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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

PEZ SEAFOOD DTLA, LLC, dba PEZ CANTINA and PEZ POWDER, a Limited Liability Company,

Plaintiff,

vs.

THE TRAVELERS INDEMNITY COMPANY, a Corporation; MUNTU DAVIS, an individual; and DOES 1 through 25;

Defendants.

CASE NO. 2:20-cv-04699-DMG-GJS

Hon. Dolly M. Gee

PLAINTIFF'S OPPOSITION TO DEFENDANT TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA'S MOTION TO DISMISS

Hearing Date: August 14, 2020
Time: 9:30 a.m.
Dept.: Courtroom 8C

Table of Contents

Table of Authorities

CASES

STATUTES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Travelers' Motion misconstrues California law and fails to appropriately address the main issues and properly analyze the insurance policy under which coverage is sought. Although Travelers would like to characterize Plaintiff's coverage as being limited to its additional coverage under the civil authority provision, Plaintiff's policy is undoubtedly an all-risk policy with business interruption coverage. Moreover, Travelers inappropriately attempts to place the burden on Plaintiff to prove that the virus exclusion does not apply – a burden that California law places on the insurance company.

A correct analysis of the issues is clear, Plaintiff has established a prima facie case that coverage is triggered under the business interruption coverage grant in its policy. The governmental closure orders are a covered cause of loss under the policy. The can be no real debate that the orders caused immediate and direct loss. By virtue of the Civil Authority additional coverage within the policy, Traveler's expressly *acknowledges* that an order from a civil authority is be a covered cause of loss under the policy. By restricting access to customers and employees, the governmental orders caused a physical loss to the insured property, by impacting the ability of the business to function as intended. The fundamental character and function of the business was physically changed due to the governmental orders restricting access to customers and employees due to a risk of direct physical loss and a dangerous condition.

As Plaintiff has established that coverage is triggered under the Business Income provision, Travelers must show that the virus exclusion applies. Travelers has failed to show that there was any virus on Plaintiff's property. Travelers attempts to construe the virus exclusion broadly, in clear contravention of California law. Travelers Motion must be denied.

II. SUMMARY OF PERTINENT FACTS

Plaintiff Pez Seafood DTLA, LLC ("Pez Cantina" or "Plaintiff") is a well-known restaurant located in Los Angeles, California. Defendant, The Travelers Property Casualty Company of America ("Travelers") issued an "all-risk" property insurance policy that covers all losses except those that are expressly excluded or limited. FAC at ¶ 19; Exhibit 1 at 118.

A. The Initial Coverage Grant Triggering Coverage

The restaurant is located at 401 S. Grand Avenue, Los Angeles, CA 90071 and was issued a Businessowners Deluxe Insurance Policy, 680-9M304995-20-42 by Travelers which provided insurance coverage for the restaurant including, but not limited to loss of business income and extra expenses. FAC at ¶ 11. Pursuant to the Businessowners Property Coverage Special Form Travelers agreed to "pay for direct physical loss of *or* damage to Covered Property at the premises … caused by or resulting from a Covered Cause of Loss." Exhibit 1 to FAC at 116. "Covered Causes of Loss" means all "risks of direct physical loss unless the loss is" limited or excluded. *Id.* at 118. Pursuant to the Businessowners Property Coverage Special Form Section A.3, Travelers further agreed to: "pay for the actual loss of Business Income" Plaintiff "sustain[s] due to the necessary 'suspension' of" Plaintiff's operations during the period of restoration. *Id.* at 117. In addition to business income, the policy also covers "extra expenses" which is defined as "reasonable and necessary expenses" incurred during the period of restoration that would not have bene incurred if there had been no direct physical loss. *Id.* at 118.

Several terms in the policy are not specifically defined. For instance, "Risks of Direct Physical Loss" is not defined in the policy; nor are the individual terms risks, direct, physical, or loss. Although "property damage" is not defined in the businessowners coverage part, it is defined in the policy in the commercial general liability part as including "[l]oss of use of tangible property that is not physically

injured." *Id.* p. 66 at ¶ 23(b). Once coverage is triggered, the policy covers the "actual" loss of business income and extra expenses subject to a maximum limit of $1,050,000. *Id.* at 6.

