

INDIANA COMMERCIAL COURT

STATE OF INDIANA) IN THE MARION SUPERIOR COURT 1
) SS:
COUNTY OF MARION) CAUSE NO. _____

BRISTOW ENDEAVOR HEALTHCARE,)
LLC DBA BRISTOW MEDICAL)
CENTER AND NEW MANNA)
AUGUSTA, LLC, DBA SUMMIT)
MEDICAL CENTER,)
)
)
Plaintiffs,)
)
v.)
)
FEDERAL INSURANCE COMPANY,)
)
Defendant.)

COMPLAINT FOR DECLARATORY RELIEF

1. Plaintiff Bristow Endeavor Healthcare, LLC (“Bristow”) owns and operate the Center for Orthopedic Reconstruction and Excellence, a state-of-the-art medical inpatient hospital with six operating rooms, physical therapy department, lab services, a 24-hour emergency room and full diagnostic services with its principal place of business at 3029 W. Main Street, Jenks, Oklahoma. Bristow also own and operate a satellite facility called Bristow Medical Center, an inpatient facility in Oklahoma offering general acute care hospital services including diagnostic, and 24-hour emergency room services. Both hospitals provide emergency and elective surgical services.

2. Plaintiff New Manna Augusta, LLC, DBA Summit Medical Center (“Summit”) is an acute care hospital specializing in ENT, gastroenterology, general surgery, gynecology, ophthalmology, oral surgery, orthopedics, pain management, pediatrics, primary care, radiology, lab, and pharmacy services. The hospital primarily provides elective surgical services.

3. Bristow and Summit have common owners and the same insurance agent.

4. Defendant Federal Insurance Company (“FIC”) is an insurance company incorporated in Indiana with its principal place of business in Indiana. It is licensed to and does sell insurance in Oklahoma and Wyoming.

5. At all relevant times, FIC insured Bristow and Summit. A copy of the declarations pages of Bristow’s Policy, number 3604-53-28 WUC, is attached as Exhibit 1 and a copy of the declarations pages of Summit’s Policy, number 3605-29-87 IND, is attached as Exhibit 2. The policies have different renewal dates but are comprised of substantially the same forms and will be referred to collectively as “the Policies”.

6. The Policies provides coverage for Business Income (“BI”) loss, Extra Expense (“EE”), Ingress and Egress, and loss due the actions of Civil Authority.

7. While the Policies were in force, Bristow and Summit sustained direct physical loss or damage to insured property at the described premises. This loss or damage was caused by or resulted from a covered cause of loss. As a result, Bristow and Summit sustained a necessary suspension of their operations and suffered BI loss, EE, and loss due to the actions of Civil Authorities.

8. While the Policies were in force, Bristow also sustained direct physical loss or damage by a covered peril to insured property due to the civil authority orders issued by the Governor of Oklahoma and the Oklahoma State Department of Health addressing SARS-CoV-2 and the COVID-19 Pandemic, while Summit also sustained direct physical loss or damage by a covered peril to insured property due to the civil authority orders issued by the Governor of Wyoming and the Wyoming State Department of Health addressing SARS-CoV-2 and the

COVID-19 Pandemic as well as recommendations from the College of Surgeons, American Medical Association, and other federal authorities to cease all elective procedures.

9. SARS-CoV-2 is a virus.
10. SARS-CoV-2 is a physical substance.
11. SARS-CoV-2 is a human pathogen that causes the disease COVID-19, which can be lethal.
12. SARS-CoV-2 can be present outside the human body in viral fluid particles.
13. SARS-CoV-2 can and does remain capable of being transmitted and active on inert physical surfaces for a period of time.
14. SARS-CoV-2 can and does remain capable of being transmitted and active on floors, walls, furniture, desks, tables, chairs, countertops, computer keyboards, touch screens, cardboard packages, food items, furniture, faucets, refrigerators, freezers, and other items of property for a period of time.
15. SARS-CoV-2 is transmitted by way of human contact with surfaces and items of physical property on which SARS-CoV-2 particles are physically present.
16. SARS-CoV-2 is transmitted by way of human contact with surfaces and items of physical property located in Oklahoma and Wyoming, including places like hospitals where elective and non-elective surgeries are performed.
17. SARS-CoV-2 is also transmitted by human to human contact and interaction at premises in Oklahoma and Wyoming, including places such as elective surgery centers.
18. SARS-CoV-2 has been transmitted by human to human contact and interaction at premises in Oklahoma and Wyoming. SARS-CoV-2 has also been transmitted by human to

property contact at premises in Oklahoma and Wyoming, including places such as elective surgery centers.

