ROBERT S. LARSEN, ESQ.
Nevada Bar No. 7785
WING YAN WONG, ESQ.
Nevada Bar No. 13622
GORDON REES SCULLY MANSUKHANI, LLP
300 South 4th Street, Suite 1550
Las Vegas, Nevada 89101
Telephone: (702) 577-9300
Facsimile: (702) 255-2858
E-Mail: rlarsen@grsm.com
wwong@grsm.com

MATTHEW S. FOY, ESQ.
Pro Hac Vice Forthcoming
JENNIFER WAHLGREN, ESQ.
Pro Hac Vice Forthcoming
GORDON REES SCULLY MANSUKHANI, LLP
275 Battery Street, Suite 2000
San Francisco, CA 94111
Telephone: (415-875-3174)
Facsimile: (415) 986-8054
Email: mfoy@grsm.com
jwahlgren@grsm.com

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

EGG AND I, LLC, a Nevada limited liability company; EGG WORKS, LLC, a Nevada limited liability company; EGG WORKS 2, LLC, a Nevada limited liability company; EGG WORKS 3, LLC, a Nevada limited liability company; EGG WORKS 4, LLC, a Nevada limited liability company; EGG WORKS 5, LLC, a Nevada limited liability company; EGG WORKS 6, LLC, a Nevada limited liability company; and EW COMMISSARY, LLC, a Nevada limited liability company,

Plaintiffs,

v.

U.S. SPECIALTY INSURANCE COMPANY, a Texas corporation; PROFESSIONAL INDEMNITY AGENCY, INC. dba TOKIO MARINE, HCC-SPECIALTY GROUP, a New Jersey corporation,

Defendants.

Case No.: 2:20-cv-00747-KJD-DJA

DEFENDANTS' MOTION TO DISMISS COMPLAINT (ECF NO. 1)

Defendants U.S. Specialty Insurance Company and Professional Indemnity Agency, Inc. dba Tokio Marine HCC – Specialty Group, by and through their counsel, Robert S. Larsen, Esq., Matthew S. Foy, Esq., Jennifer Wahlgren, Esq., and Wing Yan Wong, Esq., and the law firm of Gordon Rees Scully Mansukhani, LLP, pursuant to Federal Rule of Civil Procedure 12(b)(6), hereby submit their Motion to Dismiss Complaint. ECF No. 1.

This motion is based upon the pleadings and filings in this matter, the points and authorities that follow, and any argument of counsel entertained by the Court.

DATED this 26th day of May, 2020.

GORDON REES SCULLY MANSUKHANI, LLP

/s/ Robert S. Larsen

Robert S. Larsen, Esq.
Nevada Bar No. 7785
Wing Yan Wong, Esq.
Nevada Bar No. 13622
300 South Fourth Street, Suite 1550
Las Vegas, Nevada 89101

Matthew S. Foy, Esq.
Pro Hac Vice Forthcoming
Jennifer Wahlgren, Esq.
Pro Hac Vice Forthcoming
275 Battery Street, Suite 2000
San Francisco, CA 94111

Attorneys for Defendants

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants U.S. Specialty Insurance Company ("USSIC") and Professional Indemnity Agency, Inc. dba Tokio Marine, HCC-Specialty Group ("PIA") (collectively, "Defendants") respectfully request that the Court dismiss this insurance coverage action filed by Plaintiffs on the ground that Plaintiffs fail to allege facts that trigger coverage under the insurance policy at issue. Plaintiffs contend that Defendants breached the at-issue Restaurant Recovery Insurance Policy, policy no. U719-860374 (the "Policy"), and failed to act in good faith by unreasonably

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

denying and investigating Plaintiffs' claim for losses allegedly incurred as a result of Nevada Governor Sisolak's Declaration of Emergency Directive 003 and Directive 010 which address health concerns relating to COVID-19 (the "Directives"). Plaintiffs allege that as a result of the Directives, they were forced to suspend business operations at their restaurants and suffered business income losses and incurred extra expenses which they contend are covered under the Policy. ECF No. 1 at ¶¶ 6-11, 40-41.

Plaintiffs allege that they provided notice of their claim to Defendants on April 22, 2020. *Id*. at ¶ 42. A mere two days later, on April 24, 2020, Plaintiffs filed this action asserting claims for relief for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief. *See, generally*, ECF No. 1. Notwithstanding the fact that Plaintiffs provided notice of their claim on April 22, 2020, and filed this action two days later, Plaintiffs implausibly allege that Defendants denied their claim (ECF No. 1 at 63, 78, 88, 103, 114) and have "refused to or have failed to meaningfully respond to" Plaintiffs (ECF No. 1 at ¶ 43).

