IN THE DISTRICT COURT OF CHEROKEE COUNTY
STATE OF OKLAHOMA

CHEROKEE NATION;
CHEROKEE NATION BUSINESSES, LLC;
CHEROKEE NATION ENTERTAINMENT, LLC,

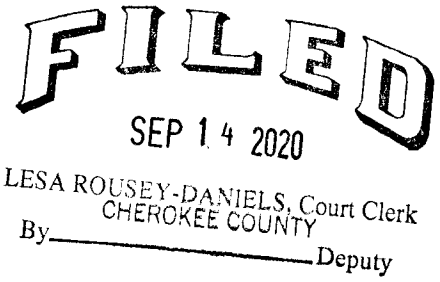
Plaintiffs,

v.

(1) LEXINGTON INSURANCE COMPANY;
(2) UNDERWRITERS AT LLOYD'S – SYNDICATES; ASC1414, XLC 2003, TAL 1183, MSP 318, ATL1861, KLN 510, AGR 3268;
(3) UNDERWRITERS AT LLOYD'S – SYNDICATE: CNP 4444;
(4) UNDERWRITERS AT LLOYD'S – ASPEN SPECIALTY INSURANCE COMPANY;
(5) UNDERWRITERS AT LLOYD'S SYNDICATES: KLN 0510, ATL 1861, ASC 1414, QBE 1886, MSP 0318, APL 1969, CHN 2015, XLC 2003;
(6) UNDERWRITERS AT LLOYD'S –SYNDICATE BRT 2987;
(7) 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;
(8) HOMELAND INSURANCE COMPANY OF NY (ONE BEACON);
(9) HALLMARK SPECIALTY INSURANCE COMPANY;
(10) ENDURANCE WORLDWIDE INSURANCE LTD T/AS SOMPO INTERNATIONAL;
(11) ARCH SPECIALTY INSURANCE COMPANY;
(12) EVANSTON INSURANCE COMPANY;
(13) ALLIED WORLD NATIONAL ASSURANCE COMPANY;
(14) LIBERTY MUTUAL FIRE INSURANCE COMPANY;
(15) XL INSURANCE AMERICA, INC.;
(16) AXA/XL AMERICA, INC.;
(17) RSUI-LANDMARK AMERICAN INSURANCE COMPANY;
(18) CHUBB BERMUDA LTD.;
(19) UNDERWRITERS AT LLOYD'S LONDON; and
(20) ABC INSURANCE COMPANIES (to be determined).

Defendants.

Case No. CV-2020-00150
Judge Douglas Kirkley



DEFENDANT INSURERS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON BUSINESS INTERRUPTION COVERAGE

COME NOW Defendants[1] (collectively, the "Insurers"), and for their Response to the Motion for Partial Summary Judgment on Business Interruption Coverage brought by Plaintiffs Cherokee Nation, Cherokee Nation Businesses, LLC, and Cherokee Nation Entertainment, LLC, submit this opposition and response.

INTRODUCTION

COVID-19 has impacted the public and businesses throughout the country in significant and unprecedented ways. But these challenging and unfortunate times do not create coverage for losses that fall outside the plain and unambiguous terms of a policyholder's insurance contract.

Plaintiffs Cherokee Nation, Cherokee Nation Businesses, LLC, and Cherokee Nation Entertainment, LLC (collectively referred to in the singular as the "Nation" or "Plaintiff"), claim it is entitled to business interruption coverage under its commercial property insurance policies.[2] Plaintiff suggests that because the Policy covers "all risks" it need only show a fortuitous loss, but this position ignores the explicit language of the Policy, which provides coverage only for "all risks *of direct physical loss or damage*." (Policy at 24, Ex. 5 to Mot. (emphasis added).) As the insured, Plaintiff bears the burden to prove that it suffered a *covered* loss under the Policy's terms. It has not done so. Indeed, the Policy language regarding the specific coverage sought by Plaintiff—business interruption—is clear and explicit. It insures business interruption losses and

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[1] Lexington Insurance Company; Certain Underwriters at Lloyd's and London Market Companies subscribing to policy PJ193647 (Syndicates ASC 1414, TAL 1183, CIN 318, ATL 1861, KLN 510, AGR 3268; and XL Catlin Insurance Company UK Limited); Certain Underwriters at Lloyd's Subscribing to Policy PJ1900131 (Syndicate CNP 4444); Aspen Specialty Insurance Company; Certain Underwriters at Lloyd's Subscribing to Policy No. PJ1933021 (Syndicates KLN 0510, ATL 1861, ASC 1414, QBE 1886, CIN 318, APL 1969, CHN 2015, and XL Catlin Insurance Company UK Limited); Certain Underwriters at Lloyd's Subscribing to Policy No. PJ1900067 (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; XL Insurance America, Inc.; AXA/XL America, Inc.; Landmark American Insurance Company; and Chubb Bermuda International (erroneously sued as "Chubb Bermuda Ltd.").

[2] As discussed in footnote 1, each defendant-insurer issued separate policies to Plaintiff with unique endorsements and exclusions. However, subject to those endorsements and exclusions, each separate policy utilizes the same "Tribal First Policy Wording, TPIP USA Form No. 15" document attached at Exhibit 5 of Plaintiff's Motion. For purposes of this opposition, the term "Policy" shall refer to Exhibit 5 of Plaintiff's Motion.

related expenses only when caused by "direct physical loss or damage" to covered premises and only while such damaged property is being "rebuil[t], repair[ed] or replace[d]." (*Id.* at 19, 23.) As such, the "loss needs to have been a 'distinct, demonstrable, physical alteration of the property.'"[3]

Plaintiff's Motion does not even attempt to demonstrate that any covered property incurred "direct physical loss or damage," as illustrated by the lack of evidence cited in Plaintiff's "Statement of Facts" to support such a finding. The Court can deny Plaintiff's Motion on this basis alone. But not only has Plaintiff failed to offer proof that the alleged business interruption was caused by a direct physical loss or damage, it has foreclosed its ability to ever do so by admitting that any business interruption it experienced resulted from its own "preemptive action"—*not* from a direct physical loss or damage as required by the Policy. Indeed, Plaintiff contends it is entitled to coverage any time its property is temporarily "unusable for its intended purpose," regardless of whether any "direct physical loss or damage" requiring "rebuilding, repairs, or replacement" ever occurred. Courts around the country assessing similarly-worded all-risk policies have rejected Plaintiff's "loss of use" theory and held that preemptive closures to prevent the spread of COVID-19 absent evidence of direct physical loss or damage do not trigger coverage.

Because Plaintiff has not met (and cannot meet) its burden to establish coverage in the first instance, the Court need not consider the Policy's exclusions in denying the Motion. There are, however, several exclusions—including exclusions for pollution and contamination—that would bar coverage in the event Plaintiff had met its initial burden. Plaintiff's failure to address the application of these applicable exclusions, coupled with its request that the Court consider an irrelevant exclusion not even included in the Policy, underscores the defective nature of Plaintiff's Motion which should be denied. Indeed, the only evidence presented to the Court supports

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[3] *See, e.g.*, Ex. 4, *Diesel Barbershop, LLC et al. v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020) (granting insurer's motion to dismiss complaint alleging business interruption losses due to COVID-19 for failure to plead "direct physical loss"); Ex. 2, *Gavrilides Mgmt. Co. v. Michigan Ins. Co.*, Case No. 20-258-CB-C30 (Mich. Cir. Ct. July 1, 2020) (holding no coverage for alleged COVID-19 business interruption losses in similarly worded all-risk policy because "direct physical loss of or damage to the property" requires "[s]omething that is tangible. Something . . . that alters the physical integrity of the property.").

judgment in the Insurers' favor, and against Plaintiff.

RESPONSE TO PLAINTIFF'S MATERIAL FACTS

1. Denied. Plaintiff purchased Policy Nos. 017471589/06 (Dec. 37) 9109, 017471589/06 (Dec. 31) 9496, and 017471589/06 (Dec. 15) 9110, for a policy period of July 1, 2019 to July 1, 2020 from Tribal First/Alliant Specialty Insurance Services. (*See, e.g.*, Petition ¶ 23.) Policy No. 017471589/06, like the other policies at issue (*see supra* at p. 1, nn.1, 2), incorporate the Tribal First Policy Wording, TPIP USA Form No. 15 (the "Policy"). The Policy plainly sets out its terms and conditions.

2. Discovery has only just begun. Defendants therefore have insufficient knowledge or information to admit or deny whether Plaintiff "experienced a loss." However, this language is not material or relevant to Plaintiff's claims against Defendants, as Defendants' obligations under the Policy are governed by the language of that Policy. The Policy "provides insurance against all risk of ***direct physical loss or damage*** occurring during the period of this Policy," not any unspecified "loss" experienced by Plaintiff. (Policy at 24, Ex. 5 to Mot. (emphasis added).)

3. Denied. Plaintiff has not established that it has suffered a fortuitous loss. Moreover, this language is not material or relevant to Plaintiff's claims against Defendants, as Defendants' obligations under the Policy are governed by the language of that Policy.

STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS

1. Plaintiff purchased Policy Nos. 017471589/06 (Dec. 37) 9109, 017471589/06 (Dec. 31) 9496, and 017471589/06 (Dec. 15) 9110 and additional policies (*see supra* at p. 1, nn.1, 2) for a policy period of July 1, 2019 to July 1, 2020 from Tribal First/Alliant Specialty Insurance Services. Subject to their respective excess exclusions and endorsements, all of the policies at issue incorporate the Tribal First Policy Wording, TPIP USA Form No. 15 (the "Policy"). (*See generally* Policy, Ex. 5 to Mot.)

2. Plaintiff's Business Interruption insuring agreement provides, in relevant part:

> **BUSINESS INTERRUPTION**
> Against loss resulting directly from interruption of business, services or rental value caused by ***direct physical loss or damage***, as covered by this Policy to real and/or

personal property insured by this Policy, occurring during the term of this Policy. . . .

(*Id.* at 19 (emphasis added).)

3. The Policy further provides that in the event of such physical loss or damage, Business Interruption loss is paid "***during the period of restoration***," defined as follows:

> The period during which business interruption and or rental interruption applies will begin on the date direct physical loss occurs and interrupts normal business operations and ***ends on the date that the damaged property should have been repaired, rebuilt or replaced*** with due diligence and dispatch, but not limited by the expiration of this policy.

(*Id.* at 23 (emphasis added).)[4]

4. Under the Policy's "General Conditions" section, covered perils are defined as:

> **PERILS COVERED**
> Subject to the terms, conditions and exclusions stated elsewhere herein, this Policy provides insurance against all risks of ***direct physical loss or damage*** occurring during the period of this Policy.

(*Id.* at 24 (emphasis added).)

5. In addition, the Policy extends business interruption coverage for "Extra Expense." Extra Expense coverage, like Business Interruption coverage, is limited to the "period of restoration." (*Id.* at 19.) And Extra Expense coverage requires "damage to or destruction of covered property by a ***covered peril.***" The Policy provides in relevant part:

> **EXTRA EXPENSE**
> This Policy is ***extended*** to cover the necessary and reasonable extra expenses occurring during the term of this Policy at any location as hereinafter defined, incurred by the Named Insured in order to continue as nearly as practicable the normal operation of the Named Insured's business following ***damage to or destruction of covered property*** by a ***covered peril*** which is on premises owned, leased or occupied by the Named Insured. . . .

(*Id.* (emphasis added).)

6. Plaintiff does not allege or present any evidence that its property suffered any "direct physical loss or damage" from COVID-19; nor does Plaintiff even allege COVID-19 was

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[4] Section III.A.2 of the Policy contains a similar description of the period of restoration: "***only such length of time as would be required*** with the exercise of due diligence and dispatch to ***rebuild, repair or replace such part of the property*** as has been ***damaged or destroyed*** commencing with the date of damage or destruction and not limited by the date of expiration of this Policy . . . ." (Policy at 19, Ex. 5 to Mot. (emphasis added).)

present on its property prior to Plaintiff's claimed business interruption. (Mot. at 14 ("Here, it would have been inherently and unreasonably dangerous for the Nation to remain open until COVID-19 was found in the insured businesses, or until after an employee or patron of one of the Nation's businesses tested positive for COVID-19.").)

7. Because Plaintiff does not allege any "direct physical loss or damage," Plaintiff also fails to allege let alone establish that it "rebuil[t], repair[ed], or replace[d]" any property that was "damaged." (Policy at 19, Ex. 5 to Mot.)

8. On March 13, 2020, President Trump issued Proclamation 9994 "Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak." President Trump declared that he took "sweeping action to control the spread of the virus" and that the "Federal Government, along with State and local governments, has taken preventive and proactive measures to slow the spread of the virus and treat those affected, including by instituting Federal quarantines." (Ex. 1 to Mot.)

9. On March 15, 2020, Oklahoma's Governor Stitt issued Executive Order 2020-07 and "declared an emergency caused by the impending threat of COVID-19 to the people of the State and the public's peace, health, and safety" and "to protect the health and safety of the public." (Ex. 2 to Mot.)

10. On March 16, 2020, Principal Chief Chuck Hoskin Jr. of the Cherokee Nation declared a "state of emergency" in the Cherokee Nation and committed the Cherokee Nation Emergency Operations Center "to assist and respond to the issues threatening the safety and well-being of our citizens, tribal enterprises and concerns (nationally and internationally), partners and tribal brethren, and fellow Oklahomans and authorize[d] all appropriate Tribal resources and personnel to respond to this emergency status." (Ex. 3 to Mot.)

11. Plaintiff "closed its properties" because it "could not risk exposing employees, patrons, and tribal members to COVID-19" and needed "time to develop appropriate protective measures." (Mot. at 2.) The declarations and proclamations did not require that Plaintiff close its properties due to "direct physical loss or damage." (*See* Mot., Exs. 1, 2, 3.)

12. In June 2020, several Cherokee Nation properties, including such casinos and businesses as Cherokee Casino Tahlequah and Cherokee Casino Fort Gibson, reopened under the Nation's "Responsible Hospitality" guidelines, implementing "sanitization and hygiene practices," "temperature screenings," and "physical distancing." (D. Sean Rowley, *Cherokee Nation Businesses Gives Reopening Dates for Its Casinos*, CHEROKEE PHOENIX (June 5, 2020), https://www.cherokeephoenix.org/Article/index/134813; *Responsible Hospitality*, CHEROKEE NATION ENTERTAINMENT (May 18, 2020), https://www.cherokeecasino.com/-/media/shared-content---hr-and-cc/re-opening-campaign/responsible-hospitality-v2/responsible-hospitality-v2.pdf?la=en&hash=B060BA5042D3E74D4F0BA18B69F49B7A.)

13. Discovery has only just begun in this case. Defendants propounded written discovery requests on Plaintiff but have not received responses. There have been no depositions.

LEGAL STANDARD

A motion for summary judgment is properly granted only if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." 12 Okla. Stat. § 2056(C); *see also* Okla. Dist. Ct. R. 13(e). The moving party bears the "initial burden to show that it is entitled to summary judgment." *McMullen v. City of Del City*, 1996 OK CIV APP 46, 920 P.2d 528, 530. "[A]ll inferences and conclusions to be drawn from the evidentiary materials must be viewed in the light most favorable to the non-moving party." *Carmichael v. Beller*, 1996 OK 48, 914 P.2d 1051, 1053. If "the materials subject to consideration on a motion for summary judgment either disclose controverted material facts, or, reasonable minds might reach different conclusions even if the material facts are undisputed, a motion for summary judgment should be denied." *Feightner v. Bank of Oklahoma, N.A.*, 2003 OK 20, ¶ 2, 65 P.3d 624, 627.

The interpretation of an insurance policy is a question of law. *May v. Mid-Century Ins. Co.*, 2006 OK 100, ¶ 22, 151 P.3d 132, 140; *Haworth v. Jantzen*, 2006 OK 35, ¶ 13, 172 P.3d 193, 196. Like any contract, a policy's terms must be given their "plain and ordinary" meaning, and if those terms are clear and unambiguous, they must be enforced. *Dodson v. St. Paul Ins. Co.*, 1991

OK 24, 812 P.2d 372, 376. "The construction of an insurance policy should be a natural and reasonable one, fairly constructed to effectuate its purpose, and viewed in the light of common sense so as not to bring about an absurd result." *Wiley v. Travelers Ins. Co.*, 1974 OK 147, 534 P.2d 1293, 1295. A court may not indulge in "forced" or "strained" constructions, nor may a court "rewrite" a policy's terms. *Dodson*, 812 P.2d at 376; *see also* 36 Okla. Stat. § 3621 (providing that "[e]very insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any rider, endorsement, or application attached to and made a part of the policy").

ARGUMENT AND AUTHORITY

I. PLAINTIFF'S MOTION FAILS BECAUSE IT HAS NOT SATISFIED THE POLICY'S "DIRECT PHYSICAL LOSS OR DAMAGE" REQUIREMENT

Plaintiff's Motion seeks "business interruption coverage" but fails to offer any facts that COVID-19 caused "direct physical loss or damage" as required by the Policy. For this reason alone, the Court should deny Plaintiff's Motion.

A. Plaintiff Ignores the "Direct Physical Loss or Damage" Requirement.

The Policy is clear: "this Policy provides insurance against all risk of ***direct physical loss or damage*** occurring during the period of this Policy." (Policy at 24, Ex. 5 to Mot. ("Perils Covered") (emphasis added).) Specifically, Business Interruption coverage extends only to "loss resulting directly from interruption of business, services or rental value caused by ***direct physical loss or damage*** . . . ." (*Id.* at 19 (emphasis added).) The Policy further indicates that the "direct physical loss or damage" be accompanied by rebuilding, repairs, or replacement: Business Interruption coverage is only paid "during the period of restoration"—*i.e.*, only such length of time as would be required for "***damaged property*** [to] have been ***repaired, rebuilt or replaced*** . . . ." (*Id.* at 19, 23 (emphasis added).) And the Extra Expense extension of coverage includes the same requirements. (*Id.* at 19.)

Plaintiff's Motion attempts to avoid the "direct physical loss or damage" requirement by asking this Court to find coverage because Plaintiff "experienced a loss" and the "loss was

fortuitous." (Mot. at 3, 6–7.) But the plain terms of the Policy cannot be avoided—it is the law of this state that an "insurance contract ***shall*** be construed according to the entirety of its terms and conditions." 36 Okla. Stat. § 3621 (emphasis added); *Wiley*, 534 P.2d at 1295. Plaintiff seeks coverage under the Policy's Business Interruption and Extra Expense insuring agreements, both of which require the insured to first demonstrate "direct physical loss or damage." But Plaintiff has not even attempted to make such a showing. As noted above, Plaintiff does not offer a single fact in support of its Motion that evidences its property sustained "direct physical loss or damage."

Plaintiff suggests the Court can ignore the actual Policy language because it is an "all-risk" policy. Plaintiff is mistaken. In *Oklahoma Schools Risk Management Trust v. McAlester Public Schools*, the Oklahoma Supreme Court analyzed an "all-risk" policy and explained that the "insured" has the initial burden "under an all-risk policy [to] show[] the loss is a ***covered*** loss." 2019 OK 3, ¶ 16, 457 P.3d 997, 1002–03, *reh'g denied* (Apr. 29, 2019) (emphasis added); *see also Smith v. CSAA Fire & Cas. Ins. Co.*, No. CIV-17-1302-D, 2020 WL 3146826, at *2 (W.D. Okla. June 12, 2020) ("Plaintiffs claim the policy at issue is an 'all-risks' policy, which would ***place the initial burden on the insured to prove***, by a preponderance of the evidence, that the structural damage to their home was the result of a ***covered peril***." (emphasis added)). Other courts have similarly held that "[l]abeling the policy as 'all-risk' does not relieve the insured of its initial burden of demonstrating a ***covered*** loss under the terms of the policy." *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D.2d 1, 6 (N.Y. App. Div. 2002) (emphasis added); *Whitaker v. Nationwide Mut. Fire Ins. Co.*, 115 F. Supp. 2d 612, 617 (E.D. Va. 1999) ("The 'direct physical loss' language provides a further limitation on the types of fortuitous loss covered under the Policy."). It is a "basic rule of insurance law" that Plaintiff, as the insured, bears the burden of establishing its losses are covered under the policy at issue. *See Pitman v. Blue Cross & Blue Shield of Okla.*, 217 F.3d 1291, 1298 (10th Cir. 2000). Thus, Plaintiff must establish it suffered "direct physical loss or damage," not that it merely suffered a "fortuitous loss."[5]

[5] Plaintiff's reliance on *Texas Eastern* to shift its burden of proof to the Insurers is misplaced. (*See* Mot. at 15–16.) The direct physical loss or damage in that case—a cavern collapse—was clearly within the coverage grant, leaving

B. "Direct Physical Loss or Damage" Requires Distinct, Demonstrable, Physical Alteration to Property.

Longstanding case law and more recent decisions arising from COVID-19 litigation confirm that to demonstrate that its covered property incurred a "direct physical loss or damage," Plaintiff must show a distinct, demonstrable, physical alteration to the property. Plaintiff has not made and cannot make this threshold showing.

As one leading treatise explains, "[t]he 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." 10A Couch on Ins. § 148:46 (3d ed. 1998); *see also Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002) (same); *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010) (same). Consistent with these principles, the Oklahoma Court of Appeal explained in *Dixson Produce LLC v. Nat'l Fire Ins. Co. of Hartford*, 2004 OK CIV APP 79, 99 P.3d 725, 728–29, that there was "no dispute" that "produce that spoiled from the loss of electricity due to [a] tornado" constituted "direct physical loss of or damage to Covered Property." *See also Southern Hosp., Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1142–43 (10th Cir. 2004) (affirming summary judgment for insurer because policy required proof of "direct physical loss or damage" and insured failed to make such a showing, alleging only business interruption losses from cancelled hotel visits after September 11, 2001). In contrast to the tornado and resulting spoilage in *Dixson*, here, there is no distinct, demonstrable, physical alteration of Plaintiff's property.

Recent decisions addressing attempts to recover COVID-19 business interruption losses under property insurance policies are instructive. To date, no court has granted judgment in favor of a plaintiff-insured for alleged COVID-19 business interruption losses:

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only the question of whether the loss was excluded under the policy and justifying the court's burden shifting to the insurer. *See Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox., Corp.*, 579 F.2d 561, 564 (10th Cir. 1978). By contrast, Plaintiff has not satisfied its initial burden of showing that a direct physical loss or damage occurred—it has asserted no such facts in support of its Motion.

- ***Social Life Magazine, Inc. v. Sentinel Ins. Co., Inc.*, No. 20 Civ. 3311 (VEC) (S.D.N.Y. May 14, 2020)**: The court denied an application for a preliminary injunction requiring the insurer to pay loss of business income and held that even if COVID-19 had been on the insured's premises (a claim Plaintiff does not make in this case), that did not trigger coverage because the policy required "direct physical loss or damage" and the ***virus "damages lungs. It doesn't damage printing presses***" or other property, and "this is just not what's covered under these insurance policies." (Ex. 1 at 5:3–4, 10:17–18, 15:15–16 (emphasis added).)
- ***Gavrilides Mgmt. Co. v. Michigan Ins. Co.*, Case No. 20-258-CB-C30 (Mich. Cir. Ct. July 1, 2020)**: The court granted the insurer's motion to dismiss based on "common meanings and under federal case law as well"—that "***direct physical loss of or damage to the property has to be something with material existence. Something that is tangible. Something . . . that alters the physical integrity of the property***." (Ex. 2 at 18:18–19:4 (emphasis added).)
- ***Rose's I, LLC, et al. v. Erie Ins. Exch.*, No. 2020 CA 002424 B (D.C. Super. Ct. Aug. 6, 2020)**: The court granted summary judgment in favor of an insurer and found that the insured restaurants, each of which had been closed due to COVID-19 closure orders, did not experience "direct physical loss" as a matter of law. (Ex. 3.) Under a "natural reading of the term 'direct physical loss,'" the court explained, "the words 'direct' and 'physical' modify the word 'loss.' As such, pursuant to [the insureds'] dictionary definitions, ***any 'loss of use' must be caused, without the intervention of other persons or conditions, by something pertaining to matter—in other words, a direct physical intrusion on to the insured property***." (*Id.* at 5 (emphasis added).)
- ***Diesel Barbershop, LLC et al. v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020)**: The court granted an insurer's motion to dismiss in part because the insureds failed to plead "direct physical loss." The court examined authorities from across the country and found the "line of cases requiring ***tangible injury to property*** . . . more persuasive," and concluded that "***the loss needs to have been a 'distinct, demonstrable physical alteration of the property***.'" (Ex. 4 at *5 (internal quotations and citations omitted.).

- ***Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-Civ-WILLIAMS/TORRES, 2020 WL 5051581 (S.D. Fl. Aug. 26, 2020)**: The court granted an insurer's motion to dismiss because the insured failed to plead "direct physical loss or damage" to its property. (Ex. 5.) Citing other authorities, the court explained 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." (*Id.* at *5 (internal quotations and citations omitted).)
- ***10E, LLC v. Travelers Indem. Co. of Conn. et al.*, No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020)**: The court granted an insurer's motion to dismiss because the insured failed to plead "direct physical loss of or damage to property." (Ex. 6.) The court explained that "[p]hysical loss or damage occurs only when property undergoes a 'distinct, demonstrable, physical alteration,'" "'[d]etrimental economic impact' does not suffice," and "[p]laintiff only plausibly allege[d] that in-person dining restrictions interfered with the use or value of its property—not that the restrictions caused direct physical loss or damage." (*Id.* at *4–5.)
- ***Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020)**: The court granted an insurer's motion to dismiss because the insured failed to state "accidental direct physical loss to Covered Property." (Ex. 7 at *8.) The court explained that "'accidental direct physical loss to Covered Property' is an unambiguous term that plainly requires Plaintiff to demonstrate ***some tangible damage*** to Covered Property." (*Id.* (emphasis added).)
- ***Pappy's Barber Shops, Inc. et al. v. Farmers Group, Inc. et al.*, No. 20-CV-907-CAB-BLM (S.D. Cal. Sept. 11, 2020)**: The court granted insurers' motion to dismiss, and rejected the insureds' argument that the term "'direct physical loss of' . . . does not require a tangible damage or alteration to property and that loss of the ability to continue operating their business as a result of the government orders qualifies." (Ex. 8 at 6–9.) "Physical loss or damage occurs

only when property undergoes a 'distinct, demonstrable, physical alteration.'" (*Id.* at 8 (citation omitted).)[6]

These decisions are consistent with the plain and ordinary meaning of "direct physical loss or damage." *Dodson*, 812 P.2d at 376. Courts routinely refer to "the generally accepted meaning and definitions found in common dictionaries and legal authorities." *Great Am. Ins. Co. of N.Y. v. O.K. Packing Co.*, 1949 OK 253, 202 Okla. 231, 233 (relying on non-Oklahoma case law); *Argonaut Ins. Co. v. Earnest*, 861 F. Supp. 2d 1313, 1317 n.4 (N.D. Okla. 2012) (relying on dictionary). Here, the phrase "direct physical loss or damage" has a "widely accepted definition": it means a "distinct, demonstrable, *physical* alteration" of the property at issue. *Port Auth. of N.Y. & N.J.*, 311 F.3d at 235 (emphasis added) (quoting 10A Couch on Ins. § 148:46); *MRI Healthcare*, 187 Cal. App. 4th at 779 (same).

The "period of restoration" provisions reinforce that coverage under the Policy requires actual physical alteration to property. The Policy's Business Interruption and Extra Expense provisions provide coverage "during the period of restoration," *i.e.*, the period of time necessary to "rebuild, repair or replace such part of the property as has been damaged or destroyed." (Policy at 19, Ex. 5 to Mot.) The terms of an insurance policy must be read together and this language becomes nonsensical unless "physical loss or damage" is interpreted to mean a distinct, demonstrable, physical alteration to the property.[7] Indeed, as courts have made clear, the "words 'repair' and 'replace' contemplate physical damage to the insured premises as opposed to a loss of use of it." *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323,

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[6] Plaintiff may cite *Studio 417, Inc. v. The Cincinnati Ins. Co.*, No. 20-cv-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), which held that an insured adequately *alleged at the pleadings stage* a direct "physical loss" under the property policies at issue. (Ex. 9.) However, there, unlike here, the plaintiff alleged the virus likely was present on the premises, and the court "emphasize[d] that Plaintiffs have merely pled enough facts to proceed with discovery. (*Id.* at *8.) Further, the court noted that "[s]ubsequent case law in the COVID-19 context, construing similar insurance provisions, and under similar facts, may be persuasive" such that "[i]f warranted, Defendant may reassert its arguments at the summary judgment stage." (*Id.*)

[7] The court in *Malaube*, Ex. 5 at *9, found that the language in the period of restoration provision further confirmed that loss of use for pure economic reasons was not recoverable under a property insurance policy. (*Id.* ("[I]f 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.").)

332 (S.D.N.Y. 2014); *see also Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 287 (S.D.N.Y. 2005) ("'Rebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature.").

C. Plaintiff's Motion Offers *No Material Facts* of "Direct Physical Loss or Damage" and Should Be Denied.

In support of its Motion, Plaintiff offers no material facts and no argument demonstrating that any covered property was physically altered in any way due to COVID-19. As a result, consistent with the weight of authorities from across the country and a plain reading of the Policy, the Court should deny Plaintiff's Motion.

