IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

CHRISTIE JO BERKSETH-ROJAS DDS, individually and on behalf of all others similarly situated, Plaintiff, vs. ASPEN AMERICAN INSURANCE COMPANY, Defendant.	Civil Action No. 3:20-cv-00948-D Hon. Senior District Judge Sidney A. Fitzwater

DEFENDANT ASPEN AMERICAN INSURANCE COMPANY'S MOTION TO DISMISS AND BRIEF IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Aspen American Insurance Company ("Aspen") moves the Court to dismiss Plaintiff Christie Jo Berkseth-Rojas DDS's Class Action Complaint (the "Complaint") for failure to state a claim upon which relief can be granted.

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I. PRELIMINARY STATEMENT

In the face of the COVID-19 crisis and government shutdown orders, some business owners, including Plaintiff Christie Jo Berkseth-Rojas DDS ("Plaintiff"), have made claims on their property insurance policies seeking to recover lost income, and have filed lawsuits when those claims were denied. Courts across the country have dismissed these lawsuits where—as here—the applicable insurance policy covers lost income only when that loss results from *direct physical loss of or damage to* insured property. These courts have held that a direct physical damage requirement means what it says, and that policyholders may not recover for intangible losses, including loss of income, unless tangible, discernible damage to property caused those losses.

That law is dispositive here. Plaintiff is a dentist who purchased an insurance policy from defendant Aspen American Insurance Company. That policy provides coverage for lost income only to the extent "*direct physical damage*" to insured property causes such loss. Here, Plaintiff seeks coverage for losses stemming from partial shutdown orders by governmental authorities. But the shutdown orders do not trigger coverage under Plaintiff's policy because the shutdown orders do not constitute direct physical loss or damage to property. As the Western District of Texas recently held, a plaintiff seeking business income coverage predicated on direct physical loss or damage to property fails to state a claim for coverage when plaintiff alleges that business shutdown orders issued in response to the COVID-19 crisis caused the income losses but otherwise pleads no direct physical loss or damage to property. *Diesel Barbershop, LLC v. State Farm Lloyds*, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020).

Plaintiff has not pled—and cannot show—that any such damage has occurred. Because "direct physical damage" is indisputably a predicate to coverage under Plaintiff's policy, Plaintiff has failed to plead facts showing a plausible basis for coverage. This disposes of

Plaintiff's claims in their entirety. Like the daily-growing number of courts that have dismissed claims for lost income related to the pandemic where policyholders are contractually required to show, but have not shown, that "direct physical damage" to property caused their losses, the Court should dismiss Plaintiff's claims.

II. RELEVANT FACTUAL BACKGROUND

A. Plaintiff Holds an Aspen Property Insurance Policy

Plaintiff provides dental care at Rojas Family Dental in Minneapolis, Minnesota. Compl. ¶ 1. Plaintiff purchased an insurance policy from Aspen, which includes the Building, Blanket Dental Practice Personal Property and Income Coverage Part (Form ASPDTPR001 0219) (the "Policy"). *Id*. ¶¶ 2, 14.[1] The Policy provides, in relevant part, that Aspen "will pay for all direct physical damage to covered property." Dkt. 5 at 50.

B. The Minnesota COVID Emergency Executive Orders

The spread of the COVID-19 virus prompted federal, state, and local governmental authorities to issue guidance and executive measures to slow the spread of the virus. Minnesota Governor Tim Walz issued the first of many Emergency Executive Orders (collectively, the "Minnesota COVID Orders") on March 13, 2020. Compl. ¶ 28. This order—Emergency Executive Order 20-01—encouraged Minnesotans to stay home if feeling ill and to frequently wash their hands in an effort to combat the spread of the virus. *Id*. ¶ 28.

On March 19, 2020, Governor Walz issued Emergency Executive Order 20-09, ordering that "all non-essential or elective surgeries and procedures, including non-emerg[ency] or elective dental care, that utilize PPE or ventilators must be postponed indefinitely." *Id*. ¶ 34.

[1] Plaintiff attached a copy of the Policy as Exhibit A to her Complaint. Dkt. 1. However, that copy was partially illegible. Plaintiff filed a fully legible copy of the Policy as a Supplement to Original Complaint [Dkt 1]. Dkt. 5. All citations to the Policy herein are to the Supplement (Dkt. 5).

