UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FOUNTAIN ENTERPRISES, LLC d/b/a ANYTIME FITNESS – WEST POINT, VITA GRATA LLC d/b/a ANYTIME FITNESS SPOKANE VALLEY, KZONE SPORTS, FITNESS, AND WELLNESS LLC d/b/a ANYTIME FITNESS – SCHUYLKILL HAVEN, B FIT B YOU LLC d/b/a ANYTIME FITNESS –DANVILLE, EWT ENTERPRISES INC. d/b/a ANYTIME FITNESS – IRWIN, GMT FITNESS ENTERPRISES LLC d/b/a ANYTIME FITNESS – GLENSHAW, and NORTHWEST WELLNESS & FITNESS LLC d/b/a ANYTIME FITNESS REDMOND, individually and on behalf of all others similarly situated, Plaintiffs, v. MARKEL INSURANCE COMPANY, Defendant.	Civil Action No. 2:21-00027-AWA-LRL

MARKEL INSURANCE COMPANY'S MEMORANDUM OF LAW
IN SUPPORT OF
<u>MOTION TO DISMISS CLASS ACTION COMPLAINT WITH PREJUDICE</u>

TABLE OF CONTENTS

Page

Table of Contents ii

Table of Authorities iv

Introduction 1

Background 2

A. The Policy 2

1. The Policy coverages at issue all require direct physical loss of or damage to property. 2

2. Multiple exclusions apply to Plaintiffs' claims. 3

B. The Complaint's allegations establish the exclusions' applicability and fail to plausibly plead direct physical loss. 4

Argument 5

I. Exclusions Bar Coverage for Plaintiffs' Claims. 6

A. The Virus Exclusion precludes all of Plaintiffs' claims. 6

1. The Virus Exclusion bars Fountain's claims under Mississippi law. 10

2. The Virus Exclusion bars KZone's, B Fit's, EWT and GMT's claims under Pennsylvania law. 10

3. The Virus Exclusion bars Vita's and Northwest's claims under Washington law. 12

4. The decisions of this Court also support dismissal. 13

B. Plaintiffs' claims are also foreclosed by other exclusions. 15

II. Plaintiffs Fail to Plausibly Allege Direct Physical Loss of or Damage to Property. 17

A. Fountain fails to plausibly allege direct physical loss of or damage to property under Mississippi law. 19

B. KZone, B Fit, EWT and GMT fail to plausibly allege direct physical loss of or damage to property under Pennsylvania law. 20

C. Vita and Northwest fail to plausibly allege direct physical loss of or damage to property under Washington law. 22

III. Plaintiffs Fail to State a Claim under the Civil Authority Provision. 26

A. None of the orders were issued "as a result of" physical loss or damage to property. 26

B. The alleged orders did not prohibit access to Plaintiffs' insured premises. 28

IV. Plaintiffs' Claims for Insurance Bad Faith Fail as a Matter of Law. 29

Conclusion 29

Certificate of Service 31

TABLE OF AUTHORITIES

Pages

Cases

1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc.,
No. 20-CV-862, 2021 WL 147139 (W.D. Pa. Jan. 15, 2021), *appeal filed*, No. 21-1109 (3d Cir. Jan. 21, 2021) 20, 21, 28

10E, LLC v. Travelers Indem. Co. of Conn.,
No. 20-CV-04418, 2020 WL 6749361 (C.D. Cal. Nov. 13, 2020), *appeal filed*, No. 20-56206 (9th Cir. Nov. 17, 2021)....................6

15 Oz Fresh & Healthy Food LLC v. Underwriters at Lloyd's London Known as Syndicates AML 2001, WBC 5886, MMX 2010, & SKB 1897,
No. 20-23407-CIV, 2021 WL 896216 (S.D. Fla. Feb. 22, 2021), *appeal filed*, No. 21-10949 (11th Cir. Mar. 24, 2021)....................14

AFM Mattress Co., LLC v. Motorists Com. Mut. Ins. Co.,
No. 20-CV-3556, 2020 WL 6940984 (N.D. Ill. Nov. 24, 2020) 7

Aggie Invs., L.L.C. v. Cont'l Cas. Co.,
No. 21-CV-0013, 2021 WL 1550479 (E.D. Tex. Apr. 20, 2021)....................18

Ainsworth v. Progressive Cas. Ins. Co.,
322 P.3d 6 (Wash. Ct. App. 2014)....................12

Al Johnson's Swedish Rest. & Butik, Inc. v. Soc'y Ins. Mut. Co.,
No. 20-CV-52 (Wis. Cir. Ct. Dec. 4, 2020)....................19

B Street Grill & Bar LLC v. Cincinnati Ins. Co.,
No. CV-20-01326, 2021 WL 857361 (D. Ariz. Mar. 8, 2021)....................18

Ba Lax LLC v. Hartford Fire Ins. Co.,
No. 20-CV-06344, 2021 WL 144248 (C.D. Cal. Jan. 12, 2021), *appeal filed*, No. 21-55109 (9th Cir. Feb. 10, 2021) 13, 25

Baker v. Or. Mut. Ins. Co.,
No. 20-cv-05467, 2021 WL 24841 (N.D. Cal. Jan. 4, 2021) 27

Ballas Nails & Spa, LLC v. Travelers Cas. Ins. Co. of Am.,
No. 20-CV-1155, 2021 WL 37984 (E.D. Mo. Jan. 5, 2021) 7, 15, 25

Barroso, Inc. v. Twin City Fire Ins. Co.,
No. 1:20-CV-632 (E.D. Va. Nov. 10, 2020)....................13, 15

Bass v. Butler,
116 F. App'x 376 (3d Cir. 2004) 1

Bel Air Auto Auction, Inc. v. Great N. Ins. Co.,
No. 20-2892, 2021 WL 1400891 (D. Md. Apr. 14, 2021)....................18

Berkseth-Rojas v. Aspen Am. Ins. Co.,
No. 20-CV-0948, 2021 WL 101479 (N.D. Tex. Jan. 12, 2021) 22

Bluegrass Oral Health Ctr., PLLC v. Cincinnati Ins. Co.,
No. 20-CV-00120, 2021 WL 1069038 (W.D. Ky. Mar. 18, 2021) 18

Bluegrass, LLC. v. State Auto. Mut. Ins. Co.,
No. 20-CV-00414, 2021 WL 42050 (S.D. W.Va. Jan. 5, 2021)....................14, 18

Blvd. Carroll Entm't Grp., Inc. v Fireman's Fund Ins. Co.,
Civ. No. 20-1171, 2020 WL 7338081 (D.N.J. Dec. 14, 2020), *appeal filed*,
No. 21-1061 (3d Cir. Jan. 12, 2021) 19

Borton & Sons, Inc. v. Travelers Ins. Co.,
99 Wash. App. 1010, 2000 WL 60028 (Jan. 25, 2000) 23

Boxed Foods Co., LLC v. Cal. Capital Ins. Co.,
No. 20-CV-04571, 2020 WL 6271021 (N.D. Cal. Oct. 26, 2020) 6, 13

Bradley Hotel Corp. v. Aspen Specialty Ins. Co.,
No. 20-CV-4249, 2020 WL 7889047 (N.D. Ill. Dec. 22, 2020), *appeal filed*,
No. 21-1173 (7th Cir. Jan. 28, 2021) 18, 27

Brian Handel D.M.D., P.C. v. Allstate Ins. Co.,
Civ. No. 20-3198, 2020 WL 6545893 (E.D. Pa. Nov. 6, 2020) 8, 20, 21

Broussard v. State Farm Fire & Cas. Co.,
523 F.3d 618 (5th Cir. 2008) 29

Burrage v. United States,
571 U.S. 204 (2014)....................10

Café La Trova LLC v. Aspen Specialty Ins. Co.,
No. 20-22055, 2021 WL 602585 (S.D. Fla. Feb. 16, 2021) 28

Cafe Plaza de Mesilla Inc. v. Cont'l Cas. Co.,
No. 2:20-CV-354, 2021 WL 601880 (D.N.M. Feb. 16, 2021) 18

Carrot Love, LLC v. Aspen Specialty Ins. Co.,
No. 20-23586-Civ, 2021 WL 124416 (S.D. Fla. Jan. 13, 2021)....................19

Chattanooga Prof'l Baseball LLC v. Nat'l Cas. Co.,
No. CV-20-01312, 2020 WL 6699480 (D. Ariz. Nov. 13, 2020), *appeal filed*,
No. 20-17422 (9th Cir. Dec. 16, 2020) 6, 9

Clear Hearing Sols., LLC v. Cont'l Cas. Co.,
2021 WL 131283 (E.D. Pa. Jan. 14, 2021) 28

Colby Rest. Grp., Inc. v. Utica Nat'l Ins. Grp.,
Civ. No. 20-5927, 2021 WL 1137994 (D.N.J. Mar. 12, 2021)....................7, 12

Crescent Plaza Hotel Owner L.P. v. Zurich Am. Ins. Co.,
No. 20 C 3463, 2021 WL 633356 (N.D. Ill. Feb. 18, 2021)....................22

Cresswell v. Pa. Nat'l Cas. Ins. Co.,
820 A.2d 172 (Pa. Super. Ct. 2003)....................29

Cytopath Biopsy Lab., Inc. v. U.S. Fid. & Guar. Co.,
774 N.Y.S.2d 710 (N.Y. App. Div. 2004) 17

Del. Valley Plumbing Supply, Inc. v. Merchs. Mut. Ins. Co.,
No. 20-CV-08257, 2021 WL 567994 (D.N.J. Feb. 16, 2021) 8

Dental Experts, LLC v. Mass. Bay Ins. Co.,
No. 20 C 5887, 2021 WL 1722781 (N.D. Ill. May 1, 2021) 9

Dickie Brennan & Co. v. Lexington Ins. Co.,
636 F.3d 683 (5th Cir. 2011) 27

Diesel Barbershop, LLC v. State Farm Lloyds,
No. 20-CV-461, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020)....................8, 9

Dime Fitness, LLC dba: Anytime Fitness v. Markel Ins. Co.,
2020 WL 6691467 (Fla. Cir. Ct. Nov. 10, 2020), *appeal filed*, No. 2D20-3662
(Fla. Dist. Ct. App. Dec. 22, 2020) 8

Duck v. First Assur. Life of Am.,
929 F. Supp. 236 (S.D. Miss. 1996)....................10

Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.,
No. 2:20-CV-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020) 14

Equity Planning Corp. v. Westfield Ins. Co.,
No. 20-CV-01204, 2021 WL 766802 (N.D. Ohio Feb. 26, 2021), *appeal filed*,
No. 21-3229 (6th Cir. Mar. 10, 2021)....................7, 15, 28

Eye Care Ctr. of N.J., PA v. Twin City Fire Ins. Co.,
Civ. No. 20-05743, 2021 WL 457890 (D.N.J. Feb. 8, 2021) 14

Franklin EWC, Inc. v. Hartford Fin. Servs. Grp.,
No. 20-CV-04434, 2020 WL 5642483 (N.D. Cal. Sept. 22, 2020) 8, 9

Fujii v. State Farm Fire & Cas. Co.,
857 P.2d 1051 (Wash Ct. App. 1993)...22, 23

Gerleman Mgmt., Inc. v. Atl. States Ins. Co.,
No. 20-CV-183, 2020 WL 8093577 (S.D. Iowa Dec. 11, 2020), *appeal filed*,
No. 21-1082 (8th Cir. Jan. 12, 2021) 7

Goodwill Indus. of Cent. Okla. v. Phila. Indem. Ins. Co.,
No. CV-20-511, 2020 WL 8004271 (W.D. Okla. Nov. 9, 2020), *appeal filed*,
No. 21-6045 (10th Cir. Apr. 13, 2021) 7, 18

Graham v. Pub. Emps. Mut. Ins. Co.,
656 P.2d 1077 (Wash. 1983)..12

Henry's La. Grill, Inc. v. Allied Ins. Co. of Am.,
No. 20-CV-2939, 2020 WL 5938755 (N.D. Ga. Oct. 6, 2020), *appeal filed*,
No. 20-14156 (11th Cir. Nov. 4, 2020)..18

Herr v. Forghani,
161 Wash. App. 1037, 2011 WL 1833829 (2011)...23

Hill & Stout PLLC v. Mut. of Enumclaw Ins. Co.,
No. 20-2-07925, 2020 WL 6784271 (Wash. Super. Ct. King Cty. Nov. 13,
2020) 24, 25, 26

Hillcrest Optical, Inc. v. Cont'l Cas. Co,
No. 20-CV-275, 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020)..................................18

Ira Stier, DDS, P.C. v. Merchs. Ins. Grp.,
127 A.D.3d 922 (N.Y. App. Div. 2015) 16

Isaac's Deli, Inc. v. State Auto Prop. & Cas. Ins. Co.,
No. 20-CV-06165, 2021 WL 1945713 (E.D. Pa. May 14, 2021)...............................11, 16, 21

Island Hotel Props., Inc. v. Fireman's Fund Ins. Co.,
2021 WL 117898 (S.D. Fla. Jan. 11, 2021) 27

J.B.'s Variety Inc. v. Axis Ins. Co.,
No. CV 20-4571, 2021 WL 1174917 (E.D. Pa. Mar. 29, 2021).................................11, 21