Plaintiff, as the moving party, was required to submit with its motion a "concise written statement of the ***material*** facts as to which [Plaintiff] contends no genuine issue exists" and reference "in the statement . . . the pages and paragraphs or lines of the evidentiary materials that are pertinent to the motion." Okla. Dist. Ct. R. 13(a) (emphasis added); *see also Progressive Indep., Inc. v. Okla. State Dep't of Health*, 2007 OK CIV APP 127, ¶ 14, 174 P.3d 1005, 1009 (moving party's "bare assertion without any evidentiary support" cannot satisfy its "initial burden of showing that there is no substantial controversy as to any material fact"). Plaintiff did not do this—instead of presenting material facts, it offers three conclusions that are immaterial to the coverage question before this Court. For example, the alleged "loss" Plaintiff suffered is not defined—there is no evidence that it resulted from "interruption of business, services or rental value" or that it was "caused by direct physical loss or damage." Plaintiff alleges no facts as to the "necessary and reasonable expenses" supposedly incurred, makes no reference to the "period of restoration," and fails to even suggest that it was required "to rebuild, repair or replace" any part of its property that had "been damaged or destroyed." Simply put, there are no material facts *alleged*, much less evidence presented of undisputed material facts. *See also Carmichael*, 914 P.2d at 1053 ("[A]ll inferences and conclusions to be drawn from the evidentiary materials must be viewed in the light most favorable to the non-moving party.").

Plaintiff's 12 attachments do not solve this fundamental failure of proof. None of the exhibits reflects actual loss from an interruption of business, let alone that such loss was caused by "direct physical loss or damage": six exhibits are printouts of court decisions, two exhibits are provisions from *other* policies, and one exhibit is the Policy at issue. The remaining three exhibits are government declarations of emergency—all of which actually weigh in favor of denying Plaintiff's motion, as courts consistently have rejected attempts by insureds to create business interruption coverage for COVID-19-related government orders. (*See, e.g., Social Life Magazine*, Ex. 1 at 5, 8; *Gavrilides*, Ex. 2 at 19; *Rose's I*, Ex. 3 at 5; *Diesel Barbershop, Ex. 4* at *5; *Malaube*, Ex. 5 at *7.)

Plaintiff has not offered this Court *any* undisputed, material facts from which it can conclude that a covered loss occurred. As such, the Motion should be denied.

D. Plaintiff Admits "Direct Physical Loss or Damage" Did Not Cause the Alleged Business Interruption.

Far from showing a covered loss caused by "direct physical loss or damage," Plaintiff's Motion acknowledges that its own "preemptive" actions triggered the business interruption now at issue. Plaintiff admits that it took preemptive measures to *prevent* harm to its property and that the closure of its properties was motivated by "factors relat[ing] to health." (Mot. at 11–15.) Such preventative measures do not equate to the "direct physical loss or damage" necessary to trigger coverage. But even if it was sufficient to trigger coverage (for the reasons set forth above, it is not), Plaintiff's claim that "the Nation reasonably and responsibly closed its properties due to risk of direct physical loss or damage to the Nation's property" (*id.* at 2) is unsupported by its own evidence. Plaintiff points to Cherokee Nation Principal Chief Hoskin's Declaration, but that Declaration says nothing of any "physical loss or damage" to Plaintiff's property—instead, it states that action is necessary to "protect public health, ensure public safety and render emergency relief" and cites the "disruption to critical infrastructure and systems" and the "threat to public safety and welfare." (Ex. 3 to Mot.) Thus, Plaintiff has conceded that "direct physical loss or damage" did not cause its alleged business interruption damages.

II. PLAINTIFF'S "LOSS OF USE" THEORY IS INCORRECT AS A MATTER OF LAW AND UNDERSCORES ITS INADEQUATE SHOWING

Plaintiff argues that despite the lack of any evidence of physical ***damage*** to the property, its property has sustained a physical ***loss*** because it has been "rendered 'unusable for its intended purpose.'" (Mot. at 7.) Plaintiff bases this argument on one material fact purportedly not in dispute—that it "experienced a loss." (*Id.* at 3.) Plaintiff argues that "physical loss" must mean something other than "damage" because the Policy uses the word "or." (*Id.* at 7–8.) But Plaintiff's construction is contrary to the Policy's plain terms and well-established law.

A. Plaintiff's "Loss of Use" Theory Would Improperly Render the Words "Direct" and "Physical" Meaningless.

There is no support for Plaintiff's suggestion that the disjunctive "or" in "direct physical loss or damage" mandates that the term "loss" encompasses mere loss of use. Multiple courts have recently considered and rejected this proposed construction in the context of COVID-19 claims. For example, in *Malaube*, the court held that the words "direct physical" modify both "loss" and "damage" and thus require "actual" change to the property at hand. (Ex. 5 at *7.)

In *Turek*, Plaintiff argued that a provision requiring "accidental direct physical loss to Covered Property" triggered coverage whenever there was an "inability to use Covered Property" or any time the Covered Property was rendered "unusable or uninhabitable," "regardless of whether any tangible damage to the property resulted." (Ex. 7 at *5.) The court rejected the argument, explaining that it would render the words "to" and "physical" meaningless. (*Id.* at *6 ("[T]he plain meaning of 'direct physical loss to Covered Property' requires that there be a loss *to* Covered Property; and not just any loss, a *direct physical loss.*" (emphasis in original)); *see also id.* at *6 n.9 ("If 'physical loss to Covered Property' includes the inability to use Covered Property, then it is unclear why the same meaning could not be conveyed by 'loss to Covered Property.'").)

Similarly, in *10E*, the insured "attempt[ed] to circumvent the plain language of the Policy by emphasizing its disjunctive phrasing—'direct physical loss of *or* damage to property,' . . . and insisting that 'loss,' unlike 'damage,' encompasses impaired use." (Ex. 6 at *5.) But the court, as in several other cases, rejected the argument. (*Id.*; *see also Diesel Barbershop*, Ex. 4 at *5 (holding

"the Policies are explicit that there has to be an accidental, direct physical loss to the property in question"); *Rose's I*, Ex. 3 at 5 ("[A]ny 'loss of use' must be caused, without the intervention of other persons or conditions, by something pertaining to matter—in other words, a direct physical intrusion on to the insured property."); *Newman Myers*, 17 F. Supp. 3d at 331 ("direct physical loss or damage" does not extend to "mere loss of use of a premises, where there has been no physical damage to such premises"); *Phoenix Ins. Co. v. Infogroup, Inc.*, 147 F. Supp. 3d 815, 825 (S. D. Iowa 2015) ("'Physical loss or damage' therefore requires "a material loss amounting to something greater than the threat of loss, even if that loss is tangential or minimal"); *Roundabout*, 302 A.D.2d at 7 (holding "direct physical loss [of] or damage" did not apply to "loss of use" and explaining that "loss of" language could simply refer to theft or misplacement of property).)

Ultimately, Plaintiff's attempt to equate "physical loss" with "loss of use" is a strained and unnatural reading of the Policy which also ignores that the "period of restoration" is tied to repairing damaged property. *See Great Lakes Ins. SE v. Bank of Eufaula*, 391 F. Supp. 3d 1060, 1064 (E.D. Okla. 2019) (courts must "give a reasonable effect to all of its provisions" (internal quotation marks omitted)). Indeed, to "expand 'direct physical loss' to include loss-of-use damages when the property has not been physically impacted in some way . . . would be equivalent to erasing the words 'direct' and 'physical' from the policy," which would be improper. *Ne. Georgia Heart Ctr., P.C. v. Phoenix Ins. Co.*, No. 2:12-CV-00245-WCO, 2014 WL 12480022, at *6 (N.D. Ga. May 23, 2014); *J.O. Emmerich & Assocs., Inc. v. State Auto Ins. Cos*, No. 3:06CV00722-DPJ-JCS, 2007 WL 9775576, at *3 (S.D. Miss. Nov. 19, 2007) (temporary unavailability of computer data did not constitute direct physical loss of or damage to covered property and to hold otherwise would "render the words 'direct' and 'physical' meaningless")[8]

[8] As other courts have held, physical loss is different from physical damage because it includes theft, which deprives the insured of physical possession of property without necessarily causing damage. *Ne. Georgia*, 2014 WL 12480022, at *1 ("[T]here is a difference between a loss of physical possession [i.e., theft] and a loss of use."); *Roundabout*, 302 A.D.2d at 7–8 (physical loss includes theft and is not redundant with physical damage).

B. Plaintiff's "Loss of Use" Theory Is Unsupported by Its Own Out-of-State Authorities and Facts.

None of the out-of-state authorities relied upon by Plaintiff involves COVID-19. And none of Plaintiff's cases supports coverage for the loss of use of property absent physical loss or damage.[9] For example, in *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 36–37 (1968), a church was closed by order of a local fire department because gasoline had infiltrated the soil "under and around the building" and "infiltrated and contaminated the foundation and halls and rooms." That the insured lost use of the building "was simply the consequential result of the fact that because of the accumulation of gasoline around and under the church building the premises became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous," all of which "equate[d] to a direct physical loss within the meaning of that phrase as used by the [policy]."[10] *Id.* at 38–39.

In *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247, at *1 (D. Or. June 7, 2016) (a decision later *vacated* by the same court, upon joint stipulation by the parties), a wildfire caused smoke, soot, and ash to accumulate on the seats and ground of a nearby "open-air, partially enclosed" theatre venue used by a festival association for performances. There was no dispute that "smoke, ashes, and dust permeated the interior of the theatre, coating the seating, HVAC, lighting, and electronic systems." *Id.* Thus, the theatre "sustained 'physical loss or damage to property' when the wildfire smoke infiltrated the theater and rendered it unusable for its intended purpose." *Id.* at *9. It was not, as Plaintiff suggests, that smoke was simply in the air with no physical effect on the theater. *Id.*

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[9] In *Diesel Barbershop*, a recent COVID-19 case denying coverage, the court noted that some courts have found physical loss even without tangible destruction to the covered property and despite the lack of physical damage. (Ex. 4 at *5.) But the court found "that the line of cases requiring tangible injury to property are more persuasive here" and that "the other cases are distinguishable." (*Id.*)

[10] Plaintiff quotes a passage in *Western Fire* that comes from *Hughes v. Potomac Ins. Co.*, 199 Cal. App. 2d 239 (1962). (Mot. at 9.) Contrary to its characterization in *Western Fire,* however, *Hughes* did not address whether the insured premises suffered "direct physical loss." Rather, *Hughes* involved a landslide that deprived an insured's home of subjacent and lateral support, and the court analyzed whether a homeowner's policy insuring a "dwelling building" also covered *the land beneath* the building. *Hughes*, 199 Cal. App. 2d at 243, 248–49. *Hughes* did not address whether "direct physical loss" can exist without tangible injury to property. And in any event, *Hughes* involved compromise to the physical integrity—specifically the structural stability—of an insured's property.

And in *TRAVCO Insurance Co. v. Ward*, 715 F. Supp. 2d 699, 703 (E.D. Va. 2010), the drywall used in a homeowner's residence released toxic sulfuric gas into the property, causing the level of sulfuric gas inside the residence to become "twenty times higher than ambient levels," impacting "susceptible metal surfaces . . . such as HVAC coils, electrical wiring in outlets, ground wires and other metallic surfaces," and requiring that the residents be relocated. Again, the case presented a physical impact on the property. Moreover, *TRAVCO* did not address business interruption coverage or the policy language at issue here. Instead, it interpreted a homeowner's policy that included both first-party property coverage for the dwelling and third-party liability coverage. Significantly, "Property Damage" in that policy was defined as "physical injury to, destruction of, or loss of use of tangible property." *Id.* at 702. The Policy at issue here does not define property damage to include "loss of use of tangible property."

Every other case Plaintiff cites for the proposition that "direct physical loss or damage . . . occurs when property is rendered unusable for its intended purpose" (Mot. at 7 & n.12 (emphasis omitted)), involved some physical force or contaminant that directly acted upon the insured's property to render it unusable. Yet, Plaintiff offers no evidence that its property has been physically altered in any way.[11] Instead, Plaintiff alleges it temporarily closed its properties to implement safety measures to protect human health and safety—not to repair, rebuild, or replace damaged structures; indeed, once social distancing, mask wearing, and other safety measures were put in place, the Nation's properties reopened for business.

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[11] Even if Plaintiff had alleged the presence of COVID-19 on its properties prior to their closure, it would not be sufficient to demonstrate "direct physical loss or damage" to property. COVID-19 presents a risk to the human body, not property such as casinos or resorts. (*See, e.g.*, *Social Life Magazine*, Ex. 1 at 5:3–4, 15:15–16 (explaining that COVID-19 "damages lungs"; "this is just not what's covered under these insurance policies").) And courts consistently have held that temporary dust, debris, or deposits on property, which can be cleaned, do not constitute direct physical loss or damage. *Great N. Ins. Co. v. Benjamin Franklin Federal Sav. & Loan Ass'n*, 953 F.2d 1387, at *1 (9th Cir. 1992) ("contamination of [an insured's] building with asbestos was an economic loss and not a physical loss" because "the building remained physically unchanged"); *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 574 n.8 (6th Cir. 2012) (items that could be cleaned by "Lysol" and ordinary washing had not suffered physical loss); *Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 17-cv-23362, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) (dust and debris on the property, which needed to be cleaned, was not direct physical loss or damage), *aff'd*, 18-12887, 2020 WL 4782369 (11th Cir. Aug. 18, 2020); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App. 3d 23, 42 (2008) (mold that was "present only on the surface of the siding and could be removed without causing harm to the wood" was not "direct physical injury").

To embrace Plaintiff's view that "loss of use" absent any actual physical alteration to the insured property gives rise to coverage "would mean that direct physical loss or damage [can be] established *whenever* property cannot be used for its intended purpose." *Pentair, Inc. v. American Guarantee and Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005) (emphasis in original). Under Plaintiff's theory, if the government outlawed gambling, Plaintiff would be entitled to coverage for the "loss of use" of its shuttered casino. Plainly, the broad reading of the Policy that Plaintiff advances here is inconsistent with the plain language of the contract.

III. BECAUSE PLAINTIFF HAS NOT MET ITS BURDEN TO ESTABLISH COVERAGE, THE COURT NEED NOT CONSIDER THE POLICY'S EXCLUSIONS

Plaintiff bears the burden to prove that it suffered a covered loss. *Okla. Schools Risk Mgmt. Trust*, 457 P.3d 1002–03. Only after meeting that burden does it shift to the insurer to show that an exclusion applies. *Id.* Here, as the moving insured, Plaintiff has not met its initial burden of establishing coverage because Plaintiff has not shown "direct physical loss or damage"; therefore, the Court need not consider the Policy's exclusions.

In any event, the Policy's exclusions bar coverage or at a minimum, present issues of fact that defeat Plaintiff's Motion. For example, the Policy contains an exclusion for "[l]oss, damage, costs or expenses in connection with any kind or description of seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever." (Policy at 28, Ex. 5 to Mot.); Mot. at 16 (listing exclusions for (45) pollution and (46) contamination); *see also Bituminous Cas. Corp. v. Cowen Constr., Inc.*, 2002 OK 34, 55 P.3d 1030, 1034–35 (holding that total pollution exclusion is not limited to environmental pollution in the "traditional [] sense"). Here, Plaintiff claims that COVID-19 can cause "contamination" and "spreads exponentially" through "person-to-person contact" and "can live on surfaces." (Mot. at 12.) And Plaintiff's claim that it closed its properties to prevent "subjecting tribal members, employees, and patrons" to COVID-19 presents at least disputed issues of fact as to whether COVID-19 constitutes "pollution" or "contamination" within the Policy's exclusions.

Finally, faced with a contract that requires "direct physical loss or damage" as a prerequisite to coverage, Plaintiff seeks to change the unambiguous language of *this* insurance contract by referencing an exclusion from a *later, different* policy year. (*Id.* at 17–18.) The Court should disregard such attempts because Plaintiff cannot seek to create an ambiguity where an ambiguity does not exist and such evidence of a later policy is irrelevant and need not be considered. *Dodson*, 812 P.2d at 376 (an insurance policy, like any other contract, must be "enforced to carry out the intention of the parties *as it existed at the time the contract was negotiated*" (emphasis added)).

IV. EXCESS INSURANCE COVERAGE DOES NOT ATTACH UNTIL LOWER LEVELS ARE EXHAUSTED

Lexington Insurance Company provides the primary layer of insurance up to $2,500,000. The other "Insurers" only provide excess insurance coverage that "attaches" at various levels after coverage under the primary and underlying insurers' policies is exhausted. All such excess insurers, at every level, maintain that coverage under their policies cannot be triggered until the insurance at the lower levels has been exhausted. *Steadfast Ins. Co. v. Agricultural Ins. Co.*, 2013 OK 63, 304 P.3d 747, 750 (citing *U.S. Fid. & Guar. Co. v. Fed. Rural Elec. Ins. Corp.*, 2001 OK 81, 37 P.3d 828, 833).[12]

CONCLUSION

For all the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment on Business Interruption Coverage must be denied, and the Court should either grant summary judgment in the Insurers' favor or allow the parties to proceed with discovery.

[12] This opposition incorporates by reference the exhaustion arguments in Hallmark Specialty Insurance Company, Aspen Specialty Insurance Company and Aspen Insurance UK, LTD, and Evanston Insurance Company's opposition briefs filed September 14, 2020.

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 this the 14th day of September 2020, a true and correct copy of the above and foregoing instrument was served via email to the following:

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Phil R. Richards

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

SOCIAL LIFE MAGAZINE, INC.,

Plaintiff,

v.

SENTINEL INSURANCE COMPANY LIMITED,

Defendant.

----------x

New York, N.Y.

20 Civ. 3311(VEC)

Teleconference
Order to Show Cause

May 14, 2020
10:00 a.m.

Before:

HON. VALERIE E. CAPRONI,

District Judge

APPEARANCES

GABRIEL J. FISCHBARG
Attorney for Plaintiff

STEPTOE & JOHNSON, LLP
Attorneys for Defendant
BY: CHARLES A. MICHAEL
SARAH D. GORDON

THE COURT: Good morning, everybody.

Do I have a court reporter on the line?

THE COURT REPORTER: Good morning, your Honor. Kristen Carannante.

THE COURT: Good morning.

Okay. Do I have Mr. Fischbarg for the plaintiff?

MR. FISCHBARG: Yes, Judge. Hi.

THE COURT: Mr. Fischbarg, is anyone else on the line for the plaintiff?

MR. FISCHBARG: Yes. The plaintiff is on a separate phone available if you need evidence or --

THE COURT: The principal of Social Life?

MR. FISCHBARG: Yes. He is in my office, you know, more than six feet away, and --

THE COURT: Okay.

And who do I have for the defendant?

MR. MICHAEL: Good morning, your Honor. This is Charles Michael, from Steptoe & Johnson, for the defendant. With me is my partner Sarah Gordon, who was just admitted *pro hac vice*, and who will be doing the presentation today.

THE COURT: Terrific.

All right --

MS. GORDON: Good morning, your Honor.

THE COURT: Good morning.

Only people who are speaking need to note their

appearances, and I have got those, Mr. Fischbarg and Ms. Gordon. Everybody else, please mute your telephone.

Also, if you hear that sound that sounds like someone has dropped off the line once we get started, I need you to stop talking so that I can make sure that I have still got the court reporter and your adversary on the line.

So, Mr. Fischbarg, this is your motion, so you get to go first.

MR. FISCHBARG: Yes. So I submitted a reply memorandum, you know, in the afternoon yesterday. I was just wondering if --

THE COURT: Yes. I saw that. Thank you.

MR. FISCHBARG: Okay, so you were also able to read it, I suppose?

THE COURT: Yes, yes.

MR. FISCHBARG: Okay.

So I guess the only other thing I want to add that's not in the papers, and then I don't know if your Honor has any issues that you want to talk about, is I mentioned that Liberty Mutual had this exclusion for viruses and it is also evident that other insurance companies have the same exclusion, including Travelers Insurance Company, and they filed the -- they actually filed a federal lawsuit for declaratory judgment in California, Docket No. 20 Civ. 3619, to preempt such claims, I guess to enforce their exclusion for viruses. So to the

extent that the defendant is claiming some kind of overreach by the plaintiff here, I don't think it is proper. There are several insurance companies who are capable of putting in a virus exclusion in their policies, and in this case there is none. So --

THE COURT: Let me ask you something. First off, I want to start with basics. Do you agree that New York law applies?

MR. FISCHBARG: Yes.

THE COURT: All right. So the -- is it the *Roundabout Theatre* case?

MS. GORDON: Yes, your Honor.

THE COURT: First Department case?

MS. GORDON: Yes, your Honor. This is Ms. Gordon on behalf of Sentinel.

THE COURT: Thank you.

Mr. Fischbarg, it would seem to me that the *Roundabout* case is a real problem for your position.

Would you like to explain to me why it doesn't preclude your claim?

MR. FISCHBARG: Yes. That case applies to off-site property damage rendering the premises at issue inaccessible. So in this case, you don't have off-site property damage. You have on-site property damage.

THE COURT: What is the damage? There is no damage to

your property.

MR. FISCHBARG: Well, the virus exists everywhere.

THE COURT: It damages lungs. It doesn't damage printing presses.

MR. FISCHBARG: Right. Well, that's a different issue, whether or not -- that's a different issue than the *Roundabout* case that had to do with accessibility. Now we are jumping to the topic of whether a virus can cause physical damage to a printing press, as your Honor mentioned. So that's a separate issue, and there are a lot of cases that we have cited where this type of material, a virus, does cause physical damage.

THE COURT: What's your best case? What do you think is your best case under New York law?

MR. FISCHBARG: Well, the problem is, under New York law, there isn't much law. The New Jersey federal court, in *TRAVCO*, citing other cases, including from other circuits, where physical damage had a broader interpretation that includes loss of use and not just, you know, something where you take a hammer and break an item.

THE COURT: With loss of use, I mean, loss of use from things like mold is different from you not being able to, quote, use your premises because there is a virus that is running amuck in the community.

MR. FISCHBARG: Okay. I would disagree with that. I

would say virus and mold are equivalent. They are both physical items which, if they land on a surface or are on a surface, just like spores that are also listed in the policy, mold is also listed in the policy. I would say that the virus, mold spores --

THE COURT: Hang on --

MR. FISCHBARG: -- anything --

THE COURT: A second.

Do I still have the court reporter?

THE COURT REPORTER: Yes, your Honor.

THE COURT: Do I have I still have, Ms. Gordon?

MS. GORDON: Yes, your Honor.

THE COURT: All right. Go ahead.

MR. FISCHBARG: Mold spores, bacteria, virus, all those are physical items which damage whatever they are on, whatever they land on. And in this case, the virus, when it lands on something and you touch it, you could die from it. So --

THE COURT: That damages you. It doesn't damage the property.

MR. FISCHBARG: But you are not able to use the property because it damages you. So it's a corollary. In other words, this policy, by the way, mentions the word "virus" and "bacteria" in it in two places.

THE COURT: Where does it mention it?

MR. FISCHBARG: It mentions it in the PDF as well as Exhibit 9, page 36 and 37, which is page 7 of 25 of the special property coverage form under additional coverages, section 5(j), where the insured would cover certain law enforcement orders requiring you to -- requiring remediation. But it contains an exclusion for bacteria and viruses, and it uses the word "bacteria" and it uses the word "virus."

So what this is really referring to is the *Legionella* bacteria, which is causes Legionnaires' disease typically. That's the bacteria. Virus is obviously something else. So this is obviously referring to when there is a Legionnaires' outbreak in a building, which could happen in New York pretty often, every few years, and then the building gets shut down and they have to do remediation. Either they -- at least as a bacteria, *Legionella* bacteria only occurs in water or pipes or in mist. So the building is shut down, and then you might have to -- and now there is a new code where the buildings have to test their cooling systems for *Legionella* bacteria. So that's an example where a bacteria causes property loss, or loss of use, or damage, physical damage to property. And I would say the virus is equivalent to that bacteria. So --

THE COURT: But it's not. This is different. The virus is not specifically in your property that is causing damage. It is everywhere. The Legionnaire example is very different. Because it's not like Legionnaire is running

rampant throughout the city, and therefore your office building can get closed. It is that the Legionnaire bacteria is in that building causing --

MR. FISCHBARG: Yes.

THE COURT: -- that building to be shut down.

MR. FISCHBARG: Yes. Yes.

So this virus is everywhere, including this office in particular, this office. In other words, they just did a random survey of people going into a grocery store in New York, and 20 percent tested positive. So, Judge, that's just a one-sample test. So if the infection rate in New York City is 20 percent, then the virus is literally everywhere. So if it --

THE COURT: That's what --

MR. FISCHBARG: -- is --

THE COURT: That is what has caused the damage is that the governor has said you need to stay home. It is not that there is any particular damage to your specific property.

MR. FISCHBARG: Well, okay, that's --

THE COURT: You may not even have the virus in your property.

MR. FISCHBARG: Well, okay, that's -- I would disagree. The virus not just causes -- it lands on equipment, it lands everywhere. That's why all of these -- all of the health guidelines from the World Health Organization and

elsewhere talk about wearing gloves, talk about wiping things down, because it lands on surfaces. It doesn't just get transmitted through the air. Another way of getting it is through contact --

THE COURT: Right, but what --

MR. FISCHBARG: -- when it touches your --

THE COURT: What evidence do you have that your premises are infected with the COVID bug.

MR. FISCHBARG: Well, the plaintiff is here. He got COVID. So that's evidence there.

THE COURT: Well, it's not evidence that he got it in his office.

MR. FISCHBARG: Yes, but, okay, it's not -- we're not -- I don't know what burden of proof we are looking at, whether it is beyond a reasonable doubt --

THE COURT: No, it's --

MR. FISCHBARG: -- or more likely than not, more likely than not, he can testify where he was and more likely than not he either got it from his office or he got it from his home. So that's a different burden of proof. If you are looking for some kind of burden of proof to show that he got it from his office, I mean, that's an evidentiary question, and we can get an epidemiologist to testify and get an expert to testify on that, which I understand is going to happen in the other lawsuits that have been filed across the country

regarding --

THE COURT: Okay.

MR. FISCHBARG: -- this issue.

THE COURT: Okay.

MR. FISCHBARG: So . . .

THE COURT: Anything further, Mr. Fischbarg?

MR. FISCHBARG: No, I guess that's all for now. Thank you.

THE COURT: Okay. Thanks.

Ms. Gordon.

MS. GORDON: Thank you, your Honor. This is Sarah Gordon on behalf of Sentinel, and we agree with your Honor's thoughts here.

The property policy has two distinct requirements here. There has to be direct physical loss or physical damage to the property and the cause of the business interruption damages they are seeking has to be direct physical loss or damage, and the cause here is not physical damage.

We think, you know, as your Honor rightly pointed out, *Roundabout* controls. It is under New York law. It's a First Department case from 2002. There are no subsequent decisions that have disagreed or overturned it here in New York; and, if anything, it has been confirmed by this . . .

THE COURT: Hang on. Did I lose my court reporter?

THE COURT REPORTER: No, Judge. I'm here.

THE COURT: Did I lose Mr. Fischbarg?

MR. FISCHBARG: No, I'm here.

THE COURT: Okay.

MS. GORDON: This court, your Honor, in *Newman Myers*, adopted the exact same rationale for a law firm that was trying to assert damages where there were no -- business interruption damages, where there was no physical harm to the property. And, you know --

THE COURT: Let me interrupt you for a second.

So Judge Engelmayer in *Newman* went out of his way to talk about a case where there was a bunch of -- there was a rock slide which didn't actually hit the house or the premises, and yet they got coverage and coverage for the invasion of fumes.

MS. GORDON: Yes, your Honor.

So for most of the cases, there are a number of them, there is -- what has happened is something physically has happened to the property that prevents people from being on the property. So, for example, in *Gregory Packaging*, in New Jersey, there was ammonia leaked out and they couldn't be on the property, so something physically happened. You couldn't necessarily see it or touch it, but there were fumes and it was unsafe to be there. The same thing with *Motorists*, where there was *E. coli* in the well. You couldn't be in that house because you were exposed to other things that had the *E. coli*.

The property has to be entirely unusable or uninhabitable for physical loss or damage to constitute a loss of use. We don't think that's the law in New York in any circumstance, but even in those other cases, there is nothing equivalent here. Mr. Fischbarg's client can go to his premises. There is no ammonia or mold or anything in the air that's not going to allow him on to the property. In fact, the governor's orders explicitly allow him to go to the property and get his mail or do routine business functions. The only rule is that he has to stay six feet apart from other people. So those cases are entirely distinguishable.

And when a business, a property is allowed to remain open or people can still occupy the premises, there is no direct physical loss or damage. That was the case -- that's what the court said in *Port Authority*, that's what happened in *Mama Jo's*, where the restaurant was allowed to be open. The cases where there is direct physical loss or damage, you literally cannot be on the premises because there is something there that is making it uninhabitable, and here that just isn't true.

THE COURT: Okay. Mr. Fischbarg I will give you the last word.

MR. FISCHBARG: All right. So I would disagree that he is allowed to go to the premises. In fact, the opposite is true. The executive order 202.8 says it requires 100 percent

reduction. So he can't go there, and he is not allowed to go there, and that is a separate claim. It is the civil authority claim besides the breach of contract claim.

THE COURT: Doesn't the executive order say -- I'm sorry, which executive order are you talking about?

MR. FISCHBARG: It is . . .

It is Exhibit 3 of the declaration, and then on page 2, "Each employer shall reduce the in-person workforce at any work locations by 100 percent no later than March 22 at 8p.m." And then it says --

THE COURT: Right, but that doesn't mean the boss can't go to the work location.

MR. FISCHBARG: I would say he is -- he is an employee and he can't go. I think it does. In my building here in New York, there is nobody here. I'm the only one. There is no bosses in any of the offices.

