

**IN THE DISTRICT COURT IN AND FOR CHEROKEE COUNTY
STATE OF OKLAHOMA**

CHEROKEE NATION,	)	
CHEROKEE NATION BUSINESS, LLC;	)	
CHEROKEE NATION ENTERTAINMENT, LLC.,	)	
	)	
PLAINTIFFS,	)	
	)	
v.	)	CASE No. CV-2020-150
	)	JUDGE DOUGLAS KIRKLEY
LEXINGTON INSURANCE COMPANY, ET AL.,	)	
	)	
DEFENDANTS.	)	

NOTICE OF SUPPLEMENTAL AUTHORITY

In addition to the authorities previously provided by Plaintiff and Defendants, Defendants¹ (collectively, the “Insurers”) submit this notice of supplemental authority to advise the Court of the following 41 orders granting dispositive motions in favor of defendant-insurers.

- September 11, 2020 Order of the U.S. District Court for the Northern District of California in *Mortar & Pestle Corp. v. Atain Specialty Insurance Company*, No. 20-cv-03461-MMC (N.D. Cal. Sept. 11, 2020), a copy of which is attached as Exhibit 1 hereto. The *Mortar & Pestle* Order granted Defendant’s motion to dismiss “for the reasons stated on the record at the hearing.” Ex. 1 at 1. The hearing transcript is attached hereto as Exhibit 1A. During the hearing, the Court acknowledged the nationwide “wave of cases” that have denied business interruption coverage because

¹ Lexington Insurance Company; Underwriters at Lloyd’s – Syndicates; ASC1414, XLC 2003, TAL 1183, MSP 318, AFL1861, KLN 510, AGR 3268; Underwriters at Lloyd’s – Syndicate: CNP 4444; Underwriters at Lloyd’s – Aspen Specialty Insurance Company; Underwriters at Lloyd’s Syndicates: KLN 0510, ATL 1861, ASC 1414, QBE 1886, MSP 0318, APL 1969, CHN 2015, XLC 2003; Underwriters at Lloyd’s – Syndicate BRT 2987; Underwriters at Lloyd’s –Syndicates: KLN 0510, TMK 1880, BRT 2987, BRT 2988, CNP 4444, ATL 1861, Neon Worldwide Property Consortium, AUW 0609, TAL 1183, AUL 1274; Homeland Insurance Company of NY (One Beacon); Hallmark Specialty Insurance Company; Endurance Worldwide Insurance Ltd t/as Sompo International; Arch Specialty Insurance Company; Evanston Insurance Company; Allied World National Assurance Company; Liberty Mutual Fire Insurance Company; XI Insurance America, Inc.; AXA/XL America, Inc.; Rsui-Landmark American Insurance Company; Chubb Bermuda International (Erroneously Sued As “Chubb Bermuda Ltd.”); and Underwriters at Lloyd’s London.

economic loss from a “shutdown during COVID” is not physical loss. *See* Ex. 1A at 15–17.

- September 14, 2020 Order of the U.S. District Court for the Northern District of California in *Mudpie, Inc. v. Travelers Casualty Insurance Company of America*, 2020 WL 5525171 (N.D. Cal. Sept. 14, 2020), a copy of which is attached as Exhibit 2 hereto. The *Mudpie* Order granted Defendant’s motion to dismiss. *See* Ex. 2 at *1. The Court explained that Plaintiff’s inability to operate and occupy its premises was not covered under the policy’s business income provisions as Plaintiff suffered neither direct physical loss nor damage without “permanent dispossession” and there was “nothing to fix, replace, or even disinfect for plaintiff to regain occupancy of its property”. *Id.* at *4.
- September 16, 2020 Order of the U.S. District Court for the Central District of California in *Plan Check Downtown III, LLC v. AmGuard Insurance Company, et al.*, 2020 WL 5742713 (C.D. Cal. Sept. 16, 2020), a copy of which is attached as Exhibit 3 hereto. The *Plan Check Downtown* Order dismissed Plaintiff’s complaint with prejudice after the court had tentatively granted Defendant’s motion to dismiss. *See* Ex. 3 at *1. That tentative ruling is attached as Exhibit 3A a hereto. *See* Ex. 3A at *4–5. The Court held that physical loss requires tangible alteration, and Plaintiff’s interpretation that the policy covered its inability to use its property “would be a sweeping expansion of insurance coverage without any manageable bounds.”
- September 21, 2020 Order of the U.S. District Court for the Northern District of Illinois in *Sandy Point Dental, P.C. v. The Cincinnati Insurance Company*, 2020 WL 5630465 (N.D. Ill. Sept. 21, 2020), a copy of which is attached as Exhibit 4 hereto. The *Sandy Point* Order granted Defendant’s motion to dismiss. *See* Ex. 4 at *1. The Court found that “Direct physical loss” “unambiguously requires some form of actual, physical damage” to the property, *id.* at *2; and coronavirus “does not physically alter the appearance, shape, color, structure, or other material dimension of the property” *id.* at *3.
- September 28, 2020 Order of the U.S. District Court for the Middle District of Florida in *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd’s London known as Syndicate PEM 4000 et al.*, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020), a copy of which is

attached as Exhibit 5 hereto. The *Infinity Exhibit* Order granted Defendant's motion to dismiss and dismissed Plaintiff's amended complaint with prejudice. The Court explained that "economic damage" resulting from "government orders and social distancing requirements" cannot constitute "physical loss," which requires "actual, concrete damage[.]" Ex. 5 at *1, *3.

- September 29, 2020 Order of the U.S. District Court for the Southern District of Iowa in *Oral Surgeons, P.C. v. The Cincinnati Insurance Company*, 2020 WL 5820552 (S.D. Iowa Sept. 29, 2020), a copy of which is attached as Exhibit 6 hereto. The *Oral Surgeons* Order granted Defendant's motion to dismiss and dismissed Plaintiff's complaint with prejudice. The Court explained that "virus-related closures of business do not amount to direct loss to property" and the "few contrary cases cited by [Plaintiff] are distinguishable on their facts and not as well analyzed as the many authorities cited by [Defendant][.]" Ex. 6 at *1.
- September 29, 2020 Order of the Illinois Circuit Court in *Its Nice, Inc., d/b/a Harold's Chicken Shack #83 v. State Farm Fire & Casualty Company*, No. 20 L 547 (Ill. Cir. Ct. Sept. 29, 2020), a copy of which is attached as Exhibit 7 hereto. The *Its Nice* Order granted Defendant's motion to dismiss and dismissed Plaintiff's complaint with prejudice "[f]or the reasons stated on the record." Ex. 7 at 1. The hearing transcript including those reasons is attached hereto as Exhibit 7A. During the hearing, the Court stated that physical loss was insufficiently pled as "plaintiff has not pled any facts showing physical alteration or structural degradation of the property, which is required to trigger coverage under this all risks policy." Ex. 7A at 27–31.
- October 1, 2020 Order of the U.S. District Court for the Southern District of California in *Pappy's Barber Shops Inc. et al. v. Farmers Group Inc. et al.*, 2020 WL 5847570 (S.D. Cal. Oct. 1, 2020), a copy of which is attached as Exhibit 8 hereto. The *Pappy's Barber Shops* Order granted Defendant's motion to dismiss and dismissed Plaintiff's complaint with prejudice. The Court explained that the presence of a virus cannot constitute direct physical loss of or damage to property; insureds' losses were caused by the Civil Authority Orders, which were "precautionary measures taken . . . to prevent the spread of COVID-19 in the future;" and the orders were not issued due to loss or damage to property. Ex. 8 at *1.

- October 2, 2020 Order of the U.S. District Court for the Central District of California in *Mark's Engine Co. No. 28 Restaurant LLC v. The Travelers Indemnity Company of Connecticut et al.*, 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020), a copy of which is attached as Exhibit 9 hereto. The *Mark's Engine* Order granted Defendant's motion to dismiss and dismissed Plaintiff's complaint with prejudice. The Court reasoned that physical loss or damage was insufficiently pled because "impaired use" cannot equate to "physical loss[.]" Ex. 9 at *1, *4.
- October 6, 2020 Order of the U.S. District Court for the Northern District of Georgia in *Henry's Louisiana Grill, Inc., et al. v. Allied Insurance Company of America*, 2020 WL 5938755 (N.D. Ga. Oct. 6, 2020), a copy of which is attached as Exhibit 10 hereto. The *Henry's Louisiana Grill* Order granted Defendant's motion to dismiss and denied Plaintiff's motion to certify questions of law to the Georgia Supreme Court. The Court reasoned that the insured's interpretation that suspension of operations due to a civil authority order represents a direct physical loss "exceeds any reasonable bounds," as such an interpretation would make an insurer liable for "negative effects of operational changes resulting from any regulation or executive decree, such as a reduction in a space's maximum capacity[.]" Ex. 10 at *1; *4–5.
- October 8, 2020 Order of the Circuit Court of the 16th Judicial Circuit for Monroe County, Florida in *Mace Marine, Inc. d/b/a Conch Republic Divers v. Tokio Marine Specialty Insurance Company*, No. 20-CA-120-P (Fla. Cir. Ct. Oct. 8, 2020), a copy of which is attached as Exhibit 11 hereto. The *Mace* Order granted Defendant's motion to dismiss. The Court reasoned that "'[d]irect' and 'physical' modify loss and impose the requirement that damage be actual[.]" Ex. 11 at 1.
- October 16, 2020 Order of the U.S. District Court for the District of Minnesota in *Seifert d/b/a The Hair Place, et al. v. IMT Insurance Company*, No. 20-cv-1102 (D. Minn. Oct. 16, 2020), a copy of which is attached as Exhibit 12 hereto. The *Seifert* Order granted Defendant's motion to dismiss. According to the Court, the insured's interpretation that economic loss constitutes direct physical loss failed to state a claim because "[a]ctual physical contamination of the insured property is still required. . . . Simply claiming 'mere loss of use or function' is not enough[.]" Ex. 12 at 7.

- October 19, 2020 Order of the U.S. District Court for the Central District of California in *Travelers Casualty Insurance Company of America v. Geragos and Geragos*, No. 2:20-cv-03619 (C.D. Cal. Oct. 19, 2020), a copy of which is attached as Exhibit 13 hereto. The *Travelers* Order granted Plaintiff and Counter-Defendant’s motion to dismiss, and dismissed Defendant and Counter-Claimant’s counterclaim without leave to amend. The Court explained that physical loss or damage requires a “distinct, demonstrable, physical alteration[.]” Ex. 13 at 1, 7.
- October 21, 2020 Order of the U.S. District Court for the Southern District of Alabama in *Hillcrest Optical, Inc. v. Continental Casualty Company*, No. 1:20-cv-275, ECF No. 34 (S.D. Ala. Oct. 21, 2020), a copy of which is attached as Exhibit 14 hereto. The *Hillcrest Optical* Order granted Defendant’s motion to dismiss and dismissed Plaintiff’s complaint with prejudice. As the Court explained, “direct physical loss of property” requires “tangible alteration” to property; “a ‘period of restoration’ can occur only by virtue of a repairable, rebuildable, or replaceable physical alteration of covered property[.]” Ex. 14 at 16–17.
- October 27, 2020 Order of the U.S. District Court for the Central District of California in *West Coast Hotel Management, LLC, et al. v. Berkshire Hathaway Guard Insurance Companies, et al.*, No. 2:20-cv-05663-VAP-DFMx, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020), a copy of which is attached as Exhibit 15 hereto. The *West Coast Management* Order granted Defendant’s motion to dismiss, and dismissed Plaintiff’s claims without leave to amend. Ex. 15 at *1, *7. In rejecting the Plaintiff’s contention that loss of use of property was sufficient to trigger coverage, the Court explained that “direct physical loss of or damage to property” “plainly requires, at a minimum, that the loss or damage be physical in nature,” as “the Policy contemplates a ‘period of restoration’ after such loss or damage during which property is ‘repaired, rebuilt, or replaced.’” *Id.* at *3.
- October 30, 2020 Order of the Superior Court of New Jersey in *FAFB LLC (d/b/a Salted Lime Bar & Kitchen) v. Blackboard Insurance Company*, No. Mer-L-000892-20 (N.J. Sup. Ct. Oct. 30, 2020), a copy of which is attached as Exhibit 16 hereto. The *FAFB* Order granted Defendant’s motion to dismiss “for the reasons placed on the record.” Ex. 16 at 1. The transcript of the Court’s decision is attached as Exhibit 16a

hereto. In its hearing, the Court explained that government orders “do not represent an external event that changed the insured property. Every physical element of the dining rooms, the floors, the ceilings, the plumbing, the HVAC, the tables, the chairs underwent no physical damage as a result of the order[.]” Ex. 16a at 7:2–7. The Court further explained that the “period of restoration” provision “expressly assumes repair, rebuild or replacement of property,” and “a reasonable insured would understand a repair to become necessary upon a tangible alteration of property and not in context of a Government order imposing use restrictions.” *Id.* at 7:13–24.

- November 2, 2020 Order of the U.S. District Court for the Southern District of West Virginia in *Uncork and Create LLC v. The Cincinnati Insurance Company et al.*, No. 2:20-cv-00401, 2020 WL 6436948 (S.D.W.V. Nov. 2, 2020), a copy of which is attached as Exhibit 17 hereto. The *Uncork and Create* Order granted Defendants’ motion to dismiss. *See* Ex. 17 at *1. The Court explained that “even when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property.” *Id.* at *5. The Court concluded: “In short, the pandemic impacts human health and human behavior, not physical structures. Those changes in behavior, including changes required by governmental action, caused the Plaintiff economic losses.” *Id.* (internal cites omitted).
- November 2, 2020 Order of the U.S. District Court for the Southern District of Florida in *Raymond H. Nahmad DDS PA et al. v. Hartford Casualty Insurance Company*, No. 1:20-cv-22833, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020), a copy of which is attached as Exhibit 18 hereto. The *Nahmad* Order granted Defendant’s motion to dismiss. *See* Ex. 18 at *1. The court rejected insured’s argument that “economic damages alone without any corresponding physical harms to the Covered Property” constitute a “direct physical loss[.]” *Id.* at *6.
- November 4, 2020 Order of the U.S. District Court for the Southern District of Mississippi in *Real Hospitality, LLC d/b/a Ed's Burger Joint v. Travelers Casualty Insurance Company of America*, 2:20-cv-00087-KS-MTP, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020), a copy of which is attached as Exhibit 19 hereto. The *Real*

Hospitality Order granted Defendant’s motion to dismiss. *See* Ex. 19 at *1. The Court explained: “Despite the disjunctive phrasing, with the modifying adjectives, the phrases are ‘direct physical loss of property’ or ‘damage to property.’ Either way, ‘property’ is involved. The property is either physically lost, *i.e.*, the insured suffers a permanent dispossession of the property, or it is damaged. After all, it is a commercial ‘property’ policy. As Travelers readily acknowledges, a theft would be a direct physical loss of property, and while a fire typical involves direct physical damage, it can also cause a total loss of property. The Court agrees with this common-sense approach to the wording.” *Id.* at *5. The Court concluded: “[T]his is a commercial property policy, not a stand-alone business interruption policy—Plaintiff’s operations are not what is insured—the building and the personal property in or on the building are.” *Id.* at *8.

- November 5, 2020 Order of the Camden County Superior Court of New Jersey, in *Mac Property Group LLC & The Cake Boutique, LLC v. Selective Fire and Casualty Insurance Company et al.*, No. L-2629-20 (N.J. Sup. Ct. Nov. 5, 2020), a copy of which is attached as Exhibit 20 hereto. The *Mac Property* Order granted Defendant’s motion to dismiss and dismissed Plaintiff’s claims with prejudice. The Court explained: “Plaintiff points to no direct physical loss or damage to covered property. There is no direct physical loss or damage to property which resulted in the order of civil authority. The direct physical damage to the electrical grid present in *Wakefern Food Corp.* is absent in this case.” Ex. 20 at 17, 16.
- November 6, 2020 Order of the U.S. District Court for the Eastern District of Pennsylvania in *Brian Handel D.M.D., P.C. v. Allstate Insurance Co.*, No. 20-3198, 2020 WL 6545893 (E.D. Pa. Nov. 6, 2020), a copy of which is attached as Exhibit 21 hereto. The *Handel* Order granted Defendant’s motion to dismiss. *See* Ex. 21 at *3–4. The Court explained that Plaintiff’s property was still “inhabitable and usable, albeit in limited ways” as a result of the closure orders that denied access to property for non-emergent dental procedures, and “‘direct physical loss of or damage to’ the property means that the functionality of the property ‘was nearly eliminated or destroyed’ or the ‘property was made useless or uninhabitable’” *Id.* (internal citation omitted).

- November 9, 2020 Order of the U.S. District Court for the Northern District of California in *Water Sports Kauai, Inc. v. Fireman's Fund Insurance Company et al.*, No. 20-cv-03750-WHO, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020), a copy of which is attached as Exhibit 22 hereto. The *Water Sports* Order granted Defendant's motion to dismiss and dismissed Plaintiff's claims with limited leave to amend. *See* Ex. 22 at *1, *3–4, *7. The Court explained: "I will follow the overwhelming majority of courts that have determined that the mere threat of coronavirus cannot cause a 'direct physical loss of or damage' covered property," and "there must be sufficient evidence of the presence of the contaminant at the property plus an imminent threat from it[.]" *Id.* at *3. Additionally, the Court found that "[t]he period of restoration provisions . . . likewise support a conclusion that there has been no covered disposition or 'loss' of property because [the insured] identifies nothing it needs to fix or replace at any of its properties." *Id.* at *6.
- November 9, 2020 Order of the County of Los Angeles Superior Court of California in *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Insurance USA INC., et al.*, No. 20STCV16681 (Cal. Sup. Ct. Nov. 9, 2020), a copy of which is attached as Exhibit 23 hereto. The *Musso* Order sustained Defendant's demurrer without leave to amend. *See* Ex. 23 at 1. The Court explained: "To the extent Plaintiff argues the term 'direct physical loss' must be read broadly to extend to coverage for when property is seized or rendered unusable for its intended purposes, regardless of whether the property itself is damaged, this argument is belied by the terms of the Policy itself, which directly reference physical damage. Specifically, Defendant cites to the Policy's 'period of restoration' during which business interruption losses are payable by reference to the date 'when the property . . . should be repaired, rebuilt, or replaced' as demonstrating that 'physical' refers to damage to or loss of the property itself, not a policy-holder's use of the property." *Id.* at 5.
- November 10, 2020 Order of the Hillsborough County Circuit Court of Florida in *Dab Dental PPLC d/b/a Sunshine Dentistry et al. v. Main Street America Protection Insurance Company*, No. 20-CA-5504 (Fla. Cir. Ct. Nov. 10, 2020), a copy of which is attached as Exhibit 24 hereto. The *Dab Dental* Order granted Defendant's motion to dismiss and dismissed Plaintiff's complaint with prejudice. *See* Ex. 24 at 9. The Court

- explained: “This Court is sympathetic to the plight of so many business owners in the wake of the COVID-19 pandemic. Yet, this Court cannot allow sympathy to cloud its review of the plain meaning of an insurance policy. Here, the Policy does not provide for coverage of the alleged economic losses resulting from the COVID-19 pandemic.” *Id.* at 4. Indeed, “the mere presence of COVID-19 on business premises does not constitute a direct physical loss of or damage to property.” *Id.* at 5.
- November 10, 2020 Order of the Hillsborough County Circuit Court of Florida in *Dime Fitness, LLC DBA: Anytime Fitness v. Markel Insurance Company*, No. 20-CA-5476 (Fla. Cir. Ct. Nov. 10, 2020), a copy of which is attached as Exhibit 25 hereto. The *Dime Fitness* Order granted Defendant’s motion to dismiss and dismissed Plaintiff’s complaint with prejudice. *See* Ex. 25 at 8. The Court found that pure economic loss did not meet the definition of a “direct physical loss,” and that “[i]nsurance companies cannot bear the burden of this crisis where, as here, the Policy does not provide for coverage of purely economic losses resulting from the COVID-19 pandemic.” *Id.* at 3.
 - November 12, 2020 Order of the United States District Court for the Central District of California in *Long Affair Carpet and Rug, Inv. d/b/a Universal Carpet and LA Carpet v. Liberty Mutual Insurance Company et al.*, No. 8:20-cv-01713-CJC-JDE (C.D. Cal. Nov. 12, 2020), a copy of which is attached as Exhibit 26 hereto. The *Long Affair Carpet* Order granted Defendant’s motion to dismiss. *See* Ex. 26 at 2. The Court held that “Plaintiff plausibly alleges only that California’s COVID-19 restrictions interfered with the use or value of its property, not that the restrictions caused direct physical loss or damage.” *Id.* at 5.
 - November 19, 2020 Order of the United States District Court for the Northern District of Illinois in *T&E Chicago, LLC v. The Cincinnati Insurance Company*, No. 1:20-cv-04001 (N.D. Ill. Nov. 19, 2020), a copy of which is attached as Exhibit 27 hereto. The *T&E* Order granted Defendant’s motion to dismiss. *See* Ex. 27 at 1. The Court explained: “The Court agrees with the courts that have found that loss of use of property without any physical change to that property cannot constitute direct physical loss or damage to the property. The policy’s use of ‘loss to’ versus ‘loss of’ phrasing supports this conclusion. In addition, the provision of coverage for a ‘period of restoration,’

- clearly implies a requirement of loss to property rather than loss of property.” *Id.* at 11 (internal citations omitted).
- November 30, 2020 Order of the United States District Court for the Western District of Missouri in *BBMS, LLC d/b/a All A'Bloom v. Continental Casualty Co.*, No. 4:20-cv-353 (W.D. Mo. Nov. 30, 2020), a copy of which is attached as Exhibit 28 hereto. The *BBMS* Order granted Defendant’s motion to dismiss. *See* Ex. 28 at 12. The Court explained: “the existence of COVID-19 [and stay-at-home orders] do not constitute ‘direct physical loss of or damage to’ business premises.” *Id.* The Court also explained that although the phrase “direct physical loss” was not defined by the policy at issue, that “does not mean, however, that the phrase has been interpreted to mean that policies employing that language provide coverage for any event that causes a suspension of business operations and a resulting loss of business income.” *Id.* at 6.
 - November 30, 2020 Order of the United States District Court for the Eastern District of Pennsylvania in *Toppers Salon & Health Spa, Inc. v. Travelers Property Casualty Company of America*, No. 2:20-cv-03342-JDW (E.D. Pa. Nov. 30, 2020), a copy of which is attached as Exhibit 29 hereto. The *Toppers* Order granted Defendant’s motion for judgment on the pleadings. *See* Ex. 29 at 1. The Court explained: “These [period of restoration] provisions make clear that there must be some sort of physical damage to the property that can be the subject of a repair, rebuilding, or replacement. The Covid-19 pandemic does not fall within that definition. [¶] Toppers admits that it will never trigger the end point for the period of restoration. It claims that fact demonstrates only that Travelers cannot prematurely end its coverage. But Toppers’ argument misses the point. The parties’ agreement to measure the period of restoration against the time it takes to repair the premises indicates that they intended the Policy to cover losses for physical damage, and that intent controls the Court’s interpretation of the Policy.” *Id.* at 7 (internal citation omitted).
 - November 30, 2020 Order of the United States District Court for the Southern District of Iowa in *Whiskey River on Vintage, Inc., et al. v. Illinois Casualty Company*, No. 4:20-cv-185 (S.D. Iowa, Nov. 30, 2020), a copy of which is attached as Exhibit 30 hereto. The *Whiskey River* Order granted Defendant’s motion for judgment on the pleadings. *See* Ex. 30 at 1. The Court explained: “While a loss of use may, in some

cases, entail a physical loss, the Court does not find ‘loss of use’ and ‘physical loss or damage’ synonymous. Indeed, interpretation of physical loss as requiring only loss of use stretches ‘physical’ beyond its ordinary meaning and may, in some cases ‘render the word ‘physical’ meaningless.’” *Id.* at 14 (internal citations omitted). “Although Plaintiffs attempt to paint their losses as physical, they have essentially pleaded loss of use, which is insufficient to establish a direct physical loss.” *Id.* at 15.

- December 2, 2020 Order of the United States District Court for the Western District of Missouri in *Zwillo V, Corp. v. Lexington Insurance Co.*, No. 4:20-00339-CV-RK (W.D. Mo. Dec. 2, 2020), a copy of which is attached as Exhibit 31 hereto. The *Zwillo* Order granted Defendant’s motion to dismiss. *See* Ex. 31 at 1. The Court explained: “[T]he words ‘direct’ and ‘physical,’ which modify the words ‘loss’ and ‘damage’ relay actual, demonstrable loss of or harm to some portion of the premises itself. Plaintiff’s allegations concerning the impact of the COVID-19 virus and stay-at-home orders do not plausibly allege ‘direct physical loss of or damage to’ property. In short, the Court agrees with Defendant that ‘direct physical loss of or damage to property’ requires physical alteration of property, or, put another way, a tangible impact that physically alters property.” *Id.* at 5–6.
- December 3, 2020 Order of the United States District Court for the Eastern District of Pennsylvania in *4431, Inc., et al. v. Cincinnati Insurance Companies, et al.*, No. 5:20-cv-04396-JFL (E.D. Pa. Dec. 3, 2020), a copy of which is attached as Exhibit 32 hereto. The *4431* Order granted Defendant’s motion to dismiss with prejudice. *See* Ex. 32 at 1. The Court “disagree[d] that ‘physical loss’ is synonymous with ‘loss of use of [] property’ [] alone—that is, loss having not arise as a result of a tangible physical condition of or on the premises.” *Id.* at 19, n.15 (internal citations omitted). The Court further explained that “the issue of exclusion is irrelevant as Plaintiffs’ claims do not fall within the scope of the Policies’ coverage.” *Id.* at 23, n.18.
- December 3, 2020 Order of the United States District Court for the District of Kansas in *Promotional Headwear International v. The Cincinnati Insurance Company*, No. 2:20-cv-02211-JAR-GEB (D. Kan. Dec. 3, 2020), a copy of which is attached as Exhibit 33 hereto. The *Promotional Headwear* Order granted Defendant’s motion to dismiss with prejudice. *See* Ex. 33 at 1. The Court explained: “[P]hysical damage’ in

- an insurance policy is widely accepted to mean ‘physical alteration.’” *Id.* at 10. “The presence of the words ‘direct’ and ‘physical’ limit the words ‘loss’ and ‘damage’ and unambiguously require that the loss be directly tied to a material alteration to the property itself, or an intrusion onto the property.” *Id.* at 15, n.61 (“[I]f there is no coverage, there is no reason to consider whether an exclusion applies.”). “While COVID-19 and the Stay at Home Orders temporarily prevented employees and customers gathering at Plaintiff’s property, there are no allegations of a material change or intrusion on the property itself that rendered it unusable. And there are no allegations demonstrating permanent dispossession.” *Id.* at 16.
- December 7, 2020 Order of the United States District Court for the Southern District of Florida in *El Novillo Restaurant, et al. v. Certain Underwriters at Lloyd’s, London et al.*, No. 1:20-cv-21525 (S.D. Fla. Dec. 7, 2020), a copy of which is attached as Exhibit 34 hereto. The *El Novillo* Order granted Defendant’s motion to dismiss with prejudice. *See* Ex. 34 at 13. The Court rejected plaintiffs’ argument that “direct physical loss” covered “nonstructural losses” and held that plaintiffs failed to “alleg[e] that [their] properties sustained any physical damage.” *Id.* at 8, 11. The Court also explained that “Plaintiffs’ reliance on the Policies’ exclusionary provisions must be rejected as a means to establish coverage in the first instance.” *Id.* at 7.
 - December 9, 2020 Order of the United States District Court for the Northern District of California in *Robert W. Fountain, Inc., et al. v. Citizens Insurance Company of America*, No. 3:20-cv-05441-CRB (N.D. Cal. Dec. 9, 2020), a copy of which is attached as Exhibit 35 hereto. The *Fountain* Order granted Defendant’s motion for judgment on the pleadings with prejudice. *See* Ex. 35 at 9. The Court explained: “Business losses resulting from the temporary inability to access an unharmed property are not ‘direct physical loss of or damage to’ property. They are quite obviously not ‘damage to property’ given the plain meaning of those words. But neither are they ‘direct physical loss of’ property.” *Id.* at 5.
 - December 9, 2020 Order of the United States District Court of the Southern District of Iowa in *Palmer Holdings and Investments, Inc., et al. v. Integrity Insurance Co., et al.*, No. 4:20-cv-00154-JAJ-HCA (S.D. Iowa Dec. 7, 2020), a copy of which is attached as Exhibit 36 hereto. The *Palmer* Order granted Defendants’ motion to dismiss. *See* Ex.

36 at 1. The Court explained: “the phrase ‘direct physical loss of or damage to property’ requires a physical invasion and loss of use is insufficient to trigger coverage without physical damage to the insured properties.” *Id.* at 15. The Court also explained that “[e]ven if loss and damage are distinct, the physicality requirement of the loss or damage remains, and Plaintiffs have failed to allege a tangible loss or alteration to property that is sufficient to trigger coverage under the Business Income Provision.” *Id.*

- December 11, 2020 Order of the United States District Court for the Southern District of New York in *Michael Cetta, Inc. d/b/a Sparks Steak House v. Admiral Indemnity Co.*, No. 20-CV-4612 (S.D.N.Y. Dec. 11, 2020), a copy of which is attached as Exhibit 37 hereto. The *Cetta* Order granted Defendant’s motion to dismiss. The Court explained: “the reading that ‘gives effect to all provisions of the Policy’ is that ‘direct physical loss or damage’ requires ‘actual, physical damage to the insured premises.’” Ex. 37 at 13, 14 (rejecting insured’s argument that “loss of use” is covered because it would render the “‘period of restoration’ provision meaningless”). “The idea that ‘loss of use’ does not constitute a ‘direct physical loss of or damage to’ property resonates in ordinary experience outside the context of insurance coverage. Say, for example, a teenager broke curfew, and his parents punished him by taking away the keys to his car. The teen undoubtedly lost the ability to use the car. However, we would not say that there had been a ‘direct physical loss of or damage to’ the car. The teenager was precluded from driving it. But the car’s physical condition remained unchanged, and its presence likely remained at the residence.” *Id.* at 12.
- December 11, 2020 Order of the Circuit Court of the 20th Judicial Circuit for Lee County, Florida in *Catlin Dental, P.A. v. The Cincinnati Indemnity Company*, No. 20-CA-004555 (Fla. Cir. Ct. Dec. 11, 2020), a copy of which is attached as Exhibit 38 hereto. The *Catlin* Order granted Defendant’s motion to dismiss and dismissed Plaintiff’s complaint without leave to amend. Ex. 38 at 1. The Court explained: “Insurance companies cannot bear the burden of this crisis where, as here, the Policy does not provide coverage for purely economic losses resulting from the COVID-19 pandemic.” *Id.* at 6. The Court also explained that “there needs to be a distinct demonstrable, physical alteration of the structural integrity of the property in order to

have direct physical loss or damage to the property. Airborne particles and the mere presence of a virus in the community do not constitute direct physical loss to the property.” *Id.* at 8. Further, the Court found that “[t]he Coronavirus does not physically alter the appearance, shape, color, structure or other material dimension of property. Even if [Plaintiff] had alleged the virus to be present at the Insured Premises, this would be insufficient.” *Id.* at 10

- December 14, 2020 Opinion of the United States District Court for the District of New Jersey in *Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co.*, No. 20-11771 (D.N.J. Dec. 14, 2020), a copy of which is attached as Exhibit 39 hereto. The *Boulevard* Order granted Defendant's motion to dismiss. The Court explained: "The Policy unambiguously limits its coverage to physical loss or damage to Plaintiff's commercial property. Each of the coverage provisions Plaintiff relies on specifically require 'direct physical loss or damage' to trigger the Policy. Here, Plaintiff has not alleged any facts that support a showing that its property was physically damaged." Ex. 39 at 3 (internal citations omitted).
- December 14, 2020 Opinion of the United States District Court for the Eastern District of Michigan in *Richard Kirsch, DDS v. Aspen American Insurance Company*, No. 3:20-cv-11930-RHC-DRG (E.D. Mich. Dec. 14, 2020), a copy of which is attached as Exhibit 40 hereto. The *Kirsch* Order granted Defendant's motion to dismiss and dismissed Plaintiff's complaint with prejudice. Ex. 40 at 15. The Court explained: "Like other viruses, COVID-19 injures people but does not seem to cause any lasting damage to physical property. Because Plaintiff's claim, as pled, alleges only a temporary loss of use of Plaintiff's property, the tangibility requirement implicit in the policy forecloses a claim under the practice income provision." *Id.* at 11–12.
- December 15, 2020 Opinion of the United States District Court for the Southern District of New York in *10012 Holding, Inc. d/b/a Guy Hepner v. Sentinel Insurance Company, Ltd.*, No. 1:20-cv-04471-LGS (S.D.N.Y. Dec. 15, 2020), a copy of which is attached as Exhibit 41 hereto. The *Hepner* Order granted Defendant's motion to dismiss with prejudice. Ex. 41 at 9. The Court explained: "Nothing in the Complaint plausibly supports an inference that COVID-19 and the resulting Civil Orders physically damaged Plaintiff's property, regardless of how the public health response

to the virus may have affected business conditions for Plaintiff. The Complaint does not state a claim for ‘loss’ of the insured property.” *Id.* at 5. The Court also found Plaintiff’s argument that “the Policy is an all-risk policy” to be “unpersuasive because . . . the Policy’s plain language unambiguously does not cover business lost due to the Civil Orders.” *Id.* at 7 (internal citation omitted).

The weight of these additional authorities not only supports the arguments in Lexington’s Opposition to Plaintiff’s Motion for Partial Summary Judgment on Business Interruption Insurance, but also entitles the Insurers to summary judgment in their favor.

Respectfully submitted,

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By:



Phil R. Richards, OBA #10457

*(signed by filing attorney with consent of all
Defendants)*

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December 2020, a true and correct copy of the above and foregoing instrument was served via email to the following:

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MORTAR AND PESTLE CORP.,

Plaintiff,

v.

ATAIN SPECIALTY INSURANCE
COMPANY,

Defendant.

Case No. [20-cv-03461-MMC](#)

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS; DISMISSING
COMPLAINT WITH LEAVE TO
AMEND**

Before the Court is defendant Atain Specialty Insurance Company's ("Atain") "Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(6)," filed August 4, 2020. Plaintiff Mortar and Pestle Corp. d/b/a Olea Restaurant ("Mortar and Pestle") has filed opposition, to which Atain has replied. The matter came on regularly for hearing on September 11, 2020. GailAnn Y. Stargardter of Mokri Vanis & Jones, LLP, appeared on behalf of Atain; Arnold Levin of Levin Sedran & Berman LLP appeared on behalf of Mortar and Pestle.

The Court, having considered the parties' respective written submissions as well as the arguments of counsel at the hearing, finds, for the reasons stated on the record at the hearing, Mortar and Pestle has not plausibly alleged a covered loss under the subject policy.

Accordingly, the Motion to Dismiss is hereby GRANTED, and Mortar and Pestle is hereby afforded leave to file, no later than October 23, 2020, its First Amended Complaint.

IT IS SO ORDERED.

Dated: September 11, 2020


MAXINE M. CHESNEY
United States District Judge

EXHIBIT 1A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MAXINE M. CHESNEY, JUDGE

MORTAR AND PESTLE CORP. d/b/a)
OLEA RESTAURANT,)

Plaintiff,)

VS.)

No. C 20-3461 MMC

ATAIN SPECIALTY INSURANCE)
COMPANY a/k/a ATAIN INSURANCE)
COMPANY,)

Defendant.)

San Francisco, California
Friday, September 11, 2020

TRANSCRIPT OF VIDEOCONFERENCE PROCEEDINGS

APPEARANCES: (via Zoom Video Conferencing)

For Plaintiff:

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Reported By: Katherine Powell Sullivan, CSR #5812, CRR, RMR
Official Reporter - U.S. District Court

Friday - September 11, 2020

9:01 a.m.

P R O C E E D I N G S

THE COURT: Well, we're proceeding by a Zoom hearing process. I'm not in the courtroom, actually. This is a virtual background. And if I move around and it starts to blur, I may just switch out of this background because some of handmade virtual backgrounds do weird things.

All right. So we're proceeding now in the hearing of Mortar and Pestle Corp. dba -- is it pronounced Olea? Is it pronounced Olea or Olea?

MR. LEVIN: I pronounce it Olea.

THE COURT: Very good.

MR. LEVIN: That's my understanding, Your Honor.

THE COURT: All right. So Mortar and Pestle Corp. dba Olea, which is a restaurant, versus Atain Specialty Insurance Company. I'd like counsel to state their appearances for the record, please, starting with plaintiff's counsel.

MR. LEVIN: Daniel Levin, of Levin Sedran & Berman, for plaintiff.

THE COURT: Thank you. And for the defendant.

MS. STARGARDTER: Good morning, Your Honor. Gail Stargardter for Atain Specialty Insurance Company.

THE COURT: Thank you very much.

We have a reporter, Ms. Sullivan. And, also, I believe that my courtroom deputy clerk is participating. She said her

1 video didn't work, but I don't see anything indicating she's
2 here at all. Ms. Geiger, can you hear me?

3 **THE CLERK:** Yes, I can, Your Honor.

4 **THE COURT:** Oh, I see. You're a large court seal.

5 **THE CLERK:** Yes.

6 **THE COURT:** All right. Fine. Thank you very much.

7 Okay. So we're going to proceed. Why am I having the
8 hearing, particularly when it's difficult to do this?

9 I think this is -- I just want to say at the beginning,
10 Mr. Levin, it's a hard argument for the plaintiff, given the
11 particular policy language here, but I very much recognize the
12 difficulties that have been heaped on businesses during the
13 COVID pandemic, particularly small businesses, restaurants in
14 great part. Olea is a small restaurant.

15 I want to make sure that I have everything in front of me
16 so that whichever way I go on this there's not a question in my
17 mind that anybody left anything out either for the plaintiff's
18 standpoint or the defendant's.

19 There's been quite a bit of litigation already around the
20 country, as you both know, concerning this particular subject.
21 It is a matter of real concern to a lot of people.

22 So I guess I could just go through, first of all, the
23 papers that I have from you. I want to make sure that I'm not
24 missing anything. I have the defendant's motion to dismiss. I
25 have the plaintiff's response, which is in opposition. I have

1 the reply. I also have a Statement of Recent Decision from the
2 defendant, that was from Judge Wilson out of the Central
3 District of California.

4 And there's a request for judicial notice. To my
5 understanding that is not opposed in any way, but I did want to
6 just confirm that with you, Mr. Levin.

7 **MR. LEVIN:** That is Correct, Your Honor.

8 **THE COURT:** Okay. Thank you.

9 And then I have a couple of proposed orders because the
10 Local Rules required you to give them to me. So I have one
11 from the plaintiff that basically says sorry, you lose. Then I
12 have one from the defendant that says more than, sorry, we win.
13 But when you get right down to it, after you get through all
14 the background facts, essentially the conclusion is you're not
15 covered, we win; and even if you were covered, you're excluded
16 after we get through with the policy.

17 So that's where we are. I'm -- I'm familiar with the
18 language that we have here. I was wondering, Mr. Levin, is
19 there anything you can add to it, at this time, that you didn't
20 have when you filed the complaint initially?

21 **MR. LEVIN:** Any additional information?

22 **THE COURT:** Yeah, any new facts or anything that you
23 could plead legitimately under Rule 11.

24 **MR. LEVIN:** Your Honor, if Your Honor does not believe
25 that we pleaded physical damage, we would request permission to

1 add additional allegations that would, in our opinion,
2 demonstrate physical damage or loss under the policy that would
3 trigger coverage. And if I could --

4 **THE COURT:** Keep going.

5 **MR. LEVIN:** Part of our damage is that the virus is a
6 physical substance that we all know, from orders throughout
7 this country, can contaminate a property and expose individuals
8 to risk of serious injury. That contamination to the property,
9 we believe, causes physical damage to the property by not
10 allowing the insured to operate that property for its intended
11 purpose.

12 It would be similar to a circumstance where if you had a
13 portion of your building damaged. That doesn't mean -- maybe
14 you can enter the basement and work in the basement. But when
15 a physical -- there's physical damage to part of the building,
16 that would trigger damages, physical loss or use under the
17 policy.

18 We believe, as a result of the pandemic, that the virus is
19 causing physical damage. It is a substance -- I'm not a
20 scientist, but it has molecules, it is a substance that
21 contaminates the property and causes damage to that property in
22 a way that allows -- doesn't allow the restaurant owner to use
23 that property for its intended purpose. It can't be used.
24 It's not safe to be used. And we believe that is a physical
25 damage under the policy.

1 **THE COURT:** Well, is that the kind of language you
2 would plan to add, or would there be any, I don't know, unique
3 facts pertaining to this particular restaurant?

4 **MR. LEVIN:** That would be the type of language, Your
5 Honor, that we would add.

6 **THE COURT:** Okay. All right. More descriptive of
7 what the coronavirus is that you may not have put in the
8 complaint itself.

9 **MR. LEVIN:** Correct, Your Honor.

10 **THE COURT:** Okay. Let's go over this a little bit and
11 see. The operative language, as I understand it in the policy,
12 is that the company will pay for direct physical loss of or
13 damage to covered property.

14 And then there's an endorsement that has an exclusion for
15 fungi, spores, bacteria or viruses. That's very broadly
16 worded. It goes on at great length in an effort to cover all,
17 I guess, at least to the insurance company, imaginable ways
18 that somebody could plead a claim based on a virus or spores or
19 bacteria.

20 A couple of points. The fact that a term isn't defined in
21 the policy, as I understand it under the law in California,
22 doesn't mean it's ambiguous. And if it has been construed by
23 an Appellate Court in California, that's ordinarily deemed to
24 clear up any potential arguable ambiguity.

25 In that regard, the defendant is relying on *MRI*, a case

1 involving, not surprisingly, an MRI. So *MRI Healthcare Versus*
2 *State Farm*. It's about a 10-year-old case. To my knowledge,
3 it has not been in any way reversed, distinguished in a way
4 that would affect us in any fashion. It's been followed.

5 I think the defendant pointed out a Court in Florida.
6 This Court ended up following it fairly recently. But, in any
7 event, that court had held -- I'll just quote them, There must
8 be a distinct demonstrable physical alteration of the policy,
9 closed quote. And they also said, essentially, that it has to
10 be, quote, damaged within the common understanding of that
11 term.

12 So in that case there was an MRI machine and there was
13 some kind of leaking or whatever above. And they turned it
14 off, and when they tried to turn it on again it wouldn't work.
15 They said, okay, that's a physical loss. And the Court said
16 no.

17 Now, the plaintiff has given us a number of cases.
18 Mr. Levin, you gave us *Armstrong World Industries*. The
19 *Studio 417* I'll get back to in a minute. *In re Chinese*
20 *Manufactured Drywall, Western Fire Insurance*. So a number of
21 cases that have, at least one could say, appeared to have
22 expanded a little bit the idea that something doesn't have to
23 just burn down or be drenched in water to the point it can't be
24 used but, rather, that the injury could be a little bit more
25 broadly interpreted under language like we have here. Either

1 exactly the same or not materially different.

2 So how about these asbestos fibers? They were embedded in
3 the property. And to make that property usable again you had
4 to pull it out because they were -- apparently, the asbestos
5 material was causing fibers to get into the building, so it was
6 uninhabitable.

7 And then there was -- I think the broadest one is where
8 the land eroded under the house, so the house looked pretty
9 good but it could fall down at any moment. So that one still
10 was found to be within coverage.

11 Then you had the drywall that was releasing gas and made
12 the place uninhabitable. And they said, okay, that's a
13 physical loss.

14 Gasoline that leaked under the church, the Presbyterian
15 church. And apparently, though, the Court had said there
16 wasn't a direct physical loss until that gasoline had actually
17 infiltrated and contaminated the foundation and the walls in
18 the rooms, not that it was just kind of sitting under it
19 quiescently.

20 So if you were trying to analogize our case to those
21 cases, where's the physical intrusion, so to speak, that we
22 have here, Mr. Levin?

23 **MR. LEVIN:** Well, we believe the virus is in the
24 building. And we would plead that. And we would respectfully
25 request, Your Honor, the opportunity to present a record of

1 that, present evidence.

2 And that's one of our arguments in our brief, is that it's
3 premature, at this moment, to dismiss our claim as not
4 triggering coverage based on the statements by defendant that
5 there's no physical damage when the Court didn't -- does not
6 have a record, as those other cases did, where the plaintiff
7 either met that burden or did not meet that burden.

8 We would respectfully request the opportunity to develop a
9 record that the virus is -- this pandemic is causing
10 contamination to the property, which would trigger coverage for
11 physical damage.

12 And a lot of these cases -- and we cite to
13 (unintelligible) insurance -- there's a distinction of the
14 fortuitous event of this. The plaintiff, unlike in the *MRI*,
15 did not bring that product into the building and -- and that
16 would cause the damage. This is something that was not brought
17 in by plaintiff. It's much like the gasoline or the -- it's
18 the contamination is the fortuitous event.

19 And we believe, given the opportunity, we can through
20 expert testimony and a record identify and demonstrate physical
21 loss which would trigger coverage under the policy.

22 **THE COURT:** Okay. The one case that you have that's
23 directly on point, if you will, would be *Studio 417 versus*
24 *Cincinnati Insurance*. That case is a case that was decided by
25 a state court in the state of Missouri. Or "Missoura" if

1 you're from there.

2 **MR. LEVIN:** It's -- Your Honor, sorry to interrupt.
3 It is the Western District of --

4 **THE COURT:** Oh, that was Western District. I'm sorry.
5 You're absolutely right. Sorry. But under Missouri state law.

6 **MR. LEVIN:** Correct.

7 **THE COURT:** Okay. And so -- as all insurance,
8 essentially, is under state law, or pretty much so.

9 So in that case they did have a stay-at-home order like we
10 have. In other words, this is as close as the plaintiff is
11 going to get to a case that helps them.

12 The defendant's response, by the way, to *Studio 417* was
13 pretty brief. It boiled down to, that's Missouri, we're in
14 California. And that's true.

15 Also, I have some question about where the Court, perhaps,
16 went farther than the cases it relied on. It collected up,
17 again, the cases we've been talking about that the plaintiff
18 has provided, where courts have found damage when the
19 structure, if you just looked at it, looked okay, but it was
20 creating problems, and somebody was going to have to either rip
21 it out, tear it down, or do something or the place was not
22 going to be usable. And I think that the Court went further
23 than those cases in finding the damage, at least on the record
24 that they had there.

25 It's possible that you may be able to add more.

1 Let me go back, for a moment, to Ms. Stargardter and see
2 if she wants to respond at all to the reliance on the cases
3 that *Studio 417* felt took that plaintiff into a point of
4 coverage.

5 **MS. STARGARDTER:** Thank you, Your Honor.

6 My reading of the 417 -- *Studio 417* case is that it talks
7 about the virus attaching to the property and depriving the
8 plaintiffs of their use of the property.

9 But that is not the definition of direct physical loss or
10 damage in California. It isn't loss -- for loss of use of
11 property to be direct physical loss, it has to mean that the
12 plaintiff is permanently deprived of their property, not that
13 it's a temporary loss of use. And I think that's the -- that
14 is the distinction between the two cases. Or that case and the
15 case -- or the facts of our case.

16 And building on that, when you look at the *Port Authority*
17 case and the *Western Fire* case, what *Port Authority* says is
18 that when -- when the damage to the building isn't observable
19 to the naked eye, that the plaintiff has to meet a higher
20 threshold and they have to show that either the building or the
21 property itself has completely lost its functionality.

22 *Western Fire* says the same thing. And, as Your Honor
23 correctly pointed out, what the *Western Fire* court says is
24 that, again, the loss of use has to be the complete loss of
25 use. And that loss of use doesn't occur until the property

1 cannot be used again.

2 Following on that, the *Mama Jo's Inc. versus Sparta* case
3 says that when -- and, again, citing the definition of direct
4 physical loss or damage used in *MRI* says that when property can
5 be restored to its functionality through the use of routine
6 maintenance, there is no direct physical loss or damage.

7 And what the evidence is, including the evidence presented
8 in plaintiff's own opening -- I'm sorry, in plaintiff's
9 complaint, is that you can take everyday household cleaner and
10 wipe down the property and the virus is gone. It doesn't
11 change the physical structure of the property. It doesn't
12 alter the property. It doesn't damage the property. And, in
13 fact, if -- if COVID-19 did that, none of us could live in our
14 homes. So loss of use is not direct physical loss or damage in
15 the first-party context under California law.

16 And that also applies as to why the *Armstrong* decision and
17 the *Thee Sombrero* decision are inapposite, because they're
18 duty-to-defend cases. And under duty to defend, the definition
19 of property damage is "or loss of use of tangible property that
20 has not been damaged." So it's a completely different
21 definition.

22 Turning back to *Hughes versus Potomac*, in that instance
23 there's a couple of things. First of all, the house itself did
24 sustain damage. There was damage to the property. It was
25 minimal damage, but there was actual physical property damage

1 to the house.

2 And what the Court held in that case is that the loss of
3 the lateral support caused by the erosion, the physical change
4 in the land under the house, was again property damage.

5 And the only question really answered by the Court in
6 *Hughes versus Potomac* was whether the loss of the land --
7 whether the land under the home was covered property.

8 **THE COURT:** Okay.

9 **MS. STARGARDTER:** They didn't talk about -- the issue
10 wasn't really -- they didn't focus so much on direct physical
11 loss. They said, yeah, it sustained direct physical loss
12 because it had moved and eroded and had changed.

13 What the Court held was that because the policy didn't
14 exclude land from the definition of covered property, in
15 addition to paying for the structural damage to the house and
16 the damage to the personal property in the house the insurance
17 company also had to pay to restore the lateral support to the
18 house.

19 **THE COURT:** Okay. Did you want to keep going?

20 **MS. STARGARDTER:** I don't want to --

21 (Audio interruption)

22 **MS. STARGARDTER:** I think all of the cases cited are
23 easily distinguishable.

24 **THE COURT:** Let me stop you for a moment.

25 All right. I don't know what happened, but at some point

1 while you were speaking just a moment or two there was a
2 recorded voice that said "The recording has stopped." Now,
3 just a moment ago it said "This meeting is being recorded." So
4 I don't know what exactly the story is here.

5 Okay. I had mentioned a few cases that the plaintiff had
6 relied on. You were going further to cite other cases, which
7 is fine. *Mama Jo's* is the case I was mentioning out of Florida
8 that it cited *MRI* and the definition that was in that -- that
9 was in *MRI*.

10 *Mama Jo's* did say that construction work dust that had to
11 be cleaned off didn't count as damage as long as you just wipe
12 it off. And there was a pretty hefty cleaning bill, in around
13 a 16-, \$17,000 cleaning bill to get rid of the dust that they
14 submitted to the insurance company. And that Court said, okay,
15 you could clean it off, so that's not damage. And we -- that's
16 in Florida, so we don't necessarily have a case exactly like
17 that here. But it has some of the similarities, I guess you
18 could say.

19 Okay. Did you want to keep going? I just wanted to stop
20 you for a moment while we tried to figure out why we were
21 getting a recorded voice. But you may have covered everything
22 you wanted to cover already.

23 **MS. STARGARDTER:** I think I did cover -- I think the
24 other distinction is in the *Chinese Drywall* case. Again, it's
25 a -- in that case the Court did find that there was -- the dust

1 and the debris from the drywall also caused physical damage to
2 other portions of the building. So, again, I think they're all
3 distinguishable.

4 I didn't know if you wanted me to talk about the virus
5 exclusion at this point in time.

6 **THE COURT:** No.

7 **MS. STARGARDTER:** Okay.

8 **THE COURT:** We hadn't gotten to that yet. We're still
9 talking about whether or not there's coverage under the main
10 part of the policy, before we get to the endorsement. And I
11 have a few questions I want to ask about the arguments and
12 responses that were raised more or less as a kind of legal
13 matter regarding the endorsement.

14 Okay. There have been a number of cases out of this
15 District that have found under language, again, quite similar
16 that there was no coverage. I don't know that you gave me any
17 of these, Counsel, so I'll just tell you about them, where
18 they're from.

19 One of them we know about. That's the 10e case that Judge
20 Wilson, in the Central District of California, recently
21 decided. And, by the way, that was on a motion to dismiss.

22 I don't remember on *Mama Jo's* if that was a motion to
23 dismiss or not. Let me take a look at that. I can't tell.
24 No, it's a summary judgment.

25 Most of the cases have been summary judgment. But we do

1 have a number of cases, in any event, from out of the area that
2 were on COVID beside Judge Wilson's case. And not all of those
3 were summary judgment. I'd have to double-check again to see.
4 I thought I had a note of this, but I guess I don't.

5 Yeah, motion to dismiss on -- the first one I'm going to
6 give you is *Diesel Barbershop versus State Farm*. That's at
7 2020 WL 4724305. It's out of the Western District of Texas
8 earlier this -- earlier -- not this month, it was in
9 mid-August. Let me take that back.

10 Then there's a case called *Roses 1* -- 1 is a numeral --
11 *versus Erie Insurance Exchange*. That was a summary judgment
12 motion. And let me give you the cite on that. 2020 WL
13 4589206, from the Superior Court of the District of Columbia.
14 That was August 6 of 2020.

15 Then there's a case called *Gavrilides* -- I'll spell it for
16 the reporter; G-a-v-r-i-l-i-d-e-s -- *versus Michigan Insurance*.
17 Michigan Circuit Court July of this year. That's 2020
18 WL 4571957. And let me see. That was a -- their equivalent, I
19 would say, of summary judgment. It's called summary
20 disposition.

21 So those cases all found language like ours, or almost
22 like ours, did not cover claims for shutdown during COVID.
23 None of them, again, is a case out of California of course. So
24 they're decided under the law of the states in which they were
25 located.

1 And we already mentioned the *10e LLC v. Travelers*.

2 All right. So there seems to be a kind of, you know, wave
3 of cases going contrary to the plaintiff's position on
4 coverage. I don't know how much can be added.

5 Is the restaurant open at all, by the way, Mr. Levin?

6 **MR. LEVIN:** Limited capacity.

7 **THE COURT:** On the weekends, is that it?

8 **MR. LEVIN:** Yes.

9 **THE COURT:** Okay.

10 **MR. LEVIN:** May I address those cases, Your Honor?

11 **THE COURT:** Sure, yeah. Yes.

12 **MR. LEVIN:** I think as this case evolved, some of the
13 arguments have evolved as well. And I -- I know for some of
14 those cases the plaintiff was not alleging/arguing that there
15 was physical damage to the property.

16 In the Michigan case I know specifically they were arguing
17 under a civil authority order triggered coverage and conceded
18 there was not property damage. We disagree with that
19 interpretation by plaintiff. But that -- that concession was
20 dispositive in the Court's ruling, that concession that there
21 wasn't physical damage.

22 **THE COURT:** Okay.

23 **MR. LEVIN:** Therefore, they didn't have a covered loss
24 under the policy because they conceded that they didn't have a
25 physical loss. So I think that case can be distinguished

1 simply by the fact that the plaintiff conceded it didn't have
2 physical loss. We don't agree with that.

3 And, Your Honor, I -- I can't emphasize more, we want the
4 opportunity to present evidence of physical loss. Defendant
5 claims we don't have physical damage because we don't have
6 physical damage because virus doesn't cause physical damage.

7 There is not a record before this Court where you -- where
8 we can make that finding. We haven't presented evidence that
9 there is physical damage. Defendant hasn't presented any
10 evidence that there is not. We haven't been given that
11 opportunity.

12 **THE COURT:** Okay.

13 **MR. LEVIN:** We simply think it's premature, at this
14 time, to offer that kind of conclusion.

15 Now, for the *Chinese Drywall* and the other cases and the
16 gasoline case that Your Honor spoke of, when the property is in
17 such -- where it's not habitable for its use, the courts have,
18 when presented evidence of that type of harm, have found
19 property damage.

20 We believe in this case that we can meet that burden.
21 Maybe defendant will give -- be provided the opportunity to
22 also submit evidence that we can't. Our argument is, at this
23 time it's premature to find as a matter of law that we cannot
24 prove property damage under the policy.

25 **THE COURT:** Okay. Let me --

1 **MS. STARGARDTER:** Your Honor, may I just add one
2 little point?

3 **THE COURT:** Yes.

4 **MS. STARGARDTER:** In order for the civil authority
5 coverage to apply, the stay-at-home order has to be issued
6 because of property damage to premises near the insured
7 premises. The fundamental problem with plaintiff's argument is
8 that the stay-at-home order isn't -- it was never issued
9 because of property damage. The order is issued to prevent the
10 spread of virus from person to person.

11 **MR. LEVIN:** Well, I --

12 **MS. STARGARDTER:** So I think that's a critical
13 distinction. On that basis alone the loss does not fall within
14 the scope of the insuring agreement.

15 **THE COURT:** You want to respond to that, Mr. Levin?
16 Then I want to go --

17 **MR. LEVIN:** We believe that the civil authority orders
18 were developed to prevent the spread of COVID, but, also -- and
19 I think we argued that it does cause property damage. We cite
20 to the Pennsylvania Supreme Court, the New York Civil
21 Authority. So I agree with defendant that the civil authority
22 order and the covered loss do -- there is a -- they both kind
23 of fit together. But I don't agree that the civil authority
24 was not intended to protect property damage and -- and personal
25 injury loss to the public.

1 **THE COURT:** All right. Let's go to the exclusion for
2 a minute.

3 You, Mr. Levin, had raised a variety of challenges. One
4 had to do with whether or not there's some regulatory estoppel
5 because the representative of the insurance groups, the ISO,
6 may not have interpreted for the Insurance Department the
7 exclusion in the way they're using it now.

8 And the response to all that from the defendant was, we're
9 not part of that group, we are -- you know, we're a secondary
10 carrier, we don't have to submit anything to the Department,
11 and we didn't, and this is our own creation.

12 Do you have any response to that?

13 **MR. LEVIN:** Your Honor, the genesis of how the virus
14 exclusion was developed by the defendant, whether it was done
15 by the ISO, who got it approved, or in the defendant's case
16 where they may have adopted what the ISO got approved by the
17 Insurance Department and, you know, as they say the rider they
18 had attorneys draft and put it in the policy, and they didn't
19 have to get it approved, but the whole genesis of how it was
20 created, even if it was done by their own lawyers, we believe
21 under California law we're entitled to evidence of how this
22 policy was -- this language was developed to demonstrate that
23 there is ambiguity in it.

24 And what I would point out, Your Honor, is -- and we cite
25 to it in our brief. It's *Meyer National Foods v. Liberty*

1 *Mutual Fire Insurance Company* -- other insurance policies that
2 have this virus exclusion discuss the pandemic in it. This
3 particular one doesn't.

4 And we also know from -- it's -- this case, Your Honor,
5 was not cited in our briefs, but I -- *Montrose Chemical v.*
6 *Admiral*, 10 Cal.4th 645, at page 670. It's a Supreme Court of
7 California case, 1995, where the Court, you know, was going to
8 look at how these policies were drafted to determine whether,
9 you know, there was ambiguity in it.

10 In other words, it may -- the policy may look clear on its
11 face, but there may be ambiguity based on different insurance
12 policies that are in the industry. I just cited the case in
13 *Meyer National Foods*, which is on page 14, I believe, of our
14 brief, where the policy in that instance identified a pandemic.
15 It specifically identified a pandemic. But in our particular
16 case there is no mention of a pandemic.

17 We -- this is similar to our property damage argument. We
18 believe that we should be entitled to discovery to show what we
19 believe is the true meaning of the policy and the intent of the
20 parties under California law. There is case law and California
21 law that's cited in our brief that just because a policy on its
22 face may look straightforward, that doesn't mean that there
23 isn't ambiguity in it. And the Court is well within its right
24 to look outside of that policy. And that's simply what we're
25 asking the Court the opportunity to do.

1 **THE COURT:** Okay. Could I -- could I -- excuse me.
2 Could I get the cite again? 10 what was it? *Montrose*.

3 **MR. LEVIN:** I'm sorry. Cal.4th 645.

4 **THE COURT:** Okay. It's a Cal -- excuse me. It's a
5 Cal --

6 **MR. LEVIN:** Supreme Court.

7 **THE COURT:** Okay. 10 Cal.4th. That's 645 at 670;
8 correct?

9 **MR. LEVIN:** The name of the case, just in case I can't
10 read my handwriting, is *Montrose Chemical v. Admiral*.

11 **THE COURT:** I got that part. Thank you. You just
12 kind of -- you were spelling out the citation, which you
13 started to do again, and that was throwing me off.

14 **MR. LEVIN:** I apologize, Your Honor.

15 **THE COURT:** Okay. Thank you.

16 All right. So you had also cited *Century Surety versus*
17 *Casino West*, where there was somebody who died in a motel
18 because carbon monoxide fumes came off the pool heater and went
19 into the room and stayed there.

20 And the Court looked at a pollution exclusion, and they
21 were concerned about -- courts went different ways about
22 whether carbon monoxide counts as pollution. And then they
23 were worried about if you carried things too far and somebody
24 spilled a bottle of Drano that that would in some way be
25 excluded. Okay. Nobody slipped on a mushroom here. Nobody

1 got injured by a COVID-19 test swab. So we're not really
2 dealing with that.

3 As far as the scope, essentially it looks like we're
4 dealing with them saying, if you have some kind of loss from a
5 virus, if you take it from your standpoint that there's some
6 kind of damage to the property by reason of a virus, they're
7 saying, okay, that's not covered.

8 So then you respond by saying, well, what we're really
9 dealing with is the order. And the order doesn't have -- that
10 might not be covered by this because they might not have been
11 thinking about stay-at-home orders. But then that's not really
12 necessarily physical damage, so you get into a kind of catch-22
13 there.

14 **MR. LEVIN:** Right.

15 **THE COURT:** Let's face it. If you want to say that
16 the restaurant is uninhabitable because of COVID, and you want
17 to allege that there is damage and by reason of whatever you
18 want to add, I won't stop you from -- from taking another shot
19 at it. It is a motion to dismiss. And although at least one
20 or more courts have said dismiss, and essentially it was
21 dismissed with prejudice, and I forget which of the cases --

22 **MR. LEVIN:** Well --

23 **THE COURT:** Excuse me. I waited a long time to hear
24 everybody else.

25 Judge Wilson did give that plaintiff leave to amend. He

1 did mention -- you don't say there's any COVID on your
2 property. Has anybody tested Olea? Is somebody going to go in
3 there, breathe on a table, and then somebody will go in and
4 test it and say there's COVID in the restaurant?

5 I mean, what's going to happen? You have no idea. There
6 probably is no COVID. It dies after a certain amount of time.
7 They've been closed. I don't know. I mean, I don't know how
8 you can say there's going to be COVID there. But you can make
9 the more general argument that you're making, that it,
10 nonetheless, could be there, and that could be damage, I guess.

11 I'm not sure what you're going to say even if there's no
12 exclusion. That's what concerns me, you know. It's not that I
13 don't want to see your client get coverage. I mean, I feel
14 some, you know, empathy for them. But I don't know that you're
15 going to be able to do much with it. I'm, you know, concerned
16 about that. But if you want to give that a shot, I think on
17 the complaint we have now that I'm, in all likelihood, going to
18 grant this motion.

19 About the exclusion, the record that's presented to the
20 Department of Insurance by the Insurance Services Office, is
21 that available to the public in any way? Is that a public
22 record? Can you get that?

23 **MR. LEVIN:** Your Honor, Dan Levin. I have submitted
24 the virus -- my understanding, and I'm not a complete expert in
25 the insurance industry, but the ISO submits policies on behalf

1 of the insurance industry that have been approved by the ISO.

2 We are, in other cases, in the process of subpoenaing
3 those records from the ISO, which I believe they'll comply with
4 the subpoenas. We're debating some of the, you know, what they
5 will produce and what have you, but we're -- we are in the
6 process of trying to obtain that information. Not
7 particularly, Your Honor, in this case obviously. We haven't
8 reached that point where we can, you know, conduct discovery.
9 But we are in the process of doing that. And what I --

10 **THE COURT:** What would you hope to plead if you get
11 those records that would, in your view, preclude the defendant
12 here from relying on the exclusion to bar coverage for the
13 claim your client is bringing?

14 **MR. LEVIN:** We believe that the documents that we've
15 obtained, the evidence that we will gather, we believe will be
16 instructive on this Court in determining that the virus
17 exclusion was not intended to cover this pandemic.

18 **THE COURT:** No, I understand instructive. But what
19 would it have to say? What would you have to find? Would you
20 have to find, for example, that they went in and said, we're
21 only going to use it to cover X, and now they're trying to use
22 it to cover Y? Is that the point you're going to try to make?

23 **MR. LEVIN:** Right. We anticipate that the virus
24 exclusion was intended to exclude coverage for isolated
25 contamination of virus, not for a global pandemic.

1 **THE COURT:** What would isolated mean?

2 **MR. LEVIN:** Where it's not something that required a
3 city to shut down, where it's a virus that -- a food-borne
4 virus or, you know, whatever it may be for a circumstance that
5 happened at the restaurant or -- or -- that's what I mean by
6 isolated. Not where it's the government deciding we need to
7 shut down. In this case it was basically the whole
8 United States because of the pandemic. We believe we will
9 develop evidence that they didn't intend to cover that.

10 And I think, Your Honor, I do believe that that case that
11 we cited to is instructive, where the policy did include a
12 pandemic. The defendants draft these policies, not the
13 plaintiff. And there are certain -- and words mean something.
14 And certain policies in the industry have expanded it to
15 include pandemic. This one does not appear to do so.

16 **THE COURT:** Okay. But just to play this out for a
17 moment. The defendant doesn't care about this exclusion if you
18 don't have property damage to start with. In other words, this
19 is its backup position. You're not covered, but if you are
20 covered we've excluded you.

21 Their position is just making an order is not property
22 damage. If the order is based on property damage -- for
23 example, if you took the drywall case, and maybe the owner of
24 the building didn't -- didn't find that the building was
25 uninhabitable, despite the fact there were noxious fumes that

1 could be very damaging to health in the building, and some
2 building inspector came in and said, okay, we're shutting you
3 down, they're not just shutting them down as a policy, they're
4 shutting them down because there is, according to *Chinese*
5 *Drywall*, property damage.

6 So I'm not sure where it's going to go, but I'm happy to
7 have you make the best record you can on this. And it is a
8 motion to dismiss. At this point I think that it's not
9 inappropriate to decide the case on a motion to dismiss.

10 One of the reasons I asked you whether certain records are
11 available without discovery was to see whether you can plead,
12 you know, your bar to reliance on the exclusion. Since you are
13 getting discovery, apparently in another case, one or more,
14 hopefully you can get that, and I can give you some time to
15 file an amended complaint with the idea that you would get that
16 material hopefully from the Department.

17 Now, that would not be from California Department of
18 Insurance, though, would it? Or would it?

19 **MR. LEVIN:** It may very well be.

20 **THE COURT:** Oh --

21 **MR. LEVIN:** In our case -- to be clear, Your Honor,
22 and I'd have to look at our file, I'm not certain that the ISO
23 in the particular case that we're subpoenaing records to dealt
24 with a California insured. But I do believe that the ISO has
25 submitted records to the California Insurance Department, you

1 know, for the insurance industry in California.

2 **THE COURT:** Well, --

3 **MR. LEVIN:** But we certainly could, in this case,
4 subpoena those records and get that information.

5 **THE COURT:** Okay. Yeah, you might well be able to
6 just get it. After all, the Department of Insurance has an
7 interest in consumers. I would think they would be relatively
8 cooperative.

9 Okay. So where are we? I think we've probably covered
10 the landscape. It's an interesting issue. It's one that's
11 important, obviously, to the plaintiff and to a number of other
12 people. So --

13 (Audio interruption.)

14 **THE CLERK:** Sorry, Your Honor.

15 **THE COURT:** I'm not sure why it's doing it, but at
16 this point I'm just ignoring those words that are coming from
17 some disembodied computer.

18 Yes.

19 **MS. STARGARDTER:** Your Honor, may I have an
20 opportunity to respond to the regulatory estoppel argument?

21 **THE COURT:** Yes, go ahead. I thought -- I'm sorry.
22 Why don't you go ahead and do that.

23 **MS. STARGARDTER:** Well, Your Honor, I think the
24 argument is flawed for a number of reasons. One, because under
25 California law, as a primary threshold matter, we don't jump to

1 the reasonable expectations of the insured. The Court first
2 has to determine that the policy language is ambiguous. And it
3 has to be ambiguous in the terms of the policy itself and in
4 the facts of the case.

5 And here our exclusion plainly and clearly states that the
6 insurance afforded under the policy does not apply to any claim
7 or loss or damage resulting from or caused by viruses. And as
8 plaintiff's complaint alleges, plaintiff's loss is caused by a
9 virus. So the exclusion is clear and explicit. It is not
10 subject to two reasonably sound interpretations under the facts
11 of this case. Second of all, if it's clear and unambiguous, it
12 applies, and we don't have to look at the drafting history.

13 Next, the drafting history is important only if the
14 insured is aware of the drafting history and relied on the
15 drafting history in purchasing the policy. And in this
16 instance regulatory estoppel is dependent on what the
17 California Department of Insurance or other Departments of
18 Insurance thought the exclusion meant, not what the insured
19 thought the exclusion meant. It's a complete -- I'm sorry,
20 completely divorced third party.

21 And I think the *Nammo* case out of Arizona really sets --
22 articulates why this Court should not adopt a regulatory
23 estoppel argument in this case.

24 You need to follow California law. And under California
25 law the exclusion is clear, it's ambiguous, it applies under

1 the facts of the case, and it -- and an insurer is entitled to
2 remove coverage for an entire category of risk, which is
3 exactly what Atain has done in this case. And if it does so,
4 the insured can have no reasonable expectation of coverage.

5 **THE COURT:** I think you misspoke and said it's
6 ambiguous, it sounded like.

7 **MS. STARGARDTER:** Not ambiguous. It's crystal clear.

8 **THE COURT:** All right.

9 **MS. STARGARDTER:** Thank you, Your Honor. Thank you
10 for letting me make that point.

11 **THE COURT:** All right. So, nonetheless, first of all,
12 we don't even know what Mr. Levin is going to come up with in
13 terms of whatever was said or wasn't said to the Department of
14 Insurance by the ISO, if they said anything at all.

15 And if they said something, is your client stuck with it?
16 And that could just bring up a whole lot of issues that at the
17 moment are almost more just hypothetical because, as Mr. Levin
18 said, he thinks he should be allowed to do discovery. It turns
19 out he is doing it somewhere. Maybe he'll come up with
20 something and then you can decide how much of an argument you
21 want to make to that point if it is actually fleshed out.

22 In the meantime, then, I will deem the matter submitted.
23 And I'm going to rule and not keep you dangling. You know what
24 my thoughts are on this.

25 And, again, looking at the policy language, which requires

1 a direct physical loss to or damage to the property, the loss
2 of or damage to the property, I do find that the plaintiff
3 really has not plausibly alleged a covered loss but only
4 detrimental economic impact, which under the *MRI* case is not
5 sufficient.

6 It also appears to the Court, at least from the very broad
7 and what appears to be clear language of the exclusion, that
8 even if there were deemed to be damage or a covered loss that
9 it would be excluded under the virus exclusion. But I do feel
10 this is the plaintiff's first shot at this, and they should be
11 given an opportunity. So I'm going to grant the motion with
12 leave to amend.

13 Mr. Levin, how much time do you think you need to put
14 together whatever further facts you want to add to the
15 complaint?

16 **MR. LEVIN:** Your Honor, as I told you, I know in one
17 case the subpoenas did go out, and we received objections from
18 the ISO.

19 I don't want to get too far ahead of myself, but if we
20 could have 60 days just to let that discovery play out, I think
21 that would be helpful. And I could report back. Understanding
22 that Your Honor might not grant my request if we need more
23 time, I can set forth the reasons why we would request more
24 time.

25 I just want to throw out there that we're not solely

1 making a regulatory estoppel. And I understand, Your Honor,
2 you know, you issued a ruling. We are not making a regulatory
3 estoppel. We believe under California law, in that case I
4 cited, allows us to also look at what the defendant did when it
5 was drafting the policy, as well, not solely just what the ISO
6 represented to the insurance department. And under that
7 *Montrose Chemical* case it's not solely what the understanding
8 was of the regulators, but it's the reasonable expectations of
9 the parties as well.

10 **THE COURT:** All right. Well, I've already ruled --

11 (Unreportable simultaneous colloquy.)

12 **THE COURT:** Excuse me.

13 You can put whatever you feel is appropriate in the
14 amended complaint. If you're saying, all right, we're now
15 switching gears, maybe we're not looking at the ISO because we
16 did discovery and there wasn't anything to help us, how about
17 what did this defendant say? Well, your client got the policy.
18 And if the defendant told them anything about this particular
19 exclusion, either in writing or orally, then you would know
20 about it. You don't have to do discovery for that.

21 So you know-- I don't mean to rudely cut you off after
22 I've ruled, but if you get into it then I've got to let the
23 defendant counsel get back into it. It's not going to change
24 anything because I already ruled.

25 As far as the time, ordinarily, I would make it about a

1 month. You want double that. Let me see what the defendant
2 has to say about it and whether they really care. They're not
3 out any money while you're waiting.

4 **MS. STARGARDTER:** Your Honor, obviously my client
5 would like to shut this down as quickly as possible, but I'm
6 willing to agree with whatever the Court agrees with. If you
7 think 45, 60 days, you know, that's fine.

8 **THE COURT:** I was going to go with a month, all right.
9 Sixty seems far off. You know, at some point I'm going to have
10 to go back and do all this research again and read it all over
11 again. I'm going to forget what I read to, you know, get ready
12 for this conference. And I want to kind of keep the general
13 knowledge that I've got fairly current.

14 So let's take a look. I'm just leaning over. I may blur,
15 but I'm looking at a calendar. So today's the 4th. No, I'm
16 sorry, today's the 11th. I'd like to forget that particular
17 day, but it is the 11th. So, let's see. Well, let's do this.
18 I'm just going to split this and say October 23. I think that
19 came out to 45 days or essentially six weeks rather than four.
20 Yeah.

21 All right. If you're on the cusp to get -- somebody has
22 told you "we're giving it to you next Friday," you can ask for
23 an extension on good cause.

24 So the deadline to file plaintiff's First Amended
25 Complaint would be October 23. That's more than, I think, I've

1 given anybody in the past. So that will help you, hopefully,
2 in that regard.

3 But no matter what I do ultimately, I do think the
4 plaintiff should have a shot at making their very best record.
5 If I end up staying with my initial read of this, at least
6 they'll have had a chance to make their best showing.

7 I will say this, and you can keep it in mind for how
8 you're going to plead an amended complaint. We are all
9 operating under the same potential of virus-contaminated
10 surfaces. Every time one of us goes out and touches anything
11 and comes back and puts our hands on a surface, there may be
12 virus.

13 There may be someone in my chambers walking around who's
14 asymptomatic. We're all living where we're living. Our houses
15 are not uninhabitable. Our places of work are not
16 uninhabitable by reason of physical damage. We are all there.

17 And so it's true in stay at home, at least in California,
18 strangers weren't supposed to be able to come into your house.
19 But we're not all suing saying we've got damage to our house.
20 So I'm not sure where the distinction lies, but I'm leaving it
21 to you to try to make that.

22 And I guess that's all for today. I thank you, both, --

23 **THE CLERK:** Your Honor --

24 **THE COURT:** -- for the work you've put into this.

25 Yes.

1 **THE CLERK:** Excuse me. I just wanted to let you know
2 they have an initial case management conference on
3 October 16th.

4 **THE COURT:** Okay. Probably we should move that back
5 to another date without having to have a separate order on
6 that.

7 Thank you, Ms. Geiger.

8 So if we've got October 16, you're not going to file an
9 amended complaint until the 23rd. They'll have a couple of
10 weeks to respond to it. That takes you into around the 6th.
11 And then you know they're going to file another motion to
12 dismiss, so that will be one, two, three, four, five -- we're
13 already into December. I'd say let's move the case management
14 to January 29, with a statement by the 22nd.

15 **MS. STARGARDTER:** Very good. Thank you, Your Honor.
16 Thank you for your time this morning. Appreciate it.

17 **THE COURT:** Thank you, both, very much. I'll leave
18 you to get back to working with all these issues.

19 That will conclude the conference at this time. Everyone
20 stay well.

21 **MR. LEVIN:** Thank you, Your Honor.

22 **MS. STARGARDTER:** Thank you, Your Honor.

23 (At 9:58 a.m. proceedings were adjourned.)

24 - - - - -

25

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Thursday, September 17, 2020

Katherine Sullivan

Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter

EXHIBIT 2



KeyCite Blue Flag – Appeal Notification

Appeal Filed by [MUDPIE, INC. v. TRAVELERS CASUALTY INSURANCE](#), 9th Cir., September 24, 2020

2020 WL 5525171

Only the Westlaw citation is currently available.
United States District Court, N.D. California.

MUDPIE, INC., Plaintiff,

v.

[TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA](#), Defendant.

Case No. 20-cv-03213-JST

|
Signed 09/14/2020

Synopsis

Background: Retailer filed putative class action alleging that its insurer unlawfully denied coverage under comprehensive commercial liability and property insurance policy for lost business income as result of COVID-19 pandemic. Insurer moved to dismiss.

Holdings: The District Court, [Jon S. Tigar](#), J., held that:

retailer's inability to operate and occupy its premises did not constitute "direct physical loss or damage to property" under policy's business income provisions, and

retailer's losses did not fall within scope of policy's civil authority coverage provision.

Motion granted.

Attorneys and Law Firms

[Eric H. Gibbs](#), [Amy Marie Zeman](#), [Andre Michel Mura](#), [Karen Barth Menzies](#), [Steven Augustine Lopez](#), Gibbs Law Group LLP, Oakland, CA, [Andrew N. Friedman](#), Pro Hac Vice, [Eric Alfred Kafka](#), [Geoffrey Aaron Graber](#), [Julie S. Selesnick](#), [Karina Grace Puttieva](#), [Victoria S. Nugent](#), Cohen Milstein Sellers & Toll PLLC, Washington, DC, for Plaintiff.

[Andrew B. Downs](#), Bullivant Houser Bailey PC, San Francisco, CA, [Stephen Edward Goldman](#), Pro Hac Vice,

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ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Re: ECF No. 11

[JON S. TIGAR](#), United States District Judge

*1 Before the Court is Defendant's motion to dismiss. ECF No. 11. The Court will grant the motion.

I. BACKGROUND

Plaintiff Mudpie, Inc. is a San Francisco retail store that sells children's clothing, toys, housewares, books, and other goods. ECF No. 1 ¶ 26. Mudpie brings this putative class action on behalf of itself and other California retailers who purchased comprehensive business insurance from Defendant Travelers Casualty Insurance Company of America ("Travelers"), filed a claim for lost business income following California's Stay at Home Order, and were denied coverage. *Id.* ¶ 43.

The Stay at Home Order was issued in response to an outbreak of COVID-19, a novel strain of coronavirus. *Id.* ¶¶ 17, 24-25. On March 11, 2020, "the World Health Organization declared COVID-19 a global health pandemic based on existing and projected infection and death rates and concerns about the speed of transmission and ultimate reach of this virus." *Id.* ¶ 19. At that time, "it was generally understood in the scientific and public health communities that COVID-19 was spreading through human-to-human transmission and could be transmitted by asymptomatic carriers." *Id.* ¶ 17. Public health officials thus advised that social distancing – the maintenance of physical space between people – was needed to stop the transmission of COVID-19. *Id.* ¶¶ 17, 20, 22.

On March 12, 2020, California Governor Gavin Newsom issued a statewide directive known as the Safer at Home Order, which required California residents "to heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures, to control the spread of COVID-19." *Id.* ¶ 24. On March 19, 2020, the Governor issued a series of mandates known as the Stay at Home Order, which "requir[ed] retailers to cease in-person services." *Id.* ¶ 25.

Mudpie had purchased a “comprehensive commercial liability and property insurance” policy from Travelers “to insure against risks the business might face.” *Id.* ¶ 30. Mudpie alleges that its compliance with the government closure orders “result[ed] in substantial loss to business income” because its storefront became “useless and/or uninhabitable.” *Id.* ¶¶ 27, 59. On or about April 27, 2020, Mudpie reported its loss of business income as of March 16, 2020, under its Travelers insurance policy. *Id.* ¶ 32.

In May 2020, Travelers denied Mudpie's insurance claim. *Id.* ¶ 33. Travelers took the position that Mudpie was not entitled to Business Income and Extra Expense coverage under its policy because “the limitations on [Mudpie's] business operations were the result of the Governmental Order, as opposed to ‘direct physical loss or damage to property at the described premises.’ ” *Id.* In addition, Travelers found that Mudpie was not entitled to Civil Authority coverage because “the Governmental Order that affected [Mudpie's] business was not issued due to ‘direct physical loss of or damage to property.’ ” *Id.* Finally, Travelers stated that the policy contained “an exclusion for ‘loss or damage caused by or resulting from any virus’ – such as the COVID-19 virus.” *Id.*

*2 Mudpie alleges three causes of action in its complaint. First, Mudpie seeks “a declaration for itself and similarly situated retailers that its business income losses are covered and not precluded by exclusions or other limitations in its comprehensive business insurance policy.” *Id.* ¶ 62. Second, Mudpie alleges that Travelers breached its contract by denying it comprehensive business coverage. *Id.* ¶ 69. Third, Mudpie alleges that Travelers breached the implied covenant of good faith and fair dealing by: (1) selling policies that appear to provide liberal coverage with the intent of interpreting ambiguous, undefined, and poorly defined terms to deny coverage; (2) unreasonably denying coverage by applying undefined, ambiguous, and contradictory terms contrary to applicable rules of policy construction and the plain terms and purpose of the policy; (3) denying Mudpie's claim without conducting a fair, unbiased, and thorough inquiry; (4) misrepresenting policy terms; and (5) compelling policy holders to initiate litigation to recover policy benefits to which they are entitled. *Id.* ¶ 75.

On June 3, 2020, Travelers filed a motion to dismiss Mudpie's complaint. ECF No. 11. Mudpie opposes the motion, ECF No. 19, and Travelers has filed a reply, ECF No. 20.

II. JURISDICTION

The Court has jurisdiction over this putative class action pursuant to 28 U.S.C. § 1332(d)(2) because the amount in controversy exceeds \$5 million and at least one member in the proposed class of over 100 members is a citizen of a state different from Travelers.¹

¹ Mudpie is a California resident, and Travelers is a Connecticut resident. ECF No. 1 ¶¶ 11, 12.

III. LEGAL STANDARD

A. Motion to Dismiss

A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) (citation omitted). A complaint need not contain detailed factual allegations, but facts pleaded by a plaintiff must be “enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). “To survive a motion to dismiss, a complaint must contain 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, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citation and internal quotation marks omitted). The Court must “accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party.” *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

B. Insurance Policy Interpretation

Under California law, the interpretation of an insurance contract is question of law for the courts.² See *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18, 44 Cal.Rptr.2d 370, 900 P.2d 619 (1995). “While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply.” *Bank of the W. v. Superior Court*, 2 Cal. 4th 1254, 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545 (1992). “If contractual language is clear and explicit, it governs.” *Id.* In addition, “[t]he terms in an insurance policy must be read in context and in reference to the policy as a whole, with each clause helping to interpret the other.” *Sony Comput. Entm't Am. Inc. v. Am. Home Assurance Co.*, 532 F.3d 1007, 1012 (9th Cir. 2008) (citing Cal. Civ. Code § 1641; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal. 4th 854, 867, 21 Cal.Rptr.2d 691, 855 P.2d 1263

(1993); *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115, 90 Cal.Rptr.2d 647, 988 P.2d 568 (1999)). “[I]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.” *Bank of the W.*, 2 Cal. 4th at 1264-65, 10 Cal.Rptr.2d 538, 833 P.2d 545 (quoting Cal. Civ. Code § 1649). “Only if this rule does not resolve the ambiguity do [courts] then resolve it against the insurer.” *Id.* at 1265, 10 Cal.Rptr.2d 538, 833 P.2d 545. California courts have cautioned that language in a contract “cannot be found to be ambiguous in the abstract,” and courts should “not strain to create an ambiguity where none exists.” *Waller*, 11 Cal. 4th at 18-19, 44 Cal.Rptr.2d 370, 900 P.2d 619.

- 2 The parties do not dispute that California law governs the underlying insurance policy. See ECF No. 11 at 15 n.4; ECF No 19 at 13 n.5.

IV. DISCUSSION

*3 Travelers argues that Mudpie's “factual allegations cannot satisfy the prerequisites for coverage under the Civil Authority, Business Income and Extra Expense” provisions in the insurance policy that Travelers issued to Mudpie.³ ECF No. 11 at 14. In addition, Travelers argues that the policy's virus exclusion “clearly and unambiguously precludes coverage.” *Id.*

- 3 The insurance policy, ECF No. 11-2, is incorporated by reference. “Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

A. Business Income and Extra Expense Coverage

The parties dispute whether Mudpie's allegations establish “a direct physical loss of” property as required by the Business Income and Extra Expense provisions in the insurance policy. The Business Income provisions state:

We 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 caused by or result from a Covered Cause of Loss.

ECF No. 11-2 at 72-73. Similarly, the Extra Expense provisions provide for payment of “reasonable and necessary expenses you incur during the ‘period of restoration’ that you would not have incurred if there had been no *direct physical loss of or damage to property* caused by or resulting from a Covered Cause of Loss.” *Id.* at 73 (emphasis added). “Covered Causes of Loss” are defined as “risks of direct physical loss,” subject to certain limitations and exclusions. *Id.* at 73-74 (emphasis omitted).

1. Physical Alteration or Change to Property

Mudpie claims that its inability to operate and occupy its storefront following the government closure orders is a direct physical loss of property covered by its insurance policy. ECF No. 19 at 14. Travelers argues that, in order to establish a “direct physical loss of” property, Mudpie must allege “a distinct, demonstrable, physical alteration of the property” or “a *physical change* in the condition of the property, i.e., it must have been ‘damaged’ within the common understanding of that term.” ECF No. 11 at 22-23 (quoting *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779-80, 115 Cal.Rptr.3d 27 (2010)).

The Court disagrees with Travelers's broad conception of the language “direct physical loss of” property. Another district court within this Circuit recently rejected a nearly identical interpretation of this language. See *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB (KSx), 2018 WL 3829767, at *3-4 (C.D. Cal. July 11, 2018). The plaintiff in *Total Intermodal*, who also held a Travelers insurance policy, filed a claim for cargo that had been mistakenly returned to China, where it became unrecoverable and was ultimately destroyed. *Id.* at *1. Travelers denied the claim and, in the ensuing lawsuit, it relied on *MRI Healthcare Center* to argue that “direct physical loss of” property requires some damage or alteration to the property. *Id.* at *2, 4. The court disagreed, concluding that the phrase “direct physical loss to business personal property” in *MRI Healthcare Center* should be construed differently than “direct physical loss of” property in the Travelers insurance policy.⁴ *Id.* at *4 (emphasis added). The court reasoned that “the ‘loss of’ property contemplates that the property is misplaced and unrecoverable, without regard to whether it was damaged.” *Id.* at *3. Furthermore, “to interpret ‘physical loss of’ as requiring ‘damage to’ would render meaningless the ‘or damage to’ portion of the same clause, thereby violating a black-letter canon of contract interpretation—that every

word be given a meaning.” *Id.* (citing [Cal. Civ. Code § 1641](#)). The court thus concluded that “loss of” could include “the permanent dispossession of something.” *Id.* at *4.

4 The *Total Intermodal* court also found that the phrase “direct physical loss” should be construed differently than “direct physical loss of.” *Total Intermodal*, 2018 WL 3829767, at *4. For this reason, Travelers’s reliance on *Meridian Textiles, Inc. v. Indemnity Ins. Co. of N. Am.*, in which the insurance policy covered “physical loss or damage,” is misplaced. No. CV 06-4766 CAS, 2008 WL 3009889, at *2, 3 (C.D. Cal. Mar. 20, 2008); see ECF No. 11 at 22-23.

*4 As in *Total Intermodal*, the insurance policy here covers “direct physical loss of or damage to property.” ECF 11-2 at 72-73. In accordance with the reasoning in *Total Intermodal*, the Court finds that the language of this provision, alone, does not require a “physical alteration of the property” or “a physical change in the condition of the property.” ECF No. 11 at 22-23 (citation omitted). Nevertheless, the facts at hand do not fall within the *Total Intermodal* court’s more expansive interpretation of “direct physical loss of property.” Although Mudpie has been dispossessed of its storefront, it will not be a “permanent dispossession” as with the lost cargo in *Total Intermodal*. See 2018 WL 3829767, at *4. When the Stay at Home orders are lifted, Mudpie can regain possession of its storefront. Mudpie’s physical storefront has not been “misplaced” or become “unrecoverable,” and neither has its inventory. See *id.* at *3.

Moreover, while a “direct physical loss of” property does not require damage or physical alteration to the property, the surrounding provisions within Travelers’s insurance policy suggest that Mudpie’s inability to occupy its storefront does not fall within the Business Income and Extra Expense coverage of this policy. See *Sony Comput.*, 532 F.3d at 1012 (“The terms in an insurance policy must be read in context and in reference to the policy as a whole, with each clause helping to interpret the other.”). The insurance policy states that the “period of restoration” – applicable to both Business Income and Extra Expense coverage – “[b]egins 24 hours after the time of direct physical loss or damage” and “[e]nds on the date when the property ... should be repaired, rebuilt or replaced with reasonable speed and similar quality.” ECF No. 11-2 at 84. The words “[r]ebuild,” “repair” and “replace” all strongly suggest that the damage contemplated by the Policy is physical in nature.” *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 287 (S.D.N.Y. 2005). But here, there is nothing to fix, replace, or even disinfect for Mudpie

to regain occupancy of its property, which Mudpie admits in its opposition brief: “Mudpie’s loss is caused by state closure orders and thus will last for however long those restrictions remain.” ECF No. 19 at 8.

2. Intervening Physical Force

Mudpie cites several non-California cases for the proposition that the “loss of functionality of, or access to, a property,” such as Mudpie’s loss of functionality of its storefront, “constitutes a direct physical loss of property.”⁵ ECF No. 19 at 15. However, each of these cases involved an intervening physical force which “made the premises uninhabitable or entirely unusable.” See, e.g., *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418 (WHW) (CLW), 2014 WL 6675934, at *6-7 (D.N.J. Nov. 25, 2014) (finding that ammonia discharge inflicted “direct physical loss of or damage to” property where “there [was] no genuine dispute that the ammonia release physically transformed the air” within the premises and rendered it unusable); *Manpower Inc. v. Ins. Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *6 (E.D. Wis. Nov. 3, 2009) (finding that the insured’s inability to access its property was a direct physical loss where the loss “was caused by a physical event—the [building] collapse—which created a physical barrier between the insured and its property”); *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 509 S.E.2d 1, 5, 17 (1998) (finding that “[l]osses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property” when a rockfall made plaintiffs’ homes uninhabitable).

5 Mudpie cites one unpublished California case in support of its argument, *Universal Savings Bank v. Bankers Standard Insurance Co.*, No. B159239, 2004 WL 515952, at *6 (Cal. Ct. App. Mar. 17, 2004), *vacated*, No. B159239, 2004 WL 3016644 (Cal. Ct. App. Dec. 30, 2004). Pursuant to California Rule of Court 8.1115 and Civil Local Rule 3-4(e), the Court may not consider this unpublished case. See *Sarmiento v. Sealy, Inc.*, No. 18-CV-01990-JST, 2019 WL 3059932, at *6 n.7 (N.D. Cal. July 12, 2019) (declining to apply unpublished California authority).

The Court notes that some district and appellate courts within the Ninth Circuit do consider unpublished California appellate authority. See, e.g., *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1223 n.3 (9th Cir. 2015) (“Even though unpublished California Courts of Appeal

decisions have no precedential value under California law, the Ninth Circuit is not precluded from considering such decisions as a possible reflection of California law.”) (quotation and citation omitted). The clear text of Local Rule 3-4(e), however, forecloses such a result here. *See* Civ. L.R. 3-4(e) (“Any order or opinion that is designated: ‘NOT FOR CITATION,’ pursuant to Civil L.R. 7-14 or pursuant to a similar rule of any other issuing court, may not be cited to this Court, either in written submissions or oral argument, except when relevant under the doctrines of law of the case, res judicata or collateral estoppel.”) (emphasis in original).

*5 Indeed, numerous courts outside the Ninth Circuit have found that some outside physical force must have *induced* a detrimental change in the property's capabilities before a plaintiff alleging loss of use can establish a “direct physical loss of property.” *See, e.g., Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005) (rejecting the argument “that direct physical loss or damage is established whenever property cannot be used for its intended purpose”); *Ne. Ga. Heart Ctr., P.C. v. Phx. Ins. Co.*, No. 2:12-CV-00245-WCO, 2014 WL 12480022, at *6 (N.D. Ga. May 23, 2014) (listing cases where “the reviewing court required some outside physical force to have induced a detrimental change in the property's capabilities” to award pure loss-of-use damages). For instance, in *Western Fire Insurance Co. v. First Presbyterian Church* the Supreme Court of Colorado determined that a direct physical loss had occurred when the insured, acting upon the orders of the fire department, closed the church building because gas had infiltrated the soil underneath it. 165 Colo. 34, 437 P.2d 52, 54-55 (1968). The court clarified that “the so-called ‘loss of use’ of the church premises, standing alone, d[id] not in and of itself constitute a ‘direct physical loss.’” *Id.* at 55. Rather, the direct physical loss resulted from the “accumulation of gasoline around and under the church building,” which made further use of the building highly dangerous. *Id.* The California Court of Appeal reinforced the *Western Fire* court's reasoning, noting that *Western Fire* “does not stand for the proposition that loss of intangible property can constitute a physical loss.” *Ward Gen. Ins. Servs., Inc. v. Emps. Fire Ins. Co.*, 114 Cal. App. 4th 548, 558, 7 Cal.Rptr.3d 844 (Cal. Ct. App. 2004). Rather, “[a] physical loss occurred when the foundations became saturated with gasoline.” *Id.*

Finally, a court in Michigan recently held that allegations of “a loss of business due to executive orders shutting down [] restaurants for dining” in response to the COVID-19 pandemic were insufficient to establish “direct physical loss of or damage to” the property. *Gavrilides Mgmt. Co. v. Mich.*

Ins. Co., Case No. 20-258-CB-C30 (Mich. Cir. Ct. July 1, 2020); ECF No. 21-1 at 19-20.⁶

⁶ At the time this order was issued, only the official court transcript was available, which is located at ECF No. 21-1.

Similar to the plaintiff in *Gavrilides*, Mudpie does not allege that “Covid-19 entered the [property] through any employee or customer.” ECF No. 21-1 at 19; *see* ECF No. 19 at 21 (noting that “the complaint nowhere states that Mudpie was closed because its employees became sick or coronavirus was discovered on the property”). Rather than alleging that COVID-19 or any other physical impetus caused the loss of functionality of its storefront, Mudpie alleges that its “loss is caused by government closure orders and thus will last for however long those restrictions remain.” ECF No. 19 at 8, 2; *see* ECF No. 1 ¶ 27. Because Mudpie's complaint contains no allegations of a physical force which “induced a detrimental change in the property's capabilities,” the Court finds that Mudpie has failed to establish a “direct physical loss of property” under its insurance policy.⁷ *See Ne. Ga. Heart Ctr.*, 2014 WL 12480022, at *6.

⁷ Had Mudpie alleged the presence of COVID-19 in its store, the Court's conclusion about an intervening physical force would be different. SARS-CoV-2 – the coronavirus responsible for the COVID-19 pandemic, which is transmitted either through respiratory droplets or through aerosols which can remain suspended in the air for prolonged periods of time – is no less a “physical force” than the “accumulation of gasoline” in *Western Fire* or the “ammonia release [which] physically transformed the air” in *Gregory Packaging*. *See Western Fire*, 437 P.2d at 55; *Gregory Packaging*, 2014 WL 6675934, at *6.

Following the conclusion of briefing, Mudpie submitted as supplemental authority the opinion in *Studio 417, Inc. v. Cincinnati Insurance Co.*, No. 20-CV-03127-SRB, --- F.Supp.3d ---, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020). Like Mudpie, plaintiffs in that case were businesses (a hair salon and several restaurants) who sought coverage for losses incurred when their businesses were impacted by the COVID-19 pandemic. *Id.* at --- – ---, 2020 WL 4692385 st *1-2. Plaintiffs there also alleged that business closure orders issued by civil authorities required them to cease or reduce their business operations. *Id.* at ---, 2020 WL 4692385 at *2. Unlike Mudpie, however, plaintiffs also claimed that the presence of the COVID-19 virus inside their establishments made them unusable. *Id.* (“Plaintiffs

allege that over the last several months, it is likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus. Plaintiffs allege that COVID-19 ‘is a physical substance,’ that it ‘live[s] on’ and is ‘active on inert physical surfaces,’ and is ‘emitted into the air.’ Plaintiffs further allege that the presence of COVID-19 ‘renders physical property in their vicinity unsafe and unusable,’ and that they ‘were forced to suspend or reduce business at their covered premises.’ ” (citations omitted). Based on the latter allegations, the *Studio 417* court found that plaintiffs had plausibly alleged a covered loss:

*6 Plaintiffs have adequately alleged a direct physical loss. Plaintiffs allege a causal relationship between COVID-19 and their alleged losses. Plaintiffs further allege that COVID-19 “is a physical substance,” that it “live[s] on” and is “active on inert physical surfaces,” and is also “emitted into the air.” COVID-19 allegedly attached to and deprived Plaintiffs of their property, making it “unsafe and unusable, resulting in direct physical loss to the premises and property.” Based on these allegations, the Amended Complaint plausibly alleges a “direct physical loss” based on “the plain and ordinary meaning of the phrase.”

Id. at —, 2020 WL 4692385 at *4 (citations omitted). Mudpie makes no similar allegation here. It does not allege, for example, that the presence of the COVID-19 virus in its store created a physical loss. Rather, its sole focus is on the shelter-in-place orders that have prevented it from opening, a distinctly less physical phenomenon. ECF No. 1 ¶ 27 (“*Compliance with those orders* has caused direct physical loss of Mudpie’s insured property in that the property has been made useless and/or uninhabitable; and its functionality has been severely reduced if not completely or nearly eliminated.” (emphasis added)). Accordingly, *Studio 417* does not assist Mudpie.

The Court’s conclusion is further supported by the policy’s provision which states that Travelers “will not pay for loss or damage caused by or resulting from ... loss of use or loss of market.” ECF No. 11-2 at 94. The separate provision for loss of use suggests that the “direct physical loss of ... property” clause was not intended to encompass a loss where the property was rendered unusable without an intervening physical force. The provision also undermines Mudpie’s claim that “a reasonable purchaser of insurance would read the policy as providing coverage for a loss of functionality.”⁸ See ECF No. 19 at 14. Thus, because Mudpie fails to allege any intervening physical force beyond the government closure

orders, the Court finds that Mudpie is not entitled to Business Income or Extra Expense coverage under the terms of its policy.

8 Mudpie argues that the insurance policy’s definition of “property damage” as “[l]oss of use of tangible property that is not physically injured” “supports the conclusion that a reasonable purchaser of insurance would read the policy as providing coverage for a loss of functionality.” ECF No. 19 at 14. However, Mudpie itself acknowledges that the property damage definition to which it refers is “not in the businessowners coverage part” of the insurance policy, which provides Business Income and Extra Expense coverage. ECF No. 19 at 12. Rather, it appears in and is applicable to the commercial general liability section of the policy. See ECF No. 11-2 at 33, 142.

B. Civil Authority Coverage

Travelers’s Civil Authority coverage provision extends Business Income and Extra Expense coverage to insure losses. The provision states:

When the Declarations show that you have coverage for Business Income and Extra Expense, you may extend that insurance to apply to the actual loss of Business Income you sustain and reasonable and necessary Extra Expense you incur caused by action of civil authority that prohibits access to the described premises. The civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises, that are within 100 miles of the described premises, caused by or resulting from a Covered Cause of Loss.

ECF No. 11-2 at 85. Travelers argues that Mudpie is not entitled to Civil Authority coverage because Mudpie cannot establish that the civil authority action – the closure orders in this case – were issued “due to direct physical loss of or damage to” any property. ECF No. 11 at 19-21. The Court agrees.

*7 Under the Civil Authority provision, Mudpie must establish the “requisite causal link between damage to adjacent property and denial of access” to its store. *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-0756 FMS, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995); see also *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686 (5th Cir. 2011) (finding that civil authority coverage requires a “causal link between prior property damage and the civil authority order”). In *Syufy Enterprises*, a theater owner closed his theaters in response to the curfew orders which

were imposed by California civil authorities following the Rodney King verdict. 1995 WL 129229, at *1. Finding that the curfews were not imposed “because of damage to adjacent property” but instead “to prevent ‘potential’ looting, rioting, and resulting property damage,” the court concluded that the theater owner was not entitled to civil authority coverage. *Id.* at *2-3; see also *United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 129, 134 (2d Cir. 2006) (affirming the district court's denial of coverage under a similar civil authority provision where the government's decision to halt airport operations on September 11, 2001 “was based on fears of future attacks” rather than prior physical damage to an adjacent property); *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, No. H-06-4041, 2008 WL 450012, at *10 (S.D. Tex. Feb. 15, 2008) (finding no coverage under an analogous civil authority provision where the government evacuation order “was issued due to the anticipated threat of damage to the county and not due to property damage that had occurred”).

Mudpie's allegations establish that the government closure orders were intended to prevent the spread of COVID-19. See ECF No. 1 ¶ 24 (California's Safer at Home Order was issued “to control the spread of COVID-19.”). Because the orders were preventative – and absent allegations of damage to adjacent property – the complaint does not establish the requisite causal link between prior property damage and the government's closure order.

That Mudpie's opposition brief attempts to downplay its Civil Authority coverage allegations underscores the Court's conclusion. Mudpie states that “[n]one of [its] claims seek recovery specifically under the civil authority extension” and that “[i]t need not invoke the civil authority extension to establish coverage under the policy.” ECF No. 19 at 17. Accordingly, the Court finds as a matter of law that Mudpie is not entitled to Civil Authority coverage.⁹

⁹ Because Mudpie is not entitled to Civil Authority coverage, the Court need not consider Travelers's additional argument that the virus exclusion bars such coverage. ECF No. 11 at 17-19.

C. Dismissal of Each Cause of Action

Mudpie's first cause of action “seeks a declaration for itself and similarly situated retailers that its business income losses are covered and not precluded by exclusions or other limitations in its comprehensive business insurance policy.” ECF No. 1 ¶ 62. Because Mudpie is not entitled to Business Income, Extra Expense, or Civil Authority coverage as a

matter of law, *see supra* at IV.A-B, Mudpie's first cause of action is dismissed.

Mudpie's second cause of action alleges that Travelers breached its contract by denying Mudpie comprehensive business insurance coverage. ECF No. 1 ¶ 69. The elements of a cause of action for breach of contract under California law are: “(1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff.” *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821, 124 Cal.Rptr.3d 256, 250 P.3d 1115 (2011). “[A]bsent an actual withholding of benefits due, there is no breach of contract.” *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 n.10, 271 Cal.Rptr. 246 (Cal. Ct. App. 1990) (citation and emphasis omitted). Because Mudpie has failed to allege that any “benefits due were withheld or delayed,” it cannot allege a breach of contract. See *id.* at 1152, 271 Cal.Rptr. 246. Mudpie's second cause of action is therefore dismissed.

Mudpie's third cause of action alleges breach of the implied covenant of good faith and fair dealing. Under California law, a breach of the implied covenant of good faith and fair dealing in the insurance context has two elements: “(1) benefits due under the policy must have been withheld and (2) the reason for withholding benefits must have been unreasonable or without proper cause.” *Love*, 221 Cal. App. 3d at 1151, 271 Cal.Rptr. 246. Because Mudpie has failed to allege that benefits were withheld, the “threshold requirement” for a bad faith claim has not been met. See *id.* at 1151-52, 271 Cal.Rptr. 246; see also *Waller*, 11 Cal. 4th 1 at 35, 44 Cal.Rptr.2d 370, 900 P.2d 619 (affirming that a bad faith claim cannot be maintained unless policy benefits are due under the contract). Accordingly, Mudpie's third cause of action is dismissed.

*8 Lastly, the Court dismisses Mudpie's putative class claims. “[W]here the named plaintiffs have failed to state a claim in themselves for the relief they seek[,] ... there is no occasion for the court to wrestle with the problems presented in considering whether the action may be maintained on behalf of the class.” *Boyle v. Madigan*, 492 F.2d 1180, 1182 (9th Cir. 1974).

V. LEAVE TO AMEND

Under *Federal Rule of Civil Procedure* 15(a), leave to amend is freely given when justice so requires. The Court may, however, “exercise its discretion to deny leave to amend due to ‘undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure deficiencies by amendments

previously allowed, undue prejudice to the opposing party ..., [and] futility of amendment.’ ” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892 (9th Cir. 2010) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). In this case, it seems doubtful that Mudpie could establish a “direct physical loss of ... property” as the term is defined in its insurance policy for Business Income and Extra Expense coverage. Furthermore, Mudpie has failed to establish entitlement to Civil Authority coverage and admits that none of its claims “seek recovery specifically under the civil authority extension.” ECF No. 19 at 17. The Court also recognizes, however, that the law concerning business interruption coverage linked to the COVID-19 pandemic is very much in development. Accordingly, the Court will dismiss the complaint without prejudice and grant leave to amend.

CONCLUSION

For the foregoing reasons, the Court grants Travelers's motion to dismiss without prejudice. Mudpie may file an amended complaint solely to correct the deficiencies identified in this order. An amended complaint is due 21 days from the date of this order. If no amended complaint is filed, the Court will dismiss the case with prejudice.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 5525171

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EXHIBIT 3



KeyCite Blue Flag – Appeal Notification

Appeal Filed by [PLAN CHECK DOWNTOWN III, LLC v. AMGUARD INSURANCE COMPANY, ET AL.](#), 9th Cir., October 2, 2020

2020 WL 5742713

Only the Westlaw citation is currently available.
United States District Court, C.D. California.

PLAN CHECK DOWNTOWN III, LLC

v.

AMGUARD INSURANCE COMPANY, et al.

Case No. CV 20-6954-GW-SKx

|
Filed 09/16/2020

Attorneys and Law Firms

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PROCEEDINGS: IN CHAMBERS - ORDER

The Honorable [GEORGE H. WU](#), UNITED STATES DISTRICT JUDGE

*1 On September 10, 2020, this Court issued a tentative ruling on Defendant's motion to dismiss this lawsuit and entertained oral argument thereon. *See* Docket No. 31. The Court continued the hearing to September 17, 2020. Plaintiff's counsel has now submitted a "Status Report" which indicates that the Plaintiff "accepts dismissal of this action with prejudice." *See* Docket No. 33. Based on that filing, the Court dismisses this action with prejudice.

All Citations

Slip Copy, 2020 WL 5742713

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EXHIBIT 3A

2020 WL 5742712

Only the Westlaw citation is currently available.
United States District Court, C.D. California.

PLAN CHECK DOWNTOWN III, LLC

v.

AMGUARD INSURANCE COMPANY, et al.

Case No. Cv 20-6954-GW-SKx

Signed 09/10/2020

Attorneys and Law Firms

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[Chet A. Kronenberg](#), Simpson Thacher and Bartlett LLP, Los
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PROCEEDINGS: TELEPHONIC HEARING ON DEFENDANT'S MOTION TO DISMISS [8]

[GEORGE H. WU](#), UNITED STATES DISTRICT JUDGE

*1 The Court's Tentative Ruling is circulated and attached.
Court and counsel confer. For reasons stated on the record,
the Court continues the motion to September 17, 2020 at 8:30
a.m.

Plan Check Downtown III v. AmGuard Insurance Company
et al.; Case No. 2:20-cv-06954-GW-(SKx) Tentative Ruling
on Defendant's Motion to Dismiss

I. Background¹

¹ The following abbreviations are used for the filings:
(1) Notice of Removal ("NoR"), ECF No. 1; (2)
Complaint ("Compl."), ECF No. 1-1; (3) Business
Owner's Coverage Form ("Policy"), ECF No. 10-1; (4)
Defendant's Motion to Dismiss ("Mot."), ECF No. 8;
(5) Plaintiff's Opposition to Motion to Dismiss ("Opp."),
ECF No. 17; (6) Defendant's Reply in Support of Motion
to Dismiss ("Reply"), ECF No. 21.

Like many other restaurateurs across the country, plaintiff
Plan Check Downtown III has seen its business suffer

greatly since the onset of the ongoing COVID-19 pandemic.
In response to various city-and state-government orders
requiring restaurants to suspend on-premise dining and
individuals to shelter at home, Plan Check stopped all
operations at its two restaurant locations in Los Angeles
in March 2020. Compl. ¶ 43. While its West Los Angeles
location has since reopened for take-out and delivery service,
its downtown location remains closed. *Id.*

Prior to these events, Plan Check had purchased a property
insurance policy from defendant AmGuard Insurance
Company (the "Policy") for its two restaurants. *Id.* ¶ 14. The
Policy provides coverage for, among other things, loss of
business income due to the necessary suspension of business
operations due to any "physical loss of or damage to" the
covered properties. *See* Policy § I.A.5(f). Plan Check argues
that its loss of business income caused by the changes to its
operations is covered by the Policy and submitted a claim
to AmGuard for reimbursement. Compl. ¶ 50. AmGuard
rejected the claim, concluding that Plan Check had not
suffered a physical loss or damage to its properties and that
in any event a "virus exclusion" in the Policy meant that Plan
Check's claims were not covered. *Id.* ¶ 52.

After AmGuard's denied its claim, Plan Check brought
this putative class action against AmGuard on behalf of
all restaurants in California that purchased comprehensive
business insurance coverage from AmGuard. *Id.* ¶ 64. Plan
Check filed its lawsuit in California state court, alleging
a breach of contract and other related claims. AmGuard
removed the case to federal court based on diversity
jurisdiction. *See* NoR at 2-5. Before the Court is AmGuard's
motion to dismiss for failure to state a claim.

II. Legal Standard

Under Rule 12(b)(6), a defendant may move to dismiss for
failure to state a claim upon which relief can be granted. *Fed.*
R. Civ. P. 12(b)(6). A complaint may be dismissed for failure
to state a claim for one of two reasons: (1) lack of a cognizable
legal theory; or (2) insufficient facts under a cognizable legal
theory. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007);
see also Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d
1097, 1104 (9th Cir. 2008).

*2 The court must construe the complaint in the light
most favorable to the plaintiff, by accepting all well-pled
allegations of material fact as being true, and drawing all
reasonable inferences from well-pleaded factual allegations
in favor of the plaintiff. *Gompper v. VISX, Inc.*, 298 F.3d 893,

896 (9th Cir. 2002). The court is not required to accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While a complaint does not need detailed factual allegations to survive a Rule 12(b)(6) motion, the plaintiff must provide grounds demonstrating its entitlement to relief. *Twombly*, 550 U.S. at 555 (2007). Under the Supreme Court's decisions in *Twombly* and *Iqbal*, this requires that the complaint contains "sufficient factual matter ... to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

III. Discussion

The parties agree that the Policy is governed by California law. See generally *Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.*, 14 Cal.App.4th 637, 718-21 (1993) (principal location of insured risk is most important consideration in determining which state's law applies to insurance policy); *Restatement (Second) of Conflict of Laws* § 193 (rights created by policy are determined by the local law of the state which the parties understood was to be the principal location of the insured risk).

"When determining whether a particular policy provides a potential for coverage," a court "[is] guided by the principle that interpretation of an insurance policy is a question of law." *Waller v. Truck Ins. Exch., Inc.*, 11 Cal.4th 1, 18 (1995). "[A]ny ambiguity or uncertainty in an insurance policy is to be resolved against the insurer and ... if semantically permissible, the contract will be given such construction as will fairly achieve its object of providing indemnity for the loss to which the insurance relates." *Reserve Ins. Co. v. Pisciotto*, 30 Cal.3d 800, 807 (1982). The purpose is "to protect the insured's reasonable expectation of coverage in a situation in which the insurer-draftsman controls the language of the policy." *Id.* at 808. "Whereas coverage clauses are interpreted broadly so as to afford the greatest possible protection to the insured, exclusionary clauses are interpreted narrowly against the insurer." *Id.*

A. The terms of the insurance policy

In the Policy, AmGuard promises that "[it] will pay for direct physical loss of or damage to Covered Property ... caused by or resulting from any Covered Cause of Loss." Policy § I.A. It goes on to provide a subsection titled "Additional Coverages," which specifies some covered causes of loss. Relevant here, that section includes:

Section I – Property

A. Coverage

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.

...

5. Additional Coverages

f. Business Income

... We 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 caused by or result from a Covered Cause of Loss.

...

g. Extra Expense

(1) We will pay necessary Extra Expense 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 at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss....

(2) Extra Expense means expense incurred:

(a) To avoid or minimize the suspension of business and to continue "operations":

*3 (i) At the described premises; or (ii) At replacement premises or at temporary locations, including relocation expenses, and costs to equip and operate the replacement or temporary locations.

(b) To minimize the suspension of business if you cannot continue "operations"

Policy § I.A.5.f-g. The Policy includes an "Exclusions" section. Relevant here is the following "virus exclusion":

Section I – Property

A. Coverage

...

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

a. Ordinance Or Law

...

j. Virus or Bacteria.

(1) Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

Policy § I.B.1.j(1).

B. Whether Plan Check suffered from any “direct physical loss of or damage to” its properties

The Policy is an “all-risk property” insurance policy² that limits its coverage to “direct physical loss of or damage to Covered Property.” Policy § I.A.³ The term “physical loss or damage” is typically the trigger for coverage in modern all-risk property insurance policies. 10A *Couch on Insurance* (3d ed. 2010), § 148:46. The word “physical” modifies both “loss” and “damage.” Plan Check concedes that its properties did not suffer any “physical damage.” Opp. at 11. However, the parties do dispute whether Plan Check has suffered a “physical loss.”

² An “all-risk” policy is one that covers all losses of the type described unless the loss is specifically excluded. By contrast, a named-perils policy covers only losses attributable to expressly enumerated causes.

³ The Policy covers physical loss of or damage to Covered Property “caused by or result from any Covered Cause of Loss.” Policy § I.A. The Covered Causes of Loss in turn are defined broadly to include all “[r]isks of direct physical loss” unless the loss falls within one of the Policy’s exclusions or limitations.

Neither the words “physical” nor “loss” are defined in the Policy. When interpreting an insurance policy provision, courts “must give its terms their ordinary and popular sense, unless used by the parties in a technical sense or a special

meaning is given to them by usage.” *Palmer v. Truck Ins. Exch.*, 21 Cal.4th 1109, 1115 (1999). Courts must also “interpret these terms in context, and give effect to every part of the policy with each clause helping to interpret the other.” *Id.*

AmGuard focuses on the word “physical.” That the “loss” must be “physical,” given the ordinary definition of that word, “is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, *physical alteration of the property.*” *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal.App.4th, 766, 799 (2010) (emphasis added) (quoting *Couch on Insurance*, § 148.46). According to AmGuard, the fact that there was no physical alteration to the properties means that Plan Check has not suffered a physical loss of property.

*4 Plan Check, on the other hand, focuses on the word “loss” and the accompanying prepositions. In particular, it emphasizes the fact that the Policy extends to “physical *loss of property*” or “physical *damage to property.*” Plan Check’s main criticism of AmGuard’s interpretation that “loss of” requires some kind of physical alteration is that it would make the terms “loss of” and “damage to” redundant. According to Plan Check, the Policy must be read so that these two terms have different meanings. Opp. at 14; *see also Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal.App.4th 715, 753 (1993) (“The way we define words should not produce redundancy, but instead should give each word significance.”).

Plan Check’s interpretation of “physical loss of” would not require a tangible alteration to the property, but would “include[] changes in what activities can physically occur in the space that cause loss to the insured, without including changes to the property that have no physical manifestation.” Opp. at 14. This would be a major expansion of insurance coverage, but by limiting the requirement of a tangible alteration to “physical damage to,” Plan Check argues this better harmonizes the case law while giving effect to these two terms. Under this interpretation, its inability to offer on-premise dining at its restaurants would be a physical loss of property covered by the Policy, even though there was no physical alteration.

While Plan Check’s argument is not inconceivable, the Court finds that it places too much weight on the need to avoid

surplusage, and asks a handful of words – “loss,” “of,” and “to” – to do too much work. The Court is mindful of the principle that in interpreting insurance policies, a court should “give effect to every part of the policy with each clause helping to interpret the other.” *Palmer*, 21 Cal.4th at 1115. However, this is not an inflexible rule that a court must follow when the outcome would be impracticable. *See Cal. Civ. Code* § 1641 (“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”); *Flintkote Co. v. General Acc. Assur. Co.*, 410 F.Supp.2d 875, 890 (N.D. Cal. 2006) (observing that in “adopt[ing] the only reasonable construction of the contract,” “[t]he fact that some redundancy results is not fatal”).

The authorities the Court has seen often blur the very distinction between “loss” and “damage” that Plan Check argues is so critical. In the insurance context, “loss” and “default” are the default, catch-all terms for referring to what the insured is protected against. *See Black’s Law Dictionary* (11th ed. 2019) (defining “insurance” as “[a] contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage, or liability arising from the occurrence of some specified contingency”). One treatise notes that in modern all-risk property insurance policies (such as the Policy), the trigger language is often “physical loss or damage,” though it also “may be any of several variants focusing on ‘injury,’ ‘damage,’ and the like.” *Couch on Insurance*, § 148:46 (emphasis added). Just three paragraphs later, the treatise goes on to observe – speaking about what is covered by these policies – that “[t]he requirement that the *loss* be ‘physical’ ... is widely held to exclude alleged losses that are intangible or incorporeal.” *Couch on Insurance*, § 148:46 (emphasis added). Though the language uses the word “loss,” it is clear that the treatise is referring to all property insurance policies. No matter whether the trigger language is “physical loss or damage” or simply “injury,” “loss,” “damage,” or something else, most courts – at least according to this treatise – hold that the tangible requirement applies. *See Simon Marketing, Inc. v. Gulf Ins. Co.*, 149 Cal.App.4th 616, 623 (2007) (“the reference to ‘direct’ losses is intended to mean *direct losses to property*, *i.e.*, physical damage to insured property * * * * ‘detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property’ (10A *Couch on Insurance*, *supra*, § 148:46, p. 148-81) is not compensable under a contract of property insurance.”).

