IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-00127-NRN

THE WESTERN UNION COMPANY, a Delaware corporation,

Plaintiff,

v.

ACE AMERICAN INSURANCE COMPANY, a Pennsylvania corporation,

Defendant.

PLAINTIFF THE WESTERN UNION COMPANY'S RESPONSE IN OPPOSITION TO DEFENDANT ACE AMERICAN INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT (ECF NO. 17)

Plaintiff, The Western Union Company ("Western Union" or "Plaintiff"), by and through undersigned counsel, hereby submits its Response in Opposition to the Motion to Dismiss filed by Defendant Ace American Insurance Company ("ACE" or "Defendant"):

INTRODUCTION AND SUMMARY OF ARGUMENT

Months before the COVID-19 pandemic, Western Union purchased an "all risk" insurance policy (the "Policy") from ACE that promised coverage for "all risks of direct physical loss, damage or destruction to property," and for the interruption of Western Union's business by virtue of such loss or damage being sustained by properties owned by Western Union or owned by others and supplied to Western Union so that its agents could operate Western Union's money movement and payment services business. When COVID-19 swept the globe and many of Western Union's properties and agent locations were required by civil authority order to shut down for a period of time to prevent the further spread of COVID-19, ACE refused to fulfill its contractual promises.

Now, ACE asks the Court to dismiss Western Union's claims for contractual relief and statutory bad faith. Although ACE correctly identifies the key issue to be addressed by the Court on its Motion – whether Western Union has pled that "direct physical loss, damage or destruction to property" gave rise to its losses – ACE asks the Court to do everything but apply Colorado principles of insurance contract interpretation to the Policy that ACE actually issued to Western Union. ACE instead resorts to broad and unsupported pronouncements about the insurance industry's role with respect to COVID-19 business interruption losses, coupled with discussion of cases dismissing COVID-19 claims where those cases did not apply Colorado law and did not address the arguments relevant to the particular language of the Policy at issue here.

Here, the issue is a contractual one specific to the policy ACE sold to Western Union, not a political or "insurance industry" issue. The parties agree that Colorado law governs the contract. The Policy expressly provides coverage for "direct physical loss" ***or*** "direct physical damage," and ACE used this "direct physical loss" language years after Colorado's Supreme Court held that "direct physical loss" includes a loss of access to property caused by a dangerous condition. Colorado's rules of contract interpretation (i) permit the Court to look to ordinary dictionary definitions of terms ACE failed to define in the Policy such as "loss" (which Merriam-Webster defines to mean deprivation), and (ii) dictate that "loss" and "damage" cannot be interpreted to mean the same thing (e.g., "physical alteration") without rendering one of the words superfluous.

ACE's citation to certain cases dismissing COVID-19 claims proves both too much and too little. On the one hand, the clear divergence of opinion on coverage at most suggests an inherent ambiguity in the terms "physical loss" and "physical damage" that must be resolved in favor of coverage. On the other hand, the decisions denying coverage also demonstrate the

important distinction between the Policy language at issue here and the policies considered in those cases. Indeed, absent from the decisions that dismissed coverage claims is consideration of this Policy's express recognition that even a "threatened" release of a substance that could "threaten" damage to human health or loss of access to property is a covered risk unless expressly excluded, and this Policy removes "virus" from the type of releases excluded from coverage.

Western Union has alleged all elements necessary to state plausible claims for coverage and for statutory bad faith. ACE's Motion should be denied.

ARGUMENT

I. LEGAL STANDARD

A. Standards Applicable to ACE's Motion to Dismiss

ACE seeks dismissal of Western Union's Complaint in its entirety, with prejudice, for failure to state a claim. Under Rule 12(b)(6), a complaint may not be dismissed if it "contains 'enough facts to state a claim to relief that is plausible on its face.'" *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). On a Motion to Dismiss, the Court is required to "assume the truth of the plaintiff's well-pleaded factual allegations and view them in the light most favorable to the plaintiff." *Id*. Granting a motion to dismiss "is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009).

B. Colorado Canons of Insurance Policy Interpretation

ACE contends that the substantive law of Colorado applies to Western Union's claims, noting that the Policy was issued to Western Union in Colorado via a broker who was also located in Colorado. ECF No. 17 at 8. Western Union agrees that Colorado's substantive law applies.