19. SARS-CoV-2 can be transmitted through airborne particles emitted into the air at places such as elective surgery centers like Bristow and Summit.

20. SARS-CoV-2 has been transmitted by way of human contact with airborne particles emitted into the air at places similar to elective surgery centers in Oklahoma and Wyoming.

21. The presence of SARS-CoV-2 particles renders items of physical property unsafe.

22. The presence of SARS-CoV-2 particles on physical property or in the air within a building impairs that business's value, usefulness and/or normal function.

23. The presence of SARS-CoV-2 particles on physical property causes direct physical harm to that property.

24. The presence of SARS-CoV-2 particles on physical property causes direct physical loss to that property.

25. The presence of SARS-CoV-2 particles on physical property causes direct physical damage to that property.

26. The Policies do not contain an exclusion for loss caused by a virus.

27. SARS-CoV-2, and virus in general, is a covered cause of loss under the terms of the Policies since it is a risk of direct physical loss of or damage to covered property and is not excluded in the policies or the subject of any limitation of coverage.

28. The presence of people infected with or carrying SARS-CoV-2 particles renders physical property in the vicinity of Bristow and Summit's premises unsafe and unusable, resulting in direct physical loss or damage to that property.

29. People infected with or carrying SARS-CoV-2 particles have been present in Bristow and Summit's premises, and such presence of people infected with or carrying SARS-CoV-2 particles at Bristow and Summit renders the premises unsafe, resulting in direct physical loss or damage to the premises and property.

30. It has been widely reported that SARS-CoV-2 can live on inert surfaces. Exactly how long it can live on various surfaces is disputed and/or not yet fully known and is the subject of ongoing research. The same is true of airborne particles containing the virus.

31. In response to SARS-CoV-2 and the COVID-19 Pandemic, the Governors of Oklahoma and Wyoming have issued multiple executive orders pursuant to the authority vested in them by the Oklahoma and Wyoming Constitutions and the laws of those states.

32. The term "civil authority" is not defined in the Policies.

33. The State of Oklahoma and the State of Wyoming are civil authorities as contemplated by the Policies.

34. The Oklahoma and Wyoming Departments of Health are civil authorities as contemplated by the Policies.

35. The Governors of the State of Oklahoma and Wyoming are civil authorities as contemplated by the Policies.

36. In consequence of the danger posed by the coronavirus and the Pandemic, the Governors of Oklahoma and Wyoming issued several executive orders. Oklahoma Executive Order 2020-07, issued on March 24, 2020, declared an emergency "caused by the impending threat of COVID-19 to the people of this State and the public's peace, health, and safety" for "all 77 Oklahoma Counties." Wyoming Executive Order 2020-2, issued on March 13, 2020, declared

a State of Emergency and Public Health Emergency in the State of Wyoming in response to the nationwide coronavirus pandemic.

37. On March 24, 2020, Oklahoma banned all elective surgeries, minor medical procedures, and non-emergency dental procedures until April 7, 2020. This executive order was then extended and elective surgeries were allowed to resume on April 24, 2020 and April 30, 2020, depending on the type of procedure.

38. On March 24, 2020, Oklahoma issued a “Safer at Home” order across all 77 counties, requiring those age 65 and older and individuals who are immunocompromised or have pre-existing conditions to shelter in their homes until May 15, except for those working in a critical infrastructure sector or to conduct essential errands.

39. While the Wyoming governor and the Department of Health did not prohibit elective procedures, the Department of Health issued guidance on resuming elective and non-emergency procedures for those hospitals and providers that had suspended their procedures per CMS guidance.

40. The civil authority orders issued in Wyoming and Oklahoma were proximately caused by or resulted from the risk that SARS-CoV-2 particles were present on physical property in the vicinity of Bristow and Summit’s insured premises, and/or the actual presence of SARS-CoV-2 particles on physical property in the vicinity of Bristow and Summit’s insured premises, and to limit the spread of the virus by limiting the potential for human-to-physical-property contact.