Plaintiffs' Complaint and the claims for relief asserted therein fail as a matter of law based on the allegations and the plain language of the Policy. The Policy covers specified losses and expenses incurred by an insured, but only when those losses or expenses have been incurred directly and solely as a result of a covered "Insured Event." The Policy defines an "Insured Event" as "Accidental Contamination," "Malicious Tampering," "Product Extortion" or "Adverse Publicity," as those terms are further defined by the Policy. *Id*. at ¶¶ 28-29. Plaintiffs fail to allege any facts showing that their claimed losses were caused by or resulting from any of the enumerated "Insured Events" as required to trigger coverage under the Policy. As a result, Plaintiffs have failed to state a claim against Defendants for breach of contract or breach of the implied covenant of good faith and fair dealing and those claims for relief must be dismissed.

Further, declaratory judgment is a form of relief and not an independent cause of action. Coupled with Plaintiffs' failure to state a substantive cause of action against Defendants for breach of contract and breach of the implied covenant, Plaintiffs' claims for relief for declaratory relief must also be dismissed. Similarly, Plaintiffs are not entitled to the declarations of coverage

they seek in any event because, as indicated, they have not alleged facts of any "Insured Event" in the first instance as required for coverage under the Policy to apply.

II. FACTUAL BACKGROUND AND ALLEGATIONS

A. The Policy

USSIC insured Plaintiffs under a Restaurant Recovery Insurance Policy, policy no. U719-860374, in force from September 1, 2019 through September 1, 2020 (the "Policy"). ECF No. 1 at ¶ 3; ECF No. 1-3 (the Policy as attached to Complaint). The Policy does not cover any and all kinds of business losses or expenses. Instead, coverage under the Policy is only available for those losses caused by or resulting from an "Insured Event." The Policy provides:

> The *Insurer* will reimburse the *Insured* for its Loss in excess of the Deductible, but not exceeding the limits or sub-limits of liability stated in the Declarations, caused by or resulting from any of the following *Insured Events* first discovered during the Policy Period and reported to the *Insurer,* in accordance with **6.20** Notice of an Incident, during the Policy Period or up to forty eight (48) hours after expiration of the Policy Period, provided that as of inception of this insurance the *Insured* was not aware and could not reasonably have been aware of circumstances which could lead to a potential claim or loss under this Policy of insurance.

See ECF No. 1-3, p. 6 of 27, Section 1. The Policy defines "Insured Event" to include: (1) "Accidental Contamination," (2) "Malicious Tampering," (3) "Product Extortion," and (4) "Adverse Publicity." *Id*. at p. 10 of 27, Section 3.9. These enumerated "Insured Events" are defined in the Policy as follows:

> **1.1 ACCIDENTAL CONTAMINATION**
>
> Any accidental or unintentional contamination, impairment or mislabeling of an *Insured Product(s),* which occurs during or as a result of its production, preparation, manufacture, packaging or distribution -- provided that the use or consumption of such *Insured Product(s)* has resulted in or would result in clear, identifiable, internal or external visible physical symptoms of bodily injury, sickness, disease or death of any person(s), within three hundred and sixty five (365) days following such consumption or use.
>
> **1.2 MALICIOUS TAMPERING**
>
> Any actual, alleged or threatened intentional, malicious, and wrongful alteration or contamination of the *Insured's Product(s),*whether or not by an employee of the *Insured,* so as to render it unfit or dangerous for its intended use or consumption or to create such an impression with the public.

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

> For the purposes of this clause and any applicable exclusions, "malicious" means: "circumstances where there is clear evidence that the person(s) committing the act or threat to alter or contaminate the *Insured Product(s)* has an intention to cause loss or damage to the *Insured* or *Insured Product(s)*, or where a person or persons use any such *Insured Product(s)* as a means to attempt to cause or actually cause bodily injury or property damage".
>
> **1.3 PRODUCT EXTORTION**
>
> Any threat or connected series of threats to commit a Malicious Tampering, for the purpose of demanding *Extortion Monies*, communicated to the *Insured*.
>
> **1.4 ADVERSE PUBLICITY**
>
> Any *Adverse Publicity* which is subsequently found to be baseless by reason of the absence of any physical evidence from any source whatsoever, that an Accidental Contamination (as per Section **1.1** above) has occurred.
>
> For the avoidance of doubt, the *Insured* shall not be able to recover for *Adverse Publicity* under this Section **(1.4)** in circumstances where its Loss is within the scope of coverage provided by Section **1.1** Accidental Contamination.

Id. at p. 6 of 27, Sections 1.1-1.4.

