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Exhibit Compendium

1. *Mehl v. The Travelers Home & Marine Ins. Co.*, Case No. 4:16-cv-01325 CDP, 2018 WL 11301983 (E.D. Mo. May 2, 2018)
2. *North State Deli, LLC et al. v. The Cincinnati Ins. Co. et al.*, Case No. 2-cvs-02569 (Durham County, N.C., Super. Court Div. Oct. 9, 2020)
3. *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, Case No. A-20-816628-B, at *5 (D. Nev. Nov. 30, 2020)
4. *Dino Palmieri Salons, Inc., et al. v. State Auto. Mut. Ins. Co.*, No. CV-20-932117, at *7, *10-11 (Ct. Com. Pl., Cuyahoga Cnty. Ohio Nov. 17, 2020)
5. Exemplar Orders
 - a. March 17, 2020 Proclamation No. 2020-01 by Greenville, SC Mayor
 - b. March 21, 2020 Executive Order No. 2020-005 by Augusta, GA Mayor

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHRISTOPHER MEHL,)
)
Plaintiff,)
)
v.) No. 4:16 CV 1325 CDP
)
THE TRAVELERS HOME AND)
MARINE INSURANCE COMPANY,)
)
Defendant.)

MEMORANDUM AND ORDER

Plaintiff Christopher Mehl and his wife closed on the purchase of their house on February 10, 2012. When they moved in a month later, they discovered brown recluse spiders in the home. After unsuccessful efforts to eradicate the poisonous spiders, Mrs. Mehl moved from the home in May 2012. Plaintiff left the home in June 2012. After continued unsuccessful efforts to eradicate the spiders, plaintiff considered the property uninhabitable and filed a claim under his homeowners insurance policy for loss of use of the property. Defendant Travelers Home and Marine Insurance Company denied the claim, and this action for breach of contract and vexatious refusal to pay followed. Travelers moves for summary judgment, arguing that Mehl's claim is not covered under the policy and that, regardless, any claim arose before the policy period. I will deny the motion.

The insurance policy at issue covers the period from February 10, 2012, to February 10, 2013, and insures against “direct physical loss” to Mehl’s property. Travelers argues that “direct physical loss” means actual physical damage and that because there is no dispute that the insured residence suffered no “physical damage” on account of the spiders, Mehl’s claim for coverage fails. I disagree.

“Direct physical loss” is not defined in the policy, and Travelers points to no language in the policy that would lead a reasonable insured to believe that actual physical damage is required for coverage. Notably, however, the policy defines “property damage” as “physical injury to, damage of, *or loss of use* of tangible property,” and the policy explicitly provides coverage for “loss of use.” In view of this definition and the policy’s express coverage for loss of use, to construe the term “direct physical loss” as requiring damage not defined in the policy leads to an ambiguity in the policy. *See Cincinnati Ins. Co. v. German St. Vincent Orphan Ass’n, Inc.*, 54 S.W.3d 661, 668 (Mo. Ct. App. 2001) (language is ambiguous if it is reasonably open to different constructions). I therefore must adopt construction of the policy that is most favorable to the insured. *Id.* at 667-68. Mehl filed a claim for loss of use of tangible property, which is property damage as defined under the policy and for which the policy provides coverage. I construe the policy so as to provide coverage for such a claim.

Travelers also argues, however, that because the spiders were present before

Mehl purchased the home and before the policy period began, any claimed loss purportedly caused by the spiders is not covered by the policy. Upon review of the evidence submitted on the motion, I find there to be genuine issues of material fact as to when the spiders were present in the home; if their presence in the home arose to such a level so as to cause a “loss of use”; and, if so, when such condition occurred.¹


Accordingly, on the evidence and information before the Court, and viewing all facts and inferences in the light most favorable to the non-moving party, *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), I cannot say that Travelers has established its right to judgment with such clarity as to leave room for no controversy and that Mehl is not entitled to prevail on his claims under any discernable circumstances. *Vette Co. v. Aetna Cas. & Sur. Co.*, 612 F.2d 1076, 1077 (8th Cir.1980). I will therefore deny Travelers’ motion for summary judgment.

Therefore,

IT IS HEREBY ORDERED that defendant Travelers Home and Marine Insurance Company’s Motion for Summary Judgment [21] is **DENIED**.

¹ The policy defines an “occurrence” as an “accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results during the policy period, in . . . ‘property damage[.]’” As noted above, “property damage” includes loss of use of tangible property.

This matter remains set for a jury trial on the two-week docket beginning
June 18, 2018.



CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 2nd day of May, 2018.

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

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

2020 OCT -9 P 3:14

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,

2020, C.S.C.
[Handwritten signature]

ORDER GRANTING PLAINTIFFS' RULE 56 MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs,

v.

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

Defendants.

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 Tavern¹), 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.

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. BACKGROUND³

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.

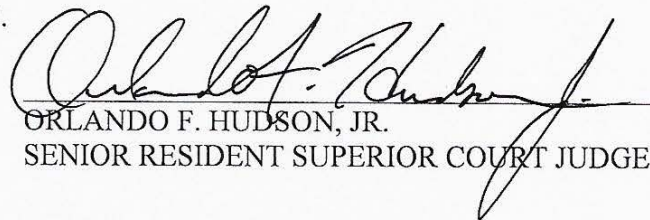
Finally, nothing in the Policies excludes coverage for Plaintiffs’ losses. Notably, it is undisputed that the Policies do not exclude virus-related causes of loss. Cincinnati instead contends that three other exclusions apply: the “Ordinance or Law” exclusion, the “Acts or Decisions” exclusion, and the “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



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16 **DISTRICT COURT**
17 **CLARK COUNTY, NEVADA**

18 JGB VEGAS RETAIL LESSEE, LLC,
19 Plaintiff,

20 v.

