COMMONWEALTH OF MASSACHUSETTS

Appeals Court

No. 2021-P-0231

Suffolk, ss.

VERVEINE CORP. D/B/A COPPA,
1704 WASHINGTON LLC D/B/A TORO, AND
JFKFOODGROUP LLC D/B/A LITTLE DONKEY, Appellants
v.
STRATHMORE INSURANCE COMPANY AND
COMMERCIAL INSURANCE AGENCY, INC., Appellees

On Appeal From A Judgment Of The Suffolk Superior Court
Lower Court No. 2084CV01378-BLS2

BRIEF OF THE APPELLANTS VERVEINE CORP. D/B/A COPPA, 1704 WASHINGTON LLC D/B/A TORO, AND JFKFOODGROUP LLC D/B/A LITTLE DONKEY

Date: 06/11/2021

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the Plaintiff-Appellant, Verveine Corp. d/b/a Coppa, states that: (1) it has no parent corporation; and (2) no publicly held corporation owns 10 percent or more of its stock.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The plaintiffs own and operate restaurants that were, at all relevant times, insured by "all-risk" insurance policies ("the Policies") written and sold to them by Strathmore Insurance Company ("Strathmore"). The plaintiffs lost a significant amount of income as a result of the COVID-19 pandemic and their inability to use and access their properties as intended and insured without endangering health and safety. The Policies specifically provide coverage for lost business income for a period of one year following a covered loss that results in a suspension of operations. Strathmore, however, denied the plaintiffs' claims for Business Income coverage, prompting this lawsuit. The issue to be addressed de novo by this Court is whether the plaintiffs have alleged facts sufficient to trigger coverage for loss of business income under the Policies, and whether the Superior Court erred in holding otherwise and dismissing the Complaint.

More specifically, to trigger coverage for loss of business income under the Policies, there must be "direct physical loss of or damage to" insured property. The plaintiffs allege, inter alia, that during the relevant time period the novel coronavirus became ubiquitous and present wherever people congregated; that because of the imminent and certain threat to property and human life posed by the virus, and the Stay at Home Orders issued in response to that threat, the plaintiffs were prevented from accessing and using their insured properties as intended; and

that they suffered resulting partial and complete suspensions of operations and loss of business income. The issue on appeal is whether these allegations, taken as true, constitute "direct physical loss of or damage to" property under a reasonable interpretation of the Policies, triggering coverage for plaintiffs' losses.

STATEMENT OF THE CASE

The plaintiffs-appellants, Verveine Corp d/b/a Coppa ("Coppa"), 1704 Washington LLC d/b/a Toro ("Toro"), and JKFOODGROUP LLC d/b/a Little Donkey ("Little Donkey"), operate three restaurants located in Boston and Cambridge and share common owners. For many years and at all relevant times, these businesses were covered by insurance policies issued by defendant-appellee Strathmore and sold by defendant-appellee Commercial Insurance Agency, Inc. ("Commercial").

The plaintiffs' businesses were successful until March 2020, when they suffered losses as a result of the COVID-19 pandemic and government closure orders that rendered their insured properties unusable and inaccessible for their intended business operations. Faced with this unexpected business interruption, the plaintiffs submitted claims to Strathmore for loss of business income. Within days, Strathmore rejected the plaintiffs' claims by form letter.

On June 29, 2020, the plaintiffs filed suit against Strathmore, alleging breach of contract for its denial of coverage and seeking declaratory judgment for

enforcement of the insurance policies. (RAI/11-235; RAII/3-240).[1] Little Donkey also brought a claim against Commercial for negligence in the recommendation and sale of an insurance policy from Strathmore which contained a virus exclusion not present in the Strathmore policy covering Coppa and Toro.

On October 9, 2020, Strathmore served a Motion to Dismiss the Complaint pursuant to Mass. R. Civ. P. 12(b)(6), arguing that the plaintiffs had failed to allege facts sufficient to establish an entitlement to insurance coverage for their COVID-19 business income losses. (RAII/259-312; RAIII/4-24). Commercial also served a Motion for Judgment on the Pleadings pursuant to Mass. R. Civ. P. 12(c), arguing that Little Donkey could not establish a causal connection between Commercial's negligence and Little Donkey's damages because Strathmore denied coverage for reasons unrelated to that policy's virus exclusion. (RAIII/25-36). On December 21, 2020, the lower court issued a Memorandum of Decision and Order allowing both Motions in their entirety, and dismissing plaintiffs' claims with prejudice. (RAIII/291-300). On January 5, 2021, judgment was entered on all claims. (RAIII/301-302). Coppa, Toro, and Little Donkey timely appealed. (RAIII/303).

[1] Citations are to pages in the Record Appendix with the volume number and page(s) identified. ("RAI/5-12"). Additionally, citations are to the Addendum with page(s) identified. ("ADD/7").

STATEMENT OF FACTS

Coppa and Toro, located at two separate properties in Boston, and Little Donkey, located in Cambridge, share common ownership under chef Ken Oringer. (RAI/12, ¶6). They are renowned local dine-in restaurants that collectively employ over 150 people. (RAI/12, ¶7). For many years, the plaintiffs purchased their insurance through Commercial and have been insured by Strathmore policies. (RAI/12, ¶¶8-9). Coppa and Toro were insured under a single "all risk" commercial property policy issued by Strathmore and covering the period from September 5, 2019 to September 5, 2020 ("Coppa/Toro Policy"), while Little Donkey was insured under a separate "all risk" commercial property policy issued by Strathmore and covering the period from June 17, 2019 to June 17, 2020 ("Little Donkey Policy"). (RAI/13, ¶¶10-13). All-risk policies are a special type of insurance "extending to risks not usually contemplated," including "all losses of a fortuitous nature" not specifically excluded. Slater v. U.S. Fidelity and Guaranty Co., 7 Mass. App. Ct. 281, 283-284 (1979).

The Policies provide Business Income and Extra Expense Coverage, which states in relevant part as follows:

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

> Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. (emphasis added) (RAI/121; RAII/99).

In addition to this provision, the Little Donkey Policy contains an "Exclusion of Loss Due to Virus or Bacteria," which states that the policy will not cover "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." (RAII/139). The Coppa/Toro Policy does not contain any such exclusion or limitation for loss or damage caused by viruses. (RAI/21, ¶62). Commercial advised the plaintiffs to purchase the Policies and sold two different policies to the plaintiffs. (RAI/13, ¶¶14-15; RAI/22-23, ¶¶70-73).

In early 2020, the COVID-19 virus began spreading around the world and eventually reached Boston and Cambridge. (RAI/13-14, ¶16-17). The COVID-19 virus is highly infectious. (RAI/14, ¶¶17-19; RAI/15, ¶¶21-23). The virus travels, lives, and spreads from person-to-person contact, as well as via surfaces contacted by infected people. (RAI/14, ¶18). By March, there was evidence that the virus had infected a significant portion of the Boston and Cambridge population. (Id. at ¶17). It quickly became a well-established fact that wherever people congregated, the virus was present and being released and spread. (Id. at ¶¶18-19; RAI/18, ¶38; RAII/215).

In an effort to slow the spread of COVID-19, state and local governments, including in Boston and Cambridge, imposed directives requiring residents to

remain in their homes. (Id. at ¶20). These directives became colloquially known as "Stay at Home Orders." (Id.). The Stay at Home Orders also required businesses deemed "non-essential" to be closed, and eliminated or greatly reduced the ability of businesses to access and use their business properties. (RAI/15-16, ¶¶24-26). In particular, access and use of dining rooms at restaurants was initially prohibited, and subsequent directives only allowed use and access of these properties under strict restrictions. (Id. at ¶¶27-29). The Stay at Home Orders were issued in response to a virus that authorities knew would inevitably spread at properties and harm and even kill people if the properties remained open and fully operational. (RAI/14-15, ¶¶20-23; RAI/20, ¶51).

Coppa, Toro, and Little Donkey are sit-down restaurants, and the restaurants' dining rooms are an essential part of the plaintiffs' properties. (RAI/16-18, ¶¶27-37). As a result of COVID-19 and the Stay at Home Orders, the plaintiffs' access and use of their properties were at times prohibited, and thereafter severely constrained, in an effort to avoid the inevitable spread of virus that would occur without these prohibitions and constraints. (Id.). The properties, and portions thereof, were thus rendered unusable for their intended and insured purpose, causing the plaintiffs to suffer major financial losses in the form of lost business income. (Id.).

On March 21, 2020, the plaintiffs informed Commercial of their losses, and Commercial submitted a claim to Strathmore for the plaintiffs' losses and expected losses of business income under their respective policies with Strathmore. (RAI/18, ¶39). Within days, Strathmore denied the claims in two separate form letters, stating that there was "no physical loss of or damage to" the insured properties sufficient to trigger Business Income coverage. (Id. at ¶40-42; RAII/217-221; 223-227). Strathmore also stated that the virus exclusion in the Little Donkey Policy provides a separate ground for exclusion of coverage. (RAII/223-227). The plaintiffs thus filed suit.

The lower court issued its decision allowing Strathmore's Motion to Dismiss and Commercial's Motion for Judgment on the Pleadings on December 21, 2020. The court noted that the coverage dispute centers on the meaning of the phrase "direct physical loss of or damage to" as used in the Business Income coverage provision. (ADD/61). Despite the fact that the Policies explicitly treat physical loss of property and physical damage to property as separately insurable, the court held that this phrase "unambiguously require[s] that the physical state of the property in question must be altered in order for there to be coverage," remarking that its decision was "[i]n line with the majority of recent cases across the country that have tackled this exact issue arising from the COVID-19 pandemic." (ADD/61-

62). The lower court's decision was erroneous, contrary to the policy language and Massachusetts law, and this appeal ensued.

SUMMARY OF ARGUMENT

The judgment issued by the Superior Court dismissing the plaintiffs' Complaint should be reversed for the following reasons:

A. The plaintiffs have alleged a covered loss of Business Income under the plain, ordinary meaning of the insuring language. Left undefined by Strathmore, the phrase "physical loss of or damage to" property is ambiguous because it is susceptible of more than one meaning. Where it can be reasonably interpreted in favor of coverage, the law requires that it be so interpreted. The plaintiffs allege that they lost access and use of their property due to a ubiquitous deadly virus that threatened the health and safety of occupants if the property were put to normal use. This constitutes "physical loss of" **or** "damage to" property, or both, under the dictionary definitions of those terms. The Superior Court neither mentioned nor applied these principles of contract interpretation, ignored dictionary-based definitions of the insuring language that supported plaintiffs' position, and inserted into the Policies a requirement that the "physical state of the property . . . be altered" to trigger coverage. This was clear error. (P. 21-26).

B. For decades, including in Massachusetts, the phrase "physical loss of or damage to" property, stated in the disjunctive, can and has been reasonably and

consistently interpreted to encompass situations where a property has become uninhabitable or unusable due to a physical danger at or around the property, and this Court should so find. (P. 26-33).

C. The Superior Court's analogy to and reliance upon cases involving defects in title and other "intangible" encumbrances on property was erroneous. The facts alleged here, relating to a ubiquitous deadly virus, are obviously distinguishable from purely economic or legal encumbrances on property, and are much more akin to cases involving harmful gases, odors, fibers, fumes, and other invisible but harmful substances that make a property and the use of it dangerous. (P. 33-35).

D. The Superior Court's reliance upon what it called "a majority of courts across the country" that have addressed this coverage issue in the context of COVID-19 was also erroneous. First, the question before the court was not what a perceived "majority" of trial courts think the **most** reasonable interpretation of the Policy language is. Rather, the question was whether the Policy language can reasonably be interpreted as triggering coverage. The fact that numerous well-reasoned decisions across the country have found that coverage is or may be triggered under the circumstances here proves, at a minimum, that reasonable minds can differ on what this language means. Where policy language is left

undefined and can be reasonably interpreted in favor of coverage, it must be so interpreted. That is the law, and it should be followed. (P. 35-40).

E. While not addressed at all by the Superior Court, the very existence of a virus exclusion in one Policy excluding coverage for losses "resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease" by definition means that any loss "resulting from" a ubiquitous virus is a covered loss. In any event, the virus exclusion is ambiguous and does not -- and was not intended to -- apply to these otherwise covered losses. (P. 41-42).

F. The other arguments put forth by Strathmore, and at least partially adopted by the Superior Court, are not grounds for denying coverage or reading the insuring language in the manner suggested by Strathmore. In particular, the Superior Court's reliance upon clauses such as the "period of restoration" and "loss of use" provisions to prop up its coverage determination was error. These provisions relate to matters unrelated to the subject insuring language. (P. 43-50).

G. The Policies' Civil Authority coverage was triggered for substantially the same reasons as Business Income coverage was triggered. (P. 50-52).

H. If the virus exclusion applies, which it does not, Little Donkey's claims against Commercial must be reinstated. (P. 52).

ARGUMENT

I. Standard of Review

The lower court's allowances of a motion to dismiss under Mass. R. Civ. P. 12(b)(6) and a motion for judgment on the pleadings under Mass. R. Civ. P. 12(c) are subject to de novo review. UBS Fin. Servs., Inc. v. Aliberti, 483 Mass. 396, 405 (2019); A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transportation Auth., 479 Mass. 419, 424 (2018); Jarosz v. Palmer, 436 Mass. 526, 530 (2002) (defendant's "motion under rule 12[(c)] is akin to a motion [to dismiss] under Mass. R. Civ. P. 12 [(b)(6)]"). Furthermore, the resolution of this case turns upon the interpretation of insurance contracts, which is a question of law also to be reviewed de novo. See A.L. Prime Energy Consultant, Inc., 479 Mass. at 424.

To survive a motion to dismiss, a complaint need only contain factual allegations which "plausibly suggest" an entitlement to relief. Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). In its analysis, the Court must accept as true the facts alleged in the plaintiffs' Complaint, regardless of whether or not the Court believes them, as well as any favorable inferences that reasonably can be drawn from them. See Galiastro v. Mortg. Elec. Registration Sys., Inc., 467 Mass. 160, 164 (2014).

II. Controlling Principles of Contract Interpretation

Strathmore could have defined the phrase "direct physical loss of or damage to" in the Commercial Property portion of the Policies, but it did not. Where, as here, an insurer fails to define a key term, it must be strictly construed against the insurer. See Interstate Gourmet Coffee Roasters, Inc. v. Seaco Ins. Co., 59 Mass. App. Ct. 78, 85 (2003) ("The term 'debris removal' is not defined in the policy and, consequently, we construe it strictly against the insurer.").

Absent a definition, "[i]t is a well-settled rule . . . that to determine whether an agreement is clear and unambiguous, the document must be viewed in its entirety and its language be given its plain, ordinary and usual meaning." Siebe, Inc. v. Louis M. Gerson Co., 74 Mass. App. Ct. 544, 549 (2009). To determine ordinary meaning, courts should "consider dictionary definitions" and may "also look to case law to determine whether courts have adopted a consistent interpretation." Dorchester Mut. Ins. v. Krusell, 485 Mass. 431, 438 (2020). "Normally, a dictionary definition of a term is strong evidence of its common meaning." Brigade Leveraged Cap. Structures Fund Ltd. v. PIMCO Income Strategy Fund, 466 Mass. 368, 374 (2013); 17A Am. Jur. 2d Contracts § 350 (2020).

A term is ambiguous where "it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one."

Citation Ins. Co. v. Gomez, 426 Mass. 379, 381 (1998). If there is any doubt as to the meaning of the words that Strathmore used in the Policies, this Court must resolve all such doubts in favor of coverage. See Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London, 449 Mass. 621, 628 (2007) ("Any ambiguities in the language of an insurance contract are interpreted against the insurer who used them and in favor of the insured."); Bos. Gas Co. v. Century Indem. Co., 454 Mass. 337, 356 (2009). Where policy terms are ambiguous, an insured's interpretation of the policy language need not be unequivocal; if both the insured and the insurer advance plausible interpretations of the language, "the insured is entitled to the benefit of the one that is more favorable to it." Trustees of Tufts Univ. v. Commercial Union Ins. Co., 415 Mass. 844, 849 (1993).

Finally, when in doubt as to the proper meaning of a term, this Court must "consider what an objectively reasonable insured, reading the relevant policy language, would expect to be covered." Dorchester Mut. Ins., 485 Mass. at 437. This basic tenet of contract interpretation is particularly important where, as one court aptly observed in analyzing a COVID-19 Business Income claim:

> The over [200] page Policy at issue here can only be described as a labyrinth of pages, paragraphs, and pronouncements. The terms of the Policy require the insured to fall down a rabbit hole and wander through a vast thicket of verbiage that would leave even the most careful reader mystified by the mazes of pages to be pieced together and deciphered in order to determine if there is coverage on the other side.

Susan Spath Hegedus, Inc. vs. ACE Fire Underwriters Ins. Co., U.S. Dist. Ct., No. 20-2832, slip op. at 1 (E.D. Pa. May 7, 2021) (ADD/139). The insureds in this case are small local businesses who were unable to use their properties as intended without threatening the health and safety of employees and the public. Having little doubt that they had suffered both "physical loss of" and "damage to" their properties, they submitted a claim under their Strathmore Policies, which each had a yearly premium of over $27,000. (RAI/38; RAI/36; RAII/117). Strathmore replied with form letters stating that the inability to use their property safely and as intended did not constitute "physical loss of or damage to" property. (RAII/217-221; 223-227).

Whether Strathmore's letter contained a reasonable reading of the Policies or not is of no consequence because, before one falls down the rabbit hole and enters the labyrinth of the Policies, one basic legal truism governs: If it was objectively reasonable for the plaintiffs to read the insuring language as triggering coverage, then there is coverage under the law.

III. The Policies Provide Coverage for Plaintiffs' Claims.

A. The plain, ordinary meaning of the policy language demonstrates that the plaintiffs have suffered "direct physical loss of or damage to" property.

To determine ordinary meaning of undefined terms, Massachusetts courts use dictionary definitions. Dorchester Mut. Ins., 485 Mass. at 438; McLaughlin v.

Berkshire Life Ins. Co. of Am., 82 Mass. App. Ct. 351, 356 (2012). The term "direct" means "characterized by close logical, causal, or consequential relationship" or "stemming immediately from a source." Merriam-Webster Dictionary, Direct, https://www.merriam-webster.com/dictionary/direct. "Physical" means "[o]f or relating to material things" or "having material existence: perceptible especially through the senses and subject to the laws of nature." The American Heritage Dictionary, Physical, https://www.ahdictionary.com/word/search.html?q=physical; Merriam-Webster Dictionary, Physical, https://www.merriam-webster.com/dictionary/physical. "Loss" has a number of definitions, several of which provide coverage to the plaintiffs. These definitions include "the act or fact of being unable to keep or maintain something," "decrease in amount, magnitude, value, or degree," and "failure to . . . utilize." Merriam-Webster Dictionary, Loss, www.merriam-webster.com/dictionary/loss. Another dictionary defines "loss" as "the state of being deprived of or of being without something that one has had." Dictionary.com, Loss, https://www.dictionary.com/browse/loss. According to one insurance law treatise, the word "loss" can mean either of two things:

> (1) detriment/disadvantage, or (2) something that is lost. In the context of a standard insurance policy, the word "loss" can mean either of those things. Both definitions are reasonable. Applying the first definition, therefore, when an insurance policy refers to physical loss of or damage to property, the "loss of property" requirement can be satisfied by any "detriment," and a

> "detriment" can be present without there having been a physical alteration of the object.

3 A.D. Windt, Insurance Claims & Disputes § 11:41 (6th ed. 2021). Finally, the term "damage" simply means that the insured property has suffered some form of injury or harm. See Merriam-Webster Dictionary, Damage, https://www.merriam-webster.com/dictionary/damage. Indeed, Strathmore defined "property damage" in the General Liability portion of the Policies to include "loss of use of tangible property that is not physically injured."[2] (RAI/186, ¶17(b.); RAII/171, ¶17(b.)).

With these dictionary definitions and the common usage of the insuring words in mind, the allegations of the Complaint trigger coverage.[3] The insureds here allege that they lost, i.e., were deprived of, use of and access to their properties because of a deadly substance that would inevitably be present and spread if the properties were normally used and accessed. They allege that the properties, used as intended, were not safe or habitable, rendering them useless or of greatly reduced utility. (RAI/16, ¶27). Without more, such allegations constitute "direct physical loss of or damage to" property, or both, as those terms are

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[2] This Court can and should use this definition when considering the definition of "physical loss of or damage to" in the Policies. See Lumbermens Mut. Cas. Co. v. Offs. Unlimited, Inc., 419 Mass. 462, 466-67 (1995) (language of policy may be used to clarify undefined term). Use of Strathmore's own definition of "property damage" found elsewhere in the Policies triggers coverage – a fact not addressed by the Superior Court.

[3] Below, neither Strathmore nor the Superior Court mentioned the dictionary definitions of these words.

commonly used and understood. The definitions of the terms direct, physical, loss (of), and damage have all been satisfied.

A reasonable insured would certainly believe they had suffered "physical loss of or damage to" their property where they could not safely put their insured property to its intended use. The fact that the Policy expressly covers **either** loss of **or** damage to the property only buttresses the argument – both elements have been established when either one would be sufficient.[4] On this basic application of legal principles and policy language, the Superior Court's judgment should be reversed.

B. "Physical loss of or damage to" property has consistently been found to be ambiguous, and can be reasonably interpreted to fit the circumstances alleged in the Complaint.

While basic tenets of contract interpretation and dictionary definitions establish that coverage has been triggered, so too does decades of case law. The language of the Policies does not exist in a vacuum. Strathmore defined many terms in the Policies, but chose not to define the insuring language. It made this choice despite the fact that for at least fifty years, courts in Massachusetts and elsewhere have told insurance companies that the phrase "direct physical loss of or damage to" property, or similar language, is ambiguous and provides coverage

[4] By inserting a "physical alteration" requirement into the Policies, the Superior Court not only added language to the Policies that isn't there, it "improperly conflate[d] 'direct physical loss of' with 'direct physical…damage to' and ignore[d] the fact that these two phrases are separated in the contract by the disjunctive 'or'." MacMiles, LLC vs. Erie Insurance Exchange, No. GD-20-7753 (Pa. Ct. of Com. Ps May 25, 2021)(ADD/289).

when a physical substance renders use of and access to a property dangerous or even just intolerable. This line of cases began when gasoline from a fuel station leaked underground, permeating the soil underneath a church and sending gasoline vapors into the church, inundating its rooms, making a church "uninhabitable" and "making the use of the building dangerous." W. Fire Ins. Co. v. First Presbyterian Church, 437 P.2d 52, 54 (Colo. 1968). This was "direct physical loss" under the property insurance policy.

Similarly, asbestos fibers presented a potential but unrealized threat to human life, resulting in "direct physical loss" to insured buildings, even though there was no injury to the physical structure of the buildings. Sentinel Mgmt. Co. v. N.H. Ins. Co., 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (noting that buildings' function was "seriously impaired or destroyed and the property rendered useless by the presence of contaminants."). Lead-paint dust that rendered a home uninhabitable constituted "direct physical loss" because the insured property was "rendered unusable or uninhabitable." Widder v. La. Citizens Prop. Ins. Corp., 82 So. 3d 294, 296 (La. Ct. App. 2011). When E. coli contaminated a well on a homeowner's property, "direct physical loss" could be found if "the functionality of the [insured] property was nearly eliminated or destroyed" or if that "property was made useless or uninhabitable." Motorists Mut. Ins. Co. vs. Hardinger, 131 F. App'x 823 (3d Cir. 2005) (stating that this standard should govern "in a case where

sources unnoticeable to the naked eye have allegedly reduced the use of the property to a substantial degree"). (ADD/74). The odor of cat urine, not even dangerous to humans but which made the insured property unrentable, resulted in "direct . . . physical loss" as long as it was "distinct and demonstrable." Mellin v. N. Sec. Ins. Co., 115 A.3d 799, 805 (N.H. 2015). "Evidence that a change rendered the insured property temporarily or permanently unusable or uninhabitable may support a finding that the loss was a physical loss to the insured property." Id. The same holds when the insured property is food rather than real property: if rendered useless for its intended purpose, there is a direct physical loss. Gen. Mills, Inc. v. Gold Medal Ins. Co., 622 N.W.2d 147, 150 (Minn. Ct. App. 2001) (when an unapproved pesticide was used on oats, rendering them unusable in the policyholder's business even though they were safe to eat, they were covered).

Physical alteration of a property of any particular duration is not required to establish physical loss of or damage to it. For example, a policyholder suffered direct physical loss of or damage to property where ammonia was released in an unsafe amount in a factory, requiring evacuation and temporarily incapacitating the factory until the ammonia dissipated. Gregory Packaging, Inc. vs. Travelers Prop. Cas. Co. of Am., U.S. Dist. Ct., No. 2:12-CV-04418, slip op. at 11 (D.N.J. Nov. 25, 2014) (ADD/81). Similarly, physical loss of or damage to property was found when a theater had to cancel outside performances because of "poor air quality

caused by" wildfire smoke and the perceived, but unrealized, threat of harm if people encountered it. Oregon Shakespeare Festival Ass'n vs. Great Am. Ins. Co., U.S. Dist. Ct., No. 1:15-CV-01932-CL, slip op. at 3 (D. Or. June 7, 2016), vacated on other grounds, No. 1:15-CV-01932-CL (D. Or. Mar. 6, 2017). (ADD/98). Even though the theater did not suffer "any permanent or structural damage to its property," the smoke made the theater "uninhabitable" and "unusable for its intended purpose," and "the property experienced a loss of 'essential functionality.'" Id. at 18 (ADD/113).

Underlying these decisions is a fundamental, common sense concept: that when a physical substance or condition makes inhabiting or using property dangerous to occupants such that access and use must be prohibited or curtailed, physical loss of or damage to the property has occurred. This reasoning led one court to hold that "direct physical loss" had occurred when, in the wake of a rock slide that left homes physically undamaged, a threat of danger persisted; the affected houses "became unsafe for habitation, and therefore suffered real damage when it became clear that rocks and boulders could come crashing down at any time." Murray v. State Farm Fire & Cas. Co., 509 S.E.2d 1, 17 (W. Va. 1998). Under such dangerous conditions, the insureds' homes "could scarcely be considered 'homes' in the sense that rational persons would be content to reside there." Id. This is analogous to what occurred here: it became clear to the insureds

and every local and national authority that the insureds' properties, if inhabited and used per usual, would inevitably cause spread of a deadly pathogen at those properties. No rational person would have continued to use his or her property as usual under such circumstances. The insureds, mitigating their losses, could only access and use their property in limited ways until the threat of the ubiquitous substance dissipated. This must, by any reasonable definition, be loss of or damage to property. As these cases implicitly recognize, the alternative would be to hold that the property owners should use the property, wait for the proverbial boulder to fall, and collect for the damage if they are alive to do so.

In keeping with this long, well-developed, and well-reasoned precedent -- none of which prompted Strathmore to define or refine its operative coverage language -- Massachusetts courts have come to similar conclusions about the ambiguity of Strathmore's insuring language. In Matzner vs. Seaco Insurance Company, the Superior Court held that carbon-monoxide contamination is "direct physical loss or damage to" insured property, and that the phrase is ambiguous. Mass. Super. Ct., Suffolk No. CIV. A. 96-0498-B, at 3-4 (Aug. 12, 1998).[5] (ADD/118). In Arbeiter vs. Cambridge Mutual Fire Insurance Company, another Superior Court judge held that the presence of oil fumes in a house satisfied the policy's requirement of a direct "physical loss." Mass. Super. Ct., Middlesex No.

[5] In Matzner, the Court was discussing the phrase "physical loss or damage"; a phrase narrower than the phrase "physical loss of or damage to."

940083 (Mar. 15, 1996). (ADD/126). The First Circuit relied on both Matzner and Arbeiter when it held, in a slightly different context, that noxious odor from carpet could be "physical injury" under a liability policy. Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399, 406 (1st Cir. 2009).

The Superior Court attempted to distinguish this line of cases – specifically Matzner, Sentinel Management, and Arbeiter – by stating that "the Complaint here does not allege that the COVID-19 virus was actually present in plaintiffs' restaurants, resulting in physical contamination of the premises." (ADD/64). In the first instance, this finding was erroneous because it was not based on a fair reading of the Complaint. The Complaint, read in favor of the plaintiffs as it must be, stated that COVID-19 was present at the property in proportion to its presence in a known percentage of the population, and that the restrictions on use and access of the properties were to prevent the "inevitable" presence and spread of the virus with use and habitation. (RAI/14-15, ¶¶19-22). These allegations are sufficient to allege contamination: where people congregated, so too did the virus in proportion to the level of infection in the community.

But perhaps more importantly, the determination of coverage cannot, should not, and in this case does not logically turn on whether the insured alleges actual contamination. According to the Complaint, using the property as intended was deemed unsafe and would inevitably result in contamination, sickness and death.

(Id.). It is the loss of use, access, habitability, and utility in response to a ubiquitous dangerous substance that constitutes "physical loss of or damage to" property. The Superior Court's reasoning, taken to its logical conclusion, would mean that a restaurant that flouted the Stay at Home Orders, and invited contamination of its property and sickness and death to customers and employees, would be covered for its inevitable losses, but a restaurant that followed the Stay at Home Orders to avoid such catastrophe would not be covered. Requiring contamination in this context puts the insured in a position no reasonable insured (or insurer) would ever expect, one which the Policies do not envision, and which the law cannot condone: an endless cycle of opening, contamination, sickness and death, and (covered) losses.

For decades, insurers have attempted unsuccessfully to get courts to reach the result urged by Strathmore, arguing in almost tongue-in-cheek fashion that the inability to use a property due to dangerous physical substance does not constitute loss of or damage to property: the properties are fine, just dangerous for people to enter and use. Courts have consistently rejected such arguments, favoring an analysis that is in keeping the policy language, common sense, the reasonable expectations of insureds, and the ameliorative purpose of the law itself: when a property is rendered uninhabitable, unsafe, or of limited use because of a

dangerous substance (even an invisible one), physical loss of or damage to that property has occurred. This Court should reach the same conclusion.

In sum, a straightforward approach to the policy language, and the legal principles controlling its interpretation, requires a finding of coverage. Longstanding nationwide and Massachusetts precedent underscores the reasonableness of the plain-meaning construction that the plaintiffs advance.[6] The Superior Court's decision should be reversed and its judgment vacated.

C. The line of cases relied upon by the Superior Court relating to "intangible" losses is not logically applicable to these claims.

Instead of following or even meaningfully addressing the decades of case law supporting the plaintiffs' position, the Superior Court based its decision on a line of cases standing for the proposition that "physical loss . . . does not include intangible losses that flow from a defect in title, for example." (ADD/62) (citing Crestview Country Club v. St. Paul Guardian Ins. Co., 32 F. Supp. 2d 260 (D. Mass. 2004) (analyzing whether a golf course could recover, in a property damage claim, for loss of diminution of value to the course from the loss of a tree, after the insurer had already paid for the tree under the same policy provision); Eveden, Inc. vs. N. Assurance Co. of Am., U.S. Dist. Ct., No. 10–10061 (D. Mass. 2014)

[6] With decades of litigation and precedent on the ambiguity of the insuring language, one can only conclude that insurers like Strathmore chose not to define it to keep their options open in cases like this where they felt they could plausibly avoid providing coverage.

(finding that a lien placed on goods did not constitute a physical loss of the goods) (ADD/128); HRG Dev. Corp. v. Graphic Arts Mut. Ins. Co., 26 Mass. App. Ct. 374 (1988) (defect in title that existed prior to the policy did not constitute "physical loss or damage"); and Pirie v. Federal Ins. Co., 45 Mass. App. Ct. 907 (1998) (deleading of building not covered because it was not caused by a fortuitous event, but a condition that predated the insurance policy)).

Relying upon these cases as analogous is wrong.[7] The allegations here relate to a ubiquitous, dangerous substance that made normal access to and use of a commercial property a danger to health and safety -- no reasonable view of the Complaint suggests that the plaintiffs have alleged or suffered an "intangible loss" akin to a defect in title or a less aesthetically-pleasing golf course.[8] To analogize to

[7] Three cases from other jurisdictions relied upon by Strathmore below similarly bear little resemblance to the facts or issues presented here. See Pentair, Inc. v. Am. Guarantee & Liab. Ins., 400 F. 3d 613 (8th Cir. 2005) (2-1 decision involving power outage to subsidiary's factory resulting in business losses); Newman Myers v. Great N. Ins. Co., 17 F. Supp. 323 (S.D.N.Y. 2014) (intentional power outage to protect power company's equipment); and Harry's Cadillac v. Motors Ins. Corp., 126 N.C. App. 698 (Ct. App. NC 1997) (brief closure due to snowstorm). All three were decided at summary judgment, two involved the narrower language "physical loss or damage," and none involved loss of use due to an imminent and inevitable threat at the premises, a distinction pointed out by the Newman Myers court.

[8] Similarly, while the Superior Court cited Couch's treatise for the proposition that "physical loss" of property requires "physical alteration," the citation is incomplete and the reliance misplaced. (ADD/63). Immediately after the cited language, the treatise discusses the different analytical framework that arises when a property is not physically altered, but is uninhabitable or subject to a fortuitous physical threat, and notes that such a situation "essentially triggers the

such cases, while ignoring the more analogous cases involving fumes, fibers, odors, and impending rock slides, is flawed legal reasoning that should not be adopted by this Court.

D. The Superior Court's reliance on what it termed the "majority of cases across the country" addressing COVID-19 insurance claims was error.

The lower court was presented, as this Court will be, with citations to cases from a variety of state and federal trial courts analyzing COVID-19 business interruption insurance claims. Some decisions support the plaintiffs' reading of the policy language, and some support Strathmore's. The lower court did not discuss or find that any of the decisions supporting the plaintiffs' position were unreasonable or infirm; it simply observed that the cases favoring the insurers constituted a "majority," and adopted the reasoning of those cases. (ADD/62). This was error that should not be repeated in this Court.

In the first instance, the law does not analyze ambiguities in insurance policies by determining how many trial courts have found one way on a coverage issue, how many have found the other way, and then following whatever view a court believes -- rightly or wrongly -- to be the "majority" of trial courts. Rather,

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insured's obligation to mitigate the impending loss." The key, according to the treatise, is that that risk be a fortuitous, "random risk" that poses a threat to the property and triggers a duty to mitigate. See 10A Couch on Ins. § 148:46 (3d ed. 2019). This section of Couch's treatise, read in its entirety and in conjunction with these Policies and facts alleged, supports plaintiffs' position.

the law requires a court to determine whether the insuring language at issue can reasonably be interpreted to have more than one meaning. If so, and if that language can be plausibly interpreted in favor of coverage, the insured prevails, regardless of which view the court feels is "more reasonable." This entire analysis is to be done with the reasonable expectations of the insured in mind. The obvious split in the trial courts demonstrates, if nothing else, that reasonable minds can differ about the meaning of the undefined insuring language, and where reasonable minds can differ, the insured is covered. That is the law, and it should be followed here.

The fact is that there are many well-reasoned decisions from across the country that deny motions to dismiss and some which enter summary judgment in favor of insureds on similar alleged facts, similar policy language, and a close analysis of dictionary definitions and state law.[9] Even if one, as an intellectual exercise, found an opposing line of reasoning more appealing or convincing than these opinions, that is not the standard to be applied. The standard is one of reasonableness, and there is simply nothing unreasonable about the following interpretations of the policy language in favor of coverage:

[9] Rather than cite and attach every unpublished trial court opinion in the insured's or insurer's favor, the plaintiffs-appellants have attached representative cases in favor of both insureds and insurers in the Addendum to this Brief beginning at ADD/139.

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

North State Deli, LLC vs. Cincinnati Ins. Co., N.C. Super. Ct., No. 20-CVS-02569, slip op. at 6 (Oct. 7, 2020) (granting summary judgment for a group of insured restaurants). (ADD/154).

> . . . Plaintiffs argue that physical loss *of* the real property means something different than damage to the real property, and this is a valid argument. Otherwise, why would both phrases appear side-by-side separated by the disjunctive conjunction "or"? Plaintiffs argue that they lost their real property when the state governments ordered that the properties could no longer be used for their intended purposes – as dine-in restaurants. The Policy's language *is* susceptible to this interpretation.

Henderson Road Restaurant Systems, Inc. vs. Zurich Am. Ins. Co., U.S. Dist. Ct., No. 1:20 CV 1239, slip op. at 18 (N.D. Ohio Jan. 19, 2021). (ADD/165).

> Accordingly, one reasonable interpretation of "direct physical loss of" property at premises is that the interruption of PSBC's business operations as a result of the proclamations was a direct physical loss of PSBC's property because PSBC's property could not physically be used for its intended purpose, i.e., PSBC suffered a loss of its property because it was deprived from using it. . . . The Court finds that this is an interpretation that

> an average lay person would understand by the phrase "loss of" property in the Policy.

Perry Street Brewing Co., LLC vs. Mut. of Enumclaw Ins. Co., Wash. Super. Ct., Spokane No. 20-2092212-32, slip op. at 6 (Nov. 12, 2020). (ADD/178).

> The Additional Coverages disputed here are all Business Income and/or Extra Expenses coverages. If "property" in the context of those Additional Coverages includes the use and operation of the business at the described premises, then a mandatory shutdown of in-person business operations could reasonably constitute a loss of that property. Viewing the Policy as a whole, it is a reasonable interpretation of the Business Income insurance language that the ability to operate a business, and generate Business Income, is one of the sticks in the bundle of property rights protected by this Policy. . . . Plaintiff argues that the "Closure Orders caused a 'direct physical loss' of [Plaintiff's] property by denying the Plaintiff the ability to use its property as intended." The allegations in the Plaintiff's Complaint regarding its suspension of operations could plausibly constitute a "direct physical loss of . . . property at the described premises," in that Plaintiff lost the ability to physically operate its business at the described premises. The Court concludes that the phrase "direct physical loss of or damage to property at the described premises", in the context of Business Income and Extra Expense insurance, is ambiguous.

Susan Spath Hegedus, Inc., U.S. Dist. Ct., No. 20-2832, slip op. at 15, 18. (ADD/144-145).

> It is, perhaps, easier to say what loss *does not* mean than what it does mean. One problem is that the policy uses the term "loss" to define the term "loss." But the Court is persuaded that a reasonable factfinder could find that the term "physical loss" is broad enough to cover, as Williams argues, a deprivation of the use of its business premises. That's the common meaning of loss . . . and there is no basis to believe that the Cincinnati policy uses the term any differently.

Derek Scott Williams PLLC vs. The Cincinnati Ins. Co., U.S. Dist. Ct., No. 20-C-2806, slip op. at 8 (N.D. Ill. Feb. 28, 2021). (ADD/193).

> But a reasonable jury can find that the Plaintiffs did suffer a direct "physical" loss of property on their premises. First, viewed in the light most favorable to the Plaintiffs, the pandemic-caused shutdown orders do impose a *physical* limit: the restaurants are limited from using much of their physical space. It is not as if the shutdown orders imposed a *financial* limit on the restaurants by, for example, capping the dollar-amount of daily sales that each restaurant could make. No, instead the Plaintiffs cannot use (or cannot fully use) the physical space. Indeed, the policy defines "covered property" to include buildings at the premises, not just personal property or movable items.

In re: Society Ins. Co. COVID-19 Bus. Interruption Protection Ins. Lit., U.S. Dist. Ct., MDL No. 2964, No. 20-C-02813, slip op. at 21 (N.D. Ill. Feb. 22, 2021). (ADD/217).

While these cases are not binding precedent, neither are the cases cited by Strathmore that reach the opposite conclusion. The divergence of this authority is powerful evidence that the language is ambiguous. See Macheca Transp. v. Phila. Indem. Ins. Co., 649 F.3d 661, 668 (8th Cir. 2011) (fact that several jurisdictions reached divergent conclusions on meaning of term is evidence of term's ambiguity); Scott Craven DDS PC vs. Cameron Mut. Ins. Co., Mo. Cir. Ct., Clay No. 20CY-CV06381, slip op. at 4 (W.D. Mo. Nov. 18, 2020) ("While the Court concludes that Defendant's cases are factually and legally distinguishable for the reasons explained by the Plaintiffs, at minimum, it is proof of ambiguity that jurists are reaching different conclusions in applying the similar policy language to this unique set of circumstances.") (ADD/229); see also Charles C. Marvel, Division of opinion among judges on same court or among other courts or jurisdictions

considering same question, as evidence that particular clause of insurance policy is ambiguous, 4 A.L.R. 4th 1253 (1981 & supp. 2021).

A considerable majority of reported decisions in so-called COVID-19 business interruption cases are federal district court decisions, many of which cite largely to sister district courts, creating an impermissible federal common law around an issue that is supposed to be based on, and predictive of, what state high courts would hold.[10] See West v. Am. Tel. & Tel. Co., 311 U.S. 223, 237 (1940); see also Gooding v. Wilson, 405 U.S. 518, 525 n.3 (1972); Comm'r v. Bosch's Estate, 387 U.S. 456, 465 (1967). What can be said with certainty -- and what Strathmore must acknowledge -- is that there is no "majority view" from state appellate courts on any of these COVID-19 coverage issues. This Court should lead the way, as it has historically done, by finding for the plaintiffs, because such a finding is consistent with the basic tenets of Massachusetts' law of contract interpretation.

[10] See, e.g., Kamakura, LLC vs. Greater New York Mut. Ins. Co., U.S. Dist. Ct., No. 20-11350-FDS, slip op. at 10 (D. Mass. Mar. 9, 2021) (ADD/232); Legal Sea Foods, LLC vs. Strathmore Ins. Co., 20-cv-10850, slip op. at 7-9 (D. Mass. Mar. 5, 2021)(ADD/262).

E. The Virus Exclusion is not applicable to Little Donkey's claim, and Strathmore's reliance on it proves that the facts alleged in the Complaint constitute "physical loss of or damage to" property.

The lower court's opinion did not address the fact that Strathmore inserted a "virus exclusion" into the Little Donkey Policy but not the Coppa/Toro Policy. This fact alone strongly favors the plaintiffs' coverage analysis and raises numerous factual issues that should have resulted in a denial of Strathmore's Motion to Dismiss.

Strathmore argued below that the virus exclusion applied to Little Donkey's claim because it constituted loss or damage caused by a virus, while at the same time arguing that the plaintiffs' claims (even those that involve actual presence of virus on property) would not constitute "physical loss of or damage" to property. (RAII/281-282). This, of course, makes little sense. The Policy covers losses of Business Income due to "physical loss of or damage to" property. A claim that the virus exclusion applies is by definition a claim that a covered loss has occurred that requires exclusion. It is axiomatic that an exclusion is unnecessary unless the excluded event would otherwise fall within the coverage provisions. See Dupre v. Allstate, 61 P.3d 1025, 1029 (Colo. Ct. App. 2002) (citing Betco Scaffolds Co. v. Houston United Cas. Ins. Co., 29 S.W.3d 341 (Tex. App. 2000)).

In any event, the virus exclusion does not apply, and both plaintiffs' claims are covered. As alleged in the Complaint and amply supported by the record, the

virus exclusion -- while a clear acknowledgement that a virus can cause "physical loss of or damage to" property -- was only intended to address allegations of contamination of food by a virus, not loss of access and use of an insured property to prevent a threat to health and safety. (RAI/21, ¶¶58-64). Further, the Complaint alleges that to exclude damage of the type alleged here, pandemic exclusions were available, but Strathmore made the business decision not to use one in either policy.[11] (Id.). Taken as true, as they must be here, these allegations raise numerous factual issues, including the meaning and intent of the virus exclusion, the availability and use (or lack thereof) of pandemic exclusions, and the fact that these exclusions exist because these events result in otherwise covered losses. In the end, the allegations regarding this novel exclusion that has only recently come into existence require factual development in the form of documents, policy manuals, and testimony, and were not properly addressed in a motion to dismiss.

[11] Strathmore and the Superior Court simply did not address the allegations that (1) Strathmore and other insurers had pandemic exclusions that would have applied to the plaintiffs' claims at the time the policies were issued, and (2) Strathmore failed to insert such an exclusion into the Policies. Like a virus exclusion, a pandemic exclusion can only exist if a pandemic can result in a covered loss.

F. The "period of restoration, "loss of use" and other provisions in the Policy raised by Strathmore below do not support the Superior Court's decision, and logically have little or nothing to do with the coverage issue.

In the lower court, Strathmore argued in somewhat scattershot form, that certain isolated clauses in the Policies should affect the analysis of whether coverage was triggered. Some of these arguments were used in dicta by the Superior Court, but none of them withstand scrutiny.[12]

1. Period of Restoration

Strathmore argued below, and the Superior Court accepted in its dicta, that a finding of a covered loss under the circumstances alleged here is somehow inconsistent with the Policies' "period of restoration" provision. This does not reflect a fair reading of the Policies. The "period of restoration" provision, on its face, merely sets the time period for covered damage; it has nothing to do with the **scope of coverage** under the Policies. A covered Business Income loss begins 72 hours after the "physical loss of or damage to property" occurs, and "Ends on the earlier of: (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; (2) The date when business is resumed at a new permanent location; **or** (3) One year after the

[12] Perhaps realizing that these arguments misstated and misinterpreted the language of the Policies, and knowing that all exclusionary language was to be strictly construed against it, Strathmore supported them with little argument or authority.

time of direct physical loss or damage." (RAI/166-167; RAII/151-152) (emphasis added). The provision does not require repair, rebuilding or replacement of anything; indeed, it expressly contemplates situations where nothing is or can be done to restore the property to full working order, in which case the losses are limited to one year.

Not surprisingly, courts have adopted the common sense notion that the period of restoration simply "provides the methodology to calculate loss of business income," specifically the time period that damages are recoverable. Verrill Farms, LLC v. Farm Family Cas. Ins. Co., 86 Mass. App. Ct. 577, 584 (2014). Similarly, courts have found that the period of restoration language does not contain any requirement that physical repairs be done in order for coverage to apply. See, e.g., Oregon Shakespeare Festival Ass'n, No. 1:15-CV-01932-CL, slip op. at 12 ("Defendant [insurer] claims that this period of time [the time it took for smoke to dissipate] cannot be considered 'restoration' because no *structural* repairs were necessary. Once again, the Court can find no such limitation within the terms of the policy.") (ADD/107).

Strathmore's misplaced reliance on the "period of restoration" as a modifier of its "physical loss of or damage" language, has been and should be dismissed as having nothing to do coverage for COVID-19 losses, but pertaining only to duration of damages:

> First and foremost, the "Period of Restoration" describes a *time* period during which loss of business income will be covered, rather than an explicit definition of coverage. Instead, the explicit definition of coverage is that direct physical "loss of" property is covered—not just "damage to" property, as explained earlier. Second, the limit on the Period of Restoration does include the words "repaired" and "replaced," that is, the restoration period ends when the property at the premises is "repaired" or "replaced." There is nothing inherent in the meanings of those words that would be inconsistent with characterizing the Plaintiffs' loss of their space due to the shutdown orders as a physical loss.

In re: Society Ins. Co. COVID-19 Bus. Interruption Protection Ins. Lit., No. 20-C-02813, at 22-23. (ADD/218-219). See Derek Scott Williams PLLC, No. 20-C-2806 at 9 (stating that even the word repair "is not inherently physical; one need only consider common references to repairing a relationship or repairing one's health")(ADD/194); MacMiles, LLC, No. GD-20-7753 (noting that a similar provision "merely imposes a time limit on available coverage" which ends when any required repairs are made, or 12 months, whichever is earlier; it "does not somehow redefine or place further substantive limits on types of available coverage."). (ADD/294).

In the end, Strathmore's argument attempts to use a duration of damages provision to inject a requirement of physical alteration/damage to property that is not contained in the insuring language. Piecing together isolated phrases in different sections of the Policy in the least favorable way to its insured, when they can be read harmoniously and in favor of coverage, is exactly contrary to how insurance policies are to be read and interpreted by courts.

2. Failure to allege suspension of operations

Strathmore's assertion below that the plaintiffs failed to allege suspension of operations was based upon an unfair and impermissibly narrow reading of the Complaint. The Complaint states that plaintiffs were unable to act as dine-in restaurants, and were limited in their ability to use and access their property thereafter. (RAI/16, ¶¶27-38). They allege that, as a result, "COVID-19 has caused and continues to cause direct physical loss of or damage to Coppa/Toro's property," and that "[b]ecause of direct physical loss of or damage to property, Coppa and Toro have experienced a slowdown or cessation of its business (i.e., a "suspension" as defined by the Policy), and resulting loss of business income and extra expense." (RAI/24, ¶¶83-84). These allegations are repeated as to Little Donkey. (RAI/26-27, ¶¶104-105). The plaintiffs have plainly alleged a suspension of operations.

3. Loss of Use

Strathmore's reliance on the "loss of use" exclusion was also knowingly misplaced, but the Superior Court nonetheless adopted it. Under a section of the Policies entitled Causes of Loss—Special Form, the Policies provide the following exclusionary language: Strathmore "will not pay for loss or damage caused by or

resulting from . . . b. Delay, loss of use or loss of market."[13] (RAI/158, ¶2(b.); RAII/142, ¶2(b.)). The Superior Court reasoned, albeit in dicta, that a reasonable insured would understand these eight words on page 139 to somehow inject a physical alteration requirement into the insuring language "physical loss of or damage to" property on page 96 of the all-risk Policies. This reasoning does not withstand analysis,[14] changed the operative insuring language of the Business Income endorsement, and was error.

The fact that "Delay, loss of use or loss of market" were excluded as Covered Causes of Loss simply means that a claim for Business Income (or any other loss) could not be predicated on "Delay, loss of use or loss of market" alone; the loss had to be from an identifiable Covered Cause, meaning any cause not otherwise excluded. The cause of the loss in this case was not and was never alleged to be "Delay, loss of use or loss of market"; the cause was the ubiquitous virus and the Stay at Home Orders that flowed from it, each of which affected the use, access, habitability and utility of the property and constituted "physical loss of or damage to property" under the operative coverage language.

[13] These eight words fall between exclusions for losses caused by electromagnetic energy, and vapor from agricultural smudging, proof in itself that they were not meant to have the broad exclusionary language proposed by Strathmore and adopted by the Superior Court.

[14] It is difficult to envision any insured sitting down, reading the Policies, and coming to such an understanding.

Once physical loss of or damage to property occurs due to a Covered Cause not excluded, **every** business interruption loss by definition involves loss of use of the property; these are, in fact, the losses which Strathmore specifically agreed to cover. The "loss of use" exclusion from Covered Causes of loss simply limits coverage to losses flowing from a covered cause as opposed to other consequential, remote losses. See Dictiomatic, Inc. v. U.S. Fid. & Guar. Co., 958 F. Supp. 594, 603 (S.D. Fla. 1997) (exclusion applies to consequential damages from losses *other than* the covered cause, in that case a hurricane); Bartram, LLC v. Landmark Am. Ins. Co., 864 F. Supp. 2d 1229, 1239 (N.D. Fla. 2012) (exclusion did not apply to loss which "flows directly from the water damage").

To read this exclusion as the Strathmore does would render *all* business income coverage illusory (whether involving a physical alteration of the property or not) and, as such, this Court would be required to void the exclusion. See Liberty Mut. Ins. Co. v. Tabor, 407 Mass. 354, 358 (1990) (**"**A provision in an insurance policy that negates the very coverage that the policy purports to provide . . . is void as against public policy."). The Court need not reach this result because the clause does not apply.

4. Ordinance or Law

In the lower court, Strathmore pointed to the "ordinance or law" exclusion, an argument made in one paragraph with a single citation to an unsupportive

case.[15] First, such exclusions do not and cannot apply when an ordinance or law is issued to address the cause of the loss itself, i.e., the hazardous condition. See Matzner, supra, at n.12 (citing Sentinel Mgmt. Co., 563 N.W.2d 296 (collecting cases for the proposition that exclusion does not apply to government orders addressing "extraneous forces" that have themselves led to damage)). (ADD/125).

Under Strathmore's interpretation, if a government entity prevents use or access to a property, whether because of fire, flood, fumes, odors, virus, or any condition that constitutes a physical loss or damage, there would be no coverage for losses. Again, this interpretation contradicts the Policies and renders essentially all of its coverage (including Civil Authority coverage which specifically provides coverage for losses resulting from government action) illusory. See id. ("[I]f an insurer could disclaim coverage whenever an instance of physical damage implicated the requirements of some law or ordinance, a typical insurance policy would cover far fewer losses than, in my judgment, an objectively reasonable insured would expect."). (ADD/125). Further, the operative exclusionary language speaks to "construction, use or repair," and relates to situations where regulations require additional costs incurred in remediating an otherwise covered loss. This is why the application of "ordinance or law" has been limited to claims where the act

[15] Like the "loss of use" exclusion, Strathmore did not even mention the "ordinance or law" provision in its denial letters. (RAII/217-221; 223-227) This was not an oversight; it was because Strathmore knew that these provisions do not apply here.

or ordinance is **independent** of the cause of loss, and results in unexpected increases in damages during repair or reconstruction. The only case even cited by Strathmore on this issue confirms this. See Ira Stier, DDS, P.C. v. Merchants Ins. Grp., 127 A.D. 3d 922 (N.Y. App. Div. 2015) (after paying for property damage caused by vandals, insurer declined coverage for delays in opening due to a deficiency in the certificate of occupancy that predated and was unrelated to the loss itself).

G. Plaintiffs plausibly allege that Civil Authority Coverage applies.

Strathmore claimed below that the Policies' Civil Authority coverage did not apply to the plaintiffs' losses because the plaintiffs have not alleged that people were completely forbidden and prevented from accessing the insured premises, and because the plaintiffs did not allege a causal nexus between existing damage to property away from the plaintiffs' insured premises and the Stay at Home Orders. These arguments should fail.

Strathmore posits that Civil Authority coverage is only triggered if all access to the insured's property by anyone for any reason is completely prohibited. This position may be to Strathmore's advantage, but it is not what the Policies say. The phrase to which Strathmore attributes critical significance is "prohibits access." Black's Law Dictionary defines "prohibit" as "1. To forbid by law. 2. To prevent, preclude, or severely hinder." Black's Law Dictionary, Prohibit (11th ed. 2019).

The plain language of the Complaint makes clear that customers and employees were prohibited, prevented, precluded, and severely hindered from accessing the plaintiffs' properties at various times and for various purposes. That is sufficient under the civil authority provision. See US Airways, Inc. vs. Commonwealth Ins. Co., Va. Cir. Ct., No. 03-587, slip op. at *5 (July 23, 2004) (Where government closed airport due to 9/11 and fear of impending attacks, Court found "[i]t is clear from the evidence that an order by civil or military authority was issued as a direct result of risk of damage or loss to [the airline's] property" and civil authority coverage applied.) (ADD/135). Strathmore's strict, narrow reading of the words "prohibits access" asks the Court to go far beyond the words Strathmore chose, and is not a reading to which it is entitled at any stage of these proceedings. See Studio 417, Inc. v. Cincinnati Ins. Co., 478 F.Supp.3d 794, 804 (W. D. Mo. 2020) ("[Plaintiffs'] allegations plausibly allege that access was prohibited to such a degree as to trigger the civil authority coverage . . . 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.").

Strathmore also made a last-ditch argument below that the Stay at Home Orders were not issued "as a result of" or "in response to" the loss or damage to other property, but instead to prevent future harm at the property. This argument, on its face, necessarily requires a detailed factual inquiry concerning the basis for

the orders, when the loss or damage to nearby properties occurred, and the like, and is therefore not an appropriate argument to raise in a motion to dismiss.[16]

H. Given Business Income coverage applies, the question of Commercial's negligence should be remanded.

Little Donkey's claim against Commercial sounds in negligence, and relates to Commercial's inexplicable decision to sell Little Donkey an insurance policy with a virus exclusion, while selling the other plaintiffs in its restaurant group a policy without the exclusion. Having established that the plaintiffs' claims are covered by the Strathmore Policies, and to the extent factual issues remain as to the meaning and application of the virus exclusion (which the plaintiffs maintain does not apply), Little Donkey's claim should be remanded for further development of the record as to (1) the basis for Strathmore's denial of coverage to Little Donkey, whether the virus exclusion or otherwise; and (2) the reasons that Commercial sold a policy containing a virus exclusion to Little Donkey. Until there is a full record on these issues, any determinations as to Little Donkey's claims against Commercial are premature.

[16] Below, Strathmore cited to cases decided at summary judgment, while attaching and referencing documents outside the pleadings, to make this argument, all but admitting that this is not an argument appropriately addressed by a Motion to Dismiss.

CONCLUSION

Plaintiff-Appellants, Verveine Corp d/b/a Coppa, 1704 Washington LLC d/b/a Toro, and JKFOODGROUP LLC d/b/a Little Donkey respectfully request that this Court reverse the decision of the Superior Court, find that the plaintiffs have sufficiently alleged coverage under the Strathmore Policies, and vacate the judgment issued for Strathmore and Commercial below. To the extent the Court determines that further allegations are necessary to trigger coverage, the Court should vacate so much of the Court's ruling dismissing the claims with prejudice.

Respectfully submitted,

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Date: 06/11/2021

ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
SUCV2020-1378-BLS2

VERVEINE CORP. d/b/a COPPA, 1704 WASHINGTON LLC d/b/a TORO, and JKFOODGROUP LLC d/b/a LITTLE DONKEY
Plaintiffs

vs.

STRATHMORE INSURANCE COMPANY and COMMERCIAL INSURANCE AGENCY, INC.
Defendants

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANT STRATHMORE INSURANCE COMPANY'S MOTION TO DISMISS AND ON DEFENDANT COMMERCIAL INSURANCE AGENCY, INC.'S MOTION FOR JUDGMENT ON THE PLEADINGS

notice sent 12.24.20 GPV TS Rfcup JMc Rfc up DM Brz Stipc ARF EAD CBup mo

The plaintiffs are entities that own and operate two Boston restaurants, Coppa and Toro, and one Cambridge restaurant, Little Donkey. They have jointly filed this insurance coverage action against the defendants, Strathmore Insurance Company, Inc. (Strathmore), and Commercial Insurance Agency, Inc. (Commercial). Plaintiffs' claims arise from their loss of business income due to the COVID-19 pandemic. Defendant Strathmore has moved to dismiss the Complaint pursuant to Rule 12(b)(6), contending that, based on the unambiguous language of the insurance policies that it issued, the plaintiffs' losses are not covered. Commercial, plaintiffs' nsurance agent, has moved for judgment on the pleadings pursuant to Rule 12(c) on the grounds that, if Strathmore's denial of coverage was proper, it follows that the claim asserted against Commercial also fails as a matter of law. This Court concludes that there is no coverage for plaintiffs' business losses under the Strathmore policies such that both Motions must be **ALLOWED**.

BACKGROUND

The Complaint, relevant insurance policies, and certain government orders set forth the following facts.[1] The plaintiff corporations, Vervaine Corp., 1704 Washington LLC, and JKFOODGROUP LLC, share common ownership and operate the restaurants Coppa, Toro, and Little Donkey, respectively. For many years, plaintiffs have purchased their insurance through Commercial and have been insured under Strathmore policies. As is relevant here, Coppa and Toro were insured under a single "all risk" commercial property policy issued by Strathmore covering the period between September 5, 2019 and September 5, 2020 (the Coppa/Toro Policy). Little Donkey was separately insured under a commercial property policy issued by Strathmore for the period June 17, 2019, to June 17, 2020 (the Little Donkey Policy). The only difference between the Coppa/Toro Policy and the Little Donkey Policy that is relevant to the instant motions is that the Little Donkey Policy contained a "virus exclusion" provision whereas the Coppa/ Toro Policy did not.

On March 15, 2020, in connection with the COVID-19 pandemic, the Governor of Massachusetts issued an order "prohibiting gatherings of more than 25 people and on-premises consumption of food or drink." In particular, it provided:

> "Any restaurant, bar, or establishment that offers food or drink shall not permit on-premises consumption of food or drink; provided that such establishments may continue to offer food for take-out and by delivery provided that they follow the social distancing protocols set for the Department of Public Health guidance."

About a week later, the Governor issued another stricter stay-at-home order, but continued to allow restaurants and bars to offer food for take-out and delivery. Beginning in June 2020, further orders allowed for a phased-in reopening of certain business, subject to certain

[1] The court may take judicial notice of the government orders as a matter of public record. Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000).

"workplace safety rules and standards designed to protect against the risk of the COVID-19 virus." On June 6, 2020, the Governor issued an order allowing outdoor table service at restaurants to open on June 8, 2020. On June 19, 2020, the Governor issued an order allowing indoor table service to resume at restaurants on June 22, 2020 (collectively, the Governor's Orders).

As a consequence of the Governor's Orders, plaintiffs could not use their properties as fully operational restaurants: although they could still use the premises to prepare food for take-out and delivery, plaintiffs suffered a major loss of business income because of the restrictions relating to on-premises dining.[2] Plaintiffs filed a claim for those losses with Strathmore, which determined that neither the Coppa/Toro Policy nor the Little Donkey Policy provided coverage. This lawsuit ensued.

The Complaint seeks declaratory relief and damages for breach of contract and for a violation of G. L. c. 93A and 176D against Strathmore. Counts I through III relate to the Coppa/Toro Policy and Counts IV through VI relate to the Little Donkey Policy. Plaintiff JKFOODGROUP, LLC has asserted an additional claim (Count VII) against Commercial, the insurance agent on the Little Donkey Policy, alleging that, if the virus exclusion provision in that policy applies, then Commercial was negligent in procuring that policy for the plaintiff.

DISCUSSION

In seeking coverage for their business losses, plaintiffs rely on two sets of provisions which appear in both the Coppa/Toro Policy and in the Little Donkey Policy. The first set of

[2] Coppa and Toro did provide takeout and delivery service to customers. According to the Complaint, Little Donkey chose not to do so, electing to provide meals only to front-line healthcare workers and first responders dealing with the COVID-19 crisis.

provisions appear in the "Business Income (and Extra Expense) Coverage" section. The Business Income Provision 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 premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss . . . .

(Emphasis added). The Extra Expense Provision covers the "necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no **direct physical loss or damage** to property caused by a Covered Cause of Loss." (Emphasis added). The second major provision relevant to coverage is each Policy's Civil Authority Provision. That 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, if 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.

The coverage dispute between the parties centers on the phrases in boldface above — namely, the meaning of the phrase "direct physical loss of or damage to property" as used in the Business Income and Extra Expense provisions, and similarly, the meaning of "damage" that prohibits access to the premises as used in Civil Authority provision. Defendants take the position these words unambiguously require that the physical state of the property in question must be altered in order for there to be coverage. Plaintiffs, on the other hand, contend that

limitations on access to and use of the property are enough, and that the quoted language is at least ambiguous. In line with the majority of recent cases across the country that have tackled this exact issue arising from the COVID-19 pandemic, this Court agrees with defendants.

A. Business Income and Extra Expense

The Business Income and Extra Expense Provisions of the Strathmore Policies condition coverage on proof of "direct physical loss of or damage to property." Here, there is no allegation that the properties where the restaurants are located were physically damaged. Rather, plaintiffs allege that limitations imposed on the use of their properties because of the Governor's Orders constitute a "physical loss" within the meaning of these provisions. In support of their position that they suffered a "physical loss," plaintiffs contend that the parties clearly contemplated and understood that the properties would be used and accessed as dine-in restaurants; because plaintiffs could no longer use the premises for their intended purpose, they necessarily suffered (it is argued) a "direct physical loss." The weight of authority does not support this interpretation of the Policy language.

As an initial matter, the word "physical" must be given its plain meaning. A "physical loss" thus does not include intangible losses that flow from a defect in title, for example. See Eveden Inc. v. Northern Assurance Co. of America, 2014 WL 952543 *5 (D. Mass. 2014), and cases cited therein. Nor does it include a diminution in value of the property. See, e.g., Crestview Country Club Inc., 321 F. Supp. 2d at 264 (decrease in value of golf course was not a "direct physical loss"). The phrase "direct physical loss of or damage to property" in a property insurance policy like this one cannot therefore be construed to cover physical loss in the absence of some physical damage to the insured's property. HRG Dev. Corp. v. Graphic Arts Mut. Ins. Co., 26 Mass. App. Ct. 374, 377 (1998). Accord Pirie v. Federal Ins. Co., 45 Mass. App. Ct.

907, 908 (1998). These decisions are in line with a leading insurance treatise, which states that the term "physical loss" has been "widely held to exclude losses that are intangible or incorporeal," thereby precluding claims "resulting from a detrimental economic impact unaccompanied by distinct, demonstrable physical alteration of the property." Couch on Insurance §148.46 (3d ed. 2019).

In line with these principles, a majority of courts across the country called upon to decide insurance coverage claims involving losses occasioned by COVID-19 have concluded that restrictions on the use of the an insured's property due to government orders are not "physical losses or damage" within the meaning of provisions similar to the one before this Court. See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am., 2020 WL 5525171 (N.D. Cal. 2020); Pappy's Barber Shops, Inc. v. Farmers Grp., Inc., 2020 WL 5500221 (S.D. Cal. 2020); Malaube, LLC v. Greenwich Ins. Co., 2020 WL 5051581 (S.D. Fla. 2020); Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am., 2020 WL 5938755 (N.D. Ga. 2020); Seifert v. IMT Ins. Co., 2020 WL 6120002 (D. Minn. 2020); Brian Handel D.M.D., P.C. v. Allstate Ins. Co., 2020 WL 6545893 (E.D. Pa. 2020). As the court explained in one case, the use of "direct" and "physical" to describe the loss which is covered necessarily requires "actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure." Sandy Point Dental PC v. Cincinnati Ins. Co., 2020 WL 5630465, at *2 (N.D. Ill. 2020). Similarly, courts have concluded that restrictions on the use of the property — for example, a prohibition against in-person dining at restaurants — does not as a matter of law amount to "direct physical loss or damage" to the premises. See, e.g., 10E, LLC v. Travelers Indem. Co. of Conn., 2020 WL 5359653, at *5 (C.D. Cal. 2020) (in-person dining restrictions that impair use or value of

property does not result in "direct physical loss" within the meaning of the policy); Rose's 1 LLC v. Erie Ins. Exchange, 2020 WL 4589206, at *2 (D.C. Super. Ct. 2020) (because government restriction on on-premises dining did not have any effect on the "material or tangible structure of the insured's properties," there was no coverage). Significantly, all of these cases were decided on motions to dismiss, with courts concluding that the policy language was unambiguous. The coverage issues in this case are, of course, decided under Massachusetts law, but there is no indication in Massachusetts case law that would suggest a different conclusion.

Plaintiffs argue that the phrase "direct physical loss" is at the very least ambiguous and could be reasonably interpreted to include loss of access to and use of property occasioned by an imminent threat of physical harm to its occupants. They compare their situation to the loss suffered by an insured whose property is rendered too dangerous to occupy because of the presence of dangerous contaminants. Although the contaminants do not actually damage the physical structure, some courts have held that this may constitute a "physical loss" within the meaning of the insurance policy. See, e.g., Matzner v. Seaco Ins. Co., 1998 WL 566658 (Mass. Super. 1998) (poisonous carbon monoxide buildup in plaintiff's home); see also Sentinel Mgt. Co. v. New Hampshire Ins. Co., 563 N.W.2d 296 (Minn. App. Ct. 1997) (presence of asbestos in building constituted a physical loss); see also Arbeiter v. Cambridge Mut. Fire Ins. Co., 1996 WL 1250616, at *2 (Mass. Super. 1996) (noxious fumes from oil spill). The problem with this argument is that the Complaint here does not allege that the COVID-19 virus was actually present in plaintiffs' restaurants, resulting in physical contamination of the premises. Rather, it alleges that the loss of income for which they seek coverage was the result of the Governor's Orders that prevented plaintiffs from using the premises as intended. Plaintiffs' actual property

remains the same as it was pre-pandemic, and patrons and employees were not prohibited from entering the premises as long as the Governor's Orders were followed.

Equally unavailing is plaintiffs' argument that the COVID-19 virus constitutes an "imminent threat" to their premises and thus could amount to a physical loss within the meaning of the policies. As the defendants point out, this argument conflates the concept of "damage" and "risk." To obtain coverage under the Business Income and Extra Expense provisions, plaintiffs must allege not only that there was actual "physical loss of or damage to" the insured's property but that this was caused by a risk that is not excluded (i.e. a "Covered cause of Loss.") Stated another way, in order to give effect to all the language in this provision, a risk that a dangerous condition might result cannot itself constitute a "direct physical loss."

Finally, the Court must construe the disputed language as part of an entire contract and interpret its provisions where possible to be consistent with other language in the policy. "Every word in an insurance contract must be presumed to have been employed with a purpose and must be given meaning and effect whenever practicable." Allamerica Fin. Corp. v. Certain Underwriters at Lloyd's London, 449 Mass. 621, 628 (2007) (internal quotations and citations omitted); see also Verrill Farms, LLC v. Farm Family Cas. Ins. Co., 86 Mass. App. Ct. 577, 579 (2014). Here, the construction favored by the defendants finds considerable support in the language of the Policies themselves. The Policies, for example, refer to a "period of restoration" and the costs to "repair or replace property," both of which contemplate that such property was, in some way, lost or damaged. The Policies further provide that Strathmore "will not pay for loss or damage caused by or resulting from . . . b. Delay, loss of use or loss of market." It would be unreasonable for any insured to read a policy containing that exclusion as nonetheless

providing coverage for loss of use based on a separate provision clearly related to losses that are physical in nature.

B. Civil Authority

Plaintiffs also claim coverage pursuant to the Civil Authority Provision. As noted, this provides coverage only where there is "damage to property other than property at the described premises" and some action is taken by a civil authority that "prohibits access" to the insured property. The provision contains two additional conditions: 1) the insured property must be "not more than one mile from the damaged property" and 2) the action by the civil authority must be "taken in response to dangerous physical conditions" or "to enable a civil authority to have unimpeded access to the damaged property." In order to state a claim for coverage under this provision, the Complaint must therefore allege, at a minimum, that the government: 1) prohibited plaintiffs from accessing their restaurants; and 2) this action was taken as a result of damage to property within a one-mile radius of these locations. The allegations in the Complaint do not satisfy either requirement.

First, plaintiffs, their employees, and their customers have not been prohibited from accessing the insureds' restaurants, a fact the Complaint plainly concedes. Rather, the scope of permitted use of those physical spaces was altered by the Governor's Orders. Plaintiffs still had access to the premises to prepare food and for takeout and delivery. Second, as the Court already has discussed, plaintiffs have failed to allege damage to property, either at their restaurants or at any other building within a mile thereof. The majority of courts across the country that have interpreted similar Civil Authority provisions concluded that they did not provide coverage for the kind of losses that plaintiffs here assert. See, e.g., Mudpie, Inc., 2020 WL 5525171, at *7 (no civil authority coverage on similar COVID-19-related facts); Pappy's Barber Shops, Inc., 2020

WL 5500221, at *6 (same); Brian Handel D.M.D., P.C., 2020 WL 6545893, at *4 (same). This Court sees no reason to reach a different result.

C. The Negligence Claim against Commercial

As noted above, Counts I through VI, asserted against Strathmore, turn on whether Strathmore properly denied coverage to plaintiffs. In light of this Court's conclusion that it did, these Counts must be dismissed. Count VII is asserted against Commercial only, and alleges that Commercial, as the insurance agent for Little Donkey, was negligent in selling policies with a virus exclusion. Because this Court concludes that the denial of coverage was proper without reliance on this exclusion, it necessarily follows that this Count too fails to state a claim.

ORDER

For the foregoing reasons and for other reasons set forth in the defendants' Memoranda, Strathmore's Motion to Dismiss and Commercial's Motion for Judgment on the Pleadings are **ALLOWED**. The Complaint is hereby **DISMISSED**.

Janet L. Sanders
Justice of the Superior Court

Dated: December 21, 2020

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-1750

MOTORISTS MUTUAL INSURANCE COMPANY

v.

DAVID M. HARDINGER; CHRYSTAL HARDINGER,
Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 02-cv-08310
(Honorable Franklin S. Van Antwerpen)

Argued March 10, 2005
Before: SCIRICA, *Chief Judge*, ROTH and AMBRO, *Circuit Judges*

(Filed: May 18, 2005)

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OPINION OF THE COURT

SCIRICA, *Chief Judge*.

The District Court granted summary judgment to Motorists Mutual Insurance Company ("Motorists"), holding that Motorists had no duty to provide insurance coverage under David and Chrystal Hardinger's homeowner's insurance policy. We will vacate and remand.

I.

At the end of October of 2000, the Hardingers bought a homeowner's insurance policy from Motorists for their home in Berks County. Coverage under the policy began on September 29, 2000, and continued until October 1, 2001. Within a week and a half of moving in, Chrystal Hardinger and her children became ill, experiencing infections, as well as respiratory, viral, and skin conditions. The Hardingers vacated the premises on February 28, 2001, notifying Motorists on May 10, 2001, that they would pursue a property damage claim under the policy.

Motorists conducted a study on February 28, 2001, and received a report from the testing company on October 19, 2001. Motorists employed a second company to analyze the samples taken from the Hardingers' well. The test occurred on June 14, 2001, and the group issued a report on June 19, 2001. It found that the well was contaminated with e-coli bacteria. On August 26, 2002, a third testing company collected and tested water samples, and in a report issued on September 19, 2002, also found the samples contained e-coli.

On October 22, 2001, Motorists informed the Hardingers it would deny their property claim for the following reasons:

> The occurrence of the loss was prior to the inception of the policy by Motorists Insurance Group. The loss is also excluded under the current Home Owners Policy carried by the above insured.

The letter also stated that the loss fell under a policy provision that excluded loss caused by pollutants ("the pollution exclusion"). Motorists reaffirmed its denial of coverage in a letter dated October 4, 2002.

Attempts to fix the problem were unsuccessful. The Hardingers conveyed their property to National Penn Bank on February 19, 2003.

On November 4, 2002, Motorists brought a declaratory judgment action against the Hardingers, seeking a determination that it was under no duty to provide insurance coverage under the policy. The District Court granted Motorists' motion for summary

judgment on the basis that the Hardingers failed to establish a physical loss, a prerequisite for coverage under the policy.

II.

The District Court had diversity jurisdiction under 28 U.S.C. § 1332 and the declaratory judgment action was brought under 28 U.S.C. § 2201. We have jurisdiction over this appeal based upon 28 U.S.C. § 1291.

Summary judgment is appropriate if there are no genuine issues of material fact presented and the moving party is entitled to judgment as a matter of law.[1] Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322- 23 (1986). In determining whether a genuine issue of fact exists, we resolve all factual doubts and draw all reasonable inferences in favor of the nonmoving party. *Suders v. Easton,* 325 F.3d 432, 435 n.2 (3d Cir.2003). On appeal, "[w]e apply the same standard that the District Court should have applied." *Stratton v. E.I. DuPont De Nemours & Co.,* 363 F.3d 250, 253 (3d Cir. 2004). Pennsylvania substantive law applies in this diversity suit. *Nowak By and Through Nowak v. Faberge USA Inc.*, 32 F.3d 755, 757 (3d Cir. 1994).

[1]The District Court incorrectly identified the non-moving party as Motorists, stating that "[a]ll inferences must be drawn, and all doubts resolved, in favor of the non-moving party – *in this case, Plaintiff*" (emphasis added). The non-moving party in this case was not the plaintiff, Motorists, but the defendants, the Hardingers. We believe this mistake was in all likelihood a clerical error and did not reflect the District Court's actual analysis. On remand, the District Court should ensure that it draws inferences and resolve doubts in favor of the appropriate party.

III.

Motorists argues that three grounds justify its denial of coverage: the loss does not constitute a "physical loss," the loss predated the policy, and the loss falls within the pollution exclusion. We believe there is a genuine issue of material fact on whether there was a physical loss and whether the loss predated the policy. We leave the inquiry whether the pollution exclusion applies to the District Court.

A. Physical Loss

A prerequisite for coverage under the homeowner's policy is "direct physical loss or risk of a direct physical loss." The policy does not define the term "physical loss to property."[2] Holding that there was no genuine issue on whether there was a physical loss, the District Court granted summary judgment to Motorists.[3] While the bacteria allegedly made the house uninhabitable, the court deemed this a "constructive loss," and held it insufficient to satisfy the policy's requirement of "physical loss."

We look to Pennsylvania law in this diversity action and predict how the Supreme Court of Pennsylvania would decide the case. *See Debiec v. Cabot Corp.*, 352 F.3d 117, 128 (3d Cir. 2003) (citing *Bohus v. Beloff,* 950 F.2d 919, 924 (3d Cir. 1991)). No Pennsylvania Supreme Court case, however, directly addresses whether loss of use may

[2]In the definition section, the policy does, however, define the term "property damage" as "physical injury to, destruction of, or loss of use of tangible property."

[3]We agree with the District Court that Motorists did not waive its ability to deny coverage on the basis that there was no physical loss.

constitute a physical loss. Decisions of lower Pennsylvania courts also provide little guidance.[4]

In *Port Authority of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002), we considered a similar policy that insured against "physical loss or damage" as it applied to existence of asbestos in the insured buildings.[5] We held that the insurer was only required to cover the expense of correcting the problem insofar as the asbestos made the structure unusable. *Id*. at 230.[6] In the case of asbestos, *Port Authority* stated the following as the "proper standard for 'physical loss or damage' to a structure":

> only if an actual release of asbestos fibers from asbestos containing materials has resulted in contamination of the property such that its *function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable*, or if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such *loss of utility*.

Id. at 236 (emphasis added).

---

[4]Instructive, however, is *Hetrick v. Valley Mut. Ins. Co.*, 15 Pa. D. & C.4th 271, 273 (Pa. Com. Pl. 1992). In *Hetrick*, the court gave substantial attention and approval to *Western Fire Insurance Co. v. First Presbyterian Church*, 165 Colo. 34, 38-39(1968). In that case, the Colorado Supreme Court held the term "direct physical loss" extended to cover the loss of use of the insured property where the accumulation of gasoline around and under the property rendered it uninhabitable.

[5]Like the Hardingers' policy, the policy in *Port Authority* was a first-party insurance policy – one which protects against loss caused by injury to the insured's property. *See Port Authority*, 311 F.3d at 233.