"Insured Product(s)" are defined in the Policy as:

> all ingestible products for human consumption, or any of their ingredients or components, that have been reported to the *Insurer* on the application on file with the *Insurer* for the effective dates of this Policy or by addendum to such application and that are:
>
> a. in production; or
> b. have been manufactured, handled or distributed by the *Insured*; or
> c. manufactured by any contract manufacturer for the *Insured*; or
> d. being prepared for or are available for sale; or
> e. all ingestible products for human consumption served at any restaurant location operating under the same trade name as the Insured.

Id. at pp. 10-11 of 27, Section 3.11.

Further, for any loss or expense to be covered under the Policy, such loss or expense must be incurred by an insured directly and solely as the result of a covered "Insured Event." Specifically, "Loss under this Policy includes only the following reasonable and necessary expenses or costs incurred by the *Insured* directly and solely as the result of a covered *Insured Event* at any insured *Location* and subject to the limits of liability of each *Insured Event.*" *Id*. at

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

p. 7 of 27, Section 2. Under the Policy, reasonable and necessary costs or expenses include the following:

> **2.3 BUSINESS INTERRUPTION**
>
> *Loss of Gross Revenue* and *Extra Expense* provided that the *Insured* continues to incur such losses beyond the *Waiting Period.*
>
> **2.4 REHABILITATION EXPENSE**
>
> Reasonable and necessary expenses actually incurred directly by the *Insured* as a direct result of an *Insured Event* to re-establish the *Insured's Product(s)* to the reasonably projected level of sales or market share anticipated prior to the *Insured Event*. Rehabilitation Expense is limited to expenses incurred within twelve (12) months after the *Insured Event* first became known to the *Insured*
>
> The Sub-limit of liability for all such *Rehabilitation Expense* will be the amount stated in Item **11**. of the Declarations. This does not increase the Limit of Liability as stated in the Declarations nor impose any additional Deductible on the *Insured*.

ECF No. 1-3, p. 7 of 27, Sections 2.3-2.4. The Policy further defines "Extra Expense" in part as follows:

> **3.6 EXTRA EXPENSE** means the excess of the total cost of conducting business activities during the period of time necessary to clean or repair the *Location* (owned or operated by the *Insured*) where the incident occurred for the sole purpose of reducing the Loss. This Policy only covers those extra expenses which are over and above the cost of such activities during the same period of time had no incident occurred. . . .

Id. at pp. 10-11 of 27, Section 3.6.

B. This Insurance Coverage Action

The named Plaintiffs in this action consist of a group of restaurants operating in Las Vegas, Nevada. ECF No. 1 at ¶ 1. On March 20, 2020, the Governor of Nevada issued Declaration of Emergency Directive 003 in response to the health crisis caused by COVID-19 ("Directive 003"). *Id*. at ¶ 6; ECF No. 1-4 (Directive 003 as attached to the Complaint).

Directive 003 recognized concerns "that there is a correlation between density of persons gathered and the risk of transmission of COVID-19" and, as a result, further provided that "close proximity to other persons is currently contraindicated by public health and medical best practices to combat COVID-19." ECF No. 1-4 at p. 1. Directive 003 also provided that

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

restaurants in Las Vegas "shall cease onsite dining," but could continue to "serve customers through a take-out, drive-through, curbside pickup, or delivery capacity." *Id*. at p. 4.

On March 27, 2020, the Governor issued guidance in connection with Directive 003 (the "Guidance"). ECF No. 1-5 (the Guidance as attached to the Complaint). Under the Guidance, "Essential Business" including restaurants "offering meals via take-out, drive-through, curbside pickup, or delivery" were permitted to remain in operation, but were required to adopt "COVID-19 risk mitigation measures that reduce the risk of community disease spread." *Id*. at p. 2 of 11. As set forth in the Guidance, the goal of Directive 003 is to implement social distancing:

> If an essential licensed business is unable to provide take-out, drive-through, curbside pickup, or delivery services, it must, to the extent practicable, limit access to its premises so that customers can maintain a minimum of six feet of separation between each other AND must implement sanitization and disinfection policies in compliance with the CDC's recommendations.

ECF No. 1-5, p. 5 of 11; *See also,* ECF No. 1-5, p. 7 of 11 (discussing the specific "COVID-19 risk mitigation measures" for restaurants and food establishments). On March 31, 2020, the Governor issued Declaration of Emergency Directive 010 Stay at Home Order ("Directive 010") to extend the effective date of Directive 003 to April 30, 2020. ECF No. 1 at ¶ 10; ECF No. 1-6 (Directive 010 as attached to the Complaint), p. 3 of 4. Directive 010 together with Directive 003 are collectively referred to as the "Directives."

