

IN RE:

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1 BEFORE:

2

THE HONORABLE JOYCE DRAGANCHUK

3

4 APPEARANCES:

5

MATTHEW HEOS, ESQUIRE

6

Representing the Plaintiffs

7

HENRY EMRICH, ESQUIRE

8

Representing the Defendant

9

ALSO PRESENT:

10

11

NICK GAVRILIDES

12

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1 MR. EMRICH: I've got my
2 assistant in here, your Honor,
3 just in case we have any technical
4 difficulties.

5 JUDGE DRAGANCHUK: That's --
6 that's good to know.

7 MR. EMRICH: Because I am --
8 I am totally unequipped to handle
9 them.

10 JUDGE DRAGANCHUK: Well, I'm
11 proud of you. You got on -- you
12 got on Zoom.

13 MR. EMRICH: Yeah.

14 JUDGE DRAGANCHUK: Okay.
15 This is -- pardon me if I massacre
16 this -- Gavrilides Management
17 Company, et al. versus Michigan
18 Insurance Company, Docket Number
19 20-258CB. And this is the time
20 set for defendant, Michigan
21 Insurance Company's, Motion for
22 Summary Disposition.

23 And just for the record,
24 could I have your appearances,

1 please?

2 MR. HEOS: Yes, your Honor.
3 Matthew Heos. And Nick Gavrilides
4 is here in the courtroom also with
5 me. He's the owner of the
6 plaintiff companies.

7 MR. EMRICH: Henry Emrich on
8 behalf of Michigan Insurance
9 Company, your Honor, and my
10 assistant, Chenny Ward (phon).

11 JUDGE DRAGANCHUK: Okay.
12 Thank you.

13 And your motion, Mr. Emrich,
14 if you wish to go ahead.

15 MR. EMRICH: Thank you, your
16 Honor. I'm going to assume that
17 the Court has read all of the
18 pleadings in this case, so I'll
19 try not to belabor some of the
20 points.

21 I think the -- the key --
22 the key fact here that we need to
23 focus on, as I've -- as we've
24 argued, is that there's little

1 question here, but the policies
2 that insure Mr. Gavrilides'
3 properties against -- against
4 direct physical loss or damage to
5 the property, and contrary to any
6 claim that the policy benefits in
7 question, this business income
8 coverage is illusory, the policy
9 in question here clearly provides
10 that for the business coverage --
11 the business income coverage to
12 apply, and most of the other
13 primary coverages under their
14 policy, there must be a direct
15 physical loss of or damage to the
16 insured property in order for it
17 to apply.

18 And I think it's important,
19 as we'll discuss later in our
20 argument, depending on what Mr.
21 Heos has to say, why this is
22 important. We must focus on the
23 fact that there must be direct
24 physical loss or damage to the

1 insured property and not direct
2 physical loss of use or damage to
3 the property, as has been
4 suggested by Mr. Gavrilides and
5 his attorney, in order for the
6 coverage at issue to apply.

7 While we acknowledge, your
8 Honor, that this is a somewhat
9 unique, extraordinary, if you
10 will, matter to be filing at this
11 point in the proceedings, as our
12 initial pleading, I think it's
13 important to understand that when
14 we look at Mr. Gavrilides'
15 complaint, it does not contain one
16 single allegation that this
17 insured property has in any way
18 been damaged or lost.

19 To the contrary, the
20 allegations in the complaint
21 affirmatively allege that the
22 plaintiffs' business interruption
23 claim is based on the stay-at-home
24 orders of Governor Whitmer. There

1 is no allegation of any kind that
2 the property in question has in
3 any way been damaged, lost, or
4 anything of the sort.

5 Given that this motion has
6 been brought under 2 --
7 2.116(C)(10), plaintiff must
8 produce some evidence to
9 contradict the uncontroverted
10 facts that have been alleged, not
11 only in the complaint, but in the
12 affidavit submitted by Mr.
13 Gavrilides and any of the other
14 materials that Mr. Heos has
15 attached to his response, as -- as
16 indicated, most importantly the
17 affidavit from Mr. Gavrilides that
18 reiterates the admissions in the
19 complaint that there has not been
20 any loss of or damage to either of
21 the properties for which they seek
22 coverage.

23 The insureds' property today
24 exists in the very same condition

1 as it existed the day prior to the
2 effective date of the stay-at-home
3 order. They have not been lost.
4 They have not been damaged. They
5 have not required any repairs
6 because of any damage to those
7 properties.

8 The business operation, its
9 operation as a restaurant today is
10 the same as the day prior to the
11 effective date of the order,
12 albeit with some modifications
13 that have been required to avoid
14 grouping and to maintain social
15 distancing, in a sense
16 improvements to the real estate,
17 not repairs, you know, and to --
18 and it's been maintained as a
19 take-out -- take-out operation at
20 least until recently when they
21 resumed the dining operation.

22 There has been no loss of or
23 damage to either building that has
24 prevented the plaintiffs from

1 operating as a restaurant or
2 entering it, for that matter,
3 if -- as they have.

4 If plaintiffs wanted to sell
5 either building today, they could
6 do so, and while plaintiffs have
7 provided some speculative evidence
8 about the decreased value of that
9 property, although as I read
10 Mr. -- as I read the Deloitte
11 materials that Mr. Heos kindly
12 attached to his response, the fact
13 of matter is, as pointed out in
14 that -- in that article, is that
15 while the operation of a
16 commercial property may get
17 harder, it's not impossible to
18 operate it in the future under our
19 new normal.

20 Because plaintiffs'
21 complaint, the affidavit, the
22 other information that has been
23 provided to the -- to your Honor
24 provides no evidence of any damage

1 to that property, plaintiffs could
2 never prove that either property
3 suffered any direct physical loss
4 from the imposition of Governor
5 Whitmer's emergency order, and
6 thus, could never recover business
7 interruption coverage under this
8 policy based on the facts that
9 have been presented to the Court.

10 The same holds true under
11 the business coverage -- income
12 coverage if a civil authority
13 prevents or prohibits access to
14 either property because of direct
15 physical damage to an adjacent or
16 nearby property for the very same
17 reason. There has been no direct
18 physical loss of or damage to any
19 adjacent property that has been
20 alleged, that has been provided to
21 the Court in Mr. Hoes' response.

22 And frankly, when you look
23 at the order that they have --
24 that is at issue in this case,

1 there's nothing there that
2 prevents access to Mr. Gavrilides'
3 properties whatsoever.

4 In summary, your Honor,
5 there are no facts alleged in --
6 in the complaint or in any of the
7 materials that I've looked at,
8 including Mr. Gavrilides'
9 affidavit, that shows there has
10 been direct physical loss of or
11 damage to the insured property.

12 And for those reasons, your
13 Honor, we believe our motion -- on
14 those reasons alone, we believe
15 our Motion for Summary Disposition
16 should be granted.

