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United States District Court, C.D. California.

10E, LLC

v.

TRAVELERS INDEMNITY CO. OF CONNECTICUT et al.

Case No. 2:20-cv-04418-SVW-AS
|
Filed 11/13/2020

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Proceedings: ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITHOUT LEAVE TO AMEND [41]

The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

I. Introduction

***1** Before the Court is Defendant Travelers Property Casualty Company of America's motion to dismiss Plaintiff's Second Amended Complaint ("SAC"). For the reasons articulated below, the Court GRANTS the motion to dismiss without leave to amend.

II. Factual and Procedural Background

On September 2, 2020, the Court filed its amended Order granting Defendant's motion to dismiss Plaintiff's First Amended Complaint ("FAC"). Dkt. 39. The Court's Order recounted the facts giving rise to this lawsuit and its procedural history, which need not be repeated here. *Id.*

The Court's rationale for dismissing the FAC was that Plaintiff failed to plausibly allege facts constituting physical loss or damage from COVID-19 as required under its insurance policy ("the Policy") with Defendant. *Id.* at 7-9. This failure barred recovery under both Policy provisions for which Plaintiff sought coverage. The Policy's Business Income and Extra Expense Coverage requires "*direct physical loss of or damage* to property at the described premises ... caused by or result[ing] from a Covered Cause of Loss." Declaration of Kenneth Kupec, Dkt. 42-1, at 108-09 (emphasis added). The Policy's Civil Authority Coverage requires losses "caused by action of civil authority that prohibits access to the described premises." *Id.* at 121. "The civil authority action must be due to *direct physical loss of or damage* to property at locations, other than described premises, that are within 100 miles of the described premises, caused by or resulting from a Covered Cause of Loss." *Id.* (emphasis added).

The Court did not determine the applicability of the Policy's virus exclusion. Dkt. 39 at 9. The virus exclusion states that "[w]e will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Kupec Decl., at 247. However, the Court "note[d] its skepticism that Plaintiff can evade application of the Policy's virus exclusion ... [because] Plaintiff's theory of liability appears to inevitably rest on a potentially implausible allegation that in-person dining restrictions are not attributable to 'any virus.' " Dkt. 39 at 9.

Plaintiff filed its SAC on September 16, 2020. Dkt. 40. Defendant filed the instant motion to dismiss on September 30, 2020. Dkt. 42 ("Mot."). Plaintiff filed its opposition on October 19, 2020. Dkt. 44 ("Oppo."). Defendant filed its reply on October 26, 2020. Dkt. 46 ("Reply").

III. Discussion

a. Legal Standard

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. *See* Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.*; *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678).

***2** In reviewing a Rule 12(b)(6) motion, a court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). Thus, "[w]hile legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

b. Application

i. **Direct Physical Loss or Damage**

Plaintiff's SAC fails to respond to the pleading deficiencies identified by the Court in its prior Order. Plaintiff's opposition does not point to any allegations of direct physical loss of or damage to property at its own premises. Oppo., at 9-17. The SAC rests on the same allegations and legal theory rejected in the Court's prior Order. *See generally id.*; *compare* SAC ¶¶ 23-24 *with* FAC ¶¶ 20-21. Like the FAC, the SAC thus does not state a claim based on entitlement to Business Income and Extra Expense coverage. Dkt. 39, at 7-8.

Likewise, Plaintiff did not amend its complaint to properly allege that direct physical loss or damage to any property prompted in-person dining restrictions. The SAC rests on the same conclusory allegations but fails to plead facts indicating direct physical loss or damage to property within 100 miles of the restaurant or connect any such facts to in-person dining restrictions. *Compare* SAC ¶¶ 22, 24 *with* FAC ¶¶ 17-18. Like the FAC, the SAC also does not state a claim based on entitlement to Civil Authority coverage. Dkt. 39, at 9.

Therefore, for the reasons explained in the Court's prior Order, the Court grants Defendant's motion to dismiss.

ii. **Virus Exclusion**

While the Court only expressed skepticism that Plaintiff could evade the virus exclusion in its prior Order, the Court now concludes that the virus exclusion provides an independent basis for granting the motion to dismiss as to Business Income, Extra Expense, and Civil Authority coverage. These coverages only extend to loss or damage caused by or resulting from a covered cause of loss. Kupec Decl., at 108-09; *id.* at 121. The Policy's virus exclusion states that "[w]e will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." *Id.* at 247. This exclusion applies to "forms or endorsements that cover business income, extra expense ... or action of civil authority." *Id.*

"The interpretation of an exclusionary clause is an issue of law subject to this court's independent determination." *Marquez Knolls Prop. Owners Ass'n, Inc. v. Exec. Risk Indem.*, 153 Cal. App. 4th 228, 233 (2007). Several courts have dismissed complaints on the ground that similar virus exclusion clauses foreclosed recovery for losses incurred due to the pandemic. *See, e.g.*, *West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, 2020 WL 6440037, at *5 (C.D. Cal. 2020); *Travelers Cas. Ins. Co. of Am. v. Geragos and Geragos*, 2020 WL 6156584, at *3-*4 (C.D. Cal. 2020); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5938689, at *5 (C.D. Cal. 2020). The Court finds these cases persuasive.

Plaintiff's SAC seeks to recover under the Policy for losses incurred as a result of in-person dining restrictions during the COVID-19 pandemic. Plaintiff admits in the SAC that these restrictions were enacted in response to the pandemic. The SAC alleges that statewide restrictions as of September 16, 2020 were imposed "in counties where positive COVID-19 test results are greater than 7 per 100,000 people," SAC ¶ 16, and that City restrictions were "issued based on the dire risks of exposure with the contraction of COVID-19," *id.* ¶ 22. Likewise, the SAC concedes that at least one goal of business restrictions was to mitigate effects of the virus

such as "concern for the availability of hospital beds." *Id.* ¶ 21. These admissions reveal that Plaintiff cannot even describe the relevant public health measures without falling back on the virus to which those measures seek to respond. Because in-person dining restrictions result from a virus, the virus exclusion bars coverage for their consequences. *See Fireman's Fund Ins. Co. v. Superior Court*, 65 Cal. App. 4th 1205, 1212-13 (1997) (citations omitted) ("[Courts] will not strain to create an ambiguity where none exists or indulge in tortured constructions to divine some theoretical ambiguity in order to find coverage where none was contemplated.").

***3** Plaintiff again attempts to plead around the virus exclusion with assertions that business restrictions had motives or causes independent of the COVID-19 virus. The SAC references "outside factors and nefarious forces that are neither based in logic nor science," *id.* ¶¶ 17, and a "desire to exert control over California citizens in order to influence politics during a national election year," *id.* ¶ 21. Plaintiff alleges no facts to suggest these insinuations of bad faith are plausible.

Plaintiff also argues that the language of the virus exclusion indicates that it does not apply to losses caused only indirectly by business restrictions during the pandemic. Plaintiff attempts to bolster this interpretation by pointing to language in the Policy that excludes loss or damage "caused directly or indirectly" by various other causes. Oppo. at 7-8 (quoting Kupec Decl., at 128). By contrast, the virus exclusion contains no "directly or indirectly" language. *See* Kupec Decl., at 247.

This argument would stretch the virus exclusion beyond its plain meaning. *See Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115 (1999) (citation omitted) ("If the policy language 'is clear and explicit, it governs.' "). The virus exclusion forecloses coverage where loss or damage is "caused by or resulting from any virus." Kupec Decl., at 247. "The term 'resulting from' broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship." *Mosley v. Pac. Specialty Ins. Co.*, 49 Cal. App. 5th 417, 424 (2020) (citation and quotation marks omitted). "[T]he term 'resulting from' is generally equated ... with origination, growth or flow from the event." *Id.* (citation and quotation marks omitted). Even if, as Plaintiff alleges, business restrictions enacted in response to COVID-19 were disproportionate to the magnitude of the public health problem, they would still have a "minimal causal connection" to or "flow from" the COVID-19 virus. Therefore, the plain meaning of the virus exclusion does foreclose coverage under the Policy.

iii. **Breach of Contract, Bad Faith, and UCL Claims**

As explained in the Court's prior Order, because Plaintiff has failed to plead facts supporting entitlement to coverage under the Policy, Plaintiff cannot state a claim for breach of contract, bad faith denial of coverage, or fraudulent, unfair, or unlawful conduct under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* Dkt. 39, at 9-10.

iv. **Leave to Amend**

In evaluating a request for leave to amend, we consider the following factors: "undue delay, the movant's bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility." *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020) (citation omitted). "Leave to amend is warranted if the deficiencies can be cured with additional allegations that are 'consistent with the challenged pleading' and do not contradict the allegations in the original complaint." *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011) (citation omitted).

The Court already gave Plaintiff one opportunity to amend its complaint. As explained above, Plaintiff failed to cure the deficiencies in its pleading of "direct physical loss or damage." Moreover, Plaintiff's suggestion that in-person dining restrictions during the pandemic did not result from the COVID-19 virus is implausible and contradicted in the SAC itself. In line with other courts that denied leave to amend complaints asserting similar theories, the Court concludes that to allow Plaintiff to initiate a third round of briefing on the same flawed legal theories would be futile and prejudicial to Defendant. *See, e.g.*, *West Coast Hotel Mgmt., LLC*, 2020 WL 6440037, at *6; *Geragos and Geragos*, 2020 WL 6156584, at *5; *Mark's Engine Co. No. 28 Rest., LLC*, 2020 WL 5938689, at *6. Accordingly, the Court grants the motion to dismiss without leave to amend.

IV. Conclusion

***4** For the foregoing reasons, the Court GRANTS Defendant's motion to dismiss without leave to amend.

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United States District Court, E.D. Pennsylvania.

4431, INC.,4431 ASSOC., LP, 3354 WALBERT ASSOC., LP, 3354 WALBERT AVENUE ASSOCIATES, LLC, BLUE GRILLE HOUSE AND WINE BAR, 4131 ASSOCIATES, CANDLELIGHT INN, 2960 CENTER VALLEY PARKWAY, LLC, 3739 WEST CHESTER PIKE, LLC, MELT RESTAURANT GROUP, LLC, PAXOS RESTAURANTS, INC., MELT REAL ESTATE GROUP, LP., and TOP CUT STEAKHOUSE, Plaintiffs,

v.

CINCINNATI INSURANCE COMPANIES, THE CINCINNATI INSURANCE COMPANY, THE CINCINNATI CASUALTY COMPANY, and THE CINCINNATI INDEMNITY COMPANY, Defendants.

No. 5:20-cv-04396
|
12/03/2020

JOSEPH F. LEESON, JR., United States District Judge

O P I N I O N Defendants' Motion to Dismiss for Failure to State a Claim, ECF No. 5—GRANTED Joseph F. Leeson, Jr. December 3, 2020

United States District Judge

I. INTRODUCTION

***1** This insurance coverage dispute stems from the ongoing COVID-19 pandemic and its impact on the ability of several restaurants to operate. Plaintiffs are twelve commercial entities that own and operate restaurants in Pennsylvania (collectively, "Plaintiffs"). They purchased four identical "All Risk" property insurance policies ("the Policies") from Defendants Cincinnati Insurance Company and related entities (collectively, "Cincinnati"). As with so many other businesses, Plaintiffs have been forced to limit their operations as a result of the COVID-19 pandemic, closing their restaurants for in-dining and bar service. After Cincinnati refused to pay Plaintiffs' claims for pandemic-related loss of income under the Policies, Plaintiffs commenced this action in the Court of Common Pleas of Northampton County. Cincinnati removed the action to this Court on diversity grounds and now moves to dismiss the Complaint for failure to state a claim, arguing Plaintiffs' losses are not covered by the terms of the Policies. Plaintiffs oppose the motion.

Upon consideration of Cincinnati's motion to dismiss and Plaintiffs' opposition thereto, and for the reasons set forth below, the motion is granted, and Plaintiffs' Complaint is dismissed.

II. BACKGROUND

A. Facts Alleged in Plaintiffs' Complaint[1]

Plaintiffs operated bar and dine-in services on the premises of and as part of several restaurants in Pennsylvania. Plaintiffs' Complaint ("Compl."), ECF No. 1, ¶¶ 2, 22. Due to Orders issued by the Governor of Pennsylvania in response to the COVID-19 pandemic, Plaintiffs were forced to close on-premises dining and bar service at their restaurants beginning on March 19, 2020, and continuing to the present. *Id*. ¶¶ 3, 27-31. Their restaurants remain open only for takeout service. *Id*. ¶ 32. These closures have resulted in losses in excess of $100,000.00 per month since March 19, 2020, for each of Plaintiffs' restaurants. *Id*.

Prior to March 2020, Plaintiffs purchased four "All Risk" insurance policies from Cincinnati.[2] *See* Compl. ¶ 4. The terms of the Policies are identical. *Id*. ¶ 14. The Policies provide as follows:

> We will pay for the actual loss of "Business Income" and "Rental Value" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss.

***2** Policy at 47. The Policies further state:

> 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 "loss" 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" must be caused by or result from a Covered Cause of Loss.

Id. at 102. And further:

> We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain . . . during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.

Id. at 48. The Policies also provide that Cincinnati "will pay for direct 'loss' to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss." *Id*. at 32.

Relevant to Plaintiffs' suit, the Policies also contain a provision regarding covered losses stemming from actions of "civil authority":

> When a Covered Cause of Loss causes damage to property other than Covered Property at a "premises", we will pay for the actual loss of "Business Income" and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the "premises", provided that both of the following apply:
>
> (a) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
>
> (b) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Policy at 48.

The Policies define "Covered Causes of Loss" as used in the above provisions as "direct 'loss' unless the 'loss' is excluded or limited in this coverage part." Compl. ¶ 16. "Loss" is in turn defined as "[a]ccidental physical loss or accidental physical damage." *Id*; *see, e.g*., Policy at 67. There are no exclusions or limitations for viruses under the Policies. *See* Compl. ¶¶ 17, 41-42.

The Policies were fully paid and in effect as of March 2020, and have remained fully paid and in effect at all times since March 2020. Compl. ¶¶ 23-24. At some point during or after March 2020, Plaintiffs submitted claims for loss of income under the Policies. *Id*. ¶ 34. Plaintiffs state that their loss of income is the result of mandatory physical closures due to the spread of COVID-19, and is covered under the terms of the Policies. *Id*. ¶ 45. Specifically, Plaintiffs claim the closures were the result of "a covered cause of loss which inflicted a direct physical loss and/or caused direct physical damage to their covered premises. Plaintiffs also have had to pay for disinfecting and cleaning the premises to prevent COVID-19 contamination." *Id*. Plaintiffs also state that they are entitled to "Civil Authority Coverage" under the Policies as a result of what they identify as Pennsylvania's "Civil Authority Orders"—*i.e*., mandatory closure and stay at home orders issued by the Governor of Pennsylvania.[3] *Id*. ¶¶ 57-62. Cincinnati denied all of Plaintiffs' claims for lost business income. *Id*. ¶ 35.

***3** Based upon the above averments, Plaintiffs assert a claim for declaratory judgment under 42 PA. CONS. STAT. § 7532,[4] *see* Compl. ¶¶ 36-63, as well as a claim for breach of contract, *see id*. ¶¶ 64-69.

B. Procedural Background

On July 24, 2020, Plaintiffs commenced this action in the Court of Common Pleas of Northampton County. *See* ECF No. 1. Cincinnati filed a Notice of Removal on September 8, 2020, removing the case to this Court on the basis of diversity jurisdiction. *See id.* Shortly thereafter on September 15, 2020, Cincinnati filed the instant motion to dismiss the Complaint for failure to state a claim. *See* ECF No. 5. On September 23, 2020, Plaintiffs filed a motion to remand the action back to state court. *See* ECF No. 6. On October 14, 2020, after receiving correspondence from the parties indicating Plaintiffs' wish to withdraw their motion to remand, the Court granted that request and extended the deadline for Plaintiffs' response to the pending motion to dismiss. *See* ECF No. 10. Plaintiffs' opposition to the motion to dismiss was filed on October 26, 2020, *see* ECF No. 11, and Cincinnati's reply in further support of its motion was filed on November 3, 2020, *see* ECF No. 13.

III. DISCUSSION

A. Whether Exercising Jurisdiction is Appropriate

1. Applicable Legal Principles

Although Plaintiffs' motion to remand has technically been withdrawn, the question of whether this Court should exercise jurisdiction over the action and rule on Cincinnati's motion to

dismiss is still one that the Court must address. This is due to the declaratory relief Plaintiffs seek. *See Rarick v. Federated Serv. Ins. Co.*, 852 F.3d 223, 227 (3d Cir. 2017) ("When an action seeks legal relief, federal courts have a virtually unflagging obligation to exercise jurisdiction.... When an action seeks declaratory relief, however, federal courts may decline jurisdiction under the [federal] Declaratory Judgment Act.") (internal quotation marks omitted).

The federal Declaratory Judgment Act ("DJA")[5] provides in relevant part as follows:

> In a case of actual controversy within its jurisdiction...any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a) (emphasis added).[6] "[T]he DJA grants discretion to federal district courts, who have 'no compulsion' to exercise their jurisdiction over cases seeking declaratory judgment." *Greg Prosmushkin, P.C. v. Hanover Ins. Grp.*, No. CV 20-2561, 2020 WL 4735498, at *2 (E.D. Pa. Aug. 14, 2020) (quoting *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 494 (1942)).

***4** In *Rarick v. Federated Service Insurance Company*, 852 F.3d 223 (3d Cir. 2017), the Third Circuit established the "independent claim test" as the appropriate test for determining whether a district court should exercise jurisdiction over an action seeking *both* declaratory *and* legal relief based on issues of state law. The *Rarick* Court stated as follows with regard to the independent claim test:

> When a complaint contains claims for both legal and declaratory relief, a district court must determine whether the legal claims are independent of the declaratory claims. If the legal claims are independent, the court has a "virtually unflagging obligation" to hear those claims, subject of course to [*Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976)'s] exceptional circumstances. If the legal claims are dependent on the declaratory claims, however, the court retains discretion to decline jurisdiction of the entire action, consistent with our decision in [*Reifer v. Westport Ins. Corp.*, 751 F.3d 129 (3d Cir. 2014)].[7]

Rarick, 852 F.3d at 229. The Court went on to explain why the independent claim test is superior to other tests it had examined:

> The independent claim test is superior to the others principally because it prevents plaintiffs from evading federal jurisdiction through artful pleading. Although [Plaintiffs] Rarick and Easterday included declaratory claims in their complaints, they requested a legal remedy —damages—for breach of contract. Because both cases satisfied the requirements for diversity jurisdiction, Rarick and Easterday could have obtained their desired relief in federal courts without requesting a declaratory judgment. By including a declaratory claim in their pleadings, however, Rarick and Easterday invited the District Court to avoid *Colorado River*'s "virtually unflagging obligation" in favor of the more expansive discretion afforded under *Reifer*.
>
> This outcome is inconsistent with the purpose of the Declaratory Judgment Act, which is to "clarify legal relationships" in order to help putative litigants "make responsible decisions about the future." The Declaratory Judgment Act was intended to "*enlarge*[ ] the range of remedies available in the federal courts" by authorizing them to adjudicate rights and obligations even though no immediate remedy is requested.

Id. (citation omitted).

***5** With respect to the first step of the independent claim test—determining the dependency or independency of claims —the Court observes that "[n]on-declaratory claims are 'independent' of a declaratory claim when they are alone sufficient to invoke the court's subject matter jurisdiction and can be adjudicated without the requested declaratory relief." *Rarick*, 852 F.3d at 228 (quoting *R.R. St. & Co., Inc. v. Vulcan Materials Co.*, 569 F.3d 711, 715 (7th Cir. 2009)).

Assuming that Plaintiffs' claim for breach of contract is independent of their claim for declaratory relief, the second step of the independent claim test requires application of *Colorado River.* "The *Colorado River* doctrine allows a federal court to abstain, either by staying or dismissing a pending federal action, when there is a parallel ongoing state court proceeding." *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 307 (3d Cir. 2009). "The initial question is whether there is a parallel state proceeding that raises 'substantially identical claims [and] nearly identical allegations and issues.' If the proceedings are parallel, courts then look to a multi-factor test to

determine whether 'extraordinary circumstances' meriting abstention are present." *Id*. at 307-08 (quoting *Yang v. Tsui,* 416 F.3d 199, 204 n.5 (3d Cir. 2005) and *Spring City Corp. v. American Bldgs. Co.,* 193 F.3d 165, 171 (3d Cir. 1999)). The six factors courts examine to determine whether "exceptional circumstances" exist pursuant to *Colorado River* are the following: "(1) which court [state or federal] first assumed jurisdiction over property [in an *in rem* case]; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) whether federal or state law controls; and (6) whether the state court will adequately protect the interests of the parties."[8] *Spring City Corp.*, 193 F.3d at 171.

2. Application to Plaintiffs' Complaint

Applying the "independent claim test" to Plaintiffs' Complaint, the Court first observes that Plaintiffs' claim for breach of contract is indeed independent of their claim for declaratory relief, as it is "alone sufficient to invoke the court's subject matter jurisdiction and can be adjudicated without the requested declaratory relief." *Rarick*, 852 F.3d at 228; *see Wilson v. Hartford Cas. Co.*, No. CV 20-3384, 2020 WL 5820800, at *5 (E.D. Pa. Sept. 30, 2020) ("This Court has held multiple times that legal claims are independent of claims for declaratory relief when applying *Rarick* to insurance coverage disputes.") (collecting cases).

The Court therefore turns to the second step of the independent claim test—whether the considerations set forth in *Colorado River* and its progeny indicate the existence of "exceptional circumstances" sufficient to negate this Court's "virtually unflagging obligation" to exercise jurisdiction over legal claims.

First, because there is no parallel state court action here, it is doubtful whether *Colorado River* is even applicable. *See Wilson*, 2020 WL 5820800, at *5 ("Exceptional circumstances do not apply here since there are no parallel pending state court proceedings, which Plaintiffs concede."); *Nat'l City Mortg. Co. v. Stephen*, 647 F.3d 78, 84 (3d Cir. 2011) ("[W]e note that the controversy has taken place almost exclusively in federal court, the state proceeding began after NCM appealed to us and has been stayed pending the outcome of this appeal, and there are none of the complicating factors present in *Colorado River.* Thus, *Colorado River* abstention does not apply either."), *as amended* (Sept. 29, 2011); *Nationwide Mut. Fire Ins. Co.*, 571 F.3d at 307 ("The *Colorado River* doctrine allows a federal court to abstain, either by staying or dismissing a pending federal action, *when there is a parallel ongoing state court proceeding*.") (emphasis added).

***6** However, even if the Court were to consider the *Colorado River* factors, five of the six factors weigh against declining to exercise jurisdiction based on the existence of extraordinary circumstances. These factors indicate that such extraordinary circumstances do not exist here.

Factor one—which court first assumed jurisdiction over property—is inapplicable here because this is not an *in rem* proceeding.[9] Factor two—the inconvenience of the federal forum— does not weigh in favor of abstention. There are no arguments raised that the federal forum is inconvenient for Plaintiffs. Factor three—the desirability of avoiding piecemeal litigation—is met "only when there is evidence of a strong federal policy that all claims should be tried in the state courts." *Ryan v. Johnson*, 115 F.3d 193, 197-98 (3d Cir. 1997) (citing *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm'n,* 791 F.2d 1111, 1118 (3d Cir. 1986)). There is no evidence of any such strong federal policy here. Factor four—the order in which jurisdiction was obtained—is inapplicable here because there is no competing state court proceeding, and therefore no "order" of obtaining jurisdiction. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 (1983) (explaining that "priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions"). Factor six—whether the state court will adequately protect the interests of the parties—is similarly inapplicable. *See Ryan*, 115 F.3d at 200 ("[T]he mere fact that the state forum is adequate does not counsel in favor of abstention, given the heavy presumption the Supreme Court has enunciated in favor of exercising federal jurisdiction. Instead, this factor is normally relevant only when the state forum is *in*adequate.") (emphasis in original).

The only factor that weighs in favor of abstention under *Colorado River* is factor five— whether federal or state law controls. This action is controlled exclusively by Pennsylvania law. The Court also acknowledges that the questions of state law that Plaintiffs' action presents are novel, having yet to be addressed by any Pennsylvania court.[10] Indeed, as one court in this District recently observed in a similar COVID-related insurance coverage dispute, "[t]he issues of state law presented in Plaintiffs' action are novel, complex, and exceedingly important, creating a compelling

public policy interest for these claims to be allowed to be decided by Pennsylvania courts." *Greg Prosmushkin, P.C. v. Hanover Ins. Grp.*, No. CV 20-2561, 2020 WL 4735498, at *5 (E.D. Pa. Aug. 14, 2020).

However, in the Court's view, the novel nature of the state law question cannot, without more, permit this Court to circumvent its "virtually unflagging obligation" to exercise jurisdiction where the prerequisites for that exercise have otherwise been met, as they have been here. *See* 28 U.S.C. § 1332. Nor is this conclusion inconsistent with very recent precedent. At least two courts in this District have recently chosen to exercise jurisdiction over COVID-related insurance converge disputes where declaratory relief was sought. In *Wilson v. Hartford Cas. Co.*, No. CV 20-3384, 2020 WL 5820800 (E.D. Pa. Sept. 30, 2020), the court exercised jurisdiction based on the dependency of plaintiffs' claims for legal and declaratory relief, as well as on the absence of a parallel state court proceeding, and granted defendants' motion to dismiss the complaint. *See id.* at *6 (explaining that "[t]he legal claims found in the Plaintiffs' initial Complaint appear to be both jurisdictionally and substantively independent (and Plaintiffs do not argue otherwise) of the requested declaratory relief....As a result, they are alone sufficient to invoke the Court's subject matter jurisdiction"). Another court in this District recently exercised jurisdiction in a COVID-related insurance coverage dispute in the absence of a motion to remand without even engaging in a discussion as to abstention. *See Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. CV 20-3198, 2020 WL 6545893, at *3 (E.D. Pa. Nov. 6, 2020) (granting defendant's motion to dismiss and dismissing plaintiff's claims for breach of contract and declaratory relief where "plaintiff's property remained inhabitable and usable, albeit in limited ways" and finding that "[p]laintiff has failed to plead plausible facts that COVID-19 caused damage or loss in any physical way to the property so as to trigger coverage").

***7** It is moreover significant that in several recent COVID-based insurance disputes in which federal courts in this Circuit have *declined* to exercise jurisdiction, unlike Plaintiffs' Complaint here the complaints at issue presented *only* a request for declaratory judgment and no claims for legal relief. *See, e.g., Greg Prosmushkin, P.C.*, No. CV 20-2561, 2020 WL 4735498, at *5 (E.D. Pa. Aug. 14, 2020) ("In sum, Plaintiffs present no independent claim for legal relief in their Complaint."); *Dianoia's Eatery, LLC v. Motorists Mut. Ins. Co.*, No. CV 20-787, 2020 WL 5051459, at *2 (W.D. Pa. Aug. 27, 2020) ("Plaintiff's single-count declaratory judgment action simply does not state a breach of contract action against Defendant seeking damages."); *Venezie Sporting Goods, LLC v. Allied Ins. Co. of Am.*, No. 2:20-CV-1066, 2020 WL 5651598, at *3 (W.D. Pa. Sept. 23, 2020) ("The long and the very short of it is that there are no independent money damage or equitable claims asserted, only a request that this Court implement a declaration of coverage by either requiring Defendants to act in accord with such a declaration, or to refrain from taking actions contrary to such a declaration."). The absence of independent legal claims allowed these courts to retain "the more expansive discretion afforded under *Reifer*" to decline the exercise of jurisdiction. *Rarick v. Federated Serv. Ins. Co.*, 852 F.3d 223, 229 (3d Cir. 2017).

In summary, the circumstances capable of constituting "exceptional circumstances" as set forth in *Colorado River* and its progeny are "extraordinary and narrow exception[s]" to a federal court's "virtually unflagging obligation" to exercise jurisdiction where legal relief is sought. *Colo. River*, 424 U.S. at 813, 817. The Court acknowledges that Plaintiffs' Complaint presents novel questions of Pennsylvania law. However, in light of (1) the independence of Plaintiffs' legal claim from their request for declaratory relief, and (2) the absence of any parallel state court proceedings, the Court finds that there are insufficient other considerations to permit the Court to circumvent this obligation. The Court will therefore exercise its jurisdiction, and proceeds to an analysis of Cincinnati's motion to dismiss Plaintiffs' Complaint.

B. Cincinnati's Motion to Dismiss the Complaint

1. Legal Standard: Motions to Dismiss under Rule 12(b)(6)

In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court clarified the appropriate pleading standard in civil cases and set forth the approach to be used when deciding motions to dismiss brought under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

After identifying a pleaded claim's necessary elements,[11] district courts are to "identify [ ] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679; *see id.* at 678 ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' " (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))); *Thourot v. Monroe Career & Tech. Inst.*, No. CV 3:14-1779, 2016 WL 6082238, at *2 (M.D. Pa. Oct. 17, 2016) (explaining that "[a] formulaic recitation of the elements of a cause of

action" alone will not survive a motion to dismiss). Though "legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679.

Next, if a complaint contains "well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 678. This standard, commonly referred to as the "plausibility standard," "is not comparable to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. (citing *Twombly*, 550 U.S. at 556-57). It is only where the "[f]actual allegations...raise a right to relief above the speculative level" that the plaintiff has stated a plausible claim.[12] *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 555).

***8** Putting these steps together, the Court's task in deciding a motion to dismiss for failure to state a claim is to determine the following: whether, based upon the facts as alleged, which are taken as true, and disregarding legal contentions and conclusory assertions, the complaint states a claim for relief that is plausible on its face in light of the claim's necessary elements. *Iqbal*, 556 U.S. at 679; *Ashford v. Francisco*, No. 1:19-CV-1365, 2019 WL 4318818, at *2 (M.D. Pa. Sept. 12, 2019) ("To avoid dismissal under Rule 12(b)(6), a civil complaint must set out sufficient factual matter to show that its claims are facially plausible."); *see Connelly*, 809 F.3d at 787.

In adjudicating a Rule 12(b)(6) motion, the scope of what a court may consider is necessarily constrained: a court may "consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *United States v. Gertsman*, No. 15 8215, 2016 WL 4154916, at *3 (D.N.J. Aug. 4, 2016) (quoting *Guidotti v. Legal Helpers Debt Resolution*, L.L.C., 716 F.3d 764, 772 (3d Cir. 2013)). A court adjudicating a Rule 12(b)(6) motion may also take judicial notice of certain undisputed facts. *See Devon Drive Lionville, LP v. Parke Bancorp, Inc.*, No. CV 15-3435, 2017 WL 5668053, at *9 (E.D. Pa. Nov. 27, 2017).

2. Applicable Legal Principles: Insurance Policies as Contracts

A dispute over coverage arising under an insurance policy "is fundamentally an issue of contract interpretation." *Wilson*, 2020 WL 5820800, at *6. As both sides here appear to assume, Pennsylvania's law of contracts and rules of contract interpretation govern the instant dispute.[13] Under Pennsylvania law,

> [c]ontract interpretation is a question of law that requires the court to ascertain and give effect to the intent of the contracting parties as embodied in the written agreement. Courts assume that a contract's language is chosen carefully and that the parties are mindful of the meaning of the language used. When a writing is clear and unequivocal, its meaning must be determined by its contents alone.

In re Old Summit Mfg., LLC, 523 F.3d 134, 137 (3d Cir. 2008) (quoting *Dep't of Transp. v. Pa. Indus. for the Blind & Handicapped,* 886 A.2d 706, 711 (Pa Cmwlth. Ct. 2005)).

In construing an insurance policy to determine whether coverage was improperly denied, the Court must first determine whether a policy's language is unambiguous, or whether it is reasonably susceptible to different readings. "When policy language is clear and unambiguous, a court applying Pennsylvania law must give effect to that language." *Toppers Salon & Health Spa, Inc. v. Travelers Property Casualty Co. of America*, No. 2:20-CV-03342, 2020 WL 7024287, at *2 (E.D. Pa. Nov. 30, 2020) (citing *Kvaerner Metals Div. of Kvaerner, U.S. v. Commercial Union Ins. Co.*, 908 A.2d 888, 897 (Pa. 2006)). "When a provision in a policy is ambiguous, however, the policy is to be construed in favor of the insured to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage." *401 Fourth St., Inc. v. Inv'rs Ins. Grp.*, 879 A.2d 166, 171 (Pa. 2005). A policy's language is ambiguous "if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." *Id*. (quoting *Madison Construction Co. v. Harleysville Mutual Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999)).

***9** Under Pennsylvania law, "[t]he initial burden in insurance coverage disputes is on the insured to show that the claim falls within the policy." *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. CV 20-3198, 2020 WL 6545893, at *2 (E.D. Pa. Nov. 6, 2020). "[I]f the insured meets that burden, the insurer then bears the burden of demonstrating that a policy exclusion excuses the insurer from providing

coverage if the insurer contends that it does." *State Farm Fire & Cas. Co. v. Estate of Mehlman*, 589 F.3d 105, 111 (3d Cir. 2009) (citing *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996)).

3. The Contentions of the Parties

According to Cincinnati, "[t]he requirement of direct physical loss is a core element in property insurance policies like Plaintiffs', and appears in multiple places in the [P]olicies." Defs.' Mem. at 6. Pointing to the Policies' definition of "loss" as "physical loss or damage to property," Cincinnati contends that "there is no Covered Cause of Loss, and therefore no Business Income coverage, unless the insured first establishes, among other things, that there is direct physical loss to covered property." *Id*. According to Cincinnati, because "Plaintiffs not only *admit*, but *affirmatively allege*, that there was no direct physical loss or damage to any property as a result of the virus, or the [Governor's] Orders," there can be no coverage under the Policies. *Id*. at 12 (emphasis in original) (citing Compl. ¶ 52 ("A virus, unlike a fire, flood, or weather event, cannot damage walls, floors, roofs or equipment.")). In support of this contention, Cincinnati points to *Philadelphia Parking Authority v. Fed. Ins. Co*., 385 F. Supp. 2d 280 (S.D.N.Y. 2005), a case applying Pennsylvania law, and argues that *Philadelphia Parking Authority* is consistent with a growing body of case law holding that virus-related losses do not constitute physical damage or loss. *See* Defs.' Mem. at 13-20. Cincinnati also argues that the absence of a virus exclusion in the Policies is irrelevant, because "[e]xclusions do not come into play unless there is first direct physical loss," which there is not. *Id*. at 20. Finally, Cincinnati asserts that there is no Civil Authority coverage, because the "Plaintiffs do not allege the [Governor's] Orders prohibited access to their premises," as the Policies require. *Id*. at 23.

In opposition, Plaintiffs first contend that they are entitled to business interruption coverage under the Policies because "loss" is defined as *either* "physical loss" *or* "physical damage," and while their properties have not been damaged, they have sustained "physical loss."[14] Pls.' Opp'n. at 3-4. In particular, Plaintiffs claim "physical loss" is synonymous with "loss of use of the property," which they have suffered as a result of the pandemic and the Governor's Orders. *Id*. at 7 (emphasis in original). Accordingly, they need not have sustained "physical damage" to their premises. *See id*. at 7-8. *See id*. at 4-7.

According to Plaintiffs, they are also entitled to coverage under the "Civil Authority" provision of the Policies. *See* Pls.' Opp'n. at 8-11. The heart of their argument on this point is as follows:

> ***10** As a result of the Civil Authority Orders, access to Plaintiffs' properties was strictly prohibited. The principal use of the properties was for upscale on-site dining. These were not drive-through pickup fast food places. Defendants' contention that because Plaintiffs could continue take out and home delivery service, there was no denial of access misses the point that there has been physical loss or damage when the use of the property has been "nearly eliminated."

Id. at 10.

4. Application to Plaintiffs' Complaint

The Court finds that Plaintiffs are not entitled to coverage under the Policies, because their premises have not suffered a direct "loss" as that term is unambiguously defined in the Policies: "[a]ccidental *physical* loss or accidental *physical* damage." Policy at 67 (emphasis added). As an initial matter, it appears that Plaintiffs concede that their premises have not suffered any direct "physical damage" as a result of COVID-19 and the Governor's Orders. *See* Pls.' Opp'n. at 7 ("For there to be coverage for business interruption lost income there must be direct physical loss to the insured properties. Direct physical damage is not required."). The Court will therefore focus its analysis on the construction of the term direct "physical loss."

In light of the plain language of the Policies—in particular, the modifier "physical" preceding the word "loss"—and after surveying the legal authority presented by the parties and revealed through the Court's own independent research, the Court reaches the following conclusion: To constitute direct "physical loss" under the Policies as that term is construed under Pennsylvania law, economic loss resulting from an inability to utilize a premises as intended must (1) bear some causal connection to the *physical* conditions of that premises, which conditions (2) operate to completely or near completely preclude operation of the premises as intended.[15] The Court finds support for these conclusions in relevant case law.

In *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co*., 311 F.3d 226 (3d Cir. 2002), the Third Circuit, applying New York and New Jersey state law, addressed the question of to what extent the presence of asbestos in a building constitutes "physical loss or damage" so as to

warrant coverage under an "All Risk" property insurance policy similar to the Policies at issue here. Affirming a grant of summary judgment in favor of the insurer, the Court stated as follows with regard to the term "physical loss":

> When the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner. However, if asbestos is present in components of a structure, but is not in such form or quantity as to make the building unusable, the owner has not suffered a loss. The structure continues to function—it has not lost its utility. The fact that the owner may choose to seal the asbestos or replace it with some other substance as part of routine maintenance does not bring the expense within first-party coverage....The effect of asbestos fibers in such quantity is comparable to that of fire, water or smoke on a structure's use and function.

***11** *Id*. at 236. *Port Authority*'s central holding—that a release of asbestos fibers, or an imminent threat of such a release, must have "resulted in contamination of [ ] property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable," *id*.—was upheld under Pennsylvania law by the Third Circuit in *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823 (3d Cir. 2005), an unpublished opinion.[16] *See id*. at 826 ("We predict that the Pennsylvania Supreme Court would adopt a similar principle as we did in *Port Authority*.").

In *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280 (S.D.N.Y. 2005), the Southern District of New York, applying Pennsylvania law, addressed whether economic loss on its own could warrant coverage under a policy's "direct physical loss" provision. There, the operator of a parking garage at the Philadelphia International Airport sustained significant economic loss as the result of a downturn in air travel stemming from the terrorist attacks of September 11, 2001. The court held that economic loss stemming from an inability to utilize property as intended was alone not sufficient to invoke coverage:

> The Court finds that the phrase "physical loss or damage" is not ambiguous since "reasonably intelligent [people] on considering it in the context of the entire policy would [not] honestly differ as to its meaning." As stated above, the phrase "direct physical loss or damage," when considered in the context of the Insurance Policy at issue in the present case, requires *that claimed loss or damage must be physical in nature.*

Id. at 289 (emphasis added) (quoting *United Servs. Auto Ass'n v. Elitzky*, 517 A.2d 982, 985 (Pa. Super. Ct. 1986)). The Southern District of New York also held that the at-issue policy's "civil authority" provision did not cover plaintiff's economic losses, as the relevant civil authority "did not 'prohibit[ ] access to' Plaintiff's garages as the policy requires." *Philadelphia Parking Auth.*, 385 F. Supp. 2d at 289.

These cases support the conclusion that under Pennsylvania law, for Plaintiffs to assert an economic loss resulting from their inability to operate their premises as intended within the coverage of the Policy's "physical loss" provision, the loss and the bar to operation from which it results must bear a causal relationship to some *physical condition* of or on the premises. The cases also indicate the existence of an element correlating to extent of operational utility—*i.e*., a premises must be uninhabitable and unusable, or nearly as such; the ability to operate in almost any capacity, even on a limited basis, precludes coverage.

***12** At least two recent cases from within the Eastern District of Pennsylvania have reached the same conclusions when construing similar contracts in light of COVID-19.

In a November 6, 2020 decision *in Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. CV 20-3198, 2020 WL 6545893 (E.D. Pa. Nov. 6, 2020), the court held that economic losses resulting from COVID-19 and the Governor's Orders suffered by a dentist's office did not constitute "direct physical loss" under a property insurance policy. Because "no order by either the Governor or the Department of Health ever required dental offices such as plaintiff to close completely" and because "plaintiff was able to remain open for emergency procedures," the court concluded that "plaintiff's property remained inhabitable and usable, albeit in limited ways. Plaintiff has failed to plead plausible facts that COVID-19 caused damage or loss in any physical way to the property so as to trigger coverage." *Id*. at *3.

The court reached a similar conclusion in a November 30, 2020 decision in *Toppers Salon & Health Spa, Inc. v. Travelers Property Casualty Co. of America*, No. 2:20-CV-03342, 2020 WL 7024287 (E.D. Pa. Nov. 30, 2020). In that case, the owner of a spa brought suit under an insurance policy for lost revenue resulting from COVID-19 and the Governor's shut-down Orders, claiming coverage under a "direct physical loss of or damage to" provision. Unlike the dentist office in *Handel*, plaintiff in *Toppers* was required to suspend its operations. So the only question before the

court was "whether physical loss or damage caused that suspension." *Id*. at *3. The court found that "[i]t did not," because the policy's other provisions—in particular, reference to a "period of restoration," and the premises being "repaired, rebuilt or replaced"— made "clear that there must be some sort of physical damage to the property that can be the subject of a repair, rebuilding, or replacement. The Covid-19 pandemic does not fall within that definition." *Id*. at *4.

Here, Plaintiffs' loss of business income as a result of COVID-19 and the Governor's Orders does not constitute direct "physical loss" under the Policies for the same reasons coverage was precluded in *Handel* and *Toppers*. First, there is no physical component to Plaintiffs' loss; there are no allegations that any physical conditions of or on the covered premises have been altered in a way that has resulted in or affected Plaintiffs' loss.[17] Second, Plaintiffs maintain the ability to operate at their premises, albeit on a limited basis. For these related reasons, Plaintiffs have suffered no direct "physical loss." Without a direct "physical loss" or direct "physical damage," there is no "Covered Cause of Loss." Under these circumstances, Plaintiffs cannot claim coverage under the "Business Income" provision of the Policies.

***13** Finally, for the reasons that have already been presented, there is also no coverage under either the Policies' "Extra Expenses" or "Civil Authority" provisions. *See* Policy at 48. Coverage under both provisions requires an insured to have suffered a Covered Cause of Loss, and thus a direct physical loss. *See id.* With no direct physical loss, there can be no coverage. Additionally, it is clear that Plaintiffs' ability to continue limited takeout and delivery operations at the premises precludes coverage under the Civil Authority provision: a prohibition on access to the premises, which is a prerequisite to coverage, is not present.[18] *See Handel*, 2020 WL 6545893, at *3 ("[P]laintiff's property remained inhabitable and usable, albeit in limited ways. Plaintiff has failed to plead plausible facts that COVID-19 caused damage or loss in any physical way to the property so as to trigger coverage.").

C. Leave to Amend

The Court must consider whether Plaintiffs are entitled to amend the Complaint and re-plead their claims. *See Kanter v. Barella*, 489 F.3d 170, 181 (3d Cir. 2007) ("Generally, a plaintiff will be given the opportunity to amend her complaint when there is an asserted defense of failure to state a claim."). Although leave to amend pleadings, when not as of right, should be "freely give[n] when justice so requires," FED. R. CIV. P 15(a)(2), the denial of leave to amend is appropriate where there exists undue delay, bad faith, dilatory motive, or futility. *See Holst v. Oxman*, 290 F. App'x 508, 510 (3d Cir. 2008).

Here, it is clear that any amendment to the Complaint would be futile. The terms of the Policies are not in dispute, and there is nothing else Plaintiffs could allege that would bring their claimed losses within the Policies' coverage. Leave to amend is therefore denied.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs are not entitled to coverage under the terms of the Policies for their COVID-related business income losses. As such, their Complaint fails to state a viable claim for relief, and it is dismissed, with prejudice.

A separate Order follows this Opinion.

BY THE COURT:

*/s/ Joseph F. Leeson, Jr.*_____

JOSEPH F. LEESON, JR.

United States District Judge

All Citations

Slip Copy, 2020 WL 7075318

Footnotes

1 These allegations are accepted as true, with all reasonable inferences drawn in Plaintiffs' favor. *See Lundy v. Monroe Cty. Dist. Attorney's Office*, No. 3:17-CV-2255, 2017 WL 9362911, at *1 (M.D. Pa. Dec. 11, 2017), *report and recommendation adopted*, 2018 WL 2219033 (M.D. Pa. May 15, 2018). Neither conclusory assertions nor legal contentions need be considered by the Court in determining the viability of Plaintiffs' claims. *See Brown v. Kaiser Found. Health Plan of Mid-Atl. States, Inc.*, No. 1:19-CV-1190, 2019 WL 7281928, at *2 (M.D. Pa. Dec. 27, 2019). Much of the Complaint is legal

argument regarding construction of insurance policies and Plaintiffs' Policies in particular. The majority of these legal assertions are not included in the Court's recital here, except where necessary for context and continuity.

3 Plaintiffs additionally state that the Policies' "Pollutants Exclusion" does not apply to a virus. *See* Compl. ¶ 63.

4 Notwithstanding its label as the Complaint's "First Cause of Action," "[d]eclaratory judgment is a form of relief, not an independent legal claim." *Jones v. ABN AMRO Mortg. Grp., Inc.*, 551 F. Supp. 2d 400, 406 (E.D. Pa. 2008), *aff'd*, 606 F.3d 119 (3d Cir. 2010).

5 At the outset, the Court observes that its authority to issue declaratory relief stems from the federal Declaratory Judgment Act, 28 U.S.C. § 2201, rather than from Pennsylvania's declaratory judgment statute, 42 PA. CONS. STAT. § 7532. This is because "[o]nly the courts of the Commonwealth [of Pennsylvania] have 'the power to grant declarations and injunctive relief pursuant to [Pennsylvania's] Declaratory Judgments Act.' " *Keystone ReLeaf LLC v. PA Dep't of Health*, 186 A.3d 505, 517 (Pa. Commw. Ct. 2018) (quoting *Empire Sanitary Landfill, Inc. v. Com., Dep't of Envtl. Res.*, 546 Pa. 315, 332 (1996)); *see SWB Yankees, LLC v. CNA Fin. Corp.*, No. 3:20-CV-01303, 2020 WL 5848375, at *2 (M.D. Pa. Oct. 1, 2020) ("[A] Pennsylvania state court in a declaratory action may 'declare rights, status, and other legal relations whether or not further relief is or could be claimed.' " (quoting 42 Pa. Cons. Stat. § 7532)).

6 "Although courts often refer to a court's 'jurisdiction' under the DJA, the statute is not a jurisdictional grant. Rather, the Supreme Court has characterized the DJA as procedural, affording a remedial option in a case over which a court must have an independent basis for exercising jurisdiction." *Kelly v. Maxum Specialty Ins. Grp.*, 868 F.3d 274, 281 n.4 (3d Cir. 2017).

7 In *Colorado River*, the Supreme Court "reminded federal courts that they have a 'virtually unflagging obligation' to exercise jurisdiction over actions seeking legal relief." *Rarick*, 852 F.3d at 225 (quoting *Colo. River*, 424 U.S. 800, 817 (1976)). However, the Court also explained that abstaining from exercising federal jurisdiction can be justified—and indeed, *only* justified— "in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Colo. River*, 424 U.S. at 813.

In *Reifer*, the Third Circuit held that "it is not a *per se* abuse of discretion for a court to decline to exercise jurisdiction when pending parallel state proceedings do not exist. Nor is it a *per se* abuse of discretion for a court to exercise jurisdiction when pending parallel state proceedings do exist." *Reifer*, 751 F.3d at 144. Rather, "the existence or non-existence of pending parallel state proceedings is but one factor for a district court to consider." *Id*.

8 "Only the first four of these factors were delineated in *Colorado River*, the other two are drawn from *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23, 26 (1983)." *Nationwide Mut. Fire Ins. Co.*, 571 F.3d at 308 n.10.

9 The Court considers this and the other "inapplicable" factors to be "neutral." "[T]he presence of a neutral factor necessarily weighs against abstention." *Hartford Life Ins. Co. v. Rosenfeld*, No. CIV.A. 05-5542, 2007 WL 2226014, at *7 (D.N.J. Aug. 1, 2007).

10 The Court's own independent research was unable to unearth any state court decisions addressing the questions at issue in Plaintiffs' suit.

11 The Third Circuit has identified this approach as a three-step process, with the identification of a claim's necessary elements as the first step. *See Connelly v. Lane Const. Corp.*, 809 F.3d 780, 787 n.4 (3d Cir. 2016) ("Although *Ashcroft v. Iqbal* described the process as a 'two-pronged approach,' 556 U.S. 662, 679 (2009), the Supreme Court noted the elements of the pertinent claim before proceeding with that approach, *id.* at 675-79. Thus, we have described the process as a three-step approach.") (citation omitted).

12 As the Supreme Court has observed, "[d]etermining whether a complaint states a plausible claim for relief...[is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679

13 "In a diversity case, the forum state's choice of law rules govern. Under Pennsylvania's choice of law rules, a contract is construed according to the law of the state with the 'most significant contacts or relationship with the contract.' " *Wilson*, 2020 WL 5820800, at *6 n.3 (citing *Gen. Star Nat. Ins. Co. v. Liberty Mut. Ins. Co.*, 960 F.2d 377, 379 (3d Cir. 1992) and quoting *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 228 (3d Cir. 2007)). Because the Policies here were issued to insure businesses and property located in Pennsylvania, the Court can safely assume the law of Pennsylvania governs interpretation of the Policies. The parties appear to assume the same. *See* Defs.' Mem. at 13; Plaintiffs' Memorandum in Opposition ("Pls.' Opp'n."), ECF No. 11, at 4, 6.

14 In further support of this argument, Plaintiffs make a single, conclusory contention as to the absence of a virus exclusion: "At the outset, we note that there is no contention by Defendants that there is a virus exclusion in the policy, so COVID-19 is a covered cause of loss." Pls.' Opp'n. at 3.

15 To frame point (1) slightly differently, although the Court agrees with Plaintiffs that the disjunctive nature of "physical loss" *or* "physical damage" as used in the Policies indicates that the two terms are not synonymous, *see* Pls.' Opp'n. at 4, the

Court disagrees that "physical loss" is synonymous with "loss of use of [ ] property," *id*. at 7, alone—that is, loss having not arisen as a result of a tangible physical condition of or on the premises.

16 *Hardinger* involved contamination of a homeowner's well from e-coli bacteria. In *Hardinger*, the Third Circuit found instructive a 1992 Pennsylvania trial court decision in *Hetrick v. Valley Mut. Ins. Co.*, 15 Pa. D. & C 4th 271 (Pa. Com. Pl. 1992). The Court noted that "[i]n *Hetrick,* the court gave substantial attention and approval to *Western Fire Insurance Co. v. First Presbyterian Church*, 165 Colo. 34, 38-39, 437 P.2d 52(1968). In that case, the Colorado Supreme Court held the term 'direct physical loss' extended to cover the loss of use of the insured property where the accumulation of gasoline around and under the property rendered it uninhabitable." *Hardinger*, 131 F. App'x at 826 n.4. The court in *Hetrick* (the 1992 trial court decision) concluded as follows: "an oil spill which pollutes the ground water may make a building uninhabitable. And if the building is uninhabitable, then there is direct loss to that building." *Hetrick*, 15 Pa. D. & C.4th at 274 (internal citation omitted).

17 Construing "physical loss" under the Policies to require a causal connection to some physical condition of a covered premises is, similar to the policy in *Toppers*, further supported by the structure of the Policies. As Cincinnati points out, here "there can be no 'Period of Restoration' " for pandemic-related losses as that term is used in the Policies, *see* Policy at 47-48, "because the Coronavirus does not constitute direct physical loss to property requiring any physical repair, rebuilding or replacement. The inapplicability of the 'Period of Restoration' element to Plaintiffs' alleged loss further demonstrates that...pure economic losses are not covered under the Policy," Cincinnati's Reply Memorandum ("Defs.' Mem."), ECF No. 13, at 5.

18 Additionally, Plaintiffs' conclusory assertion that, because "there is no contention by Defendants that there is a virus exclusion in the policy," it follows that "COVID-19 is a covered cause of loss," Pls.' Opp'n. at 3, is without merit. It is undisputed that there is no virus exclusion. However, Plaintiffs have failed to provide any support for the notion that the absence of an exclusion means that whatever could have been excluded but wasn't is necessarily covered. Even more fundamentally, the issue of exclusions is irrelevant as Plaintiffs' claims do not fall within the scope of the Policies' coverage.

End of Document

2020 WL 6940984
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United States District Court,
N.D. Illinois, Eastern Division.

AFM MATTRESS CO., LLC, Plaintiff,

v.

MOTORISTS COMMERCIAL MUTUAL INS. CO., Defendant.

No. 20 CV 3556
|
11/25/2020

Judge Manish S. Shah

MEMORANDUM OPINION AND ORDER

***1** Plaintiff AFM Mattress Company owns 52 mattress stores in Indiana and Illinois. In March 2020, it shut down its businesses due to the COVID-19 pandemic and the related state and local governments' stay-at-home orders. Plaintiff submitted a claim for business-interruption coverage to its insurer, defendant Motorists Commercial Mutual Insurance Company, but defendant denied the claim. Plaintiff seeks a declaratory judgment that it is entitled to coverage. Defendant moves to dismiss for failure to state a claim, citing the policy's virus exclusion. For the reasons discussed below, the motion is granted.

I. Legal Standards

To survive a motion to dismiss under Rule 12(b)(6), a complaint must state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). The complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In reviewing a motion to dismiss, I construe all factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *Sloan v. Am. Brain Tumor Ass'n*, 901 F.3d 891, 893 (7th Cir. 2018).

At this stage of the case, I may only consider allegations in the complaint, documents attached to the complaint, documents that are both referred to in the complaint and central to its claims, and information that is subject to proper judicial notice. *Reed v. Palmer*, 906 F.3d 540, 548 (7th Cir. 2018) (quoting *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012)). Plaintiff attaches the insurance policy to its complaint, [1-1] Exh. 1,[1] so I consider that policy in ruling on the motion to dismiss. *See Hongbo Han v. United Cont'l Holdings, Inc.*, 762 F.3d 598, 601 n.1 (7th Cir. 2014).

II. Facts

Plaintiff owned 52 mattress stores in Indiana and Illinois. [1-1] ¶ 14. Defendant was plaintiff's insurer. [1-1] ¶¶ 15–16. The insurance policy covered loss of business income and loss due to actions of a civil authority. [1-1] ¶ 17. Under the civil authority provision, defendant would pay for businesses losses sustained "[w]hen a Covered Cause of Loss cause[d] damage to property other than the property at the described premises" and the "action of civil authority" prohibited access to the described premises. [1-1] ¶ 23. For coverage to apply, the civil authority must have prohibited access to the area surrounding the damaged property "as a result of the damage," and the described premises must have been within a mile of the damaged property. [1-1] ¶ 23. Also, the civil authority must have acted "in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage," or "the action [wa]s taken to enable a civil authority to have unimpeded access to the damaged property." [1-1] ¶ 23. The policy defined "Covered Cause of Loss" as "direct physical loss unless the loss is excluded or limited in this policy." [1-1] ¶ 25. The policy did not define "civil authority." [1-1] ¶ 24. Plaintiff alleges that the states of Illinois and Indiana, the governors of those states, the Illinois state department of health, and the City of Chicago are all civil authorities. [1-1] ¶¶ 41–47, 54–55.

***2** The policy also contained a "virus exclusion" clause. [1-1] at 180. The exclusion stated: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." [1-1] at 180. The exclusion applied to "all coverage under all forms and endorsements that comprise this Coverage Part or Policy," including, but not limited to, business income, extra expense, or action of a civil authority. [1-1] at 180.

On March 11, 2020, the World Health Organization characterized COVID-19 as a pandemic. [1-1] ¶ 48. A few days later, Illinois Governor J.B. Pritzker issued an executive order banning public and private gatherings of 50

or more people. [1-1] ¶¶ 40–41, 49–50. The intent of the executive order was to slow the spread of COVID-19, because frequently used surfaces in public settings posed a risk of exposure if not cleaned and disinfected property. [1-1] ¶ 50. It was also to promote social distancing, the "paramount strategy for minimizing the spread of COVID-19." [1-1] ¶ 51. A few days later, in response to COVID-19, the governor issued an order requiring Illinois residents to stay home, except for essential activities, and reduced gatherings to ten people or less. [1-1] ¶¶ 4, 51. The Illinois Department of Health and the City of Chicago also issued orders banning gatherings of more than ten people. [1-1] ¶¶ 42– 43. On March 6, 2020, Indiana Governor Eric Holcomb declared a public health emergency due to the pandemic. [1-1] ¶ 52. Ten days later, he issued an order prohibiting events of more than fifty people, and, on March 23, 2020, issued a stay-at-home order directing all nonessential businesses to close and reducing gatherings to ten people. [1-1] ¶¶ 52–53.

In March 2020, because of the executive orders issued in response to COVID-19, plaintiff closed its stores. [1-1] ¶ 56. Plaintiff sustained losses as a result. [1-1] ¶¶ 27–29, 57. The company submitted a claim to defendant for its business losses, and defendant denied the claim. [1-1] ¶¶ 58–59.

III. Analysis

Plaintiff seeks a declaratory judgment under 735 ILCS § 5/2-701 requiring defendant to cover its losses.[2] Defendant moves to dismiss for failure to state a claim based on the virus exclusion in the insurance policy.[3] Defendant does not concede that plaintiff has adequately pleaded that physical damage or loss occurred, [11] at 6 n.3; [16] at 4 n.1, but argues that it need not address any argument other than whether the virus exclusion applies. As plaintiff sees it, defendant must cover its losses because it was the shutdown orders, not the virus itself, that caused them. Plaintiff also argues that the virus exclusion applied only to viruses that existed at the time the parties entered into the insurance policy.

***3** The interpretation of an insurance policy is a matter of state law. *Westfield Ins. Co. v. Vandenberg*, 796 F.3d 773, 777 (7th Cir. 2015). A court sitting in diversity applies the law of the forum state. *See Lodholtz v. York Risk Servs. Grp., Inc.*, 778 F.3d 635, 639 (7th Cir. 2015). Both parties here agree that Illinois law applies. Under Illinois law, the general rules governing interpretation of contracts also govern the interpretation of insurance policies. *Scottsdale Ins. Co. v. Columbia Ins. Grp.*, 972 F.3d 915, 919 (7th Cir. 2020). The goal is to "ascertain and give effect to the intention of the parties, as expressed in the policy language." *Id.* (quoting *Hobbs v. Hartford Ins. Co. of the Midwest*, 214 Ill.2d 11 (2005)); *Ill. Farmers Ins. Co. v. Hall*, 363 Ill.App.3d 989, 993 (1st Dist. 2006). All provisions of the policy should be read together; every part of the contract must be given meaning, so no part is meaningless or surplusage. *Mkt. St. Bancshares, Inc. v. Fed. Ins. Co.*, 962 F.3d 947, 954–55 (7th Cir. 2020), *reh'g denied* (July 10, 2020).

If the words of a policy are reasonably susceptible to more than one meaning, the words are considered ambiguous. *Cent. Ill. Light Co. v. Home Ins. Co.*, 213 Ill.2d 141, 153 (2004). If language in the policy is ambiguous, it is construed against the insurer. *Id; see also Altom Transp., Inc. v. Westchester Fire Ins. Co.*, 823 F.3d 416, 421 (7th Cir. 2016). But a contract is not ambiguous "merely because the parties disagree on its meaning." *Cent. Ill. Light Co.*, 213 Ill.2d at 158. Courts will not strain to find ambiguity where none exists. *Hall*, 363 Ill.App.3d at 994.

The text of the policy precludes civil authority coverage here. Civil authority coverage applied when "a Covered Cause of Loss cause[d] damage" that led a civil authority to prohibit access to plaintiff's property, under certain circumstances. [1-1] at 170. The policy defined Covered Cause of Loss as "direct physical loss unless the loss is excluded or limited in this policy." [1-1] at 186. The policy excluded loss or damage "resulting from any virus," [1-1] at 180, and that exclusion applied to "all coverage under all forms and endorsements that comprise this Coverage Part or Policy," including action of a civil authority. [1-1] at 180. Contracts in Illinois must be interpreted to honor the parties' intentions as reflected in the text, and the text of this policy is straightforward. Defendant agreed to cover plaintiff when a covered cause of loss caused damage to a nearby property, triggering the government to prohibit access to plaintiff's stores. But damage from a virus was not a covered cause of loss—the policy explicitly excluded coverage for virus-related loss. And the virus exclusion itself made clear that the exclusion applied to civil authority coverage. The policy contemplated that a government entity might take some action in response to a virus, and specifically excluded coverage in that scenario.[4]

Plaintiff's argument that its losses occurred because the Indiana and Illinois governmental entities issued shutdown orders, not because of the virus itself, is unpersuasive. Plaintiff's complaint undermines its argument—the complaint alleges that plaintiff's losses were due to both the virus and the

shutdown orders that followed. *See, e.g.*, [1-1] ¶ 4 (plaintiff suspended business "due to the COVID-19 pandemic, and the ensuing orders of governmental authorities"); [1-1] ¶ 8 ("Defendant has refused to pay Plaintiff's claim for losses sustained due to the COVID-19 pandemic and the ensuing orders of governmental authorities.").

***4** Moreover, civil authority coverage does not exist in a vacuum—there is always some underlying cause of loss that triggers the government action, and the policy must cover that underlying cause for civil authority coverage to apply. Generally, civil authority coverage "is intended to apply to situations where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property." *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686–87 (5th Cir. 2011) (citation omitted). Governments typically don't issue shutdown orders for no reason, so the underlying cause of damage matters. For example, courts have found civil authority coverage applied when governments prohibited access in response to damage caused by the September 11 terrorist attacks, hurricanes, and civil unrest. *See S. Hospitality, Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1140–41 (10th Cir. 2004) (collecting cases); *Abner, Herrman & Brock, Inc. v. Great Northern Ins. Co.*, 308 F.Supp.2d 331, 333 (S.D.N.Y. 2004). In this case, the governments issued shutdown orders in response to the virus, an excluded cause of loss. Without a covered cause of loss, there is no civil authority coverage, and plaintiffs do not plead that some other event triggered the shutdown orders. That other governments reacted differently or imposed looser restrictions doesn't change the fact that the governments at issue here restricted public access to plaintiff's stores in response to the virus.

That COVID-19 didn't exist when the parties entered into the insurance contract is irrelevant. The policy excludes coverage for damages caused by "any" virus. To be sure, the word "any" could mean "some" or "all." *See United States v. Miscellaneous Firearms*, 376 F.3d 709, 712 (7th Cir. 2004) (defining the word "any"); *see also People v. Sedelsky*, 2013 IL App (2d) 111042, ¶¶ 20–21 ("any" could mean "some," "one out of many," or an "indefinite number"). And where "any" could reasonably mean either "all" or "some," contracts and statutes have been deemed ambiguous. *See First Bank & Tr. v. Firstar Info. Servs., Corp.*, 276 F.3d 317, 323–24 (7th Cir. 2001) (contract was ambiguous where "any Service" could plausibly mean either all services or some services). But the meaning of a contract "cannot be derived from words and phrases considered in isolation." *Id.* at 324. The text of the exclusion here does not support the meaning that plaintiff gives it. The exclusion reads: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." In context, the word "any" here means all viruses that induce or are capable of inducing illness or disease. There's no temporal limitation in the policy on when a given virus must have come into existence to be included in the virus exclusion, and nothing in the text suggests that the parties intended the exclusion to apply only to viruses that existed at the time they entered into the policy. While plaintiff rightly points out that, under Illinois law, ambiguous language should be interpreted to favor the insured, that presumption is triggered only when the language is ambiguous. *Phillips v. Prudential Ins. Co.*, 714 F.3d 1017, 1020 (7th Cir. 2013); *Hobbs v. Hartford Ins. Co.*, 214 Ill.2d 11, 17 (2005). There is no ambiguity in the language here.

IV. Motion for Sur-Response and Leave to Amend

Plaintiff's motion to file a sur-response is denied. Plaintiff seeks to reframe its case in a sur-response brief by adding an allegation that defendant made misrepresentations to state insurance regulators to obtain approval of the virus exclusion. But that allegation doesn't appear in the complaint, and a plaintiff may not amend its complaint in a response brief. *Rose v. Bd. of Election Comm'rs*, 815 F.3d 372, 376 n.3 (7th Cir. 2016).

***5** Leave to amend should be freely given after dismissal of an initial complaint, unless amendment would be futile. *Pension Tr. Fund for Operating Eng'rs v. Kohl's Corp.*, 895 F.3d 933, 941 (7th Cir. 2018). Given that plaintiff may have an alternative theory for why defendant should cover its losses, amendment is not obviously futile. Plaintiff's complaint is dismissed without prejudice.

V. Conclusion

Plaintiff's motion to file a sur-response [26] is denied. Defendant's motion to dismiss [10] is granted. The complaint is dismissed without prejudice. If plaintiff does not file an amended complaint by December 16, 2020, the dismissal will convert to one with prejudice.

ENTER:

Manish S. Shah

United States District Judge

Date: November 25, 2020

All Citations

Slip Copy, 2020 WL 6940984

Footnotes

1 Bracketed numbers refer to entries on the district court docket. Referenced page numbers are taken from the CM/ECF header placed at the top of filings.

2 Plaintiff brought its claim for a declaratory judgment under Illinois law. A federal court sitting in diversity applies state substantive law and federal procedural law. *Reynolds v. Henderson & Lyman*, 903 F.3d 693, 695 (7th Cir. 2018). Both the federal and Illinois declaratory judgment statutes are procedural, not substantive. *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 199 (2014) (federal statute); *Beahringer v. Page*, 204 Ill.2d 363, 373 (2003) (state statute). So the federal Declaratory Judgment Act governs plaintiff's claim. *People ex rel. Barra v. Archer Daniels Midland Co.*, 704 F.2d 935, 940 (7th Cir. 1983).

3 The court has subject-matter jurisdiction over these state-law claims. Plaintiff is an LLC. Its members are all citizens of Illinois or Delaware. *See* [25]. Defendant is an insurance company organized under the laws of Ohio with its principal place of business of business in Ohio. The amount in controversy exceeds $75,000. [1] ¶¶ 4(f)–(g); *see* 28 U.S.C. § 1332.

4 Other courts that have considered similar or identical virus exclusions have found the text of the policy precluded coverage and granted the insurers' motions to dismiss. *See, e.g.*, *10e, LLC v. Travelers Indem. Co.*, 2020 WL 6749361, at *3 (C.D. Cal. Nov. 13, 2020) (collecting cases); *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020); *Martinez v. Allied Ins. Co.*, 2020 WL 5240218, at *2 (M.D. Fla. Sept. 2, 2020); *Diesel Barbershop, LLC v. State Farm Lloyds,* 2020 WL 4724305, at *7 (W.D. Tex. Aug. 13, 2020).

2020 WL 5637963
Only the Westlaw citation is currently available.
United States District Court,
W.D. Missouri, Western Division.

BLUE SPRINGS DENTAL CARE, LLC, et al., individually and on behalf of all others similarly situated, Plaintiffs,

v.

OWNERS INSURANCE COMPANY, Defendant.

Case No. 20-CV-00383-SRB
|
Filed 09/21/2020

ORDER

STEPHEN R. BOUGH, JUDGE UNITED STATES DISTRICT COURT

***1** Before the Court is Defendant Owners Insurance Company's ("Owners") Motion to Dismiss (Doc. #4) and Motion to Strike Class Allegations (Doc. #6). The motions have been fully briefed and the Court held oral argument on the motions on September 8, 2020. For the reasons stated below, the motions are DENIED.

I. BACKGROUND

This lawsuit is the latest in a nationwide flood of insurance-related litigation by parties seeking coverage for losses incurred during the course of the COVID-19 pandemic. The relevant factual background of this case is briefly set forth below. Since this matter is before the Court on a motion to dismiss, Plaintiffs' factual allegations as set forth in their complaint are taken as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotation marks omitted) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Plaintiffs are Blue Springs Dental Care LLC, Green Hills Dental LLC, Highland Dental Clinic LLC, and Kearney Dental LLC, four dental care clinics located in the greater Kansas City metropolitan area. Owners is an Ohio corporation with its principal place of business located in Lansing, Michigan. Plaintiffs each purchased a businessowners insurance policy (the "Policies") from Owners for their clinic, and all parties agree that the policies are materially identical.

The Policies here provide that "[Owners] will pay for direct physical loss of or damage to Covered Property at the premises described in the Declaration caused by or resulting from any Covered Cause of Loss" unless the claimed loss is excluded or otherwise limited. (Doc. #1-1, pp. 47–48.)[1] Under the Policies, a "Covered Cause of Loss" is defined as:

> RISKS OF DIRECT PHYSICAL LOSS unless the loss is
>
> a. Excluded in Section B., Exclusions; or
>
> b. Limited in Paragraph A.4, Limitations.

(Doc. #1-1, p. 48.) The Policies do not define the term "physical loss," and the parties agree the Policies do not contain an exclusion clause for "pandemics" or "communicable disease."[2] (Doc. #1, ¶ 65.) A Covered Cause of Loss is required to invoke the coverage provisions of the Policy. Four coverage provisions are at issue in this case and are set forth in relevant part below.

First, the Policies provide for Business Income coverage in the event of a Covered Loss:

> [Owners] will pay for the actual loss of Business Income you sustained due to the necessary suspension of your "operations"[3] during the "period of restoration."[4] The suspension must be caused by direct physical loss of or damage to property at the described premises ... caused by or resulting from any Covered Cause of Loss.

***2** (Doc. #1-1, p. 86.) Second, the Policies provide for Extra Expense coverage, which states that:

> [W]e will pay necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property at the described premises ... caused by or resulting from a Covered Clause or Loss.

Extra Expense means expense incurred:

> (1) To avoid or minimize the suspension of business and to continue "operations":
>
> (a) At the described premises; or
>
> (b) At replacement premises or at temporary locations, including:

(i) Relocation expenses; and

(ii) Costs to equip and operate the replacement or temporary locations.

(2) To minimize the suspension of business if you cannot continue "operations."

(Doc. #1-1, p. 86.) Third, the Policies contain a Civil Authority coverage provision which states:

We extend Business Income and Extra Expense to include the actual loss or damage sustained by you which is a direct result of an interruption of the business covered by this policy because access to the described business premises is prohibited by order of civil authority because of damage or destruction of property adjacent to the described premises by the perils insured against. Coverage applies while access is denied, but no longer than two consecutive weeks.

(Doc. #1-1, p. 91.) Lastly, the complaint identifies a "Sue and Labor" coverage provision, but no section by that name appears in the Policy. At oral argument, Plaintiffs clarified that the "Sue and Labor" provision refers to a section within the Policies entitled "Duties in the Event of Loss or Damage," which states in relevant part:

PROPERTY LOSS CONDITIONS

...

3. Duties In The Event Of Loss Or Damage

You must see that the following are done in the event of loss or damage to Covered Property:

...

d. Take all reasonable steps to protect the Covered Property from further damage by a Covered Cause of Loss. If feasible, set the damaged property aside and in the best possible order for examination. Also keep a record of your expenses for emergency and temporary repairs, for consideration in the settlement of the claim. This will not increase the limit of insurance.

(Doc. #1-1, pp. 55–56.)

Most are intimately familiar with the cascading series of events which took place across the nation following the emergence of COVID-19 in the United States, including state and local governments imposing stay-at-home orders in effort to slow the spread of the virus. Missouri is no different. Plaintiffs were not only subject to Missouri's Stay at Home Order issued on April 3, 2020 ("Missouri SHO"), but also to the stay-at-home orders issued by the county where each dental clinic is located,[5] as well as the stay-at-home order issued on March 24, 2020, by the City of Kansas City, Missouri ("Kansas City SHO"). While the language of each stay-at-home order (collectively, "Stay Home Orders") varies, they all encouraged residents to stay home except when necessary to perform essential activities. Plaintiffs allege that COVID-19 and the Stay Home Orders have forced them to suspend most of their business operations and deprived them of the use of their dental clinics, thus causing them to suffer "a direct physical loss" and entitling them to coverage under the Policies.

***3** On or around May 6, 2020, Plaintiffs submitted claims to Owners for coverage under the Policies based on losses incurred due to the COVID-19 pandemic. Owners denied coverage, and Plaintiffs subsequently filed suit on behalf of themselves and similarly situated policyholders that made similar claims under identical Policies and were denied coverage. Plaintiffs assert eight claims based on the four specified Policy coverage provisions discussed earlier: (1) Count I: Declaratory and Injunctive Relief–Business Income; (2) Count II: Breach of Contract–Business Income; (3) Count III: Declaratory and Injunctive Relief–Civil Authority; (4) Count IV: Breach of Contract–Civil Authority; (5) Count V: Declaratory and Injunctive Relief–Extra Expense; (6) Count VI: Breach of Contract–Extra Expense; (7) Count VII: Declaratory and Injunctive Relief – Sue and Labor; and (8) Count VIII: Breach of Contract–Sue and Labor. Jurisdiction is proper under the Class Action Fairness Act ("CAFA"), given that the proposed class has more than one hundred members, the amount in controversy exceeds $5 million, and minimal diversity of the parties is satisfied. Owners seeks dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) and additionally moves to strike class action allegations pursuant to Rule 12(f).

II. LEGAL STANDARD

Rule 12(b)(6) provides that a defendant may move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ash*

v. Anderson Merchs., LLC, 799 F.3d 957, 960 (8th Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678). When deciding a motion to dismiss, "[t]he factual allegations of a complaint are assumed true and construed in favor of the plaintiff, even if it strikes a savvy judge that actual proof of those facts is improbable." *Data Mfg., Inc. v. United Parcel Serv., Inc.*, 557 F.3d 849, 851 (8th Cir. 2009) (citations and quotations omitted).

Because this case is based on diversity jurisdiction, "state law controls the construction of [the] insurance policies[.]" *J.E. Jones Const. Co. v. Chubb & Sons, Inc.*, 486 F.3d 337, 340 (8th Cir. 2007). Under Missouri law, "[t]he interpretation of an insurance policy is a question of law to be determined by the Court." *Lafollette v. Liberty Mut. Fire Ins. Co.*, 139 F. Supp. 3d 1017, 1021 (W.D. Mo. 2015) (quoting *Mendota Ins. Co. v. Lawson*, 456 S.W.3d 898, 903 (Mo. App. W.D. 2015)). "Missouri courts read insurance contracts 'as a whole and determine the intent of the parties, giving effect to that intent by enforcing the contract as written.' " *Id.* (quoting *Thiemann v. Columbia Pub. Sch. Dist.*, 338 S.W.3d 835, 840 (Mo. App. W.D. 2011)). "Insurance policies are to be given a reasonable construction and interpreted so as to afford coverage rather than to defeat coverage." *Cincinnati Ins. Co. v. German St. Vincent Orphan Ass'n, Inc.*, 54 S.W.3d 661, 667 (Mo. App. E.D. 2001).

"Policy terms are given the meaning which would be attached by an ordinary person of average understanding if purchasing insurance." *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 763 (8th Cir. 2020) (applying Missouri law) (quotations omitted). When interpreting policy terms, "the central issue ... is determining whether any ambiguity exists, which occurs where there is duplicity, indistinctness, or uncertainty in the meaning of the words used in the contract." *Id.* (quotations omitted). If the "insurance policies are unambiguous, they will be enforced as written absent a statute or public policy requiring coverage. If the language is ambiguous, it will be construed against the insurer." *Id.* (quotations omitted).

III. DISCUSSION

After Owners filed its motion to dismiss but before Plaintiffs had filed their response in opposition, this Court denied a motion to dismiss in a similar but unrelated case also involving an insurer's denial of coverage for COVID-19 related losses, *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-cv-03127, --- F. Supp. 3d. ---, 2020 WL 4692385, at *1 (W.D. Mo. Aug. 12, 2020). In their response, Plaintiffs contend this case is on all fours with *Studio 417* and urge the Court to reach the same result as *Studio 417*. In its reply and during oral argument, Owners emphasizes that the facts and circumstances presented in this case are highly distinguishable from *Studio 417*, namely because Plaintiffs in this case are "essential businesses" that were impacted by the Stay Home Orders in a dramatically different fashion than the "non-essential" business claimants in *Studio 417*. While *Studio 417* is instructive in certain respects, this case presents a different set of facts and contractual language, discussed in relevant part below.

A. Plaintiffs Have Adequately Alleged a "Direct Physical Loss" Under the Policies

***4** As a threshold issue, Owners argues that a direct physical loss or damage is a prerequisite for establishing coverage under the Policy provisions at issue, and contends that Plaintiffs fail to allege facts that plausibly show a physical loss or damage occurred. Specifically, Owners states Plaintiffs' allegation that their insured properties were damaged because "[i]t is likely customers, employees, and/or other visitors to the insured property over the recent months were infected with the coronavirus" is a naked conclusion that does not satisfy the *Iqbal/Twombly* pleading standard. (Doc. #5, p. 17.)

Plaintiffs respond that they have sufficiently pled their insured properties were physically damaged, arguing they have adequately alleged that "the presence of COVID-19 on and around the insured property deprived Plaintiffs of the use of their property and also damaged it." (Doc. #9, p. 7.) Plaintiffs also contend they sufficiently allege a physical loss, arguing their allegations that Plaintiffs were forced to end or dramatically reduce all operations at their clinics because of "actual contamination by COVID-19" as well as related restrictions imposed by the Stay Home Orders that "prohibited the public from accessing Plaintiffs' covered premises." (Doc. #9, p. 9.) Plaintiffs argue that Owners attempts to equate the term "loss" with "damage" when those terms are not synonymous, and note the loss of access to a property or the loss of a property's essential functionality can constitute a physical loss.

Upon review of the record, the Court finds that Plaintiffs have adequately stated a claim for a direct physical loss.[6] As an initial matter, the parties agree that the Policies do not define a direct "physical loss," so the Court must in turn "rely on the plain and ordinary meaning of the phrase." *Vogt*, 963 F.3d at 763. The Court elects to adopt the definition of "physical loss" used in *Studio 417* and, upon applying that definition to the factual allegations in the complaint, finds Plaintiffs

have adequately alleged a claim for a direct physical loss. *See Studio 417*, 2020 WL 4692385, at *4 (discussing dictionary definitions of "direct" ("characterized by a close logical, causal, or consequential relationship"), "physical" ("having material existence: perceptive especially through the senses and subject to the laws of nature"), and "loss" ("the act of losing possession" and "deprivation") in determining the plain and ordinary meaning of the phrase "direct physical loss").

Here, Plaintiffs allege that "it is likely customers, employees, and/or other visitors to the insured properties over the recent month were infected with the coronavirus," they "suspended operations due to COVID-19 to prevent physical damages to the premises by the presence or proliferation of the virus and the physical harm it could cause persons present there," and that "customers cannot access the property due to the Stay at Home Orders or fear of being infected with or spreading COVID-19." (Doc. #1, ¶¶ 17, 70, 18.) Plaintiffs also explain how COVID-19 is physically transmitted by air and surfaces through droplets, aerosols, and fomites that remain infectious for extended periods of time. (Doc. #1, ¶¶ 7–9, 44–48, 51, 54.) Taking Plaintiffs' fact allegations as true, as the Court must at this stage, and after drawing reasonable inferences from those facts in their favor, Plaintiffs plausibly allege that COVID-19 physically attached itself to their dental clinics, thereby depriving them of the possession and use of those insured properties. Taken as a whole, Plaintiffs tender more than mere "naked assertions devoid of further factual enhancement" in their complaint. *Iqbal*, 556 U.S. at 662. Additionally, as this Court discussed in *Studio 417*, this interpretation is supported by caselaw. *See Studio 417*, 2020 WL 4692385, at *4–*6 (collecting cases) (summarizing intra-circuit and extra-circuit caselaw recognizing that "absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purposes").

B. Counts I & II: Business Income Provision

***5** In its briefing and during oral argument, Owners states that no matter what definition of "physical loss" this Court chooses to adopt, Plaintiffs' claims pursuant to the Policies' Business Income provision necessarily fail. Owners argues that to qualify for Business Income coverage, Plaintiffs' "suspension of operations must be caused by direct physical loss of or damage to" the insured property. (Doc. #1-1, p. 86.) Owners contends (1) Plaintiffs did not suspend their dental clinic operations because they continued to see patients on an emergency basis, (2) Plaintiffs did not identify a period of restoration, and (3) Plaintiffs fail to allege any facts showing COVID-19 or the Stay Home Orders actually caused their suspension. Each argument is addressed below.

a. Suspension of Operations

Owners asserts "Plaintiffs never suspended their operations" and that their decision "to temporarily offer only emergency services does not trigger Business Income coverage." (Doc. #5, p. 20.) Owners argues that Missouri courts have interpreted the term "necessary suspension" to mean "a total cessation of business activity," citing for support *Am. States Ins. Co. v. Creative Walking, Inc.*, 16 F. Supp. 2d 1062, 1065 (E.D. Mo. 1998). Plaintiffs note the term "suspension" is not defined anywhere in the Policies and argue that the plain and ordinary meaning of the term does not require total cessation. During oral argument, Plaintiffs identified other portions of the Policies using the word "suspension" in a manner that, in their view, contemplates a partial or complete suspension. Neither party argues the term is ambiguous.

The Court finds that Plaintiffs have sufficiently alleged a suspension of their operations. The Policies do not define "suspension" and no Missouri state court has interpreted that phrase to have a specific meaning. While the Eastern District of Missouri found in *Creative Walking* that "necessary suspension" would be ordinarily understood by a lay person to mean a total cessation of business activity, *see* 16. F. Supp. 2d at 1065, that decision is not binding on this Court and is distinguishable given the contractual language in this case. Even if the Court did elect to adopt the narrow definition from *Creative Walking*, however, Plaintiffs' allegations that three of their dental clinics totally ceased all clinical operations would satisfy their pleading burden. But this Court should give a phrase in an insurance policy the "meaning which would be attached by an ordinary person of average understanding if purchasing insurance." *Vogt*, 963 F.3d at 763. As the term at issue is not defined within the Policies, the Court turns to a dictionary to ascertain its ordinary meaning. *See Doe Run Res. Corp. v. Am. Guarantee & Liab. Ins.*, 531 S.W.3d 508, 512 (Mo. banc 2017) ("When a policy does not define a particular term, courts use the ordinary meaning of the word as set forth in the dictionary.").

The Merriam-Webster Dictionary defines suspension in part as a "temporary removal" or "temporary abrogation of a law or rule."[7] That definition, in and of itself, does not indicate a suspension must be total or complete in nature. In addition, the root of the word suspension—suspend—

is defined to mean "to debar temporarily from a privilege, office, or function," "to defer to a later time," and "to hold in an undetermined or undecided state awaiting further information."[8] Once again, this definition does not suggest that "suspension" refers only to a situation where the act of abrogation, deferral, or removal is done in a full, complete, or total fashion. In turn, an ordinary purchaser of insurance would not interpret the Policies to exclude coverage for any partial or less-than-total suspension of operations. *See generally* *Doe Run*, 531 S.W.3d at 513.

***6** Furthermore, under Missouri law "the provisions of an insurance policy are read in the context of the policy as a whole," not in isolation. *Am. Econ. Ins. Co. v. Jackson*, 476 F.3d 620, 624 (8th Cir. 2007) (citations omitted) (applying Missouri law). When other parts of the Policies are examined, the Court finds the Policies contemplate a partial suspension of the insured party's operations. The Extra Expense subsection of the Business Income provision defines an "Extra Expense" to mean, in part, expenses incurred "to avoid or minimize the suspension of business and to continue 'operations,' " suggesting a suspension of operations includes scenarios where an insured's operations are able to continue at a reduced volume or capacity. (Doc. #1-1, pp. 50, 127–28.) Another Policy provision provides that when calculating business income losses, the total loss amount will be reduced "to the extent you can resume your 'operations,' in whole or in part[.]" (Doc. #1-1, p. 58.) Again, this language contemplates the insured's ability to be able to operate at some less-than-full or total capacity, also suggesting suspension need not be complete to entitle the insured to coverage. When interpreting a provision in light of the insurance policy as a whole, "[c]ourts 'must endeavor to give each provision a reasonable meaning and to avoid an interpretation that renders some provisions useless or redundant.' " *Progressive Cas. Ins. Co. v. Morton*, 140 F. Supp. 3d 856, 860–61 (E.D. Mo. 2015) (quoting *Dibben v. Shelter Ins. Co.*, 261 S.W.3d 553, 556 (Mo. App. W.D. 2008)). Since other Policy provisions contemplate that an insured party's business operations can be minimized, continued, or resumed in part, interpreting "suspension" to only provide coverage for a total cessation of operations would contradict other parts of the Policy or render them superfluous. *See* *Macheca Transp. v. Philadelphia Indem. Ins. Co.*, 649 F.3d 661, 669 (8th Cir. 2011) (citing *Henges Mfg., LLC v. Amerisure Ins. Co.*, 5 S.W.3d 544, 545 (Mo. App. E.D. 1999) (a court "must give meaning to all [policy] terms and, where possible, harmonize those terms in order to accomplish the intention of the parties."). Plaintiffs' allegations are sufficient on this point to survive dismissal.

b. Period of Restoration

Owners argues that Plaintiffs also fail to identify a "period of restoration" because they have not alleged their need to repair, rebuild, or replace any property. (Doc. #5, p. 21; Doc. #18, p. 11.) Owners argues the anemic allegations on this issue are indicative of the fatal shortcoming of Plaintiffs' claims, namely that there can be no "period of restoration" because a physical loss or damage never occurred. Plaintiffs contend they "clearly allege that they began limiting their services to emergency care only starting on or around March 17, 2020," which identifies the start of the period of restoration, and that the loss suffered was ongoing at the time they initiated suit. (Doc. #9, p. 11.) During oral argument, Plaintiffs emphasized that the alleged physical loss was ongoing at the time this suit was filed and their claim should not be defeated at this early stage, particularly since discovery will illuminate the actual period of restoration in this case.

The Court finds Plaintiffs have met their burden at this stage of the proceeding. Plaintiffs plausibly allege their dental clinics ceased operations, entirely or in part, "on or about March 17, 2020, and have remained at that limited operational capacity through the date of this Complaint." (Doc. #1, ¶ 16.) Discovery will ultimately show whether Plaintiffs' alleged closure date was the actual date when the alleged physical loss occurred, the duration of that alleged physical loss, at what point in time the insured properties could or should have been repaired, rebuilt, or replaced, and whether Plaintiffs took those restoration measures. For now, Plaintiffs have done enough to survive dismissal on this point.

c. Suspension Caused by a Direct Physical Loss or Damage

Owners insists that Plaintiffs present no factual allegations showing the alleged physical loss was caused by COVID-19 or the Stay Home Orders. Specifically, Owners argues Plaintiffs' "decision to limit their operations to emergency services and thus not use their properties to their fullest capabilities" was voluntary and not mandated by the Stay Home Orders or by COVID-19. Plaintiffs counter that their insured premises "suffered actual contamination by COVID-19, and related government shut down orders prohibit[ing] the public from accessing" Plaintiffs' clinics. (Doc. #9, p. 9.) Plaintiffs also argue that the imminent threat of loss or harm posed by the spread of COVID-19 is sufficient

to constitute a physical loss, and that their decision to close or reduce operations in light of that threat of harm or loss does not defeat their claim.

The Court finds Plaintiffs have satisfied their burden at this stage of the proceeding and plausibly alleged that COVID-19 caused their alleged physical loss. As discussed earlier in this Order, Plaintiffs plausibly allege that COVID-19 had physically occupied and contaminated their dental clinics and thereby deprived them of their use of those clinics by making them unusable. Plaintiffs also allege they "suspended operations due to COVID-19 to prevent physical damages to the premises by the presence or proliferation of the virus and the physical harm it could cause persons present there." (Doc. #1, ¶ 70.) Plaintiffs' decision to suspend clinic operations due to COVID-19 and the continuing threat to health and safety posed by the virus does not negate their allegation that COVID-19 was the cause of that suspension. *See, e.g., Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (a "commonsense meaning of [the policy provision] is that any loss or damage due to the *danger* of direct physical loss is covered"). Owners argues that to show COVID-19 caused the suspension of operations, Plaintiffs must allege the presence of COVID-19 made their dental clinics unusable or uninhabitable. Owners' argument does not challenge the sufficiency of the pleadings so much as the nature, scale, and scope of the alleged physical loss, including whether the actual danger posed by COVID-19 was concrete, severe, or imminent enough to prevent Plaintiffs from being able to use the dental clinics for their intended purpose. That is an issue better suited for resolution at the summary judgment stage, after the parties have had the benefit of discovery.[9]

***7** In sum, Plaintiffs' claims regarding coverage under the Business Income provision of the Policies survive dismissal and Owners' motion to dismiss Counts I & II is denied.

C. Counts V & VI: Extra Expense

Owners' arguments regarding the Extra Expense coverage provision are derivative of its arguments regarding coverage under the Business Income provision. Specifically, Owners states Plaintiffs are not entitled to Extra Expense coverage because they did not suffer a direct physical loss or damage, failed to identify a period of restoration, and failed to allege what extra expenses they incurred. Since this Court previously found Plaintiffs' allegations to be sufficient on those issues, and because at this stage Plaintiffs do not have to allege with specificity the itemized extra expenses they have allegedly incurred, Owners' motion to dismiss Counts V & VI is denied.

D. Counts III & IV: Civil Authority

Plaintiffs additionally argue that they are entitled to coverage under the Civil Authority provision of the Policies. In support of dismissal, Owners argues Civil Authority coverage only exists if the relevant order of civil authority is specific to the insured property and the property adjacent to it, rather than an order of general applicability. Plaintiffs disagree, arguing no Policy language limits coverage to losses arising from a specific, rather than generally applicable, order of civil authority. Plaintiffs also note that due to the Stay Home Orders and the guidance issued by the Centers for Disease Control ("CDC") and American Dental Association ("ADA"), three of their dental clinics ceased all operations entirely; only one continued to operate, and did so at a significantly reduced capacity. In its reply brief, Owners argues that Plaintiffs' designation as "essential" businesses exempted them from the Stay Home Orders and contends that Plaintiffs put forth no allegations regarding the damage or destruction of property located adjacent to the dental clinics due to the Stay Home Orders or COVID-19.[10]

First, a review of the Policy language is in order. The Civil Authority provision provides that Owners extends its Business Income and Extra Expense coverage liability when triggered by a narrowly defined civil authority scenario. *Cf. Altru Health Sys. v. Am. Protection Ins. Co.*, 238 F.3d 961, 963 (2001). The coverage-triggering scenario requires there to be (1) an order of civil authority (2) prohibiting access to Plaintiffs' dental clinics (3) because of damage or destruction of property adjacent to those clinics (4) "by the perils insured against[,]" e.g., a Covered Loss under the Policies. (Doc. #1-1, p. 91.) The orders of civil authority at issue are the Stay Home Orders.[11] The Policies do not require that the relevant order of civil authority be specifically directed at the insured premises or properties adjacent to it in order to trigger coverage, and Owners does not cite any legal authority suggesting otherwise. Further, Plaintiffs allege the Stay Home Orders broadly applied to the areas "in and around Plaintiffs' place of business" and, by their terms, "explicitly acknowledge that COVID-19 causes direct physical damage and loss to property." (Doc. #1, ¶ 56.) Given the Court's earlier determination that Plaintiffs sufficiently allege a direct physical loss—the same alleged physical loss which prompted the issuance of the Stay Home Orders—

the issue turns on whether access to Plaintiffs' clinics was prohibited by the Stay Home Orders.

***8** Regarding the question of access, Plaintiffs allege the Orders "caused the suspension of non-essential and essential businesses," limited "ingress and egress into the [insured] property," and "required individuals ... to avoid leaving their homes except as necessary to perform limited activities and to at all times practice social distancing." (Doc. #1, ¶¶ 17, 18, 35, 39–42.) The Policies do not define the term "access" and, again, *Studio 417* is instructive on this issue. In *Studio 417*, this Court found the claimants sufficiently alleged that a stay-at-home order had prohibited access to their business premises "to such a degree as to trigger the civil authority coverage." 2020 WL 4692385, at *7 (citation omitted). In that instance, the hair-salon plaintiffs alleged their businesses were closed entirely due to stay-at-home orders, while the restaurant and food-service plaintiffs alleged stay-at-home orders had similarly limited their operations with the narrow exception of delivery or carry-out services. *See id.* There, like here, the insurance policy did not specify that "all access" or "any access" to the insured property had to be prohibited. In this case, Plaintiffs allege three of their dental clinics were closed entirely and, for the clinic that did continue to provide treatment, only emergency dental services were offered. (Doc. #1, ¶ 16.) The allegations put forth by Plaintiffs sufficiently establish access to the clinics was prohibited to such a degree that the Civil Authority provision could be invoked. *See id.*

However, that is not the end of the Court's inquiry. While Plaintiffs allege the Stay Home Orders are what prohibited access to their clinics, Owners argues that assertion is contradicted by the language of the Stay Home Orders. Owners contends the Stay Home Orders' designation of dental clinics as "essential" businesses excluded Plaintiffs from the restrictions they imposed, citing to various provisions of the Stay Home Orders for support. (Doc. #18, p. 14; Doc. #5, p. 7.) While the language cited by Owners is persuasive, the Court declines to consider the cited provisions in a vacuum. For example, the Jackson County Stay Home Order, cited by Owners in its reply brief, references and incorporates the statewide Missouri SHO, which itself incorporates CDC guidelines and other federal coronavirus guidance—guidance that allegedly directed dental clinics to "restrict their practices to urgent and emergency care treatments." (Doc. #1, ¶ 16.) In addition, the Stay Home Orders do not address whether an essential business that performs both "essential" and "non-essential" healthcare services (e.g., elective surgeries in specialty medical clinics, teeth whitening in dental clinics, etc.) could continue to provide non-essential services without restriction. In sum, there remain unresolved factual questions as to the scope, effect, applicability, and impact of the Stay Home Orders—questions neither side has fully briefed and that are better suited for resolution at a later stage of litigation once discovery has taken place. Plaintiffs' allegations, in aggregate, plausibly state a claim for relief under the Civil Authority provision of the Policies, and dismissal of Counts III & IV is denied. *See Data Mfg., Inc.*, 557 F.3d at 851 (citation and quotation marks omitted) ("The factual allegations of a complaint are assumed true and construed in favor of the plaintiff, even if it strikes a savvy judge that actual proof of those facts is improbable."). Whether Plaintiffs are ultimately entitled to the relief they seek will be decided at a later time.

E. Counts VII & VII: Sue and Labor Provision

Lastly, Plaintiffs allege they "sustained a loss covered by the Sue and Labor provision" and Owners refused to pay a claim under that provision. Owners argues Plaintiffs "have not identified any 'expenses borne' by them" or alleged what "actual or imminent loss" necessitated those unidentified expenses. (Doc. #5, p. 26.) Plaintiffs contend such specified pleading is not required at the dismissal stage. During oral argument, Owners additionally asserted that the Sue and Labor provision is, in essence, a duty to mitigate and does not create a basis for standalone coverage. In response, Plaintiffs argue the Sue and Labor provision entitles them to coverage of certain losses they allegedly suffered and that Owners' failure to pay for those losses entitles them to sue for coverage.

An insurance policy is, at its core, a bilateral contract which establishes the obligations and duties of the insurer and the insured. *See Omaha Indem. Co. v. Pall, Inc.*, 817 S.W.2d 491, 496 (Mo. App. E.D. 1991) ("An insurance policy is a contract designed to furnish protection according to the needs and desires of the insured."). Plaintiffs allege they have "substantially performed their obligations under the terms of the Policies," including "complying with the [Stay Home] Orders[.]" (Doc. #1, ¶¶ 135–136, 71.) At oral argument, Plaintiffs expanded somewhat on that allegation, stating their continued compliance with the Stay Home Orders was necessary in light of the dangers posed by COVID-19 and caused them to incur expenses and damages.

***9** In *Studio 417*, this Court examined a nearly identical Sue and Labor contract provision and determined the plaintiffs, by alleging the suspension of their operations and complying with relevant closure orders, had adequately stated a claim for

a covered loss. *See* 2020 WL 4692385, at *8. The result is the same here and the claims thus survive dismissal. However, during oral argument Plaintiffs acknowledged that some of the losses allegedly arising under this particular Sue and Labor provision may be duplicative of their alleged Business Income and Extra Expense losses, at least to some extent. The Court reserves for a later time the issue of whether the Sue and Labor claims asserted here are derivative, and therefore duplicative, of other coverage claims asserted elsewhere in the complaint.

In sum, Owners' motion to dismiss is denied in its entirety. However, as this Court stated in *Studio 417*, all the rulings herein are subject to further review following discovery. Further, as relevant caselaw in the COVID-19 context continues to develop, subsequent decisions construing similar insurance provisions under similar facts may be persuasive. If warranted, Owners may reassert its arguments at the summary judgment stage.

F. Rule 12(f) Motion to Strike Class Allegations

Owners additionally filed a motion to strike class allegations contemporaneously with its motion to dismiss. Pursuant to Rule 12(f), a court may "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "Striking a party's pleading, however, is an extreme and disfavored measure." *BJC Health Sys. v. Columbia Cas. Co.*, 478 F.3d 908, 917 (8th Cir. 2007) (citation omitted). Particularly in the context of a class action suit, striking class allegations prior to discovery and the class certification stage is a rare remedy "because it is seldom, if ever, possible to resolve class representation question from the pleadings alone." *Courtright v. O'Reilly Auto., Stores, Inc.*, No. 14-00334-CV-W-GAF, 2014 WL 12623695, at *2 (W.D. Mo. July 7, 2014) (citations and quotation marks omitted). Given the early stage of litigation in this case and "the chance exists that Rule 23 elements may be satisfied with discovery," *id.*, the Court declines to strike the class action allegations specified by Owners. Consequently, the motion to strike is denied.

IV. CONCLUSION

Accordingly, it is hereby **ORDERED** that Defendant Owners Insurance Company's Motion to Dismiss (Doc. #4) is DENIED and Motion to Strike Class Allegations (Doc. #6) is DENIED.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 5637963

Footnotes

1 All page numbers refer to pagination automatically generated by CM/ECF.

2 Owners relies, in part, on decisions granting dismissal of COVID-19 insurance claims, several of which involve insurance policies that contain a virus exclusion clause. Owners did not include a virus exclusion clause in the Policies at issue here, making that body of caselaw non-binding on this Court when applying Missouri state law.

3 The Policies define "operations" as "your business activities occurred at the described premises." (Doc. #1-1, p. 63.)

4 The Policies define "period of restoration" as the "period of time that: a. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and b. Ends on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality." (Doc. #1-1, pp. 63–64.)

5 Highland Dental and Kearney Dental are located in Clay County, Missouri, Blue Springs Dental is located in Jackson County, Missouri, and Green Hills Dental is located in Platte County, Missouri. (Doc. #1, ¶ 12.) All three counties issued their own stay-at-home orders.

6 During oral argument, Owners emphasized that Plaintiffs' allegations did not plausibly show their insured properties suffered any "physical damage." Given this Court's finding that Plaintiffs adequately allege a physical loss and the disjunctive Policy language contemplates "a direct physical loss *or* damage," the Court need not decide the issue at this stage.

7 *See* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/suspension (last accessed Sept. 11, 2020).

8 *See* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/suspend (last accessed Sept. 11, 2020).

9 Owners presents persuasive arguments regarding the Stay Home Orders and how the designation as an "essential" business under those orders impacts Plaintiffs' physical loss arguments. However, given this Court's finding that Plaintiffs

adequately allege a physical contamination by COVID-19 forced them to suspend their dental clinics' operations, the Court need not decide at this point whether that suspension was caused by the imposition of Stay Home Orders.

10 The Court observes that, in contrast to the analogous Civil Authority provision in *Studio 417* that was labeled as such, the provision here is labeled “Coverage Extension” and appears in a subparagraph within the Electronic Equipment Endorsement's “Additional Coverage” section, specifically the “Business Income and Extra Expense” subsection. (Doc. #1-1, p. 91, Section 5.b(3).) During oral argument, the Court inquired whether the Civil Authority provision is broadly applicable or if it is limited to a claim arising under the Electronic Equipment Endorsement. The parties offered differing perspectives on the broad or narrow applicability of the provision. Given that the issue was not raised or briefed by the parties, the Court declines to decide at this point whether Civil Authority provision is broadly or narrowly applicable, the effect of the Electronic Equipment Endorsement on the base insurance policy, or whether a conflict of coverage exists between the two.