The prefatory language of this order indicated a need to "conserve[e] [] critical resources such as ventilators and personal protective equipment ("PPE") [a]s essential to aggressively address the COVID-19 pandemic." *See* Emergency Executive Order 20-09.[2]

On March 25, 2020, Governor Walz issued Emergency Executive Order 20-20, requiring "all persons currently living in the State of Minnesota . . . to stay at home or in their place of residence except for certain essential activities and work." Compl. ¶ 37 (internal citations omitted). "The purpose of Executive Order 20-20 was to slow the spread of the COVID-19 pandemic." *Id.* ¶ 38. On April 8, 2020, Governor Walz issued Emergency Executive Order 20-33, which extended the duration of Emergency Executive Order 20-20. *Id.* ¶ 40. "The purpose of Executive Order 20-33 was to continue Minnesota's measures to slow the spread of the COVID-19 pandemic." *Id.* ¶ 41.

C. The Complaint

On or about March 27, 2020, Plaintiff submitted a claim to Aspen under the Policy for business interruption coverage, which Aspen—through its state administrator—denied. *Id.* ¶¶ 44-45. On April 17, 2020, Plaintiff filed the Complaint against Aspen in this Court seeking breach of contract damages and declaratory relief under the Policy, alleging wrongful denial of coverage.

Pursuant to the Policy, "Aspen agrees to 'pay for all direct physical damage' to the Covered Property 'caused by or resulting from any covered cause of loss.'" *Id.* ¶ 16. Plaintiff alleges that "[l]osses due to COVID-19 are a Covered Cause of Loss under" the Policy," *id.* ¶ 18, and that "losses caused by COVID-19 and the related orders issued by local, state, and federal

[2] The Court may take judicial notice of the Minnesota COVID Orders. *Norris v. Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir. 2007) (it is "clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record").

authorities triggered the Practice Income, Extra Expense, Civil Authority, and Sue and Labor provisions of the Aspen policy." *Id.* ¶ 26.[3]

Plaintiff alleges that "[t]he presence of COVID-19 caused 'direct physical loss of or damage to' the 'Covered Property' under the Plaintiff's policy . . . by denying use of and damaging the Covered Property, and by causing a necessary suspension of operations during a period of restoration." *Id.* ¶ 42. The phrase "presence of COVID-19," as used in the Complaint, evidently indicates the presence of the COVID-19 virus and/or COVID-19 disease generally within society rather than in a specific location. *See id.* ¶ 27 ("The *presence of COVID-19* has caused civil authorities throughout the country to issue orders requiring the suspension of business at a wide range of establishments . . .") (emphasis added). The Complaint does not allege that the COVID-19 virus or COVID-19 was present in Plaintiff's insured property.

Plaintiff further alleges that "[a]s a result of the presence of COVID-19 and the [Minnesota COVID Orders], Plaintiff . . . lost Practice Income and incurred Extra Expense." *Id.* ¶ 44. Plaintiff seeks breach of contract damages and declaratory relief under the Practice Income, Civil Authority, Extra Expense, and Sue and Labor coverages of the Policy. *Id.* ¶ 15.

D. Relevant Policy Provisions

The Policy, in relevant parts, provides:

> **I. COVERAGE AGREEMENTS**
>
> **A. Covered Property**
>
> We will pay for all direct physical **damage** to covered property at the premises described on the Declarations caused by or resulting from any **covered cause of loss**.

[3] The "Sue and Labor" nomenclature is Plaintiff's, which Aspen adopts for the purposes of this motion. The complaint identifies a provision in the Duties in the Event of Damage section of the Policy as the "Sue and Labor" provision. *See infra* at 7.

Covered property means the following types of property for which a limit of insurance is shown on the Declarations or which is show below:

1. **Building**;

2. **Your blanket dental practice personal property**;

. . .

3. **Practice Income**

We will pay for the actual loss of **practice income you** sustain . . . due to the necessary suspension of **your** practice during the **period of restoration**. The suspension must be caused by direct physical **damage** to the **building** or **blanket dental practice personal property** at the described premises caused by or resulting from a **covered cause of loss** . . .

We will only pay for **loss of practice income** that occurs within 12 consecutive months after the date of direct physical **damage** . . .

. . .

4. **Extra Expense**

Extra expense means the extra expenses necessarily incurred by **you** during the **period of restoration** to continue normal services and operations which are interrupted due to **damage** by a **covered cause of loss** to the premises described . . .

We will only pay for extra expenses that you incur within 12 consecutive months after the date of direct physical **damage** . . .

. . .

B. **Covered Related Expenses**

. . .

