No. HHD-CV21-6140378-S MASHANTUCKET PEQUOT TRIBAL NATION, *Plaintiff,* *v.* FACTORY MUTUAL INSURANCE COMPANY, *Defendant.*	SUPERIOR COURT COMPLEX LITIGATION DOCKET JUDICIAL DISTRICT OF HARTFORD AT HARTFORD MAY 4, 2021

DEFENDANT FACTORY MUTUAL INSURANCE COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STRIKE THE COMPLAINT

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Defendant Factory Mutual Insurance Company ("Factory Mutual") respectfully submits this memorandum of law in support of its motion to strike each count of Plaintiff Mashantucket Pequot Tribal Nation's ("Plaintiff") First Amended Complaint, filed on April 12, 2021 ("Complaint") pursuant to Connecticut Practice Book § 10-39.

PRELIMINARY STATEMENT

Plaintiff is a federally recognized Indian Tribe that operates a variety of hospitality, entertainment and tourism businesses within Connecticut's borders, including the Foxwoods Resort Casino. Plaintiff claims that its economic losses resulting from the "probable" presence of COVID-19 on or around its property and COVID-19-related government social-distancing orders are covered by a property insurance policy issued by Factory Mutual. On this basis, Plaintiff brings claims for breach of contract and declaratory judgment, as well as for common law bad faith and violation of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110b ("CUTPA"). Each claim of Plaintiff's Complaint should be stricken, however, because the relief it seeks is unavailable under the clear and unambiguous terms of the parties' insurance contract (the "Policy").[1]

First, the Policy expressly excludes viruses as a covered risk of loss. Specifically, it excludes from coverage "contamination," defined as "any condition of property due to the actual or suspected presence of," *inter alia*, any "pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent." This exclusion bars coverage for losses resulting from COVID-19 because it is a "pathogen or pathogenic organism," "virus," and "disease causing or illness causing agent."

[1] The Policy is attached to the Complaint as Exhibit A. All citations to Exhibit A of the Complaint are referred to herein as citations to the "Policy."

Second, virus exclusion aside, the Complaint must also be stricken because the presence of COVID-19 does not cause "physical loss or damage" to property. Connecticut law is clear that the word "physical" requires an actual, tangible alteration to property. However, the presence of COVID-19 virus does not alter property in any tangible way. As many courts nationwide have now concluded, COVID-19 threatens people, not property.

Likewise, COVID-19-related social-distancing orders did not physically or tangibly alter Plaintiff's property. The Complaint suggests that loss from the social-distancing orders are covered because they limited Plaintiff's use of its property. More than 100 courts nationwide in similar COVID-19 coverage disputes have concluded that "loss of use" due to a social-distancing order is not "physical loss or damage" to property.

Third, even if "loss of use" due to a social distancing order was "physical loss or damage" to property (which it is not), the Policy in this case specifically excludes coverage for "loss of use."

Fourth, Plaintiff's claims are incompatible with the language of the Policy read as a whole. Plaintiff ***did*** purchase specific coverage for income lost due to interruption of business caused by the presence of communicable diseases such as COVID-19 at insured locations. That coverage, however, is not implicated here because coverage for communicable disease requires "actual not suspected presence of communicable disease" at an insured location. The Complaint does not plead facts showing actual presence of COVID-19 at Foxwoods Resort Casino or another insured property. And, even if there was COVID-19 actually present at insured property and the other requirements for coverage were met, Plaintiff would be expressly limited to the Policy's annual aggregate $1 million communicable disease sub-limit. The Complaint's suggestion that the inclusion of $1 million of communicable disease coverage in the Policy somehow nullifies the exclusion for contamination and allows Plaintiff to access the far higher limits applicable to

coverages triggered by physical loss or damage is not a reasonable understanding of the parties' intent as reflected in the plain language of the Policy.

As Plaintiff cannot state a claim for coverage under the plain terms of the Policy, its claims for declaratory judgment and breach of contract (Counts I and II) are legally insufficient and should be stricken. Further, Plaintiff's remaining claims—for common law bad faith (Count III) and breach of CUTPA (Count IV)—must be stricken as well because each require a showing that Plaintiff is entitled to coverage under the Policy, which Plaintiff cannot make.

BACKGROUND

A. The Parties

Factory Mutual is a Rhode Island-based insurance company licensed to write commercial property insurance in Connecticut. Compl. ¶ 5. Plaintiff is a federally recognized Indian Tribe headquartered in Connecticut that operates certain hospitality, entertainment, and tourism businesses. *Id.* ¶¶ 4, 10–21. Plaintiff alleges that it purchased the commercial property insurance Policy, attached as Exhibit A to the Complaint, from Factory Mutual. *Id.* ¶ 23.

B. The Complaint

The following facts, set forth in the Complaint, are assumed to be true solely for purposes of this Motion to Strike:

Plaintiff alleges that Plaintiff's businesses incurred $76 million in losses when it had to temporarily shut down or limit operations as a result of the COVID-19 pandemic. *See id.* ¶ 2. Plaintiff alleges that "it is more probable than not that COVID-19 was actually present" at its businesses by March 2020. *Id.* ¶¶ 72–82. Plaintiff claims this probable presence of COVID-19 caused "physical loss or damage" to its property, and as a result, its businesses voluntarily "shut down or appropriately limited operations … until it was clear that it was safe to reopen for employees and guests." *Id.* ¶ 85. Further, Plaintiff alleges that "[t]ribal and state governments

issued orders restricting activities directly because of … physical loss or damage to property and to minimize the spread of COVID-19" and that these orders led to the "temporary closure" of Plaintiff's businesses. *Id.* ¶¶ 87, 89–93.

Plaintiff alleges it submitted a claim for coverage under the Policy on April 8, 2020, and that Factory Mutual denied coverage. *Id.* ¶¶ 168, 171–76. Plaintiff seeks (1) declarations that coverage exists under the Policy, (2) compensatory and consequential damages for Factory Mutual's alleged breach of contract in denying coverage, (3) punitive damages, fees and costs for Factory Mutual's alleged common law bad faith conduct in responding to Plaintiff's claim, and (4) punitive damages, fees and costs for Factory Mutual's alleged bad faith under CUTPA. *See id.* ¶¶ 224–51.

C. The Policy

The Policy "covers property . . . against ALL RISKS OF PHYSICAL LOSS OR DAMAGE" to the covered property, "except as hereinafter excluded" in the Policy. Policy at 1. If there is physical loss or damage to property or other loss that is covered by the Policy, such loss or damage will be covered, unless a specific exclusion applies to bar coverage.

The Policy's exclusions, in turn, provide that they may be subject to exceptions specified in the Policy. *Id.* at 10 (stating that exclusions apply "unless otherwise stated"). Thus, the Policy provides coverage for physical loss or damage unless an exclusion applies, and an exclusion applies unless an exception to the exclusion is "otherwise stated" in the Policy.

