UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CREATIVE BUSINESS, INC. **d/b/a BLUES HALL DINING ROOM** **d/b/a RUM BOOGIE CAFE** **Plaintiff,** **v.** **COVINGTON SPECIALTY INSURANCE COMPANY,** **Defendant.**	)	**Case No.: 2:20-cv-02452-JTF-atc**

ORDER GRANTING DEFENDANT COVINGTON SPECIALTY INSURANCE COMPANY'S MOTION FOR JUDGMENT ON THE PLEADINGS AND DISMISSING THIS CASE WITH PREJUDICE

Before the Court is Defendant Covington Specialty Insurance Company's ("Covington") Motion for Judgment on the Pleadings and supporting memorandum of law filed on December 29, 2020. (ECF No. 28, 28-2.) Plaintiff Creative Restaurants, Inc. ("Plaintiff") filed a Response in Opposition on February 2, 2021, to which Covington replied on March 3, 2021. (ECF Nos. 32 & 38.) Covington also filed Notices of Additional Recent Decisions in support of its motion for Judgment on the Pleadings on April 30, 2021, July 7, 2021 and September 2, 2021. (ECF No. 43, ECF Nos 43-1–43-4, ECF No. 44, ECF Nos. 44-1– 44-2, ECF No. 45 and ECF No. 45-1.) For the following reasons, Covington's Motion for Judgment on the Pleadings is **GRANTED**.

FACTUAL BACKGROUND

Plaintiff Creative Restaurants, Inc. is a Delaware corporation that maintains its principal place of business in New Hampshire. Plaintiff leases property at 182 Beale Street in Memphis,

Tennessee where it operates a restaurant, the Blues Hall Dining Room and Rum Boogie Cafe. (ECF No. 1, ¶¶ 1, 12 and 13.) Plaintiff purchased "an all risk general liability policy," Policy Number VBA743106" (the "Policy") issued by Defendant Covington Specialty Insurance Company to protect the business from certain losses or damages from February 12, 2020, to February 12, 2021.[1] (ECF No. 1 ¶ 2; ECF No. 1-2.) The Policy was underwritten by Defendants RSUI Indemnity Company ("RSUI") and Alleghany Insurance Holdings, LLC. ("Alleghany"), parties that were voluntarily dismissed from the lawsuit with prejudice on February 18, 2021. (ECF No. 1 ¶ 20 and ECF No. 35.)

In March 2020, the COVID-19 pandemic permeated the state of Tennessee, and by March 12, 2020, Tennessee Governor Bill Lee declared a state of emergency.[2] As of September 3, 2021, 126,479 people in Shelby County had contracted the COVID-19 virus or 11.8 percent of all cases statewide; 5,644 persons have been hospitalized, 18.3 percent of all hospitalizations statewide; 1,900 persons in Shelby County have succumbed to the virus or 13.9 persons of all deaths statewide; and 117,247 persons have recovered, or 12.0 percent of all inactive/recovered cases statewide.[3]

Beginning in March 2020, Plaintiff was forced to suspend business operations at the restaurant because of the risk of Covid-19 infection to the public. (ECF No. 1, ¶ 9.) In mid-March, Plaintiff submitted a claim under the Policy for loss of business income resulting from the mandatory closure of non-essential businesses as mandated by City of Memphis ordinances and Shelby County Health Department directives. (ECF No. 1 ¶¶ 9, 41–45, 51.) Plaintiff alleges that due to

[1] A copy of the Policy is attached to Plaintiff's original and Amended Complaints. (ECF Nos. 1-1, 15-1.)
[2] https://www.tn.gov/governor/news/2020/3/12/gov--bill-lee-issues-executive-order-declaring-state-of-emergency-in-response-to-covid-19.html.
[3] https://www.tn.gov/health/cedep/ncov/data/county-data-snapshot.html (last visited on September 7, 2021)

these health orders, it sustained loss of business income from the mandatory closure, subsequent capacity restraints on on-premises dining and additional expenses for increased sanitizing costs, payroll obligations, and the expiration of food products. (ECF No. 1 ¶¶ 47–48.) On March 20, 2020, Covington denied Plaintiff's claim despite Plaintiff's assertion that this type of loss is consistent with "the actual loss of 'Business Income," "business interruption," "loss of business income beyond the Period of Restoration under certain conditions," and "Extra Expense," all losses that are covered under the Policy. (ECF No. 1 ¶¶ 5–6, ¶ 52 and ¶¶ 22–34.)