21 STARR SURPLUS LINES INSURANCE
22 COMPANY,
23 Defendant.

Case No.: A-20-816628-B
Dept. No.: XIII

**ORDER DENYING DEFENDANT
STARR SURPLUS LINES INSURANCE
COMPANY'S MOTION TO DISMISS
COMPLAINT WITHOUT PREJUDICE**

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28

1 **ORDER DENYING MOTION TO DISMISS**

2 On June 16, 2020, Plaintiff JGB Vegas Retail Lessee, LLC (“Plaintiff” or “JGB”) filed its
3 Complaint against Defendant Starr Surplus Lines Insurance Company (“Defendant” or “Starr”)
4 asserting four causes of action arising from its insurance claim for coverage under Policy No.
5 SLSTPTY11245819 issued by Starr to JGB (the “Policy”). JGB alleged causes of action for: (1)
6 Breach of Contract; (2) Declaratory Judgment; (3) Violations of the Nevada Unfair Claims Practices
7 Act, N.R.S. 686A.310; and (4) Breach of the Covenant of Good Faith and Fair Dealing.¹ On
8 September 16, 2020, Starr moved to dismiss the entire Complaint with prejudice (“Motion to
9 Dismiss”). JGB filed its opposition to the Motion to Dismiss on October 14, 2020, and Starr filed a
10 Reply in support of the Motion (“Reply”) on November 4, 2020. Pursuant to its Minute Order on
11 November 9, 2020, the Court vacated the scheduled hearing due to the continuing coronavirus
12 situation and deemed the matter submitted on the briefs and under advisement as of November 12,
13 2020. The Court, having reviewed the pleadings and the parties’ filings related to the Motion to
14 Dismiss (excluding the supplemental filings of Plaintiff on October 26 and November 10, 2020,
15 which have not been reviewed or considered by the Court), rules as follows.²

16 The Court first rejects the argument in Starr’s Motion to Dismiss that the Policy designates
17 New York as the sole and exclusive venue to resolve any and all disputes arising out of the Policy,
18 and therefore, that Nevada is not the proper forum to adjudicate this action. As Starr contends, the
19 Policy form “General Conditions” provides that “[a]ny suit, action, or proceeding against the
20 COMPANY [*i.e.* Starr] must be brought solely and exclusively in a New York state court or a
21 federal district court sitting within the State of New York.” Policy, Property Coverage, General
22 Conditions, § 12(e). However, at Endorsement #27, the Policy also includes a “Service of Process
23 Clause Endorsement,” which provides, in part, that:

24
25 ¹ On July 23, 2020, Starr removed this action to the United States District Court for the District of
26 Nevada, on the basis of diversity of citizenship. On September 1, 2020, the United States District
27 Court entered the parties’ stipulation and order to remand the action to this Court based on a lack of
complete diversity between the parties.

28 ² The Court provides no opinion regarding which state’s law is applicable in denying Starr’s Motion
to Dismiss.

1 In the event of failure of the Insurer to pay any amount claimed to be due hereunder,
2 the Insurer, at the request of the Insured, will submit to the jurisdiction of a court of
3 competent jurisdiction within the United States. Nothing in this condition constitutes
4 or should be understood to constitute a waiver of the Insurer's rights to commence an
5 action in any court of competent jurisdiction in the United States, to remove an action
6 to a United States District Court, or to seek transfer of a case to another court as
permitted by the laws of the United States or any state in the United States. It is
further agreed . . . that [for] any suit instituted against the Insurer upon this policy, the
Insurer will abide by the final decision of such court or of any appellate court in the
event of an appeal.

7 Policy, Endt. 27. The Service of Process Clause Endorsement continues, that "pursuant to any statute
8 of any state, territory, or district of the United States," Starr "designates the Superintendent,
9 Commissioner or Director of Insurance, or other officer specified for that purpose in the statute" as
10 its agent for service of process. *Id.* The Court finds that there is a conflict between these two
11 provisions and, as an endorsement, the Service of Process Clause Endorsement governs over the
12 forum selection clause in the Policy's form. *See Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins.*
13 *Co.*, 88 F. Supp. 3d 1156, 1162-65 (S.D. Cal. 2015) (holding that the Service of Suit Endorsement
14 "changed the original insurance agreement" that contained a forum selection clause and
15 "unambiguously permits Plaintiff to bring suit in a forum of its choosing."); *Wayne Cnty. Airport*
16 *Auth. v. Allianz Glob. Risks U.S. Ins. Co.*, No. 11-15472, 2012 WL 3134074, at *3 (E.D. Mich. Aug.
17 1, 2012) ("[Insurers] seek dismissal and enforcement of the forum selection clause that was
18 bargained away. The [insurers] are not entitled to enforce the forum selection clause in the policy
19 over that in the endorsement."). Moreover, Starr has failed to show that Nevada is an inconvenient
20 forum to justify dismissal. *See* N.R.S. 13.050(2)(c); *Provincial Gov't of Marinduque v. Placer*
21 *Dome, Inc.*, 131 Nev. 296, 300-07, 350 P.3d 392, 396-400 (2015). Accordingly, this action is
22 properly within the jurisdiction of this Court, and Starr's Motion to Dismiss on forum is denied.

23 The Court next analyzes Starr's arguments for dismissal under NRCP 12(b)(5). When a court
24 considers a motion to dismiss under NRCP 12(b)(5), the "court will recognize all factual allegations
25 in [the] complaint as true and draw all inferences in its favor." *Buzz Stew, LLC v. City of N. Las*
26 *Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). "A complaint need only set forth sufficient
27 facts to demonstrate the necessary elements of a claim for relief so that the defending party has
28 adequate notice of the nature of the claim and relief sought." *W. States Constr., Inc. v. Michoff*, 108

1 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). Thus, the complaint “should be dismissed only if it
2 appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle
3 [the plaintiff] to relief.” *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

4 On the first cause of action, JGB states a ~~valid~~ claim for relief for breach of the Policy. The
5 Policy’s initial coverage grant provides that it “covers the property insured hereunder against all
6 risks of direct physical loss or damage to covered property while at INSURED LOCATIONS
7 occurring during the Term of this POLICY, except as hereinafter excluded or limited.” Policy,
8 Property Coverage, General Conditions, § 1; *see* Compl. ¶¶ 30-32. The Policy also provides certain
9 “TIME ELEMENT” coverages for business interruption losses; the main section provides coverage
10 for “[l]oss directly resulting from necessary interruption of the Insured’s NORMAL business
11 operations caused by direct physical loss or damage to real or personal property covered herein[.]”
12 Policy, Business Interruption, § 1; *see* Compl. ¶¶ 33-40. Also included in the TIME ELEMENT
13 COVERAGE is “Interruption by Civil or Military Authority.”³

