UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PROCACCIANTI COMPANIES, INC. and TPG HOTELS & RESORTS, INC., *Plaintiffs,*	)	
v.	)	**CASE NO.: 1:20-cv-00512**
ZURICH AMERICAN INSURANCE COMPANY, *Defendant.*	)	

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

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Defendant Zurich American Insurance Company ("Zurich") submits this memorandum of law in support of its Motion to Dismiss the Complaint filed by Plaintiffs (collectively referred to as "Plaintiffs" and "Procaccianti").

I. INTRODUCTION

Plaintiffs operate and develop various hotels within the hospitality industry. Plaintiffs seek coverage under a commercial property insurance policy issued by Zurich for business interruption losses that they purportedly sustained because of the COVID-19 pandemic and the resulting "Stay-at-Home" orders issued by various state and local governments, which restricted the activities of non-essential businesses to curb the further transmission of the SARS-CoV-2 virus that causes COVID-19. Compl., ECF No. 1 [the "Compl."], ¶¶ 91-92, 76-77.

Any alleged losses under the policy at issue here ("Policy") are covered only if such losses are caused by a "Covered Cause of Loss." *See* Policy § 1.01. However, losses due to "virus" and "other disease causing or illness causing" substances are among the expressly excluded causes. *See* Compl., Ex. A, Zurich EDGE Policy (the "Policy") §§ 3.03.01.01 (PageID # 65), 7.09 (PageID # 102) (the "Contamination Exclusion"). Most courts across the country have already dismissed COVID-19 business interruption claims and many have done so because the policies excluded losses due to viruses, similar to the Policy's Contamination Exclusion. *See infra* § IV.A. Plaintiffs' invitation for the Court to rewrite this clear and unambiguous exclusion should be rejected under well-settled Rhode Island law. For example, there is no merit to Plaintiffs' contention that an endorsement specific to Louisiana should be interpreted as changing the terms of the Policy for risks located outside that state because the clear language of the Policy confined the endorsement to Louisiana risks. Plaintiffs' argument is the type of "mental gymnastics" that the Rhode Island Supreme Court has expressly rejected. *Peerless Insurance Co. v. Luppe*, 118

A.3d 500, 506 (R.I. 2015) (court must "refrain from 'engaging in mental gymnastics or from stretching the imagination to read ambiguity into a policy where none is present.'"). Just like the near unanimous rulings of other courts on the virus exclusion, the Contamination Exclusion expressly bars any of Plaintiffs' alleged losses under the Policy regardless of whether Plaintiffs point to COVID-19 or the government Stay-at-Home orders as the cause of their losses.

Despite Plaintiffs' repeated references to "broad all risks coverage," *see, e.g.*, Compl., ¶ 2, an all-risk policy is not an all-loss policy. *See Emerald Coast Restaurants, Inc. v. Aspen Specialty Ins. Co.*, No. 3:20-cv-5898-TKW-HTC, 2020 WL 7889061, at *2 (N.D. Fla. Dec. 18, 2020); *AJC Int'l, Inc. v. Triple-S Propiedad*, 790 F.3d 1, 7 (1st Cir. 2015) ("an 'all risks policy'—covers all *physical loss* to the [specified] property unless 'caused by or resulting from' an *excluded peril*") (internal quotation omitted and emphasis added). The Policy covers only "direct physical loss of or damage to" property and, in some cases, other losses resulting from direct physical loss or damage such as lost profits while a damaged building is being repaired. The overwhelming majority of courts across the country have held that COVID-19 business interruption claims fail as a matter of law because policyholders cannot demonstrate the requirement of "direct physical loss of or damage to" any insured property to trigger coverage. *See Roy H. Johnson, DDA v. Hartford Financial Services Group, Inc.*, No 1:20-cv-02000-SDG, 2021 WL 37573, at *4 (N.D. Ga. Jan. 4, 2020) ("More specifically, a litany of federal and state courts across the country interpreting similar policy language have roundly dismissed COVID-19-realted insurance cases for failure to allege that the covered properties sustained any physical damage.") (citing several other recent decisions collecting cases).

There is no reason why the result should not be the same for Plaintiffs' claims under the policy the Policy. Plaintiffs' conclusory allegations that COVID-19 was present on its properties

does not save the Complaint because even the presumed presence of COVID-19 does not provide the requisite "direct physical loss of or damage to" property needed to trigger coverage. *See Roy H. Johnson, DDA*, 2021 WL 37573, at *4 (no physical loss of or damage to property despite allegations of the "infiltration and proliferation of the virus" because plaintiffs did not allege any "detrimental change" to the property and the structural integrity of property "remain[s] entirely unscathed despite the proliferation and persistence of COVID-19" and any broader interpretation would render the word "physical" found in the Policy meaningless); *Bluegrass, LLC. v. State Auto. Mut. Ins. Co.*, No. 2:20-CV-00414, 2021 WL 42050, at *4 (S.D.W. Va. Jan. 5, 2021) (court was "unpersuaded by Plaintiff's alternative argument that the presence of COVID-19 at the covered properties created an altered physical condition that would trigger coverage under the policy" because "[t]o find that a physical loss or damage has taken place at the covered [] properties under these conditions would be to ignore the reality that many restaurants and cafes have continued to operate during the pandemic," like hotels). In sum, while the COVID-19 pandemic and the resultant "Stay-at Home" orders meant to curb the further community spread of the virus have had an adverse economic impact on Plaintiffs' business operations, claims for such intangible economic damage are simply not within the scope of the property insurance policy issued by Zurich.

Accordingly, just like the overwhelming majority of courts have already ruled when considering nearly identical allegations and policy language, Plaintiffs cannot state any claim for which relief may be granted because their alleged losses are the result of an excluded cause of loss (the SARS-CoV-2 virus) and they have not suffered the kind of losses covered by the Policy (direct physical loss of or damage to property). *See* Appendix 1 (list of 84 COVID-19 cases where the court finds no physical loss of or damage to property); *see also* Appendix 2 (list of 53 COVID-19

cases where the court enforced an unambiguous virus exclusion to preclude coverage). Either one of these reasons requires dismissal and both are applicable here. Because no amendment can cure these deficiencies, this Court should dismiss the Complaint with prejudice.

II. FACTUAL BACKGROUND

a. The Complaint[1]

Plaintiff Procaccianti is a real estate transaction holding company that owns and operates hotels in the United States. Compl., ¶ 8. Plaintiff TPG is a wholly owned subsidiary of Procaccianti and is an operator and developer of several hospitality brands. *Id.* ¶ 9.

