

D. Recent Judicial Opinions Support Wakonda's Claim for Coverage

Wakonda acknowledges that several courts that have ruled on business interruption claims premised on governmental closure orders have found against coverage. However, as discussed below, many of those cases are distinguishable for multiple reasons including, without limitation, the simple failure of many courts to apply well-established principles of insurance contract interpretation to the facts giving rise to the closures. This case presents novel issues due to its procedural posture and expansive policy language.[3]

Henderson v. Road Restaurant Systems, Inc. v. Zurich American Ins. Co., 1:20-CV-1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021), is one of most recent cases evaluating business interruption claims and provides the proper roadmap for applying the well-established principles of insurance contract interpretation to business income provisions. In *Henderson*, the plaintiff made nearly identical claims as Wakonda makes in this case. The

[3] Most recently, the United Kingdom's highest court ruled in favor of the insured business owners in the UK's version of Business Interruption cases, concluding that the insurance companies must provide coverage for losses arising out of the government's closure of businesses. *See Financial Conduct Authority v Arch Insurance* (UK) Ltd. 15 Jan 2021 [2021] UKSC 1, SC(E) on appeal from 15 Sep 2020 [2020] EWHC 2448 (Comm), DC (Flaux LJ, Butcher J). While there are differences in the coverages in the U.K. policies, the main thrust and significant of the decision is that the United Kingdom has recognized that insurer should pay on business interruption policies as result of the establishments having been closed completely or partially due to proclamations of their government.

court reviewed similar policy provisions and considered the ordinary definitions of the policy's undefined works. Upon doing so, the court held:

> Because Zurich's Policy is susceptible of more than one interpretation and because Plaintiffs have shown that they incurred "loss of **'business income'** due to the necessary **'suspension'** of their **'operations'** during the **'period of restoration'"** "caused by direct physical loss of or damage to property at a **'premises,'**" they are entitled to summary judgment on the issue of coverage under the Policy.

Henderson, 2021 WL 168422 at *12.

Studio 417 v. Cincinnati Ins. Co., No. 20-cv-03127, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), is another analogous litigation involving business interruption insurance claims due to governmental closure orders that also involves similar policy language. In *Studio 417*, the United States District Court for the Western of Missouri held stated the relevant governmental closure orders caused a "physical loss" because the Closure Orders prohibited or significantly restricted access to Plaintiffs' premises. *Id* at *7. In reaching its decision, the *Studio 417* court explained that the policies at issue provide coverage for "'accidental physical loss *or* accidental physical damage.'" *Id.* at *5 (emphasis sic). The court further explained that "Defendant conflates 'loss' and 'damage' in support of its argument that the Policies require a tangible, physical alteration. However, the Court must give meaning to both terms. *Id.*

Similarly, in *North State Deli, LLC v. The Cincinnati Ins. Co.*, Case No. 20-CVS-02569, 2020 WL 6281507, (N.C. Super. Oct. 09, 2020), the North Carolina General Court of Justice for Durham County granted the insured restaurant owners' motion for summary judgment, affirmatively holding the insurer must provide coverage under a policy similar to the one at issue in this lawsuit. The court relied upon Merriam-Webster and Black's Law Dictionary definitions in support of its ruling:

> Applying these definitions reveals 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, resulting from a given cause without the intervention of other conditions. In the context of the Policies, therefore, "direct physical loss" describes the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders. Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a "direct physical loss," and the Policies afford coverage.

Id. at *6.

Other district courts that have properly applied the well-established principles of insurance contract interpretation have reached the same conclusion. *See e.g. Nautilus Grp., Inc. v. Allianz Global Risks US*, No. C11-

5281BHS, 2012 WL 760940, at * 7 (W.D. Wash. Mar. 8, 2012) (stating that 'if "physical loss" was interpreted to mean "damage," then one or the other would be superfluous"); *Blue Springs Dental Care, LLC*, Case No. 20-CV-00383 (W.D. Mo. Sept. 21, 2020) (denying defendant insurer's motion to dismiss on the same grounds as in *Studio 417*) *Urogynecology Specialist of Florida, LLC v. Sentinel Insurance Company, Ltd.*, Case No. 6:20-cv-1174, 2020 WL 5939172 (M.D. Fl. Sept. 24, 2020).

