STATE OF MICHIGAN

IN THE COURT OF APPEALS

GAVRILIDES MANAGEMENT COMPANY LLC,
GAVRILIDES PROPERTY MANAGEMENT LLC, and
GAVRILIDES MANAGEMENT WILLIAMSTON LLC,

Plaintiffs-Appellants,

v

MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

Court of Appeals No. 354418

Ingham County Circuit Court
No. 20-000258-CB

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MICHIGAN RESTAURANT AND LODGING ASSOCIATION AND RESTAURANT LAW CENTER'S MOTION FOR LEAVE TO FILE A JOINT AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Michigan Restaurant and Lodging Association ("MRLA") and Restaurant Law Center ("RLC"), through their counsel, Honigman LLP, and pursuant to MCR 7.212(H), hereby move this Honorable Court for leave to allow MRLA and RLC to appear as *amici curiae* in the above-captioned action and to file with the Court the Joint Amicus Curiae Brief in Support of Plaintiffs-Appellants submitted concurrently with this Motion. In support of this Motion, MRLA and RLC state as follows:

1. MRLA is a trade association representing thousands of Michigan foodservice, beverage, and lodging establishments. MRLA's members, members' employees, and those like them make up an integral part of Michigan's economy, employing nearly 600,000 people and generating $40 billion in statewide annual revenue.

2. RLC is a public policy organization affiliated with the National Restaurant Association, the world's largest foodservice trade association. Through regular participation in amicus briefs on behalf of the industry, RLC provides courts with the industry's perspective on legal issues in pending cases that may have industry-wide implications.

3. This case centers on an issue of first impression in Michigan that is of critical importance to the restaurant industry: whether restaurants are entitled to business interruption coverage for the necessary suspension of their business operations caused by the executive orders issued in response to the COVID-19 pandemic.[1]

4. The restaurant industry has been incredibly hard-hit by the COVID-19 pandemic as executive orders have restricted physical access to restaurants and curtailed their business operations. 90% of Michigan restaurants have encountered slimmer profit margins since the

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[1] There are over 1,400 similar lawsuits nationwide. See Tom Baker, Penn Law, <https://cclt.law.upenn.edu/cclt-case-list/> (accessed Feb 8, 2020).

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beginning of the COVID-19 pandemic and 33% of Michigan operators report it is unlikely their restaurant will survive six months without some form of relief. [2]

5. Many of MRLA's members—and restaurants more generally—purchased business interruption insurance to protect against the risk that they would be unable to use their property to operate their business. They understood, expected, and believed that their policies would cover any and all non-excluded risks, including executive shutdown orders, that caused "direct physical loss of or damage to" their restaurants. Coverage under these policies is crucial to the continuing vitality of the restaurant industry in Michigan.

6. MRLA and RLC therefore have a unique and significant interest in this litigation, and their perspective may aid the Court in its deliberations.

7. This Motion for Leave to File a Joint Amicus Brief is timely filed under MCR 7.308(B)(2).

8. MRLA and RLC's Joint Amicus Curiae Brief in Support of Plaintiffs-Appellants accompanies this motion.

WHEREFORE, MRLA and RLC respectfully request that this Honorable Court enter an Order granting this Motion for Leave to File a Joint Amicus Curiae Brief, accept for filing the Joint Amicus Curiae Brief in Support of Plaintiffs-Appellants submitted concurrently with this Motion, and grant such additional relief as the Court deems just and equitable.

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[2] See Michigan Restaurant and Lodging Ass'n, *COVID-19 Restaurant Impact Survey*, <https://www.mrla.org/uploads/1/2/1/3/121332115/michigan_12-2020.pdf> (accessed Feb 8, 2020).

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Respectfully submitted,
HONIGMAN LLP

Dated: February 9, 2021 By: /s/ Peter B. Ruddell

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QUESTIONS PRESENTED

Michigan Restaurant and Lodging Association ("MRLA") and Restaurant Law Center ("RLC") concur in the Statement of Questions Involved set forth in the Brief of Plaintiffs-Appellants.

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INTRODUCTION AND STATEMENT OF INTEREST OF THE AMICI CURIAE

MRLA is a trade association representing thousands of Michigan foodservice, beverage, and lodging establishments. MRLA's members, members' employees, and those like them make up an integral part of Michigan's economy, employing nearly 600,000 people and generating $40 billion in statewide annual revenue. Many of MRLA's members—and restaurants more generally—have purchased business interruption insurance. Coverage under these policies is crucial to the continuing vitality of the restaurant industry in Michigan.

RLC is a public policy organization affiliated with the National Restaurant Association, the world's largest foodservice trade association. Through regular participation in amicus briefs on behalf of the industry, RLC provides courts with the industry's perspective on legal issues in pending cases that may have industry-wide implications.

This case raises issues of vital importance to the restaurant industry. Many restaurants have paid significant premiums for business interruption coverage to protect against the necessary suspension of their business operations. They have filed claims for the physical loss or damage they suffered as a direct result of the unprecedented executive orders issued in response to the COVID-19 pandemic. Insurers understood the risk of loss from such measures and failed to unambiguously exempt it from coverage. Yet they have unreasonably and categorically denied coverage on the basis that restaurants supposedly have not incurred physical loss or damage even though their properties have been rendered non-functional, detrimentally altered, and physically impaired as a result of the orders. This is an issue of first impression in Michigan and the subject of thousands of lawsuits across the country. MRLA and RLC have a strong interest in highlighting for the Court the importance these issues have to the restaurant industry.