17 I'd just like to make a
18 couple of additional points before
19 I shut up on why we believe
20 summary disposition is warranted
21 on this basis alone. And I refer
22 to the court -- to the case that
23 we've discussed in our -- in our
24 brief, your Honor, that's referred

1 to as Universal Insurance
2 Productions versus Chubb. And
3 that's a decision of the Eastern
4 District of Michigan involving a
5 claim that -- that involved an
6 insured property. It was damaged
7 by a pervasive odor that developed
8 in the property as a result of
9 mold that grew in the property
10 because of some water seepage.

11 And why that case is
12 important is because it discusses
13 the Michigan rules of contract
14 interpretation that still apply
15 today if policy language is clear
16 and unambiguous on its face, which
17 we believe is clearly the case
18 here, that states that the words
19 and the terms of the policy should
20 be enforced utilizing plain and
21 commonly understood meanings.

22 And when I said earlier that
23 that's important when we talk
24 about what direct physical loss of

1 or damage to property means, it
2 means we look at those words. We
3 don't add words, such as loss of
4 use, that Mr. Heos and Mr.
5 Gavrilides have added in order to
6 understand what we're talking
7 about here. We look at the
8 language in the policy.

9 Every case that Mr. Heos
10 produced, your Honor, says the
11 very same thing. In Universal,
12 like here, the policy was an
13 all-risk policy that required,
14 like here, direct physical loss or
15 damage to the insured property in
16 order to trigger coverage unless
17 that coverage was excluded.

18 As Universal pointed out,
19 applying a dictionary meaning of
20 direct and physical as meaning
21 something immediate or proximate,
22 as opposed to something that is
23 distant or incidental, and
24 physical meaning something that

1 has a material existence meant in
2 the context of a loss involving a
3 contaminant that, unlike here, per
4 the uncontroverted allegations of
5 the complaint and other evidence
6 produced by plaintiff in response
7 to this motion, that in order for
8 direct physical loss to the
9 property in this context, the
10 contaminant must actually alter
11 the structural integrity of the
12 property in order to trigger
13 coverage under language that is at
14 issue in this case.

15 And it didn't happen in
16 Universal, as the Court denied
17 coverage there, granted a firm
18 summary disposition, and
19 importantly, your Honor, it hasn't
20 even been alleged in this case.

21 Regardless of any authority
22 to the contrary anywhere else in
23 the country, this remains the law
24 in our courts when interpreting

1 policy terms at issue. There's a
2 requirement that there be direct
3 physical loss of or damage to
4 property, and the allegations
5 deduced here in the complaint and
6 the evidence that's been attached
7 has specifically acknowledged no
8 such contamination and no such
9 damage to the property as a result
10 of that contamination.

11 As in Universal, your Honor,
12 the mere presence of odors or even
13 mold was not any evidence of
14 structural or tangible damage to
15 the insured property. And as
16 such, no direct physical loss or
17 damage to the property had --
18 was -- occurred.

19 Here, your Honor, we have
20 the very same thing except that we
21 have not even had any allegations
22 of any damage to the property
23 caused by this -- this
24 unfortunate -- this horrible

1 virus.

2 Finally -- and although we
3 do not believe the Court even has
4 to get to this point -- even if we
5 assume for purposes of this motion
6 that contamination occurred on
7 each premises and that somehow
8 affected the structural integrity
9 of either building -- again,
10 neither scenario is alleged.

11 And even if it were, we do
12 not believe under the
13 circumstances and the science that
14 exists that it would necessarily
15 constitute direct physical loss of
16 or damage to the property, the
17 virus exclusion of the policy,
18 which clearly and unequivocally
19 states that it applies to all
20 coverages and endorsement, and
21 that the company will not pay for
22 loss or damages caused by or
23 resulting from any virus,
24 bacterium, or other microorganism

1 that induces or is capable of
2 inducing physical distress,
3 illness, or disease, and Lord
4 knows that that has certainly been
5 the case with what's happened with
6 COVID-19 throughout our country.

7 Clearly, your Honor, that
8 exclusion -- again, we don't
9 believe we even have to -- you
10 even have to get there, but that
11 exclusion would clearly exclude
12 any claim here even if plaintiffs
13 could prove direct physical loss
14 of or damage to the insured
15 property or any nearby property
16 that resulted in a civil authority
17 issuing an order prohibiting
18 access to the property.

19 As of eight days ago, your
20 Honor, there have only been two
21 jurisdictions in this country,
22 Florida and Pennsylvania, that
23 have discussed and applied this --
24 a similar exclusion as at issue in

1 this case, and in every one of
2 those cases, the Court has
3 enforced that exclusion as written
4 because it's clear and
5 unambiguous.

6 Again, your Honor, for all
7 of the reasons that we've set
8 forth here today and the brief
9 that we've filed and our reply, we
10 request that the Court grant our
11 Motion for Summary Disposition at
12 this time.

13 Thank you.

14 JUDGE DRAGANCHUK: Thank
15 you.

16 Mr. Heos?

17 MR. HEOS: Thank you, your
18 Honor, and may it please the
19 Court?

20 Obviously, Mr. Emrich and I
21 have a different interpretation of
22 direct physical loss of or damage
23 to covered property because here
24 the loss comes from the issue of

1 the executive order restricting
2 the use of the property.

3 Physically you cannot use
4 for dine-in services any of the
5 interior of the building for a
6 period of time, and a complete
7 prohibition isn't contemplated by
8 the language of the contract. I
9 think a limited restriction also
10 falls within the coverage.

11 And I think that -- that if
12 you're going to take -- accept the
13 defendant's argument, you'd have
14 to limit the meaning to
15 destruction of the physical
16 building itself, but we know that
17 the coverage extends to
18 nondestructive losses, the civil
19 authority being one.

20 I put in the example in the
21 brief of subterranean pollution.
22 You can look at asbestos or the
23 computer virus as something that
24 would occur where there would be

1 no physical destruction to the
2 property itself.

3 The fact of the matter is,
4 is that Mr. Gavrilides can't use
5 the covered properties because
6 of -- or he's lost, rather, the
7 use of those properties because of
8 the order. And it looks like that
9 will continue in some form for a
10 while.

11 And so I think that counsel
12 is wrong in trying to limit the
13 scope, even with the case law he
14 cited, most of which is
15 persuasive and not binding.
16 That's number one, Judge.

17 As for the virus exclusion
18 itself the only case law we have
19 relates to person-to-person
20 transmission of a virus at the
21 covered property, and I think that
22 fits more with what's going on.
23 We see in the news that Harper's
24 in East Lansing and even the

1 HopCat in Kalamazoo is making
2 headlines of people contracting
3 COVID there.

4 But the impetus of the order
5 was to protect public health and
6 welfare, which is the Governor's
7 duty. It's not caused by a virus.