*5 The weight of California law also appears to require some tangible alteration, no matter whether the trigger language uses “loss” or “damage.” One California court, dealing with an identical “direct physical loss of or damage to property” trigger, was confronted with a case involving a plaintiff who lost information stored in a computer database.⁴ *See Ward Gen. Ins. Serv., Inc. v. Emp’rs Fire Ins. Co.*, 114 Cal.App.4th 548 (2003). In determining that the loss of the database information was not a physical loss of property, the court focused on the fact that the property lost by the plaintiff could not “be said to have a material existence, be formed out of tangible matter, or be perceptible to the sense of touch.” *Id.* at 556.

4 The information was lost due to human error and a bug in the software, not mechanical or electrical failure in the hardware storing the database information.

Plan Check’s reliance on the difference between prepositions – “of” versus “to” – is tied up with the “loss”/“damage” issue and also goes too far. For example, in arguing for a tangible-alteration requirement, AmGuard cited to a case involving a policy that covered “accidental direct physical *loss to* business personal property.” *See* Mot. at 10 (citing *MRI Healthcare Ctr.*, 187 Cal.App.4th 766); *see also* Reply at 8. That court observed that “some external force must have acted upon the insured property to cause a physical change in the condition of the property, *i.e.* it must have been ‘*damaged*’ within the common understanding of that term.” *MRI Healthcare Ctr.*, 187 Cal.App.4th at 780 (emphasis added). Plan Check argues that the requirement of a “physical change” is not tied to the use of the word “loss,” but rather stems from the preposition “to,” and therefore should not be imported into an interpretation of the Policy’s “physical loss of or damage to” trigger. But did the mere word “to” do all the work there, or did the fact that “loss” was the sole trigger also contribute? For example, what good would a policy that protected against “direct physical *loss of* business personal property” be if it covered the misplacement of some property (without any physical alternation), but not its physical destruction? Not much, and yet that is the interpretation that Plan Check’s reasoning would support.

The Court agrees with Plan Check that sometimes the distinction between prepositions is important, but finds that this case is not one of them. In arguing that “loss of” property should extend to instances where an owner is dispossessed of the property, Plan Check relies heavily on a case involving an insurance policy of personal – as opposed to real – property that used the identical “direct physical loss of or damage

to” trigger. *See* Opp. at 12 (citing *Total Intermodal Serv. Inc. v. Travelers Prop. Cas. Co. of Am.*, 17-cv-04908, 2018 WL 3829767 (C.D. Cal. July 11, 2018)). When the insured did not receive its cargo because the cargo was accidentally shipped to the wrong port (custom authorities there refused to return it), the insurer argued that the loss was not covered because there was no physical damage to the cargo.⁵ The court rejected this argument, finding that “[physical] loss of” property contemplates that the property is misplaced and unrecoverable, without regard to whether it was damaged.” *Total Intermodal*, 2018 WL 3829767 at *3. While the court drew a distinction between “loss of” and “loss to,” it was careful to “recognize[] that the same phrase in a different kind of insurance contract could mean something else.” *Id.*, n. 4. The Court agrees that it would be a strange cargo insurance policy that covered only physical damage to the cargo, but not the insured's deprivation of it. In that setting, the court's holding that “the phrase ‘[physical] loss of’ includes the permanent dispossession of something” makes sense. *Id.* However, it requires a leap to extend that understanding of a permanent dispossession to the real-property insurance context to “include[] changes in what activities can physically occur in the space that cause loss to the insured.” Opp. at 15.

⁵ The cargo was in fact later destroyed, but the destruction did not happen during the applicable time period. *Total Intermodal*, 2018 WL 3829767 at *3.

*6 Ultimately, the Court finds that Plan Check's interpretation is not a reasonable one because it would be a sweeping expansion of insurance coverage without any manageable bounds. Plan Check insists that its bounding of “physical loss” to situations where changes in permitted physical activities is workable, but as AmGuard notes, it would mean that potentially any regulation that limits a business's operations would trigger coverage. Reply at 7. For example, consider the following scenarios: (1) a city changes its maximum occupancy codes to lower the caps, meaning that a particular restaurant can no longer seat as many customers as it used to;⁶ (2) a city amends an ordinance requiring restaurants located in residential zones to cease operations between 1:00 a.m. and 5:30 a.m. to expand the window to 12:00 a.m. to 6:00 a.m.; (3) a city issues a mandatory evacuation order to all of its residents due to nearby wildfires (a consequence of this is that all businesses must suspend operations), but lifts the order three weeks later when the wildfires are extinguished without, fortunately, any destruction of property. Under Plan Check's standard, all of these instances would trigger insurance coverage. While Plan

Check may believe that that is an appropriate result, the Court is not persuaded.⁷

⁶ To be concrete, suppose that the restaurant can no longer seat six people to a booth, but is now limited to four people to a booth. The changed maximum occupancy codes therefore do not render any booth or other structure in the restaurant useless.

⁷ Because the Court finds that Plan Check has not suffered any physical loss of or damage to its properties and therefore its loss is not covered by the Policy, it does not address AmGuard's additional argument that the Policy's virus exclusion applies.

The manageability issue is not limited to government action, but with anything that interferes with the permitted physical activities on a property. If a building's elevator system had a software bug that temporarily shut down all the elevators, that would clearly interfere with permitted physical activities. Similarly, a snowstorm would interfere with a restaurant's outdoor dining service. And yet Plan Check's interpretation would cover all of these scenarios. It offers no way, and the Court does not see any way, to limit this coverage. Though parties could in theory contract away coverage, this is not practicable for all-risk policies where everything is covered unless expressly excluded. The list of losses that do not fit within the parties' expectations of what property insurance should cover would be a very, very long one.

IV. Conclusion

⁸ Faced with similar insurance policies and claims – though dealing with different bodies of state law – courts have split on whether the insureds' losses during the COVID-19 pandemic are covered. Some have applied a similar “physical alteration” standard as this Court. *See, e.g., Social Life Magazine, Inc. v. Sentinel Ins. Co. Ltd.*, No. 20-cv-03311 (S.D.N.Y. May 14, 2020) (applying New York law); *see also Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 17-cv-23362, 2018 WL 3412974, at * (S.D. Fla. Jun. 11, 2018) (finding that insured had not demonstrated “physical loss of or damage to” its restaurant due to nearby construction dust and debris accumulating on it because the loss was “intangible or incorporeal”). At least one court has ruled in favor of plaintiffs by denying a motion to dismiss. *See Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-cv-03127, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020) (applying Missouri law and observing that although “there is case law in support of its position that physical tangible alteration is required to show a ‘physical loss,’ ” deciding that that case law was

either factually dissimilar or not binding and therefore declining to apply a physical-alteration requirement on the motion to dismiss).

*7 Small businesses are suffering from this unprecedented pandemic and COVID-19 insurance cases are starting to be litigated across the nation. However, Plan Check's theory of relief is a major departure from established California law. Just last month, another court in this district dismissed a suit brought by another Los Angeles restaurateur against its insurer involving the identical "physical loss of or damage to" trigger. *See 10E, LLC v. Travelers Indemnity Co. of*

Connecticut et al., 20-cv-04418 (C.D. Cal. Aug. 28, 2020).⁸ Based on the foregoing reasons, the Court finds that Plan Check's claims were not covered by the Policy and therefore Plan Check fails to state a claim for a breach of contract or the covenant of good faith and fair dealing. Its derivative claim for unfair business practices therefore also fails. Accordingly, the Court **GRANTS** the motion.

All Citations

Slip Copy, 2020 WL 5742712

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EXHIBIT 4

2020 WL 5630465

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois, Eastern Division.

SANDY POINT DENTAL, PC, Plaintiff,

v.

The CINCINNATI INSURANCE
COMPANY, Defendant.

Case No. 20 CV 2160

|
Signed 09/21/2020

Attorneys and Law Firms

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MEMORANDUM OPINION & ORDER

[Robert W. Gettleman](#), United States District Judge

*1 Plaintiff Sandy Point Dental, PC brought a three count complaint against defendant, The Cincinnati Insurance Company, seeking a declaration that defendant must provide coverage under the policy for losses due to governmental closure orders intended to slow the spread of the Coronavirus and COVID-19, damages and attorneys' fees under [215 ILCS 5/155](#), and a claim for breach of contract for failing to provide coverage. Defendant moves to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#) for failure to state a claim. For the reasons set forth below, the court grants defendant's motion.

BACKGROUND

Plaintiff is a dentist office. On March 20, 2020, Illinois Governor Pritzker issued an order instructing all "non-essential businesses" to close in order to slow the spread of COVID-19. That order left dental offices able to do emergency and non-elective work, but not routine work. As a dental office that mostly does routine work, plaintiff alleges that it was effectively forced to shut down for the duration of

the crisis. This shut-down has resulted in a substantial loss of revenue for plaintiff.

Defendant issued an insurance policy to plaintiff for the period of October 14, 2017 to October 14, 2020. The relevant provisions can be found in the Building and Personal Property Coverage Form and the Business Income Coverage Form. The Business Income Coverage states, in relevant part:

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

[...]

We 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" to property at "premises" which is described in the Declarations and for which a "Business Income" Limit of Insurance is shown in the Declaration. The "loss" must be caused by or result from a Covered Cause of Loss.

The policy defines a Covered Cause of Loss as "RISKS OF DIRECT PHYSICAL LOSS," unless expressly excluded by the policy.

The policy also provides Civil Authority coverage. To trigger such coverage, orders of civil authority must "prohibit access to the 'premises' due to direct physical 'loss' to the property, other than at the 'premises', caused by or resulting from a Covered Cause of Loss."

DISCUSSION

Defendants moved to dismiss pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#). The purpose of such a motion is to test the sufficiency of the complaint, not to judge the merits of the case. [Gibson v. City of Chicago](#), 910 F.2d 1510, 1520 (7th Cir. 1990). When considering the motion, the court accepts as true all well-pleaded factual allegations and draws all reasonable inferences in plaintiff's favor. [McMillan v. Collection Professionals Inc.](#), 455 F.3d 754, 758 (7th Cir. 2006). The complaint must plead sufficient facts to plausibly suggest that plaintiff has a right to relief and raise that possibility above the "speculative level." [Bell Atlantic Corp.](#)

[v. Twombly](#), 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

1) Property Damage

*2 The parties agree that Illinois law governs their dispute. In Illinois, the construction of an insurance policy is a question of law. [Country Mut. Ins. Co. v. Livorsi Marine, Inc.](#), 222 Ill.2d 303, 305 Ill.Dec. 533, 856 N.E.2d 338, 342 (Ill. 2006). An insurance policy is to be construed as a whole, “giving effect to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose.” [Valley Forge Ins. Co. v. Swiderski Elecs., Inc.](#), 223 Ill.2d 352, 307 Ill.Dec. 653, 860 N.E.2d 307, 314 (Ill. 2006). “If the words used in the policy are clear and unambiguous, they must be given their plain, ordinary, and popular meaning.” [Cent. Ill. Light Co. v. Home Ins. Co.](#), 213 Ill.2d 141, 290 Ill.Dec. 155, 821 N.E.2d 206, 213 (Ill. 2004). However, “[a] policy provision is not rendered ambiguous simply because the parties disagree as to its meaning.” [Founders Ins. Co. v. Munoz](#), 237 Ill.2d 424, 341 Ill.Dec. 485, 930 N.E.2d 999 (Ill. 2010).¹

¹ The court may take notice of the policy without converting the motion to dismiss into a motion for summary judgment. [Venture Assoc. Corp. v. Zenith Data Sys. Corp.](#), 987 F.2d 429, 431 (7th Cir. 1993).

At the most basic level, the parties dispute whether the substantial closure of the dentist office due to Governor Pritzker's orders constituted a “direct physical loss” under the policy. Plaintiff's complaint does not allege that there was any demonstrable, physical alteration to the property at its dental office. Rather, plaintiff asserts that the language of the policy does not require a tangible, material loss to the physical structure, but allows for a partial loss to the properties from loss of use. Plaintiff further argues that the policy contains several exclusions to coverage, and that an exclusion for pandemics is conspicuously absent from the exclusion section.

The critical policy language here—“direct physical loss”—unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage. The words “direct” and “physical,” which modify the word “loss,” ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure. See [Newman Myers Kreines Gross, P.C. v. Great Northern Ins.](#)

[Co.](#), 17 F.Supp.3d 323 (S.D.N.Y. 2014) (law firm did not suffer “direct physical loss” when electric utility preemptively shut off power in advance of Hurricane Sandy). Plaintiff simply cannot show any such loss as a result of either inability to access its own office or the presence of the virus on its physical surfaces, the latter of which plaintiff fails to allege in its complaint. Plaintiff has not pled any facts showing physical alteration or structural degradation of the property. Nothing about the property has been altered since March 2020. Plaintiff need not make any repairs or change any part of the building to continue its business. Compare [Id.](#) (explaining that “repair” and “replace” in period of restoration clause “contemplate physical damage to the insured premises as opposed to loss of use of it”); with [Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Int'l Ins. Co.](#), 308 Ill.App.3d 597, 242 Ill.Dec. 1, 720 N.E.2d 622, 625-26 (Ill. Ct. App. 1999), as modified on denial of rehearing (Dec. 3, 1999) (finding physical damage to the property, and thus coverage, because plaintiff was required to conduct repairs and remove asbestos-causing materials from the premises).

This holding is consistent with other courts that have evaluated whether the coronavirus causes property damage warranting insurance coverage. See, for example, [Social Life Magazine, Inc. v. Sentinel Ins. Co. Ltd.](#), No. 20 C 3311 (S.D.N.Y. 2020), ECF No. 25, Ex. B at 5:3-4 (denying a motion for preliminary injunction because the coronavirus does not cause direct physical loss, therefore no coverage was required; the coronavirus “damages lungs. It doesn't damage printing presses”); [Diesel Barbershop, LLC v. State Farm Lloyds](#), — F.Supp.3d —, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) (granting a motion to dismiss because the coronavirus did not cause a direct physical loss, and “the loss needs to have been a ‘distinct, demonstrable physical alteration of the property.’ ”); [Gavrilides Mgmt. Co. v. Michigan Ins. Co.](#), No. 20-258-CB (Mich. 2020), ECF No. 25, Ex. C (explaining that direct physical loss to property requires tangible alteration or damage that impacts the integrity of the property, and dismissing the case because plaintiff failed to allege that the coronavirus had any impact to the premises); [Rose's 1, LLC v. Erie Ins. Exch.](#), No. 2020 CA 002424 B, 2020 WL 4589206, at *5 (D.C. Super. Aug. 6, 2020) (granting summary judgment for insurer on restaurant's claims of lost business caused by coronavirus closure orders because there was no direct physical loss to property).²

² Plaintiff heavily relies on [Studio 417 Inc. v. The Cincinnati Insurance Co.](#), 20 C 3127-SRB (S.D. Mo. Aug. 12, 2020), a Missouri case that found that the

coronavirus caused a physical loss to property warranting insurance coverage. That court rested its decision on that policy's expansive language, language very different from the policy in the instant case. The unambiguous language in the instant policy warrants a different conclusion—physical damage that demonstrably alters the property is necessary for coverage, and the coronavirus does not cause physical damage.

*3 In essence, plaintiff seeks insurance coverage for financial losses as a result of the closure orders. The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property. Consequently, plaintiff has failed to plead a direct physical loss—a prerequisite for coverage.³

³ Plaintiff's arguments regarding the exclusions are unavailing. By the policy's plain and unambiguous text, the exclusions are triggered only when there is first a direct physical loss. Having determined that there is no direct physical loss, the court need not address arguments regarding the exclusions.

2) Civil Authority

Plaintiff's arguments regarding civil authority coverage fail for similar reasons. As noted above, the policy's civil authority coverage applies only if there is a Covered Cause of Loss, meaning a direct physical loss, to property other than the plaintiff's property. Even then, there is coverage only if the civil authority order, (1) prohibits access to the premises due to (2) direct physical loss to property, other than plaintiff's premises, caused by or resulting from any Covered Cause of Loss.

Just as the coronavirus did not cause direct physical loss to plaintiff's property, the complaint has not (and likely could not) allege that the coronavirus caused direct physical loss to other property. By the policy's own terms, the civil authority coverage does not apply. Failure to meet this requirement alone warrants dismissal of any claim for civil authority coverage. As to the next prong, while coronavirus orders have limited plaintiff's operations, no order issued in Illinois prohibits access to plaintiff's premises. See [Syufy Enters. v. Home Ins. Co. of Ind.](#), 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995) (riot-related curfew prevented customers

from being outside, it did not prohibit access to the insured's premises). Indeed, plaintiff concedes that dental offices were deemed essential businesses for emergency and non-elective work. Consequently, plaintiff has failed to allege that access to its premises was prohibited by government order, and its claim for civil authority coverage fails.

For the foregoing reasons, Counts I and II are dismissed.

3) Section 155

215 ILCS 5/155 provides “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 (7th 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 omitted). Section 5/155 claims may be dismissed at the pleadings stage when a plaintiff fails to state a sufficient factual basis for sanctions, or when a bona fide dispute regarding coverage is apparent from the face of the complaint. See [9557, LLC & River W. Meeting Assocs., Inc. v. Travelers Indem. Co. of Conn.](#), No. 15 C 10822, 2016 WL 464276, at *4 (N.D. Ill. Feb. 8, 2016).

Here, plaintiff's complaint states in a conclusory fashion: “[d]efendant's denials were vexatious and unreasonable.” The only factual allegation provided is that defendant denied the insurance claim without conducting an investigation. Plaintiff has thus failed to plead a sufficiently plausible basis for sanctions. Further, the face of the complaint presents, at most, a bona fide dispute over coverage which precludes a finding of Section 155 liability. Count III is dismissed.

CONCLUSION

*4 For the reasons stated above, defendant's motion to dismiss (Doc. 25) is granted.

All Citations

Slip Copy, 2020 WL 5630465

EXHIBIT 5

2020 WL 5791583

Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Tampa Division.

INFINITY EXHIBITS, INC., Plaintiff,

v.

CERTAIN UNDERWRITERS AT
LLOYD'S LONDON KNOWN AS
SYNDICATE PEM 4000 and Hamilton
Designated Activity Company, Defendants.

Case No. 8:20-cv-1605-T-30AEP

|
Signed 09/28/2020

Attorneys and Law Firms

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Gornitsky, PLLC, Ft. Lauderdale, FL, for Plaintiff.

[Armando Pedro Rubio](#), Fields Howell LLP, Miami, FL, for
Defendants.

ORDER

[JAMES S. MOODY, JR.](#), UNITED STATES DISTRICT
JUDGE

*1 This cause is before the Court on Defendants Certain Underwriters at Lloyd's, London Known as Syndicate PEM 4000's and Hamilton Designated Activity Company's (collectively "Underwriters") Motion to Dismiss Plaintiff's Amended Complaint (Dkt. 11), Plaintiff's Response in Opposition (Dkt. 16), and Defendant's Reply (Dkt. 19). Upon review of these filings, and upon being otherwise advised in the premises, the Court concludes that Defendants' motion should be granted because Plaintiff has not adequately alleged direct physical loss or damage to the subject property or any surrounding property. The Court also concludes that further amendment would be futile. Accordingly, the amended complaint will be dismissed with prejudice.

BACKGROUND

A. The Policies

Underwriters provided two property insurance policies to Plaintiff Infinity Exhibits, Inc., a company that designs and fabricates trade show displays. The first policy, number 994OR100192, was issued for the period April 4, 2019, to April 4, 2020, and insured the property located at 2226 8th Street, Sarasota, FL 34237 (the "Property"). The second policy, number 994OR100642, insures the Property for the April 4, 2020, to April 4, 2021 period. *See* Complaint, Exhibits A (at p.32 of 160) and B (at p. 96 of 160) [Dkt. 1-2], collectively referred to as the "Policies."

The Policies' insuring clause provides:

A. Coverage

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.

(Policies, [Dkt. 1-2], Exhibits A and B, Form CP 00 10 10 12, at p. 1 of 16).

The Policies provide coverage for loss of "Business Income" and state in relevant part:

1. Business Income

* * *

We 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 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. With respect to loss or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises. (Exhibits A and B, Form CP 00 30 10 12, at p. 1 of 9) (emphasis added).

The Policies also provide coverage for "Extra Expense:"

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*.

We will pay Extra Expense (other than the expense to repair or replace property) to:

(1) Avoid or minimize the “suspension” of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.

*2 (2) Minimize the “suspension” of business if you cannot continue “operations”.

We will also pay Extra Expense to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable under this Coverage Form.

(Policies, [Doc. 1-2] Exhibits A and B, Form CP 00 30 10 12, p. 1-2 of 9) (emphasis added).

The Policies define the “period of restoration,” in part, as:

... 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.

(Policies, [Dkt.1-2] Exhibits A and B, Form CP 00 30 10 12, at p. 9 of 9).

The Policies provide “Civil Authority” coverage as follows:

5. Additional Coverages

a. Civil Authority

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 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 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 damage 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.

(Policies, [Dkt. 1-2] Exhibits A and B, Form CP 00 30 10 12, p. 2 of 9) (emphasis added).

B. The Insurance Claim

Plaintiff submitted a claim seeking recovery for business income loss as a result of state orders issued in response to the Novel Coronavirus Disease 2019 (“COVID-19”) pandemic (the “Claim”). (Dkt. 1-2, Exhibit 1 at ¶ 51).

According to the Amended Complaint, Plaintiff began to lose income on or about March 2, 2020, as a result of cancelled trade shows. The Amended Complaint references an order enacted by Florida Governor Ron DeSantis mandating the closure of non-essential businesses on April 1, 2020. *Id.* at ¶44. The Amended Complaint does not include any allegations that Plaintiff was precluded from accessing the Property as a result of COVID-19 or any of the related government orders and social distancing requirements. The Amended Complaint does not describe how the Property or any other property experienced “direct physical loss or damage.”

Underwriters moves to dismiss the entirety of the Amended Complaint for failure to state a claim under [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#). Underwriters’ main argument is that the Policies do not cover the Claim because Plaintiff has not alleged direct physical loss or damage to the Property. The Court agrees.

STANDARD OF REVIEW

*3 Rule 12(b)(6) allows a complaint to be dismissed for failure to state a claim on which relief can be granted. When reviewing a motion to dismiss, courts must limit their consideration to the well-pleaded allegations, documents central to or referred to in the complaint, and matters judicially noticed. See *La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (internal citations omitted); *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005). Furthermore, they must accept all factual allegations contained in the complaint as true and view the facts in a light most favorable to the plaintiff. See *Erickson v. Pardus*, 551 U.S. 89, 93–94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007).

Legal conclusions, though, “are not entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 664, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). In fact, “conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal.” *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003). To survive a motion to dismiss, a complaint must instead contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (internal quotation marks and citations omitted). This plausibility standard is met when the plaintiff pleads enough factual content to allow the court “to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (internal citations omitted).

DISCUSSION

Under Florida law, the interpretation of an insurance contract, including resolution of any ambiguities contained therein, is a question of law to be decided by the court. *Dahl–Eimers v. Mutual of Omaha Life Ins. Co.*, 986 F.2d 1379, 1381 (11th Cir. 1993) (citing *Sproles v. Amer. States Ins. Co.*, 578 So. 2d 482, 484 (Fla. 5th DCA 1991)). In construing an insurance contract, a court must strive to give every provision meaning and effect. *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000); *Excelsior Ins. Com. v. Pomona Park Bar & Package Store*, 369 So. 2d 938, 941 (Fla. 1979). A party claiming coverage bears the burden of proof to establish that coverage exists. *U.S. Liab. Ins. Co. v. Bove*, 347 So. 2d 678, 680 (Fla. 3rd DCA. 1977). The Florida Supreme Court has

noted that an “all-risk” policy—like the Policies at issue in this case—is not an “all loss policy, and thus does not extend coverage for every conceivable loss.” *Sebo v. Am. Home Assurance Co.*, 208 So. 3d 694, 696–97 (Fla. 2016) (citation omitted).

Plaintiff argues that economic damage is synonymous with “physical loss” and is therefore covered under the Policies. Plaintiff’s argument is unpersuasive because Florida law and the plain language of the Policies reflect that actual, concrete damage is necessary. In *Mama Jo’s Inc. v. Sparta Insurance Company*, No. 18-12887, — Fed.Appx. —, —, 2020 WL 4782369, at *8 (11th Cir. Aug. 18, 2020), the Eleventh Circuit recently held that “under Florida law, an item or structure that merely needs to be cleaned has not suffered a ‘loss’ which is both ‘direct’ and ‘physical.’ ” (quoting *Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017)); see also *Vazquez v. Citizens Prop. Ins. Corp.*, — So.3d —, —, 2020 WL 1950831, at *3 (Fla. 3d DCA 2020). The Eleventh Circuit noted that the definition of “direct physical loss” is the diminution of value of something. Specifically: “Direct and physical modify loss and impose the requirement that the damage be actual.” — Fed.Appx. at —, 2020 WL 4782369, at *8.

*4 The *Mama Jo’s* opinion undercuts Plaintiff’s response in opposition to Underwriters’ motion because it rejects Plaintiff’s argument that the Policies are ambiguous. The opinion also rejects Plaintiff’s contention that pure economic losses are covered. Notably, although *Mama Jo’s* was not about closures related to COVID-19, the initial claim had two components: one for cleaning the restaurant and another for Business Income Loss related to nearby road construction that caused dust and debris to interfere with the operation of the plaintiff’s restaurant. Like the Policies here, the policy’s Building and Personal Property Coverage Form stated that the insurance company “will pay for direct physical loss of or damage to Covered Property ... caused by or resulting from any Covered Cause of Loss.”

The policy’s Business Income Coverage Form provided that the insurance company 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” covered property. *Id.* (internal citations omitted). The Eleventh Circuit held that, even if the plaintiff had shown a “suspension” of operations as a result of the construction, the plaintiff did not establish that “it suffered

a direct physical loss of or damage to its property during the policy period.” *Id.*

Significantly, Plaintiff is not the first insured to seek coverage due to COVID-19 government shutdown orders under a policy that limits coverage to losses caused by direct physical loss or damage to the property. Courts across the country have held that such coverage does not exist where, as here, policyholders fail to plead facts showing physical property damage. For example, in *Turek Enterprises, Inc. v. State Farm Mutual Automobile Insurance Co.*, No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020), the plaintiff chiropractor sought coverage for loss of income due to government orders that restricted plaintiff's ordinary use of its property. The court dismissed the action with prejudice, holding that the plaintiff had failed to demonstrate tangible damage to covered property, as “plainly” required by the policy term “direct physical loss.” *Id.* at *8.

In *10E, LLC v. Travelers Indemnity Co. of Connecticut*, No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020), the plaintiff sought coverage for income lost as a result of government shutdown orders that prevented the ordinary and intended use of a property. The court dismissed the action, holding that the plaintiffs “cannot recover by attempting to artfully plead impairment to economically valuable use of property as physical loss or damage,” and noting that impaired use or value cannot substitute for physical loss or damage. *Id.* at *5.

In *Malube, LLC v. Greenwich Insurance Co.*, No. 1:20-cv-22615-KMW, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020), the plaintiff sought coverage for lost income due to government orders that restricted the plaintiff's ability to use its property as intended. The Magistrate Judge's Report and Recommendation concluded that the action should be dismissed because the policy required direct physical loss or property damage and plaintiff had alleged “merely [] economic losses—not anything tangible, actual, or physical.” *Id.* at *8; see also *Mudpie, Inc. v. Travelers Cas. Ins. Co. of America*, C.A. No. 4:20-cv-03213-JST, --- F.Supp.3d ---, 2020 WL 5525171 (N.D. Cal. Sept. 14, 2020) (granting insurer's motion to dismiss); *Pappy's Barber Shops, Inc., et al. v. Farmers Group, Inc., et al.*, C.A. No. 3:20-cv-907-

CAB-BLM, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020) (granting insurer's motion to dismiss); *Diesel Barbershop, LLC v. State Farm Lloyds*, C.A. No. 5:20-cv-461-DAE, --- F.Supp.3d ---, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020) (granting insurers' motion to dismiss); *Soc. Life Magazine, Inc. v. Sentinel Ins. Co.*, C.A. No. 20-cv-3311-VEC (S.D.N.Y. May 14, 2020) (denying insured's motion for preliminary injunction seeking coverage); *The Inns by the Sea v. Cal. Mut. Ins. Co.*, C.A. No. 20-cv-001274 (Cal. Super. Ct. Aug. 6, 2020) (granting insurer's demurrer); *Rose's 1, LLC v. Erie Ins. Exch.*, C.A. No. 2020-CA-002424-B, 2020 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020) (granting insurer's summary judgment motion); *Gavrilides Mgmt. Co. v. Mich. Ins. Co.*, C.A. No. 20-000258-CB (Mich. Cir. Ct. July 1, 2020) (granting insurer's motion for “summary disposition” which under Michigan law was on a motion to dismiss standard).

*5 In sum, although the Court is sympathetic to Plaintiff and all insureds that experienced economic losses associated with COVID-19, there is simply no coverage under the policies if they require “direct physical loss of or damage” to property. Here, there is no business income coverage and no civil authority coverage because the Amended Complaint fails to allege facts describing how the Property suffered any actual physical loss or damage. It is also apparent that any amendment would be futile under these circumstances.

It is therefore ORDERED AND ADJUDGED that:

1. Defendants Certain Underwriters at Lloyd's, London Known as Syndicate PEM 4000's and Hamilton Designated Activity Company's Motion to Dismiss Plaintiff's Amended Complaint (Dkt. 11) is granted.
2. The Amended Complaint is dismissed with prejudice.
3. The Clerk of Court is directed to close this case and terminate any pending motions as moot.

DONE and ORDERED in Tampa, Florida, this September 28, 2020

All Citations

--- F.Supp.3d ----, 2020 WL 5791583

EXHIBIT 6

2020 WL 5820552

Only the Westlaw citation is currently available.

United States District Court,
S.D. Iowa, Central Division.

ORAL SURGEONS, P.C., Plaintiff,

v.

The CINCINNATI INSURANCE
COMPANY, Defendant.

No. 4-20-CV-222-CRW-SBJ

Signed 09/29/2020

Attorneys and Law Firms

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IA, Daniel G. Litchfield, [Laurence J. Tooth](#), Pro Hac Vice,
Litchfield Cavo LLP, Chicago, IL, for Defendant.

ORDER

[CHARLES R. WOLLE](#), JUDGE U.S. DISTRICT COURT

*1 Background. In this lawsuit, removed from the Iowa District Court for Polk County, plaintiff Oral Surgeons, P.C. (OSPC) asserts the defendant Cincinnati Insurance Company (Cincinnati) issued OSPC insurance policy ECP 036 57 36 for the policy period January 1, 2019 to January 1, 2022. OSPC contends that in April 2020 it filed a claim with Cincinnati under the policy's business interruption/loss of income clause. OSPC asserts it suffered a loss of use of its property when, in an effort to slow the spread of the novel coronavirus COVID-19, the State of Iowa issued a proclamation and subsequent mandates that restricted OSPC from performing non-emergency dental procedures from approximately March 26, 2020 to May 8, 2020. OSPC asserts that Cincinnati subsequently denied coverage. OSPC's petition, now deemed a complaint in this Court, asserts claims for 1) declaratory relief that the policy provides coverage for OSPC's claim, 2)

breach of the insurance contract, and 3) bad faith denial of the claim.

Motion to dismiss. On September 15, 2020, the Court held a hearing by telephone conference call on Cincinnati's resisted motion to dismiss (Docket # 3). The Court does not convert this motion to dismiss into a motion for summary judgment, considering that the policy identified in the complaint is integral to and embraced by OSPC's claims. See [Hushes v. City of Cedar Rapids](#), 840 F.3d 987, 998 (8th Cir. 2016).

Cincinnati contends OSPC has failed to state a claim for which relief can be granted, arguing that the policy at issue insures only against physical loss to property, not the purely economic loss OSPC suffered.

Analysis. The policy language states:

We 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 "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss.

Policy, p. 18. The term "loss" is defined to mean "accidental physical loss or accidental physical damage." Policy, p. 38. OSPC does not allege any such "physical" or "accidental" loss, but instead contends its loss was caused by the COVID-19 coronavirus and the government actions to suspend temporarily non-emergency dental procedures. Recent Cases cited by Cincinnati have held that virus-related closures of business do not amount to direct loss to property covered by the Cincinnati policy of insurance. The few contrary cases cited by OSPC are distinguishable on their facts and not as well analyzed as the many authorities cited by Cincinnati.

The Court grants the Cincinnati motion to dismiss; this case is dismissed with prejudice at plaintiff's cost.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 5820552

EXHIBIT 7

UNITED STATES OF AMERICA

STATE OF ILLINOIS

COUNTY OF DU PAGE

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

ITS NICE INC

-VS-

STATE FARM FIRE AND CASUALTY CO

2020L000547
CASE NUMBER**FILED**

20 Sep 29 PM 01: 07

*Chris Kachirobas*CLERK OF THE
18TH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

ORDER

For the reasons stated on the record, Defendant State Farm's 2-615 motion to dismiss is granted, with prejudice, with respect to both Count I and Count II of Plaintiff's complaint.

Submitted by: JUDGE BRYAN CHAPMAN

DuPage Attorney Number:

Attorney for:

Address:

City/State/Zip:

Phone number:

Bryan Chapman
File Date: 09/29/2020

Entered:

JUDGE BRYAN CHAPMAN

Validation ID : DP-09292020-0107-11175

Date: 09/29/2020

EXHIBIT 7A

IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

IT'S NICE, INC., d/b/a	)	
HAROLD'S CHICKEN SHACK #83, an	)	
Illinois Corporation,	)	
	)	
Plaintiff,	)	
	)	
- vs -	)	No. 20 L 547
	)	2-615 Motion
STATE FARM FIRE AND CASUALTY	)	
CO.,	)	
	)	
Defendant.	)	

REPORT OF VIDEOCONFERENCE PROCEEDINGS

had at the hearing of the above-entitled cause, before
the Honorable BRYAN S. CHAPMAN, DuPage County,
Illinois, recorded via Zoom and transcribed by
Kristin M. Barnes, Certified Shorthand Official Court
Reporter, commencing on the 29th day of September,
2020.

Kristin M. Barnes, CSR
Official Court Reporter
CSR No. 084-004026

1 PRESENT:

2 FRANKLIN LAW GROUP, by
3 MR. RYAN ENDSLEY,

4 appeared on behalf of the Plaintiff;

5 SUDEKUM, CASSIDY & SHULRUFF, CHTD., by
6 MS. FLORENCE M. SCHUMACHER and
7 MR. FREDERICK J. SUDEKUM, III,

8 appeared on behalf of the Defendant.
9
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1 THE COURT: All right. Good morning, Counsel.

2 MR. ENDSLEY: Good morning, your Honor.

3 THE COURT: All right. This is 20 L 547, It's
4 Nice, Inc. versus State Farm Fire and Casualty.

5 We come on for a 2-615 motion in connection
6 with It's Nice's claim for coverage under the policy.

7 I've had a chance to read the motion, the
8 corresponding briefing, and I know there had been some
9 motions for leave to file supplemental authority. I
10 have had a chance to look at those motions.

11 I assume both parties are okay with each side
12 submitting their respective -- their respective briefs
13 in support of their -- their respective authority in
14 support of their positions.

15 Is that a fair characterization?

16 MR. ENDSLEY: Yes, your Honor. For It's Nice, at
17 least.

18 THE COURT: Sure.

19 MS. SCHUMACHER: State Farm as well, your Honor,
20 there's no objection.

21 THE COURT: All right. Why don't we go ahead and
22 have the parties state their names for the record.

23 MS. SCHUMACHER: Sure.

24 Florence Schumacher and Rick Sudekum here on

1 behalf of State Farm.

2 THE COURT: Uh-huh.

3 MR. ENDSLEY: Ryan Endsley on behalf of It's Nice,
4 Inc.

5 THE COURT: Okay. What I'd like to do here, guys,
6 I have spent considerable time with the -- with the
7 courtesy copies. I've got my tabs. Like I said, I've
8 read the authority. I've read the additional authority
9 submitted.

10 I don't necessarily need a regurgitation of
11 the positions already taken in the briefs. I feel like
12 I have adequately familiarized myself with the parties'
13 positions.

14 I do want to give the parties a chance to
15 make their record here. I appreciate the issue and
16 that it's kind of a fastly moving issue through the
17 courts right now, and, as a result, I want to give the
18 parties a chance a make their record.

19 That said, I don't necessarily need, you
20 know, sort of, your Honor, this is how insurance
21 policies work. I mean, tell me whatever you want to
22 tell me. I may have a question or two for the parties,
23 but I'll let you make your record first.

24 State Farm, it's your motion. I'll let you

1 go ahead if there's anything you want to add.

2 MS. SCHUMACHER: Sure, your Honor.

3 I am going to briefly run through our
4 argument again, trying to sort of work in some of those
5 cases that have come in more recently.

6 I understand that the court is familiar with
7 insurance policies in general, so we won't -- hopefully
8 won't belabor you with too much elementary insurance
9 law here.

10 Obviously, the plaintiffs know -- or the
11 court knows that the plaintiff is seeking to recover
12 for a business interruption loss resulting from the
13 COVID-19 pandemic and the executive orders.

14 In our view, there are basically two main
15 barriers to plaintiffs being able to state a cause of
16 action. The first is the lack of accidental direct
17 physical loss and the second is the virus exclusion.

18 The way I look at these, your Honor, it's
19 sort of like -- the lack of accidental direct physical
20 loss is like a 10-foot hurdle and the virus exclusion
21 is like a brick wall. So even if the plaintiffs could
22 plead accidental direct physical loss, which they
23 can't, they're going to run right into the virus
24 exclusion and there's not going to be any coverage for

1 that reason either.

2 THE COURT: That was my -- that was the one thing
3 I wondered a little bit about in reading your briefing,
4 more the structure of your brief.

5 MS. SCHUMACHER: Right.

6 THE COURT: You led with the virus exclusion, and,
7 to my mind, there's an insuring agreement here as a
8 preliminary matter and we only get to the virus
9 exclusion if the court finds that there is, in fact,
10 accidental direct physical loss to the property in the
11 first instance.

12 You would agree with that?

13 MS. SCHUMACHER: I would, your Honor.

14 THE COURT: Okay.

15 MS. SCHUMACHER: You know, the court is
16 familiar -- it's the trigger of coverage. I mean, just
17 like in a life insurance policy, until you have the
18 death of the insured, there's no coverage to begin
19 with.

20 It's the same for these policies. They're
21 property policies, so their triggering coverage is
22 accidental direct physical loss. You know, you can't
23 just skip this part. It's the trigger of coverage.
24 It's something that the plaintiff has the burden of

1 proof on.

2 So, in this case, the covered property is the
3 restaurant property, so the first question is, where is
4 the accidental direct physical loss pleaded, and our
5 response, obviously, is that it isn't.

6 So, you know, just looking briefly at the
7 complaint, you know, they allege that there was no
8 virus on the property and their accidental direct
9 physical loss argument is based on loss and use.

10 But, you know, my first point is, it has to
11 be accidental direct physical loss, and I think it's
12 undisputed that there was no difference to this
13 property physically on the day before these executive
14 orders were issued than there was on the day after, so
15 physically the property was exactly the same.

16 So where's the loss? Where's the loss
17 they're arguing? They're saying that loss of use is
18 sufficient, that they couldn't use the property in the
19 same way, and that somehow that constitutes accidental
20 direct physical loss to the property, and we disagree
21 with that position.

22 So we believe that the Illinois law and all
23 these cases that have recently come out correctly hold
24 that loss of use of property without any physical

1 change to that property cannot constitute accidental
2 direct physical loss.

3 THE COURT: Mr. Endsley, at the risk of stealing
4 your thunder, I'm going to ask Ms. Schumacher
5 why don't you go ahead and respond to the western
6 district of Missouri cases that were cited by It's Nice
7 where it looks like some district courts in the western
8 district have found, you know, sort of a lack of
9 definition in the policy for physical damage or loss
10 of -- you know, what are the factual distinctions in
11 those cases, if any --

12 MS. SCHUMACHER: Right, right.

13 THE COURT: -- as to why the court should not find
14 those cases persuasive here as opposed to some of the
15 cases you've cited?

16 MS. SCHUMACHER: Sure.

17 So the first thing I would say, the court
18 says there are courts in the western district of
19 Missouri. What we actually have is one court -- it's
20 the same judge in the two cases -- who has gone
21 essentially the other way on this accidental direct
22 physical loss question.

23 Those cases are factually distinguishable on
24 two main grounds. The first is that the plaintiffs in

1 those cases argue that they had virus on the premises.
2 So the plaintiff in this case has not even alleged that
3 there was any virus present.

4 The second distinction is in the policy
5 language. So the trigger of coverage in those
6 policies, in the Studio 417 and the other case, were --
7 I think I've got the exact language here -- accidental
8 direct -- or accidental physical loss or accidental
9 physical damage.

10 And so the court in Studio 417 felt that it
11 had to somehow -- you know, focusing on that
12 disjunctive *or*, the court found that it had to give
13 separate meaning to physical loss and physical damage.

14 That's not the case in our policy. There's
15 one trigger of coverage, which is accidental direct
16 physical loss to property.

17 We also have a virus exclusion, which wasn't
18 present in those cases, but I know the court is asking
19 me about physical loss.

20 So I would say the first and the most
21 important distinguishing factor is, obviously, the
22 pleading in this case -- I think it's in paragraphs, I
23 think, 25 and 36 of the complaint where the plaintiffs
24 specifically deny that they had any virus present on

1 premises.

2 And, again, I would disagree with Studio 417.
3 I'm not sure even in their presence a virus is enough.
4 Other courts have disagreed with that opinion as well,
5 but I think for our purposes in our complaint we have a
6 complaint that alleges the absence of the virus. And
7 then, obviously, we have a policy that doesn't have
8 that *or* in there that the Studio 417 court seemed to
9 think was determinative.

10 THE COURT: All right. Anything else you want to
11 add?

12 MS. SCHUMACHER: Just jumping briefly into the
13 virus exclusion, your Honor, in case we get there, we
14 have that anti-concurrent causation language which
15 broadly excludes coverage when a loss would not have
16 occurred in the absence of a virus.

17 That language, that anti-concurrent causation
18 language, has been upheld in Illinois. The virus
19 exclusion clearly applies in this case. There is no
20 requirement in that policy language that the virus be
21 physically present on the property, like plaintiff
22 alleges. They're just adding language to the exclusion
23 which isn't present. The exclusion needs to be applied
24 as written. It unambiguously excludes a broad range of

1 losses. Virus is one of them.

2 Oh, the argument about, you know, the
3 proliferation issue, that somehow those two
4 subparagraphs of the virus exclusion need to be read
5 together, that's just not correct. The virus portion
6 of that exclusion is separate. It says that loss is
7 excluded, current virus, bacteria, or other
8 microorganism.

9 So, again, I think it's -- I don't see how it
10 could possibly be ambiguous: I mean, this -- clearly
11 we have a too late chain of causation here. The virus
12 caused the executive orders which caused the loss and
13 it's excluded under the virus exclusion.

14 THE COURT: Okay. Mr. Endsley, do you want to
15 respond to anything that's -- do you want to respond
16 with anything that's not in your brief? Or if there's
17 a point or two you want to emphasize, I'm happy to give
18 you a chance to do so.

19 MR. ENDSLEY: Thank you, your Honor.

20 So I just wanted to highlight a couple of
21 things. In particular, we -- you know, the Studio 417
22 case, we have the same situation where State Farm
23 elected not to define physical loss or damage. And, in
24 this case, while counsel has pointed out that this

1 policy only says physical loss, that's really the
2 broader of the two. Physical damage is what's probably
3 more in line with what State Farm's position is, which
4 is that a physical loss or damage must be a structural
5 alteration.

6 And the fact is that I think the Illinois
7 courts have not limited themselves quite so much to
8 structural physical alteration as State Farm would like
9 the court to believe. In particular, it's sort of an
10 all squares are rectangles argument. They cite cases
11 which are saying, you know, a change in color or shape
12 or appearance to the property is a physical loss or
13 damage, which is true, but that's not the only type of
14 physical loss.

15 And I think sort of looking at the asbestos
16 cases really sort of points that out, and State Farm's
17 position really throughout the briefs has been that
18 Illinois law requires a physical alteration to the
19 structure, and that's just not really what Illinois
20 case law actually says.

21 The other thing I'd sort of like to
22 highlight -- and this impinges a little bit on both the
23 virus exclusion and the physical loss or damage -- and
24 that's sort of the nature of an exclusion. And I know

1 that this is, you know, kind of a basic insurance
2 issue, but the fact is that an exclusion exists to
3 exclude coverage which would otherwise be present.

4 A virus cannot cause physical alteration to
5 the building, as far as I'm aware. If there's a way
6 that it can be done, State Farm certainly hasn't
7 articulated it. So at least this policy, as written,
8 clearly seems to contemplate nonphysical alterations
9 which would otherwise be covered causes of loss.

10 And that's a problem for the policy in a
11 couple -- for State Farm in a couple of ways in that
12 State Farm wants to apply the virus exclusion where it
13 was not present. Even in the absence of a virus
14 exclusion, if the governor had never closed the
15 building, It's Nice could never have made a claim
16 for -- under this policy because the coronavirus
17 existed somewhere. You know, even if there is
18 absolutely no virus exclusion in a different policy
19 like that, there just wasn't anything affecting It's
20 Nice's property.

21 And separately, with the physical loss or
22 use, when you're reading the policy, a number of these
23 exclusions, including, you know, both the virus
24 exclusion itself as well as the government closure

1 exclusion, really does contemplate under the policy
2 exclusions for nonphysical, nonstructural altering
3 causes of loss.

4 And that, to me, reads -- particularly when
5 State Farm has elected not to define loss or -- you
6 know, physical loss, that's a problem for them because
7 the policies seem to exclude things which wouldn't be
8 covered anyway under State Farm's interpretation, and
9 yet there they are.

10 Reading the policy as a whole and
11 constructing the ambiguities in favor of coverage,
12 certainly at this point dismissal seems premature.

13 THE COURT: Counsel, do you have a response to the
14 virus exclusion argument that the -- as I understand
15 counsel's argument, it's that the virus -- if we were
16 to take State Farm's proffered definition of physical
17 as understood in insurance contracts, the virus
18 exclusion would never fit that definition because it's
19 never going to alter a physical structure.

20 I'm going to go to paragraph 23 of your
21 motion, page 10, where State Farm says, In cases
22 interpreting the word *physical* in insurance contracts,
23 *physical* is widely held to exclude alleged losses that
24 are intangible or incorporeal, such as detrimental

1 economic impact, unaccompanied by distinct demonstrable
2 physical alteration of property.

3 So how is the virus exclusion consistent with
4 that proffered definition of *physical*?

5 MS. SCHUMACHER: Well, my first response, your
6 Honor, is I'm not sure we should assume that a virus
7 could never alter a structure. We're not familiar with
8 every --

9 THE COURT: Fair enough.

10 MS. SCHUMACHER: -- virus in the world, so I think
11 that the exclusion -- you know, I look at it as sort of
12 a belt and suspenders approach. I mean, surely I think
13 this virus is not causing physical damage, but that
14 certainly doesn't mean that there's no virus that could
15 ever develop that doesn't cause physical damage and
16 bodily injury. We don't know that. So I think, in a
17 sense, that the insurer clearly wanted to exclude this
18 kind of loss.

19 I think in the event that there is some
20 unexpected virus that comes up in the future that could
21 cause physical damage, I think the insurer is well
22 within its right to, you know, exclude that in the
23 event that that might happen some day.

24 It's clearly in the policy. The insured was

1 aware of it. It's a broad exclusion. And, again, I
2 think their whole question is just based on the
3 assumption that all viruses are going to be like this
4 virus, and I just don't think that that's the case.

5 THE COURT: Counsel, Mr. Endsley, let me ask you a
6 question.

7 One of the things, as I've thought about this
8 case a little bit, I'm worried a little bit or I'm
9 concerned at least about, were the court to accept your
10 argument as to loss of use, I'm concerned about a
11 limiting principle or lack thereof in terms of what is
12 the underwritten risk here.

13 And there appears to be, to my mind,
14 different types of coverage available for loss of use,
15 whether it is, in fact, civil authority when you think
16 about the cases right after 9/11 around the World Trade
17 Center. There's a lot of case law coming down in the
18 southern district of New York in the second circuit
19 involving business interruption where civil authority
20 has retail shops shut down but you've got physical
21 damage to other property, ingress/egress sorts of
22 issues.

23 Without the loss of use, sort of, well,
24 there's physical accidental physical loss to property

1 if I can't access it, that strikes me, when I look at
2 the policy in its entirety, to be potentially a very
3 different risk than what may have been contemplated
4 here.

5 Is that a fair concern?

6 MR. ENDSLEY: So I think that is something of a
7 concern. But to alleviate that a little bit, we're
8 dealing with a fairly unique set of circumstances and I
9 think there sort of still is a principle here.

10 If the governor's orders hadn't actually
11 required closure, if they, you know, had limited how
12 many patrons you could have in the restaurant or if
13 the -- you know, the effect of the general governor's
14 orders to shelter at home had been to reduce income,
15 you know, if we were talking about loss of income,
16 that's not a covered cause of loss.

17 And, in fact, I think some of the cases cited
18 by State Farm sort of indicate what the -- what the
19 difference is -- and those would be the Anchor
20 [phonetic] and Keach [phonetic] cases. And,
21 particularly, those focused on the difference between
22 when something is actually completely closed down and
23 when it's merely suffered, you know, a loss of business
24 income, and there really is a significant difference

1 here.

2 And the other thing I would sort of add, as
3 far as a policy situation, is I think the tremendous
4 number of lawsuits we've seen from this is sort of an
5 indication that a lot of these insureds thought that
6 this would have been covered, something like this, and
7 learned only late in the game that it wasn't or at
8 least the insurance company thought it wasn't.

9 And I'd just sort of articulate again, you
10 know, the basic principle that ambiguities in the
11 policy are construed against the drafter. State Farm
12 was the one who got to say what this policy looked
13 like, State Farm was the one who got to draft the
14 language of the policy, and, frankly, had put a lot
15 more thought into it than any of their insureds.

16 So I think to say that, you know, this wasn't
17 in the contemplation of the parties, it was at least a
18 little bit. State Farm has a number of exclusions
19 which nearly but do not quite apply. They were able to
20 draft around this.

21 And, frankly, exclusions exist in certain
22 policies which do address this specific concern. We've
23 reviewed a couple of them from client -- from potential
24 clients who wanted coverage and actually saying that if

1 there's a government closure order because of a
2 pandemic, no coverage.

3 So there are ways for the insurer to protect
4 themselves from this, but in this case it's the insured
5 who really had this dropped on them unexpectedly and is
6 now having to litigate.

7 THE COURT: Well, certainly, obviously, companies
8 and businesses around the world and certainly the
9 country and certainly Illinois are faced with a
10 remarkable predicament through largely no cause of
11 their own, if at all, as a result of the pandemic.

12 Let me be very clear. I am not -- when I ask
13 the question about the limiting principle, I am not
14 suggesting that the court is trying to ascertain the
15 intent of the parties at this point. I'm simply trying
16 to ascertain whether or not there's a reasonable
17 interpretation on the other side.

18 But wouldn't your argument, Mr. Endsley, be a
19 bit stronger if the definition or if the insuring
20 agreement language said insure for all accidental
21 direct physical loss of covered property as opposed to
22 to?

23 In other words, it's talking about -- I'm
24 concerned that we're reading direct physical to

1 property. We're kind of just pretending that it
2 doesn't say what it -- what it clearly says and we're
3 kind of saying, well, loss of property or loss to
4 property, same thing, whatever.

5 Wouldn't you have a stronger argument if it
6 said loss of property?

7 MR. ENDSLEY: In this case, I'm actually not sure
8 that we would, your Honor.

9 It's Nice still has the property, but the
10 property suffered a loss of use and that was a loss to
11 the property. It's Nice hasn't -- you know, the
12 property isn't gone. It's Nice has, in fact, recently
13 resumed business operations --

14 THE COURT: So let me ask you a question.

15 If I said, when I think loss to the property,
16 I think the roof is blown off; okay? That's what I
17 think of just -- at the very least, at a superficial
18 level.

19 If you're telling me a closing of the doors
20 by executive order is a loss to the property, help me
21 understand why that's the same thing.

22 MR. ENDSLEY: Well, I think you're certainly
23 correct that, you know, when we think of -- that is
24 classic losses.

1 THE COURT: That is, to my mind, closer to a loss
2 of property. It's a functional loss of property, not
3 to property.

4 MR. ENDSLEY: I guess the best argument I can sort
5 of think of, just off the spur of the moment, relates
6 to the fact that the type of property it is is what
7 affected the loss and that's -- because it's a
8 restaurant, this was a different type of loss. If this
9 was just being used as residential housing, there is no
10 loss to the property.

11 So State Farm insured a particular type of
12 business and a particular -- that particular type was a
13 restaurant which was affected, and that impacted this
14 property. That was a loss to this specific property
15 rather than a removal.

16 So to some extent, you know, if it said *loss*
17 *of property*, that, to me, almost suggests that
18 something -- a little more of the structural alteration
19 argument State Farm prefers, which is almost that
20 something was removed from the property or just ceased
21 to exist on the property -- because it was burned up or
22 something -- whereas I think *to property* sort of
23 suggests that it's anything that affects, you know,
24 that business property. It wasn't just the -- you

1 know, this wasn't just a title policy or something like
2 that. This was a business coverage policy.

3 THE COURT: It doesn't say anything is physical;
4 right?

5 MR. ENDSLEY: It does say physical.

6 THE COURT: I mean, it's not any conceivable way
7 you're unable to use the property in the way you see
8 fit. It's got to be direct physical loss. And, I
9 guess, your view is loss of use, there's a physical
10 displacement; right? That's --

11 MR. ENDSLEY: Yes.

12 THE COURT: -- your position?

13 Okay. Ms. Schumacher, if there's anything
14 you want to respond to, I'll give you the last word.

15 MS. SCHUMACHER: Sure. There are many things.
16 I'm going to try to stick to a couple.

17 I think the Turek court actually discussed
18 that *physical loss* to concept and I think it held that
19 to implies contact and *physical* implies physical
20 contact, direct physical loss to property.

21 And I looked in the dictionary. They gave
22 examples like a right uppercut to the jaw or applying
23 varnish to a surface. Whatever theory they have about
24 their loss not being able to use the property, that

1 simply is not physical loss to that property.

2 And I just want to briefly touch on -- the
3 court is concerned about the breadth of their
4 interpretation. So the first thing they said is, well,
5 this is a different situation because the restaurant
6 was required to be closed.

7 I would point out that in the executive
8 orders they did not close restaurants. Restaurants
9 were permitted to stay open for takeout or delivery.
10 So regardless of whether they chose to close the
11 restaurant, even under their complaint, they weren't
12 required to. So this is not a situation where
13 restaurants were closed.

14 The second and more broad point I would make,
15 your Honor, is that under their theory of accidental
16 direct physical loss, let's just say after COVID is
17 over the restaurant is open until 1:00 a.m. There's an
18 ordinance that says restaurants have to close at
19 midnight now. According to their theory, they now have
20 a loss of income claim because the restaurant has to
21 close an hour early because, according to them, there
22 doesn't have to be any physical impact; it just has to
23 affect the use of their property.

24 So, again, I agree with the court's concern

1 that their interpretation is way too broad and it
2 brings many more things into coverage than are intended
3 under a property policy which covers accidental direct
4 physical loss and then loss of income once that's
5 happened. But you just can't skip that step.

6 And I think that's all I have. I know the
7 court is familiar with all of this and there was a lot
8 that was said, but I'd like to keep it as brief as I
9 can. So I think unless the court has any additional
10 questions, I think we've made our point.

11 THE COURT: I think we -- I just want to make sure
12 all the parties agree that regardless of the coverage
13 form under the all risk policy, everyone agrees that
14 direct physical loss is required; right?

15 MR. ENDSLEY: Yes.

16 THE COURT: That phrase, that is an insuring
17 agreement that attaches to all. You know, sometimes
18 these all risk policies, there's all these amendments,
19 you know, there's the general exclusions and then
20 there's the exclusions within the broad form coverage
21 and there's exclusions within that and those don't
22 apply to the general -- you know, so that was my review
23 of the policy, that there was no separate insuring
24 agreement, everything goes back to Section 1 property

1 insuring agreements, direct physical loss requirement.

2 MS. SCHUMACHER: Yes.

3 THE COURT: Okay.

4 MR. ENDSLEY: Yeah, I believe there was a little
5 bit of confusion that we were maybe trying to get
6 coverage under the civil -- civil authority provision,
7 but that was --

8 THE COURT: Well, as I understand your argument,
9 you'll take coverage wherever you can find it; right?

10 MR. ENDSLEY: Yes, that's correct.

11 And that all relates back to the all risk
12 direct physical loss.

13 THE COURT: Right. Okay. Very good. Thank you.

14 Okay. The court is in a position to rule on
15 this today. The question presented by a 2-615 motion
16 to dismiss is whether sufficient facts are contained in
17 the pleadings that, if proved, would entitle the
18 plaintiff to relief. That's Evers versus Edwards
19 Hospital, 247 Ill. App. 3d 717.

20 A motion to dismiss under Section 615 admits
21 all well-pleaded facts but does not admit conclusions
22 of law or conclusions of fact not supported by
23 allegations of specific fact.

24 Exhibits -- I assume the policy was, in fact,

1 attached to the complaint?

2 MS. SCHUMACHER: It was -- your Honor, it was
3 either attached or filed by agreement.

4 I have two different cases. One they
5 attached a partial policy and then --

6 MR. ENDSLEY: Yeah, I --

7 MS. SCHUMACHER: Was yours the partial policy?

8 MR. ENDSLEY: Yeah, I believe it was attached by
9 agreement.

10 MS. SCHUMACHER: Okay.

11 THE COURT: The court is --

12 MR. ENDSLEY: There was --

13 THE COURT: The parties are asking the court to
14 consider the policy, right --

15 MR. ENDSLEY: Yes.

16 MS. SCHUMACHER: Yes, your Honor.

17 THE COURT: -- for purposes of this motion?

18 All right. So the policy is an exhibit to
19 the complaint for purposes of this motion.

20 Exhibits are part of the complaint to which
21 they are attached and the factual allegations contained
22 within an exhibit attached to a complaint serve to
23 negate inconsistent allegations of fact contained
24 within the body of the complaint.

1 I say that because, in some ways, this
2 operates almost more like a 12(b)(6) than -- most 615's
3 are sort of, if you haven't pled this element, you
4 haven't pled that element, and this operates more sort
5 of a -- whether or not there is a claim upon which
6 relief can be granted based on the complaint itself.

7 And, for that reason, I point out simply that
8 the exhibits to the complaint, which, in this case,
9 includes the policy, the parties have asked the court
10 to consider that as well.

11 Okay. Having said all of that, the critical
12 language here, first, is the direct physical loss
13 language, and the court finds that direct physical loss
14 unambiguously requires some form of actual physical
15 damage to the insured premises to trigger coverage.

16 The words *direct* and *physical*, which modify
17 the word *loss*, ordinarily connote actual demonstrable
18 harm of some form to the premises itself rather than
19 force the closure of the premises for reasons
20 extraneous to the premises itself or adverse business
21 consequences that flow from such closure.

22 Defense counsel -- I'm sorry, the insurance
23 counsel points out here that Illinois courts have not
24 squarely addressed direct physical loss in this

1 context, but I do want to note in cases interpreting
2 the word *physical* in insurance contracts, *physical* is
3 widely held to exclude alleged losses that are
4 intangible or incorporeal in Illinois, such as
5 detrimental economic impact unaccompanied by a distinct
6 demonstrable physical alteration of the property.

7 That's One Place Condo, LLC, versus
8 Travelers, 2015 Westlaw, Northern District of Illinois,
9 applying Illinois law.

10 The other case here that, I think, is
11 particularly useful is, in fact, Judge Gettleman's
12 decision in the northern district of -- I want to get
13 this right -- Sandy Point Dental v. Cincinnati
14 Insurance. This is 2020 Westlaw 5360465 dealing with
15 very similar facts and similar policy language.

16 In this case, the court finds, just as in
17 that case, plaintiff simply cannot show any such loss
18 as a result of either inability to access its own
19 office or the presence of the virus on its physical
20 surface, the latter of which here plaintiff fails to
21 allege in its complaint.

22 I don't think that's in dispute. There's no
23 argument that the coronavirus was, in fact, on the
24 surface of the property. The plaintiff has not pled

1 any facts showing physical alteration or structural
2 degradation of the property, which is required to
3 trigger coverage under this all risks policy.

4 The court wants to note that in addressing
5 this insuring agreement argument, this holding is
6 consistent with other courts that have evaluated
7 whether the coronavirus causes property damage
8 warranting insurance coverage.

9 Again, I want to reference 20 L -- I'm sorry,
10 not 20 L. 2020 Westlaw 5360465. That's Sandy Point
11 Dental versus Cincinnati Insurance.

12 I want to further note that Social Life
13 Magazine versus Sentinel Insurance Company, denying a
14 motion for preliminary injunction because the
15 coronavirus does not cause direct physical loss;
16 therefore, no coverage was required. The coronavirus,
17 quote, damages lungs. It doesn't damage printing
18 presses, close quote.

19 Diesel Barbershop versus State Farm Lloyds,
20 2020 Westlaw 4724305, Western District of Texas,
21 August 13, 2020, granting a motion to dismiss because
22 the coronavirus did not cause a direct physical loss
23 and, quote, the loss needs to have been a distinct
24 demonstrable physical alteration of the property, close

1 quote.

2 I further want to direct the parties'
3 attention to Gavrilides Management versus Michigan
4 Insurance Company. This is a state court of Michigan
5 handing down a decision last month that was cited by
6 State Farm in this case explaining that direct physical
7 loss to property requires tangible alteration or damage
8 that impacts the integrity of the property and
9 dismissing the case because plaintiff failed to allege
10 that the coronavirus had any impact to the premises.

11 I want to point out that these are not
12 controlling cases for purposes of an Illinois state
13 court; however, the court finds that these cases just
14 cited are, in fact, consistent with Illinois courts
15 treating of physical damage under insurance policies.

16 And, of course, there are meaningful
17 differences at times between first and third party
18 policies and first and third policy claims; however,
19 the court finds that there is a consistent line of
20 reasoning by Illinois courts as far as what physical
21 damage must mean for purposes of insurance coverage in
22 this case.

23 In essence, to quote Judge Gettleman in the
24 Sandy Point Dental Case, plaintiff here seeks coverage

1 for financial losses as a result of closure orders.
2 And I don't think anybody really disagrees with that
3 here.

4 The coronavirus has not physically altered
5 the appearance, shape, color, structure, or other
6 material dimension of the property and, as a result, it
7 doesn't come within the insuring agreement and, as a
8 result, plaintiff has failed to plead a direct physical
9 loss, which is a prerequisite for coverage.

10 However, I do want to point out here that
11 even if, even if, plaintiff had, in fact, been able to
12 plead within the insuring agreement -- that this claim
13 comes within the insuring agreement, the court does
14 find that the virus exclusion applies.

15 Now, the virus exclusion, which is Exclusion
16 J under Section 1 of the policy, states as follows --
17 and there's important, what we'll call, lead-in
18 language that I want to direct the parties' attention
19 to. The lead-in language under Section 1 exclusions,
20 which applies to all coverage forms under this all
21 risks policy, all coverage forms incorporate Section 1,
22 the lead-in language states as follows: We do not
23 insure under any coverage for any loss which would not
24 have occurred in the absence of one or more of the

1 following excluded events.

2 We do not insure for such loss regardless of,
3 A, the cause of the excluded event; or, B, other causes
4 of loss; or, C, whether other causes acted concurrently
5 or in any sequence with the excluded event to produce
6 the loss; or, D, whether the event occurred suddenly or
7 gradually, involves isolated or widespread damage,
8 arises from natural or external forces, or occurs as a
9 result of any combination of these, and it begins to
10 list the exclusions.

11 So the virus exclusion is Exclusion J. The
12 heading, which does not control, says fungi, virus, or
13 bacteria. Paragraph 1 states, Growth, proliferation,
14 spread, or presence of fungi or wet or dry rot or, new
15 paragraph, 2, Virus, bacteria, or other microorganism
16 that induces or is capable of inducing physical
17 distress, illness, and disease.

18 For our purposes, those are the relevant
19 provisions of the virus exclusion that needs to be
20 addressed here. First, the court finds that the
21 growth, proliferation, spread, or presence is not
22 required for purposes of applying the virus exclusion
23 because that is in a separate paragraph designed to
24 address fungus or fungi. There are not just one but

1 two disjunctive *or*'s in between fungus and virus
2 because it goes fungus -- or states fungus or wet or
3 dry rot or and then a new paragraph starting with the
4 word *virus* enumerated as number two.

5 So the court finds that it doesn't have to
6 establish a growth of a virus, just simply the idea of
7 a virus, the fact that a virus that is capable of
8 inducing physical distress, illness, or disease.

9 Even if -- if, in fact, this was some kind of
10 physical -- accidental physical damage, physical loss
11 coming within the insuring agreement, the virus
12 exclusion applies because Subsection C of the lead-in
13 language says this virus exclusion applies whether
14 other causes, executive orders, acted concurrently or
15 in any sequence with the excluded event to produce the
16 loss.

17 Here, I think everyone would agree absent the
18 virus, absent the virus, there would be no executive
19 orders, and so because C says this exclusion would
20 apply even where the sequence of the ordering with
21 other causes isn't entirely known or isn't entirely
22 clear or happens one two or two one, it still applies.

23 Furthermore, whether or not a virus could, in
24 fact, alter the physical structure, I think that's a

1 much -- that's not entirely clear at all that a virus
2 could.

3 And that's plaintiff's -- or I'm sorry,
4 insured's argument is the virus exclusion doesn't make
5 any sense for a sort of physical alteration requirement
6 of physical damage -- or a loss of, I should say --
7 physical loss because a virus would never alter the
8 physical structure.

9 The court doesn't agree with that. Virus,
10 bacteria, and microorganisms can exist in, in fact, a
11 meaningful way, and I think there's a strain of thought
12 out there that at one time was dominant -- it still may
13 be true to a certain extent -- that this virus can
14 exist on surfaces.

15 So even if the loss of use because of
16 coronavirus could constitute, the virus exclusion would
17 still apply -- could constitute physical -- accidental
18 physical loss, direct physical loss, I should say --
19 the virus exclusion applies.

20 And so for those reasons, the court is going
21 to grant the motion to dismiss.

22 I want to point out -- or I do want to
23 address the authority provided by Harold's Chicken --
24 It's Nice, Inc., d/b/a Harold's Chicken. A couple

1 things, I think, are worth pointing out.

2 One is the State Farm language here -- not
3 only are those cases from the western district and, as
4 a result, they're not controlling, the court believes
5 or is of the opinion that the cases relied upon for its
6 ruling today are more consistent with Illinois law as
7 it exists with respect to this issue.

8 Furthermore, the policy language was
9 different in those western district cases. And that's
10 not to say that the result would be different if you
11 had identical language, but I do think that's different
12 language.

13 And, moreover, and perhaps importantly, the
14 court was evaluating a 12(b)(6) motion in which the
15 insureds in that case allege the presence of COVID on
16 the property. And, to the court's mind, that is a --
17 that's a meaningful distinction here.

18 And, again, there's no virus exclusion in
19 that policy that the court would have had to have
20 considered as well and we don't know what the court
21 would have done in that case.

22 But I do think, at least for purposes of the
23 insuring agreement argument, those cases are
24 distinguishable without regarding -- without, you know,

1 advising as to what the result would be in this court.
2 But I do think those are different cases and they need
3 to be treated differently as such.

4 And so, for those reasons, the court is going
5 to go ahead and grant the motion both with respect to
6 the insuring agreement argument as well as with respect
7 to the virus exclusion.

8 I do want to point out, for the record, the
9 insured does not seem to argue -- kind of seems to have
10 one foot in and one foot out on civil authority.
11 They're happy to find civil authority coverage if it
12 exists, but they're not specifically asking for it.

13 But I want to point out, for the record,
14 that, as noted above, the policy's civil authority
15 coverage applies only if there is a covered cause of
16 loss, meaning direct physical loss, again, going back
17 to direct physical loss to property other than the
18 plaintiff's property.

19 Just as the coronavirus did not cause direct
20 physical loss to plaintiff's property here, the
21 complaint has not and likely could not allege that the
22 coronavirus caused direct physical loss to other
23 property. By the policy's own terms, the civil
24 authority coverage then does not apply.

1 So with that having been said, I'm granting
2 the motion. You know, I'm kind of -- do the parties
3 want a dismissal with prejudice?

4 MS. SCHUMACHER: Your Honor, we are asking for a
5 dismissal with prejudice, the reason being their claim
6 is for the loss of income due to the executive orders
7 which is caused by the virus, and without alleging a
8 completely different kind of claim, there's no set of
9 facts that they're going to be able to allege that's
10 going to avoid that result.

11 The executive orders are full of references
12 to the virus. The chain of causation is strong. The
13 virus exclusion is present. And, again, the same thing
14 with the physical damage issue. There's no claim that
15 there was any structural alteration to the property.

16 So I think in this case, your Honor, on that
17 basis, I don't think there's any way they're going to
18 be able to plead around either of those issues, and so
19 we are asking for a dismissal with prejudice.

20 THE COURT: Mr. Endsley, any response to that or
21 are you in agreement that this is time for other minds
22 to evaluate this claim?

23 MR. ENDSLEY: Yeah, your Honor, that's probably
24 correct. I don't think we can change the pleading such

1 that -- to get around the issues that you're finding
2 are insurmountable.

3 THE COURT: I don't disagree. It is a 615, and so
4 I do want to just at least give the parties the
5 opportunity to request without -- whether or not I give
6 that is a different issue, but it sounds like the
7 parties are of one mind and the court is in agreement
8 that this dismissal for this type of a 615 motion is
9 and should be with prejudice, and the court will enter
10 such an order.

11 MS. SCHUMACHER: Thank you, your Honor.

12 THE COURT: Okay.

13 MR. ENDSLEY: Thank you, your Honor.

14 THE COURT: Thank you, guys. Thank you very much
15 for your time and energy on this. I want to commend
16 the parties. I know this is a very interesting issue
17 under very -- a very unique set of facts.

18 MS. SCHUMACHER: Thank you, your Honor.

19 MR. ENDSLEY: Thank you, your Honor.

20 THE COURT: Thank you.

21 (Which were all the proceedings had at
22 the hearing of the above-entitled
23 cause, this date.)
24

1 IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT

2 DU PAGE COUNTY, ILLINOIS

3
4
5 I, KRISTIN M. BARNES, do hereby certify that
6 the foregoing Report of Proceedings, consisting of
7 Pages 1 to 39, inclusive, was reported in shorthand by
8 me via Zoom videoconferencing, and the said Report of
9 Proceedings is a true, correct and complete transcript
10 of my shorthand notes so taken at the time and place
11 hereinabove set forth.

12
13
14
15 _____
16 Official Court Reporter
17 Eighteenth Judicial Circuit of Illinois
18 DuPage County
19 CSR License No. 084-004026
20
21
22
23
24

EXHIBIT 8

2020 WL 5847570

Only the Westlaw citation is currently available.
United States District Court, S.D. California.

PAPPY'S BARBER SHOPS, INC. et al., Plaintiffs,
v.
FARMERS GROUP, INC. et al., Defendants.

Case No.: 20-CV-907-CAB-BLM
|
10/01/2020

**ORDER ON MOTION FOR LEAVE TO
FILE AMENDED COMPLAINT** [Doc. No. 21]

*1 On September 11, 2020, the Court dismissed Plaintiffs' complaint seeking insurance coverage for business income losses they incurred as a result of the COVID-19 Civil Authority Orders issued by San Diego Mayor Kevin Falconer and Governor Gavin Newsom. In the order, the Court indicated that because the facts surrounding Plaintiffs' insurance claim are largely undisputed, any amendment to the complaint was likely to be futile, but it nevertheless allowed Plaintiffs to seek leave to amend. Plaintiffs' motion for leave to amend is now before the Court.

[Federal Rule of Civil Procedure 15](#) states that courts "should freely give leave [to amend] when justice so requires." "But a district court need not grant leave to amend where the amendment: (1) prejudices the other party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile."  [AmeriSourceBergen Corp. v. Dialysist W., Inc.](#), 465 F.3d 946, 951 (9th Cir. 2006). "Futility of amendment is analyzed much like a Rule 12(b)(6) motion to dismiss—an amended complaint is futile when it would be subject to dismissal." [Woods v. First Am. Title, Inc.](#), No. CV111284GHKVBKX, 2011 WL 13218022, at *2 (C.D. Cal. Sept. 20, 2011). Thus, Plaintiffs' motion for leave to amend should be denied if the proposed amended complaint does not remedy the deficiencies that caused the Court to dismiss the original complaint.

The allegations from the original complaint are detailed in the Court's dismissal order and will not be repeated here. The primary additions to the proposed amended complaint are speculative allegations that the COVID-19 virus, or individuals infected by the virus, likely had entered Plaintiffs' premises at the time of the COVID-19 Civil Authority Orders. Even assuming the truth of these allegations, the presence of the virus itself, or of individuals infected the virus, at Plaintiffs' business premises or elsewhere do not constitute direct physical losses of or damage to property. Moreover, even if they do constitute direct physical losses of or damage to property, they were not the cause of the business income losses for which Plaintiffs' seek coverage here.

The cause of Plaintiffs' business income losses was the COVID-19 Civil Authority Orders themselves, which, as the proposed amended complaint alleges, were "precautionary measures taken by the state to prevent the spread of COVID-19 in the future" [Proposed Am. Compl. at ¶ 51], and therefore not issued as a result of loss or damage to property at Plaintiffs' premises or elsewhere. In the absence of the COVID-19 Civil Authority Orders, Plaintiffs would not have closed their business and thus would not have suffered the business income losses for which they now seek coverage. Accordingly, for these and all of the reasons stated in the Court's order dismissing the original complaint, the proposed amended complaint fails to state a claim. No amount of artful pleading by Plaintiffs can state a plausible claim that they suffered any business income losses due to direct physical loss of or damage to property at their premises, or due to civil authority orders prohibiting access to Plaintiffs' premises due to direct physical loss or damage to property elsewhere, as required for coverage under the Policy.

*2 The motion for leave to amend is therefore **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.

It is **SO ORDERED**.

Dated: October 1, 2020

All Citations

Slip Copy, 2020 WL 5847570

EXHIBIT 9



KeyCite Blue Flag – Appeal Notification

Appeal Filed by [MARKS ENGINE COMPANY NO. 28 RE v. TRAVELERS PROPERTY CASUALTY CO, ET AL](#), 9th Cir., October 6, 2020

2020 WL 5938689

Only the Westlaw citation is currently available.
United States District Court, C.D. California.

MARK'S ENGINE COMPANY
NO. 28 RESTAURANT, LLC, a
limited liability company, Plaintiff,
v.
[THE TRAVELERS INDEMNITY
COMPANY OF CONNECTICUT](#),
a corporation; ERIC GARCETTI,
an individual; and DOES 1
TO 25, inclusive, Defendants.

Case No. 2:20-cv-04423-AB-SK

|
Filed 10/02/2020

ORDER GRANTING DEFENDANT TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

HONORABLE ANDRÉ BIROTTE JR. UNITED STATES
DISTRICT COURT JUDGE

I. INTRODUCTION

*1 Pending before the Court is Defendant Travelers Property Casualty Company of America's ("Travelers" or "Defendant") Motion to Dismiss. (ECF 28.) The motion has been fully briefed and the Court heard oral arguments on this matter on September 4, 2020. (ECF 50.) For the following reasons, the motion is **GRANTED** and this matter is **DISMISSED WITH PREJUDICE**.

II. BACKGROUND

Plaintiff Mark's Engine Company No. 28 Restaurant, LLC ("Plaintiff") owns and operates a restaurant in downtown Los Angeles. (FAC ¶ 1.) In September 2019, Plaintiff obtained insurance coverage (the "Policy") from Travelers that covers "losses including, but not limited to, business

income losses at [Plaintiff's] restaurant." (FAC ¶ 6.) The Policy includes provisions for "Business Income and Extra Expense Coverage" in the case Civil Authority orders closure of the restaurant. (*Id.* ¶ 11.) The Policy states that a covered cause of loss under the policy includes "direct physical loss or direct physical damage unless the loss is specifically excluded or limited in the Policy." (*Id.* ¶ 13.) The Policy specifically excludes "loss or damage caused by or resulting from any virus." (ECF 29-2 at 212.)

In March 2020, like many other businesses, Plaintiff had to significantly adjust its operations due to COVID-19. (*See* FAC at ¶ 22.) Specifically, Plaintiff has "been forced to ... begin the termination process for dozens of its employees" and to deal with employees who "refused to work out of fear of contracting the novel Coronavirus." (*Id.* at ¶¶ 22-23.) Mayor Eric Garcetti ("Garcetti") issued an order requiring restaurants to close all but take-out and delivery services due to the "dire risks of exposure with the contraction of COVID-19 and evidence of physical damage to property." (*Id.* at ¶ 18.) Garcetti "direct[ed] all non-essential businesses to be closed in Los Angeles," and Plaintiff states that, "[e]xcept for delivery or takeout," the order "caused a complete and total shutdown of Plaintiff's business operations." (*Id.* at ¶¶ 18, 22.)

On April 15, 2020, Plaintiff filed a lawsuit in Los Angeles Superior Court seeking declaratory judgment as to the applicability of the insurance policy to the insured premises. (ECF 1-2.) Plaintiff also asserted causes of action for breach of the implied covenant of good faith and fair dealing and violation of [Cal. Insurance Code Section 790.03](#). (*Id.*) On May 15, 2020, the case was removed to federal court and on May 22, 2020, Defendant Travelers Indemnity Company of Connecticut filed a Motion to Dismiss. (ECF 1, 13, 14.) On May 29, 2020, Plaintiff filed its First Amended Complaint ("FAC"), replacing Defendant Travelers Indemnity Company of Connecticut with Defendant Travelers Property Casualty Company of America ("Travelers") and mooted the pending Motion to Dismiss. (ECF 21, 25.) Plaintiff also filed a Motion to Remand which was denied on July 27, 2020. (ECF 22, 39.)

The FAC included four causes of action: (1) declaratory relief; (2) breach of contract; (3) breach of implied covenant of good faith and fair dealing; and (4) violation of [Business & Professions Code § 17200](#). (*See generally* FAC.) On June 12, 2020, Travelers filed a Motion to Dismiss. (ECF 28, 29.) Defendant attached a copy of the Policy to its Motion. (ECF 29-2.) Plaintiff opposed the Motion and the Court heard oral arguments on September 4, 2020. (ECF 34, 50.)

*2 Defendant asserts two main arguments: (1) Plaintiff is not entitled to coverage under either the Civil Authority or Business Income and Extra Expense Coverage; (2) even if Plaintiff could show that the Policy provisions apply, the Virus Exclusion provision expressly denies coverage in this instance. (*See* Mot. at 9-10, 14.) Plaintiff argues that (1) where a government-mandated shutdown impedes operations or access to an insured property, Civil Authority coverage applies; (2) it is entitled to coverage because the order caused “physical loss of” its property; and (3) the Virus Exclusion does not apply because the “physical loss” resulted from the government order, not the coronavirus. (Opp’n at 5-6, 7-13.) Both parties have submitted supplemental authorities from other courts, including ones in California and this district. (ECF 41, 42, 46, 47, 48, 49, 51.)

III. THE INSURANCE POLICY

The parties’ arguments center on three provisions of the Policy: Civil Authority Coverage, Business Income and Extra Expense Coverage, and the Virus Exclusion endorsement.

A. Civil Authority Coverage

The Civil Authority provision covers losses and expenses “caused by action of civil authority that prohibits access to the described premises.” (ECF 29-2 at 99.) “The civil authority action must be due to direct physical loss of or damage to property ... caused by or resulting from a Covered Cause of Loss.” (*Id.*)

B. Business Income and Extra Expense Coverage

The Business Income provision provides that Defendant “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 caused by or result from a Covered Cause of Loss....” (*Id.* at 86-87.)

Plaintiff’s Extra Expense coverage provides, in relevant part: “Extra Expense means reasonable and necessary expenses you incur during the ‘period of restoration’ that you would not have incurred if there had been no direct physical loss of

or damage to property caused by or resulting from a Covered Cause of Loss. (*Id.* at 87.)

C. Virus Exclusion Provision

The Policy also contains an endorsement entitled, “EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA.” (*Id.* at 212.) This exclusion applies to action of the civil authority, business income, and extra expense provisions. (*Id.*) It reads as follows: “We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” (*Id.*)

IV. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. *See Fed. R. Civ. P. 12(b)(6)*. To survive a motion to dismiss, the plaintiff’s complaint “must contain 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 Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible “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. A complaint that offers mere “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” *Id.*; *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678). In reviewing a Rule 12(b)(6) motion, a court “must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party.” *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). Thus, “[w]hile legal conclusions can provide the complaint’s framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Iqbal*, 556 U.S. at 679.

V. ANALYSIS

A. Plaintiff Fails to Plausibly Allege that Any Policy Term Applies.

*3 The Civil Authority, Business Income, and Extra Expense provisions all contain identical language regarding what conditions trigger coverage: “direct physical loss of or damage to property.” (ECF 29-2 at 86-86, 99, 212.) Absent either direct physical loss of or damage to the property, Plaintiff cannot show that coverage applies. The Court finds persuasive the reasoning of the Honorable Steven V. Wilson who addressed identical policy language as it relates to COVID-19 with parties whose arguments mirrored those made before this Court:¹

Although “[a]s a general rule, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion,” a court can consider extrinsic material when its “authenticity ... is not contested and the plaintiff’s complaint necessarily relies on them.” *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citation and quotation marks omitted). Plaintiff does not contest the authenticity of the insurance policy attached to Defendant’s memorandum. *See generally* Opp’n. Because Plaintiff seeks to recover under the Policy, *see generally* ECF 21, the FAC necessarily relies on the Policy. Therefore, the Court will consider the language contained directly in the Policy in resolving this motion. *See Khoury Investments Inc. v. Nationwide Mutual Ins. Co.*, 2013 WL 12140449, at *2 (C.D. Cal. 2013) (citing *United States ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 999 (9th Cir. 2011)) (“Because Plaintiffs refer to this insurance policy in their FAC and their claim for breach of contract relies on the terms of the policy , this document would likely be appropriate for judicial notice as ‘unattached evidence on which the complaint necessarily relies.’”).

“When interpreting a policy provision, we must give terms their ordinary and popular usage, unless used by the parties in a technical sense or a special meaning is given to them by usage.” *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115 (1999) (citation and quotation marks omitted). The property insurance Policy at issue here requires “direct physical loss of or damage to property” for recovery under the civil authority provision, [the business income provision, and the extra expense provision]. ECF 29-2 at 86-87, 99.

Under California law, losses from inability to use property do not amount to “direct physical loss of or damage to property” within the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a “distinct, demonstrable, physical alteration.” *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen.*

Ins. Co., 187 Cal. App. 4th 766, 779 (2010) (citation and quotation marks omitted). “Detrimental economic impact” does not suffice. *Id.* (citation and quotation marks omitted); *see also Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33, 39 (2018) (“[D]iminution in value is not a covered peril, it is a measure of loss” in property insurance).

An insured cannot recover by attempting to artfully plead impairment to economically valuable use of property as physical loss or damage to property. For example, in *MRI Healthcare Ctr.*, the court held that lost use of an MRI machine after it was powered off did not qualify as a “direct physical loss.” 187 Cal. App. 4th at 789. Likewise, in *Ward General Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548 (2003), the court held that a loss of valuable electronic data did not qualify as “direct physical loss or damage” without any physical alteration to the storage media. 114 Cal. App. 4th at 555-56. Finally, in *Doyle*, 21 Cal. App. 5th 33 (2018), the court held that purchasing counterfeit wine did not count as a loss to the wine covered by a property insurance policy without a physical alteration to the insured property. 21 Cal. App. 5th at 38-39.

*4 Plaintiff’s FAC attempts to make precisely this substitution of impaired use or value for physical loss [of] or damage. Plaintiff only plausibly alleges that in-person dining restrictions interfered with the use or value of its property—not that the restrictions caused direct physical loss or damage.

Plaintiff characterizes in-person dining restrictions as “labeling of the insured property as nonessential.” FAC at ¶ 19. That “labeling” surely carries significant social, economic, and legal consequences. But it does not physically alter any of Plaintiff’s property.

Plaintiff’s FAC appears to suggest that Plaintiff’s business hardships resulted from the physical action of the novel coronavirus itself, which “infects and stays on surfaces of objects or materials ... for up to twenty-eight days.” *Id.* at ¶ 16. However, Plaintiff does not allege that the virus “infect[ed]” or “stay[ed] on surfaces of” its insured property. Whatever physical alteration the virus may cause to property in general, nothing in the FAC plausibly supports an inference that the virus physically altered Plaintiff’s property, however much the public health response to the virus may have affected business conditions for Plaintiff’s restaurant. Even if Plaintiff could somehow recover for physical loss or damage to other property, such

loss or damage could hardly qualify as “direct.” See *MRI Healthcare Ctr.*, 187 Cal. App. 4th at 779 (internal citation and quotation marks omitted) (“[D]irect means [w]ithout intervening persons, conditions, or agencies; immediate.”).

Plaintiff attempts to circumvent the plain language of the Policy by emphasizing its disjunctive phrasing – “direct physical loss of *or* damage to property,” ECF 29-2 at 87, 99—and insisting that “loss [of],” unlike “damage,” encompasses impaired use. To support this argument, Plaintiff relies on *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767 (C.D. Cal. 2018). In *Total Intermodal*, the court concluded that giving separate effect to “loss [of]” and “damage” in the phrase, “direct physical loss or damage,” required recognizing coverage for “the permanent dispossession of something.” *Id.* at *4.

Even if the Policy covers “permanent dispossession” in addition to physical alteration, that does not benefit Plaintiff here. Plaintiff’s FAC does not allege that it was permanently dispossessed of any insured property. See generally FAC. As far as the FAC reveals, while public health restrictions kept the restaurant’s “large groups” and “happy-hour goers” at home instead of in the dining room or at the bar, Plaintiff remained in possession of its dining room, bar, flatware, and all of the accoutrements of its [restaurant.] FAC at ¶ 8.

¹ The Court notes that in adopting the reasoning of Judge Wilson, it has changed the text only to the extent that it reflects the records cites for this matter.

Next, to the extent Plaintiff relies on this Court’s order in *Total Intermodal* for the proposition that “direct physical loss of” encompasses deprivation of property without physical change in the condition of the property (Opp’n at 11-12), the Court notes that such an interpretation of any insurance policy would be without any “manageable bounds.” See *Plan Check Downtown III, LLC v. AmGuard Insurance Company, et al.*, No. 2:20-cv-06954-GW-SK at 7 (Sept. 10, 2020) (distinguishing *Total Intermodal*, 2018 WL 3829767, No. 17-cv-04908 (C.D. Cal. July 11, 2018) from COVID-19 business closure).

*5 Lastly, the Court alternatively concludes that Plaintiff suffered no complete “direct physical loss of” its property as it always had complete access to the premises even after the order was issued. The only individuals who could potentially claim “direct physical loss of” access to the premises would be

patrons who were no longer allowed to dine in. And even then, the Policy is between Plaintiff and Defendant, not restaurant goers and Defendant.

The Court concludes that Plaintiff has not alleged facts plausibly supporting an inference that it is entitled to coverage under the Policy.

B. Even Assuming Plaintiff Could Plausibly Allege “Direct Physical Loss Of or Damage To” Its Premises, the Virus Exemption Precludes Coverage.

Although the Court finds that Plaintiff fails to plausibly allege that that it suffered a “physical loss of or damage to” its premises by having to shift its business operations, the Court further finds that even if Plaintiff was able to show that it suffered such loss or damage, coverage would be precluded under the virus exemption provision.

The virus provision clearly and unequivocally exempts “loss or damage caused by or resulting from any virus.” (ECF 29-2 at 212.) Plaintiff’s FAC clearly demonstrates that all alleged loss or damage was both caused by and resulted from the novel coronavirus. The FAC alleges that Mayor Garcetti issued the order because of “the dire risks of exposure with the contraction of COVID-19 and evidence of physical damage to property.” (FAC ¶ 18.) Plaintiff also states that it shut down its business because employees had “refused to work out of fear of contracting the novel Coronavirus.” (*Id.* at ¶ 22.) And most tellingly, Plaintiff seeks declaratory relief “due to physical loss or damage from the Coronavirus.” (*Id.* at ¶ 28.) The virus exemption applies here and precludes all coverage.

C. All Causes of Action Fail Because They Are Premised Upon an Inapplicable Policy.

Plaintiff’s first cause of action fails because Plaintiff has failed to provide a cognizable legal theory or set of facts about the Policy that would allow the Court to provide declaratory relief, this cause of action fails. See *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1514 (9th Cir. 1994) (“The district court, ... may grant declaratory relief only when there is an actual case or controversy; a declaratory judgment may not be used to secure judicial determination of moot questions.”), *overruled on other grounds by Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019); see also *Amaral v. Wachovia*

Mortg. Corp., 692 F. Supp. 2d 1226, 1236 & n.3 (E.D. Cal. 2010) (dismissing two of three requested declarations in part because “a determination as to whether Plaintiffs [were] entitled to the third requested declaration [would] involve an analysis of the issues surrounding the first two with no need for separate declarations on all three matters”).

Next Plaintiff's second cause of action fails because Travelers did not withhold benefits due because no conditions triggered coverage, and even if they had, coverage would have been excluded under the virus provision. “[T]he failure of [a policy's] conditions precedent is a complete defense to [an insured's] breach of contract claim.” 1231 *Euclid Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 135 Cal. App. 4th 1008, 1020–21 (Ct. App. 2006); see also *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 n.10 (Ct. App. 1990) (quoting Kornblum et al., Cal. Practice Guide: Bad Faith § 4:28, pp. 4–9) (emphasis omitted) (“[A]bsent an actual withholding of benefits due, there is no breach of contract.”).

*6 Plaintiff's third cause of action similarly fails because “[w]here benefits are withheld for proper cause, there is not breach of the implied covenant.” *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 (1990).

And finally, Plaintiff's fourth cause of action fails because it is premised upon the above claims which also fail. See *Aleksick v. 7-Eleven, Inc.*, 205 Cal. App. 4th 1176, 1185 (Ct. App. 2012); *Krantz v. BT Visual Images, LLC*, 89 Cal. App. 4th 164, 178 (Ct. App. 2001) (finding viability of a UCL claim “stand[s] or fall[s] depending on the fate of the antecedent substantive causes of action”); see also *Glenn K. Jackson*

Inc. v. Roe, 273 F.3d 1192, 1203 (9th Cir. 2001) (finding Section 17200 claim failed where underlying negligence and fraud claims failed). Further, the Court has concluded that Plaintiff was not entitled to recover under the Policy on the facts alleged in the FAC based on the “ordinary and popular sense” of the Policy language. *Palmer*, 21 Cal. 4th at 1115. And because “the ordinary and popular sense” of the Policy language does not support recovery on these facts, Plaintiff cannot plausibly allege that the Policy constitutes fraudulent, unfair, or unlawful conduct giving rise to UCL liability. See *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1203 (9th Cir. 2001) (citing *Cel-Tech Comms., Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 182 (1999)) (“[T]he breadth of [the UCL] does not give a plaintiff license to ‘plead around’ the absolute bars to relief contained in other possible causes of action by recasting those causes of action as one for unfair competition.”).

VI. CONCLUSION

For the reasons above, the Court **GRANTS** Defendant's Motion to Dismiss the FAC. The Court finds that even if Plaintiff plausibly alleged coverage under the Policy, the Virus Exemption provision would preclude all coverage such that Travelers would have no duty to perform under—or breach—the Policy. Accordingly, amendment would be futile and this matter is **DISMISSED WITH PREJUDICE**.

All Citations

Slip Copy, 2020 WL 5938689

EXHIBIT 10

2020 WL 5938755

Only the Westlaw citation is currently available.

United States District Court,
N.D. Georgia, Atlanta Division.

**HENRY'S LOUISIANA
GRILL, INC., et al., Plaintiffs,**

v.

**ALLIED INSURANCE COMPANY
OF AMERICA, Defendant.**

CIVIL ACTION FILE NO. 1:20-CV-2939-TWT

|
Filed 10/06/2020

OPINION AND ORDER

THOMAS W. THRASH, JR. United States District Judge

*1 This is a breach of contract case. It is before the Court on the Defendant's Motion to Dismiss [Doc. 4] and the Plaintiffs' Motion to Certify Questions of Law to the Georgia Supreme Court [Doc. 8]. For the reasons set forth below, the Defendant's Motion to Dismiss [Doc. 4] is GRANTED and the Plaintiffs' Motion to Certify Questions of Law to the Georgia Supreme Court [Doc. 8] is DENIED.

I. Background

The Plaintiffs, Henry's Louisiana Grill and Henry's Uptown ("Henry's"), are a restaurant and affiliated "private party and overflow" space, respectively. (Compl. ¶¶ 5–6.) The Plaintiffs maintained insurance through the Defendant, Allied Insurance Company of America ("Allied"). (Compl. ¶ 8.) Generally, the Plaintiffs' policy insured the Plaintiffs "against direct physical loss unless" the loss was excluded or limited by other provisions in the insurance contract. (Compl., at 30.) As part of its coverage, the Plaintiffs' policy included Business Income coverage:

g. Business Income

(1) Business Income with Ordinary Payroll Limitation

(a) We 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....

(c) We will only pay for loss of "business income" that you sustain during the "period of restoration" and that occurs within the number of consecutive months shown in the Declarations for Business Income-Actual Loss Sustained after the date of direct physical loss or damage....

(Compl., at 33–34.) In a subsequent definitions section, the policy defines "period of restoration" as the time period between the direct physical loss and the earlier of:

(i) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

(ii) The date when the business is resumed at a new permanent location.

(Compl., at 67.)

In addition to this Business Income coverage, the policy included Civil Authorities Coverage:

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 and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided both of the following apply:

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage ... ; 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.

(Compl., at 35.)

Further, the Plaintiffs' policy included a specific "Virus or Bacteria" exclusion, under which the Defendant would "not pay for loss or damage caused directly or indirectly by ... [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness, or disease." (Compl., at 48, 50.)

*2 On March 14, 2020, in response to the growing threat of COVID-19 in the State of Georgia, Governor Brian Kemp issued an Executive Order declaring a “Public Health State of Emergency.” (See Compl. ¶ 9; Pl.’s Mot. to Certify, Ex. 2, at 3.) This Executive Order generally activated resources and loosened certain regulation as a response to COVID-19. For example, the Executive Order allowed the grant of temporary licenses to medical professionals and loosened weight restrictions on vehicles providing emergency relief. (See Pl.’s Mot. to Certify, Ex. 2, at 4–5.)

As a “direct response” to the Governor’s Executive Order, the Plaintiffs closed its dining rooms, the Plaintiffs’ primary source of revenue. (Compl. ¶ 13.) On March 27, 2020, the Plaintiffs notified the Defendant of the closure of its dining rooms. (Compl. ¶ 14.) However, after further communication between the Plaintiffs and the Defendant, the Defendant denied coverage for this closure, pointing to the language of the Business Income provision and the Virus or Bacteria exclusion. (Compl. ¶¶ 15–16.) The Plaintiffs claim that the Defendant repeatedly misquoted the policy in their communications and relied on the misquote in denying coverage. (Compl. ¶ 16.) The Plaintiffs note that at no time has there been “any virus located at, on, or in Plaintiff’s premises.” (Compl. ¶ 17.)

II. Legal Standards

A. Motion to Dismiss

A complaint should be dismissed under Rule 12(b)(6) only where it appears that the facts alleged fail to state a “plausible” claim for relief. *Ashcroft v. Iqbal*, 129 S. Ct. 1337, 1349 (2009); Fed. R. Civ. P. 12(b)(6). A complaint may survive a motion to dismiss for failure to state a claim, however, even if it is “improbable” that a plaintiff would be able to prove those facts; even if the possibility of recovery is extremely “remote and unlikely.” *Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the plaintiff. See *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 994–95 (11th Cir. 1983); see also *Sanjuan v. American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994) (noting that at the pleading stage, the plaintiff “receives the benefit of imagination”). Generally, notice pleading is all that is required for a valid complaint. See *Lombard’s, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975

(11th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986). Under notice pleading, the plaintiff need only give the defendant fair notice of the plaintiff’s claim and the grounds upon which it rests. See *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing *Twombly*, 550 U.S. at 555).

B. Motion to Certify

Federal courts have the discretion to certify questions of law to the Supreme Court of Georgia for an answer on determinative state law issues in the cases before them. See O.C.G.A. § 15-2-9. “Under this circuit’s precedents, we should certify questions to the state supreme court when we have substantial doubt regarding the status of state law.” *Peoples Gas Sys. v. Posen Constr., Inc.*, 931 F.3d 1337, 1340 (11th Cir. 2019) (internal quotation marks omitted). As the Eleventh Circuit has noted:

While this circuit traditionally has been less reluctant than others to certify questions of state law, it nonetheless has been our practice to do so with restraint and only after the consideration of a number of factors: ... [t]he most important are the closeness of the question and the existence of sufficient sources of state law ... to allow a principled rather than conjectural conclusion.

*3 *Royal Capital Development, LLC v. Maryland Cas. Co.*, 659 F.3d 1050, 1055 (11th Cir. 2011) (internal quotation marks and punctuation omitted).

III. Discussion

In its Motion to Dismiss, the Defendant argues that the plain language of the Business Income and Civil Authority coverage provisions indicates the Plaintiffs’ suspension of their dining room operations is not a covered loss. (Br. in Support of Def.’s Mot. to Dismiss, at 6.) Further, the Defendant argues that even if the closure of the dining rooms represents a covered loss, the policy’s “Virus or Bacteria” exclusion precludes coverage. (*Id.* at 10.) In response, the Plaintiffs argue that the closure of their dining rooms qualifies as a “direct physical loss of” a covered property, and that if this Court has any doubts, it should certify a question to the Georgia Supreme Court to define this phrase. (Pls.’ Br. in Opp’n to Def.’s Mot. to Dismiss, at 6, 13.) The Plaintiffs also argue that they have pleaded sufficient facts to state a claim under the Civil Authority coverage provision, and that the “Virus or Bacteria” exclusion is inapplicable because the dining rooms were closed in response to the Governor’s Orders, not COVID-19. (See *id.* at 17–18.)

"In Georgia, insurance is a matter of contract, and the parties to an insurance policy are bound by its plain and unambiguous terms." *Hays v. Ga. Farm Bureau Mut. Ins. Co.*, 314 Ga. App. 110, 111 (2012) (punctuation omitted). Construction of the policy's terms are questions of law:

The court undertakes a three-step process in the construction of the contract, the first of which is to determine if the instrument's language is clear and unambiguous. If the language is unambiguous, the court simply enforces the contract according to its terms, and looks to the contract alone for the meaning.

American Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., 288 Ga. 749, 750 (2011) (internal citations omitted). Unambiguous terms must be given effect "even if beneficial to the insurer and detrimental to the insured," and Georgia courts "will not strain to extend coverage where none was contracted or intended." *Jefferson Ins. Co. of New York v. Dunn*, 269 Ga. 213, 215 (1998). By Georgia statute, "the whole contract should be looked to in arriving at the construction of any part." O.C.G.A. § 13-2-2.

A. Business Income Loss Coverage

Because the Plaintiffs and the Defendant argue the plain language of the policy leads to different results, a thorough analysis of the relevant provisions is required here. With regards to the Plaintiffs' Business Income claim, the parties agree that the key phrase is "direct physical loss of or damage to" the covered property.

In seeking to dismiss this claim, the Defendant argues that "a direct physical loss of or damage to" requires some form of physical change to the covered premises. (Def.'s Br. in Supp. of Def.'s Mot. to Dismiss, at 6.) Because no physical change occurred at the Plaintiffs' property as a result of COVID-19 or the Governor's Executive Order, no coverage can extend to their losses. (*Id.* at 8.) In response, the "Plaintiffs argue that physical change did occur: prior to the Executive Order, Plaintiffs' dining room space was physically available to patrons, whereas after the Executive Order was issued, Plaintiffs' dining room space was no longer physically available to patrons." (Pls.' Br. in Opp'n to Def.'s Mot. to Dismiss, at 13.)

*4 While Georgia case law analyzing this phrase is relatively sparse, both parties discuss at-length one Georgia Court of Appeals case, *AFLAC, Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306 (2003). In *AFLAC*, an insured had several policies

with its insurer that included various provisions with three similar phases: "direct physical loss of or damage to;" "direct physical loss of, or damage to;" and, "direct physical loss or damage to." *Id.* at 307. Under these provisions, the insured filed claims with its insurer to cover expenses related to software updates made in preparation for potential fallout from "Y2K." *Id.* at 306.

Despite the different underlying facts and the number of semantic variations analyzed, the decision provides some direction in interpreting the provision before this Court. First, the *AFLAC* court defined some terms relevant here. The court held that the "or" in this context is a coordinating conjunction, meaning the coordinating adjectives "direct physical" "modify the word 'damage' as 'connected' to the word 'loss.'" *Id.* at 308. Further, the court defined "direct" as "without intervening persons, conditions, or agencies; immediate." *Id.* (internal quotation marks and punctuation omitted). In addition, the court found:

[T]he words "loss of" ... and the words "damage to" ... make it clear that coverage is predicated upon a change in the insured property resulting from an external event rendering the insured property, initially in a satisfactory condition, unsatisfactory.

Id.

Both parties have attempted to apply the *AFLAC* understanding of these terms to support their case. The Defendant argues no relevant physical change took place, while the Plaintiffs argue that the Governor's Executive Order generated a physical change that rendered the once-satisfactory dining rooms "unsatisfactory." (See Def.'s Br. in Supp. of Def.'s Mot. to Dismiss, at 6–8; Pls.' Br. in Opp'n to Def.'s Mot. to Dismiss, at 8.)

The Plaintiffs' allegation of a physical change here is curious. The Plaintiffs repeatedly note that COVID-19 has never been identified on the premises.¹ (See Pls.' Br. in Opp'n to Def.'s Mot. to Dismiss, at 19–20.) Therefore, no physical change as a result of the virus' presence can be argued here. Instead, the Plaintiffs cast the Governor's Executive Order as imposing some physical change on the covered premises. Under the Plaintiffs' logic, a minute before the Governor issued the Order, the dining rooms existed in one state. A minute later, the Governor issued the Order, and the restaurant underwent a direct physical change that left the dining rooms in a different state. This interpretation of the contractual language exceeds any reasonable bounds of possible construction, pushing the

words individually and collectively beyond what any plain meaning can support.

¹ This fact, emphasized by the Plaintiffs, distinguishes this case from the cases the Plaintiffs point to as support for their position. One district court in Missouri has declined to dismiss several similar cases, holding that the plaintiffs properly stated a claim of physical loss. *See, e.g., Studio 417, Inc. v. Cincinnati Ins. Co.*, Civ. A. No. 20-cv-03127, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020). However, in those cases, the insureds alleged that COVID-19 was present on their premises, and that the virus' presence caused the physical damage. *See id.* at *4. As such, those claims are distinguishable from the Plaintiffs' claims here, where the alleged source of the physical loss is the Governor's Executive Order.

First, the claim that the Governor's Executive Order had a “direct” effect on the Plaintiffs' dining rooms defies both the ordinary meaning and the *AFLAC* court's definition of the word. The Order did not have an “immediate” effect on the dining rooms “without intervening persons, conditions, or agencies.” *AFLAC*, 260 Ga. App. at 308; *see Direct*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/direct>, (last visited Sept. 25, 2020) (defining “direct” as “stemming immediately from a source”). The Order, by its plain terms, declares a Public Health State of Emergency and mobilizes state resources to manage the threat. The Order did not impose limitations on businesses or their operations. The Plaintiffs' closure was likely prudent, but that decision was not made directly by the Order—it was made by intervening persons as a result of intervening conditions. With regards to the Plaintiffs, the Order was at most an official recognition of an already present threat, and it did not have a direct effect on the dining rooms.

*5 Second, holding that the Governor's Executive Order led to a “physical loss of” the dining rooms would massively expand the scope of the insurance coverage at issue here. Under the *AFLAC* definition, the Order would have to generate “a change in the insured property resulting from an external event rendering the insured property, initially in a satisfactory condition, unsatisfactory.” *AFLAC*, 260 Ga. App. at 308. As mentioned above, the Order merely recognized an existing threat. It did not represent an external event that changed the insured property. Every physical element of the dining rooms—the floors, the ceilings, the plumbing, the HVAC, the tables, the chairs—underwent no physical change as a result of the Order. The only possible change was an increased public and private perception of the existing threat,

which cannot be deemed a physical change that rendered the property unsatisfactory. The Plaintiffs' construction would potentially make an insurer liable for the negative effects of operational changes resulting from any regulation or executive decree, such as a reduction in a space's maximum occupancy. *See Plan Check Downtown III, LLC v. Amguard Ins. Co.*, Civ. A. No. 2:20-cv-06954, slip op. at 9 (C.D. Cal. Sept. 10, 2020) (outlining scenarios where an insurer would be held liable under this improper construction of the policy).

As a final interpretative argument, the Plaintiffs claim that the Defendant's interpretation of “direct physical loss of” renders the words “damage to” surplusage, which is disfavored under Georgia law. (*See Pls.' Br. in Opp'n to Def.'s Mot. to Dismiss*, at 14.) The Plaintiffs allege that though their dining rooms experienced no damage, they experienced a “physical spatial loss of their dining rooms,” and this definition eliminates surplusage concerns between “loss of” and “damage to.” (*Id.* at 15.) However, the plain meanings of these terms indicate they have different and complementary meanings in this context.

To determine the plain meaning of these words, Georgia courts look to various dictionaries to provide guidance. *See Western Pac. Mut. Ins. Co. v. Davies*, 267 Ga. App. 675, 678 (2004) (“In construing a contract of insurance to ascertain the intent of the parties, the court should give a term or phrase in the contract its ordinary meaning or common signification as defined by dictionaries”). Black's Law Dictionary defines “loss” as “the disappearance or diminution of value,” while Merriam-Webster provides “the act of losing possession.” *Loss*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Loss*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/loss>, (last visited Sept. 25, 2020). Black's Law Dictionary defines “damage” as “loss or injury to person or property,” and Merriam-Webster's definition is substantially the same. *Damage*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Damage*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/damage>, (last visited Sept. 25, 2020) (defining “damage” as “loss or harm resulting from injury to person, property, or reputation”). These definitions can support two different meanings—that loss is the “disappearance of value” or “the act of losing possession” by complete destruction, while damage is any other injury requiring repair. As an illustrative example, a tornado that destroys the entirety of the restaurant results in a “loss of” the

restaurant, while a tree falling on part of the kitchen would represent “damage to” the restaurant.

This understanding of the contract language is further emphasized by the policy's definition of the “period of restoration.” Because Georgia law requires that the whole contract should be analyzed to give meaning to its parts, this definition is instructive in analyzing undefined words and phrases. *See* O.C.G.A. § 13-2-2. The “period of restoration” is the time period during which the insurer will cover the insured's business income losses, and is defined as the time between the date of the loss and the earlier of:

- (i) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
- (ii) The date when the business is resumed at a new permanent location.

*6 (Compl., at 67.) This definition appears to contemplate a range of potential covered damages, ranging from those requiring repairs or replacements to those requiring the relocation of the business. This range of contemplated harms aligns with an understanding that “loss of” means total destruction while “damage to” means some amount of harm or injury.

Thus, the contract language issue here is not ambiguous, and because the Governor's Executive Order did not create a “direct physical loss of” the Plaintiffs' dining rooms, the Business Income provision does not apply to the Plaintiffs' claims.²

² This Court notes that though jurisprudence regarding COVID-19 is understandably in its early stages, recent decisions within the Eleventh Circuit appear to align with this Court's decision here. *See Malaube, LLC v. Greenwich Ins. Co.*, Civ. A. No. 20-22615-Civ, 2020 WL 5051581, at *8 (S.D. Fla. Aug. 26, 2020) (holding that allegations of “direct physical loss or damage” without alleging that the virus has entered the premises does not state a claim for which relief can be granted); *cf. Mama Jo's Inc. v. Sparta Ins. Co.*, No. 18-12887, 2020 WL 4782369, at *8–9 (11th Cir. Aug 18, 2020) (citing favorably, in a non-pandemic context, AFLAC's definition of “direct physical loss or damage” and rejecting a business interruption claim for losses incurred by construction dust and debris landing in the restaurant over a period of time).

B. Civil Authority Coverage

As an alternative means of coverage, the Plaintiffs argue that the policy's Civil Authority provision requires the Defendant to cover their business income losses. This provision states:

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 and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage ... ; 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.

(Compl., at 35.) The Plaintiffs argue that because of the community spread of COVID-19, property other than its own had been damaged by the virus, which led to the issuance of the Governor's Executive Order. (*See* Pls.' Br. in Opp'n to Def.'s Mot. to Dismiss, at 17–18; Pls.' Surreply Br. in Opp'n to Def.'s Mot. to Dismiss, at 6.)

Even accepting the Plaintiffs' allegations of damage to other property as true, the Plaintiffs have not pleaded sufficient facts to demonstrate coverage under the Civil Authority provision. The provision contains several clear conditions precedent for coverage. First, the Plaintiffs have pleaded no facts regarding a civil authority's action that prohibited access to the premises. The Governor's Executive Order had no substantive provisions limiting access to private businesses or their operations. While the Order could be read as “advising” residents to stay home, the Order itself does not represent an action to prohibit access to the described premises. (Pls.' Surreply Br. in Opp'n to Def.'s Mot. to Dismiss, at 6.) And the Plaintiffs point to no other action by a civil authority that could have prohibited access to their dining rooms at the time of the closure. Second, the Plaintiffs pleaded no facts that the areas “immediately surrounding” the damaged properties were blocked by the civil authority. In fact, the Plaintiffs do not identify any particular property around their premises which was damaged by COVID-19 or had its access restricted by a civil authority. Finally, with no damaged property or

civil authority action identified, the Plaintiffs cannot plead facts that the civil authority's access limitations resulted from COVID-19 or were necessary to allow the civil authority's unimpeded access to area. Thus, by failing to plead sufficient facts to satisfy several conditions precedent, the Plaintiffs cannot claim coverage under the Civil Authority provision.³

³ Because the Plaintiffs have not pleaded sufficient facts to support a claim for coverage here, this Court will not proceed to analyze the parties' arguments regarding the Virus or Bacteria exclusion.

C. The Plaintiffs' Motion to Certify

*7 As discussed above, the Plaintiffs have failed to state a claim for coverage under this contract. As such, the Plaintiffs have not generated a “substantial doubt regarding the status of state law” required to support certification of these questions to the Georgia Supreme Court. *Peoples Gas Sys. v. Posen Constr., Inc.*, 931 F.3d 1337, 1340 (11th Cir. 2019) (internal quotation marks omitted). A dearth of Georgia Supreme Court decisions addressing a particular phrase cannot be sufficient cause—on its own—to certify a question to that court. That is especially true where, as here, the contract language is unambiguous as to coverage on these facts. Given this Court's view of the unambiguous contract language, this Court will not exercise its discretion to certify the Plaintiffs' proposed questions of law to the Georgia Supreme Court.

IV. Conclusion

This Court recognizes the challenging position the Plaintiffs found themselves in. The COVID-19 pandemic has imposed massive changes and pressures on every business and every household in this country. The Plaintiffs, faced with a difficult decision, made a choice that they felt would best ensure the health of their customers and employees. This Court's decision here is not a judgment on the Plaintiffs' business sense or the wisdom of shuttering dining rooms in the face of a global pandemic. This decision merely reflects the plain language of the parties' insurance contract.

For the reasons set forth above, the Defendant's Motion to Dismiss [Doc. 4] is GRANTED and the Plaintiffs' Motion to Certify Questions of Law to the Georgia Supreme Court [Doc. 8] is DENIED.

SO ORDERED, this 6 day of October, 2020.

All Citations

Slip Copy, 2020 WL 5938755

EXHIBIT 11

**IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA**

**MACE MARINE, INC.,
d/b/a Conch Republic Divers,
Plaintiff,**

Case No. 20-CA-120-P

v.

**TOKIO MARINE SPECIALTY INSURANCE
COMPANY,
Defendant.**

**ORDER GRANTING DEFENDANT TOKIO MARINE SPECIALTY
INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFF'S
AMENDED COMPLAINT WITHOUT PREJUDICE**

THIS MATTER comes before the Court pursuant to Defendant Tokio Marine Specialty Insurance Company's Motion to Dismiss Plaintiff's Amended Complaint. The matter has been fully briefed, and hearing the parties' oral arguments on September 21, 2020, and the Court being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED

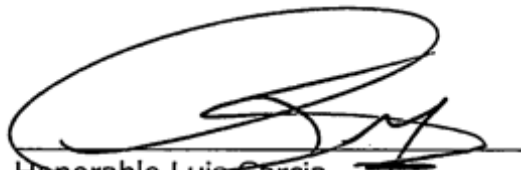
1. Defendant's Motion to Dismiss the First Amended Complaint is granted without prejudice to Amend. See, *Homeowners Choice Property & Casualty vs. Maspons*, 211 So.3d 1067 (3rd DCA 2017) "A "loss" is the diminution of value of something, and in this case, the 'something' is the insureds' house or personal property. "Direct" and "physical" modify loss and impose the requirement that the damage be actual." (Emphasis added)
2. Count III of the Complaint asserts a claim for bad faith, is dismissed as premature.

FILED FOR RECORD

OCT -9 PM 3:53

DONE AND ORDERED in Plantation Key, Monroe County, Florida this 8th day

of October 2020.



Honorable Luis Garcia
Circuit Court Judge

Cc: ✓ Matthew D. Landau, Esq. matt@thelandaulawgroup.com
✓ Eric M. Fischer, Esq. eric@thelandaulawgroup.com
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✓ Nicole Langesfeld, Esq. nlangesfeld@reedsmith.com

 OCT 08 2020

EXHIBIT 12

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

KENNETH SEIFERT d/b/a THE HAIR PLACE
and HARMAR BARBERS, INC., *individually
and on behalf of all others similarly
situated,*

Civil No. 20-1102 (JRT/DTS)

Plaintiffs,

**MEMORANDUM OPINION AND ORDER
GRANTING DEFENDANT'S MOTION TO
DISMISS**

v.

IMT INSURANCE COMPANY,

Defendant.

Amanda M. Williams, Daniel E. Gustafson, and Mary M. Nikolai, **GUSTAFSON GLUEK PLLC**, 120 South Sixth Street, Suite 2600, Minneapolis, MN 55402; Dennis Stewart, **GUSTAFSON GLUEK PLLC**, 600 B Street, San Diego, CA 92101; Chad Thronset and Patrick W. Michenfelder, **THRONSET MICHENFELDER LLC**, One Central Avenue West, Suite 203, St. Michael, MN 55376; and Yvonne M. Flaherty, **LOCKRIDGE GRINDAL NAUEN PLLP**, 100 Washington Avenue South, Suite 2200, Minneapolis, MN 55401, for plaintiffs.

Shayne M. Hamann, Gregory J. Duncan, and Steven J. Erffmeyer, **ARTHUR, CHAPMAN, KETTERING, SMETAK & PIKALA PA**, 81 South Ninth Street, Suite 500, Minneapolis, MN 55402, for defendant.

Plaintiffs ("Seifert") filed this action to collect lost business income, as a result of the coronavirus-related and government-mandated closure of Seifert's hair salon and barbershop, which he alleges is covered under insurance policies issued by Defendant IMT Insurance Co. ("IMT"). IMT filed a Motion to Dismiss, claiming that the insurance policies

only cover losses attributable to direct physical loss or damage, not a businessowner's mere loss of use of an insured property, and that the virus or bacteria exclusion precludes any otherwise qualifying loss or damage. Because Seifert does not plausibly allege any direct physical loss or damage to the properties, or plausibly demonstrate that the virus or bacteria exclusion would not preclude coverage given the facts he does allege, the Court will grant IMT's Motion to Dismiss.

BACKGROUND

I. THE PANDEMIC

Seifert owns and runs a hair salon, The Hair Place, and a barbershop, Harmar Barbers, Inc. (Compl. ¶¶ 1–2, May 6, 2020, Docket No. 1.) On March 13, 2020, Minnesota Governor Tim Walz declared a peacetime emergency in response to the spread of the novel coronavirus and issued several Emergency Executive Orders, one of which mandated the closure of salons and barbershops.¹ (*Id.* ¶ 20.) As a result of the Orders, Seifert had to suspend all business operations. (*Id.* ¶ 4.) Subsequently, he contacted his independent insurance broker, an authorized IMT agent, in late March to file a claim for lost business income. (*Id.* ¶ 27.) Seifert was advised that his losses were not covered by the insurance policies. (*Id.* ¶¶ 5, 27.)

¹ See Minn. Emergency Exec. Order No. 20-08 at 1 (Mar. 18, 2020), https://mn.gov/governor/assets/Filed%20EO-20-08_Clarifying%20Public%20Accommodations_tcm1055-423784.pdf.

II. THE POLICIES

A. COVERAGE

Seifert entered into insurance policies with IMT on March 25, 2019 and renewed both policies on April 2, 2020. (*Id.* ¶¶ 3, 11–12, 15; Aff. of Shayne M. Hamman (“Hamman Aff.”) ¶¶ 3–6, May 29, 2020, Docket No. 13.)² Each policy contains a Businessowners Coverage Form, which covers “direct physical loss of or damage to Covered Property at the premises described.” (Hamman Aff. ¶¶ 3–6, Ex. A (“Policy”) at 77, Ex. B at 207, Ex. C at 363, and Ex. D at 526, May 29, 2020, Docket No. 13-1.)³ The policies also insure against lost Business Income:

We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your “operations” The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.