On June 25, 2020, Plaintiff filed a Class Action Complaint against Defendants Covington, RSUI Indemnity Company, and Alleghany Insurance Holdings, LLC, on behalf of himself and other similarly situated businesses, alleging that: (1) its claim for coverage under the Policy was wrongfully denied, and (2) Defendant engaged in a "systematic and uniform refusal to pay insureds for any losses they attribute to risk of infection of COVID-19 and/or actions taken by civil authorities to suspend or prohibit access to and occupancy of the business." (ECF No. 1 ¶ 67.) Plaintiff filed an Amended Complaint on August 17, 2020, which added allegations attempting to show "direct physical loss" due to presence of COVID-19 on the actual premises. (ECF No. 15 ¶ 50–52.) Both the original and Amended Complaint contain three counts seeking declaratory judgment, three counts for breach of contract, and one count for breach of covenant of good faith and fair dealing. (ECF Nos. 1, 20–31; 15, 25–36.) Plaintiff brings one count seeking declaratory judgment and one count for breach of contract for each of the following: Business Income coverage, Extra Expense Coverage, and coverage under the Civil Authority provision. (*Id.*) As noted above, before the Court is Covington's Motion for Judgment on the Pleadings and supporting memorandum of law. (ECF No. 28 and ECF No. 28-2.) As noted above, Covington recently submitted additional supplemental authority to support its motion for judgment on the pleadings.

(ECF No. 43, ECF No. 43-1 – ECF No. 43-4, ECF No. 44, ECF No. 44-1–ECF No. 44-2, ECF No. 45 and ECF 45-1.)

LEGAL STANDARD

The standard of review for a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) is the same as the standard of review for a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 761 (6th Cir. 2006). "The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993) (citing *Nishiyama v. Dickson Cty., Tenn.*, 814 F.2d 277, 279 (6th Cir. 1987)). When evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must determine whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012) (The court must "construe the complaint in the light most favorable to the plaintiff and accept all allegations as true."). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. In other words, although the complaint need not contain detailed facts, its factual assertions must be substantial enough to raise a right to relief above a speculative level. *Ass'n of Cleveland Fire Fighters v. City of Cleveland,* 502 F.3d 545, 548 (6th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). Determining whether a complaint states a plausible claim is "context-specific," requiring the Court to draw upon its experience and common sense. *Iqbal*, 556 U.S. at 679.

While the Court's decision to grant or deny a motion to dismiss "rests primarily upon the

allegations of the complaint, 'matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint [] also may be taken into account.'" *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008) (quoting *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001)). The Court may also consider "exhibits attached to the defendant's motion to dismiss so long as they are referred to in the complaint and are central to the claims contained therein without converting the motion to one for summary judgment." *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 680–81 (6th Cir. 2011) (citation omitted).

LEGAL ANALYSIS

Covington asserts that dismissal is appropriate because Plaintiff has failed to allege sufficient factual evidence of "direct physical loss" as required for coverage under the Policy's Business Income (and Extra Expense) Form and Additional Coverage for Civil Authority. (ECF No. 28-2 , ECF No. 44, 1–2 and ECF No. 45, 1–3) Alternatively, Covington argues that even if the facts support "direct physical loss" so as to put Plaintiff's claim within the bounds of the Policy's coverage, either the Pathogen Exclusion or the Pollutant Exclusion, or both, precludes coverage as a Covered Cause of Loss. (ECF No, 28-2, ECF 43, 3 and ECF No. 44, 3–4.) Plaintiff responds that it has in fact, alleged sufficient evidence of "direct physical losses" so as to constitute a Covered Cause of Loss because "structural damage is not required to trigger coverage." (ECF No. 32.) Plaintiff also argues that the exclusions in the Policy do not apply, that the Civil Authority provision does apply, and that the "period of restoration" language does not preclude coverage.

I. Applicable Law

A federal court sitting in diversity applies the substantive law of the state in which it sits. *Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 566 (6th Cir. 2001) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). Under Tennessee law, "a contract is presumed

to be governed by the law of the jurisdiction in which it was executed absent a contrary intent." *Williams v. Smith*, 465 S.W.3d 150, 153 (Tenn. Ct. App. 2014) (citing *Ohio Cas. Ins. Co. v. Travelers Indem. Co.*, 493 S.W.2d 465, 467 (Tenn. 1973)). The insurance contract at issue in this action was executed in Tennessee; therefore, Tennessee law governs this breach of contract action. (*See* ECF No. 1 ¶ 18.)