8 It would be the same order
9 as with the dam in Midland being
10 issued to protect public health
11 and welfare. It wasn't caused by
12 a flood. It was caused by the
13 Governor's duty to act to protect
14 the people she's in charge of
15 protecting, and I think that's
16 what's happening here, and it's
17 distinguishable from the case
18 then -- I think it's Bogler
19 (phon), the case cited regarding
20 the virus inclusion.

21 And I think that if you go
22 further in accepting defendant's
23 position, then we get into the
24 illusory promise of, well, if the

1 government issues the order, we're
2 not going to cover it because any
3 decision of a government body or a
4 group of people is excluded. And
5 so there you get into the circle
6 in the contract where if you're
7 really going to buy into counsel's
8 logic, it would make that
9 provision illusory.

10 And for those reasons, I
11 think that the motion should
12 actually roll back on the
13 defendants because the language
14 supports the claim. And to the
15 extent that the Court thinks that
16 there's a deficiency in my
17 pleading and is going to grant
18 defendant's motion, then I'd like
19 leave to amend the complaint, but
20 I don't think that's the case
21 here.

22 And with that, I'll leave it
23 back to the Court. If the Court
24 would like to ask me any

1 questions, I'm happy to take them.

2 JUDGE DRAGANCHUK: I don't
3 have any. Thank you.

4 I'll give Mr. Emrich
5 rebuttal time.

6 MR. EMRICH: Thank you, your
7 Honor.

8 Your Honor, what I would say
9 is that when we talk about these
10 cases that Mr. Heos has mentioned
11 that might provide coverage in
12 certain situations, I read those
13 cases a little while ago, and I'm
14 kind of tired of reading some of
15 these cases about insurance
16 coverage, but the point in every
17 one of those cases is that the
18 conditions he referred to actually
19 caused damage to the property.

20 In this case, there has not
21 been any such damage. And if we
22 look at what the coverage for
23 business loss or business -- the
24 business income loss that they're

1 seeking says, it says that if the
2 business -- that coverage would
3 apply if the business operation is
4 suspended provided the suspension
5 must be caused by the direct
6 physical loss of or damage to
7 property.

8 In this case, that hasn't
9 occurred. Nothing prevents Mr.
10 Gavrilides from using that
11 property. It has been used as
12 such. The fact that there may be
13 other coverages that may provide
14 some limited coverage goes against
15 what Mr. Heos is arguing, because
16 clearly if those coverages were
17 covered under this language, then
18 why have a special coverage that
19 provides certain conditions for
20 its application?

21 The point is in each of
22 those civil authority cases that
23 he talked about, the property
24 actually sustained damage. Here

1 it didn't sustain damage.

2 As to his claim, you know,
3 in this case that he wants an
4 opportunity to amend his complaint
5 if the Court feels compelled to
6 grant my motion, what is that
7 going to accomplish? He's already
8 alleged in his complaint and his
9 client has already signed an
10 affidavit where he, no doubt, put
11 his hand up and swore to the
12 contents of that affidavit in
13 which he said there has been no
14 damage to that property.

15 We don't create coverage
16 by -- because somebody thinks they
17 ought to have coverage, but
18 that -- that whole line of cases,
19 Rory versus Continental Insurance
20 and some of the other cases in
21 our -- in our brief that we cited
22 clearly support the -- the notion
23 that the reasonable expectation
24 concept doesn't apply in Michigan.

1 It just doesn't cut it.

2 There is no coverage here,
3 your Honor. That exclusion is
4 clear if there -- if the Court
5 feels that there may be or that
6 there may be a situation that
7 would give rise to it, but again,
8 you have to come forward at the
9 time that you -- that you respond
10 to this motion with some evidence
11 to suggest that. That hasn't
12 happened here.

13 I mean, even when you look
14 at the response that he's filed,
15 he talks about scenarios that has
16 absolutely no bearing to this
17 case.

18 And, you know, I'll just
19 make one last point, your Honor.
20 You know, when I was a young
21 prosecutor, I had the benefit of
22 being able to argue a number of
23 cases to juries that required me
24 to prove the defendant's guilt

1 beyond a reasonable doubt.

2 And in those cases, I
3 would -- I was trained to listen
4 closely to the defendant's
5 argument, and if in a case where
6 the facts were particularly
7 egregious, the defense attorney
8 would often not even talk about
9 those facts and talk about the law
10 and he'd talk about how that law
11 was -- somehow created this
12 reasonable doubt in hopes of
13 creating some confusion on the
14 part of one juror who might then
15 find in his client's favor because
16 reasonable doubt existed.

17 And in those cases, I would
18 make sure that when I got up in
19 rebuttal, just as I have been
20 given the opportunity to here, I
21 would point that out to the jury
22 and to indicate to them that there
23 was a reason for that, and that's
24 because they didn't want you to

1 talk about the facts that clearly
2 supported conviction.

3 On the other hand, if it was
4 a case where the law -- you know,
5 or the facts may have been murky,
6 but the law was clear, the defense
7 attorney would only focus on --
8 you know, on those facts and not
9 talk about the law. And, again, I
10 I'd point that out to the jury
11 there.

12 But in this case, you
13 know -- and there were cases back
14 then, too, like our case here,
15 that were neither supported by the
16 facts or the law, which I believe
17 is clearly the case in this case,
18 and the defense attorney would get
19 up and argue something that -- to
20 the jury that had absolutely
21 nothing to do with the case in
22 hopes of confusing them, just like
23 Mr. Heos has suggested by talking
24 about these asbestosis cases or

1 some of these other cases that
2 have nothing to do with this.

3 Or in this case, when you
4 look at his responsive pleading,
5 he talks about an accident
6 situation that has absolutely no
7 application here, nothing to do
8 with this case. Or in his -- in
9 his argument, he starts out
10 talking about a discussion of the
11 virus of racism. And as there --
12 as there, we would point out -- as
13 there, if we were in front of a
14 jury, I -- just like I'd point out
15 to them, and I'm pointing it out
16 to you, it hasn't got anything to
17 do with this case.

18 Your Honor, the reason for
19 that and the reason for him to
20 talk about that is that he
21 needs -- he knows that neither the
22 facts or the law support his
23 claim. And nothing he could file
24 as an amendment would change that.

1 He is hoping to somehow
2 create this little bit of
3 possibility, some scintilla that
4 some evidence is going to pop up
5 that shows that the property has
6 been damaged in hopes that he
7 could trigger coverage. And as
8 this Court knows, under the cases
9 we've discussed in our brief, that
10 is not sufficient to deny summary
11 disposition in a case that clearly
12 warrants it even at this early
13 stage.

14 Thank you, your Honor, for
15 your patience.

16 Thank you, Mr. Heos. We've
17 never met. I've heard a lot of
18 good things about you.

19 Mr. Gavrilides, nice to have
20 met you. I'm very sorry for the
21 situation you're in. It's just
22 crazy all the way around.

23 And just like having to
24 argue this case on TV is really

1 disconcerting for me, but in any
2 event, thank you, your Honor, for
3 your patience.

