PROGRAM MATERIALS
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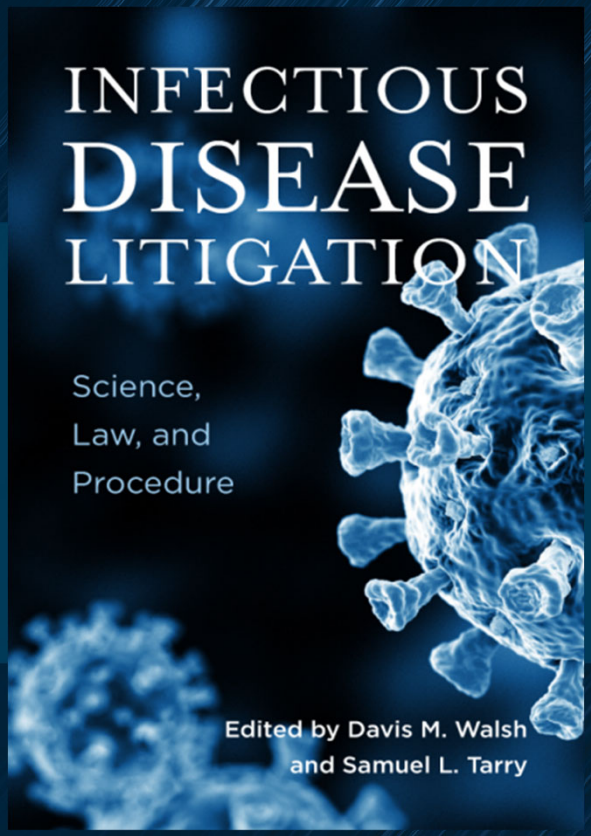
September 8, 2021

Infectious Disease Litigation: The Post-COVID Landscape

- Davis Walsh, Esq. – McGuireWoods
- Samuel Tarry, Jr., Esq. - McGuireWoods

Celesq® AttorneysEd Center
www.celesq.com

5255 North Federal Highway, Suite 100, Boca Raton, FL 33487
Phone 561-241-1919



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Infectious Disease Litigation: The Post-COVID Landscape

September 8, 2021

Sam Tarry and Davis Walsh

Today's Panelists and Panel Discussion

Samuel L. Tarry Jr.
Partner
McGuireWoods LLP

Davis M. Walsh
Partner
McGuireWoods LLP

Brogan S. Chubb
Associate
McGuireWoods LLP

CONFIDENTIAL 2

Rise of Infectious Disease Litigation

- Millions of people die each year from sepsis
- Science has developed
  - Typhoid fever vs. O.J. Simpson Trial vs. DNA Typing/Virus Variants
- Law continues to develop
- Focus increased by COVID-19 litigation

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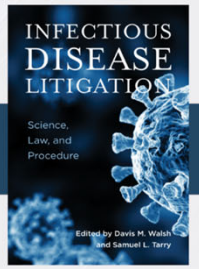
Outline of Talk/CLE

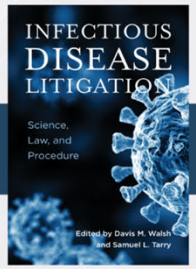
- Discuss infectious disease litigation through lens of recent COVID decisions in key areas:
  - Tort/Exposure
  - Employment
  - Vaccine Mandates
  - Insurance Coverage



Exposure Cases and Liability

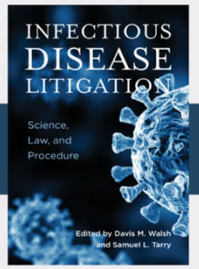
Take-Home Exposure cases show key considerations for exposure cases

- Employment law generally addresses exposures to employees. But, what about when an employee “takes home” the virus to others?
- What is an employer’s duty to spouses?
- How does an employer’s COVID precautions impact liability?



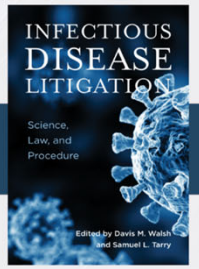
Take-Home Exposure Case Law

- *Estate of William Madden v. Southwest Airlines, Co.*, 2021 WL 2580119 (D. Md. June 23, 2021)
  - **Facts**: Carol Madden, on behalf of herself and deceased husband, sued Southwest alleging negligence for failing to implement reasonable safety and health protocols for COVID-19 during a required Flight Attendant Training that she attended. Ms. Madden alleged she was exposed to COVID-19 during her training. Ms. Madden developed severe symptoms and then Mr. Madden did also. He passed away shortly thereafter.
  - **Holding**:
    - Court concluded that for a variety of reasons—including opening the floodgates—Southwest did not owe a duty to Mr. Madden.
      - The "dispositive weight on the scale in favor of finding "no duty" was Maryland's third-party duty case law and its emphasis on limiting the class of potential plaintiffs.
    - The Court noted that it is extremely difficult to identify the precise origin of one's illness given its contagiousness.
    - This was a highly factual analysis and underscores how developing science can impact cases.



Take-Home Exposure Case Law

- *Ruiz v. Conagra Foods Packages Foods, LLC*, 2021 WL 3056275 (E.D. Wis. July 20, 2021)
  - **Facts**: After his wife's death, Rigoberto Ruiz sued Conagra Foods Packages Foods alleging negligence for failing to implement reasonable COVID-19 protocols. Ruiz alleged that ConAgra had an outbreak of 100 cases and did not implement safety measures when it knew employees were displaying symptoms.
  - **Holding**:
    - The death of Ruiz's wife was a *foreseeable* result of ConAgra's inaction, so the case will move forward with trial.
      - Wisconsin law does not require that the particular harm (or the particular plaintiff) be foreseeable so long as a dangerous condition was created.
    - Here, the court focused on foreseeability, while in *Madden*, the court discussed other factors.



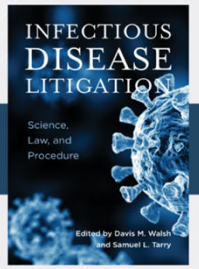
Take-Home Exposure Takeaways

1. A duty to spouses or an employees' close contact *may* exist depending on the respective court's duty analysis.

2. In determining duty, courts focus on the causal link and foreseeability of the act leading to the contraction of COVID-19. Courts have deemed this foreseeable but have dismissed cases where it was "incredibly challenging" to know precisely where or when any individual caught the virus.

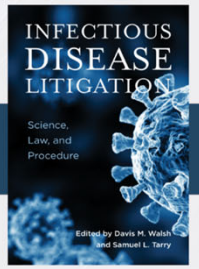
3. States' third-party duty case law will direct courts to their conclusion.

Practical Point: Thus far the decisions have primarily looked at pleading stage (i.e., does the plaintiff meet the pleading requirements). At that stage, COVID-19 mitigation strategies that the defendant took are de-emphasized. As cases progress to summary judgment and trial, the focus on mitigation strategies will increase.



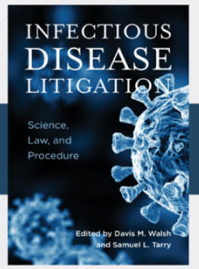
Employment Law Class Actions

- Generally workers' compensation is the exclusive remedy for monetary claims, but is that still true with COVID-19?
- Does a class action change the workers' compensation exclusive remedy analysis?
- How should employers approach class actions for equitable relief?
- What strategies are plaintiffs trying to avoid the exclusive remedy bar from workers' compensation? Are they working?
- How are governmental actions regarding the workplace and COVID-19 impacting employment law?



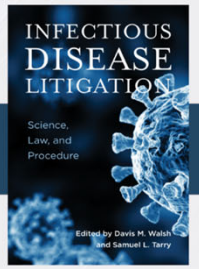
Employment Law – Officers and Directors

- *Garcia v. Swift Beef Co., et al.*, 2021 WL 2826791 (N.D. Tex. July 7, 2021)
  - **Facts**: Plaintiffs, employees of Defendant Swift Beef Co., sued individual officers of the corporation for failing to provide a safe working environment to Plaintiffs.
  - **Holding**:
    - Removal allowed under federal officer jurisdiction
      - "Swift Beef acted under the color of federal authority by maintaining operations during the pandemic to ensure the stability of the national food supply."
    - A corporate officer acting on the corporation's behalf does not owe a corporate employee an individualized duty to provide that employee a safe workplace.
      - If employer is protected from tort suit by workers' compensation, the individual officers likely are too.



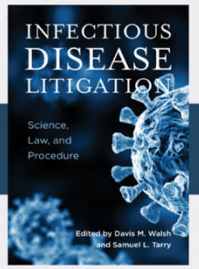
Employment Law – Class Action

- *Hess v. United Parcel Service, Inc.*, 2021 WL 1700162 (N.D. Cal. Apr. 29, 2021)
  - **Facts**: Former employee of UPS, Inc. filed a class action and alleged that UPS failed to take reasonable steps to limit the spread of COVID-19 (i.e. no social distancing, did not sanitize the facility). Among other claims, Plaintiff filed suit for public nuisance. The public nuisance claim arose from violations of California's Labor Code and applicable regulations and guidance. Plaintiff tried to avoid workers' compensation exclusive remedy by claiming that the class did not suffer an injury through the normal operation of Defendant's business—they were forced to work in a workplace with heightened danger due to alleged non-compliance.
  - **Holding**:
    - Because Plaintiff's alleged harm arose out of and in the course of their employment – Plaintiff's only option was workers' compensation.



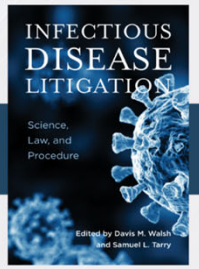
Employment Law – Preemption

- *Amazon.com, Inc. v. James*, 21-cv-00767 (E.D. N.Y. Aug. 10, 2021)
  - **Facts**: Responding to New York Attorney General Letitia James' health and safety improvement demands, Amazon filed suit for a declaratory judgment that James is preempted by Federal health and safety laws and her actions fall within the jurisdiction of federal agencies.
  - **Holding**:
    - Although the Court had subject matter jurisdiction, it abstained from that jurisdiction under *Younger.*
      - *Younger* allows abstention under certain civil enforcement actions when the action is akin to a criminal prosecution in important aspects (i.e. sanctions).
        - Here, there is a related state court case pending in which James seeks sanctions against Amazon.



Employment Law - Preemption

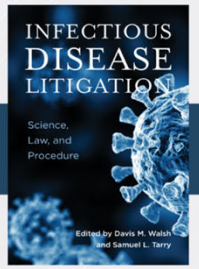
- *New York by James v. Amazon.com, Inc.*, 2021 WL 3140051, at *8-9 (S.D. N.Y. July 26, 2021)
  - **Facts**: Two Amazon employees reported Amazon's poor response and one of them was fired for not practicing social distancing. Here, James sued for inadequate disinfection and contact-tracing protocols and retaliation. NY sought to remand the case to state court.
  - **Holding**:
    - The federal issues that Amazon raises do not satisfy the *Gunn-Grable* Test for federal jurisdiction over a state law claim—therefore case remanded.
      - The federal issue was not necessarily raised because it was not an essential element of the state law claim such that the claim's very success depends on giving effect to a federal requirement.



Employment Law Takeaways

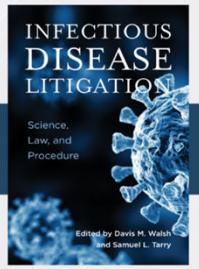
1. The exclusive remedy rule of workers' compensation has not changed due to COVID-19.
2. There is no independent duty owed to employees for corporate officers acting on the corporation's behalf.
3. Class actions do not change the workers' compensation analysis.
4. Federal preemption thus far has not aided employers in state enforcement actions related to COVID-19.

Practical Point: The typical exceptions to workers' compensation likely still apply (independent contractor, etc.). Although mitigation and negligence are not typically at issue in workers' compensation, those considerations may remain important in other related types of employment litigation.



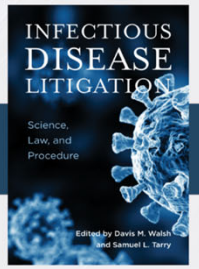
Vaccine Mandates

- Does the FDA's full approval of Pfizer change the litigation potential?
- Does the employment setting matter at all (college v. healthcare)?
- Should employers expect their vaccine mandates to be upheld?



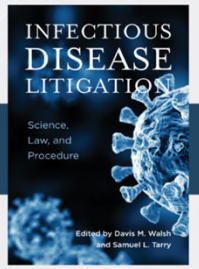
Vaccine Mandates – Case Law

- *Klassen v. Trustees of Indiana University*, No. 21A15 (7th Cir. Aug. 12, 2021)
  - **Facts**: In May 2021, Indiana University instituted a vaccine requirement prior to returning to campus absent an exemption (i.e. religion). Eight students sued alleging constitutional violations of their bodily integrity and autonomy. The students argue that the university's interests are not sufficiently strong because the risks of death from COVID-19 for college students are "close to zero."
  - **Holding**:
    - District Court denied the request – interest in promoting public health for its students, faculty, and staff.
    - On August 12, 2021, the 7th Circuit denied to put the vaccine mandate on hold pending litigation.
    - Judge Easterbrook wrote that it is clearly constitutional under *Jacobson v. Massachusetts* (upholding a vaccine mandate for smallpox.
    - SCOTUS Justice Amy Coney Barrett denied the student's request without comment and without referring the request to the full court for a vote – suggesting that SCOTUS did not see this as a particularly close case.



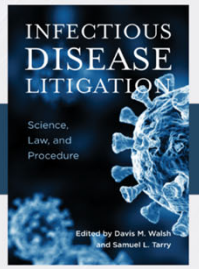
Vaccine Mandates – Case Law

- *Zywicki v. Gregory Washington*, et al., No. 1:21-cv-00894 (E.D. Va. Aug. 17, 2021)
  - **Facts**: Plaintiff sued George Mason University alleging that the COVID-19 mandate violates his right to bodily autonomy and to decline medical treatment under the 9th and 14th Amendment. Plaintiff also alleged that it was preempted by the FDA's emergency use authorization for the COVID-19 vaccines, which states that anyone who receives the vaccine must be informed of the option to accept or refuse it.
  - **Holding**:
    - This case settled when Plaintiff was granted an exemption to GMU's policy.



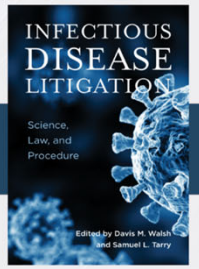
Vaccine Mandates – Case Law

- *Bridges*, et al. *v. Houston Methodist Hospital* et al., No. 4:21-cv-01774 (S.D. Tex. June 12, 2021)
  - **Facts**: Hospital employees refused the hospital's vaccine mandate. They sued arguing that it was an effort to coerce them into getting what they characterized as untested and unreliable.
  - **Holding**:
    - Dismissed in its entirety – Texas law only protects employees from wrongful termination when they're asked to do something illegal, which was not the case here.
    - Temporary Restraining Order Denied because the public policy supports widespread inoculation efforts and a TRO would "disserve the public interest."
    - U.S. Equal Employment Opportunity Commission has noted that employers can legally impose a COVID-19 vaccine mandate so long as they consider potentially exempting those with valid religious or medical reasons.
    - The Court likened any threats of termination to policies requiring employees to show up on time to work.



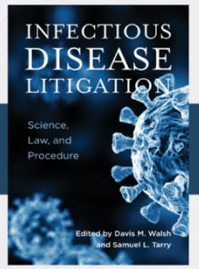
Vaccine Mandate Takeaways

1. Litigation thus far as upheld mandates.
2. A vaccine mandate within a hospital seems to be less questionable.
3. Warning of termination may not be viewed as coercion if other requirements are met (i.e. exemptions to the policy).
4. Some states have enacted legislation that would permit an employee to refuse vaccination.



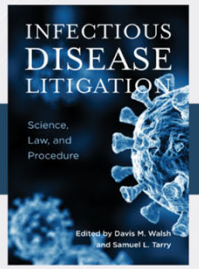
Insurance Coverage

- What types of business interruption and insurance cases are parties filing relating to COVID-19?
- Are the decisions coming out on a case-by-case basis or are similarities appearing?
- Are business interruption insurance claims successful?



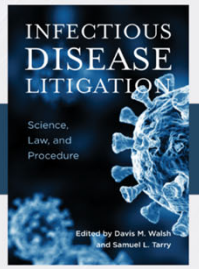
Business Interruption Case Law

- *Bel Air Auto Auction, Inc. v. Great Northern Insurance Company*, Case No. 21-1493 (4th Cir. Aug. 10, 2021) (denying coverage because no "physical change" to the premises had occurred).
  - **Facts**: Plaintiff Bel Air Auto Auction brought a business interruption suit to establish insurance coverage for having to implement COVID-19 protocols. The commercial property insurance policy issued by Defendant required "direct physical loss or damage . . . To property."
  - **Holding**:
    - The "direct physical loss or damage" phrase does *not* include economic losses or loss of use, unaccompanied by physical alterations to the property itself.
    - Even though Plaintiff's *business* was impacted by having to implement COVID-19 protocols—such as closing the onsite restaurant and suspending live auctions—the virus did not physically alter Bel Air's property.



Business Interruption Case Law

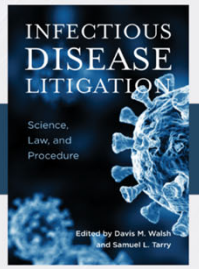
- *Los Angeles Lakers, Inc. v. Federal Insurance Company*, Case No. 2:21-cv-0228 (C.D. Cal. Aug. 12, 2021) (denying coverage and noting that of 388 similar COVID-19 business interruption suits, more than 93% did not survive the motion to dismiss).
  - **Facts**: The Los Angeles Lakers argued that the virus caused direct physical loss or damage to the arena. Specifically, the physical alterations, disinfection stations, and other safety protocols were direct physical loss or damage.
  - **Holding**:
    - Though the Lakers' COVID-19 protocols included alterations to the arena, modifications to the arena did *not* constitute "direct physical loss or damage to the property."



Business Interruption Case Law

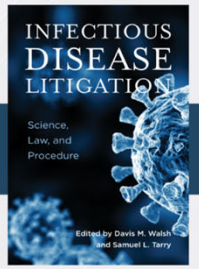
- *Ungarean v. CNA*, 2021 WL 1164836 (Pa. Allegheny Cty. Mar. 25, 2021) (granting coverage and noting that the policy language is *not* limited to actual physical damage)
  - **Facts**: Timothy Ungarean operated a dental practice and had limited patients due to COVID-19 restrictions that allowed only emergency surgeries.
  - **Holding**:
    - Summary Judgment for Plaintiff because "direct physical loss or damage," specifically "direct physical loss," focuses on the act of losing possession and/or deprivation of property instead of one that encompasses various forms of damage to property.

Practical Point: Although this state court ruled in favor of coverage, the Eastern District of Pennsylvania ruled that "direct physical loss or damage" must be physical in nature and does not include loss of business income in numerous cases.



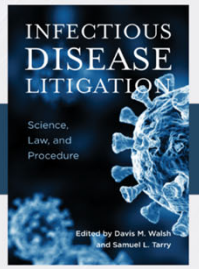
Compare Presence of COVID

- *Blue Coral, LLC v. W. Bend Mut. Ins. Co.*, No. 5:20-CV-00496-M, 2021 WL 1395771, at *4 (E.D. N.C. Apr. 13, 2021)
  - **Facts**: Owners of massage parlors and spas sought coverage for business losses under communicable disease provisions.
  - **Holding**:
    - Plaintiffs had not plead that COVID-19 was actually on site at their facilities.
    - Plaintiffs tried to avoid this by arguing that the outbreak of COVID-19 was everywhere based on the Governor's Executive Order, but the Court held that the policy was intended to cover outbreaks at a facility, not the public at large.



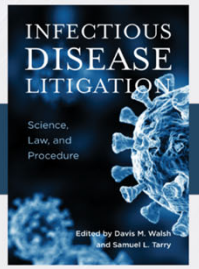
Compare Presence of COVID

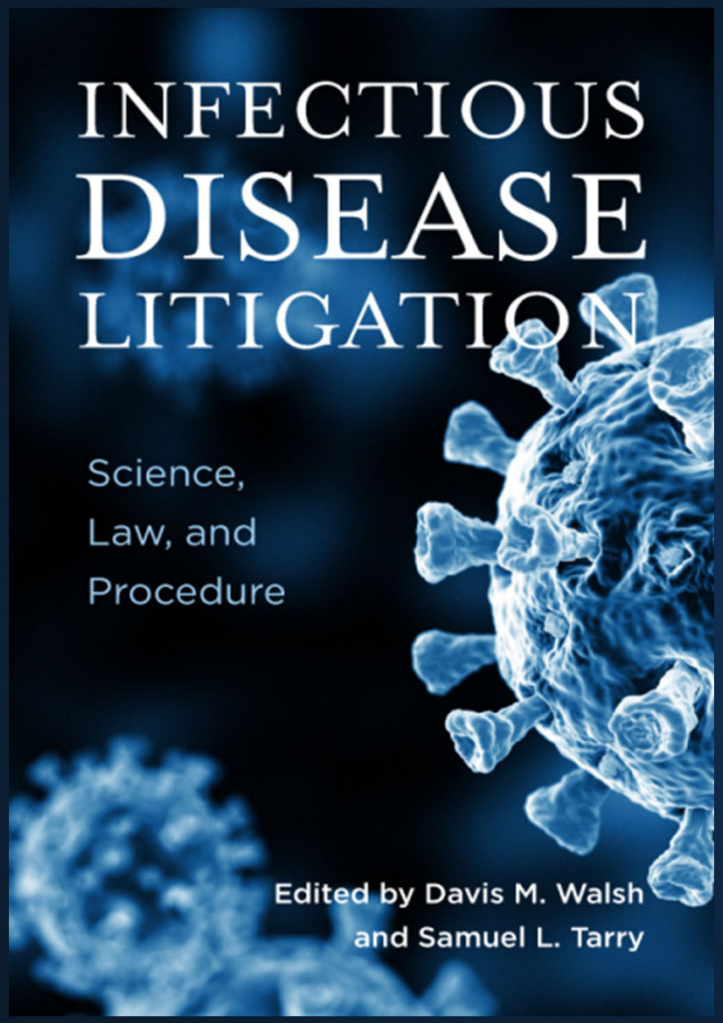
- *Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.,* No. 4:21-CV-00011, 2021 WL 1851030 (E.D. Tex. May 5, 2021)
  - **Facts:** Cinemark sought coverage for losses relating to people not going to the movies. The insurer sought judgement on the pleadings.
  - **Holding:** The Court denied the Motion.
    - Cinemark alleged "Over 1,700 Cinemark employees tested positive for, were exposed to, or displayed symptoms of COVID-19. Most of these employees were on Cinemark property just before testing positive. As a direct result of the damage caused by COVID-19 to its property, Cinemark was forced to close its theaters, incurring business income loss."
    - Unlike Blue Coral, Cinemark alleged actual harm from COVID-19 being on the property.
    - **"Here, Cinemark alleges a different harm and is governed by different contract terms. Unlike Selery, Cinemark alleges that COVID-19 was actually present and actually damaged the property by changing the content of the air."**



Business Interruption Claim Takeaways

1. Although decisions are issued daily on this, in general, courts have *not* granted coverage for COVID-19 business interruption losses.
   - The decisions typically turns on what "direct physical loss or damage" means. The most successful argument *for* coverage is that actual physical damage/alteration to the premises is not required under the phrase "direct physical loss or damage."
   - Even when businesses have implemented physical alterations to the premises to conform with COVID-19 protocols, Courts have refused to grant coverage.
2. Facts about COVID being on the property may change the analysis.





Questions or comments?

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2021 WL 2580119
Only the Westlaw citation is currently available.
United States District Court, D. Maryland.

ESTATE OF William MADDEN, et al., Plaintiffs,
v.
SOUTHWEST AIRLINES, CO., Defendant.

Civil Action No.: 1:21-cv-00672-SAG
|
Signed 06/23/2021

Attorneys and Law Firms

Dan R. Mastromarco, The Mastromarco Firm PLLP, Annapolis, MD, for Plaintiffs.

Kathryn A. Grace, Wilson Elser Moskowitz Edelman & Dicker LLP, McLean, VA, William J. Katt, Pro Hac Vice, Wilson Elser Moskowitz Edelman and Dicker LLP, Milwaukee, WI, for Defendant.

MEMORANDUM OPINION

Stephanie A. Gallagher, United States District Judge

***1** Carol Madden ("Ms. Madden"), on behalf of herself and the Estate of her deceased husband William Madden ("Mr. Madden") (collectively, "Plaintiffs"), sued Southwest Airlines Co. ("Southwest") asserting four negligence-based causes of action related to Mr. Madden's contraction of and subsequent death from COVID-19. ECF 1, ¶¶ 200-36. Southwest moved to dismiss. ECF 6. Plaintiffs opposed the motion, ECF 11, and Southwest replied, ECF 12. No hearing is necessary. *See* Loc. R. 105.6 (D. Md. 2018). For the reasons set forth below, Southwest's Motion to Dismiss will be granted and Plaintiffs' claims will be dismissed without prejudice.

I. FACTUAL BACKGROUND

The following facts are drawn from Plaintiffs' Complaint and are taken as true for the purposes of this Motion to Dismiss. Ms. Madden is a flight attendant employed by Southwest. ECF 1 ¶8. The Federal Aviation Administration ("FAA") requires active flight attendants to attend Recurrent Training and to maintain a Certificate of Demonstrated Proficiency ("Certificate"). *Id.* ¶¶ 24-26. Southwest was therefore required to direct Ms. Madden to attend Recurrent Training to maintain her Certificate if she wished to continue her employment. *Id.* ¶ 28. Ms. Madden attended Recurrent Training on July 13, 2020, at the Baltimore Washington International Airport. *Id.* ¶ 31. The training involved groups of ten participant flight attendants at a time, including Ms. Madden, demonstrating various proficiencies such as the ability to use various safety devices onboard an aircraft. *Id.* ¶ 34.

During this training, Southwest allegedly failed to implement reasonable safety and health protocols to prevent the participant flight attendants from contracting or spreading COVID-19. Plaintiffs identify various alleged failings including: (a) failing to screen participant flight attendants in the training session for COVD-19, (b) failing to screen instructors in the training session for COVID-19, (c) failing to exclude those that had been exposed to COVID-19, (d) failing to enforce mask policies that would have lessened transmission, (d) failing to implement safe distancing requirements, (e) failing to sanitize equipment in shared and common use, and (f) failing to implement contact tracing that would have prevented transmission after-the-fact or alerted participant flight attendants at an early time to COVID-19 exposure. *Id.* ¶ 204.

As a result of Southwest's failure to exercise a standard of care to prevent transmission of the virus, Ms. Madden was exposed to COVID-19 during the training. *Id.* ¶¶ 98-99. Two weeks following the training, a Southwest employee called Ms. Madden to inform her of the exposure at the training, but at that point both Ms. Madden and Mr. Madden had developed symptoms. *Id.* ¶ 138, 186. Indeed, approximately three days after the training concluded, Ms. Madden began experiencing increasingly more severe COVID-19 symptoms. *Id.* ¶ 101. Ms. Madden was in close contact with her husband, with whom she lived, ultimately transmitting COVID-19 to him. *Id.* ¶ 186. Mr. Madden began experiencing symptoms approximately ten days after the training, before testing positive for COVID-19 on August 1, 2020. *Id.* ¶¶ 107, 145-48. Mr. Madden's condition rapidly deteriorated, and he ultimately passed away on August 12, 2020 due to complications from the COVID-19 virus. *Id.* at ¶¶ 142-75.

II. LEGAL STANDARD

***2** Southwest has filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). A defendant is permitted to test the legal sufficiency of a complaint by way of a motion to dismiss. *See, e.g.*, *In re Birmingham*, 846 F.3d 88, 92 (4th Cir. 2017); *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159,

165-66 (4th Cir. 2016). A Rule 12(b)(6) motion constitutes an assertion by a defendant that, even if the facts alleged by a plaintiff are true, the complaint fails as a matter of law "to state a claim upon which relief can be granted."

Whether a complaint states a claim for relief is assessed by reference to the pleading requirements of Rule 8(a)(2), which provides that a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of the rule is to provide the defendants with "fair notice" of the claims and the "grounds" for entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

To survive a motion under Rule 12(b)(6), a complaint must contain facts sufficient to "state a claim to relief that is plausible on its face." *Id.* at 570; *see Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions.' "); *see also Willner v. Dimon*, 849 F.3d 93, 112 (4th Cir. 2017). But, a plaintiff need not include "detailed factual allegations" in order to satisfy Rule 8(a)(2). *Twombly*, 550 U.S. at 555. Moreover, federal pleading rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam).

Nevertheless, the rule demands more than bald accusations or mere speculation. *Twombly*, 550 U.S. at 555; *see Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013). If a complaint provides no more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action," it is insufficient. *Twombly*, 550 U.S. at 555. Rather, to satisfy the minimal requirements of Rule 8(a)(2), the complaint must set forth "enough factual matter (taken as true) to suggest" a cognizable cause of action, "even if ... [the] actual proof of those facts is improbable and ... recovery is very remote and unlikely." *Id.* at 556 (internal quotation marks omitted).

In reviewing a Rule 12(b)(6) motion, a court "must accept as true all of the factual allegations contained in the complaint" and must "draw all reasonable inferences [from those facts] in favor of the plaintiff." *E.I. du Pont de Nemours & Co.*, 637 F.3d 435 at 440 (citations omitted); *see Semenova v. Maryland Transit Admin.*, 845 F.3d 564, 567 (4th Cir. 2017); *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015). However, a court is not required to accept legal conclusions drawn from the facts. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). "A court decides whether [the pleading] standard is met by separating the legal conclusions from the factual allegations, assuming the truth of only the factual allegations, and then determining whether those allegations allow the court to reasonably infer" that the plaintiff is entitled to the legal remedy sought. *A Society Without a Name v. Virginia*, 655 F.3d 342, 346 (4th. Cir. 2011), *cert. denied*, 566 U.S. 937 (2012).

III. ANALYSIS

To state a claim for negligence in Maryland, a complaint must plausibly allege the following four elements: (1) that the defendant owed a duty to the person who was injured; (2) that the defendant breached that duty; (3) that an actual injury or loss existed; and (4) that the injury or loss proximately resulted from the defendant's breach of the duty. *See, e.g.*, *Rosenblatt v. Exxon Co., U.S.A.*, 335 Md. 58, 76 (Md. 1994). The same elements apply to gross negligence, though the showing requires more egregious conduct on the part of the defendant. *See Taylor v. Harford County Dep't of Social Servs.*, 384 Md. 213, 227-28 (Md. 2004). The parties disagree, here, as to the first, threshold factor—whether Southwest owed a duty to Mr. Madden, given that he was not a Southwest employee and otherwise had no relationship with the company beyond his wife's employment. "[T]he existence of a legal duty is a question of law to be decided by the court." *Remsburg v. Montgomery*, 376 Md. 568, 581 (2003). For the following reasons, the Court concludes that no duty existed, such that Plaintiffs have failed to state any negligence-based claims.

a. The Appropriate Framework for Assessing Duty

***3** The parties dispute the proper framework for assessing the existence of a duty in Maryland. Southwest argues that this case is covered by a bright line rule, namely Maryland's alleged refusal to recognize any duty on the part of an employer to an employee's spouse in the context of "take-home" exposure to diseases and dangerous substances absent one of three exceptions not present here: a special relationship, control, or a relevant statute. *See* ECF 6-17 at 7-8. Analyzing asbestos, HIV, and other similar cases in which an employer's alleged negligence resulted in an employee bringing a harm home from work which injured the employee's spouse, Southwest asserts that these cases' uniform finding of "no duty" are directly applicable and end the duty inquiry without further analysis. *Id.* at 7-12.

Plaintiffs, on the other hand, suggest that Southwest's case law is distinguishable by virtue of those cases' focus on

nonfeasance (as opposed to the malfeasance allegedly at issue here). Instead, Plaintiffs urge the assessment of seven factors some Maryland courts have used to identify the existence of a duty. ECF 11 at 16-17.

In fact, Maryland's duty analysis appears to lie somewhere in between the two parties' positions. In *Sumo v. Garda World*, 2017 WL 2962819, at *3 (Md. Ct. Spec. App. July 12, 2017), the Maryland Court of Special Appeals faced a similar choice between the two frameworks. In the context of a third-party duty claim involving a bystander injured during a violent robbery, the *Sumo* defendant claimed that the lack of a special relationship ended the third-party duty inquiry, while plaintiff sought application of the seven factors. *Id.* The *Sumo* Court ultimately found that "the exact relationship between the three exceptions to the 'no duty' rule [for third-party harms] ... and this 7-factor test, is unclear" but went on to conclude that the two approaches were "consonant" with one another, ultimately analyzing duty under *both* frameworks. *Id.* (citing *Kiriakos v. Phillips*, 448 Md. 440, 486 (2016)).

The Court, here, is similarly unable to divine a clear rule demarcating the application of one duty analysis versus the other. Southwest's reliance on cases like *Warr v. JMGM Grp., LLC*, 433 Md. 170, 189-90 (2013), is persuasive in that the cases contain broad and seemingly unambiguous language embracing a "no duty" rule absent a relationship between the defendant and the injured third party. Indeed, *Warr* itself is particularly compelling in that it appears to reject an argument nearly identical to Plaintiffs' theory here, namely that a defendant's active creation or aggravation of a risk creates a different, broader set of duties than where a defendant fails to act to prevent or mitigate an unrelated risk. *Id.* at 185-190; *see also Barclay v. Briscoe*, 427 Md. 270, 300-01 (2012) (rejecting the existence of a duty where employer's conduct allegedly created foreseeable risk of harm to a third party). However, it is also true that Maryland courts have consistently used the seven-factor analysis proposed by Plaintiffs to assess whether a duty exists, instead of simply relying on Southwest's proffered bright line rule. *See, e.g.*, *Eisel v. Bd. of Educ. of Montgomery County*, 324 Md. 376, 386 (Md. 1991); *May v. Air & Liquid Sys. Corp.*, 446 Md. 1, 11 (Md. 2015). In fact, even *Warr* invoked the seven factors, despite its language strongly suggesting the existence of a blanket "no duty" rule absent control or a special relationship. 433 Md. at 182-83. As such, the Court will follow the *Sumo* Court's lead and will assess whether Southwest owed a duty under both the seven-factor and the "no third-party duty" approaches.

b. No Third-Party Duty Approach

As noted above, Maryland's general rule is that "a private person is under no special duty to protect another from the criminal [or tortious] acts by a third person." *Valentine v. On Target, Inc.*, 353 Md. 544, 550 (1999) (citation omitted). After all, "[o]ne cannot be expected to owe a duty to the world at large to protect it against the actions of third parties ...." *Id.* at 553. There are three exceptions, however, to this "no duty" rule:

***4** (1) If the defendant has control over the conduct of the third party;

(2) If there is a special relationship between the defendant and the third party or between the defendant and the plaintiff; or

(3) If there is a statute or ordinance that is designed to protect a specific class of people. *Warr*, 433 Md. at 189 (control); *Barclay*, 427 Md. at 293-94 (special relationship); *Kiriakos*, 448 Md. at 457 (statute or ordinance).

None of these three enumerated exceptions apply in this case. Plaintiffs do not argue that Southwest had control over Ms. Madden after she left the flight attendant training, nor do they argue that it had a special relationship with Mr. or Ms. Madden, [1] or that a statute governed its conduct in this area protecting third parties like Mr. Madden. Instead, Plaintiffs rely on a theory centering on "malfeasance"—the notion that Southwest owed Mr. Madden a duty because its affirmative conduct in conducting its flight attendant training without adequate safety protocols created a previously non-existent risk of harm to him by negligently exposing his spouse to COVID-19. Such a notion is, obviously, not covered by the exceptions to the standard "no duty" rule outlined above, meaning that under the standard approach, Southwest owed Mr. Madden no duty.

c. Seven-Factor Test

The Court next assesses this case under Plaintiffs' preferred seven-factor test for duty, which consists of the following:

(1) the foreseeability of harm to the plaintiff,

(2) the degree of certainty that the plaintiff suffered the injury,

(3) the closeness of the connection between the defendant's conduct and the injury,

(4) the moral blame attached to the defendant's conduct,

(5) the policy of preventing future harm,

(6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise reasonable care with resulting liability for breach,

(7) and the availability, cost and prevalence of insurance for the risk involved.

Kiriakos, 448 Md. at 486 (quoting *Ashburn v. Anne Arundel Cnty.*, 306 Md. 617, 627 (1986)). The Court will address each factor in turn.

i. Foreseeability of the Harm

Drawing on the case law cited in *Sumo*, "[f]oreseeability as a factor in the determination of the existence of a duty involves a prospective consideration of the facts existing at the time of the negligent conduct." *Henley v. Prince George's Cnty.*, 305 Md. 320, 336 (1986). In the context of duty, the "foreseeability of harm test ... is based upon the recognition that a duty must be limited to avoid liability for unreasonably remote consequences." *Valentine*, 353 Md. at 551. "Although foreseeability is perhaps most important among these factors, it alone does not justify the imposition of a duty." *Kiriakos*, 448 Md. at 486 (citation omitted). Here, the question is whether it was foreseeable to Southwest, and not unreasonably remote, that as a result of its allegedly unsafe flight attendant training in the midst of a global pandemic, one training attendee would contract COVID-19 and fatally infect her spouse with it.

