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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Circus Circus LV, LP, Plaintiff, v. AIG Specialty Insurance Company, Defendant.	Case 2:20-cv-01240-JAD-NJK **DEFENDANT AIG SPECIALTY INS. CO.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS**

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff alleges in its Complaint that it suffered a business interruption loss when it closed its doors to casino patrons at 12:01 a.m. on March 18, 2020 – literally the very last moment it was allowed to do so by a prophylactic government order designed to mitigate the spread of the COVID-19 disease. As explained in AIG's Motion, Plaintiff did not suffer a business interruption loss caused by a "direct physical loss or damage" to property. Rather, Plaintiff suffered a purely economic loss as a result of a government order.

Since Plaintiff filed its Complaint, seven courts across the country have rejected similar claims to recover business interruption losses following government orders designed to prevent

the spread of COVID-19. In an attempt to avoid the same fate, Plaintiff recasts its allegations in its Opposition. Now, Plaintiff asserts that when it alleged in its Complaint that it closed its doors at 12:01 a.m. on March 18, 2020 because of "COVID-19 and [the government] Orders" to stop its spread (ECF No. 1, Compl. ¶ 40), it ***actually*** meant that it closed because of the physical presence of the COVID-19 virus on its own property and government Orders to stop the virus's spread. And when it alleged generally that COVID-19 "***can*** exist on contaminated … surfaces" (*Id.*, ¶¶ 25-28) (emphasis added), it meant that COVID-19 ***in fact*** was present on surfaces at its property, and this was the reason it closed. (ECF No. 23, Opp. 6:4-9)

Plaintiff's contradictory re-characterization of its Complaint is belied by its own allegations. Plaintiff's Complaint is clear: Although Plaintiff alleges COVID-19 was present on its property ***at some point*** in the months before its closed, it closed only when the government required it to do so. It also is telling that Plaintiff does not allege that it took any steps to repair, rebuild or replace damaged property. Instead, Plaintiff now admits that it reopened its casino when the government lifted its order. Thus, Plaintiff (1) alleges that it closed its casino pursuant to government order; (2) concedes it opened its casino when that order was lifted; and (3) does not allege it did anything to remediate the virus on its property before, in between, or after those orders. This completely debunks Plaintiff's opportunistic attempt to now assert it was really the physical presence of the virus on its property that caused the closure.

But even if Plaintiff could actually plead the facts and theory it now sets forth in its Opposition to the Motion to Dismiss, the Court need not grant leave to amend because Plaintiff's recast allegations underscore why the Policy's exclusion for loss from actual or threatened release, discharge, or dispersal of a health-harming virus applies. Nevada and Ninth Circuit law offers no support for Plaintiff's attempts to write-out the health-harming contaminants exclusion, which applies specifically to viruses like COVID-19, from this Policy.

I. Plaintiff Does Not Allege Facts Supporting a Conclusion that Direct Physical Loss or Damage to Property ***Caused*** Its Business Interruption.

To come within the Policy's coverage, and trigger payment for actual loss of income sustained, suspension of the insured's business must be caused by direct physical loss or damage.

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(ECF No. 2-1, at 25.) In its Motion, AIG noted that neither *Studio 417* nor any other court has held that an insured's losses caused by government's prophylactic orders to prevent the spread of COVID-19 are covered under property policies, and identified five cases holding to the contrary. (ECF No. 17, Motion at 9, 18; *see also* ECF No. 23, Opp. 7:3-15 (acknowledging multiple cases finding no coverage for losses caused by government orders).) Since then, two more courts have dismissed claims for losses from government orders to prevent the spread of COVID-19: Ex. B, *Turek Enterprises Inc. v. State Farm Mutual Automobile Ins. Co.* 20-11655, 2020 WL 5258484, at *7-8 (E.D. Mich. Sept. 3, 2020) ECF No. 23, at 14 (inability to use property was not direct physical loss); and Ex. C, *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-cv-04418-SVW-AS (C.D. Cal. Sept. 2, 2020), ECF No. 39, at 7 (impairment of use of property from in-person-dining restrictions was not direct physical loss). And AIG remains unaware of any case that has allowed a claim to proceed for losses from complying with government orders to stop the spread of COVID-19.

Plaintiff has not cited any caselaw in any jurisdiction finding that a government order restricting a business' activities – standing alone – can constitute direct physical loss or damage. Plaintiff points to *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *3 (D.N.J. Nov. 25, 2014). But there, applying New Jersey law, the court found direct physical loss where an ammonia release at the property had to be ***remediated*** before it was habitable again and that business interruption coverage applied only during the actual remediation. *Id*. The court did not find that loss of use from government restrictions could constitute direct physical loss or damage.[1] Unlike *Gregory Packaging*, Plaintiff does not allege that it did anything to repair, rebuild, or replace damaged property—or that remediating the property would have allowed it to avoid closing or to reopen again before the Governor lifted his order prohibiting gaming operations.

[1] *Gregory Packaging* is part of a line of out-of-state cases applying a broader view of direct physical loss. But even under that broader view, courts have not found that loss of use, standing alone, is a covered peril. *See, e.g., W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 38, 437 P.2d 52, 55 (1968) (declining to hold that loss of use, "standing alone," constitutes direct physical loss). As discussed below (at 9-10), each of those cases requires a distinct, demonstrable injury to the property which, if remediated, would allow the property to be used again.

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The Central District of California rejected an argument, like the one Plaintiff makes here (Opp. 15), that the disjunctive phrase (direct physical loss ***or*** damage) requires physical loss to be interpreted broadly to encompass government orders restricting the use of property. Ex. C, *10E, LLC* at 8. The court reasoned: "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." *Id*. But "[e]ven 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." *Id*. For the same reason, *Nautilus Grp., Inc. v. Allianz Glob. Risks US*, No. C11-5281BHS, 2012 WL 760940, at *6 (W.D. Wash. Mar. 8, 2012), is inapposite. In *Nautilus*, the court found "physical loss" where insured property was stolen, depriving the insured of physical possession of the property, but not damaged. Plaintiff has not alleged that its property was stolen, or that it ever lost ***physical*** possession of its property.