Plaintiffs allege that "COVID-19 is a deadly communicable disease" that has, at the time of the Complaint, "already infected 14 million people in the U.S. and caused more than 281,253 deaths." *Id.* ¶ 27. Plaintiffs further allege that the World Health Organization ("WHO") declared the COVID-19 outbreak a pandemic and U.S. President Trump declared a nationwide emergency due to the U.S. outbreak. *Id.* ¶ 28. Plaintiffs assert the conclusory allegation that because the COVID-19 outbreak has been declared a pandemic, "COVID-19 is present globally, including at each Procaccianti Location." *Id.* ¶ 30. They further conclude that "the ubiquitous presence of COVID-19 also is confirmed by statistics," *id.* ¶ 59 (without citing any statistics), and "[b]ecause COVID-19 is a pandemic and is statistically certain to be carried by a number of individuals who visit Procaccianti Locations daily, COVID-19 is continually reintroduced to the air and surfaces of Procaccianti Locations." *Id.* ¶ 60.

Plaintiffs assert that "[t]he presence of COVID-19 on property, including indoor air and surfaces, causes a tangible, physical transformation of the property" because "it changes the

[1] The relevant allegations of the Complaint are set forth solely for the purposes of the present motion and are not admitted.

property, including air and the surfaces into dangerous transmission mechanisms for the disease, rendering the affected property unsafe, unfit and uninhabitable for ordinary functional use." *Id.* ¶ 61. They similarly assert, without pleading facts, that beginning in February 2020, "[t]he presence of COVID-19 on property, including Procaccianti's property, therefore, caused and continues to cause physical loss and/or damage to Procaccianti's property." *Id.* ¶¶ 64, 67. The crux of their Complaint, however, is that "[t]he presence of COVID-19 . . . renders Procaccianti's property hazardous and unsafe to human health, thereby depriving Procaccianti of the functionality and reliability of its property." *Id.* ¶ 65. And, as a result, Plaintiffs allege that they were "required" to close locations, incur extra expense, adopt remedial and precautionary measures. *Id.* ¶ 66. In addition to the "loss of functionality" due to the vague statistical assertions, Plaintiffs allege that the governmental Stay-At-Home orders, which were issued to slow the spread of COVID-19, "limited, restricted, or prohibited partial or total access" to their locations. *Id.* ¶¶ 75-77. Plaintiffs fail to mention that many of the Stay-At-Home expressly deemed hotels essential and not require closure. Nevertheless, Plaintiffs submitted a claim related to its alleged business interruption losses, which Zurich denied. *Id.* ¶ 93. This action alleged breach of contract based on the declination of coverage.

b. The Policy

Zurich issued Policy No. ERP 7234788-01 to Plaintiffs, with an effective date of April 1, 2019. The Insuring Agreement of the Policy states that:

> This Policy insures against *direct physical loss of or damage* caused by a **Covered Cause of Loss**[2] to covered property, at an insured location … all subject to terms, conditions and exclusions stated in this Policy.

[2] A copy of the Policy is attached to the Complaint as Exhibit A (ECF. #1-1). The Policy uses **bold** type for defined terms. **Covered Cause of Loss** is defined as "[a]ll risks of direct physical loss of or damage from any cause unless excluded." Policy, § 7.11 (PageID # 102).

Policy, § 1.01 (PageID #55) (emphasis in italics added).

The Policy also covers certain Time Element losses, *i.e.*, the loss of business income resulting from the suspension of the policyholder's business activities after there has been the required direct physical loss of or damage to insured property. Specifically, the Business Interruption coverage provision states:

> The company will pay for the actual Time Element Loss the insured sustains, as provided in the Time Element Coverages, during the Period of Liability.[3] 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 insured under this Policy other than* ***Finished Stock****) caused by a* ***Covered Cause of Loss*** *at the* ***Location***.

Id., § 4.01.01 (PageID # 68) (emphasis added).

Similarly, the Policy covers "Extra Expense" incurred "*due to* direct physical loss of or damage" "caused by a **Covered Cause of Loss**." *Id.*, § 4.02.03 (PageID # 70) (emphasis added).[4]

The Policy also includes the following business interruption "Special Coverage," under which Plaintiffs has asserted claims, related to direct physical loss or damage to third party property:

> CIVIL OR MILITARY AUTHORITY
>
> The Company will pay for the Actual Time Element loss sustained by the Insured, as provided by the Policy, resulting from the necessary **Suspension** of the Insured's business activities at an insured location if the **Suspension** is caused by order of a civil or military authority that prohibits access to the **Location**. *That order must result from a civil authority's response to a direct physical loss of or damage caused by a* ***Covered Cause of Loss*** *to property* not owned, occupied, leased or

[3] The "Period of Liability" for insured building and equipment means "[t]he period starting from the time of physical loss or damage … and ending when with due diligence and dispatch the building and equipment could be repaired and replaced." *Id.*, § 4.03.01.01 (PageID # 72).

[4] "Extra Expense" is defined at "that amount spent to continue the Insured's business activities over and above the expenses the Insured would have normally incurred *had there been no direct physical loss of or damage* caused by a Covered Cause of Loss to Property of the type insurable under this Policy at a Location. *Id.* (emphasis added).

> rented by the Insured under this Policy and located within the distance[5] of the Insured's location as stated in the Declarations.

Id., § 5.02.03 (PageID # 74-75) (emphasis added).

The Civil Authority, like all other coverages under the Policy, requires a threshold showing of direct physical loss or of damage to property.

The Policy also contains relevant exclusions. Section 3.03 of the Policy sets forth exclusions which apply to all coverage parts under the Policy. Section 3.03.01.01 states, in pertinent part:

> This Policy excludes the following unless it results from direct physical loss or damage not excluded by this Policy:
>
> **Contamination,** and any cost due to **Contamination**, including the inability to use or occupy the property, or any cost of making property safe or suitable for use or occupancy.

Policy, § 3.03.01.01 (PageID # 65). The term "Contamination" is defined as "any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen, pathogenic organism, bacteria, *virus*, disease causing or illness causing agent, **Fungus,** mold or mildew." *Id*., § 7.09 (PageID # 102) (emphasis in italics added).

The Policy also expressly excludes coverage for any "[l]oss or damage arising from delay, loss of market, or loss of use" and "[i]ndirect or remote loss or damage." *Id.*, § 3.03.02.01, § 3.03.02.02. Moreover, Section 3.03.01.03 of the Policy excludes:

> 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.

Policy, § 3.03.01.03 (PageID # 65).

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[5] The Declarations require that any such third-party property be located within 5 miles of the insured premises. Policy, § 2.03.08 (PageID # 59).

III. APPLICABLE STANDARD

a. Legal Standard for Motion to Dismiss

To withstand "a motion to dismiss, a complaint must allege 'a plausible entitlement to relief.'" *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Conclusory allegations, bare recitations of elements, and legal conclusions will not allow a complaint to survive a motion to dismiss. *Twombly*, 550 U.S. at 555; *see also Shawmut Realty Co. v. United States Bank*, No. 16-cv-113-M-LDA, 2017 U.S. Dist. LEXIS 26266, at *3 (D.R.I. Feb. 21, 2017) (McConnell, J.) (internal citation omitted). In short, "Federal Rule of Civil Procedure 8(a)(2) requires a "*showing*, rather than a blanket assertion, of entitlement to relief," and the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555–56, n.3. "[A] court should dismiss a case when a plaintiff fails to allege 'enough facts to state a claim to relief that is plausible on its face.'" *Pemental v. Sedgwick Claims Mgmt. Sys.*, No. 14-45-M, 2014 U.S. Dist. LEXIS 69131, at *5 (D.R.I. May 19, 2014) (McConnell, J.) (quoting *Twombly*, 550 U.S. at 570).

