IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE OLD FASHIONED PANCAKE HOUSE, INC., Plaintiff, v. GRANGE INSURANCE COMPANY, Defendant.	21 CV 402

PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS

Plaintiff, by and through the undersigned, hereby Responds to a Motion to Dismiss, stating:

Introduction and Facts

The Policy states "we 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." Defendant's Exhibit B at 53, Section I(A). Covered Causes of Loss include "[r]isks of direct physical loss unless the loss is" otherwise excluded. Exhibit B, at 54, Section I(A)(3). The policy also states that

> [w]e will pay for the actual loss of Business Income you sustain due to the necessary suspension of your 'operations' during the 'period of restoration.' The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be cause by or result from a Covered Cause of Loss." Defendant's Exhibit B, at 57, I(A)(5)(f).

Finally, the policy states that "when a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain… caused by action of civil authority that prohibits access to the described premises." Exhibit B, at 59, (I)(A)(5)(i). That section applies only if "access to the area immediately surrounding the damages property is prohibited by civil authority as a result of the damage," and "the action of civil authority

is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property." Exhibit B, at 59-60, (I)(A)(5)(i)(1) and (2).

The policy also states that Defendant will pay for loss resulting directly from forgery or alteration of a check. Exhibit B, at 60, (I)(A)(5)(k). It contains a specific limitation for "fungi, wet rot or dry rot." Exhibit B, at 60, (I)(A)(5)(r). It contains exclusions for "nuclear hazard," Exhibit B, at 67, (I)(B)(1)(d), the failure of computer hardware and software, Exhibit B at 68, (I)(B)(1)(h), and viruses, Exhibit B at 69, (I)(B)(1)(j).

The Complaint tells what is, by this point, a familiar story. Plaintiff operates a restaurant in Joliet, IL. Complaint at ¶ 1. As a result of COVID-19, and the resulting lockdowns, Plaintiff was forced to cease its operations for a time to slow the spread of the COVID-19 pandemic. Complaint at ¶ 2. This was not only as a result of the virus itself, but also as a result of the Illinois government's Order prohibiting the public from accessing Plaintiff's restaurant. Complaint at ¶ 23. Following the closure order, Plaintiff submitted a claim to Defendant – Plaintiff's insurance carrier – and was denied. Complaint at ¶ 25. The Complaint seeks Declaratory Judgment, damages for a Breach of Contract, and a finding that the denial was in bad faith under 215 ILCS 5/155.

Argument

I. Standards on a Motion to Dismiss

Under Federal Rules of Civil Procedure § 12(b)(6), dismissal of a complaint is proper where it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim on which relief may be granted. Hickey v. O'Bannon, 287 F.3d 656, 657 (7 Cir., 2002). All well-pleaded facts, and any reasonable inferences are construed in favor of the plaintiff. *Id.*; Stachon v. United Consumers Club, 229 F.3d 673, 675 (7 Cir. 2000).

II. The virus exclusion does not prevent liability here.

In some ways, the inclusion of the virus exclusion in this policy is the greatest piece of evidence in favor of an expansive understanding of the word "physical" as it pertains to Plaintiff's Complaint. At the same time, Defendant suggests that the policy, by its simple terms, excludes the damages sought here. This is not the case. On the simplest level, the virus did not cause a shutdown of Plaintiff's business. That was the government. For example, according to a report co-authored by the USDA's Foreign Agricultural Service and The Hague staff, in Sweden, "bars and restaurants [were] open, but [the government] introduced some changes to their operations." Sweden Extends Support to Businesses During the COVID-19 Crises, attached as Exhibit A. Instead, "The government has prohibited crowds of people in queues, at tables, at buffets, or at bar counters, and visitors should be able to keep distance between each other." As a result, there has been turnover in the restaurant industry, but there never was a total shutdown in Sweden, despite that country maintaining a per capita death count similar to that of ours. Exhibit A, at page 3-4.

While it is true that "the interpretation of an insurance policy and the respective rights and obligations of the insurer and the insured as questions of law that the court may resolve summarily… the court must construe the complaint against the insured liberally, and any doubts as to the insurer's duty must be resolved in favor of the insured." Roman Catholic Diocese of Springfield in Ill. v. Maryland Cas. Co., 39 F.3d 561, 565 (7th Cir.1998). That is to say, "if the language of the policy is susceptible to more than one meaning, it is considered ambiguous and will be construed strictly against the insurer who drafted the policy and in favor of the insured." Traveler's Ins. Co. v. Eljer Mfg., Inc., 197 Ill.2d 278, 757 N.E. 481, 491 (Ill. 2001).