Generally, an insurance policy is to be interpreted in the same manner as any other contract. *Am. Justice Ins. Reciprocal v. Hutchison*, 15 S.W.3d 811, 814 (Tenn. 2000). In interpreting an insurance contract, "the language of the parties should be given its plain and ordinary meaning," and "the contract should be read as a whole and each word given its appropriate meaning, if possible." *Burdett Oxygen Co. of Cleveland, Inc. v. Employers Surplus Lines Ins. Co.*, 419 F.2d 247, 248 (6th Cir. 1969). "[U]nder an all-risk policy, the claimant has the initial burden of proving that a loss comes within the terms of the policy . . . but the burden is upon the insurer to show that an exclusion applies which precludes recovery." *Se. Mental Health Ctr., Inc. v. Pac. Ins. Co.*, 439 F. Supp. 2d 831, 835 (W.D. Tenn. 2006) (citing *Blaine Constr. Corp. v. Ins. Co. of N. Am.*, 171 F.3d 343, 349 (6th Cir. 1999)).

The relevant Policy language provides: In the Policy's Building and Personal Property Coverage Form, Covington states that it 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." (ECF No. 15-1, 16.) As stated in the Policy's Causes of Loss – Special Form, "Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy." (ECF No. 15-1, 43.) The Policy's Business Income (and Extra Expense) Form provides that Covington

> will pay for the actual loss of Business Income [Plaintiff] sustain[s] due to the necessary "suspension" of [its] "operations" during the "period of restoration." The

> "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

(ECF No. 15-1, 32.) "Extra Expense" means necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss." (*Id.*) The Special Form also includes a Civil Authority provision, which states:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, [Covington] will pay for the actual loss of Business Income [Plaintiff] sustain[s] and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> (1) Access to the area immediately surrounding the damaged property is prohibited by the civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> (2) 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.
>
> Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.
>
> Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end:
>
> (1) Four consecutive weeks after the date of that action; or
> (2) When [Plaintiff's] Civil Authority Coverage for Business Income ends; whichever is later.

(ECF No. 15-1, 33.) The Business Income Form also provides the following definition:

> "Period of restoration" means the period of time that:
> a. Begins:

> (1) 72 hours after the time of direct physical loss or damage for Business Income Coverage; or
> (2) Immediately after the time of direct physical loss or damage for Extra Expense Coverage;
> caused by or resulting from any Covered Cause of Loss at the described premises; and
> b. Ends on the earlier of:
> (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
> (2) The date when business is resumed at a new permanent location.

(ECF No. 15-1, 40.) The Policy includes an Exclusion of Pathogenic or Poisonous Biological or Chemical Materials (the "Pathogen Exclusion"), as a separate Endorsement modifying the Commercial Property Coverage. Covington provides that it

> will not pay for loss or damage caused directly or indirectly by the discharge, dispersal, seepage, migration, release, escape, or application of any pathogenic or poisonous biological or chemical materials. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

(ECF No. 15-1, 82.) Another exclusion (the "Pollutant Exclusion"), on the Cause of Loss – Special Form, states that Covington

> will not pay for loss or damage caused by or resulting from . . . discharge, dispersal, seepage, migration, release, or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release, or escape is itself caused by any of the "specified causes of loss." But if the discharge, dispersal, seepage, migration, release, or escape of "pollutants" results in a "specified cause of loss," we will pay for the loss or damage caused by that "specified cause of loss."

(ECF No. 15-1, 45–46.)

The Court notes that there appears to be no published authority from Tennessee state courts on the interpretation of the policy language present in this case. Notwithstanding, in an unpublished decision, the Tennessee Court of Appeals has addressed a policy covering "direct physical loss of or damage to Covered Property at the premises . . . caused by or resulting from any Covered Cause of Loss." *Great River Ins. Co. v. Edison Automation, Inc.*, No. M2001-01635-

COA-R3-CV, 2004 Tenn. App. LEXIS 258, at *5 (Tenn. Ct. App. Apr. 23, 2004). The policy in that case defined "Covered Causes of Loss" as "Risks of Direct Physical Loss." *Id*. The claimant in that case labored under the mistaken belief it had secured a contract to build custom products, when in fact no such arrangement was in place. *Id.* at *3–*4. Because the products were custom built for a non-existent contract, the products were not marketable, and thus, according to the claimant, "essentially destroyed." *Id.* at *5–*6. The court rejected the claimant's argument and held:

> [C]overage is provided for "direct physical loss or damage." Construing this language in its usual and ordinary manner, it is clear to us that there is no coverage under the terms of this contract. The products covered under the terms of the policy suffered no damage, and no physical loss. The products were not destroyed, nor were they damaged. The products were capable of being used in the manner in which the Appellants sought to use them.

