

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 21-cv-00127-PAB-NRN

THE WESTERN UNION COMPANY, a Delaware corporation,

Plaintiff,

v.

ACE AMERICAN INSURANCE COMPANY, a Pennsylvania corporation,

Defendant.

**DEFENDANT ACE AMERICAN INSURANCE COMPANY’S MOTION TO DISMISS
PLAINTIFF’S COMPLAINT**

Defendant, ACE American Insurance Company (“ACE” or “Defendant”), by and through undersigned counsel, hereby submits its Motion to Dismiss Plaintiff The Western Union Company’s (“Western Union’s” or Plaintiff’s”) Complaint and Memorandum of Law in Support thereof:

CERTIFICATION OF CONFERRAL

Undersigned counsel hereby certifies that she conferred with Plaintiff’s counsel on or about April 2, 2021, and has determined that the deficiency in Plaintiff’s Complaint is not correctable by amendment.

I. INTRODUCTION / STATEMENT OF ISSUES

We are all living in unprecedented times, subject to a global pandemic arising from the novel coronavirus and resulting disease, commonly referred to as “COVID-19.” However, the COVID-19 pandemic does not provide a basis to discard well-established rules of contractual interpretation or to rewrite insurance contracts to impose financial obligations insurers never

agreed to undertake.¹ Yet, that is precisely what Western Union would have this Court do. This lawsuit is one of numerous lawsuits that have been filed across the country in which businesses seek to force their property insurers to provide coverage for business income losses arising from the COVID-19 pandemic. While the pandemic has presented challenging and unforeseen circumstances for many businesses throughout the country, the financial losses cannot somehow be shifted to private insurers that never undertook to cover such a risk and never received a premium for it.

According to its Complaint, Western Union is “a leader in global money movement and payment services, providing people and businesses with fast, reliable and convenient ways to send money and make payments around the world” with over 555,000 agent locations in more than 200 countries. *See* Dkt. 1 at ¶¶ 7-8. In its Complaint, Western Union seeks damages, up to the applicable limits of coverage for ACE’s alleged breach of contract and for failure to pay without a reasonable basis. Western Union alleges that ACE breached the insurance policy by failing to pay Western Union’s claim. Western Union further alleges that ACE lacked a reasonable basis to deny its claim. Western Union has also filed corresponding claims for declaratory judgment which seeks a declaration that ACE is obligated to provide insurance coverage for the losses Western

¹ The National Association of Insurance Commissioners has issued a statement explaining that “[b]usiness interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19.” Instead, insurance is designed for circumstances where “a relatively small number of claims are spread across a broader group” rather than a global pandemic. Moreover, “if insurance companies are required to cover such claims, such an action would create substantial solvency risks for the sector, significantly undermine the ability of insurers to pay other types of claims, and potentially exacerbate the negative financial and economic impacts the country is currently experiencing.” *See* NAIC Statement on Congressional Action Relating to COVID-19, Mar. 25, 2020. (https://content.naic.org/article/statement_naic_statement_congressional_action_relating_covid_19.htm).

Union allegedly sustained in relation to its insured properties. To date, dozens of courts across the country have ruled that property policies such as ACE's do not provide coverage for pandemic related business interruption claims. This Court should make the same finding here and dismiss all claims against ACE.

Here, Western Union's Complaint fails to plausibly allege entitlement to benefits under the Policy because coverage turns on whether there has been "direct physical loss, damage, or destruction" of property. Western Union has not and cannot allege "direct physical loss, damage, or destruction" as required by the Policy and as interpreted under Colorado law and by numerous courts that have considered similar claims. Courts across the country have dismissed similar suits on the grounds that "direct physical loss, damage, or destruction" refers unambiguously to some discernible tangible impact to property. *See, e.g., Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D.2d 1, 7, (N.Y. 2002). Courts nationwide have similarly dismissed claims seeking coverage for closures resulting from civil authority orders on the grounds that such orders do not prohibit access to covered property due to direct physical loss, damage, or destruction to property other than covered property. As a result, Western Union's claims for declaratory relief and/or breach of contract fail. Likewise, Western Union cannot state a claim for violation of C.R.S. § 10-3-1115 (1) and (2) because such a claim requires coverage – which Western Union has failed to allege as a matter of law. Because Western Union has failed to state any cognizable claims against ACE, and there is no indication that Western Union can ever cure these defects, the Complaint should be dismissed with prejudice.