Likewise, the United States District Court for the Eastern District of Michigan recently opined in *Turek* on the importance of the "physical loss *of or* damage to" policy language present here, as opposed to other, more limiting, policy language. Specifically, the *Turek* court rejected the plaintiff's claim for business income coverage due to its closure in response to the Michigan Orders, construing the policy to require "tangible damage" to trigger coverage. *Turkek*, 2020 WL 5258484. However, the relevant policy language in *Turek* provided coverage only for "accidental direct physical loss to Covered Property." *Id.* at *7. And as the *Turek* court explained, "[t]he term here is 'direct physical loss,' not 'direct physical loss or damage.' Consequently, reading 'direct physical loss' to require tangible damage does not risk redundantly interpreting 'loss' and 'damage.'" Id. at *6.

Moreover, the *Turek* court went on to further explain:

> Plaintiff suggests that "physical loss to Covered Property" includes the inability to use Covered Property. This interpretation seems consistent with one definition of "loss" but ultimately renders the word "to" meaningless. "To" is used here as a preposition indicating contact between two nouns, "direct physical loss" and "Covered Property." Accordingly, the plain meaning of "direct physical loss to Covered Property" requires that there be a loss to Covered Property; and not just any loss, a direct physical loss. Plaintiff's interpretation would be plausible if, instead, the term at issue were "accidental direct physical loss of Covered Property." *See Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) ("[T]he policy's use of the word 'to' in the policy language 'direct physical loss to property' is significant. [The claimant's] argument might be stronger if the policy's language included the word 'of' rather than 'to,' as in 'direct physical loss of property' or even 'direct loss of property.'")

Id. at *6 (emphasis sic)(internal citations omitted).

Perhaps most notably, in a recent Multi-District Litigation decision in *In re Society Insurance Co.*, MDL 2964, 2021 WL 679109, *8-10 (N.D. Ill. Feb. 22, 2021) in which the United States District Court of the Northern District of Illinois determined, "a reasonable jury can find that the Plaintiff did suffer a direct 'physical' loss of property" because "shutdown orders do impose a physical limit: the restaurants are limited from using much of their physical space."

Accordingly, as explained in *Henderson, Studio 417* and *Turek*, the "direct physical loss of or damage to property" Policy language at issue here cannot be construed to require "tangible damage" to the Insured Premises because to do so would improperly conflate "loss" with "damage," when

either is sufficient to trigger coverage under the Policy. Numerous courts throughout the country have similarly held that "tangible damage" such as structural alteration is not required to trigger coverage under insurance policies containing "physical loss of or damage to" property language. *See* e.g., *One Place Condo., LLC v. Travelers Prop. Cas. Co. of Am*., No. 11 C 2520, 2015 U.S. Dist. LEXIS 56565 at *25 (N.D. Ill. April 22, 2015)("where a general all-risk commercial or homeowner's policy insures against both 'loss' and 'damage' to an existing structure, 'physical' damage may take the form of loss of use of otherwise undamaged property, which in turn suffices as a covered loss"); *Prudential Prop. & Cas. Ins. Co. v. Lilliard-Roberts*, No. CV-01-1362-ST, 2002 U.S. Dist. LEXIS 20387 at *26 (D.Or. June 18, 2002) ("the inability to inhabit a building [is] a 'direct, physical loss' covered by insurance"); *American Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.*, No. CIV 99-185 TUC ACM, 2000 U.S. Dist. LEXIS 7299 at *6 (D.Az. April 19, 2000)(holding that "'physical damage' is not restricted to the physical destruction of computer circuity but includes loss of access, loss of use, and loss of functionality)".