Id. at *9. This suggests that Tennessee courts would treat the Policy's language as requiring tangible damage or destruction to covered property. The Court finds this reasoning applicable and helpful in addressing the present case. *See also SGDG LLC, d/b/a Shallowford Family Dental Group v. The Cincinnati Ins. Co*., No. 1:20-cv-00237, 2021 WL 4057573 (E.D. Tenn. Aug. 31, 2021). The Court in *SGDG LLC,* held that the insurance provider was not liable for losses under the business income, extra expense or civil authority provisions because these losses require a direct loss from an accidental physical loss or accidental physical damage. (*Id*. at *4.) As explained below, Plaintiff has not alleged a direct physical loss or that any damage occurred to the property which prevented Plaintiff from conducting on-premises dining. As such, the property at issue remained physically capable of being used in its intended manner.

II. Business Income Coverage

In Count I of the Amended Complaint, Plaintiff seeks a declaratory judgment that the Policy's Business Income coverage is applicable in this case. In Count II, Plaintiff alleges the Defendant

breached the contract by denying it coverage under the Business Income provision. (ECF No. 15 ¶¶ 84–103.) Regarding Business Income coverage under the Policy, Covington submits that Plaintiff is unable to show evidence of "direct physical loss of or damage to" the insured property. Covington submits that Plaintiff has shown only economic loss, which is not a Covered Cause of Loss. (ECF No. 28-2.) Plaintiff argues that the all-risk nature of the Policy puts all losses—no matter how fortuitous—within the scope of coverage, unless they are specifically excluded. Plaintiff asserts that the presence of COVID-19 on the actual premises as alleged in the Amended Complaint is sufficient to show tangible alteration to the insured property that constitutes "direct physical loss." (ECF No. 32.)

> The Policy's Business Income coverage provides that Covington
>
> will pay for the actual loss of Business Income [Plaintiff] sustain[s] due to the necessary "suspension" of [its] "operations" *during the "period of restoration."* The "suspension" must be caused by *direct physical loss of or damage to property* at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. *The loss or damage must be caused by or result from a Covered Cause of Loss.*

(ECF No. 15-1, 32) (*emphasis added*). First, both parties present opposing arguments regarding whether the term "period of restoration" suggests a denial of coverage in this situation. (ECF No. 28-2, 13–14 and ECF No. 32, 16.) Regarding restoration, the Policy provides that "the period of restoration" ends "when the property at the described premises should be repaired, rebuilt or replaced… at reasonable speed." (ECF No. 15-1, 40.) It is clear that the Business Income provision contemplates some sort of physical injury or damage to the property for coverage to apply. *See Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, 497 F. Supp. 3d 1203, 1213 (S.D. Ala. 2020); *see also Newman Myers Kreines Gross, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 332 (S.D.N.Y. 2014) ("The words 'repair' and 'replace' contemplate physical damage to the insured premises as opposed to loss of use of it.") (citations omitted). This is evident by the period of

restoration ending upon repair or replacement of the property—an occurrence that arises only after physical, tangible injury—or ending upon business resuming at a new *permanent* location, which would presumably occur if the previous property had been completely destroyed or so physically altered as to make it impractical to repair. Thus, Business Income coverage unambiguously requires physical injury to the property. In this case, there has been no period of restoration that was caused by a physical loss or any damage to the restaurant's premises on Beale. Therefore, this provision does not afford Plaintiff any relief. Similar conclusions have been reached by most courts addressing this issue. *See e.g.*, *KD Unlimited, Inc. v. Owners Ins. Co.*, No. 1:20-CV-2163-TWT, 2021 U.S. Dist. LEXIS 5926, at *9–10 (N.D. Ga. Jan. 5, 2021) (collecting cases).

