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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

SACRAMENTO DOWNTOWN ARENA LLC; SACRAMENTO KINGS LIMITED PARTNERSHIP; SAC MUB1 HOTEL, LLC; and SGD RETAIL LLC, Plaintiffs, vs. FACTORY MUTUAL INSURANCE COMPANY, and DOES 1-10, inclusive, Defendant.	**CASE NO.: 2:21-cv-00441-KJM-DB** **DEFENDANT FACTORY MUTUAL INSURANCE COMPANY'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT** **Date: June 18, 2021** **Time: 10:00 a.m.** **Dept.: Courtroom 3** Complaint Filed: March 11, 2021

TO: PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 18, 2021, at 10:00 a.m. or as soon as thereafter as the matter may be heard before the Honorable Judge Kimberly J. Mueller in Courtroom 3 of the United States District Courthouse for the Eastern District of California, 501 I Street, Sacramento, California 95814, Defendant Factory Mutual Insurance Company ("FM") will and hereby does move the Court for an order granting FM's Motion to Dismiss Plaintiffs Complaint (ECF 1), in whole or in part, pursuant to Federal Rules of Civil Procedure 12(b)(6).

Plaintiffs contend that FM wrongfully denied policy benefits for reported losses to Plaintiffs' businesses arising from the COVID-19 pandemic and have asserted claims for declaratory judgment, breach of contract and bad faith. This motion is made on the grounds that

(1) COVID-19 and the associated governmental shut-down orders cannot cause or constitute physical loss or damage under the FM policy as a matter of law; and (2) the FM Policy's contamination and loss of use exclusions bar coverage for Plaintiffs' claims. FM seeks a determination that the above policy provisions preclude Plaintiffs' claims as a matter of law. As such, FM submits this Motion to Dismiss to dismiss Plaintiffs' Causes of Action for Breach of Contract, Declaratory Relief, and Breach of the Implied Covenant of Good Faith and Fair Dealing as to Plaintiffs' claims for coverage under the above provisions.

The parties have met and conferred pursuant to Local Rule 230 and the Scheduling Order, including exchanging written communications regarding the substance and legal authorities pertaining to the issues to be raised in FM's motion, but were unable to resolve the issues.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Request for Judicial Notice, the pleadings on file with this Court and such arguments and authorities as may be presented at or before the hearing.

Dated: May 7, 2021

CARLSON, CALLADINE & PETERSON LLP

By: */s/Joyce C. Wang*
Joyce C. Wang
Attorneys for Defendant
FACTORY MUTUAL INSURANCE CO.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on May 7, 2021, a true and correct copy of **DEFENDANT FACTORY MUTUAL INSURANCE COMPANY'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT** was electronically filed with the Clerk of Court via the Court's CM/ECF System and will be sent electronically to all registered participants as identified on the Notice of Electronic Filing.

This 7th day of May, 2021.

/s/ Joyce C. Wang
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SACRAMENTO DOWNTOWN ARENA LLC; SACRAMENTO KINGS LIMITED PARTNERSHIP; SAC MUB1 HOTEL, LLC; and SGD RETAIL LLC, Plaintiffs, vs. FACTORY MUTUAL INSURANCE COMPANY, and DOES 1-10, inclusive, Defendant.	**CASE NO.: 2:21-cv-00441-KJM-DB** **DEFENDANT FACTORY MUTUAL INSURANCE COMPANY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT** **ORAL ARGUMENT REQUESTED** **Date:** **June 18, 2021** **Time:** **10:00 a.m.** **Dept.:** **Courtroom 3** Complaint Filed: March 11, 2021

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I. INTRODUCTION

Plaintiffs own and operate arena, hotel, and retail properties in downtown Sacramento. Plaintiffs bring this action against their property insurer, Factory Mutual Insurance Company ("FM"), claiming millions of dollars in coverage for losses related to the coronavirus pandemic. In the Complaint, Plaintiffs allege that their operations at the Golden Center 1 arena, and adjacent hotel/retail operations, were temporarily interrupted by government orders intended to limit the spread of the virus that causes COVID-19 (hereafter, "COVID-19"). Under the plain language of Plaintiffs' Policy, there is no coverage for these types of losses.

Plaintiffs' complaint fails to state a claim for at least three reasons:

First, Plaintiffs' Policy covers loss that is a "direct result of physical loss or damage." (Policy, Exh A to Complaint, ECF 1-1 at 2, 8, 40, 77; *see* Compl., ECF 1 at 6, ¶31). Plaintiffs do not allege any physical damage or alteration to their properties nor can they plausibly do so. Instead, Plaintiffs assert only that the theoretical presence of Covid-19, and government orders restricting activities designed to limit the spread of the virus, have impeded their ability to use their properties. California courts have repeatedly held that the presence of Covid-19 in or near properties, and government orders limiting certain types of commercial activities, do not cause "physical loss or damage," even if they impact the economic use of a property. *See, e.g., Islands Restaurants, LP v. Affiliated FM Ins. Co.*, 2021 U.S. Dist. LEXIS 65015 (S.D. Cal. Apr. 2, 2021); *Out West Restaurant Group, Inc. v. Affiliated FM Ins. Co.*, 2021 U.S. Dist. LEXIS 52462 (N.D. Cal. Mar. 19, 2021).

Second, Plaintiffs' Policy contains a "Contamination Exclusion," which excludes losses related to the "inability to use or occupy property" that is "due to" a "virus." (Policy, ECF 1-1, at 19, ¶D.1; Compl., ECF 1 at 18-19, ¶106) As California courts have recognized, exclusions such as this are dispositive of claims related to the Covid-19 pandemic. *See, e.g., Phan v. Nationwide General Ins. Co.*, 2021 U.S. Dist. LEXIS 20051 (C.D. Cal. Feb. 1, 2021).

Third, Plaintiffs' Policy includes an express exclusion for "loss of use," regardless of whether that loss is the direct result of physical loss or damage. (Policy, ECF 1-1 at 16, ¶3.A.3). Here, Plaintiffs allege that their ability to use insured property for a particular purpose was temporarily suspended as a result of COVID-19 and related government orders. (Compl., ECF 1 at 11-12, ¶¶55-

62). Such a claim is expressly excluded by the Loss of Use Exclusion, which provides a third independent basis for granting this motion to dismiss.

Separate from the above, the FM Policy does provide limited coverage for losses due to "Communicable Disease," where the terms and conditions of those coverage provisions are met. [1] (Policy, ECF 1-1 at 27 and 58; *see* Compl, ECF 1 at 17-18). However, FM has not denied the Communicable Disease claim, which is still being adjusted and remains under consideration. In fact, Plaintiffs recently submitted new information related to the adjustment of this claim to FM on May 3, 2021, which is under review. That claim is therefore not ripe. *See Out West Rest. Grp. Inc. v. Affiliated FM Ins. Co.*, 2021 U.S. Dist. LEXIS 52462 at *17-18 (N.D. Cal. March 19, 2021) (dismissal of complaint does not address pending communicable disease claim).

FM requests that the Court grant its Motion to Dismiss, dismissing all claims in Plaintiffs' Complaint with the possible exception of the claim related to the limited Communicable Disease coverage provisions. *See, e.g., Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 115 (2d Cir.1982); *CommunityCare HMO, Inc. v. MemberHealth, Inc.*, 2007 U.S.Dist. LEXIS 582, at *4–*5 (N.D. Okla. Jan. 3, 2007) (when there are separate and distinct breaches of contract alleged as part of a single cause of action, a party may move to dismiss those portions of the claim that fail to state a claim for relief). No coverage is afforded for Plaintiffs with respect to these claims as a matter of law.

II. THE ALLEGATIONS IN PLAINTIFFS' COMPLAINT

Plaintiffs are Sacramento Downtown Arena LLC, which owns and operates the Golden 1 Center, an event venue in downtown Sacramento; Sacramento Kings Limited Partnership, which operates and manages Sacramento Kings-related events at the Golden 1 Center; Sac MUB1 Hotel LLC, which owns the Kimpton Sawyer Hotel adjacent to the Golden 1 Center; and SGD Retail LLC, which owns retail spaces surrounding the Golden 1 Center. (Compl., ECF 1 at 4, ¶¶15-18; all four entities are collectively referred to herein as "Plaintiffs").

Plaintiffs plead that both the presence of COVID-19 and the governmental orders issued to combat it caused direct physical loss or damage to Plaintiffs' properties. (Compl., ECF 1 at 13-15,

[1] The Communicable Disease provisions do not require "physical loss or damage" as a condition of coverage, and the Contamination and Loss of Use exclusions do not apply to these coverages, which have an applicable sublimit in the annual aggregate of $1,000,000.

¶¶67-81 and ECF 1 at 15-16, ¶¶82-90). They plead that COVID-19 spreads from person to person, primarily through airborne transmission. (Compl., ECF 1 at ¶¶41-42). They also plead that the virus can remain on various surfaces, known as fomites, for hours or days. (*Id.* at ¶¶43-44). Plaintiffs conclude, without providing detail, that COVID-19 was present in the air, on surfaces, and in persons, at or near their properties. (Compl., ECF 1 at 14, ¶¶73-76, and 16, ¶88-89).

Plaintiffs then allege that governmental orders, issued from March to August 2020 for the purpose of "mitigat[ing] the spread of COVID-19," resulted in temporary loss of access to its business locations for several months, which in turn caused lost revenues and profits. (Compl., ECF 1 at 9-11, ¶¶49-54). Plaintiffs also concede that they lost business opportunities because non-government entities, such as the NBA and concert promoters, chose to cancel events as well. (Compl., ECF 1 at 11, ¶55, and at 12, ¶¶58-59). Plaintiffs allege that they spent sums "cleaning and disinfecting the property, repairing or replacing air filters, and remodeling and reconfiguring physical spaces." (Compl., ECF 1 at 14-15, ¶77).