14 JGB’s Complaint alleges the physical presence and known facts about the coronavirus,
15 including that it spreads through infected droplets that “are physical objects that attach to and cause
16 harm to other objects” based on its ability to “survive on surfaces” and then infect other people.
17 Compl. ¶¶ 16-20. JGB also alleges that by March 11, 2020, COVID-19 was present at the Mirage
18 casino, within one mile from JGB’s Grand Bazaar Shops. *Id.* ¶ 21. JGB alleges that based on these
19 facts and the location and characteristics of the Grand Bazaar Shops, that it was “highly likely that
20 the novel coronavirus that causes COVID-19 has been present on the premises of the Grand Bazaar
21 Shops, thus damaging the property JGB had leased to its tenants.” *Id.* ¶ 26; *see also id.* ¶ 7. The
22 Complaint also states that because the presence of COVID-19 at or near the Grand Bazaar Shops and

23 _____
24 ³ The coverage part for “Interruption by Civil or Military Authority” provides that:

25 This POLICY is extended to include, starting at the time of physical loss or damage, the actual loss
26 sustained by the Insured, resulting directly from an interruption of business as covered hereunder,
27 during the length of time, not exceeding the number of days shown under TIME LIMITS stated in
28 the Declarations, when, as a direct result of damage to or destruction of property within one (1)
statute mile of an INSURED LOCATION by the peril(s) insured against, access to such described
premises is specifically prohibited by order of civil or military authority.

Policy, Business Interruption, § 7.

1 Governor Sisolak’s March 20, 2020 Order restricting and prohibiting access to non-essential
2 business, the Grand Bazaar Shops were forced to close and the few restaurants that remained open
3 were severely limited in their operations, resulting in significant losses. *Id.* ¶¶ 26-28.

4 The Court finds that JGB’s Complaint sufficiently alleges losses stemming from the direct
5 physical loss and/or damage to property from COVID-19 to trigger Starr’s obligations under the
6 property and TIME ELEMENT coverage provisions in the Policy, including coverage for general
7 business interruption and Interruption by Civil or Military Authority. *See, e.g., Studio 417, Inc. v.*
8 *Cincinnati Ins. Co.*, No. 20-cv-03127, 2020 WL 4692385, at *2, *4 (W.D. Mo. Aug. 12, 2020)
9 (complaint alleged direct physical loss, because it alleged that the virus “is a physical substance,”
10 which “live[s] on” and is “active on inert physical surfaces,” and that “it is likely that customers,
11 employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby
12 infected the insured properties with the virus” and “the presence of COVID-19 ‘renders physical
13 property in their vicinity unsafe and unusable’”).⁴

14 Starr also moves to dismiss JGB’s claim for breach of contract (and related claims) on the
15 basis that any loss or damage suffered by JGB is nonetheless excluded by the Policy’s “Pollution and
16 Contamination Exclusion.” Motion to Dismiss at 24-26; Reply at 24-27. The Pollution and
17 Contamination Exclusion provides:

18 b. Pollution and Contamination Clause:

19 This POLICY does not insure against loss or damage caused by or
20 resulting from any of the following regardless of any cause or event
contributing concurrently or in any other sequence to the loss:

- 21 1. contamination;
- 22 2. the actual or threatened release, discharge, dispersal, migration or seepage of
23 POLLUTANTS at an INSURED LOCATION during the Term of this
24 POLICY unless the release, discharge, dispersal, migration, or seepage is
25 caused by fire, lightning, leakage from fire protective equipment, explosion,
aircraft, vehicles, smoke, riot, civil commotion or vandalism. This POLICY
does not insure off premises cleanup costs arising from any cause and the
coverage afforded by this clause shall not be construed otherwise.

27 ⁴ *See also Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, No. BER-L-3681-20, 2020 WL
28 5806576 (N.J. Super. L. Aug. 13, 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-
cv-00383, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020).

1 Policy, Property Coverage, General Conditions, § 7(b). The Policy does not define “contamination,”
2 but defines “POLLUTANT or CONTAMINANTS” as:

3 any solid, liquid, gaseous or thermal irritant or CONTAMINANT including, but
4 not limited to, smoke, vapor, soot, fumes, acids, alkalis, chemicals, virus, waste,
5 (waste includes materials to be recycled, reconditioned or reclaimed) or hazardous
6 substances as listed in the Federal WATER Pollution Control Act, Clean Air Act,
Resource Conservation and Recovery Act of 1976, and Toxic Substances Control
Act, or as designated by the U.S. Environmental Protection Agency.

7 Policy, Property Coverage, General Conditions, § 13(T).

8 Starr contends that the Pollution and Contamination Exclusion clearly and unambiguously
9 applies on its face to exclude JGB’s claims. Reply at 24-25. As the insurer, Starr bears the burden to
10 prove any clause excludes coverage. *See Nat’l Auto. & Cas. Ins. Co. v. Havas*, 75 Nev. 301, 303,
11 339 P.2d 767, 768 (1959). “[I]f an insurer wishes to exclude coverage by virtue of an exclusion in its
12 policy, it must (1) write the exclusion in obvious and unambiguous language in the policy, (2)
13 establish that the interpretation excluding covering under the exclusion is the only interpretation that
14 could fairly be made, and (3) establish that the exclusion clearly applies to this particular case.”
15 *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 164, 252 P.3d 668, 674 (2011) (citing *Alamia v.*
16 *Nationwide Mut. Fire Ins. Co.*, 495 F. Supp. 2d 362, 367 (S.D.N.Y. 2007)); *see also Belt Painting*
17 *Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383 (2003) (stating “policy exclusions are given a strict and
18 narrow construction”). Starr has not shown that it is unreasonable to interpret the Pollution and
19 Contamination Exclusion to apply only to instances of traditional environmental and industrial
20 pollution and contamination that is not at issue here,⁵ where JGB’s losses are alleged to be the result
21 of a naturally-occurring, communicable disease. This is the case, even though the Exclusion contains
22 the word “virus.” *See, e.g., Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, No. 6:20-cv-
23 1174, 2020 WL 5939172, at *4 (M.D. Fla. Sept. 24, 2020) (“Denying coverage for losses stemming
24 from COVID-19, however, does not logically align with the grouping of the virus exclusion with
25 other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these

26
27
28 ⁵ *See, e.g., Century Surety Co. v. Casino W., Inc.*, 130 Nev. 395, 398-401, 329 P.3d 614, 616-18
(2014); *Belt Painting*, 100 N.Y.2d at 383-88.

1 kinds of business losses.”). Accordingly, the Court finds that the Pollution and Contamination
2 Exclusion does not apply to exclude JGB’s claims.