The ultimate question before this Court is whether the mandated closure and capacity limitations constitute "direct physical loss" as required for coverage under the Policy. Covington cites *Toppers Salon & Health Spa, Inc. v. Travelers Property Casualty Co. of America*, 503 F. Supp. 3d 251 (E.D. Pa. 2020). In holding that a similar "business income" coverage provision did not apply, the *Toppers* court reasoned that "there must be some sort of physical damage to the property that can be the subject of a repair, rebuild, or replacement and "[t]he Covid-19 pandemic does not fall within that definition." *Id*. at 256–57. While physical *damage* is not required *per se*, it is clear from the Policy's language that some sort of physical loss that is subject to repair is required. Covington has provided recent case authority for its position that suspended non-emergency operations due to the COVID pandemic and the related government-imposed restrictions do not qualify as covered provisions for direct physical damage or loss business income and/or extra expense claims as a result of the business' suspension. (ECF No. 44-1 and ECF No. 44-2); *Oral Surgeons, PC v. Cincinnati Ins. Co*., No. 20-3211, 2021 U.S. App. LEXIS 19775 (8th Cir. April 14, 2021) and *Till Metro Entm't v. Covington Specialty Ins. Co*., No. 20-CV-255-GKF-

JF, 2021 US Dist. LEXIS 1119917 (N.D. Okl. June 28, 2021). Plaintiff argues that requiring some sort of structural loss for a claim to be covered by the Policy would render superfluous the disjunctive "or" within "direct physical loss of *or* damage to property." (ECF No. 32, 11)(*emphasis added*). The Court disagrees.

In arguing that Plaintiff did not suffer "direct physical loss," Covington also relies on *1210 McGavock Street Hospitality Partners, LLC v. Admiral Indemnity Co.*, No. 3:20-CV-694, 2020 WL 7641184 (M.D. Tenn. Dec. 23, 2020). *1210 McGavock Street* contained nearly identical claimed losses due to operational limitations caused by the COVID-19 pandemic and a nearly identical set of policy provisions. In granting the defendant's motion to dismiss, the court concluded that "[t]he plaintiff has certainly suffered economic loss, but it is unable to show that it has suffered 'direct physical loss *of* or damage *to*' the premises or property covered by the Policy." *Id*. at *8. Generally, courts do not allow purely economic losses to constitute direct physical loss or damage under a property insurance policy. *See also Oral Surgeons, PC. v. Cincinnati Ins. Co*., 2 F.4th 1141, 1144 (8th Cir. 2021)(*citing cases*) and Scott G. Johnson, *What Constitutes Physical Loss or Damage in a Property Insurance Policy?* 54 Tort Trial & Ins. Prac. L.J. 95 (2019) (citing *Simon Mktg. v. Gulf Ins. Co.*, 57 Cal. Rptr. 3d 49 (Ct. App. 2007); *J & J Pumps, Inc. v. Star Ins. Co.*, 795 F. Supp. 2d 1023, 1029 (E.D. Cal. 2011); *Lissauer v. Fireman's Fund Ins. Co.*, 459 F. App'x 67, 67–68 (2d Cir. 2012)). In *Universal Image Productions, Inc. v. Federal Insurance Co.*, 475 F. App'x 569 (6th Cir. 2012), the Sixth Circuit affirmed the Michigan district court's grant of summary judgment on the ground that a possible contamination of the building's HVAC system and consequential business interruption did not constitute "direct physical loss" within the meaning of a nearly-identical policy provision because the plaintiff "did not experience any form of 'tangible damage' to its insured property." *Id*. at 573. Plaintiff's argument is less persuasive

than those presented in *Universal* because here the cause of the business interruption was not unique to Plaintiff's specific property; all non-essential businesses were forced to close for preventative measures, not for repairs or restoration. In another case cited by Covington, the district court granted defendant's motion for judgment on the pleadings, ruling that plaintiff had failed to prove that COVID and the resulting closure orders constituted a direct physical loss of its property, a prerequisite for coverage under either the Business Income or Extra Expense provisions in a similar policy. *Till Metro Entertainment v. Covington Specialty Ins. Co*., No. 20-CV-255-GKF-JF, 2021 US Dist. LEXIS 119917 (N.D. Okl. June 28, 2021) (ECF No. 44-2).

It is clear that Plaintiff's business was negatively affected by the COVID-19 pandemic, which resulted in some loss. However, not every "loss of use" is a Covered Cause of Loss under the Policy. Plaintiff has failed to allege any direct tangible impact to the property itself that is not excluded by the Policy. It attempts to liken its losses to those that were afforded coverage in cases in other districts. The Court notes that the majority of courts addressing the insurance-related effects of COVID-19 have denied coverage.

