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

vs.

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

Defendants.

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT

COMES NOW, Plaintiffs Egg & I, LLC; Egg Works, LLC; Egg Works 2, LLC; Egg Works 3, LLC; Egg Works 4, LLC; Egg Works 5, LLC; Egg Works 6, LLC, and EW Commissary, LLC (collectively "Plaintiffs" or "Egg Works"),by and through their attorneys of record, the law firm of Arias Sanguinetti Wang & Torrijos, LLP, and the law firm of Brayton & Purcell, LLP, and hereby opposes Defendants U.S. Specialty Insurance Company ("USIC") and Professional Indemnity Agency, Inc. dba Tokio Marine HCC- Specialty Group ("PIA") Motion to Dismiss, filed as ECF No. 24.

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This Motion is supported by the accompanying memorandum of points and authorities, the pleadings and papers already on file, any facts subject to judicial notice, and any other arguments presented to this Court at or before the hearing on the motion, if any.

Dated: June 30, 2020.

ARIAS SANGUINETTI WANG & TORRIJOS, LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Across the nation, businesses, like Egg Works, have been shut down by operation of various governmental declarations and orders attempting to curb the spread of COVID-19. These businesses, in turn, look to their commercial insurance policies for relief under business interruption coverage and are being routinely and wrongly denied. These denials have forced businesses like Egg Works to file lawsuits and bear the burden of not being made whole for insured covered losses for which companies dutifully paid premiums for years.

The Defendants' Motion to Dismiss is entirely based on a flawed foundation. This case is not about accidental food contamination. Defendants, in their continued attempt to deny rightful coverage, contort their Restaurant Recovery Insurance Policy (the "Policy") to convince this Court

that coverage obtains only if Plaintiffs allege that there was contaminated food served with COVID-19 or some other virus. This is incorrect.

To begin, the headings of the Policy referenced by the Defendants in their Motion with specific regard to the Insured Events, by the very terms of the Policy, do not frame coverage or "affect the provisions to which they relate." (ECF No. 1-3, p. 20 of 27, ⁋ 6.30, "Titles of paragraphs are inserted solely for the convenience of reference and will not limit, expand, or otherwise affect the provisions to which they relate.") Each "Insured Event" as defined in the Policy, i.e. "Accidental Contamination," "Malicious Tampering," "Product Extortion," and "Adverse Publicity" is named in a way that provides no guidance as to the actual coverage afforded. This Court must look to the plain language of the Policy detail, and specifically the definitions of the "Insured Events" to determine what is covered.

Coverage exists under this Policy due to the cessation and interruption of on-site dining at Plaintiffs' restaurants at the direction of Nevada Governor Steve Sisolak. Section 1.1 of the Policy indicates that coverage exists for any "impairment" of an "Insured Product" that would result "in physical symptoms of bodily injury, sickness, disease or death." (ECF No. 1-3, p. 6 of 27). These are the very things that prompted Governor Sisolak's Emergency Directives. The Policy does not define "impairment," but Defendants concede that the term means "damaged, weakened, or diminished due to a defect or flaw in the product itself." (ECF No. 24, p. 11, ll. 21-22). Section 1.2 of the Policy provides coverage for "threatened…contamination" of the "Insured's Product(s)… so as to render it unfit or dangerous… or to create such an impression with the public." (ECF No. 1-3, p. 6 of 27).

Defendants misdirect the Court in asserting that "Insured Product" is somehow limited to food. It's not. This is a mischaracterization of the Policy coverage. The Policy expressly applies to "**offerings served** during the Policy period at any time at any of the Insured's Locations." (Emphasis added) (ECF No. 1-3 p. 4 of 27). Egg Works' on-site family-oriented dining offerings have been decimated by the COVID-19 circumstance. This definition of an "Insured Product" can only mean on-site dining, which was stopped by government directive, interrupting Egg Works' business, and for which Defendants must provide coverage under the Policy.

Defendants' Motion to Dismiss must be denied.

II. STATEMENT OF FACTS

A. THE TOKIO MARINE INSURANCE POLICY

Egg Works is a group of well-known and locally owned restaurants in Clark County, Nevada, serving breakfast and lunch (ECF No. 1, ⁋ 1). Egg Works provides a dining experience years in the making and one on which it prides itself – eating there is an experience that is difficult to explain in opposing a motion to dismiss.