[6]We noted that, "[i]n ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure." *Port Authority*, 311 F.3d at 235. (citing 10 Couch on Insurance § 148:46 (3d ed.1998)). We found that "[p]hysical damage to a building as an entity by sources unnoticeable to the naked eye must meet a higher threshold." *Id.*

The District Court provided two reasons why *Port Authority* is inapplicable. First, the District Court reasoned that *Port Authority*'s holding, a "prediction of what may eventually become the law of [New York and New Jersey]," is not applicable to this diversity case, which is governed by Pennsylvania substantive law. *Motorists Mut. Ins. Co. v. Hardinger*, 2004 WL 384999, at *5 n.5 (E.D.Pa. Feb. 27, 2004). We find nothing, however, in New York, New Jersey, or Pennsylvania law that would cause us to disregard *Port Authority* under Pennsylvania law. Indeed, *Port Authority* noted that "applicable state law provides no guidance," *id.* at 234-35, and thus, it appears that nothing unique about the law of New York or New Jersey dictated the result. Nor does it appear that there is any substantive law in Pennsylvania at odds with *Port Authority*. Second, the District Court suggested that *Port Authority* does not apply because "[t]he presence of asbestos in a structure presents unique concerns" not applicable in this case. Hardinger, 2004 WL 384999, at *5 n.5. While we agree that asbestos presents unique concerns, we find *Port Authority* instructive in a case where sources unnoticeable to the naked eye have allegedly reduced the use of the property to a substantial degree.

We predict that the Pennsylvania Supreme Court would adopt a similar principle as we did in *Port Authority*. Applying *Port Authority*'s standard here, we believe there is a genuine issue of fact whether the functionality of the Hardingers' property was nearly eliminated or destroyed, or whether their property was made useless or uninhabitable.

B. Whether the Loss Predated the Policy and the Pollution Exclusion

Because it decided the motion for summary judgment entirely on the basis that there was no physical loss, the District Court did not consider Motorists' other stated reasons for denial – namely, that the loss predated the policy and that it fell within the pollution exclusion.

1. Whether the Loss Predated the Policy

We believe the August 20, 2001 memorandum written by Ron Snyder, a Motorists regional property consultant, at the least, creates a genuine issue of material fact on whether the loss predated the policy. Snyder wrote:

> After as through [sic] investigation as possible at this time it can also be concluded that the well became contaminated after our insured moved into the house based of a water test by the health department and the fact that the previous occupants did not become ill. **Microbiological contamination was not found in the water well when it was tested in 1998**.

Appendix at 393 (emphasis in original). Snyder's opinion may not definitively establish that the loss occurred after the policy's inception, but it is sufficient to create a genuine issue of fact. Summary judgment on the basis that the loss predated the policy is therefore inappropriate for Motorists.

2. Pollution Exclusion

The pollution exclusion applies to loss caused by "solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids[,] alkalis, chemicals and waste." There is no Pennsylvania case law identified by the parties that addresses

whether bacteria should fall within the definition. Courts that have addressed whether bacteria fits under similar pollution exclusions are divided. *Compare Keggi v. Northbrook Prop. and Cas. Ins. Co.*, 199 Ariz. 43, 47 (Ariz. App. Div. 2000) (holding that bacteria does not constitute a pollutant under an identical pollution exclusion clause), *and E. Mut. Ins. Co. v. Kleinke*, Index # 2123-00, RJI #0100062478 (N.Y. Super. Ct. Jan. 17, 2001) (holding that similar pollution exclusion is ambiguous on whether e-coli bacteria falls within the policy's definition of pollutant), *with Landshire Fast Foods of Milwaukee v. Employers Mut. Cas. Co.*, 676 N.W.2d 528, 532 ("bacteria, when it renders a product impaired or impure" falls within "the ordinary, unambiguous definition of 'contaminant'").

While Judge Ambro's concurrence thoughtfully considers the matter, we express no opinion. We believe the issue whether bacteria fall under the plain meaning of the pollution exclusion or whether the pollution exclusion is ambiguous as applied to the facts of this case should be left to the District Court in the first instance.[7] Therefore, we

[7]Some insurers have defined "pollutant" to include biological and etiologic agents. *See, e.g., Hydro Sys., Inc. v. Cont'l Ins. Co.*, 929 F.2d 472, 474 (9th Cir. 1991) (defining pollutant as "any noise, solid, semisolid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, mists, acids, alkalis, chemicals, *biological and other etiologic agents or materials*") (emphasis added); *E. Quincy Servs. Dist. v. Cont'l Ins. Co.* 864 F.Supp. 976, 979 (E.D.Ca. 1994) ("'Pollutants' mean any noise, solid, semi-solid, liquid, gaseous or thermal irritant or contaminant, including. . . . biological and etiologic agents or materials, . . . "waste" and any irritant or contaminant.").

will direct the court to consider whether the pollution exclusion applies to the presence of e-coli bacteria in the Hardingers' well.[8]

IV.

Summary judgment was not proper because there is a genuine issue of material fact whether there was a physical loss. In addition, there is at least a genuine issue whether that loss predated the policy and we leave to the District Court to address the applicability of the pollution exclusion in the first instance. For the foregoing reasons, we will vacate and remand.

AMBRO, Circuit Judge, concurring

I agree with my colleagues that there are genuine issues of material fact regarding whether there was a physical loss and whether that loss predated the policy. Though I also agree that the District Court should consider this issue in the first instance, I write

[8]Whether or not the pollution exclusion applies to bacteria *per se*, e-coli may spread through sewage-contaminated water and waste, and there may be a question whether that is classifiable as a pollutant. *But see Inc. Village of Cedarhurst v. Hanover Ins. Co.*, 223 A.D.2d 528, 529 (N.Y. App. Div. 1996) ("'raw sewage' is not explicitly listed in the policy as a pollutant, and the term 'waste' contained in the exclusion is subject to more than one reasonable interpretation. Thus, since the exclusion is ambiguous as to whether raw sewage is encompassed within the definition of waste, the exclusion is not applicable in this case") (collecting cases). In this case, however, so far as we can determine, the record does not appear to show how the e-coli found its way into the Hardingers' well.

separately to explain briefly why the pollution exclusion is likely ambiguous (if not plainly inapplicable) as applied to the facts of the case. This issue is crucial in the insurance context because "where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer." *Minn. Fire & Cas. Co. v. Greenfield*, 855 A.2d 854, 861 (Pa. 2004).

With respect to the pollution exclusion, the parties have primarily addressed two possible bases of ambiguity. First, they have jousted over the meaning of the language in the policy limiting the exclusion to situations involving the "[d]ischarge, dispersal, seepage, migration, release or escape of pollutants." At this stage of the proceedings the source of the bacteria has not been established; therefore, the resolution of this point of contention is best left to the District Court.

Whether the second issue regarding the pollution exclusion should be resolved now or on remand presents a closer question. As Chief Judge Scirica indicates, courts have reached different conclusions regarding whether bacteria are "pollutants" under similar policy language. Nevertheless, *Keggi v. Northbrook Property and Casualty Insurance Co.*, 13 P.3d 785 (Ariz. Ct. App. 2000), is instructive. In reaching its conclusion that an identical pollution exclusion did not include bacteria within the definition of "pollutants," the Court pointed out the significant problems with reading the exclusion to cover bacteria. The policy (like the Hardingers') limited "pollutants" to "irritants" and "contaminants" that are "solid, liquid, gaseous or thermal" and the Court

reasoned—correctly, in my view—that "water-borne bacteria . . . do not fit neatly within this definition. To the extent that bacteria might be considered 'irritants' or 'contaminants' they are *living, organic* irritants or contaminants that defy description under the policy as 'solid,' 'liquid,' gaseous,' or 'thermal' pollutants." *Id.* at 789-90 (emphasis in original).

The policy in *Keggi* also stated that "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste" were included within the definition of "pollutants." *Id*. at 790. However, "[b]acteria, as living organisms, are not similar to the exclusion's enumerated list." *Id*. While there is an argument that bacteria, to the extent they emanate from sewage (apparently a factual possibility in our case), fall within the definition of "waste," that term appears to be either inapplicable or susceptible to more than one reasonable interpretation, in which case the language is ambiguous. *See id.*; *see also Wagner v. Erie Ins. Co*., 801 A.2d 1226, 1231 (Pa. Super. Ct. 2002) ("Terms in an insurance contract are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts." (internal quotation omitted)).

On the other side of the legal divide, the Wisconsin Court of Appeals held in *Landshire Fast Foods of Milwaukee v. Employers Mutual Casualty Company*, 676 N.W.2d 528, 532 (Wis. Ct. App. 2004), that the term "contaminants" in a similar pollution exclusion unambiguously "incorporates bacteria such as Listeria monocytogenes" in food products. *Landshire Fast Foods*, however, is inconsistent with

Pennsylvania case law. Under Pennsylvania law, courts are guided by the principle that ambiguity (or the lack thereof) is "determined by reference to a particular set of facts." *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 107 (Pa. 1999). The *Landshire Fast Foods* Court, applying Wisconsin law, accepted the conclusion reached in a prior case that language in the policy was unambiguous, notwithstanding that the case relied on did not involve bacteria, but brine and ammonia. *See Landshire Fast Foods*, 676 N.W.2d at 532 (citing *Richland Valley Prods. v. St. Paul Fire & Cas. Co.*, 548 N.W.2d 127, 132 (Wis. Ct. App. 1998)). For this reason, I believe the Pennsylvania Supreme Court is unlikely to find *Landshire Fast Foods*'s reasoning persuasive. *Cf. Nationwide Mut. Fire Ins. Co. v. Pipher,* 140 F.3d 222, 228 (3d Cir. 1998) (explaining that in applying Pennsylvania law "we are not free to exercise our independent judgment but must instead predict how the Supreme Court of Pennsylvania would rule").

While it is prudent to afford the District Court the opportunity to consider these issues in the first instance, I doubt further proceedings will render the reasoning of *Keggi* less apt. With this personal sidebar to my colleagues' opinion, I concur.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GREGORY PACKAGING, INC.,

Plaintiff,

v.

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,

Defendant.

OPINION

Civ. No. 2:12-cv-04418 (WHW) (CLW)

Walls, Senior District Judge

This insurance coverage dispute arises out of a property insurance policy which Defendant Travelers Property Casualty Company of America ("Travelers") issued to Plaintiff Gregory Packaging, Inc. ("Gregory Packaging"). Subject to limitations and exclusions, the policy covered "direct physical loss of or damage to" Gregory Packaging's property. In July 2010, ammonia was released inside one of Gregory Packaging's facilities. Gregory Packaging now moves for partial summary judgment on the issue of whether it incurred "direct physical loss of or damage to" property from the ammonia release. Without oral argument under Federal Rule of Civil Procedure 78(b), the Court finds that Gregory Packaging sustained "direct physical loss of or damage to" property and grants Gregory Packaging's motion.

FACTUAL AND PROCEDURAL BACKGROUND

Gregory Packaging, headquartered in Newark, New Jersey, makes and sells juice cups. Pl.'s Mem. 1, ECF No. 40; Pl.'s Statement of Material Facts ("Pl.'s SMF") ¶ 1, ECF No. 41; Def.'s Opp. 4, ECF No. 49; Def.'s Responsive Statement of Material Facts ("Def.'s Resp. SMF") ¶ 1, ECF No. 49-1. In 2009, Gregory Packaging decided to build a new juice packaging facility and purchased a building for that purpose on Amlajack Boulevard in Newnan, Georgia. Pl.'s Mem. 2;

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Pl.'s SMF ¶ 7; Def.'s Opp. 4; Def.'s Resp. SMF" ¶ 7. Travelers issued Gregory Packaging a property insurance policy for the period running from February 28, 2010 to September 11, 2010. Pl.'s Mem. 5; Def.'s Opp. 13.

The insurance policy states that Travelers "will pay for direct physical loss of or damage to Covered Property caused by or resulting from a Covered Cause of Loss." Pl.'s SMF ¶ 3; Def.'s Resp. SMF ¶ 3. It defines "Covered Property" to include "designated buildings or structures at the premises described in the Declarations, including: . . . (2) Fixtures . . . [and] (3) Machinery and equipment permanently attached to the building . . . ." Pl.'s SMF ¶ 4; Def.'s Resp. SMF ¶ 4; Cert. of Robert D. Chesler ("Chesler Cert.") ¶ 3, Ex. A, Form DX T1 00 03 98. The policy's "Declarations" indicate, and the parties have not disputed, that the policy covered the buildings and structures Gregory Packaging purchased in Newnan, Georgia. Chesler Cert. ¶ 3, Ex. A, Form IL T0 03 04 96.[1]

Gregory Packaging needed to install machinery and equipment in its new building before it could begin producing juice cups there. Pl.'s Mem. 2; Def.'s Opp. 4-5. Gregory Packaging installed a refrigeration system at the facility which used anhydrous ammonia as its refrigerant. Pl.'s SMF ¶¶ 8-9; Def.'s Resp. SMF ¶¶ 8-9. By July 20, 2010, the basic installation of the refrigeration system was complete, and Gregory Packaging's contractors from Uni-Temp Refrigeration, Inc. ("Uni-Temp") were working to start the refrigeration system so that it could begin operating as needed for the juice packaging process. Pl.'s Mem. 2-3; Def.'s Opp. 5-6. During the start-up process on July 20, 2010, ammonia was released from the refrigeration system into the facility. Pl.'s SMF ¶ 11; Def.'s Resp. SMF ¶ 11. The ammonia severely burned a Uni-Temp

[1] The issue of whether the physical loss or damage was caused by or resulted from a "Covered Cause of Loss," as required for coverage under the policy, is not at issue in this motion.

employee who was working at or near the site of the discharge. Pl.'s Mem. 4; Pl.'s SMF ¶ 13; Def.'s Resp. SMF ¶¶ 11, 13; Def.'s Opp. 1.

The parties contest what caused the ammonia release. Gregory Packaging asserts that it was caused by or coincided with an "explosion," which ejected the ammonia from the refrigeration system in liquid and gaseous forms. Pl.'s Mem. 3-4. Travelers asserts that there was no explosion, and that the ammonia was released when the Uni-Temp employee attempted to fix a leaking union in the refrigeration system but "turned the nut on the union the wrong way, loosening it instead of tightening it," and thereby "caused a larger amount of ammonia to escape from the union." Def.'s Opp. 7-8.

The parties agree that the facility was evacuated after the ammonia release and that various governmental agencies arrived on the scene. Pl.'s Mem 4; Chesler Cert. ¶ 4, Ex. B at 206; Def.'s Opp. 8. They also agree that Gregory Packaging hired a remediation company, Rhino Services, LLC, to dissipate the ammonia from the building. Pl.'s SMF ¶ 15; Def.'s Resp. SMF ¶ 15.

The parties dispute how long it took Rhino Services to remediate the ammonia presence in the building. Gregory Packaging asserts that it took approximately one week. Pl.'s Mem. 4. Travelers states that "Rhino worked at the Newnan Facility for approximately 5 days" and points to witness testimony which Travelers argues shows that "it took considerably less than 5 days for the ammonia levels to reach a safe level for occupancy." Def.'s Opp. 8. Despite the parties' argument about how long it took to dissipate the ammonia, Travelers' statements about the remediation acknowledge that an unsafe amount of ammonia was released into the building, that it remained present in the building for some amount of time, and that it was remediated.

Gregory Packaging filed this action in July 2012, alleging that the ammonia release "resulted in the loss of property and an interruption of business" which qualified for coverage

under its property insurance policy. Compl. ¶ 10. Gregory Packaging alleges that Travelers breached the parties' insurance contract by rejecting Gregory Packaging's claim, *id.* ¶¶ 18-23, and seeks a declaratory judgment that Travelers is obligated to pay for Gregory Packaging's damages. *Id.* ¶¶ 14-17. Travelers disputes Gregory Packaging's assertions, and indicates that it denied Gregory Packaging's insurance claim because Gregory Packaging did not suffer physical loss or damage to covered property and because the loss was subject to a specific exclusion under the policy's terms. Def.'s Opp. 14.

Gregory Packaging now moves for partial summary judgment on the sole issue of whether it incurred "direct physical loss of or damage to" property. Pl.'s Mem. 1. Gregory Packaging argues that "the explosion made the ammonia refrigeration system inoperable and rendered the Georgia Plant uninhabitable," thus inflicting direct physical loss of and damage to its property. *Id.* at 1, 13.

Travelers opposes Gregory Packaging's motion on multiple grounds. First, Travelers disputes that Gregory Packaging sustained "direct physical loss of or damage to" property as those policy terms are construed under New Jersey and Georgia law. *Id.* at 17-25. Advocating for a specific interpretation of relevant law, Travelers asserts that "physical loss or damage" necessarily involves "a physical change or alteration to insured property requiring its repair or replacement." *Id.* at 18. Travelers emphasizes that Gregory Packaging's "inability to use the plant . . . as it might have hoped or expected" does not constitute direct physical loss or damage. *Id.* Second, Travelers argues that there are genuine disputes of material fact "that relate to whether the property suffered the physical loss or damage alleged." Def.'s Opp. 25-30. Third, Travelers contends that partial summary judgment is inappropriate on the issue of whether Gregory Packaging sustained direct physical loss or damage without simultaneously establishing the cause of any loss or damage and resolving other related factual matters. *Id.* at 15-17. The Court addresses these arguments.

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STANDARD OF REVIEW

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute between the parties must be both genuine and material to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A disputed fact is material where it would affect the outcome of the suit under the relevant substantive law. *Id.* at 248. A dispute as to a material fact is genuine when a rational trier of fact could return a verdict for the non-movant. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

Once the movant has carried its initial burden to demonstrate the absence of a genuine issue of material fact, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts" in question. *Scott*, 550 U.S. at 380 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). Each party must support its position by "citing to particular parts of materials in the record . . . or showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). At this stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter." *Anderson*, 477 U.S. at 249. Where there is a genuine dispute as to a material fact, the court must view that fact in the light most favorable to the non-movant. *Scott*, 550 U.S. at 380.

DISCUSSION

1. There Is No Genuine Dispute that the Ammonia Release Temporarily Incapacitated Gregory Packaging's Facility

There is no genuine dispute that the ammonia release on July 20, 2010 rendered Gregory Packaging's facility physically unfit for normal human occupancy and continued use until the

ammonia was sufficiently dissipated. Travelers admits that there was an ammonia release from the refrigeration system into the facility, Pl.'s SMF ¶ 11; Def.'s Resp. SMF ¶ 11, and that Gregory Packaging hired Rhino Services to dissipate the ammonia in the building. Pl.'s SMF ¶ 15; Def.'s Resp. SMF ¶ 15. Travelers even acknowledges that the purpose of Rhino Services' remediation work was to reduce the ammonia gas "to reach a safe level for occupancy." Def.'s Opp. 8.

Beyond the parties' apparent agreement that the ammonia rendered the building temporarily unfit for occupancy and use, Gregory Packaging has put forth substantial evidence that the ammonia discharge physically incapacitated its facility. Multiple witnesses have testified that the facility was evacuated after the ammonia release because it was unsafe. Edward Gregory, President of Gregory Packaging, testified that government authorities "evacuated the area for a mile radius" after the incident. Chesler Decl. ¶ 4, Ex. B at 203. Paul Heerema, Vice President of the firm Gregory Packaging hired to install the refrigeration system, testified that "[t]he fire department took charge and set up a hot zone, and no one could enter the building." *Id.* ¶ 7, Ex. E at 200. Mr. Heerema also stated that "the fire department directed us that they would not allow anyone in the building" after the incident occurred or the following morning. *Id.* ¶ 7, Ex. E at 125, 128, 200. In a statement which Mr. Gregory, according to his testimony, wrote two days after the incident, he recounted that "Rick Anthony of Uni-Temp . . . returned to the interior of the freezer dressed in a safety suit in an effort to direct the fire crew to the proper valves needed to turn off any more leaks." Cert. of Robert F. Cossolini ("Cossolini Cert.") ¶ 4, Ex. C; Chesler Decl. ¶ 4, Ex. B at 202-04. A Uni-Temp "Work Order Summary" also indicates that the ammonia level in the facility was too high for normal human occupancy. The Uni-Temp work order summary states: "on 7-21-10 still could not get into the building until the ammonia level came down in the building." Cossolini Cert. ¶ 6, Ex. E at 2.

Multiple witnesses have also testified that Rhino Services was hired to dissipate the ammonia in order to make the facility safe for occupancy. In his written account of the incident, Mr. Gregory stated that "the Fire Chief told me that we would need to hire an outside environmental clean-up service," which led to Gregory Packaging's engagement of Rhino Services for remediation. Cossolini Cert. ¶ 4, Ex. C. Gabriel Rios, manager of the facility, testified that Gregory Packaging "had to air the property because of the ammonia leak. The vapors. And we hired a company called Rhino. Rhino was to do the cleanup. . . . Wash down anything with water. They were trying to get rid – they had brought in dry ice, trying to neutralize the stuff inside the plant. Set up fans and all that." Cossolini Cert. ¶ 3, Ex. B at 88.

Travelers has not put forth any evidence that contradicts the conclusion that the ammonia discharge incapacitated Gregory Packaging's facility until the ammonia was dissipated.

2. The Ammonia Discharge Inflicted "Direct Physical Loss of or Damage to" Gregory Packaging's Facility Under Either New Jersey or Georgia Law

Because there is no genuine dispute that the ammonia discharge temporarily incapacitated Gregory Packaging's facility, the Court will determine as a matter of law whether the ammonia-induced incapacitation constituted "direct physical loss of or damage to" the facility within the meaning of that phrase in the insurance policy. The phrase "direct physical loss of or damage to" is not defined by the policy.

a. Choice of Law

This case invokes the Court's diversity jurisdiction and, as such, the Court must first determine which state's substantive law applies. Gregory Packaging is headquartered in Newark, New Jersey, but the ammonia release occurred at its facility in Georgia. Gregory Packaging asserts that there is no conflict between New Jersey and Georgia law regarding the interpretation of

insurance contracts and that, under federal court choice of law principles, the Court should apply New Jersey law to this case. Pl.'s Mem. 6-8. Travelers does not address the choice of law issue.

A federal court applies the choice of law rules of its forum state—here, New Jersey—in order to determine which state's law controls in cases under its diversity jurisdiction. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941). New Jersey applies a two-step choice of law test. *P.V. v. Camp Jaycee*, 962 A.2d 453, 460-61 (N.J. 2008). In the first step, the court decides if an "actual conflict" exists between potentially applicable laws by determining "whether there is a distinction between them." *Id.* at 460; *Lebegern v. Forman*, 471 F.3d 424, 428-30 (3d Cir. 2006) (internal citations omitted). If there is no conflict or only a "false conflict," where the potentially applicable laws would produce the same result on the particular issue presented, the court avoids the choice of law question and applies New Jersey law. *Lebegern*, 471 F.3d at 428; *Williams v. Stone*, 109 F.3d 890, 893 (3d Cir. 1997). If there is an actual conflict, the court proceeds to the second step and must determine which jurisdiction has the "most significant relationship to the claim." *Camp Jaycee*, 962 A.2d at 460.

Since it is possible that either New Jersey or Georgia law could govern this motion, the Court must first determine whether an actual conflict exists between New Jersey and Georgia law.

b. Application of New Jersey Law

Under New Jersey law, "an insurance policy should be interpreted according to its plain and ordinary meaning." *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1260 (N.J. 1992). "When the meaning of a phrase is ambiguous, the ambiguity is resolved in favor of the insured and in line with an insured's objectively-reasonable expectations." *Id.* (internal citations omitted).

Several courts have construed the terms "physical damage" and "physical loss or damage" under New Jersey law to resolve insurance disputes. In doing so, the Court of Appeals for the Third

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Circuit noted that "[i]n ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure." *Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002). While structural alteration provides the most obvious sign of physical damage, both New Jersey courts and the Third Circuit have also found that property can sustain physical loss or damage without experiencing structural alteration.

In *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, the New Jersey Appellate Division considered a case where physical damage was temporary and non-structural: the dispute turned on whether an electrical grid had experienced "physical damage" during a blackout. 968 A.2d 724, 727 (N.J. Super. Ct. App. Div. 2009). The Court determined that the electrical grid "was 'physically damaged' because, due to a physical incident or series of incidents, the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity." *Id.* at 734. The Court acknowledged that there was disputed evidence that the grid had experienced structural damage to "assorted individual pieces" of equipment, but explicitly rested its decision on "the loss of function of the system as a whole." *Id.*

The *Wakefern* court supported its holding by looking to the Colorado Supreme Court's decision in *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968), which held that a church building's saturation with gasoline vapors constituted a "direct physical loss" when the building could no longer be occupied or used. *Wakefern*, 968 A.2d at 735-36. The *Wakefern* court also relied on other cases which it described as "likewise accept[ing] the view that 'damage' includes loss of function or value." *Wakefern*, 968 A.2d at 735-36 (citing cases). The

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Wakefern decision indicates that property's temporary and non-structural loss of function is recognized as direct physical loss or damage under New Jersey law.

In *Port Authority*, the Third Circuit similarly found that physical contamination of a building rendering it useless would constitute physical loss under New Jersey law. *Port Authority*, 311 F.3d at 236. Travelers argues that *Port Authority* held that physical loss or damage cannot occur without physical alteration and urges this Court to adopt its interpretation of the *Port Authority* holding as the proper enunciation of New Jersey law.[2] Def.'s Opp. 18-19. The Court rejects this invitation because Travelers' reading of *Port Authority* contradicts the opinion's plain text. The Circuit wrote that if "the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner" which would constitute "physical loss." *Port Authority*, 311 F.3d at 236. The opinion comports with the New Jersey Appellate Division's holding in *Wakefern* that property can be physically damaged, without undergoing structural alteration, when it loses its essential functionality.

In other jurisdictions, courts considering non-structural property damage claims have found that buildings rendered uninhabitable by dangerous gases or bacteria suffered direct physical loss or damage. Applying Pennsylvania law in *Motorists Mutual Ins. Co. v. Hardinger*, the Third Circuit found that the bacteria contamination of a home's water supply constituted a "direct physical loss" when it rendered the home uninhabitable. 131 Fed.Appx. 823, 825-27 (3d Cir. 2005). *See also Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (finding

[2] This Court's application of New Jersey law is dictated not by the Third Circuit but by the Supreme Court of New Jersey. *See Gares v. Willingboro Twp.*, 90 F.3d 720, 725 (3d Cir. 1996). The Third Circuit has directed that "[i]n the absence of guidance from the state's highest court, we are to consider decisions of the state's intermediate appellate courts for assistance in predicting how the state's highest court would rule." *Id.*

that, under Massachusetts law, an unpleasant odor rendering property unusable constituted physical injury to the property); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 709 (E.D.Va. 2010), aff'd, 504 F. App'x. 251 (4th Cir. 2013) (finding "direct physical loss" where "home was rendered uninhabitable by the toxic gases" released by defective drywall).

In the present case, there is no genuine dispute that the ammonia release physically transformed the air within Gregory Packaging's facility so that it contained an unsafe amount of ammonia or that the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated. The Court finds that the ammonia discharge inflicted "direct physical loss of or damage to" Gregory Packaging's facility, as that phrase would be construed under New Jersey law by the New Jersey Supreme Court, because the ammonia physically rendered the facility unusable for a period of time.

c. Application of Georgia Law

The Court must also determine how this motion would be resolved under Georgia law to discover whether an actual conflict exists between Georgia and New Jersey law.

Under Georgia law, "insurance is a matter of contract, and the parties to an insurance policy are bound by its plain and unambiguous terms." *Richards v. Hanover Ins. Co.*, 299 S.E.2d 561, 563 (Ga. 1983). "Any ambiguities in the contract are strictly construed against the insurer as drafter of the document; any exclusion from coverage sought to be invoked by the insurer is likewise strictly construed; and insurance contracts are to be read in accordance with the reasonable expectations of the insured where possible." *Id.* (internal citations omitted).

Although the Georgia Supreme Court has not construed the terms at issue here, the Court of Appeals of Georgia has held that direct physical loss or damage occurs when there is "an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous

event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." *AFLAC Inc. v. Chubb & Sons, Inc.*, 581 S.E.2d 317, 319-20 (Ga. Ct. App. 2003) (citing cases). In the case establishing that standard, the court found that AFLAC had not sustained physical loss or damage because its alleged property damage was merely a defect in its computer systems that had "existed from the time the systems were created by design" and because AFLAC did not allege that any fortuitous event had changed the computer systems. *Id.* at 320.

There is no apposite Georgia case dealing with the physical contamination of a building by harmful gas, but the incident at Gregory Packaging's facility meets the standard set out in *AFLAC*. The ammonia discharge was occasioned by a fortuitous event, whether it was an explosion or worker's error, which produced an actual change in the content of the air in Gregory Packaging's facility. Before the ammonia discharge, the facility was in a satisfactory state for human occupancy and continued build-out, but after the ammonia discharge its state was unsatisfactory and required remediation. The Court finds that Gregory Packaging would be entitled to partial summary judgment that the ammonia discharge caused "physical loss of or damage to" its facility under Georgia law because there is no genuine dispute that the ammonia release physically changed the facility's condition to an unsatisfactory state needing repair.

Because the Court finds that Gregory Packaging would be entitled to partial summary judgment under either New Jersey or Georgia law, there is a false conflict in the choice of law. As such, the Court need not resolve the choice of law question and will apply New Jersey law to decide this motion. As stated earlier, the Court finds that the ammonia discharge inflicted "physical loss of or damage to" Gregory Packaging's facility under New Jersey law.

3. No Genuine Dispute Exists to Preclude the Court from Granting Partial Summary Judgment

Travelers argues that genuine disputes of material fact preclude the Court from granting Gregory Packaging's motion. Def.'s Opp. 25-30. Gregory Packaging responds that "Travelers' disputed facts are immaterial" because "[i]n this partial summary judgment motion, there is one material fact: the Georgia plant was evacuated and rendered temporarily uninhabitable." Pl.'s Reply 6, ECF No. 50. The Court agrees that the factual disputes Travelers has identified do not challenge the central fact necessary to resolve this motion—that the ammonia release temporarily incapacitated Gregory Packaging's facility.

First, Travelers argues that there is a genuine dispute as to whether the facility "suffered an explosion." Def.'s Opp. 26. This dispute is immaterial to the present motion. What matters for this motion is that the ammonia was released, and the parties do not dispute that it was.

Second, Travelers asserts that there is genuine dispute that the refrigeration system in Gregory Packaging's facility was rendered inoperable and required repair.[3] Def.'s Opp. 27. While there may be a genuine dispute as to the ammonia discharge's impact on the refrigeration system, the Court need not find that the refrigeration system sustained direct physical loss or damage to resolve Gregory Packaging's motion. Because the Court has found that there is no genuine dispute that the facility itself was temporarily incapacitated by the ammonia release and resolves this motion on that basis, the Court does not address the question of whether the refrigeration system was also damaged. It is sufficient for this motion to find that the facility incurred direct physical loss or damage.

[3] Relatedly, Travelers also asserts that there is genuine dispute as to whether there was an "explosive separation" of pipes in the refrigeration system and as to whether certain pipes became misaligned. Def.'s Opp. 29-30.

Third, Travelers says that it disputes that "the plant was rendered inoperable" after the ammonia release. Def.'s Opp. 28. But its dispute does not actually challenge the fact that the facility was temporarily incapacitated by the ammonia. Rather, Travelers "assumes that Plaintiff's allegation that 'the plant was rendered inoperable after the explosion' is a reference to the alleged 'delay' in the Newnan Facility becoming fully operational." Def.'s Opp. 28. Proceeding from this assumption, Travelers' argument focuses on whether the ammonia release delayed the facility's readiness for juice packaging operations. *See* Def.'s Opp. 28-29. Any such delay is a separate issue which does not need to be resolved for the Court to decide this motion.

The Court finds that there is no genuine dispute precluding the Court from resolving, as a matter of law, that the ammonia-induced incapacitation constituted "direct physical loss of or damage to" Gregory Packaging's facility.

4. Partial Summary Judgment is Appropriate

Travelers also argues that granting partial summary judgment on the issue of physical loss or damage is inappropriate because establishing physical loss or damage is not sufficient to determine that Gregory Packaging is entitled to recover under the insurance policy. Def.'s Opp. 15-17. Travelers argues that factual disputes exist as to whether any physical damage that did occur arose from a "Covered Cause of Loss," as is required under the policy, and that it would be imprudent for the Court to decide the issue of whether physical loss or damage occurred in isolation. *Id.* The Court disagrees. There is no genuine dispute of material fact that the ammonia discharge caused the physical incapacitation of the facility, and resolving the issue of physical damage now does not alter the fact that Gregory Packaging must still prove that the damage was caused by or resulted from a "Covered Cause of Loss" and was not excluded under the policy's terms.

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CONCLUSION

Gregory Packaging's motion for partial summary judgment is granted. The Court finds that Gregory Packaging incurred "physical loss of or damage to" its Newnan, Georgia facility when ammonia gas was discharged into the facility's air on July 20, 2010 and rendered the facility temporarily unfit for occupancy.

Date: November 25, 2014

/s/ William H. Walls
United States Senior District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

OREGON SHAKESPEARE FESTIVAL ASSOCIATION,

Plaintiff,

v.

GREAT AMERICAN INSURANCE COMPANY,

Defendant,

Case No. 1:15-cv-01932-CL

ORDER

CLARKE, Magistrate Judge

Plaintiff Oregon Shakespeare Festival Association, the insured, brings this cause of action against first party insurance carrier defendant Great American Insurance Company for denial of coverage under a property insurance policy. Plaintiff claims it suffered loss or damage to property when smoke from a nearby wildfire filled the Allen Elizabethan Theatre in the summer of 2013, causing Plaintiff to cancel performances and lose business income. This case comes before the Court on the defendant's amended motion for summary judgment (#25) and Plaintiff's cross motion for partial summary judgment (#17). For the reasons below, defendant's motion is GRANTED in part and DENIED in part, and Plaintiff's motion is GRANTED.

LEGAL STANDARD

Summary judgment shall be granted when the record shows that there is no genuine dispute as to any material of fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party has the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). The court cannot weigh the evidence or determine the truth but may only determine whether there is a genuine issue of fact. *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th Cir. 2002). An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

When a properly supported motion for summary judgment is made, the burden shifts to the opposing party to set forth specific facts showing that there is a genuine issue for trial. *Id.* at 250. Conclusory allegations, unsupported by factual material, are insufficient to defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposing party must, by affidavit or as otherwise provided by Rule 56, designate specific facts which show there is a genuine issue for trial. *Devereaux*, 263 F.3d at 1076. In assessing whether a party has met its burden, the court views the evidence in the light most favorable to the non-moving party. *Allen v. City of Los Angeles*, 66 F.3d 1052, 1056 (9th Cir. 1995).

FACTUAL BACKGROUND

Plaintiff Oregon Shakespeare Festival Association (OSF) operates the Oregon Shakespeare Festival in Ashland, Oregon. The Festival takes place at three live stage production venues owned by OSF. Two of the venues, the Angus Bowmer Theatre and the Thomas Theatre, are fully enclosed. The third venue, the Allen Elizabethan Theatre, is an open-air, partially

enclosed structure. It is walled and enclosed, but the roof does not extend over the entirety of the top of the building.

In late July and early August, 2013, smoke from several different wildfires was present in the area. The fires caused smoke, soot, and ash to accumulate on the surface of the hard plastic seats and concrete ground of OSF's open-air theater. According to Director of Production Alys Holden, the ash and soot consisted of "very small ashes and dust." The smoke, ashes, and dust permeated the interior of the theatre, coating the seating, HVAC, lighting, and electronic systems.

OSF's Executive Director Cynthia Rider decided to cancel a total of four separate evening performances due to health concerns from the poor air quality caused by the wildfire smoke. The performances had been scheduled to take place at OSF's Allen Elizabethan Theatre at 8:00 p.m. on July 30, July 31, August 1, and August 7, 2013.

Ms. Rider reached her decision on the night of each scheduled performance after consulting with a special committee, of which she was the chairperson, comprised of a total of eight OSF employees and managers. The committee included: OSF's Associate Producers, Kimberley Barry, Claudia Allen, and Ted DeLong, Director of Production Alys Holden, Associate Artistic Director Christopher Acebo, its Director of Marketing and Communications Mallory Pierce, and Director of the American Revolutions Program Alison Carey. The committee created, and relied upon, documents setting forth specific criteria regarding potential performance cancellation.

Each evening during late July and early August of 2013, the committee met at 6:15-6:30 p.m. to determine whether or not to cancel the regularly scheduled 8:00 p.m. performance at the Allen Elizabethan Theatre. Decisions were announced by 7:00 p.m., prior to each performance.

The committee also assigned a "smoke team" each evening that performances went on as scheduled. The members of the "smoke team" met at 7:30 p.m. and stayed through intermission or the end of the performance, depending on weather conditions. The "smoke team" determined whether any last minute cancellations needed to take place.

The committee's decisions each evening included an analysis of: (1) current weather conditions, (2) the forecast for the remainder of the evening, and (3) the health status of the actors. Specifically, if the Air Quality Rating was "Good to Moderate," the performance would continue as planned. If the Air Quality Rating was "Unhealthy to Hazardous," the performance would be cancelled. If the Air Quality Rating was "Unhealthy for Sensitive Groups," the committee would make a determination based on the following, specific criteria:

1. Ashland Air Quality / Particle Data (specifically the one hour average PM2.5 and instantaneous reading taken during the show from the Ashland monitoring device "R2D2")
2. Trending of the air quality data
3. Forecast for evening – consultation with the Weather Service Office
4. Visibility
5. Current air quality conditions in and around the Elizabethan Theatre
6. Conditions in Medford (only if Ashland data is unavailable or Medford conditions are pertinent to the Ashland weather forecast)
7. Is performance possible with alterations, e.g., slowing down stage combat, etc?
8. Is performance possible with curtain time delay (latest start time 9:00 p.m.)?

During the show, the committee also relied on feedback from cast members regarding their physical ability to continue performing.

Executive Director Rider testified during her Examination Under Oath that the reason OSF cancelled the performances was due to "air quality from surrounding forest fires." OSF's Associate Producer of Stage Management, Kimberley Barry, confirmed that the performances were cancelled due to poor air quality. Ms. Barry testified that there "had been concerns about the forest fires and what affect the smoke related to fires could affect the well-being of the

company and audience. The company, meaning the actors and crew working in the outdoor theater." Jerry Roos, OSF's Director of Finance and Administration, testified that, in making the decision to cancel performances, OSF's "primary concern was for our acting company and our production staff and our patrons."

In addition to the concern expressed by OSF employees and managers, a number of the OSF actors and performers, including the actors' union equity deputy, were concerned about performing in smoky conditions. According to Ms. Barry, after a union representative spoke with OSF actor Anthony Heald, OSF was told to cancel performances due to "health concerns because of air quality."

Ms. Rider confirmed that no federal, state, local agency, or public authority of any kind, such as the Environmental Protection Agency or Oregon Department of Environmental Quality, ordered cancellation of the performances due to air quality concerns. Ms. Rider also admitted that OSF does not know which fire caused the smoke, or how far away the fire was located.

During defendant GAIC's investigation of the claim, OSF representatives and employees confirmed that, even though there was some temporary accumulation of soot and ash on the surface of the open-air theater, OSF did not suffer any permanent or structural damage to its property. Indeed, it is undisputed that the performances were cancelled due to poor air quality and the related health concerns.

The outdoor theater floor is made of concrete and the seats are made of hard resin plastic. OSF employees testified that they cleaned up the soot and ash well before any scheduled performances each day using rags and buckets of water; no special chemicals or other cleaning equipment were needed. OSF employees testified that it took them between 20 minutes and one hour each day to clean up the soot and ash in the open-air theater.

OSF employees were not paid overtime for the time spent cleaning the soot and ash. OSF employees testified that their schedules remained the same, but their duties were slightly reallocated to deal with the soot and ash. OSF employees changed air filters three or four times during this period. OSF employees completed the clean-up by mid-afternoon each day, and OSF never had to cancel an 8:00 p.m. evening performance due to clean-up.

There were days during the smoky time period that soot or ash landed on the seats in the open-air theater and OSF chose not to cancel the performance that evening. Ms. Rider stated that the decision of whether to remain open or cancel was based on the perceived "level of particulates in the air" and considerations such as "[w]ere your eyes itchy, was your throat [itchy], were you having trouble breathing" were factors OSF considered in making the decision to cancel performances. Ms. Tacconi stated that if the air quality had been better, OSF would have been in a position to hold performances each night.

On July 30, 2013, (the date of the first performance cancellation), the Air Quality Index ("AQI") registered a high of 400 PM2.5, which constituted "very unhealthy" conditions. On July 31, 2013, (the date of the second performance cancellation), the AQI again registered a high of 400 PM2.5. On August 1, 2013, (the date of the third performance cancellation), the AQI registered a high of around 250 PM2.5, which constituted "unhealthy" conditions. On August 7, 2013, (the date of the fourth performance cancellation), the AQI registered a high of approximately 220 PM2.5, which constituted "unhealthy" conditions. On August 6, 2013, (a night in which performances were not cancelled), the AQI registered a high of approximately 150 PM2.5, which also constituted "unhealthy" conditions. On August 8, 2013, (a night in which performances were not cancelled), the AQI registered a high of approximately 200 PM2.5, which constituted "unhealthy" conditions.

APPLICABLE INSURANCE POLICY PROVISIONS

The applicable Policy terms state:

Building and Personal Property Coverage Form

A. Coverage

We will pay for direct physical loss of or damage to covered property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.
. . .

Business Income (and Extra Expense) Coverage Form

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

The policy, amended by endorsement, defines "period of restoration," in part, as:

The period of time that:

a. Begins:

1. at the time of direct physical loss or damage for Business Income Coverage; or
2. immediately after the time of direct physical loss or damage for Extra Expense Coverage;

caused by or resulting from any Covered Cause of Loss at the described premises; and

b. Ends on the earlier of:

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

Causes of Loss – Special Form

A. Covered Causes of Loss
When Special is shown in the Declarations, Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this Policy.

B. Exclusions

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

i. Ordinance or Law
. . .
ii. Earth Movement
. . .
iii. Governmental Action
. . .
iv. Nuclear Hazard
. . .
v. Utility Services
. . .
vi. War and Military Action
. . .
vii. Water
. . .
viii. "Fungus," Wet Rot, Dry Rot, and Bacteria
. . .

2. We will not pay for loss or damage caused by any of the following:

a. Artificially generated electrical, magnetic or electromagnetic energy that damages, disturbs, disrupts or otherwise interferes with any: (1) electrical or electronic device, appliance, system, or network; or (2) device, appliance, system or network utilizing cellular or satellite technology.
. . .
b. Delay, loss of use or loss of market.
c. Smoke, vapor or gas from agricultural smudging or industrial operations.
d. (1) wear and tear, (2) rust or other corrosion, decay, deterioration, hidden or latent defect. . . (3) smog, (4) settling, cracking, shrinking or expansion, (5) nesting or infestation. . . (6) mechanical breakdown. . ..
. . .

DISCUSSION

I. Plaintiff's claim is covered by the policy because the Elizabethan Theatre sustained "physical loss or damage to property" when the wildfire smoke infiltrated the theater and rendered it unusable for its intended purpose.

Determining whether insurance coverage exists is a two-step process under Oregon law. The insured has the burden of proof of first establishing that the loss falls within the scope of the policy's coverage grant. *ZRZ Realty Co. v. Beneficial Fire and Cas. Ins. Co.*, 222 Or. App. 453, 465, 194 P.3d 167, 174 (2008) (citations omitted). If the insured meets its initial burden, the insurer then bears the burden of establishing that the loss is excluded by specific language in the policy. *Id.* However, for a court interpreting an insurance policy's terms in Oregon, "[t]he primary and governing rule of the construction of insurance contracts is to ascertain the intention of the parties." *Hoffman Const. Co. of Alaska v. Fred S. James & Co. of Oregon*, 313 Or. 464, 469, 836 P.2d 703, 706 (1992) ("*Hoffman*") (quoting *Totten v. New York Life Ins. Co.*, 298 Or. 765, 770, 696 P.2d 1082 (1985)). The court determines the intention of the parties based on the terms and conditions of the insurance policy. *Id.* (citing ORS 742.016). If the insurance policy does not define the crucial term, the court is required to give the term meaning in the context of the dispute. *Id.*

If the parties submit two or more plausible interpretations of the term, the court must examine the interpretations in light of the particular context of that term in the policy, as well as the broader context of the policy as a whole. *See Hoffman*, 313 Or. at 470, 836 P.2d at 706. "If two or more plausible interpretations of the term withstand scrutiny, i.e., continues to be reasonable," after such an examination, the term is considered ambiguous. Such an ambiguity "justifies application of the rule of construction against the insurer." *Id.* "That is, when two or more competing, plausible interpretations prove to be reasonable after all other methods for

resolving the dispute over the meaning of particular words fail, then the rule of interpretation against the drafter of the language becomes applicable, because the ambiguity cannot be permitted to survive." *Id.*

a. The plain meaning of the terms of the Policy favors coverage.

In this case, the parties disagree over the term "direct physical loss of or damage to covered property." The parties agree that the Allen Elizabethan Theatre is "covered property," but they dispute whether the smoke that filled the partially-enclosed, open-air facility constituted "direct physical loss or damage," such that another provision – the loss of business income coverage – is activated. The insurance policy does not define the term "direct physical loss or damage."

Plaintiff defines the terms in question by relying on Webster's Dictionary, defining "physical" as "of or belonging to all created existence; relating to or in accordance with the laws of nature; of or relating to natural or material things as opposed to things mental, moral, or spiritual." Plf. Mtn. 14 (#17) (citing Webster's Third New Int.l Dictionary 1339 (unabridged ed. 1993)). Plaintiff distills this definition down to mean a "natural or material thing." *Id.* "Loss" is defined as the "state or act of being destroyed or placed beyond recovery" or the "amount of an insured's financial detriment due to the occurrence of a stipulated event…" *Id.* "Damage" means "loss due to injury; injury or harm to person, property, or reputation." *Id.* Plaintiff asserts that these definitions, taken together, create a plain meaning of "physical loss or damage" as "any injury or harm to a natural or material thing." Based on this interpretation, Plaintiff claims that the wildfire smoke caused injury or harm to the interior of the theater, which includes the air within the theater.

Defendant disputes this definition, arguing that the air in the theater cannot be insured by the policy because such air is not "property." The policy itself does not give any indication that the air within a covered building cannot suffer contamination or infiltration such that "physical loss of or damage to property" exists.

Defendant nevertheless stresses that the loss or damage must be *physical*, but does not give a sufficient explanation for why air is not physical. Certainly, air is not mental or emotional, nor is it theoretical. For example, if the dispute were over the theater's reputation or its fair market value, the Court might be inclined to agree with the Defendant. By contrast, while air may often be invisible to the naked eye, surely the fact that air has physical properties cannot reasonably be disputed. Defendant's contention implies a different definition of "physical" altogether. Defendant implies that, in order to be "physical," the loss or damage must be *structural* to the building itself. Defendant does not provide any evidence from within the policy to show that the plain meaning of the term "physical" includes such a limitation.

Additionally, defendant argues that the smoke in the air at the theater did not require any "repairs" to the structure of the property; therefore, there was no "period of restoration" such that business income loss coverage would apply. The applicable terms state:

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

The policy, amended by endorsement, defines "period of restoration," in part, as:

The period of time that:

a. Begins:

1. at the time of direct physical loss or damage for Business Income Coverage; or
2. immediately after the time of direct physical loss or damage for Extra Expense Coverage;

caused by or resulting from any Covered Cause of Loss at the described premises; and

b. Ends on the earlier of:

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

In this case, it is undisputed that the interior of the building had to be cleaned, the air filters had to be changed multiple times, and smoke in the air within the theater had to dissipate before business could be resumed. While the cleaning of the space took merely a few hours, the dissipation of the smoke took several days, during which time the Plaintiff was forced to suspend operations. Defendant claims that this period of time cannot be considered "restoration" because no *structural* repairs were necessary. Once again, the Court can find no such limitation within the terms of the policy.

The Court finds that defendant's interpretation, which would add the word "structural," and exclude the air within the building, is not a plausible plain meaning of the term "direct physical loss of or damage to property." However, even if such an interpretation were plausible, the text and context of the policy would preclude such a definition.

b. Text and context of the Policy favors coverage.

The Court has already considered the specific terms of the policy requiring a "direct physical loss of or damage to property," and a "period of restoration." The Court now considers the policy as a whole to determine if the terms could reasonably include the wildfire smoke that infiltrated the interior of the theater in this case. The Defendant points to three different exclusions to show that the smoke should be excluded from coverage.

i. Delay, loss of use, loss of market

Defendant does not specify how the exclusion for "delay, loss of use or loss of market" applies in this case. The delay and loss of use of the theater for performance was caused by smoke. Thus it was caused by the claimed damage. In any other situation, if a delay or loss of use of covered property was caused by a claimed damage to the property, yet was excluded from coverage, that exclusion would void the entire purpose of the policy. This interpretation is unreasonable. The exclusion only makes sense in the context of the policy when a delay external to the damage causes a loss of use. For instance, in this case, if the actors and production staff of OSF were not ready to perform at the scheduled time, causing a delay or cancellation of a show, such loss of business income would not be covered by the policy. There is no contention of an external delay here.

ii. "Smog" or "smoke"

"Smog" is a specific exclusion contained in the policy, but the term is not defined by the policy. Defendant argues that the dictionary definition of smog includes smoke. Citing the Oxford Dictionary, defendant defines smog as "fog or haze combined with smoke and other atmospheric pollutants." "Haze" is defined as "a slight obscuration of the lower atmosphere, typically caused by fine suspended particles." Therefore, according to the defendant, the wildfire smoke in this case is excluded from coverage.

First, there is no evidence in the record that there was any fog or haze with which the smoke could have combined to create "smog" in this case. Second, the defendant's interpretation would require the Court to ignore the fact that "smoke" is specifically excluded from coverage by the policy in another provision. *Leach v. Scottsdale Indemn. Co.*, 261 Or. App. 234, 242, 323 P.3d 337 (2014) (any proposed interpretation that requires a court to disregard a provision of the policy is not reasonable as a matter of law). The specific smoke exclusion, however, is limited to "smoke, vapor or gas *from agricultural smudging or industrial operations*" (emphasis added). Such a limited exclusion does not apply to this case, as there is no evidence of agricultural smudging or industrial operations. Applying either exclusion to the wildfire smoke in this case is not a reasonable interpretation of the policy terms.

iii. Pollutants

Defendant argues a similar exclusion here, attempting to construe the wildfire smoke as a "pollutant." The context of the pollutant exception demonstrates why it does not apply in this case. Under the policy, the "period of restoration" excludes:

> any increased time required due to the enforcement of or compliance with any ordinance or law that . . . requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize or in any way respond to, or assess the effects of "pollutants."

"Pollutants" means "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." This provision does not apply because there is no required "enforcement of or compliance with any ordinance or law." Even if there were such a requirement, "pollutants" would not include wildfire smoke for the same reason discussed above regarding "smog." If the policy drafters wanted to exclude smoke other than smoke "from agricultural smudging or industrial operations," they could have done so.

Based on the text and the context of the policy, it is not reasonable to exclude wildfire smoke from policy coverage. The Plaintiff's interpretation that the infiltration of smoke into the interior of the theater is a covered "physical loss of or damage to property" remains reasonable.

c. Case law favors coverage.

Plaintiff's interpretation of the policy terms remains the only reasonable interpretation offered by the parties. However, even if both parties' interpretations were reasonable, case law from Oregon and other jurisdictions would favor the Plaintiff's argument.

In *Farmers Ins. Co. of Oregon v. Trutanich*, 123 Or. App. 6, 858 P.2d 1332 (1993), the Oregon Court of Appeals was asked to determine whether or not a "pervasive odor" in a residential home caused by a subtenant's illegal methamphetamine operation was considered a "direct physical loss." The court concluded that odor was "physical," because it damaged the house. The court distinguished *Wyoming Sawmills, Inc. v. Transportation Ins. Co.*, 282 Or. 401, 578 P.2d 1253 (1978), in which a manufacturer's defective studs were determined not to be covered by a similar policy provision because there was no physical damage to the building, only a loss in value, or depreciation. The court determined that *Trutanich* was different because there was "evidence that the house was physically damaged by the odor that persisted in it." 123 Or. App. at 10, 858 P.2d at 335.

Trutanich was cited favorably along with *Largent v. State Farm Fire & Cas. Co.*, 116 Or.App. 595, 842 P.2d 445(992), by District of Oregon Judge Hubel to stand for the proposition that "physical damage can occur at the molecular level and can be undetectable in a cursory inspection." *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, 1999 WL 619100, at *6 (D. Or. Aug. 4, 1999). Judge Hubel cautioned that "recognition that physical damage or alteration of property may occur at the microscopic level does not obviate the requirement that physical damage need

be distinct and demonstrable." *Id.* at *7. In making the determination, "courts consider the nature and intended use of the property itself and the purpose of the insurance contract." *Id.* at *6.

In another District of Oregon case, a hammer was left behind in the Plaintiff's furnace and disintegrated, causing the furnace to be contaminated with lead particles. *Stack Metallurgical Services Inc. v. Travelers Ind. Co. of Connecticut*, 2007 WL 464715 (D. Or. 2007) ("*Stack*"). The furnace could no longer be used for treating medical devices because those devices would then also be contaminated. The defendant insurance company argued that the only "direct physical damage" sustained to plaintiff's property was the loss of the hammer that disintegrated in the furnace. The insurance company asserted that, because the furnace could still be used to treat materials other than medical devices, it did not suffer "physical damage," and therefore the Plaintiff could not make a claim under the business income coverage provision. *Id.* at *7. The court disagreed. Though the terms "direct physical loss" and "physical damage" were not defined in the policy, the court determined that, because the lead particle contamination "prevented the furnace from being used for its ordinary expected purpose, [it] is fairly characterized as a 'direct physical loss of or damage to' the furnace." *Id.* at *8.

Additionally, this Court finds a District of New Jersey case to be extremely persuasive based on the similarities of the facts and the insurance policy terms at issue. In *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *3 (D.N.J. Nov. 25, 2014), an accidental release of ammonia into a packaging facility caused the facility to be shut down for one week while the ammonia dissipated. The evidence in the record showed that in order to remedy the problem, the facility had to "air the property" and hire an outside company "to do the cleanup. . . Wash down anything with water . . . [They] brought in dry ice, trying to

neutralize the [ammonia] inside the plant. Set up fans and all that." *Id.* at *4. The defendant insurance company asserted that the incident was not covered because "physical loss or damage" necessarily involves a "physical change or alteration to insured property requiring its repair." *Id.* at *2. The court disagreed, noting that "while structural alteration provides the most obvious sign of physical damage," various courts have found "that property can sustain physical loss or damage without experiencing structural alteration." *Id.* at *5. *See also Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 543, 968 A.2d 724, 736 (App. Div. 2009) (holding that property can be physically damaged, without undergoing structural alteration, when it loses its essential functionality). The court concluded that the packaging facility incurred "physical loss or damage" when ammonia gas was discharged into the facility's air. . . and rendered the facility temporarily unfit for occupancy." *Id.* at *8.

Other courts around the country have held that damage does not have to be "structural" to be "physical," as long as it renders the property unusable for its intended purpose. *See, e.g., Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52 (1968) (where gasoline vapors penetrated the foundation of the insured church and accumulated, rendering building uninhabitable, the property was held to have suffered a "direct, physical loss"); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658 (Mass. Super. 1998) (holding that carbon monoxide levels in an apartment building sufficient to render building uninhabitable were a "direct, physical loss").

In different circumstances, courts have also found that certain losses to property are not covered by such policy terms. In *Great Northern Ins. Co. v. Benjamin Franklin Fed. S & L Ass'n*, 793 F.Supp. 259 (D.Or.1990), asbestos was discovered in the insulation of the building during a remodel, causing the building's tenant to threaten to vacate unless the asbestos was removed. The building's owner filed a proof of loss under the property insurance policy for

anticipated removal of the asbestos, loss of use, and related expenses. The court determined that the asbestos, which had not been released into the building, was not a covered loss because "the building remained physically intact and undamaged." *Id.* at 263. Moreover, the court found that even if the asbestos was a "direct, physical loss," it would be excluded by the policy as a "pollutant." *Id.*

In this case, wildfire smoke infiltrated the interior of the theater, making it uninhabitable and unusable for holding performances. Like the home infiltrated by methamphetamine odor, or the furnace contaminated by lead particles, or the facility filled with ammonia, the theater filled with smoke was unusable for its intended purpose. Even though the loss or damage was not structural or permanent, the property experienced a loss of "essential functionality." Unlike in *Great Northern*, the smoke particles were present in the air, not trapped, harmless in the walls. Based on the case law, as discussed above, the Elizabethan Theatre sustained "physical loss or damage to property" when the wildfire smoke infiltrated the theater and rendered it unusable for its intended purpose.

d. Smoke infiltration of the theater was a fortuitous event affording coverage.

Defendant argues in its response to Plaintiff's motion for partial summary judgment that the decision to cancel the performances was "voluntary" and therefore not a fortuitous event affording coverage. The court disagrees. Plaintiff has submitted extensive evidence that the air inside the theater was infiltrated by smoke from multiple local wildfires. The smoke was not within the Plaintiff's control. It is undisputed that the air contained an unhealthy level of particulates and that Plaintiff cancelled the performances out of concern for the health of patrons and OSF actors and staff.

e. The fact that the Allen Elizabethan Theatre is only partially enclosed does not change the Court's analysis.

As discussed above, the smoke that infiltrated the theater caused direct property loss or damage by causing the property to be uninhabitable and unusable for its intended purpose. Defendant GAIC claims, in part, that this is impossible because the Allen Elizabethan Theatre is an "out-door," open-air facility, and therefore it is subject to the weather conditions and any passing winds that may come and go. Defendants do not dispute the fact that the theater is completely enclosed by a walled structure, and partially enclosed by a roof in certain portions of the facility. The conditions of the theater are uniquely exposed to the elements of the outdoors, but the insurance policy does not limit any of its terms based on this unique condition. Therefore, the open-air aspect of the theater does not affect the policy's coverage as to the damage to the property or the business income provision.

II. Defendant's motion for summary judgment regarding Plaintiff's claim for breach of the implied covenant of good faith and fair dealing is denied.

Oregon law does not allow a first-party extra contractual tort claim for bad faith against an insurance company. *See, e.g,. Santilli v. State Farm*, 278 Or. 53, 562 P.2d 965 (1977); *Farris v. U.S. Fid. and Guar. Co.*, 284 Or. 453, 587 P.2d 1015 (1978). However, "[a] party may violate its [contractual] duty of good faith without also breaching the express provisions of the contract." *McKenzie v. Pac. Health & Life Ins. Co.*, 118 Or. App. 377, 380-81, 847 P.2d 879, 881 (1993) (citing *Elliot v. Tektronix, Inc.*, 102 Or. App. 388, 796 P.2d 361, *rev. den.* 311 Or. 13, 803 P.2d 731 (1990)). Accordingly, "a [contract] claim for breach of the duty of good faith may be pursued independently of a claim for breach of the express terms of the contract." *Id.* In the context of an insurance dispute, within defendant's obligation to pay all covered claims is the duty to determine, in good faith, whether a claim is covered, and to refrain from arbitrarily denying a claim. *Id.*

Plaintiff's second cause of action asserts that the insurance policy contains an implied covenant of good faith and fair dealing, and that defendant GAIC breached this covenant by failing and refusing to promptly and fairly investigate the Business Income and Extra Expense claims made by Plaintiff. Particularly, Plaintiff claims that:

a. GAIC unnecessarily required fourteen (14) OSF employees to submit to examinations under oath after it had already denied the Business Income and Extra Expense Claims;
b. GAIC required fourteen (14) OSF employees to submit to examinations under oath regarding the factual circumstances of OSF's claim that were unrelated to the only legal theory GAIC has ever provided as a basis for denying OSF's claims. There is no good faith reason to have required fourteen (14) examinations under oath when no amount of factual investigation would have changed GAIC's only legal theory for denial;
c. GAIC caused OSF to incur substantial costs responding to redundant, repeated, and immaterial document requests after it had already denied OSF's Business Income and Extra Expense Claims;
d. GAIC caused OSF to incur substantial costs responding to redundant, repeated, and immaterial document requests that were unrelated to the only legal theory GAIC has ever provided as a basis for denying OSF's Business Income and Extra Expense Claims. That includes demands for five years' worth of unrelated corporate board records, committee agendas, and minutes and all pre-read materials, regardless of subject matter, provided to board members, as well as employees' personal photographs. There is no good faith reason to have required OSF to incur these costs when no amount of factual investigation would have changed GAIC's only legal theory for denial.
e. GAIC caused OSF to incur substantial costs responding to its extensive demands for a detailed breakdown of OSF's total lost business income during periods of physical loss and/or physical damage between ticket refunds, exchanges, donations, and the issuance of vouchers, which, in turn, required OSF to dedicate staff resources to writing new software code to extract the detail sought by GAIC from existing accounting and box office data, even after GAIC had denied OSF's Business Income and Extra Expense Claims; and
f. GAIC caused OSF to incur substantial costs responding to its extensive demands for a detailed breakdown of OSF's total lost

> business income during periods of physical loss and/or physical damage between ticket refunds, exchanges, donations, and the issuance of vouchers that was unrelated to the only legal theory GAIC has ever provided as a basis for denying OSF's claims, which, in turn, required OSF to dedicate staff resources to writing new software code to extract the detail sought by GAIC from existing accounting and box office data. There is no good faith reason to have required OSF to incur these costs when no amount of factual investigation would have changed GAIC's only legal theory for denial.

Complaint ¶ 38(a-f).

Plaintiff has not moved for summary judgment on this claim. Defendant has moved for summary judgment, but has not asserted specific facts or submitted evidence to show that GAIC's actions in investigating were taken promptly, fairly, and in good faith. It may very well be that this is the case, but on the record before the Court, judgment as a matter of law is not appropriate at this time.

While the Court finds that the defendant's coverage position is not taken in bad faith, due to the unique circumstances of the partially-enclosed, open-air facility of the Allen Elizabethan Theatre, the Plaintiff's claim stems from the extensive, allegedly unnecessary and over-broad investigation conducted by defendant. This is not a duplicative cause of action stemming from the same facts as the breach of the terms of the policy, but a separate claim based on the harm caused by the defendant's alleged misconduct in the course of the investigation. The Court cannot find as a matter of law, based on the evidence currently in the record, that defendant's actions were reasonable, fair, and in good faith. Therefore, Defendant's motion for summary judgment on this claim is denied.

III. Defendant's motion for summary judgment as to Plaintiff's claim for negligence is granted.

Plaintiff brings its third cause of action for negligence based on defendant GAIC's breach of the standard of care set forth in the Oregon Unfair Claims Settlement Practices Act. Compl. ¶ 42. However, violations of the Act are not independently actionable, and are therefore appropriately dismissed on summary judgment. *Richardson v. Guardian Life Ins. Co. of Am.*, 161 Or. App. 615, 623-24, 984 P.2d 917, 923 (1999) (citing *Farris v. U.S. Fid. and Guar. Co.*, 284 Or. 453, 458, 587 P.2d 1015 (1978)). Additionally, the facts alleged in this claim are the same as alleged in the prior claim for breach of the implied duty of good faith and fair dealing. Therefore this claim is duplicative. It is dismissed with prejudice.

ORDER

For the forgoing reasons, the Plaintiff's motion for partial summary judgment (#17) as to the first claim for relief is GRANTED. Defendants' motion for summary judgment (#25) is GRANTED in part and DENIED in part. Plaintiff's third claim is dismissed with prejudice. Plaintiff's second claim for breach of the implied covenant of good faith, and Plaintiff's damages as to the first claim, are issues of fact for a jury to resolve at trial.

It is so ORDERED and DATED this 7 day of June, 2016.

MARK D. CLARKE
United States Magistrate Judge

9 Mass.L.Rptr. 41
Superior Court of Massachusetts.

Joseph MATZNER and another [1]
v.
SEACO INSURANCE COMPANY.

No. CIV. A. 96-0498-B.
|
Aug. 12, 1998.

COMMONWEALTH OF MASSACHUSETTS

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

HINKLE, J.

***1** Plaintiffs challenge defendant's refusal to pay, under an insurance policy it issued to plaintiffs, damages associated with the carbon-monoxide contamination of plaintiffs' apartment building. Plaintiffs assert that defendant breached its contract and violated G.L. c. 93A and c. 176D. Both parties have moved for partial summary judgment. For the reasons set out below, plaintiffs' motion is *allowed* in part and *denied* in part, and defendant's motion is *denied.*

BACKGROUND

The following facts are undisputed unless otherwise noted. At all relevant times, plaintiffs Joseph and Alexander Matzner ("the Matzners") owned an apartment building at 270 Clarendon Street, Boston ("the Building"), and were insured by a "Businessowners" insurance policy ("the Policy") issued by defendant SEACO Insurance Company ("SEACO"). The Policy's "Businessowners Special Property Coverage Form" ("the Form"), on which the Matzners rely for coverage, states that:

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

The Form defines "Covered Cause of Loss" as:

> RISKS OF DIRECT PHYSICAL LOSS unless the loss is [excluded or limited in subsequent sections of the Form].

The Form does not define either the term "direct physical loss ... or damage" or the term "RISKS OF DIRECT PHYSICAL LOSS."

In addition to explaining what *is* covered, the Form contains several relevant exclusions, discussed below as necessary.

The parties' dispute over the scope of coverage arises from events beginning February 10, 1995, when a tenant in Unit # 4 of the Building called the Boston Fire Department because the unit's carbon-monoxide detector had sounded. The Fire Department arrived, measured a high level of carbon monoxide, [2] and directed the tenants to leave the unit. [3] Mr. Matzner contacted his heating service, which in turn contacted a chimney-sweep service. Employees of both services came to the building and reviewed the condition of the building's chimney. One or both concluded that the carbon monoxide buildup was due to "some sections of old round galvanized pipe" that had "wedged [their] way into the top of" and were blocking the chimney. As of the filing of the summary-judgment motions, the parties had not discovered how the pipe found its way into the chimney.

The chimney-sweep service removed the piping; however, the alarm in Unit # 4 sounded again the next day. The chimney-sweep service returned and cleaned and tested the chimney again. Consultations among the chimney-sweep service, a building inspector and the plaintiffs' heating company yielded the suggestion that the chimney be lined and an exhaust fan installed on its top, both of which were done.

By telephone and by letter dated April 3, 1995, Mr. Matzner contacted the agent through whom he had purchased the Policy and requested reimbursement under the Policy for expenses associated with the carbon-monoxide

contamination. By facsimile dated April 18, 1995, the agency transmitted Mr. Matzner's letter to SEACO.

***2** SEACO hired an adjuster to assess the merits of plaintiffs' claim. The adjuster investigated the claim (meeting with Mr. Matzner, contacting the chimney-sweep service and possibly viewing the Building) and consulted with SEACO Senior Property Examiner Jack Warren. Ultimately, Warren directed the adjuster to deny the claim. By letter dated May 23, 1995, the adjuster notified Mr. Matzner of SEACO's decision. The letter explains that coverage is precluded by the "Pollution" and the "Ordinance or Law" exclusions.

The Matzners in turn hired a different adjuster to re-evaluate their claim. By letter dated June 26, 1995, their adjuster requested that SEACO reverse its decision;[4] the adjuster cited, among other things, two recent extrajurisdictional cases that he felt supported the Matzners' position. By letter dated September 26, 1995, Warren notified the agency through whom the Matzners had purchased the Policy that, after review of the Matzners' adjuster's letter by SEACO's counsel, SEACO had decided to maintain its position denying coverage.

Counsel for plaintiffs sent SEACO a letter dated December 6, 1995, demanding settlement of plaintiffs' claim under G.L. c. 93A. The summary-judgment record includes a letter dated December 14, 1995, from SEACO's counsel to plaintiffs' counsel, responding to the demand letter and restating SEACO's decision to deny coverage for the claim.[5] By letter dated April 3, 1996, plaintiffs' counsel notified SEACO of additional expenses incurred by the Matzners and again demanded settlement under G.L. c. 93A. By letter dated May 1, 1996, SEACO declined to change its position.

DISCUSSION

I. Summary Judgment Standard

This Court grants summary judgment where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. *Cassesso v. Commissioner of Correction,* 390 Mass. 419, 422, 456 N.E.2d 1123 (1983); *Community Nat'l Bank v. Dawes,* 369 Mass. 550, 553, 340 N.E.2d 877 (1976); Mass.R.Civ. p. 56(c), 365 Mass. 824 (1974). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson v. Time, Inc.,* 404 Mass. 14, 16-17, 532 N.E.2d 1211 (1989). Where, as here, both parties have moved for summary judgment, and " 'in essence there is no real dispute as to the salient facts or if only a question of law is involved,' " summary judgment shall be granted to the party entitled to judgment as a matter of law. *Cassesso,* 390 Mass. at 422, 456 N.E.2d 1123, quoting *Community Nat'l Bank v. Dawes, supra.*

II. Coverage

A. Principles of Policy Interpretation

The interpretation of an insurance contract is generally a question of law. *Cody v. Connecticut General Life Insurance Co.,* 387 Mass. 142, 146, 439 N.E.2d 234 (1982). Interpretation is governed by familiar rules of construction. " '[W]hen construing language in an insurance policy, "[a court] consider[s] what an objectively reasonable insured, reading the relevant policy language, would expect to be covered." ' " *Western Alliance Ins. Co. v. Gill,* 426 Mass. 115, 117, 686 N.E.2d 997 (1997), quoting *Atlantic Mut. Ins. Co. v. McFadden,* 413 Mass. 90, 92, 595 N.E.2d 762 (1992), quoting *Hazen Paper Co. v. United States Fid. & Guar. Co.,* 407 Mass. 689, 700, 555 N.E.2d 576 (1990). If there is no ambiguity in the policy language, the Court " ' construe[s] the words of the policy in their usual and ordinary sense,' " *Citation Ins. Co. v. Gomez,* 426 Mass. 379, 381, 688 N.E.2d 951 (1998), quoting *Hakim v. Massachusetts Insurers' Insolvency Fund,* 424 Mass. 275, 280, 675 N.E.2d 1161 (1997), citing *Cody,* 387 Mass. at 146, 439 N.E.2d 234. "When the language of an insurance contract is ambiguous," however, the Court " interpret[s] it in the way most favorable to the insured." *Citation Ins. Co.,* 426 Mass. at 381, 688 N.E.2d 951, citing *Hakim,* 424 Mass. at 281-282, 675 N.E.2d 1161. " 'However, an ambiguity is not created simply because a controversy exists between the parties, each favoring an interpretation contrary to the other.' " *Citation Ins. Co.,* 426 Mass. at 381, 688 N.E.2d 951, quoting *Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc.,* 419 Mass. 462, 466, 645 N.E.2d 1165 (1995), citing *Jefferson Ins. Co. v. Holyoke,* 23 Mass.App.Ct. 472, 475, 503 N.E.2d 474 (1987). "A term is ambiguous only if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one." *Citation Ins. Co.,* 426 Mass. at 381, 688 N.E.2d 951, citing *Jefferson Ins. Co.,* 23 Mass.App.Ct. at 474-475, 503 N.E.2d 474, citing *Ober v. National Cas. Co.,* 318 Mass. 27, 30, 60 N.E.2d 90 (1945).

***3** The parties disagree as to the proper scope of several terms and provisions of the Policy; I discuss each in turn.

B. "Direct Physical Loss or Damage"

Defendant claims that contamination of the Building by carbon monoxide does not constitute "direct physical loss or damage" within the meaning of the Policy. I find and rule that the phrase "direct physical loss or damage" *is* ambiguous in that it is susceptible of at least two different interpretations. One includes only tangible damage to the structure of insured property. The second includes a wider array of losses. Following the rule of construction that an ambiguous phrase be accorded the interpretation more favorable to the insured, I adopt the latter interpretation.

Although I have found no Massachusetts case that interprets the phrase "direct physical loss or damage," courts in other jurisdictions have addressed that and similar phrases with differing results. I am persuaded by the reasoning of those cases that have construed the phrase "direct physical loss or damage" broadly, to include more than tangible damage to the structure of insured property.

In *Western Fire Ins. Co. v. First Presbyterian Church,* 165 Colo. 34, 437 P.2d 52 (1968), for example, the court considered a policy that insured against "direct physical loss" to property. The damage claimed was "the infiltration of gasoline in the soil under and around" a church, where the "gasoline and vapors thereof infiltrated and contaminated the foundation and halls and rooms of the ... building, making [them] uninhabitable and making the use of the building dangerous." *Id.* at 36-37, 437 P.2d 52. The court rejected the insurer's argument that the insured had merely suffered a "loss of use" of the church not covered under the policy. On the contrary, according to the court, "this particular 'loss of use' was simply the consequential result of the fact that because of the accumulation of gasoline around and under the church building the premises became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous. All of which we hold equates to a direct physical loss within the meaning of that phrase as used by [the insurer in a policy similar to that here]." *Id.* at 39, 437 P.2d 52.

The adoption of this interpretation is in accord with the Massachusetts rule that ambiguous policy terms be interpreted in the manner most favorable to the insured. It also comports with the mandate that this Court "consider what an objectively reasonable insured ... would expect to be covered." *Western Alliance Ins. Co. v. Gill,* 426 Mass. at 117, 686 N.E.2d 997 (internal quotation marks omitted). See also, *e.g., Sentinel Mgt. Co. v. New Hampshire Ins. Co.,* 563 N.W.2d 296 (Ct.App.Minn.1997) (asbestos contamination constituted "direct physical loss"; court noted that "Direct physical loss also may exist in the absence of structural damage to the insured property," citing to *Western Fire Ins. Co. v. First Presbyterian Church, supra,* and *Hughes v. Potomac Ins. Co.,* 199 Cal.App.2d 239, 18 Cal.Rptr. 650 (1962)); *Farmers Insurance Co. of Or. v. Trutanich,* 123 Or.App. 6, 10, 11, 858 P.2d 1332 (1993) (concluding that "odor [from methamphetamine 'cooking'] was 'physical' because it damaged the [insured property]" and that the cost of removing the odor was a "direct physical loss"). [6]

***4** Thus, I find and rule that carbon-monoxide contamination constitutes "direct physical loss of or damage to" property, namely the insured Building, "caused by or resulting from any Covered Cause of Loss [*i.e.,* by a 'risk of direct physical loss']," namely, the *risk* of carbon monoxide contamination. Therefore, such contamination is covered by the Policy.

C. The Pollution Exclusion

As noted above, the Policy contains a number of exclusions to coverage. Defendant argues that the contamination in this case is excluded by the "Pollution Exclusion." I disagree.

Like all the exclusions, this one is preceded by the following paragraph:

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

The Pollution Exclusion itself provides that:

> We will not pay for loss or damage caused by or resulting from the discharge, dispersal, seepage, migration, release or escape of 'pollutants' unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the 'specified causes of loss'. But

> if loss or damage by the 'specified causes of loss' results, we will pay for the resulting damage caused by the 'specified cause of loss'.

"Pollutants" are defined as:

> any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

"Specified Causes of Loss" with exceptions not material here are defined as:

> Fire; lightning; explosion, windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

Defendant contends that carbon monoxide is a "pollutant," and therefore that the Pollution Exclusion excludes carbon monoxide contamination from coverage.

The Massachusetts appellate courts have not resolved the precise issue of whether a property insurance policy with the language at issue here covers carbon-monoxide contamination. However, two Massachusetts cases interpreting liability policies with pollution exclusions nearly identical to that in this case have concluded that such exclusions do not operate to exclude damage caused by contaminants.

In *Atlantic Mut. Ins. Co. v. McFadden,* 413 Mass. 90, 595 N.E.2d 762 (1992), the Supreme Judicial Court held that a pollution exclusion [7] in a comprehensive general liability policy did *not* operate to exclude coverage for lead-contaminated paint in a residential property owned by the insureds. The Court considered what an insured could "reasonably have understood" the exclusion to mean, and concluded that such an insured:

> ***5** could have understood the provision at issue to exclude coverage for injury caused by certain forms of industrial pollution, but not coverage for injury allegedly caused by the presence of leaded materials in a private residence. *Id.* at 92, 595 N.E.2d 762, citing *West Am. Ins. Co. v. Tufco Flooring East,* 104 N.C.App. 312, 321-326, 409 S.E.2d 692 (1991), noting that *West Am. Ins. Co.* construed substantially the same exclusion.
>
> The Court noted that there was "simply ... no language in the exclusion ... from which to infer that the provision was drafted with a view toward limiting liability for lead paint-related injury." *Id.* at 92, 595 N.E.2d 762. Rather, according to the Court, the terms in the exclusion (the Court listed "discharge," "dispersal," "release," and "escape") were "terms of art in environmental law which generally are used with reference to damage or injury caused by improper disposal or containment of hazardous waste." *Id.* at 92, 595 N.E.2d 762, citing *West Am. Ins. Co.,* 104 N.C.App. at 324, 409 S.E.2d 692. Thus, the Court concluded that the pollution exclusion in that case did not exclude coverage for lead-contaminated paint in a residence.

The Supreme Judicial Court recently reaffirmed this understanding of that pollution exclusion. In *Western Alliance Ins. Co. v. Gill, supra,* the Court held that a virtually identical pollution exclusion in a general liability policy covering a restaurant did *not* operate to exclude personal injuries caused by a patron's exposure to carbon-monoxide fumes in the restaurant. [8] The Court held that although *Atlantic Mut. Ins. Co. v. McFadden, supra,* involved a different sort of contamination and considered a policy applicable to a residence as opposed to a business, its reasoning applied equally well to *Western Alliance Ins. Co.* The Court relied particularly on the distinction drawn in the earlier case between industrial and other contaminants and on the notion that an "objectively reasonable insured ... would not expect a disclaimer of coverage" for " 'injuries resulting from everyday activities [as opposed to industrial ones] gone slightly, but not surprisingly, awry,' " *Western Alliance Ins. Co.,* 426 Mass. at 119, 120, 686 N.E.2d 997, quoting *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.,* 976 F.2d 1037, 1044 (7th Cir.1992). As support for its holding that the exclusion was limited to *industrial* pollution, the Court referred to an extrajurisdictional case that "not[ed] that

the history of the ... exclusion indicates that the provision was drafted to avoid enormous expense of environmental litigation" and concluded that " '[w]e would be remiss, therefore, if we were to simply look to the bare words of the exclusion, ignore its *raison d'etre,* and apply it to situations which do not remotely resemble traditional environmental contamination,' " *Western Alliance Ins. Co.,* 426 Mass. at 118, 686 N.E.2d 997, citing and quoting *American States Ins. Co. v. Koloms,* Ill.2d (Oct. 17, 1997), slip op. at 16.