Next, the Pathogen Exclusion in the Policy appears to preclude coverage for the COVID-19 virus. Plaintiff relies, in part, on *Studio 417, Inc. v. Cincinnati Insurance Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020), where the plaintiff alleged the likely presence of "viral fluid particles" on the premises, even though the insurance policy contained no exclusion related to viruses. *Id*. at 797, 802. The Court finds this authority unpersuasive, and notes that *Studio 417* appears to be an outlier that has received significant negative treatment. *See, e.g.*, *Zwillo V, Corp. v. Lexington Ins. Co.*, 504 F. Supp. 3d 1034, 1043 (W.D. Mo. 2020); *1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc.*, No. 2:20-CV-862, 2021 WL 147139 at *6 (W.D. Pa. Jan. 15, 2021) ("Rather, the growing body of case law rejects the contrived definition of 'direct physical loss of or damage to' that would provide

coverage for economic losses unrelated to physical impact to the covered structure."). Plaintiff cannot have it both ways; either the virus was not present within the actual premises and thus, there was no "direct physical loss" that affected the property itself; or the virus was indeed present as alleged in the Amended Complaint and therefore, precluded by the exclusions enumerated in the Policy. Regardless, Plaintiff has not alleged facts that support Business Income coverage under the Policy. If the "direct physical loss" allegedly is the presence of the virus itself, then no claim can stand; any loss caused by pathogenic materials, "directly or indirectly," is explicitly exempted from coverage by the Pathogen Exception. (ECF No. 15-1, 82.)

Neither has Plaintiff shifted the burden to Covington to show that an exclusion applies. Plaintiff speculates that COVID-19 was present on the premises without alleging facts of positive COVID-19 test results or contact tracing. "Such conclusory allegations are insufficient to state a plausible claim that Plaintiff['s] property was damaged." *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, No. 1:20-CV-665-RP, 2021 WL 972878 at *7 (W.D. Tex. Jan. 21, 2021). Plaintiff has not met its burden, and as such, the Court does not need to further discuss the Policy's exclusions.

Plaintiff and Covington both cite *Southeast Mental Health Center, Inc. v. Pacific Insurance Co.*, 439 F.Supp.2d 831 (W.D. Tenn. July 20, 2006), a case that appears to support Covington's interpretation of "direct physical loss." In that case, a storm hit the insured's clinic location. Nearby utility poles sustained damage, and as a result, the insured's clinic had no electricity or phone service for approximately two weeks. *Id.* at 833, 836. The plaintiff also alleged the clinic's computer lost data due to the power outage. *Id.* at 833. The lack of electricity and phone service resulted in lost business income for the plaintiff. *Id.* at 834. However, plaintiff's real property "did not suffer any physical damage as a result of the storm." *Id.* The all-risks insurance policy's

business income coverage form had language identical to the Policy in the case-at-bar. *Southeast Mental Health Center, Inc.*, 439 F.Supp.2d at 836. The court held that the loss of business income due to the power outage was not within the meaning of "direct physical loss of or damage to" the plaintiff's property because "the electrical and telephone outages were caused by damage to power and utility lines that were not located on Plaintiff's property." *Id.* at 837. The court, however, reached a different conclusion regarding loss of business income because of damage to the clinic's computer. *Id.* at 837–38. The court found that "corruption of the pharmacy computer" resulting from the power outage "constitute[d] 'direct physical loss of or damage to property' under the business interruption policy." *Id.* at 837. In this regard, the court held that "'physical damage' is not restricted to the physical destruction or harm of computer circuitry but includes loss of access, loss of use, and loss of functionality." *Id.* at 838 (quoting *Am. Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.*, 2000 WL 726789, at *2 (D. Ariz. 2000)). Notwithstanding, *Southeast Mental Health* does not support Plaintiff's argument. The court still required tangible injury as to the plaintiff's real property, and found no coverage given the lack of such. Another court in this Circuit has distinguished *Southeast Mental Health* on a similar basis, stating that "loss of functionality was considered to be physical damage only insofar as it related to a physical object located on the covered premises." *1210 McGavock St. Hospitality*, 2020 U.S. Dist. LEXIS 241668, at *27.

Ultimately, by providing no facts showing physical loss of or damage to property, Plaintiff has failed to plausibly allege a claim that is within the Policy's Business Income coverage. Accordingly, Count One of Plaintiff's Complaint is **DISMISSED** with prejudice.