3 On the second cause of action for declaratory relief, for the reasons stated above (*supra* at 2-
4 5), the Court finds that JGB’s Complaint sufficiently alleges facts to state a claim upon which relief
5 can be granted for declaratory relief under Nevada law. *See* N.R.S. 30.010 *et seq.* Accordingly,
6 Starr’s Motion to Dismiss this cause of action is denied.

7 On the third cause of action, an insurer violates the Unfair Claims Practices Act for, *inter*
8 *alia*, “[m]isrepresenting to insureds or claimants pertinent facts or insurance policy provisions
9 relating to any coverage at issue” or “[f]ailing to effectuate prompt, fair and equitable settlements of
10 claims in which liability of the insurer has become reasonably clear.” N.R.S. 686A.310(1)(a) & (e).
11 Regarding the fourth cause of action, “an implied covenant of good faith and fair dealing [is] in
12 every contract.” *Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 792-93, 858 P.2d 380, 382 (1993).
13 “[W]ith respect to the covenant of good faith and fair dealing . . . ‘[w]hen one party performs a
14 contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of
15 the other party are thus denied, damages may be awarded against the party who does not act in good
16 faith.’” *Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d 335, 338 (1995) (citing *Hilton Hotels v. Butch*
17 *Lewis Prods.*, 107 Nev. 226, 234, 808 P.2d 919, 923 (1991)); *see also Pemberton*, 109 Nev. at 793,
18 858 P.2d at 382 (“An insurer fails to act in good faith when it refuses ‘without proper cause’ to
19 compensate the insured for a loss covered by the policy.”); *D.K. Prop., Inc. v. Nat’l Union Fire Ins.*
20 *Co. of Pittsburgh, PA.*, 92 N.Y.S.3d 231, 232-34 (App. Div. 1st Dep’t 2019).

21 The Complaint alleges that Starr denied the claim, did so unreasonably, and did so with
22 knowledge that denial was unreasonable. Compl. ¶¶ 10, 46, 61. JGB also alleged that Starr
23 misrepresented the facts of the claim by asserting that “there [wa]s no mention of the [Nevada]
24 orders having been issued because of physical loss or damage” and that it did “not appear that the
25 [Nevada] orders in question prohibited access to the insured premises[.]” *Id.* ¶¶ 45-47. Moreover,
26 JGB alleged that Starr misrepresented the scope of the Policy by citing the Pollution and
27 Contamination Exclusion to apply to coverage, and by requiring that JGB be “physical prevent[ed]”
28 from the premises in order to trigger the TIME ELEMENT coverages. *Id.* ¶¶ 48, 49, 52. Finally, JGB

1 alleged consequential damages from Starr’s allegedly unreasonable denial of coverage. *See, e.g., id.*
2 ¶ 83. The Court finds that JGB’s Complaint sufficiently alleges facts to state claims upon which
3 relief can be granted for violation of the Nevada Unfair Claims Practices Act and for breach of the
4 implied covenant of good faith and fair dealing.

5 Lastly, Starr’s request to deny Plaintiff leave to amend the Complaint is denied as moot.

6 **IT IS THEREFORE ORDERED** that Defendant’s Motion to Dismiss **IS DENIED IN ITS**
7 **ENTIRETY** without prejudice.

8 
9 _____
November 30, 2020.

10 Respectfully submitted,

11 WOLF, RIFKIN, SHAPIRO, SCHULMAN &
12 RABKIN, LLP

13 /s/ Don Springmeyer


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Company

STATE OF OHIO)
)
) SS:
)
 CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS

CASE NO. CV- 20-932117

DINO PALMIERI SALONS, INC.,)
 individually and on behalf of all others)
 similarly situated)
 and)

FISH FURNITURE SHOP, INC.,)
 individually and on behalf of all others)
 similarly situated)

Plaintiffs,)

v.)

State Automobile Mutual Insurance)
 Company)

Defendant.)

**ORDER AND OPINION DENYING
DEFENDANT'S MOTION TO DISMISS**

Maureen E. Clancy, J:

This case is before the Court on Defendant State Automobile Mutual Insurance Company's Motion to Dismiss, filed June 25, 2020. Plaintiffs Dino Palmieri Salons, Inc. and Fish Furniture Shop, Inc. filed an Opposition on July 31, 2020. Defendant filed a Reply on August 14, 2020. Plaintiffs filed a Sur-Reply on August 25, 2020, which the Court allowed over Defendant's objection on September 11, 2020. Defendant filed Supplemental Authority on August 11, 2020 and September 3, 2020. On September 9,

2020 Plaintiffs filed a response to the Supplemental Authority Defendant filed on September 3, 2020. Plaintiffs filed Supplemental Authority on August 18, 2020. On August 31, 2020, an oral argument was held on Defendant's Motion. On October 6, 2020 Defendant filed a Second Notice of Supplemental Authority, to which Plaintiffs responded on October 14, 2020. Also on October 6, 2020, Plaintiffs filed a Notice of Supplemental Authority. On October 12, 2020 Defendant filed a Third Notice of Supplemental Authority. On November 3, 2020 Defendant filed a Fourth Notice of Supplemental Authority. On November 11, 2020 Defendant filed a Fifth Notice of Supplemental Authority. Consistent with the following Order and Opinion, the Court hereby DENIES Defendant's Motion to Dismiss.

I. Factual Background

Plaintiffs, a chain of salons and a pair of furniture stores, are insured by Defendant. On June 3, 2020 Plaintiffs filed this class action lawsuit against Defendant, State Automobile Insurance Company, on behalf of themselves and all others similarly situated. Plaintiffs have all-risk businessowners policies. "All-risk policies cover all risks of loss except for risks that are expressly and specifically excluded." *Studio 417 v. Cincinnati Ins. Co.*, W.D.Mo. No. 20-cv-03127-SRB, 2020 U.S. Dist. LEXIS 147600, *2 (Aug. 12, 2020). Included within the Policy is coverage for losses due to Business Interruption, Extra Expense coverage and coverage for losses due to the actions of a Civil Authority. Amended Complaint, ¶ 12. The Policies do not contain virus exclusions.

