UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BENEDICTINE COLLEGE, individually and on behalf of all others similarly situated, Plaintiff, v. ZURICH AMERICAN INSURANCE COMPANY, Defendant.	)	Case No. 2:20-cv-02361 Hon. John W. Broomes

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DEFENDANT ZURICH AMERICAN INSURANCE COMPANY'S
BRIEF IN SUPPORT OF ITS MOTION TO DISMISS
PLAINTIFF BENEDICTINE COLLEGE'S COMPLAINT

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INTRODUCTION

Plaintiff Benedictine College seeks coverage under its commercial property insurance policy with Defendant Zurich American Insurance Company for "financial losses" allegedly incurred because of COVID-19. Benedictine asserts claims for breach of contract and declaratory judgment under nine provisions of the policy. Because Benedictine cannot allege that it satisfies several requirements for coverage under the policy, it fails to state any claim as a matter of law.

First, eight of the nine coverage provisions referenced in the Complaint require "direct physical loss of or damage to property," and the ninth provision requires "actual or imminent physical loss or damage." Under Kansas law, which applies here, physical damage requires a "physical alteration" of property, and a "physical loss" would occur when "there has been damage to . . . covered property as the value of the property is diminished when it has been damaged." Benedictine has not alleged that any of those things happened; instead, it makes only the unsupported conclusory allegation that "damage due to viruses constitute[s] physical damage and loss." Compl. ¶ 60. In fact, Benedictine does not even allege that the virus was present on campus; it only speculates that the virus's presence was "more likely than not." *Id.* ¶ 14. Therefore, like numerous other insureds across the country, Benedictine has failed to plausibly allege physical loss or damage. Indeed, the overwhelming majority of courts to have addressed the issue have dismissed claims, like Benedictine's here, that attempt to stretch *property* insurance policies to cover economic losses caused by the COVID-19 virus.

Second, even if the COVID-19 virus were present at Benedictine's locations, as Benedictine alleges, the policy has a "Contamination" exclusion that expressly excludes a "virus" as a covered cause of loss. The policy further excludes from coverage any cost due to a

virus, including "the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy"—precisely what Benedictine alleges in its Complaint. Many courts have already held that similar virus exclusions unambiguously exclude coverage for any loss arising out of the COVID-19 pandemic and have dismissed cases at the outset with prejudice. Benedictine seeks to evade the policy's virus exclusion, however, by alleging that a Louisiana-specific state amendatory endorsement (one of 31 such state-specific amendatory endorsements attached to the policy) applies to the losses Benedictine allegedly sustained as a result of the closure of its campus in Kansas. But as many courts have held, state-specific endorsements apply only to property in the state at issue. There is no basis to apply a Louisiana endorsement here given that the insured property is in Kansas.

Third, many of the coverage provisions cited in Benedictine's Complaint have no conceivable relevance to Benedictine's alleged losses, even putting aside (i) Benedictine's failure to allege the requisite direct physical loss of or damage to property or (ii) a legitimate basis to ignore the virus exclusion. For example, Benedictine's request for "Civil or Military Authority" coverage fails because the COVID-19 orders were not issued in "response" to "direct physical loss or damage," as required for coverage, but instead were issued in response to the threat that further spread of the virus posed to human health.

For similar reasons appearing on the face of the policy and Complaint, explained below, Benedictine likewise cannot invoke coverage for "Decontamination Costs," "Contingent Time Element" coverage, or "Expediting Costs" coverage. Coverage under the Decontamination Costs provision is available only if a "law or ordinance regulating Contamination" required Benedictine to incur an increased cost to decontaminate or remove property that was lost or

damaged by a covered cause of loss. The COVID-19 orders are not laws or ordinances that regulate contamination and do not require Benedictine to decontaminate or remove property.

Contingent Time Element coverage exists only if there was "direct physical loss of or damage" to "Direct Dependent Time Element Locations," "Indirect Dependent Time Element Locations," or "Attraction Properties"—each of which are defined terms in the policy. But Benedictine does not identify any such locations or properties, much less allege that they incurred direct physical loss or damage.

With regard to "Expediting Costs" coverage, Benedictine does not allege that it had to "repair" or "replace" any property damaged by the virus—nor could it do so because the virus does not damage property and instead can be simply cleaned and disinfected from property, a fact that this Court may judicially notice.

For these reasons, all of Benedictine's claims should be dismissed. In addition, the declaratory-judgment claim should be dismissed as duplicative of the breach-of-contract claim. Because these flaws cannot be remedied by amendment, the entire action should be dismissed with prejudice.

STATEMENT OF THE NATURE OF THE MATTER

Benedictine is a private college located in Atchison, Kansas. Under its property insurance policy with Zurich, Benedictine seeks to recover the financial losses it alleges it sustained because of the coronavirus. Benedictine invokes nine coverage provisions, namely "Gross Earnings Loss," "Extra Expense," "Extended Period of Liability," "Civil or Military Authority," "Ingress/Egress," "Decontamination Costs," "Contingent Time Element," "Expediting Costs," and "Protection and Preservation of Property." Zurich disputes that coverage exists under each of these provisions, because eight of the provisions require "physical loss of or physical damage to property," and the remaining provision, "Protection and

Preservation of Property" coverage, requires "actual or imminent physical loss or damage." Zurich also disputes that coverage exists because certain exclusions in the policy apply, including one that expressly excludes losses caused by a virus.

QUESTIONS PRESENTED

Breach of Contract Claim

1. Whether Benedictine has plausibly alleged that the coronavirus has caused "physical loss or damage" to property—a precondition for coverage under the nine coverage provisions Benedictine invokes.
2. Whether the policy's "Contamination" exclusion—which expressly excludes coverage for losses caused by a virus—forecloses coverage under the nine coverage provisions Benedictine invokes.
3. Whether Benedictine is entitled to "Civil or Military Authority" coverage, which is limited to losses resulting from civil authority orders issued in response to loss or damage to property not owned, occupied, leased, or rented by Benedictine.
4. Whether Benedictine is entitled to "Decontamination Costs" coverage, which is limited to the increased cost of decontaminating or removing property that is "Contaminated from direct physical loss of or damage caused by a covered cause of loss," if the costs were incurred to "satisfy" an "in force" "law or ordinance regulating Contamination due to the actual not suspected presence of Contaminant(s)."
5. Whether Benedictine is entitled to "Contingent Time Element" coverage, which is limited to losses resulting from the necessary suspension of Benedictine's business activities at its insured location if the suspension resulted from direct physical loss of or damage caused by a covered cause of loss to property at "Direct Dependent Time Element

Locations, Indirect Dependent Time Element Locations, and Attraction Properties," as those terms are defined in the policy.