"In reviewing a motion to dismiss, the 'court may consider not only the complaint, but also the 'facts extractable from documentation annexed to or incorporated by reference in the complaint and matters susceptible to judicial notice.'" *Gonsalves-Pastore Realty, LLC v. Twin City Fire Ins. Co.*, No. 18-185-JJM-PAS, 2018 U.S. Dist. LEXIS 189604, at *2–3 (D.R.I. Nov. 6, 2018) (McConnell, J.) (quoting *Narragansett Elec. Co. v. Constellation Energy Commodities Grp., Inc.*, 526 F. Supp. 2d 260, 268 (D.R.I. 2007)); *see also Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 32 (1st Cir. 2000) (holding that in considering a motion to dismiss

the court may consider documents "integral to or explicitly relied upon in the complaint") (citation omitted). "[W]hen a 'complaint's factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged), that document effectively merges into the pleadings.'" *Narragansett Elec. Co.*, 526 F. Supp. 2d at 268 (quoting *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 17 (1st Cir. 1998)).

If the contracts upon which a claim is based contradict the allegations upon which the claim depends, the court may disregard the allegations of the complaint and dismiss the claims. *See Penney v. Deutsche Bank Nat'l Trust Co.*, No. 16-cv-10482-ADB, 2017 U.S. Dist. LEXIS 37162, at **11–12 (D. Mass. Mar. 15, 2017) ("Courts may examine a contract's terms at the motion to dismiss stage to determine if the plain terms of the contract contradict a plaintiff's allegations.") (citing *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 232 (1st Cir. 2013); *Amerifirst Bank v. TJX Cos. Inc. (In re TJX Cos. Retail Sec. Breach Litig.)*, 564 F.3d 489, 499-500 (1st Cir. 2009); *Henning v. Wachovia Mortg., FSB*, 969 F. Supp. 2d 135, 147 (D. Mass. 2013) (reasoning that "[w]hen such documents [mortgage and note] contradict allegations in the complaint, the documents trump the allegations," and dismissing breach of contract claim where allegation was "flatly contradicted by the terms of the mortgage and note")).

b. Rhode Island Law on Insurance Policy Interpretation

"An insurance policy is contractual in nature[.]" M*edical Malpractice Joint Underwriting Assoc. of Rhode Island v. Charlesgate Nursing Center, L.P.*, 115 A.3d 998, 1002 (R.I. 2015) (quoting *Derderian v. Essex Ins. Co.*, 44 A.3d 122, 127 (R.I. 2012)). Therefore, "when interpreting the disputed terms of an insurance policy, [the Court] must do so in accordance with the rules of construction that govern contracts." *Id.* The Court must "consider[ ] the policy in its entirety and [will] not establish ambiguity by viewing a word in isolation or by taking a phrase out of context."

Cheaters, Inc. v. United Nat. Ins. Co., 41 A.3d 637, 645 (R.I. 2012) (alteration in original) (internal quotation omitted). While a policy may, at times, employ redundant language, "'[the] label ["redundancy"] surely is not a fatal one when it comes to insurance contracts . . . where redundancies abound.'" *Ardente v. Standard Fire Ins. Co.*, 744 F.3d 815, 819 (1st Cir. 2014) (quoting *TMW Enterprises, Inc. v. Fed. Ins. Co.*, 619 F.3d 574, 577–78 (6th Cir. 2010)).

"[The Court] shall not depart from the literal language of the policy absent a finding that the policy is ambiguous." *Van Hoesen v. Lloyd's of London*, 134 A.3d 178, 181 (R.I. 2016) (quoting *Allstate Insurance Co. v. Ahlquist*, 59 A.3d 95, 98 (R.I. 2013)). To determine whether a policy's terms are ambiguous, the court shall "give words their plain, ordinary, and usual meaning." *Medical Malpractice*, 115 A.3d at 1002 (quoting *Derderian*, 44 A.3d at 128). "[The court] read[s] the policy in its entirety, giving words their plain meaning; importantly, [the court] refrain[s] from 'engaging in mental gymnastics or from stretching the imagination to read ambiguity into a policy where none is present.'" *Peerless Ins. Co.*, 118 A.3d at 506 (quoting *Mallane v. Holyoke Mutual Ins. Co. in Salem*, 658 A.2d 18, 20 (R.I. 1995)). Where an "exclusion is clear and unambiguous[,] [and] [t]he words used in that provision are all of common usage and they are not reasonably susceptible to multiple meanings . . . [the court] will apply the policy language as it is written to the facts of th[e] case." *Henderson v. Nationwide Ins. Co.*, 35 A.3d 902, 906–07 (R.I. 2012); *see also Emsbo v. Fireman's Fund Ins. Co.*, 950 F. Supp. 2d 369, 373 (D.R.I. 2013) (applying clear and unambiguous language of the property policy's water exclusion).

IV. ARGUMENT

a. The Contamination Exclusion Bars All Coverage

Each of the coverage parts under which Plaintiffs makes their claim specifically require that any direct physical loss or damage must be caused by a **Covered Cause of Loss**, which is

defined as all risks of direct physical loss of or damage "unless excluded." Policy, § 7.11 (PageID # 102). Among the excluded causes of loss, prominently set forth in the section explicitly labeled "Exclusions," is the Contamination Exclusion. Policy § 3.03.01.01 states:

> This Policy excludes the following unless it results from direct physical loss or damage not excluded by this Policy. . . **Contamination**, and 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 . . ."

"**Contamination**" is further specifically defined in the Policy, in pertinent part, as "Any condition of property due to the actual presence of any . . . ***virus*** [or] disease causing or illness causing agent." *Id.* § 7.09 (emphasis added).[6] The Contamination Exclusion expressly bars Plaintiffs claim and Plaintiffs' reference to a Louisiana-specific revision does not apply.

i. The Express Terms of the Contamination Exclusion Bar the Claim

Despite strategically referring to COVID-19 as a "communicable disease," Plaintiffs do, indeed, admit that the SARS-CoV-2 virus is a "virus," making the exclusion application to their claim. *See, e.g.*, Compl., ¶ 43 ("Viral RNA contained in aerosol form can be circulated through a room via air circulations systems or natural air circulation."); *Id.*, ¶¶ 48-52 (describing potential sources of virus transmission). Plaintiffs further allege that all their claimed losses are allegedly caused by the virus and the resultant Stay-At-Home orders. *Id.*, ¶¶ 64-67, 91-92 ("The presence of COVID-19 has caused and continues to cause actual physical loss and damage of the type insured under the Policy to insured property. The presence of COVID-19 at Procaccianti Locations has therefore triggered coverage under the Policy."); *Id.*, ¶¶ 76-77 ("Procaccianti Locations were damaged by stringent requirements of the Government Orders to the same extent they were damaged from COVID-19 and the Pandemic as Locations were unusable.").