Plaintiffs allege they are entitled to coverage under the Civil and Military Authority Time Element and Communicable Disease coverages in the Policy. (Compl., ECF 1 at 15-18). Plaintiffs seek declaratory judgment in favor of coverage, as well as damages for alleged breach of contract and bad faith. (Compl., ECF 1 at 21-24).

III. THE POLICY

A. General Framework of the Policy.

The Policy insures property "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, ***except as hereinafter excluded*** . . . ." (Compl., ECF 1 at 6**,** ¶31, and Exh. A (Policy) thereto, ECF 1-1, at 2, *see also* p. 8 (italics and bold added)). Thus, to the extent there is physical loss or damage to property that is covered by the Policy, such loss or damage will be covered (assuming all other Policy requirements are met) ***unless*** a specified exclusion applies to bar coverage. The exclusions, in turn, are subject to exceptions specified in the Policy. As the preamble to the "EXCLUSIONS" provisions of the Property Damage section notes, "[i]n addition to the exclusions elsewhere in this Policy, the following ***exclusions apply unless otherwise stated***[.]" (Ex. A, Policy, ECF 1-1 at 16 (emphasis added)). Thus, the Policy responds as follows: (1) an event of physical loss or damage to a covered

property will be covered if the factual predicate is met, (2) *unless* an exclusion applies, and (3) an exclusion applies unless an exception to that exclusion is "otherwise stated."

B. Physical Loss or Damage Required.

With the exception of the limited Communicable Disease coverage, the Policy provisions relied upon by Plaintiffs specifically require "physical loss or damage" as a prerequisite to coverage. Plaintiffs' Complaint relies primarily on the Time Element (i.e., business interruption) coverages, particularly the Civil and Military Authority Coverage Extension, all of which further reinforce the "physical loss or damage" requirement. The relevant policy language is as follows:

Time Element	"This Policy insures TIME ELEMENT loss, as provided in the TIME ELEMENT COVERAGES, *directly resulting from physical loss or damage of the type insured . . . .*" (ECF 1-1, Policy, at 40, ¶1.A.; emph. added).
Contingent Time Element Extended	"This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY *directly resulting from physical loss or damage of the type insured to property of the type insured* at contingent time element locations located within the TERRITORY of this Policy." (ECF 1-1, Policy, at 52, ¶B.; emph. added).
Civil or Military Authority	"5. This Policy also insures TIME ELEMENT loss, as provided by the TIME ELEMENT COVERAGES of this Policy, for the TIME ELEMENT COVERAGE EXTENSIONS described below. . . (ECF 1-1 at 50). [¶][¶] **SUPPLY CHAIN TIME ELEMENT COVERAGE EXTENSIONS** **A. CIVIL OR MILITARY AUTHORITY** This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY if an order of civil or military authority limits, restricts or prohibits partial or total access to an insured location **provided such order is the *direct result of physical damage of the type insured*** at the insured location or within five statute miles/eight kilometres of it." (ECF 1-1 at 52; emph. added).

C. Applicable Exclusions: The Contamination Exclusion and the Loss of Use Exclusions.

The Contamination and the Loss of Use exclusions appear under the Property Exclusions Section and apply to the entire Policy, including coverages provided under the Time Element section, "unless otherwise stated." (Policy, ECF 1-1 at 16, ¶3). The preamble to the Time Element section also specifically provides that all Time Element coverages, including the Civil and Military Authority

coverage, are subject to exclusions shown elsewhere in the Policy. (Policy, ECF 1-1 at 40; *see also* ECF 1-1 at 40, Section 1.A., and ECF 1-1 at 49, ¶4).

1. The Contamination Exclusion.

The Policy specifically excludes "contamination, and any cost ***due to*** contamination ***including the inability to use or occupy property*** or any cost of making property safe or suitable for use or occupancy." (Policy, ECF 1-1 at 19) (emphasis added)). The Policy defines the term "contamination" to mean "any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, ***virus***, disease causing or illness causing agent, fungus, mold or mildew." (Policy, ECF 1-1 at 69) (emphasis added)).

Thus, the Policy excludes, with respect to all coverages, any contamination by virus and any cost due to such contamination, unless there is an exception.

2. The Loss of Use Exclusion.

In addition to the Contamination Exclusion, the Policy "excludes: . . . 3) loss of market or loss of use." (Policy, ECF 1-1 at 16, ¶3.A.3). Plaintiffs' claimed losses stem from their inability to use their properties due to governmental orders or the Coronavirus (*e.g.*, Compl., ECF 1 at 14, ¶72), and therefore directly implicate this "loss of use" exclusion.

IV. LEGAL STANDARD

A. Motion to Dismiss Standard.

Federal Rule of Civil Procedure Rule 12(b)(6) empowers the Court to dismiss a complaint that fails to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). In deciding a motion to dismiss, the Court identifies conclusory allegations and proceeds to disregard them, for they are "not entitled to the assumption of truth." *Id.* at 1951; *see also Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (court need not accept conclusory allegations, unwarranted deductions of fact, and unreasonable inferences). Next, the Court "consider[s] the factual allegations in [the complaint] to determine if they plausibly suggest an entitlement to relief." *Ashcroft v. Iqbal*,

supra, 129 S.Ct. at 1951*; Daniels-Hall v. Nat'l Educ. Ass'n,* 629 F.3d 992, 998 (9th Cir. 2010). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This determination "is context specific, requiring the reviewing court to draw on its experience and common sense." *Id.* at 1940.

The Complaint's exhibits are part of the pleading, and a court may consider them on a motion to dismiss. Fed. R. Civ. Proc. 10(c); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555, n. 19 (9th Cir. 1989)). ("[W]here a plaintiff attaches documents and relies upon the documents to form the basis for a claim or part of a claim, dismissal is appropriate if the document negates the claim."); *Thompson v. Illinois Dept. of Professional Regulation,* 300 F.3d 750, 754 (7th Cir. 2002) ("exhibit trumps the allegations").

A court may grant a Motion to Dismiss in whole or in part. *E.g., CommunityCare HMO, Inc. v. MemberHealth, Inc.*, 2007 U.S. Dist. LEXIS 582, at *4–*5 (N.D. Okla. Jan. 3, 2007) (when there are separate and distinct breaches of contract alleged as part of a single cause of action, a party may move to dismiss those portions of the claim that fail to state a claim for relief)). "[A] Rule 12(b)(6) motion to dismiss need not be granted nor denied in toto . . ." *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 115 (2d Cir.1982).

B. Insurance Contract Interpretation Standards.

When one party brings a pleadings motion in an insurance case, the Court applies the plain language of the policy to determine whether the insured's complaint states a claim as a matter of law. *See Jamison v. Certain Underwriters at Lloyd's*, 599 F. App'x 720, 721 (9th Cir. 2015) (citing *Hervey v. Mercury Cas. Co.*, 185 Cal. App. 4th 954 (2010)). The interpretation of an insurance contract is a question of law. *Ruiz Food Prods., Inc. v. Catlin Syndicate Ltd.*, 588 F. App'x 704, 705 (9th Cir. 2014); *Waller v. Truck Insurance Exchange*, 11 Cal. 4th 1, 18 (1995). Where policy language is clear, it governs, and the policy provisions and exclusions must be enforced as written. *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115-17 (1999)). The court should not rewrite policies to bind the insurer to a risk that it did not contemplate. *Smyth v. USAA*, 5 Cal.App.4th 1470, 1474 (1992).

California requires courts to give effect to every term in a policy so none is "read out" of the contract or rendered meaningless. *See AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 838 (1990); *see also* Cal. Civil Code § 1641. "The terms in an insurance policy must be read in context and in reference to the policy as a whole, with each clause helping to interpret the other." *Sony Computer Entertainment Am. Inc. v. Am. Home Assurance Co.*, 532 F.3d 1007, 1012 (9th Cir. 2008). Moreover, where a policy provision has been judicially construed, that judicial construction is read into the policy. *Lockheed Martin Corp. v. Continental Ins. Co.*, 134 Cal. App. 4th 187, 197 (2005).

V. PLAINTIFFS FAIL TO STATE A CLAIM FOR BREACH OF CONTRACT

A. Plaintiffs Have Not Plausibly Alleged "Physical Loss or Damage" to Its Properties Because Neither COVID-19 Nor the Related Governmental Orders Are "Physical Loss or Damage."

Plaintiffs fail to plausibly allege that their losses were the "direct result of physical loss or damage," as required by the Policy. Plaintiffs generally allege, without providing any detail, that COVID-19 is present in the air and on surfaces at their properties, and that infected persons have "been present" at the properties. (Compl., ECF 1 at 14, ¶74). They also allege that various government orders, which resulted in suspension of commercial activities at insured locations, constitute "physical loss or damage" under the Policy. In the wake of COVID-19, California courts have repeatedly held that such allegations are insufficient to meet the physical loss or damage prerequisites in insurance policies.

Even before the pandemic, California had a robust body of law addressing the common insurance requirement of a physical loss or damage. For example, the California Court of Appeal interpreted the phrase "direct physical loss of or damage to property" as requiring some "distinct, demonstrable, physical alteration of the property." *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779–80 (2010); *accord Simon Marketing, Inc. v. Gulf Ins. Co.*, 149 Cal. App. 4th 616, 623 (2007) (requirement that the loss be 'physical' precludes losses that are intangible or incorporeal and any claim where the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.); *Ward General Ins. Servs. Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 556–57 (2003).