B. Additional Coverage Extensions Under the Policy

Beyond the initial grant of coverage, the policy also extends coverage when other real or personal property is lost or damaged. *Id.* at 130. These "Coverage Extensions" include, additional coverage for "Civil Authority" for actual loss of business income and extra expenses incurred "caused by action of civil authority that prohibits access to the described premises." *Id.* at 130. The civil authority action must be due to direct physical loss of or damage to property at locations that are within 100 miles of the described premises, caused by or resulting from a "Covered Cause of Loss." *Id.* In that event, the policy provides three weeks of coverage for business income and extra expense. *Id.* In addition to the above coverages, the policy also provides for "Claim Data Expense" coverage. *Id.* at 120. This provision covers "reasonable expenses" incurred in preparing claim data required by Travelers to show the extent of loss. *Id.* at 120.

C. Additional Endorsements Limiting Coverage

In addition, the policy has certain endorsements that purport to limit coverage. The "exclusion of loss due to virus or bacteria" states that Travelers "will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." *Id.* at 284. The policy does not contain a pandemic exclusion, public safety exclusion, or a public health exclusion. See *Id.* at 8-10.

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D. Governmental Shutdown Orders for Public Health and Safety Due to the Global Covid-19 Pandemic

On March 11, 2020, the World Health Organization officially recognized the COVID-19 pandemic. FAC at ¶ 20. As a result of the global pandemic, counties and cities closed certain "non-essential" businesses to protect the health of the public, including, but not limited to the integrity of the healthcare system. On March 15, 2020, Mayor Eric Garcetti of Los Angeles issued an order placing restrictions on certain establishments throughout the City of Los Angeles including the prohibition of dine-in food service. FAC at ¶ 22. On April 1, 2020 an amended order was issued that specifically acknowledged that COVID-19 is "physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time." FAC at ¶ 23. A further order extending the time of the previous order was made on April 10, 2020. FAC at ¶ 24. All three of the Garcetti Orders prohibited dine-in food service. FAC at ¶¶ 22-24. On March 16, 2020, the Health Officer of Los Angeles, Defendant Muntu Davis, issued an order directing all individuals to stay at home except to provide certain essential services. FAC at ¶ 25. The order specifically prohibited dine-in food services. *Id.* As a result of the Garcetti and Davis orders ("Orders"), Plaintiff had to completely shut down its business operations on March 19, 2020. FAC at ¶ 27. Plaintiff incurred substantial expenses due to the necessary interruption of its business operations as well as actual loss of business income. *Id.*

E. Plaintiff's Claim of Loss with Travelers and the Present Lawsuit

After paying substantial policy premiums to cover a loss to its business if the business was suspended or interrupted, Plaintiff made a claim for its losses. To prevent Plaintiff from being left without vital coverage to ensure the survival of its business on April 20, 2020, Plaintiff filed suit in Los Angeles Superior Court,

alleging a cause of action for declaratory relief seeking an interpretation of The Orders related to insurance coverage issues, including, a declaration as to whether or not the Order specifically prohibited access to Plaintiff's restaurant. On April 30, 2020, Travelers denied Plaintiff's request for insurance coverage shortly after Plaintiff provided its notice of claim, without little to no investigation. FAC at ¶ 30. On May 20, 2020, Plaintiff filed a First Amended Complaint ("FAC") claiming the following causes of action: (1) declaratory relief; (2) breach of contract; and (3) breach of implied covenant of good faith and fair dealing. On May 27, 2020, Defendant TRAVELERS removed this action to this Court, on the basis of diversity of citizenship, pursuant to 28 U.S.C. section 1332, contending that Dr. Davis is a sham defendant. On June 25, 2020, Plaintiff filed a Motion to Remand this case back to state court due to lack of subject matter jurisdiction. The Motion to Remand has been fully briefed and is currently set to be heard on July 24, 2020.

III. LEGAL STANDARD

When assessing a Fed.R.Civ.P. Rule 12(b)(6) motion, the Court should "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Assoc. for L.A. Deputy Sheriffs v. County of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011). The complaint need allege "only enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the alleged facts "allow 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).