(Policy at 82.) “Covered Causes of Loss” are defined as “[d]irect physical loss[es] unless the loss is excluded.” (*Id.* at 78.)

² In reviewing a motion to dismiss, the Court may consider the allegations in the complaint as well as “those materials that are necessarily embraced by the pleadings.” *Schriener v. Quicken Loans, Inc.*, 774 F.3d 442, 444 (8th Cir. 2014). As such, it may consider “documents whose contents are alleged in a complaint and whose authenticity no party questions.” *Kushner v. Beverly Enters., Inc.*, 317 F.3d 820, 831 (8th Cir. 2003) (quoting *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 926 (9th Cir. 1996)).

³ From this point forward, the Court will simply cite to Ex. A, as all the policies are identical.

Finally, the policies offer Civil Authority coverage. (*Id.* at 85.) This coverage is triggered when a Covered Cause of Loss causes damage to nearby property other than the insured property and, as a consequence, a civil authority prohibits access to the insured property because of “dangerous physical conditions resulting from the damage or . . . to enable a civil authority to have unimpeded access to the damaged property.” (*Id.*) If triggered, Civil Authority coverage would also insure against lost business income. (*Id.*)

B. EXCLUSIONS

The Businessowners policies insure against “all risk” except for risks that are expressly excluded. (See Compl. ¶¶ 14–15.) The prefatory language of the exclusions section states that IMT “will not pay for loss or damage caused directly or indirectly” by an excluded event. (Policy at 93.) The prefatory language also includes an anti-concurrent causation clause, stating that any such loss or damage “is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.” (*Id.*) Finally, the policy contains a Virus or Bacteria Exclusion, which precludes coverage for any loss or damage associated with a “virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness or disease.” (*Id.* at 96.)

III. PROCEDURAL BACKGROUND

On May 6, 2020, Seifert filed his Complaint, alleging breach of contract and seeking declaratory and monetary relief. (Compl. ¶¶ 37–48.) In response, IMT filed a Motion to

Dismiss pursuant to Rule 12(b)(6), arguing that 1) Seifert failed to satisfy the condition precedent of filing a formal claim; 2) Seifert failed to plead sufficient facts alleging lost business income caused by a direct physical loss of or damage to his properties, 3) various exclusions precluded coverage, and 4) the known-loss doctrine precluded any claim of loss (Mot. Dismiss, May 29, 2020, Docket No. 9.)

DISCUSSION

I. STANDARD OF REVIEW

In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court considers all facts alleged in the complaint as true to determine if the complaint states a “claim to relief that is plausible on its face.” *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “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.” *Iqbal*, 556 U.S. at 678. The Court construes the complaint in the light most favorable to the plaintiff, drawing all inferences in their favor. *Ashley Cty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009). Although the Court accepts the complaint’s factual allegations as true, it is not bound to accept as true a legal conclusion couched as a factual allegation. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation omitted). “Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops

short of the line between possibility and plausibility,” and therefore must be dismissed. *Iqbal*, 556 U.S. at 678.

II. ANALYSIS

Under Minnesota law, the interpretation of an insurance contract is a question of law. *Horizon III Real Estate v. Hartford Fire Ins. Co.*, 186 F. Supp. 2d 1000, 1004 (D. Minn. 2002). “[A] court will compare the allegations in the complaint in the underlying action with the relevant language in the insurance policy.” *Midwest Family Mut. Ins. Co. v. Justkyle, Inc.*, No. 17-1632, 2018 WL 3475486, at *5 (D. Minn. July 19, 2018) (quoting *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 415 (Minn. 1997)). “While the insured bears the initial burden of demonstrating coverage, the insurer carries the burden of establishing the applicability of exclusions.” *Id.* at *6 (quoting *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006)).

A. COVERAGE UNDER THE POLICIES⁴

1. Business Income

The insurance policies cover the loss of business income when business operations are suspended because of “direct physical loss of or damage to property at the described

⁴ As a preliminary matter, IMT argues that it is under no obligation to perform under the policies, as Seifert failed to satisfy the condition precedent with respect to properly submitting a formal claim. IMT also argues that the known-loss doctrine precludes coverage. Both arguments are unavailing. With respect to the condition precedent, not only did Seifert promptly contact his insurance broker, an authorized IMT agent, after the closure of his businesses, but he also satis-
(footnote continued on next page)

premises.” (Policy at 82.) Minnesota caselaw does not require a showing of structural damage to qualify for coverage. “Direct physical loss” can also be found when business premises are contaminated by asbestos, *see Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997), or smoke, *see Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001). In short, “[i]t is sufficient to show that the “insured property is injured in some way,” which may be something less than structural damage or some other tangible injury. *See Archer Daniels Midland Co. v. Aon Risk Servs., Inc. of Minnesota*, No. 97-2185, 2002 WL 31185884, at *3 (D. Minn. Sept. 27, 2002), *aff’d*, 356 F.3d 850 (8th Cir. 2004).

However, this is not to say that a qualifying loss is established “*whenever* property cannot be used for its intended purpose.” *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005) (emphasis in original). Actual physical contamination of the insured property is still required. *See Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 837–38 (8th Cir. 2006). Simply claiming “mere loss of use or function” is not enough. *Pentair*, 400 F.3d at 616; *see also Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986).

fied the procedure for reporting a claim, as outlined on IMT’s website. With respect to the known-loss doctrine, it is a fraud-based defense, but fraud is not being disputed here, so the doctrine is inapplicable. *See Guar. Title, Inc. v. Alterra Excess & Surplus Ins. Co.*, No. 14-0028, 2014 WL 12601039, at *3 (D. Minn. Nov. 19, 2014) (citing *Sand Cos., Inc. v. Gorham Hous. Partners III, LLP*, No. A10–113, 2010 WL 5154378, at *7 (Minn. Ct. App. Dec. 21, 2010).

Seifert claims that his inability to provide haircuts and salon services is indistinguishable from the intangible physical loss in *General Mills*. However, in *General Mills*, there was smoke contamination of the insured's property; here, Seifert has not pleaded any facts demonstrating his businesses were similarly contaminated by the novel coronavirus. That is, he only asserts that he suffered an economic loss unrelated to an actual infiltration and contamination of the properties.

Seifert also asserts that another case, *Cedar Bluff*, stands for the proposition that physical loss can be found when an external force renders property unsafe or unusable, even when the property remains physically unchanged. Yet, he fails to mention that the *Cedar Bluff* court held that undamaged panels of siding were covered only because adjoining panels were damaged, and repairs could not be made without resulting in a color mismatch. *See Cedar Bluff Townhome Condo. Ass'n, Inc. v. Am. Family Mut. Ins. Co.*, 857 N.W.2d 290, 295 (Minn. 2014). That is, there was still a physical loss; the dispute only concerned the extent of the loss.

As such, Seifert's claims fail to fall within the permissible realm of "direct physical loss," as he cannot allege facts showing his properties were actually contaminated or damaged by the coronavirus.⁵ In fact, Seifert explicitly states that his business losses were

⁵ *Accord 10E, LLC v. Travelers Indem. Co.*, No. 20-04418, 2020 WL 5359653, at *5 (C.D. Cal. Sept. 2, 2020) (granting defendant's motion to dismiss for failing to allege that the virus had infected or entered the premises); *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615, 2020 WL 5051581, (footnote continued on next page)

“not because of the presence of a virus” at the premises. (Compl. ¶ 24.) Instead, the Orders are alleged to be the sole cause of his losses, but governmental action prohibiting the use of property, by itself, is not enough. *See Source Food*, 465 F.3d at 838. As a result, Seifert does not plead a plausible claim for relief. Accordingly, the Court will grant IMT’s Motion to Dismiss with respect to Business Income coverage under the policies.

2. Civil Authority

The policies also provide coverage when a Covered Cause of Loss causes damage to another’s property and a civil authority then prohibits access to the insured property. Thus, a direct physical loss of or damage to property is again required to trigger coverage.

As such, if a complaint does not plead facts alleging some actual contamination or damage to property to a neighboring property, then the complaint does not state a plausible claim to relief. Here, Seifert does not plead any facts demonstrating that the coronavirus contaminated properties neighboring his businesses, or that a civil authority then prohibited him from entering his insured properties because of any such contamination. Accordingly, the Court will grant IMT’s Motion to Dismiss with respect to Civil Authority coverage under the policies.

at *7 (S.D. Fla. Aug. 26, 2020) (same); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 20-461, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) (finding that pleading mere economic loss was not a plausible claim). *But cf. Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-03127, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020) (denying defendant’s motion to dismiss because plaintiffs alleged that COVID-19 had physically entered the premises).

B. VIRUS OR BACTERIA EXCLUSION⁶

The virus exclusion precludes coverage for any loss or damage caused indirectly or directly by any “virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” (Policy at 96.) Furthermore, as defined by the prefatory language applicable to all excluded events, the virus exclusion is an anti-concurrent loss provision. “When an anti-concurrent loss provision is triggered . . . courts need not inquire into which of a covered or excluded loss was the proximate cause of the damage, but simply exclude coverage where any portion of the loss was caused or contributed to by an excluded loss.” *Ken Johnson Props., LLC v. Harleysville Worcester Summary Ins. Co.*, No. 12-1582, 2013 WL 5487444, at *12 (D. Minn. Sept. 30, 2013). Thus, the virus exclusion would extend “to all losses where a virus is part of the causal chain.” *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *8–9 (E.D. Mich. Sept. 3, 2020).

Here, Seifert alleges that his business losses are the direct and proximate result of “Governmental Pandemic Closure Orders; orders that have been put in place in an effort

⁶ In addition to the Virus or Bacteria Exclusion, IMT argues that the Pollution Exclusion and the Ordinance or Law Exclusion also apply. However, exclusions are to be construed narrowly and strictly against the insurer. *Grinnell Mut. Reinsurance Co. v. Villanueva*, 37 F. Supp. 3d 1043, 1046 (D. Minn. 2014), *aff'd*, 798 F.3d 1146 (8th Cir. 2015). As such, IMT’s attempt to place the coronavirus in the same category of pollutants as “smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste” is unavailing. (Policy at 100). Additionally, while the Ordinance or Law Exclusion might be applicable, IMT offers nothing to demonstrate whether the Emergency Executive Order specifically closing barbershops and hair salons had the force of law. As such, the Court will also construe this exclusion against IMT.

to control the spread of the COVID-19 Pandemic.” (Compl. ¶ 24.) Pursuant to the anti-concurrent loss provision, if a virus is any part of the causal chain causing a loss, then the loss is not covered. Accordingly, the Court will grant IMT’s Motion to Dismiss with respect to the Virus or Bacteria Exclusion.

CONCLUSION

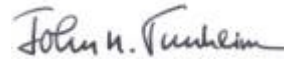
Although Seifert has failed to plead factual content to allow the Court to draw the reasonable inference that Seifert is entitled to coverage for lost business income, it is possible that his claims may survive if properly alleged.⁷ Accordingly, the Court will grant Seifert twenty days to amend the Complaint to address the deficiencies in pleading identified above.

ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Defendant’s Motion to Dismiss [Docket No. 9] is **GRANTED without prejudice**. If no Amended Complaint is filed within twenty days from the date of this Order, the Court will dismiss the case with prejudice.

⁷ See, e.g., *Studio 417*, 2020 WL 4692385, at *5–6; see also *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-3213, 2020 WL 5525171, at *8 (N.D. Cal. Sept. 14, 2020) (“The Court [recognizes] that the law concerning business interruption coverage linked to the COVID-19 pandemic is very much in development . . . and [will] grant leave to amend.”).

DATED: October 16, 2020
at Minneapolis, Minnesota.

A handwritten signature in black ink, reading "John R. Tunheim". The signature is written in a cursive style with a horizontal line extending from the end.

JOHN R. TUNHEIM
Chief Judge
United States District Court

EXHIBIT 13

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES - GENERAL

Case No.	CV 20-3619 PSG (Ex)	Date	October 19, 2020
Title	Travelers Casualty Insurance Company of America v. Geragos and Geragos		

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy Hernandez

Not Reported

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

Not Present

Not Present

Proceedings (In Chambers): The Court GRANTS the motion to dismiss.

Before the Court is a motion to dismiss filed by Plaintiff and Counter-Defendant Travelers Casualty Insurance Company of America (“Travelers”). *See* Dkt. # 30 (“*Mot.*”). Defendant and Counter-Claimant Geragos and Geragos (“G&G”) opposed, *see* Dkt. # 34 (“*Opp.*”), and Travelers replied, *see* Dkt. # 35 (“*Reply*”). The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having considered the moving, opposing, and reply papers, the Court **GRANTS** the motion without leave to amend.

I. Background

G&G, a law firm with offices in Los Angeles, purchased an insurance policy from Travelers with coverage from December 16, 2019 to December 16, 2020 (the “Policy”). *See* Dkt. # 26 (“*Counterclaim*”) ¶ 1 2. On March 19, 2020, Mayor Eric Garcetti of Los Angeles issued an Executive Order directing all “non-essential” business to close (the “Order”),¹ based on “the dire risk of exposure with contraction of COVID-19.” *See id.* ¶ 17. G&G alleges that the Policy covers its claimed business income losses caused by the Order’s closure of their business. *See id.* ¶¶ 6 21.

On April 20, Travelers commenced this action seeking declaratory relief under two insurance policies that Travelers issued to G&G regarding the firm’s claimed losses of business income at its Los Angeles and New York offices related to the Coronavirus.² *See generally Complaint*, Dkt. # 1. Shortly thereafter, Travelers removed a declaratory judgment action that

¹ The counterclaim states the Order was issued on March 15, but it in fact was issued on March 19.

² At issue in this order is Policy Number 680-5G335353. *See Counterclaim* ¶ 2.

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G&G had filed in the Los Angeles County Superior Court regarding a claim for losses at its Los Angeles office only. *Geragos & Geragos, APC v. Travelers Indem. Co. of Conn.*, No. 2:20-cv-04414-PSG-E, ECF No. 1. After denying G&G's motion to remand, the Court consolidated the removed action with this case. *See* Dkt # 22. On September 2, pursuant to a Court order, *see* Dkt. # 27, G&G refiled its First Amended Complaint in the removed action as a Counterclaim in this action, asserting claims against Travelers and Mayor Garcetti (collectively, "Counter-Defendants"). *See generally Counterclaim.*

The Counterclaim asserts the following causes of action:

First Cause of Action: declaratory relief against Counter-Defendants that (1) the Order constitutes a prohibition of access to G&G's premises; (2) the prohibition is "prohibited access" as defined in the Policy; (3) the Order triggers coverage because the Policy does not include an exclusion for a viral pandemic and extends coverage for loss or damage due to physical loss and damage; and (4) the Policy provides coverage for losses due to future civil authority closures of commercial buildings from COVID-19. *See id.* ¶¶ 28 33.

Second Cause of Action: breach of contract against Travelers. *See id.* ¶¶ 34 44.

Third Cause of Action: bad faith breach of implied covenant of good faith and fair dealing against Travelers. *See id.* ¶¶ 45 53.

Fourth Cause of Action: violation of Cal. Bus. & Prof. Code § 17200 against Travelers. *See Counterclaim* ¶¶ 54 59.

Travelers now moves to dismiss all four causes of action in the Counterclaim. *See generally Mot.* Specifically, Travelers argues that the Court should dismiss the first cause of action because G&G is not entitled to civil authority coverage, *see id.* at 9 15, or business income and extra expense coverage, *see id.* at 15 19. Travelers further contends that the Court should (1) dismiss G&G's second cause of action because G&G has not alleged any breach, *see id.* at 20; (2) dismiss G&G's third cause of action because G&G is not entitled to coverage as a matter of law, *see id.* at 20 21; and (3) dismiss G&G's fourth cause of action because G&G does not plead fraudulent, unfair, or unlawful conduct, *see id.* at 21 24.

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II. The Insurance Policy

The parties' arguments center on three provisions of the Policy: (1) Civil Authority Coverage, (2) Business Income and Extra Expense Coverage, and (3) the Virus Exclusion Provision.

A. Civil Authority Coverage

Civil authority coverage insures certain business income losses and expenses "caused by action of civil authority" that are "due to direct physical loss of or damage to property at locations . . . caused by or resulting from a Covered Cause of Loss." *See Declaration of Kenneth Kupec*, Dkt. # 30-2 ("*Kupec Decl.*"), Ex. 1 at 81. Moreover, the "action of civil authority" must "prohibit[] access to the described premises" for there to be any potential for coverage. *See id.*

B. Business Income and Extra Expense Coverage

The Business Income and Extra Expense provision provides coverage for physical loss or damage "cause by or resulting from a Covered Cause of Loss." *See id.* at 85. The Extra Expense provision covers reasonable and necessary expenses incurred by G&G during the period of restoration of its business "that [G&G] would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss." *See id.* at 87.

C. Virus Exclusion Provision

The Policy also contains an endorsement entitled "EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA," which "applies to all coverage under all forms and endorsements that comprise" the Commercial Property Coverage Part of the Policy "including but not limited to forms or endorsements that cover . . . business income, extra expense, rental value or action of civil authority." *See id.* at 186. The exclusion states: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable or inducing physical distress, illness or disease." *See id.*

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III. Legal Standard

“A motion to dismiss a counterclaim is subject to the same standard as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)” *Alvarez v. XPO Logistics Cartage, LLC*, No. 2:18-CV-03736-SJO-E, 2020 WL 1289550, at *1 (C.D. Cal. Feb. 6, 2020). To survive a motion to dismiss under Rule 12(b)(6), a complaint must “contain 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)). In assessing the adequacy of the complaint, the court must accept all pleaded facts as true and construe them in the light most favorable to the plaintiff. *See Turner v. City & Cty. of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). The court then determines whether the complaint “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* Accordingly, “for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

IV. Judicial Notice

“Generally, the scope of review on a motion to dismiss . . . is limited to the contents of the complaint.” *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *see also Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002) (“Ordinarily, a court may look only at the face of the complaint to decide a motion to dismiss.”). Courts may also, however, consider “attached exhibits, documents incorporated by reference, and matters properly subject to judicial notice.” *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014). Under Federal Rule of Evidence 201, a court may take judicial notice of facts not subject to reasonable dispute because they (1) are generally known within the court’s territorial jurisdiction, or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b).

Travelers requests that the Court take judicial notice of the Policy, *see generally Request for Judicial Notice*, Dkt. # 31 (“RJN”), which is explicitly incorporated by reference in the Counterclaim. *See Counterclaim* ¶ 39 (“Counter-Claimant is informed and believes and thereon alleges that Travelers is in possession of a complete copy of the operative insurance agreement, and therefore incorporates its terms as though fully set forth.”). The Policy is referred to as bearing “Policy Number 680-5G335353” and encompassing “the period of December 16, 2019 through December 16, 2020.” *Id.* ¶¶ 2, 8, 9. Along with the RJN, Travelers submits a certified

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copy of the Policy. *See RJN* 2:12 14; *see also Kupec Decl.* Ex. 1. Accordingly, the Court **GRANTS** Travelers’ request and takes judicial notice of the Policy.

V. Discussion

Travelers’ argues for the dismissal of each cause of action. *See generally Mot.* The Court agrees, and addresses each cause of action in turn.

A. First Cause of Action

Travelers argues that the Court should dismiss the first cause of action because (1) G&G is not entitled to civil authority coverage, and (2) business income and extra expense coverage does not apply, and therefore G&G is not entitled to any of its requested declarations. *See id.*

i. *Civil Authority Coverage*

Travelers asserts that G&G is not entitled to civil authority coverage for two reasons: (1) losses due to a virus are not a “Covered Cause of Loss” under the policy, *see Mot.* 9:13 12:20; and (2) the Order did not actually prohibit access to G&G’s business because the law firm was deemed essential, *see id.* 12:23 15:18. Because the Court finds the first argument sufficient to grant dismissal, the Court does not address the second argument.

First, Travelers argues that the civil authority provision is limited to only covered causes of loss and that damages or loss due to a virus are explicitly excluded from coverage under the Virus Exclusion provision. *See id.* 9:13 12:20.

G&G responds that (1) it is unclear whether the Order stemmed from the virus, and (2) discovery is needed to resolve the issue. *See Opp.* 7:8 9:17. The Court is not convinced by this argument because the Counterclaim explicitly alleges that the Order was “issued based on the dire risks of exposure with the contraction of COVID-19.” *See Counterclaim* ¶ 17; *see also 10E, LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-CV-04418-SVW-AS, 2020 WL 5359653, at *6 (C.D. Cal. Sept. 2, 2020) (dismissing a virtually identical argument and expressing “skepticism that Plaintiff can evade application of the Policy’s virus exclusion”); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020) (“While the Orders technically forced the Properties to close to protect public health, the Orders only came about sequentially as a result of the COVID-19 virus Thus, it was the

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presence of COVID-19 . . . that was the primary root cause of Plaintiff’s businesses temporarily closing.”).

Furthermore, the Policy clearly states that the civil authority provision applies only to covered causes of loss. *See Kupec Decl.* at 81. The Virus Exclusion Provision, which explicitly applies to civil authority coverage, also explicitly excludes loss or damage resulting from a virus. *See id.* at 186. (“The exclusion . . . applies to . . . forms or endorsements that cover business income, extra expense, rental value or action of civil authority.”); *see also Fireman’s Fund Ins. Co. v. Superior Court*, 65 Cal. App. 4th 1205, 1212–13 (1997) (“[Courts] will not strain to create an ambiguity where none exists or indulge in tortured constructions to divine some theoretical ambiguity in order to find coverage where none was contemplated.”). Thus, civil authority coverage is prevented by the virus exclusion.

Additionally, other courts have dismissed similar claims based on virus exclusion provisions. *See Mark’s Engine Co. No. 28 Rest., LLC v. The Travelers Indem. Co. of Conn.*, No. 20-04423, Order (C.D. Cal., Oct. 2, 2020) (ECF No. 54) (dismissing a claim based on the same virus exclusion provision and the same stay-at-home order because the virus exclusion provision applied and precluded coverage); *see also Turek Enters. Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, Order Granting Insurer’s Motion to Dismiss (E.D. Mich., September 3, 2020) (ECF No. 23) (dismissing a claim based on the virus exclusion provision because the “only reasonable conclusion is that the Order and, by extension, Plaintiff’s business interruption losses would not have occurred but for COVID-19”); *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, No. 220CV00401FTM66NPM, 2020 WL 5240218 (M.D. Fla. Sept. 2, 2020) (same); *Diesel Barbershop*, 2020 WL 4724305 at *6 (same).

Accordingly, the Court finds that the Virus Exclusion Provision explicitly excludes civil authority coverage, and **GRANTS** the motion to dismiss on this ground.

ii. Business Income and Extra Expense Coverage

“When interpreting a policy provision, we must give terms their ordinary and popular usage, unless used by the parties in a technical sense or a special meaning is given to them by usage.” *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115 (1999) (citation and quotation marks omitted). The Business Income and Extra Expense provision at issue here conditions recovery on “direct physical loss of or damage to property.” *See Kupec Decl.* at 69–70. Travelers argues that G&G is not entitled to business income and extra expense coverage because the Counterclaim does not allege physical loss of or damage to property. *See Mot.* 5:23–28. The Court agrees.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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G&G argues that it was “deprived of the typical foot traffic, visibility, and ability to interface with clients that it ordinarily depends on, and is entitled to coverage for the business losses that resulted from this deprivation.” *See Opp.* at 14. However, G&G fails to allege that there was *physical* damage to the property and concedes that Coronavirus “has never been detected at [its] property.” *See id.* at 1.

The Court finds persuasive the reasoning of the Honorable Steven V. Wilson who addressed identical policy language as it relates to COVID-19 with parties whose arguments mirrored those made before this Court:

Under California law, losses from inability to use property do not amount to “direct physical loss of or damage to property” within the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a “distinct, demonstrable, physical alteration.” “Detrimental economic impact” does not suffice.

An insured cannot recover by attempting to artfully plead temporary impairment to economically valuable use of property as physical loss or damage. For example, in *MRI Healthcare Ctr.*, the court held that lost use of an MRI machine after it was powered off did not qualify as a “direct physical loss.” Likewise, in *Ward General Ins. Servs., Inc. v. Employers Fire Ins. Co.*, the court held that a loss of valuable electronic data did not qualify as “direct physical loss or damage” without any physical alteration to the storage media. Finally, in *Doyle*, the court held that purchasing counterfeit wine did not count as a loss to the wine covered by a property insurance policy without a physical alteration.

Plaintiff's FAC attempts to make precisely this substitution of temporary impaired use or diminished value for physical loss or damage in seeking Business Income and Extra Expense coverage. Plaintiff only plausibly alleges that in-person dining restrictions interfered with the use or value of its property not that the restrictions caused direct physical loss or damage.

10E, 2020 WL 5359653 at *4 *5 (citations omitted).

UNITED STATES DISTRICT COURT
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Furthermore, in *10E*, the plaintiff alleged that “in-person dining restrictions” were equivalent to “labeling of the insured property as non-essential.” *See id.* at *6. The court found that while “‘labeling’ surely carries significant social, economic, and legal consequences. . . it does not physically alter any of Plaintiff’s property.” *See id.* Here, G&G makes similar arguments, *see Counterclaim* ¶ 18, and even acknowledges that it was “exempted as an ‘essential business’ under the Order,” *see id.* ¶ 22. This Court agrees that “labeling” is not “physical damage,” particularly when, as here, the business was not even labeled “non-essential.”

Accordingly, the Court **GRANTS** Travelers’ motion to dismiss on this ground.

B. Second, Third, and Fourth Causes of Action

G&G does not oppose Travelers’ motion to dismiss the second, third, and fourth causes of action. *See generally Opp.* Arguments to which no response is supplied are deemed conceded. *See, e.g., Tapia v. Wells Fargo Bank, N.A.*, No. CV 15-03922 DDP (AJWX), 2015 WL 4650066, at *2 (C.D. Cal. Aug. 4, 2015). Furthermore, these causes of action are derivative of coverage. Because G&G is not entitled to coverage under the Policy, it cannot state a claim for breach of contract, breach of the implied covenant of good faith and fair dealing, or a UCL violation. *See 10E*, 2020 WL 5359653 at *6.

Accordingly, the Court **GRANTS** Travelers’ motion to dismiss the second, third, and fourth causes of action.

C. Leave to Amend

Whether to grant leave to amend rests in the sound discretion of the trial court. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). Courts consider whether leave to amend would cause undue delay or prejudice to the opposing party, and whether granting leave to amend would be futile. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). Generally, dismissal without leave to amend is improper “unless it is clear that the complaint could not be saved by any amendment.” *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

The Court finds the Virus Exclusion provision precludes all civil authority coverage such that Travelers has no duty to perform under the Policy. Furthermore, because there was no physical damage to G&G’s property, the Business Income and Extra Expenses coverage does not apply. Accordingly, amendment would be futile, and the Court **DENIES** leave to amend.

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VI. Conclusion

For the reasons above, the Court **GRANTS** Travelers' motion to dismiss the Counterclaim in its entirety without leave to amend.

IT IS SO ORDERED.

EXHIBIT 14

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

HILLCREST OPTICAL, INC., a corporation on)
behalf of itself and all others in the State of)
Alabama similarly situated,)
))
Plaintiff,)
))
v.) **CIVIL ACTION NO. 1:20-CV-275-JB-B**
))
CONTINENTAL CASUALTY COMPANY,)
))
Defendant.)

ORDER

This matter is before the Court on Defendant Continental Insurance Company's ("Continental" or "Defendant") Motion to Dismiss (Doc. 17). The Motion has been briefed and is ripe for review.

I. BACKGROUND

Plaintiff is an Alabama corporation which operates an optometrist office in Mobile, Alabama. (Doc. 1 at ¶¶1, 5, PageID.1 – 2). Defendant is an Illinois insurance corporation. Plaintiff purchased an “all-risk” insurance policy from Defendant to cover its property from May 1, 2019, until May 1, 2020. (*Id.* at ¶6, PageID.2). The parties do not dispute the policy’s contents. The policy’s “Business Special Property Coverage Form” provides: “[Defendant] will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from a Covered Cause of Loss.” (Doc. 1 at ¶9, PageID.3; Doc. 1-2, PageID.34) (capitalization in original). The policy’s “Business Income and Extra Expense” endorsement provides:

We 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 caused by or result from a Covered Cause of Loss.

(Doc. 1 at ¶11, PageID.3; Doc. 1-2, PageID.56) (capitalization in original). The policy does not define the phrase “direct physical loss of . . . property.” (Doc. 1-2, PageID.56). Plaintiff also purchased Extra Expense coverage from Defendant. (Doc. 1 at ¶12, PageID.3) (capitalization in original). That coverage provides:

- a. Extra Expense means reasonable and necessary expenses you incur during the “period of restoration” that you would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss.
- b. We will pay Extra Expense (other than the expense to repair or replace property) to:
 - (1) Avoid or minimize the “suspension” of business and to continue “operations” at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement premises or temporary locations; or
 - (2) Minimize the “suspension” of business if you cannot continue “operations.”
- c. We will also pay Extra Expense (including Expediting Expenses) to repair or replace the property, but only to the extent it reduces the amount of loss that otherwise would have been payable under Paragraph 1. Business Income above.

(Doc. 1-2, PageID.57) (capitalization and emphasis in original). The policy defines “operations” and “period of restoration” as follows:

19. **“Operations”** means the type of your business activities occurring at the described premises and tenantability of the described premises.

20. **“Period of restoration”** means the period of time that:

a. Begins with the date of direct physical loss or damage 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.

“Period of restoration: does not include any increased period required due to the enforcement of any law that:

(a) Regulates the construction, use or repair, or requires the tearing down of any property; or

(b) Regulates the prevention, control, repair, clean-up or restoration of environmental damage.

(Doc.1-2, PageID.51 – 52) (emphasis in original).

On March 13, 2020, President Trump declared the COVID-19 pandemic a national emergency. (Doc. 1 at ¶15, PageID.4). Following President Trump’s declaration, Alabama Governor Kay Ivey declared the COVID-19 pandemic a State public health emergency and directed relevant State agencies to exercise their statutory and regulatory authority to implement measures to curb the rise of COVID-19 cases in Alabama. (Doc. 1-3, PageID.177).

On March 27, 2020, Dr. Scott Harris, the Alabama State Health Officer, entered a Statewide Order (the “Order”) which provided, *inter alia*, all medical procedures would be postponed beginning March 28, 2020, with certain exceptions, until further notice. Plaintiff avers it shut down operations in compliance with the State’s Order. (Doc. 1 at ¶17, PageID.4). Dr. Harris entered a second Order (the “Second Order”), approximately one month later (*Id.* at ¶18, PageID.5), allowing all medical procedures to resume. (Doc. 1-4, PageID.188). Plaintiff reopened and resumed its ordinary operations at its first available opportunity on April 30, 2020. (Doc. 1 at ¶18, PageID.5). Plaintiff alleges it suffered a substantial loss of business income as a consequence of the Order. (*Id.* at ¶19). Plaintiff does not allege COVID-19 was present on its premises.

Plaintiff filed a claim for its business income losses with Defendant on April 15, 2020. (Doc. 1 at ¶19, PageID.5). Plaintiff provided Defendant several documents with its claim, outlining its financial losses and other information Defendant requested. (*Id.*). Plaintiff’s counsel sent an email to Defendant on May 4, 2020, advising if Defendant did not respond to Plaintiff’s claim within five (5) days it would consider the claim denied and proceed with litigation. (*Id.*). Defendant did not respond within that time and Plaintiff commenced this action on May 15, 2020.

Plaintiff brings this action individually and for similarly situated parties. In its Complaint, Plaintiff seeks a Declaratory Judgment of its rights under the policy (Doc. 1 at ¶¶39, 40, PageID.10), and asserts a breach of contract claim. (*Id.* at ¶¶43 – 47, PageID.11). Plaintiff’s breach of contract claim is limited to Defendant’s alleged failure to cover Plaintiff’s loss of business income. (*Id.* at ¶45). Plaintiff contends it suffered a direct physical loss of its property

because it lost the ability to use its property for its intended purposes as a consequence of the Order. (*Id.* at ¶22, PageID.5 – 6). Alternatively, Plaintiff contends the Court should certify the question of whether it has adequately alleged a direct physical loss of property to the Alabama Supreme Court because Alabama law lacks sufficient guidance to answer it. (Doc. 24, PageID.288).

II. STANDARD OF REVIEW

Rule 12(b)(6), Fed.R.Civ.P., provides a court may dismiss a claim for failure to state a claim upon which relief can be granted. “To survive a motion to dismiss, a complaint must contain 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 Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Conclusory statements, assertions or labels will not survive a 12(b)(6) motion to dismiss. *Id.* A plaintiff’s 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.” *Id.*; see also *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1291 (11th Cir. 2010). “Factual allegations must be enough to raise a right to relief above the speculative level[.]” *Twombly*, 550 U.S. at 555 (citation omitted). “Although it must accept well-pled facts as true, the court is not required to accept a plaintiff’s legal conclusions.” *Iqbal*, 556 U.S. at 678.

III. ANALYSIS¹

Defendant contends Plaintiff’s Complaint is due to be dismissed pursuant to Rule 12(b)(6) because: (1) Plaintiff failed to allege a direct physical loss of its property in accordance with the

¹ The parties address the policy’s Civil Authority Endorsement (See Doc. 1-2, PageID.82) which modifies the Business Property Special Coverage Form and Extra Expense Endorsement. Plaintiff concedes this endorsement provides it no coverage. (See Doc. 18, PageID.236, 252 – 254).

policy's Business Special Property Coverage Form; (2) Plaintiff's inability to use its property for its intended purpose did not constitute a direct physical loss of property; and (3) Plaintiff failed to allege a period of restoration as required by the policy's Business Income and Extra Expense endorsement. (Doc. 18, PageID.240, 246, 250). In anticipation of Plaintiff's Opposition, Defendant also contends the Court should not certify the question of whether Plaintiff sufficiently alleged a direct physical loss because there is sufficient Alabama law to guide the Court in its decision. (*Id.* at PageID.245 n.7).

In Opposition, Plaintiff maintains it adequately alleged a direct physical loss of property because the State's Order prevented it from using its property for its intended purpose. (Doc. 24, PageID.289). Plaintiff also contends it adequately alleged a period of restoration based on its interpretation of the word "repair" as it appears in the policy. (*Id.*, PageID.296). In Reply, Defendant again contends Plaintiff failed to allege a direct physical loss of its property. Defendant contends Plaintiff's allegation that it lost its ability to use its property for its intended purpose fails to satisfy the policy's requirements. (Doc.25, PageID.308 – 311).²

A. Alabama's principles of insurance contract construction.

Before considering the parties' arguments, the Court finds it appropriate to review Alabama's principles on insurance contract construction. Matters of insurance contract construction under Alabama law are well-settled. Generally,

[t]he issue of whether a contract is ambiguous or unambiguous is a question of law for a court to decide. If a word or phrase is not defined in an insurance policy, then the court should construe the

² The parties also filed several notices of significant and pertinent authority which the Court has considered in making its determination. (See Doc. 26; Doc. 28; Doc. 30).

word or phrase according to the meaning a person of ordinary intelligence would reasonably give it.

Crook v. Allstate Indemnity Company, 2020 WL 3478552, *3 (Ala. 2020) (internal brackets, citations, and quotation marks omitted). Further,

[t]he court should not define words it is construing based on technical or legal terms. When analyzing an insurance policy, a court gives words used in the policy their common, everyday meaning and interprets them as a reasonable person in the insured's position would have understood them. If, under this standard, they are reasonably certain in their meaning, they are not ambiguous as a matter of law and the rule of construction in favor of the insured does not apply. A policy is not made ambiguous by the fact that the parties interpret the policy differently or disagree as to the meaning of a written provision in a contract. However, if a provision in an insurance policy is found to be genuinely ambiguous, policies of insurance should be construed liberally in respect to persons insured and strictly with respect to the insurer.

Id. at *4. *See also Nationwide Mut. Ins. Co. v. Thomas*, 103 So.3d 795, 804 (Ala. 2012) (citing *Tate v. Allstate Ins. Co.*, 692 So.2d 822 (Ala. 1997)). Further, “an insurance policy must be read as a whole. The provisions of the policy cannot be read in isolation, but, instead, each provision must be read in context with all other provisions.” *Cowart v. Geico Cas. Co.*, 296 So.3d 266, 270 (Ala. 2019) (quoting *Allstate Ins. Co. v. Hardnett*, 763 So.2d 963, 965 (Ala. 2000) (quoting *Attorneys Ins. Mut. of Alabama, Inc. v. Smith, Blocker & Lowther, P.C.*, 703 So.2d 866, 870 (Ala. 1996))).

B. Plaintiff’s request for certification to the Alabama Supreme Court is unavailing.

Rule 18 of the Alabama Rules of Appellate Procedure states that federal courts may certify “determinative” questions of law where “there are no clear controlling precedents in the decisions of the supreme court of this state” to receive “instructions concerning such questions

or propositions of state law[.]” Ala. R. App. P. 18(a). In deciding whether to certify a question to the Alabama Supreme Court, courts are instructed to consider the following factors:

- (1) the closeness of the question; (2) the existence of sufficient sources of state law; (3) the degree to which considerations of comity are relevant in light of the particular issue and case to be decided; (4) the likelihood of recurrence of a particular issue; and (5) the practical limitations of the certification process.

Arnold v. State Farm Fire and Casualty Company, 2017 WL 5451749, *4 (S.D. Ala. 2017) (citing *Smigiel v. Aetna Casualty & Surety Co.*, 785 F.2d 922, 924 (11th Cir. 1986)); see also *Heatherwood Holdings, LLC v. First Commer. Bank*, 61 So.3d 1012, 1026 (Ala. 2010) (declining to answer a certified question where Alabama law was sufficient to guide the court in answering the certified question).

Plaintiff contends the Court must certify the question of whether it suffered a direct physical loss of its property because the issue is determinative to this litigation. (Doc. 24, PageID.288). Further, Plaintiff contends, “the Alabama Supreme Court would probably be inclined to accept the certified question, because the COVID-19 pandemic has generated numerous business-interruption-insurance lawsuits across the country, and several in this state[.]”. (*Id.*). In Reply, Defendant argues the question is not close and present Alabama law can sufficiently guide the Court’s analysis. (Doc. 25, PageID.318 – 319). Based on the analysis in section C., *infra*, the Court is satisfied certification is not necessary and shall address the substance of Plaintiff’s arguments.

C. The Court finds Plaintiff’s arguments unavailing.

In support of its argument that the Order caused a direct physical loss of its property, Plaintiff relies on *Total Intermodal Serv., Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767

(C.D. Cal. July 11, 2018) and *State Farm Mut. Auto. Ins. Co. v. Rodriguez*, 987 N.E.2d 896 (Ill. App. 2013). That reliance is misplaced. In *Total Intermodal*, the allegations of loss involved a complete and permanent dispossession of property. The court found that such a dispossession constituted a direct physical loss. *Total Intermodal Services Inc.*, 2018 WL 3829767, *3 – 4. Plaintiff's Complaint here does not allege complete and permanent disposition of Plaintiff's property.

Rodriguez likewise does not support Plaintiff's argument. In *Rodriguez*, police suddenly seized the defendants' cars after discovering they were purchased from a thief. *Rodriguez*, 987 N.E.2d at 898. The defendants filed insurance claims for the loss. Their insurance carrier denied the claims and filed declaratory judgment actions. *Id.* The relevant policy language provided: "**We** will pay: a. for **loss**, except **loss caused by collision**, to a **covered vehicle** [.]. **Loss** means: 1. direct, sudden, and accidental damage to; or 2. total or partial theft of a **covered vehicle**." *Id.* at 899 (emphasis in original). The defendants argued, *inter alia*, the vehicles suffered damage because their seizure by police was sudden. The court disagreed, stating:

We share the view of the trial courts that although the seizure of the vehicles does constitute damage to the defendants, it does not constitute damage "to" the covered vehicles. The defendants have not claimed that the seizure resulted in physical damage to the vehicles. The defendants have failed to suggest any reasonable interpretation of the term "damage" under which their vehicles, as opposed to the defendants themselves, have been damaged.

Rodriguez, 987 N.E.2d at 901.

Both *Total Intermodal* and *Rodriguez* concerned permanent physical dispossession of covered property, and to that extent are distinguishable from this case. The issue of whether the complete and permanent dispossession of property constitutes a direct physical loss of property is not before the Court.

The Court must determine whether a temporary inability to use property due to governmental intervention constituted a direct physical loss of property. Plaintiff contends the phrases “loss of” and “loss to” mean different things, and that they suffered a “loss of” their property notwithstanding that there was not a “loss to” it. Plaintiff attempts to support this argument based on a number of non-binding opinions, including *Sentinel Management Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. App. 1997); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332, 1336 (Or. App. 1993); *Murray v. State Farm Ins. Fire and Cas. Co.*, 509 S.E.2d 1, 16 (W.Va. 1998); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 701 (E.D. Va. 2010). The Court finds these authorities to be materially distinguishable. Several of these cases addressed the phrase “direct physical loss to property.” Others concerned physical contamination of premises that were rendered unusable due to an event which had a tangible effect on the property. See e.g., *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (“[T]his particular ‘loss of use’ was simply the consequential result of the fact that because of the accumulation of gasoline . . . the premises became so infiltrated and saturated as to be uninhabitable . . .”); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332, 1335 (Or. App. 1993); *Oregon Shakespeare Festival Association v. Great American Insurance Company*, 2016 WL 3267247, *2 (D. Or. 2016) (finding physical loss of property where wildfire smoke infiltrated the covered premises), *vacated on other grounds by Oregon Shakespeare Festival Association v. Great American Insurance Company*, 2017 WL 1034203.

1. **A reasonable insured would not understand the policy language to cover Plaintiff's purely economic losses incurred as a consequence of the Order.**

As other courts in this Circuit have noted, there is scant state-specific case law on the issue before the Court. *See, e.g., Henry's Louisiana Grill, Inc., et al., v. Allied Insurance Company of America*, 2020 WL 5938755, *4 (N.D. Ga. 2020); *Malaube, LLC v. Greenwich Insurance Company*, 2020 WL 5051581, *6 (S.D. Fla. 2020). Indeed, the Court could find no Alabama decision addressing whether a temporary inability to use one's property for its intended purpose constituted a "direct physical loss of property." However, there is sufficient authority to guide the Court's decision on the meaning of that phrase.

First, the Court notes, that the words "direct" and "physical" modify the word "loss" in the phrase "direct physical loss of property." Therefore, analysis of this phrase must account for both words as they apply to the type of loss of property Plaintiff must have suffered to trigger coverage. *See, e.g., Henry's Louisiana Grill, Inc.*, 2020 WL 5928755, at *4; *Malaube, LLC*, 2020 WL 5051581, at *7 (citing *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014)).

The Alabama Supreme Court's decision in *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293 (Ala. 2000) provides substantial interpretative guidance regarding the meaning of "direct" in the context of the phrase "direct physical loss of property." There, the insureds purchased a "Homeowners' Extra" policy from State Farm. *Slade*, 747 So. 2d at 297. The policy covered the "direct physical loss[es] to [the insured's] property." *Id.* at 298. The insureds' home was damaged by lightning during a severe thunderstorm when a bolt struck the insureds' retaining wall attached to their home. *Id.* at 297 – 298. This damage led to, *inter alia*, cracking in the interior

and exterior of the insureds' home due to shifting soil. *Id.* at 298. State Farm ultimately denied coverage, arguing on appeal that the earth-movement exclusion in the parties agreement "unambiguously exclude[d] any loss caused in any way by earth movement." *Id.* at 310. The insureds contended, *inter alia*, because the lightning directly struck their retaining wall, the earth-movement exclusion in the policy did not apply to their loss, and the earth movement exclusion of their insurance contract was ambiguous and that it only applied to certain situations (earthquakes and landslides). *Id.* at 308, 310. The court, analyzing insureds' cited precedent stated, "'direct' [loss] means 'immediate' or 'proximate' and is not synonymous with 'physical contact.'" *Id.* at 310 (quoting *Bly v. Auto Owners Insurance Co.*, 437 So.2d 495, 496 (Ala. 1983)). Thus, Alabama precedent does not require a "direct loss," without more, to have a physical component, though the type of loss of property contemplated in policy must have been due to some immediate or proximate cause. But, this does not end the Court's inquiry.

The Alabama Supreme Court has required some tangible alteration or disturbance to property to demonstrate physicality in most contexts. *See Downs v. Lyles*, 41 So.3d 86, 92 (Ala. Civ. App. 2009) (finding physical trespass where appellant impermissibly traveled across, projected debris onto, and directed water onto appellee's property); *Town of Gurley v. M & N Materials, Inc.*, 143 So.3d 1, 13 (Ala. 2012) (inverse condemnation claim); *Hous. Auth. of the Birmingham Dist. v. Logan Props., Inc.*, 127 So.3d 1169, 1176 (Ala. 2012) (same). Similarly, the Alabama Supreme Court has found the mere presence of a pollutant in an area could not be reasonably understood to mean a "discharge, dispersal, release, or escape" – a physical act. *Porterfield v. Audobon Indem. Co.*, 856 So. 2d 289, 805 (Ala. 2002). Specifically, when confronting the issue of whether lead chips in paint constituted a pollutant, and whether the emission of such

chips was a “discharge, dispersal, release, or escape” the court held the mere presence of the chips could not comprise a “discharge, dispersal, release, or escape,” though the inhalation of such chips indicated a physical release from the walls holding them. *Porterfield*, 856 So. 2d at 805 – 806 (collecting cases).³

Furthermore, the insurance treatise upon which Alabama courts frequently rely in insurance coverage disputes indicates a direct physical loss requires a tangible injury to property.⁴ See COUCH ON INSURANCE 10A § 148:46 (“The requirement that the loss be ‘physical,’ given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.”).

Though Plaintiff maintains its inability to use its property constitutes a direct physical loss, the Court is not persuaded. Plaintiff’s loss of usability did not result from an immediate occurrence which tangibly altered its property – the Order did not immediately cause some sort of tangible alteration to Plaintiff’s office. Rather, Plaintiff was only temporarily precluded from performing routine medical procedures while the Order was in effect. Under Plaintiff’s

³ The Court is aware that the Alabama Supreme Court has recognized physical disturbance by acts which cause property to be less enjoyable or less accessible. See, e.g., *See Ala. Power Co. v. Guntersville*, 177 So. 332, 336 – 337 (Ala. 1937) (discussing cases where compensable physical injury to property was done where municipalities levelled sidewalks and removed homeowners’ trees).

⁴ For examples of Alabama courts’ reliance on COUCH in various contexts, see, e.g., *Carolina Cas. Ins. Co. v. Williams*, 945 So.2d 1030, 1035 (Ala. 2006); *Allstate Ins. Co. v. Skelton*, 675 So.2d 377, 382 (Ala. 1996); *Int’l Surplus Lines Ins. Co. v. Assocs. Commercial Corp.*, 514 So.2d 1326, 1327 (Ala. 1987); *State Farm Fire & Cas. Co. v. Lambert*, 291 Ala. 645, 647, 285 So.2d 917, 917 (1973). Defendant also presented authority demonstrating this position in its Memorandum. (See Doc. 18, PageID.245).

interpretation, possession carries the same meaning as usability; therefore, loss of possession is equivalent to the inability to use something. However, not every instance of possession leads to use. For instance, a person can possess a car but be unable to use it due to gas rationing ordered by the government. This type of argument has been attempted in this Circuit before and found unavailing. *See Northeast Georgia Heart Center, P.C. v. Phoenix Insurance Company*, 2014 WL 12480022, *1 (N.D. Ga. 2014) (applying Georgia law: “Without doubt, losing physical possession may qualify as a direct physical loss. Nonetheless, there is a difference between a loss of physical possession and a loss of use. This difference is critical because the policy covers only lost business income *caused by* direct physical loss. Even though plaintiff suffered a direct physical loss by returning the generator, that loss did not cause plaintiff's lost business income.”). As one district court describes it, Plaintiff’s argument here would “potentially make an insurer liable for the negative effects of operations changes resulting from any regulation or executive decree, such as a reduction in a space’s maximum occupancy.” *Henry’s Louisiana Grill, Inc.*, 2020 WL 5938755, at *5.

Notably, several courts have recently decided that absent allegations of some tangible alteration to property, litigants have suffered no direct physical loss of property in other business interruption disputes arising consequent to COVID-19 closure orders. *See Malalube, LLC, v. Greenwich Ins. Co.*, 2020 WL 5051581, *8 (S.D. Fla., 2020) (applying Florida law: “Although the plaintiff in *Mama Jo’s* failed to put forth any evidence that his cleaning claim constituted a direct physical loss, he at least alleged that there was a physical intrusion (i.e. dust and debris) into his restaurant. Plaintiff has done nothing similar in this case. Plaintiff merely claims that two Florida Emergency Orders closed his indoor dining. But, for the reasons already stated, this cannot state

a claim because the loss must arise to actual damage.”); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000*, 2020 WL 5791583, at *4 (M.D. Fla. 2020) (citing *Malaube*, 2020 WL 5051581, at *8) (applying Florida law: “[T]he action should be dismissed because the policy required direct physical loss or property damage and plaintiff had alleged ‘merely [] economic losses—not anything tangible, actual, or physical.’”); *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, 2020 WL 5500221, at *4 (S.D. Cal. 2020) (applying California law); *Henry's Louisiana Grill, Inc., et al., v. Allied Insurance Company of America*, 2020 WL 5938755, *4 (N.D. Ga. 2020) (applying Georgia law: “This interpretation of the contractual language exceeds any reasonable bounds of possible construction, pushing the words individually and collectively beyond what any plain meaning can support.”).

The Court finds the guidance from Alabama courts, as well as those above, persuasive in this matter and concludes a reasonable insured would not understand a “direct physical loss of property” to have occurred as a consequence of the State’s Order.

2. A reasonable insured would not understand the Second Order to constitute a “repair” under the policy.

Plaintiff next argues the “period of restoration” contained in the policy contemplates Plaintiff’s inability to use its property as a “direct physical loss of property.” (Doc. 24, PageID.296). Specifically, Plaintiff argues its property required “repair” because the Order rendered it unusable and the Second Order returned it to a “sound or healthy state.” (*Id.* at PageID.297).

The Business Income and Extra Expense Endorsements in the policy provides, in relevant part, Defendant shall “pay for the actual loss” of Plaintiff’s business income “due to the necessary ‘suspension’ of [its] ‘operations’ during the ‘period of restoration’” and this “suspension” must

have been caused by a “direct physical loss of property.” (Doc.1-2, PageID.56). The “period of restoration” is defined as “the date of direct physical loss . . .” and “[e]nds 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.” (Doc. 1-2, PageID.51 – 52). This period of restoration “does not include any increased period required due to the enforcement of any law that: (a) Regulates the . . . use . . . of any property[.]”. (Doc.1-2, PageID.52).

It is apparent from the above that a “direct physical loss of property” contemplates the tangible alteration of property which would necessitate a party’s absence to fix it or require the party to begin operations elsewhere. The “period of restoration” expressly assumes repair, rebuild or replacement of property. Read in context with “direct physical loss of property,” a “period of restoration” can occur only by virtue of a repairable, rebuildable, or replaceable physical alteration of covered property. This begs the question: how can a statewide order which “required” Plaintiff to shutdown necessitate some sort of repair? In answer to this, Plaintiff argues a “repair” in certain contexts includes “restor[ing] [the property] to a sound or healthy state.” (Doc. 24, PageID.296 – 297). But Plaintiff claims its property was not in a sound state only because it could not use its property. (Doc. 24, PageID.297). Plaintiff was not dispossessed of its property due to the Order, nor was there any tangible alteration to it. Plaintiff’s inability to use its property was not caused by an unsound and or unhealthy condition of the property itself, which necessitated repair, rebuilding, or replacement.

Further, the Court is not persuaded that Plaintiff’s interpretation of “repair” is one that would be shared by a reasonable insured. Rather, the meaning generally given to “repair” in

Alabama and elsewhere indicates a reasonable insured would understand a “repair” to become necessary only upon a tangible alteration of property. See “REPAIR,” BLACK’S LAW DICTIONARY (11th ed. 2019); *Pritchett v. State Farm Mut. Auto. Ins. Co.*, 834 So.2d 785, 791 (Ala. Civ. App. 2002) (“In the common usage, the word ‘repair’ means to fix by replacing or putting together what is broken, or, as the court in *Carlton v. Trinity Universal Ins. Co.*, [32 S.W.3d 454 (Tex.Ct.App.2000)], stated, ‘to bring back to good or useable condition.’ *O’Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 290 (Del.2001).”); *Wildin v. Am. Family Mut. Ins. Co.*, 638 N.W.2d 87, 90 (Wis. 2001) (“The common and ordinary meaning of ‘repair’ is ‘restore by replacing a part or putting together what is torn or broken.’”).

D. Plaintiff’s request for a Declaratory Judgment fails because its breach of contract claim fails.

Where a plaintiff’s request for a declaratory judgment is premised on its underlying legal claims and those claims fail, as is the case here, its request for a declaratory judgment also fails. See *Sadeghian v. Univ. of S. Ala.*, 2020 U.S. Dist. LEXIS 29534, *38 (S.D. Ala. Feb. 21, 2020) (collecting cases). Because Plaintiff’s underlying legal claims fails, so too does its request for a Declaratory Judgment.

CONCLUSION

Defendant Continental Insurance Company’s Motion to Dismiss (Doc. 17) is granted. Plaintiff’s Complaint is dismissed with prejudice.

DONE and ORDERED this 21st day of October, 2020.

/s/ JEFFREY U. BEAVERSTOCK
UNITED STATES DISTRICT JUDGE

EXHIBIT 15

2020 WL 6440037

Only the Westlaw citation is currently available.
United States District Court, C.D. California.

**WEST COAST HOTEL
MANAGEMENT, LLC, et al., Plaintiffs,**
v.
**BERKSHIRE HATHAWAY
GUARD INSURANCE
COMPANIES, et al., Defendants.**

2:20-cv-05663-VAP-DFMx

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Signed 10/27/2020

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Order GRANTING Motion to Dismiss (Dkt. 12).

Virginia A. Phillips, United States District Judge

*1 Defendants Berkshire Hathaway Guard Insurance Companies and AmGUARD Insurance Company (“Defendants”) filed a Motion to Dismiss Plaintiffs’ Complaint (“Motion”). (Dkt. 12). Plaintiffs filed an Opposition to the Motion. (Dkt. 25). After considering all papers filed in connection with the Motion, the Court GRANTS the Motion.

I. BACKGROUND

This matter arises out of the current COVID-19 pandemic and its significant impact on businesses across the country. (See Dkt. 1). Plaintiffs West Coast Hotel Management, *dba* University Square Hotel of Fresno, and West Coast Orange Group, LLC, *dba* The Hotel Fresno, each own and operate a hotel in Fresno, California. (*Id.* ¶¶ 1–2).

Beginning in January 2020, Plaintiffs suffered losses due to the COVID-19 pandemic. (*Id.* ¶ 21). The spread of COVID-19 internationally affected travel and resulted in fewer reservations at Plaintiffs’ hotels. (*Id.*). Then in March 2020, as the virus spread domestically, the Mayor of Fresno issued an Executive Order (“Fresno Order”) directing the closure of all non-essential businesses. (See *id.* ¶ 23). The Governor of California issued a similar state-wide Executive Order (“State Order”) the same week. (*Id.*). Plaintiffs allege that as a direct and proximate result of these two Orders (together, the “Executive Orders”), public access to Plaintiffs’ hotels was prohibited and Plaintiffs suffered severe financial losses. (*Id.* ¶ 24).

Plaintiffs’ hotel properties are covered under a business insurance policy (the “Policy”) issued by Defendants.¹ (*Id.* ¶ 12). The parties do not dispute that the Policy was in effect during the time period relevant to this matter. Coverage under the policy extends only to losses that result from a “Covered Cause of Loss.” Excluded as a Covered Cause of Loss is any “loss or damage caused directly or indirectly by ... [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” (*Id.* Ex. 1, at 67, 70). It further provides that “[s]uch loss or damage is excluded regardless of any other cause or event that contributed concurrently or in any sequence to the loss.” (*Id.* at 67).

¹ Defendants assert that Berkshire Hathaway Guard Insurance Companies is not a legal entity and that Plaintiffs are insured by AmGUARD Insurance Company. (Dkt. 12 at 1). As AmGUARD is a named defendant in this action, this distinction does not affect the determination of the Motion.

Under the Policy, “Business Income” coverage is available for loss of business income sustained due to the necessary suspension of operations during a “period of restoration” when the suspension is caused by “direct physical loss of or damage to property at the described premises.” (*Id.* at 58). The period of restoration begins “72 hours after the time of direct physical loss or damage” and ends on the earlier of “[t]he date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or ... [t]he date when business is resumed at a new permanent location.” (*Id.* at 82). Relatedly, “Extra Expense” coverage covers expenses incurred during the period of restoration that would not have been incurred “if there had been no direct physical loss or damage to property at the described premises.” (*Id.* at 60).

*2 The Policy also provides “Civil Authority” coverage. When a Covered Cause of Loss causes damage to property outside the described premises, coverage will extend to any loss of Business Income or incurred Extra Expense caused by an action of civil authority that prohibits access to the described premises. (*Id.* at 60–61). Civil Authority coverage requires that access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage and that the action of civil authority is taken in response to the damage. (*Id.*).

In January 2020, Plaintiffs sought indemnification from Defendants for incurred business losses. (Dkt. 1 ¶ 25). Defendants denied Plaintiffs' claim. (*Id.* ¶ 26). Plaintiffs filed their Complaint on June 25, 2020, seeking a judicial declaration that (i) the Executive Orders constitute civil authority orders that prohibit access to Plaintiffs' hotels; (ii) the prohibition of access is a covered cause of loss; (iii) the prohibition of access was necessitated by physical loss of or damage to the hotels; (iv) coverage is warranted under the Policy despite the Virus Exclusion; and (v) the Policy provides Civil Authority and Business Income coverage for losses or damage due to COVID-19 and the Executive Orders. (*Id.* ¶¶ 43–45).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a party to bring a motion to dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6) is read along with Rule 8(a), which requires a short, plain statement upon which a pleading shows entitlement to relief. Fed. R. Civ. P. 8(a) (2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint—as well as any reasonable inferences to be drawn from them—as true and construe them in the light most favorable to the non-moving party. See *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005); *ARC Ecology v. U.S. Dep't of Air Force*, 411 F.3d 1092, 1096 (9th Cir. 2005); *Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994). “The court need not accept as true, however, allegations that contradict facts that may be judicially noticed by the court.” *Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000).

To survive a motion to dismiss, a plaintiff must allege “enough facts to state a claim to relief that is plausible

on its face.” *Twombly*, 550 U.S. at 570; *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). “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. Where a complaint pleads facts that are ‘merely consistent with’ a defendant's liability, it stops short of the line between possibility and plausibility of ‘entitlement to relief.’ ” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556).

The Ninth Circuit has clarified that (1) a complaint must “contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively” and (2) “the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

Although the scope of review is limited to the contents of the complaint, the Court may also consider exhibits submitted with the complaint, *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990), and “take judicial notice of matters of public record outside the pleadings,” *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988).

III. EVIDENTIARY ISSUES

*3 The Court first resolves the various evidentiary issues associated with the present Motion. The Court grants Defendants' request for judicial notice of (i) Executive Order N-33-20, issued by Governor Gavin Newsom on March 19, 2020 (Dkt. 14-1); (ii) Proclamation of the Mayor of the City of Fresno, California, issued by Mayor Lee Brand on March 16, 2020 (Dkt. 14-2); and (iii) Emergency Order 2020-02, issued by Fresno City Manager Wilma Quan on March 18, 2020 (Dkt. 14-3). (Dkt. 13). Judicial notice is appropriate as the Complaint refers to and relies on these Orders and Plaintiffs have not objected to the authenticity of the copies submitted by Defendants. See *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (“A court may consider evidence on which the complaint ‘necessarily relies’ if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.”). Additionally, these Orders are appropriate for judicial notice as they are “matters of public record.” *Mir*, 844 F.2d at 649. The Court denies Defendants' remaining requests for judicial notice as

the Court does not rely upon the underlying documents. (Dkts. 13, 30). Additionally, the Court will consider the Policy, which is attached as an exhibit to Plaintiffs' Complaint and incorporated by reference. *Biltmore Assocs., LLC v. Twin City Fire Ins. Co.*, 572 F.3d 663, 665 n.1 (9th Cir. 2009) (“A court may consider documents, such as the insurance policies, that are incorporated by reference into the complaint.”)

The Court also sustains Defendants' evidentiary objections. (Dkt. 28). The Court will not consider the Declaration of Bac Tran (Dkt. 26), as well as the portions of Plaintiffs' Opposition referring to the Declaration, and the “Proposal of Insurance” attached as an exhibit to Plaintiffs' Opposition. In support of their Opposition, Plaintiffs have relied improperly on unpled factual allegations and documents not attached or referred to in their Complaint nor judicially noticeable. As explained above, on a motion to dismiss, the Court will consider only the complaint, documents incorporated by reference, and other matters appropriate for judicial notice. To the extent Plaintiffs' Opposition cites to or relies upon other facts outside the Complaint, the Court will disregard them.

IV. DISCUSSION

Plaintiff seeks several declarations from the Court which would, in effect, establish that (1) coverage under the Business Income and Civil Authority provisions of the Policy was triggered under the circumstances alleged in the Complaint and (2) the Virus Exclusion does not preclude coverage. The Court addresses each of these three contested Policy provisions in turn.

A. Business Income Coverage

Under California law, “interpretation of an insurance policy is a question of law.”² *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115, 988 (1999). “When interpreting a policy provision, we must give terms their ordinary and popular usage, unless used by the parties in a technical sense or a special meaning is given to them by usage.” *Id.* (citation and quotation marks omitted). In addition, “[t]he terms in an insurance policy must be read in context and in reference to the policy as a whole, with each clause helping to interpret the other.” *Sony Comput. Entm't Am. Inc. v. Am. Home Assurance Co.*, 532 F.3d 1007, 1012 (9th Cir. 2008) (citing Cal. Civ. Code § 1641; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal. 4th 854, 867 (1993); *Palmer*, 21 Cal. 4th at 1115).

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The parties do not dispute that California law governs the interpretation of the Policy.

Accordingly, the Court examines the Business Income provisions in context to determine if Plaintiffs have stated a legally cognizable claim. Business Income coverage requires that Plaintiffs suffer “direct physical loss of or damage to property.” (Dkt. 1 Ex. 1, at 58). While “direct physical loss of or damage to property” is not defined in the Policy, it plainly requires, at minimum, that the loss or damage be physical in nature. Indeed, the Policy contemplates a “period of restoration” after such loss or damage during which property is “repaired, rebuilt, or replaced.” (*Id.* at 82). This interpretation is consistent with the interpretations given to similar or identical language by courts applying California law. See *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-ASx, 2020 WL 5359653, at *4 (C.D. Cal. Sept. 2, 2020) (holding that “[p]hysical loss or damage occurs only when property undergoes a ‘distinct, demonstrable, physical alteration’ ”) (quoting *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal.App.4th, 766, 799 (2010)); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04423-AB-SKx, 2020 WL 5938689, at *3 (C.D. Cal. Oct. 2, 2020) (same); *Plan Check Downtown III, LLC v. Amguard Ins. Co.*, No. CV 20-6954-GW-SKx, 2020 WL 5742712, at *4–7 (C.D. Cal. Sept. 10, 2020) (applying a physical alteration standard in determining if insured alleged “physical loss of or damage to property”); *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 556 (2003) (holding that a direct physical loss can exist only where the property at issue has “a material existence, formed out of tangible matter, and is perceptible to the sense of touch”).

*4 Here, Plaintiffs' Complaint establishes that they suffered a temporary loss of economically valuable use of their hotels due to a decrease in patronage or the Executive Orders. (See Dkt. 1). Plaintiffs do not claim that any property has undergone a physical alteration or needs to be “repaired, rebuilt, or replaced.”³ The Complaint does not allege that Plaintiffs are not in possession of their hotels and the property contained within them. Instead, Plaintiffs contend that the loss of use of their properties is sufficient to trigger coverage under the Policy. (Dkt. 25 at 5–6). Under California law, however, a “detrimental economic impact” alone—as Plaintiffs have alleged—is not compensable under a property insurance contract. *MRI Healthcare*, 187 Cal. App. 4th at 779; see also

Doyle v. Fireman's Fund Ins. Co., 21 Cal. App. 5th 33, 39 (2018) (“[W]hen it comes to property insurance, diminution in value is not a covered peril, it is a measure of a loss.”). Hence, Plaintiffs cannot state a legally cognizable claim based on the temporary loss of use of property alleged here.⁴ See *10E*, 2020 WL 5359653, at *6 (dismissing claim because losses from inability to use property do not amount to “direct physical loss of or damage to property” within the ordinary and popular meaning of that phrase); *Mark's Engine Co.*, 2020 WL 5938689, at *3 (same).

3 To the extent Plaintiffs have attempted to argue that physical alteration occurred, they have failed to do so in a non-conclusory manner. The Court addresses this failure below.

4 Plaintiff relies on *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), a case from the Western District of Missouri applying Missouri law. (Dkt. 25 at 5–6). The Court chooses to follow the California authorities cited herein. Moreover, the insurance policy in question in *Studio 417* did not have a virus exclusion which, as discussed below, precludes coverage in the present matter. 2020 WL 4692385, at *1.

In their Opposition, Plaintiffs argue that there was physical damage to their property as a result of the physical nature of COVID-19. (Dkt. 25 at 5). Plaintiffs' Complaint, however, lacks the factual allegations needed to lend this theory plausibility. The Complaint merely states that there was “direct physical loss of or damage to the [hotels].” (Dkt. 1 ¶ 27). The Court disregards this conclusory allegation. See *Iqbal*, 556 U.S. at 679 (“[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.”). Absent that allegation, Plaintiffs' Complaint provides only generic statements regarding the physical nature of COVID-19 and the number of cases in California and Fresno County. (Dkt. 1 ¶¶ 28–33). Critically, the Complaint does not attempt to connect those allegations to any losses or damage at Plaintiffs' properties. Although Plaintiffs attempt belatedly to do so in their Opposition, the Court will not consider those new factual allegations.

B. Civil Authority Coverage

Unlike the Business Income provisions, the Civil Authority provisions provide coverage for certain economic losses suffered by an insured in the absence of damage to the insured's property. (See Dkt. 1 Ex. 1, at 60–61). As is expected

for a property insurance policy, the requirement of property damage is not eliminated. (*Id.*). Instead, coverage is premised on damage to property other than the insured's but within one mile of the insured's premises. (*Id.*). The insured's losses must result from an act of a civil authority, taken in response to that property damage, that prohibits access to the area immediately surrounding the damaged property, including the insured's premises. (*Id.*).

Here, Plaintiffs request declaratory relief establishing the existence of Civil Authority coverage under the facts alleged in the Complaint. (See Dkt. 1 ¶¶ 43–45). While Plaintiffs briefly describe the Executive Orders—the acts of civil authority at issue—and contend they were issued based on “evidence of physical damage to property,” Plaintiffs nevertheless fail to provide sufficient non-conclusory allegations to state a plausible claim. (*Id.* ¶ 23). Besides the generic descriptions of the Executive Orders, Plaintiffs' Complaint contains unsupported statements like “the properties that are damaged are in the immediate area of the [hotels].” (*Id.* ¶¶ 23–24). Plaintiffs simply have recited the coverage criteria set forth in the Policy, and such bare allegations cannot support Plaintiffs' request for declaratory relief. See *Iqbal*, 556 U.S. at 678 (a court need not take as true “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements”); *10E*, 2020 WL 539653, at *6 (granting motion to dismiss claim for civil authority coverage where plaintiff “paraphrase[d] the language of the Policy without specifying facts that could support recovery under the Policy”).

C. Virus Exclusion

*5 As with the other provisions of an insurance policy, “[t]he interpretation of an exclusionary clause is an issue of law.” *Marquez Knolls Property Owners Assoc., Inc. v. Executive Risk Indemnity, Inc.*, 153 Cal. App. 4th 228, 233–234 (2007). To be enforceable, a coverage exclusion must be “conspicuous, plain and clear.” *Haynes v. Farmers Ins. Exch.*, 32 Cal. 4th 1198, 1204 (2004); see also *Ausmus v. Lexington Ins. Co.*, No. 08–CV–2342 L(LSP), 2009 WL 1098627, at *4 (S.D. Cal. Apr. 22, 2009) *aff'd*, 414 F. App'x 76 (9th Cir. 2011) (granting motion to dismiss because applicable exclusion was conspicuous and clear).

The Policy here excludes as a Covered Cause of Loss any “loss or damage caused directly or indirectly by ... [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” (Dkt. 1 Ex. 1, at 67, 70). Coverage under the Business Income and Civil

Authority provisions requires that the claimed loss or damage results from, or is caused by, a “Covered Cause of Loss.” (*Id.* at 58, 60–61). Plaintiffs seek a declaration from the Court that there is “coverage under the Policy despite the Virus Exclusion provision.” (Dkt. 1 ¶ 44). Defendants assert that the Virus Exclusion provision precludes all requested relief because it prevents coverage under the Policy.⁵ (Dkt. 12 at 6–7).

⁵ Typically, the insurer bears the burden of proving the applicability of an exclusion. *State Farm Fire & Cas. Co. v. Martin*, 872 F.2d 319, 321 (9th Cir. 1989). Defendants have met that burden. Plaintiffs, however, request declaratory relief regarding the applicability of the Virus Exclusion. Accordingly, Plaintiffs must also allege facts that state a plausible claim for relief.

The Court first analyzes the enforceability of the Virus Exclusion. A limitation on coverage is plain and clear when it is communicated in language understandable by the average layperson. *Nat'l Auto. & Cas. Ins. Co. v. Stewart*, 223 Cal.App.3d 452, 457 (1990). Here, the Virus Exclusion is plainly stated in language free of jargon. The Exclusion defines that losses are excluded whether caused directly or indirectly by a virus and specifies the viruses that are excluded, *i.e.* those that induce or can induce physical distress, illness, or disease. (*See* Dkt. 1 Ex. 1, at 67, 70). The Court can see no grounds for determining that this limitation is anything but plain and clear.

The Virus Exclusion is also conspicuous within the Policy. An exclusion “must be placed and printed so that it will attract the reader's attention.” *Haynes*, 32 Cal.4th at 1204. Plaintiffs assert that the Exclusion was included “as three sentences” buried within the “100+ page policy packet.” (Dkt. 1 ¶ 37). The body of the Policy, sans endorsements, however, is 48 pages long. (*See id.* Ex. 1, at 54–101). The Exclusion is identified in the Form Index that precedes the Policy, which states that the “Virus or Bacteria Exclusion” is located on page 17 of the Policy. (*Id.* at 53). The Virus Exclusion is in fact located on page 17 under a bold-font heading titled “Virus or Bacteria.” (*Id.* at 70). It is also located alongside other Policy exclusions under another bold-font heading that sensibly reads, “Exclusions.” (*Id.* at 67, 70). As the Virus Exclusion is both conspicuous and clear, it is enforceable against Plaintiffs.

^{*6} Under the facts alleged in the Complaint, the Court determines that the Virus Exclusion precludes coverage. Plaintiffs' Complaint contains multiple admissions that their

losses were caused directly or indirectly by a virus capable of inducing disease. First, Plaintiffs conceded that “COVID-19 is an infectious disease caused by a virus.” (Dkt. 1 ¶ 19). Plaintiffs then assert that “*due to the COVID-19 outbreak*, Plaintiffs experienced a significant decline in hotel reservations and suffered significant economic losses.” (*Id.* ¶ 21 (emphasis added)). Plaintiffs also assert that they “have suffered, and continue to suffer, significant losses from the closure of their [hotels] and related losses *due to the COVID-19 pandemic*.” (*Id.* ¶ 42 (emphasis added)). Even if Plaintiffs were to argue that their losses were caused solely by the Executive Orders and not “directly or indirectly” by the virus, Plaintiffs have already admitted that the Orders were issued “to halt the physical spread of COVID-19.” (*Id.* ¶ 34). Indeed, the text of the Orders, of which the Court takes judicial notice, allows no other conclusion. (*See* Dkt. 14-1 (State Order providing that “[o]ur goal is simple, we want to bend the curve, and disrupt the spread of the virus”); Dkt. 14-2 (Fresno Order issued in response to “conditions of extreme peril ... with respect to the international COVID-19 pandemic”)).

Plaintiffs do not dispute that their losses were caused by a virus. Instead, Plaintiffs argue that the Virus Exclusion is unenforceable under the reasonable expectations doctrine. (*See* Dkt. 25 at 1–5). Specifically, Plaintiffs allege that Defendants did not highlight or explain the Virus Exclusion provision before Plaintiffs purchased the Policy, causing Plaintiffs to believe they had coverage under the factual circumstances alleged in the Complaint. (Dkt. 1 ¶ 38). The doctrine, however, does not give courts a license to refuse to enforce contract terms based on one party's expectations. “[A]n insured's reasonable expectation of coverage is merely an interpretative tool used to resolve an ambiguity once it is found to exist and cannot be relied upon to create an ambiguity where none exists.” *Cal. Traditions, Inc. v. Claremont Liab. Ins. Co.*, 197 Cal. App. 4th 410, 420 (2011) (internal citations omitted).

Plaintiffs argue that ambiguity exists because “[a] pandemic is a social health crisis that afflicts entire countries and continents globally; it is much more than just a simple virus.”⁶ (Dkt. 25 at 4). The Court declines to accept Plaintiffs' interpretation. As Defendants correctly note, Plaintiffs' interpretation defies the plain and unambiguous text of the Policy and is “akin to arguing that a coverage exclusion for damage caused by fire does not apply to damage caused by a very large fire.” (Dkt. 27 at 3). As Plaintiffs are unable to

circumvent the Virus Exclusion, Plaintiffs' Complaint fails to state a legally cognizable claim for relief.

6 Plaintiffs also raise this interpretation as an independent reason for the Court to determine that the COVID-19 pandemic is outside the scope of the Virus Exclusion. This does not alter the Court's rejection of Plaintiffs' interpretation.

D. Leave to Amend

Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." When considering whether to grant leave to amend pleadings, "a court must be guided by the underlying purpose of Rule 15—to facilitate decision on the merits rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). Accordingly, leave to amend should be denied only when allowing amendment would unduly prejudice the opposing party, cause undue delay, be futile, or if the moving party acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008). When dismissing a claim, "a district court should grant leave

to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Eldridge v. Block*, 832 F.2d 1132, 1130 (9th Cir. 1987) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995) (internal quotation marks omitted)). Here, as the Virus Exclusion precludes coverage under the Civil Authority and Business Income provisions of the Policy, the Court determines that granting Plaintiffs leave to amend would be futile. Accordingly, the Court GRANTS the Motion without leave to amend.

V. CONCLUSION

*7 The Court GRANTS Defendants' Motion to Dismiss without leave to amend.

IT IS SO ORDERED.

All Citations

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End of Document

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EXHIBIT 16

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*Attorneys for Defendant Blackboard Insurance
Company*FAFB LLC (d/b/a/ SALTED LIME BAR &
KITCHEN),

Plaintiffs,

vs.

BLACKBOARD INSURANCE COMPANY,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION; MERCER COUNTY
DOCKET NO. MER-L-000892-20

CIVIL ACTION

**ORDER GRANTING
BLACKBOARD'S MOTION TO
DISMISS THE COMPLAINT WITH
PREJUDICE**

THIS MATTER having been opened to the Court by Defendant Blackboard Insurance Company ("Blackboard") by and through its counsel, by way of a motion seeking an Order for dismissal of the Complaint of Plaintiff FAFB d/b/a Salted Lime Bar & Kitchen ("Plaintiff") with prejudice pursuant to Rule 4:6-2, and the Court having considered papers submitted by the parties and oral argument from counsel, and for the reasons placed on the record on this date:

IT IS on this 4th day of November, 2020;

ORDERED that Blackboard's Motion to Dismiss the Complaint is hereby GRANTED;

ORDERED that Plaintiff's Complaint is hereby dismissed with prejudice; and

IT IS FURTHER ORDERED that a copy of this Order be served upon the attorneys for the parties of record within 10 days of the date hereof by ordinary mail

/s/ Douglas H. Hurd

P.J. Cv.

OPPOSED: __x__

UNOPPOSED:

On, 10/30/20, the court's statement of reasons have been set forth on the record.

EXHIBIT 16A

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MERCER COUNTY, NEW JERSEY
DOCKET NO. MER-L-892-20
A.D. # _____

FAFB, LLC,	)	
	)	TRANSCRIPT
Plaintiff,	)	
	)	OF
v.	)	
	)	DECISION
BLACKBOARD INSURANCE	)	
COMPANY,	)	
	)	
Defendant.	)	

Place: Mercer County Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: November 4, 2020

BEFORE:

THE HON. DOUGLAS H. HURD, P.J.Cv.

TRANSCRIPT ORDERED BY:

KELLY LLOYD LANKFORD, ESQ. (Dentons US LLP)

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I N D E XPAGEDECISION

3

1 THE COURT: Docketed Mercer County Law
 2 Division 892-20. This matter deals with a motion to
 3 dismiss filed by the defendant. There is opposition
 4 from the plaintiff. A reply was also filed. Oral
 5 argument occurred on October 30th and today is November
 6 4th and the Court is putting its decision on the
 7 record.

8 In this matter, the plaintiff is a restaurant
 9 that operates the Salted Lime Kitchen & Bar which is a
 10 restaurant and bar in Somerdale (sic), Brunswick, New
 11 Jersey. This deals with the COVID-19 pandemic and the
 12 Governor's orders that resulted in the closure of
 13 businesses and restaurants. Specifically in March
 14 2020, the Governor entered various executive orders
 15 which prohibited restaurants from having any dining in
 16 their premises and limited the dining. Obviously, the
 17 executive orders had other matters that were part of
 18 it, but this focuses on that part of those orders. And
 19 plaintiff claims that as a result of those orders, it
 20 cannot use its restaurant space and ultimately had to
 21 close.

22 Plaintiff claims that it has suffered a
 23 substantial loss of business and income and that the
 24 closure was a result of the orders that are physically
 25 impacting plaintiff's business. That's in Plaintiff's

complaint at Paragraphs 20 and 21. Plaintiff has business owner's insurance with the defendant Blackboard for the period November 6, 2019 through November 6, 2020. The policy includes business interruption coverage, including coverage for business income, extra expense and loss resulting from civil authority. Here in Mercer County, plaintiff has filed a declaratory judgment action in which they seek the declaration that Blackboard has an obligation to provide business interruption, extra expense and civil authority coverage and that the virus exclusion policy does not apply to plaintiff's loss.

This is a 4:6-2(e) motion which we know should be granted only in the rarest of circumstances. The leading case that we know deals with 4:6-2 is Printing Mart v. Sharp Electronics, 116 N.J. 739. And the Court in that case said at this preliminary stage of the litigation, the Court is not concerned with the ability of plaintiff to prove the allegations contained in the complaint. For purposes of analysis, plaintiffs are entitled to every reasonable inference of fact and the examination of the complaint's allegations of fact required by those principles should be one that is at once painstaking and undertaken with a generous and hospitable approach. So that is the framework by which

the Court will consider this motion.

The plaintiff, as I said, has alleged that it suffered covered loss or damage as a result of the closure of its business based on the Governor's orders. Plaintiff points to Section I.A.4(f) of the contract that provides the following business income coverage. Quote, we will pay for the actual loss of business income you sustained 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 caused by or result from the covered cause of loss, closed quote.

Also, the policy defines covered with respect to extra expense and the policy provides at Subparagraph (g) that we will pay necessary extra expense that 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 at the described premises. The loss or damage must be caused by or result from a covered cause of loss.

And we know from the case of President v. Jenkins, 180 N.J. 550, that when reviewing an insurance policy, a Court should give the policy's words their plain ordinary meaning. And when the Court uses that

1 test and applies it to the language in the policy,
 2 including that this is income or extra expense coverage
 3 and the other coverage sections and exclusion sections
 4 that are the subject of dispute here, it's clear that
 5 the motion must be granted.

6 The Court should dismiss the complaint even
 7 when the facts construed in its favor fail to
 8 articulate a legal basis for relief and that's the case
 9 here and that's the Rieder v. State Department of
 10 Transportation case, 221 N.J. Super. 547. And as that
 11 case said, as well, and it's applicable to this case,
 12 too, there is no need for discovery to resolve these
 13 issues. Even assuming discovery bears out all of
 14 plaintiff's allegations, there would be no coverage.

15 So dismissal is mandated where the factual
 16 allegations are palpably insufficient to support a
 17 claim of relief upon which relief can be granted.
 18 Specifically, even assuming that discovery could prove
 19 all of plaintiff's allegations true, this would only
 20 establish a loss of use of property and there's no
 21 coverage under New Jersey Law for loss of use, quote,
 22 unquote, standing alone without some physical impact on
 23 the property and that's a quote from one of the cases
 24 cited by both parties here from Wakefern at Page 540.

25 Here, the Government orders do not create any

1 distinct demonstrable physical impact on the property.
 2 The Government orders to prevent COVID-19, quote, do
 3 not represent an external event that changed the
 4 insured property. Every physical element of the dining
 5 rooms, the floors, the ceilings, the plumbing, the
 6 HVAC, the tables, the chairs underwent no physical
 7 damage as a result of the order, closed quote. And
 8 that's a quote from the Henry's case, 2020 WL 5938755
 9 in which the Court interpreted Government orders as
 10 physical loss would exceed any reasonable bounds of
 11 possible construction. And that same analysis clearly
 12 applies to this case.

13 In addition, there's really no dispute here
 14 that there is nothing to repair, rebuild or replace
 15 that in the ordinary meaning of those terms, but
 16 because, as we know here, the plaintiff's policy
 17 provides coverage only during a period of restoration
 18 which expressly assumes repair, rebuild or replacement
 19 of property. So it's fair then and the convincing
 20 argument is the one of the defendant that a reasonable
 21 insured would understand a repair to become necessary
 22 upon a tangible alteration of property and not in
 23 context of a Government order imposing use
 24 restrictions.

25 So because the plaintiff has asserted that

1 the loss was caused by the Governor's closure orders
 2 and not the virus, it's clear that plaintiff's position
 3 is contrary to New Jersey Law, as I said, that requires
 4 plaintiff to establish that their structures, their
 5 insured structures, were, in fact, physically damaged
 6 in order to trigger coverage. The defendant has also
 7 cited to 26 additional cases that nationwide have --
 8 that they claim have dismissed identical claims. The
 9 Court has gone through those cases and finds them,
 10 obviously, not binding on this Court, but very
 11 persuasive in its analysis.

12 In addition, the plaintiff is seeking its
 13 rights to coverage under the policy's civil authority
 14 provisions and that's from Paragraph 24 of the
 15 complaint. Once again, under a plain reading of the
 16 policy, it's clear that this claim fails as a matter of
 17 law. The policy's civil authority coverage applies
 18 only in specifically defined circumstances specifically
 19 where damage to a nearby property prohibits access to
 20 the immediately surrounding area, including the insured
 21 restaurant. There is no civil authority coverage
 22 except under those circumstances.

23 And it's clear that civil authority coverage
 24 does not apply here where the neighboring properties
 25 were also impacted by the same Government use

1 restrictions applying to plaintiff or face the same
 2 threat. Defendant cites to many cases of other courts
 3 across the country that are persuasive on this Court
 4 that have dismissed claims for civil authority coverage
 5 for losses from Government restrictions due to COVID-19
 6 because the insureds cannot establish the requisite
 7 causal nexus between damage to nearby property and the
 8 Government order.

9 In addition, the civil authority orders are
 10 only covered to the extent access to plaintiff's
 11 physical premises is prohibited and not if plaintiffs
 12 are simply prohibited from operating their business.
 13 So while the civil authority orders here precluded
 14 plaintiff from operating its in-person dining facility,
 15 they did not prohibit access to the premises for other
 16 purposes such as takeout and delivery.

17 The Court has gone through the plaintiff's
 18 cases cited in support of its position and with respect
 19 those cases are not persuasive on this Court. Those
 20 cases involve typically they involve the prohibition on
 21 access to the insured property because of damage to
 22 neighboring properties which is not the case here.

23 Turning now to the virus exclusion. The
 24 policy provides at Section B that we will not pay for
 25 loss or damage caused directly or indirectly by any of

1 the following, such loss or damages excluded,
 2 regardless of any other cause or event that contributes
 3 concurrently or in any sequence to the loss. These
 4 exclusions apply whether or not the loss event results
 5 in widespread damage or affects a substantial area --

6 UNIDENTIFIED SPEAKER: Three more minutes.

7 THE COURT: -- at Subsection J. We have the
 8 virus or bacteria exclusion. Any virus, bacterium or
 9 other microorganism that induces or is capable of
 10 inducing physical distress, illness or disease. Once
 11 again, a plain reading of that language makes it clear
 12 that the plaintiff's claim must fail as a matter of
 13 law. And that's, you know, under the assumption that
 14 plaintiff has pled facts sufficient to establish a
 15 direct physical loss or damage which, as I already
 16 said, they haven't. But, nonetheless, its claims would
 17 still be precluded under the policy's exclusion for
 18 loss or damage caused directly or indirectly, which is
 19 a very important word there, by any virus, bacterium or
 20 other microorganism that induces or is capable of
 21 inducing physical distress, illness or disease.

22 There really is no differing or other
 23 interpretation of the policy that would support the
 24 plaintiff's position because there's no legitimate
 25 dispute that the COVID-19 virus is capable of inducing

1 physical distress, illness or disease. And, once
 2 again, the cases cited by the defendants here are
 3 certainly persuasive on this Court and consistent with
 4 the policy language that this Court is dealing with and
 5 requires that the claim be dismissed due to the virus
 6 exclusion.

7 Plaintiff next makes an argument in its brief
 8 with respect to regulatory estoppel. However, the
 9 regulatory estoppel theory is not pled in its brief and
 10 is not -- should not be considered by the Court. But,
 11 nonetheless, even if the Court were to consider that
 12 position since it is raised in its opposing brief, it's
 13 clear that this regulatory estoppel theory does not
 14 defeat the motion to dismiss.

15 The defendant's position actually is
 16 consistent with the position plaintiff describes to the
 17 insurance services office during the regulatory
 18 process and it's clear when you look at the language
 19 and consistent with those representations that were
 20 made. Blackboard notes in Section 1 of the motion that
 21 there's no coverage for losses from Government orders
 22 to prevent COVID-19 spread and that's even before the
 23 virus's exclusion is considered. But what's most
 24 important on this theory is that regulatory estoppel
 25 does not void clear and unambiguous language provisions

1 or provide a basis for recision.

2 So, as I've said here many times, when the
3 Court looks at the plain, unambiguous language of this
4 policy coverage provisions, as well as the exclusion
5 provisions, it's clear that the declaratory judgment
6 action filed by the plaintiff herein must be dismissed
7 as a matter of law. The dismissal will be with
8 prejudice because it's clear that any further discovery
9 on these claims would not impact how the Court decides
10 these legal issues. So for those reasons, the Court
11 will grant the application.

12 * * * * *

C E R T I F I C A T I O N

I, KELLI R. PHILBURN, the assigned
transcriber, do hereby certify the foregoing transcript
of proceedings on CD, playback number 8:31:42 to
8:46:12, is prepared in full compliance with the
current Transcript Format for Judicial Proceedings and
is a true and accurate compressed transcript of the
proceedings as recorded, to the best of my ability.

/s/ Kelli R. Philburn

KELLI R. PHILBURN AOC #587

J&J COURT TRANSCRIBERS, INC. DATE: November 12, 2020

EXHIBIT 17

2020 WL 6436948

Only the Westlaw citation is currently available.
United States District Court, S.D. West Virginia.

UNCORK AND CREATE LLC, Plaintiff,

V.

THE CINCINNATI INSURANCE
COMPANY, et al., Defendants.

CIVIL ACTION NO. 2:20-cv-00401

|
Filed 11/02/2020

MEMORANDUM OPINION AND ORDER

IRENE C. BERGER UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA

*1 The Court has reviewed the Defendants' *Motion to Dismiss Plaintiff's Complaint* (Document 12), the *Memorandum of Law in Support of Defendants' Motion to Dismiss* (Document 13), the *Plaintiff's Response in Opposition to Defendants' Motion to Dismiss Plaintiff's Complaint* (Document 18), and the *Reply Memorandum in Support of the Cincinnati Defendants' Motion to Dismiss Plaintiff's Amended Class Action Complaint* (Document 22), as well as all attached exhibits. In addition, the Court has reviewed the *Class Action Complaint* (Document 1), the *Notice of Supplemental Authorities in Support of the Cincinnati Insurance Company, the Cincinnati Casualty Company and the Cincinnati Indemnity Company's Motion to Dismiss and Its Reply to Plaintiff's Response to Motion to Dismiss* (Document 29), and the *Plaintiff's Notice of Supplemental Authority* (Document 31). For the reasons stated herein, the Court finds that the Defendants' motion should be granted.

FACTUAL ALLEGATIONS

The Plaintiff, Uncork and Create LLC, initiated this purported class action against the Defendants, the Cincinnati Insurance Company, the Cincinnati Casualty Company, and the Cincinnati Indemnity Company (collectively, Cincinnati), on June 12, 2020. The Plaintiff is a creative events company with locations in Barboursville and Charleston, West Virginia.

The Plaintiff had an "all-risk" commercial property coverage insurance policy from Cincinnati with a policy effective date of December 7, 2017 to December 7, 2020, which was in effect at all relevant times. The Policy provides coverage, with specified exclusions, for a "loss," defined as "accidental physical loss or accidental physical damage." (Policy at Section G.8, p. 38, attached as Exhibit 1 to the Plaintiff's complaint) (Document 1-1). In the event of a covered loss, the Policy includes coverage for loss of business income during a suspension of operations, including such a suspension sustained due to a civil authority prohibiting access to the premises.¹

¹ The Policy provides as follows: "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 a direct 'loss' to property at a 'premises' caused by or resulting from any Covered Cause of Loss." (Policy at Section E.b(1) at p. 13).

On March 16, 2020, the Governor of West Virginia declared a state of emergency related to the novel coronavirus, or COVID-19, pandemic. On March 23, 2020, the Governor issued an Executive Order requiring all non-essential businesses to cease all activities beyond minimum basic operations to maintain inventory, process payroll, etc., effective at 8:00 p.m., on March 24, 2020. Uncork and Create was among the non-essential businesses shut down as a result of the Governor's order. The Charleston location re-opened on June 11, 2020, but the Barboursville location was permanently closed on April 24, 2020. The Plaintiff incurred and continues to incur a loss of business income and other additional expenses.

*2 The Plaintiff timely notified Cincinnati of its claim based on the interruption to its business. Cincinnati responded with a denial letter dated May 14, 2020, stating that the claim did not involve a direct physical loss at the Plaintiff's premises, and additionally asserting that a "Pollution Exclusion" was applicable. The Plaintiff contends that the Governor's order requiring the business to close constitutes a covered cause of loss under the Policy, and/or that the virus itself causes direct physical loss or damage and is thus a covered cause of loss.

The Plaintiff asserts causes of action for declaratory judgment under 28 U.S.C. § 2201, declaratory judgment under W.Va. Code § 55-3-1 *et. seq.*, and breach of contract. It seeks "a declaration that there is coverage under the Policy for the

interruption to Plaintiff's business and the associated business income lost therefrom," damages, costs, attorney's fees, and interest, and any other relief deemed proper. (Compl. at p. 15–16.)

STANDARD OF REVIEW

A motion to dismiss filed pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) for failure to state a claim upon which relief can be granted tests the legal sufficiency of a complaint or pleading. [Francis v. Giacomelli](#), 588 F.3d 186, 192 (4th Cir. 2009); [Giarratano v. Johnson](#), 521 F.3d 298, 302 (4th Cir. 2008). [Federal Rule of Civil Procedure 8\(a\)\(2\)](#) requires that a pleading contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” [Fed. R. Civ. P. 8\(a\)\(2\)](#). Additionally, allegations “must be simple, concise, and direct.” [Fed. R. Civ. P. 8\(d\)\(1\)](#). “[T]he pleading standard [Rule 8](#) announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” [Ashcroft v. Iqbal](#), 556 U.S. 662, 678 (2009) (quoting [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 555 (2007)). In other words, “a complaint must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” [Twombly](#), 550 U.S. at 555. Moreover, “a complaint [will not] suffice if it tenders naked assertions devoid of further factual enhancements.” [Iqbal](#), 556 U.S. at 678 (quoting [Twombly](#), 550 U.S. at 557) (internal quotation marks omitted).

The Court must “accept as true all of the factual allegations contained in the complaint.” [Erickson v. Pardus](#), 551 U.S. 89, 93 (2007). The Court must also “draw[] all reasonable factual inferences from those facts in the plaintiff's favor.” [Edwards v. City of Goldsboro](#), 178 F.3d 231, 244 (4th Cir. 1999). However, statements of bare legal conclusions “are not entitled to the assumption of truth” and are insufficient to state a claim. [Iqbal](#), 556 U.S. at 679. Furthermore, the court need not “accept as true unwarranted inferences, unreasonable conclusions, or arguments.” [E. Shore Mkts., v. J.D. Assocs. Ltd. P'ship](#), 213 F.3d 175, 180 (4th Cir. 2000). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice ... [because courts] ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’ ” [Iqbal](#), 556 U.S. at 678 (quoting [Twombly](#), 550 U.S. at 555).

To survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, ‘to state a claim to relief that is plausible on its face.’ ” [Iqbal](#), 556 U.S. at 678 (quoting [Twombly](#), 550 U.S. at 570). In other words, this “plausibility standard requires a plaintiff to demonstrate more than ‘a sheer possibility that a defendant has acted unlawfully.’ ” [Francis](#), 588 F.3d at 193 (quoting [Twombly](#), 550 U.S. at 570). A plaintiff must, using the complaint, “articulate facts, when accepted as true, that ‘show’ that the plaintiff has stated a claim entitling him to relief.” [Francis](#), 588 F.3d at 193 (quoting [Twombly](#), 550 U.S. at 557). “Determining whether a complaint states [on its face] a plausible claim for relief [which can survive a motion to dismiss] will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” [Iqbal](#), 556 U.S. at 679.

DISCUSSION

***3** The Defendants move to dismiss, asserting that the factual allegations do not establish that the Plaintiff is entitled to relief. They argue that physical loss or physical damage to the covered property is a prerequisite to coverage, and closure of a business due to the threat posed by a virus does not constitute physical loss or damage. They point out that COVID-19 harms people, not property. It contends that the virus and related closures caused only financial losses to the Plaintiff, without physically altering the premises. To the extent the Plaintiff claims that the coronavirus was actually physically present at its premises, the Defendant argues that it can be removed by cleaning. The Defendants urge the Court to consider several recent court decisions reaching the conclusion that the coronavirus does not cause physical loss or physical damage for purposes of insurance coverage.

The Plaintiff responds that West Virginia courts do not require “structural alteration of covered property” as a necessary element to finding a “direct physical loss” for insurance coverage. (Pl.'s Resp. at 1.) It argues that losses not specifically excluded should be covered by an all-risks commercial property insurance policy. It notes that the Policy does not include a virus exclusion developed by insurers following the SARS pandemic in the early 2000s. The Plaintiff emphasizes that the closure order, and/or the virus itself, deprived it from using the property for its intended purpose. It cites cases that it contends stand for the proposition that a property that is unsafe to inhabit has physical loss or damage, even absent structural alteration.

Under West Virginia law, the scope of coverage provided by an insurance contract, absent factual disputes, is a question of law. Syl. Pt. 1, *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 745 S.E.2d 508, 511 (W. Va. 2013) (quoting Syl. Pt. 1, *Tennant v. Smallwood*, 568 S.E.2d 10 (W. Va. 2002)). “Language in an insurance policy should be given its plain, ordinary meaning.” *Id.* at Syl. Pt. 8 (quoting Syl. Pt. 1, *Soliva v. Shand, Morahan and Co., Inc.*, 345 S.E.2d 33 (1988)). Clear and unambiguous provisions “are not subject to judicial construction or interpretation.” *Id.* at Syl. Pt. 9. “Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.” *Id.* at Syl. Pt. 11 (quoting Syl. Pt. 5, *National Mutual Insurance Co. v. McMahon and Sons, Inc.*, 356 S.E.2d 488 (W. Va. 1987)). Further, “ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured.” Syl. Pt. 3, *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 3 (W.Va. 1998) (quoting Syl. Pt. 4, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488 (W.Va. 1987)).

As both parties recognize, this motion turns on whether COVID-19 and the Governor's closure order constitute “physical loss or physical damage” under the terms of the Policy. The Plaintiff cites a case in which the West Virginia Supreme Court considered whether homes rendered too dangerous for habitation by a rockfall and imminent risk of additional rockfalls had suffered “physical loss” covered by an insurance policy. *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998). The rockfall impacted multiple neighboring homes, including a home that had no direct damage but was exposed to likely future rockfalls, requiring evacuation and utility shut-offs. *Id.* at 5. The court considered similar cases from other jurisdictions and concluded that direct physical loss “may exist in the absence of structural damage to the insured property,” given that the homes all “became unsafe for habitation, and therefore suffered real damage when it became clear that rocks and boulders could come crashing down at any time.” *Id.* at 17.

*4 The Plaintiff argues that *Murray* is comparable to the situation presented here, and that no physical alteration to the premises is required for coverage under a policy requiring physical damage or physical loss. However, the homes were rendered uninhabitable by a physical threat: an unstable retaining wall loomed over the home, and experts anticipated further rockfalls likely to physically damage the home and

harm inhabitants. The novel coronavirus has no effect on the physical premises of a business. Non-essential businesses were ordered to shut down to prevent people from exposing one another. In a recent case not involving COVID-19, Judge Johnston explained that “economic losses, such as loss of income and benefits” do not constitute property damage or physical injury to property. *Cooper v. Westfield Ins. Co.*, No. 2:19-CV-00324, 2020 WL 5647015, at *5 (S.D.W. Va. Sept. 22, 2020) (Johnston, C.J.). Recovery for the Plaintiff here would be purely economic, solely for lost business without any accompanying repairs to the premises. Thus, the Court does not find that *Murray* directs coverage under the circumstances presented herein.

Several courts have considered similar insurance coverage disputes related to the COVID-19 pandemic, although there are no precedential decisions in the Fourth Circuit or from the West Virginia Supreme Court. A Missouri federal district court, relied upon by the Plaintiffs, found that a “direct physical loss” was adequately alleged where the plaintiff alleged that COVID-19 was a physical substance that lives on physical surfaces and in the air, and rendered their property unsafe and unusable. *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at *4 (W.D. Mo. Aug. 12, 2020). The court concluded that the plaintiffs had “plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable.” *Id.* at *6.

The majority of courts to address the issue, however, have found that COVID-19 and governmental orders closing businesses to slow the spread of the virus do not cause physical damage or physical loss to insured property. A federal district court in Florida distinguished *Studio 417* based on the allegations in that case that the virus was physically present on the premises, and further reasoned that actual, physical, or tangible alteration to a property was required, not “merely...economic losses.” *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIV, 2020 WL 5051581, at *8 (S.D. Fla. Aug. 26, 2020) (also detailing the context provided by other provisions similar to those in the instant Policy, allowing for business interruption losses during a period of repair and restoration, that clarify that physical damages requiring repair are necessary). The federal District Court for the Eastern District of Texas likewise found a demonstrable physical alteration to the property necessary to establish a physical loss. *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) (also finding that a virus

exclusion would preclude coverage). The federal District Court for the Northern District of California reasoned that, although dispossession may sometimes constitute a “loss” without physical alteration of the property, California’s Stay at Home orders temporarily prohibiting the plaintiff business from operating did not constitute the type of permanent or unrecoverable loss necessary for coverage. *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-03213-JST, 2020 WL 5525171, at *4 (N.D. Cal. Sept. 14, 2020). The court also noted surrounding provisions concerning restoration, repair, and replacement of the property that bolstered its finding that coverage is inapplicable to COVID-19 and the Stay at Home orders. *Id.* An opinion from the Northern District of Illinois provides a helpful summation: “In essence, plaintiff seeks insurance coverage for financial losses as a result of the closure orders. The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property. Consequently, plaintiff has failed to plead a direct physical loss—a prerequisite for coverage.” *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, No. 20 CV 2160, 2020 WL 5630465, at *3 (N.D. Ill. Sept. 21, 2020).

*5 The Court finds those decisions concluding that COVID-19 does not cause a direct physical damage or loss to property to be more persuasive. Although some courts have drawn a distinction based on whether a complaint alleged presence of the virus on the premises, the Court does not find such an allegation determinative. *See, e.g., Seifert v. IMT Ins. Co.*, No. CV 20-1102 (JRT/DTS), 2020 WL 6120002, at *3 (D. Minn. Oct. 16, 2020) (dismissing because plaintiff failed to allege physical infiltration and contamination of the virus on the properties). Firstly, while factual allegations drive the analysis of a motion to dismiss, courts are not required to set aside common sense, and neither *Studio 417*, which relied in part on the allegation of presence of the virus, nor the instant case, involve actual allegations of employees or patrons with infections traced to the business. There is a similar risk of exposure to the virus in any public setting, regardless of artful pleading as to the likelihood of the presence of the virus. Secondly, even when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property. Because routine cleaning, perhaps performed with

greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover, and a covered “loss” is required to invoke the additional coverage for loss of business income under the Policy.

COVID-19 poses a serious risk to people gathered in proximity to one another, and the governmental orders closing certain businesses were designed to ameliorate that risk. *See, e.g., Henry’s Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, No. 1:20-CV-2939-TWT, 2020 WL 5938755, at *5 (N.D. Ga. Oct. 6, 2020) (an Executive Order that prompted closure of restaurant dining room “merely recognized an existing threat” and “did not represent an external event that changed the insured property”). Property, including the physical location of Uncork and Create, is not physically damaged or rendered unusable or uninhabitable. If people could safely congregate anywhere without risk of infection, the Plaintiff has alleged no facts to suggest any impediment to Uncork and Create’s operation. No repairs or remediation to the premises are necessary for its safe occupation in the event the virus is controlled and no longer poses a threat. In short, the pandemic impacts human health and human behavior, not physical structures. Those changes in behavior, including changes required by governmental action, caused the Plaintiff economic losses. The Court is not unsympathetic to the situation facing the Plaintiff and other businesses. But the unambiguous terms of the Policy do not provide coverage for solely economic losses unaccompanied by physical property damage. Therefore, the motion to dismiss must be granted.

CONCLUSION

Wherefore, after thorough review and careful consideration, the Court **ORDERS** that the Defendants’ *Motion to Dismiss Plaintiff’s Complaint* (Document 12) be **GRANTED** and that this matter be **DISMISSED** from the Court’s docket. The Court further **ORDERS** that any pending motions be **TERMINATED AS MOOT**.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and to any unrepresented party.

All Citations

Slip Copy, 2020 WL 6436948

EXHIBIT 18

2020 WL 6392841

Only the Westlaw citation is currently available.

United States District Court, S.D. Florida.

RAYMOND H NAHMAD

DDS PA, et al., Plaintiffs,

v.

HARTFORD CASUALTY

INSURANCE COMPANY, Defendant.

Case No. 1:20-cv-22833-BLOOM/Louis

|
11/02/2020

BETH BLOOM, UNITED STATES DISTRICT JUDGE

ORDER

***1 THIS CAUSE** is before the Court upon Defendant's Motion to Dismiss, ECF No. [7] ("Motion"). Plaintiffs filed a Response in Opposition, ECF No. [9] ("Response"), to which Defendant filed a Reply, ECF No. [17] ("Reply"). The Court has considered the Motion, the Response, the Reply, the record in this case, the applicable law, and is otherwise fully advised. For the reasons set forth below, the Motion is granted.

I. BACKGROUND

This matter stems from a lawsuit Plaintiffs initiated in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida against Defendant on May 25, 2020. ECF No. [1-2] at 4-16 ("Complaint"). Defendant timely removed this lawsuit to this Court on July 10, 2020, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446.

According to the Complaint, Plaintiffs entered into an insurance contract with Defendant to insure Plaintiffs' business premises under a policy bearing No. 21 SBA VJ7288 ("Policy").¹ ECF No. [1-2] at ¶¶ 5-6. Plaintiffs operate a dental practice, which practice was suspended due to "orders issued by the Governor of Florida and Mayor of Miami-Dade County that non-emergent or elective dental care be postponed indefinitely" in light of the COVID-19 pandemic. *Id.* at ¶ 10. *See also id.* at ¶ 18-20 (alleging that a public health emergency was declared on March 1, 2020 and that

Executive Order 20-72, limiting dental office operations, was issued on March 20, 2020). This suspension has had a "deleterious effect on [Plaintiffs'] business income." *Id.* at ¶ 21. Plaintiffs submitted a claim for business interruption loss, but Defendant denied Plaintiffs' claim on March 20, 2020. *Id.* at ¶¶ 22-24. Defendant denied the claim because the loss at issue did not come within the coverage grant of the Policy and because certain "potentially applicable exclusions" may bar coverage. *Id.* at ¶ 24. The Complaint asserts two counts: breach of contract (Count I) and declaratory relief (Count II). *Id.* at ¶¶ 11-12.

¹ Defendant filed a certified copy of the Policy, ECF No. [6-1]. For purposes of analysis, citations to policy provisions will be to the page listed on the bottom of the Policy itself rather than to portions contained in the parties' briefings.

Regarding Count I, *id.* at ¶¶ 13-39, Plaintiff alleges that Defendant "is denying the obligation to pay for business income losses and other covered expenses incurred by policyholders for the physical loss and damage to the insured property from measures put in place by the civil authorities to stop the spread of COVID-19 among the population." *Id.* at ¶ 11. In Plaintiffs' view, Defendant has breached the Policy by failing to provide coverage under the Policy's Business Income, Extra Expense, and Civil Authority provisions. *Id.* at ¶¶ 12, 25, 31-33.

Regarding Count II, *id.* at ¶¶ 40-54, Plaintiff seeks a "declaratory judgment that affirms that the COVID-19 pandemic and the corresponding response by civil authorities to stop the spread of the outbreak triggers coverage, has caused physical property loss and damage to the insured property, provides coverage for future civil authority orders that result in future suspensions or curtailments of business interruption, and finds that [Defendant] is liable for the losses suffered by policyholders." *Id.* at ¶ 11.

***2** Defendant now moves to dismiss the Complaint with prejudice as to both counts. ECF No. [7]. It makes four main arguments. First, the Policy's virus exclusion, ECF No. [6-1] at 135, bars coverage. ECF No. [7-1] at 6-7, 11-19. In this regard, it argues that the Policy's plain terms apply, the virus caused Plaintiffs' loss, and governmental orders aimed at slowing the spread of the coronavirus do not impact the applicability of the virus exclusion. *Id.* Second, even if the virus exclusion did not apply, Plaintiffs are not entitled to business income coverage because they do not allege any direct physical loss or damage to their property, which is

required for coverage. *Id.* at 7, 19-20. Third, Plaintiffs are not entitled to “civil authority” coverage under the terms of the Policy. *Id.* at 7, 20-23. Finally, because there is no breach of contract given the lack of coverage under the Policy, Count I fails and, as a consequence, Count II fails. *Id.* at 23.

Plaintiffs respond that they have stated actionable claims. ECF No. [9]. They make five points. First, the Complaint sufficiently alleges a covered cause of loss under the Policy, *id.* at 6-11; second, the Complaint sufficiently alleges “loss of” or “damage to” insured property, *id.* at 11-15; third, the loss at issue is not specifically excused by the Policy’s “limited fungi, bacteria or virus coverage” provision, *id.* at 15-18; fourth, Count II is plausibly asserted, *id.* at 18; and finally, Plaintiffs maintain that the issues underlying coverage and exclusions involve factual inquiries inappropriate for resolution at this time. *Id.* at 19-20.

Defendant replies that the Complaint alleges only economic losses rather than physical loss or damage, thus precluding coverage, and that regardless, the Complaint cannot avoid application of the Policy’s virus exclusion. ECF No. [17] at 2. It adds that four courts have “now concluded COVID-19 business income losses do not satisfy the direct physical loss requirements of property policies.” *Id.* at 3. They make three primary arguments. First, they assert that the virus exclusion applies and Plaintiffs’ case citations are inapposite. *Id.* at 3-5. Second, Plaintiffs fail to carry their burden to demonstrate a direct physical loss because business income is not “covered commercial property” under the Policy and the Complaint fails to demonstrate a direct physical loss. *Id.* at 5-10. Finally, there are no factual disputes that require resolution and dismissal is appropriate. *Id.* at 10.

The Motion, accordingly, is ripe for consideration.

II. LEGAL STANDARD

Rule 8 of the Federal Rules of Civil Procedure requires that a pleading contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Although a complaint “does not need detailed factual allegations,” it must provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); see *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (explaining that Rule 8(a)(2)’s pleading standard “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation”). In the same vein, a

complaint may not rest on “ ‘naked assertion[s]’ devoid of ‘further factual enhancement.’ ” *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955 (alteration in original)). “Factual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. These elements are required to survive a motion brought under Rule 12(b)(6), which requests dismissal for “failure to state a claim upon which relief can be granted.”

When reviewing a motion under Rule 12(b)(6), a court, as a general rule, must accept the plaintiff’s allegations as true and evaluate all plausible inferences derived from those facts in favor of the plaintiff. See *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance*, 304 F.3d 1076, 1084 (11th Cir. 2002); *AXA Equitable Life Ins. Co. v. Infinity Fin. Grp., LLC*, 608 F.Supp.2d 1349, 1353 (S.D. Fla. 2009). However, this tenet does not apply to legal conclusions, and courts “are not bound to accept as true a legal conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955; see *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937; *Thaeter v. Palm Beach Cnty. Sheriff’s Office*, 449 F.3d 1342, 1352 (11th Cir. 2006). Moreover, “courts may infer from the factual allegations in the complaint ‘obvious alternative explanations,’ which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer.” *Am. Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 682, 129 S.Ct. 1937).

*3 A court considering a Rule 12(b)(6) motion is generally limited to the facts contained in the complaint and the attached exhibits, including documents referred to in the complaint that are central to the claim. See *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009); *Maxcess, Inc. v. Lucent Technologies, Inc.*, 433 F.3d 1337, 1340 (11th Cir. 2005) (“[A] document outside the four corners of the complaint may still be considered if it is central to the plaintiff’s claims and is undisputed in terms of authenticity.”) (citing *Horsley v. Feldt*, 304 F.3d 1125, 1135 (11th Cir. 2002)). “[W]hen the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern.” *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir. 2007).

It is through this lens that the Court considers the Motion and the parties’ arguments.

III. DISCUSSION

Determining whether Defendant is entitled to dismissal of the Complaint raises three overarching issues. The first is whether

the Complaint alleges facts that come within the scope of the Policy's coverage grants. If so, the second is whether coverage is nonetheless barred by a policy exclusion. And third, whether the claim for declaratory relief is actionable if the breach of contract claim fails. The Court will examine each issue in turn.

A. The Policy

Under the Special Property Coverage Form, ECF No. [6-1] at 31, the Policy provides coverage as follows:

We will pay for direct physical loss of or physical damage to Covered Property at the premises described in the Declarations (also called “scheduled premises” in this policy) caused by or resulting from a Covered Cause of Loss.

Id.

The premises, as listed in the declarations pages of the Policy, is 7950 N.W. 53 Street, Suites 112, 113, and 114, Miami, FL 33166. *Id.* at 15-16. “Covered Property” includes buildings and structures, business personal property, but it excludes “money,” “accounts, bills,” and “valuable paper and records.” *Id.* at 31-32. The Policy does not define “direct physical loss” or “physical damage.” A “Covered Cause of Loss” is defined as “risks of direct physical loss unless the loss is: a. Excluded in Section B., Exclusions; or b. Limited in Paragraph A.4. *Id.* at 32 (capitalization omitted).

The Policy also provides additional coverage for business income, extra expense, and civil authority as follows:

Business Income: We 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 physical damage to property at the “scheduled premises,” including personal property in the open (or in a vehicle) within 1,000 feet of the “scheduled premises,” caused by or resulting from a Covered Cause of Loss....With respect to the coverage provided in this Additional Coverage, suspension means: (a) The partial slowdown of your business activities; or (b) That part or all of the “scheduled premises” is rendered untenable as a result of a Covered Cause of Loss if coverage for Business Income applies to the policy.

Id. at 40.

Extra Expense: We will pay reasonable and necessary Extra Expense you incur during the “period of restoration” that you would not have incurred if there had been no direct physical loss or physical damage to property at the “scheduled premises,” including personal property in the open (or in a vehicle) within 1,000 feet, caused by or resulting from a Covered Cause of Loss.

*4 *Id.*

Civil Authority: This insurance is extended to apply to the actual loss of Business Income you sustain when access to your “scheduled premises” is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your “scheduled premises.”

Id. at 41.

Extended Business Income: If the necessary suspension of your “operations” produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period...Loss of Business Income must be caused by direct physical loss or physical damage at the “scheduled premises” caused by or resulting from a Covered Cause of Loss.

Id. at 42.

By endorsement, the Policy also contains an exclusion for “fungi,” wet rot, dry rot, bacteria and virus as follows:

We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss: (1) Presence, growth, proliferation, spread or any activity of “fungi,” wet rot, dry rot, bacteria or virus. ...This exclusion applies whether or not the loss even results in widespread damage or affects a substantial area.

Id. at 135.

B. Insurance contract interpretation in Florida

Both parties agree that Florida law governs interpretation of the Policy. *See* ECF Nos. [7-1] at 11; [9] at 7. The Court likewise agrees that Florida law controls. *State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So. 2d 1160, 1163 (Fla. 2006).

In determining coverage under an insurance policy, courts look at the policy in its entirety and are required to give “every provision its full meaning and operative effect.” *See State Farm Fire & Cas. Co. v. Steinberg*, 393 F.3d 1226, 1230 (11th Cir. 2004) (internal quotation marks omitted). Thus, when construing a policy's terms, “the pertinent provisions should be read *in pari materia*.” *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 877 (Fla. 2007) (quoting *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1074 (Fla. 1998)). A court's inquiry begins with “the plain language of the policy, as bargained for by the parties.” *Steinberg*, 393 F.3d at 1230 (citing *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000)). Stated differently, “insurance contracts are construed according to their plain meaning.” *Garcia v. Federal Ins. Co.*, 473 F.3d 1131, 1135 (11th Cir. 2006) (quoting *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005)); *see also Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 736 (Fla. 2002) (“[The] terms of an insurance policy should be taken and understood in their ordinary sense and the policy should receive a reasonable, practical and sensible interpretation consistent with the intent of the parties.” (citation omitted)). The unambiguous language of the policy is controlling; however, where the language is “susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the insurance policy is considered ‘ambiguous,’ and must be ‘interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy.’ ” *Steinberg*, 393 F.3d at 1230.

*5 “[I]nsurance coverage must be construed broadly and its exclusions narrowly.” *Evanston Ins. Co. v. Budget Grp. Inc.*, 199 F. App'x. 867, 868 (11th Cir. 2006) (citing *Demshar v. AAACon Auto Transport, Inc.*, 337 So. 2d 963, 965 (Fla. 1976)). In the same vein, policies “are to be construed most strongly against the insurer and liberally in favor of the insured.” *Id.* (citing *Hartnett v. Southern Ins. Co.*, 181 So.2d 524, 528 (Fla. 1965)). Accordingly, exclusionary clauses restricting the insured's coverage are generally disfavored. *Hartford Acc. & Indem. Co. v. Beaver*, 466 F.3d 1289, 1296 (11th Cir. 2006) (citing *Northland Cas. Co. v. HBE Corp.*, 160 F. Supp. 2d 1348, 1359 (M.D. Fla. 2001)). The burden falls on the insurer to prove that an exclusionary clause precludes coverage, and it must do so by “demonstrating that the allegations of the complaint are cast solely and entirely within the policy exclusion and are subject to no other reasonable interpretation.” *Id.* (citing *Northland*, 160 F. Supp. 2d at 1359); *see also U.S. Concrete Pipe Co. v. Boulder*, 437 So.

2d 1061, 1065 (Fla. 1983) (“Non-insurability is a defensive matter, with the burden resting on the insurer.”).

C. The Complaint fails to allege coverage under the Policy's plain terms

Plaintiffs contend that the Motion should be denied because “[l]osses stemming from the COVID-19 Pandemic are without factual or legal precedent,” and a “fact-specific inquiry into these issues is especially critical here, especially because insurance policy decisions are not binding where the policy forms and underlying facts differ.” ECF No. [9] at 19. In their view, the “parties have barely scratched the surface of dense factual issues relevant to this coverage determination” and thus “an order concluding that coverage is barred as a matter of law is premature at the pleading stage.” *Id.* The Court disagrees.

As Defendant correctly notes, Plaintiffs “do not identify a single factual issue that needs to be developed. The reason is simple: there are none.” ECF No. [17] at 10. Numerous other courts across the country have dismissed substantially similar COVID-19-related lawsuits at this stage for failing to plead actionable claims under the insurance policy. *See, e.g., Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIV, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020); *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, No. 220CV00401FTM66NPM, 2020 WL 5240218 (M.D. Fla. Sept. 2, 2020); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000*, No. 8:20-CV-1605-T-30AEP, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020); *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020); *Seifert v. IMT Ins. Co.*, No. CV 20-1102 (JRT/DTS), 2020 WL 6120002 (D. Minn. Oct. 16, 2020); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, No. 20 CV 2160, 2020 WL 5630465 (N.D. Ill. Sept. 21, 2020).

“Under Florida law, an insured seeking to recover under an all-risks policy...bears the burden of proving that a covered loss occurred at the insured property. The burden is on the insured to prove that the insurance policy covers a claim.” *Berkower v. USAA Cas. Ins. Co.*, No. 15-23947-CIV, 2017 WL 1250419, at *7 (S.D. Fla. Apr. 4, 2017). “In Florida, the insured has the burden of proving facts that bring its claim within an insurance policy's affirmative grant of coverage. In order to meet this burden under a policy of property damage insurance, the insured must prove (1) that the property harmed

or damaged falls within the ‘insuring clause’ of the policy, and (2) the loss claimed falls within a second ‘covered perils’ provision contained in each policy.” *Id.* (citation omitted; emphasis removed). Once the insured shows coverage, the burden shifts to the insurer to prove an exclusion applies to the coverage. *Id.* If there is an exception to the exclusion, the burden once again is placed on the insured to demonstrate the exception to the exclusion. *Id.* Accordingly, Plaintiffs bear the burden to demonstrate that coverage exists under the Policy.

