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

WINDBER HOSPITAL d/b/a CHAN SOON SHIONG MEDICAL CENTER, on behalf of itself and all others similarly situated, *Plaintiff,* v. TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, *Defendant*.	Case No. 3:20-CV-00080-KRG

DEFENDANT TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA'S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

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Plaintiff Windber Hospital ("Windber") purchased a Travelers Property Casualty Company of America ("Travelers") insurance policy (the "Policy") with an explicit virus exclusion. After suffering alleged business income losses due to the Coronavirus, Windber now attempts to end-run the Policy's virus exclusion, and asks this Court to force Travelers to reimburse Windber for losses that Travelers never agreed to insure. Windber demonstrates the weakness of its position by failing to respond directly to Travelers' arguments and instead attempting to persuade the Court with various confusing, rambling arguments and newly-invented theories inconsistent with its own allegations. Windber's arguments lack merit as explained below, and the Court should grant judgment on the pleadings in favor of Travelers.

ARGUMENT

I. CIVIL AUTHORITY COVERAGE DOES NOT APPLY AS A MATTER OF LAW

Windber fails to demonstrate that it can satisfy any of the requirements for Civil Authority coverage, which are: (1) a Covered Cause of Loss caused damage to non-insured property, resulting in a civil authority action; (2) the civil authority action "prohibited" "[a]ccess to the area immediately surrounding the damaged property," including the insured premises, "as a result of the damage"; and (3) the civil authority action was "taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or . . . to enable a civil authority to have unimpeded access to the damaged property." (Doc. 1-2, at 58-59.)

A. Civil Authority Coverage Does Not Apply to Losses Caused by or Resulting from a Virus

The most straightforward way for this Court to bring this litigation to a swift end is based on the Policy's express exclusion for "loss or damage *caused directly or indirectly by . . . [a]ny*

virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Doc. 1-2, at 36, 38 (emphasis added). Windber does not and cannot dispute that the COVID-19 virus is a "virus" that "induces or is capable of inducing physical distress, illness or disease." Windber also does not and cannot dispute that its own Complaint repeatedly admits that it seeks to recover for "*losses caused by the COVID-19 virus* and the governmental Orders entered in connection therewith." Compl. ¶ 2 (emphasis added); *see also id.* Count I, ¶¶ 31, 33, 35, 36, 39, 66-68, 72, Prayer for Relief; Count II, ¶¶ 50, 52-54, Prayer for Relief. Windber also does not and cannot dispute that, as the Complaint alleges, the relevant government orders (the "Orders") were issued to reduce "the risk of transmission and the risk of community spread of COVID-19." Compl. ¶ 21; Orders attached to Answer as Exs. 2-7. The virus exclusion thus clearly and unambiguously excludes Winber's claims.

Windber argues that the virus exclusion "does not exclude coverage for 'continuing normal operating expenses'" because the exclusion applies to "loss or damage" and does not reference "expenses." (Doc. 24, at 25-26.) This theory is contrary to Windber's own allegations and a complete misreading of the Policy. Throughout the Complaint, Windber seeks to recover for "***losses*** caused by COVID-19 virus . . . ." *See, e.g.*, Compl. ¶ 1 (emphasis added); *see also id.* ¶¶ 2, 10, 12, 14, 31, 33, 35, 36, 39, 40, 46, 49(a), (c), (d), (f), 66, 67, 68, 72; Count II, ¶¶ 50-54; Prayers for Relief.[1] There is not even a *hint* in the Complaint that Windber was seeking coverage only for "continuing normal operating expenses" and, as it now says, "is not seeking coverage for any other benefit, such as lost profits." (Doc. 24, at 2 & n.4.)

[1] The two specific causes of action alleged (seeking declaratory and injunctive relief) both repeatedly seek to recover for "***losses*** caused by the COVID-19 virus and referenced Orders." *Id.* ¶ 66 (emphasis added); Count II, ¶ 50; *see also id.* ¶¶ 67, 68, 72; Count II, ¶¶ 51-54; Prayers for Relief. There are also a few references to Windber seeking "recovery of ***damages*** caused by the COVID-19 virus and referenced Orders." *Id.* ¶ 34 (emphasis added).