J. O. Emmerich & Assocs., Inc. v. State Auto Ins. Cos.,
No. 06-CV-00722, 2007 WL 9775576 (S.D. Miss. Nov. 19, 2007).................................19, 20

James Colgan v. Sentinel Ins. Co.,
No. 20-CV-04780, 2021 WL 472964 (N.D. Cal. Jan. 26, 2021), *appeal filed*,
No. 21-15332 (9th Cir. Feb. 25, 2021) 13, 24

James E. Torina Fine Homes, Inc. v. Mut. of Enumclaw Ins. Co.,
74 P.3d 648 (Wash. Ct. App. 2003)....................29

Jernigan v. Nationwide Mut. Ins. Co.,
No. C 04-5327, 2006 WL 463521 (N.D. Cal. Feb. 27, 2006)....................17

Kahn v. Pa. Nat'l Mut. Cas. Ins. Co.,
No. 1:20-CV-781, 2021 WL 422607 (M.D. Pa. Feb. 8, 2021)....................5

Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.,
Case No. 20-CV-04265, 2020 WL 7696080 (N.D. Cal. Dec. 28, 2020), *appeal filed*, No. 21-15147 (9th Cir. Jan. 25, 2021)....................13

Karmel Davis & Assocs., Attorneys-at-Law, LLC v. The Hartford Fin. Servs. Grp., Inc.,
No. 20-CV-02181, 2021 WL 420372 (N.D. Ga. Jan. 26, 2021)....................28

Kessler Dental Assocs., P.C. v. Dentists Ins. Co.,
No. 20-03376, 2020 WL 7181057 (E.D. Pa. Dec. 7, 2020)....................21

Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.,
No. 20-CV-04783, 2021 WL 141180 (N.D. Cal. Jan. 13, 2021)....................19, 24

L&L Logistics & Warehousing Inc. v. Evanston Ins. Co.,
No. 3:20-CV-324, 2021 WL 1396280 (E.D. Va. Apr. 13, 2021)....................15

Levy Ad Grp., Inc. v. Chubb Corp.,
No. 20-CV-00763, 2021 WL 777210 (D. Nev. Feb. 16, 2021), *appeal filed*, No. 21-15413 (9th Cir. Mar. 9, 2021)....................18

LJ New Haven LLC v. AmGUARD Ins. Co.,
No. 20-CV-00751, 2020 WL 7495622 (D. Conn. Dec. 21, 2020)....................14

Mangia Restaurant Corp. v. Utica First Ins. Co.,
No. 713847/2020 (Queens Cty. Sup. Ct. Mar. 31, 2021)....................29

Manuel v. Wells Fargo Bank Nat'l Ass'n,
123 F. Supp. 3d 810 (E.D. Va. 2015)....................1

Mashallah, Inc. v. W. Bend Mut. Ins. Co.,
No. 20 C 5472, 2021 WL 679227 (N.D. Ill. Feb. 22, 2021), *appeal filed*, No. 21-1507 (7th Cir. Mar. 23, 2021)....................13

Mayssami Diamond, Inc. v. Travelers Cas. Ins. Co.,
No. 20-CV-01230, 2021 WL 1226447 (S.D. Cal. Mar. 20, 2021)....................6

McGavock Street Hospitality Partners, LLC v. Admiral Indem. Co.,
No. 20-CV-694, 2020 WL 7641184 (M.D. Tenn. Dec. 23, 2020)....................18

Mena Catering, Inc. v. Scottsdale Ins. Co.,
No. 20-CV-23661, 2021 WL 86777 (S.D. Fla. Jan. 11, 2021) 7

MHG Hotels, LLC v. *Emasco Ins. Co.*,
No. 20-CV-01620 (S.D. Ind. Mar. 8, 2021)....................18, 24

Michael Cetta, Inc. v. Admiral Indem. Co.,
No. 20-CIV-4612, 2020 WL 7321405 (S.D.N.Y. Dec. 11, 2020)....................18, 24

Moody v. Hartford Fin. Grp., Inc.,
No. CV 20-2856, 2021 WL 135897 (E.D. Pa. Jan. 14, 2021) 9, 20

Morrison v. Mountain Laurel Assurance Co.,
748 A.2d 689 (Pa. Super. Ct. 2000)....................29

Mortar & Pestle Corp. v. Atain Specialty Ins. Co.,
No. 20-CV-03461, 2020 WL 7495180 (N.D. Cal. Dec. 21, 2020)....................15

Mosley v. Pac. Specialty Ins. Co.,
263 Cal. Rptr. 3d 28 (Ct. App. 2020), *review filed* (July 1, 2020) 10

Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.,
No. 20-CV-03213, 2020 WL 5525171 (N.D. Cal. Sept. 14, 2020), *appeal filed*, No. 20-16858 (9th Cir. Sept. 24, 2020) 15, 20

N.H. Indem. Co., Inc. v. Budget Rent-A-Car Sys., Inc.,
64 P.3d 1239 (2003)....................25

Natty Greene's Brewing Co., LLC v. Travelers Cas. Ins. Co.,
No. 20-CV-437, 2020 WL 7024882 (M.D.N.C. Nov. 30, 2020)....................7

Newchops Rest. Comcast LLC, 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020) 11, 16, 21

Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins, Co.,
17 F. Supp. 3d 323 (S.D.N.Y. 2014)....................24

Noxubee Cty. Sch. Dist. v. United Nat'l Ins. Co.,
883 So. 2d 1159 (Miss. 2004)....................5

O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co.,
No. 20-CV-02951, 2021 WL 105772 (N.D. Cal. Jan. 12, 2021)....................18

Pane Rustica, Inc. v. Greenwich Ins. Co.,
No. 20-CV-1783, 2021 WL 1087219 (M.D. Fla. Mar. 22, 2021) 7

Paradigm Care & Enrichment Ctr., LLC v. W. Bend Mut. Ins. Co.,
No. 20-CV, 2021 WL 1169565 (E.D. Wis. Mar. 26, 2021) 22

Paul Glat MD, P.C. v. Nationwide Mut. Ins. Co.,
No. CV 20-5271, 2021 WL 1210000 (E.D. Pa. Mar. 31, 2021)....................11

Perry Street Brewing Co., LLC v. Mut. of Enumclaw Ins. Co.,
No. 20-2-02212-32, 2020 WL 7258116 (Wash. Super. Ct. Spokane Cty. Nov. 23, 2020) 24, 25, 26

Precious Treasures, LLC v. Markel Ins. Co.,
No. CAM-L-2690-20 (N.J. Super. Ct. L. Div. Nov. 13, 2020), *appeal filed*, No. A-000962-20 (N.J. Super. Ct. App. Div. Mar. 8, 2020) 8

Promotional Headwear Int'l v. Cincinnati Ins. Co.,
No. 20-CV-2211, 2020 WL 7078735 (D. Kan. Dec. 3, 2020)....27

Protege Rest. Partners LLC v. Sentinel Ins. Co., Ltd.,
No. 20-CV-03674, 2021 WL 428653 (N.D. Cal. Feb. 8, 2021) 14, 25

Pure Fitness LLC v. Twin City Fire Ins. Co.,
No. 20-CV-775-RDP, 2021 WL 512242 (N.D. Ala. Feb. 11, 2021)....8

Q Clothier New Orleans LLC v. Twin City Fire Ins. Co.,
Civ. No. 20-1470, 2021 WL 1600247 (E.D. La. Apr. 23, 2021)....18

Quadrant Corp. v. Am. States Ins. Co.,
110 P.3d 733 (Wash. 2005)....12

Quakerbridge Early Learning LLC v. Selective Ins. Co. of N.E.,
No. CV-20-7798, 2021 WL 1214758 (D.N.J. Mar. 31, 2021), *appeal filed*, No. 21-1719 (3d Cir. Apr. 20, 2021) 7

Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.,
No. 20-CV-22833, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020) 18

RDS Vending LLC v. Union Ins. Co.,
No. CV 20-3928, 2021 WL 1923024 (E.D. Pa. May 13, 2021) 10

Real Hospitality, LLC v. Travelers Cas. Ins. Co. of Am.,
No. 20-CV-00087, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020)....7, 10, 20

Riverside Dental of Rockford, Ltd. v. Cincinnati Ins. Co.,
No. 20 CV 50284, 2021 WL 346423 (N.D. Ill. Jan. 19, 2021)....29

Riverwalk Seafood Grill Inc. v. Travelers Cas. Ins. Co. of Am.,
No. 20-CV-03768, 2021 WL 81659 (N.D. Ill. Jan. 7, 2021)....8

Rococo Steak, LLC v. Aspen Specialty Ins. Co.,
No. 8:20-CV-2481, 2021 WL 268478 (M.D. Fla. Jan. 27, 2021), *appeal filed*, No. 21-10672 (11th Cir. Feb. 26, 2021) 28

Santo's Italian Cafe LLC v. Acuity Ins. Co.,
No. 20-CV-01192, 2020 WL 7490095 (N.D. Ohio Dec. 21, 2020) 18

SAS Int'l, Ltd. v. Gen. Star Indem. Co.,
No. 20-11864, 2021 WL 664043 (D. Mass. Feb. 19, 2021), *appeal filed*, No. 21-1219 (1st Cir. Mar. 24, 2021) 18

Seifert v. IMT Ins. Co.,
No. 20-1102, 2020 WL 6120002, at *3 (D. Minn. Oct. 16, 2020) 18

Selane Prod., Inc. v. Cont'l Cas. Co.,
No. 20-CV-07834, 2020 WL 7253378 (C.D. Cal. Nov. 24, 2020)....................18

Shantzer v. Travelers Cas. Ins. Co. of Am.,
No. CV 20-2093, 2021 WL 1209845 (E.D. Pa. Mar. 31, 2021), *appeal filed*, No. 21-1716 (3d Cir. Apr. 20, 2021) 11

Skillets, LLC v. Colony Ins. Co.,
No. 3:20-CV-678, 2021 WL 926211 (E.D. Va. Mar. 10, 2021), *appeal filed*, No. 21-1268 (4th Cir. Mar. 11, 2021)....................5, 15

SSN Hotel Mgmt., LLC v. Harford Mut. Ins. Co.,
No. CV 20-6228, 2021 WL 1339993 (E.D. Pa. Apr. 8, 2021), *appeal filed*, No. 12-1921 (3rd Cir. May 10, 2021)....................11

St. Julian Wine Co. v. Cincinnati Ins. Co.,
No. 20-CV-374, 2021 WL 1049875 (W.D. Mich. Mar. 19, 2021)....................18

Summit Hospitality Grp., Ltd. v. Cincinnati Inc. Co.,
No. 20-CV-254, 2021 WL 831013 (E.D.N.C. Mar. 4, 2021) 19

TAQ Willow Grove, LLC v. Twin City Fire Ins.,
No. 20-3863, 2021 WL 131555 (E.D. Pa. Jan. 14, 2021)....................21

The Woolworth LLC v. Cincinnati Ins. Co.,
No. 20-CV-01084, 2021 WL 1424356 (N.D. Ala. Apr. 15, 2021)....................25, 26

TJBC, Inc. v. Cincinnati Ins. Co., Inc.,
No. 20-cv-815, 2021 WL 243583 (S.D. Ill. Jan. 25, 2021), *appeal filed*, No. 21-1203 (7th Cir. Feb. 2, 2021) 24

Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.,
No. 20-CV-03342, 2020 WL 7024287 (E.D. Pa. Nov. 30, 2020) 7, 11

Torres Hillsdale Country Cheese, L.L.C. v. Auto-Owners Ins. Co.,
Dkt. No. 308824, 2013 WL 5450284 (Mich. Ct. App. Oct. 1, 2013)....................17

Tria WS LLC v. Am. Auto. Ins. Co.,
No. CV 20-4159, 2021 WL 1193370 (E.D. Pa. Mar. 30, 2021), *appeal filed*, No. 21-1741 (3rd Cir. Apr. 16, 2021)....................21

Trinity Indus., Inc. v. Ins. Co. of N. Am.,
916 F.2d 267 (5th Cir. 1990) 23

Turek Enters. v. State Farm Mut. Auto. Ins. Co.,
No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020)....................8

U.S. Fidelity & Guar. Co. v. Wigginton,
964 F.2d 487 (5th Cir. 1992) 29

Ultimate Hearing Solutions II, LLC v. Twin City Fire Ins.,
No. 20-2401, 2021 WL 131556 (E.D. Pa. Jan. 14, 2021)....................21

Uncork & Create LLC v. Cincinnati Ins. Co.,
No. 20-CV-00401, 2020 WL 6436948 (S.D. W.Va. Nov. 2, 2020) 19

Ungarean v. CNA,
No. GD-20-006544 (Pa. Com. Pl. Mar. 22, 2021)....................21

Villella v. Pub. Emps. Mut. Ins. Co.,
725 P.2d 957 (Wash. 1986)....................12

Visconti Bus Serv., LLC v. Utica Nat'l Ins. Grp.,
2021 WL 609851, at *12 (N.Y. Sup. Ct. Feb. 12, 2021)....................27

Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.,
No. 20-CV-1277, 2021 WL 389215 (S.D. Cal. Feb. 3, 2021)....................18, 28

Whiskey Flats Inc. v. Axis Ins. Co.,
No. CV 20-3451, 2021 WL 534471....................11