11 The Stay Home Orders are the primary civil authority discussed by the parties, but Plaintiffs also suggest the formal guidance issued by the CDC and the ADA are orders of civil authority that additionally prohibited access to Plaintiffs' dental clinics. (Doc. #9, p. 15.) Plaintiffs also allege that some of the Stay Home Orders reference and/or incorporate CDC guidance, including specific CDC guidance that dental clinics “restrict their practices to all but urgent and emergent dental care treatments.” (Doc. #1, ¶¶ 36, 38.) While the Court's analysis here is limited to Stay Home Orders, in doing so it does not foreclose the possibility that the alleged CDC and/or ADA guidance may form the basis, at least in part, of Plaintiffs' Civil Authority coverage claim.

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2020 WL 6827742
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

Border Chicken AZ LLC, Plaintiff,
v.
Nationwide Mutual Insurance Company, et al., Defendants.

No. CV-20-00785-PHX-JJT
|
11/20/2020

within days of the of this order., Honorable John J. Tuchi, United States District Judge

ORDER

***1** At issue is the Motion to Dismiss Plaintiff's First Amended Complaint filed by Defendant Allied Property and Casualty Insurance Company (Doc. 18, MTD). The Court has considered Plaintiff's Response (Doc. 26, Resp.), Defendant's Reply (Doc. 28), as well as the parties' Notices of Supplemental Authority (Docs. 37, 40, 42-45, 47-48) and finds this matter appropriate for decision without oral argument. *See* LRCiv 7.2(f). Because the insurance policy at issue contains a provision that unambiguously bars coverage for "loss or damage caused directly or indirectly…" by "any virus, bacterium, or other microorganism," the Court will dismiss Plaintiff's Complaint in its entirety.

I. BACKGROUND

Plaintiff Border Chicken AZ LLC owns 15 franchises of Church's Fried Chicken and one franchise of Little Caesars Pizza, 14 in Arizona and one in New Mexico. (Doc. 15, First Am. Compl. ("FAC") ¶ 7.)[1] On or about December 26, 2019, Plaintiff purchased the Premier Businessowners Policy ("Policy") from Defendant for coverage from January 1, 2020 to January 1, 2021.[2] (FAC ¶¶ 11-12.) The Policy covers various types of losses, including in pertinent part, losses caused by "Civil Authority." This section states:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.
>
> Civil Authority coverage for "business income" will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to 30 days after coverage begins. Civil Authority coverage for necessary "extra expense" will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end: (1) 30 days after the time of that action; or (2) When your Civil Authority coverage for "business income" ends, whichever is later.

(Doc. 18, Ex. A § A(5)(j).)

***2** Additionally, the Policy excludes coverage for certain events, including in pertinent part, loss due to "Virus or Bacteria" ("Virus Exclusion"). The relevant portion of this section states:

> 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. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.
>
> (i.) Any virus, bacterium or other microorganism that induces or is capable
>
> of inducing physical distress, illness or disease.

(Doc. 18, Ex. A § B(1)(i).) On March 19, 2020, in response to the rising number of COVID-19 cases in Arizona, Governor Doug Ducey issued Executive Order 2020-09 LIMITING THE

OPERATIONS OF CERTAIN BUSINESSES TO SLOW DOWN THE SPREAD OF

COVID-19 ("Arizona Order 2020-09"), which mandated that as of the close of business on Friday March 20, 2020, "all restaurants in counties of the State with confirmed cases of COVID-19 shall close access to on-site dining until further notice. Restaurants may continue serving the public through pick up, delivery, and drive-thru operations." (FAC ¶¶ 23, 25.) Subsequently, on March 30, 2020, Governor Ducey issued Executive Order 2020-18 ("Executive Order 2020-18"), requiring businesses and entities remaining open to implement rules and procedures that facilitate physical distancing and spacing of individuals of at least six feet. Plaintiff complied with these Orders, shutting down on-site dining and only serving customers through pick up and drive-thru operations, which caused it to suffer financial losses. (FAC ¶¶ 25, 28.) Plaintiff subsequently sought coverage for its financial losses under the Civil Authority provision, but Defendant refused coverage due to the Virus Exclusion. (FAC ¶¶ 28-29.)

Plaintiff alleges that Defendant is required under the Civil Authority provision to cover Plaintiff's financial losses caused by its compliance with Governor Ducey's Executive Orders, and that Defendant's refusal to do so constitutes a breach of contract. Defendant argues that the Civil Authority provision of the Policy does not cover Plaintiff's losses for a multitude of reasons, including that the Virus Exclusion bars coverage for losses caused by viruses such as COVID-19, and now moves to dismiss the FAC under Federal Rule of Civil Procedure 12(b)(6).

Before delving further into each party's arguments, the Court notes that Plaintiff's FAC did not contain a single allegation regarding the Virus Exclusion. Rather, Plaintiff waited until it filed its Response to raise new allegations that focus on an Insurance Service Office ("ISO") document ("ISO Circular") that allegedly supports Plaintiff's legal theories as to why the Virus Exclusion should not apply.

That is not the way this works. Plaintiff must raise all allegations in its pleadings and cannot surprise Defendant with new allegations in its Response. Plaintiff's inclusion of new allegations in the Response is particularly inexcusable because Plaintiff had multiple opportunities to amend the Complaint in order to address the Virus Exclusion. First, Defendant notified Plaintiff, as required by LRCiv 12.1(c), that it planned to move to dismiss the Complaint based on the Virus Exclusion, but Plaintiff chose not to amend the Complaint. (Doc. 11 at 13.) Defendant subsequently filed the first Motion to Dismiss, which expressly argued that the Complaint should be dismissed based on the Virus Exclusion. (Doc. 11 at 7-10.) In response, Plaintiff amended the Complaint, but the FAC still did not include any allegations regarding the Virus Exclusion or the ISO Circular. Plaintiff's repeated failure to address the Virus Exclusion in the pleadings is highly inefficient and a waste of both time and resources.

***3** Taking only the allegations in the FAC as true, the Court holds that Plaintiff has failed to state a claim. Likewise, if the Court was to take the proposed allegations in the Response as true and take judicial notice of the cited ISO Circular, the Court would still hold that Plaintiff failed to state a claim because the Virus Exclusion applies to bar coverage for Plaintiff's losses caused by COVID-19.

II. LEGAL STANDARD

When analyzing a complaint for failure to state a claim for relief under Federal Rule of Civil Procedure 12(b)(6), the well-pled factual allegations are taken as true and construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Legal conclusions couched as factual allegations are not entitled to the assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and therefore are insufficient to defeat a motion to dismiss for failure to state a claim. *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010).

A dismissal under Rule 12(b)(6) for failure to state a claim can be based on either (1) the lack of a cognizable legal theory or (2) insufficient facts to support a cognizable legal claim. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). "While a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted). The complaint must thus contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that 'recovery is very remote and unlikely.' " *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

III. ANALYSIS

Because this case was brought in federal district court based on this Court's diversity jurisdiction, Arizona law governs the interpretation of the contract. *See Colony Ins. Co. v. Events Plus, Inc.* 585 F. Supp. 2d 1148, 1151 (D. Ariz. 2008) (applying Arizona law to interpret contract); *AMERCO v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. CV 13–2588–PHX–PGR, 2014 WL 2094198 at *3 (D. Ariz. May 20, 2014) (same). Under Arizona law, the interpretation of a contract is a question of law for the court to decide. *Hadley v. Sw. Props., Inc.*, 570 P.2d 190, 193 (Ariz. 1977).

"Courts construe an insurance contract according to its plain and ordinary meaning." *AMERCO*, 2014 WL 2094198 at *3. "Unambiguous provisions must be given effect as written," and "[w]hen policy language is unambiguous, the court does not create ambiguity to find coverage." *Id.* Furthermore, "[a]n insurer may limit its liability by imposing conditions and restrictions as long as those restrictions are not contrary to public policy." *Cooper v. Am. Family Mut. Ins. Co.*, 184 F. Supp. 2d 960, 963 (D. Ariz. 2002).

Defendant advances multiple arguments in support of its MTD. Chief among these arguments is the contention that the Virus Exclusion bars coverage under the Civil Authority provision. Defendant further argues that Governor Ducey's Order does not prohibit consumer access to the restaurant and that Plaintiff has not suspended its operations as required by the Policy. Because the Court finds that the Virus Exclusion plainly and unambiguously bars coverage for losses claimed by Plaintiff under the Civil Authority provision, it does not reach a conclusion on Defendant's other arguments.

***4** The Civil Authority provision expressly states that it will only provide coverage when an action of civil authority is taken in response to a "Covered Cause of Loss." (Doc. 18, Ex. A § (A)(5)(j).) The Policy is also clear that any loss that is listed in Section B, "EXCLUSION," will not be considered a "Covered Cause of Loss," stating, "We will not pay for loss or damage caused directly or indirectly by any of the following." (Doc. 18, Ex. A § (B)(1).) The Virus Exclusion, part of Section B, expressly excludes losses caused "directly or indirectly" by "Virus or Bacteria." (Doc. 18, Ex. A § (B)(1)(i).) Plaintiff does not dispute that COVID-19 is a virus. Taken together, these provisions unambiguously preclude coverage for the Plaintiff's losses.

A. The Virus Exclusion Applies to Civil Authority Coverage

Plaintiff first argues that the Virus Exclusion should not apply because Governor Ducey's Executive Order, not COVID-19, caused its business income loss. (Resp. at 7-9.) This argument misreads the plain language of the Policy and ignores that Governor Ducey issued the Executive Orders in order to combat the spread of COVID-19. The Policy expressly states that the Virus Exclusion bars coverage for "loss or damage caused *directly or indirectly*" by a virus and "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." (Doc. 18, Ex. A § B(1)(i) (emphasis added).) At the least, COVID-19 was an indirect cause of Plaintiff's loss. In fact, the FAC states that Plaintiff suffered losses due to the civil actions taken by governmental authorities in order to "address the current coronavirus pandemic" (FAC ¶ 1), and Governor Ducey's Executive Order 2020-09 was titled "LIMITING THE OPERATIONS OF CERTAIN BUSINESSES TO SLOW THE SPREAD OF COVID-19."

Further, Arizona courts have enforced similar policy exclusions that bar coverage for a concurrent-cause. *See, e.g., Cooper*, 184 F. Supp. 2d at 962 ("Arizona has not adopted the 'efficient proximate cause' rule and as such, an insurer is permitted to limit its liability with a concurrent causation lead-in clause"); *Millar v. State Farm Fire & Cas. Co.,* 804 P.2d 822, 826 (Ariz. Ct. App. 1990) (rejecting "efficient proximate cause" doctrine and enforcing policy exclusion denying coverage for a concurrent-cause).

In further support of the argument that the Virus Exclusion does not apply, Plaintiff points out that the "payout for civil authority coverage comes from business income loss or extra expense, not the property damage caused by the virus." (Resp. at 8.) It is unclear to the Court why this distinction matters; regardless of what type of losses the Civil Authority provision covers, it is unambiguous that the Policy does not cover any losses directly or indirectly caused by the virus. Federal district courts analyzing similar virus exclusion provisions have come to the same conclusion. *See e.g. Diesel Barbershop, LLC v. State Farm Lloyds*, Case No. 5:20-CV-461-DAE (W.D. Texas) (August 13, 2020 Order; Ezra, J.) (holding virus exclusion unambiguously bars the plaintiff's claims under civil authority provision of policy); *West Coast Hotel Management, LLC v. Berkshire Hathaway Guard Ins. Cos.*, 2020 WL 6440037 at *5-6 (C.D. Cal. Oct. 27, 2020) (same); *Mark's Engine Co. No. 28 Rest., LLC .v Travelers Indem. Co. of Conn.*, 2020 WL 5938689 (C.D. Cal.

Oct. 2, 2020) (same). Notably, the exclusion clause in *Mark's Engine Co. No. 28 Restaurant, LLC* did not expressly state that coverage was barred for losses caused "indirectly" by a virus, but the court still held that the virus exclusion applied. 2020 WL 5938689 at *2.

B. Plaintiff Did Not Have a Reasonable Expectation of Coverage

The remainder of Plaintiff's arguments rely on allegations first asserted in its Response. Plaintiff argues that the Virus Exclusion should not be enforced because Plaintiff had the reasonable expectation that the Policy would provide coverage for losses suffered if its business was forced to shut down. (Resp. at 9.) Plaintiff cites *Darner Motor Sales, Inc. v. Universal Underwriters Insurance. Co.*, 682 P.2d 388, 406 (Ariz. 1984) for the proposition that boilerplate language that conflicts with the intent of the parties will not be enforced. This argument fails on multiple levels. *Darner* is clear that a plaintiff must provide a reason as to why its expectation was reasonable, such as prior negotiations. *Id.* (reasonable expectations claim will only be recognized where plaintiff can demonstrate that the expectations to be realized are those that "have been induced by the making of a promise," as evidenced by prior negotiations or other factors). Plaintiff does not allege any prior negotiations or other activity that would lead to the reasonable expectation of coverage. Instead, it points to the ISO Circular, allegedly written to justify including a virus exclusion clause in future policies, to argue that the Virus Exclusion was only meant to address temporary contaminations, such as E. coli or salmonella, but not a pandemic on the scale of COVID-19. (Resp. at 10, citing ISO Circular LI-CF-2006-175, New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria, ISO (July 6, 2006), https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISOCircular-LI-CF-2006-175-Virus.pdf.) This allegation is insufficient; the ISO is a non-party and Plaintiff does not make any allegations that it relied on or much less read the ISO Circular prior to agreeing to the Policy.

***5** Even if Plaintiff had alleged that it relied on the ISO Circular, it would not be sufficient to show a reasonable expectation of coverage. The ISO Circular does not distinguish between coverage for temporary illnesses versus long term illnesses and pandemics. If anything, it illustrates the ISO's intent that a virus exclusion would apply to a disease such as COVID-19 by expressly stating that a virus exclusion is necessary so that the insurance company would not have to cover losses caused by, amongst other things, "rotavirus, SARS, influenza (such as avian flu)," (ISO Circular at 1.) which are "highly infectious diseases" that are similar to COVID-19. *Boxed Foods Co., LLC v. Cal. Cap. Ins. Co.*, No. 20-cv-04571 at 10 (N.D. Cal.) (Oct. 26, 2020 Order) (explaining that the ISO's intent that the virus exclusion bar coverage for losses caused by SARS was evidence that exclusion would apply to COVID-19). Further, in the "Current Concerns" section of the ISO Circular, it expressly states that a virus exclusion is necessary because "the specter of *pandemic*… raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent." (ISO Circular at 2 (emphasis added).) If Plaintiff had read the ISO Circular prior to entering the agreement, it would have had the reasonable expectation that losses due to a pandemic would not be covered.

Plaintiff additionally argues that Defendant's mere offering of the Policy gave Plaintiff the reasonable expectation that it would provide coverage if Plaintiff's business was forced to shut down. This expectation by itself falls far short of the reasonable expectation standard set in *Darner*, which expressly warns against allowing plaintiffs to claim that they had a reasonable expectation of coverage solely based on their purchase of the policy. *Id.* at 395 ("most insureds develop a 'reasonable expectation' that every loss will be covered by their policy;" therefore, "the reasonable expectation concept must be limited by something more than the fervent hope usually engendered by loss").

Lastly, the Policy expressly states that the Virus Exclusion "does not apply to loss or damage caused by or resulting from "fungi, wet rot or dry rot," illustrating that if the parties wanted the Virus Exclusion to not cover pandemics, they would have included such a provision in the contract. *Depositors Ins. Co. v. Ubrina*, 411 F. Supp. 3d. 454, 460 (D. Ariz. 2019) (stating limitations on coverage expressly written in contract served to exclude other limitations not listed).

C. The Policy is Unambiguous

In the alternative, Plaintiff argues that that the policy language is ambiguous and extrinsic evidence is necessary to clarify the ambiguity. However, Plaintiff fails to identify any ambiguity. Instead, Plaintiff contends that because the Policy uses standardized form language created by the ISO, the Court must allow discovery into how the Virus Exclusion's scope and meaning were represented to the insurance regulators. This argument misses the mark; a party cannot simply create ambiguity. *See Millar*, 804 P.2d at 825 ("a policy term is

not ambiguous...merely because one party assigns a different meaning to it in accordance with his or her own interest"). Furthermore, "[w]here the policy language is clear, a court may not take the easy way out by inventing ambiguity, then resolving it to find coverage where none exists under the policy." *Id.* at 824. Here, the Court finds that the language in the Virus Exclusion clearly and unambiguously bars coverage for losses directly and indirectly caused by a virus.

D. Regulatory Estoppel Does Not Apply

Likewise, Plaintiff's regulatory estoppel argument is unconvincing. Regulatory estoppel is a "doctrine foreign courts have used to preclude insurers from taking a position contrary to one allegedly presented to a regulatory agency." *Nammo Talley Inc. v. Allstate Ins. Co.*, 99 F. Supp. 3d 999, 1005 (D. Ariz. 2015). Plaintiff argues in a footnote that the "principles of regulatory estoppel" are implicated by the way Defendant received approval from regulators to include the Virus Exclusion. (Resp. at 2 n. 2.) This argument fails for multiple reasons. First, Arizona courts have not recognized the theory of regulatory estoppel. *Id.* (holding regulatory estoppel did not apply and noting that "Arizona has never adopted the doctrine of regulatory estoppel"). Furthermore, Plaintiff did not plead any facts in the FAC regarding regulatory estoppel. Even if the Court were to rely on allegations in Plaintiff's Response, those allegations still would be insufficient to properly state a claim for breach of contract based upon regulatory estoppel. The Response merely states Plaintiff's belief that the non-party ISO assisted Defendant in obtaining permission from the state insurance regulators to include a Virus Exclusion clause under the wrongful premise that it did not change coverage. Plaintiff's belief, devoid of specific allegations of any action or representation made by the Defendant, is insufficient. *See Iqbal*, 556 U.S. at 678 (pleading that contains "naked assertions devoid of further factual enhancement" will not survive motion to dismiss). Regardless, the ISO Circular is clear that the Virus Exclusion is meant to exclude losses caused by pandemics. *See supra* at II.B. Assuming regulators did rely on the ISO document, they would have been aware of its effect on future coverage.

E. Supplemental Authorities

***6** Both parties filed multiple notices of supplemental authorities containing cases where other courts have either denied or granted the defendant insurance companies' motions to dismiss plaintiffs' breach of contract complaints for failure to cover a policyholder's losses caused by COVID-19. The Court has reviewed these authorities and has cited to authorities submitted by Defendant throughout the Order. The Court does not find Plaintiff's submissions to be persuasive because they either do not analyze a virus exclusion clause or are distinguishable for other reasons.

In *Urogynecology Specialist of Florida LLC v. Sentinel Insurance Co.*, No: 6:20-cv-1174-Orl-22EJK, slip op. at 7 (M.D. Fla. Sept. 24, 2020), the court held that because the virus exclusion clause also excluded losses due to "fungi, wet rot, dry rot…," it did not "logically align" and was thus ambiguous as to whether it would exclude losses for an illness such as COVID-19. The court also noted that the virus exclusion applied to portions of the insurance policy that it had not yet received and thus could not review. Here, neither issue is present. The Virus Exclusion unambiguously excludes coverage for losses caused by viruses such as COVID-19 and expressly states that it does not apply to "fungi, wet rot or dry rot." *See supra* at II.B. Furthermore, the Court has reviewed the entire policy.

In *Ridley Park Fitness, LLC v. Philadelphia Indemnity Insurance Co*., No. 01093, slip op. (Pa. Ct. Com. Pl. Aug. 31, 2020), the only other case submitted by Plaintiff where the policy contained a virus exclusion clause, the court did not provide its reasoning for denying the motion to dismiss.

The insurance policies in the other cases that Plaintiff cites do not contain virus exclusion clauses or are clearly distinguishable based on their procedural posture.[3] Notably, the court held in *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020) that the policy's lack of a virus exclusion clause distinguished it from policies that did have such a clause. *Id.* at *9 n.2 (denying defendant's motion to dismiss and stating decisions cited by defendant were inapposite because policies in those cases contained a virus exclusion clause). Finally, in *Adorn Barber & Beauty, LLC v. The Hartford*, No. 3:20-cv-00418, slip op. (E.D. Va. Sept. 15, 2020), the court merely held that the plaintiff could amend its complaint and granted the plaintiff's motion to stay.

For the foregoing reasons, the Court holds that Plaintiff has failed to state a claim for breach of contract. When a defective complaint can be cured, the plaintiff is entitled to amend the complaint before the action is dismissed. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000). Here, it does not appear that amendment can cure the defects in the FAC, even with the

suggestions Plaintiff makes in its Response. As a result, the Court denies Plaintiff leave to amend the FAC.

F. Attorney's Fees

Pursuant to A.R.S. § 12-341.01, Defendant requests its attorneys' fees and costs in defending this action because Plaintiffs' claims arise out of a contract between the parties. The Court agrees that, under A.R.S. §§ 12-341.01 and 12-349, Defendant is entitled to seek reasonable attorneys' fees and costs and may submit an application for fees and costs that complies with the applicable rules.

IT IS THEREFORE ORDERED granting Defendants' Motion to Dismiss Plaintiff's Amended Complaint (Doc. 18).

***7 IT IS FURTHER ORDERED** denying as moot Defendants' prior Motion to Dismiss (Doc. 11).

IT IS FURTHER ORDERED directing the Clerk of Court to enter final judgment dismissing this case and to close this matter.

IT IS FURTHER ORDERED that Defendant shall file any application for fees within 14 days of the date of this order.

Dated this 20th day of November, 2020.

Honorable John J. Tuchi

United States District Judge

All Citations

Slip Copy, 2020 WL 6827742

Footnotes

1 After Defendant filed its prior Motion to Dismiss (Doc. 11), Plaintiff filed the FAC, the now-operative Complaint (Doc. 15), as well as a Notice of filing the FAC (Doc. 17). As a result, the Court will deny as moot the prior-filed Motion to Dismiss (Doc. 11).

2 Plaintiff's initial Complaint (Doc. 1) listed Nationwide Mutual Insurance Company (Nationwide), the parent company of Allied Property and Casualty Insurance Company (Allied), as a Defendant. Plaintiff removed Nationwide as a Defendant in the FAC.

3 While the Court does not discuss all of the cases cited by Plaintiff, it has reviewed all of them and finds them distinguishable and unpersuasive.

2020 WL 6271021
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

BOXED FOODS COMPANY, LLC, et al., Plaintiffs,
v.
CALIFORNIA CAPITAL INSURANCE COMPANY, Defendant.

Case No. 20-cv-04571-CRB
|
Signed 10/26/2020
|
Amended 10/27/2020

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AMENDED ORDER GRANTING CALIFORNIA CAPITAL INSURANCE COMPANY'S MOTION TO DISMISS THE COMPLAINT WITH PREJUDICE

CHARLES R. BREYER, United States District Judge

***1** COVID-19 poses an existential threat to small businesses throughout the United States. Since March, the San Francisco Bay Area alone has seen almost 8,300 businesses close, 4,000 of which shuttered permanently. See Leonardo Castañeda, The Bay Area's small business closure crisis is already here, The Mercury News (Sept. 22, 2020 7:00 AM), https://www.mercurynews.com/2020/09/22/the-bay-areas-small-business-closure-crisis-is-already-here/. To survive the catastrophic effects of COVID-19, businesses have filed close to 1,300 federal lawsuits seeking coverage for business interruption losses. See Covid Coverage Litigation Tracker, University of Pennsylvania Carey School of Law, https://cclt.law.upenn.edu/ (last visited Oct. 23, 2020). Absent government relief or assistance, these small businesses risk permanent closure. Plaintiffs are among those seeking relief through their insurance policy. But while the Court sympathizes with Plaintiffs' circumstances, the Court cannot ignore that the insurance policy excludes coverage for losses caused by viruses, like COVID-19. Thus, the Court GRANTS Defendant's motion to dismiss for the reasons outlined below.

I. BACKGROUND

Boxed Foods Company, LLC and Gourmet Provisions, LLC (collectively, "Plaintiffs") seek a declaration that they are entitled to business loss coverage under the Business Income, Extra Expense, and Civil Authority coverage provisions of their insurance policy agreement with California Capital Insurance Company ("Defendant") and Capital Insurance Group.[1] Compl. (dkt. 1) ¶¶ 1–4, 79. The insurance policy (the "Policy") provides coverage for business interruption losses that occurred between August 31, 2019 and August 31, 2020. Id. ¶ 11.

[1] Plaintiffs voluntarily dismissed Capital Insurance Group from the case. See Voluntary Dismissal (dkt. 14).

On March 4, 2020, California declared a State of Emergency in response to the outbreak of COVID-19. Id. ¶ 46. On March 11, California issued an initial order restricting large gatherings, but followed up on March 16 with an order prohibiting large gatherings altogether. Id. ¶ 47. In response to California's March 11 order, Plaintiffs shuttered their San Francisco restaurants: B Restaurant Bar and the Pin Up All-Star Diner. Compl. ¶ 55. On March 19, California issued another order (collectively, the "Civil Authority Orders") requiring all businesses to cease non-essential operations. Id. ¶ 48.

Plaintiffs allege that they were not able to operate their restaurants as a direct consequence of COVID-19 and the Civil Authority Orders. Id. ¶ 49. Plaintiffs submitted a claim to Defendant on March 7 for the losses associated with not being able to operate their restaurants. Id. ¶ 13. Defendant concluded that the Policy did not encompass COVID-19 as a covered cause of loss, and therefore denied Plaintiffs coverage. See generally, Compl. Ex. 2 (dkt. 1-2).

Plaintiffs filed a class action complaint against Defendant seeking declarations that:

- the Civil Authority Orders constitute a prohibition of access to Plaintiffs' properties;

***2** • the Civil Authority Orders fall within the "prohibited access" coverage as defined in the policy;

- the exclusion of "Loss Due to Virus or Bacteria does not apply to the business losses incurred by Plaintiffs" because the Civil Authority Orders proximately caused business losses;
- the Civil Authority Orders trigger coverage under the Policy;
- the Policy "provides coverage to Plaintiffs for any current and future civil authority closures of their businesses ... due to physical loss [sic] or damage directly or indirectly from the COVID-19 pandemic under the Civil Authority coverage parameters;" and
- the Policy provides "business income coverage in the event that COVID-19" directly or indirectly caused loss or damage at or within the immediate area of Plaintiffs' insured properties. Compl. ¶ 79.

On August 31, Defendant filed a motion to dismiss Plaintiffs' complaint. See Mot. (dkt. 19).[2]

[2] Defendant asks the Court to take judicial notice of various government documents, pleadings, and hearing transcripts. Def. Requests for Judicial Notice (dkt. 19-2, 26-2). That is appropriate. A court can take judicial notice of documents properly submitted with the complaint or upon which the complaint necessarily relies if the materials' "authenticity ... is not contested" and comprise "matters of public record." Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) overruled on other grounds by Galbraith v. Cnty. of Santa Clara, 307 F.3d 1119 (9th Cir. 2002) (citation omitted).

The Court has jurisdiction over this putative class pursuant to 28 U.S.C. 1332(d)(2) because the amount in controversy exceeds $5 million and at least one member in the proposed class is diverse from Defendant.

II. LEGAL STANDARD

A. 12(b)(6) Motion to Dismiss.

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be dismissed for failure to state a claim upon which relief may be granted. Dismissal may be based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Godecke v. Kinetic Concepts, Inc., 937 F.3d 1201, 1208 (9th Cir. 2019). A complaint must plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. When evaluating a motion to dismiss, the Court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007).

B. Insurance Policy Interpretation.

***3** Under California law, the interpretation of an insurance policy is a question of law for the courts to determine. See Waller v. Truck Ins. Exch., Inc., 11 Cal. 4th 1, 18, 44 Cal.Rptr.2d 370, 900 P.2d 619 (1995). "The insurer bears the burden of proving ... the applicability of an exclusion ...." State Farm Fire & Cas. Co. v. Martin, 872 F.2d 319, 321 (9th Cir. 1989). The court must "look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it." Waller, 11 Cal. 4th at 18, 44 Cal.Rptr.2d 370, 900 P.2d 619 (citation omitted). The plain language of the insurance policy governs its interpretation. See Bank of the W. v. Superior Ct., 2 Cal. 4th 1254, 1264–65, 10 Cal.Rptr.2d 538, 833 P.2d 545 (1992). A policy provision is ambiguous if it is "capable of two or more constructions, both of which are reasonable." Waller, 11 Cal. 4th at 18, 44 Cal.Rptr.2d 370, 900 P.2d 619. If the language is ambiguous or unclear, "it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." Bank of the W., 2 Cal. 4th at 1264–65, 10 Cal.Rptr.2d 538, 833 P.2d 545. Courts should "not strain to create an ambiguity where none exists." Waller, 11 Cal. 4th at 18–19, 44 Cal.Rptr.2d 370, 900 P.2d 619.

III. DISCUSSION

Defendant argues that the Pathogenic Organisms Exclusion (hereinafter "Virus Exclusion")[3] excludes coverage for the losses alleged in the complaint, which necessitates dismissing

the complaint in its entirety. Mot. at 1–2.[4] The Virus Exclusion states:

> We do not insure for loss or damage caused by, resulting from, contributing to or made worse by the actual, alleged or threatened presence of any pathogenic organism, all whether direct or indirect, proximate or remote, or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy ....

Policy at 43.

3 " 'Pathogenic Organisms' means any ... virus ...." Policy (dkt. 1-1) at 43.

4 Defendant separately argues that the losses in the complaint fall outside the scope of the Policy's Business Income, Extra Expenses, and Civil Authority coverage provisions. See Mot. at 1. The Court does not address Defendant's second argument, because the first argument is sufficient to grant dismissal.

The Court agrees that the Virus Exclusion bars Plaintiffs' claim. Plaintiffs' arguments fail to persuade the Court that: (1) the Virus Exclusion does not apply to the Civil Authority coverage provision, Opp. (dkt. 22) at 7–8; (2) the Virus Exclusion is ambiguous and does not apply to pandemics, id. at 8–9; (3) denying coverage under the Virus Exclusion would be contrary to the reasonable expectation of the parties, id. at 10–11; and (4) Defendant's motion is not ripe because the case requires discovery to ascertain the scope and validity of the Virus Exclusion. Id. at 12–13.

A. The Virus Exclusion Precludes Plaintiffs' Claim under the Civil Authority Coverage Provision.

An insured entity must allege the following in order to trigger coverage under a policy's Civil Authority provision: (1) civil authority prohibits access to the insured property, (2) due to physical loss of or damage to other property, and (3) a Covered Cause of Loss, i.e., "a covered risk of physical loss or damage," caused the loss or damage to the property. Santa Monica Amusements, LLC v. Royal Indem. Co., B155253, 2002 WL 31429795, at *2 (Cal. Ct. App. Oct. 31, 2002).

Plaintiffs' claim collapses under the third requirement because the Policy's Virus Exclusion excludes viruses as a Covered Cause of Loss, thereby precluding Plaintiffs' claim for business income losses and extra expenses under the Civil Authority provision. Plaintiffs argue that the exclusion does not apply to the Civil Authority provision because "the payout for civil authority coverage comes from business income or extra expense caused by Civil Authority orders, not solely the property damage caused by the virus." Opp. at 7 (emphasis included). Plaintiffs also argue that the Virus Exclusion does not apply to business income loss and extra expense covered by the Civil Authority provision because the Civil Authority Orders caused Plaintiffs' loss of business income and extra expenses, not COVID-19. Id. Both arguments fail.

***4** The Civil Authority provision states in pertinent part:

> We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

Policy at 57 (emphases added).

Plaintiffs attempt to distinguish the Virus Exclusion as only applying to property damage, whereas the Civil Authority provision applies to business income and extra expenses. Opp. at 7. But nothing in the Virus Exclusion suggests that it is limited to property damage. See Policy at 43. To the contrary, the Policy specifically states when an exclusion does not apply to certain provisions, see, e.g., id. at 105 ("This exclusion does not apply to the Business Income coverage or to the Extra Expense coverage."), and the Virus Exclusion contains no such limitation. The Virus Exclusion precludes coverage for any loss "direct[ly] or indirect[ly]" caused by a virus because the Policy determined that viruses fall outside the scope of the Policy's Covered Causes of Loss. See id. at 43, 51, 104; see Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc., 20-cv-04434 JSC, 2020 WL 5642483, at *2–3 (N.D. Cal. Sept. 22, 2020) (concluding that a policy's civil authority, business income, and extra expense coverage provisions did not cover COVID-19 related civil authority orders because the policy's virus exclusion precluded such claims). Plaintiffs seek business losses and extra expenses that stem from Civil Authority Orders, but California issued these orders as a direct response to COVID-19, Compl. ¶¶ 33, 61—"a cause of loss that falls squarely within the Virus Exclusion." Franklin EWC, Inc., 2020 WL 5642483, at *2.

Plaintiffs also argue that the Civil Authority Orders caused their business losses, "not solely" COVID-19. Opp. at 7–8. They argue that the tenuous connection between the excluded cause of lost—COVID-19—the civil authority orders, and the resulting business income losses and extra expenses,

cannot preclude coverage. See id. Yet not only does the Virus Exclusion apply when a virus indirectly causes or contributes to the cause of loss, see Policy at 43, but under California law, COVID-19 is the "efficient proximate cause" of Plaintiffs' losses. See Garvey v. State Farm Fire & Cas. Co., 48 Cal. 3d 395, 257 Cal.Rptr. 292, 770 P.2d 704 (1989). An "efficient proximate cause" is a cause of loss that predominates and sets the other cause of loss in motion. See id. at 402–03, 257 Cal.Rptr. 292, 770 P.2d 704. When loss can be attributed to two causes—a covered and an excluded cause—coverage only exists if the efficient proximate cause of the damage is covered under the policy. See id. at 403, 257 Cal.Rptr. 292, 770 P.2d 704. The Civil Authority Orders would not exist absent the presence of COVID-19; COVID-19 is therefore the efficient proximate of Plaintiffs' losses. Thus, the Virus Exclusion precludes Plaintiffs' claim for business income losses and extra expenses under the Civil Authority provision.[5]

[5] As discussed above, the Virus Exclusion does not distinguish between property damage and business income losses. The Virus Exclusion therefore applies equally to Plaintiffs' claim under the Business Income and Extra Expense coverage provisions. Like the Civil Authority provision, the Business Income and Extra Expense provisions provide coverage for "loss or damage ... caused by or result from a Covered Cause of Loss." See Policy at 55, 57 (emphasis included). Thus, the Virus Exclusion precludes Plaintiffs' claim under the Business Income and Extra Expense provisions because viruses, like COVID-19, do not constitute a Covered Cause of Loss. Contra Opp. at 7, 20–21.

B. The Virus Exclusion Is Not Ambiguous.

***5** Plaintiffs argue that the Virus Exclusion is ambiguous because the absence of the word "pandemic" implicitly creates two reasonable interpretations of the Virus Exclusion: (1) that the exclusion applies to all viruses, no matter how widespread; or (2) that the exclusion applies to stand-alone viruses, but not viruses that escalate into a pandemic. See Opp. at 9–10. However, the second interpretation is unreasonable because the Virus Exclusion lacks any ambiguity.

First, Plaintiffs cite no authority supporting their argument that the absence of language makes a policy ambiguous. The California Supreme Court has concluded the opposite, "The absence from a policy of a ... word ... does not by itself ... necessarily create an ambiguity." Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co., 5 Cal. 4th 854, 866, 21 Cal.Rptr.2d 691, 855 P.2d 1263 (1993).

Second, the word "pandemic" describes a disease's geographic prevalence, but it does not replace disease as the harm-causing agent. See Oxford English Dictionary (3rd ed., 2005). Plaintiffs provide no support for their argument that insurers must specify the magnitude of an excluded cause of loss in order to avoid ambiguity. See Opp. at 8. The Virus Exclusion's alleged failure to specify how widespread a disease must become to trigger the exclusion does not demonstrate that the exclusion is ambiguous.

Third, the second interpretation also effectively nullifies the plain language of the Virus Exclusion. Courts interpreting a policy must give effect to every term in the policy so that no term is rendered meaningless. See Collin v. American Empire Ins. Co., 21 Cal. App. 4th 787, 818, 26 Cal.Rptr.2d 391 (1994). The Virus Exclusion contemplates situations where a virus indirectly contributes to or worsens a loss. See Policy at 43. Even if the Court accepts Plaintiffs' distinction between a stand-alone virus and a pandemic, only COVID-19 can cause the COVID-19 pandemic and subsequently, civil authority orders and business income losses. COVID-19 remains the "indirect" cause of the insured's harm, even if the exclusion did not contemplate the scale of COVID-19. See id. The second interpretation therefore renders the use of "indirect" meaningless.

Thus, the Virus Exclusion is only subject to one reasonable interpretation: that coverage does not extend to any claim premised on virus-induced damage, regardless of the virus's magnitude. See Franklin EWC, Inc., 2020 WL 5642483, at *2–3.

C. Reasonable Expectations Doctrine Does Not Apply.

Plaintiffs cite extrinsic evidence to argue that denying coverage under the Virus Exclusion would be contrary to the reasonable expectations of the parties. Opp. at 10–11 (citing ISO Circular LI-CF-2006-175, New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria, ISO (July 6, 2006), https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf.). But courts do not evaluate the reasonable expectations doctrine when a policy's language is clear and unambiguous. See, e.g., Bank of the W., 2 Cal. 4th at 1265, 10 Cal.Rptr.2d 538, 833 P.2d 545 ("[A] court that is faced with an argument for coverage based on assertedly ambiguous policy language must first attempt to determine whether coverage

is consistent with the insured's objectively reasonable expectations." (emphasis added)).[6] Because the Virus Exclusion is unambiguous, see supra III.B, the Court does not evaluate the reasonable expectations of the parties.

6 California courts have reaffirmed that the reasonable expectations analysis does not apply when a policy's language is unambiguous. See, e.g., Williams v. Cal. Physicians' Serv., 72 Cal. App. 4th 722, 738, 85 Cal.Rptr.2d 497 (1999) ("[W]here contractual language is clear and unequivocal, the subscriber may only reasonably expect the coverage afforded by the plain language of the contract."); Ananda Church of Self-Realization v. Mass. Bay Ins. Co., 95 Cal. App. 4th 1273, 1279 n.2, 116 Cal.Rptr.2d 370 (2002) ("The [reasonable expectations] doctrine is triggered only where a policy provision or exclusion is uncertain or ambiguous, in which case the court's inquiry would turn to what a reasonable purchaser of the policy would expect."); Lyons v. Fire Ins. Exch., 161 Cal. App. 4th 880, 885, 74 Cal.Rptr.3d 649 (2008) ("[W]here there is no ambiguity or uncertainty in the coverage provisions, the insured cannot reasonably expect a defense.").

D. Discovery is Unnecessary to Determine the Scope and Validity of the Virus Exclusion.

***6** Even if a contract is unambiguous, California courts consider extrinsic evidence when the evidence "is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 37, 69 Cal.Rptr. 561, 442 P.2d 641 (1968) ("Drayage"). Such consideration includes evaluating evidence of the parties' intentions. See id. at 38, 69 Cal.Rptr. 561, 442 P.2d 641. However, an insurer moving to dismiss based on policy language may "establish conclusively that this language unambiguously negates beyond reasonable controversy the construction alleged in the body of the complaint." Palacin v. Allstate Ins. Co., 119 Cal. App. 4th 855, 862, 14 Cal.Rptr.3d 731 (2004). To do so, the court must conditionally consider extrinsic evidence "alleged in the complaint, to determine if it would be relevant to prove a meaning to which the language of the instrument is reasonably susceptible." George v. Auto. Club of S. Cal., 201 Cal. App. 4th 1112, 1122, 135 Cal.Rptr.3d 480 (2011). None of Plaintiffs' alleged extrinsic evidence suggests a reasonable alternative construction of the Virus Exclusion.

First, Plaintiffs argue that Defendant could not have intended for the exclusion to encompass pandemics because Defendant allegedly borrowed Insurances Services Office's ("ISO") standardized language that ISO drafted before the COVID-19 pandemic. See Opp. at 13. Plaintiffs allege little, if any, evidence of Defendant's intent, instead they rely on evidence of ISO's intent and attribute ISO's intent to Defendant. See Compl. ¶¶ 21–23. Notwithstanding that Plaintiffs have not cited any authority permitting the Court to use evidence of third-party intent to infer Defendant's intent, the evidence of ISO's intent indicates that the Virus Exclusion contemplates highly infectious diseases. For example, the complaint alleges that ISO created its Virus Exclusion in response to the early 2000s SARS outbreak, id. ¶¶ 21–22, which suggests that both ISO and Defendant's Virus Exclusion account for highly infectious diseases, such as COVID-19. Plaintiffs contend that the opposite is true: SARS was not a pandemic, and therefore the Virus Exclusion cannot apply to pandemics. See id. ¶ 22; Opp. at 13. But as sources in the complaint acknowledge, state regulators and insurer representatives, like ISO, sought to introduce new virus exclusions to account for potential pandemic diseases like SARS. Compl. ¶ 23 (citing Richard P. Lewis, et al., Here we go again: Virus exclusion for COVID-19 and insurers, PropertyCasualty360 (Apr. 7, 2020) https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/?slreturn=20200907134604). Even if Defendant based its Virus Exclusion on ISO's standardized language, such language contemplates widespread diseases like SARS and COVID-19.

Second, Plaintiffs argue that "the Court should consider statements made to insurance regulators to determine" whether insurers and regulators "intended to exclude" losses related to the pandemic. Opp. at 13. But the complaint only alleges that ISO made statements to regulators, not Defendant. Compl. ¶ 23. The Court cannot consider statements that have not been alleged in the complaint. See George, 201 Cal. App. 4th at 1122, 135 Cal.Rptr.3d 480 ("[T]he court must conditionally consider the parol evidence alleged in the complaint to determine if it would be relevant to prove a meaning to which the language of the instrument is reasonably susceptible." (emphasis added)). Further, even if the Court attributes ISO's communications with state regulators to Defendant, both the complaint and the sources it relies on acknowledge that the widespread outbreak of SARS prompted ISO and state regulators to agree to a new virus exclusion. Compl. ¶¶ 22–23 (citing Lewis, et al., supra.). Thus, both the complaint and parol evidence suggest that state

regulators intended to exclude coverage for damages caused by a pandemic.

Third, Plaintiffs allege that ISO fraudulently misled state regulators about the scope of its Virus Exclusion to induce them to approve it. Id. ¶ 23. Plaintiffs attempt to use ISO's alleged misrepresentations—the substance of which is unknown—to argue that regulators did not intend for the Virus Exclusion to exclude widespread viruses. See id. However, extrinsic evidence "may not be used to show that words in contracts mean the exact opposite of their ordinary meaning." ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co., 17 Cal. App. 4th 1773, 1790–91, 22 Cal.Rptr.2d 206 (1993). Even if ISO mispresented the purpose and scope of its Virus Exclusion, Plaintiffs' theory requires the Court to construe Defendant's plain, unambiguous Virus Exclusion to mean the exact opposite of its ordinary meaning. Neither California law nor federal courts interpreting Virus Exclusions, permit such an outcome. See, e.g., id.; Turek Enter., Inc. v. State Farm Mut. Auto. Ins. Co., 20-11655, —— F.Supp.3d ——, ——, 2020 WL 5258484, at *9 (E.D. Mich. Sept. 3, 2020) ("[E]ven if Defendants misrepresented the purpose and extent of the Virus Exclusion in 2006, the plain, unambiguous meaning of the Virus Exclusion today negates coverage."). Further, ISO's alleged improper conduct cannot change Defendant's Virus exclusion because the language in Defendant's Virus Exclusion is materially different from ISO's Virus Exclusion. Compare Compl. ¶ 24 ("[L]oss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.")[7] with Policy at 43 ("[L]oss or damage caused by, resulting from, contributing to or made worse by the actual, alleged or threatened presence of any pathogenic organism, all whether direct or indirect, proximate or remote, or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy, except as provided under section A.").

7 Plaintiffs do not cite the source of the quoted excerpt in Compl. ¶ 24, but a review of other cases confirms that Plaintiffs drew the quoted language directly from ISO's Virus Exclusion. See Turek Enter., Inc., —— F.Supp.3d at ——, 2020 WL 5258484, at *9 n.13; 10E, LLC v. Travelers Indem. Co. of Conn., 2:20-cv-04418-SVW-AS, 2020 WL 5359653, at *1 (C.D. Cal. Sept. 2, 2020).

***7** Thus, while California law permits parties to introduce extrinsic evidence that may clarify the meaning of an insurance policy, none of Plaintiffs' proposed evidence "is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." Drayage, 69 Cal. 2d at 37, 69 Cal.Rptr. 561, 442 P.2d 641 (emphasis added). Plaintiffs have failed to demonstrate that discovery is necessary to determine the scope of the Policy's Virus Exclusion, and as a result, the Virus Exclusion bars Plaintiffs' claim for business interruption coverage.[8]

8 The Court's holding should not be construed to necessarily apply to all virus exclusions. The Virus Exclusion casts an exceptionally wide net relative to other virus exclusions because it lacks relevant limitations and ambiguous language. Compare Policy at 47 with Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd., 6:20-cv-1174-Orl-22EJK, 2020 WL 5939172, at *3 (M.D. Fla. Sept. 24, 2020) (involving a virus exclusion that contained ambiguous language and potentially permitted the plaintiff's claim).

IV. CONCLUSION

If a court does dismiss a complaint for failure to state a claim, it should "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). However, a court has discretion to deny leave to amend due to, among other things, "futility of amendment." Leadsinger, Inc. v. BMG Music Pub., 512 F.3d 522, 532 (9th Cir. 2008) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). The Court initially issued an order dismissing Plaintiffs' complaint without prejudice. Order (dkt. 33). However, the Court recognizes that any attempt to amend the Complaint would be futile considering the breadth of the Virus Exclusion. Accordingly, the Court GRANTS Defendant's motion to dismiss with prejudice.

IT IS SO ORDERED.

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United States District Court, E.D. Pennsylvania.

BRIAN HANDEL D.M.D., P.C.

v.

ALLSTATE INSURANCE CO.

CIVIL ACTION NO. 20-3198

|

11/06/2020

MEMORANDUM

Bartle, J. November 6th, 2020

***1** Plaintiff Brian Handel D.M.D., P.C. has sued defendant Allstate Insurance Co. in this diversity action for a declaratory judgment and for breach of contract. These counts arise from defendant's denial of coverage for claims of plaintiff for business income loss and extra expenses due to the interruption of plaintiff's dental practice during the COVID-19 pandemic.

Before the court is the motion of defendant to dismiss plaintiff's first amended complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I.

When considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court must accept as true all well-pleaded factual allegations in the complaint and draw all reasonable inferences in the light most favorable to the plaintiff. See Phillips v. Cty. of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008); Umland v. PLANCO Fin. Servs., Inc., 542 F.3d 59, 64 (3d Cir. 2008). We must then determine whether the pleading at issue "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

On a motion to dismiss under Rule 12(b)(6), the court may consider "allegations contained in the complaint, exhibits attached to the complaint and matters of public record." Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993) (citing 5A Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (2d ed. 1990)). The court may also consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case." Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2006) (citing 5B Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. 2004)).

II.

For present purposes, the court accepts as true the following well-pleaded facts set forth in the amended complaint. Plaintiff, a professional corporation, is a dental practice in Wayne, Pennsylvania. Plaintiff has an "all-risk" insurance policy with defendant, dated September 9, 2019, for non-excluded business losses.

On March 19, 2020, the Governor of Pennsylvania prohibited business operations that are not life sustaining so as to prevent the spread of COVID-19, a highly contagious respiratory virus that has infected more than 8 million people in the United States and killed more than 225,000. According to the complaint, COVID-19 is known to be transmitted by aerosols which can linger in the air for up to three hours and on surfaces for up to three days.

On March 23, 2020, the Governor issued a stay-at-home order for residents of various counties in Pennsylvania, including Chester County, where plaintiff is located. This order required residents in seven counties to stay at home "except as needed to access, support, or provide life sustaining business, emergency, or government services." On April 1, 2020, the Governor extended the stay-at-home order to all counties in the Commonwealth.

***2** Pursuant to the Governor's orders and a March 26, 2020 guidance from the state Department of Health, plaintiff was forced to close its office for all non-emergency dental services. Plaintiff subsequently made a claim for business income loss and/or extra expense coverage with defendant under the terms of the policy.

The policy at issue provides that defendant will pay for "direct physical loss of or damage to Covered Property...caused by or resulting from any Covered Cause of Loss." A Covered Cause

of Loss is defined as "[d]irect physical loss unless the loss is excluded or limited under Section I – Property."

This coverage includes business income loss sustained "due to the necessary suspension of your 'operations' during the 'period of restoration' " if the suspension was "caused by direct physical loss of or damage to property at the described premises" and was caused by a Covered Cause of Loss. "Operations" refers to "business activities occurring at the described premises." The "period of restoration" begins either immediately after the direct physical loss or damage or seventy-two hours after the loss or damage and ends when the property is repaired or replaced or when business resumes at a new location.

The policy also covers "necessary Extra Expense" incurred during the "'period of restoration' that [the insured] would not have incurred if there had been no direct physical loss or damage to property at the described premises" if the loss or damage are "caused by or result from a Covered Cause of Loss."

The policy includes a provision to cover the loss of business income and necessary extra expenses when a Covered Cause of Loss damages property other than the described premises and actions of a civil authority prohibit access to the described premises. This "Civil Authority" provision requires that "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage," and "[t]he action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage."

Encompassed within the property coverage section of the policy are exclusions from coverage. One such exclusion is for "loss or damage caused directly or indirectly" by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."

On May 28, 2020, defendant denied plaintiff's claim for coverage because it claimed that "there is no damage to the premises by a covered cause of loss that caused your business to lose income."

III.

The initial burden in insurance coverage disputes is on the insured to show that the claim falls within the policy, but if the insured is able to make this showing the insurer has the burden to demonstrate that there is an applicable policy exclusion which denies coverage. State Farm Fire & Cas. Co. v. Estate of Mehlman, 589 F.3d 105, 111 (3d Cir. 2009). If the language is ambiguous in that it is open to more than one interpretation, the court must construe the language in favor of the insured. Med. Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999). A contract provision is not ambiguous simply because the parties do not agree on the construction of the provision. Weisman v. Green Tree Ins. Co., 670 A.2d 160, 161 (Pa. Super. 1996).

***3** Plaintiff avers in its amended complaint that COVID-19: caused "direct physical damage, as well as indirect non-physical damage;" rendered the property "unsafe, uninhabitable, or otherwise unfit for its intended use;" and restricted the use of the property resulting in "direct physical loss." Plaintiff also claims that the "Covid-19 Effect," or the public's social anxiety about public health and the safety of indoor spaces, "is the functional equivalent of damage of a material nature or an alteration in physical composition."

Defendant counters that plaintiff fails to plead any facts describing any property alteration or damage that would constitute physical loss or damage and that the mere risk of contamination is not enough to constitute property damage. Defendant also argues that at most the property would need sanitizing.

Our Court of Appeals has ruled that "[i]n ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure," such as from fire, water, or smoke, that "may demonstrably alter the components of a building and trigger coverage." Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226, 235 (3d Cir. 2002). The burden is on the plaintiff to establish that its structure was physically damaged. Id. at 232.

Allegations of physical damage to a building from "sources unnoticeable to the naked eye must meet a higher threshold." Id. at 235. In Port Authority of New York and New Jersey v. Affiliated FM Insurance Co., the Court determined that asbestos causes physical damage if it is present in such large quantities that it makes the structure "uninhabitable and unusable," but if the building continues to function and remain usable then the building owner has not suffered a

loss. Id. at 236. The court concluded that the "mere presence of asbestos, or the general threat of future damage from that presence, lacks the distinct and demonstrable character necessary for first-party insurance coverage." Id.

In a subsequent insurance coverage case involving contamination of a homeowner's well from e-coli bacteria, the Court of Appeals found its reasoning in Port Authority to be applicable under Pennsylvania law and "instructive in a case where sources unnoticeable to the naked eye have allegedly reduced the use of the property to a substantial degree." Motorists Mut. Ins. Co. v. Hardinger, 131 F. App'x 823, 826 (3d Cir. 2005). In those circumstances "direct physical loss of or damage to" the property means that the functionality of the property "was nearly eliminated or destroyed" or the "property was made useless or uninhabitable." Id. at 826-27. This definition applies equally to the situation here involving the COVID-19 virus.

Plaintiff alleges generally in the amended complaint that it was "forced to suspend or reduce business operations following an order from Pennsylvania Governor Wolf." (emphasis added). In its brief in opposition to defendant's motion to dismiss, plaintiff clarifies that the effect of the orders of the Governor and Department of Health only "denied access to Plaintiff's premises for all non-emergent procedures" and that its business "has suffered reduced operations and loss of income." In fact, no order by either the Governor or the Department of Health ever required dental offices such as plaintiff to close completely. Instead, plaintiff was able to remain open for emergency procedures.

Thus, plaintiff's property remained inhabitable and usable, albeit in limited ways. Plaintiff has failed to plead plausible facts that COVID-19 caused damage or loss in any physical way to the property so as to trigger coverage as set forth in Hardinger. See 131 F. App'x at 826-27.

IV.

***4** Plaintiff's claim for coverage pursuant to the civil authority provision of the policy also fails. That provision obliges defendant to cover the loss of business income and necessary extra expenses when a Covered Cause of Loss damages property in the immediate area and a civil authority prohibits access to the covered property. The policy requires that "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage" and that "[t]he action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage."

As previously stated, to constitute a Covered Cause of Loss there must be direct physical loss. In addition, the Governor's orders limit, rather than prohibit, access to the property. Absent facts of direct physical loss or prohibited access to the property, plaintiff cannot sustain a claim for coverage under the civil authority provision of this policy.

V.

Even if plaintiff had pleaded sufficient facts for physical damage or loss as a result of COVID-19, plaintiff's claims are still excluded by the virus exclusion provision. Courts have routinely granted motions to dismiss when an exclusion provision in an insurance policy applies to the action. See Brewer v. U.S. Fire Ins. Co., 446 F. App'x 506, 510 (3d Cir. 2011); Wilson v. Hartford Cas. Co., Civil Action No. 20-3384, 2020 WL 5820800, at *7 (E.D. Pa. Sept. 30, 2020).

The policy at issue unambiguously states that defendant will not cover loss or damage if caused, either directly or indirectly, by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." There is no other way to characterize COVID-19 than as a virus which causes physical illness and distress. Therefore, the virus exclusion unambiguously bars coverage for plaintiff's claims due to COVID-19.

Plaintiff argues that the exclusion only states that defendant will not pay for "loss or damage" but does not say anything about paying for expenses and that plaintiff can still recover for extra expenses. In order to recover extra expenses, however, plaintiff would still need to plead sufficient facts of direct physical loss or damage caused by a Covered Cause of Loss. As stated above, plaintiff has not done so.

VI.

Plaintiff asserts that the doctrine of regulatory estoppel prevents defendant from raising the virus exclusion to deny coverage. Regulatory estoppel "prohibits parties from switching legal positions to suit their own ends." Sunbeam Corp. v. Liberty Mut. Ins. Co., 781 A.2d 1189, 1192 (Pa.

2001). If an insurer represents to a regulatory agency that new language in a policy will not result in decreased coverage, the insurer cannot assert the opposite position when insureds raise the issue in litigation. Id. at 1192-93.

To support a claim for regulatory estoppel, a plaintiff must plead two elements: "(1) A party made a statement to a regulatory agency; and (2) Afterward, the party took a position opposite to the one presented to the regulatory agency." Simon Wrecking Co. v. AIU Ins. Co., 541 F. Supp. 2d 714, 717 (E.D. Pa. 2008). The representations the insurer made to the regulatory agency must be contrary to the insurer's position in the current litigation for regulatory estoppel to apply. Hussey Copper, LTD v. Arrowood Indem. Co., 391 F. App'x 207, 211 (3d Cir. 2010).

Plaintiff satisfies the first element of regulatory estoppel since it avers that the Insurance Services Office, Inc. ("ISO") and the American Association of Insurance Services ("AAIS") presented to state regulatory agencies in 2006 on behalf of multiple insurers, including defendant, to include a virus exclusion in insurance policies. However, plaintiff fails to plead any facts to satisfy the second element that defendant currently takes a position contrary to the statements made before the regulatory agencies on behalf of the insurers.

***5** Plaintiff cites to the statements of the ISO and the AAIS in which both organizations made clear that property policies have not been and were not intended to be a source of recovery for damage from disease-causing agents such as a virus. The statement of AAIS to which plaintiff cites explicitly states that "[t]his endorsement clarifies that loss, cost, or expense caused by, resulting from, or relating to any virus...is excluded."

Defendant takes the same position here as the ISO and AAIS did by arguing that the virus exclusion eliminates coverage for any damage or loss as a result of the causes enumerated therein. Since defendant does not take a contradictory position to the one made to regulatory agencies, the doctrine of regulatory estoppel does not apply to this action.

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Texas, San Antonio Division.

DIESEL BARBERSHOP, LLC; Wilderness Oaks Cutters, LLC; Diesel Barbershop Bandera Oaks, LLC; Diesel Barbershop Dominion, LLC; Diesel Barbershop Alamo Ranch, LLC; and Henley's Gentlemen's Grooming, LLC, Plaintiffs,
v.
STATE FARM LLOYDS, Defendant.

No. 5:20-CV-461-DAE
|
Signed 08/13/2020

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ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

David Alan Ezra, Senior United States District Judge

***1** Before the Court is a Motion to Dismiss filed by State Farm Lloyds ("Defendant" or "State Farm") on May 8, 2020. (Dkt. # 9.) Plaintiffs Diesel Barbershop, LLC; Wilderness Oak Cutters, LLC; Diesel Barbershop Bandera Oaks, LLC; Diesel Barbershop Dominion, LLC; Diesel Barbershop Alamo Ranch, LLC; and Henley's Gentlemen's Grooming, LLC (collectively "Plaintiffs") responded on May 22, 2020 (Dkt. # 14), and Defendant filed a reply on May 29, 2020 (Dkt. # 17). The Court presided over a virtual hearing on July 29, 2020, during which Shannon Loyd, Esq., represented Plaintiffs and Neil Rambin, Esq. and Susan Egeland, Esq. represented Defendant. After careful consideration of the memorandum filed in support of and against the motion and after hearing arguments from counsel, the Court—for the reasons that follow—**GRANTS** Defendant's Motion to Dismiss.

FACTUAL BACKGROUND

On February 11, 2020, the World Health Organization identified the 2019 Coronavirus ("COVID-19") as a disease. Since then, COVID-19 has spread across the world, and health organizations, including the Center for Disease Control ("CDC"), characterize COVID-19 as a global pandemic. (See Dkt. # 8.) The outbreak in the United States is a rapidly evolving situation, and the state of Texas saw an exponential increase in COVID-19 cases. To stop "community spread" of COVID-19, state and local governments have issued executive orders that limit the opening of certain businesses and require social distancing. Bexar County Judge Nelson Wolff and Texas Governor Greg Abbott have issued executive orders throughout this crisis, and below are the relevant orders (the "Orders") for the purposes of this case.

a. The Bexar County Orders

County Judge Wolff issued multiple executive orders pertaining to the "state of local disaster ... due to imminent threat arising from COVID-19." (Dkt. # 8, Exh. B.) On March 23, 2020, County Judge Wolff issued an order requiring "all businesses operating within Bexar County" save for those "exempted" to "cease all activities" at any business located in Bexar County from March 24, 2020 until April 9, 2020. (Id.) The order defines exempted businesses as those pertaining to: (a) healthcare services, (b) government functions, (c) education and research, (d) infrastructure, development, operation and construction, (e) transportation, (f) IT services, (g) food, household staples, and retail, (h) services to economically disadvantaged populations, (i) services necessary to maintain residences or support exempt businesses, (j) news media, (k) financial institutions and insurance services, (l) childcare services, (m) worship services, (n) funeral services, and (o) CISA sectors. (Id.) County Judge Wolff notes that he is authorized "to take such actions as are necessary in order to protect the health, safety, and welfare of the citizens of Bexar County" and "has determined that extraordinary emergency measures must be taken to mitigate the effects of this public health emergency and to facilitate a cooperative response" in line with Governor Abbott's "declaration of public health disaster." (Id.)

***2** In a supplemental executive order dated April 17, 2020, County Judge Wolff emphasizes that "the continued spread of COVID-19 by pre- and asymptomatic individuals is a significant concern in Bexar County and on April 3, 2020, the [CDC] recommended cloth face coverings be worn by the general public to slow the spread of COVID-19 and implementing this measure would assist in reducing the transmission of COVID-19 in San Antonio and Bexar County." (Id.) The goal of the supplemental order was to "reduce the spread of COVID-19 in and around Bexar County" and to "continue to protect the health and safety of the community and address developing and the rapidly changing circumstances when presented by the current public health emergency." (Id.)

b. The State of Texas Order

On March 31, 2020, Texas Governor Greg Abbott signed an executive order closing all "non-essential" businesses from April 2, 2020 until April 30, 2020. (Dkt. # 8, Exh. C.) Governor Abbott's order provides the following:

> NOW, THEREFORE, I, Greg Abbott, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order the following on a statewide basis effective 12:01 a.m. on April 2, 2020, and continuing through April 30, 2020, subject to extension based on the status of COVID-19 in Texas and the recommendations of the CDC and the White House Coronavirus Task Force:
>
> > In accordance with guidance from DSHS Commissioner Dr. Hellerstedt, and to achieve the goals established by the President to reduce the spread of COVID-19, every person in Texas shall, except where necessary to provide or obtain essential services, minimize social gatherings and minimize in-person contact with people who are not in the same household.
> >
> > "Essential services" shall consist of everything listed by the U.S. Department of Homeland Security in its Guidance on the Essential Critical Infrastructure Workforce, Version 2.0, plus religious services....
> >
> > In accordance with the Guidelines from the President and the CDC, people shall avoid eating or drinking at bars, restaurants, and food courts, or visiting gyms, massage establishments, tattoo studios, piercing studios, or cosmetology salons; provided, however, that the use of drive-thru, pickup, or delivery options for food and drinks is allowed and highly encouraged throughout the limited duration of this executive order.

(Dkt. # 8, Exh. C.)

c. Plaintiffs' Insurance Policies

Plaintiffs run barbershop businesses; a type of business deemed non-exempt and non-essential under the Orders. (Dkt. # 8.) State Farm issued insurance policies (the "Policies")[1] to Plaintiffs regarding the insured properties (the "Properties") that are subject of this dispute. (See Dkt. # 9, Exhs. A-1–A-6.)

The Policies state, in relevant part, the following:

> When a Limit Of Insurance is shown in the Declarations for that type of property as described under Coverage A – Buildings, Coverage B – Business Personal Property, or both, we will pay for accidental direct physical loss to that Covered Property at the premises described in the Declarations caused by any loss as described under SECTION I — COVERED CAUSES OF LOSS.

(Id.) The Policies note in Section I–Covered Causes of Loss that State Farm will "insure for accidental direct physical loss to Covered Property" unless the loss is excluded under Section I–Exclusions or limited in the Property Subject to Limitations provision. (Id.) The Policies further contain a "Fungi, Virus, or Bacteria" exclusion (the "Virus Exclusion"), which contains lead-in language and states the following:

> ***3** 1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
>
> ...
>
> **j. Fungi, Virus Or Bacteria**
>
> ...

> (2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease.

(Id.) The Policies also contain an endorsement modifying the businessowners coverage form, including a Civil Authority provision which states in relevant part:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual "Loss of Income" you sustain and necessary "Extra Expense" caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> 1. Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> 2. The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause Of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

(Id.) There are various other exclusions within the Policies including for example, the "Ordinance or Law," the "Acts or Decisions" and the "Consequential Loss" exclusions. (Dkt. # 9.)

PROCEDURAL HISTORY

Plaintiffs assert that due to the COVID-19 outbreak and the Orders, Plaintiffs "have sustained and will sustain covered losses" under the terms of the Policies. (Dkt. # 8.) Plaintiffs filed a claim with State Farm seeking coverage for business interruption to the Properties pursuant to the Policies in March 2020. (Id.) Without seeking additional documentation or information, and without further investigation, State Farm denied Plaintiffs' claims. (Dkt. # 8, Exh. D.) In the denial letter, State Farm asserted that Plaintiffs' claims are not covered as the "policy specifically excludes loss caused by enforcement of ordinance or law, virus, and consequential losses." (Id.) State Farm argued that there is a requirement "that there be physical damage, within one mile of the described property" and "that the damage be the result of a Covered Cause of Loss" which, State Farm asserted, a "virus is not." (Id.)

Plaintiffs sued State Farm in state court on April 8, 2020, after State Farm denied Plaintiffs coverage. (Dkt. # 1, Exh. C.) Defendant timely removed the action to this Court on April 13, 2020. (Dkt. # 1.) In their second amended complaint, Plaintiffs bring claims of breach of contract, noncompliance with the Texas Insurance Code, and breach of the duty of good faith and fair dealing. (Dkt. # 8.) Attached to Plaintiffs' second amended complaint are the Policies, Orders, and State Farm's letter denying coverage.

On May 8, 2020, State Farm filed a motion to dismiss for failure to state a claim. (Dkt. # 9.) The Court granted the parties' joint motion to stay discovery pending a ruling on the motion to dismiss on May 18, 2020. (Dkt. # 12.) Plaintiffs responded to the motion to dismiss on May 22, 2020 (Dkt. # 14), and a week later, Defendant filed its reply (Dkt. # 17). Defendant filed a notice of supplemental authority on July 14, 2020 (Dkt. # 21), and Plaintiffs filed a notice of supplemental authority on July 28, 2020 (Dkt. # 22). The Court held a virtual hearing on this matter on July 29, 2020. Defendant filed an additional notice of supplemental authority on August 7, 2020 (Dkt. # 25), and Plaintiffs filed another notice of supplemental authority on August 12, 2020 (Dkt. # 27). Defendant filed its third notice of supplemental authority on August 13, 2020 (Dkt. # 28), notifying the Court of the United States Judicial Panel on Multidistrict Litigation's decision to deny the creation of an industry-wide multidistrict litigation. (Id., Exh. A.)

TEXAS CONTRACT-INTERPRETATION STANDARDS

***4** "Insurance policies are contracts and are governed by the principles of interpretation applicable to contracts." Amica Mut. Ins. Co. v. Moak, 55 F.3d 1093, 1095 (5th Cir. 1995). Under Texas contract-interpretation standards, the "paramount rule is that courts enforce unambiguous policies as written" such that court must "honor plain language, reviewing policies as drafted, not revising them as desired." Pan Am Equities, Inc. v. Lexington Ins. Co., 959 F.3d 671, 674 (5th Cir. 2020). Importantly, an "ambiguity" is "more than lack of clarity"; a court should find an insurance contract ambiguous only if "giving effect to all provisions, its language is subject to two or more reasonable interpretations." Id. (internal quotation marks and citation omitted). To determine ambiguity, which is a question of law, a court must "examine

the entire contract in order to harmonize and give effect to all provisions so that none will be meaningless." Id. (internal quotation marks and citation omitted); see also Provident Life & Acc. Ins. Co. v. Knott, 128 S.W.3d 211, 216 (Tex. 2003) ("In interpreting these insurance policies as any other contract, we must read all parts of each policy together and exercise caution not to isolate particular sections or provisions from the contract as a whole."); State Farm Lloyds v. Page, 315 S.W.3d 525, 527 (Tex. 2010) ("The fact that the parties may disagree about the policy's meaning does not create an ambiguity." (citations and internal quotation marks omitted)). "The goal in interpreting ... [language within the contract] is to ascertain the true intentions of the parties as expressed in the writing itself." Richards v. State Farm Lloyds, 597 S.W.3d 492, 499 (Tex. 2020) (citation and internal quotation marks omitted).

RULE 12(b)(6) LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

In analyzing whether to grant a Rule 12(b)(6) motion, a court accepts as true "all well-pleaded facts" and views those facts "in the light most favorable to the plaintiff." United States ex rel. Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 346 (5th Cir. 2013) (citation omitted). A court need not "accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678, 129 S.Ct. 1937. Furthermore, in assessing a motion to dismiss under Rule 12(b)(6), a court's review is generally limited to the complaint, documents attached to the complaint, and any documents attached to the motion to dismiss that are referred to in the complaint and are central to the plaintiff's claims. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007); see also Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC, 594 F.3d 383, 387 (5th Cir. 2010).

DISCUSSION

State Farm argues that for business income coverage to apply, the Policies explicitly require (1) an accidental direct physical loss to the insured property and (2) that the loss is not excluded. (Dkt. # 9.) Defendant asserts that Plaintiffs fail to properly plead direct physical loss to the Properties as Plaintiffs argue that the Orders are the reason for the business interruption claim and fail to show that the Properties have been tangibly "damaged" per se. (Dkts. ## 9, 17.) Defendant also argues that regardless, Plaintiffs fail to overcome the Virus Exclusion hurdle that is unambiguously within the Policies and was added to these Policies in response to the SARS pandemic in the early 2000s. (Id.)

***5** In response, Plaintiffs assert that the language in the Policies does not require a tangible and complete physical loss to the Properties, but rather allows for a partial loss to the Properties, which includes the loss of use of the Properties due to the Orders restricting usage of the Properties. (Dkt. # 14.) Plaintiffs also argue that it is not COVID-19 within Plaintiffs' Properties that caused the loss directly, but rather that it was the Orders that caused the direct physical loss and thus the Virus Exclusion should not apply. (Id.) Plaintiffs also argue that the Orders were issued to protect public health and welfare, and that Plaintiffs claims thus fall under the Civil Authority provision within the Policies. (Id.)

Based on the parties' filings, plain language of the Policies in question, and argument at the hearing, as much as the Court sympathizes with Plaintiffs' situation, the Court determines that the motion to dismiss must be granted for the following reasons.

a. Accidental Direct Physical Loss

This Court is mandated to "honor plain language, reviewing policies as drafted, not revising them as desired." Pan Am Equities, 959 F.3d at 674. The Court looks at the coverage provided by the Policies as a whole in order to determine the plain language. Id. Here, the Policies are explicit that there has to be an accidental, direct physical loss to the property in question. The Court agrees with Plaintiffs that some courts have found physical loss even without tangible destruction to the covered property. See e.g., TRAVCO Ins. Co. v. Ward, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010), aff'd, 504 F. App'x 251 (4th Cir. 2013) (noting that "physical damage to the property

is not necessary, at least where the building in question has been rendered unusable by physical forces"); Murray v. State Farm Fire & Cas. Co., 203 W. Va. 477, 493, 509 S.E.2d 1 (1998) (" 'Direct physical loss' provisions require only that a covered property be injured, not destroyed. Direct physical loss also may exist in the absence of structural damage to the insured property." (citation omitted)). The Court also agrees that a virus like COVID-19 is not like a hurricane or a hailstorm, but rather more like ammonia, E. coli, and/or carbon monoxide (i.e. cases in which the loss is caused by something invisible to the naked eye), and in such cases, some courts have found direct physical loss despite the lack of physical damage. See e.g., Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226, 236 (3d Cir. 2002) (holding that while mere installation of asbestos was not loss or damage, the presence or imminent threat of a release of asbestos would "eliminate[ ] or destroy[ ]" the function of the structure, thereby making the building "useless or uninhabitable"); Lambrecht & Assocs., Inc. v. State Farm Lloyds, 119 S.W.3d 16, 24–26 (Tex. App. 2003) (noting that while State Farm argued that the losses were not "physical" as they were not "tangible," the court found that under the "direct language" of the policy allowed for coverage to "electronic media and records" and the "data stored on such media" as "such property is capable of sustaining a 'physical' loss"); Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399, 406 (1st Cir. 2009) ("We are persuaded both that odor can constitute physical injury to property ... and also that allegations that an unwanted odor permeated the building and resulted in a loss of use of the building are reasonably susceptible to an interpretation that physical injury to property has been claimed.").

Even so, the Court finds that the line of cases requiring tangible injury to property are more persuasive here and that the other cases are distinguishable. See Dickie Brennan & Co. v. Lexington Ins. Co., 636 F.3d 683, 686 (5th Cir. 2011) (affirming summary judgment and holding that there was no coverage under the civil authority provision of the policy as plaintiffs "failed to demonstrate a nexus between any prior property damage and the evacuation order" when the city issued a mandatory evacuation order prior to the arrival of a hurricane and plaintiffs allegedly suffered business interruption losses); United Air Lines, Inc. v. Ins. Co. of State of PA, 439 F.3d 128, 134 (2d Cir. 2006) (determining that United could not show that its lost earnings resulted from physical damage to its property or from physical damage to an adjacent property when the government shut down the airport after the 9/11 terrorist attacks). For instance, unlike Essex Ins. Co., COVID-19 does not produce a noxious odor that makes a business uninhabitable. It appears that within our Circuit, the loss needs to have been a "distinct, demonstrable physical alteration of the property." Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co., 181 F. App'x 465, 470 (5th Cir. 2006) ("The requirement that the loss be "physical," given the ordinary definition of that term is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." (citation omitted)); see also Ross v. Hartford Lloyd Ins. Co., 2019 WL 2929761, at *6–7 (N.D. Tex. July 4, 2019) ("direct physical loss" requires "a distinct, demonstrable, physical alteration of the property" (citing 10A Couch on Ins. § 148:46 (3d ed. 2010)).) Thus, the Court finds that Plaintiffs fail to plead a direct physical loss.

b. The Virus Exclusion

***6** Even if the Court had found that the language within the Policies was ambiguous and/or that Plaintiffs properly plead direct physical loss to the Properties, the Court finds that the Virus Exclusion bars Plaintiffs' claims. The language in the lead-in of the Virus Exclusion (also called the anti-concurrent causation ("ACC") clause) expressly states that State Farm does not insure for a loss regardless of "whether other causes acted concurrently or in any sequence within the excluded event to produce the loss." (See Dkt. # 9, Exhs. A-1–A-6.) Here, Plaintiffs allege that the loss of business occurred as a result of the Orders that mandated non-essential businesses to discontinue operations for a set period of time to help staunch community spread of COVID-19. (Dkts. ## 8, 14.) Plaintiffs also assert that the Court should find that the Virus Exclusion does not apply because COVID-19 was not present at the Properties. (Id.)

The Court notes that the parties vehemently dispute how to read the lead-in language to the Virus Exclusion. Defendant cites Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346 (5th Cir. 2007) in support of the argument that the lead-in language to the Virus Exclusion bars Plaintiffs' claims and that the lead-in language is unambiguous and enforceable. Meanwhile, Plaintiffs cite Stewart Enterprises, Inc. v. RSUI Indem. Co., 614 F.3d 117 (5th Cir. 2010) in support of their assertion that the lead-in language does not exclude coverage here.

The Court finds the facts in Stewart Enterprises distinguishable from the facts here. There, the ACC clause was within a policy provided by Lexington Insurance Company and contained different language than the ACC clause in State Farm's Policies here. See Stewart Enterprises, 614 F.3d at 125 (noting in the ACC clause that "this policy does not insure against loss or damage caused directly or indirectly by any of the excluded perils" as "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss"). In addition, the issue in Stewart Enterprises was that the insurer was seeking "to use the ACC clause to bar recovery for damage caused by two included perils." Id. at 126 (emphasis added). The Fifth Circuit rightly decided there that it would be absurd to "read the policy to force Stewart to prove a windless flood." Id. at 127.

But here, the Court can read the Policies objectively and without "creating difficult causation determination where none otherwise exist." Id. Like the Fifth Circuit in Tuepker, the Court finds that here, the State Farm ACC clause within the Policies is unambiguous and enforceable. See Tuepker, 507 F.3d at 356. The Policies expressly state that State Farm does not "insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these[.]" (See Dkt. # 9, Exhs. A-1–A-6.) Guided by the plain language of the Policies, the Court finds that Plaintiffs have pleaded that COVID-19 is in fact the reason for the Orders being issued and the underlying cause of Plaintiffs' alleged losses. While the Orders technically forced the Properties to close to protect public health, the Orders only came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community. Thus, it was the presence of COVID-19 in Bexar County and in Texas that was the primary root cause of Plaintiffs' businesses temporarily closing. Furthermore, while the Virus Exclusion could have been even more specifically worded, that alone does not make the exclusion "ambiguous." See In re Katrina Canal Breaches Litig., 495 F.3d 191, 210 (5th Cir. 2007) ("The fact that an exclusion could have been worded more explicitly does not necessarily make it ambiguous.").

***7** Thus, the Court finds that the Policies' ACC clause excluded coverage for the losses Plaintiffs incurred in complying with the Orders. See, e.g., JAW The Pointe, L.L.C. v. Lexington Ins. Co., 460 S.W.3d 597, 610 (Tex. 2015) ("Because the covered wind losses and excluded flood losses combined to cause the enforcement of the ordinances concurrently or in a sequence, we agree with the court of appeals that the policy's anti-concurrent-causation clause excluded coverage for JAW's losses."). Thus, even if the Court found direct, physical loss to the Properties, the Virus Exclusion applies and bars Plaintiffs' claims.

c. The Civil Authority Provision

In light of the foregoing, the Court also finds that the Civil Authority provision within the Policies is not triggered. Plaintiffs' recovery remains barred due to the unambiguous nature of the events that occurred, causing the Virus Exclusion to apply such that Plaintiffs fail to allege a legally cognizable "Covered Cause of Loss." See Dickie Brennan, 636 F.3d at 686–87 ("[C]ivil authority coverage is intended to apply to situations where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property.").

CONCLUSION

The Court finds merit in Defendant's arguments and determines that Plaintiffs' breach of contract, Texas Insurance Code,[2] and breach of duty of good faith and fair dealing claims all fail. While there is no doubt that the COVID-19 crisis severely affected Plaintiffs' businesses, State Farm cannot be held liable to pay business interruption insurance on these claims as there was no direct physical loss, and even if there were direct physical loss, the Virus Exclusion applies to bar Plaintiffs' claims. Given the plain language of the insurance contract between the parties, the Court cannot deviate from this finding without in effect re-writing the Policies in question. That this Court may not do.

For the reasons stated above, the Motion to Dismiss (Dkt. # 9) is **GRANTED**. Because allowing Plaintiffs leave to amend their claims would be futile, the Court **DISMISSES** Plaintiffs' claims. The Clerk's office is instructed to **ENTER JUDGMENT** and **CLOSE THIS CASE**.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 4724305

Footnotes

1 Defendant attaches each Plaintiff's policy and endorsement to the policy to the motion to dismiss. (See Dkt. # 9, Exhs. A-1–A-6.) Defendant asserts that "the relevant provisions of the policies are identical" (Dkt. # 9), and thus this Court shall cite the policies together without analyzing each Plaintiff's policy separately.

2 Plaintiffs expressly seek to drop their allegation of misrepresentation pending further discovery in light of this Court's ruling in Brasher v. State Farm Lloyds, 2017 WL 9342367, at *7 (W.D. Tex. Feb. 2, 2017). (Dkt. # 14.)

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United States District Court, S.D. Florida.

EL NOVILLO RESTAURANT, et al., Plaintiffs,
v.
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, et al., Defendants.

CASE NO. 1:20-cv-21525-UU
|
Signed 12/07/2020

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ORDER

URSULA UNGARO, UNITED STATES DISTRICT JUDGE

***1** THIS CAUSE is before the Court upon Defendants' Motion to Dismiss Plaintiffs' First Amended Class Action Complaint (the "Motion"). D.E. 24. The Court has considered the Motion and the pertinent portions of the record and is otherwise fully advised in the premises. For the reasons that follow, the Motion is GRANTED.

I. Background

Unless otherwise indicated, the following facts come from Plaintiffs' First Amended Class Action Complaint [D.E. 20] (the "Amended Complaint") and are accepted as true.

Plaintiffs El Novillo Restaurant d/b/a DJJ Restaurant Corp. ("DJJ") and El Novillo Restaurant d/b/a Triad Restaurant Corp. ("Triad" and, together with DJJ, "Plaintiffs") each own, operate, manage, and control a restaurant by the name of "El Novillo." D.E. 20 ¶¶ 16, 17. On July 1, 2019, Defendants Certain Underwriters at Lloyd's London ("Defendants") issued commercial property insurance policy number 773TA10063 to DJJ and insurance policy number 773TA10064 to Triad (the "Policies"). *Id.* ¶ 19. DJJ's insurance policy describes the insured property as the El Novillo Restaurant located at 15450 New Barn Road in Hialeah, Florida. *Id.* ¶ 40. And Triad's policy identifies the El Novillo Restaurant located at 6830 Bird Road in Miami, Florida as the insured property. *Id.*

Plaintiffs allege that the Policies are "all-risk" commercial property insurance policies, "which cover loss or damage to the covered premises resulting from all risks other than those expressly excluded." *Id.* ¶ 30. The Policies include "business interruption coverage," which "promises to indemnify the insured for lost income and certain expenses in the event of a business interruption." *Id.* More specifically, each Policy includes a "Business Income (and Extra Expense) Coverage Form," which provides coverage for "Business Income" and "Extra Expense," as well as additional coverage for actions taken by a "Civil Authority." *Id.* ¶¶ 32, 38, 39.

Plaintiffs allege that as a direct result of the global COVID-19 pandemic and certain governmental orders that restricted restaurant operations ostensibly designed to reduce the number of COVID-19 cases, "Plaintiffs could not use their properties as intended." *Id.* ¶ 48. Plaintiffs specifically identify Emergency Order 02-20, issued on March 16, 2020 by Miami-Dade County Mayor Carlos Gimenez, which "restrict[ed] operating times for all restaurants within Miami-Dade County to 6 a.m. to 11 p.m. other than for delivery." *Id.* ¶ 45. Plaintiffs also identify Emergency Order 03-20, issued by Mayor Gimenez on March 17, 2020, which had the effect of "closing all restaurants in Miami-Dade County other than for delivery or takeout." *Id.* ¶ 46. Plaintiffs allege that they have "suffered both direct physical losses and damage to the properties in the form of diminished value, lost business income, a reduction in right of full ownership, and forced physical alterations during a period of restoration." *Id.* ¶ 48.

Plaintiffs assert that Defendants "are denying claims for business income losses and other covered expenses resulting from the measures put in place by the civil authorities to stop the spread of COVID-19." *Id.* ¶ 7. According to Plaintiffs, "Defendants have no intention of providing coverage" for Plaintiffs' purported business income losses

stemming from the COVID-19 pandemic. *Id.* ¶ 50. And Defendants purportedly "have taken the position in this litigation that Plaintiffs' losses are not covered." *Id.*

***2** Plaintiffs filed the Amended Complaint on July 6, 2020, asserting two causes of action of Defendants: Declaratory Judgment (Count I) and Anticipatory Breach of Contract (Count II). Defendants filed the Motion on July 16, 2020, seeking dismissal of the Amended Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The Motion is fully briefed and ripe for adjudication.

II. Legal Standard

To state a claim, Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." While the Court must consider the allegations contained in the plaintiff's complaint as true, this rule "is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). In addition, the complaint's allegations must include "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955).

In practice, to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim of relief that is plausible on its face.' " *Id.* (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* The plausibility standard requires more than a sheer possibility that a defendant has acted unlawfully. *Id.* Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Id.* Determining whether a complaint states a plausible claim for relief is a context-specific undertaking that requires the court to draw upon its judicial experience and common sense. *Id.* at 679, 129 S.Ct. 1937. A court may dismiss a case with prejudice if the allegations of a complaint, even when taken as true, afford no basis for relief or when amendment would be futile. *E.g.*, *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999); *Chiron Recovery Ctr., LLC v. United Healthcare Servs., Inc.*, 438 F. Supp. 3d 1346, 1356 (S.D. Fla. 2020).

III. Analysis

Florida law places the initial burden on an insured seeking to recover under an all-risk policy of proving that a loss occurred. *See S.O. Beach Corp. v. Great Am. Ins. Co. of New York*, 305 F. Supp. 3d 1359, 1364 (S.D. Fla. 2018), *aff'd*, 791 F. App'x 106 (11th Cir. 2019). At this stage of the litigation, therefore, Plaintiffs must sufficiently allege that their purported losses are covered under the Policies. *See Timber Pines Plaza, LLC v. Kinsale Ins. Co.*, 192 F. Supp. 3d 1287, 1293 (M.D. Fla. 2016). In determining coverage under an insurance policy, a court's inquiry begins with "the plain language of the policy, as bargained for by the parties." *State Farm Fire & Cas. Co. v. Steinberg*, 393 F.3d 1226, 1230 (11th Cir. 2004) (quoting *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000)). In other words, "insurance contracts are construed according to their plain meaning." *Garcia v. Federal Ins. Co.*, 473 F.3d 1131, 1135 (11th Cir. 2006). If an insurance policy's language is unambiguous, it governs. *Steinberg*, 393 F.3d at 1230. But where "the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the insurance policy is considered ambiguous, and must be 'interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy.' " *Id.* (quoting *Anderson*, 756 So. 2d at 34).

A. The Policies

***3** Under the Business Income (and Extra Expense) Coverage Form, the Policies provide coverage for lost income and certain expenses in the event of a business interruption or suspension. D.E. 24-1, pp. 37–45; D.E. 24-2, pp. 37–45. Relevant here, the Policies provide coverage for "Business Income" and "Extra Expense," as well as additional coverage for actions taken by a "Civil Authority." *Id.* at 37–38. The Business Income Coverage section states, in relevant part:

> 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.

Id. at 37. The Extra Expense Coverage section provides coverage for "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 property caused by or resulting from a Covered Cause of Loss. *Id.* The Civil Authority Additional Coverage section provides:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action taken to enable a civil authority to have unimpeded access to that damaged property.

Id. at 38.

Relevant to the above coverage provisions, the Policies define "suspension" as "[t]he slowdown or cessation of your business activities." *Id.* at 45. "Period of restoration" means the period of time that begins "after the time of direct physical loss or damage," and ends on the earlier of "[t]he date when the property at the described premises should be repaired, rebuilt or replaced" or "[t]he date when business is resumed at a new permanent location." *Id.* And "Covered Cause of Loss" is defined as "direct physical loss unless the loss is excluded or limited in this policy." *Id.* at 49. The terms "physical loss," "loss," "damage," and "property damage" are undefined.

B. Business Income and Extra Expense Coverage

Defendants assert that the Amended Complaint should be dismissed because under the Business Income and Extra Expense Coverage sections, the "Policies provide coverage for business income losses only if such losses are the result of 'direct physical loss of or damage to' the Properties," and the Amended Complaint contains no plausible allegations that the insured properties have suffered any such loss or damage. D.E. 24. Defendants contend that "Plaintiffs make conclusory allegations that they have suffered direct physical damage, but the Amended Complaint is devoid of any mention of what physical damage occurred, how the physical damage occurred, and when the physical damage occurred." *Id.* According to Defendants, "none of Plaintiffs' allegations even if taken as true, state a plausible claim that Plaintiffs have suffered a 'direct physical loss or damage' as required to trigger coverage under the Policies." *Id.*

***4** In response, Plaintiffs acknowledge that "direct physical loss of or damage to property" is not defined by the Policies, and they agree that the definition of this term "is critical to determining the scope of the Policies' business income coverage." D.E. 29. But Plaintiffs argue that this term "must be read to include intangible losses" such as "a loss of functionality or intended use." *Id.* Plaintiffs contend that when interpreted "in the context of the entire policy," the Policies "do not support Defendants' conclusion that 'direct physical loss of or damage to' connotes only structural damage." *Id.*

In each Policy, the term "direct physical loss" first appears in the Policies' definition of "Covered Causes of Loss." As noted above, a "Covered Cause of Loss" is defined as a "direct physical loss unless the loss is excluded or limited in this policy." D.E. 24-1, p. 49; D.E. 24-2, p. 49. Based on this definition, Plaintiffs argue that any loss expressly excluded under the Policies "must also be defined as a 'direct physical loss' " because "there would be no reason to draft a specific exclusion for a category of losses not covered in the first instance." D.E. 29. And according to Plaintiffs, certain policy exclusions "contemplate losses that do not arise from structural or tangible damage to covered property, but instead deprive the insured of the property's intended use." *Id.*

In making this argument, Plaintiffs necessarily rely on the Policies' exclusionary provisions in an effort to establish coverage under the Policies. The Florida Supreme Court, however, has squarely rejected such an approach. In *Siegle v. Progressive Consumers Insurance Co.*, the court recognized that "policy exclusions cannot create coverage where there is no coverage in the first place." 819 So. 2d 732, 740 (citation omitted). The *Siegle* court continued: "This statement of the law is undeniable—the existence or nonexistence of an exclusionary provision in an insurance contract is not at all relevant until it has been concluded that the policy provides coverage for the insured's claimed loss." *Id.* Accordingly, Plaintiffs' reliance on the Policies' exclusionary provisions must be rejected as a means to establish coverage in the first instance.

As an additional basis to establish coverage, Plaintiffs point to the express language of the Business Income Coverage section, which "provides coverage for any 'suspension' of 'operations' caused by 'direct physical loss of **or** damage to' property at the premises described in the Declarations." D.E. 29 (emphasis in original). Plaintiffs argue that the "use of the disjunctive 'or' indicates that a 'loss of' property is distinct from 'damage to' property." *Id.* And because the terms "damage" and "property damage" "certainly include structural damage to property," Plaintiffs contend that the term "direct physical loss" cannot be "limited to mean only structural damage." *Id.*

Further, Plaintiffs assert that "reading the Policies to cover nonstructural losses accords with the common meaning afforded their plain terms." *Id.* Plaintiffs offer dictionary definitions of the words "direct," "physical," and "loss" in an effort to establish that, taken together, "direct physical loss" may mean "an actual loss of possession," or "the loss of something material, as opposed to mental or spiritual." *Id.* As such, Plaintiffs argue that "the loss of a business, or some aspect thereof, and the temporary loss of possession of one's property, real or personal, both qualify as 'direct physical losses.' " *Id.*

Chief Judge Moore had occasion to consider the meaning of "direct physical loss of or damage to" property under a similar commercial insurance policy. *See Mama Jo's, Inc. v. Sparta Insurance Co.*, No. 17-CV-23362, 2018 WL 3412974, at *1 (S.D. Fla. June 11, 2018). In *Mama Jo's*, the plaintiff restaurant sought coverage for a purported loss "in the form of construction debris and dust" from construction roadwork that was performed at the street adjacent to the restaurant. *Id.* The plaintiff argued that "the migration of dust and construction debris from the roadwork adjacent to the restaurant caused damage to the restaurant" and "that this dust and debris constitute[d] 'direct physical loss' to the Property under the Policy." *Id.* at *8.

***5** Judge Moore determined that the term "direct physical loss" contemplates "an *actual change* in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." *Id.* at *9 (internal quotation marks and citation omitted) (emphasis added). Judge Moore continued:

> "The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property."

Id. (quoting Couch on Insurance § 148:46 (3d Ed. West 1998)). Ultimately, Judge Moore concluded that the plaintiffs "cannot recover under the Business Income (And Extra Expense) Coverage because Plaintiff cannot show that there was any suspension of operations caused by 'physical damage.' " *Id.* at *10. Indeed, the restaurant in *Mama Jo's* "remained open every day, customers were always able to access the restaurant, and suppliers were always able to access the restaurant." *Id.*

The Eleventh Circuit recently affirmed the *Mama Jo's* decision. *See Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 880 (11th Cir. 2020). In determining whether coverage existed under the policy at issue, the Eleventh Circuit also addressed the definition of "direct physical loss" and determined that " 'direct' and 'physical' modify loss and impose the requirement that the damage be actual." *Id.* at 879 (citing *Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017)). The Eleventh Circuit affirmed Judge Moore's order, holding that the plaintiff failed to show that it "suffered a loss which is both direct and physical." *Id.* (internal quotation marks omitted).

Relying on *Mama Jo's*, Magistrate Judge Torres recommended dismissal of a case in which the plaintiff sought to recover insurance benefits for the loss of business income to its restaurant as a result of the COVID-19 pandemic. *See Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615, 2020 WL 5051581, at *1 (S.D. Fla. Aug. 26, 2020). In examining the commercial insurance policy at issue, Judge Torres found that the complaint failed to state a claim for coverage where the plaintiff "merely claim[ed] that two Florida Emergency Orders closed his indoor dining." *Id.* at *8. Judge Torres determined that those allegations alone "cannot state a claim because the loss must arise to actual damage." *Id.* Notably, Judge Torres compared the allegations in *Mama Jo's* to the allegations in the *Malaube* complaint and explained that the plaintiff in *Mama Jo's* "at least alleged that there was a physical intrusion (i.e. dust and debris) into his restaurant." *Id.* In *Malaube*, on the other hand, the plaintiff failed to state a claim because "the restaurant merely suffered economic loss – not anything tangible, actual, or physical." *Id.* Moreover, Judge Torres explained that the words "repair" and "replace" in the policy's definition of "period of restoration"

contemplated "physical damage to the insured premises." *Id.* at *9.

Similarly, Judge Bloom examined whether economic losses caused by a COVID-19 business closure constituted a "direct physical loss" or "physical harm." *See Raymond H. Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 20-CV-22833, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020). In *Nahmad*, the insurance policy at issue included business income, extra expense, and civil authority coverage. *Id.* at *3. Judge Bloom found that there was no coverage under the business income and extra expenses provisions because the complaint "fail[ed] to allege 'direct physical loss of or physical damage to' the property, which is a necessary component of coverage under those provisions." *Id.*

***6** In addition to the two orders referenced above, federal district courts throughout the country have dismissed substantially similar COVID-19-related lawsuits for failing to state a claim for business income coverage. *See, e.g.*, *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London*, No. 20-CV-1605, —— F.Supp.3d ——, ——, 2020 WL 5791583, at *3 (M.D. Fla. Sept. 28, 2020) ("Here, there is no business income coverage and no civil authority coverage because the Amended Complaint fails to allege facts describing how the Property suffered any actual physical loss or damage. It is also apparent that any amendment would be futile under these circumstances."); *Seifert v. IMT Ins. Co.*, No. 20-1102, —— F.Supp.3d ——, ——, 2020 WL 6120002, at *3 (D. Minn. Oct. 16, 2020) (granting motion to dismiss and finding that the plaintiff's claims "fail to fall within the permissible realm of 'direct physical loss,' as he cannot allege facts showing his properties were actually contaminated or damaged by the coronavirus."); *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, No. CV 20-3619, 2020 WL 6156584, at *4 (C.D. Cal. Oct. 19, 2020) ("[L]osses from inability to use property do not amount to "direct physical loss of or damage to property" within the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a "distinct, demonstrable, physical alteration." (quoting *10E, LLC v. Travelers Indem. Co. of Conn.*, No. 20-CV-04418, —— F.Supp.3d ——, ——, 2020 WL 5359653, at *4 (C.D. Cal. Sept. 2, 2020)); *Hillcrest Optical, Inc. v. Continental Cas. Co.*, No. 20-CV-275, —— F.Supp.3d ——, ——, 2020 WL 6163142, at *9 (S.D. Ala. Oct. 21, 2020) (dismissing plaintiff's complaint with prejudice because plaintiff failed to allege a "direct physical loss of property").

Here, just like in *Malaube* and *Nahmad*, the Business Income and Extra Expense Coverage sections require "direct physical loss of or damage to property." D.E. 24-1, p. 37; D.E. 24-2, p. 37. Each section also contemplates a "period of restoration," which, like in *Malaube*, uses the words "repair" and "replace" in its definition. In the Amended Complaint, Plaintiffs allege only (and in an entirely conclusory fashion) that "Plaintiffs ... have suffered direct physical losses of or damage to their properties due to the suspension of their operations from the global COVID-19 pandemic," and that they "suffered both direct physical losses and damage to the properties in the form of diminished value, lost business income, a reduction in right of full ownership, and forced physical alterations during a period of restoration." D.E. 20 ¶¶ 40, 48. But the Amended Complaint falls short of alleging that Plaintiffs' properties sustained any physical damage. The Court thus finds that Plaintiffs' allegations are insufficient as a matter of law to establish coverage under the Business Income or Extra Expense Coverage sections.

C. Civil Authority Additional Coverage

As for the Civil Authority Additional Coverage section, Defendants argue that the Amended Complaint "fail[s] to trigger the Policies' civil authority coverage" because Plaintiffs fail to allege "physical loss or damage to property near the insured property," or that "access to the insured property is prohibited because of that damage." D.E. 24. According to Defendants, "the first requirement of the civil authority coverage is that there be direct physical loss that causes damage to property other than the insured property," and the second requirement is that, as a result of that damage, "the civil authority must prohibit access to the insured location because the nearby property damage has created a dangerous condition." *Id.* Defendants contend Plaintiffs fail to allege these elements.

In *Nahmad*, Judge Bloom squarely addressed the coverage issue under a similar Civil Authority Coverage provision and found that the plaintiff failed to allege coverage under that provision. 2020 WL 6392841, at *9. In so finding, Judge Bloom reasoned that the complaint "allege[d] no physical harm to any properties in the immediate area, only suspensions and closures in general due to government orders," and that the complaint failed to "allege that access to the scheduled premises was specifically prohibited by order of a civil authority." *Id.* (internal quotation marks omitted). Judge Bloom explained that merely restricting access to the plaintiffs' business, without completely prohibiting access,

"does not trigger coverage under the Policy's Civil Authority provision." *Id.*

***7** Here, similar to the insurance policy in *Nahmad*, the Civil Authority Additional Coverage section requires "action by a civil authority that prohibits access to the described premises," as a result of "damage to property other than property at the described premises." D.E. 24-1, p. 38; D.E. 24-2, p. 38. In the Amended Complaint, Plaintiffs fail to allege any physical damage to any property in the immediate area. Instead, Plaintiffs generally allege that "[t]he COVID-19 pandemic and the ensuing governmental orders ... are physically impacting private commercial property in Miami-Dade County." D.E. 20 ¶ 51. Moreover, Plaintiffs do not allege that access to their restaurants was completely prohibited by order of a civil authority. In fact, Plaintiffs expressly allege that Emergency Order 02-20 "restricted operating times for all restaurants within Miami-Dade County to 6 a.m. to 11 p.m. other than for delivery," and that Emergency Order 03-20 had the effect of "closing all restaurants in Miami-Dade County other than for delivery or takeout." D.E. 20 ¶¶ 45, 46. In other words, these orders did not prohibit customer access to Plaintiffs' properties, but merely restricted access to indoor dining, while the restaurants remained open for delivery and takeout. Given these deficiencies, the Court finds that Plaintiffs fail to allege coverage under the Civil Authority Additional Coverage section.

IV. Conclusion

For the foregoing reasons, Plaintiffs' Amended Complaint is subject to dismissal. Given that Plaintiffs have already had an opportunity to amend their initial complaint, and because the Court finds that any further amendment would be futile, the dismissal is with prejudice. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Motion (D.E. 24) is GRANTED. Plaintiffs' Amended Complaint is DISMISSED WITH PREJUDICE. It is further

ORDERED AND ADJUDGED that the Clerk of Court SHALL close this case. All future hearings and deadlines are CANCELLED, and all pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers, Miami, Florida, this 7th day of December, 2020.

All Citations

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United States District Court, E.D. Virginia,
Norfolk Division.

ELEGANT MASSAGE, LLC d/b/a Light Stream Spa, on behalf of itself and all others similarly situated, Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and State Farm Fire and Casualty Company, Defendant.