In any event, Windber's newly-fashioned theory, for which it cites no supporting case law, has no merit, for two reasons. *First*, Windber has not and cannot satisfy the requirement of direct physical loss of or damage to property caused by a Covered Cause of Loss. The Business Income provision covers "the actual loss of Business Income you [i.e., the insured] sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration' . . . caused by ***direct physical loss of or damage to property at [the insured] premises***" that is "caused by or result[s] from a ***Covered Cause of Loss***." (Doc. 1-2, at 57 (emphasis added).) Similarly, the Civil Authority provision, which is a limited extension of the Business Income coverage, states that "[w]hen a ***Covered Cause of Loss*** causes ***damage to property other than property at the described premises***, we will pay for the actual loss of Business Income you sustain . . . caused by action of civil authority that prohibits access to the described premises," if "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage," and certain other requirements are satisfied. (*Id.* at 58 (emphasis added.)) Thus, both the Business Income and Civil Authority provisions are clear that there must be "direct physical loss of or damage to property" (Business Income) or "damage to property" (Civil Authority) caused by a Covered Cause of Loss. While the Complaint does not allege that anything happened to the property in Windber's premises, and does not allege that any civil authority acted in response to any damage to property anywhere, to the extent the Complaint attempts to allege that anything physically happened to any property, its allegations are that the COVID-19 virus can remain on surfaces for periods of time. Compl. ¶¶ 14-15. The virus exclusion makes clear that any alleged physical loss or damage allegedly caused by a virus is not a Covered Cause of Loss.

Second, the Policy's reference to continuing normal operating expenses is simply part of the method of *calculation* of the amount of a covered Business Income *loss* where the Policy

provides coverage. Continuing normal operating expenses after a covered physical loss of or damage to property are no more than a factor to be included in calculating the amount of a claimed loss of Business Income, assuming coverage exists, subject to the requirements discussed above. The Policy specifies that "Business Income means *the sum of* the: **(1)** Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; *plus* **(2)** Continuing normal operating expenses incurred, including payroll." (*Id.* (italics added).) The Policy makes reference to continuing normal operating expenses simply in describing how to *measure* the amount of a covered "loss" of Business Income. *See HTI Holdings, Inc. v. Hartford Cas. Ins. Co.*, No. 10-CV-06021-TC, 2011 WL 4595799, at *13 (D. Or. Aug. 24, 2011), *report and recommendation adopted*, No. CIV. 10-6021-AA, 2011 WL 6205903 (D. Or. Dec. 8, 2011) (explaining, under similar policy language, that "profit or loss and continuing operating expenses are jointly considered.").[2] The coverage is for "actual loss of Business Income," and continuing normal operating expenses are simply part of the method of loss *measurement* assuming that coverage exists. There is no separate, self-standing coverage for "continuing normal operating expenses" independent of a claim for "loss or damage," as Windber erroneously suggests.[3]

B. Civil Authority Coverage Does Not Apply Because the Complaint Does Not Allege that Access to the Area Surrounding Plaintiff's Premises Was Prohibited by a Civil Authority

The Civil Authority provision requires that "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described

[2] The provision entitled "Loss Determination" similarly explains that "[t]he amount of Business Income *loss* will be determined" based on a specified methodology that takes into account operating expenses. (Doc. 1-2, at 66 (emphasis added).) The "Loss Payment" provision applicable to Business Income and Civil Authority coverages further explains that what Travelers will pay for is a "covered *loss*." (*Id.* at 67 (emphasis added).)