II. STATEMENT OF FACTS

A. Western Union's Claimed Losses

Western Union alleged that a number of governing bodies have instituted Closure Orders requiring certain types of businesses to cease or limit their operations. Dkt. 1, at ¶¶ 29-32. Western Union further alleged that in response to the various Closure Orders, it closed some of its insured properties and/or many of its leased properties were closed by the “suppliers . . . of premises” between March 2020 and the filing of its Complaint. *Id.* at ¶¶33-34; 55. As a result, Western Union alleges that it was unable to access a number of its insured properties during this period. *Id.* at ¶35. Western Union concludes that the various Closure Orders “responded to the already present physical loss of or damage to property caused by COVID-19,” but does not allege facts to support a conclusion that COVID-19 was ever present on its property, even if the mere presence of COVID-19 on its premises were enough to trigger coverage (which it is not). *Id.* at ¶36. Western Union only claims, in a conclusory way, that the “actual and/or statistically certain presence of COVID-19 on and around the insured properties and agent locations triggered coverage under the All-Risk Policy. *Id.* at ¶¶58, 60.

B. The Policy

ACE American Insurance Company issued Policy No. D42285055 012 to The Western Union Company (the “Policy”), for the Policy Period of October 1, 2019 through October 1, 2020. (*See* Dkt. 1-1, Exhibit A). Western Union alleges that coverage was improperly denied under the Policy’s coverages for business interruption, extra expense, contingent business interruption, civil authority and ingress and egress. (Dkt. 1 *generally*). The Policy includes the following insuring agreement:

1. PERILS INSURED AGAINST

This **Policy** insures against all risk of direct physical loss, damage or destruction to property described herein occurring during the term of insurance, except as hereinafter excluded.

Wherever used in this **Policy**, the term “peril(s) insured against” refers to the conditions stated above and as modified under Perils Excluded, Clause 4. of these Policy Provisions.

Dkt. 1-1, at 18.

Western Union alleges that some or all of its losses are covered under the “Business Interruption”, “Extra Expense”, and “Time Element Extensions” all of which require the existence of “direct physical loss, damage, or destruction” of property. The Business Interruption and Extra Expense Provisions read, in relevant part, as follows:

B. Business Interruption

- (1) Loss resulting from necessary interruption of business conducted by the **Insured**, whether total or partial, and caused by direct physical loss, damage, or destruction insured herein during the term of this **Policy** to real and personal property as described in Clause 2.A. of the Policy Provisions.

...

C. Extra Expense

- (1) Extra Expense incurred resulting from direct physical loss, damage, or destruction insured herein during the term of this **Policy** to real or personal property as described in Clause 2.A of the Policy Provisions.

...

Id. at 19, 22. Notably, both coverages require “direct physical loss, damage, or destruction” to trigger coverage. *Id.*

The provisions within the “Time Element Extension” under which Western Union seeks coverage are: (1) Contingent Business Interruption; (2) Civil Authority; and (3) Ingress and Egress,

all of which also require “direct, physical loss, damage or destruction of property.” *Id.* at 24-25.

These provisions read, in relevant part:

G. Time Element Extensions

(1) This **Policy** insures against **Time Element** losses resulting from:

...
(b) Contingent Business Interruption and Contingent Extra Expense

Direct physical loss, damage or destruction as insured herein to property of the type insured that wholly or partially prevents any direct or indirect supplier of any tier of goods and/or services to the **Insured** from rendering their goods and/or services, other than the services described in subparagraph (a) above, or property of the type insured that wholly or partially prevents any direct or indirect receiver of any tier of goods and/or services from the **Insured** from accepting the **Insured’s** goods and/or services, such supplier or receiver to be located anywhere in the world where permitted by law.

...

(2) This **Policy** insures against **Time Element** losses resulting from:

(a) Interruption by Civil or Military Authority:²
An interruption of business, whether total or partial, during the period of time when, in connection with or following a peril insured against, access to real or personal property is impaired by order or action of civil or military authority.