*6 Under the Policy’s Special Property Coverage Form, coverage exists for “direct physical loss of or physical damage to Covered Property at the... ‘scheduled premises’ ...caused by or resulting from a Covered Cause of Loss.” ECF No. [6-1] at 31. According to Plaintiffs, the “Complaint sufficiently alleges that the ‘cause’ of loss was the governmental suspension orders and/or the COVID-19 Pandemic.” ECF No. [9] at 10. Plaintiffs add that loss of business income “constitutes a direct ‘physical loss’ and ‘physical damage,’ as nonessential dental procedures were specifically suspended by Governor DeSantis.” *Id.* at 11-12. In their view, economic damages alone without any corresponding physical harms to the Covered Property is covered under the Policy. *Id.* at 13-15. The Court is unpersuaded.

As an initial matter, business income is not included within the list of Covered Property under the Policy. ECF No. [6-1] at 32-33. In fact, money and accounts are expressly excluded from the definition. *Id.* But more importantly, the Complaint itself alleges that there were no physical harms to the insured premises because Plaintiffs’ injuries are purely economic. *See* ECF No. [1-2] at ¶¶ 9-12, 21, 30. *See also* ECF No. [9] at 5 (“To be clear, [Plaintiffs] do[] not allege or argue that the closure(s) were precipitated by the presence of coronavirus on the insured property.”).

Federal courts in Florida that have examined whether economic losses caused by COVID-19 business closures or suspensions constitute a “direct physical loss” or “physical harm” have rejected Plaintiffs’ arguments. *See Malaube, LLC*, 2020 WL 5051581, at *5-7 (“courts in our district have found that “[a] direct physical loss ‘contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.’...Plaintiff has not alleged any physical harm. There is no allegation, for example, that COVID-19 was physically present on the premises. Instead, Plaintiff only alleges that

two Florida Emergency Orders forced the closure of its restaurant. And, as stated earlier, courts have found this to be insufficient to state a claim because there must be some allegation of actual harm.”) (citation omitted); *Infinity Exhibits, Inc.*, 2020 WL 5791583, at *3-5 (“Plaintiff argues that economic damage is synonymous with ‘physical loss’ and is therefore covered under the Policies. Plaintiff’s argument is unpersuasive because Florida law and the plain language of the Policies reflect that actual, concrete damage is necessary....Significantly, Plaintiff is not the first insured to seek coverage due to COVID-19 government shutdown orders under a policy that limits coverage to losses caused by direct physical loss or damage to the property. Courts across the country have held that such coverage does not exist where, as here, policyholders fail to plead facts showing physical property damage....there is simply no coverage under the policies if they require ‘direct physical loss of or damage’ to property.”).

The Court finds these decisions instructive. In *Malaube, LLC*, plaintiff sought to recover insurance benefits for the loss of business income to its restaurant as a result of government shutdowns in response to the COVID-19 pandemic. Just like here, plaintiff claimed that the government shutdown orders resulted in significant financial losses. 2020 WL 5051581, at *1. The insurer denied coverage and argued that the policy’s virus exclusion applied, there was no coverage because plaintiff did not allege that it suffered any direct physical loss or damage to the insured property, and the emergency orders did not prohibit access to the property. *Id.* at *2. The policy similarly did not define “physical loss” or “physical damage.” *Id.* at *5.

*7 In examining the policy, that court determined that the complaint’s allegations were insufficient to state a claim for coverage. *See id.* at *7 (“Plaintiff’s allegations are insufficient to state a claim for an entirely separate reason because, when we examine the language of the insurance policy, ‘direct physical’ modifies both ‘loss’ and ‘damage.’ That means that any ‘interruption in business must be caused by some physical problem with the covered property...which must be caused by a ‘covered cause of loss.’”) (citing *Philadelphia Parking Authority v. Federal Ins. Co.*, 385 F. Supp. 2d 280, 288 (S.D.N.Y. 2005); *see also United Airlines, Inc. v. Ins. Co. of State of Pa.*, 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005), *aff’d* 439 F.3d 128 (2d Cir. 2006) (“The inclusion of the modifier ‘physical’ before ‘damages’...supports [defendant’s] position that physical damage is required before business interruption coverage is paid.”)).

The court further analyzed Florida state court decisions, determining that “Florida’s appellate courts are in agreement with this interpretation,” and it noted that the “Eleventh Circuit’s decision in *Mama Jo’s Inc. v. Sparta Ins. Co.*, 2020 WL 4782369, at *1 (11th Cir. Aug. 18, 2020), is also consistent with our interpretation of Florida law.” *Id.* at *7-8 (summarizing *Mama Jo’s*).² Notably, the court then compared *Mama Jo’s* framework to the complaint’s allegations and determined that plaintiff’s allegations are “far weaker,” especially as “it is not plausible how two government orders meet [coverage under the policy] when the restaurant merely suffered economic losses – not anything tangible, actual, or physical.” *Id.* The court also looked at other provisions and concluded that “if there was any lingering doubt on whether a loss of use for pure economic reasons could be recoverable under the policy, the other provisions of the policy put that uncertainty to bed.” *Id.* at *9. Accordingly, the carrier’s motion to dismiss was granted.

² In *Mama Jo’s*, 2020 WL 4782369, which did not involve COVID-19, the Eleventh Circuit affirmed summary judgment in favor of defendant insurer where the plaintiff submitted a claim to the insurer for cleaning the restaurant and for business income loss related to nearby road construction that caused dust and debris to interfere with the restaurant’s operations. Like the Policy here, the all-risk policy provided coverage for “direct physical loss of or damage to Covered Property...caused by or resulting from any Covered Cause of Loss.” *Id.* at *8. The Court explained that under Florida law, the definition of “direct physical loss” is the “diminution of value of something” and that “[d]irect and ‘physical’ modify loss and impose the requirement that the damage be actual.” *Id.* (citations omitted). Regarding the cleaning claim, the court determined that “under Florida law, an item or structure that merely needs to be cleaned has not suffered a ‘loss’ which is both ‘direct’ and ‘physical.’ ” *Id.* As to the business income loss claim, the court noted that there was no evidence that the restaurant “suffered a direct physical loss of or damage to its property during the policy period.” *Id.* at *9.

In *Infinity Exhibits, Inc.*, the court dismissed with prejudice plaintiff’s claims for business income loss related to government shutdown orders caused by the COVID-19 pandemic because plaintiff “has not alleged direct physical loss or damage to the Property” under the all-risk policy. 2020 WL 5791583, at *2. In particular, the court reasoned that *Mama Jo’s* decision “undercuts Plaintiff’s response” to the motion to dismiss because it “rejects Plaintiff’s argument

that the Policies are ambiguous” and “also rejects Plaintiff’s contention that pure economic losses are covered.” *Id.* at *4. The court further collected cases from across the country where courts denied claims for economic losses related to the COVID-19 pandemic where there is no accompanying physical property harms or damages. *Id.* at *4-5.

*8 Plaintiffs fail to convince the Court that the instant allegations command a different result. *See also Sandy Point Dental, PC*, 2020 WL 5630465, at *2-3 (determining that there was no coverage for dental office’s losses due to COVID-19 closures; “The critical policy language here—‘direct physical loss’—unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage. The words ‘direct’ and ‘physical,’ which modify the word ‘loss,’ ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure...In essence, plaintiff seeks insurance coverage for financial losses as a result of the closure orders. The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property. Consequently, plaintiff has failed to plead a direct physical loss—a prerequisite for coverage.”).

The Complaint does not allege any physical harm to Plaintiffs’ Covered Property much less “direct physical loss of or physical damage” caused by or resulting from a “Covered Cause of Loss.” ECF No. [6-1] at 31. Accordingly, there is no coverage under the Special Property Coverage Form.³ As for additional coverages under the Business Income, Extra Expense, and Extended Business Income provisions, *id.* at 40-41, there is likewise no coverage under those portions of the Policy because the Complaint fails to allege “direct physical loss of or physical damage to” the property, which is a necessary component of coverage under those provisions.

³ Plaintiffs contend that *Maspons*, 211 So. 3d 1067 “hits the nail on the head” and “forecloses [Defendant’s] argument that damage to the building or structure itself is required to trigger coverage or that damage to that [] insured property is ‘not covered.’ ” ECF No. [9] at 14. The Court is unconvinced. In *Maspons*, the loss at issue involved an actual tangible harm because a drain pipe failed to perform its function, and the case involved the repair of the drain line. *See* 211 So. 3d at 1069 (“it is clear that the failure of the drain pipe to perform its function constituted a ‘direct’ and ‘physical’ loss to the property within the meaning of the property.”). Here,

by contrast, Plaintiffs allege only pure economic losses without any corresponding physical components. And, to be sure, *Malaube, LLC, Infinity Exhibits, Inc., and Mama Jo's Inc.* all cite *Maspons* in support of finding no “direct physical loss or damage” under the policies.

As for coverage under the Civil Authority provision, that coverage applies when “access to your ‘scheduled premises’ is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your ‘scheduled premises.’ ” *Id.* at 41. Plaintiffs do not clearly express how the Complaint alleges coverage within the terms of this provision other than to state that Defendant “employs legal gymnastics to twist coverage endorsements...into supplemental restrictions.” ECF No. [9] at 9. Regardless, the Court agrees with Defendant that the Complaint does not allege coverage under this provision.

First, Plaintiffs fail to allege that access to the premises is prohibited “as the direct result of a Covered Cause of Loss,” which again under the Policy means a “risk[] of direct physical loss,” “to property in the immediate area[.]” ECF No. [6-1] at 32. The Complaint alleges no physical harm to any properties in the immediate area, only suspensions and closures in general due to government orders. ECF No. [1-2] at ¶ 8. *See Seifert, 2020 WL 6120002, at *4* (granting motion to dismiss civil authority coverage claim because plaintiff “does not plead any facts demonstrating that the coronavirus contaminated properties neighboring his businesses, or that a civil authority then prohibited him from entering his insured properties because of any such contamination”).

*9 Second, the Complaint does not allege that “access” to the “scheduled premises” was “specifically prohibited by order of a civil authority.” Rather, Plaintiffs allege that they suspended or reduced their practice because two government orders required “that non-emergent or elective dental care be postponed indefinitely.” ECF No. [1-2] at ¶ 10; *see also id.* at ¶ 19 (alleging that Governor DeSanitiss issued an order “specifically prohibit[ing] all dental offices from providing any medically unnecessary, non-urgent or non-emergency procedure or surgery. Accordingly, all ...dentists, were ordered to immediately cease performing these elective services.”). Plaintiffs do not allege that they were prohibited from accessing the premises nor do they allege that they could not perform medically necessary non-elective medical procedures. Merely restricting access to Plaintiffs’ dental practice for essential medical services does not trigger coverage under the Policy’s Civil Authority provision. *See, e.g., Ski Shawnee, Inc. v. Commonwealth Ins. Co., No. 3:09-*

*CV-02391, 2010 WL 2696782, at *4 (M.D. Pa. July 6, 2010)* (“When the action of a civil authority completely shuts down access to a party’s premises, federal courts have held that the coverage in insurance policies similar to the one at bar are triggered. However, where the action of a civil authority merely hinders access to the covered premises, without completely prohibiting access, federal courts have held that such action is not covered under policies like the one in the instant case.”).

Accordingly, Plaintiffs have failed to allege facts that come within the Policy’s coverage grants. Count I for breach of contract, therefore, fails to state a claim upon which relief can be granted because Plaintiffs have not shown that Defendant breached its obligations under the Policy.

C. The Policy’s virus exclusion applies even if Plaintiffs had alleged facts otherwise supporting the existence of coverage

Assuming for argument’s sake that Plaintiffs had alleged facts triggering coverage under the Policy, the virus exclusion would still apply to bar coverage for Plaintiffs’ losses. Under the Policy, the parties agreed that Defendant

will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss: (1) Presence, growth, proliferation, spread or any activity of “fungi,” wet rot, dry rot, bacteria or virus. ...This exclusion applies whether or not the loss even results in widespread damage or affects a substantial area.

ECF No. [6-1] at 135.

According to Defendant, the Complaint alleges that the COVID-19 pandemic triggered the civil government orders to halt the spread of the virus, which in turn led to Plaintiffs’ business suspension and/or closure, and hence coronavirus is one of the direct or indirect causes for Plaintiffs’ losses. ECF No. [7-1] at 7-8. Plaintiffs respond that they have not alleged that coronavirus caused their business losses, but rather they are “seeking to be made whole for covered business closures precipitated by a series of government orders aimed at fighting the COVID-19 Pandemic.” ECF No. [9] at 5. *See also id.* at 12 (“Significantly, the operative causes of the loss were the government suspension orders suspending [Plaintiffs’] operations and the COVID-19 pandemic, as opposed to the presence of the coronavirus on the insured property.”).

Upon consideration, the Court does not agree that Plaintiffs' distinction between the government orders versus the virus as the immediate cause of their losses avoids the plain language of the virus exclusion. Even if COVID-19 is not a direct cause of their losses, the Complaint's allegations demonstrate that the government's civil orders were specifically enacted to address COVID-19 activity in Florida. *See* ECF No. [1-2] at ¶¶ 7-12. Thus, coronavirus still remains part of the causal chain leading to Plaintiffs' losses, and the exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." As Defendant argues, the government orders at issue "undisputably exist solely to reduce or limit the spread of the virus and would not have been issued absent the coronavirus." ECF No. [7-1] at 8.

Court that have considered whether the virus exclusion applies where government closure orders themselves rather than the virus are alleged to be the cause of plaintiff's business losses, have rejected similar arguments and determined that coverage is excluded. *See, e.g., Mauricio Martinez, DMD, P.A., 2020 WL 5240218, at *2* (determining that virus exclusion barred dental office's claims for business losses caused by COVID-19 government orders because "the policy expressly excludes insurer liability for loss or damage caused 'directly or indirectly' by any virus" and plaintiff's "damages resulted from COVID-19, which is clearly a virus"); *Diesel Barbershop, LLC, 2020 WL 4724305, at *6* ("the Court finds that Plaintiffs have pleaded that COVID-19 is in fact the reason for the Orders being issued and the underlying cause of Plaintiffs' alleged losses. While the Orders technically forced the Properties to close to protect public health, the Orders only came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community. Thus, it was the presence of COVID-19 in Bexar County and in Texas that was the primary root cause of Plaintiffs' businesses temporarily closing."); *Seifert, 2020 WL 6120002, at *4* (D. Minn. Oct. 16, 2020) (granting motion to dismiss pursuant to virus exclusion because plaintiff "alleges that his business losses are the direct and proximate result of 'Governmental Pandemic Closure Orders; orders that have been put in place in an effort to control the spread of the COVID-19 Pandemic.' Pursuant to the anti-concurrent loss provision, if a virus is any part of the causal chain causing a loss, then the loss is not covered.").⁴ This is all the more so given that the Complaint expressly alleges that Plaintiffs' losses were incurred from measures "to stop the spread of COVID-19[.]" ECF No. [1-2] at ¶ 11.

4

The Court recognizes that in *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd., No. 620CV1174ORL22EJK, 2020 WL 5939172, at *4* (M.D. Fla. Sept. 24, 2020), the court rejected defendant's argument that the instant virus exclusion barred coverage. However, unlike here, that court refused to "make a decision on the merits of the plain language of the Policy to determine whether Plaintiff's losses were covered" because, in part, the parties failed to provide the court with relevant coverage forms that corresponded to the exclusions.

***10** Further, the Court rejects Plaintiffs' argument that the virus exclusion is ambiguous because the term "virus" is undefined in the Policy. ECF No. [9] at 12, 15-16. "An ambiguous policy must, for example, have a genuine inconsistency, uncertainty, or ambiguity in meaning after the court has applied the ordinary rules of construction. 'Just because an operative term is not defined, it does not necessarily mean that the term is ambiguous.' " *Malaube, LLC, 2020 WL 5051581, at *3* (citations omitted). Plaintiffs offer no basis for construing "COVID-19" or the "pandemic" as a non-virus for purposes of this exclusion. Nor can they plausibly do so, as the global spread, proliferation, and activity of "coronavirus" is the underlying pandemic at issue.⁵ *See* ECF No. [1-2] at ¶¶ 7, 11, 18, 30 (alleging that the Centers for Disease Control and Prevention issued guidance for "stopping the spread of COVID-19," Florida declared a public health emergency caused by the "COVID-19 pandemic," and civil authorities have responded to "stop the spread of the outbreak"). Indeed, they cite no cases where courts have determined that COVID-19 is not a virus for purposes of this exclusion.

5

The Court disagrees with Plaintiffs that *Westport Ins. Corp. v. VN Hotel Grp., LLC, 513 F. App'x 927* (11th Cir. 2013) renders the virus exclusion inapplicable. That case is distinguishable because the exclusion under that policy was limited to the "presence of any 'fungi' or bacteria on or within a building or structure," and the injury at issue occurred in an outdoor spa, which did not qualify as a structure. *Id.* at 932. Here, the virus exclusion does not contain any similar restrictive language. Further, the Complaint does not allege that coronavirus was present at the premises. ECF No. [1-2] at ¶ 30. *See also* ECF No. [9] at 5, 18 (emphasizing that Plaintiffs do not allege that coronavirus was present on the insured property).

Finally, while Plaintiffs maintain that the anti-concurrent causation language contained in the virus exclusion rests on "shaky ground," ECF No. [9] at 17, they fail to establish that

the exclusion contains an ambiguity precluding this clause's application. Additionally, as Defendant notes, Florida courts enforce anti-concurrent causation clauses where the excluded peril is one cause of the loss. *See, e.g., Sec. First Ins. Co. v. Czelusniak*, No. 3D19-589, 2020 WL 2463762, at *1 (Fla. 3d DCA May 13, 2020) (“However, when the insurer explicitly avoids the application of the concurring-cause doctrine with an anti-concurrent cause provision, the plain language of the policy precludes recovery.... ‘[P]arties may contract around the concurrent cause doctrine with an anti-concurrent cause provision.’ ”) (footnote and citations omitted); *Hatch v. GeoVera Specialty Ins. Co.*, No. 617CV2142ORL41DCI, 2019 WL 2515926, at *4 (M.D. Fla. June 18, 2019) (enforcing anti-concurrent cause provision related to losses caused by earth movement). As such, the Court agrees with Defendant that even if the Complaint's allegations came within the Policy's coverage grants, the virus exclusion applies to bar coverage. Accordingly, Count I for breach of contract fails.

D. Count II is duplicative of Count I and fails to state an actionable claim

Plaintiffs seek a declaratory judgment that there is coverage for their losses under the Policy. *See* ECF No. [1-2] at ¶¶ 11, 40-54. “Declaratory judgment claims may properly coexist with breach of contract claims when they provide the plaintiff a form of relief unavailable under the breach of contract claim. Such claims for declaratory judgment must be forward-looking, rather than retrospective, as any retrospective declaration would be equally solved by resolution of the breach of contract claim.” *Garcia v. Scottsdale Ins. Co.*, No. 18-20509-CIV, 2018 WL 3432702, at *2 (S.D. Fla. July 16, 2018) (internal citation omitted). Declaratory judgment claims that functionally seek adjudication on the merits of a breach of contract claim are duplicative and cannot stand. *See Miami Yacht Charters, LLC v. Nat'l Union Fire Ins. Co.*, No. 11-21163-CIV, 2012 WL 1416428, at *2 (S.D. Fla. Apr. 24, 2012); *Ministerio Evangelistico Int'l v. United Specialty Ins. Co.*, No. 16-25313-CIV, 2017 WL 1363344, at *2 (S.D. Fla. Apr. 5, 2017); *ABC Univ. Shops, LLC v. Scottsdale Ins. Co.*, No. 18-60562-CIV, 2018 WL 3672265, at *3-4 (S.D. Fla.

July 24, 2018), *report and recommendation adopted*, No. 18-CV-60562, 2018 WL 4409851 (S.D. Fla. Aug. 16, 2018).

*11 Here, the Court does not find that an actual controversy exists under the Policy as to whether coverage exists for Plaintiffs' losses. The claim for declaratory relief, in essence, is that judicial interpretation of the Policy could result in coverage for the same losses that underlie the breach of contract claim. “Because the breach-of-contract claim is dismissed, no controversy exists. Accordingly, Count II is dismissed as well.” *Mauricio Martinez, DMD, P.A.*, 2020 WL 5240218, at *3.

IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Motion, ECF No. [7], is **GRANTED**.
2. The Complaint, ECF No. [1-2], is **DISMISSED with prejudice**.
3. To the extent not otherwise disposed of, any scheduled hearings are **CANCELED**, all pending motions are **DENIED** as moot, and all deadlines are **TERMINATED**.
4. The Clerk of Court shall **CLOSE** this case. **DONE AND ORDERED** in Chambers at Miami, Florida, on November 1, 2020.

BETH BLOOM

UNITED STATES DISTRICT JUDGE

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Counsel of Record

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EXHIBIT 19

2020 WL 6503405

Only the Westlaw citation is currently available.

United States District Court, S.D.

Mississippi, Eastern Division.

REAL HOSPITALITY, LLC d/

b/a Ed's Burger Joint, Plaintiff

v.

**TRAVELERS CASUALTY INSURANCE
COMPANY OF AMERICA**, Defendant

CIVIL ACTION NO. 2:20-cv-00087-KS-MTP

|

Signed 11/04/2020

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MEMORANDUM OPINION AND ORDER**[KEITH STARRETT](#)**, UNITED STATES DISTRICT JUDGE

*1 This cause came before the Court on the Motion to Dismiss the Complaint [9] filed by Defendant Travelers Casualty Insurance Company of America ("Travelers"). Plaintiff Real Hospitality, LLC has responded [16], and Travelers replied [18]. Having reviewed the parties' submissions, the Plaintiff's Class Action Complaint [1], the insurance policy, and the relevant legal authorities, and otherwise being duly advised in the premises, the Court finds, for the reasons stated below, that the motion will be granted and the Complaint dismissed.

I. BACKGROUND

Because this comes before the Court on a Motion to Dismiss, we look to the allegations of the Complaint. Plaintiff alleges as follows:

A. Allegations Regarding the Pandemic and Executive Orders

On March 11, 2020, the World Health Organization Director General Tedros Adhanom Ghebreyesus declared the COVID-19 outbreak a worldwide pandemic. [1] at ¶ 1. Thereafter, the President of the United States, the Centers for Disease Control and Prevention, and a national Coronavirus Task Force issued guidance to help stop the spread of COVID-19. [1] at ¶ 2. Following such guidance, many local and state government administrations across the nation recognized the need to take measures to protect the health and safety of their residents. [1] at ¶ 3. Because recommendations have proven ineffective to minimize the spread of COVID-19, containment efforts have resulted in civil authorities issuing orders closing non-essential business establishments, including restaurants, bars, hotels, theaters, personal care salons, gyms, and schools and mandating social distancing among the population. [1] at ¶ 21.

Plaintiff is a Mississippi corporation doing business in Hattiesburg, Mississippi. [1] at ¶ 13. On March 18, 2020, Hattiesburg Mayor Toby Barker issued an executive order restricting operating times for all restaurants within Hattiesburg, and on March 21, 2020, he issued another executive order closing all dine-in services at Hattiesburg restaurants. [1] at ¶ 35; [10-2] at pp. 2, 3.¹ On March 24, 2020, Governor Tate Reeves issued an executive order, likewise restricted restaurant operations by suspending all dine-in services. [1] at ¶ 36; [10-2] at p. 4.² Other similar orders have been issued that close or restrict all non-essential business operations or prohibit public access to the property of non-essential businesses. [1] at ¶ 37. As a direct result of the governmental orders and the COVID-19 pandemic, Plaintiff has been forced to close its premises, suspend business operations, and furlough employees. [1] at ¶ 39.

¹ Although the Executive Orders were not attached to the Complaint, but rather the motion to dismiss, the Court may consider documents attached to the motion that are referred to in the Complaint and are central to the plaintiff's claims. See *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). This applies to both the Executive Orders and the insurance policy at issue here, which was also attached to the motion to dismiss. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir. 2000)("[D]ocuments that a defendant attaches to its motion to dismiss are considered part of the pleadings if

they are referred to in the plaintiff's complaint and are central to [its] claim.”).

2 On May 8, 2020, when Plaintiff filed its Complaint, said closings were still in effect. [1] at ¶ 36.

B. Allegations Regarding the Insurance Policy and Alleged Breach

*2 Travelers issued to Plaintiff an “all risk” commercial property insurance policy, which covers loss or damage to the covered premises resulting from all risks other than those expressly excluded (the “Policy”). [1] at ¶ 23; [10-1]. Plaintiff's Policy contains Common Policy Declarations, which provide that Plaintiff is the named insured, and the business is a family style restaurant located at 3800 Hardy St. in Hattiesburg, Mississippi. [10-1] at p. 7. The Common Policy Declarations also state that the coverage parts that form part of the policy is a Businessowners Coverage Part. [10-1] at p. 7. The Policy also contains a Businessowners Coverage Part Declarations page, which indicates that the policy contains Commercial General Liability Coverage and Businessowners Property Coverage. [10-1] at p. 8. Under the Businessowners Property Coverage section, the Declarations page indicates a deductible amount per occurrence for both “Businessowners Property Coverage” and “Building Glass.” [10-1] at p. 8. Also under the Businessowners Property Coverage section, there is a Business Income/Extra Expense Limit, as well as a Period of Restoration-Time Period. *Id.* Finally, the Businessowners Property Coverage indicates there is additional coverage for Fine Arts. *Id.*

As for the body of the Policy itself, Travelers uses standard, uniform insurance policies that contain a standard policy form titled “Businessowners Property Coverage Special Form.” [1] at ¶¶ 24, 25; [10-1] at p. 21. This Special Form contains the following provisions, some of which Plaintiff includes in the Complaint, others of which the Court finds essential to the analysis of Plaintiff's ability to state a claim:

A. COVERAGE

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 a Covered Cause of Loss.

1. Covered Property

Covered Property, as used in this Coverage Form, means the type of property described in this Paragraph

A.1., and limited in Paragraph **A.2.**, Property Not Covered

a. Building, meaning the building or structure described in the Declarations, including:

b. Business Personal Property located in or on the buildings described in the Declarations or in the open (or in a vehicle) within 1,000 feet of the described premises, including:

3. Business Income and Extra Expense Business Income and Extra Expense is provided at the premises described in the Declarations when the Declarations show that you have coverage for Business Income and Extra Expense.

a. Business Income

(1) Business Income means:

(a) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred []; and

(b) Continuing normal operating expenses incurred, including pay-roll

(2) We 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 caused by or result from a Covered Cause of Loss....

b. Extra Expense

(1) Extra expense means reasonable and necessary expenses you incur during the “period of restoration” that you would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss.

c. Extended Business Income

If the necessary “suspension” of your “operations” produces a Business Income loss payable under Paragraph **a**. Business Income above, we will also pay for the actual loss of Business Income you sustain during the period that:

(1) Begins on the date property is actually repaired, rebuilt, or replaced and “operations” are resumed; and

(2) Ends on the earlier of:

(a) The date you could restore your “operations” with reasonable speed, to the level which would generate the Business Income amount that would have existed if no direct physical loss or damage occurred; or

(b) Sixty consecutive days after the date determined in Paragraph (1) above.

[10-1] at pp. 22-24.³ Under the definitions section for “Period of Restoration,” the Policy states, in relevant part:

19. “Period of Restoration”

a. Means the period of time that:

(1) Begins:

(i) For Business Income coverage:

***3 (a)** With the date of direct physical loss or damage

(ii) For Extra Expense coverage with the date of direct physical loss or damage;

Caused by or resulting from any Covered Cause of Loss at the described premises; and

(2) Ends on the earlier of:

(i) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

(ii) The date when business is resumed at a new permanent location.

[10-1] at p. 58. Further, the Policy contains an endorsement titled “Exclusion of Loss Due to Virus or Bacteria,” which reads, in relevant part, “We will not pay for loss or damage caused by or resulting from any virus, bacterium or other

microorganism that induces or is capable of inducing physical distress, illness, or disease.” [10-1] at p. 149.

³ Plaintiff also includes the provision for “Additional Coverage Civil Authority.” [1] at ¶ 29. However, all allegations and argument regarding such provision are moot, as Plaintiff advises the Court in its response to the instant motion that Plaintiff is now seeking coverage under the Business Income provision only. [16] at p. 14.

Lastly, Plaintiff alleges that it has faithfully paid the premiums, which Travelers has accepted, and thus, Travelers is obligated to honor its contractual duty to provide coverage for the business losses and extra expenses and other expenses suffered. Travelers denied Plaintiff’s claims, contending that Plaintiff’s business interruption losses due to the COVID-19 pandemic are not covered under its form policy. [1] at ¶ 40.⁴ Plaintiff asserted two causes of action—one for declaratory judgment and one for breach of contract.

⁴ Plaintiff brings the Complaint as a class action and seeks to certify a nationwide class of policyholders who have suffered losses due to the measures put in place to stop the spread of COVID-19; however, it cannot do so if Plaintiff is not part of the class because its individual facts fail to state a claim. *Cf. O’Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (explaining that if none of the named plaintiffs purporting to represent a class can establish a requisite case or controversy, then none may seek relief on behalf of himself or any other member of the class).

C. The Motion to Dismiss

Travelers now moves for dismissal under Federal Rule of Procedure 12(b)(6), arguing that Plaintiff has failed to state a claim for coverage under the Business Income/Extra Expense provision, namely because Plaintiff has not alleged facts showing a physical loss of property or any physical damage to property that would trigger the Business Income/Extra Expense coverage. In addition, Travelers argues that even if such facts required for coverage were pled, Plaintiff’s claim would be expressly excluded by the “virus exclusion.”

In response, Plaintiff firsts asks that the Court certify to the Mississippi Supreme Court the question of what the Business Income Coverage provision means. Plaintiff also argues that the Business Income coverage provision applies because it has suffered a loss of use of the business premises. In addition, Plaintiff argues that the policy exclusion for viruses does not clearly and unambiguously exclude coverage.

II. DISCUSSION

A. Legal Standard

*4 “To survive a motion to dismiss under Rule 12(b)(6), ‘a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.’ ” *Great Lakes Dredge & Dock Co. LLC v. La. State*, 624 F.3d 201, 210 (5th Cir. 2010) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is plausible “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, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). “The Court must ‘accept all well-pleaded facts as true and construe the complaint in the light most favorable to the plaintiff.’ ” *Id.* “[T]he Court will not accept as true ‘conclusory allegations, unwarranted factual inferences, or legal conclusions.’ ” *Id.* “Likewise, ‘a formulaic recitation of the elements of a cause of action will not do.’ ” *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 417 (5th Cir. 2010).

B. Analysis

The Court will apply Mississippi law, as the Court, sitting in diversity jurisdiction, applies the choice of law rules of the forum state. *Sorrels Steel Co., Inc. v. Great Southwest Corp.*, 906 F.2d 158, 167 (5th Cir. 1990).⁵ In cases arising from insurance contracts, Mississippi follows *Restatement (Second) Conflict of Laws* § 193, under which “the rights created by [an insurance] contract ‘are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy.’ ” *Hartford Underwriters Ins. Co. v. Found. Health Svcs., Inc.*, 524 F.3d 588, 594 (5th Cir. 2008). Here, the insured is located in Mississippi, and the insured premises, i.e., the restaurant, is located in Mississippi. [1] at ¶¶ 31-32; [10-1] at p. 1.

⁵ Both parties agree that Mississippi law governs this insurance coverage dispute.

Under Mississippi law, courts “follow[] the plain meaning and common sense approach when interpreting insurance clauses.” *Wooten v. Miss. Farm Bureau Ins. Co.*, 924 So. 2d 519, 522 (Miss. 2006). In other words, “when the words of an insurance policy are plain and unambiguous, the court will afford them their plain, ordinary meaning and will apply

them as written.” *Paul Revere Life Ins. Co. v. Prince*, 375 So. 2d 417, 418 (Miss. 1979). “[A]mbiguities do not exist simply because two parties disagree over the interpretation of a policy.” *United States Fid. & Guar. Co. of Miss. v. Martin*, 998 So. 2d 956, 963 (Miss. 2008) (citing *HeartSouth, PLLC v. Boyd*, 865 So.2d 1095, 1105 (Miss. 2003)).

1. Business Income/Extra Expense Coverage

Here, Plaintiff is seeking a declaratory judgment that Business Income coverage applies under the facts alleged in the Complaint and that Travelers breached the contract in failing to pay the claim. Travelers moves to dismiss on the grounds that the Complaint does not allege a physical loss of property or any physical damage to property as is required for coverage under the Business Income/Extra Expense coverage provision. In its response, Plaintiff contends that the policy language does not require physical alteration to property and that loss of the usability of the business premises qualifies it for coverage.⁶

⁶ As to Plaintiff’s first argument presented in its response—that the question of coverage should be certified to the Mississippi Supreme Court—under the Mississippi Rules of Appellate Procedure, that is not an option for a district court. *See Miss. R. App. P. 20(a)* (authorizing certification only by the Supreme Court of the United States or by a United States Court of Appeals).

“The interpretation of an insurance policy is a question of law.” *Hankins v. Maryland Cas. Co.*, 101 So. 3d 645, 652 (Miss. 2012). Under the Business Income and Extra Expense provision, the policy reads, in relevant part:

*5 We 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 caused by or result from a Covered Cause of Loss.

[10-1] at pp. 23-24. Based on this language, it is clear that in order to qualify for coverage, there must be a suspension of Plaintiff’s operations, which no one disputes, that was caused by “direct physical loss of or damage to property at the described premises.”

Because the policy does not define the phrases “direct physical loss of” and “damage to,” Plaintiff focuses on the

disjunctive “or” that denotes a choice between alternatives. [16] at p. 7. Plaintiff contends the phrases must be considered separately as a trigger of coverage. In relying on the disjunctive phrasing, Plaintiff focuses on the first alternative —“direct physical loss of”—arguing that it does not require a tangible damage or alteration to property.⁷ In addressing this argument, the Court first notes that Travelers never argued that both phases require some sort of physical *damage* to the property, so the fact there is a distinction between the two phrases is irrelevant and does not get Plaintiff where it needs to go.

⁷ Plaintiff’s reliance on cases that deal with the isolated word “loss” or the use of the word within a grouping such as “loss, damage, or destruction,” is misplaced. The grammar used in this particular policy is clear that it requires a “direct physical loss of property.”

Giving separate effect to “loss” and “damage” in the phrase, “direct physical loss of or damage,” only highlights the distinction between “the permanent dispossession of” and “damage.” *Total Intermodal Svcs., Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 17-cv-4908, 2018 WL 3829767, at *2 (C.D. Cal. July 11, 2018).⁸ Even if the Policy covers “permanent dispossession” in addition to physical alteration, which the Court concludes that it does, that does not benefit Plaintiff here. Despite the disjunctive phrasing, with the modifying adjectives, the phrases are “direct physical loss of property” or “damage to property.” Either way, “property” is involved. The property is either physically lost, *i.e.*, the insured suffers a permanent dispossession of the property, or it is damaged. After all, it is a commercial “property” policy.⁹ As Travelers readily acknowledges, a theft would be a direct physical loss of property, and while a fire typical involves direct physical damage, it can also cause a total loss of property. The Court agrees with this common-sense approach to the wording.

⁸ In *Total Intermodal Services* Travelers denied a claim for lost cargo, arguing that because there had been no physical loss or damage to the cargo, coverage did not apply. 2018 WL 3829767 at *1. However, the court denied summary judgment, ruling that the phrase “direct physical loss of property” does not require damage but includes the permanent dispossession of something. *Id.* at *3.

⁹ One does not buy simply “business interruption insurance.” Policyholders are not insuring against “all risks” to their income—they are insuring against “all risks” to their property—that is, the building and its

contents. Here, as Plaintiff has pled, the Policy purchased is a “commercial property” policy. [1] at ¶ 23. Thus, just as the Declarations state, the Policy carries property coverage as well as liability coverage. [10-1] at p. 8. Based on the definition of Covered Property, should a covered peril befall the building or personal property located in or on the building, the insured can make a claim. As a subset of this coverage, should such a loss of or damage to the building or any personal property cause a disruption to a policyholder’s business such that it suspends operations, then there is coverage for that income loss during the time of repair, rebuilding or replacement in order to get, for lack of a better phrase, “back to normal.” Travelers could have made the Business Income coverage even clearer by using the phrase “direct physical loss of or damage to Covered Property,” as it did in the policy at issue in *Total Intermodal Svcs., Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 17-cv-4908, 2018 WL 3829767, at *2 (C.D. Cal. July 11, 2018), but it is still “loss of or damage to property at the described premises” nonetheless.

*6 “A policy must be considered as a whole, with all relevant clauses together.” *United States Fid. & Guar. Co. of Miss. v. Martin*, 998 So. 2d 956, 963 (Miss. 2008)(citing *J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co.*, 723 So.2d 550, 552 (Miss. 1998)). When all of the provisions are read together it makes logical sense that the property that is insured, *i.e.*, the building and/or personal property in or on the building, must first be lost or damaged before Business Income coverage kicks in. Borrowing from Traveler’s example, there is at least one scenario where there could be both. For instance, in a restaurant with ten tables, there could be a fire, which completely burns up five of the tables—thus, there is a “direct physical loss of property.” The fire also could melt the tabletops or cause smoke damage to the remaining five tables—thus, there is “damage to property.” Because the Business Income is paid only during the “period of restoration,” we must also look to that definition.

The Policy states that the Period of Restoration begins: “With the date of direct physical loss or damage” and ends “[t]he date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (ii) The date when business is resumed at a new permanent location.” If there is no requirement that physical loss of or physical damage to the property be involved, the definition of the time period for paying the claim makes no sense. In addition, the policy covers Extended Business Income, and while not specifically at issue here, this provision likewise makes clear that there must be some

sort of physical loss or physical damage. That provision states that if the suspension of operations produces a loss payable under the Business Income provision, Travelers will also pay for the loss of business income that begins on the date property is actually “repaired, rebuilt, or replaced and operations are resumed” and ends when operations reach a certain level. None of these provisions indicate that the period of payment will end simply when operations resume, as Plaintiff contends. As such, the Court rejects Plaintiff’s interpretation of the “Period of Restoration,” which is that when the Executive Orders are lifted, this would constitute a “repair” because Plaintiff’s property would be restored to a “sound state.” [16] at p. 14.¹⁰ This contorted interpretation is inconsistent with the plain and common sense meaning of the word “repair.”

¹⁰ Plaintiff relies on a definition from Merriam Webster, which defines “repair” as “to restore to a sound or healthy state.” [16] at p. 14.

Based on the foregoing, reading the Policy as a whole, the Court finds that Plaintiff’s Complaint fails to state a claim because it does not allege that any insured property was damaged or that Plaintiff was permanently dispossessed of any insured property. Consequently, Plaintiff’s contention that “loss of property” reasonably includes loss of usability is not sustainable.¹¹

¹¹ The cases from other jurisdictions cited by Plaintiff for the proposition that loss of use is sufficient to trigger coverage are all distinguishable. [16] at pp. 10-11. In each of those cases there was a pervasive, physical impact on the insured property for which each court concluded was tantamount to physical loss or damage. Conditions such as the presence of gasoline or ammonia, asbestos contamination, odor from a methamphetamine lab, threat of rock falls, and toxic gases from Chinese drywall were present in each of those cases. Such cases involved circumstances “where the building in question ha[d] been rendered unusable by physical forces.” *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010). Here, Plaintiff has not pled the existence of any such condition that would render its premises uninhabitable.

*7 Plaintiff is not the first policyholder to argue in court that executive/government orders issued during the COVID-19 pandemic that have affected their operations trigger insurance under Business Income/Extra Expense provisions identical to the one at issue in the Policy here. Most courts have rejected these claims and granted motions to dismiss based on

the finding that the businesses’ complete or partial closures due to government orders issued to slow the spread of COVID-19 do not constitute “direct physical loss of or damage to property.”¹² See e.g., *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, No. CV 20-3619 PSG, 2020 WL 6156584 (C.D. Cal. Oct. 19, 2020) (J. Gutierrez); *Louis G. Orsatti, DDS, P.C. v. Allstate Ins. Co.*, No. 5:20-cv-00840, 2020 WL 5948269 (W.D. Tex. Oct. 7, 2020); *Henry’s La. Grill, Inc. v. Allied Ins. Co. of Am.*, No. 1:20-cv-2939, 2020 WL 5938755 (N.D. Ga. Oct. 6, 2020); *Mark’s Engine Co. No. 28 Restaurant, LLC v. The Travelers Indemnity Co. of Conn.*, No. 2:20-cv-4423, 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020) (J. Birotte); *Pappy’s Barber Shops, Inc. v. Farmers Grp., Inc.*, No. 20-CV-907-CAB-BLM, 2020 WL 5500221, at *1 (S.D. Cal. Sept. 11, 2020); *10E, LLC v. Travelers Indemnity Co. of Conn.*, No. 2:20-cv-4418, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020) (J. Wilson); *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIV, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020).

As one district court in California recently explained,¹³

An insured cannot recover by attempting to artfully plead temporary impairment to economically valuable use of property as physical loss or damage.... Plaintiff’s [First Amended Complaint] attempts to make precisely this substitution of temporary impaired use or diminished value for physical loss or damage in seeking Business Income and Extra Expense coverage. Plaintiff only plausibly alleges that in-person dining restrictions interfered with the use or value of its property – not that the restrictions caused direct physical loss or damage.

10E, LLC, 2020 WL 5359653, at *4–5 (internal citations omitted). Here, Plaintiff makes similar arguments for coverage under identical policy language. In its response to Travelers’ motion, Plaintiff tellingly states, not that damage was done to its property, but rather “Plaintiff will never be able to recoup the damage done to its business operations by the Coronavirus.”

¹² The case of *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127, — F.Supp.3d —, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), relied on by Plaintiff, is distinguishable. [20-1]. In that case, the district court denied the insurer’s motion to dismiss, at least in part, on the allegations “that COVID-19 ‘is a physical substance,’ that it ‘live[s] on’ and is ‘active on inert physical surfaces,’ and is also ‘emitted into the air.’ COVID-19 allegedly attached to and deprived Plaintiffs of their property, making it ‘unsafe and unusable, resulting in

direct physical loss to the premises and property.’ ” *Studio 417*, --- F.Supp.3d at ---, 2020 WL 4692385, at *4. The plaintiff in that case also alleged that “it is likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus.” *Id.* at ---, 2020 WL 4692385 at *2. As such, the court found that the complaint “plausibly alleg[ed] a ‘direct physical loss’ based on ‘the plain and ordinary meaning of the phrase.’ ” *Id.* In contrast, here, Plaintiff never specifically alleges that the virus is/was present on the restaurant premises. Rather, the Complaint states, “As a direct result of the governmental orders and the COVID-19 pandemic, Plaintiff has been forced to close its premises, suspend business operations, and furlough employees.” [1] at ¶ 39.

13 California law on contract interpretation is similar to, if not the same as, Mississippi law, *i.e.*, policy provisions are interpreted in their ordinary and popular sense. See *Waller v. Truck Ins. Exch., Inc.*, 11 Cal.4th 1, 44 Cal.Rptr.2d 370, 900 P.2d 619, 627 (1995), *as modified on denial of reh'g* (Oct. 26, 1995).

*8 As noted in footnote 10 above, this is a commercial property policy, not a stand-alone business interruption policy—Plaintiff’s *operations* are not what is insured—the building and the personal property in or on the building are. Accordingly, Plaintiff is incorrect when it states, “Plaintiff’s property lost its usability due to the imposition of civil orders which suspended operations and for which there is coverage.” [16] at p. 15. Again, Plaintiff has failed to plausibly allege any entitlement to coverage under the Business Income or Extra Expense provisions in its Policy with Travelers.

2. Virus Exclusion

Although the Court finds that Plaintiff fails to plausibly allege that it suffered a “direct physical loss of or damage to” its

property, the Court further finds that even if Plaintiff was able to show it suffered such loss or damage, coverage would be precluded under the virus exemption to the Policy.

The virus exclusion clearly and unequivocally exempts “loss or damage caused by or resulting from any virus.” [10-1] at p. 149. Plaintiff’s Complaint clearly demonstrates that all alleged loss or damage was caused by or resulted from COVID-19. Plaintiff alleges that “[c]oronaviruses are a type of virus that often cause respiratory diseases in humans” and that that COVID-19 is short for Coronavirus Disease-2019. [1] at ¶¶ 16, 17. Plaintiff also alleges that “[t]he civil authority orders expressly state that the closing of non-essential businesses are necessary measures to protect the health and safety of all residents by stopping the spread of the virus through human to human and surface to human contact.” [1] at ¶ 38. Plaintiff further alleges that “[a]s a direct result of ... the COVID-19 pandemic, Plaintiff has been forced to close its premises, suspend business operations, and furlough employees.” [1] at ¶ 39. Therefore, the virus exemption applies here and precludes all coverage.

III. CONCLUSION

Because the allegations of the Complaint do not state a claim for coverage under the Policy, Plaintiff’s claims for declaratory judgment and breach of contract must be dismissed. Accordingly, it is hereby ORDERED that the Motion to Dismiss the Complaint [9] filed by Defendant Travelers Casualty Insurance Company of America is GRANTED, and the Complaint is dismissed in its entirety.

SO ORDERED AND ADJUDGED this 4th day of November 2020.

All Citations

--- F.Supp.3d ----, 2020 WL 6503405

EXHIBIT 20

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS**

MAC PROPERTY GROUP LLC &
THE CAKE BOUTIQUE LLC,

Plaintiff,

v.

SELECTIVE FIRE AND
CASUALTY INSURANCE
COMPANY, JOHN DOES (1-10)
and ABC COMPANIES (1-10),

Defendant(s).

: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION: CAMDEN COUNTY
: DOCKET NO. L-2629-20

: **Civil Action**

: **OPINION**

Decided: November 5, 2020

Robert W. Williams, Esquire, Mattleman, Weinroth & Miller, P.C., on behalf of
Plaintiffs, Mac Property Group, LLC and The Cake Boutique, LLC

Joseph K. Scully, Esquire (Pro Hac Vice) and Elizabeth J. Sher, Esquire, Day
Pitney, LLP, on behalf of Defendant, Selective Fire and Casualty Insurance
Company

HON. STEVEN J. POLANSKY, P.J.Cv.

Defendant moves to dismiss plaintiff's Complaint in this matter
pursuant to Rule 4:6-2.

BACKGROUND

The Complaint filed by Plaintiffs Mac Property Group, LLC and the
Cake Boutique seeks recovery from defendant Selective Fire and
Casualty Insurance Company under a policy of insurance issued by
Selective Fire and Casualty Insurance Company bearing Policy No. S
1982947. The policy at issue covered the period April 28, 2019 to April
28, 2020. That policy was subsequently renewed for the period April 28,
2020 to April 28, 2021.

The policy provides coverage for the insured location at 115 Swedesboro Road, Mullica Hill, New Jersey. The Complaint asserts that the policy provides coverage for both action of civil authority and business income and extra expense losses.

Plaintiffs allege that they sustained a loss of business income and incurred extra expense as a result of the following four events:

1. Executive Order 103 issued by New Jersey Governor Philip D. Murphy on March 9, 2020;
2. The World Health Organization Declaration of a Global Pandemic on March 11, 2020 related to COVID-19;
3. President Donald Trump's Declaration of a National Emergency as a Result of COVID-19 on March 13, 2020; and
4. Executive Order 107 issued by New Jersey Governor Philip D. Murphy on March 21, 2020.

Plaintiffs assert that they suffered direct physical loss and damage to property as a result of being unable to use their property for its intended purpose. As a result of the actions identified above, it is asserted that plaintiffs were required to suspend business operations. Plaintiffs allege causes of action for breach of contract and for declaratory judgment pursuant to N.J.S.A. 2A:16-50 et seq.

EXECUTIVE ORDER 103

The Governor, under Executive Order 103, declared a public health emergency, finding that the spread of COVID-19 within New Jersey constituted an imminent public health hazard. The Order authorized and empowered the State Director of Emergency Management, in conjunction with the Commissioner of the Department of Health, to take any emergency measures they deemed necessary.

This Executive Order however did not order the closure of any business or other commercial establishment.

WORLD HEALTH ORGANIZATION MARCH 11, 2020
VIDEO PRESS CONFERENCE

The World Health Organization declared a public health emergency of international concern on January 30, 2020.

[https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov)) (viewed October 12, 2020).

On March 11, 2020, the World Health Organization declared the COVID-19 outbreak as a pandemic.

<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-COVID-19---11-march-2020> (viewed October 12, 2020).

PRESIDENTIAL DECLARATION

On March 13, 2020, the President of the United States declared a national emergency as a result of the COVID-19 outbreak. Federal Register Volume 85, #53, Wednesday, March 28, 2020, Proclamation 9994.

Under the terms of the Declaration, the Secretary of Health and Human Services was authorized to exercise authority under Section 1135 of the Social Security Act to temporarily waive or modify certain requirements of the Medicare, Medicaid and State Children's Health Insurance Programs and the Health Insurance Portability and Accountability Act Privacy Rules through the duration of the public health emergency.

EXECUTIVE ORDER 107

On March 21, 2020, Governor Philip Murphy issued Executive Order 107 instituting emergency measures in accordance with the public health emergency and state of emergency declared in Executive Order 103. That Order required that all New Jersey residents remain at home or at their place of residence unless they fell within one of nine enumerated exceptions set forth in the Order. That Order further prohibited gatherings of individuals at parties, celebrations or social events. The premises of all non-essential retail businesses were ordered

to close to the public. Only essential retail businesses were permitted to remain open.

INSURANCE COVERAGE

Defendant Selective Fire and Casualty Insurance Company issued a policy of insurance to MAC Property Group, LLC & The Cake Boutique, LLC c/o George Benas bearing Policy No. S 1982947 for the period April 28, 2019 to April 28, 2020. This policy was a renewal of a prior policy. The package policy provided both first party coverage as well as liability coverage for the insureds.

Business income/extra expense coverage is provided for a period of twelve months. Business interruption coverage is provided initially under the business owner's coverage form, BP 00 03 (Edition 07/13). This provision provides in part:

f. Business Income

(a) We 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 caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

This language is replaced under the Business Owner's Property Enhancement Endorsement, Form BP 72 46 (Edition 09/18). This endorsement modifies the business interruption coverage as follows:

Business Income

1. Direct Damage

We 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 caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises includes the area within 1,000 feet of the site at which the described premises are located.

Plaintiff also seeks coverage under the civil authority coverage. Policy form BP00 03 (Edition 07/13) provides coverage as follows:

i. Civil Authority

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 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 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 necessary 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 your Civil Authority Coverage for Business Income ends; whichever is later.

The definitions of Business Income and Extra Expense contained in the Business Income and Extra Expense Additional Coverages also apply to this Civil Authority Additional Coverage. The Civil Authority Additional Coverage is not subject to the Limits of Insurance of Section I – Property.

This coverage is modified by the Business Property Enhancement Endorsement, Form BP 72 46 (Edition 09/18) which reads as follows:

3. Civil Authority

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 and necessary Extra Expense caused by action of civil authority that

prohibits access to the described 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 the described premises are within that area but are not more than five miles from the damaged property; 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.

For Business Income, this Additional Coverage will begin immediately after the time of the first action of civil authority that prohibits access to the described premises, unless one of the optional waiting period endorsements is attached to this policy and will apply for a period of up to 30 consecutive days from the date on which such coverage begins.

For Extra Expense, this Additional Coverage will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end:

- a. Four consecutive weeks after the date of that action; or
- b. When your Civil Authority Coverage for Business Income ends; whichever is later.

Plaintiff at oral argument could not state whether it was asserting coverage under the original BP 0003 policy, or the endorsement BP 72 76 which modifies the provisions of the base business owner's policy form. The policy provisions cited in plaintiff's brief are from the BP 00 03 form. Defendant, at oral argument, stated that it was relying upon the modified policy provisions in the business owner's property enhancement endorsement.

For purposes of this decision, the Court finds that the businessowner's property enhancement endorsement, BP 72 46, is the proper language to be considered. That form specifically provides on the first page that it modifies the insurance provided under the businessowner's coverage form, which is BP 0003. The Court further notes that regardless of which provision is considered, the determination on this motion would not change irrespective of which language was found to be applicable under the circumstances presented.

The policy under Form BP 0003 (07/13) provides coverage for the following property:

SECTION I – PROPERTY

A. Coverage

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.

1. Covered Property

Covered Property includes Buildings as described under Paragraph a. below, Business Personal Property as described under Paragraph b. below, or both, depending on whether a Limit Of Insurance is shown in the Declarations for that type of property. Regardless of whether coverage is shown in the Declarations for Buildings, Business Personal Property, or both, there is no

coverage for property described under
Paragraph 2. Property Not Covered.

a. Buildings, meaning the buildings and
structures at the premises described in the
Declarations, including:

(1) Completed additions;

(2) Fixtures, including outdoor fixtures;

(3) Permanently installed:

(a) Machinery; and

(b) Equipment;

(4) Your personal property in apartments,
rooms or common areas furnished by you
as landlord;

(5) Personal property owned by you that is
used to maintain or service the buildings
or structures or the premises, including:...

This form also specifically contains the following relevant exclusion
from coverage for virus or bacteria:

B. Exclusions

1. We will not pay for loss or damage caused
directly or indirectly by any of the following.
Such loss or damage is excluded regardless of
any other cause or event that contributes
concurrently or in any sequence to the loss.
These exclusions apply whether or not the loss
event results in widespread damage or affects
a substantial area.

...j. Virus Or Bacteria

(1) Any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.

(2) However, the exclusion in Paragraph (1) does not apply to loss or damage caused by or resulting from "fungi", wet rot or dry rot. Such loss or damage is addressed in Exclusion i.

(3) With respect to any loss or damage subject to the exclusion in Paragraph (1), such exclusion supersedes any exclusion relating to "pollutants".

ANALYSIS

The test for determining the adequacy of the pleading is whether a cause of action is suggested by the facts. Velantzas v. Colgate-Palmolive Corp., 109 N.J. 189 (1998). The court must search in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is conducted. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 772 (1989). The court in Printing Mart cautioned that a Rule 4:6-2(e) motion to dismiss "should be granted in only the rarest of instances." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 772 (1989); see also Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993). The Rule requires that plaintiffs must receive "every reasonable inference of fact ["and a reviewing court must search the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary."] Printing Mart, supra, 116 N.J. at 746 (quoting DiCristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). Every reasonable inference is therefore accorded to the plaintiff. Banco Popular North America v. Gandi, 184 N.J. 161, 165-166 (2005).

Policies of insurance are generally interpreted in favor of the insured and against the insurer. Salem Group v. Oliver, 128 N.J. 1 (1992). This in part is based upon the public policy of interpreting the insurance policy against the drafter. Werner Industries, Inc. v. First State Insurance Company, 112 N.J. 30 (1988). All ambiguities and uncertainties in the insurance policy are resolved in favor of the insured and against the insurer. Sparks v. St. Paul Insurance Company, 100 N.J. 325 (1985); Killeen Trucking, Inc. v. Great American Surplus Lines Insurance Company, 211 N.J. Super. 712 (App. Div. 1986).

The court must enforce the clear and unambiguous terms of the policy of insurance. Erdo v. Torcon Construction Company, 275 N.J. Super. 117 (App. Div. 1994). The test for determining whether an ambiguity exists is whether the phrasing of the policy of insurance is sufficiently confusing such that the average policy-holder cannot make out the boundaries of coverage. Nunn v. Franklin Mutual Insurance Company, 274 N.J. Super. 543 (App. Div. 1994); Ryan v. State Health Benefits Commission, 260 N.J. Super. 359 (App. Div. 1992). A disagreement between the insurer and the insured concerning interpretation of the language of an insurance policy does not alone create an ambiguity. Aviation Charters, Inc. v. Avemco Insurance Co., 335 N.J. Super. 591 (App. Div. 2000), affirmed as modified 170 N.J. 76 (2000). A policy of insurance is ambiguous only where reasonably intelligent persons would differ regarding its meaning. Id. Where the insurance policy language is clear and unambiguous, the Court need not consider the claimed reasonable expectations of the insured. Katchen v. Government Employer's Ins. Co., 457 N.J. Super. 600, 607 (App. Div. 2019), appeal dismissed 241 N.J. 354 (2020); see Passaic Valley Sewerage Commissioners v. St. Paul Fire & Marine Ins. Co., 206 N.J. 596, 608 (2011).

Words utilized in the insurance policy are interpreted in accordance with their plain and ordinary meaning. Voorhees v. Preferred Mutual Insurance Company, 128 N.J. 165 (1992); Daus v. Marble, 270 N.J. Super. 241 (App. Div. 1994). Where the policy language will support two interpretations, only one of which will support a finding of coverage, the court will choose the interpretation favoring the insured and find that coverage exists. Meeker Sharkey Associates, Inc. v. National Union Fire Insurance Company of Pittsburgh, 208 N.J. Super. 354 (App. Div. 1986).

Defendant first argues that business interruption coverage does not apply because plaintiff does not allege direct physical loss or damage to covered property. They assert this is a pre-condition to any coverage under the insurance policy.

Defendant asserts that the virus exclusion bars coverage for the losses claimed. They further argue that there was no covered loss by order of civil authority, since the complaint does not allege governmental action taken as a result of damage to nearby property as a result of a covered cause of loss.

Plaintiffs argue in response that because they were unable to use their property for its intended purpose, they suffered direct physical loss or damage to property. Plaintiffs further assert they are entitled to coverage for order of civil authority because they were denied access to their property as a result of property damage. This property damage allegedly results from Executive Orders 103 and 107.

Plaintiffs claim that because the virus exclusion is an affirmative defense, it may not be considered by the court on a Rule 4:6-2 motion. Finally, plaintiffs argue that their reasonable expectations were that losses such as that which occurred would be covered.

Both parties cite to a litany of unreported decisions reaching conclusions either in their favor, or finding that motions to dismiss were premature. Both parties rely upon the New Jersey Appellate Division decision in Wakefern Food Corp. v. Liberty Mutual Fire Ins. Co., 406 N.J. Super. 524 (App. Div.), certif. denied 200 N.J. 209 (2009) to support their position.

In the Wakefern Food Corp. case, the claim arose out of a failure in the North American electrical grid which caused a four-day electrical blackout over portions of the Northeastern United States and Eastern Canada. Wakefern suffered losses due to food spoilage during the power outage. The insurance policy issued by Liberty Mutual Fire Insurance Company contained a specific endorsement providing coverage for damage due to the loss of electrical power. The policy required that the interruption of coverage be caused by physical damage from a covered peril to any power house, generating plant, substation,

power switching station, gas compressor station, transformer, telephone exchange, transmission lines, connections or supply pipes which furnish electricity to a covered location.

The parties disputed whether the interruption of electrical power resulted in physical damage to the specified electrical equipment and property. The court there concluded that despite the differing explanations by experts as to why the power went out and why it remained out, ultimately the entire electrical system was incapable of producing electrical power for several days. The court's decision was based upon the specific language contained in the "Services Away Extension" which provided coverage for interruption of electrical service.

The Appellate Division in Arthur Anderson LLP v. Federal Ins. Co., 416 N.J. Super. 334 (App. Div. 2010) rejected a claim for business interruption losses alleged to have resulted from the September 11, 2001 attacks on the World Trade Center and the Pentagon. The insured asserted that it suffered a loss of earnings in excess of \$200,000,000 as a result of these events. The court rejected the claim, finding that the insured could show no loss or damage to its real or personal property described in the policy, and concluded that the insured had no insurable interest in the World Trade Center property or the Pentagon. Based upon this analysis, the court rejected the business interruption claim.

Other decisions reflect the need to examine the specific language in the policy at issue when evaluating coverage. Where an insured's automobile dealership was inaccessible for a week due to a snow storm, the court concluded that even though the property itself sustained some roof damage which did not require a suspension of business, the language of the policy precluded coverage where it was the storm and road conditions which caused the closure of the business. Harry's Cadillac-Pontiac-GMC Truck Co., v. Motors Insurance Corp., 126 N.C. App. 698, 699-702; 486 S.E.2d 249, 251-252 (1997). A Federal District Court concluded that no covered loss of business income occurred as a result of a power outage without direct physical loss to insured property caused by a covered peril, but did find covered loss due to direct physical damage to the computer system of the insured. Southeast Mental Health Center, Inc. v. Pacific Ins. Co., 439 F.Supp. 2d 831, 836-839 (W.D. Tenn 2006). The Oregon Court in Protection Mutual Ins. Co.

v. Mitsubishi Silicon America Corp., 164 Ore.App. 385, 992 P.2d 479 (1999), review denied 330 Ore. 331, 6 P.3d 1100 (2000) found no business interruption coverage because flood was not a covered cause of loss for business interruption.

Neither party cites to any reported New Jersey case specifically addressing a virus exclusion. Other courts have upheld exclusions barring coverage for losses caused by hazardous substances. See Certain Underwriters at Lloyd's of London v. Creagh, 563 F.Appx. 209, 211 (3d Cir. 2014) (finding loss allegedly caused by bacteria excluded); Sentinel Ins. Co. v. Monarch Med Spa, Inc., 105 F.Supp. 3d 464 (E.D.Pa. 215) (enforcing exclusion for loss resulting from presence of or exposure to fungi, bacteria and viruses).

The virus exclusion in the Selective policy contains what is commonly referred to as an anti-concurrent causation provision. This is evidenced in part by the policy language preceding the virus or bacteria exclusion which excludes coverage "regardless of any other cause or event that contributes concurrently or in any sequence to the loss".

New Jersey Courts have enforced anti-concurrent causation provisions in first party property insurance cases where the policy contains clear and unambiguous language. Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 431 (App. Div. 2004) (finding that anti-sequential concurrent causation clause in the earth movement exclusion evidenced a clear intention to bar coverage for earth movement regardless of any other contributing cause). The Appellate Division in a case involving third party coverage applied the same doctrine to find coverage excluded for a claim involving the shooting of a patron at a nightclub where the policy excluded coverage for injury or damage arising out of or caused in whole or in part by an assault and/or battery. Stafford v. T.H.E. Ins. Co., 309 N.J. Super. 97, 104-105 (App. Div. 1998). That policy further excluded coverage where the underlying operative facts alleged constituted an assault or battery, regardless of the theory of liability asserted. Id.

Plaintiff argues in its brief that it is improper for defendants to rely upon an exclusion from coverage on a Rule 4:6-2 motion. They cite no

caselaw in support of that assertion. At oral argument plaintiff refused to acknowledge that COVID-19 is a virus¹.

This argument ignores the fact that it is the plaintiff's Complaint itself which introduces a loss caused by virus as part of the allegations of the complaint. Paragraph 16 of plaintiff's Complaint asserts that on March 9, 2020, Governor Philip Murphy signed Executive Order 103 declaring both a public health hazard and state of emergency in New Jersey. Executive Order 103 starts with the following introductory paragraph:

WHEREAS, Coronavirus disease 2019 ("COVID-19") is a contagious, and at times fatal, respiratory disease caused by the SARS-CoV-2 virus....

Paragraph 18 of the Complaint asserts that the President on March 13, 2020 declared a national emergency as a result of COVID-19. That declaration by the President reads in part as follows:

In December 2019, a novel (new) coronavirus known as SARS-CoV-2 ("the virus") was first detected in Wuhan, Hubei Province, People's Republic of China, causing outbreaks of the coronavirus disease COVID-19 that has now spread globally.

Paragraph 19 of the Complaint discusses the March 21, 2020 Executive Order 107 issued by Governor Murphy requesting residents to remain at home. The language of the order reflects that the restrictions are being imposed to prevent or reduce the spread of COVID-19, a highly contagious virus.

The Complaint itself places the involvement of a virus at issue. Governor Murphy's Executive Orders 103 and 107, the World Health Organization Declaration of a Global Pandemic and the President's Declaration of a National Emergency all reference the coronavirus

¹ This Court could take judicial notice pursuant to New Jersey Rule of Evidence 201(b) that COVID-19 is a virus. That however is unnecessary since the governmental orders and declarations referenced in the complaint specifically identify COVID-19 as a virus, and because the exclusion is broader than suggested by plaintiff. The policy excludes losses caused by "any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease".

specifically identified as COVID-19. Plaintiff's Complaint in paragraph 21 alleges that as a result of these governmental actions, it was forced to suspend operations.

Plaintiff cannot ignore that its Complaint identifies the coronavirus as the cause of the government actions requiring the suspension of business operations. The allegations of the Complaint itself essentially are that a virus, specifically COVID-19, was the cause of the governmental action. Since the virus is alleged to be the cause of the governmental action, and the governmental action is asserted to be the cause of the loss, plaintiff cannot avoid the clear and unmistakable conclusion that the coronavirus was the cause of the alleged damage or loss. Under the anti-concurrent causation provision of the insurance policy, "such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

It therefore does not matter whether the closure of plaintiff's business as a result of governmental orders to prevent the spread of the coronavirus constitutes direct physical damage to covered property, nor whether civil authority coverage can be triggered, since the reason for the exercise of that civil authority was the virus.

Ultimately the decision here is specific to the policy language and facts at issue. Plaintiff points to no direct physical loss or damage to covered property. There is no direct physical loss or damage to property which resulted in the order of civil authority. The direct physical damage to the electrical grid present in Wakefern Food Corp. is absent in this case.

Plaintiff points to no language in the insurance policy or declarations which created any reasonable expectation of coverage for the claimed loss. Reasonable expectations must be based upon the insurance contract itself, and not on an insured's subjective belief about what insurance should cover. Because the court finds the policy language, the virus exclusion, to be clear and unambiguous, any expectation of coverage by the insureds is not reasonable.

CONCLUSION

For these reasons, the Court concludes that defendant is entitled to dismissal of plaintiff's claims with prejudice. Amendment of the Complaint will not change the conclusion that plaintiff's claims based upon actions taken to slow or stop the spread of the coronavirus fall within the virus or bacteria exclusion. For that reason, the Court will not grant leave to amend, and the dismissal will be with prejudice.

DAY PITNEY LLP

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ATTORNEYS FOR Defendant

Selective Fire and Casualty Insurance Company

ORDER MODIFIED BY COURT

MAC PROPERTY GROUP LLC & : SUPERIOR COURT OF NEW JERSEY
 THE CAKE BOUTIQUE LLC, : LAW DIVISION: CAMDEN COUNTY
 : DOCKET NO. L-002629-20
 Plaintiff,

v.

Civil Action

SELECTIVE FIRE AND :
 CASUALTY INSURANCE : **ORDER TO DISMISS PLAINTIFF'S**
 COMPANY, JOHN DOES (1-10) : **COMPLAINT AGAINST DEFENDANT**
 and ABC COMPANIES (1-10), : **SELECTIVE FIRE AND CASUALTY**
 : **INSURANCE COMPANY**

Defendant(s).

THIS MATTER having been opened to the Court by Day Pitney LLP, attorneys Defendant Selective Fire and Casualty Insurance Company ("Selective"), upon notice to Mattleman, Weinroth & Miller, P.C., attorneys for Plaintiff Mac Property Group LLC & The Cake Boutique LLC ("Plaintiff"), for an order dismissing the Complaint pursuant to R. 4:6-2(e) for failure to state a claim; and the Court having considered the moving papers and the papers filed in opposition, and having heard the argument of counsel on

October 30, 2020, and for the reasons set forth in the written opinion of the Court;

IT IS on this 5th day of November, 2020, **ORDERED** as follows:

1. Plaintiff's Complaint be and the same is hereby dismissed, with prejudice.

2. A true copy of this Order shall be served upon all counsel of record via regular mail within 7 days of receipt of this order.


HON. STEVEN J. POLANSKY, P.J.Cv.

[] Unopposed
[X] Opposed

EXHIBIT 21

2020 WL 6545893

Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

BRIAN HANDEL D.M.D., P.C.

v.

ALLSTATE INSURANCE CO.

CIVIL ACTION NO. 20-3198

|
11/06/2020

MEMORANDUM

Bartle, J. November 6th, 2020

*1 Plaintiff Brian Handel D.M.D., P.C. has sued defendant Allstate Insurance Co. in this diversity action for a declaratory judgment and for breach of contract. These counts arise from defendant's denial of coverage for claims of plaintiff for business income loss and extra expenses due to the interruption of plaintiff's dental practice during the COVID-19 pandemic.

Before the court is the motion of defendant to dismiss plaintiff's first amended complaint for failure to state a claim under [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#).

I.

When considering a motion to dismiss for failure to state a claim under [Rule 12\(b\)\(6\)](#), the court must accept as true all well-pleaded factual allegations in the complaint and draw all reasonable inferences in the light most favorable to the plaintiff. See [Phillips v. Cty. of Allegheny](#), 515 F.3d 224, 233 (3d Cir. 2008); [Umland v. PLANCO Fin. Servs., Inc.](#), 542 F.3d 59, 64 (3d Cir. 2008). We must then determine whether the pleading at issue "contain[s] 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 Atlantic Corp. v. Twombly](#), 550 U.S. 544, 570 (2007)).

On a motion to dismiss under [Rule 12\(b\)\(6\)](#), the court may consider "allegations contained in the complaint, exhibits attached to the complaint and matters of public record."

[Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.](#), 998 F.2d 1192, 1196 (3d Cir. 1993) (citing 5A Charles Allen Wright & Arthur R. Miller, [Federal Practice and Procedure § 1357](#) (2d ed. 1990)). The court may also consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case." [Buck v. Hampton Twp. Sch. Dist.](#), 452 F.3d 256, 260 (3d Cir. 2006) (citing 5B Charles Allen Wright & Arthur R. Miller, [Federal Practice and Procedure § 1357](#) (3d ed. 2004)).

II.

For present purposes, the court accepts as true the following well-pleaded facts set forth in the amended complaint. Plaintiff, a professional corporation, is a dental practice in Wayne, Pennsylvania. Plaintiff has an "all-risk" insurance policy with defendant, dated September 9, 2019, for non-excluded business losses.

On March 19, 2020, the Governor of Pennsylvania prohibited business operations that are not life sustaining so as to prevent the spread of COVID-19, a highly contagious respiratory virus that has infected more than 8 million people in the United States and killed more than 225,000. According to the complaint, COVID-19 is known to be transmitted by aerosols which can linger in the air for up to three hours and on surfaces for up to three days.

On March 23, 2020, the Governor issued a stay-at-home order for residents of various counties in Pennsylvania, including Chester County, where plaintiff is located. This order required residents in seven counties to stay at home "except as needed to access, support, or provide life sustaining business, emergency, or government services." On April 1, 2020, the Governor extended the stay-at-home order to all counties in the Commonwealth.

*2 Pursuant to the Governor's orders and a March 26, 2020 guidance from the state Department of Health, plaintiff was forced to close its office for all non-emergency dental services. Plaintiff subsequently made a claim for business income loss and/or extra expense coverage with defendant under the terms of the policy.

The policy at issue provides that defendant will pay for "direct physical loss of or damage to Covered Property...caused by or resulting from any Covered Cause of Loss." A Covered Cause

of Loss is defined as “[d]irect physical loss unless the loss is excluded or limited under Section I – Property.”

This coverage includes business income loss sustained “due to the necessary suspension of your ‘operations’ during the ‘period of restoration’ ” if the suspension was “caused by direct physical loss of or damage to property at the described premises” and was caused by a Covered Cause of Loss. “Operations” refers to “business activities occurring at the described premises.” The “period of restoration” begins either immediately after the direct physical loss or damage or seventy-two hours after the loss or damage and ends when the property is repaired or replaced or when business resumes at a new location.

The policy also covers “necessary Extra Expense” incurred during the “‘period of restoration’ that [the insured] would not have incurred if there had been no direct physical loss or damage to property at the described premises” if the loss or damage are “caused by or result from a Covered Cause of Loss.”

The policy includes a provision to cover the loss of business income and necessary extra expenses when a Covered Cause of Loss damages property other than the described premises and actions of a civil authority prohibit access to the described premises. This “Civil Authority” provision requires that “[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage,” and “[t]he 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.”

Encompassed within the property coverage section of the policy are exclusions from coverage. One such exclusion is for “loss or damage caused directly or indirectly” by “[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”

On May 28, 2020, defendant denied plaintiff’s claim for coverage because it claimed that “there is no damage to the premises by a covered cause of loss that caused your business to lose income.”

III.

The initial burden in insurance coverage disputes is on the insured to show that the claim falls within the policy, but if the insured is able to make this showing the insurer has the burden to demonstrate that there is an applicable policy exclusion which denies coverage. [State Farm Fire & Cas. Co. v. Estate of Mehlman](#), 589 F.3d 105, 111 (3d Cir. 2009). If the language is ambiguous in that it is open to more than one interpretation, the court must construe the language in favor of the insured. [Med. Protective Co. v. Watkins](#), 198 F.3d 100, 103 (3d Cir. 1999). A contract provision is not ambiguous simply because the parties do not agree on the construction of the provision. [Weisman v. Green Tree Ins. Co.](#), 670 A.2d 160, 161 (Pa. Super. 1996).

*3 Plaintiff avers in its amended complaint that COVID-19: caused “direct physical damage, as well as indirect non-physical damage;” rendered the property “unsafe, uninhabitable, or otherwise unfit for its intended use;” and restricted the use of the property resulting in “direct physical loss.” Plaintiff also claims that the “Covid-19 Effect,” or the public’s social anxiety about public health and the safety of indoor spaces, “is the functional equivalent of damage of a material nature or an alteration in physical composition.”

Defendant counters that plaintiff fails to plead any facts describing any property alteration or damage that would constitute physical loss or damage and that the mere risk of contamination is not enough to constitute property damage. Defendant also argues that at most the property would need sanitizing.

Our Court of Appeals has ruled that “[i]n ordinary parlance and widely accepted definition, physical damage to property means ‘a distinct, demonstrable, and physical alteration’ of its structure,” such as from fire, water, or smoke, that “may demonstrably alter the components of a building and trigger coverage.” [Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.](#), 311 F.3d 226, 235 (3d Cir. 2002). The burden is on the plaintiff to establish that its structure was physically damaged. [Id.](#) at 232.

Allegations of physical damage to a building from “sources unnoticeable to the naked eye must meet a higher threshold.” [Id.](#) at 235. In [Port Authority of New York and New Jersey v. Affiliated FM Insurance Co.](#), the Court determined that asbestos causes physical damage if it is present in such large quantities that it makes the structure “uninhabitable and unusable,” but if the building continues to function and remain usable then the building owner has not suffered a

loss. [Id.](#) at 236. The court concluded that the “mere presence of asbestos, or the general threat of future damage from that presence, lacks the distinct and demonstrable character necessary for first-party insurance coverage.” [Id.](#)

In a subsequent insurance coverage case involving contamination of a homeowner's well from e-coli bacteria, the Court of Appeals found its reasoning in [Port Authority](#) to be applicable under Pennsylvania law and “instructive in a case where sources unnoticeable to the naked eye have allegedly reduced the use of the property to a substantial degree.” [Motorists Mut. Ins. Co. v. Hardinger](#), 131 F. App'x 823, 826 (3d Cir. 2005). In those circumstances “direct physical loss of or damage to” the property means that the functionality of the property “was nearly eliminated or destroyed” or the “property was made useless or uninhabitable.” [Id.](#) at 826-27. This definition applies equally to the situation here involving the COVID-19 virus.

Plaintiff alleges generally in the amended complaint that it was “forced to suspend or reduce business operations following an order from Pennsylvania Governor Wolf.” (emphasis added). In its brief in opposition to defendant's motion to dismiss, plaintiff clarifies that the effect of the orders of the Governor and Department of Health only “denied access to Plaintiff's premises for all non-emergent procedures” and that its business “has suffered reduced operations and loss of income.” In fact, no order by either the Governor or the Department of Health ever required dental offices such as plaintiff to close completely. Instead, plaintiff was able to remain open for emergency procedures.

Thus, plaintiff's property remained inhabitable and usable, albeit in limited ways. Plaintiff has failed to plead plausible facts that COVID-19 caused damage or loss in any physical way to the property so as to trigger coverage as set forth in [Hardinger](#). See 131 F. App'x at 826-27.

IV.

*4 Plaintiff's claim for coverage pursuant to the civil authority provision of the policy also fails. That provision obliges defendant to cover the loss of business income and necessary extra expenses when a Covered Cause of Loss damages property in the immediate area and a civil authority prohibits access to the covered property. The policy requires that “[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a

result of the damage” and that “[t]he 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.”

As previously stated, to constitute a Covered Cause of Loss there must be direct physical loss. In addition, the Governor's orders limit, rather than prohibit, access to the property. Absent facts of direct physical loss or prohibited access to the property, plaintiff cannot sustain a claim for coverage under the civil authority provision of this policy.

V.

Even if plaintiff had pleaded sufficient facts for physical damage or loss as a result of COVID-19, plaintiff's claims are still excluded by the virus exclusion provision. Courts have routinely granted motions to dismiss when an exclusion provision in an insurance policy applies to the action. See [Brewer v. U.S. Fire Ins. Co.](#), 446 F. App'x 506, 510 (3d Cir. 2011); [Wilson v. Hartford Cas. Co.](#), Civil Action No. 20-3384, 2020 WL 5820800, at *7 (E.D. Pa. Sept. 30, 2020).

The policy at issue unambiguously states that defendant will not cover loss or damage if caused, either directly or indirectly, by “[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” There is no other way to characterize COVID-19 than as a virus which causes physical illness and distress. Therefore, the virus exclusion unambiguously bars coverage for plaintiff's claims due to COVID-19.

Plaintiff argues that the exclusion only states that defendant will not pay for “loss or damage” but does not say anything about paying for expenses and that plaintiff can still recover for extra expenses. In order to recover extra expenses, however, plaintiff would still need to plead sufficient facts of direct physical loss or damage caused by a Covered Cause of Loss. As stated above, plaintiff has not done so.

VI.

Plaintiff asserts that the doctrine of regulatory estoppel prevents defendant from raising the virus exclusion to deny coverage. Regulatory estoppel “prohibits parties from switching legal positions to suit their own ends.” [Sunbeam Corp. v. Liberty Mut. Ins. Co.](#), 781 A.2d 1189, 1192 (Pa.

2001). If an insurer represents to a regulatory agency that new language in a policy will not result in decreased coverage, the insurer cannot assert the opposite position when insureds raise the issue in litigation. [Id.](#) at 1192-93.

To support a claim for regulatory estoppel, a plaintiff must plead two elements: “(1) A party made a statement to a regulatory agency; and (2) Afterward, the party took a position opposite to the one presented to the regulatory agency.” [Simon Wrecking Co. v. AIU Ins. Co.](#), 541 F. Supp. 2d 714, 717 (E.D. Pa. 2008). The representations the insurer made to the regulatory agency must be contrary to the insurer's position in the current litigation for regulatory estoppel to apply. [Hussey Copper, LTD v. Arrowood Indem. Co.](#), 391 F. App'x 207, 211 (3d Cir. 2010).

Plaintiff satisfies the first element of regulatory estoppel since it avers that the Insurance Services Office, Inc. (“ISO”) and the American Association of Insurance Services (“AAIS”) presented to state regulatory agencies in 2006 on behalf of multiple insurers, including defendant, to include a virus exclusion in insurance policies. However, plaintiff fails to

plead any facts to satisfy the second element that defendant currently takes a position contrary to the statements made before the regulatory agencies on behalf of the insurers.

*5 Plaintiff cites to the statements of the ISO and the AAIS in which both organizations made clear that property policies have not been and were not intended to be a source of recovery for damage from disease-causing agents such as a virus. The statement of AAIS to which plaintiff cites explicitly states that “[t]his endorsement clarifies that loss, cost, or expense caused by, resulting from, or relating to any virus...is excluded.”

Defendant takes the same position here as the ISO and AAIS did by arguing that the virus exclusion eliminates coverage for any damage or loss as a result of the causes enumerated therein. Since defendant does not take a contradictory position to the one made to regulatory agencies, the doctrine of regulatory estoppel does not apply to this action.

All Citations

Slip Copy, 2020 WL 6545893

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EXHIBIT 22

2020 WL 6562332

Only the Westlaw citation is currently available.
United States District Court, N.D. California.

WATER SPORTS KAUAI, INC., Plaintiff,

v.

**FIREMAN'S FUND INSURANCE
COMPANY**, et al., Defendants.

Case No. 20-cv-03750-WHO

Signed 11/09/2020

Attorneys and Law Firms

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[John Paul Phillips](#), Paul Hastings LLP, San Francisco, CA, [Gregory George Sperla](#), DLA Piper LLP, Sacramento, CA, [Robert M. Hoffman](#), DLA Piper LLP, Dallas, TX, for Defendants.

ORDER GRANTING THE MOTION TO DISMISS

Re: Dkt. No. 39

William H. Orrick, United States District Judge

*1 Plaintiff Water Sports Kauai, Inc., a Hawaii corporation, dba Sand People ("Sand People"), shut down its businesses (twelve stores on three islands that sell gifts, artwork, décor, jewelry, glassware, coastal furnishing, apparel, soaps, lotions, candles, and books) six months ago due both to the spread of the coronavirus and to directives from Hawaii's Governor limiting the operation of non-essential businesses, including Sand People's stores. Amended Complaint ("AC"), Dkt. No. 38, ¶ 56. It submitted a claim for coverage under an insurance policy (Policy) issued by defendants Fireman's Fund Insurance Company, National Surety Corporation, and Allianz Global Risks US Insurance Co. (collectively, "defendants") under the "Lost Business Income" and "Civil

Authority" provisions. AC ¶ 4. That claim was denied, and Sand People filed suit.

I agree with the vast majority of cases that have addressed materially similar policy provisions and facts. Sand People has failed to plausibly plead Business Income or Civil Authority coverage. Its claims are dismissed with limited leave to amend.

BACKGROUND

The Policy provides that the defendants 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." AC, Ex. 9 at 30. In relevant part, the Policy states:

3. Covered Causes of Loss

RISKS OF DIRECT PHYSICAL LOSS unless the loss is [excluded].

Id. at 31.

g. Business Income

We 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, including personal property in the open (or in a vehicle) within 100 feet, caused by or resulting from any Covered Causes of Loss.

Id. at 33.

h. Extra Expense

We will pay necessary Extra Expense 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 at the described premises, including personal property in the open (or in a vehicle) within 100 feet of the described premises, caused by or resulting from a Covered Cause of Loss

Id. at 34.

i. Civil Authority

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits 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 any Covered Cause of Loss. This coverage will apply for a period of up to two consecutive weeks from the date of that action.

Id. at 35.

15. Period of Restoration means the period of time that:

- a. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and
- b. Ends on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality.

*2 *Id.* at 63.

Based on the spread of the coronavirus, directives from Hawaii's Governor limiting the operation of non-essential businesses, including Sand People's stores, and government closure orders issued in 49 other states/jurisdictions as a result of the coronavirus pandemic, and defendants' denial of requests for coronavirus coverage under similarly worded policies, Sand People asserts the following claims on behalf of a class and a subclass: (1) Breach of Contract; (2) Breach of Covenant of Good Faith and Fair Dealing; (3) Unfair or Deceptive Business Practices; and (4) Declaratory Relief.

The class and subclass are defined as:

Class

All persons or entities in the United States (including its territories and the District of Columbia) who own an interest in a business that was insured by Defendants in March 2020 and made (or attempted to make) a claim with Defendants arising from lost business income (or other losses related to business interruption) at that business related to COVID-19, and did not receive coverage for that claim.

Hawaii Subclass

All persons or entities in Hawaii who own an interest in a business that was insured by Defendants in March 2020 and made (or attempted to make) a claim with

Defendants arising from lost business income (or other losses related to business interruption) at that business related to COVID-19, and did not receive coverage for that claim.

AC ¶ 123.

LEGAL STANDARD

In Hawaii, “ ‘because insurance policies are contracts of adhesion and are premised on standard forms,’ ” the contracts must be “construed liberally” in favor of the insured and based on the reasonable expectations of a layperson, with any ambiguities being resolved against the insurer. *Hart v. Ticor Title Ins. Co.*, 126 Hawai'i 448, 456 (2012) (quoting *Dairy Road Partners v. Island Ins. Co., Ltd.*, 92 Hawai'i 398, 411-414 (2000)); see also *Great Divide Ins. Co. v. AOA Mahuna Kai Estates*, 492 F. Supp. 2d 1216, 1226–27 (D. Haw. 2007) (“A policy provision is not ambiguous just because the insurer and insured disagree over the interpretation of the terms of a policy.... Ambiguity exists only when the policy ‘taken as a whole, is reasonably subject to differing interpretation.’ ”) (quoting *Oahu Transit Servs., Inc. v. Northfield Ins. Co.*, 107 Hawai'i 231, 236 n. 7 (Haw. 2005)).

DISCUSSION

Defendants move to dismiss Sand People's claims because the mere threat of coronavirus is insufficient to show a “direct physical loss of or damage to” its covered property and the government closures orders are likewise insufficient to show the same. Defendants note that district courts around the country – including ones in this District and throughout the Ninth Circuit – have rejected identical claims under similar policies and that the only two federal cases Sand People identifies in support of their claims – both from the Western District of Missouri – are distinguishable or wrongly decided. Sand People responds that this case is different from the bulk of district court cases relied on by defendants because (i) it specifically alleges that it had to close its properties due directly to the coronavirus' rapid spread and imminent threat to its businesses, and (ii) the vast majority of district court cases dismissing for lack of coverage also had virus exclusions limitations in their policies.

*3 As described below, I will follow the overwhelming majority of courts that have determined that the mere threat of coronavirus cannot cause a “direct physical loss of or damage

to” covered property as required under the Policy. That resolves the issue of coverage under the Business Income and Civil Authority provisions as a result of both the spread of coronavirus and the government closure orders.

I. LOST BUSINESS INCOME

Sand People contends that “lost business income” coverage was triggered by both the “physical” spread of the coronavirus and, independently, the government closure orders. I will address each argument in turn.

A. Spread of Coronavirus

Sand People asserts that it adequately alleged closure because of the “imminent” threat of coronavirus at their properties. AC ¶ 69 (“The Coronavirus and its pernicious spread created inherently dangerous conditions where the stores and property within them were at immediate and imminent risk of exposure to the Coronavirus. This caused them to suspend operations and lose access to the stores, which rendered them untenable.”); ¶ 76 (“Because, inter alia, the spread of Coronavirus rendered Sand People's facilities no longer usable for their intended purpose(s), and in many cases impossible to operate safely, it directly caused them to suffer physical damage and loss.”). It claims that the explosive spread of coronavirus and the imminence of the threat it presented is sufficient to show a “direct physical loss” because the closure is alleged to have resulted from a physical event “the spread of the virus” and potential exposure to a disease.

Sand People relies on a series of cases where courts found coverage because asbestos, arsenic, and e-coli contamination were present on covered property. For example, in *Port Auth. of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002), the Third Circuit interpreted a “physical loss or damage” policy with respect to asbestos and concluded, “[w]hen the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner. However, if asbestos is present in components of a structure, but is not in such form or quantity as to make the building unusable, the owner has not suffered a loss.” *Id.* at 236. The court explained, “‘physical loss or damage’ occurs only if an actual release of asbestos fibers from asbestos containing materials has resulted in contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable, or if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause

such loss of utility. The mere presence of asbestos, or the general threat of future damage from that presence, lacks the distinct and demonstrable character necessary for first-party insurance coverage.” *Id.*

That case confirms that there must be sufficient evidence of the *presence* of the contaminant at the property plus an imminent threat from it. *Id.* at 236 (“We thus find ourselves in agreement with the District Court's ruling that plaintiffs’ inability ‘to produce evidence concerning the manifestation of an imminent threat of asbestos contamination’ forecloses the existence of a viable claim. Although the plaintiffs demonstrated that many of its structures used asbestos-containing substances, those buildings had continuous and uninterrupted usage for many years. The mere presence of asbestos or the general threat of its future release is not enough to survive summary judgment or to show a physical loss or damage to trigger coverage under a first-party ‘all risks’ policy.”); see also *In Assn. of Apt. Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1069 (D. Haw. 2013) (“direct physical loss or damage” to property satisfied where plaintiff demonstrates “that an event had a direct impact and proximately caused a loss related to the physical matter of the Property” and arsenic seeping into the “concrete slab, carpet, and interior objects are physical matter within the ordinary use of those words.”); *Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 826–27 (3d Cir. 2005) (unpublished) (“we believe there is a genuine issue of fact whether the functionality of the Hardingers’ property was nearly eliminated or destroyed, or whether their property was made useless or uninhabitable” by presence of e-coli in well). For that reason, it does not help Sand People.

*4 Defendants do not dispute that actual presence of a contaminant at a covered property might trigger coverage. They argue that what is alleged here – the “mere threat” of exposure – is categorically insufficient to trigger coverage as a direct physical loss of or damage to Sand People's property. They contend that there must be an incident of a direct physical impact to covered property to trigger coverage and a mere threat does not suffice. That distinction is supported by *Port Authority*, 311 F.3d at 236, where even though asbestos was in the property – and thus there was some threat of exposure in the future – plaintiff's claims failed because there was insufficient “evidence concerning the *manifestation* of an imminent threat of asbestos contamination.” *Id.* at 236 (emphasis added). Sand People pleads that coronavirus was rapidly spreading and feasibly in Hawaii but fails to allege

both its *presence* in any of its properties and a *manifestation* of imminent threat of contamination in any of its properties.

That manifestation is significant because the Policy requires a “direct physical loss of or damage to” property that has not been alleged. *See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 20-CV-03213-JST, 2020 WL 5525171, at *5 (N.D. Cal. Sept. 14, 2020) (dismissing claim for failure to allege COVID-19 or any other physical impetus caused the loss of functionality “where plaintiff “does not allege that ‘Covid-19 entered the [property] through any employee or customer” and did not allege that store was closed “because its employees became sick or coronavirus was discovered on the property”). For this reason alone, Sand People’s reliance on *Studio 417, Inc. v. Cincinnati Ins. Co.*, 20-CV-03127-SRB, 2020 WL 4692385, at *2 (W.D. Mo. Aug. 12, 2020) and *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 20-CV-00383-SRB, 2020 WL 5637963, at *6 (W.D. Mo. Sept. 21, 2020), is unhelpful. Unlike in those cases – where a hair salon, restaurant, and dental practice alleged the *actual* presence of the coronavirus in their establishments – Sand People only pleads an “imminent threat.” *See also Mudpie, Inc.*, 2020 WL 5525171 *6 (distinguishing *Studio 417* because “Mudpie makes no similar allegation here. It does not allege, for example, that the presence of the COVID-19 virus in its store created a physical loss.”). There are no facts plausibly alleging an actual exposure at one or more Sand People stores, much less that an actual physical exposure caused them to close a particular store or set of stores.¹

Instead of alleging actual physical exposure, Sand People broadly claims that closing the stores to avoid imminent exposure is “indistinguishable” from actual exposure in the context of an insurance contract because it was under a duty to mitigate losses. *Oppo*. at 5. But Sand People cites no cases finding that similar coverage provisions were triggered without some physical and direct occurrence on the property in the first instance. *See, e.g., Hampton Foods, Inc. v. Aetna Cas. and Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (plaintiff suffered “direct, concrete and immediate loss due to extraneous physical damage to the building,” and because of “the unquestioned danger of reentering the building” at risk of collapse, plaintiff was entitled to attempt to mitigate its damages by “removing and salvaging as much property as it could before the building’s destruction.”); *see also Armstrong World Industries, Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 92 (Cal. App. 1st Dist. 1996) (“remedial costs incurred in cleaning up contaminated waste sites are covered by CGL policies, but ‘prophylactic’ costs-costs incurred in advance of

any release of hazardous waste, to prevent threatened future pollution-are not incurred because of property damage.”).²

*5 Sand People also contends that the significant “gravity of the risk” from coronavirus, as confirmed by the March 2020 government closure orders and which they intend to prove through discovery and expert testimony, “will demonstrate how, in the midst of a global pandemic, Plaintiff’s traveler-focused Stores in touristic centers of Hawai’i would have been exposed to Coronavirus had they not closed down.” *Oppo*. 8-9. But it cites no case finding coverage based only on a “would have been exposed” allegation because of a contaminant’s rapid spread.

Finally, Sand People asserts that coverage is independently required because of “exposure” to coronavirus on other properties in Hawaii that were in the “same tourism and supply chains” as its stores and that third party exposure establishes coverage. *Oppo*. at 9.³ However, no specific “income support property” in Sand People’s supply chain is identified in the Amended Complaint. Even if one was, Sand People would still need to allege facts showing that the identified income support property itself suffered a direct physical loss, which then caused Sand People a specific loss.

B. Government Closure Orders

Sand People also contends that the government closure orders independently triggered coverage because (i) it suffered a “loss of” its property and “material alteration” of the property is not required and (ii) deprivation of the functionality of the property triggers coverage. It argues that “loss” broadly includes a deprivation, dispossession, and impairment of property, similar to what it suffered here due to the government orders shutting down non-essential businesses like Sand People’s. It asserts that there is no need, under the “loss” prong, to show a “material alteration” of its property (that might otherwise be required under the “damage to” prong).

Sand People relies on *Total Intermodal Services Inc. v. Travelers Prop. Cas. Co. of Am.*, CV 17-04908 AB (KSX), 2018 WL 3829767 (C.D. Cal. July 11, 2018). There the court recognized that the separate “loss of” property clause “contemplates that the property is misplaced and unrecoverable, without regard to whether it was damaged,” but could include the permanent dispossession of something; there the loss of a shipping container. *Id.* at *3-4. The *Total Intermodal* court distinguished “loss of” from “loss to”

property, where “loss to” suggests an external force acting on property, and “loss of” connotes simple dispossession or similar harm not “localized” on a segment of property. *Id.* at 3-4; *see also* Oppo. at 10-11.

In the *Mudpie* case, the Hon. Jon S. Tigar of this District accepted the distinction drawn by *Total Intermodal* and rejected the alleged requirement – suggested by defendants here – that there be some physical alteration to the covered property. *Mudpie, Inc.*, 2020 WL 5525171 at *4. However, Judge Tigar concluded *Total Intermodal* did not help plaintiffs because while

Mudpie has been dispossessed of its storefront, it will not be a “permanent dispossession” as with the lost cargo in *Total Intermodal*. *See* 2018 WL 3829767, at *4. When the Stay at Home orders are lifted, Mudpie can regain possession of its storefront. Mudpie's physical storefront has not been “misplaced” or become “unrecoverable,” and neither has its inventory.

*6 2020 WL 5525171 at *4.

The same is true here. As Judge Tigar noted, applying the broader “loss of” coverage, the surrounding provisions within the policy at issue there “suggest that Mudpie's inability to occupy its storefront does not fall within the Business Income and Extra Expense coverage of this policy” given the “period of restoration” definition limits the period of coverage to when the property is “repaired, rebuilt or replaced with reasonable speed and similar quality.” *Id.* He stated that there was “nothing to fix, replace, or even disinfect for Mudpie to regain occupancy of its property” because its loss was “caused by state closure orders and thus will last for however long those restrictions remain.” *Id.* The period of restoration provisions in this case are materially identical and likewise support a conclusion that there has been no covered disposition or “loss of” property because Sand People identifies nothing it needs to fix or replace at any of its properties.

Sand People takes issue with those two conclusions, arguing that a covered “disposition” does not have to be “permanent” and cites to multiple cases where “removeable substances” like asbestos and mold have been found to trigger a “direct physical loss.” But, as noted above, those cases do not help Sand People because it has not alleged any *direct physical* anything that happened to or at its specific properties. Moreover, it has not been dispossessed or deprived of any specific property; its inventory and equipment remain.

Instead, it complains of loss of *use*, meaning its inability to operate its stores.

Numerous courts have found that materially identical allegations do not trigger coverage under similarly worded policies as a result of government closure orders. The cases consistently conclude that there needs to be some *physical* tangible injury (like a total deprivation of property) to support “loss of property” or a *physical* alteration or active presence of a contaminant to support “damage to” property. *See, e.g., Mudpie, Inc.*, 2020 WL 5525171, at *4 (“Although Mudpie has been dispossessed of its storefront, it will not be a “permanent dispossession” as with the lost cargo in *Total Intermodal*.... When the Stay at Home orders are lifted, Mudpie can regain possession of its storefront.”); *Real Hospitality, LLC d/b/a/ Ed's Burger Joint v. Travelers Casualty Insurance Company of America*, No. 2:20-cv-00087, slip op. (S.W.D. Ms. November 4, 2020) (interpreting “loss of” prong in “direct physical loss of or damage to” to mean total dispossession of property); *10E, LLC v. Travelers Indem. Co. of Connecticut*, 2:20-CV-04418-SVW-AS, 2020 WL 5359653, at *4 (C.D. Cal. Sept. 2, 2020) (“Under California law, losses from inability to use property do not amount to ‘direct physical loss of or damage to property’ within the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a ‘distinct, demonstrable, physical alteration.’ [] ‘Detrimental economic impact’ does not suffice.” (internal citations omitted)); *see also Travelers Cas. Ins. Co. of Am. v. Geragos and Geragos*, CV 20-3619 PSG (EX), 2020 WL 6156584, at *4 (C.D. Cal. Oct. 19, 2020) (dismissing claim under “loss of or damage to” language where insured “fails to allege that there was physical damage to the property and concedes that Coronavirus ‘has never been detected at [its] property.’ ”); *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 1:20-CV-2939-TWT, 2020 WL 5938755, at *6 (N.D. Ga. Oct. 6, 2020) (dismissing claims because the “range of contemplated harms aligns with an understanding that ‘loss of’ means total destruction while ‘damage to’ means some amount of harm or injury.”).⁴

*7 Sand People's “deprivation of functionality” argument – namely its inability to operate the stores during the duration of the government closure orders, triggering coverage – fares no better. There is no allegation of any direct physical contact that caused a tangible loss to their property (as in *Total Intermodal*) or the direct physical presence of a contaminant that creates an inability to use or need for remediation (like the actual presence of coronavirus, asbestos, mold, etc.). *See*,

e.g., *Assn. of Apt. Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1068 (D. Haw. 2013) (“arsenic concentrated and posed a health risk that required abatement”).

Finally, as in *Mudpie*, viewing the language of the Policy as a whole, the “Period of Restoration” language (during which the Policy covers lost business income and extra expenses) shows the strength of defendants’ argument and the weakness of Sand People’s. *Mudpie, Inc.*, 2020 WL 5525171 at *4; AC, Ex. 9 at 63 (defining the restoration period as beginning on the “date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises” and ending when “the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality.”). As in *Mudpie*, here there is nothing on any of Sand People’s premises that allegedly needs to be repaired, rebuilt or replaced.⁵

Therefore, Sand People has failed to allege a plausible basis for Lost Business Income coverage under either of its theories (the threat of rapidly spreading coronavirus or the Hawaii government closure orders). This claim is DISMISSED. Sand People is given limited leave to amend. It is unlikely to be able to allege the physical presence of coronavirus in any of its covered properties, but it may be able to allege the physical presence of coronavirus and additional facts in support of its “supply chain” theory.

II. CIVIL AUTHORITY LOSS

*8 Sand People also argues that under the plain language of the Policy, it is entitled to coverage under the Civil Authority provision because the closure orders in Hawaii “prohibited” access to its stores and the orders themselves were issued “in response” to physical loss and damage elsewhere. Numerous judges, including Judge Tigar in *Mudpie*, have addressed and rejected this argument in this identical posture:

Mudpie’s allegations establish that the government closure orders were intended to prevent the spread of COVID-19. See ECF No. 1 ¶ 24 (California’s Safer at Home Order was issued “to control the spread of COVID-19.”). Because the orders were preventative – and absent allegations of damage to adjacent property – the complaint does not establish the requisite causal link between prior property damage and the government’s closure order. *Mudpie, Inc.*, 2020 WL 5525171, at *7.

The same result is required here. The preventative closure orders cannot support a causal link of direct physical loss of or damage to property for the reasons discussed above. In the absence of any allegation that any specific neighboring property to a Sand People property in Hawaii had actual coronavirus exposure, this coverage has not plausibly been triggered. See *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 20 CV 2160, 2020 WL 5630465, at *3 (N.D. Ill. Sept. 21, 2020) (“the policy’s civil authority coverage applies only if there is a Covered Cause of Loss, meaning a direct physical loss, to property other than the plaintiff’s property. Even then, there is coverage only if the civil authority order, (1) prohibits access to the premises due to (2) direct physical loss to property, other than plaintiff’s premises, caused by or resulting from any Covered Cause of Loss.”); *In Raymond H. Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-cv-22833-BB, slip op. (S.D. Fla. Nov. 2, 2020) (same).

This claim is likewise dismissed with limited leave to amend.

III. REMAINING CLAIMS

Given the failure to plead plausible coverage under any of the provisions of the Policy, I need not reach plaintiff’s remaining claims (Unfair or Deceptive Trade Practices, under *HI Rev Stat § 480-1 et seq.*, Breach of Covenant of Good Faith and Fair Dealing, and declaratory relief) because they all fail if the underlying breach of contract claim based on coverage fails.

An unfair conduct claim could be premised on defendants’ alleged “misrepresentation” of the scope of coverage. *Oppo*, at 22. However, there are no “how and what and where” facts alleged identifying any alleged misrepresentations in the Amended Complaint. The only time “misrepresent” is used is in paragraph 155 (alleging unfair conduct as “promising coverage to Plaintiffs and the Subclass that was not provided, and that Defendants had no intention of providing”). No specific facts regarding alleged fraudulent acts or misrepresentations are provided.⁶ Sand People is given limited leave to amend this claim to identify the specific misrepresentations it allegedly received regarding the coverage provided by defendants.

CONCLUSION

For the foregoing reasons, defendants’ motion is GRANTED. Sand People is given limited leave to amend as described

above. Any amended complaint should be filed within twenty days of the date of this Order.

All Citations

Slip Copy, 2020 WL 6562332

*9 IT IS SO ORDERED.

Footnotes

- 1 During the oral argument, Sand People's counsel admitted that it would not be able to plead facts that coronavirus actually entered or was otherwise found in one of the Sand People's stores. I also note that at least one court has dismissed coverage claims despite plaintiff's allegation that coronavirus had entered a property. *See, e.g. Uncork and Create LLC v. The Cincinnati Insurance Company, et al.*, No. 2:20-cv-00401, slip op. (S.D.W. Va. November 2, 2020) (granting motion to dismiss for lack of "physical loss" and concluding that "even when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property.").
- 2 Cases confirming coverage where there was physical contamination of properties, therefore, do not aid plaintiff. *See Oppo.* at 6-7.
- 3 The Policy provides: "j. Income Support Properties. We will pay for the actual loss of Business Income you sustain due to direct physical loss or damage at the premises of an income support property not described in the schedule caused by or resulting from any Covered Cause of Loss. Income Support Property means property operated by others on whom you depend to: (1) Deliver material or services to you, or to others for your account; (2) Accept your products or services; (3) Manufacture products for delivery to your customers under contract of sale; or (4) Attract customers to your business." AC, Ex. 9 at 35.
- 4 Sand People argues that these cases (and the dozens of other cases that have been similarly decided by district courts) are not persuasive because some of them also addressed virus exclusions in the policies at issue. The majority of these courts reasonably determined, first, that coverage was not implicated given the lack of a direct physical event causing loss of or damage to property. *See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 20-CV-03213-JST, [2020 WL 5525171](#), at *7 n. 9 (N.D. Cal. Sept. 14, 2020) ("Because Mudpie is not entitled to Civil Authority coverage, the Court need not consider Travelers's additional argument that the virus exclusion bars such coverage."); *10E, LLC v. Travelers Indem. Co. of Connecticut*, 2:20-CV-04418-SVW-AS, [2020 WL 5359653](#), at *6 (C.D. Cal. Sept. 2, 2020) ("Plaintiff's FAC does not articulate a theory of Civil Authority coverage clearly enough to allow the Court to adjudicate at this stage whether and how the Policy's virus exclusion applies."); *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 1:20-CV-2939-TWT, [2020 WL 5938755](#), at *6 n. 3 (N.D. Ga. Oct. 6, 2020) ("Because the Plaintiffs have not pleaded sufficient facts to support a claim for coverage here, this Court will not proceed to analyze the parties' arguments regarding the Virus or Bacteria exclusion."). These courts' initial coverage determinations are persuasive here.
- 5 In post-briefing submissions, plaintiff submits a pair of North Carolina Superior Court decisions from October 9, 2020, granting summary judgment to plaintiffs on policies that require only a "direct loss" to Property. Dkt. No. 45. Those decisions are not persuasive. Defendants provide four additional district court cases as supplemental authority, including two that are very similar to this case and highly persuasive. In the first, *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, No. 2:20-cv-05663-VAP-DFMx, slip op. (C.D. Cal. Oct. 27, 2020), a Central District judge granted defendants' motion to dismiss on a policy requiring a "direct physical loss of or damage to property" for Business Income coverage and Civil Authority coverage. Similarly, in *Uncork and Create LLC v. The Cincinnati Insurance Company, et al.*, No. 2:20-cv-00401, slip op. (S.D.W. Va. November 2, 2020), the district court dismissed with prejudice claims materially identical to the ones asserted here. *Id.* (rejecting Business Income and Civil Authority coverages under a "direct physical damage or loss to property" policy despite plaintiffs' assertions of closure due to (1) a direct threat/exposure to coronavirus and (2) government closure orders). *See also In Raymond H. Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-cv-22833-BB, slip op. (S.D. Fla. Nov. 2, 2020) (dismissing Business Income and Civil Authority claims under a "direct physical damage or loss to property" policy); *Real Hospitality, LLC d/b/a Ed's Burger Joint v. Travelers Casualty Insurance Company of America*, No. 2:20-cv-00087, slip op. (S.W.D. Ms. November 4, 2020) ("When all of the provisions are read together it makes logical sense that the property that is insured, i.e., the building and/or personal property in or on the building, must first be lost or damaged before Business Income coverage kicks in." ... "Plaintiff never specifically alleges that the virus is/was present on the restaurant premises.").

- 6 The other unfair acts – categorically denying claims and failing to investigate claims – fail if no coverage has been plausibly triggered.

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EXHIBIT 23

FILED
Superior Court of California
County of Los Angeles

NOV 09 2020

Sherri R. Carter, Executive Officer/Clerk
A. Barton Deputy

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES**

DEPARTMENT 71

TENTATIVE RULING

MUSSO & FRANK GRILL CO., INC., Case No.: 20STCV16681

VS.

MITSUI SUMITOMO INSURANCE
USA INC., et al.

Hearing Date: November 9, 2020

Defendant Mitsui Sumitomo Insurance USA, Inc.'s demurrer to the complaint of Plaintiff Musso & Frank Grill Co., Inc. is sustained without leave to amend.

Defendant's motion to strike is moot.

A. Demurrer

Defendant Mitsui Sumitomo Insurance USA, Inc.'s ("Defendant") demurs to the 1st (breach of implied covenant of good faith and fair dealing) and 2nd (breach of contract) causes of action in the complaint of Plaintiff Musso & Frank Grill Co., Inc. ("Plaintiff"). (Notice of Demurrer, pgs. 1-3.)

To the extent Defendant requests the Court take judicial notice of a printout of Plaintiff's website as of July 15, 2020, the request is denied. (Demurrer, pg. 11, fn. 3; Decl. of Golub, Exh. 3; Reply, pg. 9, fn. 7.)

Plaintiff's 10/14/20 evidentiary objection to the Declaration of Larry M. Golub is sustained as to Nos. 1 and 2. Plaintiff's evidentiary objection to lines 1-2 of Defendant's demurrer is overruled as to No. 3, which amounts to argument set forth in the body of the demurrer and is not evidence as to which Plaintiff can raise an objection. (Evidentiary Objections, pg. 3.)

11/10/2020

On May 1, 2020, Plaintiff filed its complaint in the instant action against Defendant and HUB International Insurance Services Inc. (“HUB”) alleging the following causes of action: (1) breach of implied covenant of good faith and fair dealing [against Defendant]; (2) breach of contract [against Defendant]; and (3) negligence [against HUB]. As such, Defendant demurs to the only causes of action asserted against it.

Allegations of Plaintiff's Complaint

Plaintiff alleges it purchased from Defendant an “All Risk” commercial property and general liability insurance policy (Policy No. PKG3127327) (the “Policy”), which included “Business Income (and Extra Expense)” coverage in the event there is “a ‘loss of Business Income... sustain[ed] due to the necessary ‘suspension’ of [Plaintiff’s] ‘operations’” and/or “necessary expenses... incur[red]... that [Plaintiff] 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.” (Complaint ¶¶5-6, Exh. 3, pg. 51.) Plaintiff alleges that with HUB’s assistance it obtained the Policy effective from June 30, 2019 to June 30, 2020. (Complaint ¶23, Exh. 3, pg. 3.) Plaintiff alleges the Policy does not define “direct physical loss.” (Complaint ¶28.) Plaintiff alleges the Policy defines “Covered Causes of Loss” under the Business Income Coverage as “direct physical loss unless the loss is excluded or limited in this policy.” (Complaint ¶33, Exh. 3, pgs. 52, 12, 65.) Plaintiff alleges the Policy provides additional coverage for Civil Authority which provides for coverage of loss of Business Income sustained if access surrounding the damaged 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. (Complaint ¶34, Exh. 3, pg. 101.) Plaintiff’s complaint acknowledges the Policy’s Government Action Exclusion and Virus Exclusion. (Complaint ¶¶36-37, Exh. 3, pgs. 66, 78.)

Plaintiff alleges the March 15, 2020 Public Order by Mayor Eric Garcetti (the “Order”), which, as of midnight on March 15, 2020, prohibited restaurants from serving food for consumption on their premises while permitting restaurants to continue to operate for the purposes of preparing food via delivery or pickup. (Complaint ¶57, Exh 2.) Plaintiff alleges that this Order effectively forced Plaintiff, a restaurant that had never prepared or offered food to customers via delivery or pickup, to close resulting in a loss of functional use of its premises and an interruption of business. (Complaint ¶58.) Plaintiff alleges Mayor Garcetti’s March 19, 2020 Safer at Home Order ordered citizens to remain at home except for essential activities or infrastructure, which was extended to May 15, 2020 in an

April 10, 2020 order, and that these additional orders constitute a continuing predominate cause of Plaintiff's losses. (Complaint ¶¶60, Exhs. 4, 5.)

Plaintiff alleges it submitted a Property Loss Notice to Defendant on March 19, 2020, describing the loss as "Business Income Loss/Civil Authority." (Complaint ¶¶61, Exh. 6.) Plaintiff alleges on March 20, 2020, Defendant's Property Claims Specialist Jeff Kinhead ("Kinhead") emailed Plaintiff stating Defendant assigned the independent adjuster firm of Engle Martin and Associates ("EMA") to contact Plaintiff to begin Defendant's investigation into the claim, and requested certain information from Plaintiff. (Complaint ¶¶62, Exh. 7.) Plaintiff alleges no one at EMA ever contacted Plaintiff to investigate the claim and instead, on March 27, 2020, Kinhead sent a second email indicating EMA would not be investigating the loss and Kinhead would be doing so himself. (Complaint ¶¶63-64, Exh. 8.) Plaintiff alleges Defendant denied the claim on April 1, 2020 on the grounds the Policy does not cover the claim because COVID-19 is not a covered cause of loss given the Policy's Virus Exclusion and given COVID-19 did not cause Plaintiff to suffer direct physical loss of or damage to insured property. (Complaint ¶¶65-66, Exh. 9.)

Breach of Contract (2nd COA)

"To state a cause of action for breach of contract, a party must plead the existence of a contract, his or her performance of the contract or excuse for nonperformance, the defendant's breach and resulting damage. [Citation]" (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307.)

"[A]t the pleading stage, an insurer moving for a demurrer based on insurance policy language must establish conclusively that this language unambiguously negates beyond reasonable controversy the construction alleged in the body of the complaint. To meet this burden, an insurer is required to demonstrate that the policy language supporting its position is so clear that parol evidence would be inadmissible to refute it." (*Palacin v. Allstate Ins. Co.* (2004) 119 Cal.App.4th 855, 862.)

"When the facts are undisputed, as they are deemed to be on a ruling on a demurrer, the interpretation of a contract, including whether an insurance policy is ambiguous or whether an exclusion or limitation is sufficiently conspicuous, plain, and clear, is a question of law." (*Hervey v. Mercury Casualty Co.* (2010) 185 Cal.App.4th 954, 962-963.)

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Plaintiff's breach of contract cause of action is based on the above general allegations, and allegations Defendant breached its contractual obligations under the Policy, causing Plaintiff to suffer damages. (Complaint ¶81.) Accordingly, Plaintiff alleges Defendant's denial of Plaintiff's insurance claim and failure to properly investigate the claim amounts to a breach of the policy.

Plaintiff failed to allege sufficient facts to constitute a breach of contract cause of action against Defendant. Plaintiff fails to allege facts suggesting Defendant's denial amounted to a breach of the terms of the Policy, which only covered *physical loss or damage*, given Plaintiff has alleged no facts suggesting Plaintiff's operations were suspended due to a physical alteration of insured property. (Demurrer, pgs. 7-9.) Rather, Plaintiff alleges the Public Health Orders caused Plaintiff to shut down. (Complaint ¶59.) In addition, Plaintiff did not allege facts suggesting the Orders prohibited access to Plaintiff's premises as a result of damage to property within one mile as required for Civil Authority Coverage and Plaintiff did not allege facts suggesting its premises were *not accessible* due to the Orders. (Demurrer, pgs. 9-11.) Finally, Plaintiff failed to allege facts suggesting its claim would *not* fall within the Virus Exclusion, which bars claims *resulting from* a virus, given Plaintiff's allegations demonstrate the Public Health Orders that caused Plaintiff's closure were in response to the spread of the virus COVID-19. (Demurrer, pgs. 11-12.)

In opposition, Plaintiff argues when a loss can be viewed as the product of two perils acting concurrently, there is coverage if the "predominating cause" of the loss is a covered peril, which Plaintiff asserts the Orders were, and the issue of which peril is the predominating cause is not subject to a demurrer. (Opposition, pgs. 1.) Similarly, Plaintiff argues the Virus Exclusion does not bar coverage because the predominating cause of Plaintiff's loss was the Orders and not COVID-19. (Opposition, pgs. 12-13.) However, these arguments are without merit given Plaintiff's allegations that the Orders were issued in an effort to stop the spread of COVID-19, which amounts to an allegation that COVID-19 was the predominate or efficient cause of the Orders which resulted in Plaintiff's closure. (See *Sabella v. Wisler* (1963) 59 Cal.2d 21, 31-32 ["[T]he efficient cause [is] the one that sets others in motion... the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster."].) Plaintiff has not alleged facts suggesting the Policy's Virus Exclusion does not apply to Plaintiff's submitted claim.

Plaintiff's argument that the Policy's inclusion of a "Virus Exclusion" confirms that, absent an applicable exclusion, virus-related claims fall within the Policy's scope of coverage is without merit and against the plain meaning of the

Policy's terms which specifically state the exclusion does not create coverage for losses that would not otherwise be covered. (Opposition, pg. 6; Reply, pg. 7.) Rather, the allegations set forth that the claim, which is based on Plaintiff's closure in response to Public Health Orders issued to curb the spread of the virus COVID-19, would fall *within* the Policy's Virus Exclusion, barring Plaintiff's claim.

Plaintiff argues the Policy can be reasonably construed to provide coverage for a loss resulting from Plaintiff's inability use or access to its property. (Opposition, pgs. 5-7.) However, Plaintiff relies on *Hughes v. Potomac Ins. Co. of District of Columbia* (1962) 199 Cal.App.2d 239, 249, which is distinguishable from the instant action given it involved physical damage to the property adjacent to the home in a manner that physically damaged the home itself by taking away its lateral support. (Opposition, pgs. 6-7; Reply, pgs. 7-8.) Plaintiff's remaining cited authorities are inapposite since they involve lost physical possession of insured property, which is distinguishable from the instant action in which Plaintiff has not alleged it has been dispossessed of its restaurant. (Opposition, pgs. 7-9; Reply, pgs. 8-9.) Losses from inability to use property do not amount to direct physical loss of or damage to property; "there must be a 'distinct, demonstrable, physical alteration' of the property." *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.* (2010) 187 Cal. App. 4th 766, 779 (citation and quotation marks omitted). Here, Plaintiff has not alleged facts suggesting actual or potential physical damage or loss or that Plaintiff has been deprived of its possession of its physical property. Rather, the Public Health Orders cited in the complaint restricted restaurants from operating in-person dining, not from operating entirely.

To the extent Plaintiff argues the term "direct physical loss" must be read broadly to extend to coverage for when property is seized or rendered unusable for its intended purpose, regardless of whether the property itself is damaged, this argument is belied by the terms of the Policy itself, which directly reference physical damage. (Opposition, pgs. 8-9, 11.) Specifically, Defendant cites to the Policy's "period of restoration" during which business interruption losses are payable by reference to the date "when the property... should be repaired, rebuilt, or replaced" as demonstrating that "physical" refers to damage to or loss of the property itself, not a policy-holder's use of the property. (Reply, pg. 9; Complaint, Exh. 3, pg. 59.) Defendant also cites to the Policy provision excluding coverage for "loss or damage caused by or resulting from... loss of use" as suggesting the "direct physical loss of property" clause was not intended to include a loss where property was rendered unusable without an intervening *physical* force. (Reply, pg. 9; Complaint, Exh. 3, pg. 68.) As such, Plaintiff has not alleged facts suggesting Defendant breached its Policy with Plaintiff in denying Plaintiff's claim given the terms of the Policy included in Plaintiff's pleading.

Based on the foregoing, Defendant's demurrer to Plaintiff's 2nd cause of action is sustained without leave to amend.

Breach of Implied Covenant of Good Faith and Fair Dealing (1st COA)

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (*Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 508.) "[T]he scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." (*Id.* at 509.) "The covenant of good faith and fair dealing... exists... to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. The covenant thus cannot 'be endowed with an existence independent of its contractual underpinnings.' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 (Citations Omitted).)