Under an "all risk" policy, the insured has the threshold burden of proving a loss within the policy's insuring clause. Once the insured has done so, the burden shifts to the insurer to prove the loss was caused by an excluded peril. *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal.3d 395, 406 (1989). The burden on the insured

in this situation is usually minimal, typically requiring proof only that the insured suffered a "direct physical loss" while the policy was in effect *Central Nat'l Ins. Co. v. Sup.Ct. (Spindt)* (1992) 2 Cal.App.4th 926, 932.

IV. ARGUMENT

A. Pez Cantina Has Plausibly Pleaded a Covered Loss Under the Initial Grant of Coverage

Travelers improperly attempts to characterize this policy as a specified peril policy, covering "fire and windstorm." Motion at p. 11:10-11. It then attempts to misdirect this Court to an additional coverage of Civil Authority in the policy rather than the initial grant of coverage for analysis. However, this policy is an all-risk policy, specifically defining Covered Cause of Loss as all "risks of direct physical loss unless the loss is" limited or excluded. See Exhibit 1 to FAC at 118. As such, the proper analysis is as follows: First, the Court should determine whether Plaintiff has suffered a covered loss under the insuring clause. Second, the Court should determine where or not Travelers has sufficiently shown that the loss falls within the virus exclusion (as Travelers is only arguing this exclusion). *Garvey v. State Farm Fire & Cas. Co*., 48 Cal.3d at 406. Plaintiff has specifically shown that it suffered a covered loss, and Travelers has failed to show that the virus exclusion applies. Travelers misdirects the Court to an extension of coverage for civil authority while largely evading consideration of the policy's initial grant of coverage for direct physical losses to the restaurant and its contents, including for interruptions in business and the attendant loss of business income. Because Pez Cantina has plausibly pleaded a loss that falls squarely within the insuring agreement in the Businessowners Coverage Part Deluxe, dismissal is not warranted.

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Travelers argues that because the virus exclusion applies, the Court need not determine whether or not Plaintiff suffered direct physical loss of or damage to its property. *See* Motion at Dkt. 12 fn 9. However, as stated above, this analysis is incorrect under California law, and the Court must first consider whether Plaintiff has suffered a covered loss. To that point, Travelers contends that Pez Cantina cannot establish a covered loss for business interruption because the policy's language "direct physical loss of or damage to property" is met only when there is a physical change in or alteration of the property. Motion at 16 Dkt. 12. A leading case involving this same language in Travelers' policy rejected this argument. *See Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, *No.* CV 17-04908 AB (KSX), 2018 WL 3829767 (C.D. Cal. July 11, 2018). *Total Intermodal* concerned an insurance dispute over property that was loaded onto a ship in California and became unrecoverable from China. *Id.* at *2. Travelers sought summary judgment, claiming that coverage for "direct physical loss" applies when property is physically damaged, but not when property is merely lost. *Id.* The court denied Travelers' motion. It concluded, first, that "direct physical loss of . . . Covered Property" was the relevant clause that provides coverage; and next, that the phrase "loss of" property plainly encompasses property that is not accessible. *Id.* at *3-4. The court in *Total Intermodal* also distinguished cases which had read different policy language, such as "direct physical loss to" property, as requiring damage or alteration to the property itself. *Id.* at *4 (distinguishing *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766 (2010)).

There is no good reason to depart from *Total Intermodal's* sensible reading of the phrase "loss of." That phrase encompasses Pez Cantina's allegations that the government closure orders made its property unavailable to be occupied or operated, and therefore unfit for dine-in services, which is the property's main

function, and which constitutes a direct physical loss of Pez Cantina's insured property. Due to the orders, Pez Cantina is no longer able to have customers inside its restaurant, which is an essential component for the functionality of a fine dining restaurant. Travelers ignores this and instead rehashes the same construction of "direct physical loss of . . . Covered Property" that the court in Total Intermodal rejected, and it does so again based on *MRI Healthcare, which Total Intermodal* which is easily distinguished. See 2018 WL 3829767, at *4.