...

(b) Ingress/Egress:
An interruption of business, whether total or partial, during the period of time when, in connection with or following a peril insured against, ingress to or egress from real or personal property is impaired.

Id.

² In its Complaint, Western Union misquotes the Civil Authority coverage. *Compare* Dkt. 1, at ¶ 46 with Dkt. 1-1 at 25. The quotations in this Motion are accurate.

Pursuant to the Policy, words and phrases that appear in **bold** have special meanings and are defined in the Property/Business Income Conditions and Definitions. *Id.* at 58-65).³

The Policy also contains a Pollution and Contamination Exclusions and Related Coverage Extensions with Sub-Limits Endorsement. *Id.* at 90-92. The endorsement provides:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

The following exclusions and provisions are added to this policy; supersede any term, provision or endorsement to the contrary in this policy; and apply notwithstanding such term, provision or endorsement:

1. This insurance does not apply to:
...
 - B. Loss or damage caused by, resulting from, contributed to, or made worse by actual, alleged or threatened release, discharge, escape or dispersal of Contaminants or Pollutants, all whether direct or indirect, proximate or remote, or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy;

...

3. The following definition is added to this policy:

Contaminants or Pollutants means any material which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, **including**, but not limited to bacteria, fungi, **virus** or hazardous substances as listed in the Federal Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of

³ Western Union incorrectly alleges that “State Amendatory Endorsement” removed the word “virus” from the applicable definition of “pollutants”. Dkt. 1, at ¶¶48-50. The Endorsement, which is found at Dkt. 1-1, at 101-116 contains changes for almost every individual state. The Colorado Changes deal only with concealment and fraud and do not alter the definition of “pollutant.” Dkt. 1-1, at 102. Moreover, the Pollution and Contamination Exclusions and Related Coverage Extensions with Sub-Limits Endorsement, provides that its terms “supersede any term, provision or endorsement to the contrary in this policy; and apply notwithstanding such term, provision or endorsement.” *Id.* at 90. Therefore, the definition found in the Pollution and Contamination Exclusions and Related Coverage Extensions with Sub-Limits Endorsement controls.

1976 and Toxic Substances Control Act or as designated by the U. S. Environmental Protection Agency.

Id.

III. LEGAL STANDARD

A. Colorado Law Applies

The Court’s jurisdiction in this matter is founded on diversity of citizenship. 28 U.S.C. §1332(a). According to the Complaint, Western Union is a Delaware corporation with its principal place of business in Denver, Colorado. Dkt. 1, ¶3. ACE is incorporated under the laws of Pennsylvania with its principal place of business in Philadelphia, Pennsylvania. *Id.* at ¶4.

Colorado courts use the “most significant relationship” approach to determine which state’s law applies to a contract. *Wood Brothers Homes v. Walker Adjustment Bureau*, 601 P.2d 1369 (Colo. 1979). Colorado courts typically interpret insurance policies under the law of the state where the policy was issued. *Fire Ins. Exch. v. Bentley*, 953 P.2d 1297 (Colo. App. 1998); *TPLC, Inc. v. United Nat’l Ins. Co.*, 44 F.3d 1484 (10th Cir. 1995). The Policy was issued to The Western Union Company in Denver, Colorado via a broker, also located in Denver, Colorado. Dkt. 1-1, at 1. Therefore, this Court should apply the substantive law of Colorado.

B. Fed. R. Civ. P. 12(b)(6) Warrants Dismissal of the Complaint With Prejudice.

A motion to dismiss under Rule of Civil Procedure 12(b)(6) challenges the legal sufficiency of the claims stated in the Complaint. When considering a Rule 12(b)(6) motion, the court must “assume all *factual* allegations are true and construe them in the light most favorable to the plaintiff.” *Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir. 2003) (emphasis added). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim 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)); *see also Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008). However, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678. A 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.*

A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” *Id.* Nor does a pleading suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.” *Id.* “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. A complaint that pleads facts that are merely consistent with a defendant’s liability stops short of the line between possibility and plausibility of entitlement of relief. *Id.* at 678. Where a plaintiff’s factual allegations have failed to nudge her claims across the line from the conceivable to the plausible, as in this case, the pleading should be dismissed. *See Id.* at 680.