6. Whether Benedictine is entitled to "Expediting Costs" coverage, which is limited to the reasonable and necessary costs incurred to pay for the temporary repair of direct physical loss of or damage caused by a covered cause of loss to insured property and "to expedite the permanent repair or replacement of such damaged property."

"Declaratory Relief" Claim

7. Whether Benedictine's claim for "Declaratory Relief" should be dismissed because declaratory relief is a remedy, not a standalone cause of action.

8. Whether Benedictine's claim for "Declaratory Relief" should be dismissed as duplicative of its claim for breach of contract.

BACKGROUND

I. Benedictine's Allegations Against Zurich

Benedictine College is a private, liberal arts college in Atchison, Kansas with an enrollment of more than 2,300 students. Compl. ¶ 12. Zurich issued Benedictine a property insurance policy for the period July 1, 2019 to July 1, 2020. Declaration of Bronwyn F. Pollock ("Pollock Decl.") Ex. 1 ("Policy"); *see also* Compl. ¶ 45.

Benedictine alleges that, as a result of COVID-19 and ensuing governmental orders, it was forced to "cease[] normal operations" and "effectively close[]" its campus in mid-March 2020. Compl. ¶ 13. It seeks first-party property-insurance coverage under the Policy for "financial losses due to COVID-19," including "room-and-board reimbursements," "lost revenue from on-campus events," "lost revenue from summer classes and programs," "lost revenue related to room, board, and fees," and "increased costs to clean and disinfect the campus." *Id.* ¶¶ 4-5, 13.

Although Benedictine identifies no cases of COVID-19 on its premises, it alleges that "[i]t is more likely than not that by at least early March 2020 other persons infected with COVID-19 were present on Plaintiff's campus and thereby caused the virus to be present throughout Plaintiff's insured property and surrounding areas." *Id.* ¶ 14. Benedictine alleges that, "[b]ecause damage due to viruses constitute[s] physical damage and loss under the Policy, and the Stay at Home Orders have caused [Benedictine] to have lost the use of its premises for their intended purpose, [its] losses are covered under the Policy." *Id.* ¶ 60; *see also id*. ¶ 64 ("Access to Plaintiff's property has been limited, restricted, and prohibited in part or in total due to the presence and threat of COVID-19 and related Stay-at-Home Orders.").

Benedictine also identifies its own actions in response to COVID-19 as a cause of its alleged losses. Specifically, Benedictine alleges that it "imposed limitations, restrictions, and prohibitions due to the dangerous condition caused by the presence of COVID-19" and "suspended operations and effectively closed campus due to COVID-19." *Id.* ¶¶ 22, 60.

Benedictine brings claims for declaratory relief (Count I) and breach of contract (Count II) based on nine coverage provisions in its Policy.

II. Benedictine's Property Insurance Policy With Zurich

The Policy insures against "direct physical loss of or damage caused by a **Covered Cause of Loss**."[1] Policy at Zurich_BC_000015. A "Covered Cause of Loss" is defined as "[a]ll risks of direct physical loss of or damage from any cause unless excluded." *Id.* at Zurich_BC_000065. Generally, and as relevant here, the Policy provides coverage for business incomes losses associated with property loss or damage (*i.e.*, "Time Element" coverages), and coverage to protect and repair property.

[1] The Policy uses bold typeface to identify defined terms.

Benedictine invokes six "Time Element" coverages. These coverages require a "Suspension" of Benedictine's "business activities" due to "direct physical loss of or damage to Property":

> The Time Element loss must result from the necessary **Suspension** of the Insured's business activities at an Insured Location. The **Suspension** must be due to direct physical loss of or damage to Property (of the type insurable under this Policy other than **Finished Stock**) caused by a **Covered Cause of Loss** at the **Location** or as provided in Off Premises Storage for Property Under Construction Coverages.

Id. at Zurich_BC_000028. A "Suspension" is defined as "[t]he slowdown or cessation of [Benedictine's] business activities" or "[a]s respects rental income that a part or all of the Insured Location is rendered untenantable." *Id.* at Zurich_BC_000071. The six "Time Element" provisions under which Benedictine seeks coverage are as follows:

1. "**Gross Earnings**," which covers a loss of "Gross Earnings" loss as calculated per the Policy's terms (*id.* at Zurich_BC_000028-29);
2. "**Extended Period of Liability**," which only applies if there is "Gross Earnings" loss coverage and extends that coverage beyond the "Period of Liability" up to an additional year or until Benedictine "could restore its business with due diligence, to the condition that would have existed had no direct physical loss or damage occurred" to the insured property, whichever occurs first (*id.* at Zurich_BC_000029).
3. "**Extra Expense**," which covers the reasonable and necessary additional costs needed to "resume and continue as nearly as practicable" the college's "normal business activities that otherwise would be necessarily suspended, due to direct physical loss of or damage caused by a **Covered Cause of Loss"** to the insured property (*id.* at Zurich_BC_000030); and

4. "**Civil or Military Authority**," which covers loss "resulting from the necessary **Suspension** of [Benedictine's] business activities" at its insured location "if the **Suspension** is caused by order of civil or military authority that prohibits access" to the location and the order "result[s] from a civil authority's response to direct physical loss of or damage caused by a **Covered Cause of Loss** to property not owned, occupied, leased or rented" by Benedictine (*id.* at Zurich_BC_000035-36);
5. "**Ingress/Egress**," which covers loss "resulting from the necessary **Suspension** of [Benedictine's] business activities" at its insured location if "ingress or egress" to that location by Benedictine's "suppliers, customers or employees is prevented by physical obstruction due to direct physical loss of or damage caused by a **Covered Cause of Loss** to property not owned, occupied, leased or rented" by Benedictine (*id.* at Zurich_BC_000040); and
6. "**Contingent Time Element**," which covers the loss "resulting from the necessary **Suspension** of [Benedictine's] business activities" at its insured location "if the **Suspension** results from direct physical loss of or damage caused by a **Covered Cause of Loss** to property at "**Direct Dependent Time Element Locations**, **Indirect Dependent Time Element Locations**, and **Attraction Properties** (*id.* at Zurich_BC_000036).