[3] The fact that Windber found a virus exclusion, not included in Windber's Policy, that includes the word "expense" (Doc. 24, at 27) is irrelevant as explained above, and the Court's analysis must focus on the virus exclusion at issue here, in the context of Windber's Policy. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 210 (5th Cir. 2007) (court "reject[ed] the plaintiffs' arguments that the flood exclusions in the policies before us are ambiguous in light of more specific language used in other policies").

premises are within that area but are not more than 100 miles from the damaged property." (Doc. 1-2, at 58-59.) Windber does not dispute that, as the case law cited by Travelers demonstrated, this provision requires a complete prohibition of access to the insured premises (and the area immediately surrounding it). (Doc. 11, at 14-16.) Instead, Windber argues that this requirement was satisfied because "[t]he government directed Windber's employees to not leave their houses." (Doc. 24, at 19.) But Windber fails to cite *any* allegation in the Complaint to support this assertion, and there is none. Moreover, Windber operates *medical centers*. Compl. ¶ 4; *see also* Doc. 1-2, at 7 (listing insured locations under policy). The "stay at home" order issued by Governor Wolf that Windber cites and relies upon in its Complaint has an exception for life sustaining businesses, Compl. ¶ 20; Answer Ex. 4, and the exhibit to Governor Wolf's order reflects (as is well-known) that hospitals and other healthcare facilities were permitted to continue operations, with the exception of certain elective procedures. Ex. A hereto, at 4. In addition, as reflected in an exhibit to the Complaint, Windber informed Travelers that its hospital remained open but was performing fewer surgeries. (Doc. 1-3, at 1.) Windber has not alleged that its employees were completely prohibited from accessing its medical centers, let alone that everyone was prohibited from accessing the area immediately surrounding its premises.[4]

C. Civil Authority Coverage Does Not Apply Because the Complaint Does Not Allege That the Orders Were the Result of Damage to Property

The Policy further requires that the civil authority order result "[w]hen a Covered Cause of Loss causes damage to property other than property at the described premises," with the prohibition of access by a civil authority being "a result of the damage . . . ." (Doc. 1-2, at 58.) "The action of civil authority [must be] taken in response to dangerous physical conditions

[4] Windber's citation to *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020) does not support its position. The Pennsylvania Supreme Court recited Governor Wolf's orders and referenced the list of life-sustaining businesses. *Id.* at 879. It did not mention or address the scope of activities permitted to be performed by a medical center.

resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property." (*Id.* at 59.) Windber does not dispute, as Travelers' memorandum demonstrated, that this provision requires a "causal link between prior damage and civil authority action." *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 687 (5th Cir. 2011); *see also* Doc. 11, at 17-18. Instead, Windber argues that "[t]he government acted as it did, in part, because the virus was on surfaces throughout the city (a dangerous condition), necessarily including surfaces within one mile of Windber's medical center," and "the presence of the virus on those surfaces constituted physical damage to property." (Doc. 24, at 19.) The Complaint, however, does not allege that Governor Wolf or the Pennsylvania Department of Health acted based on physical damage to property (and if that were the case, the virus exclusion would plainly bar coverage). To the contrary, the Complaint alleges, and the Orders reflect, that they were issued "as a result of the COVID-19 virus," and to reduce "unnecessary gatherings, personal contact and interaction that will increase the risk of transmission and the risk of community spread of COVID-19." Compl. ¶¶ 18, 21; *see also* Orders, Docs. 9-2 through 9-7.[5] *See, e.g.*, *Dickie Brennan*, 636 F.3d at 686 (no civil authority coverage because order was not "'due to' physical damage to property"); *Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, No. 4:19-CV-00693-SAL, 2020 WL 886120, at *8 (D.S.C. Feb. 24, 2020) (finding no coverage under civil authority provision where governor's executive order, "which started the mandatory evacuation, does not reference any 'damage or destruction of property'").

[5] Because the Orders make no reference to damage to property, the Complaint's conclusory allegation that "[t]he COVID-19 virus, as evidenced by the[] Orders, causes damage to property," Compl. ¶ 24, must be disregarded. *See, e.g.*, *Payne v. DeLuca*, No. 2:02-CV-1927, 2006 WL 3590014, at *9 n.5 (W.D. Pa. Dec. 11, 2006) ("[A] court is not required to accept conclusory allegations in a complaint when those allegations are contradicted by documents incorporated in the pleadings."); *U.S. Claims, Inc. v. Flomenhaft & Cannata, LLC*, 519 F. Supp. 2d 515, 520 (E.D. Pa. 2006) ("Nor must a court accept as true conclusory allegations contradicted by documents underlying the complaint.").