1. Relevant Property Damage Additional Coverages

Protection and Preservation of Property Coverage is an additional coverage that insures costs incurred to protect or preserve insured property "due to *actual, or … immediately impending, insured physical loss or damage to such insured property*." *Id.* at 29 (emphasis added).

2. Relevant Time Element Coverages

The Policy's general **Time Element Coverage** insures "TIME ELEMENT loss … *directly resulting from physical loss or damage* of the type insured" to the covered property. *Id.* at 35 (emphasis added). "Time element loss" includes certain business income losses and expenses incurred during periods of time when operations are impaired as a result of physical loss or damage to property. *See id.* at 35–36.

Civil or Military Authority Coverage is a time element coverage extension that applies when "an order of civil or military authority or state or tribal gaming commission 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." *Id.* at 47 (emphasis added).

Contingent Time Element Extended Coverage is a time element coverage extension that covers certain business income losses or expenses "*directly resulting from physical loss or damage of the type insured* to property of the type insured at contingent time element locations," *id.* at 48 (emphasis added), defined as "any location (1) of a direct customer, supplier, contract manufacturer or contract service provider to the Insured; [or] (2) of any company under a royalty, licensing fee or commission agreement with the Insured," within the United States. *Id.* at 66.

Ingress/Egress Coverage is a time element coverage extension that applies when the insured's business is interrupted "due to partial or total physical prevention of ingress to or egress from an insured location … provided that such prevention is a *direct result of physical damage of the type insured*." *Id.* at 48 (emphasis added).

Attraction Property Coverage is a time element coverage extension that covers certain business income losses and expenses "*directly resulting from physical loss or damage of the type*

insured to property of the type insured that attracts business to an insured location and is within 1 statute mile/1.6 kilometres of the insured location." *Id.* at 51–52 (emphasis added).

3. Relevant Exclusions

The Policy contains a number of relevant exclusions, which apply "unless otherwise stated." *Id.* at 10. The Policy excludes, *inter alia*, (i) "interruption of business, except to the extent provided by this Policy"; (ii) "loss of market or loss of use"; and (iii) "loss from enforcement of any law or ordinance" regulating, among other things, the "use" of any property. *Id.* at 10–11. The Policy also "excludes the following unless directly resulting from other physical damage not excluded by this Policy":

> **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. This exclusion [ ] does not apply to radioactive contamination which is excluded elsewhere in this Policy.

Id. at 14. "Contamination" is defined 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 66 (emphasis added).

4. Communicable Disease Coverages

The Policy contains two coverage provisions which respond to the "actual not suspected presence" of a communicable disease, defined as "disease which is (A) transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges, or (B) Legionellosis." *Id.* at 66. Unlike the other coverage provisions at issue, the communicable disease coverages do not require physical loss or damage to trigger coverage.

Communicable Disease Response Coverage applies when Plaintiff's insured property "has the *actual not suspected presence* of communicable disease and access to such location is limited, restricted or prohibited by (1) an order of an authorized government agency regulating the actual not suspected presence of communicable disease; or (2) a decision of an Officer of the Insured as a result of the actual not suspected presence of communicable disease." *Id.* at 22 (emphasis added). Communicable Disease Response Coverage covers costs of "cleanup, removal and disposal of the actual not suspected presence of communicable diseases from insured property," as well as certain resulting public relations and reputation management costs. *Id.* The Policy's limit of liability for Communicable Disease Response Coverage is "USD1,000,000 in the aggregate during any policy year." *Id.* at 3. In addition, the Policy provides that "[t]he Company's maximum limit of liability for INTERRUPTION BY COMMUNICABLE DISEASE and this coverage combined shall not exceed USD1,000,000 in the aggregate during any policy year regardless of the number of locations, coverages or occurrences involved." *Id.* at 3–4. Unlike the coverages discussed above, Communicable Disease Response coverage does not require a showing of "physical loss or damage of the type insured."

Interruption by Communicable Disease Coverage covers certain business income losses and expenses, also up to a $1,000,000 limit, when insured property "has the *actual not suspected presence* of communicable disease and access to such location is limited, restricted or prohibited" by "order of an authorized governmental agency" or "an Officer of the Insured." *Id.* at 53–54 (emphasis added). Like Communicable Disease Response Coverage, but unlike the other coverages discussed above, this coverage also does not require "physical loss or damage of the type insured."

STANDARD OF REVIEW

A motion to strike a complaint or cause of action should be granted where the "allegations of a complaint" are legally insufficient "to state a claim on which relief can be granted." *Ahmed v. Tower Ins. Co. of N.Y.*, No. CV14-6025032-S, 2015 WL 5237416, at *1 (Conn. Super. Ct. Aug. 4, 2015) (quoting *Bennett v. Conn. Hospice, Inc.*, 56 Conn. App. 134, 136 (1999)). "If [a] motion to strike has merit as to certain allegations of the complaint … the proper course for the court is to strike those allegations." *Coe v. Bd. of Educ. of Town of Watertown*, 301 Conn. 112, 121 n.5 (2011); *see also Alessie v. Stop & Shop Supermarket*, No. NNH-CV18-6076540-S, 2019 WL 6884533, at *2 (Conn. Super. Ct. Nov. 20, 2019) ("A motion to strike may attack individual paragraphs of a single-count complaint."). In conducting this analysis, "[t]he motion [to strike] admits well pleaded facts but does not admit any legal conclusions or the truth or accuracy of opinions stated in the pleadings." *City of Bridgeport v. C.R. Klewin Ne., LLC*, 51 Conn. Supp. 1, 4 (Conn. Super. Ct. 2007).

The Policy, attached as Exhibit A to the Complaint, can properly be considered by this Court on this motion to strike. *See, e.g.*, *Blueridge Health Servs., Inc. v. Campania Mgmt. Co.*, No. X-03-CV-010510941-S, 2002 WL 1817005, at *2 (Conn. Super. Ct. July 3, 2002) ("[A]ttachments and exhibits to a complaint are deemed part of the pleadings for the purposes of considering a motion to strike"). And, where the terms of the Policy establish that "the [policyholder's] factual allegations are legally insufficient to state a claim of breach of contract, the [insurer's] motion to strike . . . [must be] granted." *Cambridge Mut. Fire Ins. v. Bemis*, No. 074007914, 2008 WL 5156448, at *2 (Conn. Super. Ct. Nov. 13, 2008).

Under Connecticut law, "[c]onstruction of a contract of insurance presents a question of law for the court." *Moore v. Cont'l Cas. Co.*, 252 Conn. 405, 409 (2000). Connecticut courts interpret insurance policies "by the same general rules that govern the construction of any written

contract" and "[i]f the terms of the policy are clear and unambiguous, then the language … must be accorded its natural and ordinary meaning." *Conn. Med. Ins. Co. v. Kulikowski*, 286 Conn. 1, 5 (2008). The Court should grant this motion to strike each count of the Complaint because the unambiguous terms of the Policy do not cover the loss alleged in the Complaint. *See Sanzo v. Metro. Grp. Prop. & Cas. Ins. Co.*, No. CV166010488S, 2018 WL 1749967, at *5 (Conn. Super. Ct. Mar. 9, 2018); *see also England v. Amica Mut. Ins. Co.*, No. 3:16-Civ-1951, 2017 WL 3996394, at *4 (D. Conn. Sept. 11, 2017).