The remaining three coverages that Benedictine invokes generally provide coverage for the protection and repair of property. They are as follows:

7. "**Decontamination Costs**," which covers the increased "cost of decontamination and/or removal" of "**Contaminated**" property but only if the property is "'**Contaminated**' from direct physical loss of or damage caused by a **Covered Cause of Loss**" to the insured property and costs were incurred to "satisfy" an "in force" "law or ordinance regulating

Contamination due to the actual not suspected presence of Contaminant(s)" (*id.* at Zurich_BC_000037-38);

8. "**Expediting Costs**," which covers the "reasonable and necessary costs incurred to pay for the temporary repair of direct physical loss of or damage caused by a **Covered Cause of Loss**" to insured property and "to expedite the permanent repair or replacement of such damaged property" (*id.* at Zurich_BC_000038); and
9. "**Protection and Preservation of Property**," which covers the "reasonable and necessary costs incurred for actions to temporarily protect or preserve" the insured property, provided that "such actions are necessary due to actual or imminent physical loss or damage due to a **Covered Cause of Loss**" to the insured property (*id.* at Zurich_BC_000043).

These provisions all require "direct physical loss of or damage to property" caused by a "Covered Cause of Loss" for coverage to be triggered, except for the "Protection and Preservation of Property" coverage, which is similar but requires "actual or imminent physical loss or damage due to a Covered Cause of Loss."

The Policy excludes as a Covered Cause of Loss any loss or damage caused by, and any cost due to "Contamination," including the "inability to use or occupy property." Specifically, the Policy excludes:

> **Contamination**, and any cost due to **Contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy, except as provided by the Radioactive Contamination Coverage of this Policy.

Id. at Zurich_BC_000024. "Contamination" is expressly defined to include a "virus."

> **Contamination(Contaminated)** - Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, *virus*, disease causing or illness causing agent, **Fungus**, mold or mildew.

Id. at Zurich_BC_000065 (italics added).

The Policy also expressly excludes coverage for loss of use of property. The Policy excludes any "[l]oss or damage arising from delay, loss of market, or loss of use" and "[i]ndirect or remote loss or damage." *Id.* at Zurich_BC_000024. Moreover, the Policy excludes loss or damage arising from the enforcement of any law, ordinance, regulation, or rule regulating or restricting the . . . occupancy, operation, or other use of the insured property." Specifically, this provision excludes from coverage:

> Loss or damage arising from the enforcement of any law, ordinance, regulation or rule regulating or restricting the construction, installation, repair, replacement, improvement, modification, demolition, occupancy, operation or other use, or removal including debris removal of any property.

Id.

The Complaint refers to a Louisiana-specific amendatory endorsement ("Amendatory Endorsement – Louisiana"), but that is one of 31 state-specific amendatory endorsements attached to the Policy. These amendatory endorsements implement requirements of each state's law or regulation governing (among other things) canceling or declining to renew the policy, when suit must be brought, fraud-related provisions, and in some cases, policy exclusions. The Kansas-specific endorsement, for example, deletes and/or replaces General Policy Conditions relating to Cancellations and Non-Renewal, Appraisal, and Suit Against the Company. *Id.* at Zurich_BC_000116. The Kansas endorsement does not alter or amend the "contamination" exclusion of the Policy. By contrast, the Louisiana endorsement, in addition to modifying the cancellation/non-renewal, appraisal, suit-against-the-company, and numerous other policy conditions, modifies the exclusions for weapons of mass destruction and contamination.[2] *Id.* at Zurich_BC_000119.

[2] Of the 31 state-specific endorsements, only the Louisiana endorsement amends the "contamination" exclusion.

PRINCIPLES GOVERNING INTERPRETATION OF INSURANCE POLICIES

Under Kansas law, the interpretation and legal effect of an insurance contract are questions of law to be determined by the court. *Am. Media, Inc. v. Home Indem. Co*., 658 P.2d 1015, 1018 (Kan. 1983). "The language of a policy of insurance, like any other contract, must, if possible, be construed in such way as to give effect to the intention of the parties." *O'Bryan v. Columbia Ins. Grp.*, 56 P.3d 789, 792 (Kan. 2002) (citation omitted). "In construing a policy of insurance, a court should consider the instrument as a whole and endeavor to ascertain the intention of the parties from the language used, taking into account the situation of the parties, the nature of the subject matter, and the purpose to be accomplished." *Id.* "If an insurance policy's language is clear and unambiguous, it must be taken in its plain, ordinary, and popular sense" and in that situation, there is "no need . . . for the application of rules of liberal construction" in favor of the insured. *Id.*

"The court shall not make another contract for the parties and must enforce the contract as made." *Id.* Thus, the court views the policy language based on how a "reasonably prudent insured would understand the language to mean" and "should not strain to create an ambiguity where, in common sense, there is not one." *Id.* at 793.

APPLICABLE LEGAL STANDARDS

To survive a motion to dismiss brought under Rule 12(b)(6), "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) (quotations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*; *Hall v.*

Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) ("[T]he court need accept as true only the plaintiff's well-pleaded factual contentions, not his conclusory allegations.").

Under Rule 12(b)(6), a court "must consider the complaint in its entirety," as well as "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *In re Zagg, Inc. Sec. Litig.*, 797 F.3d 1194, 1201 (10th Cir. 2015). Here, the Court may consider the Policy itself; the civil authority orders referenced in the complaint; and the judicially noticeable fact that the virus that causes COVID-19 can be cleaned from surfaces using standard household-cleaning products, as confirmed by the Centers for Disease Control and Prevention ("CDC") and the Environmental Protection Agency ("EPA").[3]

ARGUMENT

I. Benedictine Has Not Stated And Cannot State A Claim For Breach Of Contract.

Benedictine alleges that Zurich breached the Policy by not providing coverage for COVID-19-related financial losses. *See* Compl. ¶¶ 4-5, 13. The burden is on Benedictine, as the insured, "to demonstrate that the loss falls within the scope of the policy." *Brumley v. Lee*, 963 P.2d 1224, 1228 (Kan. 1998). Benedictine cannot plausibly do so.

A. Benedictine Fails To Allege Physical Loss Or Damage To Property.

All of Benedictine's claims fail because there is no "physical loss of or damage" to property—which is required under all of the coverage provisions at issue.