CIVIL ACTION NO. 2:20-cv-265
|
Signed 12/09/2020

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MEMORANDUM OPINION AND ORDER

Raymond A. Jackson, United States District Judge

***1** Before the Court is State Farm Mutual Automobile Insurance Company's and State Farm Fire and Casualty Company's (collectively, "State Farm" or "Defendants"), Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6). ECF No. 29. Plaintiff has responded in opposition and Defendants replied. ECF Nos. 39, 41. Having reviewed the parties' filings, this matter is ripe for judicial determination. For the following reasons, Defendant's Motion to Dismiss is **DENIED IN PART AND GRANTED IN PART.**

I. FACTUAL AND PROCEDURAL HISTORY

The following facts taken from Elegant Massage, LLC's ("Elegant" or "Plaintiff") Complaint are considered true and cast in the light most favorable to Elegant. ECF No. 1; *see also, Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

Since 2016, Elegant has owned and operated Light Stream Spa which provides therapeutic massages in Virginia Beach, Virginia. On July 22, 2019, State Farm sold an insurance policy (Policy No. 96-C6-P556-1) ("the Policy") to Plaintiff. *See* ECF No. 1 at Exhibit 1. The Policy issued to Plaintiff is an "all risk" commercial property policy, which covers loss or damage to the covered premises resulting from all risks other than those expressly excluded. *Id.* The Policy was effective through July 22, 2020 and Plaintiff paid an annual premium of $475.00. *Id.* at ¶ 27. The Policy includes coverage of "Loss of Income and Extra Expense." The standard form for Loss of Income and Extra Expense Coverage is identified as CMP-4705.1. *Id.* at ¶ 33. Under the provision, the policy provides for the loss of business income sustained as a result of the suspension of business operations which includes action of a civil authority that prohibits access to the Plaintiff's business property. *Id.* at ¶ 34-35. The Policy also states that it does not cover Exclusions for "Fungi, Virus or Bacteria," "Ordinance or Law," "Acts or Decisions," or "Consequential Loss" *Id.*

On March 13, 2020, President Donald J. Trump issued a National Emergency Concerning the Novel Coronavirus Disease ("COVID-19") Outbreak.[1] On March 16, 2020, the Centers for Disease Control (CDC) issued guidance recommending the implementation of "social distancing" policies to prevent the spread of the a novel strain of coronavirus, SARS-CoV-2 ("COVID-19"). On March 20, 2020, Governor Northam and the Virginia State Health Commissioner declared a public health emergency and restricted the number of patrons permitted in restaurants, fitness centers and theaters to ten or less.[2] On March 23, 2020, Governor Northam issued Executive Order No. 53, which ordered the closure of "recreational and entertainment businesses," including "spas" and "massage parlors." ECF No. 30 at Exhibit 1 at 1-4. On March 23, 2020, Governor Northam issued Executive Order No. 55, which ordered all individuals in Virginia to stay home unless they were carrying out necessary life functions. *Id.* at Exhibit 1 at 5-7. On May 8, 2020, the Governor issued Executive Order No. 61, which amended Executive Order Nos. 53 and 55 and, beginning

on May 15, 2020, eased some of the restrictions. *Id.* at Exhibit 1 at 8-18. Under Executive Order No. 61, spas and message centers were permitted to re-open subject to certain restrictions including limiting occupancy to 50% as well as requiring six feet between workstations, workers and patrons to wear face coverings, and hourly cleaning and disinfection while in operation. However, if businesses were unable to comply with the restrictions in Executive Order No. 61, they were ordered to remain closed. *Id.*

***2** As a result of the policies on social distancing and restrictions on its business, Plaintiff voluntarily closed Light Stream Spa on March 16, 2020 and remained closed through May 15, 2020. *Id.* at ¶ 25. Accordingly, Plaintiff suffered a complete loss of income since closing on March 16, 2020. On March 16, 2020, Plaintiff submitted a claim for loss of business income and extra expenses under the Policy. *Id.* at ¶ 42. On March 26, 2020, Defendants denied Plaintiff's claim ("Denial Letter"). *Id.* The Denial Letter stated that the grounds for denial were because Plaintiff voluntarily closed their business on March 16, 2020, there was no civil order to close the business, there was no known damage to the business space or property resulting from COVID-19, and the Loss of Income Coverage excludes coverage for loss caused by virus. *Id.*

On May 27, 2020, Plaintiff filed the instant Class Action complaint for Declaratory Judgement (Count I) and Breach of Contract (Count II) against Defendants, pursuant to Fed. R. Civ. P. 23(b)(1), 23(b)(2) and 23(b)(3) on behalf of themselves and all members of the proposed class and sub-class. *Id.* at ¶ 48. On July 13, 2020, Plaintiff filed a First Amended Complaint ("FAC") stating that it is bringing Counts I and II on behalf of itself and the proposed class and sub-class, as well as adding a claim for Breach of Covenant of Good Faith and Fair Dealing (Count III). ECF No. 20 at ¶ 173. On August 11, 2020, Defendants filed a Motion to Dismiss Count II. ECF No. 29. Plaintiff responded in opposition and Defendants replied. ECF Nos. 39, 41.

II. LEGAL STANDARD

A. Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of actions that fail to state a claim upon which relief can be granted. The United States Supreme Court has stated that in order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Specifically, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. Moreover, at the motion to dismiss stage, the court is bound to accept all of the factual allegations in the complaint as true. *Id.* However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Assessing the claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." (*Id.* at 679.). In considering a Rule 12(b)(6) motion to dismiss, the Court cannot consider "matters outside the pleadings" without converting the motion to a summary judgment. Fed. R. Civ. P. 12(d). Nonetheless, the Court may still "consider documents attached to the complaint ... as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic." *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007); *see also* Fed. R. Civ. P. 10(c).

B. Class Certification

In order to certify a suit as a class action, the proponent of class certification has the burden of establishing that the conditions enumerated in Rule 23 of the Federal Rules of Civil Procedure have been met. *Windham v. American Brands, Inc.*, 565 F.2d 59, 64 n.6 (4th Cir. 1977) (en banc) *cert. denied*, 435 U.S. 968, 56 L. Ed. 2d 58, 98 S. Ct. 1605 (1978). The Court must conduct a "rigorous analysis" in determining whether the requirements of Rule 23 have been met. *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982). Whether the proponent of certification has met his or her burden is left to the trial court's discretion and will be reversed only for abuse of such discretion. *Windham*, 565 F.2d at 65. In conducting its rigorous analysis of Rule 23, the Court must take a "close look at the facts relevant to the certification question and, if necessary, make specific findings on the propriety of certification." *Thorn v. Jefferson—Pilot Life Ins. Co.*, 445 F. 3d 311, 319 (4th Cir. 2004) (internal quotations omitted). "Such findings can be necessary even if the issues tend to overlap into the merits of the underlying case." *Id.*

III. DISCUSSION

A. Class Certification

***3** In order to conduct a proper analysis of Plaintiff's allegations on behalf of all members of the proposed classes (or any other class authorized by the Court), Plaintiff must move the Court to apply relevant facts within Plaintiffs' Complaint to Rule 23(a) and (b). However, Plaintiff has not yet moved the Court to certify the class. Therefore, the Motion to Dismiss will only address Counts II and III as they apply to Plaintiff and not on behalf of any members of a proposed class. That is, any matters pertaining to a Class may only be considered after Plaintiff moves for it.

B. Subject Matter Jurisdiction and Choice of Law

As an initial matter, the Court has diversity jurisdiction under 28 U.S.C. § 1332. Plaintiff Elegant Massage, LLC, doing business as Light Stream Spa, is a Virginia Corporation and with its principle place of business located in Virginia Beach, Virginia. ECF No. 20 at ¶ 22. Defendant State Farm Mutual Automobile Insurance Company is organized under the laws of the State of Illinois, is licensed in all 50 states, and has its Corporate headquarters in Bloomington, Illinois. *Id.* at ¶ 23. Defendant State Farm Fire and Casualty Company is organized under the laws of the State of Illinois, provides property insurance for State Farm customers in the United States, and has its Corporate headquarters Bloomington, Illinois. *Id.* at ¶ 24. The amount in controversy exceeds $75,000. *Id.* This Court has personal jurisdiction over Defendants, because they have purposefully availed themselves to jurisdiction in this District by marketing, advertising and selling insurance policies, including the insurance policy sold to Plaintiff, within this District, including through numerous agents doing business in Virginia.

In a diversity action, district courts apply federal procedural law and state substantive law. *See Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 635 (4th Cir. 2005) (citing *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, at 496 (1941)) ("A federal court hearing a diversity claim must apply the choice-of-law rules of the state in which it sits."); *see also, Gasperini v. Ctr. For Humanities, Inc.*, 518 U.S. 415, 427 (1996). In this case, the Complaint was filed in Virginia, and, therefore, Virginia's choice-of-law rules apply. " 'Under Virginia law, a contract is made when the last act to complete it is performed, and in the context of an insurance policy, the last act is the delivery of the policy to the insured.' " *Id.* (citing *Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 419 (4th Cir. 2004); *Buchanan v. Doe*, 246 Va. 67, 70 (1993)). Here, Plaintiff received the Policy on July 22, 2019 and, now, alleges breach of contract (Count I) and breach of Covenant of good faith and fair dealing, which are examined based on law in the Commonwealth of Virginia. Va. Code Ann. § 8.1A-304 ("Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement."); *see Charles E. Brauer Co.*, 466 S.E.2d at 385; *see also Allaun v. Scott*, 59 Va. Cir. 461, 465 (2002).

C. Count II: Breach of Contract

In Virginia, the elements of a breach of contract action are (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation. *Sunrise Continuing Care, LLC v. Wright*, 277 Va. 148, 671 S.E.2d 132, 134 (2009). To be actionable, Plaintiff must establish that the breach was material. *Horton v. Horton*, 254 Va. 111, 487 S.E.2d 200, 204 (1997). A material breach is a failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract. *Id.* Plaintiff also bears the burden to establish the element of damages with reasonable certainty. *Nichols Construction Corp. v. Virginia Machine Tool Co., LLC*, 276 Va. 81, 661 S.E.2d 467, 472 (2008). Damages that are contingent, speculative, and uncertain are not recoverable because they cannot be established with reasonable certainty. *Shepherd v. Davis, 265 Va. 108, 574 S.E.2d 514, 524 (2003).*

***4** Here, the issue at heart is whether Plaintiff has sufficiently pleaded facts to establish the plausibility that Defendants breached their duty in the contract by refusing to cover Plaintiff's "accidental direct physical loss" as a result of the COVID-19 Executive Orders.

1. General Principles of Virginia Insurance Contract Interpretation

In Virginia, " '[c]ourts interpret insurance policies, like other contracts, in accordance with the intention of the parties gleaned from the words they have used in the document.' " *Seals v. Erie Ins. Exchange*, 277 Va. 558, 562 (2009) (quoting *Floyd v. Northern Neck Ins. Co.*, 245 Va. 153, 158 (1993)); *see Bohreer v. Erie Ins. Grp.*, 475 F. Supp. 2d 578, 584 (E.D. Va. 2007) ("[A]n insurance policy is a contract governed by rules of contract interpretation."); *see also, Evanston Ins. Co. v. Harbor Walk Dev., LLC*, 814 F. Supp. 2d 635, 643 (E.D. Va. 2011), *aff'd sub nom. Evanston Ins. Co. v. Germano*, 514 F. App'x 362 (4th Cir. 2013). As such, "when the language

in an insurance policy is clear and unambiguous, courts ... give the language its plain and ordinary meaning and enforce the policy as written." *Selective Way Ins. Co. v. Crawl Space Door Sys., Inc.*, 162 F. Supp. 3d 547, 551 (E.D. Va. 2016) (citing *Blue Cross & Blue Shield v. Keller*, 248 Va. 618, at 626 (1994)); *see also, PMA Capital Ins. Co. v. U.S. Airways, Inc.*, 271 Va. 352, 359 (2006) (citation omitted). It is not the function of the Court to " 'make a new contract for the parties different from that plainly intended and thus create a liability not assumed by the insurer.' " *Keller*, 248 Va. at 626 (quoting *Pilot Life Ins. Co. v. Crosswhite*, 206 Va. 558, 561 (1965)).

However, "[insurance] companies bear the burden of making their contracts clear." *Res. Bankshares Corp.*, 407 F.3d at 636. "Accordingly, if an ambiguity exists, it must be construed against the insurer." *Id.* (citations omitted). "A policy provision is ambiguous when, in context, it is capable of more than one reasonable meaning." *Id.* (citation omitted). "In determining whether the provisions are ambiguous, we give the words employed their usual, ordinary, and popular meaning." *Nextel Wip Lease Corp. v. Saunders*, 276 Va. 509, 516 (2008) (citation omitted). "An ambiguity, if one exists, must be found on the face of the policy," *Granite State Ins. Co. v. Bottoms*, 243 Va. 228, 233–34 (1992) (citation omitted), and "courts must not strain to find ambiguities." *Res. Bankshares Corp.*, 407 F.3d at 636 (citations omitted). "[C]ontractual provisions are not ambiguous merely because the parties disagree about their meaning." *Nextel Wip*, 276 Va. at 516, 666 S.E.2d at 321.

Finally, the policyholder bears the burden of proving that the policyholder's conduct is covered by the policy." *Res. Bankshares Corp.*, 407 F.3d at 636 (citations omitted). However, "the insurer bears the burden of proving that an exclusion applies." *Bohreer v. Erie Ins. Group*, 475 F.Supp.2d 578, 585 (E.D. Va. 2007) (citations omitted). Therefore, "[w]here an insured has shown that his loss occurred while an insurance policy was in force, if the insurer relies upon exclusionary language in the policy as a defense, the burden is upon the insurer to prove that the exclusion applies to the facts of the case." *Bituminous Cas. Corp.*, 239 Va. 332, at 336 (1990); *see also Am. Reliance Ins. Co. v. Mitchell*, 238 Va. 543, 547 (1989) ("Exclusionary language in an insurance policy will be construed most strongly against the insurer and the burden is upon the insurer to prove that an exclusion applies.").

2. The All-Risk Policy

a. Coverage

***5** On July 22, 2019, Plaintiff purchased from Defendant an "all-risk" insurance policy which covers loss or damage to the covered commercial property resulting from all risks other than those expressly excluded. ECF No. 1 at Exhibit 1. Although, the Policy incorrectly names "Ladies Spa Inc." as the insured, instead of Elegant Massage, LLC d/b/a Light Stream Spa, the Policy correctly identifies Plaintiff's principal place of business located at 665 Newtown Road, Suite 114, Virginia Beach, Virginia 23462, as the premises covered under the Policy. Light Stream Spa is the only business operating at 665 Newtown Road, Suite 114, Virginia Beach, Virginia 23462. *Id.* at ¶ 32.

The Policy includes coverage of "Loss of Income and Extra Expense." *Id.* Under provision CMP-4705.1, the Policy provides for the loss of business income sustained as a result of the " 'suspension[3]' of 'operations'." *Id.* The suspension "must be caused by accidental *direct physical loss* to property at the described premises." (*emphasis added*). The Policy states that it will only pay for " 'Loss of Income' that [the policyholder] sustains during the 'period of restoration' that occurs after the date of accidental direct physical loss." *Id.* Under the provision regarding "Extra Expenses," the Policy provides that it will pay "necessary 'Extra Expense' [the policyholder] incur[s] during the 'period of restoration' that [the policyholder] would not have incurred if there had been no accidental direct physical loss to property at the described premises. The loss must be caused by a Covered Cause of Loss." *Id.* According to the Policy, a Covered Cause of Loss is an "accidental direct physical loss to covered property unless the loss is (1) Excluded in SECTION 1-EXCLUSIONS; or (2) Limited in the Property Subject to Limitations Provisions." *Id.* (*emphasis added*).

Furthermore, the Policy covers the loss of income that results from the suspension of the policyholder's operations. The Policy also covers loss of income and extra expenses "caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply: (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damaged ... [and] (2) the action of civil authority is taken in respond to dangerous physical conditions resulting from the damage or continuation of the Covered Clause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the

damaged authority." *Id.* Additionally, the loss of income will be reduced to the extent that the policyholder can "resume [ ] operations, in whole or in part, by using damaged or undamaged property." *Id.*

b. Exclusions

Under SECTION 1-EXCLUSIONS, the Policy states:

> 1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these: ... a. Ordinance Or Law b. Earth Movement, c. Volcanic Eruption, d. Governmental action, e. Nuclear Hazard, f. Power failure, g. War And Military Action, h. Water, i. Certain Computer-related losses, and j. Fungi, Virus or Bacteria.

***6** *Id.* at Exhibit 1, at 5-6.

There are three relevant exclusions for the instant case. First, the "Fungi, Virus, or Bacteria" exclusion does not cover for loss of income and extra expense due to "(2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease" or (3) [a]ny loss of use or delay in rebuilding covered property, including any associated cost of expense, due to interference at the described premises or location of the rebuilding, repair, or replacement of that property, by 'fungi,' wet or dry rot, virus, bacteria or other microorganism." *Id.* at 5-6.

Second, the "Ordinance or law" exclusion does not cover for loss of income and extra expenses due to the "(1) Enforcement of any ordinance or law: (a) regulating the construction, use or repair of any property; or (b) requiring the tearing down of any property, including the cost of removing its debris. (2) This exclusion 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 course of construction, repair, renovation, remodeling or demolition of property or removal of its debris, following an accidental direct physical loss to that property." *Id.* at Exhibit 1 at 5.

Third, the "Acts or Decisions" exclusion does not cover for "conduct, acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body whether intentional, wrongful, negligent or without fault." *Id.* at 8.

Additionally, the Policy also excludes coverage for consequential losses due to "delay, loss of use or loss of market." *Id.*

3. *Plaintiff's Claim*

a. *A fortuitous "Direct Physical Loss"*

Based on a plain reading of the all-risk Policy, the Court finds that the Policy covers all accidental or fortuitous "direct physical loss[es]" unless the cause of the loss is explicitly excluded under the contract. *See, Fid. & Guar. Ins. Underwriters, Inc. v. Allied Realty Co.*, 238 Va. 458, 461 (1989) (recognizing that all-risk insurance policies provide broad coverage against all risk other than those the parties know to be inevitable at the time of contracting). In this context, a fortuitous loss is defined in various ways, but is essentially an event that is dependent on chance, an accident, or is unexpected. *See Id.* (holding that "[a] fortuitous loss is one that does not result from any inherent defect in the property insured, ordinary wear and tear, or intentional misconduct"); *see also, Ins. Co. of N. Am. v. U.S. Gypsum Co.*, 678 F.Supp. 138, 141 (W.D. Va. 1988), *aff'd*, 870 F.2d 148 (4th Cir. 1989) (" 'All risk' insurance contracts are a type of insurance where the insurer agrees to cover all risks of loss except for certain excluded events."). Accordingly, the insured, Plaintiff, has the initial burden of proof to establish that the loss was fortuitous. *U.S. Gypsum Co.*, 678 F.Supp. at 141.

In the instant case, Plaintiff entered into a contract with Defendant on July 19, 2019 with the intent to cover for all foreseeable and unforeseeable, tangible and intangible, risks covered by the Policy which were not explicitly excluded. On March 16, 2020, after the Nationwide and Statewide orders and guidelines to reduce the spread of COVID-19, Plaintiff voluntarily closed Light Stream Spa. *Id.* at ¶ 25. However, seven days later, on March 23, 2020, Plaintiff was required by Executive Order No. 53 to close until May 15, 2020. *See* ECF

No. 1 at ¶¶ 79-81. On March 24, 2020, Plaintiff submitted a good faith claim for loss of business income and extra expenses under the Policy for a date of loss starting on March 15, 2020 due to the unexpected loss which impacted the operations and services of the covered commercial property. ECF No. 1 at ¶ 42.

***7** The question here is whether the mandated closures based on the Orders qualifies as a fortuitous loss which caused a "direct physical loss" to the Plaintiff's commercial property. That is, if the Court finds that a plain reading of the Policy provides that Plaintiff's claim was explicitly excluded then the Court must grant the instant Motion to Dismiss. However, if the Court finds ambiguity or multiple interpretations of the Policy that plausibly allow Plaintiff to recover, then the motion to dismiss must be denied.

b. *"Direct Physical Loss": A Spectrum of Legal Definitions*

The first key issue is what constitutes a "direct physical loss" in context of the Policy and Plaintiff's circumstances. Since the Policy does not define "direct physical loss," the Court must determine whether "direct physical loss" is ambiguous. *See Lott v. Scottsdale Ins. Co.*, 827 F. Supp. 2d 626, at 631 (E.D. Va. 2011) (interpreting ambiguous insurance policy provisions under Virginia law and noting that "when unambiguous, [insurance policies] must be given their plain and ordinary meaning" but that "policy language is not always clear and unambiguous."). In making this determination, the Policy's provisions "must be considered and construed together, and any internal conflicts between provisions must be harmonized, if reasonably possible, to effectuate the parties' intent." *Va. Farm Bureau Mut. Ins. Co. v. Williams*, 278 Va. 75 (2009). When a disputed policy term is unambiguous, the Court must apply its plain meaning as written. *Id.* "However, if disputed policy language is ambiguous and can be understood to have more than one meaning, [the court must] construe the language in favor of coverage and against the insurer." *Id.*; *see also, Copp v. Nationwide Mut. Ins. Co.*, 279 Va. 670, at 681 (2010); *St. Paul Fire & Marine Ins. Co. v. S.L. Nusbaum & Co.*, 227 Va. 407, 411 (Va. 1984); *Am. Reliance Ins. Co.*, 238 Va. at 547 ("[D]oubtful, ambiguous language in an insurance policy will be given an interpretation which grants coverage[.]"); *Bituminous Cas. Corp.*, 239 Va. at 336 ("[B]ecause insurance contracts are ordinarily drafted by insurers rather than by policyholders, the courts consistently construe such contracts, in cases of doubt, in favor of that interpretation which affords coverage.").

Defendants argue that "direct physical loss" unambiguously requires that there be "structural damage" to the covered property for the Plaintiff to recover under the Policy. ECF No. 29. Particularly, Defendants argue that various district courts in other jurisdictions have interpreted "direct physical loss" to mean perils that cause actual, tangible structural damage to property of the kind caused by hurricane winds, rainwater, and fire, for example. *Id.*[4] However, while the Court recognizes these cases, the Court finds that they are out-of-circuit and non-binding cases which rely on out-of-state law in ruling on what constitutes a "direct physical loss to property"—an interpretation that this Court must make in accordance with Virginia State law and case law.

***8** On the other hand, Plaintiff argues that, under Virginia law, "direct physical loss" has not been consistently interpreted to require structural or tangible damage to property. ECF No. 39 at 11. Particularly, Plaintiff argues that federal courts have interpreted "direct physical loss" to mean the inability to use the premises because of uncontrollable forces. That is, Plaintiff argues that the Executive Orders physically prohibited Plaintiff from using the commercial property between March 16, 2020 to May 15, 2020 which resulted in a suspension of its business operations and substantial loss of income. ECF No. 20 at ¶¶ 58, 63, 73, 76.

The Court finds that the phrase "direct physical loss" has been subject to a spectrum of interpretations in Virginia on a case-by-case basis, ranging from direct tangible destruction of the covered property to impacts from intangible noxious gasses or toxic air particles that make the property uninhabitable or dangerous to use. Accordingly, "[w]hen [various] constructions are equally possible, that most favorable to the insured will be adopted. Language in a policy purporting to exclude certain events from coverage will be construed most strongly against the insurer." *Seals*, 277 Va. at 562, 674 S.E.2d 860 (quoting *St. Paul Fire & Marine Ins. Co. v. S.L. Nusbaum & Co., Inc.*, 227 Va. 407, 411, 316 S.E.2d 734 (1984)). Here, the Court is not straining to find ambiguities but rather is carefully examining the accepted definitions based on Virginia case law to apply to the unprecedented circumstances of this case. *See Res. Bankshares Corp.*, 407 F.3d at 636. Moreover, while both parties disagree over the meaning of "direct physical loss", "[c]ontractual provisions are not ambiguous merely because the parties disagree about their meaning." *Nextel WIP Lease Corp. v. Saunders*, 276 Va.

509, 516, 666 S.E.2d 317 (2008) (citing *Dominion Sav. Bank, FSB v. Costello*, 257 Va. 413, 416, 512 S.E.2d 564 (1999)). Therefore, the Court is tasked with determining where "direct physical loss," as applied to this case, falls on the spectrum of accepted interpretations.

i. Structural Damage

First, at one end of the spectrum, Virginia case law establishes that "direct physical loss" has traditionally, though not exclusively, been defined as covering incidents that result in structural damage to the property caused by, for example, fires, floods, hurricanes, and rainwater. *See, e.g., Whitaker v. Nationwide Mutual Fire Ins. Co.*, 115 F. Supp. 2d 612, at 617 Fn.5 (E.D. Va. 1999) (holding that "[a]ssuming Plaintiffs' loss is fortuitous, the Policy nevertheless covers *only* those fortuitous losses that are direct and physical. Thus, it is the definition of 'direct physical loss' that is dispositive."); *Lower Chesapeake Assocs. v. Valley Forge Ins. Co.*, 260 Va. 77, 89 (2000) (finding that the disputed all-risk policy provision regarding "direct physical damage" was ambiguous and that rainwater damage to a home qualified as direct and physical); *Clark v. Nationwide Mut. Fire Ins. Co., 48 Va. Cir. 454, 1999 WL 370407* (Fairfax Cir. Ct. 1999) (fire damage as a covered loss generally); *Capitol Prop. Mgmt. Corp. v. Nationwide Prop. & Cas. Ins. Co.*, 261 F. Supp. 3d 680, 684 (E.D. Va. 2017), *aff'd*, 757 F. App'x 229 (4th Cir. 2018) (holding that an "insurance claim processing fee, payable to insured's property manager under property management agreement between property manager and insured, did not qualify as an extra expense covered under property insurance policy, which provided coverage for direct physical loss to building or business personal property."). However, Plaintiff's claim is distinguishable because Plaintiff's covered property did not suffer from a structural form of direct physical loss.

ii. Distinct and Demonstratable Physical Alteration

***9** Second, some court have also found physical loss when a plaintiff cannot physically use his or her covered property, even without tangible structural destruction, if a plaintiff can show a distinct and demonstrable physical alteration to the property. *See e.g., TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) (noting that "physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces."); *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 493 (1998) (" 'Direct physical loss' provisions require only that a covered property be injured, not destroyed. Direct physical loss also may exist in the absence of structural damage to the insured property." (citation omitted)); *See, Capitol Prop. Mgmt. Corp. v. Nationwide Prop. & Cas. Ins. Co.* 261 F. Supp. 3d 680, at 685 (E.D. Va. 2017), *aff'd*, 757 F. App'x 229 (4th Cir. 2018) (Holding that a payment of an insurance processing fee, on its own, does not constitute a direct physical loss to property.); *see also, Mellin v. N. Sec. Ins. Co., Inc.*, 167 N.H. 544, 115 A.3d 799 (2015) (" "Physical loss" within meaning of homeowners policy covering direct physical loss to property may include not only tangible changes to the insured property, but also changes that are perceived by the sense of smell and that exist in the absence of structural damage; however, these changes must be distinct and demonstrable."). Recently, in cases dealing with a similar issue as the instant matter, sister jurisdictions narrowly relied on this interpretation to dismiss plaintiff's action. *See 10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-ASx, 2020 WL 5359653, at *4 (C.D. Cal. Sept. 2, 2020) (holding that "[p]hysical loss or damage occurs only when property undergoes a 'distinct, demonstrable, physical alteration' ") (quoting *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal.App.4th, 766, 799 (2010)); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Companies*, No. 220CV05663VAPDFMX, 2020 WL 6440037, at *3 (C.D. Cal. Oct. 27, 2020). In the instant matter, there is no distinct, demonstrable, or physical alteration to the structure of the property. However, this second plausible interpretation of "direct physical loss" does show that if Defendants wanted to limit liability of "direct physical loss" to strictly require structural damage to property, then Defendants, as the drafters of the policy, were required to do so explicitly. *See Allstate Ins. Co. v. Gauthier*, 273 Va. 416, 420 (2007) (noting that if insurer wanted to not provide coverage under certain circumstances "it needed to use language clearly accomplishing that result."); *see also, Res. Bankshares Corp.*, 407 F.3d at 636 ("[b]ecause insurance companies typically draft their policies without the input of the insured, the companies bear the burden of making their contracts clear."). Defendants were fully aware of cases that interpreted intangible damage as a "direct physical loss" promulgated before the issuance of Plaintiff's policy. Since Defendants did not explicitly include "structural damage" in the language, the Policy may be construed in favor of more coverage based on plausible interpretations.

iii. Uninhabitable, Inaccessible, and Dangerous to Use

Third, courts have also interpreted direct physical loss to include incidents that make the covered property uninhabitable, inaccessible, and dangerous to use for the owners and clients because of, for example, intangible and invisible noxious gasses or toxic air particles. *See, e.g., TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) ("[u]nder Virginia law, insured's residence sustained "direct physical loss" within meaning of homeowners policy when it was rendered uninhabitable by toxic gases released by drywall manufactured in China, even though drywall was still intact."); *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34 (1968) (en banc) (gasoline fumes which rendered church building unusable constitute physical loss); *Farmers Ins. Co. of Oregon v. Trutanich, 123 Or. App.* 6, 858 P.2d 1332, 1336 (1993) (cost of removing odor from methamphetamine lab constituted a direct physical loss); *Murray v. State Farm Fire & Cas. Co., 203 W.Va.* 477, 509 S.E.2d 1, 17 (1998) (home rendered unusable by increased risk of rockslide suffered direct physical loss even in the absence of structural damage); *See Port Authority of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (" '[P]hysical loss or damage' occurs only if an actual release of asbestos fibers ... has resulted in contamination of the property ..., *or the structure is made useless or uninhabitable* ...." (emphasis added)); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) (holding there was a direct physical loss to property when "ammonia physically rendered the facility unusable for a period of time"); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding "[a]lthough asbestos contamination does not result in tangible injury to the physical structure of a building, a building's function may be seriously impaired or destroyed and the property rendered useless by [its] presence"); *Homeowners Choice Prop. & Cas. v. Miguel Maspons*, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017) ("[I]t is clear that the failure of the [property] to perform its function constituted a 'direct' and 'physical' loss to the property within the meaning of the policy."). However, the Court does not go as far as to interpret "direct physical loss" to mean whenever "property cannot be used for its intended purpose" due to intangible sources. *Pentair v. American Guarantee and Liability Ins.*, 400 F.3d 613, 616 (8th Cir. 2005).

* * *

***10** Therefore, given the spectrum of accepted interpretations, the Court interprets the phrase "direct physical loss" in the Policy in this case most favorably to the insured to grant more coverage. *See Virginia Farm Bureau Mut. Ins. Co. v. Williams*, 278 Va. 75, at 81 (2009) ("[I]f disputed policy language is ambiguous ... we construe the language in favor of coverage and against the insurer."). Based on the case law, the Court finds that it is plausible that a fortuitous "direct physical loss" could mean that the property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural, sources. *See US Airways, Inc. v. Commonwealth Ins. Co.*, 2004 WL 1094684, at *5 (Va. Cir. Ct. May 14, 2004) (holding FAA order grounding flights at Reagan National Airport could constitute direct physical loss when "nothing in the Policy ... requires that [there] be damage to [the insured's] property."). Here, while the Light Stream Spa was not structurally damaged, it is plausible that Plaintiff's experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus. That is, the facts of this case are similar those where courts found that asbestos, ammonia, odor from methamphetamine lab, or toxic gasses from drywall, which caused properties uninhabitable, inaccessible, and dangerous to use, constituted a direct physical loss.

Accordingly, the Court finds that Plaintiff submitted a good faith plausible claim to the Defendants for a "direct physical loss" covered by the policy. Therefore, Plaintiff's complaint has alleged "facts and circumstances, some of which, if proved, would fall within the risk covered by the policy." *Brenner v. Lawyers Title Ins. Corp.*, 240 Va. 185, 397 S.E.2d 100, 102 (1990); *see also, Reisen v. Aetna Life and Cas. Co.*, 225 Va. 327, 302 S.E.2d 529, 531 (1983); *See* ECF No. 20 at ¶¶ 57-65, ¶¶ 79-95.

c. Civil Authority Provision

The Policy provides coverage for extra expenses and loss of income caused by "action of a civil authority that prohibits access to the described premises, provided that both of the following apply: (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and (2) The action of the civil authority is

taken in response to dangerous physical conditions resulting from the damage of continuation of the Covered Cause of loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property." ECF No. 1 at Exhibit 1.

Plaintiff alleges that the Civil Authority Coverage applies because (1) COVID-19 caused damage to property other than Plaintiff's property, ECF No. 1 at ¶ 85; (2) the damage was caused by a Covered Cause of Loss; (3) the Orders were issued by a civil authority—state and local executives; (4) the governmental authorities limited and prohibited access to the nearby property prior to issuing the Orders, *Id.* at ¶¶ 45–47, ¶85; and (5) these actions were taken in response to a dangerous physical condition. *Id.* at ¶¶ 38, 45–53. *See, e.g., Assurance Co. of Am. v. BBB Serv. Co.*, 593 S.E.2d 7, 8–9 (Ga. Ct. App. 2003) (civil authority coverage applied where order was issued in response to hurricane after storm progressed and caused damage to property other than the insured premises). Particularly, Plaintiff alleges that "[t]he Orders were issued as a result of *physical damage and dangerous physical conditions* occurring in properties all around cities and business districts. As a result of direct physical loss stemming from the pandemic, Light Stream Spa's operations were suspended, and it lost business income and incurred other covered expenses." *Id.* at ¶ 85 (*emphasis added*).

Defendants argue that the Civil Authority Coverage does not apply because it only applies when "access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property." ECF No. 30 at 22 (citing *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686-87 (5th Cir. 2011); *see United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 131 (2d Cir. 2006); *Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, 440 F. Supp. 3d 520, 528-29 (D.S.C. 2020); *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, 2008 WL 450012, at *9 (S.D. Tex. Feb. 15, 2008).).

***11** Here, the Court finds that the Civil Authority Coverage does not apply because Plaintiff has not shown a causal link between any physically damaged or dangerous surrounding properties proximate to the insured property and a civil authority prohibiting Plaintiff's from accessing or using their property. That is, the Executive Orders were issued because "COVID-19 presents an ongoing threat to [Virginia] communities", and not because of prior actual "physical damage" to its own property or surrounding properties. *See* Exec. Or. 53 at 1. Therefore, Defendant's Motion is **GRANTED IN PART** on this ground.

4. Defendants Shifted Burden of Proof: Exclusions

Despite the inapplicability of the Civil Authority Provision, Plaintiff has still established a plausible claim for a fortuitous "direct physical loss" under the Policy. Thus, the burden now shifts to the insurance provider, Defendants, to show that the loss is excluded under the contract. *See Bituminous Cas. Corp. v. Sheets*, 239 Va. 332, 389 (1990) ("Where an insured has shown that his loss occurred while an insurance policy was in force, but the insurer relies upon exclusionary language in the policy as a defense, the burden is upon the insurer to prove that the exclusion applies to the facts of the case."); *TravCo Ins. Co. v. Ward*, 284 Va. 547 (2012) ("[T]he burden is upon the insurer to prove that an exclusion of coverage applies."); *see also, Reisen* 302 S.E.2d at 531 (holding this burden is not especially onerous since the insurer must defend unless "it clearly appears from the initial pleading the insurer would not be liable under the policy contract for *any* judgment based upon the allegations." (citing *Travelers Indem. Co. v. Obenshain*, 219 Va. 44, 245 S.E.2d 247, 249 (1978)).

On March 26, 2020, Defendants denied Plaintiff's claim ("Denial Letter"). *Id.* at Exhibit 2. The Denial Letter stated that the grounds for denial were because Plaintiff voluntarily closed their business on March 16th because of waning business, there was no civil order to close the business as of March 24, 2020, there was no known physical damage to the business space or property resulting from COVID-19, and the Policy excluded losses caused by a virus. *Id.* In the Denial Letter, Defendant State Farm did not provide an explanation of how the exclusions applied specifically to the Plaintiff but rather provided verbatim language of SECTION 1-EXCLUSIONS.

a. Virus Exclusion

As with the other provisions of an insurance policy, the interpretation of an exclusionary clause is an issue of law. *See Res. Bankshares Corp.*, 407 F.3d at 636. (4th Cir. 2005).

In their Motion to Dismiss, Defendants argue that the Virus Exclusion applies as defined in SECTION 1-EXCLUSIONS of the Policy. ECF No. 29 at 7. Defendants argue that the Virus Exclusion unambiguously applies in this circumstance

because COVID-19 is at the heart of the Executive Orders that required Plaintiff to close their business and "applies to any loss where a virus is anywhere in the chain of causation." *Id.* at 10. Specifically, Defendants allege that the Virus Exclusion has an expansive anti-concurrent causation clause which excludes from coverage "for losses if virus is 'in any sequence' in the chain of causation, even if there are also other causes." *Id.* (citing *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 351, 354 (5th Cir. 2007); *see also Metro Brokers, Inc. v. Transportation Ins. Co.*, 603 F. App'x 833, 836 (11th Cir. 2015)). Notably, the Court finds that the expansive anti-concurrent causation clause is not a recognized or settled doctrine in the Court's jurisdiction.

***12** On the other hand, Plaintiff alleges that the loss of business occurred as a result of the Orders that mandated specific kinds of businesses, like the Light Stream Spa, to discontinue operations from March 16, 2020 to May 15, 2020 to prevent the spread of COVID-19. ECF No. 1. Plaintiff also asserts that the Court should find that the Virus Exclusion does not apply because COVID-19 was not present at Plaintiff's property and is not the basis for the loss of income. ECF No. 39 at 16-18.

The Fungi, Virus or Bacteria Exclusion specifically excludes losses from: "(1) Growth, proliferation, spread or presence of 'fungi' or wet or dry rot; or (2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease; and (3) We will also not pay for ... (a) Any remediation of "fungi", wet or dry rot, virus, bacteria or other microorganism ...." ECF No. 20 at Exhibit 2.

The Court finds that the Virus Exclusion does not apply here and that the anti-concurrent theory has not been established as law in this jurisdiction. Thus, to be enforceable, the insurer "must draft the language of an exclusion conspicuously, plainly and clearly set forth any limitation on coverage to the insured." *Waste Mgmt., Inc. v. Great Divide Ins. Co.*, 381 F. Supp. 3d 673, at 683 (E.D. Va. 2019) (citation omitted).

Although the Policy does not define "Virus," the Court will base its analysis on a plain reading of the Virus Exclusion taken together with the exclusion language as a whole. *See Virginia Farm Bureau Mut. Ins. Co. v. Williams*, 278 Va. 75, 80 (2009) ("Provisions of an insurance policy must be considered and construed together, and any internal conflicts between provisions must be harmonized, if reasonably possible, to effectuate the parties' intent."); *see also, Copp*, 279 Va. at 681 ("Each phrase and clause of an insurance contract should be considered and construed together and seemingly conflicting provisions harmonized when that can be reasonably done, so as to effectuate the intention of the parties as expressed therein."). Accordingly, the Court finds that the Virus Exclusion particularly deals with the "[g]rowth, proliferation, spread or presence" of "virus, bacteria or other microorganism" just as it applies to " 'fungi' or wet or dry rot." *Id.* Indeed, the plain reading of the language indicates that the Policy excludes coverage for losses stemming from the "[g]rowth, proliferation, spread or presence" of " 'fungi' or wet or dry rot" or "[v]irus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease[.]" Furthermore, the Policy also provides that it will not cover for remediation or removal of virus, bacteria, or fungi at the property which includes "tear out and replace[ment]" of building parts to access the virus and "contain[ment], treat[ment], detoxify[cation], neutraliz[ation] or dispos[al]" of the virus). *Id.* This supports the interpretation that the Virus Exclusion applies where a virus has spread throughout the property. Other state and federal courts have interpreted similar virus, bacteria, and fungi exclusions in the same way. *See, e.g., Mount Vernon Fire Ins. Co. v. Adamson*, 2010 WL 3937336, at *4 (E.D. Va. Sept. 15, 2010) (exclusions barring coverage for mold exposure barred claims for mold exposure); *Poore v. Main Street Am. Assurance Co.*, 355 F. Supp. 3d 506, 512 (W.D. Va. 2018) (finding mold exclusion barred coverage from losses stemming from mold in the insured's property); *Alexis v. Southwood Ltd. P'ship*, 792 So. 2d 100, 104 (La. Ct. App. 2001) (communicable disease exclusion barred coverage from illness after exposure to raw sewage); *Evanston Ins. Co. v. Harbor Walk Development, LLC*, 814 F. Supp. 2d 635, 652 (E.D. Va. 2011) (finding pollution exclusion which barred claims stemming from bodily injury or property damaged caused by pollutants barred claims stemming from bodily injury or property damage caused by pollutants). Therefore, in applying the Virus Exclusion there must be a direct connection between the exclusion and the claimed loss and not, as the Defendants argue, a tenuous connection anywhere in the chain of causation. That is, although the Virus Exclusion does require that the virus be the cause of the policyholder's loss, the connection must be the immediate cause in the chain.

***13** Here, Plaintiff is neither alleging that there is a presence of a virus at the covered property nor that a virus is the direct cause of the property's physical loss. Also, Plaintiff does not allege that the Executive Orders the Commonwealth of Virginia issued were as a result of "growth,

proliferation, spread or presence" of virus contamination at the Plaintiff's property. Rather, Plaintiff alleges that the Orders were the "sole cause of the Plaintiff's [...] loss of business income and extra expense." ECF No. 20 at ¶ 84. Moreover, while some businesses could continue operating despite the COVID-19 social distancing guidelines, the Executive Orders specifically classified Plaintiff's type of property, a spa, as a hotspot for COVID-19 and, thus, selectively ordered that it be closed as a preventative health measure. Therefore, Defendants have failed to meet its burden to show that the Virus Exclusion applies to Plaintiff's claim.

b. Ordinance and Law Exclusion

Defendants also assert that the Ordinance and Law Exclusion applies. ECF No. 29 at 25-26. The "Ordinance or law" Exclusion bars coverage for any loss due to "[t]he enforcement of any ordinance or law" "regulating the ... use ... of any property," and "applies ... even if the property has not been damaged." ECF No. 20 at Exhibit 2 at 5. The Policy states that the ordinance or law must "(a) regulate the construction, use or repair ... or (b) requir[e] the tearing down of any property." *Id.* The Policy also provides that the exclusion 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 course of construction, repair, renovation, remodeling or demolition of property or removal of its debris, following an accidental direct physical loss to that property." *Id.*

Here, however, the Court concludes that the Executive Orders, which were temporary restrictions that impacted the Plaintiff's business, were not ordinances or laws such as safety regulations or laws passed by a legislative body regulating the construction, use, repair, removal of debris, or physical aspects of the property. Therefore, there is no ordinance or law, from a legislative body, that prohibits the physical use of Plaintiff's covered property. Furthermore, it is clear that the Ordinance or law Exclusion applies to ordinances related to the structural integrity, maintenance, construction, or accessibility due to the property's physical structural state, which existed *before*. The physical structural integrity of the covered property is not the central issue in this case. Thus, "Ordinance or Law" exclusion is unavailable to the Defendants to dismiss Plaintiff's claims.

c. Acts or Decisions Exclusion

The "Acts or Decisions" Exclusion bars coverage for any loss caused by "[c]onduct, acts or decisions ... of any person, group, organization, or governmental body whether intentional, wrongful, negligent or without fault." ECF No. 20 at Exhibit 2 at 8.

Some courts have found the "acts or decisions" exclusion in similar insurance policies to be ambiguous and concluded that coverage was not excluded. As one court explained, if the exclusion were to be taken literally, "it would exclude coverage from all acts and decisions of any character of all persons, groups, or entities. Such an interpretation would leave the insurance policy practically worthless." *Jussim v. Massachusetts Bay Ins. Co.*, 33 Mass. App. Ct. 235, 238–39, 597 N.E.2d 1379, 1382 (1992), *aff'd as amended*, 415 Mass. 24, 610 N.E.2d 954 (1993); *see also, St. Paul Fire & Marine Ins. Co. v. Gen. Injectables & Vaccines, Inc.*, No. CIV.A.98-07370R, 2000 WL 270954, at *5, n.5 (W.D. Va. Mar. 3, 2000); *Cincinnati Holding Co., LLC v. Fireman's Fund Ins. Co.*, No. 1:17CV105, 2020 WL 635655, at *9 (S.D. Ohio Feb. 11, 2020); *see also Mettler v. Safeco Ins. Co. of Am.*, No. C12-5163 RJB, 2013 WL 231111, at *6 (W.D. Wash. Jan. 22, 2013) (same). However, some courts have held that if the acts or decisions of the Plaintiff were the cause of the damage, then the "acts or decisions" exclusion does apply. *See Landmark Hosp., LLC v. Cont'l Cas., Co.*, No. CV 01-0691, 2002 WL 34404929, at *2 (C.D. Cal. July 2, 2002) (concluding the "acts or decisions" exclusion is unambiguous and holding that "[t]his exclusion provision excuses Defendant from providing coverage for damages caused by Plaintiff's negligence" if it is later determined that "Plaintiffs acts are the predominate cause of the damages.").

***14** Here, the Court finds that the "acts and decisions" exclusion is so ambiguous and broad, that taken literally under its plain reading, the Policy would be worthless as any act from any character of all persons, groups, or entities would prohibit coverage. To the extent the language of the Policy is ambiguous, the Court must construe it against the insurer. *See, Hopeman Bros., Inc. v. Cont'l Cas. Co.*, 307 F. Supp. 3d 433, 461 (E.D. Va. 2018); see also, *GenCorp, Inc. v. American Intern. Underwriters*, 178 F.3d 804, 818 (6th Cir. 1999); *see also* John H. Mathias et al., *Insurance Coverage Disputes (LJP)* § 1.03 (2017) ("Where the following form policy is silent on how to resolve conflicts in wording with the underlying policy or policies it purports to follow, however,

the conflict should be resolved in the manner most favorable to the policyholder."). Moreover, in this case, Plaintiff was not the cause of the Executive Orders which issued the covered property to close. Thus, the "Acts or Decisions" exclusion is unavailable to the Defendants to dismiss Plaintiff's claims.

d. Consequential Losses Exclusion

The "Consequential Loss" Exclusion bars coverage for "loss whether consisting of, or directly and immediately caused by ... [d]elay, loss of use or loss of market." ECF No. 20 at Exhibit 2 at 6. Between March 16, 2020 to March 22, 2020 (before the Executive Orders), Plaintiff decided to voluntarily close the business as a result of waning business. Therefore, the Court grants that during this period of time, March 16, 2020 to March 22, 2020 (or period before the mandatory closure Orders), Plaintiff was properly barred from coverage under this exclusion. Accordingly, the extent to which Plaintiff's claim is based on this limited period, March 16, 2020 to March 22, 2020, the Defendant's motion is **GRANTED IN PART.**

D. Count III: Breach of Covenant of Good Faith and Fair Dealing

Plaintiff also makes a claim for breach of the duty of good faith and fair dealing. ECF No. 20 at ¶¶ 173-75. "Under Virginia law, the elements of a claim for breach of an implied covenant of good faith and fair dealing are "(1) a contractual relationship between the parties, and (2) a breach of the implied covenant." *Enomoto v. Space Adventures, LTD*, 624 F.Supp.2d 443, 450 (E.D. Va. 2009) (citing *Charles E. Brauer Co., Inc. v. NationsBank of Va., N.A.*, 466 S.E.2d 382, 386 (Va. 1996)). At minimum, however, it includes "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party [to a contract]." *Id.* (citing Restatement (Second) of Contracts § 205 cmt. a (1981); *see also RW Power Partners, L.P. v. Virginia Elec. & Power Co.*, 899 F.Supp. 1490, 1498 (E.D. Va. 1995) (citing, among other authorities, the commentary of Section 205 of the Restatement for a definition of "good faith"). This duty of good faith and fair dealing prohibits a party from acting arbitrarily, unreasonably, and in bad faith. It also prohibits one party from acting in such a manner as to prevent the other party from performing its obligations under the contract. *See* Restatement (Second) of Contracts § 205 cmt. a (1981). Moreover, the United States Court of Appeals for the Fourth Circuit has made clear that every contract governed by the laws of Virginia contains an implied covenant of good faith and fair dealing. *See Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 541–42 (4th Cir. 1998); *see also, Enomoto*, 624 F.Supp.2d at 450; see also, *SunTrust Mortg., Inc. v. Mortgages Unlimited, Inc.*, No. 3:11CV861-HEH, 2012 WL 1942056, at *3 (E.D. Va. May 29, 2012).

In the instant case, Defendants argue that this claim should be dismissed because there is no coverage under the Policy for Plaintiff's losses. ECF No. 29 at 29. Although coverage is a pre-requisite to a claim for bad faith, the Court has found that Plaintiff has pleaded sufficient facts, which if proved, would fall within the Policy's coverage. *See, Builders Mut. Ins. Co. v. Dragas Mgmt. Corp.*, 709 F. Supp. 2d 432, 441 (E.D. Va. 2010) (noting that "coverage is a prerequisite to a claim for bad faith"). Therefore, the Defendants' Motion is **DENIED** on this ground.

* * *

***15** In summary, for Plaintiff to establish a Covered Cause of Loss under the Policy, the claim must both constitute an "accidental direct physical loss to" Covered Property and it must not be explicitly excluded by the Policy. ECF No. 20 at Exhibit 1. Here, Plaintiff has pled sufficient facts to state a claim to allow this Court to draw reasonable inferences that relief is plausible on its face for Counts II and III. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Also, since Defendants failed to show that any of the Policy's Exclusions clearly apply, Plaintiff's claims may proceed.

IV. CONCLUSION

Based on the foregoing reasons, Defendant's Motion to Dismiss is **DENIED IN PART AND GRANTED IN PART.**

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 7249624

Footnotes

1 Proclamation No. 9994, 85 Fed. Reg. 15337 (March 18, 2020). "Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak." ("Presidential COVID-19 Proclamation").

2 Order of Public Health Emergency One, "Amended Order of the Governor and State Health Commissioner Declaration of Public Health Emergency," (March 20, 2020).

3 The Policy defines "suspension" as (a) The partial slowdown or complete cessation of your business activities; or (b) that part or all of the described premises is rendered untenable, if coverage for "Loss of Income" applies. *Id. at CMP-4705.1.8.*

4 For example, various state and federal district courts have interpreted that mandatory COVID-19 closures orders did not constitute a "direct physical loss" according to their State laws and the specific facts of those cases and insurance policies. *See, e.g. Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, 2020 WL 6156584 (C.D. Cal. Oct. 19, 2020); *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020); *Seifert v. IMT Ins. Co.*, 2020 WL 6120002 (D. Minn. Oct. 16, 2020) ("Minnesota law does not require a showing of structural damage to qualify for coverage for direct physical loss in all-risk policy."); *West Coast Hotel Management, LLC v. Berkshire Hathaway Guard Insurance Companies*, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020); *Vizza Wash, LP d/b/a The Wash Tub v. Nationwide Mutual Insurance Company and Bradley Worth*, No. 5:20-cv-00680-OLG, 2020 WL 6578417, (W.D. Tex. Oct. 26, 2020); *Uncork and Create LLC v. The Cincinnati Insurance Company*, 2020 WL 6436948 (S.D.W. Va. Nov. 2, 2020); *Real Hospitality, LLC d/b/a Ed's Burger Joint v. Travelers Casualty Insurance Company*, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020); *Raymond H. Nahmad DDS PA v. Hartford Casualty Insurance Company*, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020).

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2020 WL 6561315
Only the Westlaw citation is currently available.
United States District Court, W.D. Oklahoma.

GOODWILL INDUSTRIES OF CENTRAL OKLAHOMA, INC., d/b/a Goodwill Career Pathways Institute, Plaintiff,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY, Defendant.

No. CV-20-511-R
|
Signed 11/09/2020

Attorneys and Law Firms

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ORDER

DAVID L. RUSSELL, UNITED STATES DISTRICT JUDGE

***1** Before the Court is Plaintiff's Motion to Abstain from Exercising Jurisdiction and Remand and Brief in Support. Doc. No. 12. Defendant filed an Opposition to Plaintiff's Motion, Doc. No. 18, and Plaintiff filed a Reply in Support of its Motion. Doc. No. 19. Plaintiff, Goodwill Industries of Central Oklahoma, Inc. ("Goodwill"), is a not-for-profit corporation operating various locations throughout central Oklahoma. Doc. No. 12, p. 2. Defendant, Philadelphia Indemnity Insurance Company ("PIIC") is a Delaware corporation with its principal place of business in Pennsylvania. Doc. No. 1, ¶ 3.

Goodwill purchased an insurance policy ("the Policy") underwritten by PIIC for the "period from May 1, 2019 to May 1, 2020." Doc. No. 1-1, p. 2. The policy includes coverage for losses incurred by "direct physical loss of or damage to property at premises" operated by Goodwill throughout central Oklahoma. *Id.* pp. 2-3. Additionally, Goodwill alleges that "[PIIC] added an endorsement to the Policy that purports to exclude coverage for loss due to virus or bacteria." *Id.* p. 5. The endorsement is titled "Exclusion of Loss Due to Virus or Bacteria" ("Virus Endorsement"), and it "applies to all coverage under all forms and endorsements ..., including ... damage to buildings or personal property and ... business income, extra expense, or action of civil authority." Doc. No. 1-1, p. 100.

On March 15, 2020, the Governor of Oklahoma issued an Executive Order declaring a state of emergency as a result of the eighth case of the novel coronavirus ("COVID-19") in Oklahoma. *Id.* p. 3. Soon after, mayors in cities across central Oklahoma required the "suspension of non-essential businesses," causing Goodwill to close its locations in each respective city. *Id.*

Goodwill alleges its closures caused it to "sustain[ ] direct physical loss or damage to its property ... covered by the Policy." *Id.* p. 7. PIIC argues that the Policy does not cover the closures resulting from COVID-19. Doc. No. 8, pp. 12, 14.

Goodwill filed suit in the District Court of Cleveland County on May 6, 2020, seeking a declaratory judgment from the Court that "Goodwill sustained 'direct physical loss' of or damage to its property" from the mandated closures enacted in response to COVID-19. Doc. No. 1-1, ¶ 18. On June 1, 2020, PIIC removed this action from state court pursuant to 28 U.S.C. §§ 1332 and 1441.[1] However, Goodwill asks the Court to decline to exercise its jurisdiction and remand the case to state court. Doc. No. 12, p. 4. Accordingly, the Court must decide whether to abstain from exercising its diversity jurisdiction over Goodwill's declaratory judgment action.

The Declaratory Judgment Act states that a court "may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). Thus, district courts retain discretion to decide whether to entertain an action under the Declaratory Judgment Act, even when the dispute satisfies subject matter jurisdictional requirements. *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494 (1942). "Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). In *Wilton*, the Court characterized the Declaratory Judgment Act as a "remedial arrow in the district court's

quiver" establishing "an opportunity, rather than a duty, to grant a new form of relief."[2] *Id.* at 288.

***2** The Tenth Circuit addressed a district court's discretionary decision in *State Farm Fire Cas. Co. v. Mhoon*, 31 F.3d 979 (10th Cir. 1994), instructing district courts to consider the following factors when deciding whether to "declare the rights and other legal relations" under the Declaratory Judgment Act:

i) whether a declaratory action would settle the controversy;

ii) whether it would serve a useful purpose in clarifying the legal relations at issue;

iii) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race to *res judicata*";

iv) whether use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and

v) whether there is an alternative remedy which is better or more effective.

Mhoon, 31 F.3d at 983. Under *Mhoon*, the Court is "obligat[ed] to weigh these various factors when deciding whether to hear a declaratory judgment action." *Id.* at 983. Both parties agree that the declaratory judgment action would settle the controversy[3] and serve a useful purpose in clarifying the legal relations at issue.[4] Thus, the Court must only address the third through fifth *Mhoon* factors.

I. The Third *Mhoon* Factor

Goodwill argues that the third factor is neutral because "there is no evidence either party engaged in 'procedural fencing.' " Doc. No. 12, p. 8. PIIC responds that "the third *Mhoon* factor cuts against Plaintiff ... [because] the only 'procedural fencing' here is Plaintiff's own claim-splitting strategy." Doc. No. 18, p. 9 n. 3. At this time, the only claim before the Court is the claim for declaratory judgment, thus, the Court will not speculate as to future claims that the Plaintiff or Defendant may bring. Therefore, the Court finds the third *Mhoon* factor to be neutral.

II. The Fourth *Mhoon* Factor

"[T]he Supreme Court directed that we prevent the 'gratuitous interference with the orderly and comprehensive disposition' of a pending state court action." *Grand Trunk W. R. Co. v. Consol. Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984) (quoting *Brillhart*, 316 U.S. at 495). In *Grand Trunk*, the Sixth Circuit explained that requesting the district court "to do what the state court ha[d] already refused to do ... [would] create unnecessary friction between the federal and state courts." *Id.* The Court, adopting what are known in the Tenth Circuit as the *Mhoon* factors, concluded that the district court erred in giving declaratory judgment because of its interference with the state court litigation. *Id.* at 327.

***3** However, "the absence of a pending parallel state court proceeding makes it less likely that by choosing to exercise jurisdiction over the action, this court will cause friction with the state court." *Bd. of Cnty. Comm'rs. of Cnty. of Marshall v. Cont'l W. Ins. Co.*, 184 F. Supp. 2d 1117, 1122 (D. Kan. 2001); *see also Nw. Pac. Indem. Co. v. Safeway, Inc.*, 112 F. Supp. 2d 1114, 1121 (D. Kan. 2000) (noting declaratory jurisdiction would cause unnecessary friction because the dispute ... "*remain[ed] active.*") (emphasis added); *United Specialty Ins. Co. v. Conner Roofing & Guttering, LLC*, No. 11-CV-0329-CVE-TLW, 2012 WL 208104, at *5 (N.D. Okla. Jan. 24, 2012) (finding that the *Mhoon* factors did not support declining jurisdiction because "[the] case [did] not present any substantial factual or legal issue ... litigated in the state court lawsuit."); *W. Am. Ins. Co. v. Atyani*, 338 F. Supp. 3d 1227, 1234 (D.N.M. 2018) (finding no unnecessary friction between state and federal courts when the district court suit addressed "interpretation ... in the liability policies" and the related state court suit addressed a violation of a city ordinance.).[5]

Goodwill argues that "this case was removed pursuant to diversity jurisdiction and thus implicates no federal statutory law." Doc. No. 12, p. 9. However, district courts retain an interest in exercising jurisdiction over diversity cases. *See e.g., Valls v. Allstate Ins. Co.*, 919 F.3d 739, 743 (2d Cir. 2019). The Supreme Court articulated this interest by stating that "we can discern in [Congress's] action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine." *Meredith v. City of Winter Haven*, 320 U.S. 228, 236 (1943).

Goodwill alternatively argues that the issue "is one of first impression," and thus is "best addressed by Oklahoma courts." Doc. No. 12, p. 11. However, "[a]n insurance policy

is a contract, and the rules ... for the construction of written instruments apply to contracts of insurance equally with other contracts." *Tri-State Cas. Ins. Co. v. Loper*, 204 F.2d 557, 558 (10th Cir. 1953). Further, the Tenth Circuit has "expressly recognized that one of the primary functions of the [Declaratory Judgment] Act is to provide ... a forum" for having an insurer's liability declared. *Farmers All. Mut. Ins. Co. v. Jones*, 570 F.2d 1384, 1386 (10th Cir. 1978) *citing Western Casualty and Surety Co. v. Teel*, 391 F.2d 764, 766 (10th Cir. 1968).

The risk of unnecessary friction between the state and federal courts is low because there is no pending state litigation nor any special interest preventing the federal court from exercising its jurisdiction, and thus, the fourth *Mhoon* factor weighs in PIIC's favor.

III. The Fifth *Mhoon* Factor

A more effective alternative remedy may exist when "the same issues [are] involved in ... pending state proceedings." *St. Paul Fire & Marine Ins. Co. v. Runyon*, 53 F.3d 1167, 1169 (10th Cir. 1995); *see also Kunkel v. Continental Casualty Co.*, 866 F.2d 1269, 1276 (10th Cir. 1989) (explaining that the Court "should not entertain a declaratory judgment action over which it has jurisdiction if the same fact-dependent issues are likely to be decided in another pending proceeding.").

***4** However, here, there is no pending state proceeding. Thus, a better or more effective alternative is unavailable. "If the federal courts in Oklahoma are closed to insurers and insureds seeking declaratory relief, it will leave all the parties [...] in a precarious position." *Horace Mann Ins. Co. v. Johnson ex rel. Johnson*, 953 F.2d 575, 578 (10th Cir. 1991) (concluding that the district court abused its discretion "in declining to exercise jurisdiction over the declaratory judgment action."); *see also Allstate Ins. Co. v. Brown*, 920 F.2d 664, 668 (10th Cir. 1990) (holding that even staying a declaratory judgment action on liability insurance coverage pending resolution of the underlying tort litigation in state court was inappropriate).

"Declaratory judgment actions are ... useful in actions where[ ] insurance companies seek to have their liability declared." *Farmers All. Mut. Ins. Co. v. Jones*, 570 F.2d 1384, 1386 (10th Cir. 1978). Without an alternative remedy currently available, the fifth factor weighs in PIIC's favor.

IV. Conclusion

After weighing the factors outlined in *Mhoon*, the Court finds that it should entertain the Declaratory Judgment Action properly removed by PIIC. Therefore, Goodwill's Motion to Abstain from Exercising Jurisdiction and Remand is DENIED IN ITS ENTIRETY.

IT IS SO ORDERED on this 9th day of November 2020.

All Citations

Slip Copy, 2020 WL 6561315

Footnotes

1 "Goodwill does not dispute the Court has jurisdiction." Doc. No. 12, p. 4.

2 In *Wilton*, the Court declined to "delineate the outer boundaries" of a district court's discretion. Notably, the Court explained that it did not decide whether such discretion applies to "cases in which there are no parallel state proceedings." *Wilton*, 515 U.S. at 290.

3 Goodwill conceded that the first *Mhoon* factor, "whether the declaratory judgment action would settle the controversy," weighs in PIIC's favor because "a declaration ... would presumably settle the controversy." Doc. No. 12, p. 8. PIIC noted Goodwill's concession, without elaborating on its position. Doc. No. 18, pp. 12-13. In its motion to dismiss, PIIC argues that "Plaintiff's declaratory judgment claim would not resolve the dispute between the parties." Doc. No. 8, p. 19. However, whether a declaratory judgment action completely resolves the dispute depends on the success of Goodwill's claim. For the purposes of this motion, however, because the parties do not dispute one another's position, the Court accepts Goodwill's concession and notes that the first two *Mhoon* factors weigh in PIIC's favor.

4 "Because this case is limited to a coverage dispute, and a declaration of whether Goodwill's losses are covered would presumably settle the controversy, the first two factors admittedly weigh in PIIC's favor." Doc. No. 12, p. 8.

5 The district court for the district of New Mexico explained that "[i]f ongoing state court proceedings do not qualify as 'parallel' with a federal declaratory judgment action, the district court's discretion to abstain from deciding the declaratory judgment action is limited." *Hartford Fire Ins. Co. v. Gandy Dancer, LLC*, No. CIV 10-0137 JB/RHS, 2011 WL 1336523, at *12 (D.N.M. Mar. 30, 2011) (quoting 12-57 M. Redish *Moore's Federal Practice* § 57.42 (3d ed. 1999)).

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2020 WL 6018918
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Orlando Division.

HARVEST MOON DISTRIBUTORS, LLC, Plaintiff,

v.

SOUTHERN-OWNERS INSURANCE COMPANY, Defendant.

Case No. 6:20-cv-1026-Orl-40DCI
|
Signed 10/09/2020

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ORDER

PAUL G. BYRON, UNITED STATES DISTRICT JUDGE

***1** This cause is before the Court on Defendant's Motion to Dismiss Pursuant to Rule 12(b)(6) (Doc. 3 (the "**Motion**")) and Plaintiff's Response to Defendant's Motion to Dismiss and Incorporated Memorandum of Law (Doc. 19 (the "**Response**")). Upon consideration, Defendant's Motion is due to be granted.

I. BACKGROUND

This lawsuit arises from a dispute between Plaintiff Harvest Moon Distributors, LLC, and Defendant Southern-Owners Insurance Company as to Plaintiff's entitlement to payments under its commercial insurance policy (hereinafter, the "**Policy**"). Plaintiff, a wine and beer distributor, purchased beer at an unspecified date in accordance with its contract with Walt Disney Parks and Resorts US Inc. ("**Disney**"). (Doc. 1-2, ¶¶ 34, 39). On March 15, 2020, before Plaintiff shipped its product, Disney voluntarily closed to the public due to the COVID-19 pandemic. (Doc. 1-2, ¶ 33; Doc. 3, p. 6). Disney subsequently refused to accept Plaintiff's product or compensate Plaintiff. (*See* Doc. 3, p. 6).

Four days after Disney's voluntary closure, Plaintiff submitted a claim to Defendant for loss of business income, extra expense, inventory, and accounts receivable caused by the pandemic. (*Id.*). On April 15, 2020, Plaintiff submitted a sworn proof of loss of its product to Defendant, claiming that its beer spoiled while Disney remained closed. (*Id.* at pp. 6–7). Defendant denied Plaintiff's claim. (*Id.* at p. 7).

On May 22, 2020, Plaintiff filed a complaint in Florida state court, requesting damages for breach of contract and declaratory judgment that it is entitled to coverage under the Policy. (Doc. 1-2, ¶¶ 28, 31; Doc. 3, pp. 2, 7). On June 11, 2020, Defendant removed the case to this Court. (Doc. 1). Defendant filed the instant Motion on June 18, 2020 (Doc. 3), and Plaintiff filed its Response on July 17, 2020 (Doc. 19). On July 31, 2020, Defendant submitted a reply to Plaintiff's Response (Doc. 29 (the "**Reply**")).

II. STANDARD OF REVIEW

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(1). Thus, to survive a motion to dismiss made pursuant to Rule 12(b)(6), the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is plausible on its face when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* To assess the sufficiency of factual content and the plausibility of a claim, courts draw on their "judicial experience and common sense" in considering: (1) the exhibits attached to the complaint; (2) matters that are subject to judicial notice; and (3) documents that are undisputed and central to a plaintiff's claim. *See id.*; *Parham v. Seattle Serv. Bureau, Inc.*, 224 F. Supp. 3d 1268, 1271 (M.D. Fla. 2016).

***2** Though a complaint need not contain detailed factual allegations, mere legal conclusions or recitation of the elements of a claim are not enough. *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. Moreover, courts are "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). "While legal conclusions can provide the

framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937. Courts must also view the complaint in the light most favorable to the plaintiff and must resolve any doubts as to the sufficiency of the complaint in the plaintiff's favor. *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1483 (11th Cir. 1994) (per curiam).

In sum, courts must (1) ignore conclusory allegations, bald legal assertions, and formulaic recitations of the elements of a claim; (2) accept well-pled factual allegations as true; and (3) view well-pled allegations in the light most favorable to the plaintiff. *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937.

III. DISCUSSION

Federal courts construe insurance contracts according to substantive state law. *See Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. of Pittsburgh, Pa.*, 412 F.3d 1224, 1227 (11th Cir. 2005) (citation omitted). In Florida, "the law of the jurisdiction where the contract was executed governs the rights and liabilities of the parties in determining an issue of insurance coverage." *State Farm Mut. Ins. Co. v. Roach*, 945 So. 2d 1160, 1163 (Fla. 2006) (citation omitted); *see LaTorre v. Conn. Mut. Life. Ins. Co.*, 38 F.3d 538, 540 (11th Cir. 1994). Because the instant Policy was issued in Florida, Florida law controls its interpretation. (Doc. 3, p. 4).

"Under Florida law, the interpretation of an insurance contract is a matter of law to be decided by the court." *AIX Specialty Ins. Co. v. Ashland 2 Partners, LLC*, 383 F. Supp. 3d 1334, 1337 (M.D. Fla. 2019). Moreover, "Florida courts have said again and again that 'insurance contracts must be construed in accordance with the plain language of the policy.' " *Sphinx*, 412 F.3d at 1227 (citing *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003)). When interpreting insurance contracts for purposes of a Motion to Dismiss, "coverage clauses ... are interpreted in the broadest possible manner to effect the greatest amount of coverage," and "exclusionary clauses are strictly construed, again in a manner that affords the insured the broadest possible coverage." *Fabricant v. Kemper Indep. Ins. Co.*, 474 F. Supp. 2d 1328, 1331 (S.D. Fla. 2007) (citing *Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So. 2d 176, 179 (Fla. 4th DCA 1997)). When an insurance policy "unambiguously reveals that the underlying claim is not covered," dismissal is appropriate. *Cammarota v. Penn-Am. Ins. Co.*, No. 17-cv-21605, 2017 WL 5956881, at *2, 2017 U.S. Dist. LEXIS 188073, at *5–6 (S.D. Fla. Nov. 9, 2017) (collecting cases).

"To state a claim for breach of contract, a plaintiff must allege: '(1) the existence of a contract; (2) a material breach of that contract; and (3) damages resulting from the breach.' " *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, No. 2:20-cv-00401, —— F.Supp.3d ——, ——, 2020 WL 5240218, at *2 (M.D. Fla. Sept. 2, 2020)[1] (quoting *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009)). Plaintiff clearly alleges the existence of the Policy (Doc. 1-2, ¶ 18) and damages resulting from Defendant's alleged breach (*Id.* ¶ 25). Thus, the only remaining issue is whether Plaintiff properly alleged a material breach.

1 "Unpublished opinions are not controlling authority and are persuasive only insofar as their legal analysis warrants." *Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 (11th Cir. 2007).

***3** To allege a material breach, Plaintiff must establish that the denied claim was covered by the Policy. Upon review of the Policy's plain language, coverage exists when (1) the insured suffers a "direct physical loss of or damage to Covered Property," (2) arising from a covered Cause of Loss, (3) provided that the loss is not otherwise excluded under the Policy. (*See* Doc. 3-1).[2] The Court analyzes the sufficiency of Plaintiff's Complaint by addressing each element in turn.

2 "[W]here the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal, and the defendant's attaching such documents to the motion to dismiss will not require conversion of the motion into a motion for summary judgment." *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997).

A. Whether the Complaint Alleges Direct Physical Loss or Damage

To state a claim for breach of contract under the Policy, Plaintiff must first allege a "direct physical loss of or damage to Covered Property." (Doc. 3, p. 3). Plaintiff alleges that it suffered a "direct physical loss of or damage to" its beer.

If Plaintiff properly alleges the general requirement of "direct physical loss of or damage to Covered Property" (*i.e.*, the beer), then it may also be entitled to payments under the Business Income and Extra Expenses Endorsement and the Accounts Receivable Endorsement. (*See id.* at p. 8). To sufficiently plead claims for business income, extra expenses,

and accounts receivable coverage, Plaintiff must comply with the terms of the respective Endorsements.

1. Loss of Beer

First, Plaintiff claims that it suffered a "direct physical loss" of its beer. In relevant part, the Policy provides:

> **A. COVERAGE**
>
> We will pay for *direct physical loss of or damage to* Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

(Doc. 3-1, p. 33) (emphasis added). Notably, the Policy does not define "direct physical loss or damage." (*See* Doc. 3-1). "Covered Property" includes "Stock," which is defined as "merchandise held in storage for sale, raw materials and in-process or finished goods, including supplies used in their packing or shipping." (*Id.* at pp. 33, 42).

Plaintiff alleges that it "operates as a wine and beer distributor, supplying its products to certain Vendors," and that it "purchased South African beers" pursuant to its contract with Disney. (Doc. 1-2, ¶¶ 34, 39). Plaintiff therefore properly alleges that its beer constitutes "Stock." (Doc. 3-1, pp. 33, 42).

The Complaint also asserts that the beer spoiled when Disney voluntarily closed due to the pandemic, and that the spoliation of Plaintiff's product constituted a direct physical loss. (Doc. 1-2, ¶¶ 13, 15, 42) ("Plaintiff's loss of use of the insured property and insured property's inability to function as contemplated and intended by Plaintiff ... is a direct physical loss."). The Complaint therefore alleges enough factual matter to plead a plausible claim that the spoiled beer constitutes a covered loss because the current alleged condition of the beer makes it inedible. *See Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

Defendant argues that no "direct physical loss or damage" occurred because there was no actual damage to Plaintiff's beer. (Doc. 3, pp. 13, 18). Plaintiff counters that "direct physical loss" does not require actual damage to or destruction of the property. (Doc. 19, p. 7). Thus, the parties raise the question of whether spoliation of the beer constitutes "direct physical loss or damage." However, for the purpose of determining the propriety of the instant Motion, the Court does not need to address this question now. Plaintiff alleges spoliation of the beer, which sufficiently raises a plausible claim that "direct physical loss or damage" occurred.

2. Loss of Income

***4** Second, Plaintiff claims that it suffered a loss of income when its beer spoiled. The Policy includes two endorsements that pertain to monetary loss: (1) the Business Income and Extra Expense Endorsement; and (2) the Accounts Receivable Endorsement.

Under the Business Income and Extra Expense Endorsement, coverage for loss of business income is provided as follows:

> **a. Business Income**
>
> Subject to the Limit of Insurance provisions of this endorsement, 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."
>
> Business income means the:
>
> **(1)** Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
>
> **(2)** Continuing normal operating expenses incurred, including payroll.

(Doc. 3-1, p. 19). Additionally, the Endorsement covers "necessary Extra Expense[s] ... incur[red] during the 'period of restoration.' " (*Id.*). An "Extra Expense" is an expense incurred:

> **(1)** To avoid or minimize the suspension of business and to continue "operations":
>
> **(a)** At the described premises or at a "newly acquired location"; or
>
> **(b)** At a replacement premises or at temporary locations, including:
>
> **1)** Relocation expenses; and
>
> **2)** Costs to equip and operate the replacement or temporary locations.
>
> **(2)** To minimize the suspension of business if you cannot continue "operations"; or
>
> **(3) (a)** To repair or replace any property; or

(b) To research, replace or restore the lost information on damaged valuable papers and records ...

(*Id.*). The Endorsement defines "operations" as "business activities occurring at the described premises or at a 'newly acquired location' " and "period of restoration" as beginning on the date of the direct physical loss or damage and ending on the date when the property "should be repaired, rebuilt or replaced with reasonable speed and similar quality." (*Id.* at p. 22).

Plaintiff alleges a loss of business income and extra expenses incurred "to minimize the suspension of business and continue its operations" when its product spoiled due to Disney's voluntary closure (Doc. 1-2, ¶¶ 13–15, 33, 40). Plaintiff argues that these allegations are sufficient because its "inability to sell its product was a suspension of its business operations" and "[t]he period of restoration would be the timeframe in which the Plaintiff would be able to replenish its stock and resume sales operations." (Doc. 19, pp. 13–14).

But Plaintiff merely states that *Disney* suspended operations. (*Id.* ¶ 33). Plaintiff never explicitly alleges that it suspended its "operations" or underwent any "period of restoration." (*See* Doc 1-2). Specifically, there is no indication that Plaintiff was unable to purchase beer from its suppliers, sell beer to willing buyers, or deliver beer to such buyers. There is no allegation that Disney is Plaintiff's *only* buyer and, therefore, Disney's unwillingness or inability to purchase the beer effectively terminated *all* of Plaintiff's business activities. The Court cannot infer from the mere assertion that Plaintiff's product spoiled that Plaintiff's operations were suspended. The Complaint therefore fails to allege enough factual matter to plead coverage for lost business income and extra expenses is warranted. *See Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

***5** Next, the Accounts Receivable Endorsement provides coverage as follows:

1. all amounts your customers owe you that you cannot collect;

2. interest charges on loans you secure to offset impaired receipts until we pay these amounts;

3. collection costs in excess of normal; and

4. other expenses you reasonably incur to re-establish your records;

which result from direct physical loss of or damage *to your records of accounts receivable*;

1. caused by or resulting from any Covered Cause of Loss; and

2. which occurs on the premises described in the Declarations.

(Doc. 3-1, p. 23) (emphasis added). Defendant argues that the Accounts Receivable Endorsement "is designed to protect against damage to the accounting records themselves, rather than to the products underlying those records." (Doc. 3, p. 19). Defendant supports this argument by pointing to the language "which result from direct physical loss of or damage to your records of accounts receivable." (*Id.*). In response, Plaintiff asserts that "the policy language is ambiguous as to the phrase 'direct physical loss of or damage to Covered Property.' " (Doc. 19, p. 15).

Plaintiff's counterargument is erroneous for two reasons. First, Plaintiff points to the general Policy language rather than the specific Accounts Receivable Endorsement language. To establish coverage under the Building and Personal Property Coverage Form, Plaintiff must indeed suffer a "direct physical loss of or damage to *Covered Property*," (*i.e.*, Plaintiff's beer). (Doc. 3-1, p. 33) (emphasis added). But to establish coverage under the Accounts Receivable Endorsement, Plaintiff must suffer "direct physical loss of or damage to [ ] *records of accounts receivable*," (*i.e.*, Plaintiff's records). (*Id.* at p. 23) (emphasis added). In sum, each Policy provision has an independent trigger for coverage. Although Plaintiff alleged that its beer spoiled, it did not allege any damage to its records of accounts receivable. (*See* Doc. 1-2). Second, the potential ambiguity of the phrase "direct physical loss or damage" is irrelevant because Plaintiff did not allege *any* loss or damage to its records of accounts receivable. The Complaint thus fails to include enough factual matter to plead a plausible claim that coverage for loss of accounts receivable is warranted. *See Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

In sum, Plaintiff alleges enough facts to support a claim that the loss of its beer was "direct physical loss or damage." However, Plaintiff fails to plead enough facts to support a claim that it is entitled to reimbursement under the terms of the Business Income and Extra Expense Endorsement or the Accounts Receivable Endorsement.

B. Covered Causes of Loss and Relevant Exclusions

Although Plaintiff sufficiently alleges "direct physical loss of or damage to" its beer, it nonetheless fails to satisfy the pleading standard if it does not allege that the loss was caused by a Covered Cause of Loss.

The Policy's "Covered Causes of Loss" section refers to the Causes of Loss Form, which provides that "Covered Causes of Loss means RISKS OF DIRECT PHYSICAL LOSS" unless an exclusion or limitation applies. (Doc. 3-1, p. 11). Because almost any event can pose a "risk" of loss, the Policy's exclusions and limitations are invaluable in determining what constitutes a Covered Cause of Loss.

***6** The Policy includes two exclusions that are relevant here. First, the Policy does not cover losses or damages caused by "[d]elay, loss of use or loss of market." (*Id.* at p. 12). Second, the "[a]cts or decisions ... of any person, group, organization or governmental body" is not a Covered Cause of Loss. (*Id.* at p. 13).

The Complaint states:

> As a result of this pandemic, Harvest Moon Distributors LLC's property sustained direct physical loss or damages ... Plaintiff's *loss of use* of the insured property and insured property's inability to function as contemplated and intended by Plaintiff and Defendant is a direct physical loss.... *Due to Walt Disney Parks & Resorts US Inc.'s voluntary closure*, in an effort to minimize risk and help "stop the spread" of the COVID-19 pandemic, Harvest Mood [sic] Distributors LLC lost Business Income, Extra Expense, Inventory, and Accounts Receivable, and sustained other consequential damages and losses. On or about March 19, 2020, Plaintiff submitted its claim to Defendant for Loss ... due to the COVID-19 pandemic ....

(Doc. 1-2, ¶¶ 13, 15, 39–42) (emphasis added). Defendant asserts that the cause of Plaintiff's alleged losses was its inability to sell its beer—that is, Disney's inability or unwillingness to buy Plaintiff's beer—which is not a Covered Cause of Loss under the Policy. (Doc. 3, pp. 14–17, 20–23). By contrast, Plaintiff argues that the pandemic caused its losses. (Doc. 19, pp. 5, 8–11). Plaintiff states that because the Policy does not expressly exclude pandemic events from coverage, the COVID-19 pandemic is a Covered Cause of Loss. (*Id.*).

Although the Policy does not explicitly exclude pandemic-related losses, Plaintiff's loss arose from *Disney's act* of refusing the beer, not from the pandemic. COVID-19 itself did not damage Plaintiff's beer. In other words, Plaintiff's beer would not have been damaged or destroyed but for *Disney's decision*, making Disney the cause of the alleged spoliation. For example, if Disney had accepted and refrigerated Plaintiff's beer or otherwise compensated Plaintiff, then Plaintiff would not have suffered any harm, regardless of the existence of the pandemic.

Rather, COVID-19 merely motivated Disney's decision to voluntarily close and to refuse acceptance of Plaintiff's beer. But Disney's motivation for its decisions is irrelevant. The Policy explicitly excludes from coverage such business decisions by persons, groups, or organizations. The pandemic does not change the terms of the Policy, which the parties bargained for and agreed to. Moreover, the Complaint itself states that Plaintiff experienced "*loss of use*" of its product, which the Policy expressly excludes from coverage. (Doc. 1-2, ¶ 15). Even construing the coverage terms as broadly as possible and the exclusionary terms as narrowly as possible, the Complaint fails to overcome the Policy's exclusionary language. *See Fabricant*, 474 F. Supp. 2d at 1331. Thus, Plaintiff fails to allege enough facts to warrant coverage because Disney's refusal of Plaintiff's product is not a Covered Cause of Loss under the Policy. *See Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.[3]

3 Plaintiff also requests declaratory judgment. (Docs. 1-2, ¶ 31; 3, p. 2). The Eleventh Circuit has held that Florida's Declaratory Judgment Act "is a procedural mechanism that confers subject matter jurisdiction on Florida's circuit and county courts; it does not confer any substantive rights." *Coccaro v. Geico Gen. Ins.*, 648 F. App'x 876, 880 (11th Cir. 2016) (citing *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1138 n.3 (11th Cir. 2005); *Garden Aire Vill. S. Condo. Ass'n Inc. v. QBE Ins.*, 774 F. Supp. 2d 1224, 1227 (S.D. Fla. 2011); *Nirvana Condo. Ass'n, Inc. v. QBE Ins.*, 589 F. Supp. 2d 1336, 1343 n.1 (S.D. Fla. 2008)). Thus, the federal Declaratory Judgment Act applies, which states in pertinent part: "In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). However, the basis of Plaintiff's declaratory judgment claim is Plaintiff's assertion that judicial interpretation of the Policy could result in coverage for the loss underlying its breach of contract claim. An actual controversy must exist before

the Court can afford declaratory relief and, because the breach of contract claim is dismissed, there is no controversy. *See Mauricio Martinez*, —— F.Supp.3d at ——, 2020 WL 5240218, at *3 (citing *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937)). Furthermore, the Supreme Court has held that "[t]he Declaratory Judgment Act was an authorization, not a command. It gave federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Pub. Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111, 112, 82 S.Ct. 580, 7 L.Ed.2d 604 (1962). Accordingly, Plaintiff's claim for declaratory judgment is dismissed as well.

IV. CONCLUSION

***7** Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion to Dismiss Pursuant to Rule 12(b)(6) (Doc. 3) is **GRANTED**;

2. Plaintiff's Complaint (Doc. 1-2) is **DISMISSED WITHOUT PREJUDICE**; and

3. On or before October 23, 2020, Plaintiff may file an Amended Complaint consistent with the directives of this Order, if it believes it can do so in accordance with Rule 11; and

4. Failure to timely file an Amended Complaint in accordance with the requirements of this Order will result in closure of this action without further notice.[4]

[4] In the alternative, on or before October 16, 2020, Plaintiff may request the Court to enter judgment dismissing the Complaint with prejudice based on the rulings in this Order to perfect the issue for appeal. Failure to timely file a request to enter judgment dismissing the Complaint with prejudice in accordance with the requirements of this Order will result in closure of this action without further notice.

DONE AND ORDERED in Orlando, Florida on October 9, 2020.

All Citations

--- F.Supp.3d ----, 2020 WL 6018918

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Only the Westlaw citation is currently available.
United States District Court,
N.D. Georgia, Atlanta Division.

HENRY'S LOUISIANA GRILL, INC., et al., Plaintiffs,

v.

ALLIED INSURANCE COMPANY OF AMERICA, Defendant.

CIVIL ACTION FILE NO. 1:20-CV-2939-TWT
|
Signed 10/06/2020

Attorneys and Law Firms

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OPINION AND ORDER

THOMAS W. THRASH, JR., United States District Judge

***1** This is a breach of contract case. It is before the Court on the Defendant's Motion to Dismiss [Doc. 4] and the Plaintiffs' Motion to Certify Questions of Law to the Georgia Supreme Court [Doc. 8]. For the reasons set forth below, the Defendant's Motion to Dismiss [Doc. 4] is GRANTED and the Plaintiffs' Motion to Certify Questions of Law to the Georgia Supreme Court [Doc. 8] is DENIED.

I. Background

The Plaintiffs, Henry's Louisiana Grill and Henry's Uptown ("Henry's"), are a restaurant and affiliated "private party and overflow" space, respectively. (Compl. ¶¶ 5–6.) The Plaintiffs maintained insurance through the Defendant, Allied Insurance Company of America ("Allied"). (Compl. ¶ 8.) Generally, the Plaintiffs' policy insured the Plaintiffs "against direct physical loss unless" the loss was excluded or limited by other provisions in the insurance contract. (Compl., at 30.) As part of its coverage, the Plaintiffs' policy included Business Income coverage:

> g. Business Income
>
> (1) Business Income with Ordinary Payroll Limitation
>
> (a) 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....
>
> (c) We will only pay for loss of "business income" that you sustain during the "period of restoration" and that occurs within the number of consecutive months shown in the Declarations for Business Income-Actual Loss Sustained after the date of direct physical loss or damage....

(Compl., at 33–34.) In a subsequent definitions section, the policy defines "period of restoration" as the time period between the direct physical loss and the earlier of:

> (i) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
>
> (ii) The date when the business is resumed at a new permanent location.

(Compl., at 67.)

In addition to this Business Income coverage, the policy included Civil Authorities Coverage:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided both of the following apply:
>
> (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage ...; and
>
> (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a

> civil authority to have unimpeded access to the damaged property.

(Compl., at 35.)

Further, the Plaintiffs' policy included a specific "Virus or Bacteria" exclusion, under which the Defendant would "not pay for loss or damage caused directly or indirectly by ... [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness, or disease." (Compl., at 48, 50.)

***2** On March 14, 2020, in response to the growing threat of COVID-19 in the State of Georgia, Governor Brian Kemp issued an Executive Order declaring a "Public Health State of Emergency." (*See* Compl. ¶ 9; Pl.'s Mot. to Certify, Ex. 2, at 3.) This Executive Order generally activated resources and loosened certain regulation as a response to COVID-19. For example, the Executive Order allowed the grant of temporary licenses to medical professionals and loosened weight restrictions on vehicles providing emergency relief. (*See* Pl.'s Mot. to Certify, Ex. 2, at 4–5.)

As a "direct response" to the Governor's Executive Order, the Plaintiffs closed its dining rooms, the Plaintiffs' primary source of revenue. (Compl. ¶ 13.) On March 27, 2020, the Plaintiffs notified the Defendant of the closure of its dining rooms. (Compl. ¶ 14.) However, after further communication between the Plaintiffs and the Defendant, the Defendant denied coverage for this closure, pointing to the language of the Business Income provision and the Virus or Bacteria exclusion. (Compl. ¶¶ 15–16.) The Plaintiffs claim that the Defendant repeatedly misquoted the policy in their communications and relied on the misquote in denying coverage. (Compl. ¶ 16.) The Plaintiffs note that at no time has there been "any virus located at, on, or in Plaintiff's premises." (Compl. ¶ 17.)

II. Legal Standards

A. Motion to Dismiss

A complaint should be dismissed under Rule 12(b)(6) only where it appears that the facts alleged fail to state a "plausible" claim for relief. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); Fed. R. Civ. P. 12(b)(6). A complaint may survive a motion to dismiss for failure to state a claim, however, even if it is "improbable" that a plaintiff would be able to prove those facts; even if the possibility of recovery is extremely "remote and unlikely." *Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the plaintiff. *See Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 994–95 (11th Cir. 1983); *see also Sanjuan v. American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994) (noting that at the pleading stage, the plaintiff "receives the benefit of imagination"). Generally, notice pleading is all that is required for a valid complaint. *See Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986). Under notice pleading, the plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. *See Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing *Twombly*, 550 U.S. at 555).

B. Motion to Certify

Federal courts have the discretion to certify questions of law to the Supreme Court of Georgia for an answer on determinative state law issues in the cases before them. *See* O.C.G.A. § 15-2-9. "Under this circuit's precedents, we should certify questions to the state supreme court when we have substantial doubt regarding the status of state law." *Peoples Gas Sys. v. Posen Constr., Inc.*, 931 F.3d 1337, 1340 (11th Cir. 2019) (internal quotation marks omitted). As the Eleventh Circuit has noted:

> While this circuit traditionally has been less reluctant than others to certify questions of state law, it nonetheless has been our practice to do so with restraint and only after the consideration of a number of factors: ... [t]he most important are the closeness of the question and the existence of sufficient sources of state law ... to allow a principled rather than conjectural conclusion.

***3** *Royal Capital Development, LLC v. Maryland Cas. Co.*, 659 F.3d 1050, 1055 (11th Cir. 2011) (internal quotation marks and punctuation omitted).

III. Discussion

In its Motion to Dismiss, the Defendant argues that the plain language of the Business Income and Civil Authority coverage provisions indicates the Plaintiffs' suspension of their dining room operations is not a covered loss. (Br. in Support of Def.'s Mot. to Dismiss, at 6.) Further, the Defendant argues that even if the closure of the dining rooms represents a covered loss, the policy's "Virus or Bacteria" exclusion precludes coverage. (*Id.* at 10.) In response, the

Plaintiffs argue that the closure of their dining rooms qualifies as a "direct physical loss of" a covered property, and that if this Court has any doubts, it should certify a question to the Georgia Supreme Court to define this phrase. (Pls.' Br. in Opp'n to Def.'s Mot. to Dismiss, at 6, 13.) The Plaintiffs also argue that they have pleaded sufficient facts to state a claim under the Civil Authority coverage provision, and that the "Virus or Bacteria" exclusion is inapplicable because the dining rooms were closed in response to the Governor's Orders, not COVID-19. (*See id.* at 17–18.)

"In Georgia, insurance is a matter of contract, and the parties to an insurance policy are bound by its plain and unambiguous terms." *Hays v. Ga. Farm Bureau Mut. Ins. Co.*, 314 Ga. App. 110, 111 (2012) (punctuation omitted). Construction of the policy's terms are questions of law:

> The court undertakes a three-step process in the construction of the contract, the first of which is to determine if the instrument's language is clear and unambiguous. If the language is unambiguous, the court simply enforces the contract according to its terms, and looks to the contract alone for the meaning.

American Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., 288 Ga. 749, 750 (2011) (internal citations omitted). Unambiguous terms must be given effect "even if beneficial to the insurer and detrimental to the insured," and Georgia courts "will not strain to extend coverage where none was contracted or intended." *Jefferson Ins. Co. of New York v. Dunn*, 269 Ga. 213, 215 (1998). By Georgia statute, "the whole contract should be looked to in arriving at the construction of any part." O.C.G.A. § 13-2-2.

A. Business Income Loss Coverage

Because the Plaintiffs and the Defendant argue the plain language of the policy leads to different results, a thorough analysis of the relevant provisions is required here. With regards to the Plaintiffs' Business Income claim, the parties agree that the key phrase is "direct physical loss of or damage to" the covered property.

In seeking to dismiss this claim, the Defendant argues that "a direct physical loss of or damage to" requires some form of physical change to the covered premises. (Def.'s Br. in Supp. of Def.'s Mot. to Dismiss, at 6.) Because no physical change occurred at the Plaintiffs' property as a result of COVID-19 or the Governor's Executive Order, no coverage can extend to their losses. (*Id.* at 8.) In response, the "Plaintiffs argue that physical change did occur: prior to the Executive Order, Plaintiffs' dining room space was physically available to patrons, whereas after the Executive Order was issued, Plaintiffs' dining room space was no longer physically available to patrons." (Pls.' Br. in Opp'n to Def.'s Mot. to Dismiss, at 13.)

***4** While Georgia case law analyzing this phrase is relatively sparse, both parties discuss at-length one Georgia Court of Appeals case, *AFLAC, Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306 (2003). In *AFLAC*, an insured had several policies with its insurer that included various provisions with three similar phases: "direct physical loss of or damage to;" "direct physical loss of, or damage to;" and, "direct physical loss or damage to." *Id.* at 307. Under these provisions, the insured filed claims with its insurer to cover expenses related to software updates made in preparation for potential fallout from "Y2K." *Id.* at 306.

Despite the different underlying facts and the number of semantic variations analyzed, the decision provides some direction in interpreting the provision before this Court. First, the *AFLAC* court defined some terms relevant here. The court held that the "or" in this context is a coordinating conjunction, meaning the coordinating adjectives "direct physical" "modify the word 'damage' as 'connected' to the word 'loss.' " *Id.* at 308. Further, the court defined "direct" as "without intervening persons, conditions, or agencies; immediate." *Id.* (internal quotation marks and punctuation omitted). In addition, the court found:

> [T]he words "loss of" ... and the words "damage to" ... make it clear that coverage is predicated upon a change in the insured property resulting from an external event rendering the insured property, initially in a satisfactory condition, unsatisfactory.

Id.

Both parties have attempted to apply the *AFLAC* understanding of these terms to support their case. The Defendant argues no relevant physical change took place, while the Plaintiffs argue that the Governor's Executive Order generated a physical change that rendered the once-satisfactory dining rooms "unsatisfactory." (*See* Def.'s Br. in Supp. of Def.'s Mot. to Dismiss, at 6–8; Pls.' Br. in Opp'n to Def.'s Mot. to Dismiss, at 8.)

The Plaintiffs' allegation of a physical change here is curious. The Plaintiffs repeatedly note that COVID-19 has never been identified on the premises.[1] (*See* Pls.' Br. in Opp'n to Def.'s

Mot. to Dismiss, at 19–20.) Therefore, no physical change as a result of the virus' presence can be argued here. Instead, the Plaintiffs cast the Governor's Executive Order as imposing some physical change on the covered premises. Under the Plaintiffs' logic, a minute before the Governor issued the Order, the dining rooms existed in one state. A minute later, the Governor issued the Order, and the restaurant underwent a direct physical change that left the dining rooms in a different state. This interpretation of the contractual language exceeds any reasonable bounds of possible construction, pushing the words individually and collectively beyond what any plain meaning can support.

1 This fact, emphasized by the Plaintiffs, distinguishes this case from the cases the Plaintiffs point to as support for their position. One district court in Missouri has declined to dismiss several similar cases, holding that the plaintiffs properly stated a claim of physical loss. *See, e.g., Studio 417, Inc. v. Cincinnati Ins. Co.*, Civ. A. No. 20-cv-03127, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020). However, in those cases, the insureds alleged that COVID-19 was present on their premises, and that the virus' presence caused the physical damage. *See id.* at *4. As such, those claims are distinguishable from the Plaintiffs' claims here, where the alleged source of the physical loss is the Governor's Executive Order.

First, the claim that the Governor's Executive Order had a "direct" effect on the Plaintiffs' dining rooms defies both the ordinary meaning and the *AFLAC* court's definition of the word. The Order did not have an "immediate" effect on the dining rooms "without intervening persons, conditions, or agencies." *AFLAC*, 260 Ga. App. at 308; *see Direct*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/direct, (last visited Sept. 25, 2020) (defining "direct" as "stemming immediately from a source"). The Order, by its plain terms, declares a Public Health State of Emergency and mobilizes state resources to manage the threat. The Order did not impose limitations on businesses or their operations. The Plaintiffs' closure was likely prudent, but that decision was not made directly by the Order—it was made by intervening persons as a result of intervening conditions. With regards to the Plaintiffs, the Order was at most an official recognition of an already present threat, and it did not have a direct effect on the dining rooms.

***5** Second, holding that the Governor's Executive Order led to a "physical loss of" the dining rooms would massively expand the scope of the insurance coverage at issue here. Under the *AFLAC* definition, the Order would have to generate "a change in the insured property resulting from an external event rendering the insured property, initially in a satisfactory condition, unsatisfactory." *AFLAC*, 260 Ga. App. at 308. As mentioned above, the Order merely recognized an existing threat. It did not represent an external event that changed the insured property. Every physical element of the dining rooms—the floors, the ceilings, the plumbing, the HVAC, the tables, the chairs—underwent no physical change as a result of the Order. The only possible change was an increased public and private perception of the existing threat, which cannot be deemed a physical change that rendered the property unsatisfactory. The Plaintiffs' construction would potentially make an insurer liable for the negative effects of operational changes resulting from any regulation or executive decree, such as a reduction in a space's maximum occupancy. *See Plan Check Downtown III, LLC v. Amguard Ins. Co.*, Civ. A. No. 2:20-cv-06954, slip op. at 9 (C.D. Cal. Sept. 10, 2020) (outlining scenarios where an insurer would be held liable under this improper construction of the policy).

As a final interpretative argument, the Plaintiffs claim that the Defendant's interpretation of "direct physical loss of" renders the words "damage to" surplusage, which is disfavored under Georgia law. (*See* Pls.' Br. in Opp'n to Def.'s Mot. to Dismiss, at 14.) The Plaintiffs allege that though their dining rooms experienced no damage, they experienced a "physical spatial loss of their dining rooms," and this definition eliminates surplusage concerns between "loss of" and "damage to." (*Id.* at 15.) However, the plain meanings of these terms indicate they have different and complementary meanings in this context.

To determine the plain meaning of these words, Georgia courts look to various dictionaries to provide guidance. *See Western Pac. Mut. Ins. Co. v. Davies*, 267 Ga. App. 675, 678 (2004) ("In construing a contract of insurance to ascertain the intent of the parties, the court should give a term or phrase in the contract its ordinary meaning or common signification as defined by dictionaries...."). Black's Law Dictionary defines "loss" as "the disappearance or diminution of value," while Merriam-Webster provides "the act of losing possession." *Loss*, Black's Law Dictionary (10th ed. 2014); *Loss*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/loss, (last visited Sept. 25, 2020). Black's Law Dictionary defines "damage" as "loss or injury to person or property," and Merriam-Webster's definition is substantially the same. *Damage*, Black's Law Dictionary (10th ed. 2014); *Damage*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/damage, (last visited Sept. 25, 2020) (defining "damage" as "loss or harm resulting

from injury to person, property, or reputation"). These definitions can support two different meanings—that loss is the "disappearance of value" or "the act of losing possession" by complete destruction, while damage is any other injury requiring repair. As an illustrative example, a tornado that destroys the entirety of the restaurant results in a "loss of" the restaurant, while a tree falling on part of the kitchen would represent "damage to" the restaurant.

This understanding of the contract language is further emphasized by the policy's definition of the "period of restoration." Because Georgia law requires that the whole contract should be analyzed to give meaning to its parts, this definition is instructive in analyzing undefined words and phrases. *See* O.C.G.A. § 13-2-2. The "period of restoration" is the time period during which the insurer will cover the insured's business income losses, and is defined as the time between the date of the loss and the earlier of:

> (i) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
>
> (ii) The date when the business is resumed at a new permanent location.

***6** (Compl., at 67.) This definition appears to contemplate a range of potential covered damages, ranging from those requiring repairs or replacements to those requiring the relocation of the business. This range of contemplated harms aligns with an understanding that "loss of" means total destruction while "damage to" means some amount of harm or injury.

Thus, the contract language issue here is not ambiguous, and because the Governor's Executive Order did not create a "direct physical loss of" the Plaintiffs' dining rooms, the Business Income provision does not apply to the Plaintiffs' claims.[2]

[2] This Court notes that though jurisprudence regarding COVID-19 is understandably in its early stages, recent decisions within the Eleventh Circuit appear to align with this Court's decision here. *See Malaube, LLC v. Greenwich Ins. Co.*, Civ. A. No. 20-22615-Civ, 2020 WL 5051581, at *8 (S.D. Fla. Aug. 26, 2020) (holding that allegations of "direct physical loss or damage" without alleging that the virus has entered the premises does not state a claim for which relief can be granted); *cf. Mama Jo's Inc. v. Sparta Ins. Co.*, No. 18-12887, 2020 WL 4782369, at *8–9 (11th Cir. Aug 18, 2020) (citing favorably, in a non-pandemic context, *AFLAC*'s definition of "direct physical loss or damage" and rejecting a business interruption claim for losses incurred by construction dust and debris landing in the restaurant over a period of time).