"In construing the terms in an insurance policy, the court must ascertain the intent of the parties." Outboard Marine Corp. v. Liberty Mutual Ins. Co., 154 Ill.2d 90, 102, 607 NE 2d 1204, 1217 (1992). "If the terms in the policy are clear and unambiguous, the court must give them their

plain, ordinary, popular meaning." *Id.* "If a term in the policy is subject to more than one reasonable interpretation within the context in which it appears, it is ambiguous." *Id.* "Ambiguous terms are construed strictly against the drafter of the policy and in favor of coverage." *Id.* This is especially true with respect to exclusionary clauses." *Id.* "This is so because there is little or no bargaining involved in the insurance contracting process, the insurer has control in the drafting process, and the policy's overall purpose is to provide coverage to the insured." *Id.* The "public policy of this State… requires that insurance contracts be construed and enforced to accord with the objectively reasonable expectations of the *insured*." Posing v. Merit Ins., 258 Ill. App.3d 827, 629 N.E.2d 1179, 1183 (Ill. 3 Dist. 1994).

In this case, Defendants suggest that while the lockdowns are the main cause of the damages here, they are inexorably linked to the virus, which is the subject of a specific exclusion. Courts in Illinois have dealt with similar question in the past. For example, Kim v. State Farm Fire & Cas. Co., 312 Ill.App.3d 770 (1 Dist. 2000) had to do with a laundromat in which a machine's malfunction released a pollutant onto the floor. *Id.* State Farm denied coverage due to the fact that it had a policy preventing liability on the basis of pollutants. *Id.* In Kim, the question was undeniably whether physical damage was done due to a spill of a chemical that was a pollutant.

There, the Court took great pains to limit the scope of the policy's coverage, reasoning that

> Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope and lead to some absurd results. To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution. *Id.* citing Pipefitters Welfare Educational Fund v. Westchester Fire Insurance Co., 976 F.2d 1037, 1043 (7th Cir.1992)

The Illinois Supreme Court, in a decision heavily quoted in Kim, similarly noted that the history of the pollutant exception ought to be considered in understanding the extent of its scope. American States. Ins. V. Koloms, 177 Ill.2d 473 (1997). It similarly pointed out that "a number of courts, while acknowledging the lack of any facial ambiguity, have nevertheless questioned whether the breadth of the language renders application of the exclusion uncertain, if not absurd." *Id.* These considerations should mitigate against construing the policy against Plaintiffs.

Here too, the history of the virus exception similarly should be considered in determining how expansive the exception here should be read. It was initially proposed by the Insurance Services Office, Inc., which is

> an association of approximately 1,400 domestic property and casualty insurers… is the almost exclusive source of support services in this country for [commercial general liability] insurance. ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 772 (1993).

The virus exemption was introduced in many insurance policies in 2006, in response to the SARS outbreak. See French, Christopher C., COVID-19 Business Interruption Insurance Losses: The Cases For and Against Coverage (June 30, 2020). 27 Conn. Ins. L. J. 1, 3 (2020), Available at SSRN: https://ssrn.com/abstract=3639589, (hereinafter French), at 9. The proposed policy states "We will not pay for loss or damage resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." French, at 9, ISO Form CP 01 40 07 06 – Exclusion of Loss Due to Virus or Bacteria 8, LI-CF-2006-175, Exhibit B. The ISO Circular identifies the source of its concern:

> Commercial Property policies currently contain a pollution exclusion that encompasses contamination (in fact, uses the term contaminant in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types

> that appear to warrant particular attention at this point in time. Exhibit B at 1, "Background."

The ISO Circular then explains that "Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case." Exhibit B at 6. Based on that concern, the ISO Circular suggests "an exclusion relating to contamination by disease causing viruses or bacteria or other disease-causing microorganisms." Exhibit B at 6.

Here, the initial impetus was not the potential for government lockdowns and general quarantines of healthy people, which were almost entirely unanticipated in 2006. Rather, the insurance industry's concern was that an outbreak could – absent any action from the government – impact a business's bottom line. Here, there has been no suggestions that anybody at Plaintiff's restaurant was afflicted with COVID-19.