"[T]he phrase 'physical damage' in an insurance policy is widely accepted to mean a 'physical alteration.'" *Great Plains Ventures, Inc. v. Liberty Mut. Fire Ins. Co.*, 161 F. Supp. 3d 970, 978 (D. Kan. 2016) (applying Kansas law); *see also* 10 Couch on Insurance § 148:46 (3d

[3] Concurrent with this motion, Zurich has filed a request for incorporation by reference and judicial notice.

ed. 1998) ("In ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure."). Thus, for example, Judge Robinson interpreted the phrase "physical loss or damage" to "unambiguously" include hail indentations to metal seam roof panels on an insured property. *Great Plains Ventures*, 161 F. Supp. 3d at 975, 978. In addition, this Court has interpreted the term "'loss' in the context of an insurance policy." *Taylor v. LM Ins. Corp.*, 2020 WL 4000958, at *4 (D. Kan. July 15, 2020). A loss occurs when "there has been damage to that covered property as the value of the property is diminished when it has been damaged." *Id.*

The overwhelming majority of courts across the country that have construed the phrase "direct physical loss of or damage to property" or similar phrases in the context of COVID-19 property insurance claims have reached similar conclusions. For example, a federal court held that "losses from inability to use property" as a result of COVID-19 orders "do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase." *10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5359653, at *6 (C.D. Cal. Sept. 2, 2020). In particular, the court reasoned that the plaintiff failed to allege that the COVID-19 closure orders resulted in "damage" (*i.e.*, a physical alteration) or "loss" (*i.e.*, permanent dispossession) of property, explaining:

> Plaintiff characterizes in-person dining restrictions as "labeling of the insured property as non-essential." That "labeling" surely carries significant social, economic, and legal consequences. But it does not *physically alter* any of Plaintiff's property . . . .
>
> Even if the Policy covers "permanent dispossession" in addition to physical alteration, that does not benefit Plaintiff here. Plaintiff's FAC does not allege that it was permanently dispossessed of any insured property. As far as the FAC reveals, while public health restrictions kept the restaurant's "large groups" and "happy-hour goers" at home instead of in the dining room or at the bar, Plaintiff remained in possession of its dining room, bar, flatware, and all of the accoutrements of its "elegantly sophisticated surrounding."

Id. (emphasis added) (citations omitted).

Another federal court dismissed an insured's claims with prejudice, holding that "direct physical loss" requires "a distinct, demonstrable, physical alteration of the property." *Diesel Barbershop, LLC v. State Farm Lloyds*, --- F. Supp. 3d ---, 2020 WL 4724305, at *5, *7 (W.D. Tex. Aug. 13, 2020). Yet another judge agreed with the court in *10E* that "government orders forcing [the plaintiffs'] business to stop operating" did not cause "direct physical loss of" the business property. *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 2020 WL 5500221, at *4 (S.D. Cal. Sept. 11, 2020). A fourth federal judge, after surveying the law on "direct physical loss or damage" across jurisdictions, concluded that the language requires a "physical problem," because "'direct physical' modifies both 'loss' and 'damage,'" and that the plaintiff could not meet that standard because there was "no allegation, for example, that COVID-19 was physically present on the premises" and thus no allegation of "physical intrusion" by the virus. *Malaube, LLC v. Greenwich Ins. Co.*, 2020 WL 5051581, at *7 (S.D. Fla. Aug. 26, 2020). A fifth federal judge dismissed a complaint with prejudice because "there is simply no coverage under the policies if they require 'direct physical loss of or damage' to property." Pollock Decl. Ex. 22 [*Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known As Syndicate PEM 4000*, No. 20-cv-01605, at 10 (M.D. Fla. Sept. 28, 2020)]. It also recognized that "[c]ourts across the country have held that such coverage does not exist where, as here, policyholders fail to plead facts showing physical property damage." *Id.* at 8. A sixth federal judge concluded that, "'direct physical loss' . . . unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage." *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020). And a seventh federal judge held that the insured failed to allege a "physical loss" by alleging its "loss was caused by COVID-19 coronavirus and the government actions." Pollock Decl. Ex. 23 [Order, *Oral Surgeons, P.C. v. The Cincinnati*

Ins. Co., No. 4-20-CV-222-CRW-SBJ at 2 (S.D. Iowa Sept. 29, 2020)]. The court acknowledged the weight of recent cases which have "held that virus-related closures of business do not amount to direct loss to property." *Id.*

Other courts have held the same. *See* Pollock Decl. Ex. 19 [Hr'g Tr. at 4:17-18, 4:25-5:4, 6:14-20, *Social Life Magazine, Inc. v. Sentinel Ins. Co.*, No. 20-cv-03311-VEC (S.D.N.Y. May 14, 2020) (ECF No. 24-1)] (concluding that even if the "virus exists everywhere," as the insured argued, the virus "damages lungs. . . . It doesn't damage the property."); Pollock Decl. Exs. 20-21 [Order and Hr'g Tr. 19:17-20:9, 20:5-9, *Gavrilides Mgmt. Co. v. Mich. Ins. Co.*, No. 20-258-CB (Mich. Cir. Ct. July 1, 2020) ("[T]he plaintiff just can't avoid the requirement that there has to be something that physically alters the integrity of the property. There has to be some tangible, i.e., physical damage to the property.")]; *Rose's 1, LLC v. Erie Ins. Exch.*, 2020 WL 4589206, at *3 (D.C. Super. Ct. Aug. 8, 2020) ("[U]nder a natural reading of the term 'direct physical loss,' the words 'direct' and 'physical' modify the word 'loss.' As such, . . . any 'loss of use' must be caused . . . by something pertaining to matter—in other words, a direct physical intrusion on to the insured property".).[4]

Application of Kansas law compels the same result: dismissal of Benedictine's complaint. Under Kansas law, Benedictine must allege that the virus caused a "physical alteration" of its property, or damage that diminished the property's value. Benedictine has not done so. It does not identify any property that was physically altered or lost value from having been damaged. Instead, ignoring the relevant standard, Benedictine alleges only that its property

[4] Based on the plain language of the policies at issue, the courts in the cited cases rejected policyholder claims for "direct physical loss of or damage to" property from the presence of COVID-19 virus or losses due to COVID-19-related orders. Benedictine's Policy further forecloses coverage for purely economic loss of use that is untethered to any direct physical loss of or damage to property, by excluding "loss of use" and indirect losses as noted above. *See supra* page 10.

has been "rendered unsuitable for its intended use and has been subject to a variety of limitations, restrictions, and prohibitions, including by government Stay at Home Orders imposed by the State of Kansas and Atchison County, Kansas." Compl. ¶ 21; *see also id.* ¶ 60. In fact, Benedictine does not allege even that the virus was present on campus. Rather, it only speculates about the virus' presence, averring: "It is more likely than not that by at least early March 2020 other person infected with COVID-19 were present on [Benedictine's] campus and thereby caused the virus to be present throughout [Benedictine's] insured property and surrounding areas." *Id.* ¶ 14.