[6] These exclusions apply to the Time Element Coverage, not only through the use of the term "Covered Cause of Loss", but also through § 4.02.05 (PageID # 71), which expressly incorporates all "the exclusions elsewhere in this Policy."

This should be the end of the inquiry because Plaintiffs' claim falls squarely within the terms of the Contamination Exclusion. Indeed, an ever-growing number of courts have routinely enforced substantially identical exclusions to preclude coverage for claims arising from the COVID-19 pandemic and the associated Stay-at-Home Orders. For example, just recently, Judge Shea in the District of Connecticut wrote a well-reasoned opinion addressing virus as an excluded cause of loss and dismissed a claim very similar to the one at issue here. *LJ New Haven LLC v. AmGuard Ins. Co.,* No. 20-cv-00751, 2020 WL 7495622 (D. Conn. Dec. 21, 2020). And, just last week, another federal district court added to the consensus view and wrote: "it is unsurprising that federal courts interpreting identical Virus Exclusions have nearly unanimously determined that these exclusions bar coverage of similar claims." *The Riverwalk Seafood Grill Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 1:20-cv-03768, 2021 WL 81659 (N.D. Ill. Ja. 7, 2021) (internal quotation marks omitted); s*ee also N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.*, No. 20-0529, 2020 WL 6501722, at *4 (D.N.J. 2020) (collecting cases) ("These courts have dismissed claims where policyholders claimed their losses resulted either from the presence of the virus or from governmental order intended to slow the spread of the virus."); *Handel v. Allstate Ins. Co.,* No. 20-3198, 2020 WL 6545893, at *4 (E.D. Pa. Nov. 6, 2020) (exclusion which precluded coverage for loss caused by "any virus …or other microorganism capable of inducing physical distress, illness or disease" "unambiguously bars coverage for claims due to Covid-19"); *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co.*, No. 2:20-cv-03342, 2020 WL 7024287, at *3 (E.D. Pa. Nov. 30, 2020) (same); *Kessler Dental Assoc. v. Dentists Ins. Co.*, No. 2:20-cv-03376-JDW, 2020 WL 7181057, at *3 (E.D. Pa. Dec. 7, 2020) (virus exclusion "applies to Covid-19, which is caused by a coronavirus that causes physical illness or distress"); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-cv-04423-AB-SK, 2020 WL 5938689, at *5 (C.D.

Cal. Oct. 2, 2020) ("The virus provision clearly and unequivocally exempts 'loss or damage caused by or resulting from any virus'"); *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020) ("the Virus Exclusion bars coverage for any loss that would not have occurred but for some '[v]irus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness, or disease.'"); *10E, LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-cv-04418-SVW-AS, 2020 WL 6749361 (C.D. Cal. Nov. 13, 2020) (the virus exclusion forecloses coverage where loss or damage is "caused by or resulting from any virus"); *Dime Fitness, LLC v. Markel Ins. Co*., No. 20-CA-5467, 2020 WL 6691467, at *5 (Fla. Cir. Ct. Nov. 10, 2020) (dismissing claim based on exclusion which precludes coverage for damages "caused by or resulting from" a virus); *Diesel Barbershop LLC, v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020); *Mauricio Martinez DMD, P.A. v. Allied Insur. Co. of America*, No. 2-20-cv-00401, 2020 WL 524028 (M.D. Fla. Sept. 2, 2020).

Plaintiffs cannot create ambiguity in otherwise clear and unambiguous Policy language simply by using the word "ambiguous" in the Complaint. Compl., ¶ 117. *See Amica Mut. Ins. Co. v. Streicker*, 583 A.2d 550, 551 (R.I. 1990) (holding where terms of the contract are clear, "judicial construction is at an end"). Rhode Island courts have consistently held that they will consider an insurance policy in its entirety and will "refrain from engaging in mental gymnastics or from stretching the imagination to read ambiguity into a policy where none is present." *New London Cty. Mut. Ins. Co. v. Fontaine*, 45 A.3d 551, 557 (R.I. 2012). Likewise, Plaintiffs' reference to "traditional industrial pollution" is misguided. Compl., ¶ 121. While some courts have entertained the argument the term "pollution" in a pollution exclusions is open to debate about whether that term should be given its clear and unambiguous meaning or confined to traditional environmental

pollution, there is no parallel to the word "virus" in the Contamination Exclusion. The term "virus" has an accepted scientific meaning that cannot be debated, interpreted or changed. And, there can be no debate that SARS-CoV-2 is a virus.

ii. The Louisiana Amendatory Endorsement Does Not Apply Here

Knowing that the Contamination Exclusion's clear and unambiguous language is fatal to their claim, Plaintiffs resort to a desperate invocation of a Policy endorsement specific to Louisiana, even though Plaintiffs have not pled any damage to Louisiana property. Indeed, Plaintiffs invite the Court to engage in mental gymnastics by mischaracterizing the endorsement clearly and unambiguously labeled, "**Amendatory Endorsement – Louisiana**," Compl., Ex. A (PageID # 140 (bold and large font in original), and then claiming it applies without geographic restriction. Compl., ¶¶ 126-135. Despite Plaintiffs' allegations, the word "Louisiana" is more than a mere title to the endorsement. It is an essential identifier of the endorsement. The Policy contains endorsements of general application that are identified as: Change Endorsement, Limited Coverage for Electronic Data, Programs or Software; Cyber Event Coverage Endorsement; and Cap of Losses from Certified Acts of Terrorism. ECF # 1-1, pp. 67-72. The Policy also contains 31 state-specific endorsements that are identified by their state names. *Id.*, pp. 73 *et seq.* The Court is not prohibited from considering this essential identifying language or common sense.

The Court must read the Policy in its entirety. *Peerless Insurance Co.*, 118 A.3d at 506. Here, some state-specific endorsements directly contradict each other, and others contain identical terms. For example, the Florida Endorsement states that a policyholder cannot sue Zurich more than five years from "the date of loss," whereas the Louisiana Endorsement limits the time-to-sue

at 24 months."[7] Under Plaintiff's theory, each state-specific endorsement, e.g. the Florida and Louisiana endorsements, would apply without geographic restriction. But adopting that theory would require the Court to pick which of those provisions to follow and which to set aside. When faced with multiple options on how to interpret a contract, a court will adopt the one that gives effect to each term and renders no term meaningless. *Wagenmaker v. Amica Mut. Ins. Co.*, 601 F.Supp.2d 411, 416 (D.R.I. 2009) ("All provisions of a policy are read together and construed according to their plain meaning, while at the same time giving effect to all provisions."); *Picerne-Military Hous., LLC v. Am. Int'l Specialty Lines Ins. Co.*, 650 F. Supp. 2d 135, 138 (D.R.I. 2009) ("court affords equal weight to all terms and may not create ambiguity by 'viewing a word in isolation' or 'taking a phrase out of context'") By confining the state-specific endorsements to their respectively identifies states as intended, the Court can give effect to all the contract terms.