THE COURT: There is nothing about the governor's order that prohibits a small businessperson or a big businessperson from going into their office to pick up mail, to water the plants, to do anything like --

MR. FISCHBARG: Your Honor --

THE COURT: -- that, including employees that are working.

MR. FISCHBARG: Sorry.

MS. GORDON: Your Honor, this is Sarah Gordon. Oh, go

ahead, Mr. Fischbarg.

MR. FISCHBARG: Okay.

Again, I would disagree. I think the order is pretty clear that 100 percent means that you are not supposed to go to work, and that's what people have been doing in New York. They are not going into the office. And to the extent they are getting mail, I mean, there is work-arounds where the workers in the building have been leaving it downstairs for people to pick up, but the way it's been implemented is that 100 percent means no one is going to any office.

THE COURT: You are in your office.

MR. FISCHBARG: Yeah, I'm not -- I'm considered, by the way -- lawyers are considered essential, and if you are a sole practitioner, you are considered essential. So I have the exclusion, and that's why I am here, but otherwise I wouldn't be here. So . . .

MS. GORDON: Your Honor, if I may? We submitted with Mr. Michael's affidavit, Exhibit D, a printout from the Empire State Development website. And on question 13, it addresses exactly this issue. It says, "What if my business is not essential but a person must pick up mail or perform a similar routine function each day?" And the answer provided by the Empire State is, "A single person attending a nonessential closed business temporarily to perform a specific task is permitted so long as they will not be in contact with other

people."

THE COURT: I thought I had read that somewhere.

MS. GORDON: Yes. It is in Mr. Michael's declaration, and I think it's ECF 18-4, page 304.

THE COURT: Okay.

MR. FISCHBARG: Right, but I think the executive order supersedes that is what I would argue.

THE COURT: Okay.

Mr. Fischbarg, you have got to demonstrate a probability of success on the merits. I feel bad for your client. I feel bad for every small business that is having difficulties during this period of time. But New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going. You get an A for effort, you get a gold star for creativity, but this is just not what's covered under these insurance policies.

So I will have a more complete order later, but your motion for preliminary injunction is going to be denied.

Anything further for the plaintiff?

MR. FISCHBARG: I guess just a housekeeping thing. We filed an amended complaint. Are we going to deem it served or does it have to be re-served?

THE COURT: Has the defendant -- does the defendant want to be reserved or will you take the amended complaint?

MR. MICHAEL: Your Honor, this is Charles Michael.

We have entered a notice of appearance, and so I think once they filed it on ECF, that service, we are happy to consider it served. That's fine. And he does have one amendment as of right.

THE COURT: Correct.

MR. MICHAEL: That was within his right to file it.

THE COURT: Does defendant plan to move or answer?

MR. MICHAEL: Probably to move. We would have to discuss it with our client, but I believe so.

THE COURT: Okay. What are the parties' position on discovery while the motion to dismiss is pending?

MR. FISCHBARG: Well, I would say there are two motions filed -- there is one in the Eastern District of Pennsylvania and one in, I think, the Northern District of Illinois -- for an MDL, multi-district litigation, involving a lot of lawsuits combining, so I think this might be happening in each state until that motion is decided, and I think the briefing schedule is in June --

MS. GORDON: We -- your Honor --

MR. FISCHBARG: -- so I think --

MS. GORDON: Sorry, Mr. Fischbarg.

MR. FISCHBARG: So I would say that this case might be transferred to the multi-district panel at some point.

THE COURT: Okay. So, Mr. Fischbarg, what I am hearing you say is that you are perfectly happy to have the

defendants not move until we find out whether or not your case is going to get scooped up into the MDL?

MR. FISCHBARG: Yes, correct.

THE COURT: All right. I presume that the defendants are perfectly happy to do nothing until you hear back from the MDL.

MS. GORDON: Your Honor, I need to consult with my client on that. I'm not sure that that's true. We don't think these cases are appropriate for consolidation in the MDL for many of the reasons which were evident today, given the different states' conclusions on these laws. So I need to consult with my client on the motion practice. We may intend to want to move in any event.

THE COURT: Okay. Well, you could move, but if there is a likely -- if there is some likelihood that they are going to get scooped into the MDL, I'm not likely to decide it until that decision is made. So it is entirely -- I guess from my perspective I don't really care, but from your client's perspective, they may be making a motion to dismiss that's unnecessary. If you are right, and you may well be right, that they are not going to MDL these kinds of cases, then all that's happening is this is just being delayed into the summer for you to incur fees making a motion to dismiss.

So why don't you talk to your client, figure out what you want to do. One way or the other, it does not seem to me

to make sense to proceed with discovery in this matter, certainly under the circumstances that everyone is in, and particularly the plaintiff is in, strapped for revenue, until we figure out whether a lawsuit is going to go forward.

So talk to your client, figure out whether -- the defendant should talk to Sentinel. Figure out whether you are happy staying this case pending a decision on the MDL or not, and just write me a letter and let me know.

MS. GORDON: Yes, your Honor. Thank you.

MR. MICHAEL: Your Honor --

THE COURT: Anything further from the plaintiff?

MR. MICHAEL: Just one housekeeping matter. This is Charles Michael, again, for the defendant.

THE COURT: Okay.

MR. MICHAEL: I just wondered if there was any special procedures for ordering the transcript or if we go just through the normal Southern District website? I didn't know, under the COVID circumstances, if there is something different we should do.

THE COURT: I don't think there is anything different, but we have got the court reporter on.

So, Madam Court Reporter, is there anything different they need to do?

THE COURT REPORTER: At the end of this proceeding, I am going to email the parties with their instructions.

THE COURT: Okay.

MR. MICHAEL: Terrific. Thank you so much.

THE COURT: Anything further from the plaintiff, Mr. Fischbarg?

MR. FISCHBARG: No. Thank you, Judge.

THE COURT: Anything further from the insurance company? Ms. Gordon?

MS. GORDON: No. Thank you, your Honor.

THE COURT: All right. Thank you, all.

MR. FISCHBARG: Okay. Bye, Judge.

MR. MICHAEL: Thank you, your Honor.

oOo

EXHIBIT 2

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

GAVRILIDES MANAGEMENT COMPANY,
Plaintiff,
vs. File No. 20-258-CB

MICHIGAN INSURANCE COMPANY,
Defendant.
/

DEFENDANTS MOTION FOR SUMMARY DISPOSITION
BEFORE THE HONORABLE JOYCE DRAGANCHUK, CIRCUIT COURT JUDGE
LANSING, MICHIGAN - WEDNESDAY, JULY 01, 2020

APPEARANCES:

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Lansing, Michigan

Wednesday, July 01, 2020

2:58:57 PM

THE COURT: This is, pardon me if I massacre this, Gavri--, Gavrilides Management Company, et al versus Michigan Insurance Company, docket number 20-258-CB. And this is the time set for Defendant Michigan Insurance Company's Motion for Summary Disposition. And just for the record, could I have your appearances, please?

MR. HEOS: Yes, your Honor. Matthew Heos and Nick Gavrilides is here in the courtroom also with me. He is the owner of the immediate plaintiff company's.

MR EMRICH: Henry Emrich on behalf of Michigan Insurance Company, your Honor and my assistant Chenney Ward.

THE COURT: Okay, thank you. And your motion, Mr. Emrich, if you wish to go ahead.

MR. EMRICH: Thank you, your Honor. I am going to assume that the Court has read all of the pleadings in this case, so I'll try not to belabor some of the points. I think the, the key fact that we need to focus on is that as we've argued is that there's no question here but the policies that insure Mr. Gavrilides properties against, against direct physical loss or damage to the property and contrary, any claim with the policy benefits in question

this business income coverage is illusory, the policy in question here clearly provides that for the business coverage, the business income coverage to apply and, and most of the other primary coverages under their policy, there must be a direct physical loss of or damage to the insured property in order for it to apply.

And I think it's important as we'll discuss later in our argument depending on what Mr. Heos has to say, why this is important, we must focus on the fact that there must be direct physical loss or damage to the insured property and not direct physical loss of use of or damage to the property as has been suggested by Mr. Gavrilides and his attorney in order for the coverage at issue to apply.

While I acknowledge, your Honor, that this is a somewhat unique, extraordinary if you will, matter to be filing at this point in the proceedings as our initial pleading; I think it's important to understand that when we look at Mr. Gavrilides complaint, it does not contain one single allegation that this insured property has in any way been damaged or lost. To the contrary, the allegations in the complaint affirmatively allege that the plaintiff business interruption claim is based on the "Stay at Home" orders of Governor Whitmer. There is no allegation of any kind that the property in question has

in any way been damaged, lost or anything of the sort.

Given that this motion has been brought under 2.116(c)(10), plaintiff must produce some evidence to contradict the uncontroverted facts that have been alleged not only in the complaint, but in the affidavit submitted Mr. Gavrilides and in any of the other materials that Mr. Heos has attached to his response as, as indicated, most importantly, the affidavit of Mr. Gavrilides that reiterates the admissions in the complaint that there has not been any loss of or damage to either of the properties for which they seek coverage.

The insureds property today exists in the very same condition as it existed the day prior to the effective date of the "Stay at Home" order. They have not been lost, they have not been damaged, they have not required any repairs because of any damage to those properties. The business operation, its, its operation as a restaurant today is, is the same as the day prior to the effective date of the order, albeit with some modifications that had been required to avoid grouping and to maintain social distancing in, in a sense improvements to the real estate. Not repairs, you know, and, and it's been maintained as a take-out, take-out operation at least until recently when they resumed the dining operation. There has been no loss of or damage to either building

that has prevented the plaintiff from operating as a restaurant or entering it for that matter if--, as they have. If plaintiffs wanted to sell either building today, they could do so. And while plaintiffs have provided some speculative evidence about the decreased value of that property, although, as I read Mr.--, as I read the materials that Mr. Heos kindly attached to his response, the fact of the matter is it pointed out in that article was that while they operation of a commercial property may get harder, it's not impossible to operate it in the future under our new normal.

Because plaintiffs complaint, the affidavit, the other information that has been provided to your Honor provides no evidence of any damage to that property. Plaintiffs could never prove that either property suffered any direct physical loss from the imposition of Governor Whitmer's emergency order. And thus, could never recover business interruption coverage under this policy based on the facts that have been presented to the Court. The same holds true under the business cover, income coverage, if a civil authority prevents or prohibits access to either property because of direct physical damage to an adjacent or nearby property for the very same reason. There has been no direct physical loss or damage to any adjacent property that has been alleged, that has been provided to

the Court in Mr. Heos response. And frankly, when you look at the order that they have, that is at issue in this case, there's nothing there that prevents access to Mr. Gavrilides properties whatsoever.

In summary, your Honor, there are no facts alleged in the complaint or in any of the materials that I've looked at, including Mr. Gavrilides affidavit, that shows there has been direct physical loss of or damage to the insured property. And for those reasons, your Honor, we believe that our motion--, for those reasons alone, we believe our motion for summary disposition should be granted.

I'd just like to make a couple of additional points before I shut up. I really believe summary disposition is warranted on this basis alone and I would turn the Court to the case that we've discussed in our, in our brief, your Honor, that's referred to Universal Insurance Production versus Chubb. And that's the decision of the Eastern District of Michigan involving a claim that involved insured property. It was damaged by a pervasive odor that developed in the property as a result of mold that grew in the property because of some water seepage. And why that case is important is because it discusses the Michigan Rules of Contract Interpretation, that still apply today, policy language is clear and unambiguous on

its face, which we believe is clearly the case here that states that the words and the terms of the policy should be enforced utilizing plain and commonly understood meanings.

And when I said earlier that that's important when we talk about what direct physical loss of or damage to property means, it means we look at those words. We don't add words such as loss of use, that Mr. Heos and Mr. Gavrilides have added in order to understand what we're talking about here. We look at the language in the policy. Every case that Mr. Heos produced your Honor, says the very same thing. In Univer--, Universal, like here, the policy was an 'all-risk' policy that required, like here, direct physical loss or damage to the insured property in order to trigger coverage unless that coverage was excluded.

As Universal pointed out, applying a dictionary meaning of direct and physical as meaning something immediate or proximate as a premise to something that is distant or incidental and physical meaning something that has a material existence meant in the context of a loss involving a contaminant that, unlike here, per the uncontroverted allegations of the complaint and other evidence produced by plaintiff in response to this motion. That in order for direct physical loss of the property in this

context, the contaminant must actually alter the structure integrity of the property in order to trigger coverage under language that is at issue in this case. And it didn't happen in Universal, as the Court denied coverage there, granted affirmed summary disposition. And importantly your Honor, it hasn't even been alleged in this case. Regardless of any authority to the contrary, anywhere else in the country, this remains the law in our courts when interpreting policy terms at issue. There is a requirement that there be direct physical loss of or damage to property. And the allegations produced here in the complaint and the evidence that's been attached have specifically acknowledged no such contamination and no such damage to the property as a result of that contamination.

As in Universal, your Honor, the mere presence of odor or even mold was not any evidence of structural or tangible damage to the insured property. And as such, no direct physical loss or damage to the property had-, was occurred. Here, your Honor, we have the very same thing except that we have not even had any allegations of any damage to the property caused by this unfortunate, this horrible virus.

Finally, and although we do not believe the Court even has to get to this point, even if we assume for

purposes of this motion that contamination occurred on each premises and that somehow effected the structural integrity of either building, again, neither scenario is alleged. And even if it were, we do not believe under the circumstances and the science that exists that it would necessarily constitute direct physical loss over damage to the property. The buyer's exclusion of the policy, which clearly and unequivocally states that it applies to all coverages and endorsement and that the company will not pay for loss or damages caused by or resulting from any virus, bacteria or other microorganism that induces or is, is capable of inducing physical distress, illness or disease. And Lord knows, that that has certainly been the case with what's happened with Covid-19 throughout our country.

Clearly, your Honor, that exclusion, again, I don't believe you even have to get there, but that exclusion would clearly exclude any claim here even if plaintiff's could prove direct physical loss of or damage to the insured property or any nearby property that resulted in a civil authority issuing an order prohibiting access to the property. As of eight days ago, your Honor, they have only been few jurisdictions in this country, Florida and Pennsylvania, that have discussed and applied this, a similar exclusion as at issue in this case and in

every one of those cases, the Court has enforced that exclusion as written because it's clear and unambiguous. Again, your Honor, for all the reasons that we've set forth here today and the brief that we filed and our reply, we request that the Court grant our Motion for Summary Disposition at this time. Thank you.

THE COURT: Thank you. Mr. Heos?

MR. HEOS: Thank you, your Honor and may it please the Court. And obviously Mr. Emrich and I have a different interpretation of direct physical loss of or damage to covered properties because here the loss comes from the issue of the executive order restricting use of property. Physically you cannot use for, for dine-in services any of the interior of the building for a period of time. And a complete prohibition isn't contemplated by the language of the contract, I think a limited restriction also falls within the coverage. And I think that if you're gonna accept the defendants argument you would have to limit the meaning to destruction of the physical building itself, but we know that the coverage extends to non-destructive loss, civil authority being one.

I put in example in the brief subterranean pollution, you can look at asbestos or a computer virus is something that would occur that there would be no physical

make sure that when I got up in rebuttal, just as I have been given the opportunity to here, I would point that out to the jury and indicate to them that there's a reason for that. And that's because they didn't want you to talk about the facts that clearly supported conviction.

On the other hand, if it was a case where the law, you know, or the facts may have been murky, but the law was clear, the defense attorney would only focus on, you know, on those facts and not talk about the law. And again, I point that out to the jury there. But, in this case, you know, and there were cases back then to, like our case here that were neither supported by the facts or the law. Which I believe is clearly the case in this case. And the defense attorney would get up and argue something that to the jury that had absolutely nothing to do with the case in hopes of confusing them. Just like Mr. Heos has suggested by talking about these asbestos cases or some of these other cases that have nothing to do with this.

Well in this case, when you look at his responsive pleading, he talks about an accident situation that has absolutely no application here. Nothing to do with this case. While in his argument, he starts out talking about a discussion of the virus of racism and as there, as there, we would point out, if we were in front

of a jury, just like I'd point out to them and I'm pointing out to you, it hasn't got anything to do with this case. Your Honor, the reason for that and the reason for the topic of that is that he knows that neither the facts or the law support his claim and nothing he could file as an amendment would change that.

He is hoping to somehow create this little bit of possibility, some scintilla that some evidence is gonna pop up that shows that the property has been damaged in hopes that he could trigger coverage. And as this Court knows under the cases we've discussed in our brief, that is not sufficient to deny summary disposition in a case that clearly warrants it even at this early stage.

Thank you your Honor for your patience. Thank you Mr. Heos, we've never met. I've heard a lot of good things about you. Mr. Gavrilides, nice to have met you, very sorry for the situation you're in. It's just crazy all the way around. And just like having to argue this case on TV is really just disconcerting for me. But, in any event, thank you your Honor for your patience.

THE COURT: Thank you. You're on Youtube not TV. But--

MR. EMRICH: I meant screen. Yeah, whatever.

THE COURT: Right.

MR. EMRICH: The screen.

THE COURT: I, I did read the briefs. I studied them very carefully and I've listened to the argument of counsel today. And taking all the-, that together I, I note that the plaintiff speaks of and focuses on arguments about access to the property, use of the property and definitions of loss and damage. But, the first inquiry has to start with a full look, not just isolating some words or phrases from the policy. But, a full look at the coverage that's provided under the policy.

Coverage is provided for actual loss of business income sustained during a suspension of operations. The policy goes on to provide the 'suspension must be caused by direct physical loss of or damage to property.' And it also provides 'the loss or damage must be caused by or result from a covered cause of loss. The causes of loss special form provides that a covered cause of loss means risks of direct physical loss.'

So, whether we're talking about the cause for the suspension of the business or the cause for the loss or the damage, it is clear from the policy coverage provision only direct physical loss is covered. Under their common meanings and under federal case law as well, that the plaintiff has cited that interprets this standard form of insurance, direct physical loss of or damage to the property has to be something with material existence.

Something that is tangible. Something according to the one case that the plaintiff has cited from the Eastern District, that alters the physical integrity of the property. The complaint here does not allege any physical loss of or damage to the property. The complaint alleges a loss of business due to executive orders shutting down the restaurants for dining, for dining in the restaurant due to the Covid-19 threat.

But, the complaint also states that a no time has Covid-19 entered the Soup Spoon or the Bistro through any employee or customer and in fact, states that it has never been present in either location. So, there simply are no allegations of direct physical loss of or damage to either property. The plaintiff seems to make in the briefing, at least, two arguments about the language in the coverage provision and what it means.

The first argument is that the plaintiff says coverage applies to "direct physical loss or damage to property." Even if that were the wording of the coverage provision, it wouldn't save the plaintiff from the requirement that the loss or damage must be physical and the analysis could end right there. But, I have to go on to say that this is not even the wording of the coverage provision. Coverage according to the policy applies to a suspension caused by "direct physical loss of or damage to

property." So, I'm not going to get into a detailed analysis of the rules of grammar. But, common rules of grammar would apply to make that phrase a short-cut way of saying "direct physical loss of property or direct physical damage to property." So, again, the plaintiff just can't avoid the requirement that there has to be something that physically alters the integrity of the property. There has to be some tangible, i.e., physical damage to the property.

Then the plaintiff in the briefing, at least, seems to make a second argument that and this is not 100% clear, but, it seems like the plaintiff is saying that the physical requirement is met because people were physically restricted from dine-in services. But, that argument is just simply nonsense. And it comes nowhere close to meeting the requirement that there's some, there has to be some physical alteration to or physical damage or tangible damage to the integrity of the building.

So, the next argument that the plaintiff makes is that the virus and bacteria exclusion is vague and can't apply here. The plaintiff has not adequately explained how the term virus is vague. And in fact, supplies a completely workable, understandable, usable definition of the word virus. The argument in this regard really seems to be more that the virus exclusion doesn't

apply. And it goes something like this as far as I can tell, first, a virus can't cause physical loss or damage to property because virus' harm people, not property. Second, the damage caused here was really caused by actions of the civil authority to protect public health. And then third, therefore, coverage for acts of any person, group, organization or governmental body applies. But, that argument bring us right back to the direct physical loss or damage requirement. Again, going back to the cause of loss special form B, as in boy, exclusions provides that acts of government are only covered when they result in a covered cause of loss. A covered cause of loss, again, is direct physical loss. So, even if the virus exclusion did not apply, which the plaintiff has not supported that it doesn't apply, I only argue that it's vague, which I reject. But, even if it did not apply, it could only be coverage for governmental actions that resulted in direct physical loss or damage.

And then, finally, the plaintiff argues that the policy has a contradiction in it that renders it illusory. So, the plaintiff says that the policy extends coverage for governmental acts. But, then, it takes it away in the causes of loss special form. But, that's simply not true. Coverage is provided for actual loss of business income sustained during the suspension of operations. However,

according to the coverage provision, the suspension must be caused by direct physical loss of or damage to property. And governmental acts are likewise covered if it results in a covered cause of loss, which is again, a direct physical loss. There is no granting of coverage and then excluding the same coverage in the policy. As a matter of fact, the policy is consistent throughout and consistent with federal law cited by the plaintiff. It requires physical loss or damage.

There is a virus exclusion even if plaintiff was alleging, was alleging, even if there were allegations in the complaint alleging actual physical loss or damage, which the complaint does not do. But, there is a virus exclusion that would also apply. And governmental action that results in direct physical loss is covered. But again, there is no direct physical loss alleged here.

Now, I have to address a little bit this, that it was brought as a (c)(10) motion. The actually the defendant hasn't provided any support by way of factual support, depositions, affidavits, et cetera, for a (c)(10) motion. So, if the defendant doesn't do that, then the plaintiff has no burden under Maiden versus Rosewood. So, there's no shifting burden until the moving party first does it. But, I don't think it properly is labeled a (c)(10) motion. I think it's a (c)(8) motion. Because this

is the motion that can be decided as a matter of law. Take all the allegations in the complaint as true and examine nothing more than the contract upon which the complaint is based, the policy of insurance and as a matter of law, the plaintiffs complaint cannot be sustained. And although the plaintiff has requested a chance to amend without any indication of how they would do that, there actually is no factual development that could change the fact that the complaint is complaining about the loss of access or use of the premised due to executive orders and the Covid-19 virus crisis. So, there's no factual development that could possibly change that or amendment to the complaint that could possibly change that those things do not constitute the direct physical damage or injury that's required under the policy as I've outlined.

So, for those reasons, I am granting the Defendant's Motion for Summary Disposition. I'm doing it under MCR 2.116 (c)(8). And Mr.—

MR. EMRICH: Thank you, your Honor.

THE COURT: Mr. Emrich, will you submit an order?

MR. EMRICH: Certainly will, your Honor.

THE COURT: Okay.

MR. EMRICH: Thank you.

THE COURT: Thank you.

MR. HEOS: Thank you very much.

THE COURT: That will conclude our hearing.

(Hearing concludes at 3:32:35 PM.)

STATE OF MICHIGAN)

)

COUNTY OF INGHAM)

I certify that that this transcript, consisting of 24 pages, is a complete, true, and correct transcript of the proceedings and testimony taken in this case on Wednesday, July 01, 2020.

July 09, 2020

Susan C. Melton-CER 7548
30th Circuit Court
313 West Kalamazoo Avenue
Lansing, Michigan 48901
517-483-6500 ext. 6703

EXHIBIT 3

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION—CIVIL ACTIONS BRANCH

ROSE'S 1, LLC, et al.,	*	
	*	
Plaintiffs,	*	Civil Case No. 2020 CA 002424 B
	*	Civil II, Calendar I
v.	*	Judge Kelly A. Higashi
	*	
ERIE INSURANCE EXCHANGE,	*	
	*	
Defendant.	*	

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Motion") and Defendant's Cross-Motion for Summary Judgment ("Defendant's Motion"). While the Court is sympathetic to the plight of Plaintiffs, it must grant summary judgment to Defendant as a matter of law.

I. FACTS

Plaintiffs own and operate a number of prominent restaurants in the District of Columbia. They all purchased "Ultrapack Plus Commercial Property Coverage" from Defendant Erie Insurance Exchange. Included in this policy is coverage for "loss of 'income' and/or 'rental income'" sustained "due to partial or total 'interruption of business' resulting directly from 'loss' or damage" to the property insured. Rose's 1 Ultrapack Plus Commercial Property Coverage ("Coverage") at 3. The coverage document further states that the "policy insures against direct physical 'loss'" with the exception of several exclusions that are not relevant to this matter. *Id.* at 4.

This case comes in the context of the COVID-19 pandemic. COVID-19 is "a novel severe acute respiratory illness that has killed ... more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be

infected but asymptomatic, they may unwittingly infect others." *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring). On March 11, 2020, D.C. Mayor Muriel Bowser declared a state of emergency and a public health emergency due to the "imminent hazard of or actual occurrence of widespread exposure" to COVID-19. Plaintiffs' Statement of Material Facts ("SMF") ¶3. On March 16, Mayor Bowser issued an order prohibiting table seating at restaurants and bars in D.C. SMF ¶4. On March 20, Mayor Bowser extended this ban to "standing customers at restaurants, bars, taverns, and multi-purpose facilities." SMF ¶5. On March 24, Mayor Bowser ordered the closure of all non-essential businesses. SMF ¶6. On March 30, she ordered all D.C. residents to stay in their residences except for limited "essential" reasons, a restriction that continued for several months. SMF ¶¶7-8.

As a result of Mayor Bowser's orders, the restaurant Plaintiffs were forced to close their businesses and suffered serious revenue losses. SMF ¶¶21-22. To cover those losses, they filed insurance claims with Defendant pursuant to insurance policies that "are substantively identical in all ways relevant to this action." SMF ¶78. When Defendant denied their claims, Plaintiffs filed this lawsuit seeking a declaratory judgment that their claims were covered by the express language of their insurance contracts with Defendant. Both sides subsequently moved for summary judgment.

II. SUMMARY JUDGMENT STANDARD

D.C. Superior Court Rule of Civil Procedure 56 allows a court to grant summary judgment to a party when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. D.C. Super. Ct. Civ. R. 56(a); *Perkins v. District of Columbia*, 146 A.3d 80, 84 (D.C. 2016). In considering a motion for summary judgment, the

court must view the evidence "in the light most favorable to the nonmoving party, who is entitled to all favorable inferences which may reasonably be drawn from the evidentiary materials." *Phelan v. City of Mt. Rainier*, 805 A.2d 930, 936 (D.C. 2002) (internal quotation marks omitted). The Court "may not resolve issues of fact or weigh evidence at the summary judgment stage." *Fry v. Diamond Construction, Inc.*, 659 A.2d 241, 245 (D.C. 1995) (internal quotation marks omitted). Even if no material dispute of fact exists, the moving party must still establish that it is entitled to judgment as a matter of law. D.C. Super. Ct. Civ. R. 56(a).

III. ANALYSIS

Under District of Columbia law, "[c]ontract principles are applicable to the interpretation of an insurance policy." *Carlyle Inv. Mgmt. LLC v. Ace Am. Ins. Co.*, 131 A.3d 886, 894 (D.C. 2016). "The proper interpretation" of an insurance contract, "including whether [the] contract is ambiguous, is a legal question." *Id.* (internal quotation mark omitted) (quoting *Tillery v. D.C. Contract Appeals Bd.*, 912 A.2d 1169, 1176 (D.C. 2006)). "[A]n insurance policy is to be . . . enforced in accordance with the real intent of the parties as expressed in the language employed in the policy." *Redmond v. State Farm Ins. Co.*, 728 A.2d 1202, 1205 (D.C. 1999) (internal quotation marks omitted) (quoting *Peerless Ins. Co. v. Gonzalez*, 697 A.2d 680, 682 (Conn. 1997)). A court must "give the words used in an insurance contract their common, ordinary, and . . . popular meaning," *Id.* (omission in original) (internal quotation marks omitted) (quoting *Quadrangle Dev. Corp. v. Hartford Ins. Co.*, 645 A.2d 1074, 1075 (D.C. 1994)), and must interpret the contract "as a whole, giving reasonable, lawful, and effective meaning to all its terms, and ascertaining the meaning in light of all the circumstances surrounding the parties at the time the contract was made," *Carlyle Inv. Mgmt.*, 131 A.3d at 895 (internal quotation mark omitted) (quoting *Debnam v. Crane Co.*, 976 A.2d 193, 197 (D.C. 2009)).

"[I]f the provisions of the contract are ambiguous, the correct interpretation becomes a question for a factfinder." *Carlyle Inv. Mgmt.*, 131 A.3d 886 at 895 (internal quotation marks omitted) (quoting *Debnam*, 976 A.2d at 197-98). "Where," however, "insurance contract language is not ambiguous, summary judgment is appropriate because a written contract duly signed and executed speaks for itself and binds the parties without the necessity of extrinsic evidence." *Fogg v. Fidelity Nat. Title Ins. Co.*, 89 A.3d 510, 514 (D.C. 2014) (internal quotation marks omitted) (quoting *Stevens v. United Gen. Title Ins. Co.*, 801 A.2d 61, 66 (D.C. 2002)). Indeed, the Court "should not seek out ambiguity where none exists." *Athridge v. Aetna Cas. & Sur. Co.*, 351 F.3d 1166, 1172 (D.C. Cir. 2003) (citing *Medical Serv. of Dist. of Columbia v. Llewellyn*, 208 A.2d 734, 736 (D.C. 1965)).

At the most basic level, the parties dispute whether the closure of the restaurants due to Mayor Bowser's orders constituted a "direct physical loss" under the policy. Plaintiffs start with dictionary definitions to support their case. For example, they cite the American Heritage Dictionary definition of "direct" as "[w]ithout intervening persons, conditions, or agencies; immediate." Plaintiffs' Motion at 9-10. They also cite the Oxford English Dictionary definition of "physical" as pertaining to things "[o]f or pertaining to matter, or the world as perceived by the senses; material as [opposed] to mental or spiritual." *Id.* at 10. As for "loss," it is defined by the coverage document as "direct and accidental loss of or damage to covered property." Coverage at 36.