Nor could Benedictine ever allege that the virus causes a "physical alteration" or damage to property. As numerous courts have held, when a substance, such as the virus here, can easily be removed using standard household cleaners, there is no "physical loss of or damage to property" as a matter of law. *See* Pollock Decl. Exs. 15-18 (providing evidence from the CDC and EPA for the judicially noticeable fact that the virus can be cleaned from surfaces, disinfected, or both, using standard household cleaning and disinfectant products).

For example, the Eleventh Circuit held that construction dust that had migrated into a nearby restaurant did not cause "direct physical loss" to the property, explaining that "an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'" *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2020 WL 4782369, at *8 (11th Cir. June 11, 2018). The Sixth Circuit similarly has held that, under Michigan law, mold and bacterial contamination in a building's HVAC system did not cause physical loss or damage to the building or to the plaintiff's property inside the building. *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x, 569, 573 (6th Cir. 2012). While the plaintiff paid for cleaning expenses, those were an uncovered economic loss; the court did not believe that "the Michigan courts

would find basic cleaning" "performed with hot water and Lysol" to constitute physical loss or damage. *Id*. at 574 n.8 (internal quotation marks omitted). And two federal district courts in Florida have reasoned that, because property has not suffered loss or damage if it merely needs to be cleaned, a business could not claim that it had suffered property loss or damage from COVID-19 after state orders required it to shut its doors. *Malaube*, 2020 WL 5051581, at *8; Pollock Decl. Ex. 22 [*Infinity Exhibits*, No. 20-cv-01605, at 10].

Because the virus does not physically alter a property's structure and instead sits passively until it no longer is viable or is wiped away or disinfected, the virus cannot, as a matter of law, cause "physical loss or damage" to property. This alone requires dismissal of Benedictine's entire complaint, because physical loss or damage is a predicate to all nine of the coverage provisions Benedictine invokes.

B. Coverage Under The Policy Does Not Extend To Financial Losses Caused By The Virus.

Because the Complaint asserts no facts plausibly showing a direct physical loss of or damage to any property—the Court need not reach the exclusions to coverage. But contrary to the assertion in Plaintiff's Complaint, the Policy contains an express exclusion for loss caused by a "virus" like the COVID-19 virus, which supplies an independent basis for dismissing the Complaint with prejudice.

1. The Contamination Exclusion Precludes Coverage.

The nine coverage provisions invoked in Plaintiff's Complaint all require a "Covered Cause of Loss," which is defined in the Policy as "[a]ll risks of direct physical loss of or damage to property from any cause unless excluded." Policy at Zurich_BC_000065. The Policy includes a "Contamination Exclusion," which excludes from coverage "Contamination, and any cost due to Contamination including the ability to use or occupy property or any cost of making

property safe or suitable for use or occupancy." *Id*. at Zurich_BC_000024. The Policy defines "Contamination" as "any condition of the property due to the actual presence of any . . . virus [or] disease causing or illness causing agent." *Id*. at Zurich_BC_000065.

Benedictine's Complaint squarely alleges that the "presence" ("more likely than not") of COVID-19 virus resulted in business losses to Benedictine. Compl. ¶ 14. And Benedictine also seeks coverage for its claimed inability to use or occupy its property and costs associated with making property safe or suitable for use or occupancy. Benedictine's allegations, therefore, bring its claim squarely within the Policy's Contamination Exclusion.

Although courts in Kansas have not yet ruled on the applicability of a virus exclusion, numerous courts in other jurisdictions have enforced similar exclusions as written to preclude coverage for claims exactly like Benedictine's arising from the COVID-19 pandemic and associated civil authority orders. Most recently, a California federal court dismissed an insured's complaint based on the unambiguous language of a policy excluding damage caused by the "[p]resence, growth, proliferation, spread or any activity of 'fungi', wet rot, dry rot, bacteria or virus," where the complaint (like Benedictine's here) "repeatedly allege[d] that the virus caused and continues to cause the risk of direct physical loss required for a Covered Cause of Loss." *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 2020 WL 5642483, at *2 (N.D. Cal. Sept. 22, 2020). Similarly, a Florida federal court granted an insurer's motion to dismiss based on the plain language of an exclusion for "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease," because the complaint (as here) alleged "damages resulted from COVID-19, which is clearly a virus." *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co.*, --- F. Supp. 3d ---, 2020 WL 5240218 (M.D. Fla. Sept. 2, 2020); *accord Diesel Barbershop, LLC*, 2020 WL 4724305, at *6 (holding that virus exclusion barred

plaintiffs' recovery for losses incurred during COVID-19 pandemic where plaintiffs "pleaded that COVID-19 [was] in fact the reason for [county and state shutdown orders] being issued" and that, while the "Orders technically forced [plaintiffs' properties] to close to protect public health, the Orders only came about sequentially as a result of the COVID-19 virus spreading" and therefore "it was the presence of COVID-19 . . . that was the *primary root cause* of Plaintiffs' [losses]") (emphasis added); *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020) (granting motion to dismiss based in part on virus exclusion); *10E, LLC,* 2020 WL 5359653, at *6 (noting policyholder's "attempts to plead around the Policy's virus exclusion with vague, circuitous, and – at this stage – fatally conclusory allegations" and expressing "skepticism that Plaintiff can evade application of the Policy's virus exclusion").[5]

So too here, this Court should enforce Zurich's contamination exclusion as written to bar Benedictine's claim under each of the coverage provisions referenced in the Complaint.