Plaintiffs do not allege that they have suffered any losses or incurred any expenses directly and solely as the result of an "Insured Event," *e.g.,* resulting from any product contamination or tampering, or negative publicity arising from any product contamination. Instead, and to the contrary, Plaintiffs allege they have suffered losses or incurred expenses because they were forced to suspended business operations at their restaurants "[i]n accordance with the above-referenced Directives." *Id*. at ¶ 11.

Plaintiffs provided notice of their losses to Defendants on April 22, 2020. *Id*. at ¶ 42. A mere two days later, on April 24, 2020, Plaintiffs filed their Complaint in this action. *See,*

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

generally, ECF No. 1. Plaintiffs nonetheless allege that Defendants have, *inter alia*, wrongfully denied and failed to investigate their claim. *See, e.g.*, ECF No. 1, ¶¶ 43, 63, and 67.[1]

Plaintiffs brought this action as a purported class action on behalf of unnamed class members who suffered suspension of business caused by COVID-19 and whose claims for Business Income and Extra Expense were denied. Plaintiffs assert claims for relief for (1) breach of contract based on Defendants' alleged denial of claims made for Business Income and Extra Expense, (2) breach of the implied covenant of good faith and fair dealing based on Defendants' alleged unreasonable handling of and denial of claims made for Business Income and Extra Expense, and (3) declaratory relief based on Plaintiffs' position that the Policy provides coverage for their claimed losses. As discussed below, Plaintiffs' claims fail as a matter of law and must be dismissed.

III. LEGAL STANDARD

Federal Rules of Civil Procedure, Rule 12(b)(6) authorizes a motion to dismiss a claim for "failure to state a claim upon which relief can be granted[.]" "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic 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.*

When considering a motion to dismiss, this Court may "consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir.2003). "A copy of a written

[1] The fact that Plaintiffs filed their Complaint two days after submitting their claim under the Policy completely undermines their allegations that Defendants failed to investigate and wrongfully denied Plaintiffs' claim. While it is true that based on the facts alleged by Plaintiffs, there is no coverage for their claim under the Policy, the conduct of Plaintiffs and their counsel in filing this action two days after the claim was presented is clear evidence of a rush to the courthouse to gain some perceived, but unmeritorious, advantage.

instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c).

IV. LEGAL ARGUMENTS

A. Plaintiffs' Breach Of Contract Claims For Relief Fail As A Matter Of Law Because They Have Not, And Cannot, Allege Facts That Their Claim Is Covered Under the Policy.

"[B]ecause this court's jurisdiction is invoked upon diversity of citizenship, a federal court is bound to apply the substantive law of the state in which it sits." *Schumacher v. State Farm Fire & Cas. Co*., 467 F.Supp.2d 1090, 1094 (D. Nev. 2006) (citing *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Strassberg v. New England Mutual Life Ins. Co.*, 575 F.2d 1262 (9th Cir. 1978)).

Under Nevada law, breach of contract requires Plaintiffs to allege that 1) there is a valid contract, 2) that one party performed pursuant to the contract, 3) the other party failed to perform and was not excused from performance, and 4) the performing party sustained damages as a result of the breach. *Calloway v. City of Reno*, 116 Nev. 250, 256, 993 P.2d 1259, 1263 (2000); *Reichert v. Gen. Ins. Co. of Amer*., 68 Cal.2d 822, 830, 69 Cal. Rptr. 321, 325 (1968). Here, Plaintiffs as the parties alleging that their claim is covered under the Policy, and that Defendants breached their contractual obligations, bear the burden of proving that the claim is covered under the Policy's insuring agreement. *Lucini-Parish Ins. v. Buck*, 108 Nev. 617, 620, 836 P.2d 627, 629 (1992) ("A party who seeks to recover on an insurance policy has the burden of establishing any condition precedent to coverage"); *Aydin Corp. v. First State Ins. Co*., 18 Ca1.4th 1183, 1188 (1998).

To determine whether alleged loss or damage "resulted from a covered cause of loss, [this Court] look[s] to the language of the Policy." *Fourth Street Place v. Travelers Indem*., 127 Nev. 957, 963, 270 P.3d 1235, 1239 (Nev. 2011). In Nevada, "[t]he interpretation of an insurance policy presents a legal question." *Powell v. Liberty Mut. Fire Ins. Co*., 127 Nev. 156, 161, 252 P.3d 668, 672 (2011). "An insurance policy should 'be read as a whole'." *Fourth Street Place*, 127 Nev. at 963, 270 P.3d at 1239 (quoting *Am. Excess Ins. Co. v. MGM*, 102 Nev.