ARGUMENT

I. THE COURT SHOULD STRIKE COUNTS I AND II BECAUSE THE POLICY EXCLUDES CONTAMINATION BY VIRUS

The Court should strike Count I, for declaratory relief, and Count II, for breach of contract, because the loss for which Plaintiff seeks coverage is expressly excluded under the Policy.[2] The Policy excludes "contamination," defined as "any condition of property due to the actual or suspected presence of any … pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent." Policy at 66. It is undisputed that COVID-19 is caused by the virus SARS-CoV-2, short for "Severe Acute Respiratory Syndrome Coronavirus 2." *See* Compl. ¶¶ 44–45. This is fatal to Plaintiff's contention that its COVID-19-related losses constitute or result from

[2] Because the declaratory judgment (Count I) and breach of contract (Count II) claims "both turn on whether the insurance polic[y] in question provide[s] coverage for the plaintiff['s] alleged loss[,]" they are "redundant" and are treated together herein. *See Willenborg v. Unitrin Preferred Ins. Co.*, No. TTD-CV-16601936-S, 2018 WL 7046877, at *3 (Conn. Super. Ct. Dec. 14, 2018). As Plaintiff's declaratory judgment claim merely restates its claim for breach of contract, "[t]he only thing that brings the plaintiff's claims within the declaratory judgment statute is the plaintiff's allegation for a declaratory judgment in the first count of its complaint." *Hurley Mfg. Co. v. Bankers Life & Cas. Co.*, No. 0061986, 1993 WL 241771, at *2 (Conn. Super. Ct. June 21, 1993). In such circumstances, "on the face of the complaint, there [is] another more appropriate remedy"—*i.e.*, a direct, breach of contract action—"and the court … should … refuse[] to entertain a declaratory judgment action at all." *Id.* (quoting *Jenkins v. Indem. Ins. Co.*, 152 Conn. 249, 260 (1964)).

physical loss or damage of the type insured. *See Dumas v. USAA Gen. Indem. Co.*, No. 3:17-cv-01083, 2019 WL 3574920, at *4 (D. Conn. Aug. 6, 2019) ("Because plaintiffs do not identify any grounds for loss that are separate and independent from the exclusions that apply in this case, they are not entitled to coverage."). Therefore, there is no coverage under the Property Damage or Time Element Coverages. Indeed, the language of the contamination exclusion specifically extends to "any condition of property" and to "the inability to use or occupy property" resulting from viruses such as COVID-19.

Connecticut law affords exclusions in insurance policies their "natural and ordinary meaning," and courts should not engage "in a forced construction ignoring provisions or so distorting them as to accord a meaning other than that evidently intended by the parties." *Heyman Assocs. No. 1 v. Ins. Co. of State of Pa.*, 231 Conn. 756, 770–71, 776 (1995) (holding that unambiguous exclusion barred recovery). Here, the only reasonable application of the exclusion's "natural and ordinary meaning" is to bar Plaintiff's claims for coverage. *See England*, 2017 WL 3996394, at *5); *Adams v. Allstate Ins. Co.*, 276 F. Supp. 3d 1, 2 (D. Conn. 2017).

The overwhelming majority of courts around the country to have considered the issue have concluded that exclusions for losses due to viruses or other pathogens bar COVID-19-related property insurance claims as a matter of law. In *LJ New Haven LLC v. AmGUARD Insurance Co.*, for example, the court, applying Connecticut law, concluded that an exclusion for loss or damage caused by "[a]ny virus … that induces or is capable of inducing physical distress, illness or disease" required dismissal of practically the same COVID-19-related insurance claim. No. 3:20-cv-00751, 2020 WL 7495622, at *3, *8 (D. Conn. Dec. 21, 2020). The court observed that "it cannot seriously be disputed … that the virus is at least a 'but for' cause of [plaintiff's] loss, *i.e.*, that loss would not have occurred had the virus never come into existence or infected human

beings." *Id.* at *5. More than 100 other recent decisions are in accord. *See, e.g.*, *Michael J. Redenburg, Esq., PC v. Midvale Indem. Co.*, No. 20-cv-5818, 2021 WL 276655, at *8 (S.D.N.Y. Jan. 27, 2021) (collecting cases); *Causeway Auto., LLC v. Zurich Am. Ins. Co.*, No. 20-cv-8393, 2021 WL 486917, at *7 (D.N.J. Feb. 10, 2021) (virus exclusion bars access to time element coverages that respond in the case of "physical damage *of the type insured*"; as a result of such exclusion, "the Policy plainly does not provide coverage for an action of Civil Authority taken in response to a virus").

This exclusion also bars coverage under Plaintiff's alternative argument that government orders suspending business operations themselves cause "physical loss or damage" to property. Courts considering such arguments have held that to the extent such orders could somehow be found to cause physical loss or damage, they would nonetheless fall within the scope of virus exclusions. *See, e.g.*, *Causeway Auto.*, 2021 WL 486917, at *7; *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, No. 8:20-cv-1416, 2021 WL 22314, at *8 (M.D. Fla. Jan. 4, 2021) ("The virus and the orders are not two equal independent concurrent causes that worked together to cause the loss. The orders are wholly dependent on the virus."); *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, No. 5:20-cv-04265, 2020 WL 7696080, at *4 (N.D. Cal. Dec. 28, 2020) (holding that "the virus" is "the efficient proximate cause of Plaintiff's losses" because "but-for COVID-19, the civil authority orders would not exist"); *see also AFM Mattress Co., LLC v. Motorists Commercial Mut. Ins. Co.*, No. 20-cv-3556, 2020 WL 6940984, at *3 (N.D. Ill. Nov. 25, 2020) ("Plaintiff's argument that its losses occurred because … governmental entities issued shutdown orders, not because of the virus itself, is unpersuasive.").

Plaintiff's contention that the Policy's exclusion is ambiguous because differently-worded exclusions are allegedly "in common usage in the insurance industry" (Compl. ¶¶ 154–57, 160–

61) is unavailing. The fact that other policies may contain differently-worded exclusions is irrelevant, because extrinsic evidence, such as the terms of other parties' contracts, cannot be used to *create* ambiguity. To the contrary, "[o]nly if the text of the policy is ambiguous does a court look to other evidence of the parties' intent." *Dumas*, 2019 WL 3574920, at *2; *see also Conn. Ins. Guar. Ass'n v. Drown*, 314 Conn. 161, 187–88 (2014) ("The determinative question is the intent of the parties, that is, what coverage the ... [insured] expected to receive and what the [insurer] was to provide, as disclosed *by the provisions of the policy*.") (emphasis added); *LJ New Haven*, 2020 WL 7495622, at *4 (claimed ambiguity in virus exclusion "must emanate from the language used in the contract").