Windber further suggests that government officials acted based on concerns that, "absent a closing of the building to business, the building would inevitably become infested with virus," which Windber characterizes as a form of anticipated future "property damage." (Doc. 24, at 23.) Windber uses a hypothetical example of a business that is closed in anticipation of an impending hurricane. (*Id.* at 22.) This argument fails for two reasons. *First*, the Complaint makes no factual allegations that government officials acted based on anticipated damage to property, and the Orders provide no support for this contention. (Docs. 9-2 through 9-7.) *Second*, courts interpreting similar civil authority provisions have repeatedly *rejected* insureds' arguments that such a provision provides coverage when a civil authority order is issued due to anticipated future damage to property, including in the context of hurricanes.[6]

II. BUSINESS INCOME COVERAGE DOES NOT APPLY AS A MATTER OF LAW

A. The Complaint Fails to Plead "Direct Physical Loss of or Damage to" Property at the Insured Premises

Windber acknowledges that one of the essential prerequisites to coverage under the Business Income provision is "'direct physical loss of or damage to property' at the insured premises (Windber's medical center)."[7] (Doc. 24, at 5; *see also* Policy, Doc. 1-2, at 57.) Windber maintains that this requirement is satisfied on the basis that "the term loss of can only mean '*loss of use*' of the property," and "Windber has been unable to *use* its medical center (the insured premises)." (Doc. 24, at 6, 9-10 (emphasis added).) Contrary to Windber's position, courts have

[6] *See, e.g.*, *Kelaher, Connell & Conner*, 2020 WL 886120, at *8 (collecting cases holding that civil authority provisions do not apply to orders based on threatened or anticipated future damage; finding no coverage under civil authority provision where governor's evacuation order was based on "the potential, future, or predicted impacts on life and property" from hurricane); *S. Texas Med. Clinics, P.A. v. CNA Fin. Corp.*, No. CIV.A. H-06-4041, 2008 WL 450012, at *10 (S.D. Tex. Feb. 15, 2008) (same result where Hurricane Rita evacuation order was based on "anticipated threat of damage to the county and not due to property damage that had occurred").

[7] Windber's Opposition to Travelers' Motion for Judgment on the Pleadings does not address Extra Expense coverage. Accordingly, to the extent the Complaint makes passing references to Extra Expense Coverage, *see* Compl. ¶¶ 32, 36, Windber has abandoned any such claim.

repeatedly rejected arguments that a mere loss of use constitutes a direct physical loss of property, and no court has *ever* held that a temporary restriction on the use of a property or a required closure of a property as a result of a government order is a "direct physical loss of or damage to property." For example, in *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D.2d 1 (N.Y. App. Div. 2002), a Broadway theatre was forced to cancel performances when the city closed off the block after scaffolding attached to a nearby building collapsed. *Id.* at 2-3. The appellate court rejected the trial court's conclusion that "loss of" includes "loss of use" of property, holding that that "the plain meaning of the words 'direct' and 'physical' narrows the scope of coverage and mandates the conclusion that losses resulting from off-site property damage do not constitute covered perils under the policy." *Id.* at 7 (citations omitted). Other courts have rejected similar business interruption claims based on loss of use.[8]

Consistent with all of these prior decisions, in the first decision to address this issue in a COVID-19 case, a Michigan Circuit Court judge recently granted the equivalent of a motion to dismiss, ruling from the bench that there were "no allegations of direct physical loss of or damage