Similarly, this Court must be extremely cautious in being persuaded by the Selective's list cases cited in support of its motion. For example, *Diesel Barber Shop* and *Sandy Point Dental* involved policies that only covered

"accidental direct physical loss to", etc. *Diesel Barbershop, LLC v. State Farm Lloyds*, 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, No. 20 CV 2160, 2020 WL 5630465 (N.D. Ill. Sept 21, 2020). *10E* and *Pappy's Barber Shop* imposed a permanent dispossession requirement that was not based on any language in the relevant policies. *10E, LLC v. Travelers Indemn. Co. of Conn.*, No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020); *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, No. 20-CV-907-CAB-BLM, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020).

Ultimately, the majority of state courts ruling on business interruption claims and applying state law have been decided in favor of the insured. (Baker Report)(App. at 1042-1058). Out of the many federal court decisions ruling in favor of insurers, over one hundred of them are based in a mere five states, those states being California, Florida, Illinois, Ohio and Texas. (Baker Report)(App. 1042-1058). **The fact that over 50 federal and state courts have found that governmental shutdown orders constituting "physical loss of property" is a "plausible" interpretation of that language means that the Policy language is, at a minimum, ambiguous.** (Baker Report)(App. 1042-1058). Indeed, the late Chief Justice of the Iowa Supreme Court, Justice Cady, stated that although disparate opinions do not by

themselves establish an ambiguity, disagreements of the courts does tend to show that there is "strong indication" of an ambiguity. *Am. Fam. Mut. Ins. Co. v. Petersen*, 679 N.W.2d 571, 578 (Iowa 2004), amended on denial of reh'g (May 6, 2004). And, of course, under Iowa law ambiguous policy language must be construed liberally in favor of coverage. Accordingly, the only proper interpretation of the Policy in these circumstances is that the suspension of Wakonda's operations was caused by "direct physical loss of or damage to property" — Wakonda's loss of the ability to use the Insured Premises for their intended purpose due to the Proclamation.

E. The District Court Erred in Determining that the Virus Exclusion Applies to These Circumstances

Section B.1.j. of Selective's Policy provides it "will not pay for loss or damage cause directly or indirectly" by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (Policy)(App. at 179). Wakonda's claim, however, was not caused by or resulting from COVID-19. In fact, there is no claim or allegation that Wakonda's Insured Premises was closed as the result of the known or confirmed presence of SARS-CoV-2 or COVID-19 or that there were no known or presumed infected persons with COVID-19 at any of the Insured Premises at any time. Rather, Wakonda's claim was based solely on the forced

closure of its restaurant and bar in response to the Proclamation, which is most certainly not a "virus".

Selective argues the COVID-19 pandemic, not the Proclamation, is the real cause of Wakonda's losses and damage. That argument is belied by what is actually happening today. The COVID-19 pandemic continues to persist. In-person dining at 50% capacity was been allowed for months while the pandemic continued to explode. Governor Reynolds lifted all restrictions on restaurants on February 7, 2021 despite the ever-present existence of the virus. Likewise, many businesses never closed or otherwise limited their capacity (e.g., grocery stores, gas stations, and golf courses) despite wide-spread presence of the virus. If the virus was the cause of Wakonda's closure, it would still be closed. The circumstances of Wakonda's closure and reopening are absolute proof that COVID-19 did not cause Wakonda's restaurant and bar to close — the Proclamation did.

The *Henderson* case again provides the proper analysis to an insurer's attempt to rely on the virus exclusion to preclude coverage for government closure orders:

> Zurich argues that COVID-19 "indirectly" caused Plaintiffs to close their restaurants. But this is not entirely accurate. There was "no known or presumed infected person(s) with COVID-19 at any of the Insured Premises at any time from March 15, 2020 to April 27, 2020." Thus, it was clearly the government's orders that caused the closures.