C. Interpretation of Insurance Contracts Under Colorado Law

Under Colorado law, questions of coverage under an insurance policy are generally matters of law reserved for the court. *See Fire Ins. Exch. v. Bentley*, 953 P.2d 1297, 1300 (Colo. App. 1998). The policy must be enforced as written unless the policy contains an ambiguity. *Cary v. United of Omaha Life Ins. Co.*, 108 P.3d 288, 290 (Colo. 2005). The policy should be construed to give effect to the intent of the parties. *Id.* “Whenever possible this intent should be ascertained from the plain language of the policy alone.” *Farmers Ins. Exch. v. Anderson*, 260 P.3d 68, 72

(Colo. App. 2010). “[W]ords should be given their plain meaning according to common usage, and strained constructions should be avoided.” *Compton v. State Farm Mut. Auto. Ins. Co.*, 870 P.2d 545, 547 (Colo. App. 1993). Courts may not rewrite, add, or delete provisions to extend or restrict coverage. *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 299 (Colo. 2003).

IV. ARGUMENT

A. Breach of Contract Standard and Burden

Under Colorado law, a claim for breach of contract requires a plaintiff to prove the following elements: (1) that an enforceable contract existed between the parties; (2) that the plaintiff fully performed its obligations under the contract or that its performance was excused; (3) that the defendant breached its obligations under the contract; (4) that the plaintiff suffered an injury caused by the defendant’s breach. *Western Distributing Co. v. Diodosio*, 841 P.3d 1053, 1058 (Colo. 1992). It is undisputed that the Policy is a contract between the parties. The insured bears the initial burden of demonstrating coverage under the policy. *See Rodriguez ex rel. Rodriguez v. Safeco Ins. Co. of Am.*, 821 P.2d 849, 853 (Colo. App. 1991). The burden then shifts to the insurer to prove the applicability of an exclusion from coverage; if the insurer makes this showing, the burden shifts back to the insured to show an exception to any coverage exclusion. *See id.*

B. Western Union Failed To State a Claim for Relief for Declaratory Judgment and for Breach of Contract (Counts I and II)

1. Element Not Alleged: Western Union has not alleged “direct physical loss, damage, or destruction” to property required to trigger coverage under the Business Interruption, Extra Expense, Ingress and Egress, Civil Authority and Contingent Business Interruption provisions of the Policy.

In its Complaint, Western Union seeks both a judicial declaration that Western Union is entitled to coverage for its alleged COVID-19 related business losses and also alleges that ACE

breached its obligations under the Policy by denying its claim for COVID-19 related business losses. Dkt. 1, at ¶¶ 76-85. The Policy provisions under which Western Union seeks coverage are: Business Interruption; Extra Expense; Contingent Business Interruption; Civil Authority; and Ingress/Egress coverage. Dkt. 1, at ¶¶ 42-47. Because Western Union has failed to plead sufficient facts to demonstrate the insuring agreement, requiring “direct physical loss, damage, or destruction,” was triggered for any of these coverages, Western Union is not entitled to a declaration of coverage in its favor nor did ACE breach its obligations under the Policy.

The Policy does not define the term “direct physical loss, damage, or destruction.” However, courts that have considered this term has required some showing of actual physical damage to the insured’s property to trigger coverage. *See Roundabout Theatre Co. v. Cont’l Cas. Co.*, 302 A.D.2d 1, 7 (N.Y. 2002) (“Reading these provisions together, the only conclusion that can be drawn is that the business interruption coverage is limited to losses involving physical damage to the insured's property.”) Further, many courts have considered the issue in light of COVID-19 related executive orders and have held that, at a minimum, a direct physical loss in a commercial property policy requires some type of tangible damage to the covered property. *See, e.g., Sandy Point Dental, PC v. The Cincinnati Ins. Co.*, No. 20 CV 2160, 2020 WL 5630465, *3 (N.D. Ill. Sept. 21, 2020) (N.D. Ill., Sept. 21, 2020) (“The critical policy language here—”direct physical loss”—unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage. The words “direct” and “physical,” which modify the word “loss,” ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure.”); *Social Life Magazine, Inc. v. Sentinel Ins.*

Co. Ltd., No. 20 C 3311 (S.D.N.Y. 2020) (denying a motion for preliminary injunction because the coronavirus does not cause direct physical loss, therefore no coverage was required; the coronavirus “damages lungs. It doesn’t damage printing presses”);⁴ *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 360 (W.D. Tex. Aug. 13, 2020) (granting a motion to dismiss because the coronavirus did not cause a direct physical loss, and “the loss needs to have been a ‘distinct, demonstrable physical alteration of the property.’”).