Building on this precedent, during the pandemic California courts have extended the reasoning of *MRI Healthcare* to hold that COVID-19 claims fail because COVID-19 does not constitute a demonstrable physical alteration of the property. *E.g., O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co.*, 2021 U.S. Dist. LEXIS 6003, *8-9 (N.D. Cal., 2021). Likewise, California courts have repeatedly found that government orders that limit or suspend commercial activities do not result in "physical loss or damage." *E.g., 10E, LLC v. Travelers Indemnity Co. of Connecticut,* 2020 U.S. Dist. LEXIS 156827, at *13-14 (C.D. Cal. Aug. 28, 2020). Two recent decisions that were decided on nearly-identical policy language at issue in this case illustrate these findings.

In *Islands Restaurants, LP v. Affiliated FM Ins. Co.*, 2021 U.S. Dist. LEXIS 65015 (S.D. Cal. Apr. 2, 2021), District Judge Huff found that the "Policy requirement of 'physical loss or damage' is not ambiguous." 2021 U.S. Dist. LEXIS 65015, at *11. The District Court relied on both the *MRI Healthcare* line of authority, discussed above, and also noted that "[i]nsurance policies commonly contain physical loss or damage coverage triggers." *Id.* (citing *Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33, 38 (2018); *MRI Healthcare,* 115 Cal. App. 4th at 779). "If a policy term has been 'judicially construed' in a 'sufficiently analogous context,' that term is 'not ambiguous.'" *Id.* (quoting *McMillin Homes Constr., Inc. v. Natl. Fire & Marine Ins. Co.*, 35 Cal. App. 5th 1042, 1052 (2019)). Because the "direct physical loss or damage" requirement was not ambiguous, the Court ruled the plaintiffs' allegation that government orders suspended certain commercial activities at their insured locations was not enough to allege "physical loss or damage." *Id.* at *14. The Court granted then entered judgment on the pleadings.

The result was the same in *Out West Restaurant Group, Inc. v. Affiliated FM Ins. Co.*, 2021 U.S. Dist. LEXIS 52462 (N.D. Cal. Mar. 19, 2021), which noted that "[t]he overwhelming majority of courts have concluded that neither COVID-19 nor the governmental orders associated with it cause or constitute property loss or damage for purposes of insurance coverage. These decisions have reasoned that the virus fails to cause physical alteration of property because temporary loss of use of property (if any) during a pandemic and while government orders are in effect does not qualify as physical loss or damage." *Id.* at *11. Thus, the District Court held that the "plaintiffs have not plausibly alleged

'direct physical loss of or damage to' property, as required by the Policy, and their alleged losses are not covered as a matter of law." *Id.* at *16.

The results discussed above in *Island* and *Out West* have been repeatedly confirmed in a multitude of other nearly identical cases in California. These courts have concluded that neither the presence of COVID-19 nor a temporary restriction on the way a property can be used constitute a physical loss or damage:

- *Sky Flowers, Inc. v. Hiscox Ins. Co*. 2021 U.S. Dist. LEXIS 58387, at *8 (C.D. Cal. Mar. 26, 2021) ("Sky Flowers alleges only loss of use of the property due to the government's response to COVID-19, which does not amount to direct physical damage. …").
- *Daneli Shoe Co. v. Valley Forge Ins. Co.*, 2021 U.S. Dist. LEXIS 53886, at *6-7 (S.D. Cal. Mar. 17, 2021) ("The presence of COVID-19 on surfaces does not 'physically alter' the property …. Without evidence of a 'distinct, demonstrable, physical alteration,' Plaintiff does not have a valid claim.").
- *Another Planet Ent., LLC v. Vigilant Ins. Co.*, 2021 U.S. Dist. LEXIS 35760, at *1-2 (N.D. Cal. Feb. 25, 2021) ("Another Planet's facilities did not shut down because of the virus's presence on facility surfaces. Rather, those facilities shut in response to the closure orders…. Therefore, the company's losses were not caused by 'direct physical loss or damage' to its facilities."). [2]

[2] Other California case law on this issue includes: *French Laundry Partners, LP DBA French Laundry v. Hartford Fire Insurance Company*, 2021 U.S. Dist. LEXIS 80726, (N.D. Cal. April 27, 2021); *Protégé Rest. Partners LLC v. Sentinel Ins. Co. Ltd*, 2021 U.S. Dist. LEXIS 24835, at *11-12 (N.D. Cal. Feb. 8, 2021) *; Wellness Eatery La Jolla LLC, v. The Hanover Ins. Grp.*, 2021 U.S. Dist. LEXIS 23014 (S.D. Cal. Feb. 3, 2021); *Unmasked Management, Inc. v. Century-National Insurance Company*, 2021 U.S. Dist. LEXIS 13372 (S.D. Cal. Jan. 22, 2021); *Kevin Barry Fine Art Associates v. Sentinel Insurance Company*, 2021 U.S. Dist. LEXIS 10458, at *17, *19 (N.D. Cal. Jan. 13, 2021) (allegations regarding virus being present on and damaging property implausible and insufficient to state a claim); *BA LAX, LLC et al. v. Hartford Fire Ins. Co.*, 2021 U.S. Dist. LEXIS 10919 (C.D. Cal. Jan. 12, 2021); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co.*, 2020 U.S. Dist. LEXIS 188463 at *7-13 (C.D. Cal. Oct. 2, 2020); *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, 2020 U.S. Dist. LEXIS 182406 *3-4 (S.D. Ca. Oct. 1, 2020) ("*Pappy's II*") (presence or threatened presence of virus is not physical loss or damage, and, even if so, were not the cause of the losses); *John's Grill, Inc. v. The Hartford Fin. Srvcs. Grp.*, Case No. CGC-20-584184, San Francisco Sup. Ct. (Feb. 10, 2021); *The Inns By The Sea v. California Mutual Ins. Co.*, Case No. 20-cv-001274 (Monterey Superior Ct. Aug. 4, 2020). This list is not exhaustive—well over a dozen other California federal district courts have similarly ruled that COVID-19 and government shut down orders are not "physical loss or damage."

As the overwhelming majority of courts in California and elsewhere have found, the presence of COVID-19, which can be cleaned, cannot constitute physical loss or damage because it does not alter the property at all, let alone create tangible, structural damage. *O'Brien Sales & Mktg. v. Transp. Ins. Co.*, 2021 U.S. Dist. LEXIS 6003, *8-9 (N.D. Cal. Jan 12, 2021) (no physical loss or damage because surfaces contaminated with the novel coronavirus "can be disinfected and cleaned"); *Circus Circus LV, LP v. AIG Specialty Insurance Co.*, 2021 U.S. Dist. LEXIS 36306, *10 (Feb. 26, 2021) ("any alleged surface-contamination is ephemeral—the virus is only detectable on surfaces for 'up to three days.'"); *Promot. Headwear Int'l v. Cincinnati*, 2020 U.S. Dist. LEXIS 228093, at *23-24 (D. Kan., Dec. 3, 2020) ("even assuming that the virus physically attached to covered property, it did not constitute the direct, physical loss or damage required to trigger coverage because its presence can be eliminated."); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 2020 U.S. Dist. LEXIS 234939, at *20 (W.D. Tex. Dec. 14, 2020) (even assuming that the virus that causes COVID-19 was present, it would not constitute the direct physical loss or damage because it can be eliminated and does not threaten the structures covered by property insurance policies).

There is a practical, common sense aspect present in these multiple court rulings. In essence, Plaintiffs' argument—that the mere presence of transient particles visible only through an electron microscope constitutes "physical loss or damage" sufficient to trigger coverage under a property insurance policy—would effectively render insurers responsible for every cost associated with the billions of organic and inorganic particles that travel through the air or rest on the surfaces around us at every moment of every day. As other courts have recognized, this absence of any limiting principle provides another reason why Plaintiffs' claims must be dismissed. *See, e.g., Bel Air Auto Auction Inc. v. Great Northern Ins. Co.*, 2021 U.S. Dist. LEXIS 72154 (D. Md. Apr. 14, 2021) (cleaning and disinfecting surfaces is not repair or replacement of property that has been structurally altered by an outside force); *Uncork and Create LLC v. Cincinnati Ins. Co.*, 2020 U.S. Dist. LEXIS 204152 at *14 (S.D.W. Va. Nov. 2, 2020) ("In short, the pandemic impacts human health and human behavior, not physical structures. Those changes in behavior, including changes required by governmental action, caused the Plaintiff economic losses.") As set forth above, that cannot be, and is not, the law.

Similarly, loss of use or restricted access to properties due to COVID-19-related government shut-down orders does not constitute physical loss or damage either. *E.g., Protégé Rest. Partners LLC v. Sentinel Ins. Co., Ltd.*, 2021 U.S. Dist. LEXIS 24835 at *10-11 (N.D. Cal. Feb. 8, 2021) (collecting cases) ("[e]very California court that has addressed COVID-19 business interruption claims to date has concluded that government orders that prevent full use of a commercial property or that make the business less profitable do not themselves cause or constitute "direct physical loss of or physical damage to" the insured property"; *Ba Lax, LLC v. Hartford Fire Ins. Co.*, 2021 U.S. Dist. LEXIS 10919, at *7-8 (C.D. Cal. Jan. 12, 2021) (collecting cases); *Colgan v. Sentinel Ins. Co., Ltd.*, 2021 U.S. Dist. LEXIS 27055, at *5-6 (N.D. Cal. Jan. 26, 2021); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F. Supp. 3d 937, 943-44 (S.D. Cal. Sept. 11, 2020) (inability to use barber shop under government order did not constitute physical loss or damage).