Plaintiff's breach of implied covenant of good faith and fair dealing cause of action is based on the above general allegations and allegations that Defendant breached its duty by: (1) depriving Plaintiff of the Policy's benefits; (2) depriving its insureds of the benefits of policies it issues; (3) failing to conduct a proper investigation of the bases of Plaintiff's claim and the bases of claims made under policies it issues; (4) failing to investigate to determine the efficient proximate cause (predominant cause) of Plaintiff's loss; (5) failing to give Plaintiff as much consideration as itself; (6) placing its own financial interests above Plaintiff's; (7) failing to comply with regulations including Section 2695.7(b)(1); (8) failing to apply the Policy's definitions and terms to determine whether Plaintiff's claim was covered; and (9) compelling Plaintiff to initiate this action to obtain benefits under the policy. (Complaint ¶70.)

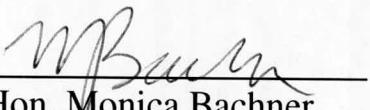
Plaintiff failed to allege sufficient facts to constitute its first cause of action against Defendant. First, Plaintiff's breach of implied covenant of good faith and fair dealing cause of action is derivative of Plaintiff's breach of contract claim, which Plaintiff concedes. (Opposition pg. 13 ["[I]f [Defendant's] policy provides no coverage for [Plaintiff's] claim, [Defendant] cannot face liability for denying the claim in bad faith."].) Moreover, Plaintiff has not alleged facts suggesting Defendant's denial of Plaintiff's claim was unreasonable or without proper cause. Plaintiff's allegations that Defendant acted unreasonably are conclusory and unsupported.

Based on the foregoing, Defendant's demurrer to the first cause of action is sustained without leave to amend.

B. Motion to Strike

In light of the Court's ruling on the demurrer, Defendant's motion to strike is moot.

Dated: November 9, 2020



Hon. Monica Bachner
Judge of the Superior Court

EXHIBIT 24

**IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION**

**DAB DENTAL PLLC D/B/A
SUNSHINE DENTISTRY, on behalf of
itself and all other similarly-situated
persons,**

Plaintiff,

**CASE NO: 20-CA-5504
DIVISION: H**

v.

**MAIN STREET AMERICA PROTECTION
INSURANCE COMPANY,
Defendant.**

ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

THIS MATTER came before the Court for telephonic hearing on November 4, 2020, on Defendant, Main Street America Protection Insurance Company's *Motion to Dismiss Plaintiff's Complaint with Prejudice*, filed August 31, 2020. On November 2, 2020, Plaintiff filed its *Response to Motion to Dismiss*. On November 3, 2020, Defendant filed a *Notice of Filing Supplemental Authority in Support of Defendant's Motion to Dismiss Plaintiff's Complaint with Prejudice*. Having reviewed the Motion and Response, considered the argument of counsel at the hearing, and analyzed the applicable legal authority, the Court finds as follows:

PROCEDURAL HISTORY

This breach of contract and declaratory relief action hinges on an interpretation of an insurance policy between Plaintiff and Defendant. Plaintiff seeks business income losses and extra expenses pursuant to Section A(5)(h) of the Business Coverage Form of the Policy, which is entitled "Civil Authority" (hereinafter "Civil Authority Provision" or "Provision").¹ Plaintiff alleges that by repudiating its obligations under the Policy, by anticipatorily breaching the Policy, and by failing to pay Plaintiff's claim, Defendant, its insurer, breached its duties and obligations under the Policy and caused damages. With respect to Plaintiff's declaratory judgment claim, Plaintiff alleges that it is in doubt of its rights under the Policy, in particular the Virus Exclusion. Plaintiff contends that the Civil Authority Provision covers losses caused by the civil authority action at issue here and that no exclusion bars coverage, while Defendant contends that the Virus Exclusion applies. The Policy was attached to the Complaint.

The July 7, 2020, *Complaint and Demand for Jury Trial* alleges that Plaintiff was forced to close its dental practice to comply with the Governor's Executive Order 20-91 (hereinafter "Executive Order"). Issued April 1, 2020, Plaintiff contends that the "stay-at-home order" was an action of civil authority that forced businesses like Plaintiff to close and remain closed until the Executive Order

¹ This Provision is found in BPM P 1FL 03 19, Businessowners Coverage Form.

expired.² Plaintiff alleges that the forced closure resulted in lost Business Income and Extra Expenses, as defined in the Policy, for both Plaintiff and similarly-situated businesses. Plaintiff specifically alleges that the Executive Order was not issued due to Plaintiff's premises sustaining direct physical loss or damage. Instead, Plaintiff alleges that the Executive Order prohibited access to Plaintiff's premises due to *other* property sustaining the direct physical loss or damage of COVID-19 being present. Plaintiff alleges that its losses are covered under the Civil Authority Provision and that no condition, exclusion, or coverage defense bars coverage. Plaintiff alleges that Defendant repudiated or anticipatorily breached the Policy by preemptively sending correspondence to its policyholders stating its intent to deny claims for lost income based on the Virus Exclusion. Plaintiff alleges that despite its requests, Defendant never provided a coverage decision and never paid Plaintiff's claim. As such, Plaintiff contends that Defendant effectively denied the claim or repudiated or anticipatorily breached its obligations under the Policy.

Defendant contends that the Complaint should be dismissed for three reasons. First, Plaintiff was an essential business excluded from the requirements of the Executive Order and thus, was not required to close. Second, even if the Executive Order applied to Plaintiff, the Civil Authority Provision would not provide coverage because Plaintiff has failed to, and cannot in good faith, allege that the Executive Order prohibits access to its premises "due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss." Finally, Defendant contends that the Virus Exclusion excludes coverage.

APPLICABLE LEGAL AUTHORITY

Defendant alleges dismissal is appropriate pursuant to Florida Rule of Civil Procedure 1.140. Despite not explicitly stating so in their Motion, the gravamen of Defendant's position is that Plaintiff has failed to state a cause of action and thus, dismissal pursuant to Rule 1.140(b)(6) is appropriate. "A motion to dismiss is designed to test the sufficiency of a complaint, not to determine issues of fact." *Lowery v. Lowery*, 654 So. 2d 1218, 1219 (Fla. 2d DCA 1995). As such, "[t]he material allegations of the complaint must be taken as true." *Davison v. Iona-McGregor Fire Prot. & Rescue Dist.*, 674 So. 2d 858, 859 (Fla. 2d DCA 1996). However, "[a] party does not properly allege a cause of action by alleging in conclusive form, which tracks the language of the statute, acts which lack factual allegations and merely state bare legal conclusions." *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So.2d 490, 501 (Fla. 3d DCA 1994) (disagreed with on other grounds in *Condo. Ass'n of La Mer Estates, Inc. v. Bank of New York Mellon Corp.*, 137 So. 3d 396 (Fla. 4th DCA 2014)). The Court is limited to a review of the four corners of the complaint, but such review includes any exhibits attached to it. *See Haslett v. Broward Health Imperial Point Med. Cnt*, 197 So. 3d 124, 127 (Fla. 4th DCA 2016). "[A] complaint should not be dismissed for failure to state a cause of action 'unless the movant can establish beyond any doubt that the claimant could prove no set of facts whatever in support of his claim.'" *Meadows Community Ass'n, Inc. v. Russell-Tutty*, 928 So. 2d 1276, 1280 (Fla. 2d DCA 2006) (quoting *Ingalsbe v. Stewart Agency, Inc.*, 869 So. 2d 30, 35 (Fla. 4th DCA 2004)).

"A party may not maintain a claim for breach of contract where the plain language of the contract upon which the claim is based unambiguously establishes that the defendant did not breach the duty alleged in the complaint." *Detwiler v. Bank of Central Fla.*, 736 So. 2d 757, 758 (Fla. 5th DCA 1999), *cf. Consuegra v. Lloyd's Underwriters at London*, 801 So. 2d 111, 112 (Fla. 2d DCA 2001) (finding that the contract in that case did not unambiguously establish that Lloyd's did not

² Plaintiff alleges that the Executive Order was effective on April 3, 2020, and lasted through April 30, 2020.

breach the duty alleged in the complaint). The contract at issue here is a policy of insurance. Florida law provides that the construction of an insurance policy is a question of law for the court. *See generally U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 877 (Fla. 2007). Such policies must be “construed according to their plain meaning.” *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005). Moreover, “[i]n construing an insurance policy, courts should read the policy as a whole, endeavoring to give every provision its full meaning and operative effect.” *Gen. Star Indem. Co. v. West Fla. Village Inn, Inc.*, 874 So. 2d 26, 30 (Fla. 2d DCA 2004). “Indeed, a single policy provision should not be considered in isolation, but rather, the contract shall be construed according to the entirety of its terms as set forth in the policy and as amplified by the policy application, endorsements, or riders.” *Id.* (citing *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 166 (Fla. 2003)). Courts may not “rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties.” *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138 (Fla. 1998) (quoting *State Farm Mutual Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986)). “Where no ambiguity exists, the policy shall be construed according to the plain language of the policy . . .” *Gen. Star Indem. Co.*, 874 So. 2d at 30. Policy language is considered ambiguous only if it “is susceptible to more than one reasonable interpretation, one providing coverage and another limiting coverage.” *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007).

CONCLUSIONS OF LAW

The Court first addresses Defendant’s contention that Plaintiff was excluded from the requirements of the Executive Order and thus, was not required to close its business. To support this argument, Defendant relies on documents and allegations outside the four corners of the Complaint. Defendant contends that this Court may take judicial notice of executive orders, and attaches the following documents to its Motion:

1. Executive Order 20-91
2. Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response, dated March 28, 2020
3. Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response
4. Executive Order 20-89
5. Miami-Dade County Emergency Order 07-20
6. Amendment No. 1 to Miami-Dade County Emergency Order 07-20
7. Amendment No. 2 to Miami-Dade County Emergency Order 07-20
8. Amendment No. 3 to Miami-Dade County Emergency Order 07-20

The Court takes as true Plaintiff’s allegation that Executive Order 20-91 required Plaintiff to close its dental practice. None of the foregoing eight documents are attached to the Complaint, and only Executive Order 20-91 is addressed within the allegations of the Complaint.³ It would be reversible error for this Court to take judicial notice of and then consider documents outside the four corners of the Complaint when deciding a motion to dismiss. *See Norwich v. Global Financial Associates, LLC*, 882 So. 2d 535, 537 (Fla. 4th DCA 2004) (finding that “the trial court erred when it

³ While Plaintiff’s Complaint alleges Executive Order 20-91 was the civil authority that required closure, the Executive Order was not actually attached as an exhibit to the Complaint.

ventured outside the four corners of the complaint, took judicial notice of the final judgment of dissolution of marriage, and dismissed the complaint with prejudice”). Moreover, even if the Court could take judicial notice of these documents at the motion to dismiss stage, the court file does not reflect that Defendant provided Plaintiff timely written notice of its request for judicial notice. *See* § 90.23, Fla. Stat. (2014). Rather, Defendant made a passing statement of permissibility within the body of its Motion. The Court cannot and will not consider documents, information, or allegations outside the four corners of the Complaint in ruling on this motion to dismiss.

Having dispensed with that preliminary matter, the Court must now evaluate whether coverage was triggered based on the allegations in the Complaint. This Court is sympathetic to the plight of so many business owners in the wake of the COVID-19 pandemic. Yet, this Court cannot allow sympathy to cloud its review of the plain meaning of an insurance policy. Here, the Policy does not provide for coverage of the alleged economic losses resulting from the COVID-19 pandemic. Taking as true the facts alleged in the Complaint, and considering such facts in conjunction with the plain language of the Policy, the Court must grant the motion to dismiss.

The Policy’s Coverage Form defines coverage as follows:

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.⁴

(emphasis added).

The term “Covered Cause of Loss” is defined in the Policy as follows:

3. Covered Causes of Loss

Risks of direct physical loss unless the loss is:

- a. Excluded in Paragraph B. Exclusions in Section I; or
- b. Limited in Paragraph A.4. Limitations in Section I.⁵

The Civil Authority Provision was the basis for Plaintiff’s claim of loss. This Provision provides in relevant part as follows:

When the Declarations show you have coverage for Business Income and Extra Expense, we will pay for the actual loss of Business Income you sustain and necessary Extra Expenses caused by action of civil authority that prohibits 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 any Covered Cause of Loss.

Plaintiff alleges that the Executive Order—an action of civil authority—prohibited access to its premises due to COVID-19 being present at other businesses, which Plaintiff alleges constituted a

⁴ This is found in BPM P 1FL 03 19, Businessowners Coverage Form.

⁵ This definition is found in BPM P 1FL 03 19, Businessowners Coverage Form.

direct physical loss or damage to property, and that such loss or damage was caused by or resulted from a Covered Cause of Loss—the presence of COVID-19. Defendant’s position is that the presence of COVID-19 on a business’s premises does not constitute direct physical loss of or damage to property. Thus, in this case, the applicability of the Civil Authority Provision turns largely on whether the mere presence of COVID-19 on business premises indeed constitutes *a direct physical loss of or damage to property*. This is a legal determination suitable for resolution on a motion to dismiss. A plain reading of the Policy language and a consideration of Florida law lead to the only reasonable interpretation that the mere presence of COVID-19 on business premises does not constitute a direct physical loss of or damage to property. As such, it is also not a Covered Cause of Loss and cannot serve as the basis for Civil Authority coverage.

Plaintiff argues that the presence of harmful substances which render property uninhabitable or unusable constitutes direct physical loss or damage; that tangible or structural damage is not required. However, all of Plaintiff’s cited legal authority is from outside this jurisdiction and does not apply Florida law. Instead, Florida law “reflect[s] that actual, concrete damage is necessary.” *Infinity Exhibits, Inc. v. Lloyd’s London*, 2020 WL 5791583, at *3 (M.D. Fla. Sept. 28, 2020) (finding unpersuasive an argument that “economic damage is synonymous with ‘physical loss’”) (citing *Mama Jo’s Inc. v. Sparta Ins. Co.*, 823 Fed.Appx. 868 (11th Cir. Aug. 18, 2020) (“*Mama Jo’s II*”).⁶ “A ‘loss’ is the diminution of value of something [. . .] Direct and physical modify loss and impose the requirement that the damage be actual.” *Mama Jo’s II*, 823 Fed.Appx. at 879 (finding that “an item or structure that merely needs to be cleaned has not suffered a ‘loss’ which is both ‘direct’ and ‘physical’”) (citing *Black’s Law Dictionary* (10th ed. 2014), *Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017), and *Vazquez v. Citizens Prop. Ins. Corp.*, 2020 WL 1950831, at *3 (Fla. 3d DCA March 18, 2020); citing also *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010) (“A direct physical loss ‘contemplates an actual change in insured property.’”). Similar to Plaintiff’s argument here, in *Diesel Barbershop*, plaintiffs argued that the policy did not require tangible physical loss and that restricted usage due to governmental orders in connection with COVID-19 was a covered loss. See *Diesel Barbershop, LLC v. State Farm Lloyds*, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020).⁷ The *Diesel Barbershop* Court acknowledged that some courts have found direct physical loss despite the lack of physical damage. *Id.* at *5 (citations omitted). Yet, the Court found more compelling the line of cases requiring tangible injury to property. *Id.* (citations omitted). This Court similarly finds.

Moreover, persuasive authority for the Court’s analysis is found in cases applying Florida law in the context of COVID-19-related losses. In the Middle District’s opinion in *Infinity*, the Court noted that plaintiff “[was] not the first insured to seek coverage due to COVID-19 government shutdown orders under a policy that limits coverage to losses caused by direct physical loss or damage to the property.”⁸ The *Infinity* Court further stated that “[c]ourts across the country have held that

⁶ In *Infinity*, the Court granted a motion to dismiss for failure to state a claim. *Mama Jo’s II* was decided on a motion for summary judgment.

⁷ The Court notes that *Diesel Barbershop* applied Texas law, but given the similarity in argument, the Court finds such case to be persuasive authority.

⁸ Of note, Plaintiff cited to *Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385 (W.D. Missouri Aug. 12, 2020) which found that “Plaintiffs here have plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable” which was sufficient to survive a

such coverage does not exist where, as here, policyholders fail to plead facts showing physical property damage.” *Infinity*, at *4 (citing *Turek Enter., Inc. v. State Farm Mutual Auto. Ins. Co.*, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020), *10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020), and *Malaube, LLC v. Greenwich Ins. Co.*, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020)).⁹ In *Infinity*, the Middle District of Florida found no coverage where the insured alleged lost income due the mandated closure of non-essential businesses as there was no allegation of direct physical loss. Similarly, in *Malaube*, the Southern District of Florida found no direct physical loss based on allegations that two Florida Emergency Orders limited the full use of a restaurant. *Malaube*, 2020 WL 5051581, at *4-5 (citing, among others, 10A *Couch On Insurance* § 148.46 (3d Ed. 2019) (“[T]he requirement that the loss be ‘physical,’ given the ordinary definition of that term, is widely held to exclude losses that are intangible or incorporeal, and, thereby to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.”)). There is no allegation that COVID-19 physically altered or physically damaged any property. Nor is Plaintiff’s lack of access to its own premises a direct physical loss or damage, as those terms are defined by Florida law. The Court concludes that the mere presence of COVID-19 on business premises does not constitute a direct physical loss of or damage to property. As such, it cannot be found that the Executive Order prohibiting access to the premises was due to a direct physical loss of or damage to property other than at Plaintiff’s premises.¹⁰ See generally *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686-87 (5th Cir. 2011) (“[C]ivil authority coverage is intended to apply to situations where access to an insured’s property is prevented or prohibited by an order of civil authority issued as a direct result of *physical damage* to other premises in the proximity of the insured’s property.”) (citations omitted) (emphasis added). Moreover, because no direct physical loss or damage is alleged in this case, no covered cause of loss can be found.

motion to dismiss. *Id.* at *6 (applying Missouri law). The factual allegations of the complaint in *Studio 417* were far more extensive than those in this case. Here, Plaintiff simply alleges that the Executive Order prohibited access to its premises due to COVID-19 being present at other businesses. Plaintiff alleges that the mere presence of COVID-19 at other business premises constituted a direct physical loss or damage to property, and that such loss or damage was caused by or resulted from a Covered Cause of Loss—the presence of COVID-19. Here, the Court is concluding that the mere presence of COVID-19 does not constitute a direct physical loss or damage to property. This leaves Plaintiff with an allegation of lack of access, which similarly is not a direct physical loss. An additional critical difference between *Studio 417* and the present case is that the policies at issue in *Studio 417* did not exclude or limit losses from viruses.

⁹ *Turek*, *10E*, and *Malaube* were all decided on motions to dismiss.

¹⁰ Additionally, the Court notes that Plaintiff alleges Executive Order 20-91 was *Florida’s* stay-at-home order, implying state-wide applicability. Plaintiff alleges that the Order forced Sunshine and similarly-situated businesses to close. Yet, there is no allegation that the Order was issued due to direct physical loss of or damage to particularized property other than at the described premises, as is contemplated in cases such as *Dickie Brennan*. Instead, the allegation is that the stay-at-home order broadly prohibited access to Sunshine’s premises (and all other similarly-situated businesses) due to other property generally experiencing the presence of COVID-19. The distinction as the Court sees it is that this Executive Order was issued on a state-wide preventative basis versus on a targeted basis particularized to certain property as is contemplated by civil authority provisions generally. See generally *Dickie Brennan*, 636 F.3d at 686-87. The distinction is a fine one, but notable.

Because the allegations of the Complaint demonstrate that multiple factors required for coverage under the Civil Authority Provision remain unmet, the Court finds that Plaintiff has failed to state a cause of action for breach of contract. *See Detwiler*, 736 So. 2d at 758. This Court’s analysis matches that of a growing body of cases addressing economic loss as a result of the COVID-19 pandemic, and the governmental directives aimed at slowing its spread. *See generally Infinity, Turek Enter., Inc., 10E, LLC and Malaube*; *see also Social Life Magazine, Inc. v. Sentinel Ins. Co.*, No. 20 Civ. 3311 (VEC) (S.D.N.Y. May 14, 2020) (similarly finding that New York law requires damage to property and explaining that “[coronavirus] damages lungs. It doesn’t damage printing presses.”). While these cases provide only persuasive authority, the Court finds value in considering how other courts are evaluating similar policy provisions in the context of COVID-19-related losses.¹¹

Even if the Court assumes that Plaintiff has presented allegations sufficient to trigger coverage under the Civil Authority Provision, the Court further finds that the Virus Exclusion applies to exclude such coverage. The Virus Exclusion reads in relevant part:

B. *We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.*

(emphasis added).¹² The Court will first address Plaintiff’s argument that the Virus Exclusion is not enumerated within the definition of Covered Cause of Loss and therefore, it cannot exclude coverage. More specifically, Plaintiff argues that Covered Cause of Loss is defined in the Policy as:

Risks of direct physical loss unless the loss is:

- a. *Excluded in Paragraph B. Exclusions in Section I; or*
- b. *Limited in Paragraph A.4. Limitations in Section I.*¹³

(emphasis added). Because the Virus Exclusion is not found in Paragraph B, but rather in a standalone endorsement, Plaintiff contends that it cannot bar coverage. The Court disagrees. The Virus Exclusion is an endorsement to the Policy which begins with the following:

A. The exclusion set forth in Paragraph B. *applies to all coverage under Section I-Property in all forms and endorsements that comprise this Businessowners Policy, except as provided in Paragraph C. This includes but is not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expenses or action of civil authority.*

The Court finds that a plain reading of the Virus Exclusion leads to the only reasonable conclusion that it modifies the definition of a Covered Cause of Loss to the extent that this endorsement provides an additional exclusion. Finding that the Virus Exclusion can indeed exclude

¹¹ Notably, *Infinity*, *Malaube*, and later-cited *Martinez* all apply Florida law.

¹² This Exclusion is found in BPM 1115FL 03 16 Florida-Exclusion of Loss Due to Virus or Bacteria.

¹³ Again, this definition is found in BPM P 1FL 03 19, Businessowners Coverage Form.

coverage, the Court turns to whether the Virus Exclusion is triggered by the facts alleged in the Complaint.

Plaintiff also argues that the Virus Exclusion is inapplicable because its loss was not caused by or resulting from COVID-19. Rather, Plaintiff contends that its losses were caused by and resulted from the Executive Order. This is a narrow application of the Exclusion to the alleged facts which is not supported by a plain and reasonable reading of the language. While the economic losses at issue here were purportedly suffered as a result of business closures required by the Executive Order, the Executive Order would not have been issued had COVID-19 not created a public health concern necessitating the Order. The Executive Order was in direct response to the threat of COVID-19 and aimed at slowing its spread. *See generally Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 2020 WL 5642483, at *2 (N.D. Cal. Sept. 22, 2020) (highlighting a California case which considered the argument that the loss was created by the Closure Orders not the virus, finding such argument to be nonsensical); *see also Martinez v. Allied Ins. Co. of Am.*, Case No.: 2:20-cv-00401-FtM-66NPM (M.D. Fla. Sept. 2, 2020) (dismissing with prejudice upon finding that policy specifically excludes loss caused by a virus, therefore dentist failed to state a claim for breach of contract and declaratory judgment); *see generally Diesel Barbershop*, 2020 WL 4724305, at *6 (“While the Orders technically forced the Properties to close to protect public health, the Orders only came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community.”). Plaintiff also pleaded that COVID-19 was the reason the Executive Order was issued—due to COVID-19 being present at other businesses. Given this, the Court finds that Plaintiff’s purported loss was caused by or resulted from COVID-19—a virus. Therefore, this Court finds that the Virus Exclusion applies to exclude coverage.

Given the foregoing, the Court finds that a plain reading of the Policy contradicts Plaintiff’s claim of coverage. The Civil Authority Provision requires direct physical loss or damage, and Florida law supports a legal conclusion that the mere presence of COVID-19 on business premises does not constitute direct physical loss or damage. Without direct physical loss or damage, there is no covered cause of loss. Even if Plaintiff’s allegations established coverage, the Virus Exclusion applies. This Policy does not cover the economic losses Plaintiff allegedly suffered as a result of its business closure required by the Executive Order which was issued to address a public health crisis caused by COVID-19. As such, the Court finds that Plaintiff has failed to state a cause of action for breach of contract—without coverage, there can be no breach. *See generally Ranieri v. Paincaire Holdings, Inc.*, 889 So. 2d 106 (Fla. 5th DCA 2004) (affirming order granting dismissal based on trial court’s interpretation of employment contract as unambiguous and such plain language contradictory to a claim for breach of contract).

Moreover, Plaintiff has failed to state a cause of action for declaratory relief because there is no basis for Plaintiff to be in doubt of its rights under the Policy where the plain language and law do not extend coverage for the alleged loss. The Policy, the Civil Authority Provision, and the Virus Exclusion are all clear and unambiguous, and none are subject to any other reasonable interpretation. Amendment would be futile under the circumstances. Dismissal with prejudice is warranted.

It is therefore **ORDERED AND ADJUDGED** that

1. Defendant, Main Street America Protection Insurance Company's *Motion to Dismiss Plaintiff's Complaint with Prejudice* is hereby **GRANTED** and Plaintiff's *Complaint and Demand for Jury Trial* is **DISMISSED WITH PREJUDICE**.
2. Plaintiff shall go hence without day.

DONE AND ORDERED on: _____.

Electronically Conformed 11/10/2020

Emmett L. Battles

E. LAMAR BATTLES,
Circuit Court Judge

Electronic Copies Provided Through JAWS

EXHIBIT 25

**IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION**

**DIME FITNESS, LLC DBA: ANYTIME
FITNESS,**

Plaintiff,

CASE NO: 20-CA-5467

DIVISION: H

v.

**MARKEL INSURANCE COMPANY,
Defendant.**

ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

THIS MATTER came before the Court for telephonic hearing on November 2, 2020, on *Defendant, Markel Insurance Company's Motion to Dismiss Complaint*, filed August 20, 2020. On October 19, 2020, Plaintiff filed its *Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint and Supporting Memorandum*. On October 29, 2020, Defendant filed its *Reply in Support of Motion to Dismiss Complaint*. Having reviewed the Motion, Opposition, and Reply, considered the argument of counsel at the hearing, and analyzed the applicable legal authority, the Court finds as follows:

PROCEDURAL HISTORY

This action primarily seeks business income losses purportedly caused by the Governor's Executive Order which required the closure of certain businesses to address a public health crisis. The July 6, 2020, *Complaint and Demand for Jury Trial* presents two causes of action: (1) Breach of Contract and (2) Declaratory Judgment. Plaintiff, who operates a fitness center, contends that Defendant, its insurer, breached the subject policy of insurance (hereinafter "Policy") by denying coverage for Plaintiff's claimed loss under the Civil Authority Provision (hereinafter "Provision").¹ The Policy was attached to the Complaint. Plaintiff contends that Executive Order 20-71 (hereinafter "Executive Order"), issued March 20, 2020, was a civil authority which ordered the closure of all non-essential storefront businesses. Plaintiff further alleges that other businesses within a one mile radius were shut down due to the Executive Order. Plaintiff alleges that the Executive Order was in response to the state of emergency due to the threat of COVID-19.

Defendant denied Plaintiff's claim for the following reasons:

1. No direct physical loss of or damage to covered property
2. No covered cause of loss
3. Civil authority does not apply
4. Virus or bacteria exclusion²

¹ This Provision is found in Form MCP 1217 09 14 of the Policy.

² This explanation of denial was provided via a Coverage Disclaimer letter dated May 19, 2020, which was attached to the Complaint.

With respect to Plaintiff's declaratory judgment claim, Plaintiff contends that the Policy is ambiguous and unclear, and as such, Plaintiff is in doubt of its rights under the Policy.

Similar to its coverage denial letter, Defendant contends that the Complaint should be dismissed for three reasons. First, the Civil Authority Provision requires direct physical loss to property and does not cover the purely economic losses alleged here. Second, the claim for coverage under the Civil Authority Provision fails because the action of civil authority—the Executive Order—was issued to address public health concerns surrounding COVID-19, not to address any property damage. Third, the allegations establish the applicability of the Policy's Virus Exclusion (hereinafter "Exclusion" or "Virus Exclusion").

APPLICABLE LEGAL AUTHORITY

Defendant alleges dismissal is appropriate for failure to state a cause of action pursuant to Florida Rule of Civil Procedure 1.140(b)(6). "A motion to dismiss is designed to test the sufficiency of a complaint, not to determine issues of fact." *Lowery v. Lowery*, 654 So. 2d 1218, 1219 (Fla. 2d DCA 1995). As such, "[t]he material allegations of the complaint must be taken as true." *Davison v. Iona-McGregor Fire Prot. & Rescue Dist.*, 674 So. 2d 858, 859 (Fla. 2d DCA 1996). However, "[a] party does not properly allege a cause of action by alleging in conclusive form, which tracks the language of the statute, acts which lack factual allegations and merely state bare legal conclusions." *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So.2d 490, 501 (Fla. 3d DCA 1994) (disagreed with on other grounds in *Condo. Ass'n of La Mer Estates, Inc. v. Bank of New York Mellon Corp.*, 137 So. 3d 396 (Fla. 4th DCA 2014)). The Court is limited to a review of the four corners of the complaint, but such review includes any exhibits attached to it. *See Haslett v. Broward Health Imperial Point Med. Cnt*, 197 So. 3d 124, 127 (Fla. 4th DCA 2016). "[A] complaint should not be dismissed for failure to state a cause of action 'unless the movant can establish beyond any doubt that the claimant could prove no set of facts whatever in support of his claim.'" *Meadows Community Ass'n, Inc. v. Russell-Tutty*, 928 So. 2d 1276, 1280 (Fla. 2d DCA 2006) (quoting *Ingalsbe v. Stewart Agency, Inc.*, 869 So. 2d 30, 35 (Fla. 4th DCA 2004)).

"A party may not maintain a claim for breach of contract where the plain language of the contract upon which the claim is based unambiguously establishes that the defendant did not breach the duty alleged in the complaint." *Detwiler v. Bank of Central Fla.*, 736 So. 2d 757, 758 (Fla. 5th DCA 1999) (granting motion to dismiss finding that breach of contract claim failed as a matter of law), *cf. Consuegra v. Lloyd's Underwriters at London*, 801 So. 2d 111, 112 (Fla. 2d DCA 2001) (finding that the contract in that case did not unambiguously establish that Lloyd's did not breach the duty alleged in the complaint). The contract at issue here is a policy of insurance. Florida law provides that the construction of an insurance policy is a question of law for the court. *See generally U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 877 (Fla. 2007). Such policies must be "construed according to their plain meaning." *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005). Moreover, "[i]n construing an insurance policy, courts should read the policy as a whole, endeavoring to give every provision its full meaning and operative effect." *Gen. Star Indem. Co. v. West Fla. Village Inn, Inc.*, 874 So. 2d 26, 30 (Fla. 2d DCA 2004). "Indeed, a single policy provision should not be considered in isolation, but rather, the contract shall be construed according to the entirety of its terms as set forth in the policy and as amplified by the policy application, endorsements, or riders." *Id.* (citing *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 166 (Fla. 2003)). Courts may not "rewrite contracts, add meaning that is not present, or otherwise reach results contrary

to the intentions of the parties.” *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138 (Fla. 1998) (quoting *State Farm Mutual Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986)). “Where no ambiguity exists, the policy shall be construed according to the plain language of the policy . . .” *Gen. Star Indem. Co.*, 874 So. 2d at 30. Policy language is considered ambiguous only if it “is susceptible to more than one reasonable interpretation, one providing coverage and another limiting coverage.” *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007).

CONCLUSIONS OF LAW

This Court is sympathetic to the plight of so many business owners in the wake of the COVID-19 pandemic. Yet, this Court cannot allow sympathy to cloud its review of the plain meaning of an insurance policy. Insurance companies cannot bear the burden of this crisis where, as here, the Policy does not provide for coverage of purely economic losses resulting from the COVID-19 pandemic. Taking as true the facts alleged in the Complaint, and considering such facts in conjunction with the plain language of the Policy, the Court must grant the motion to dismiss.

We start with the Civil Authority Provision as this was the basis for Plaintiff’s claim of loss. This Provision provides in relevant part as follows:

(6) Additional Coverages
(a) Civil Authority

In this Additional Coverage, Civil Authority, the described premises are premises to which this endorsement applies.

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for actual loss of Business Income you sustain and necessary Extra Expense you incur caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(i) Access to the area immediately surrounding the damaged property is prohibited by 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

(ii) The action of a 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 action is taken to enable civil authority to have unimpeded access to the damaged property.

The Provision provides that Defendant will pay for business income loss and extra expenses under certain circumstances. Breaking down each clause of the Provision creates a checklist for determining whether coverage extends to the factual circumstances presented here. The Provision begins, in relevant part, with the clause “[w]hen a Covered Cause of Loss causes damage . . .” Plaintiff ignores this introductory clause, skipping straight to the word “damage” and argues that the Civil Authority Provision does not require “direct physical loss” to trigger its application. Rather, Plaintiff contends that this Provision requires only “damage,” not physical damage. As Defendant aptly points

out in its Reply, this argument is based on an incomplete reading of the Provision. And just because the Civil Authority Provision provides for additional coverage above and beyond normal coverage does not mean that it is read in a vacuum siphoned off from the rest of the Policy.

The Court finds that a plain reading of the Provision first requires a determination of whether a covered cause of loss caused damage. The term “covered cause of loss” is defined in the Policy as “risks of direct physical loss” unless the loss is excluded or limited.³ Thus, the Court must first determine whether there was a covered cause of loss, then whether the other requirements of the Civil Authority Provision are met, and if yes, whether the Virus or Bacteria Exclusion applies to exclude coverage.

Beginning with a determination of whether there was a covered cause of loss, the Court must evaluate whether the admittedly pure economic loss alleged here meets the Policy definition of a “covered cause of loss.” It does not. A “covered cause of loss” is a “risk of direct physical loss.” “Direct physical loss” has been defined by other courts—the consensus of which is that “direct physical loss” requires a “physical alteration of the property.” *Mama Jo’s, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018), *affirmed Mama Jo’s Inc. v. Sparta Ins. Co.*, 823 Fed.Appx. 868 (11th Cir. Aug. 18, 2020) (“*Mama Jo’s II*”) (citing others);⁴ *see also Infinity Exhibits, Inc. v. Lloyd’s London*, 2020 WL 5791583, at *3 (M.D. Fla. Sept. 28, 2020) (citing *Mama Jo’s II* for proposition that Florida law and the plain language of the policy require “actual, concrete damage”).⁵ The Policy’s Coverage Form further supports the need for direct physical loss by defining coverage as follows:

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.⁶

(emphasis added). Thus, there is a consistent reference back to the defined term “Covered Cause of Loss” which similarly requires a direct physical loss.

Plaintiff does not allege a direct physical loss. The damage asserted here is business income loss, along with a vague reference to “damage” in the form of a denial of access to the premises. Therefore, this purely economic loss, as well as a lack of access, would not qualify as a covered cause of loss because no direct physical loss has been alleged. Persuasive authority for the Court’s analysis is found in the Middle District’s opinion in *Infinity* where the Court noted that plaintiff in that case “[was] not the first insured to seek coverage due to COVID-19 government shutdown orders under a policy that limits coverage to losses caused by direct physical loss or damage to the property.” Notably, the *Infinity* Court quoted the relevant policy language, and both the coverage clause and civil authority provision are nearly identical to those in the Policy at issue here. The *Infinity* Court further stated that “[c]ourts across the country have held that such coverage does not exist where, as here,

³ This definition is found in CP 10 30 06 07, Causes of Loss-Special Form.

⁴ The Court acknowledges that *Mama Jo’s* was decided on a motion for summary judgment.

⁵ In *Infinity*, the Court granted a motion to dismiss for failure to state a claim.

⁶ This is found in CP 00 10 06 07, Building and Personal Property Coverage Form.

policyholders fail to plead facts showing physical property damage.” *Infinity*, at *4 (citing *Turek Enter., Inc. v. State Farm Mutual Auto. Ins. Co.*, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020), *10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020), and *Malaube, LLC v. Greenwich Ins. Co.*, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020)).⁷ Because no physical property damage is alleged in this case, no covered cause of loss can be found. Moreover, for reasons explained below, the Court further finds that this loss is excluded by the Virus Exclusion, which provides a secondary reason why the “covered cause of loss” definition is not satisfied here.

The Court’s analysis continues with the next portion of the Provision. It reads “[w]hen a Covered Cause of Loss *causes damage to property other than property at the described premises . . .*” (emphasis added). The damage purportedly suffered at other properties (i.e., surrounding businesses similarly compelled to close in accordance with the Executive Order) is business income losses and denial of access. As noted above, Plaintiff contends that the Policy does not require “direct physical loss” but only “damage.” This Court finds that such an interpretation would require a divorce of the phrase “damage to property” from the preceding phrase “[w]hen a Covered Cause of Loss causes.” Such a separation is not conducive to a plain reading of the Policy. Moreover, a common sense reading of the Provision leads to the only reasonable interpretation that the phrase “damage to property other than property at the described premises” is referring to physical property, not intangible property such as money. A consideration of this phrase in the context of the larger Provision reinforces the plain reading that physical damage must occur to physical property. Plaintiff asserts that there was no contamination of COVID-19 at its, or surrounding, premises, let alone actual physical loss associated with COVID-19.

Next, the Provision provides that the business income losses must be “caused by action of civil authority that prohibits access to the described premises.” The Executive Order is the purported civil authority. The allegations of the Complaint demonstrate this factor is met as the purported losses were caused by the Executive Order requiring the closure of businesses like that of Plaintiff. But two additional factors must be met. First, “access to the area immediately surrounding *damaged property* is prohibited by civil authority *as a result of the damage*.”⁸ Plaintiff contends that the “damaged property” is lost business income. There is no allegation of any physical damage to physical property. Moreover, the Executive Order was not issued as a result of the purported damage here (i.e., lost business income). The Executive Order was issued in an effort to address public health concerns surrounding the COVID-19 pandemic. Therefore, there is no damaged property to which access was denied, nor was the civil authority issued as a result of the alleged damage here.

Finally, the Civil Authority Provision requires that “the action of a civil authority [be] taken *in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage*.” Alternatively, the action of civil authority must be “taken to enable civil authority to have unimpeded access to the damaged property.” The latter is inapplicable here as there is no allegation that the Executive Order was taken to provide access to property. The former is also inapplicable as the Executive Order was not issued in response to a dangerous physical condition resulting from damage or the continuation of a covered cause of loss

⁷ *Turek*, *10E*, and *Malaube* were all decided on motions to dismiss.

⁸ This factor also requires that “the described premises are within that area but are not more than one mile from the damaged property.” The allegations satisfy this factor in that Plaintiff contends that surrounding businesses similarly were required to shut down.

that caused the damage. *See generally Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686-87 (5th Cir. 2011) (“[C]ivil authority coverage is intended to apply to situations where access to an insured’s property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured’s property.”) (citations omitted). Again, the Executive Order was issued to address a public health crisis. There was no damage to other property which caused the issuance of the Executive Order. Nor was the Executive Order issued in response to a dangerous physical condition that caused property damage.

Because the allegations of the Complaint demonstrate that multiple factors required for coverage under the Civil Authority Provision remain unmet, the Court finds that Plaintiff has failed to state a cause of action for breach of contract. *See Detwiler*, 736 So. 2d at 758. This Court’s analysis matches that of a growing body of cases addressing economic loss as a result of the COVID-19 pandemic, and the governmental directives aimed at slowing its spread. *See generally Infinity, Turek Enter., Inc., 10E, LLC and Malaube*; *see also Social Life Magazine, Inc. v. Sentinel Ins. Co.*, No. 20 Civ. 3311 (VEC) (S.D.N.Y. May 14, 2020) (similarly finding that New York law requires damage to property and explaining that “[coronavirus] damages lungs. It doesn’t damage printing presses.”). While these cases provide only persuasive authority, the Court finds value in considering how other courts are evaluating similar policy provisions in the context of COVID-19-related losses.⁹

Even if the Court assumes that Plaintiff has presented allegations sufficient to establish coverage under the Civil Authority Provision, the Court finds that the Virus or Bacteria Exclusion applies to exclude such coverage. That Exclusion reads:

- A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B. *We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.* However, this exclusion does not apply to loss or damage caused by or resulting from “fungus”, wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.

(emphasis added).¹⁰

Plaintiff contends that the Virus Exclusion is inapplicable because COVID-19 did not actually contaminate Plaintiff’s business. This is a narrow interpretation of the Exclusion which is not supported by a plain and reasonable reading of the language. Defendant contends that Plaintiff cannot avoid the Exclusion by alleging the virus did not contaminate the insured property or surrounding properties, but only caused the businesses to shut down due to civil authority.

⁹ Notably, *Infinity, Malaube*, and later-cited *Martinez* all apply Florida law.

¹⁰ This Exclusion is found in CP 01 40 07 06 Exclusion of Loss Due to Virus or Bacteria.

The Court initially notes that this Exclusion applies to the additional coverage provided in the Civil Authority Provision.¹¹ The Exclusion excludes coverage for damages “caused by or resulting from” a virus. To require that a virus “contaminate” or “infect” the physical business premises would add a requirement beyond the plain language, which reads more broadly. While the economic losses at issue here were suffered as a result of business closures required by the Executive Order, the Executive Order would not have been issued had COVID-19 not created a public health concern. The Executive Order was in direct response to the threat of COVID-19 and aimed at slowing its spread. *See generally Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 2020 WL 5642483, at *2 (N.D. Cal. Sept. 22, 2020) (considering the argument that the loss was created by the Closure Orders not the virus, and finding such argument to be “nonsense”); *see also Martinez v. Allied Ins. Co. of Am.*, Case No.: 2:20-cv-00401-FtM-66NPM (M.D. Fla. Sept. 2, 2020) (dismissing with prejudice upon finding that policy specifically excludes loss caused by a virus, therefore dentist failed to state a claim for breach of contract and declaratory judgment); *see generally Diesel Barbershop, LLC v. State Farm Lloyds*, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020) (“While the Orders technically forced the Properties to close to protect public health, the Orders only came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community.”). Given this, the economic loss was caused by or resulted from COVID-19—a virus. Therefore, this Court finds that the Virus Exclusion applies to exclude coverage.

Finally, Plaintiff argues that even if the Court finds that the Virus Exclusion applies, the loss is still covered under the concurrent causation theory. This argument is based on the proposition that the loss had two possible causes—COVID-19 and the Executive Order—and that as such, there is a factual issue for the trier of fact to resolve. Yet, as stated above, the Executive Order issued as *a result of* COVID-19. Because the Executive Order was dependent upon the existence of COVID-19, the concurrent causation rule does not apply here. *See Sebo v. Am. Home Assurance Co., Inc.*, 208 So. 3d 694 (Fla. 2016) (concluding that “when independent perils converge and no single cause can be considered the sole or proximate cause, it is appropriate to apply the concurring cause doctrine”).

Given the foregoing, the Court finds that a plain reading of the Policy contradicts Plaintiff’s claim of coverage. The language of the Civil Authority Provision leads to but one reasonable conclusion: the Policy does not cover the purely economic losses Plaintiff allegedly suffered as a result of its business closure required by the Executive Order which was issued to address a public health crisis caused by COVID-19. As such, the Court finds that Plaintiff has failed to state a cause of action for breach of contract—without coverage, there can be no breach. *See generally Ranieri v. Paincaire Holdings, Inc.*, 889 So. 2d 106 (Fla. 5th DCA 2004) (affirming order granting dismissal based on trial court’s interpretation of employment contract as unambiguous and such plain language contradictory to a claim for breach of contract).

Moreover, Plaintiff has failed to state a cause of action for declaratory relief because there is no basis for Plaintiff to be in doubt of its rights under the Policy where the plain language and law do not extend coverage for the alleged loss. The Policy, the Civil Authority Provision, and the Virus Exclusion are all clear and unambiguous, and none are subject to any other reasonable interpretation. Amendment would be futile. Dismissal with prejudice is warranted.

¹¹ The Exclusion “applies to all coverage under all forms and endorsements” of the Policy.

It is therefore **ORDERED AND ADJUDGED** that

1. *Defendant, Markel Insurance Company's Motion to Dismiss Complaint* is hereby **GRANTED** and Plaintiff's *Complaint and Demand for Jury Trial* is **DISMISSED WITH PREJUDICE**.
2. Plaintiff shall go hence without day.

DONE AND ORDERED on: _____.

Electronically Conformed 11/10/2020

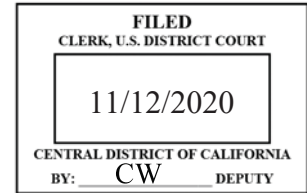
Emmett L. Battles _____

**E. LAMAR BATTLES,
Circuit Court Judge**

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EXHIBIT 26

JS-6



**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

**LONG AFFAIR CARPET AND RUG,
INC. d/b/a UNIVERSAL CARPET and
LA CARPET,**

Plaintiff,

v.

**LIBERTY MUTUAL INSURANCE
COMPANY, OHIO SECURITY
INSURANCE COMPANY, and DOES
1-20,**

Defendants.

Case No.: SACV 20-01713-CJC(JDEx)

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS [Dkt. 15]**

I. INTRODUCTION

Plaintiff Long Affair Carpet and Rug, Inc. d/b/a Universal Carpet and LA Carpet filed this lawsuit against Defendants Liberty Mutual Insurance Company ("Liberty Mutual") and Ohio Security Insurance Company ("Defendant") in Orange County

Superior Court. (Dkt. 1-1 [Complaint]; see Dkt. 8 [First Amended Complaint, hereinafter “FAC”].) On September 9, 2020, Liberty Mutual removed to this Court. (Dkt. 1 [Notice of Removal].) On September 15, 2020, Liberty Mutual was dismissed by the parties’ stipulation. (Dkt. 11.) Defendant now moves to dismiss Plaintiff’s FAC. (Dkt. 15 [Motion to Dismiss, hereinafter “Mot.”].) For the following reasons, the motion is **GRANTED**.¹

II. BACKGROUND

Plaintiff is a California corporation doing business in Orange County California. (FAC ¶ 2.) Plaintiff purchased a business insurance policy from Defendant, which covers “direct physical loss of or damage to the Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.” (Dkt. 8-1 [Policy] at 47.)² The only Covered Cause of Loss is “[d]irect physical loss.” (*Id.* at 48.) The Policy also includes Business Income and Extra Expense coverage, which also requires the loss or damage to be caused by or result from “a direct physical loss.” (FAC ¶ 11; see Policy at 53, 55.) Specifically, the Business Income provision states, “[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.” (Policy at 53.) The Extra Expense provision states, “[w]e will pay necessary Extra Expense 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 at the described premises.” (*Id.* at 55.)

¹ Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. See Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for November 16, 2020, at 1:30 p.m. is hereby vacated and off calendar.

² Plaintiff attaches a copy of the Policy, which forms the basis of its claim, to its amended complaint. Accordingly, under the doctrine of incorporation, the Court may consider the language contained in the Policy in resolving this motion. See *United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003).

On March 15, 2020, Plaintiff was forced to close its business in its entirety due to government orders in response to the COVID-19 pandemic. (FAC ¶¶ 12–13.) Plaintiff subsequently submitted a claim for loss of its business income to Defendant. (*Id.* ¶ 14.) Defendant rejected Plaintiff’s claim without investigating. (*Id.*) As a result, Plaintiff filed the instant lawsuit asserting two claims for (1) breach of the implied covenant of good faith and fair dealing and (2) breach of contract. (*Id.* ¶¶ 20–33.)

III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). When evaluating a Rule 12(b)(6) motion, the district court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994).

However, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (stating that while a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, courts “are not bound to accept as true a legal conclusion couched as a factual allegation” (citations and quotes omitted)). Dismissal of a complaint for failure to state a claim is not proper where a plaintiff has alleged “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. In keeping with this liberal

pleading standard, the district court should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual allegations. *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

IV. DISCUSSION

A. Direct Physical Loss or Damage

The interpretation of an insurance contract is a question of law for the courts. See *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995). “While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply.” *Bank of the W. v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992). “When interpreting a policy provision, we must give terms their ordinary and popular usage, unless used by the parties in a technical sense or a special meaning is given to them by usage.” *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115 (1999) (citation and quotation marks omitted). Additionally, “[t]he terms in an insurance policy must be read in context and in reference to the policy as a whole, with each clause helping to interpret the other.” *Sony Comput. Ent. Am. Inc. v. Am. Home Assurance Co.*, 532 F.3d 1007, 1012 (9th Cir. 2008).

The Policy at issue requires “direct physical loss of or damage to property” for there to be coverage. (See Policy at 53, 55.) Under California law, losses from inability to use property do not amount to “direct physical loss of or damage to property” within the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a “distinct, demonstrable, physical alteration.” *MRI Healthcare Ctr. Of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010) (citation and quotation marks omitted); see also *Ward Gen. Ins. Servs., Inc. v. Emps. Fire Ins. Co.*, 114 Cal. App. 4th 548, 554 (2003) (“direct physical” modifies both “loss of”

and “damage to”). “Detrimental economic impact” is insufficient. *MRI Healthcare*, 187 Cal. App. 4th 779; *see also Doyle v. Fireman’s Fund Ins. Co.*, 21 Cal. App. 5th 33, 39 (2018) (“[D]iminution in value is not a covered peril, it is a measure of loss” in property insurance.”). In other words, “[a]n insured cannot recover by attempting to artfully plead impairment to economically valuable use of property as physical loss or damage to property.” *10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5359653, at *5 (C.D. Cal. Sept. 2, 2020). “Plaintiff’s FAC attempts to make precisely this substitution of impaired use of value for physical loss [of] or damage [to] in seeking . . . coverage.” *Id.* Plaintiff plausibly alleges only that California’s COVID-19 restrictions interfered with the use or value of its property, not that the restrictions caused direct physical loss or damage.

Nevertheless, Plaintiff argues that the Court should apply “a more liberal interpretation” and find “‘direct physical loss or damage’ where there is a direct loss of use, utility, access, or function of the covered property, even though there is no structural damage.” (Dkt. 20 [Opposition] at 5–8.) However, the cases Plaintiff cites in support of this argument, involve a structure being rendered “uninhabitable” or “useless.” *See, e.g., Hughes v. Potomac Ins. Co. of D.C.*, 199 Cal. App. 2d 239, 248 (1962) (“rendered completely useless”); *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 39 (1968) (“uninhabitable”); *Sentinel Management Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (“rendered useless”); *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 493 (1998) (“unusable or uninhabitable”); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (“uninhabitable and unusable”).³ Similarly, courts in this district have found that “the phrase ‘loss of’ includes the

³ Other cases cited by Plaintiff are inapposite because they address specific policy provisions that are not at issue in this case. *See Farmers Ins. Co. of Or. v. Trutanich*, 123 Or. App. 6, 11 (1993) (physical loss due to methamphetamine “vapor” was covered under “smoke” provision); *Nat’l Ink & Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.*, 435 F. Supp. 3d 679, 682–86 (D. Md. 2020) (coverage for loss of functionality of a computer system under “Electronic Media and Records (Including Software)” policy provision).

1 permanent dispossession of something.” *See Total Intermodal Servs. Inc. v. Travelers*
 2 *Prop. Cas. Co. of Am.*, 2018 WL 3829767, at *4 (C.D. Cal. July 11, 2018).

3
 4 The facts alleged in Plaintiff’s FAC do not fall within this more expansive
 5 interpretation of “direct physical loss or damage to” property. Plaintiff has been
 6 dispossessed of its storefronts, but it is not a “permanent dispossession.” *See Mudpie,*
 7 *Inc. v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 5525171, at *4 (N.D. Cal. Sept. 14,
 8 2020). “When the [COVID-19] orders are lifted, [Plaintiff] can regain possession of its
 9 storefront[s].” *Id.* Similarly put, there is no coverage under the Policy for Plaintiff’s loss
 10 of business caused by the COVID-19 orders.

11 12 **B. Virus Exclusion**

13
 14 While the Court finds that Plaintiff fails to plausibly allege that it suffered a
 15 “physical loss of or damage to” its premises due to the COVID-19 orders, the Court
 16 further finds that coverage would be precluded under the virus exclusion provision of the
 17 Policy. The virus exclusion provision clearly and unequivocally states:

18 19 **B. Exclusions**

20 We will not pay for loss or damage caused directly or indirectly by any of
 21 the following. . . .

22 **j. Virus or Bacteria**

23 **(1)** Any virus, bacterium or other microorganism that induces
 24 or is capable of inducing physical distress, illness or disease.

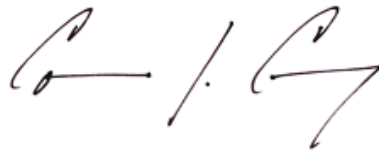
25
 26 (Policy at 66, 68.) Plaintiff’s FAC clearly demonstrates that all alleged loss or
 27 damage was both caused by and resulted from the novel coronavirus, either
 28 directly or indirectly. The FAC alleges that Plaintiff’s closure was caused by

1 government officials' orders "to protect the public health and limit social
2 interactions" in response to the COVID-19 pandemic. (See FAC ¶¶ 12–13.) The
3 virus exclusion applies here and precludes all coverage.

4
5 **V. CONCLUSION**

6
7 For the foregoing reasons, Defendant's motion to dismiss is **GRANTED**. There is
8 no coverage under the Policy because there was no physical damage to Plaintiff's
9 business premises and, in any event, the virus exclusion in the Policy precludes coverage
10 for any damage or loss caused directly or indirectly by COVID-19. Plaintiff cannot state
11 a claim for breach of contract or breach of the implied covenant of good faith and fair
12 dealing. Because amendment is futile, the FAC is **DISMISSED WITH PREJUDICE**.

13
14
15 DATED: November 12, 2020



17
18 _____
HON. CORMAC J. CARNEY

19 UNITED STATES DISTRICT JUDGE
20
21
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EXHIBIT 27

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

**T & E CHICAGO LLC,
individually, and on behalf
of all others similarly
situated,**

Plaintiff,

v.

**THE CINCINNATI INSURANCE
COMPANY,**

Defendant.

Case No. 20 C 4001

Judge Harry D. Leinenweber

MEMORANDUM OPINION AND ORDER

For the reasons stated herein, the Court grants Defendant's Motion to Dismiss Plaintiff's Complaint. (Dkt. No. 11.)

I. BACKGROUND

Plaintiff T & E Chicago, LLC is the owner-operator of a tavern located in the Logan Square neighborhood of Chicago, Illinois. (Compl. ¶ 1, Dkt. No. 1.) On March 15, 2020, due to the COVID-19 global pandemic, Illinois Governor J. B. Pritzker issued an order closing all "non-essential businesses" to the public. (*Id.* ¶ 10.) This order has been extended several times. (*Id.*) As a result of these closure orders, Plaintiff, a non-essential business, was forced to close and lost substantial revenue. (*Id.* ¶ 11.)

On or about July 20, 2019, Plaintiff obtained "business interruption insurance" from Defendant and paid the required

premium. (*Id.* ¶¶ 13 & 15, see also Policy, Compl., Ex. A, Dkt. No. 1-1.) The coverage extended one year, until July 20, 2020. (Compl. ¶ 13.) Plaintiff alleges the business interruption insurance was part of an “all risks” policy, providing coverage for any risk except those that are specifically excluded. (*Id.* ¶ 15.) As a result of its business interruption and the resulting loss of income caused by the COVID-19 closure orders, Plaintiff filed a claim with Defendant. (See *id.* ¶ 16.)

After receiving Plaintiff’s claim, Defendant issued a blanket denial for any losses resulting from the COVID-19 pandemic and the Governor’s closure orders. (*Id.*) Its denial letter asserted that Plaintiff’s losses were not covered because the reason preventing Plaintiff from operating its business did not result from “direct physical damage” or “direct physical loss” to Plaintiff’s property. (*Id.* ¶ 17; see also 4/15/20 Letter, Compl., Ex. B, Dkt. No. 1-2.)

“All risks” policies differ from policies that cover only specified risks, like hurricanes or earthquakes. (Compl. ¶¶ 65–66.) Despite referring to its policy as an “all risks” policy, Plaintiff acknowledges that the policy does not actually cover “all risks.” (*Id.* ¶ 67.) Indeed, the policy provides for specific exclusions. (*Id.*) Thus, if an exclusion does not apply the risk is

covered and if an exclusion applies then the risk is not covered.

(*Id.*)

The specific provisions involved are:

SECTION A. COVERAGE.

We will pay for direct "loss" to Covered Property at the "premises" caused by or resulting from any Covered Cause of Loss.

* * *

(1) Business Income

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. With respect to "loss" to personal property in the open or personal property in a vehicle or portable storage unit, the "premises" include the area within 1,000 feet of the building or 1,000 feet of the "premises", whichever is greater.

* * *

(2) Extra Expense

(a) We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain (as described in Paragraphs **(2)(b)**, **(c)** and **(d)**) 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.

(b) If these expenses reduce the otherwise payable "Business Income" "loss", we will pay expenses (other than the expense to repair or replace property as described in Paragraph **(2)(c)**) to:

1) Avoid or minimize the "suspension" of business and to continue "operations" either:

a) At the "premises"; or

b) At replacement "premises" or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location; or

2) Minimize the "suspension" of business if you cannot continue "operations".

(c) We will also pay expenses to:

1) Repair or replace property; or

2) Research, replace or restore the lost information on damaged "valuable papers and records";

but only to the extent this payment reduces the otherwise payable "Business Income" "loss". If any property obtained for temporary use during the "period of restoration" remains after the resumption of normal "operations", the amount we will pay under this Coverage will be reduced by the salvage value of that property.

(d) Extra Expense does not apply to "loss" to Covered Property as described in the **BUILDING AND PERSONAL PROPERTY COVERAGE FORM**.

(Policy at 31 & 46-47.) The Illinois Business Income endorsement also provides additional separate Business Income and Extra Expense coverage grants, utilizing the same language. (See *id.* at 91-99.)

The policy's definitions section defines the term loss as "accidental physical loss or accidental physical damage." (*Id.* at 66.) The policy also contains a provision covering loss caused by civil authority as follows:

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.

This Civil Authority coverage for "Business Income" will begin immediately after the time of that action and will apply for a period of up to 30 days from the date of that action.

This Civil Authority coverage for Extra Expense will begin immediately after the time of that action and will end:

- 1)** 30 consecutive days after the time of that action; or
 - 2)** When your "Business Income" coverage ends;
- whichever is later.

(*Id.* at 47.) Further, the Illinois Business Income endorsement provides additional, separate civil authority coverage as follows:

b. Civil Authority

When a Covered Cause of Loss causes direct damage to property other than Covered Property at the "premises", we will pay for the actual loss of "Business Income" you sustain 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:

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; 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 immediately after the time of the first action of civil authority that prohibits access to the "premises"

and will apply for a period of up to 30 consecutive days 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 "premises" and will end 30 consecutive days after the date of that action; or when your Civil Authority coverage for "Business income" coverage ends, whichever is later.

(*Id.* at 92.)

After Defendant's denial letter, Plaintiff filed a four-count putative class action complaint. Count One seeks a declaratory judgment, Count Two alleges breach of contract, Count Three alleges breach of the duty of good faith and fair dealing, and Count Four alleges bad faith denial of insurance under Illinois state law. Defendant now moves to dismiss the Complaint pursuant to FED. R. CIV. P. 12(b)(6).

II. LEGAL STANDARD

A Rule 12(b)(6) motion challenges the legal sufficiency of the complaint. To survive a Rule 12(b)(6) motion, the allegations in the complaint must meet a standard of "plausibility." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 (2007). A claim is facially plausible "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). The Court will accept all well-pleaded factual allegations as true and construes all reasonable inferences in the

plaintiff's favor. *Marshall-Mosby v. Corp. Receivables, Inc.*, 205 F.3d 323, 326 (7th Cir. 2000). "If it is possible to hypothesize a set of facts, consistent with the complaint, that would entitle the plaintiff to relief, dismissal under Rule 12(b)(6) is inappropriate." *Alper v. Alzheimer & Gray*, 257 F.3d 680, 684 (7th Cir. 2001) (citations omitted).

III. DISCUSSION

The parties agree that in this diversity case the choice of law favors Illinois. See *Lapham-Hickey Steel Corp. v. Prot. Mut. Ins. Co.*, 655 N.E.2d 842, 844-45 (Ill. 1995). The proper construction of the policy is a question of law and the primary objective is to ascertain and give effect to the intentions of the parties as expressed in the policy. *Am. States Ins. Co. v. Koloms*, 687 N.E.2d 72, 75 (Ill. 1997). If a policy term is susceptible to more than one reasonable interpretation, it is ambiguous and will be construed in favor of the insured. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1212 (Ill. 1992). However, a policy provision is not ambiguous solely because the parties disagree about its interpretation. *Founders Ins. Co. v. Munoz*, 930 N.E.2d 999, 1004 (Ill. 2010).

On this motion, Defendant argues the Court should dismiss the Complaint because the Plaintiff has not alleged a direct physical loss or damage to property. Defendant contends the policy

indemnifies against loss or damage to *property* while an infectious disease like COVID-19 damages *people*. The Business Income, Extra Expense, and Civil Authority coverages likewise apply only to income losses tied to physical loss or damage to property and not losses incurred to protect the public from disease. Thus, without direct physical loss or damage to property, Defendant argues that coverage is not available.

Plaintiff responds, arguing that the policy covers both physical loss and physical damage, which Defendant incorrectly treats as synonymous. The policy does not define either term, and to equate the two would render one or the other superfluous. See 11 Williston on Contracts § 32:5 (4th ed.) (“An interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable.”).

Next, Plaintiff argues that an average person would interpret the phrase “accidental physical loss” to include a sudden inability by the insured to use the property that was previously useable. Plaintiff claims that it is entitled to coverage under the Civil Authority provision for the same reason: it has lost the physical use of its property. Plaintiff also points out that Defendant did not avail itself of an “Exclusion for Loss Due to Virus or Bacteria” endorsement developed in 2006 by the Insurance Services

Office, a nonprofit corporation composed of insurance companies. (Resp. at 9, Dkt. No. 19 (citing ISO Form CP 01 40 07 06).) Finally, Plaintiff argues that, at worst, the policy provision is ambiguous and must be construed in favor of the insured, thus providing coverage.

In reply the Defendant points out that the policy clearly applies only to situations where there is “direct physical loss or damage to property” and not to “purely financial losses.” (Reply at 2, Dkt. No. 20.) Additionally, there are a multitude of cases, including two from Illinois, that have since been decided to interpret policy provisions like these as not providing coverage for COVID-19-related losses.

Defendant is correct—this issue has been the subject of numerous decisions issued by various state and federal courts in the United States, including Illinois. As Defendant points out, most of these decisions, including the two from Illinois, have found for the insurance companies. These decisions found no coverage for business closures resulting from civil authority closure orders. For example, a case in this District—*Sandy Point Dental, PC v. Cincinnati Insurance Company*, 20CV2160, 2020 WL 5630465 (N.D. Ill. Sept 21, 2020)—was decided in favor of the defendant insurance carrier. Plaintiff acknowledges this decision, but argues that it was “wrongfully decided.” (Resp. at 19.)

Similarly, in a recent Illinois state court decision, the court interpreted the language “loss to” to require a physical loss to the property itself, not including the loss of use of the property to the insured. *It’s Nice, Inc. v. State Farm Fire and Cas. Co.*, No. 2020L000547 (Ill. Cir. Ct. Sept. 29, 2010).

There are other cases deciding against coverage for losses resulting from closure orders under similar policy provisions. *See, e.g., Diesel Barbershop, LLC, et al. v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020); *Gavrilides Mgmt. Co. v. Mich. Ins Co.*, No 20-258-CB, 2020 WL 4561979 (Mich. Cir. Ct. July 21, 2020); *Rose’s 1, LLC v. Erie Ins. Exch.*, No. 2020 CA 002424 B., 2020 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020); *Hillcrest Optical, Inc. v. Cont’l Cas. Co.*, 1:20-CV-275-JB-B, 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020); *UnCork and Create LLC v. Cincinnati Ins. Co.*, 2:20-cv-00401, 2020 WL 6436948 (S.D. W.Va. Nov 2, 2020); *Raymond H. Nahmad, DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-cv-22833-BLOOM/Louis, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020). True, there have been decisions to the contrary, including those cited by Plaintiff. *See, e.g., North State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507 (N.C. Super. Ct. Oct. 9, 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 20-cv-03127-SRB, 2020 WL 4692385 (W.D. Mo., Aug 12, 2020). The Court notes though that the Central District of

California explicitly declined to follow *Studio 417 in West Coast Hotel Mgmt., LLC v Berkshire Hathaway Guard Ins. Co.*, 2:20-cv-05663-VAP-DFMx, 2020 WL 6440037, at *4 n.4 (C.D. Cal. Oct. 27, 2020), and interpreted the insurance policy at issue in favor of the insurance company.

The Court sympathizes with Plaintiff. Nevertheless, the policy's phrasing requires the Court to find in Defendant's favor. The Court agrees with the courts that have found that loss of use of property without any physical change to that property cannot constitute direct physical loss or damage to the property. The policy's use of "loss to" versus "loss of" phrasing supports this conclusion. (See Policy at 46 (covering "direct 'loss' to property").) In addition, the provision of coverage for a "period of restoration," see *id.*, clearly implies a requirement of loss to property rather than loss of property. Defendant's interpretation is the correct one.

There being no coverage under the policy, the Court must dismiss Count One. Because the remaining counts, Counts Two, Three, and Four, rely on an interpretation of Defendant's policy that the Court cannot accept, the Court also dismisses Counts Two, Three and Four.

IV. CONCLUSION

For the foregoing reasons, the Court grants Defendant's Motion to Dismiss Plaintiff's Complaint. (Dkt. No. 11.)

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'Leinenweber', is written above a horizontal line.

Harry D. Leinenweber, Judge
United States District Court

Dated: 11/19/2020

EXHIBIT 28

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

BBMS, LLC d/b/a ALL A'BLOOM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 20-0353-CV-W-BP
	)	
CONTINENTAL CASUALTY CO.,	)	
	)	
Defendant.	)	

ORDER DIRECTING PLAINTIFF TO FILE SECOND AMENDED COMPLAINT

Plaintiff filed this suit in May 2020, and its operative pleading is its Amended Complaint. (Doc. 4.) Defendant filed a Motion to Dismiss, and on November 10, 2020, the Court heard oral argument on the motion. During the argument Plaintiff requested leave to file a Second Amended Complaint if the Court concluded that the Amended Complaint fails to state a claim.

The Court has considered the parties' arguments (both written and oral) and the authorities they have cited (both those in their briefing and those submitted after the hearing). The Court now concludes that the Amended Complaint fails to state a claim and grants Plaintiff leave to file a Second Amended Complaint.

I. BACKGROUND

Plaintiff is a limited liability company that operates a flower shop in Jackson County, Missouri. (Doc. 4, ¶ 1.) It purchased an "all risk" insurance policy that contains several Endorsements, (collectively "the Policy"), from Defendant. (*E.g.*, Doc. 1, ¶ 27.) The following provisions are relevant to the issues before the Court:

The Special Property Coverage Form states that the Policy provides coverage "for direct physical loss of or damage to Covered Property at the premises . . . caused by or resulting from a

Covered Cause of Loss.” (Doc. 4-1, p. 14.)¹ The phrase “direct physical loss of or damage to” is not defined in the Policy. “Covered Causes of Loss” is defined to include “RISKS OF DIRECT PHYSICAL LOSS unless the loss is” excluded or limited elsewhere in the Policy. (Doc. 4-1, pp. 15-16.)

The Special Property Coverage itself does not provide coverage for lost income, but three Endorsements that extend the Policy’s coverage do. The first is a Business Income and Extra Expense Endorsement, (“the Business Income Endorsement”). It provides coverage for lost business income necessitated by the suspension of the insured’s business if the suspension is “caused by direct physical loss of damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.” (Doc. 4-1, p. 36.)

The second Endorsement is a Civil Authority Endorsement. It extends the Business Income Endorsement to cover Business Income lost and Extra Expenses incurred due to “action of civil authority that prohibits access to the described premises.” (Doc. 4-1, p. 62.) However, not all “actions of civil authority” will qualify. “The civil authority action must be *due to* direct physical loss of or damage to property at locations *other than* described premises, caused by or resulting from a Covered Cause of Loss.” (Doc. 4-1, p. 62 (emphasis supplied).)

The final Endorsement relevant to this case is a Dependent Property Endorsement. It extends the Business Income Endorsement to cover Business Income lost and Extra Expenses incurred due to a suspension of the insured’s operations “caused by direct physical loss or damage at the premises of a Dependent Property, caused by or resulting from a Covered Cause of Loss.” (Doc. 4-1, p. 153.) A “Dependent Property” is defined to include “property operated by other[s]” that the insured depends on to deliver material or services, accept the insured’s products or

¹ All page numbers are those generated by the Court’s CM/ECF system.

services, manufactures products for the insured's customers, or attract customers to the insured's business. (Doc. 4-1, p. 153.)

Plaintiff alleges that it lost business income in the wake of the emergence of COVID-19. As the Amended Complaint succinctly states, "COVID-19 is a highly contagious virus that has rapidly spread and continues to spread across the globe. It can cause severe respiratory distress and even death." (Doc. 4, ¶ 13.) It can be spread in a variety of ways, including through the air or by touch; the Centers for Disease Control "has reported that a person can . . . become infected with COVID-19 by touching a surface or object . . . that has the virus on it, and then touching their own mouth, nose or eyes." (Doc. 4, ¶ 15.) "COVID-19 has been declared a pandemic by the World Health Organization," (Doc. 4, ¶ 16), and various levels of government – including Jackson County and the State of Missouri – have issued Stay at Home Orders and occupancy restrictions, (collectively, "SHOs"), to slow the virus's spread. (Doc. 4, ¶¶ 18-23.) These orders and restrictions have allegedly caused Plaintiff to suffer a loss of income. Plaintiff alleges that its lost income is covered by the Policy; Defendant disagrees and contends that the Amended Complaint should be dismissed in its entirety.² While the Amended Complaint contains ten counts, the Court need only discuss Counts I, II and V.³

Count I is based on the Business Income Endorsement. It alleges that "COVID-19 caused direct physical loss and damage to Plaintiff's . . . Covered Propert[y], requiring suspension of

² Plaintiff intends to seek certification of a class of Defendant's policyholders, but that aspect of the case has no bearing on the issues addressed in this Order.

³ Count III seeks coverage for Extra Expenses under the Business Income Endorsement, so Count III's viability depends on the viability of Count I. Count IV similarly invokes provisions of the Business Income Endorsement and therefore also depends on Count I. Counts VI through X seek declarations that the provisions addressed in Counts I through V provide coverage, and are thus largely the same as (and subsumed in) Counts I through V. Accordingly, Counts III–IV and VI–X do not need to be discussed independently.

operations at the Covered Propert[y]. Losses caused by COVID-19 thus triggered the Business Income provision of” the Policy. (Doc. 4, ¶ 56.)

Count II is based on the Civil Authority Endorsement. It alleges that “[t]he stay-at-home orders triggered the Civil Authority provision under” the Policy. (Doc. 4, ¶ 64.)

Count V is based on the Dependent Property Endorsement. It alleges that “COVID-19 caused direct physical loss or damage to dependent property that caused suspension of operations at” Plaintiff’s business, and “thus triggered the Dependent Property” Endorsement. (Doc. 4, ¶ 94.) Elsewhere, the Amended Complaint generally alleges that “[t]he virus and stay-at-home orders and restrictions have resulted in losses due to . . . closures of dependent businesses.” (Doc. 4, ¶ 24.) It also alleges that Plaintiff has suffered “a supply shortage due to many flowers used in its business being grown in the states of California and Washington and the country of Mexico” and that “weddings, funerals, and proms have been canceled due to COVID-19 and the” SHOs. (Doc. 4, ¶ 25.)

Defendant’s primary argument is that the Amended Complaint does not describe any business – including Plaintiff’s – that suffered a “direct physical loss . . . or damage,” in part because the SHOs do not satisfy that requirement. Plaintiff disagrees and argues that the Amended Complaint alleges that its business, as well as others, suffered direct physical loss or damage. In brief summary, Plaintiff argued at the hearing that the SHOs combined with the virus’s existence constitute direct physical loss or damage because it “lost” the use of its business premises. The Court resolves the parties’ arguments below.

II. DISCUSSION

Under Rule 12(b)(6), the Court “must accept as true all of the complaint’s factual allegations and view them in the light most favorable to the Plaintiff[].” *Stodghill v. Wellston*

School Dist., 512 F.3d 472, 476 (8th Cir. 2008); *see also Alexander v. Hedback*, 718 F.3d 762, 765 (8th Cir. 2013).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. 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. 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. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quotations and citations omitted). A claim is facially plausible if it allows the reasonable inference that the defendant is liable for the conduct alleged. *E.g.*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Horras v. American Capital Strategies, Ltd.*, 729 F.3d 798, 801 (8th Cir. 2013). In making this evaluation, the Court is limited to a review of the Complaint, exhibits attached to the Complaint, and materials necessarily embraced by the Complaint. *E.g.*, *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697 n.4 (8th Cir. 2003).

However, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

A. Count I – Business Income Endorsement

“The interpretation of an insurance policy is a question of law, to which Missouri courts apply general contract-interpretation principles.” *Gohagan v. Cincinnati Ins. Co.*, 809 F.3d 1012, 1015 (8th Cir. 2016) (citing *McCormack Baron Mgmt. Servs., Inc. v. Am. Guarantee & Liab. Ins. Co.*, 989 S.W.2d 168, 171 (Mo. 1999) (en banc)). “In disputes over the meaning of contract language, the key is whether the contract language is ambiguous or unambiguous.” *Id.* (cleaned

up.) “A contract is ambiguous if its language is *reasonably* susceptible to different interpretations.” *Wilson v. General Mortg. Co.*, 638 S.W.2d 821, 823 (Mo. Ct. App. 1982) (citations omitted; emphasis supplied); *see also Mendota Ins. Co. v. Ware*, 348 S.W.3d 68, 71-72 (Mo. Ct. App. 2011) (ambiguity requires two or more reasonable interpretations of the relevant provision). Interpreting an insurance policy requires that “we ascertain the intention of the parties and . . . give effect to that intention.” *Id.* “The intention of the parties is presumptively expressed by the plain and ordinary meaning of the policy’s provisions, which we read in the context of the policy as a whole.” *Id.* But, if an insurance policy’s language is ambiguous, the ambiguity is to be construed in favor of the insured. *E.g., Jordan v. Safeco Ins. Co. of Illinois*, 741 F.3d 882, 885 (8th Cir. 2014) (citing *Manner v. Schiermeier*, 393 S.W.3d 58, 65 (Mo. 2013) (en banc)).

As stated earlier, the Policy does not define the phrase “direct physical loss.” And the Eighth Circuit, applying Missouri law, has held that the phrase is ambiguous. *Hampton Foods Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 351-52 (8th Cir. 1986). This does not mean, however, that the phrase has been interpreted to mean that policies employing that language provide coverage for any event that causes a suspension of business operations and a resulting loss of business income. *Id.* at 352 (“We agree . . . that not every risk of loss is covered by this policy.”). A survey of cases, both from Missouri and elsewhere, confirms that the phrase requires some physical event or force on, in or affecting the property in question and not mere “loss of use.” Ruling otherwise would render the word “physical” a nullity.

Thus, for instance, in *Hampton Foods*, “plaster fell from the ceiling of the building and the building evidenced other signs that it was in imminent danger of collapse.” *Hampton Foods*, 787 F.2d at 351. Therefore, the insured “suffered direct, concrete and immediate loss due to extraneous physical damage to the building. . . . The loss in value of Hampton’s inventory necessitated by the

sudden evacuation, and the destruction of its business equipment upon the building's collapse, constitute 'loss or destruction to the property insured . . . resulting from all risks of direct physical loss.'" *Id.* at 352 (second ellipses in original). In *Cincinnati Ins. Co. v. German St. Vincent Orphan Ass'n, Inc.*, the Missouri Court of Appeals held that the release of asbestos into a building constituted "direct physical loss or damage." 54 S.W.3d 661, 666 (Mo. Ct. App. 2001). In both cases, an event caused damage to, physical contact with, or had a physical impact on the insured premises.⁴

On the other hand, events that do not have a direct physical effect on the insured property will not give rise to coverage, even if they interrupt business operations or deny access to the premises. For instance, in *Pentair, Inc. v. American Guarantee & Liability Ins. Co.*, 400 F.3d 613 (8th Cir. 2005), an earthquake disrupted power to two factories in Taiwan that supplied products to the insured. The insured argued that the factories suffered "direct physical loss" because of their inability to function due to a lack of electricity, even though they had not suffered physical damage in the earthquake. The Eighth Circuit (applying Minnesota law) held that they had not, explaining that mere loss of use or function is not "direct physical loss or damage" and in so doing differentiated cases in which loss of use was the result of physical damage to or contamination in the premises. *Pentair*, 400 F.3d at 616. The Eighth Circuit applied similar reasoning in *Source Food Tech., Inc. v. United States Fidelity & Guaranty Co.*, 465 F.3d 834 (8th Cir. 2006). There, the property in question was beef products that could not be transported from Canada into the United States due to an embargo imposed because of concerns about mad cow disease. Critically, "[t]he parties agree[d] that there [was] no evidence that the [insured's] beef product was

⁴ At oral argument, Plaintiff noted that in *German St. Vincent* the Health Department required the insured to stop using the first floor of the premises due to the asbestos. However, the Missouri Court of Appeals did not characterize the Health Department's order itself as constituting direct physical loss or damage.

contaminated by mad cow disease.” *Source Food*, 465 F.3d at 835. Because the insured’s beef was not contaminated, the Eighth Circuit held that it had not experienced “direct loss or damage.”

Although Source Food’s beef product in the truck could not be transported to the United States due to the closing of the border to Canadian beef products, the beef product on the truck was not—as Source Foods concedes—physically contaminated or damaged in any manner. To characterize Source Food’s inability to transport its truckload of beef product across the border and sell the beef product in the United States as direct physical loss to property would render the word “physical” meaningless.

Id. at 838.

The COVID-19 pandemic has understandably generated numerous suits by policyholders seeking coverage for losses, and many of those suits involve policies with the same language that is at issue here. While none of the cases that have been decided are binding on this Court, the weight of authority demonstrates that stay at home orders and the existence of COVID-19, alone, does not qualify as “direct physical loss of or damage to” property. Cases reaching this conclusion include:

- *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020) – The Court held that the language required the property to be “physically lost” or “physically damaged,” and the existence of stay at home orders did not qualify as either. 2020 WL 6503405 at *6-7.
- *Water Sports Kauai, Inc. v. Fireman’s Fund Ins. Co.*, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020) – The Court rejected the insured’s argument that closing business due to stay at home orders or to avoid risk of contamination qualifies as “direct physical loss” or “physical damage.” 2020 WL 6562332 at *4-6.
- *Diesel Barbershop, LLC v. State Farm Lloyds*, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020) – The Court held that a business that was ordered to be closed did not suffer direct

physical loss or physical damage because there was no tangible change to or effect on the property, and thus nothing “physical” occurred. 2020 WL 4724305 at *5.

- *Hillcrest Optical, Inc. v. Continental Casualty Co.*, 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020) – The Court held that a stay at home order did not cause physical damage or loss because “Plaintiff’s loss of usability did not result from an immediate occurrence which tangibly altered its property – the Order did not immediately cause some sort of tangible alteration to Plaintiff’s office.” 2020 WL 6163142 at *7.
- *West Coast Hotel Mgt., LLC v. Berkshire Hathaway Guard Ins. Co.*, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020) – The Court held that the plaintiffs did not “claim that any property has undergone a physical alteration or needs to be ‘repaired, rebuilt, or replaced,’” that they were “not in possession of their hotels and the property contained within them,” or allege facts demonstrating that “there was physical damage to their property as a result of the physical nature of COVID-19.” 2020 WL 6440037 at *4.

These are just some of the federal cases addressing this issue in the context of COVID-19 and related stay at home orders that reach this conclusion. There are also numerous decisions from state courts reaching the same conclusion.

Applying these principles to this case demonstrates that the Amended Complaint does not state a claim. The Amended Complaint does not allege that there was a “physical loss of” or “physical damage to” Plaintiff’s business; in fact, there are no allegations about anything “physical” in connection with Plaintiff’s business at all. And the existence of the SHOs appears to have no bearing on the matter whatsoever: loss of use alone is insufficient to satisfy this provision and, like the embargo in *Source Food* and the COVID-related orders in cases such as

Water Sports Kauai, *Diesel Barbershop*, and *Hillcrest Optical*, the SHOs in this case have no physical effect on property – direct or otherwise.

In contending that the Amended Complaint is sufficient Plaintiff relies principally on two cases. The first is an unpublished decision from the Eastern District of Missouri in *Mehl v. Travelers Home & Marine Ins. Co.*, No. 4:16-CV-1325-CDP. In that case, the plaintiff alleged that his house became infested with brown recluse spiders and argued that he had suffered a “direct physical loss,” at least for the period of time it took to remove the infestation. The insurance company sought dismissal arguing that “‘direct physical loss’ means actual physical damage and because there is no dispute that the insured residence suffered no ‘physical damage’ on account of the spiders,” the plaintiff’s claim should be dismissed. (Doc. 24-1, p. 2.) The Eastern District declined to dismiss, but this decision does not aid Plaintiff for two reasons. First, the spiders were physically in the house – much like the asbestos fibers were physically in the building in *German St. Vincent*. But here, Plaintiff has not alleged that there was any physical infestation of its business. Second, *Mehl* relied in part on the policy’s definition of “property damage.” The Policy in this case also defines “property damage,” (Doc. 4-1, p. 118), but it does so in connection with Plaintiff’s liability coverage. The Business Income Endorsement does not utilize the phrase “property damage,” so the definition of that phrase does not dictate the Business Income Endorsement’s coverage.

The second case Plaintiff points to is *Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692386 (W.D. Mo. Aug. 12, 2020). Like this case, *Studio 417* involved a claim for coverage arising from the pandemic. However, there are significant differences between the Amended Complaint in this case and the operative pleading in *Studio 417*. In that case, the plaintiff alleged that the virus was present in and on its premises. *Studio 417*, 2020 WL 4692386 at *6. This

allegation differentiates *Studio 417* from this case, as well as the other cases cited earlier. Like the plaintiffs in those cases – and in contrast to the plaintiff in *Studio 417* – Plaintiff relies on (1) the mere existence of COVID-19 and (2) the SHOs. As outlined above, these allegations are insufficient.

Accordingly, the Court concludes that the Amended Complaint fails to allege facts that plausibly demonstrate that there was “direct physical loss of or damage to” Plaintiff’s business premises and therefore Count I fails to state a claim. However, the Court cannot say – depending on the facts – that it is legally impossible for Plaintiff to state a claim under the Business Income Endorsement. Therefore, the Court will grant Plaintiff’s oral request for that opportunity.

B. Count II – Civil Authority Endorsement

The Court also concludes that Count II presently fails to state a claim. At the outset, the Court observes that the SHOs are not the type of “civil authority” described in the Civil Authority Endorsement. Coverage applies when a civil authority prohibits Plaintiff from accessing *its* premises “*due to* direct physical loss of or damage to property at locations *other than*” Plaintiff’s premises. (Doc. 4-1, p. 62.) Plaintiff does not allege that any location other than its premises suffered direct physical loss or damage. Moreover, Plaintiff does not allege that the SHOs were issued “due to” that loss or damage. As with Count I, Plaintiff will be given an opportunity to amend Count II.

C. Count V – Dependent Property Endorsement

Finally, the Court also concludes that Count V presently fails to state a claim. The Dependent Property Endorsement applies when Plaintiff’s operations are suspended due to “direct physical loss or damage at the premises of a Dependent Property.” (Doc. 4-1, p. 153.) Plaintiff has not identified a Dependent Property (as that phrase is defined in the Policy) that suffered a

“direct physical loss or damage at [its] premises,” nor has Plaintiff alleged that it suspended its operations due to any such physical loss or damage. Plaintiff’s general allegation that “[t]he virus and stay-at-home orders and restrictions have resulted in losses due to . . . closures of dependent businesses,” (Doc. 4, ¶ 24), does not make this claim viable because it is a “threadbare recital” of the claim that *Iqbal* counsels is insufficient. *Iqbal*, 556 U.S. at 678. Nonetheless, the Court cannot say it is impossible for Plaintiff to amend Count V so that it states a claim, so Plaintiff’s request for leave to do so will be granted.

III. CONCLUSION

For the reasons state above, the Court concludes that the existence of COVID-19 and the related SHOs do not constitute “direct physical loss of or damage to” business premises. As this is the theory relied upon by Plaintiff, the Amended Complaint fails to state a claim for which relief can be granted. However, Plaintiff will be granted an opportunity to file a Second Amended Complaint. Plaintiff shall have fourteen days to electronically file its Second Amended Complaint, at which point the Motion to Dismiss will be moot.

IT IS SO ORDERED.

Date: November 30, 2020

/s/ Beth Phillips
BETH PHILLIPS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

EXHIBIT 29

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TOPPERS SALON & HEALTH SPA, INC.,

Plaintiff

v.

TRAVELERS PROPERTY CASUALTY COMPANY
OF AMERICA,

Defendant.

Case No. 2:20-cv-03342-JDW

MEMORANDUM

There was a time not so long ago when someone seeking an escape from day-to-day pressures could count on a trip to a spa, like Marge Simpson at Rancho Relaxo.¹ But like so many other things, the Covid-19 pandemic has upended that norm. Like so many other businesses, state and local governments have at times issued orders closing spas to prevent the virus's spread. Those businesses have, in turn, looked to recoup their losses from insurers. This is one such case.

Plaintiff Toppers Salon & Health Spa, Inc. seeks coverage for the government-mandated suspension of its businesses in Pennsylvania, New Jersey, and Delaware. The commercial property policy that Toppers purchased from Travelers Property Casual Company of America offers coverage for many interruptions to Toppers' business. But it does not cover Covid-19, both because it includes an exclusion that applies to virus-related losses and because the various governmental orders do not trigger coverage under Toppers' policy. The Court will therefore grant Travelers' motion for judgment on the pleadings and deny Toppers' motion for partial summary judgment.

¹ See *The Simpsons: Homer Alone* (Fox TV Broadcast February 6, 1992).

I. BACKGROUND

A. The Policy

Toppers operates a chain of day spas in Pennsylvania, New Jersey, and Delaware. It receives commercial property insurance coverage from Travelers under a policy from October 2019 for its locations in Philadelphia, Wayne, and Newtown, Pennsylvania; Marlton, New Jersey; and Dover, Delaware. Among other things, the Policy includes a Business Income Coverage Form that offers Toppers coverage in the event of certain interruptions to its business. Relevant here, that Form includes both Business Income coverage and Civil Authority coverage.

The Policy covers Business Income loss that Toppers sustains “due to the necessary suspension of your ‘operations’ during the ‘period of restoration,’” if the suspension was “caused by direct physical loss of or damage to property at [the insured’s] premises.” (ECF No. 5-2 at 41.) The Policy defines the period of restoration as the “period of time after direct physical loss or damage” and “when the premises should be repaired, rebuilt, or replaced with reasonable speed and similar quality.” (*Id.* at 50.) Business Income includes “net income ... *plus* continuing normal operating expenses incurred, including payroll.” (*Id.* at 41) (emphasis added).

The “Civil Authority” provision covers loss of Business Income and extra expenses incurred due to damage to property other than property at the insured’s premises, when as a result of “dangerous physical conditions,” a civil authority’s actions prohibit access to both the insured’s premises and the area immediately surrounding the damaged property. (*Id.* at 42.) The damaged property must be within one mile of the insured’s premises to enable a civil authority to have unimpeded access to the damaged property.

The Policy excludes coverage for any “loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” (*Id.* at 82 (the “Virus Exclusion”).) The Exclusion applies to “all coverage under all forms and endorsements” including Business Income and Civil Authority coverage. (*Id.*)

B. The Shutdown Orders

In March 2020, Pennsylvania, New Jersey, and Delaware, issued sweeping stay-at-home orders to mitigate the further spread of the Covid-19 virus. Those Shutdown Orders referenced that the virus can be transmitted through contact with surfaces and through exposure to airborne particles. As a result of these Orders, Toppers had to suspend operations at all of its locations. In June 2020, Toppers filed a coverage claim for its operating expenses during the suspension period. Travelers denied Toppers’ claim later that month. It explained that Toppers’ loss did not satisfy the Policy’s Business Income or Civil Authority coverage provisions and was also subject to the Policy’s Virus Exclusion, as well as several other exclusions.

C. Procedural History

On July 8, 2020, Toppers filed this action against Travelers for breach of contract for failure to provide coverage under the Policy. Both parties requested pre-trial judgment: Toppers moved for partial summary judgment, while Travelers moved for judgment on the pleadings. Both Motions are ripe for decision.

II. LEGAL STANDARD

A. Summary Judgment

Federal Rule of Civil Procedure 56(a) permits a party to seek, and a court to enter, summary judgment “if the movant shows that there is no genuine dispute as to any material

fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “[T]he plain language of Rule 56[(a)] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quotations omitted). In ruling on a summary judgment motion, a court must “view the facts and draw reasonable inferences ‘in the light most favorable to the party opposing the [summary judgment] motion.’” *Scott v. Harris*, 550 U.S. 372, 378 (2007) (quotation omitted).

B. Judgment on the Pleadings

“After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). A court can grant a Rule 12(c) motion “if, on the basis of the pleadings, the movant is entitled to judgment as a matter of law.” *Fed Cetera, LLC v. Nat’l Credit Servs., Inc.*, 938 F.3d 466, 470 n.7 (3d Cir. 2019) (quotation omitted). A Rule 12(c) motion “is analyzed under the same standards that apply to a Rule 12(b)(6) motion[,]” construing all allegations and inferences in the light most favorable to the nonmoving party. *Wolfington v. Reconstructive Orthopaedic Assocs. II PC*, 935 F.3d 187, 195 (3d Cir. 2019) (quotation omitted).

III. DISCUSSION

The parties agree that Pennsylvania insurance law applies. Under Pennsylvania law, the goal in interpreting an insurance policy, “as with interpreting any contract, is to ascertain the parties’ intentions, as manifested by the policy’s terms.” *Kvaerner Metals Div. of Kvaerner, U.S. v. Commercial Union Ins. Co.*, 908 A.2d 888, 897 (Pa. 2006). A court should not consider individual items in isolation. It must consider the entire insurance provision to ascertain the intent of the parties. See *401 Fourth St., Inc. v. Inv’rs Ins. Grp.*, 879 A.2d 166, 171 (Pa. 2005).

When policy language is clear and unambiguous, a court applying Pennsylvania law must give effect to that language. See *Kvaerner Metals*, 908 A.2d at 897. When a provision in the policy is ambiguous, a court must construe the policy “in favor of the insured to further the contract’s prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage.” *401 Fourth St.*, 879 A.2d at 171. “Contractual language is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.” *Id.* (quote omitted).

A. The Virus Exclusion

The Virus Exclusion applies to “loss or damage caused by or resulting from any virus ... that induces or is capable of inducing physical distress, illness or disease.” The language is not ambiguous, and it applies to Covid-19, which is caused by a coronavirus that causes physical illness and distress. See *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, Civ. No. 20-3198, 2020 WL 6545893, at *4 (E.D. Pa. Nov. 6, 2020) (similar virus exclusion barred coverage). Other courts considering Travelers’ policies under other states’ laws have reached the same conclusion.² That means that the Virus Exclusion applies to Toppers’ insurance claim.

Toppers concedes that the Virus Exclusion applies. It argues that the exclusion does not extend to claims for continuing expenses because those expenses are not a “loss” or a “damage.” Toppers’ argument ignores both the Policy’s language and structure. First, the Policy uses the word “loss,” but it does not define it. The Court must therefore give it its plain

² See *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 6503405, at *8 (S.D. Miss. Nov. 4, 2020); *Travelers Cas. Ins. Co. of Am. v. Geragos and Gergaos*, No. CV 20-3619 PSG (Ex), 2020 WL 6156584, at *4 (C.D. Cal. Oct. 19, 2020); *Mark’s Engine Co. No. 28 Rest., LLC v. The Travelers Indem. Co. of Conn.*, No. 20-04423, Order (C.D. Cal. Oct. 2, 2020); *10E, LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-CV-04418-SVW-AS, 2020 WL 5359653, at *6 (C.D. Cal. Sept. 2, 2020).

and ordinary meaning. See *Pa. Manufacturers' Ass'n Ins. Co. v. Aetna Cas. & Sur. Ins. Co.*, 233 A.2d 548, 551 (Pa. 1967). In the insurance context, a “loss” is the “amount of financial detriment caused by ... an insured property’s damage.” Black’s Law Dictionary 1087 (10th ed. 2009). More generally, the word refers to an “undesirable outcome of a risk” (*id.*) or an “amount of money lost by a business or organization” (New Oxford American Dictionary 1033 (3d ed. 2010)).

Both the failure to collect income and the payment of continued expenses fall within these definitions of “loss.” In addition, the Policy’s structure indicates that the parties intended the word “loss” to cover both lost income and continuing expenses. Under the Policy, “Business Income” includes both net income and continuing expenses, and the Policy provides coverage for any “loss of Business Income.” (ECF No. 5-2 at 41.) Under the heading “Loss Determination,” it describes the way that the parties anticipated determining the “amount of Business Income loss.” (*Id.* at 46.) And the Policy includes a provision that imposed on Toppers certain duties in the event of a “loss.” (*Id.*) These provisions, read as a whole, demonstrate that the parties intended the term “loss” to extend to all types of Business Income, including covered expenses. Toppers’ argument to the contrary does not analyze the Policy’s text; it does not point to a different definition of “loss;” and it does not account for the Policy’s overall structure. As a result, it does not carry the day.

B. Coverage

Even if the Virus Exclusion did not bar coverage, Toppers would not be able to show that the Policy covers its claim, either under the Business Income or the Civil Authority coverage.

1. Business Income coverage

Under the Policy, Toppers can obtain Business Income coverage if it must suspend its operations during a period of restoration as a result of “direct physical loss of or damage to” its premises. (ECF No. 5-2 at 41.) No one disputes that Toppers suspended its operations at each of its premises as a result of the Shutdown Orders. So the only question is whether physical loss or damage caused that suspension. It did not.

The Policy only pays Business Income coverage during a period of restoration. The Policy measures that period from the start of the physical loss until the “date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality” or when “business is resumed at a new permanent location.” (*Id.* at 50.) In addition, the Policy includes special exclusions for the Business Income coverage that apply to an “increase of loss caused by or resulting from [a d]elay in resulting, repairing, or replacing the property due to interference at the location by strikers or other persons.” (*Id.* at 56.) These provisions make clear that there must be some sort of physical damage to the property that can be the subject of a repair, rebuilding, or replacement. The Covid-19 pandemic does not fall within that definition.

Toppers admits that it will never trigger the end point for the period of restoration. (ECF No. 19 at 7.) It claims that fact demonstrates only that Travelers cannot prematurely end its coverage. But Toppers’ argument misses the point. The parties’ agreement to measure the period of restoration against the time it takes to repair the premises indicates that they intended the Policy to cover losses for physical damage, and that intent controls the Court’s interpretation of the Policy.

Toppers also argues that Policy’s use of the phrase “loss of” the premises means the loss of use of the premises. The Court agrees. But that does not save Toppers because it

ignores the question of why Toppers lost use of the premises. It did not lose use because the premises suffered physical damage. Business Income coverage does not apply.

2. Civil Authority coverage

The Policy's Civil Authority coverage applies only if there is "damage to property other than property at the described premises" and if a civil authority prohibits access to the area immediately around the covered premises in response to dangerous physical conditions in the area. (ECF No. 5-2 at 42.) But Toppers did not close because of damage to a nearby premise or because there was some dangerous physical condition at another nearby premise. It closed because the Shutdown Orders applied to its own operations. Its shutdown and resulting losses fall outside the scope of the Civil Authority coverage.

IV. CONCLUSION

Businesses nationwide have struggled to stay afloat during the pandemic. While the pandemic has affected Toppers' salons, the Policy's Virus Exclusion is unambiguous and bars Toppers' coverage claim. Toppers also cannot show that Covid-19 or the Shutdown Orders caused it physical damage or reparable loss under the Policy. Therefore, Toppers is not entitled to summary judgment. On the contrary, Travelers has demonstrated that it is entitled to judgment on the pleadings. An appropriate Order follows.

BY THE COURT:

/s/ Joshua D. Wolson

HON. JOSHUA D. WOLSON

United States District Judge

November 30, 2020

EXHIBIT 30

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

WHISKEY RIVER ON VINTAGE, INC.,
d/b/a WHISKEY RIVER ON VINTAGE,
WHISKEY ON MAIN, INC., d/b/a
WHISKEY RIVER, FOUNDERS ON MAIN,
INC., d/b/a FOUNDERS IRISH PUB,
Plaintiffs,

vs.

ILLINOIS CASUALTY COMPANY,
Defendant.

No. 4:20-cv-185-JAJ

ORDER

This matter comes before the Court pursuant to Defendant's Motion for Judgment on the Pleadings filed on September 25, 2020. [Dkt. No. 26] Defendant moves for judgment on the pleadings of all three counts of Plaintiffs' Amended Complaint and relief on its counterclaim. [Dkt. No. 28] Plaintiffs filed a resistance on October 9, 2020. [Dkt. No. 31] Defendant filed its reply to Plaintiffs' resistance on October 22, 2020. [Dkt. No. 37] For the reasons stated below, Defendant's Motion for Judgment on the Pleadings is **GRANTED**.

I. Introduction

A. Background

On a motion for judgment on the pleadings, the Court must take the non-movant's *well-pleaded* factual allegations as true. *Country Preferred Ins. Co. v. Lee*, 918 F.3d 587, 588 (8th Cir. 2019); *Guenther v. Griffin Constr. Co.*, 846 F.3d 979, 981 (8th Cir. 2017). Nevertheless, this statement of the background does not simply recite all of the allegations in Plaintiffs' Amended Complaint. Rather, it focuses on allegations pertinent to the Defendant's Motion for Judgment on the Pleadings.

Plaintiffs filed its original complaint in this action in the Polk County District Court. The case was removed to federal court in June 2020. Defendant filed its Answer, Affirmative Defenses, and Counterclaim to Plaintiff's original complaint on June 18, 2020. [Dkt. No. 3] Plaintiff answered Defendant's Counterclaim on July 24, 2020. [Dkt. No. 9] Plaintiff submitted an

Amended and Substituted Complaint and Jury Demand on August 27, 2020. [Dkt. No. 22] Defendant answered Plaintiff's Amended Complaint on September 10, 2020. [Dkt. No. 24]

Plaintiffs are restaurants or bars incorporated and operating in Iowa. Pls.' Am. Compl. [Dkt. No. 22], ¶¶ 2, 16. Plaintiffs' Amended Complaint states they purchased "both Business Income and Civil authority insurance coverage" from Defendant. *Id.* ¶ 17. Plaintiffs' respective insurance policies¹ were effective from October 15, 2019 to October 15, 2020; February 14, 2020 to February 14, 2021; and February 15, 2020 to February 15, 2021. *Id.* ¶ 18. Plaintiffs did not attach the policy to the original Complaint or Amended Complaint, but Defendant attached the policy to its original answer to Plaintiffs' Complaint. [Dkt. Nos. 3-1, 3-2, 3-3] The policy is identified in the Amended Complaint and is integral to and embraced by Plaintiffs' claims. *See Dean Snyder Constr. Co. v. Travelers Prop. Cas. Co. Am.*, 173 F. Supp. 3d 837, 841 (S.D. Iowa 2016). Reynolds's proclamation is also integral to and embraced by Plaintiffs' claims. As such, the Court may consider the policy and the proclamation without converting Defendant's Motion for Judgment on the Pleadings into a motion for summary judgment. *See id.*; *Williams v. Employers Mut. Cas. Co.*, 845 F.3d 891, 903–04 (8th Cir. 2017) (noting courts may consider items subject to judicial notice, matters of public record, and orders without converting a motion for judgment on the pleadings to a motion for summary judgment).

On March 17, 2020, Iowa Governor Kim Reynolds issued a proclamation related to the COVID-19 pandemic. In relevant part, the proclamation stated:

All Restaurants and Bars are hereby closed to the general public except that to the extent permitted by applicable law, and in accordance with any recommendations of the Iowa Department of Public Health, food and beverages may be sold if such food or beverages are promptly taken from the premises, such as on a carry-out or drive-through basis, or if the food or beverage is delivered to customers off the premises.

Def.'s Ans. to Pls.' Am. Compl. & Jury Demand [Dkt. No. 24], ¶ 44.

Plaintiffs claim they are entitled to coverage under the insurance policy. Pls.' Am. Compl. [Dkt. No. 22], ¶ 72. Specifically, they allege they are entitled to coverage under the Business

¹ Because the relevant language in each of the policies is identical, the Court will only cite to one of the policies and will refer to the collective policies as a single policy throughout this order. The Court will cite to the specific policy that was issued to Whiskey River on Main Inc. d/b/a Whiskey River, attached as Exhibit 1A to Defendant's Answer, Affirmative Defenses, and Counterclaim to Plaintiffs' original Complaint. Def.'s Ans., Ex. 1A [Dkt. No. 3-1]. All citations to the insurance policy will be to this specific exhibit, and the page numbers will correspond with the page numbers stamped to the exhibit upon filing.

Income, Extra Expense, and Civil Authority provisions of their policy. *Id.* ¶ 72. Plaintiffs also contend Defendant should be estopped from invoking the Virus Exclusion provision of the policy. *Id.* ¶ 87.

The Business Income provision of the policy states:

We 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 caused by or result from a Covered Cause Of Loss.

Def.’s Ans., Affirm. Defs., & Countercl. [hereinafter Def.’s Ans.], Ex. 1A [Dkt. No. 3-1 at 21].

The Extended Business Income provision states:

- (a) If the necessary suspension of your “operations” produces a Business Income loss payable under this Coverage Form, we will pay for the actual loss of Business Income
-
- (b) Loss of Business Income must be caused by direct physical loss or damage at the described “premises” caused by or resulting from any Covered Cause Of Loss.

Id. at 22.

The Extra Expense provision states:

We will pay necessary Extra Expense 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 at the described “premises.” The loss or damage must be caused by or result from a Covered Cause Of Loss.

Id.

The Civil Authority provision states:

- 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 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 civil authority as a result of the damage, and the described “premises” are within that area but are not outside a one mile radius 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. . . .

Id. at 23.

The Virus Exclusion provision states:

- a. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

. . .

(9) Loss Due To Virus or Bacteria

We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.

Id. at 45, 47.

The Consequential Losses Exclusion contained in the policy states, “We will not pay for loss or damage caused by or resulting from any of the following (1) Consequential Losses: Delay, loss of use or loss of market. *Id.* at 48. The Acts or Decisions Exclusion contained in the policy states:

We will not pay for loss or damage caused by or resulting from any of the following Paragraphs (1) through (3). But if an excluded cause of loss that is listed in Paragraphs (1) through (3) results in a Covered Cause Of Loss, we will pay for the loss or damage caused by that Covered Cause Of Loss.

. . .

(2) Acts Or Decisions Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

Id. at 50.

B. Plaintiffs’ Claims and Defendant’s Counterclaim and Affirmative Defenses

1. Plaintiffs’ Claims

Plaintiffs’ Amended Complaint contains several allegations that are incorporated into the final Counts. In relevant part, Plaintiffs allege:

44. On March 17, 2020, Iowa Governor Kim Reynolds issued a proclamation closing all bars and restaurants from dine-in or in-person service.

. . .

46. The action of this Civil Authority resulted in the necessary suspension of Plaintiffs' operations as they economically could not operate their businesses solely on a take-out or delivery basis.

47. The proclamation caused "direct physical loss of or damage to" Plaintiffs' covered property under the Policy by precluding Plaintiffs from conducting their operations , [sic] precluding customers from patronizing the business, and otherwise frustrating the intended purpose of Plaintiffs' businesses, all thereby causing the necessary suspension of operations during a period of restoration.

48. Governor Reynolds' March 17, 2020 Order prohibited access to Plaintiff's Covered Property, and the area immediately surrounding the Covered Property, in response to dangerous physical conditions resulting in and from a Covered Cause or Loss.

49. Losses caused by COVID-19 and/or the Governor Reynolds' proclamation triggered the Business Income, Extra Expense, Civil Authority, and Contamination provisions of the Policy[.]

Pls.' Am. Compl. [Dkt. No. 17], ¶¶ 44, 46–49.

In Count I of their Amended Complaint, Plaintiffs allege they are entitled to a declaratory judgment against Defendant stating that Plaintiffs are entitled to coverage under the Business Income, Extra Expense, and Civil Authority provisions of their insurance policy with Defendant. *Id.* ¶ 74. Plaintiffs also request Defendant be estopped from relying on the Virus Exclusion in the policy, and that the Court order payment of loss of income, including costs and attorney fees. *Id.* In support of this relief, Plaintiffs state:

71. Plaintiffs re-allege all of the above paragraphs 1 through 70 as if fully set forth herein.

72. Each Plaintiff claims damages that are covered under the business interruption loss of income policy issued to each Plaintiff by the Defendant, including claims under the Business Income, Extra Expense, and Civil Authority provisions.

73. Defendant Illinois Casualty Company has denied coverage under [Plaintiffs' policy].

Id. ¶¶ 71–73.

In Count II, Plaintiffs allege a claim of breach of contract by Defendant. In pertinent part, this Count states:

75. That Plaintiffs re-allege paragraphs 1 through 72 as fully set forth herein.

76. Plaintiffs' Policy is a contract under which Defendant was paid premiums in exchange for its promise to pay Plaintiff's losses for claims covered by the Policy.

77. The Business Income provisions in the Policies require Defendant to pay for Plaintiffs' actual loss of Business Income sustained due to the necessary suspension of its operations during the period of restoration.

78. Governor Reynolds' Proclamation and/or COVID-19 caused direct physical loss to Plaintiffs' Property resulting in loss of Business Income, thereby triggering the Business Income provision of Plaintiff's Policy.

79. The Policies also provide Civil Authority coverage, which promises to pay the actual loss of Business Income Plaintiff's sustained and the necessary Extra Expense cause by action of civil authority that prohibits access to Plaintiff's premises due to physical loss of or damage to the property caused by or resulting from any Covered Cause of Loss.

80. Governor Reynolds' Proclamation prohibited access to Plaintiffs' premises due to physical loss or damage to property resulting in loss of Business Income and Extra Expense, thereby triggering the Civil Authority provision under Plaintiff's Policy.

81. The Policies also provide that Defendant will pay necessary Extra Expense Plaintiff incurs during the period of restoration that Plaintiff would not have incurred had there been no direct physical loss or damage to the premises.

82. Due to Governor Reynolds' Proclamation, Plaintiffs incurred Extra Expenses at Covered Property.

...

84. The losses described herein are covered losses under the policy.

85. Plaintiff has complied with the applicable provisions of the Policy.

86. No valid policy exclusion exists to preclude coverage

...

88. By denying coverage for the claims and losses set forth herein, Defendant has breached its coverage obligations under the Policies.

Id. ¶¶ 75–82, 84–86, 88.

In Count III, Plaintiffs allege Defendant acted with bad faith by failing to investigate their claims. Specifically, Plaintiffs assert:

90. Defendant has a contractual obligation to fully and completely investigate a claim of an insured for policies which they have written and for which they have received commissions.

...

92. Defendant denied coverage for each Plaintiff's claim based on a virus exclusion contained in the policy.

93. Defendant failed to make any investigation of each claim and did not inquire if any facility that was insured had any evidence of infestation of the coronavirus or any other virus at any time, or if any employee or customer had become infected with the coronavirus or other virus at any time.

94. That there was a complete failure in any manner in good faith to investigate each Plaintiff's claim and the claims were summarily denied.

95. That the Defendant has acted in bad faith in denying each Plaintiff's claim, and failing in good faith to investigate Plaintiffs' claim pursuant to Iowa Administrative Code section 191-15.41 (507A) and Iowa Code section 507A(4)(b).

96. That as a direct and proximate result of Defendant's bad faith in failing to investigate Plaintiffs' claim, each Plaintiff has been damaged

Id. ¶¶ 90, 92–96.

Plaintiffs admit they have no knowledge of any of the insured properties being infected with COVID-19 nor are they aware of any customers or employees who contracted the virus. *Id.* ¶ 60. Plaintiffs seek a jury trial on all claims. Plaintiffs seek a declaratory judgment stating they are entitled to coverage under their insurance policy, an award for the loss of income of each of the Plaintiffs plus pre-judgment interest, a monetary award for the loss of revenue to The District Venue, attorney fees and costs, punitive damages, and any other relief the Court deems proper. *Id.* ¶¶ 74, 88, 97.

2. Defendant's Counterclaim and Affirmative Defenses

In Defendant's Answer, Affirmative Defenses, and Counterclaim, Defendant asserts a counterclaim against Plaintiffs and provides several affirmative defenses to Plaintiffs' claims. In Count I, Defendant requests a declaratory judgment against Plaintiffs. In support of their request, Defendant states:

3. Illinois Casualty Company issued to Counterclaim Defendant Whiskey River on Main, Inc., insurance policy number BP42546,

effective October 15, 2019 to October 15, 2020. A true and correct copy is attached here as Exhibit 1A.

4. Illinois Casualty Company issued to Counterclaim Defendant Whiskey River on Vintage, Inc., insurance policy number BP44174, effective February 14, 2020 to February 14, 2021. A true and correct copy is attached here as Exhibit 1B.

5. Illinois Casualty Company issued to Counterclaim Defendant Founder on Main, Inc., an insurance policy number BP37140, effective February 15, 2020 to February 15, 2021. A true and correct copy is attached here as Exhibit 1C.

...

6. Counterclaim Defendants made claims for coverage on March 17, 2020.

7. Counterclaim Defendants claimed they were entitled to Business Interruption coverage caused by Governor Kim Reynolds's Proclamation and Order.

8. Counterclaim Defendants provided no evidence or attestation to Illinois Casualty Company that there was physical loss or damage to the premises.

9. Counterclaim Defendants' claims do not satisfy the Insuring Agreements of any of the Policies' coverage parts and otherwise are excluded by the following provisions: Loss due to Virus or Bacteria; Consequential Losses; and Acts or Decisions.

10. On March 25, 2020 and April 17, 2020, Illinois Casualty Company denied the claims. See Exhibit 2A (denial letter to Whiskey River on Main, Inc.), 2B (denial letter to Whiskey River on Vintage, Inc.), and 2C (denial letter to Founders on Main, Inc.).

Def.'s Ans., Affirm. Defs., & Countercl. [Dkt. No. 3], ¶¶ 3–10. Defendant seeks an order affirming “the denials of coverage based upon the claims Plaintiffs presented.” *Id.* ¶ 12.

Defendant also raises several affirmative defenses to Plaintiffs' claims, including 1) failure to state a claim, 2) preclusion from coverage under the insurance policy's provisions, 3) nonwaiver, 4) fairly debatable claim, 5) failure to perform, 6) failure to mitigate damages, 7) and violation of the Due Process Clause should punitive damages be awarded. *Id.* at 16–17. As to the policy provisions, Defendant states:

Applicable policy exclusions and provisions preclude coverage for the damages alleged in this case, specifically, (1) the fundamental insuring language requiring “direct physical loss of or damage to property at the described ‘premises;’” (2) Business Income and Extended Business Income Coverage; (3) Extra Expense and Civil Authority Coverage; (4)

Food Contamination and Spoilage Coverage; (5) Virus or Bacteria Exclusion; (6) Consequential Losses Exclusion; and (7) Acts or Decisions Exclusion.

Id. at 17.

C. Motion for Judgment on the Pleadings

In the motion now before the Court, Defendant seeks judgment on the pleadings dismissing all three Counts included in Plaintiffs' Amended Complaint. Defendant also seeks relief on its counterclaim for declaratory relief. Defendant advances two primary arguments for judgment on the pleadings. First, Defendant argues Plaintiffs' insurance policy does not provide coverage for Plaintiffs' insurance claims because Plaintiffs have not alleged direct physical loss or damage to their covered properties. Second, even if the policy did provide coverage, Defendant contends relevant policy exclusions preclude coverage of Plaintiffs' claims. Because Plaintiffs were not entitled to coverage under the policy, Defendant argues their breach of contract claim must fail. Defendant also argues that Plaintiffs' bad faith claim fails as a matter of law because Defendant had a reasonable basis for denying Plaintiffs' coverage claims based on the policy's language.

In reply, Plaintiffs argue loss and damage are two distinct concepts, with loss not requiring physical alteration to property. They contend they have demonstrated a direct physical loss under the business interruption provision of their insurance policy. Plaintiffs allege Governor Reynolds's proclamation itself amounts to a direct physical loss that is covered under the Business Income and Extra Expense provisions. They contend the proclamation directly caused their businesses to close. Plaintiffs argue the loss of use or inability to use a facility for its intended purpose can constitute a physical loss. Plaintiffs also contend they qualify for coverage under the Civil Authority provision because the coverage applies when an insured party loses the use of the insured premises. They argue proclamation prohibited access to their property and that the policy does not require access to be completely prohibited to trigger coverage. Finally, Plaintiffs contend they have plausibly stated a claim for bad faith based on Defendant's failure to conduct a good faith investigation into their claims.

II. Legal Analysis

A. Applicable Standards

1. Judgment on the Pleadings

Rule 12(c) of the Federal Rules of Civil Procedure provides, "After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings."

Fed. R. Civ. P. 12(c). Notably, the rule does not provide a standard by which to decide a motion for judgment on the pleadings. Fortunately, the Eighth Circuit Court of Appeals has explained, “As a general rule, a Rule 12(c) motion for judgment on the pleadings is reviewed under the same standard as a 12(b)(6) motion to dismiss.” *In re Pre-Filled Propane Tank Antitrust Litig.*, 893 F.3d 1047, 1056 (8th Cir. 2018) (quoting *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1233 n.3 (8th Cir. 2010)).

Thus, the Court must take the non-movant’s *well-pleaded* factual allegations as true, grant all *reasonable* inferences in the nonmovant’s favor, and may grant the motion *only* when there is no material issue of fact and the moving party is entitled to judgment as a matter of law. *Lee*, 918 F.3d at 588; *Guenther*, 846 F.3d at 981. The Court is not obligated to accept the nonmoving party’s conclusions of law as true. *Brown v. Medtronic, Inc.*, 628 F.3d 451, 459 (8th Cir. 2010). The Court may dismiss a claim when a dispositive issue of law demonstrates a claim does not exist on the pleadings. *Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989). Although the Court must generally restrict itself to matters in the pleadings, “courts may consider matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned without converting the motion into one for summary judgment.” *Williams*, 845 F.3d at 903–04.

2. Declaratory Judgments

Parties may seek relief from a district court in the form of a declaratory judgment pursuant to the Declaratory Judgment Act. The Declaratory Judgment Act provides in relevant part:

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a). To determine whether a substantial controversy exists, courts consider whether “there is a substantial controversy, between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Caldwell v. Gurley Refining Co.*, 755 F.2d 645, 649 (8th Cir. 1985) (quoting *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). Declaratory relief is proper: “1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue; and 2) when it will

terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceedings.” *Alsager v. Dist. Ct. of Polk Cty.*, 518 F.2d 1160, 1163 (8th Cir. 1975).

3. Construction of Insurance Policies

This case was removed to federal court on the basis of diversity jurisdiction. When sitting in diversity jurisdiction, courts apply federal procedural law and state substantive law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Accordingly, Iowa law applies to the substantive claims and the Federal Rules of Civil Procedure apply to the Motion for Judgment on the Pleadings itself. *See id.* Under Iowa law, the party seeking coverage under an insurance policy has the burden of demonstrating that a claim falls within the policy’s terms. *Am. Guar. & Liab. Ins. Co. v. Chandler Mfg. Co.*, 467 N.W.2d 226, 228 (Iowa 1991). The insurer bears the burden of demonstrating that a coverage exclusion applies. *Postell v. Am. Family Mut. Ins. Co.*, 823 N.W.2d 35, 41 (Iowa 2012).

The intent of the parties is controlling in the construction of insurance policies. *Farm Bureau Life Ins. Co. v. Holmes Murphy & Assocs., Inc.*, 831 N.W.2d 129, 133 (Iowa 2013) (citing *Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678, 681 (Iowa 2008)). Courts examine the language of the policy itself to ascertain the intent of the parties, except when the language is ambiguous. *Id.* at 133–34 (citing *A.Y. McDonald Indus., Inc. v. Ins. Co. of N.A.*, 475 N.W.2d 607, 618 (Iowa 1991)). Contract terms are ambiguous when the terms are “capable of more than one meaning when viewed objectively by a reasonably intelligent person” *Phoenix Ins. Co. v. Infogroup, Inc.*, 147 F. Supp. 3d 815, 822 (S.D. Iowa 2015) (citations omitted). A disagreement about the meaning of terms does not establish ambiguity. *Id.* (quoting *Farm Bureau Life Ins.*, 831 N.W.2d at 133). Additionally, “[a]n undefined policy term does not automatically equate to an ambiguous term” *Milligan v. Grinnell Mut. Reinsurance Co.*, No. 00-1452, 2001 WL 427642, at *2 (Iowa Ct. App. Apr. 27, 2001). When terms in a policy are undefined, courts interpret the terms to have their ordinary meaning. *Amera–Seiki Corp. v. Cincinnati Ins. Co.*, 721 F.3d 582, 585 (8th Cir. 2013). Undefined terms are interpreted in light of the policy as a whole. *See Fashion Fabrics of Ia., Inc. v. Retail Inv’rs Corp.*, 266 N.W.2d 22, 26 (Iowa 1978).

To succeed on a bad faith claim under Iowa law, the insured must demonstrate: “(1) that the insurer had no reasonable basis for denying benefits under the policy and, (2) the insurer knew, or had reason to know, that its denial was without basis.” *United Fire & Cas. Co. v. Shelly Funeral Home, Inc.*, 642 N.W.2d 648, 657 (Iowa 2002). The first element is objective, and the second

element is subjective. *Id.* An insurer’s objectively reasonable denial of coverage precludes bad-faith liability. *Id.* at 652. A reasonable basis exists for denying coverage when “the insured’s claim is fairly debatable either on a matter of fact or law.” *Bellville v. Farm Bureau Mt. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005). A court may determine whether a denial of coverage was fairly debatable as a matter of law. *Id.*

B. Discussion: Plaintiffs’ Claims

1. Declaratory Judgment

a. Business Income and Extra Expense Coverage

For there to be coverage under the Business Income provision, there must be “direct physical loss of or damage to property at the described ‘premises.’” Def.’s Ans., Affirm. Defs., & Countercl., Ex. 1A [Dkt. No. 3-1 at 21]. Plaintiffs focus on the first portion of this phrase, “direct physical loss of.” They contend the use of the disjunctive—or—indicates “loss” and “damage” are two distinct concepts, either of which is sufficient to trigger coverage. Pls.’ Am. Compl. [Dkt. No. 22], ¶¶ 27–28. Plaintiffs note the policy does not define this phrase or any of its terms, and as such, the policy terms should be interpreted in light of the policy as a whole. *Id.* ¶ 26. They allege other portions of the policy indicate that “loss” does not have to be a tangible alteration of property. They contend several courts had interpreted “physical loss or damage to property” to include any condition that makes it impossible to use property for its intended use. *Id.* ¶ 30.