As Plaintiff concedes (ECF No. 23, Opp. 22-23), its policy includes an express exclusion for "loss of use," which precludes coverage for loss of use caused by anything other than a covered peril, i.e., direct physical loss of or damage to property. No court, in this Circuit or anywhere, has held that loss of use from a government order constitutes direct physical loss or damage. Multiple courts rejected that view before the COVID-19 pandemic (ECF No. 17, Motion at 19, collecting authorities) and ***seven*** courts have now rejected that proposition in the specific context of prophylactic government orders to prevent the spread of COVID-19.

Faced with the overwhelming caselaw finding that loss of use from government orders restricting operations is not direct physical loss or damage, Plaintiff's Opposition attempts to recast its allegations[2] to come within the Missouri federal district court's decision in *Studio 417, Inc. v. The Cincinnati Insurance Company*, Case No. 20-cv-03127, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), the only written decision AIG is aware of which allowed a policyholder's claim

[2] *Wilson v. Holder*, 7 F. Supp. 3d 1104, 1122–23 (D. Nev. 2014), *aff'd sub nom. Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016) ("[p]laintiff cannot attempt to cure defects in her complaint by including the necessary allegations in her opposition brief.").

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for COVID-19 losses to survive dismissal. But *Studio 417* allowed the plaintiffs' claims to proceed because it concluded the "Plaintiffs … allege that this physical substance [the COVID-19 virus] is likely on their premises ***and caused*** them to cease or suspend operations." *Id.*, at *11 (emphasis added). Here, Plaintiff alleges that COVID-19 was on its property for *months* but does not allege that COVID-19 ***caused*** it to take any action whatsoever. Plaintiff alleges it acted only at the exact moment the government required it to shut down gaming operations. (ECF No. 1, Compl. ¶¶ 40-42.) And Plaintiff's Opposition (at 24) confirms it reopened "on or around June 4, 2020" – the very date Governor Sisolak allowed gaming activities to resume.[3] Plaintiff alleges nothing in its Complaint about repairing, rebuilding, or replacing damaged property before reopening. Although Plaintiff now attempts to characterize its Complaint as alleging that presence of COVID-19 caused it to close, this characterization is belied by its factual allegations, which, if true, do not support such a finding. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (conclusory allegations "are not entitled to the assumption of truth." Plaintiff must allege facts which, if true, would "allow[] the court to draw the reasonable inference that the defendant is liable.").

II. Plaintiff Cannot Avoid the Clear Exclusion for Health-Harming Contaminants, Including Viruses.

Plaintiff contends that the virus was present on its property, but (in an effort to avoid the exclusion) insists that it somehow got there without being released, discharged, or dispersed. (ECF No. 23, Opp. 2:27-28.) COVID-19 is a virus that is dispersed from discharge of aerosols containing from infected people. (ECF No. 1, Compl. ¶¶ 24-28; *see also* ECF No. 23 Opp. 5:18-6:3.) Plaintiff explains that "the coronavirus pandemic" is like "a fire ravaging our cities and towns that is spread by infected people ***breathing out invisible embers every time they speak, cough, or sneeze***." (ECF No. 23, Opp. 5, n.3 (emphasis added).) The government orders that caused its losses were issued because of the actual and threatened discharge of COVID-19 when people breathe, cough, or sneeze, and to slow the continued dispersal of the virus. (*Id.*; ECF No.

[3]*See*, Ex. A, Nevada Gaming Commission website announcement re gaming reopening. This court may take judicial notice of statements in government websites on a motion to dismiss. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

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1, Compl. ¶ 29.) Put simply, unless humans were discharging and dispersing the virus, there would be no pandemic. Accordingly, Plaintiff's losses fall squarely within the Policy's exclusion for "[t]he actual … or threatened release, discharge, escape or dispersal of … Contaminants," that threaten "human health" including "virus." (ECF No. 2-1, at 48.)

Century Sur. Co. v. Casino W., Inc., 130 Nev. 395, 399, 329 P.3d 614, 617 (2014), affirms that where an exclusion uses "obvious and unambiguous language" that is susceptible to only one reasonable interpretation and plainly applies to the particular case before the court, it will be enforced as written. Here, the health-harming contaminants exclusion "obviously and unambiguously" extends to contaminants, such as viruses, which "threaten damage to human health or human welfare." There can be no reasonable expectation of coverage for loss from the actual or threatened discharge or dispersal of health-harming viruses.

Plaintiff cannot write out the health-harming contaminants exclusion from this first party property policy and replace it with the absolute exclusion for traditional outdoor environmental pollution typically found in a third-party liability policy. *See Casino W.*, 329 P.3d at 617. Absent language indicating otherwise, the absolute pollution exclusion in ***third-party*** policies precludes coverage only for an insured's liability for traditional, outdoor environmental pollution. *Id*. But that interpretation is not applicable to exclusions in a first-party property policy, which does not cover outdoor environmental media like land, soil, or water. (ECF 2-1, Policy at 22-23 (Policy does not cover "land," "any substance in or on land" or "water" not part of a piping system or tank.).) In these circumstances, interpreting the exclusion to apply only to liability from traditional outdoor pollution renders the exclusion meaningless. *See Broome Cty. v. The Travelers Indem. Co.*, 125 A.D.3d 1241, 1243, 6 N.Y.S.3d 300 (2015) (the exclusion would have "no significance at all in this first-party policy" if limited to traditional pollution).[4] Nor is it applicable where, as

[4] In addition, the rationale for limiting the absolute pollution exclusion to outdoor environmental pollution is not present here. In *Casino W.* the court held that: "Taken at face value, the policy's definition of a pollutant is broad enough that it could be read to include items such as soap, shampoo, rubbing alcohol, and bleach insofar as these items are capable of reasonably being classified as contaminants or irritants. … Such results would undoubtedly be absurd and contrary to any reasonable policyholder's expectations." *Casino W.*, 130 Nev. at 400, 329 P.3d at 617. Unlike the absolute pollution exclusion in *Casino W.*, the health-harming contaminants exclusion here, by its terms, does ***not*** apply to every irritant or [footnote continued on next page]

here, the Policy expressly states it applies to health-harming contaminant, ***not*** only environmental pollution. *Casino W., Inc.*, 130 Nev. at 399, 329 P.3d at 617 (2014).