Here, Plaintiffs allege that they suffered economic loss because access to their business was impeded by various "stay-at-home" government orders. (Compl., ECF 1 at 9-11). As Plaintiffs concede, the orders were issued to slow the spread of the disease by preventing large groups of people from gathering together and engaging in non-essential activities, not because of any physical damage at their properties. (Compl., *e.g.*, ECF 1 at 9, ¶¶49-51). Plaintiffs' Complaint does not and cannot allege their properties suffered "physical loss or damage" as required by the Policy.

A. Plaintiffs Have Not Suffered "Physical Damage of the Type Insured" Under the Civil and Military Authority Coverage Extension.

In an effort to avoid the overwhelming case law, Plaintiffs argue that their time element claim under the Civil and Military Authority ("CMA") provision is covered because that coverage extension states that the physical loss or damage must be "of the type insured," which, Plaintiffs assert, is "broader" than "physical loss or damage." (Compl., ECF 1 at 15-17; *see* p. 16, ¶91); Plaintiffs are wrong for many reasons.

The CMA coverage provision states as follows:

> **"A. CIVIL OR MILITARY AUTHORITY**
>
> This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY if an order of civil or

> military authority limits, restricts or prohibits partial or total access to an insured location **provided such order is the *direct result of physical damage of the type insured*** at the insured location or within five statute miles/eight kilometres of it." (ECF 1-1 at 52; emph. added).

The unambiguous language in the CMA imposes two separate requirements: first, the order must be the direct result of "***physical loss or damage***" and, second, the damage must be "***of the type insured***." Plaintiffs do not plausibly allege its losses meet either requirement. Plaintiffs here allege only that operations there were suspended or impeded as a result of the government orders. (Compl., ECF 1 at 11-12). *See Pappy's Barber Shops*, 487 F. Supp. 3d 937, 945 (holding insured failed to state a claim under Civil Authority Coverage because: "[T]he complaint does not allege that any COVID-19 Civil Authority Orders prohibited Plaintiffs from access to their business premises. Rather, it only alleges that Plaintiffs were prohibited from operating their businesses at their premises."). Indeed, Plaintiffs concede that their loss of business stemmed in large part from decisions made by the NBA and other third-party business organizations to suspend or cancel events nationwide, not by any government orders "prohibiting access" as a direct result of physical damage at any specific insured location. (Compl., ECF 1 at 11, ¶55 and 12, ¶58).

Plaintiffs also do not plausibly allege that the coronavirus caused physical damage to any of their facilities or within five miles of them, or that the orders were implemented as a consequence of physical damage caused by COVID-19 at those locations. *See Unmasked Management, Inc. v. Century-National Insurance Company*, 2021 U.S. Dist. LEXIS 13372, at *19-20 (rejecting insured's claim of coverage under civil authority provision where there was no allegation of physical damage).[3]

Nevertheless, Plaintiffs argue that, because COVID-19 constitutes a communicable disease under the Communicable Disease provisions of the Policy, the presence of COVID-19 must be physical loss or damage "of the type insured" for purposes of all other coverages in the Policy. (Compl., ECF 1 at 16-17, ¶¶91-92). However, as Plaintiffs concede, the phrase "physical loss or

[3] Numerous court decisions that have specifically addressed Civil Authority coverage in COVID-19 claims have found that restricted access due to governmental shelter in place orders are not the result of "physical loss or damage." *E.g., 10E, LLC v. Travelers Indemnity Co. of Connecticut*, 2020 U.S. Dist. LEXIS 156827 (C.D. Cal. Aug. 28, 2020); *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, 2020 U.S. Dist. LEXIS 182406 (S.D. Ca. Oct. 1, 2020); *Rose's 1, LLC v. Erie Ins. Exchange*, 2020 D.C. Super. LEXIS 10 (Superior Court of D.C. Aug. 6, 2020); *Malaube LLC v. Greenwich Ins. Co.*, 2020 U.S. Dist. LEXIS 156027 (S.D. Fl. Aug. 26, 2020); *The Inns by the Sea v. California Mutual Ins. Co.*, Case No. 20CV001274 (Superior Ct. of Cal., Aug. 6, 2020).

damage of the type insured" *still requires the existence of physical damage*, which, as discussed above, simply is not present here. (*Id*.)

Moreover, the Communicable Disease provisions do not require "physical loss or damage" at all. Rather, the conditions to Communicable Disease coverage are:

- the actual, not suspected, presence of a *communicable disease* at a location owned, leased or rented by the insured;[4]
- access to which has been limited, restricted or prohibited for more than 48 hours;
- by an order of an authorized governmental agency regulating such presence of communicable disease. (Policy, ECF 1-1 at 27, ¶F. and at 58, ¶E).

The Communicable Disease provisions thus require the actual presence of a communicable disease, *not* the existence of physical loss or damage. The provisions provide limited coverage for communicable disease, provided all of the requirements of the provisions are met. Thus, any coverage for COVID-19 under the Communicable Disease provisions does not equate to a "type" of "physical loss or damage" covered under the other provisions of the Policy. Plaintiffs' interpretation of the Policy is a contrived effort to achieve a result that is contrary to the plain meaning of the Policy language. *See, e.g.*, *Sony Computer Entertainment Am. Inc. v. Am. Home Assurance Co.*, 532 F.3d 1007, 1012 (9th Cir. 2008) (insurance policy must be read in context and in reference to the policy as a whole, with each clause helping to interpret the other).

Finally, the alleged "physical damage" here is not "of the type insured." Plaintiffs' Policy contains two unambiguous exclusions that prevent them from claiming their alleged losses were of the type insured: the Contamination Exclusion and the Loss of Use Exclusion.

VI. POLICY EXCLUSIONS PRECLUDE PLAINTIFFS' CLAIMS

A. The Contamination Exclusion Bars Plaintiffs' Complaint.

As a separate and independent basis for dismissal, the Policy contains an unambiguous exclusion for viruses and disease-causing agents. The Policy excludes "contamination, and any cost

[4] The Policy defines "communicable disease," in relevant part, as "disease which is transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges ...." (Policy, ECF 1-1 at 69). The Policy then sets forth limited coverage specific to communicable disease, subject to a $1,000,000 sublimit. (ECF 1-1 at 10, 11).

due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy." (Policy, ECF 1-1 at 19). This exclusion incorporates the definition of contamination, which is defined in relevant part as "any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, *pathogen or pathogenic organism*, bacteria, *virus*, *disease causing or illness causing agent*, fungus, mold or mildew." (*Id.* at 69 (emphasis added)). Reading the definition of "contamination" together with Contamination Exclusion, the Policy specifically excludes "the inability to use or occupy property" when that condition is "due to the actual or suspected presence of any … virus."

Plaintiffs' often-repeated allegations that its losses stem from the presence of COVID-19 at its properties and elsewhere mean that the properties experienced *contamination* from a *virus* as defined in the Policy. Plaintiffs have thus pleaded themselves squarely into the Contamination Exclusion and out of coverage. The Contamination Exclusion expressly excludes precisely the loss of use and mitigation claims Plaintiffs have pleaded, by excluding "any cost due to contamination *including the inability to use or occupy property* or any cost of *making property safe or suitable for use or occupancy*." (Policy, ECF 1-1 at 19 (emphasis added)). Moreover, because COVID-19 contamination is excluded, it cannot constitute "physical loss or damage *of the type insured*" as required by the CMA coverage provisions relied upon by Plaintiffs, as discussed above.

Courts that have examined contamination exclusions similar to the one at issue have held that they preclude recovery of losses related to the pandemic and government shut down orders. *See, e.g.*, *West Coast Hotel Mgmt. v. Berkshire Hathaway Guard Ins. Cos.*, 2020 U.S. Dist. LEXIS 201161, **15-16 (C.D. Cal. Oct. 27, 2020) (exclusion precludes coverage for "losses caused directly or indirectly by a virus capable of inducing disease"); *Boxed Foods Co., LLC v. California Capital Ins. Co.*, 2020 U.S. Dist. LEXIS 198859 (N.D. Cal. Oct. 26, 2020) (business interruption losses due to COVID-19 excluded by policy's "Pathogenic Organisms Exclusion"); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co.*, 2020 U.S. Dist. LEXIS 188463 at *13-14 (C.D. Cal. Oct. 2, 2020) (coverage precluded under virus exclusion even if losses from inability to use property amounted to direct physical loss or damage to property); *Phan v. Nationwide General Ins. Co.*, 2021 U.S. Dist. LEXIS 20051, at *8 (C.D. Cal. Feb. 1, 2021) ("Because Plaintiff's loss arises from the coronavirus

pandemic and resulting Public Orders, the Virus Exclusion applies on its face."); *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, 2020 U.S. Dist. LEXIS 196932, at *9 (C.D. Cal. Oct. 19, 2020) (civil authority coverage is prevented by the virus exclusion, which "explicitly excludes loss or damage resulting from a virus"); *Franklin EWC, Inc., v. The Hartford Financial Services Group, Inc.*, 2020 U.S. Dist. LEXIS 234651, at *8 (N.D. Cal. Dec. 14, 2020); *Healthnow Medical Center, Inc. v. State Farm General Ins. Co.*, 2020 U.S. Dist. LEXIS 232626, at *4 (N.D. Cal. Dec. 10, 2020) ("Plaintiff thus urges that the Virus Exclusion does not apply. In so doing, Plaintiff urges the Court to reject the analysis adopted by courts throughout the Ninth Circuit, and indeed across the country."); *Founder Inst. Inc. v. Hartford Fire Ins. Co.*, 2020 U.S. Dist. LEXIS 196732, at *1 (N.D. Cal. Oct. 22, 2020).[5]

In a nod to its vulnerability on this score, Plaintiffs' Complaint pre-emptively offers several reasons it says render the Contamination Exclusion inapplicable. None is persuasive. *First*, Plaintiffs point to the language of the "exception" to the exclusion, set forth in bold below:

> "D. This Policy excludes the following unless directly resulting from other physical damage not excluded by this Policy:
>
> 1) contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. If **contamination due only to the actual not suspected presence of contaminant(s) directly results from other physical damage not excluded by this Policy, then only physical damage caused by such contamination may be insured."** (Policy, ECF 1-1 at 19 (bold added)).