***5** Based on the facts as presently alleged, such an outcome is both foreseeable and not unreasonably remote. The COVID-19 virus is extraordinarily contagious and spreads via close contact, particularly in the absence of sufficient cleaning and social-distancing techniques designed to limit the possibility of spread. Southwest was unavoidably aware of the nature of the virus, as demonstrated by its website's apparent assurances that it was implementing "stringent cleaning and physical-distancing practices" and "[knew] what needs to be done and how it needs to be done to keep people safe," among other commitments to COVID-19 safety. ECF 1 ¶¶ 81-86. Failing to actually implement such transmission-mitigation strategies at an in-person flight attendant training would foreseeably increase the risk of flight attendant(s) contracting the virus. It was, similarly, foreseeable that an infected flight attendant like Ms. Madden would subsequently be in close proximity to her spouse, because married couples frequently live together and share close contact, particularly when quarantining at home was recommended by health authorities. And it is, tragically, foreseeable that a family member who contracts COVID-19 may die, given the severity of the virus. While such developments may occur over an extended period of time because of incubation periods post-transmission and varying degrees of immune responses to the virus, the causal chain leading to Mr. Madden's death was neither remote nor unforeseeable.

ii. Degree of Certainty of Injury

This second factor is, functionally, a causal inquiry—how certain is it that Southwest's actions would cause Plaintiffs' injuries? *See Sumo*, 2017 WL 2962819, at *5. Plaintiffs, of course, need not definitively *prove* causation at this juncture, since assessment of whether causation exists on these specific facts is generally a jury question in negligence cases. However, the defendant's conduct must be reasonably certain to lead to the plaintiffs' injuries in the abstract (i.e. is conducting a training without adequate safety protocols reasonably certain to be the cause of an attendee's COVID-19 infection and subsequent transmission to a spouse?). This is a much closer call than the foreseeability factor. Holding an unsafe training would certainly increase the risk of COVID-19 exposure. However, as previously noted, COVID-19 is incredibly infectious and transmits easily in a variety of settings. *See Coronavirus (COVID-19) Frequently Asked Questions*, Centers for Disease Control and Prevention ("CDC") (June 22, 2021), https://www.cdc.gov/coronavirus/2019-ncov/faq.html. By Plaintiffs' own admission, this makes identifying the precise origin of one's illness extremely difficult. *See* ECF 11 at 34-35 (acknowledging the general challenges of proving causality regarding COVID-19 infections given the prevalence of the virus).

Although a close COVID-positive contact is certainly a possible cause of a given infection, that is little guarantee that the particular infection originated from that contact as opposed to some other source, given how hard it is to completely isolate oneself from other, ubiquitous infection vectors. This rationale holds even greater strength when

applied to a third party like Mr. Madden who did not attend the training and thus is insulated by another layer of causal uncertainty. In the midst of a global pandemic, it is incredibly challenging to know precisely where or when any individual caught the virus—indeed, that is precisely what has made the pandemic such a difficult beast to contain. Thus, there is a substantial degree of *un* certainty that the Southwest's training would be reasonably certain to cause any third-party non-attendee to contract COVID-19, such that this factor weighs against imposition of a duty.

iii. Closeness Between Southwest's Conduct and Injury

"The third factor ... is, by another name, proximate cause." *Sumo*, 2017 WL 2962819, at *5. The analysis requires a balancing of the connection between the breach of duty and the harm, as well as the nature of the risk—as the magnitude of the risk increases, the closeness of the connection is relaxed such that a duty to a larger class of persons may be imposed where the risk is of death or personal injury. *Kiriakos*, 448 Md. at 488. Here, the nature of the risk is high given the severity of the COVID-19 virus (particularly during the pre-vaccine time period when the events of this lawsuit took place). Thus, the "closeness" between conduct and injury—which, as outlined in the previous section, is lacking insofar as reasonable certainty of causation is concerned—may be relaxed to encompass a more remote connection. Mr. Madden did not attend Southwest's allegedly unsafe training and had no direct contact with Southwest. However, as noted in Section III(b)(i), the chain of events leading from the training to Ms. Madden's infection at that training to her close contact with Mr. Madden to his subsequent infection and death is foreseeable. Ultimately, the likelihood that a flight attendant would contract COVID-19 at an unsafe, in-person training during a pandemic, and then transmit it to her co-habitant spouse, is "not so remote that we simply foreclose liability," *Sumo*, 2017 WL 2962819, at *5 (citations omitted). Therefore, this factor also weighs in Plaintiffs' favor.

iv. Moral Blameworthiness of Southwest's Conduct

***6** "Under [the moral blame] factor, our standard is not evidence of intent to cause harm ... [r]ather, we consider the reaction of persons in general to the circumstances." *Kiriakos*, 448 Md. at 489 (citations omitted). Taking Plaintiffs' allegations as true, Southwest's conduct is morally blameworthy. The reasonable reaction to a global pandemic would be to take all necessary precautions when holding in-person gatherings, particularly in the context of a flight attendant training requiring close proximity of the trainees to one another and the shared handling of equipment required by the various training exercises. In fact, Southwest outlined at length the COVID-19 safety protocols it claimed to be implementing as an assurance to its customers that it was committed to their safety while flying. To allegedly disregard these protocols and hold an in-person training without adequate safety precautions, in the midst of a global pandemic taking hundreds of thousands of lives across the United States, is morally blameworthy. This factor therefore weighs in favor of imposing a duty.

v. The Policy of Preventing Future Harm

The fifth factor considers whether imposition of a duty would help prevent future harm by providing "a strong incentive to prevent the occurrence of the harm." *Kiriakos*, 448 Md. at 490. Finding a duty here would incentivize employers to take minimum precautions against the spread of COVID-19 to employees and their families via the implementation of minimum safety procedures that most companies, including Southwest, already ostensibly embrace. ECF 1 at ¶¶ 80-97. It would appear uncontroversial to suggest that stopping the spread of COVID-19 is an important policy goal, and the existence of a duty would unmistakably further that goal by preventing first order infections of employees and therefore protecting against later spread to third parties. This factor therefore also weighs in favor of a duty.

vi. Burden on Southwest and Consequences of Imposing a Duty

At least insofar as Southwest specifically is concerned, there appears little "additional" burden that imposition of a duty here would create. Employers like Southwest would be required to take reasonable steps to ensure the safety of foreseeable third parties like Mr. Madden from contracting COVID-19 as a result of Southwest's activities. To do so, employers would simply be required to follow best practices like social distancing, contact tracing, and regular sanitation protocols to protect their own employees, so that those employees do not become conduits to their cohabitants. Southwest already embraced such practices with regard to its customers, *id.* at ¶¶ 80-97—in fact, one might reasonably expect that ensuring flight attendants' safety would be

a natural corollary of Southwest's promise to protect its customers.

The broader societal consequences of the imposition of that duty, however, are harder to justify. Such a duty would significantly expand the field of potential liability. *See Sumo*, 2017 WL 2962819, at *6 (considering an "overly expanded field of potential liability" as a reason to weigh the sixth factor against imposition of a duty). As Southwest points out, Maryland courts have historically been exceedingly concerned about "opening the floodgates" to expansive new classes of third-party plaintiffs. Maryland courts have furthermore expressed this concern specifically in the context of possible duties owed by an employer to an employee's spouse. *See, e.g.*, *Doe v. Pharmacia & Upjohn Co.*, 388 Md. 407 (2005) (holding that an employer does not owe a duty to third-party spouse of employee when employee contracted HIV at work and transmitted it to his wife); *Adams v. Owens-Illinois, Inc.*, 119 Md. App. 395 (1998) (finding employer had no duty to employee's wife with regard to asbestosis allegedly contracted from close contact with employee's clothing). Plaintiffs suggest that there are special circumstances here that give rise to a duty here. For example, they cite the fact that Ms. Madden lived alone with her husband, was following CDC guidelines by staying at home with him, and was directly exposed to COVID-19 at Southwest's training, such that the causal link to Mr. Madden's ultimate infection is uniquely clear. ECF 11 at 33-34. However, as Plaintiffs acknowledge, COVID-19 is "ubiquitous," *id.*, and as previously noted, an individual's exact point of exposure is therefore often exceedingly difficult to trace, even in circumstances where precautions are taken or where one point of exposure is known. Thus, despite Plaintiffs' contentions, there are no special causation-based limitations that would allow successful litigation here but foreclose it elsewhere—instead, finding a duty here would leave employers litigating countless COVID-19 third-party exposures simply by virtue of contact with their employees during the pandemic. All that would functionally be required for duty to attach would be potential exposure at work and subsequent contact with a foreseeable third party, which represents a relatively common set of circumstances.

***7** Similarly, the class of foreseeable third-party plaintiffs suggested by Plaintiffs offers few clear limiting principles. Despite Plaintiffs' contention that Ms. Madden "practiced safe precautions," *id.*, foreseeability is not adequately narrowed by CDC or other similar guidelines recommending safety measures such as isolating at home and maintaining close contact only with co-habitants. First, it is eminently foreseeable that some individuals will not follow such safety guidelines and will instead have close contact with members of the public outside their homes. Plaintiffs proffer no reason why compliance with the CDC's recommended safety protocols is any more foreseeable than non-compliance, in terms of limiting the category of prospective third-party plaintiffs. Moreover, even if such guidelines are followed, the range of people one might come in close contact with "at home" can vary significantly, despite how facially narrow the notion of "home" appears. It is not always as simple as Ms. Madden coming home to her husband alone. Take, for example, an apartment building—it may be necessary for a resident to walk through a common lobby, share an elevator, and pass other residents in narrow hallways. What distinguishes those encounters, unavoidable despite compliance with CDC guidelines, from Mr. Madden? Would Southwest be liable to everyone in Ms. Madden's hypothetical apartment building? What about essential outings like trips to the grocery store or, similarly, a bathroom break during Mr. and Ms. Madden's drive from BWI to Pennsylvania following the training? Any suggested limitation on the class of foreseeable third-party plaintiffs achieved by drawing the line at adherence to regulatory guidance and following safety protocols is of little practical use, given the many circumstances in which contact both falls within the guidelines and implicates an exceedingly broad cross-section of the public at large. The "floodgates" consequence of imposing a duty here therefore weighs against such an imposition.

vii. Insurance for the Risk

The parties spend little time on this factor, but the Court agrees with Southwest that "COVID-19 claims are new for insurance companies and whether insurance coverage applies to COVID-19-related claims will be dependent on the specific facts, policy language, and applicable law in each case." ECF 12 at 10. Given these individualized considerations, the Court is unable to draw any broad conclusions one way or the other regarding how the imposition of a duty would impact insurance. *See Sumo*, 2017 WL 2962819, at *6 (declining to address the insurance factor where there was a lack of evidence in the record about insurance).

viii. Balancing the Seven Factors

Taking stock of the foregoing factors, four of the seven weigh in favor of finding a duty, while two weigh against it (and the last, insurance, was not considered at all). This case, then, does not provide the sort of clear-cut outcome that *Sumo* reached, leaving the Court to balance the factors against one another. The majority of the factors, including the factor ostensibly considered by Maryland courts to be the most important, foreseeability, *see Kiriakos*, 448 Md. at 486, weighed in favor of duty. Practically, however, foreseeability appears to frequently take a back seat to concerns regarding the consequences of finding a duty, at least where that duty would be owed to third parties. Such concerns over "opening the floodgates" to overly broad new categories of third-party plaintiffs are particularly evident in the Maryland cases covering spousal relationships. For example, in *Doe*, 388 Md. at 417, the HIV transmission case, the court found it foreseeable that an unwitting, infected employee would have sexual relations with his wife, just as it is foreseeable here that a COVID-infected employee would be in close contact with her husband. But that, alone, was not enough to overcome the court's concerns over where to draw the line between foreseeable sexual partners and others. *Id.* at 421. In fact, this case implicates a line that is far blurrier, because it involves mere close contact rather than sex, and thus generally implicates a broader class of potential third-party plaintiffs. Indeed, the "close contact" facet of this case shares close similarities with *Adams*, the asbestos transmission case, in which the Maryland Court of Special Appeals held that an employer had no duty to its employees' spouses, in part because of concerns over dramatically expanding the pool of potential plaintiffs without a clear way to distinguish third parties.[2] *See Adams*, 119 Md. App. At 411 ("If liability for exposure to asbestos could be premised on Mary Wild's handling of her husband's clothing, presumably Bethlehem would owe a duty to others who came in close contact with Edwin Wild, including other family members, automobile passengers, and co-workers.").

***8** Cumulatively, Maryland's third-party duty case law and its emphasis on limiting the class of prospective future plaintiffs heavily informs the Court's balancing. In fact, it is the dispositive weight on the scale in favor of finding "no duty" here, despite the fact that the narrow majority of factors, including foreseeability, favor imposition of a duty. Maryland courts have made their priorities with regard to third-party duties clear, and the prospect of an unstemmed and ill-defined tide of third-party plaintiffs bringing suit predominates the duty analysis.[3] Thus, Plaintiffs' proposed seven-factor balancing test and Southwest's proffered bright line "no third-party duty" rule are, as in *Sumo* and *Kiriakos*, "consonant" with one another—Southwest owed no duty to Mr. Madden.

d. Dismissal without Prejudice

Southwest urges the Court to dismiss Plaintiffs' claims with prejudice, claiming that it is impossible for any set of pleadings to plausibly allege a duty owed by Southwest to Mr. Madden. ECF 6-1 at 12. "The determination whether to dismiss with or without prejudice under Rule 12(b)(6) is within the discretion of the district court." *Weigel v. Maryland*, 950 F. Supp. 2d 811, 825 (D. Md. 2013) (quoting *180s, Inc. v. Gordini U.S.A., Inc.*, 602 F. Supp. 2d 635, 638-39 (D. Md. 2009)). A plaintiff "should generally be given a chance to amend his complaint ... before the action is dismissed with prejudice," though there are exceptions where there exists no set of facts the plaintiff could present to support the claim. *Id.* at 825-26. The Court declines to deviate from the "without prejudice" norm here. While it does appear unlikely that Plaintiffs will be able to plead additional facts to satisfy Maryland's third-party duty jurisprudence, it is not impossible that some new set of allegations could more closely link Southwest and Mr. Madden or otherwise alter the duty analysis. As such, Plaintiffs' claims will be dismissed without prejudice.

IV. CONCLUSION

For the reasons set forth above, Southwest's Motion to Dismiss, ECF 6, is GRANTED and Plaintiffs' claims are dismissed without prejudice. This case will be closed. A separate Order follows.

All Citations

Slip Copy, 2021 WL 2580119

Footnotes

1 The employment relationship here between Southwest and Ms. Madden is not a "special relationship" that would give rise to a duty to Mr. Madden, because Ms. Madden was operating outside the scope of her employment when she returned home post-training and had close contact with Mr. Madden. *See Barclay*, 427 Md. at 295. Furthermore, while the Restatement (Second) of Torts § 317 makes clear that a special relationship may exist even when an employee is operating outside the scope of employment so long as certain requirements are met, several of § 317's factors are not satisfied here.

2 It is significant, too, that the Maryland Court of Appeals more or less directly rejected Plaintiffs' proposed interpretation of the third-party duty doctrine in *Warr*, 433 Md. 170. Just as Plaintiffs do here, the dissent in *Warr* explored the relationship between the Second and Third Restatements of Torts, examined Prosser and other torts treatises, charted the evolution of Maryland case law, and ultimately suggested a dispositive distinction between an active creation of a risk of harm and passive failure to aid or rescue another when it comes to the existence of duty to a third party. *Id.* at 200-53. The *Warr* majority rejected this theory outright, flatly calling it an "attempt to sidestep our jurisprudence." *Id.* at 85. Regardless of the merits of Plaintiffs' understanding of the active-passive duty distinction, it would be a striking and inappropriate departure from Maryland jurisprudence to embrace that theory despite its explicit and direct rejection in *Warr* by Maryland's highest court.

3 Plaintiffs argue that the "real harm" is not the prospect of a flood of COVID-19 litigation, but rather "the perverse effect [finding no duty] would have in emboldening the Defendant and others to skirt health safeguards..., allowing Southwest to treat their flight attendants with far less care than they express for the fare-paying [customer], eventually harming the public." ECF 11 at 38. This argument fails for two reasons. First, the crux of this dispute is not about how Southwest treats its flight attendants—the duty a company owes to an employee like Ms. Madden is distinct from the duty (if any) it owes to a third-party member of the public like Mr. Madden. To suggest that finding no duty here as to Mr. Madden somehow permits Southwest to negligently expose its employees to COVID-19 is to inappropriately conflate entirely separate questions of duty. Second, this Court, sitting in diversity, is tasked with the narrow responsibility of applying Maryland negligence jurisprudence, not simply deciding for itself which policy goals are most important. Maryland courts have expressed clear and consistent concern over opening the door to overly broad classes of plaintiffs in the context of duties to third parties. Thus, regardless of whether this Court agrees with Plaintiffs that the "floodgates" rationale should take a backseat to other concerns, it is not empowered to ignore Maryland courts' judgments on the matter.

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United States District Court, E.D. Wisconsin.

Rigoberto RUIZ, Plaintiff,
v.
CONAGRA FOODS PACKAGED FOODS, LLC, Defendant.

Case No. 21-CV-387-SCD
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Signed 07/20/2021

Attorneys and Law Firms

Douglas J. Phebus, Victor M. Arellano, Arellano & Phebus SC, Middleton, WI, for Plaintiff.

Emily L. Stedman, Patrick M. Harvey, Husch Blackwell LLP, Milwaukee, WI, for Defendant.

DECISION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

STEPHEN C. DRIES, United States Magistrate Judge

***1** On February 26, 2021, Rigoberto Ruiz filed a complaint in Walworth County Circuit Court against his former employer, ConAgra Foods Packaged Foods, LLC, alleging state-law claims of wrongful death and survival. *See* ECF No. 1-2. ConAgra removed the action to federal court on March 26, 2021, ECF No. 1, and the parties consented to magistrate-judge jurisdiction, see ECF Nos. 4, 9. After ConAgra filed a motion to dismiss the complaint, ECF No. 5, Ruiz responded by filing an amended complaint, ECF No. 8. The amended complaint alleges that Ruiz contracted COVID-19 while working at ConAgra under unsafe conditions and that Ruiz transmitted the virus to his wife, who succumbed to the disease. ConAgra has filed a motion to dismiss the amended complaint, arguing that the Public Readiness and Emergency Preparedness Act (PREP Act), see 42 U.S.C. § 247d-6d, immunizes ConAgra from Ruiz's claims. ECF No. 10. For the reasons given below, the motion will be denied. [1]

BACKGROUND

The following allegations are taken from Ruiz's amended complaint. *See* ECF No. 8. ConAgra operates a meat-packing plant in Darien, Wisconsin, where Ruiz was employed from 1995 until he tested positive for COVID-19 on April 22, 2020. *Id.* ¶ 5. Ruiz alleges that he contracted COVID-19 because of ConAgra's inadequate safety measures and, in some cases, the failure to institute any measures at all. As a result, Ruiz alleges that over 100 of ConAgra's employees tested positive for COVID-19 in April 2020, an outbreak that prompted ConAgra to temporarily close its plant on April 22, 2020. *See* ECF No. 8 ¶¶ 5-9.

Ruiz alleges that, prior to its temporary closure, ConAgra was aware of at least one of its employees testing positive for COVID-19; it further knew that many of its employees exhibited symptoms caused by COVID-19. Despite this knowledge, ConAgra failed to institute adequate safety measures. In fact, Ruiz alleges that ConAgra requested that its employees who were exhibiting COVID-19 symptoms continue working. As for workers housed in the company dorm, Ruiz alleges that ConAgra failed to properly space out its workers' sleeping arrangements. Moreover, the amended complaint alleges that ConAgra failed to institute a track-and-trace system or train its workers properly to mitigate COVID-19 risks. The company also allegedly failed to properly distance its workers or enforce a mask policy. Ruiz alleges that many of these failures were in violation of Governor Evers' emergency orders. Ruiz alleges that he contracted the virus as a result of ConAgra's inadequate safety measures and then unwittingly exposed his wife, who later died from the disease. *See* ECF No. 8 ¶¶ 9-12. Accordingly, Ruiz now brings both a wrongful death and a survival action against his former employer, ConAgra.

MOTION TO DISMISS

***2** A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) challenges the sufficiency of the plaintiff's pleaded allegations. To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.... 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." *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 622 (7th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 (2009)). Indeed, "the plausibility requirement demands ... that a plaintiff provide sufficient

detail 'to present a story that holds together.' " *Alexander v. United States*, 721 F.3d 418, 422 (7th Cir. 2013) (quoting *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010)).

Nonetheless, a court may "reject sheer speculation, bald assertions, and unsupported conclusory statements." *Taha v. Int'l Bhd. of Teamsters, Local 781*, 947 F.3d 464, 469 (7th Cir. 2020) (citations omitted). Likewise, a pleading is insufficient where it merely offers "labels and conclusions or a formulaic recitation of the elements of a cause of action, ... [or] tenders naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007)) (internal quotation marks omitted).

DISCUSSION

I. PREP Act Immunity

ConAgra first argues that the PREP Act immunizes it from the claims alleged in the amended complaint. In 2005, Congress enacted the PREP Act in response to the SARS epidemic of 2003. The purpose of the Act's immunity provision is to insulate covered individuals and entities from liability for their administration or use of countermeasures, such as vaccines or N95 surgical masks, that are designed to combat the pandemic. "[T]he Act precludes ... liability claims alleging negligence by a manufacturer in creating a vaccine, or negligence by a health care provider in prescribing the wrong dose, absent willful misconduct." *Estate of Maglioli v. Andover Subacute Rehab. Ctr. I*, 478 F. Supp. 3d 518, 531 (D.N.J. 2020).[2] The Act's immunity provision states:

> a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration [by the Secretary of a public health emergency] has been issued with respect to such countermeasure.

42 U.S.C. §§ 247d-6d(a)(1), 247d-6d(b) 22. To trigger the immunity provision, there must be "a causal relationship with the administration to or use by an individual of a covered countermeasure." 42 U.S.C. § 247d-6d(a)(2)(B).

"Covered countermeasures" are determined by the Secretary of the Department of Health and Human Services (the Secretary). In March 2020, the Secretary declared a "public health emergency" under the PREP Act and recommended certain covered countermeasures to combat COVID-19. *See* Declaration, 85 Fed. Reg. 15,198. Originally, the "covered countermeasures" were limited to "any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19 ..." *Id.* at 15,202. This definition "has been amended and expanded" several times. *Bolton v. Gallatin Ctr. for Rehab. & Healing, LLC*, No. 3:20-cv-00683, 2021 WL 1561306, at *3 (M.D. Tenn. Apr. 21, 2021). By December 2020, the Secretary had declared that covered countermeasures included products manufactured, used, or designed to prevent COVID-19, which could include facemasks. *See* Fourth Amendment to the Secretary's Declaration, 85 Fed. Reg. 79,190, 79,196 (Dec. 9, 2020).

***3** To prevail on its immunity argument, ConAgra must establish both that it is a covered person and that it implemented covered countermeasures. And, although the parties gloss over the point, any immunity would apply only to injury "caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure." § 247d-6d(a)(1). Here, most of Ruiz's claims have nothing to do with covered countermeasures; instead, Ruiz asserts much more general claims about unsafe working conditions—requiring employees to work while sick, inadequate spacing, and the like. Accordingly, even if I agreed with Conagra that the PREP Act applies, most of the amended complaint's allegations would remain untouched by the Act's immunity provision. *See Maglioli*, 478 F. Supp. 3d at 533 (on appeal) ("[M]any of the measures with which Defendants allegedly failed to comply were acts such as 'social distancing, quarantining, lockdowns, and others.' ... These are not covered 'countermeasures' under the PREP Act at all.").

A. Covered Person

Immunity is conferred upon only a "covered person." The statute defines a covered person, when used with respect to the administration or use of a covered countermeasure,

as "a person or entity that is ... (i) a manufacturer of such countermeasure; (ii) a distributor of such countermeasure; (iii) a program planner of such countermeasure; (iv) a qualified person who prescribed, administered, or dispensed such countermeasure," or (v) an agent or employee of one of the above. 42 U.S.C. § 247d-6d(i)(2)(B). ConAgra maintains that it is a program planner, which the statute defines as:

> a State or local government ... or *other person who supervised or administered a program with respect to the administration, dispensing, distribution, provision, or use of ... a qualified pandemic or epidemic product*, including a person who has established requirements, provided policy guidance, or supplied technical or scientific advice or assistance or provides a facility to administer or use a covered countermeasure in accordance with a declaration under subsection (b).

42 U.S.C.A. § 247d-6d(i)(6) (italics added).

ConAgra argues that because it took certain safety precautions, including distributing facemasks to its employees, it "administered a program with respect to the ... dispensing, distribution, provision, or use of ... a qualified pandemic or epidemic product." ConAgra, a food company, does not naturally fit within the PREP Act's purpose, which is to shield the medical community from liability. *See, e.g.*, *Maglioli*, 478 F. Supp. 3d at 529 ("[The PREP Act's] evident purpose is to embolden caregivers, permitting them to administer certain encouraged forms of care ... with the assurance that they will not face liability for having done so.") Nonetheless, in an advisory opinion issued in October 2020, the Secretary's Office of General Counsel noted that "any individual or organization can potentially be a program planner and receive PREP Act coverage." U.S. Dep't of Health & Human Servs., Office of Gen. Counsel, Advisory Opinion 20-04 on the Public Readiness and Emergency Preparedness Act and the Secretary's Declaration Under the Act, at 3 (Oct. 23, 2020). The opinion stated that even a grocery store that implements a mask policy may be entitled to PREP Act immunity. *Id.* at 6.

Here, because the Act's language is quite broad, it is conceivable that, in issuing masks and other personal protective equipment to its employees, ConAgra "administered a program" with respect to dispensing qualified pandemic products. Accordingly, I will assume for purposes of ConAgra's motion that the company could qualify as a program planner. [3]

B. Causal Link between Covered Countermeasure and Loss

***4** As noted above, the PREP Act provides immunity for "all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure." § 247d-6d(a)(1). Thus, for the PREP Act to apply, there must be a causal link between the program planner's use of covered countermeasures and the injury the plaintiff sustained. *See Brown v. Big Blue Healthcare*, 480 F. Supp. 3d 1196, 1206 (D. Kan. 2020) ("The PREP Act still requires a causal connection between the injury and the use or administration of covered countermeasures"). In arguing that PREP Act immunity applies to Ruiz's claims, ConAgra contends that, "because Plaintiff's claims relate to ConAgra's administration of efforts intended to prevent or mitigate the spread of COVID-19, the PREP Act bars Plaintiff's claim." ECF No. 11 at 7.

The injury here "relates to" the administration of covered countermeasures only in the negative sense, however. That is, the amended complaint alleges that the injury resulted from Conagra's lax safety measures, including *not* requiring employees to wear masks. Although the Act's "relating to" language is arguably quite broad, courts have not stretched it so far as to immunize a defendant for *not* providing or requiring covered countermeasures. *See Eaton v. Big Blue Healthcare*, 480 F. Supp. 3d 1184, 1195 (D. Kan. 2020) ("There is simply no room to read [the PREP Act] as equally applicable to the non-administration or non-use of covered countermeasures."). As another court aptly put it, the PREP Act was "designed to protect those who employ countermeasures, not those who decline to employ them." *Maglioli*, 478 F. Supp. 3d at 531; *see also Sherod v. Comprehensive Healthcare Mgmt. Servs., LLC*, No. 20CV1198, 2020 WL 6140474, at *7 (W.D. Pa. Oct. 16, 2020) ("The PREP Act creates immunity for all claims of loss causally connected to the *use* of covered countermeasures.") (emphasis added). Indeed, "other district courts have consistently found that failures to take countermeasures ... fall outside the ambit of the

PREP Act." *Khalek*, 2021 WL 2433963, at *6 (compiling cases). Here, because the amended complaint alleges that Ruiz contracted COVID-19 because of ConAgra's failure to implement adequate countermeasures, the PREP Act's immunity provision does not apply.

It's true that the Secretary has indicated "that an 'inaction claim' is not necessarily beyond the scope of the PREP Act." *Reed, et al. v. Sunbridge Hallmark Health Servs., LLC*, No. CV 21-3702-JFW(AGRx), 2021 WL 2633156, at *4 (C.D. Cal. June 25, 2021). However, immunity for such claims is the exception, not the rule. The Secretary's December 3, 2020 Amendment makes clear that inaction claims fall within the scope of the PREP Act only where: "(1) there are limited covered countermeasures; and (2) there was a failure to administer a covered countermeasure to one individual because it was administered to another individual." *Id.* (citing Fourth Amendment, 85 Fed. Reg. at 79,197). In other words, "[p]rioritization or purposeful allocation of a Covered Countermeasure, particularly if done in accordance with a public authority's directive, can fall within the PREP Act and th[e] Declaration's liability protections." *Reed*, 2021 WL 2633156, at *4 (quoting Fourth Amendment, 85 Fed. Reg. at 79,197). For example, the Act could immunize a pharmacy that chooses to administer vaccines to people in Group 1 from a lawsuit brought by someone in Group 2 alleging that the pharmacy wrongfully denied him a vaccine shot. "This specific example makes clear that the non-administration of a vaccine in limited supply necessarily arises from the decision to administer the vaccine to others first." *Lopez v. Life Care Ctrs. of Am., Inc.*, No. CV 20-0958 JCH/LF, 2021 WL 1121034, at *11 (D.N.M. Mar. 24, 2021).

***5** That's not what's alleged here. The amended complaint does not allege that Ruiz contracted COVID-19 due to ConAgra's purposeful allocation of countermeasures to other individuals. Nor does it allege that Ruiz's loss was caused by ConAgra's prioritization of other individuals with respect to the administration, use, or distribution of countermeasures. To the contrary, Ruiz alleges that ConAgra "failed to exercise ordinary care in its Darien facility which resulted in over 100 of its workers at the plant testing positive in April 2020." ECF No. 8 ¶ 6. In sum, because Ruiz alleges "that it was inaction, rather than action," that caused his wife's death, the PREP Act's immunity provision does not shield ConAgra from suit or liability. *Reed*, 2021 WL 2633156, at *4 (citations omitted).

II. Ruiz's Claim for Negligence

ConAgra also briefly argues that Ruiz fails to sufficiently plead a claim for negligence, contending that any harm was not foreseeable given the chaotic situation at the outset of the pandemic. As a federal court with diversity jurisdiction, I am "to apply state substantive law, as [I] believe the highest court of the state would apply it." *Neumann v. Borg-Warner Morse Tec LLC*, 168 F. Supp. 3d 1116, 1124 (N.D. Ill. 2016) (quoting *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 634 (7th Cir. 2007)). In Wisconsin, a plaintiff must prove four elements to demonstrate negligence: " '(1) [a] duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury.' " *Martindale v. Ripp*, 629 N.W.2d 698, 707 (Wis. 2001) (quoting *Rockweit v. Senecal*, 541 N.W.2d 742, 747 (Wis. 1995)).

ConAgra argues that the uncertain nature of the pandemic rendered any harm to Ruiz's wife unforeseeable. *See* ECF No. 13 at 10 (citing *Hoida, Inc. v. M&I Midstate Bank*, 717 N.W.2d 17 (Wis. 2006)). The question of foreseeability in Wisconsin is not narrowly construed, however: "The risk need not be to the particular plaintiff. The test is whether unreasonable risk to the world at large is created by the conduct." *Morgan v. Pa. Gen. Ins. Co.*, 275 N.W.2d 660, 665 (Wis. 1979) (citations omitted); *see also State v. Chrysler Outboard Corp.*, 580 N.W.2d 203, 222 (Wis. 1998) (noting that "[i]n Wisconsin everyone has a duty of due care to the whole world"); *Jones v. United States*, 194 F. Supp. 3d 849, 852 (E.D. Wis. 2016) (Wisconsin law "does not require that the particular harm (or the particular plaintiff) be foreseeable so long as a dangerous condition was created.").

Here, Ruiz alleges ConAgra was negligent because it failed to: establish a contact-tracing system, train its workers adequately regarding COVID-19 safety, properly distance its employees, and enforce a mask policy, see ECF No. 8 ¶ 11. If proven, these allegations could demonstrate that any risk to Ruiz (or anyone else) would have been foreseeable. This is particularly true given that the amended complaint alleges more than 100 employees tested positive for COVID-19 in April 2020. *Id.* at ¶ 6. The unfortunate nature of a pandemic is that infections spread exponentially, meaning that even a single infection can give rise to countless more cases. It is therefore conceivable that Ruiz could demonstrate the foreseeability of injury to employees and non-employees alike arising out of an unsafe work environment. (Proving causation is another matter.) [4]

***6** This conclusion is echoed by a recent district court case from Maryland. There, the court concluded it would have been foreseeable to Southwest Airlines that unsafe flight attendant training could have resulted in the infection of an employee and transmission of the virus to her spouse:

> Here, the question is whether it was foreseeable to Southwest, and not unreasonably remote, that as a result of its allegedly unsafe flight attendant training in the midst of a global pandemic, one training attendee would contract COVID-19 and fatally infect her spouse with it.
>
> Based on the facts as presently alleged, such an outcome is both foreseeable and not unreasonably remote. The COVID-19 virus is extraordinarily contagious and spreads via close contact, particularly in the absence of sufficient cleaning and social-distancing techniques designed to limit the possibility of spread.

Estate of Madden v. Sw. Airlines, Co., No. 1:21-CV-00672-SAG, 2021 WL 2580119, at *4–5 (D. Md. June 23, 2021). The court also observed that it was

> foreseeable that an infected flight attendant ... would subsequently be in close proximity to her spouse, because married couples frequently live together and share close contact, particularly when quarantining at home was recommended by health authorities. And it is, tragically, foreseeable that a family member who contracts COVID-19 may die.

Id. at *5. [5] The same holds true here. At the pleading stage of this lawsuit, I cannot say that a jury would be unable to find that Conagra's conduct foreseeably created an unreasonable risk of harm to others. [6]

CONCLUSION

For all the foregoing reasons, ConAgra's motion to dismiss the amended complaint, ECF No. 10, is **DENIED**. Its motion to dismiss the original complaint, ECF No. 5, is **DENIED as moot**.

SO ORDERED this 20th day of July, 2021.

All Citations

Slip Copy, 2021 WL 3056275

Footnotes

1 ConAgra's motion to dismiss the original complaint, ECF No. 5, is denied as moot. *See Coal. to Save the Menominee River, Inc. v. U.S. EPA*, No. 18-C-1798, 2019 WL 1746336, at *1 (E.D. Wis. Apr. 18, 2019) (noting that the filing of an amended complaint generally renders moot a motion to dismiss the original complaint).

2 The link quoted in that opinion is no longer accessible. The same information, however, can be found in the Federal Register. *See* Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasure Against COVID-19, 85 Fed. Reg. 15,198, 15,200 (Mar. 17, 2020).

3 Notably, other courts have raised questions about the persuasiveness of the Secretary's declarations and the Office of General Counsel's advisory opinions. *See, e.g.*, *Bolton*, 2021 WL 1561306, at *8 (concluding that a different PREP Act advisory opinion "lacks the power to persuade") (citation and internal quotation marks omitted); *Khalek v. S. Denver Rehab., LLC*, No. 1:20-CV-02240-RBJ, 2021 WL 2433963, at *5 (D. Colo. June 11, 2021) (same); *Smith v. Colonial Care Ctr., Inc.*, No. 2:21-CV-00494-RGK-PD, 2021 WL 1087284, at *6 (C.D. Cal. Mar. 19, 2021) (same).

4 Conagra also takes issue with the amended complaint's reference to Wisconsin's Safe Place statute, Wis. Stat. § 101.11. The statute creates duties to employees and to "frequenters," which are defined as "every person, other than an employee, who may go in or be in a place of employment or public building under

circumstances which render such person other than a trespasser." Wis. Stat. § 101.01(6). Even if Conagra is right, Conagra still has a general duty of care wholly apart from the Safe Place statute.

5 That court ultimately dismissed the action based on Maryland case law limiting duties to third parties. *Id.* at *8.

6 I do not address the arguments raised for the first time in Conagra's reply brief. *See Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997) ("[A]rguments raised for the first time in the reply brief are waived.") (internal quotation marks and citation omitted).

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United States District Court,
N.D. Texas, Amarillo Division.

Simon GARCIA, et al., Plaintiffs,
v.
SWIFT BEEF CO., et al., Defendants.

2:20-CV-263-Z
|
Signed 07/07/2021

Attorneys and Law Firms

Kurt B. Arnold, Caj D. Boatright, Claire Elizabeth Traver, Joseph F. McGowin, Roland Thomas Christensen, Arnold & Itkin LLP, Houston, TX, Joe L. Lovell, Lovell Lovell Isern & Farabough, Amarillo, TX, Timothy D. Newsom, Law Offices of Frank L. Branson, PC, Dallas, TX, for Plaintiffs.

Alexander M. Brauer, Adam Gregory Bell, Benjamin L. Stewart, Clayton E Bailey, Bailey Brauer PLLC, Dallas, TX, Matthew W. Sherwood, Brown & Fortunato PC, Amarillo, TX, for Defendant Swift Beef Company.

MEMORANDUM OPINION AND ORDER

MATTHEW J. KACSMARYK, UNITED STATES DISTRICT JUDGE

***1** Before the Court is Plaintiffs' Motion to Remand (ECF No. 11) and Defendants' Motion to Dismiss Individual Defendants (ECF No. 8). For the reasons stated below, Plaintiffs' Motion is **DENIED,** and Defendants' Motion is **GRANTED.**

BACKGROUND

Plaintiffs were employees of Defendant Swift Beef's meat-packing plant located in Cactus, TX during the first half of 2020. ECF No. 1-16 ("First Amended Petition") at 3–4. As the COVID-19 pandemic swept across the United States, many states, including Texas, began to implement precautionary measures to slow the spread of the virus. *Id.* at 5. Effective April 2, 2020, Texas Governor Greg Abbott issued a stay-at-home order, but Plaintiffs allege they were required to continue to work at Swift Beef's plant. *Id.*

While working at the plant, Plaintiffs allege that they were exposed to and contracted COVID-19. *Id.* at 6. Asserting claims for negligence and gross negligence, Plaintiffs brought suit in Texas state court naming Manny Guerrero, Ashley Henning, Jacob Montoya, and Donny Estrada as defendants. *Id.* at 5. Plaintiffs alleged these individuals "failed to fulfill their job duties to provide a safe working environment to Plaintiffs." *Id.* Plaintiffs later amended their state petition to include Swift Beef Company as a defendant. *Id.* at 2.