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

601, 604, 729 P.2d 1352, 1354 (1986)). The terms of an insurance contract should also "'be viewed in their plain, ordinary and popular connotations.'" *Id.*

Under the insuring agreement in the Policy, USSIC plainly and clearly only covers "Loss in excess of the Deductible. . . caused by or resulting from any of the following *Insured Events* first discovered during the Policy Period and reported to the *Insurer*, in accordance with 6.20 Notice of an Incident[.]" ECF No. 1-3, p. 6 of 27, Section 1. The "Insured Events" enumerated in the Policy are: (1) "Accidental Contamination," (2) "Malicious Tampering," (3) "Product Extortion," and (4) "Adverse Publicity." *Id.* at p. 10, Section 3.9. The Policy defines "Loss" as "only the following reasonable and necessary expenses or costs incurred by the *Insured* directly and solely as the result of a covered *Insured Event* at any insured *Location*[.]" *Id.* at p. 7 of 27, Section 2. Thus, in order to trigger coverage under the Policy, and to maintain the claims for relief they assert against Defendants, Plaintiffs must allege that the losses and expenses they claim were incurred directly and solely as the result of a covered "Insured Event." *Lucini-Parish Ins., supra,* 836 P.2d 627 at 629; *Aydin Corp., supra,* 18 Ca1.4th at 1188; *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal.4th 1, 16 (1995). Plaintiffs have not and cannot do so. Plaintiffs' Complaint is devoid of any allegations that the losses they claim were incurred directly and solely as the result of an "Insured Event" as that term is defined in the Policy.

1. Plaintiffs Fail to Allege Any "Accidental Contamination."

Of the four "Insured Events" identified in the Policy, Plaintiffs only refer to the definition of the "Accidental Contamination" insured event in their Complaint. ECF No. 1 at ¶ 30. Under the "Accidental Contamination" insured event, Plaintiffs must plead and prove there was:

> (i) "accidental or unintentional contamination, impairment or mislabeling of an *Insured Product(s)*,"
>
> (ii) "which occurs during or as a result of its production, preparation, manufacture, packaging or distribution," and
>
> (iii) "the use or consumption of such *Insured Product(s)* has resulted in or would result in clear, identifiable, internal or external visible physical symptoms of bodily injury, sickness, disease or death of any person(s) within three hundred and sixty-five (365) days following such consumption or use."

See ECF No. 1-3, p. 6 of 27, Section 1.1.

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

Plaintiffs have not alleged in their Complaint, and cannot allege, that their claimed losses were incurred directly and solely as the result of "Accidental Contamination" as required for their claim to be covered under the Policy. To the contrary, Plaintiffs allege that their losses resulted from the forced suspension of business operations at their restaurants due to the Directives from the Governor of Nevada. ECF No. 1 at ¶¶ 11, 40-41.

Among the requirements of the "Accidental Contamination" insured event is that there be accidental or unintentional contamination, impairment or mislabeling of an insured product. ECF No. 1-3, p. 6 of 27, Section 1.1. "Contamination" requires a showing that "the product has come in contact with some sort of contaminate." *Wornick Co. v. Houston Cas. Co.*, 1:11-cv-00391, 2013 U.S. Dist. LEXIS 62465 at *16-17 (S.D. Ohio May 1, 2013) (addressing contamination by salmonella); *Caudill Seed & Warehouse Co. v. Houston Cas. Co.*, 835 F.Supp.2d 329, 335 (W.D. Kent. Dec. 20, 2011) (same); *Windsor Food Quality Co., Ltd. v. Underwriters of Lloyds of London*, 234 Cal.App.4th 1178, 1186 (2015) (addressing contamination through infection by "mad cow" disease). Courts addressing similar product contamination policy language have consistently looked to the natural and commonly understood meaning of "contamination" to evaluate whether the products at issue were actually contaminated so as to trigger coverage. *Wornick Co., supra*, 2013 U.S. LEXIS 62465 at *15-16; *HoneyBaked Foods, Inc. v. Affiliated FM Ins. Co.*, 757 F.Supp.2d 738 (N.D. Ohio 2010) ("the 'usual and ordinary meaning' of 'contaminate' is 'to render unfit for use by the introduction of unwholesome or undesirable elements'").

"Impairment" means "damaged, weakened, or diminished due to a defect or flaw in the product itself." *Wornick Co., supra,* 2013 U.S. LEXIS 62465 at *22 (Black's Law Dictionary defines "impairment" as "[t]he fact or state of being damaged, weakened, or diminished"). The impairment must "be to the product itself, and not as a result of the collateral circumstances surrounding the product.'" *Id.* (quoting *Ruiz Food Prods. v. Catlin Underwriting U.S., Inc.*, 1:11-cv-00889-BAM, 2012 U.S. Dist. LEXIS 131031 at *10 (E.D. Calif. Sept. 13, 2012)).