B. Civil Authority Coverage

As an alternative means of coverage, the Plaintiffs argue that the policy's Civil Authority provision requires the Defendant to cover their business income losses. This provision states:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided both of the following apply:
>
> (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage ...; and
>
> (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

(Compl., at 35.) The Plaintiffs argue that because of the community spread of COVID-19, property other than its own had been damaged by the virus, which led to the issuance of the Governor's Executive Order. (*See* Pls.' Br. in Opp'n to Def.'s Mot. to Dismiss, at 17–18; Pls.' Surreply Br. in Opp'n to Def.'s Mot. to Dismiss, at 6.)

Even accepting the Plaintiffs' allegations of damage to other property as true, the Plaintiffs have not pleaded sufficient facts to demonstrate coverage under the Civil Authority provision. The provision contains several clear conditions precedent for coverage. First, the Plaintiffs have pleaded no facts regarding a civil authority's action that prohibited access to the premises. The Governor's Executive Order had no substantive provisions limiting access to private businesses or their operations. While the Order could be read as "advising" residents to stay home, the Order itself does not represent an action to prohibit access to the described premises. (Pls.' Surreply Br. in Opp'n to Def.'s Mot. to Dismiss, at 6.) And the Plaintiffs point to no other action by a civil authority that could have prohibited access to their dining rooms at the time of the closure. Second, the Plaintiffs pleaded no facts that

the areas "immediately surrounding" the damaged properties were blocked by the civil authority. In fact, the Plaintiffs do not identify any particular property around their premises which was damaged by COVID-19 or had its access restricted by a civil authority. Finally, with no damaged property or civil authority action identified, the Plaintiffs cannot plead facts that the civil authority's access limitations resulted from COVID-19 or were necessary to allow the civil authority's unimpeded access to area. Thus, by failing to plead sufficient facts to satisfy several conditions precedent, the Plaintiffs cannot claim coverage under the Civil Authority provision.[3]

[3] Because the Plaintiffs have not pleaded sufficient facts to support a claim for coverage here, this Court will not proceed to analyze the parties' arguments regarding the Virus or Bacteria exclusion.

C. The Plaintiffs' Motion to Certify

***7** As discussed above, the Plaintiffs have failed to state a claim for coverage under this contract. As such, the Plaintiffs have not generated a "substantial doubt regarding the status of state law" required to support certification of these questions to the Georgia Supreme Court. *Peoples Gas Sys. v. Posen Constr., Inc.*, 931 F.3d 1337, 1340 (11th Cir. 2019) (internal quotation marks omitted). A dearth of Georgia Supreme Court decisions addressing a particular phrase cannot be sufficient cause—on its own—to certify a question to that court. That is especially true where, as here, the contract language is unambiguous as to coverage on these facts. Given this Court's view of the unambiguous contract language, this Court will not exercise its discretion to certify the Plaintiffs' proposed questions of law to the Georgia Supreme Court.

IV. Conclusion

This Court recognizes the challenging position the Plaintiffs found themselves in. The COVID-19 pandemic has imposed massive changes and pressures on every business and every household in this country. The Plaintiffs, faced with a difficult decision, made a choice that they felt would best ensure the health of their customers and employees. This Court's decision here is not a judgment on the Plaintiffs' business sense or the wisdom of shuttering dining rooms in the face of a global pandemic. This decision merely reflects the plain language of the parties' insurance contract.

For the reasons set forth above, the Defendant's Motion to Dismiss [Doc. 4] is GRANTED and the Plaintiffs' Motion to Certify Questions of Law to the Georgia Supreme Court [Doc. 8] is DENIED.

SO ORDERED, this 6 day of October, 2020.

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United States District Court, S.D.
Alabama, Southern Division.

HILLCREST OPTICAL, INC., a corporation on behalf of itself and all others in the State of Alabama similarly situated, Plaintiff,

v.

CONTINENTAL CASUALTY COMPANY, Defendant.

CIVIL ACTION NO. 1:20-CV-275-JB-B

|

Signed 10/21/2020

Attorneys and Law Firms

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ORDER

JEFFREY U. BEAVERSTOCK, UNITED STATES DISTRICT JUDGE

***1** This matter is before the Court on Defendant Continental Insurance Company's ("Continental" or "Defendant") Motion to Dismiss (Doc. 17). The Motion has been briefed and is ripe for review.

I. BACKGROUND

Plaintiff is an Alabama corporation which operates an optometrist office in Mobile, Alabama. (Doc. 1 at ¶¶1, 5, PageID.1 – 2). Defendant is an Illinois insurance corporation. Plaintiff purchased an "all-risk" insurance policy from Defendant to cover its property from May 1, 2019, until May 1, 2020. (*Id.* at ¶6, PageID.2). The parties do not dispute the policy's contents. The policy's "Business Special Property Coverage Form" provides: "[Defendant] will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from a Covered Cause of Loss." (Doc. 1 at ¶9, PageID.3; Doc. 1-2, PageID.34) (capitalization in original). The policy's "Business Income and Extra Expense" endorsement provides:

> 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.

(Doc. 1 at ¶11, PageID.3; Doc. 1-2, PageID.56) (capitalization in original). The policy does not define the phrase "direct physical loss of ... property." (Doc. 1-2, PageID.56). Plaintiff also purchased Extra Expense coverage from Defendant. (Doc. 1 at ¶12, PageID.3) (capitalization in original). That coverage provides:

> a. Extra Expense means reasonable and necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss.
>
> b. 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 or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement premises or temporary locations; or
>
> (2) Minimize the "suspension" of business if you cannot continue "operations."
>
> c. We will also pay Extra Expense (including Expediting Expenses) to repair or replace the property, but only to the extent it reduces the amount of loss that otherwise would have been payable under Paragraph **1.** Business Income above.

(Doc. 1-2, PageID.57) (capitalization and emphasis in original). The policy defines "operations" and "period of restoration" as follows:

> 19. **"Operations"** means the type of your business activities occurring at the described premises and tenantability of the described premises.
>
> 20. "**Period of restoration"** means the period of time that:

a. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and

***2 b.** Ends on the earlier of:

(1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

(2) The date when business is resumed at a new permanent location.

"Period of restoration: does not include any increased period required due to the enforcement of any law that:

(a) Regulates the construction, use or repair, or requires the tearing down of any property; or

(b) Regulates the prevention, control, repair, clean-up or restoration of environmental damage.

(Doc. 1-2, PageID.51 – 52) (emphasis in original).

On March 13, 2020, President Trump declared the COVID-19 pandemic a national emergency. (Doc. 1 at ¶15, PageID.4). Following President Trump's declaration, Alabama Governor Kay Ivey declared the COVID-19 pandemic a State public health emergency and directed relevant State agencies to exercise their statutory and regulatory authority to implement measures to curb the rise of COVID-19 cases in Alabama. (Doc. 1-3, PageID.177).

On March 27, 2020, Dr. Scott Harris, the Alabama State Health Officer, entered a Statewide Order (the "Order") which provided, *inter alia*, all medical procedures would be postponed beginning March 28, 2020, with certain exceptions, until further notice. Plaintiff avers it shut down operations in compliance with the State's Order. (Doc. 1 at ¶17, PageID.4). Dr. Harris entered a second Order (the "Second Order"), approximately one month later (*Id.* at ¶18, PageID.5), allowing all medical procedures to resume. (Doc. 1-4, PageID.188). Plaintiff reopened and resumed its ordinary operations at its first available opportunity on April 30, 2020. (Doc. 1 at ¶18, PageID.5). Plaintiff alleges it suffered a substantial loss of business income as a consequence of the Order. (*Id.* at ¶19). Plaintiff does not allege COVID-19 was present on its premises.

Plaintiff filed a claim for its business income losses with Defendant on April 15, 2020. (Doc. 1 at ¶19, PageID.5). Plaintiff provided Defendant several documents with its claim, outlining its financial losses and other information Defendant requested. (*Id.*). Plaintiff's counsel sent an email to Defendant on May 4, 2020, advising if Defendant did not respond to Plaintiff's claim within five (5) days it would consider the claim denied and proceed with litigation. (*Id.*). Defendant did not respond within that time and Plaintiff commenced this action on May 15, 2020.

Plaintiff brings this action individually and for similarly situated parties. In its Complaint, Plaintiff seeks a Declaratory Judgment of its rights under the policy (Doc. 1 at ¶¶39, 40, PageID.10), and asserts a breach of contract claim. (*Id.* at ¶¶43 – 47, PageID.11). Plaintiff's breach of contract claim is limited to Defendant's alleged failure to cover Plaintiff's loss of business income. (*Id.* at ¶45). Plaintiff contends it suffered a direct physical loss of its property because it lost the ability to use its property for its intended purposes as a consequence of the Order. (*Id.* at ¶22, PageID.5 – 6). Alternatively, Plaintiff contends the Court should certify the question of whether it has adequately alleged a direct physical loss of property to the Alabama Supreme Court because Alabama law lacks sufficient guidance to answer it. (Doc. 24, PageID.288).

II. STANDARD OF REVIEW

***3** Rule 12(b)(6), Fed.R.Civ.P., provides a court may dismiss a claim for failure to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Conclusory statements, assertions or labels will not survive a 12(b)(6) motion to dismiss. *Id.* A plaintiff's claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.; see also Edwards v. Prime, Inc.*, 602 F.3d 1276, 1291 (11th Cir. 2010). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Twombly*, 550 U.S. at 555 (citation omitted). "Although it must accept well-pled facts as true, the court is not required to accept a plaintiff's legal conclusions." *Iqbal*, 556 U.S. at 678.

III. ANALYSIS[1]

[1] The parties address the policy's Civil Authority Endorsement (*See* Doc. 1-2, PageID.82) which modifies the Business Property Special Coverage Form and Extra Expense Endorsement. Plaintiff concedes this endorsement provides it no coverage. (*See* Doc. 18, PageID.236, 252 – 254).

Defendant contends Plaintiff's Complaint is due to be dismissed pursuant to Rule 12(b)(6) because: (1) Plaintiff failed to allege a direct physical loss of its property in accordance with the policy's Business Special Property Coverage Form; (2) Plaintiff's inability to use its property for its intended purpose did not constitute a direct physical loss of property; and (3) Plaintiff failed to allege a period of restoration as required by the policy's Business Income and Extra Expense endorsement. (Doc. 18, PageID.240, 246, 250). In anticipation of Plaintiff's Opposition, Defendant also contends the Court should not certify the question of whether Plaintiff sufficiently alleged a direct physical loss because there is sufficient Alabama law to guide the Court in its decision. (*Id.* at PageID.245 n.7).

In Opposition, Plaintiff maintains it adequately alleged a direct physical loss of property because the State's Order prevented it from using its property for its intended purpose. (Doc. 24, PageID.289). Plaintiff also contends it adequately alleged a period of restoration based on its interpretation of the word "repair" as it appears in the policy. (*Id.*, PageID.296). In Reply, Defendant again contends Plaintiff failed to allege a direct physical loss of its property. Defendant contends Plaintiff's allegation that it lost its ability to use its property for its intended purpose fails to satisfy the policy's requirements. (Doc. 25, PageID.308 – 311).[2]

[2] The parties also filed several notices of significant and pertinent authority which the Court has considered in making its determination. (*See* Doc. 26; Doc. 28; Doc. 30).

A. Alabama's principles of insurance contract construction.

Before considering the parties' arguments, the Court finds it appropriate to review Alabama's principles on insurance contract construction. Matters of insurance contract construction under Alabama law are well-settled. Generally,

> [t]he issue of whether a contract is ambiguous or unambiguous is a question of law for a court to decide. If a word or phrase is not defined in an insurance policy, then the court should construe the word or phrase according to the meaning a person of ordinary intelligence would reasonably give it.

Crook v. Allstate Indemnity Company, 2020 WL 3478552, *3 (Ala. 2020) (internal brackets, citations, and quotation marks omitted). Further,

> [t]he court should not define words it is construing based on technical or legal terms. When analyzing an insurance policy, a court gives words used in the policy their common, everyday meaning and interprets them as a reasonable person in the insured's position would have understood them. If, under this standard, they are reasonably certain in their meaning, they are not ambiguous as a matter of law and the rule of construction in favor of the insured does not apply. A policy is not made ambiguous by the fact that the parties interpret the policy differently or disagree as to the meaning of a written provision in a contract. However, if a provision in an insurance policy is found to be genuinely ambiguous, policies of insurance should be construed liberally in respect to persons insured and strictly with respect to the insurer.

***4** *Id.* at *4. *See also Nationwide Mut. Ins. Co. v. Thomas*, 103 So.3d 795, 804 (Ala. 2012) (citing *Tate v. Allstate Ins. Co.*, 692 So.2d 822 (Ala. 1997)). Further, "an insurance policy must be read as a whole. The provisions of the policy cannot be read in isolation, but, instead, each provision must be read in context with all other provisions." *Cowart v. Geico Cas. Co.*, 296 So.3d 266, 270 (Ala. 2019) (quoting *Allstate Ins. Co. v. Hardnett*, 763 So.2d 963, 965 (Ala. 2000)) (quoting *Attorneys Ins. Mut. of Alabama, Inc. v. Smith, Blocker & Lowther, P.C.*, 703 So.2d 866, 870 (Ala. 1996)).

B. Plaintiff's request for certification to the Alabama Supreme Court is unavailing.

Rule 18 of the Alabama Rules of Appellate Procedure states that federal courts may certify "determinative" questions of law where "there are no clear controlling precedents in the decisions of the supreme court of this state" to receive "instructions concerning such questions or propositions of state law[.]" Ala. R. App. P. 18(a). In deciding whether to certify a question to the Alabama Supreme Court, courts are instructed to consider the following factors:

> (1) the closeness of the question; (2) the existence of sufficient sources of state law; (3) the degree to which considerations of comity are relevant in light of the particular issue and case to be decided; (4) the likelihood of recurrence of a particular issue; and (5) the practical limitations of the certification process.

Arnold v. State Farm Fire and Casualty Company, 2017 WL 5451749, *4 (S.D. Ala. 2017) (citing *Smigiel v. Aetna Casualty & Surety Co.*, 785 F.2d 922, 924 (11th Cir. 1986)); *see also Heatherwood Holdings, LLC v. First Commer. Bank*, 61 So.3d 1012, 1026 (Ala. 2010) (declining to answer a certified question where Alabama law was sufficient to guide the court in answering the certified question).

Plaintiff contends the Court must certify the question of whether it suffered a direct physical loss of its property because the issue is determinative to this litigation. (Doc. 24, PageID.288). Further, Plaintiff contends, "the Alabama Supreme Court would probably be inclined to accept the certified question, because the COVID-19 pandemic has generated numerous business-interruption-insurance lawsuits across the country, and several in this state[.]". (*Id.*). In Reply, Defendant argues the question is not close and present Alabama law can sufficiently guide the Court's analysis. (Doc. 25, PageID.318 – 319). Based on the analysis in section C., *infra*, the Court is satisfied certification is not necessary and shall address the substance of Plaintiff's arguments.

C. The Court finds Plaintiff's arguments unavailing.

In support of its argument that the Order caused a direct physical loss of its property, Plaintiff relies on *Total Intermodal Serv., Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767 (C.D. Cal. July 11, 2018) and *State Farm Mut. Auto. Ins. Co. v. Rodriguez*, 987 N.E.2d 896 (Ill. App. 2013). That reliance is misplaced. In *Total Intermodal*, the allegations of loss involved a complete and permanent dispossession of property. The court found that such a dispossession constituted a direct physical loss. *Total Intermodal Services Inc.*, 2018 WL 3829767, *3 – 4. Plaintiff's Complaint here does not allege complete and permanent disposition of Plaintiff's property.

5** *Rodriguez* likewise does not support Plaintiff's argument. In *Rodriguez*, police suddenly seized the defendants' cars after discovering they were purchased from a thief. *Rodriguez*, 987 N.E.2d at 898. The defendants filed insurance claims for the loss. Their insurance carrier denied the claims and filed declaratory judgment actions. *Id.* The relevant policy language provided: "We*** will pay: a. for ***loss*****,** except ***loss caused by collision*****,** to a ***covered vehicle*** [.]. ***Loss*** means: 1. direct, sudden, and accidental damage to; or 2. total or partial theft of a ***covered vehicle.***" *Id.* at 899 (emphasis in original). The defendants argued, *inter alia*, the vehicles suffered damage because their seizure by police was sudden. The court disagreed, stating:

> We share the view of the trial courts that although the seizure of the vehicles does constitute damage to the defendants, it does not constitute damage "to" the covered vehicles. The defendants have not claimed that the seizure resulted in physical damage to the vehicles. The defendants have failed to suggest any reasonable interpretation of the term "damage" under which their vehicles, as opposed to the defendants themselves, have been damaged.

Rodriguez, 987 N.E.2d at 901.

Both *Total Intermodal* and *Rodriguez* concerned permanent physical dispossession of covered property, and to that extent are distinguishable from this case. The issue of whether the complete and permanent dispossession of property constitutes a direct physical loss of property is not before the Court.

The Court must determine whether a temporary inability to use property due to governmental intervention constituted a direct physical loss of property. Plaintiff contends the phrases "loss of" and "loss to" mean different things, and that they suffered a "loss of" their property notwithstanding that there was not a "loss to" it. Plaintiff attempts to support this argument based on a number of non-binding opinions, including *Sentinel Management Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. App. 1997); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332, 1336 (Or. App. 1993); *Murray v. State Farm Ins. Fire and Cas. Co.*, 509 S.E.2d 1, 16 (W. Va. 1998); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 701 (E.D. Va. 2010). The Court finds these authorities to be materially distinguishable. Several of these cases addressed the phrase "direct physical loss *to* property." Others concerned physical contamination of premises that were rendered unusable due to an event which had a tangible effect on the property. *See e.g., Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) ("[T]his particular 'loss of use' was simply the consequential result of the fact that because of the accumulation of gasoline ... the premises became so infiltrated and saturated as to be uninhabitable ..."); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332, 1335 (Or. App. 1993); *Oregon Shakespeare Festival Association v. Great American Insurance Company*, 2016 WL 3267247, *2 (D. Or. 2016) (finding physical loss of property where wildfire smoke infiltrated the covered premises), *vacated on other grounds by Oregon Shakespeare Festival Association v. Great American Insurance Company*, 2017 WL 1034203.

1. A reasonable insured would not understand the policy language to cover Plaintiff's purely economic losses incurred as a consequence of the Order.

As other courts in this Circuit have noted, there is scant state-specific case law on the issue before the Court. *See, e.g., Henry's Louisiana Grill, Inc., et al., v. Allied Insurance Company of America*, 2020 WL 5938755, *4 (N.D. Ga. 2020); *Malaube, LLC v. Greenwich Insurance Company*, 2020 WL 5051581, *6 (S.D. Fla. 2020). Indeed, the Court could find no Alabama decision addressing whether a temporary inability to use one's property for its intended purpose constituted a "direct physical loss of property." However, there is sufficient authority to guide the Court's decision on the meaning of that phrase.

***6** First, the Court notes, that the words "direct" and "physical" modify the word "loss" in the phrase "direct physical loss of property." Therefore, analysis of this phrase must account for both words as they apply to the type of loss of property Plaintiff must have suffered to trigger coverage. *See, e.g., Henry's Louisiana Grill, Inc.*, 2020 WL 5928755, at *4; *Malaube, LLC*, 2020 WL 5051581, at *7 (citing *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014)).

The Alabama Supreme Court's decision in *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293 (Ala. 2000) provides substantial interpretative guidance regarding the meaning of "direct" in the context of the phrase "direct physical loss of property." There, the insureds purchased a "Homeowners' Extra" policy from State Farm. *Slade*, 747 So. 2d at 297. The policy covered the "direct physical loss[es] to [the insured's] property." *Id.* at 298. The insureds' home was damaged by lightning during a severe thunderstorm when a bolt struck the insureds' retaining wall attached to their home. *Id.* at 297 – 298. This damage led to, *inter alia*, cracking in the interior and exterior of the insureds' home due to shifting soil. *Id.* at 298. State Farm ultimately denied coverage, arguing on appeal that the earth-movement exclusion in the parties agreement "unambiguously exclude[d] any loss caused in any way by earth movement." *Id.* at 310. The insureds contended, *inter alia*, because the lightning directly struck their retaining wall, the earth-movement exclusion in the policy did not apply to their loss, and the earth movement exclusion of their insurance contract was ambiguous and that it only applied to certain situations (earthquakes and landslides). *Id.* at 308, 310. The court, analyzing insureds' cited precedent stated, " 'direct' [loss] means 'immediate' or 'proximate' and is not synonymous with 'physical contact.' " *Id.* at 310 (quoting *Bly v. Auto Owners Insurance Co.*, 437 So.2d 495, 496 (Ala. 1983)). Thus, Alabama precedent does not require a "direct loss," without more, to have a physical component, though the type of loss of property contemplated in policy must have been due to some immediate or proximate cause. But, this does not end the Court's inquiry.

The Alabama Supreme Court has required some tangible alteration or disturbance to property to demonstrate physicality in most contexts. *See Downs v. Lyles*, 41 So.3d 86, 92 (Ala. Civ. App. 2009) (finding physical trespass where appellant impermissibly traveled across, projected debris onto, and directed water onto appellee's property); *Town of Gurley v. M & N Materials, Inc.*, 143 So.3d 1, 13 (Ala. 2012) (inverse condemnation claim); *Hous. Auth. of the Birmingham Dist. v. Logan Props., Inc.*, 127 So.3d 1169, 1176 (Ala. 2012) (same). Similarly, the Alabama Supreme Court has found the mere presence of a pollutant in an area could not be reasonably understood to mean a "discharge, dispersal, release, or escape" – a physical act. *Porterfield v. Audobon Indem. Co.*, 856 So. 2d 289, 805 (Ala. 2002). Specifically, when confronting the issue of whether lead chips in paint constituted a pollutant, and whether the emission of such chips was a "discharge, dispersal, release, or escape" the court held the mere presence of the chips could not comprise a "discharge, dispersal, release, or escape," though the inhalation of such chips indicated a physical release from the walls holding them. *Porterfield*, 856 So. 2d at 805 – 806 (collecting cases).[3]

3 The Court is aware that the Alabama Supreme Court has recognized physical disturbance by acts which cause property to be less enjoyable or less accessible. *See, e.g., See Ala. Power Co. v. Guntersville*, 177 So. 332, 336 – 337 (Ala. 1937) (discussing cases where compensable physical injury to property was done where municipalities levelled sidewalks and removed homeowners' trees).

***7** Furthermore, the insurance treatise upon which Alabama courts frequently rely in insurance coverage disputes indicates a direct physical loss requires a tangible injury to property.[4] *See* COUCH ON INSURANCE 10A § 148:46 ("The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic

impact unaccompanied by a distinct, demonstrable, physical alteration of the property.").

4 For examples of Alabama courts' reliance on COUCH in various contexts, *see, e.g., Carolina Cas. Ins. Co. v. Williams*, 945 So.2d 1030, 1035 (Ala. 2006); *Allstate Ins. Co. v. Skelton*, 675 So.2d 377, 382 (Ala. 1996); *Int'l Surplus Lines Ins. Co. v. Assocs. Commercial Corp.*, 514 So.2d 1326, 1327 (Ala. 1987); *State Farm Fire & Cas. Co. v. Lambert*, 291 Ala. 645, 647, 285 So.2d 917, 917 (1973). Defendant also presented authority demonstrating this position in its Memorandum. (*See* Doc. 18, PageID.245).

Though Plaintiff maintains its inability to use its property constitutes a direct physical loss, the Court is not persuaded. Plaintiff's loss of usability did not result from an immediate occurrence which tangibly altered its property – the Order did not immediately cause some sort of tangible alteration to Plaintiff's office. Rather, Plaintiff was only temporarily precluded from performing routine medical procedures while the Order was in effect. Under Plaintiff's interpretation, possession carries the same meaning as usability; therefore, loss of possession is equivalent to the inability to use something. However, not every instance of possession leads to use. For instance, a person can possess a car but be unable to use it due to gas rationing ordered by the government. This type of argument has been attempted in this Circuit before and found unavailing. *See Northeast Georgia Heart Center, P.C. v. Phoenix Insurance Company*, 2014 WL 12480022, *1 (N.D. Ga. 2014) (applying Georgia law: "Without doubt, losing physical possession may qualify as a direct physical loss. Nonetheless, there is a difference between a loss of physical possession and a loss of use. This difference is critical because the policy covers only lost business income *caused by* direct physical loss. Even though plaintiff suffered a direct physical loss by returning the generator, that loss did not cause plaintiff's lost business income."). As one district court describes it, Plaintiff's argument here would "potentially make an insurer liable for the negative effects of operations changes resulting from any regulation or executive decree, such as a reduction in a space's maximum occupancy." *Henry's Louisiana Grill, Inc.*, 2020 WL 5938755, at *5.

Notably, several courts have recently decided that absent allegations of some tangible alteration to property, litigants have suffered no direct physical loss of property in other business interruption disputes arising consequent to COVID-19 closure orders. *See Malalube, LLC, v. Greenwich Ins. Co.*, 2020 WL 5051581, *8 (S.D. Fla., 2020) (applying Florida law: "Although the plaintiff in *Mama Jo's* failed to put forth any evidence that his cleaning claim constituted a direct physical loss, he at least alleged that there was a physical intrusion (i.e. dust and debris) into his restaurant. Plaintiff has done nothing similar in this case. Plaintiff merely claims that two Florida Emergency Orders closed his indoor dining. But, for the reasons already stated, this cannot state a claim because the loss must arise to actual damage."); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000*, 2020 WL 5791583, at *4 (M.D. Fla. 2020) (citing *Malaube*, 2020 WL 5051581, at *8) (applying Florida law: "[T]he action should be dismissed because the policy required direct physical loss or property damage and plaintiff had alleged 'merely [ ] economic losses—not anything tangible, actual, or physical.' "); *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, 2020 WL 5500221, at *4 (S.D. Cal. 2020) (applying California law); *Henry's Louisiana Grill, Inc., et al., v. Allied Insurance Company of America*, 2020 WL 5938755, *4 (N.D. Ga. 2020) (applying Georgia law: "This interpretation of the contractual language exceeds any reasonable bounds of possible construction, pushing the words individually and collectively beyond what any plain meaning can support.").

***8** The Court finds the guidance from Alabama courts, as well as those above, persuasive in this matter and concludes a reasonable insured would not understand a "direct physical loss of property" to have occurred as a consequence of the State's Order.

2. A reasonable insured would not understand the Second Order to constitute a "repair" under the policy.

Plaintiff next argues the "period of restoration" contained in the policy contemplates Plaintiff's inability to use its property as a "direct physical loss of property." (Doc. 24, PageID.296). Specifically, Plaintiff argues its property required "repair" because the Order rendered it unusable and the Second Order returned it to a "sound or healthy state." (*Id.* at PageID.297).

The Business Income and Extra Expense Endorsements in the policy provides, in relevant part, Defendant shall "pay for the actual loss" of Plaintiff's business income "due to the necessary 'suspension' of [its] 'operations' during the 'period of restoration' " and this "suspension" must have been caused by a "direct physical loss of property." (Doc. 1-2, PageID.56). The "period of restoration" is defined as "the date of direct physical loss ..." and "[e]nds the earlier of: (1) The

date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) The date when business is resumed at a new permanent location." (Doc. 1-2, PageID.51 – 52). This period of restoration "does not include any increased period required due to the enforcement of any law that: (a) Regulates the ... use ... of any property[.]". (Doc. 1-2, PageID.52).

It is apparent from the above that a "direct physical loss of property" contemplates the tangible alteration of property which would necessitate a party's absence to fix it or require the party to begin operations elsewhere. The "period of restoration" expressly assumes repair, rebuild or replacement of property. Read in context with "direct physical loss of property," a "period of restoration" can occur only by virtue of a repairable, rebuildable, or replaceable physical alteration of covered property. This begs the question: how can a statewide order which "required" Plaintiff to shutdown necessitate some sort of repair? In answer to this, Plaintiff argues a "repair" in certain contexts includes "restor[ing] [the property] to a sound or healthy state." (Doc. 24, PageID.296 – 297). But Plaintiff claims its property was not in a sound state only because it could not use its property. (Doc. 24, PageID.297). Plaintiff was not dispossessed of its property due to the Order, nor was there any tangible alteration to it. Plaintiff's inability to use its property was not caused by an unsound and or unhealthy condition of the property itself, which necessitated repair, rebuilding, or replacement.

Further, the Court is not persuaded that Plaintiff's interpretation of "repair" is one that would be shared by a reasonable insured. Rather, the meaning generally given to "repair" in Alabama and elsewhere indicates a reasonable insured would understand a "repair" to become necessary only upon a tangible alteration of property. *See* "REPAIR," Black's Law Dictionary (11th ed. 2019); *Pritchett v. State Farm Mut. Auto. Ins. Co.*, 834 So.2d 785, 791 (Ala. Civ. App. 2002) ("In the common usage, the word 'repair' means to fix by replacing or putting together what is broken, or, as the court in *Carlton v. Trinity Universal Ins. Co.*, [32 S.W.3d 454 (Tex. Ct. App. 2000)], stated, 'to bring back to good or useable condition.' *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 290 (Del. 2001)."); *Wildin v. Am. Family Mut. Ins. Co.*, 638 N.W.2d 87, 90 (Wis. 2001) ("The common and ordinary meaning of 'repair' is 'restore by replacing a part or putting together what is torn or broken.' ").

D. Plaintiff's request for a Declaratory Judgment fails because its breach of contract claim fails.

***9** Where a plaintiff's request for a declaratory judgment is premised on its underlying legal claims and those claims fail, as is the case here, its request for a declaratory judgment also fails. *See Sadeghian v. Univ. of S. Ala.*, 2020 U.S. Dist. LEXIS 29534, *38 (S.D. Ala. Feb. 21, 2020) (collecting cases). Because Plaintiff's underlying legal claims fails, so too does its request for a Declaratory Judgment.

CONCLUSION

Defendant Continental Insurance Company's Motion to Dismiss (Doc. 17) is granted. Plaintiff's Complaint is dismissed with prejudice.

DONE and ORDERED this 21st day of October, 2020.

All Citations

Slip Copy, 2020 WL 6163142

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UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

ORDER DENYING TRANSFER
AND DIRECTING ISSUANCE OF SHOW CAUSE ORDERS

Before the Panel:[*] There are two motions under 28 U.S.C. § 1407 to centralize pretrial proceedings in this litigation. The first motion is brought by plaintiffs in the two Eastern District of Pennsylvania actions listed on Schedule A (the Pennsylvania movants). The Pennsylvania movants seek centralization of eleven actions in the Eastern District of Pennsylvania. The second motion is brought by plaintiffs in seven actions pending in various districts (the Illinois movants).[1] The Illinois movants request centralization of fifteen actions (the eleven on the first motion and five others) in the Northern District of Illinois.[2] All fifteen actions, which are listed on Schedule A, assert declaratory judgment and/or breach of contract claims against plaintiffs' respective providers of commercial property insurance. Plaintiffs allege that these policies provide coverage for business interruption losses caused by the COVID-19 pandemic and the related government orders suspending, or severely curtailing, operations of non-essential businesses. In addition to the fifteen actions on the motions, the Panel has received notice of 263 related actions. Collectively, these actions are pending in 48 districts and name more than a hundred insurers.

Plaintiffs in more than 175 actions or related actions responded to the motions. Many of these plaintiffs support centralization in one of the two districts proposed by movants. Other plaintiffs suggest the Northern District of California, Southern District of Florida, the Western District of Missouri, the District of New Jersey, and the Western District of Washington as potential transferee districts for this litigation. Still other plaintiffs oppose centralization or ask to be excluded from any MDL.

Plaintiffs in more than thirty actions (some of which either support or oppose centralization

[*] Judges Karen K. Caldwell and David C. Norton took no part in the decision of this matter.

[1] These movants include plaintiffs in: Central District of California *Caribe Restaurant & Nightclub, Inc.*; Southern District of New York *Gio Pizzeria & Bar Hospitality, LLC*; Northern District of Ohio *Bridal Expressions LLC*; Southern District of Ohio *Troy Stacy Enterprises Inc.*; District of Oregon *Dakota Ventures, LLC*; Northern District of Texas *Berkseth-Rojas*; and Eastern District of Wisconsin *Rising Dough Inc.*

[2] A sixteenth action on the second motion was voluntarily dismissed.

in the first instance) propose that, instead of creating the "industry-wide" MDL requested by the movants, the Panel should centralize these insurance coverage actions on a state-by state, regional, or insurer-by-insurer basis. These proposals, which were raised for the first time in the parties' responses to the motions, encompass claims against Certain Underwriters at Lloyd's, London; Cincinnati Insurance Company; The Hartford; State Farm; and Westchester Surplus Lines/Chubb. These plaintiffs variously suggest ten districts for these narrower MDLs.

In total, thirty-two insurers or insurer-groups named as defendants in the related actions responded to the motions.[3] Unlike plaintiffs, the defendants uniformly oppose centralization. Several defendants, in their Notices of Presentation or Waiver of Oral Argument, indicated alternative support for one or more potential transferee districts. In addition to these defendants, one non-party insurer group and several *amici curiae* filed responses in opposition to centralization.

After considering the arguments of counsel,[4] we conclude that the industry-wide centralization requested by movants will not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation. The proponents of centralization identify three core common questions: (1) do the various government closure orders trigger coverage under the policies; (2) what constitutes "physical loss or damage" to the property; and (3) do any exclusions (particularly those related to viruses) apply. These questions, though, share only a superficial commonality. There is no common defendant in these actions—indeed, there are no true multi-defendant cases, as the actions involve either a single insurer or insurer-group (*i.e.*, related insurers operating under the same umbrella or sharing ownership interests). Thus, there is little potential for common discovery across the litigation. Furthermore, these cases involve different insurance policies with different coverages, conditions, exclusions, and policy language, purchased by different businesses in different industries located in different states. These differences will overwhelm any common factual questions.[5]

The proponents of centralization argue that the insurers use standardized forms. Even so,

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[3] Two responses by defendant insurers were submitted after the close of briefing and were not considered by the Panel. *See* Notices of Major Deficiency, MDL No. 2942 (J.P.M.L. July 24, 2020), ECF Nos. 755 & 756.

[4] In light of the concerns about the spread of COVID-19 virus (coronavirus), the Panel heard oral argument by videoconference at its hearing session of July 30, 2020. *See* Suppl. Notice of Hearing Session, MDL No. 2942 (J.P.M.L. July 14, 2020), ECF No. 692.

[5] *Cf. In re Hotel Industry Sex Trafficking Litig.*, 433 F. Supp. 3d 1353, 1356 (J.P.M.L. 2020) ("[E]ach action involves different alleged sex trafficking ventures, different hotel brands, different owners and employees, different geographic locales, different witnesses, different indicia of sex trafficking, and different time periods. Thus, unique issues concerning each plaintiff's sex trafficking allegations predominate in these actions. Indeed, there is no common or predominant defendant across all actions, further indicating a lack of common questions of fact.").

there are many such "standardized" forms in circulation, and any form used by a given insurer will have been modified in a unique way. While the policy language for business income and civil authority coverages may be very similar among the policies, seemingly minor differences in policy language could have significant impact on the scope of coverage.[6]

Moreover, the proposed MDL raises significant managerial and efficiency concerns. A transferee court would have to establish a pretrial structure to manage the hundreds of plaintiffs—many with disparate views of the litigation—and more than one hundred insurers. The court also would have to identify common policies with identical or sufficiently similar policy language and oversee discovery that likely will differ insurer-to-insurer. To say this litigation would result in a complicated MDL seems an understatement. Managing such a litigation would be an ambitious undertaking for any jurist, and implementing a pretrial structure that yields efficiencies will take time. As counsel emphasized during oral argument, however, time is of the essence in this litigation. Many plaintiffs are on the brink of bankruptcy as a result of business lost due to the COVID-19 pandemic and the government closure orders. An industry-wide MDL in this instance will not promote a quick resolution of these matters.

Put simply, the MDL that movants request entails very few common questions of fact, which are outweighed by the substantial convenience and efficiency challenges posed by managing a litigation involving the entire insurance industry. The proponents' arguments that these problems can be overcome are not persuasive. We therefore deny the motions for centralization.

The proposals for regional and state-based MDLs raised by some of the responding plaintiffs suffer from many of the same problems as the industry-wide motions. Although these MDLs would be smaller, they still would involve multiple defendants with different policies, coverages, exclusions, and endorsements. Any efficiencies with respect to common discovery and motion practice would be outweighed by the unique discovery and motion practice as to each insurer. We likewise deny these regional and state-based MDLs proposals.

In contrast, the arguments for insurer-specific MDLs are more persuasive. Such an MDL would be limited to a single insurer or group of related insurers and thus would not entail the managerial problems of an industry-wide MDL involving more than a hundred insurers. The actions are more likely to involve insurance policies utilizing the same language, endorsements, and exclusions. Thus, there is a significant possibility that the actions will share common discovery and

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[6] The Illinois movants' citation to the experience of the United Kingdom's Financial Conduct Authority (FCA) in reviewing property insurance policies is illustrative. The FCA, which operates under a unitary legal system, reviewed property insurance policies from eight different insurers and concluded that the policies issued in that one jurisdiction fell within seventeen different policy categories. *See* Baker Decl. ¶ 7, Ex. A to the Illinois Movants' Reply Br., MDL No. 2942 (J.P.M.L. Jun. 15, 2020), ECF No. 544-1. An industry-wide MDL, encompassing more than a hundred insurers and the laws of the fifty states, would entail far more differences. The example of the FCA—which is operating using stipulated facts—thus weighs *against* centralization.

pretrial motion practice. Moreover, centralization of these actions could eliminate inconsistent pretrial rulings with respect to the overlapping nationwide class claims that most of the insurers face. An insurer-specific MDL therefore could achieve the convenience and efficiency benefits envisioned by Section 1407.

That said, we will not attempt to create an insurer-specific MDL on the present record. The proposals for insurer-specific MDLs were made midway through the briefing on the industry-wide motions, and no motion for an insurer-specific MDL was filed. As a result, only a few insurers, and few plaintiffs other than the movants, responded to the insurer-specific MDL proposals, which themselves were often vague as to which actions would be included in a given MDL.[7] The Panel requires a better understanding of the factual commonalities and differences among these actions, as well as the efficiencies that may or may not be gained through centralization, before creating an insurer-specific MDL.

Instead, we will direct the Clerk of the Panel to issue orders with respect to actions naming four insurers or groups of related insurers—Certain Underwriters at Lloyd's, London; Cincinnati Insurance Company; the Hartford insurers;[8] and Society Insurance—directing the parties to show cause why those actions should not be centralized. *See* Panel Rule 8.1. With respect to these four insurers or insurer groups, centralization may be warranted to eliminate duplicative discovery and pretrial practice. Cognizant that delay should be avoided in this litigation to the extent possible, the due date for responses to the show cause orders will be expedited by one week to ensure that the Panel will be able to consider the matters at its next hearing session on September 24, 2020.

With respect to the actions in this litigation involving other insurers, centralization does not appear appropriate. There are alternatives to centralization available to minimize any duplication in pretrial proceedings, including informal cooperation and coordination of the actions. The parties also may seek to relate actions against a common insurer in a given district before one judge. Such alternatives appear practicable as to these insurers, given the limited number of actions and districts involved as to each.

IT IS THEREFORE ORDERED that the motions for centralization of the actions listed on Schedule A are denied.

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[7] In addition, many of the insurers are not named in any of the actions on the motions, but only in actions noticed as related to those motions. This potentially presents a procedural obstacle to any immediate centralization as to those insurers. *See* 28 U.S.C. § 1407(c) (requiring notice to the parties that centralization of the actions is contemplated).

[8] The Hartford insurers include: Hartford Financial Services Group, Inc.; Hartford Fire Insurance Company; Hartford Casualty Insurance Company; Hartford Underwriters Insurance Company; Sentinel Insurance Company Limited; and Twin City Fire Insurance Company. These six insurers filed a joint response to the motions. *See* Hartford's Interested Party Response at 1 & n.1, MDL No. 2942 (J.P.M.L. Jun. 5, 2020), ECF No. 425.

IT IS FURTHER ORDERED that the Clerk of the Panel shall issue a show cause order as to the actions listed on Schedule B. The show cause order shall be captioned "*In re: Certain Underwriters at Lloyd's, London, COVID-19 Business Interruption Protection Insurance Litigation*."

IT IS FURTHER ORDERED that the Clerk of the Panel shall issue a show cause order as to the actions listed on Schedule C. The show cause order shall be captioned "*In re: Cincinnati Insurance Company COVID-19 Business Interruption Protection Insurance Litigation*."

IT IS FURTHER ORDERED that the Clerk of the Panel shall issue a show cause order as to the actions listed on Schedule D. The show cause order shall be captioned "*In re: Hartford COVID-19 Business Interruption Protection Insurance Litigation*."

IT IS FURTHER ORDERED that the Clerk of the Panel shall issue a show cause order as to the actions listed on Schedule E. The show cause order shall be captioned "*In re: Society Insurance Company COVID-19 Business Interruption Protection Insurance Litigation*."

IT IS FURTHER ORDERED that responses to the above show cause orders shall be due on August 26, 2020, and replies on September 2, 2020.

PANEL ON MULTIDISTRICT LITIGATION

Ellen Segal Huvelle
Acting Chair

R. David Proctor
Nathaniel M. Gorton
Catherine D. Perry
Matthew F. Kennelly

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

SCHEDULE A

Northern District of Alabama

WAGNER SHOES LLC v. AUTO-OWNERS INSURANCE COMPANY, C.A. No. 7:20-00465

Central District of California

CARIBE RESTAURANT AND NIGHTCLUB, INC. v. TOPA INSURANCE COMPANY, C.A. No. 2:20-03570

Middle District of Florida

PRIME TIME SPORTS GRILL, INC. v. DTW 1991 UNDERWRITING LIMITED, C.A. No. 8:20-00771

Southern District of Florida

EL NOVILLO RESTAURANT, ET AL. v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL., C.A. No. 1:20-21525

Northern District of Illinois

BIG ONION TAVERN GROUP, LLC, ET AL. v. SOCIETY INSURANCE, INC., C.A. No. 1:20-02005
BILLY GOAT TAVERN I, INC., ET AL. v. SOCIETY INSURANCE, C.A. 1:20-02068
SANDY POINT DENTAL PC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 1:20-02160

Southern District of New York

GIO PIZZERIA & BAR HOSPITALITY, LLC, ET AL. v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NUMBERS ARP-74910-20 AND ARP-75209-20, C.A. No. 1:20-03107

Northern District of Ohio

BRIDAL EXPRESSIONS LLC v. OWNERS INSURANCE COMPANY, C.A. No. 1:20-00833

Southern District of Ohio

TROY STACY ENTERPRISES INC. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 1:20−00312

District of Oregon

DAKOTA VENTURES, LLC, ET AL. v. OREGON MUTUAL INSURANCE CO., C.A. No. 3:20−00630

Eastern District of Pennsylvania

LH DINING LLC v. ADMIRAL INDEMNITY COMPANY, C.A. No. 2:20−01869
NEWCHOPS RESTAURANT COMCAST LLC v. ADMIRAL INDEMNITY COMPANY, C.A. No. 2:20−01949

Northern District of Texas

BERKSETH−ROJAS DDS v. ASPEN AMERICAN INSURANCE COMPANY, C.A. No. 3:20−00948

Eastern District of Wisconsin

RISING DOUGH, INC., ET AL. v. SOCIETY INSURANCE, C.A. No. 2:20−00623

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

SCHEDULE B

Middle District of Florida

PRIME TIME SPORTS GRILL, INC. v. DTW 1991 UNDERWRITING LIMITED, C.A. No. 8:20−00771

Southern District of Florida

RUNWAY 84, INC. & RUNWAY 84 REALTY, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO CERTIFICATE NUMBER ARP–75203–20, C.A. No. 0:20–61161

EL NOVILLO RESTAURANT, ET AL. v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL., C.A. No. 1:20−21525

ATMA BEAUTY, INC. v. HDI GLOBAL SPECIALTY SE, ET AL., C.A. No. 1:20–21745

SUN CUISINE, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO CONTRACT NUMBER B0429BA1900350 UNDER COLLECTIVE CERTIFICATE ENDORSEMENT 350OR100802, C.A. No. 1:20-21827

SA PALM BEACH LLC v. CERTAIN UNDERWRITERS AT LLOYDS LONDON, ET AL., C.A. No. 9:20-80677

Central District of Illinois

RJH MANAGEMENT CORP. v. CERTAIN UNDERWRITERS AT LLOYDS, LONDON SUBSCRIBING TO POLICY CERTIFICATE NO. TNR 198538, C.A. No. 3:20-03143

Eastern District of Louisiana

STATION 6, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, C.A. No. 2:20–01371

District of New Jersey

PALM AND PINE VENTURES, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL., C.A. No. 3:20–08212

MDH GLOBAL, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL., C.A. No. 3:20–08214

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Southern District of New York

GIO PIZZERIA & BAR HOSPITALITY, LLC, ET AL. v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NUMBERS ARP-74910-20 AND ARP-75209-20, C.A. No. 1:20-03107

632 METACOM, INC. v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. XSZ146282, C.A. No. 1:20–03905

Eastern District of Pennsylvania

FIRE ISLAND RETREAT v. CERTAIN UNDERWRITERS AT LLOYDS, LONDON SUBSCRIBING TO POLICY NO. B050719MKSFL000081-00, C.A. No. 2:20–02312

INDEPENDENCE RESTAURANT GROUP, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, C.A. No. 2:20–02365

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

SCHEDULE C

Middle District of Alabama

EAGLE EYE OUTFITTERS, INC. v. THE CINCINNATI CASUALTY COMPANY, C.A. No. 1:20–00335
PEAR TREE GROUP, LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 3:20–00382
SNEAK & DAWDLE, LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 3:20–00383
AUBURN DEPOT LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 3:20–00384

Northern District of Alabama

HOMESTATE SEAFOOD LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 2:20–00649
SOUTHERN DENTAL BIRMINGHAM LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 2:20–00681

Northern District of Illinois

SANDY POINT DENTAL PC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 1:20–02160
3 SQUARES, LLC, ET AL. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 1:20–02690
DEREK SCOTT WILLIAMS PLLC, ET AL. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 1:20–02806

District of Kansas

PROMOTIONAL HEADWEAR INT'L v. THE CINCINNATI INSURANCE COMPANY, INC., C.A. No. 2:20–02211

Western District of Missouri

STUDIO 417, INC. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 6:20–03127

Southern District of Ohio

TROY STACY ENTERPRISES INC. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 1:20–00312
TASTE OF BELGIUM LLC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 1:20–00357
SWEARINGEN SMILES LLC, ET AL. v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 1:20–00517

Eastern District of Pennsylvania

MILKBOY CENTER CITY LLC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 2:20–02036
STONE SOUP, INC. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 2:20–02614

Western District of Pennsylvania

HIRSCHFIELD-LOUIK v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 2:20–00816

Southern District of West Virginia

UNCORK AND CREATE LLC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 2:20–00401

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

SCHEDULE D

Northern District of Alabama

PURE FITNESS LLC v. THE HARTFORD FINANCIAL SERVICES GROUP INC., ET AL., C.A. No. 2:20–00775

District of Arizona

FORFEX LLC v. HARTFORD UNDERWRITERS INSURANCE COMPANY, ET AL., C.A. No. 2:20–01068
JDR ENTERPRISES LLC v. SENTINEL INSURANCE COMPANY LIMITED, ET AL., C.A. No. 4:20–00270

Central District of California

GERAGOS & GERAGOS ENGINE COMPANY NO. 28, LLC v. HARTFORD FIRE INSURANCE COMPANY, ET AL., C.A. No. 2:20–04647
PATRICK AND GEOFF INVESTMENTS INC. v. THE HARTFORD, ET AL., C.A. No. 2:20–05140
ROUNDIN3RD SPORTS BAR LLC v. THE HARTFORD, ET AL., C.A. No. 2:20–05159
R3 HOSPITALITY GROUP, LLC v. THE HARTFORD, ET AL., C.A. No. 5:20–01182

Northern District of California

PROTEGE RESTAURANT PARTNERS LLC v. SENTINEL INSURANCE COMPANY, LIMITED, C.A. No. 5:20–03674

Southern District of California

PIGMENT INC. v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00794

District of Connecticut

LITTLE STARS CORPORATION v. HARTFORD UNDERWRITERS INS. CO., ET AL., C.A. No. 3:20–00609
CONSULTING ADVANTAGE INC. v. HARTFORD FIRE INSURANCE COMPANY, ET AL., C.A. No. 3:20–00610

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RENCANA LLC, ET AL. v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00611
COSMETIC LASER, INC. v. TWIN CITY FIRE INSURANCE COMPANY, C.A. No. 3:20–00638
DR. JEFFREY MILTON, DDS, INC. v. HARTFORD CASUALTY INSURANCE COMPANY, C.A. No. 3:20–00640
ONE40 BEAUTY LOUNGE, LLC v. SENTINEL INS. CO., LTD., C.A. No. 3:20–00643
PATS v. HARTFORD FIRE INSURANCE COMPANY, ET AL., C.A. No. 3:20–00697
DOTEXAMDR PLLC v. HARTFORD FIRE INS. CO., ET AL., C.A. No. 3:20–00698
KENNEDY HODGES & ASSOCIATES LTD., LLP, ET AL. v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00852
LEAL, INC. v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00917
SA HOSPITALITY GROUP, LLC, ET AL. v. HARTFORD FIRE INSURANCE COMPANY, C.A. No. 3:20–01033

District of District of Columbia

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United States District Court, S.D. Florida.

MALAUBE, LLC, Plaintiff,

v.

GREENWICH INSURANCE COMPANY, Defendant.

Case No. 20-22615-Civ-WILLIAMS/TORRES

|

Signed 08/26/2020

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REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO DISMISS

EDWIN G. TORRES, United States Magistrate Judge

***1** This matter is before the Court on Greenwich Insurance Company's ("Defendant" or "Greenwich") motion to dismiss against Malaube, LLC's ("Plaintiff") amended complaint. [D.E. 10]. Plaintiff responded to Defendant's motion on July 30, 2020 [D.E. 14] to which Defendant replied on August 6, 2020. [D.E. 15]. Therefore, Defendant's motion is now ripe for disposition. After careful consideration of the motion, response, reply, relevant authority, and for the reasons discussed below, Defendant's motion to dismiss should be **GRANTED**.[1]

1 On August 7, 2020, the Honorable Kathleen Williams referred Defendant's motion to dismiss to the undersigned Magistrate Judge for disposition. [D.E. 16].

I. BACKGROUND

Plaintiff filed this action on April 23, 2020 [D.E.1] in Florida state court, seeking to recover insurance benefits for the loss of business income as a result of government shutdowns in response to the COVID-19 pandemic.[2] On September 25, 2019, Greenwich entered into an insurance contract with Plaintiff with the latter agreeing to make payments in exchange for Greenwich's promise to indemnify for losses including business income at Plaintiff's restaurant.[3] Plaintiff alleges that the insurance policy is in full effect, providing business income and personal property insurance from September 25, 2019 to September 25, 2020.

2 Defendant removed this case to federal court on June 24, 2020 based on the Court's diversity jurisdiction. Plaintiff is a citizen of Florida and Greenwich is a citizen of Delaware and Connecticut.

3 The restaurant serves Italian food at 5748 Sunset Drive, Miami, FL 33143.

On March 17, 2020, Miami-Dade Mayor Carlos Gimenez signed an order to close all restaurants for indoor dining and only permitted takeout and delivery as a result of the COVID-19 pandemic. Florida Governor, Ron DeSantis, then issued an executive order on March 20, 2020 that closed all onsite dining at restaurants.[4] Plaintiff claims that these orders resulted in significant business losses for Plaintiff's restaurant and that Greenwich was obligated to pay because of government orders that prohibited access to indoor dining. When Plaintiff demanded payment for these losses, Greenwich denied Plaintiff's claim because Plaintiff did not experience any physical loss or damage to the insured property. Plaintiff now fears that, with Greenwich's improper denial of its insurance benefits, its restaurant may be forced to close permanently. Therefore, Plaintiff seeks a declaratory judgment that the insurance policy provides coverage for the losses stemming from the government shutdowns including costs, prejudgment interest, and attorney's fees.

4 We refer to these collectively as the Florida Emergency Orders.

II. APPLICABLE PRINCIPLES AND LAW

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a claim for failure to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Conclusory

statements, assertions or labels will not survive a 12(b)(6) motion to dismiss. *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; *see also Edwards v. Prime, Inc.*, 602 F.3d 1276, 1291 (11th Cir. 2010) (setting forth the plausibility standard). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Twombly*, 550 U.S. at 555 (citation omitted). Additionally:

> ***2** Although it must accept well-pled facts as true, the court is not required to accept a plaintiff's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (noting "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). In evaluating the sufficiency of a plaintiff's pleadings, we make reasonable inferences in Plaintiff's favor, "but we are not required to draw plaintiff's inference." *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005). Similarly, "unwarranted deductions of fact" in a complaint are not admitted as true for the purpose of testing the sufficiency of plaintiff's allegations. *Id.*; *see also Iqbal*, 556 U.S. at 681 (stating conclusory allegations are "not entitled to be assumed true").

Sinaltrainal v. Coca-Cola, 578 F.3d 1252, 1260 (11th Cir. 2009), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, 566 U.S. 449, 453 n.2, (2012). The Eleventh Circuit has endorsed "a 'two-pronged approach' in applying these principles: 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, 'assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.' " *American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 679).

III. ANALYSIS

Defendant seeks to dismiss Plaintiff's amended complaint for three independent reasons.[5] First, Defendant argues that the insurance policy was never triggered because it excludes any coverage for viruses, bacteria, or other microorganisms that induce physical distress, illness, or disease. Second, Defendant claims that there is no insurance coverage because Plaintiff failed to allege that it suffered any direct physical loss or damage to property. And third, Defendant reasons that the two Florida Emergency Orders never prohibited Plaintiff from accessing the insured property – a prerequisite that must be satisfied before insurance coverage can apply. Before we consider the merits, we must consider the general principles governing the interpretation of insurance contracts under Florida law. These principles are necessary, as they will inform the analysis that follows.

5 In determining whether Plaintiff's amended complaint fails to state a claim, we may consider the language of the policy itself because exhibits are part of a pleading "for all purposes." Fed. R. Civ. P. 10(c); *see also Solis–Ramirez v. U.S. Dep't of Justice,* 758 F.2d 1426, 1430 (11th Cir. 1985) ("Under Rule 10(c) Federal Rules of Civil Procedure, such attachments are considered part of the pleadings for all purposes, including a Rule 12(b)(6) motion."). To the extent the complaint's allegations conflict with the exhibit, the exhibit must control. *See Hoefling v. City of Miami*, 811 F.3d 1271, 1277 (11th Cir. 2016) ("A district court can generally consider exhibits attached to a complaint in ruling on a motion to dismiss, and if the allegations of the complaint about a particular exhibit conflict with the contents of the exhibit itself, the exhibit controls.") (citing *Crenshaw v. Lister,* 556 F.3d 1283, 1292 (11th Cir. 2009)).

A. General Principles of Insurance Contracts

"Under Florida law, an insurance policy is treated like a contract, and therefore ordinary contract principles govern the interpretation and construction of such a policy." *Pac. Emp'rs Ins. Co. v. Wausau Bus. Ins. Co.*, 2007 WL 2900452, at *4 (M.D. Fla. Oct. 2, 2007) (citing *Graber v. Clarendon Nat'l Ins. Co.*, 819 So. 2d 840, 842 (Fla. 4th DCA 2002)). The interpretation of an insurance contract – including the question of whether an insurance provision is ambiguous – is a question of law. *See id.*; *Travelers Indem. Co. of Illinois v. Hutson*, 847 So. 2d 1113 (Fla. 1st DCA 2003) (stating that whether an ambiguity exists in a contract is a matter of law).

***3** In addition, "[u]nder Florida law, insurance contracts are construed according to their plain meaning." *Garcia v. Fed. Ins. Co.*, 473 F.3d 1131, 1135 (11th Cir. 2006) (quoting *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005)). The "terms of an insurance policy should be taken and understood in their ordinary sense and the policy should receive a reasonable, practical and sensible interpretation consistent with the intent of the parties-not a strained, forced or unrealistic construction." *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 736 (Fla. 2002) (quoting *Gen. Accident Fire & Life Assurance Corp. v. Liberty Mut. Ins. Co.*, 260 So. 2d 249 (Fla. 4th DCA 1972));

see also Gilmore v. St. Paul Fire & Marine Ins., 708 So. 2d 679, 680 (Fla. 1st DCA 1998) ("The language of a policy should be read in common with other policy provisions to accomplish the intent of the parties.").

However, if there is more than one reasonable interpretation of an insurance policy, an ambiguity exists and it "should be construed against the insurer." *Pac. Emp'rs Ins.*, 2007 WL 2900452, at *4 (citing *Purrelli v. State Farm Fire & Cas. Co.,* 698 So. 2d 618, 620 (Fla. 2d DCA 1997)). Where an interpretation "involve[s] exclusions to insurance contracts, the rule is even clearer in favor of strict construction against the insurer: exclusionary provisions which are ambiguous or otherwise susceptible to more than one meaning must be construed in favor of the insured." *Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 412 F.3d 1224, 1228 (11th Cir. 2005) (quoting *State Farm Mut. Auto. Ins. Co. v. Pridgen,* 498 So. 2d 1245, 1248 (Fla. 1986)). An insurance policy must, of course, be ambiguous before it is subject to these rules. *See Taurus Holdings, Inc.*, 913 So. 2d at 532 ("Although ambiguous provisions are construed in favor of coverage, to allow for such a construction the provision must actually be ambiguous."). An ambiguous policy must, for example, have a genuine inconsistency, uncertainty, or ambiguity in meaning after the court has applied the ordinary rules of construction. *See Deni Assocs. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.*,711 So. 2d 1135 (Fla. 1998). "Just because an operative term is not defined, it does not necessarily mean that the term is ambiguous." *Amerisure Mut. Ins. Co. v. Am. Cutting & Drilling Co.*, 2009 WL 700246, at *4 (S.D. Fla. Mar. 17, 2009) (citing *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.,* 845 So. 2d 161, 166 (Fla. 2003)).

On the other hand, "if a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision." *Hagen v. Aetna Cas. & Sur. Co.,* 675 So. 2d 963, 965 (Fla. 5th DCA 1996). Ultimately "in the absence of some ambiguity, the intent of the parties to a written contract must be ascertained from the words used in the contract, without resort to extrinsic evidence." *Fireman's Fund Ins. Co. v. Tropical Shipping & Const. Co.*, 254 F.3d 987, 1003 (11th Cir. 2001) (quoting *Lee v. Montgomery*, 624 So. 2d 850, 851 (Fla. 1st DCA 1993)).

When the parties dispute coverage and exclusions under a policy, a burden-shifting framework applies. "A person seeking to recover on an insurance policy has the burden of proving a loss from causes within the terms of the policy[,] and if such proof of loss is made within the contract of insurance, the burden is on the insurer to establish that the loss arose from a cause that is excepted from the policy." *U.S. Liab. Ins. Co. v. Bove,* 347 So. 2d 678, 680 (Fla. 3d DCA 1977) (alteration added; citations omitted). If the insurer is able to establish that an exclusion applies, the then burden shifts back to the insured to prove an exception to the exclusion. *See id.*; *see also IDC Const., LLC. v. Admiral Ins. Co.*, 339 F. Supp. 2d 1342, 1348 (S.D. Fla. 2004) ("When an insurer relies on an exclusion to deny coverage, it has the burden of demonstrating that the allegations in the complaint are cast solely and entirely within the policy exclusions and are subject to no other reasonable interpretation."). That is, "if there is an exception to the exclusion, the burden once again is placed on the insured to demonstrate the exception to the exclusion." *East Fla. Hauling, Inc. v. Lexington Ins. Co.*, 913 So. 2d 673, 678 (Fla. 3d DCA 2005) (citing *LaFarge Corp. v. Travelers Indem. Co.,* 118 F.3d 1511, 1516 (11th Cir. 1997)).

B. The Business Income Exclusion

***4** Having set forth the relevant legal principles, Defendant's strongest argument is that Plaintiff's amended complaint fails to state a claim because the insurance policy only provides coverage for the actual loss of business income if a *direct physical loss or damage* to the property causes a suspension to Plaintiff's operations:

> 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.

[D.E. 5-1 at 53]. The policy further provides coverage for extra expenses during a period of restoration, but that also only applies if the insured property suffers direct physical loss or damage:

> Extra Expense Coverage is provided at the premises described in the Declarations only if the Declarations show that Business Income Coverage applies at that premises.
>
> Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been on direct physical loss or damage to property caused by or resulting from a Coverage Cause of Loss.

Id. at 53.

Defendant argues that Plaintiff has failed to state a claim because there are no allegations that the insured property has ever suffered a direct physical loss or damage. Instead, Plaintiff alleges that two Florida Emergency Orders limited the full use of its restaurant and that, as a result, Plaintiff suffered significant businesses losses. [D.E. 5 at ¶¶ 13-14 ("On March 17, 2020, Miami-Dade Mayor, Carlos Gimenez, signed an order to close all restaurants for dining in and only permitting takeout and delivery. On March 20, 2020, the Florida Governor, Ron DeSantis, issued an executive order closing all onsite dining at restaurants")]. Defendant also states that the amended complaint concedes that the Florida Emergency Orders were issued in response to the COVID-19 pandemic and entirely unrelated to any physical loss or damage to Plaintiff's property. *See id.* at 18 ("The Government Shutdowns that interfered with [Plaintiff"] access to its business came as a result of the COVID-19 pandemic."). Because Plaintiff's allegations seek coverage for pure economic losses stemming with no connection to any physical loss or damage, Defendant reasons that Plaintiff's amended complaint must be dismissed.

Plaintiff's response is that there is an ongoing debate in both state and federal courts on the meaning of "direct physical loss" and "direct physical damage." Plaintiff contends, for example, that the use of the "or" in the phrase "direct physical loss or damage" suggests that the two terms are not the same, and that they must be distinct. If the terms were the same, Plaintiff believes that it would render some component of the insurance policy meaningless and undermine a fundamental rule of Florida contract law. *See, e.g.*, *Westport Ins. Corp. v. Tuskegee Newspapers, Inc.*, 402 F.3d 1161, 1166 (11th Cir. 2005) ("[A] court will attempt to give meaning and effect, if possible, to every word and phrase in the contract, ... and a construction which neutralizes any provision of a contract should never be adopted if the contract can be so construed as to give effect to all the provisions.") (quoting *J. Appleman, Insurance Law and Practice* § 7383 (1981)).

***5** Plaintiff also states that the Florida Emergency Orders caused a direct physical loss because they forced Plaintiff to close its indoor dining to mitigate the spread of COVID-19. As support, Plaintiff references several state and federal court opinions – some of which date back to the 1970s – with a contention that these are the "better reasoned cases" in the ongoing debate and that they are consistent with Florida law. Plaintiff then asserts, with a reference to several other cases, that the inability to use the intended purpose of a business constitutes a direct physical loss because Plaintiff had no option other than to close the indoor dining section of its restaurant. Thus, Plaintiff equates the closure of its indoor dining to a physical loss because the business could no longer operate for its intended purpose.

To begin, Plaintiff's response is, in many respects, unhelpful because it is conclusory and fails to put forth any substantive reasons in support of its position. Plaintiff makes assertions, for example, that physical damage is different from physical loss and then follows that statement with a string cite of parentheticals with no explanation as to how any of the cases are relevant. Plaintiff complicates matters further when it references cases, some of which are decades old, across the country (including Michigan, Minnesota, and California) but then fails to offer any analysis whatsoever. Plaintiff just leaves it for the Court to examine these cases, and to do the work that Plaintiff should have done in the first place. That is, Plaintiff invites the Court to develop its own argument and determine which of these cases (1) are relevant to Florida law, (2) are applicable to the insurance policy in this case, (3) offers a persuasive distinction between physical loss and damage, and (4) are analogous to the partial closure of a business. Hence, Plaintiff's response is largely unpersuasive. *See United States Liab. Ins. Co. v. Bove*, 347 So. 2d 678, 680 (Fla. 3rd DCA 1977) (stating that a party claiming coverage has the burden of proof to establish that coverage exists).

Putting aside this problem, Plaintiff argues that physical loss does not require structural alteration and that a property's inability to operate with its intended purpose (i.e. the operation of both its indoor and outdoor dining sections) falls within the insurance policy's coverage. The policy does not define "physical loss" or "physical damage." However, "[t]he mere failure to provide a definition of a term involving coverage does not render the term ambiguous." *Those Certain Underwriters at Lloyd's London v. Karma Korner, LLC*, 2011 WL 1150466, at *2 (M.D. Fla. 2011) (citation omitted). When a policy does not define a term, the plain and generally accepted meaning should be applied. *See Evanston Ins. Co. v. S & Q Prop. Inv.*, LLC, 2012 WL 4855537, at *2 (S.D. Fla. 2012).

Defendant argues that, under the plain meaning of the word "physical", Plaintiff has not alleged coverage for any loss because, by definition, the policy excludes losses that are intangible. *See, e.g.*, 10A *Couch On Insurance* § 148.46 (3d Ed. 2019) ("[T]he requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held

to exclude losses that are intangible or incorporeal, and, thereby to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property."). This is persuasive, in some respects, because courts in our district have found that "[a] direct physical loss 'contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.' " *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) (quoting *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010)), *aff'd*, 2020 WL 4782369 (11th Cir. Aug. 18, 2020).

***6** While neither party cited a binding decision on the meaning of "direct physical loss" or "direct physical damage" under Florida law, a case that addresses many of the arguments presented is a district court's recent decision in *Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385, at *4 (W.D. Mo. Aug. 12, 2020). There, the plaintiffs purchased insurance policies for their hair salons and restaurants. The policies provided coverage for physical losses or physical damages, and the plaintiffs argued that they should recover the insurance proceeds as a result of the Covid-19 pandemic. The defendants moved to dismiss because – with the policies requiring either a direct physical loss or damage – the plaintiffs could not recover unless there was an actual, tangible, permanent, or physical alteration to the insured properties. The district court rejected that argument, however, because "loss" and "damage" could not be conflated with the "or" separated between them. Instead, the court had to "give meaning to both terms," to avoid the other from being superfluous. *Studio 417, Inc.*, 2020 WL 4692385, at *5 (citing *Nautilus Grp., Inc. v. Allianz Global Risks US*, 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")).

The district court then referenced several decisions where courts have recognized that, absent a physical alteration, a physical loss may occur when a property is uninhabitable or substantially unusable for its intended purpose. *Studio 417, Inc.*, 2020 WL 4692385, at *5 (citing *Port Auth. of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (affirming the denial of coverage but recognizing that "[w]hen the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct [physical] loss to its owner"); *Prudential Prop. & Cas. Ins. Co. v. Lilliard-Roberts*, 2002 WL 31495830, at * 9 (D. Or. June 18, 2002) (citing case law for the proposition that "the inability to inhabit a building [is] a 'direct, physical loss' covered by insurance"); *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) ("We have previously held that direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way.")); *see also Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 509 (1998) (holding policyholders to suffer a "direct physical loss" when their homes were rendered uninhabitable due to threat of rockfall); *W. Fire Ins. Co. v. First Presbyterian Church,* 165 Colo. 34, 437 P.2d 52, 55 (1968) (holding that the policyholder suffered "direct physical loss" when "the accumulation of gasoline around and under the [building caused] the premises to become so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous").

The court also acknowledged that there were cases where an actual alteration was required to show a "physical loss," but distinguished those on the basis that they were, for the most part, decided on a motion for summary judgment, factually dissimilar, or non-binding. *Id.* (citing *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006)(affirming the denial of insurance coverage on a motion for summary judgment and under Minnesota law)); *Mama Jo's, Inc.*, 2018 WL 3412974, at *8 (granting summary judgment in favor of the insurance company because the plaintiff could not "show that there was any suspension of operations caused by 'physical damage.' ") (citing *Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co. of Am.*, 835 F.2d 812, 814 (11th Cir. 1988)) ("[R]ecovery is intended when the loss is due to inability to use the premises where the damage occurs.").[6]

6 In *Source Food*, the insured's beef was not allowed to cross from Canada into the United States because of an embargo related to mad cow disease. The insured was therefore unable to fill orders and had to find a new supplier. The insured sought coverage based on a provision requiring "direct physical loss to property," but the district court denied coverage and the Eighth Circuit affirmed, explaining that:

> Although Source Food's beef product in the truck could not be transported to the United States due to the closing of the border to Canadian beef products, the beef product on the truck was not—as Source Foods

> concedes—physically contaminated or damaged in any manner. To characterize Source Food's inability to transport its truckload of beef product across the border and sell the beef product in the United States as direct physical loss to property would render the word 'physical' meaningless.
>
> *Source Food Tech., Inc.*, 465 F.3d at 838.

***7** In light of these decisions, the district court denied the defendant's motion to dismiss because the plaintiffs alleged that COVID-19 was a highly contagious virus that was *physically present* in viral fluid particles and deposited on surfaces and objects. The plaintiffs further alleged that the physical substance was on the premises and caused them to cease or suspend operations. That is, "[r]egardless of the allegations in ... other cases, Plaintiffs ... plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable." *Studio 417, Inc.*, 2020 WL 4692385, at *6. And that was "enough to survive a motion to dismiss." *Id.*

This case is materially different because Plaintiff has not alleged any physical harm. There is no allegation, for example, that COVID-19 was physically present on the premises. Instead, Plaintiff only alleges that two Florida Emergency Orders forced the closure of its restaurant. And, as stated earlier, courts have found this to be insufficient to state a claim because there must be some allegation of actual harm:

> The critical policy language here—"direct physical loss or damage"—similarly, and unambiguously, requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage. [Plaintiff] simply cannot show any such loss or damage to the 40 Wall Street Building as a result of either (1) its inability to access its office from October 29 to November 3, 2012, or (2) Con Ed's decision to shut off the power to the Bowling Green network. The words "direct" and "physical," which modify the phrase "loss or damage," ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure.
>
> *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014).

Plaintiff's allegations are insufficient to state a claim for an entirely separate reason because, when we examine the language of the insurance policy, "direct physical" modifies both "loss" and "damage." That means that any "interruption in business must be caused by some *physical problem* with the covered property ... which must be caused by a 'covered cause of loss.' " *Philadelphia Parking Authority v. Federal Ins. Co.*, 385 F. Supp. 2d 280, 288 (S.D.N.Y. 2005); *see also United Airlines, Inc. v. Ins. Co. of State of Pa.*, 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005), *aff'd* 439 F.3d 128 (2d Cir. 2006) ("The inclusion of the modifier 'physical' before 'damages' ... supports [defendant's] position that physical damage is required before business interruption coverage is paid.").

Florida's appellate courts are in agreement with this interpretation. The Third District has found, for instance, that a "loss" constitutes a diminution of value and that, with the modifiers "direct" and "physical," the alleged damage *must be actual*:

> A "loss" is the diminution of value of something, and in this case, the 'something' is the insureds' house or personal property. Loss, *Black's Law Dictionary* (10th ed. 2014). "Direct" and "physical" modify loss and impose the requirement that the damage be actual. Examining the plain language of the insurance policy in this case, it is clear that the failure of the drain pipe to perform its function constituted a "direct" and "physical" loss to the property within the meaning of the policy.
>
> *Homeowners Choice Prop. & Cas. v. Miguel Maspons*, 211 So. 3d 1067, 1069 (Fla. 3rd DCA 2017); *see also Vazquez v. Citizens Prop. Ins. Corp.*, 2020 WL 1950831, at *3 (Fla. 3rd DCA Mar. 18, 2020) ("Consistent with this plain meaning, the trial court determined that the 'insured loss' is the property that was actually damaged."); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, 1999 WL 619100, at *7 (D. Or. Aug. 4, 1999) (holding that a policyholder could not recover under a policy requiring "physical loss" unless the claimed mold physically and demonstrably damaged the insured property); *MRI Healthcare Ctr. of Glendale, Inc.*, 187 Cal. App. 4th at 779 ("A direct physical loss contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.") (internal quotation marks and citation omitted); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App. 3d 23, 42 (Ohio Ct. App. 2008).

***8** The Eleventh Circuit's decision in *Mama Jo's Inc. v. Sparta Ins. Co.*, 2020 WL 4782369, at *1 (11th Cir. Aug. 18, 2020), is also consistent with our interpretation of Florida law. There, the plaintiff owned and operated a restaurant and, from December 2013 until June 2015,

there was roadway construction in its general vicinity. The construction generated dust and debris, requiring the plaintiff to perform daily cleanings. Although the restaurant was open every day during the roadwork, customer traffic decreased and the business suffered an economic loss. The plaintiff was insured under a policy, which included coverage for loss of business. This policy covered "direct physical loss of or damage to Covered Property ... caused by or resulting from any Covered Cause of Loss." *Id.* at *1 (citation and quotation marks omitted). The plaintiff submitted a claim to the insurer on the basis that dust and debris caused a loss in business. The insurer denied that claim because the proof of loss form failed to reflect the existence of any physical damage (and it was questionable whether a direct physical loss occurred). Thus, the insurer concluded that plaintiff's claim was not covered under the policy.

After finding no error in the district court's decision to exclude several of the plaintiff's experts, the Eleventh Circuit found that the plaintiff failed to show any evidence of direct physical loss or damage. The plaintiff alleged that his insurance claim had two components: one for cleaning the restaurant and another for the loss of business income. In determining whether coverage existed, the Court looked to the same Florida decisions we referenced above and found that "direct physical loss" is defined as a diminution in value and that the modifiers "direct" and "physical" "imposed the requirement that the damage be actual." *Id.* (citing *Homeowners Choice Prop. & Cas.*, 211 So. 3d at 1069; *Vazquez*, 2020 WL 1950831, at *3).

The Court then examined whether coverage existed for the cleaning claim because the plaintiff's public adjuster testified that cleaning and painting was all that was required. In fact, there was no need for the removal or replacement of any items during the construction. The Eleventh Circuit found that, based on the evidence that the district court considered, the cleaning claim did not constitute a direct physical loss because these expenses are merely economic losses. *Id.* at *8 ("We conclude that the district court correctly granted summary judgment on Berries' cleaning claim because, under Florida law, an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.' ") (citing *Maspons*, 211 So. 3d at 1069 (recognizing that "damage [must] be actual"); *Vazquez*, 2020 WL 1950831, at *3 (same)); *see also Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 573 (6th Cir. 2012) ("[C]leaning ... expenses ... are not tangible, physical losses, but economic losses."); *MRI Healthcare Ctr. of Glendale, Inc.*, 187 Cal. App. 4th at 779 ("A direct physical loss 'contemplates an actual change in insured property."); *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 307 (2003) (same).

The Eleventh Circuit also agreed with the district court, with respect to the business loss claim, because that too required that a suspension of operations be caused by direct physical loss or damage to the property. Yet, the plaintiff failed to put forward any evidence that it suffered a direct physical loss or damage during the policy period. And in the absence of any evidence of actual damage, the Eleventh Circuit concluded that the district court was correct in granting the insurer's motion for summary judgment.

When comparing *Mama Jo's* to the allegations in this case, Plaintiff's allegations are far weaker. Although the plaintiff in *Mama Jo's* failed to put forth any evidence that his cleaning claim constituted a direct physical loss, he at least alleged that there was a physical intrusion (i.e. dust and debris) into his restaurant. Plaintiff has done nothing similar in this case. Plaintiff merely claims that two Florida Emergency Orders closed his indoor dining. But, for the reasons already stated, this cannot state a claim because the loss must arise to actual damage. And it is not plausible how two government orders meet that threshold when the restaurant merely suffered economic losses – not anything tangible, actual, or physical.

***9** As a last ditch effort, Plaintiff suggests that we should adopt a more expansive definition of "direct physical loss or damage," so that coverage could apply if the property is either uninhabitable or substantially unusable. *See, e.g.*, *Port Auth. of New York & New Jersey*, 311 F.3d at 236 ("When the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner."). Assuming we were inclined to ignore both Eleventh Circuit and Florida precedent, Plaintiff still fails to state a claim because – even under an expanded definition – there are no allegations that the restaurant was uninhabitable or substantially unusable. Plaintiff only alleges that the government forced it to close its indoor dining to contain the spread of COVID-19. The government permitted Plaintiff to continue its takeout and delivery services. While Plaintiff never makes clear whether it undertook either of these options, the government never made the restaurant uninhabitable or substantially unusable. Therefore, under no definition of "direct physical loss or damage" has Plaintiff stated a claim where coverage exists under this insurance policy.

Although unnecessary to the disposition of the motion to dismiss, other provisions of the insurance policy support the same interpretation. Take, for instance, the "Business Income" and "Extra Expense" provisions where it provides coverage for Plaintiff's operations during a "period of restoration." [D.E. 5-1 at 53]. A "period of restoration" is defined in the policy as beginning "(1) 72 hours after the time of direct physical loss or damage for Business Income Coverage; or (2) [i]mmediately after the time of direct physical loss or damage for Extra Expenses Coverage[.]" *Id.* at 61. The policy then states that this "period of restoration" "[e]nds on the earlier of (1) [t]he date when the property at the described premises should be *repaired, rebuilt or replaced* with reasonable speed and similar quality; or (2) [t]he date when business is resumed at a new permanent location." *Id.* (emphasis added).

"The words 'repair' and 'replace' contemplate physical damage to the insured premises as opposed to loss of use of it." *Newman Myers Kreines Gross Harris, P.C.*, 17 F. Supp. 3d at 332 (*United Airlines,* 385 F. Supp. 2d at 349 (policy language limiting coverage "for only such length of time [needed] to rebuild, repair or replace such part of the Insured Location(s) as has been damaged or destroyed" supports the notion that "physical damage is required before business interruption coverage is paid"); *Philadelphia Parking Auth.,* 385 F. Supp. 2d at 287 (" 'Rebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature.")). This means that, if we construe "direct physical loss or damage" to require actual harm, it gives effect to the other provisions in the policy. And that is exactly what Florida law requires us to do so that no section of the insurance policy is left meaningless. *See Aucilla Area Solid Waste Admin. v. Madison Cty.*, 890 So. 2d 415, 416–17 (Fla. 1st DCA 2004) ("Pursuant to the principles of contract construction, we must construe the provisions of a contract in conjunction with one another so as to give reasonable meaning and effect to all of the provisions.") (citing *Hardwick Properties, Inc. v. Newbern,* 711 So. 2d 35, 40–41 (Fla. 1st DCA 1998)). And making matters worse, the policy further provides that the period of restoration "does not include any increased period required due to the enforcement of any ordinance or law that ... [r]egulates the construction, *use* or repair ... of any property[.]" [D.E. 5-1 at 61]. Thus, if there was any lingering doubt on whether a loss of use for pure economic reasons could be recoverable under the policy, the other provisions of the policy put that uncertainty to bed. Accordingly, Defendant's motion to dismiss should be **GRANTED**.

IV. CONCLUSION

For the foregoing reasons, the Court **RECOMMENDS** that Defendant's motion to dismiss be **GRANTED**. If viable under Rule 11, any amended complaint should be filed within (14) fourteen days from the date the District Judge adopts this Report and Recommendation.[7]

7 Because Plaintiff's complaint fails for the reasons stated above, we offer no opinion on Defendant's remaining arguments. To the extent Plaintiff files an amended complaint, it should ensure that it can survive any other exclusion that may exist under the policy.

***10** Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 73, the parties have fourteen (14) days from service of this Report and Recommendation within which to file written objections, if any, with the District Judge. Failure to timely file objections shall bar the parties from *de novo* determination by the District Judge of any factual or legal issue covered in the Report *and* shall bar the parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *see, e.g., Patton v. Rowell,* 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security,* 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

DONE AND SUBMITTED in Chambers at Miami, Florida, this 26th day of August, 2020.

All Citations

Slip Copy, 2020 WL 5051581

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Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Fort Myers Division.

MAURICIO MARTINEZ, DMD, P.A., Plaintiff,

v.

ALLIED INSURANCE COMPANY OF AMERICA, Defendant.

CASE NO. 2:20-cv-00401-FtM-66NPM
|
Signed 09/02/2020

Attorneys and Law Firms

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Thomas A. Keller, Butler Weihmuller Katz Craig LLP, Tampa, FL, for Defendant.

ORDER

JOHN L. BADALAMENTI, UNITED STATES DISTRICT JUDGE

***1** In this two-count insurance coverage action, Mauricio Martinez, DMD, P.A. ("Martinez"), sues his insurance carrier, Allied Insurance Company of America ("Allied"), for damages Martinez claims were "caused by or result[ing] from a Covered Cause of Loss." (Docs. 4, 4-1.) The overarching cause of the alleged loss, Martinez maintains, is the impact of the COVID-19 virus and the Governor of Florida's COVID-19 emergency declaration, which limited dental services. Specifically, Martinez claims that he: (1) incurred costs to decontaminate his dental office of the virus, and (2) lost business income because of the Governor's limitation of dental services to only emergency procedures during the COVID-19 pandemic. (Doc. 4 at 2–3.)

Allied moves to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. (Doc. 6.) Because the insurance policy expressly excludes coverage from damages caused by a virus, Allied's motion to dismiss is **GRANTED**.

Statement of Facts

Accepting the allegations in both the complaint and the attached exhibits as true for the purpose of adjudicating a Rule 12(b)(6) motion to dismiss,[1] the facts are as follows: Allied issued a commercial insurance policy to cover Martinez's dental practice for the period September 28, 2019, to September 28, 2020. (Doc. 4-1 at 2.) In early March 2020, the Governor of Florida issued an executive order declaring a state of emergency in Florida due to the COVID-19 pandemic. (Doc. 4 at 4.) In mid-March, President Donald J. Trump, the Centers for Disease Control and Prevention, and Medicaid recommended that providers limit all "non-essential" dental procedures. (*Id.*) The executive order permitted only emergency dental procedures during its operative period. (*Id.* at 5.)

Martinez subsequently filed a claim with Allied for monetary losses that his business sustained because of the COVID-19 pandemic. (*Id.*) On April 1, 2020, Allied denied that claim. (Doc. 6-1 at 190.) Martinez alleges that COVID-19 caused damage to the dental office, namely the cost of decontaminating his office and of closure, physical damage, and loss of business income. (Doc. 4 at 4.)

Discussion

The insurance policy provides coverage "for direct physical loss or damage to Covered Property at the [plaintiff's] premises" that is "caused by or result[s] from any Covered Cause of Loss." (Doc. 4-1 at 2.) Allied asserts that there was no direct physical loss or damage to covered property at the dental practice's premises "as a result of the appointment cancellations or the closure of [the plaintiff's] dental practice."[2] (Doc. 6-1 at 190.)

***2** Coverage for loss of business income is provided as "additional coverage" under the insurance policy. (Doc. 4-1 at 4.) This covers the "actual loss" of "business income" sustained during the necessary suspension of the policyholder's "operations" during "the period of restoration." (*Id.* at 7.) Suspension must be caused by direct physical loss of or damage to property at the covered premises. (*Id.*) The loss or damage "must be caused by" or "result[ ] from" a "Covered Cause of Loss. (*Id.*)

The policy's provision governing loss of business income due to the act of a "civil authority" states, in relevant part:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, [the insurer] will pay for the actual loss of Business income [ ] sustain[ed] and necessary Extra Expense caused by action of civil authority that prohibits access to the [covered] premises, provided that ... (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and (2) the action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

(Doc. 4-1 at 8.) Allied asserts that there has been: (1) no action of civil authority prohibiting access to Martinez's dental practice premises, and (2) no damage to property within one mile of the premises from a covered cause of loss. (Doc. 6 at 8–10.) Most importantly, Allied also argues that the policy contains an exclusion for loss or damage caused "directly or indirectly," by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (*Id.*; Doc. 4-1 at 21, 23.)

Count I—Breach of Contract

"Contract interpretation is generally a question of law." *Lawyers Title Ins. Corp. v. JDC (Am.) Corp.*, 52 F.3d 1575, 1580 (11th Cir. 1995). "In interpreting an insurance contract, we are bound by the plain meaning of the contract's text." *Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co.*, 185 So. 3d 638, 640 (Fla. 2d DCA 2016)) (quoting *State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So. 3d 566, 569 (Fla. 2011)). The scope of insurance coverage is defined by the language and the terms of the insurance policy, and where the language of the policy is plain and unambiguous, the contract must be enforced as written. *See generally* *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 734–35 (Fla. 2002). To state a claim for breach of contract, a plaintiff must allege: "(1) the existence of a contract; (2) a material breach of that contract; and (3) damages resulting from the breach." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009) (citing *Friedman v. N.Y. Life Ins. Co.*, 985 So. 2d 56, 58 (Fla. 4th DCA 2008)).

Here, Martinez argues that the business income and civil authority provisions of the insurance policy covers his dental practice's loss of business income as a result of the Governor's executive order—a civil authority—to limit dental services to only emergency procedures during the COVID-19 pandemic, and that Allied breached the insurance policy by denying benefits under the above provisions.

Accepting all allegations as true, the dental practice's argument still fails because the loss or damage asserted was not due to a "Covered Cause of Loss." In fact, the policy expressly excludes insurer liability for loss or damage caused "directly or indirectly" by any virus. (Doc. 4-1 at 23) (excluding coverage from "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease"). Because Martinez's damages resulted from COVID-19, which is clearly a virus, neither the Governor's executive order narrowing dental services to only emergency procedures nor the disinfection of the dental office of the virus is a "Covered Cause of Loss" under the plain language of the policy's exclusion. Because, as a matter of law, the plain language of the insurance policy excludes coverage of the dental practice's purported damages, the breach-of-contract claim (Count I) is dismissed.

Count II—Declaratory Judgment

***3** The sole basis on which Count II's declaratory judgment claim is pleaded is Martinez's assertion that judicial interpretation of the insurance policy could result in coverage under the civil authority and business income provisions for the loss underlying his breach-of-contract claim. (Doc. 6 at 10.) Pursuant to 28 U.S.C. § 2201, a district court may "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." But before the court may afford declaratory relief, an actual controversy must exist. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 239–40, 57 S.Ct. 461, 81 L.Ed. 617 (1937). Because the breach-of-contract claim is dismissed, no controversy exists. Accordingly, Count II is dismissed as well.

Conclusion

Because the insurance policy specifically excludes loss caused because of a virus, Martinez fails to state a claim for breach of contract and, in turn, for declaratory judgment. Allied's motion to dismiss, (Doc. 6), is **GRANTED**. Given

the deficiencies of this complaint, any amendment would be futile. Accordingly, this action is **DISMISSED WITH PREJUDICE**. The clerk is ordered to **CLOSE** the case.

ORDERED in Fort Myers, Florida, on September 2, 2020.

All Citations

--- F.Supp.3d ----, 2020 WL 5240218

Footnotes

1 For the purpose of adjudicating a Rule 12(b)(6) motion, well-pleaded allegations are presumed true, and the pleadings are viewed in the light most favorable to the plaintiff. *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1066 (11th Cir. 2007). Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." A plaintiff must provide facts on which he can state his claim, and a conclusory or "formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

2 Responding to the motion to dismiss, Martinez's response offers no opposition to the arguments asserted by Allied. (Doc. 10.) Martinez's argument is encapsulated simply in a summary at the conclusion: "Here the Defendant hasn't established beyond a doubt that a breach of contract nor declaratory action should be litigated. The Plaintiff asserts that these matters are well plead and therefore the Defendant's Motion should be denied." (Doc. 10 at 4.) First, it is not any defendant's duty to establish "beyond a doubt" that an action "should be litigated." Second, an insurer's duty to defend its insured against legal action depends solely on the facts alleged in the pleadings and on the legal claims alleged against the insurer.

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UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION

MDL No. 2961

ORDER DENYING TRANSFER

Before the Panel:[*] At its July 2020 hearing session, the Panel considered two motions seeking centralization of an industry-wide litigation involving claims for insurance coverage of business interruption losses caused by the COVID-19 pandemic and the related government orders suspending, or severely curtailing, operations of non-essential businesses. We denied the motions, concluding that the differences among the many insurers would overwhelm any common factual questions and hinder the transferee court's ability to efficiently manage the litigation. *See In re COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2942, 2020 WL 4670700, __ F. Supp. 3d __ (J.P.M.L. Aug. 12, 2020). In the briefing on those motions, several parties proposed that insurer-specific MDLs be created. We concluded that we needed "a better understanding of the factual commonalities and differences among these actions, as well as the efficiencies that may or may not be gained through centralization, before creating an insurer-specific MDL." *Id.* at *3. Therefore, we ordered the Panel Clerk to issue orders directing the parties to certain actions involving a common insurer or group of insurers to show cause why those actions should not be centralized.

One of those orders encompassed the thirteen actions listed on Schedule A,[1] which involve claims against Certain Underwriters at Lloyd's, London (Lloyd's). Since we issued this show cause order, the parties have notified us of eleven related actions. Plaintiffs in twelve of these 24 actions support the creation of a Lloyd's MDL. They variously suggest five potential transferee districts: the Southern District of Florida; the Eastern District of Louisiana; the Western District of Missouri; the Southern District of New York; and the Eastern District of Pennsylvania. Plaintiffs in two actions oppose centralization, as do the responding Lloyd's defendants[2] and defendant DTW1991

[*] Judge David C. Norton took no part in the decision of this matter.

[1] A fourteenth action on the show cause order, filed in the Central District of Illinois, was voluntarily dismissed.

[2] The responding Lloyd's defendants include Certain Underwriters at Lloyd's, London trading as Syndicates HIS 33, MSP 318, HDU 382, FDY 435, KLN 510, AUW 609, AFB 623, SAM 727, CSL 1084, TAL 1183, AMA 1200, AES 1225, ASC 1414, RNR 1458, AXS 1686, DUW 1729, ACS 1856, QBE 1886, SKD 1897, WRB 1967, APL 1969, AML 2001, XLC 2003, NVA 2007,
(continued...)

Underwriting Ltd. In the alternative, the Lloyd's defendants suggest that the Southern District of Florida serve as the transferee court for this litigation. Additionally, we received two briefs by amici curiae, one in support of and one in opposition to centralization.

After considering the arguments of counsel,[3] we conclude that centralization of the Lloyd's actions will not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation. Most of the insurance policies at issue in the Lloyd's actions listed on Schedule A appear to use one of two standard forms drafted by the Insurance Services Office (ISO) and will involve the interpretation of the phrases "direct physical loss of," "direct physical loss to," and "damage to" property, as well as the application of four common exclusions. There are, however, significant differences among the actions that will hinder the ability of the transferee court to efficiently manage the MDL—differences that are likely to increase as more actions are transferred to the MDL. For instance, one action (*Fire Island Retreat*) involves a homeowners insurance policy, not a business property insurance policy. Furthermore, Lloyd's is not a single insurance company, but rather is an insurance market in which more than 90 "syndicates" agree to accept several liability for a percentage of the coverage provided by a particular insurance policy. *See generally Corfield v. Dallas Glen Hills LP*, 355 F.3d 853, 857–59 (5th Cir. 2003) (discussing the structure of the Lloyd's market). Not only does the subscription nature of the Lloyd's market mean that the insurers will change from policy to policy, but some policies are issued on "split markets," in which non-Lloyds' insurers participate. This could dramatically expand the scope of this MDL. Indeed, several of the actions, both on the show cause order and noticed as related to this litigation, involve non-Lloyd's insurers.[4] A Lloyd's MDL that pulls in multiple insurers would introduce the same manageability concerns that weighed against the creation of an industry-wide litigation in MDL No. 2942.

Additionally, the parties do not dispute that Lloyd's is a surplus line carrier (one of the largest such carriers in the United States). Lloyd's therefore is not obligated to use ISO forms in its policies, unlike "admitted" insurers, which are required to use forms approved by each state's

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[2](...continued)
MMX 2010, CHN 2015, ARG 2121, CGM 2488, NEO 2468, AFB 2623, MAP 2791, BRT 2987, BRT 2988, AGR 3268, HCC 4141, XIS H4202, PRL 4242, CNP 4444, TRV 5000, ENH 5151, VSM 5678, WBC 5886, and PPP9981, along with Axis Specialty Europe SE, HDI Global Specialty SE, Vanguard Claims Administration, Inc., and Blair & Company. Defendants note that Axis Specialty Europe SE and HDI Global Speciality SE are not Lloyd's underwriters. Vanguard Claims Administration and Blair & Company are not insurers, but claims management companies.

[3] In light of the concerns about the spread of COVID-19 virus (coronavirus), the Panel heard oral argument by videoconference at its hearing session of September 24, 2020. *See* Suppl. Notice of Hearing Session, MDL No. 2961 (J.P.M.L. Sept. 8, 2020), ECF No. 102.

[4] One of these, the Southern District of New York *Century 21 Department Stores, LLC* action, is particularly concerning in this regard, as it appears to involve a layered program of property insurance provided by nine different insurers.

department of insurance. *See, e.g.*, *Triage, Inc. v. Prime Ins. Syndicate, Inc.*, 887 A.2d 303, 306 (Pa. 2005) (discussing the surplus line distinction under Pennsylvania law). The inclusion of non-standard and non-common forms and policy language would hinder the ability of the transferee court to organize the litigation and quickly reach the common factual and legal questions.

This litigation demands efficiency. As counsel repeatedly emphasized in their papers and during oral argument, time is of the essence in this litigation. Many plaintiffs are on the brink of bankruptcy as a result of business lost due to the COVID-19 pandemic and the government closure orders. Efficiency here is best obtained outside the MDL context. If these actions were centralized, the transferee court would have to establish a pretrial structure to manage numerous plaintiffs, many of which are pursuing distinct theories of liability. Given the likelihood that the scope of any MDL will expand to encompass other insurers who participated with the Lloyd's market on certain policies, organization of the defendants also might be necessary. The court then would have to identify common policies with identical or sufficiently similar policy language and interpret those policies under applicable state law.

It thus will take some time to organize this litigation. In the meantime, dispositive motions addressing the core policy interpretation questions are pending in ten of the thirteen show cause actions, at least five of which are fully briefed. If plaintiffs' claims survive these motions,[5] discovery appears relatively straightforward and much of it will be plaintiff- and property-specific. In these circumstances, the actions will reach resolution more quickly if they remain in the transferor courts. We impress upon the courts overseeing these actions the importance of advancing these actions towards resolution as quickly as possible.

Accordingly, centralization of the actions listed on Schedule A is not warranted. To the extent necessary, alternatives to centralization are available to minimize any duplication in pretrial proceedings, including informal cooperation and coordination among the parties and courts. We also note that some similar actions are pending in the same district before multiple judges, and it may be appropriate for the courts or the parties to seek to relate those before one judge.

[5] We take no position on the merits of these dispositive motions. *See In re Kauffman Mut. Fund Actions*, 337 F. Supp. 1337, 1339–40 (J.P.M.L. 1972) ("The framers of Section 1407 did not contemplate that the Panel would decide the merits of the actions before it and neither the statute nor the implementing Rules of the Panel are drafted to allow for such determinations.").

IT IS THEREFORE ORDERED that the order to show cause regarding the actions listed on Schedule A is vacated.

PANEL ON MULTIDISTRICT LITIGATION

Karen K. Caldwell
Chair

Ellen Segal Huvelle
Catherine D. Perry
Matthew F. Kennelly

R. David Proctor
Nathaniel M. Gorton

IN RE: CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2961

SCHEDULE A

Middle District of Florida

PRIME TIME SPORTS GRILL, INC. v. DTW 1991 UNDERWRITING LIMITED, C.A. No. 8:20−00771

Southern District of Florida

RUNWAY 84, INC. & RUNWAY 84 REALTY, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO CERTIFICATE NUMBER ARP–75203–20, C.A. No. 0:20–61161

GIO PIZZERIA & BAR HOSPITALITY, LLC, ET AL. v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NUMBERS ARP−74910−20 AND ARP−75209−20, C.A. No. 0:20−61741

EL NOVILLO RESTAURANT, ET AL. v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL., C.A. No. 1:20−21525

ATMA BEAUTY, INC. v. HDI GLOBAL SPECIALTY SE, ET AL., C.A. No. 1:20–21745

SUN CUISINE, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO CONTRACT NUMBER B0429BA1900350 UNDER COLLECTIVE CERTIFICATE ENDORSEMENT 350OR100802, C.A. No. 1:20-21827

SA PALM BEACH LLC v. CERTAIN UNDERWRITERS AT LLOYDS LONDON, ET AL., C.A. No. 9:20-80677

Eastern District of Louisiana

STATION 6, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, C.A. No. 2:20–01371

District of New Jersey

PALM AND PINE VENTURES, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL., C.A. No. 3:20–08212

MDH GLOBAL, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL., C.A. No. 3:20–08214

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Southern District of New York

632 METACOM, INC. v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. XSZ146282, C.A. No. 1:20–03905

Eastern District of Pennsylvania

FIRE ISLAND RETREAT v. CERTAIN UNDERWRITERS AT LLOYDS, LONDON SUBSCRIBING TO POLICY NO. B050719MKSFL000081-00, C.A. No. 2:20–02312

INDEPENDENCE RESTAURANT GROUP, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, C.A. No. 2:20–02365

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: CINCINNATI INSURANCE COMPANY COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2962

ORDER DENYING TRANSFER

Before the Panel: At its July 2020 hearing session, the Panel considered two motions seeking centralization of an industry-wide litigation involving claims for insurance coverage of business interruption losses caused by the COVID-19 pandemic and the related government orders suspending, or severely curtailing, operations of non-essential businesses. We denied the motions, concluding that the differences among the many insurers would overwhelm any common factual questions and hinder the transferee court's ability to efficiently manage the litigation. *See In re COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2942, 2020 WL 4670700, __ F. Supp. 3d __ (J.P.M.L. Aug. 12, 2020). In the briefing on those motions, several parties proposed that insurer-specific MDLs be created. We concluded that we needed "a better understanding of the factual commonalities and differences among these actions, as well as the efficiencies that may or may not be gained through centralization, before creating an insurer-specific MDL." *Id.* at *3. Therefore, we ordered the Panel Clerk to issue orders directing the parties to certain actions involving a common insurer or group of insurers to show cause why those actions should not be centralized.

One of those orders encompassed the seventeen actions listed on Schedule A,[1] which involve claims against Cincinnati Insurance Company and related insurers (collectively, Cincinnati). Since we issued this show cause order, the parties have notified us of 49 related actions. Plaintiffs in 27 of these 66 actions support the creation of a Cincinnati MDL. They variously suggest a number of potential transferee districts, including: the Northern District of Illinois; the District of Kansas; the Western District of Missouri; the District of New Jersey; the Southern District of New York; the Southern District of Ohio; the Eastern District of Pennsylvania; and the Western District of Pennsylvania. Plaintiffs in five actions oppose centralization, as does Cincinnati and several non-insurer co-defendants in a related action pending in the Eastern District of Missouri. In the alternative, Cincinnati suggests that the Northern District of Alabama or the Southern District of Ohio serve as the transferee court for this litigation. Additionally, we received two briefs by amici curiae, one in support of and one in opposition to centralization.

[1] An eighteenth action on the show cause order, filed in the Northern District of Illinois, subsequently was dismissed.

After considering the arguments of counsel,[2] we conclude that centralization of the Cincinnati actions will not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation. Centralization of these actions presents a close question. The insurance policies at issue in the Cincinnati actions appear to use standard forms drafted by the Insurance Services Office (ISO) and will involve the interpretation of common language, such as "direct loss to property." To the extent discovery is necessary of Cincinnati regarding the drafting and interpretation of its policies, such discovery will be common to all actions. Thus, these actions present common legal and factual questions that could, in other circumstances, support centralization.[3]

Common factual questions, however, are not the sole prerequisite for centralization under Section 1407. Centralization also must promote the just and efficient conduct of the actions. This litigation demands efficiency. As counsel repeatedly emphasized in their papers and during oral argument, time is of the essence in this litigation. Many plaintiffs are on the brink of bankruptcy as a result of business lost due to the COVID-19 pandemic and the government closure orders. The most pressing question for us, therefore, is whether centralization presents the most efficient means of advancing these actions towards resolution.

Efficiency here is best obtained outside the MDL context. If these actions were centralized, the transferee court would have to establish a pretrial structure to manage numerous plaintiffs, many of which are pursuing distinct theories of liability.[4] The court also would have to identify common policies with identical or sufficiently similar policy language and interpret those policies under applicable state laws. The Cincinnati actions are pending in 29 different districts in nineteen states.