2. The Louisiana Amendatory Endorsement Does Not Alter The Contamination Exclusion In Kansas Or Other States.

No doubt understanding the clear effect of the Policy's Contamination Exclusion, Benedictine stretches to evade its operation by alleging that its losses—all of which occurred in

[5] *See also Certain Underwriters at Lloyds of London Subscribing to Policy No. SMP3791 v. Creagh*, 563 F. App'x 209 (3d Cir. 2014) (enforcing "microorganism" exclusion to property-damage claim for contamination caused by bodily fluids containing bacteria that escaped from a decomposing human corpse); *12W RPO, LLC v. Affiliated FM Ins. Co.,* 353 F. Supp. 3d 1039, 1052 (D. Or. 2018) (holding that contamination exclusion foreclosed claim arising from contamination by materials composed of or containing ethylene propylene diene monomer rubber or EPDM); *cf. Williams v. Empls. Mut. Cas. Co*., 845 F.3d 891, 905-06 (8th Cir. 2017) (Missouri law) (holding that plain language of insurance policy's pollution exclusion excluded contaminants radium and coliform bacteria from coverage); *Lambi v. Am. Family Mut. Ins. Co.*, 498 F. App'x 655, 656 (8th Cir. 2013) (enforcing "communicable disease exclusion" because "infecting another with the HIV virus clearly falls within the plain and ordinary meaning of the transmission of a communicable disease") (Missouri law).

Kansas—are not subject to the exclusion because, in Benedictine's view, a ***Louisiana***-specific endorsement modifies that exclusion. Compl. ¶¶ 52-54. That assertion misconstrues the language and structure of the Policy and should be rejected.

First, the context in which state-specific amendatory endorsements—essentially state-specific riders—are included in insurance policies is critical to understanding how these endorsements work. Under the federal McCarran-Ferguson Act, the federal government expressly cedes to the individual states the power to regulate "[t]he business of insurance, and every person engaged therein." 15 U.S.C. § 1012. And different states regulate insurance contracts in different ways. Property insurance, in particular, is heavily regulated, and states often impose requirements on insurers issuing policies covering risks in those states. *See, e.g.,* Kan. Admin. Regs. § 40-3-15 (titled "Fire and casualty insurance contracts; cancellation at option of insurer; notice required" and regulating certain terms of fire and casualty policies "issued by fire or casualty insurers *within the state of Kansas*" (emphasis added)); La. Rev. Stat. § 22:1311 (setting requirements for fire insurance policies "on any property *in this state*" (emphasis added)); N.Y. Ins. Law § 3404(b)(1) (McKinney) ("No policy or contract of fire insurance shall be made, issued or delivered by any insurer or by any agent or representative thereof*, on any property in this state*, unless it shall conform as to all provisions, stipulations, agreements and conditions with such form of policy. . . ." (emphasis added)); Ga. Code Ann. § 33-32-1(a) (West) ("No policy of fire insurance *covering property located in this state* shall be made, issued, or delivered unless it conforms as to all provisions and the sequence of the standard or uniform form prescribed by the Commissioner. . . ." (emphasis added)).

Given the regulatory backdrop, courts generally have recognized that insurance policies include state-specific endorsements to comply with individual state regulatory requirements and

therefore do not apply outside each respective state—and this principle has been specifically applied with respect to a Louisiana endorsement. *Menard v. Gibson Applied Tech. & Eng'g, Inc.,* 2017 WL 6610466, at *3 (E.D. La. Dec. 27, 2017) (refusing to expand the scope of a Louisiana state amendatory endorsement "to the benefit of individuals like [the claimant] who are injured outside the state"); *see also Tomars v. United Fin. Cas. Co.*, 2015 WL 3772024, at *3 (D. Minn. June 17, 2015) (noting that commercial general liability policy covering a fleet of vehicles across the country may "include a series of state-specific endorsements conforming its coverages to the requirements imposed by the insurance laws of the states in which particular vehicles are located"); *Kamp v. Empire Fire & Marine Ins. Co.*, 2013 WL 310357, at *6 (D.S.C. Jan. 25, 2013) (acknowledging "structure" of policy whereby the main coverage form excluded uninsured motorist coverage, whereas individual state endorsements added uninsured motorist coverage to the policy only when and to the extent required in an individual state), *aff'd*, 570 F. App'x 350 (4th Cir. 2014).[6]

In each case, the court found that the *only* way to reconcile the multiple state endorsements attached to a given policy covering multi-state risks was to apply each state's endorsement *only* to risks in the particular state. This approach is consistent with Kansas law, which requires the Court to "consider the instrument as a whole and endeavor to ascertain the

[6] *Storage Props. v. Safeco Ins. Co. of Am.*, 2010 WL 1936127 (D. Kan. May 12, 2010), is not to the contrary. There, the policy included both Kansas and Texas state amendatory endorsements, each of which contained conflicting "appraisal" requirements. The insured was based in Kansas, but the property was located in Texas. The court applied the endorsement (Kansas) most favorable to the insured, concluding that a Kansas insured reasonably could believe that the appraisal requirements would be governed by Kansas law even if the property is located in another state. *Id*. at *5-6. Here, there is no conflict between the Policy language and a state amendatory endorsement, as the Complaint alleges no connection whatsoever between Benedictine's loss and the State of Louisiana, and there is therefore no basis to apply the Louisiana endorsement in the first place. *Storage Properties* thus does not support application of a foreign-state endorsement here.

intention of the parties from the language used, taking into account the situation of the parties, the nature of the subject matter, and the purpose to be accomplished." *Am. Family Mut. Ins. Co. v. Wilkins*, 179 P.3d 1104, 1109 (Kan. 2008) (citations omitted). Here, the 31 state amendatory endorsements attached to Zurich's policy are the result of state-specific regulation of the insurance industry and do not evince an intent for one state's endorsement (Louisiana) to apply to covered property anywhere else but in Louisiana.

Moreover, if it were otherwise—*i.e.*, if the Louisiana endorsement were applicable to property in every other state—then every state-specific endorsement would have to be applicable to property in every other state. Yet that is impossible, because several state-specific endorsements conflict with each other. For example, both the Maryland and Washington endorsements modify the same sentence of Section VI – General Policy Conditions, Cancellation/Non-Renewal, Cancellation differently. *Compare* Maryland Endorsement ¶ 1, Zurich_BC_000122, *with* Washington Endorsement ¶ 4, Zurich_BC_000161. And both Nebraska and West Virginia modify the Appraisal Provision of Section VI to operate differently from the Policy's Appraisal provision, while Louisiana deletes the Appraisal Provision entirely. Compare Policy ¶ 6.13.05, Zurich_BC_000059, *with* Nebraska Endorsement ¶ 3, Zurich_BC_000142, West Virginia Endorsement ¶ 1, Zurich_BC_000164, *and* Louisiana Endorsement ¶ 6, Zurich_BC_000120. Because it would be impossible for every state-specific endorsement to apply in every other state, the only permissible interpretation of the Policy is that each state-specific endorsement is limited to property within that state.