On November 11, 2020, Defendants timely removed the case to this Court under 28 U.S.C. §§ 1331, 1332, and 1442(a)(1). ECF No. 1 at 4. On November 18, 2020, the individual defendants moved to dismiss the claims against them. ECF No. 8. On December 8, 2020, Plaintiffs filed their Motion to remand this case back to the 69th District Court, Moore County. ECF No. 11.

The Court proceeds by deciding the motion to remand first and finds that there is jurisdiction under the federal officer removal statute. The Court then addresses the individual Defendants' Motion to Dismiss (ECF No. 8).

JURISDICTION UNDER THE FEDERAL OFFICER REMOVAL STATUTE

A. Legal Standards

"Federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute, lack the power to adjudicate claims." *Lavery v. Barr*, 943 F.3d 272, 275 (5th Cir. 2019) (internal quotations omitted). "Any ambiguities are construed against removal because the removal statute should be strictly construed in favor of remand." *Manguno v. Prudential Prop. and Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002) (citing *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 339 (5th Cir. 2000)).

The federal officer removal statute, however, must be liberally interpreted because of its broad language and unique purpose. *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 147 (2007). The statute provides, in relevant part:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity *for or relating to* any act under color of such office...
>
> ***2** 28 U.S.C. § 1442(a)(1) (emphasis added).

While courts are to interpret this statute liberally, the removing defendant still bears the burden of establishing a basis for federal jurisdiction. *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387, 397 (5th Cir. 1998). In light of the 2011 Congressional Amendment to section 1442(a), the Fifth Circuit articulated a four-part test to determine whether federal officer removal is justified: (1) the party has asserted a colorable federal defense; (2) the party is a "person" within the meaning of the statute; (3) the party has acted pursuant to a federal officer's directions; (4) and the charged conduct is connected or associated with an act pursuant to a federal officer's directions. *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020).

B. Analysis

The Court finds Defendants have carried their burden to establish jurisdiction under the federal officer removal statute.

1. Defendants have asserted a colorable federal defense.

The well-pleaded complaint rule provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *Caterpillar v. Williams*, 482 U.S. 386, 392 (1987). Consequently, the well-pleaded complaint rule usually bars defendants from removing to federal court when the only jurisdictional hook is a federal defense. *See Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

But the federal officer removal statute is an exception. It permits an officer to remove a case even if no federal question is raised so long as the officer asserts a federal defense. *Latiolais*, 951 F.3d at 290. The asserted defense need not even be clearly sustainable. *Id.* at 297. Instead, "an asserted federal defense is colorable unless it is immaterial and made solely for the purpose of obtaining jurisdiction or wholly insubstantial and frivolous." *Id.* "Certainly, if a defense is plausible, it is colorable." *Id.*

In their notice of removal, Defendants raised two federal defenses. ECF No. 1 at 15-16. First, they argue that the Federal Meat Inspection Act (FMIA) expressly preempts plaintiffs' state-law claims. *Id.* Second, the Defendants claim that there is conflict preemption between Plaintiffs' claims and President Trump's April 28 *Food Supply Chain Resources* Executive Order paired with the Defense Production Act. *Id.*

The Federal Meat Inspection Act "regulates a broad range of activities at slaughterhouses to ensure the safety of meat and the humane handling of animals." *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455 (2012). The FMIA contains an express preemption provision which reads:

> "Requirements *within the scope* of this [Act] with respect to *premises, facilities and operations* of any establishment at which inspection is provided under ... this [Act], which are *in addition to, or different* than those made under this [Act] may not be imposed by any State."
>
> 21 U.S.C. § 678 (emphasis added).

In Plaintiffs' view, the FMIA only expressly preempts state laws covering the inspection, handling, and slaughter of livestock for human consumption, so their common-law negligence claims are not preempted. ECF No. 11 at 16.

***3** Defendants emphasize the first portion of the provision, which prohibits state-law requirements "with respect to premises, facilities and operations." ECF No. 20 at 17. Defendants also stress the Supreme Court has ruled that the Federal Meat Inspection Act's preemption clause "sweeps widely." *Id.* (quoting *Nat'l Meat Ass'n*, 565 U.S. at 459).

In sum, Plaintiffs frame this case as a workplace safety issue that is not preempted by FMIA. Defendants frame this case as being about "sanitary conditions" and "disease control" which could be pre-empted by the FMIA. *See, e.g.*, 9 C.F.R. §§ 416.5(b)-(c), 416.2(b).

Preliminarily, the Court takes note that the Supreme Court has held "that state laws of general application (workplace safety regulations, building codes, etc.) will *usually* apply to slaughterhouses." *Nat'l Meat Ass'n*, 565 U.S. at 467 n. 10 (emphasis added). The word "usually" implies that *sometimes* the FMIA *does* preempt state workplace safety regulations.

This case is not a typical workplace injury case such as a slip and fall that lands outside of the scope of the FMIA's preemption provision. *See, e.g.* ECF No. 25 at 9 ("Swift does

not cite a single case where a state personal injury claim filed in state court was successfully removed based on the FMIA preemption clause"). Instead, this case arose in the unique context of a global pandemic. Workplace conditions and procedures related to disease prevention implicate food safety, which could bring Plaintiffs' claims under the ambit of the FMIA.

At this stage, the Court finds, without expressing any opinion on the merits, that preemption under the Federal Meat Inspection Act is plausible. And, as the Fifth Circuit has held, if the defense is plausible, it is colorable. *Latiolais*, 951 F.3d at 297. Accordingly, Defendants have satisfied the first prong of the *Latiolais* requirements. [1]

2. Defendants are "persons" within the meaning required in Section 1442.

The parties do not dispute that Defendants satisfy the second prong of the *Latiolais* test. Section 1442(a)(1) applies to "private persons" and corporations. *Bell v. Thornburg*, 743 F.3d 84, 89 (5th Cir. 2014) (quoting *Watson*, 551 U.S. at 143); *Latiolais*, 951 F.3d at 291.

3. Defendants acted under a federal officer's directions.

Defendants must establish they were *acting under* the directions of a federal officer to satisfy the third prong under *Latiolais*. 28 U.S.C. § 1442(a)(1); *Latiolais*, 951 F.3d at 296.

Under section 1442(a)(1), a "private person's acting under must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 152. "Although the words 'acting under' are undoubtedly broad, the Supreme Court has clarified that they must refer to a relationship that involves acting in a certain capacity, considered in relation to one holding a superior position or office." *Zeringue v. Crane Company*, 846 F.3d 785, 792 (5th Cir. 2017).

***4** Defendants point to two possible sources of direction from a federal officer: Swift Beef's designation as "critical infrastructure" and President Trump's April 28, 2020 Executive Order. ECF No. 20 at 3–7. [2]

Defendants argue they were acting under a federal officer's directions because Swift Beef was designated as "critical infrastructure" by the federal government. The Patriot Act empowers the federal government to designate particular industries as "critical infrastructure," meaning that "their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof." *Id.* at 3.

On March 13, 2020, Swift Beef, along with other components of the Food and Agriculture Sector, was designated as critical infrastructure in response to the COVID-19 pandemic. *Id.* at 4; Exec. Office of Pres., *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337, 15,337 (Mar. 13, 2020).

After this designation, Swift Beef interacted with multiple government agencies and was "in close contact with various federal agencies, including officials at the CDC and the National Institute for Occupational Safety and Health ('NIOSH')." ECF No. 20 at 4. Furthermore, the Department of Homeland Security relied upon its "National Critical Functions Set" to designate certain critical "supply" functions. *Id.* "Those designations flowed down to individual Swift Beef employees who received letters authorizing them to continue working and traveling in support of 'critical infrastructure' notwithstanding any state or local quarantine restrictions." *Id.* at 5.

Plaintiffs contend that the critical-infrastructure designation is insufficient to conclude that defendants were "acting under" the directions of a federal officer. Plaintiffs specifically cite to *Watson*, where the Supreme Court held that private entities that are merely subject to government regulation cannot remove under the federal officer removal statute. 551 U.S. at 152 ("In our view, the help or assistance necessary to bring a private person within the scope of the statute does *not* include simply *complying* with the law."). Plaintiffs aver that Defendants' evidence only proves "it communicated with federal regulators and that Swift was subject to federal regulation." ECF No. 25 at 8.

But unlike *Watson*, Defendants here exhibited "an effort to help assist, or carry out, the duties and tasks of the federal superior." *Watson*, 551 U.S. at 152. Defendants did so by working directly with the Department of Agriculture to guarantee that there was an adequate food supply. ECF No. 20 at 5. ("On March 16, 2020, the Department of Agriculture issued a statement that it was committed to the 'timely

delivery of services to maintain the movement of America's food supply from farm to fork,' " and that it was "prepared to *utilize their authority and all administrative means and flexibilities* to address staffing considerations.") (emphasis added).

***5** Accordingly, the Court finds Defendants were "acting under" the directions of federal officials when the federal government announced a national emergency on March 13, 2021 and designated Swift Beef as "critical infrastructure."

4. The charged conduct is connected or associated with an act pursuant to a federal officer's directions.

Finally, Defendants must show a connection or association between the federal officer's directions and Plaintiffs' claims. *Latiolais*, 951 F.3d at 296.

Plaintiffs assert that there must be a "causal nexus" between the Plaintiffs' claims and the directions that the Defendants received from a federal officer. *See* ECF No. 11 at 12. Plaintiffs rely on *Winters v. Diamond Shamrock Chemical Company*, 149 F.3d 387 (5th Cir. 1998). The *Winters* standard no longer governs.

The Fifth Circuit in *Latiolais* elucidated the correct standard after the 2011 Congressional Amendment to 28 U.S.C. § 1442(a), changing the word "for" to the phrase "for *or relating to*." *Latiolais*, 951 F.3d at 292 (emphasis added). The *Latiolais* court held that the 2011 revisions "broadened federal officer removal to actions, not just causally connected, but alternatively *connected* or *associated*, with acts under color of federal office." *Id.* at 292 (emphasis added). Under this more relaxed standard, the Court finds Defendants have satisfied their burden.

Plaintiffs allege that Defendants failed to create an adequately safe working environment during the COVID-19 pandemic by not providing personal protective equipment or implementing social-distancing measures. First Amended Petition at 5–6. According to the Plaintiffs, the lack of personal protective equipment and social distancing measures led to their contraction of COVID-19. *Id.* at 6.

As explained above, Swift Beef acted under the color of federal authority by maintaining operations during the pandemic to ensure the stability of the national food supply. Logically, the choice of what safety precautions should be taken — such as whether personal protective equipment should be provided or what social-distancing measures should be adopted — is connected to the broader decision to keep the plant operating during the pandemic. Thus, the final prong of the *Latiolais* standard is met. [3]

C. Conclusion

For the reasons set forth above, Defendants have met the standards of the federal officer removal statute. On that ground alone, Plaintiffs' Motion to Remand is properly **DENIED.**

MOTION TO DISMISS THE INDIVIDUAL DEFENDANTS

A. Plaintiffs' Factual Allegations

According to Plaintiffs' First Amended Petition, Defendants Guerrero, Henning, Montoya, and Estrada respectively held the roles of General Manager, Safety Manager, Plant Engineer, and Technical Services Manager. *Id.* at 2-3. Because of these roles, Plaintiffs allege Defendants were "directly responsible for implementing a safe work environment at [Swift Beef's] Cactus meatpacking plant." *Id.* at 5. Plaintiffs further allege that Defendants were "also directly responsible for implementing and enforcing adequate safety measures to prevent the spread of COVID-19." *Id.*

***6** Plaintiffs aver that, upon information and belief, Defendants "failed to fulfill their duty to provide a safe working environment to Plaintiffs." *Id.* at 6. As a result, Plaintiffs allege they contracted COVID-19 at Swift Beef's meatpacking plant. *Id.*

The individual Defendants now move to dismiss the claims against them. ECF No. 8 at 2. Defendants argue that "the duty to provide a safe workplace is nondelegable and belongs solely to the employer rather than individual employees." *Id.* The Court agrees.

B. Legal Standards

"To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.' " *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation

to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of the cause of action will not do." *Twombly*, 550 U.S. at 555 (internal marks omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *In re Katrina*, 495 F.3d at 205 (quoting *Twombly*, 550 U.S. at 555) (internal marks omitted). "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Id.* (quoting *Martin K. Eby Constr. Co., Inc. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)) (internal marks omitted).

The Court must "begin by identifying the pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). After assuming the veracity of any well-pleaded allegations, the Court should then "determine whether they plausibly give rise to an entitlement of relief." *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.* at 678 (citation omitted). This standard of "plausibility" is not necessarily a "probability requirement," but it requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.* (internal marks omitted).

After a case has been removed under the federal officer removal statute, "[a] federal court's role ... is similar to that of a federal court sitting in diversity." *Winters v. Diamond Shamrock Chem. Co.*, 941 F. Supp. 617, 620 (E.D. Tex. 1996). "Accordingly, the federal court applies the choice of law rules of the forum state to determine the applicable law." *Id.* In this case, Texas substantive law controls.

C. The individual defendants did not owe an independent duty to other Swift Beef employees.

Under Texas law, *employers* have a nondelegable duty to provide a safe working environment for their employees. *Leitch v. Hornsby*, 935 S.W.2d 114, 117 (Tex. 1996); *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006). When the employer is a corporation, the law charges the corporation itself, not the individual corporate officer, with the duty to provide the employee a safe workplace. *Leitch*, 935 S.W.2d at 117. A corporate officer or agent's individual liability arises only when the officer or agent owes an *independent duty of reasonable care* to the injured party apart from the employer's duty. *Id.*

***7** In *Leitch*, an employee sued his employer, Pro Com Marketing Services, and two individuals who were officers, directors, and stockholders of Pro Com Marketing Services after suffering an injury while on the job. *Id.* at 116. The employee sued the corporate officers partially "because of their positions" within the company. *Id.* at 117. The employee alleged that "all three defendants did not provide a safe work place and equipment [and] did not provide proper equipment." *Id.*

The Texas Supreme Court held that "a corporate officer acting on the corporation's behalf does not owe a corporate employee an individualized duty to provide that employee with a safe work place." *Id.* at 118. The Texas Supreme Court reached that conclusion by reasoning that actions by the officers, "whether active or passive, were actions of a corporate officer on behalf" of the corporation and are "deemed" the corporation's acts. *Id.* at 118.

This case falls squarely into *Leitch*. Nowhere in Plaintiffs' First Amended Complaint is there even *an attempt* to differentiate the duties owed by the individual defendants and those owed by Swift Beef as a corporation. *See In re Butt*, 495 S.W.3d 455, 464 (Tex. App.—Corpus Christi 2016) (Plaintiffs cannot impose liability on "employees where the employer and the employees committed identical negligent acts or omissions.").

Plaintiffs' Response to the Motion only confirms that there is no difference in duties owed. Consider Plaintiffs' arguments:

- *Swift Beef* failed to take adequate precautions to protect the workers at its meatpacking facilities. ECF No. 15 at 2 (emphasis added).
- Here, the individual named Defendants *held positions* that necessarily placed a duty on them to implement policies and practices to prevent the spread of COVID-19. *Id.* at 7 (emphasis added).
- These Defendants failed to fulfill their *job duties*. *Id.* (emphasis added).
- Defendants' conduct, effectuated through both *Swift Beef* and the other named Defendants, was negligent. *Id.* at 3 (emphasis added).

Each of these arguments demonstrate that the alleged acts of negligence are identical. Furthermore, each argument reinforces Defendants' contention that they had no *separate* duties apart from their duties as employees. [4]

D. Any attempt to amend is futile.

Plaintiffs have requested the opportunity to amend their complaint. ECF No. 15 at 7. According to Federal Rule of Civil Procedure 15(a)(2), "the court should freely give leave [to amend before trial] when justice so requires." Fed. R. Civ. P. 15(a)(2). But it is within the district court's discretion to deny a motion to amend if it is futile. *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 872-73 (5th Cir. 2000). An amendment is considered futile if "the amended complaint would fail to state a claim upon which relief could be granted." *Stripling*, 234 F.3d at 872-73.

The premise of Plaintiffs' suit is rooted in Swift Beef's duty to provide a safe working environment. First Amended Petition at 5–6. "Even if Plaintiffs amended their complaint a second time, corporate employees, individually, still would not have a duty to provide a safe working environment. Thus, any amendment to the complaint would be futile." *Fields v. Brown*, No. 6:20-CV-475-JCB (N.D. Tex. Feb. 11, 2021), ECF No. 21.

***8** Accordingly, the individual Defendants' Motion to Dismiss (ECF No. 8) is **GRANTED.**

SO ORDERED.

All Citations

Slip Copy, 2021 WL 2826791

Footnotes

1 Because Defendants have a colorable defense under the FMIA, the Court does not address Defendants' second argument regarding conflict preemption with President Trump's Executive Order. Here, the allegations contained in the First Amended Petition do not contain facts regarding the dates when Plaintiffs contracted COVID-19 except for Plaintiff Garcia who was alleged to be hospitalized on April 18, which was before the Executive Order was issued.

2 Because the Court holds that Defendants were acting under the direction of a federal officer because of Defendants' "critical infrastructure" designation, the Court does not address Defendants' second argument regarding President Trump's Executive Order. Here, the allegations contained in the First Amended Petition do not contain facts regarding the dates when Plaintiffs contracted COVID-19 except for Plaintiff Garcia who was alleged to be hospitalized on April 18, which was before the Executive Order was issued. *See supra*, fn 1.

3 Because defendants have established federal jurisdiction under the federal officer removal statute, it is not necessary to determine whether there is federal question jurisdiction as well. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

4 Defendants state the individual Defendants "were fraudulently joined in Plaintiffs' effort to defeat diversity jurisdiction." ECF No. 20 at 1. The Court is inclined to agree. But because the Court has found jurisdiction in this case under the federal officer removal statute, there is no need to determine if the individual defendants were improperly joined. ECF No. 20 at 20.

2021 WL 1700162
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

Desdnie HESS, Plaintiff,
v.
UNITED PARCEL SERVICE, INC., UPS.

No. 3:21-cv-00093 WHA
|
Signed 04/29/2021

Attorneys and Law Firms

Carolyn Hunt Cottrell, Kristabel Sandoval, Kyle G. Bates, Kyle Geoffrey Bates, Schneider Wallace Cottrell Konecky Wotkyns LLP, Emeryville, CA, for Plaintiff.

Rachel S. Brass, Joseph Richard Rose, Gibson Dunn & Crutcher LLP, San Francisco, CA, for United Parcel Service, Inc.

ORDER GRANTING MOTION TO DISMISS

WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE

INTRODUCTION

***1** In this putative class action for COVID-19 workplace health and safety violations, defendant moves to dismiss the complaint entirely. Because plaintiff is not a current employee, she lacks standing to seek injunctive relief against defendant's employment practices. The public nuisance tort claim is barred by the exclusive remedy rule of workers' compensation. Plaintiff does not state a claim for business expense reimbursement. Therefore, the motion is **GRANTED**.

STATEMENT

Plaintiff Desdnie Hess is a former employee of defendant United Parcel Service, Inc., the multinational shipping and logistics giant. From about October 2019 to May 2020, plaintiff worked as a local sort supervisor at UPS's distribution center in Santa Maria, California. Plaintiff made "schedules for warehouse associates and to oversee and direct them while they unloaded delivery trucks, sorted packages, and re-loaded the sorted packages into semi-truck[s]" (Compl. at ¶ 15).

Plaintiff alleges that UPS failed to take reasonable steps to limit the spread of COVID-19 among its employees while they worked for UPS in violation of the California Occupational Health and Safety Act, Cal. Lab. Code §§ 6300 *et seq.*, and applicable regulations and guidance. For example, plaintiff alleges (Compl. at ¶¶ 48–50, 52, 53, 55):

- UPS failed to ensure social distancing among its employees. There were approximately 300 employees at the Santa Maria facility working side-by-side, indoors, with only about 1.5–2 feet in between.
- UPS failed to adequately sanitize the Santa Maria facility or provide adequate personal protective equipment (PPE). UPS did not adequately sanitize or clean common areas or bathrooms. Employees regularly touched potentially contaminated surfaces without gloves or access to sanitizing wipes.
- UPS did not provide its employees with face coverings until May 2020, well after the virus was circulating. Even then, there were never enough face coverings for all employees.
- UPS did not modify the ventilation or airflow systems at the Santa Maria facility.
- UPS did not provide a training or illness prevention program to educate its employees about COVID-19.
- At least three employees at the Santa Maria facility contracted COVID-19. UPS failed to take action to prevent others from being infected, did not do contact tracing for the infected individuals, and did not notify employees who had been in close contact with the infected individuals.
- Due to UPS's failure to provide adequate sanitizer, cleaning supplies, masks and other PPE, plaintiff and other employees had to buy those things themselves to protect themselves from contracting COVID-19 while working for UPS.

In July 2020, plaintiff filed a complaint with the same allegations with the California Department of Industrial Relations (*id.* at ¶ 59). Plaintiff also alleges that UPS operated all its California facilities in a substantially similar fashion (*id.* at ¶ 51).

Plaintiff filed her complaint in Alameda County Superior Court. She brought four claims for relief: public nuisance under California's Civil Code § 3480; unfair competition under California's Business and Profession Code § 17200; reimbursement of business expenses under California's Labor Code §§ 2800, 2802; and declaratory relief. She also sought to represent a class comprised of "All current and former non-exempt workers employed by United Parcel Service, Inc. throughout California any time starting four years prior to the filing of this Complaint until resolution of this action" (*id.* at ¶ 61).

***2** UPS timely removed the action here. Jurisdiction is proper under 28 U.S.C. § 1332(a) and (d). UPS moves to dismiss the complaint under FRCP 12(b)(1) and (6). This order follows full briefing and a hearing held telephonically.

ANALYSIS

FRCP 8(a) requires a claim for relief to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." "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.' 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 (2009) (citation omitted). In making the plausibility assessment, all well-pled factual allegations are taken as true and all reasonable inferences that can be drawn from the well-pled facts are drawn in favor of the complaint. *See ibid.*

1. ARTICLE III STANDING.

Article III of the Constitution limits federal court jurisdiction to cases or controversies. *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Ibid.* To have standing to sue in federal court, the "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Ibid.*

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Id.* at 1548 (citation omitted). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.' " *Ibid.* (citation omitted).

Furthermore, "[s]tanding must be shown with respect to each form of relief sought, whether it be injunctive relief, damages or civil penalties." *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). Only current employees have standing to seek injunctive relief against their employer's employment practices. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 988 (9th Cir. 2011).

UPS argues that plaintiff did not suffer an injury in fact because she did not actually contract COVID-19 but was only exposed to an increased risk of doing so. An increased risk of exposure to COVID-19, however, is an injury in fact for purposes of Article III standing. [*] Most of those decisions involved increased risk of exposure in circumstances of civil detainment or incarceration. But the meaning of Article III does not change depending on the type of case or claim.

***3** UPS also argues that plaintiff's harm is not redressable because she is no longer employed by UPS. To the extent the argument is premised on plaintiff's lack of standing to seek injunctive relief, UPS is correct. Because plaintiff is no longer an employee of UPS, she cannot seek injunctive relief or prospective relief of any kind directed at her former employer's employment practices. *Ellis v. Costco Wholesale Corp.*, 657 F.3d at 988.

In addition to injunctive and declaratory relief, however, plaintiff seeks compensatory damages and civil and statutory penalties. UPS does not argue that such remedies would not redress plaintiff's injury.

Therefore, the motion to dismiss for lack of subject-matter jurisdiction is **DENIED**.

2. SECTION 17200.

California's Unfair Competition Law prohibits unfair competition, broadly defined as "any unlawful, unfair or fraudulent business act or practice...." Cal. Bus. & Prof. Code § 17200. "By proscribing any unlawful business practice, section 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech Commc'ns, Inc.*

v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 180 (1999) (cleaned up).

While the substantive scope of § 17200 is broad, its remedies are limited. The remedies available to a private plaintiff under § 17200, as opposed to a district attorney or city or county counsel, "are generally limited to injunctive relief and restitution." *Cel-Tech Commc'ns.*, 20 Cal.4th at 179.

As noted, plaintiff does not have standing to seek injunctive relief.

Nor has she stated a claim for restitution.

> Restitution under Business and Professions Code section 17203 is confined to restoration of any interest in money or property, real or personal, which may have been acquired by means of such unfair competition. A restitution order against a defendant thus requires both that money or property have been lost by a plaintiff, on the one hand, and that it have been acquired by a defendant, on the other. Compensatory damages are not recoverable as restitution.

Zhang v. Superior Court, 57 Cal. 4th 364, 371 (2013) (citations omitted).

> [A]n order for restitution [is] one compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person.

Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1144–45 (2003) (cleaned up).

Here, plaintiff alleges that because of UPS's failure to provide personal protective equipment, masks, hand sanitizer, etc., she and other employees had to buy those things themselves to protect themselves while working for UPS. She alleges she is entitled to reimbursement for those purchases under California's Labor Code, which she brings as a separate claim for relief. She cannot recover those expenditures as restitution because the money she spent did not pass to UPS; UPS did not acquire the money from plaintiff by means of its alleged unfair competition. Plaintiff makes no allegations supporting the remedy of restitution.

Therefore, because plaintiff lacks standing to seek injunctive relief, and because she alleges no facts plausibly stating a claim for restitution, her § 17200 claim must be **DISMISSED**. This order does not address UPS's other arguments for dismissal of the § 17200 claim.

3. PUBLIC NUISANCE.

***4** Under California law, a nuisance includes "[a]nything which is injurious to health...." Cal. Civ. Code § 3479. A public nuisance, as opposed to a private nuisance, is

> one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

Id. § 3480.

UPS argues plaintiff's public nuisance claim is barred by the exclusive remedy rule of California's Workers' Compensation Law. Cal. Lab. Code §§ 3200 *et seq.* California Labor Code § 3600(a) states in part,

> Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall ... exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment....

Section 3602(a) states in part,

> Where the conditions of compensation set forth in Section 3600 concur, the right to recover compensation is ... the sole and exclusive remedy of the employee ... against the employer.

The "conditions of compensation" are present here. Plaintiff's alleged harm arose out of and in the course of her employment for UPS and was proximately caused by the employment. Moreover, at the hearing on the instant motion, UPS represented that at the time of plaintiff's injury, UPS and plaintiff were subject to the compensation provisions of the Workers' Compensation Law. The exceptions to the exclusive remedy rule of the Workers' Compensation Law provided by Labor Code §§ 3602, 3706, and 4558 do not apply.

Plaintiff does not dispute this. Instead, she argues that the exclusive remedy rule does not apply because (Dkt. No. 17 at 15):

> Plaintiff and the putative class did not suffer an injury through the normal operation of Defendant's business—they were forced to work in facilities that were rendered dangerous and unsafe by virtue of Defendant's non-compliance with applicable regulations related to COVID-19.

Thus, plaintiff's public nuisance tort claim is predicated on UPS's alleged violations of California's Labor Code and applicable regulations and guidance (*see* Compl. at ¶¶ 33–47). She is barred, however, from pursuing a tort claim or tort damages by the exclusive remedy rule of the Workers' Compensation Law. *See Shoemaker v. Myers*, 52 Cal.3d 1, 16 (1990). The exclusive remedy rule applies only to claims for damages, however, not equitable relief.

To the extent plaintiff seeks to enforce UPS's duty to provide "a place of employment that is safe and healthful for the employees therein," Cal. Lab. Code § 6400(a), she has not stated a claim under California's Labor Code Private Attorneys General Act of 2004, *id.* §§ 2698 *et seq.*

Therefore, the public nuisance claim is **DISMISSED**. This order does not address UPS's other arguments for dismissal of the public nuisance claim.

4. LABOR CODE §§ 2800, 2802(a).

Section 2800 of California's Labor Code states, "An employer shall in all cases indemnify his employee for losses caused by the employer's want of ordinary care."

***5** Section 2802(a) states, "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties...."

Plaintiff seeks to be reimbursed for the cost of face coverings, masks, hand sanitizer, and cleaning supplies like sanitization wipes. UPS argues these items are not reimbursable as business expenditures because they were generally usable in all circumstances when plaintiff worked for UPS at the inception of the pandemic, in Spring 2020. This order agrees. Indeed, the parties agree that by late May 2020, Santa Barbara County, where plaintiff worked, required masks to be worn indoors in public generally. *See* https://countyofsb.org/uploadedFiles/phd/PROGRAMS/Disease_Control/Corona/Health% 20Officer% 20Order% 202020-10.pdf. Plaintiff points out that the order required businesses to require their employees to wear a face covering while working; but the order does not say that employers must supply the masks or reimburse employees for the costs of masks they use at work. More fundamentally, the order reflects that the mask requirement was not an expense UPS required its employees to incur for its benefit, but instead an obligation imposed on it by law. The same is true of the other items plaintiff seeks reimbursement for. Plaintiff does not show that she incurred these expenses for the benefit of UPS and she points to no law specifically requiring UPS to reimburse her.

Therefore, the claim for business expense reimbursement under §§ 2800 and 2802(a) is **DISMISSED**.

5. DECLARATORY JUDGMENT.

Plaintiff states a "claim" for declaratory judgment. A declaratory judgment is not a claim but a remedy. Plaintiff states no claim for relief, declaratory or otherwise.

CONCLUSION

For the foregoing reasons, the complaint is **DISMISSED**.

Plaintiff may seek leave to amend the complaint. Plaintiff has **FOURTEEN DAYS** from the date of this order to file a motion, noticed on the normal 35-day calendar, for leave to file an amended complaint. A proposed amended complaint must be appended to the motion. In the proposed amended complaint, plaintiff should bring only colorable claims. The motion should explain how the amendments to the complaint address the defects identified in this order as well as any problems identified by UPS in its motion potentially relevant to the amended complaint but not addressed by this order.

IT IS SO ORDERED.

All Citations

Slip Copy, 2021 WL 1700162

Footnotes

* *Texas Democratic Party v. Abbot*, 978 F.3d 168, 178 (5th Cir. 2020) (in person voting); *Zepeda Rivas v. Jennings*, 445 F.Supp.3d 36 (N.D. Cal. April 29, 2020) (immigration detainment) (Judge Vince Chhabria); *Carranza v. Reams*, 2020 WL 2320174 (D. Colo. May 11, 2020) (pre-trial detainment and post-conviction incarceration) (Chief Judge Philip A. Brimmer); *Prieto Refunjol v. Adducci*, 461 F.Supp.3d 675 (S.D. Ohio May 14, 2020) (immigration detainment) (Judge Sarah D. Morrison); *Gutierrez-Lopez v. Figueroa*, 462 F.Supp.3d 973 (D. Ariz. May 27, 2020) (immigration detainment) (Judge Steven P. Logan).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AMAZON.COM, INC.,	:	**MEMORANDUM DECISION AND ORDER**
Plaintiff,	:	21-cv-767 (BMC)
- against -	:	
ATTORNEY GENERAL LETITIA JAMES, in her official capacity as the Attorney General of the State of New York,	:	
Defendant.	:	

COGAN, District Judge.

Plaintiff Amazon.com commenced this action for declaratory and injunctive relief. It contends that the New York Attorney General's attempts to subject Amazon to state oversight of certain activities are preempted by federal law. The Attorney General moved to dismiss the action for lack of subject matter jurisdiction and for failure to state a claim; Amazon moved for summary judgment. For the reasons explained below, the Attorney General's motion to dismiss is granted. In light of the Court's decision to grant the Attorney General's motion, there is no need to resolve Amazon's motion.

BACKGROUND[1]

Amazon is an online retailer that operates a fulfillment center in Staten Island, New York. In 2020, Amazon terminated the employment of two associates at its Staten Island fulfilment center for violating Amazon's COVID-19-related health and safety rules and directives.

[1] Unless otherwise noted, the below facts are taken from plaintiff's amended complaint and are assumed to be true for purposes of this motion. See Kolbasyuk v. Capital Mgmt. Servs., LP, 918 F.3d 236, 239 (2d Cir. 2019).

Purportedly in response to Amazon's actions, the Attorney General launched an investigation of Amazon's COVID-19 response.

Sometime after the commencement of its investigation, the Attorney General threatened to sue Amazon if it did not immediately agree to a list of demands. In response to the Attorney General's threat, Amazon commenced this action to seek a declaration that the Attorney General lacks the authority to regulate (i) workplace safety responses to COVID-19 and (ii) claims of retaliation against workers who protest working conditions. Amazon contends that it is entitled to such a declaration because these two areas are preempted by federal law (namely, the Occupational Safety and Health Act and the National Labor Relations Act). Amazon also seeks an injunction against the Attorney General to prevent her from purporting to exercise regulatory authority over the same two areas, again on the grounds of federal preemption.

Four days after Amazon commenced this action, the Attorney General filed suit against Amazon in state court. See Complaint, People of the State of New York v. Amazon.com, Inc., Index No. 450362/2021, ECF No. 1 (N.Y. Sup. Ct. N.Y. Cty.). Amazon removed that case to the United States District Court for the Southern District of New York, but it was subsequently remanded back to state court. See People of the State New York v. Amazon.com, Inc., No. 21-cv-1417, 2021 WL 3140051 (S.D.N.Y. July 26, 2021).[2] The case is currently pending in state court.

[2] The Court may and does take judicial notice of this separate litigation between the parties only "to establish the fact of such litigation and related filings." Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc., 146 F.3d 66, 70 (2d Cir. 1998) (quoting Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384, 1388 (2d Cir. 1992)).

DISCUSSION

The Attorney General has moved to dismiss for lack of subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)) and for failure to state a claim (Fed. R. Civ. P. 12(b)(6)). Amazon moves for summary judgment (Fed. R. Civ. P. 56). Because the Attorney General has raised a lack of subject matter jurisdiction, the Court begins its analysis there. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) (describing the "requirement that jurisdiction be established" as a "threshold matter").

I. Subject Matter Jurisdiction

"A district court properly dismisses an action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction if the court 'lacks the statutory or constitutional power to adjudicate it.'" Cortlandt St. Recovery Corp. v. Hellas Telecommunications, S.a.r.l., 790 F.3d 411, 416-17 (2d Cir. 2015) (quoting Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)). "When deciding whether to grant a 12(b)(1) motion to dismiss, the court 'accepts as true all the factual allegations in the complaint and must draw all reasonable inferences in favor of the plaintiff.'" Cayuga Indian Nation of New York v. Vill. of Union Springs, 293 F. Supp. 2d 183, 187 (N.D.N.Y. 2003) (quoting Lunney v. United States, 319 F.3d 550, 554 (2d Cir. 2003)). The burden for establishing the existence of subject matter jurisdiction lies with the plaintiff asserting it, who must do so by a preponderance of the evidence. Makarova, 201 F.3d at 113.

"Under the well-pleaded complaint rule, federal subject matter jurisdiction typically exists only when the plaintiff's well-pleaded complaint raises issues of federal law." Montefiore Med. Ctr. v. Teamsters Loc. 272, 642 F.3d 321, 327 (2d Cir. 2011) (internal quotations omitted). Generally, "a complaint seeking a declaratory judgment is to be tested, for purposes of the well-pleaded complaint rule, as if the party whose adverse action the declaratory judgment plaintiff apprehends had initiated a lawsuit against the declaratory judgment plaintiff." Fleet Bank, Nat'l

Ass'n v. Burke, 160 F.3d 883, 886 (2d Cir 1998). In the instant case, the declaratory judgment plaintiff – Amazon – seeks a declaration that the Attorney General's actions are improper because they are preempted by federal law and fall within the jurisdiction of federal agencies. Reversing the positions of the parties (as is the case in the pending state action) would result in Amazon's federal preemption argument being raised as a defense to the Attorney General's state law claims. Such a case is not one in which federal subject matter jurisdiction exists. Montefiore Med. Ctr., 642 F.3d at 327 (the well-pleaded complaint rule is not satisfied "when federal preemption might be invoked as a defense to liability").[3]

However, in cases where the plaintiff seeks an injunction in addition to a declaratory judgment, federal subject matter jurisdiction may be found as long as the case does not require the interpretation of state law. Fleet Bank, 160 F.3d at 888-89 (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983)). As the Second Circuit explained,

> the Supreme Court has consistently recognized federal jurisdiction over declaratory- and injunctive-relief actions to prohibit the enforcement of state or municipal orders alleged to violate federal law . . . . A party is not required to pursue "arguably illegal activity . . . or expose itself to criminal liability before bringing suit to challenge" a statute alleged to violate federal law.

Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton, 841 F.3d 133, 144-45 (2d Cir. 2016) (quoting Knife Rights, Inc. v. Vance, 802 F.3d 377, 385 (2d Cir. 2015)) (holding that plaintiffs who were threatened with escalating fines and other sanctions under the local laws

[3] There is an exception to this rule involving complete preemption, but "[t]he Supreme Court has only found three statutes to have the requisite extraordinary preemptive force to support complete preemption." Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 272 (2d Cir. 2005) (listing the three statutes: § 301 of the Labor–Management Relations Act (LMRA), 29 U.S.C. § 185; § 502(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a); and §§ 85 and 86 of the National Bank Act, 12 U.S.C. §§ 85-86). The dispute between Amazon and the Attorney General does not involve any of these three statutes, so the complete preemption exception is not triggered in this case.

could invoke federal jurisdiction to enjoin enforcement on the ground that the laws were enacted in violation of a federal statute's procedural prerequisites).