In their Amended Complaint, filed June 3, 2020, Plaintiffs allege that Defendant refused to provide coverage for SARS-CoV-2 and/or Covid-19-related losses which should have been covered under the Business Income, Extra Expense, and Civil Authority

provisions of their policies. The parties agree on the language within the policies. In pertinent part, those sections of the policies obligate Defendant to:

- 1) Business Income: “pay for the actual loss of Business Income [Plaintiffs] sustain due to the necessary ‘suspension of [Plaintiffs]’ ‘operations’ during the ‘period of restoration’. The suspension must be caused by direct physical loss of or damage to the property at the described premises...”
- 2) Extra Expense: “pay necessary Extra Expense [Plaintiffs] sustain during the ‘period of restoration’ that [Plaintiffs] would not have incurred had there been no physical direct loss or damage to property at the described premises...”
and
- 3) Civil Authority: “pay for the actual loss of Business Income [Plaintiffs] sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described physical premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.”

Plaintiffs seek a declaratory judgment that they and others similarly situated are entitled to coverage under the insurance policies they have with Defendant for losses Plaintiffs sustained, and continue to sustain, “at, in, on and/or around their premises,” as a result of SARS-CoV-2 and/or Covid-19 Pandemic-related closures. Amended Complaint, ¶ 21. They allege both that SARS-CoV-2/Covid-19 was in their establishments during their policy periods, and that it was *probably* present in their establishments. Plaintiffs further allege that SARS-CoV-2 is a physical substance, “that is transmissible and is active on inert physical surfaces for a period of time, and that SARS-CoV-2 is a

human pathogen that causes the disease COVID-19 that can be lethal.” Amended Complaint, ¶¶ 26, 28. Plaintiffs further allege that “SARS-CoV-2 has been transmitted by human contact with surfaces and items of physical property located at premises in Ohio” and “SARS-CoV-2 has been transmitted by human contact with airborne particles emitted into the air at premises in Ohio.” Amended Complaint, ¶¶ 31, 34. Plaintiffs further allege the presence of any SARS-CoV-2 particles causes direct physical harm to property, direct physical loss to property and direct physical damage to property. Amended Complaint, ¶¶ 38, 39, 40. They allege that the presence of any SARS-CoV-2 particles at premises renders the premises unsafe, thereby impairing the premises' value, usefulness, and normal function; that the presence of people infected with or carrying SARS-CoV-2 particles renders physical property in their vicinity unsafe and unusable, resulting in direct physical loss to that property; that the presence of people infected with or carrying SARS-CoV-2 particles at premises renders the premises, including property located at that premises, unsafe, resulting in direct physical loss to the premises and property. Amended Complaint, ¶¶ 36, 41, 42. Plaintiffs allege that they “have sustained direct physical loss and damage to items of property located at their premises and direct physical loss and damage to the premises described in their Policies as a result of the presence of SARS-CoV-2, COVID-19, and/or the COVID-19 Pandemic.” Amended Complaint, ¶¶ 67. Thus, Plaintiffs allege that the presence of SARS-CoV-2, COVID-19, and/or the Covid-19 Pandemic caused direct physical loss or damage to property. “Physical loss or damage to property” is not defined in the policies.

Plaintiffs also contend that as a result of Covid-19, the State of Ohio issued authoritative orders mandating that they cease or significantly curtail their operations.

They allege that on March 9, 2020, Ohio Governor Mike DeWine declared a state of emergency in response to the Covid-19 pandemic; that on March 18, 2020 Ohio ordered the temporary closure of all hair and nail salons; and that on March 22, 2020 the Ohio Department of Health ordered all non-essential businesses (including Plaintiffs) in Ohio to cease all activities. Amended Complaint, ¶¶ 49-52.

Defendant argues that the mere possibility of the presence of Covid-19 in Plaintiffs' businesses is not sufficient to survive its Civ.R. 12(b)(6) Motion. It also argues that the presence of a virus cannot satisfy the requirement that Plaintiffs have suffered direct physical loss or damage (a threshold requirement to coverage under the three policy sections that are the subject of Plaintiffs' Amended Complaint). In addition, Defendants argue that Ohio Public Health Orders at issue cannot create a covered claim. As a result, Defendants move to dismiss Plaintiff's Amended Complaint.

II. Legal Standard

Pursuant to *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, a motion to dismiss for failure to state a claim upon which relief can be granted under Civ.R. 12(b)(6) will only be granted where the party opposing the motion is unable to prove any set of facts that would entitle him to relief. Indeed, before a court may dismiss an action under this rule, " * * * it must appear beyond doubt from the Complaint that the Plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, 71 O.O.2D 223, 327 N.E.2d 753, syllabus. To make this determination, the Court is required to interpret all material allegations in the Complaint as true and admitted. *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80. The Court must draw all reasonable inference in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988).

III. Analysis

Defendant's overarching argument is that Plaintiffs' allegations do not rise to the level of direct physical loss or damage to property, and therefore, because physical loss or damage to property is a threshold requirement for coverage under the three policy provisions at issue here, Plaintiffs' Amended Complaint must be dismissed.

"Insurance policies are contracts and their interpretation is a matter of law for the court . . . Insurance coverage is determined by reasonably construing the contract in conformity with the intention of the parties as gathered from the ordinary and commonly understood meaning of the language employed. Contract terms are to be given their plain and ordinary meaning. Where provisions of a contract of insurance are reasonably susceptible to more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured. However, where the intent of the parties to a contract is evident from the clear and unambiguous language used, a court must not read into the contract a meaning not contemplated or placed there by an act of the parties to the contract. Although, as a rule, a policy of insurance that is reasonably open to different interpretations will be construed most favorably for the insured, that rule will not be applied so as to provide an unreasonable interpretation of the words of the policy." *Dunson v. Home-Owners Ins. Co.*, 3d Dist. Hancock No. 5-09-37, 2010-Ohio-1928, ¶ 12-14 (internal citations and quotations omitted).

"Physical loss or damage" is not defined in the policy. As noted by Defendant in its Motion, The Eighth District Court of Appeals has previously interpreted the requirement in an insurance policy that the insured property in question must have sustained physical loss, damage, or injury:

Read in context with the other terms used in the definition of “property damage,” we construe the term “physical injury” to mean a harm to the property that adversely affects the structural integrity of the house. This interpretation is consistent with authorities on insurance law. See, e.g., 10A Couch on Insurance (3d Ed. 1998), Section 148:46 (“The requirement that the loss be ‘physical,’ given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property”); Comment, Why Fear the Fungus: Why Toxic Mold Is and Is Not the Next Big Toxic Tort (2004), 52 Buff.L.Rev. 257, 276 (homeowners must show “distinct and demonstrable” damage to property as a result of mold growth, such as “clear physical damage to the structure of the home” to recover under a homeowner policy).

