UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KBH SPORTS CLUB LLC and DAVID CHUNG, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

AMERICAN ZURICH INSURANCE COMPANY,

Defendant.

No. 1:20-cv-5555-NGG-RML

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT AMERICAN ZURICH INSURANCE COMPANY'S MOTION TO DISMISS THE AMENDED COMPLAINT

Date: May 7, 2021

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INTRODUCTION

Plaintiffs KBH Sports Club LLC and David Chung seek property-insurance coverage for business losses their fitness center sustained when COVID-19 government orders placed restrictions on the center's operations during the pandemic. To state a claim for coverage under the plain language of the policy issued by Defendant American Zurich Insurance Company, however, Plaintiffs must allege that damage to, or destruction of, the fitness center occurred and resulted in a suspension of the center's operations, and in turn caused business losses, during the period before the property could be repaired or replaced. Nothing in the Amended Complaint even hints at such property loss or damage or any repair or replacement of property—which is unsurprising because the COVID-19 government orders are incapable of causing property damage, much less rendering property a total loss.

Plaintiffs are not the first insureds who have attempted to contort the language of a property-insurance policy to cover purely economic business losses attributable to the COVID-19 government orders. Federal and state judges—including this Court—have nearly unanimously rejected such efforts, with some judges going so far as to call the theory Plaintiffs advance here as "exceed[ing] any reasonable bounds of possible [policy] construction" and "just simply nonsense."[1]

[1] *Henry's La. Grill, Inc. v. Allied Ins. Co. of Am.*, 2020 WL 5938755, at *4 (N.D. Ga. Oct. 6, 2020); *Gavrilides Mgmt. Co. v. Mich. Ins. Co.*, No. 20-258-CB (Mich. Cir. Ct. July 1, 2020), Hr'g Tr. at 20:10-18 (Declaration of Bronwyn Pollock ("Pollock Decl.") Ex. 1); *Gavrilides Mgmt. Co. v. Mich. Ins. Co.* 2020 WL 4561979, at *1 (Mich. Cit. Ct. July 1, 2020); *see also AE Mgmt., LLC v. Ill. Union Ins. Co.*, 2021 WL 827192, at *3 (S.D. Fla. Mar. 4, 2021) ("[The] nearly unanimous view [is] that neither the government's orders nor COVID-19 caused direct physical loss of or damage to ... property sufficient to trigger coverage."); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 2020 WL 5642483, at *2 (N.D. Cal. Sept. 22, 2020) (argument that "the loss is created by the Closure Orders" is "[n]onsense").

Indeed, federal district judges in New York have dismissed every COVID-19 business-income claim that they have considered. *See Soundview Cinemas Inc. v. Great Am. Ins. Grp.*, 2021 WL 561854, at *9 (N.Y. Sup. Ct. Feb. 8, 2021) ("Federal courts in New York and throughout the country have almost uniformly held that loss of use of premises due to COVID-19 related government orders does not trigger business income coverage based on physical loss to property."). This Court is among them, having dismissed a COVID-19 property-insurance case because the COVID-19 government orders did not cause any "actual, tangible harm to the property," but rather merely restricted the insured's use of his business's premises for its intended purpose. *DeMoura v. Cont'l Cas. Co.*, 2021 WL 848840, at *6 (E.D.N.Y. Mar. 5, 2021). The Court need not look any further than that case to dismiss Plaintiffs' coverage claims here. Even Plaintiffs' counsel acknowledged during the pre-motion conference that this is "not an easy case for us" and that no case law in New York, the state whose law applies here, supports Plaintiffs' position.[2] Despite the lack of supporting authority, Plaintiffs nevertheless bring claims for breach of contract, unjust enrichment, and money had and received.

There are two independently sufficient reasons why the Court should dismiss Plaintiffs' claim for breach of the insurance policy.

First, Plaintiffs fail to plausibly allege "direct physical loss" or "direct physical damage" to property, which is required to trigger coverage under the Business Income and Extra Expense provisions in their *property*-insurance Policy, or "damage to property," as required for coverage under the Policy's Civil Authority provision. Plaintiffs allege that they have satisfied the property

[2] Pollock Decl. Ex. 2 [Hr'g Tr. 12:2-4] ("[The Court]: Is there case law in New York that would support your position? [Plaintiffs' counsel]: Not directly, no."), [13:6-10] ("Plaintiffs' counsel: And [although] there is no case directly on point, but there are some arguments that we could possibly make, and I know it's not an easy case for us, but we will still like to have our clients go through – you know, have a day in court.") (April 6, 2021).

loss or damage requirements because "they have been unable to use the property for [its] intended commercial purpose" during the pandemic. Am. Compl. ("AC") ¶ 57, ECF No. 19. But as this Court has already concluded under New York law, the policy language covers "two scenarios: one where 'physical loss' occurs—which naturally refers to a situation where the value of the property as a whole 'disappear[s]' or 'dimin[ishes]'—and one where 'damage' occurs—that is, where the property is harmed but not destroyed." *DeMoura*, 2021 WL 848840, at *6. Plaintiffs have not alleged either scenario, but instead allege merely that they and their neighbors experienced the temporary inability to use property because of COVID-19-related government orders, which does not suffice. Confirming that, the Policy expressly excludes mere loss of use of property unaccompanied by any property loss or damage.

Second, the Policy excludes from coverage any "loss or damage caused by or resulting from any virus ... that is capable of inducing physical distress, illness or disease." Plaintiffs admit that their purported loss or damage resulted from the COVID-19 virus. *See* AC ¶ 70 (alleging that the cause of their loss was the "Business Closure" "resulting" from the "communicable disease, COVID-19 pandemic"). Courts across the country have "nearly unanimously" concluded that exclusions that are similar or identical to the one in Plaintiffs' Policy unambiguously preclude coverage for claimed losses caused by the COVID-19 government orders. *See Mashallah, Inc. v. W. Bend Mut. Ins. Co.*, 2021 WL 679227, at *2 (N.D. Ill. Feb. 22, 2021).

The Court also should dismiss Plaintiffs' quasi-contract claims for unjust enrichment and money had and received. It is fundamental that Plaintiffs may not bring a quasi-contract claim since they have pleaded the existence of a valid and enforceable contract that addresses the very subject of Plaintiffs' claims—the amount of premium and the circumstances under which a premium refund would be due. Further, Plaintiffs' refund theory contravenes basic principles of

insurance law; insureds are not entitled to a refund because the insured risk either did not materialize or turned out to be less than anticipated.