> Ironically, Zurich later argues in its motion for summary judgment that the government orders "responded to a public health crisis," and were not related to any damage at the Plaintiffs' properties. This argument seems to undermine the purpose of the Microorganism exclusion which was plainly to exclude coverage for damage caused by microorganisms *at* the Plaintiffs' properties.
>
> The insurer, being the one who selects the language in the contract, must be specific in its use; an exclusion from liability must be clear and exact in order to be given effect. Here, Plaintiffs' argument prevails because the Microorganism exclusion does not clearly exclude loss of property caused by a government closure. Plaintiffs' restaurants were not closed because there was an outbreak of COVID-19 at their properties; they were closed as a result of governmental orders. Because Zurich's Microorganism exclusion did not identify the possibility that, even absent "the presence, growth, proliferation, spread, or any activity of "microorganisms" damaging the Plaintiffs' properties, the Plaintiffs may be required to close their dine-in restaurants due to government orders responding to a public health crisis, the Microorganism Exclusion does not apply.

Henderson, 2021 WL 168422 *14 (internal citations omitted).

Similarly, in *McKinley Development Leasing Company, Ltd. et al. v. Westfield Insurance Company*, Case No. 2020CV00815, 2021 WL 506266, (Stark County Ohio, Feb. 9, 2021), with policy language identical or materially identical to the present policy, a state court judge in Ohio stated that "the Court can only surmise that with these differing opinions, the policy is ambiguous." The *McKinley* court goes on to state that "[it] is obvious to the Court that a virus is not the same as a pandemic." *Id*.

As the court recognized in *Henderson*, going forward, Selective could undoubtedly include an exclusion for government closures in its policies. But the Policy that Wakonda purchased did not contain such an exclusion. Thus, it would be contrary to Iowa's laws of contract interpretation to apply the Virus Exclusion to the unprecedented government closures that occurred in 2020, particularly when the parties agree that Wakonda's premises was not closed as the result of known or confirmed presence of COVID-19 at its location. This is the conclusion that must be reached under Iowa law because the Policy's language did not clearly identify the unusual and unforeseeable events that led to the closings of Wakonda's business operations. Nor could Wakonda have been aware of such an exclusion when it purchased a policy and paid premiums to Selective for coverage. (Affidavit of Susan Voss)(App. at 975-981).

F. The District Court Erred in Determined that the Ordinance or Law Exclusion Applies to These Circumstances

Selective asserts the Ordinance or Law exclusion also precludes coverage. The exclusion reads:

> 1. We will not pay for loss or damage caused by or resulting from any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> a. Ordinance Or Law

> The enforcement of or compliance with any ordinance or law:
>
> (1) Regulating the construction, use or repair of any property; or
>
> (2) Requiring the tearing down of any property, including the cost of removing its debris.

(Policy)(App. at 180).

According to Selective, this exclusion precludes coverage arising out of Governor Reynolds' March 17, 2020 proclamation because the proclamation was an act or decision of a governmental body. Selective's application of this exclusion completely eviscerates the Civil Authority coverage Wakonda purchased under the Policy. Governor Reynolds' Proclamation, an act of a Civil Authority that prohibits access to the described premises, is a Covered Cause of Loss. While Wakonda is not appealing the decision regarding Civil Authority coverage, a holding that coverage under the Civil Authority provision is actually excluded under the Ordinance or Law Exclusion would create a nonsensical situation in which Wakonda paid for a policy providing Civil Authority coverage that at the same time excludes coverage for actions of a Civil Authority. The Ordinance or Law Exclusion should be stricken from the Policy in its entirety.