[8] *See, e.g.*, *Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp.*, 486 S.E.2d 249, 251 (N.C. App. 1997) (finding no "physical loss" sufficient to trigger business interruption coverage where heavy snowstorm made insured premises inaccessible); *Pentair, Inc. v. American Guar. and Liab. Ins. Co.*, 400 F.3d 613, 617 (8th Cir. 2005) (rejecting insured's argument that "mere loss of use or function of property constitutes 'direct physical loss or damage'"); *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) ("The words 'direct' and 'physical,' which modify the phrase 'loss or damage,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure."); *Northeast Georgia Heart Ctr., P.C. v. Phoenix Ins. Co.*, 2014 WL 12480022, *6 (N.D. Ga. May 23, 2014) ("The court will not expand 'direct physical loss' to include loss-of-use damages when the property has not been physically impacted in some way. To do so would be equivalent to erasing the words 'direct' and 'physical' from the policy."); *J. O. Emmeric & Assocs., Inc. v. State Auto Ins. Cos.*, 2007 WL 9775576, at *5 (S.D. Miss. Nov. 19, 2007) (where insured was denied access to computer data during power outage, there was no "direct physical loss of or damage to" property). Along the same lines, courts have repeatedly held that a defect in title to property which has the legal effect of depriving the insured of the property, is not a tangible, "physical loss," and therefore not covered by property insurance policies. *See Dae Assocs., LLC v. AXA Art Ins. Corp.*, 158 A.D.3d 493, 494 (N.Y. App. Div. 2018); *HRG Dev. Corp. v. Graphic Arts Mut. Ins. Co.*, 527 N.E.2d 1179, 1180 (Mass. App. Ct. 1988); *Nevers v. Aetna Ins. Co.*, 546 P.2d 1240, 1241 (Wash. Ct. App. 1976); *Thane Hawkins Polar Chevrolet, Inc. v. Truck Ins. Exch.*, 1995 WL 70152, *2 (Minn. Ct. App. Feb. 21, 1995) (unpublished).

to . . . property" under the policy because that "has to be something with material existence," "[s]omething that is tangible," "that alters the physical integrity of the property." *Gavrildes Mgmt. Co. v. Michigan Ins. Co.*, Case No. 20-258-CB-C30, tr. at 18-19 (Mich. Cir. Ct. July 1, 2020) (Ex. B hereto). The court further stated that "it seems like the plaintiff is saying that the physical requirement is met because people were physically restricted from dine-in services [at the plaintiffs' restaurants]," "[b]ut, that argument is just simply nonsense [a]nd it comes nowhere close to meeting the requirement that . . . there has to be some physical alteration to or physical damage or tangible damage to the integrity of the building." *Id.* at 20.

The cases cited by Windber are readily distinguishable on the basis that there was either a physical impact or physical manifestation at the insured property that allegedly made the premises uninhabitable or entirely unusable. In *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002), the Third Circuit was called upon to decide whether, under the law of New York or New Jersey, the existence of asbestos-containing building materials in a building constituted "direct physical loss or damage" to property. The Third Circuit acknowledged that "[i]n ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure," and then stated:

> "[P]hysical loss or damage" occurs only if an actual release of asbestos fibers from asbestos containing materials has resulted in contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable, or if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility. The mere presence of asbestos, or the general threat of future damage from that presence, lacks the distinct and demonstrable character necessary for first-party insurance coverage.

Id. at 235. Because the summary judgment record revealed no evidence of actual contamination or an imminent threat of asbestos contamination rendering any of the insured buildings uninhabitable, the court held that no "direct physical loss or damage" had occurred. *Id.* at 236.

In *Motorists Mutual Ins. Co. v. Hardinger*, 131 F. App'x 823 (3rd Cir. 2005), the insureds fell ill shortly after moving into a home they had just purchased. *Id.* at 824. Testing confirmed that the artesian well connected to the home was contaminated with dangerous levels of E-coli bacteria. *Id.* The district court granted summary judgment for the insurer because no "direct physical loss" had occurred. *Id*. at 825. In an unpublished decision, the Third Circuit predicted that the Pennsylvania Supreme Court would follow *Port Authority*, and remanded the case so that a jury could decide "whether the functionality of the [insured's] property was nearly eliminated or destroyed, or whether their property was made useless or uninhabitable" by the presence of harmful E-coli bacteria. *Id.* at 826-27.[9]