Plaintiffs allege they are entitled to coverage under the Business Income provision because Reynolds’s proclamation caused them direct physical loss of or harm to their covered properties by “precluding Plaintiffs from conducting their operations , [sic] precluding customers from patronizing the business, and otherwise frustrating the intended purpose of Plaintiffs’ businesses, all thereby causing the necessary suspension of operations during a period of restoration.” *Id.* ¶ 47.

Defendant contends Plaintiffs have failed to allege direct physical loss or damage, and therefore they do not fall within the policy’s coverage. Def.’s Mem. Auths. Supp. Mot. J. Pleadings [Dkt. No. 28 at 7]. Defendant argues the phrase “direct physical loss of or damage to property” requires tangible loss or damage to trigger coverage, which Plaintiffs have not pleaded. *Id.* at 9, 15. Further, Defendant contends Plaintiffs’ loss of use of the insured properties for its intended purpose does not constitute tangible loss or damage because Plaintiffs’ argument rests on a misinterpretation of Reynolds’s proclamation. *Id.* at 16–17.

Plaintiffs respond by arguing ambiguities about the term “loss” preclude Defendant’s Motion for Judgment on the Pleadings. Pls.’ Resis. Def.’s Mot. Dismiss & Req. Oral Arg. [Dkt. No. 31 at 12–15]. Plaintiffs contend “loss” is not defined anywhere in the policy as requiring actual alteration of property. *Id.* at 12. They also affirm their stance on the importance of the use of the disjunctive in the phrase “direct physical loss of or damage.” *Id.* at 13–14. Plaintiffs allege the proclamation itself constitutes direct physical loss and that they could not have exercised any judgment in deciding to keep their operations open. *Id.* at 15. They contend, the proclamation “directly deprived [them] of the ability to operate their businesses, thereby necessitating the suspension of their operations.” *Id.* at 16.

At the first step of the analysis, the Court seeks to ascertain the intent of the parties by looking at the language of the policy. *See Farm Bureau Life Ins.*, 831 N.W.2d at 133. The Court finds the language of the Business Income provision to be unambiguous. Reading the policy language as a whole, the policy is unambiguous in its requirement that an insured suffer “direct physical loss of or damage” to the insured property to qualify for the Business Income provision. Because the phrase and its terms are undefined, the undefined terms are given their ordinary meaning. *Amera–Seiki Corp.*, 721 F.3d at 585.

Iowa courts have interpreted similar language in insurance policies in the past. In 2001, the Iowa Court of Appeals considered the meaning of the phrase “direct physical loss or damage” in an insurance policy. *Milligan*, 2001 WL at *2. Because the phrase and its terms were not defined in the policy, the Iowa Court of Appeals turned to the ordinary meaning of the terms “loss” and “damage.” *Id.* The court determined the terms unambiguously referred to the destruction or injury of the insured property, meaning the alleged loss or destruction must be physical. *Id.* The Iowa Court of Appeals concluded the phrase was not open to any other interpretation. *Id.*

In 2015, this Court interpreted the phrase, “direct physical loss of or damage,” in an insurance policy according to Iowa law. *See Phoenix Ins. Co.*, 147 F. Supp. 3d at 821–27. In *Phoenix Insurance Company v. Infogroup, Inc.*, the Court considered whether an insured party was entitled to coverage under an insurance policy’s Extra Expense provision after the insured temporarily relocated its business due to the threat of flooding. *Id.* at 818, 821. The Extra Expense provision required “direct physical loss of or damage to property” to trigger coverage. *Id.* at 819. Like the case currently before the Court, the phrase and its terms were not defined in the insurance policy. *Id.* at 823. This Court determined “physical loss or damage generally requires some sort of

physical invasion” and rejected Infogroup’s argument that the loss of use of their property as a result of the threat of flooding amounted to direct physical loss or damage. *Id.* at 823–24. In so doing, this Court acknowledged its interpretation “comports with other courts interpreting what constitutes ‘physical loss’ under similar insurance provisions.” *Id.* at 823 (citing *Milligan*, 2001 WL at *2).

In reaching this conclusion, this Court noted that interpreting the policy to only require loss of use “would not give effect to the plain language of the policy.” *Id.* at 825 (citing *Farm Bureau Life Ins.*, 831 N.W.2d at 133). The Court stated:

While a loss of use may, in some cases, entail a physical loss, the Court does not find “loss of use” and “physical loss or damage” synonymous. Indeed, interpretation of physical loss as requiring only loss of use stretches “physical” beyond its ordinary meaning and may, in some cases “render the word ‘physical’ meaningless.” *Source Food Tech., Inc. v. U.S. Fidelity and Guar. Co.*, 465 F.3d 834, 835 (8th Cir.2006) (finding no coverage under a policy covering “direct physical loss to property” when property was meat which was not allowed to cross the border into the United States and was thus treated as unusable but in fact suffered no spoilage or contamination); *Pentair, Inc. v. Am. Guarantee and Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir.2005) (affirming district court's finding of no coverage under the policy because “[o]nce physical loss or damage is established, loss of use or function is certainly relevant in determining the amount of loss ... But [Plaintiff's] argument, if adopted, would mean that direct physical loss or damage is established whenever property cannot be used for its intended purpose.”).

Id. As such, the Court concluded “physical loss or damage” requires a material loss, which calls for something more than a threat of loss. *Id.*

In 2016, another court in this district considered the meaning of the phrase “direct physical loss” in a dispute regarding when direct physical loss occurred to the insured property. In *Dean Snyder Construction Company v. Travelers Property Casualty Company of America*, the parties disputed whether direct physical loss occurred when a windstorm damaged the insured property or when liability attached to the insured following an arbitration award with a third party for rebuilding costs. 173 F. Supp. 3d at 842–43. The court considered the common usage of the terms “loss” and “physical” to determine when the direct physical loss occurred. *Id.* at 843. Based on the common understanding of the terms at issue, the court concluded an arbitration award does not constitute physical loss. *Id.* at 844.

Plaintiffs, among other reasons, attempt to distinguish their case from *Phoenix* because the decision did not specifically address the significance of the use of the disjunctive in the phrase “direct physical loss of or damage.” This argument goes to Plaintiffs’ contention that the use of “or” in the policy means that coverage applies when there is either “physical loss of property or damage to property occurs.” Pls.’ Am. Compl. [Dkt. No. 22], ¶ 27. Despite Plaintiffs’ attempt to differentiate *Phoenix*, the Court finds no reason to diverge from its previous interpretation of the phrase “direct physical loss of or damage.” As such, the Court concludes the phrase “direct physical loss of or damage to property” requires a physical invasion and loss of use is insufficient to trigger coverage without physical damage to the insured properties. *See Phoenix Ins. Co.*, 147 F. Supp. 3d at 824–26.

Even if the Court assumes loss and damage are distinct concepts that can independently trigger coverage, the terms are unambiguous, and Plaintiffs have failed to allege facts sufficient to qualify for Business Income coverage. *See Phoenix Ins. Co.*, 147 F. Supp. 3d at 826. Plaintiffs allege that the proclamation caused them direct physical loss or damage by precluding customers from patronizing their business, precluding them from conducting business, and frustrating the intended purpose of their businesses. Pls.’ Am. Compl. [Dkt. No. 22], ¶ 47. Although Plaintiffs attempt to paint their losses as physical, they have essentially pleaded loss of use, which is insufficient to establish a direct physical loss. *See Phoenix Ins. Co.*, 147 F. Supp. 3d at 825–26. Even if loss and damage are distinction, the physicality requirement of the loss or damage remains, and Plaintiffs have failed to allege a tangible loss or alteration to property that is sufficient to trigger coverage under the Business Income provision. *See id.* at 826.

The Extra Expense provision requires “direct physical loss or damage” to the insured property to trigger coverage. For the same reasons identified above, Plaintiffs have failed to plausibly allege direct physical loss or damage to the insured property within the meaning of the Extra Expense provision. Because Plaintiffs have failed to allege direct physical loss or damage to the insured property as required by the policy, they are not entitled to coverage under the Business Income or Extra Expense provisions.

Courts across the country have considered the availability of insurance coverage for business closures mandated as a result of the COVID-19 pandemic. Many of these courts considered policy language and circumstances similar to those before this Court, with many courts reaching the same conclusion as this Court regarding the meaning of physical loss or damage. In

this district, a court recently concluded an insured party failed to allege any physical loss or damage within an insurance policy's coverage when the insured claimed its loss was a result of COVID-19 and the governor's proclamation suspending non-emergency dental procedures. *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, No. 4:20-cv-CRW-SBJ, 2020 WL 5820552, at *1 (S.D. Iowa Sept. 29, 2020). In *Diesel Barbershop, LLC v. State Farm Lloyds*, a Texas court concluded an insured party's allegation that it lost the use of the insured property because of government-closure orders in response to COVID-19 was insufficient to constitute direct physical loss under the insurance policy. No. 5:20-cv-461-DAE, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020). In *Malaube, LLC v. Greenwich Insurance Company*, a Florida court held an insured party's allegation that the government emergency orders forced its restaurant to close was insufficient to constitute direct physical loss or damage under the insurance policy. Case No. 20-22615-Civ-Williams/Torres, 2020 WL 5051581, at *7 (S.D. Fla. Aug. 26, 2020). In *Sandy Point Dental, PC. v. Cincinnati Insurance Company*, an Illinois court concluded the phrase "direct physical loss" unambiguously requires some form of physical damage to the insured premises, and COVID-19 related government closure orders did not amount to direct physical loss to the insured premises. Case No. 20 CV 2160, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020).

Similarly, in *Pappy's Barber Shops, Inc. et al. v. Farmers Group Inc.*, a California court rejected the plaintiffs' contention that the phrase "direct physical loss of or damage to property" does not require tangible damage or alteration to the insured property. Case No. 20-CV-907-CAB-BLM, 2020 WL 550221, at *4 (S.D. Cal. Sept. 11, 2020). The court also rejected the plaintiffs' argument that the government-closure orders themselves caused direct physical loss or damage to the insured property. *See id.* at *4–6. Likewise, the court was not persuaded by the plaintiffs' contention that the use of the disjunctive in the phrase "direct physical loss" did not require tangible damage. *See id.* at 5–6. In *10E, LLC v. Travelers Indemnity Company of Connecticut*, the plaintiff alleged it was entitled to coverage under the Business Income and Extra expense provisions of its insurance policy because the government orders restricting dine-in services at its restaurants prohibited access to its restaurant and prevented the intended use of the property. 2:20-cv-04418-SVW-AS, 2020 WL 5359653, at *1–2 (C.D. Cal. Sept. 2, 2020). The California court concluded the plaintiff was not entitled to coverage under these provisions because the plaintiff failed to allege a direct physical loss or damage. *Id.* at *5. In the case currently before the Court, Plaintiffs cite some cases that are contrary to this interpretation; however, these cases are distinguishable

based on their facts. Further, the cases cited by the Plaintiffs are not analyzed on the same level as the cases referenced above.

The Court concludes that it is a settled matter in Iowa law that direct physical loss or damage requires tangible alteration of property and that loss of use alone is insufficient. *See Milligan*, 2001 WL at *2. The Court further concludes that Plaintiffs have not alleged a direct physical loss or damage that is sufficient under the policy or Iowa law. *See id.*; *Phoenix Ins. Co.*, 147 F. Supp. 3d at 825. Because a direct physical loss or damage to the insured property is a prerequisite to trigger coverage under the Business Income and Extra Expense provisions of the policy, Plaintiffs have failed to plausibly plead an entitlement to coverage under these provisions. No material issue of fact remains unresolved, and Defendant is entitled to judgment as a matter of law.

b. Civil Authority Coverage

To trigger coverage under the Civil Authority provision, a Covered Cause of Loss must cause damage to a property other than the insured property. Additionally, there must be an “action of civil authority that prohibits access to the described ‘premises’” in “response to dangerous physical conditions” created by “damage to property other than property at the described ‘premises’” that causes “[a]ccess to the area immediately surrounding the damaged property [to be] prohibited by civil authority as a result of the damage” and the insured property is within a one-mile radius of the damaged property. Def.’s Ans., Ex. 1A [Dkt. No. 3-1 at 23].

Plaintiffs allege Reynolds’s proclamation was an action of a Civil Authority that “resulted in the necessary suspension of Plaintiffs’ operations.” Pls.’ Am. Compl. [Dkt. No. 22], ¶ 46. They allege the proclamation itself caused direct physical loss of or damage to the insured properties because it “prohibited access to Plaintiff’s Covered Property, and the area immediately surrounding the Covered Property, in response to dangerous physical conditions resulting in and from a Covered Cause of Loss.” *Id.* ¶ 48.

Defendant contends Plaintiffs do not meet the coverage requirements of the Civil Authority provision. Defendant argues Plaintiffs have failed to plead physical loss, either at the insured premises or another location. Def.’s Mem. Auths. [Dkt. No. 28 at 8 n.2]. Further, Defendant alleges Plaintiffs were not denied access to their properties. *Id.* Defendant also contends the proclamation was not issued as a result of specific physical damage, rather it was issued to limit the spread of

COVID-19. *Id.* Finally, Defendant argues Plaintiffs have not alleged their properties were within a one-mile radius of the damaged property. *Id.*

Plaintiffs respond by arguing that Reynolds's proclamation is an action of a Civil Authority that prohibited access to their property. Pls.' Resis. Def.'s Mot. Dismiss [Dkt. No. 31 at 22]. They contend that the Civil Authority provision does not explicitly state that access to the insured property must be completely prohibited for coverage to apply. *Id.* Plaintiffs argue "the actions of Civil Authorities closing non-essential businesses such as Plaintiffs' bars and restaurants evidences an awareness on the part of Federal, state, and local governments that covid-19 causes 'loss of or damage to property' with respect to both the Business Income and Civil Authority claims." *Id.* Plaintiffs contend the threat of COVID-19 and its ability to attach to and harm property resulted in the proclamation which caused direct physical losses to Plaintiffs' properties. *Id.* at 21.

Here, the Civil Authority provision unambiguously requires that an order of civil authority be issued in response to a dangerous physical condition created by damage to another property and that the insured property be within a one-mile radius of the damaged property. Def.'s Ans., Ex. 1A [Dkt. No. 3-1 at 21]. Plaintiffs have failed to plead facts sufficient to qualify for coverage under the Civil Authority provision. They point generally to the physical form COVID-19 may take; however, Plaintiffs have not alleged damage to another property. Further, Reynolds's proclamation was not issued in response to a dangerous physical condition that resulted from a Covered Cause of Loss. Rather, the proclamation was issued to limit the spread of COVID-19. Because Plaintiffs have failed to allege facts sufficient to trigger the Civil Authority provision, the Court need not address whether a civil authority order must completely prohibit access. However, the Court is skeptical that the prohibits access prong would be satisfied when the Plaintiffs were able to conduct delivery and take-out services from their properties but chose not to do so. *See Phoenix Ins. Co.*, 147 F. Supp. 3d at 824 (concluding the court could not find a loss of use of the insured property when the insured party still stored data and had employees at the property at the time of the alleged loss of use). Regardless, Plaintiffs have failed to allege facts sufficient to state a claim for coverage under the Civil Authority provision.

Courts across the country have reached the same conclusion in similar circumstances and with comparable insurance policy language. In *Sandy Point Dental, PC*, an Illinois court held an insured party was not entitled to civil authority coverage where the insured failed to allege COVID-19 caused direct physical loss to another property. 2020 WL at *3. The court also noted civil

authority coverage was not triggered because the government order only limited non-essential dental procedures. *Id.* As such, the court determined the insured failed to establish that there was an order of civil authority that limited its access to the insured property. *Id.* In *Mudpie, Inc. v. Travelers Casualty Insurance Company of America*, a California court found an insured party was not entitled to coverage under the civil authority provision because the insured failed to establish a connection between other damaged property and the denial of access to its business. Case No. 20-cv-03213-JST, 2020 WL 5525171, at *6–7 (N.D. Cal. Sept. 14, 2020). In *10E, LLC*, a California court concluded the civil authority provision of an insurance policy was not triggered when the insured party failed to allege direct physical loss or damage to another property. 2020 WL at *5.

The Court concludes that Plaintiffs have not alleged facts plausibly demonstrating an entitlement to coverage under the policy’s Civil Authority provision. No material issue of fact remains unresolved, and Defendant is entitled to judgment as a matter of law.

c. Virus Exclusion

Plaintiffs’ Amended Complaint alleges Defendant should be estopped from invoking the Virus Exclusion to preclude coverage. Pls.’ Am. Compl. [Dkt. No. 22], ¶ 74. Plaintiffs contend the original adoption of the virus exclusion by the Iowa Insurance Commissioner was secured by misrepresentations and that Defendant directly or indirectly participated in this effort. *Id.* ¶ 66–69. Plaintiffs allege this is sufficient to estop Defendant from invoking the Virus Exclusion. *Id.* ¶ 74.

Defendant argues that even if Plaintiffs can establish that they are entitled to coverage under the Business Income, Extra Expense, or Civil Authority provision, Plaintiffs are not entitled to coverage because several policy exclusions preclude coverage. Def.’s Mem. Auths. [Dkt. No. 28 at 17]. Defendant contends the Virus Exclusion precludes coverage because the Plaintiffs’ losses resulted from a virus and the Virus Exclusion unambiguously applies. *Id.* at 20. Defendant alleges the exclusion applies regardless of whether Plaintiffs allege the proclamation or COVID-19 caused their losses. *Id.*

In reply, Plaintiffs contend the proclamation itself amounts to a direct physical loss to their covered properties and the surrounding area. Pls.’ Resis. Def.’s Mot. Dismiss [Dkt. No. 31 at 23]. They also argue they would have continued operating their businesses despite the COVID-19 pandemic. *Id.* Plaintiffs affirm their stance that Defendant should be estopped from enforcing the

Virus Exclusion based on estoppel, unclean hands, breach of good faith and fair dealing, and general public policy. *Id.* at 24.

The Virus Exclusion unambiguously states it will not pay for loss or damage that is directly or indirectly caused by any virus, regardless of any other cause or event that contributes to the loss. Def.'s Ans., Ex. 1A [Dkt. No. 3-1 at 45, 47]. Plaintiffs' alleged losses were caused by or resulted from a virus, specifically, COVID-19. Plaintiffs' Amended Complaint states their losses were "caused by COVID-19 and/or the Governor Reynolds's proclamation" Pls.' Am. Compl. [Dkt. No. 22], ¶¶ 49, 78. Plaintiffs thereby recognize their alleged losses were caused by COVID-19, which triggers the Virus Exclusion. Plaintiffs also recognize their losses resulted from COVID-19 in their resistance to Defendant's Motion for Judgment on the Pleadings. In their resistance, Plaintiffs state, "The threat and ubiquitous presence of COVID-19 . . . resulted in Governor Reynolds' proclamation, which in turn caused 'direct physical loss' to Plaintiffs' covered property." Pls.' Resis. Def.'s Mot. Dismiss [Dkt. No. 31 at 21].

Plaintiffs' contention that it was the proclamation that caused their losses rather than the virus because they would have remained open does not save their claims from the Virus Exclusion. Plaintiffs' losses were directly or indirectly caused by or resulted from COVID-19, rather than strictly the proclamation. The proclamation was issued in response to the COVID-19 pandemic as referenced in the proclamation itself. Office of the Governor of Iowa Kim Reynolds, *Gov. Reynolds Issues a State of Public Health Disaster Emergency*, iowa.gov, <https://governor.iowa.gov/press-release/gov-reynolds-issues-a-state-of-public-health-disaster-emergency> (Mar. 17, 2020). The Virus Exclusion is therefore triggered, and coverage is excluded even if Plaintiffs could establish coverage under the Business Income, Extra Expense, or Civil Authority provisions of the insurance policy.

Courts across the country have reached the same conclusion when reviewing similar claims under similar circumstances and insuring language. *See, e.g., Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, Case No. 20-cv-04434 JSC, 2020 WL 5642483, at *2–4 (N.D. Cal. Sept. 22, 2020) (concluding the virus exclusion provision with similar language applied under similar circumstances); *10E, LLC*, 2020 WL at *6 (expressing skepticism that the plaintiff could avoid application of the policy's virus exclusion by suggesting in-person dining restrictions put in place to limit the spread of COVID-19 were not caused by a virus); *Diesel Barbershop, LLC*, 2020 WL at *6–7 (concluding an insurance policy's virus exclusion provision applied when the plaintiffs

contended the state shutdown order put in place to limit the spread of COVID-19 caused their losses rather than the virus).

Because the allegations in Plaintiffs' Amended Complaint do not plausibly state a claim for coverage under the Business Income, Extra Expense, or Civil Authority provisions of the policy, Plaintiff is not entitled to the declaratory relief requested.

2. Breach of Contract

Plaintiffs allege Defendant breached its coverage obligations to Plaintiffs by denying Plaintiffs' claims. Pls.' Am. Compl. [Dkt. No. 22], ¶ 88. Plaintiffs contend they complied with the terms of the policy and have suffered losses that triggered the Business Income, Extra Expense, and Civil Authority provisions of the policy. *Id.* ¶¶ 78–81, 85. Plaintiffs argue they had reasonable expectations that their alleged losses were covered under the policy provisions referenced above. *Id.* ¶ 83. They allege no policy exclusions apply to preclude coverage, and if the Virus Exclusion were applicable, Plaintiffs argue Defendant should be estopped from invoking it under these circumstances. *Id.* ¶¶ 85–87. Specifically, Plaintiffs contend Defendant should be estopped from enforcing the Virus Exclusion based on regulatory estoppel, unclean hands, breach of good faith and fair dealing, and general public policy. Pls.' Resis. Def.'s Mot. Dismiss [Dkt. No. 31 at 24].

Plaintiffs allege the Virus Exclusion was included in these types of policies under false and pretenses. Pls.' Am. Compl. [Dkt. No. 22], ¶ 66. In support of this contention, Plaintiffs refer to the adoption of this exclusion by the insurance industry over a decade ago. They contend the insurance industry cast the virus exclusion as a clarification for coverage of disease-causing agents. *Id.* ¶ 63. Plaintiffs allege the insurance industry misrepresented to states that the virus exclusion would not alter the scope of coverage when it actually did without lowering premiums. *Id.* ¶ 68. They contend Defendant directly or indirectly "participated in the insurance industry's efforts to effect Insurance Commissioners, including the State of Iowa's Insurance Commissioner, to approve the suggested virus exclusion." *Id.* ¶ 69.

Defendant denies these allegations. Defendant argues Plaintiffs' breach of contract claim fails because Plaintiffs were not entitled to coverage under any policy provisions. Def.'s Mem. Auths. [Dkt. No. 28 at 6–16]. Even if Plaintiffs could qualify for coverage under the Business Income, Extra Expense, or Civil Authority provisions, Defendant contends Plaintiffs' claims would still be precluded under the Virus, Consequential Losses, and Acts or Decisions exclusions. *Id.* at 17–24.

The Court finds Plaintiffs have not plausibly stated a claim for breach of contract because Plaintiffs failed to plausibly state a claim for coverage under the policy for the reasons outlined above. Plaintiffs have also not plausibly stated a claim to estop Defendant from invoking the Virus Exclusion. Plaintiffs have not alleged Defendant specifically misrepresented the purpose of the Virus Exclusion to them. Likewise, Plaintiffs have not plausibly stated a claim to invoke the reasonable expectations doctrine. The reasonable expectations doctrine only applies to prevent the application of an exclusion in an insurance policy when the exclusion “(1) is bizarre or oppressive, (2) eviscerates terms explicitly agreed to, or (3) eliminates the dominant purpose of the transaction.” *Clark-Peterson Co. v. Indep. Ins. Assocs., Ltd.*, 492 N.W.2d 675, 677 (Iowa 1992) (citations omitted). Before a court even considers these elements, the insured party bears the burden of proving either “circumstances attributable to the insurer which would foster coverage expectations” or that the policy is “such that an ordinary lay person would misunderstand its coverage.” *Id.* The reasonable expectations doctrine is not intended to expand coverage on a purely equitable basis. *Id.*

Plaintiffs have failed to plead facts that are sufficient to invoke the reasonable expectations doctrine and to generate an issue of material fact. The language of the virus exclusion is clear; it explicitly states Defendant “will not pay for loss or damage caused by or resulting from any virus” Def.’s Ans., Ex. 1A [Dkt. No. 3-1 at 47]. Based on the plain language of the exclusion, Plaintiffs could not have reasonably expected their alleged losses to be covered. *See Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 504 (Iowa 2013). The Virus Exclusion provision is not one “where only ‘painstaking study of the policy provisions would have’ revealed an exclusion or neutralized an otherwise reasonable expectation.” *Phoenix Ins. Co.*, 147 F. Supp. 3d at 832 (quoting *Farm Bureau Mut. Ins. Co. v. Sandbulte*, 302 N.W.2d 104, 112 (Iowa 1981) (citations omitted)). Even if Plaintiffs had pleaded sufficient facts to make out a claim for the prerequisite, the reasonable expectations doctrine remains inapplicable because they have failed to allege sufficient facts to demonstrate that the policy language is bizarre or oppressive, that the exclusion eviscerates terms explicitly agreed to, or sufficient facts that demonstrates applying the exclusion would eliminate the dominant purpose for coverage.

Plaintiffs’ Amended Complaint does not plausibly state a claim for coverage under the Business Income, Extra Expense, or Civil Authority provisions of the policy. No issue of material fact remains unresolved and Defendant is entitled to judgment as a matter of law. Even if Plaintiffs

could state a claim for coverage under these provisions, Plaintiffs' breach of contract claim still fails because the Virus Exclusion would preclude coverage.

3. Bad Faith Claim

Plaintiffs allege Defendant has a contractual obligation to fully investigate insurance claims. Pls.' Am. Compl. [Dkt. No. 22], ¶ 90. They contend Defendant failed to investigate their claims and summarily denied their claims. *Id.* ¶¶ 93–94. Plaintiffs argue Defendant acted in bad faith by denying their claims without an investigation. *Id.* ¶ 95.

Defendant denies these allegations. Defendant contends it did not act in bad faith in denying Plaintiffs' claims because it had a reasonable basis for denying their claims. . Def.'s Mem. Auths. [Dkt. No. 28 at 25]. Defendant argues Plaintiffs' claims did not meet the fundamental insuring language, and their claims were otherwise barred due to other policy exclusions. *Id.* Further, Defendant contends that Plaintiffs have not alleged that Defendant knew or should have known it lacked support to deny Plaintiffs' claims. *Id.* at 26.

In reply, Plaintiffs affirm their stance that Defendant had an obligation to fully investigate their claims and failed to do so. Pls.' Resis. Def.'s Mot. Dismiss [Dkt. No. 31 at 30–31]. They contend Defendant's self-serving denial of Plaintiffs' claims based on ambiguous policy language is not a reasonable basis for denial. *Id.* at 32.

Plaintiffs' bad faith claim fails because Plaintiffs have not pleaded facts that are sufficient to state a claim for bad faith. The Business Income and Extra Expenses provisions require that there be direct physical damage or loss to the insured property, and Iowa courts have consistently interpreted similar language to require tangible harm to property. *See Milligan*, 2001 WL at *2. Plaintiffs have failed to allege any facts that are sufficient to constitute direct physical damage or loss under Iowa law. *See id.* Plaintiffs have not alleged facts sufficient to qualify for coverage under the Civil Authority provision. The Civil Authority provision requires damage to property other than the insured property and that a civil authority order prohibits access to the insured premises as a result of a dangerous condition at the damaged property. Plaintiffs have not alleged damage to another property within a one-mile radius of the insured properties. Further, the policy requires access to be prohibited, and Plaintiffs admitted in their Amended Complaint that the proclamation only closed all dine-in or in-person service at all bars and restaurants but still permitted take out or delivery services. Consequently, Plaintiffs have failed to allege facts that are sufficient to demonstrate Defendant lacked a reasonable basis to deny their claims for coverage

under the Business Income, Extra Expense, and Civil Authority provisions. *See Shelly Funeral Home, Inc.*, 642 N.W.2d at 657.

Regardless, Plaintiffs' bad faith claim fails because Plaintiffs have not alleged facts that are sufficient to prevent the application of the Virus Exclusion. The Virus Exclusion precludes coverage for losses caused directly or indirectly by a virus. As demonstrated by Plaintiffs' pleadings, Plaintiffs' alleged losses were directly or indirectly caused by COVID-19 because Reynolds's proclamation was issued as a result of the COVID-19 pandemic. Consequently, Plaintiffs have failed to allege facts that are sufficient to demonstrate Defendant lacked a reasonable basis to deny their claims for coverage based on the Virus Exclusion. *See Shelly Funeral Home, Inc.*, 642 N.W.2d at 657. Additionally, Plaintiffs have not pleaded facts that are sufficient to demonstrate Defendant knew or should have known that it lacked a reasonable basis to deny Plaintiffs' claims.

Plaintiffs have failed plausibly state a claim for bad faith. No issue of material fact remains unresolved, and Defendant is entitled to judgment on this claim as a matter of law.

C. Discussion: Defendant's Counterclaim

Defendant's Counterclaim requests a declaratory judgment affirming Defendant's denials of coverage of Plaintiffs' claims under the policy.²

1. Extended Business Income Coverage

Defendant's Answer to Plaintiff's Complaint raises the inapplicability of the Extended Business Income provision as an affirmative defense and seeks a declaratory judgment affirming its denial of coverage on this policy provision. Defendant contends Plaintiffs have not provided them with evidence demonstrating a physical loss or damage to the insured premises. Def.'s Ans. [Dkt. No. 3], ¶ 8. Defendant also alleges none of Plaintiffs' claims fall within the policy's coverage language. *Id.* ¶ 9. Even if Plaintiffs' claims did qualify for coverage, Defendant argues coverage would be excluded by the Virus Exclusion, Consequential Loss Exclusion, and Acts or Decisions Exclusion. *Id.* Plaintiffs' Answer denies these allegations. Pls.'/Countercl. Defs.' Ans. [Dkt. No. 9 at 2].

² Defendant only included its counterclaim in its Answer, Affirmative Defenses, and Counterclaim to Plaintiff's original Complaint. [Dkt. No. 3] Defendant did not restate its counterclaim in its Answer to Plaintiffs' Amended Complaint. [Dkt. No. 24] However, the Court may still consider Defendant's counterclaim even though it was not realleged in Defendant's Answer to Plaintiff's Amended Complaint. *See Davis v. White*, 794 F.3d 1008, 1015–16 (8th Cir. 2015).

Defendant argues Plaintiffs fail to meet the coverage language of the Extended Business Income provision. Defendant contends this provision requires “direct physical loss or damage at the premises,” which Plaintiffs have failed to allege. Def.’s Mem. Auths. [Dkt. No. 28 at 8]. Plaintiffs do not specifically address the Extended Business Income provision in their response to Defendant’ Motion for Judgment on the Pleadings; however, Plaintiffs argue they have alleged a direct physical loss. Pls.’ Resis. Def.’s Mot. Dismiss [Dkt. No. 31 at 15].

The Extended Business Income provision unambiguously requires direct physical loss or damage to trigger coverage. Defendant has alleged facts that are sufficient to demonstrate Plaintiffs were ineligible for coverage under the Extended Business Income provision. For the reasons outlined above, Plaintiffs have not plausibly alleged a direct physical loss. Because Defendant has alleged facts that are sufficient to demonstrate Plaintiffs were not entitled to coverage under this provision and Plaintiffs have failed to allege facts to the contrary, Defendant is entitled to the declaratory relief sought as to this provision. Regardless, the Virus Exclusion would preclude coverage for the reasons set forth above.

2. Food Contamination Coverage

Defendant’s Answer to Plaintiff’s Complaint raises the inapplicability of the Food Contamination provision as an affirmative defense and seeks a declaratory judgment affirming its denial of coverage on this policy provision. Defendant contends Plaintiffs have not provided them with evidence demonstrating a physical loss or damage to the insured premises. Def.’s Ans. [Dkt. No. 3], ¶ 8. Defendant also alleges none of Plaintiffs’ claims fall within the policy’s coverage language. *Id.* ¶ 9. Even if Plaintiffs’ claims did qualify for coverage, Defendant argues coverage would be excluded by the Virus Exclusion, Consequential Loss Exclusion, and Acts or Decisions Exclusion. *Id.* Plaintiffs’ Answer denies these allegations. Pls.’/Countercl. Defs.’ Ans. [Dkt. No. 9 at 2].

Defendant argues that Plaintiffs never claimed or pleaded coverage under the Food Contamination provision as required by the policy. Def.’s Mem. Auths. [Dkt. No. 28 at 7 n.1]. Defendant notes Plaintiffs’ Amended Complaint does not allege food contamination, which is required to trigger coverage under the policy’s Food Contamination provision. *Id.* As such, Defendant asserts denial was proper because Plaintiffs failed to submit a claim or plead the applicability of this provision. *Id.* Plaintiffs do not address this provision in their response to Defendant’s Motion for Judgment on the Pleadings.

It is unclear whether Plaintiffs ever actually submitted a claim for coverage under the Food Contamination provision of the policy; however, the policy clearly requires a governmental authority or a board of health to close the insured property as a result of the discovery or suspicion of contaminated food. Defendant has alleged facts that are sufficient to demonstrate Plaintiffs were ineligible for coverage under the Food Contamination provision. Plaintiffs have not pleaded food contamination. Because Defendant has alleged facts that are sufficient to demonstrate Plaintiffs were not entitled to coverage under this provision and Plaintiffs have failed to allege facts to the contrary, Defendant is entitled to the declaratory relief sought as to this provision. Regardless, the Virus Exclusion would preclude coverage for the reasons set forth above.

3. Spoilage Coverage

Defendant's Answer to Plaintiffs' Complaint raises the inapplicability of the Spoilage provision as an affirmative defense and seeks a declaratory judgment affirming its denial of coverage on this policy provision. Again, Defendant contends Plaintiffs have not provided them with evidence demonstrating a physical loss or damage to the insured premises. Def.'s Ans. [Dkt. No. 3], ¶ 8. Defendant also alleges none of Plaintiffs' claims fall within the policy's coverage language. *Id.* ¶ 9. Even if Plaintiffs' claims did qualify for coverage, Defendant argues coverage would be excluded by the Virus Exclusion, Consequential Loss Exclusion, and Acts or Decisions Exclusion. *Id.* Plaintiffs' Answer denies these allegations. Pls.'/Countercl. Defs.' Ans. [Dkt. No. 9 at 2]. Defendant argues that direct physical loss to perishable stock is required to trigger coverage under the Spoilage provision, and Plaintiffs have failed to plead physical loss of perishable stock. Def.'s Mem. Auths. [Dkt. No. 28 at 8]. Plaintiffs do not address this provision in their response to Defendant's Motion for Judgment on the Pleadings.

Again, it is unclear if Plaintiffs ever actually submitted a claim for coverage under the Spoilage provision of the policy; however, the policy unambiguously requires direct physical loss or damage to perishable stock that is caused by a Covered Cause of Loss. Defendant has alleged facts that are sufficient to demonstrate Plaintiffs were ineligible for coverage under the Spoilage provision. Plaintiffs have not alleged a physical loss or damage to perishable stock. Because Defendant has alleged facts that are sufficient to demonstrate Plaintiffs were not entitled to coverage under this provision and Plaintiffs have failed to allege facts to the contrary, Defendant is entitled to the declaratory relief sought as to this provision. Regardless, the Virus Exclusion would preclude coverage for the reasons set forth above.

4. Consequential Losses Exclusion

Defendant's Answer to Plaintiffs' Complaint raises the Consequential Losses Exclusion contained in the policy as an affirmative defense. Def.'s Ans. [Dkt. No. 3 at 17]. Defendant alleges Plaintiffs' claims for coverage are excluded by the Consequential Losses provision of the policy. *Id.* ¶ 9. Defendant argues Plaintiffs have merely pleaded a loss of use, loss of market, or loss of access, which is an unsound argument because access to their facilities was not prohibited. Def.'s Mem. Auths. [Dkt. No. 28 at 23]. Defendant contends the policy defines Plaintiffs' alleged losses as consequential damages, which are excluded from coverage under the Consequential Losses Exclusion. *Id.* Defendant alleges the policy's definition of "consequential damages" is consistent with Iowa law. *Id.*

Plaintiffs argue the Consequential Losses Exclusion is inapplicable. They contend the Exclusion does not apply to a "loss of business income resulting from the necessary suspension of Plaintiffs' operations due to a Covered Loss." Pls.' Resis. Def.'s Mot. Dismiss [Dkt. No. 31 at 26]. Plaintiffs contend that Defendant is required to pay the actual loss of their business income if they can establish the suspension of their operations was necessary as a result of a covered loss. *Id.* They claim they have demonstrated they are entitled to coverage under the Business Income and Civil Authority provisions and permitting the Consequential Losses provision to offset this coverage would render the policy worthless. *Id.*

The Consequential Losses provision unambiguously states that Defendant will not pay for loss or damage resulting from a loss of use. The Court finds Defendant has alleged facts that are sufficient to demonstrate the applicability of the Consequential Losses exclusion. Plaintiffs have failed to allege facts that would prevent the application of this exclusion. Because Defendant has alleged facts that are sufficient to demonstrate the applicability of this exclusion and Plaintiffs have failed to allege facts to the contrary, Defendant is entitled to the declaratory relief sought as to this provision. Regardless, the Virus Exclusion would preclude coverage for the reasons set forth above.

5. Acts or Decisions Exclusion

In Defendant's Answer to Plaintiffs' Complaint, Defendant argues the Acts of Decisions Exclusion precludes coverage. Def.'s Ans. [Dkt. No. 3 at 17]. Defendant argues Plaintiffs' Amended Complaint alleges the proclamation caused their losses, and any loss therefore was the result of the decision of a governmental actor. Def.'s Mem. Auths. [Dkt. No. 28 at 24]. Because

Governor Reynolds is a governmental body as an officer of the state of Iowa, Defendant argues the facts pleaded by the Plaintiffs demonstrate this exclusion applies. *Id.*

Plaintiffs respond by contending the Acts or Decisions Exclusion is inapplicable. They contend the exclusion states “it will pay for the loss or damage if an act or decision of a governmental body results in a Covered Cause of Loss.” Pls.’ Resis. Def.’s Mot. Dismiss [Dkt. No. 31 at 28]. Plaintiffs argue they have alleged a Covered Cause of Loss based on the Civil Authority provision because the proclamation prohibited access to their insured properties. *Id.* They contend the Acts or Decisions Exclusion cannot apply here because it would be nonsensical for it to apply to exclude coverage under the Civil Authority Provision. *Id.*

The Acts or Decisions provision unambiguously states Defendant will not pay for any loss or damage caused by or resulting from the acts or decisions of a governmental body. The Court finds Defendant has alleged facts that are sufficient to demonstrate the applicability of the Acts or Decisions exclusion. Plaintiffs have failed to allege facts that would prevent the application of this exclusion. Because Defendant has alleged facts that are sufficient to demonstrate the applicability of this exclusion and Plaintiffs have failed to allege facts to the contrary, Defendant is entitled to the declaratory relief sought as to this provision. Regardless, the Virus Exclusion would preclude coverage for the reasons set forth above.

III. Conclusion

For the reasons stated above and after consideration of all of the parties’ arguments, the Court concludes that Defendant is entitled to judgment on the pleadings as to all Counts included in Plaintiff’s Amended Complaint. Defendant is also entitled to judgment on the pleadings as to its counterclaim.

Upon the foregoing,

IT IS ORDERED that Defendant’s Motion for Judgment on the Pleadings [Dkt. No. 26] is granted. The Clerk shall enter judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Governor Kim Reynolds’s March 17, 2020 proclamation restricting in-person dining at bars and restaurants did not cause “direct physical loss of or damage” to Plaintiffs’ insured properties within the meaning of the insurance policy issued to Plaintiffs by Defendant Illinois Casualty Company. Defendant is not required to pay for Plaintiffs’ alleged losses because Plaintiffs’ claims do not fall within the policy’s coverage or are otherwise excluded.

DATED this 30th day of November, 2020.



JOHN A. JARVEY, Chief Judge
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

EXHIBIT 31

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

ZWILLO V, CORP., INDIVIDUALLY	)	
AND ON BEHALF OF ALL OTHERS	)	
SIMILARLY SITUATED;	)	
	)	
Plaintiff,	)	Case No. 4:20-00339-CV-RK
	)	
v.	)	
	)	
LEXINGTON INSURANCE CO.,	)	
	)	
Defendant.		

ORDER

This lawsuit involves the issue of whether Defendant wrongfully denied insurance coverage on Plaintiff’s commercial property claim stemming from COVID-19. Before the Court is Defendant’s motion to dismiss. (Doc. 7). For the reasons set forth below, the motion is **GRANTED**, and this case is **DISMISSED WITHOUT PREJUDICE**.

I. OVERVIEW

Plaintiff Zwillo owns and operates the Westport Flea Market and Grill, a Kansas City dining establishment, and operates a catering business from the restaurant. Defendant Lexington Insurance Company entered into a commercial property insurance policy with Plaintiff covering the premises.

On April 27, 2020, Plaintiff filed a complaint alleging Defendant wrongfully denied coverage under the policy. The claims stem from the impact of the COVID-19 virus and stay-at-home orders issued by the City of Kansas City, Missouri, Jackson County, Missouri, and the State of Missouri, on their business. (Doc. 1 at 6-7).

The complaint alleges in part, “COVID-19 and the resulting response by state and local governments have . . . interrupted Plaintiff’s business,” yielding an 80 percent loss of revenue. (Doc. 1 at 2). The complaint states the “virus can be spread by respiratory droplets when an infected person coughs, sneezes, or talks”; a person “can become infected from respiratory droplets or potentially by touching a surface or object that has the virus on it and then by touching the mouth, nose, or eyes”; the virus can live on surfaces for several days if not longer; and the virus can live in aerosols in the air. (Doc. 1 at 7-9).

Plaintiff further claims, “It is likely customers, employees, and/or other visitors to the insured property over the last two months were infected with the coronavirus and thereby caused physical loss and damage to the property.” (Doc. 1 at 4). Also, Plaintiff alleges the stay-at-home orders financially impacted it by limiting its business to carry-out and delivery services. (Doc. 1 at 6-7).

Plaintiff filed the complaint on its behalf and on behalf of all similarly situated. (Doc. 1 at 14). Plaintiff’s ten-count complaint seeks damages for breach of contract as well as declaratory and injunctive relief. (Doc. 1 at 17-26).

Defendant moves for dismissal, arguing Plaintiff has not alleged facts that could support a finding of coverage and Plaintiff’s claim for coverage is excluded under the policy. Further facts are set forth as necessary.

II. STANDARD

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a claim may be dismissed for “failure to state a claim upon which relief can be granted.” A complaint must provide “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “To survive a motion to dismiss, a claim must be facially plausible, meaning that the ‘factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Cole v. Homier Dist. Co.*, 599 F.3d 856, 861 (8th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679.

Generally, the Court “‘accept[s] the allegations contained in the complaint as true and draw[s] all reasonable inferences in favor of the nonmoving party.’” *Cole*, 599 F.3d at 861 (quoting *Coons v. Mineta*, 410 F.3d 1036, 1039 (8th Cir. 2005)). The principle that a court must accept as true all of the allegations contained in a complaint does not apply to legal conclusions, however. *Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice”).

In other words, to determine whether a complaint states a claim, the Court looks at two factors. First, the Court must identify the allegations that are “not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 678. To state a claim, a complaint must plead more than “legal conclusions” and “[t]hreadbare recitals of the elements of a cause of action [that are] supported by

mere conclusory statements.” *Id.* at 678. Second, the Court must determine whether the complaint states a plausible claim for relief, which is more than a “mere possibility of misconduct.” *Id.* at 679. This step is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* The Court must review the factual allegations “to determine if they plausibly suggest an entitlement to relief.” *Id.* When faced with alternative explanations for the alleged misconduct, the Court may exercise its judgment in determining whether Plaintiff’s conclusion is the most plausible or whether it is more likely that no misconduct occurred. *Id.* at 681-82.

The parties agree Missouri state law applies in this diversity action. *United Fire & Cas. Co. v. Titan Contractors Serv., Inc.*, 751 F.3d 880, 883 (8th Cir. 2014). As such, the Court is “bound by the decisions of the Supreme Court of Missouri.” *Id.* “If the Supreme Court of Missouri has not addressed an issue, we must predict how the court would rule, and we follow decisions from the intermediate state courts when they are the best evidence of Missouri law.” *Id.*

Under Missouri law, the interpretation of an insurance policy is a question of law. *Schmitz v. Great Am. Assurance Co.*, 337 S.W.3d 700, 705 (Mo. banc 2011). If the policy language is unambiguous, “the contract will be enforced as written.” *Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43, 47 (Mo. banc 2009) (internal quotation marks omitted). But if the policy language is ambiguous, it will be construed against the insurer. *Id.* An ambiguity exists “if provisions of an insurance policy (when read in the context of the policy as a whole) are ambiguous, i.e., there is duplicity, indistinctness, or uncertainty in its meaning, and the policy is therefore open to different constructions.” *Id.* Language is ambiguous if it is reasonably open to different constructions.” *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 690 (Mo. banc 2009) (internal quotation marks omitted). When interpreting insurance policies, Missouri courts “appl[y] the meaning [that] would be attached [to the policy] by an ordinary person of average understanding if purchasing insurance.” *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010) (internal quotation marks omitted).

“An insured cannot create an ambiguity by reading only a part of the policy and claiming that, read in isolation, that portion of the policy suggests a level of coverage greater than the policy actually provides when read as a whole.” *Owners Ins. Co. v. Craig*, 514 S.W.3d 614, 617 (Mo. 2017). “Such a request for a truncated consideration of portions of the policy is unavailing.” *Id.* “Insurance policies are read as a whole, and the risk insured against is made up of both the general

insuring agreement as well as the exclusions and definitions.” *Id.* When determining whether an ambiguity exists, “[c]ourts should not interpret policy provisions in isolation but rather evaluate policies as a whole.” *Id.* And “[a]bsent an ambiguity, an insurance policy must be enforced according to its terms.” *Id.*

III. ANALYSIS

While the insured bears the burden of proving coverage under an insurance policy, the insurer bears the burden of proving the applicability of its policy exclusion. *Fischer v. First Am. Title Ins. Co.*, 388 S.W.3d 181, 187 (Mo. App. W.D. 2012).

A. Coverage

Titled “Perils Insured Against,” the Policy “insures against all risks of *direct physical loss of or damage to* property described herein including general average, salvage and other similar charges on shipments covered hereunder, if any, except as hereinafter excluded.” (Doc. 1-1 at 12-13) (emphasis added). Plaintiff claims coverage under five provisions of the policy: (1) “Business Interruption,” (2) “Extra Expense,” (3) “Civil or Military Authority,” (4) “Ingress or Egress,” and (5) “Sue and Labor.”

“Business Interruption” is defined in the policy as “loss resulting from necessary interruption of business conducted by the Insured and caused by direct physical loss or damage by any of the perils covered herein during the term of this policy to Real and/or Personal Property as covered herein.” (Doc. 1-1 at 8). Business Interruption loss is paid only during the “period of restoration,” defined as beginning with “the date of direct physical loss or damage” by a covered peril and ending “on the date when the property at the described premises should be repaired, rebuilt, or replaced with reasonable speed and similar quality.” (Doc. 1-1 at 9).

“Extra Expense” is set out in the policy as “the excess cost necessarily incurred to continue the operation of the Insured’s business or facility that would not have been incurred had there been no loss or damage by any of the perils covered herein during the term of this policy to Real and/or Personal Property as covered herein.” (Doc. 1-1 at 9).

The “Civil or Military Authority” provision “provides coverage for interruption of business conducted by the Insured resulting from loss or damage, by the perils insured against, . . . to any property when access to the premises is prohibited by order of civil or military authority, for a period not exceeding two (2) weeks.” (Doc. 1-1 at 10).

Similarly, the Policy's Business Interruption provision relating to "Ingress or Egress" states that coverage is provided "for interruption of business conducted by the Insured resulting from loss or damage, by the perils insured against, . . . to any property thereby preventing ingress to or egress from the Insured's premises, for a period not exceeding two (2) weeks." (Doc. 1-1 at 10).

The Policy also provides for "Sue and Labor" coverage, as follows:

In case of actual (or imminent, with prior notice to and approval from this Company) loss or damage by a peril insured against, it shall, without prejudice to the insurance, be lawful and necessary for the Insured, their factors, servants, or assigns to sue, labor, and travel for, in, and about the defense, the safeguard, and the recovery of the property, or any part of the property, insured hereunder without prejudice to this insurance; nor in the event of loss or damage, shall the acts of the Insured or of the Company in recovery, saving, and preserving the insured property be considered a waiver or an acceptance of abandonment. . . .

(Doc. 1-1 at 19).

Defendant argues Plaintiff has failed to state a claim upon which relief may be granted for the overlapping reasons that (A) Plaintiff has not alleged facts supporting Business Interruption Insurance in that (1) Missouri law interprets "physical loss or damage" to property as requiring physical alteration of the property, (2) the mere existence of COVID-19 on property is not direct physical loss or damage, (3) the speculative existence of COVID-19 on the property did not cause the business interruption, and (4) the stay-at-home orders and general public fear are not "direct physical loss to property." (Doc. 8 at 11-15). Defendant additionally argues that (B) Plaintiff has not alleged facts necessary to fall within the Policy's coverage for Civil Authority; Ingress/Egress; Extra Expense; or Sue and Labor. (Doc. 8 at 15-17).

Based on the Perils Insured Against provision, at the heart of the question of coverage here is whether Plaintiff can meet its burden of showing it suffered a "direct physical loss of or damage to property" so as to trigger the coverage provisions reproduced above.¹ Plaintiff has not met that burden. The term "direct physical loss of or damage to property" plainly requires physical loss of or some form of physical damage to the insured property to effect coverage. Put another way, the words "direct" and "physical," which modify the words "loss" and "damage" relay actual, demonstrable loss of or harm to some portion of the premises itself. Plaintiff's allegations

¹ Plaintiff's complaint describes the policy as "an all-risk policy," citing the Perils Insured Against provision. (Doc. 1 at 5). Both parties use this provision as the starting point of analysis in their briefing. See Doc. 8 at 2 (Defendant's Motion to Dismiss); Doc. 13 at 9 (Plaintiff's Suggestions in Opposition) and Doc. 20 at 14 (Defendant's Reply).

concerning the impact of the COVID-19 virus and stay-at-home orders do not plausibly allege “direct physical loss of or damage to” property. In short, the Court agrees with Defendant that “direct physical loss of or damage to property” requires physical alteration of property, or, put another way, a tangible impact that physically alters property.²

Plaintiff suggests that because the term “physical loss” is not defined in the policy, the Court should look to dictionary definition of “loss” for the plain and ordinary meaning of the term. Relying on Merriam-Webster, Plaintiff contends loss could encompass “the act of losing possession” and “deprivation.” (Doc. 13 at 11, citing <https://www.merriam-webster/dictionary/loss> (last visited August 24, 2020)). Plaintiff claims it has been “deprived of the use of the property because of COVID-19 and related government shutdown orders.” In short, Plaintiff argues the loss of the ability to access property constitutes physical loss of property. (Doc. 13 at 11).

But it is axiomatic that an insurance policy need not define every term. And the term “direct physical loss of or damage to” does not encompass simple deprivation of use. Further, reading the term “loss” in isolation goes against Missouri’s well-established proviso that an insurance policy must be read as a whole. *Owners Ins. Co.*, 514 S.W.3d at 617.

In so ruling, the Court notes Missouri state courts have not addressed the issue of whether damage from the possible or actual presence of a virus or loss of use due to a stay-at-home order because of the virus constitutes “direct physical loss of or damage to” property.³ However, several other courts have examined the same or meaningfully similar policy language in this context with the same result. *See, e.g., Diesel Barbershop, LLC, v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020) (determining the plaintiff failed to state a claim for

² The rationale bears out for the five defined coverage provisions as well, each of which incorporates the Perils Insured Against clause and each of which includes language, that, when read in the context of the policy as a whole, does not extend coverage under these facts. “Business Interruption” references “direct physical loss or damage” (Doc. 1-1 at 8) and as to timing includes the phrase “on the date when the property at the described premises should be repaired, rebuilt, or replaced with reasonable speed and similar quality” (Doc. 1-1 at 9); “Civil or Military Authority” references the perils insured against and requires “loss or damage . . . to any property” (Doc. 1-1 at); “Extra Expense” is set out in the policy as “the excess cost . . . that would not have been incurred had there been no loss or damage by any of the perils to Real and/or Personal Property” (Doc. 1-1 at 9); “Ingress or Egress” applies “for interruption of business . . . resulting from loss or damage, by the perils insured against, . . . to any property thereby preventing ingress to or egress from . . .” (Doc. 1-1 at 10); “Sue and Labor” provides for coverage in case of “actual (or imminent . . .) loss or damage by a peril insured against, [when] the Insured [must] sue, labor, and travel for, in, and about the defense, the safeguard, and the recovery of the property, or any part of the property, insured hereunder . . .” (Doc. 1-1 at 19). Read in the context of the Perils Insured Against clause, each of the five provisions requires direct physical loss of or damage to the property.

³ Notably, neither party relies on any Missouri state cases examining the policy language at bar in any context.

“accidental direct physical loss to covered property”; holding unpersuasive a line of cases finding coverage under similar policy language where there was no tangible destruction to the physical property); *Galvrilides Mgmt. Co. v. Michigan Ins. Co.*, No. 20-258-CB (Mich. Cir. Ct. July 1, 2020) (dismissing restaurant’s claim that it was entitled to coverage for lost business income as a result of stay-at-home orders because there was no “direct physical loss or damage”; holding no factual development or amendment to the complaint could “constitute the direct physical damage or injury that’s required under the policy”); *Turek Enters. v. State Farm Mut. Auto. Co.*, No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020) (dismissing case because the term “direct physical loss to Covered Property” requires a loss to the property, and not just any loss, but a direct physical loss); *Pappy’s Barber Shops, Inc. v. Farmers Grp., Inc.*, No:20-cv-907-CAB-BLM, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020) (dismissing case because under California law “losses from inability to use property do not amount to ‘direct physical loss of or damage to property’ within ordinary and popular meaning of that phrase”; “[p]hysical loss or damage occurs only when property undergoes a ‘distinct, demonstrable, physical alteration.’”) (citation omitted); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, No. 20-cv-2160 (N.D. Ill. Sept. 21, 2020) (holding there was “no direct physical loss” because the “coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property” and similarly rejecting argument for civil authority coverage); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd’s London*, No. 8:20-cv-1605-T-30AEP (M.D. Fla. Sept. 28, 2020) (dismissing case and finding no coverage under policies that require “direct physical loss of or damage to” property under similar facts); *Oral Surgeons, P.C. v. The Cincinnati Ins. Co.*, No. 4-20-CV-222-CRW-SBJ (S.D. Iowa Sept. 29, 2020) (dismissing case and holding “virus-related closures of business do not amount to direct loss to property covered by the Cincinnati policy of insurance”).

Whether the complaint is couched in terms of COVID-19’s presence on the premises or of loss of use of premises due to the stay-at-home orders (or the virus itself), Plaintiff has failed to state a claim upon which relief may be granted because the policy does not cover the alleged claim.

B. Pollution and Contamination Exclusion

Even if Plaintiff’s claims could fall within the realm of “direct physical loss of or damage to property,” dismissal would be appropriate for the independent reason that Defendant has met its burden of establishing the Policy contains an applicable exclusion prohibiting coverage. Titled the “Pollution and Contamination Exclusion,” that provision states:

This Policy does not cover loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this Policy. . . .

CONTAMINANTS or POLLUTANTS means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U. S. Environmental Protection Agency. Waste includes materials to be recycled, reconditioned or reclaimed.

(Doc. 1-1 at 47.)

By its plain terms, the Policy does not cover loss or damage caused by, resulting from, contributed to, or made worse by actual or alleged “Contaminants or Pollutants,” as defined therein. Relevant to this case, the term “Contaminants or Pollutants” is defined as (1) any solid, liquid, gaseous or thermal, irritant or contaminant, (2) including examples not relevant here, (3) which after its release can cause damage to human health or cause damage or loss of value or loss of use to property, (4) including virus. Here, then, the provision in question expressly excludes damage or loss of value and even loss of use of property caused by a virus. As alleged in the complaint, COVID-19 is plainly a virus.

Plaintiff argues the exclusion is inapplicable for five reasons. First, relying on a case applying Louisiana law, Plaintiff claims the exclusion is meant to apply to traditional environmental and industrial pollution. Missouri precedent directs a different result because the exclusion at bar includes “virus” as a part of its definition. *See, e.g., Heringer v. Am. Family Mut. Ins.*, 140 S.W.3d 100, 105 (Mo. Ct. App. 2004) (holding that exclusion was not limited to traditional exclusion as applied to lead because the policy “specifically and unambiguously defines lead as a pollutant,” and acknowledging case law holding that there is no requirement the insured “be in violation of an environmental law for the pollution exclusion to apply” because the exclusion must be enforced as written).

Second and relatedly, Plaintiff argues the industry has developed a “virus-specific exclusion” that would preclude coverage. As Defendant notes and as found above, however, the policy at bar also expressly excludes from coverage damages caused by virus.⁴

Third, Plaintiff contends the “last antecedent rule” applies to compel a reading that the exclusion does not apply. Plaintiff argues in order to fall within the definition of “Contaminants or Pollutants,” a virus must be an “irritant” or a “contaminant.” Jumping over the word “including,” the argument continues that “irritants” or “contaminants,” which Plaintiff recasts in the plural form, are defined as “smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health . . . including, but not limited to, bacteria, virus, or hazardous substances. . . .” Plaintiff thus argues the word “virus” modifies only “waste” in the list of irritants and contaminants; Plaintiff says this is “clear by the use of the singularly ‘its’ in a clause following the singular ‘waste.’” Plaintiff then employs the dictionary definition of waste to argue a virus does not fit within that definition and therefore falls outside of the scope of the exclusion; Plaintiff further asserts that at a minimum its interpretation is reasonable, making the exclusion ambiguous and requiring construction against Defendant.

Plaintiff’s argument is without merit for several reasons. As an initial matter, accepting Plaintiff’s reading of the exclusion requires overlooking the word “including” (and the comma before it) that precedes the phrase “smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.” This the Court cannot do. *Gulf Ins. Co. v. Noble Broad.*, 936 S.W.2d 810, 814 (Mo. banc 1997) (“every word in a contract is to be given meaning if possible”). Further, Plaintiff’s reading that “after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder” refers only to “waste” because “waste” is the only single noun in that category would require the reader to ignore the phrase “any solid, liquid, gaseous or thermal *irritant* or *contaminant*” – both nouns in their single form – from which the whole of the definition flows.

Adopting Plaintiff’s reading would controvert Missouri’s longstanding rule that a “court may not create an ambiguity . . . to distort policy language and enforce a construction it feels is more appropriate.” *Taylor v. Bar Plan Mut. Ins. Co.*, 457 S.W.3d 340, 344 (Mo. banc 2015); *see*

⁴ Plaintiff includes a citation to a statement to state insurance regulators concerning the referenced industry exclusion; notably, the statement references “viral or bacterial contamination” (Doc. 13 at 19), terms that overlap with the exclusion at bar.

also *Todd v. Mo. United Sch. Ins. Council*, 223 S.W.3d 156, 163 (Mo. 2007) (“Definitions, exclusions, conditions and endorsements are necessary provisions in insurance policies. If they are clear and unambiguous within the context of the policy as a whole, they are enforceable.”).

Fourth, Plaintiff argues “it does not make sense that inserting the word ‘virus’ to provide an example of the types of ‘waste’ that can qualify as a ‘contaminant’ or ‘irritant’ was intended to exclude coverage for all virus-related losses, including those caused by a pandemic, but rather it merely intended to ensure losses caused by viral or bacterial agents identified as toxic by the EPA would be excluded as another form of pollution.” Once again, this argument requires the reader to read singular nouns as plural and to overlook the word “including” (and the comma before it) that precedes the phrase “smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.” As explained above, this the Court cannot do.

Fifth, Plaintiff argues fact issues preclude dismissal under the exclusion. Plaintiff argues (1) whether a virus falls within any of the federal statutes listed is a solid, liquid, gas, or of a thermal nature, and (2) whether and to what extent viruses are listed in the federal statutes included in the exclusion are both issues for determination by the finder of fact. The Court finds neither to be a material issue precluding dismissal.

For these reasons, the Court finds Defendant has met its burden of establishing that the exclusion applies and is entitled to dismissal.

C. Recent Cases within this District

In so ruling, the Court has considered Plaintiff’s argument that the Court should deny Defendant’s motion to dismiss to be in harmony with other rulings in this district: (1) *Studio 417, Inc. et al., v. The Cincinnati Insurance Co.*, No. 20-cv-03127, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), (2) *K.C. Hopps, Ltd. v. The Cincinnati Ins. Co.*, No. 20-cv-00437 (W.D. Mo. Aug. 12, 2020), and (3) *Blue Springs Dental Care, LLC et al., v. Owners Insurance Company*, No. 20-cv-00383 (W.D. Mo. Sept. 21, 2020). Plaintiff relies on *Studio 417* and *K.C. Hopps* for determinations of complaints surviving dismissal where the policy provided coverage for “accidental physical loss or accidental physical damage.” The *Studio 417* and *K.C. Hopps* Court found the policy language ambiguous and therefore determined Plaintiffs had stated a claim under various provisions. However, that Court emphasized that the rulings are subject to further review; notably, the Court stated “[s]ubsequent case law in the COVID-19 context, construing similar provisions, and under similar facts, may be persuasive.” *Studio 417, Inc.*, No. 20-cv-3127, Doc. 40 at 16-17. In *Blue*

Springs Dental Care, the policy language at bar was the same as in the Perils Insured Against provision here – “direct physical loss from or damage to” – and the Court again found that the complaint survived dismissal with the same warning that additional development of caselaw may cause the Court to reconsider its rulings on summary judgment. *Blue Springs Dental Care*, No. 20-cv-00383, Doc. 20 at 19.

The main distinction between the case at bar and *Studio 417*, *K.C. Hopps*, and *Blue Springs Dental Care* is here the policy contains the exclusion examined above. Additionally, the Court concludes dismissal is warranted based on a reading of the policy as a whole. *Owners Ins. Co.*, 514 S.W.3d at 617. To the extent this Court’s ruling – finding the language in the policy plainly and unambiguously does not cover the claims – conflicts with *Studio 417*, *K.C. Hopps*, and *Blue Springs Dental Care*, this Court respectfully disagrees with those cases.

IV. Conclusion

Although the Court is sympathetic to the plight of businessowners affected by COVID-19 and related aftermath, including the economic effect of the stay-at-home orders, Plaintiff and the class it seeks to represent are not entitled to relief under the Policy.

Leave to amend should be freely granted. Here, however, all of Plaintiff’s claims are dismissed without prejudice because the Court finds Plaintiff cannot meet its burden of establishing the insurance claims are covered, and, even assuming Plaintiff could show coverage based on “all risks of direct physical loss of or damage to property,” Defendant has met its burden of demonstrating the applicable exclusion cleanly indicates otherwise.

Defendant’s motion to dismiss (Doc. 7) is granted, and this case is dismissed without prejudice.

IT IS SO ORDERED.

s/ Roseann A. Ketchmark
ROSEANN A. KETCHMARK, JUDGE
UNITED STATES DISTRICT COURT

DATED: December 2, 2020

EXHIBIT 32

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

4431, INC., 4431 ASSOC., LP, 3354 WALBERT :
ASSOC., LP, 3354 WALBERT AVENUE :
ASSOCIATES, LLC, BLUE GRILLE HOUSE :
AND WINE BAR, 4131 ASSOCIATES, :
CANDLELIGHT INN, 2960 CENTER VALLEY :
PARKWAY, LLC, 3739 WEST CHESTER PIKE, :
LLC, MELT RESTAURANT GROUP, LLC, :
PAXOS RESTAURANTS, INC., MELT REAL :
ESTATE GROUP, LP., and TOP CUT :
STEAKHOUSE, :

Plaintiffs,

v.

CINCINNATI INSURANCE COMPANIES, :
THE CINCINNATI INSURANCE COMPANY, :
THE CINCINNATI CASUALTY COMPANY, :
and THE CINCINNATI INDEMNITY :
COMPANY, :

Defendants.

No. 5:20-cv-04396

OPINION

Defendants' Motion to Dismiss for Failure to State a Claim, ECF No. 5—GRANTED

Joseph F. Leeson, Jr.
United States District Judge

December 3, 2020

I. INTRODUCTION

This insurance coverage dispute stems from the ongoing COVID-19 pandemic and its impact on the ability of several restaurants to operate. Plaintiffs are twelve commercial entities that own and operate restaurants in Pennsylvania (collectively, "Plaintiffs"). They purchased four identical "All Risk" property insurance policies ("the Policies") from Defendants Cincinnati Insurance Company and related entities (collectively, "Cincinnati"). As with so many other businesses, Plaintiffs have been forced to limit their operations as a result of the COVID-19

pandemic, closing their restaurants for in-dining and bar service. After Cincinnati refused to pay Plaintiffs' claims for pandemic-related loss of income under the Policies, Plaintiffs commenced this action in the Court of Common Pleas of Northampton County. Cincinnati removed the action to this Court on diversity grounds and now moves to dismiss the Complaint for failure to state a claim, arguing Plaintiffs' losses are not covered by the terms of the Policies. Plaintiffs oppose the motion.

Upon consideration of Cincinnati's motion to dismiss and Plaintiffs' opposition thereto, and for the reasons set forth below, the motion is granted, and Plaintiffs' Complaint is dismissed.

II. BACKGROUND

A. Facts Alleged in Plaintiffs' Complaint¹

Plaintiffs operated bar and dine-in services on the premises of and as part of several restaurants in Pennsylvania. Plaintiffs' Complaint ("Compl."), ECF No. 1, ¶¶ 2, 22. Due to Orders issued by the Governor of Pennsylvania in response to the COVID-19 pandemic, Plaintiffs were forced to close on-premises dining and bar service at their restaurants beginning on March 19, 2020, and continuing to the present. *Id.* ¶¶ 3, 27-31. Their restaurants remain open only for takeout service. *Id.* ¶ 32. These closures have resulted in losses in excess of \$100,000.00 per month since March 19, 2020, for each of Plaintiffs' restaurants. *Id.*

¹ These allegations are accepted as true, with all reasonable inferences drawn in Plaintiffs' favor. See *Lundy v. Monroe Cty. Dist. Attorney's Office*, No. 3:17-CV-2255, 2017 WL 9362911, at *1 (M.D. Pa. Dec. 11, 2017), *report and recommendation adopted*, 2018 WL 2219033 (M.D. Pa. May 15, 2018). Neither conclusory assertions nor legal contentions need be considered by the Court in determining the viability of Plaintiffs' claims. See *Brown v. Kaiser Found. Health Plan of Mid-Atl. States, Inc.*, No. 1:19-CV-1190, 2019 WL 7281928, at *2 (M.D. Pa. Dec. 27, 2019). Much of the Complaint is legal argument regarding construction of insurance policies and Plaintiffs' Policies in particular. The majority of these legal assertions are not included in the Court's recital here, except where necessary for context and continuity.

Prior to March 2020, Plaintiffs purchased four “All Risk” insurance policies from Cincinnati.²² See Compl. ¶ 4. The terms of the Policies are identical. *Id.* ¶ 14. The Policies provide as follows:

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.

Policy at 47. The Policies further state:

We 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 “loss” 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” must be caused by or result from a Covered Cause of Loss.

Id. at 102. And further:

We will pay Extra Expense 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.

²² Although a copy of the Policies may have been attached to the original Complaint when filed in state court, there are no copies attached to the Complaint as filed with Cincinnati’s Notice of Removal. The Policies are however attached in full as exhibits to Cincinnati’s motion papers. Policy No. EPP 017 41 30 was issued to the Blue Grillhouse Plaintiffs for the policy period October 1, 2019 to October 1, 2022; Policy No. ECP 028 55 02 was issued to the Torre Restaurant Plaintiff for the policy period October 1, 2019 to October 1, 2022; Policy No. EPP 040 99 71 was issued to the Firepoint Grille Plaintiff for the policy period October 1, 2019 to October 1, 2020; and Policy No. EPP 017 41 28 was issued to the Melt Restaurant Plaintiffs for the policy period October 1, 2019 to October 1, 2020. See Cincinnati’s Memorandum in Support of their Motion to Dismiss (“Defs.’ Mem.”), ECF No. 5, Exhibits A-D. The Court directly references the language of the Policies rather than the Complaint where doing so enhances clarity. Where the Court directly references the language of the Policies, the Court’s citation is to the Policy attached as Exhibit A to Cincinnati’s Memorandum in Support of its Motion, ECF No. 5-5. The Court cites to the Bates numbers applied by Cincinnati to the bottom of each page of the document.

Id. at 48. The Policies also provide that Cincinnati “will pay for direct ‘loss’ to Covered Property at the ‘premises’ caused by or resulting from any Covered Cause of Loss.” *Id.* at 32.

Relevant to Plaintiffs’ suit, the Policies also contain a provision regarding covered losses stemming from actions of “civil authority”:

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.

Policy at 48.

The Policies define “Covered Causes of Loss” as used in the above provisions as “direct ‘loss’ unless the ‘loss’ is excluded or limited in this coverage part.” Compl. ¶ 16. “Loss” is in turn defined as “[a]ccidental physical loss or accidental physical damage.” *Id.*; *see, e.g.*, Policy at 67. There are no exclusions or limitations for viruses under the Policies. *See* Compl. ¶¶ 17, 41-42.

The Policies were fully paid and in effect as of March 2020, and have remained fully paid and in effect at all times since March 2020. Compl. ¶¶ 23-24. At some point during or after March 2020, Plaintiffs submitted claims for loss of income under the Policies. *Id.* ¶ 34. Plaintiffs state that their loss of income is the result of mandatory physical closures due to the spread of COVID-19, and is covered under the terms of the Policies. *Id.* ¶ 45. Specifically, Plaintiffs claim the closures were the result of “a covered cause of loss which inflicted a direct physical loss and/or caused direct physical damage to their covered premises. Plaintiffs also

have had to pay for disinfecting and cleaning the premises to prevent COVID-19 contamination.”

Id. Plaintiffs also state that they are entitled to “Civil Authority Coverage” under the Policies as a result of what they identify as Pennsylvania’s “Civil Authority Orders”—*i.e.*, mandatory closure and stay at home orders issued by the Governor of Pennsylvania.³ *Id.* ¶¶ 57-62. Cincinnati denied all of Plaintiffs’ claims for lost business income. *Id.* ¶ 35.

Based upon the above averments, Plaintiffs assert a claim for declaratory judgment under 42 PA. CONS. STAT. § 7532,⁴ *see* Compl. ¶¶ 36-63, as well as a claim for breach of contract, *see id.* ¶¶ 64-69.

B. Procedural Background

On July 24, 2020, Plaintiffs commenced this action in the Court of Common Pleas of Northampton County. *See* ECF No. 1. Cincinnati filed a Notice of Removal on September 8, 2020, removing the case to this Court on the basis of diversity jurisdiction. *See id.* Shortly thereafter on September 15, 2020, Cincinnati filed the instant motion to dismiss the Complaint for failure to state a claim. *See* ECF No. 5. On September 23, 2020, Plaintiffs filed a motion to remand the action back to state court. *See* ECF No. 6. On October 14, 2020, after receiving correspondence from the parties indicating Plaintiffs’ wish to withdraw their motion to remand, the Court granted that request and extended the deadline for Plaintiffs’ response to the pending motion to dismiss. *See* ECF No. 10. Plaintiffs’ opposition to the motion to dismiss was filed on October 26, 2020, *see* ECF No. 11, and Cincinnati’s reply in further support of its motion was filed on November 3, 2020, *see* ECF No. 13.

³ Plaintiffs additionally state that the Policies’ “Pollutants Exclusion” does not apply to a virus. *See* Compl. ¶ 63.

⁴ Notwithstanding its label as the Complaint’s “First Cause of Action,” “[d]eclaratory judgment is a form of relief, not an independent legal claim.” *Jones v. ABN AMRO Mortg. Grp., Inc.*, 551 F. Supp. 2d 400, 406 (E.D. Pa. 2008), *aff’d*, 606 F.3d 119 (3d Cir. 2010).

III. DISCUSSION

A. Whether Exercising Jurisdiction is Appropriate

1. *Applicable Legal Principles*

Although Plaintiffs’ motion to remand has technically been withdrawn, the question of whether this Court should exercise jurisdiction over the action and rule on Cincinnati’s motion to dismiss is still one that the Court must address. This is due to the declaratory relief Plaintiffs seek. *See Rarick v. Federated Serv. Ins. Co.*, 852 F.3d 223, 227 (3d Cir. 2017) (“When an action seeks legal relief, federal courts have a virtually unflagging obligation to exercise jurisdiction. . . . When an action seeks declaratory relief, however, federal courts may decline jurisdiction under the [federal] Declaratory Judgment Act.”) (internal quotation marks omitted).

The federal Declaratory Judgment Act (“DJA”)⁵ provides in relevant part as follows:

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a) (emphasis added).⁶ “[T]he DJA grants discretion to federal district courts, who have ‘no compulsion’ to exercise their jurisdiction over cases seeking declaratory

⁵ At the outset, the Court observes that its authority to issue declaratory relief stems from the federal Declaratory Judgment Act, 28 U.S.C. § 2201, rather than from Pennsylvania’s declaratory judgment statute, 42 PA. CONS. STAT. § 7532. This is because “[o]nly the courts of the Commonwealth [of Pennsylvania] have ‘the power to grant declarations and injunctive relief pursuant to [Pennsylvania’s] Declaratory Judgments Act.’” *Keystone ReLeaf LLC v. PA Dep’t of Health*, 186 A.3d 505, 517 (Pa. Commw. Ct. 2018) (quoting *Empire Sanitary Landfill, Inc. v. Com., Dep’t of Env’tl. Res.*, 546 Pa. 315, 332 (1996)); *see SWB Yankees, LLC v. CNA Fin. Corp.*, No. 3:20-CV-01303, 2020 WL 5848375, at *2 (M.D. Pa. Oct. 1, 2020) (“[A] Pennsylvania state court in a declaratory action may ‘declare rights, status, and other legal relations whether or not further relief is or could be claimed.’” (quoting 42 Pa. Cons. Stat. § 7532)).

⁶ “Although courts often refer to a court’s ‘jurisdiction’ under the DJA, the statute is not a jurisdictional grant. Rather, the Supreme Court has characterized the DJA as procedural, affording a remedial option in a case over which a court must have an independent basis for

judgment.” *Greg Prosmushkin, P.C. v. Hanover Ins. Grp.*, No. CV 20-2561, 2020 WL 4735498, at *2 (E.D. Pa. Aug. 14, 2020) (quoting *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 494 (1942)).

In *Rarick v. Federated Service Insurance Company*, 852 F.3d 223 (3d Cir. 2017), the Third Circuit established the “independent claim test” as the appropriate test for determining whether a district court should exercise jurisdiction over an action seeking *both* declaratory *and* legal relief based on issues of state law. The *Rarick* Court stated as follows with regard to the independent claim test:

When a complaint contains claims for both legal and declaratory relief, a district court must determine whether the legal claims are independent of the declaratory claims. If the legal claims are independent, the court has a “virtually unflagging obligation” to hear those claims, subject of course to [*Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)]’s exceptional circumstances. If the legal claims are dependent on the declaratory claims, however, the court retains discretion to decline jurisdiction of the entire action, consistent with our decision in [*Reifer v. Westport Ins. Corp.*, 751 F.3d 129 (3d Cir. 2014)].⁷

Rarick, 852 F.3d at 229. The Court went on to explain why the independent claim test is superior to other tests it had examined:

The independent claim test is superior to the others principally because it prevents plaintiffs from evading federal jurisdiction through artful pleading. Although [Plaintiffs] *Rarick* and *Easterday* included declaratory claims in their complaints,

exercising jurisdiction.” *Kelly v. Maxum Specialty Ins. Grp.*, 868 F.3d 274, 281 n.4 (3d Cir. 2017).

⁷ In *Colorado River*, the Supreme Court “reminded federal courts that they have a ‘virtually unflagging obligation’ to exercise jurisdiction over actions seeking legal relief.” *Rarick*, 852 F.3d at 225 (quoting *Colo. River*, 424 U.S. 800, 817 (1976)). However, the Court also explained that abstaining from exercising federal jurisdiction can be justified—and indeed, *only* justified— “in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.” *Colo. River*, 424 U.S. at 813.

In *Reifer*, the Third Circuit held that “it is not a *per se* abuse of discretion for a court to decline to exercise jurisdiction when pending parallel state proceedings do not exist. Nor is it a *per se* abuse of discretion for a court to exercise jurisdiction when pending parallel state proceedings do exist.” *Reifer*, 751 F.3d at 144. Rather, “the existence or non-existence of pending parallel state proceedings is but one factor for a district court to consider.” *Id.*

they requested a legal remedy—damages—for breach of contract. Because both cases satisfied the requirements for diversity jurisdiction, Rarick and Easterday could have obtained their desired relief in federal courts without requesting a declaratory judgment. By including a declaratory claim in their pleadings, however, Rarick and Easterday invited the District Court to avoid *Colorado River*’s “virtually unflagging obligation” in favor of the more expansive discretion afforded under *Reifer*.

This outcome is inconsistent with the purpose of the Declaratory Judgment Act, which is to “clarify legal relationships” in order to help putative litigants “make responsible decisions about the future.” The Declaratory Judgment Act was intended to “*enlarge*[] the range of remedies available in the federal courts” by authorizing them to adjudicate rights and obligations even though no immediate remedy is requested.

Id. (citation omitted).

With respect to the first step of the independent claim test—determining the dependency or independency of claims—the Court observes that “[n]on-declaratory claims are ‘independent’ of a declaratory claim when they are alone sufficient to invoke the court’s subject matter jurisdiction and can be adjudicated without the requested declaratory relief.” *Rarick*, 852 F.3d at 228 (quoting *R.R. St. & Co., Inc. v. Vulcan Materials Co.*, 569 F.3d 711, 715 (7th Cir. 2009)).

Assuming that Plaintiffs’ claim for breach of contract is independent of their claim for declaratory relief, the second step of the independent claim test requires application of *Colorado River*. “The *Colorado River* doctrine allows a federal court to abstain, either by staying or dismissing a pending federal action, when there is a parallel ongoing state court proceeding.” *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 307 (3d Cir. 2009). “The initial question is whether there is a parallel state proceeding that raises ‘substantially identical claims [and] nearly identical allegations and issues.’ If the proceedings are parallel, courts then look to a multi-factor test to determine whether ‘extraordinary circumstances’ meriting abstention are present.” *Id.* at 307-08 (quoting *Yang v. Tsui*, 416 F.3d 199, 204 n.5 (3d Cir. 2005) and *Spring City Corp. v. American Bldgs. Co.*, 193 F.3d 165, 171 (3d Cir. 1999)).

The six factors courts examine to determine whether “exceptional circumstances” exist pursuant to *Colorado River* are the following: “(1) which court [state or federal] first assumed jurisdiction over property [in an *in rem* case]; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) whether federal or state law controls; and (6) whether the state court will adequately protect the interests of the parties.”⁸ *Spring City Corp.*, 193 F.3d at 171.

2. *Application to Plaintiffs’ Complaint*

Applying the “independent claim test” to Plaintiffs’ Complaint, the Court first observes that Plaintiffs’ claim for breach of contract is indeed independent of their claim for declaratory relief, as it is “alone sufficient to invoke the court’s subject matter jurisdiction and can be adjudicated without the requested declaratory relief.” *Rarick*, 852 F.3d at 228; *see Wilson v. Hartford Cas. Co.*, No. CV 20-3384, 2020 WL 5820800, at *5 (E.D. Pa. Sept. 30, 2020) (“This Court has held multiple times that legal claims are independent of claims for declaratory relief when applying *Rarick* to insurance coverage disputes.”) (collecting cases).

The Court therefore turns to the second step of the independent claim test—whether the considerations set forth in *Colorado River* and its progeny indicate the existence of “exceptional circumstances” sufficient to negate this Court’s “virtually unflagging obligation” to exercise jurisdiction over legal claims.

First, because there is no parallel state court action here, it is doubtful whether *Colorado River* is even applicable. *See Wilson*, 2020 WL 5820800, at *5 (“Exceptional circumstances do not apply here since there are no parallel pending state court proceedings, which Plaintiffs

⁸ “Only the first four of these factors were delineated in *Colorado River*, the other two are drawn from *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23, 26 (1983).” *Nationwide Mut. Fire Ins. Co.*, 571 F.3d at 308 n.10.

concede.”); *Nat'l City Mortg. Co. v. Stephen*, 647 F.3d 78, 84 (3d Cir. 2011) (“[W]e note that the controversy has taken place almost exclusively in federal court, the state proceeding began after NCM appealed to us and has been stayed pending the outcome of this appeal, and there are none of the complicating factors present in *Colorado River*. Thus, *Colorado River* abstention does not apply either.”), *as amended* (Sept. 29, 2011); *Nationwide Mut. Fire Ins. Co.*, 571 F.3d at 307 (“The *Colorado River* doctrine allows a federal court to abstain, either by staying or dismissing a pending federal action, *when there is a parallel ongoing state court proceeding.*”) (emphasis added).

However, even if the Court were to consider the *Colorado River* factors, five of the six factors weigh against declining to exercise jurisdiction based on the existence of extraordinary circumstances. These factors indicate that such extraordinary circumstances do not exist here.

Factor one—which court first assumed jurisdiction over property—is inapplicable here because this is not an *in rem* proceeding.⁹ Factor two—the inconvenience of the federal forum—does not weigh in favor of abstention. There are no arguments raised that the federal forum is inconvenient for Plaintiffs. Factor three—the desirability of avoiding piecemeal litigation—is met “only when there is evidence of a strong federal policy that all claims should be tried in the state courts.” *Ryan v. Johnson*, 115 F.3d 193, 197-98 (3d Cir. 1997) (citing *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm'n*, 791 F.2d 1111, 1118 (3d Cir. 1986)). There is no evidence of any such strong federal policy here. Factor four—the order in which jurisdiction was obtained—is inapplicable here because there is no competing state court proceeding, and therefore no “order” of obtaining jurisdiction. *See Moses H. Cone Mem'l Hosp.*

⁹ The Court considers this and the other “inapplicable” factors to be “neutral.” “[T]he presence of a neutral factor necessarily weighs against abstention.” *Hartford Life Ins. Co. v. Rosenfeld*, No. CIV.A. 05-5542, 2007 WL 2226014, at *7 (D.N.J. Aug. 1, 2007).

v. Mercury Constr. Corp., 460 U.S. 1, 21 (1983) (explaining that “priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions”). Factor six—whether the state court will adequately protect the interests of the parties—is similarly inapplicable. *See Ryan*, 115 F.3d at 200 (“[T]he mere fact that the state forum is adequate does not counsel in favor of abstention, given the heavy presumption the Supreme Court has enunciated in favor of exercising federal jurisdiction. Instead, this factor is normally relevant only when the state forum is *inadequate*.”) (emphasis in original).

The only factor that weighs in favor of abstention under *Colorado River* is factor five—whether federal or state law controls. This action is controlled exclusively by Pennsylvania law. The Court also acknowledges that the questions of state law that Plaintiffs’ action presents are novel, having yet to be addressed by any Pennsylvania court.¹⁰ Indeed, as one court in this District recently observed in a similar COVID-related insurance coverage dispute, “[t]he issues of state law presented in Plaintiffs’ action are novel, complex, and exceedingly important, creating a compelling public policy interest for these claims to be allowed to be decided by Pennsylvania courts.” *Greg Prosmushkin, P.C. v. Hanover Ins. Grp.*, No. CV 20-2561, 2020 WL 4735498, at *5 (E.D. Pa. Aug. 14, 2020).

However, in the Court’s view, the novel nature of the state law question cannot, without more, permit this Court to circumvent its “virtually unflagging obligation” to exercise jurisdiction where the prerequisites for that exercise have otherwise been met, as they have been here. *See* 28 U.S.C. § 1332. Nor is this conclusion inconsistent with very recent precedent. At

¹⁰ The Court’s own independent research was unable to unearth any state court decisions addressing the questions at issue in Plaintiffs’ suit.

least two courts in this District have recently chosen to exercise jurisdiction over COVID-related insurance converge disputes where declaratory relief was sought. In *Wilson v. Hartford Cas. Co.*, No. CV 20-3384, 2020 WL 5820800 (E.D. Pa. Sept. 30, 2020), the court exercised jurisdiction based on the dependency of plaintiffs' claims for legal and declaratory relief, as well as on the absence of a parallel state court proceeding, and granted defendants' motion to dismiss the complaint. *See id.* at *6 (explaining that "[t]he legal claims found in the Plaintiffs' initial Complaint appear to be both jurisdictionally and substantively independent (and Plaintiffs do not argue otherwise) of the requested declaratory relief As a result, they are alone sufficient to invoke the Court's subject matter jurisdiction"). Another court in this District recently exercised jurisdiction in a COVID-related insurance coverage dispute in the absence of a motion to remand without even engaging in a discussion as to abstention. *See Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. CV 20-3198, 2020 WL 6545893, at *3 (E.D. Pa. Nov. 6, 2020) (granting defendant's motion to dismiss and dismissing plaintiff's claims for breach of contract and declaratory relief where "plaintiff's property remained inhabitable and usable, albeit in limited ways" and finding that "[p]laintiff has failed to plead plausible facts that COVID-19 caused damage or loss in any physical way to the property so as to trigger coverage").

It is moreover significant that in several recent COVID-based insurance disputes in which federal courts in this Circuit have *declined* to exercise jurisdiction, unlike Plaintiffs' Complaint here the complaints at issue presented *only* a request for declaratory judgment and no claims for legal relief. *See, e.g., Greg Prosmushkin, P.C.*, No. CV 20-2561, 2020 WL 4735498, at *5 (E.D. Pa. Aug. 14, 2020) ("In sum, Plaintiffs present no independent claim for legal relief in their Complaint."); *Dianoia's Eatery, LLC v. Motorists Mut. Ins. Co.*, No. CV 20-787, 2020 WL 5051459, at *2 (W.D. Pa. Aug. 27, 2020) ("Plaintiff's single-count declaratory judgment action

simply does not state a breach of contract action against Defendant seeking damages.”); *Venezie Sporting Goods, LLC v. Allied Ins. Co. of Am.*, No. 2:20-CV-1066, 2020 WL 5651598, at *3 (W.D. Pa. Sept. 23, 2020) (“The long and the very short of it is that there are no independent money damage or equitable claims asserted, only a request that this Court implement a declaration of coverage by either requiring Defendants to act in accord with such a declaration, or to refrain from taking actions contrary to such a declaration.”). The absence of independent legal claims allowed these courts to retain “the more expansive discretion afforded under *Reifer*” to decline the exercise of jurisdiction. *Rarick v. Federated Serv. Ins. Co.*, 852 F.3d 223, 229 (3d Cir. 2017).

In summary, the circumstances capable of constituting “exceptional circumstances” as set forth in *Colorado River* and its progeny are “extraordinary and narrow exception[s]” to a federal court’s “virtually unflagging obligation” to exercise jurisdiction where legal relief is sought. *Colo. River*, 424 U.S. at 813, 817. The Court acknowledges that Plaintiffs’ Complaint presents novel questions of Pennsylvania law. However, in light of (1) the independence of Plaintiffs’ legal claim from their request for declaratory relief, and (2) the absence of any parallel state court proceedings, the Court finds that there are insufficient other considerations to permit the Court to circumvent this obligation. The Court will therefore exercise its jurisdiction, and proceeds to an analysis of Cincinnati’s motion to dismiss Plaintiffs’ Complaint.

B. Cincinnati’s Motion to Dismiss the Complaint

1. Legal Standard: Motions to Dismiss under Rule 12(b)(6)

In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court clarified the appropriate pleading standard in civil cases and set forth the approach to be used when deciding motions to dismiss brought under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

After identifying a pleaded claim’s necessary elements,¹¹ district courts are to “identify [] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Id.* at 679; *see id.* at 678 (“A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))); *Thourot v. Monroe Career & Tech. Inst.*, No. CV 3:14-1779, 2016 WL 6082238, at *2 (M.D. Pa. Oct. 17, 2016) (explaining that “[a] formulaic recitation of the elements of a cause of action” alone will not survive a motion to dismiss). Though “legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” *Iqbal*, 556 U.S. at 679.

Next, if a complaint contains “well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Iqbal*, 556 U.S. at 679. “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.” *Id.* at 678. This standard, commonly referred to as the “plausibility standard,” “is not comparable to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (citing *Twombly*, 550 U.S. at 556-57). It is only where the “[f]actual allegations . . . raise a right to relief above the speculative level” that

¹¹ The Third Circuit has identified this approach as a three-step process, with the identification of a claim’s necessary elements as the first step. *See Connelly v. Lane Const. Corp.*, 809 F.3d 780, 787 n.4 (3d Cir. 2016) (“Although *Ashcroft v. Iqbal* described the process as a ‘two-pronged approach,’ 556 U.S. 662, 679 (2009), the Supreme Court noted the elements of the pertinent claim before proceeding with that approach, *id.* at 675-79. Thus, we have described the process as a three-step approach.”) (citation omitted).

the plaintiff has stated a plausible claim.¹² *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 555).

Putting these steps together, the Court’s task in deciding a motion to dismiss for failure to state a claim is to determine the following: whether, based upon the facts as alleged, which are taken as true, and disregarding legal contentions and conclusory assertions, the complaint states a claim for relief that is plausible on its face in light of the claim’s necessary elements. *Iqbal*, 556 U.S. at 679; *Ashford v. Francisco*, No. 1:19-CV-1365, 2019 WL 4318818, at *2 (M.D. Pa. Sept. 12, 2019) (“To avoid dismissal under Rule 12(b)(6), a civil complaint must set out sufficient factual matter to show that its claims are facially plausible.”); see *Connelly*, 809 F.3d at 787.

In adjudicating a Rule 12(b)(6) motion, the scope of what a court may consider is necessarily constrained: a court may “consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant’s claims are based upon these documents.” *United States v. Gertsman*, No. 15 8215, 2016 WL 4154916, at *3 (D.N.J. Aug. 4, 2016) (quoting *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 772 (3d Cir. 2013)). A court adjudicating a Rule 12(b)(6) motion may also take judicial notice of certain undisputed facts. See *Devon Drive Lionville, LP v. Parke Bancorp, Inc.*, No. CV 15-3435, 2017 WL 5668053, at *9 (E.D. Pa. Nov. 27, 2017).

2. Applicable Legal Principles: Insurance Policies as Contracts

A dispute over coverage arising under an insurance policy “is fundamentally an issue of contract interpretation.” *Wilson*, 2020 WL 5820800, at *6. As both sides here appear to assume,

¹² As the Supreme Court has observed, “[d]etermining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679

Pennsylvania's law of contracts and rules of contract interpretation govern the instant dispute.¹³

Under Pennsylvania law,

[c]ontract interpretation is a question of law that requires the court to ascertain and give effect to the intent of the contracting parties as embodied in the written agreement. Courts assume that a contract's language is chosen carefully and that the parties are mindful of the meaning of the language used. When a writing is clear and unequivocal, its meaning must be determined by its contents alone.

In re Old Summit Mfg., LLC, 523 F.3d 134, 137 (3d Cir. 2008) (quoting *Dep't of Transp. v. Pa. Indus. for the Blind & Handicapped*, 886 A.2d 706, 711 (Pa Cmwlth. Ct. 2005)).

In construing an insurance policy to determine whether coverage was improperly denied, the Court must first determine whether a policy's language is unambiguous, or whether it is reasonably susceptible to different readings. "When policy language is clear and unambiguous, a court applying Pennsylvania law must give effect to that language." *Toppers Salon & Health Spa, Inc. v. Travelers Property Casualty Co. of America*, No. 2:20-CV-03342, 2020 WL 7024287, at *2 (E.D. Pa. Nov. 30, 2020) (citing *Kvaerner Metals Div. of Kvaerner, U.S. v. Commercial Union Ins. Co.*, 908 A.2d 888, 897 (Pa. 2006)). "When a provision in a policy is ambiguous, however, the policy is to be construed in favor of the insured to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage." *401 Fourth St., Inc. v. Inv'rs Ins. Grp.*, 879 A.2d 166, 171 (Pa. 2005). A policy's language is ambiguous "if it is reasonably susceptible of different constructions and

¹³ "In a diversity case, the forum state's choice of law rules govern. Under Pennsylvania's choice of law rules, a contract is construed according to the law of the state with the 'most significant contacts or relationship with the contract.'" *Wilson*, 2020 WL 5820800, at *6 n.3 (citing *Gen. Star Nat. Ins. Co. v. Liberty Mut. Ins. Co.*, 960 F.2d 377, 379 (3d Cir. 1992) and quoting *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 228 (3d Cir. 2007)). Because the Policies here were issued to insure businesses and property located in Pennsylvania, the Court can safely assume the law of Pennsylvania governs interpretation of the Policies. The parties appear to assume the same. See Defs.' Mem. at 13; Plaintiffs' Memorandum in Opposition ("Pls.' Opp'n."), ECF No. 11, at 4, 6.

capable of being understood in more than one sense.” *Id.* (quoting *Madison Construction Co. v. Harleysville Mutual Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999)).

Under Pennsylvania law, “[t]he initial burden in insurance coverage disputes is on the insured to show that the claim falls within the policy.” *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. CV 20-3198, 2020 WL 6545893, at *2 (E.D. Pa. Nov. 6, 2020). “[I]f the insured meets that burden, the insurer then bears the burden of demonstrating that a policy exclusion excuses the insurer from providing coverage if the insurer contends that it does.” *State Farm Fire & Cas. Co. v. Estate of Mehlman*, 589 F.3d 105, 111 (3d Cir. 2009) (citing *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996)).

3. The Contentions of the Parties

According to Cincinnati, “[t]he requirement of direct physical loss is a core element in property insurance policies like Plaintiffs’, and appears in multiple places in the [P]olicies.” Defs.’ Mem. at 6. Pointing to the Policies’ definition of “loss” as “physical loss or damage to property,” Cincinnati contends that “there is no Covered Cause of Loss, and therefore no Business Income coverage, unless the insured first establishes, among other things, that there is direct physical loss to covered property.” *Id.* According to Cincinnati, because “Plaintiffs not only *admit*, but *affirmatively allege*, that there was no direct physical loss or damage to any property as a result of the virus, or the [Governor’s] Orders,” there can be no coverage under the Policies. *Id.* at 12 (emphasis in original) (citing Compl. ¶ 52 (“A virus, unlike a fire, flood, or weather event, cannot damage walls, floors, roofs or equipment.”)). In support of this contention, Cincinnati points to *Philadelphia Parking Authority v. Fed. Ins. Co.*, 385 F. Supp. 2d 280 (S.D.N.Y. 2005), a case applying Pennsylvania law, and argues that *Philadelphia Parking Authority* is consistent with a growing body of case law holding that virus-related losses do not

constitute physical damage or loss. *See* Defs.’ Mem. at 13-20. Cincinnati also argues that the absence of a virus exclusion in the Policies is irrelevant, because “[e]xclusions do not come into play unless there is first direct physical loss,” which there is not. *Id.* at 20. Finally, Cincinnati asserts that there is no Civil Authority coverage, because the “Plaintiffs do not allege the [Governor’s] Orders prohibited access to their premises,” as the Policies require. *Id.* at 23.

In opposition, Plaintiffs first contend that they are entitled to business interruption coverage under the Policies because “loss” is defined as *either* “physical loss” *or* “physical damage,” and while their properties have not been damaged, they have sustained “physical loss.”¹⁴ Pls.’ Opp’n. at 3-4. In particular, Plaintiffs claim “physical loss” is synonymous with “loss of use of the property,” which they have suffered as a result of the pandemic and the Governor’s Orders. *Id.* at 7 (emphasis in original). Accordingly, they need not have sustained “physical damage” to their premises. *See id.* at 7-8. *See id.* at 4-7.

According to Plaintiffs, they are also entitled to coverage under the “Civil Authority” provision of the Policies. *See* Pls.’ Opp’n. at 8-11. The heart of their argument on this point is as follows:

As a result of the Civil Authority Orders, access to Plaintiffs’ properties was strictly prohibited. The principal use of the properties was for upscale on-site dining. These were not drive-through pickup fast food places. Defendants’ contention that because Plaintiffs could continue take out and home delivery service, there was no denial of access misses the point that there has been physical loss or damage when the use of the property has been “nearly eliminated.”

Id. at 10.

¹⁴ In further support of this argument, Plaintiffs make a single, conclusory contention as to the absence of a virus exclusion: “At the outset, we note that there is no contention by Defendants that there is a virus exclusion in the policy, so COVID-19 is a covered cause of loss.” Pls.’ Opp’n. at 3.

4. *Application to Plaintiffs' Complaint*

The Court finds that Plaintiffs are not entitled to coverage under the Policies, because their premises have not suffered a direct “loss” as that term is unambiguously defined in the Policies: “[a]ccidental *physical* loss or accidental *physical* damage.” Policy at 67 (emphasis added). As an initial matter, it appears that Plaintiffs concede that their premises have not suffered any direct “physical damage” as a result of COVID-19 and the Governor’s Orders. *See* Pls.’ Opp’n. at 7 (“For there to be coverage for business interruption lost income there must be direct physical loss to the insured properties. Direct physical damage is not required.”). The Court will therefore focus its analysis on the construction of the term direct “physical loss.”

In light of the plain language of the Policies—in particular, the modifier “physical” preceding the word “loss”—and after surveying the legal authority presented by the parties and revealed through the Court’s own independent research, the Court reaches the following conclusion: To constitute direct “physical loss” under the Policies as that term is construed under Pennsylvania law, economic loss resulting from an inability to utilize a premises as intended must (1) bear some causal connection to the *physical* conditions of that premises, which conditions (2) operate to completely or near completely preclude operation of the premises as intended.¹⁵ The Court finds support for these conclusions in relevant case law.

In *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002), the Third Circuit, applying New York and New Jersey state law, addressed the question of to what extent the presence of asbestos in a building constitutes “physical loss or

¹⁵ To frame point (1) slightly differently, although the Court agrees with Plaintiffs that the disjunctive nature of “physical loss” or “physical damage” as used in the Policies indicates that the two terms are not synonymous, *see* Pls.’ Opp’n. at 4, the Court disagrees that “physical loss” is synonymous with “loss of use of [] property,” *id.* at 7, alone—that is, loss having not arisen as a result of a tangible physical condition of or on the premises.

damage” so as to warrant coverage under an “All Risk” property insurance policy similar to the Policies at issue here. Affirming a grant of summary judgment in favor of the insurer, the Court stated as follows with regard to the term “physical loss”:

When the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner. However, if asbestos is present in components of a structure, but is not in such form or quantity as to make the building unusable, the owner has not suffered a loss. The structure continues to function—it has not lost its utility. The fact that the owner may choose to seal the asbestos or replace it with some other substance as part of routine maintenance does not bring the expense within first-party coverage. . . . The effect of asbestos fibers in such quantity is comparable to that of fire, water or smoke on a structure's use and function.

Id. at 236. *Port Authority*’s central holding—that a release of asbestos fibers, or an imminent threat of such a release, must have “resulted in contamination of [] property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable,” *id.*—was upheld under Pennsylvania law by the Third Circuit in *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App’x 823 (3d Cir. 2005), an unpublished opinion.¹⁶ See *id.* at 826 (“We predict that the Pennsylvania Supreme Court would adopt a similar principle as we did in *Port Authority*.”).

In *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280 (S.D.N.Y. 2005), the Southern District of New York, applying Pennsylvania law, addressed whether economic loss on

¹⁶ *Hardinger* involved contamination of a homeowner’s well from e-coli bacteria. In *Hardinger*, the Third Circuit found instructive a 1992 Pennsylvania trial court decision in *Hetrick v. Valley Mut. Ins. Co.*, 15 Pa. D. & C 4th 271 (Pa. Com. Pl. 1992). The Court noted that “[i]n *Hetrick*, the court gave substantial attention and approval to *Western Fire Insurance Co. v. First Presbyterian Church*, 165 Colo. 34, 38-39, 437 P.2d 52(1968). In that case, the Colorado Supreme Court held the term ‘direct physical loss’ extended to cover the loss of use of the insured property where the accumulation of gasoline around and under the property rendered it uninhabitable.” *Hardinger*, 131 F. App’x at 826 n.4. The court in *Hetrick* (the 1992 trial court decision) concluded as follows: “an oil spill which pollutes the ground water may make a building uninhabitable. And if the building is uninhabitable, then there is direct loss to that building.” *Hetrick*, 15 Pa. D. & C.4th at 274 (internal citation omitted).

its own could warrant coverage under a policy’s “direct physical loss” provision. There, the operator of a parking garage at the Philadelphia International Airport sustained significant economic loss as the result of a downturn in air travel stemming from the terrorist attacks of September 11, 2001. The court held that economic loss stemming from an inability to utilize property as intended was alone not sufficient to invoke coverage:

The Court finds that the phrase “physical loss or damage” is not ambiguous since “reasonably intelligent [people] on considering it in the context of the entire policy would [not] honestly differ as to its meaning.” As stated above, the phrase “direct physical loss or damage,” when considered in the context of the Insurance Policy at issue in the present case, requires *that claimed loss or damage must be physical in nature*.

Id. at 289 (emphasis added) (quoting *United Servs. Auto Ass’n v. Elitzky*, 517 A.2d 982, 985 (Pa. Super. Ct. 1986)). The Southern District of New York also held that the at-issue policy’s “civil authority” provision did not cover plaintiff’s economic losses, as the relevant civil authority “did not ‘prohibit[] access to’ Plaintiff’s garages as the policy requires.” *Philadelphia Parking Auth.*, 385 F. Supp. 2d at 289.

These cases support the conclusion that under Pennsylvania law, for Plaintiffs to assert an economic loss resulting from their inability to operate their premises as intended within the coverage of the Policy’s “physical loss” provision, the loss and the bar to operation from which it results must bear a causal relationship to some *physical condition* of or on the premises. The cases also indicate the existence of an element correlating to extent of operational utility—*i.e.*, a premises must be uninhabitable and unusable, or nearly as such; the ability to operate in almost any capacity, even on a limited basis, precludes coverage.

At least two recent cases from within the Eastern District of Pennsylvania have reached the same conclusions when construing similar contracts in light of COVID-19.

In a November 6, 2020 decision in *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. CV 20-3198, 2020 WL 6545893 (E.D. Pa. Nov. 6, 2020), the court held that economic losses resulting from COVID-19 and the Governor's Orders suffered by a dentist's office did not constitute "direct physical loss" under a property insurance policy. Because "no order by either the Governor or the Department of Health ever required dental offices such as plaintiff to close completely" and because "plaintiff was able to remain open for emergency procedures," the court concluded that "plaintiff's property remained inhabitable and usable, albeit in limited ways. Plaintiff has failed to plead plausible facts that COVID-19 caused damage or loss in any physical way to the property so as to trigger coverage." *Id.* at *3.

The court reached a similar conclusion in a November 30, 2020 decision in *Toppers Salon & Health Spa, Inc. v. Travelers Property Casualty Co. of America*, No. 2:20-CV-03342, 2020 WL 7024287 (E.D. Pa. Nov. 30, 2020). In that case, the owner of a spa brought suit under an insurance policy for lost revenue resulting from COVID-19 and the Governor's shut-down Orders, claiming coverage under a "direct physical loss of or damage to" provision. Unlike the dentist office in *Handel*, plaintiff in *Toppers* was required to suspend its operations. So the only question before the court was "whether physical loss or damage caused that suspension." *Id.* at *3. The court found that "[i]t did not," because the policy's other provisions—in particular, reference to a "period of restoration," and the premises being "repaired, rebuilt or replaced"—made "clear that there must be some sort of physical damage to the property that can be the subject of a repair, rebuilding, or replacement. The Covid-19 pandemic does not fall within that definition." *Id.* at *4.

Here, Plaintiffs' loss of business income as a result of COVID-19 and the Governor's Orders does not constitute direct "physical loss" under the Policies for the same reasons coverage

was precluded in *Handel* and *Toppers*. First, there is no physical component to Plaintiffs' loss; there are no allegations that any physical conditions of or on the covered premises have been altered in a way that has resulted in or affected Plaintiffs' loss.¹⁷ Second, Plaintiffs maintain the ability to operate at their premises, albeit on a limited basis. For these related reasons, Plaintiffs have suffered no direct "physical loss." Without a direct "physical loss" or direct "physical damage," there is no "Covered Cause of Loss." Under these circumstances, Plaintiffs cannot claim coverage under the "Business Income" provision of the Policies.

Finally, for the reasons that have already been presented, there is also no coverage under either the Policies' "Extra Expenses" or "Civil Authority" provisions. *See* Policy at 48. Coverage under both provisions requires an insured to have suffered a Covered Cause of Loss, and thus a direct physical loss. *See id.* With no direct physical loss, there can be no coverage. Additionally, it is clear that Plaintiffs' ability to continue limited takeout and delivery operations at the premises precludes coverage under the Civil Authority provision: a prohibition on access to the premises, which is a prerequisite to coverage, is not present.¹⁸ *See Handel*, 2020 WL 6545893, at *3 ("[P]laintiff's property remained inhabitable and usable, albeit in limited ways.

¹⁷ Construing "physical loss" under the Policies to require a causal connection to some physical condition of a covered premises is, similar to the policy in *Toppers*, further supported by the structure of the Policies. As Cincinnati points out, here "there can be no 'Period of Restoration'" for pandemic-related losses as that term is used in the Policies, *see* Policy at 47-48, "because the Coronavirus does not constitute direct physical loss to property requiring any physical repair, rebuilding or replacement. The inapplicability of the 'Period of Restoration' element to Plaintiffs' alleged loss further demonstrates that . . . pure economic losses are not covered under the Policy," Cincinnati's Reply Memorandum ("Defs.' Mem."), ECF No. 13, at 5.

¹⁸ Additionally, Plaintiffs' conclusory assertion that, because "there is no contention by Defendants that there is a virus exclusion in the policy," it follows that "COVID-19 is a covered cause of loss," Pls.' Opp'n. at 3, is without merit. It is undisputed that there is no virus exclusion. However, Plaintiffs have failed to provide any support for the notion that the absence of an exclusion means that whatever could have been excluded but wasn't is necessarily covered. Even more fundamentally, the issue of exclusions is irrelevant as Plaintiffs' claims do not fall within the scope of the Policies' coverage.

Plaintiff has failed to plead plausible facts that COVID-19 caused damage or loss in any physical way to the property so as to trigger coverage.”).

C. Leave to Amend

The Court must consider whether Plaintiffs are entitled to amend the Complaint and re-plead their claims. *See Kanter v. Barella*, 489 F.3d 170, 181 (3d Cir. 2007) (“Generally, a plaintiff will be given the opportunity to amend her complaint when there is an asserted defense of failure to state a claim.”). Although leave to amend pleadings, when not as of right, should be “freely give[n] when justice so requires,” FED. R. CIV. P. 15(a)(2), the denial of leave to amend is appropriate where there exists undue delay, bad faith, dilatory motive, or futility. *See Holst v. Oxman*, 290 F. App’x 508, 510 (3d Cir. 2008).

Here, it is clear that any amendment to the Complaint would be futile. The terms of the Policies are not in dispute, and there is nothing else Plaintiffs could allege that would bring their claimed losses within the Policies’ coverage. Leave to amend is therefore denied.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs are not entitled to coverage under the terms of the Policies for their COVID-related business income losses. As such, their Complaint fails to state a viable claim for relief, and it is dismissed, with prejudice.

A separate Order follows this Opinion.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge

EXHIBIT 33

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**PROMOTIONAL HEADWEAR
INTERNATIONAL, individually and on behalf
of all others similarly situated,**

Plaintiff,

v.

THE CINCINNATI INSURANCE COMPANY,

Defendant.

Case No. 20-cv-2211-JAR-GEB

MEMORANDUM AND ORDER

Plaintiff Promotional Headwear International brings this putative class action against its property insurer, The Cincinnati Insurance Company, for declaratory judgment and breach of contract arising out of Defendant's denial of Plaintiff's insurance claim for property losses sustained due to COVID-19. Before the Court is Defendant's Motion to Dismiss (Doc. 7). The motion is fully briefed and the Court has considered the parties' many notices of supplemental authority. For the reasons explained more fully below, the Court grants Defendant's motion to dismiss.

I. Factual Allegations

The following material facts are either alleged in the Complaint or taken from the insurance policy attached thereto. The well-pled facts alleged in the Complaint are assumed to be true for purposes of deciding this motion.

As of April 24, 2020, when Plaintiff filed its Complaint, more than 46,000 Americans had died of COVID-19, and the Department of Health for Johnson County, Kansas had reported 403 confirmed cases. The virus can spread by respiratory droplets when an infected person

coughs, sneezes, or talks. Studies demonstrate that COVID-19 spreads through the air by aerosols, where they can remain for hours or more. A person can also potentially become infected by touching a surface or object that has the virus on it and then by touching the mouth, nose, or eyes. According to studies, the virus can live on surfaces for several days if not longer.

In response to COVID-19's rapid, deadly spread across the United States, state and local governments imposed directives in February and March 2020, often called "Stay at Home Orders," requiring residents to stay in their homes except to perform certain "essential" activities. The Stay at Home Orders generally required non-essential businesses to close. At one point, 95% of the United States population was under one or more Stay at Home Orders. The State of Kansas and Johnson County, Kansas issued Stay at Home Orders in March 2020 that were still in effect at the time the Complaint was filed. The March 24, 2020 Johnson County Order recognized that the virus "endanger[s] health, safety and welfare of persons and property within the border of Johnson County, Kansas," and that it "remains a public disaster affecting life, health, property and the public peace."¹ The Johnson County Order was issued to mitigate and slow the spread of COVID-19 in the community. The March 28, 2020 State of Kansas Order directed all Kansans to stay in their homes to slow the spread of COVID-19 with several exceptions. Like the Johnson County Order, the purpose of the State Order was to "mitigate the spread of COVID-19 throughout Kansas."² On April 16, 2020, the State Order was extended to May 3, 2020.

¹ Dr. Joseph LeMaster, Emergency Order of Local Health Officer at 1 (Mar. 22, 2020), <https://www.jocogov.org/sites/default/files/documents/CMO/JoCo%20Public%20Health%20Officer%20Stay%20at%20Home%20Order%203-22-20.pdf>; *see also* Doc. 1 ¶ 46(a).

² Doc. 1 ¶ 32 (quoting Kan. Exec. Order No. 20-16 at 1 (Mar. 28, 2020), <https://governor.kansas.gov/wp-content/uploads/2020/03/EO20-16.pdf>).

Plaintiff is a wholesale distributor of headwear, bags, aprons, towels, and other products, including custom promotional caps sold to businesses across the globe for marketing purposes. Plaintiff's facility is located in Johnson County, Kansas. Plaintiff projected it would exceed \$100 million in sales for 2020, but due to the Stay at Home Orders and the risk of transmitting of COVID-19, several of Plaintiff's employees could not show up to work and risk infection, preventing Plaintiff from meeting sales targets. COVID-19 and the Stay at Home Orders prevented Plaintiff from using its premises for its intended purpose. Plaintiff suspended its operations in order to mitigate further losses when government officials "announced that COVID-19 posed a risk of causing further physical damage and loss."³ As a result, Plaintiff lost nearly 95% of its sales.

Plaintiff purchased property insurance from Defendant, bearing Policy No. 05ECP0562300 (the "Policy"), that did not contain an exclusion for pandemic coverage. The all-risk Policy is comprised of a number of forms and endorsements that define the scope of coverage. It covers "direct 'loss' to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss."⁴ "Covered Cause of Loss" is defined under the Policy as "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part."⁵ "Loss" is defined as "accidental physical loss or accidental physical damage."⁶

The Policy includes coverage for business income losses, losses due to certain civil authority orders, and loss of ingress/egress. The Policy covers "actual loss of 'Business Income' . . . you sustain due to the necessary 'suspension' of your 'operations' during the 'period of

³ *Id.* ¶ 56.

⁴ Doc. 1-1 § A, at 6.

⁵ *Id.* § A(3)(a), at 8.

⁶ *Id.* § G(8), at 41.

restoration.’ The ‘suspension’ must be caused by direct ‘loss’ to property at a ‘premises’ caused by or resulting from any Covered Cause of Loss.”⁷ The civil authority coverage provision states:

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.⁸

The ingress/egress form provides coverage for

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.⁹

The Policy imposes certain duties on the insured in the event of loss or damage, including to protect the covered property from further damage, and “[k]eep a record of . . . expenses necessary to protect the Covered Property for consideration in the settlement of the claim.”¹⁰

In March 2020, Plaintiff notified Defendant of a loss under the Policy sustained from COVID-19 and the Stay at Home Orders. Specifically, Plaintiff maintains it lost revenue and

⁷ *Id.* § A(5)(b)(1), at 21; § A(1)(a), at 75.

⁸ *Id.* § A(5)(b)(3), at 22.

⁹ *Id.* § A(5)(e), at 78.

¹⁰ *Id.* § D(3)(a)(4), at 33–34; § C(2)(a)(4), at 79.

business opportunities due to the suspension of its operations, rendering it unable to fulfill or accept apparel orders. Defendant requested additional information and refused coverage under the Policy. In this action, Plaintiff seeks a declaration of the parties' respective rights and duties under the Policy and requests the Court deem Defendant's conduct unlawful and in material breach of the Policy. Plaintiff also asserts breach of contract claims under Kansas law based on the business income, civil authority, ingress/egress, and Sue and Labor provisions in the Policy.

II. Standard

To survive a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6), a complaint must contain factual allegations that, assumed to be true, "raise a right to relief above the speculative level" and must include "enough facts to state a claim for relief that is plausible on its face."¹¹ In order to pass muster under Rule 12(b)(6), "the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims."¹² The plausibility standard does not require a showing of probability that a defendant has acted unlawfully, but requires more than "a sheer possibility."¹³ "[M]ere 'labels and conclusions,' and 'a formulaic recitation of the elements of a cause of action' will not suffice; a plaintiff must offer specific factual allegations to support each claim."¹⁴ Finally, the Court must accept the nonmoving party's factual allegations as true and may not dismiss on the ground that it appears unlikely the allegations can be proven.¹⁵

The Supreme Court has explained the analysis as a two-step process. For the purposes of

¹¹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007).

¹² *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

¹³ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

¹⁴ *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011) (quoting *Bell Atl. Corp.*, 550 U.S. at 555).

¹⁵ *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

a motion to dismiss, the court “must take all the factual allegations in the complaint as true, [but] we ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’”¹⁶ Thus, the court must first determine if the allegations are factual and entitled to an assumption of truth, or merely legal conclusions that are not entitled to an assumption of truth.¹⁷ Second, the court must determine whether the factual allegations, when assumed true, “plausibly give rise to an entitlement to relief.”¹⁸ “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.”¹⁹

Finally, if the Court on a Rule 12(b)(6) motion looks to matters outside the pleadings, it generally must convert the motion to a Rule 56 motion for summary judgment.²⁰ However, the Court may consider documents that are referred to in the complaint if they are central to the plaintiff’s claim and the parties do not dispute their authenticity.²¹ Here, the Court considers the insurance policy attached to the Complaint, and language quoted in the Complaint from state and local Stay at Home Orders.²²

III. Discussion

Defendant’s motion to dismiss argues that Plaintiff fails to allege sufficient facts to demonstrate a “direct loss to Covered Property” under the terms of its all-risk Policy. Defendant further argues that even if Plaintiff could show direct loss, there is otherwise no coverage under

¹⁶ *Id.* (quoting *Twombly*, 550 U.S. at 555).

¹⁷ *Id.* at 679.

¹⁸ *Id.*

¹⁹ *Id.* at 678.

²⁰ Fed. R. Civ. P. 12(d); *GFF Corp. v. Associated Wholesale Grocers*, 130 F.3d 1381, 1384–85 (10th Cir. 1997).

²¹ See *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1215 (10th Cir. 2007); *GFF Corp.*, 130 F.3d at 1384–85.

²² See Doc. 1-1.

the civil authority, ingress/egress, or “Sue and Labor” provisions of the Policy. Plaintiff responds that it has alleged sufficient facts to demonstrate it suffered a covered loss and that the other provisions apply. In the alternative, Plaintiff argues that the definition of “loss” is ambiguous and should be construed in its favor.

The parties agree that Kansas law applies. Under Kansas law, the interpretation and legal effect of an insurance contract is a matter of law to be determined by the court.²³ In construing an insurance policy, a court must consider the instrument as a whole and interpret the policy language in such a way as to give effect to the intent of the parties.²⁴ “If an insurance policy’s language is clear and unambiguous, it must be taken in its plain, ordinary, and popular sense.”²⁵ In such a case, there is no need for judicial interpretation or the application of rules of liberal construction.²⁶

However, if the policy language is ambiguous, it must be construed in favor of the insured.²⁷ “To be ambiguous, a contract must contain provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language.”²⁸ “Ambiguity in a written contract does not appear until the application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or

²³ *Am. Media, Inc. v. Home Indem. Co.*, 658 P.2d 1015, 1018 (Kan. 1983); *Gerdes v. Am. Fam. Mut. Ins. Co.*, 713 F. Supp. 2d 1290, 1295 (D. Kan. 2010) (quoting *Goforth v. Franklin Life Ins. Co.*, 449 P.2d 477, 480 (Kan. 1969)).

