IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ERIC R. SHANTZER, DDS d/b/a
RICHBORO DENTAL EXCELLENCE,

Plaintiff,

v.

TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA, THE TRAVELERS INDEMNITY COMPANY,

Defendants.

Case No. 2:20-cv-02093

DEFENDANTS' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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I. INTRODUCTION

The Policy provides *property* insurance coverage. The Business Income and Civil Authority provisions both require "direct physical loss of or damage to property" at either Plaintiff's Premises (for Business Income coverage) or a non-insured premises within 100 miles (for Civil Authority coverage), caused by a Covered Cause of Loss, such as a windstorm. The Policy does not cover losses Plaintiff might suffer due to what he describes as "any potential *financial storm* caused by a forced closure." (Doc. 25, at 8-10 (emphasis added)).[1] Recent decisions in similar COVID-19-related cases have repeatedly granted insurers' motions to dismiss either because the plaintiffs suffered purely economic losses and could not plausibly allege any "direct physical loss of or damage to property," and/or because the policy contained a virus exclusion.[2] Plaintiff's First Amended Complaint ("FAC") fares no better and should likewise be dismissed.

II. ARGUMENT

A. The Virus Exclusion Bars Coverage for Plaintiff's Claimed Losses

Plaintiff makes three arguments in his attempt to avoid application of the virus exclusion: (1) the exclusion is ambiguous, (Doc. 25, at 23-24); (2) the exclusion does not apply because "[g]overnment orders and not a virus is what caused Plaintiff's business losses," (*id.* at 22 (citing FAC, ¶ 35); and (3) regulatory estoppel bars Travelers from relying on the virus exclusion, (*id.* at

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[1] Documents filed on CM/ECF are cited to the Document ("Doc.") number and page number created by the CM/ECF system that appears at the top of the page. Capitalized terms used herein are defined in the same manner as in Defendants' prior memorandum in support of this motion. (Doc. 18-1).

[2] *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, 2020 WL 5240218 (M.D. Fla. Sept. 2, 2020); *10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020); *Malaube, LLC v. Greenwich Ins. Co.*, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020); *Diesel Barbershop, LLC et al v State Farm Lloyds*, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020); *Rose's 1 LLC et al. v. State Farm Lloyds*, 2020 WL 4589206, *2 (D.C. Super. Ct. Aug. 6, 2020); *Gavrilides Mgm't Co. v. Mich. Ins. Co.*, Case No. 20 258 CB (Mich. Cir. Ct. July 1, 2020) (Doc. 18-3).

26). Courts across the country have repeatedly rejected the first two arguments in nearly identical cases, and Plaintiff has failed to plead any plausible basis for regulatory estoppel.

First, every court that has analyzed a virus exclusion in a COVID-19 property insurance case has found its language to be clear and unambiguous. *Martinez* involved a dental practice like Plaintiff's, and the court read the "plain language" of a virus exclusion to preclude coverage. *Martinez*, 2020 WL 5240218, at *2; *see also Diesel Barbershop*, 2020 WL 4724305, at *6 (similar). In *Gavrilides*, the court concluded that the same virus exclusion at issue here "supplies a completely workable, understandable, usable definition of the word virus," and found no coverage for a restaurant's COVID-19-related claim. (Doc. 18-3, p. 20-21).

Plaintiff argues that the virus exclusion could have specifically included the word "pandemic" in addition to "virus" (Doc. 25, at 24), but this is a meaningless exercise in semantics.[3] All of the COVID-19 cases to date have involved virus exclusions that did not include the word "pandemic," and the court in *Diesel Barbershop* rejected an argument that a virus exclusion "could have been more specifically worded." *Diesel Barbershop*, 2020 WL 4724305, *6 (citing *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 210 (5th Cir. 2007) ("The fact that an exclusion could have been worded more explicitly does not necessarily make it ambiguous.").