The COVID-19-related ruling in *Zwillo V, Corp. v. Lexington Insurance Co.*, No. 4:20-cv-00339, 2020 WL 7137110 (W.D. Mo. Dec. 2, 2020), is instructive. In *Zwillo V*, the court concluded that a "pollution and contamination exclusion" barred coverage for COVID-19 claims as a matter of law where it excluded loss or damage caused by the "release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS," defined to include "any … virus." *Id.* at *6. Reasoning that "the provision in question expressly excludes damage or loss of value and even loss of use of property caused by a virus," and "COVID-19 is plainly a virus," the court held that the exclusion unambiguously applied. *Id.* Similarly, in *Manhattan Partners, LLC v. American Guarantee & Liability Insurance Co.*, No. 20-cv-14342, 2021 WL 1016113 (D.N.J. Mar. 17, 2021), the court construed a contamination exclusion that applied to "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," and concluded that "[a] final bar to Plaintiffs' claims can be found in the Policy's Contamination exclusion, which clearly and explicitly excludes coverage for

damage, loss or expense arising from a virus." *Id.* at *2 n.3. Other recent decisions are in accord. *See, e.g.*, *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, No. 2:20-cv-01240, 2021 WL 769660, at *6 (D. Nev. Feb. 26, 2021) ("I find that the SARS-CoV-2 virus and resulting COVID-19 pandemic falls squarely within the policy's pollutants-or-contaminants exclusion."); Ex. A, *Firebirds Int'l, LLC v. Zurich Am. Ins. Co.*, No. 2020-CH-05360, slip op. at 7 (Ill. Cir. Ct., Cook Cnty. Apr. 19, 2021) (holding that contamination exclusion barred losses of income caused by COVID-19, a virus, and "[t]he factual scenario in this case is the exact type anticipated by the exclusion"), attached as Exhibit 1.[3]

Moreover, a standard form of virus exclusion, which the Complaint suggests is in "common usage," typically provides: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease." *See, e.g.*, *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, No. 20-cv-1949, 2020 WL 7395153, at *8 (E.D. Pa. Dec. 17, 2020) (construing a form of virus exclusion proposed by the Insurance Services Office in 2006). This language is not meaningfully clearer or

[3] *Thor Equities, LLC v. Factory Mutual Insurance Co.*, No. 20-cv-3380, 2021 WL 1226983 (S.D.N.Y. Mar. 31, 2021) denied Factory Mutual's motion for partial judgment on the pleadings regarding construction of the contamination exclusion. In its opinion, the court acknowledged that "Plaintiff's reading of the exclusion could tend to render certain aspects of the exclusion meaningless"—specifically, "the first two words of the exclusion—'contamination, and'"—but failed to explain how this did not render the plaintiff's proposed interpretation unreasonable and thus refute the plaintiff's claims of ambiguity. *Id.* at *4. This unreasonable result was rejected in *Firebirds International*, where the court held the contamination exclusion excludes "*both* an otherwise covered loss caused by a 'Contamination' as well as an otherwise covered cost attributed to a 'Contamination'" and any other conclusion "would render [the] broad exclusionary language quite meaningless." Slip op. at 8 (emphasis in original). Failing to give weight to the full language of the exclusion in this manner is impermissible under Connecticut law. *See R.T. Vanderbilt Co. v. Cont'l Cas. Co.*, 273 Conn. 448, 468–69 (2005) (recognizing the Connecticut rules of interpretation that "a policy should not be interpreted so as to render any part of it superfluous" and "[a] construction of an insurance policy which entirely neutralizes one provision should not be adopted").

more specific than that of exclusion at issue here, which applies where a claim results from "the actual or suspected presence of any … pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent." Policy at 66. Courts have not hesitated to enforce a variety of explicit virus exclusions in the COVID-19 context, ranging from the contamination exclusion in *Zwillo V*, to the virus exclusion in *LJ New Haven*, to the form endorsement language in *Newchops*. The result should be no different here.

II. THE COURT SHOULD ALSO STRIKE COUNTS I AND II BECAUSE THE COMPLAINT OTHERWISE FAILS TO PLEAD FACTS REQUIRED TO ESTABLISH COVERAGE

A. COVID-19 Does Not Cause "Physical Loss or Damage" to Property

The Policy provisions under which Plaintiff seeks coverage, other than the Communicable Disease Coverages, each require a showing of "physical loss or damage" or "physical damage of the type insured." Plaintiff claims that these coverages apply because the "probable" presence of COVID-19 caused physical loss or damage to Plaintiff's property. Compl. ¶¶ 82–84. Notably, Plaintiff never specifically alleges that COVID-19 was actually detected at any insured property, or that any specific property was purportedly damaged as a result. However, even assuming Plaintiff had sufficiently pleaded COVID-19's presence on its property, the Complaint fails to allege "physical loss or damage" under Connecticut law.

The Complaint relies on allegations regarding COVID-19's propensity to attach to surfaces, if not remediated with standard cleaning products, and its person-to-person transmission via airborne spread. Compl. ¶¶ 54–71. However, such allegations fail to plead loss or damage that is *physical*, a modifier that requires "physical, tangible alteration to any property." *Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 308 Conn. 760, 782 (2013); *see also Mazzarella v. Amica Mut. Ins. Co.*, No. 3:17-cv-598, 2018 WL 780217, at *3 (D. Conn. Feb. 8, 2018); *England v. Amica Mut. Ins. Co.*, No. 3:16-cv-1951, 2017 WL 3996394, at *7 (D. Conn. Sept. 11, 2017) (physical

loss "is limited to observable, tangible effects"). Under Connecticut law, a requirement that loss or damage be "physical" has barred coverage for imperceptible chemical reactions, leakage of carbon monoxide, and allegations that were too vague regarding tangible impact to property to allow examination by the court. *See Capstone Bldg.*, 308 Conn. at 782; *England*, 2017 WL 3996394, at *7; *Zamichiei v. CSAA Fire & Cas. Ins. Co.*, No. 3:16-cv-739, 2018 WL 950116, at *8 (D. Conn. Feb. 20, 2018); *Mazzarella, 2018 WL 780217, at *3*. In *Capstone*, for instance, the Connecticut Supreme Court considered a policy which covered "physical injury to tangible property, including all resulting loss of use of that property." *Capstone Bldg.*, 308 Conn. at 776–77. The policyholder alleged that the use of defective materials in construction of its building had caused the escape of carbon monoxide into the premises, resulting in a loss of use. *Id.* at 782. The Court found that the seepage of carbon monoxide was not "physical," as it "caused no physical, tangible alteration to any property or any physical injury to the homeowners." *Id.* (internal quotations omitted).