Plaintiffs argue that, under the language in bold above, the Contamination Exclusion does not apply if there is coverage under other terms of the Policy, such as under the Civil and Military Authority extension or Communicable Disease provisions. (Compl., ECF 1 at 19, ¶109). Plaintiffs' allegation does not make sense.

[5] Courts in other states concur: *e.g., Diesel Barbershop LLC v. State Farm Lloyds*, 2020 U.S. Dist. LEXIS 147276. *17-20 (W.D. Tex. Aug. 13, 2020); *Turek Enterprises, Inc. v. State Farm Mut. Aut. Ins. Co.*, 2020 U.S. Dist. LEXIS 161198, *21 (E.D. Mich. Sept. 3, 2020) ("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.'"); *Martinez v. Allied Ins. Co. of America*, U.S. Dist. LEXIS 165140, *6 (M.D. Fla. Sept. 2, 2020) (COVID-19 was "clearly a virus . . . under the plain language of the policy's exclusion"); *Wilson v. Hartford Casualty Co.*, 2020 U.S. Dist. LEXIS 179896, *17-19 (E.D. Penn. Sept. 30, 2020).

The bolded "exception" to the exclusion language cited by Plaintiffs applies only where the contamination itself "directly results" from other non-excluded physical damage. If, for example, an ammonia line is struck by a forklift truck (non-excluded damage), and the ammonia then escapes into a building directly resulting in other, *additional* "physical damage . . . by contamination," then the exception may come into play and the resulting damage may be covered. Here, however, Plaintiffs do not allege that the alleged contamination of their properties directly resulted from *other physical damage not excluded by the Policy*. Rather, they repeatedly allege that the excluded contamination (the presence of the virus) *is* the physical damage causing their loss. Neither do Plaintiffs plausibly allege that any additional physical damage ensued from the contamination caused by the other, damage not excluded by the Policy.

Second, Plaintiffs argue that the Contamination Exclusion "conflicts" with the Communicable Disease coverage in the Policy, and "swallows" the Communicable Disease provisions "as a whole." (Compl., ECF 1 at 19, ¶110). This allegation ignores the well-settled rule that "'[a]n insurance policy may exclude coverage for particular injuries or damages in certain specified circumstances while providing coverage in other circumstances.'" *Julian v. Hartford Underwriters Ins. Co.*, 35 Cal.4th 747, 759 (2005), quoting *Frank and Freedus v. Allstate Ins. Co.*, 45 Cal.App.4th 461, 471 (1996) ("*Julian*"). The fact that FM provides limited coverage for Communicable Disease (if the relevant Policy requirements are met) does not preclude application of the Contamination Exclusion in other circumstances. As the *Julian* Court stated, an insurer is not prohibited from "drafting and enforcing policy provisions that provide or leave intact coverage for some, but not all, manifestations of a particular peril." *Id.* FM is free to exclude contamination, including all viruses, disease causing or illness causing agents, *except* for Communicable Disease, provided the conditions of the Communicable Disease coverage are met.

The fact is that the Communicable Disease and Contamination Exclusion provisions are not only easily harmonized, but also inherently complementary. There is no need to read one or the other out of the Policy, as Plaintiffs urge. The Communicable Disease provisions work in tandem with the Contamination Exclusion because one is a limited exception to the other. The Contamination Exclusion broadly precludes coverage for all contamination, including contamination caused by virus

or a disease-causing agent (such as aerosols or fomites). In the introductory language to the EXCLUSIONS section, the Policy clarifies that exceptions to exclusions may apply: "[T]he following exclusions apply *unless otherwise stated* . . . ." (Policy, ECF 1-1 at 16 (emphasis added)). The Communicable Disease coverages act as such an exception to the Contamination Exclusion for certain costs and losses related to the actual presence of communicable disease at the insured's premises. *See, e.g., Julian,* 35 Cal.4th at 759; *see also Salon XL Color & Design Grp., LLC v. W. Bend Mut. Ins. Co.*, 2021 U.S. Dist. LEXIS 21298, at *8-9 (E.D. Mich. Feb. 4, 2021) (rejecting argument that a communicable disease provision created ambiguity because it could be read harmoniously with virus exclusion). The Policy's limited Communicable Disease coverages are further subject to a combined $1 million annual aggregate sublimit and cannot reasonably be construed to open up the Policy to cover all loss arising out of a communicable disease. (Policy, ECF 1-1 at 10, 11).

Plaintiffs' interpretation would read out of the Policy a number of different terms in contravention of well-established rules of contract construction. *See AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 838 (1990) (courts must give effect to every term in a policy so none is "read out" of the contract or rendered meaningless); *see also* Cal. Civil Code § 1641. For instance, the Contamination Exclusion itself explicitly bars coverage not only for "virus," but also for "disease causing or illness causing agents." (Policy, ECF 1-1 at 19). If Plaintiffs were correct, the presence of the Communicable Disease provisions would mean the Contamination Exclusion would not bar recovery for *any* "disease causing or illness causing agents," thus rendering their inclusion within the Contamination Exclusion a nullity. Similarly, the Communicable Disease provisions themselves provide for a $1 million sublimit. If, as Plaintiffs contend, the existence of those two coverages somehow renders the Contamination Exclusion inapplicable and thus consequently unlocks each of the other coverages identified by Plaintiffs as applicable here, losses stemming from a communicable disease like COVID-19 would be covered up to the Policy's full limit of liability in the annual aggregate (here, $850 million), thus rendering that $1 million sublimit a complete nullity, as well.

Third, Plaintiffs argue that the exclusion only applies to "costs" or "cost-based" claims, not to time element losses or "other physical damage of the type insured." (Compl., ECF 1 at 19, ¶111). But that is simply not true. The Exclusion states that it "excludes the following: [¶] **contamination, and**

any cost due to contamination **including the inability to use or occupy property or** any **cost of making property safe or suitable for use or occupancy**." (Policy, ECF 1-1 at 19). The use of a comma and the conjunctive "and" means that the word "contamination" has meaning in addition to the phrase "cost due to contamination." As courts have recently noted, Plaintiffs' argument "misunderstands the conjunctive effect that the word 'and' included after the word 'Contamination' has." *Firebirds Internat'l, LLC v. Zurich Am. Ins. Co.*, No. 2020-CH-05360, *Slip Op.* at *8 (Ill. Cir. Ct. Apr. 19, 2021) (copy attached as RJN Exh. 1).

Given that the Policy itself covers "all risks of physical loss or damage," the only definition of a "contamination" exclusion which makes any sense must encompass precisely those categories Plaintiffs seek to read out of the Policy, *i.e.*, all "loss or damage due to or resulting from contamination," including time element or other loss. This is the conclusion reached by the *Firebirds Int'l* court, which stated that "[i]nterpreting the exclusion to exclude only "cost" and not "loss" would render [the policy's] broad exclusionary language quite meaningless." *Firebirds Internat'l, LL, Slip Op.* RJN Exh. 1, at *8.

The Contamination Exclusion excludes "contamination, and any cost due to contamination *including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy*." This Exclusion expressly excludes precisely the loss of use and mitigation claims Plaintiffs have pleaded. *Firebirds Internat'l, LLC*, RJN Exh. 1, at *7 ("ordinary meaning of the exclusion is that any loss caused by a virus and any cost attributed to a virus are excluded from coverage").

B. The Loss of Use Exclusion precludes Plaintiffs' Claims.

Plaintiffs' FM Policy also unambiguously excludes "loss of market or loss of use." (Policy, ECF 1-1 at 16, ¶3.A.3). Here, Plaintiffs' alleged losses stem from the suspension of operations at its facilities pursuant to government orders. This claim directly implicates the Loss of Use Exclusion. Plaintiffs' complaint repeatedly alleges that governmental orders, and actions by third parties such as the NBA, event planners, and customers, impeded Plaintiffs' ability to use its facilities.

Notably, if Plaintiffs are relying on the "loss of use" caused by government orders to establish the "physical loss" requirement for coverage, then they must also concede that the exclusion for a

"loss of use" means that its losses are not "of the type insured." Indeed, that was the conclusion of the Northern District in the case *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834 (N.D. Cal. Sept. 14, 2020): "The separate provision for loss of use suggests that the 'direct physical loss of ... property' clause was not intended to encompass a loss where the property was rendered unusable without an intervening physical force." *Id*. at 843.