Second, a growing number of courts have uniformly rejected Plaintiff's argument that the virus exclusion does not apply because "[g]overnment orders and not a virus is what caused Plaintiff's business losses." (Doc. 25, at 22). In *Diesel Barbershop*, the court reasoned:

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[3] As Plaintiff's Opposition states, "Merriam and Webster's defines pandemic as '<u>an outbreak of a disease</u> that occurs over a wide geographic area and affects an exceptionally high proportion of the population: <u>a pandemic outbreak of a disease</u>[.]" (Doc. 25, at 24 (underscores added)). The virus exclusion bars coverage for any "loss or damage caused by or resulting from any virus[] . . . that induces or is capable of inducing . . . <u>disease</u>." (Doc. 14-1, at 150). The virus exclusion bars coverage for losses caused by a virus capable of inducing disease whether the virus induces disease in one person or one million people.

> Plaintiffs have pleaded that COVID-19 is in fact the reason for the [government] Orders being issued and the underlying cause of Plaintiff's alleged losses. While the Orders technically forced the Properties to close to protect public health, *the Orders only came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community.* ***Thus, it was the presence of COVID-19 in Bexar County and in Texas that was the primary root cause of Plaintiff's businesses temporarily closing.***

Id. at *6 (emphasis added));[4] *see also Martinez,* 2020 WL 5240218 at *2 ("Because [the insured dental practice's] damages resulted from COVID-19, which is clearly a virus, neither the Governor's executive order narrowing dental services to only emergency procedures nor the disinfection of the dental office of the virus is a 'Covered Cause of Loss' under the plain language of the policy's exclusion."); *Gavrilides*, Doc. 18-3, at 22 (rejecting argument that virus exclusion did not apply because civil authority orders were the cause). Here, as in *Diesel Barbershop, Martinez* and *Gavrilides*, Plaintiff does not dispute that the Orders requiring that dental practices limit operations to urgent/emergency services were issued "*for the prevention and suppression of disease*" and to reduce "*the risk of community spread of COVID-19*." (Doc. 25, at 31 (emphasis in original)). Moreover, the virus exclusion specifically applies to Civil Authority coverage, and the exclusion would be illusory as applied to Civil Authority coverage if the virus exclusion were inapplicable whenever a public health order was issued to combat the spread of a virus. Plaintiff's repeated pleas for discovery regarding the exclusion must be rejected because under Pennsylvania law, "when a written contract is clear and unequivocal, its meaning must be determined by its contents alone." *Alleman v. State Farm Life Ins. Co.*, 334 Fed. Appx. 470, 473 (3d Cir. 2009); *see also Gross v. St. Paul Fire & Marine Ins. Co.*, 68 Fed. Appx. 348, 350 (3d Cir. 2003).

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[4] The court also discussed an anti-concurrent causation ("ACC") clause in the virus exclusion in the policy at issue. *Id.* at *6-7. The ACC clause was not essential to the outcome, however, because the court concluded that the virus was the "primary root cause" of the plaintiff's claimed losses. *Id.* at *6.

Third, Plaintiff's argument (relying on an article written by policyholder-side attorneys) that Travelers should be estopped from relying on the virus exclusion because the Insurance Services Office ("ISO") allegedly misrepresented the meaning of the virus exclusion to regulators in 2006 is meritless. First, the alleged "misrepresentation"—"that property insurance policies do not and were not intended to cover losses caused by viruses, and so the Virus Exclusion offers mere clarification of existing law" (Doc. 25, at 26; FAC ¶ 26)—is not a misrepresentation at all, as recent COVID-19 decisions confirm.[5] Moreover, in Pennsylvania, the doctrine of regulatory estoppel applies only where an insurer "switch[es] legal positions to suit [its] own ends" by taking one position in regulatory proceedings and then later "asserting the opposite position [in court] when claims are made by the insured policyholders." *Sunbeam Corp. v. Liberty Mutual Insurance Company*, 566 Pa. 494, 500 (2001). Here, even if ISO's 2006 statement could somehow bind Travelers (which it cannot, and Plaintiff fails to allege any basis for such a conclusion), Travelers has not "switch[ed] legal positions." Travelers' position in this action is that the Policy does not provide coverage because Plaintiff cannot satisfy the essential requirements of the coverage grant for Civil Authority or Business Income coverage and, in addition, the virus exclusion bars coverage. Travelers' position is thus consistent with ISO's alleged 2006 statement. *Hussey Copper, Ltd. v. Royal Ins. Co. of Am.*, 2009 WL 2913959, at *9 (W.D. Pa. Sept. 9, 2009) (regulatory estoppel was inapplicable because positions taken before insurance department "can be read consistently with the positions taken by Defense counsel in