The question before this Court turns on Illinois' application of the anti-concurrent cause doctrine, which is elucidated, among many other places, in Bozek v. Erie Ins. Grp., 2015 IL App (2d) 150155. Bozek is an extremely well-written and thorough decision that traces the lineage of the ACCs, and discusses the dominant theory of interpreting them in light of Illinois law. Specifically, the decision finds that Illinois employs the "efficient-or-dominant-proximate-cause rule" in the absence of an ACC *Id* at ¶ 22. Specifically, that means that an exclusion may apply "if a risk of loss that is specifically insured against in the insurance policy sets in motion, in an unbroken causal sequence, the events that cause the ultimate loss, even though the immediate cause in the chain of causation is an excluded cause." *Id.* at ¶ 21. ACCs must then be understood to mean that "when two perils converge at the same point in time, contemporaneously and operating in conjunction, there is a concurrent cause or event." *Id.* at 26. But even policies containing the magic words "'in any

sequence', could not be used to divest an insured of the right to be indemnified for a covered loss." *Id.* at ¶ 31.

By way of example, in determining whether an ACC precluding water or flood damage barred coverage in the case of hurricane damage:

> [A] finder of fact must determine what losses, if any, were caused by wind, and what losses, if any, were caused by flood. If the property suffered damage from wind, and separately was damaged by flood, the insured is entitled to be compensated for those losses caused by wind. Any loss caused by `[flood] damage' is excluded. If the property first suffers damage from wind, resulting in a loss, whether additional `[flood] damage' occurs is of no consequence, as the insured has suffered a compensable wind-damage loss. *Id.* at ¶ 32.

The Bozek decision identifies itself as the only reported decision in Illinois to address the question of ACCs. *Id.* at ¶ 38. Unfortunately for all parties involved, the Court specifically refused to address the question of whether ACCs are enforceable in Illinois due to quality of the plaintiff's brief in that matter. *Id.* That therefore remains an open question in the State of Illinois. Several states specifically forbid, or refuse to enforce, such ACC clauses. For example, the Supreme Court of the State of Washington interpreted an ACC (which it called an exclusionary clause) as simply applying the state's existing efficient proximate cause rule, which is similar to the default in Illinois. Safeco Ins. Co. v. Hirschmann, 773 P.2d 413, 112 Wn.2d 621, 629 (Wa. 1989). See also Murray v. State Farm Fire and Casualty Co., 509 S.E.2d 1, 15 (W. Va. 1998)(ACCs are against public policy; the excluded peril itself must be the efficient proximate cause of the loss for an exclusion to apply).

As set out in some detail above, if a good argument exists to read an exclusion narrowly in order to comport with the reasonable expectations of the *insured*, the exclusion should not apply – even if a good argument also exists in favor of exclusion. Two good arguments exist here to hold that the virus exclusion should not prevent liability: the damage was done by the civil authority, and not the government; and public policy demands that the anti-concurrent causation clause in this

contract be interpreted so as to not differ from Illinois' default position, the efficient-or-dominant-proximate-cause rule.

III. The simple terms of the insurance contract make it clear that the damages Plaintiff suffered here were covered by the policy as physical damage.

With respect to whether there was physical damage to the property, here too the policy should be interpreted in accordance with the reasonable expectation of the *insured.* Posing, *supra.*

Defendant emphatically hammers at the fact that the policy ostensibly covers only physical losses caused by physical damage. But the policy has several exclusions (and some inclusions) for non-physical maladies, as detailed above. This is an admission that "physical" means something other than what is in the dictionary. See Eljer Mfg. Inc., v. Liberty Mut. Ins. Co., 972 F.2d 805 (7th Cir. 1992).

In this case, the building became unusable due to a government policy in ostensible response to a condition affecting the physical property: being inside increases susceptibility to COVID-19. Morawska L, Tang JW, Bahnfleth W, et al. How can airborne transmission of COVID-19 indoors be minimised?. Environ Int. 2020;142:105832, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7250761/, (hereinafter "Morawska"). Due to the government's lockdown – the actions of the civil authority – Plaintiffs were unable to use their own facilities. This is precisely what the policy is meant to cover, as is made clear from what the policy takes pains to exclude. At minimum, the reasonable expectation of the *insured* is consistent with coverage in this case.