The health-harming virus exclusion is dispositive of all of Plaintiff's claims, which allege loss caused by or contributed to by the actual or threatened release, discharge, or dispersal of the COVID-19 virus. (ECF No. 1, Compl. ¶ 29, 40, 43-44.) Three courts have dismissed claims for loss from government efforts to stop the threatened spread of COVID-19 under materially similar exclusions. ECF 18-1, *Diesel Barbershop*, No. 5:20-cv-00461-DAE, at *17; Ex. B, *Turek*, at 15; Ex. D, *Mauricio Martinez v. Allied Ins. Co.*, No. 2:20-cv-00401-FtM-66NPM (M.D. Fla. Sept. 2, 2020), ECF No. 22, at 4-5 (same). As in those three cases, the Policy's exclusion for health-harming contaminants alone justifies dismissal of Plaintiff's Complaint. [5]

III. Presence of COVID-19 on Property Is Not Direct Physical Loss or Damage.

The Court need not address whether the presence of COVID-19 on property could qualify as direct physical loss or damage: Plaintiff has not alleged that the presence of COVID-19 caused its losses, and, in any event, the Policy's virus-specific exclusion applies. However, to the extent the Court reaches this issue, AIG urges the court to follow the many cases, both before and after the COVID-19 pandemic, holding that direct physical loss or damage requires an actual, detectable change that damages property. *See, e.g.*, *MRI Healthcare Center of Glendale, Inc. v. State Farm General Insurance Co.*, 187 Cal. App. 4th 766, 779 (2010) ("For there to be a "loss" within the meaning of the policy … it must have been damaged within the common meaning of that term."); ECF No. 17 (Motion) at 10, collecting authorities). Plaintiff's argument that *MRI* somehow supports coverage for loss of use without actual property damage (ECF No. 23, Opp. 13) ignores the plain language of that case requiring an "actual change in insured property then in satisfactory state" and holding that the disjunctive phrase ("physical loss or damage") is "widely held to exclude alleged losses that are intangible or incorporeal." *MRI*, 187 Cal. App. 4th at 779.

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contaminant. Rather, it applies only to an irritant or contaminant "which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder." (ECF No. 2-1, Policy 49.)

[5] Plaintiff argues (ECF No. 23, Opp. 22) that the Policy's exclusion implies there is coverage for health harming contaminants that do not cause direct physical loss or damage to property. But while COVID-19 does not damage property, other health-harming contaminants may.

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Although Plaintiff argues that its Policy was an "all risk" policy (ECF No. 23, Opp. 4), "[t]he label 'all risk' is essentially a misnomer. All risk policies are not 'all loss' policies." *Ingenco Holdings, LLC v. Ace Am. Ins. Co.*, 921 F.3d 803, 814 n.9 (9th Cir. 2019). Here, the "risk" the Policy protects against is risks of "direct physical loss or damage to Insured Property" that are not excluded. (ECF No. 2-1, at 19.) Plaintiff correctly alleges that COVID-19 is a peril that is "deadly" to ***people***. (ECF No. 23, Opp. 5.) COVID-19 does not create a risk of direct ***physical*** loss to ***property***. As the Southern District of New York held in *Social Life*, COVID-19 "damages lungs" it doesn't damage property. (ECF No. 18-2, Social Life Magazine at 5, 15.)

Plaintiff concedes that "physical" in "direct physical loss" means "***perceptible*** especially through the senses and subject to the laws of nature." (ECF No. 23, Opp. 5:10-11 (emphasis added).) In *Diesel Barbershop, LLC v. State Farm Lloyds*, Judge Ezra noted some cases have allowed coverage when "loss is caused by something invisible to the naked eye," but the loss is still "demonstrable" – such as where a "noxious odor" is perceptible on the property and must be removed for the property to be habitable. 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020). Judge Ezra distinguished COVID-19 from cases finding a perceptible, demonstrable noxious odor: "COVID-19 does not produce noxious odors that make a business uninhabitable." *Id*. In fact, COVID-19 effects no perceptible change to property. *Id*.

The court in *Meridian Textiles, Inc. v. Indem. Ins. Co. of N. Am.*, No. CV06-4766 CAS, 2008 WL 3009889, at *5 (C.D. Cal. Mar. 20, 2008), explains this distinction. "[M]ere alteration of property at the microscopic level does not obviate the requirement that physical damage need be distinct and demonstrable." *Meridian*, 2008 WL 3009889, at *5 (citations and internal quotations omitted). Rather, property must have experienced a "detectable physical change" – such as an odor – which renders the property unusable until remediated. *Id*. at *5-*6.[6]

Importantly, here Plaintiff argues that COVID-19 can be seen at the microscopic level (ECF No. 23, Opp. 5), but it is unable to allege any "distinct and demonstrable alteration in its

[6] The court discussed another case which held that an article of retail clothing, intended as new "first quality goods," that had an odor and needed to be washed would suffer damage. The court did not adopt any holding that real property, such as a building, which is intended to be frequently cleaned as part of normal use would be damaged by a substance that required cleaning.

property" from COVID-19. Indeed, Plaintiff is not even able to allege that COVID-19 was on its property at any given time, on what specific property COVID-19 was purportedly present, that anyone perceived COVID-19 on the property at any point, or that its property could be usable again once remediated. (ECF No. 1, Compl. ¶¶ 40-42.) Under *Meridian* and *Diesel Barbershop*, the failure to allege a distinct and ***demonstrable*** alteration to property that rendered it unusable until remediated is fatal. Rather than a "loss of use" that can be rectified by remediating or replacing property, the loss of use here is solely the result of governments orders designed to prevent people from congregating in indoor spaces, like gaming halls, and spreading the virus. This is a purely economic loss that cannot be addressed by remediating or replacing physically damaged property impacted by demonstrable presence of a physical substance.