ACE's recitation of Colorado's relevant principles of insurance contract interpretation, however, omits several key principles. Specifically, coverage provisions in an insurance contract must be liberally construed in favor of the insured to provide the broadest possible coverage. *Thompson v. Maryland Cas. Co.*, 84 P.3d 496, 502 (Colo. 2004). Any limitations on coverage must be clearly expressed, *Tepe v. Rocky Mountain Hosp. & Med. Servs.*, 893 P.2d 1323, 1327 (Colo. App. 1994), and any exclusions or limitations on coverage "are to be given a narrow construction." *Cont'l. West. Ins. Co. v. Shay Constr., Inc.*, 805 F.Supp.2d 1125, 1128 (D. Colo. 2011) (citing *American Family Mut. Ins. Co. v. Johnson*, 816 P.2d 952, 953 (Colo. 1991)). Where terms in a policy are not defined, the court may look to the plain and ordinary meaning of those terms, including as set forth in a dictionary. *Renfandt v. N.Y. Life Ins. Co.*, 419 P.3d 576, 580 (Colo. 2018). Moreover, it is fundamental that ambiguous terms in an insurance policy are construed in favor of the insured and against the insurer. *Thompson*, 84 P.3d at 502.

II. WESTERN UNION STATES A CLAIM FOR DECLARATORY RELIEF AND A CLAIM FOR BREACH OF CONTRACT FOR LOSSES CAUSED BY THE CLOSURE OF ITS INSURED PROPERTIES AND AGENT LOCATIONS IN RESPONSE TO COVID-19 AND RESULTING CLOSURE ORDERS

A. DISPUTED: Western Union Has Alleged "Direct Physical Loss, Damage or Destruction to Property" Sufficient to Trigger the Policy's Contingent Business Interruption and Other Time Element Coverages

ACE contends throughout its brief that Western Union has not alleged "direct physical loss, damage, or destruction to property" to trigger the various coverages referenced in its Complaint,

including that for Business Interruption, Extra Expense, Ingress and Egress, Civil Authority[1] and Contingent Business Interruption. Specifically, ACE contends that Western Union did not identify any covered properties that sustained "direct physical loss, damage, or destruction" and/or did not allege that any of its "direct or indirect supplier[s or recipients] of any tier of goods and/or services" were unable to do so. ECF No. 17 at 6. Although ACE may disagree that the allegations support a claim under Colorado law, Western Union plainly alleged each of these elements, alleging:

- Western Union's money transfer service relies heavily on remittances to be sent from agent locations worldwide (ECF No. 1 at ¶ 10);
- In response to the imminent threat of physical loss or damage to property and human health from COVID-19, governments worldwide imposed unprecedented directives prohibiting travel, requiring certain "non-essential" or "high risk" businesses to close, and requiring residents to remain in their homes unless performing "essential" activities ("Closure Orders") (*Id.* at ¶¶ 29, 31-32, 36);
- The Closure Orders were in effect in numerous countries in which Western Union agents operate during the policy period, requiring the closure of certain Western Union insured properties and the properties of numerous suppliers to Western Union of premises from which Western Union agents operate, precluding customers of Western Union from accessing those locations to transact business (*Id.* at ¶¶ 30, 33-35, 55-57);

[1] ACE's Motion erroneously accuses Western Union of misquoting the Civil Authority coverage. ECF No. 17 at 6 n.2. Western Union's Complaint correctly quotes that provision, as it is amended by Endorsement No. 16 (ECF 1-1 at 96).

- Property exposed to COVID-19 is unsafe and dangerous because of the highly transmissible nature of the virus via respiratory droplets which can attach to surfaces and people, as well as the lengthy incubation period for COVID-19 and the fact that asymptomatic individuals can transmit the virus (*Id.* at ¶¶ 15, 17-22, 24-27);
- Property exposed to COVID-19 cannot be safely used, as evidenced by the resulting Closure Orders (*Id.* at ¶¶ 24-27, 36);
- Western Union's notice of loss specifically provided examples of insured properties and agent locations where there were confirmed or presumptive cases of COVID-19 among personnel (*Id.* at ¶ 59); and
- The virus that causes COVID-19 was present in and on Western Union's properties and agent locations, as well as the surrounding properties (*Id.* at ¶¶ 58, 60-61).

1. Under Colorado Law, "Direct Physical Loss" Includes the Loss of Access to Property Caused by a Dangerous Condition

The thrust of ACE's Motion to Dismiss is that Western Union does not state a claim cognizable by the Policy because it does not allege that there was tangible damage to property. ACE gives short shrift to Colorado case law, instead focusing at length on pre-COVID and COVID decisions from other jurisdictions seemingly requiring a policyholder to prove physical alteration of property to trigger coverage. ACE's gambit is not surprising, as neither the Supreme Court of Colorado nor any intermediate Colorado court has ever held that physical alteration of property is required to trigger coverage under a commercial all-risk policy.