In keeping with this, courts considering the issue in the COVID-19 context have concluded that COVID-19 does not cause physical loss or damage, and thus have dismissed COVID-19-related property insurance claims—including in two recent decisions construing materially similar policies issued by a Factory Mutual affiliate. *See Mohawk Gaming Enterprises, LLC v. Affiliated FM Ins. Co.*, No. 8:20-cv-701, 2021 WL 1419782 (N.D.N.Y. Apr. 15, 2021); *Out West Rest. Grp. v. Affiliated FM Ins. Co.*, No. 20-cv-06786, 2021 WL 1056627 (N.D. Cal. Mar. 19, 2021). *Mohawk Gaming*, like this case, involved claims for coverage for losses resulting from the closure of a casino by tribal authorities due to the COVID-19 pandemic. The court dismissed the case, reasoning that "the inclusion of the modifier 'physical'" in the policy's coverage grant "clearly imposes a requirement that the damage actually be tangible in nature; *i.e.*, this language

unambiguously requires some form of physical harm to the location[.]" 2021 WL 1419782, at *5. Even if the casino had alleged the actual presence of COVID-19 on its premises, "the presence of the novel coronavirus at the Casino would still not qualify as 'physical damage.'" *Id.* Similarly, in *Out West*, the court interpreted the policy and concluded that plaintiffs' allegations of the presence of COVID-19 on insured property "[did] not plausibly allege[] 'direct physical loss of or damage to' property, as required by the Policy," so plaintiffs' "alleged losses are not covered as a matter of law." 2021 WL 1056627, at *6. Because the *Out West* court found "that Plaintiffs cannot allege direct physical loss or damage," it concluded that "it need not address the scope of the Policy's virus exemption." *Id.*

In reaching these holdings, both courts noted that they were following the approach taken by "[t]he overwhelming majority of courts," which "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." *Id.*, at *4; *see also Mohawk*, 2021 WL 1419782, at *6 ("[T]he great majority of courts that have addressed this issue of insurance coverage for business losses sustained as a result of COVID-19 restrictions have held that a complaint which only alleges loss of use of the insured property fails to satisfy the requirement for physical damage or loss.").[4] As

[4] *See, e.g.*, *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 20-cv-10850, 2021 WL 858378, at *3–4 (D. Mass. Mar. 5, 2021) (holding that the COVID-19 virus "is incapable of damaging physical structures" and "thus cannot constitute 'direct physical loss of or damage to' property") (collecting cases); *DeMoura v. Cont'l Cas. Co.*, No. 20-cv-2912, 2021 WL 848840, at *6 (E.D.N.Y. Mar. 5, 2021) (finding potential presence of COVID-19 insufficient because "direct physical loss of or damage to property" requires "actual, tangible harm to the property"); *SAS Int'l, Ltd. v. Gen. Star Indem. Co.*, No. 20-cv-11864, 2021 WL 664043, at *4 n.4 (D. Mass. Feb. 19, 2021) ("[N]o reasonable construction of the phrase 'direct physical loss,' however broad, would cover the presence of a virus."); *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.*, No. 20-cv-1277, 2021 WL 389215, at *7 (S.D. Cal. Feb. 3, 2021) (COVID-19 "harms human beings, not property."); *Moody v. Hartford Fin. Grp., Inc.*, No. 20-cv-2856, 2021 WL 135897, at *6 (E.D. Pa. Jan. 14, 2021) (allegations "that the virus is on its property" are insufficient to show "direct physical loss or damage"); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 2020 WL 6436948, at *5

Out West explained, "[t]hese 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." 2021 WL 1056627, at *4. The court also relied on the fact that the COVID-19 virus "can be disinfected and cleaned from surfaces," siding with authorities from around the country that have held that property that merely needs to be cleaned has not suffered a tangible, physical loss. *Id.* at *5 (internal quotations omitted); *see also Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 879 (11th Cir. 2020) (holding that "an item or structure that merely needs to be cleaned" has not suffered a physical loss); *Moody*, 2021 WL 135897, at *6 (stating that COVID-19 contamination could not constitute physical loss or damage because "surfaces would merely need to be cleaned"). *Out West* and *Mohawk Gaming* are directly applicable here, and their reasoning persuasively demonstrates why Plaintiff's allegations of physical loss or damage are legally insufficient and fail to state a claim on which relief may be granted.

Finally, Plaintiff contends that Factory Mutual has somehow "acknowledged" that COVID-19 causes physical loss or damage because of its assertion—in an undecided motion in limine filed in an unrelated case in New Mexico federal court concerning coverage under a different company's insurance policy—that mold had physically damaged property. Compl. ¶ 117 (citing *Factory Mut. Ins. Co. v. Fed. Ins. Co.*, No. 1:17-cv-00760 (D.N.M. Nov. 11, 2019), ECF No. 127). Factory Mutual's motion, however, does nothing of the sort. In the case Plaintiff references, there had been an actual, tangible infestation of a sterile environment by mold as a

(S.D. W. Va. Nov. 2, 2020) ("COVID-19 poses a serious risk to people gathered in proximity to one another … [but] [p]roperty, including the physical location of [plaintiff], is not physically damaged or rendered unusable or uninhabitable."); *Social Life Magazine, Inc. v. Sentinel Ins. Co.*, No. 20-cv-3311, 2020 WL 2904834 (S.D.N.Y. May 14, 2020) (Transcript) (COVID-19 "damages lungs. It doesn't damage printing presses").

result of a lightning strike (a specifically covered peril under the "Life Sciences" policy at issue), which necessitated destruction of the antibiotic products stored in that room as well as remediation to restore the property to its original condition. The fact that a mold infestation can physically damage pharmaceutical products and an aseptic "clean room" facility says nothing about whether alleged widespread community transmission of COVID-19 constitutes physical loss or damage to casino and resort property.

B. Government Social-Distancing Orders Do Not Cause "Physical Loss or Damage" To Property

Plaintiff asserts in the alternative that government social-distancing orders and the Tribal Council's decision to suspend operations constitute a covered "risk of physical loss or damage." Compl. ¶ 115. But a government order that closes or limits business operations does not cause physical loss or damage for purposes of triggering property insurance coverage, because it does not tangibly alter the affected businesses' property in any way. *See, e.g.*, *Mazzarella*, 2018 WL 780217, at *3; *Liston-Smith v. CSAA Fire & Cas. Ins. Co.*, 287 F. Supp. 3d 153, 162 (D. Conn. 2017) (holding that plaintiff failed to show covered damage had occurred); *Zamichiei*, 2018 WL 950116, at *9 (same).[5]

More than 100 courts around the country, including one construing a materially similar policy issued by a Factory Mutual affiliate, have addressed this same theory of coverage and concluded that a loss of use prompted by government orders—rather than any tangible injury to

[5] *See also Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235–36 (3d Cir. 2002) (rejecting claim for business income coverage for presence of asbestos where plaintiff could not allege any "distinct, demonstrable, and physical alteration" of the insured premises); *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) (rejecting claim for business income and civil authority coverage after the government closed the U.S.-Canada border in response to Mad Cow Disease, preventing policyholder's delivery of beef from arriving, because there was no evidence covered property, the beef, was physically damaged or contaminated).