Total Intermodal is not alone in reaching this sensible reading of the phrase "loss of" property. Courts widely agree that the loss of functionality of, or access to, a property constitutes a direct physical loss of property. See also *Murray v. State Farm Fire & Cas. Co*., 509 S.E.2d 1, 17 (W.Va. 1998) (holding that losses that rendered insured property "unusable or uninhabitable, may exist in the absence of structural damage to the insured property."); *Manpower Inc. v. Ins. Co. of Penn.*, *No.* 08C0085, 2009 WL 3738099, at *5-7 (E.D. Wis. Nov. 3, 2009) (holding that inaccessibility of property can constitute a direct physical loss even if there is no physical damage; *Gregory Packing, Inc. v. Prop. Cas. Co. of Am*., No. 2:12-cv-04418 (WHW)(CLW), 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014) ("[P]roperty can be physically damaged, without undergoing structural alteration, when it loses its essential functionality."); *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (holding coverage applied without physical alteration because the covered properties "no longer performed the function for which they were designed."); *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 38–39, 437 P.2d 52, 55 (1968) (holding that gasoline saturation under and around a church rendering occupancy unsafe and uninhabitable constituted a "direct physical loss within the meaning of that phrase" of the insured's all-risk policy); *Southwest Mental Health Center, Inc. v. Pacific Ins. Co, LTD*, 439 F.Supp.2d 831 (W.D. Tenn. 2006) (finding that loss of use, loss of access, and loss

of functionality all constitute 'physical damage."); *National Ink and Stitch, LLC* 2020 WL 374460 (Dist. MD 2020) (finding that loss of use, loss of reliability, or impaired functionality demonstrate the necessary physical loss or damage to property as required under the policy, even though the property was not completely dysfunctional).

Travelers argues that the Orders were issued because of Covid-19. See Motion at 9:13-15. A resolution of the Board of Supervisors which was adopted on April 14, 2020 specifically explains the intent of the County of Los Angeles in adopting shutdown orders such as the Orders. See Exhibit 3 to RJN. The Board of Supervisors specifically states: "The Executive Order is hereby amended to address the County's public policy and intent to close certain businesses to protect public health, safety and welfare and that the physical loss of and damage to businesses is resulting from the shutdown and that these business have lost the use of their property and are not functioning as intended." See Exhibit 3 to RJN at p. 7, section 6. Under the plain reading of this resolution, the County of Los Angeles explicitly acknowledges that orders substantially similar to the Orders were for the public safety and welfare. Further, the resolution, which was adopted into law specifically states that businesses such as Pez Cantina that have had to shutdown have suffered a loss of use of their property which is not functioning as intended. Certainly, the intent of the County and other governmental bodies in enacting orders such as the Orders is a question of fact, that should not be decided on the pleadings.

Moreover, a review of the policy as a whole makes it clear that this is the only reasonable reading of the Policy. First, although Travelers alleges that the governmental order cannot be a Covered Cause of Loss under the Policy, the additional coverage of Civil Authority proves otherwise. By virtue of inclusion of an additional coverage for Civil Authority, Travelers expressly admits that an order

of Civil Authority, such as the Orders, can constitute a Covered Cause of Loss under the Policy. See Civil Code section 1641 ("The whole of a contract is to be taken together, so as to give effect to every part […] each clause helping to interpret the other."). Further, the commercial general liability coverage part defines "Property damage" as "Loss of use of tangible property that is not physically injured." This definition supports the conclusion that a reasonable purchaser of insurance would read the policy as providing coverage for a loss of functionality. See *Am. Alternative Ins. Corp. v. Super. Ct.*, 135 Cal. App. 4th 1239, 1248 (2006) (holding that "the use of the word 'damage' as part of the defined term 'physical damage ' which encompass both physical injury and physical loss, may reasonably be read to endow the word 'damaged' in 'damaged property' with a broader meaning that also encompasses physical loss"); see also *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709-10 (E.D. Va. 2010) ("When read in the context of the precedent discussed above, this definition suggests that the parties intended to define 'direct physical loss' to include total loss of use."), aff'd, 504 F. App'x 251 (4th Cir. 2013).

Further, given the number of similar lawsuits filed by restaurants like Pez Cantina seeking coverage for the lost business income that Travelers and other insurers are denying, this comports with the understanding of reasonable businesses which purchased policies similar to the Policy.

For these reasons, Pez Cantina's loss of its restaurant constituted a "direct physical loss of" its covered property under the policy's plain language and California law. That is the only reasonable reading of this policy. Even if Travelers' reading were also reasonable, that would at best "create[] an ambiguity which must be construed in favor of coverage that a lay policyholder would reasonably expect." *Minkler v. Safeco Ins. Co. of Am.*, 49 Cal. 4th 315, 319 (2010),

see also *Bob Lewis Volkswagen v. Universal Underwriters Grp.*, 571 F. Supp. 2d 1148, 1154 (N.D. Cal. 2008).