In contrast, in each of the cases Plaintiff cites to support coverage (Opp. 10-11), the insured showed an impact on property from a physical substance that was perceptible through the senses or otherwise demonstrable, and needed to be remediated before the property could be used again. *Farmers Ins. Co. of Oregon v. Trutanich*, 123 Or. App. 6, 10, 858 P.2d 1332, 1335 (1993) (finding direct physical loss where "a pervasive odor persists in the house" rendering it uninhabitable until remediated); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *3 (D. Or. June 7, 2016), vacated, No. 1:15-CV-01932-CL, 2017 WL 1034203 (D. Or. Mar. 6, 2017) (finding direct physical loss where particulates in the air could be "perceived" by theater-goers, rendering theater unusable until remediated); *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 24 A.D.3d 743, 806 N.Y.S.2d 709 (2005) (direct physical loss where faulty ingredients caused "off-tasting" soft drinks which were not saleable); *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 39, 437 P.2d 52, 55 (1968) (gasoline "infiltrated and saturated" soil in and around church, resulting in "strange odor" and precluding use of church until addressed); *Cooper v. Travelers Indem. Co. of Illinois*, No. C-01-2400-VRW, 2002 WL 32775680, at *3 (N.D. Cal. Nov. 4, 2002) (effluent containing the bacteria E-Coli escaped from manhole rendering property unusable until remediated); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (insured "***presented evidence showing*** that released asbestos fibers have contaminated the [insured] buildings" rendering them uninhabitable until

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asbestos is abated) (emphasis added); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *1 (D.N.J. Nov. 25, 2014) ("ammonia was released from the refrigeration system into the facility," on a particular known date, burning an employee and rendering the property unusable until professional remediation was complete).

As discussed in AIG's Motion (ECF No. 17, 12:9-13:2) courts have also distinguished this line of authority in situations where, as here, a party claims loss of use from a substance on property that is cleanable. *Studio 417*, stands alone in finding that there could be "physical" loss from a substance that (1) is not alleged to be perceptible on property through any sense or demonstrably present on the property at any particular time, (2) can be cleaned from the property, and, (3) absent any allegation that remediating the property would cause it to be usable again.[7] Plaintiff has cited no other case, from any jurisdiction that countenances such a result. Contrary to Plaintiff's claims (ECF No. 23, Opp. 8), the court in *10E* did not "explicitly acknowledge that COVID-19 may cause physical alteration to property"– and does not help Plaintiff here. Indeed, in the language Plaintiff quotes from the court's original order, the court expressly declined to address that issue. The court removed the language Plaintiff relies on in its amended order issued *sua sponte* the day after Plaintiff filed its brief – eliminating any suggestion that the decision to grant leave to amend supports a finding that COVID-19 causes physical loss or damage.[8]

Nor has Plaintiff identified any case finding direct physical loss or damage where such loss or damage is merely imminent. *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 492, 509 S.E.2d 1, 16 (1998), does not so hold. There, the court recognized that soil movement which transplants a dwelling to a dangerous position – such as the side of a cliff – constitutes damage. *Id*. The court found damage based on actual movement of the dwelling to an unsafe position – not because such a result was merely imminent or likely. *Id*.; *see also Fujii v. State Farm Fire & Cas.*

[7] The *Studio 417* court specifically admonished that the anticipated development of COVID-19 business interruption jurisprudence might lead to a different outcome. 2020 WL 4692385, at *8. As evidenced by the COVID-19 case law AIG cites herein, the law has been uniformly developing against any finding of coverage.

[8] The *10E* court also clarified that it was skeptical any amendment could successfully avoid the virus exclusion: "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." Ex. C. *10E, LLC*, at *9.

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Co., 71 Wash. App. 248, 251, 857 P.2d 1051, 1052 (1993) (no coverage where "the threat of loss … is imminent"); *MRI Healthcare*, 187 Cal. App. at 779 (direct physical loss or damage requires an "actual change" to property). Accordingly, even if presence of COVID-19 on property could be direct physical loss or damage, losses from efforts to prevent ***future*** spread of COVID-19 on property are not physical losses.

IV. Claims for Other Coverages Also Fail.

The failure to allege direct physical loss or damage and the virus exclusion are fatal to all of Plaintiff's claims. (ECF No. 2-1, Policy at 42 (policy insures against "all risks of direct physical loss of or damage to property" from a Covered Cause of Loss that is not excluded).) But, Plaintiff's claims for civil authority, ingress/egress, contingent time element and extra expense coverage also fail for other, independent reasons.

Plaintiff asserts that it has stated a claim for civil authority because "Circus Circus experienced direct physical loss to ***its*** property because of COVID-19" and because the civil authority orders caused a loss of use of ***Circus Circus's*** property. (ECF No. 23, Opp. 17:25-18:2 (emphasis added).) But these allegations are irrelevant to Civil Authority coverage, which requires direct physical loss or damage to property ***of others*** within one mile of the insured property. To state a claim for civil authority coverages, it is not enough to "point generally to the physical action of the coronavirus" or allege that it can survive on surfaces or objects. Ex. C, *10E, LLC*, at 8. Rather, Plaintiff must allege "actual cases" of property damage – here, to property of others within one mile of the insured property. *Id*. Further, Plaintiff must "connect[] the alleged property damage to restrictions on in-person dining" at its premises. *Id*. at 9. Plaintiff has made no such allegations here. That failure to allege any "actual cases" of damage to property of others also dooms its Contingent Time Element and Ingress/Egress claims, which similarly require direct physical loss or damage to property of others.