Indeed, that interpretation is compelled by the bedrock constitutional principle—grounded in the Commerce, Due Process, and Full Faith and Credit Clauses—that states may not regulate conduct outside their borders. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559,

571-72 (1996) (citing cases). As the Supreme Court explained sixty years ago, "it is clear that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders." *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 300 (1960). Because Benedictine seeks to do just that by maintaining that the Louisiana endorsement applies to its property located in Kansas, Benedictine's unsupported interpretation of the Policy must be rejected.

C. Benedictine's Requests for Coverage Under the "Civil or Military Authority," "Decontamination Costs," "Contingent Time Element," and "Expediting Costs" Provisions Fail for Additional Reasons.

1. Civil Authority Coverage Does Not Exist Because The Orders Were Not Issued In "Response" To Direct Physical Loss Of Or Damage To Property.

The Policy's Civil or Military Authority provision requires the relevant civil authority orders to have been issued in "response to direct physical loss of or damage caused by a **Covered Cause of Loss** to property not owned, occupied, leased or rented" by Benedictine. Policy at Zurich_BC_000035-36. The civil authority orders, however, were issued in response to a public health crisis, not loss or damage to property unconnected to Benedictine.

As numerous courts have recognized, civil authority insurance provisions "contemplate[] 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. Philadelphia Indem. Ins. Co.*, 2011 WL 13214381, at *6 (E.D. Tex. Mar. 30, 2011) (quotation omitted) ("[C]overage is provided only for civil authority action *in response to* direct physical *loss of or damage* to property, and courts uniformly interpret this as requiring that such loss or damage precede the

action of a civil authority." *Id.* (emphasis added)).[7] Thus, the civil authority order must have been issued *in response to* property loss or damage—that is, after, not before, the loss or damage occurred. Consistent with these cases, federal district courts have recently dismissed COVID-19 claims for civil authority coverage because the causal link between prior property loss or damage and the government's closure order was missing. For example, a federal court in California concluded as a matter of law that an insured was "not entitled to Civil Authority coverage" because the government closure orders "were intended to prevent the spread of COVID-19." *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, --- F. Supp. 3d ---, 2020 WL 5525171, at *7 (N.D. Cal. Sept. 14, 2020). Thus, the court reasoned, "[b]ecause the orders were preventative," the insured had failed to "establish the requisite causal link between prior property damage and the government's closure order." *Id.* Similarly, the court in *10E* dismissed a claim for civil authority coverage because the insureds had failed to "describe particular property damage or articulate any facts connecting the alleged property damage to [the civil authority order's] restrictions." 2020 WL 5359653, at *6. Rather, the insureds had only "assert[ed] without any relevant detail that 'the property that is damaged is in the immediate area of the Insured Property.'" *Id.*

Benedictine's allegations are no better than the insufficient allegations in *Mudpie* and *10E*. Benedictine alleges merely that "[i]t is more likely than not" that the virus was present in areas "surrounding" its property and that the virus can cause physical damage and loss to property. Compl. ¶¶ 14, 60. Like in *10E*, these conclusory allegations do not identify with any

[7] *See also Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, 2020 WL 886120, at *8 (D.S.C. Feb. 24, 2020) (no civil authority coverage because there was no damage to "any property *before* the Governor issued the evacuation order"); *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, 2008 WL 450012, at *10 (S.D. Tex. Feb. 15, 2008) (no coverage "[b]ecause the mandatory evacuation order . . . was issued due to the anticipated threat of damage . . . and not due to property damage that had occurred").

"relevant detail" the property that was lost or damaged, or connect that specific property loss or damage to any of the relevant orders. Nor could Benedictine do so, because the orders were issued in response to the unfolding health crisis resulting from the spread of the coronavirus and were preventative measures designed to stop the threat that further spread posed to human health and life. *See* Pollock Decl. Exs. 2-14.[8]

2. There Is No Coverage For Decontamination Costs Because The COVID-19 Orders Did Not Require Benedictine to Decontaminate or Remove Property.

Coverage for Decontamination Costs exists only if a law or ordinance regulating contamination required Benedictine to incur an increased cost to decontaminate or remove property. Policy at Zurich_BC_000037-38. Although Benedictine alleges that the virus was "more likely than not" present throughout its "insured property" (Compl. ¶ 14), Benedictine does not—and cannot—allege that any of the COVID-19 orders are laws or ordinances regulating contamination, much less that the orders themselves required it to incur an increased cost to decontaminate or remove property that was lost or damaged by a covered cause of loss.

3. Benedictine Does Not Allege Loss Or Damage To Any Of The Three Specified Types Of Properties, As Required For Contingent Time Element Coverage.

The Contingent Time Element coverage requires Benedictine to have suspended its operations because of "direct physical loss of or damage caused by a Covered Cause of Loss to Property" at one or more of three types of properties: "Direct Dependent Time Element

[8] Although two of the orders state that the virus "remains a public disaster affecting life, health, property, and the public space" (*see* Pollock Exs. 13-14), the orders, like Benedictine's allegations, provide no factual basis for that statement. The conclusory statement also does not indicate how the virus has been "affecting" property and thus whether the virus caused "physical loss or damage" as required for coverage. Indeed, the virus could "affect" property simply because it requires property to be cleaned or disinfected. But as explained above, when the source of the purported loss merely can be cleaned or disinfected, there is no "physical loss or damage" as a matter of law. *See supra* pages 16-17.

Locations, Indirect Dependent Time Element Locations, and Attraction Properties located worldwide" except in specified countries. Policy at Zurich_BC_000036-37.

A "Direct Dependent Time Element Location is "[a]ny Location of a direct: customer, supplier, contract manufacturer or contract service provider" to Benedictine and "[a]ny Location of any company under a royalty, licensing fee or commission agreement with [Benedictine]." *Id.* at Zurich_BC_000066. An "Indirect Dependent Time Element Location" is "[a]ny Location of a company that is a direct: customer, supplier, contract manufacturer or contract service provider to a Direct Dependent Time Element Location" or "[a]ny Location of a company that is an indirect: customer, supplier, contract manufacturer or contract service provider to a Direct Dependent Time Element Location." *Id.* at Zurich_BC_000067. An Attraction Property is a property located within one mile of Benedictine's insured property that "attracts customers" to Benedictine's higher education business. *Id.* at Zurich_BC_000064.