Count Two of Plaintiff's Complaint asserts breach of contract based on Defendant's denial of Business Income Coverage. (ECF No. 15, 27 ¶¶ 95–103.) Under Tennessee law, a breach of contract claim requires a plaintiff to "prove the existence of a valid and enforceable contract, a

deficiency in the performance amounting to a breach, and damages caused by the breach." *Fed. Ins. Co. v. Winters*, 354 S.W.3d 287, 291 (Tenn. 2011) (citing *ARC LifeMed, Inc. v. AMC-Tenn., Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005)). Plaintiff has not alleged facts that bring a claim within the Policy's coverage terms. As a result, Plaintiff cannot plausibly allege that Defendant breached the insurance contract by denying Business Income coverage. *See Iqbal*, 556 U.S. at 678–79. Count Two of Plaintiff's Complaint is **DISMISSED** with prejudice.

III. Extra Expense Coverage

Count III of the Amended Complaint seeks declaratory judgment for Extra Expense coverage, and Count IV alleges breach of contract for Extra Expense coverage. (ECF No. 15, 28 ¶¶ 104–123.) The Policy states that "Extra Expense means necessary expenses you incur *during the 'period of restoration'* that you would not have incurred if there had been no direct physical loss or damage to property *caused by or resulting from a Covered Cause of Loss*." (ECF No. 15-1, 32) (*emphasis added*). Plaintiff argues that it was forced to pay incidental expenses relating to replacement of spoiled food, extra cleaning costs, installation of plexi-glass shields, and other remedial measures, and that these expenses are within the bounds of the Policy's Extra Expense coverage. (ECF No. 15 ¶ 55 and ECF No. 32, 8–9.) Covington primarily asserts that the Extra Expense coverage does not apply because the incurred expenses were not a result of a Covered Cause of Loss and do not constitute "direct physical loss." (*See* ECF No. 38 ¶ 6.)

Regarding the claim for "Extra Expense Coverage," Plaintiff's arguments are unpersuasive for reasons similar discussed above. The "period of restoration" language suggests that the type of loss suffered by Plaintiff is not within the scope of coverage. The effect of that language is not dispositive for coverage as a whole, again because the COVID-19 pandemic generally does not qualify as a "physical loss" requiring a repair, rebuild, or any replacement. Because Plaintiff's

losses do not constitute "direct physical loss," coverage is not provided for a claim under the Policy's Extra Expense clause." [4] *See Se. Mental Health Ctr., Inc.,* 439 F. Supp. 2d at 837–38; *1 S.A.N.T., Inc.*, 2021 WL 147139 at *6 and *Oral Surgeons, PC v. Cincinnati Ins. Co*., No. 20-3211, at *7–*8. Therefore, Plaintiff's claims for declaratory judgment and breach of contract regarding Extra Expense coverage under the Policy—Counts III and IV—must also be **DISMISSED** with prejudice.

IV. Civil Authority Coverage

Count V of the Amended Complaint seeks declaratory judgment for coverage under the Civil Authority provision, and Count VI alleges breach of contract for the Civil Authority provision. (ECF No. 15, 31–34 ¶¶ 124–143.) The Civil Authority provision states that "when a *Covered Cause of Loss* causes damage to property *other than property at the described premises*, [Covington] will pay for the actual loss of Business Income [Plaintiff] sustain[s] and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises. . . ." (ECF No. 15-1, 33) (*emphasis added*). Plaintiff argues that the provision applies because a series of actions by civil authority—the COVID-19 closure orders—directly led to its losses by prohibiting access to the insured premises. (ECF No. 32, 17.) Covington argues that the provision requires damage to a specific nearby property that leads civil authority to prohibit access to the described premises. The present case does not fall within the scope of this provision. (ECF No. 28-2.)

[4] Similarly, Plaintiff is not entitled to Spoilage Coverage for expired food because the loss is not a Covered Cause of Loss within Section Q(3) of the Coverage Enhancement Endorsement. (*See* ECF No. 15-1, 67.) That being said, Plaintiff cannot rely on food spoilage as its "direct physical loss" within the meaning of the rest of the Policy, for "specific clauses in insurance policies control general claims." *Crutchfield ex rel. Crutchfield v. Transamerica Occidental Life Ins. Co*., 894 F. Supp. 2d 971, 976 (W.D. Ky. 2012).