While no Colorado court nor the Tenth Circuit have yet considered the issue in the context of COVID-19 closure orders, it is anticipated that Western Union will assert that under *Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968), the existence of a condition that renders a premise uninhabitable constitutes physical loss of or damage to property. In *Western Fire*, a church sought coverage for losses after the local fire department ordered the Church to close its building after determining that an accumulation of gasoline around and under the Church making the premises so infiltrated and saturated as to be uninhabitable and making further use of building dangerous. The Colorado Supreme Court held that this was “direct physical loss” of the covered property triggering coverage.

However, this case is distinguishable from *Western Fire*. First, unlike *Western Fire*, Western Union has not, and cannot, allege any *actual* infiltration of COVID-19 into its establishments which in turn prompted the closure of those businesses. Western Union made it clear that its claim is based on the alleged requirements to close its locations due to the various Closure Orders. Dkt. 1, at ¶¶33-35. As such, even if an actual infiltration could be considered to

⁴ A true and correct copy of the *Social Life* Transcript containing the quote is attached hereto as ***Exhibit A***.

be direct physical loss, damage or destruction to property, which it cannot, Western Union's complaint fails to allege facts to state such a claim. Moreover, even if Western Union had plausibly alleged that the COVID-19 virus was actually present in its establishments, and ACE does not concede that it has, the alleged presence of the virus is not analogous to a building being "infiltrated and saturated" in gasoline because there is no evidence that that the virus presents a danger to the building itself. Similarly, *Western Fire* involved a tangible physical change or alteration of the property or premises (saturation of gasoline), which rendered the property itself unusable or uninhabitable. Here, no peril has caused direct physical loss, damage, or destruction to Western Union's facilities. Instead, governmental orders allegedly mandated closure. The governmental orders requiring certain categories of businesses to close or limit their operations to *proactively* limit the spread of COVID-19 are not the equivalent of an order to close one specific location, *reactively* to remedy a situation such as gasoline saturation or a fire burning a restaurant's kitchen. Western Union's alleged losses resulted from the economic impact of states' prioritizing the health and safety of its citizens by way of the orders when faced with an unprecedented pandemic and not direct physical loss, damage, or destruction of the insured premises or any premises at all.

A growing number of decisions across the country have held that loss of use of a business premise caused by the virus, directly or due to preventative governmental orders, does not equate to physical loss or damage to trigger coverage.⁵ See e.g. *Sandy Point Dental*, 2020 WL 5630465,

⁵ While the entirety of COVID-19 litigation thus far appears to have analyzed whether these orders constitute "direct physical loss or damage," ACE submits that these orders cannot possibly be considered "destruction" either, because "destruction," which is defined as "the state or fact of being destroyed, necessarily involves an even more severe physical impact than even "damage," which is defined as "loss or harm from injury to ... property." Compare the Merriam-Webster definitions of Damage (<https://www.merriam-webster.com/dictionary/damage>) with Destruction (<https://www.merriam-webster.com/dictionary/destruction>).

at *2 (dismissing the action where plaintiff alleged merely loss of use of property and failed to plead “facts showing physical alteration or structural degradation of the property”); *10E, LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-cv-04418, 2020 WL 5359653, at *1–2 (C.D. Cal. Sept. 2, 2020) (holding that plaintiffs “cannot recover by attempting to artfully plead impairment to economically valuable use of property as physical loss or damage,” and noting that impaired use or value cannot substitute for physical loss or damage); *Pappy’s Barber Shops, Inc. v. Farmers Grp., Inc.*, No. 20-cv-907-CAB-BLM, 2020 WL 5500221, at *4–5 (S.D. Cal. Sept. 11, 2020) (holding that loss of the ability to continue to operate a business does not qualify as “direct physical loss of or damage to property”); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-cv-03213, 2020 WL 5525171, at *1–2 (N.D. Cal. Sept. 14, 2020) (holding that “temporary dispossession of property did not constitute “direct physical loss of or damage to” property); *Seifert v. IMT Ins. Co.*, No. 20-1102, 2020 WL 6120002, at *3 (D. Minn. Oct. 16, 2020) (dismissing the action because “governmental action prohibiting the use of property, by itself, is not enough” to “fall within the permissible realm of ‘direct physical loss’”).⁶ Colorado law supports this Court finding likewise.