Further, the cases Plaintiff cites to support its civil authority claim (ECF No. 23, Opp. at 17-18) all confirm ***AIG's*** position that there has been no prohibition on access here, where gaming activities have been prevented by government order but the insured premises have not been physically closed. As reflected in Plaintiff's quote from *Kean, Miller, Hawthorne, D'Armond,*

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McCowan & Jarman, LLP v. Nat'l Fire Ins. Co. of Hartford, courts generally require that a civil authority order "actually requires the insured's ***business premises to close***" to trigger civil authority coverage. No. CIV.A. 06-770-C, 2007 WL 2489711, at *6 (M.D. La. Aug. 29, 2007). While Circus Circus may have been required to cease its gaming operations, it has not been required to ***close its premises***. *See, e.g.*, ECF No. 1, Compl. ¶¶ 8, 43 & ECF No. 2-4, Ex. D at 12.

By contrast, for example, in *Narricot Indus., Inc. v. Fireman's Fund Ins. Co.*, No. CIV.A.01-4679, 2002 WL 31247972, at *1, *16-*17 (E.D. Pa. Sept. 30, 2002), cited by Plaintiff in its Opposition at 18, the town "prohibited access" to the road where the insured facility was located and "[l]aw enforcement and highway patrol officers stationed at each entrance to the road barred travel." *Id*.; *see also Assurance Co. of Am. v. BBB Serv. Co.*, 265 Ga. App. 35 (2004) (civil authority required all persons to evacuate the town where the insured business was located); *Southlanes Bowl, Inc. v. Lumbermen's Mut. Ins. Co.*, 46 Mich. App. 758, 759, 208 N.W.2d 569, 570 (1973)(civil authority closed all places of amusement to prevent rioting). Plaintiff does not cite any case finding civil authority coverage where an activity has been prohibited on the insured property, but the insured ***premises*** has not been closed – and indeed is allowed to remain open for essential functions, such as hotel operations. (*See, e.g.*, ECF No.1, Compl. ¶¶ 8, 43 & ECF No. 2-4, Ex. D at 12.)

For the same reason, Plaintiffs' ingress/egress claim also fails. That coverage requires a "physical" bar to ingress and egress. Plaintiff has not alleged any facts from which the court could make an inference that ingress and egress had been "physically" prevented — as required to state a claim. *Ashcroft*, 556 U.S. at 678.

Finally, with respect to Extra Expense coverage, Plaintiff concedes that the coverage only covers expenses to continue normal operations as a result of direct physical loss or damage (Opp. 18), but alleges that it has now reopened and is incurring extra expenses because of additional exposures to COVID-19. But none of those additional exposures are alleged in its Complaint. And, in any event, any losses from exposures to COVID-19 since reopening would be precluded under the virus exclusion and would not constitute a direct physical loss or damage.

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CONCLUSION

This Court should grant AIG's Motion and dismiss Circus Circus's claims with prejudice.

Dated: September 8, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 8th day of September, 2020, I caused a true and correct copy of the foregoing **DEFENDANT AIG SPECIALTY INS. CO.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS** to be served via the U.S. District Court's Notice of Electronic Filing system ("NEF") in the above-captioned case, upon the following:

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EXHIBIT A

Nevada Gaming Commission website announcement

EXHIBIT A

HEALTH AND SAFETY POLICIES FOR RESUMPTION OF GAMING OPERATIONS

RESTRICTED LICENSEES

INTRODUCTION

On March 12, 2020, Governor Steve Sisolak issued the Declaration of Emergency for COVID-19 pursuant to the emergency powers conferred upon the Governor of Nevada by chapter 414 of NRS. Pursuant to his Declaration of Emergency, Governor Sisolak issued Emergency Directive 002 on March 18, 2020, which suspended all gaming operations for 30 days. The expiration of Emergency Directive 002 was subsequently extended to April 30, 2020 by Emergency Directive 010. Pursuant to Governor Sisolak's "Nevada United: Roadmap to Recovery" plan, gaming operations will not resume in the beginning stage of recovery, and it will be incumbent upon the Board to ensure the safe reopening of gaming operations in this State.

The purpose of these policies and procedures (Policy) is to notify Nevada's restricted gaming licensees of new operational requirements to mitigate and reduce the risk of exposure to COVID-19 for all employees, patrons, and other guests.

NRS 463.0129(1)(d) requires that all establishments where gaming is conducted and where gaming devices are operated be controlled and assisted to protect the public health and safety of Nevada's residents, and the Nevada Gaming Control Board (Board) and Nevada Gaming Commission remain resolute in ensuring that gaming operations in this State do not compromise the health and safety of Nevadans.

In consultation with the Office of the Governor, as well as federal, state, and local health officials, the Board has created this Policy to diminish personal contact and increase the level of disinfection in high-use areas, and expects full compliance with this Policy by its restricted licensees. COVID-19 research is continuously developing. In the event of a conflict between any provision set forth in this Policy and any policy or requirement of a federal, state, or local health authority, the requirements set forth by those health authorities shall control.

The Board issued Industry Notice #2020-25 on May 1, 2020. On May 7, the Nevada Gaming Commission ratified this Policy and confirmed the Board's ongoing responsibility to issue health and safety policies for the gaming industry. On May 27, the Governor directed the Board to promulgate requirements for a phased and incremental resumption of gaming operations, and confirmed that the failure of a gaming licensee to comply with any such requirements shall be considered injurious to the public health, safety, morals, good order, and general welfare of the inhabitants of the State, and constitute a failure to comply with the Governor's Emergency Directives. Gaming operations were authorized to resume on June 4, 2020, so long as licensees remain in full compliance with this Policy, as amended.