²⁴ *O’Bryan v. Columbia Ins. Grp.*, 56 P.3d 789, 792 (Kan. 2002) (citing *Farm Bureau Mut. Ins. Co. v. Horinek*, 660 P.2d 1374, 1375 (Kan. 1983)); *Magnus, Inc. v. Diamond State Ins. Co.*, 101 F. Supp. 3d 1046, 1054 (D. Kan. 2015) (citing *Brumley v. Lee*, 963 P.2d 1224, 1226 (Kan. 1998)).

²⁵ *O’Bryan*, 56 P.3d at 792 (citing *First Fin. Ins. Co. v. Bugg*, 962 P.2d 515, 519 (Kan. 1998)); *Magnus*, 101 F. Supp. 3d at 1054.

²⁶ *Gerdes*, 713 F. Supp. 2d at 1296.

²⁷ *Magnus*, 101 F. Supp. 3d at 1054 (citing *Brumley*, 963 P.2d at 1226); *O’Bryan*, 56 P.3d at 793 (citing *Catholic Diocese of Dodge City v. Raymer*, 840 P.2d 456, 459 (Kan. 1992)).

²⁸ *Gerdes*, 713 F. Supp. 2d at 1296 (quoting *Catholic Diocese*, 840 P.2d at 459).

more meanings is the proper meaning.”²⁹ A court should not strain to find ambiguity where none exists.³⁰ “The test in determining whether an insurance contract is ambiguous is not what the insurer intends the language to mean, but what a reasonably prudent insured would understand the language to mean.”³¹

A. Direct Loss

The parties dispute the threshold question of whether Plaintiff sustained “direct loss to Covered Property at the premises caused by or resulting from any Covered Cause of Loss,” a requirement for all of the coverage provisions claimed by Plaintiff.³² Defendant argues that a direct loss to covered property under the Policy requires that the property be physically altered; because COVID-19 did not affect the structural integrity of the covered property, there is no coverage. Defendant maintains that the lack of a specific virus exclusion is immaterial to the Court’s construction of the Policy’s use of the term “loss.”

Plaintiff responds that under the plain terms of the policy, direct physical loss or damage does not require a tangible, permanent loss or physical alteration of the property. Instead, a reasonably prudent insured would understand that physical loss or damage includes loss of access or use of the property, which Plaintiff alleged in this case. In the alternative, Plaintiff argues that “direct physical loss” under the Policy is ambiguous, particularly when read in the absence of a virus exclusion.

Whether Plaintiff sustained a “direct loss” under the Policy is a question of coverage. The insured has the burden of proving that the loss is of the type included in the general

²⁹ *Id.*

³⁰ *Id.*

³¹ *O’Bryan*, 56 P.3d at 793 (citing *Bugg*, 962 P.2d at 519).

³² Doc. 1-1 § A, at 6.

provisions of coverage.³³ “Loss” is defined by the Policy as “accidental physical loss or accidental physical damage.”³⁴ Plaintiff points to the dictionary definition of the word “loss,” as “the act of losing possession,” and argues that a reasonably prudent insured would understand that loss of use or access to the property is a physical loss.³⁵ Plaintiff cites to definitions of the word “damage” that include a reduction in the property’s “value or usefulness.”³⁶ But even if the Court adopts these definitions, Plaintiff wholly ignores the modifiers “direct” and “physical” that precede both “loss” and “damage” in the Policy definition.³⁷ Although neither word is further defined by the Policy, Plaintiff’s interpretation of “loss” and “damage” would write out these modifiers entirely. Instead, the Court considers the plain meaning of these terms when read together and in conjunction with the Policy as a whole.

“Direct” in this context “is meant to exclude situations in which an intervening force played some role in the property damage.”³⁸ In the context of modifying the words “loss” or “damage,” dictionaries define “physical” as relating to or involving “material things,”³⁹ “relating

³³ See, e.g., *BankInsure, Inc. v. FDIC*, 796 F.3d 1226, 1234 (10th Cir. 2015).

³⁴ Doc. 1-1 § G(8), at 41.

³⁵ See *Loss*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/loss> (last visited Nov. 30, 2020) (“[T]he act of losing possession . . . decrease in amount, magnitude, or degree . . .”).

³⁶ See *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (first quoting Random House Dictionary of the English Language 504 (2d ed. 1987); then quoting Webster’s New World Dictionary 356 (2d ed. 1980); and then quoting Black’s Law Dictionary 389 (6th ed. 1990)).

³⁷ Plaintiff’s reliance on *Dundee Mutual Insurance* is inapposite for this reason. The language from that case quoted by Plaintiff in its brief states that “*without qualification*, the term ‘damage’ encompasses more than physical or tangible damage.” 587 N.W.2d at 194 (emphasis added). But the term “damage” in the Policy at issue here is qualified by the word “physical.” The explicit plain language of this Policy makes clear that damage does *not* encompass more than physical damage. Thus, *Dundee Mutual Insurance* does not apply.

³⁸ 10A Couch on Insurance § 148:60, Westlaw (database updated June 2020) (citing *Advance Cable Co. v. Cincinnati Ins. Co.*, 788 F.3d 743, 746 (7th Cir. 2015)); see also *Loss*, Black’s Law Dictionary (11th ed. 2019) (further defining “direct loss” as “[a] loss that results immediately and proximately from an event”); see also, e.g., *Hillcrest Optical, Inc. v. Cont’l Cas. Co.*, No. 1:20-cv-275-JB-B, 2020 WL 6163142, at *6–7 (S.D. Ala. Oct. 21, 2020) (finding “direct” means “immediate or proximate.”).

³⁹ *Physical*, Black’s Law Dictionary (11th ed. 2019).

to things you can see or touch, or relating to the laws of nature,”⁴⁰ and “having material existence; perceptible especially through the senses and subject to the laws of nature.”⁴¹

As this Court previously held in *Great Plains Ventures, Inc. v. Liberty Mutual Fire Ins. Co.*, “physical damage” in an insurance policy is widely accepted to mean “physical alteration.”⁴² While there is no governing Kansas or Tenth Circuit law about the plain meaning of “direct physical loss” or “direct physical damage” in the insurance context, other circuit court decisions support the *Great Plains* interpretation that “physical damage” requires actual, tangible damage. Case law also supports the interpretation that “direct physical loss” requires some sort of intrusion or contamination on the property.

For example, the Eleventh Circuit recently addressed a claim for business interruption coverage under an insurance policy that required suspension of operations caused “by direct physical loss of or damage to” the property.⁴³ The plaintiff owned a restaurant that suffered business losses during adjacent roadway construction that went on for almost two years. The restaurant lost customers, and dust and debris from the construction entered the restaurant, requiring daily cleaning. The court found that “under Florida law, an item or structure that merely needs to be cleaned has not suffered a ‘loss’ which is both ‘direct’ and ‘physical.’”⁴⁴ The

⁴⁰ *Physical*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/physical> (last visited Nov. 30, 2020).

⁴¹ *Physical*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/physical> (last visited Nov. 30, 2020).

⁴² 161 F. Supp. 3d 970, 978 (D. Kan. 2016); *see also Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002) (citing 10 Couch on Insurance § 148:46 (3d ed. 1998) (“In ordinary parlance and widely accepted definition, physical damage to property means ‘a distinct, demonstrable, and physical alteration’ of its structure.”); *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App’x 569, 574 (6th Cir. 2012) (finding no coverage because the plaintiff “did not suffer any tangible damage to physical property, nor were the Evergreen premises rendered uninhabitable or substantially unusable.”).

⁴³ *Mama Jo’s, Inc. v. Sparta Ins. Co.*, 823 F. App’x 868, 878 (11th Cir. 2020).

⁴⁴ *Id.* at 879.

Eleventh Circuit reasoned that the words “direct” and “physical” modify “loss,” under the policy, which in turn require that the property damage be “actual.”⁴⁵ The court relied on state and federal cases finding that direct physical loss requires some sort of actual change in the insured property.⁴⁶ Because the property there did not require removal or replacement of items, only cleaning, the court upheld the district court’s determination that the loss was not direct and physical.⁴⁷

The Eighth Circuit has twice weighed in on the plain meaning of direct physical loss or damage. In *Pentair, Inc. v. America Guarantee & Liability Insurance Co.*, the court considered the policy language “direct physical loss of or damage to property.”⁴⁸ There, the plaintiff’s supplier could not manufacture orders due to an earthquake that disabled the electrical power station for the supplier’s factories. The plaintiff sought coverage for losses sustained due to the supplier’s failure to manufacture the products it needed to meet customer needs for the Christmas season. The court found that the factories’ loss of power did not constitute “physical loss or damage” to property under the policy because there was no physical contamination involved, noting that the plaintiff’s interpretation “would mean that direct physical loss or damage is established whenever property cannot be used for its intended purpose.”⁴⁹ The court determined

⁴⁵ *Id.*

⁴⁶ *Id.* (citing *Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067, 1069 (Fla. Dist. Ct. App. 2017); *Vazquez v. Citizens Prop. Ins. Corp.*, –So. 3d–, 2020 WL 1950831, at *3 (Fla. Dist. Ct. App. Mar. 18, 2020); *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App’x 569, 573 (6th Cir. 2012); *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 115 Cal. Rptr. 3d 27, 37 (Cal. Ct. App. 2010); *AFLAC Inc. v. Chubb & Sons, Inc.*, 581 S.E.2d 317, 319 (Ga. Ct. App. 2003)); *see also Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) (“The words ‘direct’ and ‘physical,’ which modify the phrase ‘loss or damage,’ ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure.”).

⁴⁷ *Mama Jo’s, Inc.*, 823 F. App’x at 879.

⁴⁸ 400 F.3d 613, 614 (8th Cir. 2005).

⁴⁹ *Id.* at 616.

that Minnesota law did not support such a broad interpretation of physical loss or damage; some sort of physical contamination is required.⁵⁰

In *Source Food Technology, Inc. v. U.S. Fidelity & Guaranty Co.*, the Eighth Circuit considered a business income claim under policy language that required “direct physical loss to property.”⁵¹ There, the plaintiff sold a beef product provided by a Canadian supplier. The beef product was manufactured, packaged, and ready for delivery to the United States when the United States Department of Agriculture issued an order prohibiting the importation of certain beef products due to the threat of mad cow disease. Although not contaminated with mad cow disease, the plaintiff’s beef product supply was not shipped due to the embargo and the plaintiff could not fill its supply orders for a period of time. The court determined that because the beef product was not physically contaminated, there was no direct physical loss:

Although Source Food’s beef product in the truck could not be transported to the United States due to the closing of the border to Canadian beef products, the beef product on the truck was not—as Source Foods concedes—physically contaminated or damaged in any manner. To characterize Source Food’s inability to transport its truckload of beef product across the border and sell the beef product in the United States as direct physical loss to property would render the word “physical” meaningless. Moreover, the policy’s use of the word “to” in the policy language “direct physical loss to property” is significant. Source Food’s argument might be stronger if the policy’s language included the word “of” rather than “to,” as in “direct physical loss of property” or even “direct loss of property.” But these phrases are not found in the policy. Thus, the policy’s use of the words “to property” further undermines Source Food’s argument that a border closing triggers insurance coverage under this policy.⁵²

⁵⁰ *Id.* (first citing *Sentinel Mgmt. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997); then citing *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 151 (Minn. Ct. App. 2001); and then citing *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 98 N.W.2d 280, 285 (Minn. 1959)).

⁵¹ 465 F.3d 834 (8th Cir. 2006).

⁵² *Id.* at 838; see also *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, –F. Supp. 3d–, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020).

In line with these decisions, the overwhelming majority of cases to consider business income claims stemming from COVID-19 with similar policy language hold that “direct physical loss or damage” to property requires some showing of actual or tangible harm to or intrusion on the property itself.⁵³ The cases cited by Plaintiff in support of a broader interpretation are unavailing. In *TRAVCO Insurance Co. v. Ward*, the court determined that a direct physical loss can occur if the property is “rendered unusable by physical forces.”⁵⁴ There, the property’s drywall emitted toxic gases that, while not affecting the structural integrity of the building,

⁵³ See *Raymond H. Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-cv-22833-BLMM/Louis, 2020 WL 6392841, at *8 (S.D. Fla. Nov. 2, 2020) (finding no direct physical loss or damage because the harm was purely economic); *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL 6436948, at *4–5 (S.D. W. Va. Nov. 2, 2020) (finding purely economic losses without physical damage to the insured property does not constitute “physical loss or physical damage” under insurance policy); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, No. 2:20-cv-05663, 2020 WL 6440037, at *4 (C.D. Cal. Oct. 27, 2020) (“Plaintiffs contend that the loss of use of their properties is sufficient to trigger coverage under the Policy. Under California law, however, a ‘detrimental economic impact’ alone—as Plaintiffs have alleged—is not compensable under a property insurance contract.” (citation omitted)); *Hillcrest Optical, Inc. v. Cont’l Cas. Co.*, No. 1:20-cv-275-JB-B, 2020 WL 6163142, at *6–7 (S.D. Ala. Oct. 21, 2020) (finding Alabama law requires a tangible injury to property under policy requiring “direct physical loss.”); *Infinity Exs., Inc. v. Certain Underwriters at Lloyd’s London Known as Syndicate PEM 4000*, –F. Supp. 3d–, 2020 WL 5791583, at *3–5 (M.D. Fla. Sept. 28, 2020) (finding that under Florida law and the plain language of the policies at issue, “direct physical loss or damage to the property” requires a showing of actual, concrete damage); *Sandy Point Dental, PC v. Cincinnati Ins Co.*, No. 20 CV 2160, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020) (finding direct physical loss requires “some form of actual, physical damage to the insured premises to trigger coverage.”); *10E, LLC v. Travelers Indem. Co.*, No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653, at *4–5 (C.D. Cal. Sept. 2, 2020) (“Under California law, losses from inability to use property do not amount to ‘direct physical loss of or damage to property’ within the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a ‘distinct, demonstrable, physical alteration.’” (quoting *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 115 Cal. Rptr. 3d 27, 38 (Cal. Ct. App. 2010))); *Turek Enters., Inc.*, 2020 WL 5258484, at *8 (“[A]ccidental direct physical loss to Covered Property’ is an unambiguous term that plainly requires Plaintiff to demonstrate some tangible damage to Covered Property.”); *Malube, LLC v. Greenwich Ins. Co.*, No. 20-22615-Civ-WILLIAMS/TORRES, 2020 WL 5051581, *7–8 (S.D. Fla. Aug. 26, 2020) (finding that direct, physical loss requires actual harm; purely economic losses are insufficient); *Pappy’s Barber Shops, Inc. v. Farmers Grp., Inc.*, No. 20-CV-907-CAB-BLM, 2020 WL 5500221, at *4–5 (S.D. Cal. Sept. 11, 2020) (following *10E, LLC*, 2020 WL 5359653, at *4 and finding no direct physical loss or damage based on Stay at Home Orders); *Diesel Barbershop, LLC v. State Farm Lloyds*, –F. Supp. 3d–, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) (acknowledging and distinguishing caselaw that finds direct physical loss without tangible destruction and finding that the loss must be a “distinct, demonstrable physical alteration of the property.” (quoting *Hartford Ins. Co. v. Miss. Valley Gas Co.*, 181 F. App’x 465, 470 (5th Cir. 2006))); *Rose’s 1, LLC v. Erie Ins. Exch.*, No. 2020 CA 002424 B, 2020 WL 4589206, at *2–5 (D.C. Super. Ct. Aug. 6, 2020) (finding that dictionary definitions and the weight of caselaw support the interpretation that direct physical loss requires a physical change to the insured property).

⁵⁴ 715 F. Supp. 2d 699, 708–10 (E.D. Va. 2010), *aff’d*, 504 F. App’x 251 (4th Cir. 2013).

rendered the property uninhabitable.⁵⁵ Unlike in this case, the loss of use in *Ward* was due to an actual physical force—toxic gases—that rendered the property unusable.⁵⁶ Plaintiff cites *Murray v. State Farm Fire & Casualty Co.* for the proposition that “[d]irect physical loss also may exist in the absence of structural damage to the insured property.”⁵⁷ But *Murray* relies on a Minnesota Court of Appeals case that *Pentair* and *Source Food* persuasively distinguished because it was based on the release of asbestos fibers—actual, physical contamination.⁵⁸ Similarly, *Western Fire Insurance Co. v. First Presbyterian Church* found “direct physical loss” due to gasoline saturation under a church that rendered occupancy unsafe.⁵⁹ There, the court found that the church was uninhabitable due to “infiltration and contamination” of the church building, even though the structural integrity of the building was intact.⁶⁰ These cases all found that a physical force rendered the property unfit for use. Here, there is no such physical force rendering the property unusable. The Stay at Home orders are certainly not a physical intrusion onto the property. And while the threat of COVID-19 transmission may prohibit gathering at the property, there is no allegation that the virus has physically intruded onto the property like the asbestos, gasoline, or toxic gas described in the caselaw.

The Court finds that coverage for “direct loss to Covered Property” under the Policy unambiguously requires more than mere diminution in value or impairment of use of the

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 509 S.E.2d 1, 17 (W. Va. 1998) (citing *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997)).

⁵⁸ See *Source Food Tech., Inc. v. U.S. Fidelity & Gar. Co.*, 465 F.3d 834, 837–38 (8th Cir. 2006); *Pentair, Inc. v. Am. Guar. & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005).

⁵⁹ 437 P.2d 52, 55 (Colo. 1968).

⁶⁰ *Id.*

property.⁶¹ Under Kansas law, “[t]he failure of an insurance policy to specifically define a word does not necessarily create ambiguity.”⁶² The presence of the words “direct” and “physical” limit the words “loss” and “damage” and unambiguously require that the loss be directly tied to a material alteration to the property itself, or an intrusion onto the insured property.⁶³ The Court follows the majority of courts to consider identical policy language in the context of COVID-19 and holds that direct physical loss or damage to the property requires a tangible, actual change to or intrusion on the covered property. Like the restaurant in *Mama Jo’s*, Plaintiff alleges no loss or damage to the property that required repair or replacement based on an actual or tangible problem with the premises.⁶⁴ And like the plaintiffs in *Pentair* and *Source Food*, Plaintiff suffers purely economic damages due to temporary loss of use, not a direct, physical change or intrusion onto the property.

Plaintiff responds that “physical loss” and “physical damage” must be construed and considered separately so as to give meaning to each term, and that requiring tangible harm to the property reads out any distinction between those terms. But the Court has taken care to give meaning to both terms. As discussed, the words “direct” and “physical” modify *both* “loss” and

⁶¹ The fact that Defendant chose not to include a virus exclusion in the Policy does not render it ambiguous. See *Harmon v. Safeco Ins. Co. of Am.*, 954 P.2d 7, 11 (Kan. Ct. App. 1998). And if there is no coverage, there is no reason to consider whether an exclusion applies.

⁶² *First Fin. Ins. Co. v. Bugg*, 962 P.2d 515, 525 (Kan. 1998). The Eighth Circuit’s decision in *Hampton Foods, Inc. v. Aetna Casualty & Surety Co.* does not support a finding that this Policy language is ambiguous. 787 F.2d 349 (8th Cir. 1986). The policy language in *Hampton Foods* stated: “[t]his policy insures against loss of or damage to the property insured . . . resulting from all risks of direct physical loss.” *Id.* at 351. The parties disputed whether a “direct physical loss” was required, or merely damage or loss resulting from the *risk* of direct physical loss. The court found the policy language ambiguous and construed it in favor of the insured. *Id.* at 352. Here, the disputed language is “direct physical loss” and “direct physical damage.” There is no “risk” language at issue here; therefore, *Hampton Foods* does not persuade the Court to find the Policy language here ambiguous.

⁶³ See, e.g., *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, No. 20 CV 2160, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020) (“The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property. Consequently, plaintiff has failed to plead a direct physical loss—a prerequisite for coverage.”)

⁶⁴ *Mama Jo’s, Inc. v. Sparta Ins. Co.*, 823 F. App’x 868, 878 (11th Cir. 2020).

“damage” under this Policy. Assuming “loss” can be defined as an interference or reduction in use, caselaw has made clear that when modified by the terms “direct” and “physical,” coverage is triggered when there is either “permanent dispossession” of the property, or where the property itself becomes unusable or uninhabitable due to a material intrusion.⁶⁵ While COVID-19 and the Stay at Home Orders temporarily prevented employees and customers gathering at Plaintiff’s property, there are no allegations of a material change or intrusion onto the property itself that rendered it unusable.⁶⁶ And there are no allegations demonstrating permanent dispossession.

A few recent district court cases have determined that an allegation of COVID-19 entering the premises through an employee or customer is sufficient to demonstrate direct physical loss or damage.⁶⁷ Thus, Plaintiff asserts that it sufficiently pled physical loss or damage by alleging that the “premises likely have been infected with COVID-19. . . . It is likely customers, employees, and/or other visitors to the insured property over the last two months were infected with the coronavirus and thereby infected the insured property with the coronavirus.”⁶⁸ Plaintiff alleges that despite the limited access to the property due to Stay at Home Orders, the

⁶⁵ *10E, LLC*, 2020 WL 5359653, at *5 (citing *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB (Ksx), 2018 WL 3829767, at *4 (C.D. Cal. July 11, 2018)); *Pappy’s Barber Shops, Inc.*, 2020 WL 550221, at *4; *Rose’s 1, LLC v. Erie Ins. Exch.*, 2020 WL 4589206, at *3; *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708–10 (E.D. Va. 2010), *aff’d*, 504 F. App’x 251 (4th Cir. 2013) (finding physical loss where property was uninhabitable due to toxic gas released by drywall, despite the fact that the drywall was not structurally damaged).

⁶⁶ Plaintiff’s reliance on language in the Stay at Home Order recognizing that COVID-19 poses a threat to property is unavailing. The Court determines the meaning of the Policy based on the plain meaning of the language therein. *O’Bryan v. Columbia Ins. Grp.*, 56 P.3d 789, 792 (Kan. 2002).

⁶⁷ See *Studio 417, Inc. v. Cincinnati Ins. Co.*, –F. Supp. 3d–, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963, at *4 (W.D. Mo. Sept. 21, 2020); see also *Mudpie, Inc. v. Travelers Cas. Ins. Co.*, –F. Supp. 3d–, 2020 WL 5525171, at *5 n.7 (N.D. Cal. Sept. 14, 2020) (noting that if the plaintiff had adequately alleged the presence of COVID-19 in the premises, it would have reached a different conclusion about whether it constituted an “intervening physical force”).

⁶⁸ Doc. 1 ¶ 15.

incubation period for COVID-19 is fourteen days, and there is evidence that the first COVID-19 death in the United States occurred as early as February 6, 2020. Plaintiff cites several studies in the Complaint finding that the virus is spread through air droplets and, therefore, is able to spread across distances and can settle on physical surfaces that later infect another person.

The Court finds that Plaintiff's allegation that the virus likely contaminated its property fails to raise a "right of relief above the speculative level."⁶⁹ The health data and studies described in the Complaint do not support the conclusory assertion that the virus was present on the surfaces of Plaintiff's property, causing its losses.⁷⁰ The fact that the virus travels through the air and was present in the United States sooner than first suspected, does not support the assertion that it "likely" exists on the surfaces of Plaintiff's property. "There is a similar risk of exposure to the virus in any public setting, regardless of artful pleading as to the likelihood of the presence of the virus."⁷¹ The Complaint alleges that at the time of filing, there were 403 known infections in Johnson County; there is no allegation that any of these infected individuals were ever present on Plaintiff's property, or that employees or customers came into contact with someone who was infected before entering the property. To accept Plaintiff's conclusory assertion would be to accept the proposition that any business located in a community with COVID-19 infections was likely contaminated with the virus.⁷² The Court declines to accept this speculative assertion, even at the motion to dismiss stage.

⁶⁹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

⁷⁰ Under this reasoning, any property in the United States that was not completely closed by February 6, 2020 was "likely" infected with the virus.

⁷¹ *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL 6436948, at *5 (S.D. W. Va. Nov. 2, 2020).

⁷² *See id.* ("[W]hile factual allegations drive the analysis of a motion to dismiss, courts are not required to set aside common sense, and neither *Studio 417*, which relied in part on the allegation of presence of the virus, nor the instant case, involve actual allegations of employees or patrons with infections traced to the business.")

Moreover, even assuming that the virus physically attached to covered property, it did not constitute the direct, physical loss or damage required to trigger coverage because its presence can be eliminated. Much like the dust and debris at issue in *Mama Jo's*, routine cleaning and disinfecting can eliminate the virus on surfaces.⁷³ Plaintiff seeks purely economic damages associated with the suspension of its operations due to COVID-19; it does not claim property damage due to the presence of COVID-19 in its buildings. The Court echoes the words of another Court faced with deciding this issue:

Property . . . is not physically damaged or rendered unusable or uninhabitable. If people could safely congregate anywhere without risk of infection, the Plaintiff has alleged no facts to suggest any impediment to [its] operation. No repairs or remediation to the premises are necessary for its safe occupation in the event the virus is controlled and no longer poses a threat. In short, the pandemic impacts human health and human behavior, not physical structures. Those changes in behavior, including changes required by governmental action, caused the Plaintiff economic losses. The Court is not unsympathetic to the situation facing the Plaintiff and other businesses. But the unambiguous terms of the Policy do not provide coverage for solely economic losses unaccompanied by physical property damage.⁷⁴

The Complaint fails to allege that Plaintiff sustained a “direct loss to Covered Property” due to COVID-19 and the Stay at Home Orders. Because there is no direct physical loss or damage alleged in the Complaint, it must be dismissed for failure to state a claim.

B. Civil Authority Coverage

The Policy’s loss of business income provision covers lost business income as a result of direct loss to Plaintiff’s covered property. The civil authority coverage provision applies when there is a “Covered Cause of Loss,” that causes damage to property other than Plaintiff’s

⁷³ *Id.* at *5; *Mama Jo's, Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 878 (11th Cir. 2020).

⁷⁴ *Uncork & Create LLC*, 2020 WL 6436948, at *5.

property, and the action of a civil authority makes Plaintiff unable to reach its property. If Plaintiff shows that a covered cause of loss caused damage to adjacent property, it must meet two additional requirements: (1) access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and (2) the action of civil authority is taken in response to dangerous physical conditions resulting from direct physical loss.

First, Defendant argues that Plaintiff cannot show that a covered cause of loss caused damage to property other than Plaintiff's for the same reasons outlined above. The Court agrees. Plaintiff points to no allegation in the Complaint that sufficiently alleges damage to surrounding property for the same reasons discussed above. Instead, Plaintiff makes the circular argument that because state and local governments issued Stay at Home Orders in response to the COVID-19 pandemic, this "includes the area surrounding Plaintiff's property."⁷⁵ The allegations in the Complaint are insufficient to demonstrate direct loss, or damage to property surrounding Plaintiff's property.

Second, even if Plaintiff could demonstrate direct physical loss or damage to surrounding property, it has not alleged sufficient facts demonstrating that access to the area immediately surrounding the property is prohibited by civil authority as a result of the damage. As the Tenth Circuit has explained, "prohibited" means "to 'formally forbid, esp. by authority' or 'prevent.'"⁷⁶ The Policy language "requires a direct nexus between the civil authority order and the suspension of the insured's business."⁷⁷ The civil authority action must either prohibit access to

⁷⁵ Doc. 17 at 17.

⁷⁶ *S. Hospitality, Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1141 (10th Cir. 2004) (quoting Oxford American Dictionary and Language Guide 795 (1999)).

⁷⁷ *Id.*

the business, or require the premises to close.⁷⁸ Having the indirect effect of restricting or hampering access to the business is insufficient.⁷⁹

The Complaint alleges that some of Plaintiff’s employees could not work and risk becoming infected, that “ingress and egress to the property currently is limited,”⁸⁰ and that customers and suppliers cannot access the property “due to the Stay at Home Orders or fear of being infected with or spreading COVID-19.”⁸¹ The Stay at Home Orders referenced in the Complaint do not prohibit employees or the public from entering Plaintiff’s premises. Nor do the Stay at Home Orders require Plaintiff to suspend its business. The State of Kansas Order provides: “Travel to and from work to pick up equipment or supplies needed for telework or other work-from-home capabilities is allowed so long as employees and employers follow appropriate safety protocols.”⁸² The Johnson County Order similarly allows residents to leave their homes in order “[t]o perform work providing essential products and services at an Essential Business or to otherwise carry out activities specifically permitted in this Order, including Minimum Basic Operations.”⁸³ Assuming as true the facts alleged in the Complaint, access to Plaintiff’s property was not prohibited by the Stay at Home Orders; therefore, the Policy’s civil authority coverage provision does not apply.

⁷⁸ See, e.g., *id.* (finding no coverage where the FAA’s order stopped airplanes from flying after 9/11, but did not close hotels); *Abner, Herrman & Brock, Inc. v. Great N. Ins. Co.*, 308 F. Supp. 2d 331, 333 (S.D.N.Y. 2004) (finding no coverage after New York City lifted order prohibiting access to plaintiff’s premises even though traffic restrictions remained); *Assurance Co. of Am. v. BBB Serv. Co.*, 593 S.E.2d 7, 7–9 (Ga. Ct. App. 2003) (finding evacuation order due to hurricane required closure of plaintiff’s business).

⁷⁹ See, e.g., *S. Hospitality, Inc.*, 393 F.3d at 1141 (collecting cases).

⁸⁰ Doc. 1 ¶ 15.

⁸¹ *Id.* ¶ 16.

⁸² Kan. Exec. Order No. 20-16 ¶ 3 (Mar. 28, 2020), <https://governor.kansas.gov/wp-content/uploads/2020/03/EO20-16.pdf>.

⁸³ Dr. Joseph LeMaster, Johnson County Emergency Order of Local Health Officer at 2 (Mar. 22, 2020), <https://www.jocogov.org/sites/default/files/documents/CMO/JoCo%20Public%20Health%20Officer%20Stay%20at%20Home%20Order%203-22-20.pdf> ;

Plaintiff further argues that because the word “prohibited” is not defined by the Policy, it is at least ambiguous and should therefore be resolved in its favor. As discussed earlier in this Order, the fact that a word is not defined in an insurance policy does not mean it is ambiguous.⁸⁴ The Court finds that the meaning of “prohibited” in this Policy is unambiguous, as described above. Because the Complaint fails to allege that the Stay at Home Orders prohibited access to Plaintiff’s property, coverage does not apply and Defendant’s motion to dismiss is granted on this additional basis as to the civil authority coverage claim.

C. Ingress/Egress and Sue and Labor Provisions

Defendant argues that the remaining coverage provisions claimed by Plaintiff do not apply here. Coverage under the ingress/egress provision requires “direct ‘loss’ by a Covered Cause of Loss at a location contiguous to” Plaintiff’s property. It also requires “the prevention of existing ingress or egress,” from the Covered Cause of Loss. Again, the Complaint fails to allege that there was direct physical loss or damage at a location contiguous to the property. Plaintiff fails to even identify a contiguous property for purposes of this coverage provision. Also, as discussed under the Civil Authority coverage section, the Complaint admits that the premises was accessible despite the Stay at Home Orders. Therefore, assuming as true the facts alleged in the Complaint, COVID-19 did not prevent ingress or egress from Plaintiff’s property.

Finally, Plaintiff asserts coverage under the “Sue and Labor” provision. But Defendant correctly points out that this provision is plainly not a coverage provision. Instead, it provides that the insured has certain duties in the event of loss or damage, including to protect the covered property from further damage, and “[k]eep a record of . . . expenses necessary to protect the

⁸⁴ *First Fin. Ins. Co. v. Bugg*, 962 P.2d 515, 525 (Kan. 1998).

Covered Property for consideration in the settlement of the claim.”⁸⁵ Plaintiff fails to address this argument in the response brief, or provide any meaningful explanation about how this coverage section applies. The Court finds no coverage under the plain language of this Policy provision as applied to the well-pled facts alleged in the Complaint.

IT IS THEREFORE ORDERED BY THE COURT that Defendant’s Motion to Dismiss (Doc. 7) is **granted**. Plaintiff’s Complaint is dismissed with prejudice.

IT IS SO ORDERED.

Dated: December 3, 2020

S/ Julie A. Robinson
JULIE A. ROBINSON
CHIEF UNITED STATES DISTRICT JUDGE

⁸⁵ *Id.* § D(3)(A)(4), at 33–34; § C(2)(a)(4), at 79.

EXHIBIT 34

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 1:20-cv-21525-UU

EL NOVILLO RESTAURANT, *et al.*,

Plaintiffs,

v.

CERTAIN UNDERWRITERS AT LLOYD’S,
LONDON, *et al.*,

Defendants.

ORDER

THIS CAUSE is before the Court upon Defendants’ Motion to Dismiss Plaintiffs’ First Amended Class Action Complaint (the “Motion”). D.E. 24. The Court has considered the Motion and the pertinent portions of the record and is otherwise fully advised in the premises. For the reasons that follow, the Motion is GRANTED.

I. Background

Unless otherwise indicated, the following facts come from Plaintiffs’ First Amended Class Action Complaint [D.E. 20] (the “Amended Complaint”) and are accepted as true.

Plaintiffs El Novillo Restaurant d/b/a DJJ Restaurant Corp. (“DJJ”) and El Novillo Restaurant d/b/a Triad Restaurant Corp. (“Triad” and, together with DJJ, “Plaintiffs”) each own, operate, manage, and control a restaurant by the name of “El Novillo.” D.E. 20 ¶¶ 16, 17. On July 1, 2019, Defendants Certain Underwriters at Lloyd’s London (“Defendants”) issued commercial property insurance policy number 773TA10063 to DJJ and insurance policy number 773TA10064 to Triad (the “Policies”). *Id.* ¶ 19. DJJ’s insurance policy describes the insured property as the El Novillo Restaurant located at 15450 New Barn Road in Hialeah, Florida. *Id.* ¶ 40. And Triad’s

policy identifies the El Novillo Restaurant located at 6830 Bird Road in Miami, Florida as the insured property. *Id.*

Plaintiffs allege that the Policies are “all-risk” commercial property insurance policies, “which cover loss or damage to the covered premises resulting from all risks other than those expressly excluded.” *Id.* ¶ 30. The Policies include “business interruption coverage,” which “promises to indemnify the insured for lost income and certain expenses in the event of a business interruption.” *Id.* More specifically, each Policy includes a “Business Income (and Extra Expense) Coverage Form,” which provides coverage for “Business Income” and “Extra Expense,” as well as additional coverage for actions taken by a “Civil Authority.” *Id.* ¶¶ 32, 38, 39.

Plaintiffs allege that as a direct result of the global COVID-19 pandemic and certain governmental orders that restricted restaurant operations ostensibly designed to reduce the number of COVID-19 cases, “Plaintiffs could not use their properties as intended.” *Id.* ¶ 48. Plaintiffs specifically identify Emergency Order 02-20, issued on March 16, 2020 by Miami-Dade County Mayor Carlos Gimenez, which “restrict[ed] operating times for all restaurants within Miami-Dade County to 6 a.m. to 11 p.m. other than for delivery.” *Id.* ¶ 45. Plaintiffs also identify Emergency Order 03-20, issued by Mayor Gimenez on March 17, 2020, which had the effect of “closing all restaurants in Miami-Dade County other than for delivery or takeout.” *Id.* ¶ 46. Plaintiffs allege that they have “suffered both direct physical losses and damage to the properties in the form of diminished value, lost business income, a reduction in right of full ownership, and forced physical alterations during a period of restoration.” *Id.* ¶ 48.

Plaintiffs assert that Defendants “are denying claims for business income losses and other covered expenses resulting from the measures put in place by the civil authorities to stop the spread of COVID-19.” *Id.* ¶ 7. According to Plaintiffs, “Defendants have no intention of providing

coverage” for Plaintiffs’ purported business income losses stemming from the COVID-19 pandemic. *Id.* ¶ 50. And Defendants purportedly “have taken the position in this litigation that Plaintiffs’ losses are not covered.” *Id.*

Plaintiffs filed the Amended Complaint on July 6, 2020, asserting two causes of action of Defendants: Declaratory Judgment (Count I) and Anticipatory Breach of Contract (Count II). Defendants filed the Motion on July 16, 2020, seeking dismissal of the Amended Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The Motion is fully briefed and ripe for adjudication.

II. Legal Standard

To state a claim, Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” While the Court must consider the allegations contained in the plaintiff’s complaint as true, this rule “is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In addition, the complaint’s allegations must include “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Thus, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (citing *Twombly*, 550 U.S. at 555).

In practice, to survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim of relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at 570). 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. *Id.* The plausibility standard requires more than a sheer possibility that a defendant has acted unlawfully. *Id.* Where a complaint pleads facts that are merely consistent with a defendant’s

liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Id.* Determining whether a complaint states a plausible claim for relief is a context-specific undertaking that requires the court to draw upon its judicial experience and common sense. *Id.* at 679. A court may dismiss a case with prejudice if the allegations of a complaint, even when taken as true, afford no basis for relief or when amendment would be futile. *E.g., Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999)); *Chiron Recovery Ctr., LLC v. United Health Servs., Inc.*, 438 F. Supp. 3d 1346, 1356 (S.D. Fla. 2020).

III. Analysis

Florida law places the initial burden on an insured seeking to recover under an all-risk policy of proving that a loss occurred. *See S.O. Beach Corp. v. Great Am. Ins. Co. of New York*, 305 F. Supp. 3d 1359, 1364 (S.D. Fla. 2018), *aff'd*, 791 F. App'x 106 (11th Cir. 2019). At this stage of the litigation, therefore, Plaintiffs must sufficiently allege that their purported losses are covered under the Policies. *See Timber Pines Plaza, LLC v. Kinsale Ins. Co.*, 192 F. Supp. 3d 1287, 1293 (M.D. Fla. 2016). In determining coverage under an insurance policy, a court's inquiry begins with "the plain language of the policy, as bargained for by the parties." *State Farm Fire & Cas. Co. v. Steinberg*, 393 F.3d 1226, 1230 (11th Cir. 2004) (quoting *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000)). In other words, "insurance contracts are construed according to their plain meaning." *Garcia v. Federal Ins. Co.*, 473 F.3d 1131, 1135 (11th Cir. 2006). If an insurance policy's language is unambiguous, it governs. *Steinberg*, 393 F.3d at 1230. But where "the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the insurance policy is considered ambiguous, and must be 'interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy.'" *Id.* (quoting *Anderson*, 756 So. 2d at 34).

A. The Policies

Under the Business Income (and Extra Expense) Coverage Form, the Policies provide coverage for lost income and certain expenses in the event of a business interruption or suspension. D.E. 24-1, pp. 37–45; D.E. 24-2, pp. 37–45. Relevant here, the Policies provide coverage for “Business Income” and “Extra Expense,” as well as additional coverage for actions taken by a “Civil Authority.” *Id.* at 37–38. The Business Income Coverage section states, in relevant part:

We 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 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.

Id. at 37. The Extra Expense Coverage section provides coverage for “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 Civil Authority Additional Coverage section provides:

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 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 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 taken to enable a civil authority to have unimpeded access to that damaged property.

Id. at 38.

Relevant to the above coverage provisions, the Policies define “suspension” as “[t]he slowdown or cessation of your business activities.” *Id.* at 45. “Period of restoration” means the period of time that begins “after the time of direct physical loss or damage,” and ends on the earlier of “[t]he date when the property at the described premises should be repaired, rebuilt or replaced” or “[t]he date when business is resumed at a new permanent location.” *Id.* And “Covered Cause of Loss” is defined as “direct physical loss unless the loss is excluded or limited in this policy.” *Id.* at 49. The terms “physical loss,” “loss,” “damage,” and “property damage” are undefined.

B. Business Income and Extra Expense Coverage

Defendants assert that the Amended Complaint should be dismissed because under the Business Income and Extra Expense Coverage sections, the “Policies provide coverage for business income losses only if such losses are the result of ‘direct physical loss of or damage to’ the Properties,” and the Amended Complaint contains no plausible allegations that the insured properties have suffered any such loss or damage. D.E. 24. Defendants contend that “Plaintiffs make conclusory allegations that they have suffered direct physical damage, but the Amended Complaint is devoid of any mention of what physical damage occurred, how the physical damage occurred, and when the physical damage occurred.” *Id.* According to Defendants, “none of Plaintiffs’ allegations even if taken as true, state a plausible claim that Plaintiffs have suffered a ‘direct physical loss or damage’ as required to trigger coverage under the Policies.” *Id.*

In response, Plaintiffs acknowledge that “direct physical loss of or damage to property” is not defined by the Policies, and they agree that the definition of this term “is critical to determining the scope of the Policies’ business income coverage.” D.E. 29. But Plaintiffs argue that this term “must be read to include intangible losses” such as “a loss of functionality or intended use.” *Id.* Plaintiffs contend that when interpreted “in the context of the entire policy,” the Policies “do not

support Defendants' conclusion that 'direct physical loss of or damage to' connotes only structural damage." *Id.*

In each Policy, the term "direct physical loss" first appears in the Policies' definition of "Covered Causes of Loss." As noted above, a "Covered Cause of Loss" is defined as a "direct physical loss unless the loss is excluded or limited in this policy." D.E. 24-1, p. 49; D.E. 24-2, p. 49. Based on this definition, Plaintiffs argue that any loss expressly excluded under the Policies "must also be defined as a 'direct physical loss'" because "there would be no reason to draft a specific exclusion for a category of losses not covered in the first instance." D.E. 29. And according to Plaintiffs, certain policy exclusions "contemplate losses that do not arise from structural or tangible damage to covered property, but instead deprive the insured of the property's intended use." *Id.*

In making this argument, Plaintiffs necessarily rely on the Policies' exclusionary provisions in an effort to establish coverage under the Policies. The Florida Supreme Court, however, has squarely rejected such an approach. In *Siegle v. Progressive Consumers Insurance Co.*, the court recognized that "policy exclusions cannot create coverage where there is no coverage in the first place." 819 So. 2d 732, 740 (citation omitted). The *Siegle* court continued: "This statement of the law is undeniable—the existence or nonexistence of an exclusionary provision in an insurance contract is not at all relevant until it has been concluded that the policy provides coverage for the insured's claimed loss." *Id.* Accordingly, Plaintiffs' reliance on the Policies' exclusionary provisions must be rejected as a means to establish coverage in the first instance.

As an additional basis to establish coverage, Plaintiffs point to the express language of the Business Income Coverage section, which "provides coverage for any 'suspension' of 'operations' caused by 'direct physical loss of or damage to' property at the premises described in the

Declarations.” D.E. 29 (emphasis in original). Plaintiffs argue that the “use of the disjunctive ‘or’ indicates that a ‘loss of’ property is distinct from ‘damage to’ property.” *Id.* And because the terms “damage” and “property damage” “certainly include structural damage to property,” Plaintiffs contend that the term “direct physical loss” cannot be “limited to mean only structural damage.” *Id.*

Further, Plaintiffs assert that “reading the Policies to cover nonstructural losses accords with the common meaning afforded their plain terms.” *Id.* Plaintiffs offer dictionary definitions of the words “direct,” “physical,” and “loss” in an effort to establish that, taken together, “direct physical loss” may mean “an actual loss of possession,” or “the loss of something material, as opposed to mental or spiritual.” *Id.* As such, Plaintiffs argue that “the loss of a business, or some aspect thereof, and the temporary loss of possession of one’s property, real or personal, both qualify as ‘direct physical losses.’” *Id.*

Chief Judge Moore had occasion to consider the meaning of “direct physical loss of or damage to” property under a similar commercial insurance policy. *See Mama Jo’s, Inc. v. Sparta Insurance Co.*, No. 17-CV-23362, 2018 WL 3412974, at *1 (S.D. Fla. June 11, 2018). In *Mama Jo’s*, the plaintiff restaurant sought coverage for a purported loss “in the form of construction debris and dust” from construction roadwork that was performed at the street adjacent to the restaurant. *Id.* The plaintiff argued that “the migration of dust and construction debris from the roadwork adjacent to the restaurant caused damage to the restaurant” and “that this dust and debris constitute[d] ‘direct physical loss’ to the Property under the Policy.” *Id.* at *8.

Judge Moore determined that the term “direct physical loss” contemplates “an *actual change* in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that

repairs be made to make it so.” *Id.* at *9 (internal quotation marks and citation omitted) (emphasis added). Judge Moore continued:

“The requirement that the loss be ‘physical,’ given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.”

Id. (quoting Couch on Insurance § 148:46 (3d Ed. West 1998)). Ultimately, Judge Moore concluded that the plaintiffs “cannot recover under the Business Income (And Extra Expense) Coverage because Plaintiff cannot show that there was any suspension of operations caused by ‘physical damage.’” *Id.* at *10. Indeed, the restaurant in *Mama Jo’s* “remained open every day, customers were always able to access the restaurant, and suppliers were always able to access the restaurant.” *Id.*

The Eleventh Circuit recently affirmed the *Mama Jo’s* decision. *See Mama Jo’s Inc. v. Sparta Ins. Co.*, 823 F. App’x 868, 880 (11th Cir. 2020). In determining whether coverage existed under the policy at issue, the Eleventh Circuit also addressed the definition of “direct physical loss” and determined that “‘direct’ and ‘physical’ modify loss and impose the requirement that the damage be actual.” *Id.* at 879 (citing *Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 2d 1067, 1069 (Fla. 3d DCA 2017)). The Eleventh Circuit affirmed Judge Moore’s order, holding that the plaintiff failed to show that it “suffered a loss which is both direct and physical.” *Id.* (internal quotation marks omitted).

Relying on *Mama Jo’s*, Magistrate Judge Torres recommended dismissal of a case in which the plaintiff sought to recover insurance benefits for the loss of business income to its restaurant as a result of the COVID-19 pandemic. *See Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615, 2020 WL 5051581, at *1 (S.D. Fla. Aug. 26, 2020). In examining the commercial insurance policy

at issue, Judge Torres found that the complaint failed to state a claim for coverage where the plaintiff “merely claim[ed] that two Florida Emergency Orders closed his indoor dining.” *Id.* at *8. Judge Torres determined that those allegations alone “cannot state a claim because the loss must arise to actual damage.” *Id.* Notably, Judge Torres compared the allegations in *Mama Jo’s* to the allegations in the *Malaube* complaint and explained that the plaintiff in *Mama Jo’s* “at least alleged that there was a physical intrusion (i.e. dust and debris) into his restaurant.” *Id.* In *Malaube*, on the other hand, the plaintiff failed to state a claim because “the restaurant merely suffered economic loss – not anything tangible, actual, or physical.” *Id.* Moreover, Judge Torres explained that the words “repair” and “replace” in the policy’s definition of “period of restoration” contemplated “physical damage to the insured premises.” *Id.* at *9.

Similarly, Judge Bloom examined whether economic losses caused by a COVID-19 business closure constituted a “direct physical loss” or “physical harm.” *See Raymond H. Nahman DDS PA v. Hartford Cas. Ins. Co.*, No. 20-CV-22833, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020). In *Nahman*, the insurance policy at issue included business income, extra expense, and civil authority coverage. *Id.* at *3. Judge Bloom found that there was no coverage under the business income and extra expenses provisions because the complaint “fail[ed] to allege ‘direct physical loss of or physical damage to’ the property, which is a necessary component of coverage under those provisions.” *Id.*

In addition to the two orders referenced above, federal district courts throughout the country have dismissed substantially similar COVID-19-related lawsuits for failing to state a claim for business income coverage. *See, e.g., Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd’s London*, No. 20-CV-1605, 2020 WL 5791583, at *3 (M.D. Fla. Sept. 28, 2020) (“Here, there is no business income coverage and no civil authority coverage because the Amended Complaint fails

to allege facts describing how the Property suffered any actual physical loss or damage. It is also apparent that any amendment would be futile under these circumstances.”); *Seifert v. IMT Ins. Co.*, No. 20-1102, 2020 WL 6120002, at *3 (D. Minn. Oct. 16, 2020) (granting motion to dismiss and finding that the plaintiff’s claims “fail to fall within the permissible realm of ‘direct physical loss,’ as he cannot allege facts showing his properties were actually contaminated or damaged by the coronavirus.”); *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, No. CV 20-3619, 2020 WL 6156584, at *4 (C.D. Cal. Oct. 19, 2020) (“[L]osses from inability to use property do not amount to “direct physical loss of or damage to property” within the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a “distinct, demonstrable, physical alteration.” (quoting *10E, LLC v. Travelers Indem. Co. of Conn.*, No. 20-CV-04418, 2020 WL 5359653, at *4 (C.D. Cal. Sept. 2, 2020)); *Hillcrest Optical, Inc. v. Continental Cas. Co.*, No. 20-CV-275, 2020 WL 6163142, at *9 (S.D. Ala. Oct. 21, 2020) (dismissing plaintiff’s complaint with prejudice because plaintiff failed to allege a “direct physical loss of property”).

Here, just like in *Malaube* and *Nahman*, the Business Income and Extra Expense Coverage sections require “direct physical loss of or damage to property.” D.E. 24-1, p. 37; D.E. 24-2, p. 37. Each section also contemplates a “period of restoration,” which, like in *Malaube*, uses the words “repair” and “replace” in its definition. In the Amended Complaint, Plaintiffs allege only (and in an entirely conclusory fashion) that “Plaintiffs . . . have suffered direct physical losses of or damage to their properties due to the suspension of their operations from the global COVID-19 pandemic,” and that they “suffered both direct physical losses and damage to the properties in the form of diminished value, lost business income, a reduction in right of full ownership, and forced physical alterations during a period of restoration.” D.E. 20 ¶¶ 40, 48. But the Amended Complaint falls short of alleging that Plaintiffs’ properties sustained any physical damage. The

Court thus finds that Plaintiffs' allegations are insufficient as a matter of law to establish coverage under the Business Income or Extra Expense Coverage sections.

C. Civil Authority Additional Coverage

As for the Civil Authority Additional Coverage section, Defendants argue that the Amended Complaint "fail[s] to trigger the Policies' civil authority coverage" because Plaintiffs fail to allege "physical loss or damage to property near the insured property," or that "access to the insured property is prohibited because of that damage." D.E. 24. According to Defendants, "the first requirement of the civil authority coverage is that there be direct physical loss that causes damage to property other than the insured property," and the second requirement is that, as a result of that damage, "the civil authority must prohibit access to the insured location because the nearby property damage has created a dangerous condition." *Id.* Defendants contend Plaintiffs fail to allege these elements.

In *Nahmad*, Judge Bloom squarely addressed the coverage issue under a similar Civil Authority Coverage provision and found that the plaintiff failed to allege coverage under that provision. 2020 WL 6392841, at *9. In so finding, Judge Bloom reasoned that the complaint "allege[d] no physical harm to any properties in the immediate area, only suspensions and closures in general due to government orders," and that the complaint failed to "allege that access to the scheduled premises was specifically prohibited by order of a civil authority." *Id.* (internal quotation marks omitted). Judge Bloom explained that merely restricting access to the plaintiffs' business, without completely prohibiting access, "does not trigger coverage under the Policy's Civil Authority provision." *Id.*

Here, similar to the insurance policy in *Nahmad*, the Civil Authority Additional Coverage section requires "action by a civil authority that prohibits access to the described premises," as a

result of “damage to property other than property at the described premises.” D.E. 24-1, p. 38; D.E. 24-2, p. 38. In the Amended Complaint, Plaintiffs fail to allege any physical damage to any property in the immediate area. Instead, Plaintiffs generally allege that “[t]he COVID-19 pandemic and the ensuing governmental orders . . . are physically impacting private commercial property in Miami-Dade County.” D.E. 20 ¶ 51. Moreover, Plaintiffs do not allege that access to their restaurants was completely prohibited by order of a civil authority. In fact, Plaintiffs expressly allege that Emergency Order 02-20 “restricted operating times for all restaurants within Miami-Dade County to 6 a.m. to 11 p.m. other than for delivery,” and that Emergency Order 03-20 had the effect of “closing all restaurants in Miami-Dade County other than for delivery or takeout.” D.E. 20 ¶¶ 45, 46. In other words, these orders did not prohibit customer access to Plaintiffs’ properties, but merely restricted access to indoor dining, while the restaurants remained open for delivery and takeout. Given these deficiencies, the Court finds that Plaintiffs fail to allege coverage under the Civil Authority Additional Coverage section.

IV. Conclusion

For the foregoing reasons, Plaintiffs’ Amended Complaint is subject to dismissal. Given that Plaintiffs have already had an opportunity to amend their initial complaint, and because the Court finds that any further amendment would be futile, the dismissal is with prejudice. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Motion (D.E. 24) is GRANTED. Plaintiffs’ Amended Complaint is DISMISSED WITH PREJUDICE. It is further

ORDERED AND ADJUDGED that the Clerk of Court SHALL close this case. All future hearings and deadlines are CANCELLED, and all pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers, Miami, Florida, this 7th day of December, 2020.

EXHIBIT 35

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4
5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7

8 ROBERT W. FOUNTAIN, INC., et al.,

9 Plaintiffs,

10 v.

11 CITIZENS INSURANCE COMPANY
12 OF AMERICA,

13 Defendant.

Case No. [20-cv-05441-CRB](#)

**ORDER GRANTING MOTION FOR
JUDGMENT ON THE PLEADINGS**

14 Plaintiffs Robert W. Fountain, Inc. and Robert W. Fountain (collectively,
15 “Fountain”), operators of an event planning business in San Francisco, California, brought
16 suit against their insurer, Defendant Citizens Insurance Company of America, for breach of
17 contract and declaratory relief. See generally Compl. (dkt. 3). Fountain claims that it is
18 entitled to insurance coverage for business income losses flowing from the San Francisco
19 and California statewide “shelter in place” and “stay home” orders issued in March 2020.
20 Id. ¶¶ 7–8. Citizens now moves for judgment on the pleadings, arguing that coverage does
21 not exist for Fountain’s claims because Fountain did not suffer a direct physical loss of or
22 damage to property, and a Virus Exclusion in the policy precludes coverage. Mot. (dkt.
23 13) at 1–2.¹ The Court finds this matter suitable for resolution without oral argument and
24 therefore VACATES the hearing currently set for December 17, 2020. See Northern
25 District of California Civil Local Rule 7-1(b).
26
27

28 ¹ Citizens initially argued that a Consequential Loss Exclusion in the policy also precluded coverage, id. at 2, but it has withdrawn that argument, see Reply (dkt. 17) at 8.

I. BACKGROUND

Fountain alleges that the San Francisco and California statewide “shelter in place” and “stay at home” orders of March 2020 “were issued for public health reasons as a result of a pandemic of a disease called coronavirus 2019, or COVID-19.” Compl. ¶ 9. It adds that “Plaintiffs did not suffer from this virus nor was there evidence that it existed or even threatened their business establishment.” *Id.* Fountain contends that “Because of these governmental orders, Plaintiffs were physically unable to utilize their business premises and thus lost the physical use thereof.” *Id.* ¶ 10. Fountain made a claim to Citizens for business interruption coverage under two successive and identical Citizens insurance policies: Businessowners insurance policy number OBF-9926622, with effective dates of 05/01/2019 to 05/01/2020, and 05/01/2020 to 05/01/2121. *Id.* ¶¶ 6, 11; Austin Decl. (dkt. 13-1) Ex. 1. Citizens denied the claim. Compl. ¶ 12.

The policies state that Citizens “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.” Austin Decl. Ex. 1 at 33. The policies define “Covered Causes of Loss” as “Risks of direct physical loss unless the loss is” excluded by the Policy’s exclusions. *Id.* at 35. The two relevant provisions of the policies are (A) the Business Income provision, and (B) the Virus Exclusion provision.

A. Business Income Provision

The policies define the Business Income coverage as follows:

5. Additional Coverages

f. Business Income

When Business Income Coverage is provided under this policy:

(1) Business Income

(a) We 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

1 damage to a described premises shown in the Declarations.
 2 The loss or damage must be caused by or result from a
 Covered Cause of Loss.

3 Id. at 39. The policies then define the Period of Restoration as follows:

4 41. "Period of Restoration"

5 a. Means the period of time that:

6 (1) Begins:

7 (a) After the number of hours shown as the Business Income
 8 Waiting Period in the Declarations after the time of direct
 physical loss or damage for Business Income Coverage;
 9 or

10 (b) Immediately after the time of direct physical loss or
 damage for Extra Expense Coverage;

11 caused by or resulting from any Covered Cause of Loss
 12 at the described premises; and

13 (2) Ends on the earlier of:

14 (a) The date when the property at the described premises
 should be repaired, rebuilt or replaced (to a condition
 15 permitting occupancy) with reasonable speed and similar
 quality; or

16 (b) The date when business is resumed at a new permanent
 location; or

17 (c) Exhaustion of the number of consecutive months as
 18 shown on the Policy Declarations Page.

19 Id. at 86.

20 **B. Virus Exclusion Provision**

21 The policies define the Virus Exclusion as follows:

22 **B. Exclusions**

23 1. We will not pay for loss or damage caused directly or
 24 indirectly by any of the following. Such loss or damage is
 excluded regardless of any other cause or event that contributes
 25 concurrently or in any sequence to the loss.

26 i. Virus or Bacteria

27 (1) Any virus, bacterium or other microorganism that

induces or is capable of inducing physical distress, illness or disease.

Id. at 69, 71.

Interpretation of these two provisions is critical to resolving Citizens' motion for judgment on the pleadings.

II. LEGAL STANDARD

A. Judgment on the Pleadings

A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is proper "when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990) (citation omitted). As with a motion to dismiss for failure to state a claim under Rule 12(b)(6), "a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012) (citation omitted). "A dismissal on the pleadings for failure to state a claim is proper only if 'the movant clearly establishes that no material issue of fact remains to be resolved[.]'" McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988) (quoting Doleman v. Meiji Mut. Life Ins. Co., 727 F.2d 1480, 1482 (9th Cir. 1984)). A court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." Usher v. City of L.A., 828 F.2d 556, 561 (9th Cir. 1987).

B. Insurance Policy Interpretation

Under California law, the interpretation of an insurance policy is a question of law. See Waller v. Trucks Ins. Exch., Inc., 11 Cal. 4th 1, 18 (1995). Grants of coverage are to be interpreted broadly, while exclusions are interpreted narrowly and against the insurer. Shade Foods, Inc. v. Innovative Product Sales, 78 Cal. App. 4th 847, 867 (2000). "The insurer bears the burden of proving . . . the applicability of an exclusion" State Farm

1 Fire & Cas. Co. v. Martin, 872 F.2d 319, 321 (9th Cir. 1989). The court must “look first to
2 the language of the contract in order to ascertain its plain meaning or the meaning a
3 layperson would ordinarily attach to it.” Waller, 11 Cal. 4th at 18 (citation omitted). The
4 plain language of the insurance policy governs its interpretation. See Bank of the W. v.
5 Superior Ct., 2 Cal. 4th 1254, 1264–65 (1992). A policy provision is ambiguous if it is
6 “capable of two or more constructions, both of which are reasonable.” Waller, 11 Cal. 4th
7 at 18. If the language is ambiguous or unclear, “it must be interpreted in the sense in
8 which the promisor believed, at the time of making it, that the promisee understood it.”
9 Bank of the W., 2 Cal. 4th at 1264–65. Courts should “not strain to create an ambiguity
10 where none exists.” Waller, 11 Cal. 4th at 18–19.

11 **III. DISCUSSION**

12 There is no coverage for Fountain’s losses under the policies.

13 **A. “Direct Physical Loss of or Damage to”**

14 First, despite Fountain’s efforts, see Compl. ¶ 10 (alleging that Fountain was
15 “physically unable to utilize their business premises and thus lost the physical use
16 thereof”), it has not plausibly alleged “direct physical loss of or damage to” property, as
17 required by the policies, see Austin Decl. Ex. 1 at 33 (Citizens “will pay for direct physical
18 loss of or damage to Covered Property at the premises described in the Declarations caused
19 by or resulting from any Covered Cause of Loss”), 39 (“‘suspension’ must be caused by
20 direct physical loss of or damage to a described premises”). Business losses resulting from
21 the temporary inability to access an unharmed property are not “direct physical loss of or
22 damage to” property. They are quite obviously not “damage to property” given the plain
23 meaning of those words. But neither are they “direct physical loss of” property.

24 Citizens relies on MRI Healthcare Center of Glendale, Inc. v. State Farm General
25 Ins. Co., 187 Cal. App. 4th 766, 779 (2010), which held that a policy that covered
26 “accidental direct physical loss to business personal property” required that a property
27

undergo a “distinct, demonstrable, physical alteration.” See Mot. at 8–9. Citizens argues that, as there has been no physical alteration to Fountain’s property, there has been no direct physical loss. Id.; see also Crisco, et al. v. Foremost Ins. Co. Grand Rapids, Michigan, et al., No. 19-07320 WHA, 2020 WL 7122476, at *5 (N.D. Cal. Dec. 4, 2020) (quoting MRI Healthcare, noting that “[o]ur plaintiffs do not seek to recover . . . loss of income. . . . Rather, plaintiffs seek to recover for the loss of their insured dwellings. . . . the fire caused a ‘distinct, demonstrable, physical alteration’ to the insured dwellings”).

This Court is persuaded by Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am., No. 17-04908 AB (KSx), 2018 WL 3829767, at *3–4 (C.D. Cal. July 11, 2018) and Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am., 20-03213-JST, 2020 WL 5525171, at *4 (N.D. Cal. Sept. 14, 2020), which held that physical alteration to property is not necessary for a “direct physical loss of” that property. The court in Total Intermodal noted that the language in MRI Healthcare was “direct physical loss to business personal property,” and not, as here, “direct physical loss of” property. 2018 WL 3767, at *4. It concluded that “the phrase ‘loss of’ includes the permanent dispossession of something.” Id.; see also Mudpie, 2020 WL 5525171, at *4 (following Total Intermodal in COVID-19 insurance case where policy covered “direct physical loss of or damage to property.”).

That is nonetheless a problem for Fountain. Fountain alleges that it was “physically unable to utilize their business premises and thus lost the physical use thereof,” Compl. ¶ 10, not that it was permanently dispossessed of its property. As Judge Tigar explained in Mudpie, temporary dispossession is inadequate: “although Mudpie has been dispossessed of its storefront, it will not be a ‘permanent dispossession’” because “[w]hen the Stay at Home orders are lifted, Mudpie can regain possession of its storefront. Mudpie’s physical storefront has not been ‘misplaced’ or become ‘unrecoverable,’ and neither has its inventory.” 2020 WL 5525171, at *4. Judge Tigar also looked to the policy’s “period of restoration” language, similar to the language here, which, by referencing an end date of

1 “when the property . . . should be repaired, rebuilt or replaced with reasonable speed and
2 similar quality,” suggested ““that the damage contemplated by the Policy is physical in
3 nature.”” Id. (quoting Philadelphia Parking Auth. v. Fed. Ins. Co., 385 F. Supp. 2d 280,
4 287 (S.D.N.Y. 2005)). Mudpie was not entitled to Business Income coverage. Id. at *6.

5 Another court in this district recently reached the same conclusion. In Water Sports
6 Kauai, Inc. v. Fireman’s Fund Ins. Co., No. 20-03750-WHO, 2020 WL 6562332, at *1
7 (N.D. Cal. Nov. 9, 2020), a company with “direct loss of or damage to” language in its
8 policy shut down its businesses due to the spread of coronavirus and government
9 directives. Citing Mudpie, Judge Orrick explained that the plaintiffs had “not alleged
10 any direct physical anything that happened to or at its specific properties. Moreover, it has
11 not been dispossessed or deprived of any specific property; its inventory and equipment
12 remain. Instead, it complains of loss of use,” which does not trigger coverage. Id. at *6
13 (collecting cases).

14 This Court agrees that “loss of” contemplates that the property is unrecoverable.
15 Fountain has not alleged that, and therefore has not alleged a plausible basis for Business
16 Income coverage.² The Business Income provision also requires that “[t]he loss or damage
17

18 ² In its opposition brief, Fountain asserts for the first time that there is coverage under the policies’
19 Civil Authority Provision. See Opp’n (dkt. 16) at 6. There is not. The Civil Authority Provision
20 requires, among other things, that a “Covered Cause of Loss causes damage to property other than
21 property at the described premises” and an “action by civil authority that prohibits access to the
22 described premises due to direct physical loss or damage to property within one mile of the
23 described premises.” Austin Decl. Ex. 1 at 42. The Complaint here does not implicate a Covered
24 Cause of Loss, as explained below, nor does it allege that there was damage to a property within
25 one mile of Fountain’s property. See generally Compl. As another court in this district recently
26 explained, “the Civil Authority Provision does not create coverage, it ‘extends’ coverage when the
27 civil authority orders are issued ‘as the direct result of a Covered Cause of Loss to property in the
28 immediate area’ of the insured’s property” and does not extend coverage when the Stay at Home
order was “issued as the direct result of COVID-19—a cause of loss that falls squarely within the
Virus Exclusion.” Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc., No. 20-04434 JSC, 2020
WL 5642483, at *2 (N.D. Cal. Sept. 22, 2020); see also Water Sports Kauai, 2020 WL 6562332,
at *8 (“In the absence of any allegation that any specific neighboring property . . . had actual
coronavirus exposure, this coverage has not plausibly been triggered.”); Mudpie, 2020 WL
5525171, at *7 (“Because the orders were preventative – and absent allegations of damage to
adjacent property – the complaint does not establish the requisite causal link between prior
property damage and the government’s closure order.”).

1 must be caused by or result from a Covered Cause of Loss.” Austin Decl. Ex. 1 at 39. As
2 explained below, the cause of loss here is not covered, because it is excluded.

3 **B. Virus Exclusion**

4 The second reason that Fountain’s losses are not covered is that Citizens has met its
5 burden of proving that the Virus Exclusion applies. See Martin, 872 F.2d at 321. Fountain
6 argues that “the virus exclusion applies only to a ‘loss or damage caused by or resulting
7 from . . . any virus,” and that it “does not apply where, as here, the insured’s losses are not
8 due to a virus but by a shutdown ordered by the government.” Opp’n at 7. Consistent with
9 that theory, the Complaint alleges that “[b]ecause of [the] governmental orders, Plaintiffs
10 were physically unable to utilize their business premises.” See Compl. ¶ 10.

11 As an initial matter, Fountain misquotes the Virus Exclusion, which applies to “loss
12 or damage caused directly or indirectly by . . . Any virus.” See Austin Decl. at 69, 71
13 (emphasis added); see also id. at 69 (adding that “Such loss or damage is excluded
14 regardless of any other cause or event that contributes concurrently or in any sequence to
15 the loss.”). Moreover, Fountain cannot convincingly argue that its losses were caused by
16 the March 2020 governmental orders while ignoring that those governmental orders were
17 themselves caused by a virus. The Complaint actually acknowledges that “[t]he
18 aforementioned orders were issued for public health reasons as a result of a pandemic of a
19 disease”—a virus—“called coronavirus 2019, or COVID-19.” See Compl. ¶ 9.

20 As this Court stated in Boxed Foods Co., LLC v. California Capital Ins. Co.,
21 “Plaintiffs seek business losses and extra expenses that stem from Civil Authority Orders,
22 but California issued these orders as a direct response to COVID-19 . . . ‘a cause of loss
23 that falls squarely within the Virus Exclusion.’” No. 20-04571-CRB, 2020 WL 6271021,
24 at *4 (N.D. Cal. Oct. 26, 2020), as amended (Oct. 27, 2020) (quoting Franklin EWC, Inc.,
25 2020 WL 5642483, at *2). When the plaintiffs in Boxed Foods, like Fountain here, argued
26 “that the Civil Authority Orders caused their business losses, ‘not solely’ COVID-19,” this
27

Court reasoned that “not only does the Virus Exclusion apply when a virus indirectly causes or contributes to the cause of loss . . . but under California law, COVID-19 is the “efficient proximate cause” of Plaintiffs’ losses.” Id. (citing Garvey v. State Farm Fire & Cas. Co., 48 Cal. 3d 395 (1989)). This Court explained:

An “efficient proximate cause” is a cause of loss that predominates and sets the other cause of loss in motion. See id. at 402–03, 257 Cal.Rptr. 292, 770 P.2d 704. When loss can be attributed to two causes—a covered and an excluded cause—coverage only exists if the efficient proximate cause of the damage is covered under the policy. See id. at 403, 257 Cal.Rptr. 292, 770 P.2d 704. The Civil Authority Orders would not exist absent the presence of COVID-19; COVID-19 is therefore the efficient proximate of Plaintiffs’ losses. Thus, the Virus Exclusion precludes Plaintiffs’ claim for business income losses and extra expenses under the Civil Authority provision.

Id. As in Franklin EWC, Inc., Fountain cannot plead around this reality. See 2020 WL 5642483, at *2 (rejecting plaintiffs’ theory that “the loss is created by the Closure Orders rather than the virus, and therefore the Virus Exclusion does not apply”).

The Virus Exclusion applies and therefore precludes Fountain’s claim under the Business Income Provision (as well as the Civil Authority Provision).

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS the motion for judgment on the pleadings. The Court does so with prejudice as it concludes that amendment would be futile. See Leadsinger, Inc. v. BMG Music Pub., 512 F. 3d 522, 532 (9th Cir. 2008) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

IT IS SO ORDERED.

Dated: December 9, 2020



CHARLES R. BREYER
United States District Judge

EXHIBIT 36

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PALMER HOLDINGS AND
INVESTMENTS, INC., et al.,
Plaintiffs,

vs.

INTEGRITY INSURANCE CO., et al.,
Defendants.

No. 4:20-cv-154-JAJ

ORDER

This matter comes before the Court pursuant to Defendants’ Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted filed on October 2, 2020. [Dkt. No. 20]. Plaintiffs filed a Resistance on October 26, 2020. [Dkt. No. 29]. Defendants replied to Plaintiffs’ Resistance on November 17, 2020. [Dkt. No. 35]. Plaintiffs included two affidavits in its resistance to Defendants’ Motion to Dismiss, and Defendant filed a Motion to Strike these affidavits from Plaintiffs’ resistance on November 16, 2020. [Dkt. No. 34]. Plaintiffs filed a Resistance to the motion to strike on November 30, 2020 [Dkt. No. 36], and Defendants replied on December 7, 2020. [Dkt. No. 37]. For the reasons stated below, Defendants’ Motion to Dismiss is **GRANTED** and Defendants’ Motion to Strike is **DENIED**.

I. Introduction

A. Background

Plaintiffs are businesses operating and managing various restaurants in Polk County, Iowa. Pls.’ Am. Compl. [Dkt. No. 17], ¶ 3. Plaintiffs’ Amended Complaint alleges they purchased Business Income and Civil Authority insurance from Defendants. *Id.* ¶ 10. Plaintiffs did not attach the insurance policy to the original Complaint or Amended Complaint, but Defendants attached the policy to their Answer to Plaintiffs’ original Complaint. [Dkt. No. 5-1]. The policy is identified in the Amended Complaint and is integral to and embraced by Plaintiffs’ claims. *See Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 (8th Cir. 2017) (citations omitted). Reynolds’s proclamation is also integral to and embraced by Plaintiffs’ claims. As such, the Court may consider the policy and the proclamation without converting Defendants’ Motion to Dismiss into a motion for summary judgment. *See id.* (citations omitted).

On March 17, 2020, Iowa Governor Kim Reynolds issued a proclamation related to the COVID-19 pandemic. In relevant part, the proclamation stated:

All Restaurants and Bars are hereby closed to the general public except that to the extent permitted by applicable law, and in accordance with any recommendations of the Iowa Department of Public Health, food and beverages may be sold if such food or beverages are promptly taken from the premises, such as on a carry-out or drive-through basis, or if the food or beverage is delivered to customers off the premises.

Office of the Governor of Iowa Kim Reynolds, *Gov. Reynolds Issues a State of Public Health Disaster Emergency*, iowa.gov, <https://governor.iowa.gov/press-release/gov-reynolds-issues-a-state-of-public-health-disaster-emergency> (Mar. 17, 2020).

Plaintiffs' claim they are entitled to coverage under their insurance policy with Defendants. Pls.' Am. Compl. [Dkt. No. 17], ¶ 65. Specifically, they allege they are entitled to coverage under the Business Income, Extra Expense, and Civil Authority provisions of their policy. *Id.* Additionally, Plaintiffs contend Defendants should be estopped from invoking the Virus Exclusion provision of the policy. *Id.* ¶ 80.

In relevant part, the Business Income provision states:

We 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 caused by or result from a Covered Cause of Loss.

Defs.' Ans., Affirm. Defs., & Jury Demand, Ex. 1 [Dkt. No. Dkt. No. 5-1 at 38].

The Extra Expense provision states, in relevant part:

We will pay necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to the property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.

Id. at 40.

The Civil Authority provision states:

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 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 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.

Id. at 40–41.

The Virus Exclusion states:

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

...

j. Virus or Bacteria

(1) Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

(2) However, the exclusion in Paragraph (1) does not apply to loss or damage caused by or resulting from “fungi”, wet rot or dry rot. Such loss or damage is addressed in Exclusion i.

(3) With respect to any loss or damage subject to the exclusion in Paragraph (1), such exclusion supersedes any exclusion relating to “pollutants”.

Id. at 48, 50.

The policy defines “Period of Restoration” as follows:

9. “Period of Restoration”:

a. means the period of time that:

(1) Begins:

(a) 72 hours after the time of direct physical loss or damage for Business Income Coverage; or

(b) 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

(2) Ends the earlier of:

(a) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

(b) The date when business is resumed at a new permanent location...

Id. at 63. “Property damage” is defined in Section II – Liability as including “loss of use of tangible property that is not physically injured . . .” *Id.* at 78.

The Ordinance or Law Exclusion provides:

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

a. Ordinance Or Law

(1) The enforcement of any ordinance or law:

(a) Regulating the construction, use or repair of any property;

...

(2) This exclusion, Ordinance or Law, applies whether the loss results from:

(a) An ordinance or law that is enforced even if the property has not been damaged

Id. at 48.

1. Plaintiffs’ Claims

Plaintiffs’ Amended Complaint contains several allegations that are incorporated into the final Counts. In relevant part, Plaintiffs allege:

10. To protect its businesses in the event they suddenly had to suspend operations for reasons outside of their control, Plaintiffs purchased Businessesowners’ Coverage that included both Business Income and Civil authority insurance coverage from Illinois Casualty Company.

...

13. The policy in question was a blanket business personal property coverage form providing for coverage that would 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.

...

20. The policies do not define the phrase “direct physical loss of or damage to...”, nor do they define “direct”, “physical”, “loss”, or “damage” individually.

21. The use of the disjunctive “or” in the phrase “direct physical loss of or damage to” means that coverage is triggered if either a physical loss of property or damage to property occurs.

22. The Policies’ use of the disjunctive “or” between the terms “physical loss” and “damage” necessarily means that either a “loss” or “damage” is required, and that “loss” is distinct from “damage.”

23. The Policies do not state or otherwise define “loss” to require an actual alteration of property.

24. At the time Plaintiffs purchased the Policies, courts had held on numerous occasions that any condition making it impossible to use property for its intended use constituted “physical loss or damage to property.”

...

38. On March 17, 2020, Iowa Governor Kim Reynolds issued a proclamation closing all bars and restaurants from dine-in or in-person service.

...

40. The action of this Civil Authority resulted in the necessary suspension of Plaintiffs’ operations as they economically could not operate their businesses solely on a take-out or delivery basis.

41. The proclamation caused “direct physical loss of or damage to” Plaintiffs’ covered property under the Policy by precluding Plaintiffs from conducting their operations, precluding customers from patronizing the business, and otherwise frustrating the intended purposed of Plaintiffs’ businesses, all thereby causing the necessary suspension of operations during a period of restoration.

42. Governor Reynolds’ March 17, 2020 Order prohibited access to Plaintiff’s Covered Property, and the area immediately surrounding the Covered Property, in response to dangerous physical conditions resulting in and from a Covered Cause of Loss.

43. Losses caused by COVID-19 and/or the Governor Reynolds’ proclamation triggered the Business Income, Extra Expense, and Civil Authority provisions of the Policy.

...

45. Plaintiffs, in an effort to mitigate their income losses, have attempted to provide curb service, take-out services, or deliveries at three of the insured facilities that have not proven to be financially sustainable.

...

48. Plaintiffs have fully complied with their obligations under the policy.

49. On April 8, 2020 Palmer Holdings and Investments, Inc. received a letter from Integrity Insurance Company stating that Integrity had completed their investigation and have determined that there would be no coverage under the applicable policy for the claim. The denial-of-coverage letter is attached hereto and made a part of the allegations of the Petition.

...

62. Based on information and belief, Defendant directly or indirectly participated in the insurance industry's efforts to effect state Insurance Commissioners, including the State of Iowa's Insurance Commissioner, to approve the suggested virus exclusion.

63. Defendant incorporated suggested provisions of the Insurance Services Office, Inc. into the policy issued to Plaintiffs, including the definition of covered losses, Civil Authority, and virus exclusions.

Pls.' Am. Compl. [Dkt. No. 17], ¶¶ 10, 13, 20–24, 38, 40–43, 45, 48–49, 62–63.

In Count I of their Amended Complaint, Plaintiffs request a declaratory judgment stating that their losses are covered under the Business Income, Extra Expense, and Civil Authority provisions of the policy. *Id.* ¶ 67. Plaintiffs also request Defendants be estopped from relying on the Virus Exclusion in Plaintiffs' insurance policy, and that the Court order payment of loss of income, including costs and attorney fees. *Id.* In support of this request for relief, Plaintiffs state:

65. Plaintiffs claim damages that are covered under the business interruption and loss of income policy issued by the Defendants, including claims under the Business Income, Extra Expense, and Civil Authority provisions.

66. Defendants have denied coverage under policy BP 2767901 01.

Id. ¶¶ 65–66.

In Count II, Plaintiffs allege a claim of breach of contract by Defendants. Plaintiffs request an award of more than \$250,000, including interest. *Id.* ¶ 81. Plaintiffs also seek costs, attorneys fees, and all other relief the court deems proper. *Id.* In pertinent part, this count states:

69. Plaintiffs' Policy is a contract under which Defendants were paid premiums in exchange for its promise to pay Plaintiffs' losses for claims covered by the Policy.

70. The Business Income provisions in the Policies require Defendants to pay for Plaintiffs' actual loss of Business Income

sustained due to the necessary suspension of its operations during the period of restoration.

71. Governor Reynolds' Proclamation and/or Covid-19 caused direct physical loss to Plaintiffs' Property resulting in loss of Business Income, thereby triggering the Business Income provision of Plaintiff's Policy.

72. The Policies also provide Civil Authority coverage, which promises to pay the actual loss of Business Income Plaintiff sustained and the necessary Extra Expense cause by action of civil authority that prohibits access to Plaintiff's premises due to physical loss of or damage to the property caused by or resulting from any Covered Cause of Loss.

73. Governor Reynolds' Proclamation prohibited access to Plaintiffs' premises due to physical loss or damage to property resulting in loss of Business Income and Extra Expense, thereby triggering the Civil Authority provision under Plaintiff's Policy.

74. The Policies also provide that Defendants will pay necessary Extra Expense Plaintiff incurs during the period of restoration that Plaintiff would not have incurred had there been no direct physical loss or damage to the premises.

75. Due to Governor Reynolds' Proclamation, Plaintiffs incurred Extra Expense at Covered Property.

76. At all times material hereto, Plaintiffs maintained reasonable expectations that the loss of business income and additional expenses would be covered under the Policies under the circumstances described herein.

77. The losses described herein are covered losses under the policy.

78. Plaintiffs have complied with the applicable provisions of the Policy.

79. No valid policy exclusion exists to preclude coverage.

80. To the extent the Virus Exclusion would potentially apply, Defendants should be estopped from claiming the virus exclusion excludes coverage under these circumstances.

81. By denying coverage for the claims and losses set forth herein, Defendants have breached its coverage obligations under the Policies.

Id. ¶¶ 69–81.

In Count III, Plaintiffs allege Defendants acted in bad faith by failing to fully investigate their claims in good faith and summarily denying their claims. *Id.* ¶ 88. Plaintiffs request an award of more than \$250,000, including interest. *Id.* ¶ 89. Plaintiffs also seek punitive damages, costs and attorneys fees, and all other relief the court deems proper. *Id.* Plaintiffs assert:

83. Defendants have a contractual obligation to fully and completely investigate a claim of an insured for policies which they have written and for which they have received commissions.

...

85. Defendants denied coverage for Plaintiffs' claim based on a virus exclusion contained in the policy.

86. Defendants failed to make any investigation of the claim and did not inquire if any facility that was insured had any evidence of infestation of the coronavirus or any other virus at any time, or if any employee or customer had become infected with the corona virus or other virus at any time.

87. That there was a complete failure in any manner in good faith to investigate the Plaintiffs' claim and the claim was summarily denied.

88. That the Defendants have acted in bad faith in denying the Plaintiffs' claim, and failing in good faith to investigate Plaintiffs' claim pursuant to Iowa Administrative Code section 191-15.41 (507A) and Iowa Code section 507A(4)(b).

89. That as a direct and proximate result of Defendants' bad faith in failing to investigate Plaintiffs' claim, Plaintiffs have been damaged . .

..

Id. ¶¶ 83, 85–89.

Plaintiffs admit they have no knowledge of any of the insured properties being infected with COVID-19 nor are they aware of any customers or employees who contracted the virus. *Id.* ¶ 52. Plaintiffs seek a jury trial on all claims. Plaintiffs seek a declaratory judgment stating they are entitled to coverage under their insurance policy, an award for the loss of income of each of the Plaintiffs plus pre-judgment interest, a monetary award in excess of \$250,000 plus pre-judgment interest, attorney fees and costs, punitive damages, and any other relief the Court deems proper. *Id.* ¶¶ 67, 81, 89.

2. Defendants' Motion to Strike

Defendants' Motion to Strike requests that the Court strike the affidavits of Susan Voss and Elizabeth Robertson from Plaintiffs' Resistance to Defendants' Motion to Dismiss. [Dkt. No. 36]. Plaintiffs offered these affidavits to support their Resistance to the Motion to Dismiss. Defendants contend the affidavits should be struck and should not be considered in deciding the Motion to Dismiss because the affidavits are matters outside of the pleadings that present legal conclusions. Plaintiffs argue that the affidavits are embraced by the pleadings, that the affidavits

do not present legal conclusions, and that extrinsic evidence is admissible to interpret ambiguous policy language.

II. Legal Analysis

A. Applicable Standards

1. Motion to Dismiss

Defendants move for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. [Dkt. No. 20]. Rule 12(b)(6) allows a party to argue, by motion, that the initial pleading does not “state a claim upon which relief can be granted[.]” Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss predicated on Rule 12(b)(6), a “complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “[A] pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 440 U.S. 544, 555 (2007)). A complaint must include “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Twombly*, 444 U.S. at 556).

“In considering a motion to dismiss under Rule 12(b)(6), the court must assume that all facts alleged by the complaining party . . . are true, and must liberally construe those allegations.” *McLeodUSA Telecommunications Servs., Inc. v. Qwest Corp.*, 469 F. Supp. 2d 677, 687–88 (N.D. Iowa 2007) (citations omitted). However, the Court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 570. “[A] court should grant the motion and dismiss the action only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Handeen v. Lemaire*, 112 F.3d 1339, 1347 (8th Cir. 1997) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). In deciding a 12(b)(6) motion, courts may consider documents incorporated by reference or integral to the claim, items subject to judicial notice, and matters of public records. *Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 (8th Cir. 2017) (citations omitted). Courts may consider these items without converting a 12(b)(6) motion to a motion for summary judgment. *Id.* (citing Fed. R. Civ. P. 12(d)).

2. Declaratory Judgments

Parties may seek relief from a district court in the form of a declaratory judgment pursuant to the Declaratory Judgment Act. The Declaratory Judgment Act provides in relevant part:

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a). Declaratory relief is proper: “(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue; and 2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceedings.” *Alsager v. Dist. Ct. of Polk Cty.*, 518 F.2d 1160, 1163 (8th Cir. 1975).

3. Construction of Insurance Policies

This case was removed to federal court on the basis of diversity jurisdiction. When sitting in diversity jurisdiction, courts apply federal procedural law and state substantive law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Accordingly, Iowa law applies to the substantive claims and the Federal Rules of Civil Procedure apply to the Motion to Dismiss itself. *See id.* Under Iowa law, the party seeking coverage under an insurance policy has the burden of demonstrating that a claim falls within the policy’s terms. *Am. Guar. & Liab. Ins. Co. v. Chandler Mfg. Co.*, 467 N.W.2d 226, 228 (Iowa 1991). The insurer bears the burden of demonstrating that a coverage exclusion applies. *Postell v. Am. Family Mut. Ins. Co.*, 823 N.W.2d 35, 41 (Iowa 2012).

The intent of the parties is controlling in the construction of insurance policies. *Farm Bureau Life Ins. Co. v. Holmes Murphy & Assocs., Inc.*, 831 N.W.2d 129, 133 (Iowa 2013) (citing *Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678, 681 (Iowa 2008)). Courts examine the language of the policy itself to ascertain the intent of the parties, except when the language is ambiguous. *Id.* at 133–34 (citing *A.Y. McDonald Indus., Inc. v. Ins. Co. of N.A.*, 475 N.W.2d 607, 618 (Iowa 1991)). Contract terms are ambiguous when the terms are “capable of more than one meaning when viewed objectively by a reasonably intelligent person” *Phoenix Ins. Co. v. Infogroup, Inc.*, 147 F. Supp. 3d 815, 822 (S.D. Iowa 2015) (citations omitted). A disagreement about the meaning of terms does not establish ambiguity. *Id.* (quoting *Farm Bureau Life Ins.*, 831 N.W.2d at 133). Additionally, “[a]n undefined policy term does not automatically equate to an ambiguous term” *Milligan v. Grinnell Mut. Reinsurance Co.*, No. 00-1452, 2001 WL 427642, at *2 (Iowa Ct. App. Apr. 27, 2001). When terms in a policy are undefined, courts interpret the

terms to have their ordinary meaning. *Amera–Seiki Corp. v. Cincinnati Ins. Co.*, 721 F.3d 582, 585 (8th Cir. 2013). Undefined terms are interpreted in light of the policy as a whole. *See Fashion Fabrics of Ia., Inc. v. Retail Inv’rs Corp.*, 266 N.W.2d 22, 26 (Iowa 1978).

To succeed on a bad faith claim under Iowa law, the insured must demonstrate: “(1) that the insurer had no reasonable basis for denying benefits under the policy and, (2) the insurer knew, or had reason to know, that its denial was without basis.” *United Fire & Cas. Co. v. Shelly Funeral Home, Inc.*, 642 N.W.2d 648, 657 (Iowa 2002). The first element is objective, and the second element is subjective. *Id.* An insurer’s objectively reasonable denial of coverage precludes bad-faith liability. *Id.* at 652. A reasonable basis exists for denying coverage when “the insured’s claim is fairly debatable either on a matter of fact or law.” *Bellville v. Farm Bureau Mt. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005). A court may determine whether a denial of coverage was fairly debatable as a matter of law. *Id.*

4. Motion to Strike

Federal Rule of Civil Procedure 12(f) permits a court to strike “an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter” from any pleading. Fed. R. Civ. P. 12(f). A court may strike these matters on its own accord or upon a motion made by a party prior to responding to the pleading or within 21 days after service of the pleading if a response is not permitted. *Id.* The Federal Rules of Civil Procedure define “pleading” to include a complaint, an answer to a cross claims, an answer to a counterclaim, a third-party complaint, an answer to a third-party complaint, and a reply to an answer when one is so ordered by the court. *Id.* 7(a). Courts possess considerable discretion in ruling on a motion to strike. *Nationwide Ins. Co. v. Cent. Mo. Electric Coop., Inc.*, 278 F.3d 742, 748 (8th Cir. 2001).

B. Discussion: Plaintiffs’ Claims

1. Declaratory Judgment

a. Business Income and Extra Expense Coverage

For there to be coverage under the Business Income provision, there must be “direct physical loss of or damage to property at the described premises.” Defs.’ Ans., Affirm. Defs., & Jury Demand, Ex. 1 [Dkt. No. 5-1 at 38]. Plaintiffs focus on the first portion of this phrase, “direct physical loss of.” They contend the use of the disjunctive—or—indicates “loss” and “damage” are two distinct concepts, either of which is sufficient to trigger coverage. Pls.’ Am. Compl. [Dkt. No. 17], ¶¶ 21–22. Plaintiffs note the policy does not define this phrase or any of its terms. *Id.* ¶ 20.

They contend the policy does not define “loss” as requiring alteration to property. *Id.* ¶ 23. Plaintiffs allege several courts have interpreted “physical loss or damage to property” to include any condition that makes it impossible to use property for its intended use. *Id.* ¶ 24. Plaintiffs contend Reynolds’s proclamation caused them direct physical loss of or damage to their covered properties by “precluding customers from patronizing the business, and otherwise frustrating the intended purpose[s] of Plaintiffs’ businesses, all thereby causing the necessary suspension of operations during a period of restoration.” *Id.* ¶ 41.

Defendants contend Plaintiffs have failed to allege direct physical loss or damage, and therefore they do not fall within the policy’s coverage. Defs.’ Br. Supp. Mot. Dismiss Pls.’ Am. Compl. [Dkt. No. 20-1 at 11–12]. Defendants argue the phrase “direct physical loss of or damage to property” requires tangible loss or damage to trigger coverage, which Plaintiffs have not pleaded. *Id.* Further, Defendants contend Plaintiffs’ argument that the proclamation caused physical loss or damage is inconsistent with the proclamation itself, which indicates it was enacted to limit the spread of COVID-19. *Id.* Defendants argue requiring tangible injury is also consistent with the definition for “period of restoration,” which contemplates actual structural damage to the insured property. *Id.* at 12.

Plaintiffs respond by arguing that the term “loss” is ambiguous and should defeat Defendants’ Motion to Dismiss. Pls.’ Resis. Defs.’ Mot. Dismiss [Dkt. No. 29 at 14–17]. Plaintiffs note neither the phrase “direct physical loss of or damage” or its terms are explicitly defined in the policy. *Id.* at 14–15. They contend the definition of “property damage” located in another part of the policy indicates that “damage” includes loss of use. *Id.* at 15. Plaintiffs argue that reading the policy as a whole suggests “damage” encompasses loss of use. *Id.*

Plaintiffs also reemphasize their stance on the importance of the use of the disjunctive in the phrase “direct physical loss of or damage.” *Id.* at 16–17. They allege the proclamation itself constitutes direct physical loss. *Id.* at 17, 22. Plaintiffs argue the proclamation expressly forbade them to access and use their property “for the income-generating purposes for which the property was insured.” *Id.* at 17. Defendants reply and note the definition of “property damage” cited by the Plaintiffs is located in Section II of the policy whereas Plaintiffs claims fall under Section I of the policy. Defs.’ Reply Pls.’ Resis. Defs.’ Mot. Dismiss [Dkt. No. 35 at 9]. They contend the definitions provided in Section II are limited in application to that section, and their interpretation

of the phrase “direct physical loss of or damage” is not inconsistent with the definition of “property damage” in Section II. *Id.*

Analysis

At the first step of the analysis, the Court seeks to ascertain the intent of the parties by looking at the language of the policy. *See Farm Bureau Life Ins.*, 831 N.W.2d at 133. The Court finds the language of the Business Income provision to be unambiguous. Reading the policy language as a whole, the policy is unambiguous in its requirement that an insured suffer “direct physical loss of or damage” to the insured property to qualify for the Business Income provision. Because the phrase and its terms are undefined, the undefined terms are given their ordinary meaning. *Amera–Seiki Corp.*, 721 F.3d at 585.

Iowa courts have interpreted similar language in insurance policies in the past. In 2001, the Iowa Court of Appeals considered the meaning of the phrase “direct physical loss or damage” in an insurance policy. *Milligan*, 2001 WL at *2. Because the phrase and its terms were not defined in the policy, the Iowa Court of Appeals turned to the ordinary meaning of the terms “loss” and “damage.” *Id.* The court determined the terms unambiguously referred to the destruction or injury of the insured property, meaning the alleged loss or destruction must be physical. *Id.* The Iowa Court of Appeals concluded the phrase was not open to any other interpretation. *Id.*

In 2015, this Court interpreted the phrase, “direct physical loss of or damage,” in an insurance policy according to Iowa law. *See Phoenix Ins. Co.*, 147 F. Supp. 3d at 821–27. In *Phoenix Insurance Company v. Infogroup, Inc.*, the Court considered whether an insured party was entitled to coverage under an insurance policy’s Extra Expense provision after the insured temporarily relocated its business due to the threat of flooding. *Id.* at 818, 821. The Extra Expense provision required “direct physical loss of or damage to property” to trigger coverage. *Id.* at 819. Like the case currently before the Court, the phrase and its terms were not defined in the insurance policy. *Id.* at 823. This Court determined “physical loss or damage generally requires some sort of physical invasion” and rejected Infogroup’s argument that the loss of use of their property as a result of the threat of flooding amounted to direct physical loss or damage. *Id.* at 823–24. In so doing, this Court acknowledged its interpretation “comports with other courts interpreting what constitutes ‘physical loss’ under similar insurance provisions.” *Id.* at 823 (citing *Milligan*, 2001 WL at *2).

In reaching this conclusion, this Court noted that interpreting the policy to only require loss of use “would not give effect to the plain language of the policy.” *Id.* at 825 (citing *Farm Bureau Life Ins.*, 831 N.W.2d at 133). The Court stated:

While a loss of use may, in some cases, entail a physical loss, the Court does not find “loss of use” and “physical loss or damage” synonymous. Indeed, interpretation of physical loss as requiring only loss of use stretches “physical” beyond its ordinary meaning and may, in some cases “render the word ‘physical’ meaningless.” *Source Food Tech., Inc. v. U.S. Fidelity and Guar. Co.*, 465 F.3d 834, 835 (8th Cir.2006) (finding no coverage under a policy covering “direct physical loss to property” when property was meat which was not allowed to cross the border into the United States and was thus treated as unusable but in fact suffered no spoilage or contamination); *Pentair, Inc. v. Am. Guarantee and Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir.2005) (affirming district court's finding of no coverage under the policy because “[o]nce physical loss or damage is established, loss of use or function is certainly relevant in determining the amount of loss ... But [Plaintiff's] argument, if adopted, would mean that direct physical loss or damage is established whenever property cannot be used for its intended purpose.”).

Id. As such, the Court concluded “physical loss or damage” requires a material loss, which calls for something more than a threat of loss. *Id.*

In 2016, another court in this district considered the meaning of the phrase “direct physical loss” in a dispute regarding when direct physical loss occurred to the insured property. In *Dean Snyder Construction Company v. Travelers Property Casualty Company of America*, the parties disputed whether direct physical loss occurred when a windstorm damaged the insured property or when liability attached to the insured following an arbitration award with a third party for rebuilding costs. 173 F. Supp. 3d at 842–43. The court considered the common usage of the terms “loss” and “physical” to determine when the direct physical loss occurred. *Id.* at 843. Based on the common understanding of the terms at issue, the court concluded an arbitration award does not constitute physical loss. *Id.* at 844.

Plaintiffs, among other reasons, attempt to distinguish their case from *Phoenix* because the decision did not specifically address the significance of the use of the disjunctive in the phrase “direct physical loss of or damage.” This argument goes to Plaintiffs’ contention that the use of “or” in the policy means that coverage applies when there is either “physical loss of property **or** damage to property occurs.” Pls.’ Am. Compl. [Dkt. No. 17], ¶ 21. Despite Plaintiffs’ attempt to

differentiate *Phoenix*, the Court finds no reason to diverge from its previous interpretation of the phrase “direct physical loss of or damage.” As such, the Court concludes the phrase “direct physical loss of or damage to property” requires a physical invasion and loss of use is insufficient to trigger coverage without physical damage to the insured properties. *See Phoenix Ins. Co.*, 147 F. Supp. 3d at 824–26. The phrase is unambiguous and the definition of “property damage” in Section II does not generate ambiguity because this definition only applies to Section II.

Even if the Court assumes loss and damage are distinct concepts that can independently trigger coverage, the terms are unambiguous, and Plaintiffs have failed to allege facts sufficient to qualify for Business Income coverage. *See id.* at 826. Plaintiffs allege that the proclamation caused them direct physical loss or damage by precluding customers from patronizing their business, precluding them from conducting business, and frustrating the intended purpose of their businesses. Pls.’ Am. Compl. [Dkt. No. 22], ¶ 41. Although Plaintiffs attempt to paint their losses as physical, they have essentially pleaded loss of use, which is insufficient to establish a direct physical loss. *See Phoenix Ins. Co.*, 147 F. Supp. 3d at 825–26. Even if loss and damage are distinct, the physicality requirement of the loss or damage remains, and Plaintiffs have failed to allege a tangible loss or alteration to property that is sufficient to trigger coverage under the Business Income provision. *See id.* at 826.

The Extra Expense provision requires “direct physical loss or damage” to the insured property to trigger coverage. For the same reasons identified above, Plaintiffs have failed to plausibly allege direct physical loss or damage to the insured property within the meaning of the Extra Expense provision. Because Plaintiffs have failed to allege direct physical loss or damage to the insured property as required by the policy, they are not entitled to coverage under the Business Income or Extra Expense provisions.

Courts across the country have considered the availability of insurance coverage for business closures mandated as a result of the COVID-19 pandemic. Many of these courts considered policy language and circumstances similar to those before this Court, with many courts reaching the same conclusion as this Court regarding the meaning of physical loss or damage. In this district, a court recently concluded an insured party failed to allege any physical loss or damage within an insurance policy’s coverage when the insured claimed its loss was a result of COVID-19 and the governor’s proclamation suspending non-emergency dental procedures. *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, No. 4:20-cv-CRW-SBJ, 2020 WL 5820552, at *1 (S.D. Iowa Sept. 29,

2020). In *Diesel Barbershop, LLC v. State Farm Lloyds*, a Texas court concluded an insured party's allegation that it lost the use of the insured property because of government-closure orders in response to COVID-19 was insufficient to constitute direct physical loss under the insurance policy. No. 5:20-cv-461-DAE, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020). In *Malaube, LLC v. Greenwich Insurance Company*, a Florida court held an insured party's allegation that the government emergency orders forced its restaurant to close was insufficient to constitute direct physical loss or damage under the insurance policy. Case No. 20-22615-Civ-Williams/Torres, 2020 WL 5051581, at *7 (S.D. Fla. Aug. 26, 2020). In *Sandy Point Dental, PC. v. Cincinnati Insurance Company*, an Illinois court concluded the phrase "direct physical loss" unambiguously requires some form of physical damage to the insured premises, and COVID-19 related government closure orders did not amount to direct physical loss to the insured premises. Case No. 20 CV 2160, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020).

Similarly, in *Pappy's Barber Shops, Inc. et al. v. Farmers Group Inc.*, a California court rejected the plaintiffs' contention that the phrase "direct physical loss of or damage to property" does not require tangible damage or alteration to the insured property. Case No. 20-CV-907-CAB-BLM, 2020 WL 550221, at *4 (S.D. Cal. Sept. 11, 2020). The court also rejected the plaintiffs' argument that the government-closure orders themselves caused direct physical loss or damage to the insured property. *See id.* at *4–6. Likewise, the court was not persuaded by the plaintiffs' contention that the use of the disjunctive in the phrase "direct physical loss" did not require tangible damage. *See id.* at 5–6. In *10E, LLC v. Travelers Indemnity Company of Connecticut*, the plaintiff alleged it was entitled to coverage under the Business Income and Extra expense provisions of its insurance policy because the government orders restricting dine-in services at its restaurants prohibited access to its restaurant and prevented the intended use of the property. 2:20-cv-04418-SVW-AS, 2020 WL 5359653, at *1–2 (C.D. Cal. Sept. 2, 2020). The California court concluded the plaintiff was not entitled to coverage under these provisions because the plaintiff failed to allege a direct physical loss or damage. *Id.* at *5. In the case currently before the Court, Plaintiffs cite some cases that are contrary to this interpretation; however, these cases are distinguishable based on their facts. Further, the cases cited by the Plaintiffs are not analyzed on the same level as the cases referenced above.

The Court concludes that it is a settled matter in Iowa law that direct physical loss or damage requires tangible alteration of property and that loss of use alone is insufficient. *See*

Milligan, 2001 WL at *2. The Court further concludes that Plaintiffs have not alleged a direct physical loss or damage that is sufficient under the policy or Iowa law. *See id.*; *Phoenix Ins. Co.*, 147 F. Supp. 3d at 825. Because a direct physical loss or damage to the insured property is a prerequisite to trigger coverage under the Business Income and Extra Expense provisions of the policy, Plaintiffs have failed to plausibly plead an entitlement to coverage under these provisions.

b. Civil Authority Coverage

To trigger coverage under the Civil Authority provision, a Covered Cause of Loss must cause damage to a property other than the insured property. Additionally, there must be an “action of civil authority that prohibits access to the described ‘premises’” in “response to dangerous physical conditions” created by “damage to property other than property at the described ‘premises’” that causes “[a]ccess to the area immediately surrounding the damaged property [to be] prohibited by civil authority as a result of the damage” and the insured property is within one mile of the damaged property. Defs.’ Ans., Affirm. Defs., & Jury Demand, Ex. 1 [Dkt. No. 5-1 at 40–41].

Plaintiffs allege Reynolds’s proclamation was an action of a civil authority that “resulted in the necessary suspension of Plaintiffs’ operations.” Pls.’ Am. Compl. [Dkt. No. 17], ¶ 40. They allege the proclamation itself caused direct physical loss of or damage to the insured properties because it “prohibited access to Plaintiff’s Covered Property, and the area immediately surrounding the Covered Property, in response to dangerous physical conditions resulting in and from a Covered Cause of Loss.” *Id.* ¶ 42.

Defendants contend Plaintiffs do not meet the coverage requirements of the Civil Authority provision. Defendants argue Plaintiffs have failed to plead physical loss, either at the insured premises or another location. Defs.’ Br. Supp. Mot. Dismiss Pls.’ Am. Compl. [Dkt. No. 20-1 at 17–18]. They argue Plaintiffs have not alleged Reynolds’s proclamation was issued in response to a dangerous physical condition posed by damage at another property or that damage to the other property was due to a Covered Cause of Loss. *Id.* at 16. Defendants also contend the proclamation was not issued as a result of specific physical damage, rather it was issued to limit the spread of COVID-19. *Id.* at 18. Defendants argue Plaintiffs have not alleged their properties were within one mile of the damaged property. *Id.* Further, Defendants allege Plaintiffs were not denied access to their properties because access to the insured properties was not completely prohibited. *Id.* at 18–19.

Plaintiffs respond by arguing that Reynolds’s proclamation is an action of a civil authority that prohibited access to their property. They contend that the Civil Authority provision does not explicitly state that access to the insured property must be completely prohibited for coverage to apply. Pls.’ Resis. Defs.’ Mot. Dismiss [Dkt. No. 31 at 23–24]. Plaintiffs argue “the actions of Civil Authorities closing non-essential businesses such as Plaintiff’s restaurant evidences an awareness on the part of Federal, state, and local governments that COVID-19 causes damage to property with respect to both the Business Income and Civil Authority claim.” *Id.* at 24. Plaintiffs claim the proclamation was issued in response to a dangerous physical condition in the immediately surrounding area, namely, the droplets carrying the virus. *Id.*

Here, the Civil Authority provision unambiguously requires that an order of civil authority be issued in response to a dangerous physical condition created by damage to another property and that the insured property be within one mile of the damaged property. Defs.’ Ans., Affirm. Defs., & Jury Demand, Ex. 1 [Dkt. No. Dkt. No. 5-1 at 40–41]. Plaintiffs have failed to plead facts sufficient to qualify for coverage under the Civil Authority provision. They point generally to the physical form COVID-19 may take; however, Plaintiffs have not alleged damage to another property. Further, Reynolds’s proclamation was not issued in response to a dangerous physical condition that resulted from a Covered Cause of Loss. Rather, the proclamation was issued to limit the spread of COVID-19. Because Plaintiffs have failed to allege facts sufficient to trigger the Civil Authority provision, the Court need not address whether a civil authority order must completely prohibit access. However, the Court is skeptical that the prohibits access prong would be satisfied when the Plaintiffs were able to—and did—conduct delivery and take-out services at the insured properties. *See Phoenix Ins. Co.*, 147 F. Supp. 3d at 824 (concluding the court could not find a loss of use of the insured property when the insured party still stored data and had employees at the property at the time of the alleged loss of use). Regardless, Plaintiffs have failed to allege facts sufficient to state a claim for coverage under the Civil Authority provision.

Courts across the country have reached the same conclusion in similar circumstances and with comparable insurance policy language. In *Sandy Point Dental, PC*, an Illinois court held an insured party was not entitled to civil authority coverage where the insured failed to allege COVID-19 caused direct physical loss to another property. 2020 WL at *3. The court also noted civil authority coverage was not triggered because the government order only limited non-essential dental procedures. *Id.* As such, the court determined the insured failed to establish that there was

an order of civil authority that limited its access to the insured property. *Id.* In *Mudpie, Inc. v. Travelers Casualty Insurance Company of America*, a California court found an insured party was not entitled to coverage under the civil authority provision because the insured failed to establish a connection between other damaged property and the denial of access to its business. Case No. 20-cv-03213-JST, 2020 WL 5525171, at *6–7 (N.D. Cal. Sept. 14, 2020). In *10E, LLC*, a California court concluded the civil authority provision of an insurance policy was not triggered when the insured party failed to allege direct physical loss or damage to another property. 2020 WL at *5.

The Court concludes that Plaintiffs have not alleged facts plausibly demonstrating an entitlement to coverage under the policy’s Civil Authority provision.

c. Virus Exclusion

Plaintiffs’ Amended Complaint alleges Defendants should be estopped from invoking the Virus Exclusion to preclude coverage. Pls.’ Am. Compl. [Dkt. No. 17], ¶ 80. Plaintiffs contend the original adoption of the virus exclusion by the Iowa Insurance Commissioner was secured by misrepresentations and that Defendants directly or indirectly participated in this effort. *Id.* ¶¶ 59, 61–62.

Defendants argue that even if Plaintiffs can establish that they are entitled to coverage under the Business Income, Extra Expense, or Civil Authority provision, Plaintiffs are not entitled to coverage because the Virus Exclusion precludes coverage. Defs.’ Br. Supp. Mot. Dismiss Pls.’ Am. Compl. [Dkt. No. 20-1 at 20]. Defendants contend the Virus Exclusion unambiguously precludes coverage and that the anti-concurrent clause applies. *Id.* They argue Reynolds’s proclamation was directly or indirectly caused by a virus, triggering the Virus Exclusion. *Id.* at 21–22.

In reply, Plaintiffs contend the proclamation itself amounts to a direct physical loss to their covered properties and the surrounding area. Pls.’ Resis. Defs.’ Mot. Dismiss [Dkt. No. 29 at 25]. They argue COVID-19 was not a but-for cause of their losses because they would have continued operating their businesses despite the COVID-19 pandemic. *Id.* Plaintiffs affirm their stance that Defendants should be estopped from enforcing the Virus Exclusion based on estoppel, unclean hands, breach of good faith and fair dealing, and general public policy. *Id.*

The Virus Exclusion unambiguously states it will not pay for loss or damage that is directly or indirectly caused by any virus, regardless of any other cause or event that contributes to the loss.

Defs.’ Ans., Affirm. Defs., & Jury Demand, Ex. 1 [Dkt. No. 5-1 at 48, 50]. Plaintiffs’ alleged losses were caused by or resulted from a virus, specifically, COVID-19. Plaintiffs’ Amended Complaint states their losses were “caused by COVID-19 and/or the Governor Reynolds’ proclamation” Pls.’ Am. Compl. [Dkt. No. 17], ¶ 43. Plaintiffs thereby recognize their alleged losses were caused by COVID-19, which triggers the Virus Exclusion. Plaintiffs also recognize their losses resulted from COVID-19 in their Resistance to Defendants’ Motion to Dismiss. In their Resistance, Plaintiffs state, “The threat and ubiquitous presence of COVID-19 . . . resulted in Governor Reynolds’ proclamation, which in turn caused ‘direct physical loss’ to Plaintiffs’ covered property.” Pls.’ Resis. Defs.’ Mot. Dismiss [Dkt. No. 29 at 22].

Plaintiffs’ contention that it was the proclamation that caused their losses rather than the virus because they would have remained open does not save their claims from the Virus Exclusion. Plaintiffs’ losses were directly or indirectly caused by or resulted from COVID-19, rather than strictly the proclamation. The proclamation was issued in response to the COVID-19 pandemic as referenced in the proclamation itself. Office of the Governor of Iowa Kim Reynolds, *supra*. The Virus Exclusion is therefore triggered, and coverage is excluded even if Plaintiffs could establish coverage under the Business Income, Extra Expense, or Civil Authority provisions of the insurance policy.

Courts across the country have reached the same conclusion when reviewing similar claims under similar circumstances and insuring language. *See, e.g., Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, Case No. 20-cv-04434 JSC, 2020 WL 5642483, at *2–4 (N.D. Cal. Sept. 22, 2020) (concluding the virus exclusion provision with similar language applied under similar circumstances); *10E, LLC*, 2020 WL at *6 (expressing skepticism that the plaintiff could avoid application of the policy’s virus exclusion by suggesting in-person dining restrictions put in place to limit the spread of COVID-19 were not caused by a virus); *Diesel Barbershop, LLC*, 2020 WL at *6–7 (concluding an insurance policy’s virus exclusion provision applied when the plaintiffs contended the state shutdown order put in place to limit the spread of COVID-19 caused their losses rather than the virus).

Additionally, Defendants argue Plaintiffs’ claims are also precluded by the Ordinance or Law Exclusion; however, the Court need not reach this argument because Plaintiffs have not demonstrated they are entitled to coverage under any policy provision, and even if Plaintiffs could state a claim under one of the policy provisions, the Virus Exclusion would preclude coverage.

Because the allegations in Plaintiffs' Amended Complaint do not plausibly state a claim for coverage under the Business Income, Extra Expense, or Civil Authority provisions of the policy, Plaintiffs are not entitled to the declaratory relief requested and dismissal is proper.

2. Breach of Contract

Plaintiffs allege Defendants breached their coverage obligations to Plaintiffs by denying Plaintiffs' claims. Pls.' Am. Compl. [Dkt. No. 17], ¶ 81. Plaintiffs contend they complied with the terms of the policy and have suffered losses that triggered the Business Income, Extra Expense, and Civil Authority provisions of the policy. *Id.* ¶¶ 71, 73–74, 78. Plaintiffs argue they had reasonable expectations that their alleged losses were covered under the policy provisions referenced above. *Id.* ¶ 76. They allege no policy exclusions apply to preclude coverage, and if the Virus Exclusion were applicable, Plaintiffs argue Defendants should be estopped from invoking it under these circumstances. *Id.* ¶¶ 79–80. Specifically, Plaintiffs contend Defendants should be estopped from enforcing the Virus Exclusion based on regulatory estoppel, unclean hands, breach of good faith and fair dealing, and general public policy. Pls.' Resis. Defs.' Mot. Dismiss [Dkt. No. 29 at 25].

Plaintiffs allege the Virus Exclusion was included in the policy under false pretenses. Pls.' Am. Compl. [Dkt. No. 17], ¶ 59–61. In support of this contention, Plaintiffs refer to the adoption of this exclusion by the insurance industry over a decade ago. They contend the insurance industry cast the virus exclusion as a clarification for coverage of disease-causing agents. *Id.* ¶ 61. Plaintiffs allege the insurance industry misrepresented to states that the virus exclusion would not alter the scope of coverage when it actually did without lowering premiums. *Id.* They contend Defendants directly or indirectly “participated in the insurance industry’s efforts to effect state Insurance Commissioners, including the State of Iowa’s Insurance Commissioner, to approve the suggested virus exclusion.” *Id.* ¶ 62.

Defendants deny these allegations. Defendants contend that Plaintiffs were not entitled to coverage under the Business Income or Civil Authority provisions, therefore, Plaintiffs' breach of contract claim fails. Defs.' Br. Supp. Mot. Dismiss Pls.' Am. Compl. [Dkt. No. 20-1 at 24]. Defendants contend Plaintiffs lack standing to argue that Defendants should be estopped from invoking the Virus Exclusion. Defs.' Reply Pls.' Resis. Defs.' Mot. Dismiss [Dkt. No. 35 at 19]. In reply, Plaintiffs affirm their stance that they are entitled to coverage under the Business Income,

Extra Expense, and Civil Authority provisions of the policy. They also affirm their stance that no policy exclusion precludes coverage.

The Court finds Plaintiffs have not plausibly stated a claim for breach of contract because Plaintiffs failed to plausibly state a claim for coverage under the policy for the reasons outlined above. Assuming—without deciding—Plaintiffs have standing to argue Defendants should be estopped from invoking the Virus Exclusion, Plaintiffs have also not plausibly stated a claim to estop Defendants from invoking the Virus Exclusion. Plaintiffs have not alleged Defendants specifically misrepresented the purpose of the Virus Exclusion to them. Likewise, Plaintiffs have not plausibly stated a claim to invoke the reasonable expectations doctrine. The reasonable expectations doctrine only applies to prevent the application of an exclusion in an insurance policy when the exclusion “(1) is bizarre or oppressive, (2) eviscerates terms explicitly agreed to, or (3) eliminates the dominant purpose of the transaction.” *Clark-Peterson Co. v. Indep. Ins. Assocs., Ltd.*, 492 N.W.2d 675, 677 (Iowa 1992) (citations omitted). Before a court even considers these elements, the insured party bears the burden of proving either “circumstances attributable to the insurer which would foster coverage expectations” or that the policy is “such that an ordinary lay person would misunderstand its coverage.” *Id.* The reasonable expectations doctrine is not intended to expand coverage on a purely equitable basis. *Id.*

Plaintiffs have failed to plead facts that are sufficient to invoke the reasonable expectations doctrine. The language of the virus exclusion is clear; it explicitly states Defendants “will not pay for loss or damage caused directly or indirectly” by “[a]ny virus, bacterium or other microorganism . . .” “regardless of any other cause or event that contributes concurrently or in any sequence to the loss. . . .” Defs.’ Ans., Affirm. Defs., & Jury Demand, Ex. 1 [Dkt. No. Dkt. No. 5-1 at 48, 50]. Based on the plain language of the exclusion, Plaintiffs could not have reasonably expected their alleged losses to be covered. *See Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 504 (Iowa 2013). The Virus Exclusion provision is not one “where only ‘painstaking study of the policy provisions would have’ revealed an exclusion or neutralized an otherwise reasonable expectation.” *Phoenix Ins. Co.*, 147 F. Supp. 3d at 832 (quoting *Farm Bureau Mut. Ins. Co. v. Sandbulte*, 302 N.W.2d 104, 112 (Iowa 1981) (citations omitted)). Even if Plaintiffs had pleaded sufficient facts to make out a claim for the prerequisite, the reasonable expectations doctrine remains inapplicable because they have failed to allege sufficient facts to demonstrate that the policy language is bizarre or oppressive, that the exclusion eviscerates terms explicitly agreed to,

or sufficient facts that demonstrates applying the exclusion would eliminate the dominant purpose for coverage.

Plaintiffs' Amended Complaint does not plausibly state a claim for coverage under the Business Income, Extra Expense, or Civil Authority provisions of the policy. Even if Plaintiffs could state a claim for coverage under these provisions, Plaintiffs' breach of contract claim still fails because the Virus Exclusion would preclude coverage. As such, dismissal of this claim is appropriate.

3. Bad Faith Claim

Plaintiffs allege Defendants have a contractual obligation to fully investigate insurance claims. Pls.' Am. Compl. [Dkt. No. 17], ¶ 83. They contend Defendants failed to investigate their claims and summarily denied their claims. *Id.* ¶ 86–87. Plaintiffs argue Defendants acted in bad faith by denying their claims without an investigation. *Id.* ¶ 88.

Defendants contend they had a reasonable basis to deny Plaintiffs' claims. Defs.' Br. Supp. Mot. Dismiss Pls.' Am. Compl. [Dkt. No. 20-1 at 22]. They argue Iowa courts have consistently interpreted the phrase “direct physical loss of or damage to property” to require tangible harm to the insured property. *Id.* Defendants contend Plaintiffs have failed to allege facts demonstrating a physical loss or damage to the insured properties. *Id.* They also argue Plaintiffs have not alleged physical damage to a property within one mile of the insured properties or facts demonstrating prohibited access to the insured properties. *Id.* Regardless, Defendants contend the Virus Exclusion precludes coverage and that they had a reasonable basis for denying Plaintiffs' claims. *Id.* at 23.

In reply, Plaintiffs note the policy does not define the phrase “direct physical loss of or damage” or define the terms making up the phrase. Pls.' Resis. Defs.' Mot. Dismiss [Dkt. No. 29 at 31–32]. They contend “loss” and “damage” are two separate concepts, and the policy, when read as a whole, indicates “damage” encompasses loss of use. *Id.* at 32. Plaintiffs argue the Virus Exclusion recognizes viruses can cause physical loss or damage. *Id.* Finally, Plaintiffs contend Defendants had no evidence to support their denial. *Id.*

Plaintiffs' bad faith claim fails because Plaintiffs have not pleaded facts that are sufficient to plausibly state a claim for bad faith. The Business Income and Extra Expenses provisions require that there be direct physical damage or loss to the insured property, and Iowa courts have consistently interpreted similar language to require tangible harm to property. *See Milligan*, 2001

WL at *2. Plaintiffs have failed to allege any facts that are sufficient to constitute direct physical damage or loss under Iowa law. *See id.* Plaintiffs have not alleged facts sufficient to qualify for coverage under the Civil Authority provision. The Civil Authority provision requires damage to property other than the insured property and that a civil authority order prohibits access to the insured premises as a result of a dangerous condition at the damaged property. Plaintiffs have not alleged damage to another property within one mile of the insured properties. Further, the policy requires access to be prohibited, and Plaintiffs admitted in their Amended Complaint that the proclamation only closed dine-in or in-person service at all bars and restaurants but still permitted take out or delivery services. Further, Plaintiffs acknowledge they provided take-out and delivery services at three of the insured properties. Consequently, Plaintiffs have failed to allege facts that are sufficient to demonstrate Defendants lacked a reasonable basis to deny their claims for coverage under the Business Income, Extra Expense, and Civil Authority provisions. *See Shelly Funeral Home, Inc.*, 642 N.W.2d at 657.