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STATEMENT OF FACTS

MRLA and RLC rely upon and accept the Statement of Facts and Procedural History set forth in the Brief of Plaintiffs-Appellants.

ARGUMENT

The restaurant industry is a significant sector of the Michigan economy and a major driver of economic activity across the country. For years, restaurants in Michigan have paid substantial premiums for business interruption coverage, which is an important tool for managing the risks associated with owning and operating a business. Business interruption insurance is designed to protect the business's commercial viability by allowing it to meet its ongoing obligations and to replace lost revenue when confronted with a sudden, unplanned suspension of operations. For small businesses operating with low profit margins—like most restaurants—business interruption insurance can be crucial.

Despite the importance of this coverage for restaurants, when policyholders like Plaintiffs-Appellants were forced to close or significantly curtail operations by order of public health authorities beginning in March, insurance companies across the country—including Defendant-Appellee Michigan Insurance Company—uniformly denied their claims. In doing so, the insurers have imposed new requirements not found in the plain language of the policies they issued.

This Court should not allow this belated re-drafting. Bedrock interpretation principles hold that undefined terms should be given their plain and ordinary meaning and that a court should not inject additional terms or conditions into an insurance policy. Black-letter law further requires that all ambiguities in insurance policies be resolved in favor of the insured. Insurance companies issued business interruption policies to restaurants knowing that the words "physical loss of or damage to property" do not require structural alteration of the property, and

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understanding that a global pandemic could one day require restrictive public health interventions. Despite that knowledge and understanding, they failed to unambiguously exclude coverage for the necessary suspension of business operations that inevitably followed.

Because Plaintiffs-Appellants have shown they are entitled to coverage under a reasonable reading of their policy, this Court should reverse the Circuit Court's grant of summary disposition and remand this matter so Plaintiffs-Appellants may amend their complaint.

I. Standard of Review.

MRLA and RLC agree with Plaintiffs-Appellants that this Court's review is *de novo*. This is an issue of first impression in Michigan, and this Court owes no deference to the Circuit Court's ruling or the federal authorities on which Defendant-Appellee has relied.

II. The Circuit Court Erred by Finding the Suspension of Plaintiffs-Appellants' Business Was Not Caused by Physical Loss of or Damage to Property.

A. The Restaurant Industry, Which Drives Billions of Dollars in Revenue and Employs Millions of Workers, is in Crisis.

The restaurant and foodservice industry plays a major role in Michigan's economy. It generates an estimated $17.9 billion in sales across 16,543 locations in the state.[1] It is also a considerable source of employment, providing jobs to approximately 447,200 workers, and accounting for approximately 10% of employment statewide.[2] Consumer spending at restaurants has a multiplier effect too. Every dollar spent at table-service restaurants—the businesses most

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[1] Michigan Restaurant and Lodging Ass'n, *Restaurant & Lodging Industry Impact in Michigan*, <https://www.mrla.org/industry-impact.html> (accessed Feb 8, 2021).

[2] *Id*.

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impacted by the executive orders—returns $1.90 to the state's economy.[3] A single restaurant contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses like hotels.[4]

Restaurants are also cultural centers, creating unique neighborhood identities and driving commercial revitalization. That is particularly true of the many small, often family-owned restaurants that make up the vast majority of the industry. Indeed, the restaurant industry remains a shining example of upward mobility. Nearly one half of all adults get their first job experience in a restaurant.[5] And the industry provides key employment for women, minorities, immigrants, young people, and other historically disadvantaged groups.[6]

The success of the restaurant industry, however, is neither self-sustaining nor guaranteed. Today, the industry is more at risk than ever as restaurants have suffered catastrophic financial losses and continue to face unprecedented challenges. In a recent impact survey,[7] 80% percent of Michigan restaurant operators said their October 2020 sales had declined compared to October

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[3] Nat'l Restaurant Ass'n, *Michigan Restaurant Industry at a Glance*, <https://www.restaurant.org/downloads/pdfs/state-statistics/michigan.pdf> (accessed Feb 8, 2020).

[4] Eric Amel et al., Independent Restaurants Are a Nexus of Small Business in the United States and Drive Billions of Dollars of Economic Activity That Is at Risk of Being Lost Due to the COVID-19 Pandemic (June 10, 2020), available at <https://media-cdn.getbento.com/accounts/cf190ba55959ba5052ae23ba6d98e6de/media/EmH1JsVMRNylmKAeF2FJ_Report.pdf> (accessed Feb 8, 2021).

[5] Nat'l Restaurant Ass'n, *Restaurant Industry: 2020 Facts*, <https://www.restaurant.org/Downloads/PDFs/Research/SOI/2020-State-Of-The-Industry-Factbook.pdf> (accessed Feb 8, 2021).

[6] See Amel, *supra* note 4, at 6–9.

[7] See Michigan Restaurant and Lodging Ass'n, *COVID-19 Restaurant Impact Survey – December 2020*, <https://www.mrla.org/uploads/1/2/1/3/121332115/michigan_12-2020.pdf> (accessed Feb 8, 2021).

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2019, losing a quarter of their business on average. 89% of Michigan operators expected their sales to further decrease during the next three months. At the same time, costs had increased at 54% of Michigan restaurants. Overall, 90% of Michigan operators have encountered a slimmer profit margin since the beginning of the COVID-19 pandemic, and 33% said it was unlikely their restaurant would still be in business six months from now unless they get some form of relief.