Here, the Amended Complaint seeks a declaration regarding federal – not state – law. Specifically, the Amended Complaint "seeks a declaration that, as applied to the facts of this case, the state laws that the [Attorney General] seeks to enforce are preempted by federal law [namely, the Occupational Safety and Health Act and the National Labor Relations Act] and an injunction against the [Attorney General]'s ongoing misuse of those laws against Amazon." This requires an interpretation of federal law and whether it preempts state law; it does not require interpreting the meaning or scope of state law.

In briefing, the Attorney General focuses on paragraphs in the Amended Complaint that discuss her abilities under state law, but those paragraphs are immaterial as to the subject matter jurisdiction issue – they could be removed from the Amended Complaint without altering the relief sought or the relevant analysis for determining the existence of subject matter jurisdiction. In other words, although Amazon includes contentions about the Attorney General exceeding her authority under state law, its requested relief does not require interpreting state law to determine whether or not she actually is. Rather, the only question Amazon puts before the Court through its requested relief is whether state law (regardless of whether the Attorney General is acting in conformity with it or not) is preempted by federal law.

If, on the other hand, Amazon also sought an injunction on the ground that the Attorney General is acting outside the scope of her legal authority under state law (by, for example and as alleged, failing to first secure a finding from the state Labor Commissioner that a dangerous condition exists at Amazon's Staten Island facility), then Amazon would be raising a question of state law that would need to be resolved. For the reasons set forth in Fleet Bank, finding

jurisdiction in such a case would not be appropriate. See Fleet Bank, 160 F.3d at 891-92. Because Amazon does not seek such relief, though, jurisdiction obtains under Shaw.

II. Abstention

The Attorney General argues next that even if the Court finds it has jurisdiction over the case, Younger abstention requires dismissal.

Generally, "federal courts are obliged to decide cases within the scope of federal jurisdiction." Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 72 (2013). But there are exceptions to this rule, such as where a case would contravene the "longstanding public policy against federal court interference with state court proceedings," which is based on principles of federalism and comity. Younger v. Harris, 401 U.S. 37, 43-44 (1971). This exception, which has taken the form of the Younger abstention doctrine, applies in three "exceptional" categories: "ongoing state criminal prosecution," "certain civil enforcement proceedings," and "civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions." Disability Rights of New York v. New York, 916 F.3d 129, 133 (2d Cir. 2019) (quoting Sprint, 571 U.S. at 78).

In this case, it is the second category of cases – "certain civil enforcement proceedings" – that is applicable. "[A] civil enforcement action may warrant abstention when that action is 'akin to a criminal prosecution' in 'important respects.'" Helms Realty Corp. v. City of New York, 820 F. App'x 79, 80 (2d Cir. 2020) (quoting Sprint, 571 U.S. at 79).

> Specifically, abstention may be warranted when the civil enforcement action is "initiated to sanction the federal plaintiff . . . for some wrongful act;" when it features a "state actor" who "initiates the action;" when "[i]nvestigations are . . . involved;" and when the result of such investigations is frequently the "filing of a formal complaint or charges."

Id. at 80-81 (quoting Sprint, 571 U.S. at 79).

Here, there is a pending state action that was commenced by a state actor following an investigation. The purpose of the state action is also plainly to sanction Amazon. Thus, the Sprint test is satisfied.

Prior to the Supreme Court's decision in Sprint, courts evaluated whether to invoke Younger abstention by applying a three-part test that was set forth in Middlesex County Ethics Comm. v. Garden State Bar Association, 457 U.S. 423 (1982). The three criteria in the Middlesex test are: (i) there is a pending state proceeding, (ii) that implicates an important state interest, and (iii) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the plaintiff's federal constitutional claims. In Sprint, though, the Court made it clear that these three factors are *not* dispositive in deciding whether to apply Younger abstention; rather, they are "*additional* factors appropriately considered by the federal court before invoking Younger." Sprint, 571 U.S. at 81-82 (holding that "Younger extends to the three 'exceptional circumstances' . . . but no further"). Although neither the Supreme Court nor the Second Circuit has resolved how much weight the Middlesex factors should be given after Sprint, see Falco v. Justs. of the Matrimonial Parts of Sup. Ct. of Suffolk Cty., 805 F.3d 425, 427 (2d Cir. 2015), both Amazon and the Attorney General focus on these factors in their briefs, rather than on the Sprint test.

Even on these additional factors, however, abstention is still appropriate. First, it is undisputed that there is an ongoing state proceeding. Second, with respect to whether an "important state interest" exists, Amazon contends that it does not because New York "has no legally cognizable interest" in resolving issues "that are governed exclusively by federal law and are within the jurisdiction of federal regulators." But the test for whether an important state

interest exists does not turn on whether a specific state activity may be preempted by federal law. Rather,

> [a] state interest is important . . . where exercise of the federal judicial power would disregard the comity between the States and the National Government. Resolution of that question turns on whether the state action concerns the central sovereign functions of state government. Significantly, however, the Court of Appeals has cautioned that a court must not look narrowly to [the State's] interest in the outcome of the particular case, but rather look to the importance of the generic proceedings to the State. Further, in order to ascertain the generic proceeding involved in the action brought by the state, a court cannot focus solely or chiefly upon the style of the state's pleading, such as the particular causes of action pleaded or statutes invoked. Instead, it must consider the underlying nature of the state proceeding on which the federal lawsuit would impinge.

In re Standard & Poor's Rating Agency Litig., 23 F. Supp. 3d 378, 409-10 (S.D.N.Y. 2014) (internal quotation and citations omitted).[4]

Here, the Attorney General's state action seeks to enforce state labor laws and health and safety regulations, and to sanction an employer for allegedly illegal conduct that occurred within the state. In other words, the general nature of the Attorney General's state case is the enforcement of the state's laws, particularly those aimed at protecting the health and safety of its citizens. Such an action goes to a fundamental interest of the state as a sovereign. See Cuomo v. Dreamland Amusements, Inc., Nos. 08-cv-7100, 08-cv-6321, 2008 WL 4369270, *10 (S.D.N.Y. Sept. 22, 2008) (holding that Younger abstention was appropriate in an action seeking an injunction against state investigation of immigration law violations on the ground of preemption; explaining that a "state's interest in enforcing its own laws and investigating their violation cannot seriously be disputed. Moreover, the State of New York has an important interest in

[4] Amazon suggests that the Court apply the "facially conclusive" or "readily apparent" exception to the Younger abstention doctrine. This exception, which exists in other Circuits but has never been adopted by the Second Circuit, permits a court to exercise jurisdiction over a case that otherwise calls for abstention where preemption of the state law issues is "readily apparent." See HSBC Bank USA, N.A. v. N.Y. City Comm'n on Human Rts., 673 F. Supp. 2d 210, 215 (S.D.N.Y. 2009). Given the importance of comity and the longstanding public policy against federal court interference with state court proceedings that underlies Younger, this Court declines to adopt a new exception to the doctrine absent a clear holding from the Supreme Court or the Second Circuit.

assuring safe, sanitary, and non-discriminatory working conditions for workers in the State."); Chertock v. Cuomo, No. 07-cv-0077, 2007 WL 9710990, *2 (E.D.N.Y. Nov. 19, 2007) (holding Younger abstention was appropriate in an action seeking to enjoin enforcement of a judgment by the state; finding state interest requirement satisfied because "[s]tates have a palpable and significant interest in investigating and securing recovery for illegal conduct. States also have a substantial interest in investigating and prosecuting violations of their state laws.").

Third, the state forum provides an adequate opportunity for review of Amazon's federal claims: indeed, Amazon has already asserted its preemption arguments in its motion to dismiss the state proceeding. Amazon contends that the New York state court "is unlikely to afford Amazon the declaratory and injunctive relief it seeks" because "[i]f the state court dismisses the [Attorney General]'s complaint based on Amazon's federal constitutional arguments, judgment will be entered without any opportunity for Amazon to secure the necessary declaratory and injunctive relief against the [Attorney General]'s ongoing refusal to abide by federal law." The problem with this argument is that Amazon fails to explain why it cannot seek the injunctive relief it says is necessary through a counterclaim in the existing state court proceeding. Therefore, even considering the non-dispositive Middlesex factors, abstention is still appropriate.

There are two exceptions to the Younger abstention doctrine that may lead a court to exercise jurisdiction over a case even if the Sprint test is met. The first exception is for a case involving "extraordinary circumstances" that "render the state court incapable of fairly and fully adjudicating the federal issues before it." Jordan v. Bailey, 570 F. App'x 42, 44 (2d Cir. 2014). "[S]uch circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief." Id. (quoting Diamond "D" Const. Corp. v. McGowan, 282 F.3d 191, 201 (2d Cir. 2002)). The facts of the instant case do not present the

extraordinary circumstances required for this exception, and Amazon does not contend otherwise.

The second exception, and the one that Amazon argues should apply, is where the state actor that commenced the state action did so in bad faith. However, this exception is very narrow. A "federal plaintiff seeking to establish that the bad faith exception to Younger applies must show that 'the party bringing the state action [has] no reasonable expectation of obtaining a favorable outcome.'" Jackson Hewitt Tax Serv. Inc. v. Kirkland, 455 F. App'x 16, 18 (2d Cir. 2012) (quoting Cullen v. Fliegner, 18 F.3d 96, 103 (2d Cir. 1994)). "[A] state proceeding that is legitimate in its purposes, but unconstitutional in its execution – even when the violations of constitutional rights are egregious – will not warrant the application of the bad faith exception." Schorr v. DoPico, 686 F. App'x 34, 37 (2d Cir. 2017) (quoting Diamond "D" Constr. Corp., 282 F.3d at 199). "[I]t is only when the state proceeding is brought with no legitimate purpose that th[e] state interest in correcting its own mistakes dissipates, and along with it, the compelling need for federal deference." Diamond "D" Constr. Corp., 282 F.3d at 200.

Here, Amazon argues that the Attorney General is acting in bad faith, but does not convincingly explain why she has no "reasonable expectation of obtaining a favorable outcome." Amazon's contention that federal law preempts the Attorney General's ability to bring New York Labor Law claims is not as clear-cut as Amazon says it is: neither the Occupational Safety and Health Act nor the National Labor Relations Act are among the short list of federal statutes recognized as having complete preemption over state law. See Sullivan, 424 F.3d at 272; see also Amazon.com, Inc., 2021 WL 3140051, at *6 (explaining that "[t]he Occupational Safety and Health Act (OSHA), on which Amazon here relies, has not joined the ranks of the LMRA, ERISA, and the National Bank Act for [purposes of complete preemption] . . . OSHA does not

preempt claims under New York Labor Law § 200 even defensively"). Moreover, Amazon does not explain why the Attorney General's action – even if brought in bad faith – entirely lacks a legitimate purpose. As noted above, the state has a legitimate interest in ensuring that employers are complying with state labor laws, are enforcing important health safety measures, and are sanctioned for illegal conduct that occurs within the state.[5] Thus, the bad faith exception to the Younger abstention doctrine is not appropriate in this case.

CONCLUSION

In light of the above analysis, although the Court does have subject matter jurisdiction, it will abstain from exercising that jurisdiction under Younger. The Court therefore grants the Attorney General's motion to dismiss [Dkt. No. 31]. There is no need to resolve Amazon's motion for summary judgment [Dkt No. 33] in light of the Court's abstention.

SO ORDERED.

Digitally signed by
Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York
August 10, 2021

[5] That the Court finds that New York has a compelling state interest in these matters for purposes of the Younger analysis, and that the Occupational Safety and Health Act and the National Labor Relations Act do not completely preempt state law, should not be taken as an evaluation of the merits of the Attorney General's actions under state law, or of what relief Amazon is or could be entitled to. In accordance with Younger and its progeny, it is appropriate to permit the state court to answer those questions – including whether the Attorney General is acting beyond the scope of her authority – in the first instance.

2021 WL 3140051
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

People of the State of NEW YORK,
BY Letitia JAMES, Attorney General
of the State of New York, Plaintiff,
v.
AMAZON.COM, INC., et al., Defendants.

21-cv-1417 (JSR)
|
Signed July 26, 2021

Synopsis

Background: State of New York, by and through its Attorney General, brought action in state court against e-commerce retailer for violations of New York labor laws, alleging inadequate implementation of worker safety protocols in response to the COVID-19 pandemic and retaliation against workers who protested unhygienic work conditions, and seeking, inter alia, declaratory relief. Following removal, State filed motion to remand case to state court, and retailer moved to transfer case to district where retailer's declaratory judgment action seeking a declaration that federal law preempted state regulation on COVID-19 workplace safety issues was pending.

Holdings: The District Court, Jed S. Rakoff, J., held that:

[1] New York was the real party in interest, and thus, federal diversity jurisdiction did not exist, as would provide grounds for removal;

[2] state labor law violation claims were not completely preempted by federal law, as would allow removal of action on basis of federal question jurisdiction;

[3] a federal issue was not necessarily raised, and thus, federal question jurisdiction did not lie over state law claims, as would provide ground for removal;

[4] federal issues raised by retailer were not substantial, and thus, federal question jurisdiction did not lie over claims, as would provide ground for removal;

[5] preemption issues were not capable of resolution in federal court without disrupting the federal-state balance, and thus, federal question jurisdiction did not lie over claims, as would provide ground for removal; and

[6] there was no federal question jurisdiction under the "mirror image" rule, as would provide ground for removal.

Motion granted.

Procedural Posture(s): Motion for Remand; Motion to Transfer or Change Venue.

West Headnotes (27)

[1] Federal Courts

Federal district courts are courts of limited subject-matter jurisdiction.

[2] Federal Courts

A state is not a citizen for purposes of the diversity jurisdiction; thus, a suit between a state and a citizen of a different state does not create diversity jurisdiction. 28 U.S.C.A. § 1332.

[3] Federal Courts

Because a state's presence as a party will destroy complete diversity, when a state or state official brings suit, courts consider whether the state is the real party in interest before concluding that diversity jurisdiction does not lie. 28 U.S.C.A. § 1332.

[4] Federal Courts

The "real-party-in-interest" analysis for diversity jurisdiction requires consideration of the nature of the case as presented by the whole record, rather than a claim-by-claim analysis. 28 U.S.C.A. § 1332.

[5] Federal Courts

When a holistic review of a complaint reveals that a state merely asserts the personal claims of its citizens, the state is not a real party in interest for diversity jurisdiction purposes. 28 U.S.C.A. § 1332.

[6] Removal of Cases

State of New York was the real party in interest in action against e-commerce retailer, alleging that retailer violated state labor laws in its response to the COVID-19 pandemic, and thus, diversity jurisdiction did not exist, as would provide grounds for removal; although State sought backpay and emotional distress damages on behalf of two former employees, State also had a separate financial interest in the outcome of the litigation from the personal interests of its citizens in that State sought disgorgement of retailer's profits, which only State could seek, and brought action under New York's Executive Law for fraudulent or illegal business activities in pursuit of securing an honest marketplace. 28 U.S.C.A. §§ 1332, 1441(a); N.Y. Executive Law § 63(12).

[7] Statutes

While the Attorney General is authorized by statute to seek injunctive and other relief in the name of the people of the State of New York, the Attorney General can also seek disgorgement of profits on the State's behalf; when the Attorney General seeks disgorgement of profits, the beneficiary is the state treasury. N.Y. Executive Law § 63(12).

[8] States

A state's goal of securing an honest marketplace in which to transact business is quasi-sovereign interest independent from the interests of individual citizens.

[9] Federal Courts

For diversity jurisdiction purposes, the presence of interested individual citizens does not necessarily negate a plaintiff state's interest in the litigation. 28 U.S.C.A. § 1332.

[10] Federal Courts

Complaint that does not allege federal cause of action "arises under" federal law only when (1) Congress expressly provides for removal of such state law claims, (2) state law claims are completely preempted, or (3) state law right turns on question of federal law. 28 U.S.C.A. § 1331.

[11] Removal of Cases

A case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in a plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

[12] Removal of Cases

For removal to federal court to be proper on preemption grounds, a federal statute must completely preempt state law claims; complete preemption exists when Congress has developed an all-encompassing regulatory scheme that leaves no room for state action at issue.

[13] Removal of Cases

New York's claims against e-commerce retailer for alleged violations of New York labor laws in its response to the COVID-19 pandemic were not completely preempted by federal law, as would allow removal of action on basis of federal question jurisdiction; neither the Occupational Safety and Health Act (OSHA) nor the National Labor Relations Act (NLRA) completely preempted State's claims under New York labor laws. 28 U.S.C.A. §§ 1331, 1441(a); National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.; Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.; N.Y. Labor Law § 200.

[14] Removal of Cases

The Occupational Safety and Health Act (OSHA) does not completely preempt state law claims such that it displaces all state causes of action, so as to make such claims removal on grounds of federal question jurisdiction. 28 U.S.C.A. §§ 1331, 1441(a); Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

[15] Federal Courts

Federal jurisdiction over state law claim will lie if federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting federal-state balance approved by Congress. 28 U.S.C.A. § 1331.

[16] Federal Civil Procedure

A federal issue is not "necessarily raised," for purposes of federal question jurisdiction, when it becomes relevant only by way of a defense to an obligation created entirely by state law; the federal issue must be an essential element of the state law claim such that the claim's very success depends on giving effect to a federal requirement. 28 U.S.C.A. § 1331.

[17] Federal Courts

A federal issue was not necessarily raised in New York's suit against e-commerce retailer for violations of New York labor laws regarding retailer's response to the COVID-19 pandemic, and thus, federal question jurisdiction did not lie over state law claims, as would provide ground for removal; National Labor Relations Act (NLRA) and Occupational Safety and Health Act (OSHA) preemption issues raised by retailer were only relevant by way of a defense, and issue of whether Center for Disease Control (CDC) guidance was binding under the Administrative Procedures Act (APA) was not part and parcel of the relevant New York labor law claims, and state law claim did not rise or fall with CDC guidance's binding effect. 5 U.S.C.A. § 551 et seq.; 28 U.S.C.A. §§ 1331, 1441(a); National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.; Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.; N.Y. Labor Law § 200.

[18] Federal Courts

For a federal issue to be "substantial," for purposes of federal question jurisdiction, it must be important to the federal system as a whole, implicating the federal interest in claiming the advantages of a federal forum. 28 U.S.C.A. § 1331.

[19] Federal Courts

A purely legal question is more likely to be a substantial federal question for purposes of federal question jurisdiction. 28 U.S.C.A. § 1331.

[20] Federal Courts

For purposes of federal question jurisdiction, an issue is not important to the federal system when federal law is raised only as an indicator of reasonable conduct or public policy. 28 U.S.C.A. § 1331.

[21] Removal of Cases

Federal issues raised by e-commerce retailer in suit over its alleged violations of New York labor laws in response to COVID-19 pandemic were not substantial, and thus, federal question jurisdiction did not lie over claims, as would provide ground for removal; determination of whether it was reasonable to require businesses to implement certain cleaning and ventilation standards, establish contact-tracing programs, and enforce social distancing to protect health and safety of employees did not require interpretation of federal law, victims had recourse in federal courts and agencies to vindicate federal rights, and question of whether Center for Disease Control (CDC) guidance

suggested that retailer's safety measures were unreasonable under state law was fact-bound and situation specific. 28 U.S.C.A. §§ 1331, 1441(a); N.Y. Labor Law § 200.

[22] Removal of Cases

Preemption issues raised by e-commerce retailer in New York's action against it, alleging violations of New York labor laws in response to COVID-19 pandemic, were not capable of resolution in federal court without disrupting the federal-state balance, and thus, federal question jurisdiction did not lie over claims, as would provide ground for removal; Congress approved a balance where state labor and workplace safety laws coexisted with federal standards, and Congress did not indicate that state courts were inappropriate forums to resolve such issues by completely preempting them. 28 U.S.C.A. §§ 1331, 1441(a); N.Y. Labor Law § 200.

[23] Declaratory Judgment

The Declaratory Judgment Act does not expand the jurisdiction of the federal courts. 28 U.S.C.A. § 2201.

[24] Declaratory Judgment

A federal court has original jurisdiction over an action seeking declaratory relief where the declaratory judgment defendant's threatened action or the suit actually filed by the declaratory judgment defendant present a federal question.

[25] Federal Courts

Courts evaluate whether federal subject matter jurisdiction exists over suits for declaratory relief by rearranging the parties into the hypothetical mirror image coercive suit.

[26] Removal of Cases

There was no federal question jurisdiction under the "mirror image" rule over New York's claims against e-commerce retailer for violations of New York labor laws in response to COVID-19 pandemic, based on retailer's separate action seeking a declaration that state law was preempted, as would provide ground for removal; complaint filed by New York did not seek a judgment on the preemptive effect of any federal law, but instead sought a declaration that retailer violated New York labor laws, and even if complaint did seek a declaration that state law was not preempted, it was the character of the threatened action, which was governed by state labor laws, and not the defense, that determined whether there was federal question jurisdiction. 28 U.S.C.A. §§ 1331, 1441(a); N.Y. Labor Law § 200, 215, 740.

[27] Declaratory Judgment

When a complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in district court.

Attorneys and Law Firms

Julie Rivchin Ulmet, Daniela Nogueira, Elizabeth Koo, Fiona Jeannette Kaye, Roya S. Aghanori, Jeremy Pfetsch, Karen Cacace, Seth Kupferberg, Office of the New York State Attorney General, New York, NY, for Plaintiff.

Jason C. Schwartz, Lucas Townsend, Gibson, Dunn & Crutcher, LLP, Washington, DC, Mylan Lee Denerstein, Zainab Ahmad, Gibson, Dunn & Crutcher, LLP, New York, NY, for Defendants.

OPINION & ORDER

JED S. RAKOFF, U.S.D.J.

***1** The State of New York by and through Letitia James, Attorney General of the State of New York (the "Attorney General" or "New York"), sued Amazon.com Inc.,

Amazon.com Sales, Inc., and Amazon.com Services LLC (collectively, "Amazon") in the New York Supreme Court, New York County for violations of New York Executive Law § 63(12) and New York Labor Law §§ 200, 215, and 740. New York alleges that Amazon inadequately implemented worker safety protocols in response to the COVID-19 pandemic and retaliated against workers who protested unhygienic work conditions. The next day, Amazon removed the action to federal court, asserting that this Court has subject matter jurisdiction on diversity and federal question grounds.

New York then moved to remand the case to state court pursuant to 28 U.S.C. § 1447 and Amazon moved to transfer the case to the U.S. District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1404(a). By bottom-line order dated April 9, 2021, the Court granted New York's motion and denied Amazon's motion. ECF No. 35'. This Opinion states the reasons for that decision and directs the Clerk to enter judgment and close the case.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

The Complaint alleges the following facts. COVID-19 is a deadly respiratory disease caused by a novel and highly contagious coronavirus. Compl. ¶ 17. The novel coronavirus spreads through person-to-person contact and is more transmissible when individuals gather within six feet of one another for longer than 15 minutes over a 24-hour period. Id. at ¶ 18. Mildly symptomatic, pre-symptomatic, and even asymptomatic individuals can spread the virus. Id. at ¶ 19. The resulting disease can ravage the lungs, shut down the organs, and cause severe neurological malfunctions. Id. The first confirmed case of COVID-19 in New York was reported on March 1, 2020. Id. at ¶ 22.

In March 2020, the New York state legislature amended the Executive Law to authorize Governor Cuomo to issue directives necessary to address epidemics and disease outbreaks. Id. at ¶ 25. A series of executive orders affecting New York businesses followed. Id. Governor Cuomo declared a statewide disaster emergency, curtailed nonessential business operations, and directed the Empire State Development Corporation (ESD) to issue guidance and directives on required closures and the steps necessary to maintain a safe work environment during the pandemic. Id. at ¶¶ 25-29. ESD issued guidance that categorized "warehouse/distribution and fulfillment" as essential and, accordingly, Amazon's fulfillment and distribution centers were not ordered closed. Id. at ¶ 28. Instead, essential businesses like Amazon were directed to "comply with the guidance and directives for maintaining a clean and safe work environment issued by the Department of Health." Id. at ¶ 30. In May, Governor Cuomo issued another executive order "authorizing a phased re-opening of non-essential businesses," similarly "subject to the guidelines promulgated by the Department of Health." Id. at ¶ 31.

***2** The Department of Health issued industry-specific minimum safety standards in June 2020. See id. at ¶ 32. These minimum standards incorporated by reference Centers for Disease Control ("CDC") cleaning guidance issued in February 2020. Id. at ¶ 34. This guidance recommended that facilities: (1) enforce social distancing where possible; (2) encourage regular handwashing; (3) close areas used by infected employees, ventilate affected areas, and wait at least 24 hours before beginning to clean those areas; and (4) cooperate with state and local health departments to implement a contact-tracing program that includes investigation of COVID-19 cases and prompt notification to employees who may have been exposed to the virus. Id. at ¶¶ 35-38.

Amazon is a Washington-based e-commerce retailer, incorporated in Delaware, that distributes goods nationwide. Id. at ¶¶ 14-16. Amazon operates two facilities in New York: JFK8, a Staten Island fulfillment center, and DBK1, a Queens distribution center. Id. at ¶¶ 3, 45. At Amazon fulfillment and distribution centers, continued employment depends on productivity as measured by digital devices that scan bins and packages to be shipped, record how many units are processed per hour, and calculate the amount of time employees spend "off task." Id. at ¶¶ 56-59. If an employee's time off task drops below certain established thresholds known only to managers, the employee could face termination. Id. at ¶¶ 59-61.

Most workers at JFK8 and DBK1 continued to work on-site after New York became the epicenter of the COVID-19 pandemic. Id. at ¶¶ 4, 45-46. At various times since the coronavirus outbreak, Amazon has allegedly: (1) failed to implement site closure, disinfection, and cleaning protocols when workers infected with COVID-19 had been present at JFK8 and DBK1 within the previous seven days, (2) neglected to create a robust contact-tracing program, and (3) refused to soften its productivity-related discipline policies to allow its workers sufficient time for handwashing and hygiene practices. Id. at ¶ 4. Though Amazon claims that it paused

productivity-related discipline in March 2020, Amazon did not notify workers of this change until July 10, 2020. Id. at ¶ 63. The practice resumed in October 2020. Id. at ¶ 64.

In late March, two employees at JFK8, Christian Smalls, a "process assistant" who had been promoted to a management position, and Derrick Palmer, a "process guide warehouse associate," raised concerns with their managers and with the media about Amazon's pandemic response. Id. at ¶ 78. Both had worked at Amazon since 2015, had a history of good work performance, and had received positive feedback from supervisors. Id. at ¶¶ 79-80. During the week of March 22, Smalls and Palmer, along with a dozen other employees, approached JFK8 managers to ask that Amazon close the facility for proper cleaning. Id. at ¶¶ 80-83.

On March 30, Smalls and Palmer protested Amazon's pandemic response in front of JFK8. Id. at ¶ 88. Amazon fired Christian Smalls in late March 2020 for violating quarantine and social-distancing protocols by attending the protest after being exposed to COVID-19, though Smalls did not enter the facility during his quarantine period and instead remained on an adjacent sidewalk during the protest. Id. at ¶¶ 5, 88-89. In early April 2020, Amazon sent Derrick Palmer a disciplinary letter termed a "final written warning," reprimanding Palmer for attending the protest and violating social distancing policies. Id. at ¶¶ 5, 95.

It is further alleged that Smalls and Palmer are two of many Amazon employees who "reasonably fear that if they make legitimate health and safety complaints about Amazon's COVID-19 response, Amazon will retaliate against them as well." Id. at ¶ 99. Since April 2020, Amazon has allegedly continued to prioritize increased worker productivity and profit margins over compliance with state health and safety guidance. Id. at ¶¶ 100-06, 108. During the pandemic alone, Amazon has earned over $160 billion in profits, a $30 billion increase from its pre-pandemic performance. Id. at ¶ 109. About $28.5 million in profits can be traced to Amazon's facilities in New York. Id.

II. Procedural Background

***3** On February 16, 2021, the New York Attorney General sued Amazon in the New York Supreme Court, New York County, alleging that Amazon's inadequate disinfection and contract-tracing protocols, its prioritization of productivity policies over sanitation and social-distancing practices, and its termination of workers who protested Amazon's COVID-19 response violated New York Labor Law §§ 200, 215, and 740. See Compl., ECF No. 1. Section 200 requires New York businesses to be "constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein." N.Y. Labor L. § 200. Section 215 prohibits employers from discriminating or retaliating against employees who bring potential state labor law violations to the attention of the employer, a labor commissioner, an authorized representative, or the Attorney General. N.Y. Labor L. § 215(1)(a). Finally, section 740 prohibits employers from taking retaliatory action against employees who disclose or threaten to disclose to a supervisor or to a governmental authority that an employer has violated a law, rule, or regulation and has thereby "present[ed] a substantial and specific danger to the public health or safety." N.Y. Labor L. § 740(2)(a).

The state court complaint premised the Attorney General's right to sue on New York Executive Law § 63(12), which empowers the Attorney General to seek injunctive and other relief against entities that "engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business" in New York. See N.Y. Exec. Law § 63(12). The Attorney General sought injunctive relief against Amazon's allegedly unlawful practices; an order directing Amazon to notify employees of their Labor Law rights and to provide related training to supervisors; backpay, lost compensation and benefits, liquidated damages, and emotional distress damages on behalf of Christian Smalls; emotional distress damages and liquidated damages on behalf of Derrick Palmer; and disgorgement of ill-gotten profits under Executive Law § 63(12).

On February 17, 2021, Amazon filed a notice of removal in the Southern District of New York pursuant to 28 U.S.C. §§ 1331, 1332, 1367, and 1441. Five days before the instant action commenced, Amazon filed a complaint against the New York Attorney General in the Eastern District of New York, seeking a declaration that state regulation of Amazon's COVID-19 response is preempted by federal law. See Schwartz Decl., ECF No. 24, at Ex. A.

On March 3, 2021, New York moved to remand this case to state court. ECF No. 19. That same day, Amazon moved to transfer this case to the Eastern District of New York. ECF No. 17.

DISCUSSION

[1] A defendant may remove to federal court "any civil action ... of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). The federal district courts are courts of limited subject-matter jurisdiction. Purdue Pharma L.P. v. Kentucky, 704 F.3d 208, 213 (2d Cir. 2013). This Court has diversity jurisdiction over certain disputes between citizens of different states pursuant to 28 U.S.C. § 1332 and federal question jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States" pursuant to 28 U.S.C. § 1331. Id. Neither ground supports the exercise of jurisdiction over this action.

I. Diversity Jurisdiction

Federal courts have diversity jurisdiction over suits in which no plaintiff is a citizen of the same state as any defendant and the amount-in-controversy exceeds $75,000. See 28 U.S.C. § 1332. There is no diversity jurisdiction over this action, because the State of New York is the real party in interest and its presence destroys diversity.

[2] **[3]** "[A] state is not a 'citizen' for purposes of the diversity jurisdiction." Moor v. County of Alameda, 411 U.S. 693, 717, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973). Thus, a suit between a state and a citizen of a different state does not create diversity jurisdiction. See, e.g., State Highway Comm'n of Wyoming v. Utah Const. Co., 278 U.S. 194, 199, 49 S.Ct. 104, 73 L.Ed. 262 (1929) (explaining the "well-settled" principle that a suit between a state and a citizen of another state is not a suit between citizens of different states). However, "because a State's presence as a party will destroy complete diversity," when a state or state official brings suit, courts consider whether the state is the real party in interest before concluding that diversity jurisdiction does not lie. Mississippi ex rel. Hood v. AU Optronics Corp., 571 U.S. 161, 174, 134 S.Ct. 736, 187 L.Ed.2d 654 (2014).

***4** **[4]** **[5]** The real-party-in-interest analysis requires "consideration of the nature of the case as presented by the whole record," rather than a claim-by-claim analysis. See Purdue Pharma, 704 F.3d at 218 (quoting Ferguson v. Ross, 38 F. 161, 162-63 (C.C.E.D.N.Y. 1889)). When a holistic review of the complaint reveals that a state "merely asserts the personal claims of its citizens, [the state] is not the real party in interest." See In re Baldwin-United Corp., 770 F.2d 328, 341 (2d Cir. 1985); see also id. at 219.

[6] **[7]** Here, the State is the real party in interest. While the State seeks backpay and emotional distress damages on behalf of Smalls and Palmer, the Attorney General also asserts a right that only the Attorney General can enforce. See, e.g., In re Standard & Poor's Rating Agency Litig., 23 F. Supp. 3d 378, 404 (S.D.N.Y. 2014) (finding that the state's status as real party in interest is "manifest" when "the case is brought by the state attorney general under his exclusive authority"). In particular, while Executive Law § 63(12) authorizes the Attorney General to seek injunctive and other relief "in the name of the people of the State of New York," the Attorney General can seek disgorgement of profits on the State's behalf. See People ex rel. Schneiderman v. Greenberg, 27 N.Y.3d 490, 497–98, 34 N.Y.S.3d 402, 405, 54 N.E.3d 74, 77 (2016); People ex rel. Spitzer v. Applied Card Sys., Inc., 11 N.Y.3d 105, 124–27, 863 N.Y.S.2d 615, 627–29, 894 N.E. 2d 1, 14-15 (2008) (noting that the Attorney General may "obtain disgorgement -- an equitable remedy distinct from restitution [to aggrieved consumers] -- of profits that respondents derived"); People v. Ernst & Young, LLP, 114 A.D.3d 569, 980 N.Y.S.2d 456, 457 (2014) (finding the disgorgement remedy available to the Attorney General under section 63(12) even without direct losses to New York consumers or the public). When the Attorney General seeks disgorgement of profits, the beneficiary is the State treasury. See, e.g., United States v. Twin America, LLC, 2015 WL 9997203, at *2 (S.D.N.Y. Nov. 17, 2015) (ordering that profits disgorged under section 63(12) be paid to the State of New York through its Budget & Fiscal Management Bureau). Thus, the State has an interest in the outcome of this litigation separate from the personal interests of its citizens.

[8] In addition to the State's financial interest, "[t]he State's goal of securing an honest marketplace in which to transact business is a quasi-sovereign interest" independent from the interests of individual citizens. See New York ex rel. Abrams v. Gen. Motors Corp., 547 F. Supp. 703, 705-706 & n.5 (S.D.N.Y. 1982) (finding New York the real party in interest in a suit brought under New York Executive Law § 63(12) and remanding to state court); see also In re Standard & Poor's, 23 F. Supp. 3d at 404-405. Amazon quibbles with the applicability of the "honest marketplace" rationale here, arguing that the phrase implies fraud, which the Attorney General has not alleged. But the State's statutory interest under § 63(12) encompasses the prevention of either "fraudulent or illegal" business activities. Misconduct that is illegal for reasons other than fraud still implicates the government's interest in guaranteeing a marketplace that

adheres to standards of fairness, as well ensuring that business transactions in the state do not injure public health. Thus, the State does not sue "only as an agent, but also as [a party] who has [its] own stake in the litigation." See Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 194 (2d Cir. 2003) (holding that the real party in interest for diversity jurisdiction purposes depends on whether a plaintiff brings suit in a solely representative capacity).

*5 [9] Amazon argues that the fired workers, Smalls and Palmer, are the real parties in interest -- and that as New Jersey citizens, Smalls and Palmer are diverse from Amazon, which maintains a principal place of business in Washington. But the State's decision to seek damages on behalf of Smalls and Palmer is incidental to the State's other interests. Courts in this district have previously recognized that where "a state seeks both injunctive relief against illegal business practices and restitution for victims," these purposes cannot "be separated from each other" and neither should be characterized as the "primary" interest in the case. People of New York ex rel. Cuomo v. Charles Schwab & Co., 2010 WL 286629, at *6 (S.D.N.Y. Jan. 19, 2010). As the Second Circuit has indicated, for diversity jurisdiction purposes, the presence of interested individual citizens "does not necessarily negate" a plaintiff state's interest. Purdue Pharma, 704 F.3d at 220.

Amazon insists that the Supreme Court's ruling in Mo., Kan., & Tex. Ry. Co. v. Hickman, 183 U.S. 53, 22 S.Ct. 18, 46 L.Ed. 78 (1901), counsels against finding that New York is the real party in interest in this case. In Hickman, which involved a state-created rail commission, the Supreme Court noted that the state's "governmental interest in the welfare of all its citizens ... is not that which makes the state, as an organized political community, a party in interest in the litigation." Id. at 60, 22 S.Ct. 18. The state's interest here is more specific than that -- it is the interest in securing safe and fair conditions for the transaction of business within its borders.

Hickman also holds that "the state is such a real party when the relief sought is that which inures to it alone." Id. at 59, 22 S.Ct. 18. The State here seeks relief -- disgorgement of profits -- that only the State can seek. This distinguishes this case from Hickman, where the lawsuit was "not an action to recover any money for the state" and "[i]ts results will not inure to the benefit of the state as a state in any degree." Id. Whether the money the state obtains will ultimately benefit certain Amazon workers is not relevant where, as here, "the moneys recovered were payable into the treasury of the state." See id. Because New York is a real party in interest in this case, its presence destroys diversity, and there is no federal jurisdiction under 28 U.S.C. § 1331.