Whiskey River on Vintage, Inc. v. Ill. Cas. Co.,
No. 20-CV-185, 2020 WL 7258575 (S.D. Iowa Nov. 30, 2020), *appeal filed*,
No. 20-3707 (8th Cir. Dec. 29, 2020)....................17, 18

Windber Hosp. v. Travelers Prop. Cas. Co. of Am.,
No. 3:20-CV-80, 2021 WL 1061849 (W.D. Pa. Mar. 18, 2021) 21

Wolstein v. Yorkshire Ins. Co.,
985 P.2d 400 (Wash. Ct. App. 1999)....................23

Wright v. State Farm Fire & Cas. Co.,
555 F. App'x 575 (6th Cir. 2014) 16

Zhaoyun Xia v. ProBuilders Specialty Ins. Co. RRG,
400 P.3d 1234 (Wash. 2017)....................12

Zwillo V. Corp. v. Lexington Ins. Co.,
No. 20-00339-CV, 2020 WL 7137110 (W.D. Mo. Dec. 2, 2020), *appeal filed*,
No. 21-1015 (8th Cir. Jan. 5, 2021) 18

Other Authorities

Fed. R. Civ. P. 12(b)(6)....................1

Couch on Insurance (3d ed. 2007)....................19

New Shorter Oxford English Dictionary (1993)....................10

Leslie Scism, *Companies Hit by Covid-19 Want Insurance Payouts. Insurers Say No.*, Wall St. J. (June 30, 2020) 27

INTRODUCTION

This Court should dismiss with prejudice the Complaint of Plaintiffs Fountain Enterprises, LLC ("Fountain"),[1] KZone Sports, Fitness, And Wellness LLC ("KZone"), B Fit B You LLC ("B Fit"), EWT Enterprises Inc. ("EWT"), GMT Fitness Enterprise LLC ("GMT"), Vita Grata LLC ("Vita"), and Northwest Wellness & Fitness LLC ("Northwest") under Fed. R. Civ. P. 12(b)(6). The Complaint fails to state a claim against Defendant Markel Insurance Company ("MIC").[2] As a matter of law, Plaintiffs are not entitled to insurance coverage for alleged losses resulting from the coronavirus pandemic for multiple independent reasons addressed in this motion.

First, Plaintiffs allege facts that establish the applicability of various preclusive exclusions. Their policies' "Exclusion of Loss Due to Virus or Bacteria" broadly declares, "We will not pay for loss or damage caused by or resulting from any virus." Such alleged losses are the gravamen of Plaintiffs' Complaint.

Second, Plaintiffs' insurance policies require "direct physical" loss of or damage to property. The policies do not cover the purely economic losses alleged here.

Additionally, "Civil Authority" coverage is triggered only (1) if an order was issued "as a result of" damage to property other than property at the insured premises, and "in response to" "dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage," and (2) if the order "prohibit[ed] access" to Plaintiffs' insured premises. Plaintiffs cannot meet their burden to establish either of these coverage requirements under the Civil Authority provision.

---

[1] This is the second forum in which Fountain has pursued these same claims. Fountain filed a nearly identical Class Action Complaint in the Northern District of Illinois on June 24, 2020, Case No. 1:20-CV-03689. After MIC prepared and filed a motion to dismiss in that case, Fountain filed a notice of dismissal. MIC intends to file a motion for its attorneys' fees incurred in the initial forum as contemplated by Rule 41(d).

[2] Because the named plaintiffs in this action fail to state a claim, this entire action must be dismissed. *See Bass v. Butler*, 116 F. App'x 376, 385 (3d Cir. 2004) ("Because no class has been certified here, if [plaintiffs'] claim fails, the entire action must be dismissed."); *cf. Manuel v. Wells Fargo Bank Nat'l Ass'n*, 123 F. Supp. 3d 810, 816 (E.D. Va. 2015) ("If a named plaintiff in a putative class action cannot establish that he has standing to pursue a claim or claims, then the entire action must be dismissed as to the claim or claims as to which standing is lacking.").

BACKGROUND

A. The Policy

1. The Policy coverages at issue all require direct physical loss of or damage to property.

Plaintiffs each purchased MIC commercial property insurance policies which they allege contain identical relevant terms. (ECF No. 9 ¶¶ 95-100, 104.) Plaintiffs invoke the insurance policies' Business Income and Extra Expense Coverages (Counts I-III), Extended Business Income Coverage (Counts IV-VI), and Civil Authority Coverage (Counts VII-IX). (ECF No. 9 ¶¶ 105, 109, 111, 113, 114.)

All of the coverages at issue require "direct physical" loss of or damage to either the insured premises or, in the case of Civil Authority Coverage, to property within one mile of the insured premises. Business Income Coverage applies only where there is a loss of Business Income sustained due to a necessary suspension of operations, which "must be caused by *direct physical loss of or damage to property* at premises that are described in the Declarations of the policy." (ECF No. 9 ¶ 109 (emphasis added); ECF No. 9-1 at 94-95, subpts. F.1-2.) Extra Expense Coverage also requires "direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss." (ECF No. 9-1 at 95, subpt. F.3 (emphasis added); *id.* at 95, subpt. F.4; *id.* at 64, § A ("Covered Cause of Loss" means "direct physical loss unless the loss is excluded or limited in this policy" (emphasis added).) Extended Business Income Coverage applies only where there is a "Business Income loss payable under this policy." (ECF No. 9 ¶ 111; ECF No. 9-1 at 96 subpt. F.6.c.) And that section of the Policy reiterates that loss of Business Income "must be caused by *direct physical loss or damage* at the described premises caused by or resulting from a Covered Cause of Loss." (*Id.* (emphasis added).)

The Policy's Business Income and Extra Expense (and, by extension, Extended Business Income) provisions afford coverage only during the "period of restoration." (ECF No. 9 ¶¶ 109, 111; ECF No. 9-1 at 95, subpts. F.1-3.) The "period of restoration" ends when damaged premises are or should be "repaired, rebuilt or replaced." (ECF No. 9-1 at 116 subpt. J.1.b.(1).)

The Policy's Civil Authority provision, too, applies only to risks of "direct physical loss" and requires "damage to property other than," and "not more than one mile from," the insured premises. (ECF No. 9 ¶ 113; ECF No. 9-1 at 95-96 subpt. F.6.a.i.; ECF No. 9-1 at 64, § A (defining "Covered Cause of Loss").) As reflected in the below-quoted policy section, two additional requisites for coverage under the Civil Authority provision are (1) an action of civil authority issued "as a result of" the damage to that other property and (2) the action of civil authority must have "prohibit[ed] access" to the insured premises:

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

(ECF No. 9 ¶ 113; ECF No. 9-1 at 95-96 subpt. F.6.a. (emphasis added).)

2. Multiple exclusions apply to Plaintiffs' claims.

The Policy contains several pertinent exclusions. First, the Policy's Exclusion of Loss Due to Virus or Bacteria (the "Virus Exclusion") applies to "all coverage under all forms and endorsements" of the Policy and broadly excludes payment for "loss or damage caused by or resulting from any virus" (ECF No. 9-1 at 253; *see* ECF No. 9 ¶¶ 134-35):

> **EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA**
>
> **A.** The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

> **B.** We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

Additionally, the Policy excludes from coverage "loss or damage caused by or resulting from … [d]elay, loss of use or loss of market." (ECF No. 9-1 at 66 subpt. B.2.b.) The Policy also contains an exclusion for "Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body." (*Id.* at 67 subpt. B.3.b.) And the Policy further contains an "ordinance or law" exclusion, which provides that MIC "will not pay for damage caused directly or indirectly by ... [t]he enforcement of any ordinance or law regulating the construction, use or repair of any property." (*Id.* at 64 subpt. B.1.a.)

B. The Complaint's allegations establish the exclusions' applicability and fail to plausibly plead direct physical loss.

Fountain alleges that it owns and operates four Anytime Fitness locations in Mississippi and Alabama (ECF No. 9 ¶ 2) and that it suspended business at those locations based on certain coronavirus-driven orders issued by state and local government authorities in those states (*id.* ¶¶ 16-21.) KZone, B Fit, EWT, and GMT allege that they are franchisees of Anytime Fitness in Pennsylvania (*id.* ¶¶ 4-6) and that they suspended business based on certain coronavirus-driven orders issued in Pennsylvania (*id.* ¶¶ 33-34, 44-45, 55-56). Vita and Northwest allege that they are franchisees of Anytime Fitness in Washington state (*id.* ¶¶ 3, 7) and that they suspended business based on certain coronavirus-driven orders issued in Washington (*id.* ¶¶ 27-28, 66-67).

Plaintiffs conclusorily allege that their "Covered Property suffered 'direct physical loss or damage' due to the Closure Orders mandating that Plaintiff[s] discontinue primary use of the Covered Property." (*Id.* ¶ 91.) Plaintiffs further allege that they "suffered direct physical loss *of use* of the covered property for its intended purposes." (*Id.* ¶ 224 (emphasis added).) They aver that they have been required to "alter the physical characteristics of how their business can be used" (due to sanitization requirements and the like) and to "change the physical layouts of their businesses" and impose "physical restrictions" and such (*id.* ¶¶ 242-46)—but not as a result of any direct *physical* loss of or damage to property.

None of the named Plaintiffs allege any concrete or plausible instances of physical loss of or damage to either their property or to any property within a mile of insured premises. Rather, Plaintiffs affirmatively plead economic losses "as a result of" the coronavirus-driven orders issued in Plaintiffs' respective jurisdictions. (ECF No. 9 ¶¶ 21 (Fountain), 34 (KZone), 45 (B Fit), 56 (EWT & GMT), 67 (Northwest), 78 (Vita).) As Plaintiffs had it in their original Complaint, their losses occurred "given the response to the global pandemic associated with the spread of COVID-19." (ECF No. 1 ¶ 95.)

ARGUMENT

Plaintiffs' claims here are governed by Mississippi, Pennsylvania, and Washington law. "This Court, sitting in diversity, must apply Virginia's choice-of-law rules. In Virginia, the law of the place where the insurance contract is delivered controls." *Skillets, LLC v. Colony Ins. Co.*, No. 3:20-CV-678, 2021 WL 926211, at *4 n.5 (E.D. Va. Mar. 10, 2021) (citations omitted) (dismissing with prejudice a claim for coronavirus-related business-interruption coverage), *appeal filed*, No. 21-1268 (4th Cir. Mar. 11, 2021). Fountain's insurance policy was delivered in Mississippi insuring properties in Mississippi and Alabama. (ECF No. 9-1 at 9; ECF No 9-1 at 205.) Fountain is also domiciled in Mississippi. (ECF No. 9 ¶ 2.) The policies for KZone, EWT and GMT, and B Fit were delivered in Pennsylvania insuring properties in Pennsylvania. (*See* Ex. 1, including Declarations for policies issued to KZone, EWT and GMT, and B Fit.) Those plaintiffs are also domiciled in Pennsylvania. (ECF No. 9 ¶¶ 4-6.) Vita's and Northwest's insurance policies were delivered in Washington insuring properties in Washington. (Ex. 4 at MIC_VITA_000009; Ex. 1, Declarations for Northwest's policy.) Vita and Northwest are also domiciled in Washington. (ECF No. 9 ¶¶ 3, 7.)

Under all three states' laws, when, as here, "the words of an insurance policy are plain and unambiguous, the court will afford them their plain, ordinary meaning and will apply them as written." *Noxubee Cty. Sch. Dist. v. United Nat'l Ins. Co.*, 883 So. 2d 1159, 1165 (Miss. 2004); *see Kahn v. Pa. Nat'l Mut. Cas. Ins. Co.*, No. 1:20-CV-781, 2021 WL 422607, at *4 (M.D. Pa. Feb. 8, 2021); *Dolsen Cos. v. Bedivere Ins. Co.*, 264 F. Supp. 3d 1083, 1088 (E.D. Wash. 2017).

A straightforward reading of the Policy in relation to the Complaint shows that the Policy's Virus Exclusion bars coverage. Nor have Plaintiffs plausibly alleged the requisite direct physical loss of or damage to any relevant property. Accordingly, the Court must enter judgment in MIC's favor and dismiss Plaintiffs' Complaint with prejudice.

I. Exclusions Bar Coverage for Plaintiffs' Claims.

A. The Virus Exclusion precludes all of Plaintiffs' claims.

Plaintiffs' claims all fail as a matter of law under the Policy's Virus Exclusion, which "applies to all coverage under all forms and endorsements" of the Policy, specifically "including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority." (ECF No. 9-1 at 253.) Under the Virus Exclusion, MIC "will not pay for loss or damage *caused by or resulting from any virus*, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (*Id.* (emphasis added).) In addition, Plaintiffs' coverage theories all require a "Covered Cause of Loss." (*See, e.g.*, ECF No. 9 ¶¶ 105, 109, 111, 113 (quoting Policy language for each allegedly applicable coverage).) The Policy defines "Covered Cause of Loss" to mean "direct physical loss *unless the loss is excluded … in this policy*." (ECF No. 9-1 at 64 § A (emphasis added).) The Virus Exclusion thus removes from the scope of a "Covered Cause of Loss" all claims caused by or resulting from a virus.