These losses have had a massive effect on Michigan's economy. 89% of Michigan restaurants have had to lay off or furlough employees, with two-thirds of them reporting more than a 20% reduction in staffing levels. Most restaurants are anticipating additional layoffs in the coming months. The inability of restaurants to generate income—either through normal operations or through business interruption coverage—has also had downstream effects for the rest of Michigan's economy, as commercial landlords have been forced to forgo rents and restaurants have been unable to pay their mortgages and property taxes.[8]

It is likely that these conditions will only worsen. Many restaurant businesses are on the brink of financial ruin, and their losses will cause further harm to workers and their families, landlords, neighbors, and communities.

B. Restaurants Rely on Business Interruption Insurance to Protect Against the Risk They Will be Unable to Use Their Property to Operate Their Business.

To protect against the risk that they will be unable to use their property to operate their business, many restaurants purchase business interruption insurance. This coverage is distinct from property insurance and intended to protect the business as an entity as opposed to its real estate or personal property on its premises. Indeed, modern business interruption insurance grew out of

[8] See, e.g., Michigan Radio, *Cascading Effects of COVID-19 in Michigan's Residential Rental Market* (Mar 24, 2020), available at <https://www.michiganradio.org/post/cascading-effects-covid-19-michigan-s-residential-rental-market> (accessed Feb 8, 2021).

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"use and occupancy" insurance,[9] and arose because traditional property insurance covered only "loss and the value of the tangible asset," whereas with "commercial enterprises, it became apparent that another form of economic loss—loss of business income generated by the use of the tangible business property—was also at risk."[10]

The use of physical property is essential for a restaurant to operate its business. In an industry known for tight margins, restaurant owners and operators thoughtfully utilize their physical space to maintain the level of revenue necessary to support their staff and other operational costs. Table service restaurants, for example, were not designed to operate as a hub for take-out or delivery. They have far larger dining areas than a take-out only operation, and most have proportionally smaller kitchens than a restaurant designed only to produce food. Those dining areas are built out, often at significant expense, to create the kind of warm, inviting ambience that draws guests in. Restaurant dining is an experience, not just a financial transaction. The physical space and layout plays a crucial role in that experience.

Insurers know this. They charge different premiums for different types of restaurants that operate in different physical spaces, and they account for the prospect of having to pay claims for lost business income based on the policyholder's fully operational business. Business interruption coverage thus insures against the risk that a business-owner's property will not be able to function as intended.

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[9] William H. Danne, Jr., *Business Interruption Insurance*, 37 ALR5th 41 § 2[a] (1996); David A. Borghesi, *Business Interruption Insurance -A Business Perspective*, 17 Nova L Rev 1147, 1148 (1993); H. Michael Bagley, *The Clock Is Ticking: A Look at Business Interruption Insurance*, 18-SPG Brief 8, 9 (1989).

[10] Borghesi, *supra* note 9, at 1148.

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Many Michigan restaurants pay significant insurance premiums to protect against the risk that they will be unable to use their property to operate their business. And they reasonably understand, expect, and believe that their policies cover any and all non-excluded risks, including executive shutdown orders, that cause "direct physical loss of or damage to" their restaurants. In fact, in the first quarter of 2020, as COVID-19 spread across Asia and Europe and began to enter the United States, there was a 47% increase in the demand for business interruption insurance.[11] "[A]t least part of the increase was 'purely driven by companies looking for coverage that includes viruses/pandemics.'"[12]

C. Insurers Have Wrongfully Denied Restaurants' Claims for Business Interruption Coverage.

The insurance industry foresaw the possibility of a global pandemic and its potential effect on businesses years ago. In 2015, the National Association of Insurance Commissioners hosted a half-day conference titled *The Risk of Pandemics to the Insurance Industry*.[13] The American Academy of Actuaries presented at that conference and specifically named "Business Continuity/Business Interruption/Extra Expense Loss" as one type of insurance coverage potentially affected.[14] The presentation went on to note, "Such claims usually require physical damage but could include the following conditions: Quarantines; Shutdown of healthcare facilities;

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[11] Jill M. Bisco, Stephen G. Fier, & David M. Pooser, *Business Interruption Insurance and COVID-19: Coverage and Issues and Public Policy Implications*, 39 J Ins Reg No 5, 1, 16 (2020), available at <https://tinyurl.com/y67skzpw> (accessed Feb 8, 2021).

[12] *Id.*

[13] Nat'l Ass'n of Ins Comm'rs, *The Risk of Pandemics to the Insurance Industry* (Mar 27, 2015), available at <https://tinyurl.com/y5eacwwv> (accessed Feb 8, 2021).

[14] Mary D. Miller, American Academy of Actuaries, *CIPR Event: The Risk of Pandemics to the Insurance Industry* (Mar 27, 2015), p 5, available at <https://tinyurl.com/y379wj2w> (accessed Feb 8, 2021).

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Building closures; Contingent business interruption (outbreak in another location could disrupt supply chain); Could also cover diminished revenues resulting from above[.]"[15] To address this risk to insurers, the presentation recommended reinsurance, suggesting that the insurance industry believed that it would be responsible for providing coverage in light of a pandemic like this one.[16]

This was more than mere speculation about the impact of a hypothetical pandemic; insurers had faced a similar issue in the 2003 SARS outbreak. The American Academy of Actuaries presentation noted that that outbreak had resulted in "Lost business revenue" due to "Travel restrictions," "Quarantines," and "Building closures."[17] Insurers also knew that standard physical loss or damage requirements would not foreclose these claims, as courts had long rejected the view that the term "direct physical loss of or damage to" requires structural alteration to property. See, e.g., *Hughes v Potomac Ins Co*, 199 Cal App 2d 239, 248–49; 18 Cal Rptr 650 (1962); *W Fire Ins Co v First Presbyterian Church*, 165 Colo 34, 38–39; 437 P2d 52 (1968).