Because Benedictine has not identified any of these defined locations, much less alleged that they incurred "direct physical loss of or damage," Benedictine's claim for Contingent Time Element coverage must be dismissed.

4. Benedictine Does Not Allege Any Repair Or Replacement Costs To Support Its Request For Expediting Costs Coverage.

Under the Expediting Costs coverage, the Policy covers the "reasonable and necessary costs incurred to pay for the temporary repair of direct physical loss of or damage caused by a **Covered Cause of Loss** to Covered Property and to expedite the permanent repair or replacement of such damaged property." *Id.* at Zurich_BC_000038. Nowhere does Benedictine allege that it had to temporarily repair or permanently repair or replace damaged property because of the virus—which is unsurprising because the virus does not damage property. Compl. ¶¶ 1-91. Benedictine alleges only that it incurred "increased costs to clean and disinfect

the campus as a result of COVID-19." *Id.* ¶ 4. But those are not "repair" or "replacement" costs. *See Ghoman v. New Hampshire Ins. Co.*, 159 F. Supp. 2d 928, 932 (N.D. Tex. 2001) ("Obviously, an insured cannot recover repair or replacement costs unless and until he actually repairs or replaces the insured structure.").

II. Benedictine's "Declaratory Relief" Claim Must Be Dismissed.

A declaratory judgment is a remedy, not a standalone claim. *See Alvidrez v. Ridge*, 311 F. Supp. 2d 1163, 1166 (D. Kan. 2004) ("The Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* does not create an independent cause of action, it only provides a form of relief . . . ."). Benedictine cannot invoke this Court's jurisdiction to provide that remedy, however, because it must first state a claim—which it has failed to do. *See Freeman v. Benson*, 2017 WL 5731295, at *12 (D. Kan. Nov. 28, 2017) ("Because the court has dismissed his claims for failing to state a claim as a matter of law, [plaintiff] no longer has any grounds which could support declaratory relief."); *Mauricio Martinez*, 2020 WL 5240218, at *3 (dismissing declaratory-judgment claim in a COVID-19 property insurance case because, having dismissed the breach-of-contract claim, there no longer was any "actual controversy" over the existence of coverage). Furthermore, Benedictine's declaratory-judgment claim should be dismissed as duplicative, because the breach-of-contract claim necessarily requires the Court to address whether coverage exists. *See Turek*, 2020 WL 5258484, at *10 (dismissing with prejudice declaratory-judgment claims as "duplicat[ive]" of breach-of-contract claims where plaintiff sought a declaratory judgment that the policy provides coverage for "business interruption losses incurred by the [civil authority order] and that the Virus Exclusion is inapplicable").

III. Benedictine's Complaint Should Be Dismissed With Prejudice.

If given leave to re-plead, Benedictine would never be able to state a claim because it cannot avoid the legal conclusion that the virus does not cause "direct physical loss of or damage

to property." Nor could it allege facts that would overcome the Contamination exclusion's express bar on coverage of losses due to a "virus." Nor could Benedictine ever allege coverage under the "Civil or Military Authority," "Decontamination Costs," "Contingent Time Element" and "Expediting Costs" for the following additional reasons:

- *Civil or Military Authority* – Benedictine cannot plead around the undeniable fact that the civil authority orders did not "result" from a civil authority's "*response* to direct physical loss of or damage to property not owned, occupied, or leased or rented" by Benedictine. Policy at Zurich_BC_000035-36.
- *Decontamination Costs* – The COVID-19 orders did not require Benedictine to incur any increased cost to decontaminate or remove property that was lost or damaged.
- *Contingent Time Element* – Benedictine would have already alleged one or more of the three specified types of properties if they existed.
- *Expediting Costs* – The virus does result in having to repair or replace property; all that is needed is cleaning.

Because leave to amend would be futile, the action should be dismissed with prejudice. *See Diesel*, 2020 WL 4724305, at *7 (amendment would be futile because there was "no direct physical loss" as a matter of law and the "Virus Exclusion applie[d]"); *Mauricio Martinez*, 2020 WL 5240218, at *3 (amendment would be futile "[b]ecause the insurance policy specifically excludes loss caused because of a virus"); *Rose's 1, LLC*, 2020 WL 4589206, at *5; *Turek*, 2020 WL 5258484, at *11; Pollock Decl. Ex. 23 [*Oral Surgeons*, No. 4-20-CV-222-CRW-SBJ, at 2].

CONCLUSION

The Court should dismiss Benedictine's complaint with prejudice.

Dated: September 29, 2020 By: */s/ Bradley Joseph LaForge*

Bradley Joseph LaForge (KS 20323)
HITE, FANNING & HONEYMAN, LLP
100 North Broadway, Suite 950
Wichita, KS 67202-2209
Telephone: (316) 265-7741
Facsimile: (316) 267-7803
laforge@hitefanning.com

Bronwyn F. Pollock
(admitted *pro hac vice*, CA 210912)
Douglas A. Smith
(admitted *pro hac vice*, CA 290598)
MAYER BROWN LLP
350 South Grand Avenue, 25th Floor
Los Angeles, California 90071-1503
Telephone: (213) 229-9500
Facsimile: (213) 625-0248
bpollock@mayerbrown.com
dougsmith@mayerbrown.com

Debra Bogo-Ernst
(admitted *pro hac vice*, IL 6271962)
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606-4637
Telephone: (312) 782-0600
Facsimile: (312) 701-7711
dernst@mayerbrown.com

Evan T. Tager
(admitted *pro hac vice*, DC 411719)
Archis A. Parasharami
(admitted *pro hac vice*, DC 477493)
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006-1101
Telephone: (202) 263-3000
Facsimile: (202) 263-3300
etager@mayerbrown.com
aparasharami@mayerbrown.com

Patrick Florian Hofer
(admitted *pro hac vice*, DC 412665)
Gabriela Richeimer
(admitted *pro hac vice*, DC 462520)
CLYDE & CO. US LLP - DC
1775 Pennsylvania Avenue NW, 4th Floor
Washington, DC 20011
Telephone: (202) 747-5107

Facsimile: (202) 747-5150
patrick.hofer@clydeco.us
gabriela.richeimer@clydeco.us

Attorneys for Defendant Zurich American Insurance Company