CREATION AND IMPLEMENTATION OF COVID-19 MITIGATION PLAN

Each restricted licensee must acknowledge that it will comply with this Policy. Such acknowledgement must be submitted to Ops@gcb.nv.gov at least seven (7) days before reopening. This Policy should not be implemented on a temporary basis; rather, it should be regularly and continuously reviewed and executed to ensure the health and safety of licensees' guests and employees. The Board will provide updates to this Policy as circumstances surrounding this health crisis evolve.

To comply with this Policy, the Board recognizes that certain statutory provisions, including, without limitation, those set forth in subsection 2 of NRS 463.161, contain certain requirements imposed upon restricted licensees in certain counties. Pursuant to section 13 of the Governor's Declaration of Emergency Directive 016, the Board is required to implement a phased and incremental resumption of gaming operations. Accordingly, restricted licensees subject to the requirements in subsection 2 of NRS 463.161 may choose to delay full compliance with certain of those criteria when implementing the new operational requirements set forth in this Policy. A restricted licensee that intends to delay full compliance with these statutory requirements must provide full details thereof to the Enforcement Division at Ops@gcb.nv.gov. The Board will not consider delayed compliance with such statutory requirements a violation of the Gaming Control Act, so long as a restricted licensee fully complies with this Policy. The Board will revisit this exercise of prosecutorial and regulatory discretion as the Governor's office and the Board continue to track the effects of COVID-19 on the State of Nevada.

PROCEDURES PRIOR TO RESUMING GAMING OPERATIONS

Prior to reopening, each restricted licensee shall clean and disinfect all of its hard and soft surfaces in accordance with the guidelines published by the Centers for Disease Control and Prevention (CDC) for Cleaning and Disinfecting Your Facility.

Each licensee must ensure its employees are adequately trained on: (1) the proper cleaning and disinfecting procedures set forth in the CDC's guidance above; and (2) how to prevent the spread of infectious disease, including, without limitation, social distancing, handwashing, and not spreading germs at work. Licensees should ensure that any training provided pursuant to this Policy is documented.

HEALTH AND SAFETY PROCEDURES ONCE OPERATIONAL

When implementing this Policy, licensees should utilize the Interim Guidance for Businesses and Employers to Plan and Respond to COVID-19, published by the CDC. The Board expects licensees to implement the following actions upon reopening.

Employee and Patron Health Concerns:

Signage should be posted throughout the property reminding employees and patrons of proper hygiene, including, without limitation, proper handwashing, how to cover coughs and sneezes, and to avoid touching their faces.

Employees should be instructed to stay home if they do not feel well, and to contact a supervisor or manager if they notice a co-worker or patron experiencing symptoms associated with COVID-19, such as coughing, shortness of breath, or other flu-like symptoms.

If a licensee is informed or is alerted to a case of COVID-19 at its property, it must communicate the case to and cooperate with its local health authorities. All employees should receive clear instructions on how to properly and efficiently respond to all presumed cases of COVID-19. Licensees should follow the appropriate steps to conduct additional cleaning and disinfecting protocols of all areas that patrons visited during their stay in accordance with guidelines issued by the licensee's local health authority.

Employee Training and Responsibilities:

Proper and frequent handwashing with soap is vital to help combat the spread of COVID-19. All employees should be required and consistently reminded to wash their hands with soap and warm water for 20 seconds, before the start of a shift, at least once during every break period, and several times during their shifts, including, without limitation, every time they change their gloves or otherwise contaminate their hands.

Appropriate personal protective equipment (PPE) may be required or recommended by federal, state, or local authorities. When required or recommended, licensees must ensure that PPE is utilized and properly worn by employees, and provide training on how to properly use, wear, and dispose of all PPE.

Use of Face Coverings by Patrons and Guests:

Pursuant to Governor Sisolak's Emergency Directive 024, licensees shall ensure that all patrons and guests properly utilize face coverings, subject to the guidelines in the Directive. This Policy fully incorporates Emergency Directive 024, including, without limitation, all of its requirements, conditions, limitations, and exceptions. Licensees should have dedicated signage throughout the establishment notifying patrons that face coverings are required. Pursuant to the authority granted to the Board in section 35 of Emergency Directive 021 and section 10 of Emergency Directive 024, the Board will strictly enforce Emergency Directive 024.

Gaming Machines

Licensees must ensure that the floor plan for gaming machines creates proper social distancing between patrons. To achieve these requirements, licensees may remove every other chair or stool in front of a gaming machine or cover a machine's bill and ticket validator so that patrons do not use that machine. Licensees could propose other measures to ensure proper distance between patrons. Additionally, licensees should assign employees to focus on ensuring guests do not congregate in groups.

Licensees must clean and disinfect gaming machines, devices, chairs, and other ancillary equipment on a regular basis. Licensees should make hand sanitizer or disinfectant wipes available for patron use.

Occupancy Limits

In order to achieve the social distancing guidelines issued by federal, state, and local health authorities, licensees must limit a property's occupancy to no more than fifty percent (50%) of the occupancy limit assigned to the property by local building and fire codes.

Cleaning & Disinfection Guidelines Generally:

Licensees must provide for the regular disinfection of high-use and high-touch areas, including, without limitation, bar tops, bar top gaming devices, bar stools, chairs, dining areas, customer-facing countertops, ATMs, payment terminals, marketing kiosks, and jukeboxes. Both employee- and customer-used point of sale terminals must be cleaned and disinfected continuously, preferably after each customer use. All table tents and other promotional materials must be removed from dining and bar areas.