Despite the large premiums that businesses have paid for business interruption coverage, and despite (or perhaps because of) the ubiquity of this coverage among restaurants and other businesses, insurance companies have summarily denied claims for business interruption. At the start of the pandemic, insurance industry executives telegraphed their intentions to deny business interruption coverage to policyholders who suffered losses due to the pandemic and the resulting shutdown orders.[18] In March, the leading insurance industry trade groups rejected Congressional

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[15] *Id.* at 10.

[16] *Id.* at 14.

[17] *Id.* at 12.

[18] For example, in early February, the Chairman and CEO of Chubb told analysts that the insurance industry would see "very minimal loss exposure." Mark Hollmer, Carrier Mgmt,

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calls for coverage, categorically stating that business interruption insurance does not "provide coverage against communicable diseases such as COVID-19."[19] Instead, insurance industry executives have encouraged Congress to create a fund to assist struggling businesses, seeking to shift the burden to small businesses and taxpayers, while disclaiming any responsibilities or obligations for themselves.[20]

Consistent with this response, insurers have issued rapid, boilerplate denials asserting that numerous policy provisions exclude or preclude coverage. They have denied claims both where businesses found COVID-19 physically present on their property[21] and where businesses did not.[22]

Chubb CEO Greenberg Predicts "Modest" Coronavirus Impact for Now (Feb 5, 2020), available at <https://tinyurl.com/y4sdee3s> (accessed Feb 8, 2021). Allianz made a similar statement. Patricia L. Harman, NU Property Casualty 360, *Is the Coronavirus a Covered Insurance Loss?* (Feb 3, 2020), available at <https://tinyurl.com/y5x7ark3> (accessed Feb 8, 2021). At the same time, lawyers friendly to the insurance industry were opining that BII coverage did not extend to losses caused by closure orders. See Martin Croucher, Law360, *Insurers Braced For Claims Following Coronavirus Lockdown* (Feb 3, 2020), available at <https://tinyurl.com/y2gjpxes> (accessed Feb 8, 2021).

[19] Hinshaw & Culbertson LLP, Letter from Charles Chamness et al. to Honorable Nydia M. Velazquez (Mar 18, 2020), available at https://tinyurl.com/y4l9w6gg (accessed Feb 8, 2021); Ins J, *Insurers Reject House Members' Request to Cover Uninsured COVID Business Losses* (Mar 20, 2020), available at <https://tinyurl.com/y6dgj6nl> (accessed Feb 8, 2021).

[20] Claire Wilkinson, Bus Ins, *Members of Congress Push Plan to Force Insurers to Cover Virus Losses* (Apr 15, 2020), available at <https://tinyurl.com/yxn785hc> (accessed Feb 8, 2021); Suzanne Barlyn, Reuters, *U.S. Insurers Want Taxpayers to Back Pandemic Coverage for Businesses* (Apr 29, 2020), available at <https://tinyurl.com/ycjr8k34> (accessed Feb 8, 2021).

[21] *Blue Springs Dental Care, LLC v Owners Ins Co*, No. 20-cv-00383-SRB, 2020 WL 5637963, at *4 (WD Mo Sept 21, 2020); *Studio 417, Inc v Cincinnati Ins Co*, No. 20-cv-03127-SRB, 2020 WL 4692385, at *2 (WD Mo Aug 12, 2020).

[22] *Henry's Louisiana Grill, Inc v Allied Ins Co of Am*, No. 1:20-CV-2939-TWT, 2020 WL 5938755, at *4 (ND Ga Oct 6, 2020); *Urogynecology Specialist of Fl LLC v Sentinel Ins Co*, No. 6:20-cv-1174-Orl-22EJK, 2020 WL 5939172, at *3 (MD Fla Sept 24, 2020); *Pappy's Barber Shops, Inc v Farmers Grp, Inc*, No. 20-CV-907-CAB-BLM, 2020 WL 5500221, at *2 (SD Cal Sept 11, 2020); *Turek Enters, Inc v State Farm Mut Auto Ins Co*, No. 20-11655, 2020 WL 5258484, at *4 (ED Mich Sept 3, 2020).

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And they have argued that structural damage or alteration of the insured's premises is necessary to trigger coverage,[23] even though these policies clearly identify loss of property and damage to property as distinct bases for asserting coverage, and coverage is provided for business interruptions in other contexts that do not include physical damage or alteration of the insured's premises. Insurers have also frequently invoked so-called virus exclusions in policies, or denied coverage on the basis of proximate cause. In short, the common theme running through the insurance defense is simply that there is *no* coverage under *any* scenario.

D. Plaintiffs-Appellants' Policy Does Not Unambiguously Exclude Coverage For The Loss of Property Caused by The COVID-19 Pandemic.