With apparent unanimity, courts across the country have held that the same form of Virus Exclusion at issue in this case unambiguously bars coverage for coronavirus-related business-interruption losses.[3] Among these are the only two decisions addressing the Virus Exclusion under

[3] Examples include *Chattanooga Prof'l Baseball LLC v. Nat'l Cas. Co.*, No. CV-20-01312, 2020 WL 6699480, at *2-3 (**D. Ariz.** Nov. 13, 2020) (plain language of Virus Exclusion barred claims "whether … caused by the government's orders in response to the virus or the virus itself"), *appeal filed*, No. 20-17422 (9th Cir. Dec. 16, 2020); *10E, LLC v. Travelers Indem. Co. of Conn.*, No. 20-CV-04418, 2020 WL 6749361, at *3 (**C.D. Cal**. Nov. 13, 2020) ("[T]he plain meaning of the virus exclusion does foreclose coverage under the Policy."), *appeal filed*, No. 20-56206 (9th Cir. Nov. 17, 2021); *Boxed Foods Co., LLC v. Cal. Capital Ins. Co.*, No. 20-CV-04571, 2020 WL 6271021, at *5 (**N.D. Cal**. Oct. 26, 2020) ("[T]he Virus Exclusion is only subject to one reasonable interpretation: that coverage does not extend to any claim premised on virus-induced damage."); *Mayssami Diamond, Inc. v. Travelers Cas. Ins. Co.*, No. 20-CV-01230, 2021 WL 1226447, at *4

Mississippi and Washington law. Both of these cases (each addressed more fully below) found the exclusion unambiguous and applied it in granting dismissals with prejudice. *See Real Hospitality, LLC v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-00087, 2020 WL 6503405, at *8 (S.D. Miss. Nov. 4, 2020); *Colby Rest. Grp., Inc. v. Utica Nat'l Ins. Grp.*, Civ. No. 20-5927, 2021 WL 1137994, at *2-5 (D.N.J. Mar. 12, 2021) (applying Washington, Florida, and New Jersey law). Similarly, in at least eight decisions addressed below, courts applying Pennsylvania law have applied the "unambiguous" Virus Exclusion to bar claims like Plaintiffs'. E.g., *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 20-CV-03342, 2020 WL 7024287, at *3, 4 (E.D. Pa. Nov. 30, 2020).

(**S.D. Cal.** Mar. 20, 2021) (Virus Exclusion bars claims for Business Income, Extra Expense, Extended Business Income, and Civil Authority coverage); *Pane Rustica, Inc. v. Greenwich Ins. Co*., No. 20-CV-1783, 2021 WL 1087219, at *3 (**M.D. Fla**. Mar. 22, 2021) ("[D]istrict courts around the country have almost universally dismissed with prejudice claims for loss due to COVID-19 shutdowns based on identical or substantially similar virus exclusions."); *Mena Catering, Inc. v. Scottsdale Ins. Co.*, No. 20-CV-23661, 2021 WL 86777, at *8-10 (**S.D. Fla.** Jan. 11, 2021) ("Plaintiff's losses are 'caused by or result[] from' COVID-19, a virus …."); *AFM Mattress Co., LLC v. Motorists Com. Mut. Ins. Co.*, No. 20-CV-3556, 2020 WL 6940984, at *3 (**N.D. Ill.** Nov. 24, 2020) (finding no coverage for virus-related loss under Virus Exclusion); *Gerleman Mgmt., Inc. v. Atl. States Ins. Co.*, No. 20-CV-183, 2020 WL 8093577, at *6 (**S.D. Iowa** Dec. 11, 2020) ("The Virus Exclusion is therefore triggered, and coverage is excluded even if Plaintiffs could establish coverage under the Business Income, Extra Expense, or Civil Authority provisions of the insurance policy."), *appeal filed*, No. 21-1082 (8th Cir. Jan. 12, 2021); *Ballas Nails & Spa, LLC v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-1155, 2021 WL 37984, at *4 (**E.D. Mo.** Jan. 5, 2021) ("The primary cause of Ballas's business temporarily closing was the presence of the virus in St. Louis County and the State of Missouri."); *Quakerbridge Early Learning LLC v. Selective Ins. Co. of N.E.*, No. CV-20-7798, 2021 WL 1214758, at *4 (**D.N.J.** Mar. 31, 2021) ("The Court finds no reason to deviate from this growing line of recent opinions and finds that the Virus Exclusion clearly and unambiguously bars coverage for Plaintiff's claims."), *appeal filed*, No. 21-1719 (3d Cir. Apr. 20, 2021); *Natty Greene's Brewing Co., LLC v. Travelers Cas. Ins. Co.*, No. 20-CV-437, 2020 WL 7024882, at *3, 4 (**M.D.N.C.** Nov. 30, 2020) (various exclusions, including the Virus Exclusion form at issue here, "unambiguously exclude coverage for loss or damage … resulting from" a virus); *Equity Planning Corp. v. Westfield Ins. Co.*, No. 20-CV-01204, 2021 WL 766802, at *18 (**N.D. Ohio** Feb. 26, 2021) ("The Court finds that the Virus Exclusion unambiguously excludes coverage for E.P.'s alleged COVID-19-related losses."), *appeal filed*, No. 21-3229 (6th Cir. Mar. 10, 2021); and *Goodwill Indus. of Cent. Okla. v. Phila. Indem. Ins. Co.*, No. CV-20-511, 2020 WL 8004271, at *5 (**W.D. Okla**. Nov. 9, 2020) ("COVID-19 clearly qualifies as a 'virus' that caused [plaintiff] to close its doors, which bars coverage under the Virus Endorsement."), *appeal filed*, No. 21-6045 (10th Cir. Apr. 13, 2021).

Further, two courts have decided motions to dismiss addressing the Virus Exclusion in other MIC policies. Both held that the Virus Exclusion precludes coverage, and dismissed plaintiffs' claims with prejudice. The plaintiff in *Dime Fitness, LLC dba: Anytime Fitness v. Markel Ins. Co.*, in fact, was another Anytime Fitness franchisee and putative class member under Plaintiffs' class definition here (*see* ECF No. 9 ¶ 259). 2020 WL 6691467 (Fla. Cir. Ct. Nov. 10, 2020), *appeal filed*, No. 2D20-3662 (Fla. Dist. Ct. App. Dec. 22, 2020). The Florida Circuit Court held that the franchisee's alleged loss "was caused by or resulted from COVID-19 – a virus," under "a plain and reasonable reading of the language." *Id.* at *5, 6. Similarly, in *Precious Treasures, LLC v. Markel Ins. Co.*, No. CAM-L-2690-20 (N.J. Super. Ct. L. Div. Nov. 13, 2020), *appeal filed*, No. A-000962-20 (N.J. Super. Ct. App. Div. Mar. 8, 2020), the court concluded that the executive orders were "all due to COVID-19, the virus"; the "clear" Virus Exclusion thus barred coverage. (ECF No. 7-2, Hr'g Tr. 17:18-19, 18:1-4, 18:13-22.) Courts construing other forms of virus exclusion have also overwhelmingly held that they foreclose coverage.[4]

Because Plaintiffs allege losses that unquestionably result from the coronavirus, their claims must be dismissed. Fountain alleges, for example, losses from a Fulton, Mississippi order that was issued "due to the recent outbreak of infections and deaths associated with the 'Coronavirus Disease' (COVID-19)." (ECF No. 9-3, Fulton, Mississippi Order; ECF No. 9 ¶ 16.) It alleges losses from a West Point, Mississippi order issued "due to the coronavirus COVID-19 pandemic." (ECF No. 9-4, West Point, Mississippi Order; ECF No. 9 ¶ 17.) It points to losses from

---

[4] *See, e.g.*, *Pure Fitness LLC v. Twin City Fire Ins. Co.*, No. 20-CV-775-RDP, 2021 WL 512242, at *4 (N.D. Ala. Feb. 11, 2021) (virus exclusion applied because "COVID-19, which was the root cause of Plaintiff's losses, is a virus"); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp.*, No. 20-CV-04434, 2020 WL 5642483, at *2 (N.D. Cal. Sept. 22, 2020); *Riverwalk Seafood Grill Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-03768, 2021 WL 81659, at *3 (N.D. Ill. Jan. 7, 2021); *Turek Enters. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020) ("By its plain terms, 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.'"); *Del. Valley Plumbing Supply, Inc. v. Merchs. Mut. Ins. Co.*, No. 20-CV-08257, 2021 WL 567994, at *6 (D.N.J. Feb. 16, 2021); *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, Civ. No. 20-3198, 2020 WL 6545893, at *4 (E.D. Pa. Nov. 6, 2020); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 20-CV-461, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020).

a Clay County, Mississippi resolution entered "as a result of the outbreak of COVID-19." (ECF No. 9-5, Clay County, Mississippi Resolution; ECF No. 9 ¶ 18) It alleges that Alabama orders or proclamations—issued "in response to" the coronavirus pandemic—forced it to suspend operations. (ECF No. 9-7, Alabama Order; ECF No. 9 ¶ 20.) Vita and Northwest allege losses due to government orders issued in Washington "as a result of the coronavirus disease 2019 (COVID-19)." (ECF No. 9-9, Washington Order; ECF No. 9 ¶¶ 67, 78.)[5] KZone, B Fit, EWT, and GMT all allege losses due to Pennsylvania government orders (ECF No. 9 ¶¶ 34, 45, 56), which also were issued "to mitigate the spread of COVID-19." *Moody v. Hartford Fin. Grp., Inc.*, No. CV 20-2856, 2021 WL 135897, at *2 (E.D. Pa. Jan. 14, 2021).

Whether Plaintiffs' losses are alleged to flow from the virus itself or virus-precipitated civil-authority orders, the losses plainly result from the coronavirus and are barred by the Virus Exclusion's plain language. Because "the shutdown orders were enacted in direct response to the coronavirus …; it therefore follows that … any business income loss [plaintiff] suffered due to a shutdown order resulted from the virus …." *Dental Experts, LLC v. Mass. Bay Ins. Co.*, No. 20 C 5887, 2021 WL 1722781 (N.D. Ill. May 1, 2021) (applying same form of Virus Exclusion to bar claims for Business Income and Civil Authority coverage); *see also, e.g.*, *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 20-CV-461, 2020 WL 4724305, *6 (W.D. Tex. Aug. 13, 2020) (coronavirus is "the primary root cause" of alleged losses); *Chattanooga Prof'l Baseball LLC*, 2020 WL 6699480, at *2-3 (D. Ariz. Nov. 13, 2020) (plain language of Virus Exclusion barred claims "whether … caused by the government's orders in response to the virus or the virus itself"); *Franklin EWC, Inc. v. The Hartford Finn. Servs. Grp., Inc.*, No. 20-CV-04434 JSC, 2020 WL 5642483, at *2 (N.D. Cal. Sept. 22, 2020) ("[U]nder Plaintiffs' theory, the loss is created by the Closure Orders rather than the virus, and therefore the Virus Exclusion does not apply. Nonsense.").

---

[5] While Plaintiffs have not attached to their Amended Complaint the Pennsylvania orders they assert restricted their operations, they admit the orders were "due to existing emergency circumstances" and point to no circumstance other than the coronavirus pandemic. (ECF No. 9 ¶¶ 5, 33, 44.)

1. The Virus Exclusion bars Fountain's claims under Mississippi law.

The only court to have addressed the Virus Exclusion under Mississippi law fully agreed with the national consensus regarding its plain meaning and effect. In *Real Hospitality, LLC v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-00087, 2020 WL 6503405, at *8 (S.D. Miss. Nov. 4, 2020), the court dismissed the plaintiff's claims with prejudice, finding that the same form of Virus Exclusion at issue here "clearly and unequivocally" barred coverage for losses stemming from government orders issued to stop the spread of the coronavirus. *Id.* at *8.

Indeed, the Virus Exclusion applies broadly to preclude coverage for losses "caused by or resulting from" a virus. The term "resulting from" in an insurance contract is "broadly interpret[ed]," and it "broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship." *Mosley v. Pac. Specialty Ins. Co.*, 263 Cal. Rptr. 3d 28, 35 (Ct. App. 2020) (quotation omitted), *review filed* (July 1, 2020). As the U.S. Supreme Court has explained, "[a] thing 'results' when it '[a]rise[s] as an effect, issue, or outcome from some action, process or design.'" *Burrage v. United States*, 571 U.S. 204, 210-11 (2014) (quoting *The New Shorter Oxford English Dictionary* 2570 (1993)). "[C]ourts regularly read phrases like 'results from' to require but-for causality." *Id.* at 212. Thus, under Mississippi insurance law, a loss "resulted from" a prior condition within the meaning of a policy where the "condition set in motion the chain of events culminating in the [loss], which by the causal chain, is directly linked to the … condition." *Duck v. First Assur. Life of Am.*, 929 F. Supp. 236, 239 (S.D. Miss. 1996) (plaintiff's "disability because of the staph infection is properly said to have 'resulted from' his preexisting osteoarthritic knee condition" where the preexisting condition led to a knee-replacement surgery that caused the plaintiff to develop the infection).