⁶ See also *e.g. Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *7-8 (E.D. Mich. Sept. 3, 2020); *Oral Surgeons, P.C. v. The Cincinnati Ins. Co.*, No. 4-20-CV-222-CRW-SBJ, 2020 WL 5820552, at *1 (S.D. Iowa Sept. 29, 2020); *Henry’s La. Grill Inc. v. Allied Ins. Co. of Am.*, No. 1:20-CV-2939-TWT, 2020 WL 5938755, at *1 (N.D. Ga. Oct. 6, 2020); *Hillcrest Optical, Inc. v. Cont’l Cas. Co.*, No. 1:20-CV-275, 2020 WL 6163142, at *5-6 (S.D. Ala. Oct. 21, 2020); *Uncork & Create LLC v. The Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL 6436948, at *3-5 (S.D. W. Va. Nov. 2, 2020); *Promotional Headwear Int’l v. Cincinnati Ins. Co.*, No. 20-CV-2211-JAR-GEB, 2020 WL 7078735 (D. Kan. Dec. 3, 2020); *Tappo of Buffalo, LLC v. Erie Ins. Co.*, No. 20-CV-754V(SR), 2020 WL 7867553 (W.D.N.Y. Dec. 29, 2020); *Digital Age Mktg. Grp., Inc. v. Sentinel Ins. Co. Ltd.*, No. 20-61577-CIV, 2021 WL 80535 (S.D. Fla. Jan. 8, 2021); *Bend Hotel Dev. Co., LLC v. Cincinnati Ins. Co.*, No. 20 C 4636, 2021 WL 271294, at *3 (N.D. Ill. Jan. 27, 2021); *Cafe Plaza De Mesilla Inc., v. Continental Casualty Co.*, No. 2:20-CV-354-KWR-KRS, 2021 WL 601880 (D.N.M. Feb. 16, 2021); *Levy Ad Grp., Inc. v. Chubb Corp.*, No. 2:20-CV-00763-JAD-DJA, 2021 WL 777210 (D. Nev. Feb. 16, 2021).

2. **Element Not Alleged: Western Union Has Not Alleged That Any Covered Property Sustained Direct Physical Loss, Damage, or Destruction Necessary to Trigger Business Interruption and Extra Expense Coverages**

To state a claim under the Business Interruption and Extra Expense coverages Western Union must allege that any actual or potential impairment of operations was caused by or resulted from direct physical loss, damage or destruction of its insured property. In the Complaint, Western Union merely alleges in a conclusory manner that “the presence of SARS-CoV-2 particles causes direct physical loss and/or direct physical damage to property,” Dkt. 1, at ¶25, but such conclusory allegations do not make it so. Western Union does not identify any covered property that actually sustained direct physical loss, damage, or destruction because the mere presence of COVID-19 is not direct physical loss, damage, or destruction. At most, Western Union alleges, again in a conclusory manner, that “people infected with or carrying SARS-CoV-2 at premises” can “renders premises, including property located at that premises, unsafe, resulting in direct physical loss to the premises and property,” without alleging facts to support a conclusion that there was any direct physical loss, damage, or destruction to its premises. *Id.* at ¶ 26. Western Union has done nothing more than plead the *possibility* of contamination which, even if true, does not, as a matter of law, cause “direct physical loss, damage, or destruction.” *Social Life*, Ex. A, at 5. (“...the coronavirus “damages lungs. It doesn’t damage printing presses”); *Kevin Barry Fine Art Assoc. v. Sentinel Ins. Co. Ltd.*, No. 20-CV-04783-SK, 2021 WL 141180, at *6 (N.D. Cal. Jan. 13, 2021). (“The virus COVID-19 harms people, not property.”) ACE also incorporates by reference its discussion concerning “direct physical loss, damage, or destruction” as set forth above.