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

In *Wornick Co*., the court found that the products at issue did not suffer any "contamination" or "impairment" under the insurance contract at issue. 2013 U.S. Dist. LEXIS 62465 at *18. There, the policy similarly defined "accidental product contamination" as:

> Any accidental or unintentional contamination, impairment or mislabeling (including mislabeling of instructions for use) during the manufacture, blending, mixing, compounding, packaging, labeling, preparation, production or processing (or storage on the premises of the Named Insured), of the Named Insured's PRODUCTS.

Id. at *10-11. In *Wornick Co*., the insured was an integrator of meal-ready-to-eat ("MREs") for the U.S. Government, which purchased component items from manufacturers, including dairy shake packets sourced from Plainview Milk Products. *Id*. at *3-4. An FDA investigation found salmonella in the Plainview's facilities, and Plainview issued a recall of the dairy shake packets. *Id*. at *3. The insured recalled its MREs, replaced the dairy shake packets, and submitted a claim for losses under its insurance contract. *Id*. at *5-6. The claim was denied and the insured initiated an insurance coverage action arguing that its products were contaminated because "they contained dairy shake packets that were subject to a recall." *Id*. at *14. The *Wornick Co*. court disagreed, finding that "'contamination' requires that the insured's product be soiled, stained, corrupted, infected, or otherwise made impure by contact or mixture." *Id*. at *18. Because there was no evidence that the insured's products came into contact with salmonella, the court found there was no "contamination" within the meaning of the policy. *Id*. at *18. The court also rejected the insured's argument that its MREs were "impaired." *Id*. at *23.

Here, Plaintiffs fail to allege any facts that the losses or expenses they claim were incurred directly and solely as the result of contamination or impairment of their food products as required to implicate coverage under the "Accidental Contamination" insured event.[2] Instead, and to the contrary, Plaintiffs allege that their claimed losses resulted from the suspension of their business operations due to the Directives. ECF No. 1 at ¶¶ 11, 40-41. The

[2] Plaintiffs also fail to allege, *inter alia*, any mislabeling of an insured product within the definition of "Accidental Contamination." Nor do Plaintiffs allege that the use or consumption of an insured product has resulted in or could result in physical symptoms of bodily injury, sickness, disease or death of any person, as is also required to implicate coverage under the "Accidental Contamination" insured event.

Directives addressed concerns relating to COVID-19 transmission arising from "close proximity" of persons and were aimed at impeding the spread of the virus which causes COVID-19. ECF No. 1-4, p. 2 of 6; ECF No. 1-5 at p. 2 of 11; ECF No. 1-6 at p. 2 of 4.

As a result, Plaintiffs' claimed losses were clearly not incurred directly and solely as the result of "Accidental Contamination" as required for coverage under the Policy to apply. Absent coverage under the Policy, Plaintiffs' breach of contract claims for relief against Defendants fail as a matter of law and should be dismissed.

2. Plaintiffs Also Fail to Allege Any Other "Insured Event."

As indicated, of the four "Insured Events" identified in the Policy, Plaintiffs only refer to the definition of the "Accidental Contamination" insured event in their Complaint. ECF No. 1 at ¶ 30. As set forth in the preceding section, Plaintiffs have not alleged facts required to implicate the "Accidental Contamination" insured event in the Policy. Any effort by Plaintiffs to contend that they have pled facts sufficient to implicate any of three remaining "Insured Events" identified in the Policy – "Malicious Tampering," "Product Extortion," or "Adverse Publicity" – likewise fails.

Plaintiffs have failed to allege any "intentional, malicious, and wrongful alteration or contamination" of any of their products by any third person which rendered any such products "unfit or dangerous" for their "intended use or consumption" as required for the "Malicious Tampering" insured event to be implicated. ECF No. 1-3, p. 6 of 27, Section 1.2. To the contrary, and as indicated, Plaintiffs allege the losses they claim resulted from the shutdown of their business operations due to the Directives. *Id.* at ¶¶ 1139-41, and 46. This is directly at odds with what is required to trigger coverage for "Malicious Tampering" under the Policy, *e.g.*, intentional, malicious, and wrongful alteration or tampering of any Insured Products.

"Product Extortion" requires Plaintiffs to plead and ultimately prove the existence of some "threat or connected series of threats to commit a Malicious Tampering, for the purpose of demanding Extortion Monies, communicated to the Insured." ECF No. 1-3 at p. 6 of 27, Section 1.3. "Extortion Monies" are defined in the Policy as "any monies which the *Insured* has paid or lost in transit under circumstances described in *Insured Event*, Section 1.3." *Id.* at p. 10 of 27,

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

Section 3.5. Plaintiffs have not, of course, alleged any facts that their claimed losses were caused by or resulted from some threat to intentionally, maliciously, and wrongfully alter or tamper with any of their products as required for the "Product Extortion" insured event to be implicated.