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[5] As several courts have recently held in COVID-19 cases, policies that do not include virus exclusions also do not provide coverage for losses resulting from the COVID-19 virus. *See, e.g.*, *Rose's 1*, 2020 WL 4589206, at *5 ("[E]ven in the absence of [a virus] exclusion, Plaintiffs would still be required to show a 'direct physical loss.' Because they cannot do so, the Court grants summary judgment to Defendant."); *Malaube*, 2020 WL 5051581, at *7-8 (same result). Even if these cases were incorrectly decided, it could not be a misrepresentation for ISO to take a position in the Pennsylvania Insurance Department that courts have agreed with.

this litigation"), *aff'd*, 391 Fed. Appx. 207, 211 (3d Cir. 2010) (regulatory estoppel did not apply because, *inter alia*, ISO's statements were not contrary to insurer's position in litigation).

Finally, Plaintiff completely ignores Travelers' arguments that, because Plaintiff claims the Orders were the cause of his losses, the Acts or Decisions exclusion and Ordinance or Law exclusion also preclude coverage. (*See* Doc. 18-1, at 37-38.) The applicability of these additional exclusions—which Plaintiff makes no attempt to challenge—renders it unnecessary to resolve his meritless attempts to avoid application of the virus exclusion.

B. Plaintiff Cannot Establish Entitlement to Civil Authority Coverage

Plaintiff also has not—and, as his Opposition demonstrates, cannot—establish the Civil Authority provision's essential requirements that the Orders (1) "prohibit[ed] access" to the insured premises, and (2) were issued "due to direct physical loss of or damage to property at locations, other than [the insured] premises, that are within 100 miles of the [insured] premises, caused by or resulting from a Covered Cause of Loss." (Doc. 14-1, at 34).

First, as Plaintiff admits and the Orders confirm, Plaintiff's dental practice was "permitted to remain open" for urgent/emergency procedures, and "when open" followed recommended practices. (Doc. 25, at 8; *see also id.* at 11). Plaintiff's contentions that Civil Authority coverage applies because he lost the "majority" or the "lion share" of his business, or because he was unable to obtain sufficient PPE, (*id.* at 34), are incorrect as a matter of law. Pennsylvania courts have construed the term "prohibit[] access" to require that the Orders "completely prohibit[] access" rather than "merely hinder[] access to the covered premises" in order for Civil Authority coverage to apply. *Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, 2010 WL 2696782 *4 (M.D. Pa. July 6, 2010). Plaintiff also ignores Travelers' citation to *Syufy Enterprises v. The Home Insurance. Co. of Indiana*, 1995 WL 129229 (N.D. Cal. Mar. 21, 1995), which held that "dawn-to-dusk" curfews imposed by cities during the Rodney King riots did not

"prohibit[] access" to the insured's movie theatres under a civil authority provision, even though customers could not attend during curfew hours. *Id.* at *1-2. Plaintiff's reliance on *Narricot Indus., Inc. v. Fireman's Fund Ins. Co.*, 2002 WL 31247972 *6 (E.D. Pa. Sept. 30, 2002) is misplaced because in that case two governmental actions, in the wake of a flood, completely prohibited access to an insured property located in North Carolina—a letter from the town "prohibiting [the insured] from operating" and the police department's closure of the road on which the insured premises was located. *Id.* at *4.[6] To the extent *Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), concluded that the plaintiff had adequately alleged a prohibition of access to restaurants that were allowed to remain open for take-out and delivery, the decision failed to address any of the precedent nationwide on civil authority coverage, and cited no supporting authority. *Id.* at *7.[7]