3. **Element Not Alleged: Western Union Has Not Plead Direct Physical Loss, Damage, or Destruction to Property Necessary to Trigger the Ingress/Egress or Civil Authority Provisions of the Policy**

Ingress and Egress coverage requires that there be an impairment of ingress to or egress to Western Union’s property that is “in connection with a peril insured against.” Dkt. 1-1, at 25. Similarly, Civil Authority coverage requires that any interruption of business be “in connection with or following a peril insured against.” *Id.* “[P]erils insured against’ refers to the conditions stated” in the insuring agreement in that the “Policy insures against all risk of direct physical loss, damage or destruction to property” unless otherwise excluded. *Id.* at 18. As such, the triggering event for coverage under either the Ingress/Egress and the Civil Authority provisions is, again, “direct physical loss, damage, or destruction to property.”

Here, to the extent access to Western Union establishments was prevented or limited (either by order for Civil Authority Coverage or by physical force for Ingress/Egress Coverage), no such prevention of access was due to direct physical loss, damage, or destruction to property because--as more fully set forth above -- neither the government orders nor the possibility of contamination constitute direct physical loss, damage, or destruction. Thus, for the same reason the direct coverages for Business Interruption and Extra Expense are not triggered, neither are Ingress/Egress or Civil Authority.

4. **Element Not Alleged: There Is No Contingent Business Interruption Coverage Because Western Union Has Not Pled That Direct Physical Loss, Damage, or Destruction Has Caused Any Direct or Indirect Supplier or Recipients of Goods or Services From Being Able To Do So**

There is also no Contingent Business Interruption Coverage because Western Union has failed to allege any of its “direct or indirect supplier[s or recipients] of any tier of goods and/or services” have been unable to do so. *See generally* Dkt. 1. Further, even if Western Union had alleged facts

to support one of its suppliers or recipients of goods and/or services were so prevented from supplying or receiving goods and/or services, Western Union has still failed to allege the requisite “direct physical loss, damage, or destruction” as required by this coverage. Dkt. 1-1, at 24. Again, for the same reasons all of the other coverages fail, so to does Contingent Business Interruption coverage.

5. Element Not Alleged: All Coverage Is Excluded By the Pollution and Contamination Exclusions and Related Coverage Extensions With Sub-Limits Endorsement

The Policy’s Pollution and Contamination Exclusions and Related Coverage Extensions With Sub-Limits Endorsement provides that the insurance provided by Western Union’s Policy does not apply to:

Loss or damage caused by, resulting from, contributed to, or made worse by actual, alleged or threatened release, discharge, escape or dispersal of Contaminants or Pollutants, all whether direct or indirect, proximate or remote, or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy...

Ex. 1-1, at 90. Notably, this exclusion applies whether the loss or damage actually occurred or is merely threatened. *Id.* Further, this exclusion applies whether it is the direct or indirect cause of Western Union’s economic losses. *Id.* The endorsement goes on to provide its new and superseding definition of “Contaminants or Pollutants” as follows:

Contaminants or Pollutants means any material which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to bacteria, fungi, **virus** or hazardous substances as listed in the Federal Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976 and Toxic Substances Control Act or as designated by the U. S. Environmental Protection Agency.

Id. at 92 (emphasis added). Notably, the terms of this endorsement, including the definition of “Contaminants or Pollutants,” “supersede any term, provision or endorsement to the contrary in

this policy; and apply notwithstanding such term, provision or endorsement,” making this the applicable definition. *Id.* at 90.

There is no dispute that COVID-19 is a virus. As such, COVID-19 is a “Contaminant or Pollutant” as defined by the endorsement. Further, there can be no good faith dispute that the various government orders were all enacted to try to prevent the spread of COVID-19, a “contaminant or pollutant” as defined by the Policy. Accordingly, whether Western Union’s alleged economic losses are due to the various orders or actual instances of infection, they result either directly or indirectly from the contaminant or pollutant known as COVID-19. As such, even if Western Union was able to allege the necessary “direct physical loss, damage, or destruction” to property, which it cannot, this exclusion applies to preclude all coverage.