41. With the exception of emergency procedures, Bristow nor Summit do not qualify as an Essential Business, and so had to significantly reduce operations to nearly nothing.

42. On an April 22, 2020 shareholder’s call, Evan Greenberg, CEO of

Defendant, indicated that the insurance industry would fight business interruption claims “tooth and nail,” by contesting that the virus caused direct physical loss to property and that the pandemic “will be an earnings event for Chubb.”

43. State and local governmental authorities, and public health officials around the Country, acknowledge that SARS-CoV-2, COVID-19, and the COVID-19 Pandemic cause direct physical loss and damage to property. For example:

- a. The state of Colorado issued a Public Health Order indicating that “COVID-19...physically contributes to **property loss**, contamination, and damage...” (Emphasis added);
- b. The City of New York issued an Emergency Executive Order in response to COVID-19 and the Pandemic, in part “because **the virus physically is causing property loss and damage.**” (Emphasis added);
- c. Broward County, Florida issued an Emergency Order acknowledging that COVID-19 “**is physically causing property damage.**” (Emphasis added);
- d. The State of Washington issued a stay at home Proclamation stating the “COVID-19 pandemic and its progression...remains a public disaster affecting life, health, [and] **property...**” (Emphasis added);
- e. The State of Indiana issued an Executive Order recognizing that COVID-19 has the “**propensity to physically impact surfaces and personal property.**” (Emphasis added);
- f. The City of New Orleans issued an order stating “there is reason to believe that COVID-19 may spread amongst the population by various means of exposure, including the propensity to attach to surfaces for prolonged period of time, thereby spreading from surface to person and **causing property loss and damage** in certain circumstances.” (Emphasis added);
- g. The State of Illinois issued an Executive Order describing COVID-19’s “**propensity to physically impact surfaces and personal property.**” (Emphasis added);
- h. The State of New Mexico issued a Public Health Order acknowledging the “threat” COVID-19 “poses” to “**property.**” (Emphasis added);

- i. North Carolina issued a statewide Executive Order in response to the Pandemic not only “to assure adequate protection for lives,” but also to “assure adequate protection of...**property**.” (Emphasis added); and
- j. The City of Los Angeles issued an Order in response to COVID-19 “because, among other reasons, the COVID-19 virus can spread easily from person to person and it is **physically causing property loss** or damage due to its tendency to attach to surfaces for prolonged periods of time.” (Emphasis added).

44. The coronavirus, like a bacterium, clearly has a material existence and is something that exists in nature that physically damages tangible property by rendering it unusable as it adheres to surfaces creating a dangerous property condition.

45. SARS-CoV-2, COVID-19, and the COVID-19 Pandemic have caused and continue to cause direct physical loss and damage to property.

46. SARS-CoV-2, COVID-19, and the COVID-19 Pandemic are physically impacting public and private property in Oklahoma, Wyoming, and throughout the country.

47. On April 24, 2020, the state of Oklahoma entered Part 1 of Phase 1 of reopening the state and permitted personal care businesses, state parks and outdoor recreation, and retail and other non-essential businesses to reopen under strict guidelines.

48. On May 1, 2020, the State of Oklahoma entered Part 2 of Phase 1 of reopening the state and permitted dining, entertainment, movie theaters, sporting venues, gyms, places of worship, and tattoo parlors to reopen under strict guidelines.

49. Wyoming began lifting restrictions on businesses on May 1, 2020. However, the governor of Wyoming recently extended restrictions on restaurants, bars and gyms until at least July 31, 2020.

50. As of July 17, 2020, Oklahoma had 24,140 confirmed cases of coronavirus. Coronavirus has killed at least 445 people in Oklahoma as of the date of this filing.

51. As of July 16, 2020, Wyoming had 1,644 laboratory confirmed cases of coronavirus. Coronavirus has killed at least 24 people in Wyoming as of the date of this filing.

52. People in Oklahoma and Wyoming have, and have had, COVID-19 disease but have not been diagnosed.

53. People in Oklahoma and Wyoming have SARS-CoV-2 particles on or about their person and personal property.

54. Properties and premises throughout Oklahoma and Wyoming contain the presence of SARS-CoV-2 particles on surfaces and items of property.