Second, Plaintiff's Opposition demonstrates that he cannot establish that the Orders were issued "due to direct physical loss of or damage to property at locations, other than [the insured] premises, that are within 100 miles of the [insured] premises, caused by or resulting from a Covered Cause of Loss." (Doc. 14-1, at 34). Plaintiff's Opposition concedes, as the FAC alleges and the Orders reflect,[8] that the Orders were issued "in an effort to control the pandemic and the spread of the virus," "*for the prevention and suppression of disease*" and to reduce "*the risk of community spread of COVID-19*." (Doc. 25, at 8, 31 (emphasis in original)). Because the Orders

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[6] *Narricot* also supports Travelers' position because the court concluded that coverage was precluded with respect to a second insured location in Virginia because the damage was not caused by a covered cause of loss. *Narricot Indus., Inc.*, 2002 WL 31247972 at *6. Here, not only were the Orders not issued due to property damage, they were issued as a result of the Coronavirus, which is not a Covered Cause of Loss.

[7] The sole case cited in *Studio 417* explains that "[o]ther jurisdictions that have examined this access issue have found that, generally, coverage under the civil authority section is only available when access is *completely prohibited*." *TMC Stores, Inc. v. Federated Mut. Ins. Co.*, 2005 WL 1331700, at *4 (Minn. Ct. App. June 7, 2005) (unpublished; emphasis added).

[8] FAC, ¶¶ 48, 49; *see also id.*, ¶ 70 (Orders issued "to protect the public and minimize the risk of spread of disease"); Doc. 14-2, at p. 2 of 4 (declaring state of emergency based on need to "mitigate the spread of COVID-19"); Doc. 14-3, at p. 2 of 3 (closing certain businesses due to "public health emergency" created by COVID-19)). None of the Orders relied upon and attached to the FAC make *any* reference to the order being issued "due to" any property damage. (Docs. 14-2, 14-3, 14-4, 14-5, 14-6).

were issued for public health reasons rather than due to any physical loss of or damage to property,[9] Plaintiff's reliance on *Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, 440 F. Supp. 3d 520, 531 (D.S.C. 2020), is misplaced—in that case, civil authority coverage did not apply because the government orders did not reference any existing damage to property, but rather "focused on the potential, future, or predicted impacts on life and property." *Id.* at 531. In *Studio 417*, the court failed to review and analyze any civil authority orders to identify the reasons for the orders being issued, and failed to address any of the case law. *Studio 417*, 2020 WL 4692385, at *7.

C. Plaintiff Cannot Establish Direct Physical Loss of or Damage to Property

Plaintiff's assertion that he has suffered "direct physical loss" because he has sustained "uninhabitability of the property" (Doc. 25, at 38) is contrary to his own concessions that he could and did use the Premises for urgent/emergency treatment, (*id.* at 8, 11). Plaintiff fails to allege that anything *physically* happened to his property or the Premises. He relies on various cases that are inapposite because there was a noxious odor or other direct physical impact on the insured property or immediately adjacent thereto.[10] In *Western Fire*, one of the cases Plaintiff

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[9] The Court may only consider the facts alleged in the FAC and documents subject to judicial notice, such as the Orders, in deciding this Motion to Dismiss. Plaintiff's attempts in the Opposition to recharacterize his allegations regarding the Orders by claiming they were issued due to property damage, (Doc. 25, at 30) are neither entitled to any consideration by this Court nor do they find any support in the Orders themselves.