It is no obstacle to the application of this exclusion that it is styled as a pollution or contamination exclusion. Colorado courts interpret and enforce insurance policies according to their plain language. *AD Two, Inc. d/b/a/ The Coffee Beanery v. The City and County of Denver*, 9 P.3d 373 (Colo. 2000). The exclusion clearly and unambiguously applies to loss or damage caused by, whether directly or indirectly, any Contaminant or Pollutant. Further the definition of Contaminant or Pollutant clearly and unambiguously includes viruses, such as COVID-19. For that reason, there can be no doubt that the exclusion applies notwithstanding its stylization as a “pollution and contamination exclusion” rather than as a “virus exclusion.”

And, appropriately, other federal courts have enforced similar exclusions to this one in other COVID-19 matters. In *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, for example, a Florida federal court granted an insurer’s motion to dismiss a complaint seeking coverage for business-interruption losses relating to COVID-19 based on 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.’” No. 2:20-cv-00401-FtM-66NPM, 2020 WL 5240218 at *2-*3 (M.D. Fla. Sep. 2, 2020). The ACE Policy’s “Pollution and Contamination” Exclusion is similar, as it precludes coverage for “[l]oss or damage caused by, resulting from, contributed to, or made worse by actual, alleged or threatened release, discharge, escape or dispersal of [viruses] all whether direct or indirect, proximate or remote, or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy.” Ex. 1-1, at 90. 92. It should be enforced. To *not* enforce the exclusion here would effectively write for Western Union a much better contract than the one it paid for. Because Western Union has not and cannot state a claim for relief for its Declaratory Judgment (Count I) and Breach of Contract (Count II) claims this Court should dismiss Counts I and II.

B. Element Not Alleged: Where There is No Coverage, There Can Be No Statutory Bad Faith as a Matter of Law (Dismissal of Count III)

The issue of coverage is a central predicate to any claim of bad faith breach of the insurance contract.” *Dish Network Corp v. Arch Specialty Ins. Co.*, 989 F.Supp.2d 1137, 1155 (D. Colo. 2013), *aff’d* 772 F.3d 856 (10th Cir. [Colo. law] 2014). In other words, if Plaintiff cannot demonstrate coverage, then it cannot demonstrate bad faith. Colo. Rev. Stat. § 10–3–1115 provides that “an insurer’s delay or denial was unreasonable if the insurer delayed or denied authorizing payment of a covered benefit without a reasonable basis for that action.” *Id.* at § 10–3–1115(2). To prove a claim under the statute, Plaintiff must demonstrate that: (1) ACE delayed or denied payment of a covered benefit and (2) that delay was without a reasonable basis. See *Am. Family Mut. Ins. Co. v. Barriga*, 418 P.3d 1181, 1185– 86 (Colo. 2018). The party asserting a bad faith claim has the burden of proof and thus the burden of demonstrating the unreasonableness of the insurer’s actions lies with

the insured. *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821, 836–37 (D. Colo. 2016).

In the absence of coverage, Western Union’s statutory bad faith claim must be dismissed since the latter is derivative of the former. *See Brookshire Downs at Heatherridge Condo. Ass’n, Inc. v. Owners Ins. Co.*, 17-CV-0871-WJM-NRN, 2019 WL 10946262, at *2 (D. Colo. Mar. 15, 2019) (if a claim for breach of insurance contract fails on its merits, then a claim for statutory unreasonable denial of insurance benefits likewise fails) (citing *Am. Family Mut. Ins. Co. v. Hansen*, 375 P.3d 115, 122 (Colo. 2016)). As explained above, Western Union is not entitled to coverage under the Policy as a matter of law and as such its claims for statutory bad faith (Count Three) must also be dismissed, with prejudice.

CONCLUSION

For the foregoing reasons, ACE respectfully requests that the Court dismiss Western Union’s Complaint in its entirety with prejudice under Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted this 13th day of April 2021.

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CERTIFICATE OF SERVICE

I hereby certify that, on April 13, 2021, I electronically filed the foregoing MOTION TO DISMISS PLAINTIFF’S COMPLAINT with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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