FILED
2020 Aug-31 PM 05:26
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PURE FITNESS, LLC, individually and on behalf of all others similarly situated, Plaintiff, v. THE HARTFORD FINANCIAL SERVICES GROUP, INC.; HARTFORD FIRE INSURANCE COMPANY; and TWIN CITY FIRE INSURANCE COMPANY, Defendants.	Case No. 2:20-cv-00775-JHE **OPPOSED** **ORAL ARGUMENT REQUESTED**

TWIN CITY FIRE INSURANCE COMPANY'S BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S CLASS ACTION COMPLAINT

Defendant Twin City Fire Insurance Company ("Twin City") respectfully submits this brief in support of its motion to dismiss the Class Action Complaint ("Complaint") of Plaintiff Pure Fitness, LLC ("Plaintiff") for failure to state a claim upon which relief can be granted.[1] Twin City respectfully requests oral argument on its motion.

[1] Plaintiff has voluntarily dismissed Hartford Financial Services Group, Inc. and Hartford Fire Insurance Company. *See* Doc. 8. Thus, Twin City is the only remaining defendant.

I. INTRODUCTION

Plaintiff operates a gym in Alabama. Plaintiff claims that it experienced losses when it closed its gym due to "the novel coronavirus" (commonly known as COVID-19) and government responses to it. Doc. 1, ¶ 10. Plaintiff seeks for its property insurer, Twin City, to cover its virus-related losses under a business insurance policy.

What Plaintiff fails to acknowledge is that the insurance policy, which was attached to its Complaint, contains an exclusion that expressly excludes virus-related losses of the type Plaintiff seeks to recover. While Twin City does not dispute that measures to slow the spread of COVID-19 have upended lives and resulted in broad disruption to the economy, even the fallout from the pandemic does not provide a basis to override the plain terms of an insurance contract.

The "'Fungi', Wet Rot, Dry Rot, Bacteria And Virus" Exclusion (the "Virus Exclusion") specifically states that Twin City "will not pay for loss or damage caused directly or indirectly by . . . [p]resence, growth, proliferation, spread or any activity of [a] . . . virus." Doc. 1-1 at 84. The "exclusion applies whether or not the loss event results in widespread damage or affects a substantial area." *Id*.

The novel coronavirus is a "virus" within the meaning of this Exclusion, and the losses that Plaintiff seeks to recover were "caused directly or indirectly by" it. This is because the losses were, as Plaintiff alleges, caused by the suspension of its

"business operations due to the risk of infection by the novel coronavirus . . . and/or actions of civil authorities" in response to the virus. Doc. 1, ¶ 10; *see id.* ¶¶ 37–46.

Plaintiff's attempt to ignore the Virus Exclusion—focusing instead on other provisions in the policy and on the orders of civil authorities—does not save its claims. The Virus Exclusion is clear: Any loss "caused directly or indirectly" by a virus "is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Doc. 1-1 at 84.

All of Plaintiff's breach-of-contract and declaratory-judgment claims are premised on the existence of coverage under its insurance policy. Because the Virus Exclusion bars coverage, Plaintiff's claims fail, and the Complaint should be dismissed with prejudice.

II. BACKGROUND

A. The Policy

Twin City issued a business insurance policy bearing No. 83 SBA AB9900 SA to Plaintiff for the period from October 11, 2019 to October 11, 2020 (the "Policy"). Doc. 1-1 at 11. The Policy is attached to Plaintiff's Complaint. *See* Doc. 1-1.

In the property-insurance section of the Policy, Twin City agreed to pay Plaintiff "for direct physical loss of or physical damage to Covered Property . . . caused by or resulting from a Covered Cause of Loss." *Id.* at 25. The Policy defines

"Covered Causes of Loss" as "risks of direct physical loss," unless the loss is excluded or limited in other Policy provisions. *Id*. at 26 (capitalization altered).

The Policy expressly excludes losses caused by a virus. The Virus Exclusion provides:

> [Twin City] 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:
>
> **(1)** ***Presence, growth, proliferation, spread or any activity of*** "fungi", wet rot, dry rot, bacteria or ***virus***.