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[2] In light of the concerns about the spread of COVID-19 virus (coronavirus), the Panel heard oral argument by videoconference at its hearing session of September 24, 2020. *See* Suppl. Notice of Hearing Session, MDL No. 2962 (J.P.M.L. Sept. 8, 2020), ECF No. 124.

[3] Cincinnati argues that centralization is inappropriate for the handling of purely legal questions, such as policy interpretation questions. It is true that common legal questions, standing alone, are not sufficient to satisfy Section 1407's requirement that there be common factual questions. *See In re ABA Law School Accreditation Litig.*, 325 F. Supp. 3d 1377, 1378–79 (J.P.M.L. 2018). Centralization may be appropriate even where legal questions are prominent, however, so long as common factual issues are present. *See In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 588 F. Supp. 2d 1376, 1377(J.P.M.L. 2008) ("The Panel must determine the extent of the common factual issues and the likelihood that centralized pretrial proceedings will create important efficiencies, avoid inconsistent rulings, and result in the overall fairer adjudication of the litigation for the benefit of all involved parties.").

[4] For instance, some plaintiffs argue that the COVID-19 virus is present on and caused damage to their properties. Others allege that they suffered damage as a result of state and local governments' orders restricting or closing businesses. Some plaintiffs principally seek damages for breach of contract; others assert claims for bad faith denial of insurance. These distinct claims likely will require different legal analysis and different discovery.

It will take a not insignificant amount of time to organize this litigation and resolve the central policy interpretation questions. In the meantime, dispositive motions addressing the core policy interpretation questions are pending in 39 of the 66 actions, at least twelve of which are fully briefed. Rather than have one judge attempt to organize and resolve the core policy interpretation issues, it strikes us that allowing the various transferor courts to decide these questions will result in quicker and more efficient resolution of this litigation.

Furthermore, should plaintiffs' claims survive dispositive rulings on the policy interpretation questions,[5] discovery appears relatively straightforward. While some of this discovery may well be common (particularly that directed to Cincinnati regarding the drafting and interpretation of its policy language), much of the discovery will be plaintiff- and property-specific. In these circumstances, it is more likely the actions will reach an expeditious resolution if they remain in the transferor courts. We impress upon the courts overseeing these actions the importance of advancing these actions towards resolution as quickly as possible.

Accordingly, centralization of the actions listed on Schedule A is not warranted. To the extent necessary, alternatives to centralization are available to minimize any duplication in pretrial proceedings, including informal cooperation and coordination among the parties and courts. We also note that some similar actions are pending in the same district before multiple judges, and it may be appropriate for the courts or the parties to seek to relate those before one judge.

[5] We take no position on the merits of these dispositive motions. *See In re Kauffman Mut. Fund Actions*, 337 F. Supp. 1337, 1339–40 (J.P.M.L. 1972) ("The framers of Section 1407 did not contemplate that the Panel would decide the merits of the actions before it and neither the statute nor the implementing Rules of the Panel are drafted to allow for such determinations."). To date, one court has denied two motions to dismiss with respect to Cincinnati, *see Studio 417, Inc. v. Cincinnati Ins. Co.*, C.A. No. 6:20-03127, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), while another has granted dismissal, *see Sandy Point Dental, PC v. Cincinnati Ins. Co.*, C.A. No. 1:20-02160, 2020 WL 5630465 (N.D. Ill. Aug. 21, 2020).

IT IS THEREFORE ORDERED that the order to show cause regarding the actions listed on Schedule A is vacated.

PANEL ON MULTIDISTRICT LITIGATION

Karen K. Caldwell
Chair

Ellen Segal Huvelle
Catherine D. Perry
Matthew F. Kennelly

R. David Proctor
Nathaniel M. Gorton
David C. Norton

IN RE: CINCINNATI INSURANCE COMPANY COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2962

SCHEDULE A

Middle District of Alabama

EAGLE EYE OUTFITTERS, INC. v. THE CINCINNATI CASUALTY COMPANY, C.A. No. 1:20–00335
PEAR TREE GROUP, LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 3:20–00382
SNEAK & DAWDLE, LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 3:20–00383
AUBURN DEPOT LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 3:20–00384

Northern District of Alabama

HOMESTATE SEAFOOD LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 2:20–00649
SOUTHERN DENTAL BIRMINGHAM LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 2:20–00681

Northern District of Illinois

3 SQUARES, LLC, ET AL. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 1:20–02690
DEREK SCOTT WILLIAMS PLLC, ET AL. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 1:20–02806

District of Kansas

PROMOTIONAL HEADWEAR INT'L v. THE CINCINNATI INSURANCE COMPANY, INC., C.A. No. 2:20–02211

Western District of Missouri

STUDIO 417, INC. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 6:20–03127

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Southern District of Ohio

TROY STACY ENTERPRISES INC. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 1:20–00312
TASTE OF BELGIUM LLC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 1:20–00357
SWEARINGEN SMILES LLC, ET AL. v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 1:20–00517

Eastern District of Pennsylvania

MILKBOY CENTER CITY LLC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 2:20–02036
STONE SOUP, INC. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 2:20–02614

Western District of Pennsylvania

HIRSCHFIELD-LOUIK v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 2:20–00816

Southern District of West Virginia

UNCORK AND CREATE LLC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 2:20–00401

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: HARTFORD COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2963

ORDER DENYING TRANSFER

Before the Panel:[*] At its July 2020 hearing session, the Panel considered two motions seeking centralization of an industry-wide litigation involving claims for insurance coverage of business interruption losses caused by the COVID-19 pandemic and the related government orders suspending, or severely curtailing, operations of non-essential businesses. We denied the motions, concluding that the differences among the many insurers would overwhelm any common factual questions and hinder the transferee court's ability to efficiently manage the litigation. *See In re COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2942, 2020 WL 4670700, __ F. Supp. 3d __ (J.P.M.L. Aug. 12, 2020). In the briefing on those motions, several parties proposed that insurer-specific MDLs be created. We concluded that we needed "a better understanding of the factual commonalities and differences among these actions, as well as the efficiencies that may or may not be gained through centralization, before creating an insurer-specific MDL." *Id.* at *3. Therefore, we ordered the Panel Clerk to issue orders directing the parties to certain actions involving a common insurer or group of insurers to show cause why those actions should not be centralized.

One of those orders encompassed the 66 actions listed on Schedule A,[1] which involve claims against the Hartford group of insurers. Since we issued this show cause order, the parties have notified us of 77 related actions. Plaintiffs in 55 of these 143 actions support the creation of a Hartford MDL. They variously suggest a number of potential transferee districts, including: the District of Connecticut; the Southern District of Florida; the District of New Jersey; the Eastern District of New York; the Western District of Pennsylvania; and the Western District of Washington. Plaintiffs in five actions oppose centralization, several of which alternatively suggest the Northern District of California, the District of Massachusetts, and the Eastern District of Missouri as potential transferee districts. The Hartford defendants[2] also oppose centralization and, in the alternative,

[*] Judge David C. Norton took no part in the decision of this matter.

[1] Two additional actions listed on the show cause order were voluntarily dismissed.

[2] The Hartford defendants consist of The Hartford Financial Services Group, Inc., and fifteen of its direct or indirect subsidiaries: Hartford Fire Insurance Company; Sentinel Insurance Company, Ltd.; Hartford Casualty Insurance Company; Hartford Underwriters Insurance Company; Twin City Fire Insurance Company; Trumbull Insurance Company; Property & Casualty Insurance Company
(continued...)

suggest the Southern District of New York as the transferee district for this litigation. Additionally, we received two briefs by amici curiae, one in support of and one in opposition to centralization.

After considering the arguments of counsel,[3] we conclude that centralization of the Hartford actions will not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation. Centralization of these actions presents a close question. The insurance policies at issue in the Hartford actions appear to use standard forms and will involve the interpretation of common policy language, such as the phrase "direct physical loss or physical damage to property." To the extent discovery is necessary of Hartford regarding the drafting and interpretation of its policies, such discovery will be common to all actions. Thus, these actions present common legal and factual questions that could, in other circumstances, support centralization.[4]

Common factual questions, however, are not the sole prerequisite for centralization under Section 1407. Centralization also must promote the just and efficient conduct of the actions. This litigation demands efficiency. As counsel repeatedly emphasized in their papers and during oral argument, time is of the essence in this litigation. Many plaintiffs are on the brink of bankruptcy as a result of business lost due to the COVID-19 pandemic and the government closure orders. The most pressing question for us, therefore, is whether centralization presents the most efficient means of advancing these actions towards resolution.

Efficiency here is best obtained outside the MDL context. If these actions were centralized, the transferee court would have to establish a pretrial structure to manage numerous plaintiffs, many

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[2](...continued)
of Hartford; Pacific Insurance Company, Ltd.; New England Insurance Company; New England Reinsurance Corporation; Hartford Insurance Company of Illinois; Hartford Accident & Indemnity Company; Hartford Insurance Company of the Midwest; Hartford Insurance Company of the Southeast; and Hartford Lloyd's Insurance Company.

[3] In light of the concerns about the spread of COVID-19 virus (coronavirus), the Panel heard oral argument by videoconference at its hearing session of September 24, 2020. *See* Suppl. Notice of Hearing Session, MDL No. 2963 (J.P.M.L. Sept. 8, 2020), ECF No. 230.

[4] Hartford argues that centralization is inappropriate for the handling of purely legal questions, such as policy interpretation questions. It is true that common legal questions, standing alone, are not sufficient to satisfy Section 1407's requirement that there be common factual questions. *See In re ABA Law School Accreditation Litig.*, 325 F. Supp. 3d 1377, 1378–79 (J.P.M.L. 2018). Centralization may be appropriate even where legal questions are prominent, however, so long as common factual issues are present. *See In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 588 F. Supp. 2d 1376, 1377(J.P.M.L. 2008) ("The Panel must determine the extent of the common factual issues and the likelihood that centralized pretrial proceedings will create important efficiencies, avoid inconsistent rulings, and result in the overall fairer adjudication of the litigation for the benefit of all involved parties.").

of which are pursuing distinct theories of liability.[5] The court also would have to identify common policies with identical or sufficiently similar policy language and interpret those policies under applicable state laws. The Hartford actions are pending in 36 different districts in 24 states and the District of Columbia. It will take a not insignificant amount of time to organize this litigation and resolve the central policy interpretation questions. In the meantime, dispositive motions addressing these policy interpretation questions are pending in 37 of the 143 actions, at least ten of which are fully briefed. Rather than have one judge attempt to organize and resolve the core policy interpretation issues, it strikes us that allowing the various transferor courts to decide these questions will result in quicker and more efficient resolution of this litigation.

Furthermore, should plaintiffs' claims survive dispositive rulings on the policy interpretation questions,[6] discovery appears relatively straightforward. While some of this discovery may well be common (particularly any discovery directed to Hartford regarding the drafting and interpretation of its policy language), much of it will be plaintiff- and property-specific. In these circumstances, it is more likely the actions will reach an expeditious resolution if they remain in the transferor courts. We impress upon the courts overseeing these actions the importance of advancing these actions towards resolution as quickly as possible.

Accordingly, centralization of the actions listed on Schedule A is not warranted. To the extent necessary, alternatives to centralization are available to minimize any duplication in pretrial proceedings, including informal cooperation and coordination among the parties and courts. We also note that some similar actions are pending in the same district before multiple judges, and it may be appropriate for the courts or the parties to seek to relate those before one judge.

IT IS THEREFORE ORDERED that the order to show cause regarding the actions listed on Schedule A is vacated.

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[5] For instance, some plaintiffs argue that the COVID-19 virus is present on and caused damage to their properties. Others allege that they suffered damage as a result of state and local governments' orders restricting or closing businesses. And some plaintiffs allege unique theories of coverage, such as the dental practices in the *Levy* and *Taube* actions, who assert that they closed their practices not as a result of civil authority orders, but based on guidance from the Centers for Disease Control and the American Dental Association. These distinct claims likely will require different legal analysis and different discovery.

[6] We take no position on the merits of these dispositive motions. *See In re Kauffman Mut. Fund Actions*, 337 F. Supp. 1337, 1339–40 (J.P.M.L. 1972) ("The framers of Section 1407 did not contemplate that the Panel would decide the merits of the actions before it and neither the statute nor the implementing Rules of the Panel are drafted to allow for such determinations."). To date, there have been only two rulings on motions to dismiss in Hartford actions. *See Wilson v. Hartford Cas. Co.*, C.A. No. 2:20-03384, 2020 WL 5820800 (E.D. Pa. Sept. 30, 2020) (granting motion to dismiss); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, C.A. No. 3:20-04434, 2020 WL 5642483 (N.D. Cal. Sept. 22, 2020) (granting motion to dismiss with leave to amend complaint).

PANEL ON MULTIDISTRICT LITIGATION

Karen K. Caldwell
Chair

Ellen Segal Huvelle
Catherine D. Perry
Matthew F. Kennelly
R. David Proctor
Nathaniel M. Gorton

IN RE: HARTFORD COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2963

SCHEDULE A

Northern District of Alabama

PURE FITNESS LLC v. THE HARTFORD FINANCIAL SERVICES GROUP INC., ET AL., C.A. No. 2:20–00775

District of Arizona

FORFEX LLC v. HARTFORD UNDERWRITERS INSURANCE COMPANY, ET AL., C.A. No. 2:20–01068
JDR ENTERPRISES LLC v. SENTINEL INSURANCE COMPANY LIMITED, ET AL., C.A. No. 4:20–00270

Central District of California

GERAGOS & GERAGOS ENGINE COMPANY NO. 28, LLC v. HARTFORD FIRE INSURANCE COMPANY, ET AL., C.A. No. 2:20–04647
PATRICK AND GEOFF INVESTMENTS INC. v. THE HARTFORD, ET AL., C.A. No. 2:20–05140
ROUNDIN3RD SPORTS BAR LLC v. THE HARTFORD, ET AL., C.A. No. 2:20–05159
R3 HOSPITALITY GROUP, LLC v. THE HARTFORD, ET AL., C.A. No. 5:20–01182

Northern District of California

PROTÉGÉ RESTAURANT PARTNERS LLC v. SENTINEL INSURANCE COMPANY, LIMITED, C.A. No. 5:20–03674

Southern District of California

PIGMENT INC. v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00794

District of Connecticut

LITTLE STARS CORPORATION v. HARTFORD UNDERWRITERS INS. CO., ET AL., C.A. No. 3:20–00609
CONSULTING ADVANTAGE INC. v. HARTFORD FIRE INSURANCE COMPANY, ET AL., C.A. No. 3:20–00610

RENCANA LLC, ET AL. v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00611
COSMETIC LASER, INC. v. TWIN CITY FIRE INSURANCE COMPANY, C.A. No. 3:20–00638
DR. JEFFREY MILTON, DDS, INC. v. HARTFORD CASUALTY INSURANCE COMPANY, C.A. No. 3:20–00640
ONE40 BEAUTY LOUNGE, LLC v. SENTINEL INS. CO., LTD., C.A. No. 3:20–00643
PATS v. HARTFORD FIRE INSURANCE COMPANY, ET AL., C.A. No. 3:20–00697
DOTEXAMDR PLLC v. HARTFORD FIRE INS. CO., ET AL., C.A. No. 3:20–00698
KENNEDY HODGES & ASSOCIATES LTD., LLP, ET AL. v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00852
LEAL, INC. v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00917
SA HOSPITALITY GROUP, LLC, ET AL. v. HARTFORD FIRE INSURANCE COMPANY, C.A. No. 3:20–01033

District of District of Columbia

GCDC LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–01094

Southern District of Florida

REINOL A. GONZALEZ, DMD, P.A. v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–22151

Northern District of Georgia

KARMEL DAVIS AND ASSOCIATES, ATTORNEY–AT–LAW, LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–02181

Southern District of Illinois

TAUBE v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00565

Eastern District of Louisiana

Q CLOTHIER NEW ORLEANS, LLC, ET AL. v. TWIN CITY FIRE INSURANCE COMPANY, ET AL., C.A. No. 2:20–01470

District of Massachusetts

RINNIGADE ART WORKS v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–10867

Southern District of Mississippi

THE KIRKLAND GROUP, INC. v. SENTINEL INSURANCE GROUP LTD., C.A. No. 3:20–00496

Eastern District of Missouri

ROBERT LEVY, D.M.D., LLC v. HARTFORD CASUALTY INSURANCE COMPANY, C.A. No. 4:20–00643

District of New Jersey

AMBULATORY CARE CENTER, PA v. SENTINEL INSURANCE COMPANY, LIMITED, C.A. No. 1:20–05837
THE EYE CARE CENTER OF NEW JERSEY, PA v. THE HARTFORD FINANCIAL SERVICES GROUP INC., ET AL., C.A. No. 2:20–05743
LD GELATO LLC v. HARTFORD UNDERWRITERS INSURANCE CORPORATION, C.A. No. 2:20–06215
BACK2HEALTH CHIROPRACTIC CENTER, LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 2:20–06717
MARRAS 46 LLC v. TWIN CITY FIRE INSURANCE COMPANY, C.A. No. 2:20–08886
ADDIEGO FAMILY DENTAL, LLC v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–05847
ADDIEGO ORTHODONTICS, LLC v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–05882
SWEETBERRY HOLDINGS LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–08200
BLUSHARK DIGITAL, LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–08210

Eastern District of New York

METROPOLITAN DENTAL ARTS P.C. v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–02443
BRAIN FREEZE BEVERAGE, LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 2:20–02157

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Southern District of New York

SHARDE HARVEY DDS PLLC v. THE HARTFORD FINANCIAL SERVICES GROUP INC., ET AL., C.A. No. 1:20–03350
FOOD FOR THOUGHT CATERERS, CORP. v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–03418
RED APPLE DENTAL PC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 7:20–03549

Western District of New York

BUFFALO XEROGRAPHIX INC. v. SENTINEL INSURANCE COMPANY, LIMITED, ET AL., C.A. No. 1:20–00520
SALVATORE'S ITALIAN GARDENS, INC., ET AL. v. HARTFORD FIRE INSURANCE COMPANY, C.A. No. 1:20–00659

Northern District of Ohio

SYSTEM OPTICS, INC. v. TWIN CITY FIRE INSURANCE COMPANY, ET AL., C.A. No. 5:20–01072

Eastern District of Pennsylvania

LANSDALE 329 PROP, LLC, ET AL. v. HARTFORD UNDERWRITERS INSURANCE COMPANY, ET AL., C.A. No. 2:20–02034
SIDKOFF, PINCUS & GREEN PC v. SENTINEL INSURANCE COMPANY, LIMITED, C.A. No. 2:20–02083
HAIR STUDIO 1208, LLC v. HARTFORD UNDERWRITERS INSURANCE CO., C.A. No. 2:20–02171
ULTIMATE HEARING SOLUTIONS II, LLC, ET AL. v. HARTFORD UNDERWRITERS INSURANCE COMPANY, ET AL., C.A. No. 2:20–02401
MOODY, ET AL. v. THE HARTFORD FINANCIAL SERVICES GROUP INC., ET AL., C.A. No. 2:20–02856
SEYMON BOKMAN v. SENTINEL INSURANCE COMPANY, LIMITED, C.A. No. 2:20–02887

District of South Carolina

COFFEY & MCKENZIE LLC v. TWIN CITY FIRE INSURANCE COMPANY, C.A. No. 2:20–01671
BLACK MAGIC LLC v. THE HARTFORD FINANCIAL SERVICES GROUP INC., ET AL., C.A. No. 2:20–01743

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FANCY THAT! BISTRO & CATERING LLC v. SENTINEL INSURANCE COMPANY LIMITED, ET AL., C.A. No. 3:20–02382

Eastern District of Texas

RISINGER HOLDINGS, LLC, ET AL. v. SENTINEL INSURANCE COMPANY, LTD., ET AL., C.A. No. 1:20–00176
BOOZER-LINDSEY, PA, LLC v. SENTINEL INSURANCE COMPANY, LTD., C.A. No. 6:20–00235

Northern District of Texas

GRAILEYS INC. v. SENTINEL INSURANCE COMPANY LTD.,C.A. No. 3:20–01181

Western District of Texas

INDEPENDENCE BARBERSHOP, LLC v. TWIN CITY FIRE INSURANCE CO., C.A. No. 1:20–00555

District of Utah

WILLIAM W. SIMPSON ENTERPRISES v. THE HARTFORD FINANCIAL SERVICES GROUP, C.A. No. 4:20–00075

Eastern District of Virginia

ADORN BARBER & BEAUTY LLC v. TWIN CITY FIRE INSURANCE COMPANY, C.A. No. 3:20–00418

Western District of Washington

CHORAK v. HARTFORD CASUALTY INSURANCE COMPANY, C.A. No. 2:20–00627
KIM v. SENTINEL INSURANCE COMPANY LIMITED, C.A. No. 2:20–00657
GLOW MEDISPA LLC v. SENTINEL INSURANCE COMPANY LIMITED, C.A. No. 2:20–00712
STRELOW v. HARTFORD CASUALTY INSURANCE COMPANY, C.A. No. 2:20–00797
PRATO v. SENTINEL INSURANCE COMPANY LIMITED, C.A. No. 3:20–05402
LEE v. SENTINEL INSURANCE COMPANY LIMITED, C.A. No. 3:20–05422

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: SOCIETY INSURANCE COMPANY COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2964

TRANSFER ORDER

Before the Panel: At its July 2020 hearing session, the Panel considered two motions seeking centralization of an industry-wide litigation involving insurance claims for coverage of business interruption losses caused by the COVID-19 pandemic and the related government orders suspending, or severely curtailing, operations of non-essential businesses. We denied the motions, concluding that the differences among the many insurers would overwhelm any common factual questions and hinder the transferee court's ability to efficiently manage the litigation. *See In re COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2942, 2020 WL 4670700, __ F. Supp. 3d __ (J.P.M.L. Aug. 12, 2020). In the briefing on those motions, several parties proposed that insurer-specific MDLs be created. We concluded that we needed "a better understanding of the factual commonalities and differences among these actions, as well as the efficiencies that may or may not be gained through centralization, before creating an insurer-specific MDL." *Id.* at *3. So we ordered the Panel Clerk to issue orders directing the parties to certain actions involving a common insurer or group of insurers to show cause why those actions should not be centralized.

One of those orders encompassed the 21 actions listed on Schedule A, which involve claims against Society Insurance Company (Society). Since we issued this show cause order, the parties have notified us of thirteen related actions filed in seven districts.[1] Plaintiffs in ten of the 34 actions support the creation of a Society MDL in the Northern District of Illinois. Plaintiffs in two actions support centralization in the Eastern District of Wisconsin, and one of those plaintiffs (in the *Rising Dough* action) alternatively support a Northern District of Illinois transferee district. Plaintiffs in two Northern District of Illinois actions (*Big Onion* and *Billy Goat*) and the Middle District of Tennessee *Peg Leg Porker* action oppose centralization. If an MDL is created over their objections, the *Billy Goat* and *Peg Leg Porker* plaintiffs request exclusion from it. Defendant Society opposes centralization. Additionally, the Panel received two briefs by amici curiae, one in support of and one in opposition to centralization.

[1] These actions, and any other related actions, are potential tag-along actions. *See* Panel Rules 1.1(h), 7.1 and 7.2.

After considering the arguments of counsel,[2] we conclude that centralization of the Society actions listed on Schedule A will serve the convenience of the parties and witnesses and further the just and efficient conduct of this litigation. Society is a regional carrier operating in six Midwestern states – Illinois, Indiana, Iowa, Minnesota, Tennessee and Wisconsin. Policyholders have brought individual and putative nationwide and statewide class actions against Society. These actions share common factual allegations that Society wrongfully denied policy holders' claims for business interruption protection insurance. Plaintiffs contend that Society preemptively decided to deny their claims, which are brought under various property insurance policies that, depending on the provisions plaintiff has purchased, provide: (1) business income coverage, (2) civil authority coverage, (3) extra expense coverage, (4) contamination coverage, and (5) sue and labor coverage. On March 16, 2020, Society CEO Rick Parks circulated a memorandum to Society's "agency partners," acknowledging that states had "taken steps to limit operations of certain businesses," and concluding that Society's policies likely would not provide coverage for losses for a "governmental imposed shutdown due to COVID-19 (coronavirus)." The insurance policies at issue in the Society actions appear to use standard forms drafted by the Insurance Services Office (ISO) and will involve the interpretation of common policy language. The actions therefore will require an assessment of whether COVID-19 caused any direct physical loss of or to property, and whether any of Society's policy exclusions apply to preclude plaintiffs' claims. To the extent discovery is necessary of Society regarding the drafting and interpretation of it policies, that discovery will be common to all actions. Thus, these actions present common factual and legal questions that support centralization.

In addition to requiring common factual questions, Section 1407 also requires that centralization promote the just and efficient conduct of the actions. This litigation demands efficiency. As counsel repeatedly emphasized in their papers and during oral argument, time is of the essence in this litigation. Many plaintiffs are on the brink of bankruptcy as a result of business lost due to the COVID-19 pandemic and the government closure orders. The most pressing question before us, then, is whether centralization presents the most efficient means of advancing these actions towards resolution. Unlike the other business interruption insurance dockets arising from MDL No. 2942 in which we have denied centralization, we find that centralization presents the most efficient means of advancing these actions toward resolution. Here, there are before us 34 total actions pending in six nearby states, the majority in one district. This suggests to us that this litigation presents a manageable controversy that can best be streamlined by proceeding before a single judge.

Society argues that centralization is not appropriate because the actions likely will involve primarily legal questions. It is possible that plaintiffs' claims can be decided on motions to dismiss without need for discovery into, for example, the drafting of the policies at issue or epidemiological modeling of the spread of COVID-19. But centralization may be warranted even where common questions of law are prominent, as long as common factual issues are present. In such cases, "[t]he

[2] In light of the concerns about the spread of COVID-19 virus (coronavirus), the Panel heard oral argument by videoconference at its hearing session of September 24, 2020. *See* Suppl. Notice of Hearing Session, MDL No. 2964 (J.P.M.L. Sept. 8, 2020), ECF No. 76.

Panel must determine the extent of the common factual issues and the likelihood that centralized pretrial proceedings will create important efficiencies, avoid inconsistent rulings, and result in the overall fairer adjudication of the litigation for the benefit of all involved parties." *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 588 F. Supp. 2d 1376, 1377(J.P.M.L. 2008). Here, significant factual questions exist among the actions, and centralization will create substantial efficiencies for the parties and the courts.

Opponents of centralization also argue that, should plaintiffs' claims survive dispositive rulings on policy interpretation questions, discovery will be plaintiff- and property-specific. There likely will be, by necessity, some unique aspects of each case. Were this litigation larger in geographic scope and if it involved more state laws (such as in some of the other show cause dockets before us), this might be a more persuasive argument because the transferee judge would be tasked with managing a much more complicated litigation. What sets this litigation apart is the defined geographical scope of these actions, which implicates only six state insurance laws. We note that the transferee judge can employ any number of pretrial techniques – including establishing state-specific tracks and selecting certain already-briefed motions in individual cases as bellwether motions – to manage any differences that the Society actions present.

Certain parties also assert that informal coordination among the parties and courts is preferable to formal centralization. We do not view alternatives to centralization to be an adequate substitute for an MDL here. There are nearly three dozen cases brought by diverse counsel before more than twenty judges, which makes coordination difficult. The parties also seem to disagree about how to accomplish such coordination; in fact, one effort to streamline the litigation – intra-district reassignment to a single judge in the Northern District of Illinois cases – was opposed by Society and some plaintiffs.

We are persuaded that the Northern District of Illinois is an appropriate transferee district. The district is the obvious center of gravity of this litigation against Society, with 22 of the total 34 pending cases filed there. Chicago lies at the heart of Society's regional business and represents an accessible forum with the capacity to efficiently manage these cases. Also, it is conveniently located near Society's Milwaukee, Wisconsin headquarters. We are confident that Judge Edmond E. Chang, who has not yet had the opportunity to preside over an MDL, will steer this litigation on a prudent and expeditious course.

IT IS THEREFORE ORDERED that the actions listed on Schedule A and pending outside the Northern District of Illinois are transferred to the Northern District of Illinois and, with the consent of that court, assigned to the Honorable Edmond E. Chang, for coordinated or consolidated pretrial proceedings with the actions pending there and listed on Schedule A.

PANEL ON MULTIDISTRICT LITIGATION

Karen K. Caldwell
Chair

Ellen Segal Huvelle	R. David Proctor
Catherine D. Perry	Nathaniel M. Gorton
Matthew F. Kennelly	David C. Norton

IN RE: SOCIETY INSURANCE COMPANY COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2964

SCHEDULE A

Northern District of Illinois

BIG ONION TAVERN GROUP, LLC, ET AL. v. SOCIETY INSURANCE, INC., C.A. No. 1:20−02005
BILLY GOAT TAVERN I, INC., ET AL. v. SOCIETY INSURANCE, C.A. 1:20−02068
BISCUIT CAFE INC., ET AL. v. SOCIETY INSURANCE, INC., C.A. No. 1:20–02514
DUNLAYS MANAGEMENT SERVICES, LLC, ET AL. v. SOCIETY INSURANCE, C.A. No. 1:20–02524
JDS 1455, INC. v. SOCIETY INSURANCE, C.A. No. 1:20–02546
351 KINGSBURY CORNER, LLC v. SOCIETY INSURANCE, C.A. No. 1:20–02589
ROSCOE SAME LLC, ET AL. v. SOCIETY INSURANCE, C.A. No. 1:20–02641
KEDZIE BOULEVARD CAFE INC. v. SOCIETY INSURANCE INC., C.A. No. 1:20–02692
VALLEY LODGE CORP. v. SOCIETY INSURANCE, C.A. No. 1:20–02813
THE BARN INVESTMENT LLC, ET AL. v. SOCIETY INSURANCE, C.A. No. 1:20–03142
PURPLE PIG CHEESE BAR & PORK STORE, LLC v. SOCIETY INSURANCE, C.A. No. 1:20–03164
CIAO BABY ON MAIN LLC v. SOCIETY INSURANCE INC., C.A. No. 1:20–03251
CARDELLI ENTERPRISE, LLC v. SOCIETY INSURANCE, C.A. No. 1:20–03263
726 WEST GRAND LLC, ET AL. v. SOCIETY INSURANCE, C.A. No. 1:20–03432
DEERFIELD ITALIAN KITCHEN, INC. v. SOCIETY INSURANCE, INC., C.A. No. 1:20–03896
THE WHISTLER LLC, ET AL. v. SOCIETY MUTUAL INSURANCE COMPANY, C.A. No. 1:20–03959
RIVERSIDE ENTERPRISES, LLC v. SOCIETY INSURANCE, C.A. No. 1:20–04178

District of Minnesota

LUCY'S BURGERS, LLC v. SOCIETY INSURANCE, INC., C.A. No. 0:20–01029

Middle District of Tennessee

PEG LEG PORKER RESTAURANT, LLC v. SOCIETY INSURANCE, C.A. No. 3:20–00337

Eastern District of Wisconsin

RISING DOUGH, INC., ET AL. v. SOCIETY INSURANCE, C.A. No. 2:20−00623
AMBROSIA INDY LLC v. SOCIETY INSURANCE, C.A. No. 2:20–00771

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: TRAVELERS COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2965

ORDER DENYING TRANSFER

Before the Panel:[*] At its July 2020 hearing session, the Panel considered two motions seeking centralization of an industry-wide litigation involving insurance claims for coverage for business interruption losses caused by the COVID-19 pandemic and the related government orders suspending, or severely curtailing, operations of non-essential businesses. We denied the motions, concluding that the differences among the many insurers would overwhelm any common factual questions and hinder the transferee court's ability to efficiently manage the litigation. *See In re COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2942, 2020 WL 4670700, __ F. Supp. 3d __ (J.P.M.L. Aug. 12, 2020). In the briefing on those motions, several parties proposed that insurer-specific MDLs be created. We concluded that we needed "a better understanding of the factual commonalities and differences among these actions, as well as the efficiencies that may or may not be gained through centralization, before creating an insurer-specific MDL." *Id.* at *3. Therefore, we ordered the Panel Clerk to issue orders directing the parties to certain actions involving a common insurer or group of insurers to show cause why those actions should not be centralized.

One of those orders encompassed the fourteen actions listed on Schedule A,[1] which are all brought against one or more Travelers defendants.[2] Since we issued this show cause order, the parties have notified us of 30 related actions. Plaintiffs in ten of these 44 actions support the creation of a Travelers MDL. They variously suggest three potential transferee districts: the Western District of Washington; the Southern District of New York; and the Northern District of California. Plaintiffs in three cases oppose centralization, one of which alternatively suggests centralization in the Eastern District of Missouri. The Travelers defendants oppose centralization. Additionally, the

[*] Judge David C. Norton took no part in the decision of this matter.

[1] A fifteenth action on the show cause order, filed in the Northern District of California, was dismissed by Judge John S. Tigar and has been appealed. *See Mudpie, Inc. v. Travelers Casualty Insurance Company of America*, N.D. California, C.A. 4:20–03213.

[2] Travelers Casualty Insurance Company of America, The Travelers Indemnity Company of Connecticut, The Charter Oak Fire Insurance Company, The Phoenix Insurance Company, The Travelers Indemnity Company of America, The Travelers Indemnity Company, Travelers Property Casualty Company of America, Northfield Insurance Company, Travelers Lloyds Insurance Company, Travelers Lloyds Management Company, and The Travelers Companies, Inc.

Panel received two briefs by amici curiae, one in support of and one in opposition to centralization.

After considering the arguments of counsel,[3] we conclude that centralization of the Travelers actions will not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation. Centralization of these actions presents a close question. The insurance policies at issue in the Travelers actions appear to use standard forms drafted by the Insurance Services Office (ISO), and will involve interpretation of common policy language, such as the phrase "direct physical loss or physical damage to property." Further, the policies have a similar purported virus exclusion. To the extent discovery is necessary of Travelers regarding the drafting and interpretation of its policies, such discovery will be common to all actions. Thus, these actions present common legal and factual questions that could, in other circumstances, support centralization.[4]

Common factual questions, however, are not the sole prerequisite for centralization under Section 1407. Centralization also must promote the just and efficient conduct of the actions. This litigation demands efficiency. As counsel repeatedly emphasized in their papers and during oral argument, time is of the essence in this litigation. Many plaintiffs are on the brink of bankruptcy as a result of business lost due to the COVID-19 pandemic and the government closure orders. The most pressing question before us, then, is whether centralization presents the most efficient means of advancing these actions towards resolution.

Efficiency here is best obtained outside of an MDL. If these actions were centralized, the transferee court would have to establish a pretrial structure to manage numerous plaintiffs, many of which are pursuing distinct theories of liability.[5] The court also would need to identify common

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[3] In light of the concerns about the spread of COVID-19 virus (coronavirus), the Panel heard oral argument by videoconference at its hearing session of September 24, 2020. *See* Suppl. Notice of Hearing Session, MDL No. 2965 (J.P.M.L. September 8, 2020), ECF No. 64.

[4] Travelers asserts that centralization is inappropriate for the handling of purely legal questions, such as policy interpretation questions. It is true that common legal questions, standing alone, are not sufficient to satisfy Section 1407's requirement that there be common factual questions. *See In re ABA Law School Accreditation Litig.*, 325 F. Supp. 3d 1377, 1378–79 (J.P.M.L. 2018). Centralization may be appropriate even where legal questions are prominent, however, so long as common factual issues are present. *See In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 588 F. Supp. 2d 1376, 1377 (J.P.M.L. 2008) ("The Panel must determine the extent of the common factual issues and the likelihood that centralized pretrial proceedings will create important efficiencies, avoid inconsistent rulings, and result in the overall fairer adjudication of the litigation for the benefit of all involved parties.").

[5] For instance, some plaintiffs argue that the COVID-19 virus is present on and caused damage to their properties. Others allege that they suffered damage as a result of state and local governments' orders restricting or closing businesses. And some plaintiffs allege unique theories

(continued...)

policies with identical or sufficiently similar policy language and interpret those policies under applicable state laws. The Travelers actions are pending in 22 districts in fifteen states and the District of Columbia. It will take a not insignificant amount of time to organize this litigation and resolve the central policy interpretation questions. In the meantime, dispositive motions addressing these policy interpretation questions are pending in 35 of the 44 actions, at least eleven of which are fully briefed. Rather than have one judge attempt to organize and resolve the core policy interpretation issues, it strikes us that allowing the various transferor courts to decide these questions will result in quicker and more efficient resolution of this litigation.

Furthermore, should plaintiffs' claims survive dispositive rulings on the policy interpretation questions,[6] discovery appears relatively straightforward. While some of this discovery may well be common (particularly any discovery directed to Travelers regarding the drafting and interpretation of its policy language), much of the discovery will be plaintiff- and property-specific. In these circumstances, it is more likely the actions will reach an expeditious resolution if they remain in the transferor courts. We impress upon the courts overseeing these actions the importance of advancing these actions towards resolution as quickly as possible.

Accordingly, centralization of the actions listed on Schedule A is not warranted. To the extent necessary, alternatives to centralization are available to minimize any duplication in pretrial proceedings, including informal cooperation and coordination among the parties and courts. We also note that some similar actions are pending in the same district before multiple judges, and it may be appropriate for the courts or the parties to seek to relate those before one judge.

IT IS THEREFORE ORDERED that the order to show cause regarding the actions listed on Schedule A is vacated.

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[5](...continued)
of coverage, such as the dental practices in the Eastern District of Missouri *Edwards* action, which assert that they closed their practices not as a result of civil authority orders, but based on guidance from the Centers for Disease Control and the American Dental Association. These distinct claims likely will require different legal analysis and different discovery.

[6] We take no position on the merits of these dispositive motions. *See In re Kauffman Mut. Fund Actions*, 337 F. Supp. 1337, 1339-40 (J.P.M.L. 1972) ("The framers of Section 1407 did not contemplate that the Panel would decide the merits of the actions before it and neither the statute nor the implementing Rules of the Panel are drafted to allow for such determinations."). To date, there has been only two rulings on motions to dismiss in Travelers actions. *See 10E, LLC v. Travelers Indemnity Co. of Connecticut, et al.*, C.A. No. 2:20-4418, 2020 WL 5359653 (C.D. Cal., Sept. 2, 2020); *Mudpie*, C.A. 4:20–03213, ___ F. Supp. 3d ___, 2020 WL 5525171 (N.D. Cal., Sept. 14, 2020).

PANEL ON MULTIDISTRICT LITIGATION

Karen K. Caldwell
Chair

Ellen Segal Huvelle
Catherine D. Perry
Matthew F. Kennelly

R. David Proctor
Nathaniel M. Gorton

IN RE: TRAVELERS COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2965

SCHEDULE A

Central District of California

TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA v. GERAGOS AND GERAGOS, C.A. No. 2:20–03619
MARKS ENGINE COMPANY NO. 28 RESTAURANT, LLC v. TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, ET AL, C.A. No. 2:20–04423
G & P HOSPITALITY, LLC v. THE TRAVELERS COMPANIES, INC., C.A. No. 2:20–05148

Eastern District of Missouri

GLENN R. EDWARDS, INC., ET AL. v. THE TRAVELERS COMPANIES, INC., ET AL., C.A. No. 4:20–00877

District of New Jersey

J.G. OPTICAL, INC. v. THE TRAVELERS COMPANIES, INC., C.A. No. 2:20–05744

Southern District of New York

SERVEDIO v. TRAVELERS CASUAL INSURANCE COMPANY OF AMERICA, C.A. No. 1:20–03907

Eastern District of Pennsylvania

ERIC R. SHANTZER, DDS v. TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA, ET AL., C.A. No. 2:20–02093

Northern District of Texas

SALUM RESTAURANT LTD. v. THE TRAVELERS INDEMNITY COMPANY, C.A. No. 3:20–01034

Southern District of Texas

FROSCH HOLDCO, INC., ET AL. v. THE TRAVELERS INDEMNITY COMPANY, ET AL., C.A. No. 4:20–01478

Western District of Washington

NGUYEN v. TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA, C.A. No. 2:20–00597
FOX v. TRAVELERS CASUALTY COMPANY OF AMERICA, C.A. No. 2:20–00598
HSUE v. TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA, C.A. No. 2:20–00622
KASHNER v. TRAVELERS INDEMNITY COMPANY OF AMERICA, C.A. No. 2:20–00625
BATH v. TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA, C.A. No. 3:20–05489

2020 WL 5525171
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

MUDPIE, INC., Plaintiff,

v.

TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA, Defendant.

Case No. 20-cv-03213-JST
|
Signed 09/14/2020

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ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Re: ECF No. 11

JON S. TIGAR, United States District Judge

***1** Before the Court is Defendant's motion to dismiss. ECF No. 11. The Court will grant the motion.

I. BACKGROUND

Plaintiff Mudpie, Inc. is a San Francisco retail store that sells children's clothing, toys, housewares, books, and other goods. ECF No. 1 ¶ 26. Mudpie brings this putative class action on behalf of itself and other California retailers who purchased comprehensive business insurance from Defendant Travelers Casualty Insurance Company of America ("Travelers"), filed a claim for lost business income following California's Stay at Home Order, and were denied coverage. *Id.* ¶ 43.

The Stay at Home Order was issued in response to an outbreak of COVID-19, a novel strain of coronavirus. *Id.* ¶¶ 17, 24-25. On March 11, 2020, "the World Health Organization declared COVID-19 a global health pandemic based on existing and projected infection and death rates and concerns about the speed of transmission and ultimate reach of this virus." *Id.* ¶ 19. At that time, "it was generally understood in the scientific and public health communities that COVID-19 was spreading through human-to-human transmission and could be transmitted by asymptomatic carriers." *Id.* ¶ 17. Public health officials thus advised that social distancing – the maintenance of physical space between people – was needed to stop the transmission of COVID-19. *Id.* ¶¶ 17, 20, 22.

On March 12, 2020, California Governor Gavin Newsom issued a statewide directive known as the Safer at Home Order, which required California residents "to heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures, to control the spread of COVID-19." *Id.* ¶ 24. On March 19, 2020, the Governor issued a series of mandates known as the Stay at Home Order, which "requir[ed] retailers to cease in-person services." *Id.* ¶ 25.

Mudpie had purchased a "comprehensive commercial liability and property insurance" policy from Travelers "to insure against risks the business might face." *Id.* ¶ 30. Mudpie alleges that its compliance with the government closure orders "result[ed] in substantial loss to business income" because its storefront became "useless and/or uninhabitable." *Id.* ¶¶ 27, 59. On or about April 27, 2020, Mudpie reported its loss of business income as of March 16, 2020, under its Travelers insurance policy. *Id.* ¶ 32.

In May 2020, Travelers denied Mudpie's insurance claim. *Id.* ¶ 33. Travelers took the position that Mudpie was not entitled to Business Income and Extra Expense coverage under its policy because "the limitations on [Mudpie's] business operations were the result of the Governmental Order, as opposed to 'direct physical loss or damage to property at the described premises.' " *Id.* In addition, Travelers found that Mudpie was not entitled to Civil Authority coverage because "the Governmental Order that affected [Mudpie's] business was not issued due to 'direct physical loss of or damage to property.' " *Id.* Finally, Travelers stated that the policy

contained "an exclusion for 'loss or damage caused by or resulting from any virus' – such as the COVID-19 virus." *Id.*

***2** Mudpie alleges three causes of action in its complaint. First, Mudpie seeks "a declaration for itself and similarly situated retailers that its business income losses are covered and not precluded by exclusions or other limitations in its comprehensive business insurance policy." *Id.* ¶ 62. Second, Mudpie alleges that Travelers breached its contract by denying it comprehensive business coverage. *Id.* ¶ 69. Third, Mudpie alleges that Travelers breached the implied covenant of good faith and fair dealing by: (1) selling policies that appear to provide liberal coverage with the intent of interpreting ambiguous, undefined, and poorly defined terms to deny coverage; (2) unreasonably denying coverage by applying undefined, ambiguous, and contradictory terms contrary to applicable rules of policy construction and the plain terms and purpose of the policy; (3) denying Mudpie's claim without conducting a fair, unbiased, and thorough inquiry; (4) misrepresenting policy terms; and (5) compelling policy holders to initiate litigation to recover policy benefits to which they are entitled. *Id.* ¶ 75.

On June 3, 2020, Travelers filed a motion to dismiss Mudpie's complaint. ECF No. 11. Mudpie opposes the motion, ECF No. 19, and Travelers has filed a reply, ECF No. 20.

II. JURISDICTION

The Court has jurisdiction over this putative class action pursuant to 28 U.S.C. § 1332(d)(2) because the amount in controversy exceeds $5 million and at least one member in the proposed class of over 100 members is a citizen of a state different from Travelers.[1]

III. LEGAL STANDARD

A. Motion to Dismiss

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) (citation omitted). A complaint need not contain detailed factual allegations, but facts pleaded by a plaintiff must be "enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citation and internal quotation marks omitted). The Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

B. Insurance Policy Interpretation

Under California law, the interpretation of an insurance contract is question of law for the courts.[2] *See Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18, 44 Cal.Rptr.2d 370, 900 P.2d 619 (1995). "While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." *Bank of the W. v. Superior Court*, 2 Cal. 4th 1254, 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545 (1992). "If contractual language is clear and explicit, it governs." *Id.* In addition, "[t]he terms in an insurance policy must be read in context and in reference to the policy as a whole, with each clause helping to interpret the other." *Sony Comput. Entm't Am. Inc. v. Am. Home Assurance Co.*, 532 F.3d 1007, 1012 (9th Cir. 2008) (citing Cal. Civ. Code § 1641; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal. 4th 854, 867, 21 Cal.Rptr.2d 691, 855 P.2d 1263 (1993); *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115, 90 Cal.Rptr.2d 647, 988 P.2d 568 (1999)). "[I]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." *Bank of the W.*, 2 Cal. 4th at 1264-65, 10 Cal.Rptr.2d 538, 833 P.2d 545 (quoting Cal. Civ. Code § 1649). "Only if this rule does not resolve the ambiguity do [courts] then resolve it against the insurer." *Id.* at 1265, 10 Cal.Rptr.2d 538, 833 P.2d 545. California courts have cautioned that language in a contract "cannot be found to be ambiguous in the abstract," and courts should "not strain to create an ambiguity where none exists." *Waller*, 11 Cal. 4th at 18-19, 44 Cal.Rptr.2d 370, 900 P.2d 619.

IV. DISCUSSION

***3** Travelers argues that Mudpie's "factual allegations cannot satisfy the prerequisites for coverage under the Civil Authority, Business Income and Extra Expense" provisions in the insurance policy that Travelers issued to Mudpie.[3] ECF No. 11 at 14. In addition, Travelers argues that the policy's virus exclusion "clearly and unambiguously precludes coverage." *Id.*

A. Business Income and Extra Expense Coverage

The parties dispute whether Mudpie's allegations establish "a direct physical loss of" property as required by the Business Income and Extra Expense provisions in the insurance policy. The Business Income provisions state:

> 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.

ECF No. 11-2 at 72-73. Similarly, the Extra Expense provisions provide for payment of "reasonable and necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no *direct physical loss of or damage to property* caused by or resulting from a Covered Cause of Loss." *Id.* at 73 (emphasis added). "Covered Causes of Loss" are defined as "risks of direct physical loss," subject to certain limitations and exclusions. *Id.* at 73-74 (emphasis omitted).

1. Physical Alteration or Change to Property

Mudpie claims that its inability to operate and occupy its storefront following the government closure orders is a direct physical loss of property covered by its insurance policy. ECF No. 19 at 14. Travelers argues that, in order to establish a "direct physical loss of" property, Mudpie must allege "a distinct, demonstrable, physical alteration of the property" or "a *physical change* in the condition of the property, i.e., it must have been 'damaged' within the common understanding of that term." ECF No. 11 at 22-23 (quoting *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779-80, 115 Cal.Rptr.3d 27 (2010)).

The Court disagrees with Travelers's broad conception of the language "direct physical loss of" property. Another district court within this Circuit recently rejected a nearly identical interpretation of this language. *See Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB (KSx), 2018 WL 3829767, at *3-4 (C.D. Cal. July 11, 2018). The plaintiff in *Total Intermodal*, who also held a Travelers insurance policy, filed a claim for cargo that had been mistakenly returned to China, where it became unrecoverable and was ultimately destroyed. *Id.* at *1. Travelers denied the claim and, in the ensuing lawsuit, it relied on *MRI Healthcare Center* to argue that "direct physical loss *of*" property requires some damage or alteration to the property. *Id.* at *2, 4. The court disagreed, concluding that the phrase "direct physical loss *to* business personal property" in *MRI Healthcare Center* should be construed differently than "direct physical loss *of*" property in the Travelers insurance policy.[4] *Id.* at *4 (emphasis added). The court reasoned that "the '*loss of*' property contemplates that the property is misplaced and unrecoverable, without regard to whether it was damaged." *Id.* at *3. Furthermore, "to interpret 'physical loss of' as requiring 'damage to' would render meaningless the 'or damage to' portion of the same clause, thereby violating a black-letter cannon of contract interpretation—that every word be given a meaning." *Id.* (citing Cal. Civ. Code § 1641). The court thus concluded that "loss of" could include "the permanent dispossession of something." *Id.* at *4.

***4** As in *Total Intermodal*, the insurance policy here covers "direct physical loss of or damage to property." ECF 11-2 at 72-73. In accordance with the reasoning in *Total Intermodal*, the Court finds that the language of this provision, alone, does not require a "physical alteration of the property" or "a *physical change* in the condition of the property." ECF No. 11 at 22-23 (citation omitted). Nevertheless, the facts at hand do not fall within the *Total Intermodal* court's more expansive interpretation of "direct physical loss of property." Although Mudpie has been dispossessed of its storefront, it will not be a "permanent dispossession" as with the lost cargo in *Total Intermodal*. *See* 2018 WL 3829767, at *4. When the Stay at Home orders are lifted, Mudpie can regain possession of its storefront. Mudpie's physical storefront has not been "misplaced" or become "unrecoverable," and neither has its inventory. *See id.* at *3.

Moreover, while a "direct physical loss of" property does not require damage or physical alteration to the property, the surrounding provisions within Travelers's insurance policy suggest that Mudpie's inability to occupy its storefront does not fall within the Business Income and Extra Expense coverage of this policy. *See Sony Comput.*, 532 F.3d at 1012 ("The terms in an insurance policy must be read in context and in reference to the policy as a whole, with each clause helping to interpret the other."). The insurance policy states that the "period of restoration" – applicable to both Business Income and Extra Expense coverage – "[b]egins 24 hours after the time of direct physical loss or damage" and "[e]nds on the date when the property ... should be repaired, rebuilt or replaced with reasonable speed and similar quality." ECF No.

11-2 at 84. The words " '[r]ebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature." *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 287 (S.D.N.Y. 2005). But here, there is nothing to fix, replace, or even disinfect for Mudpie to regain occupancy of its property, which Mudpie admits in its opposition brief: "Mudpie's loss is caused by state closure orders and thus will last for however long those restrictions remain." ECF No. 19 at 8.

2. Intervening Physical Force

Mudpie cites several non-California cases for the proposition that the "loss of functionality of, or access to, a property," such as Mudpie's loss of functionality of its storefront, "constitutes a direct physical loss of property."[5] ECF No. 19 at 15. However, each of these cases involved an intervening physical force which "made the premises uninhabitable or entirely unusable." *See, e.g., Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418 (WHW) (CLW), 2014 WL 6675934, at *6-7 (D.N.J. Nov. 25, 2014) (finding that ammonia discharge inflicted "direct physical loss of or damage to" property where "there [was] no genuine dispute that the ammonia release physically transformed the air" within the premises and rendered it unusable); *Manpower Inc. v. Ins. Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *6 (E.D. Wis. Nov. 3, 2009) (finding that the insured's inability to access its property was a direct physical loss where the loss "was caused by a physical event—the [building] collapse—which created a physical barrier between the insured and its property"); *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 509 S.E.2d 1, 5, 17 (1998) (finding that "[l]osses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property" when a rockfall made plaintiffs' homes uninhabitable).

***5** Indeed, numerous courts outside the Ninth Circuit have found that some outside physical force must have *induced* a detrimental change in the property's capabilities before a plaintiff alleging loss of use can establish a "direct physical loss of property." *See, e.g., Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005) (rejecting the argument "that direct physical loss or damage is established *whenever* property cannot be used for its intended purpose"); *Ne. Ga. Heart Ctr., P.C. v. Phx. Ins. Co.*, No. 2:12-CV-00245-WCO, 2014 WL 12480022, at *6 (N.D. Ga. May 23, 2014) (listing cases where "the reviewing court required some outside physical force to have induced a detrimental change in the property's capabilities" to award pure loss-of-use damages). For instance, in *Western Fire Insurance Co. v. First Presbyterian Church* the Supreme Court of Colorado determined that a direct physical loss had occurred when the insured, acting upon the orders of the fire department, closed the church building because gas had infiltrated the soil underneath it. 165 Colo. 34, 437 P.2d 52, 54-55 (1968). The court clarified that "the so-called 'loss of use' of the church premises, standing alone, d[id] not in and of itself constitute a 'direct physical loss.' " *Id.* at 55. Rather, the direct physical loss resulted from the "accumulation of gasoline around and under the church building," which made further use of the building highly dangerous. *Id.* The California Court of Appeal reinforced the *Western Fire* court's reasoning, noting that *Western Fire* "does *not* stand for the proposition that loss of intangible property can constitute a physical loss." *Ward Gen. Ins. Servs., Inc. v. Emps. Fire Ins. Co.*, 114 Cal. App. 4th 548, 558, 7 Cal.Rptr.3d 844 (Cal. Ct. App. 2004). Rather, "[a] physical loss occurred when the foundations became saturated with gasoline." *Id.*

Finally, a court in Michigan recently held that allegations of "a loss of business due to executive orders shutting down [ ] restaurants for dining" in response to the COVID-19 pandemic were insufficient to establish "direct physical loss of or damage to" the property. *Gavrilides Mgmt. Co. v. Mich. Ins. Co.*, Case No. 20-258-CB-C30 (Mich. Cir. Ct. July 1, 2020); ECF No. 21-1 at 19-20.[6]

Similar to the plaintiff in *Gavrilides*, Mudpie does not allege that "Covid-19 entered the [property] through any employee or customer." ECF No. 21-1 at 19; *see* ECF No. 19 at 21 (noting that "the complaint nowhere states that Mudpie was closed because its employees became sick or coronavirus was discovered on the property"). Rather than alleging that COVID-19 or any other physical impetus caused the loss of functionality of its storefront, Mudpie alleges that its "loss is caused by government closure orders and thus will last for however long those restrictions remain." ECF No. 19 at 8, 2; *see* ECF No. 1 ¶ 27. Because Mudpie's complaint contains no allegations of a physical force which "induced a detrimental change in the property's capabilities," the Court finds that Mudpie has failed to establish a "direct physical loss of property" under its insurance policy.[7] *See Ne. Ga. Heart Ctr.*, 2014 WL 12480022, at *6.

Following the conclusion of briefing, Mudpie submitted as supplemental authority the opinion in *Studio 417, Inc. v. Cincinnati Insurance Co.*, No. 20-CV-03127-SRB, —— F.Supp.3d ——, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020). Like Mudpie, plaintiffs in that case were businesses (a hair salon and several restaurants) who sought coverage for losses incurred when their businesses were impacted by the COVID-19 pandemic. *Id.* at —— – ——, 2020 WL 4692385 st *1-2. Plaintiffs there also alleged that business closure orders issued by civil authorities required them to cease or reduce their business operations. *Id.* at ——, 2020 WL 4692385 at *2. Unlike Mudpie, however, plaintiffs also claimed that the presence of the COVID-19 virus inside their establishments made them unusable. *Id.* ("Plaintiffs allege that over the last several months, it is likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus. Plaintiffs allege that COVID-19 'is a physical substance,' that it 'live[s] on' and is 'active on inert physical surfaces,' and is 'emitted into the air.' Plaintiffs further allege that the presence of COVID-19 'renders physical property in their vicinity unsafe and unusable,' and that they 'were forced to suspend or reduce business at their covered premises.' ") (citations omitted). Based on the latter allegations, the *Studio 417* court found that plaintiffs had plausibly alleged a covered loss:

> ***6** Plaintiffs have adequately alleged a direct physical loss. Plaintiffs allege a causal relationship between COVID-19 and their alleged losses. Plaintiffs further allege that COVID-19 "is a physical substance," that it "live[s] on" and is "active on inert physical surfaces," and is also "emitted into the air." COVID-19 allegedly attached to and deprived Plaintiffs of their property, making it "unsafe and unusable, resulting in direct physical loss to the premises and property." Based on these allegations, the Amended Complaint plausibly alleges a "direct physical loss" based on "the plain and ordinary meaning of the phrase."

Id. at ——, 2020 WL 4692385 at *4 (citations omitted). Mudpie makes no similar allegation here. It does not allege, for example, that the presence of the COVID-19 virus in its store created a physical loss. Rather, its sole focus is on the shelter-in-place orders that have prevented it from opening, a distinctly less physical phenomenon. ECF No. 1 ¶ 27 ("*Compliance with those orders* has caused direct physical loss of Mudpie's insured property in that the property has been made useless and/or uninhabitable; and its functionality has been severely reduced if not completely or nearly eliminated." (emphasis added)). Accordingly, *Studio 417* does not assist Mudpie.

The Court's conclusion is further supported by the policy's provision which states that Travelers "will not pay for loss or damage caused by or resulting from ... loss of use or loss of market." ECF No. 11-2 at 94. The separate provision for loss of use suggests that the "direct physical loss of ... property" clause was not intended to encompass a loss where the property was rendered unusable without an intervening physical force. The provision also undermines Mudpie's claim that "a reasonable purchaser of insurance would read the policy as providing coverage for a loss of functionality."[8] *See* ECF No. 19 at 14. Thus, because Mudpie fails to allege any intervening physical force beyond the government closure orders, the Court finds that Mudpie is not entitled to Business Income or Extra Expense coverage under the terms of its policy.

B. Civil Authority Coverage

Travelers's Civil Authority coverage provision extends Business Income and Extra Expense coverage to insure losses. The provision states:

> When the Declarations show that you have coverage for Business Income and Extra Expense, you may extend that insurance to apply to the actual loss of Business Income you sustain and reasonable and necessary Extra Expense you incur caused by action of civil authority that prohibits access to the described premises. The civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises, that are within 100 miles of the described premises, caused by or resulting from a Covered Cause of Loss.

ECF No. 11-2 at 85. Travelers argues that Mudpie is not entitled to Civil Authority coverage because Mudpie cannot establish that the civil authority action – the closure orders in this case – were issued "due to direct physical loss of or damage to" any property. ECF No. 11 at 19-21. The Court agrees.

***7** Under the Civil Authority provision, Mudpie must establish the "requisite causal link between damage to adjacent property and denial of access" to its store. *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-0756 FMS, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995); *see also Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686 (5th Cir. 2011) (finding that civil authority coverage requires a "causal link between prior property damage and the civil authority order"). In *Syufy Enterprises*, a theater owner closed his theaters in response to the curfew orders which

were imposed by California civil authorities following the Rodney King verdict. 1995 WL 129229, at *1. Finding that the curfews were not imposed "because of damage to adjacent property" but instead "to *prevent* 'potential' looting, rioting, and resulting property damage," the court concluded that the theater owner was not entitled to civil authority coverage. *Id.* at *2-3; *see also United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 129, 134 (2d Cir. 2006) (affirming the district court's denial of coverage under a similar civil authority provision where the government's decision to halt airport operations on September 11, 2001 "was based on fears of future attacks" rather than prior physical damage to an adjacent property); *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, No. H-06-4041, 2008 WL 450012, at *10 (S.D. Tex. Feb. 15, 2008) (finding no coverage under an analogous civil authority provision where the government evacuation order "was issued due to the anticipated threat of damage to the county and not due to property damage that had occurred").

Mudpie's allegations establish that the government closure orders were intended to prevent the spread of COVID-19. *See* ECF No. 1 ¶ 24 (California's Safer at Home Order was issued "to control the spread of COVID-19."). Because the orders were preventative – and absent allegations of damage to adjacent property – the complaint does not establish the requisite causal link between prior property damage and the government's closure order.

That Mudpie's opposition brief attempts to downplay its Civil Authority coverage allegations underscores the Court's conclusion. Mudpie states that "[n]one of [its] claims seek recovery specifically under the civil authority extension" and that "[i]t need not invoke the civil authority extension to establish coverage under the policy." ECF No. 19 at 17. Accordingly, the Court finds as a matter of law that Mudpie is not entitled to Civil Authority coverage.[9]

C. Dismissal of Each Cause of Action

Mudpie's first cause of action "seeks a declaration for itself and similarly situated retailers that its business income losses are covered and not precluded by exclusions or other limitations in its comprehensive business insurance policy." ECF No. 1 ¶ 62. Because Mudpie is not entitled to Business Income, Extra Expense, or Civil Authority coverage as a matter of law, *see supra* at IV.A-B, Mudpie's first cause of action is dismissed.

Mudpie's second cause of action alleges that Travelers breached its contract by denying Mudpie comprehensive business insurance coverage. ECF No. 1 ¶ 69. The elements of a cause of action for breach of contract under California law are: "(1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821, 124 Cal.Rptr.3d 256, 250 P.3d 1115 (2011). "[A]bsent an actual withholding of benefits due, there is no breach of contract." *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 n.10, 271 Cal.Rptr. 246 (Cal. Ct. App. 1990) (citation and emphasis omitted). Because Mudpie has failed to allege that any "benefits due were withheld or delayed," it cannot allege a breach of contract. *See id.* at 1152, 271 Cal.Rptr. 246. Mudpie's second cause of action is therefore dismissed.

Mudpie's third cause of action alleges breach of the implied covenant of good faith and fair dealing. Under California law, a breach of the implied covenant of good faith and fair dealing in the insurance context has two elements: "(1) benefits due under the policy must have been withheld and (2) the reason for withholding benefits must have been unreasonable or without proper cause." *Love*, 221 Cal. App. 3d at 1151, 271 Cal.Rptr. 246. Because Mudpie has failed to allege that benefits were withheld, the "threshold requirement" for a bad faith claim has not been met. *See id.* at 1151-52, 271 Cal.Rptr. 246; *see also Waller*, 11 Cal. 4th 1 at 35, 44 Cal.Rptr.2d 370, 900 P.2d 619 (affirming that a bad faith claim cannot be maintained unless policy benefits are due under the contract). Accordingly, Mudpie's third cause of action is dismissed.

***8** Lastly, the Court dismisses Mudpie's putative class claims. "[W]here the named plaintiffs have failed to state a claim in themselves for the relief they seek[,] ... there is no occasion for the court to wrestle with the problems presented in considering whether the action may be maintained on behalf of the class." *Boyle v. Madigan*, 492 F.2d 1180, 1182 (9th Cir. 1974).

V. LEAVE TO AMEND

Under Federal Rule of Civil Procedure 15(a), leave to amend is freely given when justice so requires. The Court may, however, "exercise its discretion to deny leave to amend due to 'undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party ..., [and] futility of amendment.' " *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892 (9th Cir. 2010) (quoting

Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). In this case, it seems doubtful that Mudpie could establish a "direct physical loss of ... property" as the term is defined in its insurance policy for Business Income and Extra Expense coverage. Furthermore, Mudpie has failed to establish entitlement to Civil Authority coverage and admits that none of its claims "seek recovery specifically under the civil authority extension." ECF No. 19 at 17. The Court also recognizes, however, that the law concerning business interruption coverage linked to the COVID-19 pandemic is very much in development. Accordingly, the Court will dismiss the complaint without prejudice and grant leave to amend.

CONCLUSION

For the foregoing reasons, the Court grants Travelers's motion to dismiss without prejudice. Mudpie may file an amended complaint solely to correct the deficiencies identified in this order. An amended complaint is due 21 days from the date of this order. If no amended complaint is filed, the Court will dismiss the case with prejudice.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 5525171

Footnotes

1 Mudpie is a California resident, and Travelers is a Connecticut resident. ECF No. 1 ¶¶ 11, 12.

2 The parties do not dispute that California law governs the underlying insurance policy. *See* ECF No. 11 at 15 n.4; ECF No 19 at 13 n.5.

3 The insurance policy, ECF No. 11-2, is incorporated by reference. "Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

4 The *Total Intermodal* court also found the that the phrase "direct physical loss" should be construed differently than "direct physical loss *of*." *Total Intermodal*, 2018 WL 3829767, at *4. For this reason, Travelers's reliance on *Meridian Textiles, Inc. v. Indemnity Ins. Co. of N. Am.*, in which the insurance policy covered "physical loss or damage," is misplaced. No. CV 06-4766 CAS, 2008 WL 3009889, at *2, 3 (C.D. Cal. Mar. 20, 2008); *see* ECF No. 11 at 22-23.

5 Mudpie cites one unpublished California case in support of its argument, *Universal Savings Bank v. Bankers Standard Insurance Co.*, No. B159239, 2004 WL 515952, at *6 (Cal. Ct. App. Mar. 17, 2004), *vacated*, No. B159239, 2004 WL 3016644 (Cal. Ct. App. Dec. 30, 2004). Pursuant to California Rule of Court 8.1115 and Civil Local Rule 3-4(e), the Court may not consider this unpublished case. *See Sarmiento v. Sealy, Inc.*, No. 18-CV-01990-JST, 2019 WL 3059932, at *6 n.7 (N.D. Cal. July 12, 2019) (declining to apply unpublished California authority).
The Court notes that some district and appellate courts within the Ninth Circuit do consider unpublished California appellate authority. *See, e.g., Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1223 n.3 (9th Cir. 2015) ("Even though unpublished California Courts of Appeal decisions have no precedential value under California law, the Ninth Circuit is not precluded from considering such decisions as a possible reflection of California law.") (quotation and citation omitted). The clear text of Local Rule 3-4(e), however, forecloses such a result here. *See* Civ. L.R. 3-4(e) ("Any order or opinion that is designated: 'NOT FOR CITATION,' pursuant to Civil L.R. 7-14 or pursuant to a similar rule of any other issuing court, may not be cited to this Court, either in written submissions or oral argument, except when relevant under the doctrines of law of the case, res judicata or collateral estoppel.") (emphasis in original).

6 At the time this order was issued, only the official court transcript was available, which is located at ECF No. 21-1.

7 Had Mudpie alleged the presence of COVID-19 in its store, the Court's conclusion about an intervening physical force would be different. SARS-CoV-2 – the coronavirus responsible for the COVID-19 pandemic, which is transmitted either through respiratory droplets or through aerosols which can remain suspended in the air for prolonged periods of time – is no less a "physical force" than the "accumulation of gasoline" in *Western Fire* or the "ammonia release [which] physically transformed the air" in *Gregory Packaging*. *See Western Fire*, 437 P.2d at 55; *Gregory Packaging*, 2014 WL 6675934, at *6.

8 Mudpie argues that the insurance policy's definition of "property damage" as "[l]oss of use of tangible property that is not physically injured" "supports the conclusion that a reasonable purchaser of insurance would read the policy as providing coverage for a loss of functionality." ECF No. 19 at 14. However, Mudpie itself acknowledges that the property damage

definition to which it refers is "not in the businessowners coverage part" of the insurance policy, which provides Business Income and Extra Expense coverage. ECF No. 19 at 12. Rather, it appears in and is applicable to the commercial general liability section of the policy. *See* ECF No. 11-2 at 33, 142.

9 Because Mudpie is not entitled to Civil Authority coverage, the Court need not consider Travelers's additional argument that the virus exclusion bars such coverage. ECF No. 11 at 17-19.

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STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 20-CVS-02569

2020 OCT -9 P 3:14

..., C.S.C.

NORTH STATE DELI, LLC d/b/a LUCKY'S DELICATESSEN, MOTHERS & SONS, LLC d/b/a MOTHERS & SONS TRATTORIA, MATEO TAPAS, L.L.C. d/b/a MATEO BAR DE TAPAS, SAINT JAMES SHELLFISH LLC d/b/a SAINT JAMES SEAFOOD, CALAMARI ENTERPRISES, INC. d/b/a PARIZADE, BIN 54, LLC d/b/a BIN 54, ARYA, INC. d/b/a CITY KITCHEN and VILLAGE BURGER, GRASSHOPPER LLC d/b/a NASHER CAFE, VERDE CAFE INCORPORATED d/b/a LOCAL 22, FLOGA, INC. d/b/a KIPOS GREEK TAVERNA, KUZINA, LLC d/b/a GOLDEN FLEECE, VIN ROUGE, INC. d/b/a VIN ROUGE, KIPOS ROSE GARDEN CLUB LLC d/b/a ROSEWATER, and GIRA SOLE, INC. d/b/a FARM TABLE and GATEHOUSE TAVERN,

Plaintiffs,

v.

THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; MORRIS INSURANCE AGENCY INC.; and DOES 1 THROUGH 20, INCLUSIVE,

Defendants.

ORDER GRANTING PLAINTIFFS' RULE 56 MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER was heard on September 23, 2020, before Senior Resident Superior Court Judge Orlando F. Hudson, Jr., with Gagan Gupta appearing for the plaintiff-restaurants (including Vin Rouge, Parizade, Mateo Bar de Tapas, Rosewater, Mothers & Sons Trattoria, Saint James Seafood, Lucky's Delicatessen, Bin 54, City Kitchen, Village Burger, Nasher Cafe,

Local 22, Kipos Greek Taverna, Golden Fleece, Farm Table, and Gatehouse Tavern[1]), and Brian Reid and Drew Vanore appearing for defendant-insurers The Cincinnati Insurance Company and The Cincinnati Casualty Company (collectively, "Cincinnati"). Plaintiffs brought a Motion for Partial Summary Judgment ("Motion") with respect to Count I of their Second Amended Complaint, seeking a declaratory judgment that Cincinnati must replace Plaintiffs' lost business income and extra expenses under insurance policy contracts entered into between the parties.[2]

THE COURT, having considered the pleadings, the Motion, the briefs filed in support of and in opposition to the Motion, the oral arguments of counsel at the hearing on the Motion, the declaration of Gagan Gupta, the affidavit testimony of the Plaintiffs and their supporting affidavits of Giorgios Nikolaos Bakatsias, Matthew Raymond Kelly, and Djafar "Jay" Mehdian, the applicable law, and other appropriate matters of record, GRANTS Plaintiffs' Motion.

Upon a review of the entire record, the Court holds there are no genuine issues as to any material fact and Plaintiffs are entitled to partial summary judgment against Cincinnati as a matter of law on the issue of liability under Count I of the Second Amended Complaint. To that end, the Court sets forth its primary reasoning herein.

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[1] The parent companies of these restaurants, and the entities bringing this lawsuit, are Vin Rouge, Inc. d/b/a Vin Rouge; Calamari Enterprises, Inc. d/b/a Parizade; Mateo Tapas, L.L.C. d/b/a Mateo Bar de Tapas; Kipos Rose Garden Club LLC d/b/a Rosewater; Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria; Saint James Shellfish LLC d/b/a Saint James Seafood; North State Deli, LLC d/b/a Lucky's Delicatessen; Bin 54, LLC d/b/a Bin 54; Arya, Inc. d/b/a City Kitchen and Village Burger; Grasshopper LLC d/b/a Nasher Cafe; Verde Cafe Incorporated d/b/a Local 22; Floga, Inc. d/b/a Kipos Greek Taverna; Kuzina, LLC d/b/a Golden Fleece; and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern (collectively, "Plaintiffs").

[2] The operative pleading to which this Order applies is the Second Amended Complaint.

I. BACKGROUND[3]

Plaintiffs, which operate sixteen restaurants in the North Carolina counties of Durham, Wake, Orange, Chatham, and Buncombe, purchased "all risk" property insurance policies ("Policies") from Cincinnati to cover their restaurants. All risk policies cover all risks of loss unless those risks are expressly excluded or limited. Plaintiffs' Policies were effective during all relevant time periods and contain the same relevant language.

The Policies include a Building and Personal Property Coverage Form and a Business Income (and Extra Expense) Coverage Form. These forms provide that Cincinnati will pay for business interruption coverage as follows:

> (1) **Business Income**
> We will pay for the actual loss of "Business Income" and "Rental Value" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss.
>
> . . .
>
> (2) **Extra Expense**
> We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain . . . during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.

Under the Policies, "Covered Cause of Loss" means "direct 'loss' unless the 'loss' is excluded or limited" therein. The Policies define "loss" to mean "accidental physical loss or accidental physical damage." Therefore, absent an exclusion or limitation, the Policies provide

[3] The Court has not resolved any disputed issues of fact, as findings of fact are unnecessary for adjudicating Plaintiffs' Motion for Partial Summary Judgment. Rather, the Court offers an overview of key undisputed facts underlying the ultimate disposition.

coverage under these provisions where the policyholder shows (i) direct "accidental physical loss" to property, ***or*** (ii) direct "accidental physical damage" to property. The Policies do not define "direct," "accidental," "physical loss," or "physical damage."

Plaintiffs seek coverage under the Policies for losses arising out of the response to the SARS-CoV-2 ("COVID-19") pandemic. Beginning in March 2020, governmental authorities across North Carolina entered civil authority orders mandating the suspension of business operations at various establishments, including Plaintiffs' restaurants (hereafter, "Government Orders"). The orders also prohibited, via stay-at-home mandates and travel restrictions, all non-essential movement by all residents.

On August 3, 2020, Plaintiffs filed their Motion for Partial Summary Judgment ("Motion"), seeking a declaratory judgment against Cincinnati under Count I that the Government Orders constitute covered perils under the Policies that caused "direct 'loss' to property" at the described premises, and that therefore Cincinnati must pay for the resulting lost Business Income and Extra Expenses as defined by the Policies. Plaintiffs' primary contention is that the Government Orders forced Plaintiffs to lose the physical use of and access to their restaurant property and premises, which constitutes a non-excluded "direct physical loss."

II. STANDARDS OF INTERPRETATION FOR INSURANCE POLICIES

The meaning of an insurance policy is a question of law, *Accardi v. Hartford Underwriters Ins. Co.*, 373 N.C. 292, 295, 838 S.E.2d 454, 456 (2020), and it is black-letter law that an undefined policy term is to be given its "ordinary meaning"; in doing so, North Carolina courts have determined that it is "appropriate to consult a standard dictionary." *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 94-95, 518 S.E.2d 814, 817 (N.C. Ct. App. 1999). If the term is nevertheless "reasonably susceptible to more than one interpretation," then it is ambiguous and

only then is the contract subject to judicial construction. *Id.*; *see also Joyner v. Nationwide Ins.*, 46 N.C. App. 807, 809, 266 S.E.2d 30, 31 (1980) ("[I]n deciding whether the language is plain or ambiguous, the test is what a reasonable person in the position of the insured would have understood it to mean, and not what the insurer intended."). "[A]ny ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary." *Accardi*, 373 N.C. at 295, 838 S.E.2d at 456.

III. DISCUSSION

As an initial matter, the Policies do not define the terms "direct," "physical loss," or "physical damage."[4] The Court must therefore turn first to the ordinary meaning of those terms. Merriam-Webster defines "direct," when used as an adjective, as "characterized by close logical, causal, or consequential relationship," as "stemming immediately from a source," or as "proceeding from one point to another in time or space without deviation or interruption." *Direct*, Merriam-Webster (Online ed. 2020). Merriam-Webster defines "physical" as relating to "material things" that are "perceptible especially through the senses." *Physical*, Merriam-Webster (Online ed. 2020). The term is also defined in a way that is tied to the body: "of or relating to the body." *Id.* Webster's Third New International Dictionary defines physical as "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary." *Physical*, Webster's Third New International Dictionary (2020). The definition from Black's Law Dictionary comports: "Of, relating to, or involving material things; pertaining to real, tangible objects." *Physical*, Black's Law Dictionary (11th ed. 2019). Finally, "loss" is defined as "the act of losing possession," "the harm of privation resulting from loss or separation," or the "failure to gain, win, obtain, or utilize." *Loss*, Merriam-Webster (Online ed.

[4] Cincinnati does not contest whether Plaintiffs' losses were "accidental."

2020). Another dictionary defines the term as "the state of being deprived of or of being without something that one has had." *Loss*, Random House Unabridged Dictionary (Online ed. 2020).

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.

The parties sharply dispute the meaning of the phrase "direct physical loss." Cincinnati argues that "the policies do not provide coverage for pure economic harm in the absence of direct physical loss to property, which requires some form of physical alteration to property." Even if Cincinnati's proffered ordinary meaning is reasonable, the ordinary meaning set forth above is also reasonable, rendering the Policies at least ambiguous. Accordingly, in giving the ambiguous terms the reasonable definition which favors coverage, the phrase "direct physical loss" includes the loss of use or access to covered property even where that property has not been structurally altered. *See Accardi*, 373 N.C. at 295, 838 S.E.2d at 456 ("[A]ny ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary.").

Moreover, it is well-accepted that "[t]he various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect." *See C. D. Spangler Constr. Co. v. Industrial Crankshaft & Engineering Co.*, 326 N.C. 133, 142, 388 S.E.2d 557, 563 (1990). Here, the Policies provide coverage for "accidental physical loss ***or*** accidental physical damage." Cincinnati's argument that the Policies require physical alteration conflates "physical loss" and "physical damage." The use of the conjunction "or" means—at the very least—that a reasonable insured could understand the terms "physical loss" and "physical damage" to have distinct and separate meanings. The term "physical damage" reasonably requires alteration to property. *See Damage*, Merriam-Webster (Online ed. 2020) ("loss or harm resulting from injury to person, property, or reputation"). Under Cincinnati's argument, however, if "physical loss" also requires structural alteration to property, then the term "physical damage" would be rendered meaningless. But the Court must give meaning to both terms.

Finally, nothing in the Policies excludes coverage for Plaintiffs' losses. Notably, it is undisputed that the Policies do not exclude virus-related causes of loss. Cincinnati instead contends that three other exclusions apply: the "Ordinance or Law" exclusion, the "Acts or Decisions" exclusion, and the "Delay or Loss of Use" exclusion. Upon a review of the entire record, the Court concludes that these exclusions, based on their terms and the undisputed facts, do not apply to Plaintiffs' losses as a matter of law.

For these primary reasons, the Court concludes that the Policies provide coverage for Business Income and Extra Expenses for Plaintiffs' loss of use and access to covered property mandated by the Government Orders as a matter of law.

IV. CONCLUSION

Accordingly, Plaintiffs' Motion for Partial Summary Judgment is GRANTED. This Court certifies, pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, that this Order represents a final judgment as to Count I of the Second Amended Complaint and is immediately appealable as there is no just reason for delay of any such appeal. **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS**: That partial summary judgment is hereby granted in favor of Plaintiffs and against Cincinnati, jointly and severally, on Count I (Declaratory Judgment).

This the 7th day of October, 2020.

ORLANDO F. HUDSON, JR.
SENIOR RESIDENT SUPERIOR COURT JUDGE

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing Order in the above captioned action on all parties by depositing a copy hereof in a postpaid wrapper in a post office depository under the exclusive care and custody of the United Postal Service, addressed as follows:

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Counsel for Defendant Morris Insurance Agency, Inc.

This the 9th day of October, 2020.

Sina B. Mack
ASSISTANT CLERK OF COURT
DURHAM COUNTY

Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.

Superior Court of New Jersey, Law Division, Bergen County

August 13, 2020, Decided

DOCKET NO.: BER-L-3681-20

Reporter
2020 N.J. Super. Unpub. LEXIS 1782 *

OPTICAL SERVICES USA/JCI, OPTICAL SERVICES USA, LLC, OPTICAL SERVICES USA-WO, RE & LE HOLDING LLC, STONG OD EWING NJ, LLC, Plaintiffs, v. FRANKLIN MUTUAL INSURANCE COMPANY, Defendant.

Core Terms

coverage, indiscernible, closure, discovery, virus, interruption, contamination, gentlemen, non-essential, transmission, morning, destruction

Counsel: [*1] Eric L. Harrison - ID #033381993, METHFESSEL & WERBEL, ESQS., Edison, New Jersey, Attorneys for Franklin Mutual Insurance Company.

Judges: Hon. Michael N. Beukas, J.S.C.

Opinion by: Michael N. Beukas

Opinion

Civil Action

ORDER

THIS MATTER having been brought before the Court by way of Motion of Methfessel & Werbel, attorneys for defendant(s), Franklin Mutual Insurance Company, seeking an Order for Dismissal, and the Court having reviewed the moving papers, any opposition thereto, oral argument having been heard, and for other good cause having been shown;

IT IS on this 13th day of August, 2020;

ORDERED
that plaintiff's Complaint and any and all Crossclaims be and is hereby dismissed DENIED*; and it is Further

ORDERED that the Court provides a copy of this Order to all counsel of record on this date via eCourts Civil. Movant is directed to serve a copy of this Order within seven (7) days of the date hereof on all parties not served electronically via regular and certified mail return receipt requested.

/s/ Michael N. Beukas

Hon. Michael N. Beukas, J.S.C.

OPPOSED

* The Motion is denied for the reasons stated at length on the record.

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REQUESTOR'S NAME/ADDRESS
TO: Eric Harrison 3 Ethel Road Suite 300 Edison, NJ 08818

CASE NAME (Plaintiff) v (Defendants)
Optical Services, USA, et al Insurance Co v Franklin Mutual
___ Appeal ___ Non-Appeal

LOWER COURT DOCKET TYPE: ___ Indictment ___ Accusation ___ Complaint
LOWER COURT NUMBER: 3681-20
Transcript Request Date: 8/13/2020

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COUNTY: Bergen County
COURT: Michael Beukas
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TRANSCRIPT OF MOTION

Place: Bergen County Justice Center

10 Main Street

Hackensack, New Jersey **[*2]** 07601

Date: August 13, 2020

BEFORE:

HONORABLE MICHAEL N. BEUKAS, J.S.C.

TRANSCRIPT ORDERED BY:

ERIC L. HARRISON, ESQ. (Methfessel & Werbel)

APPEARANCES:

SEAN E. ROSE, ESQ. (Olender Feldman, LLP)

Attorney for Plaintiffs

ERIC L. HARRISON, ESQ. (Methfessel & Werbel)

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(Proceeding commenced at 9:30:49 a.m.)

THE COURT: Superior Court of the State of New Jersey, Bergen County Vicinage, clerk recording, Alexa D'Angelo law clerk, docket number BER-L-3681-20, caption is *Optical Services USA/JCI (sic), Optical Services USA, LLC, Optical Services USA-WO, and Re and Le Holdings, LLC, Stong OD Ewing NJ, LLC versus Franklin Mutual Insurance Company*. Judge Michael N. Beukas, chambers 453. The time is approximately 9:32 a.m. May I have the appearances of counsel for the record, please, starting with the plaintiff?

MR. ROSE: Good morning, Your Honor. Sean Rose from the law firm of Olender Feldman on behalf of plaintiff, Optical Services USA/JC1, **[*3]** Optical Services USA, LLC, Optical Services USA-WO, Re and Le Holdings, LLC, and Stong OD Ewing NJ, LLC, collectively plaintiffs, Your Honor.

THE COURT: Good morning, Counsel.

MR. ROSE: Good morning.

MR. HARRISON: Good morning, Judge. Eric Harrison, Methfessel and Werbel, on behalf of Franklin Mutual Insurance Company.

THE COURT: Good morning, Counsel. Okay, gentlemen, just a -- a couple of --

RECORDING: (Indiscernible) --

THE COURT: -- reminders before we --

RECORDING: -- is now in the conference.

MR. HARRISON: Your Honor, this is Eric Harrison speaking. As a courtesy, I should let the Court know I do have a few folks dialing in. They've all been instructed to keep their phones on mute. Various FMI representatives and a colleague of mine will be listening in but will not be participating.

THE COURT: Okay, very good.

For purposes of our established record here today, gentlemen, when you do speak at oral argument, I do need you to identify yourself in between oral arguments so that the transcription service can clearly identify which attorney is speaking.

When you are referencing an oral argument to any specific controlling case, I need you to identify that case for the record and pursuant to **[*4]** *Rule 1:36-3*, I need you to identify for the record whether that is a published opinion in the State of New Jersey versus an unpublished opinion and whether or not you are citing to any law of any other jurisdiction including the US Supreme Court so that I can identify for the record as to whether or not any of the law is controlling in this case for purposes of oral argument.

In addition, we are on a Polycom speaker today and at times it may be difficult for you to hear me and I may need to interject to pose a question to either attorney so I may have to elevate my voice so that you can hear me clearly. So please don't misconstrue me elevating my --

RECORDING: (Indiscernible) --

THE COURT: -- voice --

RECORDING: -- is now in the conference.

THE COURT: Okay, gentlemen, I -- if I need to elevate my voice, it's for purposes of the Polycom picking up my voice so that you can hear it, okay.

So I have before me a Motion to Dismiss the Complaint for failure to state a claim upon which relief can be granted pursuant to *Rule 4:6-2(e)* filed by the defendant, Franklin Mutual Insurance Company. So, Mr. Harrison, this is your Motion. You may proceed.

MR. HARRISON: Yes, sir. Thank you, Your Honor. We are all aware, I know plaintiffs' **[*5]** counsel is aware, certainly my firm as an insurance defense firm is well aware of the fast-moving nature of developments in insurance litigation and other litigation over Covid-19. Two significant events happened yesterday and they're both worthy of mention. The first is, and this is not within the record, but the Court -- it's not important to the Court's decision on the policy language, but it's -- it's significant background. The multi-district litigation panel of the United States District Court denied a nation-wide Motion to Consolidate these business interruption litigations that are venued in various Federal Courts around the country essentially on the basis that the policy language differs from policy to policy. Even though a lot of insurers use (indiscernible) income and would other insurers, there is still significant differences between those forms and the facts of particular cases also can determine whether there would be coverage and to what extent.

The second significant thing to happen yesterday was the issuance of the decision that Mr. Rose brought to the Court's attention, and I don't have any objection to his filing it yesterday because it didn't come out until yesterday **[*6]** and I have had ample time to review it. It's the *Studio 417* case from U.S. District Court, Western District of Missouri, Southern Division. This opinion, which I'm not going to significantly disagree with, demonstrates the wisdom of the MDO panel in refusing to consolidate because the denial of the Motion to Dismiss based on the allegations in that complaint bespeaks the importance of policy language differing from policy to policy and alleged facts differing from complaint to complaint.

I should ask as a courtesy whether the Court has any objection to me talking about this case that Mr. Rose sent yesterday.

THE COURT: What I would like you to do, Counsel, is argue your Motion to Dismiss. This Court is bound by the implications of *Rule 1:36-3*. While the parties felt compelled to cite to numerous other jurisdictions with respect to their arguments, their respective arguments both on the Motion and in the Opposition, this Court is bound by legal precedent within the State of New Jersey, namely the Appellate Division, and the New Jersey Supreme Court. With respect to the US Supreme Court, this -- this Court also takes precedent from the US Supreme Court for controlling decisions. So this Court will **[*7]** give whatever weight is necessary to whatever arguments reflect in the controlling legal precedent set forth in this state as opposed to other states. So you may proceed with the argument.

MR. HARRISON: Okay, thank you, Your Honor. I just -- I just wanted to make sure that the Court didn't want me to completely disregard this decision. But I'm going to highlight it simply to contrast it with a case we're looking at in order to argue my position under New Jersey law.

The *Studio 417* decision describes a policy which defines a covered cause of loss, and that's at page 2 of the opinion, as follows, "Accidental direct physical loss or accidental direct physical damage." It goes on to say on the same page, "The policies do not include and are not subject to any exclusion for losses caused by

viruses or communicable diseases."

Now, I want to be clear about something. I want to be clear about a point of agreement that Franklin Mutual has with the plaintiffs in this case. At paragraph 36 of the Complaint filed in this case, plaintiffs recite as follows, "There is no known instance of Covid-19 transmission or contamination within the premises of plaintiffs' businesses." Now, the declamation of **[*8]** coverage letter that FMI issued prior to the Complaint being filed in this case because the Complaint challenges that declamation of coverage find it among relevant policy provisions the exclusion of 12(c) for contamination by any virus, et cetera. Because the complaint expressly asserts that there was no contamination and because it is our universal duty to read as accurate all facts alleged in the complaint and I agree that the contamination exclusion would not apply to this case. If the complaint had alleged that there was contamination on the premises, then there probably would be direct physical loss, but there would also be exclusion of coverage under that virus exclusion. So what we're really focused on is the policy language. In *Studio 417*, the definition of loss there was physical loss or physical damage.

THE COURT: Okay, but we're concerned about New Jersey. We're not concerned about the Western District of Missouri; correct?

MR. HARRISON: That is true, Your Honor, but we are concerned about policy language defining direct physical loss, --

THE COURT: Okay, but the --

MR. HARRISON: -- but I'm -- I'm happy to take it --

THE COURT: -- definition (indiscernible) --

MR. HARRISON: -- **[*9]** to our policy language.

THE COURT: -- definition has not been established by any court in this state with the exception of the *Wakefern* case; correct?

MR. HARRISON: I think that is absolutely correct.

THE COURT: Okay, I just want to establish that for purposes of the record.

MR. HARRISON: Okay, so back to our policy. The business interruption loss that -- of which plaintiffs seek to avail themselves governs loss of income resulting from direct covered loss. We go to page 9 of the policy form which expressly defines direct covered loss as follows, "The fortuitous direct physical loss as described in Part 1(c), General Cause of Lost Conditions, Coverages A, B, C, which occurs at described premises occupied by you." Now, the definition is (indiscernible) if it didn't refer -- if it didn't cross-reference another definition, then we'd be fighting over whether the closure of a business because of a risk of virus spread would constitute a fortuitous direct physical loss.

However, because it cross-references the description of direct covered loss that's also in the policy at page 8. We go to the more detailed definition. Covered loss, "Means fortuitous direct physical damage to or destruction **[*10]** of covered property by a covered cause of loss." The requirement of direct physical damage to or destruction of (indiscernible) --

RECORDING: (Indiscernible).

MR. HARRISON: -- requirement of direct physical damage to or destruction of covered property distinguishes this case from the *Studio 417* case in that there is the physical damage or destruction requirement that was absent in that case which also had --

RECORDING: (Indiscernible) is now in the conference.

MR. HARRISON: -- I apologize -- which also had the open-ended concept of loss which was not defined. Our policy defines loss as requiring that physical impact.

The Court has reviewed *Wakefern* I know and the -- the cases -- the New Jersey cases discussed in our brief I agree that there is no case directly on point construing the -- this precise policy language in the context a claim where there was a closure of a business because of the risk of contamination by a virus. But I think that the application of loss that's set forth in New Jersey and in the other jurisdictions we've cited as persuasive, although not binding, compels the conclusion that this did not meet the policy definition of direct covered loss to satisfy coverage.

THE **[*11]** COURT: Counsel, let me pose -- let me pose one question to you. Why didn't the policy then have specific exclusions for an event such as this? Meaning for virus proliferation.

MR. HARRISON: Well, it -- it precisely has an exclusion for virus proliferation. It does not have an exclusion for a closure of business based on the risk of virus proliferation. I can't speak to the drafters of the policy other than to say this is an unprecedented event. First in

my lifetime. First in my parents and our parents. So, yeah, in -- in an ideal world all potential cataclysmic risks could be underwritten and determined in advance as to what we're going to cover and to what extent or whether there should be any coverage at all, but before we get to the absence of an exclusion, and I agree there is no exclusion that would apply on the facts as alleged in this Complaint, we have to satisfy the coverage definition first.

THE COURT: You can proceed, Counsel. Thank you.

MR. HARRISON: I -- Your Honor, to -- to be candid, I know you've reviewed the papers. I'm happy to address any further questions the Court may have or simply reserve an opportunity to respond to my colleague. I -- I think between our papers **[*12]** and what I've had to say this morning that I've stated our case.

THE COURT: Thank you, Counsel. Okay, Mr. Rose, your response?

MR. ROSE: Thank you, Your Honor. And just to try to make sure that there's a clean record virtually, this is again Sean Rose, Olender Feldman, on behalf of plaintiff.

So contrary to the insurance industry's well rehearsed talking points and -- and Mr. Harrison has a very good brief and very good argument, the simple fact is that plaintiff and the many other in the -- and (indiscernible) plaintiffs purchased business owners policies to insure against, among other things, unexpected business interruptions. And what happened back in March, as we all know because we all lived through it, that's about as unexpected as you get. Plaintiffs were forced to close their businesses because the executive order issued by the State -- well, the State pertinent to here, but issued across the country in emergency response to the pandemic found that there is a dangerous condition on plaintiffs' property. As a result of those orders, the plaintiffs closed. All residents were told to stay at home and (indiscernible) claims (indiscernible).

Now, as Mr. Harrison pointed out, the briefing **[*13]** reflects that there are really two main points of argument that -- that I'll hit quickly because they are recited at length in the brief is the first (indiscernible) on the direct physical loss issue. We know from, and just to again bide by Your Honor's directive, we know that under the *Gregory Packaging, Inc. versus Travelers Property Casualty Company of America* case, which is an unpublished case, but from the District of New Jersey and cited in both Mr. Harrison's and our brief, we know that a dangerous condition on the property can constitute a physical loss. Now, here, we have an executive order that found that plaintiffs' businesses were deemed unfit and unsafe because of a dangerous condition. Plaintiffs' loss of income caused by the closure orders concluding that there was a dangerous condition on the property is a direct physical loss. Alternatively, if we wanted to get into the legal standard, at a minimum, it is plausible the plaintiffs have alleged a direct physical loss here which should defeat a (indiscernible) Motion and allow plaintiffs to pursue discovery, among other things, to discern the true intent behind policy terms which, in some cases, points to coverage but **[*14]** in other cases it may be ambiguous.

The second point would be the civil authority coverage and I -- I think here, the Western District of Missouri case has instructed, and I'll get to that in a second, here we -- we, again, we know what happened. We all lived through it. The closure orders forced plaintiffs to close and banned occupancy of all non-essential businesses. In doing so, the closure orders necessarily not only affected plaintiffs' businesses, but they affected all -- all properties around plaintiffs. It was a stay-at-home order. Unless it was an essential business, everything was closed. It's alleged -- it -- it's in the Motion and, you know, beyond that, Your Honor, we all lived through it. We were all there. So, again, at a minimum, it is plausible that plaintiffs are entitled to (indiscernible) coverage here. And unless Your Honor has any questions, I know the briefing was fairly detailed.

THE COURT: Thank you, Mr. Rose. You know, at the outset, gentlemen, I do commend the both of you with respect to a very, very difficult topic and concept in the State of New Jersey with regard to the interpretation of insurance law. I did find that the respective briefs were very well **[*15]** drafted.

Mr. Harrison, do you have a reply at this point?

MR. HARRISON: Briefly, Your Honor, yes. Mr. Rose says the executive order for -- forced closure based on a finding that there was a dangerous condition on plaintiffs' property. That's -- that's simply not the case. The -- the Complaint does not allege that. I understand what he's saying. It -- it's a -- it's a directive closing down non-essential businesses based on the risk that putting people in proximity to each other indoors could result in transmission of the virus, could -- it could result in the virus sitting on a piece of equipment in one of the plaintiffs' examining rooms, but the Complaint in this case expressly alleges that there has been no known

instance of Covid-19 transmission or contamination.

I -- I get it that this is business interruption insurance and to quote one of the judges I appeared before in my first year arguing coverage motion, he said, Mr. Harrison, before we turn to the policy terms, everybody knows that when an insured buys insurance for something, their reasonable expectation is that they're going to be covered for whatever might befall them, but then we got to go to the policy language and if indeed **[*16]** coverage was determined by the name of the coverage, business interruption, well, then the insurance industry loses and FMI loses this case because we're not disputing that there was business interruption. Although if we were to have to dig deeper, we would probably have a dispute over whether plaintiffs were non-essential businesses, but that's not what this Motion is about. The law requires that we look carefully at the policy language. And with reference to *Gregory Packaging*, we're talking about the release of ammonia into the air, talking about something physically occurring and I think it's -- it's clear from the plain policy language and the meaning of the terms, which are precisely defined in the policy, that in this instance under this policy based on these allegations there is no direct covered loss.

In -- in asking for discovery to determine the true intent behind policy terms, right, that's something you need to speak about briefly. When policy language is clear, I am not aware of any precedent which would support denial of a Motion to Dismiss on the basis that the plaintiff is entitled to conduct discovery to see what the drafter of the document, who I can tell the Court **[*17]** was not -- is not an employee of FMI, had in mind when defining direct covered loss or covered loss.

There -- there is -- in New Jersey we do have a -- a big case called *Morton International* which has to do with pollution exclusions and that's where our courts created this -- the concept of regulatory estoppel where essentially the insurance industry lobbied to insert a particular form of coverage within a policy with an exclusion for -- that applied to environmental losses and essentially the courts found, hey, you came to the Department of Banking and Insurance putting forth this policy language suggesting it would do something and then you went to court and suggested otherwise. There is no such allegation in this case. I haven't seen any such allegation even made in the press or -- or by the various (indiscernible) or -- or in any case that's being litigated that I'm aware of. When the plain policy terms apply plainly and directly to the facts asserted, I'm not aware of any legitimate basis for denying a Motion based on the facts accepted as true in the pleading on the basis that plaintiff wishes to take discovery to see what the defendant meant by policy language that somebody else **[*18]** wrote which the defendant adopted if the plain language controls and is unambiguous and I submit that it does control and it is unambiguous here.

THE COURT: Thank you. Gentlemen, thank you, very much. I'm prepared to rule on this Motion.

This matter comes before the Court on a Motion Seeking Dismissal of the plaintiffs' Complaint with prejudice pursuant to *Rule 4:6-2(e)*. The Court begins with a few general observations concerning the standards governing dismissal motions under *Rule 4:6-2(e)* by citing *Flinn v. Amboy Nat. Bank, 436 N.J.Super. 274, 93 A.3d 422, (App. Div. 2014)*, "In reviewing a complaint dismissed under *Rule 4:6-2(e)*, the inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint," citing *Printing Mart-Morristown versus Sharp Electronics Corp., 116 N.J. 739 at page 746, 563 A.2d 31 (1989)* and *Rieder versus Department of Transportation, 221 N.J.Super. 547 at page 552, 535 A.2d 512 (App. Div. 1987)*.

The essential test as set forth in *Green versus Morgan Properties, 215 N.J. 431 at page 451, 73 A.3d 478 (Sup. Ct. 2013)* is, "Whether a cause of action is 'suggested' by the facts," citing *Printing Mart-Morristown versus Sharp Electronics Corp., 116 N.J. at 746* quoting *Velantzas versus Colgate-Palmolive Co., 109 N.J. 189 at page 192, 536 A.2d 237 (1988)*.

"A reviewing court searches the complaint in depth and with liberality to ascertain whether the fundamental of a cause of action may be gleaned, even from an obscure statement of claim, opportunity being given to amend if necessary," citing *Di Cristofaro versus Laurel Grove Memorial Park, 43 N.J.Super. 244 at page 252, 128 A.2d 281 (App. Div. 1957)*.

In the case of *Rule 4:6-2(e)*, Dismissals, "The Court is not concerned with the ability of the plaintiffs to prove the allegation contained in the complaint," citing **[*19]** *Somers Construction Co. versus Board of Education, 198 F.Supp. 732, 734 (Dis. NJ. 1961)*. Instead,

"The plaintiffs are entitled to every reasonable inference of fact and the examination of a complaint's allegations of fact required by the aforestated principle should be one that is at once painstaking and undertaken with a

generous and hospitable approach,"

citing *Green versus Morgan Properties, 215 N.J. 431 at page 452, 73 A.3d 478* quoting *Printing Mart-Morristown versus Sharp Electronics Corp., 116 N.J. at 746*.

Notwithstanding this indulgent standard, "A pleading should be dismissed if it states no basis for relief and discovery would not provide one," citing *Rezem Family Associates, LP versus Borough of Millstone, 423 N.J.Super. 103 at page 113, 30 A.3d 1061 (App. Div. 2011)*, cert. denied and the appeal was dismissed at *208 N.J. 366, 29 A.3d 739 (2011)*. See also *Sickles versus Cabot Corp. 379 N.J.Super. 100 at page 106, 877 A.2d 267 (App. Div. 2005)* cert. denied at *185 N.J. 297, 884 A.2d 1267 (2005)*.