"Unlike most contractual relationships, where the parties negotiate contract terms, the terms of liability insurance contracts are standardized and are drafted by the insurance industry. Policyholders have little or no bargaining power to change terms. Consequently, in construing insurance contracts, any ambiguities are strictly construed against the insurer to maximize coverage." *American Bumper and Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 448; 550 NW 2d 475 (1996). Michigan courts "broadly define an ambiguity in an insurance policy to include contract provisions capable of conflicting interpretations," *Auto Club Ins Ass'n v. DeLaGarza*, 433 Mich 208, 214; 444 NW2d 803 (1989), and strictly construe exclusions against the insurer, *Hunt v Drielick*, 496 Mich 366, 373; 852 NW2d 562 (2014). "[W]herever there are two constructions that can be placed upon the policy, the construction most favorable to the policyholder will be adopted." *DeLand v. Fidelity Health & Accident Mut Ins Co*, 325 Mich 9, 18; 37 NW2d 693 (1949) (cleaned up).

These bedrock principles are especially appropriate where, as here, there is a dramatic

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[23] *Henry's Louisiana Grill, Inc v*, 2020 WL 5938755, at *4; *Turek Enters*, 2020 WL 5258484, at *5; *Studio 417, Inc*, 2020 WL 4692385, at *4.

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disparity in the parties' knowledge of the risks and ability to pay for the resulting loss. The insurance industry has long been aware of the possibility of a global pandemic that would impact business operations through restrictive government orders. By contrast, restaurant owners were not acutely aware of the fallout that would result from an event like the COVID-19 pandemic. Further, the property and casualty insurance industry currently holds $800 billion in reserves.[24] Insurers also have reinsurance, which they acquire specifically as a backstop for catastrophic events. By contrast, restaurants, facing very elastic consumer demand and substantial fixed costs for real estate, labor, and taxes, run on razor-thin margins and have very little ability to cover losses.[25] On average, restaurant profit margins are between 2% and 6%; full-service restaurants are at the lower end of this range and limited-service (or quick service) restaurants are at the higher end.[26] The average restaurant has only enough cash on hand to cover 16 days of expenses.[27]

Despite their superior knowledge and ability to unambiguously exclude risks as the drafters of business interruption policies, insurers have failed to unambiguously exclude coverage for the loss of property caused by the COVID-19 pandemic. As demonstrated at length in the Brief of Plaintiffs-Appellants, the plain language of their policy contains no requirement that the property must be structurally altered before coverage is triggered. Instead, the policy contains only the words "direct physical loss of or damage to property." These are distinct terms—separated by the disjunctive "or"—and should be given different meanings. "Physical" means "having a material

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[24] Neil Spector & Robert Gordon, American Prop Cas Ins Ass'n, *Property/Casualty Insurance Results: First-Quarter 2020*, https://tinyurl.com/y5wabho5 (accessed Feb 8, 2021).

[25] Sebastien Rankin, Lightspeed, *The Complete Guide to Restaurant Profit Margins* (July 30, 2019), available at < https://tinyurl.com/y64z9xnc> (accessed Feb 8, 2021).

[26] *Id.*

[27] *Id.*

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existence,"[28] and "loss" means "the act of losing possession," "deprivation," and the "failure to gain, win, obtain, or utilize."[29] Put together, the ordinary meaning of "physical loss" includes when a property can no longer function as intended in the real, material world.

Courts around the country have recognized that this language is at least ambiguous, see *Elegant Massage, LLC v State Farm Mut Auto Ins Co*, Civil Action No. 2:20-cv-265, 2020 WL 7249624, at *6–10 (ED Va Dec 9, 2020), and that a plausible construction of the contractual language entitles policyholders to coverage, see *Studio 417, Inc*, 2020 WL 4692385, at *4–5. Plaintiffs-Appellants have thus carried their burden to show they are entitled to coverage under a reasonable construction of their policy. The Circuit Court's contrary conclusion was in error.

III. This Court Should Remand the Virus Exclusion Issue.

In the proceedings below, Defendant-Appellee urged the Circuit Court to focus solely on the "direct physical loss of or damage to property" language, arguing that the Court it did not need to reach the virus exclusion issue. See July 1, 2020 Hrg Tr at 4, 7, 9–10. The Circuit Court apparently agreed, as its rationale for both granting Defendant-Appellees' motion, and denying Plaintiffs-Appellants' request for leave to amend, centered on the "direct physical loss of or damage to property" requirement. See *id.* at 18–23.

Although the Court stated in passing that "there is a virus exclusion that would also apply," that statement was mere dicta that was not essential to the Court's holding.[30] The Court conducted almost no independent analysis of the exclusion and did not give Plaintiffs-Appellants an

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[28] *Merriam-Webster's Collegiate Dictionary* (11th ed).

[29] *Id.*

[30] Black's Law Dictionary (7th ed) (defining obiter dictum as "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)").

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opportunity cure the alleged defect in their pleadings by filing an amended complaint. See MCR 2.116(I)(5) ("If the grounds asserted are based on subrule (C)(8), (9), or (10), the court ***shall*** give the parties an opportunity to amend their pleadings . . . ." (emphasis added)). Especially given the importance of this issue of first impression, the dearth of analysis below, and the allegations Plaintiffs-Appellants have demonstrated they could bring in an amended complaint, *amici curiae* agree with Plaintiffs-Appellants that the proper course is to remand the virus exclusion issue so the Circuit Court may analyze it in the first instance in light of an amended complaint.

CONCLUSION

For the foregoing reasons, MRLA and RLC, as *amici curiae*, respectfully submit that the Court should reverse the Circuit Court's conclusion that the suspension of Plaintiffs-Appellants' business operations was not caused by physical loss of or damage to property, and remand this matter for consideration of the virus exclusion issue in light of an amended complaint.