IV. Case law makes it even clearer that the policy should cover Plaintiff's damages.

Case law makes the picture even more clear. Policies of this nature have been interpreted many times in many states throughout the country, and in many federal courts. Physical damage, consistently, does not mean damage to the physical damage to the structure of the property. The

Complaint cites, for example, Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Int'l Ins. Co., 308 Ill. App.3d 597, 720 N.E.2d 622, 625–26 (Ill. 1 Dist. 1999), which finds that asbestos – something that was placed in the building purposefully and did not threaten the structure of the building one iota – constituted damage to the physical building by simple fact of its existence. As that decision found:

> It would be incongruous to argue there is no damage to other property when a harmful element exists throughout a building or an area of a building which by law must be corrected. The view that asbestos fibers may contaminate a building sufficiently to allege damage to property has been recently adopted in a number of cases. The essence of the allegations [of the complaints] is that the buildings have been contaminated by asbestos to the point where corrective action, under the law, must be taken. Thus, the buildings have been damaged. *Id.* citing United States Fidelity & Guaranty Co. v. Wilkin Insulation Co., 144 Ill.2d 64, 578 N.E.2d 926 (1991)(internal citations removed).

That decision, in turn, quoted Wilkin, immediately *supra*, which found that asbestos within a building – put there on purpose as part of the structure of the building – "constitutes physical injury to tangible property" as opposed to "intangible economic loss in the form of diminished market values." *Id.* Similarly, infestations of termites have been considered physical damage to a physical building despite not physically damaging the building. Posing v. Merit Ins., 258 Ill. App.3d 827, 629 N.E.2d 1179, 1183 (Ill. 3 Dist. 1994).

Outside of Illinois, other decisions have come to similar determinations. For example, the District Court in Oregon determined that the "infiltration of smoke into the interior of [a] theater is a covered 'physical loss of or damage to property'." Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co., 15 CV 1932, 2016 WL 3267247 (D. Or. June 7, 2016). In that case, the business loss was due to the infiltration of the smoke into the theater, making it impossible to hold events, including performances. The building itself was not damaged. However, the economic impact of the smoke was nonetheless covered as a physical incursion. *Id.* Similarly, ammonia discharge inflicted "direct physical loss of or damage to" a facility because its existence made the facility unusable –

despite the lack of physical damage." Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am., 12 CV 4418, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014). See also Matzner v. Seaco Ins. Co., No. 96-0498-B, 1998 WL 566658, at *3 (Mass. Super. Aug. 12, 1998)(carbon monoxide buildup); Western Fire Ins. Co. v. First Presbyterian Church, 437 P.2d 52, 55 (Colo. 1968)(gas buildup); Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 339, 406 (1 Cir. 2009)(odor). In Windridge v. Naperville Condo v. Philadelphia Indem. Ins. Co., 932 F.3d 1035, 1040 (7 Cir. 2019), the Seventh Circuit, applying Illinois law, determined not only the hail damage constituted physical damage, but that repairs to a property (from the hail damage) that resulted in inconsistent siding on the premises were further damage – an expansive understanding of both the word physical and damage.

There was no physical damage or loss in the case of ammonia, odors, etc. The policies applied, by their apparently simple language, to business losses due to physical damage to the building – not to incidental business losses due to the building becoming unusable despite the lack of any physical damage. Nonetheless, courts have consistently held that such business losses constitute the effects of physical damage to the building. The terms physical damage, physical injury, and physical loss are all terms of art that have been interpreted to apply to work stoppage due to physical conditions that render the premises of the business unusable. This is what occurred here: due to a physical condition – COVID-19 – the government prevented Plaintiff from using its physical premises, leading to a business loss.

All of this makes sense particularly in terms of Eljer Mfg. Inc., v. Liberty Mut. Ins. Co., 972 F.2d 805 (7th Cir. 1992), *supra*. The proper understanding of "physical" that would be

> "real and not illusory, is when a potentially dangerous product is incorporated into another and, because it is incorporated and not merely contained (as a piece of furniture is contained in a house but can be removed without damage to the house) must be removed, at some cost, in order to prevent the danger from materializing." *Id.* At 810.