***6** The reasoning of *Atlantic Mut. Ins. Co. v. McFadden, supra,* and *Western Alliance Ins. Co. v. Singh, supra,* applies equally to the facts of this case. [9] SEACO disagrees, arguing that this case should be distinguished because it involves a property insurance policy, which covers a narrower range of situations than the general liability policies in earlier cases. Concededly, the reasoning in *Western Alliance Ins. Co.* mentions the type of policy at issue there and the expectations that an reasonable purchaser of such a policy would have:

> The insureds purchased the *general liability policy* to protect against potential premises and operations hazards that could arise while conducting a restaurant business. A reasonable insured would not expect a pollution exclusion to abrogate this coverage. *Id.* at 120-121, 686 N.E.2d 997 (emphasis supplied; footnote omitted).
>
> I find, however, that the insureds in the case before me likely purchased their Policy for the same reason as the insureds in *Western Alliance Ins. Co.:* "to protect against potential premises ... hazards that could arise while conducting a ... business" (in the Matzners' case, the business of leasing out residential rental units). Therefore, I conclude that reasonable insureds in the Matzners' position "would not expect a pollution exclusion to abrogate this coverage." In addition, I find that an objectively reasonable insured would not expect a disclaimer of coverage for carbon-monoxide contamination, where there is no indication that the contamination resulted from industrial operations as opposed to some " 'everyday activit[y] gone slightly, but not surprisingly, awry,' " *Western Alliance Ins. Co.,* 426 Mass. at 120, 686 N.E.2d 997. [10] In sum, the reasoning in *Western Alliance Ins. Co.* and *Atlantic Mut. Ins. Co.* applies to the facts before me and leads me to rule that the Pollution Exclusion in the Matzners' Policy does not exclude coverage for carbon-monoxide contamination. [11]

D. The Negligent Work Exclusion

SEACO also argues that the contamination in this case falls within the Policy's "Negligent Work Exclusion," which excludes coverage for loss or damage resulting from:

> Faulty, inadequate or defective:
>
> (1) Planning, zoning, development, surveying, siting;
>
> (2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
>
> (3) Materials used in repair, construction, renovation or remodeling; or
>
> (4) Maintenance;
>
> of part or all of any property on or off the described premises.

SEACO theorizes that negligent construction or maintenance of the chimney *might* have caused the contamination in this case, so that the contamination would fall within this exclusion. Because SEACO, which has the burden of proving the applicability of this exclusion (see footnote 10, *supra*), has provided no evidence that this was the case, I conclude that the Matzners' motion for summary judgment must be allowed insofar as it contends that this exclusion does not apply.

E. The Ordinance or Law Exclusion

***7** SEACO also contends that the contamination falls within the Policy's "Ordinance or Law Exclusion," which excludes coverage for loss or damage resulting from:

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

SEACO argues that the Fire Department's order or recommendation that the tenants of Unit # 4 leave the unit because of the contamination represents the enforcement of an ordinance or law, and thus that the contamination (or at least any expenses related to the tenants' vacation of the unit) falls within the exclusion. Again, because SEACO, which has the burden of proving the applicability of this exclusion (see footnote 10, *supra*), has provided no evidence that the Fire Department was enforcing a particular law or ordinance, I

conclude that the plaintiffs' motion for summary judgment must be allowed insofar as it asserts that this exclusion does not apply. [12]

III. Claims Under G.L. c. 93A and c. 176D

Plaintiffs also allege that by denying coverage (and, according to plaintiffs, by failing to conduct a reasonable investigation of their claim), SEACO violated G.L. c. 93A and c. 176D. Plaintiffs have moved for summary judgment on those claims. I find and rule that the record before me contains insufficient evidence to determine whether defendant's conduct was such as to violate those statutes: specifically, there are genuine issues of material fact as to whether SEACO (1) committed "unfair or deceptive acts or practices" (in violation of G.L. c. 93A, § 2(a)); (2) rejected the Matzners' claim "without conducting a reasonable investigation" (in violation of G.L. c. 176D § 3(9)(d)); (3) "[m]isrepresent[ed] pertinent facts or insurance policy provisions relating to coverages at issue" (in violation of G.L. c. 176D, § 3(9)(a)); or (4) "[c]ompell[ed] [the] insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds" (in violation of G.L. c. 176D, § 3(9)(g)), as the Matzners allege. Therefore, plaintiffs' motion for summary judgment on those claims is denied.

ORDER

For the reasons set out above, it is *ORDERED* that plaintiffs' motion for partial summary judgment is *ALLOWED* as to Count I and *DENIED* as to Count II, and defendant's cross-motion is *DENIED* in its entirety.

All Citations

Not Reported in N.E.2d, 9 Mass.L.Rptr. 41, 1998 WL 566658

Footnotes

1 Alexandra Matzner.

2 Although defendant does not expressly dispute the fact that the Fire Department confirmed that the unit contained an unacceptably high level of carbon monoxide, the summary-judgment record indicates that SEACO personnel had doubts about, or at least considered raising the issue of the accuracy of the tenants' detector.

3 The summary-judgment record reveals some dispute as to whether the Fire Department *ordered* the tenants to leave or merely *recommended* they do so. This dispute presumably relates to the parties' respective views as to whether the damage in this case should be excluded under the Policy's "Enforcement or Law" exclusion: *i.e.,* defendant prefers a scenario in which the Fire Department *required* the tenants to leave, because this might suggest that plaintiffs' damages were caused by "the enforcement of [an] ordinance or law," whereas plaintiffs prefer a scenario in which the Fire Department *recommended* that the tenants leave, as this might suggest that no such enforcement took place. I find the distinction to be immaterial.

4 The summary judgment record does not contain a copy of the actual June 26, 1995, letter, but rather a copy of a letter of that date marked "DRAFT COPY." A memo from SEACO's adjuster to Warren referring to the June 26, 1995, letter it received from plaintiffs' adjuster indicates that the letter actually sent was most likely quite similar to the draft version in the summary-judgment record.

5 This response was misaddressed (to "*29* " rather than "*92* State Street") and the Matzners claim that they did not receive it until much later. The Matzners' original complaint, filed January 29, 1996, alleges that SEACO *never* responded to their counsel's demand letter, while their Amended Complaint (dated April 10, 1996) acknowledges that it did. I infer, therefore, that the Matzners received SEACO's response at some point between the filing of their original Complaint and the date of their Amended Complaint.

6 But see *Pirie v. Federal Ins. Co.,* 45 Mass.App.Ct. 907, 907, 908, 696 N.E.2d 553 (1998) (in homeowner's property insurance policy, "physical loss" did not include costs of removing lead paint from insured premises; court relied on principle that "an internal defect in a building ... does not rise to the level of a physical loss,"

especially where policy "also contain[ed] numerous references to specific types of physical damage which [were] covered," citing for articulation of this principle to *HRG Dev. Corp. v. Graphic Arts Mut. Ins. Co.,* 26 Mass.App.Ct. 374, 527 N.E.2d 1179 (1988), described below; also citing to *Great Northern Ins. Co. v. Benjamin Franklin Fed. Savings & Loan Assoc.,* 793 F.Supp. 259, 263 (D.Or.1990), aff'd, 953 F.2d 1387 (9th Cir.1992), described below); *HRG Dev. Corp. v. Graphic Arts Mut. Ins. Co., supra* at 374, 375, 377, 527 N.E.2d 1179 (policy's insurance of heavy machinery "against all risks of physical loss or damage from any external cause" did not cover losses due to defect in insured's title; court noted that it did not "think the salient phrase ('physical loss or damage') fairly [could] be construed to mean physical loss in the absence of *physical* damage" (emphasis in original); court noted in support of this conclusion that "In every listed exception [to coverage], save one, the 'loss[es] or damage[s]' set forth are essentially of a physical nature. In addition, two of the 'special conditions' of the policy tend to reinforce our view that the policy was intended to cover *physical* losses and damage" (emphasis in original; footnotes omitted)); *American Home Assur. v. Libbey-Owens-Ford Co.,* 786 F.2d 22, 25 (1st Cir.1986) (deciding case on other grounds, but stating: "The [trial] court noted that although a number of courts have held that intangible losses, such as loss of use or diminution of value, are 'property damage', ... all such decisions had interpreted policy language defining property damage as 'injury to tangible property' rather than '*physical* injury to tangible property.' In cases in which courts have interpreted more recent policies in which property damage is defined as 'physical' injury to tangible property, such courts have held that intangible damages, such as diminution in value, are not considered property damage" (emphasis in original), citing *Wyoming Sawmills v. Transportation Ins. Co.,* 282 Or. 401, 578 P.2d 1253 (1978); *Federated Mut. Ins. Co. v. Concrete Units, Inc.,* 363 N.W. 751, 757 (Minn.1985)); *Ranger Ins. Co. v. Globe Seed & Feed Co., Inc.,* 125 Or.App. 321, 324, 332, 865 P.2d 451 (1993) (where insurance policy excluded "damage to or destruction of the property of any person," court held that "infestation of weeds" (that insured's customer was compelled to eradicate) was *not* excluded because it was not "property damage": "An infestation of weeds ... does not damage anything.... [T]he cost of removing weeds is not a loss that is the consequence of damage to the soil or to any other property."); *Great Northern Ins. Co. v. Benjamin Franklin Fed. Savings & Loan Assoc., supra* at 261, 263 (cited in *Pirie v. Federal Ins. Co., supra*) (where property insurance policy covered any loss resulting "from a direct physical loss or damage by a Covered Cause of Loss" (*i.e.,* by "direct physical loss or damage," subject to certain exclusions), asbestos contamination was not a "direct physical loss," where the insured "building ha[d] remained physically intact and undamaged."); *Wyoming Sawmills v. Transportation Ins. Co., supra* at 403, 404, 406, 578 P.2d 1253 (where policy covered "physical injury to or destruction of tangible property," and certain studs manufactured by insured and installed in third party's building had "warped, twisted, or were otherwise defective," thereby lowering value of building (but not affecting building's structure), court held that policy did not cover labor expenses for removal and replacement of studs; court reasoned that the adjective "physical" indicated that policy did not intend to include " 'consequential or intangible damage,' such as depreciation in value, within the term 'property damage.' The intention to exclude such coverage can be the only reason for the addition of the word ['physical']" (footnote omitted).).

7 The *Atlantic Mut. Ins. Co.* exclusion applied to:

> " 'bodily injury or property damage arising out of the actual, alleged or threatened discharge, [dispersal], release or escape of pollutants....' " *Id.* at 95, 595 N.E.2d 762 (Appendix) (quoting insureds' quotation from policy).

"Pollutants" were defined as:

> " 'any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and wastes. Waste includes materials to be recycled, reconditioned or reclaimed.' " *Id.* at 96, 595 N.E.2d 762 (Appendix) (quoting insureds' quotation from policy).

8 The exclusion in the *Western Alliance Ins. Co.* case applied:

> 'to bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants.' *Western Alliance Ins. Co.,* 426 Mass. at 116 n. 4, 686 N.E.2d 997.

"Pollutants" were defined as:

'any solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Water includes materials to be recycled, reconditioned or reclaimed.' *Id.* at 117 n. 4, 686 N.E.2d 997.

9 In addition to relying on these cases, plaintiffs make the following argument: (1) carbon monoxide can be characterized as "smoke"; (2) the Policy is ambiguous as to whether smoke is covered (on the one hand, as a "pollutant," it is excluded; on the other hand, as a "specified cause of loss," it may trigger coverage for damage associated with pollutants); and (3) therefore, rules of construction mandate that the Policy be interpreted in plaintiffs' favor to cover carbon monoxide "smoke." Defendants oppose this argument, contending that carbon monoxide is not "smoke." Because I find in favor of plaintiffs on other grounds, I do not consider this argument.

10 There is no evidence on the record as to the cause of the contamination. However, where, as here, an exclusion appears in a separate paragraph of the Policy from the clause defining what *is* covered, SEACO as the insurer has the burden of showing that the exclusion applies. *Highlands Ins. Co. v. Aerovox Inc.,* 424 Mass. 226, 232 n. 8, 676 N.E.2d 801 ("determining which party bears the burden of proving an exclusion is dependent on the location of the exclusion in the insurance policy: where the exclusion is in the same paragraph as the coverage clause, the exclusion is considered part of the coverage clause for purposes of burden of proof, but where the exclusion is in a separate and distinct part of the insurance policy, the exclusion is treated separately from the coverage clause and the burden shifts to the insurer" (citations omitted)). Where there is no evidence that negligent work caused the contamination, I find and rule that SEACO would be unlikely to be able to provide such evidence at trial. Therefore, plaintiffs are entitled to summary judgment on issue of whether the contamination was industrial. See *Flesner v. Technical Communications Corp.,* 410 Mass. 805, 809, 575 N.E.2d 1107 (1991); *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 716, 575 N.E.2d 734 (1991).

11 In opposing this conclusion, SEACO relies in part on *U.S. Liab. Ins. Co. v. Bourbeau,* 49 F.3d 786 (1st Cir.1995). In that case, the Court of Appeals held that under Massachusetts law a pollution exclusion to a comprehensive liability policy *did* exclude from coverage soil contamination caused by lead paint chips scattered by a contractor while stripping and painting a building. The Court distinguished *Atlantic Mut. Ins. Co.* on three grounds: (1) *Bourbeau* was an "environmental pollution" case, unlike *Atlantic Mut. Ins. Co.;* (2) *Bourbeau* concerned property damage, whereas *Atlantic Mut. Ins. Co.* concerned personal injury; and (3) *Bourbeau* concerned the discharge of paint onto property, whereas *Atlantic Mut. Ins. Co.* concerned the presence of lead paint in a household. *Bourbeau,* 49 F.3d at 789. To the extent that *Bourbeau* is inconsistent with my conclusion, I decline to follow it. However, I note that *Bourbeau*'s conclusion is not inconsistent with mine. First, the case before me, unlike *Bourbeau,* does not appear to concern "environmental pollution." Second, the *Western Mut. Ins. Co.* case demonstrated that the Supreme Judicial Court does not consider the distinction between property damage and personal injury to be dispositive of the application of a pollution exclusion. Third, it is unclear that the case before me involves a contaminant's "discharge onto property" as opposed to "presence in a residence," which *Bourbeau* found important.

12 As an alternative ground for my conclusion, I agree with the reasoning of *Sentinel Mgt. Co. v. New Hampshire Ins. Co.,* 563 N.W.2d 296 (Ct.App.Minn.1997). The court in that case rejected an insurer's assertion of an "ordinance or law" exclusion, holding that "[s]o long as extraneous forces cause physical damage to property, this type of exclusion does not defeat recovery when, as a result, a governmental body enforces an ordinance against the property." *Id.* at 302 (citations omitted). "[The insured's] loss is ... contamination," the court reasoned; "that [the insured] might one day be required by law to remove the [contamination] does not change the nature of its existing loss into one caused by enforcement of an ordinance." *Id.*

I note as well that if an insurer could disclaim coverage whenever an instance of physical damage implicated the requirements of some law or ordinance, a typical insurance policy would cover far fewer losses than, in my judgment, an objectively reasonable insured would expect.

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Superior Court of Massachusetts.

Israel and Anna ARBEITER,
v.
CAMBRIDGE MUTUAL FIRE
INSURANCE COMPANY.

No. 9400837.
|
March 15, 1996.

GRAHAM.

Opinion Title: Memorandum and Order
on Cross Motions for Summary Judgment

INTRODUCTION

***1** On February 15, 1992, there was an oil leak at the home of the plaintiffs, Israel and Anna Arbeiter. On March 30, 1992, the Department of Environmental Protection (DEP) sent the Arbeiters a Notice of Responsibility under G.L.c. 21E, ordering that the oil leak be measured and cleaned up. The defendants, Cambridge Mutual, paid for: 1) tests to determine the extent of contamination, 2) excavation and removal of contaminated soil, 3) treatment of groundwater, 4) replacement of the oil damaged portions of the building and 5) the installation of a passive ventilation system to carry away from the building petroleum fumes lingering in the ground. The plaintiffs assert that the presence of the passive ventilating system constitutes a diminution in the market value of their house. They further claim that there are still oil fumes in the house. Consequently the plaintiffs now bring this claim for permanent damage to their property.

DISCUSSION

This court grants summary judgment where there are no issues of material facts and where the summary judgment record entitles the moving party to a judgment as a matter of law. *Cassesso v. Commissioner of Correction,* 390 Mass. 419, 422, 456 N.E.2d 1123 (1983); Mass.R.Civ.P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson v. Time, Inc.,* 404 Mass. 14, 16-17, 532 N.E.2d 1211 (1989). The nonmoving party's failure to prove an essential element of its case "renders all other facts immaterial" and mandates summary judgment in favor of the moving party. *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 711, 575 N.E.2d 734 (1991).

In this case, each party moves for summary judgment. The plaintiff seeks a ruling that as a matter of law they are entitled to be compensated by the terms of the insurance contract. The defendants, on the other hand, argue that given all the facts of the case, the contract entitles them to summary judgment for several reasons: that the Arbeiters cannot show a physical loss to the building itself, that the leak was not a peril against which the Arbeiters were insured, and finally, that the Arbeiters failed to give prompt notice of the loss to the insurer.

1. The installation of a venting system is not a physical loss.

Section I, Coverage A requires that there be a physical loss to the insured property in order for coverage to exist. The Arbeiters consented to the installation of the ventilation system, and this structural change to the house is not the sort of fortuitous damage contemplated by the insurance policy. Indeed, this system was part of the remediation of the problem sought by the Arbeiters. Without the vents, the odors would have plagued the homeowners, which odors are meant to be eliminated by the vents. If the odors are a loss, the vents are the remediation. If there is a loss in property value related to the fumes, it must be in the odors themselves or in the stigmatizing presence of the vents, reminders of the spill and odor problem. Stigmatization, no matter how real, is not among the physical losses contemplated by the policy.

***2** 2. The existence of fumes may be a physical loss.

The plaintiffs argue persuasively that fumes are a physical loss which attaches to the property. The court of a sister state has found that the persistence of an odor throughout the house constituted physical damage to the house. *Farmer's Insurance Co. v. Trutanich,* 123 Or.App. 6, 10, 858 P.2d 1332 (1993).

3. An oil spill is not a peril against which the policy provides protection.

The insurance policy between the parties excludes coverage for "release, discharge or dispersal of contaminants or

pollutants." Section 1, page 3, item 2f. The Supreme Judicial Court considered a similar policy which excluded coverage for "release, discharge, or dispersal of contaminants or pollutants." *Hanover New England Ins. Co. v. Smith,* 35 Mass.App.Ct. 417, 418, 621 N.E.2d 382 (1993). The Court in *Hanover* accepts the assumption of the trial court judge that "a release of home heating oil is a release of a contaminant within the meaning of the policy." *Id*. at 419, 621 N.E.2d 382.

Here the Arbeiters argue that a sudden break in the fuel line, leading to the oil spill, and not the release itself of the contaminants, is a covered risk. The plaintiffs assert that the break in the line is the "efficient proximate cause" of the property damage, citing *Jussim v. Massachusetts Bay Insurance Co.,* 415 Mass. 24, 27, 610 N.E.2d 954 (1993). Indeed, the court in *Hanover* considered the *Jussim* case and explained the concept of "efficient proximate cause." In *Jussim,* the *Hanover* court explains, "the insured was held covered for losses caused by a seepage of oil from his neighbor's cellar, despite a release of contaminants exclusion in his policy, because the oil spill in the neighbor's cellar was the result of a covered cause, negligence." *Id*. at 420, 621 N.E.2d 382.

As in the present case, the *Jussim* case also involved a bursting pipe, the bursting of which was considered a separate cause from the spread of contaminants which resulted from it. *Jussim,* 415 Mass. at 30, 610 N.E.2d 954. The *Jussim* court held that "the bursting pipe ... set in motion a chain of circumstances that resulted in ... a loss that constitutes an event excluded under the policy." *Id*. The court continues, "However, where the excluded event is not the cause of the loss, but rather the *result* of a covered risk, the insured may recover." *Id*.

Moreover, it remains an unresolved issue of fact in the present case whether, if negligence accounts for the pipe's bursting, it was the negligence of a third party such as the oil company which led to the bursting. Where the negligence results from the actions of a third party, it is a further reason that the risk not be interpreted to have been excluded. *Standard Elec. Supply Co., Inc. v. Norfolk and Dedham Mut. Fire Ins. Co.,* 1 Mass.App.Ct. 762, 764, 307 N.E.2d 11 (1974).

***3** 4. The insurer has the burden to prove that it is not liable because of exceptions to coverage under the policy.

In the present case, the Arbeiters argue that the efficient proximate cause of the damage to the house was a sudden break in the fuel line. The insurer argues that the cause was the spill itself. Here as in the *Jussim* case, the negligence of another is a covered cause of damage to the property, and a sudden rupture in the pipes may be the result of negligent behavior on the part of the oil company. When the parties disagree as to what caused the damage, it is up to the insurer to prove that coverage is not provided due to an exception. George P. Couch, Cyclopedia of Insurance Law, section 79:384 (1983); *Murray v. Continental Insurance Co.,* 313 Mass. 557, 563, 48 N.E.2d 145 (1943). "[W]here the exception is in ... [a] distinct clause of the ... contract ... then the burden is upon the party relying upon such an exception." *Murray,* 313 Mass. at 563, 48 N.E.2d 145.

A jury is the proper fact-finder to decide what event caused the damage to the property.

5. The insurance company has the burden of proving that prompt notice was not given.

The insurance company is required to prove both that the notice provision was breached and that the breach resulted in prejudice to its position. *Johnson Controls v. Bowes,* 381 Mass. 278, 282, 409 N.E.2d 185 (1980). Again, there is a material dispute as to whether the alleged delay in notifying the insurance company resulted in prejudice to the company or was in fact a breach.

ORDER

Accordingly, summary judgment is GRANTED to the defendants only as concerns the ventilation system, but denied as to the noxious fumes.

All Citations

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United States District Court, D. Massachusetts.

EVEDEN, INC., Plaintiff,
v.
The NORTHERN ASSURANCE COMPANY OF AMERICA, Defendant.

Civil Action No. 10–10061–GAO.
|
Filed March 12, 2014.

Attorneys and Law Firms

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OPINION AND ORDER

O'TOOLE, District Judge.

***1** The plaintiff, Eveden Inc. ("Eveden"), brought this action against The Northern Assurance Company ("Northern"), seeking recovery for a loss it claims falls within the coverage provided under its "all risk" cargo insurance policy with Northern. Specifically, Eveden brings four counts against Northern: breach of contract, declaratory judgment, breach of implied covenant of good faith and fair dealing, and violation of Massachusetts General Laws, chapter 93A. The parties have cross-moved for summary judgment on all claims on a substantial summary judgment record. Both sides make their presentation in exquisite detail, but in the end the resolution of their dispute does not turn on a close analysis of subsidiary facts, but rather can satisfactorily be understood and determined at a broader level, and that is sufficient to conclude that Eveden's claimed loss is not covered by the Northern policy.

I. Background

A. The Parties' Relationship

At relevant times, Eveden, a Massachusetts corporation, maintained a place of business in Hyde Park. At the time of the relevant events, Eveden had for some time been engaged in the business of manufacturing and selling ladies' undergarments, using manufacturing facilities located in various countries other than the United States, including the Philippines, El Salvador, and Colombia. In 2005, Eveden made the decision to consolidate all of its foreign manufacturing into one facility to save costs in both freight and labor. Rick Alexander, president of Eveden's U.S. Division, met with a former business partner, Fernando Herradon, to explore establishing a manufacturing facility in the Dominican Republic. Eveden was only interested in facility located in a "Duty Free Zone," from where a manufacturer may ship its products duty free. The laws of the Dominican Republic afforded that opportunity. After some negotiations with Eveden, Herradon and his partner, Juan Carlos Garcia, created F & J Internacional, S.A. ("FJI"), a Dominican manufacturing entity that qualified for a license to operate in a Duty Free Zone.

Eveden identified such a facility in the Duty Free Zone of San Pedro de Macoris (the "Facility"). In August 2005 it entered into a production agreement with FJI and moved its sewing operations to the Facility by the end of 2005.

To satisfy the requirements of Dominican law, all inventory of raw materials, work in process, and finished goods at the Facility had to be deemed owned by FJI. Under Dominican law, there is a presumption that one in possession of goods is the owner. Accordingly, all materials shipped to the Facility by Eveden were shown on all the shipping and customs documents as consigned to FJI. Similarly, finished goods being shipped out of the Duty Free Zone were shipped under FJI's name. Customs officials of the Duty Free Zone also required FJI to produce a certificate of origin certifying that FJI had manufactured the products.

Over the next couple of years, Eveden and FJI worked closely in the manufacturing and shipping of finished Eveden products within and from the Duty Free Zone. The physical plant bore a sign that read, "Eveden by F & J Internacional, S.A." Eveden formed a Dominican subsidiary, Eveden Dominicana, to participate in the manufacturing process within the Facility. Eventually, rather than ship already cut goods to the Facility to be sewn there, Eveden Dominica employees cut, and FJI employees sewed, all within the same physical plant.

***2** Multiple financial dealings occurred between the parties, sometimes at arm's length, sometimes as practical, if not formal, joint venturers. In late 2006 and early 2007 Eveden

and FJI explored establishing a formal joint venture, and they executed a Good Faith Agreement ("GFA") and Letter of Intent to form a Joint Venture ("LOI"). As things turned out, according to Eveden, relations between the parties soured before the contemplated joint venture could be formally established.

B. The Insurance Agreement

Eveden purchased from Northern Ocean Marine Open Cargo Policy, No. NBJC50154, effective September 1, 2007, ("the policy"), insuring the coverage period from September 1, 2007 through August 31, 2008. Clause 52 of the policy covered Eveden "against all risks of physical loss or damage from any external cause," subject to certain exemptions.

C. The "Loss"

In early 2008, FJI was experiencing financial difficulties. For example, it wanted to terminate some of its employees but could not afford to pay the severance payments required by Dominican law. Eveden agreed to absorb fifty percent of the severance payments. Eveden also agreed to loan FJI emergency working capital so FJI could pay various creditors. That led to an internal dispute between FJI's partners, Herradon and Garcia. The joint venture deal between Eveden and FJI apparently fell apart as a result, and by May, 2008, negotiations commenced for Eveden to purchase FJI's business, including its Duty Free Zone license. Before the transaction could be consummated, Eveden discovered that an attachment, referred to as an "embargo" in Dominican law, had been obtained against FJI's assets by a creditor of Herradon.

Eveden became concerned that because, in order to take advantage of duty free benefits the work in process and finished goods were nominally regarded as FJI's under Dominican law, it would have difficulty protecting what it regarded as its property within the Facility from seizure by FJI's creditors. In June, Eveden and FJI discussed a proposal where Eveden would purchase some of FJI's assets and would provide payment to FJI in consideration for FJI's cooperation with the release of Eveden's assets. These negotiations stalled, however, because Eveden balked at FJI's monetary demand.

Meanwhile, another creditor of FJI surfaced with documentation that purported that FJI had pledged all of the inventory and equipment of the Facility to it. On June 19, 2008, FJI evicted Eveden and its employees from the Facility and subsequently refused to permit their return.

On June 26, 2008, Eveden sued FJI in the Court of First Instance for San Pedro de Macoris, seeking a judicial order authorizing entry into the Facility to retrieve what it claimed as its property. The court granted Eveden an embargo on the goods, but did not authorize either entry or removal of goods. A few days later, the court ordered that the goods remain in the Facility with FJI as their custodian. Over the next two months, Eveden, FJI, and FJI's major creditor attempted to resolve the impasse by negotiations, but they were not fruitful.

***3** Meanwhile, during the 2008 summer, various FJI employees brought wage or severance claims in the San Pedro de Macoris Labor Court and also obtained embargoes on the property within the Facility. The goods were originally scheduled to be sold in later August or early September to satisfy the employee's claims, but Eveden was allowed to intervene and succeeded in postponing the sale. Eventually, the Labor Court ruled that Eveden had failed to prove that the embargoed assets belonged to it, and further ruled that even if they did, Eveden, given its relationship to FJI and the manufacturing Facility, would nonetheless be liable to employees. Eventually, the goods were sold for the benefit of the employee claimants in the fall of 2008 (after the expiration of the coverage period of the insurance policy).

II. Standard of Review

Summary judgment is appropriate "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party bears the burden of showing the basis for its motion and identifying where there exists a lack of any genuine issue of material fact. *Id.* at 323. A dispute is "genuine" only if a reasonable jury could find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). As to materiality, "the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* In considering a motion for summary judgment, the Court must "view the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." *Noonan v. Staples, Inc.,* 556 F.3d 20, 25 (1st Cir.2009).

III. Discussion

A. Liability

The parties agree that the relevant portion of the insurance agreement at issue provides "all-risk" coverage. An all-risk policy creates a "special type of insurance extending to risks not usually contemplated." *Markel Am. Ins. Co. v. Pajam Fishing Corp. .,* 691 F.Supp.2d 260, 265 (D.Mass.2010). An insured bears the burden of establishing a prima facie case for recovery under an all-risk insurance policy. *Fajardo Shopping Center, S.E. v. Sun Alliance Ins. Co. of Puerto Rico, Inc.,* 167 F.3d 1, 7 (1st Cir.1999).

Under the relevant provision, for coverage to apply, a physical loss must have occurred that is also fortuitous. *See Markel,* 691 F.Supp.2d at 265. A fortuitous event is "without intention or design, and which is unexpected, unusual and unforeseen" *Id.* Plaintiff need not prove the cause of a fortuitous loss, but rather only that the loss occurred. *Id.* at 265–66.

***4** The parties also agree that in this case questions of domestic law are answered by reference to federal general maritime law. In cases of marine insurance, the doctrine of proximate cause is strictly applied, whereby the assured may recover for a loss only if it was proximately caused by a hazard covered by the policy. *Lanasa Fruit S.S. & Imp. Co. v. Universal Ins. Co.,* 302 U.S. 556, 562, 58 S.Ct. 371, 82 L.Ed. 422 (1938).

Eveden argues that FJI wrongfully converted its goods held at the Facility, and the wrongful conversion proximately caused Eveden's loss. Loss resulting from conversion is both physical and fortuitous, and "all-risk language ... covers conversion." *Intermetal Mexicana, S.A. v. Ins. Co. of North America* 866 F.2d 71, 78 (3d Cir.1989) *quoting Buckeye Cellulose Corp. v. Atlantic Mut. Ins. Co.,* 643 F.Supp. 1030, 1036 (S.D.N.Y.1986). Thus, Eveden relies on the theory that a wrongful conversion occurred to establish that there was a "fortuitous" "physical" loss that brings the loss within the scope of the policy. The determinative question is whether Eveden's theory that there was a wrongful conversion is legally tenable.

Consideration of Dominican law pertaining to embargoes is relevant to that question. Under Federal Rule of Civil Procedure 44 .1, a determination of foreign law is a question of law for the Court to decide. The record contains input from each party's expert on Dominican law, and after considering their submissions, I make the following determinations.

Embargoes issued by the Civil Chamber of the Court of the First Instance act as a lien upon physical assets. Embargoes may be obtained through ex parte application when the Civil Chamber is persuaded that a credit exists that is liquid and for a sum certain, that it is due and payable, and that the debtor's assets are in danger of being dissipated. As in our law, an embargo may be used for the purpose of preserving property so that it is not moved or dissipated pending litigation on the merits of a claim. The guardian of the assets faces liability if the assets under embargo are not preserved. As noted above, Dominican law recognizes a presumption that the party in possession of property is the owner of that property.

Conversion is an intentional and wrongful exercise of dominion or control over a chattel, which seriously interferes with the owner's rights in the chattel. *See Evergreen Marine Corp. v. Six Consignments of Frozen Scallops,* 4 F.3d 90, 94 (1st Cir.1993). Eveden claims that FJI converted Eveden's assets on June 25, 2008 when Eveden's counsel went to the warehouse, demanded return of the assets which had lawfully been in FJI's possession, and that demand was refused.

Other issues aside, the fundamental flaw in Eveden's case is that it cannot establish that FJI *wrongfully* exercised control over the property. There is no dispute between the parties that as of June 25, 2008, FJI was embroiled in a number of legal quarrels with creditors. There were embargoes on FJI's assets authorized by a Dominican court with proper jurisdiction. The embargoes required FJI to maintain the property and not permit the assets to leave the warehouse. Compliance with a legal requirement to freeze the assets in place, without more, simply does not amount to conversion. *See HRG Development Corp. v. Graphic Arts Mut. Ins. Co.,* 26 Mass.App.Ct. 374, 527 N.E.2d 1179, 1181 (Mass.App.Ct.1988) ("[Plaintiff] may have temporarily lost the use and enjoyment of its equipment, but only as a result of a proper order of the court which temporarily relieved [plaintiff] of its possessory rights.")

***5** The policy provision relied on by Eveden, set forth in Clause 52, requires a "physical" loss. Intangible losses, such as a defect in title or a legal interest in property, are generally not regarded as "physical" losses in the absence of actually physical damage to the property. *See id.* at 1180 ("Nor do we think the salient phrase ('physical loss or damage') fairly can be construed to mean physical loss in the absence of *physical* damage."). So, for example, an " 'all risk' policy does not provide coverage for a defect in title." *Id.* at 1181. *See also Commercial Union Ins. Co. v. Sponholz,* 866 F.2d 1162 (9th

Cir.1989) (loss of vessel by police seizure not a "physical" casualty under "all risk" policy).

Moreover, losses falling within an "all risk" clause such as Clause 52 must have been "unforeseen" or "fortuitous." *See HRG Development Corp.,* 527 N.E.2d at 1180. *See also Standard Elec. Supply Co., Inc. v. Norfolk & Dedham Mut. Fire Ins. Co.,* 1 Mass.App.Ct. 762, 307 N.E.2d 11, 12 (Mass.App.Ct.1973). Whether a loss has been fortuitous is a question of law, *Intermetal Mexicanam,* 866 F.2d at 77, and "there is nothing fortuitous about the fact that a creditor ... would resort to the courts to obtain collateral for unpaid debts." *Id.*

In sum, the placement of embargoes, and the ultimate judicial disposition of the property at the Facility, constituted neither a physical casualty nor a fortuitous loss, as would be necessary for recovery under Clause 52 of the Northern policy.

Eveden has not met its burden of proving a loss covered by the policy. [1] The undisputed facts show that, given the fact of the embargoes, in the summer of 2008 FJI had a legal obligation under Dominican law to refuse Eveden's demand to turn over any property held within the manufacturing Facility. The actions of FJI in this respect do not amount to conversion or any fortuitous physical loss covered by the policy.

IV. Conclusion

For the foregoing reasons, the defendant's Motion for Summary Judgment (dkt. no 88) is GRANTED. The plaintiff's Motion for Summary Judgment (dkt no. 92) is DENIED. The plaintiff's Motions for Partial Summary Judgment on Northern's nondisclosure defense (dkt. no 94), and for exclusion due to strikes, riots and civil commotions or employee dishonesty exclusions (dkt. no. 96) are MOOT. Judgment shall enter for the defendant.

It is SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 952643

Footnotes

1 In light of this conclusion it is not necessary to consider in detail Northern's additional arguments that certain policy exclusions also would preclude coverage.

65 Va. Cir. 238
Circuit Court of Virginia,
Arlington County.

US AIRWAYS, INC., et al., Plaintiffs,
v.
COMMONWEALTH INSURANCE COMPANY, et al., Defendants.

No. 03-587.
|
July 23, 2004.

Findings of Facts and Conclusions of Law

JOANNE F. ALPER, Judge.

***1** This case comes before the Court on U.S. Airways' Motion for Judgment against PMA Capital Insurance Company alleging breach of an insurance contract. US Airways claims damages as a result of business interruption caused by the nationwide ground stop orders issued by the Federal Aviation Administration and the closure of Reagan National Airport in the wake of the terrorist attacks on September 11, 2001.

US Airways Group, Inc. ("US Airways") entered into an insurance contract with several insurers for property liability insurance. The Policy is a subscription policy, where several insurance providers jointly agree to underwrite a percentage of coverage, with a limit of $25 million. The Policy does not cover aircraft or personal injury liability. This case involves only one of the insurers under the Policy, PMA Capital Insurance Company ("PMA"). PMA is a successor in interest to Caliber One Indemnity Company, who was one of the original subscribers to the Policy.

On May 14, 2004, this Court issued rulings on cross-motions for summary judgment. In denying PMA's motion for summary judgment, the Court found that actual damage to U.S. Airways property is not a condition precedent to recovery for business interruption under the Policy. Rather, the Court found that the Policy was clear and unambiguous on its face and a jury could find, under the facts presented, coverage applied under the civil or military intervention provisions. [1]

The Court sustained PMA's motion for summary judgment finding that U.S. Airways could not recover for loss of market share as the Policy explicitly excludes recovery for such a loss. PMA sought summary judgment on the issue of whether U.S. Airways submitted a valid proof of loss for the claim which was denied.

Summary judgment was granted in favor of PMA on the issue of U.S. Airways' claim of breach of the covenant of good faith and fair dealing. The law in Virginia supports the Court's finding that U.S. Airways cannot seek recovery for bad faith in the current litigation. The Court dismissed the claim, without prejudice, as premature.

The final issue raised in the May 14th ruling was whether PMA can offset any damages under the Policy with funds received by U.S. Airways from the Federal government under the Air Transportation Safety and System Stabilization Act. The Court found that U.S. Airways is required to offset any insurance proceeds from any claim under the Stabilization Act, but that does not require U.S. Airways to offset the federal payments from its claims for coverage under the business interruption Policy. Therefore, the Court granted summary judgment in favor of U.S. Airways.

Based on these rulings, the Court heard this matter, without a jury, on the sole issue of whether U.S. Airways' claim was covered under the Policy. [2] Having taken evidence, considered the arguments of counsel, and taken the matter and PMA's Motion to Strike the Plaintiff's Evidence under advisement, the Court issues the following findings of facts and conclusions of law.

Findings of Fact [3]

***2** 1. US Airways Group, Inc., entered into a property insurance contract with Caliber One Indemnity Company (the "Policy") which provides for coverage for the period of December 1, 2000 through December 1, 2001.*

2. The Policy states that coverage extends to U.S. Airways Group, Inc. "and any subsidiary, associated, or affiliated company, corporation, firm, organization, partnership, joint venture, or individual as now exist or are hereafter constituted or acquired, and any other party in interest that is required by contract or other agreement to be named, hereafter referred to as the 'Insured.' "

3. The Policy is a subscription policy which covers damage to property, including business interruption, up to a limit of $25 million.

4. The Policy does not cover loss or damage to aircraft.

5. PMA Capital Insurance Corporation ("PMA") became a party to this action as a successor in interest to Caliber One Indemnity Company.*

6. The relevant sections of the Policy are as follows:

7. ***COVERAGE***

Except as hereinafter excluded, this policy covers:

A. ***Real and Personal Property***

1. The interest of the Insured in all real and personal property (including improvements and betterments) owned, used or intended for use by the Insured, or hereafter constructed, erected, installed, or acquired including while in course of construction, erection, installation, and assembly ...

B. ***Business Interruption***

1. Loss resulting from necessary interruption of business conducted by the Insured and caused by loss, damage, or destruction to real or personal property by any of the perils covered herein during the term of this policy....

5. Resumption of Operations: It is a condition of this insurance that if the Insured could reduce the loss resulting from the interruption of business:

(a) by a complete or partial resumption of operation of the property insured, whether damaged or not; ...

F. ***Provision Applicable to Business Interruption***

5. Interruption by Civil or Military Authority: This policy extended to cover the loss sustained during the period of time, not to exceed 30 consecutive days when, as a direct result of a peril insured against, access to real or personal property is prohibited by order of civil or military authority.

8. ***PERILS INSURED AGAINST***

This policy insures against all risk of direct physical loss of or damage to property described herein including general average, salvage, and all other charges on shipments covered hereunder, except as hereinafter excluded ...

9. ***PERILS EXCLUDED***

This policy does not insure:

E. against loss of market, except as provided for elsewhere in this policy.

28. ***Notice of Loss***

As soon as practicable after any loss or damage occurring under this policy is known to the Insured's home office insurance department, the Insured shall report such loss or damage with full particulars to Aon Risk Services, Inc. of IL, ...

29. ***Proof of Loss***

***3** It shall be necessary for the Insured to render a signed and sworn proof of loss to the Company or its appointed representative stating: the place, time, and cause of the loss, damage, or expense; the interest of the Insured and of all others; the value of the property involved in the loss; and the amount of loss, damage, or expense.

34. ***Assistance and Cooperation of the Insured***

The insured shall cooperate with this Company and, upon this Company's request and expense, shall attend hearings and trials and shall assist in effecting settlements, in securing and giving evidence, in obtaining the attendance of witnesses, and in conducting suits.

38. ***Suit Against the Company***

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless the Insured shall have fully complied with all the requirements of this policy. The Company agrees that any action or proceeding against it for recovery of any loss under this policy shall not be barred if commenced within the time prescribed therefor in the statutes of [the] State of New York.

7. On September 11, 2001, terrorists launched an attack on the United States in which commercial aircraft were hijacked and used as weapons.

8. US Airways sought coverage under the Policy for losses related to the shut down of the national airspace and the closure of Reagan National Airport as a result of

the terrorist attacks on the United States on September 11, 2001.

9. US Airways bases its claim for business interruption coverage on the "Interruption by Civil or Military Authority" provision in the Policy.*

10. On September 11, 2001, the Department of Transportation ("DOT"), through the Federal Aviation Administration ("FAA"), issued a national ground stop order which closed the entire national airspace in the United States for the first time.*

11. The routine method of communication between the FAA and U.S. Airways is via teletype sent by the FAA from the FAA Command Center located in Herndon, Virginia to the U.S. Airways Operations Command Center ("OCC") located in Pittsburgh, Pennsylvania. Another method of communication between the FAA and U.S. Airways is via telephone conference calls every two hours between the FAA Command Center in Herndon, Virginia and the U.S. Airways OCC.*

12. On September 11, 2001, U.S. Airways' OCC received the national ground stop order from the FAA. U.S. Airways' OCC forwarded the FAA national ground stop order to U.S. Airways' operations personnel, including personnel at all subsidiary airlines, at each airport from which U.S. Airways operated flights.*

13. The FAA ground stop order prohibited any aircraft from departing from designated airports.*

14. All commercial air traffic ceased in each of U.S. Airways' stations as a direct consequence of the FAA ground stop order.*

15. The Metropolitan Washington Airport Authority ordered Reagan National Airport terminals closed to the public and ordered personnel to exclude public access to the Airport facilities. Reagan National Airport remained close to the public and all airport employees, but for only a select few for security purposes, until October 4, 2001.

4 16. The national ground stop implemented by the FAA on September 11, 2001 remained in effect through 11:00 a.m. EST on September 13, 2001.

17. After the landing of its aircraft following the ground stop, U.S. Airways did not operate any commercial flights until the ground stop was lifted on September 13, 2001.*

18. US Airways' only business is the transportation of people and cargo by aircraft.*

19. Each airport in the United States remained closed to commercial air traffic until September 13, 2001.*

20. US Airways sustained business interruption losses as a result of the FAA ground halt order which closed the national airspace for the period of September 11, 2001 to September 13, 2001.

21. Reagan National Airport was closed to all commercial air traffic from September 11, 2001 to October 4, 2001, when it partially resumed commercial operations.*

22. During the closure of Reagan National Airport, officials for MWAA installed locks on the doors and maintained a security presence to bar not only the public but most airport personnel from the premises.

23. US Airways sustained business interruption losses as a result of the orders of civil and military authority which closed Reagan National Airport for the period of September 11, 2001 to October 4, 2001.*

24. The Federal Aviation Administration, the Department of Transportation and the Metropolitan Washington Airport Authority are civil authorities within the meaning of the Policy.*

25. On October 26, 2001, U.S. Airways provided Caliber One with notice of its intent to file a business interruption claim under the Policy.

26. On July 30, 2002, U.S. Airways submitted an amended Proof of Loss to Caliber One claiming losses under the policy as the insured "US Airways, Inc."

Conclusions of Law [4]

The Policy

1. In Virginia, insurance policies are construed in accordance with traditional principles of contract law. *Floyd v. Northern Neck Ins. Co.,* 245 Va. 153, 427 S.E.2d 193 (1993). To that end, polices must be read as a whole. *American Spirit Ins. Co. v. Owens,* 261 Va. 270, 541 S.E.2d 553 (2001). In reading an insurance contract, as a

whole, each component of the insurance contract must be considered. *Virginia Farm Bur. Mut. Ins. Co. v. Frazier,* 247 Va. 172, 440 S.E.2d 898 (1994). When the language in a policy is clear and unambiguous, the language will be given its plain and ordinary meaning and enforced as written. *Partnership Umbrella, Inc. v. Federal Ins. Co.,* 260 Va. 123, 530 S.E.2d 154 (2000).*

2. Multiple related components of an insurance contract must be construed together and seemingly conflicting provisions harmonized when that can reasonably be done.* *Transcontinental Ins. Co. v. RBMW, Inc.,* 262 Va. 502, 551 S.E.2d 313 (2001).

3. The agreement entered into between U.S. Airways and Caliber One Insurance Company is a valid contract.*

4. The Policy before the Court is plain and unambiguous by its terms.*

Coverage Under the Policy

***5** 5. In order for this Court to find coverage under the Policy, U.S. Airways must demonstrate, by a preponderance of the evidence, that a civil or military authority issued an order which caused a denial of access to U.S. Airways' property and that order was issued as a direct result of a peril insured against.

6. "Peril insured against" is defined in the Policy as "all risk of direct physical loss of or damage to property described herein including general average, salvage, and all other charges on shipments covered hereunder, except as hereinafter excluded." *

7. PMA concedes that as a result of the orders of civil and military authorities the national airspace was closed from September 11, 2001 through September 13, 2001, and that Reagan National Airport was closed for the period of September 11, 2001 through October 4, 2001.

8. PMA asserts that the orders were not issued as a direct result of a peril insured against and therefore coverage under the Policy should be denied.

9. At trial, U.S. Airways put forth evidence that established that Reagan National Airport was closed as a direct result of fear that United Flight 93 was heading for the airport. One computer generation had the aircraft less than 20 minutes away and heading directly for National Airport. At the time of the evacuation, Christopher Brown, airport manager of Reagan National Airport, testified that it was his understanding that Reagan National Airport could be a target of a terrorist attack. In addition to the large number of people on the premises, the fuel storage facility, holding about 4 million gallons of jet fuel, was thought to have been a target.

10. The order to close Reagan National Airport was made specifically out of fear of being a target for further terrorist attacks. Closing the premises acted to protect the property of not only U.S. Airways, but all of the other commercial and private operators at the airport.

11. The Policy does not require actual damage or loss of property to invoke coverage.

12. It is clear from the evidence that an order by civil or military authority was issued as a direct result of risk of damage or loss to U.S. Airways property. As counsel for PMA acknowledged during closing arguments, coverage would apply if MWAA closed Reagan National Airport, denying access to the premises, during a thunderstorm because lightning struck a building next to the airport and a fire threatened U.S. Airways' property. The same is true here, MWAA closed Reagan National Airport out of a fear that a hazard existed and the remedy was to evacuate the premises and deny access not only to the public but also airline employees.

13. Since MWAA's orders denied access to Reagan National Airport and denied "access to real or personal property" of U.S. Airways the orders qualify under the Civil Authority provision of the Policy.

14. Likewise, the ground stop order issued by the FAA closing the nation's airspace clearly denied U.S. Airways use of its property and prohibited U.S. Airways from operating its business which is the transportation of passengers and cargo by aircraft.

***6** 15. Based upon the evidence presented, the Court finds that the events of September 11, 2001 and the resulting closure of the national airspace until September 13, 2001, and the continued closure of Reagan National Airport until October 4, 2001, are covered events under the Policy.

16. The Court, as a matter of law, must now determine whether U.S. Airways satisfied the conditions

precedent to recovery under the Policy or determine whether PMA waived those conditions.

Proof of Loss

17. The Policy requires that "[a]s soon as practicable after any loss or damage occurring under this policy is known to the Insured's home office insurance department, the Insured shall report such loss or damage with full particulars to Aon Risk Services, Inc. of IL, ..."

18. It is established law in Virginia that "such a requirement of timely notice of an accident or occurrence is a condition precedent to an insurance company's liability coverage requiring 'substantial compliance by the insured.' " *Liberty Mut. Ins. Co. v. Safeco Ins. Co. of Am.,* 223 Va. 317, 323, 288 S.E.2d 469, 473 (1982). The Supreme Court has held that "if a violation of the notice requirement is substantial and material, the insurance company need not show that it was prejudiced by such a violation," rather, only a showing that notice was not given is sufficient to prove the condition precedent was satisfied. *State Farm Fire & Cas. Co. v. Scott,* 236 Va. 116, 120, 372 S.E.2d 383, 385 (1988).

19. PMA admits that it received notice from U.S. Airways of their intent to file a claim under the Policy on October 26, 2001. This admission provides adequate basis for the Court to rule that U.S. Airways satisfied the notice requirement under the Policy.

20. In addition to submitting a notice of claim, U.S. Airways was required to submit a proof of loss under the Policy.

21. The Policy provides: "It shall be necessary for the Insured to render a signed and sworn proof of loss to the Company or its appointed representative stating: the place, time, and cause of the loss, damage, or expense; the interest of the Insured and of all others; the value of the property involved in the loss; and the amount of loss, damage, or expense."

22. When determining whether an insured has submitted a valid proof of loss, the settled law of this Commonwealth is that "if an insurance policy makes the furnishing of a proof of loss a condition precedent to an action upon it, performance or waiver of it must be shown before a recovery can be had." *Aetna Cas. & Sur. Co. v. Harris,* 218 Va. 571, 578, 239 S.E.2d 84, 88 (1977). The purpose of the proof of loss is to enable the insurer to investigate the insured's losses, to estimate its rights and liabilities, and to prevent assertion of fraudulent or unjust claims. *Allstate Ins. Co. v. Charity,* 255 Va. 55, 59, 496 S.E.2d 430, 431-32 (1998). The burden of proving that a valid proof of loss was submitted rests upon the insured to "[prove] compliance with the necessary requirements of an insurance policy as to proof of loss, or the waiver of such compliance on the party of the company ... if [the insured] fails to establish the same by a preponderance of the evidence his action must fail." *Aetna Cas. & Sur. Co. v. Harris,* 218 Va. 571, 578, 239 S.E.2d 84, 88 (1977).

***7** 23. PMA admits that it received a proof of loss from U.S. Airways on July 29, 2002 and an amended proof of loss on July 30, 2002.

24. The proof of loss submitted on July 30, 2002 stated that the Insured, U.S. Airways, Inc., sustained business interruption losses from on September 11, 2001 through September 13, 2001 for its entire fleet and losses associated with the closure of Reagan National Airport from September 11, 2001 through October 4, 2001.

25. The proof of loss estimated damages of $58,199,634. That damage estimate included an asterisk which indicated that the loss figure specifically did not include the losses suffered by the covered subsidiary airlines.

26. The question before the Court is whether the proof of loss submitted to PMA was for U.S. Airways alone or whether it was for U.S. Airways Group, Inc., the named insured in the Policy, which includes the mainline carrier and its four subsidiaries-Allegheny Airlines, Inc., Piedmont Airlines, Inc., PSA Airlines, Inc. and MidAtlantic Airways, Inc.

27. PMA has asserted throughout the litigation that the language in the proof of loss explicitly excludes the subsidiaries within U.S. Airways' claim, while U.S. Airways contends that since the loss exceed the policy limit by two fold the failure to give the dollar

amount of the U.S. Airways subsidiaries' losses was neither a substantial nor material omission.

28. The law in Virginia is clear that "liability is determined by the loss itself, the policy's coverage restrictions, and the limits of the policy, not by the dollar amount the insured places on the proof of loss." *Allstate Ins. Co. v. Charity,* 255 Va. 55, 59, 496 S.E.2d 430, 431-32 (1998). "Not knowing the dollar amount of the insured's claim does not affect the ability of the insurance company to determine the amount of its liability." *Id.*

29. The Policy, clearly and unambiguously, covers not only U.S. Airways but all of its subsidiaries.

30. PMA clearly knew the nature of the claim from the notice submitted on October 26, 2001 and the proof of losses submitted on July 29 and 30, 2002.

31. The proof of loss was filed under the name of the insured, the proof of loss refers to the policy, by number, which covers both the mainline carrier and the subsidiaries, and the proof of loss clearly references the four subsidiaries.

32. Since the damages well exceeded the Policy limits, it would have been a futile effort to require U.S. Airways to extract the exact amount of damages for each subsidiary when PMA was clearly put on notice that subsidiaries also experience losses as a result of business interruption.

33. At trial, PMA did not present any evidence of prejudice based upon the omission of the subsidiaries' losses.

34. It is clear from the record that the notice of claim and proof of loss provides PMA with sufficient information "to investigate the loss, to determine its liability, and to prevent a fraudulent claim." *See Allstate Ins. Co. v. Charity,* 255 Va. 55, 496 S.E.2d 430 (1998); *Seaboard Fire & Marine Ins. Co. of New York v. Hurst,* 186 Va. 21, 41 S.E.2d 495 (1947).

***8** 35. Based upon the evidence presented, the Court finds that PMA was given sufficient information to investigate the claim, and the proof of loss submitted by U.S. Airways on July 30, 2002 was valid for not only U.S. Airways mainline carrier, but also the four subsidiaries included in the Policy.

Cooperation Clause

36. The Policy requires: "The insured shall cooperate with this Company and, upon this Company's request and expense, shall attend hearings and trials and shall assist in effecting settlements, in securing and giving evidence, in obtaining the attendance of witnesses, and in conducting suits." PMA argues that U.S. Airways failed to cooperate with the investigation of its claim and as a result has breached the Policy.

37. If U.S. Airways failed to cooperate in the investigation of the claim, that inaction could constitute breach and relieve PMA of any liability under the Policy. In evaluating an allegation of failure to cooperate with an insurer, the Supreme Court has stated "there must be a lack of cooperation in some substantial and material respect." *Cooper v. Employers Mut. Liab. Ins. Co. of Wisconsin,* 199 Va. 908, 913-14, 103 S.E.2d 210, 214 (1958)(The Court's ruling was partially overturned by the General Assembly in 1966. The General Assembly enacted Virginia Code § 38.1-381, codified as § 38.2-2204, which requires a showing of prejudice in relation to liability insurance on motor vehicles, aircraft and watercraft).

38. During its investigation, Caliber One requested that U.S. Airways provide it with certain factual and documentary information so that Caliber One could render a coverage determination.*

39. At trial, PMA did not present any evidence to demonstrate that U.S. Airways failed to cooperate with the investigation of the claim.

40. Based on the evidence, the Court finds that U.S. Airways did not breach it duty to cooperate under the Policy.

Conclusion

For the foregoing reasons, PMA's Motion to Strike is denied. The Court finds that U.S. Airways' claim for business interruption is covered by the Policy and that U.S. Airways has satisfied all of the necessary conditions precedent to move for recovery.

THIS CASE IS CONTINUED until September 20, 2004 for a trial, before a jury, on the issue of damages.

All Citations

Not Reported in S.E.2d, 65 Va. Cir. 238, 2004 WL 1637139

Footnotes

1 US Airways did not file a motion for summary judgment on the issue of coverage, the Court was only proceeding on PMA's motion.

2 The issue of damages has been reserved to be heard by a jury if the Court finds that U.S. Airways' claim is covered under the Policy.

3 Each finding of fact marked with an * represents a finding to which the parties agree since neither party has stated an objection to that finding.

4 Each conclusion of law marked with an * represents a proposition to which the parties agree since neither party has stated an objection to that conclusion.

2021 WL 1837479
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

SUSAN SPATH HEGEDUS, INC., d/b/a Kern & Co., and on behalf of those similarly situated, Plaintiff,
v.
ACE FIRE UNDERWRITERS INSURANCE COMPANY, Defendant.

CIVIL ACTION No. 20-2832
|
Filed 05/07/2021

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MEMORANDUM

Schiller, District Judge

***1** Presently before the Court is Defendant ACE Fire Underwriters Insurance Company's ("ACE") motion to dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted. Plaintiff filed a claim for, *inter alia*, business income coverage from ACE after its retail furniture business was forced to close in March 2020 pursuant to an order issued by the Governor of California in the early days of the COVID-19 pandemic. ACE denied Plaintiff's claim for coverage, and Plaintiff filed suit. This case requires the Court to interpret an "all risk" Businessowners' Insurance Policy to determine whether Plaintiff has suffered a loss that ACE must cover.

The over-100-page Policy at issue here can only be described as a labyrinth of pages, paragraphs, and pronouncements. The terms of the Policy require the insured to fall down a rabbit hole and wander through a vast thicket of verbiage that would leave even the most careful reader mystified by the mazes of pages to be pieced together and deciphered in order to determine if there is coverage on the other side. For the reasons that follow, Defendant's motion will be denied.

I. FACTUAL BACKGROUND

Plaintiff is a California corporation that operates an interior design/retail furniture business with two locations in California. Plaintiff purchased an "all risk" commercial policy of insurance from Defendant ("the Policy"). (Compl. ¶¶ 13, 16.)

A. Plaintiff's Losses and Claim

In response to the COVID-19 pandemic, on March 4, 2020, Governor Gavin Newsom declared a state of emergency for California. On March 19, 2020, he issued a statewide stay-at-home order, shuttering non-essential businesses. (*Id.* ¶ 31.) The stay-at-home order permitted exceptions for 16 critical infrastructure sectors identified by the federal government, but Plaintiff's business did not fall within those exceptions. (*Id.* ¶ 32.) On April 10, 2020, the County of San Diego entered a stay-at-home order, which stated "the actions required by this Order are necessary to reduce the number of individuals who will be exposed to COVID-19, and ... will help preserve critical and limited healthcare capacity in the county and will save lives." (*Id.* ¶ 33.) On May 7, 2020, Governor Newsom issued an order permitting gradual reopening of the state. (*Id.* ¶ 34.) Plaintiff's two locations, each located in San Diego County, remained closed from March 20, 2020 until May 22, 2020. (*Id.* ¶ 42).

Plaintiff filed a claim under the Policy for lost business income and related coverages, and Defendant denied Plaintiff's claim by letter dated April 24, 2020. (Compl. Ex. B [Denial Letter].) Defendant stated that Plaintiff's losses were not covered by the Policy because they did not arise from any direct physical loss or damage and were barred by the Policy's Virus Exclusion. (Compl. ¶ 45.) Here, Plaintiff seeks a declaration that coverage exists under the Policy and seeks damages for Defendant's alleged breach of contract. Plaintiff alleges that the Policy "provides broad property insurance coverage for all non-excluded, lost business income[.]" (*Id.* ¶ 3.) The Complaint alleges that Plaintiff "has incurred, and continues to incur, among other things, a substantial loss of business income and extra expenses covered under the Policy." (*Id.* ¶ 43.) Specifically, Plaintiff's allegations are primarily related to coverage for Business Income and Extra Expense, but the Complaint also contains allegations related to the Policy's Additional Coverages for Action of Civil Authority and Business Income from Dependent

Properties as "additional bas[e]s for coverage under the Policy[.]" (Compl. ¶¶ 43-49.) Plaintiff's Complaint alleges that the government orders, in and of themselves, caused a loss of business income for which Defendant must pay. (*Id.* ¶ 46.) Alternatively, Plaintiff alleges, "to the extent the orders themselves are not found to be a Covered Cause of Loss, the COVID-19 pandemic and ubiquitous nature of the coronavirus caused direct physical loss of or damage to the Covered Property." (*Id.* ¶ 47.) Finally, Plaintiff alleges that the Virus Exclusion does not apply, and/or "does not preclude coverage for Plaintiff's claim under the Policy." (*Id.* ¶¶ 51-52.)

B. The Motion to Dismiss

***2** Defendant argues that Plaintiff has not alleged a claim that falls within the scope of the Policy coverage because its losses were caused by a virus, which is excluded. "[R]ewriting clear and unambiguous contractual language is not the solution to the extraordinary problems arising from the coronavirus pandemic," Defendant cautions the Court. (Def.'s Mot. to Dismiss at 1.) Defendant argues that Plaintiff cannot amend to avoid the Virus Exclusion, so its Complaint should be dismissed with prejudice. (*Id.* at 13.) ACE's motion does not address "whether the SARS-CoV-2 virus is in fact capable of causing 'direct physical loss of or damage to property,' but [Defendant] reserves the right to do so should that issue become relevant." (*Id.* at 5 n.3.) Plaintiff's Complaint does not allege the presence of the virus at either of Plaintiff's business locations, so the Court does not consider the precise issue Defendant has reserved to be relevant to disposition of this motion. Moreover, in its reply, Defendant contends that "[a]lthough not the basis of ACE's motion ... California law[ ] holds that physical loss or damage occurs only when property undergoes a 'distinct, demonstrable, physical alteration.' " (Def.'s Reply Br. in Supp. Mot. to Dismiss [Def.'s Reply] at 1.)

Plaintiff opposes Defendant's motion to dismiss by arguing the Complaint states a claim for coverage and the virus exclusion does not bar Plaintiff's claims. Plaintiff notes that ambiguous language in insurance policies must be interpreted in favor of the insured and exclusions to coverage must be construed narrowly against the insurer. (Pl.'s Resp. in Opp'n to Def.'s Mot. to Dismiss [Pl.'s Opp'n] at 2.) Plaintiff argues, "[w]hile the virus and its propensities were considerations taken into account by government officials, the causal chain begins, and ends, with the issuance of the closure orders that deprived Plaintiff of its use of its property." (*Id.*) Plaintiff argues what caused the loss is a question of fact that should not be decided at this early stage of the litigation. (*See id.* at 9.) Additionally, according to Plaintiff, if a loss is caused by a combination of covered and excluded causes, coverage exists as long as the covered risk was the most important cause or the "efficient proximate cause" of the loss. (*Id.* at 11.) Plaintiff further argues that California courts consistently decline to enforce contractual provisions that seek to circumvent the efficient proximate cause doctrine. (*Id.* at 10-11).

II. STANDARD OF REVIEW

In deciding a motion to dismiss for "failure to state a claim upon which relief can be granted," the Court must accept as true all factual allegations in the complaint and make all reasonable inferences in favor of the plaintiff. Fed. R. Civ. P. 12(b)(6); *McDermott v. Clondalkin Group, Inc.*, 649 F. App'x 263, 266 (3d Cir. 2016). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). The plausibility requirement "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* When a pleading draws a conclusion that does not logically follow from the alleged facts themselves, the conclusion is not a factual allegation entitled to an assumption of truth. *See Morrow v. Balaski*, 719 F.3d 160, 165 (3d Cir. 2013).

III. DISCUSSION

The pandemic-era situation presented in this case, as it relates to business losses, is unprecedented in modern history. The economic costs and burdens placed on businesses by the pandemic are enormous. Upon review of the record and the case law, the Court finds that the losses alleged in Plaintiff's Complaint plausibly fall within the scope of the Policy. Further, Defendant has not established that the Virus Exclusion unambiguously applies to or bars coverage for Plaintiff's alleged losses. Thus, its motion will be denied.

To explain how the Court arrived at this decision, first, the Court will review the standard to state a claim for insurance coverage under California law. Next, the Court will explain the general structure and content of the "all risk" Businessowners Policy issued to Plaintiff by Defendant—endeavoring to unravel a spool of string [1] as it traverses the labyrinth in order to map a path through. Then, the Court will explain why, for the purpose of Business Income and related coverages, the language "direct physical loss of or damage to property at the described premises" is ambiguous. Finally, the Court will explain why it rejects Defendant's argument

that the Virus Exclusion unambiguously bars coverage for Plaintiff's alleged losses.

A. Stating a Claim for Coverage Under California Law

***3** Defendant contends that California law applies here, because in insurance coverage cases, courts apply the law of "the state which the parties understood was to be the principal location of the insured risk during the term of the policy." (Def.'s Mot. To Dismiss at 8.) For the purposes of this motion, Plaintiff does not dispute that California law applies to Kern & Co.'s claims. [2]

Under California law, interpretation of an insurance contract is a question of law for the court to decide using ordinary rules of contract interpretation. *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.,* 487 F. Supp. 3d 937, 942 (S.D. Cal. Sept. 11, 2020) (citing *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995)). There are two parts to any insurance coverage analysis. *Id.* First, the insured bears the burden of pleading a claim that falls within the policy terms, which should be interpreted broadly in favor of coverage. *Id.* If the insured establishes that its claim falls within the policy terms, the burden shifts to the insurer to prove that an exclusion applies. *Id.* Generally, "insurance coverage is interpreted broadly so as to afford the greatest possible protection to the insured, whereas exclusionary clauses are interpreted narrowly against the insurer." *My Choice Software, LLC v. Travelers Cas. Ins. Co.,* 823 F. App'x 510, 512 (9th Cir. 2020) (citation and internal alterations excluded).

In interpreting an insurance contract, the court examines the language of the policy to determine its plain and ordinary meaning. *Pappy's Barber Shops, Inc.*, 487 F. Supp. 3d at 942. The policy must be interpreted as a whole; where the policy is ambiguous, it should be interpreted to protect the reasonable expectations of the insured. *Id.* A policy is ambiguous if it is capable of more than one reasonable interpretation. *Id.* "Ambiguities may concern the fact or extent of coverage ... and may arise from contradictory or necessarily inconsistent language in different portions of the policy[.]" *Gutowitz v. Transamerica Life Ins. Co.,* 126 F. Supp. 3d 1128, 1136 (C.D. Cal. 2015). However, "[a] court may not adopt a strained or absurd interpretation of the policy language in order to find ambiguity where none would otherwise exist.... When a court concludes that policy language is ambiguous, it examines whether a finding of coverage is consistent with the objectively reasonable expectations of the insured." *Id.* With all of this in mind, the Court will explain the structure and relevant content of the Policy at issue here.

B. Overview of the Policy

The all-risk "Businessowners Policy" at issue is 113 pages in total, and like many insurance policies, it is made up of different "forms", often referred to as "endorsements." The two forms that make up the bulk of this Policy are the Businessowners Coverage Form ("BCF") and the Businessowners Property Enhancements Form ("BPEF"). The BCF is a 53-page standard businessowners insurance policy. It is drafted in an outline format with three broad sections: (I) Property, (II) Liability, and (III) Common Policy Conditions. Relevant here is Section I—Property, which comprises the bulk of the BCF. Separately, the BPEF, as the name suggests, enhances the coverage provided in the BCF under Section I—Property. The BPEF is also drafted in an outline format; it is 30 pages of additions and modifications to Section I—Property in the BCF.

***4** The BCF does not include a table of contents or any simple means of discerning the basic structure of its outline or which of its provisions are modified or replaced in the BPEF. Indeed, an introductory paragraph of the BCF advises policyholders, "[v]arious provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered." (*Id.* at 6.) The chosen format makes construction of the Policy as a whole, even more important to determining the objectively reasonable expectations of the insured.

Before the BCF, the Policy begins with four pages that comprise the "Businessowners Policy Declarations," which specify Plaintiff's overall coverage limits and the addresses of the described premises. Within the BCF, Section I—Property consists of eight broad parts, (A) through (H). Most relevant here are: (A) Coverage, (B) Exclusions, and (H) Property Definitions.

Following the BCF but before the BPEF, there are approximately 15 pages of separate endorsement forms. (*Id.* at 59-73.) These largely refer to Section II—Liability of the BCF. Then, there is the BPEF, which begins with a Schedule, in the form of a chart. It lists 61 coverages and "enhancements", organized by which Limit of Insurance applies to the coverages listed beneath each heading. (*Id.* at 75-77.) And following the 30-page BPEF, there are another four endorsement forms that modify the Businessowners Coverage Form. (*Id.* at 107, 105-06.)

In the BCF, Section I—Property, part (A) Coverage and part (B) Exclusions are each broken into six numbered paragraphs, which seem to correspond with each other. These six paragraphs in (A) Coverage are titled: (1) Covered Property, (2) Property Not Covered, (3) Covered Causes of Loss, (4) Limitations, (5) Additional Coverages, and (6) Coverage Extensions. These paragraph titles use capital letters and are referred to throughout the Policy using capital letters, but none of those six terms are contained in quotation marks or defined in paragraph (H) Property Definitions. Paragraphs 1 through 4 make up two and a half pages of part (A) Coverage, whereas paragraph (5) Additional Coverages and (6) Coverage Extensions, together, comprise 14 pages of part (A) Coverage in the BCF.

Beneath the heading (A) Coverage, prior to any numbered paragraphs, the Policy states, "[w]e will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." (*Id.* at 6.) Under (1) Covered Property, the Policy explains that Covered Property refers to Buildings and Business Personal Property, as those terms are described in their respective subparagraphs. (*Id.* at 6-7.) And paragraph (2) Property Not Covered, begins, "Covered Property does not include:" then lists ten types of property (subparagraphs a. through j.), that the Policy does not cover. (*Id.* at 7.) Under paragraph (3) Covered Causes of Loss, the Policy simply states "[d]irect physical loss unless the loss is excluded or limited under Section I—Property." (*Id.* at 7.)

Plaintiff's claims relate to Business Income and related coverages, which are included under paragraph (5) Additional Coverages. In the BCF, paragraph (5) Additional Coverages contains 18 separate coverages (a. through r.) that are included in the Policy *in addition* to what is addressed under paragraph (1) Covered Property. (*Id.* at 8-20.) The final paragraph in part (A) Coverage is paragraph (6) Coverage Extensions, which specifically expands the coverage explained by paragraphs 1 and 2. For example, "accounts receivable" is included under paragraph (2) Property Not Covered, but there is a Coverage Extension in paragraph 6 for accounts receivable.

***5** The coverage for Business Income under paragraph (5) Additional Coverages, states that it will pay:

> [T]he 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.

(*Id.* at 11.) As Plaintiff alleges, the Policy does not define "direct physical loss of or damage to property...." (Compl. ¶ 19.) And under (3) Covered Causes of Loss, the Policy simply states, "direct physical loss unless the loss is excluded or limited under Section I—Property." (Policy at 6.)

Much like part (A) Coverage, part (B) Exclusions is divided into six numbered paragraphs, which will be referred to as: (1) Anti-concurrent Cause Exclusions, (2) We Will Not Pay Exclusions, (3) Specified Concurrent Causes Exclusions, (4) Additional Exclusion, (5) Business Income and Extra Expense Exclusions, and (6) Accounts Receivable Exclusion.[3] In part (A) Coverage, the Business Income and Extra Expense coverages are found under paragraph (5) Additional Coverages, and in part (B) Exclusions, paragraph 5 are the Business Income and Extra Expense Exclusions. Similarly, part (A) Coverage, paragraph (6) Coverage Extensions includes the Accounts Receivable Coverage Extension, and part (B) Exclusions, paragraph (6) includes the Accounts Receivable Exclusion.

Part (B) Exclusions, paragraph 1 begins with an anti-concurrent causation clause, which states:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply regardless of whether or not the loss event results in widespread damage or affects a substantial area.

(*Id.* at 22.) Beneath the anti-concurrent causation clause, there are ten subparagraphs listing the causes subject to the anti-

concurrent causation clause. These will be referred to as the Anti-Concurrent Cause Exclusions. The Virus Exclusion is one of the Anti-Concurrent Cause Exclusions. (*See id.* at 25. Section I—Property, Part B. Exclusions, paragraph 1.j.: "Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.")

Following the BCF but before the BPEF, there are approximately 15 pages of separate endorsement forms. (*Id.* at 59-73.) Then, there is the BPEF, which begins with a Schedule, in the form of a chart. It lists 61 coverages and "enhancements", organized by which Limit of Insurance applies to the coverages listed beneath each heading. (*Id.* at 75-77.) And following the 30-page BPEF, there are another four endorsement forms that modify the Businessowners Coverage Form. (*Id.* at 107, 105-06.) Suffice it to say that interpretation of this Policy is not a task for the faint of heart.

C. Plaintiff's Alleged Covered Losses

***6** To state a claim for relief, Plaintiff must allege losses that fall within the scope of the Policy. Here, all of the coverages potentially at issue are related to Business Income —which is an Additional Coverage in Section I—Property, Part (A) paragraph 5—and therefore the Complaint must allege a suspension of operations due to, "direct physical loss of or damage to property"[4], that was "caused by or resulting from a Covered Cause of Loss." (Policy at 11, 12, 14, 15.) Paragraph (3) Covered Causes of Loss only states "direct physical loss unless the loss is excluded or limited under Section I—Property." (*Id.* at 7.) Plaintiff contends that when "construing the operative phrase 'direct physical loss of or damage to Covered Property,' it is essential to focus on the word 'property.' A thing is not 'property' unless and until legal rights attach to it." (Pl.'s Opp'n at 11.) The Court agrees that the word "property" is an important focus of this analysis, however, Plaintiff is mistaken in relying upon the language beneath the general heading (A) Coverage, "direct physical loss of or damage to Covered Property." (Policy at 6.) As the Court will explain, in this Policy, Business Income insurance is not the same as the insurance that applies to Covered Property—it is an *additional* coverage. Plaintiff's claims are for Business Income and related coverages, which are not limited by the term Covered Property, *i.e.* Buildings and/or Business Personal Property.

In this Policy, Business Income and Extra Expense insurance is separate and distinct from insurance for Covered Property. (*Compare id.* at 84 ("You may extend the insurance that applies to Buildings.... You may extend the insurance that applies to Business Personal Property ..."), *with id.* at 95 ("You may extend your business income coverage to apply to property at any location you acquire[,]"), *id.* at 17 ("you may extend the insurance that applies to Business Income and Extra Expense ...").) The Court must consider the language of the Business Income and Extra Expense related coverages in the context of the property interest they were purchased to protect—the business operation. Therefore, the Court will analyze the distinct language used in relation to loss of Business Income and/or Extra Expense coverages to determine if it creates ambiguity in the definitions of "property" and "direct physical loss".

For the reasons that follow, the Court finds that Plaintiff has plausibly stated claims for coverage related to Business Income / Extra Expense insurance. The Court will explain why, considering the Policy as a whole, it finds the phrase "direct physical loss of or damage to property at the described premises" as it relates to Business Income and Extra Expense insurance, ambiguous. First, the Court will consider the definition of property in the insurance for Covered Property and Additional Coverages for Business Income and Extra Expense. Next, the Court will interpret the language "direct physical loss of or damage to property", and finally, the Court will assess the meaning of a "Covered Cause of Loss".

1. Covered Property and Additional Coverages for Business Income and Extra Expense

The Policy provides two distinct categories of property insurance—Covered Property insurance and Business Income / Extra Expense insurance—which protect different business property interests. Under Section I—Property, (A) Coverage, (1) Covered Property, the Policy states: "Covered Property includes Buildings as described under Paragraph a. below, Business Personal Property as described under Paragraph b. below, or both, depending on whether a Limit of Insurance is shown in the Declarations for that type of property." (Policy at 6-7.) Thus, "Covered Property" refers to Buildings, Business Personal Property, or both. Business Personal Property includes, *inter alia*, "property you own that is used in your business[,]" "[p]roperty of others that is in your care, custody or control ..." and "[l]eased personal property which you have a contractual responsibility to insure[.]" (*Id.* at 6.)

Some of the coverages included under paragraph (5) Additional Coverages expand coverage in relation to Covered Property, while others relate to Business Income or Extra Expense insurance. Although there is overlap, the distinction in categories of property insurance included in this Policy is illustrated by the Declarations in the BCF, which describe the insurance limits applicable to Section I—Property. The Declarations list a Blanket Limit, and Business Personal Property Limits at each of the described premises. (*See id.* at 69.) Separately, the Declarations list a limit of insurance under Section I—Property for Business Income and Extra Expense, the limit of which is the "actual loss sustained." (*Id.* at 2.) Further, the BPEF Schedule is organized according to which Limit of Insurance applies to each coverage, the categories include: "Coverages subject to the Blanket Limit of Insurance", "Coverages subject to the applicable Building or Business Personal Property Limit of Insurance *or* Included in Business Income and Extra Expense", and "Coverages subject to separate Limits of Insurance." (*Id.* at 75-76.) (emphasis added).

***7** Business Income and Extra Expense are necessarily related forms of coverage—they provide insurance to protect the business "operations", *i.e.,* "your business activities occurring at the described premises." (*Id.* at 38.) The Business Income Additional Coverage 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." (*Id.* at 11.) (emphasis added).

The Extra Expense Additional Coverage will pay the "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." (*Id.* at 13.) Extra Expense will pay the additional costs the business incurs to restore operations, that it would not have incurred if its operations had not been necessarily suspended.

In attempting to assess the "plain meaning" of the language in this Policy, the Court focuses on the distinct categories of property insurance provided by the Policy. "Ambiguities may concern the fact or extent of coverage ... and may arise from contradictory or necessarily inconsistent language in different portions of the policy[.]" *Gutowitz,* 126 F. Supp. at 1136.

Throughout the Policy, when the Policy contemplates insurance strictly for "Covered Property", *i.e.*, Buildings and/or Business Personal Property, the Policy states "direct physical loss or damage" or simply "damage." (*See id.* at 82, 95, 96 ("With respect to a building that has sustained covered direct physical loss or damage ..."); *id.* at 84 ("We will pay for direct physical loss or damage to Building or Business Personal Property ..."); *id.* at 98 ("This insurance is extended to apply to a reward for information leading to a felony conviction arising out of loss or damage to Covered Property ...").) When, however, the Policy contemplates coverage under Business Income and Extra Expense insurance, the Policy uses the phrase "direct physical loss *of* or damage to property at the described premises", which indicates coverage of "property" beyond merely "Covered Property".[5] (*Id.* at 11, 13) (emphasis added). Indeed, the Business Income and Extra Expense Additional Coverages use the phrase "property at the described premises," not "Covered Property," which indicates the loss of or damage to "property" contemplated by Business Income insurance is not limited to loss or damage to Buildings or Business Personal Property. This inconsistent language used in relation to different forms of property loss, covered under different provisions of the Policy, creates ambiguity.

"When a court concludes that policy language is ambiguous, it examines whether a finding of coverage is consistent with the objectively reasonable expectations of the insured." *Gutowitz*, 126 F. Supp. 3d at 1137. "In determining whether coverage is consistent with the insured's objectively reasonable expectations, the disputed policy language must be examined in the context of its intended function in the policy." *Id.* Therefore, whether coverage for Plaintiff's losses exists will depend on Plaintiff's objectively reasonable expectations.