4 JUDGE DRAGANCHUK: And thank
5 you. You're on YouTube, not TV,
6 but...

7 MR. EMRICH: I meant the
8 screen. Yeah. Whatever.

9 JUDGE DRAGANCHUK: But I --

10 MR. EMRICH: The screen.

11 JUDGE DRAGANCHUK: I did
12 read the briefs. I studied them
13 very carefully, and I've listened
14 to the argument of counsel today.
15 And taking all of that together,
16 I -- I note that the plaintiff
17 speaks of and focuses on arguments
18 about access to the property, use
19 of the property, and definitions
20 of loss and damage, but the first
21 inquiry has to start with a full
22 look, not just isolating some
23 words or phrases from the policy,
24 but a full look at the coverage

1 that's provided under the policy.

2 Coverage is provided for
3 actual loss of business income
4 sustained during a suspension of
5 operations. The policy goes on to
6 provide the suspension must be
7 caused by direct physical loss of
8 or damage to property. And it
9 also provides the loss or damage
10 must be caused by or result from a
11 covered cause of loss.

12 The Causes of Loss Special
13 Form provides that a covered cause
14 of loss means risk of direct
15 physical loss. So whether we're
16 talking about the cause for the
17 suspension of the business or the
18 cause for the loss or the damage,
19 it is clear from the policy
20 coverage that only direct physical
21 loss is covered.

22 Under their common meanings,
23 and under federal case law, as
24 well, that the plaintiff has cited

1 that interprets this standard form
2 of insurance, direct physical loss
3 of or damage to the property has
4 to be something with material
5 existence, something that is
6 tangible, something, according to
7 the one case that the plaintiff
8 has cited from the Eastern
9 District, that alters the physical
10 integrity of the property.

11 The complaint here does not
12 allege any physical loss of or
13 damage to the property. The
14 complaint alleges a loss of
15 business due to executive orders
16 shutting down the restaurants for
17 dining -- for dining in the
18 restaurant due to the COVID-19
19 threat, but the complaint also
20 states that at no time has
21 COVID-19 entered the Soup Spoon or
22 The Bistro through any employee or
23 customer, and in fact, states that
24 it has never been present in

1 either location. So there simply
2 are no allegations of direct
3 physical loss of or damage to
4 either property.

5 The plaintiff seems to make
6 in the briefing, at least, two
7 arguments about the language in
8 the coverage provision and what it
9 means. The first argument is that
10 the plaintiff says coverage
11 applies to, quote, direct physical
12 loss or damage to property, end
13 quote.

14 Even if that were the
15 wording of the coverage provision,
16 it wouldn't save the plaintiff
17 from the requirement that the loss
18 or damage must be physical and the
19 analysis could end right there,
20 but I have to go on to say that
21 that is not even the wording of
22 the coverage provision.

23 Coverage, according to the
24 policy, applies to a suspension

1 caused by, quote, direct physical
2 loss of or damage to property, end
3 quote. So I'm not going to get
4 into a detailed analysis of the
5 rules of grammar, but common rules
6 of grammar would apply to make
7 that phrase a shortcut way of
8 saying, quote, direct physical
9 loss of property or direct
10 physical damage to property, end
11 quote.

12 So, again, the plaintiff
13 just can't avoid the requirement
14 that there has to be something
15 that physically alters the
16 integrity of the property. There
17 has to be some tangible, i.e.
18 physical damage to the property.

19 And then the plaintiff in
20 the briefing, at least, seems to
21 make a second argument that -- and
22 this is not a hundred percent
23 clear, but it seems like the
24 plaintiff is saying that the

1 physical requirement is met
2 because people were physically
3 restricted from dine-in services,
4 but that argument's just simply
5 nonsense, and it comes nowhere
6 close to meeting the requirement
7 that there has to be some physical
8 alteration to or physical damage
9 or tangible damage to the
10 integrity of the building.

11 So the next argument that
12 the plaintiff makes is that the
13 virus and bacteria exclusion is
14 vague and can't apply here. The
15 plaintiff has not adequately
16 explained how the term "virus" is
17 vague, and in fact, supplies a
18 completely workable,
19 understandable, usable definition
20 of the word "virus."

21 The argument in this regard
22 really seems to be more that the
23 virus exclusion doesn't apply.
24 And it goes something like this,

1 as far as I can tell: First, a
2 virus can't cause physical loss or
3 damage to property because viruses
4 harm people, not property.

5 Second, the damage caused
6 here was really caused by actions
7 of a civil authority to protect
8 public health.

9 And then third, therefore,
10 coverage for acts of any person,
11 group, organization, or
12 governmental body applies. But
13 that argument brings us right back
14 to the direct physical loss or
15 damage requirement.

16 Again, going back to the
17 Causes of Loss Special Form B, as
18 in boy, Exclusions provides that
19 acts of government are only
20 covered when they result in a
21 covered cause of loss. A covered
22 cause of loss, again, is direct
23 physical loss.

24 So even if the virus

1 exclusion did not apply, which the
2 plaintiff has not supported that
3 it doesn't apply, only argue that
4 it's vague, which I reject, but
5 even if it did not apply, there
6 could only be coverage for
7 governmental actions that resulted
8 in direct physical loss or damage.

9 And then finally, the
10 plaintiff argues that the policy
11 has a contradiction in it that
12 renders it illusory, so the
13 plaintiff says that the policy
14 extends coverage for governmental
15 acts, but then it takes it away in
16 the Causes of Loss Special Form.
17 But that's simply not true.

18 Coverage is provided for
19 actual loss of business income
20 sustained during a suspension of
21 operations. However, according to
22 the coverage provision, the
23 suspension must be caused by
24 direct physical loss of or damage

1 to property.

2 And governmental acts are
3 likewise covered if it results in
4 a covered cause of loss, which is,
5 again, a direct physical loss.

6 There is no granting of
7 coverage and then excluding the
8 same coverage in the policy. As a
9 matter of fact, the policy is
10 consistent throughout and
11 consistent with federal law cited
12 by the plaintiff. It requires
13 physical loss or damage.

14 There is a virus exclusion.
15 Even if plaintiff was alleging --
16 was alleging, even if there were
17 allegations in the complaint
18 alleging actual physical loss or
19 damage, which the complaint does
20 not do, but there is a virus
21 exclusion that would also apply.

22 And governmental action that
23 results in direct physical loss is
24 covered, but again, there is no

1 direct physical loss alleged here.

2 Now, I had to address a
3 little bit this -- that it was
4 brought as a (C)(10) motion.
5 Actually, the defendant hasn't
6 provided any support by way of
7 factual support, depositions,
8 affidavits, et cetera, for a
9 (C)(10) motion. So if the
10 defendant doesn't do that, then
11 the plaintiff has no burden under
12 Maiden versus Rosewood, so there's
13 no shifting burden until the
14 moving party first does it.

15 But I don't think it
16 properly is labeled a (C)(10)
17 motion. I think it's a (C)(8)
18 motion because this is a motion
19 that can be decided as a matter of
20 law.