2. The Virus Exclusion bars KZone's, B Fit's, EWT and GMT's claims under Pennsylvania law.

Courts applying Pennsylvania law have uniformly agreed that the same Virus Exclusion in Plaintiffs' Policy bars losses from coronavirus-driven closure orders. E.g., *RDS Vending LLC v. Union Ins. Co.*, No. CV 20-3928, 2021 WL 1923024, at *6 (E.D. Pa. May 13, 2021) (The Virus "[E]xclusion is comprehensively worded. Under its unambiguous language, the policy does not

cover losses or damage caused by SARS-CoV-2, the novel coronavirus that causes COVID-19. Because all of Plaintiff's claims for coverage are due to COVID-19, this exclusion is fatal to Plaintiff's claims."). Several of these decisions have emphasized that the Virus Exclusion *explicitly* applies to the Business Income, Extra Expense, and Civil Authority coverages at issue here.

The court in *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, for instance, applied the Virus Exclusion to bar coverage for Business Income and Civil Authority claims, emphasizing the exclusion's explicit application to those coverages. No. CV 20-1869, 2020 WL 7395153, at *8 (E.D. Pa. Dec. 17, 2020). The Virus Exclusion specifically "contemplates a civil authority action taken in response to a virus," the court noted, and "excludes it from coverage." *Id.* The court in *Shantzer v. Travelers Cas. Ins. Co. of Am.* concurred: "Whether COVID-19 or the government shutdown caused [plaintiff's] loss is immaterial. The virus exception explicitly states it excludes coverage under any other provision in the policy, including the business income and extra expense provision and the civil authority provision." No. CV 20-2093, 2021 WL 1209845, at *5 (E.D. Pa. Mar. 31, 2021), *appeal filed*, No. 21-1716 (3rd Cir. Apr. 20, 2021). And the court in *J.B.'s Variety Inc. v. Axis Ins. Co*. agreed: "[T]he language of the exclusion is not ambiguous and clearly states that it 'applies to all coverage under all forms and endorsements [ ], including ... forms or endorsements that cover business income, extra expense or action of civil authority.'" No. CV 20-4571, 2021 WL 1174917, at *5 (E.D. Pa. Mar. 29, 2021).

Other cases construing the same Virus Exclusion under Pennsylvania law have likewise applied it to dismiss claims like Plaintiffs'. *See SSN Hotel Mgmt., LLC v. Harford Mut. Ins. Co*., No. CV 20-6228, 2021 WL 1339993, at *5 (E.D. Pa. Apr. 8, 2021), *appeal filed*, No. 12-1921 (3d Cir. May 10, 2021); *Paul Glat MD, P.C. v. Nationwide Mut. Ins. Co*., No. CV 20-5271, 2021 WL 1210000, at *7 (E.D. Pa. Mar. 31, 2021); *Whiskey Flats Inc. v. Axis Ins. Co.*, No. CV 20-3451, 2021 WL 534471, at *4 (E.D. Pa. Feb. 12, 2021, *appeal filed*, No. 21-1294 (3rd Cir. Feb. 18, 2021); *Toppers Salon & Health Spa, Inc.*, 2020 WL 7024287, at *3-4 (E.D. Pa. Nov. 30, 2020). Indeed, research has not identified any case that declined on the merits to apply this form of Virus Exclusion to bar coverage for claims like Plaintiffs'.

3. The Virus Exclusion bars Vita's and Northwest's claims under Washington law.

Washington law is equally clear that a court must apply "the plain meaning of the contract," *Ainsworth v. Progressive Cas. Ins. Co.*, 322 P.3d 6, 11 (Wash. Ct. App. 2014), including the "plain language of [an] exclusion," *Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d 733, 741 (Wash. 2005). While no Washington court has yet decided a dispositive motion involving a virus exclusion, a New Jersey federal court recently considered the same Virus Exclusion at issue here under the laws of Washington, Florida, and New Jersey. In *Colby Restaurant Group, Inc. v. Utica National Ins. Grp.*, Civ. No. 20-5927, 2021 WL 1137994, at *2-5 (D.N.J. Mar. 12, 2021), the court dismissed the plaintiffs' claims with prejudice, finding that "the Virus Exclusion's language is unambiguous" in excluding losses resulting from the COVID-19 pandemic. The court specifically rejected plaintiffs' argument that state-government orders, rather than the virus itself, were the efficient proximate cause of their losses. Citing case authority that losses from coronavirus-driven government orders "are tied inextricably to th[e] virus" in a direct line of causation, the court agreed that "plaintiffs cannot avoid the clear and unmistakable conclusion that the coronavirus was the cause of the alleged damage or loss." *Id.* at *5 (citations and internal quotation marks omitted).

Colby's reasoning properly reflects principles of Washington law on causation in the context of an insurance exclusion. Under Washington's "efficient proximate cause" rule, an excluded cause of loss bars coverage if it is the "predominant cause which sets into motion the chain of events producing the loss." *See Graham v. Pub. Emps. Mut. Ins. Co.*, 656 P.2d 1077, 1081 (Wash. 1983). "It is perfectly acceptable for insurers to write exclusions that deny coverage when an excluded occurrence initiates the causal chain and is itself either the sole proximate cause or the efficient proximate cause of the loss." *Zhaoyun Xia v. ProBuilders Specialty Ins. Co. RRG*, 400 P.3d 1234, 1241 (Wash. 2017).

In addition to *Colby*, numerous courts in California have applied virus exclusions to dismiss business-interruption claims under an efficient-proximate-cause rule materially the same as Washington's. *See Villella v. Pub. Emps. Mut. Ins. Co.*, 725 P.2d 957, 962 (Wash. 1986) (acknowledging that, like Washington courts, California courts apply the efficient-proximate-

cause rule). These courts have held, as a matter of law, that the coronavirus is the efficient proximate cause of alleged business-interruption losses. For instance, in *Boxed Foods Co., LLC*, 2020 WL 6271021, at *4, the court explained that an "efficient proximate cause" is "a cause of loss that predominates and sets the other cause of loss in motion." Under that standard, the coronavirus was the efficient proximate cause of plaintiffs' loss because the civil-authority orders "would not exist absent the presence of COVID-19." *Id.*; *see James Colgan v. Sentinel Ins. Co.*, No. 20-CV-04780, 2021 WL 472964, at *4 (N.D. Cal. Jan. 26, 2021) ("Plaintiff's invocation of the proximate cause doctrine is unavailing because the virus is the efficient proximate cause of Plaintiff's loss."), *appeal filed*, No. 21-15332 (9th Cir. Feb. 25, 2021); *Ba Lax LLC v. Hartford Fire Ins. Co.*, No. 20-CV-06344, 2021 WL 144248, at *4 (C.D. Cal. Jan. 12, 2021) ("Here, there is no genuine dispute that the activity of the virus, namely COVID-19, set government restrictions in motion, and is therefore the efficient proximate cause of Plaintiffs' claimed losses."), *appeal filed*, No. 21-55109 (9th Cir. Feb. 10, 2021); *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, Case No. 20-CV-04265, 2020 WL 7696080, at *4 (N.D. Cal. Dec. 28, 2020) (finding COVID-19 the efficient proximate cause of plaintiffs' losses), *appeal filed*, No. 21-15147 (9th Cir. Jan. 25, 2021); *see also Mashallah, Inc. v. W. Bend Mut. Ins. Co.*, No. 20 C 5472, 2021 WL 679227, at *4 (N.D. Ill. Feb. 22, 2021) (applying efficient-proximate-cause rule substantially similar to Washington's and holding that "there is no genuine dispute that the activity of a virus, namely COVID-19, set government restrictions in motion, and is therefore the efficient proximate cause of Plaintiffs' claimed losses") (citations and internal quotation marks omitted), *appeal filed*, No. 21-1507 (7th Cir. Mar. 23, 2021).

4. The decisions of this Court also support dismissal.

Four decisions of this Court have addressed coronavirus-related business-interruption insurance claims. All of them support dismissal here.

Two decisions of this Court have addressed the enforceability of virus exclusions under Virginia law. In the first, *Barroso, Inc. v. Twin City Fire Ins. Co.*, No. 1:20-CV-632, Hr'g Tr. 10:7-15, 16:11-20 (E.D. Va. Nov. 10, 2020) (attached at ECF No. 7-3), the Court granted judgment in

the insurer's favor on the basis of the exclusion. The second, *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020), is one of the few federal-court decisions nationally to deny a motion to dismiss as to a virus exclusion. In that case, the Court concluded that a form of exclusion different from the one here required the virus to be "the *immediate* cause in the chain" to be effective. *Id.* at *3, 12 (emphasis added).

Elegant Massage is fully consistent with dismissal here. It involved a form of exclusion addressing "contain[ment], treat[ment], detoxif[ication], neutraliz[ation] or dispos[al]" of a virus. From such language, the Court inferred an intent to preclude coverage only when "a virus has spread throughout the property" and concluded that, as a result, the virus must be the "immediate cause" to preclude coverage.[6] *Id.* at *12. The Virus Exclusion here includes no such limiting language. It applies to any "loss or damage caused by or resulting from a virus" and to "all coverage under all forms and endorsements" of the Policy, including, explicitly, "business income, extra expense or action of civil authority"—the very coverage provisions at issue. Further, as numerous courts have observed in distinguishing *Elegant Massage*, its holding is limited to an application of Virginia law, which is not implicated here. *See, e.g.*, *15 Oz Fresh & Healthy Food LLC v. Underwriters at Lloyd's London Known as Syndicates AML 2001, WBC 5886, MMX 2010, & SKB 1897*, No. 20-23407-CIV, 2021 WL 896216, at *6 n.2 (S.D. Fla. Feb. 22, 2021), *appeal filed*, No. 21-10949 (11th Cir. Mar. 24, 2021); *Protege Rest. Partners LLC v. Sentinel Ins. Co., Ltd.*, No. 20-CV-03674, 2021 WL 428653, at *5 (N.D. Cal. Feb. 8, 2021) (declining to follow *Elegant Massage*, in part, because it relied on different state law).

---

[6] The reasoning of *Elegant Massage* has received significant scrutiny from courts across the country. *See, e.g.*, *Eye Care Ctr. of N.J., PA v. Twin City Fire Ins. Co.*, Civ. No. 20-05743, 2021 WL 457890, at *4 (D.N.J. Feb. 8, 2021) (commenting that *Elegant Massage* "is the only case that analyzed the virus exclusion and came to a different conclusion"); *Bluegrass, LLC. v. State Auto. Mut. Ins. Co.*, No. 20-CV-00414, 2021 WL 42050, at *4 (S.D. W.Va. Jan. 5, 2021) (declining to apply *Elegant Massage* because it "is a notable outlier"); *LJ New Haven LLC v. AmGUARD Ins. Co.,* No. 20-CV-00751, 2020 WL 7495622, at *7 n.7 (D. Conn. Dec. 21, 2020) ("I do not find [*Elegant Massage*] persuasive in light of the weight of authority favoring application of the virus exclusion when courts were presented with similar policy language and analyzed the issue.").

Two other decisions of this Court—applying the laws of Florida and California—have, like *Barroso*, dismissed the kinds of claims averred here. Under Florida law, in *Skillets, LLC*, 2021 WL 926211, at *6-7 (E.D. Va. Mar. 10, 2021), the Court dismissed claims with prejudice because "the presence of COVID-19 is not a direct physical loss." And in *L&L Logistics & Warehousing Inc. v. Evanston Ins. Co.*, No. 3:20-CV-324, 2021 WL 1396280, at *4 (E.D. Va. Apr. 13, 2021), applying California law, the Court held: "[T]he Virus Exclusion prohibits any claim caused by a virus – full stop." The plain language of the Virus Exclusion, and the vast weight of authority interpreting it, foreclose Plaintiffs' claims here.

B. Plaintiffs' claims are also foreclosed by other exclusions.

Even if Plaintiffs' losses could survive the plain language of the Virus Exclusion (they do not—see Section I.A above) and fell within the scope of the Policy's insuring language (they do not—see Section II below), three additional express exclusions preclude coverage.

"Loss of use" exclusion. Plaintiffs' Policy provides that MIC "will not pay for any damages caused by or resulting from ... delay, loss of use or loss of market." (ECF No. 1-2 at 66 subpt. B.2.b.) This clause unambiguously excludes coverage for "loss of use," and makes clear that Plaintiffs may not recover for lost income from a mere "loss of use" that is not caused by "direct *physical* loss of or damage to" property. As the court stated in *Equity Planning Corp. v. Westfield Ins. Co.*, No. 20-CV-01204, 2021 WL 766802, at *11 (N.D. Ohio Feb. 26, 2021), the loss-of-use exclusion "requires more than a loss of use or other intangible harm to trigger coverage."[7]

[7] *See also Ballas Nails & Spa, LLC v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-1155, 2021 WL 37984, at *4 (E.D. Mo. Jan. 5, 2021) ("[C]onstruing the policy's requirement of 'direct physical loss or damage' to include the mere loss of use of insured property with nothing more would negate the 'loss of use' exclusion."); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-CV-03461, 2020 WL 7495180, at *4 (N.D. Cal. Dec. 21, 2020) (citing loss-of-use exclusion as further support for finding that a detrimental economic impact, unaccompanied by a distinct, demonstrable, physical alteration of property, is insufficient to state a claim for coverage); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-03213, 2020 WL 5525171, at *6 (N.D. Cal. Sept. 14, 2020) (loss-of-use exclusion suggests that "direct physical loss of [] property" was "not intended to encompass a loss where the property was rendered unusable without an intervening physical force"), *appeal filed*, No. 20-16858 (9th Cir. Sept. 24, 2020).