To the contrary, the Colorado Supreme Court has addressed this precise issue, holding that where conditions exist "making further use of [a] building highly dangerous," a "direct physical

loss" triggering coverage has occurred. *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968). In *Western Fire*, the Littleton Fire Department ordered a church to close because gasoline vapors had infiltrated the church building, rendering the property dangerous for people to occupy. As here, there was no physical structural alteration of the building itself, and the insurer argued that the insured had not suffered the requisite "direct physical loss" to trigger coverage. The Colorado Supreme Court specifically rejected the notion that evidence of "tangible injury" or "physical alteration" of the building itself was required, holding that a condition rendering a property uninhabitable and dangerous (in that case evidenced by a civil authority order to that effect) constitutes "direct physical loss":

> It is perhaps quite true that the so-called "loss of use" of the church premises, standing alone, does not in and of itself constitute a "direct physical loss." A "loss of use" of course could be occasioned by many different causes. But, in the instant case, the so-called "loss of use," occasioned by the action of the Littleton Fire Department, cannot be viewed in splendid isolation, but must be viewed in proper context. When thus considered, this particular "loss of use" was simply the consequential result of the fact that because of the accumulation of gasoline around and under the church building the premises became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous. All of which we hold equates to a direct physical loss within the meaning of that phrase as used by the Company in its Special Extended Coverage Endorsement insuring against "all other risks."

Id.

The Tenth Circuit has applied the principle set forth in *Western Fire* to "all risk" policies like the Policy at issue here. An "all risk" policy is very broad, covering "any fortuitous loss not resulting from an excluded risk or from fraud by the insured." *Adams-Arapahoe Joint School District No. 28-J v. Continental Ins. Co.*, 891 F.2d 772, 774 (10th Cir. 1989) (applying Colorado law). In *Adams-Arapahoe*, where the roof of Gateway High School in Aurora partially collapsed,

the insurer argued that the insured's "loss" extended only to that portion of the roof which actually collapsed. *Id.* at 777. The Tenth Circuit affirmed the trial court's holding that, under *Western Fire*, the insured's "loss" included the entire corroded area of the roof "because the corrosion made the school unsafe and unusable." *Id.*

Colorado is hardly alone in this regard, as beginning at least as early as the 1960s, courts across the country issued decisions putting insurers like ACE on notice that "physical loss," and its variants, covers claims for loss of access. Numerous states' high courts,[2] in addition to Colorado's, and intermediate appellate courts[3] held long before the COVID crisis that "physical loss" and its variants include property that is rendered inaccessible because it is unsafe, even without tangible or structural damage. Federal appellate courts have reached the same conclusion under various states' law.[4]

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[2] *Mellin* v. *N. Sec. Ins. Co.*, 115 A.3d 799 (N.H. 2015) (urine odor); *Sentinel Mgmt. Co.* v. *Aetna Cas. & Sur. Co.*, 615 N.W.2d 819 (Minn. 2000) (asbestos); *Dundee Mut. Ins. Co.* v. *Marifjeren*, 587 N.W.2d 191 (N.D. 1998) (power outage); *Murray* v. *State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998) (threat of rockfall).

[3] *Widder* v. *La. Citizens Prop. Ins. Corp.*, 82 So. 3d 294 (La. Ct. App. 2011) (lead contamination); *Wakefern Food Corp.* v. *Liberty Mut. Fire Ins. Co.*, 968 A.2d 724 (N.J. App. Div. 2009) (electrical grid shutdown); *Graff* v. *Allstate Ins. Co.*, 54 P.3d 1266 (Wash. Ct. App. 2002) (meth residue); *Azalea, Ltd.* v. *Am. States Ins. Co.*, 656 So. 2d 600 (Fla. Ct. App. 1995) (destruction of bacteria colony in treatment plant); *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 91 (1995) (the "health hazard [] of the potential for *future* [asbestos] releases," causes an "injury to the buildings [that] is a physical one") (emphasis in original); *Bd. of Educ.* v. *Int'l Ins. Co.*, 720 N.E.2d 622 (Ill. Ct. App. 1999) (asbestos); *Farmers Ins. Co.* v. *Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (meth odor).

[4] *Essex Ins. Co.* v. *BloomSouth Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009) (Massachusetts law) (chemical odors); *Intermetal Mexicana, S.A.* v. *Ins. Co. of N. Am.*, 866 F.2d 71 (3d Cir. 1989) (Pennsylvania law) (theft); *Hampton Foods, Inc.* v. *Aetna Cas. & Sur. Co.*, 787 F.2d 349 (8th Cir. 1986) (Missouri law) (risk of collapse); *Am. Alliance Ins. Co.* v. *Keleket X-Ray Corp.*, 248 F.2d 920 (6th Cir. 1957) (Ohio law) (radium contamination).