Travelers devotes considerable attention to language in a section of the policy that extends coverage when other real or personal property is lost or damaged. One such provision extends coverage when access to an insured's property is prohibited by a civil authority order issued due to physical loss of or damage to other property within 100 miles of the insured's property, that is caused by or results from a covered cause of loss. See Exhibit 1 to FAC at 130.

Travelers reads this extension of coverage as a limitation on the initial grant of insurance coverage. It thus argues that if coverage is not available under this extension, then it cannot be available under any other aspect of the policy because this extension concerns civil authority orders. Travelers has misread the policy and disregarded California law. The civil authority extension does not reduce or replace the principal insuring agreement provided under the Businessowners Coverage Part Deluxe establishing the scope of business income coverage; rather, it extends coverage to situations where an insured is unable to demonstrate a "direct physical loss of or damage to" its own covered property. *Id.* A coverage extension "gives additional coverage not available elsewhere under the Policy," but it "does not limit coverage otherwise available." *Sierra Pac. Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 665 F.3d 1166, 1173 (9th Cir. 2012). Pez Cantina has demonstrated a direct physical loss of its covered property. It need not invoke the civil authority extension to establish coverage under the policy, and that extension may not be read to limit the coverage available to Pez Cantina under the business income and extra expense provisions. See *id.* Having established coverage for an insurable loss, there is no reason to dismiss any claim. See *Films of Distinction, Inc. v. Allegro Film Prods., Inc., Ltd.*, 12 F. Supp. 2d 1068, 1083 (C.D. Cal. 1998).

B. Pez Cantina Has Plausibly Pleaded a Covered Loss Under the Additional Civil Authority Coverage and Claim Expense Provision

In addition to the coverage provided as stated above, the Policy also provides for the following additional coverage: "actual loss of Business Income you sustain and reasonable and necessary Extra Expense you incur caused by action of civil authority that prohibits access to the described premises. The civil authority action must be due to direct physical loss of or damage to property at locations, other than the described premises, that are within 100 miles of the described premises, caused by or resulting from a Covered Cause of Loss." Ex 1 to FAC at 130. Again, Travelers improperly attempts to shift the burden of proof to Plaintiff to show that the virus exclusion does not apply. This is improper. Plaintiff has sufficiently shown that the Covered Cause of Loss (the Orders) specifically prohibited access to the premises. More specifically, the FAC states that as a result of the Orders, Plaintiff "had to completely shut down its business operations and access to the insured property [was] specifically prohibited." FAC at ¶ 27. Travelers attempts to argue beyond the pleadings that access to Plaintiff's premises was not specifically prohibited. However, at the pleadings stage, all inferences must be made in favor of Plaintiff's allegations in the complaint. *Assoc. for L.A. Deputy Sheriffs v. County of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011). Therefore, Plaintiff has sufficiently pled coverage under the civil authority provision.

In addition to above coverages, the policy also provides for "Claim Data Expense" coverage. Exhibit 1 to FAC at 120. This provision covers "reasonable expenses" incurred in preparing claim data required by Travelers to show the extent of loss. *Id.* at 120. Travelers argues that there was never any request to compile claim data and that Plaintiff does not allege that it has incurred such costs. However, the FAC requests a declaration that "claim expense coverage is available

in the amount of $25,000 for making a claim under The Policy." FAC at 9:25. Plaintiff has sufficiently pled a claim for declaratory relief under this theory.

C. Travelers Fails to Establish that Any Exclusion Compels Dismissal

According to Travelers, a virus exclusion precludes coverage and compels dismissal. To the contrary, this exclusion provides no basis for dismissal.