Plaintiffs use these definitions to make three primary arguments. *First*, Plaintiffs argue that the loss of use of their restaurant properties was "direct" because the closures were the direct result of the mayor's orders without intervening action. Plaintiffs' Motion at 9-10. But those orders were governmental edicts that commanded individuals and businesses to take certain

actions. Standing alone and absent intervening actions by individuals and businesses, the orders did not effect any direct changes to the properties.

Second, Plaintiffs argue that their losses were "physical" because the COVID-19 virus is "material" and "tangible," and because the harm they experienced was caused by the mayor's orders rather than "some abstract mental phenomenon such as irrational fear causing diners to refrain from eating out." Plaintiffs' Motion at 11. But Plaintiffs offer no evidence that COVID-19 was actually present on their insured properties at the time they were forced to close. And the mayor's orders did not have any effect on the material or tangible structure of the insured properties.

Third, Plaintiffs argue that by defining "loss" in the policy as encompassing either "loss" or "damage," Defendant must treat the term "loss" as distinct from "damage," which connotes physical damage to the property. Plaintiffs' Motion at 11-12. In contrast, Plaintiffs argue, "loss" incorporates "loss of use," which only requires that Plaintiffs be deprived of the use of their properties, not that the properties suffer physical damage. *Id.* at 12-13. But under a natural reading of the term "direct physical loss," the words "direct" and "physical" modify the word "loss." As such, pursuant to Plaintiffs' dictionary definitions, any "loss of use" must be caused, without the intervention of other persons or conditions, by something pertaining to matter—in other words, a direct physical intrusion on to the insured property. Mayor Bowser's orders were not such a direct physical intrusion.

Further, none of the cases cited by Plaintiffs stand for the proposition that a governmental edict, standing alone, constitutes a direct physical loss under an insurance policy. In *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, the court found that the release of ammonia into a juice cup packaging factory was a "direct physical loss" because it constituted

"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." 2014 U.S. Dist. LEXIS 165232 at *13-19 (D.N.J. Nov. 25, 2014) (quoting *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 319-20 (Ga. Ct. App. 2003)) (internal quotation marks omitted) (emphasis added). Similarly, in *Western Fire Insurance Co. v. First Presbyterian Church*, the Colorado Supreme Court found a "direct physical loss" when gasoline fumes from an unknown source entered an insured church and the fire department ordered the church's closure. 437 P.2d 52, 55 (Colo. 1968). The court based its reasoning on the fact that the church "became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous." *Id.* At the same time, the Court noted that "[i]t is perhaps quite true" that the fire department's closure order, "*standing alone*, does not in and of itself constitute a 'direct physical loss.'" *Id.* (emphasis added). All of the other cases cited by Defendant involved some compromise to the physical integrity of the insured property. *See Port Authority v. Affiliated FM Insurance Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (presence of asbestos in building was not "physical loss" because building owner could not show real or imminent "contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable"); *Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 826-27 (3d Cir. 2005) (presence of bacterium on property could constitute "direct physical loss" if it "reduced the use of the property to a substantial degree"); *TRAVCO Insurance Co. v. Ward*, 715 F. Supp. 2d 699, 709-10 (E.D. Va. 2010), *aff'd* 504 F. Appx. 251 (4th Cir. 2013) (home rendered uninhabitable by toxic gases released by defective drywall constituted "direct physical loss"); *Mellin v. Northern Security Insurance Company, Inc.*, 115 A.3d 799, 805 (N.H. 2015) (cat urine odor from neighboring apartment may constitute "direct

physical loss" if plaintiff could show "distinct and demonstrable alteration to the unit"); *Murray v. State Farm Fire & Casualty Co.*, 509 S.E.2d 1, 16-17 (W.Va. 1998) (landslide rendering homes uninhabitable, due to either actual physical damage or palpable future risk of physical damage from a follow-on landslide, was a "direct physical loss"); *Sentinel Management Co. v. New Hampshire Insurance Co.*, 563 N.W.2d 296, 300-01 (Minn. Ct. App. 1997) (asbestos contamination in building was "direct physical loss" when "property rendered useless").

In contrast, courts have rejected coverage when a business's closure was not due to direct physical harm to the insured premises. In *Roundabout Theatre Co. v. Continental Casualty Co.*, the City of New York ordered the closure of a theater after a portion of a neighboring building under construction collapsed onto the street and adjacent buildings. 302 A.D.2d 1, 2-3 (N.Y. App. Div. 2002). The theater itself sustained minor damage that was repaired in one day. *Id.* at 3. Nonetheless, the court found that the theater did not suffer a "direct physical loss" as a result of the city-mandated closure. *Id.* at 7. It found that "[t]he plain meaning of the words 'direct' and 'physical'" narrowed the scope of coverage and mandated "the conclusion that losses resulting from off-site property damage do not constitute covered perils under the policy." *Id.* Similarly, in *Newman Myers Kreines Gross, P.C. v. Great Northern Insurance Co.*, a federal district court found that a law firm did not suffer a "direct physical loss" when an electric utility preemptively shut off power in advance of Hurricane Sandy. 17 F. Supp. 3d 323 (S.D.N.Y. 2014). The court distinguished the cases cited by the law firm (several of which were also cited by Plaintiffs in this case) as either "involv[ing] the closure of a building due to either a physical change for the worse in the premises … or a newly discovered risk to its physical integrity." *Id.* at 330. Citing *Roundabout*, the Court reasoned:

> The critical policy language here—"direct physical loss or damage"—similarly, and unambiguously, requires some form of actual, physical damage to the insured premises to

> trigger loss of business income and extra expense coverage. Newman Myers simply cannot show any such loss or damage to the 40 Wall Street Building as a result of either (1) its inability to access its office from October 29 to November 3, 2012, or (2) Con Ed's decision to shut off the power to the Bowling Green network. 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.

Id. at 331; *see also United Airlines, Inc. v. Insurance 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."); *Philadelphia Parking Auth. v. Federal Insurance Co.*, 385 F. Supp. 2d 280, 287-88 (S.D.N.Y. 2005) (noting that "'direct physical' modifies both loss and damage," and therefore "the interruption in business must be caused by some physical problem with the covered property . . . which must be caused by a 'covered cause of loss'").

While the Court can find no published cases in this jurisdiction analyzing the exact term "direct physical loss," cases addressing similar issues do not help Plaintiffs. Most relevantly, in *Bros., Inc. v. Liberty Mutual Fire Insurance Co.*, the District of Columbia Court of Appeals considered whether a restaurant could recover on its claim after it lost business due to a curfew imposed by the D.C. government as a result of the riots following the assassination of Dr. Martin Luther King, Jr. in 1968. 268 A.2d 611 (D.C. 1970). The insurance contract included this relevant language:

> In consideration of the premium for this coverage shown on the first page of this policy [Building and Contents] . . . the coverage of this policy is extended to include direct loss by . . . Riot . . . [and] Civil Commotion . . . .
>
> When this Endorsement is attached to a policy covering Business Interruption, . . . the term "direct," as applied to loss, means loss, as limited and conditioned in such policy, *resulting from direct loss to described property from perils insured against*; . . . .

Id. at 613 (emphasis in original).[1] The Court of Appeals interpreted the term "direct loss" in the contract to mean "a loss proximately resulting from physical damage to the property or contents caused by a riot or civil commotion." *Id.* Under that definition, the Court found that the restaurant was unable to recover, since, "at the most," the restaurant's lost business due to the curfew "was an indirect, if not remote, loss resulting from riots" and there was no "physical damage to the property." *Id.* Accordingly, while the Court agrees with Plaintiffs that *Bros., Inc.* is not directly on point, the case does support the proposition that, in the context of property insurance, the term "direct loss" implies some form of direct physical change to the insured property.

With both dictionary definitions and the weight of case law supporting Defendant's interpretation of the term "direct physical loss," Plaintiffs' additional arguments are unconvincing. First, Plaintiffs argue that because the insurance contract has specific exclusions for "loss of use" under some coverage lines but not for Income Protection coverage, the Court should infer that the Income Protection coverage covers losses such as Plaintiffs'. Plaintiffs' Motion at 13-14. But as already discussed, even if "loss of use" was covered, Plaintiffs would still have to show that the loss of use was a "direct physical loss" similar to those in the cases discussed *supra* at 5-7. And for the reasons explained in this order, there was no "direct physical loss" to Plaintiffs. Second, Plaintiffs argue that, unlike some similar insurance policies, their policies do not include a specific exclusion for pandemic-related losses. *Id.* at 19-20. But again,

[1] This Court notes that the phrase at issue in the *Bros., Inc.* contract was "direct loss," as opposed to "direct physical loss," at issue in the present case, and that in the *Bros., Inc.* case, there was an issue as to whether the "Building and Contents" Form, which was mistakenly attached to the policy at the time of signing, or the "Business Interruption" Form, which the insurance company later substituted, was construed by the trial court. However, the Court of Appeals found it "unnecessary to ascertain which of the two forms was construed by the trial court," 268 A.2d at 612, as the Court found that the insurance company prevailed under both forms.

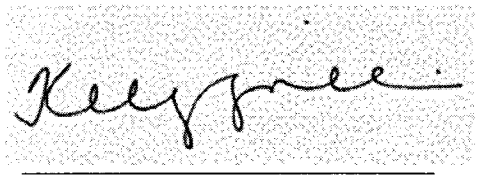
even in the absence of such an exclusion, Plaintiffs would still be required to show a "direct physical loss." Because they cannot do so, the Court grants summary judgment to Defendant.

Accordingly, it is this **6th** day of **August, 2020**, hereby

ORDERED that Plaintiffs' Motion for Summary Judgment is **DENIED**; and it is further

ORDERED that Defendant's Cross-Motion for Summary Judgment is **GRANTED**; and it is further

ORDERED that judgment is **ENTERED** in favor of Defendant Erie Insurance Exchange and against Plaintiffs, the initial scheduling conference is **VACATED**, and the case is **CLOSED**.



Kelly A. Higashi
Associate Judge
(Signed in Chambers)

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EXHIBIT 4

2020 WL 4724305
Only the Westlaw citation is currently available.
United States District Court, W.D.
Texas, San Antonio Division.

DIESEL BARBERSHOP, LLC; Wilderness Oaks Cutters, LLC; Diesel Barbershop Bandera Oaks, LLC; Diesel Barbershop Dominion, LLC; Diesel Barbershop Alamo Ranch, LLC; and Henley's Gentlemen's Grooming, LLC, Plaintiffs,

v.

STATE FARM LLOYDS, Defendant.

No. 5:20-CV-461-DAE
|
Signed 08/13/2020

Attorneys and Law Firms

Shannon E. Loyd, Loyd Law Firm, PLLC, San Antonio, TX, for Plaintiffs.

W. Neil Rambin, Susan Elizabeth Egeland, Faegre Drinker Biddle & Reath, LLP, Dallas, TX, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

David Alan Ezra, Senior United States District Judge

***1** Before the Court is a Motion to Dismiss filed by State Farm Lloyds ("Defendant" or "State Farm") on May 8, 2020. (Dkt. # 9.) Plaintiffs Diesel Barbershop, LLC; Wilderness Oak Cutters, LLC; Diesel Barbershop Bandera Oaks, LLC; Diesel Barbershop Dominion, LLC; Diesel Barbershop Alamo Ranch, LLC; and Henley's Gentlemen's Grooming, LLC (collectively "Plaintiffs") responded on May 22, 2020 (Dkt. # 14), and Defendant filed a reply on May 29, 2020 (Dkt. # 17). The Court presided over a virtual hearing on July 29, 2020, during which Shannon Loyd, Esq., represented Plaintiffs and Neil Rambin, Esq. and Susan Egeland, Esq. represented Defendant. After careful consideration of the memorandum filed in support of and against the motion and after hearing arguments from counsel, the Court—for the reasons that follow—**GRANTS** Defendant's Motion to Dismiss.

FACTUAL BACKGROUND

On February 11, 2020, the World Health Organization identified the 2019 Coronavirus ("COVID-19") as a disease. Since then, COVID-19 has spread across the world, and health organizations, including the Center for Disease Control ("CDC"), characterize COVID-19 as a global pandemic. (See Dkt. # 8.) The outbreak in the United States is a rapidly evolving situation, and the state of Texas saw an exponential increase in COVID-19 cases. To stop "community spread" of COVID-19, state and local governments have issued executive orders that limit the opening of certain businesses and require social distancing. Bexar County Judge Nelson Wolff and Texas Governor Greg Abbott have issued executive orders throughout this crisis, and below are the relevant orders (the "Orders") for the purposes of this case.

a. The Bexar County Orders

County Judge Wolff issued multiple executive orders pertaining to the "state of local disaster ... due to imminent threat arising from COVID-19." (Dkt. # 8, Exh. B.) On March 23, 2020, County Judge Wolff issued an order requiring "all businesses operating within Bexar County" save for those "exempted" to "cease all activities" at any business located in Bexar County from March 24, 2020 until April 9, 2020. (Id.) The order defines exempted businesses as those pertaining to: (a) healthcare services, (b) government functions, (c) education and research, (d) infrastructure, development, operation and construction, (e) transportation, (f) IT services, (g) food, household staples, and retail, (h) services to economically disadvantaged populations, (i) services necessary to maintain residences or support exempt businesses, (j) news media, (k) financial institutions and insurance services, (l) childcare services, (m) worship services, (n) funeral services, and (o) CISA sectors. (Id.) County Judge Wolff notes that he is authorized "to take such actions as are necessary in order to protect the health, safety, and welfare of the citizens of Bexar County" and "has determined that extraordinary emergency measures must be taken to mitigate the effects of this public health emergency and to facilitate a cooperative response" in line with Governor Abbott's "declaration of public health disaster." (Id.)

*2 In a supplemental executive order dated April 17, 2020, County Judge Wolff emphasizes that "the continued spread of COVID-19 by pre- and asymptomatic individuals is a significant concern in Bexar County and on April 3, 2020, the [CDC] recommended cloth face coverings be worn by the general public to slow the spread of COVID-19 and implementing this measure would assist in reducing the transmission of COVID-19 in San Antonio and Bexar County." (Id.) The goal of the supplemental order was to "reduce the spread of COVID-19 in and around Bexar County" and to "continue to protect the health and safety of the community and address developing and the rapidly changing circumstances when presented by the current public health emergency." (Id.)

b. The State of Texas Order

On March 31, 2020, Texas Governor Greg Abbott signed an executive order closing all "non-essential" businesses from April 2, 2020 until April 30, 2020. (Dkt. # 8, Exh. C.) Governor Abbott's order provides the following:

> NOW, THEREFORE, I, Greg Abbott, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order the following on a statewide basis effective 12:01 a.m. on April 2, 2020, and continuing through April 30, 2020, subject to extension based on the status of COVID-19 in Texas and the recommendations of the CDC and the White House Coronavirus Task Force:
>
> > In accordance with guidance from DSHS Commissioner Dr. Hellerstedt, and to achieve the goals established by the President to reduce the spread of COVID-19, every person in Texas shall, except where necessary to provide or obtain essential services, minimize social gatherings and minimize in-person contact with people who are not in the same household.
> >
> > "Essential services" shall consist of everything listed by the U.S. Department of Homeland Security in its Guidance on the Essential Critical Infrastructure Workforce, Version 2.0, plus religious services....
> >
> > In accordance with the Guidelines from the President and the CDC, people shall avoid eating or drinking at bars, restaurants, and food courts, or visiting gyms, massage establishments, tattoo studios, piercing studios, or cosmetology salons; provided, however, that the use of drive-thru, pickup, or delivery options for food and drinks is allowed and highly encouraged throughout the limited duration of this executive order.

(Dkt. # 8, Exh. C.)

c. Plaintiffs' Insurance Policies

Plaintiffs run barbershop businesses; a type of business deemed non-exempt and non-essential under the Orders. (Dkt. # 8.) State Farm issued insurance policies (the "Policies")[1] to Plaintiffs regarding the insured properties (the "Properties") that are subject of this dispute. (See Dkt. # 9, Exhs. A-1–A-6.)

The Policies state, in relevant part, the following:

> When a Limit Of Insurance is shown in the Declarations for that type of property as described under Coverage A – Buildings, Coverage B – Business Personal Property, or both, we will pay for accidental direct physical loss to that Covered Property at the premises described in the Declarations caused by any loss as described under SECTION I — COVERED CAUSES OF LOSS.

(Id.) The Policies note in Section I–Covered Causes of Loss that State Farm will "insure for accidental direct physical loss to Covered Property" unless the loss is excluded under Section I–Exclusions or limited in the Property Subject to Limitations provision. (Id.) The Policies further contain a "Fungi, Virus, or Bacteria" exclusion (the "Virus Exclusion"), which contains lead-in language and states the following:

> *3 1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
>
> ...
>
> **j. Fungi, Virus Or Bacteria**
>
> ...

> (2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease.

(Id.) The Policies also contain an endorsement modifying the businessowners coverage form, including a Civil Authority provision which states in relevant part:

> 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 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.) There are various other exclusions within the Policies including for example, the "Ordinance or Law," the "Acts or Decisions" and the "Consequential Loss" exclusions. (Dkt. # 9.)

PROCEDURAL HISTORY

Plaintiffs assert that due to the COVID-19 outbreak and the Orders, Plaintiffs "have sustained and will sustain covered losses" under the terms of the Policies. (Dkt. # 8.) Plaintiffs filed a claim with State Farm seeking coverage for business interruption to the Properties pursuant to the Policies in March 2020. (Id.) Without seeking additional documentation or information, and without further investigation, State Farm denied Plaintiffs' claims. (Dkt. # 8, Exh. D.) In the denial letter, State Farm asserted that Plaintiffs' claims are not covered as the "policy specifically excludes loss caused by enforcement of ordinance or law, virus, and consequential losses." (Id.) State Farm argued that there is a requirement "that there be physical damage, within one mile of the described property" and "that the damage be the result of a Covered Cause of Loss" which, State Farm asserted, a "virus is not." (Id.)

Plaintiffs sued State Farm in state court on April 8, 2020, after State Farm denied Plaintiffs coverage. (Dkt. # 1, Exh. C.) Defendant timely removed the action to this Court on April 13, 2020. (Dkt. # 1.) In their second amended complaint, Plaintiffs bring claims of breach of contract, noncompliance with the Texas Insurance Code, and breach of the duty of good faith and fair dealing. (Dkt. # 8.) Attached to Plaintiffs' second amended complaint are the Policies, Orders, and State Farm's letter denying coverage.

On May 8, 2020, State Farm filed a motion to dismiss for failure to state a claim. (Dkt. # 9.) The Court granted the parties' joint motion to stay discovery pending a ruling on the motion to dismiss on May 18, 2020. (Dkt. # 12.) Plaintiffs responded to the motion to dismiss on May 22, 2020 (Dkt. # 14), and a week later, Defendant filed its reply (Dkt. # 17). Defendant filed a notice of supplemental authority on July 14, 2020 (Dkt. # 21), and Plaintiffs filed a notice of supplemental authority on July 28, 2020 (Dkt. # 22). The Court held a virtual hearing on this matter on July 29, 2020. Defendant filed an additional notice of supplemental authority on August 7, 2020 (Dkt. # 25), and Plaintiffs filed another notice of supplemental authority on August 12, 2020 (Dkt. # 27). Defendant filed its third notice of supplemental authority on August 13, 2020 (Dkt. # 28), notifying the Court of the United States Judicial Panel on Multidistrict Litigation's decision to deny the creation of an industry-wide multidistrict litigation. (Id., Exh. A.)

TEXAS CONTRACT-INTERPRETATION STANDARDS

*4 "Insurance policies are contracts and are governed by the principles of interpretation applicable to contracts." Amica Mut. Ins. Co. v. Moak, 55 F.3d 1093, 1095 (5th Cir. 1995). Under Texas contract-interpretation standards, the "paramount rule is that courts enforce unambiguous policies as written" such that court must "honor plain language, reviewing policies as drafted, not revising them as desired." Pan Am Equities, Inc. v. Lexington Ins. Co., 959 F.3d 671, 674 (5th Cir. 2020). Importantly, an "ambiguity" is "more than lack of clarity"; a court should find an insurance contract ambiguous only if "giving effect to all provisions, its language is subject to two or more reasonable interpretations." Id. (internal quotation marks and citation omitted). To determine ambiguity, which is a question of law, a court must "examine

the entire contract in order to harmonize and give effect to all provisions so that none will be meaningless." Id. (internal quotation marks and citation omitted); see also Provident Life & Acc. Ins. Co. v. Knott, 128 S.W.3d 211, 216 (Tex. 2003) ("In interpreting these insurance policies as any other contract, we must read all parts of each policy together and exercise caution not to isolate particular sections or provisions from the contract as a whole."); State Farm Lloyds v. Page, 315 S.W.3d 525, 527 (Tex. 2010) ("The fact that the parties may disagree about the policy's meaning does not create an ambiguity." (citations and internal quotation marks omitted)). "The goal in interpreting ... [language within the contract] is to ascertain the true intentions of the parties as expressed in the writing itself." Richards v. State Farm Lloyds, No. 19-0802, 2020 WL 1313782, at *5 (Tex. Mar. 20, 2020) (citation and internal quotation marks omitted).

RULE 12(b)(6) LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead "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). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In analyzing whether to grant a Rule 12(b)(6) motion, a court accepts as true "all well-pleaded facts" and views those facts "in the light most favorable to the plaintiff." United States ex rel. Vavra v. Kellogg Brown & Root, Inc., 727 F. 3d 343, 346 (5th Cir. 2013) (citation omitted). A court need not "accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678. Furthermore, in assessing a motion to dismiss under Rule 12(b)(6), a court's review is generally limited to the complaint, documents attached to the complaint, and any documents attached to the motion to dismiss that are referred to in the complaint and are central to the plaintiff's claims. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007); see also Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC, 594 F.3d 383, 387 (5th Cir. 2010).

DISCUSSION

State Farm argues that for business income coverage to apply, the Policies explicitly require (1) an accidental direct physical loss to the insured property and (2) that the loss is not excluded. (Dkt. # 9.) Defendant asserts that Plaintiffs fail to properly plead direct physical loss to the Properties as Plaintiffs argue that the Orders are the reason for the business interruption claim and fail to show that the Properties have been tangibly "damaged" per se. (Dkts. ## 9, 17.) Defendant also argues that regardless, Plaintiffs fail to overcome the Virus Exclusion hurdle that is unambiguously within the Policies and was added to these Policies in response to the SARS pandemic in the early 2000s. (Id.)

*5 In response, Plaintiffs assert that the language in the Policies does not require a tangible and complete physical loss to the Properties, but rather allows for a partial loss to the Properties, which includes the loss of use of the Properties due to the Orders restricting usage of the Properties. (Dkt. # 14.) Plaintiffs also argue that it is not COVID-19 within Plaintiffs' Properties that caused the loss directly, but rather that it was the Orders that caused the direct physical loss and thus the Virus Exclusion should not apply. (Id.) Plaintiffs also argue that the Orders were issued to protect public health and welfare, and that Plaintiffs claims thus fall under the Civil Authority provision within the Policies. (Id.)

Based on the parties' filings, plain language of the Policies in question, and argument at the hearing, as much as the Court sympathizes with Plaintiffs' situation, the Court determines that the motion to dismiss must be granted for the following reasons.

a. Accidental Direct Physical Loss

This Court is mandated to "honor plain language, reviewing policies as drafted, not revising them as desired." Pan Am Equities, 959 F.3d at 674. The Court looks at the coverage provided by the Policies as a whole in order to determine the plain language. Id. Here, the Policies are explicit that there has to be an accidental, direct physical loss to the property in question. The Court agrees with Plaintiffs that some courts have found physical loss even without tangible destruction to the covered property. See e.g., TRAVCO Ins. Co. v. Ward, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010), aff'd, 504 F. App'x 251 (4th Cir. 2013) (noting that "physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces"); Murray v. State Farm Fire & Cas. Co., 203 W. Va. 477, 493

(1998) (" 'Direct physical loss' provisions require only that a covered property be injured, not destroyed. Direct physical loss also may exist in the absence of structural damage to the insured property." (citation omitted)). The Court also agrees that a virus like COVID-19 is not like a hurricane or a hailstorm, but rather more like ammonia, E. coli, and/or carbon monoxide (i.e. cases in which the loss is caused by something invisible to the naked eye), and in such cases, some courts have found direct physical loss despite the lack of physical damage. See e.g., Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226, 236 (3d Cir. 2002) (holding that while mere installation of asbestos was not loss or damage, the presence or imminent threat of a release of asbestos would "eliminate[ ] or destroy[ ]" the function of the structure, thereby making the building "useless or uninhabitable"); Lambrecht & Assocs., Inc. v. State Farm Lloyds, 119 S.W.3d 16, 24–26 (Tex. App. 2003) (noting that while State Farm argued that the losses were not "physical" as they were not "tangible," the court found that under the "direct language" of the policy allowed for coverage to "electronic media and records" and the "data stored on such media" as "such property is capable of sustaining a 'physical' loss"); Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399, 406 (1st Cir. 2009) ("We are persuaded both that odor can constitute physical injury to property ... and also that allegations that an unwanted odor permeated the building and resulted in a loss of use of the building are reasonably susceptible to an interpretation that physical injury to property has been claimed.").

Even so, the Court finds that the line of cases requiring tangible injury to property are more persuasive here and that the other cases are distinguishable. See Dickie Brennan & Co. v. Lexington Ins. Co., 636 F.3d 683, 686 (5th Cir. 2011) (affirming summary judgment and holding that there was no coverage under the civil authority provision of the policy as plaintiffs "failed to demonstrate a nexus between any prior property damage and the evacuation order" when the city issued a mandatory evacuation order prior to the arrival of a hurricane and plaintiffs allegedly suffered business interruption losses); United Air Lines, Inc. v. Ins. Co. of State of PA, 439 F.3d 128, 134 (2d Cir. 2006) (determining that United could not show that its lost earnings resulted from physical damage to its property or from physical damage to an adjacent property when the government shut down the airport after the 9/11 terrorist attacks). For instance, unlike Essex Ins. Co., COVID-19 does not produce a noxious odor that makes a business uninhabitable. It appears that within our Circuit, the loss needs to have been a "distinct, demonstrable physical alteration of the property." Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co., 181 F. App'x 465, 470 (5th Cir. 2006) ("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." (citation omitted)); see also Ross v. Hartford Lloyd Ins. Co., 2019 WL 2929761, at *6–7 (N.D. Tex. July 4, 2019) ("direct physical loss" requires "a distinct, demonstrable, physical alteration of the property" (citing 10A Couch on Ins. § 148:46 (3d ed. 2010)).) Thus, the Court finds that Plaintiffs fail to plead a direct physical loss.

b. The Virus Exclusion

***6** Even if the Court had found that the language within the Policies was ambiguous and/or that Plaintiffs properly plead direct physical loss to the Properties, the Court finds that the Virus Exclusion bars Plaintiffs' claims. The language in the lead-in of the Virus Exclusion (also called the anti-concurrent causation ("ACC") clause) expressly states that State Farm does not insure for a loss regardless of "whether other causes acted concurrently or in any sequence within the excluded event to produce the loss." (See Dkt. # 9, Exhs. A-1–A-6.) Here, Plaintiffs allege that the loss of business occurred as a result of the Orders that mandated non-essential businesses to discontinue operations for a set period of time to help staunch community spread of COVID-19. (Dkts. ## 8, 14.) Plaintiffs also assert that the Court should find that the Virus Exclusion does not apply because COVID-19 was not present at the Properties. (Id.)

The Court notes that the parties vehemently dispute how to read the lead-in language to the Virus Exclusion. Defendant cites Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346 (5th Cir. 2007) in support of the argument that the lead-in language to the Virus Exclusion bars Plaintiffs' claims and that the lead-in language is unambiguous and enforceable. Meanwhile, Plaintiffs cite Stewart Enterprises, Inc. v. RSUI Indem. Co., 614 F.3d 117 (5th Cir. 2010) in support of their assertion that the lead-in language does not exclude coverage here.

The Court finds the facts in Stewart Enterprises distinguishable from the facts here. There, the ACC clause was within a policy provided by Lexington Insurance

Company and contained different language than the ACC clause in State Farm's Policies here. See Stewart Enterprises, 614 F.3d at 125 (noting in the ACC clause that "this policy does not insure against loss or damage caused directly or indirectly by any of the excluded perils" as "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss"). In addition, the issue in Stewart Enterprises was that the insurer was seeking "to use the ACC clause to bar recovery for damage caused by two included perils." Id. at 126 (emphasis added). The Fifth Circuit rightly decided there that it would be absurd to "read the policy to force Stewart to prove a windless flood." Id. at 127.

But here, the Court can read the Policies objectively and without "creating difficult causation determination where none otherwise exist." Id. Like the Fifth Circuit in Tuepker, the Court finds that here, the State Farm ACC clause within the Policies is unambiguous and enforceable. See Tuepker, 507 F.3d at 356. The Policies expressly state that State Farm does not "insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these[.]" (See Dkt. # 9, Exhs. A-1–A-6.) Guided by the plain language of the Policies, 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. Furthermore, while the Virus Exclusion could have been even more specifically worded, that alone does not make the exclusion "ambiguous." See In re Katrina Canal Breaches Litig., 495 F.3d 191, 210 (5th Cir. 2007) ("The fact that an exclusion could have been worded more explicitly does not necessarily make it ambiguous.").