Id. at 84 (emphasis added). The Virus Exclusion has two exceptions that are not alleged to apply here.[2]

B. Plaintiff's Allegations

Plaintiff alleges that it was "forced to suspend business operations due to risk of infection by the novel coronavirus . . . and/or actions of civil authorities prohibiting public access to and occupancy of the business premises and rendering occupancy of the premises by customers unlawful and untenantable." Doc. 1, ¶ 10. Plaintiff specifically alleges that the actions of civil authorities (specifically, government orders) were "prompted" by "[t]he pervasive presence of COVID-19,"

[2] The two exceptions are (1) when the virus results from fire or lightning or (2) when certain limited additional coverage applies. *See* Doc. 1-1 at 84. The limited additional coverage "only applies" if, among other conditions, the virus results from certain "specified cause[s] of loss" not at issue here (*e.g.*, windstorm, hail, volcanic action) or from an equipment breakdown. *Id.* at 85; *see also id.* at 49 (defining "specified cause of loss"). Plaintiff does not allege that either exception applies.

id. ¶ 39, and were taken due to risk of infection by COVID-19, *id.* ¶¶ 41–42. The orders themselves, which were cited and quoted in the Complaint, state that they were issued to prevent the spread of COVID-19. *See, e.g.*, Ex. A, Order of the Jefferson County Health Officer Suspending Certain Public Gatherings and Closing Nonessential Businesses and Services Due to Risk of Infection by COVID-19 at 1 (Mar. 19, 2020)[3] (stating that "further social distancing measures are necessary to be implemented to further prevent the spread of COVID-19 in Jefferson County"); Ex. B, Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 at 1 (Mar. 27, 2020)[4] (stating that "further social distancing measures are necessary to be implemented on a statewide basis to prevent the spread of COVID-19"); Ex. C, Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 at 1 (Apr. 3, 2020)[5] (same); Ex. D, Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 at 1 (Apr. 28, 2020)[6] (stating that "social-distancing and related measures remain necessary on a statewide basis to prevent the spread of COVID-19").

[3] *Available at* https://www.jcdh.org/SitePages/Misc/PdfViewer?AdminUploadId=722.

[4] *Available at* http://alabamapublichealth.gov/legal/assets/order-adph-cov-gatherings-032720.pdf

[5] *Available at* http://alabamapublichealth.gov/legal/assets/soe-covid19-040320.pdf.

[6] *Available at* http://alabamapublichealth.gov/legal/assets/order-adph-cov-gatherings-042820.pdf.

Plaintiff seeks to recover from Twin City for purported business-income losses and extra expense that Plaintiff incurred because of the suspension of its business operations. The Complaint asserts six causes of action under the business-income, extra-expense, and civil-authority provisions of the Policy. *See* Doc. 1, ¶¶ 70–129.

III. LEGAL STANDARDS

A. Motion to Dismiss

To survive a Rule 12(b)(6) 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, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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.* "Factual allegations must be enough to raise a right to relief above the speculative level," and when they do not adequately plead "a claim of entitlement to relief," dismissal is warranted. *Twombly*, 550 U.S. at 555, 558. "[C]onclusory allegations, unwarranted deductions of fact or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

Dismissal is warranted under Rule 12(b)(6) if, assuming the truth of the complaint's factual allegations, a dispositive legal issue precludes relief. *Neitzke v.*

Williams, 490 U.S. 319, 326 (1989); *Marshall Cnty. Bd. of Educ. v. Marshall Cnty. Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). Courts in this circuit routinely grant motions to dismiss in insurance cases when the plaintiff's allegations fall squarely within the policy's exclusions to coverage. *See, e.g.*, *Robinson v. Liberty Mut. Ins. Co.*, 958 F.3d 1137, 1142 (11th Cir. 2020) (affirming dismissal of complaint because the unambiguous policy exclusion applied as a matter of law); *Dawson v. Liberty Ins. Corp.*, No. 19-cv-755-RDP, 2020 WL 570134, at *5 (N.D. Ala. Feb. 5, 2020) (finding exclusion barred insurance coverage and granting insurer's motion to dismiss).