13. As respects practice income:

. . .

b. Civil Authority

We will pay for the actual loss of **practice income** and **rents you** sustain caused by action of civil authority that prohibits access to the described premises due to the direct physical **damage** to property, other than at the described premises, caused by or resulting from any **covered cause of loss**.

. . .

II. EXCLUSIONS

A. We will not pay for **damage** caused directly or indirectly by any of the following. Such **damage** is excluded regardless of any other cause or event that contributes concurrently in any sequence to the **damage**.

1. Ordinance of Law

The enforcement of any ordinance or law:

a. regulating the construction, use or repair of any property; or

b. requiring the tearing down of any property, including the cost of removing the debris.

. . .

B. We will not pay for damaged caused by or resulting from any of the following:

. . .

2. delay, loss of use or loss of market;

IV. DEFINITIONS

. . .

"**Damage**" means partial or total loss of or damage to your covered property.

. . .

"**Period of Restoration**" means the period of time that:

A. begins 24 hours immediately following direct physical **damage** . . . caused by or resulting from any **covered cause of loss** at the described premises . . .; and

B. ends on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality.

. . .

V. CONDITIONS

. . .

I. **Duties In The Event Of Damage**

You must see that the following are done in the event of damage to covered property:

. . .

4. Take all reasonable steps to protect covered property from further **damage** by a **covered cause of loss**. If feasible, set the **damaged** property aside and in the best possible order for examination. Also keep a record of **your** expenses for emergency and temporary repairs, for consideration in the settlement of the claim. [4]

Dkt. 5 at 50, 52-53, 56, 60-61, 68-69, 72.

III. ARGUMENTS AND AUTHORITIES

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—that the pleader is entitled to relief" and dismissal is appropriate. *Gonzales v. Kay*,

[4] Plaintiff labels this provision the "Sue and Labor" provision.

577 F.3d 600, 603 (5th Cir. 2009) (citations omitted). A court is not to strain to find inferences favorable to the plaintiff and is not to accept conclusory allegations or legal conclusions. *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005) (citations omitted). "[L]abels and conclusions or a formulaic recitation of the elements of a cause of action" are insufficient to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

When considering a Rule 12(b)(6) motion, courts may consider documents attached to a complaint "if they are referred to in the plaintiff's complaint and are central to her claim." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 499 (5th Cir. 2000) (citing *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)). If attachments reveal facts that foreclose recovery as a matter of law, dismissal is appropriate. *Red Hook Commc'ns I, L.P. v. On-Site Manager, Inc.*, 700 Fed. App'x. 329, 332 (5th Cir. 2017) (citing *Ass'd Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974)). To the extent that an exhibit attached to a complaint contradicts the complaint, the exhibit controls. *Id.*

A. Rules of Insurance Policy Interpretation

Under Minnesota law, the interpretation of insurance contracts is a question of law.[5] *Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 887 (Minn. 1978). "[A] policy of insurance is within the application of general principles of the law of contracts." *Bobich v. Oja*, 104 N.W.2d 19, 24 (Minn. 1960). Contract language shall be given its plain and ordinary meaning.

[5] A federal court exercising diversity jurisdiction must apply the choice of law rules of the forum state. *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400, 403 (5th Cir. 2004) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)). Aspen has identified no relevant conflicts between Minnesota and Texas law, and thus no choice of law analysis is necessary. For purposes of this Motion, Aspen will assume that Minnesota law applies. To the extent any conflicts are identified, Aspen reserves all rights with respect to the applicable governing law.

Employers Mut. Liab. Ins. Co. v. Eagles Lodge, 165 N.W.2d 554, 556 (Minn. 1969). "Although [courts] begin with the plain and ordinary meaning of the terms, the terms of a contract must be read in the context of the entire contract." *Quade v. Secura Ins.*, 814 N.W.2d 703, 705 (Minn. 2012) (citations and internal quotations omitted). Courts are to interpret a contract to give meaning to all a contract's provisions. *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995). A court should not create an ambiguity out of plain words in order to find coverage. *Jenoff, Inc. v. New Hampshire Ins. Co.*, 558 N.W.2d 260, 262 (Minn. 1997).[6]

B. Plaintiff Has Not Alleged A Covered Loss Within The Scope Of The Policy

In a claim for insurance coverage "the initial burden of proof is on the insured to establish a prima facie case of coverage." *See SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 311 (Minn. 1995). Plaintiff seeks coverage under four provisions: the Practice Income Provision, the Extra Expense Provision, the Civil Authority Provision, and the Sue and Labor Provisions. *Critically*, all four provisions explicitly limit coverage to situations in which property has sustained "direct physical damage." Under the Practice Income, Extra Expense, and Sue and Labor Provisions, the insured's own property must have sustained direct physical damage. Under the Civil Authority Provision, a different physical property must have sustained direct physical damage.