In those rare instances, as cited in *Smith versus SBC Communications, Inc., 178 N.J. 265 at page 282, 839 A.2d 850 (2004)*, a motion to dismiss pursuant to *Rule 4:6-2(e)* ordinarily is granted without prejudice. See *Hoffman versus Hampshire Labs Incorporated, 405 N.J.Super. 105, 116, 963 A.2d 849 (App. Div. 2009)*.

The defendant, Franklin Mutual Insurance Company, hereinafter FMI, issued a business owners policy to plaintiff, Optical Services USA/JC1 under policy number SBP2598006 with effective dates of October 5, 2019 to October 5, 2020. FMI issued the business owners policy to the plaintiff, Stong OD Ewing NJ, LLC, hereinafter Stong OD, bearing policy number SBP2613680 with effective dates of April 1, 2020 to April 1, 2021. Optical Services USA/JC1 and Stong OD filed separate claims seeking loss of business income caused by the closure mandated by Governor Murphy's March **[*20]** 21, 2020 Executive Order Number 107 suspending the operation of non-essential retail businesses on the account of the Covid-19 pandemic. Plaintiffs closed their businesses on March 20, 2020 and have not reopened to date. Plaintiffs allege that Executive Order Number 107 mandated the closure of their businesses. FMI issued letters dated April 6, 2020 and April 14, 2020 to Optical Services USA/JC1 and Stong OD denying their claims for business income and related expenses. Plaintiffs, Optical Services USA, LLC, Optical Services USA-WO, Re and Le Holdings, LLC were not named insureds on either policy.

Both policies contained the BUO4010110 Business Owners Policy Form. The plaintiffs allege that the -- the plaintiffs allege that Optical Services USA/JC1, Optical Services USA, LLC, Optical Services USA-WO, Re and La -- and Le Holding, LLC and Stong OD Ewing NJ, LLC purchased business interruption insurance from insurers to protect their business from an -- an unanticipated crisis. The plaintiffs further allege that the policies issued by FMI provide coverage for loss of income resulting from a necessary interruption of plaintiffs' businesses caused by direct covered losses and temporary closures **[*21]** required by orders of a civil authority.

A Complaint for a Declaratory Judgment in this action was filed on June 25, 2020. The Complaint also included a Demand for Trial by Jury. No answer has been filed by the defendant, FMI. Therefore, the discovery end date has not been established in this case.

On July 15, 2020, the defendant, FMI, filed a Motion Seeking Dismissal of the Complaint pursuant to *Rule 4:6-2(e)*. Within days of filing the Complaint, the defendant, FMI, filed the within Motion to Dismiss. It is clear that there is no established record in this case and there has been no discovery presented to the Court for consideration with respect to the arguments and events by respective legal counsel. Notwithstanding same, the defendants argued three points before this Court. The first legal argument is that the Court should dismiss the complaint for failure to state a legally cognizable claim. The second legal argument is that the plaintiffs did not sustain direct physical loss or direct physical damage to or destruction of covered property precluding coverage for business income or extra expenses under the FMI policy. Lastly, the defendants argue that the plaintiffs occupancy of their respective **[*22]** properties was not prohibited by civil authorities because of a loss at a local premises not owned or occupied by the plaintiffs precluding civil authority coverage under the FMI policies.

The plaintiffs argue before this Court that they state claims for coverage under the policies because they suffered a direct covered loss and were forced to close their business by order of a civil authority. Plaintiffs further allege that they state claims for loss of income coverage because they suffered a direct covered loss under the policy and they state claims for civil coverage because the closure order prohibited the plaintiffs from accessing their business.

Naturally, each of the respective arguments advanced by the parties requires a fact-sensitive analysis wherein the respective parties have failed to present a sufficient record before this Court for a legal determination of their respective positions. There has been no discovery

produced to the Court for consideration, no affidavits, no certifications, or sworn testimony derived from depositions. In fact, discovery has not been undertaken by the parties with respect to the declaratory relief sought in the Complaint. Notwithstanding these **[*23]** deficiencies, the Court will endeavor to address the legal arguments advanced by the respective parties on the extremely limited record provided to the Court.

The defendant, FMI, concedes that the plaintiffs' business operations were interrupted by an executive order based on the risk of the Covid-19 virus transmission throughout the State of New Jersey. The pivotal issue before this Court is the parties' interpretation of the subject policy language and FMI's claim denial premised on a narrow interpretation of the terms of the subject policies. The issue before this Court is the interpretation of a direct covered loss under the policy and whether or not there was physical damage to the plaintiffs' business.

The plaintiffs argue that the loss of physical functionality and the use of their business constitutes a covered loss under the policies. The plaintiffs argue that Governor Murphy's executive order prohibited access to the plaintiffs' premises.

FMI argues that the plaintiffs failed to state a claim for civil authority coverage because the complaint does not allege that property damage occurred elsewhere leading to the loss of access to plaintiffs' business. The defendant acknowledged **[*24]** in their moving papers that presumably the plaintiffs will argue that while their properties were not physically damaged, they sustained a physical loss by operation of the Governor's executive order. FMI argues that the plaintiffs' loss of use of their respective properties does not constitute a direct physical loss and therefore is not a direct covered loss defined by the policies.

A simple review of the moving papers indicates that the defendant has not provided this Court with any controlling legal authority to support their version of the interpretation of the defined terms in the policy. In fact, there is limited legal authority in the State of New Jersey addressing this issue. This is not surprising to the Court as the State of New Jersey was recently faced with a historic event which was unprecedented with respect to the losses sustained by businesses across the State of New Jersey due to the proliferation of the Covid-19 pandemic. The defendant argues that there is a plain meaning of "direct physical loss" and the closure of the plaintiffs' business does not qualify for business -- I'm sorry, qualify for purposes of coverage. This is a blanket statement unsupported by any common **[*25]** law in the State of New Jersey or by a blanket review of the policy language. Moreover, there has been no discovery taken in this matter which would provide guidance to the Court with respect to a Motion to Dismiss filed under *Rule 4:6-2(e)*.

Pursuant to the legal authority recited by this Court with regard to the standards associated with filing such a motion, the plaintiff should be permitted to engage in issue-oriented discovery and also be permitted to amend its complaint accordingly prior to an adjudication on the merits of any policy language. Such a motion is premature at best.

It is noteworthy to mention that the plaintiffs' argument set forth to this Court that the loss of use of their business because the State of New Jersey deemed all non-essential businesses unsafe constitutes a direct covered loss under the policy is the pivotal issue in the absence of any issue-oriented discovery on this topic is whether direct physical loss and direct physical damage encompasses closure for businesses that bears no specific -- relationship to a specific condition on the property pursuant to an executive order. The plaintiffs counter that argument by alleging that the executive order of the Governor **[*26]** deemed all non-essential businesses unsafe given the risk of transmission of Covid-19 thus the closure order had a specific relationship to a specific condition within the plaintiffs' business.

The plaintiffs provide a citation from *Wakefern Food Corp. versus Liberty Mutual Fire Insurance Company, 406 N.J.Super. 524, 968 A.2d 724 (App. Div. 2019)* to support their argument. Their argument based on the holding of *Wakefern* is that there was a finding of coverage for a grocery store that lost power when an electrical grid and transmission lines were physically incapable of performing their essential function of providing electricity even though they were not necessarily damaged. The Court in *Wakefern* did hold that,

"Since the term "physical" can mean more than material alteration or damage, it is incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided."

Citing *Wakefern versus Liberty Mutual Insurance Company, 406 N.J.Super. at 542*. Also citing *Customized Distribution Services versus Zurich Insurance Co., 373 N.J.Super. 480 at page 491, 862*

A.2d 560 (App. Div. 2004), cert. denied at *183 N.J. 214, 871 A.2d 91 (2005)*.

The Court finds such an argument compelling for purposes of surviving a Motion to Dismiss pursuant to *Rule 4:6-2(e)* in the absence of any complete record for disposition. Again, the Court notes in the absence of the legal precedent set forth in *Wakefern*, there is a lack of controlling legal authority presented to the Court for consideration in this regard.

"When **[*27]** interpreting insurance contracts, the intention of the parties must be determined from the language of the policy," citing Stone v. Royal Insurance Company, 211 N.J.Super. 246 at page 248, 511 A.2d 717 (App. Div. 1986). "When the terms of the contract are clear and unambiguous, the Court must enforce the contract as written." That is an incitation at page 248.

The language which forms the basis of the complaint and the filing of a Motion to Dismiss is subject to further analysis and interpretation. By operation of the distinct and opposite interpretations of the language set forth before the Court by the parties with no other clarity from the record having been established to date, which the Court notes is largely non-existent, this Court reaches the inevitable conclusion solely for purposes of disposition of this Motion that the plaintiff should be afforded the opportunity to develop their case and prove before this Court that the event of the Covid-19 closure may be a covered event under the Coverage C, Loss of Income, when occupancy of the described premises is prohibited by civil authorities. There is an interesting argument made before this Court that physical damage occurs where a policy holder loses functionality of their property and by operation of civil authority such **[*28]** as the entry of an executive order results in a change to the property.

The plaintiffs are offering in advancing in a novel theory of insurance coverage in this matter that warrants a denial of the Motion to Dismiss at this early stage of the litigation. As such, this Court must afford the plaintiffs an opportunity to engage in issue-oriented discovery with FMI in order to fully establish the record with respect to direct covered losses and to amend the Complaint accordingly if required. To that end, the Motion to Dismiss is denied.

Gentlemen, I will have an order prepared and most likely uploaded by this afternoon. Again, I want to thank you for your briefs and I thank you for your legal arguments here today.

MR. HARRISON: Thank you, Your Honor. Have a good weekend.

THE COURT: Thank you, gentlemen.

(Proceeding concluded at 10:08:29 a.m.)

CERTIFICATION

I, Laura Scicutella, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart, Index No. from *9:30:49* to *10:08:29*, is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings, **[*29]** as recorded.

/s/ Laura Scicutella

Laura Scicutella

AD/T 685

AOC Number

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Agency Name

8/14/2020

Date

Table1 (Return to related document text)

Table1 (Return to related document text)

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2020 WL 5500221
Only the Westlaw citation is currently available.
United States District Court, S.D. California.

PAPPY'S BARBER SHOPS, INC. et al., Plaintiffs,
v.
FARMERS GROUP, INC. et al., Defendants.

Case No.: 20-CV-907-CAB-BLM
|
Signed 09/11/2020

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ORDER ON MOTION TO DISMISS

[Doc. No. 16]

Cathy Ann Bencivengo, United States District Judge

***1** This insurance coverage matter is before the Court on Defendants' motion to dismiss. The motion has been fully briefed, and the Court deems it suitable for submission without oral argument. For the following reasons, the motion is granted.

I. Background

Plaintiffs Pappy's Barber Shops, Inc., and Pappy's Barber Shop Poway, Inc., each operate a business in the San Diego area. The complaint makes no distinction between the plaintiffs, referring to them jointly as "Pappy's Barber Shop." The complaint does not expressly allege what type of business each Plaintiff operates, but based on the names of the entities, presumably the businesses are each a barber shop or salon.

The complaint names three defendants—Farmers Group, Inc., Farmers Insurance Company, Inc., and Truck Insurance Exchange—but makes no distinction among the three entities, referring to them throughout as "Farmers." According to the complaint, "Farmers" issued Pappy's Barber Shop an insurance policy with a policy period of February 1, 2020 through February 1, 2021 (the "Policy"). [*Id.* at ¶ 17.] The Policy itself is not attached to the complaint, but Defendants attach a copy of the Policy to their motion to dismiss and ask the Court to take judicial notice of the Policy. Plaintiffs did not oppose the request for judicial notice, and because judicial notice of the Policy is appropriate,[1] the request for judicial notice is granted. According to the Policy itself, Truck Insurance Exchange is the insurer, and Plaintiffs do not dispute this fact in their opposition to the instant motion. [Doc. No. 16-2 at 9; Doc. No. 18 at 20.]

On March 16, 2020, in connection with the COVID-19 pandemic, San Diego Mayor Kevin Falconer "issued Executive Order No. 2020-1, prohibiting any gathering of 50 or more people and discouraging all non-essential gatherings of any size." [Doc. No. 1 at ¶ 25.] Three days later, California governor Gavin Newsom "issued Executive Order N-33-20, requiring 'all individuals living in the State of California to stay home or at their place of residence except as needed' for essential service and engage in strict social distancing." [Doc. No. 1 at ¶ 26.] As a result of these orders, both Plaintiffs, along with "[a]ll California businesses not deemed essential, ... were ordered to close their doors." [*Id.* at ¶ 27.] In addition, 49 state governments have issued orders limiting or prohibiting the operation of non-essential businesses as a result of the COVID-19 pandemic. [*Id.* at ¶ 30.] The complaint refers to these government orders collectively as the "COVID-19 Civil Authority Orders." [*Id.* at ¶ 2.]

***2** On April 1, 2020, Plaintiffs made a claim under the Policy for business income losses they incurred as a result of the COVID-19 Civil Authority Orders issued by Mayor Falconer and Governor Newsom. [*Id.* at ¶ 46.] Defendants notified Plaintiffs that day that they were denying coverage and issued a formal denial letter on April 3, 2020. [*Id.*] According to the complaint, this denial of coverage was improper because several coverage provisions were triggered, and none of the Policy exclusions apply.

First, the complaint alleges that there is coverage under the "Business Income" provision, which states:

> 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.

[Doc. No. 16-2 at 15 (Policy § A.5.f.(1))]. Second, the complaint alleges that there is coverage under the "Civil Authority" provision, which states:

> We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

[Doc. No. 16-2 at 27 (Policy § A.5.i.)]. Finally, the complaint alleges that there is coverage under the "Extra Expense" provision, which states:

> We will pay necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.

[Doc. No. 16-2 at 27 (Policy § A.5.g.(1))]. According to the Policy, "Covered Causes of Loss" are "[r]isks of Direct Physical Loss unless the loss is" excluded in the exclusions section of the Policy or limited in the limitations section of the Policy. [Doc. No. 16-2 at 23 (Policy § A.3.)]. The Policy defines "Business Income" as "[n]et income (Net Profit or Loss before income taxes) that would have been earned or incurred if no physical loss or damage had occurred...." [Doc. No. 16-2 at 25 (Policy § A.f.(1))].

The complaint alleges that none of the Policy's exclusions or limitations apply. More specifically, the complaint alleges that exclusions for (1) mold and microorganisms, (2) virus or bacteria, and (3) fungi, wet rot, dry rot, and bacteria, do not apply because "the efficient proximate cause of [Plaintiffs'] losses was precautionary measures taken by the state to prevent the spread of COVID-19 in the future, not because coronavirus was found on or around Plaintiffs' insured properties." [Doc. No. 1 at ¶¶ 40, 42, 44.] Along these lines, the complaint does not allege that COVID-19 or the coronavirus itself caused a direct physical loss triggering coverage under the Policy. Rather, the complaint alleges only that the government orders themselves caused direct physical loss and damage to Plaintiffs' property. [Doc. No. 1 at ¶ 93.]

Based on these allegations, Plaintiffs assert a total of six claims (for declaratory relief and breach of contract based on each of the three coverage provisions listed above) on behalf of themselves, a nationwide class, and California subclass, and a seventh claim for violation of California's unfair competition law ("UCL"), California Business and Professions Code section 17200 et seq., on behalf of Plaintiffs and the California subclass. Defendants move to dismiss the complaint in its entirety.

II. Legal Standards

***3** The familiar standards on a motion to dismiss apply here. To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Thus, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). On the other hand, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). Nor is the Court "required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). "In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotation marks omitted).

III. Discussion

Neither party disputes that California law governs this insurance coverage dispute. *See, e.g., Intri-Plex Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (stating that law of the forum state applies in diversity actions). Under California law, the "interpretation of an insurance policy is a question of law" to be answered by the court. *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995). The "goal in construing insurance contracts, as with contracts generally, is to give effect to the parties' mutual intentions." *Minkler v. Safeco Inc. Co.*, 49 Cal. 4th 315, 321 (2010) (quoting *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992)).

To accomplish this goal, the court must "look first to the language of the contract in order to ascertain its plain meaning

or the meaning a layperson would ordinarily attach to it." *Waller*, 11 Cal. 4th at 18; *see also Cont'l Cas. Co. v. City of Richmond*, 763 F.2d 1076, 1080 (9th Cir. 1985) ("The best evidence of the intent of the parties is the policy language."). "The clear and explicit meaning of [the policy] provisions, interpreted in their ordinary and popular sense, unless used by the parties in a technical sense or a special meaning is given to them by usage, controls judicial interpretation." *Waller*, 11 Cal. 4th at 18 (internal quotation marks and citations omitted); *see also Minkler*, 49 Cal. 4th at 321 ("If contractual language is clear and explicit, it governs.") (citation omitted). However, "[i]f the terms are ambiguous [i.e., susceptible of more than one reasonable interpretation], [courts] interpret them to protect the objectively reasonable expectations of the insured." *Minkler*, 49 Cal. 4th at 321 (citations omitted). That being said, "[c]ourts will not strain to create an ambiguity where none exists." *Waller*, 11 Cal. 4th at 18-19.

There are two parts to any coverage analysis. First, "[b]efore even considering exclusions, a court must examine the coverage provisions to determine whether a claim falls within the policy terms." *Waller*, 11 Cal. 4th at 16 (internal brackets and quotation marks omitted). The insured bears the burden of proof in this regard, but the insuring agreement language in a policy is interpreted broadly in favor of coverage. *See AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 822 (1990) ("[W]e generally interpret coverage clauses of insurance policies broadly, protecting the objectively reasonable expectations of the insured."). If the insured proves that the claim falls within the policy terms, the burden then shifts to the insurer to prove that an exclusion applies. *Waller*, 11 Cal. 4th at 16; *see also Universal Cable Prods., LLC v. Atl. Specialty Ins. Co.*, 929 F.3d 1143, 1151 (9th Cir. 2019) ("The burden is on the insured to establish that the claim is within the basic scope of coverage and on the insurer to establish that the claim is specifically excluded.") (quoting *MacKinnon v. Truck Ins. Exch.*, 31 Cal.4th 635, 648 (2003)). Exclusions "are interpreted narrowly against the insurer." *Minkler*, 49 Cal. 4th at 322.

***4** Here, Defendants move to dismiss on the grounds that the complaint does not allege any "direct physical loss of or damage to property" as is required for coverage under the business income, civil authority, and extra expense coverage provisions. In their opposition, Plaintiffs contend that this Policy language does not require "physical alteration to property," and that "jurisdictions around the country have held that a property that is uninhabitable or unsuitable for its intended purpose qualifies as a physical loss under commercial property insurance policies." [Doc. No. 18 at 11.]

Business Income and Extra Expense Coverage

For there to be coverage under the business income and extra expense provisions, there must be "direct physical loss of or damage to property at the described premises." Plaintiffs focus on the first alternative—"direct physical loss of"—arguing that it does not require a tangible damage or alteration to property and that loss of the ability to continue operating their business as a result of the government orders qualifies. Plaintiffs are not the first policyholders to argue in court that government orders forcing their businesses to stop operating as a result of the COVID-19 pandemic trigger insurance under provisions similar or identical to the ones in the Policy here. Most courts have rejected these claims, finding that the government orders did not constitute direct physical loss or damage to property. *See, e.g., Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIV, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020) (recommending dismissal of complaint seeking coverage for loss of business income as a result of Florida COVID-19 Civil Authority Orders because the requirement that the plaintiff's restaurant close indoor dining to mitigate the spread of COVID-19 was not a direct physical loss).[2] As a district court explained just last week in an opinion granting a motion to dismiss a claim for coverage under identical policy language for business income losses of a restaurant due to COVID-19 Civil Authority Orders in Los Angeles:

> "When interpreting a policy provision, we must give terms their ordinary and popular usage, unless used by the parties in a technical sense or a special meaning is given to them by usage." *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115 (1999) (citation and quotation marks omitted). The Business Interruption and Extra Expense provision at issue here conditions recovery on "direct physical loss of or damage to property."
>
> Under California law, losses from inability to use property do not amount to "direct physical loss of or damage to property" within the ordinary and
>
> popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a "distinct, demonstrable, physical alteration." *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010) (citation and quotation marks

omitted). "Detrimental economic impact" does not suffice. *Id.* (citation and quotation marks omitted)

....

An insured cannot recover by attempting to artfully plead temporary impairment to economically valuable use of property as physical loss or damage. For example, in *MRI Healthcare Ctr.*, the court held that lost use of an MRI machine after it was powered off did not qualify as a "direct physical loss." 187 Cal. App. 4th at 779 ....

Plaintiff's FAC attempts to make precisely this substitution of temporary impaired use or diminished value for physical loss or damage in seeking Business Income and Extra Expense coverage. Plaintiff only plausibly alleges that in-person dining restrictions interfered with the use or value of its property – not that the restrictions caused direct physical loss or damage.

***5** ...

Plaintiff attempts to circumvent the plain language of the Policy by emphasizing its disjunctive phrasing – "direct physical loss of or damage to property,"–and insisting that "loss," unlike "damage," encompasses temporary impaired use. To support this argument, Plaintiff relies on *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767 (C.D. Cal. 2018). In *Total Intermodal*, the court concluded that giving separate effect to "loss" and "damage" in the phrase, "direct physical loss or damage," required recognizing coverage for "the permanent dispossession of something." *Id.* at *4.

Even if the Policy covers "permanent dispossession" in addition to physical alteration, that does not benefit Plaintiff here. Plaintiff's FAC does not allege that it was permanently dispossessed of any insured property. As far as the FAC reveals, while public health restrictions kept the restaurant's "large groups" and "happy-hour goers" at home instead of in the dining room or at the bar, Plaintiff remained in possession of its dining room, bar, flatware, and all of the accoutrements of its "elegantly sophisticated surrounding."

10E, LLC v. Travelers Indem. Co. of Connecticut, No. 2:20-CV-04418-SVW-AS, 2020 WL 5359653, at *4–5 (C.D. Cal. Sept. 2, 2020) (internal citations to the record omitted). This analysis is persuasive and equally applicable here, as Plaintiffs make similar arguments for coverage under identical policy language and also rely on *Total Intermodal* to support their position. For all the same reasons, Plaintiffs have failed to plausibly allege any entitlement to coverage under the business income or extra expense provisions in their Policy with Truck Insurance Exchange.

Civil Authority Coverage

***6** There is also no coverage under the civil authority provision of the Policy. To trigger coverage under this provision, there must be an "action of civil authority that *prohibits access to the described premises* due to direct physical loss of or damage to property, *other than at the described premises*, caused by or resulting from any Covered Cause of Loss." [Doc. No. 16-2 at 27 (Policy § A.5.i.) (*emphasis* added)]. Thus, to survive dismissal, the complaint must, at a minimum, allege that the government (1) prohibited Plaintiffs from accessing their premises (2) due to direct physical loss of or damage to property elsewhere. The allegations in the complaint do not satisfy either requirement.

First, the complaint does not allege that any COVID-19 Civil Authority Orders prohibited Plaintiffs from access to their business premises. Rather, it only alleges that Plaintiffs were prohibited from operating their businesses at their premises. Plaintiffs fail to make any distinction between their place of business (i.e., the physical premises where they operate their business), and the business itself, but this distinction is relevant to coverage under the Policy. The Policy insures property, in this case Plaintiffs' property and physical places of business, and not Plaintiff's business itself. To that end, the civil authority coverage provision only provides coverage to the extent that access to Plaintiff's physical premises is prohibited, and not if Plaintiff's are simply prohibited from operating their business. The government orders alleged in the complaint prohibit the operation of Plaintiff's business; they do not prohibit access to Plaintiffs' place of business.

Second, even if the government orders alleged in the complaint could be construed as prohibiting Plaintiffs from accessing their premises, the orders were not issued due to direct physical loss of or damage to property *other than at Plaintiffs' premises.* Just as the complaint does not plausibly allege any direct physical loss of Plaintiff's property, it also does not allege any direct physical loss or damage to property not at Plaintiffs' places of business. In the opposition, Plaintiff does not argue otherwise, referring only to its arguments under the business income and extra expense provisions that the complaint alleges direct physical loss of or damage to *Plaintiffs'* property. [Doc. No. 18 at 16]; *see generally, 10E, LLC*, 2020 WL 5359653, at *5-6 (finding no civil authority

coverage as a result of COVID-19 Civil Authority Orders requiring restaurant to cease indoor operations).

Accordingly, because the complaint does not plausibly allege (1) any civil authority orders that prohibited access to Plaintiffs' places of business (as opposed to simply prohibiting Plaintiffs from operating their businesses), or (2) any direct physical loss of or damage to property, other than at Plaintiffs' premises, the complaint does not state a claim for coverage under the civil authority provision of the Policy.

IV. Conclusion

Because the allegations in the complaint do not a state a claim for coverage under the Policy, Plaintiffs' claims for declaratory relief that there is coverage and for breach of contract must be dismissed. Likewise, because the UCL claim is premised on the existence of coverage under the Policy, it is dismissed as well. *See generally, 10E, LLC*, 2020 WL 5359653, at *6 (dismissing UCL claim based on allegation that an insurance policy provided coverage after concluding that the plaintiff was not entitled to coverage under the policy). Accordingly, it is hereby **ORDERED** that the motion to dismiss is **GRANTED**, and the complaint is **DISMISSED** in its entirety.[3]

***7** Plaintiffs make a passing request for leave to amend the complaint at the end of their opposition, but do not explain how an amended complaint would remedy any of the deficiencies identified by Defendants in their motion. Because any amendment is likely to be futile, before allowing Plaintiffs to amend their complaint, Plaintiffs must file a motion for leave to amend that attaches their proposed amended complaint, along with a redline showing all changes as compared with the original complaint. If a motion for leave to amend is not filed by **September 21, 2020**, this dismissal of Plaintiffs' complaint will be with prejudice. If Plaintiffs file a motion for leave to amend, Defendants may file an opposition on or before **September 28, 2020**. The Court will then take the motion under submission without a reply and enter an order in due course.

It is **SO ORDERED**.

All Citations

Slip Copy, 2020 WL 5500221

Footnotes

1 On a motion to dismiss under Rule 12(b)(6), the court "may also consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011) (internal quotation marks and citation omitted). All of these requirements are met here. Accordingly, the Court treats the Policy "as 'part of the complaint, and thus may assume that its contents are true for purposes of' " Defendants' motion to dismiss. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (quoting *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)). Defendants also request judicial notice of a bulletin from the California Insurance Commissioner, but because the Court did not consider the bulletin in connection with this opinion, that request is denied as moot.

2 The case on which Plaintiffs rely, *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), is distinguishable. In *Studio 417*, the district court based its denial of the insurer's motion to dismiss, at least in part, on allegations "that COVID-19 'is a physical substance,' that it 'live[s] on' and is 'active on inert physical surfaces,' and is also 'emitted into the air.' COVID-19 allegedly attached to and deprived Plaintiffs of their property, making it 'unsafe and unusable, resulting in direct physical loss to the premises and property.' " *Studio 417*, 2020 WL 4692385, at *4. The policyholder also alleged that "it is likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus." *Id.* at *2. Accordingly, "[b]ased on these allegations," the district court held that the complaint "plausibly alleges a 'direct physical loss' based on 'the plain and ordinary meaning of the phrase.' " *Id.* Here, in contrast, Plaintiffs expressly allege that COVID-19 did not cause physical loss of or damage to their properties, alleging and arguing only that that the government orders themselves constitute direct physical loss of or damage to the properties.

3 Because the complaint does not state a claim for coverage under the Policy, the Court need not address Defendants' separate argument for dismissal of Farmers Group, Inc., and Farmers Insurance Company, Inc. as defendants because they are not parties to the Policy. However, the allegation that these defendants own subsidiaries that issue property insurance, which is Plaintiffs only argument for keeping these defendants in the case, is grossly insufficient to state a claim against them for declaratory relief, breach of contract, or violation of the UCL related to insurance coverage under

a policy issued by Truck Insurance Exchange. Plaintiffs are advised that if they seek leave to amend their complaint, they must also amend their allegations as to these defendants. Failure to include factual allegations as to why these defendants can be liable for coverage under an insurance policy to which they are not a party will result in dismissal of these defendants regardless of whether Plaintiffs can plausibly allege a direct physical loss to their property or property not at their premises.

End of Document

2020 WL 7078735
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

PROMOTIONAL HEADWEAR INTERNATIONAL, individually and on behalf of all others similarly situated, Plaintiff,

v.

THE CINCINNATI INSURANCE COMPANY, Defendant.

Case No. 20-cv-2211-JAR-GEB
|
12/03/2020

JULIE A. ROBINSON, CHIEF UNITED STATES DISTRICT JUDGE

MEMORANDUM AND ORDER

***1** Plaintiff Promotional Headwear International brings this putative class action against its property insurer, The Cincinnati Insurance Company, for declaratory judgment and breach of contract arising out of Defendant's denial of Plaintiff's insurance claim for property losses sustained due to COVID-19. Before the Court is Defendant's Motion to Dismiss (Doc. 7). The motion is fully briefed and the Court has considered the parties' many notices of supplemental authority. For the reasons explained more fully below, the Court grants Defendant's motion to dismiss.

I. Factual Allegations

The following material facts are either alleged in the Complaint or taken from the insurance policy attached thereto. The well-pled facts alleged in the Complaint are assumed to be true for purposes of deciding this motion.

As of April 24, 2020, when Plaintiff filed its Complaint, more than 46,000 Americans had died of COVID-19, and the Department of Health for Johnson County, Kansas had reported 403 confirmed cases. The virus can spread by respiratory droplets when an infected person coughs, sneezes, or talks. Studies demonstrate that COVID-19 spreads through the air by aerosols, where they can remain for hours or more. A person can also potentially become infected by touching a surface or object that has the virus on it and then by touching the mouth, nose, or eyes. According to studies, the virus can live on surfaces for several days if not longer.

In response to COVID-19's rapid, deadly spread across the United States, state and local governments imposed directives in February and March 2020, often called "Stay at Home Orders," requiring residents to stay in their homes except to perform certain "essential" activities. The Stay at Home Orders generally required non-essential businesses to close. At one point, 95% of the United States population was under one or more Stay at Home Orders. The State of Kansas and Johnson County, Kansas issued Stay at Home Orders in March 2020 that were still in effect at the time the Complaint was filed. The March 24, 2020 Johnson County Order recognized that the virus "endanger[s] health, safety and welfare of persons and property within the border of Johnson County, Kansas," and that it "remains a public disaster affecting life, health, property and the public peace."[1] The Johnson County Order was issued to mitigate and slow the spread of COVID-19 in the community. The March 28, 2020 State of Kansas Order directed all Kansans to stay in their homes to slow the spread of COVID-19 with several exceptions. Like the Johnson County Order, the purpose of the State Order was to "mitigate the spread of COVID-19 throughout Kansas."[2] On April 16, 2020, the State Order was extended to May 3, 2020.

***2** Plaintiff is a wholesale distributor of headwear, bags, aprons, towels, and other products, including custom promotional caps sold to businesses across the globe for marketing purposes. Plaintiff's facility is located in Johnson County, Kansas. Plaintiff projected it would exceed $100 million in sales for 2020, but due to the Stay at Home Orders and the risk of transmitting of COVID-19, several of Plaintiff's employees could not show up to work and risk infection, preventing Plaintiff from meeting sales targets. COVID-19 and the Stay at Home Orders prevented Plaintiff from using its premises for its intended purpose. Plaintiff suspended its operations in order to mitigate further losses when government officials "announced that COVID-19 posed a risk of causing further physical damage and loss."[3] As a result, Plaintiff lost nearly 95% of its sales.

Plaintiff purchased property insurance from Defendant, bearing Policy No. 05ECP0562300 (the "Policy"), that did not contain an exclusion for pandemic coverage. The all-risk Policy is comprised of a number of forms and endorsements

that define the scope of coverage. It covers "direct 'loss' to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss."[4] "Covered Cause of Loss" is defined under the Policy as "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part."[5] "Loss" is defined as "accidental physical loss or accidental physical damage."[6]

The Policy includes coverage for business income losses, losses due to certain civil authority orders, and loss of ingress/egress. The Policy covers "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 'loss' to property at a 'premises' caused by or resulting from any Covered Cause of Loss."[7] The civil authority coverage provision states:

> When a Covered Cause of Loss causes damage to property other than Covered Property at a "premises", we will pay for the actual loss of "Business Income" and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the "premises", provided that both of the following apply:
>
> (a) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
>
> (b) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.[8]

The ingress/egress form provides coverage for

> actual loss of "Business Income" you sustain and necessary Extra Expense you sustain caused by the prevention of existing ingress or egress at a "premises" shown in the Declarations due to direct "loss" by a Covered Cause of Loss at a location contiguous to such "premises". However, coverage does not apply if ingress or egress from the "premises" is prohibited by civil authority.[9]

The Policy imposes certain duties on the insured in the event of loss or damage, including to protect the covered property from further damage, and "[k]eep a record of...expenses necessary to protect the Covered Property for consideration in the settlement of the claim."[10]

In March 2020, Plaintiff notified Defendant of a loss under the Policy sustained from COVID-19 and the Stay at Home Orders. Specifically, Plaintiff maintains it lost revenue and business opportunities due to the suspension of its operations, rendering it unable to fulfill or accept apparel orders. Defendant requested additional information and refused coverage under the Policy. In this action, Plaintiff seeks a declaration of the parties' respective rights and duties under the Policy and requests the Court deem Defendant's conduct unlawful and in material breach of the Policy. Plaintiff also asserts breach of contract claims under Kansas law based on the business income, civil authority, ingress/egress, and Sue and Labor provisions in the Policy.

II. Standard

***3** To survive a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6), a complaint must contain factual allegations that, assumed to be true, "raise a right to relief above the speculative level" and must include "enough facts to state a claim for relief that is plausible on its face."[11] In order to pass muster under Rule 12(b)(6), "the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims."[12]The plausibility standard does not require a showing of probability that a defendant has acted unlawfully, but requires more than "a sheer possibility."[13] "[M]ere 'labels and conclusions,' and 'a formulaic recitation of the elements of a cause of action' will not suffice; a plaintiff must offer specific factual allegations to support each claim."[14] Finally, the Court must accept the nonmoving party's factual allegations as true and may not dismiss on the ground that it appears unlikely the allegations can be proven.[15]

The Supreme Court has explained the analysis as a two-step process. For the purposes of a motion to dismiss, the court "must take all the factual allegations in the complaint as true, [but] we 'are not bound to accept as true a legal conclusion couched as a factual allegation.' "[16] Thus, the court must first determine if the allegations are factual and entitled to an assumption of truth, or merely legal conclusions that are not entitled to an assumption of truth.[17] Second, the court must determine whether the factual allegations, when assumed true, "plausibly give rise to an entitlement to relief."[18] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[19]

Finally, if the Court on a Rule 12(b)(6) motion looks to matters outside the pleadings, it generally must convert the motion to a Rule 56 motion for summary judgment.[20] However, the Court may consider documents that are referred to in the complaint if they are central to the plaintiff's claim and the parties do not dispute their authenticity.[21] Here, the Court considers the insurance policy attached to the Complaint, and language quoted in the Complaint from state and local Stay at Home Orders.[22]

III. Discussion

Defendant's motion to dismiss argues that Plaintiff fails to allege sufficient facts to demonstrate a "direct loss to Covered Property" under the terms of its all-risk Policy. Defendant further argues that even if Plaintiff could show direct loss, there is otherwise no coverage under the civil authority, ingress/egress, or "Sue and Labor" provisions of the Policy. Plaintiff responds that it has alleged sufficient facts to demonstrate it suffered a covered loss and that the other provisions apply. In the alternative, Plaintiff argues that the definition of "loss" is ambiguous and should be construed in its favor.

The parties agree that Kansas law applies. Under Kansas law, the interpretation and legal effect of an insurance contract is a matter of law to be determined by the court.[23] In construing an insurance policy, a court must consider the instrument as a whole and interpret the policy language in such a way as to give effect to the intent of the parties.[24] "If an insurance policy's language is clear and unambiguous, it must be taken in its plain, ordinary, and popular sense."[25]In such a case, there is no need for judicial interpretation or the application of rules of liberal construction.[26]

***4** However, if the policy language is ambiguous, it must be construed in favor of the insured.[27] "To be ambiguous, a contract must contain provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language."[28]"Ambiguity in a written contract does not appear until the application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning."[29] A court should not strain to find ambiguity where none exists.[30] "The test in determining whether an insurance contract is ambiguous is not what the insurer intends the language to mean, but what a reasonably prudent insured would understand the language to mean."[31]

A. Direct Loss

The parties dispute the threshold question of whether Plaintiff sustained "direct loss to Covered Property at the premises caused by or resulting from any Covered Cause of Loss," a requirement for all of the coverage provisions claimed by Plaintiff.[32] Defendant argues that a direct loss to covered property under the Policy requires that the property be physically altered; because COVID-19 did not affect the structural integrity of the covered property, there is no coverage. Defendant maintains that the lack of a specific virus exclusion is immaterial to the Court's construction of the Policy's use of the term "loss."

Plaintiff responds that under the plain terms of the policy, direct physical loss or damage does not require a tangible, permanent loss or physical alteration of the property. Instead, a reasonably prudent insured would understand that physical loss or damage includes loss of access or use of the property, which Plaintiff alleged in this case. In the alternative, Plaintiff argues that "direct physical loss" under the Policy is ambiguous, particularly when read in the absence of a virus exclusion.

Whether Plaintiff sustained a "direct loss" under the Policy is a question of coverage. The insured has the burden of proving that the loss is of the type included in the general provisions of coverage.[33] "Loss" is defined by the Policy as "accidental physical loss or accidental physical damage."[34] Plaintiff points to the dictionary definition of the word "loss," as "the act of losing possession," and argues that a reasonably prudent insured would understand that loss of use or access to the property is a physical loss.[35] Plaintiff cites to definitions of the word "damage" that include a reduction in the property's "value or usefulness."[36] But even if the Court adopts these definitions, Plaintiff wholly ignores the modifiers "direct" and "physical" that precede both "loss" and "damage" in the Policy definition.[37] Although neither word is further defined by the Policy, Plaintiff's interpretation of "loss" and "damage" would write out these modifiers entirely. Instead, the Court

considers the plain meaning of these terms when read together and in conjunction with the Policy as a whole.

***5** "Direct" in this context "is meant to exclude situations in which an intervening force played some role in the property damage."[38] In the context of modifying the words "loss" or "damage," dictionaries define "physical" as relating to or involving "material things,"[39] "relating to things you can see or touch, or relating to the laws of nature,"[40] and "having material existence; perceptible especially through the senses and subject to the laws of nature."[41]

As this Court previously held in *Great Plains Ventures, Inc. v. Liberty Mutual Fire Ins. Co.*, "physical damage" in an insurance policy is widely accepted to mean "physical alteration."[42] While there is no governing Kansas or Tenth Circuit law about the plain meaning of "direct physical loss" or "direct physical damage" in the insurance context, other circuit court decisions support the *Great Plains* interpretation that "physical damage" requires actual, tangible damage. Case law also supports the interpretation that "direct physical loss" requires some sort of intrusion or contamination on the property.

For example, the Eleventh Circuit recently addressed a claim for business interruption coverage under an insurance policy that required suspension of operations caused "by direct physical loss of or damage to" the property.[43] The plaintiff owned a restaurant that suffered business losses during adjacent roadway construction that went on for almost two years. The restaurant lost customers, and dust and debris from the construction entered the restaurant, requiring daily cleaning. The court found that "under Florida law, an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.' "[44] The Eleventh Circuit reasoned that the words "direct" and "physical" modify "loss," under the policy, which in turn require that the property damage be "actual."[45] The court relied on state and federal cases finding that direct physical loss requires some sort of actual change in the insured property.[46] Because the property there did not require removal or replacement of items, only cleaning, the court upheld the district court's determination that the loss was not direct and physical.[47]

***6** The Eighth Circuit has twice weighed in on the plain meaning of direct physical loss or damage. In *Pentair, Inc. v. America Guarantee & Liability Insurance Co.*, the court considered the policy language "direct physical loss of or damage to property."[48] There, the plaintiff's supplier could not manufacture orders due to an earthquake that disabled the electrical power station for the supplier's factories. The plaintiff sought coverage for losses sustained due to the supplier's failure to manufacture the products it needed to meet customer needs for the Christmas season. The court found that the factories' loss of power did not constitute "physical loss or damage" to property under the policy because there was no physical contamination involved, noting that the plaintiff's interpretation "would mean that direct physical loss or damage is established whenever property cannot be used for its intended purpose."[49] The court determined that Minnesota law did not support such a broad interpretation of physical loss or damage; some sort of physical contamination is required.[50]

In *Source Food Technology, Inc. v. U.S. Fidelity & Guaranty Co.*, the Eighth Circuit considered a business income claim under policy language that required "direct physical loss to property."[51] There, the plaintiff sold a beef product provided by a Canadian supplier. The beef product was manufactured, packaged, and ready for delivery to the United States when the United States Department of Agriculture issued an order prohibiting the importation of certain beef products due to the threat of mad cow disease. Although not contaminated with mad cow disease, the plaintiff's beef product supply was not shipped due to the embargo and the plaintiff could not fill its supply orders for a period of time. The court determined that because the beef product was not physically contaminated, there was no direct physical loss:

> Although Source Food's beef product in the truck could not be transported to the United States due to the closing of the border to Canadian beef products, the beef product on the truck was not— as Source Foods concedes—physically contaminated or damaged in any manner. To characterize Source Food's inability to transport its truckload of beef product across the border and sell the beef product in the United States as direct physical loss to property would render the word "physical" meaningless. Moreover, the policy's use of the word "to" in the policy language "direct physical loss to property" is significant. Source Food'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." But these phrases are not found in the policy. Thus, the policy's use of the words "to property" further undermines

> Source Food's argument that a border closing triggers insurance coverage under this policy.[52]

In line with these decisions, the overwhelming majority of cases to consider business income claims stemming from COVID-19 with similar policy language hold that "direct physical loss or damage" to property requires some showing of actual or tangible harm to or intrusion on the property itself.[53] The cases cited by Plaintiff in support of a broader interpretation are unavailing. In *TRAVCO Insurance Co. v. Ward*, the court determined that a direct physical loss can occur if the property is "rendered unusable by physical forces."[54] There, the property's drywall emitted toxic gases that, while not affecting the structural integrity of the building, rendered the property uninhabitable.[55] Unlike in this case, the loss of use in *Ward* was due to an actual physical force—toxic gases—that rendered the property unusable.[56] Plaintiff cites *Murray v. State Farm Fire & Casualty Co.* for the proposition that "[d]irect physical loss also may exist in the absence of structural damage to the insured property."[57] But *Murray* relies on a Minnesota Court of Appeals case that *Pentair* and *Source Food* persuasively distinguished because it was based on the release of asbestos fibers—actual, physical contamination.[58] Similarly, *Western Fire Insurance Co. v. First Presbyterian Church* found "direct physical loss" due to gasoline saturation under a church that rendered occupancy unsafe.[59] There, the court found that the church was uninhabitable due to "infiltration and contamination" of the church building, even though the structural integrity of the building was intact.[60] These cases all found that a physical force rendered the property unfit for use. Here, there is no such physical force rendering the property unusable. The Stay at Home orders are certainly not a physical intrusion onto the property. And while the threat of COVID-19 transmission may prohibit gathering at the property, there is no allegation that the virus has physically intruded onto the property like the asbestos, gasoline, or toxic gas described in the caselaw.

***7** The Court finds that coverage for "direct loss to Covered Property" under the Policy unambiguously requires more than mere diminution in value or impairment of use of the property.[61] Under Kansas law, "[t]he failure of an insurance policy to specifically define a word does not necessarily create ambiguity."[62] The presence of the words "direct" and "physical" limit the words "loss" and "damage" and unambiguously require that the loss be directly tied to a material alteration to the property itself, or an intrusion onto the insured property.[63] The Court follows the majority of courts to consider identical policy language in the context of COVID-19 and holds that direct physical loss or damage to the property requires a tangible, actual change to or intrusion on the covered property. Like the restaurant in *Mama Jo's*, Plaintiff alleges no loss or damage to the property that required repair or replacement based on an actual or tangible problem with the premises.[64] And like the plaintiffs in *Pentair* and *Source Food*, Plaintiff suffers purely economic damages due to temporary loss of use, not a direct, physical change or intrusion onto the property.

Plaintiff responds that "physical loss" and "physical damage" must be construed and considered separately so as to give meaning to each term, and that requiring tangible harm to the property reads out any distinction between those terms. But the Court has taken care to give meaning to both terms. As discussed, the words "direct" and "physical" modify *both* "loss" and "damage" under this Policy. Assuming "loss" can be defined as an interference or reduction in use, caselaw has made clear that when modified by the terms "direct" and "physical," coverage is triggered when there is either "permanent dispossession" of the property, or where the property itself becomes unusable or uninhabitable due to a material intrusion.[65] While COVID-19 and the Stay at Home Orders temporarily prevented employees and customers gathering at Plaintiff's property, there are no allegations of a material change or intrusion onto the property itself that rendered it unusable.[66] And there are no allegations demonstrating permanent dispossession.

***8** A few recent district court cases have determined that an allegation of COVID-19 entering the premises through an employee or customer is sufficient to demonstrate direct physical loss or damage.[67] Thus, Plaintiff asserts that it sufficiently pled physical loss or damage by alleging that the "premises likely have been infected with COVID-19....It is likely customers, employees, and/or other visitors to the insured property over the last two months were infected with the coronavirus and thereby infected the insured property with the coronavirus."[68]Plaintiff alleges that despite the limited access to the property due to Stay at Home Orders, the incubation period for COVID-19 is fourteen days, and there is evidence that the first COVID-19 death in the United States occurred as early as February 6, 2020. Plaintiff cites several studies in the Complaint finding that the virus is spread through air droplets and, therefore, is able to spread across

distances and can settle on physical surfaces that later infect another person.

The Court finds that Plaintiff's allegation that the virus likely contaminated its property fails to raise a "right of relief above the speculative level."[69] The health data and studies described in the Complaint do not support the conclusory assertion that the virus was present on the surfaces of Plaintiff's property, causing its losses.[70] The fact that the virus travels through the air and was present in the United States sooner than first suspected, does not support the assertion that it "likely" exists on the surfaces of Plaintiff's property. "There is a similar risk of exposure to the virus in any public setting, regardless of artful pleading as to the likelihood of the presence of the virus."[71] The Complaint alleges that at the time of filing, there were 403 known infections in Johnson County; there is no allegation that any of these infected individuals were ever present on Plaintiff's property, or that employees or customers came into contact with someone who was infected before entering the property. To accept Plaintiff's conclusory assertion would be to accept the proposition that any business located in a community with COVID-19 infections was likely contaminated with the virus.[72] The Court declines to accept this speculative assertion, even at the motion to dismiss stage.

Moreover, even assuming that the virus physically attached to covered property, it did not constitute the direct, physical loss or damage required to trigger coverage because its presence can be eliminated. Much like the dust and debris at issue in *Mama Jo's*, routine cleaning and disinfecting can eliminate the virus on surfaces.[73] Plaintiff seeks purely economic damages associated with the suspension of its operations due to COVID-19; it does not claim property damage due to the presence of COVID-19 in its buildings. The Court echoes the words of another Court faced with deciding this issue:

> ***9** Property...is not physically damaged or rendered unusable or uninhabitable. If people could safely congregate anywhere without risk of infection, the Plaintiff has alleged no facts to suggest any impediment to [its] operation. No repairs or remediation to the premises are necessary for its safe occupation in the event the virus is controlled and no longer poses a threat. In short, the pandemic impacts human health and human behavior, not physical structures. Those changes in behavior, including changes required by governmental action, caused the Plaintiff economic losses. The Court is not unsympathetic to the situation facing the Plaintiff and other businesses. But the unambiguous terms of the Policy do not provide coverage for solely economic losses unaccompanied by physical property damage.[74]

The Complaint fails to allege that Plaintiff sustained a "direct loss to Covered Property" due to COVID-19 and the Stay at Home Orders. Because there is no direct physical loss or damage alleged in the Complaint, it must be dismissed for failure to state a claim.

B. Civil Authority Coverage

The Policy's loss of business income provision covers lost business income as a result of direct loss to Plaintiff's covered property. The civil authority coverage provision applies when there is a "Covered Cause of Loss," that causes damage to property other than Plaintiff's property, and the action of a civil authority makes Plaintiff unable to reach its property. If Plaintiff shows that a covered cause of loss caused damage to adjacent property, it must meet two additional requirements: (1) access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and (2) the action of civil authority is taken in response to dangerous physical conditions resulting from direct physical loss.

First, Defendant argues that Plaintiff cannot show that a covered cause of loss caused damage to property other than Plaintiff's for the same reasons outlined above. The Court agrees. Plaintiff points to no allegation in the Complaint that sufficiently alleges damage to surrounding property for the same reasons discussed above. Instead, Plaintiff makes the circular argument that because state and local governments issued Stay at Home Orders in response to the COVID-19 pandemic, this "includes the area surrounding Plaintiff's property."[75] The allegations in the Complaint are insufficient to demonstrate direct loss, or damage to property surrounding Plaintiff's property.

Second, even if Plaintiff could demonstrate direct physical loss or damage to surrounding property, it has not alleged sufficient facts demonstrating that access to the area immediately surrounding the property is prohibited by civil authority as a result of the damage. As the Tenth Circuit has explained, "prohibited" means "to 'formally forbid, esp. by authority' or 'prevent.' "[76]The Policy language "requires a direct nexus between the civil authority order and the suspension of the insured's business."[77] The civil authority action must either prohibit access to the business,

or require the premises to close.[78] Having the indirect effect of restricting or hampering access to the business is insufficient.[79]

***10** The Complaint alleges that some of Plaintiff's employees could not work and risk becoming infected, that "ingress and egress to the property currently is limited,"[80] and that customers and suppliers cannot access the property "due to the Stay at Home Orders or fear of being infected with or spreading COVID-19."[81] The Stay at Home Orders referenced in the Complaint do not prohibit employees or the public from entering Plaintiff's premises. Nor do the Stay at Home Orders require Plaintiff to suspend its business. The State of Kansas Order provides: "Travel to and from work to pick up equipment or supplies needed for telework or other work-from-home capabilities is allowed so long as employees and employers follow appropriate safety protocols."[82] The Johnson County Order similarly allows residents to leave their homes in order "[t]o perform work providing essential products and services at an Essential Business or to otherwise carry out activities specifically permitted in this Order, including Minimum Basic Operations."[83] Assuming as true the facts alleged in the Complaint, access to Plaintiff's property was not prohibited by the Stay at Home Orders; therefore, the Policy's civil authority coverage provision does not apply.

Plaintiff further argues that because the word "prohibited" is not defined by the Policy, it is at least ambiguous and should therefore be resolved in its favor. As discussed earlier in this Order, the fact that a word is not defined in an insurance policy does not mean it is ambiguous.[84]The Court finds that the meaning of "prohibited" in this Policy is unambiguous, as described above. Because the Complaint fails to allege that the Stay at Home Orders prohibited access to Plaintiff's property, coverage does not apply and Defendant's motion to dismiss is granted on this additional basis as to the civil authority coverage claim.

C. Ingress/Egress and Sue and Labor Provisions

Defendant argues that the remaining coverage provisions claimed by Plaintiff do not apply here. Coverage under the ingress/egress provision requires "direct 'loss' by a Covered Cause of Loss at a location contiguous to" Plaintiff's property. It also requires "the prevention of existing ingress or egress," from the Covered Cause of Loss. Again, the Complaint fails to allege that there was direct physical loss or damage at a location contiguous to the property. Plaintiff fails to even identify a contiguous property for purposes of this coverage provision. Also, as discussed under the Civil Authority coverage section, the Complaint admits that the premises was accessible despite the Stay at Home Orders. Therefore, assuming as true the facts alleged in the Complaint, COVID-19 did not prevent ingress or egress from Plaintiff's property.

Finally, Plaintiff asserts coverage under the "Sue and Labor" provision. But Defendant correctly points out that this provision is plainly not a coverage provision. Instead, it provides that the insured has certain duties in the event of loss or damage, including to protect the covered property from further damage, and "[k]eep a record of...expenses necessary to protect the Covered Property for consideration in the settlement of the claim."[85] Plaintiff fails to address this argument in the response brief, or provide any meaningful explanation about how this coverage section applies. The Court finds no coverage under the plain language of this Policy provision as applied to the well-pled facts alleged in the Complaint.

IT IS THEREFORE ORDERED BY THE COURT that Defendant's Motion to Dismiss (Doc. 7) is **granted**. Plaintiff's Complaint is dismissed with prejudice.

IT IS SO ORDERED.

Dated: December 3, 2020

S/ Julie A. Robinson

JULIE A. ROBINSON

CHIEF UNITED STATES DISTRICT JUDGE

All Citations

Slip Copy, 2020 WL 7078735

Footnotes

1 Dr. Joseph LeMaster, Emergency Order of Local Health Officer at 1 (Mar. 22, 2020), https://www.jocogov.org /sites/default/files/documents/CMO/JoCo%20Public%20Health%20Officer%20 Stay%20at%20Home%20Order%203-22-20.pdf; *see also* Doc. 1 ¶ 46(a).

2 Doc. 1 ¶ 32 (quoting Kan. Exec. Order No. 20-16 at 1 (Mar. 28, 2020), https://governor.kansas.gov/wp- content/uploads/2020/03/EO20-16.pdf).

3 *Id.* ¶ 56.

4 Doc. 1-1 § A, at 6.

5 *Id.* § A(3)(a), at 8.

6 *Id.* § G(8), at 41.

7 *Id.* § A(5)(b)(1), at 21; § A(1)(a), at 75.

8 *Id.* § A(5)(b)(3), at 22.

9 *Id.* § A(5)(e), at 78.

10 *Id.* § D(3)(a)(4), at 33–34; § C(2)(a)(4), at 79.

11 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007).

12 *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

13 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

14 *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011) (quoting *Bell Atl. Corp.*, 550 U.S. at 555).

15 *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

16 *Id.* (quoting *Twombly*, 550 U.S. at 555).

17 *Id.* at 679.

18 *Id.*

19 *Id.* at 678.

20 Fed. R. Civ. P. 12(d); *GFF Corp. v. Associated Wholesale Grocers*, 130 F.3d 1381, 1384–85 (10th Cir. 1997).

21 *See Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1215 (10th Cir. 2007); *GFF Corp.*, 130 F.3d at 1384–85.

22 *See* Doc. 1-1.

23 *Am. Media, Inc. v. Home Indem. Co.*, 658 P.2d 1015, 1018 (Kan. 1983); *Gerdes v. Am. Fam. Mut. Ins. Co.*, 713 F. Supp. 2d 1290, 1295 (D. Kan. 2010) (quoting *Goforth v. Franklin Life Ins. Co.*, 449 P.2d 477, 480 (Kan. 1969)).

24 *O'Bryan v. Columbia Ins. Grp.*, 56 P.3d 789, 792 (Kan. 2002) (citing *Farm Bureau Mut. Ins. Co. v. Horinek*, 660 P.2d 1374, 1375 (Kan. 1983)); *Magnus, Inc. v. Diamond State Ins. Co.*, 101 F. Supp. 3d 1046, 1054 (D. Kan. 2015) (citing *Brumley v. Lee*, 963 P.2d 1224, 1226 (Kan. 1998)).

25 *O'Bryan*, 56 P.3d at 792 (citing *First Fin. Ins. Co. v. Bugg*, 962 P.2d 515, 519 (Kan. 1998)); *Magnus*, 101 F. Supp. 3d at 1054.

26 *Gerdes*, 713 F. Supp. 2d at 1296.

27 *Magnus*, 101 F. Supp. 3d at 1054 (citing *Brumley*, 963 P.2d at 1226); *O'Bryan*, 56 P.3d at 793 (citing *Catholic Diocese of Dodge City v. Raymer*, 840 P.2d 456, 459 (Kan. 1992)).

28 *Gerdes*, 713 F. Supp. 2d at 1296 (quoting *Catholic Diocese*, 840 P.2d at 459).

29 *Id.*

30 *Id.*

31 *O'Bryan*, 56 P.3d at 793 (citing *Bugg*, 962 P.2d at 519).

32 Doc. 1-1 § A, at 6.

33 *See, e.g.*, *BankInsure, Inc. v. FDIC*, 796 F.3d 1226, 1234 (10th Cir. 2015).

34 Doc. 1-1 § G(8), at 41.

35 *See Loss*, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss (last visited Nov. 30, 2020) ("[T]he act of losing possession...decrease in amount, magnitude, or degree....").

36 *See Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (first quoting Random House Dictionary of the English Language 504 (2d ed. 1987); then quoting Webster's New World Dictionary 356 (2d ed. 1980); and then quoting Black's Law Dictionary 389 (6th ed. 1990)).

37 Plaintiff's reliance on *Dundee Mutual Insurance* is inapposite for this reason. The language from that case quoted by Plaintiff in its brief states that "*without qualification*, the term 'damage' encompasses more than physical or tangible damage." 587 N.W.2d at 194 (emphasis added). But the term "damage" in the Policy at issue here is qualified by the word

"physical." The explicit plain language of this Policy makes clear that damage does *not* encompass more than physical damage. Thus, *Dundee Mutual Insurance* does not apply.

38 10A Couch on Insurance § 148:60, Westlaw (database updated June 2020) (citing *Advance Cable Co. v. Cincinnati Ins. Co.*, 788 F.3d 743, 746 (7th Cir. 2015)); *see also Loss*, Black's Law Dictionary (11th ed. 2019) (further defining "direct loss" as "[a] loss that results immediately and proximately from an event"); *see also, e.g.*, *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, No. 1:20-cv-275-JB-B, 2020 WL 6163142, at *6–7 (S.D. Ala. Oct. 21, 2020) (finding "direct" means "immediate or proximate.").

39 *Physical*, Black's Law Dictionary (11th ed. 2019).

40 *Physical*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/physical (last visited Nov. 30, 2020).

41 *Physical*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical (last visited Nov. 30, 2020).

42 161 F. Supp. 3d 970, 978 (D. Kan. 2016); *see also Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002) (citing 10 Couch on Insurance § 148:46 (3d ed. 1998) ("In ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure."); *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 574 (6th Cir. 2012) (finding no coverage because the plaintiff "did not suffer any tangible damage to physical property, nor were the Evergreen premises rendered uninhabitable or substantially unusable.").

43 *Mama Jo's, Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 878 (11th Cir. 2020).

44 *Id.* at 879.

45 *Id.*

46 *Id.* (citing *Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067, 1069 (Fla. Dist. Ct. App. 2017); *Vazquez v. Citizens Prop. Ins. Corp.*, –So. 3d–, 2020 WL 1950831, at *3 (Fla. Dist. Ct. App. Mar. 18, 2020); *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 573 (6th Cir. 2012); *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 115 Cal. Rptr. 3d 27, 37 (Cal. Ct. App. 2010); *AFLAC Inc. v. Chubb & Sons, Inc.*, 581 S.E.2d 317, 319 (Ga. Ct. App. 2003)); *see also Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y 2014) ("The words 'direct' and 'physical,' which modify the phrase 'loss or damage,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure.").

47 *Mama Jo's, Inc.*, 823 F. App'x at 879.

48 400 F.3d 613, 614 (8th Cir. 2005).

49 *Id.* at 616.

50 *Id.* (first citing *Sentinel Mgmt. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997); then citing *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 151 (Minn. Ct. App. 2001); and then citing *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 98 N.W.2d 280, 285 (Minn. 1959)).

51 465 F.3d 834 (8th Cir. 2006).

52 *Id.* at 838; *see also Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, –F. Supp. 3d–, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020).

53 *See Raymond H. Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-cv-22833-BLMM/Louis, 2020 WL 6392841, at *8 (S.D. Fla. Nov. 2, 2020) (finding no direct physical loss or damage because the harm was purely economic); *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL 6436948, at *4–5 (S.D. W. Va. Nov. 2, 2020) (finding purely economic losses without physical damage to the insured property does not constitute "physical loss or physical damage" under insurance policy); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, No. 2:20-cv-05663, 2020 WL 6440037,at *4 (C.D. Cal. Oct. 27, 2020) ("Plaintiffs contend that the loss of use of their properties is sufficient to trigger coverage under the Policy. Under California law, however, a 'detrimental economic impact' alone—as Plaintiffs have alleged—is not compensable under a property insurance contract." (citation omitted)); *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, No. 1:20-cv-275-JB-B, 2020 WL 6163142, at *6–7 (S.D. Ala. Oct. 21, 2020) (finding Alabama law requires a tangible injury to property under policy requiring "direct physical loss."); *Infinity Exs., Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000*, –F. Supp. 3d–, 2020 WL 5791583, at *3–5 (M.D. Fla. Sept. 28, 2020) (finding that under Florida law and the plain language of the policies at issue, "direct physical loss or damage to the property" requires a showing of actual, concrete damage); *Sandy Point Dental, PC v. Cincinnati Ins Co.*, No. 20 CV 2160, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020) (finding direct physical loss requires "some form of actual, physical damage to the insured premises to trigger coverage."); *10E, LLC v. Travelers Indem. Co.*, No. 2:20-cv-04418-SVW- AS, 2020 WL

5359653, at *4–5 (C.D. Cal. Sept. 2, 2020) ("Under California law, losses from inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a 'distinct, demonstrable, physical alteration.' " (quoting *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 115 Cal. Rptr. 3d 27, 38 (Cal. Ct. App. 2010))); *Turek Enters., Inc.*, 2020 WL 5258484, at *8 (" '[A]ccidental direct physical loss to Covered Property' is an unambiguous term that plainly requires Plaintiff to demonstrate some tangible damage to Covered Property."); *Malube, LLC v. Greenwich Ins. Co.*, No. 20-22615-Civ-WILLIAMS/TORRES, 2020 WL 5051581, *7– 8 (S.D. Fla. Aug. 26, 2020) (finding that direct, physical loss requires actual harm; purely economic losses are insufficient); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, No. 20-CV-907-CAB-BLM, 2020 WL 5500221, at *4–5 (S.D. Cal. Sept. 11, 2020) (following *10E, LLC*, 2020 WL 5359653, at *4 and finding no direct physical loss or damage based on Stay at Home Orders); *Diesel Barbershop, LLC v. State Farm Lloyds*, –F. Supp. 3d–, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) (acknowledging and distinguishing caselaw that finds direct physical loss without tangible destruction and finding that the loss must be a "distinct, demonstrable physical alteration of the property." (quoting *Hartford Ins. Co. v. Miss. Valley Gas Co.*, 181 F. App'x 465, 470 (5th Cir. 2006))); *Rose's 1, LLC v. Erie Ins. Exch.*, No. 2020 CA 002424 B, 2020 WL 4589206, at *2–5 (D.C. Super. Ct. Aug. 6, 2020) (finding that dictionary definitions and the weight of caselaw support the interpretation that direct physical loss requires a physical change to the insured property).

54 715 F. Supp. 2d 699, 708–10 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013).

55 *Id.*

56 *Id.*

57 509 S.E.2d 1, 17 (W. Va. 1998) (citing *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997)).

58 *See Source Food Tech., Inc. v. U.S. Fidelity & Gar. Co.*, 465 F.3d 834, 837–38 (8th Cir. 2006); *Pentair, Inc. v. Am. Guar. & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005).

59 437 P.2d 52, 55 (Colo. 1968).

60 *Id.*

61 The fact that Defendant chose not to include a virus exclusion in the Policy does not render it ambiguous. *See Harmon v. Safeco Ins. Co. of Am.*, 954 P.2d 7, 11 (Kan. Ct. App. 1998). And if there is no coverage, there is no reason to consider whether an exclusion applies.

62 *First Fin. Ins. Co. v. Bugg*, 962 P.2d 515, 525 (Kan. 1998). The Eighth Circuit's decision in *Hampton Foods, Inc. v. Aetna Casualty & Surety Co.* does not support a finding that this Policy language is ambiguous. 787 F.2d 349 (8th Cir. 1986). The policy language in *Hampton Foods* stated: "[t]his policy insures against loss of or damage to the property insured...resulting from all risks of direct physical loss." *Id.* at 351. The parties disputed whether a "direct physical loss" was required, or merely damage or loss resulting from the *risk* of direct physical loss. The court found the policy language ambiguous and construed it in favor of the insured. *Id.* at 352. Here, the disputed language is "direct physical loss" and "direct physical damage." There is no "risk" language at issue here; therefore, *Hampton Foods* does not persuade the Court to find the Policy language here ambiguous.

63 *See, e.g.*, *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, No. 20 CV 2160, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020) ("The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property. Consequently, plaintiff has failed to plead a direct physical loss—a prerequisite for coverage.")

64 *Mama Jo's, Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 878 (11th Cir. 2020).

65 *10E, LLC*, 2020 WL 5359653, at *5 (citing *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB (Ksx), 2018 WL 3829767, at *4 (C.D. Cal. July 11, 2018)); *Pappy's Barber Shops, Inc.*, 2020 WL 550221, at *4; *Rose's 1, LLC v. Erie Ins. Exch.*, 2020 WL 4589206, at *3; *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708–10 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) (finding physical loss where property was uninhabitable due to toxic gas released by drywall, despite the fact that the drywall was not structurally damaged).

66 Plaintiff's reliance on language in the Stay at Home Order recognizing that COVID-19 poses a threat to property is unavailing. The Court determines the meaning of the Policy based on the plain meaning of the language therein. *O'Bryan v. Columbia Ins. Grp.*, 56 P.3d 789, 792 (Kan. 2002).

67 *See Studio 417, Inc. v. Cincinnati Ins. Co.*, –F. Supp. 3d–, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963, at *4 (W.D. Mo. Sept. 21, 2020); *see also Mudpie, Inc. v. Travelers Cas. Ins. Co.*, –F. Supp. 3d–, 2020 WL 5525171, at *5 n.7 (N.D. Cal. Sept. 14, 2020) (noting that if the plaintiff had adequately alleged the presence of COVID-19 in the premises, it would have reached a different conclusion about whether it constituted an "intervening physical force").

68 Doc. 1 ¶ 15.

69 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

70 Under this reasoning, any property in the United States that was not completely closed by February 6, 2020 was "likely" infected with the virus.

71 *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL 6436948, at *5 (S.D. W. Va. Nov. 2, 2020).

72 *See id.* ("[W]hile factual allegations drive the analysis of a motion to dismiss, courts are not required to set aside common sense, and neither *Studio 417*, which relied in part on the allegation of presence of the virus, nor the instant case, involve actual allegations of employees or patrons with infections traced to the business.")

73 *Id.* at *5; *Mama Jo's, Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 878 (11th Cir. 2020).

74 *Uncork & Create LLC*, 2020 WL 6436948, at *5.

75 Doc. 17 at 17.

76 *S. Hospitality, Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1141 (10th Cir. 2004) (quoting Oxford American Dictionary and Language Guide 795 (1999)).

77 *Id.*

78 *See, e.g.*, *id.* (finding no coverage where the FAA's order stopped airplanes from flying after 9/11, but did not close hotels); *Abner, Herrman & Brock, Inc. v. Great N. Ins. Co.*, 308 F. Supp. 2d 331, 333 (S.D.N.Y. 2004) (finding no coverage after New York City lifted order prohibiting access to plaintiff's premises even though traffic restrictions remained); *Assurance Co. of Am. v. BBB Serv. Co.*, 593 S.E.2d 7, 7–9 (Ga. Ct. App. 2003) (finding evacuation order due to hurricane required closure of plaintiff's business).

79 *See, e.g.*, *S. Hospitality, Inc.*, 393 F.3d at 1141 (collecting cases).

80 Doc. 1 ¶ 15.

81 *Id.* ¶ 16.

82 Kan. Exec. Order No. 20-16 ¶ 3 (Mar. 28, 2020), https://governor.kansas.gov/wp-content/uploads /2020/03/EO20-16.pdf.

83 Dr. Joseph LeMaster, Johnson County Emergency Order of Local Health Officer at 2 (Mar. 22, 2020), https://www.jocogov.org/sites /default/files/documents/CMO /JoCo%20Public%20Health%20Officer%20Stay %20at%20Home%20Order%203-22-20.pdf ;

84 *First Fin. Ins. Co. v. Bugg*, 962 P.2d 515, 525 (Kan. 1998).

85 *Id.* § D(3)(A)(4), at 33–34; § C(2)(a)(4), at 79.

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Rose's 1, LLC v. Erie Ins. Exch.

Superior Court of the District of Columbia, Civil Division

August 6, 2020, Filed

Civil Case No. 2020 CA 002424 B

Reporter
2020 D.C. Super. LEXIS 10 *

ROSE'S 1, LLC, et al., Plaintiffs, v. ERIE INSURANCE EXCHANGE, Defendant.

Core Terms

coverage, closure, restaurant, quotation, dictionary

Case Summary

Overview
HOLDINGS: [1]-Because insureds could not show a "direct physical loss" under their insurance contracts from the closure of their businesses due to a major's COVID-19 pandemic orders, summary judgment in the insurer's favor was proper; any "loss of use" had to be caused, without the intervention of other persons or conditions, by something pertaining to matter—in other words, a direct physical intrusion on to the insured property, and the mayor's orders that impacted the businesses were not such a direct physical intrusion.

Outcome
The insureds' motion for summary judgment was denied. The insurer's cross-motion for summary judgment was granted.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] Entitlement as Matter of Law, Appropriateness

D.C. Super. Ct. R. Civ. P. 56 allows a court to grant summary judgment to a party when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. D.C. Super. Ct. R. Civ. P. 56(a); In considering a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party, who is entitled to all favorable inferences which may reasonably be drawn from the evidentiary materials. The court may not resolve issues of fact or weigh evidence at the summary judgment stage. Even if no material dispute of fact exists, the moving party must still establish that it is entitled to judgment as a matter of law. D.C. Super. Ct.

R. Civ. P. 56(a).

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Question of Law

HN2[] **Policy Interpretation, Question of Law**

Under District of Columbia law, contract principles are applicable to the interpretation of an insurance policy. The proper interpretation of an insurance contract, including whether the contract is ambiguous, is a legal question.

Contracts Law > Contract Interpretation > Intent

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Entire Contract

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Ordinary & Usual Meanings

HN3[] **Contract Interpretation, Intent**

An insurance policy is to be enforced in accordance with the real intent of the parties as expressed in the language employed in the policy. A court must give the words used in an insurance contract their common, ordinary, and popular meaning, and must interpret the contract as a whole, giving reasonable, lawful, and effective meaning to all its terms, and ascertaining the meaning in light of all the circumstances surrounding the parties at the time the contract was made.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Insurance Law > ... > Policy Interpretation > Parol Evidence > Extrinsic Evidence

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

HN4[] **Entitlement as Matter of Law, Appropriateness**

If the provisions of a contract are ambiguous, the correct interpretation becomes a question for a factfinder. Where, however, insurance contract language is not ambiguous, summary judgment is appropriate because a written contract duly signed and executed speaks for itself and binds the parties without the necessity of extrinsic evidence. Indeed, the court should not seek out ambiguity where none exists.

Judges: [*1] Kelly A. Higashi, Associate Judge.

Opinion by: Kelly A. Higashi

Opinion

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Motion") and Defendant's Cross-Motion for Summary Judgment ("Defendant's Motion"). While the Court is sympathetic to the plight of Plaintiffs, it must grant summary judgment to Defendant as a matter of law.

I. FACTS

Plaintiffs own and operate a number of prominent restaurants in the District of Columbia. They all purchased "Ultrapack Plus Commercial Property Coverage" from Defendant Erie Insurance Exchange. Included in this policy is coverage for "loss of 'income' and/or 'rental income' sustained "due to partial or total 'interruption of business' resulting directly from 'loss' or damage" to the property insured. Rose's 1 Ultrapack Plus Commercial Property Coverage ("Coverage") at 3. The coverage document further states that the "policy insures against direct physical 'loss' with the exception of several exclusions that are not relevant to this matter. *Id.* at 4.

This case comes in the context of the COVID-19 pandemic. COVID-19 is "a novel severe [*2] acute

respiratory illness that has killed ... more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others." *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 207 L. Ed. 2d 154 (2020) (Roberts, C.J., concurring). On March 11, 2020, D.C. Mayor Muriel Bowser declared a state of emergency and a public health emergency due to the "imminent hazard of or actual occurrence of widespread exposure" to COVID-19. Plaintiffs' Statement of Material Facts ("SMF") ¶3. On March 16, Mayor Bowser issued an order prohibiting table seating at restaurants and bars in D.C. SMF ¶4. On March 20, Mayor Bowser extended this ban to "standing customers at restaurants, bars, taverns, and multi-purpose facilities." SMF ¶5. On March 24, Mayor Bowser ordered the closure of all non-essential businesses. SMF ¶6. On March 30, she ordered all D.C. residents to stay in their residences except for limited "essential" reasons, a restriction that continued for several months. SMF ¶¶7-8.

As a result of Mayor Bowser's orders, the restaurant Plaintiffs were forced to close their businesses and suffered serious revenue losses. SMF ¶¶21-22. To cover those losses, they filed [*3] insurance claims with Defendant pursuant to insurance policies that "are substantively identical in all ways relevant to this action." SMF ¶78. When Defendant denied their claims, Plaintiffs filed this lawsuit seeking a declaratory judgment that their claims were covered by the express language of their insurance contracts with Defendant. Both sides subsequently moved for summary judgment.

II. SUMMARY JUDGMENT STANDARD

HN1[] D.C. Superior Court Rule of Civil Procedure 56 allows a court to grant summary judgment to a party when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. D.C. Super. Ct. Civ. R. 56(a); *Perkins v. District of Columbia*, 146 A.3d 80, 84 (D.C. 2016). In considering a motion for summary judgment, the court must view the evidence "in the light most favorable to the nonmoving party, who is entitled to all favorable inferences which may reasonably be drawn from the evidentiary materials." *Phelan v. City of Mt. Rainier*, 805 A.2d 930, 936 (D.C. 2002) (internal quotation marks omitted). The Court "may not resolve issues of fact or weigh evidence at the summary judgment stage." *Fry v. Diamond Construction, Inc.*, 659 A.2d 241, 245 (D.C. 1995) (internal quotation marks omitted). Even if no material dispute of fact exists, the moving party must still establish that it is entitled to judgment as a matter of law. D.C. Super. Ct. Civ. R. 56(a).

III. ANALYSIS

HN2[] Under District of Columbia law, "[c]ontract [*4] principles are applicable to the interpretation of an insurance policy." *Carlyle Inv. Mgmt. L.L.C. v. Ace Am. Ins. Co.*, 131 A.3d 886, 894 (D.C. 2016). "The proper interpretation" of an insurance contract, "including whether [the] contract is ambiguous, is a legal question." *Id.* (internal quotation mark omitted) (quoting *Tillery v. D.C. Contract Appeals Bd.*, 912 A.2d 1169, 1176 (D.C. 2006)). HN3[] "[A]n insurance policy is to be . . . enforced in accordance with the real intent of the parties as expressed in the language employed in the policy." *Redmond v. State Farm Ins. Co.*, 728 A.2d 1202, 1205 (D.C. 1999) (internal quotation marks omitted) (quoting *Peerless Ins. Co. v. Gonzalez*, 241 Conn. 476, 697 A.2d 680, 682 (Conn. 1997)). A court must "give the words used in an insurance contract their common, ordinary, and . . . popular meaning," *Id.* (omission in original) (internal quotation marks omitted) (quoting *Quadrangle Dev. Corp. v. Hartford Ins. Co.*, 645 A.2d 1074, 1075 (D.C. 1994)), and must interpret the contract "as a whole, giving reasonable, lawful, and effective meaning to all its terms, and ascertaining the meaning in light of all the circumstances surrounding the parties at the time the contract was made," *Carlyle Inv. Mgmt.*, 131 A.3d at 895 (internal quotation mark omitted) (quoting *Debnam v. Crane Co.*, 976 A.2d 193, 197 (D.C. 2009)).

HN4[] "[I]f the provisions of the contract are ambiguous, the correct interpretation becomes a question for a factfinder." *Carlyle Inv. Mgmt.*, 131 A.3d 886 at 895 (internal quotation marks omitted) (quoting *Debnam*, 976 A.2d at 197-98). "Where," however, "insurance contract language is not ambiguous, summary judgment is appropriate because a written contract duly [*5] signed and executed speaks for itself and binds the parties without the necessity of extrinsic evidence." *Fogg v. Fidelity Nat. Title Ins. Co.*, 89 A.3d 510, 514 (D.C. 2014) (internal quotation marks omitted) (quoting *Stevens v. United Gen. Title Ins. Co.*, 801 A.2d 61, 66 (D.C. 2002)). Indeed, the Court "should not seek out ambiguity where none exists." *Athridge v. Aetna Cas. & Sur. Co.*, 351 F.3d 1166, 1172, 359 U.S. App. D.C. 22 (D.C. Cir. 2003) (citing *Medical Serv. of Dist. of Columbia v. Llewellyn*, 208 A.2d 734, 736 (D.C. 1965)).

At the most basic level, the parties dispute whether the

closure of the restaurants due to Mayor Bowser's orders constituted a "direct physical loss" under the policy. Plaintiffs start with dictionary definitions to support their case. For example, they cite the American Heritage Dictionary definition of "direct" as "[w]ithout intervening persons, conditions, or agencies; immediate." Plaintiffs' Motion at 9-10. They also cite the Oxford English Dictionary definition of "physical" as pertaining to things "[o]f or pertaining to matter, or the world as perceived by the senses; material as [opposed] to mental or spiritual." *Id.* at 10. As for "loss," it is defined by the coverage document as "direct and accidental loss of or damage to covered property." Coverage at 36.

Plaintiffs use these definitions to make three primary arguments. *First*, Plaintiffs argue that the loss of use of their restaurant properties was "direct" because the closures were the direct result of the mayor's orders [*6] without intervening action. Plaintiffs' Motion at 9-10. But those orders were governmental edicts that commanded individuals and businesses to take certain actions. Standing alone and absent intervening actions by individuals and businesses, the orders did not effect any direct changes to the properties.

Second, Plaintiffs argue that their losses were "physical" because the COVID-19 virus is "material" and "tangible," and because the harm they experienced was caused by the mayor's orders rather than "some abstract mental phenomenon such as irrational fear causing diners to refrain from eating out." Plaintiffs' Motion at 11. But Plaintiffs offer no evidence that COVID-19 was actually present on their insured properties at the time they were forced to close. And the mayor's orders did not have any effect on the material or tangible structure of the insured properties.

Third, Plaintiffs argue that by defining "loss" in the policy as encompassing either "loss" or "damage," Defendant must treat the term "loss" as distinct from "damage," which connotes physical damage to the property. Plaintiffs' Motion at 11-12. In contrast, Plaintiffs argue, "loss" incorporates "loss of use," which only [*7] requires that Plaintiffs be deprived of the use of their properties, not that the properties suffer physical damage. *Id.* at 12-13. But under a natural reading of the term "direct physical loss," the words "direct" and "physical" modify the word "loss." As such, pursuant to Plaintiffs' dictionary definitions, any "loss of use" must be caused, without the intervention of other persons or conditions, by something pertaining to matter—in other words, a direct physical intrusion on to the insured property. Mayor Bowser's orders were not such a direct physical intrusion.

Further, none of the cases cited by Plaintiffs stand for the proposition that a governmental edict, standing alone, constitutes a direct physical loss under an insurance policy. In *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, the court found that the release of ammonia into a juice cup packaging factory was a "direct physical loss" because it constituted "an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event *directly upon the property* causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." 2014 U.S. Dist. LEXIS 165232 at *13-19 (D.N.J. Nov. 25, 2014) (quoting *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 581 S.E.2d 317, 319-20 (Ga. Ct. App. 2003)) (internal [*8] quotation marks omitted) (emphasis added). Similarly, in *Western Fire Insurance Co. v. First Presbyterian Church*, the Colorado Supreme Court found a "direct physical loss" when gasoline fumes from an unknown source entered an insured church and the fire department ordered the church's closure. 165 Colo. 34, 437 P.2d 52, 55 (Colo. 1968). The court based its reasoning on the fact that the church "became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous." *Id.* At the same time, the Court noted that "[i]t is perhaps quite true" that the fire department's closure order, "*standing alone*, does not in and of itself constitute a 'direct physical loss.'" *Id.* (emphasis added). All of the other cases cited by Defendant involved some compromise to the physical integrity of the insured property. *See Port Authority v. Affiliated FM Insurance Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (presence of asbestos in building was not "physical loss" because building owner could not show real or imminent "contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable"); *Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 826-27 (3d Cir. 2005) (presence of bacterium on property could constitute "direct physical loss" if it "reduced the use of the property to a substantial degree"); [*9] *TRAVCO Insurance Co. v. Ward*, 715 F. Supp. 2d 699, 709-10 (E.D. Va. 2010), *aff'd* 504 F. Appx. 251 (4th Cir. 2013) (home rendered uninhabitable by toxic gases released by defective drywall constituted "direct physical loss"); *Mellin v. Northern Security Insurance Company, Inc.*, 167 N.H. 544, 115 A.3d 799, 805 (N.H. 2015) (cat urine odor from neighboring apartment may constitute "direct physical loss" if plaintiff could show "distinct and demonstrable alteration to the unit"); *Murray v. State Farm Fire &*

Casualty Co., 203 W. Va. 477, 509 S.E.2d 1, 16-17 (W.Va. 1998) (landslide rendering homes uninhabitable, due to either actual physical damage or palpable future risk of physical damage from a follow-on landslide, was a "direct physical loss"); *Sentinel Management Co. v. New Hampshire Insurance Co.*, 563 N.W.2d 296, 300-01 (Minn. Ct. App. 1997) (asbestos contamination in building was "direct physical loss" when "property rendered useless").

In contrast, courts have rejected coverage when a business's closure was not due to direct physical harm to the insured premises. In *Roundabout Theatre Co. v. Continental Casualty Co.*, the City of New York ordered the closure of a theater after a portion of a neighboring building under construction collapsed onto the street and adjacent buildings. 302 A.D.2d 1, 2-3, 751 N.Y.S.2d 4 (N.Y. App. Div. 2002). The theater itself sustained minor damage that was repaired in one day. *Id.* at 3. Nonetheless, the court found that the theater did not suffer a "direct physical loss" as a result of the city-mandated closure. *Id.* at 7. It found that "[t]he plain meaning of the words 'direct' and 'physical' narrowed the [*10] scope of coverage and mandated "the conclusion that losses resulting from off-site property damage do not constitute covered perils under the policy." *Id.* Similarly, in *Newman Myers Kreines Gross, P.C. v. Great Northern Insurance Co.*, a federal district court found that a law firm did not suffer a "direct physical loss" when an electric utility preemptively shut off power in advance of Hurricane Sandy. 17 F. Supp. 3d 323 (S.D.N.Y. 2014). The court distinguished the cases cited by the law firm (several of which were also cited by Plaintiffs in this case) as either "involv[ing] the closure of a building due to either a physical change for the worse in the premises ... or a newly discovered risk to its physical integrity." *Id.* at 330. Citing *Roundabout*, the Court reasoned:

> The critical policy language here—"direct physical loss or damage"—similarly, and unambiguously, requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage. Newman Myers simply cannot show any such loss or damage to the 40 Wall Street Building as a result of either (1) its inability to access its office from October 29 to November 3, 2012, or (2) Con Ed's decision to shut off the power to the Bowling Green [*11] network. The words "direct" and "physical," which modify the phrase "loss or damage," ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure.

Id. at 331; *see also United Airlines, Inc. v. Insurance Co. of State of Pa.*, 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005), *aff'd* 439 F.3d 128 (2d Cir. 2006) ("The inclusion of the modifier 'physical' before 'damages' . . . supports [defendant's] position that physical damage is required before business interruption coverage is paid."); *Philadelphia Parking Auth. v. Federal Insurance Co.*, 385 F. Supp. 2d 280, 287-88 (S.D.N.Y. 2005) (noting that 'direct physical' modifies both loss and damage," and therefore "the interruption in business must be caused by some physical problem with the covered property . . . which must be caused by a 'covered cause of loss").

While the Court can find no published cases in this jurisdiction analyzing the exact term "direct physical loss," cases addressing similar issues do not help Plaintiffs. Most relevantly, in *Bros., Inc. v. Liberty Mutual Fire Insurance Co.*, the District of Columbia Court of Appeals considered whether a restaurant could recover on its claim after it lost business due to a curfew imposed by the D.C. government as a result of the riots following [*12] the assassination of Dr. Martin Luther King, Jr. in 1968. 268 A.2d 611 (D.C. 1970). The insurance contract included this relevant language:

> In consideration of the premium for this coverage shown on the first page of this policy [Building and Contents] . . . the coverage of this policy is extended to include direct loss by . . . Riot . . . [and] Civil Commotion . . . .
>
> When this Endorsement is attached to a policy covering Business Interruption, . . . the term "direct," as applied to loss, means loss, as limited and conditioned in such policy, *resulting from direct loss to described property from perils insured against*; . . . .

Id. at 613 (emphasis in original).[1] The Court of Appeals

[1] This Court notes that the phrase at issue in the *Bros., Inc.* contract was "direct loss," as opposed to "direct physical loss," at issue in the present case, and that in the *Bros., Inc.* case, there was an issue as to whether the "Building and Contents" Form, which was mistakenly attached to the policy at the time of signing, or the "Business Interruption" Form, which the insurance company later substituted, was construed by the trial court. However, the Court of Appeals found it

interpreted the term "direct loss" in the contract to mean "a loss proximately resulting from physical damage to the property or contents caused by a riot or civil commotion." *Id.* Under that definition, the Court found that the restaurant was unable to recover, since, "at the most," the restaurant's lost business due to the curfew "was an indirect, if not remote, loss resulting from riots" and there was no "physical damage to the property." *Id.* Accordingly, while the Court agrees with Plaintiffs that *Bros., Inc.* is not directly on point, the [*13] case does support the proposition that, in the context of property insurance, the term "direct loss" implies some form of direct physical change to the insured property.

With both dictionary definitions and the weight of case law supporting Defendant's interpretation of the term "direct physical loss," Plaintiffs' additional arguments are unconvincing. First, Plaintiffs argue that because the insurance contract has specific exclusions for "loss of use" under some coverage lines but not for Income Protection coverage, the Court should infer that the Income Protection coverage covers losses such as Plaintiffs'. Plaintiffs' Motion at 13-14. But as already discussed, even if "loss of use" was covered, Plaintiffs would still have to show that the loss of use was a "direct physical loss" similar to those in the cases discussed *supra* at 5-7. And for the reasons explained in this order, there was no "direct physical loss" to Plaintiffs. Second, Plaintiffs argue that, unlike some similar insurance policies, their policies do not include a specific exclusion for pandemic-related losses. *Id.* at 19-20. But again, even in the absence of such an exclusion, Plaintiffs would still be required to show [*14] a "direct physical loss." Because they cannot do so, the Court grants summary judgment to Defendant.

Accordingly, it is this **6th** day of **August, 2020**, hereby

ORDERED that Plaintiffs' Motion for Summary Judgment is **DENIED**; and it is further

ORDERED that Defendant's Cross-Motion for Summary Judgment is **GRANTED**; and it is further

ORDERED that judgment is **ENTERED** in favor of Defendant Erie Insurance Exchange and against Plaintiffs, the initial scheduling conference is **VACATED**, and the case is **CLOSED**.

/s/ Kelly A. Higashi

Kelly A. Higashi

Associate Judge

(Signed in Chambers)

End of Document

"unnecessary to ascertain which of the two forms was construed by the trial court," 268 A.2d at 612, as the Court found that the insurance company prevailed under both forms.

2020 WL 5630465
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

SANDY POINT DENTAL, PC, Plaintiff,

v.

The CINCINNATI INSURANCE COMPANY, Defendant.

Case No. 20 CV 2160
|
Signed 09/21/2020

Attorneys and Law Firms

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Brian M. Reid, Dennis Michael Dolan, Michael Paul Baniak, Litchfield Cavo LLP, Chicago, IL, for Defendant.

MEMORANDUM OPINION & ORDER

Robert W. Gettleman, United States District Judge

***1** Plaintiff Sandy Point Dental, PC brought a three count complaint against defendant, The Cincinnati Insurance Company, seeking a declaration that defendant must provide coverage under the policy for losses due to governmental closure orders intended to slow the spread of the Coronavirus and COVID-19, damages and attorneys' fees under 215 ILCS 5/155, and a claim for breach of contract for failing to provide coverage. Defendant moves to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. For the reasons set forth below, the court grants defendant's motion.

BACKGROUND

Plaintiff is a dentist office. On March 20, 2020, Illinois Governor Pritzker issued an order instructing all "non-essential businesses" to close in order to slow the spread of COVID-19. That order left dental offices able to do emergency and non-elective work, but not routine work. As a dental office that mostly does routine work, plaintiff alleges that it was effectively forced to shut down for the duration of the crisis. This shut-down has resulted in a substantial loss of revenue for plaintiff.

Defendant issued an insurance policy to plaintiff for the period of October 14, 2017 to October 14, 2020. The relevant provisions can be found in the Building and Personal Property Coverage Form and the Business Income Coverage Form. The Business Income Coverage states, in relevant part:

> We will pay for the actual loss of "Business Income" ... you sustain due to the necessary "suspension" of your "operation" during the "period of restoration". The "suspension" must be caused by direct physical "loss" to property at "premises" cause by or resulting from any Covered Cause of Loss.
>
> [...]
>
> 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" to property at "premises" which is described in the Declarations and for which a "Business Income" Limit of Insurance is shown in the Declaration. The "loss" must be caused by or result from a Covered Cause of Loss.

The policy defines a Covered Cause of Loss as "RISKS OF DIRECT PHYSICAL LOSS," unless expressly excluded by the policy.

The policy also provides Civil Authority coverage. To trigger such coverage, orders of civil authority must "prohibit access to the 'premises' due to direct physical 'loss' to the property, other than at the 'premises', caused by or resulting from a Covered Cause of Loss."

DISCUSSION

Defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The purpose of such a motion is to test the sufficiency of the complaint, not to judge the merits of the case. Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990). When considering the motion, the court accepts as true all well-pleaded factual allegations and draws all reasonable inferences in plaintiff's favor. McMillan v. Collection Professionals Inc., 455 F.3d 754, 758 (7th Cir. 2006). The complaint must plead sufficient facts to plausibly suggest that plaintiff has a right to relief and raise that possibility above the "speculative level." Bell Atlantic Corp.

v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

1) Property Damage

***2** The parties agree that Illinois law governs their dispute. In Illinois, the construction of an insurance policy is a question of law. Country Mut. Ins. Co. v. Livorsi Marine, Inc., 222 Ill.2d 303, 305 Ill.Dec. 533, 856 N.E.2d 338, 342 (Ill. 2006). An insurance policy is to be construed as a whole, "giving effect to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose." Valley Forge Ins. Co. v. Swiderski Elecs., Inc., 223 Ill.2d 352, 307 Ill.Dec. 653, 860 N.E.2d 307, 314 (Ill. 2006). "If the words used in the policy are clear and unambiguous, they must be given their plain, ordinary, and popular meaning." Cent. Ill. Light Co. v. Home Ins. Co., 213 Ill.2d 141, 290 Ill.Dec. 155, 821 N.E.2d 206, 213 (Ill. 2004). However, "[a] policy provision is not rendered ambiguous simply because the parties disagree as to its meaning." Founders Ins. Co. v. Munoz, 237 Ill.2d 424, 341 Ill.Dec. 485, 930 N.E.2d 999 (Ill. 2010).[1]

At the most basic level, the parties dispute whether the substantial closure of the dentist office due to Governor Pritzker's orders constituted a "direct physical loss" under the policy. Plaintiff's complaint does not allege that there was any demonstrable, physical alteration to the property at its dental office. Rather, plaintiff asserts that the language of the policy does not require a tangible, material loss to the physical structure, but allows for a partial loss to the properties from loss of use. Plaintiff further argues that the policy contains several exclusions to coverage, and that an exclusion for pandemics is conspicuously absent from the exclusion section.

The critical policy language here—"direct physical loss"—unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage. The words "direct" and "physical," which modify the word "loss," ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure. See Newman Myers Kreines Gross, P.C. v. Great Northern Ins. Co., 17 F.Supp.3d 323 (S.D.N.Y. 2014) (law firm did not suffer "direct physical loss" when electric utility preemptively shut off power in advance of Hurricane Sandy). Plaintiff simply cannot show any such loss as a result of either inability to access its own office or the presence of the virus on its physical surfaces, the latter of which plaintiff fails to allege in its complaint. Plaintiff has not pled any facts showing physical alteration or structural degradation of the property. Nothing about the property has been altered since March 2020. Plaintiff need not make any repairs or change any part of the building to continue its business. Compare Id. (explaining that "repair" and "replace" in period of restoration clause "contemplate physical damage to the insured premises as opposed to loss of use of it"); with Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Int'l Ins. Co., 308 Ill.App.3d 597, 242 Ill.Dec. 1, 720 N.E.2d 622, 625-26 (Ill. Ct. App. 1999), as modified on denial of rehearing (Dec. 3, 1999) (finding physical damage to the property, and thus coverage, because plaintiff was required to conduct repairs and remove asbestos-causing materials from the premises).

This holding is consistent with other courts that have evaluated whether the coronavirus causes property damage warranting insurance coverage. See, for example, Social Life Magazine, Inc. v. Sentinel Ins. Co. Ltd., No. 20 C 3311 (S.D.N.Y. 2020), ECF No. 25, Ex. B at 5:3-4 (denying a motion for preliminary injunction because the coronavirus does not cause direct physical loss, therefore no coverage was required; the coronavirus "damages lungs. It doesn't damage printing presses"); Diesel Barbershop, LLC v. State Farm Lloyds, —— F.Supp.3d ——, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) (granting a motion to dismiss because the coronavirus did not cause a direct physical loss, and "the loss needs to have been a 'distinct, demonstrable physical alteration of the property.' "); Gavrilides Mgmt. Co. v. Michigan Ins. Co., No. 20-258-CB (Mich. 2020), ECF. No. 25, Ex. C (explaining that direct physical loss to property requires tangible alteration or damage that impacts the integrity of the property, and dismissing the case because plaintiff failed to allege that the coronavirus had any impact to the premises); Rose's 1, LLC v. Erie Ins. Exch., No. 2020 CA 002424 B, 2020 WL 4589206, at *5 (D.C. Super. Aug. 6, 2020) (granting summary judgment for insurer on restaurant's claims of lost business caused by coronavirus closure orders because there was no direct physical loss to property).[2]

***3** In essence, plaintiff seeks insurance coverage for financial losses as a result of the closure orders. The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property. Consequently, plaintiff has failed to plead a direct physical loss—a prerequisite for coverage.[3]

2) Civil Authority

Plaintiff's arguments regarding civil authority coverage fail for similar reasons. As noted above, the policy's civil authority coverage applies only if there is a Covered Cause of Loss, meaning a direct physical loss, to property other than the plaintiff's property. Even then, there is coverage only if the civil authority order, (1) prohibits access to the premises due to (2) direct physical loss to property, other than plaintiff's premises, caused by or resulting from any Covered Cause of Loss.

Just as the coronavirus did not cause direct physical loss to plaintiff's property, the complaint has not (and likely could not) allege that the coronavirus caused direct physical loss to other property. By the policy's own terms, the civil authority coverage does not apply. Failure to meet this requirement alone warrants dismissal of any claim for civil authority coverage. As to the next prong, while coronavirus orders have limited plaintiff's operations, no order issued in Illinois prohibits access to plaintiff's premises. See Syufy Enters. v. Home Ins. Co. of Ind., 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995) (riot-related curfew prevented customers from being outside, it did not prohibit access to the insured's premises). Indeed, plaintiff concedes that dental offices were deemed essential businesses for emergency and non-elective work. Consequently, plaintiff has failed to allege that access to its premises was prohibited by government order, and its claim for civil authority coverage fails.

For the foregoing reasons, Counts I and II are dismissed.

3) Section 155

215 ILCS 5/155 provides "an extracontractual remedy to policy-holders whose insurer's refusal to recognize liability and pay a claim under a policy is vexatious and unreasonable." Phillips v. Prudential Ins. Co. of America, 714 F.3d 1017, 1023 (7th Cir. 2013). "If there is a bona fide dispute regarding coverage—meaning a dispute that is real, genuine, and not feigned—statutory sanctions under section 5/155 are inappropriate." Id. (internal citations omitted). Section 5/155 claims may be dismissed at the pleadings stage when a plaintiff fails to state a sufficient factual basis for sanctions, or when a bona fide dispute regarding coverage is apparent from the face of the complaint. See 9557, LLC & River W. Meeting Assocs., Inc. v. Travelers Indem. Co. of Conn., No. 15 C 10822, 2016 WL 464276, at *4 (N.D. Ill. Feb. 8, 2016).

Here, plaintiff's complaint states in a conclusory fashion: "[d]efendant's denials were vexatious and unreasonable." The only factual allegation provided is that defendant denied the insurance claim without conducting an investigation. Plaintiff has thus failed to plead a sufficiently plausible basis for sanctions. Further, the face of the complaint presents, at most, a bona fide dispute over coverage which precludes a finding of Section 155 liability. Count III is dismissed.

CONCLUSION

***4** For the reasons stated above, defendant's motion to dismiss (Doc. 25) is granted.

All Citations

Slip Copy, 2020 WL 5630465

Footnotes

1 The court may take notice of the policy without converting the motion to dismiss into a motion for summary judgment. Venture Assoc. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993).

2 Plaintiff heavily relies on Studio 417 Inc. v. The Cincinnati Insurance Co., 20 C 3127-SRB (S.D. Mo. Aug. 12, 2020), a Missouri case that found that the coronavirus caused a physical loss to property warranting insurance coverage. That court rested its decision on that policy's expansive language, language very different from the policy in the instant case. The unambiguous language in the instant policy warrants a different conclusion—physical damage that demonstrably alters the property is necessary for coverage, and the coronavirus does not cause physical damage.

3 Plaintiff's arguments regarding the exclusions are unavailing. By the policy's plain and unambiguous text, the exclusions are triggered only when there is first a direct physical loss. Having determined that there is no direct physical loss, the court need not address arguments regarding the exclusions.

2020 WL 6120002
Only the Westlaw citation is currently available.
United States District Court, D. Minnesota.

Kenneth SEIFERT d/b/a the Hair Place and Harmar Barbers, Inc., individually and on behalf of all others similarly situated, Plaintiffs,

v.

IMT INSURANCE COMPANY, Defendant.

Civil No. 20-1102 (JRT/DTS)
|
Signed 10/16/2020

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

JOHN R. TUNHEIM, Chief Judge

***1** Plaintiffs ("Seifert") filed this action to collect lost business income, as a result of the coronavirus-related and government-mandated closure of Seifert's hair salon and barbershop, which he alleges is covered under insurance policies issued by Defendant IMT Insurance Co. ("IMT"). IMT filed a Motion to Dismiss, claiming that the insurance policies only cover losses attributable to direct physical loss or damage, not a businessowner's mere loss of use of an insured property, and that the virus or bacteria exclusion precludes any otherwise qualifying loss or damage. Because Seifert does not plausibly allege any direct physical loss or damage to the properties, or plausibly demonstrate that the virus or bacteria exclusion would not preclude coverage given the facts he does allege, the Court will grant IMT's Motion to Dismiss.

BACKGROUND

I. THE PANDEMIC

Seifert owns and runs a hair salon, The Hair Place, and a barbershop, Harmar Barbers, Inc. (Compl. ¶¶ 1–2, May 6, 2020, Docket No. 1.) On March 13, 2020, Minnesota Governor Tim Walz declared a peacetime emergency in response to the spread of the novel coronavirus and issued several Emergency Executive Orders, one of which mandated the closure of salons and barbershops.[1] (*Id.* ¶ 20.) As a result of the Orders, Seifert had to suspend all business operations. (*Id.* ¶ 4.) Subsequently, he contacted his independent insurance broker, an authorized IMT agent, in late March to file a claim for lost business income. (*Id.* ¶ 27.) Seifert was advised that his losses were not covered by the insurance policies. (*Id.* ¶¶ 5, 27.)

1 *See* Minn. Emergency Exec. Order No. 20-08 at 1 (Mar. 18, 2020), https://mn.gov/governor/assets/Filed% 20EO-20-08_Clarifying% 20Public% 20Accommodations_tcm1055-423784.pdf.

