UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

GOOD GEORGE, LLC,
an Oregon limited liability company

Plaintiff,

v.

THE CINCINNATI INSURANCE COMPANY, an Ohio corporation,

Defendant.

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THE RINGSIDE, INC.,
an Oregon corporation,

Plaintiff,

v.

THE CINCINNATI CASUALTY COMPANY, an Ohio corporation,

Defendant.

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Case No. 3:20-cv-01705-AR
Case No. 3:20-cv-01709-AR
Case No. 3:20-cv-01711-AR

FINDINGS AND RECOMMENDATION

*Consolidated for Rule 12 motions practice*

MISSISSIPPI PRODUCTIONS, INC.,
an Oregon corporation,

Plaintiff,

v.

THE CINCINNATI INSURANCE
COMPANY, an Ohio corporation,

Defendant.

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**ARMISTEAD, Magistrate Judge**

Plaintiffs Good George, LLC, the Ringside, Inc., and Mississippi Productions, Inc. (collectively, Plaintiffs) bring these insurance coverage dispute actions against defendants Cincinnati Insurance Company and its subsidiary, Cincinnati Casualty Company (collectively, Cincinnati), to recover for business losses incurred following a series of executive orders issued by Oregon Governor Kate Brown in response to the COVID-19 pandemic.

The actions have been consolidated for Rule 12 motions practice.[1] Order, Case No. 3:20-cv-01705-AR, ECF No. 32; Case No. 3:20-cv-01709-AR, ECF No. 38. Cincinnati moves to dismiss with prejudice Plaintiffs' claims under Federal Rule of Civil Procedure (Rule) 12(b)(6), on the grounds that Plaintiffs' losses are not covered under the policies. Mots. to Dismiss, Case No. 3:20-cv-01705-AR, ECF No. 23; Case No. 3:20-cv-01709-AR, ECF No. 30; Case No 3:20-cv-01711-AR, ECF No. 25. Cincinnati's motions should be granted.

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## BACKGROUND

[1] The court generally cites the docket of the leading case, *Good George, LLC v. Cincinnati Ins. Co.*, Case No. 3:20-cv-01705-AR, unless citating the other dockets is necessary for clarity.

Plaintiffs are Oregon commercial entities that own and operate bars, restaurants, and entertainment venues in Portland, Oregon.[2] Compl. ¶ 5. Cincinnati is an Ohio corporation that issues "all risk" property insurance policies. *Id.* ¶ 6. Plaintiffs each purchased insurance policies from Cincinnati that were effective between 2018 and 2021.[3] *Id.*

Beginning in March 2020, Oregon Governor Kate Brown issued a series of executive orders (COVID-related orders) to slow the spread of the novel coronavirus. *Id.* ¶¶ 30-36. Because of those orders, Plaintiffs suspended their business operations and sustained losses of business income and extra expenses. *Id.* ¶¶ 37-40. They each submitted insurance claims to Cincinnati, contending that the COVID-related orders rendered their businesses "physically unfit or unsafe for ordinary or intended use" and "substantially unusable." *Id.* ¶ 39, 41. Plaintiffs maintain that their losses were "caused by direct accidental physical loss to property at [the] covered premise[s]." *Id.* ¶ 40, 42.

Cincinnati denied the insurance claims, and Plaintiffs filed suit to challenge those denials. *Id.* ¶ 48-49. Plaintiffs contend that coverage for their losses is appropriate under four provisions in their insurance policies: (1) Business Income, (2) Extra Expense, (3) Civil Authority, and (4) Ingress and Egress. *Id.* ¶¶ 11-18. To trigger coverage under these provisions, the policyholder must establish that the insured property has sustained a "Covered Cause of Loss"—a term

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[2] Good George, LLC owns and operates Revolution Hall. Compl. ¶ 5, Case No. 3:20-cv-01705-AR, ECF No. 1-1. Ringside, Inc. owns and operates the Ringside Steakhouse. Compl. ¶¶ 1, 5, Case No. 3:20-cv-01709, ECF No. 1-1. Mississippi Productions, Inc. owns and operates Mississippi Studios and Polaris Hall. Compl. ¶¶ 2, 5-6, Case No. 3:20-cv-01711, ECF No. 1-1.