In California, "exclusion clauses are to be interpreted narrowly in order to protect the insured." *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal.4th 1, 16 (1995); *MacKinnon v. Truck Ins. Exchange*, 31 Cal.4th 635, 648 (2003). When deciding an insurer's motion to dismiss, the Court must accept the policyholder's interpretation as true "so long as the [complaint] does not place a clearly erroneous construction on the provisions of the contract." *Aragon-Haas v. Family Insurance Services, Inc.*, 231 Cal. App. 3d 232, 239 (1999). Moreover, the question of which peril or perils caused the loss is a *triable factual issue* that courts do not decide on the pleadings. See *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 412-13 (1989); see also *Lopez v. United States*, No. 17-CV-04386-MEJ, 2018 WL 807357, at *6 (N.D. Cal. Feb. 9, 2018) (proximate cause is ordinarily a question of fact, not law) (citing *Raven H. v. Gamette*, 157 Cal. App. 4th 1017, 1029-30 (2007)).

Travelers' contrary position ignores these settled principles. First, Travelers misconstrues the allegations in the FAC in an attempt to force Pez Cantina's allegations into this exclusion when, by law, the Court's decision must be guided by Pez Cantina's allegations of loss caused by government orders, which are accepted as true at this stage. Second, Travelers advances a broad reading of an exclusion that is not only untenable on its own terms but disregards the legal principal that courts must credit reasonable readings that favor coverage. See, e.g., *Fire Ins. Exch. V. Superior Court*, 116 Cal. App. 4th 446, 470 (2004).

Based on Traveler's interpretation of the Policy, the language of the exclusion is ambiguous. The reasonable expectations doctrine, requires that the

insurance policy be read consistent with the understanding that an ordinary insured would have of it. See, e.g., *Lancaster v. U.S. Shoe Corp*., 934 F. Supp. 1137, 1157 (N.D. Cal. 1996) (exclusions that are not clear, plain, and conspicuous enough to negate a layman's objectively reasonable expectations of coverage are unenforceable); *Bank of the West v. Sup.Ct. (Industrial Indem. Co.)*, 2 Cal.4th 1254, 1264-1265 (1992); *AIU Ins. Co. v. Sup.Ct. (FMC Corp.)*, 51 Cal.3d 807, 822 (1992); *State of Calif. v. Allstate Ins. Co.*, 45 Cal.4th 1008, 1018 (2009) (ambiguous provisions interpreted to protect "the objectively reasonable expectations of the insured"). Under this doctrine, "[a]n insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage [as Travelers' "all risks" policy does] must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured." *Cox v. Allin Corp. Plan*, 70 F. Supp. 3d 1040, 1051 (N.D. Cal. 2014) (quoting *Saltarelli v. Bob Baker Grp. Med. Trust*, 35 F.3d 382, 386 (9th Cir. 1994)). The virus exclusion in the policy does not state that it applies to a global pandemic or that it applies to virus anywhere other than on the property itself. Looking at the policy in its entirety, the policy is a property policy, which is related only to specific covered property. The insured would have no reason to believe that this particular exclusion applied to virus that was not on its actual property.

1. The Virus Exclusion is Inapplicable because Pez's Losses Are Due to the Closure Orders, Not the Virus

The endorsement titled EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA excludes "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." Exhibit 1 to FAC at p. 284. Travelers completely mischaracterizes Plaintiff's FAC stating that "[t]he FAC casts COVID-19 as the

"Covered Cause of Loss." Dkt. 12:13-15. However, Plaintiff's FAC contains no allegations that there was virus on the property or that anyone tested positive for the virus who was in the property. Rather, the FAC alleges that Plaintiff suffered losses as a result of several governmental orders that were enacted for the public good, welfare, and benefit as a result of the global COVID-19 pandemic. FAC at ¶¶ 21-26.

Travelers' overly broad reading of the virus exclusion is not warranted under California law. Exclusions and limitations on coverage in an insurance policy are "strictly construed against the insurer and liberally interpreted in favor of the insured." *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal.4th 1, 16 (1995); *MacKinnon v. Truck Ins. Exchange*, 31 Cal.4th 635, 648 (2003). Again, Plaintiff's FAC does not allege that the Covered Cause of Loss was the virus itself – there are no allegations that there was actual virus on the premises itself, or that anyone tested positive for the virus. Rather, the governmental shutdown orders due to the global pandemic are what caused Plaintiff's losses.