Plaintiff, however, alleges no direct physical damage to any property and no facts showing that her losses arise from any direct physical damage. Plaintiff has therefore failed to

[6] Courts applying Texas law similarly "construe the language [of insurance contracts] according to the ordinary, everyday meaning of the words to the general public." *Ross v. Hartford Lloyd Ins. Co.*, 2019 WL 2929761, at *5 (N.D. Tex. July 4, 2019) (citations omitted). Moreover, if the insurance contract "is subject to a certain or definite legal meaning or interpretation, it is not ambiguous, and the court will construe its meaning as a matter of law." *Id.* (citations omitted). Because Plaintiff's Policy unambiguously requires direct physical damage to the insured property, and because Plaintiff alleges no direct physical damage to insured property in the Complaint, Plaintiff's claims fail as a matter of law and should be dismissed under either Minnesota or Texas law.

allege an insurance claim that falls within the Policy's scope. Aspen addresses the four coverage provisions in turn.

1. *The Complaint Does Not Allege a Loss within the Practice Income Provision*

The Policy's practice income provision applies only if direct physical damage to property causes the loss of practice income. The relevant language of the practice income provision, again, is as follows:

> We will pay for the actual loss of practice income you sustain . . . due to the necessary suspension of your practice during the *period of restoration*. The suspension must be caused by *direct physical damage* to the building or blanket dental practice personal property at the [insured] premises caused by or resulting from a covered cause of loss . . .

Supra at 5; Dkt. 5 at 52 (emphases added). Under the plain language of this provision, "direct physical damage" is a predicate to coverage. Plaintiff does not allege facts that can establish direct physical damage. Moreover, the practice income policy restricts coverage to a "period of restoration," which is a defined term within the Policy. Plaintiff similarly pleads no facts that can give rise to a period of restoration. For both reasons, Plaintiff has failed to state a claim.

a. *Plaintiff Has Not Alleged Any Direct Physical Damage, Which Requires Discernible Alteration to Property*

Courts construing Minnesota law have consistently held that the term "direct physical damage" means actual, tangible alteration of insured property as opposed to functional impairment or loss of use of insured property. For example, in *Pentair, Inc. v. American Guarantee & Liability Insurance Co.*, 400 F.3d 613, 616 (8th Cir. 2005), the Eighth Circuit considered whether loss of use due to a power outage qualified as "direct physical loss of or damage to property" under Minnesota law. The Court held that it did not, and expressly *rejected* the argument that "direct physical loss or damage is established *whenever* property cannot be

used for its intended purpose." *Id*. at 616. On the contrary: The term "direct physical loss" requires actual physical harm or contamination of the insured premises. *Id*.

The Eighth Circuit reached a similar conclusion a year later in another case decided under Minnesota insurance law, in *Source Food Technology, Inc. v. U.S. Fidelity & Guarantee Co*., 465 F.3d 834, 836 (8th Cir. 2006). In that case, an insured sought coverage under a policy with a "direct physical loss" limitation for the impairment of function and value of a food product due to a government regulation prohibiting the importation of Canadian beef in the wake of "mad cow" disease. The Eighth Circuit affirmed dismissal of the claim, holding that the insured's loss was not caused by a direct physical loss to insured property. *Id*. at 836. Again, the court reasoned that physical damage is necessary to trigger coverage, and that characterizing losses due to a government regulation as a "direct physical loss to property would render the word 'physical' meaningless." *Id*.[7]

Like the Eighth Circuit, the Minnesota intermediate appellate court has applied the term "direct physical" loss or damage as written, and has declined to extend coverage where insured property is not physically damaged. *Rest Assured, Inc. v. American Motorist Ins. Co*., 1999 WL 431112 (Minn. Ct. App. June 29, 1999) (unpublished). The insured's property in *Rest Assured* was damaged after a heavy snowfall: More than 30 roof trusses were broken. *Id*. at *1. An engineer, on inspection, determined that the remaining 300 *unbroken* trusses suffered from a contraction defect unrelated to the snowfall. *Id*. The Court of Appeals concluded that a policy providing coverage for "direct physical loss of or damage to Covered Property" did *not* cover the

[7] The Eighth Circuit suggested that it might have reached a different conclusion if the policy had covered "direct physical loss *of* property" rather than "direct physical loss *to* property." *Source Food*, 465 F.3d at 838. This distinction provides no purchase to Plaintiff in this case. Plaintiff does not allege physical loss *of* property any more than Plaintiff alleges physical loss *to* property. *See 10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5359653 at *5 (C.D. Cal. Sept. 2, 2020) (explaining that loss of property means permanent dispossession, and plaintiff—a restaurant—remained in possession of its dining room, bar, flatware, and all of its tangible property). Here, Plaintiff does not allege that she has lost her building or any tangible property).

unbroken trusses because "the unbroken trusses did not suffer any direct physical loss or damage required by the policy." *Id*. at 2.