Finally, "Adverse Publicity" requires Plaintiffs to plead and ultimately prove some "*Adverse Publicity* which is subsequently found to be baseless by reason of the absence of any physical evidence from any source whatsoever, that an Accidental Contamination … has occurred." *Id.* at p. 6 of 27, Section 1.4. "Adverse Publicity" is defined in the Policy as:

> the reporting of an actual or alleged Accidental Contamination during the Policy period in local, regional or national media (including but not limited to radio, television, newspaper, magazines or the Internet) or any governmental publication provided that the Insured Product(s) or the products served at any restaurant under the same trade name as the Insured as specifically named.

Id. at p. 8 of 27, Section 3.1. Once again, Plaintiffs have not alleged that their claimed losses were caused by or resulted from any adverse publicity due to reporting of "Accidental Contamination" that is subsequently found to be baseless as required for the "Adverse Publicity" insured event to be implicated.

In summary, Plaintiffs allege that their claimed losses resulted from the suspension of business operations due to Directives from the Governor of Nevada. ECF No. 1 at ¶ 11. The Directives were aimed at impeding the spread of the virus which causes COVID-19. ECF No. 1-4, p. 2 of 6; ECF No. 1-5 at p. 2 of 11; ECF No. 1-6 at p. 2 of 4. The Policy simply does not cover losses due to governmental directives resulting in the suspension of business operations because such losses do not directly and solely result from any covered "Insured Event" as required for coverage under the Policy to apply. Because Plaintiffs have not alleged, and have no legitimate basis to allege, that their claimed losses were incurred directly and solely as a result of any "Insured Event" (*i.e.*, "Accidental Contamination," "Malicious Tampering," "Product Extortion," or "Adverse Publicity") they cannot state a claim for coverage under the Policy and their breach of contract claims for relief against Defendants necessarily fail.

/ / /

/ / /

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

B. Plaintiffs Likewise Have Not And Cannot Allege Facts Sufficient To State A Claim For Breach Of The Implied Covenant Of Good Faith And Fair Dealing.

"Nevada law recognizes the existence of an implied covenant of good faith and fair dealing in every contract." *Pemberton v. Farmers Ins. Exchange*, 109 Nev. 789, 792-93, 858 P.2d 380, 382 (1993) (citing *A.C. Shaw Construction v. Washoe County*, 105 Nev. 913, 914, 784 P.2d 9, 10 (1989); *Ainsworth v. Combined Ins.*, 104 Nev. 587, 592, 763 P.2d 673, 676 (1988)). However, to maintain a cause of action for breach of the implied covenant, an insured must show that its claim was denied "without proper cause" and that the insured is entitled to compensation "for a loss covered by the policy." 109 Nev. at 793, 858 P.2d at 382 (citing *United States Fidelity & Guaranty Co. v. Peterson*, 91 Nev. 617, 620, 540 P.2d 1070, 1071 (1975)). "Bad faith involves an actual or implied awareness of the absence of a reasonable basis for denying benefits of the policy." *Am. Excess Ins. Co. v. MGM Grant Hotels*, 102 Nev. 601, 605, 729 P.2d 1352, 1355 (1986) (citations omitted).

As detailed in the preceding section, Plaintiffs fail to allege any facts to show that they have incurred any losses or expenses as a result of an "Insured Event." The Policy only covers losses "incurred by the *Insured* directly and solely as a result of a covered *Insured Event*." ECF No. 1-3 at p. 7 of 27, Section 2. As a result, Plaintiffs cannot allege that their claim was denied "without proper cause" or that they were entitled to compensation for a loss covered by the policy.[3]

C. Plaintiffs' Claims For Relief for Declaratory Relief Must Be Dismissed.

Declaratory relief is a form of remedy, not a stand-alone cause of action. *Herrera v. Nationstar Mortg. LLC*, 2:16-cv-01043-GMN-GWF, 2017 U.S. Dist. LEXIS 41340 at *11 (D. Nev. March 22, 2017) (dismissing declaratory judgment claim); *Antaredjo v. Nationstar Mortg., LLC*, 2:13-cv-1532-JCM-CWH, 2014 WL 298810 at *3 (D. Nev. Jan. 27, 2014) ("Declaratory

[3] Plaintiffs allege that they provided notice of their loss to Defendants on April 22, 2020. ECF No. 1 at ¶ 42. A mere two days later, on April 24, 2020, Plaintiffs filed their Complaint. Plaintiffs implausibly and absurdly allege that Defendants "refuse to or have failed to meaningfully respond" to Plaintiffs' request within these two days. *Id*. at ¶ 43. Plaintiffs should not be permitted to allege that Defendants failed to "meaningfully" respond and yet expect a meaningful response within two days from submission of a claim.

and injunctive relief are merely remedies, not stand-alone causes of action."). Plaintiffs' third, sixth (erroneously titled "fifth"), and seventh (erroneously titled "sixth") claims for relief are stand-alone claims for declaratory relief. These "claims for relief" should be dismissed as they are not proper substantive claims.