Similarly, some of the state-specific endorsements are identical. For example, both Illinois and Louisiana Endorsements provide that if Zurich cancels a policy that has been in effect for more than 60 days for nonpayment of premium, it must provide notice of at least 10 days, and the Maine and Montana Endorsements contain the same provision concerning concealment, misrepresentation and fraud. If, as Plaintiff argues, each state-specific endorsement applies without geographic limitation, the identical provisions in multiple endorsements would be mere surplusage. *See Systemized of New England, Inc. v. SCM, Inc.*, 732 F.2d 1030, 1034 (1st Cir. 2984) ("We take our guidance from the familiar principle that a court must favor interpretations which give meaning and effect to every part of a contract and reject those which reduce words to mere surplusage."); *Med. Malpractice Joint Underwriting Ass'n*, 115 A.3d at 1008 (rejecting an

[7] Other examples of conflicting endorsements include: the Appraisal Provision in the Louisiana, Nebraska and West Virginia Endorsements; the Subrogation Provision in the Louisiana and Wisconsin Endorsements; the Cancellation Provision in the Louisiana and Alaska Endorsements.

"interpretation of the policy language would render both exclusions mere surplusage"). Because Plaintiff's theory requires the Court to render some terms meaningless and others surplusage, the Court must reject the reading and apply an interpretation that gives meaning to all terms, which it can do by applying the 31 state-specific endorsements to the states identified in each.

This is also consistent with the federal McCarran-Ferguson Act, in which the federal government expressly cedes to the individual states the power to regulate within their states "[t]he business of insurance, and every person engaged therein." 15 U.S.C. § 1012. Courts have recognized that insurance policies often include state-specific endorsements to comply with individual state regulatory requirements and such endorsements do not apply outside each respective state. This principle has been specifically applied with respect to a Louisiana endorsement. *Menard v. Gibson Applied Tech. & Eng'g, Inc.*, No. 16-498, 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.*, No. 12-CV- 2162, 2015 WL 3772024, at *3 (D. Minn. June 17, 2015) (noting that 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.*, No. 3:12-CV-904-JFA, 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).

As the Supreme Court stated 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 Plaintiffs seek to do just that by maintaining that the Louisiana Endorsement applies to "physical loss of or damage" to its property located outside of Louisiana, Plaintiff's interpretation of the Policy must be rejected.

b. Plaintiffs Have Not Sustained Direct Physical Loss of or Damage To Any Covered Property

Even if Plaintiffs alleged damages were not the result of an excluded cause, the claim is still doomed because Plaintiffs have not experienced the type of loss insured by the Policy. An all-risk policy is not an all-loss policy. *See Emerald Coast Restaurants, Inc.*, 2020 WL 7889061, at *2. The Policy insures "direct physical loss of or damage to" property (such as damage from a fire) and the time element losses during the period of restoration (such as lost profits while the building is being restored from that fire). The term "direct physical loss of or damage to property" must, as with all of the Policy's terms, be afforded its "plain and ordinary meaning." *National Refrigeration, Inc. v. Travelers Indem. Co. of Am.*, 947 A.2d 906, 909-10 (R.I. 2008). "The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged 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 Ins. § 148:46 (3d Ed. West June 2020).

Even before the COVID-19 pandemic, courts have consistently ruled that for physical damage to have occurred, there must be a tangible alteration to the property itself. *See e.g.*

Universal Image Prods., Inc. v. Federal Ins. Co., 475 Fed. Appx. 569, 574 (6th Cir. 2012) (requirement of "direct physical loss or damage" not met where presence of bacteria in air conditioning system did not cause tangible damage to the insured property); *Mastellone v. Lightening Rod Mut. Ins. Co.*, 884 N.E. 2d 1130, 1144 (Ohio Ct. App. 2008) (holding that mold does not constitute "physical damage" because "the presence of mold did not alter or otherwise affect the structural integrity of the [property]"); *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co.*, 17 F. Supp. 3d 323, 329-30 (S.D.N.Y. 2014) (loss of electrical power at the insured's officers did not constitute physical damage because it did not compromise the physical integrity of the property); *Crestview Country Club, Inc. v. St. Paul Guardian Ins. Co.*, 321 F. Supp. 2d 260, 264 (D. Mass. 2004) (no direct physical loss to golf course where loss of tree modified how a hole on the course was played because there was no direct physical loss to the course; "'physical' must be given its plain meaning –*e.g.*, 'material'").

While courts in some jurisdictions have found that the presence of toxins on property may constitute direct physical loss, these cases do not help Plaintiffs here because the properties at issue in those cases were rendered "unusable or uninhabitable" by the presence of said toxins, the mere presence of toxins was not enough to establish direct physical loss. *See, e.g.*, *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant order rendered the insured property unusable); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 12-cv-04418, 2014 WL 6675934, at *3 (D.N.J. Nov. 25, 2014) (release of ammonia inside the facility was a direct physical loss because its presence rendered the facility unfit for human occupancy); *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002) (the mere presence of asbestos, or the general or future threat of damage from asbestos "lacks the distinct and demonstrable" change necessary for coverage because the structure continued to

function); *Motorists Mut. Ins v. Hardinger*, 131 Fed. App'x 823, 826-27 (3d Cir. 2005) (holding that, under *Port Authority* standard, the insured must show not only that a toxic substance was present, but also that the "functionality of the property was nearly eliminated or destroyed, or … made useless or uninhabitable").

In the context of COVID-19 business interruption claims, courts across the country already have rejected Plaintiffs' conclusory allegations, Compl., ¶¶ 64, 91, that even the presence of the virus that causes COVID-19 is sufficient "direct physical loss of or damage to" to trigger coverage. *See, e.g., Mena Catering, Inc. v. Scottsdale Ins. Co.*, No. 1:20-CV-23661, 2021 WL 86777, at *7 (S.D. Fla. Jan. 11, 2021) ("There is no 'direct physical loss' where the alleged harm consists of the mere presence of the virus on the physical structure of the premises"); *see also Sandy Point Dental Inc. P.C. v. Cincinnati Ins. Co.*, No. 20 CV 2160, 2020 WL 5630465, at *3 (N.D. Ill. Sept. 21, 2020) ("The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property. Consequently, plaintiff has failed to plead a direct physical loss—a prerequisite for coverage."); *Uncork & Create, LLC, v. Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL 643694, at *5 (S.D. W. Va. Nov. 2, 2020) ("even when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies"); *Zwillo Corp. v. Lexington Ins. Co.*, No. 4:20-cv-00339, 2020 WL 7137110, at *6 (W.D. Mo. Dec. 2, 2020) ("Whether the complaint is couched in terms of COVID-19's presence on the premises or of loss of use of premises due to the stay-at-home orders (or the virus itself), Plaintiff has failed to state a claim upon which relief may be granted."); *Johnson, DDA*, 2021 WL 37573, at *5 (despite allegations of the presence of the virus, the plaintiffs did not allege any "tangible alteration" to any "physical edifice or piece of equipment," nor did they allege COVID-19 induced a "detrimental

change in operational capabilities" because property "remain[s] entirely unscathed despite the proliferation and persistence of COVID-19").