[10] *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993) (pervasive and acrid odors rendered property uninhabitable); *In re Chinese Manufactured Drywall Prod. Liab. Litig.*, 759 F. Supp. 2d 822, 832 (E.D. La. 2010) (harmful fumes or gases rendered property uninhabitable); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658, *4 (Mass. Super. Aug. 12, 1998) (same); *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 405 (1st Cir. 2009) (same); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, *6 (D.N.J. Nov. 25, 2014) (same); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708–09 (E.D. Va. 2010) (same); *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (leaked gasoline saturating the premises rendered property uninhabitable); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826 (3d Cir. 2005) (presence of E-Coli bacteria rendered property uninhabitable); *Sentinel Mgt. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. App. Ct. 1997) (friable asbestos rendered property uninhabitable); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, *6 (D. Or. June 7, 2016), *vacated*, 2017 WL 1034203 (D. Or. Mar. 6, 2017) (smoke and soot rendered property uninhabitable); *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (presence of illegal pesticide in oats rendered them unusable); *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Cal. Ct. App. 1962) (destabilizing of the land or rockwalls adjacent to the insured dwellings rendered them uninhabitable); *Murray v. State Farm Fire & Cas. Co.,* 509 S.E.2d 1, 17 (W.Va. 1998) (same);

relies on, the court recognized that "*[i]t is perhaps quite true that the so-called 'loss of use' of the church premises, standing alone, does not in and of itself constitute a 'direct physical loss,'*" but concluded that the accumulation of gasoline around and under the church building was a "direct physical loss" because it was distinctly different from a mere loss of use not caused by a physical impact. *Western Fire*, 437 P.2d at 55 (emphasis added). Plaintiff's allegations here fail to allege any physical impact on the insured property.[11] He attempts to distinguish Travelers' citation to *Phila. Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280 (S.D.N.Y. 2005), as a case involving "only purely economic losses," (Doc. 25, at 42), but the same is true here—Plaintiff suffered what he characterizes as a "financial storm," not any physical loss or damage to property. (*Id.* at 8.)

What Plaintiff claims here is that he "lost the functionality and utility" of his Premises, including "the volume part of the business involving providing dental cleanings, [and] elective dental treatment." (Doc. 25, at 12). In the recent cases involving COVID-19-related insurance claims, courts across the country have repeatedly rejected essentially-identical arguments, with one court characterizing as "just simply nonsense" an argument that a government-imposed

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Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co., 406 N.J. Super. 524, 540, 968 A.2d 724, 734 (App. Div. 2009) ("[E]lectrical grid was 'physically damaged' because, due to a physical incident or series of incidents, the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity."); *Am. Guarantee & Liab. Ins. Co. v. Ingram Micro, Inc.*, 2000 WL 726789, at *3 (D. Ariz. Apr. 18, 2000) (power outage that removed from the insured's computer systems "programming information and custom configurations necessary for them to function" and rendered the systems "inoperable" constituted physical damage); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Connecticut*, 2007 WL 464715 *8 (D. Or. Feb. 7, 2007) (holding "physical change in the furnace resulting from a release of lead particles" which "rendered it useless" constituted "direct physical loss of or damage to the furnace"). In another case cited by Plaintiff, the court found that the insured had been permanently dispossessed of the insured property after it was mistakenly shipped to China and became unrecoverable. *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.,* 2018 WL 3829767 *3 (C.D. Cal. July 11, 2018).