Mastellone v. Lightning Rod Mut. Ins. Co., 175 Ohio App. 3d 23, 2008-Ohio-311, 884 N.E.2d 1130, ¶ 61 (8th Dist.) (holding that the trial court had erred when it refused to grant a directed verdict to insurer where plaintiffs “presented no evidence to show that the mold on the siding of their house constituted ‘physical damage’ as that term is used in the policy.” *Id.* at ¶ 63). The Eighth District’s holding in *Mastellone*, however, interpreted the policy in question – as well as whether plaintiffs had satisfied the terms of that policy – with the benefit of evidence, including expert opinions. At the Motion to Dismiss stage, this Court does not have the benefit of similar evidence.

The Court finds that, at this juncture, Plaintiffs’ allegations in their Amended Complaint are sufficient to withstand Defendant’s Motion. While Defendant argues that the mere possibility Covid-19 was present in Plaintiffs’ establishments is not enough to survive Defendant’s Motion to Dismiss, Plaintiffs allege that they “have sustained direct physical loss and damage to items of property located at their premises and direct physical loss and damage to the premises described in their Policies as a result of the presence of SARS-CoV-2, COVID-19, and/or the COVID-19 Pandemic.” Amended

Complaint, ¶ 67. Though Defendant points to *Mastellone* to provide an interpretation of “physical loss or damage,” thereby arguing that Plaintiffs have not satisfied that definition and so are not entitled to coverage, the Court finds that analysis to be premature. Interpreting all material allegations in the Amended Complaint as true and admitted, and drawing all reasonable inferences in favor of Plaintiffs, the Amended Complaint sufficiently contends that Plaintiffs’ premises sustained physical loss or damage directly from the presence of physical Covid-19 particles.

While parts of Plaintiffs’ Amended Complaint refer to the “probable” presence of Covid-19 in their establishments, Plaintiffs have also alleged the affirmative physical presence of the virus on their premises, and ensuing physical damage and loss. In addition, other courts have found that allegations of the *likely* existence of Covid-19 particles at a business was enough to survive a motion to dismiss when similar policy language was at issue.

In denying defendant insurance company’s Motion to Dismiss in a similar action, the Western District of Missouri explained:

Plaintiffs allege that COVID-19 is a highly contagious virus that is physically “present . . . in viral fluid particles,” and is “deposited on surfaces or objects.” Plaintiffs further allege that this physical substance is likely on their premises and caused them to cease or suspend operations . . . Plaintiffs expressly allege physical contamination . . . [none of the] cases cited by Defendant warrant dismissal under Rule 12(b)(6).

Defendant’s reply brief cites recent out-of-circuit decisions which found that COVID-19 does not cause direct physical loss . . . [But] Plaintiffs here have plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable. This is enough to survive a motion to dismiss.

Defendant also contends that if Plaintiffs’ interpretation is accepted, physical loss would be found “whenever a business suffers economic harm.” That is not what the Court holds here. Although Plaintiffs allege economic harm, that harm is

tethered to their alleged physical loss caused by COVID-19 and the Closure Orders. (Doc. #1-1, ¶¶ 106-107) (alleging that the COVID-19 pandemic and Closure Orders required Plaintiffs to "cease and/or significantly reduce operations at, and . . . have prohibited and continue to prohibit access to, the premises.") For all these reasons, the Court finds that Plaintiffs have adequately alleged a direct physical loss under the Policies.

Studio 417 v. Cincinnati Ins. Co., W.D.Mo. No. 20-cv-03127-SRB, 2020 U.S. Dist. LEXIS 147600, *17-18 (Aug. 12, 2020) (internal citations and quotations omitted). See also *Blue Springs Dental Care v. Owners Ins. Co.*, W.D.Mo. No. 20-CV-00383-SRB, 2020 U.S. Dist. LEXIS 172639, *12-13 (Sept. 21, 2020) ("Here, Plaintiffs allege that 'it is likely customers, employees, and/or other visitors to the insured properties over the recent month were infected with the coronavirus,' they 'suspended operations due to COVID-19 to prevent physical damages to the premises by the presence or proliferation of the virus and the physical harm it could cause persons present there,' and that 'customers cannot access the property due to the Stay at Home Orders or fear of being infected with or spreading COVID-19.' . . . Plaintiffs also explain how COVID-19 is physically transmitted by air and surfaces through droplets, aerosols, and fomites that remain infectious for extended periods of time . . . Taking Plaintiffs' fact allegations as true, as the Court must at this stage, and after drawing reasonable inferences from those facts in their favor, Plaintiffs plausibly allege that COVID-19 physically attached itself to their dental clinics, thereby depriving them of the possession and use of those insured properties").

Here, not only do Plaintiffs allege that Covid-19 – a physical substance – was *likely* on their premises (as do the Plaintiffs in *Studio 417* and *Blue Springs Dental Care*), but that it was physically present and that it caused physical loss and damage. Accordingly, the Court finds that Plaintiffs have sufficiently alleged that Covid-19 existed on their premises, and that it caused direct physical loss and damage.

Defendant also contends that even if Plaintiffs are able to prove that Covid-19 was present in their establishments, the presence of Covid-19 does not meet the definition of "physical loss or damage to property," so coverage would not apply. The Court finds that, again, Plaintiffs' Amended Complaint alleges that they have suffered physical loss and damage as the result of the physical presence of Covid-19 in their establishments, and that allegation – which must be taken as true at this stage – is sufficient to survive a motion to dismiss. See Amended Complaint, ¶ 67.

Moreover, Plaintiffs have plausibly stated a claim for extra expense and civil authority coverage under the policy as both require Plaintiffs to experience direct physical loss and damage to the property. Again, as discussed previously, Plaintiffs have adequately alleged that they suffered direct physical loss and damage to their property as a result of the physical presence of SARS-CoV-2. Plaintiffs adequately allege that the presence of the COVID-19 virus in and on their premises caused them to suffer direct physical loss and damage to their premises.

As to civil authority coverage, Defendants argue that Plaintiffs' losses are due to the State of Ohio's March 2020 orders forcing non-essential businesses (including Plaintiffs) to close, rather than direct losses due to Covid-19, but similarly, Plaintiffs' Amended Complaint – while it does attribute losses to the shutdown orders – also alleges losses stemming from the actual physical presence of the virus, both in the air and on the surfaces. *Id.* In addition, the Court finds that Plaintiffs' allegations at the Motion to Dismiss stage plausibly allege that access to their premises was prohibited to such a degree as to trigger the civil authority coverage, as Plaintiffs have adequately established the "requisite causal link between damage to adjacent property and denial of access" to their


stores. *Mudpie, Inc. v. Travelers Cas. Ins. Co.*, N.D.Ca. No. 20-cv-03213-JST, 2020 U.S. Dist. LEXIS 168385, *19 (Sept. 14, 2020). As in *Studio 417*, the policy here does not specify that *all* access to the premises be absolutely prohibited. Plaintiffs have adequately stated a claim under the civil authority section of their policies.