Relevant to the pending Motion, Egg Works purchased a Restaurant Recovery Insurance Policy Form at significant expense (the "Policy") from Defendants. At its core, Defendants' Policy agrees to reimburse Plaintiffs for losses caused by an "Insured Event" sustained in excess of the deductible up to certain predetermined limits. (ECF No. 1-3, p. 6 of 27).

The Policy covered the following, defined as "Insured Products":

> All retail restaurant offerings served during the Policy period at any time at any of the Insured's Locations in the manner prescribed in the Application form signed and dated August 29, 2019 and held on file with the Insurer.

(ECF No 1-3, p. 4 of 27). The Insured's Locations are the actual physical locations of the restaurants. (ECF No. 1, ⁋ 27).

Coverage is broadly generalized into four category headings, each one defined as an "Insured Event" and labeled: (1) accidental contamination; (2) malicious tampering: (3) product extortion; and (4) adverse publicity. Specific to this action, the Policy defines "Accidental Contamination" as:

> 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 or any person(s), within three hundred and sixty five (365) days following such consumption or use.

(ECF No. 1-3, p. 6 of 27).

The Policy defines "Malicious Tampering" as, in pertinent part:

> 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.

(ECF No. 1-3, p. 6 of 27).

Section 2 of the Policy defines Loss as "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*." (ECF No. 1-3, p. 7 of 27).

The Policy covers "Business Interruption" defined as "*Loss of Gross Revenue* and *Extra Expense* provided that the *Insured* continues to incur such losses beyond the *Waiting Period*." (ECF No. 1-3, p. 7 of 27). "Loss of Gross Revenue" is defined as an insured's "sales revenue… projected immediately prior to the happening of an *Insured Event*." (ECF No. 1-3, p. 11 of 27). "Loss of Gross Revenue" is monetarily measured as follows:

> *Loss of Gross Revenue* shall be assessed by the Insurer based on the analysis of the restaurant sales of affected *Insured Products*, and other *Insured Products* which lost sales as a direct result of the *Insured Event*, during each month of the twelve months prior to the *Insured Event*, and taking into account:
>
> i) the reasonable projection of the future profitability of such product (s) had no *Insured Event* occurred; and
>
> ii) all material changes in market conditions of any nature whatsoever which would have affected the future marketing of and profits generated by the *Insured Products* or other affected *Insured Products*

(ECF No. 1-3, p. 8 of 27).

"Extra Expense" is defined as:

> [T]he excess of the total cost of conducting business activities during the period of time necessary to clear or repair the *Location* (owned or operated by the *Insured*) where the incident occurred for the sole purpose of reducing the Loss…" Notably, Extra Expense includes maintaining a salaried workforce to the extent required by statute, union, or other work contract and maintaining a minimum work force at a minimal percentage of salary in order to be able to open the location after any sort of shutdown by a "national or local governmental organization or body.

(ECF 1-3, p. 11 of 27).

Finally, the Policy provides certain exclusions of coverage. There is not exclusion for covered losses caused by COVID-19. An exclusion for the Avian Influenza Virus states:

> This Policy of Insurance does not apply to any Loss arising out of, based upon, attributable to or consisting of, directly or indirectly:
>
> 4.18 Any loss caused directly or indirectly, in whole or in part, by
>
> 1. Any form of *Avian Influenza Viruses*;
>
> 2. Any actual, threatened, predicted or perceived outbreak of *Avian Influenza Viruses*; or
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> 3. Any supervision, instructions, recommendations, warnings or advice given or which should have been given in connection with *Avian Influenza Viruses*; or
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> 4. Any measures or actions undertaken, directed and/or recommended by any governmental or regulatory authority, or any other entity or natural person, with respect to *Avian Influenza Viruses* regardless of any other cause, event,

> material or product that contributed concurrently or in any sequence to or was accelerated by or results from the loss, injury, cost, damage, claim, expense, dispute and/or suit.
>
> For the purposes of this exclusion, the term *Avian Influenza Viruses* includes:
>
> a. All avian flu or bird influenza viruses including any other nomenclature, scientific (e.g. AH5N1, AH5N2, AH7N1, A H9N2) or otherwise (e.g. "bird flu") devised or used to describe the viruses regardless of any genetic features or differences, subtype or strain, and whether or not partnered with any neuraminidase surface proteins; and any progression, mutation or recombination thereof, including but not limited to progression, mutation or recombination of any subtype or strain, and/or any changes in the antigenic co
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> b. Any complications, infections, illnesses, or secondary or opportunistic diseases related to, or initiating because of, or occurring in conjunction with, or following *Avian Influenza Viruses*."