These flaws, and the additional ones detailed below, are fatal and cannot be remedied. In nearly 300 cases and counting, courts across the country have dismissed claims just like these. Consistent with those decisions, and as this Court has already done in a case involving nearly identical provisions (*DeMoura*, 2021 WL 848840, at *7), the Court should dismiss Plaintiffs' claims with prejudice.[3]

BACKGROUND

I. Plaintiffs' Allegations Against Zurich

Plaintiff David Chung owns Plaintiff KBH Sports Club, which operates a fitness center at 1160 White Horse Road in Voorhees, New Jersey. AC 1, ¶¶ 97-98; *id*. Ex. A ("Policy"), ECF No. 19-1, at 89. Zurich issued a property-insurance Policy to 1160 White Horse LLC for the period January 5, 2020 through January 5, 2021. *See* Policy 16. KBH is a named insured on the Policy. *See* AC ¶ 27. Plaintiff Chung is not an insured under the Policy and is otherwise not mentioned in the Policy.

On March 9, 2020, New Jersey Governor Philip Murphy declared a state of emergency because of the risk of the spread of COVID-19, and on March 16, 2020, he ordered "gym[s]" and "fitness centers" to "close[] to the public" to stop close personal contact between individuals. Pollock Decl. Exs. 4-5 (Executive Orders 103 and 104). KBH therefore temporarily suspended operations of its fitness center on March 16, 2020. AC ¶ 85. It re-opened at 25% capacity on

[3] For the Court's convenience, Zurich has compiled in an exhibit to this Motion the nearly 300 orders denying COVID-19 property-insurance coverage in cases like this one. *See* Pollock Decl. Ex. 3. The chart shows the denials based on no property loss or damage, the policy's virus exclusion, and the Civil Authority coverage's access and causation requirements.

September 1, 2020, consistent with Governor Murphy's August 27, 2020 order, and as of February 2021, was operating at 25% capacity. *See* Pollock Decl. Ex. 6 (Executive Order 181); AC ¶¶ 24, 85.[4]

Plaintiffs seek property-insurance coverage for the business losses they sustained because of "[t]he pandemic and the resulting Business Closure Order[s]." AC ¶ 102. They do not allege that they incurred business losses because of the presence of the virus on their premises. AC ¶ 69 ("No COVID-19 virus was found in, on or around the Plaintiffs' properties."). They also allege that "[a]ll other businesses surrounding Plaintiffs' businesses were required to comply with the Business Closure Order" and "many businesses within one mile of Plaintiffs suffered the same" loss of use of their properties as a result. AC ¶ 65 & n.4. They seek a partial refund of the Policy premium, on the theory that the full premium is "unearned" because Zurich's "exposure to risk of loss" from liabilities such as "slip and fall, employee misconduct and professional liability" "was substantially reduced" by the pandemic. AC ¶¶ 86, 92, 122-42.

II. The Terms Of The Property-Insurance Policy

Plaintiffs seek coverage under the Commercial Property Coverage of the Policy, which is separate from the Policy's Commercial General Liability Coverage. *See* Policy 16, 19. Specifically, they seek coverage under three provisions, namely the Business Income, Extra Expense, and Civil Authority coverages. The Business Income provision states:

> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations …. The loss or damage must be caused by or result from a Covered Cause of Loss. (Policy 107).

[4] Although the Amended Complaint describes COVID-19-related orders issued in New York (AC ¶¶ 21-22, 25), those orders are irrelevant because the only insured property is in New Jersey. *See* Policy 89-90 (schedule of insured locations).

The Extra Expense coverage provides that Extra Expense

> means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.
>
> We will pay Extra Expense (other than the expense to repair or replace property) to: … [a]void or minimize the "suspension" of business and to continue operations .... [or] [m]inimize the "suspension" of business if you cannot continue "operations". (Policy 107-08).

The Civil Authority provision states

> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property. (Policy 108).

All of these provisions are subject to a virus exclusion, which provides: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Policy 128.

LEGAL STANDARDS

To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks and citation omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* "Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

The complaint is "deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir.1995) (per curiam) (quotation marks and citation omitted). "Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint 'relies heavily upon its terms and effect,' which renders the document 'integral' to the complaint." *Chambers v. Time Warner*, 282 F.3d 147, 153 (2d Cir. 2002) (quoting *Int'l Audiotext*, 62 F.3d at 72). The Court also may consider "matters of which [it] may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Here, the Court may consider the government orders referenced in the amended complaint.

Under New York law, "an insurance contract is interpreted to give effect to the intent of the parties as expressed in the clear language of the contract" (*Vill. of Sylvan Beach, N.Y. v. Travelers Indem. Co.*, 55 F.3d 114, 115 (2d Cir. 1995)) and should be "read as a whole" such that "no provision is rendered meaningless" (*Raifman v. Berkshire Life Ins. Co.*, 81 F. Supp. 2d 412, 416 (E.D.N.Y. 2000)). "[U]nambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court." *Lend Lease (US) Constr. LMB Inc. v. Zurich Am. Ins. Co.*, 71 N.E.3d 556, 560 (N.Y. Ct. App. 2017) (quotation marks and citation omitted). "If the plain language of the policy is determinative, [the court] cannot rewrite the agreement by disregarding that language." *Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co., Inc.*, 945 N.E.2d 1013, 1017 (N.Y. Ct. App. 2011). Nor should the court "accord a policy a strained construction merely because that interpretation is possible. An insurer is entitled to have its contract of insurance enforced in accordance with its

provisions and without a construction contrary to its express terms." *Bretton v. Mut. of Omaha Ins. Co.*, 110 A.D.2d 46, 49 (N.Y. App. Div. 1985) (internal citation omitted).[5]

ARGUMENT

I. Plaintiffs Have Not Stated And Cannot State A Claim For Breach Of Contract.

Plaintiffs have not met their "burden [as the insured] to establish the existence of coverage" because they do not allege facts that would establish coverage, and the facts they do allege show that the virus exclusion applies. *Platek v. Town of Hamburg*, 26 N.E.3d 1167, 1171 (N.Y. Ct. App. 2015).