Moreover, the cases on which Defendant relies to argue that this case should be decided at the Motion to Dismiss stage were either decided after the Court had the opportunity to consider evidence; or did not include allegations that plaintiffs' losses were attributable to the physical presence of Covid-19; or involved policies with a specific virus exclusion; or did not involve a virus at all, or did not allege direct physical harm. See, e.g. *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130 (directed verdict; mold); *Universal Image Prods. v. Chubb Corp.*, 703 F. Supp. 2d 705, (E.D.Mich.2010) (motion for summary judgment; mold); *10E v. Travelers Indem. Co.*, C.D.Ca. No. 2:20-cv-04418, 2020 U.S. Dist. LEXIS 165252 (Sept. 2, 2020) (virus exclusion; losses attributable to government orders); *Malaube v. Greenwich Ins. Co.*, S.D.Fla. No. 20-22615, 2020 U.S. Dist. LEXIS 156027 (Aug. 26, 2020) (virus exclusion; losses attributable to government orders); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, S.D.Ca. No. 20-CV-907-CAB-BLM, 2020 U.S. Dist. LEXIS 166808 (Sept. 11, 2020) (losses attributable to government orders).

Accordingly, since Plaintiffs' Amended Complaint alleges the physical presence of Covid-19 on their premises, and that Plaintiffs suffered physical loss or damage directly stemming from the physical presence of Covid-19, the Court finds that Plaintiffs' Amended Complaint adequately states a claim upon which relief may be granted.

Conclusion

Interpreting all material allegations in the Amended Complaint as true and admitted, and drawing all reasonable inferences in favor of Plaintiffs, Defendant's June 25, 2020 Motion to Dismiss is therefore DENIED.


11.17.2020
MAUREEN E. CLANCY, JUDGE

A PROCLAMATION

WHEREAS, on March 13, 2020, the President of the United States declared a state of emergency to address the existing public health emergency associated with the coronavirus (COVID-19); and

WHEREAS, on March 13, 2020, the Governor of the State of South Carolina declared a state of emergency in South Carolina pertaining to the COVID-19 public health emergency and on March 15, 2020 issued an order closing all schools in the State of South Carolina; and

WHEREAS, the CDC has issued guidelines to mitigate the spread of the virus, including recommending on March 15, 2020, that for the next eight (8) weeks, in-person events that consist of 50 people or more throughout the United States be postponed or cancelled; and

WHEREAS, subsequently, the President issued his COVID-19 guidelines for the U.S. where, among other things, the President advised that citizens should avoid social gatherings or groups of more than ten people, and avoid eating or drinking at bars, restaurants, and food courts; and

WHEREAS, public health officials and experts including those in the Greenville area have determined that the coronavirus is an imminent threat to the region; and

WHEREAS, with 33 positive cases in South Carolina as of March 17, 2020, the possible increased threat from COVID-19 constitutes a threat of an imminent disaster to the health and welfare of the citizens of the City of Greenville ("City") and surrounding areas; and

WHEREAS, the City is a popular destination with many venues where the public gather such that, for the safety of the community, reasonable temporary restrictions are needed to be placed on the certain establishments within the City where large gatherings of persons occur; and

WHEREAS, Sections 12-31 through 12-40 of the City Code of Ordinances empowers the Mayor to issue a proclamation declaring a state of emergency and placing certain restrictions on businesses within the City; and

WHEREAS, in light of the foregoing, I deem it proper and necessary to declare a State of Emergency in the City and place restrictions on the operations of restaurants, bars, and breweries in an effort to reduce the spread of and the exposure to COVID-19; and

WHEREAS, City Council will be called into session no later than 24 hours following the issuance of this proclamation;

NOW, THEREFORE, I, Knox White, Mayor of the City of Greenville, South Carolina, by virtue of the power vested in me, do hereby declare and determine that a State of Emergency exists within the City of Greenville, South Carolina, and I do hereby order and direct the following emergency regulations under the provisions of said Ordinance:

Section 1. Effective midnight tonight, eating establishments, bars, and breweries within the City are temporarily restricted in order to prohibit dine-in service of food or beverages or otherwise provide for the on-premise consumption of same; provided however, said establishments may provide drive-through, curbside, and delivery service of food during the period of temporary closure. This proclamation shall continue until Wednesday, March 18, 2020 at 3 p.m., unless further extended by City Council.

Section 2. City Council will consider the attached emergency ordinance on or before Wednesday, March 18, 2020 at 3 p.m.

PROCLAIMED THIS THE DAY OF 17th DAY OF MARCH, 2020, at 3 p.m.



MAYOR

ATTEST:



CITY CLERK

APPROVED AS TO FORM:



CITY ATTORNEY

REVIEWED:



CITY MANAGER



EXECUTIVE ORDER NUMBER 2020-005

BY THE MAYOR

- WHEREAS:** The world has experienced a deep humanitarian crisis due to the COVID-19; and
- WHEREAS:** As of March 11, 2020, COVID-19 is officially a global pandemic according to the World Health Organization (WHO); and
- WHEREAS:** Governor Brian Kemp has declared a public health emergency in the state of Georgia as of March 14, 2020 due to the COVID-19 pandemic; and
- WHEREAS:** Pursuant to O.C.G.A. § 38-3-28, the Mayor, as Chair of the Board of Commissioners, is authorized to make, amend, and rescind orders, rules, and regulations as necessary for emergency purposes and to supplement carrying out the emergency management laws; and
- WHEREAS:** Pursuant to O.C.G.A. § 38-3-51, the Governor's declared public health emergency authorizes the Mayor, as Chair of the Board of Commissioners, to use emergency powers in O.C.G.A. §§ 38-3-1 through 38-3-64; and
- WHEREAS:** Pursuant to O.C.G.A. § 38-3-6, during an emergency, O.C.G.A. §§ 38-3-1 through 38-3-64 are supposed to be liberally construed to effectuate their purposes; and
- WHEREAS:** Pursuant to Section 3-3-41(a) of the AUGUSTA, GEORGIA CODE, the Mayor, as Chair of the Board of Commissioners, shall have the emergency power to declare an emergency to exist when, in the Mayor's opinion, there is an actual or threatened occurrence of a disaster or emergency, which may result in the large-scale loss of life, injury, property damage or destruction or in the major disruption of routine community affairs, business or governmental operations in Augusta; and
- WHEREAS:** Pursuant to Sections 3-3-41 through 3-3-45 of the AUGUSTA, GEORGIA CODE, the Mayor, as Chair of the Board of Commissioners, shall have the right to exercise any or all of the following options after such declaration of emergency:
- (1) To close or restrict areas to preserve, protect, or sustain life, health, welfare or safety of persons or their property.
 - (2) To impose re-entry restrictions on those areas to promote order and protect lives.
 - (3) To perform and exercise such other functions, powers, and duties as may be deemed necessary to promote and secure the safety and protection of the civilian population; and