21 Take all the allegations in
22 the complaint as true and examine
23 nothing more than the contract
24 upon which the complaint is based,

1 the policy of insurance, and as a
2 matter of law, the plaintiffs'
3 complaint cannot be sustained.

4 And although the plaintiff
5 has requested a chance to amend
6 without any indication of how they
7 would do that, there actually is
8 no factual development that could
9 change the fact that the complaint
10 is complaining about the loss of
11 access or use of the premises due
12 to executive orders and the
13 COVID-19 virus crisis.

14 So there's no factual
15 development that could possibly
16 change that or amendment to the
17 complaint that could possibly
18 change that those things do not
19 constitute the direct physical
20 damage or injury that's required
21 under the policy as I've outlined.

22 So for those reasons, I am
23 granting the defendant's Motion
24 for Summary Disposition. I'm

1 doing it under MCR 2.116(C) (8).

2 MR. EMRICH: Thank you, your
3 Honor.

4 JUDGE DRAGANCHUK: And, Mr.
5 Emrich, will you submit an order?

6 MR. EMRICH: I certainly
7 will, your Honor.

8 JUDGE DRAGANCHUK: Okay.

9 MR. EMRICH: Thank you.
10 Thank you very much.

11 JUDGE DRAGANCHUK: That
12 will -- that will conclude our
13 hearing.

14 MR. EMRICH: Thank you.

15 MR. HEOS: Thank you.

16 - - -

17 (Whereupon, the audio from
18 the hearing concluded.)

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CERTIFICATE

I HEREBY CERTIFY that the
above transcription is a true record of
the audio proceedings.

Wendy L. Walinski
Registered Professional Reporter
Notary Public
Dated: July 8, 2020

(The foregoing certification of
this transcript does not apply to any
reproduction of the same by any means,
unless under the direct control and/or
supervision of the certifying reporter.)

1 LAWYER'S NOTES

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18 _____

19 _____

20 _____

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24 _____

A	allege 6:21 33:12 alleged 7:10 10:20 11:5 14:20 16:10 25:8 40:1 alleges 33:14 alleging 39:15,16 39:18 all-risk 13:13 alter 14:10 alteration 36:8 alters 33:9 35:15 amend 22:19 25:4 41:5 amendment 29:24 41:16 analysis 34:19 35:4 and/or 43:18 appearances 2:4 3:24 application 24:20 29:7 applied 17:23 applies 16:19 34:11,24 37:12 apply 5:12,17 6:6 12:14 24:3 25:24 35:6 36:14,23 38:1,3 38:5 39:21 43:16 applying 13:19 argue 26:22 28:19 30:24 38:3 argued 4:24 argues 38:10 arguing 24:15 argument 5:20 19:13 27:5 29:9 31:14 34:9 35:21 36:11,21 37:13 arguments 31:17 34:7	argument's 36:4 article 9:14 asbestos 19:22 asbestosis 28:24 assistant 3:2 4:10 assume 4:16 16:5 attached 7:15 9:12 15:6 attorney 6:5 27:7 28:7,18 audio 1:9 42:17 43:6 authority 10:12 14:21 17:16 19:19 24:22 37:7 avoid 8:13 35:13	briefing 34:6 35:20 briefs 31:12 brings 37:13 brought 7:6 40:4 building 8:23 9:5 16:9 19:5,16 36:10 burden 40:11,13 business 5:7,10 5:11 6:22 8:8 10:6,11 23:23 23:23,24 24:2,3 32:3,17 33:15 38:19 buy 22:7	35:1 37:5,6 38:23 Causes 32:12 37:17 38:16 certain 23:12 24:19 certainly 17:4 42:6 CERTIFICATE 43:1 certification 43:15 CERTIFY 43:4 certifying 43:19 cetera 40:8 chance 41:5 change 29:24 41:9,16,18 charge 21:14 Chenny 4:10 Chubb 12:2 circle 22:5 circumstances 16:13 cited 20:14 21:19 25:21 32:24 33:8 39:11 civil 10:12 17:16 19:18 24:22 37:7 claim 5:6 6:23 12:5 17:12 22:14 25:2 29:23 clear 12:15 18:4 26:4 28:6 32:19 35:23 clearly 5:9 12:17 16:18 17:7,11 24:16 25:22 28:1,17 30:11 client 25:9 client's 27:15 close 36:6 closely 27:4 come 26:8
	B	B 37:17 back 22:12,23 28:13 37:13,16 bacteria 36:13 bacterium 16:24 based 6:23 10:8 40:24 basis 11:21 bearing 26:16 behalf 4:8 belabor 4:19 believe 11:13,14 11:19 12:17 16:3,12 17:9 28:16 benefit 26:21 benefits 5:6 beyond 27:1 binding 20:15 Bistro 33:22 bit 30:2 40:3 body 22:3 37:12 Bogler 21:18 boy 37:18 brief 11:24 18:8 19:21 25:21 30:9	C	C 40:4,9,16,17 capable 17:1 carefully 31:13 case 3:3 4:18 10:24 11:22 12:11,17 13:9 14:14,20 17:5 18:1 20:13,18 21:17,19 22:20 23:20 24:8 25:3 26:17 27:5 28:4 28:12,14,17,17 28:21 29:3,8,17 30:11,24 32:23 33:7 cases 18:2 23:10 23:13,15,17 24:22 25:18,20 26:23 27:2,17 28:13,24 29:1 30:8 cause 32:11,13 32:16,18 37:2 37:21,22 39:4 caused 15:23 16:22 21:7,11 21:12 23:19 24:5 32:7,10