Further, a party is not entitled to declaratory relief if it cannot plead or prove the elements of the underlying claim. *See Collin Cty., Tex. v. Homeowners Ass'n for Values Essential to Neighborhoods, (HAVEN)*, 915 F.2d 167, 171 (5th Cir. 1990) ("Since it is the underlying cause of action of the defendant against the plaintiff that is actually litigated in a declaratory judgment action, a party bringing a declaratory judgment action must have been a proper party had the defendant brought suit on the underlying cause of action."). As detailed above, Plaintiffs have failed to allege facts required to state any claim for breach of contract or breach of the implied covenant of good faith and fair dealing against Defendants. Plaintiffs' claims for relief for declaratory relief should also be dismissed as they have not stated a claim for the underlying cause of action.

V. CONCLUSION

Defendants respectfully request that the Court dismiss Plaintiffs' Complaint in this action, and all claims for relief asserted therein, pursuant to Federal Rule of Civil Procedure, Rule 12(b)(6). For the reasons set forth above, Plaintiffs have simply not alleged required facts that their claimed losses were incurred directly and solely as the result of an "Insured Event" as required for coverage under the Policy to apply. Plaintiffs cannot maintain their claims for breach of contract under the circumstances, nor can they maintain their claims for breach of the

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

implied covenant in the absence of some coverage denial made without proper cause. Plaintiffs' claims for declaratory relief likewise fail, and are also not independently actionable.

DATED this 26th day of May, 2020.

GORDON REES SCULLY MANSUKHANI, LLP

/s/ Robert S. Larsen

Robert S. Larsen, Esq.
Nevada Bar No. 7785
Wing Yan Wong, Esq.
Nevada Bar No. 13622
300 South Fourth Street, Suite 1550
Las Vegas, Nevada 89101

Matthew S. Foy, Esq.
Pro Hac Vice Forthcoming
Jennifer Wahlgren, Esq.
Pro Hac Vice Forthcoming
275 Battery Street, Suite 2000
San Francisco, CA 94111

Attorneys for Defendants

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of May, 2020, and pursuant to Fed. R. Civ. Pro. 5, I served via CM/ECF and/or deposited for mailing in the U. S. Mail, a true and correct copy of the foregoing DEFENDANTS' MOTION TO DISMISS COMPLAINT (ECF NO. 1) upon those persons designated by the parties in the E-Service Master Lis, as follows:

Gregg A. Hubley, Esq. (Nev. Bar No. 7386)
Christopher A.J. Swift, Esq. (Nev. Bar No. 11291)
ARIAS SANGUINETTI WANG & TORRIJOS, LLP
7201 W. Lake Mead Blvd., Suite 570
Las Vegas, Nevada 89128
Telephone: (702) 789-7529
Facsimile: (702) 909 7865
Email: gregg@aswtlawyers.com
Email: christopher@aswtlawyers.com

Mike Arias, Esq. (Cal. Bar No. 115385)
Alfredo Torrijos, Esq. (Cal. Bar No. 222458)
ARIAS SANGUINETTI WANG & TORRIJOS, LLP
6701 Center Drive West, 14th Floor
Los Angeles, California 90045
Telephone: (310) 844-9696
Email: mike@aswtlawyers.com
Email: alfredo@aswtlawyers.com

Alan Brayton, Esq. (Cal Bar No. 73685)
Gilbert Purcell, Esq. (Cal Bar No. 113603)
James Nevin, Esq. (Cal. Bar No. 220816)
Andrew Chew, Esq. (Cal. Bar No. 225679)
BRAYTON PURCELL, LLP
222 Rush Landing Road
Novato, California 94945
Telephone: (800) 598-0314
Email: abrayton@braytonlaw.com
Email: gpurcell@braytonlaw.com
Email: jnevin@braytonlaw.com
Email: achew@braytonlaw.com

Attorneys for Plaintiffs

/s/ Gayle Angulo
An Employee of GORDON REES SCULLY MANSUKHANI, LLP