A. Plaintiffs Fail To Allege Direct Physical Loss Or Damage To Property.

Plaintiffs do not plausibly allege "direct physical loss of or damage to property" as required by the Business Income and Extra Expense provisions, or "damage to property other than property at the described premises," as required for Civil Authority coverage. Nor could they. Nearly all courts that have considered the issue—including this Court and courts in multiple other actions involving similar Zurich policies—have concluded that these terms require "tangible harm to … property," which the government orders issued to prevent the spread of the COVID-19 virus cannot do. *See, e.g.*, *DeMoura*, 2021 WL 848840, at *5.[6] Plaintiffs' contrary argument that "loss of use"

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[5] Because Plaintiffs filed this case in New York, the choice-of-law analysis is governed by New York law. *See Wall v. CSX Transp., Inc.*, 471 F.3d 410, 415 (2d Cir. 2006) ("In diversity cases, federal courts look to the laws of the forum state in deciding issues regarding conflicts of law."). Under New York law, "[t]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *Matter of Allstate Ins. Co. (Stolarz)*, 613 N.E.2d 936, 937 (N.Y. Ct. App. 1993). "If no conflict exists, then the court should apply the law of the forum state," here New York. *Excess Ins. Co. v. Factory Mut. Ins. Co.*, 2 A.D.3d 150, 151 (N.Y. App. Div. 2003). Because a conflict does not exist between the law of New Jersey, where the insured property is located, and the law of New York that would be outcome determinative as to the issues relevant to this motion, the Court should apply New York law.

[6] *Brunswick Panini's, LLC v. Zurich Am. Ins. Co.*, 2021 WL 663675, at *8 (N.D. Ohio Feb. 19, 2021) (analyzing Zurich policy and stating that "[n]either the COVID-19 virus nor the state

of the property suffices is wrong as a matter of law.

1. A Physical Change To Tangible Property Is Required.

As this Court already held when addressing policy language that was similar to that at issue here, the phrase "direct physical loss of or damage to" property "exclude[s] business interruption losses from coverage when the losses were not caused by real, tangible damage to or loss of the property." *DeMoura*, 2021 WL 848840, at *5. This is because, the words "direct" and "physical" modify "loss" and "damage." *Id*. at *5-6. Their plain meaning shows that the loss or damage to property must be "'immediate,' 'real,' and 'tangible.'" *Id*. at *5. All courts in New York and New Jersey that have addressed this issue agree. *See, e.g.*, *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D. 2d 1, 7 (N.Y. App. Div. 2002) ("direct physical loss or damage" is "limited to losses involving physical damage to the insured's property").[7]

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government orders caused 'direct physical loss of or damage to'" property); *Crescent Plaza Hotel Owner L.P. v. Zurich Am. Ins. Co.*, 2021 WL 633356, at *3 (N.D. Ill. Feb. 18, 2021) (analyzing Zurich policy and stating that "the phrase requires either a permanent disposition of the property due to a physical change ('loss'), or physical injury to the property requiring repair ('damage')."); *see also Torgerson Props., Inc. v. Cont'l Cas. Co.*, 2021 WL 615416, at *1 (D. Minn. Feb. 17, 2021) ("The weight of authority is nearly unanimous that state orders restricting business operations because of the pandemic are not covered[.]"); *Kahn v. Pa. Nat'l Mut. Cas. Ins. Co.*, 2021 WL 422607, at *7 (M.D. Pa. Feb. 8, 2021) ("we are persuaded by the *unanimity* among our colleagues on" this issue) (emphasis added); *Carrot Love, LLC v. Aspen Specialty Ins. Co.*, 2021 WL 124416, at *2 (S.D. Fla. Jan. 13, 2021) (the "nearly unanimous view" is that "COVID-19 does not cause direct physical loss or damage to a property sufficient to trigger coverage"); *BBMS, LLC v. Cont'l Cas. Co.*, 2020 WL 7260035, at *4 (W.D. Mo. Nov. 30, 2020) ("[T]he weight of authority demonstrates that stay at home orders and the existence of COVID-19, alone, does not qualify as 'direct physical loss of or damage to' property."); Pollock Decl. Ex. 3 (collecting 238 cases dismissing COVID-19 claims for failure to allege "direct physical loss," "direct physical damage," or both).

[7] *See, e.g.*, *Rye Ridge Corp. v. Cincinnati Ins. Co.*, 2021 WL 1600475, at *3 (S.D.N.Y. Apr. 23, 2021) ("[U]nder New York law, 'loss' as it is used in the Policies does not mean loss of use; instead there must be some physical damage to the premises."); *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, 2021 WL 1600831, at *4 (W.D.N.Y. Apr. 22, 2021) (requiring "proof of a change or alteration of the insured structure or property to establish that it suffered damage or loss"); *Mohawk Gaming Enters., LLC v. Affiliated FM Ins. Co.*, 2021 WL 1419782, at *5 (N.D.N.Y. Apr. 15, 2021) ("the inclusion of the modifier 'physical' in a phrase such as 'direct result of physical damage' clearly

And as this Court has already recognized, this interpretation does not render "loss" and "damage" redundant, as some plaintiffs have argued in similar cases. *See, e.g.*, *DeMoura*, 2021 WL 848840, at *6. Rather, when "[r]ead together with the modifier 'physical,' the phrase 'physical loss of or damage to property' in this context plainly covers two scenarios: one where 'physical loss' occurs—which naturally refers to a situation where the value of the property as a whole 'disappear[s]' or 'dimin[ishes]'—and one where 'damage' occurs—that is, where the property is harmed but not destroyed." *Id.* Judge Cronan in the Southern District of New York has agreed, explaining that "'loss' would extend to the *complete* destruction of property, whereas 'damage' contemplates a lesser injury." *Michael Cetta*, 2020 WL 7321405, at *9.

Other parts of the Policy confirm this interpretation. For instance, the Business Income and Extra Expense provisions state that Zurich will pay for losses incurred during a "period of