For example, "if a manufacturer of construction cranes sold a defective crane which collapsed in front of a restaurant, blocking access to it and thereby impairing the restaurateur's income, and the restaurateur sued the manufacturer and recovered a judgment." *Id.* In such a case, "the manufacturer's liability insurer might not have to pay, because the blocking of access might not be considered an injury to tangible property." *Id.* That result would be contrary to the intention of the policy. *Id.*

In this rapidly developing area, various decisions have cut both ways. For example, Studio 417, Inc.v. The Cincinnati Insurance Co., 20 CV 3127-SRB (S.D. Missouri, August 12, 2020), recently found that a similar policy covered damages due to COVID-19, and the resulting lockdowns. In that matter, the Court analyzed the expression "direct physical loss," and found that it did not preclude claims for business interruption due to COVID-19. It did so by simply applying the dictionary definition of the applicable terms:

> The Merriam-Webster dictionary defines "direct" in part as "characterized by close logical, causal, or consequential relationship." Merriam-Webster, www.merriamwebster.com/dictionary/direct (last visited August 12, 2020). "Physical" is defined as "having material existence: perceptible especially through the senses and subject to the laws of nature." Merriam-Webster, www.merriam-webster.com/dictionary/physical (last visited August 12, 2020). "Loss" is "the act of losing possession" and "deprivation." Merriam-Webster, www.merriam-webster.com/dictionary/loss (last visited August 12, 2020). Studio 417, at 8.

The decision was further supported by references to various decisions interpreting similar insurance policies liberally so as to ensure that the insured's reasonable understanding of the policy was upheld. In Hampton Foods, Inc. v. Aetna Cas. & Sur. Co., 787 F.2d 349 (8th Cir. 1986), a policy that insured against "loss of or damage to the property insured… resulting from all risks of direct physical loss" was interpreted to cover "any loss or damage due to the danger of direct physical loss," *Id.* at 351-2, cited by Studio 417 at 9. Similarly, the "physical loss" language in a homeowner's

policy was held to cover a spider infestation[1]. Mehl v. The Travelers Home & Marine Ins. Co., Case 16-CV-1325-CDP (E.D. Mo. May 2, 2018), cited by Studio 417 at 9. There, the court found that since the policy did not define "physical loss" and since the insurance company "pointed to no language in the policy that would lead a reasonable insured to believe that actual physical damage is required for coverage," that "physical loss" is ***not*** synonymous with physical damage. *Id.*

Studio 417 found, further, that even absent a physical alternation, it was possible for a physical loss to occur. *Id.* at 10, citing Port Authority of New York and New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226, 236 (3 Cir. 2002)(finding that the presence of asbestos constituted a physical loss); Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts, CV-01-1362-ST, 2002 WL 31495830, at 9 (D. Or. June 18, 2002)(" the inability to inhabit a building [is] a "direct, physical loss" covered by insurance"). Finally, Studio 417 explicitly rejects the holding in both Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd., 1:20-cv-03311-VEC (S.D. N.Y.) (attached to Defendant's Motion) and Gavrilides Mgmt. Co., 20-258-CV-C30, 2020 WL 4561979 (Mich. Cir. Ct., July 21, 2020)(also attached to Defendant's Motion). The same District (and the same judge within the district) similarly denied a Motion to Dismiss in K.C. Hopps v. The Cincinnati Insurance Co., 20-cv-00437-SRB (W.D., Missouri, Aug. 12, 2020).

Another such ruling is Blue Springs Dental Care, LLC v. Owners Insurance Co., 20-CV-383-SRB (W.D., Missouri 2020), in which a district court denied a similar Motion to Dismiss. It found that it is likely customers, employees, and/or other visitors to the insured properties over the recent months were infected with the coronavirus." *Id.* at 8. The business "suspended operations due to COVID-19 to prevent physical damages to the premises by the presence or proliferation of the virus and the physical harm it could cause persons present there." *Id.* at 8. "Customers cannot access the

[1] The policy here would likely exclude spider infestations, not because they are not physical, but due to a specific policy exclusion for vermin and other animals. This is further evidence that the policy here *should* cover COVID-19, which is not excluded.

property due to the Stay at Home Orders or fear of being infected with or spreading COVID-19." *Id.* at 8. "COVID-19 is physically transmitted by air and surfaces through droplets, aerosols, and fomites that that remain infectious for extended periods of time." *Id.* at 8.