[3] The policies for Good George, LLC and Mississippi Productions, Inc. are numbered EPP 031 83 98 and were effective from April 9, 2018 through April 9, 2021. The Ringside Inc.'s policy is numbered EPP 031 83 98 and was effective from January 10, 2018 until January 10, 2021.

defined in the policy as "direct 'loss' unless the 'loss' is excluded[4] or limited in this Coverage Part." Decl. of Lloyd Bernstein (Bernstein Decl.) ¶ 7, Ex. E at 35. "Loss" is defined as "accidental physical loss or accidental physical damage." *Id.* at 68, 109. Thus, to trigger coverage, a policyholder must show direct "accidental physical loss" or "accidental physical damage" to covered property.

The coverage provisions on which Plaintiffs rely are identical across the policies. *Compare id.* at 33-70, 101-109 *with* Decl. of Leonard Bernstein (Ringside Decl.) ¶ 5, Ex. 3 at 29-66, 95-103, Case No. 3:20-cv-01709-AR, ECF No. 31. They are found in the "Building and Personal Property Coverage Form" and the "Business Income (and Extra Expense) Coverage Form." Bernstein Decl. ¶ 7, Ex. E at 33-70, 101-109. The Business Income provision states in pertinent part:

> We will pay for the actual loss of "Business Income" and "Rental Value" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss.

*Id.* at 48. The Extra Expense provision states:

> We will pay Extra Expenses you sustain during the "period of restoration." Extra Expense means necessary expenses you sustain . . . during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.

*Id.* at 49.[5]

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[4] The policies do not have any pandemic-related exclusions.

[5] For these provisions, the "period of restoration" begins at the time of "direct 'loss'" and ends at the earlier of two dates, either the "date when the property at the 'premises' should be repaired, rebuilt, or replaced with reasonable speed and similar quality" or the "date when business is resumed at a new permanent location." Bernstein Decl. ¶ 7, Ex. E at 68-69, 109.

The Civil Authority provision states in relevant part:

> When a Covered Cause of Loss causes damage to property other than Covered Property at a "premises," we will pay for the actual loss of "Business Income" and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the "premises," provided that both of the following apply:
>
> (a) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
>
> (b) 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.

*Id.* And finally, the Ingress and Egress coverage provision provides:

> We will pay for the actual loss of "Business Income" you sustain and necessary Extra Expense you sustain caused by the prevention of existing ingress or egress at a "premises" shown in the Declarations due to direct "loss" by a Covered Cause of Loss at a location contiguous to such "premises." However, coverage does not apply if ingress or egress from the "premises" is prohibited by civil authority.

*Id.* at 104.

Based on these provisions, Plaintiffs assert claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief. *Id.* ¶¶ 50-65. Cincinnati moves to dismiss those claims under Rule 12(b)(6), arguing that coverage is inappropriate because Plaintiffs allege no direct accidental physical loss or damage to the insured properties. Mot. to Dismiss at 10. Plaintiffs responded in opposition. Resp., ECF No. 36.

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## LEGAL STANDARDS

### A. *Rule 12(b)(6)*

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive a motion to dismiss, a complaint must include allegations sufficiently detailed "to raise a right to relief above a speculative level" and render each pleaded claim "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Mashiri v. Epsten Grinnell & Howell*, 845 F.3d 984, 988 (9th Cir. 2017) (quotation marks omitted).

The complaint "may not simply recite the elements of a cause of action but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). In evaluating the sufficiency of a complaint, the court accepts as true all well-pleaded factual allegations and construes them in the light most favorable to the non-moving party. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012). The court need not, however, credit a plaintiff's legal conclusions that are couched as factual allegations. *Iqbal*, 556 U.S. at 678-79.

**B. *Insurance Policy Interpretation in Oregon***

A federal court, sitting in diversity, applies state law to interpret an insurance policy. *Travelers Prop. Cas. Co. of Am. v. ConocoPhillips Co.*, 546 F.3d 1142, 1145 (9th Cir. 2008). Under Oregon law, the interpretation of an insurance policy is a question of law. *Hunters Ridge Condo. Ass'n v. Sherwood Crossing, LLC*, 285 Or. App. 416, 422 (2017) (citing *Hoffman Const. Co. v. Fred S. James & Co.*, 313 Or. 464, 469 (1992)).