***8** The Additional Coverages disputed here are all Business Income and/or Extra Expense coverages. (Compl. ¶¶ 43-49.) If "property" in the context of those Additional Coverages includes the use and operation of the business at the described premises, then a mandatory shutdown of in-person business operations could reasonably constitute a loss of that property. Viewing the Policy as a whole, it is a reasonable interpretation of the Business Income insurance language that the ability to operate a business, and generate Business Income, is one of the sticks in the bundle of property rights protected by this Policy.

The Court will next consider whether Plaintiff's alleged losses constitute a "direct physical loss of or damage to property" and are "caused by or result from a Covered Cause of Loss[,]" which are the other two requirements to state a claim under these Additional Coverages. (Policy at 11, 13.)

2. Direct Physical Loss of or Damage to Property

Defendant briefly argues that, under California law, "direct physical loss," as that term is generally understood in insurance contracts, requires a "distinct, demonstrable, physical alteration." (Def.'s Reply at 1-2 (quoting *MRI Healthcare Ctr. Of Glendale, Inc. v. State Farm Gen. Insurance Co.*, 187 Cal. App. 4th 766, 799 (2010)).) Some federal courts in California have adopted this line of reasoning. *See 10E, LLC v. Travelers Indemnity Co. of Connecticut*, 2020 WL 5359653, *4 (C.D. Cal. Sept. 2, 2020) ("Under California law, losses from inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a 'distinct, demonstrable, physical alteration.' ... Detrimental economic impact does not suffice."). Holdings such as that have been based largely on the case *MRI Healthcare*. However, the language of the Policy here differs from the policy language examined in that case. Just as Defendant notes that Plaintiff cannot "rewrit[e] clear and unambiguous contractual language" to create coverage where none exists, Defendant cannot use caselaw to overcome ambiguity. (Def.'s Mot. to Dismiss at 10.)

In *MRI Healthcare*, the plaintiff claimed business income losses related to the temporary breakdown of an MRI machine. After a large storm caused damage to the building's roof, the machine was powered down and moved so the roof could be replaced. After the move, the machine would not power back on and was unusable for about two months. The plaintiff's business insurance policy, under Section I Property Coverages, included "Coverage B—Business Personal Property" and "Coverage C—Loss of Income." *Id.* at 771. In that policy, the Loss of Income Coverage would pay, "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 *accidental direct physical loss* to property at the described premises ... caused by an insured loss." *Id.* at 771 (emphasis added). The insurance company denied the plaintiff's claim for business interruption insurance, property damage, and loss of business income. The court found that the plaintiff's loss of income related to the powering down of the MRI machine did not constitute a "physical loss" because the machine had not been altered. Further, "even if the malfunction could be characterized as 'physical loss,' it was not 'accidental' " because the decision to power down the machine was made intentionally, and the center knew there were risks associated with turning off the machine. *Id.* at 778. The court determined that for there to be a loss within the meaning of the policy, some external force must have acted on the insured property to cause a physical change in its condition, "*i.e.*, it must have been 'damaged' within the common understanding of that term." *Id.* at 780.

***9** Under that interpretation of *MRI Healthcare*, the cessation of business operations due to government closure orders, as alleged in Plaintiff's Complaint, would not qualify as a "direct physical loss" in the context of property insurance because the business establishment was not "damaged" within the common understanding of that word—even if the business could not operate. However, the language of the Policy at issue here cannot be reconciled with that interpretation. Here, the Policy covers losses due to "direct physical loss of or damage to property", whereas in *MRI Healthcare*, the policy covered only "accidental direct physical loss". If "direct physical loss" in this Policy were synonymous with damage, then the disjunctive language of the Business Income Additional Coverage—"direct physical loss of or damage to"—would be redundant. The language used in this Policy, and specifically the coverages at issue here, arguably provides broader coverage than the policy considered in *MRI Healthcare*.

Plaintiff notes, "Black's Law Dictionary defines 'ownership' as '[t]he bundle of property rights allowing one to **use**, manage, and enjoy property[.]' " (Pl.'s Opp'n at 11.) Plaintiff argues that the "Closure Orders caused a 'direct physical loss' of [Plaintiff's] property by denying Plaintiff the ability to use its property as intended." (*Id.*) The allegations in Plaintiff's Complaint regarding its suspension of operations could plausibly constitute a "direct physical loss of ... property at the described premises," in that Plaintiff lost the ability to physically operate its business at the described premises. The Court concludes that the phrase "direct physical loss of or damage to property at the described premises", in the context of Business Income and Extra Expense insurance, is ambiguous. Moreover, Defendant's motion to dismiss is based entirely on the applicability of the Virus Exclusion, and whether the insured has stated a loss within the scope

of the Policy is to be viewed broadly in favor of coverage. Therefore, the Court finds that Plaintiff has alleged a loss of property that plausibly falls within the scope of the Policy, which is sufficient to survive a motion to dismiss.

3. Covered Causes of Loss under the Policy

As described above, Plaintiff has plausibly alleged that a mandatory suspension of its in-person operations was a direct physical loss of or damage to property at the described premises. However, to state a claim, Plaintiff's Complaint must also plausibly allege that the suspension was "caused by or resulting from a Covered Cause of Loss." (Policy at 11, 13.) Covered Causes of Loss is the title of a paragraph under part (A) Coverage in the BCF, but it is not a defined term. The entirety of the "Covered Cause of Loss" paragraph states "direct physical loss unless the loss is excluded or limited under Section I—Property." The Court has already explained that Plaintiff has plausibly alleged "direct physical loss" under the Policy and will address whether Plaintiff's alleged losses are excluded under Section I—Property in the next section. Importantly, however, Plaintiff correctly points out that causation is generally a question of fact that cannot be resolved on a motion to dismiss. *Davis v. United Services Automobile Ass'n,* 223 Cal. App. 3d 1322, 1328 (1990).

In summary, viewing the Policy as a whole, the language "direct physical loss of or damage to property at the described premises" in the context of Business Income and Extra Expense insurance, is ambiguous. As a result, the Court finds that Plaintiff has plausibly alleged a loss of property that falls within the scope of the Policy. Next, the Court will turn to Defendant's argument that, despite plausibly stating a covered loss, the Policy's so-called Virus Exclusion unambiguously bars Plaintiff's claims for the losses alleged in the Complaint.

D. The Virus Exclusion

Defendant contends that Plaintiff's Complaint must be dismissed because its claims are barred by the Policy's Virus Exclusion. Piecing together subsections of the Policy, the Virus Exclusion states:

> ***10** We will not pay for loss or damage caused directly or indirectly by [any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.] Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

(Policy at 22, 25.) Defendant argues, "[n]o matter the prism, Plaintiff's alleged losses—whether directly or indirectly—were caused by a virus" and therefore cannot be covered because of the Virus Exclusion. (Def.'s Mot. to Dismiss at 1-2.)

The Court is not convinced by Defendant's argument that "[t]he plain language of the virus exclusion precludes coverage here." (*Id.* at 19.) Defendant has not established that the Virus Exclusion unambiguously bars coverage for all of Plaintiff's alleged losses, for two reasons. First, under California law, the efficient proximate cause doctrine prevents enforcement of such broad anti-concurrent causation language. Second, it is not clear that the Virus Exclusion applies to the Business Income and Extra Expense insurance.

1. Efficient Proximate Cause

In California, "[p]olicy exclusions are unenforceable to the extent they conflict with ... the efficient proximate cause doctrine." *Julian v. Hartford Underwriters Ins. Co.*, 35 Cal. 4th 747, 754 (Cal. 2005). The efficient proximate cause doctrine states that if an insurance dispute involves losses caused by multiple risks or perils, at least one of which is covered and one of which is not, coverage exists so long as the excluded peril is not the "predominant, or most important cause of a loss." *Id.* Therefore, even though the Policy states that damage caused by a virus "is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss[,]" such a broad provision is unenforceable under California law. If the predominant or most important cause of loss is a covered loss not subject to an exclusion, the loss will be covered.

In *MRI Healthcare,* the court noted, "appellate courts in the past had equated [efficient proximate cause] with 'moving cause,' which could be misconstrued if taken literally to mean the 'triggering' cause." 187 Cal. App. 4th at 782. But the court rejected that construction. Ultimately, it determined that "[t]he efficient proximate cause ... must be the *predominating*

cause." *Id.* (emphasis added). Therefore, in *MRI Healthcare* the court rejected the plaintiff's efficient proximate cause argument because the predominating cause of the MRI machine's malfunction was not the storm, but rather the decision to turn off the machine, which was not a covered loss under the policy.

Here, the Court cannot conclude that the Virus Exclusion included in the Policy unambiguously excludes coverage for business income lost because of closure orders issued to stop the spread of COVID-19. The Complaint alleges it was the government shut down orders that caused its losses, not the virus. (*See* Compl. ¶ 46 ("The governmental orders, in and of themselves, constitute Covered Causes of Loss within the meaning of the Policy.").) The Complaint does not allege the presence of the virus at the described premises. It alleges that the government orders caused its losses when its business operations were suspended from March to May of 2020. Plaintiff's claimed losses only began during the period of time in which it was prohibited from operating its business in person by the government orders. When the orders were lifted and Plaintiff resumed physical operations, the virus was still at large. Indeed, the virus remains a risk to business employees and customers, more than a year after the first such order went into effect, but businesses are no longer subject to the same operational restrictions. Regardless of what may have precipitated the closure order, the virus continues to exist. Accordingly, it was the order to shut down the business that forced the closure. Thus, the Court considers Plaintiff's argument that the orders themselves caused its losses, or were at least the predominant cause of its losses, to be sufficient to defeat a motion to dismiss.

2. Application of the Virus Exclusion to Additional Coverage for Business Income and Extra Expense

***11** Finally, even if COVID-19 were the predominant cause of Plaintiff's losses, in the context of the Policy as a whole, it is unclear to the Court whether the Anti-Concurrent Cause Exclusions—which include the Virus Exclusion—apply to the Policy's coverage for Business Income and Extra Expense. Generally, "insurance coverage is interpreted broadly so as to afford the greatest possible protection to the insured, whereas exclusionary clauses are interpreted narrowly against the insurer." *My Choice Software,* 823 Fed. App'x at 512. An exclusionary clause must be "stated precisely and understandably, in words that are part of the working vocabulary of the average layperson" and "must be construed [narrowly] in the context of the policy as a whole." *Id.* at 511.

Defendant would have the Court end its examination of the Policy with the language of the Virus Exclusion in the BCF quoted above. The Court's analysis must extend beyond that narrow focus, however. The Policy repeatedly instructs the insured to read the entire Policy, and the BPEF states: "Notwithstanding anything to the contrary, the provisions of the Businessowners Coverage Form apply, except as provided in this endorsement." (Policy at 77.) Thus, in keeping with the general rule that exclusionary language must be interpreted narrowly and in the context of the policy as a whole, the Court cannot end its examination of the Policy based only on an analysis of the Virus Exclusion in the BCF. Based on the organization of the BCF and the Policy as a whole, the Court concludes that, at this stage, Defendant has not established that the Virus Exclusion, which is included in paragraph 1 of Part (B) Exclusions, even applies to the Additional Coverages for Business Income and Extra Expense, which are included in paragraph 5 of Part (A) Coverage.

Part (A) Coverage and Part (B) Exclusions each have six numbered subsections. In part (A) Coverage, the Business Income and Extra Expense coverages are found under paragraph (5) Additional Coverages, and in part (B) Exclusions, paragraph 5 is titled: Business Income and Extra Expense Exclusions. Similarly, in part (A) Coverage, paragraph (6) Coverage Extensions includes the Accounts Receivable Coverage Extension, and in part (B) Exclusions, paragraph (6) is titled: Accounts Receivable Exclusion. The structure of the Policy suggests that the six paragraphs in parts A and B were intended to correspond to each other. Thus, it is plausible that the Anti-Concurrent Cause Exclusions (part B paragraph 1) (including the Virus Exclusion) apply to loss or damage to Covered Property (part A paragraph 1), whereas the Business Income and Extra Expense Exclusions (part B paragraph 5) apply to Business Income and Extra Expense insurance (part A paragraph 5). Ambiguities in the Policy's structure and organization, as well as the fact that Plaintiff alleges its losses were caused solely by the government orders, preclude the Court from agreeing with Defendant that the Virus Exclusion unambiguously bars coverage for Plaintiff's claims.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is denied. An Order consistent with this Memorandum will be docketed separately.

All Citations

Slip Copy, 2021 WL 1837479

Footnotes

1 *See* the myth of Theseus, the labyrinth, and the Minotaur. *E.g. Theseus and the Minotaur*, ANCIENT-GREECE.ORG (last visited May 7, 2021), https://ancient-greece.org/culture/mythology/minotaur.html.

2 However, Plaintiff reserved its right to contest the choice of law issue at a later date. (Pl.'s Opp'n at 2 n.1.) The insured businesses are located in California, and the stay-at-home orders at issue were directed to California residents and businesses. Nothing in the record thus far indicates to the Court that any law other than California law would apply to Kern & Co.'s claims.

3 The Court has named paragraph numbers one through three for ease of reference; numbers four through six are names quoted directly from the Policy.

4 The Additional Coverage for business income from dependent properties does not include the word "direct." (Policy at 15.)

5 The Policy also uses "loss of or damage to" when referring to insurance for Covered Property that is extended to include "money" or "securities". (*Id.* at 86, 94.)

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 20-CVS-02569

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..., C.S.C.

NORTH STATE DELI, LLC d/b/a LUCKY'S DELICATESSEN, MOTHERS & SONS, LLC d/b/a MOTHERS & SONS TRATTORIA, MATEO TAPAS, L.L.C. d/b/a MATEO BAR DE TAPAS, SAINT JAMES SHELLFISH LLC d/b/a SAINT JAMES SEAFOOD, CALAMARI ENTERPRISES, INC. d/b/a PARIZADE, BIN 54, LLC d/b/a BIN 54, ARYA, INC. d/b/a CITY KITCHEN and VILLAGE BURGER, GRASSHOPPER LLC d/b/a NASHER CAFE, VERDE CAFE INCORPORATED d/b/a LOCAL 22, FLOGA, INC. d/b/a KIPOS GREEK TAVERNA, KUZINA, LLC d/b/a GOLDEN FLEECE, VIN ROUGE, INC. d/b/a VIN ROUGE, KIPOS ROSE GARDEN CLUB LLC d/b/a ROSEWATER, and GIRA SOLE, INC. d/b/a FARM TABLE and GATEHOUSE TAVERN,

Plaintiffs,

v.

THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; MORRIS INSURANCE AGENCY INC.; and DOES 1 THROUGH 20, INCLUSIVE,

Defendants.

ORDER GRANTING PLAINTIFFS' RULE 56 MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER was heard on September 23, 2020, before Senior Resident Superior Court Judge Orlando F. Hudson, Jr., with Gagan Gupta appearing for the plaintiff-restaurants (including Vin Rouge, Parizade, Mateo Bar de Tapas, Rosewater, Mothers & Sons Trattoria, Saint James Seafood, Lucky's Delicatessen, Bin 54, City Kitchen, Village Burger, Nasher Cafe,

Local 22, Kipos Greek Taverna, Golden Fleece, Farm Table, and Gatehouse Tavern[1]), and Brian Reid and Drew Vanore appearing for defendant-insurers The Cincinnati Insurance Company and The Cincinnati Casualty Company (collectively, "Cincinnati"). Plaintiffs brought a Motion for Partial Summary Judgment ("Motion") with respect to Count I of their Second Amended Complaint, seeking a declaratory judgment that Cincinnati must replace Plaintiffs' lost business income and extra expenses under insurance policy contracts entered into between the parties.[2]

THE COURT, having considered the pleadings, the Motion, the briefs filed in support of and in opposition to the Motion, the oral arguments of counsel at the hearing on the Motion, the declaration of Gagan Gupta, the affidavit testimony of the Plaintiffs and their supporting affidavits of Giorgios Nikolaos Bakatsias, Matthew Raymond Kelly, and Djafar "Jay" Mehdian, the applicable law, and other appropriate matters of record, GRANTS Plaintiffs' Motion.

Upon a review of the entire record, the Court holds there are no genuine issues as to any material fact and Plaintiffs are entitled to partial summary judgment against Cincinnati as a matter of law on the issue of liability under Count I of the Second Amended Complaint. To that end, the Court sets forth its primary reasoning herein.

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[1] The parent companies of these restaurants, and the entities bringing this lawsuit, are Vin Rouge, Inc. d/b/a Vin Rouge; Calamari Enterprises, Inc. d/b/a Parizade; Mateo Tapas, L.L.C. d/b/a Mateo Bar de Tapas; Kipos Rose Garden Club LLC d/b/a Rosewater; Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria; Saint James Shellfish LLC d/b/a Saint James Seafood; North State Deli, LLC d/b/a Lucky's Delicatessen; Bin 54, LLC d/b/a Bin 54; Arya, Inc. d/b/a City Kitchen and Village Burger; Grasshopper LLC d/b/a Nasher Cafe; Verde Cafe Incorporated d/b/a Local 22; Floga, Inc. d/b/a Kipos Greek Taverna; Kuzina, LLC d/b/a Golden Fleece; and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern (collectively, "Plaintiffs").

[2] The operative pleading to which this Order applies is the Second Amended Complaint.

I. BACKGROUND[3]

Plaintiffs, which operate sixteen restaurants in the North Carolina counties of Durham, Wake, Orange, Chatham, and Buncombe, purchased "all risk" property insurance policies ("Policies") from Cincinnati to cover their restaurants. All risk policies cover all risks of loss unless those risks are expressly excluded or limited. Plaintiffs' Policies were effective during all relevant time periods and contain the same relevant language.

The Policies include a Building and Personal Property Coverage Form and a Business Income (and Extra Expense) Coverage Form. These forms provide that Cincinnati will pay for business interruption coverage as follows:

> (1) **Business Income**
> We will pay for the actual loss of "Business Income" and "Rental Value" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss.
>
> . . .
>
> (2) **Extra Expense**
> We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain . . . during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.

Under the Policies, "Covered Cause of Loss" means "direct 'loss' unless the 'loss' is excluded or limited" therein. The Policies define "loss" to mean "accidental physical loss or accidental physical damage." Therefore, absent an exclusion or limitation, the Policies provide

[3] The Court has not resolved any disputed issues of fact, as findings of fact are unnecessary for adjudicating Plaintiffs' Motion for Partial Summary Judgment. Rather, the Court offers an overview of key undisputed facts underlying the ultimate disposition.

coverage under these provisions where the policyholder shows (i) direct "accidental physical loss" to property, ***or*** (ii) direct "accidental physical damage" to property. The Policies do not define "direct," "accidental," "physical loss," or "physical damage."

Plaintiffs seek coverage under the Policies for losses arising out of the response to the SARS-CoV-2 ("COVID-19") pandemic. Beginning in March 2020, governmental authorities across North Carolina entered civil authority orders mandating the suspension of business operations at various establishments, including Plaintiffs' restaurants (hereafter, "Government Orders"). The orders also prohibited, via stay-at-home mandates and travel restrictions, all non-essential movement by all residents.

On August 3, 2020, Plaintiffs filed their Motion for Partial Summary Judgment ("Motion"), seeking a declaratory judgment against Cincinnati under Count I that the Government Orders constitute covered perils under the Policies that caused "direct 'loss' to property" at the described premises, and that therefore Cincinnati must pay for the resulting lost Business Income and Extra Expenses as defined by the Policies. Plaintiffs' primary contention is that the Government Orders forced Plaintiffs to lose the physical use of and access to their restaurant property and premises, which constitutes a non-excluded "direct physical loss."

II. STANDARDS OF INTERPRETATION FOR INSURANCE POLICIES

The meaning of an insurance policy is a question of law, *Accardi v. Hartford Underwriters Ins. Co.*, 373 N.C. 292, 295, 838 S.E.2d 454, 456 (2020), and it is black-letter law that an undefined policy term is to be given its "ordinary meaning"; in doing so, North Carolina courts have determined that it is "appropriate to consult a standard dictionary." *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 94-95, 518 S.E.2d 814, 817 (N.C. Ct. App. 1999). If the term is nevertheless "reasonably susceptible to more than one interpretation," then it is ambiguous and

only then is the contract subject to judicial construction. *Id.*; *see also Joyner v. Nationwide Ins.*, 46 N.C. App. 807, 809, 266 S.E.2d 30, 31 (1980) ("[I]n deciding whether the language is plain or ambiguous, the test is what a reasonable person in the position of the insured would have understood it to mean, and not what the insurer intended."). "[A]ny ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary." *Accardi*, 373 N.C. at 295, 838 S.E.2d at 456.

III. DISCUSSION

As an initial matter, the Policies do not define the terms "direct," "physical loss," or "physical damage."[4] The Court must therefore turn first to the ordinary meaning of those terms. Merriam-Webster defines "direct," when used as an adjective, as "characterized by close logical, causal, or consequential relationship," as "stemming immediately from a source," or as "proceeding from one point to another in time or space without deviation or interruption." *Direct*, Merriam-Webster (Online ed. 2020). Merriam-Webster defines "physical" as relating to "material things" that are "perceptible especially through the senses." *Physical*, Merriam-Webster (Online ed. 2020). The term is also defined in a way that is tied to the body: "of or relating to the body." *Id.* Webster's Third New International Dictionary defines physical as "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary." *Physical*, Webster's Third New International Dictionary (2020). The definition from Black's Law Dictionary comports: "Of, relating to, or involving material things; pertaining to real, tangible objects." *Physical*, Black's Law Dictionary (11th ed. 2019). Finally, "loss" is defined as "the act of losing possession," "the harm of privation resulting from loss or separation," or the "failure to gain, win, obtain, or utilize." *Loss*, Merriam-Webster (Online ed.

[4] Cincinnati does not contest whether Plaintiffs' losses were "accidental."

2020). Another dictionary defines the term as "the state of being deprived of or of being without something that one has had." *Loss*, Random House Unabridged Dictionary (Online ed. 2020).

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

The parties sharply dispute the meaning of the phrase "direct physical loss." Cincinnati argues that "the policies do not provide coverage for pure economic harm in the absence of direct physical loss to property, which requires some form of physical alteration to property." Even if Cincinnati's proffered ordinary meaning is reasonable, the ordinary meaning set forth above is also reasonable, rendering the Policies at least ambiguous. Accordingly, in giving the ambiguous terms the reasonable definition which favors coverage, the phrase "direct physical loss" includes the loss of use or access to covered property even where that property has not been structurally altered. *See Accardi*, 373 N.C. at 295, 838 S.E.2d at 456 ("[A]ny ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary.").

Moreover, it is well-accepted that "[t]he various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect." *See C. D. Spangler Constr. Co. v. Industrial Crankshaft & Engineering Co.*, 326 N.C. 133, 142, 388 S.E.2d 557, 563 (1990). Here, the Policies provide coverage for "accidental physical loss ***or*** accidental physical damage." Cincinnati's argument that the Policies require physical alteration conflates "physical loss" and "physical damage." The use of the conjunction "or" means—at the very least—that a reasonable insured could understand the terms "physical loss" and "physical damage" to have distinct and separate meanings. The term "physical damage" reasonably requires alteration to property. *See Damage*, Merriam-Webster (Online ed. 2020) ("loss or harm resulting from injury to person, property, or reputation"). Under Cincinnati's argument, however, if "physical loss" also requires structural alteration to property, then the term "physical damage" would be rendered meaningless. But the Court must give meaning to both terms.

Finally, nothing in the Policies excludes coverage for Plaintiffs' losses. Notably, it is undisputed that the Policies do not exclude virus-related causes of loss. Cincinnati instead contends that three other exclusions apply: the "Ordinance or Law" exclusion, the "Acts or Decisions" exclusion, and the "Delay or Loss of Use" exclusion. Upon a review of the entire record, the Court concludes that these exclusions, based on their terms and the undisputed facts, do not apply to Plaintiffs' losses as a matter of law.

For these primary reasons, the Court concludes that the Policies provide coverage for Business Income and Extra Expenses for Plaintiffs' loss of use and access to covered property mandated by the Government Orders as a matter of law.

IV. CONCLUSION

Accordingly, Plaintiffs' Motion for Partial Summary Judgment is GRANTED. This Court certifies, pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, that this Order represents a final judgment as to Count I of the Second Amended Complaint and is immediately appealable as there is no just reason for delay of any such appeal. **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS**: That partial summary judgment is hereby granted in favor of Plaintiffs and against Cincinnati, jointly and severally, on Count I (Declaratory Judgment).

This the 7th day of October, 2020.

ORLANDO F. HUDSON, JR.
SENIOR RESIDENT SUPERIOR COURT JUDGE

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing Order in the above captioned action on all parties by depositing a copy hereof in a postpaid wrapper in a post office depository under the exclusive care and custody of the United Postal Service, addressed as follows:

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This the 9th day of October, 2020.

Sina B. Mack
ASSISTANT CLERK OF COURT
DURHAM COUNTY

2021 WL 168422
Only the Westlaw citation is currently available.
United States District Court,
N.D. Ohio, Eastern Division.

HENDERSON ROAD RESTAURANT SYSTEMS, INC., dba Hyde Park Grille, et al., Plaintiff,
v.
ZURICH AMERICAN INS. CO., Defendant.

Case No: 1:20 CV 1239
|
Filed 01/19/2021

Synopsis

Background: Insured restaurant operators brought state action against insurer, asserting claims for breach of contract, bad faith denial of coverage, and declaratory judgment, following denial of coverage for business losses due to closure orders during COVID-19 pandemic. Following removal, insurer moved for summary judgment, and insureds' filed cross-motion for summary judgment.

Holdings: The District Court, Dan Aaron Polster, J., held that:

provision that insurer will pay for "direct physical loss of or damage to 'real property'" was ambiguous;

insureds were entitled to business income coverage;

microorganism exclusion did not bar coverage;

loss of use exclusion did not bar coverage; and

insurer was not liable for bad faith.

Motions granted in part and denied in part.

Procedural Posture(s): Motion for Summary Judgment; Motion for Declaratory Judgment.

Attorneys and Law Firms

Mark R. Koberna, Rick D. Sonkin, Sean T. Koran, Sonkin & Koberna, Cleveland, OH, for Plaintiff.

Jonathan Gross, Mound Cotton Wollan and Greengrass, Emeryville, CA, Kevin M. Young, Jennifer L. Mesko, Tucker Ellis - Cleveland , Cleveland, OH, for Defendant.

OPINION AND ORDER

Dan Aaron Polster, United States District Judge

***1** Before the Court are the following motions:

1. Defendant Zurich American Insurance Company's ("Zurich") Motion for summary Judgment (ECF Doc. 14); and

2. Plaintiffs' Motion for Summary Judgment on the Issue of Coverage under the Zurich Policy (ECF Doc. 15).

On December 4, 2020, Zurich and Plaintiffs filed opposition briefs (ECF Doc. 16 and ECF Doc. 17), and on December 18, 2020, both parties filed replies. ECF Doc. 18 and ECF Doc. 19. On December 23, 2020, Zurich filed a notice of supplemental authority (ECF Doc. 20), and on December 31, 2020, plaintiff filed a response to the supplemental authority. ECF Doc. 21.

For the reasons explained below, the Court GRANTS summary judgment in favor of Plaintiffs on the insurance coverage issues alleged in Counts I and III of their complaint and DENIES summary judgment on Count II. Conversely, the Court DENIES Zurich's motion for summary judgment on Counts I and III of Plaintiffs' complaint and GRANTS summary judgment on Count II.

The Court's order is final and appealable on Counts II and III. The Court's order is not final or appealable on Count I because damages have not yet been determined. However, because the Court's opinion on Count I involves a question of law that will control the outcome of Plaintiffs' breach of contract claim, the Court certifies its order on Count I for interlocutory appeal, pursuant to 28 U.S.C.S. § 1292(b). An interlocutory appeal of this dispositive issue will enable the parties to appeal the legal issue before spending additional time and money on the issue of damages.

I. Relevant Facts

Plaintiffs, Henderson Road Restaurant Systems, Inc. dba Hyde park Grille, Coventry Restaurant Systems, Inc., dba Hyde Park Chop House, Chagrin Restaurants, LLC dba Hyde

Park Prime Steak House, JR Park LLC dba Hyde Park Prime Steak House, HP CAP LLC, dba Hyde Park Prime Steakhouse, NSHP, LLC dba Hyde Park Prime Steakhouse, HPD Restaurant Systems, Inc. dba Hyde Park Prime Steak House, 457 High Street Development, LLC, CAP Restaurant Development LLC, RJ Moreland Hills, LLC and Northville Development, LLC ("Plaintiffs") operated restaurants in Ohio, Pennsylvania, Michigan, Indiana and Florida. In the spring of 2020, state governments issued orders restricting the operations of restaurants in an effort to abate the spread of the coronavirus ("COVID-19"). In response to these orders, Plaintiffs closed all but four of their Ohio restaurants on March 15, 2020. Those four Ohio restaurants continued to provide only carry-out dining until March 17, 2020, and then they closed. ECF Doc. 12 at 6.

Prior to the government closings, Plaintiffs' restaurants received very few take-out orders; their businesses were comprised almost exclusively of in-person dining. ECF Doc. 15-1 at 1 ("Saccone Decl.") ¶ 4. As a result of the closings, Plaintiffs were forced to lay off staff and suffered significant financial losses. *Id.* ¶ 2. They speculate that some of their restaurants may never re-open due to new seating capacity restrictions, and those that have reopened have reduced staffing and suffered financial loss. [1] *Id.* ¶ 3.

***2** On March 24, 2020, Plaintiffs submitted a claim to Zurich under commercial insurance policy No. CPO 6220911-06 ("Policy") [2] for loss of business income caused by the state orders. ECF Doc. 12 at 7, ¶ 50. Zurich denied coverage on April 27, 2020. ECF Doc. 12 at 8, ¶ 53. The parties have identified the following portions of the Policy as relevant to their dispute:

Business Income Coverage Form

A. COVERAGE

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 a **"premises"** at which a Limit of Insurance is shown on the Declarations for Business Income. The loss or damage must be directly caused by a **"Covered cause of loss".** We will not pay more than the applicable Limit of Insurance shown on the Declarations for Business Income at that **"premises."**

B. ADDITIONAL COVERAGES

1. Civil Authority

We will pay for the actual loss of **"business income"** you sustain for up to the number of days shown on the Declarations for Civil Authority resulting from the necessary **"suspension"** or delay in the start of your **"operations"** if the **"suspension"** or delay is caused by order of civil authority that prohibits access to the **"premises"** or **"reported unscheduled premises."** That order must result from a civil authority's response to direct physical loss of or damage to property located within one mile from the **"premises"** or **"reported unscheduled premises"** which sustains a **"business income"** loss. The loss or damage must be directly caused by a **"covered cause of loss".**

ECF Doc. 12-1 at 168.

The Policy defines "Period of restoration" as the time that begins when:

a. The direct physical loss or damages that causes **"suspension"** of your **"operations"** occurs; or

b. The date **"operations"** would have begun if the start of **"operations"** is delayed because of loss of or damage to any of the following:

1) "Real property", whether complete or under construction;

2) Alterations or additions to **"real property"**; or

3) "Personal property":

a. Used in such construction, alterations, or additions;

b. Incidental to the occupancy of the area intended for construction, alteration, or addition; or

c. Incidental to the alteration of the occupancy of an existing building or structure.

If you resume **"operations"**, with reasonable speed, the **"period of restoration"** ends on the earlier of:

a. The date when the location where the loss or damage occurred could have been physically capable of resuming the level of **"operations"** which existed prior to the loss or damage, if the location had been restored to the physical size, construction, configuration, location, and material specifications which would satisfy the

minimum requirements necessary to obtain all required building permits, occupancy permits, operating licenses, or similar documents; or

b. The date when a new permanent location is *physically capable* of resuming the level of **"operations"** which existed prior to the loss or damage, if you resume **"operations"** at a *new permanent location.*

If you do not resume **"operations"**, or do not resume **"operations"** with reasonable speed (whether at your **"premises"** or **"reported unscheduled premises"** or elsewhere), the **"period of restoration"** will end on the date when the location where the loss or damage occurred could have been restored to the physical size, construction, configuration, location, and material specifications which existed at the time of loss or damage, with no consideration for any time:

***3 a.** Which would have been required to make changes in order to satisfy the minimum requirements necessary to obtain all required building permits, occupancy permits, operating licenses, or similar documents; and

b. Which would have been necessary to make the location physically capable of resuming the level of **"operations"** which existed prior to the loss or damage after the completion of repairs, replacement or rebuilding.

"Period of restoration" does not include any increased period required due to the enforcement of any ordinance or law that requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize or *in any way respond to, or assess the effects of* "**pollutants**" or "***microorganisms.***"

The expiration of this policy will not cut short the **"period of restoration."**

ECF Doc. 12-1 at 94.

The Policy defines "covered cause of loss" as "a fortuitous cause or event, not otherwise excluded, which actually occurs during this policy period." ECF Doc. 12-1 at 86. The Business Income Coverage Form states, in relevant part:

c. EXCLUSIONS

1. Real or Personal Property

The exclusions * * * below and the excluded causes of loss in the REAL AND PERSONAL PROPERTY COVERAGE FORM, except Off-Premises Service Interruption, apply to loss of **"business income"** caused by or resulting from loss of damage to any property * * *"

ECF Doc. 12-1 at 171.

The Real and Personal Property Coverage Form includes the following exclusions:

B. EXCLUDED CAUSES OF LOSS

11. Loss of Market or Delay

We will not pay for loss or damage caused by or resulting from loss of market, loss of use, or delay. This exclusion applies even if one of these excluded causes of loss was caused by or resulted from a **"mistake"** or **"malfunction."**

12. Microorganisms

We will not pay for loss or damage consisting of, directly or indirectly caused by, contributed to, or aggravated by the presence, growth, proliferation, spread, or any activity of **"microorganisms",** unless resulting from fire or lightning. Such loss or damage is excluded regardless or any other cause or event, including a **"mistake"** or **"malfunction,"** or weather condition, that contributes concurrently or in any sequence to the loss, even if such other cause or event would otherwise be covered.

But if a result of one of the excluded causes of loss is a **"specified cause of loss"**, other than fire or lightning, we will pay that portion of the loss or damage which was solely caused by that **"specified cause of loss".**

We will also not pay for loss, cost, or expense arising out of any request, demand, order, or statutory or regulatory requirement that requires any insured or others to test for, monitor, clean up, remove, treat, detoxify, or neutralize, or in any way respond to, or assess the effects of **"microorganisms".**

ECF Doc. 12-1 at 106.

On April 30, 2020, Plaintiffs filed this case in the Cuyahoga County Court of Common Pleas. ECF Doc. 1-2. Plaintiffs

asserted a claim for breach of contract (Count I), a claim for bad faith denial of coverage (Count II), and a claim for declaratory judgment (Count III). ECF Doc. 1-2 at 15-16. Defendant removed the case to federal court on June 5, 2020. ECF Doc. 1. The parties filed stipulated facts on October 27, 2020, which state in relevant part:

> ***4** 44. None of Plaintiffs' Insured Premises were closed as the result of the known or confirmed presence of SARS-CoV-2 or COVID 19 at any of the Insured Premises.
>
> * * *
>
> 46. Plaintiffs did not provide any delivery, carry-out, take-out and/or curbside service from any of its Insured Premises while they were closed, [with the exception of the four Ohio locations.]
>
> 47. There were no known or presumed infected person(s) with COVID-19 at any of the Insured Premises at any time from March 15, 2020 to April 27, 2020.
>
> 48. There was no physical alteration or structural damage to any property at an Insured Premises any time from March 15, 2020 to April 27, 2020.
>
> 49. There was no physical obstruction affecting ingress or egress to any of the Insured Locations at any time from March 15, 2020 to April 27, 2020.

ECF Doc. 12 at 7.

II. Statement of the Parties' Arguments [3]

A. Zurich's Motion for Summary Judgment

Zurich filed its motion for summary judgment on October 30, 2020. Zurich argues that it is entitled to declaratory judgment because Plaintiffs' losses were not covered by the Policy as a matter of law. Zurich contends that Plaintiffs' economic losses are not covered by the Policy because they were not caused by "physical loss or damage to property." ECF Doc. 14 at 13. In support of this argument, Zurich does not rely directly on the Policy's language; rather, it relies on case law interpreting language from other Ohio insurance policies. *See e.g., Mastellone v. Lightning Rod Mut. Ins. Co.,* 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130 (8th Dist.); *Universal Image Prods., Inc. v. Fed. Ins. Co.,* 475 F. App'x 569, 573 (6th Cir. 2012); *Schmidt v. Travelers Indem. Co. of Am.,* 101 F. Supp. 3d 768, 781, (S.D. Ohio 2015); *Santo's Italian Café LLC dba Santosuossos Pizza Pasta Vino v. Acuity Insurance Co.,* No. 1:20 cv 01192 (N. D. Ohio Dec. 21, 2020), ECF Doc. 20-1.

Alternatively, Zurich argues that, even if there had been direct physical loss to Plaintiffs' property, the Microorganism exclusion would exclude coverage. Simply summarized, Zurich argues that the underlying cause of loss was COVID-19; that COVID-19 is a microorganism; and that the Microorganism exclusion applies. ECF Doc. 14 at 19.

Zurich also contends that the additional Civil Authority provision does not apply because the states' orders did not "prohibit access" to Plaintiffs' premises. Zurich argues that the states' orders permitted Plaintiffs to continue to operate on a carry-out and delivery basis and, therefore, did not prohibit access to Plaintiffs' restaurants as required by the Policy. Zurich also argues that the Civil Authority coverage is inapplicable because the states' orders did not respond to a direct physical loss of or damage to property located within one mile from the premises. ECF Doc. 14 at 16. Zurich cites other federal cases holding that civil authority provisions do not provide coverage in the COVID-19 context. *See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.,* No. 20-cv-03213, 2020 WL 5525171 at *7, 2020 U.S. Dist. LEXIS 168385 at *19 (N.D. Cal. Sept. 23, 2020).

***5** Finally, Zurich argues that, because it properly denied coverage, it is entitled to summary judgment on Plaintiffs' bad faith claim. Zurich argues that, even if the Court decides that coverage exists, its denial was not "arbitrary or capricious." ECF Doc. 14 at 18.

Plaintiffs filed a memorandum in opposition on December 4, 2020. ECF Doc. 17. Plaintiffs argue that Zurich could have easily drafted the Policy language to limit coverage to physical or structural alteration/damage to tangible property. Instead, Zurich chose the language "direct physical loss of or damage to property." Plaintiffs argue that "direct physical loss of" includes an inability to possess something in the real, material or bodily world, and that the government orders caused Plaintiffs to lose their property in this manner. Plaintiffs point out that Zurich's Policy does not state that "direct physical loss of or damage to property" required "physical alteration or structural damage to any property at the Insured Premises."

Plaintiffs also contend that Zurich's cases are not on point. Plaintiffs argue that different policy language was involved in *Mastellone;* the court found that there was no evidence

that the building was substantially "unusable" in *Universal Image*; and the *Schmidt* decision determined that a fraudulent cashier's check did not constitute "physical loss of or damage to property." ECF Doc. 17 at 9-10.

Instead, Plaintiffs argue that the Court should find persuasive *North State Deli, LLC, v. Cincinnati Ins. Co.,* No. 20 CVS 02569, 2020 WL 6281507, 2020 N.C. Super LEXIS 38 (N.C. Super Ct. Oct. 7, 2020), which decided that the ordinary meaning of the phrase "direct physical loss" included the inability to possess something in the real, material or bodily world, resulting from a given cause without the intervention of other conditions. Plaintiffs also cite *Cajun Conti LLC v. Certain Underwriters at Lloyd's,* No. 2020-02558, 2020 WL 8484870 (La Dist. Ct. Nov. 4, 2020) in which the court denied an insurer's dispositive motion because the restaurant had to drastically change its operations to exclude sit-down customers who were the majority of the restaurant's patrons. ECF Doc. 17 at 12.

Plaintiffs argue that even if the Court finds that the Policy's "direct physical loss of or damage to property" language does not unambiguously provide coverage for their claims, that the language is, at a minimum, ambiguous. And, if the language is ambiguous, the Court must construe it in favor of the insured and against the insurer. *Neal-Pettit v. Lahman,* 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, 424 (Ohio 2010).

Plaintiffs also argue that the government closure cases cited by Zurich are distinguishable. Plaintiffs argue that *Diesel Barbershop, LLC v. State Farm Lloyds,* No. 5:20 CV 461-DAE, 2020 WL 4724305, 2020 U.S. Dist. LEXIS 147276 (W.D. Tex. Aug. 13, 2020) and *Sandy Point Dental, PC v. Cincinnati Ins., Co.,* 2020 WL 5630465, 2020 U.S. Dist. LEXIS 171979 (N.D. Ill. Sept. 21, 2020) involved policies that only covered "accidental direct physical loss to" or "direct physical loss to property." Plaintiffs argue that here, the Policy language covering "direct physical loss *of* or damage to property" is more expansive and must be interpreted differently.

Plaintiffs also argue that *10e v. Travelers Indem. Co.,* 483 F.Supp.3d 828 (C.D. Cal. 2020) and *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.,* —— F.Supp.3d ——, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020) are inapposite. In those cases, the courts imposed a "permanent dispossession" requirement that was not based on any language in the relevant policies but on a different case. Plaintiffs also distinguish *Malaube, LLC v. Greenwich Ins. Co.,* No. 20-22615, 2020 WL 5051581, 2020 U.S. Dist. LEXIS156027 (S.D. Fla. Aug. 26, 2020) and *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London,* No. 8:20 cv 1605-T-30-AEP, —— F.Supp.3d ——, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020) both of which relied on *Mama Jo's, Inc. v. Sparta Ins. Co.,* 823 F. App'x 868 (11th Cir. 2020), a case which involved reduced business due to construction dust that needed to be cleaned before the premises could be used for their intended purpose. ECF Doc. 17 at 18.

***6** Plaintiffs argue that the Microorganism exclusion does not apply because COVID-19 was not the underlying cause of Plaintiffs' loss. Plaintiffs acknowledge that the government closure orders were issued in response to COVID-19, but argue that they were not actually *caused by* COVID-19. They argue that the Anti-Concurrent causation language does not exclude coverage because Zurich's interpretation of that clause would expand the Microorganism exclusion far beyond anything the parties could have reasonably intended or understood. ECF Doc. 17 at 22. They also argue that a virus is not technically a Microorganism. ECF Doc. 17 at 23.

Finally, Plaintiffs concede that, if the Court finds that Zurich properly denied coverage, Plaintiffs' bad faith claim should be summarily dismissed. However, if the Court finds that there *is* coverage, Plaintiffs request that they be given more time to conduct discovery and refile their motion for summary judgment on the bad faith claim. ECF Doc. 17 at 19-20.

Zurich filed a reply on December 18, 2020. ECF Doc. 18. Zurich argues that the Court should follow the "growing consensus among federal courts" that have dismissed COVID-19 business interruption claims because the insured parties did not sufficiently allege or prove physical loss or damage. Zurich also argues that the Policy's business interruption provision cannot be read as a stand-alone policy; it must be read as a part of the entire policy – a policy related to the Plaintiffs' *physical* property.

Zurich continues to argue that Plaintiffs cannot avoid the plain language of the Microorganism exclusion. Zurich argues that the Policy clearly excludes coverage for damages caused directly or indirectly by viruses and that there is no need for the Court to consider the dictionary definitions of microorganisms. Zurich argues that Plaintiffs' losses were caused by COVID-19 and that the governmental orders were issued in direct response to the virus. Zurich also continues to argue that it should not be estopped from arguing that the Microorganism exclusion applies.

B. Plaintiffs' Motion for Summary Judgment

Plaintiffs filed a cross-motion for summary judgment on October 30, 2020. ECF Doc. 15. Plaintiffs argue that they are entitled to business income coverage under the plain language of the Policy. As stated above, the Business Income Coverage provides:

> We will pay for the actual loss of **"business income"** you sustain due to the necessary **"suspension"** of your **"operations"** during the **"period of restoration"**. The **"suspension"** must be caused by direct physical loss of or damage to property at a **"premises"** at which a Limit of Insurance is shown on the Declarations for Business Income. The loss or damage must be directly caused by a **"Covered cause of loss".**

In accordance with this language, Plaintiffs argue that they are entitled to coverage if they show that 1) they necessarily suspended their operations; 2) they suffered a loss of business income due to the suspension of their operations; 3) the suspension was caused by a direct physical loss of or damage to property a premises, and 4) the loss or damage was directly caused by a covered cause of loss. ECF Doc. 14 at 5. Plaintiffs argue that they *have* shown each of these facts and are entitled to coverage under the plain language of the Policy. ECF Doc. 15 at 5-15.

Plaintiffs also argue that none of the Policy's exclusions preclude coverage. First, they contend that, under the Policy's plain language, the Microorganism exclusion does not apply. They further assert that Zurich should be estopped from arguing that this exclusion applies based on its 2006 representations to the Ohio Department of Insurance when the exclusion was first approved for inclusion in property casualty insurance policies. ECF Doc. 15 at 15-20. Plaintiffs also argue that the Loss of Market or Delay exclusion does not apply. They contend that the purpose of the business income coverage would be completely undermined if the "loss of use" exclusion applied. (ECF Doc. 15 at 20).

***7** Zurich filed a response in opposition to Plaintiffs' motion for summary judgment on December 4, 2020. ECF Doc. 16. Zurich argues that coverage under the Policy required *permanent* dispossession and that the states' orders did not permanently dispossess Plaintiffs of their property or terminate their leasehold rights. Zurich asserts that the states' orders did not preclude Plaintiffs from entering their premises and using them for carry-out and delivery service. Zurich also argues that the Court should reject Plaintiffs' interpretation of the language "physical loss of or damage to property." ECF Doc. 16 at 3-4. Zurich cites several federal cases applying California law and rejecting similar attempts to expand coverage by focusing on this language. *See, e.g. 10E, LLC v. Travelers Indem. Co.,* Case No. 2:20 cv 04418, —— F.Supp.3d ——, 2020 WL 6749361 (C.D. Cal. Nov. 13, 2020); *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.,* Case No. 20 CV 907-CAB-BLM, —— F.Supp.3d ——, ——, 2020 WL 5500221 at *——, 2020 U.S. Dist. LEXIS 166808 at *11 (S. D. Cal. Sept. 11, 2020); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut,* No. 2:20 CV 04423-AB-SK, —— F.Supp.3d ——, ——, 2020 WL 5938689 at * ——, 2020 U.S. Dist. LEXIS 188463 at * 10, (C. D. Calif. Oct. 2, 2020).

As already argued in its motion for summary judgment, Zurich argues here that there is a growing consensus of cases around the country that have held that the business interruptions caused by COVID-19 do not involve the physical loss of or damage to property necessary to trigger coverage under a first-party commercial property policy. Zurich continues to assert that Ohio law provides that "direct physical loss" requires "harm to the property that adversely affects the structural integrity of the [premises]." ECF Doc. 16 at 5-6. Zurich contends that the cases cited by Plaintiffs are inapposite. ECF Doc. 16 at 6-8. Zurich also cites the Policy's "Period of Restoration" definition in support of its argument that the Policy requires a "physical" loss. Zurich argues that the fact the Business Income Coverage ends when the location is physically capable of resuming operation supports its argument that "loss" must be of a physical nature. ECF Doc. 16 at 8-10.

Zurich argues again that the Microorganism exclusion bars coverage and that the governmental orders were issued in response to the SARS-CoV2 virus and COVID-19 disease. Zurich argues that the Microorganism exclusion applies to all loss "directly or *indirectly* caused by, contributed to, or aggravated by the ... spread, or any activity of 'microorganisms.' " Zurich argues that it should not be estopped from arguing that the microorganism exclusion applies because Ohio has not recognized the doctrine

of regulatory estoppel and, even if it had, it would be inapplicable here. ECF Doc. 16 at 12-14.

Zurich argues that the loss of use exclusion also bars coverage. Zurich argues that its interpretation of this exclusion is not non-sensical (as argued by Plaintiffs) because it does not bar coverage when there is physical damage – which Zurich argues is necessary for coverage. ECF Doc. 16 at 14. Finally, Zurich points out that Plaintiffs did not move for summary judgment on the Civil Authority provision of the Policy and are not entitled to coverage on that ground. ECF Doc. 16 at 14-15.

Plaintiffs filed a reply brief on December 18, 2020. ECF Doc. 19. Plaintiffs construe Zurich's argument regarding "permanent" dispossession of property as a concession that direct physical loss of property *could* mean "being dispossessed of covered property." However, Plaintiffs contend that the "permanent" requirement is not supported by the Policy language. Citing the Policy's definition of "suspension," Plaintiffs argue that the Policy provides coverage both when there is a cessation or a **"slowdown"** of business activities. ECF Doc. 12-1 at 101. Accordingly, Plaintiffs contend that Zurich's argument for "permanent" dispossession finds no support in the Policy.

***8** Plaintiffs also distinguish the *Total Intermodal Servs. v. Travelers Prop. Cas. Co. of Am.,* 17-cv-04908, 2018 WL 3829767, 2018 U.S. Dist. LEXIS 216917 (C.D. Cal. July 11, 2018) case cited by Zurich in support of its argument that physical loss of the premises requires permanent dispossession. The *Total Intermodal* court acknowledged that the same phrase in a different kind of insurance contract could mean something else. Plaintiffs also point out that, unlike Zurich's Policy, Travelers' policy provided coverage for "sums [the insured became] legally obligated to pay as damages as a Motor Carrier, Warehouseman, Freight Forwarder, Logistics Service Provider or Other Bailee for direct physical loss of or damage to covered property." *Id.,* at *3-4.

Plaintiffs also contend that the "Period of Restoration" definition does not redefine the business income coverage. Plaintiffs argue that, under the unambiguous language of the Policy, the "Period of Restoration" began on the dates the relevant government orders went into effect and ended or will end on the dates the in-person dining restrictions were/are fully lifted. ECF Doc. 19 at 9.

Plaintiffs continue to argue that Zurich should be estopped from arguing that the Microorganism exclusion applies based on Zurich's past representations to the Ohio Department of Insurance. And, they continue to argue that the Policy's loss of market or delay exclusion cannot be interpreted as completely canceling the Business Income coverage. ECF Doc. 19 at 12-13.

C. Zurich's Supplemental Authority

On December 23, 2020, Zurich filed supplemental authority in support of its motion for summary judgment. The supplemental authority is a Memorandum of Opinion and Order granting an insurer's motion to dismiss in *Santo's Italian Café LLC dba Santosuossos Pizza Pasta Vino v. Acuity Insurance Company,* No. 1:20 cv 00192, —— F.Supp.3d ——, 2020 WL 7490095 (N.D. Ohio Dec. 21, 2020). This supplemental authority embraces some of Zurich's arguments. Specifically, the *Santo's* court, relying on *Mastellone* and *Universal Image Prods, Inc.,* found that plaintiff failed to plead a threshold claim of 'direct physical loss of or damage to' its premises and that the government orders did not constitute a "physical intrusion on Santo's property." The *Santo's* court also accepted the insurer's interpretation of the period of restoration term and decided that coverage was excluded under the insurer's policy's virus exclusion, as argued by Zurich in the instant case.

On December 31, 2020, Plaintiffs filed a response to Zurich's notice of supplemental authority. ECF Doc. 21. Plaintiffs argue that the *Santo's* court uncritically transmuted "physical injury" to mean "physical loss of or damage to" without explaining why these different terms should be interpreted the same. Plaintiffs further contend that the "period of restoration" set forth in the *Santo's* case was different that the language here, and that the *Santo's* decision provides minimal insight into Zurich's microorganism exclusion. In short, Plaintiffs' argue that the *Santo's* decision does not bolster Zurich's argument, and that this Court should not be persuaded by its holding.

III. Law & Analysis

A. Standard of Review

Summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ.

P. 56(a). The movant bears the initial burden of showing that there is no material issue in dispute. *Id.* at 607 (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Here, the parties have filed cross-motions for summary judgment and agree that the Court must determine whether the language contained in Zurich's Policy is ambiguous as a matter of law. *See Potti v. Duramed Pharm., Inc.,* 938 F.2d 641, 647 (6th Cir. 1991).

B. Ohio Law Interpretation of Insurance Contracts

***9** A federal court sitting in diversity applies the substantive law of the state in which it sits. *Hayes v. Equitable Energy Res. Co.,* 266 F.3d 560, 566 (6th Cir. 2001). Because this Court is located in Ohio, it must apply Ohio law to the Zurich policy.[4] Courts generally apply contract law when interpreting insurance policies. *St. Mary's Foundry Inc. v. Emp'rs Ins. of Wausau,* 332 F.3d 989. Determining whether language in an insurance policy is ambiguous is a matter of law decided by the Court. *Potti v. Duramed Pharm.,* 938 F.2d 641, 647.

A court must "look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy." *Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11. However, "where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured." *King v. Nationwide Ins. Co.,* 35 Ohio St. 3d 208, 519 N.E.2d 1380, 1383 (Ohio 1988). The Ohio Supreme Court has repeatedly affirmed this bedrock principle of law. *See, e.g., Faruque v. Provident Life & Acci. Ins. Co.*, 31 Ohio St. 3d 34, 508 N.E.2d 949, 952 (Ohio 1987) ("Language in a contract of insurance reasonably susceptible of more than one meaning will be construed liberally in favor of the insured and strictly against the insurer.") (*quoting Buckeye Union Ins. Co. v. Price*, 39 Ohio St. 2d 95, 313 N.E.2d 844 (Ohio 1974)); *Thompson v. Preferred Risk Mut. Ins. Co.,* 32 Ohio St. 3d 340, 513 N.E.2d 733, 736 (Ohio 1987) ("[I]t is beyond question that any ambiguity will be resolved in favor of the insured and against the insurer."); *Marusa v. Erie Ins. Co.,* 136 Ohio St. 3d 118, 2013-Ohio-1957, 991 N.E.2d 232, 234 ("Because the cause before us involves the interpretation of an insurance contract, any ambiguities will be construed strictly against the insurer and liberally in favor of the insured.") (citation omitted). When a contract is subject to more than one interpretation, "the insurer must establish not merely that the policy is capable of the construction it favors, but rather that such interpretation is the only one that can fairly be placed on the language in question." *Andersen v. Highland House Co.,* 93 Ohio St.3d 547, 2001-Ohio-1607, 757 N.E.2d 329 (Ohio 2001); *Bosserman Aviation Equip., Inc. v. U.S. Liab. Ins. Co.*, 2009-Ohio 2526, 183 Ohio App.3d 29, 915 N.E.2d 687, 692-93 (Ohio Ct. App. 2009) (emphasis added); *see also Lane v. Grange Mut. Companies,* 45 Ohio St. 3d 63, 543 N.E.2d 488, 490 (Ohio 1989) ("[A]n exclusion from liability must be clear and exact in order to be given effect." (citation omitted).

C. The Plain Language of the Policy

1. Ambiguity

***10** The parties agree that Ohio law applies and that the Court must determine whether the Policy's language is ambiguous. Thus, the Court must first decide whether the Policy language is reasonably susceptible of more than one interpretation. As explained below, it is.

Zurich's Policy provides that it will pay for "direct physical loss of or damage to **'real property'** ..." ECF Doc. 12-1 at 104. Based on this language, Plaintiffs argue that physical loss *of* the real property means something different than damage to the real property, and this is a valid argument. Otherwise, why would both phrases appear side-by-side separated by the disjunctive conjunction "or"? Plaintiffs argue that they lost their real property when the state governments ordered that the properties could no longer be used for their intended purposes – as dine-in restaurants. The Policy's language *is* susceptible to this interpretation.

Zurich does not focus on the language in the Policy. Instead, it argues that this Court must apply Ohio law interpreting the Policy language. But Zurich has not cited any Ohio cases interpreting the same language and applying it to real property. Zurich primarily relies on the Ohio Court of Appeals' decision in *Mastellone v. Lightning Rod Mut. Ins. Co.,* 175 Ohio App.3d 23, 884 N.E.2d 1130. The *Mastellone* case involved a claim submitted on a residential homeowners' policy, which did not provide business income coverage. The *Mastellone* policy provided coverage for direct loss to property "only if that loss is a physical loss to property," and it excluded coverage for loss caused by "smog, rust or other corrosion, mold, wet or dry rot." *Id.* at ¶ 60. Because the policy did not define "physical loss to property" the court found

that coverage required a "physical injury." [5] The *Mastellone* court then construed "physical injury" to mean "a harm to the property that adversely affects the structural integrity of the house."

Zurich urges this Court to apply the *Mastellone* definition of "physical loss to" or "physical injury" to its policy and deny coverage on that basis. But the policy in *Mastellone* did not cover "direct physical loss *of* or damage to" the premises; it expressly specified that it would cover loss "only if that loss [was] physical loss *to* property." Here, Zurich's policy does not expressly limit coverage to physical loss to property; it extends coverage to direct physical loss *of* property as well. There is no reason to believe that the Ohio Court of Appeals would have interpreted the Zurich Policy language as it did the homeowners' policy in *Mastellone.* The distinct Policies used different language and were applied to different facts. Thus, the *Mastellone* decision offers little guidance in interpreting Zurich's Policy.

Zurich also cites *Universal Image Prods., Inc. v. Fed. Ins. Co.,* 475 F. App'x 569, 573 (6th Cir. 2012) for the proposition that Ohio law requires "tangible, physical losses," not mere "economic losses." ECF Doc. 14 at 9. In *Universal Image*, the Sixth Circuit applied Michigan law to a policy providing coverage for " "direct physical loss or damage to building or personal property." The *Universal Image* insurance policy specified that "building" did not mean "land, water or air, either inside or outside of the structure." The air quality in the *Universal Image* commercial property had been affected by a bacterial contamination in the buildings ductwork. But given the policy's language, the Sixth Circuit upheld summary judgment in favor of the insurer. In doing so, the Sixth Circuit considered case law from other states that had interpreted the insurance term "physical damage." The Sixth Circuit cited *Mastellone* for the proposition that mold does not constitute "physical damage" because "[t]he presence of mold did not alter or otherwise affect the structural integrity of the [property]". *Universal Image*, 475 F. App'x at 573.

***11** Like the *Mastellone* decision, the *Universal Image* decision did not interpret the same policy language as in the Zurich policy. Moreover, the Sixth Circuit's reference to *Mastellone* was only *dicta* and was directly related to mold contamination to a property. Consequently, the *Universal Image* decision provides very little guidance to the Court when interpreting Zurich's policy language.

Zurich also cites *Schmidt v. Travelers Indemnity Co. of America,* 101 F. Supp.3d 768, 781 (S.D. Ohio 2015) in which the court held that the alleged loss was not covered because there was no " 'direct physical loss of or damage to' the cashier's checks because they were not physically lost or damaged, unlike [such as being] destroyed and lost in a fire." ECF Doc. 14 at 14. The Traveler's policy further specified that "Covered Causes of Loss" are "DIRECT PHYSICAL LOSS unless the loss is" limited or excluded.

Unlike the other two Ohio cases cited by Zurich, the policy language in *Schmidt* is similar to Zurich's policy in that it provides coverage for "direct physical loss *of* or damage to" property. However, in *Schmidt* the insured sought coverage for a loss of personal property (cashier's checks), and the checks had not been lost or damaged. They were fraudulent. Thus, in *Schmidt* the interpretation and application of the policy language was relatively straight-forward. The court granted summary judgment because there had been no physical loss of or damage to the cashier's checks. The insured in *Schmidt* did not show that the policy language (as applied to the cashier's checks) was susceptible of more than one interpretation. But the application of the language "loss of" to personal property is different than it is to real property. Here, Plaintiffs experienced a loss *of* their real property – property which they had been using for dine-in customers.

Zurich contends that the state orders did not preclude Plaintiffs from using their property, because they were still permitted to use them for take out orders. However, Zurich has not disputed that prior to the states' orders, Plaintiffs' properties were used almost exclusively for in person dining. Saccone Decl., ¶ 4, ECF Doc. 15-1 at 2. Nor has Zurich asserted any facts showing that Plaintiffs would have been able to realistically transition their businesses to take-out restaurants or that they could have still used their properties (which were mostly used for dine-in customers) for take-out orders.

Zurich also argues that there is no coverage under the Policy because Plaintiffs did not permanently lose their properties. Zurich cites a case interpreting similar policy language and holding that coverage required a "permanent" loss, *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.,* Case No. 2:20 cv 00087-KS-MTP, —— F. Supp.3d ——, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020). The *Real Hospitality* court, applying Mississippi law (similar to Ohio's), rejected the plaintiffs argument that the "loss of" their property due to a closure in response to governmental orders was covered

under the Travelers policy because the loss had not involved a "permanent dispossession" of real property. In requiring a *permanent* loss, the court stated that it was following the insurer's logical approach to the phrase "loss of," and it cited *Total Intermodal Servs. v. Travelers Prop. Cas. Co. of Am.,* Case No. CV 17-4908, 2018 WL 3829767, 2018 U.S. Dist. LEXIS 216917, another case examining the language "direct physical loss of or damage to Covered Property."

***12** But in *Total Intermodal,* the court rejected the insurer's argument that "loss of" and "damage to" were interchangeable phrases. Rather, the court held that each phrase must be given its own meaning. The *Total Intermodal* court properly construed the language and gave each phrase its "ordinary and popular sense." *Id.* at *8-10. And, in holding that "loss of" included a "permanent dispossession" of something, the court chose one popular definition, but recognized that "the same phrase in a different kind of insurance contract could mean something else, and that the issue here is simply whether the phrase "loss of" includes physical dispossession in the absence of physical damage. The Court therefore uses the word "includes" to make clear that its construction is non-limiting." *Id.* at fn. 4. Given this court's explanation, it is difficult to understand why the *Real Hospitality* court relied on *Total Intermodal* to support the insurer's approach to the phrase "loss of."

Moreover, by accepting the "logical" approach of the insurer's interpretation of "loss of" as a "permanent dispossession," the *Real Hospitality* court construed Travelers' policy language - language chosen by Travelers – in Travelers' favor. As shown below, the standard definitions of the word "loss," a word not otherwise defined by Zurich's policy, is not limited to "*permanent* dispossession." The word lost does not always involve permanency, and real property can be lost and later returned or restored. If a term is not defined in the policy, the Court must look to the plain meaning of the words, not persuasive authority from other courts. Zurich's Policy did not require a permanent "loss of" property and permanency is not embodied in the definition of loss. Adding this requirement would only be interpreting an ambiguous term in favor of the insurer – something Ohio law does not permit.

Zurich correctly argues that the Court must apply Ohio law to the interpretation of its Policy. Ohio law provides that if a policy is reasonably susceptible of more than one interpretation, it must be construed strictly against the insurer and in favor of the insured. *See*, *King v. Nationwide Ins. Co.,* 35 Ohio St. 3d at 208, 519 N.E.2d 1380. Here, because Zurich's Policy is susceptible of more than one interpretation, it must be construed liberally in favor of the insureds, i.e., Plaintiffs. Zurich has not cited any Ohio law constraining this Court to its interpretation of the Policy. And because there is more than one interpretation, the Policy must be construed liberally in Plaintiffs' favor. As further explained below, when the Policy is liberally construed in Plaintiffs' favor, it provides coverage for Plaintiffs' lost business income.

2. Coverage [6]

Zurich's policy provides business income coverage 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 a **"premises"** at which a Limit of Insurance is shown on the Declarations for Business Income. The loss or damage must be directly caused by a **"covered cause of loss."**

ECF Doc. 12-1 at 168.

Plaintiffs have shown that there was a suspension of their operations. The Policy defines "suspension" as "[t]he slowdown or cessation of your business activities." ECF Doc. 12-1 at 101. It defines "operations" as "[y]our business activities occurring at the covered location prior to the physical loss or damage;" and "[t]he location is tenantable prior to the physical loss or damage." The parties stipulated that the Plaintiffs closed their premises on various dates in response to the states' orders. ECF Doc. 12 at 6-7. Thus, Plaintiffs have shown that there was a necessary "suspension" or "slowdown or cessation" of their business activities.

***13** Plaintiffs have shown that there was a loss of business income due to the suspension of their operations. The Policy defines "business income" as "Net income"; plus "Continuing expenses." ECF Doc. 12-1 at 84. "Net income" means "the net profit or loss, including rental income from tenants, that

would have been earned or incurred before taxes." ECF Doc. 12-1 at 200. "Continuing expenses" is defined as:

> **a.** Your continuing normal operating expenses including, but not limited to:
>
> **1)** Payroll;
>
> **2)** Rental payments as tenants; and
>
> **3)** Factory overhead; and
>
> * * *

Plaintiffs have submitted the declaration of Joseph Saccone stating that Plaintiffs have suffered significant financial losses as a result of the government closures. ECF Doc. 15-1 at 1. And Zurich does not deny that Plaintiffs have suffered a loss of business income.

Plaintiffs argue that, because the Policy does not define "physical," "loss," "damage," or "property," the Court should consider Webster's Dictionary to define these terms:

> **Definition of *physical*** [7]
>
> 2 a **:** having material existence **:** perceptible especially through the senses and subject to the laws of nature everything physical is measurable by weight, motion, and resistance—Thomas De Quincey
>
> b **:** of or relating to material things
>
> **Definition of *loss*** [8]
>
> 1 : DESTRUCTION, RUIN
>
> // to save the world from utter loss—John Milton
>
> 2 a: the act of losing possession: DEPRIVATION
>
> //loss of sight
>
> **Definition of *damage*** [9]
>
> 1 : loss or harm resulting from injury to person, property, or reputation
>
> // flood damage
>
> // sustained severe damage to her knee;
>
> 2 damages plural: compensation in money imposed by law for loss or injury
>
> // The judge awarded them $5,000 in damages.
>
> **Definition of *property*** [10]
>
> * * *
>
> 2 a: something owned or possessed specifically: a piece of real estate
>
> b: the exclusive right to possess, enjoy, and dispose of a thing: ownership
>
> c: something to which a person or business has a legal title

After considering the ordinary definitions of the undefined words in the Policy, the Court finds that the Plaintiffs have shown that their business operations were suspended by direct physical loss of or damage to property at the premises.

Plaintiffs have also shown, applying a plain reading of the definition of "period of restoration," that the period ended or will end on the dates the states' restrictions are lifted because that will constitute the "date when the location where the loss or damage occurred could have been physically capable of resuming the level of 'operations' which existed prior to the loss or damage." ECF Doc. 12-1 at 94. Plaintiffs are now permitted, in some capacity, to operate their restaurants in Ohio, Indiana, Michigan, Pennsylvania, and Florida with in-person dining. ECF Doc. 15-1 at ¶7.

Finally, Plaintiffs have shown that the loss or damage was caused by a "covered cause of loss." The Policy defines "covered cause of loss" as a "fortuitous cause or event, not otherwise excluded, which actually occurs during this policy period." Webster's dictionary defines "fortuitous" as "occurring by chance." [11] Plaintiffs have shown that the state orders leading to the restaurants' closings were caused by a fortuitous event. As argued by Plaintiffs, no one could have anticipated that state governments would issue orders shutting down or greatly restricting Plaintiffs' restaurants – this was an "occurrence of chance." Because Zurich's Policy is susceptible of more than one interpretation and because Plaintiffs have shown that they incurred "loss of **'business income'** due to the necessary **'suspension'** of their **'operations'** during the **'period of restoration' "** "caused by direct physical loss of or damage to property at a **'premises,'** " they are entitled to summary judgment on the issue of coverage under the Policy.

D. Exclusions

1. Microorganism Exclusion

***14** Zurich argues that the Policy's Microorganism exclusion applies to exclude coverage in this case. The Policy's Microorganism exclusion states:

> **12. Microorganisms**
>
> We will not pay for loss or damage consisting of, directly or indirectly caused by, contributed to, or aggravated by the presence, growth, proliferation, spread, or any activity of **"microorganisms",** unless resulting from fire or lightning. Such loss or damage is excluded regardless or any other cause or event, including a **"mistake"** or **"malfunction,"** or weather condition, that contributes concurrently or in any sequence to the loss, even if such other cause or event would otherwise be covered.
>
> But if a result of one of the excluded causes of loss is a **"specified cause of loss"**, other than fire or lightning, we will pay that portion of the loss or damage which was solely caused by that **"specified cause of loss".**
>
> We will also not pay for loss, cost, or expense arising out of any request, demand, order, or statutory or regulatory requirement that requires any insured or others to test for, monitor, clean up, remove, treat, detoxify, or neutralize, or in any way respond to, or assess the effects of **"microorganisms".**

ECF Doc. 12-1 at 106.

Plaintiffs argue that the Microorganism exclusion does not apply because the loss of their properties was not "directly or indirectly caused by, contributed to, or aggravated by the presence, growth, proliferation, spread, or any activity of "microorganisms." In fact, the parties stipulated that "none of Plaintiffs' Insured Premises were closed as a result of the known or confirmed presence of SARS-CoV-2 or COVID-19 at any of the Insured Premises." ECF Doc. 12 at 7, ¶ 44. Instead, Plaintiffs argue that the loss of their properties was caused by the government closures and that those closures (in the absence of any presence or outbreaks at their restaurants) are not excluded by the Policy.

Zurich argues that COVID-19 "indirectly" caused Plaintiffs to close their restaurants. But this is not entirely accurate. There was "no known or presumed infected person(s) with COVID-19 at any of the Insured Premises at any time from March 15, 2020 to April 27, 2020." ECF Doc. 12 at 7, ¶ 47. Thus, it was clearly the government's orders that caused the closures. Ironically, Zurich later argues in its motion for summary judgment that the government orders "responded to a public health crisis," and were not related to any damage at the Plaintiffs' properties. ECF Doc. 14 at 16. This argument seems to undermine the purpose of the Microorganism exclusion which was plainly to exclude coverage for damage caused by microorganisms *at* the Plaintiffs' properties.

The insurer, being the one who selects the language in the contract, must be specific in its use; an exclusion from liability must be clear and exact in order to be given effect. *Lane v. Grange Mut. Cos.,* 45 Ohio St. 3d at 65, 543 N.E.2d 488, citing *American Financial Corp. v. Fireman's Fund Ins. Co.,* 15 Ohio St. 2d 171, 239 N.E. 2d 33 (1968). Here, Plaintiffs' argument prevails because the Microorganism exclusion does not clearly exclude loss of property caused by a government closure. Plaintiffs' restaurants were not closed because there was an outbreak of COVID-19 at their properties; they were closed as a result of governmental orders. Because Zurich's Microorganism exclusion did not identify the possibility that, even absent "the presence, growth, proliferation, spread, or any activity of **"microorganisms"** damaging the Plaintiffs' properties, the Plaintiffs may be required to close their dine-in restaurants due to government orders responding to a public health crisis, the Microorganism Exclusion does not apply.

***15** Going forward, Zurich could undoubtedly include an exclusion for government closures in its policies. But the Policy that Plaintiffs purchased did not contain such an exclusion. Thus, it would be contrary to Ohio's laws of contract interpretation to apply the Microorganism Exclusion to the unprecedented government closures that occurred in 2020, particularly when the parties have stipulated that their premises were not closed as the result of known or confirmed presence of COVID-19 at any of the premises. ECF Doc. 12 at 7, ¶ 47. This is the conclusion that must be reached under Ohio law because the Policy's language did not clearly identify the unusual and unforeseeable events that led to the closings of Plaintiffs' properties. Nor could Plaintiffs have been aware of such an exclusion when they purchased a policy and paid premiums to Zurich for coverage.

This interpretation is further supported by the fact that, in 2006, when insurers sought approval from the Ohio Department of Insurance for the Microorganisms exclusion, they explained that, despite the broad language of the

exclusion, they were seeking to avoid coverage for "viral and bacterial contamination" of properties. Zurich argues that Ohio law has not recognized the doctrine of regulatory estoppel. ECF Doc. 16 at 12. That may be. But, at the least, the 2006 representations to the Ohio Department of Insurers show the insurers' intent in adding the Microorganisms exclusion to their policies. They were attempting to exclude coverage for property damage caused by the contamination of viruses and bacteria on the insureds' premises, not the loss of business income caused by a government closure. And here, the Plaintiffs' properties were not damaged by the contamination of a virus or bacteria.

Zurich argues that the anti-concurrent causation language in the Microorganism exclusion further supports its position. Zurich cites the Microorganism exclusion's language stating that "regardless of any other cause or event ... that *contributes concurrently or in any sequence to* the loss, *even if such other cause or event would otherwise be covered.*" But this argument is dependent on a finding that Microorganisms caused, at least in part, damage to Plaintiffs' property. Such a finding would be contrary to the parties' stipulation that none of Plaintiffs' restaurants "were closed as the result of the known or confirmed presence of SARS-CoV-2 or COVID 19 at any of the Insured Premises." ECF Doc. 12, ¶44. Similarly, *Boughan v. Nationwide Property & Cas. Co.,* No. 1-04-57, 2005-Ohio-244, 2005 WL 126781 at *3–4, 2005 Ohio App. LEXIS 179 at *10 (3rd Dist.), the Ohio case cited by Zurich stating that "Ohio courts look to the underlying cause of loss" is inapposite because the *Boughan* decision was based on the recognized application of the policy's exclusion to the insureds' damages – settling floors and rotting floorboards. The anti-concurrent language of the exclusion does not apply *here* because it cannot be said that one of the causes of loss was contamination of COVID-19 on the Plaintiffs' premises, a fact to which Zurich has stipulated.

Under Ohio law, the Court must attempt to construe an exclusion, not in conformity with "what the insurer now says it intended the words to mean," but "in conformity with the intention of the parties as gathered from the ordinary and commonly understood meaning of the language employed." *Bluemile, Inc., Atlas Indus. Contrs, Ltd.,* Nos. 16AP-789, 16AP-791, ¶ 24, 2017-Ohio-9196, 102 N.E.3d 579 (10th Dist.). Here, we know that insurers included the Microorganism exclusion in their polices to exclude coverage for damage to properties caused by the contamination of viruses or bacteria *on the premises.* And, the parties have stipulated to the fact that COVID-19 did not contaminate the Plaintiffs' premises. ECF Doc. 12, ¶44. Thus, in conformance with the parties' intentions and Ohio's laws of contract interpretation, the Court finds that the Microorganism Exclusion does not exclude business income coverage in this case.

2. Loss of Use Exclusion.

***16** In their motion for summary judgment, Plaintiffs anticipated that Zurich would argue that that the "Loss of Market or Delay" exclusion will exclude coverage in this case. Zurich did not actually argue this exclusion in its motion, but in subsequent filings it takes up this argument. See ECF Doc. 16 at 14. The "Loss of Market or Delay" exclusion provides:

> We will not pay for loss or damage caused by or resulting from loss of market, loss of use, or delay. This exclusion applies even if one of these excluded causes of loss was caused by or resulted from a **"mistake"** or **"malfunction."**

ECF Doc. 12-1 at 106. Plaintiffs argue that this exclusion does not apply because, if it did, it would void business income coverage in its entirety. Plaintiff cites case law (later vacated by agreement of the parties) finding a similar exclusion inapplicable because it would have vitiated the policy's business income coverage. *Oregon Shakespeare Festival Ass'n, v. Great Am. Ins. Co.,* Case No. 1:15 cv 1932-CL, 2016 WL 3267247 at *5, 2016 U.S. Dist. LEXIS 74450 at *15 (D. Or. June 7, 2016).

Zurich argues that this provision would not bar coverage when there is physical damage caused by a covered peril, such as a fire, that closes a restaurant while it is being repaired. ECF Doc. 16 at 14. But that is not at all clear from a plain reading of the Loss of Market or Delay exclusion. In fact, this exclusion *could* be argued to exclude coverage if an insured lost the use of property. The Business Income Coverage provides that Zurich will pay for "loss of business income" sustained "due to the necessary suspension of operations caused by direct physical loss of or damage to property". Here, the Loss of Use exclusion *would* vitiate the Loss of Business Income coverage. Moreover, Zurich did not even argue that

this exclusion applied until after Plaintiffs argued that it didn't. Because the Policy must be read in its entirety and disputed terms interpreted in a manner calculated to give the agreement its intended effect, the "Loss of Use" exclusion does not exclude coverage under the Business Income coverage of the Policy. *See Karabin v. State Auto. Mut. Ins. Co.,* 10 Ohio St. 3d 163, 167, 462 N.E. 2d 403, 406 (1984), quoting *German Fire Ins. Co. v. Roost,* 55 Ohio St. 581, 45 N.E. 1097, paragraph one of the syllabus (1897). Because the Policy provides coverage and none of the exclusions apply, Plaintiffs are entitled to summary judgment on the coverage issues alleged in Counts I and III of their complaint.

E. Bad Faith

Count II of Plaintiffs' complaint is a bad faith claim based on Zurich's denial of coverage. It is well established that an allegation of bad faith made against an insurer for its handling a claim for coverage will survive only if the record shows that there were no circumstances in the case which could be viewed as creating a reasonable justification for that carrier's actions. *See Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552, 644 N.E.2d 397, paragraph one of the syllabus (1994). Plaintiffs have requested additional time to conduct discovery on the issue of bad faith. However, no amount of discovery would change the fact that Zurich had a reasonable justification for determining that there was no coverage under its Policy.

Although this Court disagrees with the holding in Zurich's supplemental authority, it does illustrate that Zurich had a reasonable justification for denying coverage. Other courts have agreed with the arguments asserted by Zurich and found in favor of insurers. Zurich denied coverage based on its own interpretation of the Policy. Because the Policy was susceptible to more than one interpretation, it must be construed in favor of Plaintiffs as this Court has done in accordance with Ohio law. However, given the "growing consensus of courts" that have rejected COVID-19 business interruption claims, it cannot be said that Zurich did not have a reasonable justification for denying coverage. Because Zurich had a reasonable justification for denying coverage, it is entitled to summary judgment on plaintiff's bad faith claim as a matter of law. *See Addington v. Allstate Ins. Co.,* 142 Ohio App.3d 677, 681, 756 N.E.2d 750 (9th Dist. July 5, 2001) (holding that, as a matter of law, Allstate had not acted in bad faith by denying coverage at a time when the district had rejected similar insurance claims.) No amount of discovery would change the Court's ruling on this claim.