The reasoning of the California Court of Appeals in *Hughes v. Potomac Ins. Co.*, 199 Cal. App. 2d 239 (Cal. Ct. App. 1962), is particularly persuasive:

> To accept [the insurer's] interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been "damaged" so long as its paint remains intact and its walls still adhere to one another. ***Despite the fact that a "dwelling building" might be rendered completely useless to its owners, [the insurer] would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected.*** Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.

Id. at 248-49 (quotations omitted, emphasis added).

Indeed, as an Oklahoma trial court recently noted in granting a policyholder's motion for summary judgment on its own COVID-19 business interruption claim, because of the ambiguous breadth of the term "direct physical loss" that insurers have used for more than fifty years, courts have long "begged carriers to define the phrase to avoid the precise issue before the Court now" – closures caused by a pandemic. *Cherokee Nation v. Lexington Ins. Co.*, Case No. CV-20-150, at *3 (Okla. Dist. Ct. Cherokee Cnty. Jan. 29, 2021) (Ex. 1). ACE failed to heed those pleas, instead continuing to use the same broad language despite decades of fair warning that "physical loss" includes loss of access to property and is not limited to tangible damage.

The rationale behind *Western Fire* and these myriad other cases is mandated by the policy language itself. ACE concedes, as it must, that it chose not to define the phrase "direct physical loss, damage, or destruction," or any of its constituent words, in the Policy that it sold to Western Union. Notably, ACE *does* cite Merriam-Webster dictionary definitions of the terms "damage" and "destruction," (ECF No. 17 at 13 n.5), yet conspicuously fails to tell the Court how that same

dictionary defines the term "loss." Merriam-Webster defines "loss" as, *inter alia*, "deprivation," "the harm or privation resulting from loss or separation" or "failure to gain, win, obtain, or utilize." https://www.merriam-webster.com/dictionary/loss.[5] A second dictionary defines "loss" as "the state of being deprived of or being without something that one has had." https://www.dictionary.com/browse/loss. Under these widely accepted definitions to which a court applying Colorado law would refer, *Renfandt*, 419 P.3d at 580, "loss" includes the loss of access to property.

Further, as noted, the Policy is triggered by "direct physical loss, damage ***or*** destruction to property" (emphasis added). The Policy thus affords coverage not only for "damage" to property, but also for "loss" of property. The disjunctive "or" signals that "loss" and "damage" to property must be two distinct concepts: if "physical loss" required "physical damage" as ACE argues, then one term or the other would be superfluous. *See, e.g.*, *Henderson Road Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 1:20 CV 1239, 2021 WL 168422, at *10 (N.D. Ohio Jan. 19, 2021) (agreeing that "physical loss of the real property means something different than damage to the real property" because, if not, "why would both phrases appear side-by-side separated by the disjunctive conjunction 'or'?").[6] Thus, by conflating "loss" and "damage" with respect to property, and rendering the first term redundant, ACE's interpretation violates the basic rule that contracts should not be interpreted so as to render any words meaningless. *Cooper Mountain, Inc. v. Industrial*

[5] That same dictionary in turn defines "deprivation" as "the state of being kept from possessing, enjoying, or using something." https://www.merriam-webster.com/dictionary/deprivation.

[6] *See also Manpower Inc. v. Ins. Co. of the State of Pennsylvania*, No. 08C0085, 2009 WL 3738099, at 5 (E.D. Wis. Nov. 3, 2009) ("the policy covered physical losses in addition to physical damage, and if a physical loss could not occur without physical damage, then the policy would contain surplus language").

Systems, Inc., 208 P.3d 692, 700 (Colo. 2009) ("We choose a construction of the contract that harmonizes provisions instead of rendering them superfluous"); *Northglenn Gunther Toody's, LLC v. HQ8–10410–10450 Melody Lane, LLC*, No. 16–cv–2427–WJM–KLM, 2018 WL 1762611, at *8 ("Colorado courts strive to avoid any interpretation that would render contractual language meaningless or redundant"). The coverage promised by the Policy cannot, therefore, be construed as being limited to situations in which a property's "physical integrity" is "compromised."[7]

2. Substantial Authority Elsewhere in the Tenth Circuit and Nationwide Supports Coverage for COVID-19 Losses

Consistent with the case law discussed above establishing that "direct physical loss" occurs when an insured is deprived the use of property by virtue of a dangerous condition that renders it uninhabitable, many courts across the country have rejected efforts like ACE's to dismiss COVID-19 business interruption claims for failure to provide coverage under a grant of coverage no