Like the plaintiffs in *Pentair*, *Rest Assured*, and *Source Food*, Plaintiff here seeks recovery under a policy that requires direct physical damage to property for loss of use or function of property—and thus seeks recovery for a loss outside the scope of the Policy. Plaintiff alleges that the "presence of COVID-19 caused 'direct physical loss of or damage to' the 'Covered Property' under the Plaintiff's policy . . . by denying use of and damaging the Covered Property, and by causing a necessary suspense of operations during a period of restoration." Compl. ¶ 42. But Plaintiff alleges nothing beyond speculation that COVID-19 was ever present in the insured premises, and even if it was, Plaintiff does not (and could not) allege that the virus *physically* damaged or altered property. Plaintiff's losses relate solely to the existence of the pandemic itself and the government shutdown orders that followed. *See* Compl. ¶ 27 ("*The presence of COVID-19* has caused civil authorities throughout the country to issue *orders requiring the suspension of business* at a wide range of establishments . . .") (emphases added). The loss of use is the only discernible loss here. And loss of use due to the threat of COVID-19 and government orders does not constitute *direct physical* damage. *Lipshultz v. Gen. Ins. Co. of Amer*., 96 N.W.2d 880, 886 (Minn. 1959) (under Minnesota law, the word "direct" means immediate or proximate as opposed to remote); *see also Ross v. Hartford Lloyd Ins. Co*., 2019 WL 2929761, at *7 (N.D. Tex. July 4, 2019) (the term "physical loss" "cannot fairly be construed to mean physical loss in the absence of physical damage").

Minnesota is not an outlier in interpreting "direct physical damage" to require *physical* alteration to property. A leading insurance treatise explains that the word "physical" is used specifically because it requires tangible loss or damage to a property:

> The requirement that the loss be "physical," given the ordinary definition of that term, is widely held to exclude losses that are intangible or incorporeal, and, thereby to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.

10A Couch on Insurance § 148.46 (3d Ed. 2019).

The Western District of Texas recently confirmed that loss of use alone does not constitute direct physical loss or damage to property, and dismissed a COVID-19 business interruption lawsuit similar to Plaintiff's lawsuit. In *Diesel*, the plaintiffs sought coverage for business income loss due to the COVID-19 outbreak and related government shutdown orders. 2020 WL 4724305, at *3. The *Diesel* plaintiffs' policies covered "direct physical loss" to covered property. *Id*. at *2. The court found "the line of cases requiring tangible injury to property [] more persuasive," and held that the plaintiffs had failed to plead a direct physical loss because plaintiffs had not pled any tangible alteration or impact on insured property. *Id*. at *5, *7.

Numerous courts have reached the same conclusion: the terms "direct physical damage" and "direct physical loss" require tangible or structural change to property. *E.g.*, *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co*., 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) (under New York law, "[t]he words 'direct' and 'physical,' which modify the phrase 'loss or damage,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure.") (citation omitted); *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co*., 187 Cal. App. 4th 766, 799 (2010) ("A direct physical loss 'contemplates an actual change in insured property.'"); *Fuiji v. State Farm & Cas. Co.*, 71 Wash. App. 248, 251 (Wash. Ct. App. 1993) (a "direct physical loss" requires discernible physical damage).[8]

[8] *See also Hartford Ins. Co. of Midwest v. Miss. Valley Gas Co*., 181 F. App'x 465, 470 (5th Cir. 2006) (citing and following Couch on Insurance § 148.46 (3d Ed.) and requiring tangible physical damage under Mississippi law); *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 574 (6th Cir. 2012) (same under Michigan law).