*7 Thus, the Court finds that the Policies' ACC clause excluded coverage for the losses Plaintiffs incurred in complying with the Orders. See, e.g., JAW The Pointe, L.L.C. v. Lexington Ins. Co., 460 S.W.3d 597, 610 (Tex. 2015) ("Because the covered wind losses and excluded flood losses combined to cause the enforcement of the ordinances concurrently or in a sequence, we agree with the court of appeals that the policy's anti-concurrent-causation clause excluded coverage for JAW's losses."). Thus, even if the Court found direct, physical loss to the Properties, the Virus Exclusion applies and bars Plaintiffs' claims.

c. The Civil Authority Provision

In light of the foregoing, the Court also finds that the Civil Authority provision within the Policies is not triggered. Plaintiffs' recovery remains barred due to the unambiguous nature of the events that occurred, causing the Virus Exclusion to apply such that Plaintiffs fail to allege a legally cognizable "Covered Cause of Loss." See Dickie Brennan, 636 F.3d at 686–87 ("[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.").

CONCLUSION

The Court finds merit in Defendant's arguments and determines that Plaintiffs' breach of contract, Texas Insurance Code,[2] and breach of duty of good faith and fair dealing claims all fail. While there is no doubt that the COVID-19 crisis severely affected Plaintiffs' businesses, State Farm cannot be held liable to pay business interruption insurance on these claims as there was no direct physical loss, and even if there were direct physical loss, the Virus Exclusion applies to bar Plaintiffs' claims. Given the plain language of the insurance contract between the parties, the Court cannot deviate from this finding without in effect re-writing the Policies in question. That this Court may not do.

For the reasons stated above, the Motion to Dismiss (Dkt. # 9) is **GRANTED**. Because allowing Plaintiffs leave to amend their claims would be futile, the Court **DISMISSES** Plaintiffs' claims. The Clerk's office is instructed to **ENTER JUDGMENT** and **CLOSE THIS CASE**.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 4724305

Footnotes

1 Defendant attaches each Plaintiff's policy and endorsement to the policy to the motion to dismiss. (See Dkt. # 9, Exhs. A-1–A-6.) Defendant asserts that "the relevant provisions of the policies are identical" (Dkt. # 9), and thus this Court shall cite the policies together without analyzing each Plaintiff's policy separately.

2 Plaintiffs expressly seek to drop their allegation of misrepresentation pending further discovery in light of this Court's ruling in Brasher v. State Farm Lloyds, 2017 WL 9342367, at *7 (W.D. Tex. Feb. 2, 2017). (Dkt. # 14.)

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EXHIBIT 5

2020 WL 5051581
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

MALAUBE, LLC, Plaintiff,

v.

GREENWICH INSURANCE COMPANY, Defendant.

Case No. 20-22615-Civ-WILLIAMS/TORRES

Signed 08/26/2020

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REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO DISMISS

EDWIN G. TORRES, United States Magistrate Judge

*1 This matter is before the Court on Greenwich Insurance Company's ("Defendant" or "Greenwich") motion to dismiss against Malaube, LLC's ("Plaintiff") amended complaint. [D.E. 10]. Plaintiff responded to Defendant's motion on July 30, 2020 [D.E. 14] to which Defendant replied on August 6, 2020. [D.E. 15]. Therefore, Defendant's motion is now ripe for disposition. After careful consideration of the motion, response, reply, relevant authority, and for the reasons discussed below, Defendant's motion to dismiss should be **GRANTED**.[1]

1 On August 7, 2020, the Honorable Kathleen Williams referred Defendant's motion to dismiss to the undersigned Magistrate Judge for disposition. [D.E. 16].

I. BACKGROUND

Plaintiff filed this action on April 23, 2020 [D.E.1] in Florida state court, seeking to recover insurance benefits for the loss of business income as a result of government shutdowns in response to the COVID-19 pandemic.[2] On September 25, 2019, Greenwich entered into an insurance contract with Plaintiff with the latter agreeing to make payments in exchange for Greenwich's promise to indemnify for losses including business income at Plaintiff's restaurant.[3] Plaintiff alleges that the insurance policy is in full effect, providing business income and personal property insurance from September 25, 2019 to September 25, 2020.

2 Defendant removed this case to federal court on June 24, 2020 based on the Court's diversity jurisdiction. Plaintiff is a citizen of Florida and Greenwich is a citizen of Delaware and Connecticut.

3 The restaurant serves Italian food at 5748 Sunset Drive, Miami, FL 33143.

On March 17, 2020, Miami-Dade Mayor Carlos Gimenez signed an order to close all restaurants for indoor dining and only permitted takeout and delivery as a result of the COVID-19 pandemic. Florida Governor, Ron DeSantis, then issued an executive order on March 20, 2020 that closed all onsite dining at restaurants.[4] Plaintiff claims that these orders resulted in significant business losses for Plaintiff's restaurant and that Greenwich was obligated to pay because of government orders that prohibited access to indoor dining. When Plaintiff demanded payment for these losses, Greenwich denied Plaintiff's claim because Plaintiff did not experience any physical loss or damage to the insured property. Plaintiff now fears that, with Greenwich's improper denial of its insurance benefits, its restaurant may be forced to close permanently. Therefore, Plaintiff seeks a declaratory judgment that the insurance policy provides coverage for the losses stemming from the government shutdowns including costs, prejudgment interest, and attorney's fees.

4 We refer to these collectively as the Florida Emergency Orders.

II. APPLICABLE PRINCIPLES AND LAW

Under Federal Rule of Civil Procedure 12(b)(6), 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 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) (setting forth the plausibility standard). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Twombly*, 550 U.S. at 555 (citation omitted). Additionally:

> ***2** Although it must accept well-pled facts as true, the court is not required to accept a plaintiff's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (noting "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). In evaluating the sufficiency of a plaintiff's pleadings, we make reasonable inferences in Plaintiff's favor, "but we are not required to draw plaintiff's inference." *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005). Similarly, "unwarranted deductions of fact" in a complaint are not admitted as true for the purpose of testing the sufficiency of plaintiff's allegations. *Id.*; *see also Iqbal*, 556 U.S. at 681 (stating conclusory allegations are "not entitled to be assumed true").

Sinaltrainal v. Coca-Cola, 578 F.3d 1252, 1260 (11th Cir. 2009), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, 566 U.S. 449, 453 n.2, (2012). The Eleventh Circuit has endorsed "a 'two-pronged approach' in applying these principles: 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, 'assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.' " *American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 679).

III. ANALYSIS

Defendant seeks to dismiss Plaintiff's amended complaint for three independent reasons.[5] First, Defendant argues that the insurance policy was never triggered because it excludes any coverage for viruses, bacteria, or other microorganisms that induce physical distress, illness, or disease. Second, Defendant claims that there is no insurance coverage because Plaintiff failed to allege that it suffered any direct physical loss or damage to property. And third, Defendant reasons that the two Florida Emergency Orders never prohibited Plaintiff from accessing the insured property – a prerequisite that must be satisfied before insurance coverage can apply. Before we consider the merits, we must consider the general principles governing the interpretation of insurance contracts under Florida law. These principles are necessary, as they will inform the analysis that follows.

5 In determining whether Plaintiff's amended complaint fails to state a claim, we may consider the language of the policy itself because exhibits are part of a pleading "for all purposes." Fed. R. Civ. P. 10(c); *see also Solis-Ramirez v. U.S. Dep't of Justice*, 758 F.2d 1426, 1430 (11th Cir. 1985) ("Under Rule 10(c) Federal Rules of Civil Procedure, such attachments are considered part of the pleadings for all purposes, including a Rule 12(b)(6) motion."). To the extent the complaint's allegations conflict with the exhibit, the exhibit must control. *See Hoefling v. City of Miami*, 811 F.3d 1271, 1277 (11th Cir. 2016) ("A district court can generally consider exhibits attached to a complaint in ruling on a motion to dismiss, and if the allegations of the complaint about a particular exhibit conflict with the contents of the exhibit itself, the exhibit controls.") (citing *Crenshaw v. Lister*, 556 F.3d 1283, 1292 (11th Cir. 2009)).

A. General Principles of Insurance Contracts

"Under Florida law, an insurance policy is treated like a contract, and therefore ordinary contract principles govern the interpretation and construction of such a policy." *Pac. Emp'rs Ins. Co. v. Wausau Bus. Ins. Co.*, 2007 WL 2900452, at *4 (M.D. Fla. Oct. 2, 2007) (citing *Graber v. Clarendon Nat'l Ins. Co.*, 819 So. 2d 840, 842 (Fla. 4th DCA 2002)). The interpretation of an insurance contract – including the question of whether an insurance provision is ambiguous – is a question of law. *See id.*; *Travelers Indem. Co. of Illinois v. Hutson*, 847 So. 2d 1113 (Fla. 1st DCA 2003) (stating that whether an ambiguity exists in a contract is a matter of law).

***3** In addition, "[u]nder Florida law, insurance contracts are construed according to their plain meaning." *Garcia v. Fed. 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)). 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-not a strained, forced or unrealistic construction." *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 736 (Fla. 2002) (quoting *Gen. Accident Fire & Life Assurance Corp. v. Liberty Mut. Ins. Co.*, 260 So. 2d 249 (Fla. 4th DCA 1972));

see also Gilmore v. St. Paul Fire & Marine Ins., 708 So. 2d 679, 680 (Fla. 1st DCA 1998) ("The language of a policy should be read in common with other policy provisions to accomplish the intent of the parties.").

However, if there is more than one reasonable interpretation of an insurance policy, an ambiguity exists and it "should be construed against the insurer." *Pac. Emp'rs Ins.*, 2007 WL 2900452, at *4 (citing *Purrelli v. State Farm Fire & Cas. Co.*, 698 So. 2d 618, 620 (Fla. 2d DCA 1997)). Where an interpretation "involve[s] exclusions to insurance contracts, the rule is even clearer in favor of strict construction against the insurer: exclusionary provisions which are ambiguous or otherwise susceptible to more than one meaning must be construed in favor of the insured." *Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 412 F.3d 1224, 1228 (11th Cir. 2005) (quoting *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986)). An insurance policy must, of course, be ambiguous before it is subject to these rules. *See Taurus Holdings, Inc.*, 913 So. 2d at 532 ("Although ambiguous provisions are construed in favor of coverage, to allow for such a construction the provision must actually be ambiguous."). 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. *See Deni Assocs. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.*,711 So. 2d 1135 (Fla. 1998). "Just because an operative term is not defined, it does not necessarily mean that the term is ambiguous." *Amerisure Mut. Ins. Co. v. Am. Cutting & Drilling Co.*, 2009 WL 700246, at *4 (S.D. Fla. Mar. 17, 2009) (citing *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 166 (Fla. 2003)).

On the other hand, "if 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." *Hagen v. Aetna Cas. & Sur. Co.*, 675 So. 2d 963, 965 (Fla. 5th DCA 1996). Ultimately "in the absence of some ambiguity, the intent of the parties to a written contract must be ascertained from the words used in the contract, without resort to extrinsic evidence." *Fireman's Fund Ins. Co. v. Tropical Shipping & Const. Co.*, 254 F.3d 987, 1003 (11th Cir. 2001) (quoting *Lee v. Montgomery*, 624 So. 2d 850, 851 (Fla. 1st DCA 1993)).

When the parties dispute coverage and exclusions under a policy, a burden-shifting framework applies. "A person seeking to recover on an insurance policy has the burden of proving a loss from causes within the terms of the policy[,] and if such proof of loss is made within the contract of insurance, the burden is on the insurer to establish that the loss arose from a cause that is excepted from the policy." *U.S. Liab. Ins. Co. v. Bove*, 347 So. 2d 678, 680 (Fla. 3d DCA 1977) (alteration added; citations omitted). If the insurer is able to establish that an exclusion applies, the then burden shifts back to the insured to prove an exception to the exclusion. *See id.*; *see also IDC Const., LLC. v. Admiral Ins. Co.*, 339 F. Supp. 2d 1342, 1348 (S.D. Fla. 2004) ("When an insurer relies on an exclusion to deny coverage, it has the burden of demonstrating that the allegations in the complaint are cast solely and entirely within the policy exclusions and are subject to no other reasonable interpretation."). That is, "if there is an exception to the exclusion, the burden once again is placed on the insured to demonstrate the exception to the exclusion." *East Fla. Hauling, Inc. v. Lexington Ins. Co.*, 913 So. 2d 673, 678 (Fla. 3d DCA 2005) (citing *LaFarge Corp. v. Travelers Indem. Co.*, 118 F.3d 1511, 1516 (11th Cir. 1997)).

B. The Business Income Exclusion

*4 Having set forth the relevant legal principles, Defendant's strongest argument is that Plaintiff's amended complaint fails to state a claim because the insurance policy only provides coverage for the actual loss of business income if a *direct physical loss or damage* to the property causes a suspension to Plaintiff's operations:

> 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.

[D.E. 5-1 at 53]. The policy further provides coverage for extra expenses during a period of restoration, but that also only applies if the insured property suffers direct physical loss or damage:

> Extra Expense Coverage is provided at the premises described in the Declarations only if the Declarations show that Business Income Coverage applies at that premises.
>
> Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been on direct physical loss or damage to property caused by or resulting from a Coverage Cause of Loss.

Id. at 53.

Defendant argues that Plaintiff has failed to state a claim because there are no allegations that the insured property has ever suffered a direct physical loss or damage. Instead, Plaintiff alleges that two Florida Emergency Orders limited the full use of its restaurant and that, as a result, Plaintiff suffered significant businesses losses. [D.E. 5 at ¶¶ 13-14 ("On March 17, 2020, Miami-Dade Mayor, Carlos Gimenez, signed an order to close all restaurants for dining in and only permitting takeout and delivery. On March 20, 2020, the Florida Governor, Ron DeSantis, issued an executive order closing all onsite dining at restaurants")]. Defendant also states that the amended complaint concedes that the Florida Emergency Orders were issued in response to the COVID-19 pandemic and entirely unrelated to any physical loss or damage to Plaintiff's property. *See id.* at 18 ("The Government Shutdowns that interfered with [Plaintiff'] access to its business came as a result of the COVID-19 pandemic."). Because Plaintiff's allegations seek coverage for pure economic losses stemming with no connection to any physical loss or damage, Defendant reasons that Plaintiff's amended complaint must be dismissed.

Plaintiff's response is that there is an ongoing debate in both state and federal courts on the meaning of "direct physical loss" and "direct physical damage." Plaintiff contends, for example, that the use of the "or" in the phrase "direct physical loss or damage" suggests that the two terms are not the same, and that they must be distinct. If the terms were the same, Plaintiff believes that it would render some component of the insurance policy meaningless and undermine a fundamental rule of Florida contract law. *See, e.g., Westport Ins. Corp. v. Tuskegee Newspapers, Inc.*, 402 F.3d 1161, 1166 (11th Cir. 2005) ("[A] court will attempt to give meaning and effect, if possible, to every word and phrase in the contract, ... and a construction which neutralizes any provision of a contract should never be adopted if the contract can be so construed as to give effect to all the provisions.") (quoting *J. Appleman, Insurance Law and Practice* § 7383 (1981)).

*5 Plaintiff also states that the Florida Emergency Orders caused a direct physical loss because they forced Plaintiff to close its indoor dining to mitigate the spread of COVID-19. As support, Plaintiff references several state and federal court opinions – some of which date back to the 1970s – with a contention that these are the "better reasoned cases" in the ongoing debate and that they are consistent with Florida law. Plaintiff then asserts, with a reference to several other cases, that the inability to use the intended purpose of a business constitutes a direct physical loss because Plaintiff had no option other than to close the indoor dining section of its restaurant. Thus, Plaintiff equates the closure of its indoor dining to a physical loss because the business could no longer operate for its intended purpose.

To begin, Plaintiff's response is, in many respects, unhelpful because it is conclusory and fails to put forth any substantive reasons in support of its position. Plaintiff makes assertions, for example, that physical damage is different from physical loss and then follows that statement with a string cite of parentheticals with no explanation as to how any of the cases are relevant. Plaintiff complicates matters further when it references cases, some of which are decades old, across the country (including Michigan, Minnesota, and California) but then fails to offer any analysis whatsoever. Plaintiff just leaves it for the Court to examine these cases, and to do the work that Plaintiff should have done in the first place. That is, Plaintiff invites the Court to develop its own argument and determine which of these cases (1) are relevant to Florida law, (2) are applicable to the insurance policy in this case, (3) offers a persuasive distinction between physical loss and damage, and (4) are analogous to the partial closure of a business. Hence, Plaintiff's response is largely unpersuasive. *See United States Liab. Ins. Co. v. Bove*, 347 So. 2d 678, 680 (Fla. 3rd DCA 1977) (stating that a party claiming coverage has the burden of proof to establish that coverage exists).

Putting aside this problem, Plaintiff argues that physical loss does not require structural alteration and that a property's inability to operate with its intended purpose (i.e. the operation of both its indoor and outdoor dining sections) falls within the insurance policy's coverage. The policy does not define "physical loss" or "physical damage." However, "[t]he mere failure to provide a definition of a term involving coverage does not render the term ambiguous." *Those Certain Underwriters at Lloyd's London v. Karma Korner, LLC*, 2011 WL 1150466, at *2 (M.D. Fla. 2011) (citation omitted). When a policy does not define a term, the plain and generally accepted meaning should be applied. *See Evanston Ins. Co. v. S & Q Prop. Inv.*, LLC, 2012 WL 4855537, at *2 (S.D. Fla. 2012).

Defendant argues that, under the plain meaning of the word "physical", Plaintiff has not alleged coverage for any loss because, by definition, the policy excludes losses that are intangible. *See, e.g.*, 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."). This is persuasive, in some respects, because 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.' " *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) (quoting *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010)), *aff'd*, 2020 WL 4782369 (11th Cir. Aug. 18, 2020).

***6** While neither party cited a binding decision on the meaning of "direct physical loss" or "direct physical damage" under Florida law, a case that addresses many of the arguments presented is a district court's recent decision in *Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385, at *4 (W.D. Mo. Aug. 12, 2020). There, the plaintiffs purchased insurance policies for their hair salons and restaurants. The policies provided coverage for physical losses or physical damages, and the plaintiffs argued that they should recover the insurance proceeds as a result of the Covid-19 pandemic. The defendants moved to dismiss because – with the policies requiring either a direct physical loss or damage – the plaintiffs could not recover unless there was an actual, tangible, permanent, or physical alteration to the insured properties. The district court rejected that argument, however, because "loss" and "damage" could not be conflated with the "or" separated between them. Instead, the court had to "give meaning to both terms," to avoid the other from being superfluous. *Studio 417, Inc.*, 2020 WL 4692385, at *5 (citing *Nautilus Grp., Inc. v. Allianz Global Risks US*, 2012 WL 760940, at * 7 (W.D. Wash. Mar. 8, 2012) (stating that "if 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous")).

The district court then referenced several decisions where courts have recognized that, absent a physical alteration, a physical loss may occur when a property is uninhabitable or substantially unusable for its intended purpose. *Studio 417, Inc.*, 2020 WL 4692385, at *5 (citing *Port Auth. of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (affirming the denial of coverage but recognizing that "[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 [physical] loss to its owner"); *Prudential Prop. & Cas. Ins. Co. v. Lilliard-Roberts*, 2002 WL 31495830, at * 9 (D. Or. June 18, 2002) (citing case law for the proposition that "the inability to inhabit a building [is] a 'direct, physical loss' covered by insurance"); *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) ("We have previously held that direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way.")); *see also Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 509 (1998) (holding policyholders to suffer a "direct physical loss" when their homes were rendered uninhabitable due to threat of rockfall); *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52, 55 (1968) (holding that the policyholder suffered "direct physical loss" when "the accumulation of gasoline around and under the [building caused] the premises to become so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous").

The court also acknowledged that there were cases where an actual alteration was required to show a "physical loss," but distinguished those on the basis that they were, for the most part, decided on a motion for summary judgment, factually dissimilar, or non-binding. *Id.* (citing *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006)(affirming the denial of insurance coverage on a motion for summary judgment and under Minnesota law)); *Mama Jo's, Inc.*, 2018 WL 3412974, at *8 (granting summary judgment in favor of the insurance company because the plaintiff could not "show that there was any suspension of operations caused by 'physical damage.' ") (citing *Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co. of Am.*, 835 F.2d 812, 814 (11th Cir. 1988)) ("[R]ecovery is intended when the loss is due to inability to use the premises where the damage occurs.").[6]

6 In *Source Food*, the insured's beef was not allowed to cross from Canada into the United States because of an embargo related to mad cow disease. The insured was therefore unable to fill orders and had to find a new supplier. The insured sought coverage based on a provision requiring "direct physical loss to property," but the district court denied coverage and the Eighth Circuit affirmed, explaining that:

> 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.

Source Food Tech., Inc., 465 F.3d at 838.

*7 In light of these decisions, the district court denied the defendant's motion to dismiss because the plaintiffs alleged that COVID-19 was a highly contagious virus that was *physically present* in viral fluid particles and deposited on surfaces and objects. The plaintiffs further alleged that the physical substance was on the premises and caused them to cease or suspend operations. That is, "[r]egardless of the allegations in ... other cases, Plaintiffs ... plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable." *Studio 417, Inc.*, 2020 WL 4692385, at *6. And that was "enough to survive a motion to dismiss." *Id.*

This case is materially different because 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:

> The critical policy language here—"direct physical loss or damage"—similarly, and unambiguously, requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage. [Plaintiff] simply cannot show any such loss or damage to the 40 Wall Street Building as a result of either (1) its inability to access its office from October 29 to November 3, 2012, or (2) Con Ed's decision to shut off the power to the Bowling Green network. 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.

Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co., 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014).

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.' " *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.").

Florida's appellate courts are in agreement with this interpretation. The Third District has found, for instance, that a "loss" constitutes a diminution of value and that, with the modifiers "direct" and "physical," the alleged damage *must be actual*:

> A "loss" is the diminution of value of something, and in this case, the 'something' is the insureds' house or personal property. Loss, *Black's Law Dictionary* (10th ed. 2014). "Direct" and "physical" modify loss and impose the requirement that the damage be actual. Examining the plain language of the insurance policy in this case, 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 policy.

Homeowners Choice Prop. & Cas. v. Miguel Maspons, 211 So. 3d 1067, 1069 (Fla. 3rd DCA 2017); *see also Vazquez v. Citizens Prop. Ins. Corp.*, 2020 WL 1950831, at *3 (Fla. 3rd DCA Mar. 18, 2020) ("Consistent with this plain meaning, the trial court determined that the 'insured loss' is the property that was actually damaged."); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, 1999 WL 619100, at *7 (D. Or. Aug. 4, 1999) (holding that a policyholder could not recover under a policy requiring "physical loss" unless the claimed mold physically and demonstrably damaged the insured property); *MRI Healthcare Ctr. of Glendale, Inc.*, 187 Cal. App. 4th at 779 ("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.") (internal quotation marks and citation omitted); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App. 3d 23, 42 (Ohio Ct. App. 2008).

*8 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. There, the plaintiff owned and operated a restaurant and, from December 2013 until June 2015,

there was roadway construction in its general vicinity. The construction generated dust and debris, requiring the plaintiff to perform daily cleanings. Although the restaurant was open every day during the roadwork, customer traffic decreased and the business suffered an economic loss. The plaintiff was insured under a policy, which included coverage for loss of business. This policy covered "direct physical loss of or damage to Covered Property ... caused by or resulting from any Covered Cause of Loss." *Id.* at *1 (citation and quotation marks omitted). The plaintiff submitted a claim to the insurer on the basis that dust and debris caused a loss in business. The insurer denied that claim because the proof of loss form failed to reflect the existence of any physical damage (and it was questionable whether a direct physical loss occurred). Thus, the insurer concluded that plaintiff's claim was not covered under the policy.

After finding no error in the district court's decision to exclude several of the plaintiff's experts, the Eleventh Circuit found that the plaintiff failed to show any evidence of direct physical loss or damage. The plaintiff alleged that his insurance claim had two components: one for cleaning the restaurant and another for the loss of business income. In determining whether coverage existed, the Court looked to the same Florida decisions we referenced above and found that "direct physical loss" is defined as a diminution in value and that the modifiers "direct" and "physical" "imposed the requirement that the damage be actual." *Id.* (citing *Homeowners Choice Prop. & Cas.*, 211 So. 3d at 1069; *Vazquez*, 2020 WL 1950831, at *3).

The Court then examined whether coverage existed for the cleaning claim because the plaintiff's public adjuster testified that cleaning and painting was all that was required. In fact, there was no need for the removal or replacement of any items during the construction. The Eleventh Circuit found that, based on the evidence that the district court considered, the cleaning claim did not constitute a direct physical loss because these expenses are merely economic losses. *Id.* at *8 ("We conclude that the district court correctly granted summary judgment on Berries' cleaning claim because, under Florida law, an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.' ") (citing *Maspons*, 211 So. 3d at 1069 (recognizing that "damage [must] be actual"); *Vazquez*, 2020 WL 1950831, at *3 (same)); *see also Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 573 (6th Cir. 2012) ("[C]leaning ... expenses ... are not tangible, physical losses, but economic losses."); *MRI Healthcare Ctr. of Glendale, Inc.*, 187 Cal. App. 4th at 779 ("A direct physical loss 'contemplates an actual change in insured property."); *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 307 (2003) (same).

The Eleventh Circuit also agreed with the district court, with respect to the business loss claim, because that too required that a suspension of operations be caused by direct physical loss or damage to the property. Yet, the plaintiff failed to put forward any evidence that it suffered a direct physical loss or damage during the policy period. And in the absence of any evidence of actual damage, the Eleventh Circuit concluded that the district court was correct in granting the insurer's motion for summary judgment.

When comparing *Mama Jo's* to the allegations in this case, Plaintiff's allegations are far weaker. 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. And it is not plausible how two government orders meet that threshold when the restaurant merely suffered economic losses – not anything tangible, actual, or physical.

***9** As a last ditch effort, Plaintiff suggests that we should adopt a more expansive definition of "direct physical loss or damage," so that coverage could apply if the property is either uninhabitable or substantially unusable. *See, e.g.*, *Port Auth. of New York & New Jersey*, 311 F.3d at 236 ("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."). Assuming we were inclined to ignore both Eleventh Circuit and Florida precedent, Plaintiff still fails to state a claim because – even under an expanded definition – there are no allegations that the restaurant was uninhabitable or substantially unusable. Plaintiff only alleges that the government forced it to close its indoor dining to contain the spread of COVID-19. The government permitted Plaintiff to continue its takeout and delivery services. While Plaintiff never makes clear whether it undertook either of these options, the government never made the restaurant uninhabitable or substantially unusable. Therefore, under no definition of "direct physical loss or damage" has Plaintiff stated a claim where coverage exists under this insurance policy.

Although unnecessary to the disposition of the motion to dismiss, other provisions of the insurance policy support the same interpretation. Take, for instance, the "Business Income" and "Extra Expense" provisions where it provides coverage for Plaintiff's operations during a "period of restoration." [D.E. 5-1 at 53]. A "period of restoration" is defined in the policy as beginning "(1) 72 hours after the time of direct physical loss or damage for Business Income Coverage; or (2) [i]mmediately after the time of direct physical loss or damage for Extra Expenses Coverage[.]" *Id.* at 61. The policy then states that this "period of restoration" "[e]nds 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." *Id.* (emphasis added).

"The words 'repair' and 'replace' contemplate physical damage to the insured premises as opposed to loss of use of it." *Newman Myers Kreines Gross Harris, P.C.*, 17 F. Supp. 3d at 332 (*United Airlines*, 385 F. Supp. 2d at 349 (policy language limiting coverage "for only such length of time [needed] to rebuild, repair or replace such part of the Insured Location(s) as has been damaged or destroyed" supports the notion that "physical damage is required before business interruption coverage is paid"); *Philadelphia 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."')). This means that, if we construe "direct physical loss or damage" to require actual harm, it gives effect to the other provisions in the policy. And that is exactly what Florida law requires us to do so that no section of the insurance policy is left meaningless. *See Aucilla Area Solid Waste Admin. v. Madison Cty.*, 890 So. 2d 415, 416–17 (Fla. 1st DCA 2004) ("Pursuant to the principles of contract construction, we must construe the provisions of a contract in conjunction with one another so as to give reasonable meaning and effect to all of the provisions.") (citing *Hardwick Properties, Inc. v. Newbern*, 711 So. 2d 35, 40–41 (Fla. 1st DCA 1998)). And making matters worse, the policy further provides that the period of restoration "does not include any increased period required due to the enforcement of any ordinance or law that ... [r]egulates the construction, *use* or repair ... of any property[.]" [D.E. 5-1 at 61]. Thus, 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. Accordingly, Defendant's motion to dismiss should be **GRANTED**.

IV. CONCLUSION

For the foregoing reasons, the Court **RECOMMENDS** that Defendant's motion to dismiss be **GRANTED**. If viable under Rule 11, any amended complaint should be filed within (14) fourteen days from the date the District Judge adopts this Report and Recommendation.[7]

7 Because Plaintiff's complaint fails for the reasons stated above, we offer no opinion on Defendant's remaining arguments. To the extent Plaintiff files an amended complaint, it should ensure that it can survive any other exclusion that may exist under the policy.

***10** Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 73, the parties have fourteen (14) days from service of this Report and Recommendation within which to file written objections, if any, with the District Judge. Failure to timely file objections shall bar the parties from *de novo* determination by the District Judge of any factual or legal issue covered in the Report *and* shall bar the parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *see, e.g., Patton v. Rowell*, 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security*, 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

DONE AND SUBMITTED in Chambers at Miami, Florida, this 26th day of August, 2020.