Respectfully submitted,
HONIGMAN LLP

Dated: February 9, 2021

By: /s/ Peter B. Ruddell

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

GAVRILIDES MANAGEMENT COMPANY LLC,
GAVRILIDES PROPERTY MANAGEMENT LLC,
and GAVRILIDES MANAGEMENT
WILLIAMSTON LLC

Plaintiffs-Appellants

v

MICHIGAN INSURANCE COMPANY

Defendant-Appellee.

Court of Appeals No. 354418

Ingham County Circuit Court No.
20-000258-CB

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Appendix of Unpublished Cases

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APPENDIX OF UNPUBLISHED CASES

Tab	Case
1	*Blue Springs Dental Care, LLC v Owners Ins Co*, No. 20-cv-00383-SRB, 2020 WL 5637963 (WD Mo Sept 21, 2020).
2	*Elegant Massage, LLC v State Farm Mut Auto Ins Co*, Civil Action No. 2:20-cv-265, 2020 WL 7249624 (ED Va Dec 9, 2020).
3	*Henry's Louisiana Grill, Inc v Allied Ins Co of Am*, No. 1:20-CV-2939-TWT, 2020 WL 5938755 (ND Ga Oct 6, 2020).
4	*Pappy's Barber Shops, Inc v Farmers Grp, Inc*, No. 20-CV-907-CAB-BLM, 2020 WL 5500221 (SD Cal Sept 11, 2020).
5	*Studio 417, Inc v Cincinnati Ins Co*, Case No. 20-cv-03127-SRB, 2020 WL 4692385 (WD Mo Aug 12, 2020).
6	*Turek Enters, Inc v State Farm Mut Auto Ins Co*, No. 20-11655, 2020 WL 5258484 (ED Mich Sept 3, 2020).
7	*Urogynecology Specialist of Fl LLC v Sentinel Ins Co*, No. 6:20-cv-1174-Orl-22EJK, 2020 WL 5939172 (MD Fla Sept 24, 2020).

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TAB 1

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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
|
Signed 09/21/2020

Synopsis
Background: Insureds, dental care clinics which had purchased property insurance policies, brought a class action against property insurer for declaratory and injunctive relief and alleging breach of contract arising from insurer's denial of coverage for losses resulting from COVID-19 pandemic. Insurer moved to dismiss for failure to state a claim and to strike class action allegations.

Holdings: The District Court, Stephen R. Bough, J., held that:

insureds adequately alleged that they incurred direct physical loss;

insureds sufficiently alleged that they were entitled to coverage under business income provision of policies;

insureds sufficiently alleged that they were entitled to coverage under extra expense provision of insurance policies;

insureds stated a claim for relief under civil authority provision of insurance policies;

insureds stated a claim for sue and labor coverage; and

class action allegations in complaint would not be stricken.

Motion denied.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim; Motion to Strike All or Part of a Pleading.

Attorneys and Law Firms

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Emily M. Asp, Pro Hac Vice, Todd A. Noteboom, Pro Hac Vice, Stinson LLP, Minneapolis, MN, George Francis Verschelden, Stinson LLP, Kansas City, MO, for Defendant.

ORDER

STEPHEN R. BOUGH, JUDGE

***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, 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)).

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

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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:

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...

> 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, 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).

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 ...

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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

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factual enhancement" in their complaint. *Iqbal*, 556 U.S. at 662, 129 S.Ct. 1937. 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

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"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

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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

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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.

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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

--- F.Supp.3d ----, 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.

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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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TAB 2

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2020 WL 7249624
Only the Westlaw citation is currently available.
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

Synopsis

Background: Insured brought class action against insurers for declaratory judgment, breach of contract, and breach of covenant of good faith and fair dealing under all risk commercial property insurance policy, arising from insurers' denial of insured's claim for loss of business income and extra expenses due to closing of massage parlor because of Executive Orders imposing COVID-19 restrictions. Insurers moved to dismiss for failure to state a claim.

Holdings: The District Court, Raymond A. Jackson, J., held that:

insured submitted to insurer good faith plausible claim for direct physical loss covered by all risk commercial insurance policy;

civil authority coverage provision did not apply to provide coverage for insured's claim;

virus exclusion in all risk commercial property insurance policy did not apply to preclude coverage for insured's claim;

ordinance or law exclusion in all risk commercial insurance policy did not apply to preclude coverage for insured's claim;

acts and decisions exclusion in all risk commercial insurance policy was not available to preclude coverage for insured's claim; and

consequential loss exclusion of all risk insurance policy applied to preclude coverage for insured's claim.

Motion granted in part and denied in part.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

Attorneys and Law Firms

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Alexander Spotswood de Witt, Theodore Ira Brenner, Freeborn & Peters LLP, Richmond, VA, for Defendant.

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

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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, 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)). 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, 129 S.Ct. 1937. 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."