II. Arise-Under Jurisdiction

[10] A complaint that does not allege a federal cause of action "arises under" federal law only when (1) Congress expressly provides for removal of such state law claims, (2) the state law claims are completely preempted, or (3) the state law right turns on a question of federal law. See Fracasse v. People's United Bank, 747 F.3d 141, 142-44 (2d Cir. 2014) (per curiam); see also Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005); Gunn v. Minton, 568 U.S. 251, 258, 133 S.Ct. 1059, 185 L.Ed.2d 72 (2013). Amazon does not (and cannot) argue that Congress has expressly provided for the removal of state law labor claims. Thus, the Court addresses only whether complete preemption or the test articulated in Grable and Gunn permit the exercise of federal jurisdiction.

A. Complete Preemption

[11] [12] Ordinary (also known as defensive) preemption is insufficient to create arise-under jurisdiction. "[A] case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." Caterpillar Inc. v. Williams, 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (emphasis in original). Rather, for removal to federal court to be proper on preemption grounds, a federal statute must completely preempt state law claims. See id. at 393, 107 S.Ct. 2425; Franchise Tax Bd. v. Constr. Laborers Vacation Trust et al., 463 U.S. 1, 14, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). Complete preemption exists when Congress has developed an all-encompassing regulatory scheme that leaves no room for the state action at issue. See, e.g., Avco Corp. v. Machinists, 390 U.S. 557, 560-61, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968) (LMRA); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 66-67, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987) (ERISA). The Supreme Court has identified only three statutes with such extraordinary preemptive force: Section 301 of the Labor-Management Relations Act (LMRA), Section 502 (a) of the Employee Retirement Income Security Act (ERISA), and Sections 85 and 86 of the National Bank Act. See Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 272 (2d Cir. 2005).

*6 [13] [14] The Occupational Safety and Health Act (OSHA), on which Amazon here relies, has not joined the

ranks of the LMRA, ERISA, and the National Bank Act for these purposes. The Supreme Court has considered the preemptive effect of OSHA and concluded that "Congress expressly saved two areas from federal pre-emption" under the Act: (1) workers' compensation and (2) occupational safety and health issues for which "no federal standard is in effect." Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 97, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992). Moreover, OSHA gives states the options of avoiding federal regulation entirely by submitting to the Secretary of Labor a state plan for the development of occupational safety and health standards in a particular area. Id.; see also 29 U.S.C. § 667(b). Thus, OSHA does not completely preempt state law claims such that it displaces all state causes of action. Cf. Franchise Tax Bd., 463 U.S. at 23, 103 S.Ct. 2841 (explaining that the preemptive effect of LMRA § 301 "is so powerful as to displace entirely any state cause of action").

Further, the Palmer case on which Amazon repeatedly relies is clear that OSHA does not preempt claims under New York Labor Law § 200 even defensively. See Palmer v. Amazon.com, Inc., 498 F.Supp.3d 359, 364–65 (E.D.N.Y. 2020). In Palmer, the district court reasoned that Congress "reserv[ed] for state regulation those issues not governed by a federal standard" and found that Amazon's alleged failure to implement adequate COVID-19 protocols in violation of New York Labor Law § 200 "does not conflict with an existing federal standard." Id. at 372. The district court therefore held that it "[could] not find that plaintiffs' § 200 claim is preempted by the OSH Act." Id.

Similarly, the Supreme Court has declined to identify the NLRA (on which Amazon also relies) as one of the vanishingly few statutes that completely preempt state law claims. See Caterpillar, 482 U.S. at 398, 107 S.Ct. 2425 (observing that "[t]he fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted under the NLRA does not establish that they are removable to federal court"). While Congress indeed delegated to the National Labor Relations Board (NLRB) the authority to regulate labor policy and administration, Congress "has never exercised authority to occupy the entire field in the area of labor legislation." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). Accordingly, the NLRA does not completely preempt state law claims such that these claims arise under the laws of the United States. [1]

B. The Gunn-Grable Test

[15] "[F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." Gunn, 568 U.S. at 258, 133 S.Ct. 1059; accord Grable, 545 U.S. at 308, 125 S.Ct. 2363; NASDAQ OMX Grp. v. UBS Sec., LLC, 770 F.3d 1010, 1020 (2d Cir. 2014) (applying the "Gunn-Grable test"). There is no federal jurisdiction under the test articulated in Grable and Gunn.

1. A federal issue is not necessarily raised.

***7 [16]** A federal issue is not "necessarily raised" when it "becomes relevant only by way of a defense to an obligation created entirely by state law." Franchise Tax Bd., 463 U.S. at 13, 103 S.Ct. 2841; see also Tantaros v. Fox News Channel, LLC, 427 F. Supp. 3d 488, 494 (S.D.N.Y. 2019). The federal issue must be "an essential element" of the state law claim such that "the claim's very success depends on giving effect to a federal requirement." Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 578 U.S. 901, 136 S. Ct. 1562, 1570, 194 L.Ed.2d 671 (2016).

[17] Amazon has invoked defensive rather than "complete" preemption. Accordingly, the NRLA and OSHA preemption issues that Amazon discusses in its notice of removal are not necessarily raised but are rather "relevant only by way of a defense." Franchise Tax Bd., 463 U.S. at 13, 103 S.Ct. 2841.

Amazon also identifies as a potential federal issue whether CDC guidance is binding under the Administrative Procedure Act (APA). However, the meaning and effect of CDC guidance are not part and parcel of the relevant New York Labor Law claim. The State sues under New York Labor Law § 200, which requires employers "to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein." N.Y. Labor L. § 200. The State argues that CDC guidance can inform what constitutes "reasonable and adequate protection" and alleges that New York state guidance echoes the CDC's warnings and suggested protocols. But the state law claim does not rise and fall with the CDC guidance's binding effect. The CDC guidance may be purely advisory but nevertheless describe a minimum standard for protecting the health and safety of workers.

2. The federal issues are not substantial.

[18] **[19]** For a federal issue to be substantial, it must be important "to the federal system as a whole," implicating the federal interest in claiming the advantages of a federal forum. See Gunn, 568 U.S. at 260, 133 S.Ct. 1059. A purely legal question "is more likely to be a substantial federal question." Fracasse, 747 F.3d at 145. In Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 126 S.Ct. 2121, 165 L.Ed.2d 131 (2006), for instance, the Supreme Court distinguished Grable as presenting a "nearly pure issue of law," whereas the claim over which the Court found no subject matter jurisdiction was "fact-bound and situation-specific," and thus a state court would be "competent to apply federal law, to the extent it is relevant." Id. at 681, 126 S.Ct. 2121.

[20] An issue is not important to the federal system when a federal law is raised only as an indicator of reasonable conduct or public policy. For example, in Fracasse v. People's United Bank, two mortgage underwriters sued their former bank employer in state court for wrongful termination and breach of the covenant of good faith and fair dealing. 747 F.3d 141, 142 (2d Cir. 2014) (per curiam). Under Connecticut law, a wrongful termination claim requires the claimant to show that he or she was fired for "a reason whose impropriety is derived from some important violation of public policy." Id. at 143 n.1 (quoting Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 475, 427 A.2d 385 (1980)). In their complaint, the underwriters referred to the Fair Labor Standards Act (FLSA) as reflecting the important public policy that employees should not work more than 40 hours a week without being paid overtime. Id. at 143-44. In support of the cause of action for breach of the covenant of good faith and fair dealing, the underwriters also pleaded that the FLSA "provide[d] a basis for their reasonable expectations of defendant's contractual obligations." Id. at 144. The bank removed the action to federal court, arguing that the references to FLSA in the complaint warranted the exercise of federal jurisdiction. Id. at 143. The Second Circuit found no federal question jurisdiction, because the federal question was insubstantial. The case did not require interpretation of the FLSA, and the federal system's interest in the case was minimal, because employees continued to have "direct access to a federal forum to assert their rights under the FLSA." Id. at 145. Notably, the Second Circuit emphasized that "[n]either the federal government nor the federal system as a whole has a pressing interest in ensuring that a federal forum is available to defendants in state tort suits that include passing references to a federal statute cited only as an articulation of public policy." Fracasse, 747 F.3d at 145. Such suits do not present a substantial question of federal law, because the employees whom FLSA was designed to protect have direct access to federal forums to assert their rights under the statute. Id.

***8** **[21]** This case is akin to Fracasse. The Complaint refers to federal standards as part of a passing articulation of what reasonable safety measures entail. This Court is not required to interpret OSHA, the NLRA, or the interaction between the CDC guidance and the APA in order to resolve the state labor law claims. Rather, the Court is asked to determine whether it is reasonable to require businesses to implement certain cleaning procedures and ventilation standards, establish contact-tracing programs, enforce social distancing, and allot additional time for handwashing in order to protect the health and safety of their employees. Further, the alleged victims in this case have recourse to federal courts, as well as agencies like the NLRB, to vindicate their rights if they so choose. Finally, whether CDC guidance suggests that Amazon's workplace safety measures were unreasonable under New York Labor Law § 200 is "fact-bound and situation specific." These four characteristics indicate that any federal issues raised in the Complaint are not substantial.

3. The preemption issues are not capable of resolution in federal court without disrupting the federal-state balance.

[22] As discussed above with respect to complete preemption, Congress has already approved a balance where state labor and workplace safety laws coexist with federal standards. Congress has not indicated that state courts are inappropriate forums to resolve such issues by completely preempting them. Since courts should not "lightly read [a] statute to alter the usual constitutional balance, as it would by sending actions with all state-law claims to federal court just because a complaint references a federal duty," this Court finds that there is no federal jurisdiction. See Merrill Lynch, Pierce, Fenner & Smith, Inc., 136 S. Ct. at 1574.

III. The Mirror Image rule

[23] **[24]** **[25]** Finally, there is no federal question jurisdiction over the state law claims as declaratory relief. The declaratory judgment statute "does not expand the jurisdiction of the federal courts." Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671, 70 S.Ct. 876, 94 L.Ed. 1194 (1950). Instead, a federal court has original jurisdiction over an action

seeking declaratory relief where the declaratory judgment defendant's "threatened action" or the suit actually filed by the declaratory judgment defendant present a federal question. W. 14th St. Com. Corp. v. 5 West 14th Owners Corp., 815 F.2d 188, 194 (2d Cir. 1987). Courts evaluate whether subject matter jurisdiction exists over suits for declaratory relief by rearranging the parties into "the hypothetical 'mirror image' coercive suit." Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading Inc., 697 F.3d 59, 66 (2d Cir. 2012).

[26] Amazon filed a declaratory judgment action against the New York Attorney General in the Eastern District of New York on February 12, 2021, seeking to enjoin state regulation on COVID-19 workplace safety issues on preemption grounds. Amazon argues that the instant lawsuit, which commenced five days after the E.D.N.Y. action and seeks an order that Amazon has violated New York labor laws, is "an attempt by the State to have Amazon's affirmative federal claims decided through declaratory relief in state court, which establishes federal question jurisdiction." See Am. Notice of Removal, ECF No. 13, at 19-21. Put another way, Amazon styles the instant case as an action seeking a declaratory judgment that Amazon's declaratory judgment action cannot succeed. Amazon then urges the Court to rearrange this suit into its mirror image, such that Amazon's preemption defense becomes the affirmative basis for suit.

This hall of mirrors does not lead to Amazon's desired result. First, the Complaint actually filed by New York in state court does not devote a single sentence to preemption. The Complaint instead seeks a declaration that Amazon violated New York Labor Law §§ 200, 215, and 740. The Complaint does not seek a judgment on the preemptive effect of any federal law -- and if Amazon did not raise the issue, no such judgment would issue. Thus, the hypothetical coercive suit that mirrors this one would be a suit in which Amazon seeks a declaration that it did not violate Labor Law §§ 200, 215, and 740.

***9** **[27]** Second, even if the Complaint did specifically seek a declaration that state law was not preempted, such that the Eastern District of New York declaratory judgment action would be the Complaint's mirror image, this would not suffice. When "the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the district court." Pub. Serv. Commn. of Utah v. Wycoff Co., Inc., 344 U.S. 237, 248, 73 S.Ct. 236, 97 L.Ed. 291 (1952); see also Fleet Bank, N.A. v. Burke, 160 F.3d 883, 886 (2d Cir. 1998). Thus, even in the mirror image Amazon asks the Court to conjure, there is no federal question jurisdiction, because the threatened action is governed by state law.

Finally, Amazon's argument proves too much. By Amazon's logic, a defendant with a federal defense can always maneuver its way into federal court, despite the Supreme Court's repeated insistence that a federal issue must appear on the face of the complaint. The clever defendant need only (1) construe the complaint as seeking a declaration that the defendant is liable under a state law and (2) argue that the complaint was filed in anticipation of a suit by defendant seeking a declaratory judgment that a federal defense precludes liability. This is but an end-run around the well-established contours of arise-under jurisdiction. The Supreme Court has been plain that "a federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts ... that a federal defense the defendant may raise is not sufficient to defeat the claim." Franchise Tax Bd., 463 U.S. at 10, 103 S.Ct. 2841. Amazon does not make a persuasive case for overturning that longstanding rule.

Accordingly, the Court has determined that there is no jurisdiction over the Attorney General's declaratory relief claims.

CONCLUSION

For the foregoing reasons, the Court by order dated April 9, 2021 (ECF No. 35) granted the Attorney General's motion to remand and denied Amazon's motion to transfer as moot.

SO ORDERED.

All Citations

--- F.Supp.3d ----, 2021 WL 3140051

Footnotes

1 Amazon correctly points out that, in certain cases, the NLRB should determine whether a company has instituted unfair labor practices in the first instance. See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) (holding that the NLRB has exclusive original jurisdiction over claims of unfair labor practices under sections 7 and 8 of the NLRA, the collective bargaining and employee coercion provisions). But "defendants may not remove state claims to federal court by alleging Garmon preemption." Sullivan, 424 F.3d at 277. Even if Garmon were to apply here, this case would belong neither in federal court nor in state court, but before the NLRB. See, e.g., TKO Fleet Enterprises, Inc. v. Dist. 15, Int'l Ass'n of Machinists & Aerospace Workers, AFL--CIO, 72 F. Supp. 2d 83, 87 (E.D.N.Y. 1999).

In the

United States Court of Appeals

For the Seventh Circuit

No. 21-2326

RYAN KLAASSEN, *et al.*,

Plaintiffs-Appellants,

v.

TRUSTEES OF INDIANA UNIVERSITY,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Indiana, Fort Wayne Division.
No. 1:21-CV-238 DRL — **Damon R. Leichty**, *Judge*.

DECIDED AUGUST 2, 2021

Before EASTERBROOK, SCUDDER, and KIRSCH, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Starting next semester, all students at Indiana University must be vaccinated against COVID-19 unless they are exempt for religious or medical reasons. Exempt students must wear masks and be tested for the disease twice a week. Eight students contend in this suit that these conditions of attendance violate the Due Process Clause of the Constitution's Fourteenth Amendment. The district court denied plaintiffs' request for a preliminary

injunction, 2021 U.S. Dist. LEXIS 133300 (N.D. Ind. July 18, 2021), and they ask us to issue an injunction pending appeal.

Given *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2. Plaintiffs assert that the rational-basis standard used in *Jacobson* does not offer enough protection for their interests and that courts should not be as deferential to the decisions of public bodies as *Jacobson* was, but a court of appeals must apply the law established by the Supreme Court.

Plaintiffs invoke substantive due process. Under *Washington v. Glucksberg*, 521 U.S. 702, 720–22 (1997), and other decisions, such an argument depends on the existence of a fundamental right ingrained in the American legal tradition. Yet *Jacobson*, which sustained a criminal conviction for refusing to be vaccinated, shows that plaintiffs lack such a right. To the contrary, vaccination requirements, like other public-health measures, have been common in this nation.

And this case is easier than *Jacobson* for the University, for two reasons.

First, *Jacobson* sustained a vaccination requirement that lacked exceptions for adults. See 197 U.S. at 30. But Indiana University has exceptions for persons who declare vaccination incompatible with their religious beliefs and persons for whom vaccination is medically contraindicated. The problems that may arise when a state refuses to make accommodations therefore are not present in this case. Indeed, six of the eight plaintiffs have claimed the religious exception, and a seventh is eligible for it. These plaintiffs just need to wear

masks and be tested, requirements that are not constitutionally problematic. (The eighth plaintiff does not qualify for an exemption, which is why we have a justiciable controversy.)

Second, Indiana does not require every adult member of the public to be vaccinated, as Massachusetts did in *Jacobson*. Vaccination is instead a condition of attending Indiana University. People who do not want to be vaccinated may go elsewhere. Many universities require vaccination against SARS-CoV-2, but many others do not. Plaintiffs have ample educational opportunities.

Each university may decide what is necessary to keep other students safe in a congregate setting. Health exams and vaccinations against other diseases (measles, mumps, rubella, diphtheria, tetanus, pertussis, varicella, meningitis, influenza, and more) are common requirements of higher education. Vaccination protects not only the vaccinated persons but also those who come in contact with them, and at a university close contact is inevitable.

We assume with plaintiffs that they have a right in bodily integrity. They also have a right to hold property. Yet they or their parents must surrender property to attend Indiana University. Undergraduates must part with at least $11,000 a year (in-state tuition), even though Indiana could not summarily confiscate that sum from all residents of college age.

Other conditions of enrollment are normal and proper. The First Amendment means that a state cannot tell anyone what to read or write, but a state university may demand that students read things they prefer not to read and write things they prefer not to write. A student must read what a professor assigns, even if the student deems the books heretical, and

must write exams or essays as required. See, e.g., *Fleischfresser v. Directors of School District 200*, 15 F.3d 680, 687 (7th Cir. 1994); *Wood v. Arnold*, 915 F.3d 308 (4th Cir. 2019); *Smith v. Board of School Commissioners*, 827 F.2d 684 (11th Cir. 1987). A student told to analyze the role of nihilism in Dostoevsky's *The Possessed* but who submits an essay about Iago's motivations in *Othello* will flunk.

If conditions of higher education may include surrendering property and following instructions about what to read and write, it is hard to see a greater problem with medical conditions that help all students remain safe when learning. A university will have trouble operating when each student fears that everyone else may be spreading disease. Few people want to return to remote education—and we do not think that the Constitution forces the distance-learning approach on a university that believes vaccination (or masks and frequent testing of the unvaccinated) will make in-person operations safe enough.

The motion for an injunction pending appeal is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

TODD ZYWICKI,

Plaintiff,

v.

GREGORY G. WASHINGTON, *et al.*,

Defendants.

HON. ANTHONY J. TRENGA, U.S.D.J.
HON. MICHAEL S. NACHMANOFF, U.S.M.J.

Civil Action No.
1:21-cv-00894-AJT-MSN

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A), Plaintiff hereby gives this notice of his dismissal without prejudice of his Complaint filed on August 3, 2021. (Dkt. #1). No prior dismissal based on the same claim has occurred. *See id.* 41(a)(1)(B). Nor have Defendants served an answer or a motion for summary judgment on Plaintiff. *See id.* 41(a)(1)(A)(i).

Pursuant to Rule 41(a)(1)(A)(i), no court order is required for this Notice of Dismissal Without Prejudice to become effective.

Dated: August 20, 2021

Respectfully Submitted,

/s/ Matthew Hardin
Matthew D. Hardin (VSB #87482)
HARDIN LAW OFFICE
1725 I Street NW, Suite 300
Washington, DC 20006
Telephone: 202-802-1948
Email: HardinLawPLLC@icloud.com

/s/ Jenin Younes
Jenin Younes
Attorney for Plaintiff
Litigation Counsel
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street NW, Suite 450
Washington, DC 20036
Telephone: (202) 869-5210
Facsimile: (202) 869-5238
jenin.younes@ncla.legal
Pro hac vice
* Admitted only in New York. DC practice limited to matters and proceedings before United States courts and agencies. Practicing under members of the District of Columbia Bar.

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2021, I electronically filed the foregoing Notice of Dismissal with the Clerk of the Court using the CM/ECF system, which will send electronic notification of such filing to all counsel of record.

/s/ *Matthew Hardin*

MATTHEW HARDIN (VSB #87482)

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

Jennifer Bridges, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
versus	§	Civil Action H-21-1774
	§	
Houston Methodist Hospital, *et al.*,	§	
	§	
Defendants.	§	

Order on Dismissal

1. *Background.*

On April 1, 2021, Houston Methodist Hospital announced a policy requiring employees be vaccinated against COVID-19 by June 7, 2021, starting with the leadership and then inoculating the remaining workers, all at its expense.

Jennifer Bridges and 116 other employees sued to block the injection requirement and the terminations. She argued that Methodist is unlawfully forcing its employees to be injected with one of the currently-available vaccines or be fired. The hospital has moved to dismiss this case.

2. *Wrongful Termination.*

Bridges dedicates the bulk of her pleadings to arguing that the currently-available COVID-19 vaccines are experimental and dangerous. This claim is false, and it is also irrelevant. Bridges argues that, if she is fired for refusing to be injected with a vaccine, she will be wrongfully terminated. Vaccine safety and efficacy are not considered in adjudicating this issue.

Texas law only protects employees from being terminated for refusing to commit an act carrying criminal penalties to the worker.[1] To succeed on a wrongful termination claim, Bridges must show that (a) she was required to

[1] *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985).

commit an illegal act – one carrying criminal penalties, (b) she refused to engage in the illegality, (c) she was discharged, and (d) the only reason for the discharge was the refusal to commit an unlawful act.[2]

Bridges does not specify what illegal act she has refused to perform, but in the press-release style of the complaint, she says that she refuses to be a "human guinea pig." Receiving a COVID-19 vaccination is not an illegal act, and it carries no criminal penalties. She is refusing to accept inoculation that, in the hospital's judgment, will make it safer for their workers and the patients in Methodist's care.

Bridges also argues that the injection requirement violates public policy. Texas does not recognize this exception to at-will employment, and if it did, the injection requirement is consistent with public policy. The Supreme Court has held that (a) involuntary quarantine for contagious diseases and (b) state-imposed requirements of mandatory vaccination do not violate due process.[3]

On May 28, 2021, the Equal Employment Opportunity Commission said that employers can require employees be vaccinated against COVID-19 subject to reasonable accommodations for employees with disabilities or sincerely held religious beliefs that preclude vaccination. This is not binding, but it is advice about the position one is likely to meet at the Commission.

Her wrongful termination claim fails.

3. *Public Policy.*

Bridges also asks this court to declare that the injection requirement is invalid because it violates federal law. She says that no one can be mandated to receive "unapproved" medicines in emergencies, and she insists that no currently-available vaccines have been fully approved by the Food and Drug

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[2] *Id.*

[3] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (the state's compulsory vaccination law did not violate the Fourteenth Amendment); *Compagnie Francoise De Navigation a Vapeur v. Bd. of Health of State of La.*, 186 U.S. 380 (1902) (Louisiana law requiring involuntary quarantine during a yellow fever outbreak was a reasonable exercise of state police power).

Administration.[4]

Federal law authorizes the Secretary of Health and Human Services to introduce into interstate commerce medical products intended for use in an emergency.[5] It also requires the Secretary to ensure product recipients understand the "potential benefits and risks of use" and "the option to accept or refuse administration of the product."[6]

Bridges has misconstrued this provision. It confers certain powers and responsibilities to the Secretary of Health and Human Services in an emergency. It neither expands nor restricts the responsibilities of private employers; in fact, it does not apply at all to private employers like the hospital in this case. It does not confer a private opportunity to sue the government, employer, or worker. Bridges's claim that the injection requirement violates 21 U.S.C. § 360bbb-3 fails.

She also argues that injection requirement violates federal law governing the protection of "human subjects." She says that the injection requirement is forcing its employees to participate in a human trial because no currently-available vaccine has been fully approved by the Food and Drug Administration. Federal law requires participants give legal, effective, and informed consent before participating in a human trial; this consent cannot be obtained through coercion or undue influence.[7] Bridges says the threat of termination violates the law.[8]

Bridges has again misconstrued this provision, and she has now also misrepresented the facts. The hospital's employees are not participants in a human trial. They are licensed doctors, nurses, medical technicians, and staff members. The hospital has not applied to test the COVID-19 vaccines on its

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[4] 21 U.S.C. § 360bbb-3.

[5] *Id.*

[6] *Id.*

[7] 45 C.F.R. § 46.116.

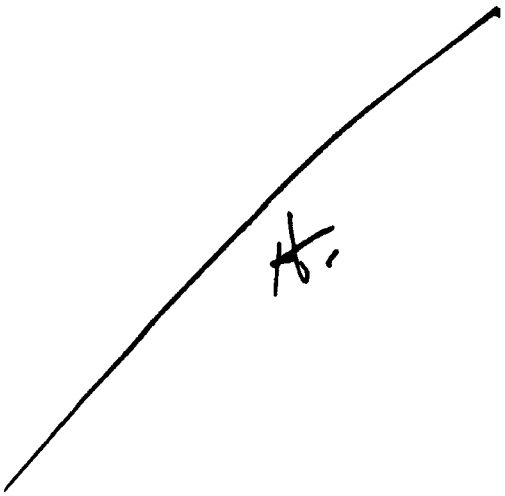
[8] *Id.*

employees, it has not been approved by an institutional review board, and it has not been certified to proceed with clinical trials. Bridges's claim that the injection requirement violates 45 C.F.R. § 46.116 also fails.

She also says that the injection requirement is invalid because it violates the Nuremberg Code, and she likens the threat of termination in this case to forced medical experimentation during the Holocaust. The Nuremberg Code does not apply because Methodist is a private employer, not a government. Equating the injection requirement to medical experimentation in concentration camps is reprehensible. Nazi doctors conducted medical experiments on victims that caused pain, mutilation, permanent disability, and in many cases, death.

Although her claims fail as a matter of law, it is also necessary to clarify that Bridges has not been coerced. Bridges says that she is being forced to be injected with a vaccine or be fired. This is not coercion. Methodist is trying to do their business of saving lives without giving them the COVID-19 virus. It is a choice made to keep staff, patients, and their families safer. Bridges can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else.

If a worker refuses an assignment, changed office, earlier start time, or other directive, he may be properly fired. Every employment includes limits on the worker's behavior in exchange for his remuneration. That is all part of the bargain.



4. *Conclusion.*

Jennifer Bridges and the balance of the plaintiffs will take nothing from Houston Methodist Hospital and Houston Methodist The Woodlands Hospital.

Signed on June 12, 2021, at Houston, Texas.

Lynn N. Hughes
United States District Judge

2021 WL 1400891
Only the Westlaw citation is currently available.
United States District Court, D. Maryland.

BEL AIR AUTO AUCTION, INC., Plaintiff,
v.
GREAT NORTHERN INSURANCE COMPANY, Defendant.

Civil Action No. RDB-20-2892
|
Signed 04/14/2021

Synopsis

Background: Insured operator of vehicle auction facility brought state action against commercial property insurer, seeking declaratory judgment that coverage existed under business interruption provisions for losses caused as a result of COVID-19 pandemic. Following removal, insured filed motion for summary judgment and motion to certify questions of law to Maryland Court of Appeals, and insurer filed motion for judgment on the pleadings.

Holdings: The District Court, Richard D. Bennett, J., held that:

[1] district court would not certify question of law to Court of Appeals of Maryland regarding whether "direct physical loss or damage" in insurance policy included detrimental or harmful loss of use of tangible property;

[2] insured failed to allege that COVID-19 contaminated property;

[3] insured was not entitled to coverage under civil authority provision; and

[4] insured was not entitled to coverage under business income with extra expense provision.

Insured's motions denied; insurer's motion granted.

Procedural Posture(s): Motion for Summary Judgment; Motion to Certify Question; Motion for Judgment on the Pleadings; Motion for Declaratory Judgment.

West Headnotes (21)

[1] Federal Civil Procedure

When considering a motion for judgment on the pleadings, a court may take judicial notice of a public document, without converting the motion into one for summary judgment. Fed R. Civ. P. 12(c), 56.

[2] Insurance

Under Maryland law, in the specific context of a claim for breach of an insurance policy, the insured bears the burden of proving every fact essential to his or her right to recovery, ordinarily by a preponderance of the evidence.

[3] Insurance

Under Maryland law, if the insured meets its burden to prove every fact essential to his or her right to recovery, and the insurer has relied upon a policy exclusion to deny coverage, the insurer bears the burden of proving that the exclusion applies.

[4] Federal Civil Procedure

Legal standard governing motion for judgment on the pleadings is the same as a motion to dismiss for failure to state a claim. Fed. R. Civ. P. 12(b)(6), 12(c).

[5] Federal Civil Procedure

Purpose of motion to dismiss for failure to state a claim is to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses. Fed. R. Civ. P. 12(b)(6).

[6] Insurance

Under Maryland law, courts follow the general rules of contract construction in the interpretation of an insurance contract.

[7] Insurance

Under Maryland law, if no ambiguity in the terms of the insurance contract exists, a court has no alternative but to enforce those terms.

[8] Insurance

Under Maryland law, when interpreting an insurance policy's terms, court is instructed to interpret such policy as a whole, according words their usual, everyday sense, giving force to the intent of the parties, preventing absurd results, and effectuating clear language.

[9] Insurance

Under Maryland law, the test for the usual, everyday sense of an insurance policy is what meaning a reasonably prudent layperson would attach to the term.

[10] Insurance

Under Maryland law, words in an insurance contract are only considered ambiguous if they reasonably can be understood to have more than one meaning.

[11] Insurance

Under Maryland law, court should give effect to each clause of an insurance policy so that a court will not find an interpretation which casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed.

[12] Insurance

Under Maryland law, where a plaintiff asserts entitlement to coverage under an insurance policy, that party bears the burden of proving coverage under the policy.

[13] Courts

The decision to certify a question to the Court of Appeals of Maryland is not obligatory and rests in the sound discretion of the federal court. Md. Code Ann., Cts. & Jud. Proc. § 12-603.

[14] Courts

District court would not certify question of law to Court of Appeals of Maryland regarding whether "direct physical loss or damage" in insurance policy included detrimental or harmful loss of use of tangible property, in insured's action against commercial property insurer, seeking declaratory judgment that coverage existed under business interruption provisions for losses caused as a result of COVID-19 pandemic, although Maryland courts had not directly opined on meaning of "direct physical loss or damage" to property in context of commercial property policy; straightforward application of Maryland contract law could resolve all remaining issues in case. Md. Code Ann., Cts. & Jud. Proc. § 12-603.

[15] Courts

In exercising its discretion to certify question to state court, federal courts may decide not to certify question to state court where federal court can reach reasoned and principled conclusion.

[16] Courts

Only if available state law is clearly insufficient should federal court certify issue to state court; when this guidance is available, federal court should decide case before it rather than staying and prolonging proceedings.

[17] Courts

When federal court is satisfied that it is able to anticipate the way in which the Maryland Court of Appeals would rule, certification is not necessary. Md. Code Ann., Cts. & Jud. Proc. § 12-603.

[18] Insurance

Under Maryland law, insured operator of vehicle auction facility failed to allege that COVID-19 physically damaged its property, as required for coverage under business interruption provisions of commercial property policy; complaint alleged that aerosolized respiratory droplets could remain on surface and contaminate any person coming into contract with that surface but did not specifically allege that insured property or surrounding property was in fact contaminated by virus.

[19] Insurance

Under Maryland law, even if insured operator of vehicle auction facility had clearly alleged contamination of property, insured was not entitled to coverage under civil authority provision of commercial property policy for losses due to stay at home orders during COVID-19 pandemic; civil authority provision explicitly required that claimed loss be attributable to "the prohibition of access to" covered premises or dependent business premises by civil authority, and stay at home orders issued by governor and county executive did not actually prohibit insured's use of its facilities.

[20] Insurance

Under Maryland law, even if insured operator of vehicle auction facility had clearly alleged contamination of property, insured was not entitled to coverage under business income with extra expense provision of commercial property policy for losses due to COVID-19 pandemic; insured had not had to repair or replace its property due to pandemic, and argument that surfaces at premises needed to be cleaned could not qualify as "restoration."

[21] Insurance

Mere loss of use of property is not "physical damage" within the meaning of Maryland insurance law.

Attorneys and Law Firms

Lawrence J. Gebhardt, Gebhardt and Smith LLP, Baltimore, MD, for Plaintiff.

Gabriela Richeimer, Clyde & Co. US LLP, Washington, DC, Daren McNally, Pro Hac Vice, Clyde and Co. US LLP, Florham Park, NJ, Matthew Addison Dent Draper, Clyde & Co. US LLP, Atlanta, GA, for Defendant.

MEMORANDUM OPINION

Richard D. Bennett, United States District Judge

***1** In August of 2020, Plaintiff Bel Air Auto Auction, Inc. ("Bel Air" or "Plaintiff") filed suit against Defendant Great Northern Insurance Company [1] ("Great Northern" or "Defendant"), seeking a declaratory judgment that coverage exists under the business interruption provisions in a property insurance policy issued by Great Northern to Bel Air. (ECF No. 1-2.) The now operative Amended Complaint specifically alleges that Bel Air's policy with Great Northern provides coverage for losses caused as a direct and sole result of the Pandemic. (ECF No. 4.) It is alleged that the presence of SARS-Cov-2 and its potential for causing COVID-19, as well as the State of Maryland and Harford County's governmental orders have impaired, diminished, and decreased Bel Air's business and operations. (*Id.* ¶ 22.) The suit was originally filed in the Circuit Court for Harford County, Maryland and was removed to this Court pursuant to 28 U.S.C. §§ 1332, 1441, and 1446 by Defendant Great Northern on October 7, 2020. (ECF No. 1.)

On January 7, 2021, Plaintiff Bel Air filed a Motion for Summary Judgment (ECF No. 18) in which it asserts that there are no genuine facts in dispute and that the only issues left to resolve are issues of Maryland contract law as applied

to insurance policies. (*See* ECF No. 18-9 at 1.) That same day, the Plaintiff also filed a Motion to Certify Questions of Law to the Maryland Court of Appeals (ECF No. 19). That motion notes that Maryland courts have not directly addressed those questions which remain in dispute and asserts that available Maryland law is presently both insufficient and unsettled in addressing such legal issues in the context of the COVID-19 Pandemic. (ECF No. 19 ¶ 6.) On February 17, 2021, Defendant Great Northern filed a Motion for Judgment on the Pleadings (ECF No. 26). The parties' submissions have been reviewed, and no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2018). For the reasons that follow, the Plaintiff Bel Air's Motion for Summary Judgment (ECF No. 18) and Motion for Other Relief to Certify Questions of Law to the Maryland Court of Appeals (ECF No. 19) are DENIED. The Defendant Great Northern's Motion for Judgment on the Pleadings (ECF No. 26) is GRANTED.

BACKGROUND

Plaintiff Bel Air is a Maryland corporation with its headquarters in Harford County, Maryland. (ECF No. 4 ¶ 2.) It occupies and operates a vehicle auction facility located at 4805 Philadelphia Road, Belcamp, Maryland, as well as other locations. (ECF No. 4 ¶ 19.) Bel Air alleges that the company typically processes over 100,000 vehicles per year through consignments from new and used car dealers, private business fleets, and fleets from public service and government agencies. (*Id.* ¶ 20.) Bel Air offers weekly auto auctions, including repossessed car auctions, government auctions, salvage auctions, and wholesale auctions and provides a wide range of auto-related services, including floor planning, storage, transportation, internet sales, full vehicle reconditioning and certification, and sales of donated vehicles for charitable organizations. (*Id.*) Before the COVID-19 Pandemic, Bel Air ran ten "lanes" of vehicles at its auctions in which prospective buyers could view the cars during "in-lane bidding." (*Id.* ¶ 20.) Bel Air's services also included "online bidding from anywhere." (*Id.* ¶ 21.)

***2** Bel Air purchased from the Chubb Group of Insurance a policy for property and liability insurance issued on October 18, 2019 by Defendant Great Northern, a corporation organized under the laws of Indiana with its principal place of business in Whitehouse Station, New Jersey. (*Id.* ¶ 29; ECF No. 1 ¶ 3.) The purchased policy, with policy number 3601-95-62 BAL (the "Policy"), was effective for the period from October 1, 2019 to October 1, 2020. (*Id.*; *see* Ex. 1, ECF No. 18-1.)

[1] On March 5, 2020, Maryland Governor Lawrence Hogan issued a proclamation which declared a state of emergency due to the spread of SARS-Cov-2, the virus causing the COVID-19 disease. (ECF No. 4 ¶ 16.) The Governor issued several other executive orders and proclamations throughout March of 2020 prohibiting large gatherings, canceling events, and closing the use and occupancy of restaurants, bars, and fitness centers to the general public. (*Id.*) However, Interpretive Guidance issued on March 23, 2020 made clear that "[a]uto and truck dealerships" were permitted to remain open as essential businesses. *See* Interpretive Guidance COVID 19-05 (Mar. 23, 2020). [2] According to the Defendant, Bel Air's website stated that, consistent with that Guidance, it would remain open throughout the Pandemic. (*See* ECF No. 27 at 7-8 (citing Richeimer Decl. ¶ 6, ECF No. 27-1).) On March 30, 2020, Governor Hogan issued a "stay at home" order, which ordered all persons in the State of Maryland to "stay in their homes or places of residence" except "to conduct or participate in Essential Activities" (defined in the order), and closing "Non-Essential Businesses" except for "Minimal Operations," which included allowing the presence of staff and owners to perform essential administrative functions. *See* Order of the Governor of the State of Maryland, Number 20-03-30-01 (Mar. 30, 2020). On March 18, 2020, Barry Glassman, the Harford County Executive, issued Executive Order 20-01 declaring a state of emergency due to the COVID-19 Pandemic and placing Harford County in line with the orders and proclamations issued by Governor Hogan. *See* Executive Order 20-01 (Mar. 18, 2020).