2. Travelers is Estopped from Arguing that the Virus Endorsement Limits Coverage Based on its Prior Misrepresentations to the Department of Insurance

Courts have uniformly held that the drafting history of an insurance policy, including regulatory findings in which the insurer explains the intended scope of the policy form and any changes to state regulators, are evidence of the meaning of the terms of an insurance policy. See. e.g., *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal 4th 645, 670 (relying on drafting history of standard general liability policies to resolve dispute over trigger of coverage); *Pardee Constr. Co. v. Insurance Co. of the West* (2000) 77 Cal.App.4th 1340, 1358-59 (relying on contemporaneous insurance industry commentary and explanatory memos).

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Here, when Travelers first introduced the virus endorsement that they are attempting to expand as applying to the pandemic[1], they represented to the California Department of Insurance that there was "no dollar impact to continue *coverage* of these perils" and "no rate adjustments being made." See Exhibit 2 to Plaintiff's Request for Judicial Notice ("RJN"). Travelers' statement that there was "no dollar impact to continue coverage of these perils" suggests that the virus endorsement provides additional coverage to the insureds, rather than an exclusion limiting coverage under the existing policy. In essence, Travelers was falsely claiming that no premium reduction was warranted because this request was one for a mere clarification rather than any substantial change to the policy. Even further, Travelers now attempts to greatly expand this exclusion to include virus that is outside of the insured property. Such an interpretation renders the virus endorsement ambiguous. As such, Travelers should be prevented from relying on the virus exclusion to bar coverage for Plaintiff's claims. "); *Morton Intern., Inc. v. General Acc. Ins. Co. of America Eyeglasses*, 629 A.2d 831, 876 (2006) ("Having profited from [the insurance industry's representations by maintaining pre-existing rates for substantially-reduced coverage, the industry justly should be required to bear the burden of its omission by providing coverage at a level consistent with its representations to regulatory authorities."); *Joy Techs., Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493, 498-500 (1992) (finding coverage for gradual property damage because "the insurance industry represented... that the [pollution] exclusion... merely clarified the pre-existing 'occurrence clause' "); *Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 89 F.3d 976, 991-92 (3d Cir. 1995) (precluding insurer from applying qualified pollution exclusion in a manner

[1] Although the virus exclusion that Travelers is relying on is not the same form number, the specific language that Travelers is relying on for this Motion is exactly the same.

inconsistent with representations); *Textron, Inc. v. Aetna Cas. & Sur. Co.*, 754 A.2d 742, 750 (R.I. 2000) (stating that "such clauses should not benefit from the misleading explanation of the standard pollution exclusion submitted to state regulators by American insurance companies"). At the very least, this regulatory filing creates a question of fact as to whether or not the virus exclusion should apply and dismissal is not warranted at the pleadings stage.

3. Determination of the Cause of Loss is a Question of Fact, that Cannot be Determined on the Pleadings

Further, Travelers' Motion alleges that the government shutdown orders are the cause of loss, and Travelers argues that the cause of loss is the Covid-19 virus. This dispute alone between the cause of Plaintiff's loss is a question of fact that cannot be decided on the pleadings. See *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 412-13 (1989) (the question of which peril or perils caused the loss is a triable factual issue that courts do not decide on the pleadings).

California's efficient proximate cause doctrine holds that where two or more independent perils combine to cause a loss, either of which could cause the loss by itself, the "efficient proximate" cause, i.e., the peril legally deemed to cause the loss, is the "predominating" or "most important cause of a loss" that determines whether the loss is covered or excluded. *Garvey*, 48 Cal. 3d at 403, 406. If the efficient proximate cause is a peril the policy covers (here, any "risk of physical loss"), the loss is covered. If it is an excluded peril, the loss is excluded. See *id*. at 412-13. Under California law, the "efficient proximate cause" is the "predominating cause" of the loss, i.e., the "most important cause." *Id*. at 403, 406. In *Garvey*, the California Supreme Court explained that the "efficient proximate cause" is not necessarily either the "moving cause," i.e., the one that sets others in motion, nor is it necessarily the "immediate cause," i.e., the last one to occur. *Id.* at

402-03. Which one is the "most important" is an issue for the trier of fact to decide. *Id*. at 412-13.