Loss of use is the crux of Plaintiffs' alleged losses: they seek coverage for "a suspension of normal business operations and a cessation of all operations on the premises." (ECF No. 9 ¶ 238.) Thus, even if mere loss of use could otherwise be construed to trigger coverage under the Policies (which it cannot be, as explained below in Section II), the Policy's loss-of-use exclusion precludes coverage for Plaintiffs' alleged loss of use that is unaccompanied by actual physical loss of or damage to property.

The "ordinance or law" exclusion.[8] The "ordinance or law" exclusion of Plaintiffs' Policy provides that MIC "will not pay for damage caused directly or indirectly by ... [t]he enforcement of or compliance with any ordinance or law … regulating the construction, use or repair of any property." (ECF No. 9-1 at 64 subpt. B.1.a.) Such exclusions "clearly and unambiguously" bar coverage for "business income losses ... caused by the enforcement of the law." *Ira Stier, DDS, P.C. v. Merchs. Ins. Grp.*, 127 A.D.3d 922, 924 (N.Y. App. Div. 2015).

The orders involved here qualify under this exclusion. Each had or has the force of law, which is the test under the exclusion. *See, e.g.*, *Wright v. State Farm Fire & Cas. Co.*, 555 F. App'x 575, 578 (6th Cir. 2014) ("Ordinances and laws are characterized by their being created and enforced by a governmental authority. For example, Webster's Third defines an 'ordinance' as 'an authoritative decree or direction' or 'a public enactment, or law promulgated by governmental authority.'"). Indeed, at least two federal courts applying Pennsylvania law have applied this exclusion in granting a motion to dismiss: "As that unequivocal language states, [the insurer] will not pay for any loss or damage caused by a law that regulated the use of any property. That is what happened here. The shutdown orders were governmental orders regulating the use of property and having the force of law." *Newchops Rest. Comcast LLC* , 2020 WL 7395153, at *7 (E.D. Pa. Dec. 17, 2020); *see Isaac's Deli, Inc. v. State Auto Prop. & Cas. Ins. Co.*, No. 20-CV-06165, 2021 WL 1945713, at *5 (E.D. Pa. May 14, 2021) (applying exclusion to bar recovery because "Governor

---

[8] The "ordinance or law" and "acts or decisions" exclusions apply to Plaintiffs' claims for Business Income, Extra Expense, and Extended Business Income coverage. By the nature of the Civil Authority Coverage, those exclusions do not apply to it when all of the specific requirements for that coverage are satisfied. As discussed below (Section III), Plaintiffs do not and cannot plausibly allege the requirements for Civil Authority coverage.

Wolf's shutdown order thus undoubtedly constitutes the 'enforcement of any ordinance or law' [and] regulated the use of Plaintiff's property"). The Court should do the same here.

The "acts or decisions" exclusion. Plaintiffs' Policy also provides that MIC "will not pay for damage caused by or resulting from ... [a]cts or decisions, including the failure to act or decide, of any …governmental body." (ECF No. 9-1 at 67 subpt. B.3.b.) That exclusion applies here: Plaintiffs allege losses caused by the acts or decisions of government entities. On similar facts—including facts arising from the current pandemic—courts have applied this exclusion to preclude coverage. *Whiskey River on Vintage, Inc. v. Ill. Cas. Co.*, No. 20-CV-185, 2020 WL 7258575, at *18-19 (S.D. Iowa Nov. 30, 2020) (in COVID-19 context, insurer entitled to declaratory relief of non-coverage under the acts-or-decisions exclusion, which "unambiguously states [the insurer] will not pay for any loss or damage caused by or resulting from the acts or decisions of a governmental body"), *appeal filed*, No. 20-3707 (8th Cir. Dec. 29, 2020); *see also Jernigan v. Nationwide Mut. Ins. Co.*, No. C 04-5327, 2006 WL 463521, at *10-11 (N.D. Cal. Feb. 27, 2006) (acts-or-decisions exclusion applied to loss caused by town's "stop-work order"); *Cytopath Biopsy Lab., Inc. v. U.S. Fid. & Guar. Co.*, 774 N.Y.S.2d 710, 711 (N.Y. App. Div. 2004) (acts-or-decisions exclusion applied where authorities refused to permit resumption of operations); *Torres Hillsdale Country Cheese, L.L.C. v. Auto-Owners Ins. Co.*, Dkt. No. 308824, 2013 WL 5450284, at *5-6 (Mich. Ct. App. Oct. 1, 2013) (acts-or-decisions exclusion applied where government order prohibited sale of cheese).

II. Plaintiffs Fail to Plausibly Allege Direct Physical Loss of or Damage to Property.

Plaintiffs also fail to state a claim for coverage or declaratory relief (Counts I-II, IV-V, VII-VIII) under the Policy's insuring language because they allege no physical loss of or damage to any relevant property. "Direct physical" loss of or damage to property has been the subject of extensive litigation throughout the United States. Courts construing the *same* language at issue here have overwhelmingly held that economic losses and loss of use of property associated with pandemic-related government orders are not "direct physical loss of or damage to" property and

do not qualify for business-interruption coverage.[9] Courts construing similar "physical loss" and "physical damage" language have also overwhelmingly held the same.[10] Particularly when

[9] Examples include *Hillcrest Optical, Inc. v. Cont'l Cas. Co*, No. 20-CV-275, 2020 WL 6163142, at *1, 8 (**S.D. Ala.** Oct. 21, 2020); *Selane Prod., Inc. v. Cont'l Cas. Co*., No. 20-CV-07834, 2020 WL 7253378, at *5-6 (**C.D. Cal.** Nov. 24, 2020); *O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co*., No. 20-CV-02951, 2021 WL 105772, at *4 (**N.D. Cal.** Jan. 12, 2021); *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp*., No. 20-CV-1277, 2021 WL 389215, at *5 (**S.D. Cal.** Feb. 3, 2021); *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co*., No. 20-CV-22833, 2020 WL 6392841, at *6 (**S.D. Fla.** Nov. 2, 2020); *Henry's La. Grill, Inc. v. Allied Ins. Co. of Am*., No. 20-CV-2939, 2020 WL 5938755, at *4, 6 (**N.D. Ga.** Oct. 6, 2020), *appeal filed*, No. 20-14156 (11th Cir. Nov. 4, 2020); *Bradley Hotel Corp. v. Aspen Specialty Ins. Co*., No. 20-CV-4249, 2020 WL 7889047, *3-4 (**N.D. Ill.** Dec. 22, 2020), *appeal filed*, No. 21-1173 (7th Cir. Jan. 28, 2021); *MHG Hotels, LLC v. Emasco Ins. Co*., No. 20-CV-01620, slip. op. at 10, 11 (**S.D. Ind.** Mar. 8, 2021) (attached at ECF No.7-4); *Whiskey River on Vintage, Inc*., 2020 WL 7258575, at *10 (**S.D. Iowa** Nov. 30, 2020); *Q Clothier New Orleans LLC v. Twin City Fire Ins. Co*., Civ. No. 20-1470, 2021 WL 1600247, at *6 (**E.D. La.** Apr. 23, 2021); *SAS Int'l, Ltd. v. Gen. Star Indem. Co*., No. 20-11864, 2021 WL 664043, at *1-3 (**D. Mass.** Feb. 19, 2021), *appeal filed*, No. 21-1219 (1st Cir. Mar. 24, 2021); *Seifert v. IMT Ins. Co*., No. 20-1102, 2020 WL 6120002, at *3 (**D. Minn.** Oct. 16, 2020); *Zwillo V. Corp. v. Lexington Ins. Co*., No. 20-00339-CV, 2020 WL 7137110, at *4-5 (**W.D. Mo.** Dec. 2, 2020), *appeal filed*, No. 21-1015 (8th Cir. Jan. 5, 2021); *Cafe Plaza de Mesilla Inc. v. Cont'l Cas. Co*., No. 2:20-CV-354, 2021 WL 601880, at *4-7 (**D.N.M.** Feb. 16, 2021); *Michael Cetta, Inc. v. Admiral Indem. Co*., No. 20-CIV-4612, 2020 WL 7321405, at *8 (**S.D.N.Y.** Dec. 11, 2020); *Santo's Italian Cafe LLC v. Acuity Ins. Co*., No. 20-CV-01192, 2020 WL 7490095, at *12 (**N.D. Ohio** Dec. 21, 2020); *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co*., No. CV-20-511, 2020 WL 8004271, at *1, 3-4 (**W.D. Okla.** Nov. 9, 2020); *McGavock Street Hospitality Partners, LLC v. Admiral Indem. Co*., No. 20-CV-694, 2020 WL 7641184, at *7-9 (**M.D. Tenn.** Dec. 23, 2020); *Aggie Invs., L.L.C. v. Cont'l Cas. Co*., No. 21-CV-0013, 2021 WL 1550479, at *3-5 (**E.D. Tex.** Apr. 20, 2021); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co*., No. 20-CV-665, 2020 WL 7351246, at *6 (**W.D. Tex.** Dec. 14, 2020); and *Bluegrass, LLC*, 2021 WL 42050, at *1, 3-5 (**S.D W.Va.** Jan. 5, 2021).

[10] Examples include *B Street Grill & Bar LLC v. Cincinnati Ins. Co*., No. CV-20-01326, 2021 WL 857361, at *5 (D. Ariz. Mar. 8, 2021) (economic loss from closure order and actual presence of virus on property did not constitute "accidental physical loss or physical damage" because not a "physical" loss or damage to property); *Bluegrass Oral Health Ctr., PLLC v. Cincinnati Ins. Co*., No. 20-CV-00120, 2021 WL 1069038, at *3-4 (W.D. Ky. Mar. 18, 2021) ("physical loss" applies to property "destroyed" by some force; "interpreting 'direct physical loss' to 'direct physical loss of use' … makes no sense"); *Bel Air Auto Auction, Inc. v. Great N. Ins. Co*., No. 20-2892, 2021 WL 1400891, at *7-12 (D. Md. Apr. 14, 2021) (holding that "'[d]irect physical loss or damage' to property does not include loss of use" and that "'[c]ontamination' by the COVID-19 virus does not constitute 'direct physical loss or damage' to property"), *appeal filed*, No. 21-1493 (4th Cir. Apr. 29, 2021); *St. Julian Wine Co. v. Cincinnati Ins. Co*., No. 20-CV-374, 2021 WL 1049875, at *3 (W.D. Mich. Mar. 19, 2021) ("[T]here is no reasonable construction of "physical loss" or "physical damage" that encompasses the presence of a contagious virus in the general population. In ordinary usage, "physical" means something tangible and material."); *Levy Ad Grp., Inc. v. Chubb Corp*., No. 20-CV-00763, 2021 WL 777210, at *3 (D. Nev. Feb. 16,

applying the federal *Iqbal*/*Twombly* pleading standard, the courts' view, as one court put it, has been "nearly unanimous … that COVID-19 does not cause direct physical loss … sufficient to trigger coverage." *Carrot Love, LLC v. Aspen Specialty Ins. Co.*, No. 20-23586-Civ, 2021 WL 124416, at *2 (S.D. Fla. Jan. 13, 2021); *see Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.*, No. 20-CV-04783, 2021 WL 141180, at *3 (N.D. Cal. Jan. 13, 2021) ("Numerous courts have considered whether allegations similar to [plaintiff's] constitute a 'direct physical loss of ... property,' and the overwhelming majority have concluded that temporarily closing a business due to government closure orders during the pandemic does not constitute a direct loss of property under insurance policies with the same coverage provision.") (collecting cases).

A. Fountain fails to plausibly allege direct physical loss of or damage to property under Mississippi law.

Fountain cannot satisfy the requirement of "direct physical loss of or damage to" property under Mississippi law. The requirement of "direct physical loss of or damage to" property "'preclude[s] 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.'" *J. O. Emmerich & Assocs., Inc. v. State Auto Ins. Cos.*, No. 06-CV-00722, 2007 WL 9775576, at *2-4 (S.D. Miss. Nov. 19, 2007) (quoting *Couch on Insurance* § 148:46 (3d ed. 2007)). Fountain's failure to allege any physical harm to property thus dooms its claims as a matter of law. A court

---

2021) (Plaintiffs "do not allege any physical losses or damage to their premises; they instead merely assert that they were 'ordered to close' and 'were not permitted to conduct business operations."), *appeal filed*, No. 21-15413 (9th Cir. Mar. 9, 2021); *Summit Hospitality Grp., Ltd. v. Cincinnati Inc. Co.*, No. 20-CV-254, 2021 WL 831013, at *3-4 (E.D.N.C. Mar. 4, 2021) (business slowdown from coronavirus-related orders not "physical loss or damage to property" as required to trigger coverage, where, among other things, "the coverage period is expressly defined as the time it takes to rebuild, repair, or replace the damaged property"); *Blvd. Carroll Entm't Grp., Inc. v Fireman's Fund Ins. Co.*, Civ. No. 20-1171, 2020 WL 7338081, at *2 (D.N.J. Dec. 14, 2020) (closure due to order addressing coronavirus "not enough" to constitute "physical loss"), *appeal filed*, No. 21-1061 (3d Cir. Jan. 12, 2021); *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 20-CV-00401, 2020 WL 6436948, at *5 (S.D. W.Va. Nov. 2, 2020) (actual presence of virus not enough for "physical loss"); *Al Johnson's Swedish Rest. & Butik, Inc. v. Soc'y Ins. Mut. Co.*, No. 20-CV-52, Hr'g Tr. 3:19-4:1, 7:23-8:6, 16:1-2 (Wis. Cir. Ct. Dec. 4, 2020) (attached at ECF No. 7-5) (loss of use of property "without more" does not constitute "direct physical loss or damage"; property must have been "compromised" in some physical way).

may not "render the words 'direct' and 'physical' meaningless in the context of the policy." *Id.* at *3.