II. THE POLICIES

A. COVERAGE

Seifert entered into insurance policies with IMT on March 25, 2019 and renewed both policies on April 2, 2020. (*Id.* ¶¶ 3, 11–12, 15; Aff. of Shayne M. Hamman ("Hamman Aff.") ¶¶ 3–6, May 29, 2020, Docket No. 13.)[2] Each policy contains a Businessowners Coverage Form, which covers "direct physical loss of or damage to Covered Property at the premises described." (Hamman Aff. ¶¶ 3–6, Ex. A ("Policy") at 77, Ex. B at 207, Ex. C at 363, and Ex. D at 526, May 29, 2020, Docket No. 13-1.)[3] The policies also insure against lost Business Income:

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" .... 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 at 82.) "Covered Causes of Loss" are defined as "[d]irect physical loss[es] unless the loss is excluded." (*Id.* at 78.)

2 In reviewing a motion to dismiss, the Court may consider the allegations in the complaint as well as "those materials that are necessarily embraced by the pleadings." *Schriener v. Quicken Loans, Inc.*, 774 F.3d 442, 444 (8th Cir. 2014). As such, it may consider "documents whose contents are alleged in a complaint and whose authenticity no party questions." *Kushner v. Beverly Enters., Inc.*, 317 F.3d 820, 831 (8th Cir. 2003) (quoting *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 926 (9th Cir. 1996)).

3 From this point forward, the Court will simply cite to Ex. A, as all the policies are identical.

***2** Finally, the policies offer Civil Authority coverage. (*Id.* at 85.) This coverage is triggered when a Covered Cause of Loss causes damage to nearby property other than the insured property and, as a consequence, a civil authority prohibits access to the insured property because of "dangerous physical conditions resulting from the damage or ... to enable a civil authority to have unimpeded access to the damaged property." (*Id.*) If triggered, Civil Authority coverage would also insure against lost business income. (*Id.*)

B. EXCLUSIONS

The Businessowners policies insure against "all risk" except for risks that are expressly excluded. (*See* Compl. ¶¶ 14–15.) The prefatory language of the exclusions section states that IMT "will not pay for loss or damage caused directly or indirectly" by an excluded event. (Policy at 93.) The prefatory language also includes an anti-concurrent causation clause, stating that any such loss or damage "is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." (*Id.*) Finally, the policy contains a Virus or Bacteria Exclusion, which precludes coverage for any loss or damage associated with a "virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness or disease." (*Id.* at 96.)

III. PROCEDURAL BACKGROUND

On May 6, 2020, Seifert filed his Complaint, alleging breach of contract and seeking declaratory and monetary relief. (Compl. ¶¶ 37–48.) In response, IMT filed a Motion to Dismiss pursuant to Rule 12(b)(6), arguing that 1) Seifert failed to satisfy the condition precedent of filing a formal claim; 2) Seifert failed to plead sufficient facts alleging lost business income caused by a direct physical loss of or damage to his properties, 3) various exclusions precluded coverage, and 4) the known-loss doctrine precluded any claim of loss (Mot. Dismiss, May 29, 2020, Docket No. 9.)

DISCUSSION

I. STANDARD OF REVIEW

In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court considers all facts alleged in the complaint as true to determine if the complaint states a " 'claim to relief that is plausible on its face.' " *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. The Court construes the complaint in the light most favorable to the plaintiff, drawing all inferences in their favor. *Ashley Cty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009). Although the Court accepts the complaint's factual allegations as true, it is not bound to accept as true a legal conclusion couched as a factual allegation. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quotation omitted). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility," and therefore must be dismissed. *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

II. ANALYSIS

Under Minnesota law, the interpretation of an insurance contract is a question of law. *Horizon III Real Estate v. Hartford Fire Ins. Co.*, 186 F. Supp. 2d 1000, 1004 (D. Minn. 2002). "[A] court will compare the allegations in the complaint in the underlying action with the relevant language in the insurance policy." *Midwest Family Mut. Ins. Co. v. Justkyle, Inc.*, No. 17-1632, 2018 WL 3475486, at *5 (D. Minn. July 19, 2018) (quoting *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 415 (Minn. 1997)). "While the insured bears the initial burden of demonstrating coverage, the insurer carries the burden of establishing the applicability of exclusions." *Id.* at *6 (quoting *Travelers Indem. Co. v.*

Bloomington Steel & Supply Co., 718 N.W.2d 888, 894 (Minn. 2006)).

A. COVERAGE UNDER THE POLICIES[4]

[4] As a preliminary matter, IMT argues that it is under no obligation to perform under the policies, as Seifert failed to satisfy the condition precedent with respect to properly submitting a formal claim. IMT also argues that the known-loss doctrine precludes coverage. Both arguments are unavailing. With respect to the condition precedent, not only did Seifert promptly contact his insurance broker, an authorized IMT agent, after the closure of his businesses, but he also satisfied the procedure for reporting a claim, as outlined on IMT's website. With respect to the known-loss doctrine, it is a fraud-based defense, but fraud is not being disputed here, so the doctrine is inapplicable. *See Guar. Title, Inc. v. Alterra Excess & Surplus Ins. Co.*, No. 14-0028, 2014 WL 12601039, at *3 (D. Minn. Nov. 19, 2014) (citing *Sand Cos., Inc. v. Gorham Hous. Partners III, LLP*, No. A10–113, 2010 WL 5154378, at *7 (Minn. Ct. App. Dec. 21, 2010)).

1. Business Income

***3** The insurance policies cover the loss of business income when business operations are suspended because of "direct physical loss of or damage to property at the described premises." (Policy at 82.) Minnesota caselaw does not require a showing of structural damage to qualify for coverage. "Direct physical loss" can also be found when business premises are contaminated by asbestos, *see Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997), or smoke, *see Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001). In short, "[i]t is sufficient to show that the "insured property is injured in some way," which may be something less than structural damage or some other tangible injury. *See Archer Daniels Midland Co. v. Aon Risk Servs., Inc. of Minnesota*, No. 97-2185, 2002 WL 31185884, at *3 (D. Minn. Sept. 27, 2002), *aff'd*, 356 F.3d 850 (8th Cir. 2004).

However, this is not to say that a qualifying loss is established "*whenever* property cannot be used for its intended purpose." *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005) (emphasis in original). Actual physical contamination of the insured property is still required. *See Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 837–38 (8th Cir. 2006). Simply claiming "mere loss of use or function" is not enough. *Pentair*, 400 F.3d at 616; *see also Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986).

Seifert claims that his inability to provide haircuts and salon services is indistinguishable from the intangible physical loss in *General Mills*. However, in *General Mills*, there was smoke contamination of the insured's property; here, Seifert has not pleaded any facts demonstrating his businesses were similarly contaminated by the novel coronavirus. That is, he only asserts that he suffered an economic loss unrelated to an actual infiltration and contamination of the properties.

Seifert also asserts that another case, *Cedar Bluff*, stands for the proposition that physical loss can be found when an external force renders property unsafe or unusable, even when the property remains physically unchanged. Yet, he fails to mention that the *Cedar Bluff* court held that undamaged panels of siding were covered only because adjoining panels were damaged, and repairs could not be made without resulting in a color mismatch. *See Cedar Bluff Townhome Condo. Ass'n, Inc. v. Am. Family Mut. Ins. Co.*, 857 N.W.2d 290, 295 (Minn. 2014). That is, there was still a physical loss; the dispute only concerned the extent of the loss.

As such, Seifert's claims fail to fall within the permissible realm of "direct physical loss," as he cannot allege facts showing his properties were actually contaminated or damaged by the coronavirus.[5] In fact, Siefert explicitly states that his business losses were "not because of the presence of a virus" at the premises. (Compl. ¶ 24.) Instead, the Orders are alleged to be the sole cause of his losses, but governmental action prohibiting the use of property, by itself, is not enough. *See Source Food*, 465 F.3d at 838. As a result, Seifert does not plead a plausible claim for relief. Accordingly, the Court will grant IMT's Motion to Dismiss with respect to Business Income coverage under the policies.

[5] *Accord 10E, LLC v. Travelers Indem. Co.*, No. 20-04418, 2020 WL 5359653, at *5 (C.D. Cal. Sept. 2, 2020) (granting defendant's motion to dismiss for failing to allege that the virus had infected or entered the premises); *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615, 2020 WL 5051581, at *7 (S.D. Fla. Aug. 26, 2020) (same); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 20-461, —— F.Supp.3d ——, ——, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) (finding that pleading mere economic loss was not a plausible

claim). *But cf. Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-03127, —— F.Supp.3d ——, ——, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020) (denying defendant's motion to dismiss because plaintiffs alleged that COVID-19 had physically entered the premises).

2. Civil Authority

***4** The policies also provide coverage when a Covered Cause of Loss causes damage to another's property and a civil authority then prohibits access to the insured property. Thus, a direct physical loss of or damage to property is again required to trigger coverage.

As such, if a complaint does not plead facts alleging some actual contamination or damage to property to a neighboring property, then the complaint does not state a plausible claim to relief. Here, Seifert does not plead any facts demonstrating that the coronavirus contaminated properties neighboring his businesses, or that a civil authority then prohibited him from entering his insured properties because of any such contamination. Accordingly, the Court will grant IMT's Motion to Dismiss with respect to Civil Authority coverage under the policies.

B. VIRUS OR BACTERIA EXCLUSION[6]

6 In addition to the Virus or Bacteria Exclusion, IMT argues that the Pollution Exclusion and the Ordinance or Law Exclusion also apply. However, exclusions are to be construed narrowly and strictly against the insurer. *Grinnell Mut. Reinsurance Co. v. Villanueva*, 37 F. Supp. 3d 1043, 1046 (D. Minn. 2014), *aff'd*, 798 F.3d 1146 (8th Cir. 2015). As such, IMT's attempt to place the coronavirus in the same category of pollutants as "smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste" is unavailing. (Policy at 100). Additionally, while the Ordinance or Law Exclusion might be applicable, IMT offers nothing to demonstrate whether the Emergency Executive Order specifically closing barbershops and hair salons had the force of law. As such, the Court will also construe this exclusion against IMT.

The virus exclusion precludes coverage for any loss or damage caused indirectly or directly by any "virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (Policy at 96.) Furthermore, as defined by the prefatory language applicable to all excluded events, the virus exclusion is an anti-concurrent loss provision. "When an anti-concurrent loss provision is triggered ... courts need not inquire into which of a covered or excluded loss was the proximate cause of the damage, but simply exclude coverage where any portion of the loss was caused or contributed to by an excluded loss." *Ken Johnson Props., LLC v. Harleysville Worcester Summary Ins. Co.*, No. 12-1582, 2013 WL 5487444, at *12 (D. Minn. Sept. 30, 2013). Thus, the virus exclusion would extend "to all losses where a virus is part of the causal chain." *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *8–9 (E.D. Mich. Sept. 3, 2020).

Here, Seifert alleges that his business losses are the direct and proximate result of "Governmental Pandemic Closure Orders; orders that have been put in place in an effort to control the spread of the COVID-19 Pandemic." (Compl. ¶ 24.) Pursuant to the anti-concurrent loss provision, if a virus is any part of the causal chain causing a loss, then the loss is not covered. Accordingly, the Court will grant IMT's Motion to Dismiss with respect to the Virus or Bacteria Exclusion.

CONCLUSION

Although Seifert has failed to plead factual content to allow the Court to draw the reasonable inference that Seifert is entitled to coverage for lost business income, it is possible that his claims may survive if properly alleged.[7] Accordingly, the Court will grant Seifert twenty days to amend the Complaint to address the deficiencies in pleading identified above.

7 *See, e.g.*, *Studio 417*, —— F.Supp.3d at ——, 2020 WL 4692385, at *5–6; *see also Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-3213, —— F.Supp.3d ——, ——, 2020 WL 5525171, at *8 (N.D. Cal. Sept. 14, 2020) ("The Court [recognizes] that the law concerning business interruption coverage linked to the COVID-19 pandemic is very much in development ... and [will] grant leave to amend.").

ORDER

***5** Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss [Docket No. 9] is **GRANTED without prejudice**. If no Amended Complaint is filed within twenty days from the date of this Order, the Court will dismiss the case with prejudice.

All Citations

--- F.Supp.3d ----, 2020 WL 6120002

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SELANE PRODUCTS, INC., on behalf of itself and all others similarly situated, Plaintiff, v. CONTINENTAL CASUALTY COMPANY, Defendant.	Case No. 2:20-cv-07834-MCS-AFM **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [26]**

Before the Court is a Motion to Dismiss ("Motion") filed by defendant Continental Casualty Company ("CCC"). Mot., ECF No. 26. Plaintiff Selane Products, Inc. filed an Opposition and CCC filed a Reply. *See* Opp., ECF No. 32; *see also* Reply, ECF No. 34. The Court considered the papers filed with the Motion and deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); Local Rule 7-15. The hearing is therefore **VACATED** and removed from the Court's calendar.

For the following reasons, the Motion is **GRANTED**.

I. SELANE'S ALLEGATIONS

Selane manufacturers dental appliances and CCC is its "long-time commercial property and business interruption insurer." Compl. ¶¶ 1-2, ECF No. 1. After local and state orders stemming from the COVID-19 pandemic required Selane to suspend business operations, CCC denied a lost business income claim under Selane's insurance policy. *Id.* ¶¶ 14, 45-46; *see also* Policy, Compl. Ex. A.

These orders include:

- **March 12** Executive Order N-25-20, mandating that: "All residents are to heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures, to control the spread of COVID-19." Compl. ¶ 34; ECF No. 26-2.
- **March 19** Executive Order N-33-20, incorporating California Government Code 8665, which permits fines and criminal charges for non-compliance. Compl. ¶ 38; ECF No. 26-3. This order's purpose is: "To preserve the public health and safety, and to ensure the healthcare delivery system is capable of serving all, and prioritizing those at the highest risk and vulnerability…" *Id.*
- **March 16** County of Los Angeles Department of Public Health Order "prohibiting gatherings of more than 50 people." Compl. ¶ 36; ECF No. 26-4.
- **March 19** County of Los Angeles Department of Public Health Order, revised to mandate closure of non-essential businesses. Compl. ¶ 37; ECF No. 26-5 ("This Order is being issued to protect the public health of Californians" and "looks to establish consistency across the state in order to ensure the that we mitigate the impact of COVID-19.")
- **March 21** County of Los Angeles Department of Public Health Order, revised to specifically require all non-essential "businesses to cease in-person operations, and close to the public." Compl. ¶ 40; ECF No. 26-6.

- **April 10** County of Los Angeles Department of Public Health Order, extending closures through May 15. Compl. ¶ 42; ECF No. 26-7.
- **March 19** City of Los Angeles Public Order, requiring Los Angeles citizens "to remain in their homes" and non-essential businesses "to cease operations that require in-person attendance by workers at a workplace." Compl. ¶ 39; ECF No. 26-9.
- **April 1** City of Los Angeles Public Order, continuing closure of non-essential businesses. Compl. ¶ 41; ECF No. 26-10.
- **April 10** City of Los Angeles Public Order, extending "mandated closures through May 15." Compl. ¶ 42; ECF No. 26-11.
- **April 27** City of Los Angeles Public Order, continuing closure of non-essential businesses. Compl. ¶ 44; ECF No. 26-12.
- **May 8** City of Los Angeles Public Order, continuing closure of non-essential businesses. Compl. ¶ 44; ECF No. 26-13.

Selane's Policy includes two endorsements concerning Selane's loss of business income: the Business Income and Extra Expense Endorsement and the Civil Authority Endorsement. Compl. ¶¶ 16-19. The Business Income and Extra Expense Endorsement states in part:

> 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 43.

"Suspension" means "the partial or complete cessation of your business activities." *Id.* 40. "Operations" means "the type of your business activities occurring at the described premises and tenantability of the described premises." *Id.* 38. "Covered Causes of Loss" means "RISKS OF DIRECT PHYSICAL LOSS unless the loss is" excluded by the Policy. *Id.* 22-23. "Period of

restoration" means the period beginning "with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises" and ending "on the earlier of: **(1)** The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or **(2)** The date when business is resumed at a new permanent location." *Id.* 38.

Under "**Extra Expense**," the Policy states:

> a. Extra Expense means reasonable and necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss.
> b. 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 or at a replacement premises or temporary locations,…; or
> **(2)** Minimize the "suspension" of business if you cannot continue "operations."

Id. 44.

Under "**Civil Authority**" the Policy states:

> When the Declarations show that you have coverage for Business Income and Extra Expense, you may extend that insurance to apply to the actual loss of Business Income you sustain and reasonable and necessary Extra Expense you incur caused by action of civil authority that prohibits access to the described premises. The civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises, caused by or resulting from a Covered Cause of Loss.

Id. 69.

Based on CCC's denial of benefits under the Policy, Selane brings the following claims against CCC on behalf of itself and a putative class of CCC policyholders: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) unfair business practices, Cal. Bus. & Prof. Code §§ 17200, et seq. ("UCL"); and (4) Declaratory Relief. *Id.* ¶¶ 78-112.

II. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Generally, a court must accept the factual allegations in the pleadings as true and view them in the light most favorable to the plaintiff. *Park v. Thompson*, 851 F.3d 910, 918 (9th Cir. 2017). But a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (2009) (quoting *Twombly*, 550 U.S. at 555). Leave to amend should be freely granted unless it is clear the complaint could not be saved by any amendment. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

Averments of fraudulent conduct are subject to the heightened pleading standard of Rule 9(b). *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003). To meet Rule 9(b), the complaint must identify the "who, what, when, where, and how" of the fraudulent misconduct, "as well as what is false or misleading about" it, and "why it is false." *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks omitted).

There are two instances in which courts may consider information outside of the complaint without converting a Rule 12(b)(6) motion into one for summary judgment: judicial notice and incorporation by reference. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Judicial notice allows courts to consider a fact that is not subject to reasonable dispute because it is generally known within the territory or can be determined from sources of unquestionable accuracy. Fed. R. Evid. 201. Incorporation by reference allows a court to consider documents which are (1) referenced in the complaint, (2) central to the plaintiff's claim, and (3) of unquestioned authenticity by either party. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

III. EXTRANEOUS MATERIALS

CCC seeks judicial notice of the health-related orders discussed above, and orders and transcripts from other court proceedings. *See* CCC's Request for Judicial Notice, ECF No. 26-1. Selane seeks judicial notice of a report filed with the U.S. Securities and Exchange Commission ("SEC"), published articles concerning pandemics' impact on the insurance industry, and a hearing transcript from a related court proceeding. *See* Selane's Request for Judicial Notice, ECF No. 33.

Under Federal Rule of Evidence 201, a court may take judicial notice of court filings and other matters of public record. *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) (noting that a court may take judicial notice of "undisputed matters of public record"); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746, n.6 (9th Cir. 2006) (taking judicial notice of pleadings, memoranda, and other court filings). The Court therefore considers the proffered court orders, transcripts, and government orders, but cannot take judicial notice of reasonably disputed facts in them. *Lee v. City of L.A.*, 250 F.3d 668, 688–89 (9th Cir. 2001). The Court considers the SEC filing because it is a publicly available document of unquestioned authenticity incorporated by reference into the Complaint. Compl. ¶ 23. The Court considers the two published articles offered by Selane because they are similarly paraphrased and incorporated into the Complaint. *Id.* ¶¶ 24-25.

IV. DISCUSSION

CCC argues that COVID-19-related business interruption cases interpreting identical provisions under California law confirm that Selane's losses fall outside the Policy. *See, e.g., 10E, LLC v. Travelers Indem. Co. of Connecticut et al.*, 2020 WL 6749361, at *3 (C.D. Cal. Nov. 13, 2020) (dismissing claims without leave to amend because lost business income stemming from COVID-19 closures fell outside policy's Business Income and Extra Expense coverage and Civil Authority coverage); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Companies*, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020) (same); *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*,

2020 WL 6156584 (C.D. Cal. Oct. 19, 2020) (same); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut*, 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020) (same); *Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, 2020 WL 5742713 (C.D. Cal. Sept. 16, 2020) (same); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020) (same, but allowing motion for leave to amend, which was later denied).

Selane stresses that this authority is not controlling, arguing that the Policy covers Selane's losses under the Civil Authority Endorsement *and* the Business Income and Extra Expense Endorsement. Opp. 10 (citing *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 842 (1990); *Armstrong World Indus., Inc. v. Aetna Cas & Sur. Co.*, 45 Cal. App. 4th 1, 103 (1996); *Hughes v. Potomac Ins. Co.*, 1999 Cal. App. 2d 239, 248-49 (1962)). The Court construes each endorsement in turn, guided by the following well-established interpretive principals.

"[I]nterpretation of an insurance policy is a question of law." *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115, 988 (1999). "When interpreting a policy provision, we must give terms their ordinary and popular usage, unless used by the parties in a technical sense or a special meaning is given to them by usage." *Id.* (citation and quotation marks omitted); *see also* Cal. Civ. Code § 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.") "The terms in an insurance policy must be read in context and in reference to the policy as a whole, with each clause helping to interpret the other." *Sony Comput. Entm't Am. Inc. v. Am. Home Assurance Co.*, 532 F.3d 1007, 1012 (9th Cir. 2008) (citing Cal. Civ. Code § 1641; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal. 4th 854, 867 (1993)); *see also Cont'l Cas. Co. v. City of Richmond*, 763 F.2d 1076, 1080 (9th Cir. 1985) ("The best evidence of the intent of the parties is the policy language."); *see also* Cal. Civ. Code § 1639 ("When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible…").

A. Civil Authority Coverage

The Civil Authority Endorsement conditions coverage "on direct physical loss of or damage to property at locations, other than described premises, caused by or resulting from a Covered Cause of Loss." Policy 69. A "Covered Cause of Loss" is a cause not limited by the Policy. *Id.* 22-23.

Selane's Complaint points to the physical attributes of COVID-19, which "can adhere to surfaces of property for several days and can linger in the air in building for several hours," and alleges they constitute "physical loss of or damage to the property." Compl. ¶¶ 4, 30-31, 49, 51. Aside from these legal conclusions, however, Selane does not adequately allege causes of "direct physical loss of or damage to property" as those terms appear in the Policy. *See, e.g., W. Coast Hotel Mgmt.*, 2020 WL 6440037, at *3–4 (rejecting conclusory allegations of physical loss to property stemming from COVID-19 as unfounded attempt to establish civil authority coverage) (citing *10E*, 2020 WL 539653, at *6 (granting motion to dismiss claim for civil authority coverage where plaintiff "paraphrase[d] the language of the Policy without specifying facts that could support recovery under the Policy")). As explained by the Honorable Steven V. Wilson and adopted in persuasive opinions addressing allegations and arguments like Selane's:

> Under California law, losses from inability to use property do not amount to "direct physical loss of or damage to property" within the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a "distinct, demonstrable, physical alteration." "Detrimental economic impact" does not suffice. An insured cannot recover by attempting to artfully plead temporary impairment to economically valuable use of property as physical loss or damage… Plaintiff only plausibly alleges that in-person dining restrictions interfered with the use or value of its property not that the restrictions caused direct physical loss or damage.
>
> ***
>
> Plaintiff attempts to circumvent the plain language of the Policy by emphasizing its disjunctive phrasing – "direct physical loss of *or* damage to property," – and insisting that "loss," unlike "damage," encompasses temporary impaired use. To support this argument, Plaintiff relies on *Total*

> *Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767 (C.D. Cal. 2018). In *Total Intermodal*, the court concluded that giving separate effect to "loss" and "damage" in the phrase, "direct physical loss or damage," required recognizing coverage for "the permanent dispossession of something." *Id.* at *4.
>
> Even if the Policy covers "permanent dispossession" in addition to physical alteration, that does not benefit Plaintiff here. Plaintiff's FAC does not allege that it was permanently dispossessed of any insured property.

10E, 2020 WL 539653, at *3-5 (citations omitted); *see also, e.g., Geragos & Geragos*, 2020 WL 6156584, at *4 (adopting this reasoning, stating that "[t]he Court finds persuasive the reasoning of the Honorable Steven V. Wilson who addressed identical policy language as it relates to COVID-19 with parties whose arguments mirrored those made before this Court."); *Water Sports Kauai v. Fireman's Fund Ins. Co.*, 2020 WL 6562332, at *1 (N.D. Cal. Nov. 9, 2020) (adopting this reasoning and concluding: "I agree with the vast majority of cases that have addressed materially similar policy provisions and facts. [Plaintiff] has failed to plausibly plead Business Income or Civil Authority coverage.")

Selane contends that *10E* "misreads" the Honorable André Birotte Jr.'s decision in *Total Intermodal*. Opp. 25. Quite the reverse, Judge Birotte Jr. recently adopted *10E*'s supposed "misreading" of his *Total Intermodal* opinion, rejecting the very interpretation of "direct physical loss of" that Selane offers here. *Mark's Engine*, 2020 WL 5938689, at *3 (adopting Judge Wilson's finding in *10E* and stating: "to the extent Plaintiff relies on this Court's order in *Total Intermodal* for the proposition that 'direct physical loss of' encompasses deprivation of property without physical change in the condition of the property, the Court notes that such an interpretation of any insurance policy would be without any 'manageable bounds.') (citing *Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, 2020 WL 5742713 (distinguishing *Total Intermodal* from COVID-19 business closure). This Court concurs with recent decisions in this District and likewise determines that Selane's conclusory allegations of "direct physical loss of or damage to

property" do not, under California law, support recovery pursuant to the Policy's Civil Authority Endorsement. *See, e.g., 10E*, 2020 WL 539653, at *3-5; *Mark's Engine*, 2020 WL 5938689, at *3-5; *see also Pappy's Barber Shops*, 2020 WL 5500221, at *6 ("Accordingly, because the complaint does not plausibly allege (1) any civil authority orders that prohibited access to Plaintiffs' places of business (as opposed to simply prohibiting Plaintiffs from operating their businesses), or (2) any direct physical loss of or damage to property, other than at Plaintiffs' premises, the complaint does not state a claim for coverage under the civil authority provision of the Policy.")

Selane's purportedly "controlling" authority is inapposite and does not warrant a different result. Opp. 14-15 (citing *AIU*, 51 Cal. 3d at 842; *Armstrong*, 45 Cal. App. 4th at 103). The commercial general liability policies in *AIU* and *Armstrong* expressly included the "loss of use" of tangible property. 51 Cal. 3d at 815 n. 3; 45 Cal. App. 4th at 88. Selane's Policy, in contrast, excludes "loss of use." Policy 26 ("We will not pay for loss or damage caused by… loss of use or loss of market.") In short, Selane provides no convincing argument or on-point authority to justify departure from the numerous cases finding that COVID-19 and its impacts do not constitute "direct physical loss of or damage to property." The Policy's Civil Authority Endorsement therefore does not cover Selane's losses.

B. Business Income and Extra Expense Coverage

Like the Civil Authority Endorsement, the Business Income and Extra Expense Endorsement conditions coverage on "direct physical loss of or damage to property…" Policy 43. As this Court has determined that Selane offers no well-pled allegations to infer that it suffered "direct physical loss of or damage to property" due to COVID-19, Selane has also failed to show that COVID-19 and its impacts as alleged in the Complaint triggered coverage under the Business Income and Extra Expense Endorsement. *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 648 (2003) ("The burden is on the insured to establish that the claim is within the basic scope of coverage...")

(citation omitted). Because the Policy does not cover Selane's losses, Selane cannot state a claim for breach of contract, *1231 Euclid Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 135 Cal. App. 4th 1008, 1020-21 (2006) ("The failure of [a policy's] conditions precedent is a complete defense to [an insured's] breach of contract claim."), breach of implied covenants, *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 (1990) ("Where benefits are withheld for proper cause, there is no breach of the implied covenant."), or declaratory relief. *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1514 (9th Cir. 1994) ("The district court,… may grant declaratory relief only when there is an actual case or controversy; a declaratory judgment may not be used to secure judicial determination of moot questions."), *overruled on other grounds by Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019).

CCC's Motion to Dismiss Selane's claims for breach of contract, breach of implied covenant, and declaratory relief is **GRANTED**.

C. <u>UCL and Punitive Damages</u>

California's UCL provides that "unfair competition ... include[s] any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof Code § 17200. The UCL "borrow[s] violations of other laws and treats" them as unlawful business practices "independently actionable under section 17200." *Farmers Ins. Exch. v. Super. Ct.*, 2 Cal. 4th 377, 383 (1992) (quotation omitted). To state a UCL claim, a plaintiff must plead a violation of another statute or common law. *Krantz v. BT Visual Images*, 89 Cal. App. 4th 164, 178 (2001) (UCL claims "stand or fall depending on the fate of the antecedent substantive causes of action"). Since Selane has not adequately alleged a predicate violation of law as explained above, its UCL claim fails. *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1203 (9th Cir. 2001) (citing *Cel-Tech Comms., Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 182 (1999) ("[T]he breadth of [the UCL] does not give a plaintiff license to 'plead around' the absolute bars to relief contained in other possible causes of action by recasting those causes of action as one for unfair competition.")) Because

Selane has not stated a claim, its punitive damages prayer also fails. *Ismail v. Cty. of Orange*, 917 F. Supp. 2d 1060, 1073 (C.D. Cal. 2012), *aff'd*, 676 F. App'x 690 (9th Cir. 2017) (dismissal of underlying claims "obviates the need to consider plaintiff's requests for punitive damages" because such requests are "not independent causes of action.") (citing *London v. Sears, Roebuck & Co.*, 458 Fed. Appx. 649, 651 (9th Cir. 2011) ("Because we affirm the district court's summary judgment dismissal, we need not consider London's claims for punitive damages.")).

CCC's Motion to Dismiss Selane's UCL and punitive damages claims is **GRANTED**.

V. CONCLUSION

For the foregoing reasons, the Motion is **GRANTED**. Selane's Complaint is **DISMISSED with leave to amend**. If Selane chooses to file a First Amended Complaint, it must do so within 14 days of this Order.

IT IS SO ORDERED.

Dated: November 24, 2020

MARK C. SCARSI
UNITED STATES DISTRICT JUDGE

k5e2SocH

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

SOCIAL LIFE MAGAZINE, INC.,

Plaintiff,

v.

SENTINEL INSURANCE COMPANY LIMITED,

Defendant.

----------x

New York, N.Y.

20 Civ. 3311(VEC)

Teleconference
Order to Show Cause

May 14, 2020
10:00 a.m.

Before:

HON. VALERIE E. CAPRONI,

District Judge

APPEARANCES

GABRIEL J. FISCHBARG
Attorney for Plaintiff

STEPTOE & JOHNSON, LLP
Attorneys for Defendant
BY: CHARLES A. MICHAEL
SARAH D. GORDON

THE COURT: Good morning, everybody.

Do I have a court reporter on the line?

THE COURT REPORTER: Good morning, your Honor. Kristen Carannante.

THE COURT: Good morning.

Okay. Do I have Mr. Fischbarg for the plaintiff?

MR. FISCHBARG: Yes, Judge. Hi.

THE COURT: Mr. Fischbarg, is anyone else on the line for the plaintiff?

MR. FISCHBARG: Yes. The plaintiff is on a separate phone available if you need evidence or --

THE COURT: The principal of Social Life?

MR. FISCHBARG: Yes. He is in my office, you know, more than six feet away, and --

THE COURT: Okay.

And who do I have for the defendant?

MR. MICHAEL: Good morning, your Honor. This is Charles Michael, from Steptoe & Johnson, for the defendant. With me is my partner Sarah Gordon, who was just admitted *pro hac vice*, and who will be doing the presentation today.

THE COURT: Terrific.

All right --

MS. GORDON: Good morning, your Honor.

THE COURT: Good morning.

Only people who are speaking need to note their

appearances, and I have got those, Mr. Fischbarg and Ms. Gordon. Everybody else, please mute your telephone.

Also, if you hear that sound that sounds like someone has dropped off the line once we get started, I need you to stop talking so that I can make sure that I have still got the court reporter and your adversary on the line.

So, Mr. Fischbarg, this is your motion, so you get to go first.

MR. FISCHBARG: Yes. So I submitted a reply memorandum, you know, in the afternoon yesterday. I was just wondering if --

THE COURT: Yes. I saw that. Thank you.

MR. FISCHBARG: Okay, so you were also able to read it, I suppose?

THE COURT: Yes, yes.

MR. FISCHBARG: Okay.

So I guess the only other thing I want to add that's not in the papers, and then I don't know if your Honor has any issues that you want to talk about, is I mentioned that Liberty Mutual had this exclusion for viruses and it is also evident that other insurance companies have the same exclusion, including Travelers Insurance Company, and they filed the -- they actually filed a federal lawsuit for declaratory judgment in California, Docket No. 20 Civ. 3619, to preempt such claims, I guess to enforce their exclusion for viruses. So to the

extent that the defendant is claiming some kind of overreach by the plaintiff here, I don't think it is proper. There are several insurance companies who are capable of putting in a virus exclusion in their policies, and in this case there is none. So --

THE COURT: Let me ask you something. First off, I want to start with basics. Do you agree that New York law applies?

MR. FISCHBARG: Yes.

THE COURT: All right. So the -- is it the *Roundabout Theatre* case?

MS. GORDON: Yes, your Honor.

THE COURT: First Department case?

MS. GORDON: Yes, your Honor. This is Ms. Gordon on behalf of Sentinel.

THE COURT: Thank you.

Mr. Fischbarg, it would seem to me that the *Roundabout* case is a real problem for your position.

Would you like to explain to me why it doesn't preclude your claim?

MR. FISCHBARG: Yes. That case applies to off-site property damage rendering the premises at issue inaccessible. So in this case, you don't have off-site property damage. You have on-site property damage.

THE COURT: What is the damage? There is no damage to

your property.

MR. FISCHBARG: Well, the virus exists everywhere.

THE COURT: It damages lungs. It doesn't damage printing presses.

MR. FISCHBARG: Right. Well, that's a different issue, whether or not -- that's a different issue than the *Roundabout* case that had to do with accessibility. Now we are jumping to the topic of whether a virus can cause physical damage to a printing press, as your Honor mentioned. So that's a separate issue, and there are a lot of cases that we have cited where this type of material, a virus, does cause physical damage.

THE COURT: What's your best case? What do you think is your best case under New York law?

MR. FISCHBARG: Well, the problem is, under New York law, there isn't much law. The New Jersey federal court, in *TRAVCO*, citing other cases, including from other circuits, where physical damage had a broader interpretation that includes loss of use and not just, you know, something where you take a hammer and break an item.

THE COURT: With loss of use, I mean, loss of use from things like mold is different from you not being able to, quote, use your premises because there is a virus that is running amuck in the community.

MR. FISCHBARG: Okay. I would disagree with that. I

would say virus and mold are equivalent. They are both physical items which, if they land on a surface or are on a surface, just like spores that are also listed in the policy, mold is also listed in the policy. I would say that the virus, mold spores --

THE COURT: Hang on --

MR. FISCHBARG: -- anything --

THE COURT: A second.

Do I still have the court reporter?

THE COURT REPORTER: Yes, your Honor.

THE COURT: Do I have I still have, Ms. Gordon?

MS. GORDON: Yes, your Honor.

THE COURT: All right. Go ahead.

MR. FISCHBARG: Mold spores, bacteria, virus, all those are physical items which damage whatever they are on, whatever they land on. And in this case, the virus, when it lands on something and you touch it, you could die from it. So --

THE COURT: That damages you. It doesn't damage the property.

MR. FISCHBARG: But you are not able to use the property because it damages you. So it's a corollary. In other words, this policy, by the way, mentions the word "virus" and "bacteria" in it in two places.

THE COURT: Where does it mention it?

MR. FISCHBARG: It mentions it in the PDF as well as Exhibit 9, page 36 and 37, which is page 7 of 25 of the special property coverage form under additional coverages, section 5(j), where the insured would cover certain law enforcement orders requiring you to -- requiring remediation. But it contains an exclusion for bacteria and viruses, and it uses the word "bacteria" and it uses the word "virus."

So what this is really referring to is the *Legionella* bacteria, which is causes Legionnaires' disease typically. That's the bacteria. Virus is obviously something else. So this is obviously referring to when there is a Legionnaires' outbreak in a building, which could happen in New York pretty often, every few years, and then the building gets shut down and they have to do remediation. Either they -- at least as a bacteria, *Legionella* bacteria only occurs in water or pipes or in mist. So the building is shut down, and then you might have to -- and now there is a new code where the buildings have to test their cooling systems for *Legionella* bacteria. So that's an example where a bacteria causes property loss, or loss of use, or damage, physical damage to property. And I would say the virus is equivalent to that bacteria. So --

THE COURT: But it's not. This is different. The virus is not specifically in your property that is causing damage. It is everywhere. The Legionnaire example is very different. Because it's not like Legionnaire is running

rampant throughout the city, and therefore your office building can get closed. It is that the Legionnaire bacteria is in that building causing --

MR. FISCHBARG: Yes.

THE COURT: -- that building to be shut down.

MR. FISCHBARG: Yes. Yes.

So this virus is everywhere, including this office in particular, this office. In other words, they just did a random survey of people going into a grocery store in New York, and 20 percent tested positive. So, Judge, that's just a one-sample test. So if the infection rate in New York City is 20 percent, then the virus is literally everywhere. So if it --

THE COURT: That's what --

MR. FISCHBARG: -- is --

THE COURT: That is what has caused the damage is that the governor has said you need to stay home. It is not that there is any particular damage to your specific property.

MR. FISCHBARG: Well, okay, that's --

THE COURT: You may not even have the virus in your property.

MR. FISCHBARG: Well, okay, that's -- I would disagree. The virus not just causes -- it lands on equipment, it lands everywhere. That's why all of these -- all of the health guidelines from the World Health Organization and

elsewhere talk about wearing gloves, talk about wiping things down, because it lands on surfaces. It doesn't just get transmitted through the air. Another way of getting it is through contact --

THE COURT: Right, but what --

MR. FISCHBARG: -- when it touches your --

THE COURT: What evidence do you have that your premises are infected with the COVID bug.

MR. FISCHBARG: Well, the plaintiff is here. He got COVID. So that's evidence there.

THE COURT: Well, it's not evidence that he got it in his office.

MR. FISCHBARG: Yes, but, okay, it's not -- we're not -- I don't know what burden of proof we are looking at, whether it is beyond a reasonable doubt --

THE COURT: No, it's --

MR. FISCHBARG: -- or more likely than not, more likely than not, he can testify where he was and more likely than not he either got it from his office or he got it from his home. So that's a different burden of proof. If you are looking for some kind of burden of proof to show that he got it from his office, I mean, that's an evidentiary question, and we can get an epidemiologist to testify and get an expert to testify on that, which I understand is going to happen in the other lawsuits that have been filed across the country

regarding --

THE COURT: Okay.

MR. FISCHBARG: -- this issue.

THE COURT: Okay.

MR. FISCHBARG: So . . .

THE COURT: Anything further, Mr. Fischbarg?

MR. FISCHBARG: No, I guess that's all for now. Thank you.

THE COURT: Okay. Thanks.

Ms. Gordon.

MS. GORDON: Thank you, your Honor. This is Sarah Gordon on behalf of Sentinel, and we agree with your Honor's thoughts here.

The property policy has two distinct requirements here. There has to be direct physical loss or physical damage to the property and the cause of the business interruption damages they are seeking has to be direct physical loss or damage, and the cause here is not physical damage.

We think, you know, as your Honor rightly pointed out, *Roundabout* controls. It is under New York law. It's a First Department case from 2002. There are no subsequent decisions that have disagreed or overturned it here in New York; and, if anything, it has been confirmed by this . . .

THE COURT: Hang on. Did I lose my court reporter?

THE COURT REPORTER: No, Judge. I'm here.

THE COURT: Did I lose Mr. Fischbarg?

MR. FISCHBARG: No, I'm here.

THE COURT: Okay.

MS. GORDON: This court, your Honor, in *Newman Myers*, adopted the exact same rationale for a law firm that was trying to assert damages where there were no -- business interruption damages, where there was no physical harm to the property. And, you know --

THE COURT: Let me interrupt you for a second.

So Judge Engelmayer in *Newman* went out of his way to talk about a case where there was a bunch of -- there was a rock slide which didn't actually hit the house or the premises, and yet they got coverage and coverage for the invasion of fumes.

MS. GORDON: Yes, your Honor.

So for most of the cases, there are a number of them, there is -- what has happened is something physically has happened to the property that prevents people from being on the property. So, for example, in *Gregory Packaging*, in New Jersey, there was ammonia leaked out and they couldn't be on the property, so something physically happened. You couldn't necessarily see it or touch it, but there were fumes and it was unsafe to be there. The same thing with *Motorists*, where there was *E. coli* in the well. You couldn't be in that house because you were exposed to other things that had the *E. coli*.

The property has to be entirely unusable or uninhabitable for physical loss or damage to constitute a loss of use. We don't think that's the law in New York in any circumstance, but even in those other cases, there is nothing equivalent here. Mr. Fischbarg's client can go to his premises. There is no ammonia or mold or anything in the air that's not going to allow him on to the property. In fact, the governor's orders explicitly allow him to go to the property and get his mail or do routine business functions. The only rule is that he has to stay six feet apart from other people. So those cases are entirely distinguishable.

And when a business, a property is allowed to remain open or people can still occupy the premises, there is no direct physical loss or damage. That was the case -- that's what the court said in *Port Authority*, that's what happened in *Mama Jo's*, where the restaurant was allowed to be open. The cases where there is direct physical loss or damage, you literally cannot be on the premises because there is something there that is making it uninhabitable, and here that just isn't true.

THE COURT: Okay. Mr. Fischbarg I will give you the last word.

MR. FISCHBARG: All right. So I would disagree that he is allowed to go to the premises. In fact, the opposite is true. The executive order 202.8 says it requires 100 percent

reduction. So he can't go there, and he is not allowed to go there, and that is a separate claim. It is the civil authority claim besides the breach of contract claim.

THE COURT: Doesn't the executive order say -- I'm sorry, which executive order are you talking about?

MR. FISCHBARG: It is . . .

It is Exhibit 3 of the declaration, and then on page 2, "Each employer shall reduce the in-person workforce at any work locations by 100 percent no later than March 22 at 8p.m." And then it says --

THE COURT: Right, but that doesn't mean the boss can't go to the work location.

MR. FISCHBARG: I would say he is -- he is an employee and he can't go. I think it does. In my building here in New York, there is nobody here. I'm the only one. There is no bosses in any of the offices.

THE COURT: There is nothing about the governor's order that prohibits a small businessperson or a big businessperson from going into their office to pick up mail, to water the plants, to do anything like --

MR. FISCHBARG: Your Honor --

THE COURT: -- that, including employees that are working.

MR. FISCHBARG: Sorry.

MS. GORDON: Your Honor, this is Sarah Gordon. Oh, go

ahead, Mr. Fischbarg.

MR. FISCHBARG: Okay.

Again, I would disagree. I think the order is pretty clear that 100 percent means that you are not supposed to go to work, and that's what people have been doing in New York. They are not going into the office. And to the extent they are getting mail, I mean, there is work-arounds where the workers in the building have been leaving it downstairs for people to pick up, but the way it's been implemented is that 100 percent means no one is going to any office.

THE COURT: You are in your office.

MR. FISCHBARG: Yeah, I'm not -- I'm considered, by the way -- lawyers are considered essential, and if you are a sole practitioner, you are considered essential. So I have the exclusion, and that's why I am here, but otherwise I wouldn't be here. So . . .

MS. GORDON: Your Honor, if I may? We submitted with Mr. Michael's affidavit, Exhibit D, a printout from the Empire State Development website. And on question 13, it addresses exactly this issue. It says, "What if my business is not essential but a person must pick up mail or perform a similar routine function each day?" And the answer provided by the Empire State is, "A single person attending a nonessential closed business temporarily to perform a specific task is permitted so long as they will not be in contact with other

people."

THE COURT: I thought I had read that somewhere.

MS. GORDON: Yes. It is in Mr. Michael's declaration, and I think it's ECF 18-4, page 304.

THE COURT: Okay.

MR. FISCHBARG: Right, but I think the executive order supersedes that is what I would argue.

THE COURT: Okay.

Mr. Fischbarg, you have got to demonstrate a probability of success on the merits. I feel bad for your client. I feel bad for every small business that is having difficulties during this period of time. But New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going. You get an A for effort, you get a gold star for creativity, but this is just not what's covered under these insurance policies.

So I will have a more complete order later, but your motion for preliminary injunction is going to be denied.

Anything further for the plaintiff?

MR. FISCHBARG: I guess just a housekeeping thing. We filed an amended complaint. Are we going to deem it served or does it have to be re-served?

THE COURT: Has the defendant -- does the defendant want to be reserved or will you take the amended complaint?

MR. MICHAEL: Your Honor, this is Charles Michael.

We have entered a notice of appearance, and so I think once they filed it on ECF, that service, we are happy to consider it served. That's fine. And he does have one amendment as of right.

THE COURT: Correct.

MR. MICHAEL: That was within his right to file it.

THE COURT: Does defendant plan to move or answer?

MR. MICHAEL: Probably to move. We would have to discuss it with our client, but I believe so.

THE COURT: Okay. What are the parties' position on discovery while the motion to dismiss is pending?

MR. FISCHBARG: Well, I would say there are two motions filed -- there is one in the Eastern District of Pennsylvania and one in, I think, the Northern District of Illinois -- for an MDL, multi-district litigation, involving a lot of lawsuits combining, so I think this might be happening in each state until that motion is decided, and I think the briefing schedule is in June --

MS. GORDON: We -- your Honor --

MR. FISCHBARG: -- so I think --

MS. GORDON: Sorry, Mr. Fischbarg.

MR. FISCHBARG: So I would say that this case might be transferred to the multi-district panel at some point.

THE COURT: Okay. So, Mr. Fischbarg, what I am hearing you say is that you are perfectly happy to have the

defendants not move until we find out whether or not your case is going to get scooped up into the MDL?

MR. FISCHBARG: Yes, correct.

THE COURT: All right. I presume that the defendants are perfectly happy to do nothing until you hear back from the MDL.

MS. GORDON: Your Honor, I need to consult with my client on that. I'm not sure that that's true. We don't think these cases are appropriate for consolidation in the MDL for many of the reasons which were evident today, given the different states' conclusions on these laws. So I need to consult with my client on the motion practice. We may intend to want to move in any event.

THE COURT: Okay. Well, you could move, but if there is a likely -- if there is some likelihood that they are going to get scooped into the MDL, I'm not likely to decide it until that decision is made. So it is entirely -- I guess from my perspective I don't really care, but from your client's perspective, they may be making a motion to dismiss that's unnecessary. If you are right, and you may well be right, that they are not going to MDL these kinds of cases, then all that's happening is this is just being delayed into the summer for you to incur fees making a motion to dismiss.

So why don't you talk to your client, figure out what you want to do. One way or the other, it does not seem to me

to make sense to proceed with discovery in this matter, certainly under the circumstances that everyone is in, and particularly the plaintiff is in, strapped for revenue, until we figure out whether a lawsuit is going to go forward.

So talk to your client, figure out whether -- the defendant should talk to Sentinel. Figure out whether you are happy staying this case pending a decision on the MDL or not, and just write me a letter and let me know.

MS. GORDON: Yes, your Honor. Thank you.

MR. MICHAEL: Your Honor --

THE COURT: Anything further from the plaintiff?

MR. MICHAEL: Just one housekeeping matter. This is Charles Michael, again, for the defendant.

THE COURT: Okay.

MR. MICHAEL: I just wondered if there was any special procedures for ordering the transcript or if we go just through the normal Southern District website? I didn't know, under the COVID circumstances, if there is something different we should do.

THE COURT: I don't think there is anything different, but we have got the court reporter on.

So, Madam Court Reporter, is there anything different they need to do?

THE COURT REPORTER: At the end of this proceeding, I am going to email the parties with their instructions.

THE COURT: Okay.

MR. MICHAEL: Terrific. Thank you so much.

THE COURT: Anything further from the plaintiff, Mr. Fischbarg?

MR. FISCHBARG: No. Thank you, Judge.

THE COURT: Anything further from the insurance company? Ms. Gordon?

MS. GORDON: No. Thank you, your Honor.

THE COURT: All right. Thank you, all.

MR. FISCHBARG: Okay. Bye, Judge.

MR. MICHAEL: Thank you, your Honor.

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2020 WL 4692385
Only the Westlaw citation is currently available.
United States District Court, W.D. Missouri, Southern Division.

STUDIO 417, INC., et al., Plaintiffs,

v.

The CINCINNATI INSURANCE COMPANY, Defendant.

Case No. 20-cv-03127-SRB
|
Signed 08/12/2020

Synopsis

Background: Insureds, businesses which had purchased all-risk property insurance policies, brought action against property insurer, seeking declaratory judgment and class certification and alleging breach of contract arising from insurer's denial of coverage for losses resulting from COVID-19 pandemic. Property insurer moved to dismiss.

Holdings: The District Court, Stephen R. Bough, J., held that:

[1] insureds adequately alleged that they incurred direct physical loss;

[2] insureds plausibly stated claim for civil authority coverage;

[3] insureds plausibly stated claim for ingress and egress coverage;

[4] insureds plausibly stated claim for dependent property coverage; and

[5] insureds plausibly stated claim for sue and labor coverage.

Motion denied.

West Headnotes (15)

[1] **Federal Civil Procedure**

When deciding a motion to dismiss complaint for failure to state a claim, the factual allegations of a complaint are assumed true and construed in favor of the plaintiff, even if it strikes a savvy judge that actual proof of those facts is improbable. Fed. R. Civ. P. 12(b)(6).

[2] **Insurance**

State law controls the construction of insurance policies where case is based on diversity jurisdiction.

[3] **Insurance**

Under Missouri law, the interpretation of an insurance policy is a question of law to be determined by the court.

[4] **Insurance**

Missouri courts read insurance contracts as a whole and determine the intent of the parties, giving effect to that intent by enforcing the contract as written.

[5] **Insurance**

In Missouri, insurance policies are to be given a reasonable construction and interpreted so as to afford coverage rather than defeat coverage.

[6] **Insurance**

Under Missouri law, insurance policy terms are given the meaning which would be attached by an ordinary person of average understanding if purchasing insurance.

[7] **Insurance**

Under Missouri law, when interpreting insurance policy terms, the central issue is determining whether any ambiguity exists, which occurs where there is duplicity, indistinctness, or uncertainty in the meaning of the words used in the contract.

[8] **Insurance**

Under Missouri law, if insurance policies are unambiguous, they will be enforced as written absent a statute or public policy requiring coverage.

[9] **Insurance**

Under Missouri law, if language in insurance policies is ambiguous, it will be construed against the insurer.

[10] **Insurance**

Insureds, businesses which had purchased all-risk insurance policies, adequately alleged that they incurred direct physical loss during COVID-19 pandemic, as necessary to obtain coverage under property insurance policies; insureds alleged causal relationship between COVID-19 and their alleged losses, in that COVID-19 resulted in government orders requiring closure of businesses, and also alleged that COVID-19 was physical substance that lived on and was active on inert physical surfaces, that it was emitted into air, and that COVID-19 attached to and deprived insureds of their property and made it unsafe and unusable.

[11] **Insurance**

Court, in interpreting insurance policy, must give meaning to all policy terms and, where possible, harmonize those terms in order to accomplish the intention of the parties.

[12] **Insurance**

Insureds, restaurants and salon which had purchased all-risk insurance policies, plausibly stated claim for civil authority coverage under policy during COVID-19 pandemic; insureds alleged that they suffered physical loss, which was applicable to other property, and that civil authorities issued closure and stay-at-home orders throughout two states, which included property other than insureds' premises, and while insureds admitted that closure orders allowed restaurant premises to remain open for food preparation, take-out, and delivery and that they did not prohibit access to salon premises, they alleged that closure order required businesses that provided personal services to suspend operations and prohibited inside seating at restaurants.

[13] **Insurance**

Insureds, businesses which had purchased all-risk insurance policies, plausibly stated claim for ingress and egress coverage under policy during COVID-19 pandemic; insureds alleged that they suffered physical loss, in that COVID-19 was physical substance that lived on inert physical surfaces and had attached to and deprived insureds of their property, and also alleged that both COVID-19 and resulting closure orders that government issued to businesses rendered premises unsafe for ingress and egress.

[14] **Insurance**

Insureds, businesses which had purchased all-risk insurance policies, plausibly stated claim for dependent property coverage under policy during COVID-19 pandemic; insureds alleged that they suffered physical loss, in that COVID-19 was physical substance that lived on inert physical surfaces and had attached to and deprived insureds of their property, and also alleged that they suffered loss of materials, services, and customers because of COVID-19 and resulting closure orders issued by government to businesses.

[15] Insurance

Insureds, businesses which had purchased all-risk insurance policies, plausibly stated claim for sue and labor coverage under policy during COVID-19 pandemic; insureds alleged that, in complying with closure orders issued by government to businesses and by suspending operations, they incurred expenses in connection with reasonable steps to protect covered property.

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ORDER

STEPHEN R. BOUGH, UNITED STATES DISTRICT JUDGE

***1** Before the Court is Defendant The Cincinnati Insurance Company's ("Defendant") Motion to Dismiss. (Doc. #20.) For the reasons set forth below, the motion is DENIED.

I. BACKGROUND

Because this matter comes before the Court on a motion to dismiss, the following allegations in Plaintiffs' First Amended Class Action Complaint (the "Amended Complaint") are taken as true. (Doc. #16); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal citations and quotation marks omitted) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)); *Zink v. Lombardi*, 783 F.3d 1089, 1098 (8th Cir. 2015).[1]

The named Plaintiffs in this case are Studio 417, Inc. ("Studio 417"), Grand Street Dining, LLC ("Grand Street"), GSD Lenexa, LLC ("GSD"), Trezomare Operating Company, LLC ("Trezomare"), and V's Restaurant, Inc. ("V's Restaurant") (collectively, the "Plaintiffs"). Studio 417 operates hair salons in the Springfield, Missouri, metropolitan area. Grand Street, GSD, Trezomare, and V's Restaurant own and operate full-service dining restaurants in the Kansas City metropolitan area.

Plaintiffs purchased "all-risk" property insurance policies (the "Policies") from Defendant for their hair salons and restaurants. (Doc. #1-1, ¶ 26.) All-risk policies cover all risks of loss except for risks that are expressly and specifically excluded. The Policies include a Building and Personal Property Coverage Form and Business Income (and Extra Expense) Coverage Form. Defendant issued each Plaintiff a separate policy, and all were in effect during the applicable time period. The parties agree that the Policies contain the same relevant language.

The Policies provide that Defendant would pay for "direct 'loss' unless the 'loss' is excluded or limited" therein. (Doc. #16, ¶ 27.) A "Covered Cause of Loss" "is defined to mean accidental [direct] physical loss ***or*** accidental [direct] physical damage." (Doc. #16, ¶ 31) (emphasis supplied); (Doc. #1-1, pp. 24, 57.)[2] The Policies do not define "physical loss" or "physical damage." The Policies also "do not include, and are not subject to, any exclusion for losses caused by viruses or communicable diseases." (Doc. #16, ¶ 13.) A loss, as defined above, is a prerequisite to invoke the different types of coverage sought in this lawsuit. (*See* Doc. #21, p. 15.) These coverages are set forth below.

First, the Policies provide for Business Income coverage. Under this coverage, Defendant agreed to:

> 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 'loss' to property at a 'premises' caused by or resulting from any Covered Cause of Loss.

(Doc. #1-1, pp. 37-38.)

Second, the Policies provide "Civil Authority" coverage. This coverage applies to:

> ***2** the actual loss of 'Business Income' sustained 'and necessary Extra Expense' sustained 'caused by action of civil authority that prohibits access to' the Covered

> Property when a Covered Cause of Loss causes direct damage to property other than the Covered Property, the civil authority prohibits access to the area immediately surrounding the damaged property, and 'the action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage[.]'

(Doc. #16, ¶ 42.)

Third, the Policies provide "Ingress and Egress" coverage. This coverage is specified as follows:

> We will pay for the actual loss of 'Business Income' you sustain and necessary Extra Expense you sustain caused by the prevention of existing ingress or egress at a 'premises' shown in the Declarations due to direct 'loss' by a Covered Cause of Loss at a location contiguous to such 'premises.' However, coverage does not apply if ingress or egress from the 'premises' is prohibited by civil authority.

(Doc. #1-1, p. 95.)

Fourth, the Policies provide "Dependent Property" coverage. This coverage applies if the insured suffers a loss of Business Income because of a suspension of its business "caused by direct 'loss' to 'dependent property.' " (Doc. #1-1, pp. 63-64.) "Dependent property means property operated by others whom [the insured] depend[s] on to ... deliver materials or services to [the insured] ... [a]ccept [the insured's] products or services ... [and] [a]ttract customers to [the insured's] business." (Doc. #1-1, p. 64.)

Finally, the Policies provide what is commonly known as "Sue and Labor" coverage. In relevant part, the Policies require the insured to "take all reasonable steps to protect the Covered Property from further damage," and to keep a record of expenses incurred to protect the Covered Property for consideration in the settlement of the claim. (Doc. #1-1, pp. 49-50.) The Policies do not exclude or limit losses from viruses, pandemics, or communicable diseases. (Doc. #16, ¶ 28.)

Plaintiffs seek coverage under the Policies for losses caused by the Coronavirus ("COVID-19") pandemic. Plaintiffs allege that over the last several months, it is likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus. (Doc. #1-1, ¶ 60.) Plaintiffs allege that COVID-19 "is a physical substance," that it "live[s] on" and is "active on inert physical surfaces," and is "emitted into the air." (Doc. #16, ¶¶ 47, 49-60.) Plaintiffs further allege that the presence of COVID-19 "renders physical property in their vicinity unsafe and unusable," and that they "were forced to suspend or reduce business at their covered premises." (Doc. #1-1, ¶¶ 14, 58, 102.)

In response to the COVID-19 pandemic, civil authorities in Missouri and Kansas issued orders requiring the suspension of business at various establishments, including Plaintiffs' businesses (the "Closure Orders"). The Closure Orders "have required and continue to require Plaintiffs to cease and/or significantly reduce operations at, and ... have prohibited and continue to prohibit access to, the[ir] premises." (Doc. #16, ¶¶ 106-107.) Plaintiffs allege that the presence of COVID-19 and the Closure Orders caused a direct physical loss or direct physical damage to their premises "by denying use of and damaging the covered property, and by causing a necessary suspension of operations during a period of restoration." (Doc. #16, ¶¶ 102.) Plaintiffs allege that their losses are covered by the Business Income, Civil Authority, Ingress and Egress, Dependent Property, and Sue and Labor coverages discussed above. (Doc. #16, ¶¶ 103-108.) Plaintiffs provided Defendant notice of their losses, but Defendant denied the claims. (Doc. #16, ¶¶ 110-115.)

***3** On April 27, 2020, Plaintiffs filed this lawsuit against Defendant. The Amended Complaint asserts claims for a declaratory judgment and for breach of contract based on Business Income coverage (Counts I, II), Extra Expense coverage (Counts III, IV), Dependent Property coverage (Counts V, VI), Civil Authority coverage (Counts VII, VIII), Extended Business Income coverage (Counts IX, X), Ingress and Egress coverage (Counts XI, XII), and Sue and Labor coverage (Counts XIII, XIV). The Amended Complaint also seeks class certification for 14 nationwide classes (one for each cause of action) and a Missouri Subclass that consists of "all policyholders who purchased one of Defendant's policies in Missouri and were denied coverage due to COVID-19." (Doc. #16, ¶¶ 117-125; *see also* Doc. #21, pp. 12-13.)

Defendant responded to the Amended Complaint by filing the pending motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Defendant's overarching argument is that the Policies provide coverage "only for income losses tied to physical damage to property, not for economic loss caused by governmental or other efforts to protect the public from disease ... the same direct physical loss requirement applies to all the coverages for which Plaintiffs sue." (Doc. #21, p.

8.) Even if a loss is adequately alleged, Defendant argues that the Amended Complaint fails to state a claim as to each type of coverage at issue. Plaintiffs oppose the motion, and the parties' arguments are addressed below.

II. LEGAL STANDARD

[1] Rule 12(b)(6) provides that a defendant may move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ash v. Anderson Merchs., LLC*, 799 F.3d 957, 960 (8th Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937). When deciding a motion to dismiss, "[t]he factual allegations of a complaint are assumed true and construed in favor of the plaintiff, even if it strikes a savvy judge that actual proof of those facts is improbable." *Data Mfg., Inc. v. United Parcel Serv., Inc.*, 557 F.3d 849, 851 (8th Cir. 2009) (citations and quotations omitted).

[2] **[3]** **[4]** **[5]** Because this case is based on diversity jurisdiction, "state law controls the construction of [the] insurance policies[.]" *J.E. Jones Const. Co. v. Chubb & Sons, Inc.*, 486 F.3d 337, 340 (8th Cir. 2007). Under Missouri law, "[t]he interpretation of an insurance policy is a question of law to be determined by the Court." *Lafollette v. Liberty Mut. Fire Ins. Co.*, 139 F. Supp. 3d 1017, 1021 (W.D. Mo. 2015) (quoting *Mendota Ins. Co. v. Lawson*, 456 S.W.3d 898, 903 (Mo. App. W.D. 2015)).[3] "Missouri courts read insurance contracts 'as a whole and determine the intent of the parties, giving effect to that intent by enforcing the contract as written.' " *Id.* (citing *Thiemann v. Columbia Pub. Sch. Dist.*, 338 S.W.3d 835, 840 (Mo. App. W.D. 2011)). "Insurance policies are to be given a reasonable construction and interpreted so as to afford coverage rather than to defeat coverage." *Cincinnati Ins. Co. v. German St. Vincent Orphan Ass'n, Inc.*, 54 S.W.3d 661, 667 (Mo. App. E.D. 2001).

***4** **[6]** **[7]** **[8]** **[9]** "Policy terms are given the meaning which would be attached by an ordinary person of average understanding if purchasing insurance." *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 763 (8th Cir. 2020) (applying Missouri law) (quotations omitted). When interpreting policy terms, "the central issue ... is determining whether any ambiguity exists, which occurs where there is duplicity, indistinctness, or uncertainty in the meaning of the words used in the contract." *Id.* (quotations omitted). If the "insurance policies are unambiguous, they will be enforced as written absent a statute or public policy requiring coverage. If the language is ambiguous, it will be construed against the insurer." *Id.* (quotations omitted).

III. DISCUSSION

A. Plaintiffs Have Adequately Alleged a Direct "Physical Loss" Under the Policies.

Defendant's first argument is that Plaintiffs have not adequately pled a "physical loss" as required by the Policies. (Doc. # 21, pp. 7-8, 15-16, 19-25; Doc. #37, pp. 2-10.) Defendant argues that "direct physical loss requires actual, tangible, permanent, physical alteration of property." (Doc. #21, p. 19) (citing cases). Defendant claims that the Policies provide property insurance coverage, and "are designed to indemnify loss or damage to property, such as in the case of a fire or storm. [COVID-19] does not damage property; it hurts people." (Doc. #21, p. 7.) According to Defendant, the requirement of a tangible physical loss applies to—and precludes—each type of coverage sought in this case.

In response, Plaintiffs agree that "physical loss" and "physical damage" are "the key phrases" in the Policies. (Doc. #31, p. 7.) However, Plaintiffs emphasize that the Policies expressly cover "physical loss ***or*** physical damage." (Doc. #31, p. 11) (emphasis supplied). This "necessarily means that either a 'loss' or 'damage' is required, and that 'loss' is distinct from 'damage.' " (Doc. #31, p. 11.) As such, Plaintiffs argue that Defendant's focus on an actual physical alteration ignores the coverage for a "physical loss." Plaintiffs further argue that Defendant could have defined "physical loss" and "physical damage," but failed to do so. Plaintiffs argue this case should not be disposed of on a motion to dismiss because "even if [Defendant's] interpretation of the policy language is reasonable ... Plaintiffs' interpretation is also reasonable[.]" (Doc. #31, p. 11.)

Upon review of the record, the Court finds that Plaintiffs have adequately stated a claim for direct physical loss. First, because the Policies do not define a direct "physical loss" the Court must "rely on the plain and ordinary meaning of the phrase." *Vogt*, 963 F.3d at 763; *Mansion Hills Condo. Ass'n v. Am. Family Mut. Ins. Co.*, 62 S.W.3d 633, 638 (Mo. App. E.D. 2001)

(recognizing that standard dictionaries should be consulted for determining ordinary meaning). The Merriam-Webster dictionary defines "direct" in part as "characterized by close logical, causal, or consequential relationship." Merriam-Webster, www.merriam-webster.com/dictionary/direct (last visited August 12, 2020). "Physical" is defined as "having material existence: perceptible especially through the senses and subject to the laws of nature." Merriam-Webster, www.merriam-webster.com/dictionary/physical (last visited August 12, 2020). "Loss" is "the act of losing possession" and "deprivation." Merriam-Webster, www.merriam-webster.com/dictionary/loss (last visited August 12, 2020).

[10] Applying these definitions, Plaintiffs have adequately alleged a direct physical loss. Plaintiffs allege a causal relationship between COVID-19 and their alleged losses. Plaintiffs further allege that COVID-19 "is a physical substance," that it "live[s] on" and is "active on inert physical surfaces," and is also "emitted into the air." (Doc. #16, ¶¶ 47, 49-60.) COVID-19 allegedly attached to and deprived Plaintiffs of their property, making it "unsafe and unusable, resulting in direct physical loss to the premises and property." (Doc. #16, ¶ 58.) Based on these allegations, the Amended Complaint plausibly alleges a "direct physical loss" based on "the plain and ordinary meaning of the phrase." *Vogt*, 963 F.3d at 763.

5** **[11]** Second, the Court "must give meaning to all [policy] terms and, where possible, harmonize those terms in order to accomplish the intention of the parties." *Macheca Transp. v. Philadelphia Indem. Ins. Co.*, 649 F.3d 661, 669 (8th Cir. 2011) (applying Missouri law). Here, the Policies provide coverage for "accidental physical loss ***or accidental physical damage." (Doc. #1-1, p. 57) (emphasis supplied). 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. *See 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").

The Court's finding that Plaintiffs have adequately stated a claim is supported by case law. In *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349 (8th Cir. 1986), the relevant provision provided that "[t]his policy insures against loss of or damage to the property insured ... resulting from all risks of direct physical loss[.]" *Id.* at 351. Applying Missouri law, the Eighth Circuit found this provision was ambiguous and affirmed the district court's decision that it covered "any loss or damage due to the *danger* of direct physical loss[.]" *Id.* at 352 (emphasis in original).

In *Mehl v. The Travelers Home & Marine Ins. Co.*, Case No. 16-CV-1325-CDP (E.D. Mo. May 2, 2018), the plaintiff discovered brown recluse spiders in his home. *Id.* at p. 1. The plaintiff unsuccessfully attempted to eliminate the spiders, and then left the home. *Id.* The plaintiff considered the property uninhabitable and filed a claim under his homeowners insurance policy for loss of use of the property. *Id.* After his insurance company denied the claim, the plaintiff filed suit for breach of contract. The insurance company moved for summary judgment and argued that the policy only covered "direct physical loss" which required "actual physical damage." *Id.* at p. 2.

Mehl rejected this argument. As in this case, the *Mehl* policy did not define "physical loss" and the insurance company "point[ed] to no language in the policy that would lead a reasonable insured to believe that actual physical damage is required for coverage." *Id.* Although the policy in *Mehl* provided coverage for "loss of use," *Mehl* supports the conclusion that "physical loss" is not synonymous with physical damage. *Id.*

Other courts have similarly recognized that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose. *See Port Auth. of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (affirming denial of coverage but recognizing that "[w]hen the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct [physical] loss to its owner"); *Prudential Prop. & Cas. Ins. Co. v. Lilliard-Roberts*, CV–01–1362–ST, 2002 WL 31495830, at * 9 (D. Or. June 18, 2002) (citing case law for the proposition that "the inability to inhabit a building [is] a 'direct, physical loss' covered by insurance"); *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) ("We have previously held that direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way.").

To be sure, and as argued by Defendant, there is case law in support of its position that physical tangible alteration is required to show a "physical loss." (Doc. #21, pp. 19-25; Doc. #37, pp. 3-10.)[4] However, Plaintiffs correctly respond

that these cases were decided at the summary judgment stage, are factually dissimilar, and/or are not binding. For example, Defendant argues that "[a] seminal case concerning the direct physical loss requirement is *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834 (8th Cir. 2006)." (Doc. #21, pp. 19-20.) However, *Source Food* was decided in the summary judgment context and under Minnesota law. *Source Food*, 465 F.3d at 834-36. Moreover, the facts of *Source Foods* are distinguishable. In that case, the insured's beef was not allowed to cross from Canada into the United States because of an embargo related to mad cow disease. *Id.* at 835. Because of the embargo, the insured was unable to fill orders and had to find a new supplier. Importantly, there was no evidence that the beef was actually contaminated. *Id.*

***6** The insured sought coverage based on a provision requiring "direct physical loss to property." The district court denied coverage, and the Eighth Circuit affirmed, explaining that:

> [a]lthough Source Food's beef product in the truck could not be transported to the United States due to the closing of the border to Canadian beef products, the beef product on the truck was not—as Source Foods concedes—physically contaminated or damaged in any manner. To characterize Source Food's inability to transport its truckload of beef product across the border and sell the beef product in the United States as direct physical loss to property would render the word 'physical' meaningless.

Id. at 838.

The facts alleged in this case do not involve the transportation of uncontaminated physical products. Instead, Plaintiffs allege that COVID-19 is a highly contagious virus that is physically "present ... in viral fluid particles," and is "deposited on surfaces or objects." (Doc. #16, ¶¶ 47, 50.) Plaintiffs further allege that this physical substance is likely on their premises and caused them to cease or suspend operations. Unlike *Source Foods*, the Plaintiffs expressly allege physical contamination. Finally, *Source Foods* recognized (under Minnesota law) that physical loss could be found without structure damage. *Source Foods*, 465 F.3d at 837 (stating that property could be "physically contaminated ... by the release of asbestos fibers"). Neither *Source Foods* nor the other cases cited by Defendant warrant dismissal under Rule 12(b)(6).

Defendant's reply brief cites recent out-of-circuit decisions which found that COVID-19 does not cause direct physical loss. (Doc. #37, pp. 5-6.) For example, Defendant relies on *Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd.*, 1:20-cv-03311-VEC (S.D.N.Y. 2020). Defendant argues that "*Social Life* famously states that the virus damages lungs, not printing presses." (Doc. #37, p. 6.) But the present case is not about whether COVID-19 damages lungs, and the presence of COVID-19 on premises, as is alleged here, is not a benign condition. Regardless of the allegations in *Social Life* or other cases, Plaintiffs here have plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable.[5] This is enough to survive a motion to dismiss.

Defendant also contends that if Plaintiffs' interpretation is accepted, physical loss would be found "whenever a business suffers economic harm." (Doc. #21, p. 22; Doc. #37, p. 2.) That is not what the Court holds here. Although Plaintiffs allege economic harm, that harm is tethered to their alleged physical loss caused by COVID-19 and the Closure Orders. (Doc. #1-1, ¶¶ 106-107) (alleging that the COVID-19 pandemic and Closure Orders required Plaintiffs to "cease and/or significantly reduce operations at, and ... have prohibited and continue to prohibit access to, the premises.")[6] For all these reasons, the Court finds that Plaintiffs have adequately alleged a direct physical loss under the Policies.[7]

B. Plaintiffs Have Plausibly Stated a Claim for Civil Authority Coverage.

***7** **[12]** Defendant next argues that Plaintiffs' claim for civil authority coverage should be dismissed for failure to state a claim. Defendant presents two arguments in support of dismissal. Defendant first contends that civil authority coverage requires "direct physical loss to property other than the Plaintiffs' property," and that "[j]ust as the Coronavirus is not causing direct physical loss to Plaintiffs' premises, it is not causing direct physical loss to other property." (Doc. #21, p. 27.)

This argument is rejected for substantially the same reasons as discussed above. Plaintiffs adequately allege that they suffered a physical loss, and such loss is applicable to other property. Additionally, Plaintiffs allege that civil authorities issued closure and stay at home orders throughout Missouri and Kansas, which includes property other than Plaintiffs' premises.

Defendant's second argument is that civil authority coverage "requires that access to Plaintiffs' premises be prohibited by

an order of Civil Authority. But, none of the orders Plaintiffs allege prohibit access to their premises. To the contrary, the Plaintiffs admit ... that the Closure Orders allowed restaurant premises to remain open for food preparation, take-out and delivery. Likewise, Plaintiffs concede that the Closure Orders did not prohibit access to salon premises." (Doc. #21, pp. 28-29) (citations omitted).

Upon review of the record, the Court finds that Plaintiffs have adequately alleged that their access was prohibited. With respect to Studio 417's hair salons, the Amended Complaint alleges that a Closure Order "required hair salons and all other businesses that provide personal services to suspend operations." (Doc. #16, ¶ 67.) With respect to Plaintiffs' restaurants, the Closure Orders mandated "that all inside seating is prohibited in restaurants," and that "every person in the State of Missouri shall avoid eating or drinking at restaurants," with limited exceptions for "drive-thru, pickup, or delivery options." (Doc. #16, ¶¶ 71-80.)

At the motion to dismiss stage, these allegations plausibly allege that access was prohibited to such a degree as to trigger the civil authority coverage. *Compare* *TMC Stores, Inc. v. Federated Mut. Ins. Co.*, No. A04-1963, 2005 WL 1331700, at * 4 (Minn. Ct. App. June 7, 2005) ("Because access remained and the level of business was not dramatically decreased, the civil authority section of the insurance policy is inapplicable and the district court did not err in granting summary judgment."). This is particularly true insofar as the Policies require that the "civil authority prohibits access," but does not specify "all access" or "any access" to the premises. For these reasons, Plaintiffs have adequately stated a claim for civil authority coverage.

C. Plaintiffs Have Plausibly Stated a Claim for Ingress and Egress Coverage.

[13] Defendant argues that Plaintiffs' claim for ingress and egress coverage should be dismissed for two reasons. First, Defendant argues that such coverage "requires both a direct physical loss at a location contiguous to the insured's property and the prevention of access to the insured's property as a result of that direct physical loss," and that Plaintiffs fail to allege a direct physical loss to any location. (Doc. #21, p. 30.) For substantially the same reasons discussed above, this argument is rejected.

Second, Defendant argues that this "coverage does not apply if ingress or egress from the 'premises' is prohibited by civil authority." (Doc. #21, p. 24; Doc. #1-1, p. 95.) Defendant contends that "[h]ere, the Closure Orders issued by civil authorities are the only identified causes of Plaintiffs' alleged losses." (Doc. #21, p. 30.) However, Plaintiffs have alleged that both COVID-19 and the Closure Orders rendered the premises unsafe for ingress and egress. (Doc. #1-1, p. 3, ¶ 14 ("Plaintiffs were forced to suspend or reduce business at their covered premises due to COVID-19 and the ensuing orders issued by civil authorities[.]"). The Court finds that Plaintiffs have adequately stated a claim for ingress and egress coverage.

D. Plaintiffs Have Plausibly Stated a Claim for Dependent Property Coverage.

***8** **[14]** Defendant argues that Plaintiffs' claim for dependent property coverage should be dismissed for two reasons. First, Defendant argues that this coverage "requires both a direct physical loss to dependent property and a necessary suspension of the insured's business as a result of that direct physical loss." (Doc. #21, p. 30.) Defendant contends that "[h]ere, again, the [Amended] Complaint does not allege any facts that show direct physical loss at any location, let alone a dependent property." (Doc. #21, pp. 30-31.) For substantially the same reasons discussed above, this argument is rejected.

Second, Defendant argues that Plaintiffs have failed to adequately allege a suspension of their businesses because of the lack of material or services from a "dependent property." (Doc. #21, pp. 30-31.) As stated above, dependent property is defined as "property operated by others whom [the insured] depend[s] on to ... deliver materials or services to [the insured] ... [a]ccept [the insured's] products or services ... [or] [a]ttract customers to [the insured's] business." (Doc. #1-1, p. 64.) The Amended Complaint adequately alleges that Plaintiffs suffered a loss of materials, services, and lack of customers as a result of COVID-19 and the Closure Orders. The Court therefore finds that Plaintiffs have adequately stated a claim for dependent property coverage.

E. Plaintiffs Have Plausibly Stated a Claim for Sue and Labor Coverage.

[15] Finally, Defendant moves to dismiss Plaintiffs' claim for sue and labor coverage. Defendant argues that this is not an additional coverage, but instead imposes a duty on the insured to prevent further damage and to keep a record of expenses incurred in the event of a covered loss. Defendant argues that because Plaintiffs have failed to adequately allege a covered loss, a claim has not been stated for this coverage.

However, regardless of the title of this claim, Defendant acknowledges that in the event of a covered loss, "the insured can recover these expenses[.]" (Doc. #21, p. 31.) As discussed above, the Court finds that Plaintiffs have adequately stated a claim for a covered loss. Moreover, Plaintiffs allege that in complying with the Closure Orders and by suspending operations, they "incurred expenses in connection with reasonable steps to protect Covered Property." (Doc. #16, ¶ 250.) Consequently, the Court finds that Plaintiffs have adequately stated a claim for sue and labor coverage.

In sum, Defendant's motion to dismiss will be denied in its entirety. The Court emphasizes that Plaintiffs have merely pled enough facts to proceed with discovery. Discovery will shed light on the merits of Plaintiffs' allegations, including the nature and extent of COVID-19 on their premises. In addition, the Court emphasizes that all rulings herein are subject to further review following discovery. Subsequent case law in the COVID-19 context, construing similar insurance provisions, and under similar facts, may be persuasive. If warranted, Defendant may reassert its arguments at the summary judgment stage.

IV. CONCLUSION

Accordingly, Defendant The Cincinnati Insurance Company's Motion to Dismiss (Doc. #20) is DENIED.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 4692385

Footnotes

1 The Amended Complaint is 54 pages long and contains 253 separate allegations. This Order only discusses those allegations and issues necessary to resolve the pending motion.

2 All page numbers refer to the pagination automatically generated by CM/ECF.

3 Defendant notes that Kansas law may apply to one policy, but contends that Missouri and Kansas law are indistinguishable for purposes of the pending motion. (Doc. #21, p. 13 n.10.) Plaintiffs do not challenge this assertion. For purposes of this Order, the Court assumes that Missouri law applies.

4 *See also* Scott G. Johnson, "*What Constitutes Physical Loss or Damage in a Property Insurance Policy?*" 54 Tort Trial & Ins. Prac. L.J. 95, 96 (2019) ("[W]hen the insured property's structure is unaltered, at least to the naked eye ... [c]ourts have not uniformly interpreted the physical loss or damage requirement[.]")

5 Defendant also relies on *Gavrilides Mgmt. Co., LLC v. Michigan Ins. Co.*, Case No. 20-258-CB (Ingham County, Mich. July 1, 2020) (transcript regarding defendant's motion for summary disposition). (Doc. #37-2.) *Gavrilides* is distinguishable, in part, because the court recognized that "the complaint also states a[t] no time has Covid-19 entered the Soup Shop of the Bistro ... and in fact, states that it has never been present in either location." (Doc. #37-2, p. 21.)

6 Defendant argues that COVID-19 does not present a physical loss because "the virus either dies naturally in days, or it can be wiped away." (Doc. #21, pp. 24-25.) However, as stated, a physical loss has been adequately alleged insofar as the presence of COVID-19 and the Closure Orders prohibited or significantly restricted access to Plaintiffs' premises. *See Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at * 6 (D.N.J. Nov. 25, 2014) (recognizing that "courts considering non-structural property damage claims have found that buildings rendered uninhabitable by dangerous gases or bacteria suffered direct physical loss or damage"). Defendant also argues that Plaintiffs have failed to adequately allege that COVID-19 was actually present on their premises. Based on Plaintiffs' allegations, and because of COVID-19's wide-spread, this argument is also rejected.

7 Although it appears to be persuasive, the Court need not address Defendant's additional argument that the Amended Complaint fails to allege "physical damage."

2020 WL 6801845
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

T & E CHICAGO LLC, individually, and on behalf of all others similarly situated, Plaintiff,
v.
THE CINCINNATI INSURANCE COMPANY, Defendant.

Case No. 20 C 4001
|
11/19/2020

Harry D. Leinenweber, Judge, United States District Court

MEMORANDUM OPINION AND ORDER

***1** For the reasons stated herein, the Court grants Defendant's Motion to Dismiss Plaintiff's Complaint. (Dkt. No. 11.)

I. BACKGROUND

Plaintiff T & E Chicago, LLC is the owner-operator of a tavern located in the Logan Square neighborhood of Chicago, Illinois. (Compl. ¶ 1, Dkt. No. 1.) On March 15, 2020, due to the COVID-19 global pandemic, Illinois Governor J. B. Pritzker issued an order closing all "non-essential businesses" to the public. (*Id.* ¶ 10.) This order has been extended several times. (*Id.*) As a result of these closure orders, Plaintiff, a non-essential business, was forced to close and lost substantial revenue. (*Id.* ¶ 11.)

On or about July 20, 2019, Plaintiff obtained "business interruption insurance" from Defendant and paid the required premium. (*Id.* ¶¶ 13 & 15, *see also* Policy, Compl., Ex. A, Dkt. No. 1-1.) The coverage extended one year, until July 20, 2020. (Compl. ¶ 13.) Plaintiff alleges the business interruption insurance was part of an "all risks" policy, providing coverage for any risk except those that are specifically excluded. (*Id.* ¶ 15.) As a result of its business interruption and the resulting loss of income caused by the COVID-19 closure orders, Plaintiff filed a claim with Defendant. (*See id.* ¶ 16.)

After receiving Plaintiff's claim, Defendant issued a blanket denial for any losses resulting from the COVID-19 pandemic and the Governor's closure orders. (*Id.*) Its denial letter asserted that Plaintiff's losses were not covered because the reason preventing Plaintiff from operating its business did not result from "direct physical damage" or "direct physical loss" to Plaintiff's property. (*Id.* ¶ 17; *see also* 4/15/20 Letter, Compl., Ex. B, Dkt. No. 1-2.)

"All risks" policies differ from policies that cover only specified risks, like hurricanes or earthquakes. (Compl. ¶¶ 65–66.) Despite referring to its policy as an "all risks" policy, Plaintiff acknowledges that the policy does not actually cover "all risks." (*Id.* ¶ 67.) Indeed, the policy provides for specific exclusions. (*Id.*) Thus, if an exclusion does not apply the risk is covered and if an exclusion applies then the risk is not covered. (*Id.*)

The specific provisions involved are:

> **SECTION A. COVERAGE**.
>
> We will pay for direct "loss" to Covered Property at the "premises" caused by or resulting from any Covered Cause of Loss.
>
> * * *
>
> **(1) Business Income**
>
> We will pay for the actual loss of "Business Income" and "Rental Value" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss. With respect to "loss" to personal property in the open or personal property in a vehicle or portable storage unit, the "premises" include the area within 1,000 feet of the building or 1,000 feet of the "premises", whichever is greater.
> * * *
>
> **(2) Extra Expense**
>
> **(a)** We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain (as described in Paragraphs **(2)**

*2 **(b), (c)** and **(d)**) during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.

(b) If these expenses reduce the otherwise payable "Business Income" "loss", we will pay expenses (other than the expense to repair or replace property as described in Paragraph **(2)(c)**) to:
1) Avoid or minimize the "suspension" of business and to continue "operations" either:

a) At the "premises"; or

b) At replacement "premises" or temporary

locations, including relocation expenses and costs to equip and operate the replacement location or temporary location; or
2) Minimize the "suspension" of business if you cannot continue "operations".

(c) We will also pay expenses to:

1) Repair or replace property; or

2) Research, replace or restore the lost

information on damaged "valuable papers and records";

but only to the extent this payment reduces the otherwise payable "Business Income" "loss". If any property obtained for temporary use during the "period of restoration" remains after the resumption of normal "operations", the amount we will pay under this Coverage will be reduced by the salvage value of that property.

(d) Extra Expense does not apply to "loss" to Covered Property as described in the **BUILDING AND PERSONAL PROPERTY COVERAGE FORM**.

(Policy at 31 & 46–47.) The Illinois Business Income endorsement also provides additional separate Business Income and Extra Expense coverage grants, utilizing the same language. (*See id.* at 91–99.)

The policy's definitions section defines the term loss as "accidental physical loss or accidental physical damage." (*Id.* at 66.) The policy also contains a provision covering loss caused by civil authority as follows:

When a Covered Cause of Loss causes damage to property other than Covered Property at a "premises", we will pay for the actual loss of "Business Income" and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the "premises", provided that both of the following apply:

(a) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and

(b) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

This Civil Authority coverage for "Business Income" will begin immediately after the time of that action and will apply for a period of up to 30 days from the date of that action.

This Civil Authority coverage for Extra Expense will begin immediately after the time of that action and will end:

1) 30 consecutive days after the time of that action; or

2) When your "Business Income" coverage ends; whichever is later.

(*Id.* at 47.) Further, the Illinois Business Income endorsement provides additional, separate civil authority coverage as follows:

b. Civil Authority

When a Covered Cause of Loss causes direct damage to property other than Covered Property at the "premises", we will pay for the actual loss of "Business Income" you sustain and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the "premises", provided that both of the following apply:
*3 **(1)** Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority coverage for "Business Income" will begin immediately after the time of the first action of civil authority that prohibits access to the "premises" and will apply for a period of up to 30 consecutive days from the date on which such coverage began.

Civil Authority coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the "premises" and will end 30 consecutive days after the date of that action; or when your Civil Authority coverage for "Business income" coverage ends, whichever is later.
(*Id.* at 92.)
After Defendant's denial letter, Plaintiff filed a four-count putative class action complaint. Count One seeks a declaratory judgment, Count Two alleges breach of contract, Count Three alleges breach of the duty of good faith and fair dealing, and Count Four alleges bad faith denial of insurance under Illinois state law. Defendant now moves to dismiss the Complaint pursuant to FED. R. CIV. P. 12(b)(6).

II. LEGAL STANDARD

A Rule 12(b)(6) motion challenges the legal sufficiency of the complaint. To survive a Rule 12(b)(6) motion, the allegations in the complaint must meet a standard of "plausibility." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court will accept all well-pleaded factual allegations as true and construes all reasonable inferences in the plaintiff's favor. *Marshall-Mosby v. Corp. Receivables, Inc.*, 205 F.3d 323, 326 (7th Cir. 2000). "If it is possible to hypothesize a set of facts, consistent with the complaint, that would entitle the plaintiff to relief, dismissal under Rule 12(b)(6) is inappropriate." *Alper v. Altheimer & Gray*, 257 F.3d 680, 684 (7th Cir. 2001) (citations omitted).

III. DISCUSSION

The parties agree that in this diversity case the choice of law favors Illinois. *See Lapham-Hickey Steel Corp. v. Prot. Mut. Ins. Co.*, 655 N.E.2d 842, 844–45 (Ill. 1995). The proper construction of the policy is a question of law and the primary objective is to ascertain and give effect to the intentions of the parties as expressed in the policy. *Am. States Ins. Co. v. Koloms*, 687 N.E.2d 72, 75 (Ill. 1997). If a policy term is susceptible to more than one reasonable interpretation, it is ambiguous and will be construed in favor of the insured. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1212 (Ill. 1992). However, a policy provision is not ambiguous solely because the parties disagree about its interpretation. *Founders Ins. Co. v. Munoz*, 930 N.E.2d 999, 1004 (Ill. 2010).

***4** On this motion, Defendant argues the Court should dismiss the Complaint because the Plaintiff has not alleged a direct physical loss or damage to property. Defendant contends the policy indemnifies against loss or damage to *property* while an infectious disease like COVID-19 damages *people*. The Business Income, Extra Expense, and Civil Authority coverages likewise apply only to income losses tied to physical loss or damage to property and not losses incurred to protect the public from disease. Thus, without direct physical loss or damage to property, Defendant argues that coverage is not available.

Plaintiff responds, arguing that the policy covers both physical loss and physical damage, which Defendant incorrectly treats as synonymous. The policy does not define either term, and to equate the two would render one or the other superfluous. *See* 11 Williston on Contracts § 32:5 (4th ed.) ("An interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable.").

Next, Plaintiff argues that an average person would interpret the phrase "accidental physical loss" to include a sudden inability by the insured to use the property that was previously useable. Plaintiff claims that it is entitled to coverage under the Civil Authority provision for the same reason: it has lost the physical use of its property. Plaintiff also points out that Defendant did not avail itself of an "Exclusion for Loss Due to Virus or Bacteria" endorsement developed in 2006 by the Insurance Services Office, a nonprofit corporation composed of insurance companies. (Resp. at 9, Dkt. No. 19 (citing ISO Form CP 01 40 07 06).) Finally, Plaintiff argues that, at worst, the policy provision is ambiguous and must be construed in favor of the insured, thus providing coverage.

In reply the Defendant points out that the policy clearly applies only to situations where there is "direct physical

loss or damage to property" and not to "purely financial losses." (Reply at 2, Dkt. No. 20.) Additionally, there are a multitude of cases, including two from Illinois, that have since been decided to interpret policy provisions like these as not providing coverage for COVID-19-related losses.

Defendant is correct—this issue has been the subject of numerous decisions issued by various state and federal courts in the United States, including Illinois. As Defendant points out, most of these decisions, including the two from Illinois, have found for the insurance companies. These decisions found no coverage for business closures resulting from civil authority closure orders. For example, a case in this District —*Sandy Point Dental, PC v. Cincinnati Insurance Company*, 20CV2160, 2020 WL 5630465 (N.D. Ill. Sept 21, 2020)— was decided in favor of the defendant insurance carrier. Plaintiff acknowledges this decision, but argues that it was "wrongfully decided." (Resp. at 19.) Similarly, in a recent Illinois state court decision, the court interpreted the language "loss to" to require a physical loss to the property itself, not including the loss of use of the property to the insured. *It's Nice, Inc. v. State Farm Fire and Cas. Co.*, No. 2020L000547 (Ill. Cir. Ct. Sept. 29, 2010).

There are other cases deciding against coverage for losses resulting from closure orders under similar policy provisions. *See, e.g.*, *Diesel Barbershop, LLC, et al. v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020); *Gavrilides Mgmt. Co. v. Mich. Ins Co.*, No 20-258-CB, 2020 WL 4561979 (Mich. Cir. Ct. July 21, 2020); *Rose's 1, LLC v. Erie Ins. Exch.*, No. 2020 CA 002424 B., 2020 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020); *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, l:20-CV-275-JB-B, 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020); *UnCork and Create LLC v. Cincinnati Ins. Co.*, 2:20-cv-00401, 2020 WL 6436948 (S.D. W.Va. Nov 2, 2020); *Raymond H. Nahmad, DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-cv-22833-BLOOM/Louis, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020). True, there have been decisions to the contrary, including those cited by Plaintiff. *See, e.g.*, *North State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507 (N.C. Super. Ct. Oct. 9, 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 20-cv-03127-SRB, 2020 WL 4692385 (W.D. Mo., Aug 12, 2020). The Court notes though that the Central District of California explicitly declined to follow *Studio 417* in *West Coast Hotel Mgmt., LLC v Berkshire Hathaway Guard Ins. Co.*, 2:20-cv-05663-VAP-DFMx, 2020 WL 6440037, at *4 n.4 (C.D. Cal. Oct. 27, 2020), and interpreted the insurance policy at issue in favor of the insurance company.

***5** The Court sympathizes with Plaintiff. Nevertheless, the policy's phrasing requires the Court to find in Defendant's favor. The Court agrees with the courts that have found that loss of use of property without any physical change to that property cannot constitute direct physical loss or damage to the property. The policy's use of "loss to" versus "loss of" phrasing supports this conclusion. (*See* Policy at 46 (covering "direct 'loss' to property").) In addition, the provision of coverage for a "period of restoration," see *id.*, clearly implies a requirement of loss to property rather than loss of property. Defendant's interpretation is the correct one.

There being no coverage under the policy, the Court must dismiss Count One. Because the remaining counts, Counts Two, Three, and Four, rely on an interpretation of Defendant's policy that the Court cannot accept, the Court also dismisses Counts Two, Three and Four.

IV. CONCLUSION

For the foregoing reasons, the Court grants Defendant's Motion to Dismiss Plaintiff's Complaint. (Dkt. No. 11.)

IT IS SO ORDERED.

Harry D. Leinenweber, Judge

United States District Court

Dated: 11/19/2020

All Citations

Slip Copy, 2020 WL 6801845

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IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

TAPS & BOURBON ON TERRACE, LLC *Plaintiff*	:	**JULY TERM, 2020**
	:	**NO. 00375**
v.	:	
	:	**COMMERCE PROGRAM**
UNDERWRITERS AT LLOYDS LONDON and MAIN LINE INSURANCE OFFICES, INC.	:	**CONTROL NO. 20093025**
Defendants	:	

ORDER

AND NOW, this 26th day of October, 2020, upon consideration of defendant Certain Underwriters at Lloyd's, London's, improperly identified as "Those Certain Underwriters at Lloyd's London" preliminary objections to plaintiff's complaint, and any response thereto, it is hereby

ORDERED

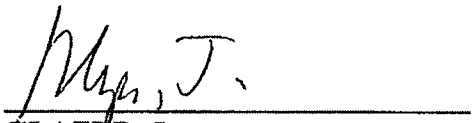
that the preliminary objections are **OVERRULED.**[1]

[1] Pursuant to Pa. R.C.P. 1028(a)(4), a party may raise a preliminary objection due to legal insufficiency of a pleading (demurrer). When considering preliminary objections, all material facts and reasonable inferences set forth must be admitted as true. Haun v. Cmty. Health Sys. Inc., 14 A.3d 120, 123 (Pa. Super. 2011) (citation omitted). A court may not consider facts that are not contained within the challenged pleading. See Detweiler v. School Dist. Of Borough of Hatfield, et al., 104 A.2d 110, 113 (Pa. 1954).

This litigation arises from the denial of insurance coverage for business losses as a result of the COVID-19 pandemic and the resulting state and local orders mandating that all non-essential businesses be temporarily closed. In the instant preliminary objections, defendant alleges that plaintiff's claim is not covered under the policy because, *inter alia*, there is no "direct physical loss" or "damage to" the property, the civil authority coverage provision does not apply, and the virus exclusion provision precludes coverage. Additionally, defendant alleges that since the claim is not covered, a bad faith claim cannot survive.

At this very early stage, it would be premature for this court resolve the factual determinations put forth by defendant to dismiss plaintiff's claims. Taking the factual allegations made the plaintiff's complaint as true, as this court must at this time, plaintiff has successfully

BY THE COURT:



GLAZER, J.

pled to survive this stage of the proceedings. Moreover, the law and facts are rapidly evolving in the area of COVID-19 related business losses. Accordingly, the preliminary objections are overruled.

2020 WL 5258484
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Northern Division.

TUREK ENTERPRISES, INC., d/b/a Alcona Chiropractic, Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, State Farm Fire and Casualty Company, Defendants.

Case No. 20-11655
|
Signed 09/03/2020

Attorneys and Law Firms

Andrew Kochanowski, Jason J. Thompson, Robert B. Sickels, Sommers Schwartz, P.C., Southfield, MI, Jennifer M. Grieco, Stephen T. McKenney, Kenneth F. Neuman, Altior Law, P.C., Birmingham, MI, for Plaintiff.

Matthew P. Allen, Thomas W. Cranmer, Miller, Canfield, Paddock and Stone, PLC, Troy, MI, Paul D. Hudson, Miller, Canfield, Paddock & Stone, P.L.C., Kalamazoo, MI, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE

THOMAS L. LUDINGTON, United States District Judge

***1** On June 23, 2020, Plaintiff Turek Enterprises, Inc., d/b/a Alcona Chiropractic, filed a complaint against Defendants State Farm Mutual Automobile Insurance Company ("State Farm Automobile") and State Farm Fire and Casualty Company ("State Farm Casualty"), on behalf of itself and all others similarly situated. Plaintiff alleges that Defendants failed to compensate Plaintiff's loss of income and extra expense as required by an insurance contract between the parties. Plaintiff seeks damages for breach of contract as well as a declaratory judgment that the insurance contract covers the loss of income and extra expense incurred by Plaintiff and all others similarly situated. On July 15, 2020, Defendants moved to dismiss the complaint for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). ECF No. 12. Timely response and reply briefs were filed. ECF Nos. 16, 19. For the reasons stated below, the motion to dismiss will be granted, and the complaint will be dismissed with prejudice.

I.

Plaintiff is a Michigan corporation operating a chiropractic office in Alcona County, Michigan. ECF No. 1 at PageID.5. State Farm Casualty and State Farm Automobile are both Illinois corporations with headquarters in Chicago, Illinois. *Id.* at PageID.6. State Farm Casualty is licensed to operate in Michigan, where it sells insurance to businesses like Plaintiff. *Id.* On May 22, 2019, Plaintiff entered into a one-year term, "all-risk" insurance contract (the "Businessowners Insurance Policy" or the "Policy") with State Farm Casualty. *Id.* at PageID.5.

A.

The first section of the Policy, entitled "Section I – Property," contains the general terms and limits of coverage and includes two important subsections, "Section I – Covered Cause of Loss" and "Section I – Exclusions."[1] ECF No. 12-4 at PageID.171–73. Pursuant to Section I – Covered Cause of Loss, the Policy "insur[es] for accidental direct physical loss to Covered Property," unless the loss is excluded by Section I – Exclusions or limited in the "Property Subject to Limitations" provision. *Id.* at PageID.172.

The Policy divides "Covered Property" into two groups, "Coverage A – Buildings" and "Coverage B – Business Personal Property." *Id.* at PageID.171. The two groups broadly cover the personal property and buildings used in the insured's business, with some limitations provided in the subsection "Property Not Covered." *Id.* The Policy also covers loss of income and extra expense (commonly referred to as "business interruption losses") through an endorsement to the Policy identified as "CMP-4905.1 Loss of Income and Extra Expense" (the "Endorsement"):

1. Loss of Income

   a. We will pay for the actual "Loss of Income" you sustain due to the necessary "suspension" of your

"operations" during the "period of restoration". The "suspension" must be caused by accidental direct physical loss to property at the described premises. The loss must be caused by a Covered Cause Of Loss...

2. Extra Expense

***2** a. We will pay necessary "Extra Expense" you incur during the "period of restoration" that you would not have incurred if there had been no accidental direct physical loss to property at the described premises. The loss must be caused by a Covered Cause Of Loss...

[...]

4. Civil Authority

a. When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual "Loss Of Income" you sustain and necessary "Extra Expense" caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause Of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

ECF No. 1 at PageID.63–64 (bolding omitted).[2] This coverage is provided "subject to the provisions of Section I – Property," which includes Section I – Exclusions. ECF No. 1 at PageID.63. Section I – Exclusions provides a lengthy list of exclusions under the Policy. The section provides, in relevant part:

1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the other excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

[...]

j. Fungi, Virus, Or Bacteria

(1) Growth, proliferation, spread or presence of "fungi" or wet or dry rot; or

(2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness, or disease; and

(3) We will also not pay for:

(a) Any loss of use or delay in rebuilding, repairing or replacing covered property, including any associated cost or expense, due to interference at the escribed premises or location of the rebuilding, repair, or replacement of that property, by "fungi", wet or dry rot, virus, bacteria or other microorganism.

(b) Any remediation of "fungi", wet or dry rot, virus, bacteria or other microorganism...

(c) The cost of any testing or monitoring of air or property to confirm the type, absence, presence or level of "fungi", wet or dry rot, virus, bacteria or other microorganism, whether performed prior to, during or after removal, repair, restoration or replacement of Covered Property.

***3** This exclusion does not apply if "fungi", wet or dry rot, virus, bacteria or other microorganism results from an accidental direct physical loss caused by fire or lightning.

ECF No. 12-4 at PageID.173–74 (emphasis omitted). The first numbered paragraph is referred to as the "Anti-Concurrent Causation Clause." The subsection governing fungi, viruses, and bacteria is referred to as the "Virus Exclusion."[3] Insurers began to add the Virus Exclusion and similar terms to contracts in 2006, after the severe acute respiratory syndrome ("SARS") outbreak. ECF No. 1 at PageID.16–17, 92. A 2006 Insurance Services Office circular (the "ISO circular") explained that insurers were "presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms."[4] *Id.* at PageID.93.