Similarly, the Superior Court of New Jersey refused to dismiss a complaint premised on nearly the same question in the matter of Optical Services USA/JC1, v. Franklin Mutual Ins. Co., Ber-L-3681-20 (Aug. 13, 2020)(See Exhibit C, a transcript of the hearing and the Court's ruling). There, the Court emphasized the plaintiff's suggestion that physical loss means "loss of physical functionality." Exhibit C at 25. The Court also found that there is no common law basis for interpreting "direct physical loss" in such a limited way as the insurer there suggested. Exhibit C at 26. This is consistent with the record in Illinois, in which the expression "direct physical loss" has been interpreted quite expansively.

Finally, the Middle District of Florida has refused to dismiss a Complaint, citing, among other things, clauses in the insurance contract quite similar to the clauses here. It focuses on the ambiguous portions of the policy, like the exclusion of coverage for fungi and bacteria: "Notably, the Policy provided does not exist as an independent document. For example, the 'Limited Fungi, Bacteria or Virus Coverage' section of the Policy starts by stating that it modifies certain coverage forms." Urogynecology Specialist of Florida, LLC v. Sentinel Ins. Co., 6:20-cv-1174-Orl-22EJK, 6-7 (Sept. 23, 2020). This, plus the lack of common law support for the restrictive interpretation advanced by the insurer, compelled the Court to deny the Motion to Dismiss.

The Motion's last line of attack is that the Civil Authority coverage was not triggered because Plaintiff was not prohibited from using the property due to a physical loss. The thrust of the argument is that since access to the building was not prohibited – just 95% of the things that Plaintiffs are paid to do in the building – the policy does not apply. Here, too, Studio 417 is instructive. There, the complaint did not allege that the government forbade all access to the

premises – in that case, restaurants and clubs – just like here. Though some limited access was permitted, access was, by and large, either prohibited or strongly discouraged. Studio 417 at 14. This was sufficient to trigger the Civil Authority clause of the insurance policy. By contrast, if access to the premises was not "dramatically decreased," the policy may not be triggered. *Id.* citing TMC Stores, Inc. v. Federated Mut. Ins. Co., No. A04-1963, 2005 WL 1331700, at * 4 (Minn. Ct. App. June 7, 2005). Like there, the policy here covers circumstances in which the civil authority prohibits access (not "all access" or "any access") to the property – which is exactly what the Complaint alleges happened. *Id.*

This is very different from decisions like Southern Hospitality, Inc. v. Zurich Am. Ins. Co., 393 F.3d 1137 (10th Cir. 2004), which found that the civil authority clause was not triggered, as to hotels, when the FAA ground flights in the wake of September 11, 2001. Simply put, the FAA had prevented people from flying, not from checking in to hotels. Similarly, when bridge repairs prevented a majority of customers from visiting a ski resort, the civil authority clause was not triggered. Ski Shawnee, Inc. v. Commonwealth Ins. Co., 2010 WL 2696782, 4 (M.D. Pa. July 6, 2010). Finally, curfews related to riots technically prevented customers from being outside, but did not prohibit access to the insured's premises. Syufy Enters. v. Home Ins. Co. of Ind., 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995).

V. Plaintiff ought to be given an opportunity to conduct discovery as to whether Defendant's refusal to honor the contract was in bad faith.

Section 215 ILCS 5/155 provides an "an extracontractual remedy to policy-holders whose insurer's refusal to recognize liability and pay a claim under a policy is vexatious and unreasonable." Phillips v. Prudential Ins. Co. of America, 714 F.3d 1017, 1023 (7 Cir. 2013). "If there is a bona fide dispute regarding coverage — meaning a dispute that is real, genuine, and not feigned — statutory

sanctions under section 5/155 are inappropriate." *Id.* (internal citations removed). "Because this statute is penal in nature its provisions must be strictly construed."

As stated above, since insurance companies have all of the power in terms of contract formation, and their customers are literally unable to negotiate about specific terms, insurance contracts must be construed against the insurer and in favor of the insured. Plaintiffs reasonably anticipated that their substantial losses, due to COVID-19 and due in particular to the government's response thereto, would be covered by their insurance policy. At the pleadings stage, Plaintiff should be entitled to conduct discovery into whether that expectation was correct, and whether Defendant's refusal to honor the policy was vexatious.

WHEREFORE, Plaintiff requests that this Honorable Court DENY Defendant's Motion and require Defendant to ANSWER the Complaint.

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