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(*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, 98 S. Ct. 1605, 56 L. Ed. 2d 58 (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, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (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, 61 S.Ct. 1020, 85 L.Ed. 1477 (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, 116 S.Ct. 2211, 135 L.Ed.2d 659 (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, 431 S.E.2d 289 (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;

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(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, 674 S.E.2d 860 (2009) (quoting *Floyd v. Northern Neck Ins. Co.*, 245 Va. 153, 158, 427 S.E.2d 193 (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, 450 S.E.2d 136 (1994)); *see also, PMA Capital Ins. Co. v. U.S. Airways, Inc.*, 271 Va. 352, 359, 626 S.E.2d 369 (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, 450 S.E.2d 136 (quoting *Pilot Life Ins. Co. v. Crosswhite*, 206 Va. 558, 561, 145 S.E.2d 143 (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, 666 S.E.2d 317 (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, 415 S.E.2d 131 (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, 389 S.E.2d 696 (1990); *see also Am. Reliance Ins. Co. v. Mitchell*, 238 Va. 543, 547, 385 S.E.2d 583 (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

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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

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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, 384 S.E.2d 613 (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, 677 S.E.2d 299 (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. 675, at 681, 692 S.E.2d 220 (2010); *St. Paul Fire & Marine Ins. Co. v. S.L. Nusbaum & Co.*, 227 Va. 407, 411, 316 S.E.2d 734 (Va. 1984); *Am. Reliance Ins. Co.*, 238 Va. at 547, 385 S.E.2d 583 ("[D]oubtful, ambiguous language in an insurance policy will be given an interpretation which grants coverage[.]"); *Bituminous Cas. Corp.*, 239 Va. at 336, 389 S.E.2d 696 ("[B]ecause insurance contracts are ordinarily drafted by

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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, 532 S.E.2d 325 (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

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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)); *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, ––– F.Supp.3d ––––, ––––, 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, 115 Cal.Rptr.3d 27 (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, 641 S.E.2d 101 (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, 437 P.2d 52 (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.

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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, 677 S.E.2d 299 (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.*, 64 Va. Cir. 408, 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.*, 265 Ga.App. 35, 593 S.E.2d 7, 8–9 (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

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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, 389 S.E.2d 696 (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, 736 S.E.2d 321 (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).

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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, 677 S.E.2d 299 (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, 692 S.E.2d 220 ("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 the 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

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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.*, 251 Va. 28, 466 S.E.2d 382, 386 (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.

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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, 129 S.Ct. 1937, 173 L.Ed.2d 868 (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*, ––– F.Supp.3d ––––, 2020 WL 6503405

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(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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TAB 3

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2020 WL 5938755
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

Synopsis
Background: Insured restaurant and affiliated private party and overflow space brought action against their insurer seeking coverage for losses they incurred when they closed their dining rooms pursuant to governor's executive order declaring public health state of emergency in response to COVID-19 pandemic. Insurer moved to dismiss, and plaintiffs moved to certify questions of law to Georgia Supreme Court.

Holdings: The District Court, Thomas W. Thrash, Chief Judge, held that:

insureds were not entitled to business income coverage, and

insureds' claims did not fall within scope of policy's civil authority provision.

Motion to dismiss granted; motion to certify denied.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim; Motion to Certify Question.

Attorneys and Law Firms

James J. Leonard, Barnes & Thornburg LLP, Atlanta, GA, for Plaintiffs.

Philip Wade Savrin, William Shawn Bingham, Freeman Mathis & Gary, LLP, Atlanta, GA, for Defendant.

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:

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(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*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868 (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, 127 S.Ct. 1955, 167 L.Ed.2d 929 (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, 106 S.Ct. 851, 88 L.Ed.2d 892 (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, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955).

B. Motion to Certify

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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, 722 S.E.2d 923 (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, 707 S.E.2d 369 (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, 496 S.E.2d 696 (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

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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, 581 S.E.2d 317 (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, 581 S.E.2d 317. 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, 581 S.E.2d 317.

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, 581 S.E.2d 317. 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.

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, 581 S.E.2d 317; *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, 581 S.E.2d 317. 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—

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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, 2020 WL 5742712, at *6 (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, 601 S.E.2d 363 (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]

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:

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(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]

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.

All Citations

--- F.Supp.3d ----, 2020 WL 5938755

Footnotes

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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, ––– F.Supp.3d ––––, 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.

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.*, 823 Fed.Appx. 868, 878 (11th Cir. 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).

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.

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TAB 4

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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

Synopsis
Background: Insured operators of barber shops brought putative class action against commercial property insurer, seeking declaratory relief and asserting claims for breach of contract, violation of California's Unfair Competition Law (UCL), after barber shops were forced to close as a result of state executive order during COVID-19 pandemic. Insurer moved to dismiss.

Holdings: The District Court, Cathy Ann Bencivengo, J., held that:

losses from mandatory closure did not constitute "direct physical loss of or damage to property" as required for coverage under business income and extra expense provisions, and

insureds were not entitled to coverage under civil authority provision.

Motion granted.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

Attorneys and Law Firms

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ORDER ON MOTION TO DISMISS

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

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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

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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, 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)). 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, 129 S.Ct. 1937 (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). 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, 44 Cal.Rptr.2d 370, 900 P.2d 619 (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, 110 Cal.Rptr.3d 612, 232 P.3d 612 (2010) (quoting *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545 (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, 44 Cal.Rptr.2d 370, 900 P.2d 619; *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, 44 Cal.Rptr.2d 370, 900 P.2d 619 (internal quotation marks and citations omitted); *see also Minkler*, 49 Cal. 4th at 321, 110 Cal.Rptr.3d 612, 232 P.3d 612 ("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, 110 Cal.Rptr.3d 612, 232 P.3d 612 (citations omitted). That being said, "[c]ourts will 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.