comes 18:24 36:5	25:19	39:3,4,24	defendant's	disposition 3:22
commercial 9:16	continue 20:9	COVID 21:3	19:13 21:22	11:15,20 14:18
common 32:22	contract 12:13	COVID-19 17:6	22:18 26:24	18:11 30:11
35:5	19:8 22:6 40:23	33:18,21 41:13	27:4 41:23	41:24
commonly 12:21	contracting 21:2	crazy 30:22	defense 27:7 28:6	distancing 8:15
companies 4:6	contradict 7:9	create 25:15 30:2	28:18	distant 13:23
company 3:17,18	contradiction	created 27:11	deficiency 22:16	distinguishable
4:9 16:21	38:11	creating 27:13	definition 36:19	21:17
Company's 3:21	contrary 5:5 6:19	crisis 41:13	definitions 31:19	distress 17:2
compelled 25:5	14:22	customer 33:23	Deloitte 9:10	District 12:4 33:9
complaining	control 43:18	cut 26:1	denied 14:16	Docket 3:18
41:10	conviction 28:2		deny 30:10	doing 42:1
complaint 6:15	counsel 20:11	D	depending 5:20	doubt 25:10 27:1
6:20 7:11,19	31:14	dam 21:9	depositions 40:7	27:12,16
9:21 11:6 14:5	counsel's 22:7	damage 5:4,15	destruction	DRAGANCH...
15:5 22:19 25:4	country 14:23	5:24 6:2 7:20	19:15 20:1	2:2 3:5,10,14
25:8 33:11,14	17:6,21	8:6,23 9:24	detailed 35:4	4:11 18:14 23:2
33:19 39:17,19	couple 11:18	10:15,18 11:11	developed 12:7	31:4,9,11 42:4
40:22,24 41:3,9	court 4:17 10:9	13:1,15 15:3,9	development	42:8,11
41:17	10:21 11:22	15:14,17,22	41:8,15	due 33:15,18
complete 19:6	14:16 16:3 18:2	16:16 17:14	dictionary 13:19	41:11
completely 36:18	18:10,19 22:15	18:22 23:19,21	different 18:21	duty 21:7,13
computer 19:23	22:23,23 25:5	24:6,24 25:1,14	difficulties 3:4	
concept 25:24	26:4 30:8	31:20 32:8,9,18	dine-in 19:4 36:3	E
conclude 42:12	courtroom 4:4	33:3,13 34:3,12	dining 8:21 33:17	earlier 12:22
concluded 42:18	courts 14:24	34:18 35:2,10	33:17	early 30:12
condition 7:24	cover 22:2	35:18 36:8,9	direct 5:4,14,23	East 20:24
conditions 23:18	coverage 5:8,10	37:3,5,15 38:8	6:1 10:3,14,17	Eastern 12:3
24:19	5:11 6:6 7:22	38:24 39:13,19	11:10 12:24	33:8
conducted 1:10	10:7,11,12	41:20	13:14,20 14:8	effective 8:2,11
confusing 28:22	13:16,17 14:13	damaged 6:18	15:2,16 16:15	egregious 27:7
confusion 27:13	14:17 19:10,17	7:3 8:4 12:6	17:13 18:22	eight 17:19
consistent 39:10	23:11,16,22	30:6	24:5 32:7,14,20	either 7:20 8:23
39:11	24:2,14,18	damages 16:22	33:2 34:2,11	9:5 10:2,14
constitute 16:15	25:15,17 26:2	date 8:2,11	35:1,8,9 37:14	16:9 34:1,4
41:19	30:7 31:24 32:2	Dated 43:12	37:22 38:8,24	emergency 10:5
contain 6:15	32:20 34:8,10	day 8:1,10	39:5,23 40:1	employee 33:22
contaminant	34:15,22,23	days 17:19	41:19 43:18	Emrich 2:7 3:1,7
14:3,10	37:10 38:6,14	decided 40:19	disconcerting	3:13 4:7,7,13
contamination	38:18,22 39:7,8	decision 12:3	31:1	4:15 18:20 23:4
15:8,10 16:6	coverages 5:13	22:3	discuss 5:19	23:6 31:7,10
contemplated	16:20 24:13,16	decreased 9:8	discussed 11:23	42:2,5,6,9,14
19:7	covered 18:23	deduced 15:5	17:23 30:9	endorsement
contents 25:12	20:5,21 24:17	defendant 2:8	discusses 12:12	16:20
context 14:2,9	32:11,13,21	3:20 40:5,10	discussion 29:10	enforced 12:20
Continental	37:20,21,21	defendants 22:13	disease 17:3	18:3

entered 33:21	29:22	goes 24:14 32:5	Heos 2:5 4:2,3	32:3 38:19
entering 9:2	factual 40:7 41:8	36:24	5:21 7:14 9:11	indicate 27:22
ESQUIRE 2:5,7	41:14	going 4:16 19:12	13:4,9 18:16,17	indicated 7:16
estate 8:16	falls 19:10	20:22 22:2,7,17	23:10 24:15	indication 41:6
et 3:17 40:8	far 37:1	25:7 30:4 35:3	28:23 30:16	induces 17:1
event 31:2	favor 27:15	37:16	42:15	inducing 17:2
evidence 7:8 9:7	federal 32:23	good 3:6 30:18	Hoes 10:21	information 9:22
9:24 14:5 15:6	39:11	government 22:1	holds 10:10	initial 6:12
15:13 26:10	feels 25:5 26:5	22:3 37:19	Honor 3:2 4:2,9	injury 41:20
30:4	file 1:5,11 29:23	governmental	4:16 6:8 9:23	inquiry 31:21
examine 40:22	filed 18:9 26:14	37:12 38:7,14	11:4,13,24	insurance 3:18
example 19:20	filing 6:10	39:2,22	13:10 14:19	3:21 4:8 12:1
exclude 17:11	finally 16:2 38:9	Governor 6:24	15:11,19 17:7	23:15 25:19
excluded 13:17	find 27:15	10:4	17:20 18:6,18	33:2 41:1
22:4	firm 14:17	Governor's 21:6	23:7,8 26:3,19	insure 5:2
excluding 39:7	first 31:20 34:9	21:13	29:18 30:14	insured 5:16 6:1
exclusion 16:17	37:1 40:14	grammar 35:5,6	31:2 42:3,7	6:17 11:11 12:6
17:8,11,24 18:3	fits 20:22	grant 18:10	HONORABLE	13:15 15:15
20:17 26:3	flood 21:12	22:17 25:6	2:2	17:14
36:13,23 38:1	Florida 17:22	granted 11:16	HopCat 21:1	insureds 7:23
39:14,21	focus 4:23 5:22	14:17	hopes 27:12	integrity 14:11
Exclusions 37:18	28:7	granting 39:6	28:22 30:6	16:8 33:10
executive 19:1	focuses 31:17	41:23	hoping 30:1	35:16 36:10
33:15 41:12	foregoing 43:15	grew 12:9	horrible 15:24	interior 19:5
existed 8:1 27:16	form 20:9 32:13	group 22:4 37:11	hundred 35:22	interpretation
existence 14:1	33:1 37:17	grouping 8:14		12:14 18:21
33:5	38:16	guilt 26:24	I	interpreting
exists 7:24 16:14	forth 18:8		illness 17:3	14:24
expectation	forward 26:8	H	illusory 5:8 21:24	interprets 33:1
25:23	frankly 10:22	hand 25:11 28:3	22:9 38:12	interruption 6:22
explained 36:16	front 29:13	handle 3:8	immediate 13:21	10:7
extends 19:17	full 31:21,24	happen 14:15	impetus 21:4	involved 12:5
38:14	further 21:22	happened 17:5	important 5:18	involving 12:4
extent 22:15	future 9:18	26:12	5:22 6:13 12:12	14:2
extraordinary		happening 21:16	12:23	isolating 31:22
6:9	G	happy 23:1	importantly 7:16	issue 6:6 10:24
F	Gavrilides 2:11	harder 9:17	14:19	14:14 15:1
face 12:16	3:16 4:3 5:2 6:4	harm 37:4	imposition 10:4	17:24 18:24
fact 4:22 5:23	6:14 7:13,17	Harper's 20:23	impossible 9:17	issued 21:10
9:12 20:3 24:12	11:2,8 13:5	headlines 21:2	improvements	issues 22:1
33:23 36:17	20:4 24:10	health 21:5,10	8:16	issuing 17:17
39:9 41:9	30:19	37:8	incidental 13:23	i.e 35:17
facts 7:10 10:8	give 23:4 26:7	heard 30:17	including 11:8	J
11:5 27:6,9	given 7:5 27:20	hearing 1:10	inclusion 21:20	JOYCE 2:2
28:1,5,8,16	go 4:14 21:21	42:13,18	income 5:7,11	Judge 3:5,10,14
	34:20	Henry 2:7 4:7	10:11 23:24	