Moreover, even taking Plaintiffs' allegations as true that the presence of COVID-19 can be confirmed at Plaintiffs' locations, the CDC has advised that the virus can easily be removed or neutralized via routine cleaning of surfaces with basic household cleaners.[8] The need for cleaning is not property damage and does not trigger coverage. *Promotional Headwear Int'l v. Cincinnati Ins Co*, No. 20-cv-2211, 2020 WL 7078735, at *8 (D. Kan. Dec. 3, 2020) ("even assuming that the virus physically attached to covered property, it did not constitute the direct, physical loss or damage required to trigger coverage because … routine cleaning and disinfecting can eliminate the virus on surfaces"); *Uncork*, 2020 WL 6436948, at *5 ("Because routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover."); *Mama Jo's Inc. v. Sparta Ins. Co.*, No. 18-12887, 2020 WL 4782369, at *8 (11th Cir. Aug. 18, 2020) ("an item or structure that merely needs to be cleaned has not suffered a "loss" which is both "direct" and "physical"); *Universal Image Prods. Ins.*, 475 Fed App'x 569, 574 n. 8 (6th Cir. 2012) (the need for basic cleaning with "hot water" and "Lysol type" products does not constitute physical loss or damage). As one court recently held:

> "[A]n item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'" Therefore, "even assuming that the virus physically attached to covered property," as plaintiffs allege in the instant case, "it did not constitute the direct, physical loss or damage required to trigger coverage because it's presence can be eliminated" by "routine cleaning and disinfecting."

Tappo of Buffalo, LLC v. Erie Ins. Co., No. 20-CV-754V(SR), 2020 WL 7867553, at *4 (W.D.N.Y. Dec. 29, 2020) (quoting *Mama Jo's Inc.*, 823 Fed. App'x at 879; *Promotional Headwear*, 2020 WL 707873, at *8).

[8] *See also Aerosol and Surface Stability of SARS-CoV-2 as Compared to SARS-CoV-1*, (https://www.nejm.org/doi/pdf/10.1056/NEJMc2004973?articleTools=true).

This lack of any needed repair or replacement of insured property is especially significant with respect to Plaintiffs' claim for business interruption coverage, because the Policy covers business interruption loss only when "Suspension" is due to direct physical loss of or damage to insured property. Policy, § 4.01.01 (PageID # 68). Indeed, the business interruption coverage applies only for the Period of Liability, which is defined as "[t]he period starting from the time of physical loss or damage … and ending when with due diligence and dispatch [the insured property] could be *repaired and replaced.*" *Id.* § 4.03.01.01 (PageID # 72) (emphasis added). Here, while Plaintiffs allege that they adopted remedial and precautionary measures to restore and remediate the air and surfaces at its locations, Compl., ¶ 66, they simultaneously allege, "there is no effective way to repair or remediate the loss or damage caused by COVID-19." *Id.*, ¶ 62. Plaintiffs cannot have it both ways. Based on these allegations, there is no Period of Liability, and hence no coverage, because there is no insured property that needed to be repaired or replaced due to any alleged temporary presence of the virus. *See, e.g. Toppers Salon & Health Spa, Inc.*, 2020 WL 7024287, at *4 (no business interruption coverage where there were no allegations of property subject to repair or replacement because of virus).

c. The Governmental Orders Do Not Cause "Direct Physical Loss of" Property

Plaintiffs also allege that "Procaccianti Locations were damaged by the stringent requirements of the Government Orders to the same extent they were damaged from COVID-19 and the Pandemic as the Locations were unusable." Compl., ¶ 77. Plaintiffs further allege the Orders had a "devastating effect" on its business. *Id.*, ¶ 84. However, any purely economic losses, which do not arise from any tangible physical damage to any insured property, simply are not within the scope of the Policy, which responds only to actual physical loss of or damage to property and the resulting consequences of such loss or damage. *See, e.g. Terry Black's Barbecue v. State*

Automobile Mut. Ins. Co., No. 1:20-cv-665-RP, 2020 WL 7351246, at *5 ("property insurance coverage is triggered by some threshold concept of physical loss or damage to the covered property"). In fact, the Policy does not cover economic damages resulting from "loss of market" or any purported "loss of use", § 3.03.02.01 (PageID # 65); instead, it only covers "direct physical loss of or damage to" insured property.

For this reason, courts have already rejected "loss of income" claims for businesses which were required to close under the COVID-19 Stay-at-Home orders (which is not true for either Plaintiffs' hotels, which were allowed to operate with restrictions). As the Southern District of New York recently stated:

> As a result of COVID-19 closure orders throughout the country, many businesses have brought lawsuits claiming entitlement to coverage under provisions materially similar to those at issue … here. And nearly every court to address this issue has concluded that loss of use of a premises due to a governmental closure order does not trigger business income coverage premised on physical loss to property.

Michael Cetta, Inc. d/b/a Sparks Steak House v. Admiral Indemnity Co., No. 20 Civ. 4612, 2020 WL 7321405, at *8 (S.D.N.Y. Dec. 11, 2020) (collecting cases); *see also 4431, Inc. v. Cincinnati Ins. Companies*, No. 5:20-CV-04396, 2020 WL 7075318, at *12 (E.D. Pa. Dec. 3, 2020) ("Plaintiffs' loss of business income as a result of COVID-19 and the Governor's Orders does not constitute direct physical loss under the policies"); *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, No. 2:20-cv-01949, 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020) (economic losses from closure orders are not a physical loss or damage under the Policy); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Co.*, No. 2:20-cv-05663, 2020 WL 6440037, at *4 (C.D. Cal. Oct. 27, 2020) ("detrimental economic impact alone … is not compensable under a property insurance contract"); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, No. 20-CV-907-CAB-BLM, 2020 WL 5500221, at *4 (S.D. Cal. Sept. 11, 2020) ("Plaintiffs are not the first