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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"); *Jeffrey M. Dressel, D.D.S., P.C. v. Hartford Ins. Co. of the Midwest, Inc.*, 2021 WL 1091711, at *3 (E.D.N.Y. Mar. 22, 2021) (policy "required coverage only in the event of some physical harm to property, which was not present here"); *Sharde Harvey, DDS, PLLC v. Sentinel Ins. Co.*, 2021 WL 1034259, at *5-7 (S.D.N.Y. Mar. 18, 2021) (collecting cases); *Tappo of Buffalo, LLC v. Erie Ins. Co.*, 2020 WL 7867553, at *4 (W.D.N.Y. Dec. 29, 2020) ("In New York, as in the vast majority of jurisdictions to consider the issue, policy language providing coverage for 'direct physical loss or damage' unambiguously requires some form of actual, physical damage to the insured premise[s]…."); *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405, at *6 (S.D.N.Y. Dec. 11, 2020) ("The plain meaning of the phrase 'direct physical loss of or damage to' therefore connotes a negative alteration in the tangible condition of property."); *Social Life Magazine, Inc. v. Sentinel Ins. Co.*, 2020 WL 2904834 (S.D.N.Y. May 14, 2020) ("[The virus] damages lungs. It doesn't damage [the property]."); *Mangia Rest. Corp. v. Utica First Ins. Co.*, 2021 WL 1705760, at *4 (N.Y. Sup. Ct. Mar. 30, 2021); *Soundview Cinemas*, 2021 WL 561854, at *9 (Courts "have almost uniformly held that loss of use of premises due to COVID-19 related government orders does not trigger business income coverage based on physical loss to property."); *Manhattan Partners, LLC v. Am. Guarantee & Liab. Ins. Co.*, 2021 WL 1016113, at *2 (D.N.J. Mar. 17, 2021); *Arash Emami, M.D., P.C., Inc. v. CNA & Transp. Ins. Co.*, 2021 WL 1137997, at *2 (D.N.J. Mar. 11, 2021); *Boulevard Carroll Ent. Grp. v. Fireman's Fund Ins. Co.*, 2020 WL 7338081, at *2 (D.N.J. Dec. 14, 2020); *see also Ascent Hosp. Mgmt. Co., LLC v. Employers Ins. Co. of Wausau*, 2021 WL 1791490, at *3-4 (N.D. Ala. May 5, 2021) (applying New York law); *Travelers Cas. Ins. Co. v. Geragos & Geragos*, 2021 WL 1659844, at *4-5 (C.D. Cal. Apr. 27, 2021) (same).

restoration" (Policy 107), which is defined to end "when the property at the described premises should be repaired, rebuilt or replaced" or "when business is resumed at a new permanent location" (Policy 115). As this Court explained, "[b]ecause something must first be physically damaged in order to be 'restore[d] to a sound or good condition' or 'fix[ed'] it follows from the plain language of the Policy that 'physical loss of or damage to' requires a change to the real, tangible property at issue for coverage to apply." *DeMoura*, 2021 WL 848840, at *5; *accord Michael Cetta*, 2020 WL 7321405, at *7 (plaintiff's "reading of the Policy—that 'loss of use' is covered—additionally would render the two possible end dates of the 'period of restoration' provision meaningless when applied to circumstances like those presented in this case"). And another district judge has similarly explained: "The terms 'rebuilt,' 'repair,' and 'replace' in the definition of 'period of restoration' indicate that the policy provides coverage for 'the length of time set aside for physical repairs to physical loss of [or] damage.'" *Robert E. Levy, D.M.D, LLC v. Hartford Fin. Servs. Grp., Inc.*, 2021 WL 598818, at *11 (E.D. Mo. Feb. 16, 2021) (citation omitted); *see also Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 332 (S.D.N.Y. 2014) ("The words 'repair' and 'replace' contemplate physical damage to the insured premises as opposed to loss of use of it."). Additionally, "the range of contemplated harm, from repairs to starting anew at a different location, aligns with an understanding that 'loss of' means total destruction while 'damage to' means some amount of harm or injury." *Robert E. Levy*, 2021 WL 598818, at *11 (citation omitted).

With this understanding of "direct physical loss of or damage to property" in mind, Plaintiffs here have not suffered the loss or damage necessary to trigger coverage. Plaintiffs allege only that they experienced "loss of use" of the property. AC ¶¶ 45-47, 57-58. That is insufficient as a matter of law.

2. "Loss Of Use" Alone Is Insufficient To Trigger Coverage.

Plaintiffs contend that they experienced "a direct physical loss and damage to their property because they have been unable to use the property" for its intended purpose. AC ¶ 57. This "loss of use" theory, however, has been rejected by the overwhelming majority of courts in New York and elsewhere that have addressed COVID-19 property-insurance claims. These courts agree that Plaintiffs' "interpretation of 'loss' is contrary to the natural reading of the Policy" (*DeMoura*, 2021 WL 848840, at *6) because "[p]urely economic loss due to temporary loss of use, without some sort of actual change in or physical damage to the insured property, does not suffice" to establish coverage (*Tappo*, 2020 WL 7867553, at *4).[8] Plaintiffs' theory also is directly contrary to the Policy, which expressly *excludes* purely economic "loss of use," untethered from any physical harm, from the "Covered Causes of Loss." Policy 118 ("We will not pay for loss or damage caused by or resulting from … loss of use or loss of market.").[9]

In support of their "loss of use" theory, Plaintiffs make four arguments. None have merit.

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[8] *See, e.g., Food for Thought Caterers Corp. v. Sentinel Ins. Co.*, 2021 WL 860345, at *4 (S.D.N.Y. Mar. 6, 2021) ("[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."); *10012 Holdings, Inc. v. Sentinel Ins. Co.*, 2020 WL 7360252, at *2-3 (S.D.N.Y. Dec. 15, 2020) ("[C]ourts have declined to interpret [direct physical loss or damage] to include 'loss of use' of the property under New York law."); *Michael Cetta*, 2020 WL 7321405, at *8 ("[N]early every court to address this issue has concluded that loss of use of a premises due to a governmental closure order does not trigger business income coverage premised on physical loss to property.").

[9] Other courts have held that the "loss of use" exclusion precludes coverage in similar cases. *See Ballas Nails & Spa, LLC v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 37984, at *4 (E.D. Mo. Jan. 5, 2021) ("to the extent [the insured] alleges that the government closure orders resulted in its inability to use its property and thus resulted in loss, the policy contains an exclusion stating that [the insurer] 'will not pay for loss or damage caused by or resulting from … loss of use'"); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, 2020 WL 7495180, at *4 (N.D. Cal. Dec. 21, 2020); *Whiskey River on Vintage, Inc. v. Ill. Cas. Co.*, 2020 WL 7258575, at *18 (S.D. Iowa Nov. 30, 2020); *Harvest Moon Distribs., LLC v. S.-Owners Ins. Co.*, 2020 WL 6018918, at *6 (M.D. Fla. Oct. 9, 2020).