IV. Conclusion

***17** Based on the foregoing, the Court GRANTS, in part and DENIES, in part, Plaintiffs' (ECF Doc. 15) and Defendant's (ECF Doc. 14) Motions for Summary Judgment. The Court GRANTS summary judgment to Plaintiffs on the insurance coverage issue alleged in Counts I and III of their complaint and DENIES summary judgment on Plaintiffs' bad faith claim in Count II. Conversely, the Court DENIES summary judgment to Defendant Zurich on Counts I and III of Plaintiffs' complaint and GRANTS summary judgment on Plaintiffs' bad faith claims.

The Court's order on Counts II and III is final and appealable. The Court's order on Plaintiffs' Count I - breach of contract claim is not final and appealable because damages have not yet been determined. The Court and parties agreed to accelerate the legal issues in this litigation before conducting discovery on damages. Because Count I involves a controlling question of law as to which there is substantial ground for difference of opinion and because an immediate appeal from this order may materially advance the ultimate termination of the litigation, I hereby certify the legal issue in Count I for interlocutory appeal pursuant to 28 U.S.C.S. § 1292(b). This will permit the immediate appeal of the Court's opinion. And an immediate appeal of the legal issues in this case would accelerate the final disposition of this case and, if affirmed, provide the most expedient path to the economic relief sought by Plaintiffs.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2021 WL 168422

Footnotes

1 Plaintiffs are now permitted, in some capacity, to operate their restaurants in Ohio, Indiana, Michigan, Pennsylvania, and Florida with in-person dining. ECF Doc. 15-1 at ¶7.

2 The Policy is located in ECF Doc. 12-1.

3 The statement of arguments identifies the main arguments in the parties' filings, which speak for themselves. The Court has only paraphrased the parties' arguments and has not attempted to exhaustively restate them herein. However, the Court has fully considered the thorough arguments asserted in the parties' filings.

4 The Court applies "the law of the state's highest court." *Garden City Osteopathic Hosp. v. HBE Corp.,* 55 F.3d 1126, 1130 (6th Cir. 1995) (citing *Erie R.R. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)). "If, however, the state's highest court has not decided the applicable law, then the federal court must ascertain the state law from all relevant data." *Id.* (internal quotation marks and citation omitted). "[A]n intermediate appellate court's judgment that announces a rule of law is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *FL Aerospace v. Aetna Cas. & Sur. Co.,* 897 F.2d 214, 218-19 (6th Cir. 1990) (internal quotation marks and citation omitted).

5 It is unclear why the *Mastellone* court found that "physical loss to property" equated to "physical injury. *Id.* at ¶ 60.

6 It is not necessary to evaluate whether the additional "Civil Authority" coverage provides coverage because general coverage exists under the Business Income Coverage Form. ECF Doc. 12-1 at 168.

7 https://www.merriam-webster.com/dictionary/physical

8 https://www.merriam-webster.com/dictionary/loss

9 https://www.merriam-webster.com/dictionary/damage

10 https://www.merriam-webster.com/dictionary/property

11 https://www.merriam-webster.com/dictionary/fortuitous

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The Honorable Michelle Szambelan

FILED
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Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SPOKANE COUNTY

PERRY STREET BREWING COMPANY, LLC, a Washington limited liability company,

Plaintiff,

v.

MUTUAL OF ENUMCLAW INSURANCE COMPANY, a Washington insurance company,

Defendant.

NO. 20-2-02212-32

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: COVERAGE GRANT

THIS MATTER came before the Court on Plaintiff's Motion for Partial Summary Judgment Re: Coverage Grant ("Motion"). The Court has duly considered the oral argument of the parties, the files and records herein, and the below-listed pleadings, papers, declarations, and exhibits submitted by the parties:

1. Plaintiff's Motion;
2. Declaration of Ben Lukes;
3. Declaration of John Cadagan;

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4. Defendant Mutual of Enumclaw Insurance Company's Opposition to Plaintiff's Motion for Partial Summary Judgment;

5. Declaration of Steven Caplow in Support of Defendant Mutual of Enumclaw Insurance Company's Opposition to Plaintiff's Motion for Partial Summary Judgment;

6. Plaintiff's Reply.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. Plaintiff's Motion is GRANTED.

2. Pursuant to CR 56, the Court enters the following undisputed facts relevant to its subsequent conclusions of law.

3. Plaintiff Perry Street Brewing Company LLC ("PSBC") owns and operates a brewery and bar with dining business with its principal place of business located at 1025 S. Perry St. # 2, Spokane, WA 99202.

4. Defendant Mutual of Enumclaw Insurance Company ("MOE") is an insurer authorized to write, sell, and issue business insurance policies in Washington to policyholders, including PSBC.

5. MOE issued a businessowners policy and related endorsements ("the Policy") with Commercial Property Coverage.

6. PSBC's business property includes property owned and/or leased by PSBC and used by PSBC primarily for operating a brewery and bar with dining services.

7. On or about January 2020, the United States of America saw its first cases of persons infected by COVID-19, which has been designated a worldwide pandemic.

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8. In light of this pandemic, on February 29, 2020, Washington Governor Jay Inslee issued Proclamation 20-5, declaring a State of Emergency for all counties in the state of Washington as the result of COVID-19.

9. Thereafter, Governor Inslee issued a series of certain proclamations and orders affecting many persons and businesses in Washington, whether infected with COVID-19 or not, requiring certain public health precautions.

10. On March 13, 2020, Governor Inslee issued Proclamation 20-11, "Statewide Limits on Gatherings," which prohibited all gatherings of 250 people or more in all Washington counties, including Spokane County.

11. On March 16, 2020, Governor Inslee issued Proclamation 20-14, "Reduction of Statewide Limits on Gatherings," which prohibited all gatherings of 50 people or more in all Washington counties, including Spokane County, and further prohibited gatherings of fewer people unless organizers of those activities complied with certain social distancing and sanitation measures.

12. Also on March 16, 2020, Governor Inslee issued Proclamation 20-13, "Statewide Limits: Food and Beverage Services, Areas of Congregation," which prohibited the onsite consumption of food and/or beverages in a public venue, including restaurants, bars, or other similar venues in which people congregate for the consumption of food or beverages.

13. By order of Governor Inslee effective October 6, 2020, for counties in "Phase Two," including Spokane County, although some indoor dining is allowed, dining and consumption of beverages are still curtailed compared to pre-pandemic. For example, restaurant table group sizes remain limited, the number of diners is capped at no more than 50 percent of capacity, hours remain restricted, and bar counters remain closed. *See*

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https://www.governor.wa.gov/sites/default/files/COVID19%20Phase%202%20and%203%20Restaurant%20and%20Tavern%20Guidance.pdf?utm_medium=email&utm_source=govdelivery.

14. Under the Business Income (and Extra Expense) Coverage Form of the Policy, MOE promised to pay PSBC for "direct physical loss of or damage to property at premises which are described in the Declarations" "caused by or resulting from any Covered Cause of Loss."

15. Whether the above undisputed facts establish coverage with the Business Income (and Extra Expense) Coverage Form as a matter of law for "direct physical loss of or damage to" property at premises—an issue on which PSBC bears the burden of proof—is the threshold issue for determination on PSBC's Motion under CR 56.

16. Determining insurance coverage is a two-step process. First, the insured must show that the loss falls within the scope of the policy's insured losses. Second, to avoid coverage the insurer must show that specific policy language excludes the loss. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992).

17. PSBC's Motion is directed toward the first step. It does not seek a CR 56 summary judgment determination as to any exclusions of coverage or the amount of relief to be issued.

18. The Court finds that PSBC has established that PSBC's claimed loss falls within the grant of coverage of the Business Income (and Extra Expense) Coverage Form of the Policy as a matter of law, because as a result of the proclamations and orders issued by Governor Inslee, PSBC suffered direct physical loss of its property at premises.

19. The Policy issued by MOE does not define the terms "direct physical loss of or damage to" property at premises.

20. As a result, the Court is mindful of Washington's rules for interpreting insurance policies.

21. In Washington, insuring provisions must be interpreted liberally to provide coverage whenever possible. *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 694, 186 P.3d 1188 (2008).

22. Insurance policies are construed in favor of coverage because: "the purpose of insurance is to insure." *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983).

23. When a term in an insurance policy is subject to multiple, reasonable definitions, the "[policyholder's] reasonable interpretation of the policy must be accepted." *Holden v. Farmers Insurance Co. of Washington*, 169 Wn.2d 750, 760, 239 P.3d 344 (2010).

24. When terms are undefined, Washington requires courts to use their "plain, ordinary, and popular" meaning – how an "average lay person" would understand them. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 876-77, 784 P.2d 507 (1990).

25. The Court may be aided by dictionary definitions, as the Washington Supreme Court so relied upon in *Boeing v. Aetna*.

26. Dictionary definitions of "loss," include "'destruction' 'ruin' or 'deprivation.'" *Loss*, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss.

27. At minimum, PSBC had a "deprivation" of its business property.

28. The undefined phrases "loss of" property and "damage to" property also are distinct from one another. *Nautilus Group, Inc. v. Allianz Global Risks US*, No. C11-5281BHS, 2012 WL 760940 (W.D. Wash. Mar. 8, 2012). In *Nautilus*, the Court reasoned that "if 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous. The fact that

they are both included in the grant of coverage evidences an understanding that physical loss means something other than damage." *Nautilus*, 2012 WL 760940, at *7.

29. The Court agrees with the rationale in *Nautilus*, especially since the undefined phrases "loss of" and "damage to" have popular meanings distinct from one another.

30. Accordingly, one reasonable interpretation of "direct physical loss of" property at premises is that the interruption of PSBC's business operations as a result of the proclamations was a direct physical loss of PSBC's property because PSBC's property could not physically be used for its intended purpose, i.e., PSBC suffered a loss of its property because it was deprived from using it.

31. The Court finds that this is an interpretation that an average lay person would understand by the phrase "loss of" property in the Policy. *See also Boeing*, 113 Wn.2d at 876.

32. In sum, the Court concludes as a matter of law that PSBC suffered a loss of its property at premises when PSBC lost the ability to use its property at premises for its intended purpose.

33. The Court, therefore, grants Plaintiff's Motion.

DATED this 23rd day of November 2020.

Michelle D. Szambelan

The Honorable Michelle Szambelan
Superior Court Judge

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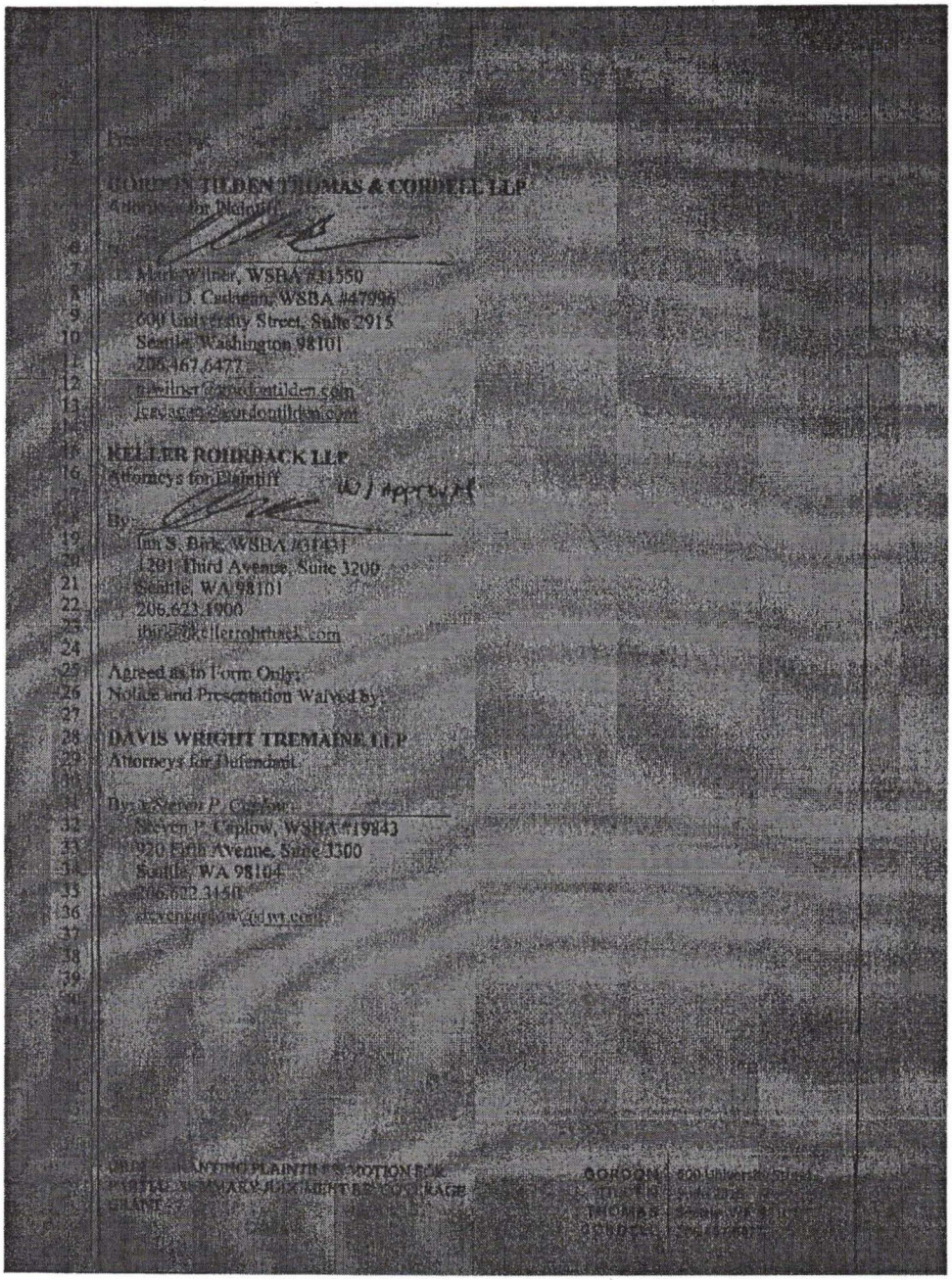

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ORDER GRANTING PLAINTIFF'S MOTION FOR ... - PAGE
PARTIAL SUMMARY JUDGMENT RE ... - PAGE
GRANT ...

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KING COUNTY
SUPERIOR COURT CLERK
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CASE #: 20-2-07925-1 SEA

SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

HILL AND STOUT PLLC, a Washington company, Plaintiff, v. MUTUAL OF ENUMCLAW INSURANCE COMPANY, a Washington insurance company, Defendant.	No. 20-2-07925-1 SEA **ORDER DENYING DEFENDANT MUTUAL OF ENUMCLAW'S MOTION TO DISMISS**

This matter came before the Court on Defendant's Motion to Dismiss, and the Court having considered the pleadings submitted by the parties in support and in opposition of the motion including the following:

1. Plaintiffs' Amended Complaint;
2. Defendant's Motion to Dismiss
3. Declaration of Steven P. Caplow in support of Defendant's Motion;
4. Plaintiffs' Response in opposition
5. Declaration of Ian S. Birk in support of Plaintiff's Response;
6. Defendant's Reply; and

And having heard the oral argument of the parties, makes the following Findings:

Undisputed Facts:

- Plaintiff Hill and Stout PLLC ("HS") is a dental practice with offices in Oak Harbor and Anacortes, Washington.

- Mutual of Enumclaw Insurance Company ("MOE") issued a Business Owner's policy ("Policy") policy to the Plaintiff covering the Plaintiff's property and business for calendar years 2019 and 2020. The Policy covered the equipment and supplies used in the business.
- On March 19, 2020, due to the COVD-19 pandemic and shortage of the Personal Protective Equipment ("PPE"), Governor Inslee issued Proclamation 20-24 which prohibited medical professionals including dentists from performing non-emergency routine procedures that required the use of the PPE.
- No COVID-19 virus has been detected on HS's business premises.

HS brought the current law suit against MOE for declaratory judgment and for breach of contract; claiming HS incurred losses and expenses resulting from the interruption of its business due to the Governor's Proclamation and that such losses and expenses are covered by the Policy issued by MOE and further alleging that MOE's denial of coverage for loss of business income and related expenses was breach of the insurance contract by MOE.

MOE argues that HS has failed to allege "direct physical loss" which are the required elements for coverage under the Policy. MOE then argues that the Complaint only alleges "indirect" rather than "direct" loss and therefore must be dismissed under CR 12(b)(6).

Legal Standard

Dismissal pursuant to CR 12(b)(6) motion is appropriate only when it appears beyond doubt that the claimant can prove no set of facts, consistent with the complaint, which would justify recovery. See *Hipple v. McFadden*, 161 Wn. App 550, 556, 255 P.3d 730 (2011). In reviewing a CR 12(b)(6) motion, the Court presumes all factual allegations in the complaint to be true and also considers any hypothetical facts, consistent with the complaint, proffered by the Plaintiff. *Gorman v. Garlock, Inc.* 155 Wn.2d 198, 214, 118 P.3d 311 (2005).

Furthermore, where a case involves a dispute regarding the coverage provisions of an insurance policy, the insured bears the burden of showing that coverage exists, and the insurer bears the burden of showing that an exception applies. *Mut. of Enumclaw Ins. Co. v. T & G Const., Inc.*, 165 Wash. 2d 255, 268, 199 P.3d 376, 383 (2008).

MOE's motion to dismiss for failure to state a claim under CR 12(b)(6):

MOE brought the current motion for dismissal against HS for failure to state a claim for "direct physical loss of or damage to" the covered property.

In its motion MOE argues that the core coverage issue under the Policy is the requirement for the Plaintiff to show that the loss of income is related to "direct physical loss of or damage to" the covered property. MOE argues that the Additional Coverage provision in the Policy refers to Covered Cause of Loss (which requires a showing of "direct physical loss of or damage to") and applies during a period that the covered property is being repaired, rebuilt, or replaced.

MOE further argues that the Plaintiff has failed to state a claim for Civil Authority provision of the Policy.

In response, HS argues that the terms of the Policy are to be given a liberal interpretation and that the insurance policies are to be construed in favor of the insureds. HS argues that the terms "direct physical loss of" or "damage to" the covered property are ambiguous and that HS suffered a direct physical loss of the covered property when the dental office and dental equipment could not be used for their intended use of dentistry services. HS further argues that pursuant to the wide spread of COVID-19 and the Governors' orders, there is a triable issue as to their access to the property by reason of property damage occurring at locations other than their business.

Legal Analysis:

Washington courts examine the terms of an insurance contract to determine whether under the plain meaning of the contract there is coverage. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash.2d 869, 876, 784 P.2d 507 (1990). [1]

In interpreting the insurance policies, the Court considers the Policy as a whole and applies a fair, sensible and reasonable meaning to its construction. *Capelouto v. Valley Forge Ins. Co.*, 98 Wash.App. 7, 13, 990 P.2d 414 (1999).

[1] See also *Nautilus Grp., Inc. v. Allianz Glob. Risks US*, No. C11-5281BHS, 2012 WL 760940, at *4 (W.D. Wash. Mar. 8, 2012)

Washington Supreme Court has held that a policy provision is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable and that where a clause is ambiguous, a meaning and construction most favorable to the insured must be applied. *Washington Restaurant Corp. v. General Ins. Co. of America*, 64 Wash.2d 150, 390 P.2d 970 (1964); *American Star Ins. Co. v. Grice*, 121 Wash.2d 869, 874, 854 P.2d 622 (1993), supplemented by 123 Wash.2d 131, 865 P.2d 507 (1994); and *Morgan v. Prudential Ins. Co. of America*, 86 Wash.2d 432, 435, 545 P.2d 1193 (1976).

The Coverage paragraph in MOE's Policy provides: *"We will pay for direct physical loss of or damage to Covered Property ..."*. The Policy does not define "direct physical loss". Similarly, the Policy does not define the terms "loss of" or "damage to" but both terms are included in the Policy language. The Policy language uses "or" to separates the "direct physical loss of" and "damage to" providing for an *alternative* means of coverage. The Court therefore has to consider these terms as alternative means for coverage.

When the terms are undefined, the courts are required to use their *"plain, ordinary, and popular"* meaning and may refer to dictionaries for undefined words. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990).

The Court first considers the term "loss". The dictionary definition for "loss" includes "destruction", "ruin", "deprivation"[2] . In applying the ordinary meaning of "deprivation", the Court finds that the Plaintiff's position that the dental practice had a "direct physical deprivation" of its property when they were unable to see patients and practice dentistry is a reasonable interpretation by the average lay person.

The Court finds that MOE in its motion applies identical meaning to the terms "loss of" and "damage to" and in this way argues that the coverage does not apply because the Plaintiff has not shown any physical damage such as damage to a property caused by fire.

While there is no factual allegation of physical alteration of the property, MOE's narrow reading of the Policy is silent as to the Policy's language providing "physical loss of" as an alternative basis for coverage. Clearly the language in the Policy intended to provide alternative means for coverage, otherwise the Policy would use one or the other term and not both as

[2] www.merriam-webster.com

alternative means. If "physical loss of" was interpreted to mean "damage to" then one or the other would be surplusage. The Court has to give meaning to the whole language and to every word in a policy[3] and cannot ignore the alternative means of coverage provided in the Policy. The fact that both terms were included in the coverage provision shows that the drafters of the Policy meant the term "physical loss of" to mean something other than "damage to".

MOE's argument that gives the same exact meaning to both terms contradicts and ignores the clear intent of the Policy. Such narrow reading is not supported by the appellate decisions in Washington.

The Court therefore finds that the phrase "physical loss of" is ambiguous because it is fairly susceptible to two reasonable interpretations and dismissal under CR 12(b)(6) is not appropriate.

Applying the legal standard to MOE's motion for dismissal on other noted grounds, the Court further finds that dismissal on all other grounds is not appropriate pursuant to CR 12(b)(6). MOE has not shown that under the specific facts in this case, beyond doubt, HS can prove no set of facts, consistent with the complaint, which would justify recovery.

It is hereby ORDERED that that:
Defendant's Motion to Dismiss Plaintiff's claims is DENIED.

IT IS SO ORDERED.

ENTERED this 12th day of November, 2020.

Susan Amini
SUPERIOR COURT JUDGE

[3] *Boeing*, *supra* at 898.

King County Superior Court
Judicial Electronic Signature Page

Case Number: 20-2-07925-1
Case Title: HIT &apm; STOUT VS MUTUAL OF ENUMCLAW INS CO

Document Title: ORDER

Signed by: Susan Amini
Date: 11/13/2020 9:00:00 AM

Judge/Commissioner/ProTem: Susan Amini

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DEREK SCOTT WILLIAMS PLLC and DEREK SCOTT WILLIAMS REAL ESTATE LLC, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
vs.	)	**Case No. 20 C 2806**
THE CINCINNATI INSURANCE CO.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Derek Scott Williams PLLC operates a dental practice in Lufkin, Texas; Derek Scott Williams Real Estate LLC owns the property where the dental practice operates. The Court will refer to them collectively as Williams. Williams purchased a commercial property insurance policy from Cincinnati Insurance Co. for the period from July 14, 2019 through July 14, 2020. As relevant here, the insurance policy provided coverage for actual loss of business income under circumstances described in the policy.

As is widely known, as a result of the coronavirus pandemic, state and local governments nationwide have, at various intervals, issued orders suspending or limiting operations of non-essential businesses that interact with the public. On March 22, 2020, the governor of Texas issued an order postponing all elective surgeries and non-emergency medical and dental procedures. Williams complied with the order and did not resume normal business operations until May 4, 2020. This resulted in a loss of

business income.

Williams alleges that it made inquiry regarding to the insurance broker through which it purchased the Cincinnati policy. The broker advised that Williams should not file a claim. Williams further alleges that insurers, including Cincinnati, have made it clear that they do not intend to provide coverage for business interruption arising from the coronavirus pandemic. Williams has filed this lawsuit seeking a declaratory judgment that it is entitled to coverage under its policy.[1] It has sued on behalf of a putative class.

Williams contends that its losses are covered by both two provisions of its insurance policy: the business income provision, and the civil authority provision. Cincinnati has moved to dismiss Williams's claims for failure to state a claim, arguing that under the plain language of these provisions, neither of them covers Williams's losses. For the reasons stated below, the Court dismisses Williams's claim under the civil authority provision but declines to dismiss its claims under the business income provision.

Factual background

As indicated, Williams's insurance policy covers the period from July 14, 2019 through July 14, 2020. During that period. an outbreak of novel coronavirus infection that began in China spread worldwide, including to the United States. To date, over 500,000 Americans have died from the coronavirus disease, and a total of at least 28,000,000 in this country have been infected with the virus—a figure that likely is

[1] Cincinnati does not dispute that it is routinely denying coverage for claims like the one made by Williams and does not contend that an "actual controversy" under the Declaratory Judgment Act is lacking.

significantly understated due to the absence of universal testing.

In its complaint, filed in May 2020, Williams alleges, citing World Health Organization reports, that the virus "is primarily transmitted from symptomatic people to others who are in close contact through respiratory droplets, by direct contact with infected persons, or by contact with contaminated objects and surfaces." Compl. ¶ 20. Williams further alleges that transmission can occur from persons who are infected with the disease who are pre-symptomatic or asymptomatic. *Id.* ¶¶ 21-22. Williams also alleges, citing reports in scientific journals, that coronaviruses can remain infectious on inanimate surfaces at room temperature for up to nine days and that "contamination of frequently touched surfaces is a potential source of virus transmission." *Id.* ¶ 23. The Court cites these allegations not to adopt their accuracy or completeness, but simply to describe the allegations in Williams's complaint.

Williams alleges that the pandemic and containment efforts led civil authorities to issue orders closing non-essential business establishments and mandating social distancing. It alleges that state governmental authorities have also issued orders "prohibiting the performance of non-urgent or non-emergency elective procedures and surgeries, which has forced the suspension of procedures at many medical, surgical, therapeutic, and dental practices." *Id.* ¶ 26. In Texas, as noted earlier, Williams alleges that the state's governor issued an order on March 22, 2020 that postponed "all elective surgeries and non-emergency medical and dental procedures." *Id.* ¶ 27. Williams says that this prevented it from conducting normal business operations through May 4.

Williams contends that it is entitled to coverage under two separate provisions of the Cincinnati policy: the business income provision, and the civil authority provision.

The business income coverage provision under DSW's insurance policy reads as follows:

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

Dkt. no. 33-1, p. 47 of 55.[2] The term "loss" is defined as follows: "Loss means accidental physical loss or accidental physical damage." Dkt. no. 33-1, p. 55 of 55. (In other words, the term "loss" is used to define itself.) The term "period of restoration" is defined as follows:

> "Period of restoration" means the period of time that:
>
> a. Begins at the time of "direct loss".
>
> b. Ends on the earlier of:
>
> (1) The date when the property at the "premises" should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
>
> (2) The date when business is resumed at a new permanent location.
>
> …

Dkt. no. 33-1, p. 55 of 55.

> The "civil authority" coverage provision reads as follows:
>
> When a Covered Cause of Loss causes direct damage to property other than Covered Property at a "premises", we will pay for the actual loss of "Business Income and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the "premises", provided that both of the following apply:

[2] The term "Covered Causes of Loss" is defined to mean "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." Dkt. no. 33-1, p. 11 of 55.

> (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
>
> (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.
>
> Civil Authority coverage for "Business Income" will begin immediately after the time of the first action of civil authority that prohibits access to the "premises" and will apply for a period of up to 30 consecutive days from the date on which such coverage began.
>
> Civil Authority coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the "premises" and will end 30 consecutive days after the date of that action; or when your Civil Authority coverage for [sic] "Business Income" coverage ends, whichever is later.

Dkt. no. 33-1, p. 48 of 55.

Cincinnati contends there is no coverage under either provision. Its principal argument regarding the business income coverage is that physical *alteration* to the property is required, and there is none. Contamination via coronavirus, Cincinnati contends, does not constitute damage to an insured's property because it can be removed by cleaning. Cincinnati's principal argument regarding the civil authority coverage is that access to Williams's property has not been prohibited but rather has been limited, which Cincinnati contends is insufficient to trigger coverage.

Discussion

On a motion to dismiss for failure to state a claim, the Court takes the plaintiff's factual allegations as true, draws reasonable inferences in the plaintiff's favor, and assesses whether the plaintiff has asserted a plausible basis for relief. *See, e.g., Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 826 (7th Cir. 2015) (citing *Ashcroft v. Iqbal*,

556 U.S. 662, 679 (2009)).

The first question involves the applicable law. Because this case is in federal court by way of diversity jurisdiction, the Court applies the choice-of-law rules of the forum state, Illinois. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 478, 496 (1941). Under Illinois law, construction of an insurance policy is typically governed by the location of the subject matter; the place of delivery of the contract; the domicile of the insured or the insurer; the place of the last act giving rise to the contract; the place of performance; or other places having a rational relationship to the contract. *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 166 Ill. 2d 520, 526-27, 655 N.E.2d 842, 845 (1995). In this case the insured property is in Texas; the insurance policy was delivered to Williams there; Williams is a Texas entity, whereas Cincinnati is an Ohio corporation. Cincinnati argues that Texas law applies, and Williams does not dispute this.

The Court will therefore apply Texas law to the parties' contract interpretation dispute. That said, in their briefs and arguments both sides have freely cited cases applying other states' law, likely because there does not appear to be an appreciable difference between the law of Texas and that of other states on the key contract interpretation principles involved. In addition, there is no controlling Texas authority on the particular policy points that the parties dispute here.

The Court will discuss the business income coverage term first and the civil authority term second.[3]

[3] This case, of course, does not stand alone in assessing an insurer's coverage obligations for business interruption related to the coronavirus pandemic. Each side has cited numerous cases supporting its position on the points at issue. These cases

1. Business income coverage

Cincinnati's primary argument on the business income provisions is that there is no coverage because Williams has alleged no facts indicating that its DSW's property was physically altered. Cincinnati contends that the term "direct loss" requires a physical loss, which it contends means a physical alteration of the insured's property. Nothing like this is alleged, Cincinnati argues, and as a result Williams is not entitled to coverage.

Insurance contracts are interpreted according to the same principles that govern contract interpretation generally. *See Utica Nat'l. Ins. Co. v. Am. Indem. Co.*, 47 Tex. Sup. Ct. J. 845, 141 S.W.3d 198, 202 (Tex. 2004). The primary goal is to give effect to the parties' written expression of their intent. *Balandran v. Safeco Ins. Co. of Am.*, 41 Tex. Sup. Ct. J. 1153, 972 S.W.2d 738, 741 (Tex. 1998). A court "must read all parts of the contract together, striving to give meaning to every sentence, clause, and word to avoid rendering any portion inoperative." *Id.* (citation omitted); *see also, e.g., Lynd Co. v. RSUI Indem. Co.*, 399 S.W.3d 197, 199 (Tex. App. 2012).

If, after applying these rules, a contract is subject to two or more reasonable interpretations, it is ambiguous. *See, e.g., Balandran*, 972 S.W.2d at 741. With an insurance contract, the interpretation of an ambiguous provision that favors the insured, if reasonable, is adopted, "even if the construction urged by the insurer appers to be more reasonable or a more accurate reflection of the parties' intent." *Id.* (quoting *Nat'l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991).

go both ways, with more favoring insurers than insureds. But none of them are controlling here. The Court has considered all of the cited cases, but it will not string-cite them, either as supporting or contrary authority.

Cincinnati's contention that the term direct loss requires physical damage to the insured's property runs afoul of these principles of construction. Specifically, even though the term loss is defined in the policy to mean *either* physical loss *or* physical damage, Cincinnati contends that it requires physical damage. This interpretation writes the term "loss" out of the definition, which contradicts the basic principle that "each word [in a contract] has some significance and meaning." *Gates v. Asher*, 154 Tex. 538, 531, 280 S.W.2d 247, 249 (1955); *see also, Choice! Power, L.P. v. Feeley*, 501 S.W.3d 199, 206 (Tex. App. 2016). More specifically, a court presumes that when different words are used together, they have different meanings, in other words, that they are not redundant. *Gulf Metals Indus., Inc. v. Chicago Ins. Co.*, 993 S.W.2d 800, 805 (Tex. App. 1999). In short, "loss"—as used in the policy definition that "Loss means accidental physical loss or accidental physical damage"—cannot simply mean "damage."

It is, perhaps, easier to say what loss *does not* mean than what it does mean. One problem is that the policy uses the term "loss" to define the term "loss." But the Court is persuaded that **a** reasonable factfinder could find that the term "physical loss" is broad enough to cover, as Williams argues, a deprivation of the use of its business premises. That's the common meaning of loss, *see* "Loss," *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/loss (last viewed Feb. 28, 2021), and there is no basis to believe that the Cincinnati policy uses the term any differently. In this regard, the Court agrees with its colleague Judge Edmond Chang, who recently concluded exactly this in assessing very similar insurance policy language. *See In re: Society Ins. Co. COVID-19 Bus. Interruption Protection Ins. Litig.*, MDL No.

2964, Case No. 20 C 5965, 2021 WL 679109, at *9 (N.D. Ill. Feb. 22, 2021).[4]

Cincinnati makes two additional arguments to the contrary. The first, found in its brief, involves the business income coverage's reference to the "period of restoration." As quoted earlier, business income coverage extends through the "period of restoration," defined as the date when the insured's property "should be repaired, rebuilt or replaced," or the date "when business is resumed at a new permanent location," whichever is earlier. Cincinnati argues that the text of these references makes it clear that "loss" requires a physical alteration—otherwise why the reference to repairing or replacing? "Repair," however, is not inherently physical; one need only consider common references to repairing a relationship or repairing one's health. *See* "Repair," *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/repair (last viewed Feb. 28, 2021). In a situation like the one at issue here, the "loss" would be "repaired" if and when orders by governmental authorities permitted full use of the property. *See In re Society Ins. Co.*, 2021 WL 679109, at *9 (concluding that "[t]here is nothing inherent in the meanings of [the] words [repair or replace] that would be inconsistent with charactering the Plaintiffs' loss of their space due to the shutdown orders as a physical loss.")

Cincinnati's final point on this issue is not made in its brief but was made at oral argument. The Court sets aside the question of forfeiture and will deal with the point on its merits. Cincinnati seems to contend that "loss to" property means something different from "loss of" property (the Court notes, in this regard, that the Society

[4] Also like Judge Chang, given the Court's reading of the policy's "loss" term, it need not determine whether, as Williams contends, it has also adequately alleged physical "damage" to its property. *See In re Society Ins. Co.*, 2021 WL 679109, at *8 n.5.

Insurance policy language assessed by Judge Chang uses the phrase "loss of"). The Court acknowledges that the words are different, but this begs the question of what "loss to" property means. At best for Cincinnati, it's poor English that makes the term ambiguous—which does not help Cincinnati in the present situation, given the principle that ambiguities in insurance policies are typically construed against the insurer. That aside, Cincinnati cites nothing authoritative or persuasive that would indicate that "loss to" an insured's property includes only physical damage that deprives the insured of the use of the property. And finally, Cincinnati's reading is simply another way of attempting to read the terms "loss" and "damage" as meaning the same thing, which they plainly do not under the terms of this policy, which expressly defines the term "loss" as including both.

For these reasons, the Court concludes that Williams's claims regarding the business income coverage state viable claims upon which relief may be granted.

2. Civil authority coverage

The Court reaches a different conclusion regarding Williams's claim under the civil authority coverage term. Cincinnati makes multiple arguments against coverage, but the Court need only deal with one: the contention that Williams has not alleged that "[a]ccess to the area immediately surrounding the damaged property is *prohibited* by civil authority . . . ." Dkt. no. 33-1, p. 48 of 55 (emphasis added).

Here the dispute involves the meaning of the term "prohibited." The common meaning is to forbid or prevent. *See* "Prohibit," *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/prohibit (last viewed Feb. 28, 2021). Williams's complaint concedes that did not happen in its case: it alleges it was

precluded only from conducting elective and non-emergency dental procedures, not from non-elective, emergency procedures. Thus there was no "prohibit[ion]." Williams argues that the restriction still constitutes a *partial* prohibition, but that's essentially an oxymoron. In this regard, the Court (again) agrees with Judge Chang in the *In re Society Insurance* case, in which he concluded that similar claims by restaurant owners had to be dismissed given their concession that access to their property by employees and others was permitted for limited ongoing operations—in that case, take-out sales and limited in-person dining. *In re Society Ins. Co.*, 2021 WL 679109, at *10.

Conclusion

For the reasons stated above, the Court dismisses count 3 of plaintiff's complaint (concerning the "civil authority" coverage term) but otherwise denies defendant's motion to dismiss [dkt. no. 32]. Defendant is directed to answer the remaining claims by no later than March 22, 2021. The case is set for a telephonic status hearing on March 5, 2021 at 9:05 a.m. to set (or reset) a schedule for further proceedings. The following call-in number will be used for the hearing: 888-684-8852, conference code 746-1053. Counsel should wait for the case to be called before announcing themselves. The parties are directed to confer and are to file a status report on March 4, 2021 proposing a schedule for entry by the Court.

Date: February 28, 2021

MATTHEW F. KENNELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: SOCIETY INSURANCE CO. COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION	)	MDL No. 2964 Master Docket No. 20 C 5965 Judge Edmond E. Chang Magistrate Judge Jeffrey I. Cummings
This Document Relates to the Following Cases:	)	
VALLEY LODGE CORP., Plaintiff, v. SOCIETY INSURANCE, a Mutual Company, Defendant.	)	No. 20 C 02813
RISING DOUGH, INC. (d/b/a MADISON SOURDOUGH), *et al.* individually and on behalf of all others similarly situated, Plaintiffs, v. SOCIETY INSURANCE, Defendant.	)	No. 20 C 05981
BIG ONION TAVERN GROUP, LLC, *et al.*, Plaintiffs, v. SOCIETY INSURANCE, INC., Defendant.	)	No. 20 C 02005

MEMORANDUM OPINION AND ORDER

This multi-district litigation addresses Society Insurance's broad-based denials of business-interruption coverage for a variety of restaurants and other businesses in the hospitality industry whose operations have been affected by the COVID-19 pandemic.

This Opinion decides dispositive motions in each of the three bellwether cases selected by the Court. R. 69. Those cases are: *Big Onion Tavern Group, LLC, et al. v. Society Insurance*, No. 1:20-cv-02005; *Valley Lodge Corp. v. Society Insurance*, No. 1:20-cv-02813; and *Rising Dough, Inc., et al. v. Society Insurance*, No. 1:20-cv-05981. Society has filed a motion to dismiss for failure to state a claim in the *Rising Dough* action, R. 20, No. 20 C 05981, Society's Br. in Support of Mot. to Dismiss; and a motion to dismiss for failure to state a claim or, in the alternative, for summary judgment in the *Big Onion* and *Valley Lodge* actions. R. 113, No. 20 C 2005, Society Mem. of Law; R. 17, No. 20 C 02813, Society Mem. of Law.

As detailed in this Opinion, Society's motions to dismiss and summary judgment motions are denied to the extent that they target the claims for business-interruption coverage. Those claims do survive. Also, the Section 155 claims survive in *Big Onion* and *Valley Lodge*. But the summary judgment motions in the *Big Onion* and *Valley Lodge* actions are granted as to the coverage theories under the Civil Authority and the Contamination provisions, and in the *Rising Dough* case as to the Sue and Labor clause.

I. Background

As readers of this Opinion know all too well, the novel coronavirus has generated a global pandemic lasting almost an entire year. Many government agencies around the world have responded by closing (at least in part) businesses of all kinds and by restricting activities, particularly group gatherings.

At issue here are the impacts of those closures on the plaintiffs in those three cases: specifically, businesses in the hospitality industry in Illinois (the *Big Onion* and *Valley Lodge* plaintiffs), and Wisconsin, Minnesota, and Tennessee (the *Rising Dough* plaintiffs). All have been forced to modify their normal business operations due to the pandemic—for example, suspending in-person dining and relying only on take-out orders—and all allege that they have lost significant revenue as a result. R. 1, 20 C 2813, *Valley Lodge* Compl. ¶¶ 3-4, 33-42; R. 14, 20 C 5981, *Rising Dough* Am. Class Action Compl. ¶¶ 50–80; R. 29, No. 20 C 2005, *Big Onion* First Am. Compl. ¶¶ 6, 97–108. All plaintiffs—indeed, all the plaintiffs in all the cases within this MDL, by definition—are insured by Society Insurance against certain interruptions to their business. The fundamental questions at stake in this litigation are how properly to classify the interruption that has happened here, and whether this particular interruption is covered under the policy. Beyond following state and local government orders and guidance, the *Rising Dough* plaintiffs also allege that the losses to their businesses occurred as a direct result of the actual presence of the coronavirus itself on the premises. R. 26, 20 C 5981, *Rising Dough* Pls.' Resp. at 8; R. 14, 20 C 5981, Am. Class Action Compl. ¶ 80 ("As a result of the presence of COVID-19 *and* the

Closure Orders, Plaintiffs and the other Class members lost Business Income and incurred Extra Expense.") (emphasis added). The *Big Onion* plaintiffs have similarly alleged that the "continuous presence of the coronavirus on or around Plaintiffs' premises has created a dangerous condition and rendered their premises unsafe and unfit for their intended use and therefore caused physical property damage or loss under the Policies." R. 29 ¶ 100.

For its part, Society counters that these losses, whether caused by the coronavirus directly or by the government orders, simply do not fall within the plain language of the policy invoked by the Plaintiffs. In particular, the Plaintiffs allege that coverage applies under the following policy provisions, common to all plaintiffs (although each group of plaintiffs has sought recovery under different subsets of these provisions)[1]:

- Business Income coverage, on the Businessowners Special Property Coverage Form, section 5, Additional Coverages:

  g. Business Income

  (1) Business Income

  (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 covered property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss….

[1]The contested policy language is identical to all plaintiffs, and thus will be cited according to the policy's own labeling of sections and subsections. Full copies of the policies can be found, *e.g.*, at R. 14, 20 C 5981, Exh. A; R. 1, 20 C 2813, Exh. B; R. 29, 20 C 2005, Exh. D.

(b) We will only pay for loss of Business Income that you sustain during the "period of restoration" and that occurs within 12 consecutive months after the date of direct physical loss or damage.

- Civil Authority coverage, on the Businessowners Special Property Coverage Form, section 5, Additional Coverages:

k. Civil Authority

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within the area; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority coverage for Business Income will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage begins.

Civil Authority coverage for necessary Extra Expense will begin immediately after the time of first action of civil authority that prohibits access to the described premises and will end:

(1) Four consecutive weeks after the time of that action; or

(2) When your Civil Authority coverage for Business Income ends; whichever is later.

The definitions of Business Income and Extra Expense contained in the Business Income and Extra Expense Additional Coverages also apply to this Civil Authority Additional Coverage. The Civil Authority Additional Coverage is not subject to the Limits of Insurance.

- Contamination coverage, on the Businessowners Special Property Coverage Form, section 5, Additional Coverages:

m. Contamination

If your "operations" are suspended due to "contamination":

(1) We will pay for your costs to clean and sanitize your premises, machinery and equipment, and expenses you incur to withdraw or recall products or merchandise from the market. We will not pay for the cost or value of the product.

The most we will pay for any loss or damage under this Additional Coverage arising out of the sum of all such expenses occurring during each separate policy period is $5,000; and

(2) We will also pay for the actual loss of Business Income and Extra Expense you sustain caused by

(a) "Contamination" that results in an action by a public health or other governmental authority that prohibits access to the described premises or production of your product.

(b) "Contamination threat"

(c) "Publicity" resulting from the discovery or suspicion of "contamination."

Coverage for the actual loss of Business Income under this section will begin immediately upon the suspension of your business operations and will continue for a period not to exceed a total of three consecutive weeks after coverage begins.

Coverage for necessary Extra Expense under this section will likewise begin immediately upon the suspension of your business operations and will continue only for a total of three consecutive weeks after coverage begins, or until the loss of Business Income coverage ends, whichever is longer. The coverages under this section may not be extended nor repeated. The definitions of Business Income and Extra Expense, contained in the Business Income and Extra Expense Additional Coverages section shall also apply to the additional coverages under this section.

(3) Contamination Exclusions

All exclusions and limitations apply except Exclusions **B.2.j.(2)** and **B.2.j.(5)**

(4) Additional Definitions:

(a) "Contamination" means a defect, deficiency, inadequacy or dangerous condition in your products, merchandise or premises.

(b) "Contamination threat" means a threat made by a third party against you to commit a "malicious contamination" unless the third party's demand for money or other consideration is met.

(c) "Malicious contamination" means an intentional, malicious and illegal altercation or adulteration of your products.

(d) "Publicity" means a publication or broadcast by the media, of the discovery or suspicion of "contamination" at a described premise.

- Extra Expense coverage, on the Businessowners Special Property Coverage Form, section 5, Additional Coverages:

h. Extra Expense

(1) 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 covered property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss….

(4) We will only pay for Extra Expense that occurs within 12 consecutive months after the date of direct physical loss or damage. This Additional Coverage is not subject to the Limits of Insurance.

- the Sue and Labor provision, on the Businessowners Special Property Coverage Form, part E, Property Loss Conditions:

3. Duties in the Event of Loss or Damage

> a. You must see that the following are done in the event of loss or damage to Covered Property: …
>
> (4) Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. This will not increase the Limit of Insurance. However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged property aside and in the best possible order for examination.

It is worth pausing here to note that the policy does *not* contain a specific exclusion of coverage for losses due to a virus or pandemic, which is now—the Plaintiffs allege—a standard exclusion in the insurance industry. *See, e.g.*, R. 124-1, 20 C 2005, *Big Onion* Pls.' Resp. at 23-24.

Society denied the Plaintiffs' claims for coverage in several ways. First, it did so preemptively and *en masse*, circulating a memorandum, on March 16, 2020, to its insurance agency partners, observing that "a quarantine of any size, or brought about by a governmental action without a Covered Cause of Loss, would likely not trigger Business Income or Extra Expense coverages under our policies"; "A widespread governmental imposed shutdown due to COVID-19 (coronavirus) would likely not trigger the additional coverage of Civil Authority"; COVID-19 "would be unlikely to trigger" Contamination coverage because it "is spread through human contact and is not seen as a foodborne illness"; and "Any alleged COVID-19 (coronavirus) exposures or spoilage from the extended shelf life of a product is not a Spoilage Covered Cause of Loss." R. 29-1, 20 C 2005, Exh. A, Email from Society CEO Rick Parks re: COVID-19 &

Insurance Coverage, at 2-3. Nonetheless, the memorandum "encourage[d] any policyholder or third-party claimant who wishes to present a claim to do so." *Id.* at 2.

Second, Society denied individual claims that various Plaintiffs filed. For example, in a letter to Plaintiff Legacy Hospitality LLC (which does business as The Vig), Society asserted that "A slowdown in business due to the public's fear of the coronavirus or a suspension of business because a governmental authority (i.e. the governor or the mayor) has ordered or recommended all or certain types of businesses to close is not a direct physical loss. In addition, the actual or alleged presence of the coronavirus is not a Covered Cause of Loss." R. 29-2, 20 C 2005, Exh. B, Letter from Society to Legacy Hospitality LLC, at 3.

Third, Society issued another memorandum on March 27, 2020, this time to all of its policyholders, entitled "A Message From our CEO on Pandemic Crisis." That memorandum does not explicitly say that Society has denied or will deny all claims resulting from pandemic-related shutdowns, but Society asserted that "pandemic events" are generally excluded from insurance coverage:

> Insurance has always identified and excluded coverage for loss events that are so large, or are so unpredictable, that they outstrip the capacity of the industry to fund losses, or even price the exposure accurately. Exclusions for acts of war, nuclear incidents and flood are part of insurance policies for these reasons. These are the same reasons that coverages for pandemic events are excluded. The insurance industry combined does not have enough assets to fund these losses and still be able to meet past and future obligations. Only government has the financial power to respond to these types of events.

R. 29-3, 20 C 2005, Exh. C, Mem. from Society CEO Rick Parks, at 2. Certainly, at this point in the litigation, all parties agree that Society has not paid, and does not

intend to pay, the Plaintiffs' pandemic-related claims. *See* R. 29, 20 C 2005, *Big Onion* First Am. Compl., ¶ 19; R. 113, 20 C 2005, Society's Mem. of Law at 3.

The Plaintiffs filed these lawsuits shortly after these denials of coverage. Valley Lodge and the *Big Onion* plaintiffs filed their complaints in the Northern District of Illinois. R. 1, 20 C 2813; R. 1, 20 C 2005. The *Rising Dough* plaintiffs filed in the Eastern District of Wisconsin. R. 1, 20 C 5981. In October 2020, the Judicial Panel on Multidistrict Litigation issued a transfer order centralizing all pandemic-related litigation against Society Insurance in this Court. R. 1. After appointing counsel to lead the litigation on the Plaintiffs' behalf, and after conferring with the parties on which motions to use as bellwethers, the Court picked these three cases. R. 69. To repeat, Society has filed a motion to dismiss for failure to state a claim in the *Rising Dough* action, and a motion to dismiss or, in the alternative, for summary judgment in the *Big Onion* and *Valley Lodge* actions. R. 20, 20 C 5981; R. 113, 20 C 2005; R. 17, 20 C 2813. Because the key interpretive question that cuts across all of the motions is primarily a question of law, the Court first will address that issue, and then discuss the remainder of the dismissal motions and the summary judgment motions.

II. Standards of Review

A. Motion to Dismiss

Under Federal Rule of Civil Procedure 8(a)(2), a complaint generally need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This short and plain statement must "give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Bell*

Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (alteration in original) (internal quotation marks and citation omitted). The Seventh Circuit has explained that this rule "reflects a liberal notice pleading regime, which is intended to 'focus litigation on the merits of a claim' rather than on technicalities that might keep plaintiffs out of court." *Brooks v. Ross*, 578 F.3d 574, 580 (7th Cir. 2009) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)).

"A motion under Rule 12(b)(6) challenges the sufficiency of the complaint to state a claim upon which relief may be granted." *Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). These allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. The allegations that are entitled to the assumption of truth are those that are factual, rather than mere legal conclusions. *Iqbal*, 556 U.S. at 678-79.

B. Summary Judgment Motion

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating summary judgment motions, courts must view the facts and draw reasonable inferences

in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). The Court may not weigh conflicting evidence or make credibility determinations, *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 704 (7th Cir. 2011), and must consider only evidence that can "be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). The party seeking summary judgment has the initial burden of showing that there is no genuine dispute and that they are entitled to judgment as a matter of law. *Carmichael v. Village of Palatine*, 605 F.3d 451, 460 (7th Cir. 2010); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Wheeler v. Lawson*, 539 F.3d 629, 634 (7th Cir. 2008). If this burden is met, the adverse party must then "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256.

III. Analysis

A. Elements of a Coverage Claim

Before getting to the big-ticket dispute over the coverage provision, it is worth noting that the Plaintiffs have otherwise adequately stated a claim for coverage under the policy. First, each plaintiff has sought a declaratory judgment from this Court pursuant to 28 U.S.C. § 2201. R. 1, 20 C 2813, *Valley Lodge* Compl., ¶¶ 43-48; R. 14, 20 C 5981, *Rising Dough* Am. Compl., ¶¶ 144-178; R. 29, 20 C 2005, *Big Onion* First Am. Compl., ¶¶ 109-114. The appropriate substantive body of law in the *Big Onion* and *Valley Lodge* actions is Illinois state law. Under Illinois law, the "essential elements of a breach of contract claim are: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4)

resultant injury to the plaintiff." *Pepper Const. Co. v. Palmolive Tower Condominiums, LLC*, 59 N.E.3d 41, 66 (Ill. App. 1st 2016). Both the *Big Onion* and *Valley Lodge* plaintiffs have alleged—and Society does not contest—that the insurance policies that the Plaintiffs held are valid and enforceable contracts; the Plaintiffs have performed their obligations under those contracts by paying premiums; the Plaintiffs have suffered losses of business income and sought payment from Society under the policies; and Society has denied coverage. R. 29, 20 C 2005, *Big Onion* First Am. Compl., ¶¶ 116-119; R. 1, 20 C 2813, *Valley Lodge* Compl., ¶¶ 49-53.

In the *Rising Dough* action, the laws of Wisconsin, Minnesota, and Tennessee govern (depending on the particular Plaintiff), although the analysis is nearly identical. R. 14, 20 C 5981, *Rising Dough* Am. Compl., ¶¶ 99–178. Again, setting aside the coverage question itself, these claims otherwise adequately state a claim for relief. "The complaint pleads a contract (duty), a breach of that contract and damages flowing reasonably from that breach and that totally states a cause of action." *Northwestern Motor Car, Inc. v. Pope*, 187 N.W.2d 200, 203 (Wis. 1971); *accord Lyon Financial Services, Inc. v. Illinois Paper and Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014) ("The elements of a breach of contract claim are (1) formation of a contract, (2) performance by plaintiff of any conditions precedent to his right to demand performance by the defendant, and (3) breach of the contract by defendant.") (cleaned up)[2]; *Federal Ins. Co. v. Winters*, 354 S.W.3d 287, 291 (Tenn. 2011) ("In a breach of contract action,

[2]This opinion uses (cleaned up) to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 Journal of Appellate Practice and Process 143 (2017).

claimants must prove the existence of a valid and enforceable contract, a deficiency in the performance amounting to a breach, and damages caused by the breach."). To repeat, here the Plaintiffs have pleaded, and Society does not contest, that the insurance policies constitute a valid and enforceable contract, and that Society has not paid on the Plaintiffs' requests for coverage. It is time to move on to the key interpretive question of coverage.

B. "Caused" by "Direct Physical Loss"

As a threshold matter, generally speaking "the interpretation of an insurance policy and the respective rights and obligations of the insurer and the insured [are] questions of law that the court may resolve summarily." *Roman Catholic Diocese of Springfield in Ill. v. Maryland Cas. Co.*, 139 F.3d 561, 565 (7th Cir. 1998) (applying Illinois law). The Court proceeds first by "examin[ing] the facts of the insured's claim to determine whether the policy's insuring agreement makes an initial grant of coverage." *American Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65, 73 (Wis. 2004). If coverage applies, then the Court "next examine[s] the various exclusions to see whether any of them preclude coverage of the present claim. Exclusions are narrowly or strictly construed against the insurer if their effect is uncertain." *Id.*; *accord Blaine Const. Corp. v. Insurance Co. of North America*, 171 F.3d 343, 349 (6th Cir. 1999) (applying Tennessee law); *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006). Having said all that, although "contract interpretation is often a question of law well suited for disposition on summary judgment … the trier of fact, not [the] court, must resolve the conflicting interpretations

of the agreement" "when a contract contains ambiguities that the parties must explain through extrinsic evidence." *Zemco Mfg., Inc. v. Navistar Intern. Transp. Corp.*, 270 F.3d 1117, 1127 (7th Cir. 2001). Just so here.[3]

The key text setting forth the business-interruption coverage requires that the loss in business be caused by "direct physical loss" of covered property:

> 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 covered property* at the described premises. The loss or damage *must be caused by or result from a Covered Cause of Loss*.

Businessowners Special Property Coverage Form, A.3 (emphasis added). In turn, the policy defines a "Covered Cause of Loss" as a "Direct Physical Loss unless the loss is excluded or limited under this coverage form." *Id.* The parties dispute whether the coronavirus itself, the pandemic, or the government shutdown orders (or some combination of those three things) trigger coverage under this provision.

1. Causation

To start untangling the policy's text: first, the policy requires that the business suspension must be *caused by* direct physical loss of (or damage to) covered property. So far, simple enough: the insured must be able to point to a direct physical loss of property as the cause of the business's suspension. But then the policy goes on to say

[3]Strictly speaking, Society has only moved for summary judgment in the *Big Onion* and *Valley Lodge* actions. But the parties have treated Society's motion to dismiss the *Rising Dough* action under Federal Rule of Civil Procedure 12(b)(6) more like a Rule 12(c) motion for judgment on the pleadings. Because Society's motions for summary judgment rely, and the Court has decided them on, legal rather than factual arguments, the Court has also addressed the relevant legal standards under the controlling state law in the *Rising Dough* case.

that the loss of property that is the cause of the suspension must, in turn, be caused by or result from a *Covered Cause of Loss*. One would expect that, in defining what is a Covered *Cause* of Loss, the policy would set forth a definition that describes a *cause* of loss—not the loss itself. Instead, the policy turns back on itself and defines Covered Cause of Loss only as a "Direct Physical Loss." Businessowners Special Property Coverage Form, A.3. So putting the coverage text together with the definition, a covered business suspension must be caused by direct physical loss of covered property—and then the loss itself must be caused by or result from a direct physical loss.

In resisting coverage, Society first argues that the Plaintiffs' businesses have been interrupted by the various state and local shutdown orders—not by the coronavirus itself. *See, e.g.*, R. 113, 20 C 2005, Society's Mem. of Law at 9. To Society's way of thinking, even if the coronavirus and the resulting pandemic could qualify as a "direct physical loss," it is really the governmental *orders* that caused the suspensions of business, and those orders—as the superseding cause of the suspensions—do not qualify as a "direct physical loss" under the policy. *Id.* at 10-11.

But Society's characterization of the cause of the business interruptions is not supported by the governing law of the pertinent States, none of which impose such a strict causation requirement. *See, e.g.*, *Manpower, Inc. v. Ins. Co. of the State of Pennsylvania*, No. 08-C-0085, 2009 WL 3738099, at *6 (E.D. Wis. Nov. 3, 2009) (Wisconsin law); *Phillips v. Parmelee*, 840 N.W.2d 713, 717-19 (Wis. 2013); *Fandrey ex rel. Connell v. American Family Mut. Ins. Co.*, 680 N.W.2d 345 (Wis. 2004); *Friedberg v. Chubb & Son, Inc.*, 691 F.3d 948, 952-53 (8th Cir. 2012) (Minnesota law); *State Bank*

of Bellingham v. BancInsure, Inc., 823 F.3d 456, 461 (8th Cir. 2016) (Minnesota law); *Capitol Indemnity Corp. v. Braxton*, 24 Fed. Appx. 434, 440-41 (6th Cir. 2001) (Tennessee law); *Planet Rock, Inc. v. Regis Ins. Co.*, 6 S.W.3d 484, 491-92 (C. App. Tenn. 1999); *For Senior Help, LLC v. Westchester Fire Ins. Co.*, 451 F. Supp. 3d 837 (M.D. Tenn. Mar. 31, 2020) (Tennessee law); *see also Clark v. Sputniks, LLC*, 368 S.W.3d 431, 440-41 (Tenn. 2012). Indeed, during the oral argument on January 14, 2021, R. 118, both sides seemed to agree that a proximate-causation standard applies under Illinois, Wisconsin, and Minnesota law, and implied as applicable under Tennessee law (which has a somewhat different concurrent-causation analysis).

The State most up for debate on this point is Illinois. At least some cases disavow a proximate-cause standard under Illinois law in deciding insurance-policy coverage questions. *See, e.g.*, *Sports Arena Mgmt., Inc. v. Great Am. Ins. Group*, No. 06 C 788, 2007 WL 684003, at *3 (N.D. Ill. Mar. 1, 2007) (citing *Transamerica Ins. Co. v. South*, 125 F.3d 392, 398 (7th Cir. 1997)). But more recent Illinois cases (or cases interpreting Illinois law) appear to endorse the proximate-cause analysis, or at least view it as available if the policy language so specifies. *See, e.g.*, *Parker v. Allstate Indemnity Co.*, 427 F. Supp. 3d 1006, 1011 (S.D. Ill. Dec. 16, 2019) (citing *Heuer v. N.W. Nat'l Ins. Co.*, 33 N.E. 411, 412 (Ill. 1893)); *Bozek v. Erie Ins. Group*, 46 N.E.3d 362, 367–69 (Ill. App. Ct. 2015) (explaining the need for anti-concurrent causation provisions because "it appears that Illinois favors the efficient-or-dominant-proximate-cause rule in the absence of contrary language"); *Moda Furniture, LLC v. Chicago Title Land Trust Co.*, 35 N.E.3d 1139, 1147, 1154–55 (Ill. App. Ct. 2015). Indeed,

in Illinois insurance-coverage cases, the proximate-cause standard traces back over a century to *Heuer v. N.W. National Insurance*. In that case, an unlucky storeowner bought an insurance policy covering loss or damage caused by fire. 33 N.E. at 411. But the policy excluded coverage for any loss caused by an explosion. *Id.* In the basement of the store, a lit match sparked an explosion of illuminating gas; the explosion in turn caused the floor of the store to collapse, and the goods were damaged in the collapse. *Id.* Although the Illinois Supreme Court refused to characterize the fire as the cause of the damage, *Heuer* applied a proximate-cause standard: "It is a well-settled principle in the law of insurance that the *proximate*, and not the remote, cause of the loss must be regarded, in order to ascertain whether the loss is covered by the policy or not." *Id.* at 412 (emphasis added). The goods had not been damaged or burned by any fire, but instead were damaged by the floor's collapse. *Id.* So, although the storeowner lost the coverage claim there, the key point is that the Illinois Supreme Court applied the proximate-cause standard to determine the cause of the loss.

Here, the Society policy does not purport to alter the proximate-cause standard—or at least a reasonable jury could so find. The policy does *not* say that the business suspension must be *directly* caused by a Covered Cause of Loss; the text simply says that the business suspension must be "caused by" a Covered Cause of Loss. Businessowners Special Property Coverage Form, A.3. It is true that Covered Cause of Loss is defined as "direct physical loss," but that definition does not purport to impose a stricter causation standard than proximate cause. Instead, the proximate-causation standard applies both to the adjective "direct" in the term "direct physical loss," and

to the "caused by" and "caused by or result from" language preceding the loss and damage terms and definitions. As to "caused by" and "result from," these are precisely the kinds of open-ended causal terms that imply the default causal standard under State law, without further constraint by any other language in the policy.

With proximate cause as the governing causation standard, a reasonable jury could find (at least on the factual record so far) that the novel coronavirus and the resulting pandemic proximately caused the business interruptions. "A proximate cause is one that produces an injury through a natural and continuous sequence of events unbroken by any effective intervening cause." *Cleveland v. Rotman*, 297 F.3d 569, 573 (7th Cir. 2002). Even if the government shutdown orders (and not the pandemic itself) played a causal role in the Plaintiffs' losses, and even if those orders cannot be construed as a "direct physical loss," the shutdown orders were proximately caused by the pandemic. At least a reasonable jury could so find given the policy's ambiguity, in which case the policy language must be construed in favor of the Plaintiffs. *See Berg v. N.Y. Life Ins. Co.*, 831 F.3d 426, 429 (7th Cir. 2016); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1212 (Ill. 1992).

2. Direct Physical Loss

This leaves the question of whether the Plaintiffs' loss is "physical" in nature—whether it is caused by the coronavirus itself, the coronavirus pandemic, or government shutdown orders.[4] Remember here that the operative text is "direct physical

[4]Contrary to Society's arguments, the Plaintiffs have in fact pleaded that their losses were caused by the virus, the pandemic, and the shutdown orders—not only the shutdown orders. *See* R. 29, 20 C 2005, *Big Onion* First Am. Compl. ¶ 6; R. 14, 20 C 5981, *Rising Dough* Am. Compl., ¶ 12; R. 1, 20 C 2813, *Valley Lodge* Compl. ¶¶ 36, 40.

loss of or damage to covered property." The disjunctive "or" in that phrase means that "physical loss" must cover something different from "physical damage." "[I]t is axiomatic that courts interpret contracts so as to give effect to all of their provisions." *In re Airadigm Communications, Inc.*, 616 F.3d 642, 657 (7th Cir. 2010). That interpretive principle refuses Society's first argument: that the coronavirus could not constitute "direct physical loss of or damage to" the covered property because the virus "does not cause a tangible change to the physical characteristics of property." *See* R. 113, 20 C 2005, Society's Mem. of Law at 5-6.[5] It would be one thing if coverage were limited to direct physical "damage." But coverage extends to direct physical "loss of" property as well. So the Plaintiffs need not plead or show a change to the property's physical characteristics.

The more challenging interpretive question is whether the restrictions imposed on the Plaintiffs' use of their premises count as *physical* loss. Society observes, and the Plaintiffs do not contest, that most of the restaurants have been able to use their kitchens and thus continue to operate on a take-out and delivery order basis during much (if not all) of the pandemic period. *See, e.g.*, R. 114, 20 C 2005, Def.'s LR

[5]The Plaintiffs dispute that there has been no physical "damage" to their property. According to the Plaintiffs, the coronavirus particles themselves have in fact rendered, or could render, physical harm to their property given that the virus lingers on surfaces and remains in the air even after decontamination efforts. *See, e.g.*, R. 32, 20 C 2813, Pls.' Resp. at 2–3. In particular, Valley Lodge has introduced evidence as to the coronavirus' persistence on surfaces, arguing that the virus physically interacts with surfaces in restaurants, such as tables and chairs, so as to qualify as "direct physical loss or damage" under the policy. *See* R. 34-1, 20 C 2813, Decl. of Erik Dubberke. Society disputes these facts. *See* R. 47, Def.'s Resp. to Pls.' St. of Additional Facts. At this stage of the case, there is no need to definitively decide that issue because, at least in the context of this dispute, "loss of" property provides for a broader scope of coverage.

56.1 St. of Undisputed Mat. Facts, ¶¶ 39–78. But the Plaintiffs have not been able to use their premises as they did for indoor, sit-down service before the pandemic. Depending on the particulars of applicable shutdown orders and the Plaintiffs' premises, some have not been able to offer on-site service at all, while others have only been able to do so at limited capacity. *See, e.g.*, R. 125, 20 C 2005, Pls.' Resp. and Obj. to Def.'s LR 56.1 St. of Undisputed Mat. Facts, ¶¶ 39–78. These on-site service restrictions have caused most of the Plaintiffs' losses for which they seek business-interruption coverage. According to Society, these losses are not "physical" because tables and chairs, walls and floors, stovetops and sinks remain in good working order; indeed, the Plaintiffs have been able to use the premises to conduct some amount of business. R. 113, 20 C 2005, Society's Mot. at 9–10.

But a reasonable jury can find that the Plaintiffs did suffer a direct "physical" loss of property on their premises. First, viewed in the light most favorable to the Plaintiffs, the pandemic-caused shutdown orders do impose a *physical* limit: the restaurants are limited from using much of their physical space. It is not as if the shutdown orders imposed a *financial* limit on the restaurants by, for example, capping the dollar-amount of daily sales that each restaurant could make. No, instead the Plaintiffs cannot use (or cannot fully use) the physical space. Indeed, the policy defines "covered property" to include buildings at the premises, not just personal property or movable items. Businessowners Special Property Coverage Form, A.1.

Another way to understand the physical nature of the loss inflicted by the shutdown orders is to consider how a restaurant might mitigate against the suspension

of operations caused by, say, a 25%-capacity limitation on the number of guests inside the restaurant. If the restaurant could expand its *physical* space, then the restaurant could serve more guests and the loss would be mitigated (at least in part). The loss is physical—or at the very least, a reasonable jury can make that finding.

Against this, Society also argues that the Court should "construe the policy as a whole," R. 20, 20 C 5981, Society's Br. in Support of Mot. to Dismiss, at 17, and read the coverage provision in light of the later definition of the "Period of Restoration." Remember that Society promised to pay only for loss of business income during the "period of restoration" (with a cap of 12 months after the date of direct physical loss). Businessowners Special Property Coverage Form, A.5.g(1)(b); H.12. The definition of "Period of Restoration" says that coverage for loss of business income "ends on the earlier of" "the date when the property at the described premises should be *repaired, rebuilt[,] or replaced* with reasonable speed and similar quality; or the date when business is resumed at a new permanent location." *Id.* (emphasis added). In Society's view, "repaired, rebuilt[,] or replaced" implies that covered "physical loss or damage" is necessarily tangible, requiring a physical injury to the covered property rather than mere loss of use.

This argument did give the Court some pause; after all, it is generally true that the policy language must be considered as a whole so that all of its parts fit together. But too many textual clues point the other way. First and foremost, the "Period of Restoration" describes a *time* period during which loss of business income will be covered, rather than an explicit definition of coverage. Instead, the explicit definition of

coverage is that direct physical "loss of" property is covered—not just "damage to" property, as explained earlier. Second, the limit on the Period of Restoration does include the words "repaired" and "replaced," that is, the restoration period ends when the property at the premises is "repaired" or "replaced." There is nothing inherent in the meanings of those words that would be inconsistent with characterizing the Plaintiffs' loss of their space due to the shutdown orders as a physical loss. If, for example, the coronavirus risk could be minimized by the installation of partitions and a particular ventilation system, then the restaurants would be expected to "repair" the space by installing those safety features. As another example, if a restaurant could mitigate the loss caused by a percentage-capacity limit by "replacing" some of its dining-room space by opening its adjacent banquet-hall room to increase the number of guests it could serve, then the restaurant would be expected to "replace" the loss of space by doing so. So the definition of the Period of Restoration is consistent with interpreting direct physical loss of property to include the loss of physical use of the covered property imposed by the shutdown orders.

Here, the scope of the term "direct physical loss" is genuinely in dispute. A reasonable jury could find for either side based on the arguments and factual record presented so far in the litigation. The Court's "function [at summary judgment] is not to weigh the evidence but merely to determine if there is a genuine issue for trial." *Zemco Mfg.*, 270 F.3d at 1122–23 (cleaned up). "[R]easonable people could come to different conclusions" on the coverage provision and "resort to extrinsic evidence will

be appropriate." *See id.* at 1127.[6] Society's motion for summary judgment is denied as to the policy's business-interruption coverage.

C. Civil Authority Coverage & Contamination Coverage

Although the business-interruption coverage is sufficient, at this stage of the litigation, for the coverage cases to move forward, it is worth addressing the other coverage theories advanced by the Plaintiffs. A decision now makes sense because, as it turns out, the other coverage theories can be decided on the current record and because it is worth streamlining discovery upfront and eliminating discovery disputes now rather than later.

First, Society has moved for summary judgment against the Plaintiffs' claims brought under the policy's Civil Authority coverage. The Civil Authority coverage pays for loss of income caused by action of a civil authority that "prohibits access" to the insured's premises and to the "area immediately surrounding" the property:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority *that prohibits access to the described premises*, provided that both of the following apply:
>
> (1) *Access* to the area immediately surrounding the damaged property is *prohibited* by civil authority as a result of the damage, and the described premises are within the area; and

[6]On the issue of extrinsic evidence, it is worth noting that the parties dispute the implication of the absence of a virus or pandemic exclusion in the policy. According to the Plaintiffs, those exclusions have been common in the insurance industry since the SARS epidemic of 2003. R. 118. The Plaintiffs say that this fact alone, given that Society would or should have known of this industry best practice, implies that the policy necessarily encompasses business interruption due to viruses and pandemics. R. 124, 20 C 2005, Pls.' Resp. at 7–8. No doubt that this issue will be the proper subject of discovery, both factual and perhaps expert.

> (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.

Businessowners Special Property Coverage Form, 5.k (emphases added). The Plaintiffs argue that, in essence, the government shutdown orders in their various jurisdictions count as a covered "action of civil authority." *See, e.g.*, R. 124, 20 C 2005, Pls. Resp. to Society's Mot. to Dismiss or Alt. for Summary Judgment, at 18-20. But even if that were right, the problem for the Plaintiffs is that the action of the civil authority must "prohibit[] access" to the premises and the surrounding area. Specifically, the policy's text requires that the civil authority "prohibit[] access to the described premises," *and* that "[a]ccess 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 the area." Businessowners Special Property Coverage Form, 5.k. As Society correctly observes, even if the general public is prohibited from congregating in the covered premises, there is no allegation that employees are outright prohibited from accessing the premises—or from accessing the immediately surrounding areas, for that matter. Indeed, for some of the Plaintiffs, take-out customers and in-room dining guests may access the premises (and the immediately surrounding areas). The Civil Authority coverage is not triggered by mere "loss of" property; there must be "prohibited" "access." The Plaintiffs' claims for coverage under this provision must be dismissed.

The analysis of the Contamination coverage provision is much the same. The Plaintiffs present two theories of coverage under the Contamination provision. First, the policy provides for cleaning and sanitizing the premises, machinery, and equipment due to contamination:

> If your "operations" are suspended due to "contamination":
>
> (1) We will pay for your costs to clean and sanitize your premises, machinery and equipment, and expenses you incur to withdraw or recall products or merchandise from the market. We will not pay for the cost or value of the product.

Businessowners Special Property Coverage Form, 5.m. The text of this coverage provision requires, first and foremost, that the Plaintiffs' "operations" be "suspended" due to "contamination." *Id.* "Contamination" is defined as "a defect, deficiency, inadequacy, or dangerous condition in your products, merchandise[,] or premises." *Id.* § 5.m(4)(a). As Society notes, the Plaintiffs have maintained operations during the pandemic, and the suspensions of business have not been caused by contamination of the premises, machinery, or equipment *themselves*. R. 114, 20 C 2005, Def.'s LR 56.1 St. of Undisputed Mat. Facts, ¶¶ 39-78. And the Plaintiffs have not made a particularized factual argument that one or more of them has been closed due to actual COVID-19 contamination of the premises, machinery, or equipment. R. 125, 20 C 2005, Pls.' Resp. to Def.'s LR 56.1 St. of Facts, ¶¶ 39-78.

The Plaintiffs also rely on a second subsection of Contamination coverage, but again, that coverage requires the suspension of operations due to contamination:

> If your "operations" are suspended due to "contamination":
>
> …

> (2) We will also pay for the actual loss of Business Income and Extra Expense you sustain caused by
>
> (a) "Contamination" that results in an action by a public health or other governmental authority that prohibits access to the described premises or production of your product.
>
> (b) "Contamination threat[.]"
>
> (c) "Publicity" resulting from the discovery or suspicion of "contamination."

Businessowners Special Property Coverage Form, 5.m. Again, the text of this coverage provision requires that the Plaintiffs' "operations" be "suspended" due to "contamination." *Id.* And again, the suspensions of business have not been caused by contamination of the premises, machinery, or equipment themselves. What's more, the listed causes in this second subsection impose additional requirements that are not met here. Like the flaw in the Civil Authority coverage theory, there has been no "action by a public health or other governmental authority that *prohibits* access to the described premises or production of your product." (emphasis added). *Id.* § 5.m(2)(a). The Plaintiffs have not been prohibited from accessing the premises, and many have continued to produce food for take-out and delivery purposes. R. 114, 20 C 2005, Def.'s LR 56.1 St. of Facts, ¶¶ 39–78; R. 125, 20 C 2005, Pls.' Resp. to Def.'s LR 56.1 St. of. Facts, ¶¶ 39–78. And given the definition of "contamination," there is no loss of income due to "contamination threat" or "publicity" from contamination, Businessowners Special Property Coverage Form, 5.m(2)(b), (c), because it is not the premises, machinery, or equipment themselves that have been contaminated. For

these reasons, neither the Civil Authority nor the Contamination provisions are viable theories of coverage under the policy.[7]

D. Sue and Labor Provision

The final coverage theory is advanced only by the *Rising Dough* plaintiffs. Those plaintiffs have pleaded that their losses are covered under the policy's Sue and Labor clause, *see* R. 14, 20 C 05981, *Rising Dough* Am. Compl. ¶¶ 16, 48, 49, 136–143, 172–178. Society seeks to dismiss this claim on the grounds that the Sue and Labor clause is "not a coverage grant," but rather "a Condition that the Insured is required to comply with." R. 20, 20 C 05981, Society's Mot. to Dismiss, at 24–25.

Society is right: the Sue and Labor clause does not independently describe coverage, but instead sets forth what the insured must do *if* there is coverage. Specifically, the clause is found in Section E.3(a)(4) of the Businessowners Special Property Coverage Form and explains to the insured what steps it must take to mitigate the loss and keep track of expenses: "in the event of loss or damage to Covered Property," the insured must "[t]ake all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of a claim." § E.3(a)(4). Nothing about the clause sets forth a duty to pay on Society's part. Indeed, Section E of the policy is entitled, "Property Loss Conditions," and is thus distinct from Section A, "Coverage," which actually contains the grants of coverage. On this issue, the plain language of

[7]If the Plaintiffs' wish to revive the coverage claims under the Civil Authority or the Contamination provisions, then they will need to file a motion seeking leave to do so, explaining how they can plead around this rationale.

the policy is unambiguous: the Sue and Labor clause does not provide coverage. The counts invoking this clause in the *Rising Dough* complaint (Counts 5 and 10) are dismissed. This dismissal is with prejudice because there is no conceivable way of fixing this particular claim.

E. Section 155 (Illinois)

Lastly, Society targets the Illinois Insurance Code claims, 215 ILCS 5/155, advanced by the *Big Onion* and *Valley Lodge* plaintiffs, alleging that Society denied coverage in bad faith. Section 155 provides for fee-shifting and potential penalties against insurers if they are "vexatious and unreasonable" in denying a claim or in delaying the settlement of a claim. 215 ILCS 5/155(1). Section 154.6 sets forth a list of "improper" claims practices, and the Plaintiffs in the Illinois bellwether actions have each alleged a modestly different set of specific violations of that section. *See* R. 29, 20 C 2005, *Big Onion* First Am. Compl., ¶¶ 120–128; R. 1, 20 C 2813, *Valley Lodge* Compl., ¶¶ 54–61. But all of the allegations are anchored by the same fundamental set of facts. Specifically, according to the Plaintiffs, the March 16 and March 27, 2020 memoranda issued by Society, which denied coverage across-the-board, allegedly misrepresented the true scope of the insurance policies; Society failed to investigate individual claims, as required, and instead issued hasty denials not based on individual claims; and Society's actions have caused an improper and lengthy delay in receiving payment.

Society argues that, as a matter of law, claims under Section 155 must be dismissed if there is a bona-fide dispute over coverage. R. 17, 20 C 2813, Society's Mem.

of Law at 17; R. 113, 20 C 2005, Society's Mem. of Law at 19. In support of this contention, Society primarily relies on two Illinois cases as examples of a bona-fide dispute over coverage as fatally undermining Section 155 claims. *Uhlich Children's Adv. Network v. Nat'l Union Fire Ins. Co.*, 929 N.E.2d 531, 543 (Ill. App. Ct. 2010); *Am. Family Mut. Ins. Co. v. Fisher Dev., Inc.*, 909 N.E.2d 274, 284 (Ill. App. Ct. 2009). But in those cases, the decisions on the Section 155 theories were made only after a definitive finding on the coverage question. For example, the insured in *Uhlich Children's Advantage Network* alleged that the insurer had unreasonably refused to fulfill its duty to defend the insured. 929 N.E.2d at 543. The Illinois Appellate Court reversed the trial court, holding that the insurer did indeed have a duty to defend. *Id.* at 542–53. Only then did the appellate court also hold that there was a genuine dispute over the duty to defend, so the Section 155 theory was not viable. *Id.* at 543–54. Similarly, in *Fisher Development*, the insured contended that the insurer breached its duty to defend; when the insurer definitively won on that point, the appellate court affirmed—in one sentence—the dismissal of the Section 155 claim too. 909 N.E.2d at 284. In the specific factual settings of each those cases, there was no reason to opine on whether an ultimate finding that there is no coverage always means that there can be no viable Section 155 claim. And, more importantly for purposes of this case, the cases had reached the ultimate conclusion on the underlying coverage dispute.