policyholders to argue in court that government orders forcing their business to stop operating as a result of the COVID-19 pandemic triggers insurance… most courts have rejected these claims finding that the government orders did not constitute direct physical loss or damage to property."); *Palmer Holdings & Investments, Inc. v. Integrity Ins. Co.*, No. 4:20-cv-154-JAJ, 2020 WL 7258857, at *9 (S.D. Iowa. Dec. 7, 2020); *Maluabe LLC v. Greenwich Ins. Co.*, No. 20-22615-Civ, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020); *Rose's 1, LLC et al. v. Erie Ins. Exchange*, No. 2020 CA 002424 B, 2020 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020); *Oral Surgeons, P.C. v. The Cincinnati Ins. Co.*, No. 4-20-CV-222-CRW-SBJ, 2020 WL 5820552 (S.D. Iowa Sept. 29, 2020); *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.*, No. 20 C 4249, 2020 WL 7889047, at *3 (N.D. Ill. Dec. 22, 2020) ("We agree with Aspen and the overwhelming majority of courts that have found no coverage when interpreting similar contractual language . . . [and, while] Bradley Hotel alleges that it could not use certain portions of the hotel, namely the restaurant and banquet hall, to the full extent they could before the pandemic[,] . . . [it] does not allege that the suspension of operations was a result of any physical loss of or damage to the property").

As these cases make clear, "when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property," there is no coverage under a provision requiring physical loss or damage. *See* 10A Couch on Ins. § 148:46 (3d Ed. 2020). To hold otherwise would effectively treat the words "direct" and "physical" in the policy's insuring agreement as meaningless surplusage, which the Court cannot do. *See Med. Malpractice Joint Underwriting Ass'n*, 115 A.3d at 1008.

d. Contingent Time Element Coverage is Not Triggered

Plaintiffs also seek "Contingent Time Element" coverage, Compl, ¶ 102, which applies where a policyholder must necessarily suspend its business activities at an Insured Location,

provided "the Suspension results from direct physical loss of or damage … to property (of the type insurable under this Policy) at Direct Dependent Time Element Locations, Indirect Dependent Time Element Locations and Attraction Properties." Policy, § 5.02.05 (PageID # 75). In Paragraph 103 of the Complaint, Plaintiffs identify four Attraction Properties where it alleges "COVID-19 continues to exist." Compl., ¶ 103. However, even taking these allegations as true, as addressed above, the mere presence of COVID-19 does not satisfy the requisite requirement for "direct physical loss of or damage" to property. Moreover, Plaintiffs fail to identify *how* the alleged presence of the virus at these Attraction Properties caused the necessary suspension of its business at any of its locations, and such conclusory allegations cannot support a colorable, let alone plausible, claim for coverage. *Mortar and Pestle Corp.*, 2020 WL 7495180, at *4 ("Although [plaintiff] has added allegations such as COVID-19 has 'intruded upon the property' and 'damaged the property' those conclusory assertions are insufficient to state a claim based thereon"). Thus, this claim must also fail.

e. Civil Authority Coverage Is Not Triggered

The Policy's "special coverages" include Civil or Military Authority Coverage, which provides:

> The Company will pay for the Actual Time Element loss sustained by the Insured, as provided by the Policy, resulting from the necessary **Suspension** of the Insured's business activities at an insured location if the **Suspension** is caused by order of a civil or military authority that prohibits access to the **Location**. *That order must result from a civil authority's response to a direct physical loss of or damage caused by a **Covered Cause of Loss** to property* not owned, occupied, leased or rented by the Insured under this Policy and located within the distance of the Insured's location as stated in the Declarations.

Policy, § 5.02.03 (PageID # 74–75) (emphasis italics added).

Under this provision, the claimed 'direct physical loss of or damage' must be to certain third-party property. Therefore, Plaintiffs must demonstrate that the civil order was in response to

direct physical loss or damage caused by a covered cause of loss to that third-party property; and, that access to their properties was prohibited by these Orders. As discussed above, the mere presence of the virus at third-party locations does not constitute the requisite direct physical loss or damage needed to trigger this coverage. Despite Plaintiffs' conclusory allegations, even the most cursory review of the Government Orders issued in response to the COVID-19 pandemic indicate that these orders were not issued in "response" to any purported specific physical loss or damage to any identifiable property. Courts have repeatedly affirmed that the failure to identify underlying physical damage is fatal to an insured's claim. *See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-03213-JST, 2020 WL 5525171, at *7 (N.D. Cal. Sept. 14, 2020) (dismissing claim for civil-authority coverage because "government closure orders were intended to prevent the spread of COVID-19" and orders were "preventative"; plaintiff failed to "establish the requisite causal link between prior property damage and the government's closure order").

Instead, the government orders were issued in response to a broad public health crisis and aimed at limiting person-to person interactions in order to "flatten the curve" with respect to the COVID-19 cases so as to protect human health and lives by limiting the future transmission of the virus. *See* Compl., ¶ 75 ("and in an effort to slow the spread of COVID-19, federal, state and local governments imposed unprecedented directives through governmental orders (the "Governmental Orders") prohibiting travel to and within the United States, requiring certain businesses to close, and requiring residents to remain in their homes unless performing essential activities."); *see also* Rhode Island E.O. 20-04 (Mar. 16, 2020) (The Governor of Rhode Island emphasizes that "additional measures are necessary to protect the health of the people of Rhode Island and to contain the spread of COVID-19; and … the Federal Centers for Disease Control and Prevention and RIDOH recommend implementation of community mitigation strategies, including the

cancellation of large events and social distancing outside the home.") (Ex. 1). Plaintiffs' cherry-picking of orders that make a cursory, unsupported reference to "property damage," and conclusory allegations as to why they believe the Orders were issued do not alter that reality or the undeniable impetus for the orders.[9] *See, e.g.*, *Newchops Rest. Comcast LLC*, 2020 WL 7395153, at *6 (dismissing civil authority claim because "[t]he shutdown orders and accompanying proclamations were in response to the COVID-19 health crisis, not damage to any property – the insureds' or another's"); *Whiskey River on Vintage, Inc. v. Illinois Cas. Co.*, No. 4:20-CV-185-JAJ, 2020 WL 7258575, at *12 (S.D. Iowa Nov. 30, 2020) ("[the governor's] proclamation was not issued in response to a dangerous physical condition that resulted from a Covered Cause of Loss. Rather, the proclamation was issued to limit the spread of COVID-19."); *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, No. 20-CV-03750-WHO, 2020 WL 6562332, at *8 (N.D. Cal. Nov. 9, 2020) (dismissing civil authority claim because "[t]he preventative closure orders cannot support a causal link of direct physical loss of or damage to property for the reasons discussed above. In the absence of any allegation that any specific neighboring property to a Sand People property in Hawaii had actual coronavirus exposure, this coverage has not plausibly been triggered").