Moreover, "[p]olicy exclusions are unenforceable to the extent that they conflict with section 530 [of the California Insurance Code] and the efficient proximate cause doctrine." *Universal Cable Prods., LLC v. Atl. Specialty Ins. Co.*, 929 F.3d 1143, 1161 (9th Cir. 2019) (quoting *Julian v. Hartford Underwriters Ins. Co*., 110 P.3d 903, 907 (Cal. 2005)). Thus, even assuming that Travelers reading is correct, "the fact that an excluded risk contributed to the loss would not preclude coverage if such a risk was a remote cause of the loss." *Id*.

Even if the Court determines the coronavirus is a contributing cause of Pez Cantina's loss, the virus exclusion still cannot be applied to preclude coverage under the "efficient proximate cause" doctrine, and certainly not as a matter of law at this early stage of litigation. Based on Pez Cantina's allegations, even if Covd-19 were deemed a contributing factor, the virus is demonstrably not the predominant cause of Pez Cantina's losses. Indeed, the complaint nowhere states that Pez Cantina was closed because its employees became sick or coronavirus was discovered on the property. Thus, the facts alleged, and all reasonable inferences in support thereof, support Plaintiff's claim that the closure orders regulating the operation of businesses in California—which are a non-excluded peril—are the predominant cause of Pez Cantina's losses. Therefore, the virus exclusion cannot be a bar to coverage, as it was not the predominant cause of loss. If the loss were caused by or resulted from a virus, Pez Cantina would be closed only as long as it would take to disinfect the store or quarantine affected employees. However, Pez Cantina's loss is caused by state closure orders and thus will last for however long those restrictions remain. For these reasons, then, the virus endorsement does not and cannot defeat coverage because the government closure orders are the cause, or at least the most important cause, of Pez Cantina's losses.

Notably, on at least one occasion known to Pez Cantina, Travelers has provided a more candid response regarding the cause of its policyholders' business interruption losses, agreeing with Pez Cantina's position that government orders, not the virus, are causing such losses. On June 12, 2020, Travelers filed an answer to a similar complaint brought by two restaurants it insures. The complaint, filed in the Middle District of North Carolina, sought similar relief as is sought here, and Travelers' answer admitted the Plaintiffs' allegations that substantially similar orders issued by the North Carolina governor were not issued "because of damages being caused by the virus itself," but instead were issued in an attempt to "mitigate community spread of the Virus and COVID-19." Answer to Amended Complaint, *Natty Greene's Brewing Co., LLC v. Traveler's Casualty Ins. Co.,* No. 1:20-cv-00437 (M.D.N.C. filed May 15, 2020), ECF No. 40., attached to RJN at Exhibit 2. Travelers' position in the North Carolina case provides another reason this Motion should be denied, as it creates yet another triable issue of fact, i.e., how Travelers understands the virus exclusion to apply. See *Fields v. Bank of New York Mellon*, No. 17-CV-00272-JST, 2017 WL 1549464, at *4 n.2 (N.D. Cal. May 1, 2017) (court may "take judicial notice of matters of public record outside the pleadings."); *Heston v. Farmers Ins. Group*, 160 Cal. App. 3d 402, 413-14 (1984) (considering brief filed by insurance company's counsel before the National Labor Relations Board as evidence of that party's understanding of a contract).

Had Travelers intended to exclude coverage for pandemic events, or the types of public health measures ordered by the California government—as opposed to contamination of property and transmission of disease—Travelers should have done so plainly and explicitly. Doing so for a pandemic was within Travelers' capability and would have been consistent with its legal obligations as the drafting party possessing superior knowledge of underwriting potential risks. For these

reasons, there is no basis to conclude, at the pleadings stage, that Travelers' virus exclusion precludes Pez Cantina's claim for coverage.

V. IN THE ALTERNATIVE, THE COURT SHOULD GRANT LEAVE TO AMEND THE COMPLAINT

If the Court is inclined to grant TRAVELERS' Motion to Dismiss, Plaintiff seeks leave to amend the FAC. See Harris v. Amgen, Inc., 573 F.3d 728, 736 (9th Cir. 2009) ("Dismissal without leave to amend is improper unless it is clear the complaint could not be saved by an amendment.")

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny TRAVELERS' motion to dismiss in its entirety.

DATED: July 24, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2020, I caused to be filed the foregoing document. This document is being filed electronically using the Court's electronic case filing (ECF) system, which will automatically send a notice of electronic filing to the email addresses of all counsel of record.

Dated: July 24, 2020

Respectfully submitted,

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