The Court agrees with Covington that Plaintiff has not alleged facts sufficient to support a claim for Civil Authority coverage. (ECF No. 44-2). The cases cited by Plaintiff in support of coverage are distinguishable. Plaintiff mentions *Sloan v. Phoenix of Hartford Insurance Co.*, 207 N.W.2d 434 (Mich. Ct. App. 1973). Notably, in *Sloan*, the curfew imposed by civil authority was in response to ongoing riots, a peril that was explicitly insured against. *Id*. at 437. Plaintiff also cites *Assurance Co. of Am. v. BBB Serv. Co.*, 593 S.E.2d 7 (Ga. Ct. App. 2003). There, the emergency shutdown orders were in response to a hurricane threat—a harm that threatened severe physical damage to the premises and within the bounds of coverage. In the present case, the COVID-19 closure orders were not taken in response to a harm covered by the Policy. *Oral Surgeons, PC v. Cincinnati Ins. Co*., No. 20-3211, at *7–*8; *Till Metro Entertainment*, 2021 US Dist. LEXIS 119917 at *10–*13.

The Civil Authority provision does not apply for two main reasons. First, the language of the provision strongly suggests that it does not insure against actions by civil authority in response to a pandemic or any event on a similarly worldwide and pervasive scale. For example, coverage under the provision is conditional on the insured property being "not more than one mile from the damaged property." (ECF No. 15-1, 33.) This provision contemplates only a suspension of operations due to a safety issue at a *specific* nearby property that renders the insured premises unsafe and warrants intervention by civil authority. *See 1210 McGavock St. Hosp. Partners, LLC*, 2020 WL 7641184 at *10 ("[T]he closure orders, which certainly constitute 'actions by civil authority,' were issued to control the spread of the coronavirus by limiting close human interaction, not because of 'dangerous physical conditions' at another location."). Second, it must be a Covered Cause of Loss suffered by the damaged property that leads civil authority to prohibit use of the insured premises *1210 McGavock St. Hosp. Partners, LLC*, 2020 WL 7641184 at *10. Again, the

COVID-19 closure orders alone are not a "direct physical loss" that creates a Covered Cause of Loss. *See Oral Surgeons, PC v. Cincinnati Ins. Co*., No. 20-3211, at *7–*8; *see also Till Metro Entm't v. Covington Specialty Ins. Co*., No. 20-CV-255-GKF-JF, 2021 U.S. LEXIS 1199917, at *24 (N.D. Okla. June 28, 2021). Thus, Plaintiff's claims for declaratory judgment and breach of contract relating to Civil Authority coverage—Counts V and VI—must also be **DISMISSED** with prejudice.

V. Covenant of Good Faith and Fair Dealing

Count VII alleges breach of the covenant of good faith and fair dealing. (ECF No. 15 ¶ 144–151.) Under Tennessee law, parties to any contract have a duty of good faith and fair dealing in the contract's performance. *German v. Ford*, 300 S.W.3d 692, 706 (Tenn. Ct. App. 2009). A claim for breach of the duty of good faith and fair dealing "is not a stand alone claim; rather, it is part of an overall breach of contract claim." *Jones v. LeMoyne Owen Coll.*, 308 S.W.3d 894, 908 (Tenn. Ct. App. 2009) (citing *Lyons v. Farmers Ins. Exch.*, 26 S.W.3d 888, 894 (Tenn. Ct. App. 2000)).

Because Plaintiff is not entitled to coverage under the Policy, the breach of contract claims are dismissed. In addition, Plaintiff's claim for breach of the covenant of good faith and fair dealing—Count VII—are not viable and must also be dismissed. *See Frisch v. Nationwide Mut. Ins. Co.*, 553 F. App'x 477, 483 (6th Cir. 2014); *see also Ike v. Quantum Serv. Corp.*, No. 11-02914, 2012 U.S. Dist. LEXIS 121422, at *14 (W.D. Tenn. Aug. 27, 2012) ("[A]bsent a valid claim for breach of contract, there is no cause of action for breach of implied covenant of good faith and fair dealing." (quoting *Envoy Corp. v. Quintiles Transnat'l Corp.*, No. 3:03cv0539, 2007 U.S. Dist. LEXIS 54429, at *8 (M.D. Tenn. July 26, 2007)). Accordingly, Count VII of the

Complaint is **DISMISSED** with prejudice. As a result, all counts of the Complaint have been dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Covington's Motion for Judgment on the Pleadings, ECF No. 28, is **GRANTED.** Accordingly, Plaintiff's Amended Complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED on this 9th day of September, 2021.

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
UNITED STATES DISTRICT COURT