Licensees should utilize cleaning products that meet Environmental Protection Agency (EPA) guidelines and are approved for use and effective against viruses, bacteria, and other airborne and bloodborne pathogens. A list of disinfectants approved by the EPA for use against COVID-19 can be found here. All disinfectants should be used in accordance with their labels to ensure proper application, contact time, and user safety.

During dining service, beverage stations, service stations and carts, counters, handrails, and serving trays must be cleaned and disinfected regularly during hours of operation. Menus, menu covers, check presenters, pens, and all other items regularly reused by guests and employees must be disinfected on a regular basis and again at the end of each working shift.

Guests should be served with single-use, disposable glassware, plates, napkins, and utensils. Condiments may only be provided in single-use packets.

Tavern, supermarket, and convenience store managers must ensure that disinfection protocols are followed for all interior and exterior door handles, kitchen or other back of house work stations, and restrooms.

Health and hygiene reminders and instructions must be posted publicly, in the view of patrons.

Social Distancing Protocols: Taverns

A tavern may not exceed more than 50% of its total capacity at any time. Dining seating capacity is also limited to 50% of a dining area's total capacity.

To ensure compliance with this Policy, a restricted licensee operating as a tavern must ensure that bar service and bar top gaming comply with state and local social distancing protocols. For example, every other bar stool may be removed to effectuate proper social distancing among patrons.

Social Distancing Protocols: Supermarkets and Convenience Stores

Gaming attendants must ensure appropriate social distancing between operational gaming devices; for example, by removing every other gaming stool or covering the bill and ticket validator on every other machine. Guests should be discouraged from congregating around gaming devices.

Health and hygiene reminders and instructions must be posted publicly, in the view of patrons.

CONCLUSION

This Policy is subject to revision by the Board based on recommendations from federal, state, and local health authorities related to the spread of COVID-19. The Board will keep restricted licensees apprised of any changes so that licensees' practices can be updated.

EXHIBIT B

Turek Enterprises Inc. v. State Farm Mutual Automobile Ins. Co. 20-11655, 2020 WL 5258484, at *7-8 (E.D. Mich. Sept. 3, 2020), ECF No. 23

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

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

Plaintiff,

v

Case No. 20-11655
Honorable Thomas L. Ludington

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

Defendants.
_____/

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

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] 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.

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

    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

[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.

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.

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.

[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.

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 . . .

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

[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.

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.

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.

[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.

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]

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

[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.

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 C*itizens 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

[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

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).

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*

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.

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.

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.

[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

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

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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.

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.'").

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

[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

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]

[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.

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.

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

[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.

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.

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

EXHIBIT C

10E, LLC v. Travelers Indem. Co. of Connecticut, No. 2:20-cv-04418-SVW-AS (C.D. Cal. Sept. 2, 2020), ECF No. 39

EXHIBIT C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:20-cv-04418-SVW-AS	Date	September 2, 2020
Title	*10E, LLC v. Travelers Indemnity Co. of Connecticut et al.*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE
Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

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

I. Introduction

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.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:20-cv-04418-SVW-AS	Date	September 2, 2020
Title	*10E, LLC v. Travelers Indemnity Co. of Connecticut et al.*		

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.*

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.*

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

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

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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").

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

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:20-cv-04418-SVW-AS	Date	September 2, 2020
Title	*10E, LLC v. Travelers Indemnity Co. of Connecticut et al.*		

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

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elements of a cause of action will not do." *Id.*; *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678).

In reviewing a Rule 12(b)(6) motion, a court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). Thus, "[w]hile legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

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.'").

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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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).

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.

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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.

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."

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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

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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.

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EXHIBIT D

Mauricio Martinez v. Allied Ins. Co., No. 2:20-cv-00401-FtM-66NPM (M.D. Fla. Sept. 2, 2020), ECF No. 22

EXHIBIT D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MAURICIO MARTINEZ, DMD, P.A.,

Plaintiff,

v. CASE NO. 2:20-cv-00401-FtM-66NPM

ALLIED INSURANCE COMPANY OF AMERICA,

Defendant.
_____/

ORDER

In this two-count insurance coverage action, Mauricio Martinez, DMD, P.A. ("Martinez"), sues his insurance carrier, Allied Insurance Company of America ("Allied"), for damages Martinez claims were "caused by or result[ing] from a Covered Cause of Loss." (Docs. 4, 4-1.) The overarching cause of the alleged loss, Martinez maintains, is the impact of the COVID-19 virus and the Governor of Florida's COVID-19 emergency declaration, which limited dental services. Specifically, Martinez claims that he: (1) incurred costs to decontaminate his dental office of the virus, and (2) lost business income because of the Governor's limitation of dental services to only emergency procedures during the COVID-19 pandemic. (Doc. 4 at 2–3.)

Allied moves to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. (Doc. 6.) Because the insurance policy expressly excludes coverage from damages caused by a virus, Allied's motion to dismiss is **GRANTED**.

STATEMENT OF FACTS

Accepting the allegations in both the complaint and the attached exhibits as true for the purpose of adjudicating a Rule 12(b)(6) motion to dismiss,[1] the facts are as follows: Allied issued a commercial insurance policy to cover Martinez's dental practice for the period September 28, 2019, to September 28, 2020. (Doc. 4-1 at 2.) In early March 2020, the Governor of Florida issued an executive order declaring a state of emergency in Florida due to the COVID-19 pandemic. (Doc. 4 at 4.) In mid-March, President Donald J. Trump, the Centers for Disease Control and Prevention, and Medicaid recommended that providers limit all "non-essential" dental procedures. (*Id.*) The executive order permitted only emergency dental procedures during its operative period. (*Id.* at 5.)