The Southern District of Mississippi has rejected the very arguments Fountain makes here. In *Real Hospitality*, 2020 WL 6503405, at *5-6, the court found that "direct physical loss of or damage to" property was not plausibly alleged where there was no physical damage to or permanent dispossession of any relevant property. That plain reading of the policy was further buttressed by the insurance policy's "period of restoration," which—as here (ECF No. 9-1 at 116 subpt. J)—lasted only until the property was "repaired, rebuilt or replaced." *Id.*; *see also, e.g.*, *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-cv-03213, 2020 WL 5525171, at *4 (N.D. Cal. Sept. 14, 2020) ("The words '[r]ebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature."). Absent a *physical* loss of or damage to property, the court held, "Plaintiff's *operations* are not what is insured." *Real Hospitality*, 2020 WL 6503405, at *8 (emphasis added). Thus, "[m]ost courts have rejected … claims [like Plaintiffs' here] and granted motions to dismiss based on the finding that the businesses' complete or partial closures due to government orders issued to slow the spread of COVID-19 do not constitute 'direct physical loss of or damage to property.'" *Id.* at *7 (citing multiple decisions).

B. KZone, B Fit, EWT and GMT fail to plausibly allege direct physical loss of or damage to property under Pennsylvania law.

Nor do the Pennsylvania-based Plaintiffs plausibly state a claim. Courts applying Pennsylvania law have overwhelmingly concluded that coronavirus-related government orders do not entail a covered physical injury to property. *See, e.g., Moody v. Hartford Fin. Group, Inc.*, CV 20-2856, 2021 WL 135897, at *6 (E.D. Pa. Jan. 14, 2021); *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, CV 20-3198, 2020 WL 6545893, at *4 (E.D. Pa. Nov. 6, 2020). The court's holding in *1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc.* is illustrative. The court there ruled that economic losses due to government actions are not covered as physical loss of or damage to property. No. 20-CV-862, 2021 WL 147139, at *5 (W.D. Pa. Jan. 15, 2021), *appeal filed*, No. 21-1109 (3d Cir. Jan. 21, 2021). In their ordinary usage, the court reasoned, the terms "loss of" or "damage to," both

"individually and in … context …, can only be reasonably construed as extending to events that impact the physical premises completely (loss) or partially (damage)." *Id*. Indeed, there is now a vast body of cases under Pennsylvania law holding that "direct physical loss" requires harm to the actual physical structure of the property.[11]

In their Amended Complaint, Plaintiffs attempt to skirt their inability to plead any covered physical loss by invoking expenses associated with government-ordered "alter[ations]" of "the physical characteristics of how their businesses can be used" and other required physical improvements to property. (ECF No. 9 ¶¶ 243-46.) Such averments miss the mark: they allege no covered physical loss of or damage to property that gave rise to such expenses.

Federal courts applying Pennsylvania law have rejected the strained logic of Plaintiffs' ordered-alterations theory. For instance, in *Isaac's Deli*, 2021 WL 1945713, at *5, the Eastern District of Pennsylvania held that "[p]reemptive safety measures intended to curb the spread of the COVID-19 virus ... do not establish the existence of structural damage or loss." Similarly, in *Tria WS LLC v. Am. Auto. Ins. Co*., No. CV 20-4159, 2021 WL 1193370, at *7 (E.D. Pa. Mar. 30, 2021), *appeal filed*, No. 21-1741 (3d Cir. Apr. 16, 2021), the court considered and rejected an insured's argument that its installation of improvements to curb the spread of the coronavirus was a covered "repair." "In ordinary parlance," the court held, "we repair what is broken, and Plaintiffs have not alleged any unsatisfactory condition on the insured properties in need of fixing." *Id.* (rejecting reasoning of *Ungarean v. CNA*, No. GD-20-006544 (Pa. Com. Pl. Mar. 22, 2021)). Indeed, Plaintiffs' theory improperly turns the Policy's insuring language on its head, compelling coverage for "physical" property improvements despite an absence of *any* underlying physical injury to the property. If, for instance, an insured installed handrails in response to a local

[11] E.g., *J.B.'s Variety Inc.*, 2021 WL 1174917, at *4 (E.D. Pa.); *TAQ Willow Grove, LLC v. Twin City Fire Ins.*, No. 20-3863, 2021 WL 131555, at *5 (E.D. Pa. Jan. 14, 2021); *Ultimate Hearing Solutions II, LLC v. Twin City Fire Ins.*, No. 20-2401, 2021 WL 131556, at *6 (E.D. Pa. Jan. 14, 2021); *Newchops Rest. Comcast LLC*, 2020 WL 7395153, at *5 (E.D. Pa.); *Kessler Dental Assocs., P.C. v. Dentists Ins. Co.*, No. 20-03376, 2020 WL 7181057, at *4 (E.D. Pa. Dec. 7, 2020); *Brian Handel D.M.D., P.C.*, 2020 WL 6545893, at *4 (E.D. Pa.); *Windber Hosp. v. Travelers Prop. Cas. Co. of Am.*, No. 3:20-CV-80, 2021 WL 1061849, at *4 (W.D. Pa. Mar. 18, 2021).

government's prophylactic safety order, Plaintiffs' logic would dictate coverage even though no physical loss of or damage to the insured's property gave rise to the order.

Cases from other jurisdictions also have persuasively rejected Plaintiffs' ordered-alterations theory. In *Crescent Plaza Hotel Owner L.P. v. Zurich Am. Ins. Co.*, for instance, the plaintiff insisted it performed "repairs" in the form of installing special air filters, plexiglass partitions, and protection shields. No. 20 C 3463, 2021 WL 633356, at *3 (N.D. Ill. Feb. 18, 2021). The court disagreed that such allegations supported coverage, noting that the plaintiff's improvements did not respond to anything that "physically alter[ed] the appearance, shape, color, structure, or other material dimension of the property." *Id.* Similarly, in *Paradigm Care & Enrichment Ctr., LLC v. W. Bend Mut. Ins. Co.*, No. 20-CV, 2021 WL 1169565, at *5, 6 (E.D. Wis. Mar. 26, 2021), the court held that coronavirus-motivated changes in the operational use or functionality of property do not constitute "physical loss of or damage" to property: that, the court held, would be an "extremely tortured interpretation" of those insuring terms. Likewise, that the coronavirus alters how an insured *uses* its property does not entail any "direct physical loss of or damage to" the property. *See, e.g.*, *Berkseth-Rojas v. Aspen Am. Ins. Co*., No. 20-CV-0948, 2021 WL 101479, at *5 (N.D. Tex. Jan. 12, 2021) (rejecting plaintiff's argument that "she was unable to use her property in the way she did before the pandemic due to the Orders and due to steps taken to prevent the 'emergence or reemergence' of COVID-19" because "direct physical loss or damage requires something more than mere loss of use or function").

C. Vita and Northwest fail to plausibly allege direct physical loss of or damage to property under Washington law.

Washington law, similarly, requires the dismissal of the claims of Vita and Northwest. Washington state appellate courts have interpreted "direct physical loss of or physical damage to" to require either actual physical alteration of property or its permanent dispossession. In *Fujii v. State Farm Fire & Casualty Co.*, 857 P.2d 1051 (Wash. Ct. App. 1993), the Court of Appeals rejected a property insurance policyholder's claim that a landslide near the property, which allegedly caused the destabilization of soil nearby, entitled the policyholder to coverage. The court

held there was no coverage because the property had not sustained a "direct physical loss," as "there was no discernible physical damage to the dwelling." *Id.* at 1052. The court further ruled that whether such damage "was likely to occur in the near future unless expensive preventative measures were taken" was not relevant for purposes of coverage under the policy. *Id.* at 1051.

Similarly, in *Wolstein v. Yorkshire Insurance Co.*, 985 P.2d 400 (Wash. Ct. App. 1999), the Court of Appeals held that a hull risk policy that required "physical loss of or damage to" a vessel for coverage did not cover the policyholder's economic losses where the shipbuilder abandoned construction. Under this policy language, the court ruled that the vessel "must sustain actual damage or be physically lost" to trigger coverage. *Id.* at 407. The delay in completion of the vessel, which prevented the policyholder from using it during the interim, "did not inflict physical damage to the [vessel] or result in the physical loss of the yacht," and therefore did not trigger coverage. *Id.* In so holding, the court pointed to a decision from the Fifth Circuit Court of Appeals concluding that "[t]he language 'physical loss or damage' strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state[.]" *Id.* at 407-08 (quoting *Trinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 270-71 (5th Cir. 1990)); *see also Herr v. Forghani*, 161 Wash. App. 1037, 2011 WL 1833829, at *8 (2011) (unpublished) (holding that losses caused by easement that reduced property's value did not constitute "direct physical loss": "The "inclusion of this word ['physical'] negates any possibility that the policy was intended to include 'consequential or intangible damage,' such as depreciation in value, within the term 'property damage.'" (quoting *Prudential Prop. & Cas. Ins. Co. v. Lawrence*, 45 Wash. App. 111, 116, 724 P.2d 418 (1986))); *Borton & Sons, Inc. v. Travelers Ins. Co.*, 99 Wash. App. 1010, 2000 WL 60028, at *4 (Jan. 25, 2000) (unpublished) (rejecting policyholder's contention that "'direct physical loss' may occur in the absence of any physical damage to the property").

Further, the Business Income, Extra Expense, and Extended Business Income provisions are all limited to a "period of restoration," which lasts until the property at issue can be "repaired, rebuilt or replaced." (ECF No. 1 ¶¶ 47, 49; ECF No. 9-1 at 96 subpts. F.1, F.3 and 116 subpt. J; ECF No. 9-1 at 96 subpt. F.6.c. (Extended Business Income Coverage applies only where there is

a "Business Income loss payable under this policy.").) As numerous courts have held, a natural reading of "repair, rebuilt or replaced" contemplates that the underlying "physical" loss of property is not a mere inability or lessened ability to use it.[12] Such language confirms the need for an "occurrence of *material* harm that then requires a physical fix." *Michael Cetta, Inc. v. Admiral Indem. Co*., 20 Civ. 4612, 2020 WL 7321405, at *6 (S.D.N.Y. Dec. 11, 2020) (emphasis added). To require MIC to cover losses arising from the pandemic and resultant government orders, rather than direct physical loss of or damage to property, would write the "period of restoration" clause out of the Policy and impermissibly change it from the Policy to which the parties agreed. *See Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins, Co.*, 17 F. Supp. 3d 323, 332 (S.D.N.Y. 2014) (policy language interpreted to give meaning to "period of restoration" clause).

MIC anticipates that Plaintiffs may rely on two recent Washington trial-court decisions, *Hill & Stout PLLC v. Mutual of Enumclaw Insurance Co*., No. 20-2-07925, 2020 WL 6784271 (Wash. Super. King Cty. Nov. 13, 2020), and *Perry Street Brewing Co., LLC v. Mutual of Enumclaw Insurance Co*., No. 20-2-02212-32, 2020 WL 7258116 (Wash. Super. Ct. Spokane Cty. Nov. 23, 2020). Those decisions are both inapposite and not binding on this Court. Critically, *neither decision involved a virus exclusion*.

[12] *See, e.g.*, *Colgan v. Sentinel Ins. Co., Ltd.*, 2021 WL 472964, *3 (N.D. Cal. Jan. 26, 2021) ("[A]llegations of temporary loss of access and use" were "plainly insufficient" because insured did not allege "loss requiring repair, rebuilding, or replacement."); *MHG Hotels, LLC* v. *Emasco Ins. Co.*, slip. op. at 10, 11 (S.D. Ind. Mar. 8, 2021) (ECF No. 7-4) ("[T]he phrase 'direct physical loss' refers to a loss that requires the insured to repair, rebuild, or replace property that has been tangibly, physically altered—not the insured's loss of use of that property."); *TJBC, Inc. v. Cincinnati Ins. Co., Inc.*, No. 20-cv-815, 2021 WL 243583, at *5 (S.D. Ill. Jan. 25, 2021) ("Without underlying tangible damage or loss to the insured's property, no repair, rebuilding, replacement, or permanent location would outwardly be required, rendering this definition [of 'period of restoration'] unclear at best .... Such strained construction ... would likely offend the rules of construction and interpretation the Court is bound to abide."), *appeal filed*, No. 21-1203 (7th Cir. Feb. 2, 2021); *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co., Ltd.*, No. 20-CV-04783, 2021 WL 141180, at *5 (N.D. Cal. Jan. 13, 2021) ("There are no repairs or replacements needed to be made here. KBFA can continue operating its business as soon as the Stay-at-Home Orders are lifted. Interpreting direct physical loss of property to include KBFA's loss of use would rend[er] the language 'period of restoration' meaningless."), *appeal pending*, No. 21-15240 (9th Cir.).