[7] Western Union plausibly states a claim for "direct physical damage" in addition to "direct physical loss." An insured's airspace is as much a part of the property as the land and structure, and the presence of a virus is an alteration of and damage to the airspace. *See, e.g., D'Amico v. Waste Mgmt. of New York, LLC*, 6:18-CV-06080 EAW, 2019 WL 1332575, at *5 n.2 (W.D. N.Y. Mar. 25, 2019) (citing *Butler v. Frontier Tel. Co.*, 186 N.Y. 486, 491 (1906) ("within reasonable limitations land includes not only the surface but also the space above and the part beneath")). Many courts thus recognize that the "direct physical loss" or "direct physical damage" requirement is satisfied by the presence of, for example, bacteria, smoke, asbestos fibers, fumes, vapors, odors, chemical contaminants and mold – all of which, like COVID-19, may be invisible to the naked eye but can permeate and damage the air and surfaces in real property. *See, e.g.*, *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247, at *9 (D. Or. June 7, 2016), *vacated on other grounds*, 2017 WL 1034203 (D. Or. Mar. 06, 2017) ("the smoke that infiltrated the theatre caused direct property loss or damage by causing the property to be uninhabitable and unusable for its intended purpose"); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, No. 2:12-c-04418 (WHW)(CLW), 2014 WL 6675934, at *8 (D. N.J. Nov. 25, 2014) (property sustained "physical damage" due to smell of ammonia).

broader than the Policy's "direct physical loss, damage or destruction" grant of coverage.[8] Indeed, some courts have even granted summary judgment to policyholders on their COVID-19 claims.[9] For example, in the recent *Ungarean* decision, the court relied upon the same principles of insurance contract interpretation required by Colorado law, including looking to dictionary definitions and interpreting provisions so as to give meaning to every word. The court held that "the most reasonable definition of 'loss' is one that focuses on the act of losing possession and/or

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[8] *See, e.g.*, *Serendipitous, LLC v. Cincinnati Ins. Co.*, No. 2:20-cv-00873-MHH, 2021 WL 1816960, at *5 (N.D. Alab. May 6, 2021) ("The policy language indicates that the insurer understands that an insured may suffer physical loss without physical alteration of property because the policy excludes from coverage some expenses incurred because of invisible substances like vapor and fumes"); *Southern Dental Birmingham LLC v. The Cincinnati Ins. Co.*, No. 2:20-cv-681-AMM, 2021 WL 1217327 (N.D. Ala. Mar. 19, 2021) (finding that insurer had failed to demonstrate that all dictionary definitions foreclosed the insured's interpretation of "loss" to include loss of access); *In re: Society Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Lit.*, No. 20-C-5965, MDL No. 2964, 2021 WL 679109, at *8 (N.D. Ill. Feb. 22, 2021) ("the disjunctive 'or' in that phrase means that 'physical loss' must cover something different from 'physical damage'"); *McKinley Dev. Leasing, et al. v. Westfield Ins. Co.*, No. 2020-cv-00815, Slip Op. (Ohio Ct. Com. Pl. Feb. 9, 2021) (finding ambiguity between portions of the policy language and susceptibility to more than one interpretation) (Ex. 2); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-cv-265, 2020 WL 7249624, at *9-10 (E.D. Va. Dec. 9, 2020) (among the "spectrum of accepted interpretations," "direct physical loss" extends to loss of access to property, as opposed to mere inability to use an accessible property for its intended purpose); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F.Supp.3d 867 (W.D. Mo. 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F.Supp.3d 794 (W.D. Mo. 2020); *Urogynecology Specialist of Fla., LLC v. Sentinel Ins. Co., Ltd.*, 489 F.Supp.3d 1297 (M.D. Fla. 2020).

[9] *See, e.g.*, *Ungarean v. CNA,* No. GD-20-006544 (Ct. Comm. Pl. Alleg. Cty. Mar. 22, 2021) (Ex. 3); *Cherokee Nation v. Lexington Ins. Co.,* Case No. CV-20-150 (Okla. Dist. Ct. Cherokee Cnty. Jan. 29, 2021) (Ex. 1); *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 20-cv-1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021); *Perry St. Brewing Co., LLC v. Mut. Of Enumclaw Ins. Co.*, No. 20-2-02212-32 (Wash. Super. Ct. Spokane Cnty. Nov. 23, 2020) (Ex. 4); *N. State Deli, LLC v. The Cincinnati Ins. Co.*, Case No. 20-cvs-02569, 2020 WL 6281507, at *6 (N.C. Sup. Ct. Oct. 9, 2020) ("In the context of the Policies, . . . 'direct physical loss' describes the scenario where business owners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. . . . In ordinary terms, this loss is unambiguously a 'direct physical loss,' and the Policies afford coverage.") (Ex. 5).

deprivation of property instead of one that encompasses various forms of damage to property, i.e., destruction and ruin. Applying this definition gives the term 'loss' meaning that is different from the term 'damage.'" *Ungarean*, No. GD-20-006544, at *13 (Ex. 3).