Here, it might very well be that, ultimately, no reasonable jury could help but find that there is a bona-fide dispute over coverage. But no discovery has taken place and the case is, for purposes of this issue, at the pleading stage. To be sure, there

might be cases in which a coverage-dispute complaint sets forth allegations that make it crystal clear that there is a bona-fide dispute over coverage, thus precluding a Section 155 claim. Here, however, the need for more factual development prevents a pleading-stage dismissal of the claim.

IV. Conclusion

Society's motions to dismiss and summary judgment motions are denied to the extent that they target the claims for business-interruption coverage. Those claims survive. Also, the Section 155 claims survive in *Big Onion* and *Valley Lodge*. But the summary judgment motions in the *Big Onion* and *Valley Lodge* actions are granted as to the coverage theories under the Civil Authority and the Contamination provisions, and in the *Rising Dough* case as to the Sue and Labor clause.

To give the parties time to confer over the proposed next steps of the case, including an efficient and speedy discovery schedule, the status hearing of February 24, 2021, is reset to March 9, 2021, at 11 a.m. The Co-Lead Counsel team and Society shall confer and file a Joint Scheduling Report on March 5, 2021, setting forth the areas of agreement and any competing proposals.[8]

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: February 22, 2021

[8]One topic of consideration is whether certification for interlocutory appeal under 28 U.S.C. § 1292(b) is warranted, although the fact-bound nature of the key interpretive issue might prevent the propriety of certification.

2021 WL 1115247 (Mo.Cir.) (Trial Order)
Circuit Court of Missouri.
Clay County

SCOTT CRAVEN DDS PC, and Met Building LLC, individually and on behalf of a class of similarly situated Missouri citizens, Plaintiffs,
v.
CAMERON MUTUAL INSURANCE COMPANY, Defendant.

No. 20CY-CV06381.
March 9, 2021.

*1 Division 2

Order Denying Defendant's Motion to Dismiss Plaintiffs' First Amended Petition

Hon. Janet Sutton, Judge.

This case comes before the Court on Defendant's Motion to Dismiss Plaintiffs' First Amended Petition and Suggestions in Support Thereof ("Mot."), filed on February 12, 2021. Plaintiffs filed their Opposition to Defendant's Motion on February 22, 2021, and the Court held a hearing on the Motion on February 25, 2021.

Upon consideration of the arguments made by the parties in the briefs and at the hearing, the Court hereby **DENIES** Defendant's Motion in its entirety, for reasons set forth more fully below:

1. Plaintiffs Scott Craven DDS and Met Building LLC bring this lawsuit for breach of contract and declaratory judgment, alleging that they are entitled to coverage for COVID-19 related losses under the property insurance policy they purchased from Defendant Cameron Mutual Insurance Company (the "Policy").

Legal Standard

2. In reviewing a motion to dismiss, "the pleading is granted its broadest intendment, all facts alleged are treated as true, and it is construed favorably to the plaintiff to determine whether the averments invoke substantive principles of law which entitle the plaintiff to relief." *Thomas v. Denney*, 453 S.W.3d 325, 329 (Mo. App. W.D. 2014) (quoting *Farm Bureau Town & Country Ins. Co. of Mo. v. Angoff*, 909 S.W.2d 348, 351 (Mo. banc 1995)).

3. Under Missouri law, coverage provisions in insurance policies "are to be liberally construed in favor of the insured to provide the broadest possible coverage." *Alessi v. Mid-Century Ins. Co., Inc.*, 464 S.W.3d 529, 531 (Mo. App. E.D. 2015) (quoting *Harrison v. Tomes*, 956 S.W.2d 268, 270 (Mo. banc 1997)). In construing insurance policies, Missouri applies "the meaning which would be attached by an ordinary person of average understanding if purchasing insurance." *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 135 (Mo. 2009). If there is an ambiguity in the insurance policy, the Court must "resolve[it] in favor of the insured." *Id.* "Missouri also *strictly* construes exclusionary clauses against the drafter, who also bears the burden of showing the exclusion applies." *Burns*, 303 S.W.3d at 510.

Business Income and Extra Expense

4. Defendant seeks dismissal of Plaintiffs' claims for coverage under the Policy's Business Income and Extra Expense coverage provisions. The Policy covers "direct physical loss of or damage to" property. First Am. Pet. at ¶ 93. Because the Policy uses the disjunctive "or" to set them apart, Plaintiffs may show *either* "loss" or "damage" to trigger coverage. Accepting as true all facts alleged in the First Amended Petition, as the Court must do as this stage, the Court concludes that Plaintiffs sufficiently allege both physical loss and physical damage.

5. With respect to "physical damage," the First Amended Petition alleges, among other things, that COVID-19 physically attaches to and can remain on surfaces and in the air for days, even up to 28 days based on one study, *id.* at ¶¶ 54-55; that COVID-19 can remain in the air within a property for hours or days and traveling on indoor air currents – rendering the entire physical enclosure potentially dangerous, *id.* at ¶ 53; that it attaches to surfaces when viral particles collide with the surface forming a noncovalent chemical bond with the surface, *id.* at ¶ 67; and that once the virus-surface bond is formed, it will persist, if left undisturbed for many weeks in some cases, *id.* at ¶ 73. These allegations satisfy the meaning that an ordinary person would ascribe to the phrase "physical damage," which Plaintiffs note accords with traditional dictionary definitions. *See* Plaintiffs' Suggestions in Opposition to Defendant's Motion to Dismiss ("Opp.") at 9.

***2** 6. The Court does not find persuasive Defendant's argument that because the COVID-19 virus is present in the world at large, and not just at Plaintiffs' premises, it cannot constitute physical damage to the covered property. In assessing whether property has been damaged, the Court considers the state of the property before and after the presence of COVID-19, just as it would if there a fire had been alleged to have damaged the property. There is nothing in the Policy that suggests the presence of physical damage is based on a comparison of Plaintiffs' property to property elsewhere. Plaintiffs' allegations, which the Court must accept as true, plausibly demonstrate that the presence of the virus has physically altered the property from its state prior to that presence and that the altered state is less valuable. The Court also rejects Defendant's argument that Plaintiffs' allegations of damage are "conclusory" and therefore can be ignored by the Court for purposes of the motion to dismiss. That allegation is not a mere legal conclusion, but it is a factual allegation supported by several supporting paragraphs that specifically describe the mechanism of damage. *See, e.g.*, First Am. Pet. at ¶¶ 62-76.

7. With respect to "physical loss," Plaintiffs allege that the physical presence of COVID-19 has rendered their premises unusable, unfit for intended function, and unsafe. First Am. Pet. at ¶ 77. They invested in the property, insured the property, insured the income derived from the property, but have been deprived of the use of the property because of COVID-19 and related government shutdown orders. The ordinary person of average understanding, purchasing protection under the Policy would understand the inability to use the property due to a physical condition – here, the actual and/or threatened presence of COVID-19 – is *physical loss* covered under the Policy. *See Neco, Inc. v. Owners Ins. Co.*, Case No. 20-cv-04211-SRB, 2021 WL 601501 (W.D. Mo. Feb. 16, 2021) (concluding that similar allegations stated a claim for "direct physical loss").

8. At a minimum, the Court concludes that the phrase "direct physical loss of or damage to property" is ambiguous. The parties have attached a legion of cases construing similar policy language in the COVID-19 context. While the Court concludes that Defendant's'cases are factually and legally distinguishable for the reasons explained by the Plaintiffs, at minimum, it is proof of ambiguity that jurists are reaching different conclusions in applying the similar policy language to this unique set of circumstances. *See Macheca Transp. v. Philadelphia Indem. Ins. Co.*, 649 F.3d 661, 668 (8th Cir. 2011) ("The fact that several jurisdictions have reached divergent conclusions about the meaning of [a] term … is evidence of the term's ambiguity under Missouri law.") (citing *Harrison v. Tomes*, 956 S.W.2d 268, 270 (Mo. 1997)). Under Missouri law, that ambiguity must be construed in Plaintiffs' favor and in favor of coverage.

9. Defendant also argues that Plaintiffs' claims for coverage under the Business Income and Extra Expense provisions should be dismissed because: (1) coverage requires complete, as opposed to partial, cessation of business operations; (2) Plaintiffs failed to allege that COVID-19 caused their losses; and (3) the Policy's "Consequential Losses" exclusion bars recovery. Mot. at 8-12. The Court rejects each of these arguments as well.

10. *First*, the Policy's Business Income provision says that Defendant will pay for losses sustained "due to the necessary suspension" of operations caused by direct physical loss of or damage to property. First Am. Pet. at ¶ 97. Defendant argues that the term "suspension" requires complete not partial, cessation of business, and because Plaintiffs operated at limited capacity, no "suspension" occurred within the meaning of the Policy. Mot. at 11-12. However, Plaintiffs *did* allege a complete cessation of business. Specifically, Plaintiffs allege that they closed their business completely for a week in June 2020 after an employee tested positive for COVID-19. First Am. Pet. at ¶ 19. Thus, even if the Court accepts Defendant's definition, Plaintiffs have sufficiently alleged "suspension" of business at this stage.

***3** 11. In addition, the Court must consider the terms of the Policy as a whole to provide relevant context. *Am. Econ. Ins. Co. v. Jackson*, 476 F.3d 620, 624 (8th Cir. 2007). Here, the Policy contemplates partial cessation of business, which Plaintiffs allege here. The Policy defines "Extra Expense" to mean, in part, expenses incurred "to avoid *or minimize* the suspension of business and to continue 'operations."' First Am. Pet. at ¶ 106 (emphasis added). And the Policy states that business income losses will be reduced "to the extent you can resume your 'operations,' in whole or in part...." *Id.* Because these provisions contemplate that an insured's business operations can be minimized, continued, or resumed in part, "interpreting 'suspension' to only provide for a total cessation of operations would contradict other parts of the Policy or render them superfluous." *Blue Springs Dental Care v. Owners Ins. Co.*, Case No. 20-CV-00383-SRB, 2020 WL 5637963, at *6 (W.D. Mo. Sept. 11, 2020) (Bough, J.) (rejecting argument that "suspension" requires complete cessation of operations). At a minimum, the presence of such a contradiction renders the word "suspension" ambiguous and therefore must be construed against Defendant as the policy's drafter and in favor of coverage. Defendant could easily have used the phrase "complete suspension," but it chose not to do so. *Peters*, 853 S.W.2d at 302 ("If the language is ambiguous, it will be construed against the insurer.").

12. *Second*, Defendant argues that Plaintiffs fail to allege that the presence of COVID-19 and the Coronavirus on their property *caused* them to slow or cease operations. *See* Mot. at 11. Under Missouri law, any insured event that is a proximate cause of the loss is sufficient to require coverage even if there is more than one causative event. *Intermed Ins. Co. v. Hill*, 367 S.W.3d 84, 88 (Mo. App. S.D. 2012). The Court, thus, rejects this argument. In their First Amended Petition, Plaintiffs allege, among other things, that "*[a]s a result of the Coronavirus and COVID-19 pandemic*, including the presence of the Coronavirus and the COVID-19 disease on Plaintiffs' property and in surrounding areas, Plaintiffs ceased normal operations in March 2020 and have not yet been able to resume normal operations...." First. Am. Pet. at ¶ 18. Plaintiffs have sufficiently alleged causation at this stage.

13. *Third*, Defendant argues that the Policy's "Consequential Losses" exclusion bars Plaintiffs' claim. Mot. at 9-10. That provision excludes "loss or damage caused by or resulting from…Delay, loss of use or loss of market." As noted, the Court must strictly construe exclusionary clauses.

14. At least one other court has considered and rejected in the COVID-19 coverage context the same argument Defendant makes here. In *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Company*, Judge Polster analyzed a provision excluding coverage for "loss or damage caused by or resulting from loss of market, loss of use, or delay." No. 1:20 CV 1239, 2021 WL 168422, at *16 (N.D. Ohio Jan. 19, 2021). Judge Polster noted that the policy at issue provided Business Income Coverage and that the loss of use exclusion, if applied as Defendant argued, would "vitiate" that coverage. *Id.* The Court agrees. Defendant's interpretation of the Consequential Losses provision would render meaningless the Policy's explicit coverages for business interruption, which necessarily contemplates loss of use.

15. At a minimum, the Court finds that the "Consequential Losses" exclusion creates an ambiguity that must be construed against Cameron Mutual. *Ritchie*, 307 S.W.3d at 136 ("To the extent these policy provisions are inconsistent, they create an ambiguity that, under Missouri law, must be construed in favor of the insured."). The "Consequential Losses" exclusion does not bar Plaintiffs' claims.

Civil Authority

16. Plaintiffs also seek coverage under the Policy's Civil Authority provision. As alleged, the provision covers losses "caused by action of civil authority that prohibits access to the described premises." First Am. Pet. at ¶ 111.

17. Defendant argues Plaintiffs have failed to state a claim under this coverage. Mot. at 12-15. Defendant argues that Plaintiffs cannot recover under the Policy's Civil Authority provision because they do not allege that governmental shutdown orders were implemented as a result of direct physical loss of or damage to property "*other than at*" the insured premises. Mot. at 12-13. Plaintiffs allege that "Coronavirus and COVID-19 caused direct physical loss of or damage to property throughout the city, state, and country where Plaintiffs' insured property is located, giving rise to the actions of civil authority in that city, state and country," and that each such order "was issued in response to direct physical loss of or damage caused by the Coronavirus and COVID-19 at property *other than the insured premises*...." *Id.* at ¶¶ 112-13. Accepting those allegations as true, as the Court must do as this stage, Plaintiffs have sufficiently alleged damage to property "other than at" the insured premises.

***4** 18. Defendant also argues that access to Plaintiffs' property was not "prohibited" as required for Civil Authority coverage, because Plaintiffs still treated some patients during the pandemic. Mot. at 13-15. But Plaintiffs do allege that certain classes of patients – those seeking non-emergency treatment – were prohibited from accessing Plaintiffs' facilities for any non-emergency treatment. *See, e.g.*, First Am. Pet. at ¶ 122. Plaintiffs allege that governmental Stay at Home orders issued by the State of Missouri, Clay County, and Kansas City, Missouri required residents to stay in their homes except for "Essential Activities." *Id.* at ¶¶ 111-25. "Essential Activities" was defined in the Orders to include only tasks "essential" to health and safety. *Id.* Plaintiffs allege that certain procedures they perform – like teeth whitenings – are *not* "essential" to health and safety. *Id.* Thus, according to Plaintiffs, the Stay at Home Orders prevented those non-emergency patients from accessing their property, which satisfies the Policy's requirement that "access" be prohibited. Accepting these allegations as true, as the Court must, the Court concludes that Plaintiffs sufficiently allege that access to their property was "prohibited." *See Studio 417, Inc. v. The Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 804 (W.D. Mo. Aug. 12, 2020) (concluding that civil authority orders that prevented in-person dining – but not drive-thru, pickup, or delivery – still prohibited access "to such a degree as to trigger the civil authority coverage.").

Sue and Labor

19. Finally, Defendant argues that Plaintiffs are not entitled to Sue and Labor reimbursement. Defendant's sole argument here is that Plaintiffs' claim must be dismissed because Plaintiffs have failed to state a claim under any other provision of the Policy. Mot. at 15. Because the Court concludes that Plaintiffs have stated a claim for coverage under the Policy's Business Income, Extra Expense, and Civil Authority provisions, the Court rejects Defendant's argument.

Conclusion

WHEREFORE, for the foregoing reasons, the Court DENIES Defendant's Motion to Dismiss in its entirety.

IT IS SO ORDERED.

<<signature>> 3/9/21

The Hon. Janet Sutton

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KAMAKURA, LLC and ATLÁNTICO, LLC, on behalf of themselves and all others similarly situated,	
Plaintiffs,	
v.	**Civil Action No. 20-11350-FDS**
GREATER NEW YORK MUTUAL INSURANCE COMPANY,	
Defendant.	

MEMORANDUM AND ORDER ON
DEFENDANT'S MOTION TO DISMISS

SAYLOR, C.J.

This is a dispute concerning insurance coverage. Jurisdiction is based on diversity of citizenship.

Beginning in March 2020, as the COVID-19 pandemic began to spread across the country, the Commonwealth of Massachusetts issued orders that required restaurants to suspend on-premises consumption of food and drink. Plaintiffs Kamakura, LLC and Atlántico, LLC operate restaurants in Boston. They seek a judgment, on behalf of themselves and those similarly situated, that insurance policies issued by defendant Greater New York Mutual Insurance Company ("GNY") cover the losses they sustained following those orders. They also seek damages for breach of contract and unfair trade practices arising out of GNY's denial of their claims. GNY has moved to dismiss the complaint for failure to state a claim upon which relief can be granted, contending that the policies on their face do not provide coverage.

The Court is certainly sympathetic to the hardships faced by restaurant owners as a result

of the pandemic. It also notes that the pandemic is the type of occurrence—a widespread disaster for which a small business cannot possibly prepare—where insurance coverage ought to be routinely available. Nonetheless, the Court cannot avoid the language of the policies as written. It therefore joins, albeit with some reluctance, the great majority of courts that has concluded that no insurance coverage is available under these policies for the losses caused by the pandemic.

Accordingly, and for the following reasons, the motion to dismiss will be granted.

I. Background

A. Factual Background

The following facts are presented as alleged in the complaint unless otherwise noted.

1. Parties

Kamakura, LLC and Atlántico, LLC are limited liability companies. (Compl. ¶¶ 11-12). Kamakura operates the Kamakura restaurant, a Japanese-style restaurant located in downtown Boston. (*Id.* ¶ 17). Atlántico operates the Atlántico restaurant, a Spanish and Portuguese seafood restaurant located in Boston's South End. (*Id.* ¶ 18).

Greater New York Mutual Insurance Company ("GNY") is a New York company with a principal place of business in New York. (*Id.* ¶ 13). It is licensed to provide property and casualty insurance in Massachusetts. (*Id.*).

2. COVID-19 Pandemic

In late 2019 and early 2020, the infectious disease COVID-19 began to spread around the world. (*Id.* ¶ 22). The City of Boston announced its first confirmed case on February 1, 2020. (*Id.*). Later that month, one of the first "super-spreader" events in the United States, a medical conference hosted by Biogen, was held in Boston. (*Id.* ¶ 23). That conference alone was linked to at least 100 confirmed cases of COVID-19. (*Id.*). Over the course of the following year,

Massachusetts reported more than 550,000 confirmed cases of COVID-19 and more than 16,000 deaths from the disease. *See* Mass.gov, COVID-19 Interactive Data Dashboard, https://www.mass.gov/info-details/covid-19-response-reporting (last visited Mar. 8, 2021).

According to the World Health Organization, COVID-19 is transmitted "through respiratory droplets, by direct contact with infected persons, or by contact with contaminated objects and surfaces." (*Id.* ¶ 25 (emphasis omitted)). It is spread "primarily from person to person through small droplets from the nose or mouth" when people "breathe in these droplets from a person infected with the virus." (*Id.* ¶ 26). Airborne transmission is "especially acute" in indoor or enclosed environments, particularly those that are crowded, have inadequate ventilation, or expose individuals to others for extended periods of time. (*Id.* ¶ 32).

COVID-19 is also spread when respiratory droplets from infected individuals "land on objects and surfaces," and others touch those surfaces and then touch their eyes, nose, or mouth. (*Id.* ¶ 26 (emphasis omitted)). According to a study published in the New England Journal of Medicine, COVID-19 is detectable for up to six days on certain types of surfaces. (*Id.* ¶ 28).

To slow the spread of the disease, state and local governments across the country issued orders that, among other things, required residents to "socially distance" and to remain at home unless performing "essential" activities. (*Id.* ¶ 34). In Massachusetts, Governor Baker issued an order on March 15, 2020, that suspended "on-premises consumption of food or drink" at restaurants. (Def. Mem. Ex. 1, at 4; Compl. ¶ 36).[1] That suspension was extended several times

[1] GNY has attached several exhibits, including a compilation of the relevant COVID-19 orders, to its motion to dismiss. (*See* Def. Mem. Ex. 1). While ordinarily "any consideration of documents not attached to the complaint, or not expressly incorporated therein, is forbidden, . . . courts have made narrow exceptions for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993) (collecting cases). Each of those exceptions applies to the orders. Furthermore, and in any event, neither party disputes that the Court may properly consider them.

in March, April, and May 2020. (Compl. ¶¶ 38, 39, 41-42; Def. Mem. Ex. 1, at 6, 20, 25, 28).

On June 6, 2020, Governor Baker issued an order that permitted restaurants to provide outdoor table service, subject to several restrictions concerning seating capacity, social distancing, and cleaning. (Compl. ¶ 46; Def. Mem. Ex. 1, at 40). Two weeks later, he authorized indoor table service to resume under similar restrictions. (Compl. ¶ 48; Def. Mem. Ex. 1, at 49).

Kamakura and Atlántico, like other restaurants, have been subject to the orders issued by Governor Baker. (Compl. ¶ 51). The complaint alleges that the orders and the spread of COVID-19 have had a "devastating effect" on their business. (*Id.*). Pursuant to the orders, the restaurants have been limited either to take-out and delivery services, which are not their "normal and primary forms of providing food and beverages," or to restricted levels of on-premises dining. (*Id.* ¶ 52). The complaint further alleges that the orders "have operated to prohibit access" to the restaurants. (*Id.* ¶ 72). Kamakura and Atlántico have therefore suspended their operations "due to their inability to use their properties for their intended purposes due to COVID-19 and the civil authority orders." (*Id.*).

3. The Insurance Policies and the Claims

Kamakura and Atlántico separately purchased insurance policies from GNY. (*Id.* ¶¶ 55-56; *see also id.* Ex. 1 ("Kamakura Policy"); *id.* Ex. 2 ("Atlántico Policy")).[2] The policies provide identical "Business Income," "Extra Expenses," and "Civil Authority" coverage. (*Compare* Kamakura Policy, at 94-95, *with* Atlántico Policy, at 93-94). The scope of that coverage is defined by the "Business Income (and Extra Expense) Coverage Form." That form

[2] The Atlántico Policy was originally issued to Cheekwein LLC d/b/a Southern Proper Restaurant. (Compl. ¶ 56). In January 2020, that restaurant closed, and Cheekwein sold its assets to Atlántico. (*Id.*). The policy was then amended to change the named insured to Atlántico. (*Id.* Ex. 3).

first provides "Business Income" coverage on the following terms:

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

(Kamakura Policy at 94; Atlántico Policy at 93). The same form then provides for "Extra Expense" coverage:

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

(*Id.*). It further provides "Civil Authority" 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 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.

(Kamakura Policy at 95; Atlántico Policy at 94).

The Business Income (and Extra Expense) Coverage Form is a standardized form drafted by the Insurance Services Office ("ISO"). (Compl. ¶ 62). ISO drafts standard policy language used by insurers in the United States. (*Id.*). In November 2006, following the outbreaks of Severe Acute Respiratory Syndrome ("SARS") and H5N1 avian flu, ISO drafted a form exclusion for losses "due to disease-causing agents such as viruses and bacteria." (*Id.* ¶ 66).

According to the complaint, "many insurers" added that form or a similar exclusion to standard commercial insurance policies. (*Id.* ¶ 65). The Kamakura and Atlántico policies, which include multiple ISO forms, do not contain exclusions for viruses or pandemics. (*Id.* ¶¶ 60-61, 69).

Kamakura and Atlántico submitted claims to GNY seeking coverage for losses sustained due to the COVID-19 pandemic and the resulting orders. (*Id.* ¶¶ 78, 87). GNY denied those claims. (*Id.*). Its denial letters stated that "there is no physical loss of or damage to your property from a covered cause of loss, nor have the local authorities prohibited access to the area immediately surrounding your property due to damage to property not more than one mile away from your business." (*Id.* Ex. 4, at 1 ("Kamakura Denial"); *see also id.* Ex. 5, at 1 ("Atlántico Denial")).[3] They further stated that the orders "do[] not constitute physical loss of or damage to either covered property at the described premises or damage to any property in the surrounding area which would limit access to the insured location." (*Id.*).[4]

The complaint alleges that the denials are "directly contrary to" the policies because the inability of Kamakura and Atlántico "to use [their premises] to operate [their businesses] as a result of the physical loss of or damage to the [properties] caused by COVID-19 is sufficient to trigger the business income and related coverages." (*Id.* ¶¶ 80, 89). It also alleges that GNY denied the claims "without conducting any inspection or review of [the properties] or documents concerning [their] business activities in 2020." (*Id.* ¶¶ 81, 90). According to the complaint, because GNY "swiftly" denied the claims "without conducting an appropriate review of the

[3] There are minor, non-material differences in the comparable sentences in the Atlántico denial letter.

[4] The Kamakura denial letter also recited the "Ordinance of Law" exclusion in the policies. That exclusion provides that GNY will not pay for loss or damage caused by "[t]he enforcement of or compliance with any ordinance or law . . . [r]egulating the construction, use or repair of any property; [or] [r]equiring the tearing down of any property, including the cost of removing its debris." (Kamakura Denial at 4). It is unclear, however, whether GNY actually relied on that exclusion when disclaiming coverage.

properties," it did not "engage in a good faith or reasonable investigation of the claims . . . ." (*Id.* ¶ 94).

The complaint further alleges that GNY has a "national policy and practice of denying, without investigation, all claims for business income and extra expense coverage and civil authority coverage, based upon the COVID-19 pandemic, including for policies which do not have a virus or pandemic exclusion." (*Id.* ¶ 93). The policy and practice allegedly constitute an effort by GNY "to limit its losses due to the COVID-19 pandemic despite the fact that the GNY policy provided coverage for losses due to loss of use of property and from closure orders issued by civil authorities." (*Id.* ¶ 95).

B. Procedural Background

On July 17, 2020, Kamakura and Atlántico, on behalf of themselves and all others similarly situated, filed suit against GNY. The complaint asserts claims for declaratory judgment (Count 1), breach of contract (Count 2), and violation of Mass. Gen. Laws ch. 93A (Count 3). Count 1 and Count 2 are asserted on behalf of Kamakura, Atlántico, and four classes: a Nationwide Business Income and Extra Expense Coverage Class, a Nationwide Civil Authority Coverage Class, a Massachusetts Business Income and Extra Expense Coverage Subclass, and a Massachusetts Civil Authority Coverage Subclass. Count 3 is asserted on behalf of Kamakura, Atlántico, and the Massachusetts subclasses.

GNY has moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

II. Standard of Review

To survive a motion to dismiss, a complaint must state a claim that is plausible on its face. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). For a claim to be plausible, the "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ."

Id. at 555 (internal citations omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556).

In determining whether a complaint satisfies that standard, a court must assume the truth of all well-pleaded facts and give plaintiffs the benefit of all reasonable inferences. *See Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 5 (1st Cir. 2007) (citing *Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir. 1999)). Dismissal is appropriate if the complaint fails to set forth "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." *Gagliardi v. Sullivan*, 513 F.3d 301, 305 (1st Cir. 2008) (quoting *Centro Medico del Turabo, Inc. v. Feliciano de Melecio*, 406 F.3d 1, 6 (1st Cir. 2005)).

Under Massachusetts law, the interpretation of an insurance contract is a question of law. *See Boston Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 355 (2009). Courts apply general contract-interpretation principles and construe "the words of the policy in their usual and ordinary sense." *Dorchester Mutual Ins. Co. v. Krusell*, 485 Mass. 431, 437 (2020) (quoting *Metropolitan Life Ins. Co. v. Cotter*, 464 Mass. 623, 634-35 (2013)). "Every word in an insurance contract must be presumed to have been employed with a purpose and must be given meaning and effect whenever practicable . . . without according undue emphasis to any particular part over another." *Boston Gas Co.*, 454 Mass. at 355-56 (internal quotation marks and citations omitted). When in doubt, a court must consider "what an objectively reasonable insured, reading the relevant policy language, would expect to be covered." *Id.* at 356 (quoting *A.W. Chesterton Co. v. Massachusetts Insurers Insolvency Fund*, 445 Mass. 502, 518 (2005)).

Any ambiguities in an insurance policy "are interpreted against the insurer who used

them and in favor of the insured." *Krusell*, 485 Mass. at 437 (quoting *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London*, 449 Mass. 621, 628 (2007)). An ambiguity "arises when there is more than one rational interpretation of the relevant policy language," but "is not created simply because a controversy exists between parties, each favoring an interpretation contrary to the other." *Boston Gas Co.*, 454 Mass. at 356 n.32 (internal quotation marks and citations omitted).

III. Analysis

A. Business Income and Extra Expense Coverage

Defendant contends that the complaint fails to state a claim for coverage under the Business Income and Extra Expense provisions. To state a claim under those provisions, it must allege "direct physical loss of or damage to property" at plaintiffs' restaurants. (Kamakura Policy at 94; Atlántico Policy at 93). Defendant contends that the complaint fails to do so because it "does not allege that Coronavirus contaminated Plaintiffs' restaurants or any property within them." (Def. Mem. at 13 (emphasis omitted)).

1. "Direct Physical Loss of or Damage to Property"

The Court must first consider the plain meaning of the policy language. As noted, the policies provide coverage for "loss" or "damage" that is "direct" and "physical." While those terms are not defined in the policies, taken as a whole, it is clear that the policies do not provide coverage for financial or other intangible losses. Instead, there must be a "physical" loss of or damage to a tangible object, such as the structure of a building. *See SAS Int'l, Ltd. v. General Star Indem. Co.*, 2021 WL 664043, at *2 (D. Mass. Feb. 19, 2021) ("[T]hese terms require some enduring impact to the actual integrity of the property at issue. In other words, the phrase 'direct physical loss of or damage to' does not encompass transient phenomena of no lasting effect, much less real or imagined reputational harm."); *Harvard St. Neighborhood Health Ctr., Inc. v.*

Hartford Fire Ins. Co., 2015 WL 13234578, at *8 (D. Mass. Sept. 22, 2015) (explaining that "[i]ntangible losses do not fit within" the definition of "direct physical loss"); *Eveden, Inc. v. North Assurance Co.*, 2014 WL 952643, at *5 (D. Mass. Mar. 12, 2014) ("Intangible losses, such as a defect in title or a legal interest in property, are generally not regarded as 'physical' losses in the absence of actual physical damage to the property."); *Crestview Country Club, Inc. v. St. Paul Guardian Ins. Co.*, 321 F. Supp. 2d 260, 264 (D. Mass. 2004) (concluding that intangible losses are not "physical" losses and identifying cases where "Massachusetts courts, as well as others elsewhere, have interpreted the phrase 'direct physical loss' in a similarly narrow way"); 10A Couch on Ins. § 148:46 (3d ed. 2020) ("The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." (footnotes omitted)).

Courts in Massachusetts have adopted that interpretation when considering insurance claims for losses related to the COVID-19 pandemic. *See Legal Sea Foods, LLC v. Strathmore Ins. Co.*, 20-cv-10850, slip op. at 7-9 (D. Mass. Mar. 5, 2021) ("Courts in Massachusetts have had occasion to interpret the phrase 'direct physical loss' and have done so narrowly, concluding that it requires some kind of tangible, material loss."); *SAS Int'l, Ltd.*, 2021 WL 664043, at *3 ("[C]onstruing the language 'physical loss of' to cover the deprivation of a property's *use* absent any tangible damage to the property distorts the plain meaning of the Policy. Simply put, the Policy does not cover a mere threat to the insured property without any actual physical damage having occurred." (footnote omitted)); *Verveine Corp. v. Strathmore Ins. Co.*, 2020 WL 8766370, at *3 (Mass. Sup. Ct. Dec. 21, 2020) ("The phrase 'direct physical loss of or damage to

property' in a property insurance policy like this one cannot therefore be construed to cover physical loss in the absence of some physical damage to the insured's property.").

It is not entirely clear from the complaint exactly what plaintiffs say caused their "loss of property"—either the threat or presence of coronavirus or COVID-19, the subsequent shutdown orders, or both. In any event, plaintiffs contend that "physical loss" includes "losses attributable to the presumed or imminent threat of contamination which renders the property unusable for its intended purposes and does not require tangible damage to the physical structure." (Pl. Opp. at 8).[5] But the "presumed or imminent threat of contamination" has no physical effect on the property. *See Verveine Corp.*, 2020 WL 8766370, at *4 ("Equally unavailing is plaintiffs' argument that the COVID-19 virus constitutes an 'imminent threat' to their premises and thus could amount to a physical loss within the meaning of the policies."). Indeed, courts have held that even the actual contamination of a property does not have the requisite "physical" effect. *See, e.g.*, *Legal Sea Foods*, slip op. at 8 ("A virus is incapable of damaging physical structures because the virus harms human beings, not property." (internal quotation marks and citation omitted)); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 2020 WL 7351246, at *7 (W.D. Tex. Dec. 14, 2020) ("Even assuming that the virus that causes COVID-19 was present at Plaintiffs' properties, it would not constitute the direct physical loss or damage required to trigger coverage under the Policy because the virus can be eliminated. The virus does not threaten the structures covered by property insurance policies, and can be removed from surfaces with routine cleaning and disinfectant."); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 2020 WL 6436948, at *5 (S.D.W. Va. Nov. 2, 2020) ("[E]ven when present, COVID-19 does not threaten

[5] In their opposition, plaintiffs focus on "physical loss," as opposed to "physical damage." (*See* Pl. Opp. at 6-8 (contending that physical damage is not required to trigger coverage); *id.* at 8-11 (contending that physical loss can occur in the absence of structural damage)).

the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant."). The spread of the coronavirus is of course "physical" in the sense that the virus is a submicroscopic organism, but under the plain language of the policy, it is the loss or damage itself that must be "physical." *See SAS Int'l, Ltd.*, 2021 WL 664043, at *4 n.4 ("[N]o reasonable construction of the phrase 'direct physical loss,' however broad, would cover the presence of a virus.").

That remains true even when the virus's presence or the subsequent government orders "render[] the property unusable for its intended purpose." (Pl. Opp. at 8). In *Verveine*, the Massachusetts Superior Court rejected the plaintiffs' contention that because they "could no longer use the premises"—two restaurants in the Boston area—"for their intended purpose" after Governor Baker issued the COVID-19 orders, "they necessarily suffered . . . a 'direct physical loss.'" *See Verveine Corp.*, 2020 WL 8766370, at *3. The Supreme Judicial Court has yet to determine whether "physical loss" includes "a property's loss of use stemming from an intangible substance." *SAS Int'l, Ltd.*, 2021 WL 664043, at *4 n.4. But the *Verveine* decision reflects the position of an increasingly large majority of courts across the country, which is that restrictions on the use of property by government orders due to the threat or presence of coronavirus do not constitute "direct physical loss" of property. *See, e.g.*, *Brunswick Panini's, LLC v. Zurich Am. Ins. Co.*, 2021 WL 663675, at *8 (N.D. Ohio Feb. 19, 2021) ("Plaintiffs' claim for loss of full use of their premises and for business interruption is precluded under the Zurich Policy. . . . Neither the COVID-19 virus nor the state government orders caused 'direct physical loss of or damage to' Plaintiffs' Insured Property."); *Whiskey Flats Inc. v. Axis Ins. Co.*, 2021 WL 534471, at *4 (E.D. Pa. Feb. 12, 2021) ("While the Court agrees that 'loss of' the premises can mean the loss of use, that loss of use must be tied to a physical condition actually

impacting the property, which is not satisfied here. Plaintiff did not lose use because the premises suffered physical damage; nor was the loss of use caused by actual contamination of the property."); *Karmel Davis & Assocs., Attorneys-At-Law, LLC v. Hartford Fin. Servs. Grp., Inc.*, 2021 WL 420372, at *5 (N.D. Ga. Jan. 26, 2021) ("[T]he Shelter Order itself did not cause an actual, physical change to Plaintiffs law office. . . . Rather, the Order only limited Plaintiff in how it could use its law office for the duration of the Order. These claims for coverage must therefore be dismissed."); *Sandy Point Dental PC v. Cincinnati Ins. Co.*, 2020 WL 5630465, at *3 (N.D. Ill. Sept. 21, 2020) ("In essence, plaintiff seeks insurance coverage for financial losses as a result of the closure orders. The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property. Consequently, plaintiff has failed to plead a direct physical loss—a prerequisite for coverage." (footnote omitted)).[6]

Plaintiffs nonetheless point to the First Circuit's decision in *Essex Insurance Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009), and two unreported decisions from Massachusetts Superior Court, *Matzner v. SEACO Insurance Co.*, 1998 WL 566658 (Mass. Sup. Ct. Aug. 12, 1998), and *Arbeiter v. Cambridge Mutual Fire Insurance Co.*, 1996 WL 1250616 (Mass. Sup. Ct. Mar. 15, 1996). Those decisions, plaintiffs contend, show that under Massachusetts law, "the presumed or imminent threat of contamination of the insured property, which renders a property unusable for its intended purposes can constitute a physical loss, without a showing of tangible injury." (Pl. Opp. at 8; Pl. Sur-Reply at 1-2).

In *Arbeiter*, the court, relying on a single out-of-state case, held that the "existence of

[6] Unlike plaintiffs' policies, the policies at issue in *Brunswick Panini's* and *Whiskey Flats* contained virus exclusions. Those exclusions, however, did not impact the courts' analyses of the availability of Business Income and Extra Expenses coverage. *See Brunswick Panini's*, 2021 WL 663675, at *9; *Whiskey Flats Inc.*, 2021 WL 534471, at *4.

[oil] fumes may be a physical loss." 1998 WL 566658, at *2. In *Matzner*, the court, again relying on out-of-state precedents, held that "carbon-monoxide contamination constitutes 'direct physical loss of or damage to' property . . . ." 1998 WL 566658, at *3-4. And in *BloomSouth Flooring*, the First Circuit, relying on *Arbeiter* and *Matzner*, concluded that "odor can constitute physical injury to property under Massachusetts law" and that "allegations that an unwanted odor permeated the building and resulted in a loss of use of the building are reasonably susceptible to an interpretation that physical injury to the property has been claimed." 562 F.3d at 406.[7]

Even if those decisions are correct under Massachusetts law, they do not require a different result.[8] To the extent there was any "loss of use" of the properties in *Arbeiter*, *Matzner*, and *BloomSouth Flooring*, it was caused by the odor or fumes. Here, conclusory allegations aside, plaintiffs' loss of use was caused by the government orders; it was not caused by the presence of the coronavirus itself. *See Torgerson Props., Inc. v. Continental Cas. Co.*, 2021 WL 615416, at *2 (D. Minn. Feb. 17, 2021) ("This case, then, is unlike the case of asbestos contamination, which the Minnesota Court of Appeals found was a 'direct physical loss.' . . . Here, it is not the presence of the virus on the premises that closed TPI's properties (or caused people to stop visiting those properties), but rather the executive orders meant to slow the virus's

[7] It is unclear whether the First Circuit's conclusion that "odor can constitute physical injury to property under Massachusetts law" was part of its holding. The court was not considering a first-party claim for coverage, but instead whether an insurer had a duty to defend. It specifically explained that it did not "need [to] resolve the ambiguity issue"—whether "direct physical loss" includes "only tangible damage to the structure of the insured property" or "a wider array of losses"—because "the salient question before [the court] involves the lesser burden of determining whether the underlying complaint is 'reasonably susceptible' of stating a covered claim." *Id.* at 404-05. In other words, the court did not necessarily see *Matzner* and *Arbeiter* as correct statements of Massachusetts law but instead as support for its conclusion that the phrase "direct physical loss" was "reasonably susceptible" to an interpretation that included odors permeating a property.

[8] There is some reason to question whether those decisions are correct. Neither *Matzner* nor *Arbeiter* followed an earlier Massachusetts Appeals Court decision stating that the phrase "physical loss or damage" could not be "fairly . . . construed to mean physical loss in the absence of physical damage." *HRG Dev. Corp. v. Graphic Arts Mut. Ins. Co.*, 26 Mass. App. Ct. 374, 377 (1988) (emphasis omitted); *see also Philadelphia Parking Auth. v. Federal Ins. Co.*, 385 F. Supp. 2d 280, 289 (S.D.N.Y. 2005) (casting doubt on the *Matzner* decision). *BloomSouth Flooring*, in turn, relied entirely on *Matzner*, *Arbeiter*, and the out-of-state cases which they cited.

spread." (internal citation omitted)). Decisions from Massachusetts courts considering similar claims have thus distinguished *Arbeiter*, *Matzner*, or *BloomSouth Flooring* in finding a lack of coverage. *See Legal Sea Foods*, slip op. at 10 (rejecting plaintiff's argument based on *BloomSouth Flooring* and *Matzner*); *SAS Int'l, Ltd.*, 2021 WL 664043, at *4 (distinguishing *BloomSouth Flooring* and *Matzner*); *Verveine Corp.*, 2020 WL 8766370, at *4 (distinguishing *Matzner* and *Arbeiter*).[9]

Plaintiffs also point out that the policies do not include virus exclusions, even though such exclusions were developed by ISO following the outbreaks of SARS and the avian flu, and the policies include other ISO exclusions. (Pl. Opp. at 13-14; Compl. ¶¶ 60-69). They contend that defendant therefore "cannot credibly argue that COVID-19 does not cause a direct physical loss of or damage to property." (Pl. Opp. at 13). But "absence of an express exclusion does not operate to create coverage." *Given v. Commerce Ins. Co.*, 440 Mass. 207, 212 (2003); *Legal Sea Foods*, slip op. at 11. And in any event, it is well-settled that the Court may not consider extrinsic evidence unless the policies are ambiguous. *See, e.g.*, *Mack v. Cultural Care Inc.*, 2020 WL 4673522, at *5 (D. Mass. Aug. 12, 2020) ("While the parties dispute the meaning of the definitions of 'cover' and 'include' on Defendant's website, the Court does 'not admit parol evidence to create an ambiguity when the plain language is unambiguous.'" (quoting *General Convention of New Jerusalem in the U.S.A., Inc. v. MacKenzi*e, 449 Mass. 832, 835 (2007))).

[9] *BloomSouth Flooring* also relied on the fact that the odors and fumes "permeated" the properties. *See* 562 F.3d at 405 ("Suffolk in fact alleged that an unwanted odor 'permeated the building.'" (emphasis omitted)); *id.* at 406 ("[A]lthough Essex may be correct that odor can only constitute physical injury to property if it is permeating or pervasive, nothing in the complaint . . . indicates that the odor was *not* pervasive or permeating."). By contrast, as plaintiffs allege, the coronavirus does not permeate property; it lives on surfaces, either for a matter of hours or days or until those surfaces are decontaminated. (*See, e.g.*, Compl. ¶¶ 25-26, 28-29). Its presence on a property's surface does not alter the property itself in any way. *See Legal Sea Foods*, slip op. at 8 ("The COVID-19 virus does not impact the structural integrity of property in the manner contemplated by the Policy and thus cannot constitute 'direct physical loss of or damage to' property."); *SAS Int'l, Ltd.*, 2021 WL 664043, at *4 ("Unlike an unpleasant odor, however, COVID-19 is imperceptible; it does not endure beyond a brief passage of time or a proper cleaning, let alone render the property permanently uninhabitable.").

Here, the plain language of the policies does not create any ambiguity; therefore, they must be enforced according to that language. *See High Voltage Eng'g Corp. v. Federal Ins. Co.*, 981 F.2d 596, 600 (1st Cir. 1992) ("A policy of insurance whose provisions are plainly and definitely expressed in appropriate language must be enforced in accordance with its terms." (quoting *Stankus v. New York Life Ins. Co.*, 312 Mass. 366, 369 (1942))).

As a result, the Court will join the growing number of courts that have concluded that the presence or threat of coronavirus does not constitute a "direct physical loss of or damage to property," even when it or subsequent government orders render that property unusable for its intended purpose. Plaintiffs therefore cannot maintain a claim for coverage under the Business Income and Extra Expense provisions.

2. Allegations of Direct Physical Loss

Even if the presence of coronavirus constituted a "direct physical loss of or damage to property," the complaint fails to plausibly allege that the virus was present at plaintiffs' restaurants. To be sure, it includes allegations concerning coronavirus transmission and the spread of the virus and COVID-19 throughout Massachusetts and the City of Boston. (*See, e.g.*, Compl. ¶¶ 22-33). And it further alleges that the risk of transmission is highest in indoor environments such as restaurants. (*See, e.g.*, *id.* ¶ 33). But the complaint lacks any allegations concerning the actual presence of the virus, or even the presence of individuals infected with COVID-19, at plaintiffs' properties.[10]

[10] The complaint's conclusory allegations concerning the "physical loss of or damage to" plaintiffs' properties are insufficient to state a claim. (*See, e.g.*, Compl. ¶ 21 ("Plaintiffs have suffered direct physical loss of or damage to their properties, loss of income, and extra expenses, caused by COVID-19 and by the Civil Authority Orders issued in Massachusetts."); *id.* ¶ 77 ("COVID-19 and the resulting orders issued by Governor Baker have caused and continue to cause Plaintiffs physical loss of or damage to property and business income losses.")). *See Iqbal*, 556 U.S. at 678 ("A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." (internal quotation marks, alterations, and citations omitted)).

Apparently recognizing that deficiency, plaintiffs contend that they are entitled to a reasonable inference that the virus was present at their restaurants. (Pl. Opp. at 13). But even considering the highly contagious nature of the virus and its spread in Boston, it is unduly speculative to infer that the virus was present within the confines of plaintiffs' restaurants. District courts faced with similar allegations have declined to engage in such speculation:

> The health data and studies described in the Complaint do not support the conclusory assertion that the virus was present on the surfaces of Plaintiff's property, causing its losses. The fact that the virus travels through the air and was present in the United States sooner than first suspected, does not support the assertion that it "likely" exists on the surfaces of Plaintiff's property. . . . [T]here is no allegation that any of these infected individuals were ever present on Plaintiff's property, or that employees or customers came into contact with someone who was infected before entering the property. To accept Plaintiff's conclusory assertion would be to accept the proposition that any business located in a community with COVID-19 infections was likely contaminated with the virus.

Promotional Headwear Int'l v. Cincinnati Ins. Co., 2020 WL 7078735, at *8 (D. Kan. Dec. 3, 2020) (internal footnotes and citations omitted); *see, e.g.*, *Johnson v. Hartford Fin. Servs. Grp., Inc.*, 2021 WL 37573, at *5 (N.D. Ga. Jan. 4, 2021) ("[C]ritically, beyond this conclusory statement the Amended Complaint does not allege that COVID-19 ever actually entered into the dental offices. The Amended Complaint likewise does not point to any instance of an employee or patient contracting the virus where it was traced to the properties. . . . They instead rely solely on speculation: *i.e.*, due to the exceedingly high number of COVID-19 cases in Georgia and ease of person-to-person transmission during the relevant time period, COVID-19 must have somehow found its way into the offices." (emphasis and internal footnotes omitted)); *Terry Black's Barbecue*, 2020 WL 7351246, at *7 ("Plaintiffs do not allege that the virus that causes COVID-19 was ever present at either of their restaurants. Plaintiffs merely speculate that the virus could have been present because of its prevalence in Austin and Dallas. Such conclusory allegations are insufficient to state a plausible claim that Plaintiffs' property was damaged."

(internal citation omitted)).[11]

Plaintiffs further contend that it is reasonable to infer that the coronavirus was present at their restaurants in light of the government orders limiting the use of restaurants. (Pl. Opp. at 13). But the orders did not apply only to businesses that were previously or presently contaminated with the coronavirus; they applied to businesses across the state, regardless of whether there was evidence of contamination. The orders were intended, as discussed below, to slow future transmission of the virus, not to remedy past transmission. As a result, the orders do not make any more reasonable an inference that the coronavirus was present at plaintiffs' properties.

* * *

In sum, the threat or presence of the coronavirus in the restaurants does not constitute "direct physical loss of or damage to property." Even if it did, the complaint does not provide a sufficient factual basis to suggest that coronavirus was actually present at plaintiffs' properties. Furthermore, the Governor's orders closing or limiting the business of the restaurants likewise did not result in a direct physical loss or damage. Accordingly, the Court will grant defendant's motion to dismiss as to Count 1 and Count 2 insofar as they depend on claims for Business Income and Extra Expense coverage.

B. Civil Authority Coverage

Defendant also contends that the complaint fails to state a claim for coverage under the

[11] In the "outlier cases" that have allowed similar complaints to survive dismissal, *SAS Int'l, Ltd.*, 2021 WL 664043, at *5, the relevant allegations went somewhat beyond those in the complaint here. *See, e.g.*, *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 798 (W.D. Mo. 2020) (denying insurer's motion to dismiss where the complaint 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"); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 2020 WL 5637963, at *4 (W.D. Mo. Sept. 21, 2020) (finding allegation that "it is likely customers, employees, and/or other visitors to the insured properties over the recent month were infected with the coronavirus" sufficient to allege a direct physical loss).

Civil Authority provision. In particular, it contends that the orders do not completely prohibit access to plaintiffs' restaurants and that the orders were not issued as a result of damage to property.

To state a claim for coverage under the Civil Authority provision, plaintiffs must allege that (1) "a Covered Cause of Loss cause[d] damage to property other than property" at the insured premises; (2) "[a]ccess to the area immediately surrounding the damaged property [was] prohibited by civil authority as a result of the damage," and the insured premises is "within that area but . . . not more than one mile from the damaged property;" (3) the "action of civil authority . . . prohibit[ed] access" to the insured premises and caused a loss of business income and extra expenses; and (4) "[t]he action of civil authority [was] 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 [was] taken to enable a civil authority to have unimpeded access to the damaged property." (Kamakura Policy at 95; Atlántico Policy at 94).

Here, the complaint does not allege that the orders were issued as a result of damage to other property. First, it does not identify any other property that was damaged. As discussed, the mere presence of the coronavirus does not constitute property damage. *See SAS Int'l Ltd.*, 2021 WL 664043, at *4 n.4 ("[N]o reasonable construction of the phrase 'direct physical loss,' however broad, would cover the presence of the virus."); *Verveine Corp.*, 2020 WL 8766370, at *5 (concluding that the complaint failed to state a claim for civil-authority coverage because, among other things, it "failed to allege damage to property, either at [plaintiffs'] restaurants or at any other building within a mile thereof").[12]

[12] The complaint alleges that "property within one mile of Plaintiffs' insured locations has suffered direct physical loss of or damage to property caused by COVID-19." (Compl. ¶ 21; *see also id.* ¶ 131 ("COVID-19-related direct physical loss of or damage to properties within a one mile radius of Kamakura's[,] [Atlántico's,] and the Classes' premises caused civil authorities to prohibit access to Plaintiff Kamakura's and Atlántico's and the Classes'

Second, even if the presence of coronavirus constituted property damage, the complaint includes only general allegations concerning the presence of the virus in Massachusetts and the City of Boston. (*See, e.g.*, Compl. ¶¶ 22-24). It fails to identify a specific "damaged property." The Civil Authority provision, however, plainly contemplates an identifiable "damaged property." It provides coverage only when "[a]ccess to the area immediately surrounding the damaged property is prohibited" and the insured premises is "within that area but . . . not more than one mile from the damaged property." (Kamakura Policy at 95; Atlántico Policy at 94). Without identifying the damaged property, it is impossible for claimants to satisfy those requirements.

Indeed, the complaint alleges neither that access to an area immediately surrounding some specific damaged property was prohibited nor that the insured premises are within that area and less than one mile from the damaged property. In fact, it could not. The orders do not prohibit access to an area surrounding an identifiable damaged property. Instead, they prohibit particular uses of properties. If Civil Authority coverage were available absent a specific and identifiable damaged property, that coverage would extend without geographic limitation—in this case, for insured premises across the entire state—something that the language of the provision plainly does not contemplate.

Plaintiffs contend that the complaint "plausibly alleges that the virus was present within a one-mile area of Plaintiffs' restaurants" considering the complaint's allegations concerning "the deadly nature of the virus and how it is rapidly spread" and its presence "throughout the City of Boston and Massachusetts." (Pl. Opp. at 18). But Civil Authority coverage is not triggered

premises.")). But again, such conclusory allegations are not sufficient to survive a motion to dismiss. *See Iqbal*, 556 U.S. at 678.

when the virus is within one mile of plaintiffs' restaurants; instead, it is triggered when plaintiffs' restaurants are within an area to which a civil authority has prohibited access. And wholly absent from the complaint are allegations concerning any specific damaged property and restrictions on access surrounding that property.[13]

Third, even if the complaint sufficiently alleged damage to a specific property, the orders were not issued "as a result of" that damage or "in response to the dangerous physical conditions resulting from" that damage. (Kamakura Policy at 95; Atlántico Policy at 94). Courts interpreting similar civil-authority provisions have made clear that there must exist a causal link between the damage to the other property and the issuance of the orders. *See, e.g.*, *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 685-87 (5th Cir. 2011) (requiring "a causal link between prior damage and civil authority action"); *United Air Lines, Inc. v. Insurance Co. of State of Pa.*, 439 F.3d 128, 134-35 (2d Cir. 2006) (examining whether the relevant orders were the "direct result" of damage to adjacent premises). That causal link is absent when "the only relevance of prior damage to other property . . . is to provide a basis for fearing future damage to the area where the insured property is located." *South Texas Med. Clinics v. CNA Fin. Corp.*, 2008 WL 450012, at *10 (S.D. Tex. Feb. 15, 2008); *see also United Air Lines*, 439 F.3d at 135 n.7 ("[T]he attack on the Pentagon 'caused' the shutdown only in the sense that it made the government fearful of future attacks.").

Plaintiffs contend that "the civil authority orders were issued in response to the dangerous physical condition of COVID-19 in the air and on surfaces in indoor environments such as

[13] Plaintiffs point out that "the Complaint specifically alleges that the virus was spread from a super-spreader event at the Marriott Long Wharf Hotel, which was within a mile of Kamakura." (Pl. Opp. at 18 n.9 (citing Compl. ¶ 23)). But that property cannot constitute the "damaged property" for the purposes of Civil Authority coverage, because the orders did not restrict access to any area around that property.

restaurants in Massachusetts." (Pl. Opp. at 19). But the orders were in fact preventative measures. They were issued to minimize future spread of the coronavirus rather than to respond to the fact that it had already spread across Massachusetts and the City of Boston. (*See, e.g.*, Compl. ¶ 34 (alleging that the orders constitute "efforts to slow the spread of COVID-19"); *id.* ¶ 50 ("The orders issued by Governor Baker were issued because of, among other things, the spread of COVID-19 and the transmission of the virus through human contact with affected property.")). Indeed, the orders were not limited to property that had been affected by the coronavirus or that was near other property that had been so affected. Because the orders were intended to minimize future damage rather than to respond to past damage, the complaint fails to state a claim for Civil Authority coverage. *See Dickie Brennan*, 636 F.3d at 685-87 (finding no civil-authority coverage for claim based on mandatory evacuation order that was issued "because of anticipated high lake and marsh tides due to the tidal surge, combined with the possibility of intense thunderstorms, hurricane force winds, and widespread severe flooding"); *United Air Lines*, 439 F.3d at 134-35 (concluding that the suspension of flights after 9/11 was "based on fears of future attacks," not the "direct result" of damage to adjacent premises, and therefore not covered by civil-authority provision).

Most courts have come to the same conclusion when considering claims for civil-authority coverage based on comparable COVID-19 orders. *See, e.g.*, *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.*, 2021 WL 389215, at *8 (S.D. Cal. Feb. 3, 2021) ("[T]he text of the Closure Orders makes clear that they were issued as general precautionary measures 'to slow the pace of community spread and avoid unnecessary strain on our medical system', to 'take precautions to prevent the spread of COVID-19', and '[t]o preserve the public health and safety, and to ensure the healthcare delivery system is capable of serving all, and prioritizing those at the

highest risk and vulnerability.' Nowhere is the presence of COVID-19 in the surrounding areas of Wellness Eatery cited as the impetus for the Closure Orders. Accordingly, for the reasons stated, the Court finds that Plaintiffs have not alleged a covered loss under the civil authority provision." (internal citations omitted)); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 7249624, at *11 (E.D. Va. Dec. 9, 2020) ("[T]he Civil Authority Coverage does not apply because Plaintiff has not shown a causal link between any physically damaged or dangerous surrounding properties proximate to the insured property and a civil authority prohibiting Plaintiff's from accessing or using their property. That is, the Executive Orders were issued because 'COVID-19 presents an ongoing threat to [Virginia] communities', and not because of prior actual 'physical damage' to its own property or surrounding properties."); *Mudpie, Inc. v. Travelers Cas. Ins. Co.*, 2020 WL 5525171, at *7 (N.D. Cal. Sept. 14, 2020) ("Mudpie's allegations establish that the government closure orders were intended to prevent the spread of COVID-19. Because the orders were preventative—and absent allegations of damage to adjacent property—the complaint does not establish the requisite causal link between prior property damage and the government's closure order." (internal citation omitted)). *But see, e.g.*, *Salon XL Color & Design Grp., LLC v. W. Bend Mut. Ins. Co.*, 2021 WL 391418, at *3 (E.D. Mich. Feb. 4, 2021) ("Salon XL has alleged that Governor Whitmer issued the order due to the spread of COVID-19 throughout Michigan, including their premises and at property within a one-mile radius of the insured premises. This is a sufficient pleading to establish a causal nexus between the Executive Order and COVID-19's presence at the insured property and properties within a one-mile radius of it to survive a motion to dismiss." (internal citation omitted)).[14]

[14] The policies at issue in *Wellness Eatery*, *Elegant Massage*, *Mudpie*, and *Salon XL* contained virus exclusions, but those exclusions did not impact the courts' analyses of the availability of civil-authority coverage.

Finally, even if the complaint alleged that the orders were issued as a result of damage to other property, it would nevertheless fail to state a claim for Civil Authority coverage because the orders did not prohibit access to plaintiffs' properties. The orders prohibited plaintiffs from using their properties for certain purposes, but they did not prohibit employees or customers from accessing the properties. (*See, e.g.*, Def. Mem. Ex. 1, at 4 ("Any restaurant, bar, or establishment that offers food or drink shall not permit on-premises consumption of food or drink; provided that such establishments may continue to offer food for take-out and by delivery provided that they follow the social distancing protocols set forth in Department of Public Health guidance.")).[15] Restaurants were in fact "encouraged to continue to offer food and beverages for take-out and by delivery provided that they follow the social distancing protocols set forth in Department of Public Health guidance." (*Id.* at 6). Plaintiffs' claims therefore fall outside the scope of the Civil Authority coverage. *See Legal Sea Foods*, slip op. at 13 ("Although Legal alleges that the Orders mandated the closure of and prohibited access to some of its insured restaurants, plaintiff fails to identify any specific Order that expressly and completely prohibited access to any of the Designated Properties."); *Verveine Corp.*, 2020 WL 8766370, at *5 ("[P]laintiffs, their employees, and their customers have not been prohibited from accessing the insureds' restaurants, a fact the Complaint plainly concedes. Rather, the scope of permitted use of those physical spaces was altered by the Governor's Orders. Plaintiffs still had access to the premises to prepare food and for takeout and delivery."); *see also Equity Planning Corp. v. Westfield Ins. Co.*, 2021 WL 766802, at *17 (N.D. Ohio Feb. 26, 2021) ("E.P. also fails to allege

See Wellness Eatery La Jolla, 2021 WL 389215, at *8 n.8; *Elegant Massage*, 2020 WL 7249624, at *11; *Mudpie, Inc.*, 2020 WL 5525171, at *7 n.9; *Salon XL Color & Design Grp.*, 2021 WL 391418, at *3-4.

[15] Again, the Court does not consider the complaint's conclusory allegations to the contrary. (*See, e.g.*, Compl. ¶ 72 ("The orders have operated to prohibit access to Plaintiffs' insured locations as well as other places throughout the Commonwealth.")). *See Iqbal*, 556 U.S. at 678.

that an action of civil authority 'prohibit[ed],' blocked, or prevented E.P. from accessing its premises. In other words, while E.P. alleges that Ohio's Stay At Home Order prevented E.P. from making 'full use of' its Property when its tenants were required to partially or completely close, the Stay At Home Order did not prevent E.P. from accessing its properties altogether." (internal citation omitted)); *First Watch Restaurants, Inc. v. Zurich Am. Ins. Co.*, 2021 WL 390945, at *4 (M.D. Fla. Feb. 4, 2021) ("[T]he governors' orders did not completely cut off access to the restaurant because First Watch was permitted to offer take-out and delivery. Merely restricting access, without completely prohibiting access, does not trigger coverage under these sorts of provisions." (internal citation omitted)); *Wellness Eatery La Jolla*, 2021 WL 389215, at *7 ("[T]he civil authority coverage provision provides coverage only to the extent that access to Plaintiffs' physical premises is prohibited—not if Plaintiffs are merely prohibited from operating the on-site consumption aspect of their business. Simply stated, the Closure Orders alleged in the complaint prohibit the on-site dining operation of Plaintiffs' business; they do not prohibit physical access to Plaintiffs' premises.").

Accordingly, the Court will grant defendant's motion to dismiss as to Count 1 and Count 2 insofar as they depend on claims for Civil Authority coverage.

C. Mass. Gen. Laws Chapter 93A

The complaint alleges that defendant violated Mass. Gen. Laws ch. 93A by refusing to pay plaintiffs' claims "without conducting a reasonable investigation based upon all the information available" and by "fail[ing] to effectuate prompt, fair and equitable settlements" of plaintiffs' claims "in which liability has become reasonably clear." (Compl. ¶ 138).

Chapter 93A makes unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce." Mass. Gen. Laws ch. 93A, § 2(a). Chapter 176D catalogues "unfair methods of competition and unfair or deceptive acts or practices in the business of insurance."

Mass. Gen. Laws ch. 176D, § 3. Those practices include unfair claim-settlement practices, such as failing to promptly and reasonably investigate claims, failing to timely affirm or deny coverage of claims, and failing to pay claims or make reasonable settlement offers once liability has become reasonably clear. *See id.* § 3(9). The SJC has concluded that "a violation of General Laws chapter 176D, § 3 . . . is evidence of an unfair business practice under chapter 93A, § 2, which would give rise to a cause of action under chapter 93A, § 11." *Federal Ins. Co. v. HPSC, Inc.*, 480 F.3d 26, 35 (1st Cir. 2007) (citing *Polaroid Corp. v. Travelers Indem. Co.*, 414 Mass. 747, 754-55 (1993); *Peterborough Oil Co. v. Great Am. Ins. Co.*, 397 F. Supp. 2d 230, 244 (D. Mass. 2005)).

To determine whether a business practice is unfair under Chapter 93A, courts must consider "(1) whether the practice . . . is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." *PMP Assocs., Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 596 (1975) (internal quotation marks and citation omitted). To be actionable under section 11, the conduct in question must constitute an "extreme or egregious" business wrong or "commercial extortion," or rise to some similar level of "rascality" that raises "an eyebrow of someone inured to the rough and tumble of the world of commerce." *Peabody Essex Museum, Inc. v. United States Fire Ins. Co.*, 802 F.3d 39, 54 (1st Cir. 2015) (citing *Baker v. Goldman Sachs & Co.*, 771 F.3d 37, 49-51 (1st Cir. 2014); *Zabin v. Picciotto,* 73 Mass. App. Ct. 141, 169 (2008)). In cases involving insurance disputes, the presence of extortionate tactics and the absence of good faith "generally characterize" actions under Chapters 93A and 176D. *See Guity v. Commerce Ins. Co.*, 36 Mass. App. Ct. 339, 344 (1994).

Those chapters, however, do not impose liability in cases of good-faith disputes over insurance coverage in which liability is "not reasonably clear." *Id.* at 343. Such disputes do not constitute unfair or deceptive trade practices, even if a court ultimately overrules the insurer's denial of a claim, as long as that denial was made in good faith, based upon a plausible interpretation of the insurance policy, and was not otherwise immoral, unethical, or oppressive. *See, e.g.*, *New England Envtl. Techs. v. American Safety Risk Retention Grp., Inc.*, 738 F. Supp. 2d 249, 259 (D. Mass. 2010) ("Because [the insurer] based its denial on a plausible, albeit erroneous, interpretation of the policy language, its conduct did not constitute a violation of Chapter 176D."); *Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co.*, 406 Mass. 7, 15 (1989) ("In good faith, [the insurer] relied upon a plausible, although ultimately incorrect, interpretation of its policy. There is nothing immoral, unethical or oppressive in such an action. . . . We hold that [the insurer] did not engage in unfair or deceptive acts in this case."); *Guity*, 36 Mass. App. Ct. at 343 ("A plausible, reasoned legal position that may ultimately turn out to be mistaken—or simply, as here, unsuccessful—is outside the scope of the punitive aspects of the combined application of c. 93A and c. 176D.").

Here, defendant correctly denied coverage under the policies. Massachusetts trial and appellate courts have repeatedly ruled that, when an insurer correctly denies coverage, Chapter 93A claims related to that denial cannot survive. *See, e.g.*, *Legal Sea Foods*, slip op. at 15 ("The Court has concluded that Strathmore correctly denied coverage under the Policy. Therefore, dismissal of the Chapter 93A claim is warranted."); *Styller v. National Fire & Marine Ins. Co.*, 95 Mass. App. Ct. 538, 546 (2019) ("When coverage has been correctly denied, as in this case, no violation of the Massachusetts statutes proscribing unfair or deceptive trade practices may be found." (quoting *Transamerica Ins. Co. v. KMS Patriots, L.P.*, 52 Mass. App. Ct. 189, 197

(2001))); *Entwistle v. Safety Indem. Ins. Co.*, 2015 WL 1602599, at *7 n.13 (Mass. Sup. Ct. Mar. 31, 2015) ("Given my conclusion that York properly applied its policy's 10% sub-limit, it could not have violated [Chapter 93A] on the facts of this case."); *Metropolitan Life Ins. Co. v. Cotter*, 2011 WL 2367906, at *14 (Mass. Sup. Ct. Feb. 7, 2011) ("An insurer which correctly denies a claim has not violated either [Chapter 93A or Chapter 176D].").[16]

Even if defendant's denials were mistaken, the complaint alleges nothing more than a good-faith dispute over interpretations of the insurance policies. Such disputes are "not the stuff of which a [Chapter 93A] claim is made." *Duclersaint v. Federal Nat. Mortg. Ass'n*, 427 Mass. 809, 814 (1998) (citing *Kobayashi v. Orion Ventures, Inc.,* 42 Mass. App. Ct. 492, 505 (1997); *Framingham Auto Sales, Inc. v. Workers' Credit Union,* 41 Mass. App. Ct. 416, 418 (1996)). Because the denials were based on plausible understandings of the policies, they are not actionable under Chapter 93A. *See New England Envtl. Techs.*, 738 F. Supp. 2d at 259; *Boston Symphony Orchestra, Inc*, 406 Mass. at 15; *Guity*, 36 Mass. App. Ct. at 343.

Plaintiffs nonetheless contend that the allegations in the complaint go beyond a disagreement concerning policy interpretation. Specifically, they contend that "GNY acted in bad faith in rejecting Plaintiffs' claims without any investigation to avoid COVID-19 losses." (Pl. Opp. at 20). The complaint alleges that defendant's denials of plaintiffs' claims "without conducting an appropriate review of the properties, as well as how swiftly GNY denied Plaintiffs' claims demonstrate that GNY did not engage in a good faith or reasonable

[16] That expression of a categorical rule may somewhat oversimplify Massachusetts law, as there may be unusual circumstances where such a claim under Chapter 93A might survive even if there is no coverage under the policy. For example, in *Jet Line Services, Inc. v. American Employers Insurance Co.*, 404 Mass. 706 (1989), the Supreme Judicial Court found that an insurer that correctly disclaimed coverage still violated Chapter 93A by leading the insured to believe that coverage was available. *See id.* at 710-17. Indeed, the First Circuit, relying on *Jet Line Services*, has stated that "[a] party is not exonerated from chapter 93A liability because there has been no breach of contract." *NASCO, Inc. v. Public Storage, Inc.*, 127 F.3d 148, 152 (1st Cir. 1997).

investigation of the claims which would have included an assessment of facts or issues relevant to the Plaintiffs' premises." (Compl. ¶ 94; *see also id.* ¶ 138 ("GNY has refused to pay the claims of Kamakura, Atlántico and members of the Massachusetts Subclasses without conducting a reasonable investigation based upon all the information available . . . .")).

But it is not clear from the complaint what made defendant's investigation, or lack of investigation, unreasonable. It alleges that defendant did not inspect the premises or documents concerning plaintiffs' business activities. (*Id.* ¶¶ 81, 90). But because defendant's denials were based on policy interpretations, not factual findings, it is not clear what would make those actions unreasonable under the circumstances. The facts underlying the claims, much like the facts underlying the present lawsuit, are largely, if not entirely, undisputed. And the speed with which defendant denied plaintiffs' claims cannot support a claim for unfair or deceptive trade practices. In fact, insurance companies risk liability under Chapter 93A and Chapter 176D when they do not timely affirm or deny claims. *See* Mass. Gen. Laws ch. 176D, § 9 ("An unfair claim settlement practice shall consist of . . . [f]ailing to acknowledge and act *reasonably promptly* upon communications with respect to claims arising under insurance policies; . . . [f]ailing to adopt and implement reasonable standards for the *prompt investigation* of claims arising under insurance policies; . . . [f]ailing to affirm or deny coverage of claims *within a reasonable time* after proof of loss statements have been completed; . . . or [f]ailing to provide *promptly* a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement." (emphases added)). In short, because the allegations in the complaint amount to nothing more than a good-faith dispute over policy interpretation, they do not state a claim under Chapter 93A.[17]

[17] The complaint further alleges that defendant violated Chapter 93A by "fail[ing] to effectuate prompt, fair and equitable settlements of Kamakura's, Atlántico's, and the Massachusetts Subclasses' claims in which liability

Accordingly, the Court will grant defendant's motion to dismiss as to Count 3.

IV. Conclusion

For the foregoing reasons, defendant's motion to dismiss is GRANTED.

So Ordered.

/s/ F. Dennis Saylor IV
F. Dennis Saylor IV
Chief Judge, United States District Court

Dated: March 9, 2021

has become reasonably clear." (Compl. ¶ 138). Plaintiffs do not rely on that allegation in their opposition and therefore appear to have abandoned it. In any event, when a defendant concludes in good faith that claims are not covered, liability is not "reasonably clear." Mass. Gen. Laws ch. 176D, § 3(9)(f). It is therefore not obligated to settle such claims. *See Capitol Specialty Ins. Corp. v. Higgins*, 203 F. Supp. 3d 200, 213 (D. Mass. 2016) ("Under Chapter 176D, the duty to settle does not arise until liability has become reasonably clear.") (citing *Clegg v. Butler*, 424 Mass. 413, 421 (1997)); *Zahiri v. General Accident Ins. Co.*, 2002 WL 2021576, at *5 (Mass. App. Ct. Sept. 4, 2002) (unpublished) ("There is nothing in the record to show that General Accident acted in violation of G.L. c. 93A by engaging in unfair or deceptive insurance practices as defined by G.L. c. 176D, § (3)(9), when it did not make a reasonable settlement offer where it believed in good faith no liability existed.") (citing *Doe v. Liberty Mut. Ins. Co.*, 423 Mass. 366, 372 (1996)).

United States District Court
District of Massachusetts

Legal Sea Foods, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 20-10850-NMG**
	)	
Strathmore Insurance Company,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM & ORDER

GORTON, J.

This case arises out of a dispute between Legal Sea Foods, LLC ("Legal") and Strathmore Insurance Company ("Strathmore") over insurance coverage for business interruption losses suffered by the insured during the COVID-19 pandemic. Pending before the Court is defendant's motion to dismiss plaintiff's second amended complaint.

I. Factual Background

Legal is a seafood restaurant chain that owns and operates dozens of restaurants in the eastern United States. Thirty-two of its restaurants located in Massachusetts, the District of Columbia, New Jersey, Pennsylvania, Rhode Island and Virginia ("the Designated Properties") are covered by a commercial

property insurance policy ("the Policy") issued by Strathmore for a one-year term beginning on March 1, 2020.

The Policy provides for Business Income (and Extra Expense) Coverage for income lost and expenses incurred during a necessary "suspension" of operations caused by "direct physical loss of or damage to" the Designated Properties. The loss or damage must also be caused by or result from a "Covered Cause of Loss," which is defined in the Policy as a "Risk[] Of Direct Physical Loss unless the loss is: [excluded] or [limited]." The Policy also provides additional coverage for business income losses and expenses that are "caused by action of civil authority that prohibits access" to the Designated Properties when a Covered Cause of Loss "causes damage to property other than" the Designated Properties as long as two additional conditions are met.

During the term of the Policy, state and local governments nationwide issued various orders in response to the COVID-19 pandemic ("the Orders"). The Orders mandated, inter alia, that residents remain in their residences unless performing certain essential activities and temporarily prohibited on-premises dining at restaurants.

In late March, 2020, Legal submitted a claim to Strathmore seeking insurance coverage under the Policy for its business interruption losses purportedly caused by the Orders. Although the substance of each Order varies by state and locality, Legal alleges that the Orders caused many of its restaurants to close or required it to limit guest capacity and to install protective barriers to reduce the spread of the virus. Legal declares that it has experienced a significant adverse impact on its business even where its restaurants have been permitted to continue delivery and take-out operations. It also avers that the virus has been physically "present" at its restaurants, outlining a "handful of examples" of individuals who were known, or suspected, to be infected at various Designated Properties.

Following an investigation of plaintiff's claim, which Legal purports consisted of a single, brief telephone call, Strathmore denied the claim. It also denied a subsequent request by Legal to reconsider its coverage determination.

II. Procedural Background

Plaintiff filed its complaint against defendant in this Court on May 4, 2020, alleging two counts of breach of contract and one count seeking a declaratory judgment. It filed its

first amended complaint ("FAC") on June 5, 2020, in which it added a claim for a violation of M.G.L. c. 93A ("Chapter 93A").

Defendant filed its motion to dismiss the FAC pursuant to Fed. R. Civ. P. 12(b)(6) on June 19, 2020, which plaintiff timely opposed.

In September, 2020, plaintiff moved for leave to file a second amended complaint ("SAC"), which this Court allowed the following month. In the SAC, Legal alleges the same four counts as in the FAC: breach of contract for failure to pay business interruption and extra expense coverage (Count I); breach of contract for failure to pay civil authority coverage (Count II); unfair or deceptive acts or practices in violation of Chapter 93A; and declaratory judgment (Count IV). Legal also alleged the actual presence of the COVID-19 virus at the Designated Properties and the purported resulting damage.

The parties subsequently filed short, supplemental memoranda in support of their positions with respect to the motion to dismiss.

III. Motion to Dismiss

A. Legal Standard

To survive a motion to dismiss, a claim must contain sufficient factual matter, accepted as true, to "state a claim

to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). In considering the merits of a motion to dismiss, the Court may only look to the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference and matters of which judicial notice can be taken. Nollet v. Justices of Trial Court of Mass., 83 F. Supp. 2d 204, 208 (D. Mass. 2000), aff'd, 228 F.3d 1127 (1st Cir. 2000).

Furthermore, the Court must accept all factual allegations in the claim as true and draw all reasonable inferences in the claimant's favor. Langadinos v. Am. Airlines, Inc., 199 F.3d 68, 69 (1st Cir. 2000). If the facts in the claim are sufficient to state a cause of action, a motion to dismiss must be denied. See Nollet, 83 F. Supp. 2d at 208.

Although a court must accept as true all the factual allegations in a claim, that doctrine is not applicable to legal conclusions. Ashcroft v. Iqbal, 556 U.S. 662 (2009). Threadbare recitals of legal elements which are supported by mere conclusory statements do not suffice to state a cause of action. Id.

B. Application

The instant dispute, like many others to have been adjudicated across the country in recent months, primarily turns on the meaning of the phrase "direct physical loss of or damage to" property, which is a prerequisite to coverage under the business income and extra expense provisions of the Policy.

The interpretation of an insurance policy is a question of law. See Ruggerio Ambulance Serv. v. Nat'l Grange Mut. Ins. Co., 430 Mass. 794, 797 (2000). The parties agree, and this Court concurs, that Massachusetts law governs the interpretation of the Policy and under Massachusetts law, courts are to

> construe an insurance policy under the general rules of contract interpretation, beginning with the actual language of the polic[y], given its plain and ordinary meaning.

Easthampton Congregational Church v. Church Mut. Ins. Co., 916 F.3d 86, 91 (1st Cir. 2019) (internal citation omitted). Although ambiguous words or provisions must be resolved against the insurer, id. at 92,

> provisions [that] are plainly and definitely expressed in appropriate language must be enforced in accordance with [the policy's] terms.

High Voltage Eng'g Corp. v. Fed. Ins. Co., 981 F.2d 596, 600 (1st Cir. 1992) (internal citation omitted).

1. Breach of Contract – Business Income & Extra Expense Coverage (Count I)

Strathmore contends that Count I should be dismissed because Legal cannot plead facts sufficient to show "direct physical loss of or damage to" property at any of the 32 Designated Properties. Legal rejoins, however, that its allegations in the SAC, namely that COVID-19 was present on its properties and caused physical loss or damage to those properties resulting in the suspension of its operations, are more than enough to survive dismissal at this stage.

First, Legal does not plausibly allege that its business interruption losses resulted from the presence of COVID-19 at the Designated Properties. Instead, it indicates in the SAC that "[t]he Orders caused and are continuing to cause" the losses for which it claims entitlement to coverage.

Second, even if Legal had properly alleged that COVID-19 caused business interruption losses due to its presence at the Designated Properties, it would not be entitled to coverage under the Policy. Courts in Massachusetts have had occasion to interpret the phrase "direct physical loss" and have done so narrowly, concluding that it requires some kind of tangible, material loss. See, e.g., Harvard St. Neighborhood Health Ctr.,

Inc. v. Hartford Fire Ins. Co., No. 14-13649-JCB, 2015 U.S. Dist. LEXIS 187495, at *18 (D. Mass. Sept. 22, 2015) ("Intangible losses do not fit within th[e] definition [of 'direct physical loss']."); Crestview Country Club, Inc. v. St. Paul Guardian Ins. Co., 321 F. Supp. 2d 260, 264-65 (D. Mass. 2004) (collecting cases). Accordingly, the plain meaning of "direct physical loss"

> require[s] some enduring impact to the actual integrity [of the insured premises and] does not encompass transient phenomena of no lasting effect.