Significantly, Plaintiff is not the first insured to seek business interruption coverage due to COVID-19 government shutdown orders under a policy that limits coverage to losses caused by direct physical damage. Nor is Plaintiff the first to sue following a denial of coverage. But as courts across the country have recognized, such coverage simply does not exist where, as here, policyholders fail to plead facts showing physical property damage:

- In *Turek Enterprises, Inc. v. State Farm Mutual Automobile Insurance Co.*, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020), the plaintiff chiropractor sought coverage for loss of income due to government orders that restricted plaintiff's ordinary use of its property. The court dismissed the action with prejudice, holding that the plaintiff had failed to demonstrate tangible damage to covered property, as "plainly" required by the policy term "direct physical loss." *Id.* at *8.

- In *10E, LLC v. Travelers Indemnity Co. of Connecticut*, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020), the plaintiff sought coverage for income lost as a result of government shutdown orders that prevented the ordinary and intended use of a property. The court dismissed the action, holding that the plaintiffs "cannot recover by attempting to artfully plead impairment to economically valuable use of property as physical loss or damage," and noting that impaired use or value cannot substitute for physical loss or damage. *Id.* at *5.

- In *Malube, LLC v. Greenwich Insurance Co.*, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020), the plaintiff sought coverage for lost income due to government orders that restricted plaintiff's ability to use its property as intended. The court dismissed the action because the policy required direct physical loss or property damage and plaintiff had alleged "merely [] economic losses—not anything tangible, actual, or physical." *Id.* at *8.

- In *Rose's 1, LLC v. Erie Insurance Exchange*, plaintiffs sought to recover business income lost when the District of Columbia's mayor ordered pandemic-related shutdowns. Order Den. Pls.' Mot. Summ. J. and Granting Def.'s Cross-Mot. Summ. J., No. 2020 CA 002424 B (D.C. Super. Ct. Aug. 6, 2020), attached as Declaration of Mason Parham in Support of Defendant's Motion to Dismiss ("Parham Dec."), Ex. A-1, Appx. at 4-14. The court granted summary judgment to the insurer because plaintiffs had failed to establish direct physical loss as required under the policy. The court specifically noted that loss of use was *not* incorporated into the term "direct physical loss." *Id.*

- In *Social Life Magazine v. Sentinel Insurance Co. Ltd.*, the plaintiff sought coverage for business income lost when the New York Governor and New York City Mayor issued shutdown orders. The court denied the policyholder's motion for preliminary injunction, stating "New York law is clear that this kind of business interruption needs some damage to the property . . . but [plaintiff's loss] is just not what's covered under these insurance policies." Tr. of Teleconference Order Show Cause, Case No. 1:20-cv-03311 (May 14, 2020), ECF 24-1 at 15:12-16, attached as Parham Dec. Ex. A-2. Appx. at 15-34.

- In *Gavrilides Management Co. v. Michigan Insurance Co.*, plaintiffs argued that they had suffered direct physical damage as a result of the Michigan governor's shutdown order. The court rejected that argument as "simply nonsense," and held that the allegations came "nowhere close to meeting the requirement that [] there has to be some physical alteration to or physical damage or tangible damage to the integrity of the building." Hr'g Tr. on Mot. Summ. Disposition (July 1, 2020), Case No. 20-258-CB (Mich. Cir. Ct. (Ingham Cty.)), Dkt. No. 24 at 20:12-18, attached as Parham Dec. Ex. A-3. Appx. at 35-59.

The plaintiffs in all of these cases, like Plaintiff in the present action, sought coverage for impairment of use of property caused by COVID-19 government shutdown orders. And in each case, the court recognized the obvious: Business interruption caused by government edicts in the face of a government shutdown or a pandemic does not stem from "direct physical damage" to an insured property.

b. ***None Of Plaintiff's Allegations Can Give Meaning To The Policy Term "Period of Restoration"***

The fact that the Policy restricts coverage for loss of practice income to a "period of restoration" further shows that the direct physical damage requirement means what it says. Under Minnesota law, a "contract must be interpreted in a way that gives all of its provisions meaning." *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995). The Policy defines "period of restoration" as "begin[ning] 24 hours immediately following direct physical damage [to covered property] and end[ing] on the date when the property at the [insured] premises should be *repaired*, *rebuilt* or *replaced* with reasonable speed and similar quality." *Supra* at 7; Dkt. 5 at 69 (emphasis added). The terms "repair," "rebuild," and "replace" all signify that the damage contemplated by the insuring agreement is physical in nature. *See, e.g.*, *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 287 (S.D.N.Y. 2005) (applying New York law). Loss of use, for which Plaintiff seeks recovery, is not a type of physical damage or loss. *Newman Myers*, 17 F. Supp. 3d at 332 ("The words 'repair' and 'replace' contemplate physical damage to the insured premises *as opposed to loss of use of it*.") (emphasis added).