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EXHIBIT 6

2020 WL 5359653
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United States District Court, C.D. California.

10E, LLC

v.

TRAVELERS INDEMNITY CO. OF CONNECTICUT et al.

Case No. 2:20-cv-04418-SVW-AS

Filed 09/02/2020

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Proceedings: AMENDED ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [26] AND DENYING PLAINTIFF'S MOTION TO REMAND [24]

The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

I. Introduction

*1 On June 12, 2020, Plaintiff 10E, LLC ("10E") filed a motion to remand this case to state court. Dkt. 24. On June 26, 2020, Defendant Travelers Indemnity Co. of Connecticut ("Travelers" or "Defendant") filed a motion to dismiss Plaintiff's First Amended Complaint ("FAC"). Dkt. 26. On August 28, 2020, this Court issued an Order that is now withdrawn and superseded by this Order. For the reasons explained below, the Court DENIES Plaintiff's motion to remand and GRANTS Defendant's motion to dismiss.

II. Factual and Procedural Background

On April 10, 2020, Plaintiff, a restaurant in downtown Los Angeles, filed its initial complaint in Los Angeles Superior Court, naming as defendants Travelers and Mayor Eric Garcetti. Dkt. 1, Ex. A. On May 15, 2020, Travelers, which is incorporated and has its principal place of business in Connecticut, Dkt. 1, at 5, removed the case to this Court, arguing that Garcetti was fraudulently joined to defeat diversity jurisdiction, *id.* at 6-10.

On May 22, 2020, Defendant filed a motion to dismiss Plaintiff's initial complaint. Dkt. 14. On June 12, 2020, Plaintiff filed its FAC. Dkt. 22.[1] The FAC asserts claims for breach of contract, bad faith, and violation of Cal. Bus. & Prof. Code § 17200 *et seq.* ("UCL"). *Id.* Plaintiff seeks both damages and declaratory relief. *Id.*

1 The Court DENIES as moot Defendant's motion to dismiss Plaintiff's initial complaint. Dkt. 14.

According to the FAC, beginning on March 15, 2020, public health restrictions adopted by Mayor Garcetti prohibited in-person dining at Plaintiff's restaurant, limiting Plaintiff to offering takeout and delivery. Dkt. 22, at 5. Plaintiff alleges that these restrictions have caused a "complete and total shutdown" of its business. *Id.*

Plaintiff seeks compensation for lost business and other costs of the disruption under the Business Income and Extra Expense provisions of its insurance policy with Defendant ("the Policy"). *Id.* at 3. Plaintiff also seeks to recover under the Policy's Civil Authority provision. *Id.* at 3-4.

Defendant attached a copy of the Policy to its motion to dismiss. Dkt. 27-2, Ex. 1. The Policy covers business income lost when business operations are suspended from a covered cause of loss, but the "suspension must be caused by direct physical loss of or damage to property at the described premises." *Id.* at 108-09. Similarly, the Policy covers extra expenses incurred during a period of restoration that the insured "would not have incurred if there had been no direct physical loss of or damage to property." *Id.* at 109.

The Policy also covers losses and expenses "caused by action of civil authority that prohibits access to the described premises." *Id.* at 121. "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." *Id.*

The Policy contains an endorsement entitled, "EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA." *Id.* at 247. This exclusion applies to "action of civil authority." *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.*

*2 Plaintiff alleges that it is entitled to recover under both provisions because physical loss or damage occurred at its restaurant and other nearby locations and because in-person dining restrictions prohibited access to its restaurant. *Id.* at 5. The restrictions caused "physical damage" by "labeling of the insured property as non-essential" and "prevent[ing] the ordinary intended use of the property." *Id.* Plaintiff also alleges that "[t]he only virus exclusion that relates in theory to a virus is not applicable here" and that the virus exclusion "does not include exclusion for a viral pandemic." *Id.* at 6-7.

Defendant filed its motion to dismiss Plaintiff's FAC on June 26, 2020. Dkt. 26. Plaintiff filed an opposition on August 10, 2020. Dkt. 33. Defendant filed its reply on August 17, 2020. Dkt. 36.

Plaintiff filed its motion to remand to state court on June 12, 2020. Dkt. 24. Defendant filed an opposition on June 29, 2020. Dkt. 29. Plaintiff filed its reply on August 17, 2020. Dkt. 35.

III. Plaintiff's Motion to Remand to State Court

a. *Legal Standard*

Federal courts are courts of limited jurisdiction, having subject matter jurisdiction only over matters authorized by the Constitution and Congress. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). A suit filed in state court may be removed to federal court if the federal court would have had original jurisdiction over the suit. 28 U.S.C. § 1441(a). "The removal statute is strictly construed against removal jurisdiction, and the burden of establishing federal jurisdiction falls to the party invoking the statute." *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004) (citation omitted). "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). Diversity jurisdiction under 28 U.S.C. § 1332(a) requires both that the amount in controversy exceed $75,000, and that complete diversity of citizenship exists between the parties.

Persons are domiciled in the places where they reside with the intent to remain or to which they intend to return. *See Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). A corporation is a citizen of "every State and foreign state by which it has been incorporated and the State or foreign state where it has its principal place of business." 28 U.S.C. § 1332(c)(1). A corporation's principal place of business is "the place where a corporation's officers direct, control, and coordinate the corporation's activities." *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010).

Under the sham defendant doctrine, a defendant's citizenship should be disregarded for purposes of diversity jurisdiction when the defendant "cannot be liable on any theory." *Grancare, LLC v. Thrower by and through Mills*, 889 F.3d 543, 548 (9th Cir. 2018) (citation omitted). "If there is a *possibility* that a state court would find that the complaint states a cause of action against any of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court." *Id.* (citation omitted) (italics in original). The defendant bears a "heavy burden" to overcome the "general presumption against [finding] fraudulent joinder." *Id.* (citation omitted).

b. *Analysis*

Defendant's removal is based on an argument that Mayor Garcetti, a citizen of California, was fraudulently joined to defeat diversity jurisdiction between Plaintiff, a citizen of California, and Defendant, a citizen of Connecticut. Dkt. 1, at 7-10. The Court agrees.

Plaintiff's only asserted claim against Garcetti is a standalone claim for declaratory relief. Dkt. 22, at 6-8. Plaintiff does not appear to argue that its FAC presently states a valid claim against Garcetti. Dkt. 24, at 2-3. Nor could it. Declaratory relief is not a standalone cause of action. *Mayen v. Bank of America N.A.*, 2015 WL 179541, at *5 (internal citations omitted) (N.D. Cal. 2015) ("[D]eclaratory relief is not a standalone claim."); 28 U.S.C. § 2201(a) (a federal court may only award declaratory relief "[i]n a case of actual controversy within its jurisdiction").

*3 Plaintiff's failure to state a cause of action does not by itself establish that Garcetti was fraudulently joined. *See Grancare*, 889 F.3d at 549 ("[T]he test for fraudulent joinder and for failure to state a claim under Rule 12(b)(6) are not equivalent."). However, it does require the Court to find that Plaintiff could possibly amend its complaint to state a cause of action against Garcetti. *See id.* ("[T]he district court must consider ... whether a deficiency in the complaint can possibly be cured by granting the plaintiff leave to amend.").

The Court is unable to imagine how such an amendment is possible. Plaintiff argues that, because "the denial of [Defendant's] policy would not have occurred absent Mayor Garcetti's order, the propriety of Mayor Garcetti's order is a significant issue that needs to be resolved." Dkt. 22, at 6-8. However, Plaintiff neither articulates a ground for some future challenge to the legality of Garcetti's order nor explains how such a challenge could be raised in the context of this insurance dispute. While its burden to show fraudulent joinder is "heavy," *Grancare*, 889 F.3d at 548, Defendant has carried that burden here. The Court concludes that Garcetti was fraudulently joined and discounts his citizenship for purposes of assessing diversity of parties.

The Court is unpersuaded by Plaintiff's other arguments supporting remand. Plaintiff argues that, because there are other insurance cases now pending in state court concerning recovery of pandemic-related losses under business interruption policies, the Court should remand the case to state court under a laundry list of prudential considerations and abstention doctrines. Crucially, as Defendant points out, although they may involve the same lawyers, these other pandemic-related insurance cases do not involve the same parties and issues as this litigation. Dkt. 29, at 18-19. Consequently, the Court has no concern that its exercise of jurisdiction here will interfere with any parallel state proceedings, and it concludes without detailed analysis that none of the doctrines raised by Plaintiff favor remand. *See Herrera v. City of Palmdale*, 918 F.3d 1037, 1043 (9th Cir. 2019) (citing *Younger v. Harris*, 401 U.S. 37, 43 (1971)) ("*Younger* abstention is grounded in a 'longstanding public policy against federal court interference with state court proceedings.' "); *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 841 (9th Cir. 2017) ("*Colorado River* and its progeny provide a multi-pronged test for determining whether 'exceptional circumstances' exist warranting federal abstention from *concurrent federal and state proceedings.*") (italics added); *Gov. Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998) (citation omitted) ("If there are *parallel state proceedings* involving the same issues and parties pending at the time the federal declaratory action is filed, there is a presumption that the entire suit should be heard in state court.") (italics added).

Because Defendant has met its burden to show that removal was proper, the Court denies Plaintiff's motion to remand the case to state court.

IV. Defendant's Motion to Dismiss Plaintiff's First Amended Complaint

a. *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).

*4 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.

b. *Analysis*

Defendant's motion to dismiss makes three arguments: 1) the Policy's virus exclusion clause precludes recovery under the Policy, 2) Plaintiff fails to allege that public health restrictions prohibited access to Plaintiff's restaurant as required for Civil

Authority coverage, and 3) Plaintiff does not plausibly allege that it suffered "direct physical loss of or damage to property" as required for Business Income and Extra Expense coverage. *See generally* Dkt. 27. Without reaching the first two arguments, the Court agrees with Defendant's third argument as to Business Income and Extra Expense coverage. The Court also concludes that Defendant's argument regarding the limited scope of the phrase, "direct physical loss of or damage to property," demonstrates that the FAC fails to properly allege entitlement to recovery under the Civil Authority provision.

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* Dkt. 33. Because Plaintiff seeks to recover under the Policy, *see generally* Dkt. 22, 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.' ").

i. Business Interruption 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 Interruption and Extra Expense provision at issue here conditions recovery on "direct physical loss of or damage to property." Dkt. 27-2, Ex. 1., at 108-09.

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).

*5 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." 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*, 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. 21 Cal. App. 5th at 38-39.

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.

Plaintiff characterizes in-person dining restrictions as "labeling of the insured property as non-essential." Dkt. 22, at 5. That "labeling" surely carries significant social, economic, and legal consequences. But it does not physically alter any of Plaintiff's property.

Plaintiff attempts to circumvent the plain language of the Policy by emphasizing its disjunctive phrasing – "direct physical loss of *or* damage to property," Dkt. 27-2, Ex. 1, at 121 – and insisting that "loss," unlike "damage," encompasses temporary 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" 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* Dkt. 22. 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 "elegantly sophisticated surrounding." *Id.* at 3.

The Court therefore concludes that Plaintiff has not alleged facts plausibly demonstrating its entitlement to recover under the Policy's Business Income and Extra Expense coverage.

ii. Civil Authority Coverage

For similar reasons, the Court finds that the facts alleged in the FAC do not support recovery under the Policy's Civil Authority coverage. The Civil Authority coverage kicks in when the insured incurs loss of business income and extra expenses as a result of civil authority action. Dkt. 27-2, Ex. 1, at 121. "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." *Id.* Plaintiff's FAC points generally to the physical action of the coronavirus, which "infects and stays on surfaces of objects or materials ... for up to twenty-eight days." Dkt. 22, at 4. However, Plaintiff does not allege actual cases of "direct physical loss of or damage to property" at other locations. At most, the FAC points to a mere possibility.

*6 Plaintiff attempts to plead around the Policy's virus exclusion with vague, circuitous, and – at this stage – fatally conclusory allegations. The FAC describes public health restrictions as "based on ... evidence of physical damage to property." *Id.* After describing the statewide order, it asserts without any relevant detail that "the property that is damaged is in the immediate area of the Insured Property." However, the FAC does not describe particular property damage or articulate any facts connecting the alleged property damage to restrictions on in-person dining. These allegations do no more than paraphrase the language of the Policy without specifying facts that could support recovery under the Policy. These allegations are thus "conclusory allegations of law" that plainly cannot survive a Rule 12(b)(6) challenge. *In re NFL's Sunday Ticket Antitrust Litigation*, 933 F.3d 1136, 1149 (9th Cir. 2019) (citation and quotation marks omitted).

While the Court does not address the scope of the Policy's virus exclusion or consider any issues of causation, the Court notes its skepticism that Plaintiff can evade application of the Policy's virus exclusion. Plaintiff's theory of liability appears to inevitably rest on a potentially implausible allegation that in-person dining restrictions are not attributable to "any virus," a cause which the Policy expressly excludes. Dkt. 27-2, at 247. Nevertheless, Plaintiff asserts that it is "is not attempting to recover any losses from COVID-19 or its proliferation." Dkt. 33, at 4. 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.

For the foregoing reasons, the Court concludes that the FAC fails to plausibly allege entitlement to Civil Authority coverage.

iii. Breach of Contract and Bad Faith Claims

Because it is not entitled to coverage under the Policy, Plaintiff cannot state a claim for breach of contract, *See 1231 Euclid Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 135 Cal. App. 4th 1008, 1020-21 (2006) ("The failure of [a policy's] conditions precedent is a complete defense to [an insured's] breach of contract claim."), or bad faith, *See Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 (1990) ("Where benefits are withheld for proper cause, there is no breach of the implied covenant.").

iv. UCL Claim

Likewise, Plaintiff's UCL claim is based on an allegation that the Policy represents that Plaintiff would be covered under these circumstances. Dkt. 22, at 10-11. The Court has concluded that Plaintiff was not entitled to recover under the Policy on the facts alleged in the FAC. That determination is based on an interpretation of the "ordinary and popular sense" of the Policy language. *Palmer*, 21 Cal. 4th at 1115. If 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."). Therefore, the Court also dismisses Plaintiff's UCL claim.

V. Conclusion

For the reasons articulated above, the Court DENIES Plaintiff's motion to remand the case to state court and GRANTS Defendant's motion to dismiss the FAC. The Court will allow Plaintiff leave to amend its complaint within 14 days of the issuance of this Amended Order.

All Citations

Slip Copy, 2020 WL 5359653

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EXHIBIT 7

2020 WL 5258484
Only the Westlaw citation is currently available.
United States District Court, E.D.
Michigan, Northern Division.

TUREK ENTERPRISES, INC., d/b/a ALCONA CHIROPRACTIC, Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY, Defendants.

Case No. 20-11655
|
09/03/2020

THOMAS L. LUDINGTON, United States District Judge

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE

*1 On June 23, 2020, Plaintiff Turek Enterprises, Inc., d/b/a Alcona Chiropractic, filed a complaint against Defendants State Farm Mutual Automobile Insurance Company ("State Farm Automobile") and State Farm Fire and Casualty Company ("State Farm Casualty"), on behalf of itself and all others similarly situated. Plaintiff alleges that Defendants failed to compensate Plaintiff's loss of income and extra expense as required by an insurance contract between the parties. 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. On July 15, 2020, Defendants moved to dismiss the complaint for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). ECF No. 12. Timely response and reply briefs were filed. ECF Nos. 16, 19. For the reasons stated below, the motion to dismiss will be granted, and the complaint will be dismissed with prejudice.

I.

Plaintiff is a Michigan corporation operating a chiropractic office in Alcona County, Michigan. ECF No. 1 at PageID.5. State Farm Casualty and State Farm Automobile are both Illinois corporations with headquarters in Chicago, Illinois. *Id.* at PageID.6. State Farm Casualty is licensed to operate in Michigan, where it sells insurance to businesses like Plaintiff. *Id.* On May 22, 2019, Plaintiff entered into a one-year term, "all-risk" insurance contract (the "Businessowners Insurance Policy" or the "Policy") with State Farm Casualty. *Id.* at PageID.5.

A.

The first section of the Policy, entitled "Section I – Property," contains the general terms and limits of coverage and includes two important subsections, "Section I – Covered Cause of Loss" and "Section I – Exclusions."[1] ECF No. 12-4 at PageID.171–73. Pursuant to Section I – Covered Cause of Loss, the Policy "insur[es] for accidental direct physical loss to Covered Property," unless the loss is excluded by Section I – Exclusions or limited in the "Property Subject to Limitations" provision. *Id.* at PageID.172.

The Policy divides "Covered Property" into two groups, "Coverage A – Buildings" and "Coverage B – Business Personal Property." *Id.* at PageID.171. The two groups broadly cover the personal property and buildings used in the insured's business, with some limitations provided in the subsection "Property Not Covered." *Id.* The Policy also covers loss of income and extra expense (commonly referred to as "business interruption losses") through an endorsement to the Policy identified as "CMP-4905.1 Loss of Income and Extra Expense" (the "Endorsement"):

1. Loss of Income
a. We will pay for the actual "Loss of Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by accidental direct physical loss to property at the described premises. The loss must be caused by a Covered Cause Of Loss...

2. Extra Expense
*2 a. We will pay necessary "Extra Expense" you incur during the "period of restoration" that you would not have incurred if there had been no accidental direct physical loss to

property at the described premises. The loss must be caused by a Covered Cause Of Loss...

[...]

4. Civil Authority
a. 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 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.

ECF No. 1 at PageID.63–64 (bolding omitted).[2] This coverage is provided "subject to the provisions of Section I – Property," which includes Section I – Exclusions. ECF No. 1 at PageID.63. Section I – Exclusions provides a lengthy list of exclusions under the Policy. The section provides, in relevant part:
1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the other excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

[...]

j. Fungi, Virus, Or Bacteria
(1) Growth, proliferation, spread or presence of "fungi" or wet or dry rot; or (2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness, or disease; and

(3) We will also not pay for:

(a) Any loss of use or delay in rebuilding, repairing or replacing covered property, including any associated cost or expense, due to interference at the escribed premises or location of the rebuilding, repair, or replacement of that property, by "fungi", wet or dry rot, virus, bacteria or other microorganism.

(b) Any remediation of "fungi", wet or dry rot, virus, bacteria or other microorganism...

(c) The cost of any testing or monitoring of air or property to confirm the type, absence, presence or level of "fungi", wet or dry rot, virus, bacteria or other microorganism, whether performed prior to, during or after removal, repair, restoration or replacement of Covered Property.

This exclusion does not apply if "fungi", wet or dry rot, virus, bacteria or other microorganism results from an accidental direct physical loss caused by fire or lightning.
*3 ECF No. 12-4 at PageID.173–74 (emphasis omitted). The first numbered paragraph is referred to as the "Anti-Concurrent Causation Clause." The subsection governing fungi, viruses, and bacteria is referred to as the "Virus Exclusion."[3] Insurers began to add the Virus Exclusion and similar terms to contracts in 2006, after the severe acute respiratory syndrome ("SARS") outbreak. ECF No. 1 at PageID.16–17, 92. A 2006 Insurance Services Office circular (the "ISO circular") explained that insurers were "presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms."[4] *Id.* at PageID.93.

B.

The first recorded case of the 2019 novel coronavirus ("COVID-19") in Michigan was reported on March 10, 2020. The next day, the World Health Organization declared COVID-19 a pandemic. On March 24, 2020, the Governor of the State of Michigan issued Executive Order 2020-21 (the "Order"). ECF No. 1 at PageID.2. The Order is entitled "Temporary requirement to suspend activities that are not necessary to sustain or protect life." ECF No. 16-4. The Order states, in relevant part:

> To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible.
>
> This order takes effect on March 24, 2020 at 12:01 am, and continues through April 13, 2020 at 11:59 pm.
>
> Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:
>
> [...]
>
> 4. No person or entity shall operate a business or conduct operations that require
>
> > workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life or to conduct minimum basic operations.

Id. at PageID.424–25. On May 21, 2020, the Order was amended to require that businesses like Plaintiff's perform structural alterations to the premises before resuming operations. ECF No. 1 at PageID.13.

C.

On March 24, 2020, Plaintiff suspended all business operations in compliance with the Order. As a result, Plaintiff lost the use of its Covered Property until at least May 28, 2020.[5] ECF No. 1 at PageID.12–14. On May 22, 2020, Plaintiff renewed the Policy with State Farm Casualty for a new term expiring on May 22, 2021. *Id.* at PageID.5. On June 4, 2020, Plaintiff made a claim with State Farm Casualty for loss of income and extra expense as a result of the Order. *Id.* at PageID.15, 81. State Farm Casualty denied Plaintiff's claim in writing, stating:

> This is a follow up to our conversation on 06-04-20. You are making a claim for Loss of Income due to COVID-19. You advised that you [sic] business has been affected by the government mandate related to COVID-19 as you have been only able to do emergency services because of this mandate. Our investigation indicates that the insured property has not sustained accidental direct physical loss. There are exclusions for virus [sic], enforcement of ordinance or law, and consequential losses...

*4 *Id.* at PageID.81. The letter then recited the terms of the Policy described above, specifically Section I – Covered Cause of Loss, Section I – Exclusions, and the Endorsement. *Id.*

D.

On June 23, 2020, Plaintiff filed a complaint against Defendants on behalf of itself and all others similarly situated. ECF No. 1. Plaintiff alleges that Defendants breached the Policy by failing to cover Plaintiff's loss of income and extra expense incurred by compliance with the Order. *Id.* Plaintiff contends that such losses fall within the Loss of Income, Extra Expense, and Civil Authority sections of the Endorsement. *Id.* at PageID.14. With respect to the Virus Exclusion, Plaintiff maintains that the Order was the sole cause of its losses. *Id.* at PageID.14–15.The Order, according to Plaintiff, was issued "to ensure the *absence* of the virus, or persons carrying the virus, from the Plaintiff's premises," and "there is no evidence at all that the virus did enter Plaintiff's property or that it had to be de-contaminated." *Id.* at PageID.4, 17 (emphasis in original).

Plaintiff also alleges that Defendants have issued "hundreds or thousands" of identical or substantially similar policies to businesses across Michigan. *Id.* at PageID.10. Plaintiff alleges that these businesses, like Plaintiff, have suffered losses from the Order that Defendants have wrongly refused to cover. *Id.* at PageID.13. Accordingly, Plaintiff seeks damages for its losses and a declaratory judgment that the Policy covers the loss of income and extra expense sustained. *Id.* at PageID.38–39. Plaintiff seeks this relief on behalf of itself and three proposed classes that correspond to types of Endorsement coverage: The Loss of Income Coverage Class, the Extra Expense Coverage Class, and the Civil Authority Coverage Class. *Id.* Counts I, III, and V are for declaratory relief. Counts II, IV, and VI are for breach of contract.

On July 15, 2020, Defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. ECF No. 15. Plaintiff filed a timely response, to which Defendants replied. ECF Nos. 16, 19.

II.

A.

Under Rule 12(b)(6), a pleading fails to state a claim if it does not contain allegations that support recovery under any recognizable theory. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In considering a Rule 12(b)(6) motion, the Court construes the pleading in the non-movants' favor and accepts the allegations of facts therein as true. *See Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008). The pleader need not provide "detailed factual allegations" to survive dismissal, but the "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 Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In essence, the pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" and "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 679–79 (quotations and citation omitted).

B.

***5** Plaintiff asserts federal diversity jurisdiction pursuant to 28 U.S.C. § 1332, so Michigan law applies. Michigan's principles of contract interpretation are well-settled. "[A]n insurance contract must be enforced in accordance with its terms." *Henderson v. State Farm Fire & Cas. Co.*, 596 N.W.2d 190, 193 (Mich. 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.*, 534 N.W.2d 502, 505 (Mich. 1995) (internal quotation marks omitted). Michigan defines "an ambiguity in an insurance policy to include contract provisions capable of conflicting interpretations." *Auto Club Ins. Ass'n v. DeLaGarza*, 444 N.W.2d 803, 805 (Mich. 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*, 565 N.W.2d 839, 841 (Mich. 1997)). Policy provisions, such as exclusions, are valid "as long as [they are] clear, unambiguous and not in contravention of public policy." *Harrington*, 565 N.W.2d at 841 (internal quotation marks omitted).

III.

Defendants' principal argument is that Plaintiff's business interruption losses were not caused by a Covered Cause of Loss. Specifically, Defendants argue (1) that Plaintiff's losses are not the result of an "accidental direct physical loss to Covered Property," and (2) that even if they were, they are excluded by the Virus Exclusion or some other exclusion, such as the Ordinance or Law, Acts or Decisions, or Consequential Losses exclusions. ECF No. 12 at PageID.133–43. Defendants further argue that Plaintiff's request for declaratory relief is redundant, and that State Farm Automobile was not a party to the Policy. *Id.* at PageID.151–52. The parties also dispute the applicability of the Loss of Income, Extra Expense, and Civil Authority sections of the Endorsement, but these disputes are tangential because the applicability of each section turns on whether Plaintiff has alleged a Covered Cause of Loss. *See* ECF No. 1 at PageID.63–64.[6]

A.

The threshold question is whether Plaintiff suffered an "accidental direct physical loss to Covered Property." The Policy does not define the term "direct physical loss," and the parties offer different interpretations. Defendants contend that the term requires "tangible damage" to Covered Property, like the damage one could expect from a fire. ECF No. 12 at PageID.139–40. Plaintiff offers the broader interpretation that "direct physical loss" includes "loss of use." ECF No. 16 at PageID.302–03. Under this view, any event rendering Covered Property "unusable or uninhabitable" would trigger coverage, regardless of whether any tangible damage to the property resulted. *Id.* Importantly, Plaintiff is adamant that COVID-19 never entered its premises. ECF No. 1 at PageID.17. According to Plaintiff, its loss of income and extra expense arise only from its suspension of operations in compliance with the Order. *Id.* at PageID.3. As a result, Plaintiff's entire case turns on the construction of "direct physical loss."[7]

*6 While Michigan courts have not interpreted the term "direct physical loss," the Sixth Circuit Court of Appeals interpreted a similar term in *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 572 (6th Cir. 2012). In *Universal*, the plaintiff brought action against its insurer, alleging that it suffered a "direct physical loss or damage to" property after it was forced to vacate its building for mold remediation. *Universal*, 475 F. App'x at 572. The district court found that "direct physical loss or damage" required "tangible damage" and entered summary judgment for the defendants. *Id.* at 571. The Sixth Circuit affirmed, noting that "[the plaintiff] did not experience any form of 'tangible damage' to its insured property" and that its losses were not "physical losses, but economic losses." *Id.* at 573. In so holding, the Sixth Circuit found *de Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714 (Tex. App. 2005), to be persuasive. In *de Laurentis*, the Texas Court of Appeals held that "physical loss" required "tangible damage" after analyzing the dictionary definitions of "physical" and "loss." *De Laurentis*, 162 S.W.3d at 723. *De Laurentis* "provid[ed] insight into how the Michigan courts would interpret the phrase 'direct physical loss' " because the Michigan Court of Appeals had previously relied on *de Laurentis* to interpret the word "direct." *Universal*, 475 F. App'x at 573.

As Plaintiff correctly notes, the Sixth Circuit considered the possibility that Michigan courts would reach a different interpretation of "direct physical loss." *Id.* at 574 (collecting cases holding that " 'physical loss' occurs when real property becomes 'uninhabitable' or substantially 'unusable' "). Contrary to Plaintiff's suggestion,however, the Sixth Circuit did not "approve" of Plaintiff's interpretation and, in fact, held that "even if Michigan were to adopt it," the *Universal* plaintiff would "still not be entitled to coverage." *Id.* Moreover, the term in this case presents a stronger argument for Defendants than the term in *Universal*. The term here is "direct physical loss," not "direct physical loss *or* damage." Consequently, reading "direct physical loss" to require tangible damage does not risk redundantly interpreting "loss" and "damage." *See Klapp v. United Ins. Grp. Agency, Inc.*, 663 N.W.2d 447, 453 (Mich. 2003) ("[C]ourts must [ ] give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.").

Furthermore, Defendants offer the only interpretation resembling the "plain and ordinary meaning" of "direct physical loss." *See McGrath v. Allstate Ins. Co.*, 802 N.W.2d 619, 622 (Mich. App. 2010) (citing *Citizens Ins. Co. v. Pro-Seal Serv. Grp., Inc.*, 730 N.W.2d 682, 687 (Mich. 2007)) (internal citations omitted). Michigan courts determine a word's ordinary meaning by consulting a dictionary. *Id.* 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).

Plaintiff suggests that "physical loss to Covered Property" includes the inability to use Covered Property. ECF No. 16 at PageID.306. This interpretation seems consistent with one definition of "loss" but ultimately renders the word "to" meaningless.[8] "To" is used here as a preposition indicating contact between two nouns, "direct physical loss" and "Covered Property." *To, Merriam-Webster*, https://www.merriam-webster.com/dictionary/to (last visited Aug. 31, 2020). Accordingly, the plain meaning of "direct physical loss to Covered Property" requires that there be a loss *to* Covered Property; and not just any loss, a *direct physical loss*.[9] Plaintiff's interpretation would be plausible if, instead, the term at issue were "accidental direct physical loss *of* Covered Property."[10] *See Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) ("[T]he policy's use of the word 'to' in the policy language 'direct physical loss *to* property' is significant. [The claimant'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.' ") (emphasis original).

*7 Defendants' interpretation is also consistent with recent COVID-19-related cases interpreting similar or identical terms. In *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020), the Western District of Texas addressed facts nearly identical to this case. The *Diesel* plaintiffs sought damages from a State Farm insurer that refused to compensate business interruption losses incurred by COVID-19-related "shutdown" orders. *Diesel Barbershop, LLC*, 2020 WL 4724305, at *3. The *Diesel* plaintiffs suffered no tangible damage to property but alleged that loss of use was sufficient.