55. SARS-CoV-2 particles have been physically present at Bristow and Summit's premises described in the Policies during the policy periods.

56. SARS-CoV-2 particles have been physically present on surfaces and items of property located at Bristow and Summit's premises described in the Policies during the policy periods.

57. Airborne SARS-CoV-2 particles have been physically present at Bristow and Summit's premises described in the Policies during the policy periods.

58. People carrying SARS-CoV-2 particles in, on or about their person have been present at Bristow and Summit's premises described in the Complaint during the policy periods.

59. Airborne SARS-CoV-2 particles have been physically present at Bristow and Summit's premises described in the Policies during the policy periods.

60. Bristow and Summit's insured premises have sustained direct physical loss or damage to items of insured property located at their premises due to the presence of SARS-CoV-2 on the insured premises, and have unquestionably sustained direct physical loss or damage at

those insured locations as the result of the Pandemic and/or civil authority orders issued by the Governor of Oklahoma and Wyoming.

61. Bristow and Summit have sustained a BI loss and EE due to the necessary suspension of their operations caused by direct physical loss of or damage to insured property at the described premises, and such loss or damage was caused by or resulted from a covered cause of loss.

62. Bristow and Summit have sustained a BI loss and EE due to the necessary suspension of their operations caused by the actions of civil authorities that have prohibited access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from a covered cause of loss.

63. Bristow and Summit submitted timely insurance claims to FIC.

64. FIC denied coverage under the Policies for any loss, including loss of Business Income, Extra Expense coverage, loss due the actions of a Civil Authority under claims tendered for losses due to SARS-CoV-2 at, in, on or around insureds' premises, loss due to the spread of SARS-CoV-2 and/or COVID-19 in the community, and loss due to civil authority orders issued by the Governor of Oklahoma and the Oklahoma Department of Health addressing SARS-CoV-2 and the COVID-19 Pandemic.

64. Since there is a dispute about whether or not Bristow and Summit have coverage under FIC's Policies for the loss sustained and to be sustained in the future, Bristow and Summit are entitled to declaratory relief from this Court pursuant to Federal Civil Rule 57 and Oklahoma Statute §12-1652.

65. Bristow and Summit are entitled to a declaration that (1) Bristow and Summit sustained direct physical loss or damage as a result of the coronavirus pandemic; (2) coronavirus

is a covered cause of loss under the Policies; (3) the losses incurred by Bristow and Summit as the result of the executive orders issued by the Governor of Oklahoma and Wyoming are covered losses under the Policies; (4) FIC has not and cannot prove the application of any exclusion or limitation; (5) virus is a covered cause of loss under the Policies, (6) Bristow and Summit are entitled to coverage for its **Business Income** loss and **Extra Expense** resulting from coronavirus; (7) Bristow and Summit are entitled to coverage for loss due to the actions of Oklahoma and Wyoming's civil authorities; (8) Bristow and Summit have coverage for any substantially similar civil authority order in the future that limits or restricts the public's access to Bristow and Summit's services; (9) any other issue that may arise during the course of litigation that is a proper issue on which to grant declaratory relief, and (10) Bristow and Summit are entitled to their attorney fees and costs in bringing this action.

66. Bristow and Summit do not seek a judicial determination of damages resulting from the coronavirus pandemic. If there is a dispute between the parties as to the amount of the loss, the Policies provides that such a dispute should be resolved by Appraisal.

67. Bristow and Summit demanded appraisal before filing this lawsuit. Plaintiffs pray for declaratory relief from the Court that FIC must resolve any dispute about the amount of loss via Appraisal. Bristow and Summit also request the Court to appoint the umpire if the appraisers cannot agree.

68. Bristow and Summit pray for any further relief the Court deems proper, including attorney fees, interest, and costs as allowed by law or in the exercise of the Court's equitable jurisdiction.

WHEREFORE, Plaintiffs Bristow Endeavor Healthcare, LLC and New Manna Augusta, LLC seek judgment against the Defendant, as set forth above, plus interest, costs, and attorney fees as allowed by law.

Respectfully submitted,

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JURY DEMAND

Plaintiffs hereby request, pursuant to Civil Rule 38(B), a trial by jury of any of the issues in the within lawsuit that are properly triable to a jury.

/s/ Michael L. Schultz
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