Indeed, absent an enforceable physical damage requirement, a provision limiting coverage for practice income to the time necessary to rebuild, repair, or replace would be meaningless. *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D.2d 1, 8, 751 N.Y.S.2d 4, 9

(N.Y. App. Div. 2002). The Southern District of Florida recently applied this reasoning in the COVID-19 context, granting an insurer's motion to dismiss where the policyholder could not trace an alleged loss of income to direct physical loss or damage that required repair, replacement, or rebuilding. *Malube*, 2020 WL 5051581, at *9 ("[I]f there was any lingering doubt on whether loss of use for pure economic reasons could be recoverable under the policy, the other provisions [including "period of restoration"] put that uncertainty to bed.").

Plaintiff's allegations establish that she did not lose income as a result of direct physical damage to covered property, or by a need for repair, replacement, or rebuilding. Plaintiff lost income because sources exogenous to the property—governmental edicts—allegedly prevented her from using her property as intended. To require Aspen to cover losses stemming from the pandemic and related government proclamations rather than from direct physical damage to property would write the "period of restoration" out of the Policy, and turn the Policy into something different from what the parties agreed to. This is impermissible. *See Ostendorf v. Arrow Ins. Co.*, 182 N.W.2d 190, 192 (Minn. 1970) (courts may not redraft an insurance policy to provide coverage when the language of the policy establishes that coverage does not exist). Crediting all of Plaintiff's well-pled allegations as true, Plaintiff has not established a plausible claim for relief under the practice income provision. No matter how favorably the Policy is construed for Plaintiff, "direct physical damage" requires a tangible loss, and Plaintiff has not pled that here. Plaintiff has not stated a claim for relief.

2. *Plaintiff Fails To State A Plausible Claim Under The Extra Expense Provision*

The Policy's extra expense provision is also limited to losses caused by direct physical damage:

> Extra expense means the extra expenses necessarily incurred by you during the *period of restoration* to continue normal services and operations which are interrupted due to damage by a covered cause of loss to the premises described . . .
>
> We will only pay for extra expenses that you incur within 12 consecutive months after the date of *direct physical damage* . . .

Supra at 5; Dkt. 5 at 53 (emphases added). Once again, Plaintiff has alleged no direct physical damage and no property in need of restoration. Her alleged losses therefore fall outside this provision too.

3. *Allegations In The Complaint Do Not Trigger The Civil Authority Provision*

Plaintiff contends that her losses come within the Policy's civil authority provision, which obligates Aspen to "pay for the actual loss of practice income . . . you sustain caused by action of civil authority that prohibits access to the [insured] premises due to *direct physical damage to property*, other than at the [insured] premises, caused by or resulting from any covered cause of loss." *Supra* at 6; Dkt. 5 at 56 (emphasis added). This provision predicates coverage on (1) direct physical damage to property other than the insured property that (2) *causes* an action of civil authority to prohibit access to the insured premises.

Plaintiff's allegations do not satisfy either requirement. Plaintiff does not allege that the COVID-19 shutdown orders responded to direct physical damage, as required to trigger coverage under the Policy. Plaintiff only alleges that the government shutdown orders were "in response to dangerous physical conditions resulting from a Covered Cause of Loss," Compl. ¶ 43, which is insufficient to trigger coverage under the Policy.

Nor does Plaintiff allege any nexus between prior property damage and the COVID-19 government shutdown orders. Those orders, as Plaintiff has described them, are not the consequence of damage to physical property; they are the consequence of the COVID pandemic

aimed at curbing the spread of the COVID-19 virus and preserving personal protective equipment. *See, e.g.*, Compl. ¶¶ 34, 38. That is dispositive. *See, e.g., Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686-87 (5th Cir. 2011) (under Louisiana law, plaintiffs "failed to demonstrate a nexus between any prior property damage and the evacuation order" and "civil authority coverage is intended to apply to situations where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property"); *Syufy Enters. v. Home Ins. Co. of Ind.*, 1995 WL 129229, at *1-2 (N.D. Cal. March 21, 1995) (under California law, an imposed curfew to prevent *potential* looting, rioting, and resulting property damage lacked the required causal link between damage to property and prohibition of access); *United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 134 (2d Cir. 2006) (under New York law, plaintiff did not demonstrate that an airport shutdown following the terrorist attacks of September 11, 2001 was the result of damage to property, as the more natural explanation was that "fears of future attacks" animated the shutdown); *The Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, 2004 WL 5704715, at *7 (N.D. Ga. Dec. 15, 2004) (under Georgia law, closure orders following the September 11, 2001 attacks did not trigger civil authority coverage because "an order . . . designed to prevent, protect against, or avoid future damage is not a 'direct result' of already existing property loss or damage."). Because Plaintiff in this case has alleged neither direct physical harm to any property nor a causal link between any such harm and her lost income, her alleged losses fall squarely *outside* the civil authority provision.