Other courts addressing COVID claims have similarly recognized that the Loss of Use Exclusion precludes coverage for pure loss of use claims, unaccompanied by physical loss or damage. *See, e.g., Selane Products, Inc. v. Continental Cas. Co.*, 2020 U.S. Dist. LEXIS 233753, at *14 (C.D. Cal. Nov. 24, 2020) (finding the Policy precluded coverage in part because it had an exclusion for "loss of use or loss or market"); *Whiskey River on Vintage, Inc. v. Illinois Cas. Co*., 2020 U.S. Dist. LEXIS 233826, at *53-54 (S.D. Iowa Nov. 30, 2020) (in addition to the failure of the insured to demonstrate direct physical loss or damage, the "loss of use" exclusion applied to preclude the COVID-19 claim); *Harvest Moon Distributors, LLC v. S.-Owners Ins. Co*., No, 2020 U.S. Dist. LEXIS 189390, at *15-16 (M.D. Fla. Oct. 9, 2020); *Salon XL Color & Design Group, LLC v. West Bend Mutual Insurance Co.*, 2021 U.S. Dist. LEXIS 21298 at *10-11 (E.D. Mich. Feb. 4, 2021).

VII. PLAINTIFFS FAIL TO STATE A CLAIM FOR BAD FAITH OR DECLARATORY RELIEF

Plaintiffs also allege a claim for breach of the implied covenant of good faith and fair dealing. But the implied covenant is "circumscribed by the purposes and express terms of the contract." *Hicks v. E.T. Legg & Associates*, 89 Cal. App. 4th 496, 509 (2001); *see also Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317, 349-350 (2000). "Under California law, a breach of the implied covenant of good faith and fair dealing in the insurance context has two elements: '(1) benefits due under the policy must have been withheld and (2) the reason for withholding benefits must have been unreasonable or without proper cause.'" *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 844 (N.D. Cal. Sept. 14, 2020) (quoting *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 (1990). Because Plaintiffs have failed to plausibly allege coverage, as a matter of law, no benefits were unreasonably withheld, and the threshold requirement for a bad faith claim is unmet. *See id.; see also*

Waller v. Truck Insurance Exchange, 11 Cal. 4th 1, 35 (1995) (plaintiff cannot maintain bad faith claim unless policy benefits were due).

In addition, where there is no coverage, the declaratory relief claim fails as well. *E.g., Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F. Supp. 3d 937, 945 (S.D. Cal. Sept. 11, 2020). The bad faith and declaratory relief claims must also be dismissed.

VIII. CONCLUSION

This Court is just the latest to be called upon to answer the same questions already addressed by many other California courts: does the presence or threatened presence of COVID-19 or a government order restricting the activities in a business amount to a "physical loss or damage", and 2) even if physical loss or damage exists, are the claims excluded by the contamination or loss of use exclusions? Under the plain meaning of Plaintiffs' Policy, and the overwhelming decisions of courts nationwide, the answers to these questions is "no." FM requests that its Motion to Dismiss be granted.

Dated: May 7, 2021

CARLSON, CALLADINE & PETERSON LLP

By: */s/Joyce C. Wang*
Joyce C. Wang
Attorneys for Defendant
FACTORY MUTUAL INSURANCE CO.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on May 7, 2021, a true and correct copy of **DEFENDANT FACTORY MUTUAL INSURANCE COMPANY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT** was electronically filed with the Clerk of Court via the Court's CM/ECF System and will be sent electronically to all registered participants as identified on the Notice of Electronic Filing.

This 7th day of May, 2021.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

SACRAMENTO DOWNTOWN ARENA LLC; SACRAMENTO KINGS LIMITED PARTNERSHIP; SAC MUB1 HOTEL, LLC; and SGD RETAIL LLC, Plaintiffs, vs. FACTORY MUTUAL INSURANCE COMPANY, and DOES 1-10, inclusive, Defendant.	**CASE NO.: 2:21-cv-00441-KJM-DB** **DEFENDANT FACTORY MUTUAL INSURANCE COMPANY'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT** **Date: June 18, 2021** **Time: 10:00 a.m.** **Dept.: Courtroom 3** Complaint Filed: March 11, 2021

Pursuant to Federal Rules of Civil Procedure, Rule 201, Factory Mutual Insurance Company ("FM") will request that this Court, in considering FM's Motion to Dismiss (FRCP 12(b)(6)), take judicial notice of the referenced document attached hereto. Pursuant to Rule 201, the Court may take judicial notice of court filings and other matters of public record. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746, n. 6 (9th Cir. 2006).

Based on the foregoing, FM respectfully requests that the Court take judicial notice of the following documents:

1. The file-endorsed copy of the opinion filed on April 19, 2021, in the Circuit Court of Illinois, Cook County, styled *Firebirds International, LLC v. Zurich American Insurance Company*, Case No. 2020-CH-05360. (A file-endorsed copy of the opinion is attached hereto as Exhibit 1).

Dated: May 7, 2021

CARLSON, CALLADINE & PETERSON LLP

By: */s/Joyce C. Wang*
Joyce C. Wang
Attorneys for Defendant
FACTORY MUTUAL INSURANCE CO.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on May 7, 2021, a true and correct copy of **DEFENDANT FACTORY MUTUAL INSURANCE COMPANY'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT** was electronically filed with the Clerk of Court via the Court's CM/ECF System and will be sent electronically to all registered participants as identified on the Notice of Electronic Filing.

This 7th day of May, 2021.

/s/ Joyce C. Wang
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EXHIBIT 1

Opinion
Circuit Court of Illinois, Cook County, styled *Firebirds International, LLC v. Zurich American Insurance Company*, Case No. 2020-CH-05360

EXHIBIT 1

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

FIREBIRDS INTERNATIONAL, LLC *Plaintiff,* vs. ZURICH AMERICAN INSURANCE CO., *Defendant.*	Case No. 2020-CH-05360 Judge Michael T. Mullen

MEMORANDUM OPINION AND ORDER

This matter comes to be heard on Defendant Zurich American Insurance Company's Motion to Dismiss Plaintiff Firebirds International LLC's First Amended Complaint pursuant to 735 ILCS 5/2-615. The Court has reviewed the briefs and supplemental authorities submitted by the parties, as well as heard the parties' oral arguments. For the reasons discussed below, Defendant's motion is granted.

I. Background

Plaintiff Firebirds International LLC ("Firebirds") owns more than 50 Wood Fired Grill restaurants in 19 states.[1] First Amended Complaint ("FAC") ¶¶ 2, 15, 18. On January 21, 2020, the United States reported its first case of COVID-19. *Id.* ¶ 16.[2] On March 11, 2020, the World Health Organization characterized COVID-19 as a pandemic. Firebirds alleges that shortly thereafter state governments in each of the 19 states in which Firebirds owns restaurants issued

[1] The states are: Alabama, Arizona, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Virginia.
[2] The Court notes that the Centers for Disease Control and Prevention states that SARS-Cov-2 is the virus that causes the disease COVID-19. Science Brief: SARS-CoV-2 and Potential Airborne Transmission; Centers for Disease Control and Prevention, Updated October 5, 2020, https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html; Coronavirus Disease 2019 (COVID-19), Centers for Disease Control and Prevention, https://www.cdc.gov/dotw/covid-19/index.html. The Court will refer to the virus and disease by their respective names except when quoting the parties.

separate closure orders intended to curb the spread of COVID-19. FAC ¶ 18. The closure orders prohibited restaurants, including Firebirds', from offering dine-in service. *Id.* Each of Firebirds' restaurants "have incurred additional extra expenses in order to clean, sanitize, repair, alter, modify" each restaurant so as to "make their restaurants safe for workers and customers." *Id.* ¶ 19. Further, each of Firebirds' restaurants have had their "gross revenues destroyed." *Id.*

These closure orders were eventually lifted or eased and patrons were allowed to return for dine-in service at Firebirds' insured restaurants, although Firebirds does not allege when the orders were lifted. Firebirds alleges that both employees and patrons at a vast majority of its insured restaurants contracted COVID-19, as evidenced by positive confirmed cases. *Id.* ¶ 27. In response to these confirmed cases, Firebirds took costly actions to prevent the spread of the virus at its insured restaurants. *Id.* These actions included professional-grade deep cleaning, installation of Plexiglass dividers, hands-free sanitizing stations, and the removal of usable chairs and tables to maintain a six feet of separation between patrons. *Id.* ¶¶ 28, 30, 33, 35.

A. Firebirds' Claim

After the state closure orders had been issued, Firebirds submitted a timely claim to Defendant Zurich American Insurance Company ("Zurich") seeking coverage for the significant losses that Firebirds had incurred. *Id.* at ¶ 47. In March of 2019, Zurich had issued an all-risk renewal commercial property insurance policy to Firebirds. *Id.* ¶¶ 22-24. Zurich EDGE Policy Number ERP 0191571-03 was effective for the policy period of March 30, 2019 to March 30, 2020 and provided $146,000,000 in coverage for loss or damage. *Id.* ¶ 22, Ex. A. This policy was renewed under Zurich EDGE Policy Number ERP 0191571-04 which was effective for the March 30, 2020 to March 30, 2021 policy period and provided $152,461,305 in coverage for loss or damage. *Id.* ¶ 22, Ex. B. On April 27, 2020, Zurich denied the coverage claim on the basis that COVID-19 (SARS-Cov-2) virus does not constitute "direct physical loss or damage to property." Zurich further denied coverage as the "Contamination" exclusion contained within the identified policies excluded coverage for Firebird's claim. *Id.* ¶ 48, Ex. C.

B. The Zurich Exclusion

The Zurich "Contamination" exclusion clause cited by Zurich in its denial of Firebirds' claim is contained in Section III of the policies which are entitled "PROPERTY DAMAGE" under "EXCLUSIONS." The relevant language reads as follows:

"SECTION III-PROPERTY DAMAGE

3.03. EXCLUSIONS

The following exclusions apply unless specifically stated elsewhere in this Policy:

3.03.01 This Policy excludes the following unless it results from direct physical loss or damage not excluded by this Policy.