Id. at 5*. The insurance policy included the same material terms at issue here. *Id.* at *2–3.

While the court noted "that some courts [had] found physical loss even without tangible destruction," "the line of cases requiring tangible injury to property [was] more persuasive." *Id.* at *5. Accordingly, the court dismissed the complaint, holding that the plaintiff failed to state an "accidental direct physical loss to Covered Property." *Id.* at *7. Similarly, the Ingham County Circuit Court recently adopted the tangible damage interpretation to dismiss a COVID-19-related insurance case. *See Gavrilides Management Co. LLC v. Michigan Insurance Co.*, Case No. 20-258-CB-C30 (Mich. Cir. Ct., Ingham Cty.). The *Gavrilides* plaintiff claimed that it suffered "direct physical loss" to its restaurant because the Order prevented customers from dining-in. ECF No. 12-5 at PageID.263. The court dismissed the argument as "simply nonsense" and agreed with the insurer-defendant that the phrase "accidental direct loss of or damage to property" required "some physical alteration to or physical damage or tangible damage to the integrity of the building." *Id.* at 272 (relying in part on *Universal Image Prods., Inc. v. Chubb Corp.*, 703 F. Supp. 2d 705, 708 (E.D. Mich. 2010), *aff'd sub nom. Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569 (6th Cir. 2012)).

Plaintiff's reliance on *Studio 417, Inc. v. Cincinnati Insurance Co.*, No. 20-cv-03127-SRB (W.D. Mo. Aug. 12, 2020), is unpersuasive. In *Studio*, the plaintiffs alleged business interruption losses from COVID-19-related "shutdown" orders that their insurer refused to compensate. ECF No. 16-2 at PageID.323. The defendant moved to dismiss, but the court denied the motion, finding that the plaintiffs had plausibly stated losses within coverage. *Id.* at PageID.326–32. Despite apparent similarities, *Studio* is readily distinguishable from the instant case. The policy at issue in *Studio* covered losses arising from "accidental physical loss *or* accidental physical damage to property." *Id.* at PageID.328 (emphasis original). According to the court, the defendant's insistence on a showing of tangible damage "conflat[ed] 'loss' and 'damage' " and was inconsistent with "giv[ing] meaning to both terms." *Id.* Furthermore, the *Studio* plaintiffs "plausibly alleged that COVID-19 particles attached to and damaged their property," a fact which the court used to distinguish *Source Foods*. *Id.* at PageID.330–31. By contrast, Plaintiff asserts that COVID-19 never entered its premises, and Defendants' interpretation would not read "direct physical loss" redundantly. Even if *Studio* supports Plaintiff's interpretation, its analysis is inapplicable here.

Plaintiff also argues that it has, in fact, stated "tangible damage" because it "alleged tangible deterioration during the several months that [its] operation has been 'suspended.' " ECF No. 16 at PageID.304 n. 11. In support, Plaintiff points to paragraph 35 of the complaint, which states, "Among the property so damaged is Plaintiff's chiropractic equipment, certain leased equipment, *medication and supplements with expiration dates, and other depreciating assets.*" ECF No. 1 at PageID.13 (emphasis added). Plaintiff is simply adding an extra step to its original theory. Rather than the loss of use being the "direct physical loss," the "direct physical loss" is now the passive depreciation *caused by* the loss of use. Plaintiff offers no authority to support the theory that passive depreciation counts as a "direct physical loss to Covered Property," and such a conclusory allegation fails to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678.

***8** Based on the foregoing, "accidental 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.[11] Counts II, IV, and VI will therefore be dismissed.

B.

1.

Even if Plaintiff's business interruption losses were caused by an "accidental direct physical loss to Covered Property," coverage would still be negated by Section I – Exclusions. As discussed above, Section I – Exclusions, which is incorporated against all Endorsement coverage, provides several pertinent exclusions, most principally the Virus Exclusion. ECF No. 12-4 at PageID.173–74. Defendants bear the burden of showing that any exclusion to coverage applies. *Heniser*, 534 N.W.2d at 505 n. 6.

By its plain terms, the Virus Exclusion bars coverage for any loss that would not have occurred but for some "[v]irus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness, or disease." ECF No. 12-4 at PageID.173–74. Plaintiff advances two arguments for why the Virus Exclusion is inapplicable: (1) that COVID-19 was not the proximate cause of its losses; and (2) that the

Virus Exclusion is limited to costs incurred as a result of viral, bacterial, or fungal contamination. ECF No. 16 at PageID.298–300. Neither argument is compelling.

Plaintiff's contention that the Order was the "sole, direct, and only proximate cause" of Plaintiff's losses is refuted by the Order itself. ECF No. 1 at PageID.3. The Order expressly states that it was issued to "suppress the spread of COVID-19" and accompanying public health risks. ECF No. 16-4 at PageID.424. The only reasonable conclusion is that the Order—and, by extension, Plaintiff's business interruption losses—would not have occurred but for COVID-19. Plaintiff is therefore wrong to suggest that "whether the reason for the [Order] was preventing the spread of a virus or an asteroid spreading magic dust is irrelevant." ECF No. 16 at PageID.299. If it were the latter, the Virus Exclusion would not apply.

Furthermore, Plaintiff's position essentially disregards the Anti-Concurrent Causation Clause, which extends the Virus Exclusion to all losses where a virus is part of the causal chain. ECF No. 12-4 at PageID.173–74. Thus, even if the Order were a more proximate cause than COVID-19, coverage would still be excluded. Plaintiff, however, rejects this interpretation, arguing that it would lead to absurd results. To illustrate, Plaintiff poses a hypothetical where coverage is excluded because a firefighter passes out from viral infection on the way to put out a small fire at Plaintiff's business which is later burned to the ground. ECF No. 16 at PageID.299. Ignoring the merits of Plaintiff's hypothetical, the task here is not to speculate on the outer limits of coverage, and Plaintiff provides no authority for discounting the plain meaning of a term because such meaning might produce counterintuitive results.[12] *See Diesel Barbershop*, 2020 WL 4724305 at *6 ("[W]hile the Virus Exclusion could have been even more specifically worded, that alone does not make the exclusion 'ambiguous.' ").

***9** Plaintiff next argues that the Virus Exclusion is inapplicable because it was only meant to exclude losses related to viral, bacterial, or fungal contamination. Plaintiff points to the 2006 ISO circular which allegedly shows that "the [Virus Exclusion] was meant to preclude coverage for 'recovery for losses involving contamination by disease-causing agents,' and that the exclusion related only 'to contamination by disease-causing viruses.' "[13] ECF No. 16 at PageID.300. The parties dispute the meaning of the ISO circular, but its exact meaning is immaterial. By its terms, the Policy does not limit the Virus Exclusion to contamination, and Plaintiff has failed to show that the Virus Exclusion is ambiguous. *C.f. Aetna Cas. & Sur. Co. v. Dow Chem. Co.*, 28 F. Supp. 2d 440, 445 (E.D. Mich. 1998) (finding pollution exclusion clause ambiguous and interpreting it along with ISO clause). Accordingly, the ISO circular is extrinsic evidence that may not be "used as an aid in the construction of the [unambiguous] contract." *City of Grosse Pointe Park v. Michigan Mun. Liab. & Prop. Pool*, 702 N.W.2d 106, 115 (Mich. 2005). Therefore, even if Defendants misrepresented the purpose and extent of the Virus Exclusion in 2006, the plain, unambiguous meaning of the Virus Exclusion today negates coverage.[14] *See Mahnick v. Bell Co.*, 662 N.W.2d 830, 832–33 (2003) ("The court must look for the intent of the parties in the words used in the contract itself. When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability to write a different contract for the parties....") (internal citations omitted).

Accordingly, assuming Plaintiff has suffered an "accidental direct physical loss to Covered Property," the Virus Exclusion negates any coverage for Plaintiff's loss of income or extra expense. For this reason, Plaintiff's request for leave to amend its complaint upon a finding that it has not suffered an "accidental direct physical loss to Covered Property" will be denied because granting such leave would be futile. ECF No. 16 at PageID.307. Counts II, IV, and VI will be dismissed.[15]

2.

The applicability of the three additional exclusions, the Ordinance or Law, Acts or Decisions, and Consequential Losses exclusions, will not be reached. It is unnecessary to decide whether these exclusions bar coverage when Plaintiff has not stated an "accidental direct physical loss to Covered Property" and the Virus Exclusion would otherwise bar recovery.[16] Similarly, the application of the Loss of Income, Extra Expense, and Civil Authority sections of the Endorsement remain undecided besides the finding that Plaintiff has failed to state a Covered Cause of Loss, which is a prerequisite to the application of each section.

C.

***10** In addition to its breach of contract claims, Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. §§ 2201

and 2202 that "the Policy and other Class members' policies provide coverage for Class members' " business interruption losses incurred by the Order and that the Virus Exclusion is inapplicable. ECF No. 1 at PageID.27–37 (Counts I, III, and V). Defendants argue that such declaratory relief would duplicate Plaintiff's breach of contract claims. Defendants are correct.

Under 28 U.S.C. § 2201(a), a district court "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." To determine whether to exercise declaratory jurisdiction, a court should consider "whether the judgment will serve a useful purpose in clarifying and settling the legal relationships in issue and whether it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Aetna Cas. Surety Co. v. Sunshine Corp.*, 74 F.3d 685, 687 (6th Cir. 1996) (citations and internal quotations omitted).

The Sixth Circuit has outlined five factors assessing the propriety of a federal court's exercise of discretion in such a situation:

> (1) whether the judgment would settle the controversy;
>
> (2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue;
>
> (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata";
>
> (4) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and

(5) whether there is an alternative remedy that is better or more effective. *Scottsdale Ins. Co. v. Roumph*, 211 F.3d 964, 968 (6th Cir. 2000). These factors reveal no useful purpose for declaratory jurisdiction here. First, declaratory relief cannot "settle the controversy" because, as discussed, Plaintiff has failed to state a Covered Cause of Loss. As a result, it seems implausible that declaratory relief could further clarify the legal relations at issue. Indeed, Plaintiff merely asserts its right to seek a declaration "that certain policy language means 'X', or that the virus exclusion does not apply, without also giving up [its] claim for damages." ECF No. 16 at PageID.315. Plaintiff does not explain how pursuing this right would offer any relief, especially since Plaintiff has failed to state a claim for breach of contract. *C.f. Dow Chem. Co. v. Reinhard*, No. 07-12012-BC, 2007 WL 2780545, at *10 (E.D. Mich. Sept. 20, 2007) (dismissing declaratory relief counts that "would result in the duplication of any disposition of the claim of a breach of contract" but retaining declaratory relief counts regarding "prospective obligations" "that differ from any determination of liability" for breach of contract).

The remaining factors are similarly unpersuasive. The factors regarding procedural fencing and comity between the state and federal courts are neutral at best. Moreover, Plaintiff's alternative claims for breach of contract would have been more efficient vehicles for relief given that Plaintiff could have obtained damages along with an opinion regarding the extent of Policy coverage. Ultimately, this opinion dismissing Plaintiff's claims for breach of contract will clarify the parties' rights under the Policy as meaningfully as any declaratory judgment would have. Allowing Plaintiff to continue seeking declaratory relief would be nonsensical. Accordingly, Counts I, III, and V must be dismissed.

D.

***11** Defendants allege that Defendant State Farm Automobile was not a party to the Policy and should be dismissed. ECF No. 12 at PageID.151. Plaintiff agrees. ECF No. 16 at PageID.292 n. 1. Accordingly, notwithstanding the discussion above, Plaintiff's claims against State Farm Automobile must be dismissed.

IV.

Accordingly, it is **ORDERED** that Defendants' Motion to Dismiss, ECF No. 12, is **GRANTED**.

It is further **ORDERED** that Plaintiff's complaint, ECF No. 1, is **DISMISSED WITH PREJUDICE**.

Dated: September 3, 2020 s/Thomas L. Ludington

THOMAS L. LUDINGTON

United States District Judge

All Citations

Slip Copy, 2020 WL 5258484

Footnotes

1 Plaintiff did not file the full Policy as an exhibit to the complaint, so reference is frequently made to the Policy as included in Defendants' motion to dismiss. *See* ECF No. 12-4.

2 The Endorsement further defines "Loss of Income" and "Extra Expense," but the precise definition of each term is irrelevant for purposes of this order.

3 Section I – Exclusions includes three additional exclusions, among others: the "Ordinance or Law," "Acts or Decisions," and "Consequential Losses" exclusions. *See* ECF No. 12-4. While Defendants partially rely on these exclusions, it is unnecessary to decide their application for reasons stated in Section III.B.2., *infra*.

4 Insurance Services Office is the industry trade group that drafts form policies for the American liability insurance market.

5 Plaintiff's response brief indicates that Plaintiff could "resume use of its property" after an amendment to the Order on May 28, 2020. ECF No. 16 at PageID.309.

6 As mentioned previously, the coverage offered under each section is "subject to the provisions of Section I – Property." ECF No. 1 at PageID.63.

7 Plaintiff does argue that it stated "tangible damage" by cursory reference to one paragraph in the complaint, but for reasons stated below, this argument is rejected. ECF No. 16 at PageID.302.

8 Of course, the fact that a word can be defined in more than one way does not make the relevant term ambiguous. "Most, if not all, words are defined in a variety of ways in each particular dictionary, as well as being defined differently in different dictionaries...[The Michigan Supreme Court] refuses to ascribe ambiguity to words in the English language simply because dictionary publishers are obliged to define words differently to avoid possible plagiarism." *Upjohn*, 476 N.W.2d at 398 n. 8.

9 Plaintiff's interpretation also risks rendering the word "physical" meaningless. If "physical loss to Covered Property" includes the inability to use Covered Property, then it is unclear why the same meaning could not be conveyed by "loss to Covered Property." Presumably, any "loss of use" would be "physical" insofar as the cause of the loss or the Covered Property itself has some physical existence.

10 Plaintiff's reliance on *Duronio v. Merck & Co.*, No. 267003, 2006 WL 1628516 (Mich. Ct. App. June 13, 2006), is misplaced. *Duronio* concerned a product liability statute, and its expansive definition of "damage to property" turned on the statutory scheme at issue and the traditional understanding of "property" as a collection of common law rights. *Duronio*, 2006 WL 1628516 at *3. By contrast, Covered Property is a well-defined term referring to buildings and personal property used in the insured's business. ECF No. 12-4 at PageID.171.

11 Plaintiff argues that even if it fails to state a claim, the complaint should survive because discovery is likely to show "that a substantial percentage of State Farm policies do not have a virus exclusion, that certain policyholders subject to the Order had reported direct Covid-19 contamination and were denied coverage anyways, or that certain class policyholders subject to the Order also sustained other, yet unknown types of property damage." ECF No. 16 at PageID.306-07. Plaintiff seems to state the rule backwards. A Rule 12(b)(6) motion ensures that "*before* proceeding to discovery, a complaint [alleges] facts suggestive of illegal conduct." *Twombly*, 550 U.S. at 563 n. 8 (emphasis added). Other putative class members are free to bring their own action against Defendants.

12 Plaintiff's insistence that the Virus Exclusion be strictly construed against Defendants is similarly ineffective. While "[e]xclusionary clauses in insurance policies are strictly construed in favor of the insured," "[c]lear and specific exclusions must be given effect." *Auto-Owners Ins. Co. v. Churchman*, 489 N.W.2d 431, 434 (Mich. 1992). "It is impossible to hold an insurance company liable for a risk it did not assume." *Id.*

13 Plaintiff alleges that because Defendants misrepresented the nature of the Virus Exclusion to insurance regulators, the exclusion is void as against public policy. ECF No. 1 at PageID.5. Defendants contend that the misrepresentation allegations are contradicted by the ISO circular, which provides, in conspicuous formatting, "This filing introduces [the Virus Exclusion,] which states that there is no coverage 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." ECF No. 1 at PageID.88. Accepting Plaintiff's allegations as true, Plaintiff has not offered any authority for voiding the exclusion, nor has it alleged that it was fraudulently induced into entering the Policy. *See* ECF No. 1.

14 Plaintiff also alleges that Defendants and other insurers are summarily denying claims for bad faith financial reasons. ECF No. 1 at PageID.19–20. Such allegations do not alter the plain meaning of the Policy, and Plaintiff has not since elaborated on these allegations.

15 Accordingly, Defendant's argument that imposing liability despite the Virus Exclusion would be unconstitutional is not reached. ECF No. 12 at PageID.138.

16 In comparison to the other issues, the parties have minimally briefed the application of the additional exclusions. Across the parties' combined 57 pages of briefing (excluding exhibits), the three additional exclusions receive about 7 pages. Most of this space is spent discussing the application of factually remote and nonbinding cases. *See* ECF No. 12 at PageID.149–51; ECF No. 16 at PageID.310–14.

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EXHIBIT 8

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PAPPY'S BARBER SHOPS, INC. et al.,
Plaintiffs,

v.

FARMERS GROUP, INC. et al.,
Defendants.

Case No.: 20-CV-907-CAB-BLM

ORDER ON MOTION TO DISMISS

[Doc. No. 16]

This insurance coverage matter is before the Court on Defendants' motion to dismiss. The motion has been fully briefed, and the Court deems it suitable for submission without oral argument. For the following reasons, the motion is granted.

I. Background

Plaintiffs Pappy's Barber Shops, Inc., and Pappy's Barber Shop Poway, Inc., each operate a business in the San Diego area. The complaint makes no distinction between the plaintiffs, referring to them jointly as "Pappy's Barber Shop." The complaint does not expressly allege what type of business each Plaintiff operates, but based on the names of the entities, presumably the businesses are each a barber shop or salon.

The complaint names three defendants—Farmers Group, Inc., Farmers Insurance Company, Inc., and Truck Insurance Exchange—but makes no distinction among the three entities, referring to them throughout as "Farmers." According to the complaint, "Farmers"

issued Pappy's Barber Shop an insurance policy with a policy period of February 1, 2020 through February 1, 2021 (the "Policy"). [*Id.* at ¶ 17.] The Policy itself is not attached to the complaint, but Defendants attach a copy of the Policy to their motion to dismiss and ask the Court to take judicial notice of the Policy. Plaintiffs did not oppose the request for judicial notice, and because judicial notice of the Policy is appropriate,[1] the request for judicial notice is granted. According to the Policy itself, Truck Insurance Exchange is the insurer, and Plaintiffs do not dispute this fact in their opposition to the instant motion. [Doc. No. 16-2 at 9; Doc. No. 18 at 20.]

On March 16, 2020, in connection with the COVID-19 pandemic, San Diego Mayor Kevin Falconer "issued Executive Order No. 2020-1, prohibiting any gathering of 50 or more people and discouraging all non-essential gatherings of any size." [Doc. No. 1 at ¶ 25.] Three days later, California governor Gavin Newsom "issued Executive Order N-33-20, requiring 'all individuals living in the State of California to stay home or at their place of residence except as needed' for essential service and engage in strict social distancing." [Doc. No. 1 at ¶ 26.] As a result of these orders, both Plaintiffs, along with "[a]ll California businesses not deemed essential, . . . were ordered to close their doors." [*Id.* at ¶ 27.] In addition, 49 state governments have issued orders limiting or prohibiting the operation of non-essential businesses as a result of the COVID-19 pandemic. [*Id.* at ¶ 30.] The complaint refers to these government orders collectively as the "COVID-19 Civil Authority Orders." [*Id.* at ¶ 2.]

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[1] On a motion to dismiss under Rule 12(b)(6), the court "may also consider unattached 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 document." *United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011) (internal quotation marks and citation omitted). All of these requirements are met here. Accordingly, the Court treats the Policy "as 'part of the complaint, and thus may assume that its contents are true for purposes of'" Defendants' motion to dismiss. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (quoting *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir.2003)). Defendants also request judicial notice of a bulletin from the California Insurance Commissioner, but because the Court did not consider the bulletin in connection with this opinion, that request is denied as moot.

On April 1, 2020, Plaintiffs made a claim under the Policy for business income losses they incurred as a result of the COVID-19 Civil Authority Orders issued by Mayor Falconer and Governor Newsom. [*Id.* at ¶ 46.] Defendants notified Plaintiffs that day that they were denying coverage and issued a formal denial letter on April 3, 2020. [*Id.*] According to the complaint, this denial of coverage was improper because several coverage provisions were triggered, and none of the Policy exclusions apply.

First, the complaint alleges that there is coverage under the "Business Income" provision, which 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.

[Doc. No. 16-2 at 15 (Policy § A.5.f.(1))]. Second, the complaint alleges that there is coverage under the "Civil Authority" provision, which states:

> 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.

[Doc. No. 16-2 at 27 (Policy § A.5.i.)]. Finally, the complaint alleges that there is coverage under the "Extra Expense" provision, which 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.

[Doc. No. 16-2 at 27 (Policy § A.5.g.(1))]. According to the Policy, "Covered Causes of Loss" are "[r]isks of Direct Physical Loss unless the loss is" excluded in the exclusions section of the Policy or limited in the limitations section of the Policy. [Doc. No. 16-2 at 23 (Policy § A.3.)]. The Policy defines "Business Income" as "[n]et income (Net Profit or

Loss before income taxes) that would have been earned or incurred if no physical loss or damage had occurred . . . ." [Doc. No. 16-2 at 25 (Policy § A.f.(1))].

The complaint alleges that none of the Policy's exclusions or limitations apply. More specifically, the complaint alleges that exclusions for (1) mold and microorganisms, (2) virus or bacteria, and (3) fungi, wet rot, dry rot, and bacteria, do not apply because "the efficient proximate cause of [Plaintiffs'] losses was precautionary measures taken by the state to prevent the spread of COVID-19 in the future, not because coronavirus was found on or around Plaintiffs' insured properties." [Doc. No. 1 at ¶¶ 40, 42, 44.] Along these lines, the complaint does not allege that COVID-19 or the coronavirus itself caused a direct physical loss triggering coverage under the Policy. Rather, the complaint alleges only that the government orders themselves caused direct physical loss and damage to Plaintiffs' property. [Doc. No. 1 at ¶ 93.]

Based on these allegations, Plaintiffs assert a total of six claims (for declaratory relief and breach of contract based on each of the three coverage provisions listed above) on behalf of themselves, a nationwide class, and California subclass, and a seventh claim for violation of California's unfair competition law ("UCL"), California Business and Professions Code section 17200 et seq., on behalf of Plaintiffs and the California subclass. Defendants move to dismiss the complaint in its entirety.

II. Legal Standards

The familiar standards on a motion to dismiss apply here. 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 Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Thus, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). On the other hand, the Court is "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). Nor is the Court "required to accept as

true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). "In sum, 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) (quotation marks omitted).

III. Discussion

Neither party disputes that California law governs this insurance coverage dispute. *See, e.g., Intri-Plex Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (stating that law of the forum state applies in diversity actions). Under California law, the "interpretation of an insurance policy is a question of law" to be answered by the court. *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995). The "goal in construing insurance contracts, as with contracts generally, is to give effect to the parties' mutual intentions." *Minkler v. Safeco Inc. Co.*, 49 Cal. 4th 315, 321 (2010) (quoting *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992)).

To accomplish this goal, the court must "look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it." *Waller*, 11 Cal. 4th at 18; *see also Cont'l Cas. Co. v. City of Richmond*, 763 F.2d 1076, 1080 (9th Cir. 1985) ("The best evidence of the intent of the parties is the policy language."). "The clear and explicit meaning of [the policy] provisions, interpreted in their ordinary and popular sense, unless used by the parties in a technical sense or a special meaning is given to them by usage, controls judicial interpretation." *Waller*, 11 Cal. 4th at 18 (internal quotation marks and citations omitted); *see also Minkler*, 49 Cal. 4th at 321 ("If contractual language is clear and explicit, it governs.") (citation omitted). However, "[i]f the terms are ambiguous [i.e., susceptible of more than one reasonable interpretation], [courts] interpret them to protect the objectively reasonable expectations of the insured."

Minkler, 49 Cal. 4th at 321 (citations omitted). That being said, "[c]ourts will not strain to create an ambiguity where none exists." *Waller*, 11 Cal. 4th at 18-19.

There are two parts to any coverage analysis. First, "[b]efore even considering exclusions, a court must examine the coverage provisions to determine whether a claim falls within the policy terms." *Waller*, 11 Cal. 4th at 16 (internal brackets and quotation marks omitted). The insured bears the burden of proof in this regard, but the insuring agreement language in a policy is interpreted broadly in favor of coverage. *See AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 822 (1990) ("[W]e generally interpret coverage clauses of insurance policies broadly, protecting the objectively reasonable expectations of the insured."). If the insured proves that the claim falls within the policy terms, the burden then shifts to the insurer to prove that an exclusion applies. *Waller*, 11 Cal. 4th at 16; *see also Universal Cable Prods., LLC v. Atl. Specialty Ins. Co.*, 929 F.3d 1143, 1151 (9th Cir. 2019) ("The burden is on the insured to establish that the claim is within the basic scope of coverage and on the insurer to establish that the claim is specifically excluded.") (quoting *MacKinnon v. Truck Ins. Exch.*, 31 Cal.4th 635, 648 (2003)). Exclusions "are interpreted narrowly against the insurer." *Minkler*, 49 Cal. 4th at 322.

Here, Defendants move to dismiss on the grounds that the complaint does not allege any "direct physical loss of or damage to property" as is required for coverage under the business income, civil authority, and extra expense coverage provisions. In their opposition, Plaintiffs contend that this Policy language does not require "physical alteration to property," and that "jurisdictions around the country have held that a property that is uninhabitable or unsuitable for its intended purpose qualifies as a physical loss under commercial property insurance policies." [Doc. No. 18 at 11.]

Business Income and Extra Expense Coverage

For there to be coverage under the business income and extra expense provisions, there must be "direct physical loss of or damage to property at the described premises." Plaintiffs focus on the first alternative—"direct physical loss of"—arguing that it does not require a tangible damage or alteration to property and that loss of the ability to continue

operating their business as a result of the government orders qualifies. Plaintiffs are not the first policyholders to argue in court that government orders forcing their businesses to stop operating as a result of the COVID-19 pandemic trigger insurance under provisions similar or identical to the ones in the Policy here. Most courts have rejected these claims, finding that the government orders did not constitute direct physical loss or damage to property. *See, e.g., Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIV, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020) (recommending dismissal of complaint seeking coverage for loss of business income as a result of Florida COVID-19 Civil Authority Orders because the requirement that the plaintiff's restaurant close indoor dining to mitigate the spread of COVID-19 was not a direct physical loss).[2] As a district court explained just last week in an opinion granting a motion to dismiss a claim for coverage under identical policy language for business income losses of a restaurant due to COVID-19 Civil Authority Orders in Los Angeles:

> "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 Interruption and Extra Expense provision at issue here conditions recovery on "direct physical loss of or damage to property."
>
> 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

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[2] The case on which Plaintiffs rely, *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), is distinguishable. In *Studio 417*, the district court based its denial of the insurer's motion to dismiss, at least in part, on 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*, 2020 WL 4692385, at *4. The policyholder 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 *2. Accordingly, "[b]ased on these allegations," the district court held that the complaint "plausibly alleges a 'direct physical loss' based on 'the plain and ordinary meaning of the phrase.'" *Id.* Here, in contrast, Plaintiffs expressly allege that COVID-19 did not cause physical loss of or damage to their properties, alleging and arguing only that that the government orders themselves constitute direct physical loss of or damage to the properties.

> 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)
>
> . . . .
>
> 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." 187 Cal. App. 4th at 779. . . .
>
> 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.
>
> . . .
>
> Plaintiff attempts to circumvent the plain language of the Policy by emphasizing its disjunctive phrasing – "direct physical loss of or damage to property,"–and insisting that "loss," unlike "damage," encompasses temporary 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" 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. 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 "elegantly sophisticated surrounding."

10E, LLC v. Travelers Indem. Co. of Connecticut, No. 2:20-CV-04418-SVW-AS, 2020 WL 5359653, at *4–5 (C.D. Cal. Sept. 2, 2020) (internal citations to the record omitted). This analysis is persuasive and equally applicable here, as Plaintiffs make similar arguments for coverage under identical policy language and also rely on *Total Intermodal*

to support their position. For all the same reasons, Plaintiffs have failed to plausibly allege any entitlement to coverage under the business income or extra expense provisions in their Policy with Truck Insurance Exchange.

Civil Authority Coverage

There is also no coverage under the civil authority provision of the Policy. To trigger coverage under this provision, there must be an "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." [Doc. No. 16-2 at 27 (Policy § A.5.i.) (*emphasis* added)]. Thus, to survive dismissal, the complaint must, at a minimum, allege that the government (1) prohibited Plaintiffs from accessing their premises (2) due to direct physical loss of or damage to property elsewhere. The allegations in the complaint do not satisfy either requirement.

First, the complaint does not allege that any COVID-19 Civil Authority Orders prohibited Plaintiffs from access to their business premises. Rather, it only alleges that Plaintiffs were prohibited from operating their businesses at their premises. Plaintiffs fail to make any distinction between their place of business (i.e., the physical premises where they operate their business), and the business itself, but this distinction is relevant to coverage under the Policy. The Policy insures property, in this case Plaintiffs' property and physical places of business, and not Plaintiff's business itself. To that end, the civil authority coverage provision only provides coverage to the extent that access to Plaintiff's physical premises is prohibited, and not if Plaintiff's are simply prohibited from operating their business. The government orders alleged in the complaint prohibit the operation of Plaintiff's business; they do not prohibit access to Plaintiffs' place of business.