In deciding a motion to dismiss, a court may consider documents attached to or incorporated into the complaint. *Wiggins v. FDIC*, No. 2:12-CV-02705-SGC, 2016 WL 8260898, at *1 (N.D. Ala. Dec. 20, 2016) ("Exhibits attached to the complaint are treated as part of the complaint for Rule 12(b)(6) purposes and may considered without converting a motion to dismiss into a motion for summary judgment.") (citing *Page v. Postmaster Gen. and Chief Exec. Officer of the U.S. Postal Serv.*, 493 Fed. Appx. 994, 995 (11th Cir. 2012)), *report and recommendation adopted*, No. 2:12-CV-02705-SGC, 2017 WL 659928 (N.D. Ala. Feb. 14, 2017); *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) ("[A] document need not be physically attached to a pleading to be incorporated by reference into it; if the

document's contents are alleged in a complaint and no party questions those contents, [the court] may consider such a document" on a motion to dismiss.).

Here, Plaintiff's entire lawsuit is premised on the Policy, and Plaintiff attached the Policy to the Complaint. Thus, the Policy is properly considered on this Motion to Dismiss. The Court also may consider the orders issued by state and local governments that were incorporated into the Complaint.

B. The Plain and Unambiguous Terms of the Virus Exclusion Govern

Under Alabama law,[7] "[i]f a policy provision is unambiguous, then a court must enforce the policy as it is written and cannot defeat express provisions, including exclusions from coverage." *Auto-Owners Ins. Co. v. Am. Cent. Ins. Co.*, 739 So. 2d 1078, 1081 (Ala. 1999). Further, "[t]he language in an exclusionary provision in a policy of insurance should be given the same meaning 'that a person of ordinary intelligence would reasonably give it.'" *Id*. (quoting *W. World Ins. Co. v. City of Tuscumbia*, 612 So. 2d 1159, 1161 (Ala. 1992)); *see also Robinson*, 958 F.3d at 1139 (affirming dismissal of complaint based on ordinary meaning of term in policy exclusion); *Lancer Ins. Co. v. Newman Specialized Carriers, Inc.*, 903 F.

[7] Under Alabama's choice-of-law rules, courts apply the law of the state where the contract was made, unless the parties choose a different state's laws to govern their agreement. *Wells Fargo Bank, Nat'l Ass'n v. Choice Medicine: Hwy 53 Med. Ctr.*, No. 19-cv-247-AKK, 2020 WL 2557927, at *2 n.3 (N.D. Ala. May 20, 2020). The Policy was issued to Plaintiff in Alabama, and the insured property is in Alabama. Doc. 1-1 at 11. Accordingly, Twin City assumes for purposes of this Motion that Alabama law applies.

Supp. 2d 1272, 1276 (N.D. Ala. 2012) ("A court must enforce the insurance policy as written if the terms are unambiguous.").

Whether a policy is unambiguous "is a question of law for a court to decide." *Nationwide Ins. Co. v. Rhodes*, 870 So. 2d 695, 696–97 (Ala. 2003) (citation omitted). "If the terms within a contract are plain and unambiguous, the construction of the contract and its legal effect become questions of law for the court." *Id*. at 697 (citation omitted).

IV. ARGUMENT

The Virus Exclusion unambiguously bars coverage for all of Plaintiff's insurance claims and mandates dismissal. That exclusion provides that Twin City "will not pay for loss or damage caused directly or indirectly by . . . [p]resence, growth, proliferation, spread or any activity of [a] . . . virus." Doc. 1-1 at 84. The exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss" and "whether or not the loss event results in widespread damage or affects a substantial area." *Id*.