Although, to be sure, ACE cites a number of decisions (none applying Colorado law) dismissing insureds' COVID-19 coverage claims, the existence of case law on both sides of the issue is instructive, and militates in favor of denying ACE's Motion to Dismiss. Under Colorado law, when different courts have read the same policy language in different ways, the divergence of opinion is itself evidence of an ambiguity that must be construed in favor of the insured. *Thompson*, 84 P.3d at 504 (citing *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1092 n.13 (Colo. 1991)); *see also New Castle County DE v. National Union Fire Ins. Co. of Pittsburgh, PA*, 243 F.3d 744, 756 (3d Cir. 2001) ("A single phrase, which insurance companies have consistently refused to define, and that has generated literally hundreds of lawsuits, with widely varying results, cannot, under our application of commonsense, be termed unambiguous.").

3. ACE's Proposed Interpretation Impermissibly Fails to Give Meaning to All Policy Terms Insofar as it Ignores that the Policy Expressly Recognizes that Otherwise Covered "Loss" or "Damage" may be Caused By the Mere "Threat" of Dispersal of Certain Substances

ACE's suggestion that "physical loss, damage or destruction" cannot be interpreted to extend to situations in which the threatened exposure to a harmful substance necessitates closure of property further violates Colorado law on insurance contract interpretation by failing to give meaning to an exclusion it chose to include in the Policy. An exclusion operates solely to negate coverage otherwise granted in the insuring clause. *See, e.g.*, *Taos Ski Valley, Inc. v. Nova Cas. Co.*, No. 16-2118, 705 F. App'x 749, 753 (10th Cir. Aug. 25, 2017) ("the very purpose of an exclusion [is] to restrict the scope of the policy beyond what would otherwise be covered") (internal

quotation omitted); *Simpson v. KFB Ins. Co.*, 498 P.2d 71, 76 (Kan. 1972) ("The very purpose of an exclusion clause is to exclude risks otherwise covered by general coverage clauses."). If a particular risk was not covered in the first instance, there would be no need to include an exclusion to address that risk.

Here, ACE chose to include in the Policy that it sold to Western Union an Endorsement titled "Pollution and Contamination Exclusions and Related Coverage Extensions with Sub-Limits Endorsement" (the "Pollution and Contamination Endorsement"). That Endorsement provides that the insurance does not apply to, *inter alia*, "[l]oss 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." (emphasis added). "Contaminants or Pollutants," in turn, are defined by the endorsement to include certain substances "which after [their] 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***." (Emphasis added).

The fact that ACE deemed it necessary to exclude coverage for a "loss" caused merely by a "threatened" intrusion into the premises of a substance posing a "human health" risk – irrespective of any "actual" intrusion of such substance into the premises (much less any particularized injury to the structure or air or any persons within) – necessarily means that such a threat otherwise ***could*** trigger "loss" resulting from a covered cause. Otherwise, this "human health threat" prong of the Pollution and Contamination Endorsement would be superfluous. *Am. Bldg. Maint. Co. v. Indemnity Ins. Co. of N.A.*, 214 Cal. 608, 613 (1932) ("The very fact that the

[insurer] thought it necessary … to eliminate this coverage indicates a belief on its part that loss arising from the [excluded risk] was included in the policy."). Thus, the cases upon which ACE relies so heavily, including the unpublished hearing transcript ACE attached to its opening brief, have no applicability to the language of the Policy in this case, which, by operation of the "human health threat" exclusionary clause, expressly recognizes that the term "loss" was understood not to require a particularized damage to any structure.

Indeed, the only way a threat of damage to human health can create a "loss" of "property" is if that threat precludes access to the property. Reading "physical loss, damage, or destruction to property" as itself excluding loss of access brought on by such threats would impermissibly render the exclusionary clause superfluous. Moreover, prior to its modification by the State Amendatory Endorsement, the Pollution and Contamination Endorsement included "virus" within the definition of "Contaminants." As a matter of law, the fact that ACE originally excluded coverage of a business interruption resulting from the threat of intrusion of a virus into the premises that would render the premises inaccessible ***necessarily*** means that such an event, without more, would otherwise be covered. And, as discussed more fully below, ACE amended the policy to eliminate "virus" from the universe of excluded "threats" – meaning that a "loss" resulting from the threat of intrusion of a virus must be ***within*** coverage.