WHEREAS: On Monday, March 16, 2020 at 4:00 P.M., a local State of Emergency for Augusta-Richmond County relating to COVID-19 was declared in Executive Order 2020-003; and

WHEREAS: Due to additional developments on the COVID-19 pandemic, Executive Order 2020-004 was issued on Tuesday, March 17, 2020 at 2:55 P.M. supplementing Executive Order 2020-003; and

WHEREAS: The Centers for Disease Control and Prevention (CDC) has issued guidance on the emerging and rapidly evolving situation of COVID-19, including how to protect oneself from becoming sick, recommending use of social distancing in order to prevent the continued spread of the virus globally; and

WHEREAS: the CDC expects that additional cases of COVID-19 will be identified in the coming days, including more cases in the United States, and that person-to-person spread is likely to continue to occur; and

WHEREAS: On March 16, 2020, the CDC advised that during the next fifteen (15) days, all events in the United States of ten (10) or more people should be cancelled or held virtually; and

WHEREAS: Pursuant to the guidance of the CDC, the City of Los Angeles, California, the City of Seattle, Washington, the City of Atlanta, Georgia, Athens-Clarke County, Georgia, the Consolidated Government of Columbus, Georgia, and the states of New York, New Jersey, and Connecticut have imposed temporary restrictions on the operations of businesses to stop large numbers of people from gathering and staying in close proximity; and

WHEREAS: The current number of COVID-19 cases in Georgia is 507 with 14 deaths and the current number of COVID-19 cases in Augusta-Richmond County confirmed by the CDC is nine (9) and those numbers are increasing daily; and

WHEREAS: Medical professionals have advised that if COVID-19 continues to spread in Augusta-Richmond County and the rest of Georgia, including the CSRA, at a rate comparable to that rate of spread in other affected areas, it may greatly strain the resources and capabilities of county and municipal governments, including public health agencies, that provide essential services for containing and mitigating the spread of contagious diseases, such as COVID-19, and the situation may become too large in scope to be handled in its entirety by the normal county and municipal operating services in some parts of this State, and this situation may spread to other parts of this State; and

WHEREAS: It has been evidenced that people in Augusta-Richmond County to continue to congregate in large numbers in enclosed spaces where social distancing cannot be effectuated; and



WHEREAS: To prevent or minimize injury to people resulting from this pandemic, I find that certain actions are required, including but not limited to, the social distancing measures set forth herein.

NOW, THEREFORE, PURSUANT TO AUGUSTA, GEORGIA CODE SECTIONS 3-3-34 THROUGH 3-3-46, AND THE AUTHORITY VESTED IN ME AS MAYOR OF THE CITY OF AUGUSTA, IT IS HEREBY

ORDERED: That there exists an actual or threatened occurrence of a disaster or emergency, which may result in the large-scale loss of life, injury, property damage or destruction or in the major disruption of routine community affairs, business or governmental operations in Augusta.

IT IS FURTHER

ORDERED: That, all public or private Community Gatherings of more than ten (10) people anywhere within Augusta, Georgia are prohibited for the duration of this Order. A "Community Gathering" is defined as any indoor or outdoor event or convening, subject to the exceptions below, that brings together or is likely to bring together ten (10) or more persons at the same time in a single room or other single confined or enclosed space, such as an auditorium, stadium (indoor or outdoor), tent arena or event center, music venue, meeting, hall, conference center, large cafeteria, or any other confined indoor and outdoor space. A Community Gathering does not include the following or similar uses, so long as persons attending the Community Gathering are generally not within six (6) feet of each other for extended periods: (1) spaces where persons may be in transit or waiting for transit such as airports, bus stations, or terminals; (2) office or manufacturing space, child-care facilities, residential buildings or any type of temporary sheltering or housing; (3) grocery stores or pharmacies; and (4) hospital or medical facilities.

IT IS FURTHER

ORDERED: Notwithstanding the previous paragraph, the following business-use categories will be regulated as follows: (1) restaurants open to the public shall close except to provide take out, drive-through, or curbside service to include alcoholic beverages in sealed containers which they are otherwise licensed to dispense; (2) all business locations with on-premises consumption of alcoholic beverage licenses which are not also restaurants shall be closed for business; (3) all establishments providing body care services which require close physical contact between the provider and client such as barbering, hair design, cosmetology, esthetics, massage therapy (except for medically licensed physical therapy), tattooing, or nail care shall be closed for business; (4) all indoor recreation facilities, to include gyms, health studios, indoor amusement facilities, bowling alleys, pool halls and theatres shall be closed for business; and (5) all other retail sales establishments (not including grocery stores or pharmacies addressed above) will be



permitted to remain open subject to the following restrictions: businesses having less than 30,000 square feet of retail space shall have no more than ten (10) customers on their premises at any one time, and businesses with more than 30,000 square feet of retail space shall have no more than fifty (50) customers on their premises at any one time; and customers shall generally not be within six (6) feet of each other for extended periods.

IT IS FURTHER

ORDERED:

Cafeterias in hospitals, nursing homes, or similar facilities shall not be subject to these restrictions and may continue normal operations.

IT IS FURTHER

ORDERED:

This shall become effective beginning on March 22, 2020 at midnight and shall remain in effect until April 5, 2020 at midnight unless further extended by further action of the Mayor or Augusta, Georgia Commission and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against Augusta, Georgia, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

This 21st day of March, 2020, at 3:31 P.M.


Hardie Davis, Jr.
Mayor