SAS Int'l, Ltd. v. General Star Indem. Co., No. 1:20-cv-11864, 2021 U.S. Dist. LEXIS 31093, at *10 (D. Mass. Feb. 19, 2021).

The COVID-19 virus does not impact the structural integrity of property in the manner contemplated by the Policy and thus cannot constitute "direct physical loss of or damage to" property. A virus is incapable of damaging physical structures because "the virus harms human beings, not property." Wellness Eatery La Jolla LLC v. Hanover Ins. Grp., No. 20cv1277, 2021 U.S. Dist. LEXIS 23014, at *16 (S.D. Cal. Feb. 3, 2021). The presence of the virus at insured locations

> would not constitute the direct physical loss or damage required to trigger coverage under the Policy because the virus can be eliminated. The virus does not threaten the structures covered by property insurance policies, and can be removed from surfaces with routine cleaning and disinfectant.

Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co., No. 1:20-CV-665, 2020 U.S. Dist. LEXIS 234939, at *20 (W.D. Tex. Dec. 14, 2020) (also observing that "[p]laintiffs have not pled any facts showing that the coronavirus caused physical loss, harm, alteration, or structural degradation to their property").

Many other courts have concluded likewise and have dismissed complaints containing similar allegations. See, e.g., SAS Int'l, Ltd., 2021 U.S. Dist. LEXIS 31093, at *8 n.4 (D. Mass. Feb. 19, 2021) ("[N]o reasonable construction of the phrase 'direct physical loss,' however broad, would cover the presence of a virus."); Uncork & Create LLC v. Cincinnati Ins. Co., 2020 U.S. Dist. LEXIS 204152, at *13-14 (S.D.W. Va. Nov. 2, 2020) (stating that "even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property [and] the pandemic impacts human health and human behavior, not physical structures"); Pappy's Barber Shops, Inc. v. Farmers Grp., Inc., No. 20-CV-907-CAB-BLM, 2020 U.S. Dist. LEXIS 182406, at *2-3 (S.D. Cal. Oct. 1, 2020) (denying motion for leave to amend the complaint to include allegations that COVID-19 was present on plaintiffs' premises because "the presence of the virus itself . . . do[es] not constitute direct physical loss[] of or damage to property").

Legal attempts to distinguish the SAC from the cited cases but overstates the cogency of its allegations and the utility of purportedly supporting caselaw. Many of the decisions cited by Legal have subsequently been distinguished or refuted. For instance, Legal relies on the decisions in Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399 (1st Cir. 2009) and Matzner v. Seaco Ins. Co., No. 96-0498-B, 1998 Mass. Super. LEXIS 407 (Mass. Super. Aug. 12, 1998) for the proposition that a virus can cause physical damage. Another session of this Court addressed those cases, however, and held that COVID-19 fundamentally differs from the unpleasant odors and fumes at issue in those cases. See SAS Int'l, Ltd., 2021 U.S. Dist. LEXIS 31093, at *7-8.

Similarly, Legal has brought to the Court's attention the oft-cited decisions in Studio 417, Inc. v. Cincinnati Ins. Co., 478 F. Supp. 3d 794 (W.D. Mo. 2020) and Blue Springs Dental Care, LLC v. Owners Ins. Co., No. 20-CV-00383-SRB, 2020 U.S. Dist. LEXIS 172639 (W.D. Mo. Sept. 21, 2020) to demonstrate that dismissal is inappropriate. Multiple courts have considered those decisions of United States District Judge Stephen Bough and have found them to be outliers. See SAS Int'l, Ltd., 2021 U.S. Dist. LEXIS 31093, at *10-11 n.8 (observing that "courts have either tiptoed around [the] holding [in Studio 417, Inc.],

criticized it, or treated it as the minority position); Cafe Plaza De Mesilla, Inc. v. Cont'l Cas. Co., No. 2:20-cv-354, 2021 U.S. Dist. LEXIS 29163 (D.N.M. Feb. 16, 2021) ("Blue Springs Dental Care, LLC, represents an outlier case and [] the weight of recent authority, created by the deluge of coronavirus-related insurance disputes, favors [the insurer's] position in almost uniformly rejecting [the insured's] reasoning."). It is clear that the weight of legal authority supports dismissal of Count I.

Legal also attempts to avoid dismissal of Count I by contending that Strathmore chose not to include a specific virus exclusion in the Policy. That argument is, however, unavailing. The "absence of an express [virus] exclusion does not operate to create coverage" for pandemic-related losses. SAS Int'l, Ltd., 2021 U.S. Dist. LEXIS 31093, at *9 (quoting Given v. Commerce Ins. Co., 440 Mass. 207, 212 (2003)). Under the express terms of the relevant provision of the Policy, Legal was entitled to coverage only for losses resulting from "direct physical loss of or damage to" the Designated Properties and the absence of a virus exclusion does not insinuate the expansion of such coverage.

Accordingly, Count I of the complaint will be dismissed.

2. Breach of Contract – Civil Authority Coverage (Count II)

Strathmore also seeks dismissal of Legal's claim of breach of contract for failure to provide coverage under the civil authority provision.

That provision of the Policy requires Strathmore to pay for Legal's business interruption losses resulting from an action of civil authority only if that action "prohibits access" to the Designated Properties. Many courts that have addressed equivalent civil authority provisions have drawn a clear line between actions that "prohibit" access to insured properties and those that merely "limit" such access. See, e.g., Riverside Dental of Rockford, Ltd. v. Cincinnati Ins. Co., No. 20 CV 50284, 2021 U.S. Dist. LEXIS 20826, at *12-13 (N.D. Ill. January 19, 2021) (dismissing claim for civil authority coverage because the relevant government orders "did not forbid or prevent the ability to enter" the insured premises but rather "limited the types of services that could be provided"); Brian Handel D.M.D., P.C. v. Allstate Ins. Co., No. 20-cv-3198, 2020 U.S. Dist. LEXIS 207892, at *9-10 (E.D. Pa. Nov. 6, 2020) (dismissing claim for civil authority coverage because "the [Pennsylvania COVID-19] orders limit, rather than prohibit, access to the property");

Sandy Point Dental, PC v. Cincinnati Ins. Co., No. 20-cv-2160, 2020 U.S. Dist. LEXIS 171979, at *7-8 (N.D. Ill. Sept. 21, 2020) (dismissing claim for civil authority coverage because "coronavirus orders have limited plaintiff's operations, [but] no order issued in Illinois prohibits access to plaintiff's premises").

Although Legal alleges that the Orders mandated the closure of and prohibited access to some of its insured restaurants, plaintiff fails to identify any specific Order that expressly and completely prohibited access to any of the Designated Properties. In fact, Legal acknowledges in both the SAC and its memoranda opposing the instant motion that the Orders permitted its restaurants to continue carry-out and delivery operations. Consequently, Legal cannot establish a necessary prerequisite of coverage under the civil authority provision of the Policy. See 4431, Inc. v. Cincinnati Ins. Cos., No. 5:20-cv-04396, 2020 U.S. Dist. LEXIS 226984, at *32 (E.D. Pa. Dec. 3, 2020) ("Plaintiffs' ability to continue limited takeout and delivery operations at the premises precludes coverage under the Civil Authority provision: a prohibition on access to the premises, which is a prerequisite to coverage, is not present.").

To the extent Legal suggests that dismissal of its civil authority coverage claim is inappropriate because it would have suffered greater financial loss by keeping its restaurants open for carry-out and delivery services, it does so in vain. It is immaterial whether it is economically feasible for Legal to continue restaurant operations solely for carry-out and delivery sales. Rather, the relevant inquiry is whether the Orders prohibited access to the Designated Properties, which they clearly did not for the reasons stated above.

Because the Orders limit, rather than prohibit, access to the Designated Properties, Legal is not entitled to civil authority coverage under the Policy and Count II of the complaint will be dismissed.

3. Chapter 93A Claim (Count III)

Strathmore seeks to dismiss Legal's Chapter 93A claim, which is based on the allegedly unfair and deceptive investigation and denial of Legal's claim to insurance coverage.

Chapter 93A prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce," M.G.L. c. 93A, § 2(a). In the insurance context, specifically, an insurer does not violate Chapter 93A in denying coverage "so long as [it] made a good faith

determination to deny coverage" even if the insurer's interpretation of the policy was incorrect. Ora Catering, Inc. v. Northland Ins. Co., 57 F. Supp. 3d 102, 110-11 (D. Mass. 2014). Furthermore,

> [w]hen coverage has been correctly denied . . . no violation of the Massachusetts statutes proscribing unfair or deceptive trade practices may be found.

Harvard St. Neighborhood Health Ctr., Inc. v. Hartford Fire Ins. Co., No. 14-13649-JCB, 2015 U.S. Dist. LEXIS 187495, at *24 (D. Mass. Sept. 22, 2015) (quoting Transamerica Ins. Co. v. KMS Patriots, 52 Mass. App. Ct. 189, 197 (2001)).

The Court has concluded that Strathmore correctly denied coverage under the Policy. Therefore, dismissal of the Chapter 93A claim is warranted.

4. Declaratory Judgment (Count IV)

Finally, Strathmore contends that Count IV, which seeks a declaratory judgment that the Policy covers Legal's claim and that no exclusion applies to bar or limit coverage for its claim, must also be dismissed.

Because the Court has determined that Legal has failed to plead facts sufficient to demonstrate that it is entitled to coverage under the Policy, dismissal of Count IV is appropriate.

ORDER

For the foregoing reasons, the motion of defendants to dismiss plaintiff's complaint (Docket No. 16) is **ALLOWED.**

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated March 5, 2021

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MACMILES, LLC D/B/A GRANT STREET TAVERN 310 Grant Street, Ste. 106 Pittsburgh, PA 15219-2213,	:	
Plaintiff,	:	No.: GD-20-7753
vs.	:	Hon. Christine Ward
ERIE INSURANCE EXCHANGE 100 Erie Insurance Place Erie, PA 16530,	:	**Memorandum and Order of Court**
Defendant.	:	

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MACMILES, LLC D/B/A GRANT STREET TAVERN 310 Grant Street, Ste. 106 Pittsburgh, PA 15219-2213,	:	
Plaintiff,	:	No.: GD-20-7753
vs.	:	
ERIE INSURANCE EXCHANGE 100 Erie Insurance Place Erie, PA 16530,	:	
Defendant.	:	

MEMORANDUM AND ORDER OF COURT

I. The Parties

MacMiles, LLC d/b/a Grant Street Tavern (hereinafter "Plaintiff") is a restaurant and bar located in the Downtown neighborhood of Pittsburgh, Allegheny County, Pennsylvania.

Erie Insurance Exchange (hereinafter "Defendant") is a reciprocal insurance exchange organized under the laws of Pennsylvania with its principal place of business in Erie, Pennsylvania.

II. Introduction

Defendant issued Plaintiff an Ultra Plus Commercial General Liability Policy for the policy period between September 12, 2019 to September 12, 2020 (hereinafter "the insurance contract"). The insurance contract is an all-risk policy, which provides coverage for any direct physical loss or direct physical damage unless the loss or damage is specifically excluded or limited by the insurance contract.

In March and April of 2020, in order to prevent and mitigate the spread of the coronavirus disease "COVID-19," Governor Tom Wolf ("Governor Wolf") issued a series of mandates restricting the operations of certain types of businesses throughout the Commonwealth of Pennsylvania (the "Governor's orders"). On March 6, 2020, Governor Wolf issued an order declaring a Proclamation of Disaster Emergency. On March 19, 2020, Governor Wolf issued an order requiring all non-life sustaining businesses in Pennsylvania to cease operations and close physical locations. On March 23, 2020, Governor Wolf issued an order directing Pennsylvania citizens in particular counties to stay at home except as needed to access life sustaining services. Then, on April 1, 2020, Governor Wolf extended the March 23, 2020 order, and directed all of Pennsylvania's citizens to stay at home. As of April 1, 2020, at least 5,805 citizens of Pennsylvania contracted COVID-19 in sixty counties across the Commonwealth, and seventy-four (74) citizens died.[1] Unfortunately, since April 1, 2020, the number of positive cases and deaths from COVID-19 has increased dramatically.[2]

As a result of the spread of COVID-19 and the Governor's orders, Plaintiff suspended its business operations. Plaintiff thereafter submitted a claim for coverage under its insurance contract with Defendant. Defendant denied Plaintiff's claim.

On September 29, 2020, Plaintiff filed a complaint in the Court of Common Pleas of Allegheny County. In its complaint, Plaintiff asserted the following counts: [a] count one is for declaratory judgment in regards to the business income protection provision of the insurance contract; [b] count two is for breach of contract in relation to the business income protection

[1] *See* Governor Tom Wolf, *Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home*, (April 1, 2020), https://www.governor.pa.gov/wp-content/uploads/2020/04/20200401-GOV-Statewide-Stay-at-Home-Order.pdf.

[2] As of May 14, 2021, 993,915 citizens of Pennsylvania have contracted COVID-19 and 26,724 citizens have died. *See* Pennsylvania Department of Health, COVID-19 Data for Pennsylvania, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx.

provision of the insurance contract; [c] count three is for declaratory judgment with regard the civil authority provision of the insurance contract; [d] count four is for breach of contract in regards to the civil authority provision of the insurance contract; [e] count five is for declaratory judgment with regard to the extra expense provision of the insurance contract; and [f] count six is for breach of contract in regards to the extra expense provision of the insurance contract. All of Plaintiff's claims require this Court's determination as to whether Plaintiff is entitled to coverage under various provisions of the insurance contract with Defendant for losses Plaintiff sustained in relation to the spread of COVID-19 and the Governor's orders.

On December 22, 2020, Plaintiff filed a Motion for Partial Summary Judgment as to Plaintiff's claims for declaratory judgment with regard to the business income protection and civil authority provisions of the insurance contract. On March 10, 2021, Defendant filed a Cross Motion for Judgment on the Pleadings. On March 31, 2021, this Court heard oral argument on Plaintiff's Motion for Partial Summary Judgment and Defendant's Cross Motion for Judgment on the Pleadings. For the reasons set forth herein, this Court grants Plaintiff's Motion for Partial Summary Judgment, in part, and denies Defendant's Cross Motion for Judgment on the Pleadings.

III. The Contract Provisions

Plaintiff's and Defendant's dispute involves the following provisions regarding coverage under the insurance contract.

> **Section 1 - Coverages**
>
> **Insuring Agreement**
>
> We will pay for direct physical "loss" of or damage to Covered Property at the premises described in the "Declarations" caused by or resulting from a peril insured against.

Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 61, Exhibit A.

> **Section II – Perils Insured Against**
>
> * * * * *
>
> **Income Protection – Coverage 3**
>
> **Covered Cause of Loss**
>
> This policy insures against direct physical "loss", except "loss" as excluded or limited in this policy.[3]

Id. at 64.

> **Income Protection – Coverage 3**
>
> **A. Income Protection**
>
> Income Protection means loss of "income" and/or "rental income" you sustain due to partial or total "interruption of business" resulting directly from "loss" or damage to property on the premises described in the "Declarations" or to your food truck or trailer when anywhere in the coverage territory from a peril insured against.[4]

[3] "Loss" means direct and accidental loss of or damage to covered property. Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 96, Exhibit A.

[4] The insurance contract defines "interruption of business" as "the period of time that your business is partially or totally suspended and it: 1. Begins with the date of direct "loss" to covered property caused by a peril insured against: and 2. Ends on the date when the covered property should be repaired, rebuilt, or replaced with reasonable speed and similar quality." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 96, Exhibit A. The insurance contract defines "income" as "the sum of net income (net profit or loss before income taxes) that would have been earned or incurred and necessary continuing operating expenses incurred by the business such as payroll expenses, taxes, interest, and rents." *Id.* The insurance contract defines "rental income" as the following:

> 1. The rents from the tenant occupancy of the premises described in the "Declarations";
>
> 2. Continuing operating expenses incurred by the business such as:
>
> a. Payroll; and
>
> b. All expenses for which the tenant is legally responsible and for which you would otherwise be responsible;
>
> 3. Rental value of the property described in the "Declarations" and occupied by you; or

Id. at 63.

C. Additional Coverages

1. Civil Authority

When a peril insured against causes damage to property other than property at the premises described in the : Declarations", we will pay for the actual loss of "income" and/or "rental income" you sustain and necessary "extra expense" caused by action of civil authority that prohibits access to the premises described in the "Declarations" or access to your food truck or trailer anywhere in the coverage territory provided that both of the following apply:

a. Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the premises described in the "Declarations" or your food truck or trailer are within that area but are not more than one mile from the damaged property; and

b. The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the peril insured against that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Id. at 64.

Section III. Exclusions

A. Coverages 1, 2, and 3

We do not cover under Building(s) – Coverage 1; Business Personal Property and Personal Property of others – Coverage 2; and Income Protection – Coverage 3 "loss" or damaged caused directly or indirectly by any of the following. Such a "loss" or damage is excluded regardless of any cause or event that contributes concurrently or in any sequence to the "loss":

* * * * *

10. By the enforcement of or compliance with any law or ordinance regulating the construction, use, or repair of any property, or requiring the tearing down of any

4. Incidental income received from coin-operated laundries, hall rentals, or other facilities on the premises described in the "Declarations".

Id. at 97. Finally, "Declarations" is defined as "the form which shows your coverages, limits of protection, premium charges, and other information." *Id*. at 96.

> property, including the cost of removing its debris, except as provided in Extensions of Coverage – **B.3., B.7.,** and **B.8.**

Id. at 66.

IV. Standard of Review

It is well-settled that, after the relevant pleadings are closed, a party may move for summary judgment, in whole or in part, as a matter of law. Pa. R.C.P. 1035.2. Summary judgment "may be entered only where the record demonstrates that there are no genuine issues of material fact, and it is apparent that the moving party is entitled to judgment as a matter of law." *City of Philadelphia v. Cumberland County Bd. of Assessment Appeals*, 81 A.3d 24, 44 (Pa. 2013). Furthermore, appellate courts will only reverse a trial court's order granting summary judgment where it is "established that the court committed an error of law or abused its discretion." *Siciliano v. Mueller*, 149 A.3d 863, 864 (Pa. Super. 2016).

The interpretation of an insurance contract is a matter of law, which may be decided by this Court on summary judgment. *Wagner. V. Erie Insurance Company*, 801 A.2d 1226, 1231 (Pa. Super. 2002). When interpreting an insurance contract, this Court aims to effectuate the intent of the parties as manifested by the language of the written instrument. *American and Foreign Insurance Company v. Jerry's Sport Center*, 2 A.3d 526, 540 (Pa. 2010). When reviewing the language of the contract, words of common usage are read with their ordinary meaning, and this Court may utilize dictionary definitions to inform its understanding. *Wagner*, 801 A.2d at 1231; *see also AAA Mid-Atlantic Insurance Company v. Ryan*, 84 A.3d 626, 633-34 (Pa. 2014). If the terms of the contract are clear, this Court must give effect to the language. *Madison Construction Company v. Harleysville Mutual Insurance Company*, 735 A.2d 100, 106 (Pa. 1999). However, if the contractual terms are subject to more than one reasonable interpretation, this Court must find that the contract is ambiguous. *Id*. "[W]hen a provision of

a[n insurance contract] is ambiguous, the [contract] provision is to be construed in favor of the [the insured] and against the insurer, as the insurer drafted the policy and selected the language which was used therein." *Kurach v. Truck Insurance Exchange*, 235 A.3d 1106, 1116 (Pa. 2020).

V. Discussion

a. Coverage Provisions

Plaintiff bears the initial burden to reasonably demonstrate that a claim falls within the policy's coverage provisions. *State Farm Cas. Co. v. Estates of Mehlman*, 589 F.3d 105, 111 (3d Cir. 2009) (applying Pennsylvania law). Then, provided that Plaintiff satisfies its initial burden, Defendant bears "the burden of proving the applicability of any exclusions or limitations on coverage." *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996) (applying Pennsylvania law). In order to prevail, Defendant must demonstrate that the language of the insurance contract regarding exclusions is "clear and unambiguous: otherwise, the provision will be construed in favor of the insured." *Fayette County Housing Authority v. Housing and Redevelopment Ins. Exchange*, 771 A.2d 11, 13 (Pa. Super. 2001).

First, this Court will address whether Plaintiff is entitled to coverage under the Income Protection provision of the insurance contract for losses Plaintiff sustained in relation to the public health crises and the spread of the COVID-19 virus. With regard to Income Protection coverage, the insurance contract provides that:

> **Section 1 - Coverages**
>
> **Insuring Agreement**
>
> We will pay for *direct physical "loss" of or damage to* Covered Property at the premises described in the "Declarations" caused by or resulting from a peril insured against.

Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 61, Exhibit A (emphasis added).

> **Section II – Perils Insured Against**
>
> * * * * *
>
> **Income Protection – Coverage 3**
>
> **Covered Cause of Loss**
>
> This policy insures against direct physical "loss", except "loss" as excluded or limited in this policy.[5]

Id. at 64.

> **Income Protection – Coverage 3**
>
> **A. Income Protection**
>
> Income Protection means loss of "income" and/or "rental income" you sustain due to partial or total "interruption of business" resulting *directly from "loss" or damage to property* on the premises described in the "Declarations" or to your food truck or trailer when anywhere in the coverage territory from a peril insured against.[6]

[5] "Loss" means direct and accidental loss of or damage to covered property. Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 96, Exhibit A.

[6] The insurance contract defines "interruption of business" as "the period of time that your business is partially or totally suspended and it: 1. Begins with the date of direct "loss" to covered property caused by a peril insured against: and 2. Ends on the date when the covered property should be repaired, rebuilt, or replaced with reasonable speed and similar quality." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 96, Exhibit A. The insurance contract defines "income" as "the sum of net income (net profit or loss before income taxes) that would have been earned or incurred and necessary continuing operating expenses incurred by the business such as payroll expenses, taxes, interest, and rents." *Id*. The insurance contract defines "rental income" as the following:

> 1. The rents from the tenant occupancy of the premises described in the "Declarations";
>
> 2. Continuing operating expenses incurred by the business such as:
>
> a. Payroll; and
>
> b. All expenses for which the tenant is legally responsible and for which you would otherwise be responsible;
>
> 3. Rental value of the property described in the "Declarations" and occupied by you; or

Id. at 63 (emphasis added).

In order to state a reasonable claim for coverage under the Income Protection provision of the insurance contract, Plaintiff must show that it suffered "direct physical loss of or damage to" its property. The interpretation of the phrase "direct physical loss of or damage to" property is the key point of the parties' dispute. Defendant contends that "direct physical loss of or damage to" property requires some physical altercation of or demonstrable harm to Plaintiff's property. Plaintiff contends that the "direct physical loss of . . . property" is not limited to physical altercation of or damage to Plaintiff's property but includes the loss of use of Plaintiff's property. Plaintiff further asserts that, because its interpretation is reasonable, this Court must find in Plaintiff's favor.

The insurance contract does not define every term in the phrase "direct physical loss of or damage to" property.[7] As previously noted, Pennsylvania courts construe words of common usage in their "natural, plain, and ordinary sense . . . and [Pennsylvania courts] may inform [their] understanding of these terms by considering their dictionary definitions." *Madison Construction Company,* 735 A.2d at 108. Four words in particular are germane to the determination of this threshold issue: "direct," "physical," "loss," and "damage." "Direct" is

> 4. Incidental income received from coin-operated laundries, hall rentals, or other facilities on the premises described in the "Declarations".

Id. at 97. Finally, "Declarations" is defined as "the form which shows your coverages, limits of protection, premium charges, and other information." *Id*. at 96.

[7] Although the insurance contract does define the term "loss" as meaning "direct and accidental loss of or damage to covered property," this definition is essentially meaningless because it is repetitive of the phrase "direct physical loss of or damage to." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 96, Exhibit A. Accordingly, when interpreting the term "loss," this Court relies upon the term's the ordinary dictionary definition as it does with the other terms in this phrase, which the insurance contract did not define.

defined as "proceeding from one point to another in time or space without deviation or interruption . . . [and/or] characterized by close logical, causal, or consequential relationship . . ."[8] "Physical" is defined as "of or relating to natural science . . . having a material existence . . . [and/or] perceptible especially through the senses and subject to the laws of nature . . . ."[9] "Loss" is defined as "DESTRUCTION, RUIN . . . [and/or] the act of losing possession [and/or] DEPRIVATION . . . ."[10] "Damage" is defined as "loss or harm resulting from injury to person, property, or reputation . . . ."[11]

Before analyzing the definitions of each of the above terms to determine whether Plaintiff's interpretation is reasonable, it is important to note that the terms, in addition to their ordinary, dictionary definitions, must be considered in the context of the insurance contract and the specific facts of this case. *See Madison Construction Company,* 735 A.2d at 106 (clarifying that issues of contract interpretation are not resolved in a vacuum). While some courts have interpreted "direct physical loss of or damage to" property as requiring some form of physical altercation and/or harm to property in order for the insured to be entitled to coverage, this Court reasonably determined that any such interpretation improperly conflates "direct physical loss of" with "direct physical . . . damage to" and ignores the fact that these two phrases are separated in the contract by the disjunctive "or."[12] It is axiomatic that courts must "not treat the words in the

[8] Direct, Merriam-Webster, https://www.merriam-webster.com/dictionary/direct.

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

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

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

[12] *See Fayette County Housing Authority v. Housing and Redevelopment Ins. Exchange*, 771 A.2d 11, 15 (Pa. Super. 2001) (explaining that merely accepting the non-binding decisions of other courts "by the purely mechanical process of searching the nations courts for conflicting decisions" amounts to an abdication of this Court's judicial role).

[contract] as mere surplusage . . . [and] if at all possible, [this Court must] construe the [contract] in a manner that gives effect to all of the [contract's] language." *Indalex Inc. v. Nation Union Fire Ins. Co. Pittsburgh, PA*, 83 A.3d 418, 420-21 (Pa. Super. 2013). Based upon this vital principle of contract interpretation, this Court concluded that, due to the presence of the disjunctive "or," whatever "direct physical 'loss' of" means, it must mean something different than "direct physical . . . damage to."

In order to determine what the phrase "direct physical loss of . . . property" reasonably means, this Court looked to the ordinary, dictionary definitions of the terms "direct," "physical," "loss," and "damage." This Court began its analysis with the terms "damage" and "loss," as these terms are the crux of the disputed language. As noted above, "damage" is defined as "loss or harm resulting from injury to person, property, or reputation . . . ,"[13] and "loss" is defined as "DESTRUCTION, RUIN . . . [and/or] the act of losing possession [and/or] DEPRIVATION . . . ."[14]

Based upon the above-provided definitions, it is clear that "damage" and "loss," in certain contexts, tend to overlap. This is evident because the definition of "damage" includes the term "loss," and at least one definition of "loss" includes the terms "destruction" and "ruin," both of which indicate some form of damage. However, as noted above, in the context of this insurance contract, the concepts of "loss" and "damage" are separated by the disjunctive "or," and, therefore, the terms must mean something different from each other. Accordingly, in this instance, the most reasonable definition of "loss" is one that focuses on the act of losing possession and/or deprivation of property instead of one that encompasses various forms of

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

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

damage to property, i.e., destruction and ruin. Applying this definition gives the term "loss" meaning that is different from the term "damage." Specifically, whereas the meaning of the term "damage" encompasses all forms of harm to Plaintiff's property (complete or partial), this Court concluded that the meaning of the term "loss" reasonably encompasses the act of losing possession [and/or] deprivation, which includes the loss of use of property absent any harm to property.

In reaching its conclusion, this Court also considered the meaning and impact of the terms "direct" and "physical." Ultimately, this Court determined that the ordinary, dictionary definitions of the terms "direct" and "physical" are consistent with the above interpretation of the term "loss." As noted previously, "direct" is defined as "proceeding from one point to another in time or space without deviation or interruption . . . [and/or] characterized by close logical, causal, or consequential relationship . . . ,"[15] and "physical" is defined as "of or relating to natural science . . . having a material existence . . . [and/or] perceptible especially through the senses and subject to the laws of nature . . . ."[16] Based upon these definitions it is certainly reasonable to conclude that Plaintiff could suffer "direct" and "physical" loss of use of its property absent any harm to property.

Here, Plaintiff's loss of use of its property was both "direct" and "physical." The spread of COVID-19, and a desired limitation of the same, had a close logical, causal, and/or consequential relationship to the ways in which Plaintiff materially utilized its property and physical space. *See* February 22, 2021 Court Order of the United States District Court, N.D. Illinois, Eastern Division case *In re: Society Insurance Co. COVID-19 Business Interruption*

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

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

Protection Insurance Litigation, Civil Case No. 1:20-CV-05965 at 21 (stating that government shutdown orders and COVID-19 *directly* impacted the way businesses used *physical* space) (emphasis added). Indeed, the spread of COVID-19 and social distancing measures (with or without the Governor's orders) caused Plaintiff, and many other businesses, to *physically* limit the use of property and the number of people that could inhabit *physical* buildings at any given time, if at all. Thus, the spread of COVID-19 did not, as Defendant contends, merely impose economic limitations. Any economic losses were secondary to the businesses' *physical* losses.

While the terms "direct" and "physical" modify the terms "loss" and "damage," this does not somehow necessarily mean that the entire phrase "direct physical loss of or damage to" property requires actual harm to Plaintiff's property in every instance. Any argument that the terms "direct" and "physical," when combined, presuppose that any request for coverage must stem from some actual impact and harm to Plaintiff's property suffers from the same flaw noted in this Court's above discussion regarding the difference between the terms "loss" and "damage:" such interpretations fail to give effect to all of the insurance contract's terms and, again, render the phrase "direct physical loss of" duplicative of the phrase "direct physical . . . damage to."

Defendant also contends that the insurance contract's Amount of Insurance provision supports the conclusion that the contract necessitates the existence of tangible damage in order for Plaintiff to be entitled to Income Protection coverage. According to Defendant, because the Amount of Insurance provision contemplates the existence of damaged or destroyed property, and the need to rebuild, repair, or replace property, Plaintiff's argument regarding loss of use in the absence of any tangible damage or destruction to property is untenable.

Although this Court agrees with Defendant on the general principle that the insurance contract's provisions must be read as a whole so that all of its parts fit together, this Court is not persuaded that the Amount of Insurance provision is inherently inconsistent with an interpretation of "direct physical loss of . . . property" that encompasses Plaintiff's loss of use of its property in the absence of tangible damage. The insurance contract provides that:

> We will pay the actual income protection loss for only such length of time as would be required to resume normal business operations. We will limit the time period to the shorter of the following periods:
>
> 1. The time period required to rebuild, repair, or replace such part of the Building or Building Personal Property that has been damaged or destroyed as a direct result of an insured peril; or
>
> 2. Twelve (12) consecutive months from the date of loss.

Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 64, Exhibit A. Upon review of the above language, this Court determined that the Amount of Insurance provision does not limit coverage only to instances where Plaintiff needed to rebuild, repair, or replace damaged or destroyed property. Indeed, the relevant part of the Amount of Insurance provision starts by generally stating that the insurer will pay for income protection loss for only such length of time as would be required to resume normal business operations. Thereafter, the Amount of Insurance provision further explains that this time period for coverage will be limited to either (a) the length of time needed to rebuild, repair, or replace damaged or destroyed property; *or* (b) twelve (12) months from the initial date of loss.

Although Defendant is correct to point out that the Amount of Insurance provision expressly contemplates some circumstances in which Plaintiff's property is actually damaged or destroyed, this provision does not necessitate the existence of damaged or destroyed property,

and does not require repairs, rebuilding, or replacement of damaged or destroyed property in order for Plaintiff to be entitled to coverage. The Amount of Insurance provision merely imposes a time limit on available coverage, which ends whenever any required rebuilding, repairs, or replacements are completed to any damaged or destroyed property that might exist, *or* twelve (12) months after the initial date of the loss. To put this another way, the Amount of Insurance provision provides that coverage ends when Plaintiff's business is once again operating at normal capacity after damaged or destroyed property is fixed or replaced, *or* within twelve (12) months from the initial date of loss in circumstances where it is not necessary to fix or replace damaged or destroyed property, or it is not feasible to do so within a twelve (12) month time frame. The Amount of Insurance provision does not somehow redefine or place further substantive limits on types of available coverage.

As this Court determined that it is, at the very least, reasonable to interpret the phrase "direct physical loss of . . . property" to encompass the loss of use of Plaintiff's property due to the spread of COVID-19 absent any actual damage to property, and because Plaintiff established that there are no genuine issues of material fact regarding its right to coverage under the Income Protection provision of the insurance contract, this Court grants Plaintiff's Motion for Partial Summary Judgment in relation to Plaintiff's claim for declaratory judgment and the income protection provision of the insurance contract.

Second, this Court will address whether Plaintiff is entitled to coverage under the Civil Authority provision of the insurance contract for losses Plaintiff sustained in relation to the Governor's orders, which were issued to help mitigate the spread of the COVID-19 virus. With regard to Civil Authority coverage, the insurance contract provides that:

> When a peril insured against causes damage to property other than property at the premises described in the : Declarations", we will pay for the actual loss of

> "income" and/or "rental income" you sustain and necessary "extra expense" caused by action of civil authority that prohibits access to the premises described in the "Declarations" or access to your food truck or trailer anywhere in the coverage territory provided that both of the following apply:
>
> a. Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the premises described in the "Declarations" or your food truck or trailer are within that area but are not more than one mile from the damaged property; and
>
> b. The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the peril insured against that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Id. at 64.

With regard to Civil Authority coverage, Plaintiff must, as a threshold matter, demonstrate that COVID-19 caused damage to property other than Plaintiff's property. Unlike the Income Protection provision, under the Civil Authority provision there is no coverage for the loss of use of property other than Plaintiff's property. Accordingly, this Court's above analysis with regard Income Protection coverage and loss of use is inapplicable, as it does not address whether COVID-19 separately caused damage to property.

Again, as noted above, "damage" is defined as "loss or harm resulting from injury to person, property, or reputation . . . ."[17] Based upon this definition, this Court determined that, at the very least, in order for COVID-19 to damage property, COVID-19 must come into contact with property and cause harm. Presently, it is contested whether COVID-19 can live on the surfaces of property for some period of time. Additionally, while this might be one way by which individuals contract COVID-19, it is not the primary means by which COVID-19 spreads. *See Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 892 (Pa. 2020) (holding that COVID-19

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

does not spread because the virus is present on any particular surface or at any particular location, rather COVID-19 spreads because of person-to-person contact). Indeed, person-to-person transmission of COVID-19, as opposed to property damage, was the primary reason for the Governor's orders, social distancing measures, and resultant changes in the ways business utilized property. With or without COVID-19 contacting the surface of any given property in the Commonwealth, businesses throughout the Commonwealth shutdown, at least partially, and suffered the loss of use of property due to the risk of person-to-person COVID-19 transmission. Thus, in the above discussion regarding the Income Protection provision, this Court determined that there are no genuine issues of material fact as to whether Plaintiff suffered the loss use of property due to COVID-19. The same is, however, not as clear with regard to the question of whether COVID-19 caused damaged to property throughout the Commonwealth.

Even if this Court were to accept that COVID-19 could and did cause damage to property under the theory presented by Plaintiff, whether Plaintiff is entitled to coverage under the Civil Authority provision depends upon whether Plaintiff can demonstrate that COVID-19 was actually present on property other than Plaintiff's property. Additionally, Plaintiff must show that any such damaged property was within one mile of Plaintiff's property, and that the actions of civil authority (in this case the Governor's orders) were "taken in response to dangerous physical conditions resulting from the *damage* or continuation of the peril insured against that caused the *damage*, or the action is taken to enable a civil authority to have unimpeded access to the *damaged* property." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 64, Exhibit A (emphasis added). At this time, genuine issues of material fact remain in dispute as to the following: [a] whether COVID-19 caused damage to property; [b] whether COVID-19

was actually present at any particular property; and [c] the extent to which the Governor's orders were issued in response to property damaged by COVID-19. Accordingly, this Court denies Plaintiff's Motion for Partial Summary Judgment in relation to its claim for declaratory judgment and the Civil Authority provision of the insurance contract without prejudice.[18]

b. Exclusions

Having determined that Plaintiff provided a reasonable interpretation demonstrating that Plaintiff is entitled to coverage under the Income Protection provision of the insurance contract, this Court turns to the question of whether Defendant demonstrated "the applicability of any exclusions or limitations on coverage." *Koppers Co.*, 98 F.3d at 1446 (applying Pennsylvania law). As discussed previously, in order to prevail, Defendant must show that the language of the insurance contract regarding an exclusion is "clear and unambiguous: otherwise, the provision will be construed in favor of the insured." *Fayette County Housing Authority*, 771 A.2d at 13.

Defendant argues that the insurance contract's exclusion regarding the enforcement of or compliance with laws and ordinances prevents coverage for income protection. The insurance contract states that the insurer will not pay for loss or damage caused "[b]y the enforcement of or compliance with any law or ordinance regulating the construction, use, or repair, of any property, or requiring the tearing down of any property, including the cost of removing its debris . . . ." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 66, Exhibit A.

According to Defendant, coverage is precluded by the above exclusion because Plaintiff's alleged losses are due solely to the Governor's orders. This, however, is not the case. In its complaint, Plaintiff states that its claim for coverage is based upon losses and expenses Plaintiff

[18] As this Court is not convinced that, as a matter of law, Plaintiff cannot prevail on its damage theory, this Court also denies Defendant's Cross Motion for Judgment on the Pleadings.

suffered in relation to both "*the COVID-19 pandemic* . . . and the orders of civil authorities enacted in response to this natural disaster." Plaintiff's Complaint at 13 (emphasis added). As this Court explained earlier in this memorandum, COVID-19 and the related social distancing measures (with and without government orders) directly forced businesses everywhere to physically limit the use of property and the number of people that could inhabit physical buildings at any given time. The Governor's orders only came into consideration in the context of Plaintiff's claim for coverage under the Civil Authority provision of the contract.[19] Accordingly, Defendant failed to demonstrate that the exclusion regarding the enforcement of or compliance with laws and ordinances clearly and unambiguously prevents coverage.

VI. Conclusion

As this Court determined that [a] Plaintiff's interpretation of the Income Protection provision of the insurance contract is, at the very least, reasonable, [b] that there are no genuine issues of material fact regarding Plaintiff's loss of use, and [c] that none of the insurance contract's exclusions clearly and unambiguously prevent coverage, Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's claim for declaratory judgment with regard to Income Protection coverage is GRANTED. In contrast, because this Court determined that there are genuine issues of material fact remaining as to the Civil Authority provision and whether COVID-19 caused damage to property, Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's claim for declaratory judgment with regard to Civil Authority coverage is DENIED

[19] Certainly, the exclusion regarding the enforcement of or compliance with laws and ordinances could not have been intended to exclude coverage under the Civil Authority provision of the contract, as this would make any extended coverage for the actions of Civil Authority illusory. *See Heller v. Pennsylvania League of Cities and Municipalities*, 32 A.3d 1213, 1228 (Pa. 2011) (holding that where an exclusionary provision of an insurance contract operates to foreclose expected claims, such a provision is void as it renders coverage illusory).

without prejudice. Finally, Defendant's Cross Motion for Judgement on the Pleadings is DENIED.

By the Court:

Christine Ward, J.

Christine Ward, J.

Dated: 5/25/2021

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MACMILES, LLC D/B/A GRANT STREET TAVERN 310 Grant Street, Ste. 106 Pittsburgh, PA 15219-2213,	:	
Plaintiff,	:	No.: GD-20-7753
vs.	:	
ERIE INSURANCE EXCHANGE 100 Erie Insurance Place Erie, PA 16530,	:	
Defendant.	:	

ORDER OF COURT

And now, this 25 day of May, 2021 it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's claim for declaratory judgment with regard Income Protection coverage is GRANTED;
2. Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's claim for declaratory judgment with regard to Civil Authority coverage is DENIED without prejudice; and
3. Defendant's Cross Motion for Judgement on the Pleadings is DENIED.

By the Court:

Christine Ward, J.

Christine Ward, J.

Dated: 5/25/2021

2020 WL 5051581
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

MALAUBE, LLC, Plaintiff,
v.
GREENWICH INSURANCE COMPANY, Defendant.

Case No. 20-22615-Civ-WILLIAMS/TORRES
|
Signed 08/26/2020

Attorneys and Law Firms

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REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO DISMISS

EDWIN G. TORRES, United States Magistrate Judge

***1** This matter is before the Court on Greenwich Insurance Company's ("Defendant" or "Greenwich") motion to dismiss against Malaube, LLC's ("Plaintiff") amended complaint. [D.E. 10]. Plaintiff responded to Defendant's motion on July 30, 2020 [D.E. 14] to which Defendant replied on August 6, 2020. [D.E. 15]. Therefore, Defendant's motion is now ripe for disposition. After careful consideration of the motion, response, reply, relevant authority, and for the reasons discussed below, Defendant's motion to dismiss should be **GRANTED**. [1]

I. BACKGROUND

Plaintiff filed this action on April 23, 2020 [D.E.1] in Florida state court, seeking to recover insurance benefits for the loss of business income as a result of government shutdowns in response to the COVID-19 pandemic. [2] On September 25, 2019, Greenwich entered into an insurance contract with Plaintiff with the latter agreeing to make payments in exchange for Greenwich's promise to indemnify for losses including business income at Plaintiff's restaurant. [3] Plaintiff alleges that the insurance policy is in full effect, providing business income and personal property insurance from September 25, 2019 to September 25, 2020.

On March 17, 2020, Miami-Dade Mayor Carlos Gimenez signed an order to close all restaurants for indoor dining and only permitted takeout and delivery as a result of the COVID-19 pandemic. Florida Governor, Ron DeSantis, then issued an executive order on March 20, 2020 that closed all onsite dining at restaurants. [4] Plaintiff claims that these orders resulted in significant business losses for Plaintiff's restaurant and that Greenwich was obligated to pay because of government orders that prohibited access to indoor dining. When Plaintiff demanded payment for these losses, Greenwich denied Plaintiff's claim because Plaintiff did not experience any physical loss or damage to the insured property. Plaintiff now fears that, with Greenwich's improper denial of its insurance benefits, its restaurant may be forced to close permanently. Therefore, Plaintiff seeks a declaratory judgment that the insurance policy provides coverage for the losses stemming from the government shutdowns including costs, prejudgment interest, and attorney's fees.

II. APPLICABLE PRINCIPLES AND LAW

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

> ***2** Although it must accept well-pled facts as true, the court is not required to accept a plaintiff's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (noting "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable

to legal conclusions"). In evaluating the sufficiency of a plaintiff's pleadings, we make reasonable inferences in Plaintiff's favor, "but we are not required to draw plaintiff's inference." *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005). Similarly, "unwarranted deductions of fact" in a complaint are not admitted as true for the purpose of testing the sufficiency of plaintiff's allegations. *Id.*; *see also Iqbal*, 556 U.S. at 681 (stating conclusory allegations are "not entitled to be assumed true").

Sinaltrainal v. Coca-Cola, 578 F.3d 1252, 1260 (11th Cir. 2009), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, 566 U.S. 449, 453 n.2, (2012). The Eleventh Circuit has endorsed "a 'two-pronged approach' in applying these principles: 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, 'assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.' " *American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 679).

III. ANALYSIS

Defendant seeks to dismiss Plaintiff's amended complaint for three independent reasons.[5] First, Defendant argues that the insurance policy was never triggered because it excludes any coverage for viruses, bacteria, or other microorganisms that induce physical distress, illness, or disease. Second, Defendant claims that there is no insurance coverage because Plaintiff failed to allege that it suffered any direct physical loss or damage to property. And third, Defendant reasons that the two Florida Emergency Orders never prohibited Plaintiff from accessing the insured property – a prerequisite that must be satisfied before insurance coverage can apply. Before we consider the merits, we must consider the general principles governing the interpretation of insurance contracts under Florida law. These principles are necessary, as they will inform the analysis that follows.

A. General Principles of Insurance Contracts

"Under Florida law, an insurance policy is treated like a contract, and therefore ordinary contract principles govern the interpretation and construction of such a policy." *Pac. Emp'rs Ins. Co. v. Wausau Bus. Ins. Co.*, 2007 WL 2900452, at *4 (M.D. Fla. Oct. 2, 2007) (citing *Graber v. Clarendon Nat'l Ins. Co.*, 819 So. 2d 840, 842 (Fla. 4th DCA 2002)). The interpretation of an insurance contract – including the question of whether an insurance provision is ambiguous – is a question of law. *See id.*; *Travelers Indem. Co. of Illinois v. Hutson*, 847 So. 2d 1113 (Fla. 1st DCA 2003) (stating that whether an ambiguity exists in a contract is a matter of law).

***3** In addition, "[u]nder Florida law, insurance contracts are construed according to their plain meaning." *Garcia v. Fed. Ins. Co.*, 473 F.3d 1131, 1135 (11th Cir. 2006) (quoting *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005)). The "terms of an insurance policy should be taken and understood in their ordinary sense and the policy should receive a reasonable, practical and sensible interpretation consistent with the intent of the parties-not a strained, forced or unrealistic construction." *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 736 (Fla. 2002) (quoting *Gen. Accident Fire & Life Assurance Corp. v. Liberty Mut. Ins. Co.*, 260 So. 2d 249 (Fla. 4th DCA 1972)); *see also Gilmore v. St. Paul Fire & Marine Ins.*, 708 So. 2d 679, 680 (Fla. 1st DCA 1998) ("The language of a policy should be read in common with other policy provisions to accomplish the intent of the parties.").

However, if there is more than one reasonable interpretation of an insurance policy, an ambiguity exists and it "should be construed against the insurer." *Pac. Emp'rs Ins.*, 2007 WL 2900452, at *4 (citing *Purrelli v. State Farm Fire & Cas. Co.,* 698 So. 2d 618, 620 (Fla. 2d DCA 1997)). Where an interpretation "involve[s] exclusions to insurance contracts, the rule is even clearer in favor of strict construction against the insurer: exclusionary provisions which are ambiguous or otherwise susceptible to more than one meaning must be construed in favor of the insured." *Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 412 F.3d 1224, 1228 (11th Cir. 2005) (quoting *State Farm Mut. Auto. Ins. Co. v. Pridgen,* 498 So. 2d 1245, 1248 (Fla. 1986)). An insurance policy must, of course, be ambiguous before it is subject to these rules. *See Taurus Holdings, Inc.*, 913 So. 2d at 532 ("Although ambiguous provisions are construed in favor of coverage, to allow for such a construction the provision must actually be ambiguous."). An ambiguous policy must, for example, have a genuine inconsistency, uncertainty, or ambiguity in meaning after the court has applied the ordinary rules of construction. *See Deni Assocs. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.*,711 So. 2d 1135 (Fla. 1998). "Just because an operative term is not defined, it does not necessarily mean that the term is ambiguous." *Amerisure Mut. Ins. Co. v. Am. Cutting & Drilling Co.*, 2009 WL 700246, at

*4 (S.D. Fla. Mar. 17, 2009) (citing *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.,* 845 So. 2d 161, 166 (Fla. 2003)).

On the other hand, "if a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision." *Hagen v. Aetna Cas. & Sur. Co.,* 675 So. 2d 963, 965 (Fla. 5th DCA 1996). Ultimately "in the absence of some ambiguity, the intent of the parties to a written contract must be ascertained from the words used in the contract, without resort to extrinsic evidence." *Fireman's Fund Ins. Co. v. Tropical Shipping & Const. Co.*, 254 F.3d 987, 1003 (11th Cir. 2001) (quoting *Lee v. Montgomery*, 624 So. 2d 850, 851 (Fla. 1st DCA 1993)).

When the parties dispute coverage and exclusions under a policy, a burden-shifting framework applies. "A person seeking to recover on an insurance policy has the burden of proving a loss from causes within the terms of the policy[,] and if such proof of loss is made within the contract of insurance, the burden is on the insurer to establish that the loss arose from a cause that is excepted from the policy." *U.S. Liab. Ins. Co. v. Bove,* 347 So. 2d 678, 680 (Fla. 3d DCA 1977) (alteration added; citations omitted). If the insurer is able to establish that an exclusion applies, the then burden shifts back to the insured to prove an exception to the exclusion. *See id.*; *see also IDC Const., LLC. v. Admiral Ins. Co.*, 339 F. Supp. 2d 1342, 1348 (S.D. Fla. 2004) ("When an insurer relies on an exclusion to deny coverage, it has the burden of demonstrating that the allegations in the complaint are cast solely and entirely within the policy exclusions and are subject to no other reasonable interpretation."). That is, "if there is an exception to the exclusion, the burden once again is placed on the insured to demonstrate the exception to the exclusion." *East Fla. Hauling, Inc. v. Lexington Ins. Co.*, 913 So. 2d 673, 678 (Fla. 3d DCA 2005) (citing *LaFarge Corp. v. Travelers Indem. Co.,* 118 F.3d 1511, 1516 (11th Cir. 1997)).

B. The Business Income Exclusion

***4** Having set forth the relevant legal principles, Defendant's strongest argument is that Plaintiff's amended complaint fails to state a claim because the insurance policy only provides coverage for the actual loss of business income if a *direct physical loss or damage* to the property causes a suspension to Plaintiff's operations:

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

[D.E. 5-1 at 53]. The policy further provides coverage for extra expenses during a period of restoration, but that also only applies if the insured property suffers direct physical loss or damage:

> Extra Expense Coverage is provided at the premises described in the Declarations only if the Declarations show that Business Income Coverage applies at that premises.
>
> Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been on direct physical loss or damage to property caused by or resulting from a Coverage Cause of Loss.

Id. at 53.

Defendant argues that Plaintiff has failed to state a claim because there are no allegations that the insured property has ever suffered a direct physical loss or damage. Instead, Plaintiff alleges that two Florida Emergency Orders limited the full use of its restaurant and that, as a result, Plaintiff suffered significant businesses losses. [D.E. 5 at ¶¶ 13-14 ("On March 17, 2020, Miami-Dade Mayor, Carlos Gimenez, signed an order to close all restaurants for dining in and only permitting takeout and delivery. On March 20, 2020, the Florida Governor, Ron DeSantis, issued an executive order closing all onsite dining at restaurants")]. Defendant also states that the amended complaint concedes that the Florida Emergency Orders were issued in response to the COVID-19 pandemic and entirely unrelated to any physical loss or damage to Plaintiff's property. *See id.* at 18 ("The Government Shutdowns that interfered with [Plaintiff'] access to its business came as a result of the COVID-19 pandemic."). Because Plaintiff's allegations seek coverage for pure economic losses stemming with no connection to any

physical loss or damage, Defendant reasons that Plaintiff's amended complaint must be dismissed.

Plaintiff's response is that there is an ongoing debate in both state and federal courts on the meaning of "direct physical loss" and "direct physical damage." Plaintiff contends, for example, that the use of the "or" in the phrase "direct physical loss or damage" suggests that the two terms are not the same, and that they must be distinct. If the terms were the same, Plaintiff believes that it would render some component of the insurance policy meaningless and undermine a fundamental rule of Florida contract law. *See, e.g.*, *Westport Ins. Corp. v. Tuskegee Newspapers, Inc.*, 402 F.3d 1161, 1166 (11th Cir. 2005) ("[A] court will attempt to give meaning and effect, if possible, to every word and phrase in the contract, ... and a construction which neutralizes any provision of a contract should never be adopted if the contract can be so construed as to give effect to all the provisions.") (quoting *J. Appleman, Insurance Law and Practice* § 7383 (1981)).

***5** Plaintiff also states that the Florida Emergency Orders caused a direct physical loss because they forced Plaintiff to close its indoor dining to mitigate the spread of COVID-19. As support, Plaintiff references several state and federal court opinions – some of which date back to the 1970s – with a contention that these are the "better reasoned cases" in the ongoing debate and that they are consistent with Florida law. Plaintiff then asserts, with a reference to several other cases, that the inability to use the intended purpose of a business constitutes a direct physical loss because Plaintiff had no option other than to close the indoor dining section of its restaurant. Thus, Plaintiff equates the closure of its indoor dining to a physical loss because the business could no longer operate for its intended purpose.

To begin, Plaintiff's response is, in many respects, unhelpful because it is conclusory and fails to put forth any substantive reasons in support of its position. Plaintiff makes assertions, for example, that physical damage is different from physical loss and then follows that statement with a string cite of parentheticals with no explanation as to how any of the cases are relevant. Plaintiff complicates matters further when it references cases, some of which are decades old, across the country (including Michigan, Minnesota, and California) but then fails to offer any analysis whatsoever. Plaintiff just leaves it for the Court to examine these cases, and to do the work that Plaintiff should have done in the first place. That is, Plaintiff invites the Court to develop its own argument and determine which of these cases (1) are relevant to Florida law, (2) are applicable to the insurance policy in this case, (3) offers a persuasive distinction between physical loss and damage, and (4) are analogous to the partial closure of a business. Hence, Plaintiff's response is largely unpersuasive. *See United States Liab. Ins. Co. v. Bove*, 347 So. 2d 678, 680 (Fla. 3rd DCA 1977) (stating that a party claiming coverage has the burden of proof to establish that coverage exists).

Putting aside this problem, Plaintiff argues that physical loss does not require structural alteration and that a property's inability to operate with its intended purpose (i.e. the operation of both its indoor and outdoor dining sections) falls within the insurance policy's coverage. The policy does not define "physical loss" or "physical damage." However, "[t]he mere failure to provide a definition of a term involving coverage does not render the term ambiguous." *Those Certain Underwriters at Lloyd's London v. Karma Korner, LLC*, 2011 WL 1150466, at *2 (M.D. Fla. 2011) (citation omitted). When a policy does not define a term, the plain and generally accepted meaning should be applied. *See Evanston Ins. Co. v. S & Q Prop. Inv.*, LLC, 2012 WL 4855537, at *2 (S.D. Fla. 2012).

Defendant argues that, under the plain meaning of the word "physical", Plaintiff has not alleged coverage for any loss because, by definition, the policy excludes losses that are intangible. *See, e.g.*, 10A *Couch On Insurance* § 148.46 (3d Ed. 2019) ("[T]he requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude losses that are intangible or incorporeal, and, thereby to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property."). This is persuasive, in some respects, because courts in our district have found that "[a] direct physical loss 'contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.' " *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) (quoting *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010)), *aff'd*, 2020 WL 4782369 (11th Cir. Aug. 18, 2020).

***6** While neither party cited a binding decision on the meaning of "direct physical loss" or "direct physical damage" under Florida law, a case that addresses many of the arguments presented is a district court's recent decision in

Studio 417, Inc. v. Cincinnati Ins. Co., 2020 WL 4692385, at *4 (W.D. Mo. Aug. 12, 2020). There, the plaintiffs purchased insurance policies for their hair salons and restaurants. The policies provided coverage for physical losses or physical damages, and the plaintiffs argued that they should recover the insurance proceeds as a result of the Covid-19 pandemic. The defendants moved to dismiss because – with the policies requiring either a direct physical loss or damage – the plaintiffs could not recover unless there was an actual, tangible, permanent, or physical alteration to the insured properties. The district court rejected that argument, however, because "loss" and "damage" could not be conflated with the "or" separated between them. Instead, the court had to "give meaning to both terms," to avoid the other from being superfluous. *Studio 417, Inc.*, 2020 WL 4692385, at *5 (citing *Nautilus Grp., Inc. v. Allianz Global Risks US*, 2012 WL 760940, at * 7 (W.D. Wash. Mar. 8, 2012) (stating that "if 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous")).

The district court then referenced several decisions where courts have recognized that, absent a physical alteration, a physical loss may occur when a property is uninhabitable or substantially unusable for its intended purpose. *Studio 417, Inc.*, 2020 WL 4692385, at *5 (citing *Port Auth. of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (affirming the denial of coverage but recognizing that "[w]hen the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct [physical] loss to its owner"); *Prudential Prop. & Cas. Ins. Co. v. Lilliard-Roberts*, 2002 WL 31495830, at * 9 (D. Or. June 18, 2002) (citing case law for the proposition that "the inability to inhabit a building [is] a 'direct, physical loss' covered by insurance"); *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) ("We have previously held that direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way.")); *see also Murray v. State Farm Fire & Cas. Co.,* 203 W.Va. 477, 509 (1998) (holding policyholders to suffer a "direct physical loss" when their homes were rendered uninhabitable due to threat of rockfall); *W. Fire Ins. Co. v. First Presbyterian Church,* 165 Colo. 34, 437 P.2d 52, 55 (1968) (holding that the policyholder suffered "direct physical loss" when "the accumulation of gasoline around and under the [building caused] the premises to become so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous").

The court also acknowledged that there were cases where an actual alteration was required to show a "physical loss," but distinguished those on the basis that they were, for the most part, decided on a motion for summary judgment, factually dissimilar, or non-binding. *Id.* (citing *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006)(affirming the denial of insurance coverage on a motion for summary judgment and under Minnesota law)); *Mama Jo's, Inc.*, 2018 WL 3412974, at *8 (granting summary judgment in favor of the insurance company because the plaintiff could not "show that there was any suspension of operations caused by 'physical damage.' ") (citing *Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co. of Am.*, 835 F.2d 812, 814 (11th Cir. 1988)) ("[R]ecovery is intended when the loss is due to inability to use the premises where the damage occurs."). [6]

***7** In light of these decisions, the district court denied the defendant's motion to dismiss because the plaintiffs alleged that COVID-19 was a highly contagious virus that was *physically present* in viral fluid particles and deposited on surfaces and objects. The plaintiffs further alleged that the physical substance was on the premises and caused them to cease or suspend operations. That is, "[r]egardless of the allegations in ... other cases, Plaintiffs ... plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable." *Studio 417, Inc.*, 2020 WL 4692385, at *6. And that was "enough to survive a motion to dismiss." *Id.*

This case is materially different because Plaintiff has not alleged any physical harm. There is no allegation, for example, that COVID-19 was physically present on the premises. Instead, Plaintiff only alleges that two Florida Emergency Orders forced the closure of its restaurant. And, as stated earlier, courts have found this to be insufficient to state a claim because there must be some allegation of actual harm:

> The critical policy language here —"direct physical loss or damage"— similarly, and unambiguously, requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage. [Plaintiff] simply cannot show any such loss or damage to the 40 Wall Street Building as a

> result of either (1) its inability to access its office from October 29 to November 3, 2012, or (2) Con Ed's decision to shut off the power to the Bowling Green network. The words "direct" and "physical," which modify the phrase "loss or damage," ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure.

Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co., 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014).

Plaintiff's allegations are insufficient to state a claim for an entirely separate reason because, when we examine the language of the insurance policy, "direct physical" modifies both "loss" and "damage." That means that any "interruption in business must be caused by some *physical problem* with the covered property ... which must be caused by a 'covered cause of loss.' " *Philadelphia Parking Authority v. Federal Ins. Co.*, 385 F. Supp. 2d 280, 288 (S.D.N.Y. 2005); *see also United Airlines, Inc. v. Ins. Co. of State of Pa.,* 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005), *aff'd* 439 F.3d 128 (2d Cir. 2006) ("The inclusion of the modifier 'physical' before 'damages' ... supports [defendant's] position that physical damage is required before business interruption coverage is paid.").

Florida's appellate courts are in agreement with this interpretation. The Third District has found, for instance, that a "loss" constitutes a diminution of value and that, with the modifiers "direct" and "physical," the alleged damage *must be actual*:

> A "loss" is the diminution of value of something, and in this case, the 'something' is the insureds' house or personal property. Loss, *Black's Law Dictionary* (10th ed. 2014). "Direct" and "physical" modify loss and impose the requirement that the damage be actual. Examining the plain language of the insurance policy in this case, it is clear that the failure of the drain pipe to perform its function constituted a "direct" and "physical" loss to the property within the meaning of the policy.

Homeowners Choice Prop. & Cas. v. Miguel Maspons, 211 So. 3d 1067, 1069 (Fla. 3rd DCA 2017); *see also Vazquez v. Citizens Prop. Ins. Corp.*, 2020 WL 1950831, at *3 (Fla. 3rd DCA Mar. 18, 2020) ("Consistent with this plain meaning, the trial court determined that the 'insured loss' is the property that was actually damaged."); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.,* 1999 WL 619100, at *7 (D. Or. Aug. 4, 1999) (holding that a policyholder could not recover under a policy requiring "physical loss" unless the claimed mold physically and demonstrably damaged the insured property); *MRI Healthcare Ctr. of Glendale, Inc.*, 187 Cal. App. 4th at 779 ("A direct physical loss contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.") (internal quotation marks and citation omitted); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App. 3d 23, 42 (Ohio Ct. App. 2008).

***8** The Eleventh Circuit's decision in *Mama Jo's Inc. v. Sparta Ins. Co.*, 2020 WL 4782369, at *1 (11th Cir. Aug. 18, 2020), is also consistent with our interpretation of Florida law. There, the plaintiff owned and operated a restaurant and, from December 2013 until June 2015, there was roadway construction in its general vicinity. The construction generated dust and debris, requiring the plaintiff to perform daily cleanings. Although the restaurant was open every day during the roadwork, customer traffic decreased and the business suffered an economic loss. The plaintiff was insured under a policy, which included coverage for loss of business. This policy covered "direct physical loss of or damage to Covered Property ... caused by or resulting from any Covered Cause of Loss." *Id.* at *1 (citation and quotation marks omitted). The plaintiff submitted a claim to the insurer on the basis that dust and debris caused a loss in business. The insurer denied that claim because the proof of loss form failed to reflect the existence of any physical damage (and it was questionable whether a direct physical loss occurred). Thus, the insurer concluded that plaintiff's claim was not covered under the policy.

After finding no error in the district court's decision to exclude several of the plaintiff's experts, the Eleventh Circuit found that the plaintiff failed to show any evidence of direct physical loss or damage. The plaintiff alleged that his insurance claim had two components: one for cleaning the restaurant and another for the loss of business income. In determining whether coverage existed, the Court looked to the same Florida decisions we referenced above and found that "direct physical loss" is defined as a diminution in value and that the modifiers "direct" and "physical" "imposed the requirement that the damage be actual." *Id.* (citing *Homeowners Choice Prop. & Cas.*, 211 So. 3d at 1069; *Vazquez*, 2020 WL 1950831, at *3).

The Court then examined whether coverage existed for the cleaning claim because the plaintiff's public adjuster testified that cleaning and painting was all that was required. In fact, there was no need for the removal or replacement of any items during the construction. The Eleventh Circuit found that, based on the evidence that the district court considered, the cleaning claim did not constitute a direct physical loss because these expenses are merely economic losses. *Id.* at *8 ("We conclude that the district court correctly granted summary judgment on Berries' cleaning claim because, under Florida law, an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.' ") (citing *Maspons*, 211 So. 3d at 1069 (recognizing that "damage [must] be actual"); *Vazquez*, 2020 WL 1950831, at *3 (same)); *see also Universal Image Prods., Inc. v. Fed. Ins.* Co., 475 F. App'x 569, 573 (6th Cir. 2012) ("[C]leaning ... expenses ... are not tangible, physical losses, but economic losses."); *MRI Healthcare Ctr. of Glendale, Inc.*, 187 Cal. App. 4th at 779 ("A direct physical loss 'contemplates an actual change in insured property."); *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 307 (2003) (same).

The Eleventh Circuit also agreed with the district court, with respect to the business loss claim, because that too required that a suspension of operations be caused by direct physical loss or damage to the property. Yet, the plaintiff failed to put forward any evidence that it suffered a direct physical loss or damage during the policy period. And in the absence of any evidence of actual damage, the Eleventh Circuit concluded that the district court was correct in granting the insurer's motion for summary judgment.

When comparing *Mama Jo's* to the allegations in this case, Plaintiff's allegations are far weaker. Although the plaintiff in *Mama Jo's* failed to put forth any evidence that his cleaning claim constituted a direct physical loss, he at least alleged that there was a physical intrusion (i.e. dust and debris) into his restaurant. Plaintiff has done nothing similar in this case. Plaintiff merely claims that two Florida Emergency Orders closed his indoor dining. But, for the reasons already stated, this cannot state a claim because the loss must arise to actual damage. And it is not plausible how two government orders meet that threshold when the restaurant merely suffered economic losses – not anything tangible, actual, or physical.

***9** As a last ditch effort, Plaintiff suggests that we should adopt a more expansive definition of "direct physical loss or damage," so that coverage could apply if the property is either uninhabitable or substantially unusable. *See, e.g.*, *Port Auth. of New York & New Jersey*, 311 F.3d at 236 ("When the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner."). Assuming we were inclined to ignore both Eleventh Circuit and Florida precedent, Plaintiff still fails to state a claim because – even under an expanded definition – there are no allegations that the restaurant was uninhabitable or substantially unusable. Plaintiff only alleges that the government forced it to close its indoor dining to contain the spread of COVID-19. The government permitted Plaintiff to continue its takeout and delivery services. While Plaintiff never makes clear whether it undertook either of these options, the government never made the restaurant uninhabitable or substantially unusable. Therefore, under no definition of "direct physical loss or damage" has Plaintiff stated a claim where coverage exists under this insurance policy.

Although unnecessary to the disposition of the motion to dismiss, other provisions of the insurance policy support the same interpretation. Take, for instance, the "Business Income" and "Extra Expense" provisions where it provides coverage for Plaintiff's operations during a "period of restoration." [D.E. 5-1 at 53]. A "period of restoration" is defined in the policy as beginning "(1) 72 hours after the time of direct physical loss or damage for Business Income Coverage; or (2) [i]mmediately after the time of direct physical loss or damage for Extra Expenses Coverage[.]" *Id.* at 61. The policy then states that this "period of restoration" "[e]nds on the earlier of (1) [t]he date when the property at the described premises should be *repaired, rebuilt or replaced* with reasonable speed and similar quality; or (2) [t]he date when business is resumed at a new permanent location." *Id.* (emphasis added).

"The words 'repair' and 'replace' contemplate physical damage to the insured premises as opposed to loss of use of it." *Newman Myers Kreines Gross Harris, P.C.*, 17 F. Supp. 3d at 332 (*United Airlines,* 385 F. Supp. 2d at 349 (policy language limiting coverage "for only such length of time [needed] to rebuild, repair or replace such part of the Insured Location(s) as has been damaged or destroyed" supports the notion that "physical damage is required before business interruption coverage is paid"); *Philadelphia Parking Auth.,* 385 F. Supp. 2d at 287 (" 'Rebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature.")). This means that, if we construe "direct physical loss or damage" to require actual harm, it gives effect to the other provisions in the policy. And that is exactly what Florida law requires us to do so that no section of the insurance policy is left meaningless. *See Aucilla Area Solid Waste Admin. v. Madison Cty.*, 890 So. 2d 415, 416–17 (Fla. 1st DCA 2004) ("Pursuant to the principles of contract construction, we must construe the provisions of a contract in conjunction with one another so as to give reasonable meaning and effect to all of the provisions.") (citing *Hardwick Properties, Inc. v. Newbern,* 711 So. 2d 35, 40–41 (Fla. 1st DCA 1998)). And making matters worse, the policy further provides that the period of restoration "does not include any increased period required due to the enforcement of any ordinance or law that ... [r]egulates the construction, *use* or repair ... of any property[.]" [D.E. 5-1 at 61]. Thus, if there was any lingering doubt on whether a loss of use for pure economic reasons could be recoverable under the policy, the other provisions of the policy put that uncertainty to bed. Accordingly, Defendant's motion to dismiss should be **GRANTED**.

IV. CONCLUSION

For the foregoing reasons, the Court **RECOMMENDS** that Defendant's motion to dismiss be **GRANTED**. If viable under Rule 11, any amended complaint should be filed within (14) fourteen days from the date the District Judge adopts this Report and Recommendation. [7]

***10** Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 73, the parties have fourteen (14) days from service of this Report and Recommendation within which to file written objections, if any, with the District Judge. Failure to timely file objections shall bar the parties from *de novo* determination by the District Judge of any factual or legal issue covered in the Report *and* shall bar the parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *see, e.g., Patton v. Rowell,* 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security,* 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

DONE AND SUBMITTED in Chambers at Miami, Florida, this 26th day of August, 2020.

All Citations

Slip Copy, 2020 WL 5051581

Footnotes

1 On August 7, 2020, the Honorable Kathleen Williams referred Defendant's motion to dismiss to the undersigned Magistrate Judge for disposition. [D.E. 16].

2 Defendant removed this case to federal court on June 24, 2020 based on the Court's diversity jurisdiction. Plaintiff is a citizen of Florida and Greenwich is a citizen of Delaware and Connecticut.

3 The restaurant serves Italian food at 5748 Sunset Drive, Miami, FL 33143.

4 We refer to these collectively as the Florida Emergency Orders.

5 In determining whether Plaintiff's amended complaint fails to state a claim, we may consider the language of the policy itself because exhibits are part of a pleading "for all purposes." Fed. R. Civ. P. 10(c); *see also Solis–Ramirez v. U.S. Dep't of Justice,* 758 F.2d 1426, 1430 (11th Cir. 1985) ("Under Rule 10(c) Federal Rules of Civil Procedure, such attachments are considered part of the pleadings for all purposes, including a Rule 12(b)(6) motion."). To the extent the complaint's allegations conflict with the exhibit, the exhibit must control. *See Hoefling v. City of Miami*, 811 F.3d 1271, 1277 (11th Cir. 2016) ("A district court can generally consider

exhibits attached to a complaint in ruling on a motion to dismiss, and if the allegations of the complaint about a particular exhibit conflict with the contents of the exhibit itself, the exhibit controls.") (citing *Crenshaw v. Lister,* 556 F.3d 1283, 1292 (11th Cir. 2009)).

6 In *Source Food*, the insured's beef was not allowed to cross from Canada into the United States because of an embargo related to mad cow disease. The insured was therefore unable to fill orders and had to find a new supplier. The insured sought coverage based on a provision requiring "direct physical loss to property," but the district court denied coverage and the Eighth Circuit affirmed, explaining that:

> Although Source Food's beef product in the truck could not be transported to the United States due to the closing of the border to Canadian beef products, the beef product on the truck was not—as Source Foods concedes—physically contaminated or damaged in any manner. To characterize Source Food's inability to transport its truckload of beef product across the border and sell the beef product in the United States as direct physical loss to property would render the word 'physical' meaningless.

Source Food Tech., Inc., 465 F.3d at 838.

7 Because Plaintiff's complaint fails for the reasons stated above, we offer no opinion on Defendant's remaining arguments. To the extent Plaintiff files an amended complaint, it should ensure that it can survive any other exclusion that may exist under the policy.

End of Document

479 F.Supp.3d 353
United States District Court, W.D. Texas, San Antonio Division.

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

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

Synopsis

Background: Insureds, the operators of barbershop businesses which were deemed non-exempt and non-essential such that insureds lost use of their properties due to state and county emergency orders in connection with COVID-19 pandemic, brought action in state court against insurer, alleging claims for breach of contract, noncompliance with the Texas Insurance Code, and breach of the duty of good faith and fair dealing in connection with denial of coverage for business interruption. Insurer removed to federal court and moved to dismiss for failure to state a claim.

Holdings: The District Court, David A. Ezra, Senior District Judge, held that:

insureds' lost business income was not covered by policies requiring accidental direct physical loss to property;

policies' unambiguous and enforceable anti-concurrent causation (ACC) clause containing virus exclusion excluded coverage for losses; and

under Texas law, civil authority provision was not triggered.

Motion granted.

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

Attorneys and Law Firms

***354** Shannon E. Loyd, Loyd Law Firm, PLLC, San Antonio, TX, for Plaintiffs.

W. Neil Rambin, Susan Elizabeth Egeland, Faegre Drinker Biddle & Reath, LLP, Dallas, TX, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

David Alan Ezra, Senior United States District Judge

Before the Court is a Motion to Dismiss filed by State Farm Lloyds ("Defendant" or "State Farm") on May 8, 2020. (Dkt. # 9.) Plaintiffs Diesel Barbershop, LLC; Wilderness Oak Cutters, LLC; Diesel Barbershop Bandera Oaks, LLC; Diesel Barbershop Dominion, LLC; Diesel Barbershop ***355** Alamo Ranch, LLC; and Henley's Gentlemen's Grooming, LLC (collectively "Plaintiffs") responded on May 22, 2020 (Dkt. # 14), and Defendant filed a reply on May 29, 2020 (Dkt. # 17). The Court presided over a virtual hearing on July 29, 2020, during which Shannon Loyd, Esq., represented Plaintiffs and Neil Rambin, Esq. and Susan Egeland, Esq. represented Defendant. After careful consideration of the memorandum filed in support of and against the motion and after hearing arguments from counsel, the Court—for the reasons that follow—**GRANTS** Defendant's Motion to Dismiss.

FACTUAL BACKGROUND

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

a. The Bexar County Orders

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

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

***356** b. The State of Texas Order

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

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

(Dkt. # 8, Exh. C.)

c. Plaintiffs' Insurance Policies

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

The Policies state, in relevant part, the following:

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

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

> 1. We do not insure under any coverage for any loss which would not ***357** have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
>
> ...
>
> **j. Fungi, Virus Or Bacteria**
>
> ...
>
> (2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease.

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

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

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

PROCEDURAL HISTORY

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

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

second amended complaint are the Policies, Orders, and State Farm's letter denying coverage.

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

TEXAS CONTRACT-INTERPRETATION STANDARDS

"Insurance policies are contracts and are governed by the principles of interpretation applicable to contracts." Amica Mut. Ins. Co. v. Moak, 55 F.3d 1093, 1095 (5th Cir. 1995). Under Texas contract-interpretation standards, the "paramount rule is that courts enforce unambiguous policies as written" such that court must "honor plain language, reviewing policies as drafted, not revising them as desired." Pan Am Equities, Inc. v. Lexington Ins. Co., 959 F.3d 671, 674 (5th Cir. 2020). Importantly, an "ambiguity" is "more than lack of clarity"; a court should find an insurance contract ambiguous only if "giving effect to all provisions, its language is subject to two or more reasonable interpretations." Id. (internal quotation marks and citation omitted). To determine ambiguity, which is a question of law, a court must "examine the entire contract in order to harmonize and give effect to all provisions so that none will be meaningless." Id. (internal quotation marks and citation omitted); see also Provident Life & Acc. Ins. Co. v. Knott, 128 S.W.3d 211, 216 (Tex. 2003) ("In interpreting these insurance policies as any other contract, we must read all parts of each policy together and exercise caution not to isolate particular sections or provisions from the contract as a whole."); State Farm Lloyds v. Page, 315 S.W.3d 525, 527 (Tex. 2010) ("The fact that the parties may disagree about the policy's meaning does not create an ambiguity." (citations and internal quotation marks omitted)). "The goal in interpreting ... [language within the contract] is to ascertain the true intentions of the parties as expressed in the writing itself." Richards v. State Farm Lloyds, 597 S.W.3d 492, 499 (Tex. 2020) (citation and internal quotation marks omitted).

RULE 12(b)(6) LEGAL STANDARD

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

In analyzing whether to grant a Rule 12(b)(6) motion, a court accepts as ***359** true "all well-pleaded facts" and views those facts "in the light most favorable to the plaintiff." United States ex rel. Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 346 (5th Cir. 2013) (citation omitted). A court need not "accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678, 129 S.Ct. 1937. Furthermore, in assessing a motion to dismiss under Rule 12(b)(6), a court's review is generally limited to the complaint, documents attached to the complaint, and any documents attached to the motion to dismiss that are referred to in the complaint and are central to the plaintiff's claims. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007); see also Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC, 594 F.3d 383, 387 (5th Cir. 2010).

DISCUSSION

State Farm argues that for business income coverage to apply, the Policies explicitly require (1) an accidental direct physical loss to the insured property and (2) that the loss is not excluded. (Dkt. # 9.) Defendant asserts that Plaintiffs fail to properly plead direct physical loss to the Properties as Plaintiffs argue that the Orders are the reason for the business interruption claim and fail to show that the Properties have

been tangibly "damaged" per se. (Dkts. ## 9, 17.) Defendant also argues that regardless, Plaintiffs fail to overcome the Virus Exclusion hurdle that is unambiguously within the Policies and was added to these Policies in response to the SARS pandemic in the early 2000s. (Id.)

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

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

a. Accidental Direct Physical Loss

This Court is mandated to "honor plain language, reviewing policies as drafted, not revising them as desired." Pan Am Equities, 959 F.3d at 674. The Court looks at the coverage provided by the Policies as a whole in order to determine the plain language. Id. Here, the Policies are explicit that there has to be an accidental, direct physical loss to the property in question. The Court agrees with Plaintiffs that some courts have found physical loss even without tangible destruction to the covered property. See e.g., TRAVCO Ins. Co. v. Ward, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010), aff'd, 504 F. App'x 251 (4th Cir. 2013) (noting that "physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces"); Murray v. State Farm Fire & Cas. Co., 203 W. Va. 477, 493, 509 S.E.2d 1 (1998) (" 'Direct physical loss' provisions require only that a covered property be injured, not destroyed. Direct physical loss also may exist in the absence of structural damage to the insured property." (citation ***360** omitted)). The Court also agrees that a virus like COVID-19 is not like a hurricane or a hailstorm, but rather more like ammonia, E. coli, and/or carbon monoxide (i.e. cases in which the loss is caused by something invisible to the naked eye), and in such cases, some courts have found direct physical loss despite the lack of physical damage. See e.g., Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226, 236 (3d Cir. 2002) (holding that while mere installation of asbestos was not loss or damage, the presence or imminent threat of a release of asbestos would "eliminate[ ] or destroy[ ]" the function of the structure, thereby making the building "useless or uninhabitable"); Lambrecht & Assocs., Inc. v. State Farm Lloyds, 119 S.W.3d 16, 24–26 (Tex. App. 2003) (noting that while State Farm argued that the losses were not "physical" as they were not "tangible," the court found that under the "direct language" of the policy allowed for coverage to "electronic media and records" and the "data stored on such media" as "such property is capable of sustaining a 'physical' loss"); Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399, 406 (1st Cir. 2009) ("We are persuaded both that odor can constitute physical injury to property ... and also that allegations that an unwanted odor permeated the building and resulted in a loss of use of the building are reasonably susceptible to an interpretation that physical injury to property has been claimed.").