Nevertheless, according to Bel Air, as a direct and sole result of the presence of SARS-Cov-2 and its potential for causing COVID-19 and the orders of both Governor Hogan and Executive Glassman, Bel Air's business and operations were, and continue to be, impaired, diminished, and decreased. (*Id.* ¶ 22.) "All in-person, in-lane, live bidding has been forced to cease," and the company has had to conduct sales by "remote Simulcast" because it "has lost the full, unfettered use of its facility." (*Id.* ¶ 23.) Bel Air alleges that the food services it previously offered have been forced to close, and various restrictions inside the facility have been imposed, such as requiring visitors to wear masks and installing signage and safe distancing reminders, COVID-screens, and plexiglass dividers. (*Id.* ¶ 25.) As the Plaintiff explains, "[a]lthough the SARS-Cov-2 and Covid-19 and the State and local governmental orders have not resulted in a

structural alteration or physical change to its premises," they have "caused direct physical loss or damage in the form of a loss of full use." (*Id.* ¶ 28.) The Plaintiff alleges that such loss of full use "has directly resulted in an actual and substantial impairment of operations, including loss of business income and an increase in business expense." (*Id.*) Bel Air asserts that such loss is recoverable under its policy with Great Northern.

***3** Bel Air seeks coverage for its losses under various sections of the Policy. The "Premises Coverages" section of the Policy states that the insurer will "pay for direct physical loss or damage to" building or personal property "caused by or resulting from a peril not otherwise excluded." (*Id.* ¶ 33; *see also* Ex. 1 at 000035, ECF No. 18-1.) The Policy does not define "direct physical loss" or "damage." The Policy does, however, define "property damage" as:

- physical injury to tangible property, including resulting loss or use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the occurrence that caused it.

(Ex. 1 at 000179, ECF No. 18-1.)

The Policy also contains business interruption coverage predicated upon on the loss of use of the subject property. For example, the "Business Income with Extra Expense" section provides coverage for "business income loss" incurred "due to the actual impairment of [ ] operations" and "extra expense" incurred "due to the actual or potential impairment of [ ] operations" incurred "during the period of restoration." (*Id.* at 000064.) However, for this section to apply, there must be "direct physical loss or damage" that must "be caused by or result from a covered peril," and must have "occur[ed] at, or within 1,000 feet of, the premises, other than a dependent business premises, shown the in Declarations." (*Id.*) "Covered peril" is defined as "peril covered by the Form(s) shown in the Property Insurance Schedule Forms ... applicable to the lost or damaged property." (*Id.* at 000115.) The "period of restoration" is defined as the period "immediately after the time of direct physical loss or damage by a covered peril to property" and continuing until operations are restored with reasonable speed, including the time required to "repair and replace the property." (*Id.* at 000124.)

The "Civil Authority" section of the Policy also provides coverage for business interruption, but specifically covers such loss incurred "due to the actual impairment" of operations and "extra expense" incurred, "directly caused by the prohibition of access to: your premises; or a dependent business premises, by a civil authority." (*Id.* at 000067.) "This prohibition of access by a civil authority," the Policy states, "must be the direct result of direct physical loss or damage to property away from such premises or such dependent business premises by a covered peril," and applies if the property is within one mile or another pre-identified distance from the premises or the dependent business premises, "whichever is greater." (*Id.*)

Finally, the Policy includes certain exclusions. The "Acts Or Decisions" exclusion applicable to the Business Income and Extra Expense coverage and the Civil Authority coverage provides that the insurance "does not apply to loss or damage caused by or resulting from acts or decisions, including the failure to act or decide, of any person, group, organization or government body." (*Id.* at 000088.) It continues, providing that the Acts Or Decisions exclusion "does not apply to ensuing loss or damage caused by or resulting from a peril not otherwise excluded." (*Id.*) The Policy does not include a specific, explicit exclusion for damage caused by a virus. On July 6, 2006, the Insurance Services Office [3] (commonly referred to as the "ISO") published for the benefit of the insurance industry a new endorsement for property insurance policies designated CP 01 40 07 06 – "Exclusion Of Loss Due To Virus Or Bacteria," which states that there is no coverage for loss or damage caused by or resulting from any "virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (Answer ¶ 39, ECF No. 14.) An exclusion of this nature is not included in the subject Policy in this case. (*See* ECF No. 18-1.)

***4** As a result of purported impairment of its business and operations and extra expenses allegedly incurred due to the spread of SARS-Cov-2, Bel Air filed a claim for business interruption and extra expense insurance coverage with Defendant Great Northern. (Answer ¶ 47, ECF No. 14.) Great Northern denied the claim for business interruption insurance coverage on May 27, 2020, and provided several reasons for this denial. (*See* Ex. 4, ECF No. 18-4.) The Defendant asserted that SARS-Cov-2 and COVID-19 have not resulted in direct physical loss or damage to the building or personal property of the Plaintiff and that the Civil Authority coverage income portion of the policy did not apply because (1) the civil authorities did not totally prohibit all

access to the premises given that employees were permitted access the property, and (2) there was no physical loss or damage to a premises away from but within one mile of the insured premises because there was no evidence of an order from a civil authority issued due to structural or other alteration to any such property. (*Id.*) The Defendant also asserted that the Acts Or Decision exclusion in the Policy would apply and bar coverage for losses based on the acts or decision of any person, group, organization, or government body, there being no ensuing loss or damage caused by or resulting from a peril not otherwise excluded. (*Id.*)

Bel Air filed the presently pending suit in October of 2020 seeking a declaratory judgment that coverage exists under the business interruption provisions in the Policy. (ECF No. 1-2.) The suit was originally filed in the Circuit Court for Harford County, Maryland and was removed to this Court pursuant to 28 U.S.C. §§ 1332, 1441, and 1446 by Defendant Great Northern on October 7, 2020. (ECF No. 1.) The now operative Amended Complaint seeks an order stating that business interruption and extra expense coverage exists under the Policy for Bel Air's losses due to the loss of use of the insured premises caused by the SARS-Cov-2 virus and COVID-19 disease and the State and local government orders, and that the Acts Or Decisions exclusion does not apply. (ECF No. 4 at p. 20-21.)

On January 7, 2021, Plaintiff Bel Air filed a Motion for Summary Judgment (ECF No. 18) as well as a Motion for Other Relief to Certify Questions of Law to the Maryland Court of Appeals (ECF No. 19). In its Motion for Summary Judgment, Bel Air asserts that summary judgment in its favor is appropriate because the Policy provides coverage for its losses arising from the COVID-19 Pandemic's contamination of its facility and governmental orders issued in response to the Pandemic. (ECF No. 18-9 at 1.) The Plaintiff contends that the material facts in this case are not in dispute, and that the only issues in dispute are legal issues of Maryland contract law as applied to insurance policies. (*Id.*) According to the Plaintiff, three issues of law are in dispute:

1. Whether coverage under the Business Income with Extra Expense provision providing coverage for "direct physical loss or damage" requires a structural change to or physical alteration of the insured premises, or whether a loss of use of the insured premises due to contamination suffices for coverage to exist;

2. Whether all access has to be completely prohibited for the Civil Authority section to apply; and

3. Whether the Acts Or Decisions exclusion has any application to the question of coverage in the Business Income With Extra Expense portion of the Policy.

(*Id.* at 1-2.) The Plaintiff moved for certification to the Maryland Court of Appeals on these legal questions under Md. Code Ann., Cts. & Jud. Proc. § 12-603, and noted that it understood the Court may defer ruling on its Motion for Summary Judgment if it granted such motion for certification. (*Id.* at 2 n.1.)

On February 17, 2021, the Defendant Great Northern filed a Motion for Judgment on the Pleadings pursuant to Rule 12(c) (ECF No. 26), in which it argues that the Plaintiff's Motion for Summary Judgment should be denied and requests that this Court award judgment in its favor because the presence or absence of a virus is irrelevant under the clear language of the Policy. (*See* ECF No. 27.) According to the Defendant, more than 100 courts have acknowledged the distinction between actual, physical loss or damage and the partial loss of use and diminished business income associated with the COVID-19 Pandemic and resulting "stay at home" orders. (*Id.* at 1.) The Defendant contends that applying basic rules of statutory construction, these courts have held that the terms "direct" and "physical" modify both "loss" and "damage" and ensure that policies are limited to tangible, physical losses to property, or, at the very least, permanent dispossession of property rendered unfit or uninhabitable by physical forces. (*Id.*) Such decisions, the Defendant asserts, "fully comport" with Maryland law, and, therefore, no certification is necessary.

STANDARD OF REVIEW

A. Motion for Summary Judgment

***5** Rule 56 of the Federal Rules of Civil Procedure provides that a court "shall grant 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(c). A material fact is one that "might affect the outcome of the suit under the governing law." *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). A genuine issue over a material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. When considering a motion for summary judgment, a

judge's function is limited to determining whether sufficient evidence exists on a claimed factual dispute to warrant submission of the matter to a jury for resolution at trial. *Id.* at 249, 106 S.Ct. 2505. In undertaking this inquiry, this Court must consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Libertarian Party of Va.*, 718 F.3d at 312; *see also Scott v. Harris*, 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

[2] **[3]** In the specific context of a "claim for breach of an insurance policy, 'the insured bears the burden of proving every fact essential to his or her right to recovery, ordinarily by a preponderance of the evidence.' " *See Jowite Ltd. P'ship v. Federal Ins. Co.*, No. DLB-18-2413, 2020 WL 4748544, at *5 (D. Md. Aug. 17, 2020) (quoting *Gen. Ins. Co. v. Walter E. Campbell Co.*, 241 F. Supp. 3d 578, 597 (D. Md. 2017) (citing *N. Am. Acc. Ins. Co. v. Plummer*, 167 Md. 670, 176 A. 466, 469 (1935), *aff'd sub nom. Gen Ins. Co. v. United States Fire Ins. Co.*, 886 F.3d 346 (4th Cir. 2018), as amended (Mar. 28, 2018))). "If the insured meets its burden and the 'insurer [has] relie[d] upon a policy exclusion to deny coverage, the insurer bears the burden of proving that the exclusion applies.' " *Id.* (quoting *Ellicott City Cable, LLC v. Axis Ins. Co.*, 196 F. Supp. 3d 577, 584 (D. Md. 2016) (citing *Finci v. Am. Cas. Co.*, 323 Md. 358, 593 A.2d 1069, 1087 (1991))).

B. Motion for Judgment on the Pleadings

[4] **[5]** Rule 12(c) of the Federal Rules of Civil Procedure authorizes a party to move for judgment on the pleadings any time after the pleadings are closed, as long as it is early enough not to delay trial. [4] *See* Fed. R. Civ. P. 12(c). The legal standard governing such a motion is the same as a motion to dismiss under Rule 12(b)(6). *See, e.g.*, *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999); *Booker v. Peterson Cos.*, 412 F. App'x 615, 616 (4th Cir. 2011); *Economides v. Gay*, 155 F. Supp. 2d 485, 488 (D. Md. 2001). Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, 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). Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes the dismissal of a complaint if it fails to state a claim upon which relief can be granted. The purpose of Rule 12(b)(6) is "to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006).

In determining whether dismissal is appropriate, this Court assumes as true all well-pleaded facts in the plaintiff's complaint but does not accept the plaintiff's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009). A complaint must be dismissed if it does not allege "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); *see also Simmons v. United Mort. & Loan Inv., LLC*, 634 F.3d 754, 768 (4th Cir. 2011); *Andrew v. Clark*, 561 F.3d 261, 266 (4th Cir. 2009). In making this assessment, a court must "draw on its judicial experience and common sense" to determine whether the pleader has stated a plausible claim for relief. *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937.

ANALYSIS

***6** **[6]** **[7]** As the basis of this Court's jurisdiction lies in diversity of citizenship, under 28 U.S.C. § 1332(a), Maryland law applies. *Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.*, 736 F.3d 255, 261 n.3 (4th Cir. 2013) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)). Under Maryland law, courts follow the general rules of contract construction in the interpretation of an insurance contract. *See Cheney v Bell Nat'l Life Ins. Co.*, 315 Md. 761, 556 A.2d 1135, 1138 (1998); *Pacific Indem. Co. v. Interstate Fire & Cas. Co.*, 302 Md. 383, 488 A.2d 486, 488 (1985). Additionally, "Maryland does not follow the rule, adopted in many jurisdictions, that an insurance policy is to be construed most strongly against the insurer." *Id.* As such, principles of contract law govern the property insurance policy at issue, and the rights and obligations of the parties are determined by the terms of that contract. *Columbia Town Ctr. Title Co. v. 100 Inv. Ltd. P'ship.*, 203 Md.App. 61, 36 A.3d 985, 1005 (2012). "[I]f no ambiguity in the terms of the insurance contract exists, a court has no alternative but to enforce those terms." *Dutta v. State Farm Ins. Co.*, 363 Md. 540, 769 A.2d 948, 957 (2001) (citing *Kendall v. Nationwide Ins. Co.*, 348 Md. 157, 702 A.2d 767, 773 (1997)).

[8] **[9]** **[10]** **[11]** When interpreting an insurance policy's terms, this Court is instructed to interpret such policy "as a whole, according words their usual, everyday sense, giving force to the intent of the parties, preventing absurd results, and effectuating clear language." *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 495 (4th Cir. 1998). The test for that "usual, everyday sense," is "what meaning a reasonably

prudent layperson would attach to the term." *See Pacific Indem.*, 488 A.2d at 488. Words in a contract are only considered ambiguous if "they reasonably can be understood to have more than one meaning." *Nationwide Mut. Ins. Co. v. Regency Furniture, Inc.*, 183 Md.App. 710, 963 A.2d 253, 260 (2009) (internal citation omitted). This Court should give effect to each clause "so that a court will not find an interpretation which casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed." *Muhammad v. Prince George's Cty. Bd. of Educ.*, 246 Md.App. 349, 228 A.3d 1170, 1179 (2020) (internal citation omitted), *cert. denied*, 471 Md. 81, 238 A.3d 273 (2020).

[12] Where a plaintiff asserts entitlement to coverage under an insurance policy, that party bears the burden of proving coverage under the policy. *See Prop. & Cas. Ins. Guar. Corp. v. Beebe-Lee*, 431 Md. 474, 66 A.3d 615, 624 (2013). Therefore, to prevail on its claim for coverage in this case, Plaintiff Bel Air has the burden to show a covered loss under the terms of the Policy. As explained above, the Plaintiff seeks coverage under the Premises Coverage (Ex. 1 at 000035, ECF No. 18-1), Business Income with Extra Expense (*id.* at 000064), and the Civil Authority subcoverage (*id.* at 000067) portions of the Policy. Each of these sections requires that there be a "direct physical loss or damage" to property—either to the covered property itself, or surrounding property identified by the Civil Authority provision. Bel Air claims that "direct physical loss or damage" includes not only detrimental and harmful structural changes or alterations to a property, but also includes "a detrimental or harmful loss of *use* of that tangible property." (ECF No. 18-9 at 16 (emphasis added).) Bel Air seeks certification of a question related to this issue of state law to the Court of Appeals of Maryland. (ECF No. 19 ¶ 3.)

[13] **[14]** Although Maryland courts have not directly opined on the meaning of "direct physical loss or damage" to property in the context of a commercial property insurance policy, this Court is not required to certify questions of law to the state court as the Plaintiff requests because a straightforward application of Maryland contract law detailed above can resolve all remaining issues in this case. This Court may certify a question of law to the Court of Appeals of Maryland "if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling [Maryland] appellate decision, constitutional provision, or statute ...." *See* Maryland Uniform Certification of Questions of Law Act, Md. Code Ann., Cts. & Jud. Proc. § 12-603. However, as this Court noted in *Marshall v. James B. Nutter & Co.*, "it is well established that the decision to certify a question to the Court of Appeals of Maryland is not obligatory and 'rests in the sound discretion of the federal court.' " No. RDB-10-3596, 2013 WL 3353475, at *7 (D. Md. July 2, 2013), *aff'd*, 758 F.3d 537 (4th Cir. 2014) (quoting *Hafford v. Equity One, Inc.*, No. AW-07-1633, 2008 WL 906015, at *4 (D. Md. Mar. 31, 2008) (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 391, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974))); *see also Boyter v. Comm'r of Internal Revenue Serv.*, 668 F.2d 1382, 1385 (4th Cir. 1981) ("Certainly we have discretion as to whether to employ the Maryland certification procedure.").

***7** **[15]** **[16]** **[17]** In exercising such discretion, federal courts may decide not to certify a question to a state court where the federal court can reach a "reasoned and principled conclusion." *Hafford*, 2008 WL 906015, at *4. As the U.S. Court of Appeals for the Fourth Circuit instructs, "[o]nly if the available state law is clearly insufficient should the court certify the issue to the state court." *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994) (citing *Smith v. FCX, Inc.*, 744 F.2d 1378, 1379 (4th Cir. 1984), *cert. denied*, 471 U.S. 1103, 105 S.Ct. 2330, 85 L.Ed.2d 848 (1985)). "When this guidance is available the federal court should decide the case before it rather than staying and prolonging the proceedings." *Arrington v. Coleen, Inc.*, No. AMD-00-191, AMD-00-421, and AMD-00-1374, 2001 WL 34117735, at *5 (D. Md. Mar. 29, 2001). When the Court is satisfied that it is "able to anticipate the way in which the Maryland Court of Appeals would rule," certification is not necessary. *See Bethany Boardwalk Grp. LLC v. Everest Security Ins. Co.*, —— F. Supp. 3d ——, —— n.6, 2020 WL 1063060, at *11 n.6 (D. Md. Mar. 5, 2020). As the following discussion will explain, under the straightforward application of Maryland contract law as applied to insurance policies, Plaintiff Bel Air does not have a claim to coverage under the plain language of its commercial property insurance policy with Defendant Great Northern, and no certification is necessary. There is sufficient guidance from Maryland state courts, this Court, and other federal district courts applying the same basic principles of contract law to almost identical insurance policy provisions to guide this Court's analysis. [5]

A. "Direct physical loss or damage" to property does not include loss of use unrelated to tangible, physical damage.

Applying basic principles of Maryland contract law, this Court has interpreted the words "physical" and "damage" in the context of a commercial general liability insurance policy. *See M Consulting & Export, LLC v. Travelers Cas. Ins. Co. of America*, 2 F. Supp. 3d 730, 735-737 (D. Md. 2014). In that case, the policy provided coverage for property damage, defined as "[p]hysical injury to tangible property, including all resulting loss of use of that property" and "[l]oss of use of tangible property that is not physically injured." *Id.* at 735-36. The plaintiff argued that conversion of the property, a form of a "loss of use" claim, qualified as "physical loss" to tangible property. *Id.* at 736. This Court found such claim was unsupported by any applicable case law and stated that the term "physical damage" was "in no way ambiguous." *Id.* Looking to the definitions of "physical" and "physical harm" as provided in the Merriam-Webster Online Dictionary and Black's Law Dictionary, this Court held that "inclusion of the term 'physical' clearly indicates that the damage must *affect the good itself*, rather than the Plaintiff's *use* of the good." *Id.* (emphasis added) (citing Merriam-Webster Online Dictionary (defining "physical" as "having a material existence," "perceptible especially through the senses and subject to the laws of nature," or "of or relating to material things") and Black's Law Dictionary (8th ed.) (defining "physical harm" as "[a]ny physical impairment of land, chattels, or the human body.")).

***8** The Maryland Court of Appeals has in one context found a loss of use to constitute a form of "damage to property" in a case applying the Maryland uninsured motorist statute. *See Berry v. Queen*, 469 Md. 674, 233 A.3d 42 (2020). The Court held that the statute, which mandated coverage for "damage to property," required automobile insurers to pay for a car rental while an insured's physically damaged vehicle was being repaired. *Id.* at 48. The court found that the ordinary meaning of "damage" necessarily included a "loss of something" and that "loss of property" could include circumstances in which "the lawful owner is deprived of the ability to apply the object in a manner he or she desires—i.e., a loss of use." *Id.* at 51. However, the context of *Berry* still involved physical harm or injury to property. As the Defendant aptly notes, "[t]he Court of Appeals was not asked to hold, nor did it hold ... that a policyholder could make an uninsured motorist claim for rental car coverage every time it suffered a 'loss of use' of a vehicle untethered to physical damage to that vehicle." (ECF No. 30 at 9.)

Further, the language of the uninsured motorist statute did not include the modifier "physical." Numerous courts have found that the phrase "direct physical loss or damage" to property, commonly used in property insurance policies, is unambiguous and have specifically held that the modifier "direct physical" applies to both "loss" and "damage." *See, e.g.*, *AFLAC, Inc. v. Chubb & Sons, Inc.*, 260 Ga.App. 306, 581 S.E.2d 317, 319 (2003); *Ward Gen. Ins. Servs., Inc. v. Emp'rs Fire Ins. Co.*, 114 Cal.App.4th 548, 7 Cal. Rptr. 3d 844, 849 (2003); *Phila. Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 287-88 (S.D.N.Y. 2005). Accordingly, such courts have held that the phrase "direct physical loss or damage" to property expressly limits coverage to tangible, physical changes to insured property. *Id.* For example, in *AFLAC, Inc.*, the court was unable to find any state precedent directly "construing the term of insurance 'direct physical loss or damage,' " but found that "the common meaning of the words and the policies as a whole, indicate that it contemplates an actual change in insured property ... causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." 581 S.E.2d at 319 (citing *Trinity Indus. v. Ins. Co. of North America*, 916 F.2d 267, 271 (5th Cir. 1990), *Wolstein v. Yorkshire Ins. Co.*, 97 Wash.App. 201, 985 P.2d 400 (1999), and *North American Shipbldg., Inc. v. Southern Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829, 833 (Tex. App. 1996)).

Numerous courts have had the opportunity to directly address the meaning of identical "direct physical loss or damage" language in commercial property insurance policies in the context of a plaintiff claiming loss of use due to the COVID-19 Pandemic and stay at home orders. Those courts have overwhelming held that the phrase requires tangible, physical losses to property, or, at the very least, permanent dispossession of the property rendered unfit or uninhabitable by physical forces, rejecting plaintiffs' claims for coverage in the context of COVID-19 through the application of the same basic principles of contract law that this Court must apply under Maryland law. *See, e.g.*, *Bluegrass Oral Health Ctr. v. Cincinnati Ins. Co.*, No. 1:20-CV-00120-GNS, 2021 WL 1069038, at *4 (W.D. Ky. Mar. 18, 2021) (finding that "the great weight of decisions recently considering" the issue of the meaning of "direct physical loss or damage" in "the midst of the current pandemic have reached the same conclusion" that the phrase requires some physical damage, rather than mere loss of use). [6]

***9** In *1 S.A.N.T. Inc. v. Berkshire Hathaway, Inc.*, the plaintiff, an operator of a restaurant and tavern business, claimed that it had incurred and was continuing to incur substantial loss of business income and other expenses due

to state orders closing all "non-life sustaining businesses," which included 1 S.A.N.T., a restaurant property covered by a property insurance policy. —— F. Supp. 3d ——, ——, 2021 WL 147139, at *1 (W.D. Pa. Jan. 15, 2021). The plaintiff was denied coverage under that policy because it did not sustain "direct physical loss or damage to a Covered Property." *Id.* The plaintiff filed suit against its insurer, contending the policy should cover its claim because it could not use the property for its intended purpose during the Pandemic and, therefore, had suffered "direct physical loss or damage" to such property. *Id.* The court held that the plain meaning of the phrase "direct physical loss or damage" to property could not support the plaintiff's claim. *Id.* at ——, 2021 WL 147139 at *5. As the court explained, the words " 'loss' and 'damage' do not stand alone but are modified by the terms 'direct physical.' " *Id.* Just as under Maryland law, the state law at issue required the court to "give effect to all the terms in the context of the Policy language." *Id.* According to the court, the presence of both "direct" and "physical" meant "there [was] no reasonable question that the Policy language presupposes that the request for coverage stems from an actual impact to the property's structure, rather than the diminution of its economic value because of governmental actions that do not affect the structure." *Id.* The court granted the defendant-insurer's motion to dismiss in this context of a restaurant property where the plaintiff, unlike Bel Air, did not concede that customers still had access to the premises.

Similarly, in *Chief of Staff, LLC v. Hiscox Ins. Co. Inc.*, the court granted a motion to dismiss in a case where the plaintiff, a hospitality support agency, sought to recover its loss of income caused by a governor's COVID-19-related orders under a commercial property insurance policy issued by the defendant pursuant to the "Business Income," "Excess Expense," and "Civil Authority" provisions of the applicable policy. No. 20-C-3169, —— F.Supp.3d ——, —— – ——, 2021 WL 1208969, at *1-*2 (N.D. Ill. Mar. 31, 2021). As in the case at hand, the policy at issue limited the applicability of "Business Income" and "Excess Expense" provisions to the "direct physical loss of or damage to property at the described premises." *Id.* at ——, 2021 WL 1208969 at *2. The court, as others, turned to the plain meaning of the words in the policy and held that " 'physical loss' refers to a deprivation caused by a tangible or concrete change in or to the thing that is lost.' " *Id.* The plaintiff's complaint alleged loss of the use of its property due to the governor's closure orders, but without any allegation of a tangible or concrete change in or to the property, the court held that the plaintiff had failed to state a claim for relief under either the business income or excess expense provisions. *Id.*

The Civil Authority provision in that case included language almost identical to the one at hand, and the court held that such provision failed to provide coverage for the same reasons as the other business interruption provisions. As the court explained, the Civil Authority section provided coverage for actual loss of business income and excess expenses "caused by action of civil authority that prohibits access to the described premises" when a "Covered Cause of Loss causes damage to property other than property at the described premise." *Id.* at ——, 2021 WL 1208969 at *5. The section was limited to those cases in which (1) "[a]ccess to the area immediately surrounding the damaged property [was] prohibited by civil authority as a result of the damage," and the premises was within a mile of the damaged property; and (2) the civil action 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." *Id.* The court held there could not be coverage under this section because the "other property," like the premises covered by the policy, had not suffered the type of physical damage the plain language of the policy required. *Id.* As the court explained, a "Civil Authority provision requires that the 'other property' have suffered 'damage,' and the complaint does not allege, nor does [the plaintiff] argue, that the closure orders were due to some property within one mile of the [plaintiff's] premises having been damaged by the coronavirus." *Id.* at ——, 2021 WL 1208969 at *6. The court noted that "[i]n holding that the Civil Authority provision does not provide coverage to [the plaintiff], this Court joins the many other courts to have interpreted materially identical provisions in the same manner." *Id.* (citing *Bluegrass Oral Health Ctr.*, 2021 WL 1069038, at *4.) [7]

***10** Bel Air asserts that despite the clear language of the Policy, Great Northern "intended" to provide coverage for losses related to the COVID-19 Pandemic because it did not include an express virus exclusion. (ECF No. 18-9 at 19.) Bel Air is not entitled to coverage in contravention to the plain meaning of "direct physical loss or damage" to property under the Premises Coverage, Business Income with Extra Expense, or the Civil Authority provisions of the Policy simply because of this alleged omission. It is true, as noted above, that the Insurance Services Office ("ISO") form endorsement entitled "Exclusion Of Loss Due to Virus Or

Bacteria" was promulgated in 2006 in response to a previous SARS outbreak. (*Id.*) The Plaintiff contends that "[t]he ISO published this form exclusion in response to the SARS pandemic and in recognition that virus contagion was at least potentially covered under the standard property policy." (*Id.*) The Plaintiff argues that when Great Northern elected not to include a similar virus exclusion in its property policies, it signaled that it did want to provide virus-related coverage. (*Id.*) This argument is without merit. As the court noted in *Bluegrass Oral Health*, it is "elementary" that " 'an exclusion cannot grant coverage.' " *See* 2021 WL 1069038, at *4 (citing *Kemper Nat'l Ins. Cos. v. Heaven Hill Distilleries, Inc.*, 82 S.W.3d 869, 873 (Ky. 2002)). Omission of an exclusion does not alter the plain language of the provisions under which the Plaintiff seeks coverage, and such provisions simply do not provide coverage for a loss of use unrelated to physical, structural, tangible damage to property.

B. "Contamination" by the COVID-19 virus does not constitute "direct physical loss or damage" to property.

[18] In an attempt to distinguish itself from other plaintiffs who have failed to assert claims for loss of use due to the COVID-19 Pandemic, Bel Air asserts a new argument in its Motion for Summary Judgment. (ECF No. 18; Memorandum in Support, ECF No. 18-9.) Bel Air claims that COVID-19 did in fact physically "damage" its property, as well as surrounding properties, by "contaminating" the property with the virus. (ECF No. 18-9 at 11-29.) This argument fails for several reasons.

First, this Court notes that Plaintiff Bel Air did not allege that COVID-19 "contaminated" its covered property or other surrounding property in the Amended Complaint. (*See* ECF No. 4.) In granting the defendant's motion to dismiss in *Bluegrass Oral Health*, the court noted the plaintiff's omission of any allegations that the relevant property was actually contaminated by the virus was relevant to its decision. 2021 WL 1069038, at *4. In this case, the Amended Complaint alleges that aerosolized respiratory droplets can remain on a surface and contaminate any person coming into contract with that surface, but Bel Air does not specifically allege that its property or surrounding property was in fact contaminated by the virus. (*Id.* ¶ 10.) The Plaintiff in fact concedes that "the SARS-Cov-2 and Covid-19 and the State and local governmental orders *have not resulted in a structural alteration or physical change* to its premises." (*Id.* ¶ 28 (emphasis added).) Given that the standard of review for a motion for judgment on the pleadings is the same as a motion to dismiss, *Edwards*, 178 F.3d at 243, the Plaintiff's allegations, and omitted allegations, are relevant in ruling on the Defendant's motion.

[19] Nevertheless, even if the Plaintiff had clearly alleged contamination of its property, the argument still fails. First, the Plaintiff cannot prevail under the Civil Authority section of the Policy because, as it concedes, the stay at home orders issued by the Governor and County Executive did not actually prohibit Bel Air's use of its facilities. Bel Air asserts that its operations were, and continue to be, "impaired, diminished, and decreased," but it admits that visitors may still access its facilities. (*Id.* ¶ 22-25.) As Bel Air alleges, visitors are required to wear face masks and practice social distancing, but the Amended Complaint does not allege that Bel Air employees or, its customers, ever completely lost use of its facilities. (*Id.*) Additionally, as noted above, Interpretive Guidance issued on March 23, 2020 made clear that "[a]uto and truck dealerships" were permitted to remain open as essential businesses. *See* Interpretive Guidance COVID 19-05 (Mar. 23, 2020). Unlike restaurants, bars, and fitness centers shuttered by the Governor's stay at home order, Bel Air was never required to completely cease its operations. This is significant. The Civil Authority section explicitly requires that the claimed loss be attributable to "the prohibition of access to" the covered premises or a dependent business premises, by a civil authority. (ECF No. 18-1 at 000067.) In granting a motion to dismiss in *Skillets, LLC v. Colony Ins. Co.*, the court noted that COVID-19 did not cause "physical damage" to property at or near the plaintiff's premises and that "[t]he closure orders restricted the services [the plaintiff] could provide to customers, but '[m]erely restricting access ... does not trigger coverage under [a] Civil Authority provision.' " No. 3:20cv678-HEH, 2021 WL 926211, at *7 (E.D. Va. Mar. 10, 2021) (quoting *Raymond H Nahmad DDS PA v. Hartford Casualty Ins. Co.*, No. 1:20CV22833-BLOOM/Louis, —— F.Supp.3d ——, ——, 2020 WL 6392841, at *9 (S.D. Fla. Nov. 1, 2020)). As Great Northern notes, "if the presence of COVID-19 were actual 'contamination' ... then every place of business in the State and the country" would have a claim for "contamination," "including hospitals, grocery stores and other businesses where people continue to flock during the pandemic." (ECF No. 27 at 23.)

***11** **[20]** Second, Bel Air cannot recover for contamination under the Business Income with Extra Expense provision either. As noted above, Maryland law requires this Court to give effect to each clause of a contract such that "a court

will not find an interpretation which casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed." *Muhammad*, 228 A.3d at 1179 (internal citation omitted). The Business Income with Extra Expense section of the Policy provides coverage for "business income loss" incurred "due to the actual impairment of [ ] operations" and "extra expense" incurred "due to the actual or potential impairment of [ ] operations" incurred "*during the period of restoration.*" (Ex. 1 at 000064, ECF No. 18-1 (emphasis added).) The "period of restoration" is defined as the period "immediately after the time of direct physical loss or damage by a covered peril to property" and continuing until operations are restored with reasonable speed, including the time required to "repair and replace the property." (*Id.* at 000124.) In other words, coverage under this section of the Policy is triggered by physical loss or damage to the property, and the coverage period is defined by the "period of restoration," the time it takes to "repair and replace" the damaged property. *See Summit Hosp. Grp., Ltd. v. Cincinnati Ins. Co.*, No. 5:20-CV-254-BO, 2021 WL 831013, at *4 (E.D.N.C. Mar. 4, 2021); *see also Moody v. Fin. Grp., Inc.*, — F. Supp. 3d —, —, 2021 WL 135897, at *6 (E.D. Pa. Jan. 14, 2021) ("Built into coverage for business income, extra expense, or extended business income losses under the Policy, then, is the idea that there is something to repair, rebuild, or replace.").

In order for the period of restoration definition to have some effect in this case, Bel Air would seemingly need to argue that cleaning surfaces of a property constitutes repair or replacement. However, as the court held in *Moody*, contamination by the COVID-19 virus would not "render the property useless or uninhabitable or nearly eliminate or destroy its functionality," and "cleaning surfaces cannot reasonably be described as repairing, rebuilding, or replacing property." *Moody*, — F.Supp.3d at —, 2021 WL 135897, at *6. In doing so, the court in *Moody* relied on *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co.*, in which the U.S. Court of Appeals for the Third Circuit considered whether the presence of asbestos in a building constituted "direct physical loss or damage" to property under New Jersey law. 311 F.3d 226, 235 (3d Cir. 2002). The Court held that "[i]n ordinary parlance and widely accepted definition, physical damage to property means distinct, demonstrable, and physical alteration of its structure." *Id.* (quoting 10 *Couch on Ins.*, § 148:46 (3d ed. 1998)). The Court noted that damages not visible to the eye could qualify as this sort of alteration, but that such damage must "meet a higher threshold" and that asbestos could qualify as such damage "only if an actual release of asbestos fibers ... has resulted in contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable." *Id.* at 236. Particles of a virus are akin to asbestos, or are perhaps more similar to a layer of dust or debris, which courts have held is insufficient to establish physical damage or loss. *See Rococo Steak, LLC v. Aspen Specialty Ins. Co.*, — F. Supp. 3d —, —, 2021 WL 268478, at *4 (M.D. Fla. Jan. 27, 2021) (granting motion to dismiss, stating "[r]ather, like the coating of dust and debris in [*Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 879 (11th Cir. 2020)], the surfaces allegedly contaminated by COVID-19 seem to only require cleaning to fix.")

In sum, "[t]he virus does not threaten the structures covered by property insurance policies, and can be removed from surfaces with routine cleaning and disinfectant." *See Barbizon Sch. of San Francisco, Inc. v. Sentinel Ins. Co. LTD*, No. 20-cv-08578-TSH, — F.Supp.3d —, —, 2021 WL 1222161, at *9 (N.D. Cal. Mar. 31, 2021) (citing *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, — F. Supp. 3d —, — – —, 2020 WL 7078735, at *8-*9 (D. Kan. Dec. 3, 2020)). Plaintiff Bel Air has not had to repair or replace its property due to the Pandemic. Arguments that the surfaces at its premises needed to be cleaned cannot qualify as restoration, and "[t]o adopt plaintiff's reading, which would allow for intangible damage to trigger coverage, would render other sections of the provision ineffective, which is something the Court cannot do." *Summit Hosp. Grp.*, 2021 WL 831013, at *4 (citing *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 246 S.E.2d 773, 777 (1978) (relying on the same rule as under Maryland law that "every word and every provision [in the policy] is to be given effect")).

C. The Plaintiff cannot recover under the Policy for losses related to COVID-19.

***12** **[21]** Quite simply, this Court is unpersuaded that the COVID-19 virus in some way physically altered Bel Air's covered properties or the surrounding areas in a manner that triggers coverage under the plain language of the Policy. A mere loss of use of property is not "physical damage" within the meaning of Maryland law. *See M Consulting & Export, LLC*, 2 F. Supp. 3d at 735-737. Further, "even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property," as "routine cleaning ... eliminates the virus on surfaces," and there is simply "nothing for an insurer to cover" as required to invoke

coverage for loss of business income under the Policy.[8] *See Uncork and Create LLC v. Cincinnati Ins. Co.*, —— F. Supp. 3d ——, ——, 2020 WL 6436948, at *5 (S.D.W. Va. Nov. 2, 2020). To allow contamination of property to constitute a physical loss would render the "period of restoration" definition meaningless and would "ignore the reality" that businesses like Bel Air "have continued to operate during the pandemic." *Bluegrass, LLC v. State Auto. Mut. Ins. Co.*, No. 2:30-CV-00414, —— F.Supp.3d ——, ——, 2021 WL 42050, at *5 (S.D.W. Va. Jan. 5, 2021). As one court within the Fourth Circuit neatly summarized:

> In short, the pandemic impacts human health and human behavior, not physical structures. Those changes in behavior, including changes required by governmental action, caused the Plaintiff economic losses. The Court is not unsympathetic to the situation facing the Plaintiff and other businesses. But the unambiguous terms of the Policy do not provide coverage for solely economic losses unaccompanied by physical property damage.

Uncork and Create, —— F.Supp.3d at ——, 2020 WL 6436948, at *5. Having considered the allegations in the pleadings and briefs, this Court finds there is no genuine issue of material fact as to the Plaintiff Bel Air's claims, and this Court will grant the Defendant's Motion for Judgment on the Pleadings (ECF No. 26).