3.03.01.01 **Contamination**, and any cost due to **Contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy, except as provided by the Radioactive Contamination Coverage of this Policy."

Subsection 3.03.01.01 of Zurich EDGE Policy Number ERP 0191571-03 and 0191571-04, Exhibits A & B to FAC at 21, 182 (emphasis in original).

At Section VII, in the "DEFINITIONS" section of the policies, the Policies define "Contamination." The relevant section reads as follows:

"SECTION VII-DEFINTIONS

7.09. **Contamination (Contaminated)** – Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, **Fungus**, mold or mildew."

Subsection 7.09 of Zurich EDGE Policy Number ERP 0191571-03 and 0191571-04, Exhibits A & B to FAC at 58, 219 (emphasis in original).

C. Firebirds' Complaint

In its six-count Amended Complaint, Firebirds asserts causes of action against Zurich for breach of contract in Counts I through III and requests a declaratory judgment in Counts IV through VI. More specifically, Firebirds asserts that by denying its claim, Zurich has materially breached the following policy provisions: "Time Element" (Count I); "Civil Authority" (Count II); and "Protection and Preservation of Property" (Count III). Firebirds further requests this court make a judicial declaration that the losses it incurred as a result of Covid-19 pandemic are insured losses pursuant to; the "Time Element" provision (Count IV); the "Civil Authority" provision (Count V); and the "Protection and Preservation of Property" provision (Count VI).

Firebirds specifically alleges that "[d]ue to the COVID-19 pandemic, Firebirds' properties have suffered direct physical loss or damage resulting from COVID-19." FAC ¶ 50. Similarly, Firebirds contends that "COVID-19 caused direct physical loss and damage to Firebirds' insured properties." *Id.* ¶¶ 87, 102. Firebirds further alleges the "actual presence" of the virus constitutes physical loss or damage. *Id.* ¶ 56. Alternatively, Firebirds alleges the identified government orders were issued "in response to the direct physical damage, and/or imminent threat thereof, caused by COVID-19" and "prohibited Firebirds' access to its properties and that have mandated Firebirds to suspend its business activities." *Id.* ¶¶ 61, 63.

II. Analysis

In response to Firebirds' First Amended Complaint, Zurich filed a Motion to Dismiss the Amended Complaint pursuant to Code of Civil Procedure section 2-615. 735 ILCS 5/2-615. Zurich's motion does not contest nor concede that Firebirds has sustained direct physical loss or damage resulting from COVID-19, which was one basis for Zurich's denial of Firebirds' underlying claim. Rather, the focus of Zurich's motion is on the significance of the "Contamination" exclusion. Specifically, Zurich maintains that as Firebird's First Amended Complaint seeks coverage exclusively for losses resulting from the presence of SARS-CoV-2 virus, it falls "squarely" within the Policies' "Contamination" exclusion whicj requires a dismissal of the First Amended Complaint with prejudice.

A. Standard of Review

A Section 2-615 motion to dismiss challenges a complaint's legal sufficiency based on facially apparent defects. *K. Miller Constr. Co. v. McGinnis*, 238 Ill. 2d 284, 291 (2010) (citing *Pooh-Bah Enter., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009)). This motion presents the question of whether the allegations of the complaint, "when construed in the light most favorable to the plaintiff, are sufficient to set forth a cause of action upon which relief may be granted." *Carter v. New Trier E. High Sch.*, 272 Ill. App. 3d 551, 555 (1995) (citing *Duncan v. Rzonca*, 133 Ill. App. 3d 184, 190-91 (1985)). Therefore, to avoid dismissal, "the complaint must sufficiently set forth every essential fact to be proved." *Id.* If the complaint "fails to allege such facts, the deficiency may not be cured by liberal construction." *Id.*

When reviewing the sufficiency of a complaint, the court must "accept as true all well-pleaded facts . . . and all reasonable inferences that may be drawn from those facts." *K. Miller*, 238 Ill. 2d at 291 (citing *Pooh-Bah*, 232 Ill. 2d at 473). The court disregards legal and factual conclusions unsupported by specific allegations of fact, and exhibits attached to the complaint will control over any conflicting allegations. *Carter*, 272 Ill. App. 3d at 555; *Compton v. Country Mut. Ins. Co.*, 382 Ill. App. 3d 323, 326 (2008) (quoting *Abbott v. Amoco Oil Co.*, 249 Ill. App. 3d 774, 778-79 (1993)). Moreover, while the complaint must contain allegations of fact sufficient to establish a cause of action, "the plaintiff is not required to set out evidence; only the ultimate facts to be proved should be alleged, not the evidentiary facts tending to prove such ultimate facts." *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 369 (2004) (quoting *Chandler v. Ill. Cent. R.R.*, 207 Ill. 2d 331, 348 (2003)). The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 19; *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34.

B. The Contamination Exclusion

Zurich moves to dismiss the First Amended Complaint arguing that since the SARS-Cov-2 virus caused Firebirds' alleged losses, the "Contamination" exclusion bars coverage. Firebirds responds that the "Contamination" exclusion does not apply and the COVID-19 virus is a covered cause of loss which resulted in direct physical loss or damage to property.

An insurance policy is a contract between the company and the policyholder, the benefits of which are determined by the terms of the contract unless the terms are contrary to public policy. *State Farm Mut. Auto. Ins. Co. v. Villicana*, 181 Ill. 2d 436, 453 (1998). In interpreting an insurance policy, the court must ascertain the intent of the parties, and construe the policy as a whole, with due regard to the risk undertaken, the subject matter of the policy and the purposes of the entire contract. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 108 (1992). Put another way, "(a) court's primary objective in construing an insurance policy's language is to ascertain and give effect to the parties' intentions as expressed through that policy's language." *Nationwide Sec. Serv., Inc.*, 2016 IL App (1st) 143924, ¶ 26. Further, when construing an insurance policy, the words used must be given their plain, ordinary and popular meaning. *Western Cas. & Sur. Co. v. Brochu*, 105 Ill. 2d 486, 495 (1985); *Young v. Allstate Ins. Co.*, 351 Ill. App. 3d 151, 158 (2004); *see Aetna Cas. & Sur. Co. v. Beautiful Signs, Inc.*, 146 Ill. App. 3d 434, 435 (1986). If words in the policy are unambiguous, the court must afford them their ordinary meaning. *Outboard Marine*, 154 Ill. 2d at 108. But if words are susceptible to more than one reasonable interpretation, they are ambiguous, and the insurance policy should be construed in favor of the insured and against the insurer that drafted the policy. *Id.* The determination of whether a term is ambiguous depends on how an ordinary person would understand it, not how a legally trained mind understands it. *USF&G v. Specialty Coatings*, 180 Ill. App. 3d 378, 391 (1989). Courts will not strain to find an ambiguity where none exists. *Southwest Disabilities Servs. & Support v. ProAssurance Specialty Ins. Co.*, 2018 IL App (1st) 171670, ¶ 21.

Under Illinois law "[a]n insurer has the right to limit coverage on a policy, and where an insurer has done so, a court must give effect to the plain language of the limitation, absent a conflict with the law." *Phusion Projects, Inc. v. Selective Ins. Co.*, 2015 IL App (1st) 150172, ¶ 47. "[W]here an exclusionary clause is relied upon to deny coverage, its applicability must be clear and free from doubt because any doubts as to coverage will be resolved in favor of the insured." *Gillen v. State Farm Mut. Auto. Ins. Co.*, 215 Ill. 2d 381, 393 (2005); *Empire Indem. Ins. Co. v. Chicago Province of the Soc'y of Jesus*, 2013 IL App (1st) 112346, ¶ 39; *see also Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446, 456, (2010) ("'provisions that limit or exclude coverage will be interpreted liberally in favor of the insured and against the insurer'" (quoting *American States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997)). "'Absent absolute

clarity on the face of the complaint that a particular policy exclusion applies, there exists a potential for coverage and an insurer cannot justifiably refuse to defend.'" *Lorenzo v. Capitol Indem. Corp.*, 401 Ill. App. 3d 616, 620 (2010) (quoting *Novak v. Insurance Admin. Unlimited, Inc.*, 91 Ill. App. 3d 148, 151 (1980)). "[W]here the language of an insurance policy is clear and unambiguous, it will be applied as written." *Hanover Ins. Co. v. MRC Polymers, Inc.*, 2020 IL App (1st) 192337, ¶ 30 (*citing State Farm Fire & Cas. Co. v. Hatherley*, 250 Ill. App. 3d 333, 337 (1993)). The insurer bears the burden of affirmatively demonstrating that a claim falls within an exclusion. *American Zurich Ins. Co. v. Wilcox & Christopoulos, L.L.C.*, 2013 IL App (1st) 120402, ¶ 34; *Continental Casualty Co. v. McDowell & Colantoni, Ltd.*, 282 Ill. App. 3d 236, 241 (1996).

C. The "Contamination" Exclusion is Clear and Unambiguous

The plain language of the "Contamination" exclusion is clear and unambiguous. Both policies at issue exclude from coverage "Contamination, and any cost due to Contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy…." Subsection 3.03.01.01, Exhibits A & B to FAC at 21, 182. "Contamination" is listed under Section 3.03 "EXCLUSIONS" which states "[t]he following exclusions apply unless specifically stated elsewhere in this Policy". Immediately under Section 3.03 is Subsection 3.03.01 which states that "[t]his Policy excludes the following…." Subsection 3.03.01.01, Exhibits A & B to FAC at 21, 182. Both policies define "Contamination" as "[a]ny condition of property due to the actual presence of any…virus." Subsection 7.09, Exhibits A & B to FAC at 58, 219. Thus, the ordinary meaning of the exclusion is that any loss caused by a virus and any cost attributed to a virus are excluded from coverage.