the property—does not constitute "physical loss or damage." *See Islands Rests., LP v. Affiliated FM Ins. Co.*, No. 3:20-cv-02013, 2021 WL 1238872, at *5 (S.D. Cal. Apr. 2, 2021) ("[T]he Court is not persuaded by Plaintiffs' argument that 'physical loss' includes the temporary loss of use of their business premises for certain purposes."); *see also Michael Cetta, Inc. v. Admiral Indem. Co.*, No. 20-cv-4612, 2020 WL 7321405, at *8 (S.D.N.Y. Dec. 11, 2020) (collecting cases). Courts have reasoned that extending insurance coverage where plaintiffs have suffered no tangible injury, but merely temporary limitation of preferred use, would expand commercial property insurance beyond workable limits. In *Chief of Staff LLC v. Hiscox Insurance Co.*, No. 1:20-cv-03169, 2021 WL 1208969 (N.D. Ill. Mar. 31, 2021), the court, applying Connecticut law, held that "'physical loss' refers to a deprivation caused by a tangible or concrete change in or to the thing that is lost[,]" and COVID-19 closure orders had not caused any such change. *Id.* at *2. The court reasoned that claiming that government shutdown orders cause "physical loss or damage" "would violate the surplusage-avoidance principle by reading the word 'physical' out of the [Policy]." *Id.* at *3. Similarly, in *Plan Check Downtown III, LLC v. AmGUARD Insurance Co.*, the court observed that this theory would include as "physical loss or damage" scenarios such as a modification of a city ordinance to lower maximum occupancy caps, limiting how many customers can be served at once, or changes to zoning requirements that restrict the permitted hours of operation for businesses in residential neighborhoods. 485 F. Supp. 3d 1225, 1231–32 (C.D. Cal. 2020). Anything that limits how businesses use their space—government directives, private contracts, deeds, court orders—could be said to cause physical loss or damage to the business and thus give rise to property insurance claims under Plaintiff's theory. That is not and cannot be the case.

The text and structure of the Policy further confirm that government restrictions on use are not a covered risk of physical loss or damage. First, the Policy's property damage coverage pays

costs associated with repairing or replacing destroyed or damaged property. *See* Policy at 15–16. Where a claim results from the temporary loss of use of property, there is no "damaged or destroyed property" to repair or replace. *See, e.g.*, *Chief of Staff*, 2021 WL 1208969, at *3 (rejecting policyholder's argument "that the mere loss of use of property at the premises, without any physical alteration to the condition or location of that property, is covered" because "[i]f there has been no physical alteration to the condition or location of the property, there is nothing to 'repair, rebuild or replace.'") (internal brackets omitted). Second, the Policy explicitly excludes "loss of use" and "loss from enforcement of any law or ordinance … regulating the … use … of any property." Policy at 11. Plaintiff's alleged loss arose from "[t]ribal and state governments issu[ing] orders restricting activities" at their property, Compl. ¶ 87, which is plainly a loss of use or a loss from enforcement of a law or ordinance regulating use. Plaintiff's theory would impermissibly write these exclusions out of the Policy. *See Heyman Assocs.*, 231 Conn. at 771 ("[C]ourts cannot indulge in a forced construction ignoring provisions"); *see also Ballas Nails & Spa, LLC v. Trav. Cas. Ins. Co. of Am.*, No. 4:20-cv-1155, 2021 WL 37984, at *4 (E.D. Mo. Jan. 5, 2021) ("[C]onstruing the policy's requirement of 'direct physical loss or damage' to include the mere loss of use of insured property with nothing more would negate the 'loss of use' exclusion."). And, third, the Policy contains a specific Civil or Military Authority time element extension coverage that provides coverage for business interruptions caused by certain government closure orders issued as a "direct result of physical damage of the type insured." Policy at 47. If such an order independently constituted "physical loss or damage," this coverage would be entirely duplicative of the general Property Damage and Time Element Coverages, which contain none of the same requirements for coverage. *See, e.g.*, *TAQ Willow Grove, LLC v. Twin City Fire Ins.*, No. 20-cv-3863, 2021 WL 131555, at *6 (E.D. Pa. Jan. 14, 2021) ("If mere loss of use is a 'direct

physical loss of or damage to property'. . . [t]here would be no need for a separate Civil Authority provision.").

C. Plaintiff Has Not Alleged "Physical Damage Of The Type Insured" As Required By The Policy's Time Element Coverages

Plaintiff also seeks to recover under certain of the Policy's Time Element Coverages, each of which require a showing of "physical loss or damage of the type insured," either at an insured location or at offsite property with a specific relationship to an insured location. For the reasons set forth above—*i.e.*, the Policy's contamination exclusion and the fact that COVID-19 does not cause physical loss or damage to property—Plaintiffs' COVID-19 related losses do not "directly result[] from physical loss or damage of the type insured," as required by these policy provisions. *See, e.g.*, *Viking Constr., Inc. v. 777 Residential, LLC*, 190 Conn. App. 245, 263, *cert. denied*, 333 Conn. 904 (2019) ("In the present case, there was only one cause of [plaintiff's] loss . . . and because that was not a covered peril, the [coverage grant at issue] does not apply."); *State v. Allendale Mut. Ins. Co.*, 154 P.3d 1233, 1237 (Mont. 2007) (where policy provision "only applies to 'physical loss or damage of the type insured,'" losses resulting from "a risk that has been excluded from the policy are not covered under this clause").[6]

Because Plaintiff has not alleged any legally-cognizable "physical loss or damage of the type insured" at an insured location, Plaintiff cannot state a claim under the Time Element Coverage or the Civil or Military Authority Coverage. Time Element Coverage insures "TIME

[6] *See also Nat'l Coatings & Supply, Inc., & Single Source, Inc., v. Valley Forge Ins. Co.*, No. 5:20-CV-00275-M, 2021 WL 1009305, at *7 n.4 (E.D.N.C. Mar. 16, 2021) (plaintiffs failed to state claim in COVID-19 insurance coverage action under multiple time element coverages, "since each provision requires the occurrence of loss or damage directly caused by or resulting from a 'covered peril,'" which COVID-19 was not); *Torgerson Props., Inc. v. Cont'l Cas. Co.*, No. 20-cv-2184, 2021 WL 615416, at *1-2 (D. Minn. Feb. 17, 2021) (dismissing COVID-19-related civil authority and ingress/egress claims that required a showing of "direct result of physical loss or damage to property of the type insured").

ELEMENT loss … *directly resulting from physical loss or damage of the type insured*[.]" Policy at 35. Civil or Military Authority Coverage extends when a government or tribal gaming commission order prohibits access to the insured premises, "provided such order is the *direct result of physical damage of the type insured*" at the insured location. *Id.* at 47.

Nor can Plaintiff avoid this outcome by relying on time element coverage extensions that require "physical loss or damage of the type insured" at specific offsite locations, such as a supplier's factory (for Contingent Time Element Extended Coverage, *see id.* at 66), a local tourist attraction (for Attraction Property Coverage, *see id.* at 51–52), or a property within five miles (for Civil or Military Authority Coverage, *see id.* at 47). Any and all purported "physical loss or damage" alleged in the Complaint arises from COVID-19 and is thus not "physical loss or damage of the type insured." Moreover, even assuming the presence of COVID-19 at specific properties could constitute such physical loss or damage, the Complaint contains no such allegations. *See* Compl. ¶¶ 124, 126, 130. Plaintiff fails to detail any specific property within five miles of its premises which prompted the government orders, any "attraction property" within one mile which brings customers to Plaintiff's premises, or any customer, supplier, or other business relationship which was disrupted. Without such allegations, these claims necessarily fail.[7]

[7] *See, e.g.*, *Henry's La. Grill, Inc. v. Allied Ins. Co. of Am.*, 1:20-cv-2939-TWT, 2020 WL 5938755, at *6 (N.D. Ga. Oct. 6, 2020) (rejecting claim for civil authority coverage because "[p]laintiffs do not identify any particular property around their premises which was damaged by COVID-19"); *see also Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-cv-756, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995) (rejecting claim for civil authority coverage where a government-ordered curfew during riots caused a business loss because "[t]he requisite causal link between damage to adjacent property" and limitation of access to plaintiff's premises was "absent"); *United Air Lines, Inc. v. Ins. Co. of State of Pa*, 439 F.3d 128, 129 (2d Cir. 2006) (finding no civil authority coverage for airline losses arising from Washington D.C. airport shutdown on September 11 because the shutdown was not "a result of" property damage at the Pentagon, but was prompted by fear of future attacks).

D. Plaintiff Has Not Alleged The "Actual Not Suspected Presence" Of Communicable Disease

Finally, Plaintiff claims coverage under the Policy's limited Communicable Disease Coverages. While these coverages do not require "physical loss or damage" to property, or "physical damage of the type insured," both require "*actual not suspected presence*" of communicable disease. Specifically, Interruption By Communicable Disease Coverage covers certain losses that occur when, as a result of "the actual not suspected presence of communicable disease," access to insured premises is limited. Policy at 53–54. Communicable Disease Response Coverage similarly covers the "reasonable and necessary costs incurred by the Insured" to clean up, remove, and dispose of "the actual not suspected presence of communicable disease" from insured property. *Id.* at 22.

Plaintiff does not allege the "actual not suspected presence" of COVID-19 on its premises, nor does it allege that any government order responded to such actual presence. Instead, Plaintiff's factual allegations regarding the COVID-19 virus amount to mere conjecture. *See* Compl. ¶¶ 72–85. Plaintiff states that, based on the reported and estimated rates of COVID-19 infections in Connecticut and nationally prior to suspending its business in mid-March, "it is more probable than not" that the COVID-19 virus was actually present on its premises. *Id.* ¶ 82. Plaintiff further alleges that a number of individuals employed to work on its premises have had "suspected or confirmed" cases of COVID-19, but pointedly does not allege that any such individuals were present in Plaintiff's businesses while COVID-19 positive. *Id.* ¶ 73.

Courts nationwide have consistently concluded that allegations of the likelihood or probability of COVID-19's presence "are mere blanket allegations and are too generalized to support the conclusion that COVID-19" was on plaintiff's premises. *See Karmel Davis & Assocs., Attorneys-At-Law, LLC v. Hartford Fin. Servs. Grp.*, No. 1:20-cv-02181, 2021 WL 420372, at *4

(N.D. Ga. Jan. 26, 2021). Where "the terms of the policy are clear and unambiguous, then the language … must be accorded its natural and ordinary meaning." *Conn. Med.*, 286 Conn. at 5. The Policy requires "actual not suspected presence," and even if deemed true, allegations of the "likely" presence of COVID-19 do not show anything more than the "suspected," not "actual," presence of a communicable disease. *See Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, No. 20-cv-03750, 2020 WL 6562332, at *4 (N.D. Cal. Nov. 9, 2020) (addressing plaintiff's failure to allege "an actual [COVID-19] exposure at one or more" insured locations); *Food for Thought Caterers Corp. v. Sentinel Ins. Co.*, No. 20-cv-3418, 2021 WL 860345, at *5 (S.D.N.Y. Mar. 6, 2021) (holding allegations of "the likely presence of COVID-19 on its property" are insufficient to state a claim based on actual presence of COVID-19); *Equity Plan. Corp. v. Westfield Ins. Co.*, No. 1:20-cv-01204, 2021 WL 766802, at *5 (N.D. Ohio Feb. 26, 2021) (same). Thus, even accepting the factual allegations of Plaintiff's Complaint as true, Plaintiff has failed to plead a claim that would entitle it to relief under the Policy's Communicable Disease Coverages.

III. COUNTS ONE AND TWO FURTHER FAIL TO STATE A CLAIM BECAUSE PLAINTIFF'S COVERAGE THEORY IS INCOMPATIBLE WITH THE TEXT AND STRUCTURE OF THE POLICY

In an effort to avoid the obvious effects of the Policy provisions discussed above, the Complaint asserts that (i) the contamination exclusion is ambiguous or incoherent and should be read out of the Policy, and (ii) the Policy's limited Communicable Disease Coverages—which provide up to only $1 million in annual aggregate coverage—have the effect of providing coverage for COVID-19-related losses without regard to that $1 million limit. Plaintiff's proposed construction is incompatible with the Policy's text and structure.

There is no conflict between the Policy's contamination exclusion and the Communicable Disease Coverages. The Policy's exclusions limit the Policy's general Property Damage Coverage grant to "all risks of physical loss or damage, except as hereinafter excluded." Thus, viral

contamination cannot give rise to coverage under Policy provisions that are triggered by physical loss or damage of the type insured. The $1 million coverage extension for Communicable Disease, however, does not require a showing of physical loss or damage to property resulting from a non-excluded cause. Instead, "actual not suspected presence of communicable disease" at an insured location triggers coverage, without regard to whether any property is damaged or destroyed by a covered cause. Read together, the Policy clearly reflects the intent of the parties to provide up to $1 million of coverage when a communicable disease is actually present on insured property, a government order or decision by an officer shuts down the business in response to the actual presence of the communicable disease, and costs are incurred due to such shut-down and for remediation, but not to provide coverage under the general Property Damage and Time Element Coverages. Plaintiff's effort to read the express exclusion of coverage for loss or damage caused by viruses out of the Policy in its entirety is contrary to the requirement of Connecticut law that "[w]hen interpreting an insurance policy, [courts] must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." *Conn. Med.*, 286 Conn. at 6 (quoting *R.T. Vanderbilt*, 273 Conn. at 462. Indeed, the Court can apply the bedrock principle of contract interpretation that "a specific provision controls a general one and may operate as an exception to it." *Issler v. Issler*, 250 Conn. 226, 237 n.12 (1999) (quoting E. Farnsworth, *Contracts* (2d Ed. 1998) § 7.11, p. 285). Here, the Communicable Disease Coverages are specific and limited, while the exclusion is a broad provision of general applicability. Those Communicable Disease Coverages are intended to be and are properly construed as limited exceptions to the contamination exclusion as a matter of law.

Plaintiff's proposed interpretation of the Communicable Disease Coverages is also unreasonable on its own terms. Plaintiff contends that by providing up to $1 million of coverage

for the otherwise uncovered and excluded peril of communicable disease, Factory Mutual also agreed to provide coverage for this same peril under the Policy's general Property Damage and Time Element Coverage provisions, whose limits far exceed $1 million. Under such an interpretation, not only would the Policy's exclusion for losses due to a virus be nullified, the Communicable Disease Coverages would themselves be effectively swallowed by these much more extensive coverages. This is not a reasonable interpretation of the Policy. *See C&H Shoreline, LLC v. Rubino*, 203 Conn. App. 351, 358 (Conn. App. 2021) (a contract is ambiguous if it "is susceptible to more than one reasonable interpretation") (emphasis added); *see also Misiti, LLC v. Travelers Prop. Cas. Co. of Am.*, 308 Conn. 146, 155 (2013) ("Th[e] rule of construction that favors the insured in case of ambiguity applies only when the terms are, without violence, susceptible of two equally reasonable interpretations.") (internal quotations and brackets omitted) (emphasis added). Indeed, this precise argument was rejected in *Mohawk Gaming*, which observed that the Communicable Disease Coverages specifically do not require "physical" loss or damage under the plain language of the Policy, and therefore did not support the argument that the presence of a communicable disease constitutes "physical" loss or damage. *See Mohawk Gaming*, 2021 WL 1419782, at *5 (rejecting the argument that "coverage is triggered because the presence of the novel coronavirus qualifies as 'physical damage' for the purpose of the Communicable Disease provisions").

Indeed, other courts have reached the same conclusion in COVID-19 insurance coverage cases involving broad virus exclusions coupled with limited coverages available for losses caused by communicable disease. In *Salon XL Color & Design Group, LLC v. West Bend Mutual Insurance Co.*, No. 20-cv-11719, 2021 WL 391418 (E.D. Mich. Feb. 4, 2021), plaintiffs sought coverage under the business income, extra expense, civil authority, and communicable disease

coverage provisions of their policy, "plausibly alleg[ing] that the COVID-19 particles have infected their property." *Id.* at *1–2. The plaintiffs argued that "in addition to being a virus" to which the virus exclusion in its policy applied, "COVID-19 is also a 'communicable disease' as defined in the policy," and "[a] special grant of coverage for communicable diseases followed by an exclusion for virus or bacteria cannot plausibly exist in the same policy." *Id.* at *3 ("[T]his contradictory language is the very definition of an ambiguity."). The court rejected this argument and concluded that the provisions could readily be harmonized—the virus exclusion "precludes coverage for the Business Income, Extra Expense, and Civil Authority Coverages, but it does not preclude the Communicable Disease coverage." *Id.* Similarly, in *Independence Barbershop, LLC v. Twin City Fire Insurance Co.*, No. A-20-cv-00555, 2020 WL 6572428 (W.D. Tex. Nov. 4, 2020), a plaintiff sought coverage for income lost due to COVID-19-related social-distancing orders. *Id.* at *1. The relevant policy contained a virus exclusion, but also provided "30-days of Business Interruption coverage for Limited Virus Coverage" if "loss or damage to property caused by … virus causes a suspension of operations." *Id.* at *3–4 (internal quotations omitted). The court concluded that the plaintiff pleaded "a plausible claim for relief" under the limited virus coverage, but the virus exclusion was "a valid exclusion clause that precludes recovery under [other] sections." *Id.* at *4. This reasoning applies with the same force here.[8]

[8] The only difference here is that unlike in *Salon XL*, where the plaintiff alleged the actual presence of COVID-19 on its premises, or *Independence Barbershop*, where the limited virus coverage did not require "actual presence" (or that the covered loss be "physical"), Plaintiff has not alleged facts that, if true, would establish the "actual not suspected presence of communicable disease" and thus potentially trigger the Policy's Communicable Disease coverages. *See supra* Section II.D.

IV. PLAINTIFF'S OTHER CLAIMS FAIL BECAUSE PLAINTIFF IS NOT ENTITLED TO COVERAGE UNDER THE POLICY

Because the Complaint does not establish that Plaintiff is entitled to coverage, Plaintiff's allegations are legally insufficient to state claims for (1) recovery of costs under the Policy's "claims preparation" coverage, (2) common law bad faith, or (3) violations of CUTPA.

A. Plaintiff Has Not Pleaded Entitlement To Claims Preparation Coverage Because Plaintiff Has Failed to State an Underlying Insured Loss

Plaintiff seeks to recover under the Policy's Claims Preparation coverage, but that provision covers certain claims preparation costs "resulting from insured loss payable under this Policy for which [Factory Mutual] has accepted liability." Policy at 21–22. This claim requires an underlying finding that Plaintiff is entitled to coverage under the Policy and that Factory Mutual has accepted liability. As Plaintiff has not stated a valid claim for coverage, *see supra* Parts I–III, this provision does not apply.

B. Plaintiff's Claim for Common Law Bad Faith (Count III) Fails

In Count III of the Complaint, Plaintiff alleges that Factory Mutual's "refusal to provide coverage and [] its handling of [Plaintiff's] claims," constituted common law bad faith. Compl. ¶¶ 236, 240–41. However, "bad faith is not actionable apart from a wrongful denial of a benefit under the policy." *Capstone Bldg.*, 308 Conn. at 798. Plaintiff's failure to state a valid claim for coverage means that this claim must be stricken as well.

C. Plaintiff's Claim for Violations of CUTPA (Count IV) Fails

Finally, in Count IV of the Complaint, Plaintiff claims that Factory Mutual engaged in "unfair acts … with such frequency and with such prevalence and widespread use in handling COVID-19 claims as to indicate a general business practice" in violation of the Connecticut Unfair Trade Practices Act. Compl. ¶¶ 247, 249. However, "[w]hen CUTPA … claims are premised on denial of coverage under an insurance policy and the insurer's interpretation of the policy is

correct," then as a matter of law "application of that interpretation as a general business practice" cannot "constitute[] oppressive, unethical or unscrupulous conduct in violation of the statutes." *Fortin v. Ins. Co. of State of Pa.*, No. CV176011987S, 2018 WL 2138001, at *9 (Conn. Super. Ct. Apr. 19, 2018) (quoting *Zulick v. Patrons Mutual Ins. Co.*, 287 Conn. 367, 378 (2008)). Plaintiff's CUTPA claim must therefore also be stricken.

CONCLUSION

Based on the foregoing, the allegations of Plaintiff's Complaint are legally insufficient and fail to state a claim upon which relief can be granted. Factory Mutual respectfully requests that the Court grant its motion to strike each count of the Complaint.

Respectfully submitted,

DEFENDANT, FACTORY MUTUAL INSURANCE COMPANY,

By: */s/ Chase Rogers*

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed or electronically delivered on May 4, 2021, to all counsel and self-represented parties of record and that written consent for electronic delivery was received from all counsel and self-represented parties of record who were electronically served:

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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, No. 2084

Judge Michael T. Mullen
APR 19 2021
Circuit Court - 2084