Moreover, each of those cases rests on reasoning that the word "loss" in the phrase "direct physical loss of or damage to" must mean something different than "damage," and therefore could include loss of use. *See Hill & Stout*, 2020 WL 6784271, at *2-3; *Perry Street*, 2020 WL 7258116, at *3. That reasoning is both distinguishable here and fundamentally flawed. First, neither decision addresses or accounts for the effect of a "loss of use" exclusion such as the one in Plaintiffs' Policy. (*See* p. 15 and n.7 above.) "[C]onstruing the policy's requirement of 'direct physical loss or damage' to include the mere loss of use of insured property with nothing more would negate the 'loss of use' exclusion." *Ballas Nails & Spa, LLC*, 2021 WL 37984, at *4.

Second, these decisions fail to give any effect to the words "direct" and "physical" that modify "loss" in the phrase "direct physical loss"—running afoul of the Washington Supreme Court's directive to interpret insurance contracts "in a manner that gives effect to each provision of the policy." *N.H. Indem. Co., Inc. v. Budget Rent-A-Car Sys., Inc*., 64 P.3d 1239, 1241 (2003), as amended (July 8, 2003). The decisions do not explain why a policy would include the word "physical" if it was intended to cover losses that are not, in fact, "physical," as "an average person" would understand the term. *See id*.

Third, these decisions rest on a faulty premise: one need not read the words "direct physical" out of the policy's reference to "loss," as *Hill & Stout* and *Perry Street* do, to give separate effect to the words "loss" and "damage." Nearly every plaintiff in a COVID-19 insurance coverage case has raised this argument, and very few courts have agreed. That is because an obvious, natural reading of the phrase "direct physical loss of or damage to" is that "loss of" refers to a physical dispossession such as theft or total destruction of property, while "damage to" refers to physical harm to property short of total dispossession or destruction. *See, e.g.*, *Protege Rest. Partners LLC v. Sentinel Ins. Co., Ltd.*, No. 20-CV-03674, 2021 WL 428653, at *4 (N.D. Cal. Feb. 8, 2021) ("Where a policy additionally requires 'direct physical loss of or physical damage to property,' there must either be a physical change in the condition or a permanent dispossession of the property."); *Ba Lax, LLC*, 2021 WL 144248, at *3 (C.D. Cal. Jan. 12, 2021) ("[T]he phrase 'loss of' includes the permanent dispossession of something."). As the court explained in *The*

Woolworth LLC v. Cincinnati Ins. Co., "a person of ordinary understanding would define 'physical damage' to be a perceptible, material harm to property. The same person would define 'physical loss' to be a material, perceptible destruction or ruin of property. In other words, a person of ordinary understanding would read the policy to cover a spectrum of property damage that ranges from lesser harm (i.e. physical damage) to total ruin (i.e. physical loss). And that person would understand that the property damage must be 'physical'—i.e., material and perceptible, not theoretical or invisible." No. 20-CV-01084, 2021 WL 1424356, at *4 (N.D. Ala. Apr. 15, 2021). Thus, any reliance on *Hill & Stout* or *Perry Street* should be rejected.

III. Plaintiffs Fail to State a Claim under the Civil Authority Provision.

By its plain terms, the Civil Authority provision of Plaintiffs' Policy is triggered only when a risk of "direct physical loss" "causes damage to property other than" and "not more than one mile from" the insured premises. (ECF No. 9-1 at 95-96 subpt. F.6.a & F.6.a.1, and at 64 § A.) For all of the reasons addressed and argued in Section II above, Plaintiffs do not plausibly allege any direct physical loss, nor any damage to any relevant property. Additionally, coverage under the Civil Authority provision requires that (1) an action of civil authority is issued "as a result of" and "in response to" that property damage (*id.* F.6.a.i & F.6.a.ii) and (2) the action of civil authority "prohibits access" to the insured premises (*id.* subpt. F.6.a). Plaintiffs satisfy neither of those additional requirements.

A. None of the orders were issued "as a result of" physical loss or damage to property.

Plaintiffs do not plausibly allege that any civil-authority order was issued "as a result of" and "in response to" damage to property within one mile of the insured premises. The government orders cited by Plaintiffs reference no such damage. All of them were issued to prophylactically prevent the person-to-person spread of the coronavirus. While some of the orders generically mention potential impacts on "property" they do not invoke or address any actual or prior property damage, let alone damage within one mile of Plaintiffs' insured premises "as a result of" which the orders were issued. Generalized references to "property" do not change the obvious reason for

the orders' issuance, and do not satisfy the requirement under the civil-authority provision that there be "proof of a causal link between prior damage and [the] civil authority action." *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 687 (5th Cir. 2011). Any claim here for civil-authority coverage fails because the government actions on which Plaintiffs rely all were taken to address public health concerns, not to address relevant property damage as required by the plain terms of the Civil Authority provision.

Indeed, MIC is not aware of any court to have concluded that references in civil-authority orders to property (or to risks of harm to property) meet the requirements for civil-authority coverage. In *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, No. 20-CV-2211, 2020 WL 7078735, at *1, *7 n.66, *9 (D. Kan. Dec. 3, 2020), for instance, the court found "unavailing" the plaintiff's reliance on a civil-authority order's reference to the coronavirus's "affecting life, health, property and the public peace" because a court must "determine[] the meaning of the Policy based on the plain meaning of the language therein." *Id.*; *see Baker v. Or. Mut. Ins. Co.*, No. 20-cv-05467, 2021 WL 24841, at *2 (N.D. Cal. Jan. 4, 2021) (statements by mayors of San Francisco and Los Angeles that they issued orders because coronavirus was "'causing property loss or damage due to' its attachment to surfaces" were insufficient to plausibly plead "direct physical loss of or damage to" property). Further, as the court observed in *Visconti Bus Serv., LLC v. Utica Nat'l Ins. Grp.*, even if one assumed that COVID-19 contamination in other buildings could constitute direct physical loss or damage, "that [i]s not the *cause* of any restriction imposed by civil authority upon the use of [the insured's] own premises." 2021 WL 609851, at *12 (N.Y. Sup. Ct. Feb. 12, 2021) (emphasis added).[13] So too here: the cause of the orders was the nationwide effort to prevent the person-to-person spread of a virus.

---

[13] *See also Island Hotel Props., Inc. v. Fireman's Fund Ins. Co.*, 2021 WL 117898, at *3 (S.D. Fla. Jan. 11, 2021) ("[T]he Court need not defer to a conclusory legal conclusion stated by the County and regurgitated here by Plaintiff."); *Bradley Hotel Corp. v. Aspen Spec. Ins. Co.*, 2020 WL 7889047, at *4 (N.D. Ill. Dec. 22, 2020) (rejecting civil-authority claim where plaintiff alleged that "properties across the entire State of Illinois were closed as a result of Governor Pritzker's Executive Orders, but not as a result of any damage to the properties"); *cf.* Leslie Scism, *Companies Hit by Covid-19 Want Insurance Payouts. Insurers Say No.*, Wall St. J. (June 30, 2020)

B. The alleged orders did not prohibit access to Plaintiffs' insured premises.

Plaintiffs' claims for civil-authority coverage also fail for the independent reason that the orders did not "prohibit access" to their business premises. Apart from conclusory allegations parroting policy language, Plaintiffs allege only that they were barred from conducting certain business activities while inside the premises, not that access was altogether prohibited.

As other courts have held in rejecting arguments based on use restrictions, that Plaintiffs were not *prohibited* from physically *accessing* their business premises is dispositive in determining that civil-authority coverage is not available. *See e.g.*, *Clear Hearing Sols., LLC v. Cont'l Cas. Co.*, 2021 WL 131283, at *10 (E.D. Pa. Jan. 14, 2021) (dismissing civil-authority claim because "employees were permitted to enter the business premises to perform basic operations," which revealed that "a prohibition on access to the properties [was] absent"); *1 S.A.N.T., Inc.*, 2021 WL 147139, at *7 (W.D. Pa.) (holding that "reduction [of access] to partial access does not suffice to trigger business income coverage under the Civil Authority provisions"); *Equity Planning Corp.*, 2021 WL 766802, at *17 (N.D. Ohio) ("[W]hile E.P. alleges that Ohio's Stay At Home Order prevented E.P. from making 'full use of' its Property when its tenants were required to partially or completely close, the Stay At Home Order did not prevent E.P. from accessing its properties altogether.").[14]

(noting plaintiffs' attorneys lobbied government officials to include references to property loss and damage in COVID-19 shutdown orders).

[14] *See also, e.g.*, *Café La Trova LLC v. Aspen Specialty Ins. Co.*, No. 20-22055, 2021 WL 602585, at *11 (S.D. Fla. Feb. 16, 2021) (merely restricting access to plaintiff's property, "without completely prohibiting access," did not trigger civil-authority coverage); *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.*, No. 20-CV-1277, 2021 WL 389215, at *7 (S.D. Cal. Feb. 3, 2021) ("[T]he civil authority coverage provision provides coverage only to the extent that access to Plaintiffs' physical premises is prohibited—not if Plaintiffs are merely prohibited from operating the on-site consumption aspect of their business."); *Rococo Steak, LLC v. Aspen Specialty Ins. Co.*, No. 8:20-CV-2481, 2021 WL 268478, at *6 (M.D. Fla. Jan. 27, 2021) (dismissing civil-authority claims where "[t]he cited actions of civil authority did not completely cut off access to the restaurant"), *appeal filed*, No. 21-10672 (11th Cir. Feb. 26, 2021); *Karmel Davis & Assocs., Attorneys-at-Law, LLC v. The Hartford Fin. Servs. Grp., Inc.*, No. 20-CV-02181, 2021 WL 420372, at *5 (N.D. Ga. Jan. 26, 2021) (dismissing civil-authority claims where civil authority "did not specifically 'prohibit' Plaintiff from continuing in-person operations at its law office"); *Riverside Dental of Rockford, Ltd. v. Cincinnati Ins. Co.*, No. 20 CV 50284, 2021 WL 346423, at *5 (N.D. Ill. Jan. 19, 2021) (dentist office's "Business Income loss is not covered under the Civil

IV. Plaintiffs' Claims for Insurance Bad Faith Fail as a Matter of Law.

Fountain's claims for insurance bad faith must also be dismissed. Under Mississippi law, to prevail on a claim for bad-faith denial of an insurance claim, Plaintiffs "must show that the insurer denied the claim (1) without an arguable or legitimate basis, either in fact or law, and (2) with malice or gross negligence in disregard of the insured's rights." *Broussard v. State Farm Fire & Cas. Co.*, 523 F.3d 618, 628 (5th Cir. 2008) (quoting *U.S. Fidelity & Guar. Co. v. Wigginton*, 964 F.2d 487, 492 (5th Cir. 1992)). In Washington, "an insured must show more than an incorrect denial of coverage. The insured must also establish that the insurer acted 'without reasonable justification' in denying coverage. The test is not whether the insurer's interpretation is correct, but whether the insurer's conduct was reasonable." *James E. Torina Fine Homes, Inc. v. Mut. of Enumclaw Ins. Co.*, 74 P.3d 648, 653 (Wash. Ct. App. 2003). Pennsylvania courts have held that if the insurer properly denied a claim, the policyholder is unable to state a bad faith claim. *See Cresswell v. Pa. Nat'l Cas. Ins. Co.*, 820 A.2d 172, 179 (Pa. Super. Ct. 2003) (citing *Morrison v. Mountain Laurel Assurance Co*., 748 A.2d 689 (Pa. Super. Ct. 2000)). As shown above, there is no coverage under the Policy terms invoked by Plaintiffs. At a minimum, there is a reasonably arguable basis for denying coverage. Plaintiffs fail to state a claim for bad faith, and Counts III, VI, and IX of their Complaint must be dismissed.

CONCLUSION

The Court should dismiss Plaintiffs' Complaint with prejudice.

Authority coverage provisions" because "[t]he Governor's Orders allowed individuals access to the premises to receive and to provide essential services"); *Mangia Restaurant Corp. v. Utica First Ins. Co.*, No. 713847/2020, slip op. at 6, 7 (attached at ECF No. 7-6) (Queens Cty. Sup. Ct. Mar. 31, 2021) (dismissing civil-authority claim; "[a] limitation of use is not the equivalent of a 'prohibition of access'").

Respectfully submitted,

DICKINSON WRIGHT PLLC

By: */s/ Henrik Jonathan Redway*
Henrik Jonathan Redway (VSB 42189)
Nicole M. Meyer (VSB 43029)
1825 Eye Street, NW, Suite 900
Washington, DC 20006
(202) 457-1060
Fax (844) 670-6009
jredway@dickinsonwright.com
nmeyer@dickinsonwright.com

Timothy M. Strong (AZ Bar No. 021345)
1850 N. Central Ave., Ste. 1400
Phoenix, AZ 85004
(602) 285-5000
Fax (844) 670-6009
tstrong@dickinsonwright.com
Admitted pro hac vice

Counsel for Defendant
Markel Insurance Company

4842-5346-9418 v4 [93199-5]

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2021, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all counsel of record.

DICKINSON WRIGHT PLLC

By: */s/ Sarah Brogi*
Sarah Brogi