G. Wakonda Maintained a Reasonable Expectation of Coverage Under the Circumstances

Iowa law recognizes the doctrine of Reasonable Expectations of the insureds. See *Clark-Peterson Co., Inc. v. Independent Ins. Associates LTD*, 492 N.W.2d 675 (Iowa 1992) and *Aid Mutual Ins. v. Steffen*, 423 N.W.2d 189 (Iowa 1988). The doctrine has become a vital part of Iowa law interpreting insurance policies, as well as in other jurisdictions. *Clark-Peterson Co. Inc*. 492 N.W.2d at 677; *see also* 2 Couch on Ins., Section 22:11 (2020). Applicability of the reasonable expectations doctrine turns on proof that (1) an ordinary lay person would misunderstand the policy's coverage or (2) circumstances attributable to the insurer fostered coverage expectations. *Clark-Peterson Co., Inc.* 492 N.W.2d at 677*; see also Grinnell Select Ins. Co. v. Continental Western Ins. Co.*, 639 N.W.2d 31 (Iowa 2002). The Court may employ the doctrine if the insurance coverage eviscerates terms explicitly agreed to or is manifestly inconsistent with the purpose of the transaction for which the insurance was purchased. *Id.* The doctrine of reasonable expectations does not require as a condition precedent to its application an interpretation of a finding of ambiguity in the insurance policy. *See C&J Fertilizer v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975); *see also Cogatelli v. Globe Life & Ace Mut. Ins. Co.*, 533 P.2d 737 (Idaho 1975)(noting that while ambiguities may be highly relevant in determining the reasonable

expectations of an insured, the invocation and application of the doctrine does not depend on the presence of ambiguities). Once the doctrine has been shown to be applicable, "the objectively reasonable expectations of applicants and intended beneficiaries regarding insurance [policies] will be honored even though painstaking study of the policy provisions would have negated those expectations." *Clark-Peterson Co., Inc.* 492 N.W.2d at 677 (quoting *Rodman v. State Farm Mutual Automobile Insurance Co.*, 208 N.W.2d 903, 906 (Iowa 1973)). When they are honored, "[r]easonable expectations may be established by proof of the underlying negotiations or inferred from the circumstances." *Steffen*, 423 N.W.2d at 192.

The Iowa Supreme Court recognized in *C&J Fertilizer, Inc.*, 227 N.W.2d 169 (Iowa 1975) that "[w]e would be derelict in our duty to administer justice if we were not to judicially know that modern insurance companies have turned to mass advertising to sell 'protection'. *Id.* at 178. The reasonable consumer depends on an insurance company to sell him a policy that works for its intended purpose. *Id.* (citing W. Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv.L.Rev. 529 (1971).

In this instance, Wakonda purchased coverage for the explicit purpose of insuring its loss of profits in the event of the suspension of the business

operations. An ordinary layperson would not easily understand Selective's "loss" versus "damage" language to require a physical alteration of property in order to trigger business income coverage. To the contrary, the Policy's use of "physical loss of or damage" creates the inference to a layperson that there does not have to be actual destruction of property for coverage to apply. This is particularly the case when (1) elsewhere in the Policy "damage" is defined to include loss of use despite no physical injury and (2) the Business Income provision provides coverage for "loss or damage", while the Civil Authority provision specifically requires "damage".

Wakonda's reasonable expectation of coverage under these circumstances precludes summary judgment in favor of Selective.

CONCLUSION

Selective's insurance contract case can and should be decided in Wakonda's favor based on the plain language of the relevant provisions of the Policy. Even if this Court prefers Selective's interpretation of the coverage requirements and exclusions, it cannot say as a matter of law that Wakonda's interpretation is unreasonable. *Grimm v. US West Communs., Inc.*, 644 N.W.2d 8, 17 (Iowa 2002) (reversing district court's ruling granting defendant's motion to dismiss where the parties offered competing

interpretations of the employee handbook). Accordingly, this Court should reverse.

REQUEST FOR ORAL ARGUMENT

The Appellant hereby requests to be heard in oral argument in connection with this appeal.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was $13.00 and that that amount has been paid in fully by counsel for Appellant.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

[X] This brief contains 9,558 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)

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[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman, font 14 point.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on August 30, 2021, I electronically filed the foregoing with the Clerk of the Court for the Iowa Supreme Court by using the EDMS system. I certify that all participants in the case are registered EDMS users and that service will be accomplished by the EDMS system.

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