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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

CIBUS LLC,

Plaintiff,

v.

CAPITAL INSURANCE GROUP, EAGLE
WEST INSURANCE COMPANY,
CALIFORNIA CAPITAL INSURANCE
COMPANY, MONTERREY INSURANCE
COMPANY, and NEVADA CAPITAL
INSURANCE COMPANY,

Defendants.

COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Cibus LLC (“Cibus” or “Plaintiff”) brings this Complaint, alleging relief against Defendants Eagle West Insurance Company (“Eagle West”), California Capital Insurance Company (“California Capital”), Monterrey Insurance Company (“Monterrey”), and Nevada Capital Insurance Company (“Nevada Capital”) and avers as follows:

NATURE OF THE CASE

1. This is a civil action seeking declaratory relief arising from Plaintiff’s contract of insurance with Defendants.

2. In light of the Coronavirus global pandemic and state and local orders mandating that all non-essential in store businesses must shut down on March 17, 2020, Plaintiff Cibus' restaurant has suffered business losses.

3. Plaintiff's insurance policies provide coverage for all non-excluded business losses, and thus provide coverage here.

4. As a result, Plaintiff is entitled to declaratory relief that its business is covered for all business losses that have been incurred in an amount greater than \$150,000.00.

JURISDICTION

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332, because there is complete diversity of citizenship between Plaintiff and Defendants. Further, Plaintiff has suffered business losses in an amount greater than \$150,000.00. The amount in controversy necessary for diversity jurisdiction over a declaratory judgment action is measured by the value of those business losses. *Id.* § 1332(a).

6. This Court has personal jurisdiction over Defendants. Defendants have engaged in substantial business in this District, including the formation of the policies underlying Plaintiff's claims, and Defendants have therefore personally availed itself of jurisdiction in this District. The owners of Plaintiff are citizens of the state of Arizona. Defendants all sold their policies to Plaintiff, the owners of which are citizens of Arizona.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this District, including the formation of the policies underlying Plaintiff's claims.

PARTIES

8. Plaintiff, Cibus owns and operates a restaurant at 47 N. Scott Street, Tucson, Arizona 85701. The owners of Cibus are Teodora Lillard, James Lillard, Raymond Lillard, Teodora Lillard, James Lillard, and Raymond Lillard are all citizens of Arizona.

9. Defendant Eagle West is a wholly owned subsidiary of the Capital Insurance Group (“CIG”) who is affiliated with Monterrey, Nevada Capital, and California Capital (collectively “Eagle West Group”). Defendant Eagle West Group is headquartered in California and is a citizen of California, located at PO Box 231, Monterey, California. At all relevant times, Eagle West Group issued a policy to Plaintiff Cibus to cover business interruption loss from October 3, 2019 until October 3, 2020. The policy number is 13-CMA-2-055324. The policy was intended to cover losses to business interruption. *See* Declaration, attached hereto as Exhibit 1 (Eagle West Group Policy).

10. Plaintiff Cibus submitted a claim for a date of loss pursuant to its policy seeking coverage under this policy. Eagle West Group rejected Plaintiff’s claim for coverage for business loss and business interruption and other claims, contending, *inter alia*, that Plaintiff Cibus did not suffer physical damage to its property directly and stating other reasons why Plaintiff Cibus purportedly is not entitled to coverage for the losses and damages. Defendants Eagle West Group also claimed the policy does not cover losses due to the Virus Exclusion Clause.

ACTUAL BACKGROUND

I. Insurance Coverage

11. Plaintiff faithfully paid policy premiums to Defendants, specifically to provide, among other things, additional coverages in the event of business interruption or closures by order of Civil Authority and for business loss for property damage.

12. Under the Eagle West Group Policy, insurance is extended to apply to the actual loss of business income sustained and the actual, necessary and reasonable extra expenses incurred when access to the Insured Properties is specifically prohibited by order of civil authority as the direct result of a covered cause of loss to property in the immediate area of Plaintiff's Insured Properties. This additional coverage is identified as coverage under "Civil Authority."

13. The Eagle West Group Policy are an all-risk policy, insofar as it provides that covered causes of loss under the policy means coverage for all covered losses, including but not limited to direct physical loss or direct physical damage, unless the loss is specifically excluded or limited in the policy.

14. The Eagle West Group Policy also covers for damages resulting from business interruption when there is property damage. The exclusion for viruses does not apply to this pandemic. The Eagle West Group Policy does not identify any exclusions for a pandemic.

15. Based on information and belief, Defendants have accepted the policy premiums with no intention of providing any coverage for business losses or the Civil Authority extension due to a loss and shutdown and property damage.

II. The Coronavirus Pandemic

16. The scientific community, and those personally affected by the virus, recognize the Coronavirus as a cause of real physical loss and damage. It is clear that contamination of the Insured Property would be a direct physical loss requiring remediation to clean the surfaces of the dental practice.

17. The virus that causes COVID-19 remains stable and transmittable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel. *See* <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last visited April 9, 2020).

18. The CDC has issued a guidance that gatherings of more than 10 people must not occur. People in congregate environments, which are places where people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19.

19. The global Coronavirus pandemic is exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials, “fomites,” for up to twenty-eight (28) days.

20. China, Italy, France, and Spain have implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the intrusion of microbials.

III. Civil Authority

21. On March 11, 2020, the Governor of Arizona, Doug Ducey, declared a Public Health Emergency related to the COVID-19 pandemic.

22. On March 15, 2020, the Governor of Arizona closed all public schools.

23. On March 17, 2020, the Governor of Arizona declared that all gatherings of more than 10 people were discouraged.

24. On March 17, 2020, the Mayor of Tucson, Arizona, Regina Romero, issued the closure of non-essential businesses, including restaurants like the Plaintiff.

25. On April 1, 2020, the Governor of Arizona issued the closure of non-essential businesses, including restaurants like the Plaintiff. This order was in effect until May 11, 2020.

26. On May 16, 2020, the Mayor of Tucson extended the closure of non-essential businesses, including restaurants like the Plaintiff, until June 8, 2020.

A. COVERAGE

27. On April 10, 2020, President Trump seemed to support insurance coverage for business loss like that suffered by the Plaintiff.

REPORTER: Mr. President may I ask you about credit and debt as well. Many American individuals, families, have had to tap their credit cards during this period of time. And businesses have had to draw down their credit lines. Are you concerned Mr. President that that may hobble the U.S. economy, all of that debt number one? And number two, would you suggest to credit card companies to reduce their fees during this time?

PRESIDENT TRUMP: Well it's something that we've already

suggested, we're talking to them. *Business interruption insurance*, I'd like to see these insurance companies—you know you have people that have paid. When I was in private I had business interruption. When my business was interrupted through a hurricane or whatever it may be, I'd have business where I had it, I didn't always have it, sometimes I had it, sometimes, I had a lot of different companies. *But if I had it I'd expect to be paid*. You have people. I speak mostly to the restaurateurs, where they have a restaurant, they've been paying for 25, 30, 35 years, business interruption. They've never needed it. All of a sudden they need it. And I'm very good at reading language. I did very well in these subjects, OK. And I don't see the word pandemic mentioned. Now in some cases it is, it's an exclusion. But in a lot of cases I don't see it. I don't see it referenced. And they don't want to pay up. I would like to see the insurance companies pay if they need to pay, if it's fair. And they know what's fair, and I know what's fair, I can tell you very quickly. But business interruption insurance, that's getting a lot of money to a lot of people. And they've been paying for years, sometimes they just started paying, but you have people that have never asked for business interruption insurance, and they've been paying a lot of money for a lot of years for the privilege of having it, and then when they finally need it, the insurance company says 'we're not going to give it.' We can't let that happen.

See <https://youtu.be/cMeG5C9TjU> (last visited on April 17, 2020) (emphasis added).

28. The President is articulating a few core points:
 - a. Business interruption is a common type of insurance.
 - b. Businesses pay in premiums for this coverage and should reasonably expect they'll receive the benefit of the coverage.
 - c. This pandemic should be covered unless there is a specific exclusion for pandemics.
 - d. If insurers deny coverage, they would be acting in bad faith.

29. These Orders and proclamations, as they relate to the closure of all “non-life-sustaining businesses,” evidence an awareness on the part of both state and local governments that COVID-19 causes damage to property. This is particularly true in places where business is conducted, such as Plaintiff, as the requisite contact and interaction causes a heightened risk of the property becoming contaminated.

B. Impact on Plaintiff Cibus

30. As a result of the Orders referenced herein, Plaintiff Cibus shut its doors to its restaurant and lost all of its perishable inventory.

31. Plaintiff Cibus' business loss occurred when the Mayor of Tucson issued her order on March 17, 2020 banning any gatherings at an establishment.

32. Prior to March 17, 2020, Plaintiff Cibus was open. Plaintiff Cibus' restaurant is not a closed environment, and because people – staff, customers, community members, and others – constantly cycle in and out of the shop, there is an ever-present risk that the Insured Property is contaminated and would continue to be contaminated.

33. Businesses like the Plaintiff Cibus' restaurant are more susceptible to being or becoming contaminated, as both respiratory droplets and fomites are more likely to be retained on the Insured Property and remain viable for far longer as compared to a facility with open-air ventilation.

34. Plaintiff Cibus' business is also highly susceptible to rapid person-to-property transmission of the virus, and vice-versa, because the service nature of the business places staff and customers in close proximity to the property and to one another and because the nature of the shop and activity exposes to high level of respiratory droplets and fomites being released into the air of the property.

35. The virus is physically impacting Plaintiff Cibus. Any effort by Defendant Eagle West Group to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger Plaintiff Cibus and the public.

36. A declaratory judgment determining that the coverage provided under the Eagle West Group Policy exists and is necessary so as to prevent Plaintiff Cibus from being left without

vital coverage acquired to ensure the survival of the trucking school due to the shutdown caused by the civil authorities' response. As a result of these Orders, Plaintiff Cibus has incurred, and continues to incur, among other things, a substantial loss of business income and additional expenses covered under the Policy.

CAUSE OF ACTION

DECLARATORY RELIEF

37. Plaintiff re-alleges and incorporates by reference into this cause of action each and every allegation set forth in each and every paragraph of this Complaint.

38. The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides that in “a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a).

39. An actual controversy has arisen between Plaintiff and Defendants as to the rights, duties, responsibilities and obligations of the parties under the Eagle West Group Policy in that Plaintiff contends and, on information and belief, the Defendants dispute and deny that:

- a. The Orders constitute a prohibition of access to Plaintiff's Insured Properties.
- b. The prohibition of access by the Orders has specifically prohibited access as defined in the Eagle West Group Policy;
- c. The Eagle West Group Policy Exclusion of Loss Due to Virus or Bacteria does not apply to the business losses incurred by Plaintiff here. These exclusions do not apply to the pandemic;
- d. The Orders trigger coverage;
- e. The Eagle West Group Policy provides coverage to Plaintiff for any current and future civil authority closures of business in Arizona due to physical loss/or damage directly or indirectly from the Coronavirus under the Civil Authority coverage parameters. The Eagle West Group Policy does not exclude the pandemic;

- f. The Eagle West Group Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the insured premises or immediate area of the Insured Property; and
- g. Resolution of the duties, responsibilities and obligation of the parties is necessary as no adequate remedy at law exists and a declaration of the Court is needed to resolve the dispute and controversy.

40. Plaintiff seeks a Declaratory Judgment to determine whether the Orders constitute a prohibition of access to Plaintiff's Insured Properties as Civil Authority as defined in the Eagle West Group Policy.

41. Plaintiff further seeks a Declaratory Judgment to affirm that the Order triggers coverage.

42. Plaintiff further seeks a Declaratory Judgment to affirm that the Eagle West Group Policy provides coverage to Plaintiff for any current and future Civil Authority closures of businesses in the State of Arizona due to physical loss or damage from the Coronavirus has caused a loss or damage at the Insured Properties.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff herein prays as follows:

- a. For a declaration that the Orders constitute a prohibition of access to Plaintiff's Insured Properties.
- b. For a declaration that the prohibition of access by the Orders is specifically prohibited access as defined in the Eagle West Group Policy.
- c. For a declaration that the Orders trigger coverage under the Eagle West Group Policy.
- d. For a declaration that the Eagle West Group Policy provides coverage to Plaintiff for any current, future and continued civil authority closures of businesses in Arizona due to physical loss or damage directly or indirectly from the Coronavirus under the Civil Authority coverage parameters.
- e. For a declaration that the Eagle West Group Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the Plaintiff's Insured Properties or the immediate area of the Plaintiff's Insured Properties.

f. For such other relief as the Court may deem proper.

TRIAL BY JURY IS DEMANDED

Plaintiff hereby demands trial by jury.

Dated: June 25, 2020

Respectfully submitted,

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