Plaintiff's claims fall squarely within the Virus Exclusion. It is undisputed that the novel coronavirus (COVID-19) is, in fact, a virus. *See* Doc. 1, ¶ 10. Plaintiff also alleges that the Governor of Alabama "declared a public health emergency in response to the appearance of COVID-19 in the State of Alabama." *Id*. ¶ 37. Plaintiff claims that it shut down its gym and suffered losses "due to risk of infection

by the novel coronavirus . . . and/or actions of civil authorities prohibiting public access to and occupancy of the business premises and rendering occupancy of the premises by customers unlawful and untenantable." *Id.* ¶ 10. The actions of civil authorities were, as Plaintiff alleges, "prompted" by "[t]he pervasive presence of COVID-19," *id.* ¶ 39, and were taken due to the risk of infection by COVID-19, *id.* ¶¶ 39–42. And the government orders themselves confirm that state and local governments acted due to the risk of infection by COVID-19 and to prevent the spread of COVID-19.[8] In other words, Plaintiff has alleged that its losses were caused by either its own efforts—or the efforts of state and local governments—to prevent the spread of COVID-19 or address the presence of COVID-19 on its property. And losses that are caused directly or indirectly by the "spread," "presence," or any "activity" of a virus, like COVID-19, are plainly excluded by the Policy. Doc 1-1 at 84.

[8] *See, e.g.*, Ex. A, Order of the Jefferson County Health Officer Suspending Certain Public Gatherings and Closing Nonessential Businesses and Services Due to Risk of Infection by COVID-19 at 1 (Mar. 19, 2020) (stating that "further social distancing measures are necessary to be implemented to further prevent the spread of COVID-19 in Jefferson County"); Ex. B, Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 at 1 (Mar. 27, 2020) (stating that "further social distancing measures are necessary to be implemented on a statewide basis to prevent the spread of COVID-19"); Ex. C, Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 at 1 (Apr. 3, 2020) (same); Ex. D, Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 at 1 (Apr. 28, 2020) (stating that "social-distancing and related measures remain necessary on a statewide basis to prevent the spread of COVID-19").

Where, as here, an insured's losses are unambiguously excluded by the plain language of the policy, like the Virus Exclusion, courts in Alabama routinely find that the policy bars coverage. *See, e.g.*, *Pa. Nat'l Mut. Cas. Ins. Co. v. Ret. Sys. of Ala.*, 104 F. Supp. 3d 1313, 1320–21 (N.D. Ala. 2015) (policy's fungi exclusion barred coverage of alleged mold damage); *Brown v. State Farm Fire & Cas. Co.*, 358 F. Supp. 3d 1265, 1280 (N.D. Ala.) (same), *opinion clarified*, 342 F. Supp. 3d 1234 (N.D. Ala. 2018). Courts outside of Alabama are in accord. *See, e.g.*, *Certain Underwriters at Lloyds of London v. Creagh*, 563 F. App'x 209, 211 (3d Cir. 2014) (policy's "microorganism exclusion" precluded coverage for the cost of remediating bacteria that escaped from a decomposed body at the insured's apartment building); *Sentinel Ins. Co. v. Monarch Med Spa, Inc.*, 105 F. Supp. 3d 464, 467, 472 (E.D. Pa. 2015) (enforcing exclusion of coverage for "[i]njury or damage arising out of or related to the presence of, suspected presence of, or exposure to . . . bacteria" based on showing that Group A Strepococcus is a bacterium); *Lambi v. Am. Fam. Mut. Ins. Co.*, No. 11-cv-906, 2012 WL 2049915, at *4–5 (W.D. Mo. June 6, 2012) (communicable-disease exclusion in homeowners' policy barred insurance coverage for virus claims), *aff'd*, 498 F. App'x 655 (8th Cir. 2013); *Alea London Ltd. v. Rudley*, No. 03-cv-1575, 2004 WL 1563002, at *3 (E.D. Pa. July 13, 2004) (mold exclusion barred coverage for suit alleging mold contamination).