First, Plaintiffs point to the definition of "[p]roperty damage" in the Commercial General Liability Coverage Form, which includes "[l]oss of use of tangible property that is not physically injured" (Policy 47[10]). AC ¶¶ 49-50. But not only is the term "property damage" different from "direct physical loss of or damage to property," the definition in the general liability section is irrelevant because it does not apply to the Business Income and Extra Expense Form at issue in this case. In fact, Judge Cronan in the Southern District of New York has already rejected this argument when addressing similar policy language. *See Michael Cetta*, 2020 WL 7321405, at *9. He explained that "the business income coverage provision is not part of the commercial general liability section. It is a part of the Policy's commercial *property* section," and, like here (*see* Policy 47, 115), the different sections had different sets of definitions, which demonstrated that the drafters did not intend for consistent definitions throughout the document. *Id*. Judge Cronan also declined to "cross wires between different definition sections of the Policy" because "the business income coverage and commercial general liability sections protect wholly different interests." *Id*. (quotation marks and citation omitted). There, just like here, the "business income coverage is found within the commercial property section of the Policy" and is "a type of 'first-party' insurance that protects property interests." *Id*. In contrast, the "commercial general liability portion of the Policy is 'third-party insurance'" that protects the insured "for claims it 'becomes legally obligated to pay as damages.'" *Id*. (citation omitted).

Second, Plaintiffs point to the Interruption of Computer Coverage limitation in the Business Income and Expense Form, which states that "[c]overage for Business Income does not apply when a 'suspension' of 'operations' is caused by destruction or corruption of electronic data,

[10] At times, the Amended Complaint cites to the incorrect page for a Policy provision. Zurich's citations throughout refer to the correct pagination.

or any loss or damage to electronic data" (Policy 108). AC ¶¶ 51-52. Plaintiffs argue that "damage can have the same meaning as loss of use" because "electronic data cannot be physically damaged since it is an intangible item." AC ¶ 52. But Plaintiffs ignore that the Policy does *not* cover "loss or damage" to electronic data unless it was caused by "a Covered Cause of Loss," which, as defined elsewhere in the Policy, must be a "direct *physical* loss." Policy 110, 116 (emphasis added). Therefore, the coverage is limited to instances in which something tangibly happened to computer equipment, resulting in the loss or destruction of the electronic data contained in it.

Third, Plaintiffs argue that because property damage does not need to have occurred to the insured property itself for purposes of Civil Authority coverage, mere loss of use of the insured property unaccompanied by any property loss or damage must suffice to trigger Business Income and Extra Expense coverage. *See* AC ¶¶ 55-56. But Plaintiffs' argument ignores the Policy's plain language. "Direct physical loss of or damage to property" is required for Business Income and Extra Expense coverage regardless of the events that may trigger Civil Authority coverage. Civil Authority coverage is a different provision with different requirements, and Plaintiffs cannot use it to excise "direct physical loss" or "direct physical damage" to property from the Business Income and Extra Expense requirements.

Finally, Plaintiffs contend that "loss of use" satisfies the requirements for coverage because an Emergency Executive Order issued by New York City Mayor Bill de Blasio states that the coronavirus "physically is causing property loss and damage." AC ¶ 59. The order is irrelevant, however, because Plaintiffs' insured property is in New Jersey, not New York. Moreover, conclusory statements in government orders about property damage caused by COVID-19 lack any factual support and are "not entitled to be assumed true." *Iqbal*, 556 U.S. at 678. And such orders, of course, say nothing about whether the covered property *here* experienced direct physical

loss or damage, especially given Plaintiffs' allegation that the COVID-19 virus was not on their property. AC ¶ 69.[11] In any event, an executive statement that "[t]he COVID-19 virus causes property loss or damage" is "irrelevant" because "the Court must look to the plain terms of the Policy and precedent interpreting similar policies." *See Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 2021 WL 972878, at *7 n.10 (W.D. Tex. Jan. 21, 2021).

B. The Policy's Virus Exclusion Independently Precludes Coverage.

The Policy's virus exclusion independently precludes all of Plaintiffs' claims for coverage, because Plaintiffs allege that their losses were incurred "as a result" of the government orders issued "to prevent the spread of COVID-19." AC ¶¶ 19-20, 47, 58.

The virus exclusion provides that Zurich "will not pay for loss or damage caused by or resulting from any virus." Policy 128. It applies regardless of whether the policyholder argues that the virus itself or the government orders caused the loss. *See, e.g., Geragos & Geragos*, 2021 WL 1659844, at *5-6 (enforcing identical virus exclusion under New York law); *Quakerbridge Early Learning Ctr., LLC v. Selective Ins. Co. of New England*, 2021 WL 1214758, at *2-4 (D.N.J. Mar. 31, 2021) (enforcing identical virus exclusion and noting that "the orders issued by Governor Murphy would not have been enacted but for the pandemic"); *Chester C. Chianese DDS LLC v. Travelers Cas. Ins. Co.*, 2021 WL 1175344, at *3 (D.N.J. Mar. 27, 2021) (enforcing identical virus exclusion); *Carpe Diem Spa, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 1153171, *3-4

[11] Even if Plaintiffs had alleged that the virus was on the premises, that would have been insufficient to trigger coverage because the virus, which can be easily removed from surfaces using common household cleaners, does not tangibly harm property. *See, e.g., Tappo*, 2020 WL 7867553, at *4 ("[E]ven assuming that the virus physically attached to covered property, as plaintiffs allege in the instant case, it did not constitute the direct, physical loss or damage required to trigger coverage because it[s] presence can be eliminated by routine cleaning and disinfecting.") (citation and quotation marks omitted).

(D.N.J. Mar. 26, 2021) (same); *Causeway Auto., LLC v. Zurich Am. Ins. Co.*, 2021 WL 486917, at *2 (D.N.J. Feb. 10, 2021) (same).[12]

Indeed, even when the policyholder admits that the virus was not on the property—as Plaintiffs do here (AC ¶¶ 69-70)—courts have enforced virus exclusions, reasoning that the government orders were issued only because of the coronavirus. *See, e.g.*, *Downs Ford*, 2021 WL 1138141, at *4 (enforcing identical virus exclusion and noting that "the plain language of the Virus Exclusion does not require a virus be present at the Insured Premises or having infected the insured's employees"); *Causeway Auto*, 2021 WL 486917, at *2 (enforcing identical virus exclusion and stating that it "in no way suggests that the virus must be present at the insured property for the exclusion to apply").[13]

Nor can Plaintiffs prevail on their argument that the Policy does not contain language