(ECF No. 1, ¶ 38; ECF No. 1-3, p. 14 of 27). There is no exclusion for coronaviruses generally or COVID-19.

B. THE NEVADA COVID-19 RESPONSE

Beginning in January 2020, the United States saw its first case of persons affected by COVID-19. As the pandemic worsened in the United States, states began to take action. On March 20, 2020, Nevada Governor Steve Sisolak issued a Declaration of Emergency Directive 003 which ordered the cessation of "non-essential" business, including on-site dining such as Plaintiffs. (ECF No. 1, ¶ 6). On March 27, 2020, Governor Sisolak issued a Guidance for Declaration of Emergency

Directive 003, clarifying that dine-in restaurants are "non –essential" business, where the risk of transmission of COVID-19 is high." (ECF No. 1, ¶ 9). Declaration of Emergency Directive 003 was extended to April 30, 2020, by way of an April 1, 2020, Declaration of Emergency Directive 010. (ECF No. 1, ¶ 10). Despite Herculean efforts to adopt these directives, Egg Works' business plummeted as it was prohibited from normal operations.

Five days after the filing of this action, and specifically on April 29, 2020, Governor Sisolak issued Declaration of Emergency Directive 016, extending the restrictions for "on-site" dining to May 15, 2020.[1] On May 13, 2020, Governor Sisolak issued a Phase One Reopening, permitting restaurants to open under strict social distancing guidelines that required each restaurant to operate at 50% capacity.[2] Plaintiffs' resulting losses accrue to this day operating only at a significantly reduced capacity in an environment where people are scared to dine-in.

C. THE NOTICE OF CLAIM

On April 22, 2020, Egg Works provided notice of its claims to Defendants. On April 23, 2020, counsel for the undersigned had a telephone conference with Defendants, who confirmed they were not accepting but rather denying coverage. Defendants take issue with filing the instant action with two days' notice. (ECF No. 24, fn. 3). Such disdain must be tongue in cheek, as Defendants were well on notice of the alarming conditions wreaking havoc on restaurants throughout the nation due to the pandemic well before Plaintiffs provided notice. Further still, these sort of claims do not require extensive evaluation to determine if coverage applies. Nevada Governor Sisolak's Declarations of Emergency Directives were readily verifiable to Defendants. It is noteworthy that, to date, and in their Motion to Dismiss, Defendants still deny coverage with the same information they have now that they had on April 23, 2020.[3]

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[1] Plaintiffs request that this Court take judicial notice of Nevada Governor Steve Sisolak's webpage which contains Declaration of Emergency Directive 003 pursuant to FRCP 201(b), http://gov.nv.gov/News/Emergency_Orders/2020/2020-04-29_-_COVID-19_Declaration_of_Emergency_Directive_016_(Attachments)/.

[2] Plaintiffs request that this Court take judicial notice of Nevada Governor Steve Sisolak's webpage, which contains Phase One Reopening Announcement at http://gov.nv.gov/uploadedFiles/govnewnvgov/Content/News/Emergency_Orders/2020/018-Roadmap-to-Recovery-Phase-One-Initial-Guidance.pdf.

[3] Notably, Nevada law requires that each insurer complete an investigation within 30 days

III. LEGAL STANDARD

A. MOTIONS TO DISMISS UNDER FED. R. CIV. P. 12(b)(6) ARE SUBJECT TO HIGH STANDARDS WHICH DEFENDANTS FAIL TO MEET

Rule 12(b)(6) requires the Court to accept all material allegations as true and to construe the Complaint in the light most favorable to the plaintiff, as non-movant. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996) (*citation omitted*). A claim cannot be dismissed on a Rule 12(b)(6) motion when the complaint contains sufficient factual to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (1937). "Rather, it must plead "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *K.T v. Pittsburgh Unified School District*, 219 F.Supp.3d 970, 976 (N.D. Cal 2016) (quoting *Twombly*, 550 U.S. at 570). A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a complaint, which requires only a "short and plain statement of the claims showing that the pleader is entitled to relief." *Johnson v. Allstate Ins. Co.*, 845 F.Supp.2d 1170, 1174 (W.D. Wash. 2012).

B. A POLICY PROVIDES COVERAGE WHEN REASONABLY INTERPRETED TO DO SO

Nevada and Ninth Circuit law concerning the interpretation of an insurance policy both favor reading the Policy as to afford coverage to Plaintiffs. "An insurance policy is to be judged from the perspective of one not trained in law or in insurance, with the terms of the contract viewed in their plain, ordinary and popular sense." *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 846 P.2d 303, 304 (Nev. 1993). Clauses providing coverage should be broadly interpreted "so as to afford the greatest possible coverage to the insured, clauses excluding coverage are interpreted narrowly against the insured." *National Union Fire Ins. V. Reno's Exec. Air*, 100 Nev. 360, 365, 682 P.2d 1380, 1383 (Nev. 1984). Any exclusion must be narrowly tailed so that it "clearly and distinctly communicates to the insured the nature of the limitation, and specifically delineates what is and is not covered. *Griffin v. Old Republic Ins. Co.*, 122 Nev. 479, 485 (2006).

Courts interpret policy terms according to the policy's definitions and read undefined terms

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after receiving notice of a claim. NAC 686A.670(2).

to mean their "plain, ordinary, and popular" meanings. *Tacoma Elec. Supply Inc. v. Atl. Mut. Ins. Co.*, 40 Fed.Appx. 567, 568 (9th Cir. 2011). Ambiguous terms in an insurance policy will be construed in favor of the insured and against the insurer. *Harvey's Wagon Wheel, Inc. v. MacSween,* 96 Nev. 215, 606 P.2d 1095, 1098 (Nev. 1980). A provision is ambiguous if it is reasonably susceptible to more than one interpretation. *Benchmark Ins. Co. v. Sparks*, 254 P.3d 617, 621 (Nev. 2011).

To preclude coverage under an insurance policy's exclusion provision, an insurer must (1) draft the exclusion in "obvious and unambiguous language," (2) demonstrate that the interpretation excluding coverage is the only reasonable interpretation of the exclusionary provision, and (3) establish that the exclusion plainly applies to the particular case before the Court. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 14, 252 P.3d 668, 674 (Nev. 2011).

IV. LEGAL ARGUMENT

A. PLAINTIFFS HAVE PROPERLY ALLEGED A CAUSE OF ACTION FOR BREACH OF CONTRACT

Nevada law requires the plaintiff in a breach of the contact action to show: (1) the existence of a valid contract; (2) a breach by the defendant; and (3) damages. *Powell v. Liberty Mutual Fire Ins. Co.*, 12 Nev. 156, 161, n. 3 (2011). Defendants acknowledge an existing contract. Plaintiffs specifically allege that Defendants breached the terms of the Policy by failing to provide coverage as there was an "Insured Event" that mandatorily triggered coverage. (ECF No. 1, ¶ 60). This covered loss implicated the "Business Interruption" and "Extra Expense" coverage and because Defendants have, admittedly, not provided this coverage, Plaintiffs suffered and continue to suffer, damages. This Court should deny the Motion outright, as all allegations in the Complaint must be taken as true for the purposes of the Motion to Dismiss and these allegations clearly meet the elements of a cause of action for breach of contract.

Should this Court consider Defendants' arguments, however, these fail as well. Under well-established rules of policy construction there is coverage under both the "Accidental Contamination" and "Malicious Tampering" definitions of an "Insured Event." Defendants pervert their own Policy to argue otherwise.

1. The Policy Provides Coverage Under "Accidental Contamination"

As discussed, clauses providing coverage should be broadly interpreted "so as to afford the greatest possible coverage to the insured, clauses excluding coverage are interpreted narrowly against the insured." *National Union Fire Ins.*, 100 Nev. 350 at 365; see also, *Federal Ins. Co. v. American Hardware Mut. Ins. Co.*, 124 Nev. 319, 324 (2008) (clauses providing coverage must be interpreted broadly). Defendants ignore this maxim and – more importantly – ignore the Policy language itself when they argue that the Court should dismiss this case because Plaintiffs have failed to allege any "Accidental Contamination." According to Defendants, "Accidental Contamination" requires Plaintiffs to contend that the food is contaminated. Defendants are wrong. A review of the Policy at issue quickly shows why.

First, the headings of the "Insured Events" are not instructive into their actual meaning. Defendants ignore this in their Motion, despite the fact that their section 6.30 of their Policy provides:

> Titles of paragraphs are inserted solely for the convenience of reference and will not limit, expand, or otherwise affect the provisions to which they relate.

(ECF No. 1-3, p. 20 of 27). Thus, consistent with contract construction and interpretation, the heading "Accidental Contamination" means nothing in the Policy, despite Defendants' Motion and suggestion to the contrary.

What **is** covered is "[a]ny accidental or unintentional... **impairment** of an *Insured Product(s)*… provide that the use… 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 (365) days following such consumption or use." (ECF No. 1-3, p. 6 of 27) (Emphasis added). Defendants' Motion to Dismiss defines "impairment" as "damages, weakened, or diminished." (ECF no. 24, p. 11, ll. 21-22).

Second, "Insured Product" under the Policy is not limited to "ingestible products" in isolation. Instead, as the Policy makes clear, "Insured Product" specifically includes food *served at Plaintiffs' restaurant locations*. The term "Insured Product" is defined in two separate places in the Policy. Section 3.11 of the Policy provides:

> INSURED PRODUCT(S) means 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:
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> a. in production; or
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> b. have been manufactured, handled or distributed by the *Insured*; or
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> c. manufactured by any contract manufacture for the *Insured*; or
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> d. being prepared for or are available for sale; or
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> e. ***all ingestible products for human consumption served at any restaurant location operating under the same trade name as the Insured***.

(ECF No. 1-3, pp. 10-11 of 27) (Emphasis added).

> "Insured Product" is also defined in the Declarations page of the Policy as:
>
> All retail ***restaurant offerings served*** during the Policy period at any time ***at any of the Insured's Locations*** in the manner prescribed in the Application form signed and dated August 29, 2019 and held on file with the Insurer.

(ECF No. 1-3, p. 4 of 27) (Emphasis added). It is clear from these definitions that the term "Insured Products" includes breakfast **service** at any of Plaintiffs' restaurant locations. Service as an "Insured Product" involves on-site dining. Defendants cannot and do not challenge the cessation of Plaintiffs' business due to the pending COVID-19 pandemic and Nevada Governor Sisolak's Emergency Directives. Nor do they assert on-site indoor dining as "safe." The interruption and extra expenses incurred by Plaintiffs due to the cessation, functional closure, and subsequent eradication of on-site dining eliminating Egg Works' businesses are covered losses under the Policy.

An example of why "Accidental Contamination" does not only speak of contaminated food is the express exclusion of the Avian Influenza Virus from coverage. (ECF No. 1-3, p. 14 of 27). The Policy spends more than half a page excluding the Avian Influenza Virus from coverage despite the virus being an airborne disease and not one that is transmitted through food.[4] It does not comport that

[4] Plaintiffs request that this Court take judicial notice, pursuant to FRE 201, of

Defendants would spend a considerable amount of effort to specifically exclude the Avian Influenza Virus from coverage if the Policy was intended to only apply to accidental contamination of food only. A court should "interpret an insurance policy to 'effectuate the reasonable expectations of the insured.'" *Am. Excess Ins. Co. v. MGM*, 102 Nev. 601, 604, 729 P.2d 1352, 1354 (Nev. 1986) (quoting *National Union Fire Ins. V. Reno's Exec. Air*, 100 Nev. at 365). "Further, an insurance policy's interpretation should not lead to an absurd or unreasonable result." *Century Sur. Co. v. Casino W., Inc.*, 130 Nev. 395, 398, 329 P.3d 614 (Nev. 2014) (citing to *Powell,* 252 P.3d at 672). As Plaintiffs can demonstrate that the "Insured Event" falls within the scope of basic coverage, Defendants must prove that a valid exclusion applies. *Garvey v. State Farm*, 48 Cal.3d 395, 406 (Cal. 1978) (citing to *Clemmer v. Hartford Ins.*, 22 Cal.3d 865,880 (Cal. 1978). The exclusion of the Avian Influenza Virus clearly indicates that Defendants were aware and intended to insure more than contaminated food. Notably absent from the Policy is any remote reference to any form of coronavirus or COVID-19.

Similarly, the Policy covers up to twelve months of loss for an "Insured Event." The length of this coverage contradicts Defendants' assertion that "Accidental Contamination" would only apply to contaminated food. By way of example, if a customer were to become sick from salmonella, an actual bacteria that affects food, the loss would surely not amount to twelve months of lost business and extra expenses and one would be hard pressed to find such a situation. A much more reasonable interpretation is that the Policy provides for "Business Interruptions" and "Extra Expenses" for up to twelve months for situations like the COVID-19 pandemic and related governmental orders. These are the type of "Insured Events" that would warrant this length of coverage.

For Defendants to claim that Plaintiffs' Complaint should be dismissed as 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" would be an absurd result.

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https://www.cdc.gov/flu/pdf/avianflu/avian-flu-transmission.pdf, generally noting that transmission when "bird flu viruses can happen when enough virus gets into a person's eyes, notes or mouth, or is inhaled."

2. The Policy Provides Coverage For "Malicious Tampering"

An "Insured Event" can also be a "Malicious Tampering," defined as:

> Any… **threatened**… contamination of the *Insured's Product(s)*… so as to render it unfit or dangerous for its intended use or consumption or to create such an impression with the public."

(ECF No. 1-3, p. 6 of 27) (Emphasis added).

As discussed in section IV(A)(1) in the paragraph immediately above, "Insured Products" applies to the aggregate on-site dining experience as well as the Egg Works' meals themselves. Governor Sisolak issued the Emergency Directives to curb the spread of COVID-19 through social gathering. Egg Works, in turn, rightfully complied with the Emergency Directive and ceased on-site restaurant dining services at a debilitating loss of revenue. Even now Egg Works operates at a significantly reduced capacity, curbside, and must attempt to do business when the public largely does not feel safe eating at a physical restaurant. Indeed, and as this Court well knows, the present day news publishes daily critical stories of restaurants with the open suggestion that the people who attend the restaurant can irresponsibly run the risk of contracting COVID-19 and through contacts, infect others.

In summary, the allegations in the Complaint, which Defendants do not factually contest, were covered by the "Accidental Contamination" and "Malicious Tampering" definitions of "Insured Events." The Defendants' Motion to Dismiss as to the breach of contract claims must be denied.

3. Plaintiffs Have Sustained Direct Loss

Numerous courts have held that "direct physical loss of or damage to property", or similar policy language, constitutes and provides coverage not only for actual physical damage but also for the lost operations or inability to use the business. See *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 2010 WL 22222, *8-9 (E.D. Va. 2010); *Motorist Mutual Ins. Co. v. Hardinger*, 131 Fed.Appx. 823, 827 (3rd Cir. 2005). A condition that renders property unsuitable for its intended use constitutes a direct physical loss even if some use and utility remains and a property's structural integrity is not affected. *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, slip. Op. at 6-8 (Indiana Super. 2007). It has even been held that fear of damage can be a direct physical loss. *Murray v. State Farm*

Fire & Cas. Co., 509S.E.2d 1, 17 (W.Va. 1998); see also *Total Intermodal Services, Inc. v. Travelers Property Casualty Co. of Am.*, 2018 WL 3829767 (C.D. Cal. 2018) (physical loss of property applied to lost cargo).

Defendants contend that Plaintiffs' losses were "clearly not incurred directly and solely as the result of 'Accidental Contamination'." This is inaccurate as Plaintiffs' losses were the direct result of the governmental proclamations, which prohibited normal, unfettered access to Plaintiffs' dining rooms for their intended purpose.

Egg Works, as restaurants that provide a family-oriented and themed dining experience as an integral part of its product, sensibly invested in their properties, insured the properties and insured the income it derives from the properties Egg Works has now been deprived of the functionality of their properties due to the Emergency Directives.[5] This amounts to a direct loss.

Cases across the Country have supported insurance coverage upon loss of use, utility, access, or function. In *Port Authority of New York & New Jersey v. Affiliated FM Insurance Co.*, 311 F.3d 226, 231 (3rd.Cir. 2002), an insured sought coverage for asbestos abatement in buildings being used. There, the court held that coverage for physical loss or damage would apply if asbestos were released in the building "such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable, or if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility." *Id.* at 236. Similarly, Egg Works has been deprived of its ability to derive a profit from on-site dining experience at a great loss – loss as to which it sensibly sought and was provided insurance to guard against.

In *Gregory Packing, Inc. v. Travelers Property Casualty Co. of American,* 2014 WL 6675934, *2 (D.N.J. Nov. 25, 2014), the court held that ammonia being released into a facility such that it was not fit for its intended use was covered under business interruption insurance. Countless other decisions support Plaintiffs' position that its loss of use of the insured premises triggers "Business Interruption" and "Extra Expense" coverage. *Am. Guarantee & Liab Ins. Co. v. Ingram Micro, Inc.*, 2000 WL 726789, *2 (D. Ariz. 2014) (loss of access to insured property triggered

[5] Please see pictures depicting Egg Works' offerings, atmosphere, and on-site dining experience, attached hereto as **Exhibit 1**.

coverage); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (church building rendered uninhabitable due to contamination of church building); *Oregon Shakespeare Fest. Assn. v. Great American Ins.*, 2016 WL 3267247 (D. Or 2016) (vacated by stipulation 2017 WL1034203 (D. Or. 2017) (smoke that infiltrates theater and renders premises unusable triggered insurance coverage).

Defendants' contention that there was no direct loss is not supported by case law or a plain reading of the Policy. Egg Works worked years to fashion its reputation as a restaurant with a family-oriented experience and ambience serving good food with exceptional service. That is its pride. That is its business. That business has been decimated. Egg Works' property was impaired due to the necessary Emergency Directives issued by Governor Sisolak, requiring coverage under the plain terms of the Policy. That "interruption" is what this case is all about since Defendants covered for it in their Policy.

B. PLAINTIFFS HAVE PROPERLY ALLEGED A CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Defendants ask this Court to dismiss Plaintiffs' claims for breach of the implied covenant of good faith and fair dealing, but raise no new arguments other than the claim that the Policy does not afford coverage. Under Nevada law, "[e]very contract imposes upon each party a duty of good faith and fair dealing in is performance and execution." *A.C. Shaw Constr. v. Washoe Cty.*, 105 Nev. 913, 784 P.2d 9, 9 (1989). "The implied covenants of good faith and fair dealing impose a burden that requires each party to a contract to 'refrain from doing anything to injure the right of the other to receive the benefits of the agreement.'" *Integrated Storage Consulting Servs.*, 2013 WL 3974537, at *7 (N.D. Cal. 2013). So it is here.

To establish a claim for breach of the implied covenants of good faith and fair dealing, a plaintiff must prove: (1) the existence of a contract between the parties; (2) that defendant breached its duty of good faith and fair dealing by acting in a manner unfaithful to the purpose of the contract; and (3) the plaintiff's justified expectations under the contract were denied. *Perry v. Jordan*, 111 Nev. 943, 900 P.2d 335, 338 (1995) (citing *Hilton Hotels Corp. v. Butch Lewis Prod.*

Inc., 107 Nev. 226, 808 P.2d 919, 922–23 (1991).

As discussed in section IV(A), which arguments are incorporated herein by reference, Defendants wrongfully denied Egg Works Business Interruption coverage under their Policy warrants denial of the pending Motion to Dismiss as to the claims for the breach of the covenant of good faith and fair dealing.

C. PLAINTIFFS' CLAIM FOR DECLARATORY RELIEF IS PROPER

Defendants request that this Court dismiss Plaintiffs' claims for declaratory relief since the claim cannot stand by itself. As discussed in section IV(A) and (B), however, Plaintiffs' claims for breach of contract are valid causes of action which permit Plaintiffs' claims for declaratory relief to proceed past the pleadings stage. *In re Wal-Mart & Hour Employment Practices Litg.*, 490 F.Supp. 1091, 1130 (D. Nev. 2007) (declaratory relief causes of action are remedies that may be afforded to a party after the party has successfully proven their claims).

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CONCLUSION

Egg Works has spent years building up a reputation as a great local restaurant in the Las Vegas area.. It is a place people bring their families to for a breakfast that is not just eggs, bacon, and hash browns, but something more. Egg Works did what any responsible business would do, obtain insurance coverage for the unexpected. It is unfortunate for businesses like Egg Works that the unexpected is here but that insurance coverage is not. Defendants' Motion to Dismiss is not well taken and should be denied so this litigation and putative class action, important to so many small business affected by the pandemic may proceed on its merits.

Dated: June 30, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2020, I served a true and correct copy of **PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT** upon all counsel of record by using the United States District Court, District of Nevada's Case Management/Electronic Case Filing System.

I certify under penalty of perjury that the foregoing is true and correct and that this Certificate of Service was executed by me on the 30th day of June, 2020 at Las Vegas, Nevada.

/s/ *Christopher A.J. Swift*
Christopher A.J. Swift