CONCLUSION

For these reasons, the Plaintiff Bel Air's Motion for Summary Judgment (ECF No. 18) is DENIED. The Plaintiff Bel Air's Motion for Other Relief to Certify Questions of Law to the Maryland Court of Appeals (ECF No. 19) is also DENIED. The Defendant Great Northern's Motion for Judgment on the Pleadings (ECF No. 26) is GRANTED. Judgment will be entered in favor of the Defendant.

A Separate Order follows.

All Citations

--- F.Supp.3d ----, 2021 WL 1400891

Footnotes

1 Plaintiff originally sued both Great Northern and its parent company, Chubb Limited. Chubb Limited was voluntarily dismissed from the suit prior to the removal of the case to this Court. (ECF No. 1-7.)

2 When considering a Rule 12(c) motion for judgment on the pleadings, a court may take judicial notice of a public document, without converting the motion into one for summary judgment. *See, e.g.*, *Armbruster Products, Inc. v. Wilson*, 35 F.3d 555 (Table), 1994 WL 489983, at *2 (4th Cir. 1994) ("The consideration of judicially noticed facts does not transform a motion for judgment on the pleadings into a motion for summary judgment."); *Ancient Coin Collection Guild v. U.S. Customs and Border Protection*, 801 F. Supp. 2d 383, 410 (D. Md. 2011); *Lefkoe v. Jos. A. Bank Clothiers*, No. WMN-06-1892, 2008 WL 7275126, at *3-4 (D. Md. May 13, 2008).

3 Insurance Services Office, Inc. is an insurance advisory organization that provides statistical and actuarial information to businesses. The company provides statistical, actuarial, underwriting, and claims information, as well as form policy language clients may adopt and use in their policies. *See* About ISO, https://www.verisk.com/insurance/brands/iso/ (last visited April 14, 2021).

4 Defendant filed an Answer (ECF No. 14) on November 4, 2020, prior to filing the Motion for Judgment on the Pleadings (ECF No. 26) on February 17, 2021. Trial has yet to be set in this matter.

5 Other federal district court addressing almost identical questions of state law under commercial property insurance policies have come to decisions without certification of such questions of law to state courts. Some courts have specifically denied motions for certification like the one filed in this case by Plaintiff Bel Air. *See Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, 497 F.Supp.3d 1203, 1209 (S.D. Ala. 2020) ("Indeed, the Court could find no Alabama decision addressing whether a temporary inability to use one's property for its intended purpose constituted a 'direct physical loss of property.' However, there is sufficient authority to guide the Court's decision on the meaning of that phrase.") *See also Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 495 F.Supp.3d 1289, 1297 (N.D. Ga. 2020); *Drama Camp Productions, Inc. v. Mt. Hawley Ins. Co.*, No. 1:20-CV-266-JB-MU, 2020 WL 8018579, at *4 (S.D. Ala. Dec. 30, 2020).

6 The court in *Bluegrass Oral Health* cited to numerous opinions of other courts. *See 10E, LLC v. Travelers Indemnity Co. of Connecticut*, 483 F. Supp. 3d 828, 836 (C.D. Cal. 2020); *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F.Supp.3d 353, 359 (W.D. Tex. 2020); *Rose's 1, LLC v. Erie Ins. Exch.*, No. 2020 CA 002424 B, 2020 WL 4589206, at *2 (D.C. Super. Ct. Aug. 6, 2020); *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, 484 F. Supp. 3d 492, 500 (E.D. Mich. 2020) (citing Merriam Webster's definition of "loss" to reject the interpretation of loss as, *inter alia*, loss of use); *Kirsch v. Aspen Am. Ins. Co.*, No. 20-11930, —— F.Supp.3d ——, ——, 2020 WL 7338570, at *5 (E.D. Mich. Dec. 14, 2020) (same); *Fam. Tacos, LLC v. Auto Owners Ins. Co.*, No. 5:20-CV-01922, —— F.Supp.3d ——, ——, 2021 WL 615307, at *5 (N.D. Ohio Feb. 17, 2021) (same); *Ceres Enters., LLC v. Travelers Ins. Co.*, No. 1:20-CV-1925, —— F.Supp.3d ——, ——, 2021 WL 634982, at *5 (N.D. Ohio Feb. 18, 2021) (same); *Dakota Girls, LLC v. Phila. Indem. Ins. Co.*, No. 2:20-CV-2035, —— F.Supp.3d ——, ——, 2021 WL 858489, at *6 (S.D. Ohio Mar. 8, 2021) (same).

7 *See also Kahn v. Pa. Nat'l Mut. Cas. Ins. Co.*, —— F. Supp. 3d ——, ——, 2021 WL 422607, at *8 (M.D. Pa. Feb. 8, 2021) ("Plaintiffs here do not allege any loss of or damage to another property caused by any 'covered cause of loss' that triggered an action of civil authority."); *O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co.*, —— F. Supp. 3d ——, ——, 2021 WL 105772, at *5 (N.D. Cal. Jan. 12, 2021) ("[I]t is apparent from the plain language of the cited civil authority orders that such directives were issued to stop the spread of COVID-19 and not as a result of any physical loss of or damage to property."); *Gerleman Mgmt., Inc. v. Atl. States Ins. Co.*, —— F. Supp. 3d ——, ——, 2020 WL 8093577, at *6 (S.D. Iowa Dec. 11, 2020) ("Plaintiffs have not alleged damage to another property."), *appeal docketed*, No. 21-1082 (8th Cir. Jan. 12, 2021);

8 This Court need not consider the applicability of the Acts Or Decision exclusion in this case, as there is no coverage under the plain language of the allegedly applicable provisions.

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United States District Court
Central District of California
Western Division

THE LOS ANGELES LAKERS, INC., Plaintiff, v. FEDERAL INSURANCE COMPANY, Defendant.	CV 21-02281 TJH (MRWx) Order JS-6

The Court has considered Defendant Federal Insurance Company's ["Federal"] motion to dismiss, together with the moving and opposing papers.

On March 15, 2021, Plaintiff The Los Angeles Lakers ["the Lakers"] filed this action against Federal, its insurer. The following facts are as alleged in the complaint.

In August, 2019, the Lakers purchased an all-risk commercial property insurance policy for the Staples Center from Federal ["the Policy"]. Based on the terms of the Policy, Federal was obligated to reimburse the Lakers for business income loss, along with extra expenses incurred, due to, *inter alia*: (1) Actual or potential impairment of [the Lakers's] operations caused by or resulting from direct physical loss or damage to the property ["Business Interruption Clause"]; or (2) Actual impairment of the Lakers's operations, directly caused by the prohibition of access to the property by a government

entity, provided that the prohibition of access by a civil authority must be the direct result of direct physical loss or damage to property away from, but within one mile of, the Lakers' covered property ["Civil Authority Clause"].

As early as December, 2019, COVID-19, a highly communicable virus, began spreading in Los Angeles. COVID-19 can be transmitted through aerosol droplets, which can be inhaled or land on nearby surfaces. Some studies have concluded that COVID-19 can be transmitted from physical surfaces.

In March, 2020, Lakers players, staff, and others – who were physically present at the Staples Center during the previous weeks – tested positive for COVID-19. Accordingly, COVID-19 was physically present in the Staples Center. Specifically, the Lakers alleged that "[t]he presence of [COVID-19] at the Staples Center damaged the property . . . [and] the damage caused by the presence of the virus at the Staples Center made it unsuable for hosting Lakers games with fans in attendance for months." "As a result, the Lakers suffered tens of millions of dollars in lost revenue."

Within a mile from the Staples Center are, *inter alia*, five Metro stations that fans utilize to get to the Staples Center. COVID-19 was, also, present and damaged those Metro stations.

State and local authorities called for the postponement or cancellation of all professional sporting events. For example, on April 1, 2020, Los Angeles Mayor Eric Garcetti revised his March 19, 2020, "Safer at Home" order to explain that "the COVID-19 virus can spread easily from person to person and it is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time."

Based on COVID-19, the Lakers submitted a claim for coverage under the Business Interruption and Civil Authority Clauses in the Policy. On May 14, 2020, Federal denied the claim. Subsequently, the Lakers initiated this action for declaratory judgment, breach of contract, and breach of the covenant of good faith and fair dealing.

Federal, now, moves to dismiss all of the Lakers's claims for failure to state a

claim.

While a complaint need not include detailed factual allegations for each element of each claim, it must contain enough facts to state a claim for relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). A plaintiff cannot simply restate the elements of its claim, but, rather, must allege enough facts to allow the Court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Further, the Court must accept all allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *See Iqbal*, 556 U.S. at 678. However, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 679.

The Lakers's claims are predicated on the premise that Federal improperly denied its claim. The parties agree, here, that whether Federal properly denied the Lakers' claim turns on whether the presence of COVID-19 at the Staples Center and the surrounding transportation stations constituted a "direct physical loss or damage to the property."

The Policy is a contract and, therefore, the ordinary rules of contractual interpretation apply. *See Palmer v. Truck Ins. Exchange*, 21 Cal. 4th 1109, 1115 (1999). When interpreting the Policy, the Court must give the Policy's terms their ordinary and popular meaning. *See Palmer*, 21 Cal. 4th at 115.

Under California law, "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." *See MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010). For there to be a "loss," the property must have been "damaged" within the common understanding of the that term. *MRI*, 187 Cal. App. 4th at 780.

The Lakers rely on, *inter alia*, the allegation that the presence of COVID-19 at

the Staples Center and the surrounding transportation stations "physically alters [that] property" and "damages [the] buildings, fixtures, systems, and personal property. . . all of which constitutes physical damage to and loss of the properties." However, the Lakers' allegations are merely legal conclusions couched as factual allegations. *See Iqbal*, 556 U.S. at 679. The Lakers failed to allege any facts to support its conclusion that the presence of COVID-19 constituted a "direct physical loss or damage". *See MRI*, 187 Cal. App. 4th at 780.

Thus, the Lakers failed to adequately state a claim for any of its claims. *See Iqbal*, 566 U.S. at 678.

Accordingly,

It is Ordered that the motion to dismiss be, and hereby is, **Granted** without prejudice.

Date: August 11, 2021

Terry J. Hatter, Jr.
Senior United States District Judge

2021 WL 1164836 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania.
Allegheny County

Timothy A. UNGAREAN, DMD d/b/a Smile Savers Dentistry, PC,
Individually and on Behalf of a Class of Similarly Situated Persons, Plaintiff,
v.
CNA and Valley Forge Insurance Company, Defendants.

No. GD-20-006544.
March 25, 2021.

*1 CIVIL DIVISION

Memorandum and Order of Court

John P. Goodrich, Esquire, Lauren R. Nichols, Esquire, 429 Fourth Ave., Suite 900 Pittsburgh, PA 15219, for plaintiff.

Scott B. Cooper, Esquire, 209 State Street, Harrisburg, PA 17101.

James C. Haggerty, Esquire, 1835 Market Street, Suite 2700 Philadelphia, PA 19103.

Jonathan Shub, Esquire, Kevin Laukaitis, Esquire, 134 Kings Highway East, 2nd Floor Haddonfield, NJ 08033.

Robert M. Runyon III, Esquire, Daniel J. Grossman, Esquire, 400 Maryland Drive, Fort Washington, PA 19034, for defendants.

William Pietragallo II, Esquire, One Oxford Centre, 38th Floor, Pittsburgh, PA 15219.

Christine Ward, Judge.

MEMORANDUM AND ORDER OF COURT

I. The Parties

Timothy A. Ungarean, DMD, d/b/a Smile Savers Dentistry, PC is a dentist who owns and operates a dental practice with places of business located at 4701 Baptist Road, Pittsburgh, Allegheny County, Pennsylvania, 15227 and 3153 Brodhead Road, Suite A, Aliquippa, Beaver County, Pennsylvania, 15001. Timothy A. Ungarean, DMD, is hereinafter referred to as "Ungarean" or "Plaintiff."

CNA is a property and casualty insurance company with a principal place of business at 151 North Franklin Street, Floor 9, Chicago, Illinois 60606. [1] Valley Forge Insurance Company is a wholly owned subsidiary company of CNA, and also provides property and casualty insurance. Both CNA and Valley Forge Insurance Company regularly and routinely conduct business in the Commonwealth of Pennsylvania. CNA and Valley Forge Insurance Company are hereinafter collectively referred to as "Defendants."

II. Introduction

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. [2] Unfortunately, since April 1, 2020, the number of positive cases and deaths from COVID-19 has increased dramatically. [3]

***2** As a result of the spread of COVID-19 and the Governor's orders, Plaintiff shutdown the majority of its business operations. For a time, Plaintiff's dental practice remained open only to perform emergency dental procedures. Not surprisingly, Plaintiff subsequently experienced a dramatic decrease in business income and furloughed some of its employees. Plaintiff thereafter submitted a claim for coverage under its business insurance policy ("the insurance contract") with Defendants. Defendants denied Plaintiff's claim.

On June 5, 2020, Plaintiff filed a complaint in the Court of Common Pleas of Allegheny County. In its complaint, Plaintiff asserted one count for declaratory judgment, by which it seeks this Court's determination as to whether Plaintiff is entitled to coverage under the insurance contract with Defendants for losses Plaintiff sustained in relation to the spread of COVID-19 and the Governor's orders. On October 5, 2020, Plaintiff filed a Motion for Summary Judgment. On December 2 and December 4, 2020, Defendants filed Cross Motions for Summary Judgment. On January 20, 2020, this Court heard oral argument on Plaintiff's Motion for Summary Judgment and Defendants' Cross Motions for Summary Judgment. For the reasons set forth herein, this Court grants Plaintiff's Motion for Summary Judgment and denies Defendants' Cross Motions for Summary Judgment.

III. The Contract Provisions

Plaintiff's and Defendants' dispute involves the following provisions regarding coverage under the insurance contract.

Business Income

a. Business Income means:

(1) Net Income (Net profit or Loss before Income taxes) that would have been earned or incurred, including:

a. "Rental Value;" and

b. "Maintenance Fees," if you are a condominium association; and

(2) Continuing normal operating expenses incurred, including payroll, subject to 90 day limitation if indicated on the Declaration page.

b. 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. [4]

Extra Expense

a. Extra Expense means reasonable and necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss.

***3** b. We will pay Extra Expense (other than the expense to repair or replace property) to:

(1) Avoid or minimize the "suspension" of business and to continue "operations" at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement premises or temporary locations; or

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

c. We will also pay Extra Expense (including Expediting Expenses) to repair or replace the property, but only to the extent it reduces the amount of loss that otherwise would have been payable under Paragraph 1. Business Income above.

Plaintiff's Complaint, at 58-59, Exhibit B (emphasis added).

Civil Authority

1. 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 an action of civil authority that prohibits access to the described premises. The civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises, caused by or resulting from a Covered Cause of Loss.

Id. at 84 (emphasis added).

Plaintiff's and Defendants' dispute also involves the following provisions regarding exclusions from coverage under the insurance contract:

Exclusions

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.

Ordinance or Law

(1) The enforcement of any ordinance or law:

(a) Regulating the construction, use or repair of any property; or

(b) Requiring the tearing down of any property, including the cost of removing debris.

(2) This exclusion applies whether the loss results from:

(a) An ordinance or law that is enforced even if the property has not been damaged; or

(b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition or property, or removal of its debris, following a physical loss to that property.

Contamination

Contamination by other than "pollutants." [5]

Consequential Loss

Delay, loss of use or loss of market.

Acts or Decisions

Acts or Decisions, including the failure to act or decide, of any person, group, organization or governmental body.

Id. at 38-42 (emphasis added).

Fungi, Wet Rot, Dry Rot and Microbes [6]

***4** *Id.* at 118-19 (emphasis added).

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, Defendants bear "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, Defendants 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 Business Income and Extra Expense provisions 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 Business Income and Extra Expense coverage, the insurance contract provides that:

> ***5** a. Business Income means: (1) [n]et income (Net Profit or Loss before Income taxes) that would have been earned or incurred … and (2) [c]ontinuing normal operating expenses incurred, including payroll, subject to 90 day limitation if indicated on the Declaration page.
>
> b. [the insurer] will pay for the actual loss of Business Income you [the insured] 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.

Plaintiff's Complaint, at 58, Exhibit B.

*****

a. Extra Expense means reasonable and necessary expenses you [the insured] incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss.

b. [the insurer] will pay Extra Expense (other than to repair or replace property) to: (1) [a]void or minimize the "suspension" of business and to continue "operations" at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement premises or temporary locations; or (2) [m]inimize the "suspension" of business if you cannot continue "operations."

c. [the insurer] will also pay any Extra Expense (including Expediting Expenses) to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable under [the above Business Income provision].

Id. at 59, Exhibit B.

The insurance contract defines "suspension" as the "partial or complete cessation of your [the insured's] business activities; or … that a part or all of the described premises is rendered untenantable," and "operations" means "the type of your [the insured's] business activities occurring at the described premises and tenantability of the described premises." *Id.* at 53-55, Exhibit B. The insurance contract defines "period of restoration" as:

> the period of time that: [b]egins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and … [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. at 53, Exhibit B. Additionally, "Covered Cause of Loss" is defined as "RISK OF DIRECT PHYSICAL LOSS unless the loss is: a. Excluded in Section B. Exclusions; b. Limited in paragraph A.4 Limitations; or c. Limited or Excluded by other provision of this Policy." *Id.* at 37, Exhibit B.

In order to state a reasonable claim for coverage under the Business Income and Extra Expense provisions 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. [7] Defendants contend 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.

***6** The insurance contract does not define the phrase "direct physical loss of or damage to property." 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 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 [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 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.

***7** 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 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. Thus, thehe spread of COVID-19 did not, as Defendant's contend, merely impose economic limitations. Any economic losses were secondary to the businesses' *physical* losses.

While Defendants are of course correct to point out that 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."

Defendants also contend that the insurance contract's definition for "period of restoration" suggests that the contract expressly contemplates and necessitates the existence of actual tangible damage in order for Plaintiff's to be entitled to Business Income and Extra Expense coverage. The insurance contract states that the insurer "will pay for the actual loss of Business Income [the insured] sustain[s] due to the necessary "suspension" of … "operations" during the "period of restoration." Plaintiff's Complaint at 58, Exhibit B. The "period of restoration" begins at the time the direct physical loss of or damage to property occurs and ends on the date when the premises "should be repaired, rebuilt, or replaced with reasonable speed and similar quality … or … when the business is resumed at a new location." *Id.* at 53, Exhibit B. Specifically, Defendants argue that, without actual tangible damage, there is no period of restoration because there is no need for the property to be repaired, rebuilt, or replaced, and Plaintiff has no plans to resume the business at a new location.

***8** Although this Court agrees with Defendants 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 definition for "period of restoration" 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 damage. Indeed, the threat of COVID-19 has necessitated many physical changes to business properties across the Commonwealth. Such changes include, but are not limited to, the installation of partitions, additional handwashing/sanitization stations, and the installations or renovation of ventilation systems. These changes would undoubtably constitute "repairs" or "rebuilding" of property. *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 Protection Insurance Litigation*,

Civil Case No. 1:20-CV-05965 at 23 (stating that the installation of partitions and particular ventilations systems constitute "repairs" consistent with the period of restoration). Additionally, in order to "replace" or "rebuild" unused space due to social distancing protocols, businesses might choose to buildout new spaces, move to larger spaces, or rearrange existing spaces in order to increase the amount of business they can safely handle during these difficult times.

Whether or not Plaintiff in the instant matter actually undertook such changes, or resumed its business at a new location, is of no moment. The "period of restoration" does not require repairs, rebuilding, replacement, or relocation of Plaintiff's property in order for Plaintiff to be entitled to coverage. The "period of restoration" merely imposes a time limit on available coverage, which ends whenever such measures, if undertaken, would have been completed with reasonable speed and similar quality. To put this another way, the "period of restoration" ends when Plaintiff's business is once again operating at normal capacity, or reasonably could be operating at normal capacity. The "period of restoration" does not somehow redefine or place further substantive limits on types of available coverage. Defendants cannot avoid providing coverage that is otherwise available simply because the end point with regard to the "period of restoration" may be, at times, slightly more difficult to pinpoint in the context of the COVID-19 pandemic.

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, Plaintiff reasonably established a right to coverage under the Business Income and Extra Expense provisions of the insurance contract. [17]

***9** 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:

> 1. When the Declarations show that [the insured has] coverage for Business Income and Extra Expense, [the insured] may extend that insurance to apply to the actual loss of Business Income [the insured] sustain[s] and reasonable and necessary Extra Expense [the insured] incur[s] caused by an action of civil authority that prohibits access to the described premises. The civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises, caused by or resulting from a Covered Cause of Loss.

Plaintiff's Complaint at 84, Exhibit B (emphasis added).

Thus, in order to state a reasonable claim of coverage under the Civil Authority provision of the insurance contract, Plaintiff must reasonably demonstrate both of the following: [1] there was "direct physical loss of or damage to property" other than Plaintiff's property; and [2] the "direct physical loss of or damage to property" other than Plaintiff's property caused civil authorities to take action(s) that prohibited access to Plaintiff's property.

Defendants contend that Plaintiff is not entitled to coverage under the Civil Authority provision of the contract because the Governor's orders did not completely prohibit Plaintiff from accessing its property. According to Defendants, although the Governor's orders closed Plaintiff's property to the majority of the general public, Plaintiff is nonetheless precluded from coverage under the Civil Authority provision of the insurance contract because Plaintiff and Plaintiff's employees were still able to access Plaintiff's property in order to conduct emergency procedures. Defendants also argue, just as they did with regard to the Business Income and Extra Expense coverage provisions, that any actions taken by civil authorities in response to COVID-19 were not caused by "direct physical loss of or damage to" property at any location. In contrast, Plaintiff contends that, because the Governor's orders prohibited Plaintiff from operating its business except in cases of emergency, and because the Governor's orders directed citizens of the Commonwealth to stay at home, the Governor's orders effectively prohibited meaningful access to Plaintiff's property. Additionally, Plaintiff argues that COVID-19 caused "direct physical loss of or damage to" property across the Commonwealth just as it did with regard to Plaintiff's property.

As to whether the spread of the COVID-19 virus caused "direct physical loss of or damage to" property, the same analysis that this Court applied with regard to Plaintiff's property also applies to other property as well. Even absent any damage to property, the spread of COVID-19 has resulted in a serious public health crisis, which has directly and physically caused the loss of use of property all across the Commonwealth. Again, this is evident because 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 in a safe and responsible manner. This Court's conclusion that other property was impacted by COVID-19 is supported by the Supreme Court of Pennsylvania. In *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 890 (Pa. 2020), our Supreme Court clarified that the COVID-19 virus qualifies as a natural disaster, and, given the nature of the manner in which COVID-19 spreads, Governor Wolf "had the authority under the Emergency Code to declare the entirety of the Commonwealth a disaster area." [18]

***10** With regard to whether "an action of civil authority … prohibit[ed] access" to Plaintiff's property, this Court determined that the phrase "prohibits access" may reasonably be interpreted to encompass the instant situation. The term "prohibit" is defined as "to forbid by authority [and/or] to prevent from doing something ...." [19] Here, the Governor's emergency orders did exactly that. The Governor's orders directed individuals to stay home and required businesses to essentially close their doors absent emergencies and/or the need to conduct life sustaining operations. Although Plaintiff's business (a dental practice) was technically permitted to remain open to conduct certain limited emergency procedures, this does not change the fact that an action of civil authority effectively prevented, or forbade by authority, citizens of the Commonwealth from accessing Plaintiff's business in any meaningful way for normal, non-emergency procedures; procedures that likely yeild a significant portion of Plaintiff's business income.

This Court is not persuaded by Defendant's argument that, in order to be entitled to Civil Authority coverage, the action of civil authority must be a complete and total prohibition of all access to Plaintiff's property by any person for any reason. If this Court were to accept Defendant's cramped interpretation of the phrase "prohibits access," it would result in businesses being precluded from coverage in nearly every instance where an action of civil authority effectively closes the business to the vast majority of the general public, but does not necessarily preclude employees, or certain other individuals, from entering the premises to clean, maintain the building, obtain important documents, or to perform other similar functions, which, while important, remain secondary to the activities that actually generate business income.

Once again this Court notes the importance of reading the insurance contract's provisions as a whole so that all of its parts fit together. In so doing, this Court recognizes that the insurance contract provisions at issue are generally designed to provide business owners with coverage for lost busines *income* in the event that their business' operations are suspended. Accordingly, this Court's primary focus when interpreting the phrase "prohibits access," at least in the context of this insurance contract, is the extent to which the action of civil authority prevented the insured from accessing its premises in a manner that would normally produce actual and regular business income. Given this understanding of the insurance contract, the fact that some employees, and even some limited number of patients, were still permitted to go to Plaintiff's property for emergency procedures does not necessarily mean that Plaintiff is altogether precluded from coverage under the Civil Authority provision. The contract merely requires that "an action of civil authority … prohibits access to" Plaintiff's property. It does not clearly and unambiguously state that any such prohibition must completely and totally bar *all* persons from *any* form of access to Plaintiff's property whatsoever.

As this Court determined that Plaintiff provided a reasonable interpretation that: [1] there was "direct physical loss of or damage to property" other than Plaintiff's property; and [2] the "direct physical loss of or damage to property" other than Plaintiff's property caused civil authorities to take action(s) that prohibited access to Plaintiff's property, this Court concluded that Plaintiff established a right to coverage under the Civil Authority provision of the contract.

b. Exclusions

Having determined that Plaintiff provided reasonable interpretations demonstrating that there is coverage under the Business Income, Extra Expense, and Civil Authority provisions of the insurance contract, this Court turns to the question of whether Defendants 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, Defendants must show 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*, 771 A.2d at 13.

***11** This Court starts by addressing the exclusion for Contamination. With regard to this exclusion, the insurance contract provides that "[the insurer] will not pay for loss or damage caused directly or indirectly by any of the following … [c]ontamination by other than "pollutants." Plaintiff's Complaint at 41, Exhibit B. Because the insurance contract does not define the term contamination, this Court looks to the word's natural, plain, and ordinary meaning, and informs its understanding of this term by considering its dictionary definition. *Madison Construction Company*, 735 A.2d at 108.

Merriam-Webster defines contamination as "the process of contaminating [and/or] the state of being contaminated."[20] Additionally, in *Raybestos-Manhattan, Inc. v. Industrial Risk Insurers*, 433 A.2d 906, 907 (Pa. Super. 1981), the Superior Court of Pennsylvania clarified that:

Contamination connotes a condition of impurity resulting from mixture or contact with a foreign substance … [and] the word contaminate is defined as … to render unfit for use by the introduction of unwholesome or undesirable elements .... Contaminate implies an action by something external to an object which by entering into or coming in contact with the object destroys its purity.

This Court recognizes that the above-described common and ordinary definitions of the terms contamination and contaminate are considerably broad. However, in determining whether the contamination exclusion applies clearly and unambiguously to the loss of use of property due to social distancing measures designed to prevent the spread of COVID-19, this Court acknowledges that the question is not whether the definition of contamination is so broad that virtually anything could come within its ambit. *Madison Construction Co.*, 735 A.2d at 607. Instead, this Court is "guided by the principle that ambiguity (or the lack thereof) is to be determined by reference to a particular set of facts." *Id.*

Based upon the above dictionary definitions, the contamination exclusion only applies, in the broadest sense, when something external comes into contact with an object, i.e., property, and destroys the object's purity. Accordingly, if the specific cause of the loss of use of property was COVID-19 contacting objects, and destroying the objects' purity, then the insurance contract's contamination exclusion might prevent coverage. However, based upon the particular facts of this case, and considering the primary means by which COVID-19 spreads, the cause for the loss of use of property was *not* the contamination of property. Rather, the cause of the loss of use of property was the risk of person-to-person transmission of COVID-19, which necessitated social distancing measures and fundamentally changed the way businesses utilized physical space (property).

The Supreme Court's recent decision in *Friends of Danny DeVito* supports the above conclusion. In rejecting the argument that actual contamination of specific property was necessary in order to justify Governor Wolf's orders restricting business operations throughout the Commonwealth, the Supreme Court of Pennsylvania elucidated that arguments regarding the dangers of COVID-19 contaminating property misunderstand the primary means by which COVID-19 spreads. *Id.* at 892. Specifically, the Supreme Court of Pennsylvania clarified that "COVID-19 does not spread because the virus is *at* a particular location … [i]nstead it spreads because of person-to-person contact, as it has an incubation period of up to fourteen days and that one in four carriers are asymptomatic. *Id.* (emphasis in original).

***12** Although it is contested whether COVID-19 can live on the surfaces of property for some period of time, and while this might be one way by which individuals contract COVID-19, it is not the primary means nor is it the only means by which COVID-19 spreads. *Id.* Indeed, with or without actual COVID-19 contamination at any given property in the Commonwealth, businesses suffered the loss of use of property due to the risk of person-to-person COVID-19 transmission. Thus, the risk

of person-to-person transmission of COVID-19, and the social distancing measures necessary to mitigate the spread of the COVID-19, together constitute a cause that is both *separate and distinct* from any possible or actual contamination of property.

It is important to note that, although the contamination exclusion might, at times, cover viruses when viruses actually contaminate property, the contamination exclusion does *not* altogether exclude loss of use of property caused by viruses in any manner whatsoever. If Defendants wanted to exclude coverage for any loss caused by viruses in any manner whatsoever, Defendants could have easily included such a provision clearly and unambiguously in the contract. However, Defendants did not include a virus exclusion.

In sum, because it is reasonable to conclude that the loss of use of property due to the risk of person-to person transmission of COVID-19 is not clearly and unambiguously encompassed by the contamination exclusion, Defendants failed to show that the contamination exclusion prevents coverage in this instance. [21]

Next, this Court will address the exclusion for Fungi, Wet Rot, Dry Rot and Microbes. With regard to this exclusion, the insurance contract provides that the insurer will not pay for loss or damage caused directly or indirectly by the "[p]resence, growth, proliferation, spread or any activity of fungi, wet or dry rot, or microbes." Plaintiff's Complaint at 118, Exhibit B. The insurance contract provides the following definition for the term "Microbes:"

> "Microbe(s)" means any non-fungal micro-organism or non-fungal, colony-form organism that causes infection or disease. "Microbes" includes any spores, mycotoxins, odors, or any other substances, products, or by products produced by, or arising out of the current or past presence of "microbes."

Id. at 19, Exhibit B.

Without any elaboration and explanation, Defendants contend that COVID-19 is excluded because viruses fall within the insurance contract's definition of the term "Microbe." This Court is, however, not persuaded that Defendants' interpretation of the term "Microbe" is clear and unambiguous.

Naturally, upon its initial review, the contract's use of the word "Microbe" caused this Court to pause and generally wonder what is a "Microbe," and more specifically with regard to this case, does a virus qualify as a "Microbe?" Again, this begs the question: If Defendants wanted to exclude viruses, why not simply use the word virus explicitly in the insurance contract? Regardless, even assuming that a virus could technically be considered a "Microbe" in the most general sense of the word, this Court recognizes that, in this instance, it is of course not the general sense of the term "Microbe" that is controlling. Rather, because the insurance contract provides a specific definition of the term "Microbe," it is this definition that necessarily dictates what a "Microbe" is, and whether viruses fall within the ambit of the contract's "Microbe" exclusion.

***13** Upon reading the insurance contract's definition of the term "Microbe," this Court determined that, in order to fall within the "Microbe" exclusion, COVID-19 must qualify as a "micro-organism" and/or an "organism." Because the contract does not define the terms "micro-organism" or "organism," this Court looked to the words' natural, plain, and ordinary meaning, and informed its understanding of these terms by considering their dictionary definitions. *Madison Construction Company*, 735 A.2d at 108.

Merriam-Webster defines "microorganism" as "an organism (such as a bacterium or protozoan) of microscopic or ultramicroscopic size." [22] Merriam-Webster defines "organism" in relevant part as "an individual constituted to carry on the activities of life by means of parts or organs more or less separate in function but mutually dependent [and/or] *a living being*." [23]

In contrast, Merriam-Webster defines a virus as "any large group of submicroscopic infectious agents that are usually regarded as *nonliving* extremely complex molecules … that are capable of growth and multiplication only in living cells, and that cause

various important diseases in humans, animals, and plants." [24] In fact, "outside a host viruses are dormant … [they] have none of the traditional trappings of life [and their] zombielike existence … makes them easy to catch and hard to kill." [25]

Based upon the ordinary, dictionary definitions of the terms "microorganism," "organism," and "virus," this Court concluded that: [1] the term "Microbe" generally includes things that carry on the activities of life, i.e., things that are alive; and [2] a virus is generally regarded as something that is non-living, and is capable of growth and multiplication only when it attaches to, or gets inside of, other living host cells. Accordingly, given the insurance contract's specific definition of the term "Microbe," it is reasonable to conclude that the "Microbe" exclusion does not actually encompass viruses, as viruses are generally not considered living things. Consequently, this Court determined that Defendants failed to demonstrate that the exclusion for Fungi, Wet Rot, Dry Rot and Microbes clearly and unambiguously prevents coverage.

In reaching these conclusions, this Court of law does not masquerade as an expert in the complex intricacies of science, nor does it presume to wholly realize the subtle considerations by which trained scientists define and classify things in the natural world. This Court acknowledges that, in certain contexts, the terms "microorganism" and/or "organism" might refer to things that are not traditionally considered living entities. [26] This Court also understands that there are some in the scientific community who might classify viruses as a kind of semi-living, zombie-like thing. [27] However, this Court need not wade into the mire of such sophisticated considerations. The question before this Court on summary judgment is not so complicated. The question is simply whether the insurance contract provisions at issue are subject to more than one reasonable interpretation. If the contract's terms are subject to more than one reasonable interpretation, they are ambiguous, and Pennsylvania law directs this Court to find in favor of the insured. Again, this Court may inform its understanding of the contract's terms using ordinary, dictionary definitions. *See Madison Construction Company,* 735 A.2d at 108. Based upon the above definitions, this Court determined that it is reasonable to interpret the "Microbe" exclusion as applying only to *living* microscopic things such as bacterium, and *not non-living* viruses. [28]

***14** Next, this Court will address the exclusion for Consequential Loss. With regard to this exclusion, the insurance contract provides that the insurer will not pay for loss or damage caused directly or indirectly by "[d]elay, loss of use or loss of market." Plaintiff's Complaint at 41, Exhibit B. Defendants argue that even if Plaintiff had shown a basis for coverage under the insurance contract, this exclusion clearly and unambiguously excludes coverage.

The problem with this exclusion is not so much that it is unclear or ambiguous. Rather, the problem is that, based upon a plain reading of the Consequential Loss exclusion, this exclusion would vitiate Business Income, Extra Expense, and Civil Authority coverage in their entirety. *See* January 19, 2021 Court Order of the United States District Court, N.D. Ohio, Eastern Division case *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Company*, Civil Case No. 1:20-cv-01239-DAP (holding that "the Loss of Use exclusion *would* vitiate the Loss of Business Income coverage"). This evident because, even if this Court accepted Defendants' more limited interpretation of the scope of coverage and the phrase "direct physical loss of or damage to property" to only include coverage in instances where Plaintiff's property was physically altered or damaged, this exclusion would effectively eliminate coverage for any kind of loss and/or damage caused by any covered peril, which closes Plaintiff's business while it is being repaired. *Id.* In other words, if this Court were to find the exclusion for Consequential Loss to be valid, this exclusion would make all Business Income, Extra Expense, and Civil Authority coverage 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 the majority of expected claims, such a provision is void as it renders coverage illusory). Because this Court must read the insurance contract in its entirety, and in a manner calculated to give the agreement its intended effect, this Court concludes that the exclusion for Consequential Loss does not prevent coverage.

Finally, this Court will address the exclusions for Acts or Decisions and Ordinance or Law. With regard to the exclusion for Acts or Decisions, the insurance contract provides that the insurer will not pay for loss or damage caused directly or indirectly by "Acts or Decisions, including the failure to act or decide, of any person, group, organization or governmental body." Plaintiff's

Complaint at 42, Exhibit B. With regard to the exclusion for Ordinance or Law, the insurance contract provides that the insurer will not pay for loss or damage caused directly or indirectly by the following:

> (1) The enforcement of any ordinance or law:
>
> (a) Regulating the construction, use or repair of any property; or
>
> (b) Requiring the tearing down of any property, including the cost of removing debris.
>
> (2) This exclusion applies whether the loss results from:
>
> (a) An ordinance or law that is enforced even if the property has not been damaged; or
>
> (b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition or property, or removal of its debris, following a physical loss to that property.

Defendants argue that coverage is precluded by both of the above exclusions because Plaintiff's claim for "direct physical loss of or damage to property" is solely due 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 suffered in relation to both "*the COVID-19 pandemic* and the actions of the government in response thereto." Plaintiff's Complaint at 4 (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. [29] Accordingly, Defendants failed to demonstrate that the exclusions for Acts or Decisions and Ordinance or Law preclude coverage.

VI. Conclusion

***15** In Pennsylvania, "where there is doubt or uncertainty about the meaning of ambiguous language used in a policy of insurance, the policy must be construed in favor of the insured in order to not defeat the protection which [the insured] reasonably expected from the policy [the insured] purchased." *Raybestos-Manhattan, Inc.*, 433 A.2d at 483. This Court determined that Plaintiff's interpretations of the Business Income, Extra Expense, and Civil Authority provisions of the insurance contract were, at the very least, reasonable. Additionally, this Court concluded that Defendants failed to demonstrate that any of the insurance contract's exclusions clearly and unambiguously prevent coverage. Accordingly, because there are no genuine issues of material fact, Plaintiff's Motion for Summary Judgment is GRANTED, and Defendants' Cross Motions for Summary Judgement are DENIED.