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[12] Courts also have ruled that similarly worded virus exclusions preclude coverage. *See, e.g.*, *Benamax Ice, LLC v. Merch. Mut. Ins. Co.*, 2021 WL 1171633, at *5-6 (D.N.J. Mar. 29, 2021); *Dezine Six, LLC v. Fitchburg Mut. Ins. Co.*, 2021 WL 1138146, at *4-5 (D.N.J. Mar. 25, 2021); *Downs Ford. Inc. v. Zurich Am. Ins.*, 2021 WL 1138141 (D.N.J. Mar. 25, 2021); *Colby Rest. Grp., Inc. v. Utica Nat'l Ins. Grp.*, 2021 WL 1137994, at *3-5 (D.N.J. Mar. 12, 2021); *In The Park Savoy Caterers LLC v. Selective Ins. Grp., Inc.*, 2021 WL 1138020, at *2-3 (D.N.J. Feb. 25, 2021); *Del. Valley Plumbing Supply, Inc. v. Merchs. Mut. Ins.*, 2021 WL 567994, at *4 (D.N.J. Feb. 16, 2021) (collecting cases); *Boulevard*, 2020 WL 7338081, at *2; *Mangia Rest. Corp.*, 2021 WL 17505760, at *4; *see also* Pollock Decl. Ex. 3 (collecting 140 orders dismissing cases based on a virus exclusion).

[13] *See, e.g.*, *Michael J. Redenburg, Esq. PC v. Midvale Indem. Co.*, 2021 WL 276655, at *7 (S.D.N.Y. Jan. 27, 2021) (enforcing virus exclusion because "these emergency orders were prompted *by the virus"*); *N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.*, 2020 WL 6501722, at *3 (D.N.J. Nov. 5, 2020) (for virus exclusion to apply, "[t]here is no requirement, as Plaintiff suggests, for the virus to have physically caused the loss, such as via contamination of the property"); *Franklin*, 2020 WL 5642483, at *2 (argument that "the loss is created by the Closure Orders rather than the virus, and therefore the Virus Exclusion does not apply" is "[n]onsense"); *Mac Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co.*, 2020 WL 7422374, at *8 (N.J. Super. Ct. Law Div. Nov. 5, 2020) ("Since the virus is alleged to be the cause of the governmental action, and the governmental action is asserted to be the cause of the [plaintiff's] loss, plaintiff cannot avoid the clear and unmistakable conclusion that the coronavirus was the cause of the alleged damage or loss.").

expressly "exclud[ing] or limit[ing] coverage from pandemic, epidemic or communicable disease or anything alike." AC ¶¶ 37, 71. The "mere existence of more explicit language cannot obligate the Court to conclude that the instant language is ambiguous. Otherwise, all contractual language would be ambiguous as language could always be more specific." *Riverwalk Seafood Grill, Inc. v. Travelers Cas. Ins. Co.*, 2021 WL 81659, at *3 (N.D. Ill. Jan. 7, 2021). Other courts have reached the same conclusion.[14] Further, Plaintiffs' argument strains common sense because no meaningful difference exists between a "virus" and a "pandemic." *See Newchops*, 2020 WL 7395153, at *9.[15]

Finally, Plaintiffs allege that Zurich added a Communicable Disease exclusion when renewing the Policy (AC ¶ 73), which they contend shows that the virus exclusion must not have excluded COVID-19-related business losses. But that addition was made to the General Liability portion of the Policy. It does not apply to coverage under the Business Income, Extra Expense, and Civil Authority provisions at issue here. *See* AC Ex. C at 4, ECF No. 19-3.

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[14] *See, e.g.*, *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, 2020 WL 7395153, at *9 (E.D. Pa. Dec. 17, 2020) ("The lack of a specific reference to a pandemic in the policy does not render the provision ambiguous."); *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, 2020 WL 6392841, at *10 (S.D. Fla. Nov. 2, 2020) (concluding that there was "no basis for construing 'COVID-19' or the 'pandemic' as a non-virus for purposes of [the virus] exclusion" because "the global spread, proliferation, and activity of 'coronavirus' is the underlying pandemic at issue"); *Franklin*, 2020 WL 7342687, at *3 ("[The argument that] the Policy could have referred explicitly to these risks or included a specific exclusion 'targeted at pandemics[']' is unavailing."); *see also Garmany of Red Bank, Inc. v. Harleysville Ins. Co.*, 2021 WL 1040490, at *7 (D.N.J. Mar. 18, 2021) ("The term 'pandemic' simply defines the prevalence of a virus or disease. The fact that the COVID-19 virus has become a pandemic does not negate the simple fact that the [New Jersey] Executive Orders were issued to curb the spread of the COVID-19 virus.").

[15] To conclude otherwise would be "akin to arguing that a coverage exclusion for damage caused by fire does not apply to damage caused by a very large fire." *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, 2020 WL 6440037, at *6 (C.D. Cal. Oct. 28, 2020); *see also Boxed Foods Co. v. Cal. Cap. Ins. Co.*, 2020 WL 6271021, at *5 (N.D. Cal. Oct. 26, 2020) ("[T]he Virus Exclusion is only subject to one reasonable interpretation: that coverage does not extend to any claim premised on virus-induced damage, regardless of the virus's magnitude.").

C. Plaintiffs Cannot Plausibly Allege Civil Authority Coverage.

Plaintiffs' claim under the Civil Authority provision should be dismissed for three reasons.

First, Plaintiffs have not alleged "damage to property" from a Covered Cause of Loss within a one-mile radius of its fitness center (Policy 108), as they allege merely that other properties were "damage[d]" by loss of use resulting from the COVID-19 government orders (AC ¶ 65). As another federal court evaluating the same Civil Authority provision determined, the "damage" referenced "must be physical," because the provision describes "dangerous physical conditions" at nearby property that instigates government intervention of some sort. *Newchops*, 2020 WL 7395153, at *5. Further, the damage must be caused by a Covered Cause of Loss—but the Covered Cause of Loss cannot be the virus itself, because the Policy's virus exclusion prohibits such an interpretation. *See Downs Ford*, 2021 WL 1138141, at *4 (evaluating the same Civil Authority provision and stating that "COVID-19 could not be a Covered Cause of Loss because of the Virus Exclusion"). Nor can the Covered Cause of Loss be the government orders, because the orders must be a response to the Covered Cause of Loss. *See Newchops*, 2020 WL 7395153, at *6 ("The civil authority action cannot be both the cause of that damage and the response to it."). Plaintiffs therefore cannot plead the requisite damage to nearby property.