The court's task in construing an insurance policy is to ascertain the parties' intent. *Id.* To determine this intent, the court analyzes the policy's express terms from the perspective of an "ordinary purchaser of insurance." *Hoffman*, 313 Or. at 469; *Totten v. New York Life Ins. Co.*, 298 Or. 765, 771 (1985). With that perspective, Oregon courts conduct the following analysis:

> If an insurance policy explicitly defines the phrase in question, we apply that definition. If the policy does not define the phrase in question, we resort to various aids of interpretation to discern the parties' intended meaning. Under that interpretive framework, we first consider whether the phrase in question has a plain meaning, *i.e.*, whether it is susceptible to only one plausible interpretation. If the phrase in question has a plain meaning, we will apply that meaning and conduct no further analysis. If the phrase in question has more than one plausible interpretation, we will proceed to the second interpretive aid. That is, we examine the phrase in light of the particular context in which that phrase is used in the policy and the broader context of the policy as a whole. If the ambiguity remains after the court has engaged in those analytical exercises, then any reasonable doubt as to the intended meaning of such a term will be resolved against the insurance company.

*Holloway v. Rep. Indem. Co. of Am.*, 341 Or. 642, 649–50 (2006) (internal quotation marks, citations, and brackets omitted). "[A] term is ambiguous *only* if two or more plausible interpretations of that term withstand scrutiny, *i.e.*, continue[ ] to be reasonable." *Id.* (Quoting *Hoffman*, 313 Or. at 469 (emphasis in original)).

The policyholder bears the initial burden of establishing coverage. *ZRZ Realty Co. v. Beneficial Fire & Cas. Co.*, 222 Or. App. 453, 465 (2008). If the policyholder satisfies this burden, the insurer then has the burden of establishing an exclusion to coverage. *Id.*

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**DISCUSSION**

Plaintiffs allege that, because of the COVID-related orders, they experienced "direct accidental physical loss to property" that should be covered under the Business Income, Extra Expense, Civil Authority, and Ingress and Egress provisions in their insurance policies. Compl.

*Id.* ¶ 42. To trigger coverage under one of those provisions, the policyholder must sustain a "Covered Cause of Loss"—in other words, direct "accidental physical loss" or "accidental physical damage" to insured property. Bernstein Decl. ¶ 7, Ex. E at 25, 68, 109. Plaintiffs contend that they have satisfied this threshold requirement by alleging that the COVID-related orders rendered their properties "physically unfit or unsafe for ordinary intended use." Compl. ¶ 41. Cincinnati counters that Plaintiffs misinterpret what qualifies as a covered loss under the policy. For the following reasons, the court agrees with Cincinnati.

In a recent action, Magistrate Judge Jolie A. Russo interpreted insurance policy provisions *identical* to those at issue and concluded that the COVID-related orders did not, without more, trigger coverage. *See Papi, LLC v. Cincinnati Ins. Co.*, Case No. 3:21-cv-00405-JR, 2021 WL 6932657, at *1-3 (D. Or. Nov. 10, 2021). The plaintiff, a Portland-based restaurant owner, asserted claims for breach of contract and declaratory relief against Cincinnati Insurance Company, contending that its losses—which stemmed from the COVID-related orders—triggered coverage under the Business Income, Extra Expense, and Civil Authority provisions of its policy. *Id.* at *1-2. Cincinnati moved for dismissal, arguing that the plaintiff could not allege plausibly that the COVID-related orders caused "physical loss" or "physical damage" to its restaurant. *Id.* Judge Russo agreed, reasoning that "the critical flaw in plaintiff's interpretation of 'physical loss' is that it gives no actual meaning to the word 'physical.'" *Id.* at *1. She explained:

> Plaintiff, like many companies, experienced business disruption during the COVID pandemic. While the COVID-related orders may have required plaintiff to make alterations to its premises and business model, such alterations are not a loss in the "physical" sense. The orders were generally applicable rules, not wrecking balls. Plaintiff does not allege the COVID-related orders themselves removed, destroyed, or tangibly altered any of plaintiff's property. Plaintiff's alleged losses are more appropriately considered financial, and not physical, in nature. *Thus, the plain meaning of the term "physical loss" does not encompass the plaintiff's business losses in the wake of the COVID-related orders.*

*Id.* at *5 (emphasis added); *see also Dakota Ventures, LLC v. Oregon Mut. Ins. Co.*, 553 F. Supp. 3d 848, 856 (D. Or. 2021) (finding the phrase "physical loss of or damage to covered property" unambiguous under a substantially similar insurance policy and dismissing the plaintiff's claims because the complaint did not plausibly allege that the COVID-related orders caused the property to be "lost, destroyed or physically changed in any manner").