By the Court:

Christine Ward, J.

Christine Ward, J.

Dated: 3/22/21

Footnotes

1 In their Cross Motions for Summary Judgment, both Valley Forge Insurance Company and CNA argue that CNA is not a proper party in this action. This Court disagrees. After Plaintiff filed its claim with Valley Forge Insurance Company, Plaintiff received a letter that Plaintiff is not entitled to coverage. Plaintiff's Complaint at 174, Exhibit C. Importantly, the letter is written by a Mark Chancellor, who identifies himself as a Claims Representative with CNA. In the letter, Mark Chancellor speaks on behalf of Valley Forge Insurance Company and specifically states that "*[w]e* have evaluated the claim under a CNA Connect Policy issued to Timothy A Ungarean by VFIC … Policy No. 6025183026 (the "Policy")." *Id.* at 175, Exhibit C (emphasis added). Given that the initial denial letter came from a CNA Claims Representative, this Court determined that CNA is a proper party in this declaratory judgment action. *See Shared Communications Services of 1800-80 JFK Blvd. Inc. v. Bell Atlantic Properties Inc.*, 692 A.2d 570, 573 (Pa. Super. 1997) (holding that "courts will disregard the corporate entity only in the limited circumstances when *used to defeat public convenience*, justify wrong, protect fraud or defend a crime") (emphasis added).

2 *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.

3 As of March 21, 2021, 843,135 citizens of Pennsylvania have contracted COVID-19 and 24,788 citizens have died. *See* Pennsylvania Department of Health, COVID-19 Data for Pennsylvania, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx.

4 The insurance contract defines "suspension" as the "partial or complete cessation of your [the insured's] business activities; or … that a part or all of the described premises is rendered untenantable." Plaintiff's Complaint at 55. The insurance contract defines "operations" as "the type of your [the insured's] business activities occurring at the described premises and tenantability of the described premises." Plaintiff's Complaint at 53. The insurance contract defines "period of restoration" as:

> the period of time that: [b]egins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and … [e]nds 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.

Plaintiff's Complaint at 53. The insurance contract defines Covered Cause of Loss as "RISK OF DIRECT PHYSICAL LOSS unless the loss is: a. Excluded in Section B. Exclusions; b. Limited in paragraph A.4 Limitations; or c. Limited or Excluded by other provision of this Policy. Plaintiff's Complaint at 37.

5 The insurance contract defines "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste, and any unhealthful or hazardous building materials (including but not limited to asbestos and lead products or materials containing lead). Waste includes materials to be recycled, reconditioned or reclaimed." Plaintiff's Complaint at 54.

6 "Microbe(s)" is specifically defined in the following manner:

> "Microbe(s)" means any non-fungal micro-organism or non-fungal, colony-form organism that causes infection or disease. "Microbes" includes any spores, mycotoxins, odors, or any other substances, products, or by products produced by, or arising out of the current or past presence of "microbes."

Id. at 118-19 (emphasis added).

7 The parties do not dispute whether Plaintiff's business operations were at least partially suspended or interfered with due to COVID-19 and/or the government orders. The parties mainly contend whether Plaintiff's loss of use of its property entitles Plaintiff to coverage. The dispositive question with regard to whether Plaintiff is entitled to coverage for Business Income and Extra Expense is whether Plaintiff suffered a "direct physical loss of or damage to" Plaintiff's property. To the extent the parties disagree as to the meaning of the "period of restoration," and the potential impact of this phrase

on the meaning of "direct physical loss of or damage to" Plaintiff's property, this Court addresses this issue in the body of this memorandum, after this Court's discussion of the phrase "direct physical loss of or damage to property."

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).

13 Damage, Merriam Webster, https://www.merriam-webster.com/dictionary/damage.

14 Loss, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss.

15 Direct, Merriam-Webster, https://www.merriam-webster.com/dictionary/direct.

16 Physical, Merriam-Webster, https://www.meriam-webster.com/dictionary/physical.

17 This Court is aware that the insurance contract provides that any "direct physical loss of or damage to property" must be caused by a Covered Cause of Loss. However, Covered Cause of Loss is defined as "RISK OF DIRECT PHYSICAL LOSS unless the loss is: a. Excluded in Section B. Exclusions; b. Limited in paragraph A.4 Limitations; or c. Limited or Excluded by other provision of this Policy." *Id.* at 37, Exhibit B. Admittedly, this Court was somewhat perplexed by this definition. One would think that in defining Covered Causes of Loss the contract would state, either specifically or more generally, covered causes of loss, i.e. fire, tornado, hurricane, lightening, etc.. Here, the contract's language instead turns back on itself and states that "direct physical loss of or damage to property" must be caused by "RISK OF DIRECT PHYSICAL LOSS unless the loss is … Excluded ...." Given that this insurance contract is an "All Risk" insurance policy that is meant to cover any losses, damages, and expenses to the insured's premises unless specifically excluded, this Court determined it is reasonable to interpret Covered Cause of Loss in a manner that does not further limit the scope of coverage beyond any instance that amounts to a "direct physical loss of or damage to property," which is not otherwise excluded. Accordingly, this Court determined that as long as the spread of COVID-19 caused "direct physical loss of or damage to property," and does not fall within the ambit of one of the contract's exclusions, it is reasonable to interpret the contract as entitling Plaintiff to coverage. This same analysis regarding the term Covered Cause of Loss applies equally in the context of the contract's provision regarding Civil Authority coverage. Thus, this Court need not address Covered Cause of Loss again separately.

18 In its opinion upholding the Governor Wolf's use of the Emergency Code to shutdown businesses throughout the Commonwealth, the Supreme Court of Pennsylvania explained that, as of April 8, 2020, confirmed cases of COVID-19 had been reported in every single county in the Commonwealth, and "*any location where two or more people can congregate is within the disaster area*." *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 889-90 (Pa. 2020) (emphasis added). The Supreme Court of Pennsylvania reached this conclusion because "[t]he virus spreads *primarily through person-to-person contact*, has an incubation period of up to fourteen days, one in four carriers are asymptomatic, and the virus can live on surfaces for up to four days." *Id.* at 889 (emphasis added).

19 Prohibit, Merriam-Webster, https://www.merriam-webster.com/dictionary/prohibit.

20 Contamination, Merriam-Webster, https://www.merriam-webster.com/dictionary/contamination.

21 While this Court's above analysis is not dependent upon whether COVID-19 was in fact at Plaintiff's premises, Defendants' Cross Motions for Summary Judgment acknowledge that "Plaintiff neither alleged nor produced evidence that the virus was present at its dental offices ...." Valley Forge Insurance Company 's Cross Motion for Summary Judgment at 10; *see also* CNA's Cross Motion for Summary Judgment at 10. This fact provides further support that the contamination exclusion does not prevent coverage in this instance. Defendants cannot, at the same time, contend that the virus was not present at Plaintiff's property and that the exclusion contamination exclusion applies.

22 Microorganism, Merriam-Webster, https://www.merriam-webster.com/dictionary/microorganism.

23 Organism, Merriam-Webster, https://www.merriam-webster.com/dictionary/organism (emphasis added).

24 Virus, Merriam-Webster, https://www.merriam-webster.com/dictionary/virus (emphasis added).

25 Sarah Kaplan et al., *The coronavirus isn't alive. That's why it's so hard to kill.*, The Washington Post, March 23, 2020 https://www.washingtonpost.com/health/2020/03/23/coronavirus-isnt-alive-thats-why-its-so-hard-kill/.

26 Merriam-Webster also defines "organism" in the most general sense as "a complex structure of interdependent and subordinate elements whose relations and properties are largely determined by their function in the whole." Organism , Merriam-Webster, https:/www.merriam-webster.com/dictionary/organism. Merriam-Webster elaborates on this particular use of the word organism by providing the following quotation from Joseph Rossi: "the nation is not merely the sum of individual citizens at any given time, but it is a living organism, a mystical body … of which the individual is an ephemeral part." *Id.* Based upon this quotation, and the context in which the terms "microorganism" and "organism" appear in the insurance contract, this Court concluded that more scientific definition is most relevant to this Court's discussion.

27 While there is some argument over whether viruses are living organisms, "[m]ost virologists consider them non-living, as they do not meet all the criteria of the generally accepted definition of life." *What are microorganisms?* Centre for Geobiology, University of Bergen, November 1, 2010 https://www.uib.no/en/geobio/56846/what-are-microorganisms.

28 Bacterium is defined to include to following:

> any of a domain (Bacteria) … of chiefly round, spiral, or rod-shaped single-celled prokaryotic microorganisms that typically *live* in soil, water, organic matter, or the bodies of plants and animals, that make their own food especially from sunlight or are saprophytic or parasitic, are often motile by means of flagella, reproduce especially by binary fission, and include many important pathogens.
>
> Bacterium, Merriam-Webster, https://www.merriam-webster.com/dictionary/bacterium (emphasis added).

29 Certainly, the exclusions for Acts or Decisions and Ordinance or Law 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).

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2021 WL 1395771
Only the Westlaw citation is currently available.
United States District Court, E.D. North Carolina, Western Division.

BLUE CORAL, LLC; ENC Massage and Facial Store #1, LLC; ENC Massage and Facial Store #2, LLC; ECNR Massage and Facial Store #3, LLC; ECNR Massage and Facial Store #4, LLC; ECNR Massage and Facial Store #5, LLC; ECNR Massage and Facial Store #6, LLC; and ECNR Massage and Facial Store #7, LLC, Plaintiffs,

v.

WEST BEND MUTUAL INSURANCE COMPANY, Defendant.

Case No. 5:20-cv-00496-M
|
Signed 04/13/2021

Synopsis

Background: Insured operators of spas and massage parlors brought state action against insurer, alleging breach of contract and seeking declaratory judgment that business losses caused by shutdown order during COVID-19 pandemic were covered by policies. Following removal, insurer moved to dismiss.

[Holding:] The District Court, Richard E. Myers, Chief Judge, held that insureds failed to allege that communicable disease provision was implicated by their business losses, as required to state claim for business income and extra expense coverage.

Motion granted.

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

West Headnotes (3)

[1] Contracts Grounds of action

Under North Carolina law, elements of claim for breach of contract are (1) existence of valid contract and (2) breach of terms of that contract.

[2] Federal Courts Substance or procedure; determinativeness

Under *Erie* doctrine, federal court sitting in diversity applies substantive law of state in which it sits and federal procedural law.

[3] Insurance Business Interruption; Lost Profits

Under North Carolina law, insured operators of spas and massage parlors failed to allege that communicable disease provision, which required that "shutdown or suspension must be due to an outbreak of a 'communicable disease' " at insured premises, was implicated by their business losses due to shutdown order during COVID-19 pandemic, as required to state claim for business income and extra expense coverage, although COVID-19 was plausibly-alleged communicable disease within meaning of provision; insureds did not allege that COVID-19 was ever present at insured premises.

Attorneys and Law Firms

W. Stacy Miller, II, Miller Law Group, PLLC, Raleigh, NC, Gavin Adams Bell, Flannery Georgalis, LLC, Charlotte, NC, for Plaintiffs.

Steven Andrew Bader, Jennifer A. Welch, Cranfill Sumner & Hartzog LLP, Raleigh, NC, for Defendant.

OPINION AND ORDER

RICHARD E. MYERS II, CHIEF UNITED STATES DISTRICT JUDGE

***1** This matter comes before the court on Defendant's motion to dismiss the complaint, filed October 20, 2020.

[DE-8] For the reasons that follow, Defendant's motion is GRANTED.

I. Background

The complaint alleges as follows: Plaintiffs are North Carolina-based franchises of Hand and Stone Massage and Facial Spa, a chain of spas and massage parlors. [DE-1-3 ¶ 6] Each Plaintiff[1] was insured by Defendant, a Wisconsin-based insurance company, under policies insuring against, *inter alia*:

> [A]ctual loss of Business Income or Extra expense ... sustain[ed] as the result of ... "operations" being temporarily shut down or suspended ... by a ... government board that has jurisdiction over [the] "operations" ... due to an outbreak of a "communicable disease" ... at the insured premises[.]

[DE-1-3 ¶¶ 1, 7, 19]

Plaintiffs' policies were in place on March 23, 2020, when North Carolina Governor Roy Cooper issued Executive Order 120 ("EO 120") in response to the advent of the COVID-19 pandemic.[2] [*see* DE-1-3 Exhibit B[3]] EO 120 was issued with the stated intent, among other things:

> [T]o protect the health and safety of the residents of North Carolina, slow the spread of the COVID-19 pandemic, reduce the number of people infected, avoid strain on our healthcare system, and to address adverse economic impacts that will lead to additional human suffering upon individuals adversely impacted by the COVID-19 pandemic[.]

[DE-1-3 Exhibit B at 2] To further such goals, EO 120 ordered that certain businesses shut down indefinitely, including: (1) certain "Spas[,]" because they are entertainment facilities at which "mass gatherings" were relatively likely to occur; and (2) "Massage Parlors[,]" because they are "personal care and grooming businesses" where "the ability to practice the social distancing necessary to reasonably protect against COVID-19 is significantly reduced" because "individuals are in close proximity for extended periods of time, or service personnel are in direct contact with clients[.]" [DE-1-3 Exhibit B §§ 1(b)–(c) ("Mass Gathering[s]")] Notably, EO 120 did not mention any specific case of COVID-19 as having taken place at any specific place, but stated that "the area subject to the COVID-19 emergency is statewide[.]" [DE-1-3 Exhibit B at 2]

***2** Plaintiffs shut down their businesses in compliance with EO 120, and the businesses remained closed until May 22, 2020, when they were allowed to reopen with certain restrictions.[4] [DE-1-3 ¶¶ 8–16] Plaintiffs thereafter filed claims with Defendant for their lost income, but the claims were denied. [DE-1-3 ¶¶ 17–20]

Plaintiffs filed their complaint in Wake County, North Carolina Superior Court on August 7, 2020, bringing claims against Defendant for breach of the insurance policies and seeking a declaratory judgment that their losses caused by EO 120 were covered by their policies. [DE-1-3 ¶¶ 23–49] Defendant removed the litigation to this court on September 22, 2020, invoking the court's diversity jurisdiction under 28 U.S.C. § 1332. [DE-1] On October 20, 2020, Defendant moved the court to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"). [DE-8]

Defendant's motion has been fully briefed by the parties and is ripe for adjudication.

II. Legal standard

Federal Rule of Civil Procedure 8 ("Rule 8") requires a pleading to contain, *inter alia*, "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). A defendant against whom a claim has been brought can challenge the claim's sufficiency under Rule 8 by moving the court to dismiss the claim pursuant to Rule 12(b)(6) for "failure to state a claim upon which relief can be granted[.]" Fed. R. Civ. P. 12(b)(6).

When considering a Rule 12(b)(6) motion to dismiss, the court must accept as true all of the well-pleaded factual allegations contained within the complaint and must draw all reasonable inferences in the plaintiff's favor, *Hall v. DIRECTV, LLC*, 846 F.3d 757, 765 (4th Cir. 2017), but

any legal conclusions proffered by the plaintiff need not be accepted as true, *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). To survive a Rule 12(b)(6) motion, a plaintiffs well-pleaded factual allegations, accepted as true, must "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). *Twombly*'s plausibility standard requires that a plaintiff's well-pleaded factual allegations "be enough to raise a right to relief above the speculative level," i.e., allege "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Id.* at 555-56, 127 S.Ct. 1955. A speculative claim resting upon conclusory allegations without sufficient factual enhancement cannot survive a Rule 12(b)(6) challenge. *Iqbal*, 556 U.S. at 678–79, 129 S.Ct. 1937 ("where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not 'show[n]'--'that the pleader is entitled to relief.' ") (quoting Fed. R. Civ. P. 8(a)(2)); *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (" 'naked assertions' of wrongdoing necessitate some 'factual enhancement' within the complaint to cross 'the line between possibility and plausibility of entitlement to relief.' " (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955)).

III. Analysis

***3** Because Plaintiffs' declaratory-judgment claim seeks a declaration by the court that Plaintiffs' "business losses suffered during the COVID-19 shutdown are covered events under their policies with Defendant, and [that] Defendant wrongfully denied their claims" [DE-1-3 ¶ 34], the declaratory-judgment claim essentially asks the court to declare that Defendant has breached the insurance policies. Plaintiffs' two claims therefore overlap entirely, and the question is whether Plaintiffs have plausibly alleged a breach of the policies.

[1] **[2]** "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000).[5] Defendant does not dispute that it had valid insurance policies with Plaintiffs in place at all relevant times, with the exception of Plaintiff ECNR Massage and Facial Store #6, who Plaintiffs subsequently voluntarily dismissed from this litigation pursuant to Federal Rule of Civil Procedure 41(a). *[see* DE-9 at 2, 15–16; DE-22] However, Defendant challenges the complaint as failing to plausibly allege that Defendant breached the terms of those policies. [DE-9 at 8–15]

The complaint invokes only one term of the insurance policies as obliging Defendant to pay Plaintiffs' insurance claims: the Communicable Disease Business Income and Extra Expense Coverage provision (the "Communicable Disease Provision"), quoted below. [DE-1-3 ¶ 19] Plaintiffs allege that: (1) EO 120 was an event implicating the Communicable Disease Provision; (2) Plaintiffs' losses resulting from their compliance with EO 120 were covered losses under the Communicable Disease Provision which Defendant was obligated to cover; and (3) Defendant breached the insurance policies by denying Plaintiffs' claims thereunder seeking such coverage. [DE-1-3 ¶¶ 23–49]

Defendant's principal argument is that Plaintiffs have failed to plausibly allege that EO 120 implicated the Communicable Disease Provision, which reads in relevant part as follows:

> You may extend this insurance to apply to the actual loss of Business Income or Extra Expense that you sustain as the result of your "operations" being temporarily shut down or suspended as ordered by a local, state, or federal board of health or similar governmental board that has jurisdiction over your "operations". The shutdown or suspension must be due to an outbreak of a "communicable disease" or a "waterborne pathogen" at the insured premises as described in the Declarations.
>
> ...
>
> The coverage for Business Income and Extra Expense will begin 24 hours after the jurisdictional board shuts down or suspends your "operations" and will end within 30 days after the jurisdictional body certifies that the described premises are habitable and that you may fully or partially resume your "operations".

[DE-1-3 Exhibit G at 8] The North Carolina Supreme Court has said that, "[a]s in other contracts, the objective of construction of terms in an insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued." *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). A plain reading of the provision makes clear that the Communicable Disease Provision was intended to cover

certain losses resulting from: (1) a temporary suspension of certain business operations that was (2) properly ordered by a governmental board (3) due to the presence of certain diseases or pathogens at the insured premises.

***4** **[3]** Plaintiffs fail to plausibly allege that the Communicable Disease Provision was implicated by their losses. While COVID-19 is a plausibly-alleged communicable disease within the meaning of the Communicable Disease Provision, Plaintiffs do not plausibly allege that COVID-19 was ever present "at the insured premises[.]" As a threshold matter, the relevant "insured premises" are defined "in the Declarations" referred to within the Communicable Disease Provision [DE-1-3 Exhibit G at 8], yet Plaintiffs neither attach the Declarations from their policies nor allege how the Declarations describe those premises. Because the court is left to speculate as to what the "insured premises" actually are, this deficiency alone is fatal to Plaintiffs' claims. *See Twombly*, 550 U.S. at 555–56, 127 S.Ct. 1955 (a pleading must "raise a right to relief above the speculative level" to survive a Rule 12(b)(6) motion). And even were the court to infer that the insured premises were the buildings at which Plaintiffs' businesses were operated and those buildings' grounds, *see* PREMISES, Black's Law Dictionary (11th ed. 2019) ("A house or building, along with its grounds; esp., the buildings and land that a shop, restaurant, company, etc. uses"); [DE-1-3 Exhibit H at 1] (denial letter addressed to same address as "Loss Location"), the complaint makes no allegation that COVID-19 was present at those premises. Further, EO 120 does not state that COVID-19 was present at any specific place or that it was issued due to the presence of COVID-19 at any specific place. [*see generally* DE-1-3 and Exhibit B] Because the Communicable Disease Provision makes clear that covered losses must result from a suspension of operations that took place "due to an outbreak of [e.g., COVID-19] at the insured premises" [DE-1-3 Exhibit G at 8], Plaintiffs' failure to plausibly allege the presence of COVID-19 at any specific place is fatal to the complaint.

Seeking to avoid this result, Plaintiffs argue that there had been an outbreak of COVID-19 *everywhere* when EO 120 was issued. EO 120 mentions that the World Health Organization had previously "declared COVID-19 a global pandemic"; that the President of the United States had "declared the ongoing COVID-19 outbreak a pandemic of sufficient severity and magnitude to warrant an emergency declaration for all states, tribes, territories, and the District of Columbia"; that the North Carolina Department of Health and Human Services had "confirmed the number of cases of COVID-19 in North Carolina continues to rise"; and that "the area subject to the COVID-19 emergency is statewide[.]" [DE-1-3 Exhibit B at 1-2] Plaintiffs focus upon the "statewide" language in arguing that EO 120 was issued due to an outbreak of COVID-19 in every specific place within the State of North Carolina, where Plaintiffs' businesses are located. [*see* DE-21 at 9 (arguing "the overall outbreak of COVID-19 and the need to implement statewide measures to quell the spread of the outbreak" as the geneses of EO 120)] Plaintiffs argue that the insurance policies did not define either what "outbreak" means or in what circumstance an outbreak should be deemed to have taken place "at the insured premises[,]" and argues that this creates ambiguity that must be construed in favor of coverage. [DE-21 at 4–7]

The North Carolina Court of Appeals has said:

> [An insurance] policy is subject to judicial construction only where the language used in the policy is ambiguous and reasonably susceptible to more than one interpretation. In such cases, the policy must be construed in favor of coverage and against the insurer; however, if the language of the policy is clear and unambiguous, the court must enforce the contract of insurance as it is written. Ambiguity in the terms of the policy is not established simply because the parties contend for differing meanings to be given to the language. Non-technical words are to be given their meaning in ordinary speech unless it is clear that the parties intended the words to have a specific technical meaning.

N.C. Farm Bureau Mut. Ins. Co. v. Mizell, 138 N.C. App. 530, 532-33, 530 S.E.2d 93, 95 (2000) (internal citations omitted). While Plaintiffs ably argue their position, the court disagrees that the Communicable Disease Provision is ambiguous and reasonably susceptible to the interpretation that Plaintiffs suggest. First of all, political territories like those referenced within EO 120 are not reasonably understood to be "premises[.]" *See* PREMISES, Black's Law Dictionary (11th ed. 2019) ("A house or building, along with its grounds;

esp., the buildings and land that a shop, restaurant, company, etc. uses"). Second, Plaintiffs' suggested interpretation—that EO 120 was issued due to a COVID-19 outbreak at Plaintiffs' premises specifically because the disease was present within the state generally—is not reasonable, as such an interpretation would impermissibly render "at the insured premises" entirely meaningless. *See Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978) ("The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect."); *Nelson v. Rhem*, 179 N.C. 303, 304, 102 S.E. 395, 396 (1920) (courts cannot "assume that the parties have inserted meaningless terms in their agreement"). And finally, the court's independent research indicates that other courts construing similar provisions have rejected arguments that COVID-19's ubiquity is sufficient to implicate them. *See, e.g., Girls v. Phila. Indem. Ins. Co.*, No. 2:20-cv-2035, 2021 WL 858489, 2021 U.S. Dist. LEXIS 42489 (S.D. Ohio Mar. 8, 2021) (dismissing claim for breach of virtually-identical provision because "[t]hese provisions contemplate an outbreak of communicable disease on the insured's premises, not an outbreak affecting the public at large[,]" and "[n]owhere in the [complaint] do Plaintiffs allege that COVID-19 was actually present in or on its premises, or that anyone on premises was actually infected with COVID-19").

***5** Plaintiffs' argument regarding the Communicable Disease Provision accordingly fails, and the court concludes that the complaint fails to plausibly allege that Defendant breached the insurance policies by denying Plaintiffs' claims thereunder.

IV. Conclusion

For the foregoing reasons, Defendant's motion is GRANTED and the complaint is DISMISSED.

SO ORDERED this the 13th day of April, 2021.

All Citations

--- F.Supp.3d ----, 2021 WL 1395771

Footnotes

1 Plaintiffs agreed to voluntarily dismiss Plaintiff ECNR Massage and Facial Store #6 from this litigation in response to Defendant's motion to dismiss. [DE-22]

2 The court takes judicial notice of the fact that coronavirus disease, or COVID-19, is a disease caused by severe acute respiratory syndrome coronavirus 2, or SARS-CoV-2, which as of the date of this opinion has spread to virtually every area within the United States, causing widespread damage to the economy, millions of infections, and hundreds of thousands of deaths. *See generally* COVID-19, https://www.cdc.gov/coronavirus/2019-ncov/ (last visited April 1, 2021); Fed. R. Evid. 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").

3 Without converting a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss to a Federal Rule of Civil Procedure 56 motion for summary judgment, the court may consider extrinsic evidence (1) attached by a plaintiff to the complaint or (2) attached by a defendant to a motion to dismiss when the document is "integral to and explicitly relied on in the complaint, and when the plaintiffs do not challenge the document's authenticity." *Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 607 (4th Cir. 2015) (internal quotation marks, brackets, and citations omitted).

4 Plaintiffs allege that other Executive Orders extended and then terminated EO 120's directive that Plaintiffs' businesses remain closed. [*see* DE-1-3 ¶¶ 8–14] Where the court refers to EO 120 within this opinion, the court also refers to any Executive Order that Plaintiffs allege modified EO 120's directive.

5 Under the *Erie* doctrine, a federal court sitting in diversity applies (1) the substantive law of the state in which it sits and (2) federal procedural law. *See Anand v. Ocwen Loan Servicing, LLC*, 754 F.3d 195, 198 (4th Cir. 2014); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The parties agree that North Carolina's substantive law governs this dispute. [*see* DE-9 at 6; DE-21 at 3]

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500 F.Supp.3d 565
United States District Court,
E.D. Texas, Sherman Division.

CINEMARK HOLDINGS, INC.
v.
FACTORY MUTUAL INSURANCE COMPANY

Civil Action No. 4:21-cv-00011
|
Signed 05/05/2021

Synopsis

Background: Insured, which was a movie theater company that had purchased an "all risks" insurance policy and that alleged that it had suffered losses due to the COVID-19 pandemic, brought action against insurer to recover under the policy's coverage for losses caused by communicable diseases. Insurer moved for judgment on the pleadings.

[Holding:] The District Court, Amos L. Mazzant, J., held that insured stated a claim that it suffered covered losses due to the COVID-19 pandemic.

Motion denied.

Procedural Posture(s): Motion for Judgment on the Pleadings.

West Headnotes (8)

[1] **Federal Civil Procedure** Determination of Motion

Federal Civil Procedure Matters deemed admitted

In examining a motion for judgment on the pleadings, the court must accept as true all well-pleaded facts contained in the plaintiff's complaint and view them in the light most favorable to the plaintiff. Fed. R. Civ. P. 12(c).

[2] **Federal Civil Procedure** Insufficiency of claim or defense

A claim will survive a motion for judgment on the pleadings if it may be supported by showing any set of facts consistent with the allegations in the complaint, i.e., a claim may not be dismissed based solely on a court's supposition that the pleader is unlikely to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder. Fed. R. Civ. P. 12(c).

[3] **Federal Civil Procedure** Insufficiency of claim or defense

Although detailed factual allegations are not required, a plaintiff, in order to defeat a defense motion for judgment on the pleadings, must provide the grounds of his entitlement to relief beyond mere labels and conclusions; a formulaic recitation of the elements of a cause of action will not do. Fed. R. Civ. P. 12(c).

[4] **Federal Civil Procedure** Insufficiency of claim or defense

To survive a motion for judgment on the pleadings, the complaint must be factually suggestive, so as to raise a right to relief above the speculative level and into the realm of plausible liability. Fed. R. Civ. P. 12(c).

[5] **Federal Civil Procedure** Insufficiency of claim or defense

For a claim to have facial plausibility so as to survive a motion for judgment on the pleadings, a plaintiff must plead facts that allow the court to draw the reasonable inference that the defendant is liable for the alleged misconduct. Fed. R. Civ. P. 12(c).

[6] **Federal Civil Procedure** Matters considered

A district court may consider documents attached to a motion for judgment on the pleadings only if the documents are referred to in the plaintiff's complaint and are central to the plaintiff's claims. Fed. R. Civ. P. 12(c).

[7] **Evidence** Official proceedings and acts

Federal Civil Procedure Matters considered

Federal Civil Procedure Motion

Taking judicial notice of public records directly relevant to the issue in dispute is proper on a motion for judgment on the pleadings and does not transform the motion into one for summary judgment. Fed. R. Civ. P. 12(b)(6).

[8] **Insurance** Risks or Losses Covered and Exclusions

Insured, which was a movie theater company, stated a claim that it suffered losses due to the COVID-19 pandemic and that the losses were covered under the communicable-diseases section of its "all risks" insurance policy, and thus insurer was not entitled to judgment on the pleadings in insured's action to recover under the policy; policy expressly covered loss and damages caused by communicable disease, and insured alleged that COVID-19 was actually present and actually damaged its property by changing the content of the air. Fed. R. Civ. P. 12(c).

Attorneys and Law Firms

***566** Dallas, TX, Joseph T. Niczky, Hunton Andrews Kurth LLP, New York, NY, Melissa Richards Smith, Gillam & Smith, LLP, Marshall, TX, Michael L. Huggins, Hunton Andrews Kurth LLP, San Francisco, CA, Rachel E. Hudgins, Hunton Andrews Kurth LLP, Atlanta, GA, for Cinemark Holdings, Inc.

Emileigh Stewart Hubbard, Henry Oddo Austin & Fletcher, PC, Shannon Marie O'Malley, Thomas Hal Cook, Jr, Michael Patrick O'Brien, Zelle LLP, Dallas, TX, for Factory Mutual Insurance Company.

ORDER

AMOS L. MAZZANT, UNITED STATES DISTRICT JUDGE

****1** Pending before the Court is Defendant Factory Mutual Insurance Company's Motion for Judgment on the Pleadings (Dkt. #24). After reviewing the relevant pleadings, the Court finds that the motion should be **DENIED**.

BACKGROUND

In early 2020, the COVID-19 pandemic upended normal life. Due to rising infection rates and concerns about public health, state and local authorities across the country responded by implementing measures that temporarily halted business activities. This dispute arises from the pandemic.

Cinemark Holdings, Inc. ("Cinemark") is the third largest movie theater circuit in the United States. To protect its property, Cinemark purchased an "All Risks" insurance policy ("the Policy") from Factory Mutual Insurance Company ("Factory Mutual"). The Policy expressly includes coverage for physical loss or damage by a communicable disease. Cinemark paid over $3.7 million in premiums to Factory Mutual.

***567** In early 2020, the COVID-19 pandemic upended normal life in the United States. COVID-19 is a deadly communicable disease that spreads in several ways, including changing the content of air and the character of surfaces. Over 1,700 Cinemark employees tested positive for, were exposed to, or displayed symptoms of COVID-19. Most of these employees were on Cinemark property just before testing positive. As a direct result of the damage caused by COVID-19 to its property, Cinemark was forced to close its theaters, incurring business income loss.

Cinemark relied on its insurance coverage and submitted a claim to Factory Mutual on April 20, 2020. The Policy insures "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this Policy." (Dkt. #21, Exhibit 1 at p. 9). The Policy also "insures TIME ELEMENT loss ... directly resulting from physical loss or damage of the type insured." (Dkt. #21, Exhibit 1 at p. 49). The Policy also lists "Additional Coverages." These include the "Communicable Disease Response" [1] and the "Interruption by Communicable Disease" [2] coverages. The

Policy contemplates that communicable diseases can cause loss or damage by excluding "loss or damage caused by or resulting from terrorism" from the Communicable Disease Coverages (Dkt. #21, Exhibit 1 at pp. 34, 69).

Months passed with no response from Factory Mutual. By the time Cinemark sued in November 2021, Factory Mutual had not issued a coverage position.

On March 30, 2021, Factory Mutual filed a Motion for Judgment on the Pleadings (Dkt. #24). Factory Mutual argues that Cinemark has not alleged physical loss or damage, and that the Policy's Contamination Exclusion [3] bars the claims. Factory Mutual relies on this Court's recent dismissal in *Selery Fulfillment, Inc. v. Colony Ins. Co.*, 4:20-CV-853, 2021 WL 963742 (E.D. Tex. Mar. 15, 2021).

**2 On April 20, 2021, Cinemark responded (Dkt. #37). Cinemark argues the Policy covers loss and damage caused by communicable diseases and that Factory Mutual's reads the communicable disease coverage out of the Policy. On April 27, 2021, Factory Mutual replied (Dkt. #44). On May 3, 2021, Cinemark filed its Sur-Reply (Dkt. #45).

LEGAL STANDARD

[1] Defendant brings its motion under Federal Rule of Civil Procedure 12(c). The standard for deciding a Rule 12(c) motion for judgment on the pleadings is the same as a Rule 12(b)(6) motion to dismiss. ***568** *Guidry v. American Public Life Ins. Co.*, 512 F.3d 177, 180 (5th Cir. 2007). In examining a motion for judgment on the pleadings, therefore, the court must accept as true all well-pleaded facts contained in the plaintiff's complaint and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996).

[2] A claim will survive if it "may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563, 127 S. Ct. 1955, 1969, 167 L. Ed.2d 929 (2007). In other words, a claim may not be dismissed based solely on a court's supposition that the pleader is unlikely "to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." *Id.* at 563 n.8, 127 S. Ct. 1955.

[3] **[4]** **[5]** Although detailed factual allegations are not required, a plaintiff must provide the grounds of his entitlement to relief beyond mere "labels and conclusions," and "a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555, 127 S. Ct. 1955. The complaint must be factually suggestive, so as to "raise a right to relief above the speculative level" and into the "realm of plausible liability." *Id.* at 555, 557 n.5, 127 S. Ct. 1955. "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, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955). For a claim to have facial plausibility, a plaintiff must plead facts that allow the court to draw the reasonable inference that the defendant is liable for the alleged misconduct. *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). Therefore, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." *Id.* (internal quotations omitted).

[6] **[7]** A district court may consider documents attached to a motion to dismiss only if the documents are referred to in the plaintiff's complaint and are central to the plaintiff's claims. *Scanlan v. Texas A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003) (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000)); *see also Causey v. Sewell Cadillac-Chevrolet*, 394 F.3d 285, 288 (5th Cir. 2004). The Fifth Circuit has also held that courts are permitted to refer to matters of public record when deciding a motion to dismiss under Rule 12(b)(6). *Cinel v. Connick*, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994). "[T]aking judicial notice of public records directly relevant to the issue in dispute is proper on a Rule 12(b)(6) review and does not transform the motion into one for summary judgment." *Motten v. Chase Home Fin.*, 831 F.Supp.2d 988, 993 (S.D. Tex. 2011) (*citing Funk v. Stryker Corp.*, 631 F.3d 777, 780 (5th Cir. 2011)).

ANALYSIS

3 **[8] After reviewing the current complaint, the motion, and the response, the Court finds that Cinemark stated plausible claims for purposes of defeating a Rule 12(c) motion.

The Court's recent ruling in *Selery* is distinguishable. In *Selery*, this Court granted a motion to dismiss where an

eCommerce logistics provider sued its insurance provider for a COVID-19 related claim. 4:20-cv-853, 2021 WL 963742 (E.D. Tex. Mar. 15, 2021). Due to government orders, Selery ceased business and submitted an insurance claim. *Id.* at *6. The claim was denied. *Id.* at *2. Selery sued and alleged that COVID-19 and the resulting government orders caused a direct physical loss or damage to its property. ***569** *Id.* at *3. The Court granted the motion to dismiss because mandatory authority suggests that "physical loss" requires a physical alteration of the property. *Id.* at *4. (citing *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 ... 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.")). Selery never alleged that COVID-19 entered the property, only that the pandemic prevented Selery from fully utilizing it. *Id.* at *6.

Here, Cinemark alleges a different harm and is governed by different contract terms. Unlike Selery, Cinemark alleges that COVID-19 was actually present and actually damaged the property by changing the content of the air. Cinemark's Policy is much broader than the one in *Selery* and expressly covers loss and damage caused by "communicable disease." Both parties agree "communicable disease" encompasses COVID-19. At this stage of the proceedings, *Selery* is distinguishable. Accordingly, Cinemark has met its burden to defeat the 12(c) motion.

CONCLUSION

It is therefore **ORDERED** that Defendant Factory Mutual Insurance Company's Motion for Judgment on the Pleadings (Dkt. #24) is hereby **DENIED**.

All Citations

500 F.Supp.3d 565, 2021 WL 1851030

Footnotes

1 The Communicable Disease Response section "covers the reasonable and necessary costs incurred by the Insured ... for the ... cleanup, removal and disposal of the actual not suspected presence of **communicable diseases** from the insured property." (Dkt #21, Exhibit 1 at pp. 34-35 (bold in original)).

2 The Interruption by Communicable Disease section covers "the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY at such **location** with the actual not suspected presence of **communicable disease**." (Dkt. #21, Exhibit 1 at p. 69 (bold in original)).

3 "This Policy excludes the following unless directly resulting from other physical damage not excluded by this Policy:

> 1) **contamination,** and any cost due to **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. If **contamination** due only to the actual not suspected presence of **contaminant(s)** directly results from other physical damage not excluded by this Policy, then only physical damage caused by such **contamination** may be insured.

(Dkt. #21, Exhibit 1 at p. 26).