Second, Plaintiffs have not alleged that the government orders were issued "*in response to* dangerous physical conditions" at nearby property. Policy 108 (emphasis added). Civil Authority coverage "contemplates a sequence of events where direct physical loss or damage to property occurs and then an order prohibiting access *because of that damage* issues." *Not Home Alone, Inc. v. Phila. Indem. Ins. Co.*, 2011 WL 13214381, at *6 (E.D. Tex. Mar. 30, 2011) (quotation marks and citation omitted). Numerous courts have dismissed COVID-19 claims for civil authority coverage because this required causal link between prior physical damage and the government's

closure order was missing. *See Newchops*, 2020 WL 7395153, at *5 ("The instigation of the orders prohibiting access must be a physical condition in a nearby property.").[16]

Plaintiffs cannot satisfy this requirement because the relevant New Jersey COVID-19 orders themselves make clear that they were not issued *in response to* prior physical damage. Rather, they were issued in response to the unfolding coronavirus crisis and were preventative measures designed to stop the spread of the virus among the population.[17] Plaintiffs admit as much in their complaint. AC ¶ 20 ("Concerned with the rising spread of COVID-19 disease, New York and New Jersey governors executed Executive Orders"); *id.* ¶ 70 ("The intent of the Business Closure Order was to contain the spread of the pandemic.").

Third, Plaintiffs have not alleged that the government orders "prohibited" "[a]ccess" to the insured premises. Policy 108. Courts have interpreted this phrase to require *complete prohibition* on entry. *See, e.g.*, *Food for Thought*, 2021 WL 860345, at *6 ("The Policy provides for coverage if the civil authority denies all access to the insured property, not simply its full use."); *Michael Cetta*, 2020 WL 7321405, at *12 (dismissing civil-authority claim because plaintiff did not allege that COVID-19 orders completely denied access); *Abner, Herrman & Brock, Inc. v. Great N. Ins. Co.*, 308 F. Supp. 2d 331, 335-37 (S.D.N.Y. 2004) (civil-authority coverage was unavailable after 9/11 once pedestrian and public-transit access was restored, despite vehicular-traffic restrictions).

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[16] Pollock Decl. Ex. 3 (collecting 82 cases dismissing Civil Authority coverage claims because the COVID-19 government orders were not issued in response to physical loss or damage but instead to limit the spread of COVID-19 virus).

[17] *See* Pollock Decl. Ex. 4 (Executive Order 103) (purpose of order was "to take action against this public health hazard to protect and maintain the health, safety, and welfare of New Jersey residents and visitors"); Ex. 5 (Executive Order 104) ("suspending operations at these businesses is part of the State's mitigation strategy to combat COVID-19 and reduce the rate of community spread").

While Plaintiffs allege that "[n]o one was allowed to enter the property … during the crisis" (AC ¶ 64), the New Jersey orders said no such thing. *See generally* Pollock Decl. Exs. 4-5 (Executive Orders 103 & 104). The Court therefore should not accept this allegation as true, because when "a document relied on in the complaint contradicts allegations in the complaint, the document, not the allegations, control." *Poindexter v. EMI Record Grp. Inc.*, 2012 WL 1027639, at *2 (S.D.N.Y. Mar. 27, 2012). Tellingly, Plaintiffs identify no order that prohibited access to their property. Accordingly, this Court should conclude that Plaintiffs did not plausibly plead facts demonstrating that the applicable COVID-19 orders prohibited access to their business.

II. Plaintiffs Fail To State Plausible Quasi-Contract Claims.

Plaintiffs' quasi-contract claims (*i.e.*, unjust enrichment and money had and received) seek a partial refund of the Policy premium based on the theory that the pandemic reduced Zurich's risk of providing coverage for *other* kinds of property losses. But Plaintiffs' refund claims fail as a matter of law because Plaintiffs specifically plead the existence of a valid and enforceable contract—*i.e.*, the Policy. *See* AC ¶ 123. As courts consistently have recognized, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 516 N.E.2d 190, 193 (N.Y. Ct. App. 1987); *Egnotovich v. Katten Muchin Zavis & Roseman LLP*, 2008 WL 199757, at *10 (N.Y. Sup. Ct. 2008) (dismissing money-had-and-received claim because parties had a valid contract). Here, the Policy governs the "subject matter" of Plaintiffs' quasi-contract claims because it defines the parties' rights with respect to the amount of the Policy premium and any potential refund of that premium. Specifically, the Policy authorizes a refund *only* when the "policy is cancelled" and provides that any refund would be paid to the first named insured—1160 White Horse LLC, which is not a plaintiff here. Policy 23. It is therefore telling that Plaintiffs' breach-of-contract claim does not

seek a return of the Policy premium: That is because the Policy expressly addresses Plaintiffs' right to a refund and makes clear that they are not entitled to one in this instance. Thus, "[g]iven that the disputed terms and conditions fall entirely within the insurance contract, there is no valid claim for unjust enrichment" or any other quasi-contract claim. *Goldman v. Metro. Life Ins. Co.*, 841 N.E.2d 742, 746-47 (N.Y. 2005). Other courts facing similar claims in COVID-19 property-insurance disputes have reached the same conclusion.[18]

Equally fatal to these claims, Plaintiffs do not allege that Zurich's retention of the premium is inequitable, as required for either claim. For example, the payment was neither "the result of a mistake" nor "unlawful or unauthorized." *See Goel v. Ramachandran*, 111 A.D.3d 783, 790, 792 (N.Y. App. Div. 2013) ("[A] plaintiff's allegation that the [defendant] received benefits, standing alone, is insufficient[.]") (alteration in original, citation omitted); *Miller v. Schloss*, 218 N.Y. 400, 408-09 (1916) (dismissing money-had-and-received claim because plaintiff did not allege "oppression, imposition, extortion, or deceit").