Plaintiff alleges it was necessary to suspend its business "due to, *inter alia*, the Civil Authority Actions." Doc. 1, ¶ 45. But the fact that governmental actions are alleged to be one of several causes of Plaintiff's losses does not impact the applicability of the Virus Exclusion. As an initial matter, those actions were, in the words of Plaintiff, "prompted" by COVID-19. *Id.* ¶ 10. So any business suspension or losses associated with them would be directly or indirectly caused by COVID-19. Moreover, the Virus Exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Doc. 1-1 at 84. That is an "anti-concurrent causation clause," and Alabama courts enforce such clauses. *See State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 311 (Ala. 1999) (holding an exclusion for "earth movement" was unambiguous and precluded coverage when it applied "whether other causes acted concurrently or in any sequence with [earth movement]"); *Brown*, 358 F. Supp. 3d at 1280 (finding anti-concurrent causation clause unambiguous and concluding that mold damage was excluded).

And multiple courts have enforced virus exclusions to preclude coverage for the very losses Plaintiff alleges here. In July 2020, a Michigan trial court addressed coverage for COVID-19 business-income claims like those at issue here. *Gavrilides Mgmt. Co. v. Michigan Ins. Co.*, Case No. 20-258-CB-C30 (Mich. Circuit Court, Ingham County July 1, 2020). That court concluded that the insured could not demonstrate any direct physical loss to its property. *See* Ex. E, Transcript at 19:12–

14. The court also explained that even if there was direct physical loss, the unambiguous virus exclusion—which was similar to the one in Plaintiff's Policy—would bar coverage. *Id.* at 22:13–14 ("But, there is a virus exclusion that would also apply.").[9]

A federal district court in Texas reached the same conclusion earlier this month. *See Diesel Barbershop, LLC v. State Farm Lloyds*, No. 20-cv-461, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020) (attached as Exhibit G). That court stated: "Even if the Court had found that the language within the Policies was ambiguous and/or that Plaintiffs properly plead direct physical loss to the Properties, the Court finds that the Virus Exclusion bars Plaintiffs' claims." *Id.* at *6.

The same is true here. The plain language of the Virus Exclusion explicitly bars Plaintiff's claims. Because all of the claims are predicated on the existence of coverage under the Policy, and because there is none, the Complaint should be dismissed in its entirety with prejudice. *See, e.g.*, *Reliance Ins. Co. v. Gary C. Wyatt, Inc.*, 540 So. 2d 688, 691 (Ala. 1988) (reversing grant of declaratory relief in favor of insured because there was no coverage under the insurance policy).

[9] The *Gavrilides* court later issued a written order granting the insurer's motion for summary disposition. *See* Ex. F, Order.

V. CONCLUSION

For the foregoing reasons and others appearing on the record, Plaintiff has not stated any claim upon which relief can be granted. Accordingly, this Court should grant Twin City's Motion to Dismiss, dismiss Plaintiff's claims with prejudice, and direct the Clerk to enter final judgment in Twin City's favor.

Respectfully submitted this 31st day of August, 2020,

/s/ *Christopher C. Frost*

Christopher C. Frost
John A. Little, Jr.
Caleb C. Wolanek
MAYNARD COOPER & GALE, P.C.
1901 Sixth Avenue N., Suite 1700
Birmingham, AL 35203
Telephone: (205) 254-1000
Facsimile: (205) 254-1999
cfrost@maynardcooper.com
jlittle@maynardcooper.com
cwolanek@maynardcooper.com

Sarah D. Gordon*
STEPTOE & JOHNSON, LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 429-8005
Facsimile: (202) 429-3902
sgordon@steptoe.com

Anthony Anscombe*
STEPTOE & JOHNSON, LLP
227 West Monroe Street, Suite 4700
Chicago, IL 60606
Telephone: (312) 577-1300
Facsimile: (312) 577-1370
aanscombe@steptoe.com

* Applications for admission
pro hac vice forthcoming

Counsel for Defendant Twin City Fire Insurance Company

CERTIFICATE OF SERVICE

This document is being filed with the Court electronically via the ECF system. The requirements of service and proof of service of this document are satisfied by the automatic notice of filing sent by the CM/ECF software in accordance with the Local Rules of this Court on this 31st day of August 2020.

/s/ Christopher C. Frost
Christopher C. Frost