4:11 18:14 20:16 23:2 31:4 31:9,11 42:4,8 42:11 July 43:12 juries 26:23 jurisdictions 17:21 juror 27:14 jury 27:21 28:10 28:20 29:14	24:14 line 25:18 44:2 listen 27:3 listened 31:13 little 4:24 23:13 30:2 40:3 location 34:1 logic 22:8 look 6:14 10:22 13:2,7 19:22 23:22 26:13 29:4 31:22,24 looked 11:7 looks 20:8 Lord 17:3 loss 5:4,15,24 6:2 7:20 8:22 10:3 10:18 11:10 12:24 13:3,14 14:2,8 15:3,16 16:15,22 17:13 18:22,24 23:23 23:24 24:6 31:20 32:3,7,9 32:11,12,14,15 32:18,21 33:2 33:12,14 34:3 34:12,17 35:2,9 37:2,14,17,21 37:22,23 38:8 38:16,19,24 39:4,5,13,18,23 40:1 41:10 losses 19:18 lost 6:18 7:3 8:3 20:6 lot 30:17	massacre 3:15 material 14:1 33:4 materials 7:14 9:11 11:7 matter 6:10 9:2 9:13 20:3 39:9 40:19 41:2 Matthew 2:5 4:3 MCR 42:1 mean 26:13 meaning 13:19 13:20,24 19:14 meanings 12:21 32:22 means 13:1,2 32:14 34:9 43:17 meant 14:1 31:7 meeting 36:6 mentioned 23:10 mere 15:12 met 30:17,20 36:1 Michigan 3:17 3:20 4:8 12:4 12:13 25:24 microorganism 16:24 Midland 21:9 modifications 8:12 mold 12:9 15:13 mosot 20:14 motion 3:21 4:13 7:5 11:13,15 14:7 16:5 18:11 22:11,18 25:6 26:10 40:4,9,17 40:18,18 41:23 moving 40:14 murky 28:5	necessarily 16:14 need 4:22 needs 29:21 neither 16:10 28:15 29:21 never 10:2,6 30:17 33:24 new 9:19 news 20:23 nice 30:19 Nick 2:11 4:3 nondestructive 19:18 nonsense 36:5 normal 9:19 Notary 1:13 43:12 note 31:16 NOTES 44:1 notion 25:22 number 1:5,11 3:18 20:16 26:22	17:17 19:1 20:8 21:4,8 22:1 42:5 orders 6:24 33:15 41:12 organization 37:11 ought 25:17 outlined 41:21 owner 4:5
K				P
Kalamazoo 21:1 key 4:21,22 kind 7:1 23:14 kindly 9:11 know 3:6 8:17 19:16 25:2 26:18,20 28:4,8 28:13 knows 17:4 29:21 30:8 K146892 1:5				PAGE 44:2 pardon 3:15 part 27:14 particularly 27:6 party 40:14 patience 30:15 31:3 pay 16:21 Pennsylvania 17:22 people 21:2,14 22:4 36:2 37:4 percent 35:22 period 19:6 person 37:10 person-to-pers... 20:19 persuasive 20:15 pervasive 12:7 phon 4:10 21:19 phrase 35:7 phrases 31:23 physical 5:4,15 5:24 6:2 10:3 10:15,18 11:10 12:24 13:14,20 13:24 14:8 15:3 15:16 16:15 17:2,13 18:22 19:15 20:1 24:6 32:7,15,20 33:2 33:9,12 34:3,11 34:18 35:1,8,10 35:18 36:1,7,8
L				
L 1:11 43:11 labeled 40:16 language 12:15 13:8 14:13 19:8 22:13 24:17 34:7 Lansing 20:24 law 14:23 20:13 20:18 27:9,10 28:4,6,9,16 29:22 32:23 39:11 40:20 41:2 LAWYER'S 44:1 leave 22:19,22 LEGAL 1:17 likewise 39:3 limit 19:14 20:12 limited 19:9				
	M			
	MAGNA 1:17 Maiden 40:12 maintain 8:14 maintained 8:18 making 21:1 Management 3:16			
		N		
		nearby 10:16 17:15		
			O	
			Obviously 18:20 occur 19:24 occurred 15:18 16:6 24:9 odor 12:7 odors 15:12 Okay 3:14 4:11 42:8 operate 9:18 operating 9:1 operation 8:8,9 8:19,21 9:15 24:3 operations 32:5 38:21 opportunity 25:4 27:20 opposed 13:22 order 5:16 6:5 8:3,11 10:5,23 13:5,16 14:7,12	