B. DISPUTED: Coverage for Western Union's Losses is Not Barred by the Policy's Pollution and Contamination Endorsement

"Under an all-risk policy, once the insured demonstrates a loss to the property covered by the policy, the insurance carrier has the burden of proving that the proximate cause of the loss was excluded by the policy language." *Leprino Foods Co. v. Factory Mut. Ins. Co.*, 453 F.3d 1281, 1287 (10th Cir. 2006) (citing *Novell v. American Guar. & Liab. Ins. Co.*, 15 P.3d 775, 778 (Colo.

App. 1999)). The only exclusion ACE relies upon in its Motion to Dismiss Western Union's claim for physical loss or damage relating to its loss of access to property is the Pollution and Contamination Endorsement, which begins on page 90 of the Policy. That Endorsement defines "Contaminants or Pollutants" to mean "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 …"

The Policy later (beginning at page 101) includes an Endorsement titled "Applicable State Amendatory Provisions – Benefit Level" (the "State Amendatory Endorsement"). That Endorsement expressly states in its preamble: "Accordingly, the following exclusions, terms and conditions are hereby added to the policy and supersede any term or condition to the contrary in this policy unless such contrary term or condition is both lawful and less restrictive upon the Insured …" One such "term" "added to the policy" and "supersed[ing] any term or condition to the contrary" is a change to the definition of "pollutants" that appears on page 104 of the Policy. Specifically, this endorsement states that the Policy's definition of "pollutants" is deleted and replaced by a new definition that expressly removes the word "virus" from the definition:

> "Pollutants" means any substance or material that is a solid, liquid, gaseous or thermal irritant or contaminant including but not limited to, smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste and any substances or materials identified in the Schedule. Waste includes materials to be recycled, reconditioned or reclaimed.[10]

[10] Western Union alleged in its Complaint (i) the terms of the State Amendatory Endorsement, including its removal of the word "virus" from the superseded definition of "Pollutants"; (ii) that the State Amendatory Endorsement is not limited in application to a particular state in geographical state; and (iii) that ACE did not include a virus exclusion in the Policy. ECF No. 1 at ¶¶ 48-54.

ACE baldly suggests that only the provisions of the State Amendatory Endorsement that fall under the header "Colorado Changes" apply.[11] ECF No. 17 at 7 n.3. ACE also suggests that the provisions of the Pollution and Contamination Endorsement trump any provisions in the State Amendatory Endorsement because the former provides that its terms "supersede any term, provision or endorsement to the contrary in this policy." *Id.* Both contentions fail.

Neither the contract language nor case law supports ACE's suggestion that only the provisions listed under "Colorado Changes" apply to Western Union's claim, which involves losses at locations all over the world. The revision to the definition of "Pollutants" is one of several provisions that appears under the header "Indiana Changes." The quoted provision (eliminating "virus" as a "contaminant") is unambiguous and must be enforced as written. *Cotter Corp. v. American Empire Surplus Ins. Lines Co.*, 90 P.3d 814, 834 (Colo. 2004). Any suggestion by ACE that the provisions listed under "Indiana Changes" apply only to properties located in the State of Indiana[12] is belied by the contract itself, which provides that "[t]he titles of paragraphs of this form and of endorsements and supplemental contracts, if any, now or hereafter attached hereto are inserted solely for convenience of reference and shall not be deemed in any way to limit or affect

[11] Because of Western Union's multi-state presence, ACE relied on state amendatory endorsements to amend its base policy form to achieve, before issuance, a single policy with a singular set of terms that would be approved by every interested state. Having achieved that approval, ACE cannot now re-write the policy.

[12] Under ACE's proffered interpretation, the "supersed[ing]" language it cites from the Pollution and Contamination Endorsement would negate the applicability of the "Indiana Changes" even for a claim relating solely to property in Indiana, which impermissibly would run afoul of the state insurance regulations that give rise to the State Amendatory Endorsement provisions.

the provisions to which they relate."[13] Thus, the title "Indiana Changes" does not "in any way" limit the application of the provisions below that title to only those properties located in Indiana.

Further, courts regularly apply state-titled endorsements to the entire policy where there is no express geographical limitation within the provision. *See, e.g.*, *John Akridge Co. v. Travelers Cos.*, 837 F. Supp. 6, 8 (D. D.C. 1993) (applying three-year limitations period in "Maryland Changes" endorsement to coverage action related to property damage occurring in Washington, D.C. because "no language in the endorsement limits its application to insured property located in Maryland").[14] The State Amendatory Endorsement here contains no express geographical limitation, at most referring only generally to a "Schedule of Locations on file with the Company," the existence of which does not appear in the record and, in any event, would not include information about *third-party* locations relevant to a claim for the *contingent* business interruption coverage promised by the Policy – a claim which Western Union has asserted here.