Port Authority and *Motorists Mutual* are readily distinguishable on the basis that there was either a physical impact or physical manifestation at the insured property that allegedly made the premises uninhabitable or entirely unusable. The same is true with respect to the other cases cited by Windber.[10] As one case cited by Windber explained, these cases all involved circumstances "where the building in question has been rendered unusable *by physical forces*." *Travco Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010) (home was contaminated by sulfuric gases

[9] While *Motorists Mutual* is readily distinguishable, Travelers does not concede that this unpublished opinion correctly sets forth the law of Pennsylvania on the meaning of "direct physical loss of or damage to property," and maintains that Pennsylvania would likely follow the majority rule nationwide, under which "[t]hat the loss needs to be 'physical,' given the ordinary meaning of the term, is '*widely held to exclude alleged losses that are intangible or incorporeal*, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a *detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property*.'" *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (Cal. Ct. App. 2010) (quoting 10A COUCH ON INSURANCE § 148:46, pp. 148-81) (emphasis added).

[10] *See Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 4, 16–17 (W. Va. 1998) (insured home was damaged by rocks falling from an adjacent highwall, which became unstable, rendering the home uninhabitable); *Sentinel Mgt. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. App. Ct. 1997) (insured building was physically impacted by the release of asbestos fibers); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658, at *1 (Mass. Super. Aug. 12, 1998) (carbon monoxide contamination required evacuation of building); *Oregon Shakespeare Festival Ass'n v. Great American Insurance Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247, at *5–6 (D. Or. June 7, 2016), *vacated*, 2017 WL 1034203, at *1 (D. Or. Mar. 6, 2017) (wildfire smoke, evidenced by soot and ash, impacted insured outdoor theater; opinion was later vacated); *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 806 N.Y.S.2d 709 (N.Y. App. Div. 2005) (faulty raw ingredients used in soft-drink products affected taste and made them unmerchantable).

from Chinese-made drywall) (emphasis added). One of the earliest in this line of cases explained 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 Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (emphasis added).

Here, in contrast, Windber's claimed "loss of use" does not involve any physical impact or manifestation at the insured premises. The Complaint does not allege that Coronavirus was ever present in any of Windber's buildings, let alone that it contaminated any property to a point where the function or use of the medical centers was eliminated (assuming that were even possible where COVID-19 is treated in medical facilities and the virus can be readily eliminated by cleaning). While the presence of Coronavirus within a building would not constitute "direct physical loss of or damage to property," that is not even alleged in this case.

Windber's arguments that certain provisions in the Policy support its "loss of use" argument lack merit. With respect to the Policy's limited coverage for "fungus," wet rot or dry rot (Doc. 24, at 8), that can cause not only "damage" but also a total loss of a building component or an item of business personal property. Under the Policy, in the event of a total loss, Travelers would pay not to repair "damage" but for the total loss, based on the actual cash value or replacement cost value. (*See* Policy, Doc. 1-2, at 49-50.) With respect to the Utility Services Endorsement, an interruption of utility services potentially can cause a total loss of perishable items. To the extent Windber argues that "a suspension of operations would not cause property to be 'lost' (unable to be found)," *id.* at 9, what the Business Income provision requires

is the opposite of that, i.e., the direct physical loss of or damage to property must cause the suspension of operations, not vice versa. (Doc. 1-2, at 57-58.)

B. Plaintiff's Proposed Interpretation of the Policy is Contrary to Basic Rules of Insurance Policy Interpretation

In several respects, Windber's "loss of use" argument is contrary to the basic principle of Pennsylvania insurance law that "an insurance policy, like every other written contract, must be read in its entirety and the intent of the policy is gathered from consideration of the entire instrument." *Riccio v. Am. Republic Ins. Co.*, 705 A.2d 422, 426 (Pa. 1997). *First*, when the Policy covers a Business Income loss, the time period for such coverage is the "period of restoration," (Doc. 1-2, at 57), which generally ends on "[t]he date when the property at the described premises should be *repaired, rebuilt or replaced* with reasonable speed and similar quality" (*id.* at 68 (emphasis added)). Courts have repeatedly recognized that this definition contemplates that Business Income coverage requires a *physical* change to insured property that is capable of being remedied through repair or replacement.[11]