Courts have previously held that prophylactic orders meant to stem future harm do not trigger the Civil Authority coverage. Illustrative on this point is the case of *United Airlines Inc. v. Ins. Co. of State of Pa.,* 439 F.3d 128 (2d Cir. 2006). United Air Lines sought recovery for losses arising from the temporary shutdown of Reagan International Airport after the 9/11 terrorist attacks that destroyed the World Trade Center Towers and damaged the Pentagon (which United

[9] Such conclusory assertions are not entitled to any presumptive effect because they cannot survive the *Twombly* plausibility standard any more than Plaintiff's own conclusory allegations.

contended was an 'adjacent property' within the scope of the Civil Authority provision in its policy). The Second Circuit found that there was no coverage because the Government's "decision to halt operations at the Airport indefinitely was based on the fear of future attacks" not because of damage to the Pentagon. *Id.* at 34; *see also Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, No. 1:03-cv-3154-JEC, 2004 WL 5704715, at *1-2 (N.D. Ga. Dec. 15, 2004) (no coverage because, *inter alia*, the FAA's order that grounded plans was not a "direct result" of property damage); *City of Chi. v. Factory Mut. Ins. Co.*, No. 2-C-7023, 2004 WL 549557, at * 4 (N.D. Ill. Mar. 18, 2004) ("[t]he business interruption[] was due to the ground stop order imposed by the FAA in order to prevent further terrorist attacks").

Here, Plaintiffs cannot establish that any physical loss or physical damage occurred due to COVID-19 and they cannot establish that the Governmental Orders *prohibited* access to their properties, as required by the Policy. *E.g.*, *1210 McGavock St. Hosp. Partners, LLC v. Admiral Indem. Co.*, No. 3:20-CV-694, 2020 WL 7641184, at *10 (M.D. Tenn. Dec. 23, 2020) ("The most natural reading of 'access,' in this context, is physical access, not simply being closed to the public. The plaintiff does not allege that it was ever physically unable to access the [insured premises]"); *Santo's Italian Café LLC v. Acuity Ins. Co.*, No. 1:20-CV-01192, 2020 WL 7490095, at *13 (N.D. Ohio Dec. 21, 2020) ("while the State's Closure Orders prevented [the insured] from conducting dine-in operations—[its] primary source of income—the Closure Orders did not prevent [the insured] from accessing its premises altogether," and, therefore, the insured "fail[ed] to meet the threshold for Civil Authority coverage"). Finally, these Orders were not issued to stop the spread of the COVID-19 among people not because of any physical loss or damage to property. Therefore, the Policy's civil authority coverage is not triggered.

f. Ingress/Egress Coverage Is Inapplicable

Plaintiffs summarily claim that they are entitled to "ingress/egress" coverage. Compl., ¶ 104. This is a curious claim and easily addressed. Ingress/Egress coverage requires "direct physical loss of or damage" to a relevant third-party location (which Plaintiffs have not and cannot show) and a resultant "physical obstruction" preventing access to an insured location. Policy, § 5.02.15. No such physical obstruction of any kind exists. Thus, this coverage simply is not applicable in any way. The Court need not accept Plaintiffs' cursory and conclusory allegations merely parroting the elements of the Policy. *See Twombly*, 550 U.S. at 555; *Rhode Island Recycled Metals, LLC v. Conway Marine Constr., Inc.*, No. 16-CV-607-M-PAS, 2017 WL 1831089, at *3 n.6 (D.R.I. May 4, 2017) (McConnell, J.) ("mere recitation of an essential element, sans factual allegations, misses the boat").

g. The Protection and Preservation of Property Coverage is Inapplicable

Plaintiffs also allege the Policy's Protection and Preservation of Property coverage because COVID-19 threatens to cause physical loss and damage to property. Compl., ¶¶ 105-106. However, this provision requires as a prerequisite "actual or imminent physical loss or damage due to a Covered Cause of Loss" to property. Policy, § 5.02.24 (PageID # 83). As explained above, COVID-19 does not cause physical loss or damage to property, thus, this coverage does not apply. *See Zwillo V, Corp.*, 2020 WL 7137110, at *4 n.2 (dismissing similar claim for so-called sue and labor coverage); *Promotional; Headwear International*, 2020 WL 7078735, at *10 (similar).

h. The Bad Faith Claims Are Without Merit

Lastly, Plaintiffs also allege that Zurich acted in bad faith by performing an inadequate claim investigation and denying the claim. Compl., ¶ 177. However, it is well-established Rhode

Island law that "[b]efore a bad-faith claim can even be considered, a plaintiff must prove that the insurer breached its obligation under the insurance contract." *Lewis v. Nationwide Mut. Ins. Co.*, 742 A.2d 1207, 1209 (R.I. 2000). "If the insurer prevails on the breach-of-contract action, it could not, as a matter of law, have acted in bad faith in its relationship with its policyholder." *Lamoureaux v. Merrimack Mut. Fire Ins. Co.*, 751 A.2d 1290, 1293 (R.I. 2000). Thus, because Plaintiffs' breach of contract claims fail as a matter of law, so too does Plaintiffs' claim for bad faith.

Moreover, any claim of bad faith by Plaintiffs must also fail because Zurich had a reasonable basis in fact and law for denying coverage. "[B]ad faith is established when the proof demonstrates that the insurer denied coverage or refused payment without a reasonable basis in fact of law for the denial." *Skaling v. Aetna Ins. Co.*, 799 A.2d 997, 1010 (R.I. 2002). The Supreme Court of Rhode Island has declined "to abandon the rule that an insurer has the right to debate a claim that is fairly debatable. *Id.* Here, Plaintiffs repeatedly admit that COVID-19 is a virus and allege its presence caused its damages. *See, e.g.*, Compl., ¶¶ 64-67, 91-92. The Contamination Exclusion found within the Policy that formed part of the basis for Zurich's denial of coverage unambiguously states that Zurich will not pay for loss or damage caused by the presence of a virus. Accordingly, there is no possible basis for finding that Zurich's coverage position was taken in bad faith. *See Comfortably Numb Marine, LLC v. Markel American Ins. Co.*, No. 20-CV-2211-JAR-GEB, 2015 WL 6396076 at *4 (D.R.I. Oct. 21, 2015) (allowing insurer's motion to dismiss claim under § 9-1-33 where "[t]he bad faith claim is conclusory, and the Complaint contains no factual allegations from which a reasonable fact-finder could conclude that Defendant denied this claim 'wrongfully and in bad faith"').

V. CONCLUSION

For the reasons set forth above, Defendant Zurich American Insurance Company respectfully requests that Plaintiffs' Complaint be dismissed with prejudice in its entirety since Plaintiffs have failed to state any cognizable claim, and any amendment would be futile.

Respectfully submitted,

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Dated: January 12, 2021

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 2021, I have caused the within *Memorandum of Law in Support of Zurich American Ins. Co.'s Motion to Dismiss* to be filed with the Court via the ECF filing system. As such, this document will be electronically sent to the registered participants identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those not receiving electronic notice:

/s/ Daniel F. Sullivan
Daniel F. Sullivan

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