Martinez subsequently filed a claim with Allied for monetary losses that his business sustained because of the COVID-19 pandemic. (*Id.*) On April 1, 2020, Allied denied that claim. (Doc. 6-1 at 190.) Martinez alleges that COVID-19 caused damage to the dental office, namely the cost of decontaminating his office and of closure, physical damage, and loss of business income. (Doc. 4 at 4.)

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[1] For the purpose of adjudicating a Rule 12(b)(6) motion, well-pleaded allegations are presumed true, and the pleadings are viewed in the light most favorable to the plaintiff. *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1066 (11th Cir. 2007). Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." A plaintiff must provide facts on which he can state his claim, and a conclusory or "formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

DISCUSSION

The insurance policy provides coverage "for direct physical loss or damage to Covered Property at the [plaintiff's] premises" that is "caused by or result[s] from any Covered Cause of Loss." (Doc. 4-1 at 2.) Allied asserts that there was no direct physical loss or damage to covered property at the dental practice's premises "as a result of the appointment cancellations or the closure of [the plaintiff's] dental practice."[2] (Doc. 6-1 at 190.)

Coverage for loss of business income is provided as "additional coverage" under the insurance policy. (Doc. 4-1 at 4.) This covers the "actual loss" of "business income" sustained during the necessary suspension of the policyholder's "operations" during "the period of restoration." (*Id.* at 7.) Suspension must be caused by direct physical loss of or damage to property at the covered premises. (*Id.*) The loss or damage "must be caused by" or "result[] from" a "Covered Cause of Loss. (*Id.*)

The policy's provision governing loss of business income due to the act of a "civil authority" states, in relevant part:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, [the insurer] will pay for the actual loss of Business income [] sustain[ed] and necessary Extra Expense caused by action

[2] Responding to the motion to dismiss, Martinez's response offers no opposition to the arguments asserted by Allied. (Doc. 10.) Martinez's argument is encapsulated simply in a summary at the conclusion: "Here the Defendant hasn't established beyond a doubt that a breach of contract nor declaratory action should be litigated. The Plaintiff asserts that these matters are well plead and therefore the Defendant's Motion should be denied." (Doc. 10 at 4.) First, it is not any defendant's duty to establish "beyond a doubt" that an action "should be litigated." Second, an insurer's duty to defend its insured against legal action depends solely on the facts alleged in the pleadings and on the legal claims alleged against the insurer.

> of civil authority that prohibits access to the [covered] premises, provided that . . . (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.

(Doc. 4-1 at 8.) Allied asserts that there has been: (1) no action of civil authority prohibiting access to Martinez's dental practice premises, and (2) no damage to property within one mile of the premises from a covered cause of loss. (Doc. 6 at 8–10.) Most importantly, Allied also argues that the policy contains an exclusion for loss or damage caused "directly or indirectly," by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (*Id.*; Doc. 4-1 at 21, 23.)

Count I—Breach of Contract

"Contract interpretation is generally a question of law." *Lawyers Title Ins. Corp. v. JDC (Am.) Corp.*, 52 F.3d 1575, 1580 (11th Cir. 1995). "In interpreting an insurance contract, we are bound by the plain meaning of the contract's text." *Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co.*, 185 So. 3d 638, 640 (Fla. 2d DCA 2016)) (quoting *State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So. 3d 566, 569 (Fla. 2011)). The scope of insurance coverage is defined by the language and the terms of the insurance policy, and where the language of the policy is plain and unambiguous, the contract must be enforced as written. *See generally Siegle v.*

Progressive Consumers Ins. Co., 819 So. 2d 732, 734–35 (Fla. 2002). To state a claim for breach of contract, a plaintiff must allege: "(1) the existence of a contract; (2) a material breach of that contract; and (3) damages resulting from the breach." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009) (citing *Friedman v. N.Y. Life Ins. Co.*, 985 So. 2d 56, 58 (Fla. 4th DCA 2008)).

Here, Martinez argues that the business income and civil authority provisions of the insurance policy covers his dental practice's loss of business income as a result of the Governor's executive order—a civil authority—to limit dental services to only emergency procedures during the COVID-19 pandemic, and that Allied breached the insurance policy by denying benefits under the above provisions.

Accepting all allegations as true, the dental practice's argument still fails because the loss or damage asserted was not due to a "Covered Cause of Loss." In fact, the policy expressly excludes insurer liability for loss or damage caused "directly or indirectly" by any virus. (Doc. 4-1 at 23) (excluding coverage from "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease"). Because Martinez's damages resulted from COVID-19, which is clearly a virus, neither the Governor's executive order narrowing dental services to only emergency procedures nor the disinfection of the dental office of the virus is a "Covered Cause of Loss" under the plain language of the policy's exclusion. Because, as a matter of law, the plain language of the insurance policy excludes coverage of the dental practice's purported damages, the breach-of-contract claim (Count I) is dismissed.

Count II—Declaratory Judgment

The sole basis on which Count II's declaratory judgment claim is pleaded is Martinez's assertion that judicial interpretation of the insurance policy could result in coverage under the civil authority and business income provisions for the loss underlying his breach-of-contract claim. (Doc. 6 at 10.) Pursuant to 28 U.S.C. § 2201, 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." But before the court may afford declaratory relief, an actual controversy must exist. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 239–40 (1937). Because the breach-of-contract claim is dismissed, no controversy exists. Accordingly, Count II is dismissed as well.

CONCLUSION

Because the insurance policy specifically excludes loss caused because of a virus, Martinez fails to state a claim for breach of contract and, in turn, for declaratory judgment. Allied's motion to dismiss, (Doc. 6), is **GRANTED**. Given the deficiencies of this complaint, any amendment would be futile. Accordingly, this action is **DISMISSED WITH PREJUDICE**. The clerk is ordered to **CLOSE** the case.

ORDERED in Fort Myers, Florida, on September 2, 2020.

JOHN L. BADALAMENTI
UNITED STATES DISTRICT JUDGE