B.

The first recorded case of the 2019 novel coronavirus ("COVID-19") in Michigan was reported on March 10, 2020. The next day, the World Health Organization declared COVID-19 a pandemic. On March 24, 2020, the Governor of the State of Michigan issued Executive Order 2020-21 (the "Order"). ECF No. 1 at PageID.2. The Order is entitled "Temporary requirement to suspend activities that are not necessary to sustain or protect life." ECF No. 16-4. The Order states, in relevant part:

> To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible.
>
> This order takes effect on March 24, 2020 at 12:01 am, and continues through April 13, 2020 at 11:59 pm.
>
> Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:
>
> [...]
>
> 4. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life or to conduct minimum basic operations.

Id. at PageID.424–25. On May 21, 2020, the Order was amended to require that businesses like Plaintiff's perform structural alterations to the premises before resuming operations. ECF No. 1 at PageID.13.

C.

On March 24, 2020, Plaintiff suspended all business operations in compliance with the Order. As a result, Plaintiff lost the use of its Covered Property until at least May 28, 2020.[5] ECF No. 1 at PageID.12–14. On May 22, 2020, Plaintiff renewed the Policy with State Farm Casualty for a new term expiring on May 22, 2021. *Id.* at PageID.5. On June 4, 2020, Plaintiff made a claim with State Farm Casualty for loss of income and extra expense as a result of the Order. *Id.* at PageID.15, 81. State Farm Casualty denied Plaintiff's claim in writing, stating:

> This is a follow up to our conversation on 06-04-20. You are making a claim for Loss of Income due to COVID-19. You advised that you [sic] business has been affected by the government mandate related to COVID-19 as you have been only able to do emergency services because of this mandate. Our investigation indicates that the insured property has not sustained accidental direct physical loss. There are exclusions for virus [sic], enforcement of ordinance or law, and consequential losses...

***4** *Id.* at PageID.81. The letter then recited the terms of the Policy described above, specifically Section I – Covered Cause of Loss, Section I – Exclusions, and the Endorsement. *Id.*

D.

On June 23, 2020, Plaintiff filed a complaint against Defendants on behalf of itself and all others similarly situated. ECF No. 1. Plaintiff alleges that Defendants breached the Policy by failing to cover Plaintiff's loss of income and extra expense incurred by compliance with the Order. *Id.* Plaintiff contends that such losses fall within the Loss of Income, Extra Expense, and Civil Authority sections of the Endorsement. *Id.* at PageID.14. With respect to the Virus Exclusion, Plaintiff maintains that the Order was the sole cause of its losses. *Id.* at PageID.14–15.The Order, according to Plaintiff, was issued "to ensure the *absence* of the virus, or persons carrying the virus, from the Plaintiff's premises," and "there is no evidence at all that the virus did enter Plaintiff's property or that it had to be de-contaminated." *Id.* at PageID.4, 17 (emphasis in original).

Plaintiff also alleges that Defendants have issued "hundreds or thousands" of identical or substantially similar policies to businesses across Michigan. *Id.* at PageID.10. Plaintiff alleges that these businesses, like Plaintiff, have suffered losses from the Order that Defendants have wrongly refused to cover. *Id.* at PageID.13. Accordingly, Plaintiff seeks damages for its losses and a declaratory judgment that the Policy covers the loss of income and extra expense sustained. *Id.* at PageID.38–39. Plaintiff seeks this relief on behalf of itself and three proposed classes that correspond to types of Endorsement coverage: The Loss of Income Coverage Class, the Extra Expense Coverage Class, and the Civil Authority Coverage

Class. *Id.* Counts I, III, and V are for declaratory relief. Counts II, IV, and VI are for breach of contract.

On July 15, 2020, Defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. ECF No. 15. Plaintiff filed a timely response, to which Defendants replied. ECF Nos. 16, 19.

II.

A.

Under Rule 12(b)(6), a pleading fails to state a claim if it does not contain allegations that support recovery under any recognizable theory. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In considering a Rule 12(b)(6) motion, the Court construes the pleading in the non-movants' favor and accepts the allegations of facts therein as true. *See Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008). The pleader need not provide "detailed factual allegations" to survive dismissal, but the "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In essence, the pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" and "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 679–79 (quotations and citation omitted).

B.

***5** Plaintiff asserts federal diversity jurisdiction pursuant to 28 U.S.C. § 1332, so Michigan law applies. Michigan's principles of contract interpretation are well-settled. "[A]n insurance contract must be enforced in accordance with its terms." *Henderson v. State Farm Fire & Cas. Co.*, 596 N.W.2d 190, 193 (Mich. 1999). "Terms in an insurance policy must be given their plain meaning and the court cannot create an ambiguity where none exists." *Heniser v. Frankenmuth Mut. Ins. Co.*, 534 N.W.2d 502, 505 (Mich. 1995) (internal quotation marks omitted). Michigan defines "an ambiguity in an insurance policy to include contract provisions capable of conflicting interpretations." *Auto Club Ins. Ass'n v. DeLaGarza*, 444 N.W.2d 803, 805 (Mich. 1989). Ambiguous terms "are construed against its drafter and in favor of coverage." *Id.* at 806.

"Michigan courts engage in a two-step analysis when determining coverage under an insurance policy: (1) whether the general insuring agreements cover the loss and, if so, (2) whether an exclusion negates coverage." *K.V.G. Properties, Inc. v. Westfield Ins. Co.*, 900 F.3d 818, 821 (6th Cir. 2018) (citing *Auto-Owners Ins. Co. v. Harrington*, 565 N.W.2d 839, 841 (Mich. 1997)). Policy provisions, such as exclusions, are valid "as long as [they are] clear, unambiguous and not in contravention of public policy." *Harrington*, 565 N.W.2d at 841 (internal quotation marks omitted).

III.

Defendants' principal argument is that Plaintiff's business interruption losses were not caused by a Covered Cause of Loss. Specifically, Defendants argue (1) that Plaintiff's losses are not the result of an "accidental direct physical loss to Covered Property," and (2) that even if they were, they are excluded by the Virus Exclusion or some other exclusion, such as the Ordinance or Law, Acts or Decisions, or Consequential Losses exclusions. ECF No. 12 at PageID.133–43. Defendants further argue that Plaintiff's request for declaratory relief is redundant, and that State Farm Automobile was not a party to the Policy. *Id.* at PageID.151–52. The parties also dispute the applicability of the Loss of Income, Extra Expense, and Civil Authority sections of the Endorsement, but these disputes are tangential because the applicability of each section turns on whether Plaintiff has alleged a Covered Cause of Loss. *See* ECF No. 1 at PageID.63–64.[6]

A.

The threshold question is whether Plaintiff suffered an "accidental direct physical loss to Covered Property." The Policy does not define the term "direct physical loss," and the parties offer different interpretations. Defendants contend that the term requires "tangible damage" to Covered Property, like the damage one could expect from a fire. ECF No. 12 at PageID.139–40. Plaintiff offers the broader interpretation that "direct physical loss" includes "loss of use." ECF No. 16 at PageID.302–03. Under this view, any event rendering Covered Property "unusable or uninhabitable" would trigger

coverage, regardless of whether any tangible damage to the property resulted. *Id.* Importantly, Plaintiff is adamant that COVID-19 never entered its premises. ECF No. 1 at PageID.17. According to Plaintiff, its loss of income and extra expense arise only from its suspension of operations in compliance with the Order. *Id.* at PageID.3. As a result, Plaintiff's entire case turns on the construction of "direct physical loss."[7]

***6** While Michigan courts have not interpreted the term "direct physical loss," the Sixth Circuit Court of Appeals interpreted a similar term in *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 572 (6th Cir. 2012). In *Universal*, the plaintiff brought action against its insurer, alleging that it suffered a "direct physical loss or damage to" property after it was forced to vacate its building for mold remediation. *Universal*, 475 F. App'x at 572. The district court found that "direct physical loss or damage" required "tangible damage" and entered summary judgment for the defendants. *Id.* at 571. The Sixth Circuit affirmed, noting that "[the plaintiff] did not experience any form of 'tangible damage' to its insured property" and that its losses were not "physical losses, but economic losses." *Id.* at 573. In so holding, the Sixth Circuit found *de Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714 (Tex. App. 2005), to be persuasive. In *de Laurentis*, the Texas Court of Appeals held that "physical loss" required "tangible damage" after analyzing the dictionary definitions of "physical" and "loss." *De Laurentis*, 162 S.W.3d at 723. *De Laurentis* "provid[ed] insight into how the Michigan courts would interpret the phrase 'direct physical loss' " because the Michigan Court of Appeals had previously relied on *de Laurentis* to interpret the word "direct." *Universal*, 475 F. App'x at 573.

As Plaintiff correctly notes, the Sixth Circuit considered the possibility that Michigan courts would reach a different interpretation of "direct physical loss." *Id.* at 574 (collecting cases holding that " 'physical loss' occurs when real property becomes 'uninhabitable' or substantially 'unusable' "). Contrary to Plaintiff's suggestion, however, the Sixth Circuit did not "approve" of Plaintiff's interpretation and, in fact, held that "even if Michigan were to adopt it," the *Universal* plaintiff would "still not be entitled to coverage." *Id.* Moreover, the term in this case presents a stronger argument for Defendants than the term in *Universal*. The 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." *See Klapp v. United Ins. Grp. Agency, Inc.*, 663 N.W.2d 447, 453 (Mich. 2003) ("[C]ourts must [ ] give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.").

Furthermore, Defendants offer the only interpretation resembling the "plain and ordinary meaning" of "direct physical loss." *See McGrath v. Allstate Ins. Co.*, 802 N.W.2d 619, 622 (Mich. App. 2010) (citing *Citizens Ins. Co. v. Pro-Seal Serv. Grp., Inc.*, 730 N.W.2d 682, 687 (Mich. 2007)) (internal citations omitted). Michigan courts determine a word's ordinary meaning by consulting a dictionary. *Id.* Merriam-Webster Dictionary defines "physical" as "having material existence; perceptible especially through the senses and subject to the laws of nature." *Physical, Merriam-Webster*, https://www.merriam-webster.com/dictionary/physical (last visited Aug. 31, 2020). Here, "physical" is an adjective modifying "loss," which is defined as, *inter alia*, "destruction, ruin," "the act of losing possession," and "a person or thing or an amount that is lost." *Loss, Merriam-Webster*, https://www.merriam-webster.com/dictionary/loss (last visited Aug. 31, 2020).

Plaintiff suggests that "physical loss to Covered Property" includes the inability to use Covered Property. ECF No. 16 at PageID.306. This interpretation seems consistent with one definition of "loss" but ultimately renders the word "to" meaningless.[8] "To" is used here as a preposition indicating contact between two nouns, "direct physical loss" and "Covered Property." *To, Merriam-Webster*, https://www.merriam-webster.com/dictionary/to (last visited Aug. 31, 2020). 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*.[9] Plaintiff's interpretation would be plausible if, instead, the term at issue were "accidental direct physical loss *of* Covered Property."[10] *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.' ") (emphasis original).

***7** Defendants' interpretation is also consistent with recent COVID-19-related cases interpreting similar or identical terms. In *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug.

13, 2020), the Western District of Texas addressed facts nearly identical to this case. The *Diesel* plaintiffs sought damages from a State Farm insurer that refused to compensate business interruption losses incurred by COVID-19-related "shutdown" orders. *Diesel Barbershop, LLC*, 2020 WL 4724305, at *3. The *Diesel* plaintiffs suffered no tangible damage to property but alleged that loss of use was sufficient. *Id.* at 5*. The insurance policy included the same material terms at issue here. *Id.* at *2–3.

While the court noted "that some courts [had] found physical loss even without tangible destruction," "the line of cases requiring tangible injury to property [was] more persuasive." *Id.* at *5. Accordingly, the court dismissed the complaint, holding that the plaintiff failed to state an "accidental direct physical loss to Covered Property." *Id.* at *7. Similarly, the Ingham County Circuit Court recently adopted the tangible damage interpretation to dismiss a COVID-19-related insurance case. *See Gavrilides Management Co. LLC v. Michigan Insurance Co.*, Case No. 20-258-CB-C30 (Mich. Cir. Ct., Ingham Cty.). The *Gavrilides* plaintiff claimed that it suffered "direct physical loss" to its restaurant because the Order prevented customers from dining-in. ECF No. 12-5 at PageID.263. The court dismissed the argument as "simply nonsense" and agreed with the insurer-defendant that the phrase "accidental direct loss of or damage to property" required "some physical alteration to or physical damage or tangible damage to the integrity of the building." *Id.* at 272 (relying in part on *Universal Image Prods., Inc. v. Chubb Corp.*, 703 F. Supp. 2d 705, 708 (E.D. Mich. 2010), *aff'd sub nom. Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569 (6th Cir. 2012)).

Plaintiff's reliance on *Studio 417, Inc. v. Cincinnati Insurance Co.*, No. 20-cv-03127-SRB (W.D. Mo. Aug. 12, 2020), is unpersuasive. In *Studio*, the plaintiffs alleged business interruption losses from COVID-19-related "shutdown" orders that their insurer refused to compensate. ECF No. 16-2 at PageID.323. The defendant moved to dismiss, but the court denied the motion, finding that the plaintiffs had plausibly stated losses within coverage. *Id.* at PageID.326–32. Despite apparent similarities, *Studio* is readily distinguishable from the instant case. The policy at issue in *Studio* covered losses arising from "accidental physical loss *or* accidental physical damage to property." *Id.* at PageID.328 (emphasis original). According to the court, the defendant's insistence on a showing of tangible damage "conflat[ed] 'loss' and 'damage' " and was inconsistent with "giv[ing] meaning to both terms." *Id.* Furthermore, the *Studio* plaintiffs "plausibly alleged that COVID-19 particles attached to and damaged their property," a fact which the court used to distinguish *Source Foods*. *Id.* at PageID.330–31. By contrast, Plaintiff asserts that COVID-19 never entered its premises, and Defendants' interpretation would not read "direct physical loss" redundantly. Even if *Studio* supports Plaintiff's interpretation, its analysis is inapplicable here.

Plaintiff also argues that it has, in fact, stated "tangible damage" because it "alleged tangible deterioration during the several months that [its] operation has been 'suspended.' " ECF No. 16 at PageID.304 n. 11. In support, Plaintiff points to paragraph 35 of the complaint, which states, "Among the property so damaged is Plaintiff's chiropractic equipment, certain leased equipment, *medication and supplements with expiration dates, and other depreciating assets*." ECF No. 1 at PageID.13 (emphasis added). Plaintiff is simply adding an extra step to its original theory. Rather than the loss of use being the "direct physical loss," the "direct physical loss" is now the passive depreciation *caused by* the loss of use. Plaintiff offers no authority to support the theory that passive depreciation counts as a "direct physical loss to Covered Property," and such a conclusory allegation fails to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678.

***8** Based on the foregoing, "accidental direct physical loss to Covered Property" is an unambiguous term that plainly requires Plaintiff to demonstrate some tangible damage to Covered Property. Because Plaintiff has failed to state such damage, the complaint does not allege a Covered Cause of Loss.[11] Counts II, IV, and VI will therefore be dismissed.

B.

1.

Even if Plaintiff's business interruption losses were caused by an "accidental direct physical loss to Covered Property," coverage would still be negated by Section I – Exclusions. As discussed above, Section I – Exclusions, which is incorporated against all Endorsement coverage, provides several pertinent exclusions, most principally the Virus Exclusion. ECF No. 12-4 at PageID.173–74. Defendants bear the burden of showing that any exclusion to coverage applies. *Heniser*, 534 N.W.2d at 505 n. 6.

By its plain terms, the Virus Exclusion bars coverage for any loss that would not have occurred but for some "[v]irus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness, or disease." ECF No. 12-4 at PageID.173–74. Plaintiff advances two arguments for why the Virus Exclusion is inapplicable: (1) that COVID-19 was not the proximate cause of its losses; and (2) that the Virus Exclusion is limited to costs incurred as a result of viral, bacterial, or fungal contamination. ECF No. 16 at PageID.298–300. Neither argument is compelling.

Plaintiff's contention that the Order was the "sole, direct, and only proximate cause" of Plaintiff's losses is refuted by the Order itself. ECF No. 1 at PageID.3. The Order expressly states that it was issued to "suppress the spread of COVID-19" and accompanying public health risks. ECF No. 16-4 at PageID.424. The only reasonable conclusion is that the Order—and, by extension, Plaintiff's business interruption losses—would not have occurred but for COVID-19. Plaintiff is therefore wrong to suggest that "whether the reason for the [Order] was preventing the spread of a virus or an asteroid spreading magic dust is irrelevant." ECF No. 16 at PageID.299. If it were the latter, the Virus Exclusion would not apply.

Furthermore, Plaintiff's position essentially disregards the Anti-Concurrent Causation Clause, which extends the Virus Exclusion to all losses where a virus is part of the causal chain. ECF No. 12-4 at PageID.173–74. Thus, even if the Order were a more proximate cause than COVID-19, coverage would still be excluded. Plaintiff, however, rejects this interpretation, arguing that it would lead to absurd results. To illustrate, Plaintiff poses a hypothetical where coverage is excluded because a firefighter passes out from viral infection on the way to put out a small fire at Plaintiff's business which is later burned to the ground. ECF No. 16 at PageID.299. Ignoring the merits of Plaintiff's hypothetical, the task here is not to speculate on the outer limits of coverage, and Plaintiff provides no authority for discounting the plain meaning of a term because such meaning might produce counterintuitive results.[12] *See* *Diesel Barbershop*, 2020 WL 4724305 at *6 ("[W]hile the Virus Exclusion could have been even more specifically worded, that alone does not make the exclusion 'ambiguous.' ").

***9** Plaintiff next argues that the Virus Exclusion is inapplicable because it was only meant to exclude losses related to viral, bacterial, or fungal contamination. Plaintiff points to the 2006 ISO circular which allegedly shows that "the [Virus Exclusion] was meant to preclude coverage for 'recovery for losses involving contamination by disease-causing agents,' and that the exclusion related only 'to contamination by disease-causing viruses.' "[13] ECF No. 16 at PageID.300. The parties dispute the meaning of the ISO circular, but its exact meaning is immaterial. By its terms, the Policy does not limit the Virus Exclusion to contamination, and Plaintiff has failed to show that the Virus Exclusion is ambiguous. *C.f.* *Aetna Cas. & Sur. Co. v. Dow Chem. Co.*, 28 F. Supp. 2d 440, 445 (E.D. Mich. 1998) (finding pollution exclusion clause ambiguous and interpreting it along with ISO clause). Accordingly, the ISO circular is extrinsic evidence that may not be "used as an aid in the construction of the [unambiguous] contract." *City of Grosse Pointe Park v. Michigan Mun. Liab. & Prop. Pool*, 702 N.W.2d 106, 115 (Mich. 2005). Therefore, even if Defendants misrepresented the purpose and extent of the Virus Exclusion in 2006, the plain, unambiguous meaning of the Virus Exclusion today negates coverage.[14] *See* *Mahnick v. Bell Co.*, 662 N.W.2d 830, 832–33 (2003) ("The court must look for the intent of the parties in the words used in the contract itself. When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability to write a different contract for the parties....") (internal citations omitted).

Accordingly, assuming Plaintiff has suffered an "accidental direct physical loss to Covered Property," the Virus Exclusion negates any coverage for Plaintiff's loss of income or extra expense. For this reason, Plaintiff's request for leave to amend its complaint upon a finding that it has not suffered an "accidental direct physical loss to Covered Property" will be denied because granting such leave would be futile. ECF No. 16 at PageID.307. Counts II, IV, and VI will be dismissed.[15]

2.

The applicability of the three additional exclusions, the Ordinance or Law, Acts or Decisions, and Consequential Losses exclusions, will not be reached. It is unnecessary to decide whether these exclusions bar coverage when Plaintiff has not stated an "accidental direct physical loss to Covered Property" and the Virus Exclusion would otherwise bar recovery.[16] Similarly, the application of the Loss of Income, Extra Expense, and Civil Authority sections of the Endorsement remain undecided besides the finding that

Plaintiff has failed to state a Covered Cause of Loss, which is a prerequisite to the application of each section.

C.

***10** In addition to its breach of contract claims, Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 that "the Policy and other Class members' policies provide coverage for Class members' " business interruption losses incurred by the Order and that the Virus Exclusion is inapplicable. ECF No. 1 at PageID.27–37 (Counts I, III, and V). Defendants argue that such declaratory relief would duplicate Plaintiff's breach of contract claims. Defendants are correct.

Under 28 U.S.C. § 2201(a), a district court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." To determine whether to exercise declaratory jurisdiction, a court should consider "whether the judgment will serve a useful purpose in clarifying and settling the legal relationships in issue and whether it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Aetna Cas. Surety Co. v. Sunshine Corp.*, 74 F.3d 685, 687 (6th Cir. 1996) (citations and internal quotations omitted).

The Sixth Circuit has outlined five factors assessing the propriety of a federal court's exercise of discretion in such a situation:

> (1) whether the judgment would settle the controversy;
>
> (2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue;
>
> (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata";
>
> (4) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and
>
> (5) whether there is an alternative remedy that is better or more effective.

Scottsdale Ins. Co. v. Roumph, 211 F.3d 964, 968 (6th Cir. 2000). These factors reveal no useful purpose for declaratory jurisdiction here. First, declaratory relief cannot "settle the controversy" because, as discussed, Plaintiff has failed to state a Covered Cause of Loss. As a result, it seems implausible that declaratory relief could further clarify the legal relations at issue. Indeed, Plaintiff merely asserts its right to seek a declaration "that certain policy language means 'X', or that the virus exclusion does not apply, without also giving up [its] claim for damages." ECF No. 16 at PageID.315. Plaintiff does not explain how pursuing this right would offer any relief, especially since Plaintiff has failed to state a claim for breach of contract. *C.f. Dow Chem. Co. v. Reinhard*, No. 07-12012-BC, 2007 WL 2780545, at *10 (E.D. Mich. Sept. 20, 2007) (dismissing declaratory relief counts that "would result in the duplication of any disposition of the claim of a breach of contract" but retaining declaratory relief counts regarding "prospective obligations" "that differ from any determination of liability" for breach of contract).

The remaining factors are similarly unpersuasive. The factors regarding procedural fencing and comity between the state and federal courts are neutral at best. Moreover, Plaintiff's alternative claims for breach of contract would have been more efficient vehicles for relief given that Plaintiff could have obtained damages along with an opinion regarding the extent of Policy coverage. Ultimately, this opinion dismissing Plaintiff's claims for breach of contract will clarify the parties' rights under the Policy as meaningfully as any declaratory judgment would have. Allowing Plaintiff to continue seeking declaratory relief would be nonsensical. Accordingly, Counts I, III, and V must be dismissed.

D.

***11** Defendants allege that Defendant State Farm Automobile was not a party to the Policy and should be dismissed. ECF No. 12 at PageID.151. Plaintiff agrees. ECF No. 16 at PageID.292 n. 1. Accordingly, notwithstanding the discussion above, Plaintiff's claims against State Farm Automobile must be dismissed.

IV.

Accordingly, it is **ORDERED** that Defendants' Motion to Dismiss, ECF No. 12, is **GRANTED**.

It is further **ORDERED** that Plaintiff's complaint, ECF No. 1, is **DISMISSED WITH PREJUDICE**.

All Citations

Slip Copy, 2020 WL 5258484

Footnotes

1 Plaintiff did not file the full Policy as an exhibit to the complaint, so reference is frequently made to the Policy as included in Defendants' motion to dismiss. *See* ECF No. 12-4.

2 The Endorsement further defines "Loss of Income" and "Extra Expense," but the precise definition of each term is irrelevant for purposes of this order.

3 Section I – Exclusions includes three additional exclusions, among others: the "Ordinance or Law," "Acts or Decisions," and "Consequential Losses" exclusions. *See* ECF No. 12-4. While Defendants partially rely on these exclusions, it is unnecessary to decide their application for reasons stated in Section III.B.2., *infra.*

4 Insurance Services Office is the industry trade group that drafts form policies for the American liability insurance market.

5 Plaintiff's response brief indicates that Plaintiff could "resume use of its property" after an amendment to the Order on May 28, 2020. ECF No. 16 at PageID.309.

6 As mentioned previously, the coverage offered under each section is "subject to the provisions of Section I – Property." ECF No. 1 at PageID.63.

7 Plaintiff does argue that it stated "tangible damage" by cursory reference to one paragraph in the complaint, but for reasons stated below, this argument is rejected. ECF No. 16 at PageID.302.

8 Of course, the fact that a word can be defined in more than one way does not make the relevant term ambiguous. "Most, if not all, words are defined in a variety of ways in each particular dictionary, as well as being defined differently in different dictionaries ... [The Michigan Supreme Court] refuses to ascribe ambiguity to words in the English language simply because dictionary publishers are obliged to define words differently to avoid possible plagiarism." *Upjohn*, 476 N.W.2d at 398 n. 8.

9 Plaintiff's interpretation also risks rendering the word "physical" meaningless. If "physical loss to Covered Property" includes the inability to use Covered Property, then it is unclear why the same meaning could not be conveyed by "loss to Covered Property." Presumably, any "loss of use" would be "physical" insofar as the cause of the loss or the Covered Property itself has some physical existence.

10 Plaintiff's reliance on *Duronio v. Merck & Co.*, No. 267003, 2006 WL 1628516 (Mich. Ct. App. June 13, 2006), is misplaced. *Duronio* concerned a product liability statute, and its expansive definition of "damage to property" turned on the statutory scheme at issue and the traditional understanding of "property" as a collection of common law rights. *Duronio*, 2006 WL 1628516 at *3. By contrast, Covered Property is a well-defined term referring to buildings and personal property used in the insured's business. ECF No. 12-4 at PageID.171.

11 Plaintiff argues that even if it fails to state a claim, the complaint should survive because discovery is likely to show "that a substantial percentage of State Farm policies do not have a virus exclusion, that certain policyholders subject to the Order had reported direct Covid-19 contamination and were denied coverage anyways, or that certain class policyholders subject to the Order also sustained other, yet unknown types of property damage." ECF No. 16 at PageID.306-07. Plaintiff seems to state the rule backwards. A Rule 12(b)(6) motion ensures that "*before* proceeding to discovery, a complaint [alleges] facts suggestive of illegal conduct." *Twombly*, 550 U.S. at 563 n. 8 (emphasis added). Other putative class members are free to bring their own action against Defendants.

12 Plaintiff's insistence that the Virus Exclusion be strictly construed against Defendants is similarly ineffective. While "[e]xclusionary clauses in insurance policies are strictly construed in favor of the insured," "[c]lear and specific exclusions must be given effect." *Auto-Owners Ins. Co. v. Churchman*, 489 N.W.2d 431, 434 (Mich. 1992). "It is impossible to hold an insurance company liable for a risk it did not assume." *Id.*

13 Plaintiff alleges that because Defendants misrepresented the nature of the Virus Exclusion to insurance regulators, the exclusion is void as against public policy. ECF No. 1 at PageID.5. Defendants contend that the misrepresentation allegations are contradicted by the ISO circular, which provides, in conspicuous formatting, "This filing introduces [the Virus Exclusion,] which states that there is no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." ECF No. 1 at PageID.88. Accepting Plaintiff's allegations as true, Plaintiff has not offered any authority for voiding the exclusion, nor has it alleged that it was fraudulently induced into entering the Policy. *See* ECF No. 1.

14 Plaintiff also alleges that Defendants and other insurers are summarily denying claims for bad faith financial reasons. ECF No. 1 at PageID.19–20. Such allegations do not alter the plain meaning of the Policy, and Plaintiff has not since elaborated on these allegations.

15 Accordingly, Defendant's argument that imposing liability despite the Virus Exclusion would be unconstitutional is not reached. ECF No. 12 at PageID.138.

16 In comparison to the other issues, the parties have minimally briefed the application of the additional exclusions. Across the parties' combined 57 pages of briefing (excluding exhibits), the three additional exclusions receive about 7 pages. Most of this space is spent discussing the application of factually remote and nonbinding cases. *See* ECF No. 12 at PageID.149–51; ECF No. 16 at PageID.310–14.

End of Document

2020 WL 6436948
Only the Westlaw citation is currently available.
United States District Court, S.D. West Virginia,
Charleston Division.

UNCORK AND CREATE LLC, Plaintiff,

v.

The CINCINNATI INSURANCE COMPANY, et al., Defendants.

CIVIL ACTION NO. 2:20-cv-00401

|

Signed 11/02/2020

MEMORANDUM OPINION AND ORDER

IRENE C. BERGER, UNITED STATES DISTRICT JUDGE

***1** The Court has reviewed the Defendants' *Motion to Dismiss Plaintiff's Complaint* (Document 12), the *Memorandum of Law in Support of Defendants' Motion to Dismiss* (Document 13), the *Plaintiff's Response in Opposition to Defendants' Motion to Dismiss Plaintiff's Complaint* (Document 18), and the *Reply Memorandum in Support of the Cincinnati Defendants' Motion to Dismiss Plaintiff's Amended Class Action Complaint* (Document 22), as well as all attached exhibits. In addition, the Court has reviewed the *Class Action Complaint* (Document 1), the *Notice of Supplemental Authorities in Support of the Cincinnati Insurance Company, the Cincinnati Casualty Company and the Cincinnati Indemnity Company's Motion to Dismiss and Its Reply to Plaintiff's Response to Motion to Dismiss* (Document 29), and the *Plaintiff's Notice of Supplemental Authority* (Document 31). For the reasons stated herein, the Court finds that the Defendants' motion should be granted.

FACTUAL ALLEGATIONS

The Plaintiff, Uncork and Create LLC, initiated this purported class action against the Defendants, the Cincinnati Insurance Company, the Cincinnati Casualty Company, and the Cincinnati Indemnity Company (collectively, Cincinnati), on June 12, 2020. The Plaintiff is a creative events company with locations in Barboursville and Charleston, West Virginia. The Plaintiff had an "all-risk" commercial property coverage insurance policy from Cincinnati with a policy effective date of December 7, 2017 to December 7, 2020, which was in effect at all relevant times. The Policy provides coverage, with specified exclusions, for a "loss," defined as "accidental physical loss or accidental physical damage." (Policy at Section G.8, p. 38, attached as Exhibit 1 to the Plaintiff's complaint) (Document 1-1). In the event of a covered loss, the Policy includes coverage for loss of business income during a suspension of operations, including such a suspension sustained due to a civil authority prohibiting access to the premises.[1]

On March 16, 2020, the Governor of West Virginia declared a state of emergency related to the novel coronavirus, or COVID-19, pandemic. On March 23, 2020, the Governor issued an Executive Order requiring all non-essential businesses to cease all activities beyond minimum basic operations to maintain inventory, process payroll, etc., effective at 8:00 p.m., on March 24, 2020. Uncork and Create was among the non-essential businesses shut down as a result of the Governor's order. The Charleston location re-opened on June 11, 2020, but the Barboursville location was permanently closed on April 24, 2020. The Plaintiff incurred and continues to incur a loss of business income and other additional expenses.

***2** The Plaintiff timely notified Cincinnati of its claim based on the interruption to its business. Cincinnati responded with a denial letter dated May 14, 2020, stating that the claim did not involve a direct physical loss at the Plaintiff's premises, and additionally asserting that a "Pollution Exclusion" was applicable. The Plaintiff contends that the Governor's order requiring the business to close constitutes a covered cause of loss under the Policy, and/or that the virus itself causes direct physical loss or damage and is thus a covered cause of loss.

The Plaintiff asserts causes of action for declaratory judgment under 28 U.S.C. § 2201, declaratory judgment under W.Va. Code § 55-3-1 *et. seq.*, and breach of contract. It seeks "a declaration that there is coverage under the Policy for the interruption to Plaintiff's business and the associated business income lost therefrom," damages, costs, attorney's fees, and interest, and any other relief deemed proper. (Compl. at p. 15–16.)

STANDARD OF REVIEW

A motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted tests the legal sufficiency of a complaint or pleading. *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009); *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Additionally, allegations "must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, "a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Moreover, "a complaint [will not] suffice if it tenders naked assertions devoid of further factual enhancements." *Iqbal*, 556 U.S. at 678 (*quoting Twombly*, 550 U.S. at 557) (internal quotation marks omitted).

The Court must "accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). The Court must also "draw[ ] all reasonable factual inferences from those facts in the plaintiff's favor." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). However, statements of bare legal conclusions "are not entitled to the assumption of truth" and are insufficient to state a claim. *Iqbal*, 556 U.S. at 679. Furthermore, the court need not "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice ... [because courts] 'are not bound to accept as true a legal conclusion couched as a factual allegation.' " *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.' " *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). In other words, this "plausibility standard requires a plaintiff to demonstrate more than 'a sheer possibility that a defendant has acted unlawfully.' " *Francis*, 588 F.3d at 193 (quoting *Twombly*, 550 U.S. at 570). A plaintiff must, using the complaint, "articulate facts, when accepted as true, that 'show' that the plaintiff has stated a claim entitling him to relief." *Francis*, 588 F.3d at 193 (quoting *Twombly*, 550 U.S. at 557). "Determining whether a complaint states [on its face] a plausible claim for relief [which can survive a motion to dismiss] will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

DISCUSSION

***3** The Defendants move to dismiss, asserting that the factual allegations do not establish that the Plaintiff is entitled to relief. They argue that physical loss or physical damage to the covered property is a prerequisite to coverage, and closure of a business due to the threat posed by a virus does not constitute physical loss or damage. They point out that COVID-19 harms people, not property. It contends that the virus and related closures caused only financial losses to the Plaintiff, without physically altering the premises. To the extent the Plaintiff claims that the coronavirus was actually physically present at its premises, the Defendant argues that it can be removed by cleaning. The Defendants urge the Court to consider several recent court decisions reaching the conclusion that the coronavirus does not cause physical loss or physical damage for purposes of insurance coverage.

The Plaintiff responds that West Virginia courts do not require "structural alteration of covered property" as a necessary element to finding a "direct physical loss" for insurance coverage. (Pl.'s Resp. at 1.) It argues that losses not specifically excluded should be covered by an all-risks commercial property insurance policy. It notes that the Policy does not include a virus exclusion developed by insurers following the SARS pandemic in the early 2000s. The Plaintiff emphasizes that the closure order, and/or the virus itself, deprived it from using the property for its intended purpose. It cites cases that it contends stand for the proposition that a property that is unsafe to inhabit has physical loss or damage, even absent structural alteration.

Under West Virginia law, the scope of coverage provided by an insurance contract, absent factual disputes, is a question of law. Syl. Pt. 1, *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 745 S.E.2d 508, 511 (W. Va. 2013) (quoting Syl. Pt. 1, *Tennant v. Smallwood*, 568 S.E.2d 10 (W. Va. 2002)).

"Language in an insurance policy should be given its plain, ordinary meaning." *Id.* at Syl. Pt. 8 (quoting Syl. Pt. 1, *Soliva v. Shand, Morahan and Co., Inc.*, 345 S.E.2d 33 (1988)). Clear and unambiguous provisions "are not subject to judicial construction or interpretation." *Id.* at Syl. Pt. 9. "Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." *Id.* at Syl. Pt. 11 (quoting Syl. Pt. 5, *National Mutual Insurance Co. v. McMahon and Sons, Inc.*, 356 S.E.2d 488 (W. Va. 1987)). Further, "ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured." Syl. Pt. 3, *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 3 (W. Va. 1998) (quoting Syl. Pt. 4, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488 (W. Va. 1987)).

As both parties recognize, this motion turns on whether COVID-19 and the Governor's closure order constitute "physical loss or physical damage" under the terms of the Policy. The Plaintiff cites a case in which the West Virginia Supreme Court considered whether homes rendered too dangerous for habitation by a rockfall and imminent risk of additional rockfalls had suffered "physical loss" covered by an insurance policy. *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998). The rockfall impacted multiple neighboring homes, including a home that had no direct damage but was exposed to likely future rockfalls, requiring evacuation and utility shut-offs. *Id.* at 5. The court considered similar cases from other jurisdictions and concluded that direct physical loss "may exist in the absence of structural damage to the insured property," given that the homes all "became unsafe for habitation, and therefore suffered real damage when it became clear that rocks and boulders could come crashing down at any time." *Id.* at 17.

***4** The Plaintiff argues that *Murray* is comparable to the situation presented here, and that no physical alteration to the premises is required for coverage under a policy requiring physical damage or physical loss. However, the homes were rendered uninhabitable by a physical threat: an unstable retaining wall loomed over the home, and experts anticipated further rockfalls likely to physically damage the home and harm inhabitants. The novel coronavirus has no effect on the physical premises of a business. Non-essential businesses were ordered to shut down to prevent people from exposing one another. In a recent case not involving COVID-19, Judge Johnston explained that "economic losses, such as loss of income and benefits" do not constitute property damage or physical injury to property. *Cooper v. Westfield Ins. Co.*, No. 2:19-CV-00324, 2020 WL 5647015, at *5 (S.D.W. Va. Sept. 22, 2020) (Johnston, C.J.). Recovery for the Plaintiff here would be purely economic, solely for lost business without any accompanying repairs to the premises. Thus, the Court does not find that *Murray* directs coverage under the circumstances presented herein.

Several courts have considered similar insurance coverage disputes related to the COVID-19 pandemic, although there are no precedential decisions in the Fourth Circuit or from the West Virginia Supreme Court. A Missouri federal district court, relied upon by the Plaintiffs, found that a "direct physical loss" was adequately alleged where the plaintiff alleged that COVID-19 was a physical substance that lives on physical surfaces and in the air, and rendered their property unsafe and unusable. *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at *4 (W.D. Mo. Aug. 12, 2020). The court concluded that the plaintiffs had "plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable." *Id.* at *6.

The majority of courts to address the issue, however, have found that COVID-19 and governmental orders closing businesses to slow the spread of the virus do not cause physical damage or physical loss to insured property. A federal district court in Florida distinguished *Studio 417* based on the allegations in that case that the virus was physically present on the premises, and further reasoned that actual, physical, or tangible alteration to a property was required, not "merely ... economic losses." *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIV, 2020 WL 5051581, at *8 (S.D. Fla. Aug. 26, 2020) (also detailing the context provided by other provisions similar to those in the instant Policy, allowing for business interruption losses during a period of repair and restoration, that clarify that physical damages requiring repair are necessary). The federal District Court for the Eastern District of Texas likewise found a demonstrable physical alteration to the property necessary to establish a physical loss. *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) (also finding that a virus exclusion would preclude coverage). The federal District Court for the Northern District of California reasoned that, although dispossession may sometimes constitute a "loss" without physical alteration of the property, California's Stay at Home orders temporarily prohibiting the plaintiff business from operating did not constitute the type of permanent or

unrecoverable loss necessary for coverage. *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-03213-JST, 2020 WL 5525171, at *4 (N.D. Cal. Sept. 14, 2020). The court also noted surrounding provisions concerning restoration, repair, and replacement of the property that bolstered its finding that coverage is inapplicable to COVID-19 and the Stay at Home orders. *Id.* An opinion from the Northern District of Illinois provides a helpful summation: "In essence, plaintiff seeks insurance coverage for financial losses as a result of the closure orders. The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property. Consequently, plaintiff has failed to plead a direct physical loss—a prerequisite for coverage." *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, No. 20 CV 2160, 2020 WL 5630465, at *3 (N.D. Ill. Sept. 21, 2020).

***5** The Court finds those decisions concluding that COVID-19 does not cause a direct physical damage or loss to property to be more persuasive. Although some courts have drawn a distinction based on whether a complaint alleged presence of the virus on the premises, the Court does not find such an allegation determinative. *See, e.g., Seifert v. IMT Ins. Co.*, No. CV 20-1102 (JRT/DTS), 2020 WL 6120002, at *3 (D. Minn. Oct. 16, 2020) (dismissing because plaintiff failed to allege physical infiltration and contamination of the virus on the properties). Firstly, while factual allegations drive the analysis of a motion to dismiss, courts are not required to set aside common sense, and neither *Studio 417*, which relied in part on the allegation of presence of the virus, nor the instant case, involve actual allegations of employees or patrons with infections traced to the business. There is a similar risk of exposure to the virus in any public setting, regardless of artful pleading as to the likelihood of the presence of the virus. Secondly, even when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property. Because routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover, and a covered "loss" is required to invoke the additional coverage for loss of business income under the Policy.

COVID-19 poses a serious risk to people gathered in proximity to one another, and the governmental orders closing certain businesses were designed to ameliorate that risk. *See, e.g., Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, No. 1:20-CV-2939-TWT, 2020 WL 5938755, at *5 (N.D. Ga. Oct. 6, 2020) (an Executive Order that prompted closure of restaurant dining room "merely recognized an existing threat" and "did not represent an external event that changed the insured property"). Property, including the physical location of Uncork and Create, is not physically damaged or rendered unusable or uninhabitable. If people could safely congregate anywhere without risk of infection, the Plaintiff has alleged no facts to suggest any impediment to Uncork and Create's operation. No repairs or remediation to the premises are necessary for its safe occupation in the event the virus is controlled and no longer poses a threat. In short, the pandemic impacts human health and human behavior, not physical structures. Those changes in behavior, including changes required by governmental action, caused the Plaintiff economic losses. The Court is not unsympathetic to the situation facing the Plaintiff and other businesses. But the unambiguous terms of the Policy do not provide coverage for solely economic losses unaccompanied by physical property damage. Therefore, the motion to dismiss must be granted.

CONCLUSION

Wherefore, after thorough review and careful consideration, the Court **ORDERS** that the Defendants' *Motion to Dismiss Plaintiff's Complaint* (Document 12) be **GRANTED** and that this matter be **DISMISSED** from the Court's docket. The Court further **ORDERS** that any pending motions be **TERMINATED AS MOOT**.

All Citations

Slip Copy, 2020 WL 6436948

Footnotes

1 The Policy provides as follows: "We will pay for the actual loss of 'Business Income' and 'Rental Value' you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration'. The 'suspension' must be caused by a direct 'loss' to property at a 'premises' caused by or resulting from any Covered Cause of Loss." (Policy at Section E.b(1) at p. 13).

End of Document

2020 WL 5939172
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida.

UROGYNECOLOGY SPECIALIST OF FLORIDA LLC, Plaintiff,

v.

SENTINEL INSURANCE COMPANY, LTD., Defendant.

Case No. 6:20-cv-1174-Orl-22EJK
|
Signed 09/24/2020

Attorneys and Law Firms

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ORDER

ANNE C. CONWAY, United States District Judge

***1** This cause comes before the Court on the Motion to Dismiss filed by Defendant Sentinel Insurance Company, LTD. (Doc. 6). Plaintiff Urogynecology Specialist of Florida, LLC filed a Response in Opposition (Doc. 16) and Sentinel filed a Memorandum in Support of its Motion (Doc. 19). For the following reasons, the Motion will be denied.

I. BACKGROUND[1]

The dispute in this case arises from an insurance contract and the alleged breach of that contract. Sentinel issued Plaintiff an all-risk insurance policy[2] ("the Policy") to cover its gynecologist practice for the period of June 19, 2019 to June 19, 2020. (Doc. 5-1). In early March 2020, the Governor of Florida issued an executive order declaring a state of emergency in Florida due to the COVID-19 pandemic. *See Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, No. 2:20-cv-00401-FTM-66NPM, 2020 WL 5240218, at *1 (M.D. Fla. Sept. 2, 2020). As a result of the nationwide and ongoing pandemic, Plaintiff was forced to close its doors for a period of time in March 2020 and could not operate as intended. (Doc. 1-1 at ¶ 13-15). While Plaintiff's business was shut down, Plaintiff suffered numerous losses including loss of use of the insured property, loss of business income, and loss of accounts receivable. (*Id*. at ¶ 12). Plaintiff also incurred additional business expenses to minimize the suspension of the business and continue its operations. (*Id*. at ¶ 15).

Plaintiff notified Sentinel of its losses associated with the medical office closing due to the ongoing pandemic and Sentinel denied coverage. (*Id*. at ¶ 20-23). As a result, Plaintiff filed this suit in the Ninth Judicial Circuit, in and for Orange County, Florida on June 2, 2020. (Doc. 1). The relevant Policy provisions upon which Plaintiff's suit relies are as follows:

A. COVERAGE

We will pay for direct physical loss of or physical damage to Covered Property at the premises described in the Declarations (also called "scheduled premises" in this policy) caused by or resulting from a Covered Cause of Loss.

....

3. Covered Causes of Loss

RISKS OF DIRECT PHYSICAL LOSS unless the loss is:

a. Excluded in Section B., EXCLUSIONS; or

b. Limited in Paragraph A.4. Limitations; that follow.

....

5. Additional Coverages

....

o. Business Income

(1) 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 a direct physical loss of or physical damage to property at the "scheduled premises", including personal property in the open (or in a vehicle) within 1,000 feet of the "scheduled

premises", caused by or resulting from a Covered Cause of Loss.

....

p. Extra Expense

(1) We will pay reasonable and necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or physical damage to property ...

***2** ....

q. Civil Authority

(1) This insurance is extended to apply to the actual loss of Business Income you sustain when access to your "scheduled 7 premises" is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your "scheduled premises".

....

6. Coverage Extensions

....

a. Accounts Receivable

(1) You may extend the insurance that applies to your Business Personal Property, to apply to your accounts receivable.

We will pay for:

(a) All amounts due from your customers that you are unable to collect;

(b) Interest charges on any loan required to offset amounts you are unable to collect pending payment of these amounts;

(c) Collection expenses in excess of your normal collection expenses that are made necessary by the physical loss or physical damage; and

(d) Other reasonable expenses that you incur to reestablish your records of accounts receivable.

(Doc. 5-1 at 36-48).

In Count I, Plaintiff asserts a claim for breach of contract for failure to adequately reimburse Plaintiff for its losses. (Doc. 1-1 at ¶ 24). In Count II, Plaintiff seeks a declaration of the parties' rights under the insurance contract. (*Id*. at ¶ 30). Sentinel was served on June 4, 2020, and timely removed to this Court on July 1, 2020. (*Id*.). Sentinel alleged in its Notice of Removal that this Court has subject matter jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332; the Notice of Removal stated that (1) Sentinel is a foreign corporation and citizen of Connecticut, (2) all members of Plaintiff's LLC are citizens of Florida, and (3) Plaintiff's claims supported a conclusion that damages were in excess of $75,000. (Doc. 1 at 2-6).

II. LEGAL STANDARD

When deciding a motion to dismiss based on failure to state a claim upon which relief can be granted, the court must accept as true the factual allegations in the complaint and draw all inferences derived from those facts in the light most favorable to the plaintiff. *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010). "Generally, under the Federal Rules of Civil Procedure, a complaint need only contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' " *Id*. (quoting Fed. R. Civ. P. 8(a)(2)). However, the plaintiff's complaint must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 556). Thus, the Court is not required to accept as true a legal conclusion merely because it is labeled a "factual allegation" in the complaint; it must also meet the threshold inquiry of facial plausibility. *Id*.

III. ANALYSIS

***3** Sentinel moves to dismiss Plaintiff's Complaint arguing that the plain language of the policy excludes coverage for Plaintiff's losses. Specifically, Sentinel argues that the Policy expressly excludes losses caused by a virus. Plaintiff responds that the Policy is ambiguous, and any ambiguity should be read in favor of coverage.

A. Breach of Insurance Contract

The issues surrounding whether insurance policy virus exclusions apply to losses caused by COVID-19 are novel and complex. Courts considering these issues have applied basic contract principles to determine whether such virus-related clauses exclude coverage. *See Mauricio Martinez, DMD, P.A.*, 2020 WL 5240218, at *2 (analyzing virus exclusions under state law contract interpretations); *see also Turek Enterprises, Inc., v. State Farm Mutual Automobile Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *5 (E.D. Mich. Sept. 3, 2020) (same); *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-cv-04418-SVW-AS, 2020 WL 5095587, at *4 (C.D. Cal. Aug. 28, 2020) (same).

In Florida, to state a claim for breach of contract, a plaintiff must allege "(1) the existence of a contract, (2) a breach of the contract, and (3) damages resulting from the breach." *Beck v. Lazard Freres & Co.*, LLC, 175 F.3d 913, 914 (11th Cir. 1999). Here, Plaintiff alleges that Sentinel breached the insurance contract by failing to pay for covered losses. Sentinel argues that the plain language of the insurance contract excludes coverage for the cause of Plaintiff's loss. Sentinel relies on the following language from the Policy under the "Limited Fungi, Bacteria or Virus Coverage" provision which states that Sentinel

> 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:
>
> **(1)** Presence, growth, proliferation, spread or any activity of "fungi," wet rot, dry rot, bacteria or virus.
>
> **(2)** But if "fungi," wet rot, dry rot, bacteria or virus results in a "specified cause of loss" to Covered Property, we will pay for the loss or damage caused by that "specified cause of loss."

(Doc. 5-1 at 141).

Under Florida law, the "construction of an insurance policy is a question of law for the court." *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 877 (Fla. 2007). "The scope and extent of insurance coverage is determined by the language and terms of the policy." *Ernie Haire Ford, Inc. v. Universal Underwriters Ins. Co.*, 541 F. Supp. 2d 1295, 1298 (M.D. Fla. 2008) (quoting *Bethel v. Sec. Nat'l Ins. Co.*, 949 So. 2d 219, 222 (Fla. 3d DCA 2006)). An insurance policy is a contract that is construed according to its plain meaning. *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007). When construing the plain meaning of phrases in an insurance contract, Florida courts "may consult references commonly relied upon to supply the accepted meanings of words." *Id.* (relying on Merriam Webster's Collegiate Dictionary to supply the plain meaning of language in an insurance contract). Finally, the Florida Statutes provide, "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy." Fla. Stat. § 627.419.

Sentinel argues that the unambiguous policy terms exclude coverage for any losses caused by a virus, including COVID-19. Plaintiff argues that ambiguity in the insurance policy requires the Court to construe the Policy in favor of coverage. Policy language is ambiguous if it "is susceptible to more than one reasonable interpretation, one providing coverage and another limiting coverage." *Garcia*, 969 So. 2d at 291 (citing *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000)). "A provision is not ambiguous simply because it is complex or requires analysis." *Id.* In addition, "[t]he fact that both sides ascribe different meanings to the language does not mean the language is ambiguous." *Kipp v. Kipp*, 844 So. 2d 691, 693 (Fla. 4th DCA 2003). An ambiguity exists only if a "genuine inconsistency, uncertainty, or ambiguity in meaning ... remains after the application of the ordinary rules of construction." *Am. Strategic Ins. Co. v. Lucas-Solomon*, 927 So. 2d 184, 186 (Fla. 2d DCA 2006) (internal quotation marks omitted).

***4** Here, several arguably ambiguous aspects of the Policy make determination of coverage inappropriate at this stage. Notably, the Policy provided does not exist as an independent document. For example, the "Limited Fungi, Bacteria or Virus Coverage" section of the Policy (Doc. 5-1 at 141) starts by stating that it modifies certain coverage forms. Those forms are not provided in the Policy itself, nor were they provided to the Court. Additionally, the second paragraph states that the virus exclusion "is added to paragraph B.1 Exclusions of the Standard Property Form and the Special Property Coverage Form" which was similarly not provided to the Court. Without the corresponding forms which are modified by the exclusions, this Court will not make a decision on the merits of the plain language of the Policy to determine whether Plaintiff's losses were covered. Additionally, it is not clear that the plain language of the policy unambiguously and necessarily excludes Plaintiff's losses. The virus exclusion states that Sentinel will not pay for loss or damage caused directly or indirectly by the presence, growth, proliferation, spread, or any activity of "fungi, wet rot, dry rot, bacteria or virus." (*Id.*). Denying coverage for losses stemming from COVID-19, however, does not logically align with the

grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses.

In arguing that the plain language of the Policy excludes coverage for Plaintiff's losses, Sentinel cites a number of cases which uphold similar virus exclusions. The cases, however, are nonbinding and distinguishable. In arguing that Florida courts routinely enforce policy provisions excluding coverage for viruses, Sentinel cites a case in which a policyholder sought coverage when a third-party asserted a claim against him for the transmission of a sexually transmitted virus. *See Clarke v. State Farm Florida Ins.*, 123 So. 3d 583, 584 (Fla. 4th DCA 2012). In arguing that the Court should give the virus exclusion a straightforward application to exclude coverage for losses caused by COVID-19, Sentinel cites cases dealing with pollution exclusions and sewage backups, damage caused by mold, and claims resulting from illness or disease, all of which fell under policy exclusions. (Doc. 6 at 11-12). Importantly, none of the cases dealt with the unique circumstances of the effect COVID-19 has had on our society —a distinction this Court considers significant. Thus, without any binding case law on the issue of the effects of COVID-19 on insurance contracts virus exclusions, this Court finds that Plaintiff has stated a plausible claim at this juncture. Plaintiff alleged the existence of the insurance contract, losses which may be covered under the insurance contract, and Sentinel's failure to pay for the losses. These allegations, when read in the light most favorable to Plaintiff, are facially plausible. *See Twombly*, 550 U.S. at 555 (holding that a complaint "attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations").

Based on the foregoing, it is ordered as follows:

1. Defendant's Motion to Dismiss (Doc. 6) will be **DENIED.**

2. Defendant **IS ORDERED TO FILE** an Answer to the Complaint within fourteen days of the date of this Order.

DONE and **ORDERED** in Chambers, in Orlando, Florida on September 24, 2020.

All Citations

Slip Copy, 2020 WL 5939172

Footnotes

1 For the purposes of this Motion, the Court will consider as true all of the allegations in Plaintiff's Complaint.

2 Plaintiff is a named insured under Policy No. 21 SBA BX5636. (Doc. 1-1 at ¶ 18).

End of Document

2020 WL 6562332
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

WATER SPORTS KAUAI, INC., Plaintiff,

v.

FIREMAN'S FUND INSURANCE COMPANY, et al., Defendants.

Case No. 20-cv-03750-WHO
|
11/09/2020

William H. Orrick, United States District Judge

ORDER GRANTING THE MOTION TO DISMISS Re: Dkt. No. 39

***1** Plaintiff Water Sports Kauai, Inc., a Hawaii corporation, dba Sand People ("Sand People"), shut down its businesses (twelve stores on three islands that sell gifts, artwork, décor, jewelry, glassware, coastal furnishing, apparel, soaps, lotions, candles, and books) six months ago due both to the spread of the coronavirus and to directives from Hawaii's Governor limiting the operation of non-essential businesses, including Sand People's stores. Amended Complaint ("AC"), Dkt. No. 38, ¶ 56. It submitted a claim for coverage under an insurance policy (Policy) issued by defendants Fireman's Fund Insurance Company, National Surety Corporation, and Allianz Global Risks US Insurance Co (collectively, "defendants") under the "Lost Business Income" and "Civil Authority" provisions. AC ¶ 4. That claim was denied, and Sand People filed suit.

I agree with the vast majority of cases that have addressed materially similar policy provisions and facts. Sand People has failed to plausibly plead Business Income or Civil Authority coverage. Its claims are dismissed with limited leave to amend.

BACKGROUND

The Policy provides that the defendants will "pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." AC, Ex. 9 at 30. In relevant part, the Policy states:

3. Covered Causes of Loss
RISKS OF DIRECT PHYSICAL LOSS unless the loss is [excluded]. *Id*. at 31.

g. 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 the described premises, including personal property in the open (or in a vehicle) within 100 feet, caused by or resulting from any Covered Causes of Loss.
Id. at 33.

h. Extra Expense

We will pay necessary Extra Expense you incur during the **period of restoration** that you would not have incurred if there had been no direct physical loss or damage to property at the described premises, including personal property in the open (or in a vehicle) within 100 feet of the described premises, caused by or resulting from a Covered Cause of Loss
Id. at 34.

i. Civil Authority

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss. This coverage will apply for a period of up to two consecutive weeks from the date of that action.
Id. at 35.
15. Period of Restoration means the period of time that:

a. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and

b. Ends on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality.

***2** *Id*. at 63.

Based on the spread of the coronavirus, directives from Hawaii's Governor limiting the operation of non-essential businesses, including Sand People's stores, and government closure orders issued in 49 other states/jurisdictions as a result of the coronavirus pandemic, and defendants' denial of requests for coronavirus coverage under similarly worded policies, Sand People asserts the following claims on behalf of a class and a subclass: (1) Breach of Contract; (2) Breach of Covenant of Good Faith and Fair Dealing; (3) Unfair or Deceptive Business Practices; and (4) Declaratory Relief.

The class and subclass are defined as:

Class

All persons or entities in the United States (including its territories and the District of Columbia) who own an interest in a business that was insured by Defendants in March 2020 and made (or attempted to make) a claim with Defendants arising from lost business income (or other losses related to business interruption) at that business related to COVID-19, and did not receive coverage for that claim.

Hawaii Subclass

All persons or entities in Hawaii who own an interest in a business that was insured by Defendants in March 2020 and made (or attempted to make) a claim with Defendants arising from lost business income (or other losses related to business interruption) at that business related to COVID-19, and did not receive coverage for that claim.

AC ¶ 123.

LEGAL STANDARD

In Hawaii, " 'because insurance policies are contracts of adhesion and are premised on standard forms,' " the contracts must be "construed liberally" in favor of the insured and based on the reasonable expectations of a layperson, with any ambiguities being resolved against the insurer. *Hart v. Ticor Title Ins. Co.,* 126 Hawai'i 448, 456 (2012) (quoting *Dairy Road Partners v. Island Ins. Co., Ltd*., 92 Hawai'i 398, 411-414 (2000)); *see also Great Divide Ins. Co. v. AOAO Maluna Kai Estates*, 492 F. Supp. 2d 1216, 1226–27 (D. Haw. 2007) ("A policy provision is not ambiguous just because the insurer and insured disagree over the interpretation of the terms of a policy....Ambiguity exists only when the policy 'taken as a whole, is reasonably subject to differing interpretation.' " (quoting *Oahu Transit Servs., Inc. v. Northfield Ins. Co*., 107 Hawai'i 231, 236 n. 7 (Haw.2005)).

DISCUSSION

Defendants move to dismiss Sand People's claims because the mere threat of coronavirus is insufficient to show a "direct physical loss of or damage to" its covered property and the government closures orders are likewise insufficient to show the same. Defendants note that district courts around the country – including ones in this District and throughout the Ninth Circuit – have rejected identical claims under similar policies and that the only two federal cases Sand People identifies in support of their claims – both from the Western District of Missouri – are distinguishable or wrongly decided. Sand People responds that this case is different from the bulk of district court cases relied on by defendants because (i) it specifically alleges that it had to close its properties due directly to the coronavirus' rapid spread and imminent threat to its businesses, and (ii) the vast majority of district court cases dismissing for lack of coverage also had virus exclusions limitations in their policies.

***3** As described below, I will follow the overwhelming majority of courts that have determined that the mere threat of coronavirus cannot cause a "direct physical loss of or damage to" covered property as required under the Policy. That resolves the issue of coverage under the Business Income and Civil Authority provisions as a result of both the spread of coronavirus and the government closure orders.

I. LOST BUSINESS INCOME

Sand People contends that "lost business income" coverage was triggered by both the "physical" spread of the coronavirus and, independently, the government closure orders. I will address each argument in turn.

A. Spread of Coronavirus

Sand People asserts that it adequately alleged closure because of the "imminent" threat of coronavirus at their properties. AC ¶ 69 ("The Coronavirus and its pernicious spread

created inherently dangerous conditions where the stores and property within them were at immediate and imminent risk of exposure to the Coronavirus. This caused them to suspend operations and lose access to the stores, which rendered them untenantable."); ¶ 76 ("Because, inter alia, the spread of Coronavirus rendered Sand People's facilities no longer usable for their intended purpose(s), and in many cases impossible to operate safely, it directly caused them to suffer physical damage and loss."). It claims that the explosive spread of coronavirus and the imminence of the threat it presented is sufficient to show a "direct physical loss" because the closure is alleged to have resulted from a physical event "the spread of the virus" and potential exposure to a disease.

Sand People relies on a series of cases where courts found coverage because asbestos, arsenic, and e-coli contamination were present on covered property. For example, in *Port Auth. of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002), the Third Circuit interpreted a "physical loss or damage" policy with respect to asbestos and concluded, "[w]hen the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner. However, if asbestos is present in components of a structure, but is not in such form or quantity as to make the building unusable, the owner has not suffered a loss." *Id.* at 236. The court explained, " 'physical loss or damage' occurs only if an actual release of asbestos fibers from asbestos containing materials has resulted in contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable, or if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility. The mere presence of asbestos, or the general threat of future damage from that presence, lacks the distinct and demonstrable character necessary for first-party insurance coverage." *Id.*

That case confirms that there must be sufficient evidence of the *presence* of the contaminant at the property plus an imminent threat from it. *Id.* at 236 ("We thus find ourselves in agreement with the District Court's ruling that plaintiffs' inability 'to produce evidence concerning the manifestation of an imminent threat of asbestos contamination' forecloses the existence of a viable claim. Although the plaintiffs demonstrated that many of its structures used asbestos-containing substances, those buildings had continuous and uninterrupted usage for many years. The mere presence of asbestos or the general threat of its future release is not enough to survive summary judgment or to show a physical loss or damage to trigger coverage under a first-party 'all risks' policy."); *see also In Assn. of Apt. Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1069 (D. Haw. 2013) ("direct physical loss or damage" to property satisfied where plaintiff demonstrates "that an event had a direct impact and proximately caused a loss related to the physical matter of the Property" and arsenic seeping into the "concrete slab, carpet, and interior objects are physical matter within the ordinary use of those words."); *Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 826–27 (3d Cir. 2005) (unpublished) ("we believe there is a genuine issue of fact whether the functionality of the Hardingers' property was nearly eliminated or destroyed, or whether their property was made useless or uninhabitable" by presence of e-coli in well). For that reason, it does not help Sand People.

***4** Defendants do not dispute that actual presence of a contaminant at a covered property might trigger coverage. They argue that what is alleged here – the "mere threat" of exposure – is categorically insufficient to trigger coverage as a direct physical loss of or damage to Sand People's property. They contend that there must be an incident of a direct physical impact to covered property to trigger coverage and a mere threat does not suffice. That distinction is supported by *Port Authority*, 311 F.3d at 236, where even though asbestos was in the property – and thus there was some threat of exposure in the future – plaintiff's claims failed because there was insufficient "evidence concerning the *manifestation* of an imminent threat of asbestos contamination." *Id.* at 236 (emphasis added). Sand People pleads that coronavirus was rapidly spreading and feasibly in Hawaii but fails to allege both its *presence* in any of its properties and a *manifestation* of imminent threat of contamination in any of its properties.

That manifestation is significant because the Policy requires a "direct physical loss of or damage to" property that has not been alleged. *See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 20-CV-03213-JST, 2020 WL 5525171, at *5 (N.D. Cal. Sept. 14, 2020) (dismissing claim for failure to allege COVID-19 or any other physical impetus caused the loss of functionality "where plaintiff "does not allege that 'Covid-19 entered the [property] through any employee or customer" and did not allege that store was closed "because its employees became sick or coronavirus was discovered on the property"). For this reason alone, Sand People's reliance on *Studio 417, Inc. v. Cincinnati Ins. Co.*, 20-CV-03127-SRB, 2020 WL 4692385, at *2 (W.D. Mo. Aug. 12, 2020) and *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 20-

CV-00383-SRB, 2020 WL 5637963, at *6 (W.D. Mo. Sept. 21, 2020), is unhelpful. Unlike in those cases – where a hair salon, restaurant, and dental practice alleged the *actual* presence of the coronavirus in their establishments – Sand People only pleads an "imminent threat." *See also Mudpie, Inc*, 2020 WL 5525171 *6 (distinguishing *Studio 417* because "Mudpie makes no similar allegation here. It does not allege, for example, that the presence of the COVID-19 virus in its store created a physical loss."). There are no facts plausibly alleging an actual exposure at one or more Sand People stores, much less that an actual physical exposure caused them to close a particular store or set of stores.[1]

Instead of alleging actual physical exposure, Sand People broadly claims that closing the stores to avoid imminent exposure is "indistinguishable" from actual exposure in the context of an insurance contract because it was under a duty to mitigate losses. Oppo. at 5. But Sand People cites no cases finding that similar coverage provisions were triggered without some physical and direct occurrence on the property in the first instance. *See, e.g.*, *Hampton Foods, Inc. v. Aetna Cas. and Sur. Co*., 787 F.2d 349, 352 (8th Cir. 1986) (plaintiff suffered "direct, concrete and immediate loss due to extraneous physical damage to the building," and because of "the unquestioned danger of reentering the building" at risk of collapse, plaintiff was entitled to attempt to mitigate its damages by "removing and salvaging as much property as it could before the building's destruction."); *see also Armstrong World Industries, Inc. v. Aetna Cas. & Sur. Co*., 45 Cal. App. 4th 1, 92 (Cal. App. 1st Dist. 1996) ("remedial costs incurred in cleaning up contaminated waste sites are covered by CGL policies, but 'prophylactic' costs-costs incurred in advance of any release of hazardous waste, to prevent threatened future pollution-are not incurred because of property damage.").[2]

***5** Sand People also contends that the significant "gravity of the risk" from coronavirus, as confirmed by the March 2020 government closure orders and which they intend to prove through discovery and expert testimony, "will demonstrate how, in the midst of a global pandemic, Plaintiff's traveler-focused Stores in touristic centers of Hawai'i would have been exposed to Coronavirus had they not closed down." Oppo. 8-9. But it cites no case finding coverage based only on a "would have been exposed" allegation because of a contaminant's rapid spread.

Finally, Sand People asserts that coverage is independently required because of "exposure" to coronavirus on other properties in Hawaii that were in the "same tourism and supply chains" as its stores and that third party exposure establishes coverage. Oppo. at 9.[3] However, no specific "income support property" in Sand People's supply chain is identified in the Amended Complaint. Even if one was, Sand People would still need to allege facts showing that the identified income support property itself suffered a direct physical loss, which then caused Sand People a specific loss.

B. Government Closure Orders

Sand People also contends that the government closure orders independently triggered coverage because (i) it suffered a "loss of" its property and "material alteration" of the property is not required and (ii) deprivation of the functionality of the property triggers coverage. It argues that "loss" broadly includes a deprivation, dispossession, and impairment of property, similar to what it suffered here due to the government orders shutting down non-essential businesses like Sand People's. It asserts that there is no need, under the "loss" prong, to show a "material alteration" of its property (that might otherwise be required under the "damage to" prong).

Sand People relies on *Total Intermodal Services Inc. v. Travelers Prop. Cas. Co. of Am.,* CV 17-04908 AB (KSX), 2018 WL 3829767 (C.D. Cal. July 11, 2018). There the court recognized that the separate "loss *of*" property clause "contemplates that the property is misplaced and unrecoverable, without regard to whether it was damaged," but could include the permanent dispossession of something; there the loss of a shipping container. *Id*. at *3-4. The *Total Intermodal* court distinguished "loss of" from "loss to" property, where "loss to" suggests an external force acting on property, and "loss of" connotes simple dispossession or similar harm not "localized" on a segment of property. *Id*. at 3-4; *see also* Oppo. at 10-11.

In the *Mudpie* case, the Hon. Jon S. Tigar of this District accepted the distinction drawn by *Total Intermodal* and rejected the alleged requirement – suggested by defendants here – that there be some physical alteration to the covered property. *Mudpie, Inc*., 2020 WL 5525171 at *4. However, Judge Tigar concluded *Total Intermodal* did not help plaintiffs because while

> Mudpie has been dispossessed of its storefront, it will not be a "permanent dispossession" as with the lost cargo in *Total Intermodal*. *See* 2018 WL 3829767, at *4. When the Stay at Home orders are lifted, Mudpie can regain possession of its storefront. Mudpie's physical storefront

has not been "misplaced" or become "unrecoverable," and neither has its inventory.

***6** 2020 WL 5525171 at *4.

The same is true here. As Judge Tigar noted, applying the broader "loss of" coverage, the surrounding provisions within the policy at issue there "suggest that Mudpie's inability to occupy its storefront does not fall within the Business Income and Extra Expense coverage of this policy" given the "period of restoration" definition limits the period of coverage to when the property is "repaired, rebuilt or replaced with reasonable speed and similar quality." *Id*. He stated that there was "nothing to fix, replace, or even disinfect for Mudpie to regain occupancy of its property" because its loss was "caused by state closure orders and thus will last for however long those restrictions remain." *Id*. The period of restoration provisions in this case are materially identical and likewise support a conclusion that there has been no covered disposition or "loss of" property because Sand People identifies nothing it needs to fix or replace at any of its properties.

Sand People takes issue with those two conclusions, arguing that a covered "disposition" does not have to be "permanent" and cites to multiple cases where "removeable substances" like asbestos and mold have been found to trigger a "direct physical loss." But, as noted above, those cases do not help Sand People because it has not alleged any *direct physical* anything that happened to or at its specific properties. Moreover, it has not been dispossessed or deprived *of* any specific property; its inventory and equipment remain. Instead, it complains of loss of *use,* meaning its inability to operate its stores.

Numerous courts have found that materially identical allegations do not trigger coverage under similarly worded policies as a result of government closure orders. The cases consistently conclude that there needs to be some *physical* tangible injury (like a total deprivation of property) to support "loss of property" or a *physical* alteration or active presence of a contaminant to support "damage to" property. *See, e.g., Mudpie, Inc.*, 2020 WL 5525171, at *4 ("Although Mudpie has been dispossessed of its storefront, it will not be a "permanent dispossession" as with the lost cargo in *Total Intermodal*....When the Stay at Home orders are lifted, Mudpie can regain possession of its storefront."); *Real Hospitality, LLC d/b/a/ Ed's Burger Joint v. Travelers Casualty Insurance Company of America*, No. 2:20-cv-00087, slip op. (S.W.D.Ms. November 4, 2020) (interpreting "loss of" prong in "direct physical loss of or damage to" to mean total dispossession of property); *10E, LLC v. Travelers Indem. Co. of Connecticut*, 2:20-CV-04418-SVW-AS, 2020 WL 5359653, at *4 (C.D. Cal. Sept. 2, 2020) ("Under California law, losses from inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a 'distinct, demonstrable, physical alteration.' [ ] 'Detrimental economic impact' does not suffice." (internal citations omitted)); *see also Travelers Cas. Ins. Co. of Am. v. Geragos and Geragos*, CV 20-3619 PSG (EX), 2020 WL 6156584, at *4 (C.D. Cal. Oct. 19, 2020) (dismissing claim under "loss of or damage to" language where insured "fails to allege that there was physical damage to the property and concedes that Coronavirus 'has never been detected at [its] property.' "); *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 1:20-CV-2939-TWT, 2020 WL 5938755, at *6 (N.D. Ga. Oct. 6, 2020) (dismissing claims because the "range of contemplated harms aligns with an understanding that 'loss of' means total destruction while 'damage to' means some amount of harm or injury.").[4]

***7** Sand People's "deprivation of functionality" argument – namely its inability to operate the stores during the duration of the government closure orders, triggering coverage – fares no better. There is no allegation of any direct physical contact that caused a tangible loss to their property (as in *Total Intermodal*) or the direct physical presence of a contaminant that creates an inability to use or need for remediation (like the actual presence of coronavirus, asbestos, mold, etc.). *See, e.g., Assn. of Apt. Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1068 (D. Haw. 2013) ("arsenic concentrated and posed a health risk that required abatement").

Finally, as in *Mudpie*, viewing the language of the Policy as a whole, the "Period of Restoration" language (during which the Policy covers lost business income and extra expenses) shows the strength of defendants' argument and the weakness of Sand People's. *Mudpie, Inc.*, 2020 WL 5525171 at *4; AC, Ex. 9 at 63 (defining the restoration period as beginning on the "date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises" and ending when "the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality."). As in *Mudpie*, here there is nothing on any of Sand People's premises that allegedly needs to be repaired, rebuilt or replaced.[5]

Therefore, Sand People has failed to allege a plausible basis for Lost Business Income coverage under either of its theories (the threat of rapidly spreading coronavirus or the Hawaii government closure orders). This claim is DISMISSED. Sand People is given limited leave to amend. It is unlikely to be able to allege the physical presence of coronavirus in any of its covered properties, but it may be able to allege the physical presence of coronavirus and additional facts in support of its "supply chain" theory.

II. CIVIL AUTHORITY LOSS

***8** Sand People also argues that under the plain language of the Policy, it is entitled to coverage under the Civil Authority provision because the closure orders in Hawaii "prohibited" access to its stores and the orders themselves were issued "in response" to physical loss and damage elsewhere. Numerous judges, including Judge Tigar in *Mudpie,* have addressed and rejected this argument in this identical posture:

> Mudpie's allegations establish that the government closure orders were intended to prevent the spread of COVID-19. *See* ECF No. 1 ¶ 24 (California's Safer at Home Order was issued "to control the spread of COVID-19."). Because the orders were preventative – and absent allegations of damage to adjacent property – the complaint does not establish the requisite causal link between prior property damage and the government's closure order.

Mudpie, Inc., 2020 WL 5525171, at *7.

The same result is required here. The preventative closure orders cannot support a causal link of direct physical loss of or damage to property for the reasons discussed above. In the absence of any allegation that any specific neighboring property to a Sand People property *in Hawaii* had actual coronavirus exposure, this coverage has not plausibly been triggered. *See Sandy Point Dental, PC v. Cincinnati Ins. Co*., 20 CV 2160, 2020 WL 5630465, at *3 (N.D. Ill. Sept. 21, 2020) ("the policy's civil authority coverage applies only if there is a Covered Cause of Loss, meaning a direct physical loss, to property other than the plaintiff's property. Even then, there is coverage only if the civil authority order, (1) prohibits access to the premises due to (2) direct physical loss to property, other than plaintiff's premises, caused by or resulting from any Covered Cause of Loss."); *In Raymond H. Nahmad DDS PA v. Hartford Cas. Ins. Co*., No. 1:20-cv-22833-BB, slip op. (S.D. Fla. Nov. 2, 2020) (same).

This claim is likewise dismissed with limited leave to amend.

III. REMAINING CLAIMS

Given the failure to plead plausible coverage under any of the provisions of the Policy, I need not reach plaintiff's remaining claims (Unfair or Deceptive Trade Practices, under HI Rev Stat § 480-1 et seq., Breach of Covenant of Good Faith and Fair Dealing, and declaratory relief) because they all fail if the underlying breach of contract claim based on coverage fails.

An unfair conduct claim could be premised on defendants' alleged "misrepresentation" of the scope of coverage. Oppo. at 22. However, there are no "how and what and where" facts alleged identifying any alleged misrepresentations in the Amended Complaint. The only time "misrepresent" is used is in paragraph 155 (alleging unfair conduct as "promising coverage to Plaintiffs and the Subclass that was not provided, and that Defendants had no intention of providing"). No specific facts regarding alleged fraudulent acts or misrepresentations are provided.[6] Sand People is given limited leave to amend this claim to identify the specific misrepresentations it allegedly received regarding the coverage provided by defendants.

CONCLUSION

For the foregoing reasons, defendants' motion is GRANTED. Sand People is given limited leave to amend as described above. Any amended complaint should be filed within twenty days of the date of this Order.

***9 IT IS SO ORDERED.** Dated:

November 9, 2020

William H. Orrick

United States District Judge

All Citations

Slip Copy, 2020 WL 6562332

Footnotes

1 During the oral argument, Sand People's counsel admitted that it would not be able to plead facts that coronavirus actually entered or was otherwise found in one of the Sand People's stores. I also note that at least one court has dismissed coverage claims despite plaintiff's allegation that coronavirus had entered a property. *See, e.g. Uncork and Create LLC v. The Cincinnati Insurance Company, et al*., No. 2:20-cv-00401, slip op. (S.D.W. Va. November 2, 2020) (granting motion to dismiss for lack of "physical loss" and concluding that "even when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property.").

2 Cases confirming coverage where there was physical contamination of properties, therefore, do not aid plaintiff. *See* Oppo. at 6-7.

3 The Policy provides: "j. Income Support Properties. We will pay for the actual loss of Business Income you sustain due to direct physical loss or damage at the premises of an income support property not described in the schedule caused by or resulting from any Covered Cause of Loss. Income Support Property means property operated by others on whom you depend to: (1) Deliver material or services to you, or to others for your account; (2) Accept your products or services; (3) Manufacture products for delivery to your customers under contract of sale; or (4) Attract customers to your business." AC, Ex. 9 at 35.

4 Sand People argues that these cases (and the dozens of other cases that have been similarly decided by district courts) are not persuasive because some of them also addressed virus exclusions in the policies at issue. The majority of these courts reasonably determined, first, that coverage was not implicated given the lack of a direct physical event causing loss of or damage to property. *See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am*., 20-CV-03213-JST, 2020 WL 5525171, at *7 n. 9 (N.D. Cal. Sept. 14, 2020) ("Because Mudpie is not entitled to Civil Authority coverage, the Court need not consider Travelers's additional argument that the virus exclusion bars such coverage."); *10E, LLC v. Travelers Indem. Co. of Connecticut,* 2:20-CV-04418-SVW- AS, 2020 WL 5359653, at *6 (C.D. Cal. Sept. 2, 2020) ("Plaintiff's FAC does not articulate a theory of Civil Authority coverage clearly enough to allow the Court to adjudicate at this stage whether and how the Policy's virus exclusion applies."); *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am*., 1:20-CV-2939-TWT, 2020 WL 5938755, at *6 n. 3 (N.D. Ga. Oct. 6, 2020) ("Because the Plaintiffs have not pleaded sufficient facts to support a claim for coverage here, this Court will not proceed to analyze the parties' arguments regarding the Virus or Bacteria exclusion."). These courts' initial coverage determinations are persuasive here.

5 In post-briefing submissions, plaintiff submits a pair of North Carolina Superior Court decisions from October 9, 2020, granting summary judgment to plaintiffs on policies that require only a "direct loss" to Property. Dkt. No. 45. Those decisions are not persuasive. Defendants provide four additional district court cases as supplemental authority, including two that are very similar to this case and highly persuasive. In the first, *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos*., No. 2:20-cv-05663-VAP-DFMx, slip op. (C.D. Cal. Oct. 27, 2020), a Central District judge granted defendants' motion to dismiss on a policy requiring a "direct physical loss of or damage to property" for Business Income coverage and Civil Authority coverage. Similarly, *in Uncork and Create LLC v. The Cincinnati Insurance Company, et al*., No. 2:20-cv-00401, slip op. (S.D.W. Va. November 2, 2020), the district court dismissed with prejudice claims materially identical to the ones asserted here. *Id*. (rejecting Business Income and Civil Authority coverages under a "direct physical damage or loss to property" policy despite plaintiffs' assertions of closure due to (1) a direct threat/exposure to coronavirus and (2) government closure orders). *See also In Raymond H. Nahmad DDS PA v. Hartford Cas. Ins. Co*., No. 1:20-cv-22833-BB, slip op. (S.D. Fla. Nov. 2, 2020) (dismissing Business Income and Civil Authority claims under a "direct physical damage or loss to property" policy); *Real Hospitality, LLC d/b/a/ Ed's Burger Joint v. Travelers Casualty Insurance Company of America*, No. 2:20-cv-00087, slip op. (S.W.D.Ms. November 4, 2020) ("When all of the provisions are read together it makes logical sense that the property that is insured, i.e., the building and/or personal property in or on the building, must first be lost or damaged before Business Income coverage kicks in."..."Plaintiff never specifically alleges that the virus is/was present on the restaurant premises.").

6 The other unfair acts – categorically denying claims and failing to investigate claims – fail if no coverage has been plausibly triggered.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

West Coast Hotel Management, LLC, et al.,

Plaintiffs,

v.

Berkshire Hathaway Guard Insurance Companies, et al.,

Defendants.

2:20-cv-05663-VAP-DFMx

Order GRANTING Motion to Dismiss (Dkt. 12).

Defendants Berkshire Hathaway Guard Insurance Companies and AmGUARD Insurance Company ("Defendants") filed a Motion to Dismiss Plaintiffs' Complaint ("Motion"). (Dkt. 12). Plaintiffs filed an Opposition to the Motion. (Dkt. 25). After considering all papers filed in connection with the Motion, the Court GRANTS the Motion.

I. BACKGROUND

This matter arises out of the current COVID-19 pandemic and its significant impact on businesses across the country. (*See* Dkt. 1). Plaintiffs West Coast Hotel Management, *dba* University Square Hotel of Fresno, and West Coast Orange Group, LLC, *dba* The Hotel Fresno, each own and operate a hotel in Fresno, California. (*Id.* ¶¶ 1–2).

Beginning in January 2020, Plaintiffs suffered losses due to the COVID-19 pandemic. (*Id.* ¶ 21). The spread of COVID-19 internationally affected travel and resulted in fewer reservations at Plaintiffs' hotels. (*Id.*). Then in March 2020, as the virus spread domestically, the Mayor of Fresno issued an Executive Order ("Fresno Order") directing the closure of all non-essential businesses. (*See id.* ¶ 23). The Governor of California issued a similar state-wide Executive Order ("State Order") the same week. (*Id.*). Plaintiffs allege that as a direct and proximate result of these two Orders (together, the "Executive Orders"), public access to Plaintiffs' hotels was prohibited and Plaintiffs suffered severe financial losses. (*Id.* ¶ 24).

Plaintiffs' hotel properties are covered under a business insurance policy (the "Policy") issued by Defendants.[1] (*Id.* ¶ 12). The parties do not dispute that the Policy was in effect during the time period relevant to this matter. Coverage under the policy extends only to losses that result from a "Covered Cause of Loss." Excluded as a Covered Cause of Loss is any "loss or damage caused directly or indirectly by . . . [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (*Id.* Ex. 1, at 67, 70). It further provides that "[s]uch loss or damage is excluded regardless of any other cause or event that contributed concurrently or in any sequence to the loss." (*Id.* at 67).

[1] Defendants assert that Berkshire Hathaway Guard Insurance Companies is not a legal entity and that Plaintiffs are insured by AmGUARD Insurance Company. (Dkt. 12 at 1). As AmGUARD is a named defendant in this action, this distinction does not affect the determination of the Motion.

Under the Policy, "Business Income" coverage is available for loss of business income sustained due to the necessary suspension of operations during a "period of restoration" when the suspension is caused by "direct physical loss of or damage to property at the described premises." (*Id.* at 58). The period of restoration begins "72 hours after the time of direct physical loss or damage" and ends on the earlier of "[t]he date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or . . . [t]he date when business is resumed at a new permanent location." (*Id.* at 82). Relatedly, "Extra Expense" coverage covers expenses incurred during the period of restoration that would not have been incurred "if there had been no direct physical loss or damage to property at the described premises." (*Id.* at 60).

The Policy also provides "Civil Authority" coverage. When a Covered Cause of Loss causes damage to property outside the described premises, coverage will extend to any loss of Business Income or incurred Extra Expense caused by an action of civil authority that prohibits access to the described premises. (*Id.* at 60–61). Civil Authority coverage requires that access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage and that the action of civil authority is taken in response to the damage. (*Id.*).

In January 2020, Plaintiffs sought indemnification from Defendants for incurred business losses. (Dkt. 1 ¶ 25). Defendants denied Plaintiffs' claim. (*Id.* ¶ 26). Plaintiffs filed their Complaint on June 25, 2020, seeking a judicial declaration that (i) the Executive Orders constitute civil authority

orders that prohibit access to Plaintiffs' hotels; (ii) the prohibition of access is a covered cause of loss; (iii) the prohibition of access was necessitated by physical loss of or damage to the hotels; (iv) coverage is warranted under the Policy despite the Virus Exclusion; and (v) the Policy provides Civil Authority and Business Income coverage for losses or damage due to COVID-19 and the Executive Orders. (*Id.* ¶¶ 43–45).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a party to bring a motion to dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6) is read along with Rule 8(a), which requires a short, plain statement upon which a pleading shows entitlement to relief. Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint—as well as any reasonable inferences to be drawn from them—as true and construe them in the light most favorable to the non-moving party. *See Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005); *ARC Ecology v. U.S. Dep't of Air Force*, 411 F.3d 1092, 1096 (9th Cir. 2005); *Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994). "The court need not accept as true, however, allegations that contradict facts that may be judicially noticed by the court." *Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000).

To survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570; *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "The plausibility standard is not

akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556).

The Ninth Circuit has clarified that (1) a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively" and (2) "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F. 3d 1202, 1216 (9th Cir. 2011).

Although the scope of review is limited to the contents of the complaint, the Court may also consider exhibits submitted with the complaint, *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990), and "take judicial notice of matters of public record outside the pleadings," *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988).

III. EVIDENTIARY ISSUES

The Court first resolves the various evidentiary issues associated with the present Motion. The Court grants Defendants' request for judicial notice of (i) Executive Order N-33-20, issued by Governor Gavin Newsom on March 19, 2020 (Dkt. 14-1); (ii) Proclamation of the Mayor of the City of Fresno, California, issued by Mayor Lee Brand on March 16, 2020 (Dkt. 14-

2); and (iii) Emergency Order 2020-02, issued by Fresno City Manager Wilma Quan on March 18, 2020 (Dkt. 14-3). (Dkt. 13). Judicial notice is appropriate as the Complaint refers to and relies on these Orders and Plaintiffs have not objected to the authenticity of the copies submitted by Defendants. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) ("A court may consider evidence on which the complaint "necessarily relies" if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion."). Additionally, these Orders are appropriate for judicial notice as they are "matters of public record." *Mir*, 844 F.2d at 649. The Court denies Defendants' remaining requests for judicial notice as the Court does not rely upon the underlying documents. (Dkts. 13, 30). Additionally, the Court will consider the Policy, which is attached as an exhibit to Plaintiffs' Complaint and incorporated by reference. *Biltmore Assocs., LLC v. Twin City Fire Ins. Co*., 572 F.3d 663, 665 n.1 (9th Cir. 2009) ("A court may consider documents, such as the insurance policies, that are incorporated by reference into the complaint.")

The Court also sustains Defendants' evidentiary objections. (Dkt. 28). The Court will not consider the Declaration of Bac Tran (Dkt. 26), as well as the portions of Plaintiffs' Opposition referring to the Declaration, and the "Proposal of Insurance" attached as an exhibit to Plaintiffs' Opposition. In support of their Opposition, Plaintiffs have relied improperly on unpled factual allegations and documents not attached or referred to in their Complaint nor judicially noticeable. As explained above, on a motion to dismiss, the Court will consider only the complaint, documents incorporated

by reference, and other matters appropriate for judicial notice. To the extent Plaintiffs' Opposition cites to or relies upon other facts outside the Complaint, the Court will disregard them.

IV. DISCUSSION

Plaintiff seeks several declarations from the Court which would, in effect, establish that (1) coverage under the Business Income and Civil Authority provisions of the Policy was triggered under the circumstances alleged in the Complaint and (2) the Virus Exclusion does not preclude coverage. The Court addresses each of these three contested Policy provisions in turn.

A. Business Income Coverage

Under California law, "interpretation of an insurance policy is a question of law."[2] *Palmer v. Truck Ins. Exch*., 21 Cal. 4th 1109, 1115, 988 (1999). "When interpreting a policy provision, we must give terms their ordinary and popular usage, unless used by the parties in a technical sense or a special meaning is given to them by usage." *Id.* (citation and quotation marks omitted). In addition, "[t]he terms in an insurance policy must be read in context and in reference to the policy as a whole, with each clause helping to interpret the other." *Sony Comput. Entm't Am. Inc. v. Am. Home Assurance Co*., 532 F.3d 1007, 1012 (9th Cir. 2008) (citing Cal. Civ. Code § 1641; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal. 4th 854, 867 (1993); *Palmer*, 21 Cal. 4th at 1115).

[2] The parties do not dispute that California law governs the interpretation of the Policy.

Accordingly, the Court examines the Business Income provisions in context to determine if Plaintiffs have stated a legally cognizable claim. Business Income coverage requires that Plaintiffs suffer "direct physical loss of or damage to property." (Dkt. 1 Ex. 1, at 58). While "direct physical loss of or damage to property" is not defined in the Policy, it plainly requires, at minimum, that the loss or damage be physical in nature. Indeed, the Policy contemplates a "period of restoration" after such loss or damage during which property is "repaired, rebuilt, or replaced." (*Id.* at 82). This interpretation is consistent with the interpretations given to similar or identical language by courts applying California law. *See 10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-ASx, 2020 WL 5359653, at *4 (C.D. Cal. Sept. 2, 2020) (holding that "[p]hysical loss or damage occurs only when property undergoes a 'distinct, demonstrable, physical alteration'") (quoting *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal.App.4th, 766, 799 (2010)); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04423-AB-SKx, 2020 WL 5938689, at *3 (C.D. Cal. Oct. 2, 2020) (same); *Plan Check Downtown III, LLC v. Amguard Ins. Co.*, No. CV 20-6954-GW-SKx, 2020 WL 5742712, at *4–7 (C.D. Cal. Sept. 10, 2020) (applying a physical alteration standard in determining if insured alleged "physical loss of or damage to property"); *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 556 (2003) (holding that a direct physical loss can exist only where the property at issue has "a material existence, formed out of tangible matter, and is perceptible to the sense of touch").

Here, Plaintiffs' Complaint establishes that they suffered a temporary loss of economically valuable use of their hotels due to a decrease in patronage or the Executive Orders. (*See* Dkt. 1). Plaintiffs do not claim that any property has undergone a physical alteration or needs to be "repaired, rebuilt, or replaced."[3] The Complaint does not allege that Plaintiffs are not in possession of their hotels and the property contained within them. Instead, Plaintiffs contend that the loss of *use* of their properties is sufficient to trigger coverage under the Policy. (Dkt. 25 at 5–6). Under California law, however, a "detrimental economic impact" alone—as Plaintiffs have alleged—is not compensable under a property insurance contract. *MRI Healthcare*, 187 Cal. App. 4th at 779; *see also Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33, 39 (2018) ("[W]hen it comes to property insurance, diminution in value is not a covered peril, it is a measure of a loss."). Hence, Plaintiffs cannot state a legally cognizable claim based on the temporary loss of use of property alleged here.[4] *See 10E*, 2020 WL 5359653, at *6 (dismissing claim because losses from inability to use property do not amount to "direct physical loss of or damage to property" within the ordinary and popular meaning of that phrase); *Mark's Engine Co.*, 2020 WL 5938689, at *3 (same).

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[3] To the extent Plaintiffs have attempted to argue that physical alteration occurred, they have failed to do so in a non-conclusory manner. The Court addresses this failure below.

[4] Plaintiff relies on *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), a case from the Western District of Missouri applying Missouri law. (Dkt. 25 at 5–6). The Court chooses to follow the California authorities cited herein. Moreover, the insurance policy in question in *Studio 417* did not have a virus exclusion which, as discussed below, precludes coverage in the present matter. 2020 WL 4692385, at *1.

In their Opposition, Plaintiffs argue that there was physical damage to their property as a result of the physical nature of COVID-19. (Dkt. 25 at 5). Plaintiffs' Complaint, however, lacks the factual allegations needed to lend this theory plausibility. The Complaint merely states that there was "direct physical loss of or damage to the [hotels]." (Dkt. 1 ¶ 27). The Court disregards this conclusory allegation. *See Iqbal*, 556 U.S. at 679 ("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth."). Absent that allegation, Plaintiffs' Complaint provides only generic statements regarding the physical nature of COVID-19 and the number of cases in California and Fresno County. (Dkt. 1 ¶¶ 28–33). Critically, the Complaint does not attempt to connect those allegations to any losses or damage at Plaintiffs' properties. Although Plaintiffs attempt belatedly to do so in their Opposition, the Court will not consider those new factual allegations.

B. Civil Authority Coverage

Unlike the Business Income provisions, the Civil Authority provisions provide coverage for certain economic losses suffered by an insured in the absence of damage to the insured's property. (*See* Dkt. 1 Ex. 1, at 60–61). As is expected for a property insurance policy, the requirement of property damage is not eliminated. (*Id.*). Instead, coverage is premised on damage to property other than the insured's but within one mile of the insured's premises. (*Id.*). The insured's losses must result from an act of a civil authority, taken in response to that property damage, that prohibits access

to the area immediately surrounding the damaged property, including the insured's premises. (*Id.*).

Here, Plaintiffs request declaratory relief establishing the existence of Civil Authority coverage under the facts alleged in the Complaint. (*See* Dkt. 1 ¶¶ 43–45). While Plaintiffs briefly describe the Executive Orders—the acts of civil authority at issue—and contend they were issued based on "evidence of physical damage to property," Plaintiffs nevertheless fail to provide sufficient non-conclusory allegations to state a plausible claim. (*Id.* ¶ 23). Besides the generic descriptions of the Executive Orders, Plaintiffs' Complaint contains unsupported statements like "the properties that are damaged are in the immediate area of the [hotels]." (*Id.* ¶¶ 23–24). Plaintiffs simply have recited the coverage criteria set forth in the Policy, and such bare allegations cannot support Plaintiffs' request for declaratory relief. *See Iqbal*, 556 U.S. at 678 (a court need not take as true "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements"); *10E*, 2020 WL 539653, at *6 (granting motion to dismiss claim for civil authority coverage where plaintiff "paraphrase[d] the language of the Policy without specifying facts that could support recovery under the Policy").

C. Virus Exclusion

As with the other provisions of an insurance policy, "[t]he interpretation of an exclusionary clause is an issue of law." *Marquez Knolls Property Owners Assoc., Inc. v. Executive Risk Indemnity, Inc.*, 153 Cal. App. 4th 228, 233–234 (2007). To be enforceable, a coverage exclusion must be

"conspicuous, plain and clear." *Haynes v. Farmers Ins. Exch*., 32 Cal. 4th 1198, 1204 (2004); *see also Ausmus v. Lexington Ins. Co*., No. 08–CV–2342 L(LSP), 2009 WL 1098627, at *4 (S.D. Cal. Apr. 22, 2009) *aff'd*, 414 F. App'x 76 (9th Cir. 2011) (granting motion to dismiss because applicable exclusion was conspicuous and clear).

The Policy here excludes as a Covered Cause of Loss any "loss or damage caused directly or indirectly by . . . [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (Dkt. 1 Ex. 1, at 67, 70). Coverage under the Business Income and Civil Authority provisions requires that the claimed loss or damage results from, or is caused by, a "Covered Cause of Loss." (*Id.* at 58, 60–61). Plaintiffs seek a declaration from the Court that there is "coverage under the Policy despite the Virus Exclusion provision." (Dkt. 1 ¶ 44). Defendants assert that the Virus Exclusion provision precludes all requested relief because it prevents coverage under the Policy.[5] (Dkt. 12 at 6–7).

The Court first analyzes the enforceability of the Virus Exclusion. A limitation on coverage is plain and clear when it is communicated in language understandable by the average layperson. *Nat'l Auto. & Cas. Ins. Co. v. Stewart*, 223 Cal.App.3d 452, 457 (1990). Here, the Virus Exclusion

[5] Typically, the insurer bears the burden of proving the applicability of an exclusion. *State Farm Fire & Cas. Co. v. Martin*, 872 F.2d 319, 321 (9th Cir. 1989). Defendants have met that burden. Plaintiffs, however, request declaratory relief regarding the applicability of the Virus Exclusion. Accordingly, Plaintiffs must also allege facts that state a plausible claim for relief.

is plainly stated in language free of jargon. The Exclusion defines that losses are excluded whether caused directly or indirectly by a virus and specifies the viruses that are excluded, *i.e.* those that induce or can induce physical distress, illness, or disease. (*See* Dkt. 1 Ex. 1, at 67, 70). The Court can see no grounds for determining that this limitation is anything but plain and clear.

The Virus Exclusion is also conspicuous within the Policy. An exclusion "must be placed and printed so that it will attract the reader's attention." *Haynes*, 32 Cal.4th at 1204. Plaintiffs assert that the Exclusion was included "as three sentences" buried within the "100+ page policy packet." (Dkt. 1 ¶ 37). The body of the Policy, sans endorsements, however, is 48 pages long. (*See id.* Ex. 1, at 54–101). The Exclusion is identified in the Form Index that precedes the Policy, which states that the "Virus or Bacteria Exclusion" is located on page 17 of the Policy. (*Id.* at 53). The Virus Exclusion is in fact located on page 17 under a bold-font heading titled "Virus or Bacteria." (*Id.* at 70). It is also located alongside other Policy exclusions under another bold-font heading that sensibly reads, "Exclusions." (*Id.* at 67, 70). As the Virus Exclusion is both conspicuous and clear, it is enforceable against Plaintiffs.

Under the facts alleged in the Complaint, the Court determines that the Virus Exclusion precludes coverage. Plaintiffs' Complaint contains multiple admissions that their losses were caused directly or indirectly by a virus capable of inducing disease. First, Plaintiffs concede that "COVID-19 is an infectious disease caused by a virus." (Dkt. 1 ¶ 19). Plaintiffs then assert

that "*due to the COVID-19 outbreak*, Plaintiffs experienced a significant decline in hotel reservations and suffered significant economic losses." (*Id.* ¶ 21 (emphasis added)). Plaintiffs also assert that they "have suffered, and continue to suffer, significant losses from the closure of their [hotels] and related losses *due to the COVID-19 pandemic.*" (*Id.* ¶ 42 (emphasis added)). Even if Plaintiffs were to argue that their losses were caused solely by the Executive Orders and not "directly or indirectly" by the virus, Plaintiffs have already admitted that the Orders were issued "to halt the physical spread of COVID-19." (*Id.* ¶ 34). Indeed, the text of the Orders, of which the Court takes judicial notice, allows no other conclusion. (*See* Dkt. 14-1 (State Order providing that "[o]ur goal is simple, we want to bend the curve, and disrupt the spread of the virus"); Dkt. 14-2 (Fresno Order issued in response to "conditions of extreme peril . . . with respect to the international COVID-19 pandemic")).

Plaintiffs do not dispute that their losses were caused by a virus. Instead, Plaintiffs argue that the Virus Exclusion is unenforceable under the reasonable expectations doctrine. (*See* Dkt. 25 at 1–5). Specifically, Plaintiffs allege that Defendants did not highlight or explain the Virus Exclusion provision before Plaintiffs purchased the Policy, causing Plaintiffs to believe they had coverage under the factual circumstances alleged in the Complaint. (Dkt. 1 ¶ 38). The doctrine, however, does not give courts a license to refuse to enforce contract terms based on one party's expectations. "[A]n insured's reasonable expectation of coverage is merely an interpretative tool used to resolve an ambiguity once it is found to exist and cannot be relied upon to create an ambiguity where none exists." *Cal.*

Traditions, Inc. v. Claremont Liab. Ins. Co., 197 Cal. App. 4th 410, 420 (2011) (internal citations omitted).

Plaintiffs argue that ambiguity exists because "[a] pandemic is a social health crisis that afflicts entire countries and continents globally; it is much more than just a simple virus.[6] (Dkt. 25 at 4). The Court declines to accept Plaintiffs' interpretation. As Defendants correctly note, Plaintiffs' interpretation defies the plain and unambiguous text of the Policy and is "akin to arguing that a coverage exclusion for damage caused by fire does not apply to damage caused by a very large fire." (Dkt. 27 at 3). As Plaintiffs are unable to circumvent the Virus Exclusion, Plaintiffs' Complaint fails to state a legally cognizable claim for relief.

D. Leave to Amend

Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." When considering whether to grant leave to amend pleadings, "a court must be guided by the underlying purpose of Rule 15—to facilitate decision on the merits rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). Accordingly, leave to amend should be denied only when allowing amendment would unduly prejudice the opposing party, cause undue delay, be futile, or if the moving party acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008).

[6] Plaintiffs also raise this interpretation as an independent reason for the Court to determine that the COVID-19 pandemic is outside the scope of the Virus Exclusion. This does not alter the Court's rejection of Plaintiffs' interpretation.

When dismissing a claim, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Eldridge v. Block*, 832 F.2d 1132, 1130 (9th Cir. 1987) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995) (internal quotation marks omitted)). Here, as the Virus Exclusion precludes coverage under the Civil Authority and Business Income provisions of the Policy, the Court determines that granting Plaintiffs leave to amend would be futile. Accordingly, the Court GRANTS the Motion without leave to amend.

V. CONCLUSION

The Court GRANTS Defendants' Motion to Dismiss without leave to amend.

IT IS SO ORDERED.

Dated: 10/27/20

Virginia A. Phillips
United States District Judge