This interpretation of "physical" is reinforced by the policy's definition of "period of restoration," a term used in the Business Income and Extra Expense coverage provisions. *Id.* at *6. Noting that the "period of restoration" ends either on the date when the property should be "repaired, rebuilt or replaced with reasonable speed and similar quality" or the date "when business is resumed at a new, permanent location," Judge Russo explained:

> Here, the COVID-related orders in question do not require the insured property to be repaired, rebuilt, or replaced, or the plaintiff's business to be permanently relocated. Plaintiff, like countless other business responding to the pandemic, has adjusted to a world indefinitely shaped by COVID. No repair, rebuilding, replacement, or relocation can offer a clear end to plaintiff's ersatz "period of restoration."

*Id.* at *6. Judge Russo reasoned, therefore, that "to invoke coverage [under Business Income and Extra Expense provisions], plaintiff must lose or suffer physical damage to its tangible property which requires repair or replacement." *Id.* She concluded that the plaintiff's allegations did not satisfy that threshold burden. *Id.* Judge Russo similarly found that the plaintiff's allegations did not trigger coverage under the Civil Authority provision because the complaint lacked "specific facts explaining how the COVID-related orders were issued in response to dangerous physical conditions at its restaurant." *Id.* Consequently, she recommended dismissing the plaintiff's claims with prejudice. *Id.* at *7. Upon review, Chief District Judge Marco A.

Hernández adopted her recommendation in full. *Papi, LLC v. Cincinnati Ins. Co.*, Case No. 3:21-cv-00405-JR, 2022 WL 475910, at *1 (D. Or. Feb. 1, 2022).

Judge Russo's reasoning is persuasive and applies with equal force to the policy provisions at issue in these actions. As in *Papi, LLC*, Plaintiffs' alleged losses stem from the COVID-related orders and thus are economic in nature. Because Plaintiffs offer no factual allegations depicting *physical* damage or loss to their property, they have not plausibly alleged a "Covered Cause of Loss" sufficient to trigger coverage under the Business Income, Extra Expense, Civil Authority, or Ingress and Egress provisions. *ZRZ Realty Co.*, 222 Or. App. at 465. As secondary grounds for dismissal under the Civil Authority provision, Plaintiffs' complaints also lack specific facts explaining how the COVID-related orders were issued in response to dangerous physical conditions at its restaurant. *See Papi, LLC*, 2021 WL 6932657, at *6 (concluding same). Moreover, Plaintiffs have not plausibly alleged that coverage is appropriate under the Ingress and Egress coverage provision because the complaints do not alleged that Plaintiffs' losses were "caused by the prevention of existing ingress or egress" at their properties due to a contiguous premises experiencing a "Covered Cause of Loss."

For the above reasons, Cincinnati's motions should be granted and Plaintiffs' claims should be dismissed. Because Plaintiffs cannot recharacterize their economic losses stemming from the COVID-related orders as physical loss or damage, the court should deny any leave to amend. *Dakota Ventures*, 553 F. Supp. 3d at 865 ("Because the Court finds that Plaintiff's FAC cannot be amended to plausibly allege a claims under the terms of the Policy, the Court denies leave to amend.").

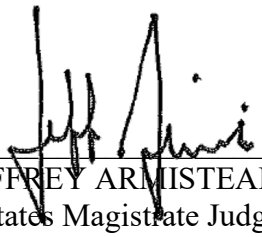
## CONCLUSION

Based on the above, Cincinnati's consolidated motions to dismiss with prejudice these actions (Case No. 3:20-cv-01705-AR, ECF No. 23; Case No. 3:20-cv-01709-AR, ECF No. 30; Case No 3:20-cv-01711-AR, ECF No. 25) should be GRANTED.

## SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due within fourteen days. If no objections are filed, the Findings and Recommendation will go under advisement on that date. If objections are filed, a response is due within fourteen days. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED August 23, 2022.



JEFFREY ARMISTEAD
United States Magistrate Judge