37:2,14,23 38:8 38:24 39:5,13 39:18,23 40:1 41:19 physically 19:3 35:15 36:2 plain 12:20 plaintiff 4:6 7:7 14:6 31:16 32:24 33:7 34:5 34:10,16 35:12 35:19,24 36:12 36:15 38:2,10 38:13 39:12,15 40:11 41:4 plaintiffs 2:6 6:22 8:24 9:4,6 9:20 10:1 17:12 41:2 pleading 6:12 22:17 29:4 pleadings 4:18 please 4:1 18:18 point 6:11 16:4 23:16 24:21 26:19 27:21 28:10 29:12,14 pointed 9:13 13:18 pointing 29:15 points 4:20 11:18 policies 5:1 policy 5:6,8,14 10:8 12:15,19 13:8,12,13 15:1 16:17 31:23 32:1,5,19 34:24 38:10,13 39:8,9 41:1,21 pollution 19:21 pop 30:4 position 21:23 possibility 30:3 possibly 41:15,17 premises 16:7 41:11	presence 15:12 present 2:9 33:24 presented 10:9 prevented 8:24 prevents 10:13 11:2 24:9 primary 5:13 prior 8:1,10 proceedings 6:11 43:6 produce 7:8 produced 13:10 14:6 Productions 12:2 Professional 1:12 43:11 prohibiting 17:17 prohibition 19:7 prohibits 10:13 promise 21:24 properly 40:16 properties 5:3 7:21 8:7 11:3 20:5,7 property 5:5,16 6:1,3,17 7:2,23 9:9,16 10:1,2 10:14,16,19 11:11 12:6,8,9 13:1,15 14:9,12 15:4,9,15,17,22 16:16 17:15,15 17:18 18:23 19:2 20:2,21 23:19 24:7,11 24:23 25:14 30:5 31:18,19 32:8 33:3,10,13 34:4,12 35:2,9 35:10,16,18 37:3,4 39:1 prosecutor 26:21 protect 21:5,10 21:13 37:7 protecting 21:15	proud 3:11 prove 10:2 17:13 26:24 provide 23:11 24:13 32:6 provided 9:7,23 10:20 24:4 32:1 32:2 38:18 40:6 provides 5:9 9:24 24:19 32:9,13 37:18 provision 22:9 34:8,15,22 38:22 proximate 13:21 public 1:13 21:5 21:10 37:8 43:12 purposes 16:5 put 19:20 25:10	<hr/> Q <hr/> question 5:1,7,9 7:2 questions 23:1 quote 34:11,13 35:1,3,8,11	<hr/> R <hr/> racism 29:11 read 4:17 9:9,10 23:12 31:12 reading 23:14 real 8:16 really 22:7 30:24 36:22 37:6 reason 10:17 27:23 29:18,19 reasonable 25:23 27:1,12,16 reasons 11:12,14 18:7 22:10 41:22 rebuttal 23:5 27:19 record 3:23 43:5	recover 10:6 refer 11:21 referred 11:24 23:18 regard 1:10 36:21 regarding 21:19 Regardless 14:21 Registered 1:12 43:11 reiterates 7:18 reject 38:4 relates 20:19 remains 14:23 renders 38:12 repairs 8:5,17 reply 18:9 reporter 1:13 43:11,19 Representing 2:6 2:8 reproduction 43:17 request 18:10 requested 41:5 required 8:5,13 13:13 26:23 41:20 requirement 15:2 34:17 35:13 36:1,6 37:15 requires 39:12 respond 26:9 response 7:15 9:12 10:21 14:6 26:14 responsive 29:4 restaurant 8:9 9:1 33:18 restaurants 33:16 restricted 36:3 restricting 19:1 restriction 19:9 result 12:8 15:9	32:10 37:20 resulted 17:16 38:7 resulting 16:23 results 39:3,23 resumed 8:21 right 34:19 37:13 rise 26:7 risk 32:14 roll 22:12 Rory 25:19 Rosewood 40:12 rules 12:13 35:5 35:5
<hr/> S <hr/>						
save 34:16 saying 35:8,24 says 13:10 24:1,1 34:10 38:13 scenario 16:10 scenarios 26:15 science 16:13 scintilla 30:3 scope 20:13 screen 31:8,10 second 35:21 37:5 see 20:23 seek 7:21 seeking 24:1 seepage 12:10 sell 9:4 sense 8:15 services 1:17 19:4 36:3 set 3:20 18:7 shifting 40:13 shortcut 35:7 shows 11:9 30:5 shut 11:19 shutting 33:16 signed 25:9 similar 17:24 simply 34:1 36:4 38:17						

<p>single 6:16 situation 26:6 29:6 30:21 situations 23:12 social 8:14 somebody 25:16 somewhat 6:8 sorry 30:20 sort 7:4 Soup 33:21 speaks 31:17 special 24:18 32:12 37:17 38:16 specifically 15:7 speculative 9:7 Spoon 33:21 stage 30:13 standard 33:1 start 31:21 starts 29:9 states 12:18 16:19 33:20,23 stay-at-home 6:23 8:2 structural 14:11 15:14 16:8 studied 31:12 submit 42:5 submitted 7:12 subterranean 19:21 suffered 10:3 sufficient 30:10 suggest 26:11 suggested 6:4 28:23 summary 3:22 11:4,15,20 14:18 18:11 30:10 41:24 supervision 43:19 supplies 36:17 support 25:22 29:22 40:6,7</p>	<p>supported 28:2 28:15 38:2 supports 22:14 sure 27:18 suspended 24:4 suspension 24:4 32:4,6,17 34:24 38:20,23 sustain 25:1 sustained 24:24 32:4 38:20 41:3 swore 25:11</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>take 19:12 23:1 40:21 takes 38:15 take-out 8:19,19 talk 12:23 23:9 27:8,9,10 28:1 28:9 29:20 talked 24:23 talking 13:6 28:23 29:10 32:16 talks 26:15 29:5 tangible 15:14 33:6 35:17 36:9 technical 3:3 tell 37:1 term 36:16 terms 12:19 15:1 thank 4:12,15 18:13,14,17 23:3,6 30:14,16 31:2,4 42:2,9 42:10,14,15 thing 13:11 15:20 things 30:18 41:18 think 4:21 5:18 6:12 19:9,11 20:11,21 21:15 21:18,21 22:11 22:20 40:15,17 thinks 22:15</p>	<p>25:16 third 37:9 threat 33:19 time 3:19 18:12 19:6 23:5 26:9 33:20 tired 23:14 today 7:23 8:9 9:5 12:15 18:8 31:14 totally 3:8 trained 27:3 transcribed 1:11 transcript 43:16 transcription 1:9 43:5 transmission 20:20 trigger 13:16 14:12 30:7 true 10:10 38:17 40:22 43:5 try 4:19 trying 20:12 TV 30:24 31:5 two 17:20 34:6</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>unambiguous 12:16 18:5 uncontroverted 7:9 14:4 understand 6:13 13:6 understandable 36:19 understood 12:21 unequipped 3:8 unequivocally 16:18 unfortunate 15:24 unique 6:9 Universal 12:1 13:11,18 14:16</p>	<p>15:11 usable 36:19 use 6:2 13:4 19:2 19:3 20:4,7 31:18 41:11 utilizing 12:20</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vague 36:14,17 38:4 value 9:8 versus 3:17 12:2 25:19 40:12 virus 16:1,17,23 19:23 20:17,20 21:7,20 29:11 36:13,16,20,23 37:2,24 39:14 39:20 41:13 viruses 37:3</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>Walinski 1:12 43:11 want 27:24 wanted 9:4 wants 25:3 Ward 4:10 warranted 11:20 warrants 30:12 wasn't 21:11 water 12:10 way 6:17 7:3 30:22 35:7 40:6 welfare 21:6,11 Wendy 1:11 43:11 we'll 5:19 we're 13:6 22:1 32:15 we've 4:23 11:23 18:7,9 30:9,16 whatsoever 11:3 Whitmer 6:24 Whitmer's 10:5 wish 4:14</p>	<p>word 36:20 wording 34:15 34:21 words 12:18 13:2 13:3 31:23 workable 36:18 wouldn't 34:16 written 18:3 wrong 20:12 www.MagnaL... 1:18</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Yeah 3:13 31:8 young 26:20 YouTube 31:5</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>Zoom 3:12</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>10 40:4,9,16</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 7:6 2.116(C)(10) 7:7 2.116(C)(8) 42:1 20-258CB 3:19 2020 43:12</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>624-6221 1:18</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>8 40:17 43:12 866 1:18</p>
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