D. Firebirds' Claims Fall Within the Contamination Exclusion

It is uncontested by the parties and widely accepted that SARS-Cov-2, a novel coronavirus, is a virus. Firebirds also alleges that SARS-Cov-2, a virus, "caused direct physical loss and damage to Firebirds' insured properties." FAC ¶¶ 87, 102. Seeking coverage for loss and damage to insured properties caused by a virus is specifically excluded by the "Contamination" exclusion in the policies at issue. The factual scenario in this case is the exact type anticipated by the exclusion. The applicability of the exclusion is free from doubt. This

Court determines that Zurich carried its burden in establishing the unambiguous "Contamination" exclusion applies to the facts alleged in the First Amended Complaint and excludes coverage. Accordingly, this Court finds that Firebirds' claims for coverage under Time Element Coverage - Section 4.01-4.03 and Protection and Preservation of Property Coverage - Section 5.02.24 are excluded by the "Contamination" exclusion.

Firebirds makes several arguments as to why the "Contamination" exclusion is inapplicable and ambiguous. Although the applicability of the exclusion is free from doubt, the Court will examine Firebirds' arguments. It is worth repeating that courts will not strain to find an ambiguity where none exists. *Southwest Disabilities Servs. & Support*, 2018 IL App (1st) 171670, ¶ 21. First, Firebirds argues that the exclusion is inapplicable because it does not exclude loss associated with contamination but instead only "cost due to Contamination." *See* Subsection 3.03.01.01, Exhibits A & B to FAC at 21, 182. Firebirds notes that other exclusions in the Zurich policies explicitly exclude "loss." This argument misunderstands the conjunctive effect that the word "and" included after the word "Contamination," has. As has been noted above, the exclusion is set forth under Section 3.03 "EXCLUSIONS" which states "[t]he following exclusions apply unless specifically stated elsewhere in this Policy" and immediately under Subsection 3.03.01 which states that "[t]his Policy excludes the following...." Subsection 3.03.01.01, Exhibits A & B to FAC at 21, 182. The policies at issue provide coverage for loss and damage, not just cost. The conjunction "and" in the "Contamination" exclusion has the effect of excluding from coverage *both* an otherwise covered loss caused by a "Contamination" as well as an otherwise covered cost attributed to a "Contamination." Interpreting the exclusion to exclude only "cost" and not "loss" would render Section 3.03's broad exclusionary language quite meaningless.

Second, Firebirds argues that including "virus" along with other pollutants and contaminants in the definition of "Contamination" renders the exclusion inapplicable to SARS-Cov-2. Firebirds argues that Zurich did not intend for the exclusion to apply to communicable diseases as the exclusion does not explicitly refer to such diseases. This argument is unpersuasive. "Contamination" is defined as: "Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent,

Fungus, mold or mildew." Subsection 7.09, Exhibits A & B to FAC at 58, 219 (emphasis in original). Not only does the definition include "virus," which the parties accept SARS-Cov-2 is, the definition also includes "pathogen or pathogenic organism" and "disease causing or illness causing agent," both of which can include SARS-Cov-2 since it causes the COVID-19 disease.[3] Contrary to Firebirds' argument, Zurich is not attempting to turn the exclusion into a virus exclusion. As the plain language of the exclusion specifically excludes coverage for loss and damage caused by a virus, Counts I, III, IV, and VI are dismissed with prejudice.

III. Government Closure Orders

Firebirds alleges the government closure orders in the 19 states where its restaurants are located also caused losses. FAC ¶¶ 60-63. Firebirds alleges that Zurich is obligated to provide coverage under the policies Civil Authority Coverage - Section 5.02.03 Civil or Military Authority. *Id.* Firebirds alleges the closure orders prohibited access to its properties and mandated it suspend its business activities. *Id.* ¶ 63.

The Court understands Firebirds' claims that the government closure orders caused loss to insured properties as alleging that SARS-Cov-2 ultimately caused the loss to its insured properties. Firebirds alleges that the cited government closure orders were issued "*in response* to the direct physical damage, and/or imminent threat thereof, caused by COVID-19." *Id.* ¶ 61 (emphasis added). Firebirds' attempt to characterize the cause of loss as also including the government closure orders is "a transparent attempt to trigger insurance coverage." *See Farmers Auto. Ins. Ass'n v. Danner*, 2012 IL App (4th) 110461, ¶ 39. Numerous other courts have examined and rejected similar arguments to those advanced by Firebirds. Although the Court has reviewed the cited decisions, it should be made clear that they are neither binding nor precedential. Yet, the reasoning contained within many of the cited decisions is both sound and persuasive. This Court finds that Zurich carried its burden of establishing that the "Contamination" exclusion bars Firebirds' claims for coverage under the Civil Authority Coverage – Section 5.02.03 Civil or Military Authority. Accordingly, Counts II and V are dismissed with prejudice.

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[3] Referring to SARS-CoV-2 as a pathogen that causes COVID-19. Science Brief: SARS-CoV-2 and Potential Airborne Transmission; Centers for Disease Control and Prevention, Updated October 5, 2020, https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html; Coronavirus Disease 2019 (COVID-19), Centers for Disease Control and Prevention, https://www.cdc.gov/dotw/covid-19/index.html.

IV. The "Louisiana" Endorsement

Both Zurich policies have 31 state-specific amendatory endorsements attached to them. *See* Exhibits A-B to FAC. One of those endorsements is titled "Amendatory Endorsement – Louisiana" and attached as form Edge-219-C. It appears in a list of the other state-specific endorsements. The endorsement removes the term "virus" from the definition of "Contamination" and redefines "Contamination" as "Any condition of property due to the actual presence of any contaminants." *See* Edge-219-C, Exhibits A-B to FAC at 110-112, 272-274.

Firebirds argues that the *inclusion* of a Louisiana Amendatory Endorsement to the policies at issue renders the "Contamination" exclusion ambiguous and inapplicable. However, both policies continued to include the original definition cited above in the main body of the policy. While an ordinary person would find the inclusion of the endorsement somewhat curious, such a person would also find the endorsement ultimately meaningless due to Firebirds lack of insured properties in Louisiana. Despite including the endorsements, the Zurich elected not to change the "Contamination" exclusion in the body of the policy. Therefore, the Court rejects Firebirds' argument. *See Manhattan Partners, LLC v. American Guar. & Liab. Ins. Co.*, Civil Action No. 20-14342 (SDW) (LDW), 2021 U.S. Dist. LEXIS 50461, at 6 n.3 (D.N.J. Mar. 17, 2021) (rejecting the insured plaintiff's argument that the Louisiana Amendatory Endorsement modified the policy's Contamination exclusion).

This Court finds that finds that the Louisiana Amendatory Endorsement does not render the "Contamination" exclusion ambiguous and inapplicable. As such, the "Contamination" exclusion is unambiguous, applies to the facts alleged in the First Amended Complaint, and bars coverage of Firebirds' claims.

V. Should Firebirds be Allowed to Amend its First Amended Complaint?

Although Firebirds has not formally sought to amend its First Amended Complaint, during oral argument counsel indicated that if the Court concluded Zurich's present motion should be granted, the Court's decision should be without prejudice and that Firebirds should be provided an opportunity to amend its First Amended Complaint. At this stage of the proceedings the Court is to liberally construe any request to amend a pleading, and this Court has done just that even though the request was oral and made without any proposed pleading for the Court to consider.

With that made clear, the Court may properly dismiss a complaint with prejudice without allowing a further pleading to be filed, if the Court concludes that any future complaint would suffer from the same fatal flaw. *See Matthews v. Chicago Transit Auth.*, 2016 IL 117638, ¶ 54. A dismissal under section 2-615 of the Code should be made with prejudice "'only where it is clearly apparent that the plaintiffs can prove no set of facts entitling recovery." *Uskup v. Johnson*, 2020 IL App (1st) 200330, ¶ 36 (citing *Norabuena v. Medtronic, Inc.*, 2017 IL App (1st) 162928, ¶ 39). If a plaintiff can state a cause of action by amending his complaint, dismissal with prejudice should not be granted. *Uskup*, 2020 IL App (1st) 200330, ¶ 36. Put another way, a cause of action will not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover. *Beahringer v. Page*, 204 Ill. 2d 363, 369 (2003); *see also Elleby v. Forest Alarm Serv.*, 2020 IL App (1st) 191597, ¶ 24.

As Zurich's "Contamination" exclusion excludes any coverage for Firebirds' losses, the Court specifically denies Firebirds' request to amend its current pleading as it is clearly apparent that no set of facts can be proven that would entitle Firebirds to recover under either of the Zurich policies. Despite this Court's great empathy for Firebirds, the Court grants Zurich's motion with prejudice.

VI. Conclusion

For the foregoing reasons, it is hereby ordered that:

1. Defendant's Motion to Dismiss the Plaintiffs' First Amended Complaint pursuant to 735 ILCS 5/2-615 is granted with prejudice;
2. The previously set status date of May 5, 2021 at 9:30 a.m. is stricken; and
3. This case is dismissed.

IT IS SO ORDERED.

THIS IS A FINAL AND APPEALABLE ORDER.

ENTERED:

Judge Michael T. Mullen

APR 19 2021

Circuit Court - 2084

Judge Michael T. Mullen, No. 2084