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, 44 Cal.Rptr.2d 370, 900 P.2d 619 (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, 274 Cal.Rptr. 820, 799 P.2d 1253 (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, 44 Cal.Rptr.2d 370, 900 P.2d 619; *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, 3 Cal.Rptr.3d 228, 73 P.3d 1205 (2003)). Exclusions "are interpreted narrowly against the insurer." *Minkler*, 49 Cal. 4th at 322, 110 Cal.Rptr.3d 612, 232 P.3d 612.

***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

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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[, 90 Cal.Rptr.2d 647, 988 P.2d 568] (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[, 115 Cal.Rptr.3d 27] (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[, 115 Cal.Rptr.3d 27]....
>
> 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).

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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**.

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All Citations

--- F.Supp.3d ----, 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, ––– F.Supp.3d ––––, 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*, ––– F.Supp.3d at ––––, 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 ––––, 2020 WL 4692385 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.

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TAB 5

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478 F.Supp.3d 794
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:

insureds adequately alleged that they incurred direct physical loss;

insureds plausibly stated claim for civil authority coverage;

insureds plausibly stated claim for ingress and egress coverage;

insureds plausibly stated claim for dependent property coverage; and

insureds plausibly stated claim for sue and labor coverage.

Motion denied.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

Attorneys and Law Firms

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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]

***797** 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.

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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 ***798** 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

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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.)

***799** 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

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).

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** "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

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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).

*800 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).

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** 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 ***801** 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).

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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, ***802** 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

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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.

***803** 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** 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," ***804** 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.

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.

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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** 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 ***805** 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.

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

478 F.Supp.3d 794, 2020 WL 4692385

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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."

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TAB 6

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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

Synopsis
Background: Insured operator of chiropractic office brought putative class action against insurer, asserting claim for breach of contract and seeking declaratory judgment that all-risk businessowners policy covered loss of income and extra expense incurred due to state's COVID-19 shutdown order. Insurer moved to dismiss.

Holdings: The District Court, Thomas L. Ludington, J., held that:

insured's business interruption losses were not result of “accidental direct physical loss to Covered Property” within meaning of policy;

virus exclusion barred coverage; and

district court would not exercise declaratory jurisdiction.

Motion granted.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

Attorneys and Law Firms

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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.

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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.

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> (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 ...

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***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, 129 S.Ct. 1937, 173 L.Ed.2d 868 (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, 127 S.Ct. 1955, 167 L.Ed.2d 929 (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, 129 S.Ct. 1937 (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.*, 460 Mich. 348, 596 N.W.2d 190, 193 (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.*, 449 Mich. 155, 534 N.W.2d 502, 505 (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*, 433 Mich. 208, 444 N.W.2d 803, 805 (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*, 455 Mich. 377,

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565 N.W.2d 839, 841 (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.*, 468 Mich. 459, 663 N.W.2d 447, 453 (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.*, 290 Mich.App. 434, 802 N.W.2d 619, 622 (2010) (citing *Citizens*

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Ins. Co. v. Pro-Seal Serv. Grp., Inc., 477 Mich. 75, 730 N.W.2d 682, 687 (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, ––– F.Supp.3d ––––, 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*, ––– F.Supp.3d at ––––, 2020 WL 4724305, at *3. The *Diesel* plaintiffs suffered no tangible damage to property but alleged that loss of use was sufficient. *Id.* at ––––, 2020 WL 4724305 at *5. The insurance policy included the same material terms at issue here. *Id.* at –––– – ––––, 2020 WL 4724305 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 ––––, 2020 WL 4724305 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 ––––, 2020 WL 4724305 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, ––– F.Supp.3d ––––, 2020 WL 4692385 (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

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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, 129 S.Ct. 1937.

***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*, ––– F.Supp.3d at ––––, 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

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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*, 473 Mich. 188, 702 N.W.2d 106, 115 (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.*, 256 Mich.App. 154, 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]

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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

--- F.Supp.3d ----, 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

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to avoid possible plagiarism." *Upjohn Co. v. New Hampshire Ins. Co.*, 438 Mich. 197, 476 N.W.2d 392, 398 n. 8 (1991).

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, 127 S.Ct. 1955 (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*, 440 Mich. 560, 489 N.W.2d 431, 434 (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.

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TAB 7

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2020 WL 5939172
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Orlando Division.

UROGYNECOLOGY SPECIALIST
OF FLORIDA LLC, Plaintiff,
v.
SENTINEL INSURANCE
COMPANY, LTD., Defendant.

Case No. 6:20-cv-1174-Orl-22EJK
|
Signed 09/24/2020

Synopsis
Background: Insured healthcare provider brought action against insurer arising from insurer's denial of coverage for losses suffered by provider when state Governor issued executive order declaring state of emergency due to COVID-19 pandemic, requiring provider to shut down its business. Insurer moved to dismiss for failure to state a claim.

The District Court, Anne C. Conway, J., held that fact issue as to scope of coverage exclusion for loss or damage caused by spread or activity of virus precluded grant of motion.

Motion denied.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

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, ––– F.Supp.3d ––––, ––––, 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:

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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

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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, 127 S.Ct. 1955). 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.*, ––– F.Supp.3d at ––––, 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, ––– F.Supp.3d ––––, ––––, 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, ––– F.Supp.3d ––––, ––––, 2020 WL 5359653, at *4 (C.D. Cal. Sept. 2, 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).

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***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, 127 S.Ct. 1955 (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

--- F.Supp.3d ----, 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).

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STATE OF MICHIGAN
MI Court of Appeals

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