[11] The Opposition makes a conclusory assertion—not found anywhere in the FAC—that the insured Premises was "contaminated by the coronavirus." (Doc. 25, at 38). Because the allegations of the FAC must control the Court's decision on Travelers' Motion to Dismiss, the Court must disregard this conclusory assertion, which is not alleged in the FAC. The FAC alleges no facts from which a conclusion could be reached that the COVID-19 virus contaminated the Premises. Elsewhere in the Opposition, Plaintiff clarifies that his claim is that the Premises were at "imminent and continued risk of Coronavirus contamination, if it was not contaminated already." (Doc. 25, at 43 (citing FAC ¶ 63)).

limitation on the use of insured property constitutes direct physical loss of or damage to property. *Gavrildes Mgmt.*, Doc. 18-3, at 21. In each of these cases, courts have consistently held that loss of functionality does not constitute "direct physical loss of or damage to property" because there was no physical impact on or permanent dispossession of any property. *10E*, 2020 WL 5359653, at *5 (holding that plaintiff failed to allege "direct physical loss of or damage to property" because "public health restrictions" limiting the plaintiff's restaurant services to take-out and delivery did not "physically alter any of Plaintiff's property"); *Rose's 1 LLC*, 2020 WL 4589206, at *2 (holding that no "direct physical loss" occurred because governmental orders limiting restaurant operations "did not effect any direct changes to the properties," and "did not have any effect on the material or tangible structure of the insured properties"); *Malaube, LLC*, 2020 WL 5051581, at *7-8 (report and recommendation finding no coverage because plaintiff "has not alleged any physical harm," and "the restaurant merely suffered economic losses – not anything tangible, actual, or physical"); *Gavrilides*, Doc. 18-3, at 19-20 (holding that there were "no allegations of direct physical loss of or damage to . . . property" because that "has to be something with material existence," "[s]omething that is tangible," "that alters the physical integrity of the property"); *Diesel Barbershop*, 2020 WL 4724305 at *5 (holding that plaintiffs failed to plead "direct physical loss" because they did not allege "a distinct, demonstrable physical alteration of the property"). As all of these cases held, allegations that government orders limited a businessowner's use of insured property, in the absence of any physical impact on property, cannot establish "direct physical loss of or damage to property." *See also Mama Jo's Inc. v. Sparta Ins. Co.*, No. 18-12887, 2020 WL 4782369, at *8 (11th Cir. Aug. 18, 2020) (unpublished) (holding that, in applying the "direct physical loss" requirement under Florida law

where dust infiltrated a restaurant, "an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical'").

Plaintiff's reliance on *Studio 417* is misplaced for two reasons. First, the court relied entirely on the plaintiffs' allegations that "over the last several months, it is likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus." *Studio 417*, 2020 WL 4692385, at *2. Here, in contrast, Plaintiff alleges that his Premises were closed except for emergency/urgent procedures, and he does not allege that any patients or staff members, or Plaintiff himself, were infected with the Coronavirus. Plaintiff expressly "does *not* seek any determination of whether the Coronavirus has caused a loss or damage at the Insured Properties." FAC ¶ 82 (emphasis added). *See Malaube*, 2020 WL 5051571, at *7 (distinguishing *Studio 417* because "[t]here is no allegation, for example, that COVID-19 was physically present on the premises. Instead, Plaintiff only alleges that two Florida Emergency Orders forced the closure of its restaurant."). Second, the policy in *Studio 417* had no virus exclusion, and any claim that the COVID-19 virus was in Plaintiff's Premises would be fatal to his claims under the virus exclusion.

Finally, while Plaintiff acknowledges that "the Court must read each policy as a whole" (Doc. 25, at 16), he completely ignores Travelers' arguments that his proposed interpretation of the Policy: (1) is irreconcilable with the Policy's definition of "period of restoration"; (2) would eviscerate the loss of use exclusion; and (3) would render the Civil Authority provision superfluous. (*See* Doc. 18-1, at 34-36.) Plaintiff's failure to address *any* of these key points made by Travelers further demonstrates the weakness of his position.

III. CONCLUSION

For all of the foregoing reasons, in addition to those stated in Travelers' Memorandum of Law in Support of this Motion, the FAC should be dismissed, in its entirety, with prejudice.

Respectfully submitted,

/s/ Richard L. Scheff

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CERTIFICATE OF SERVICE

I, Richard L. Scheff, certify that on September 11, 2020, I caused a true and correct copy of the foregoing to be served via ECF upon the following:

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