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

impact unaccompanied by a distinct, demonstrable, physical alteration of the property." (citation omitted)); see also Ross v. Hartford Lloyd Ins. Co., 2019 WL 2929761, at *6–7 (N.D. Tex. July 4, 2019) ("direct physical loss" requires "a distinct, demonstrable, physical alteration of the property" (citing 10A Couch on Ins. § 148:46 (3d ed. 2010)).) Thus, the Court finds that Plaintiffs fail to plead a direct physical loss.

b. The Virus Exclusion

Even if the Court had found that the language within the Policies was ambiguous and/or that Plaintiffs properly plead direct physical loss to the Properties, the Court finds that the Virus Exclusion bars Plaintiffs' claims. The language in the lead-in ***361** of the Virus Exclusion (also called the anti-concurrent causation ("ACC") clause) expressly states that State Farm does not insure for a loss regardless of "whether other causes acted concurrently or in any sequence within the excluded event to produce the loss." (See Dkt. # 9, Exhs. A-1–A-6.) Here, Plaintiffs allege that the loss of business occurred as a result of the Orders that mandated non-essential businesses to discontinue operations for a set period of time to help staunch community spread of COVID-19. (Dkts. ## 8, 14.) Plaintiffs also assert that the Court should find that the Virus Exclusion does not apply because COVID-19 was not present at the Properties. (Id.)

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

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

But here, the Court can read the Policies objectively and without "creating difficult causation determination where none otherwise exist." Id. Like the Fifth Circuit in Tuepker, the Court finds that here, the State Farm ACC clause within the Policies is unambiguous and enforceable. See Tuepker, 507 F.3d at 356. The Policies expressly state that State Farm does not "insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these[.]" (See Dkt. # 9, Exhs. A-1–A-6.) Guided by the plain language of the Policies, the Court finds that Plaintiffs have pleaded that COVID-19 is in fact the reason for the Orders being issued and the underlying cause of Plaintiffs' alleged losses. While the Orders technically forced the Properties to close to protect public health, the Orders only came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community. Thus, it was the presence of COVID-19 in Bexar County and in Texas that was the primary root cause of Plaintiffs' businesses temporarily closing. Furthermore, while the Virus Exclusion could have been even more specifically worded, that alone does not make the exclusion "ambiguous." See In re Katrina Canal Breaches Litig., 495 F.3d 191, 210 (5th Cir. 2007) ("The fact that an exclusion ***362** could have been worded more explicitly does not necessarily make it ambiguous.").

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

c. The Civil Authority Provision

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

CONCLUSION

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

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

IT IS SO ORDERED.

All Citations

479 F.Supp.3d 353

Footnotes

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

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

483 F.Supp.3d 828
United States District Court, C.D. California.

10E, LLC
v.
TRAVELERS INDEMNITY
CO. OF CONNECTICUT et al.

Case No. 2:20-cv-04418-SVW-AS
|
Filed 09/02/2020

Synopsis

Background: Insured restaurant filed a state action against its insurer and mayor of city in which restaurant was located, alleging that public health restrictions adopted by mayor in response to COVID-19 pandemic caused a total shutdown of restaurant's business and seeking compensation for lost business and other costs of disruption under its insurance policy. Insurer removed action to federal court based on diversity jurisdiction and moved to dismiss insured's action for failure to state a claim. Insured moved to remand case to state court.

Holdings: The District Court, Stephen V. Wilson, J., held that:

mayor was fraudulently joined to insured's action;

insured failed to state a claim that it was entitled to coverage under business interruption and extra expense provision of its insurance policy;

insured failed to state a claim that it was entitled to coverage under civil authority coverage provision of its insurance policy;

insured failed to state claims for breach of contract or bad faith; and

insured failed to state a claim for violation of California's Unfair Competition Law (UCL).

Motion to dismiss granted. Motion for remand denied.

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

Attorneys and Law Firms

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Proceedings: AMENDED ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [26] AND DENYING PLAINTIFF'S MOTION TO REMAND [24]

STEPHEN V. WILSON, U.S. DISTRICT JUDGE

I. Introduction

On June 12, 2020, Plaintiff 10E, LLC ("10E") filed a motion to remand this case to state court. Dkt. 24. On June 26, 2020, Defendant Travelers Indemnity Co. of Connecticut ("Travelers" or "Defendant") filed a motion to dismiss Plaintiff's First Amended Complaint ("FAC"). Dkt. 26. On August 28, 2020, this Court issued an Order that is now withdrawn and superseded by this Order. For the reasons explained below, the Court DENIES Plaintiff's motion to remand and GRANTS Defendant's motion to dismiss.

II. Factual and Procedural Background

On April 10, 2020, Plaintiff, a restaurant in downtown Los Angeles, filed its initial complaint in Los Angeles Superior Court, naming as defendants Travelers and Mayor Eric Garcetti. Dkt. 1, Ex. A. On May 15, 2020, Travelers, which is incorporated and has its principal place of business in Connecticut, Dkt. 1, at 5, removed the case to this Court, arguing that Garcetti was ***832** fraudulently joined to defeat diversity jurisdiction, *id.* at 6-10.

On May 22, 2020, Defendant filed a motion to dismiss Plaintiff's initial complaint. Dkt. 14. On June 12, 2020, Plaintiff filed its FAC. Dkt. 22. [1] The FAC asserts claims for breach of contract, bad faith, and violation of Cal. Bus. & Prof. Code § 17200 *et seq.* ("UCL"). *Id.* Plaintiff seeks both damages and declaratory relief. *Id.*

According to the FAC, beginning on March 15, 2020, public health restrictions adopted by Mayor Garcetti prohibited in-person dining at Plaintiff's restaurant, limiting Plaintiff to offering takeout and delivery. Dkt. 22, at 5. Plaintiff alleges that these restrictions have caused a "complete and total shutdown" of its business. *Id.*

Plaintiff seeks compensation for lost business and other costs of the disruption under the Business Income and Extra Expense provisions of its insurance policy with Defendant ("the Policy"). *Id.* at 3. Plaintiff also seeks to recover under the Policy's Civil Authority provision. *Id.* at 3-4.

Defendant attached a copy of the Policy to its motion to dismiss. Dkt. 27-2, Ex. 1. The Policy covers business income lost when business operations are suspended from a covered cause of loss, but the "suspension must be caused by direct physical loss of or damage to property at the described premises." *Id.* at 108-09. Similarly, the Policy covers extra expenses incurred during a period of restoration that the insured "would not have incurred if there had been no direct physical loss of or damage to property." *Id.* at 109.

The Policy also covers losses and expenses "caused by action of civil authority that prohibits access to the described premises." *Id.* at 121. "The civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises, that are within 100 miles of the described premises, caused by or resulting from a Covered Cause of Loss." *Id.*

The Policy contains an endorsement entitled, "EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA." *Id.* at 247. This exclusion applies to "action of civil authority." *Id.* It reads as follows: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." *Id.*

Plaintiff alleges that it is entitled to recover under both provisions because physical loss or damage occurred at its restaurant and other nearby locations and because in-person dining restrictions prohibited access to its restaurant. *Id.* at 5. The restrictions caused "physical damage" by "labeling of the insured property as non-essential" and "prevent[ing] the ordinary intended use of the property." *Id.* Plaintiff also alleges that "[t]he only virus exclusion that relates in theory to a virus is not applicable here" and that the virus exclusion "does not include exclusion for a viral pandemic." *Id.* at 6-7.

Defendant filed its motion to dismiss Plaintiff's FAC on June 26, 2020. Dkt. 26. Plaintiff filed an opposition on August 10, 2020. Dkt. 33. Defendant filed its reply on August 17, 2020. Dkt. 36.

Plaintiff filed its motion to remand to state court on June 12, 2020. Dkt. 24. Defendant filed an opposition on June 29, 2020. Dkt. 29. Plaintiff filed its reply on August 17, 2020. Dkt. 35.

*833 III. Plaintiff's Motion to Remand to State Court

a. *Legal Standard*

Federal courts are courts of limited jurisdiction, having subject matter jurisdiction only over matters authorized by the Constitution and Congress. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). A suit filed in state court may be removed to federal court if the federal court would have had original jurisdiction over the suit. 28 U.S.C. § 1441(a). "The removal statute is strictly construed against removal jurisdiction, and the burden of establishing federal jurisdiction falls to the party invoking the statute." *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004) (citation omitted). "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). Diversity jurisdiction under 28 U.S.C. § 1332(a) requires both that the amount in controversy exceed $75,000, and that complete diversity of citizenship exists between the parties.

Persons are domiciled in the places where they reside with the intent to remain or to which they intend to return. *See Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). A corporation is a citizen of "every State and foreign state by which it has been incorporated and the State or foreign state where it has its principal place of business." 28 U.S.C. § 1332(c)(1). A corporation's principal place of business is "the place where a corporation's officers direct, control, and coordinate the corporation's activities." *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93, 130 S.Ct. 1181, 175 L.Ed.2d 1029 (2010).

Under the sham defendant doctrine, a defendant's citizenship should be disregarded for purposes of diversity jurisdiction when the defendant "cannot be liable on any theory." *Grancare, LLC v. Thrower by and through Mills*, 889 F.3d

543, 548 (9th Cir. 2018) (citation omitted). "If there is a *possibility* that a state court would find that the complaint states a cause of action against any of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court." *Id.* (citation omitted) (italics in original). The defendant bears a "heavy burden" to overcome the "general presumption against [finding] fraudulent joinder." *Id.* (citation omitted).

b. *Analysis*

Defendant's removal is based on an argument that Mayor Garcetti, a citizen of California, was fraudulently joined to defeat diversity jurisdiction between Plaintiff, a citizen of California, and Defendant, a citizen of Connecticut. Dkt. 1, at 7-10. The Court agrees.

Plaintiff's only asserted claim against Garcetti is a standalone claim for declaratory relief. Dkt. 22, at 6-8. Plaintiff does not appear to argue that its FAC presently states a valid claim against Garcetti. Dkt. 24, at 2-3. Nor could it. Declaratory relief is not a standalone cause of action. *Mayen v. Bank of America N.A.*, 2015 WL 179541, at *5 (internal citations omitted) (N.D. Cal. 2015) ("[D]eclaratory relief is not a standalone claim."); 28 U.S.C. § 2201(a) (a federal court may only award declaratory relief "[i]n a case of actual controversy within its jurisdiction").

Plaintiff's failure to state a cause of action does not by itself establish that Garcetti was fraudulently joined. *See Grancare*, 889 F.3d at 549 ("[T]he test for fraudulent joinder and for failure to state a claim under Rule 12(b)(6) are not equivalent."). However, it does require the Court to find that Plaintiff could possibly amend its complaint to state a cause of action against Garcetti. *See id.* ("[T]he district ***834** court must consider ... whether a deficiency in the complaint can possibly be cured by granting the plaintiff leave to amend.").

The Court is unable to imagine how such an amendment is possible. Plaintiff argues that, because "the denial of [Defendant's] policy would not have occurred absent Mayor Garcetti's order, the propriety of Mayor Garcetti's order is a significant issue that needs to be resolved." Dkt. 22, at 6-8. However, Plaintiff neither articulates a ground for some future challenge to the legality of Garcetti's order nor explains how such a challenge could be raised in the context of this insurance dispute. While its burden to show fraudulent joinder is "heavy," *Grancare*, 889 F.3d at 548, Defendant has carried that burden here. The Court concludes that Garcetti was fraudulently joined and discounts his citizenship for purposes of assessing diversity of parties.

The Court is unpersuaded by Plaintiff's other arguments supporting remand. Plaintiff argues that, because there are other insurance cases now pending in state court concerning recovery of pandemic-related losses under business interruption policies, the Court should remand the case to state court under a laundry list of prudential considerations and abstention doctrines. Crucially, as Defendant points out, although they may involve the same lawyers, these other pandemic-related insurance cases do not involve the same parties and issues as this litigation. Dkt. 29, at 18-19. Consequently, the Court has no concern that its exercise of jurisdiction here will interfere with any parallel state proceedings, and it concludes without detailed analysis that none of the doctrines raised by Plaintiff favor remand. *See Herrera v. City of Palmdale*, 918 F.3d 1037, 1043 (9th Cir. 2019) (citing *Younger v. Harris*, 401 U.S. 37, 43, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)) ("*Younger* abstention is grounded in a 'longstanding public policy against federal court interference with state court proceedings.' "); *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 841 (9th Cir. 2017) ("*Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) and its progeny provide a multi-pronged test for determining whether 'exceptional circumstances' exist warranting federal abstention from *concurrent federal and state proceedings*.") (italics added); *Gov. Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998) (citation omitted) ("If there are *parallel state proceedings* involving the same issues and parties pending at the time the federal declaratory action is filed, there is a presumption that the entire suit should be heard in state court.") (italics added).

Because Defendant has met its burden to show that removal was proper, the Court denies Plaintiff's motion to remand the case to state court.

IV. Defendant's Motion to Dismiss Plaintiff's First Amended Complaint

a. *Legal Standard*

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. *See* Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the plaintiff's

complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." ***835** *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.*; *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937).

In reviewing a Rule 12(b)(6) motion, a court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). Thus, "[w]hile legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937.

b. *Analysis*

Defendant's motion to dismiss makes three arguments: 1) the Policy's virus exclusion clause precludes recovery under the Policy, 2) Plaintiff fails to allege that public health restrictions prohibited access to Plaintiff's restaurant as required for Civil Authority coverage, and 3) Plaintiff does not plausibly allege that it suffered "direct physical loss of or damage to property" as required for Business Income and Extra Expense coverage. *See generally* Dkt. 27. Without reaching the first two arguments, the Court agrees with Defendant's third argument as to Business Income and Extra Expense coverage. The Court also concludes that Defendant's argument regarding the limited scope of the phrase, "direct physical loss of or damage to property," demonstrates that the FAC fails to properly allege entitlement to recovery under the Civil Authority provision.

Although "[a]s a general rule, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion," a court can consider extrinsic material when its "authenticity ... is not contested and the plaintiff's complaint necessarily relies on them." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citation and quotation marks omitted). Plaintiff does not contest the authenticity of the insurance policy attached to Defendant's memorandum. *See generally* Dkt. 33. Because Plaintiff seeks to recover under the Policy, *see generally* Dkt. 22, the FAC necessarily relies on the Policy. Therefore, the Court will consider the language contained directly in the Policy in resolving this motion. *See Khoury Investments Inc. v. Nationwide Mutual Ins. Co.*, 2013 WL 12140449, at *2 (C.D. Cal. 2013) (citing *United States ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 999 (9th Cir. 2011)) ("Because Plaintiffs refer to this insurance policy in their FAC and their claim for breach of contract relies on the terms of the policy ..., this document would likely be appropriate for judicial notice as 'unattached evidence on which the complaint necessarily relies.' ").

i. **Business Interruption and Extra Expense Coverage**

"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." Dkt. 27-2, Ex. 1., at 108-09.

Under California law, losses from inability to use property do not amount to "direct physical loss of or damage ***836** 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); *see also Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33, 39, 229 Cal.Rptr.3d 840 (2018) ("[D]iminution in value is not a covered peril, it is a measure of loss" in property insurance).

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 789, 115 Cal.Rptr.3d 27.

Likewise, in *Ward General Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 7 Cal.Rptr.3d 844 (2003), the court held that a loss of valuable electronic data did not qualify as "direct physical loss or damage" without any physical alteration to the storage media. 114 Cal. App. 4th at 555-56, 7 Cal.Rptr.3d 844. Finally, in *Doyle*, the court held that purchasing counterfeit wine did not count as a loss to the wine covered by a property insurance policy without a physical alteration. 21 Cal. App. 5th at 38-39.

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.

Plaintiff characterizes in-person dining restrictions as "labeling of the insured property as non-essential." Dkt. 22, at 5. That "labeling" surely carries significant social, economic, and legal consequences. But it does not physically alter any of Plaintiff's property.

Plaintiff attempts to circumvent the plain language of the Policy by emphasizing its disjunctive phrasing – "direct physical loss of *or* damage to property," Dkt. 27-2, Ex. 1, at 121 – 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. *See generally* Dkt. 22. 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." *Id.* at 3.

The Court therefore concludes that Plaintiff has not alleged facts plausibly demonstrating its entitlement to recover under the Policy's Business Income and Extra Expense coverage.

ii. **Civil Authority Coverage**

For similar reasons, the Court finds that the facts alleged in the FAC do not support recovery under the Policy's Civil Authority coverage. The Civil Authority ***837** coverage kicks in when the insured incurs loss of business income and extra expenses as a result of civil authority action. Dkt. 27-2, Ex. 1, at 121. "The civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises, that are within 100 miles of the described premises, caused by or resulting from a Covered Cause of Loss." *Id.* Plaintiff's FAC points generally to the physical action of the coronavirus, which "infects and stays on surfaces of objects or materials ... for up to twenty-eight days." Dkt. 22, at 4. However, Plaintiff does not allege actual cases of "direct physical loss of or damage to property" at other locations. At most, the FAC points to a mere possibility.

Plaintiff attempts to plead around the Policy's virus exclusion with vague, circuitous, and – at this stage – fatally conclusory allegations. The FAC describes public health restrictions as "based on ... evidence of physical damage to property." *Id.* After describing the statewide order, it asserts without any relevant detail that "the property that is damaged is in the immediate area of the Insured Property." However, the FAC does not describe particular property damage or articulate any facts connecting the alleged property damage to restrictions on in-person dining. These allegations do no more than paraphrase the language of the Policy without specifying facts that could support recovery under the Policy. These allegations are thus "conclusory allegations of law" that plainly cannot survive a Rule 12(b)(6) challenge. *In re NFL's Sunday Ticket Antitrust Litigation*, 933 F.3d 1136, 1149 (9th Cir. 2019) (citation and quotation marks omitted).

While the Court does not address the scope of the Policy's virus exclusion or consider any issues of causation, the Court notes its skepticism that Plaintiff can evade application of the Policy's virus exclusion. Plaintiff's theory of liability appears to inevitably rest on a potentially implausible allegation that in-person dining restrictions are not attributable to "any virus," a cause which the Policy expressly excludes. Dkt. 27-2, at 247. Nevertheless, Plaintiff asserts that it is "is not attempting to recover any losses from COVID-19 or its

proliferation." Dkt. 33, at 4. Plaintiff's FAC does not articulate a theory of Civil Authority coverage clearly enough to allow the Court to adjudicate at this stage whether and how the Policy's virus exclusion applies.

For the foregoing reasons, the Court concludes that the FAC fails to plausibly allege entitlement to Civil Authority coverage.

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

Because it is not entitled to coverage under the Policy, Plaintiff cannot state a claim for breach of contract, *See 1231 Euclid Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 135 Cal. App. 4th 1008, 1020-21, 37 Cal.Rptr.3d 795 (2006) ("The failure of [a policy's] conditions precedent is a complete defense to [an insured's] breach of contract claim."), or bad faith, *See Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151, 271 Cal.Rptr. 246 (1990) ("Where benefits are withheld for proper cause, there is no breach of the implied covenant.").

iv. **UCL Claim**

Likewise, Plaintiff's UCL claim is based on an allegation that the Policy represents that Plaintiff would be covered under these circumstances. Dkt. 22, at 10-11. The Court has concluded that Plaintiff was not entitled to recover under the Policy on the facts alleged in the FAC. That determination is based on an interpretation of the "ordinary and popular sense" of the Policy language. *Palmer*, 21 Cal. 4th at 1115, 90 Cal.Rptr.2d 647, 988 P.2d 568. If ***838** the ordinary and popular sense of the Policy language does not support recovery on these facts, Plaintiff cannot plausibly allege that the Policy constitutes fraudulent, unfair, or unlawful conduct giving rise to UCL liability. *See Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1203 (9th Cir. 2001) (citing *Cel-Tech Comms., Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 182, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999)) ("[T]he breadth of [the UCL] does not give a plaintiff license to 'plead around' the absolute bars to relief contained in other possible causes of action by recasting those causes of action as one for unfair competition."). Therefore, the Court also dismisses Plaintiff's UCL claim.

V. Conclusion

For the reasons articulated above, the Court DENIES Plaintiff's motion to remand the case to state court and GRANTS Defendant's motion to dismiss the FAC. The Court will allow Plaintiff leave to amend its complaint within 14 days of the issuance of this Amended Order.

All Citations

483 F.Supp.3d 828

Footnotes

1 The Court DENIES as moot Defendant's motion to dismiss Plaintiff's initial complaint. Dkt. 14.

End of Document

2020 WL 4589206 (D.C.Super.) (Trial Order)
Superior Court of the District of Columbia,
Civil Division-Civil Actions Branch.

ROSE'S 1, LLC, et al., Plaintiffs,
v.
ERIE INSURANCE EXCHANGE, Defendant.

No. 2020 CA 002424 B.
August 6, 2020.

*1 Civil II, Calendar I

Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendant's Cross-Motion for Summary Judgment

Kelly A. Higashi, Associate Judge.

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Motion") and Defendant's Cross-Motion for Summary Judgment ("Defendant's Motion"). While the Court is sympathetic to the plight of Plaintiffs, it must grant summary judgment to Defendant as a matter of law.

I. FACTS

Plaintiffs own and operate a number of prominent restaurants in the District of Columbia. They all purchased "Ultrapack Plus Commercial Property Coverage" from Defendant Erie Insurance Exchange. Included in this policy is coverage for "loss of 'income' and/or 'rental income"' sustained "due to partial or total 'interruption of business' resulting directly from 'loss' or damage" to the property insured. Rose's 1 Ultrapack Plus Commercial Property Coverage ("Coverage") at 3. The coverage document further states that the "policy insures against direct physical 'loss"' with the exception of several exclusions that are not relevant to this matter. *Id.* at 4.

This case comes in the context of the COVID-19 pandemic. COVID-19 is "a novel severe acute respiratory illness that has killed … more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others." *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring). On March 11, 2020, D.C. Mayor Muriel Bowser declared a state of emergency and a public health emergency due to the "imminent hazard of or actual occurrence of widespread exposure" to COVID-19. Plaintiffs' Statement of Material Facts ("SMF") ¶3. On March 16, Mayor Bowser issued an order prohibiting table seating at restaurants and bars in D.C. SMF ¶4. On March 20, Mayor Bowser extended this ban to "standing customers at restaurants, bars, taverns, and multi-purpose facilities." SMF ¶5. On March 24, Mayor Bowser ordered the closure of all non-essential businesses. SMF ¶6. On March 30, she ordered all D.C. residents to stay in their residences except for limited "essential" reasons, a restriction that continued for several months. SMF ¶¶7-8.

As a result of Mayor Bowser's orders, the restaurant Plaintiffs were forced to close their businesses and suffered serious revenue losses. SMF ¶¶21-22. To cover those losses, they filed insurance claims with Defendant pursuant to insurance policies that "are substantively identical in all ways relevant to this action." SMF ¶78. When Defendant denied their claims, Plaintiffs filed this lawsuit seeking a declaratory judgment that their claims were covered by the express language of their insurance contracts with Defendant. Both sides subsequently moved for summary judgment.

II. SUMMARY JUDGMENT STANDARD

D.C. Superior Court Rule of Civil Procedure 56 allows a court to grant summary judgment to a party when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. D.C. Super. Ct. Civ. R. 56(a); *Perkins v. District of Columbia*, 146 A.3d 80, 84 (D.C. 2016). In considering a motion for summary judgment, the court must view the evidence "in the light most favorable to the nonmoving party, who is entitled to all favorable inferences which may reasonably be drawn from the evidentiary materials." *Phelan v. City of Mt. Rainier*, 805 A.2d 930, 936 (D.C. 2002) (internal quotation marks omitted). The Court "may not resolve issues of fact or weigh evidence at the summary judgment stage." *Fry v. Diamond Construction, Inc.*, 659 A.2d 241, 245 (D.C. 1995) (internal quotation marks omitted). Even if no material dispute of fact exists, the moving party must still establish that it is entitled to judgment as a matter of law. D.C. Super. Ct. Civ. R. 56(a).

III. ANALYSIS

***2** Under District of Columbia law, "[c]ontract principles are applicable to the interpretation of an insurance policy." *Carlyle Inv. Mgmt. LLC v. Ace Am. Ins. Co.*, 131 A.3d 886, 894 (D.C. 2016). "The proper interpretation" of an insurance contract, "including whether [the] contract is ambiguous, is a legal question." *Id.* (internal quotation mark omitted) (quoting *Tillery v. D.C. Contract Appeals Bd.*, 912 A.2d 1169, 1176 (D.C. 2006)). "[A]n insurance policy is to be … enforced in accordance with the real intent of the parties as expressed in the language employed in the policy." *Redmond v. State Farm Ins. Co.*, 728 A.2d 1202, 1205 (D.C. 1999) (internal quotation marks omitted) (quoting *Peerless Ins. Co. v. Gonzalez*, 697 A.2d 680, 682 (Conn. 1997)). A court must "give the words used in an insurance contract their common, ordinary, and … popular meaning," *Id.* (omission in original) (internal quotation marks omitted) (quoting *Quadrangle Dev. Corp. v. Hartford Ins. Co.*, 645 A.2d 1074, 1075 (D.C. 1994)), and must interpret the contract "as a whole, giving reasonable, lawful, and effective meaning to all its terms, and ascertaining the meaning in light of all the circumstances surrounding the parties at the time the contract was made," *Carlyle Inv. Mgmt.*, 131 A.3d at 895 (internal quotation mark omitted) (quoting *Debnam v. Crane Co.*, 976 A.2d 193, 197 (D.C. 2009)).

"[I]f the provisions of the contract are ambiguous, the correct interpretation becomes a question for a factfinder." *Carlyle Inv. Mgmt.*, 131 A.3d 886 at 895 (internal quotation marks omitted) (quoting *Debnam*, 976 A.2d at 197-98). "Where," however, "insurance contract language is not ambiguous, summary judgment is appropriate because a written contract duly signed and executed speaks for itself and binds the parties without the necessity of extrinsic evidence." *Fogg v. Fidelity Nat. Title Ins. Co.*, 89 A.3d 510, 514 (D.C. 2014) (internal quotation marks omitted) (quoting *Stevens v. United Gen. Title Ins. Co.*, 801 A.2d 61, 66 (D.C. 2002)). Indeed, the Court "should not seek out ambiguity where none exists." *Athridge v. Aetna Cas. & Sur. Co.*, 351 F.3d 1166, 1172 (D.C. Cir. 2003) (citing *Medical Serv. of Dist. of Columbia v. Llewellyn*, 208 A.2d 734, 736 (D.C. 1965)).

At the most basic level, the parties dispute whether the closure of the restaurants due to Mayor Bowser's orders constituted a "direct physical loss" under the policy. Plaintiffs start with dictionary definitions to support their case. For example, they cite the American Heritage Dictionary definition of "direct" as "[w]ithout intervening persons, conditions, or agencies; immediate." Plaintiffs' Motion at 9-10. They also cite the Oxford English Dictionary definition of "physical" as pertaining to things "[o]f or pertaining to matter, or the world as perceived by the senses; material as [opposed] to mental or spiritual." *Id.* at 10. As for "loss," it is defined by the coverage document as "direct and accidental loss of or damage to covered property." Coverage at 36.

Plaintiffs use these definitions to make three primary arguments. *First*, Plaintiffs argue that the loss of use of their restaurant properties was "direct" because the closures were the direct result of the mayor's orders without intervening action. Plaintiffs' Motion at 9-10. But those orders were governmental edicts that commanded individuals and businesses to take certain actions. Standing alone and absent intervening actions by individuals and businesses, the orders did not effect any direct changes to the properties.

Second, Plaintiffs argue that their losses were "physical" because the COVID-19 virus is "material" and "tangible," and because the harm they experienced was caused by the mayor's orders rather than "some abstract mental phenomenon such as irrational fear causing diners to refrain from eating out." Plaintiffs' Motion at 11. But Plaintiffs offer no evidence that COVID-19 was actually present on their insured properties at the time they were forced to close. And the mayor's orders did not have any effect on the material or tangible structure of the insured properties.

***3** *Third*, Plaintiffs argue that by defining "loss" in the policy as encompassing either "loss" or "damage," Defendant must treat the term "loss" as distinct from "damage," which connotes physical damage to the property. Plaintiffs' Motion at 11-12. In contrast, Plaintiffs argue, "loss" incorporates "loss of use," which only requires that Plaintiffs be deprived of the use of their properties, not that the properties suffer physical damage. *Id.* at 12-13. But under a natural reading of the term "direct physical loss," the words "direct" and "physical" modify the word "loss." As such, pursuant to Plaintiffs' dictionary definitions, any "loss of use" must be caused, without the intervention of other persons or conditions, by something pertaining to matter—in other words, a direct physical intrusion on to the insured property. Mayor Bowser's orders were not such a direct physical intrusion.

Further, none of the cases cited by Plaintiffs stand for the proposition that a governmental edict, standing alone, constitutes a direct physical loss under an insurance policy. In *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, the court found that the release of ammonia into a juice cup packaging factory was a "direct physical loss" because it constituted "an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event *directly upon the property* causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." 2014 U.S. Dist. LEXIS 165232 at *13-19 (D.N.J. Nov. 25, 2014) (quoting *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 319-20 (Ga. Ct. App. 2003)) (internal quotation marks omitted) (emphasis added). Similarly, in *Western Fire Insurance Co. v. First Presbyterian Church*, the Colorado Supreme Court found a "direct physical loss" when gasoline fumes from an unknown source entered an insured church and the fire department ordered the church's closure. 437 P.2d 52, 55 (Colo. 1968). The court based its reasoning on the fact that the church "became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous." *Id.* At the same time, the Court noted that "[i]t is perhaps quite true" that the fire department's closure order, "*standing alone*, does not in and of itself constitute a 'direct physical loss.'" *Id.* (emphasis added). All of the other cases cited by Defendant involved some compromise to the physical integrity of the insured property. *See Port Authority v. Affiliated FM Insurance Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (presence of asbestos in building was not "physical loss" because building owner could not show real or imminent "contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable"); *Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 826-27 (3d Cir. 2005) (presence of bacterium on property could constitute "direct physical loss" if it "reduced the use of the property to a substantial degree"); *TRAVCO Insurance Co. v. Ward*, 715 F. Supp. 2d 699, 709-10 (E.D. Va. 2010), *aff'd* 504 F. Appx. 251 (4th Cir. 2013) (home rendered uninhabitable by toxic gases released by defective drywall constituted "direct physical loss"); *Mellin v. Northern Security Insurance Company, Inc.*, 115 A.3d 799, 805 (N.H. 2015) (cat urine odor from neighboring apartment may constitute "direct physical loss" if plaintiff could show "distinct and demonstrable alteration to the unit"); *Murray v. State Farm Fire & Casualty Co.*, 509 S.E.2d 1, 16-17 (W.Va. 1998) (landslide rendering homes uninhabitable, due to either actual physical damage or palpable future risk of physical damage from a follow-on landslide, was a "direct physical loss"); *Sentinel Management Co. v. New Hampshire Insurance Co.*, 563 N.W.2d 296, 300-01 (Minn. Ct. App. 1997) (asbestos contamination in building was "direct physical loss" when "property rendered useless").

***4** In contrast, courts have rejected coverage when a business's closure was not due to direct physical harm to the insured premises. In *Roundabout Theatre Co. v. Continental Casualty Co.*, the City of New York ordered the closure of a theater after a portion of a neighboring building under construction collapsed onto the street and adjacent buildings. 302 A.D.2d 1, 2-3 (N.Y. App. Div. 2002). The theater itself sustained minor damage that was repaired in one day. *Id.* at 3. Nonetheless, the court found that the theater did not suffer a "direct physical loss" as a result of the city-mandated closure. *Id.* at 7. It found that "[t]he plain meaning of the words 'direct' and 'physical'" narrowed the scope of coverage and mandated "the conclusion that losses resulting from off-site property damage do not constitute covered perils under the policy." *Id.* Similarly, in *Newman Myers Kreines Gross, P.C. v. Great Northern Insurance Co.*, a federal district court found that a law firm did not suffer a "direct physical loss" when an electric utility preemptively shut off power in advance of Hurricane Sandy. 17 F. Supp. 3d 323 (S.D.N.Y. 2014). The court

distinguished the cases cited by the law firm (several of which were also cited by Plaintiffs in this case) as either "involv[ing] the closure of a building due to either a physical change for the worse in the premises … or a newly discovered risk to its physical integrity." *Id.* at 330. Citing *Roundabout*, the Court reasoned:

> The critical policy language here—"direct physical loss or damage"—similarly, and unambiguously, requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage. Newman Myers simply cannot show any such loss or damage to the 40 Wall Street Building as a result of either (1) its inability to access its office from October 29 to November 3, 2012, or (2) Con Ed's decision to shut off the power to the Bowling Green network. The words "direct" and "physical," which modify the phrase "loss or damage," ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure.

Id. at 331; *see also United Airlines, Inc. v. Insurance Co. of State of Pa.*, 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005), *aff'd* 439 F.3d 128 (2d Cir. 2006) ("The inclusion of the modifier 'physical' before 'damages' … supports [defendant's] position that physical damage is required before business interruption coverage is paid."); *Philadelphia Parking Auth. v. Federal Insurance Co.*, 385 F. Supp. 2d 280, 287-88 (S.D.N.Y. 2005) (noting that "'direct physical' modifies both loss and damage," and therefore "the interruption in business must be caused by some physical problem with the covered property … which must be caused by a 'covered cause of loss'").

While the Court can find no published cases in this jurisdiction analyzing the exact term "direct physical loss," cases addressing similar issues do not help Plaintiffs. Most relevantly, in *Bros., Inc. v. Liberty Mutual Fire Insurance Co.*, the District of Columbia Court of Appeals considered whether a restaurant could recover on its claim after it lost business due to a curfew imposed by the D.C. government as a result of the riots following the assassination of Dr. Martin Luther King, Jr. in 1968. 268 A.2d 611 (D.C. 1970). The insurance contract included this relevant language:

> In consideration of the premium for this coverage shown on the first page of this policy [Building and Contents] … the coverage of this policy is extended to include direct loss by … Riot… [and] Civil Commotion ....
>
> When this Endorsement is attached to a policy covering Business Interruption, … the term "direct," as applied to loss, means loss, as limited and conditioned in such policy, *resulting from direct loss to described property from perils insured against*; ....

Id. at 613 (emphasis in original). [1] The Court of Appeals interpreted the term "direct loss" in the contract to mean "a loss proximately resulting from physical damage to the property or contents caused by a riot or civil commotion." *Id.* Under that definition, the Court found that the restaurant was unable to recover, since, "at the most," the restaurant's lost business due to the curfew "was an indirect, if not remote, loss resulting from riots" and there was no "physical damage to the property." *Id.* Accordingly, while the Court agrees with Plaintiffs that *Bros., Inc.* is not directly on point, the case does support the proposition that, in the context of property insurance, the term "direct loss" implies some form of direct physical change to the insured property.

***5** With both dictionary definitions and the weight of case law supporting Defendant's interpretation of the term "direct physical loss," Plaintiffs' additional arguments are unconvincing. First, Plaintiffs argue that because the insurance contract has specific exclusions for "loss of use" under some coverage lines but not for Income Protection coverage, the Court should infer that the Income Protection coverage covers losses such as Plaintiffs'. Plaintiffs' Motion at 13-14. But as already discussed, even if "loss of use" was covered, Plaintiffs would still have to show that the loss of use was a "direct physical loss" similar to those in the cases discussed *supra* at 5-7. And for the reasons explained in this order, there was no "direct physical loss" to Plaintiffs. Second, Plaintiffs argue that, unlike some similar insurance policies, their policies do not include a specific exclusion for pandemic-

related losses. *Id.* at 19-20. But again, even in the absence of such an exclusion, Plaintiffs would still be required to show a "direct physical loss." Because they cannot do so, the Court grants summary judgment to Defendant.

Accordingly, it is this **6th** day of **August, 2020**, hereby

ORDERED that Plaintiffs' Motion for Summary Judgment is **DENIED**; and it is further

ORDERED that Defendant's Cross-Motion for Summary Judgment is **GRANTED**; and it is further

ORDERED that judgment is **ENTERED** in favor of Defendant Erie Insurance Exchange and against Plaintiffs, the initial scheduling conference is **VACATED**, and the case is **CLOSED**.

<<signature>>

Kelly A. Higashi

Associate Judge

(Signed in Chambers)

COPIES TO:

David L. Feinberg

Michael C. Davis

George E. Reede, Jr.

Jessica Pak

Via CaseFileXpress

Footnotes

1 This Court notes that the phrase at issue in the *Bros., Inc.* contract was "direct loss," as opposed to "direct physical loss," at issue in the present case, and that in the *Bros., Inc.* case, there was an issue as to whether the "Building and Contents" Form, which was mistakenly attached to the policy at the time of signing, or the "Business Interruption" Form, which the insurance company later substituted, was construed by the trial court. However, the Court of Appeals found it "unnecessary to ascertain which of the two forms was construed by the trial court," 268 A.2d at 612, as the Court found that the insurance company prevailed under both forms.

487 F.Supp.3d 834
United States District Court, N.D. California.

MUDPIE, INC., Plaintiff,
v.
TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA, Defendant.

Case No. 20-cv-03213-JST
|
Signed 09/14/2020

Synopsis

Background: Retailer filed putative class action alleging that its insurer unlawfully denied coverage under comprehensive commercial liability and property insurance policy for lost business income as result of COVID-19 pandemic. Insurer moved to dismiss.

Holdings: The District Court, Jon S. Tigar, J., held that:

retailer's inability to operate and occupy its premises did not constitute "direct physical loss or damage to property" under policy's business income provisions, and

retailer's losses did not fall within scope of policy's civil authority coverage provision.

Motion granted.

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

Attorneys and Law Firms

***835** Eric H. Gibbs, Amy Marie Zeman, Andre Michel Mura, Karen Barth Menzies, Steven Augustine Lopez, Gibbs Law Group LLP, Oakland, CA, Andrew N. Friedman, Pro Hac Vice, Eric Alfred Kafka, Geoffrey Aaron Graber, Julie S. Selesnick, Karina Grace Puttieva, Victoria S. Nugent, Cohen Milstein Sellers & Toll PLLC, Washington, DC, for Plaintiff.

Andrew B. Downs, Bullivant Houser Bailey PC, San Francisco, CA, Stephen Edward Goldman, Pro Hac Vice, Wystan M. Ackerman, Pro Hac Vice, Robinson and Cole LLP, Hartford, CT, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Re: ECF No. 11

JON S. TIGAR, United States District Judge

***836** Before the Court is Defendant's motion to dismiss. ECF No. 11. The Court will grant the motion.

I. BACKGROUND

Plaintiff Mudpie, Inc. is a San Francisco retail store that sells children's clothing, toys, housewares, books, and other goods. ECF No. 1 ¶ 26. Mudpie brings this putative class action on behalf of itself and other California retailers who purchased comprehensive business insurance from Defendant Travelers Casualty Insurance Company of America ("Travelers"), filed a claim for lost business income following California's Stay at Home Order, and were denied coverage. *Id.* ¶ 43.

The Stay at Home Order was issued in response to an outbreak of COVID-19, a novel strain of coronavirus. *Id.* ¶¶ 17, 24-25. On March 11, 2020, "the World Health Organization declared COVID-19 a global health pandemic based on existing and projected infection and death rates and concerns about the speed of transmission and ultimate reach of this virus." *Id.* ¶ 19. At that time, "it was generally understood in the scientific and public health communities that COVID-19 was spreading through human-to-human transmission and could be transmitted by asymptomatic carriers." *Id.* ¶ 17. Public health officials thus advised that social distancing – the maintenance of physical space between people – was needed to stop the transmission of COVID-19. *Id.* ¶¶ 17, 20, 22.

On March 12, 2020, California Governor Gavin Newsom issued a statewide directive known as the Safer at Home Order, which required California residents "to heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures, to control the spread of COVID-19." *Id.* ¶ 24. On March 19, 2020, the Governor issued a series of mandates known as the Stay at Home Order, which "requir[ed] retailers to cease in-person services." *Id.* ¶ 25.

Mudpie had purchased a "comprehensive commercial liability and property insurance" policy from Travelers "to

insure against risks the business might face." *Id.* ¶ 30. Mudpie alleges that its compliance with the government closure orders "result[ed] in substantial loss to business income" because its storefront became "useless and/or uninhabitable." *Id.* ¶¶ 27, 59. On or about April 27, 2020, Mudpie reported its loss of business income as of March 16, 2020, under its Travelers insurance policy. *Id.* ¶ 32.

In May 2020, Travelers denied Mudpie's insurance claim. *Id.* ¶ 33. Travelers took the position that Mudpie was not entitled to Business Income and Extra Expense coverage under its policy because "the limitations on [Mudpie's] business operations were the result of the Governmental Order, as opposed to 'direct physical loss or damage to property at the described premises.' " *Id.* In addition, Travelers found that Mudpie was not entitled to Civil Authority coverage because "the Governmental Order that affected [Mudpie's] business was not issued due to 'direct physical loss of or damage to property.' " *Id.* Finally, ***837** Travelers stated that the policy contained "an exclusion for 'loss or damage caused by or resulting from any virus' – such as the COVID-19 virus." *Id.*

Mudpie alleges three causes of action in its complaint. First, Mudpie seeks "a declaration for itself and similarly situated retailers that its business income losses are covered and not precluded by exclusions or other limitations in its comprehensive business insurance policy." *Id.* ¶ 62. Second, Mudpie alleges that Travelers breached its contract by denying it comprehensive business coverage. *Id.* ¶ 69. Third, Mudpie alleges that Travelers breached the implied covenant of good faith and fair dealing by: (1) selling policies that appear to provide liberal coverage with the intent of interpreting ambiguous, undefined, and poorly defined terms to deny coverage; (2) unreasonably denying coverage by applying undefined, ambiguous, and contradictory terms contrary to applicable rules of policy construction and the plain terms and purpose of the policy; (3) denying Mudpie's claim without conducting a fair, unbiased, and thorough inquiry; (4) misrepresenting policy terms; and (5) compelling policy holders to initiate litigation to recover policy benefits to which they are entitled. *Id.* ¶ 75.

On June 3, 2020, Travelers filed a motion to dismiss Mudpie's complaint. ECF No. 11. Mudpie opposes the motion, ECF No. 19, and Travelers has filed a reply, ECF No. 20.

II. JURISDICTION

The Court has jurisdiction over this putative class action pursuant to 28 U.S.C. § 1332(d)(2) because the amount in controversy exceeds $5 million and at least one member in the proposed class of over 100 members is a citizen of a state different from Travelers. [1]

III. LEGAL STANDARD

A. Motion to Dismiss

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) (citation omitted). A complaint need not contain detailed factual allegations, but facts pleaded by a plaintiff must be "enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citation and internal quotation marks omitted). The Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

B. Insurance Policy Interpretation

Under California law, the interpretation of an insurance contract is question of law for the courts. [2] *See* ***838** *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18, 44 Cal.Rptr.2d 370, 900 P.2d 619 (1995). "While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." *Bank of the W. v. Superior Court*, 2 Cal. 4th 1254, 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545 (1992). "If contractual language is clear and explicit, it governs." *Id.* In addition, "[t]he terms in an insurance policy must be read in context and in reference to the policy as a whole, with each clause helping to interpret the other." *Sony Comput. Entm't Am. Inc. v. Am. Home Assurance Co.*, 532 F.3d 1007, 1012 (9th Cir. 2008) (citing Cal. Civ. Code § 1641; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal. 4th 854, 867, 21 Cal.Rptr.2d 691, 855 P.2d 1263 (1993); *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115, 90 Cal.Rptr.2d 647, 988 P.2d 568 (1999)). "[I]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." *Bank*

of the W., 2 Cal. 4th at 1264-65, 10 Cal.Rptr.2d 538, 833 P.2d 545 (quoting Cal. Civ. Code § 1649). "Only if this rule does not resolve the ambiguity do [courts] then resolve it against the insurer." *Id.* at 1265, 10 Cal.Rptr.2d 538, 833 P.2d 545. California courts have cautioned that language in a contract "cannot be found to be ambiguous in the abstract," and courts should "not strain to create an ambiguity where none exists." *Waller*, 11 Cal. 4th at 18-19, 44 Cal.Rptr.2d 370, 900 P.2d 619.

IV. DISCUSSION

Travelers argues that Mudpie's "factual allegations cannot satisfy the prerequisites for coverage under the Civil Authority, Business Income and Extra Expense" provisions in the insurance policy that Travelers issued to Mudpie.[3] ECF No. 11 at 14. In addition, Travelers argues that the policy's virus exclusion "clearly and unambiguously precludes coverage." *Id.*

A. Business Income and Extra Expense Coverage

The parties dispute whether Mudpie's allegations establish "a direct physical loss of" property as required by the Business Income and Extra Expense provisions in the insurance policy. The Business Income provisions state:

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

ECF No. 11-2 at 72-73. Similarly, the Extra Expense provisions provide for payment of "reasonable and necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no *direct physical loss of or damage to property* caused by or resulting from a Covered Cause of Loss." *Id.* at 73 (emphasis added). "Covered Causes of Loss" are defined as "risks of direct physical loss," subject to certain limitations and exclusions. *Id.* at 73-74 (emphasis omitted).

1. Physical Alteration or Change to Property

Mudpie claims that its inability to operate and occupy its storefront following the ***839** government closure orders is a direct physical loss of property covered by its insurance policy. ECF No. 19 at 14. Travelers argues that, in order to establish a "direct physical loss of" property, Mudpie must allege "a distinct, demonstrable, physical alteration of the property" or "a *physical change* in the condition of the property, i.e., it must have been 'damaged' within the common understanding of that term." ECF No. 11 at 22-23 (quoting *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779-80, 115 Cal.Rptr.3d 27 (2010)).

The Court disagrees with Travelers's broad conception of the language "direct physical loss of" property. Another district court within this Circuit recently rejected a nearly identical interpretation of this language. *See Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB (KSx), 2018 WL 3829767, at *3-4 (C.D. Cal. July 11, 2018). The plaintiff in *Total Intermodal*, who also held a Travelers insurance policy, filed a claim for cargo that had been mistakenly returned to China, where it became unrecoverable and was ultimately destroyed. *Id.* at *1. Travelers denied the claim and, in the ensuing lawsuit, it relied on *MRI Healthcare Center* to argue that "direct physical loss *of*" property requires some damage or alteration to the property. *Id.* at *2, 4. The court disagreed, concluding that the phrase "direct physical loss *to* business personal property" in *MRI Healthcare Center* should be construed differently than "direct physical loss *of*" property in the Travelers insurance policy.[4] *Id.* at *4 (emphasis added). The court reasoned that "the '*loss of*' property contemplates that the property is misplaced and unrecoverable, without regard to whether it was damaged." *Id.* at *3. Furthermore, "to interpret 'physical loss of' as requiring 'damage to' would render meaningless the 'or damage to' portion of the same clause, thereby violating a black-letter cannon of contract interpretation—that every word be given a meaning." *Id.* (citing Cal. Civ. Code § 1641). The court thus concluded that "loss of" could include "the permanent dispossession of something." *Id.* at *4.

As in *Total Intermodal*, the insurance policy here covers "direct physical loss of or damage to property." ECF 11-2 at 72-73. In accordance with the reasoning in *Total Intermodal*, the Court finds that the language of this provision, alone, does not require a "physical alteration of the property" or

"a *physical change* in the condition of the property." ECF No. 11 at 22-23 (citation omitted). Nevertheless, the facts at hand do not fall within the *Total Intermodal* court's more expansive interpretation of "direct physical loss of property." Although Mudpie has been dispossessed of its storefront, it will not be a "permanent dispossession" as with the lost cargo in *Total Intermodal*. *See* 2018 WL 3829767, at *4. When the Stay at Home orders are lifted, Mudpie can regain possession of its storefront. Mudpie's physical storefront has not been "misplaced" or become "unrecoverable," and neither has its inventory. *See id.* at *3.

Moreover, while a "direct physical loss of" property does not require damage or physical alteration to the property, the surrounding provisions within Travelers's insurance policy suggest that Mudpie's inability ***840** to occupy its storefront does not fall within the Business Income and Extra Expense coverage of this policy. *See Sony Comput.*, 532 F.3d at 1012 ("The terms in an insurance policy must be read in context and in reference to the policy as a whole, with each clause helping to interpret the other."). The insurance policy states that the "period of restoration" – applicable to both Business Income and Extra Expense coverage – "[b]egins 24 hours after the time of direct physical loss or damage" and "[e]nds on the date when the property ... should be repaired, rebuilt or replaced with reasonable speed and similar quality." ECF No. 11-2 at 84. The words " '[r]ebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature." *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 287 (S.D.N.Y. 2005). But here, there is nothing to fix, replace, or even disinfect for Mudpie to regain occupancy of its property, which Mudpie admits in its opposition brief: "Mudpie's loss is caused by state closure orders and thus will last for however long those restrictions remain." ECF No. 19 at 8.

2. Intervening Physical Force

Mudpie cites several non-California cases for the proposition that the "loss of functionality of, or access to, a property," such as Mudpie's loss of functionality of its storefront, "constitutes a direct physical loss of property."[5] ECF No. 19 at 15. However, each of these cases involved an intervening physical force which "made the premises uninhabitable or entirely unusable." *See, e.g., Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418 (WHW) (CLW), 2014 WL 6675934, at *6-7 (D.N.J. Nov. 25, 2014) (finding that ammonia discharge inflicted "direct physical loss of or damage to" property where "there [was] no genuine dispute that the ammonia release physically transformed the air" within the premises and rendered it unusable); *Manpower Inc. v. Ins. Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *6 (E.D. Wis. Nov. 3, 2009) (finding that the insured's inability to access its property was a direct physical loss where the loss "was caused by a physical event —the [building] collapse—which created a physical barrier between the insured and its property"); *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 509 S.E.2d 1, 5, 17 (1998) (finding that "[l]osses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property" ***841** when a rockfall made plaintiffs' homes uninhabitable).

Indeed, numerous courts outside the Ninth Circuit have found that some outside physical force must have *induced* a detrimental change in the property's capabilities before a plaintiff alleging loss of use can establish a "direct physical loss of property." *See, e.g., Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005) (rejecting the argument "that direct physical loss or damage is established *whenever* property cannot be used for its intended purpose"); *Ne. Ga. Heart Ctr., P.C. v. Phx. Ins. Co.*, No. 2:12-CV-00245-WCO, 2014 WL 12480022, at *6 (N.D. Ga. May 23, 2014) (listing cases where "the reviewing court required some outside physical force to have induced a detrimental change in the property's capabilities" to award pure loss-of-use damages). For instance, in *Western Fire Insurance Co. v. First Presbyterian Church* the Supreme Court of Colorado determined that a direct physical loss had occurred when the insured, acting upon the orders of the fire department, closed the church building because gas had infiltrated the soil underneath it. 165 Colo. 34, 437 P.2d 52, 54-55 (1968). The court clarified that "the so-called 'loss of use' of the church premises, standing alone, d[id] not in and of itself constitute a 'direct physical loss.' " *Id.* at 55. Rather, the direct physical loss resulted from the "accumulation of gasoline around and under the church building," which made further use of the building highly dangerous. *Id.* The California Court of Appeal reinforced the *Western Fire* court's reasoning, noting that *Western Fire* "does *not* stand for the proposition that loss of intangible property can constitute a physical loss." *Ward Gen. Ins. Servs., Inc. v. Emps. Fire Ins. Co.*, 114 Cal. App. 4th 548, 558, 7 Cal.Rptr.3d 844 (Cal. Ct. App. 2004). Rather, "[a] physical loss occurred when the foundations became saturated with gasoline." *Id.*

Finally, a court in Michigan recently held that allegations of "a loss of business due to executive orders shutting down [ ] restaurants for dining" in response to the COVID-19 pandemic were insufficient to establish "direct physical loss of or damage to" the property. *Gavrilides Mgmt. Co. v. Mich. Ins. Co.*, Case No. 20-258-CB-C30 (Mich. Cir. Ct. July 1, 2020); ECF No. 21-1 at 19-20. [6]

Similar to the plaintiff in *Gavrilides*, Mudpie does not allege that "Covid-19 entered the [property] through any employee or customer." ECF No. 21-1 at 19; *see* ECF No. 19 at 21 (noting that "the complaint nowhere states that Mudpie was closed because its employees became sick or coronavirus was discovered on the property"). Rather than alleging that COVID-19 or any other physical impetus caused the loss of functionality of its storefront, Mudpie alleges that its "loss is caused by government closure orders and thus will last for however long those restrictions remain." ECF No. 19 at 8, 2; *see* ECF No. 1 ¶ 27. Because Mudpie's complaint contains no allegations of a physical force which "induced a detrimental change in the property's capabilities," the Court finds that Mudpie has failed to establish a "direct physical loss of property" under its insurance policy. [7] *See Ne. Ga. Heart Ctr.*, 2014 WL 12480022, at *6.

***842** Following the conclusion of briefing, Mudpie submitted as supplemental authority the opinion in *Studio 417, Inc. v. Cincinnati Insurance Co.*, No. 20-CV-03127-SRB, —— F.Supp.3d ——, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020). Like Mudpie, plaintiffs in that case were businesses (a hair salon and several restaurants) who sought coverage for losses incurred when their businesses were impacted by the COVID-19 pandemic. *Id.* at —— – ——, 2020 WL 4692385 st *1-2. Plaintiffs there also alleged that business closure orders issued by civil authorities required them to cease or reduce their business operations. *Id.* at ——, 2020 WL 4692385 at *2. Unlike Mudpie, however, plaintiffs also claimed that the presence of the COVID-19 virus inside their establishments made them unusable. *Id.* ("Plaintiffs allege that over the last several months, it is likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus. Plaintiffs allege that COVID-19 'is a physical substance,' that it 'live[s] on' and is 'active on inert physical surfaces,' and is 'emitted into the air.' Plaintiffs further allege that the presence of COVID-19 'renders physical property in their vicinity unsafe and unusable,' and that they 'were forced to suspend or reduce business at their covered premises.' ") (citations omitted). Based on the latter allegations, the *Studio 417* court found that plaintiffs had plausibly alleged a covered loss:

> Plaintiffs have adequately alleged a direct physical loss. Plaintiffs allege a causal relationship between COVID-19 and their alleged losses. Plaintiffs further allege that COVID-19 "is a physical substance," that it "live[s] on" and is "active on inert physical surfaces," and is also "emitted into the air." COVID-19 allegedly attached to and deprived Plaintiffs of their property, making it "unsafe and unusable, resulting in direct physical loss to the premises and property." Based on these allegations, the Amended Complaint plausibly alleges a "direct physical loss" based on "the plain and ordinary meaning of the phrase."

Id. at ——, 2020 WL 4692385 at *4 (citations omitted). Mudpie makes no similar allegation here. It does not allege, for example, that the presence of the COVID-19 virus in its store created a physical loss. Rather, its sole focus is on the shelter-in-place orders that have prevented it from opening, a distinctly less physical phenomenon. ECF No. 1 ¶ 27 ("*Compliance with those orders* has caused direct physical loss of Mudpie's insured property in that the property has been made useless and/or uninhabitable; and its functionality has been severely reduced if not completely or nearly eliminated." (emphasis added)). Accordingly, *Studio 417* does not assist Mudpie.

The Court's conclusion is further supported by the policy's provision which states that Travelers "will not pay for loss or damage caused by or resulting from ... loss of use or loss of market." ECF No. 11-2 at 94. The separate provision for loss of use suggests that the "direct physical loss of ... property" clause was not intended to encompass a loss where the property was rendered unusable without an intervening physical force. The provision also undermines Mudpie's claim that "a reasonable purchaser of insurance would read the policy as providing coverage for a loss of ***843** functionality." [8] *See* ECF No. 19 at 14. Thus, because Mudpie fails to allege any intervening physical force beyond the government closure orders, the Court finds that Mudpie is not entitled to Business Income or Extra Expense coverage under the terms of its policy.

B. Civil Authority Coverage

Travelers's Civil Authority coverage provision extends Business Income and Extra Expense coverage to insure losses. The provision states:

> When the Declarations show that you have coverage for Business Income and Extra Expense, you may extend that insurance to apply to the actual loss of Business Income you sustain and reasonable and necessary Extra Expense you incur caused by action of civil authority that prohibits access to the described premises. The civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises, that are within 100 miles of the described premises, caused by or resulting from a Covered Cause of Loss.

ECF No. 11-2 at 85. Travelers argues that Mudpie is not entitled to Civil Authority coverage because Mudpie cannot establish that the civil authority action – the closure orders in this case – were issued "due to direct physical loss of or damage to" any property. ECF No. 11 at 19-21. The Court agrees.

Under the Civil Authority provision, Mudpie must establish the "requisite causal link between damage to adjacent property and denial of access" to its store. *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-0756 FMS, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995); *see also Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686 (5th Cir. 2011) (finding that civil authority coverage requires a "causal link between prior property damage and the civil authority order"). In *Syufy Enterprises*, a theater owner closed his theaters in response to the curfew orders which were imposed by California civil authorities following the Rodney King verdict. 1995 WL 129229, at *1. Finding that the curfews were not imposed "because of damage to adjacent property" but instead "to *prevent* 'potential' looting, rioting, and resulting property damage," the court concluded that the theater owner was not entitled to civil authority coverage. *Id.* at *2-3; *see also United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 129, 134 (2d Cir. 2006) (affirming the district court's denial of coverage under a similar civil authority provision where the government's decision to halt airport operations on September 11, 2001 "was based on fears of future attacks" rather than prior physical damage to an adjacent property); *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, No. H-06-4041, 2008 WL 450012, at *10 (S.D. Tex. Feb. 15, 2008) (finding no coverage under an analogous civil authority provision where the government evacuation order "was issued due to the anticipated threat of damage to the county and not due to property damage that had occurred").

***844** Mudpie's allegations establish that the government closure orders were intended to prevent the spread of COVID-19. *See* ECF No. 1 ¶ 24 (California's Safer at Home Order was issued "to control the spread of COVID-19."). Because the orders were preventative – and absent allegations of damage to adjacent property – the complaint does not establish the requisite causal link between prior property damage and the government's closure order.

That Mudpie's opposition brief attempts to downplay its Civil Authority coverage allegations underscores the Court's conclusion. Mudpie states that "[n]one of [its] claims seek recovery specifically under the civil authority extension" and that "[i]t need not invoke the civil authority extension to establish coverage under the policy." ECF No. 19 at 17. Accordingly, the Court finds as a matter of law that Mudpie is not entitled to Civil Authority coverage. [9]

C. Dismissal of Each Cause of Action

Mudpie's first cause of action "seeks a declaration for itself and similarly situated retailers that its business income losses are covered and not precluded by exclusions or other limitations in its comprehensive business insurance policy." ECF No. 1 ¶ 62. Because Mudpie is not entitled to Business Income, Extra Expense, or Civil Authority coverage as a matter of law, *see supra* at IV.A-B, Mudpie's first cause of action is dismissed.

Mudpie's second cause of action alleges that Travelers breached its contract by denying Mudpie comprehensive business insurance coverage. ECF No. 1 ¶ 69. The elements of a cause of action for breach of contract under California law are: "(1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821, 124 Cal.Rptr.3d 256, 250 P.3d 1115 (2011). "[A]bsent an actual withholding of benefits due, there is no breach of contract." *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 n.10, 271 Cal.Rptr. 246 (Cal. Ct. App. 1990) (citation and emphasis omitted). Because Mudpie has failed to allege

that any "benefits due were withheld or delayed," it cannot allege a breach of contract. *See id.* at 1152, 271 Cal.Rptr. 246. Mudpie's second cause of action is therefore dismissed.

Mudpie's third cause of action alleges breach of the implied covenant of good faith and fair dealing. Under California law, a breach of the implied covenant of good faith and fair dealing in the insurance context has two elements: "(1) benefits due under the policy must have been withheld and (2) the reason for withholding benefits must have been unreasonable or without proper cause." *Love*, 221 Cal. App. 3d at 1151, 271 Cal.Rptr. 246. Because Mudpie has failed to allege that benefits were withheld, the "threshold requirement" for a bad faith claim has not been met. *See id.* at 1151-52, 271 Cal.Rptr. 246; *see also Waller*, 11 Cal. 4th 1 at 35, 44 Cal.Rptr.2d 370, 900 P.2d 619 (affirming that a bad faith claim cannot be maintained unless policy benefits are due under the contract). Accordingly, Mudpie's third cause of action is dismissed.

Lastly, the Court dismisses Mudpie's putative class claims. "[W]here the named plaintiffs have failed to state a claim in themselves for the relief they seek[,] ... ***845** there is no occasion for the court to wrestle with the problems presented in considering whether the action may be maintained on behalf of the class." *Boyle v. Madigan*, 492 F.2d 1180, 1182 (9th Cir. 1974).

V. LEAVE TO AMEND

Under Federal Rule of Civil Procedure 15(a), leave to amend is freely given when justice so requires. The Court may, however, "exercise its discretion to deny leave to amend due to 'undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party ..., [and] futility of amendment.' " *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892 (9th Cir. 2010) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). In this case, it seems doubtful that Mudpie could establish a "direct physical loss of ... property" as the term is defined in its insurance policy for Business Income and Extra Expense coverage. Furthermore, Mudpie has failed to establish entitlement to Civil Authority coverage and admits that none of its claims "seek recovery specifically under the civil authority extension." ECF No. 19 at 17. The Court also recognizes, however, that the law concerning business interruption coverage linked to the COVID-19 pandemic is very much in development. Accordingly, the Court will dismiss the complaint without prejudice and grant leave to amend.

CONCLUSION

For the foregoing reasons, the Court grants Travelers's motion to dismiss without prejudice. Mudpie may file an amended complaint solely to correct the deficiencies identified in this order. An amended complaint is due 21 days from the date of this order. If no amended complaint is filed, the Court will dismiss the case with prejudice.

IT IS SO ORDERED.

All Citations

487 F.Supp.3d 834

Footnotes

1 Mudpie is a California resident, and Travelers is a Connecticut resident. ECF No. 1 ¶¶ 11, 12.

2 The parties do not dispute that California law governs the underlying insurance policy. *See* ECF No. 11 at 15 n.4; ECF No 19 at 13 n.5.

3 The insurance policy, ECF No. 11-2, is incorporated by reference. "Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

4 The *Total Intermodal* court also found the that the phrase "direct physical loss" should be construed differently than "direct physical loss *of*." *Total Intermodal*, 2018 WL 3829767, at *4. For this reason, Travelers's reliance on *Meridian Textiles, Inc. v. Indemnity Ins. Co. of N. Am.*, in which the insurance policy covered "physical

loss or damage," is misplaced. No. CV 06-4766 CAS, 2008 WL 3009889, at *2, 3 (C.D. Cal. Mar. 20, 2008); *see* ECF No. 11 at 22-23.

5 Mudpie cites one unpublished California case in support of its argument, *Universal Savings Bank v. Bankers Standard Insurance Co.*, No. B159239, 2004 WL 515952, at *6 (Cal. Ct. App. Mar. 17, 2004), *vacated*, No. B159239, 2004 WL 3016644 (Cal. Ct. App. Dec. 30, 2004). Pursuant to California Rule of Court 8.1115 and Civil Local Rule 3-4(e), the Court may not consider this unpublished case. *See Sarmiento v. Sealy, Inc.*, No. 18-CV-01990-JST, 2019 WL 3059932, at *6 n.7 (N.D. Cal. July 12, 2019) (declining to apply unpublished California authority).

The Court notes that some district and appellate courts within the Ninth Circuit do consider unpublished California appellate authority. *See, e.g., Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1223 n.3 (9th Cir. 2015) ("Even though unpublished California Courts of Appeal decisions have no precedential value under California law, the Ninth Circuit is not precluded from considering such decisions as a possible reflection of California law.") (quotation and citation omitted). The clear text of Local Rule 3-4(e), however, forecloses such a result here. *See* Civ. L.R. 3-4(e) ("Any order or opinion that is designated: 'NOT FOR CITATION,' pursuant to Civil L.R. 7-14 or pursuant to a similar rule of any other issuing court, may not be cited to this Court, either in written submissions or oral argument, except when relevant under the doctrines of law of the case, res judicata or collateral estoppel.") (emphasis in original).

6 At the time this order was issued, only the official court transcript was available, which is located at ECF No. 21-1.

7 Had Mudpie alleged the presence of COVID-19 in its store, the Court's conclusion about an intervening physical force would be different. SARS-CoV-2 – the coronavirus responsible for the COVID-19 pandemic, which is transmitted either through respiratory droplets or through aerosols which can remain suspended in the air for prolonged periods of time – is no less a "physical force" than the "accumulation of gasoline" in *Western Fire* or the "ammonia release [which] physically transformed the air" in *Gregory Packaging. See Western Fire*, 437 P.2d at 55; *Gregory Packaging*, 2014 WL 6675934, at *6.

8 Mudpie argues that the insurance policy's definition of "property damage" as "[l]oss of use of tangible property that is not physically injured" "supports the conclusion that a reasonable purchaser of insurance would read the policy as providing coverage for a loss of functionality." ECF No. 19 at 14. However, Mudpie itself acknowledges that the property damage definition to which it refers is "not in the businessowners coverage part" of the insurance policy, which provides Business Income and Extra Expense coverage. ECF No. 19 at 12. Rather, it appears in and is applicable to the commercial general liability section of the policy. *See* ECF No. 11-2 at 33, 142.

9 Because Mudpie is not entitled to Civil Authority coverage, the Court need not consider Travelers's additional argument that the virus exclusion bars such coverage. ECF No. 11 at 17-19.

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Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

TOPPERS SALON & HEALTH SPA, INC., Plaintiff
v.
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Defendant.

Case No. 2:20-cv-03342-JDW
|
Signed 11/30/2020

Synopsis

Background: Insured filed action against insurer for breach of contract for failure to provide coverage under commercial property insurance policies for loss of business income resulting from government-mandated suspension of its businesses due to the COVID-19 pandemic. Insurer moved for judgment on the pleadings, and insured moved for partial summary judgment.

Holdings: The District Court, Joshua D. Wolson, J., held that:

exclusion precluding coverage for loss or damage caused by or resulting from any virus applied under Pennsylvania law to preclude coverage for insured's claim for loss of business income;

insured's claims for continuing business expenses constituted "loss" or "damage" under commercial property insurance policy;

business income provision did not apply under Pennsylvania law to provide coverage for insured's claim for loss of business income; and

civil authority provision did not apply under Pennsylvania law to provide coverage for insured's claim for loss of business income.

Motion granted.

Procedural Posture(s): Motion for Judgment on the Pleadings; Motion for Summary Judgment.

Attorneys and Law Firms

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MEMORANDUM

JOSHUA D. WOLSON, United States District Judge

***1** There was a time not so long ago when someone seeking an escape from day-to-day pressures could count on a trip to a spa, like Marge Simpson at Rancho Relaxo. [1] But like so many other things, the Covid-19 pandemic has upended that norm. Like so many other businesses, state and local governments have at times issued orders closing spas to prevent the virus's spread. Those businesses have, in turn, looked to recoup their losses from insurers. This is one such case.

Plaintiff Toppers Salon & Health Spa, Inc. seeks coverage for the government-mandated suspension of its businesses in Pennsylvania, New Jersey, and Delaware. The commercial property policy that Toppers purchased from Travelers Property Casual Company of America offers coverage for many interruptions to Toppers' business. But it does not cover Covid-19, both because it includes an exclusion that applies to virus-related losses and because the various governmental orders do not trigger coverage under Toppers' policy. The Court will therefore grant Travelers' motion for judgment on the pleadings and deny Toppers' motion for partial summary judgment.

I. BACKGROUND

A. The Policy

Toppers operates a chain of day spas in Pennsylvania, New Jersey, and Delaware. It receives commercial property insurance coverage from Travelers under a policy from October 2019 for its locations in Philadelphia, Wayne, and Newtown, Pennsylvania; Marlton, New Jersey; and Dover, Delaware. Among other things, the Policy includes a Business Income Coverage Form that offers Toppers coverage in the event of certain interruptions to its business. Relevant here,

that Form includes both Business Income coverage and Civil Authority coverage.

The Policy covers Business Income loss that Toppers sustains "due to the necessary suspension of your 'operations' during the 'period of restoration,' " if the suspension was "caused by direct physical loss of or damage to property at [the insured's] premises." (ECF No. 5-2 at 41.) The Policy defines the period of restoration as the "period of time after direct physical loss or damage" and "when the premises should be repaired, rebuilt, or replaced with reasonable speed and similar quality." (*Id.* at 50.) Business Income includes "net income ... *plus* continuing normal operating expenses incurred, including payroll." (*Id.* at 41) (emphasis added).

The "Civil Authority" provision covers loss of Business Income and extra expenses incurred due to damage to property other than property at the insured's premises, when as a result of "dangerous physical conditions," a civil authority's actions prohibit access to both the insured's premises and the area immediately surrounding the damaged property. (*Id.* at 42.) The damaged property must be within one mile of the insured's premises to enable a civil authority to have unimpeded access to the damaged property.

The Policy excludes coverage for any "loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (*Id.* at 82 (the "Virus Exclusion").) The Exclusion applies to "all coverage under all forms and endorsements" including Business Income and Civil Authority coverage. (*Id.*)

B. The Shutdown Orders

***2** In March 2020, Pennsylvania, New Jersey, and Delaware, issued sweeping stay-at-home orders to mitigate the further spread of the Covid-19 virus. Those Shutdown Orders referenced that the virus can be transmitted through contact with surfaces and through exposure to airborne particles. As a result of these Orders, Toppers had to suspend operations at all of its locations. In June 2020, Toppers filed a coverage claim for its operating expenses during the suspension period. Travelers denied Toppers' claim later that month. It explained that Toppers' loss did not satisfy the Policy's Business Income or Civil Authority coverage provisions and was also subject to the Policy's Virus Exclusion, as well as several other exclusions.

C. Procedural History

On July 8, 2020, Toppers filed this action against Travelers for breach of contract for failure to provide coverage under the Policy. Both parties requested pre-trial judgment: Toppers moved for partial summary judgment, while Travelers moved for judgment on the pleadings. Both Motions are ripe for decision.

II. LEGAL STANDARD

A. Summary Judgment

Federal Rule of Civil Procedure 56(a) permits a party to seek, and a court to enter, summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he plain language of Rule 56[(a)] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quotations omitted). In ruling on a summary judgment motion, a court must "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.' " *Scott v. Harris*, 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (quotation omitted).

B. Judgment on the Pleadings

"After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). A court can grant a Rule 12(c) motion "if, on the basis of the pleadings, the movant is entitled to judgment as a matter of law." *Fed Cetera, LLC v. Nat'l Credit Servs., Inc.*, 938 F.3d 466, 470 n.7 (3d Cir. 2019) (quotation omitted). A Rule 12(c) motion "is analyzed under the same standards that apply to a Rule 12(b)(6) motion[,]" construing all allegations and inferences in the light most favorable to the nonmoving party. *Wolfington v. Reconstructive Orthopaedic Assocs. II PC*, 935 F.3d 187, 195 (3d Cir. 2019) (quotation omitted).

III. DISCUSSION

The parties agree that Pennsylvania insurance law applies. Under Pennsylvania law, the goal in interpreting an insurance policy, "as with interpreting any contract, is to ascertain the parties' intentions, as manifested by the policy's terms."

Kvaerner Metals Div. of Kvaerner, U.S. v. Commercial Union Ins. Co., 589 Pa. 317, 908 A.2d 888, 897 (2006). A court should not consider individual items in isolation. It must consider the entire insurance provision to ascertain the intent of the parties. *See 401 Fourth St., Inc. v. Inv'rs Ins. Grp.*, 583 Pa. 445, 879 A.2d 166, 171 (2005). When policy language is clear and unambiguous, a court applying Pennsylvania law must give effect to that language. *See Kvaerner Metals*, 908 A.2d at 897. When a provision in the policy is ambiguous, a court must construe the policy "in favor of the insured to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage." *401 Fourth St.*, 879 A.2d at 171. "Contractual language is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." *Id.* (quote omitted).

A. The Virus Exclusion

***3** The Virus Exclusion applies to "loss or damage caused by or resulting from any virus ... that induces or is capable of inducing physical distress, illness or disease." The language is not ambiguous, and it applies to Covid-19, which is caused by a coronavirus that causes physical illness and distress. *See Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, Civ. No. 20-3198, —— F.Supp.3d ——, ——, 2020 WL 6545893, at *4 (E.D. Pa. Nov. 6, 2020) (similar virus exclusion barred coverage). Other courts considering Travelers' policies under other states' laws have reached the same conclusion.[2] That means that the Virus Exclusion applies to Toppers' insurance claim.

Toppers concedes that the Virus Exclusion applies. It argues that the exclusion does not extend to claims for continuing expenses because those expenses are not a "loss" or a "damage." Toppers' argument ignores both the Policy's language and structure. First, the Policy uses the word "loss," but it does not define it. The Court must therefore give it its plain and ordinary meaning. *See Pa. Manufacturers' Ass'n Ins. Co. v. Aetna Cas. & Sur. Ins. Co.*, 426 Pa. 453, 233 A.2d 548, 551 (1967). In the insurance context, a "loss" is the "amount of financial detriment caused by ... an insured property's damage." Black's Law Dictionary 1087 (10th ed. 2009). More generally, the word refers to an "undesirable outcome of a risk" (*id.*) or an "amount of money lost by a business or organization" (New Oxford American Dictionary 1033 (3d ed. 2010).

Both the failure to collect income and the payment of continued expenses fall within these definitions of "loss." In addition, the Policy's structure indicates that the parties intended the word "loss" to cover both lost income and continuing expenses. Under the Policy, "Business Income" includes both net income and continuing expenses, and the Policy provides coverage for any "loss of Business Income." (ECF No. 5-2 at 41.) Under the heading "Loss Determination," it describes the way that the parties anticipated determining the "amount of Business Income loss." (*Id.* at 46.) And the Policy includes a provision that imposed on Toppers certain duties in the event of a "loss." (*Id.*) These provisions, read as a whole, demonstrate that the parties intended the term "loss" to extend to all types of Business Income, including covered expenses. Toppers' argument to the contrary does not analyze the Policy's text; it does not point to a different definition of "loss;" and it does not account for the Policy's overall structure. As a result, it does not carry the day.

B. Coverage

Even if the Virus Exclusion did not bar coverage, Toppers would not be able to show that the Policy covers its claim, either under the Business Income or the Civil Authority coverage.

1. Business Income coverage

Under the Policy, Toppers can obtain Business Income coverage if it must suspend its operations during a period of restoration as a result of "direct physical loss of or damage to" its premises. (ECF No. 5-2 at 41.) No one disputes that Toppers suspended its operations at each of its premises as a result of the Shutdown Orders. So the only question is whether physical loss or damage caused that suspension. It did not.

***4** The Policy only pays Business Income coverage during a period of restoration. The Policy measures that period from the start of the physical loss until the "date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality" or when "business is resumed at a new permanent location." (*Id.* at 50.) In addition, the Policy includes special exclusions for the Business Income coverage that apply to an "increase of loss caused by or resulting from [a d]elay in resulting, repairing, or replacing the property due to interference at the location by strikers or other persons." (*Id.* at 56.) These

provisions make clear that there must be some sort of physical damage to the property that can be the subject of a repair, rebuilding, or replacement. The Covid-19 pandemic does not fall within that definition.

Toppers admits that it will never trigger the end point for the period of restoration. (ECF No. 19 at 7.) It claims that fact demonstrates only that Travelers cannot prematurely end its coverage. But Toppers' argument misses the point. The parties' agreement to measure the period of restoration against the time it takes to repair the premises indicates that they intended the Policy to cover losses for physical damage, and that intent controls the Court's interpretation of the Policy.

Toppers also argues that Policy's use of the phrase "loss of" the premises means the loss of use of the premises. The Court agrees. But that does not save Toppers because it ignores the question of why Toppers lost use of the premises. It did not lose use because the premises suffered physical damage. Business Income coverage does not apply.

2. Civil Authority coverage

The Policy's Civil Authority coverage applies only if there is "damage to property other than property at the described premises" and if a civil authority prohibits access to the area immediately around the covered premises in response to dangerous physical conditions in the area. (ECF No. 5-2 at 42.) But Toppers did not close because of damage to a nearby premise or because there was some dangerous physical condition at another nearby premise. It closed because the Shutdown Orders applied to its own operations. Its shutdown and resulting losses fall outside the scope of the Civil Authority coverage.

IV. CONCLUSION

Businesses nationwide have struggled to stay afloat during the pandemic. While the pandemic has affected Toppers' salons, the Policy's Virus Exclusion is unambiguous and bars Toppers' coverage claim. Toppers also cannot show that Covid-19 or the Shutdown Orders caused it physical damage or reparable loss under the Policy. Therefore, Toppers is not entitled to summary judgment. On the contrary, Travelers has demonstrated that it is entitled to judgment on the pleadings. An appropriate Order follows.

All Citations

--- F.Supp.3d ----, 2020 WL 7024287

Footnotes

1 *See* The Simpsons: Homer Alone (Fox TV Broadcast February 6, 1992).

2 *See Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, —— F.Supp.3d ——, ——, 2020 WL 6503405, at *8 (S.D. Miss. Nov. 4, 2020); *Travelers Cas. Ins. Co. of Am. v. Geragos and Geragos*, No. CV 20-3619 PSG (Ex), —— F.Supp.3d ——, ——, 2020 WL 6156584, at *4 (C.D. Cal. Oct. 19, 2020); *Mark's Engine Co. No. 28 Rest., LLC v. The Travelers Indem. Co. of Conn.*, No. 20-04423, Order, —— F.Supp.3d ——, 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020); *10E, LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-CV-04418-SVW-AS, —— F.Supp.3d ——, ——, 2020 WL 5359653, at *6 (C.D. Cal. Sept. 2, 2020).

CERTIFICATE OF COMPLIANCE UNDER MASS. R. APP. P. 32(g)(1)

I, Benjamin R. Zimmermann, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);

Mass. R. A. P. 16 (e) (references to the record);

Mass. R. A. P. 18 (appendix to the briefs);

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14 with one-inch margins and contains 10,785 total non-excluded words prepared with Microsoft Word 2013.

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CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. 13(e), I, Benjamin Zimmermann, attorney for Plaintiff-Appellants, hereby certify that on this 11th day of June 2021, I have made service of this Brief and Record Appendix by email and the Electronic Filing System on:

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