Regardless, Plaintiffs' bad faith claim fails because Plaintiffs have not alleged facts that are sufficient to prevent the application of the Virus Exclusion. The Virus Exclusion precludes coverage for losses caused directly or indirectly by a virus. As demonstrated by Plaintiffs' pleadings, Plaintiffs' alleged losses were directly or indirectly caused by COVID-19 because Reynolds's proclamation was issued as a result of the COVID-19 pandemic. Consequently, Plaintiffs have failed to allege facts that are sufficient to demonstrate Defendants lacked a reasonable basis to deny their claims for coverage based on the Virus Exclusion. *See id.* Additionally, Plaintiffs have not pleaded facts that are sufficient to demonstrate Defendants knew or should have known they lacked a reasonable basis to deny Plaintiffs' claims.

Because Plaintiffs have failed to plausibly state a claim for bad faith, dismissal of this claim is proper.

C. Defendants' Motion to Strike

Defendants contend the affidavits of Susan Voss and Elizabeth Robertson that Plaintiffs attached to their Resistance to Defendants' Motion to Dismiss should be struck and should not be considered in deciding the Motion to Dismiss. Defs.' Br. Supp. Mot. Strike [Dkt. No. 34-1 at 1]. They argue the affidavits are matters outside of the pleadings because they were not attach to any pleading, and the contents of the affidavits are not embraced by Plaintiffs' Amended Complaint. *Id.* at 2. Defendants analogize the affidavits to expert reports that include a discussion of the

affiants' credentials and their analysis and opinions regarding the insurance policy's language. *Id.* They note the affidavits were prepared in October 2020, indicating they were prepared for the purpose of responding to Defendants' Motion to Dismiss and substantiating Plaintiffs' Amended Complaint. *Id.* at 4. Additionally, Defendants argue the affidavits should be struck because they offer conclusions on matters of law that are for the court to decide. *Id.* They contend policy interpretation is not a factual dispute that is subject to expert opinion. *Id.* at 5. Defendants also note the meaning of terms in an insurance policy is viewed from the standpoint of a reasonable, ordinary person, not an expert. *Id.*

Plaintiffs respond and argue extrinsic evidence may be used in policy interpretation when ambiguity exists. Pls.' Br. Supp. Resis. Mot. Strike [Dkt. No. 36 at 2]. They contend Iowa law contemplates the use of extrinsic evidence to aid in interpreting ambiguous policies, and because Plaintiffs allege the policy is ambiguous, extrinsic evidence is appropriate in this case. *Id.* at 2–3. Plaintiffs argue the affidavits are embraced by the pleadings because they are directly related to paragraphs 21–23 of the Amended Complaint, meaning the affidavits are embraced by the pleadings. *Id.* at 6. Plaintiffs also note that they attached Defendants' letter denying coverage to their original Complaint and the affidavits address this letter. *Id.* at 3. Plaintiffs contend the affidavits do not provide legal opinions but rather discuss principles of the English language, grammar, semantics, and how an ordinary person could believe the policy contained ambiguity. *Id.* at 4. Finally, Plaintiffs contend that if the Court determines the affidavits are outside of the pleadings, then the Court should convert Defendants' Motion to Dismiss to a motion for summary judgment. *Id.* at 8.

The Court finds an affidavit is not a pleading and is not the proper subject of a motion to strike. *See All Energy Corp. v. Energetix, LLC, et al.*, 985 F. Supp. 2d 974, 984 (S.D. Iowa 2012) (citing Fed. R. Civ. P. 7(a)). As such, the Court treats the argument in favor of the Motion to Strike as a challenge to the significance that the Court should accord to the affidavits. *See id.* (citing *Voice Capture, Inc. v. Intel Corp.*, 354 F. Supp. 2d 997, 1007–08 (S.D. Iowa 2004)).¹

¹ The Court's treatment of Defendants' Motion to Strike on matters not included in Rule 12(f) is consistent with this district's approach to similar motions. *See All Energy Corp.*, 985 F. Supp. 2d at 984; *Mahony v. Universal Pediatric Servs., Inc.*, 753 F. Supp. 2d 839, 844 n.3 (S.D. Iowa 2010); *Aurora Nat'l Life Assurance Co. v. Harrison*, 462 F. Supp. 2d 951, 953 n.1 (S.D. Iowa 2006); *Napreljac v. John Q. Hammons Hotels, Inc.*, 461 F. Supp. 2d 981, 1044 n.37 (S.D. Iowa 2006); *Wilson v. City of Des Moines*, 338 F. Supp. 2d 1008, 1023 n.19 (S.D. Iowa 2004).

The Court is skeptical of Plaintiffs' contention that the affidavits are somehow embraced by the pleadings. However, even if the Federal Rules of Civil Procedure permitted the Court to consider these affidavits on a motion to dismiss, the policy language is unambiguous and extrinsic evidence is unnecessary to interpret the policy. The Court did not consider the affidavits in reaching its decision on Defendants' Motion to Dismiss; therefore, the Court did not convert Defendants' Motion to Dismiss to a motion for summary judgment and declines Plaintiffs' request to do so. See *Midwest Disability Initiative v. JANS Enters., Inc.*, 929 F.3d 603, 609 (8th Cir. 2019).

D. Defendants' Request for a Declaratory Judgment

In Defendants' Motion to Dismiss, Defendants request a declaration that Plaintiffs are not entitled to coverage under the insurance policy at issue, meaning there was no breach of contract and Defendants did not act in bad faith by denying Plaintiffs' claims. The Court interprets this request as a request for a declaratory judgment and concludes Defendants are not entitled to the requested declaratory judgment. The Declaratory Judgment Act provides that a court may declare the rights and responsibilities of parties upon an appropriate pleading. 28 U.S.C. § 2201(a). Because Defendants did not make this request in an appropriate pleading, a declaratory judgment is improper and the Court declines to provide one.

III. Conclusion

For the reasons stated above and taking Plaintiffs' alleged facts as true, Plaintiffs have not stated a claim upon which relief can be granted. Defendants' Motion to Dismiss is granted.

Upon the foregoing,

IT IS ORDERED that Defendants' Motion to Dismiss is granted. [Dkt. No. 20].

IT IS FURTHER ORDERED that Defendants' Motion to Strike is denied. [Dkt. No. 34].

DATED this 7th day of December, 2020.

The Clerk shall enter judgment for the Defendants.



JOHN A. JARVEY, Chief Judge
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

EXHIBIT 37

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: 12/11/2020

-----X
:
MICHAEL CETTA, INC. d/b/a SPARKS STEAK :
HOUSE *on behalf of themselves and all others similarly* :
situated, :

Plaintiff, :

-v- :

ADMIRAL INDEMNITY COMPANY, :

Defendant. :

20 Civ. 4612 (JPC)

OPINION
AND ORDER

-----X
JOHN P. CRONAN, United States District Judge:

Plaintiff Michael Cetta, Inc. d/b/a Sparks Steak House (“Sparks”) filed this putative class action alleging that Defendant Admiral Indemnity Company (“Admiral”) breached its obligation to provide coverage for losses that resulted from governmental orders to close restaurants due to the COVID-19 outbreak. Before the Court is Admiral’s Motion to Dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). For reasons that follow, the Court grants the Motion to Dismiss.

I. Background

The following factual allegations are taken from the Complaint. In the present posture, the Court accepts the Complaint’s allegations as true and draws all reasonable inferences in Sparks’s favor. *See Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009). The Court at this stage may also consider statements or documents incorporated into the Complaint by reference, such as coverage provisions in the insurance contract at issue. *See Kleinman v. Elan Corp.*, 706 F.3d 145, 152 (2d Cir. 2013); *La Vigne v. Costco Wholesale Corp.*, 284 F. Supp. 3d 496, 501 (S.D.N.Y. 2018).

A. The Insurance Policy

Sparks Steak House is a restaurant in Midtown Manhattan. Complaint, Dkt. 1 (“Compl.”) ¶ 14. Sparks purchased an all-risk commercial property insurance policy from Admiral that ran from June 26, 2019 to June 26, 2020. *Id.* ¶ 16; Defendant Admiral Indemnity Company’s Memorandum of Law in Support of Its Motion to Dismiss the Complaint, Dkt. 25 (“Motion to Dismiss”), Exh. A (“Policy”). The Policy insured the restaurant against a wide range of losses. Compl. ¶¶ 33-35. Three of these coverage provisions are at the center of the instant dispute. *Id.* ¶¶ 36-39.

The first is business income coverage. In relevant part, this provision provides that:

[Admiral] will pay for the actual loss of Business Income [the insured] sustain[s] due to the necessary “suspension” of [the insured’s] “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.

Compl. ¶ 36; Policy at 56. In other words, if Sparks had to shutter its doors because of a reason covered by the Policy, Admiral would pay for its operating expenses as well as the net income that the restaurant would have earned had it continued operating normally. Compl. ¶ 36; Policy at 56. For example, assume that fire is a “covered cause of loss” under the Policy. If a fire destroyed the restaurant, and Sparks was forced to close while the building was being repaired, Admiral would cover Sparks’s expenses, like payroll, and lost income until the establishment was up and running again. *See* Motion to Dismiss at 5.

The second type of coverage at issue here is extra expense coverage. This is a tagalong to the first type of coverage; it only applies if business income coverage applies. Compl. ¶ 38; Policy at 56. The Policy defines “extra expense” as “necessary expenses [the insured] incur[s] during the

“period of restoration” that [the insured] 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.” Compl. ¶ 38; Policy at 56. This includes expenses to “[a]void or minimize the ‘suspension’ of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location” and “[m]inimize the ‘suspension’ of business if [the insured] cannot continue ‘operations.’” Compl. ¶ 38; Policy at 56. Consider again the hypothetical fire that destroyed Sparks. In response to such a disaster, the eatery may decide to open a temporary location in Lower Manhattan while rebuilding its flagship Midtown restaurant. Extra expense coverage seemingly would require Admiral to fund many of the expenses Sparks incurred setting up the temporary Lower Manhattan location.

Finally, the Policy includes civil authority coverage, a special type of business income and extra expense coverage for certain governmental actions. It states:

When a Covered Cause of Loss causes damage to property other than property at the described premises, [Admiral] will pay for the actual loss of Business Income [the insured] 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 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.

Compl. ¶ 39; Policy at 57. This coverage works a bit differently than the first two because it does

not protect against property damage to Sparks directly. Instead, it anticipates a situation in which damage to the area surrounding Sparks prevents access to Sparks. For example, now imagine that a fire destroyed a neighboring building but left Sparks unscathed. However, heavy smoke lingered on East 46th Street, which caused the fire department to shut down the entire block for a week until the smoke cleared. With the block closed, the restaurant's employees could not go to work, and customers could not patronize the establishment. An event such as this would seem to trigger civil authority coverage under the language of the Policy.

Besides these coverage provisions, the Policy also enumerates several exclusions, which identify situations that bar coverage in all circumstances. Compl. ¶ 34; Policy at 68-72, 83. Three are relevant to Admiral's Motion to Dismiss. First is the "New York—Exclusion of Loss Due to Virus or Bacteria," which the Court refers to as the virus exclusion. Compl. ¶ 41; Policy at 83. This exclusion provides that Admiral "will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Compl. ¶ 41; Policy at 83. This exclusion expressly applies to "forms or endorsements that cover business income, extra expense or action of civil authority." Policy at 83. Second, the ordinance or law exclusion bars coverage if the claim stems from "[t]he enforcement of any ordinance or law" that "[r]egulat[es] the construction, use or repair of any property." *Id.* at 68. Finally, the act or decision exclusion forbids coverage under the Policy for "[a]cts or decisions . . . of any person, group, organization or governmental body." *Id.* at 71.

With this background of the Policy in mind, the Court now turns to the events of 2020 that ultimately led to the current dispute over the limits of the Policy's coverage.

B. The COVID-19 Pandemic

COVID-19 is a novel coronavirus that began in Wuhan, China at the end of 2019 and

quickly spread around the world. Compl. ¶¶ 17, 18, 20. By late April 2020, the deadly virus had infected millions of people across the globe and had killed 40,000 Americans. *Id.* ¶ 20. While scientists have discovered several modes of human-to-human transmission of COVID-19, including through symptomatic, presymptomatic, and asymptomatic transmission, data from studies suggest that the virus is primarily transmitted from symptomatic people to other individuals through respiratory droplets and direct contact with infected persons. *Id.* ¶ 22. Some studies also have found that the virus “can live on contaminated objects or surfaces,” thus suggesting that individuals could contract COVID-19 through contact with such surfaces. *Id.* ¶¶ 25, 26, 28.

On March 11, 2020, the Director of the World Health Organization categorized the COVID-19 outbreak as a “pandemic.” *Id.* ¶ 1. Two days later, President Donald J. Trump declared it a national emergency. *Id.* ¶ 2. The Centers for Disease Control and Prevention and members of the national Coronavirus Task Force soon issued guidance to prevent the spread of COVID-19. *Id.* This guidance advised Americans to “adopt far-reaching social distancing measures, such as working from home, avoiding shopping trips and gatherings of more than ten people, and staying away from bars, restaurants, and food courts.” *Id.*

Following from this, many governmental entities around the country ordered what they deemed “non-essential” businesses to “suspend[] or severely curtail[] business operations” in order to “stop the spread of COVID-19 among the population.” *Id.* ¶¶ 3, 9. The Complaint alleges that “almost all” States issued some form of a “stay-at-home” order and ordered private, “non-essential” businesses to close. *Id.* ¶¶ 3, 29. According to Sparks, these restrictions have been “catastrophic” for “non-essential businesses,” especially restaurants. *Id.* ¶ 4. As of the filing of the Complaint, “all but one state ha[d] closed restaurants and bars for services other than take-out and delivery.” *Id.* ¶ 30.

New York did so through several executive orders, of which the Court takes judicial notice. *See, e.g., Casey v. Odwalla, Inc.*, 338 F. Supp. 3d 284, 294 (S.D.N.Y. 2018) (“Courts may take judicial notice of public documents or matters of public record.”); *Porrazzo v. Bumble Bee Foods, LLC*, 822 F. Supp. 2d 406, 411 (S.D.N.Y. 2011) (“[I]t is well-established that courts may take judicial notice of publicly available documents on a motion to dismiss.”). On March 16, 2020, Governor Andrew M. Cuomo issued Executive Order 202.3, which stated that “[a]ny restaurant or bar in the state of New York shall cease serving patrons food or beverage on-premises effective at 8 pm on March 16, 2020, and until further notice shall only serve food or beverage for off-premises consumption.” Declaration of Stephen A. Weiss in Support of Plaintiff’s Memorandum in Opposition to Defendant’s Rule 12(b)(6) Motion to Dismiss the Complaint, Dkt. 27, Exh. C. That same day, New York City Mayor Bill De Blasio issued Executive Order 100, which contained a similar directive. Motion to Dismiss, Exh. B § 7. Mayor De Blasio ordered that restaurants, bars, and similar establishments could remain open “for the sole purpose of providing take-out or delivery service,” so long as they did not exceed “fifty percent of their occupancy or seating capacity while persons are waiting for take-out and that such persons follow social distancing protocols.” *Id.* Together, these state and local executive orders, which the Court refers to as the closure orders, meant that restaurants in New York City could no longer serve patrons on their premises, but instead could allow customers only to place take-out orders. *See* Compl. ¶ 30. The Complaint alleges that, because of these restrictions, Sparks was “forced to close.” *Id.* ¶ 46.¹

C. Procedural History

Sparks filed a claim for “business interruption losses” under its all-risk Policy with

¹ The Court recognizes that in the months after the filing of the Complaint, state and local authorities began to allow some on-premises dining at New York restaurants. However, these changes are irrelevant to the instant case because Sparks’s claims relate to losses that allegedly incurred while the original closure orders were in place.

Admiral. *Id.* ¶ 44. In a letter dated April 17, 2020, Admiral denied Sparks coverage for three reasons. *Id.* First, with regard to business income and extra expense coverage, Admiral claimed that there was “no physical damage” to Sparks. *Id.* Second, as to civil authority coverage, Admiral stated that the necessary prerequisites were not met. *Id.* And finally, Admiral denied all claims because certain “exclusions and limitations in the [P]olicy” precluded coverage. *Id.*

Sparks began the instant diversity action in this Court on June 16, 2020 with the filing of the Complaint. Dkt. 1. The crux of the Complaint is that Admiral wrongly denied coverage because the Policy covers “business losses and extra expenses, and related losses resulting from actions taken by civil authorities to stop the human to human and surface to human spread of the COVID-19 outbreak.” Compl. ¶ 10. Sparks brought this suit as a putative class action on behalf of itself and “[a]ll entities” that (1) “suffered losses due to measures put in place by civil authorities’ stay-at-home or shelter-in-place orders since March 15, 2020”; and (2) purchased from Admiral a standard all-risk commercial property insurance policy that provided for business income losses and extra expenses, and did not exclude coverage for pandemics. *Id.* ¶ 50.

The Complaint pleads three counts of declaratory judgment and three counts of breach of contract. *Id.* ¶¶ 62-108. Counts One, Three, and Five each seek a declaratory judgment that Admiral is obligated to pay Sparks under the business income, civil authority, and extra expense coverage provisions, respectively. *Id.* ¶¶ 68, 85, 100. Each of these counts seeks a declaratory judgment covering losses already incurred and losses to be incurred in connection with the closure orders. *Id.* Counts Two, Four, and Six allege that Admiral breached its obligations under the Policy when it denied Sparks coverage under these same coverage provisions. *Id.* ¶¶ 77, 92, 107.

On September 9, 2020, Admiral filed its Motion to Dismiss. Dkt. 24. Admiral argues that Sparks is not entitled to business income or extra expense coverage because Sparks did not suffer

“direct physical loss of or damage to” property, and that Sparks failed to plead entitlement to civil authority coverage because the closure orders were not the result of physical damage near the restaurant and did not prohibit access to the restaurant. Motion to Dismiss at 13-23. Admiral also argues that several exclusions bar coverage in all events. *Id.* at 8-13. Sparks opposed the motion on October 7, 2020, Dkt. 26, and Admiral replied on October 21, 2020, Dkt. 29. Because the Court holds that Sparks failed to plead that it met the requirements for the three types of coverage at issue, the Court does not reach whether the virus or other exclusions apply here.

II. Discussion

A. Legal Standard

To survive a motion to dismiss pursuant to Rule 12(b)(6), “a complaint must contain 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)). A claim is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* A complaint’s “[f]actual allegations must be enough to raise the right to relief above the speculative level.” *Twombly*, 550 U.S. at 555.

B. Choice of Law

The parties do not directly address choice of law, but they apply New York law in their briefs. See Motion to Dismiss at 7, 10, 19; Plaintiff’s Memorandum in Opposition to Defendant’s Rule 12(b)(6) Motion to Dismiss the Complaint, Dkt. 26 (“Opposition”) at 8, 9-10, 12; Defendant Admiral Indemnity Company’s Reply Memorandum in Further Support of Its Motion to Dismiss the Complaint, Dkt. 29, at 8. It is clear that New York law governs.

Jurisdiction exists here pursuant to 28 U.S.C. § 1332 because the named Plaintiff and

Defendant are diverse and the necessary amount in controversy is met. *See* Compl. ¶¶ 12-15. Federal courts sitting in diversity must apply the choice-of-law rules of the State in which they reside. *See Md. Cas. Co. v. Cont'l Cas. Co.*, 332 F.3d 145, 151 (2d Cir. 2003). “New York courts seek to apply the law of the jurisdiction with the most significant interest in, or relationship to, the dispute.” *Brink’s Ltd. v. S. African Airways*, 93 F.3d 1022, 1030 (2d Cir. 1996). In contract disputes, New York courts apply a “center of gravity” approach in which courts may “consider a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties.” *AEI Life LLC v. Lincoln Benefit Life Co.*, 892 F.3d 126, 135 (2d Cir. 2018) (quoting *Brink’s Ltd.*, 93 F.3d at 1030-31).

Sparks is a New York corporation with its principal place of business in New York. Compl. ¶ 14. New York state and local closure orders are at the center of the allegations. *Id.* ¶ 46; Motion to Dismiss at 22; Opposition at 5. Because the Court finds that New York is the jurisdiction with the most significant interest in this dispute, the Court will apply New York law.

C. Business Income Coverage

Sparks first claims that it is entitled under the Policy to business income coverage due to losses incurred as a result of the closure orders. Compl. ¶¶ 68, 75. One requirement of this coverage is that the “suspension” of the restaurant’s operation “must be caused by direct physical loss of or damage to property” at the premises. Policy at 56. The Policy defines “suspension” as “[t]he slowdown or cessation of [the insured’s] business activities,” *id.* at 67, and Admiral does not contest that Sparks’s business was suspended due to the closure orders. The question for this Court is thus whether that suspension was “caused by direct physical loss of or damage to” Sparks’s property. If it was not, this provision does not provide coverage for Sparks’s claimed

losses.

The Complaint does not allege that any of Sparks's property was physically lost or damaged, as those terms are commonly understood. Instead, it alleges that Sparks "suffered a direct physical loss of and damage to [its] property because [it has] been unable to *use* [its] property for its intended purpose" due to the closure orders. Compl. ¶ 42 (emphasis added). Sparks's core theory is thus that its inability to fully use its restaurant satisfies the loss or damage to property prerequisite of the business income coverage provision. Opposition at 9 (arguing that the phrase "'loss of property' should be interpreted to include the loss of use of property"). The Court does not agree.

Under New York law, "a policyholder bears the burden of showing that the insurance contract covers the loss." *Morgan Stanley Grp. Inc. v. New Eng. Ins. Co.*, 225 F.3d 270, 276 (2d Cir. 2000). "The initial interpretation of a contract is a matter of law for the court to decide." *Id.* at 275 (internal quotation marks, alteration, and citation omitted). "Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured." *Dean v. Tower Ins. Co. of N.Y.*, 19 N.Y.3d 704, 708 (2012). Courts must "give effect to the intent of the parties as expressed in the clear language of the contract," *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 42 (2d Cir. 2006) (internal quotation marks and citation omitted), giving "unambiguous provisions of an insurance contract . . . their plain and ordinary meaning," *Fed. Ins. Co. v. Am. Home Assurance Co.*, 639 F.3d 557, 567 (2d Cir. 2011) (internal quotation marks and citation omitted). *See Essex Ins. Co. v. Laruccia Constr., Inc.* 898 N.Y.S.2d 558, 559 (App. Div. 2010). "If the provisions are clear and unambiguous, courts are to enforce them as written." *Vill. of Sylvan Beach, N.Y. v. Travelers Indem. Co.*, 55 F.3d 114, 115 (2d Cir. 1995). If provisions are ambiguous, courts must construe

them in the insured's favor and against the insurer. *Dean*, 19 N.Y.3d at 708.

Accordingly, to ascertain the scope of the Policy's business income coverage, the Court starts with the text of the relevant provision. Once again, the operative language states that the suspension of Sparks's operations "must be caused by direct physical loss of or damage to property." Policy at 56. The Business Income (and Extra Expense) Coverage Form contained in the Policy does not define any of these words. *See id.* at 66-67. But "the lack of a definition" of course does not render a word ambiguous. *Lend Lease (US) Const. LMB Inc. v. Zurich Am. Ins. Co.*, 22 N.Y.S.3d 24, 29 (App. Div. 2015). Instead, it is appropriate to turn to dictionary definitions. *See Fed. Ins. Co.*, 639 F.3d at 567 ("[I]t is common practice for the courts of [New York] State to refer to the dictionary to determine the plain and ordinary meaning of words to a contract.") (alterations in original) (quoting *10 Ellicott Square Ct. Corp. v. Mountain Valley Indem. Co.*, 634 F.3d 112, 120 (2d Cir. 2011)); *Lend Lease*, 22 N.Y.S.3d at 29.

Because Sparks's "loss of use" theory centers on the word "loss," the Court must home in on that word's meaning in the Policy. In the relevant portion of the Policy, the term "loss" is modified by the word "physical". Compl. ¶ 36; Policy at 56. "Physical" means "[o]f, relating to, or involving material things; pertaining to real, tangible objects." *Physical*, Black's Law Dictionary (11th ed. 2019). While Black's Law Dictionary provides several definitions for the word "loss," only one could apply to physical objects: "[t]he failure to maintain possession of a thing." *Loss*, Black's Law Dictionary (11th ed. 2019). Putting these definitions together demonstrates that the "requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude [from property insurance] alleged losses that are intangible or incorporeal." 10A Couch on Ins. § 148:46 (3d ed. 2005).

The plain meaning of the phrase "direct physical loss of or damage to" therefore connotes

a negative alteration in the tangible condition of property. *See, e.g., Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) (holding that the phrase “direct physical loss or damage” “unambiguously[] requires some form of actual, physical damage to the insured premises”); *Phila. Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 288 (S.D.N.Y. 2005) (holding that the phrase “physical loss or damage” requires that “the interruption in business must be caused by some physical problem with the covered property”); *see also Mark’s Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, 20 Civ. 4423, 2020 WL 5938689, at *4 (C.D. Cal. Oct. 2, 2020) (noting that an interpretation of the phrase “direct physical loss of” to include “deprivation of property without physical change in the condition of the property” would lack “manageable bounds”) (internal quotation marks omitted). Losing the ability to use otherwise unaltered or existing property simply does not change the physical condition or presence of that property and therefore cannot be classified as a form of “direct physical loss” or “damage.” *See* 10A Couch on Ins. § 148:46 (3d ed. 2005) (explaining that property insurance claims are precluded “when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable physical alteration of the property”).

The idea that “loss of use” does not constitute a “direct physical loss of or damage to” property resonates in ordinary experience outside the context of insurance coverage. Say, for example, a teenager broke curfew, and his parents punished him by taking away the keys to his car. The teen undoubtedly lost the ability to use the car. However, we would not say that there had been a “direct physical loss of or damage to” the car. The teenager was precluded from driving it. But the car’s physical condition remained unchanged, and its presence likely remained at the residence. Similarly, imagine a fisherman visits a public pond each day to cast his line. One morning he arrived and found that the pond was closed for fishing because a nearby town was

hosting its annual swim race. Did the fisherman lose the use of the pond for the day? Yes. He could not enjoy the premises for his intended use (*i.e.*, to fish). But could anyone reasonably conclude there was a “direct physical loss of or damage to” the pond because he could not fish? No. The condition of the pond was not altered physically.

Reading the phrase “direct physical loss of or damage to” in the broader context of the Policy supports this interpretation as well. Recall that business income coverage runs for the “period of restoration.” Policy at 56. Sparks describes this period as running “until business is resumed,” Opposition at 3, but this is not accurate. Instead, the term “period of restoration” (unlike “loss” or “damage”) is defined in the Business Income (and Extra Expense) Coverage Form as ending on the earlier of: “(1) [t]he date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) [t]he date when business is resumed at a new permanent location.” Policy at 66.² The idea that the premises will be “repaired, rebuilt or replaced” suggests the occurrence of material harm that then requires a physical fix. *See Phila. Parking Auth.*, 385 F. Supp. 2d at 287 (“‘Rebuild,’ ‘repair,’ and ‘replace’ all strongly suggest that the damage contemplated by the Policy is physical in nature.”). Indeed, “[t]he words ‘repair’ and ‘replace’ contemplate physical damage to the insured premises as opposed to loss of use of it.” *Newman Myers*, 17 F. Supp. 3d at 332.

Sparks’s reading of the Policy—that “loss of use” is covered—additionally would render the two possible end dates of the “period of restoration” provision meaningless when applied to

² Both parties cite the definition of “period of restoration” that is included on the form. *See* Motion to Dismiss 15 n.4; Opposition at 3. However, it appears that a different definition may be applicable to the Policy here. *See* Policy at 110. This alternative definition adds a third possible end date for the “period of restoration”: “The date at the end of [actual loss sustained]-12 Months consecutive months after the direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises.” *Id.* The parties do not rely on this, and the Court does not see how this possible alternative end date would change the above analysis.

circumstances like those presented in this case. See *Roundabout Theater Co. v. Cont'l Cas. Co.*, 751 N.Y.S.2d 4, 9 (App. Div. 2002). The alleged loss of use here requires no physical repair or rebuilding to end the suspension of Sparks's operations. Cf. *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, No. 20 Civ. 2160, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020) ("Plaintiff need not make any repairs or change any part of the building to continue its business."); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20 Civ. 3213, 2020 WL 5525171, at *4 (N.D. Cal. Sept. 14, 2020) ("[H]ere, there is nothing to fix, replace, or even disinfect for [plaintiff] to regain occupancy of its property . . ."). And there is no suggestion that Sparks is considering opening a "new permanent location," Policy at 66, especially when its flagship Midtown restaurant has nothing physically wrong with it. Thus, the reading that "gives effect to all provisions of the Policy" is that "direct physical loss or damage" requires "actual, physical damage to the insured premises." *Newman Myers*, 17 F. Supp. 3d at 332.

What the plain meaning of the business income coverage provision suggests is the correct interpretation, case law confirms. This Court is bound to apply New York law "as interpreted by New York's intermediate appellate courts" unless there is "persuasive evidence that the New York Court of Appeals, which has not ruled on this issue, would reach a different conclusion." *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 134 (2d Cir. 1999).

The decision of the Appellate Division of the New York Supreme Court in *Roundabout Theater Co. v. Continental Casualty Co.* is on point. There, a major construction accident occurred on the street outside a theater at which a popular musical was being staged. 751 N.Y.S.2d at 5. As a result of this accident, the City of New York closed the street. *Id.* The theater itself did not suffer any relevant damage, but it was forced to cancel nearly three dozen performances of the musical because the street was inaccessible to the public for several weeks. *Id.* The theater

claimed business interruption losses, the insurer denied coverage, and the theater sued. *Id.* at 5-6.

The policy at issue in *Roundabout Theater* provided coverage for “loss of, damage to, or destruction of property or facilities . . . contracted by the insured for use in connection with such [p]roduction, caused by the perils insured against,” and defined perils as “all risks of direct physical loss or damage to the [theater’s] property.” *Id.* at 8. Reading these provisions together, the Appellate Division held that the policy “clearly and unambiguously provide[d] coverage only where the insured’s property suffers direct physical damage” and thus “the only conclusion that can be drawn is that the business interruption coverage is limited to losses involving physical damage to the insured’s property.” *Id.* The court rejected the theater’s argument that “loss of” must include “loss of use of” the insured premises. *Id.* Therefore, because the theater did not suffer physical damage, it was not entitled to coverage. *Id.* at 10.

Another court in this District applied *Roundabout Theater* to reject a similar claim that “loss of use” constitutes “direct physical loss or damage.” *Newman Myers*, 17 F. Supp. 3d at 325. In *Newman Myers*, a New York City law firm lost power for several days after Hurricane Sandy struck the New York region. *Id.* The law firm sued its insurer after it denied business income coverage. *Id.* at 328. The “decisive question” for the court was “whether the insured premises experienced ‘direct physical loss or damage’” because the firm’s employees could not access the office. *Id.* The court held that it did not and thus the firm was not entitled to business income coverage. *Id.* at 333. In reaching this holding, and citing *Roundabout Theater*, the court explained that “[t]he words ‘direct’ and ‘physical,’ which modify the phrase ‘loss or damage,’ ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse-business consequences that flow from such closure.” *Id.* at 331. Further, the court explained it was

“unaware of authority supporting [the plaintiff’s] argument that ‘direct physical loss or damage’ should be read . . . to extend to mere loss of use of a premises, where there has been no physical damage to such premises.” *Id.*

As a result of COVID-19 closure orders throughout the country, many businesses have brought lawsuits claiming entitlement to coverage under provisions materially similar to those at issue in *Roundabout Theater, Newman Myers*, and here. And nearly every court to address this issue has concluded that loss of use of a premises due to a governmental closure order does not trigger business income coverage premised on physical loss to property. *See, e.g., T & E Chicago LLC v. Cincinnati Ins. Co.*, No. 20 Civ. 4001, 2020 WL 6801845, at *5 (N.D. Ill. Nov. 19, 2020) (granting insurer’s motion to dismiss because “loss of use of property without any physical change to that property cannot constitute direct physical loss or damage to the property”); *Long Affair Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.*, No. 20 Civ. 1713, 2020 WL 6865774, at *3 (C.D. Cal. Nov. 12, 2020) (granting insurer’s motion to dismiss because “there was no physical damage to [p]laintiff’s business premises”); *Water Sports Kauai, Inc. v. Fireman’s Fund Ins. Co.*, No. 20 Civ. 3750, 2020 WL 6562332, at *5-7 (N.D. Cal. Nov. 9, 2020) (granting insurer’s motion to dismiss because loss of use did not constitute “direct physical loss of or damage to” property); *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 20 Civ. 87, 2020 WL 6503405, at *6 (S.D. Miss. Nov. 4, 2020) (granting insurer’s motion to dismiss because the complaint failed to allege “that any insured property was damaged or that [p]laintiff was permanently dispossessed of any insured property”); *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 20 Civ. 22833, 2020 WL 6392841, at *8 (S.D. Fla. Nov. 2, 2020) (granting insurer’s motion to dismiss because the plaintiff failed to allege “any physical harm” to the property); *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 20 Civ. 401, 2020 WL 6436948, at *5 (S.D.W. Va. Nov. 2, 2020) (granting insurer’s motion

to dismiss because “economic losses unaccompanied by physical property damage” did not constitute direct physical loss or damage to property); *Seifert v. IMT Ins. Co.*, No. 20 Civ.1102, 2020 WL 6120002, at *3 (D. Minn. Oct. 16, 2020) (granting insurer’s motion to dismiss because the Governor of Minnesota’s closure orders “prohibiting the use of property” were “not enough” to trigger coverage); *Henry’s La. Grill, Inc. v. Allied Ins. Co. of Am.*, No. 20 Civ. 2939, 2020 WL 5938755, at *6 (N.D. Ga. Oct. 6, 2020) (granting insurer’s motion to dismiss because the Governor of Georgia’s closure orders “did not create a ‘direct physical loss of’ the [p]laintiffs’ dining rooms”); *Mark’s Engine*, 2020 WL 5938689, at *4 (granting insurer’s motion to dismiss because the phrase “direct physical loss of” does not encompass “deprivation of property without physical change in the condition of the property”); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd’s London Known as Syndicate PEM 4000*, No. 20 Civ. 1605, 2020 WL 5791583, at *5 (M.D. Fla. Sept. 28, 2020) (granting insurer’s motion to dismiss because “there is simply no coverage under the policies if they require ‘direct physical loss of or damage’ to property”); *Sandy Point Dental, PC*, 2020 WL 5630465, at *3 (granting insurer’s motion to dismiss because the plaintiff’s claim for coverage amounted to “financial losses as a result of the closure orders” which did not constitute a “direct physical loss”); *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20 Civ. 11655, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020) (granting insurer’s motion to dismiss because the complaint did not allege “some tangible damage” to the property); *10E, LLC v. Travelers Indem. Co. of Conn.*, No. 20 Civ. 4418, 2020 WL 5359653, at *5 (C.D. Cal. Sept. 2, 2020) (granting insurer’s motion to dismiss because “[a]n insured cannot recover by attempting to artfully plead temporary impairment to economically valuable use of property as physical loss or damage”); *Diesel Barbershop LLC v. State Farm Lloyds*, 20 Civ. 461, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) (granting insurer’s motion to dismiss because the plaintiffs failed to

plead a direct physical loss).³

Sparks’s arguments to the contrary are unavailing. First, Sparks attempts to get out from under this weight of authority by arguing that *Roundabout Theater*, *Newman Myers*, and many of the recent COVID-19 decisions from courts around the country were “wrongly decided” or “off base” because they treated the terms “loss of” and “damage to” as “coextensive.” Opposition at 12 & n.3. This mischaracterizes this line of cases. In fact, the Appellate Division rejected a similar argument in *Roundabout Theater*:

The [lower] court’s interpretation that the phrase ‘loss of’ must include ‘loss of use of,’ because otherwise ‘loss of’ would be redundant to ‘destruction of,’ is flawed. Initially, as [defendant] points out, ‘loss of’ could refer to the theft or misplacement of theatre property that is neither damaged nor destroyed, yet still requires the cancellation of performances.

751 N.Y.S.2d at 8.

A close analysis of the text of the provision here confirms that the terms “loss” and “damage” are not superfluous. First, as noted in *Roundabout Theater*, the term “loss” would seem to include “theft or misplacement,” which would not constitute damage to the property. *Id.* Further, “loss” would extend to the *complete* destruction of property, whereas “damage” contemplates a lesser injury. *See Real Hosp., LLC*, 2020 WL 6503405, at *6 (“[I]n a restaurant with ten tables, there could be a fire, which completely burns up five of the tables—thus there [would be] a ‘direct physical loss of property.’” (emphasis added)); *Henry’s La. Grill*, 2020 WL

³ One court in this District has addressed a related issue. In *Social Life Magazine, Inc. v. Sentinel Insurance Co.*, No. 20 Civ. 3311 (VEC) (S.D.N.Y.), Dkt. 8-19, the plaintiff sought a preliminary injunction ordering the defendant insurance company to provide coverage for loss of business income resulting from COVID-19 closure orders. In an oral ruling on May 14, 2020, the Honorable Valerie E. Caproni denied this motion. *See Motion to Dismiss*, Exh. D at 15. Judge Caproni noted that New York law requires “some damage to the property” and concluded that the plaintiff’s claims, which were largely indistinguishable from those here, were “just not what’s covered under these insurance policies.” *Id.*

5938755, at *5 (“As an illustrative example, a tornado that destroys the entirety of the restaurant results in a ‘loss of’ the restaurant, while a tree falling on part of the kitchen would represent ‘damage to’ the restaurant.”). Thus, Sparks’s argument that “direct physical loss of” then “*must* encompass loss of use,” Opposition at 9 (emphasis added), is an untenable leap in logic.

Next, Sparks points to the Policy’s commercial general liability section’s definition of “property damage” as “[l]oss of use of tangible property that is not physically injured,” Policy at 139, and argues that the Court should apply it to the business income coverage provision, Opposition at 9. But the business income coverage provision is not part of the commercial general liability section. It is a part of the Policy’s commercial *property* section. See Policy at 27. Were the court nonetheless to use the commercial general liability section’s definition of “property damage” to interpret a provision of the commercial property section, Sparks’s “loss of use” argument would be bolstered. But the Court declines to do so.

Sparks’s only rationale for applying this definition to the business income coverage provision is so that terms would have “consistent meaning when reading the Policy as a whole.” Opposition at 9. However, the fact that the Policy includes several different definition sections counsels against this. Compare Policy at 66-67 (listing definitions for the business income coverage provision) with Policy at 137-40 (listing definitions for the commercial general liability section). This means that the same word or phrase may mean different things in different sections of the Policy. Compare Policy at 67 (defining “[o]ccurrence” as “all loss, damage or sequence of loss or damage, casualties or disasters arising from a single happening or event”) with Policy at 139 (defining “[o]ccurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions”). While Sparks asks the Court to give terms in the Policy “consistent meaning,” it is clear that the drafters of the Policy declined to do that.

The Court's reluctance to accept Sparks's argument here is further supported by the fact that the business income coverage and commercial general liability sections protect "wholly different interests." *Great N. Ins. Co. v. Mount Vernon Fire Ins. Co.*, 92 N.Y.2d 682, 688 (1999). As mentioned, business income coverage is found within the commercial property section of the Policy. Policy at 27. This is a type of "first-party" insurance that protects property interests. *Great N. Ins. Co.*, 92 N.Y.2d at 688. "[T]he goal of first-party property coverage . . . is to reimburse the insured for the insured's actual property loss, dollar for dollar, but no more." *Id.* On the other hand, the commercial general liability portion of the Policy is "third-party insurance," *id.*, which protects Sparks for claims it "becomes legally obligated to pay as damages," Policy at 125. *See Gap, Inc. v. Fireman's Fund Ins. Co.*, 782 N.Y.S.2d 242, 244 (App. Div. 2004) ("[T]he purpose of general liability insurance is to provide coverage for liability to third parties."). The Court sees no reason to cross wires between different definition sections of the Policy, especially when those sections protect entirely different interests.

Finally, Sparks points to a number of out-of-state cases for support of its argument that "an insured suffers a 'physical loss' if the structure is uninhabitable or unusable, even in the absence of physical damage." Opposition at 8. But these cases involve situations in which a plaintiff claimed that some harmful or unwanted substance entered its premises and made it impossible to use. They are therefore distinguishable because Sparks makes clear that COVID-19 was never found on its premises and that it has no reason to think the virus contaminated or damaged anything at the restaurant, let alone made it uninhabitable. Compl. ¶ 43 (explaining that coronavirus was not "found in or on [Sparks's] insured property"); Opposition at 18 ("[T]here is no allegation, and no evidence, that the virus existed on or at [Sparks's] property."); *id.* at 20 ("There has been no infestation or contamination of Sparks' property by coronavirus, nor are there any allegations that

would support such an assumption.”).

Sparks relies heavily on *Port Authority of New York and New Jersey v. Affiliated FM Insurance Co.*, 311 F.3d 226 (3d Cir. 2002). In that case, the plaintiff argued that the presence of asbestos in several of its buildings constituted a “physical loss or damage.” *Id.* at 230. Although the Third Circuit recognized that “the presence of large quantities of asbestos in the air of a building [that] make the structure uninhabitable and unusable” can constitute a loss in certain circumstances, the court ultimately affirmed summary judgment in favor of the insurer because the buildings’ functions were not “nearly eliminated or destroyed,” but rather enjoyed “continuous and uninterrupted usage.” *Id.* at 236. Thus, this case only further bolsters Admiral’s argument for dismissal because Sparks fails to argue that its restaurant was “nearly eliminated or destroyed” because of the presence of COVID-19. The other cases Sparks cites also do not support its position because they too involved situations in which the loss of use was a result of the presence of something harmful. For example, in *TRAVCO Insurance Co. v. Ward*, 715 F. Supp. 2d 699, 701, 708-09 (E.D. Va. 2010), *aff’d*, 504 F. App’x 251 (4th Cir. 2013), the court held that a building had suffered a “direct physical loss” because it had been “rendered uninhabitable by the toxic gases released by the Chinese Drywall,” but then went on to deny coverage anyway because four exclusions applied. Other cases Sparks cites are distinguishable for similar reasons. *See Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 12 Civ. 4418, 2014 WL 6675934, at *8 (D.N.J. Nov. 25, 2014) (holding that a juice plant incurred “physical loss of or damage to” its facility when ammonia gas was discharged into the plant’s air and rendered the facility “unfit for occupancy”); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 299 (Minn. Ct. App. 1997) (involving “asbestos contamination of [the plaintiff’s] buildings”). These cases are therefore inapposite because nothing has contaminated Sparks’s restaurant rendering it inaccessible. Compl.

¶ 43

Indeed, the main COVID-19-related case that Sparks cites in its favor is distinguishable along these very lines as well. In *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20 Civ. 3127, 2020 WL 4692385, at *9 (W.D. Mo. Aug. 12, 2020), the court denied an insurer’s motion to dismiss because plaintiff beauty salons and restaurants alleged that COVID-19 “attached to and deprived [p]laintiffs of their property, making it unsafe and unusable, resulting in direct physical loss to the premises and property.” *Id.* at *4 (internal quotation marks and citation omitted). These plaintiffs thus “expressly allege[d] physical contamination.” *Id.* at *6. Sparks does not. *See also Mudpie, Inc.*, 2020 WL 5525171, at *6 (distinguishing *Studio 417* because the plaintiffs in *Studio 417* alleged that “the presence of the COVID-19 virus in its store created a physical loss,” whereas the *Mudpie* plaintiffs only focused on closure orders, a “distinctly less physical phenomenon”).⁴

None of the facts pleaded in the Complaint suggest that the suspension in Sparks’s operation was “caused by direct physical loss of or damage to property.” Policy at 56. Sparks therefore has failed to plead allegations that would entitle it to the requested declaratory relief as to the Policy’s business income provision. Nor has Sparks sufficiently alleged any breach of contract as to that provision. Accordingly, Counts One and Two of the Complaint are dismissed.

D. Extra Expense Coverage

Sparks also claims entitlement to extra expense coverage by alleging that it sustained expenses that it would not have incurred but for Sparks’s closure. Compl. ¶¶ 100, 105. These claims necessarily fail for two reasons. First, extra expense coverage only applies if business income coverage applies. *See* Compl. ¶ 38; Policy at 56. Because the Court concludes that business income coverage does not apply here, extra expense coverage does not either. Relatedly,

⁴ The insurance policy at issue in *Studio 417* did not contain a virus exclusion provision. *Studio 417*, 2020 WL 4692385, at *1.

extra expense coverage—like business income coverage—requires that Sparks suffer a “physical loss or damage to property.” Compl. ¶ 38; Policy at 56. As detailed above, the Complaint fails to plead facts alleging such “physical loss or damage.” Therefore, because Sparks has not alleged sufficient facts with respect to the extra expense provision to establish the declaratory relief it seeks or to establish a breach of contract, Counts Five and Six of the Complaint are dismissed.

E. Civil Authority Coverage

The Court next turns to Sparks’s claim that it is entitled to coverage under the Policy’s civil authority provision. Compl. ¶¶ 85, 92. As relevant here, this type of coverage requires Sparks to plead, *inter alia*, two prerequisites: (1) that there was “damage to property other than [its own]” and (2) that “action of civil authority [] prohibit[ed] access” to both Sparks and to the area immediately surrounding the damage. Compl. ¶ 39; Policy at 57. Because Sparks has not pleaded facts establishing either of these prerequisites, Sparks’s claims related to civil authority coverage fail as well.

First, the Complaint fails to allege any specific damage to property near Sparks. Instead, Sparks only vaguely alludes to the fact that the closure orders affected businesses besides itself. Compl. ¶ 30 (discussing “restaurants and bars” generally); Opposition at 16 (“For the same reasons set forth above regarding the loss of Sparks’ own property caused by New York’s Closure Orders, other property within one mile of Sparks’ insured property was likewise damaged by those same Orders, and in response to the same dangerous condition, access to Sparks’ property was prohibited.”).

Other courts have repeatedly rejected such ill-defined assertions. For example, a court in the Northern District of California rejected a similar claim by the owner of several Hawaiian stores subject to COVID-19 closure orders, holding that “[i]n the absence of any allegation that any

specific neighboring property to [plaintiffs' property] in Hawaii had actual coronavirus exposure, this coverage has not plausibly been triggered.” *Water Sports Kauai*, 2020 WL 6562332, at *8 (emphasis omitted). In another case in the Northern District of Georgia, the court dismissed a restaurant’s claim for civil authority coverage, in part, because the plaintiffs did not identify “any particular property around their premises which was damaged by COVID-19 or had its access restricted by a civil authority.” *Henry’s La. Grill, Inc.*, 2020 WL 5938755, at *6; *see also Seifert*, 2020 WL 6120002, at *4 (rejecting a civil authority claim and explaining that “if a complaint does not plead facts alleging some actual contamination or damage to property to a neighboring property, then the complaint does not state a plausible claim to relief.”). So too here. Without specific allegations that a neighboring property suffered “damage to property,” the Complaint fails to state a claim that is plausible on its face as to Sparks’s entitlement of civil authority coverage.

Second, even if Sparks had properly alleged that neighboring property suffered damage, the Complaint fails to allege that access was ever denied to Sparks or the area immediately surrounding the damaged neighboring property, two necessary prerequisites for this form of coverage. *See* Compl. ¶ 39; Policy at 57. Under the Policy, civil authority coverage would only apply if, among other requirements, a civil authority “prohibit[ed] access to [Sparks]” and prohibited “[a]ccess to the area immediately surrounding the damaged property.” Compl. ¶ 39; Policy at 57. In *54th Street Ltd. Partners v. Fidelity and Guaranty Insurance Co.*, the Appellate Division held that a restaurant’s claim for civil authority coverage was properly limited to two days on which “access to its premises was denied.” 763 N.Y.S.2d 243, 244 (App. Div. 2003). However, this coverage did not extend to later days when “vehicular and pedestrian traffic in the area was diverted” because during this time “access to the restaurant was not denied” since “the restaurant was accessible to the public, plaintiff’s employees and its vendors.” *Id.*

Similar issues arose in the wake of the terrorist attacks of September 11, 2001. In *Philadelphia Parking Authority v. Federal Insurance Co.*, a parking garage company located at Philadelphia International Airport sued for lost income stemming from a federal order grounding all airplanes. 385 F. Supp. 2d at 283. The court granted the insurer’s motion to dismiss because, although the order “may have temporarily obviated the need for [p]laintiff’s parking services, it did not prohibit access to [p]laintiff’s garages and therefore cannot be used to invoke coverage.” *Id.* at 289. The same was true in *Abner, Herrman & Brock, Inc. v. Great Northern Insurance Co.*, 308 F. Supp. 2d 331, 333 (S.D.N.Y. 2004). There, the court held that a Manhattan broker-dealer was entitled to civil authority coverage from September 11, 2001 through September 14, 2001 because on those dates, access to the firm’s Lower Manhattan office was completely prohibited by civil authority. *Id.* at 336. However, civil authority coverage did not apply during later dates when “pedestrian access was permitted, and public transit was available” even though “vehicular traffic was restricted.” *Id.* at 333.

Here, Sparks has not alleged that access was ever denied completely to the restaurant or to the area immediately surrounding any neighboring damaged property. Nor does the Complaint allege that delivery workers, restaurant employees, or customers could not access the address. Instead, it only claims that the closure orders limited restaurants like Sparks to serve “take-out and delivery” items. Compl. ¶ 30. And the closure orders confirm this. Motion to Dismiss, Exh. B, § 7 (“[E]stablishments serving food and/or drink (including restaurants, bars, and cafes) may remain open for the sole purpose of providing take-out or delivery service.”); Opposition, Exh. C (“Any restaurant or bar in the state of New York . . . until further notice shall only serve food or beverage for off-premises consumption.”). The fact that Sparks could have continued to operate its restaurant in some capacity is fatal to Sparks’s claims for civil authority coverage.

Sparks's response is that the closure orders "made it illegal for Sparks to allow patrons into its restaurant." Opposition at 16. However, Sparks fails to cite any authority to support the idea that this would trigger civil authority coverage. This novel theory is without merit because under the plain meaning of the Policy, if employees (but not patrons) were allowed access to the indoor portions of the restaurant, civil authority did not prohibit access. For example, a court in the Southern District of California dismissed a claim for civil authority coverage because "the complaint does not allege that any COVID-19 [c]ivil [a]uthority [o]rders prohibited [p]laintiffs from access to their business premises." *Pappy's Barber Shops, Inc.*, 2020 WL 5500221, at *6; *see also Sandy Point Dental*, 2020 WL 5630465, at *3 ("[W]hile coronavirus orders have limited plaintiff's operations, no order issued in Illinois prohibits access to plaintiff's premises."). Moreover, as noted above, the Complaint acknowledges that the closure orders did not extend to take-out orders and deliveries. Compl. ¶ 30. Access to non-Sparks employees therefore was not even restricted by the closure orders, as the restaurant remained permitted to process delivery and take-out orders.

The Complaint fails to plead that the area surrounding Sparks suffered damage or that a civil authority order completely barred access to Sparks and the area immediately surrounding any neighboring damaged area. As with the Policy's business income and extra expense provisions, Sparks has failed to allege sufficient facts to establish its entitlement to the sought declaratory relief or to present a plausible breach of contract claim as to the civil authority provision. Counts Three and Four are therefore dismissed.⁵

⁵ Sparks fails to adequately plead entitlement to coverage under any of the three provisions at issue here. Therefore, the Complaint must be dismissed. Admiral also argues that, even if Sparks could establish entitlement to coverage, the virus exclusion, the ordinance or law exclusion, and the act or decision exclusion would bar coverage. Motion to Dismiss at 8-13. These exclusions only apply if entitlement to coverage under one of the Policy's provisions is first established. Because the Court concludes that Sparks fails to establish entitlement to coverage

F. Other Claims

Sparks brought this action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3) on behalf of itself and “all other persons similarly situated.” Compl. ¶ 49. To the extent that Sparks sought class certification in its Complaint, *see id.* at 29, the Court does not reach this because the Court today grants the motion to dismiss as to all claims that Sparks brought. *See id.* ¶ 52.

Finally, the Complaint noted in passing that it sought a declaratory judgment that the Policy “provides coverage for future civil authority orders that result in future suspensions or curtailments of business operations.” *Id.* ¶ 9. The Court does not read the Complaint’s declaratory judgment counts as seeking such relief, but instead understands them to focus on the closure orders already issued. *Id.* ¶¶ 62-68, 79-85, 94-100. If Sparks meant to seek a declaratory judgment that the Policy also provides coverage for future orders, Sparks would not be entitled to such an advisory opinion by this Court. *See Olin Corp. v. Consol. Alum. Corp.*, 5 F.3d 10, 17 (2d Cir. 1993).

III. Conclusion

For the foregoing reasons, Admiral’s Motion to Dismiss, Dkt. 24, is GRANTED. Sparks did not move this Court for leave to amend the Complaint, and, in all events, the Court finds that allowing leave to amend would be futile. Therefore, the case is DISMISSED with prejudice. The Clerk of Court is respectfully directed to close this case.

SO ORDERED.

Dated: December 11, 2020
New York, New York



JOHN P. CRONAN
United States District Judge

under the Policy, it need not reach the question of whether these various exclusions would apply.

EXHIBIT 38

IN THE CIRCUIT COURT OF THE 20TH
JUDICIAL CIRCUIT IN AND FOR LEE
COUNTY, FLORIDA

CASE NO.: 20-CA-004555

CATLIN DENTAL, P.A.,

Plaintiff,

v.

THE CINCINNATI INDEMNITY
COMPANY,

Defendant.

_____ /

ORDER GRANTING MOTION TO DISMISS COMPLAINT

THIS MATTER came before the Court for a hearing via Zoom telephone and video conference on November 23, 2020, on Defendant's, The Cincinnati Indemnity Company ("Cincinnati"), Motion to Dismiss Complaint and Incorporated Memorandum of Law filed on September 15, 2020 (the "Motion to Dismiss"). Plaintiff, Catlin Dental, P.A. ("Catlin"), filed a Memorandum of Law in Opposition to Defendant's Motion to Dismiss on November 18, 2020 (the "Opposition"). Additionally, Cincinnati filed Notices of Supplemental Authority on November 17 and 20, 2020 and Catlin filed Notices of Filing on September 17 and November 18, 2020 (collectively, the "Notices"). Having reviewed the Motion to Dismiss, the Opposition, the Notices, considered the argument of counsel at the hearing, and analyzed the applicable legal authority, the Court finds that the Motion to Dismiss should be **GRANTED without leave to amend**, for the reasons discussed below.

BACKGROUND

This action concerns Catlin's request for insurance coverage under a commercial property insurance policy issued by Cincinnati for its alleged loss of business income and extra expense relating to the ongoing COVID-19 pandemic.

Catlin filed its Complaint and Demand for Jury Trial (the "Complaint") against Cincinnati in this Court on July 14, 2020. According to the Complaint, Catlin conducts business as a general dentistry practice located at 4447 Camino Real Way, Fort Myers, FL 33966 (the "Insured Premises"). Catlin entered into an insurance contract with Cincinnati to insure Catlin's business premises under a policy number CAP 507 69 15 (the "Policy").¹ The effective dates of the Policy are from January 2, 2018 to January 2, 2021.

Beginning in or about March 2020, Catlin allegedly sustained a severe business interruption resulting from government executive orders limiting dental offices to only emergency procedures. Specifically, in support of Catlin's contention that it had to limit the scope of its practice, the Complaint references an executive order entered in or about March 2020. Catlin further contends that it sustained "business losses and extra expenses, and related losses resulting from actions taken by civil authorities to stop the human and surface to human spread of the COVID-19 outbreak." *Complaint*, ¶ 15. Catlin alleges that its losses and expenses are covered under the Policy. Cincinnati denied the claim because the loss at issue did not come within the coverage grant of the Policy and because the Policy's "pollutant" exclusion also barred coverage.

¹ A copy of the Policy was not attached to the Complaint, but was nevertheless incorporated by reference. *See Complaint*, ¶ 7. Under Florida law, where the terms of a legal document are incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss. *See One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015); *Veal v. Voyager Prop. & Cas. Ins. Co.*, 51 So. 3d 1246, 1249 (Fla. 2d DCA 2011).

The Complaint asserts two causes of action against Cincinnati: breach of contract (Count I) and declaratory judgment (Count II). Regarding Count I, in Catlin's view, Cincinnati breached the Policy by failing to provide coverage under the Policy's Business Income, Extra Expense and Civil Authority provisions. In Count II, Catlin seeks a declaration that "Defendant has erroneously refused to provide all or part of the police [sic] benefits that the Plaintiff is due" as a result of Catlin's alleged business income losses and extra expenses incurred in result to the COVID-19 pandemic. *Complaint*, ¶ 30.

Cincinnati moves to dismiss the Complaint with prejudice as to both counts. In support of its motion, Cincinnati makes four primary arguments. First, Cincinnati argues that Catlin is not entitled to Business Income or Extra Expense coverage because it does not allege any direct physical loss or damage to the Insured Premises, which is required for coverage. Second, Catlin is not entitled to Civil Authority coverage because the Complaint does not allege direct physical loss or damage to other property and does not allege a prohibition of access to the Insured Premises. Third, Cincinnati argues that even if Catlin had alleged direct physical loss, the Policy's "pollutant" exclusion would otherwise apply to bar coverage. Finally, Cincinnati argues that since there has not been a breach of contract and Count II is otherwise subsumed within Count I, then Count II must also be denied. Cincinnati also raises other procedural deficiencies with Count II.

Catlin responds in its Opposition that it has stated actionable claims. Catlin makes three primary arguments. First, Catlin argues that the Complaint sufficiently alleges "loss of or damage to" property. Secondly, Catlin argues that cases involving other types of "contamination" illustrate that there has been "physical loss of or damage to property" in this action. *Opposition*, p. 6. Finally, Catlin argues that the executive order "barred them from normal lawful access to their practice," which shows why Catlin should qualify for Civil Authority coverage. *See id.*, p. 12.

LEGAL STANDARD

Rule 1.140(b) of the Florida Rules of Civil Procedure governs motions to dismiss. “The function of a motion to dismiss a complaint is to raise a question of law as to the sufficiency of the facts alleged to state a cause of action.” *Reed v. Sampson*, 349 So. 2d 684 (Fla. 4th DCA 1977). When confronted with a motion to dismiss, a court must determine whether the complaint, as phrased within its four corners, sufficiently states a cause of action whereby relief can be granted. *See Fox v. Professional Wrecker Operators of Fla., Inc.*, 801 So. 2d 175 (Fla. 5th DCA 2001).

Under Florida procedural law, a complaint that simply strings together a series of sentences and paragraphs containing legal conclusions and theories does not establish a claim for relief. *See Fla. R. Civ. P. 1.110*; *see also Barrett v. City of Margate*, 743 So. 2d 1160, 1162–63 (Fla. 4th DCA 1999) (“It is insufficient to plead opinions, theories, legal conclusions or argument.”). The complaint must set out the elements and the facts that support the claims so that the court and the defendant can clearly determine what is being alleged. *See id.*, *see also Messana v. Maule Indus.*, 50 So. 2d 874, 876 (Fla. 1951) (a complainant must “plead [a] factual matter sufficient to apprise his adversary of what he is called upon to answer so that the court may, upon proper challenge, determine its legal effect.”).

Although the pleading of strict forms of causes of action is no longer required under Florida law, the Florida Supreme Court has nevertheless held that in order for a claim to be legally sufficient, the plaintiff must plead ultimate facts to support each element of the cause of action asserted. *See Eastern Airlines, Inc. v. King*, 557 So. 2d 574 (Fla. 1990); *see also Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490 (Fla. 3d DCA 1994). “Ultimate facts” are those facts “found in that vaguely defined field lying between evidentiary facts on the one side and the primary issue or conclusion of law on the other.” *Black v. Rouse*, 587 So. 2d 1359 (Fla. 4th DCA 1991).

A pleading is insufficient if contains merely conclusions as opposed to ultimate facts supporting each element of the cause of action. *See Price v. Morgan*, 436 So. 2d 1116 (Fla. 5th DCA 1983).

Similar principles apply in federal courts.² Specifically, a complaint that patches together a string of legal conclusions will not survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”). If legal conclusions are alleged, they are not deemed true for purposes of a motion to dismiss. *Id.* (“[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”). As the U.S. Supreme Court has long held, “we are not bound to accept as true a legal conclusion couched as a factual allegation.” *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Likewise, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation omitted).

When considering insurance coverage disputes, courts routinely dismiss complaints for failure to state a claim when a review of the insurance policy and the underlying claim for which coverage is sought unambiguously reveals that the claim is not covered. *See, e.g., Zodiac Group, Inc. v. Axis Surplus Ins. Co.*, 542 Fed. App’x 844 (11th Cir. 2013) (affirming dismissal of complaint because the “plain language of the Policy precluded coverage” for the underlying claim); *Cammarota v. Penn-Am. Ins. Co.*, 2017 WL 5956881, at *2 (S.D. Fla. Nov. 13, 2017) (granting motion to dismiss with prejudice “because the Auto Exclusion precludes coverage for the Underlying Claims.”); *MJCM, Inc. v. Hartford Cas. Ins. Co.*, 2010 WL 1949585 (M.D. Fla.

² *See* Author’s Comment to Fla. R. Civ. P. 1.110 (noting that “[p]leadings under the Florida Rules are now similar to the Federal Rules.”); *see also Carriage Hills Condo., Inc. v. JBH Roofing & Constructors, Inc.*, 109 So. 3d 329, 334 (Fla. 4th DCA 2013) (“Because our [Florida] rules of court procedures were patterned closely after the federal rules, federal cases interpreting comparable provisions are persuasive and routinely looked to for interpretive guidance.”).

May 14, 2010) (applying Florida law and granting motion to dismiss with prejudice on breach of contract claim because the underlying lawsuit was not covered under the insurance policy at issue).

DISCUSSION

This Court is sympathetic to the plight of so many business owners in the wake of the COVID-19 pandemic. But, this Court cannot allow sympathy to cloud its review of the plain meaning of an insurance policy. Insurance companies cannot bear the burden of this crisis where, as here, the Policy does not provide coverage for purely economic losses resulting from the COVID-19 pandemic. Taking as true the facts alleged in the Complaint, and considering such facts in conjunction with the plain language of the Policy, the Court finds that the Motion to Dismiss should be granted and leave to amend the Complaint would be futile.

I. The Policy

The Policy provides Business Income, Extra Expense, and Civil Authority coverages to the Insured Premises, subject to its terms, conditions, limitations, exclusions and other provisions. Starting with the Policy's Business Income coverage, the Policy states in pertinent part:

We 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" 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" must be caused by or result from a Covered Cause of Loss....

Motion to Dismiss, Policy (attached as Exhibit A) p. CIC00142.

The Policy's Extra Expense coverage also states in pertinent part:

(2) Extra Expense

We will pay "Extra Expense" you incur during the "period of restoration":

- (a)** To avoid or minimize the "suspension" of business and to continue "operations":

- 1) At the “premises”; or
- 2) At replacement locations or at temporary locations, including:
 - a) Relocation expenses; and
 - b) Costs to equip and operate the replacement or temporary locations; or
- (b) To minimize the “suspension” of business if you cannot continue “operations”.

See id., p. CIC00110.

Additionally, the Policy’s Civil Authority coverage states in pertinent part:

(4) Civil Authority

We will pay for the actual loss of “Business Income” you sustain and “Extra Expense” you incur caused by an action of civil authority that prohibits access to the “premises” due to direct physical “loss” to property, other than at the “premises”, caused by or resulting from any Covered Cause of Loss.

See id.

The term “loss” is defined by the Policy as accidental loss or damage. *See id.*, p. CIC00148.

And a Covered Cause of Loss is defined as “RISKS OF DIRECT PHYSICAL LOSS unless the ‘loss’ is ...” excluded or limited. *See id.*, p. CIC00098.

II. Insurance Contract Interpretation in Florida

Under Florida law, insurance contracts must be construed in accordance with their plain language. *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003). Insurance contracts are to be interpreted and construed in a manner that is “reasonable, practical, sensible, and just.” *Colony Ins. Co. v. Montecito Renaissance, Inc.*, 2011 WL 4529948, *3 (M.D. Fla. Sept. 30, 2011). “[I]f a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision.” *Taurus Holdings*,

Inc. v. USF&G, 913 So. 2d 528, 532 (Fla. 2005). Courts should “attempt to construe the contractual language in a manner which gives all the provisions effect.” *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 739 (Fla. 2002).

A provision is not rendered ambiguous simply because it is complex and requires analysis for application. *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007). Only “when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction is the rule apposite. It does not allow courts to rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties.” *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986). The mere fact that parties argue for different interpretations does not make a policy ambiguous and a court will not construe an insurance policy to reach an absurd result. *Deni Assocs. of Fla. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1140 (Fla. 1998).

III. The Complaint Fails to Allege Direct Physical Loss or Damage

As an initial matter, we are dealing with a property insurance policy in this action. Turning first to the Business Income coverage argument, Catlin argues that the Motion to Dismiss should be denied because COVID-19 particles existed in the air and the risk of the COVID-19 pandemic outweighed continued operations. But, Catlin did not identify any actual presence of the virus at the Insured Premises or resulting damage.

The Court is in agreement with the cases cited by Cincinnati in its motion and by its counsel during the November 23 hearing that there needs to be a distinct, demonstrable, physical alteration of the structural integrity of the property in order to have direct physical loss or damage to the property. Airborne particles and the mere presence of a virus in the community do not constitute direct physical loss to the property. *See, e.g., DAB Dental PLLC d/b/a Sunshine Dentistry v. Main*

Street Am. Protection Ins. Co., No. 20-CA-5504 (Fla. Cir. Ct., Hillsborough Cty. Nov. 10, 2020) (Florida law “reflect[s] that actual, concrete damage is necessary.” (citation omitted); *Dime Fitness, LLC d/b/a Anytime Fitness v. Markel Ins. Co.*, No. 20-CA-5467 (Fla. Cir. Ct., Hillsborough Cty. Nov. 10, 2020) (“Plaintiff does not allege a direct physical loss); *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-CV-22833, 2020 WL 6392841, at *8 (S.D. Fla. Nov. 2, 2020) (“The Complaint does not allege any physical harm to Plaintiffs’ Covered Property much less ‘direct physical loss of or physical damage’ caused by or resulting from a ‘Covered Cause of Loss.’”); *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIV-WILLIAMS/TORRES, 2020 WL 5051581, at *5-7 (S.D. Fla. Aug. 26, 2020) (“courts in our district have found that “[a] direct physical loss ‘contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.’ ... Plaintiff only alleges that two Florida Emergency Orders forced the closure of its restaurant. And, as stated earlier, courts have found this to be insufficient to state a claim because there must be some allegation of actual harm.”) (citation omitted); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd’s*, No. 8:20-cv-1605-T-30AEP, 2020 WL 5791583, at *3-5 (M.D. Fla. Sept. 28, 2020) (“Plaintiff argues that economic damage is synonymous with ‘physical loss’ and is therefore covered under the Policies. Plaintiff’s argument is unpersuasive because Florida law and the plain language of the Policies reflect that actual, concrete damage is necessary.... Significantly, Plaintiff is not the first insured to seek coverage due to COVID-19 government shutdown orders under a policy that limits coverage to losses caused by direct physical loss or damage to the property. Courts across the country have held that such coverage does not exist where, as here,

policyholders fail to plead facts showing physical property damage.... there is simply no coverage under the policies if they require ‘direct physical loss of or damage’ to property.”).

Catlin relies upon the opinions from *Studio 417, Inc. v. The Cincinnati Ins. Co.*, No. 20-cv-03127-SRB, 2020 WL 4692385 (W.D. Mo., Aug. 12, 2020) and *North State Deli, LLC v. The Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281508 (N.C. Super. Durham Cty., Oct. 10, 2020) in support of its argument that the allegations in the Complaint command a different result. However, the Court disagrees. Not only are these cases from jurisdictions outside of this State and do not apply Florida law, the Court finds that neither of these cases is persuasive or well-reasoned.

Catlin further argues that it incurred extra expense in the form of extra expense to decontaminate its business. However, Catlin does not allege any facts to support a finding that COVID-19 was present at the Insured Premises. Additionally, Cincinnati correctly argues that under Florida law, if the property can be cleaned, it has not sustained direct physical loss or damage. See *Malahube, LLC*, 2020 WL 5051581, *8 (citing *Mama Jo’s, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974 (S.D. Fla. June 11, 2018), *aff’d*, 2020 WL 4782369 (11th Cir. Aug. 18, 2020) (the plaintiff in *Mama Jo’s* failed to put forth any evidence that his cleaning claim constituted a direct physical loss); *Infinity Exhibits*, 2020 WL 5791583, at *4 (citing *Malahube*, 2020 WL 5051581, at *8) (“[T]he action should be dismissed because the policy required direct physical loss or property damage and plaintiff had alleged ‘merely [] economic losses—not anything tangible, actual, or physical.’”).

The Coronavirus does not physically alter the appearance, shape, color, structure or other material dimension of property. Even if Catlin had alleged the virus to be present at the Insured Premises, this would be insufficient. See, e.g., *Uncork & Create, LLC v. Cincinnati Ins. Co.*, No. 2:20-CV-00401, 2020 WL 6436948, at *5 (S.D.W. Va. Nov. 2, 2020) (“[E]ven when present,

COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property. Because routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover, and a covered ‘loss’ is required to invoke the additional coverage for loss of business income under the Policy.”). Therefore, there is no direct physical loss triggering coverage under the Policy’s Business Income coverage or Extra Expense coverage.

IV. Civil Authority Coverage

Turning next to the issue of Civil Authority coverage, the Court again, states that there does not appear to be any direct physical loss or damage to property as outlined earlier. For the same reasons, no direct physical loss or damage to other property is alleged. This is required under the Policy’s Civil Authority coverage. Additionally, there was no prohibition of access to the Insured Premises. It was only limited. To the extent that Catlin’s business operations were limited, it could still supply emergency services. Thus, it wasn’t prohibited from conducting all services.

Catlin argues that the Motion to Dismiss should be denied because COVID-19 particles existed in the air and the risk of the COVID-19 pandemic outweighed continued operations. Catlin further relies upon *Studio 417* by arguing that the Policy does not specify what degree of access must be prohibited. Neither of these arguments are persuasive.

The allegations of the Complaint demonstrate that multiple factors required for Civil Authority coverage remain unmet. Thus, the Court finds that Catlin’s claim does not fall within the Civil Authority coverage provisions under the Policy. This Court’s analysis matches that of a growing body of persuasive cases addressing economic loss as a result of the COVID-19

pandemic, and the governmental directives aimed at slowing its spread. *See generally Nahmad, Malaube, Infinity, DAB Dental, Dime Fitness.*

V. The “Pollutant” Exclusion

In addition to a lack of direct physical loss or damage, Cincinnati argues that even if the Policy’s insuring agreements for Business Income, Extra Expense or Civil Authority coverages had been implicated by the allegations in the Complaint, the Policy’s “pollutant” exclusion would apply to bar coverage for Catlin’s claims. The Court is unaware of any cases applying the “pollutant” exclusion to a claim relating to COVID-19. Nevertheless, the Court need not reach the merits of this exclusion because it finds that the Policy’s insuring agreements have not been triggered.³

VI. Count II is Duplicative of, and Subsumed by, Count I

In Count II of the Complaint, Catlin seeks a declaratory judgment that there is coverage for its alleged losses under the Policy. Florida Statute § 86.011 confers trial courts with discretionary jurisdiction to grant declaratory relief. The courts in Florida routinely dismiss declaratory judgment claims that are superfluous because other claims raised in the same complaint will resolve all of the same disputed issues. *See, e.g., McIntosh v. Harbour Club Villas Condo. Ass’n*, 468 So. 2d 1075, 1081 (Fla. 3d DCA 1985) *Kies v. Fla. Ins. Guar. Ass’n*, 435 So. 2d 410, 411 (Fla. 5th DCA 1983); *Taylor v. Cooper*, 60 So. 2d 534, 535 (Fla. 1952). Additionally, the courts are accorded wide discretion under Fla. Stat. § 86.011 regarding their decision to decline jurisdiction to entertain a declaratory judgment proceeding. *See Kelner v. Woody*, 399 So. 2d 35, 37 (Fla. 3d DCA 1981).

³ The Court is not denying the motion to dismiss as it relates to the “pollutant” exclusion coverage.

Here, the Court finds that Count II of the Complaint is subsumed under Count I, a breach of contract action. The Court is not willing to grant discretion to allow the declaratory action to continue when it is granting the Motion to Dismiss on Count I of the Complaint, for the reasons discussed above. Accordingly, Count II is dismissed as well.

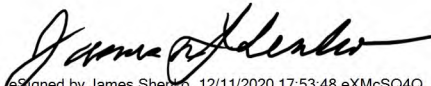
CONCLUSION

After thorough review and careful consideration of the parties' submissions, argument of counsel, and review of state and federal court cases in Florida and other states, the Court finds that the Motion to Dismiss is **GRANTED**. The primary basis for the Court's ruling is that there needs to be a distinct, demonstrable, physical alteration to the structural integrity of property and that has not occurred, nor does the Court believe it can be alleged. The Court further finds that any attempt to amend the pleadings would be futile.

It is therefore **ORDERED AND ADJUDGED** that:

1. The Cincinnati Indemnity Company's Motion to Dismiss Complaint and Incorporated Memorandum of Law is **GRANTED**.
2. Plaintiff's Complaint and Demand for Jury Trial is **DISMISSED without leave to amend**.
3. Plaintiff shall go hence without day.

DONE and ORDERED in Lee County, Florida.



Signed by James Sherko 12/11/2020 17:53:48 eXMcSQ4Q

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EXHIBIT 39

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
SUSAN D. WIGENTON
UNITED STATES DISTRICT JUDGE

MARTIN LUTHER KING COURTHOUSE
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NEWARK, NJ 07101
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December 14, 2020

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LETTER OPINION FILED WITH THE CLERK OF THE COURT

Re: Boulevard Carroll Entm't Grp., Inc. v Fireman's Fund Ins. Co.
Civil Action No. 20-11771 (SDW) (LDW)

Counsel:

Before this Court is Defendant Fireman's Fund Insurance Company's ("Defendant") Motion to Dismiss Plaintiff Boulevard Carroll Entertainment Group, Inc.'s ("Plaintiff") Declaratory Judgment Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). This Court having considered the parties' submissions, having reached its decision without oral argument pursuant to Federal Rule of Civil Procedure 78, and for the reasons discussed below, grants Defendant's motion.

DISCUSSION

A. Standard of Review

An adequate complaint must be "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). This Rule "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted); *see also Phillips v.*

County of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008) (stating that Rule 8 “requires a ‘showing,’ rather than a blanket assertion, of an entitlement to relief”).

In considering a Motion to Dismiss under Rule 12(b)(6), the Court must “accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.” *Phillips*, 515 F.3d at 231 (external citation omitted). However, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. Plaintiff Has Failed to State a Claim Upon Which Relief Can be Granted

This Court writes only for the parties and assumes their familiarity with the procedural and factual history of this matter. Plaintiff is a “full-service music production company” with locations in New Jersey, New York, and Maryland. (D.E. 1-1 ¶¶ 2-3.) When the COVID-19 pandemic reached the east coast of the United States in March, 2020, governors of those three states issued emergency orders (“Stay-at-Home Orders”) to prevent the spread of the virus, which caused Plaintiff to suffer “substantial loss of business income and related expenses.” (*Id.* ¶¶ 4-13.) As a result, Plaintiff sought to recover under a commercial property insurance policy issued by Defendant (the “Policy”) which provides coverage for: 1) “direct physical loss or damage to Property Insured caused by or resulting from a covered communicable disease event at a location;” 2) “the actual loss of business income and necessary extra expense . . . due to the necessary suspension of . . . operations during the period of restoration arising from direct physical loss or damage to property at a location;” and 3) “the actual loss of business income and extra expense you sustain due to the necessary suspension of your operations caused by action of civil authority that prohibits access to a location” provided that the prohibition of access “arise[s] from direct physical loss or damage to property . . .” (*Id.* ¶¶ 14-18, Ex. A at 52, 64, 67-68.) The Policy excludes coverage for loss, damage or expense caused “directly or indirectly or resulting from . . . regardless of any other cause or event that contributes concurrently or in any sequence to the loss [from] . . . disease, sickness, any conditions of health, bacteria, or virus.” (D.E. 1-1 Ex. A at 53-54.) Defendant denied Plaintiff’s claim on April 20, 2020. (D.E. 1-1 ¶ 19, Ex. B.)

Plaintiff then brought suit seeking declaratory judgment that the Policy provides coverage for Plaintiff’s business losses and expenses and raising claims for breach of contract and breach of the covenant of good faith and fair dealing.¹ (*See generally* D.E. 1-1.) Defendant moved to dismiss, and all briefing was timely filed. (D.E. 4, 7, 10.)

¹ Plaintiff initially filed suit in the Superior Court of New Jersey, Bergen County, and Defendant removed to this Court pursuant to diversity jurisdiction on August 28, 2020. (D.E. 1.) As a federal court sitting in diversity, this Court applies the choice-of-law rules of New Jersey to determine which state law controls. *See Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496 (1941); *Maniscalco v. Brother Int’l (USA) Corp.*, 709 F.3d 202, 206 (3d Cir. 2013); *Shapiro v. Logitech, Inc.*, Civ. No. 17-673, 2019 WL 397989, at *6-7 (D.N.J. Jan. 31, 2019). “New Jersey has adopted the [two-part] ‘most significant relationship’ test set forth in the Restatement (Second) of Conflict of Laws.” *Maniscalco*, 709 F.3d at 206 (citing *P.V. ex rel. T.V. v. Camp Jaycee*, 962 A.2d 453, 459-60 (N.J. 2008)). The first step of the inquiry is to determine whether an actual conflict exists. *See Camp Jaycee*, 962 A.2d at 460 (citing *Lebegern v. Forman*, 471 F.3d 424, 430 (3d Cir. 2006)). “That is done by examining the substance of the potentially

Plaintiff has failed to meet its burden to show that its claim falls “within the basic terms of the insurance policy.” *See, e.g. Arthur Anderson LLP v. Fed. Ins. Co.*, 3 A.3d 1279, 1287 (N.J. Super. App. Div. 2010). The Policy unambiguously limits its coverage to physical loss or damage to Plaintiff’s commercial property. Each of the coverage provisions Plaintiff relies on specifically require “direct physical loss or damage” to trigger the Policy. (*See* D.E. 1-1 Ex. A at 52, 64, 67-68.) Here, Plaintiff has not alleged any facts that support a showing that its property was physically damaged. Instead, Plaintiff pleads that by forcing him to close his business, the Stay-At-Home Orders caused Plaintiff to lose income and incur expenses. This is not enough. *See, e.g. Mac Property Grp. LLC v. Selective Fire & Cas. Ins. Co.*, Dkt. No. L-02629, Slip Op. at *15-17 (N.J. Super. Ct. Nov. 5, 2020). In addition, the Policy clearly excludes coverage for damage, loss or expense arising from a virus. (D.E. 1-1 Ex. A at 54.) Because the Stay-at-Home Orders were issued to mitigate the spread of the highly contagious novel coronavirus, Plaintiff’s losses are tied inextricably to that virus and are not covered by the Policy. *See, e.g. Mac Property*, Slip Op. at *15-16 (dismissing claims for coverage where policy contained a virus exclusion provision); *N&S Rest., LLC v. Cumberland Mutual Fire Ins. Co.*, Civ. No. 20-5289, 2020 WL 6501722, at *3-4 (D.N.J. Nov. 5, 2020). Although this Court is sympathetic to the very real losses businesses have suffered during this pandemic, it cannot grant Plaintiff the relief it seeks.²

CONCLUSION

Defendant’s Motion to Dismiss the Declaratory Judgment Complaint is **GRANTED with prejudice**. An appropriate order follows.

/s/ Susan D. Wigenton
SUSAN D. WIGENTON, U.S.D.J.

Orig: Clerk
cc: Parties
Leda D. Wettre, U.S.M.J.

applicable laws to determine whether ‘there is a distinction’ between them.” *Id.* “If there is not an actual conflict, the inquiry is over and, because New Jersey would apply its own law in such a case, a federal court sitting in diversity must do the same.” *Lebegern*, 471 F.3d at 428. Although neither party engages in a meaningful choice of law analysis, this Court is satisfied that there is no conflict between the applicable laws of New Jersey, New York or Maryland. As such, this Court will apply New Jersey law.

² This Court is not alone in this finding, as numerous other federal courts have reached the same conclusion in suits involving similar policy terms. *See, e.g. N&S Rest.*, 2020 WL 6501722, at 2-4 (D.N.J. Nov. 5, 2020); *Hillcrest Optical, Inc. v. Cont’l Cas. Co.*, Civ. No. 20-275, 2020 WL 6163142, at *9 (S.D. Ala. Oct. 21, 2020); *Henry’s Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, Civ. No. 20-2939, 2020 WL 5938755, at *5 (N.D. Ga. Oct. 6, 2020); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd’s London*, Civ. No. 20-1605-T-30AEP, Slip Op. at *10 (M.D. Fl. Sept. 28, 2020); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, Civ. No. 20-3213, 2020 WL 5525171, at *5 (N.D. Cal. Sept. 14, 2020); *Pappy’s Barber Shops, Inc. v. Farmers Group, Inc.*, Civ. No. 20-907, 2020 WL 5500221, at *6 (S.D. Cal. Sept. 11, 2020); *Turek Enter., Inc. v. State Farm Mut. Auto. Ins.*, Civ. No. 20-11655, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020); *10E, LLC v. Travelers Indem. Co. of Conn.*, Civ. No. 20-4418, 2020 WL 5095587, at *4 (C.D. Cal. Aug. 28, 2020); *Malaube, LLC v. Greenwich Ins. Co.*, Civ. No. 20-22615, 2020 WL 5051581, at *8 (S.D. Fla. Aug. 26, 2020); *Diesel Barbershop v. State Farm Lloyds*, Civ. No. 20-461, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020).

EXHIBIT 40

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

RICHARD KIRSCH, DDS,

Plaintiff,

v.

Case No. 20-11930

ASPEN AMERICAN INSURANCE COMPANY,

Defendant.

OPINION AND ORDER GRANTING DEFENDANT’S MOTION TO DISMISS

I. INTRODUCTION

Plaintiff Richard Kirsch, DDS, the owner of a Dearborn Heights dental practice, filed a complaint against Defendant Aspen American Insurance on behalf of himself and all others similarly situated. Plaintiff alleges that Defendant breached the provisions of an insurance contract when Defendant refused to pay Plaintiff’s claim for loss of income and extra expenses. The claim stems from a Michigan executive order that suspended all non-emergency dental procedures for approximately two months in an attempt to slow the spread of Coronavirus Disease (“COVID-19”). Plaintiff seeks damages for breach of contract as well as a declaratory judgment that the insurance contract covers the loss of income and extra expense incurred by Plaintiff and all others similarly situated. Defendant now moves to dismiss the complaint for failure to state a claim on which relief can be granted. The motion has been fully briefed. Upon review of the parties’ filings, the court concludes that a hearing is not necessary. See E.D. Mich. LR

7.1(f)(2). For the reasons stated below, the motion to dismiss will be granted, and the complaint will be dismissed with prejudice.

I. BACKGROUND

The following facts are drawn from the complaint and the documents attached thereto. Plaintiff Richard Kirsch, DDS, owns a dental practice in Dearborn Heights Michigan. (ECF No. 1-2, PageID.22.) Plaintiff purchased a “Building, Blanket Dental Practice Personal Property and Income Coverage” policy (“the policy”) from Defendant Aspen American Insurance Company that was in effect during the spring of 2020. (*Id.* at 22, 24.)

Like most businesses, Plaintiff’s dental practice was detrimentally affected when Michigan’s Governor, Gretchen Whitmer, issued Executive Order 2020-17 (“the executive order”) on March 23, 2020 aimed at slowing the spread of COVID-19. In what amounted to a stay of “excavation” for cavities throughout the state, the executive order required that dental facilities suspend all non-essential procedures. (*Id.* at 23.) As a result of this order, Plaintiff alleges that “use of the Dearborn Heights building for dental activities was suspended for more than two months” until a subsequent May 26, 2020 order was issued that allowed the resumption of non-emergency dental procedures. (*Id.* at 24.) The complaint does not allege any of the COVID-19 virus was present in the dental practice at the time of, or during, the mandated shutdown.

Plaintiff sought coverage for a loss of practice income under various provisions of the insurance policy issued by Defendant. (*Id.*) But Defendant denied coverage, and Plaintiff filed suit for breach of contract and declaratory relief in Wayne County Circuit

Court.¹ (See ECF No. 1-2.) As a Texas corporation with a principal place of business in Connecticut, Defendant removed the action to federal court based on diversity jurisdiction under 28 U.S.C. § 1332 and Defendant alleges that the amount in controversy exceeds \$75,000. (See ECF No. 1.)

Plaintiff and Defendant agree that their dispute is governed by the terms of a valid property insurance policy purchased by Plaintiff. The policy is attached to the initial complaint. (See ECF No. 1-2, PageID.33-161.) Based on the language of the policy limiting coverage for lost business income resulting from “direct physical damage” to property, Defendant moves to dismiss the lawsuit. (See ECF No. 12.)

III. STANDARD

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint for failure to state a claim upon which relief may be granted. Under the Rule, the court construes the complaint in the light most favorable to plaintiff and accepts all well-pleaded factual allegations as true. *Barber v. Miller*, 809 F.3d 840, 843 (6th Cir. 2015).

Federal Rule of Civil Procedure 8 requires a plaintiff to present in the complaint “a short and plain statement of the claim showing that the pleader is entitled to relief.” A complaint must provide sufficient facts to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that defendant acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). “Threadbare recitals of the elements of a cause of

¹ Plaintiff’s complaint also seeks to establish a class of other similarly situated dental practices throughout the state that purchased insurance from Defendant. (ECF No. 1-2, PageID.26) The issue of class certification is irrelevant to the present motion.

action, supported by mere conclusory statements, do not suffice.” *Id.* (citing *Twombly*, 550 U.S. at 555).

“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.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). “To state a valid claim, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory.” *Boland v. Holder*, 682 F.3d 531, 534 (6th Cir. 2012) (emphasis removed) (citing *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007)). Determining whether a complaint states a plausible claim for relief is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

In reviewing a motion to dismiss, the court may consider “any exhibits attached [to the complaint], public records, items appearing in the record of the case and exhibits attached to defendant’s motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein.” *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008).

IV. DISCUSSION

Both sides agree that the present dispute is essentially limited to the proper interpretation of the insurance policy at issue under Michigan law. (ECF No.12, PageID.268; ECF No.16, PageID.364.) In Michigan “an insurance contract must be enforced in accordance with its terms.” *Henderson v. State Farm Fire & Cas. Co.*, 460 Mich. 348, 596 N.W.2d 190, 193 (1999). “Terms in an insurance policy must be given

their plain meaning and the court cannot create an ambiguity where none exists.”

Heniser v. Frankenmuth Mut. Ins. Co., 449 Mich. 155, 534 N.W.2d 502, 505 (1995)

(internal quotation marks omitted). The plain and ordinary meaning of undefined

contract terms “may be determined by consulting dictionaries.” *McGrath v. Allstate Ins.*

Co., 290 Mich. App. 434, 439, 802 N.W.2d 619, 622 (2010) (citations omitted).

Michigan defines “an ambiguity in an insurance policy to include contract provisions capable of conflicting interpretations.” *Auto Club Ins. Ass’n v. DeLaGarza*, 433 Mich. 208, 444 N.W.2d 803, 805 (1989). Ambiguous terms “are construed against its drafter and in favor of coverage.” *Id.* at 806.

“Michigan courts engage in a two-step analysis when determining coverage under an insurance policy: (1) whether the general insuring agreements cover the loss and, if so, (2) whether an exclusion negates coverage.” *K.V.G. Properties, Inc. v. Westfield Ins. Co.*, 900 F.3d 818, 821 (6th Cir. 2018) (citing *Auto-Owners Ins. Co. v. Harrington*, 455 Mich. 377, 565 N.W.2d 839, 841 (1997)). A policy provision, such as an exclusion, is valid “as long as it is clear, unambiguous and not in contravention of public policy.” *Harrington*, 565 N.W.2d at 841 (internal quotation marks omitted).

A. The Property Insurance Policy

In its “Coverage Agreements” (Section I), the policy explains that it covers “all *direct physical damage to covered property* at the premises described on the Declarations caused by or resulting from any covered cause of loss.” (ECF No. 1-2, PageID.140 (emphasis added).) The policy also contains “limits on insurance” (Section II) and exclusions (Section III). In Section I, the policy explains it will cover losses in six categories, including: the building, dental practice personal property, practice income,

extra expenses, extended practice income, and lost rent. (*Id.* at 140-43.) The practice income provision explains the policy:

will pay for the actual loss of practice income you sustain, or the Valued Daily Limit, as described under Limits of Insurance provision III.E.6., due to the necessary suspension of your practice during the period of restoration. The suspension must be caused by *direct physical damage to the building or blanket dental practice personal property* at the described premises caused by or resulting from a covered cause of loss or power failure as described under.

(*Id.* at 142. (emphasis added).) A “civil authority” clause expands the practice income coverage to include:

[an] actual loss of practice income and rents you sustain caused by action of civil authority that prohibits access to the described premises *due to the direct physical damage to property*, other than at the described premises, caused by or resulting from any covered cause of loss. . . up to 30 consecutive days. . .

(*Id.* at 146 (emphasis added)).

Further, the policy’s “extra expense” provision adds coverage for additional “expenses necessarily incurred by you during the period of restoration to continue normal services and operations which are interrupted due to damage.” (*Id.* at 143.) But the policy states:

[it] will only pay for extra expenses that you incur within 12 consecutive months after the date of *direct physical damage* or power failure as described under Paragraph I.B.8.

(*Id.*) (emphasis added.)

The final part of the policy (Section IV) offers definitions for different terms including “damages” and “covered cause of loss.”

"Damage" means partial or total loss of or damage to your covered property.

...

"Covered Causes of Loss" means ALL RISK OF DIRECT PHYSICAL LOSS except as excluded or limited in Section II, of this Coverage Part. ALL RISK OF DIRECT PHYSICAL LOSS shall also include the following: [Collapse and Water Damage]

(*Id.* at 158.) The policy contains no specific exclusions or definitions dealing specifically with viruses.

1. Practice Income Provision

Defendant moves to dismiss the present action, arguing Plaintiff has failed to establish that the executive order resulted in “direct physical damage to property” as the policy requires for a claim. (ECF No. 12, PageID.260.) Defendant argues that because the executive order’s restriction on dental procedures did not cause “tangible or discernible property loss or damage,” the policy’s lost practice income provision was not implicated. (*Id.* at 264.)

Plaintiff responds by arguing that “tangible physical damage is not a prerequisite to coverage” under the lost income provision. (ECF No. 16, PageID.365.) In support, Plaintiff focuses on the policy’s broad definition of “damage” which is defined to include “partial or total loss of or damage to” covered property. (*Id.* at 368.) Plaintiff further argues that if the phrase “loss of” in the definition is read to require “tangible, physical damage” then the word *loss* would be “strip[ped] of its plain and ordinary meaning” and be rendered “superfluous” to the ordinary definition of “damage.” (*Id.*)

The court concludes that Defendant’s interpretation is largely correct. As a leading treatise on property insurance—cited by the Sixth Circuit—explains, usually a property insurance “policy specifically ties the insurer’s liability to the covered peril having some specific effect on the property.” “*Physical” loss or damage*, 10A Couch on Ins. § 148:46. And, “[i]n modern policies. . . this trigger is frequently ‘physical loss or damage’ but may be any of several variants focusing on ‘injury,’ ‘damage,’ and the like.” *Id.* A policy requirement that a loss be *physical* “is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the

property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.” *Id.*

While there is no published Michigan court decision interpreting the language of a standard “direct physical loss or damage” policy provision, the Sixth Circuit, found that Michigan courts would likely follow the majority rule and require “tangible damage” for coverage under such a policy provision. See *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App’x 569, 573 (6th Cir. 2012) (citing *Acorn Inv. Co. v. Michigan Basic Prop. Ins. Ass’n*, No. 284234, 2009 WL 2952677, at *1 (Mich. Ct. App. Sept. 15, 2009)) (noting that the Michigan Court of Appeals had previously relied on a Texas opinion to define the word “direct” and the Texas opinion relied on also found a tangibility requirement in the “direct physical loss” provision). In *Universal Image Prods.*, the court found that cleaning expenses, moving costs, and lost income due to the discovery of mold in the ventilation system of Plaintiff’s leased office space was not covered by a property insurance policy that limited coverage to “direct physical loss or damage” *Id.* at 571-73. Since “[a]ll remediation efforts were paid for by [plaintiff]’s landlord, and not a single piece of [plaintiff]’s physical property was lost or damaged as a result of mold or bacterial contamination,” the Sixth Circuit found the claim losses were “not tangible, physical losses, but economic losses.” *Id.* at 573.

In a recent decision in this court involving a chiropractor’s loss of income due to the same Michigan COVID-19 executive order, the court found that the order did not implicate an insurance policy providing coverage against “accidental direct physical loss to Covered Property.” *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *5, 8 (E.D. Mich. Sept. 3, 2020) (Ludington, J.) (holding

that “[a]ccidental direct physical loss to Covered Property” is an unambiguous term that plainly requires Plaintiff to demonstrate some tangible damage to Covered Property. “Because Plaintiff has failed to state such damage, the complaint does not allege a Covered Cause of Loss.”).

Plaintiff attempts to distinguish both *Universal Image Prods.* and *Turek* but its arguments are unpersuasive. First, Plaintiff points out that the Sixth Circuit’s reading of the “direct physical loss or damage” provision in *Universal Image Prods* was not essential to the court’s ultimate holding. (ECF 16, PageID.367.) It is true that the *Universal Image Prods.* court would have reached the same outcome, “even if Michigan were to adopt a more expansive definition of the phrase ‘direct physical loss or damage’” because the mold in the case never made the leased space “‘uninhabitable’ or substantially ‘unusable.’” *Universal Image Prods., Inc.*, 475 F. App’x at 574. But the opinion’s reasoning explaining why Michigan would adopt the majority approach to policy interpretation—requiring tangible damage—is still persuasive. As the *Turek* court explains:

Michigan courts determine a word's ordinary meaning by consulting a dictionary. Merriam-Webster Dictionary defines “physical” as “having material existence; perceptible especially through the senses and subject to the laws of nature.” Physical, Merriam-Webster, <https://www.merriam-webster.com/dictionary/physical> (last visited Aug. 31, 2020). Here, “physical” is an adjective modifying “loss,” which is defined as, inter alia, “destruction, ruin,” “the act of losing possession,” and “a person or thing or an amount that is lost.” Loss, Merriam-Webster, <https://www.merriam-webster.com/dictionary/loss> (last visited Aug. 31, 2020).

Turek Enterprises, 2020 WL 5258484, at *6 (citation omitted). The court sees no reason to part company with this interpretation of the phrase “direct physical loss.”²

² It is true that some courts have adopted a minority position, holding that “physical loss” occurs when real property becomes “uninhabitable” or substantially

Perhaps anticipating such an outcome, Plaintiff also argues that the policy language at issue in the present case is distinguishable from the policies in *Universal Image Prods.* and *Turek*. (ECF No. 16, PageID.367.) Plaintiff points out that the court in *Turek* found the inclusion of the preposition “to” in the phrase “direct physical loss to Covered Property,” as opposed to the preposition “of,” strengthened the case for its interpretation requiring tangible damage for a valid claim. (*Id.* (citing *Turek Enterprises*, 2020 WL 5258484, at *6).) So, Plaintiff reasons that “[t]he language in Dr. Kirsch’s policy covering ‘partial or total loss of or damage to’ the covered property is the exact language the *Turek* court said would establish a plausible claim.” (*Id.*)

Such a reading of the policy at issue here is misleading. In making his argument Plaintiff quotes the policy’s definition which defines “damage” as “partial or total loss of or damage to your covered property.” (ECF No. 1-2, PageID.158 (emphasis added)). However, both the practice income and civil authority provisions of the policy expressly limit coverage to “direct physical damage to the [covered property].” (*Id.* at 142, 46. (emphasis added).) Reading the definition of *damage* and the applicable policy

“unusable.” See e.g., *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir.2002) (“When the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct [physical] loss to its owner.”); *Prudential Prop. & Cas. Co. v. Lillard–Roberts*, CV–01–1362–ST, 2002 WL 31495830, at *9 (D.Or. June 18, 2002) (holding a “direct physical loss” is possible when property is “rendered uninhabitable by mold”); *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at *4 (W.D. Mo. Aug. 12, 2020) (denying a motion to dismiss because “COVID-19 allegedly attached to and deprived Plaintiffs of their property, making it ‘unsafe and unusable’”). The court sees no indication that Michigan court courts would adopt this minority view, in fact, the first Michigan court to consider this issue (albeit in an unpublished Circuit Court ruling) also found that tangible damage was required under the plain meaning of such an insurance provision and it held that a COVID-19 damage claim would fail. See *Management Co. LLC v. Michigan Ins. Co.*, No. 20-258-CB, 2020 WL 4561979, at *1 (Mich. Cir. Ct. July 21, 2020).

provisions together it becomes apparent that the coverage provided by the policy is at least as narrow as the “direct physical loss to Covered Property” limitation in *Turek*. See 2020 WL 5258484, at *6. While the policy adopts a rather broad definition of the word “damage” that definition is further cabined when the word “damage” is used with the adverbs “direct” and “physical” as well as the preposition “to.” Like *Turek*, these additional words act to define the subset of damage covered by the policy. The ordinary meaning of these words makes clear that a mere loss of use is insufficient to implicate coverage—just as the same adjectives and preposition made clear in *Turek* that the policy only covered a subset of possible losses.³ See *id.* Therefore, the court finds that coverage under the policy’s practice income provision is limited to instances where tangible damage to physical property has occurred.

Because Plaintiff has not “alleged that COVID-19 particles attached to and damaged their property” Plaintiff has not even attempted to establish that COVID-19 caused tangible, physical damage to the property itself. See *Turek Enterprises*, 2020 WL 5258484, at *7 (E.D. Mich. Sept. 3, 2020) (quoting *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at *6 (W.D. Mo. Aug. 12, 2020)). Like

³ The court also notes that the definition of “damage” contained in the policy is not quite as broad as Plaintiff contends. The definition does NOT cover *all* losses of or damage to your covered property but instead includes only “*partial* or *total* loss of or damage to your covered property.” (ECF No. 1-2, PageID.158 (emphasis added).) Black’s Law Dictionary makes clear that both “partial loss” and “total loss” are phrases that have a distinct meaning in a legal context apart from the broader definition of “loss”. See LOSS, Black’s Law Dictionary (11th ed. 2019) (separately defining partial loss as “[a] loss of part of the insured property; damage not amounting to a total loss,” and, a total loss as “[t]he complete destruction of insured property so that nothing of value remains and the subject matter no longer exists in its original form.”) The most straightforward reading of the provision therefore is that the phrases *partial* and *total* loss are included in the definition to merely make clear that the physical property is covered both when it is completely destroyed and when it is only partially damaged.

other viruses, COVID-19 injures people but does not seem to cause any lasting damage to physical property. Because Plaintiff's claim, as pled, alleges only a temporary loss of use of Plaintiff's property, the tangibility requirement implicit in the policy forecloses a claim under the practice income provision.

2. Civil Authority Provision

Likewise, the civil authority provision which provides coverage when a civil authority "prohibits access to the described premises due to *the direct physical damage to property*, other than at the described premises," (ECF No. 1-2, PageID.146 (emphasis added)), is not implicated by the executive order. The factual allegations in the complaint allege no tangible damage to other's property that would support a claim under the provision's language. (See ECF No. 1-2, PageID.23-5.)

Even if Plaintiff were able to point to direct physical damage to other property due to COVID-19, he has also failed to state a nexus between prior property damage and the executive order. Defendant cites a number of cases indicating that preemptive government shutdown orders to protect property do not establish a causal link between the damage to property and order barring access.⁴ See *e.g. United Air Lines, Inc. v. Ins. Co. of State of PA*, 439 F.3d 128, 134 (2d Cir. 2006) (declining to provide United coverage under a civil authority insurance provision for lost earnings stemming from the shutdown of Ronald Reagan Washington National Airport after Sept. 11th, 2001 because "the government's subsequent decision to halt operations at the Airport

⁴ It is also not clear that that the executive order actually "prohibit[ed] access" access to Plaintiff's dental office. Afterall, the order stated that Plaintiff was free to continue conducting emergency dental procedures at the facility. (ECF No. 1-2, PageID.23.)

indefinitely was based on fears of future attacks” not due to existing damage to the Pentagon.); *Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, No. 1:03-CV-3154-JEC, 2004 WL 5704715, at *7 (N.D. Ga. Dec. 15, 2004) (holding that civil authority insurance coverage was unavailable for airport shops after the FAA shutdown flights on Sept. 11th, 2001 because the order was “designed to prevent, protect against, or avoid future damage [and] is not a ‘direct result; of already existing property loss or damage.’”); *Syufy Enterprises v. Home Ins. Co. of Indiana*, No. 94-0756 FMS, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995) (denying “civil authority” insurance coverage for a movie theater closed by a curfew designed to “prevent ‘potential’ looting” because the “requisite causal link between damage to adjacent property and denial of access to a Syufy theater is absent”). In the present action, Plaintiff does not directly respond to, or attempt to distinguish, these precedents. (See ECF 16.) Plaintiff has failed to establish that the COVID-19 executive order was a direct result of damage to existing property as opposed to an attempt to curtail the virus’s spread and future damage.

3. Extra Expense Provision

Plaintiff seeks coverage under the policy’s extra expense provision. (ECF No. 1-2, PageID.25.) Defendant responds by arguing that the extra expense provision “is also limited to losses caused by direct physical damage” because “Plaintiff has alleged no direct physical damage and no property in need of restoration” his losses fall outside the policy’s coverage. In his response to the motion to dismiss, Plaintiff concedes that coverage under this clause likely hinges on whether the policy requires “tangible damage.” (ECF No.16, PageID.375.) Since the court has already found that the identical “direct physical damage” language in the practice income and civil authority provisions

require a Plaintiff to allege tangible property damage, the court must agree with Defendant's conclusion. (See ECF No. 12, PageID.279.) As explained above, Defendant has not alleged that COVID-19 was present in his dental office during the period in question. Therefore, based on the provision's ordinary meaning, extra expenses incurred due to the executive order are not covered by the policy.

B. Ordinance of Law Policy Endorsement

Plaintiff purchased additional "Ordinance or Law Coverage Extension" coverage. The endorsement provides increased coverage for "Business Income and Extra Expense" during a period of restoration. (ECF No. 1-2, PageID.63.) However, the coverage is only available when enforcement of an ordinance: "1) Regulates the construction, repair or replacement of any property; 2) Requires the tearing down or replacement of any parts of property not damaged by a covered cause of loss; and 3) Is in force at the time of loss." (*Id.* at 63-64.) While Plaintiff's complaint cites this provision as a source of extra coverage, (*Id.* at 25), Defendant argues that the complaint "fails to allege any facts that satisfy condition[s]" (1) and (2). (ECF No. 12, PageID.282.) Since the conjunction "and" is used, the court concludes that the Ordinance of Law endorsement requires all three of the above conditions be satisfied for the enhanced coverage to apply. Because the complaint does not allege specific damage to the facility requiring repair, this policy endorsement is not implicated. Plaintiff appears to concede as much as its response to the motion to dismiss does not address Defendant's argument against coverage under the ordinance or law enhancement.

V. CONCLUSION

For the reasons explained above, the court finds that the property insurance policy purchased by Plaintiff Kirsch does not apply to lost practice income and related expenses caused by a temporary Michigan executive order prohibiting non-essential dental procedures. Accordingly,

IT IS ORDERED that Defendant's motion to dismiss (ECF No. 12) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's complaint, (ECF No. 1-2), is
DISMISSED WITH PREJUDICE.

s/Robert H. Cleland /
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: December 14, 2020

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, December 14, 2020, by electronic and/or ordinary mail.

s/Lisa Wagner /
Case Manager and Deputy Clerk
(810) 292-6522

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EXHIBIT 41

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	:	
10012 HOLDINGS, INC. d/b/a GUY HEPNER,	:	
Plaintiff,	:	
	:	20 Civ. 4471 (LGS)
-against-	:	
	:	<u>OPINION AND ORDER</u>
SENTINEL INSURANCE COMPANY, LTD.,	:	
Defendant.	:	
-----X	:	

LORNA G. SCHOFIELD, District Judge:

In this insurance dispute, Plaintiff seeks coverage for business losses allegedly resulting from government restrictions on non-essential businesses during the COVID-19 pandemic. Defendant moves to dismiss the Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). For the reasons stated below, the motion is granted.

I. BACKGROUND

The following facts are taken from the Complaint and are assumed to be true for purposes of this motion. *See R.M. Bacon, LLC v. Saint-Gobain Performance Plastics Corp.*, 959 F.3d 509, 512 (2d Cir. 2020).

Plaintiff operates an art gallery and dealership in New York City. In 2019, Plaintiff obtained a business property insurance policy (the “Policy”) from Defendant. The Policy provides “Business Interruption” coverage for loss of certain income:

We 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 physical damage to property at the “scheduled premises”, including personal property in the open (or in a vehicle) within 1,000 feet of the “scheduled premises”, caused by or resulting from a Covered Cause of Loss.

As relevant here, the Policy defines “Business Income” as “Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred if no direct physical loss or physical damage had occurred” The Policy defines “suspension” as “[t]he partial slowdown or complete cessation of your business activities” if “part or all of the ‘scheduled premises’ is rendered untenable as a result of a Covered Cause of Loss if coverage for Business Income applies to the policy.” The Policy defines “Covered Causes of Loss” as “risks of direct physical loss,” subject to various exclusions and limitations not relevant here.

The Policy also provides “Extra Expense” coverage. Those provisions cover “reasonable and necessary Extra Expense[s] you incur during the ‘period of restoration’ that you would not have incurred if there had been no direct physical loss or physical damage to property at the ‘scheduled premises.’” The Policy also provides “Civil Authority” coverage: “This insurance is extended to apply to the actual loss of Business Income you sustain when access to your ‘scheduled premises’ is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your ‘scheduled premises.’”

From March 2020 onwards, Plaintiff suspended business operations in accordance with orders issued by the Governor of New York and Mayor of New York City, which limited operations for non-essential businesses during the COVID-19 pandemic (the “Civil Orders”). Plaintiff suffered losses of business and incurred expenses as a result, and requested Defendant to reimburse it under the Policy’s “Business Interruption,” “Extra Expense” and “Civil Authority” provisions. Defendant refused, and Plaintiff brought this action, asserting claims for breach of contract and declaratory relief.

II. STANDARD

On a motion to dismiss, a court accepts as true all well-pleaded factual allegations and draws all reasonable inferences in favor of the non-moving party, *Montero v. City of Yonkers, New York*, 890 F.3d 386, 391 (2d Cir. 2018), but gives “no effect to legal conclusions couched as factual allegations,” *Stadnick v. Vivint Solar, Inc.*, 861 F.3d 31, 35 (2d Cir. 2017). To withstand a motion to dismiss, a pleading “must contain 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)). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678. It is not enough for a plaintiff to allege facts that are consistent with liability; the complaint must “nudge[]” claims “across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570. “To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient ‘to raise a right to relief above the speculative level.’” *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).

Under principles of New York contract interpretation,¹ “the court’s initial task is to attempt to ascertain the parties’ intent from the language of the insurance contract itself . . . constru[ing] the policy as a whole; all pertinent provisions of the policy should be given meaning, with due regard to the subject matter that is being insured and the purpose of the entire contract.” *Westchester Fire Ins. Co. v. Schorsch*, 129 N.Y.S.3d 67, 74 (1st Dep’t 2020) (internal

¹ The Policy does not explicitly state what law governs its interpretation and enforcement. The parties apply New York law in their moving papers. Accordingly, this decision is based on New York Law. See *Arch Ins. Co. v. Precision Stone, Inc.*, 584 F.3d 33, 39 (2d Cir. 2009); accord *PetEdge, Inc. v. Garg*, 234 F. Supp. 3d 477, 486 (S.D.N.Y. 2017).

citation omitted). Courts must take care not to “make or vary the contract of insurance to accomplish its notions of abstract justice or moral obligation.” *Keyspan Gas East Corp. v. Munich Reinsurance Am., Inc.*, 96 N.E.3d 209, 216 (N.Y. 2018). “[A]n unambiguous policy provision must be accorded its plain and ordinary meaning, and the court may not disregard the plain meaning of the policy’s language in order to find an ambiguity where none exists.” *Chiarello ex rel. Chiarello v. Rio*, 59 N.Y.S.3d 129, 131 (2d Dep’t 2017) (alteration in original). “[T]he issue of whether a provision is ambiguous is a question of law,” and “focuses on the reasonable expectations of the average insured upon reading the policy.” *Hansard v. Fed. Ins. Co.*, 46 N.Y.S.3d 163, 166 (2d Dep’t 2017) (internal quotation marks and citations omitted).

III. DISCUSSION

A. Business Interruption Coverage

The Policy provides Business Interruption coverage for loss of “Business Income” sustained due to “necessary suspension” of operations, where such suspension is caused by “direct physical loss of or physical damage to property.” “Business Income” is income that Plaintiff would have earned “if no direct physical loss or physical damage had occurred.” The Complaint alleges that the Civil Orders caused a “direct physical loss” of Plaintiff’s business premises, thus triggering the Policy’s Business Interruption provisions.

New York courts interpreting substantially identical language -- “loss of, damage to, or destruction of property or facilities” -- have found it “limited to losses involving *physical damage to the insured’s property*.” *Roundabout Theatre Co. v. Cont’l Cas. Co.*, 751 N.Y.S.2d 4, 8 (1st Dep’t 2002) (emphasis added); *see also RSVT Holdings, LLC v. Main St. Am. Assur. Co.*, 25 N.Y.S.3d 712, 714 (3d Dep’t 2016) (noting that policy covering “direct physical loss of or damage to” provided coverage only for “direct damage to plaintiffs’ property”); *Soc. Life*

Magazine, Inc. v. Sentinel Ins. Co. Ltd., No. 20 Civ. 3311, Transcript of Show Cause Hearing at 15 (S.D.N.Y. May 14, 2020), *available at* Dkt. No. 21-5 (in declining to provide business interruption coverage for shutdowns resulting from the Civil Orders, noting “New York law is clear that this kind of business interruption needs some damage to the property to prohibit [a person] from going [there]”); *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) (applying *Roundabout Theatre* to find no “direct physical loss or damage” of or to the premises, where access was lost due to a government utility shutting off power during hurricane recovery); *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 288 (S.D.N.Y. 2005) (construing New York law and the phrase “direct physical loss or damage” to require that “the interruption in business must be caused by some physical problem with the covered property”); *United Airlines, Inc. v. Ins. Co. of State of Pa.*, 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005), *aff’d* 439 F.3d 128 (2d Cir. 2006). In so holding, courts have declined to interpret such language to include “loss of use” of the property under New York law.

Roundabout Theatre, 751 N.Y.S.2d at 6. Nothing in the Complaint plausibly supports an inference that COVID-19 and the resulting Civil Orders physically damaged Plaintiff’s property, regardless of how the public health response to the virus may have affected business conditions for Plaintiff. The Complaint does not state a claim for “loss” of the insured property.

Plaintiff claims the Policy is ambiguous because it covers both “loss of” and “damage to” Covered Property. Plaintiff argues that “loss” and “damage” cannot mean the same thing, as New York law requires contracts to be interpreted to give each term effect. While that principle is true, the term “loss” is unambiguous in this case in light of New York law which interprets such language as not including the “loss of use” alleged by the Complaint. *Id.* at 8; *see also Newman Myers*, 17 F. Supp. 3d at 331 (“The words ‘direct’ and ‘physical,’ which modify the

phrase ‘loss or damage,’ ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure.”).

Plaintiff argues that *Roundabout Theatre* is factually distinct, claiming that the policy in that case was limited to “property or facilities,” including the insured theater building, but that the Policy in this case sweeps more broadly to cover loss of business generally. Plaintiff cites the fact that the Policy covers “Covered Property” rather than “property.” As relevant here, “Covered Property” is defined as “Property you own that is used in your business.” From that definition, Plaintiff claims that while the Policy includes loss of physical items -- “buildings, structures, fixtures, and the like” -- it also includes “much more,” including, presumably, loss of customer access to Plaintiff’s premises and concomitant loss of business due to the public health crisis. Plaintiff does not explain, nor does the Policy’s plain language support, the conclusion that insurance against loss of “Property you own that is used in your business” encompasses business loss due to the Civil Orders limiting customer access to Plaintiff’s business. See *Roundabout Theatre*, 751 N.Y.S.2d at 6; *Newman Myers*, 17 F. Supp. 3d at 331. Instead, the Policy’s plain language limits coverage to property that Plaintiff “own[s]” “use[s]” in its business, which must suffer some direct physical harm under controlling state law.

Plaintiff points to the “Coverage” section of the Policy, which states that Defendant “will pay for direct physical loss of or physical damage . . . caused by or resulting from a Covered Cause of Loss.” Plaintiff argues that because a “Covered Cause of Loss” includes “risks of direct physical loss,” Defendant agreed to cover business lost due to the risk of COVID-19 on Plaintiff’s premises. Plaintiff does not explain how this language implicates the Business Interruption provisions cited in the Complaint. This provision only provides coverage for “direct

physical loss of or physical damage,” which the Complaint does not allege for the reasons given above.

Finally, Plaintiff notes that the Policy is an all-risk policy, under which “losses caused by any fortuitous peril not specifically excluded under the policy will be covered.” *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 41 (2d Cir. 2006). This argument is unpersuasive because, as described above, the Policy’s plain language unambiguously does not cover business lost due to the Civil Orders.

B. Extra Expense Coverage

The Policy’s “Extra Expense” coverage applies to expenses incurred during a period of restoration of the premises following a “direct physical loss or physical damage to” the covered property. Because, as described above, the Complaint does not allege a direct physical loss, the Complaint fails to state a claim for Extra Expense coverage.

C. Civil Authority Coverage

The Policy’s “Civil Authority” coverage applies to losses sustained when access to Plaintiff’s premises is “prohibited by order of a civil authority *as the direct result of a Covered Cause of Loss* to property in the immediate area” of Plaintiff’s premises (emphasis added). A “Covered Cause of Loss” includes “risks of direct physical loss.” The relevant questions are whether the Complaint alleges (1) losses sustained because the Civil Orders prohibited access to Plaintiff’s premises and (2) that such prohibition was a direct result of a risk of direct physical loss to property in the immediate area of Plaintiff’s premises.

The Complaint does not plausibly allege losses under the Civil Authority provisions. The Complaint claims that “a Covered Cause of Loss [a risk of direct physical loss] cause[d] damage to property near the insured premises, the civil authority prohibit[ed] access to property near the

insured premises, and the civil authority action [was] taken in response to dangerous physical conditions.” It is plausible that the risk of COVID-19 being physically present in neighboring properties caused state and local authorities to prohibit access to those properties. But the Complaint does not allege that these closures of *neighboring* properties “direct[ly] result[ed]” in closure of Plaintiff’s *own* premises, as the Civil Authority provisions require. Instead, the Complaint alleges that Plaintiff was forced to close for the same reason as its neighbors -- the risk of harm to individuals on its own premises due to the pandemic. Put differently, the Complaint does not plausibly allege that the potential presence of COVID-19 in neighboring properties directly resulted in the closure of Plaintiff’s properties; rather, it alleges that closure was the direct result of the risk of COVID-19 at Plaintiff’s property. *See United Air Lines*, 439 F.3d 128, 134–35 (2d Cir. 2006) (denying recovery because nationwide shutdown of airport facilities due to risk of terrorism did not directly result from physical damage to neighboring properties).

Although not necessary for the Court’s decision, this conclusion is confirmed by other provisions of the Policy. First, the Policy excludes coverage for pollutants on Plaintiff’s premises. “Pollutants” are broadly defined as “any . . . material which causes or threatens to cause physical loss, physical damage, impurity to property, unwholesomeness, undesirability . . . loss of use of property, or which threatens human health or welfare.” Second, the Policy excludes coverage for costs associated with any ordinance or law requiring any insured to “monitor, clean up, remove, contain, treat . . . or in any way respond to” to “bacteria or virus.” The Policy thus contains provisions that explicitly exclude coverage for any costs associated with containing the presence of harmful substances similar to COVID-19 on Plaintiff’s own premises. By contrast, the Civil Authority provisions address a factually distinct situation --

when some dangerous condition on neighboring premises forces a shutdown of Plaintiff's premises. Construing the "policy as a whole" to "ascertain the parties' intent" and giving "all pertinent provisions of the policy meaning," *Westchester Fire*, 129 N.Y.S.3d at 74, the "average insured" reading the Policy would not have a "reasonable expectation[]" that the Civil Authority provisions' plain language -- which addresses closures due to dangerous conditions on neighboring property -- also encompasses a situation covered elsewhere in the Policy, *i.e.* the presence of harmful substances on the insured's own property, *Hansard*, 46 N.Y.S.3d at 166.

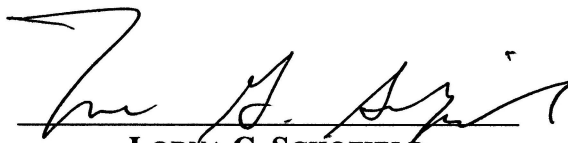
D. Leave to Replead

Plaintiff seeks leave to amend its Complaint. Leave to amend should be freely given "when justice so requires." Fed. R. Civ. P. 15(a). "However, where the plaintiff is unable to demonstrate that he would be able to amend his complaint in a manner which would survive dismissal, opportunity to replead is rightfully denied." *Hayden v. Cty. of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999); *accord Olson v. Major League Baseball*, 447 F. Supp. 3d 174, 177 (S.D.N.Y. 2020). Leave to amend also may be denied where the plaintiff "fails to specify either to the district court or to the court of appeals how amendment would cure the pleading deficiencies in its complaint." *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014). Leave to amend is denied because the Policy does not provide coverage for the loss Plaintiff suffered.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is GRANTED with prejudice. The Clerk of Court is respectfully directed to close the motion at Docket Number 19 and the case.

Dated: December 15, 2020
New York, New York


LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE