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U.S. DISTRICT COURT
N.D. OF ALABAMA

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

WAGNER SHOES, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO.**
	)	**7:20-cv-00465-LSC**
AUTO-OWNERS INSURANCE COMPANY; OWNERS INSURANCE COMPANY,	)	
	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOURTH AMENDED COMPLAINT

This case was filed by Plaintiff, **WAGNER SHOES, LLC** ("Wagner") against **AUTO-OWNERS INSURANCE COMPANY** and **OWNERS INSURANCE COMPANY** ("Defendants") on April 6, 2020, seeking a declaratory judgment in respect to insurance coverage and subsequently amended to allege breach of contract, bad faith, and negligence and wantonness. Before the Court is Defendants' *Fed. R. Civ. P.* 12(b)(6) motion to dismiss all counts in Wagner's complaint. (Doc. 19.) [1]

[1] The complaint was subsequently amended on June 8, 2020 (Doc. 12.), June 22, 2020 (Doc. 15.), and July 7, 2020, the fourth amended complaint now before the Court. (Doc. 17.) Going forward, the "complaint" refers to the fourth amendment.

I
BACKGROUND

1. Wagner filed this action against Defendants seeking a declaratory judgment that insurance coverage existed and applied to a property damage claim sustained in relation to the widespread outbreak of the COVID-19 novel coronavirus in the city of Tuscaloosa, Alabama, and the state of Alabama at large, followed by multiple government shutdown orders. (Doc. 1.) Wagner amended its complaint on April 14, 2020, after Defendants' denial of its insurance claim to allege breach of contract, bad faith, institutional bad faith, and negligence and wantonness. (Doc. 4.)

2. The complaint alleges that Wagner possessed a Businessowners Policy (BP) contract of insurance (Policy Number 49-585-800-01) and a Commercial Umbrella Insurance Policy contract of insurance with Defendants. Coverage A, "Businessowners Special Property Coverage Form (BP 00 02 01 87)," of this policy states Auto-Owners "will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." Coverage A further states that "Covered Causes of Loss" includes "RISKS OF DIRECT PHYSICAL LOSS" unless excluded. Same includes "Business Income" and "Extra Expense" coverage. (Doc. 17 at 14.)

3. The complaint alleges that Wagner's is "covered property" at the premises described in the policy and that "covered property" includes the buildings and structures as well as "permanently installed fixtures" and "personal property used to maintain or

service the building." It is undisputed that Coverage A states that "business personal property" located in or on the premises including property owned by the insured and used in its business is "covered property." (Doc. 17 at 15.)

4. The complaint additionally avers that the contract of insurance is an "All-Risk" policy and that when a property insurance policy, including that between Wagner and Defendants, is written on an all-risk basis (with or without the word "all"), the insured – Wagner – only has the burden to show (a) the existence of the policy and (b) a loss to covered property. In other words, Wagner is not required to establish the cause of loss; the burden of proof as to causation shifts to the insurer, even though the policy may not say so. (Doc. 17 at 15.)

5. Defendants contend that the policy at issue requires "direct physical loss of or damage to property" to trigger coverage. Further stating there is no allegation of a physical injury to Wagner's property, or even the presence of any virus, Defendants contend that the complaint fails to state a claim for which relief can be granted and must, therefore, be dismissed pursuant to *Fed. R. Civ. P.* 12(b)(6). (Doc. 19 at 1-2.) [2] While Defendants spell out additional arguments and grounds favoring dismissal in their motion, the specified relief sought is that Wagner's complaint is due to be dismissed because the

[2] Defendants assert that Wagner's insurance policy was issued by Defendant, Owners Insurance Company, "who (sic) is the only entity with any contractual relationship with Plaintiff." (Doc. 19 at 1.) While this is quite likely the case, Defendants' first motion to dismiss stated, "Now it (Wagner's) is suing its property insurer, Auto-Owners, seeking payment for its lost profits." (Doc. 13 at 1.) Additionally, in its motion to dismiss now before the Court, Defendants do not ask for specific relief dismissing Auto-Owners from the case as a named defendant. If the correct named defendant is, in fact, Owners Insurance, Wagner's will voluntarily dismiss Auto-Owners.

same "shows on its face" that the insurance claim "does not fall within the risks insured under the policy." (Doc. 19 at 22.)

II
STANDARD OF REVIEW

> "For purposes of a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the Court treats the facts alleged in the complaint as true and construes them in the light most favorable to Eaton. *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1215 (11th Cir. 2012).
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> "Rule 8(a) of the Federal Rules of Civil Procedure requires a pleading to contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Fed. R. Civ. P. 8(a)(2). 'Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.' *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009). Instead, **'[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.'** *Id.* at 678. When a complaint is filed with attachments, 'these exhibits are part of the pleading for all purposes,' including for purposes of a Fed. R. Civ. P. 12(b)(6) motion. *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205 (11th Cir. 2007) (quoting Fed. R. Civ. P. 10(c)) (emphasis added).

> "*Iqbal* establishes a two-step process for evaluating a complaint. **First, the Court must 'begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.'** *Id*. at 679. **Second, '[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.**' *Id*. Factual allegations in a complaint need not be detailed, but they 'must be enough to raise a right to relief above the speculative level.' *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (emphasis added)."
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> *Eaton v. Unum Grp.*, 7:15-cv-01204-LSC, 2015 WL 5306185 (N.D. Ala. Sep. 10, 2015).

III
DISCUSSION

A.
Breach of Contract and Bad Faith

7. Defendants contend that Wagner failed to plead facts stating a claim for breach of the insurance contract for two alternative reasons: (a) first, that Wagner failed to plead "direct physical loss of or damage to covered property," and thereby failed to state a claim for loss of or damage to property; and (b) second, that even had Wagner sufficiently plead facts stating a claim for breach of the insurance contract (i.e., physical loss of or

damage to property), it would make no difference because "direct physical loss does not mean business losses occasioned by civil ordinance." (Doc. 19 at 8 and 12.) Wagner will take each alternative separately.

(a)
Failure to Plead Direct Physical Loss or Property Damage

8. The Defendants contend that Wagner's complaint **fails to plead** direct physical loss or damage to property, thereby supporting their first ground for a 12(b)(06) dismissal. The contention, however, does not reflect evaluation of the complaint in the light of a 12(b)(6) motion; it is more appropriately a Rule 8, FRCP, contention. The Defendants have simply ignored the factual framework of the complaint as well as the factual material contained within.

9. The factual framework of the complaint detailed in paragraphs seven (7) through 23 represents an exhaustive review of why the COVID-19 novel coronavirus is considered to be a cause of physical loss or property damage. While Defendants may consider the whole of the same to be a "self-serving" conclusion, the factual matter or framework is the product of an intensive review and reasonable thought process for the very purpose to ensure that it **would not be conclusory** and **would not ask** the Court to assume the allegations were drawn from factual thin air.

10. While reasonable parties can argue the adjusting boundaries of an all-risk insurance policy, it is incumbent upon the policyholder only to **have coverage** and **claim a loss from a covered cause of loss** before the burden shifts to the insurer to **investigate**

the claim and pay it, prove the existence of an exclusion as reason for non-payment, or dispute coverage.

11. There is no dispute that Wagner had valid coverage. But the Defendants' backstop to prevent the claim from going any farther in the adjustment process or in this case is the assertion that COVID-19 novel coronavirus cannot be considered property damage (or cannot cause property damage), and even if it were so considered, Wagner did not claim a loss or damage from the same. On its face, however, the complaint clearly demonstrates otherwise:

> "It is undisputed that **WAGNER SHOE** communicated with its Tuscaloosa insurance broker (Fitts Agency, Inc.) on March 27, 2020, and extended a claim for **contractual property damage**, **business interruption,** and **ongoing property damage** caused by the COVID-19 agent. Plaintiff was informed there was no coverage for the same, but that it could pursue the matter. It is undisputed that **AUTO-OWNERS** sent a proof of loss form to **WAGNER** dated March 27, 2020, that was received on April 6, 2020. It is undisputed that on April 6, 2020, **AUTO-OWNERS** denied **WAGNER'S** claim before it ever allowed him to complete and return the proof of loss. It is undisputed that **AUTO-OWNERS** never undertook to investigate and adjust the insurance claim before it denied the same." (Doc. 17 at 16, paragraph 29.)

(b)
Direct Physical Loss or Damage

12. The second alternative in Defendants' motion is that under Alabama law, direct physical loss of or damage to covered property "does not mean business losses occasioned by civil ordinance." (Doc. 19 at 12.) This alternative is described somewhat inaccurately, however, by the way in which it is argued: that is, Wagner has failed to plausibly allege that it sustained physical loss or damage under the terms of the policy, because the COVID-19 novel coronavirus cannot cause physical loss or damage even though it is a contaminant.

13. The difficulty that Defendants have and cannot overcome is that the policy is silent as to any definition in respect to as to what constitutes "direct physical loss" or "damage" to covered property. Alabama courts have consistently held that undefined or ambiguous terms in an insurance policy must be construed in favor of the insured – and no Alabama court has held that physical loss or physical damage requires some *physical alteration* of the insured property. Indeed, the majority of cases nationwide find that physical damage to property is not necessary where the property has been rendered unsuitable. [3]

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[3] An example of direct physical loss without structural alteration is found in *Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America*, 2014 U.S. Dist. LEXIS 165232 (D.N.J. Nov. 25, 2014). In that case, ammonia escaped inside a production facility in Newnan, Georgia, causing its evacuation and bringing various governmental agencies to the scene to clear the area for a mile radius. The policyholder, Gregory, subsequently hired

14. Defendants next contend that Wagner is not entitled to business income or extra expenses coverage because its lost income was purely economic in nature and economic loss does not equate to "physical damage." To support this contention, Defendants resurrect their previous argument that COVID-19 novel coronavirus cannot cause physical loss or property damage.

15. Defendants lead with the following statement: "Even if it did allege that virus germs were present, such facts would not constitute 'direct physical loss of or damage to property' under Alabama law because the germs can be cleaned off, leaving no lasting harm or disfigurement." (Doc. 19 at 13.) Defendants offer no attributable case citation "under Alabama law" for this statement – likely because there is no case in which it is found or even characterized as such. Followed through to its logical conclusion – and precisely why there is no Alabama case that makes the statement – there would never be any such thing as property damage under an insurance policy in Alabama if the damage could be cleaned up or wiped up.

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a remediation company to dissipate the ammonia from the building and make it safe for occupancy. Travelers denied coverage on the basis that "ammonia induced incapacitation" did not constitute direct physical loss or damage to the facility. But the court found that the ammonia made the facility uninhabitable, thereby causing physical loss to the property without altering it structurally, and triggering the policy's business interruption coverage.

The Defendants do cite a case from the Northern District, *Travelers Prop. Cas. Co. of Am. v. Brookwood, LLC*, 283 F. Supp. 3d 1153 (N.D. Ala. 2017), ostensibly to contend that covered property must be *fortuitously physically damaged*, but they skip past any definition of the word *fortuitous*. In fact, a multitude of cases have said that covered physical damage must be *fortuitous* as a qualifier to coverage: that is the damage must be unexpected, unanticipated, and unforeseen.

16. Defendants then raise the ante with another statement that Alabama law construes "direct physical loss" to mean a tangible change that results in "direct physical alteration of the property." To be entirely accurate, the statement made is, **"Existing Alabama law construes 'direct physical loss' as more than mere economic loss; it means a tangible change that results in the physical alteration of the property."** (Doc. 19, 13-14).

17. While Alabama law does construe direct physical loss as more than economic loss and disallows the same, there is no Alabama case law either on point or factually persuasive for the proposition Defendants assert. They have artfully taken lawful case statements and tacked on their own finding the Alabama requires a physical, structural, *tangible* alteration to constitute property damage when there is no Alabama case that says any such thing.

18. Defendants first cite *Camp's Grocery, Inc. v. State Farm Fire & Cas. Co.*, No. 4:16-cv-0204-JEO (N.D. Ala. Oct. 25, 2016) (Doc.19 at 14), a case involving a declaratory judgment action at the summary judgment stage. In that case, the plaintiff acknowledged that property damage under the State Farm policy was limited to *tangible* property and that electronic damage is not *tangible* property. Plaintiff then suggested that plastic debit cards could be seen as tangible property, because they could be touched and handled. Judge Ott considered that even if they were *tangible* property, the plaintiff's argument failed because the electronic data contained on the same would be *intangible*.

This case has nothing to do with the contention for which it is cited – that is, nothing to do with physical alteration of insured property.

19. Defendants cite *American States Insurance Co. v. Martin*, 662 So.2d 245 (Ala. 1995) (Doc. 19 at 14), a case that involved a certified question from the Middle District of Alabama to the Alabama Supreme Court. The question went to the duties to defend and indemnify in a case of economic loss arising under a **commercial general liability policy (CGL)** in which the word *tangible* was used as a qualifier for property – **not** as a cause of loss or a precedent for physical damage. This case certainly stands for the proposition that pure economic losses are not included in the definition of tangible property, but it has nothing to do with the ultimate contention for which it is cited – that is, nothing to do with physical alteration of insured property.

20. Defendants then state the following: "Alabama's interpretation of 'direct physical loss of or damage to covered property' is consistent with other jurisdictions which, using the same 'ordinary meaning' standard, have construed the same or similar words or phrases to mean a **physical change** in the insured's property." (Doc. 19 at 16.) Moreover, Defendants go on to cite other jurisdictions and attach other court rulings to their motion which have nothing to do with the statement just made, because no court of binding authority in the state of Alabama has ever made it. [4]

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[4] Even suggesting that the Court conform to the case law of other jurisdictions when there is no basis for conformity is a difficult one to consider. Defendants obviously did not provide the Court with the opinion of the U.S. District Court for the Western Division of Missouri that ruled in favor of the plaintiffs in a COVID-19 case on the exact 12(b)(6) issues as in this case. Plaintiffs have, and same is attached as Exhibit A. Defendants obviously did not provide the

21. While lost business income and extra expense is surely economic loss, it is not coverage conditioned on any requirement of a physical alteration to property. As long as the business interruption occurs from a covered cause of loss, coverage is found and applies. Because the Defendants cannot defeat or come up with a workaround to the fact that physical loss or damage to property are terms not defined in the policy and are therefore construed favorably to its insured, they have come up with the faulty conclusion that a settled principle in respect to economic loss not being damage to tangible property somehow applies.

22. It is undisputed that Wagner as the policyholder had coverage for property damage, business interruption, and extra business expense; that it made an insurance claim for the coverage; and that its claim was denied on the very day it received the proof of loss to detail the information and damage on which the claim was made. To emphasize the point: Defendants denied an insurance claim on the very day its policyholder received a proof of loss they mailed him – denied the claim before taking a statement, before sending an adjuster to the insured property, before any investigation, before doing anything that resembled a claim adjustment.

Court with their written opposition to MDL treatment of **this very case** with other COVID-19 cases that argues strenuously against consolidation because "insurance policies are unique creatures of state law" and "insurance contracts must be interpreted under the applicable state law." Plaintiffs have, and same is attached as Exhibit B.

B.
Negligence and Wantonness

23. Wagner agrees that this allegation is due to be dismissed and will do so by separate pleading.

CONCLUSION

Based on the foregoing and the entirety of its complaint, Wagner respectfully suggests that it has plausibly alleged material, non-conclusory factual matters entitling it to proceed with its claims for breach of contract and bad faith and moves the Court to deny Defendant's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 25th day of August, 2020, a copy of the foregoing was served on all counsel of record in this cause by CM-ECF electronic filing.

/s/ P. Ted Colquett
OF COUNSEL