4. ***The "Sue And Labor" Coverage Is Inapplicable***

Plaintiff finally seeks coverage under what she calls the "sue and labor" provision in the Policy, under which Plaintiff is required to "take all reasonable steps to protect covered property from further damage by a covered loss." *Supra* at 7; Dkt. 5 at 72. Because Plaintiff has not

alleged any *initial* damage, there can be no *further* damage—and thus Plaintiff has not alleged a claim under this provision. The sue and labor provision also requires Plaintiff, "[i]f feasible, [to] set the damaged property aside and in the best possible order for examination." "[T]o set" implies a tangible, material quality; one cannot set aside an intangible item, and Plaintiff alleges no facts suggesting that an examination of the property is necessary. This, like the period of restoration clause in the Policy, further evidences that the Policy itself only covers direct physical damage.

C. Plaintiff's Alleged Losses Fall Within Unambiguous Exclusions In The Policy

Even if Plaintiff's alleged losses fell within the scope of coverage, Plaintiff's claims still fail because the alleged losses also come directly within the scope of two exclusions. *See Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989) (insurer is not liable for losses that fall within exclusions); *Gilbert*, 327 S.W.3d at 124 (same). Under Minnesota law, these exclusions should be applied as written. *State Farm Ins. Cos. V. Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992) (courts must view insurance contracts as a whole and give unambiguous language its plain and ordinary meaning); *Fiess*, 202 S.W.3d at 753 (court applies exclusions as written).

The "loss of use" exclusion. The Policy provides that Aspen "will not pay for any damages caused by or resulting from . . . delay, *loss of use* or loss of market." *Supra* at 6; Dkt. 5 at 61. This clause unambiguously excludes coverage for "loss of use." And loss of use is just as unambiguously the basis of Plaintiff's claim: Plaintiff alleges that she "was forced to suspend or reduce her practice," Compl. ¶ 8, and denied use of her property. *Id.* ¶ 42. This exclusion, like the four provisions discussed above, makes clear that an insured may not recover for lost income in the absence of a triggering direct physical damage to property.

The "ordinance or law" exclusion. The Policy also provides that Aspen "will not pay for damage caused directly or indirectly by . . . [t]he enforcement of any ordinance or law

regulating the construction, *use* or repair *of any property*." *Supra* at 6; Dkt. 5 at 60. The Minnesota COVID Orders constitute such ordinances. Plaintiff appears to allege that she sustained losses as a result of the COVID-19 proclamations prohibiting non-essential businesses from conducting business and prohibiting the use of property to perform non-emergency medical and dental services. Compl. ¶ 34. Those losses fall squarely within this exclusion.

IV. CONCLUSION AND REQUESTED RELIEF

Because Plaintiff has failed to state a claim upon which relief can be granted, the Court should dismiss the complaint in its entirety.

Dated: September 11, 2020

Respectfully submitted,

By: **SIDLEY AUSTIN LLP**

/s/ Yvette Ostolaza

Yvette Ostolaza
Texas Bar No.00784703
yvette.ostolaza@sidley.com
Yolanda C. Garcia
Texas Bar No. 24012457
ygarcia@sidley.com
Mason Parham
Texas Bar No. 24088182
mparham@sidley.com
SIDLEY AUSTIN LLP
2021 McKinney Avenue
Suite 2000
Dallas, Texas 75201
Telephone: 214-981-3401
Facsimile: 214-981-3400

ATTORNEYS FOR ASPEN AMERICAN INSURANCE COMPANY

CERTIFICATE OF SERVICE

I certify that on September 11, 2020, I caused the foregoing document to be filed with the Clerk of Court via the CM/ECF system, causing it to be served electronically on all counsel of record.

/s/ Yvette Ostolaza

Yvette Ostolaza
Texas Bar No.00784703
yvette.ostolaza@sidley.com
SIDLEY AUSTIN LLP
2021 McKinney Avenue
Suite 2000
Dallas, Texas 75201
Telephone: 214-981-3401
Facsimile: 214-981-3400

ATTORNEY FOR ASPEN AMERICAN INSURANCE COMPANY