Finally, Plaintiffs' argument contravenes a basic tenet of insurance law: The mere fact that some of the risks that Zurich assumed when it issued the Policy may not have materialized does not make Zurich's premiums "unjust" any more than it is "unjust" when Zurich must pay higher-than-expected losses. Insurance premiums are not retroactively adjusted because fewer or more claims than expected materialized during the policy period. When the insurer is "put *at risk* on

[18] *See, e.g.*, *Mashallah*, 2021 WL 679227, at *7 ("Plaintiffs' [unjust-enrichment] claim is also foreclosed because there is an *actual contract* that governs the relationship between the parties."); *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.*, 2021 WL 389215, at *8 n.9 (S.D. Cal. Feb. 3, 2021) (same); *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, 2020 WL 7696080, at *6 (N.D. Cal. Dec. 28, 2020) (same); *Franklin*, 2020 WL 5642483, at *4 (same); *see also Cahill v. Turnkey Vacation Rentals, Inc.*, 2020 WL 7349512, at *5 (W.D. Tex. Nov. 13, 2020) (dismissing unjust-enrichment claim seeking refunds for vacation rentals cancelled due to COVID-19 because contracts provided that payments were non-refundable).

behalf of the insured" during the policy period, it has earned the premium. *Humana Health Care Plans v. Snyder-Gilbert*, 596 N.E.2d 299, 300 (Ind. Ct. App. 1992); *see also Mashallah*, 2021 WL 679227, at *4-5 ("Plaintiffs' claims fail because there is nothing unfair or unscrupulous about holding Plaintiffs to the terms of the Policies they bought, which do not include coverage for 'any virus' like COVID-19.").[19]

III. Plaintiff Chung Can Not Recover Under The Policy.

Plaintiff Chung's breach-of-contract claim should be dismissed for the additional reason that he is neither a named insured nor a third-party beneficiary of the Policy, and therefore cannot seek coverage under it.

Plaintiffs cannot assert a breach-of-contract claim unless they are entitled to enforce the contract. *See Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 108 (2d Cir. 2009); *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 252 (2d Cir. 2006). For insurance contracts like the Policy here, this means that plaintiffs must be either a named insured or a third-party beneficiary. *See Rosano v. Freedom Boat Corp.*, 2015 WL 4162754, at *4 (E.D.N.Y. July 8, 2015) (collecting cases). And under New York law, "to recover as a third-party beneficiary of a contract, a claimant must establish that the parties to the contract intended to confer a benefit on the third party." *Subaru Distribs. Corp. v. Subaru of Am., Inc.*, 425 F.3d 119, 124 (2d Cir. 2005); *Olsen v. Steris Corp.*, 2018 WL 10676902, at *7 (E.D.N.Y. June 18, 2018) ("Proving third-party beneficiary status requires that the contract terms clearly evidence an intent to permit enforcement by the third party in question." (quotation marks and citation omitted)).

[19] 5 Couch on Ins. § 79:7 (3d ed. 2014) ("This rule is based upon just and equitable principles, for the insurer has, by taking upon itself the peril, became entitled to the premium."); 14 Williston on Contracts § 41:21 (4th ed. rev. Nov. 2020) ("If the risk has attached, the insured has received consideration for the premium, and if by the insured's own fault, or by chance, the conditional promise of the insurer need not be performed, still, no part of the premium can be recovered.").

Chung is not a named insured; he is mentioned nowhere in the Policy. *See* Policy 16 (listing named insureds). He also is not a third-party beneficiary; nowhere does the Policy evidence an intent for him to receive a benefit under any of the coverage provisions at issue. In fact, the Policy limits all rights and obligations under the relevant provisions to the "Named Insured" and contains an anti-assignment clause, all of which evidences that the Policy does not contemplate enforcement by third parties. *See* Policy 107-08 ("Throughout this policy, the words 'you' and 'your' refer to the Named Insured …. We will pay for the actual loss of Business Income [the Named Insured] sustain[s] …."); 23 ("Your rights and duties under this policy may not be transferred without our written consent ....").

Plaintiffs assert that Chung is "a third-party beneficiary under [the] Commercial General Liability Coverage" part of the Policy. AC ¶ 99 (citing Policy 41). But again, liability insurance coverage is not at issue here. Plaintiffs also assert that Chung is a third-party beneficiary under the Building and Personal Property Coverage Form in the commercial-property part of the Policy. AC ¶ 100 (citing Policy 98). But that provision simply states that insurance coverage for business personal property may include the *personal property* of a company's "officers," "partners," "members," "managers," and "employees." Policy 98. That provision therefore does not confer insured status on Chung generally, or give him any right to property-insurance coverage under the Policy. And Plaintiffs do not seek coverage for any personal property loss here. Finally, Plaintiffs assert without explanation that "Chung is a third-party beneficiary under parts of [the] Venture Programs – Property Enhancement Endorsement." AC ¶ 100; *see* Policy 131-59. That is a 29-page section, and Plaintiffs do not say where or how it demonstrates that Chung is a third-party beneficiary. For Plaintiffs to leave both Zurich and the Court guessing as to what they mean is a pleading failure that cannot withstand a motion to dismiss. *See Kahlon v. CNA Fin. Corp.*, 2017

WL 2633517, at *4 (E.D.N.Y. June 13, 2017) ("Plaintiffs' allegations regarding its entitlement to coverage are conclusory and do not plausibly establish their standing to bring this action as third-party beneficiaries."). To the extent that Plaintiffs are referring to the provision that again allows coverage for the personal property of the company's members and employees (Policy 147), that section still does not show an intent to allow those individuals to enforce any of the Business Income and Extra Expense provisions at issue here.

IV. The Complaint Should Be Dismissed With Prejudice.

Courts around the country—including this one—have dismissed with prejudice cases seeking coverage for coronavirus-related business losses, recognizing that no amount of artful pleading by those plaintiffs would state a plausible claim for coverage. *See DeMoura*, 2021 WL 848840, at *7; *Jeffrey M. Dressel*, 2021 WL 1091711, at *5; *Sharde Harvey*, 2021 WL 1034259, at *17; *Carpe Diem Spa*, 2021 WL 1153171, at *4. The Court should do the same here.

Plaintiffs have already amended their complaint once and when the Court offered them a chance to amend again (Pollock Decl. Ex. 2 [Hr'g Tr. 12:4-10]), they declined. But even if they changed their minds, Plaintiffs will never be able to state a claim under any of the coverage provisions they invoke. They cannot avoid the legal conclusion that the virus does not cause "direct physical loss" or "direct physical damage" to property. They cannot allege facts to overcome the virus exclusion, which bars coverage for losses "caused by or resulting from" any virus. And they cannot allege entitlement to Civil Authority coverage because a Covered Cause of Loss did not result in "damage to [nearby] property," the relevant government orders were not a response to "dangerous physical conditions" at nearby property, and the government orders did not "prohibit" access to Plaintiffs' property. Nor can Plaintiffs ever successfully state a claim for unjust enrichment or money had and received because the existence of the parties' contract precludes any quasi-contract claim as a matter of law.

CONCLUSION

The Court should dismiss the amended complaint with prejudice.

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Respectfully submitted,

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