Because the State Amendatory Endorsement operates to narrow the Policy's definition of "Pollutants" by expressly removing the word "virus," it operates to broaden the coverage afforded

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[13] *See also Pine Bluff Sch. Dist. v. Ace Am. Ins. Co.*, 984 F.3d 583, 593 (8th Cir. 2020) (rejecting use of section header to interpret coverage where policy explicitly stated "[t]he titles and headings to [the] endorsements of the Policy are included solely for ease of reference [and] do not in any way limit, expand or otherwise affect the provisions of such parts, sections, subsections or endorsements"); *Welch Foods, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 659 F.3d 191, 193 (1st Cir. 2011) (same).

[14] *See also Arch Specialty Ins. Co. v. Cline*, No. 10-2114-STA-dkv, 2012 WL 12823706, at *7 (W.D. Tn. Dec. 4, 2012) ("Although the endorsement is titled 'New York Amendatory Endorsement,' nowhere in the Subject Policy or the endorsement is the endorsement limited to applicability solely in New York State."); *Security Storage Properties v. Safeco Ins. Co. of Am.*, No. 09-1036-WEB-DWB, 2010 WL 1936127, at *5-6 (D. Kan. May 12, 2010) (finding policy containing Texas and Kansas titled endorsements, neither of which included geographically limiting language, ambiguous, and thus applying the interpretation favorably to the insured).

under the Policy. The State Amendatory Endorsement, which provides that its terms "supersede any term or condition to the contrary in this policy," appears *after* the Pollution and Contamination Endorsement, and thus amends the earlier endorsement. *See, e.g.*, *Minuteman Int'l Inc. v. Great American Ins. Co.*, No. 03 C 6067, 2004 WL 603482, at *8 (N.D. Ill. Mar. 22, 2004) ("if there are two inconsistent endorsements and one endorsement is subsequent to the other endorsement, the later endorsement generally will control").[15] At worst, the presence of two conflicting endorsements creates an ambiguity, which must be construed against ACE and in favor of coverage, in the form of the narrower definition of "Pollutants" found in the State Amendatory Endorsement that does not include "virus." *Thompson*, 84 P.3d at 502.[16]

III. WESTERN UNION STATES A CLAIM FOR STATUTORY BAD FAITH

A. DISPUTED: ACE's Sole Proffered Basis for Dismissal of Western Union's Statutory Bad Faith Claim is the Supposed Absence of Coverage, so if Western Union States a Claim for Coverage, it Likewise States a Claim for Statutory Bad Faith

ACE's sole basis for seeking dismissal of Western Union's claim for statutory bad faith under C.R.S. § 10-3-115 and § 10-3-116 (Count III of the Complaint) is that a claim for statutory bad faith necessarily fails if its corresponding claim for breach of contract fails. In other words, ACE provides no basis on which this Court could dismiss the claim for statutory bad faith if the

[15] *INA of Texas v. Leonard*, 714 S.W.2d 414, 417 (Tex. App. 1986) ("A later provision which is held to supersede the master policy itself would, logically, also supersede an earlier endorsement which is in conflict, since the latter is merely a constituent part of the contract as a whole.").

[16] ACE contends that "to *not* enforce the [Pollution and Contamination Endorsement] exclusion here would effectively write for Western Union a much better contract than the one it paid for." ECF No. 17 at 19. There is no evidence at the Motion to Dismiss stage as to how ACE calculated the premiums for this policy or how, if at all, its insertion of a pollution exclusion or its subsequent revision by the State Amendatory Endorsement to remove the word "virus" played a role.

Court denies ACE's Motion with respect to Western Union's contractual claims. Western Union has alleged that ACE lacked a reasonable basis to deny authorizing payment of Western Union's covered losses. ECF No. 1 at ¶ 90. If Western Union's contractual claims survive ACE's Motion to Dismiss – which they should for all of the reasons discussed *supra* – then the reasonableness of ACE's conduct in denying payment of Western Union's covered losses, including but not limited to its reliance on a purported definition of "pollutant" that is not the operative definition in the Policy, will be a question of fact for the jury. *Vaccaro v. American Family Ins. Group*, 275 P.3d 750, 759 (Colo. App. 2012).

CONCLUSION

For the foregoing reasons, the Court should deny ACE's Motion to Dismiss in its entirety.

Respectfully submitted this 18th day of May, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 18, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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