Second, even if the government orders alleged in the complaint could be construed as prohibiting Plaintiffs from accessing their premises, the orders were not issued due to direct physical loss of or damage to property *other than at Plaintiffs' premises*. Just as the complaint does not plausibly allege any direct physical loss of Plaintiff's property, it also does not allege any direct physical loss or damage to property not at Plaintiffs' places of

business. In the opposition, Plaintiff does not argue otherwise, referring only to its arguments under the business income and extra expense provisions that the complaint alleges direct physical loss of or damage to *Plaintiffs'* property. [Doc. No. 18 at 16]; *see generally, 10E, LLC,* 2020 WL 5359653, at *5-6 (finding no civil authority coverage as a result of COVID-10 Civil Authority Orders requiring restaurant to cease indoor operations).

Accordingly, because the complaint does not plausibly allege (1) any civil authority orders that prohibited access to Plaintiffs' places of business (as opposed to simply prohibiting Plaintiffs from operating their businesses), or (2) any direct physical loss of or damage to property, other than at Plaintiffs' premises, the complaint does not state a claim for coverage under the civil authority provision of the Policy.

IV. Conclusion

Because the allegations in the complaint do not a state a claim for coverage under the Policy, Plaintiffs' claims for declaratory relief that there is coverage and for breach of contract must be dismissed. Likewise, because the UCL claim is premised on the existence of coverage under the Policy, it is dismissed as well. *See generally, 10E, LLC*, 2020 WL 5359653, at *6 (dismissing UCL claim based on allegation that an insurance policy provided coverage after concluding that the plaintiff was not entitled to coverage under the policy). Accordingly, it is hereby **ORDERED** that the motion to dismiss is **GRANTED**, and the complaint is **DISMISSED** in its entirety.[3]

Plaintiffs make a passing request for leave to amend the complaint at the end of their opposition, but do not explain how an amended complaint would remedy any of the

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[3] Because the complaint does not state a claim for coverage under the Policy, the Court need not address Defendants' separate argument for dismissal of Farmers Group, Inc., and Farmers Insurance Company, Inc. as defendants because they are not parties to the Policy. However, the allegation that these defendants own subsidiaries that issue property insurance, which is Plaintiffs only argument for keeping these defendants in the case, is grossly insufficient to state a claim against them for declaratory relief, breach of contract, or violation of the UCL related to insurance coverage under a policy issued by Truck Insurance Exchange. Plaintiffs are advised that if they seek leave to amend their complaint, they must also amend

deficiencies identified by Defendants in their motion. Because any amendment is likely to be futile, before allowing Plaintiffs to amend their complaint, Plaintiffs must file a motion for leave to amend that attaches their proposed amended complaint, along with a redline showing all changes as compared with the original complaint. If a motion for leave to amend is not filed by **September 21, 2020**, this dismissal of Plaintiffs' complaint will be with prejudice. If Plaintiffs file a motion for leave to amend, Defendants may file an opposition on or before **September 28, 2020**. The Court will then take the motion under submission without a reply and enter an order in due course.

It is **SO ORDERED**.

Dated: September 11, 2020

Hon. Cathy Ann Bencivengo
United States District Judge

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their allegations as to these defendants. Failure to include factual allegations as to why these defendants can be liable for coverage under an insurance policy to which they are not a party will result in dismissal of these defendants regardless of whether Plaintiffs can plausibly allege a direct physical loss to their property or property not at their premises.

EXHIBIT 9

2020 WL 4692385
Only the Westlaw citation is currently available.
United States District Court, W.D. Missouri, Southern Division.

STUDIO 417, INC., et al., Plaintiffs,

v.

The CINCINNATI INSURANCE COMPANY, Defendant.

Case No. 20-cv-03127-SRB

Signed 08/12/2020

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ORDER

STEPHEN R. BOUGH, UNITED STATES DISTRICT JUDGE

*1 Before the Court is Defendant The Cincinnati Insurance Company's ("Defendant") Motion to Dismiss. (Doc. #20.) For the reasons set forth below, the motion is DENIED.

I. BACKGROUND

Because this matter comes before the Court on a motion to dismiss, the following allegations in Plaintiffs' First Amended Class Action Complaint (the "Amended Complaint") are taken as true. (Doc. #16); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal citations and quotation marks omitted) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)); *Zink v. Lombardi*, 783 F.3d 1089, 1098 (8th Cir. 2015).[1]

1 The Amended Complaint is 54 pages long and contains 253 separate allegations. This Order only discusses those allegations and issues necessary to resolve the pending motion.

The named Plaintiffs in this case are Studio 417, Inc. ("Studio 417"), Grand Street Dining, LLC ("Grand Street"), GSD Lenexa, LLC ("GSD"), Trezomare Operating Company, LLC ("Trezomare"), and V's Restaurant, Inc. ("V's Restaurant") (collectively, the "Plaintiffs"). Studio 417 operates hair salons in the Springfield, Missouri, metropolitan area. Grand Street, GSD, Trezomare, and V's Restaurant own and operate full-service dining restaurants in the Kansas City metropolitan area.

Plaintiffs purchased "all-risk" property insurance policies (the "Policies") from Defendant for their hair salons and restaurants. (Doc. #1-1, ¶ 26.) All-risk policies cover all risks of loss except for risks that are expressly and specifically excluded. The Policies include a Building and Personal Property Coverage Form and Business Income (and Extra Expense) Coverage Form. Defendant issued each Plaintiff a separate policy, and all were in effect during the applicable time period. The parties agree that the Policies contain the same relevant language.

The Policies provide that Defendant would pay for "direct 'loss' unless the 'loss' is excluded or limited" therein. (Doc. #16, ¶ 27.) A "Covered Cause of Loss" "is defined to mean accidental [direct] physical loss ***or*** accidental [direct] physical damage." (Doc. #16, ¶ 31) (emphasis supplied); (Doc. #1-1, pp. 24, 57.)[2] The Policies do not define "physical loss" or "physical damage." The Policies also "do not include, and are not subject to, any exclusion for losses caused by viruses or communicable diseases." (Doc. #16, ¶ 13.) A loss, as defined above, is a prerequisite to invoke the different types of coverage sought in this lawsuit. (*See* Doc. #21, p. 15.) These coverages are set forth below.

2 All page numbers refer to the pagination automatically generated by CM/ECF.

First, the Policies provide for Business Income coverage. Under this coverage, Defendant agreed to:

> 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.

(Doc. #1-1, pp. 37-38.)

Second, the Policies provide "Civil Authority" coverage. This coverage applies to:

> *2 the actual loss of 'Business Income' sustained 'and necessary Extra Expense' sustained 'caused by action of civil authority that prohibits access to' the Covered Property when a Covered Cause of Loss causes direct damage to property other than the Covered Property, the civil authority prohibits access to the area immediately surrounding the damaged property, 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[.]'

(Doc. #16, ¶ 42.)

Third, the Policies provide "Ingress and Egress" coverage. This coverage is specified as follows:

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

(Doc. #1-1, p. 95.)

Fourth, the Policies provide "Dependent Property" coverage. This coverage applies if the insured suffers a loss of Business Income because of a suspension of its business "caused by direct 'loss' to 'dependent property.' " (Doc. #1-1, pp. 63-64.) "Dependent property means property operated by others whom [the insured] depend[s] on to ... deliver materials or services to [the insured] ... [a]ccept [the insured's] products or services ... [and] [a]ttract customers to [the insured's] business." (Doc. #1-1, p. 64.)

Finally, the Policies provide what is commonly known as "Sue and Labor" coverage. In relevant part, the Policies require the insured to "take all reasonable steps to protect the Covered Property from further damage," and to keep a record of expenses incurred to protect the Covered Property for consideration in the settlement of the claim. (Doc. #1-1, pp. 49-50.) The Policies do not exclude or limit losses from viruses, pandemics, or communicable diseases. (Doc. #16, ¶ 28.)

Plaintiffs seek coverage under the Policies for losses caused by the Coronavirus ("COVID-19") pandemic. 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. (Doc. #1-1, ¶ 60.) 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." (Doc. #16, ¶¶ 47, 49-60.) 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." (Doc. #1-1, ¶¶ 14, 58, 102.)

In response to the COVID-19 pandemic, civil authorities in Missouri and Kansas issued orders requiring the suspension of business at various establishments, including Plaintiffs' businesses (the "Closure Orders"). The Closure Orders "have required and continue to require Plaintiffs to cease and/or significantly reduce operations at, and ... have prohibited and continue to prohibit access to, the[ir] premises." (Doc. #16, ¶¶ 106-107.) Plaintiffs allege that the presence of COVID-19 and the Closure Orders caused a direct physical loss or direct physical damage to their premises "by denying use of and damaging the covered property, and by causing a necessary suspension of operations during a period of restoration." (Doc. #16, ¶¶ 102.) Plaintiffs allege that their losses are covered by the Business Income, Civil Authority, Ingress and Egress, Dependent Property, and Sue and Labor coverages discussed above. (Doc. #16, ¶¶ 103-108.) Plaintiffs provided Defendant notice of their losses, but Defendant denied the claims. (Doc. #16, ¶¶ 110-115.)

*3 On April 27, 2020, Plaintiffs filed this lawsuit against Defendant. The Amended Complaint asserts claims for a declaratory judgment and for breach of contract based on Business Income coverage (Counts I, II), Extra Expense coverage (Counts III, IV), Dependent Property coverage (Counts V, VI), Civil Authority coverage (Counts VII, VIII), Extended Business Income coverage (Counts IX, X), Ingress and Egress coverage (Counts XI, XII), and Sue and Labor coverage (Counts XIII, XIV). The Amended Complaint also seeks class certification for 14 nationwide classes (one for each cause of action) and a Missouri Subclass that consists of "all policyholders who purchased one of Defendant's policies in Missouri and were denied coverage due to COVID-19." (Doc. #16, ¶¶ 117-125; *see also* Doc. #21, pp. 12-13.)

Defendant responded to the Amended Complaint by filing the pending motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Defendant's overarching argument is that the Policies provide coverage "only for income losses tied to physical damage to property, not for economic loss caused by governmental or other efforts to protect the public from disease ... the same direct physical loss requirement applies to all the coverages for which Plaintiffs sue." (Doc. #21, p. 8.) Even if a loss is adequately alleged, Defendant argues that the Amended Complaint fails to state a claim as to each type of coverage at issue. Plaintiffs oppose the motion, and the parties' arguments are addressed below.

II. LEGAL STANDARD

Rule 12(b)(6) provides that 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). "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, 129 S.Ct. 1937 (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955). "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." *Ash v. Anderson Merchs., LLC*, 799 F.3d 957, 960 (8th Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937). When deciding a motion to dismiss, "[t]he factual allegations of a complaint are assumed true and construed in favor of the plaintiff, even if it strikes a savvy judge that actual proof of those facts is improbable." *Data Mfg., Inc. v. United Parcel Serv., Inc.*, 557 F.3d 849, 851 (8th Cir. 2009) (citations and quotations omitted).

Because this case is based on diversity jurisdiction, "state law controls the construction of [the] insurance policies[.]" *J.E. Jones Const. Co. v. Chubb & Sons, Inc.*, 486 F.3d 337, 340 (8th Cir. 2007). Under Missouri law, "[t]he interpretation of an insurance policy is a question of law to be determined by the Court." *Lafollette v. Liberty Mut. Fire Ins. Co.*, 139 F. Supp. 3d 1017, 1021 (W.D. Mo. 2015) (quoting *Mendota Ins. Co. v. Lawson*, 456 S.W.3d 898, 903 (Mo. App. W.D. 2015)).[3] "Missouri courts read insurance contracts 'as a whole and determine the intent of the parties, giving effect to that intent by enforcing the contract as written.' " *Id.* (citing *Thiemann v. Columbia Pub. Sch. Dist.*, 338 S.W.3d 835, 840 (Mo. App. W.D. 2011)). "Insurance policies are to be given a reasonable construction and interpreted so as to afford coverage rather than to defeat coverage." *Cincinnati Ins. Co. v. German St. Vincent Orphan Ass'n, Inc.*, 54 S.W.3d 661, 667 (Mo. App. E.D. 2001).

3 Defendant notes that Kansas law may apply to one policy, but contends that Missouri and Kansas law are indistinguishable for purposes of the pending motion. (Doc. #21, p. 13 n.10.) Plaintiffs do not challenge this assertion. For purposes of this Order, the Court assumes that Missouri law applies.

***4** "Policy terms are given the meaning which would be attached by an ordinary person of average understanding if purchasing insurance." *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 763 (8th Cir. 2020) (applying Missouri law) (quotations omitted). When interpreting policy terms, "the central issue ... is determining whether any ambiguity exists, which occurs where there is duplicity, indistinctness, or uncertainty in the meaning of the words used in the contract." *Id.* (quotations omitted). If the "insurance policies are unambiguous, they will be enforced as written absent a statute or public policy requiring coverage. If the language is ambiguous, it will be construed against the insurer." *Id.* (quotations omitted).

III. DISCUSSION

A. Plaintiffs Have Adequately Alleged a Direct "Physical Loss" Under the Policies.

Defendant's first argument is that Plaintiffs have not adequately pled a "physical loss" as required by the Policies. (Doc. # 21, pp. 7-8, 15-16, 19-25; Doc. #37, pp. 2-10.) Defendant argues that "direct physical loss requires actual, tangible, permanent, physical alteration of property." (Doc. #21, p. 19) (citing cases). Defendant claims that the Policies provide property insurance coverage, and "are designed to indemnify loss or damage to property, such as in the case of a fire or storm. [COVID-19] does not damage property; it hurts people." (Doc. #21, p. 7.) According to Defendant, the requirement of a tangible physical loss applies to—and precludes—each type of coverage sought in this case.

In response, Plaintiffs agree that "physical loss" and "physical damage" are "the key phrases" in the Policies. (Doc. #31, p. 7.) However, Plaintiffs emphasize that the Policies expressly cover "physical loss ***or*** physical damage." (Doc. #31, p. 11) (emphasis supplied). This "necessarily means that either a 'loss' or 'damage' is required, and that 'loss' is distinct from 'damage.' " (Doc. #31, p. 11.) As such, Plaintiffs argue that Defendant's focus on an actual physical alteration ignores the coverage for a "physical loss." Plaintiffs further

argue that Defendant could have defined "physical loss" and "physical damage," but failed to do so. Plaintiffs argue this case should not be disposed of on a motion to dismiss because "even if [Defendant's] interpretation of the policy language is reasonable ... Plaintiffs' interpretation is also reasonable[.]" (Doc. #31, p. 11.)

Upon review of the record, the Court finds that Plaintiffs have adequately stated a claim for direct physical loss. First, because the Policies do not define a direct "physical loss" the Court must "rely on the plain and ordinary meaning of the phrase." *Vogt*, 963 F.3d at 763; *Mansion Hills Condo. Ass'n v. Am. Family Mut. Ins. Co.*, 62 S.W.3d 633, 638 (Mo. App. E.D. 2001) (recognizing that standard dictionaries should be consulted for determining ordinary meaning). The Merriam-Webster dictionary defines "direct" in part as "characterized by close logical, causal, or consequential relationship." Merriam-Webster, www.merriam-webster.com/dictionary/direct (last visited August 12, 2020). "Physical" is defined as "having material existence: perceptible especially through the senses and subject to the laws of nature." Merriam-Webster, www.merriam-webster.com/dictionary/physical (last visited August 12, 2020). "Loss" is "the act of losing possession" and "deprivation." Merriam-Webster, www.merriam-webster.com/dictionary/loss (last visited August 12, 2020).

Applying these definitions, 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." (Doc. #16, ¶¶ 47, 49-60.) 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." (Doc. #16, ¶ 58.) Based on these allegations, the Amended Complaint plausibly alleges a "direct physical loss" based on "the plain and ordinary meaning of the phrase." *Vogt*, 963 F.3d at 763.

5** Second, the Court "must give meaning to all [policy] terms and, where possible, harmonize those terms in order to accomplish the intention of the parties." *Macheca Transp. v. Philadelphia Indem. Ins. Co.*, 649 F.3d 661, 669 (8th Cir. 2011) (applying Missouri law). Here, the Policies provide coverage for "accidental physical loss ***or accidental physical damage." (Doc. #1-1, p. 57) (emphasis supplied). Defendant conflates "loss" and "damage" in support of its argument that the Policies require a tangible, physical alteration. However, the Court must give meaning to both terms. *See Nautilus Grp., Inc. v. Allianz Global Risks US*, No. C11-5281BHS, 2012 WL 760940, at * 7 (W.D. Wash. Mar. 8, 2012) (stating that "if 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous").

The Court's finding that Plaintiffs have adequately stated a claim is supported by case law. In *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349 (8th Cir. 1986), the relevant provision provided that "[t]his policy insures against loss of or damage to the property insured ... resulting from all risks of direct physical loss[.]" *Id.* at 351. Applying Missouri law, the Eighth Circuit found this provision was ambiguous and affirmed the district court's decision that it covered "any loss or damage due to the *danger* of direct physical loss[.]" *Id.* at 352 (emphasis in original).

In *Mehl v. The Travelers Home & Marine Ins. Co.*, Case No. 16-CV-1325-CDP (E.D. Mo. May 2, 2018), the plaintiff discovered brown recluse spiders in his home. *Id.* at p. 1. The plaintiff unsuccessfully attempted to eliminate the spiders, and then left the home. *Id.* The plaintiff considered the property uninhabitable and filed a claim under his homeowners insurance policy for loss of use of the property. *Id.* After his insurance company denied the claim, the plaintiff filed suit for breach of contract. The insurance company moved for summary judgment and argued that the policy only covered "direct physical loss" which required "actual physical damage." *Id.* at p. 2.

Mehl rejected this argument. As in this case, the *Mehl* policy did not define "physical loss" and the insurance company "point[ed] to no language in the policy that would lead a reasonable insured to believe that actual physical damage is required for coverage." *Id.* Although the policy in *Mehl* provided coverage for "loss of use," *Mehl* supports the conclusion that "physical loss" is not synonymous with physical damage. *Id.*

Other courts have similarly recognized that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose. *See Port Auth. of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (affirming denial of coverage but recognizing that "[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 [physical] loss to its owner"); *Prudential Prop. & Cas. Ins. Co. v. Lilliard-Roberts*, CV-01-1362-ST, 2002

WL 31495830, at * 9 (D. Or. June 18, 2002) (citing case law for the proposition that "the inability to inhabit a building [is] a 'direct, physical loss' covered by insurance"); *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) ("We have previously held that direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way.").

To be sure, and as argued by Defendant, there is case law in support of its position that physical tangible alteration is required to show a "physical loss." (Doc. #21, pp. 19-25; Doc. #37, pp. 3-10.)[4] However, Plaintiffs correctly respond that these cases were decided at the summary judgment stage, are factually dissimilar, and/or are not binding. For example, Defendant argues that "[a] seminal case concerning the direct physical loss requirement is *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834 (8th Cir. 2006)." (Doc. #21, pp. 19-20.) However, *Source Food* was decided in the summary judgment context and under Minnesota law. *Source Food*, 465 F.3d at 834-36. Moreover, the facts of *Source Foods* are distinguishable. In that case, the insured's beef was not allowed to cross from Canada into the United States because of an embargo related to mad cow disease. *Id.* at 835. Because of the embargo, the insured was unable to fill orders and had to find a new supplier. Importantly, there was no evidence that the beef was actually contaminated. *Id.*

4 *See also* Scott G. Johnson, "*What Constitutes Physical Loss or Damage in a Property Insurance Policy?*" 54 Tort Trial & Ins. Prac. L.J. 95, 96 (2019) ("[W]hen the insured property's structure is unaltered, at least to the naked eye ... [c]ourts have not uniformly interpreted the physical loss or damage requirement[.]")

***6** The insured sought coverage based on a provision requiring "direct physical loss to property." The district court denied coverage, and the Eighth Circuit affirmed, explaining that:

> [a]lthough 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 facts alleged in this case do not involve the transportation of uncontaminated physical products. Instead, Plaintiffs allege that COVID-19 is a highly contagious virus that is physically "present ... in viral fluid particles," and is "deposited on surfaces or objects." (Doc. #16, ¶¶ 47, 50.) Plaintiffs further allege that this physical substance is likely on their premises and caused them to cease or suspend operations. Unlike *Source Foods*, the Plaintiffs expressly allege physical contamination. Finally, *Source Foods* recognized (under Minnesota law) that physical loss could be found without structure damage. *Source Foods*, 465 F.3d at 837 (stating that property could be "physically contaminated ... by the release of asbestos fibers"). Neither *Source Foods* nor the other cases cited by Defendant warrant dismissal under Rule 12(b)(6).

Defendant's reply brief cites recent out-of-circuit decisions which found that COVID-19 does not cause direct physical loss. (Doc. #37, pp. 5-6.) For example, Defendant relies on *Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd.*, 1:20-cv-03311-VEC (S.D.N.Y. 2020). Defendant argues that "*Social Life* famously states that the virus damages lungs, not printing presses." (Doc. #37, p. 6.) But the present case is not about whether COVID-19 damages lungs, and the presence of COVID-19 on premises, as is alleged here, is not a benign condition. Regardless of the allegations in *Social Life* or other cases, Plaintiffs here have plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable.[5] This is enough to survive a motion to dismiss.

5 Defendant also relies on *Gavrilides Mgmt. Co., LLC v. Michigan Ins. Co.*, Case No. 20-258-CB (Ingham County, Mich. July 1, 2020) (transcript regarding defendant's motion for summary disposition). (Doc. #37-2.) *Gavrilides* is distinguishable, in part, because the court recognized that "the complaint also states a[t] no time has Covid-19 entered the Soup Shop of the Bistro ... and in fact, states that it has never been present in either location." (Doc. #37-2, p. 21.)

Defendant also contends that if Plaintiffs' interpretation is accepted, physical loss would be found "whenever a business suffers economic harm." (Doc. #21, p. 22; Doc. #37, p. 2.) That is not what the Court holds here. Although Plaintiffs allege economic harm, that harm is tethered to their alleged physical loss caused by COVID-19 and the Closure Orders. (Doc. #1-1, ¶¶ 106-107) (alleging that the COVID-19 pandemic and Closure Orders required Plaintiffs

to "cease and/or significantly reduce operations at, and ... have prohibited and continue to prohibit access to, the premises.")[6] For all these reasons, the Court finds that Plaintiffs have adequately alleged a direct physical loss under the Policies.[7]

6 Defendant argues that COVID-19 does not present a physical loss because "the virus either dies naturally in days, or it can be wiped away." (Doc. #21, pp. 24-25.) However, as stated, a physical loss has been adequately alleged insofar as the presence of COVID-19 and the Closure Orders prohibited or significantly restricted access to Plaintiffs' premises. *See Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at * 6 (D.N.J. Nov. 25, 2014) (recognizing that "courts considering non-structural property damage claims have found that buildings rendered uninhabitable by dangerous gases or bacteria suffered direct physical loss or damage"). Defendant also argues that Plaintiffs have failed to adequately allege that COVID-19 was actually present on their premises. Based on Plaintiffs' allegations, and because of COVID-19's wide-spread, this argument is also rejected.

7 Although it appears to be persuasive, the Court need not address Defendant's additional argument that the Amended Complaint fails to allege "physical damage."

B. Plaintiffs Have Plausibly Stated a Claim for Civil Authority Coverage.

*7 Defendant next argues that Plaintiffs' claim for civil authority coverage should be dismissed for failure to state a claim. Defendant presents two arguments in support of dismissal. Defendant first contends that civil authority coverage requires "direct physical loss to property other than the Plaintiffs' property," and that "[j]ust as the Coronavirus is not causing direct physical loss to Plaintiffs' premises, it is not causing direct physical loss to other property." (Doc. #21, p. 27.)

This argument is rejected for substantially the same reasons as discussed above. Plaintiffs adequately allege that they suffered a physical loss, and such loss is applicable to other property. Additionally, Plaintiffs allege that civil authorities issued closure and stay at home orders throughout Missouri and Kansas, which includes property other than Plaintiffs' premises.

Defendant's second argument is that civil authority coverage "requires that access to Plaintiffs' premises be prohibited by an order of Civil Authority. But, none of the orders Plaintiffs allege prohibit access to their premises. To the contrary, the Plaintiffs admit ... that the Closure Orders allowed restaurant premises to remain open for food preparation, take-out and delivery. Likewise, Plaintiffs concede that the Closure Orders did not prohibit access to salon premises." (Doc. #21, pp. 28-29) (citations omitted).

Upon review of the record, the Court finds that Plaintiffs have adequately alleged that their access was prohibited. With respect to Studio 417's hair salons, the Amended Complaint alleges that a Closure Order "required hair salons and all other businesses that provide personal services to suspend operations." (Doc. #16, ¶ 67.) With respect to Plaintiffs' restaurants, the Closure Orders mandated "that all inside seating is prohibited in restaurants," and that "every person in the State of Missouri shall avoid eating or drinking at restaurants," with limited exceptions for "drive-thru, pickup, or delivery options." (Doc. #16, ¶¶ 71-80.)

At the motion to dismiss stage, these allegations plausibly allege that access was prohibited to such a degree as to trigger the civil authority coverage. *Compare TMC Stores, Inc. v. Federated Mut. Ins. Co.*, No. A04-1963, 2005 WL 1331700, at * 4 (Minn. Ct. App. June 7, 2005) ("Because access remained and the level of business was not dramatically decreased, the civil authority section of the insurance policy is inapplicable and the district court did not err in granting summary judgment."). This is particularly true insofar as the Policies require that the "civil authority prohibits access," but does not specify "all access" or "any access" to the premises. For these reasons, Plaintiffs have adequately stated a claim for civil authority coverage.

C. Plaintiffs Have Plausibly Stated a Claim for Ingress and Egress Coverage.

Defendant argues that Plaintiffs' claim for ingress and egress coverage should be dismissed for two reasons. First, Defendant argues that such coverage "requires both a direct physical loss at a location contiguous to the insured's property and the prevention of access to the insured's property as a result of that direct physical loss," and that Plaintiffs fail to allege a direct physical loss to any location. (Doc. #21, p. 30.) For substantially the same reasons discussed above, this argument is rejected.

Second, Defendant argues that this "coverage does not apply if ingress or egress from the 'premises' is prohibited by civil authority." (Doc. #21, p. 24; Doc. #1-1, p. 95.) Defendant

contends that "[h]ere, the Closure Orders issued by civil authorities are the only identified causes of Plaintiffs' alleged losses." (Doc. #21, p. 30.) However, Plaintiffs have alleged that both COVID-19 and the Closure Orders rendered the premises unsafe for ingress and egress. (Doc. #1-1, p. 3, ¶ 14 ("Plaintiffs were forced to suspend or reduce business at their covered premises due to COVID-19 and the ensuing orders issued by civil authorities[.]"). The Court finds that Plaintiffs have adequately stated a claim for ingress and egress coverage.

D. Plaintiffs Have Plausibly Stated a Claim for Dependent Property Coverage.

***8** Defendant argues that Plaintiffs' claim for dependent property coverage should be dismissed for two reasons. First, Defendant argues that this coverage "requires both a direct physical loss to dependent property and a necessary suspension of the insured's business as a result of that direct physical loss." (Doc. #21, p. 30.) Defendant contends that "[h]ere, again, the [Amended] Complaint does not allege any facts that show direct physical loss at any location, let alone a dependent property." (Doc. #21, pp. 30-31.) For substantially the same reasons discussed above, this argument is rejected.

Second, Defendant argues that Plaintiffs have failed to adequately allege a suspension of their businesses because of the lack of material or services from a "dependent property." (Doc. #21, pp. 30-31.) As stated above, dependent property is defined as "property operated by others whom [the insured] depend[s] on to ... deliver materials or services to [the insured] ... [a]ccept [the insured's] products or services ... [or] [a]ttract customers to [the insured's] business." (Doc. #1-1, p. 64.) The Amended Complaint adequately alleges that Plaintiffs suffered a loss of materials, services, and lack of customers as a result of COVID-19 and the Closure Orders. The Court therefore finds that Plaintiffs have adequately stated a claim for dependent property coverage.

E. Plaintiffs Have Plausibly Stated a Claim for Sue and Labor Coverage.

Finally, Defendant moves to dismiss Plaintiffs' claim for sue and labor coverage. Defendant argues that this is not an additional coverage, but instead imposes a duty on the insured to prevent further damage and to keep a record of expenses incurred in the event of a covered loss. Defendant argues that because Plaintiffs have failed to adequately allege a covered loss, a claim has not been stated for this coverage.

However, regardless of the title of this claim, Defendant acknowledges that in the event of a covered loss, "the insured can recover these expenses[.]" (Doc. #21, p. 31.) As discussed above, the Court finds that Plaintiffs have adequately stated a claim for a covered loss. Moreover, Plaintiffs allege that in complying with the Closure Orders and by suspending operations, they "incurred expenses in connection with reasonable steps to protect Covered Property." (Doc. #16, ¶ 250.) Consequently, the Court finds that Plaintiffs have adequately stated a claim for sue and labor coverage.

In sum, Defendant's motion to dismiss will be denied in its entirety. The Court emphasizes that Plaintiffs have merely pled enough facts to proceed with discovery. Discovery will shed light on the merits of Plaintiffs' allegations, including the nature and extent of COVID-19 on their premises. In addition, the Court emphasizes that all rulings herein are subject to further review following discovery. Subsequent case law in the COVID-19 context, construing similar insurance provisions, and under similar facts, may be persuasive. If warranted, Defendant may reassert its arguments at the summary judgment stage.

IV. CONCLUSION

Accordingly, Defendant The Cincinnati Insurance Company's Motion to Dismiss (Doc. #20) is DENIED.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 4692385

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