UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Project Lion LLC, et al.

Plaintiffs

v.

Badger Mutual Insurance Company,

Defendant

Case No.: 2:20-cv-00768-JAD-VCF

Order Granting Motion to Dismiss and Closing Case

[ECF No. 31]

Project Lion LLC, Project M LLC, and Project W LLC sue Badger Mutual Insurance Company for failing to provide coverage for economic losses that they incurred from the government-mandated closures of their restaurants during the COVID-19 pandemic.[1] Badger moves to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that the restaurants' respective "all-risk" insurance policies do not cover their claims and coverage for any alleged damage caused by the SARS-CoV-2 virus is precluded by the policies' exclusions.[2] The restaurants maintain that they have sufficiently alleged coverage under the policy, asserting that the Badger-policy provisions are vague, they have alleged direct physical loss and damage to their properties, and the virus is not the efficient proximate cause of their injuries. While I am sympathetic to the economic woes these restaurants face, they cannot show direct physical loss or damage to their properties caused by a covered peril and, regardless, their policies' virus exclusions unambiguously bar their coverage claims. So I grant Badger's motion and dismiss plaintiffs' claims with prejudice.

[1] ECF No. 16 (amended complaint).

[2] ECF No. 31 (motion to dismiss).

Background

In March 2020, the federal government and the State of Nevada began grappling with the severity of the SARS-CoV-2 virus by ordering sweeping social-distancing measures, closing businesses, and directing customers to avoid restaurants, bars, and food courts to reduce the spread of the disease.[3] Among those hit by these measures were plaintiffs' restaurants—Crush, La Comida, and La Cave—each of whom wiped its counters one final time and turned off its ovens, "unable to use [its] property for its intended purpose" and "forced to close."[4] In the restaurants' case, this was largely a preventative measure; the novel coronavirus was not found in or on the plaintiffs' property.[5] To recoup the losses caused by the closure policies, the restaurants sought coverage from Badger, submitting a claim under their all-risk policies.[6]

La Comida's policy states that Badger will pay "the actual loss of Business Income you sustain due to the necessary suspension of your operations during the period of restoration," when the suspension of operations is "caused by direct physical loss of or damage to property at the described premises."[7] Business income is defined to include "net income . . . that would have been earned or incurred if no physical loss or damage had occurred."[8] Crush and La Cave's

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[3] ECF No. 16 at ¶ 2.

[4] *See id.* at ¶¶ 45, 53.

[5] *Id.* at ¶ 49.

[6] *Id.* at ¶¶ 36, 50.

[7] ECF No. 32-5 at 31 (emphasis omitted). In ruling on a Rule 12(b)(6) motion, a court generally considers only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice. *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). But I may also consider documents that the complaint incorporates by reference if the plaintiffs refer "extensively to the document or the document forms the basis" of the plaintiffs' claims. *Id.* Here, Badger attaches copies of the restaurants' insurance policies, which are the crux of the restaurant's breach-of-contract allegations. The restaurants do not dispute their authenticity, so I consider them in my ruling.

[8] ECF No. 32-5 at 31.

respective policies provide coverage "during the restoration period when your business is necessarily interrupted by direct physical loss to real or personal property as a result of a covered peril."[9] That coverage is extended to losses incurred "while access to the described premises is specifically denied by an order of civil authority," when that order is the "result of damage to property other than at the described premises and caused by a covered peril."[10] And all three policies exclude coverage for "loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress," including but "not limited to" losses incurred as a result of "contamination" or "denial of access to property because of any virus."[11]

Based on this policy language, Badger denied the restaurants' and its other insureds' claims.[12] So the restaurants sought relief in this court, on behalf of themselves and a putative class of other Badger policyholders, seeking declaratory relief and damages for anticipatory breaches of contract.[13] Badger moves to dismiss the restaurants' amended complaint under Rule 12(b)(6), arguing that the policies do not provide coverage for the restaurants' alleged losses.

Discussion

Under Nevada law, an insurer "bears a duty to defend its insured whenever it ascertains facts [that] give rise to the potential of liability under the policy."[14] While all doubts as to

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[9] ECF No. 32-2 at 34.

[10] *Id.* at 35; ECF No. 32-7 at 33. The restaurants do not seek coverage for their losses under this provision.

[11] ECF Nos. 32-2 at 13; 32-5 at 13; 32-7 at 12.

[12] ECF No. 16 at ¶¶ 53, 87, 94.

[13] *See generally id.*

[14] *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 1158 (Nev. 2004).

coverage are "resolved in favor of the insured," the "duty to defend is not absolute."[15] "A potential for coverage only exists when there is arguable or possible coverage" and "[d]etermining whether an insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy."[16] Interpreting insurance contract terms in Nevada is normally a job for the court.[17]

A. The restaurants fail to plausibly allege direct physical loss or damage.

Despite some differences in the restaurants' insurance policies, each requires the plaintiffs to show "direct physical loss" or "damage" to their properties to trigger coverage. The restaurants correctly note that the terms "direct physical loss or damage" are undefined, and they argue that the losses they incurred by closing their doors fall within a reasonable interpretation of that provision and that other courts have construed similar policies to support coverage. An insurance policy "is enforced according to its terms to effectuate the parties' intent,"[18] viewing its provisions "in their plain, ordinary[,] and popular sense."[19] In Nevada, any limitation in policy coverage must "clearly and distinctly communicate[] to the insured the nature of the limitation."[20]

While neither party identifies controlling Nevada authority that has explicitly interpreted the term "direct physical loss or damage," the Nevada Supreme Court has generally cabined claims for coverage under similar policies to plaintiffs who allege some sort of structural or

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[15] *Id.*

[16] *Id.*

[17] *See Century Sur. Co. v. Casino W., Inc.*, 329 P.3d 614, 616 (Nev. 2014).

[18] *Burrows v. Progressive Cas. Ins.*, 820 P.2d 748, 749 (Nev. 1991).

[19] *Siggelkow v. Phoenix Ins. Co.*, 846 P.2d 303, 304 (Nev. 1993) (citing *Nat'l Union Fire Ins. Co. v. Reno's Exec. Air*, 682 P.2d 1380, 1382 (Nev. 1984)).

[20] *Reno's Exec. Air*, 682 P.2d at 1382.

physical change to a property or its surroundings, which actually altered its functionality or use.[21] The Ninth Circuit has agreed with such a reading, upholding both an exclusion of coverage under a "direct physical loss or damage" provision when the "record reveal[ed] that there was no damage caused by the fire;"[22] and affirming dismissal of "intangible" claims under a policy's "direct physical loss" provision.[23] California courts, which often guide Nevada's, have consistently interpreted "direct physical loss" to require a "distinct, demonstrable, physical alteration of the property" or a "physical change in the condition of the property."[24] This requirement is no less true in the context of the SARS-CoV-2 pandemic, where a growing number of courts across the country, including this one, have reasoned that pure economic losses caused by COVID-19 closures do not trigger policy coverage predicated on "direct physical loss or damage."[25]

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[21] *See Fed. Ins. Co. v. Coast Converters*, 339 P.3d 1281, 1283 (Nev. 2014) (describing "electrical problems at a plastic-bag manufacturing plant [that] led to damaged machinery and an increased number of defective bags being produced"); *Farmers Home Mut. Ins. Co. v. Fiscus*, 725 P.2d 234, 236 (Nev. 1986) (upholding coverage determination under a "physical loss" provision for damage to a home caused by flooding "from disconnected water supply pipes").

[22] *Commonwealth Enters. v. Liberty Mut. Ins. Co.*, 101 F.3d 705 (table) (9th Cir. 1996).

[23] *Sentience Studio, LLC v. Travelers Ins. Co.*, 102 F. App'x 77, 81 (9th Cir. 2004) (unpublished).

[24] *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 771, 779–80 (2010) (internal quotation marks and citations omitted).

[25] *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 839–40 (N.D. Cal. 2020) ("[H]ere, there is nothing to fix, replace, or even disinfect for Mudpie to regain occupancy of its property."); *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, -- F. Supp. 3d --, 2020 WL 6562332, at *6 (N.D. Cal. 2020) ("[Plaintiff] has not alleged any *direct physical* anything that happened to or at its specific properties. Moreover, it has not been dispossessed or deprived *of* any specific property; its inventory and equipment remain."); *Emerald Coast Rests., Inc. v. Aspen Specialty Ins. Co.*, No. 20-cv-5898, 2020 WL 7889061, at *2 (N.D. Fla. Dec. 18, 2020); *Carrot Love, LLC v. Aspen Specialty Ins. Co.*, No. 20-23586-Civ, 2021 WL 124416, at *2 (S.D. Fla. Jan. 13, 2021) (noting the "nearly unanimous view that COVID-19 does not cause direct physical loss or damage to a property sufficient to trigger coverage under the policy at issue here") (collecting cases); *Johnson v. Hartford Fin. Servs. Grp., Inc.*, No. 1:20-cv-02000, 2021 WL 37573, at *5 (N.D. Ga. Jan. 4, 2021) ("Plaintiffs do not allege any tangible alteration to a

Recognizing the weight of this authority, the restaurants attempt to legally distinguish their case, arguing that (1) certain state and out-of-circuit courts have not required alteration to property to find direct physical loss or damage, and merely required a plaintiff to demonstrate that its property has become unusable; and (2) courts that have denied coverage for COVID-19-based economic losses were wrong. Each of the cases upon which the restaurants rely involved an intervening, physical force that "made the premises uninhabitable or even unusuable."[26] In *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, for example, the District of New Jersey judge reasoned that ammonia discharge inflicted "direct physical loss or damage" because there was "no genuine dispute that the ammonia release physically transformed the air," thus rendering the premises unusable.[27] Likewise, a California appellate court determined, in the partially abrogated decision *Hughes v. Potomac Insurance Co. of D.C.*, that the plaintiff should be afforded coverage because a landslide left the insured's home uninhabitable.[28] So too in *Murray v. State Farm Fire & Casualty Co.*, where the West Virginia appellate court found that a home rendered uninhabitable by a rock slide, though not physically altered, had suffered direct physical loss.[29] And in *Studio 417, Inc. v. The Cincinnati Insurance Co.*—one of the few cases to hold that tangible, physical alteration is not required to show

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single physical edifice or piece of equipment [that] the COVID-19 virus caused."); *10E, LLC v. Travelers Indem. Co of Conn.*, No. 2:20-cv-04418, 2020 WL 6749361, at *2 (C.D. Cal. Nov. 13, 2020); *Levy Ad Grp., Inc. v. Chubb Corp.*, -- F. Supp. 3d --, 2021 WL 777210, at *2 (D. Nev. 2021); *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, No. 2:20-cv-01240, 2021 WL 769660, at *2 (D. Nev. Feb. 26, 2021).

[26] *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418, 2014 WL 6675934, at *6–7 (D.N.J. Nov. 25, 2014).

[27] *Id.*

[28] *Hughes v. Potomac Ins. Co. of D.C.*, 199 Cal. App. 2d 239, 250 (1962).

[29] *Murray v. State Farm Fire & Cas. Co.*, 509 S.E. 2d 1, 5 (W. Va. 1998).

"direct physical loss"—the court found coverage in part because "COVID-19 particles attached to and damaged [the plaintiff's] property."[30]

But unlike the plaintiffs in *Hughes*, *Murray*, or *Gregory Packaging*, the restaurants have not alleged the existence of an outside, physical force that has so affected their physical property as to make it unusable. And unlike the plaintiff in *Studio 417*, the restaurants affirmatively deny that COVID-19 has entered their properties, damaged their surfaces, or infected their employees.[31] Instead, they merely assert that the temporary closure of their premises because of a government shut-down order should be a covered loss under the policies. Numerous courts have rejected this exact argument with respect to identical policy terms, considering and distinguishing the same cases upon which the restaurants rely, and they have consistently concluded "that there needs to be some *physical* tangible injury (like a total deprivation of property) to support 'loss of property' or a *physical* alteration or active presence of a contaminant to support 'damage' to property."[32] I find their reasoning persuasive and join them.

My conclusion is also bolstered by the additional language in the Badger policies. "To determine whether a term is ambiguous, it should not be viewed standing alone, but rather in conjunction with the policy as a whole 'in order to give a reasonable and harmonious meaning

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[30] *Studio 417, Inc. v. The Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 802 (W.D. Mo. 2020). Indeed, numerous courts outside the Ninth Circuit have found that a direct physical loss of property can occur when an outside physical force induces a detrimental change in the property's capabilities or contaminates its structures. *See, e.g.*, *Pentair, Inc. v. Guarantee & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005) (rejecting the argument "that direct physical loss or damage is established *whenever* property cannot be used for its intended purpose"); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54–55 (Colo. 1968).

[31] ECF No. 16 at ¶ 49; *see also* ECF No. 34 at 16 ("Here, Plaintiffs' property was not contaminated by coronavirus.").

[32] *Water Sports Kauai, Inc.*, 2020 WL 6562332 at *6 (listing cases); *Mudpie, Inc.*, 487 F. Supp. at 841–43.

and effect to all its provisions.'"[33] Here, the restaurants' policies provide coverage for physical loss or damage during a "restoration period," which ends on "the date the property should be rebuilt, repaired, or replaced."[34] As the restaurants concede, there is nothing to rebuild, repair, or replace on their premises because they merely allege a temporary loss of use. So I find, alongside the vast majority of courts nationwide, that their policies do not provide coverage for the pure economic losses they've suffered due to COVID-19-related business closures.

B. The restaurants' policies exclude their losses.

Even were I to find that the restaurants had alleged direct physical loss or damage to their properties covered by the policy, their policies' virus exclusion would preclude coverage. To prove that an exclusion prevents coverage under a policy, the insurer must "write the exclusion in obvious and unambiguous language," show that the insurer's proposed interpretation is the only fair interpretation of the exclusion, and show that the exclusion clearly applies to the claim at hand.[35] Under the terms of the policy, Badger does not provide coverage for losses "caused by, resulting from, or relating to any virus."[36] The restaurants argue that this exclusion does not apply to the Sars-CoV-2 virus and the resulting COVID-19 pandemic because (1) the clause is ambiguous and subject to multiple, reasonable interpretations that are based in part on materials extraneous to the policies; (2) the exclusion only applies when the property is itself

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[33] *Fourth St. Place v. Travelers Indem. Co.*, 270 P.3d 1235, 1239 (Nev. 2011).

[34] *See* ECF No. 32-2 at 34. La Comida's policy provides that the restoration period begins "on the date property, except finished stock, is actually repaired, rebuilt[,] or replaced and operations are resumed." ECF No. 32-7 at 32.

[35] *Big-D Const. Corp. v. Take it for Granite Too*, 917 F. Supp. 2d 1096, 1113 (D. Nev. 2013) (quoting *Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d 668, 673 (Nev. 2011) (internal quotation marks omitted)).

[36] ECF Nos. 32-2 at 13; 32-5 at 13; 32-7 at 12.

contaminated; and (3) their losses were proximately caused by the closure orders and not the virus itself.

I find that the Badger policies' virus exclusion unambiguously precludes the restaurants' losses. The exclusion is written broadly, and it states that losses related to any virus are not covered. And despite the restaurants' protestations otherwise, it also expressly declines to limit itself to losses exclusively caused by contamination of the insured's building and, instead, lists such contamination as merely one example of a situation in which coverage would be denied.[37] As another district court recently noted, the language of this exclusion "contemplates situations where a virus indirectly contributes to or worsens a loss,"[38] and the restaurants cannot reasonably deny that the virus and its spread contributed to their losses. They, in fact, devote roughly half of their complaint to describing the effects of the novel coronavirus; articulating in detail the origin, spread, and transmission of the virus; and noting that "containment efforts have led to civil authorities issuing orders closing many business establishments."[39] They also repeatedly allege that they were required to close their doors by the government to stall the spread of the virus.[40] As with the direct-physical-loss-or-damage decisions, many other courts have similarly denied plaintiffs coverage under nearly identical virus exclusions.[41] I see no reason to not join their chorus.

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[37] *Id.*

[38] *Boxed Foods Co., LLC v. Cal. Cap. Ins. Co.*, 497 F. Supp. 3d 516, 522–23 (N.D. Cal. 2020) (finding that a virus exclusion precluded plaintiff's claims for economic losses incurred by the COVID-19 pandemic).

[39] ECF No. 16 at ¶¶ 22–34.

[40] *Id.* at ¶¶ 53, 87, 94.

[41] *Boxed Foods Co.*, 497 F. Supp. at 523; *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Co.* -- F. Supp. 3d --, 2020 WL 6440037, at *5–6 (C.D. Cal. 2020); *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, No. 5:20-cv-04265, 2020 WL 7696080, at *3 (N.D. Cal.

I also do not consider the extraneous insurance documents that the restaurants proffer to manufacture ambiguity in the insurance policy.[42] "It is a general rule that parol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict . . . written instruments . . . [that] are valid, complete, unambiguous, and unaffected by accident or mistake."[43] It is only when a contract is ambiguous that "parol evidence is admissible for the purpose of ascertaining the true intentions and agreements of the parties."[44] Here, there is no mistaking the true intention of the parties, which was to exclude losses caused by or related to a virus.

Nevada's efficient-proximate-cause doctrine also does not save the restaurants' claims. In *Fourth St. Place v. Travelers Indemnity Co.*, the Nevada Supreme Court noted that, "[when] covered and noncovered perils contribute to a loss, the peril that set in motion the chain of events leading to the loss or the 'predominating cause' is deemed the efficient proximate cause or legal cause of loss."[45] While this determination is generally left to the jury, "when the facts are settled or undisputed, the determination is for the court as a matter of law."[46] Here, but-for COVID-19, the civil-authority orders would not exist, and the restaurants would not have lost business revenue, making the virus the efficient proximate cause of their losses. This fact is plain on the face of the restaurants' complaint and renders their citations to *Newman Myers Kreines Gross Harris P.C. v. Great Northern Insurance Co.* and *United Airlines, Inc. v. Insurance Co. of the*

Dec. 28, 2020) ("The language is plain and unambiguous—*any* loss caused by virus that can induce physical distress, illness, or disease, such as COVID-19, is excluded from coverage.").

[42] ECF No. 34 at 15 (citing endorsement language drafted by Insurance Services Office, Inc.).

[43] *State ex rel. List v. Courtesy Motors*, 590 P.2d 163, 165 (Nev. 1979).

[44] *Id.*

[45] *Fourth St. Place*, 270 P.3d at 1243.

[46] *Id.* at 1243–44.

State of Pennsylvania inapposite.[47] Not only do those cases fail entirely to discuss the efficient-proximate-cause doctrine, but neither dealt with a broadly phrased exclusion like the Badger policies'.[48] So I also find that the restaurants' coverage claims would be excluded under their policies' virus exclusion.

C. Leave to amend

Federal Rule 15(a) states that "[t]he court should freely give leave [to amend] when justice so requires." The Ninth Circuit has construed this rule broadly, requiring that leave to amend be granted with "extreme liberality."[49] But leave to amend may be denied if the proposed amendment is futile.[50] Because the restaurants cannot overcome the clear and unambiguous policy language that precludes their coverage claims, I dismiss their claims with prejudice and without leave to amend.

Conclusion

IT IS THEREFORE ORDERED that Badger's motion to dismiss **[ECF No. 31] is GRANTED** and the restaurants' claims are dismissed with prejudice. The **CLERK OF COURT** is directed to **CLOSE THIS CASE**.

U.S. District Judge Jennifer A. Dorsey
Dated: May 19, 2021

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[47] ECF No. 34 at 17.

[48] *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 333 (S.D.N.Y. 2014) ("Thus, the power outage Newman Myers complains of was not directly *caused by* flood, as that term is commonly understood."); *United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 134 (2d Cir. 2006) (holding that exclusion did not apply for damages "resulting from [t]errorism").

[49] *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (citation omitted); *Poling v. Morgan*, 829 F.2d 882, 886 (9th Cir. 1987) (noting "the strong policy permitting amendment" (citation omitted)).

[50] *Carrico v. City & Cnty. of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011).