Second, the Policy, read as a whole, makes clear that a bare loss of use unaccompanied by any physical loss or damage is not covered because the Policy contains an express exclusion stating that "[w]e will not pay for loss or damage caused by or resulting from . . . loss of use or loss of market." (Doc. 1-2, at 39, 41.) Construing the phrase "direct physical loss or damage" to provide coverage for a loss of use unaccompanied by a physical alteration of insured property would nullify the "loss of use" exclusion. *See Toffler Assocs., Inc. v. Hartford Fire Ins. Co.*, 651 F. Supp. 2d

[11] *See, e.g. Newman Myers*, 17 F. Supp. 3d at 332 ("The words 'repair' and 'replace' [in the policy's definition of 'period of restoration'] contemplate physical damage to the insured premises as opposed to loss of use of it."); *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 287 (S.D.N.Y. 2005) ("'Rebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature."); *Harry's Cadillac*, 486 S.E.2d at 251 ("The business interruption clause does not cover all business interruption losses, but only those losses requiring repair, rebuilding or replacement."); *Roundabout Theatre*, 302 A.D.2d at 7-8 (similar analysis).

332, 344 n.3 (E.D. Pa. 2009) ("The Court must avoid interpreting the Policy in a way that makes any term meaningless or superfluous."); *see also Schneider Equip., Inc. v. Travelers Indem. Co. of Ill.*, 2006 WL 2850465, *1, *5-6 (D. Or. Sept. 29, 2006) (where well could not produce anticipated volume of water and was determined to be unusable as a result of a damaged screen, court held that loss of use exclusion, among other exclusions, applied).[12]

Third, if, as Windber maintains, the mere loss of use of an insured premises following a governmental order restricting an insured's operations constituted "direct physical loss of or damage to property," the Civil Authority provision, which is an "Additional Coverage" that extends the scope of the Business Income coverage, would serve no purpose. If Windber's position were adopted, any action of civil authority that prohibits access to the insured premises within the meaning of the Civil Authority provision would constitute "direct physical loss of or damage to property at [the insured] premises," thereby triggering the Business Income coverage. Thus, there would be no reason for the Policies to include the "Additional Coverage" for Civil Authority. Again, an insurance policy should not be construed in a manner that renders any of its provisions superfluous. *See Toffler Assocs.*, 651 F. Supp. 2d at 344 n.3. For all of these reasons, Windber's position contravenes these basic principles of insurance policy interpretation and must be rejected.

C. Plaintiff's Alleged Business Income Loss Was Not Caused by a Covered Cause of Loss

Even assuming for purposes of argument that Windber has alleged direct physical loss of or damage to property at the insured premises (which it has not), there still would be no Business Income coverage because Windber has not alleged a Covered Cause of Loss. The virus exclusion applies to Plaintiff's claim for Business Income coverage, just as it applies to the Civil Authority

[12] Of course, when a covered cause of loss, such as a fire, results in physical loss of or damage to property and that causes a suspension of operations, the "loss of use" exclusion does not apply because the cause of the loss is the fire.

coverage. Windber attempts to end-run the virus exclusion by asserting in a footnote that the Orders were the proximate cause of the loss. (Doc. 24, at 11 n.12.) This argument fails, as a matter of law:

First, as the Complaint alleges at length, the Orders were issued because of, and to reduce the spread of, the COVID-19 virus. (*See, e.g.*, Compl. ¶¶ 18-26.) The Orders cannot be divorced from the purpose for which they were issued. Even if there were more than one cause of loss here, based on Plaintiff's allegations the virus was the "efficient proximate cause" of a loss, i.e., "the risk that sets the others in motion" and "the predominating cause of the loss." *T.H.E. Ins. Co. v. Charles Boyer Children's Tr.*, 455 F. Supp. 2d 284, 292 (M.D. Pa. 2006), *aff'd*, 269 F. App'x 220 (3d Cir. 2008) (quoting *Murray*, 509 S.E.2d at 12).

Second, even assuming for purposes of argument that the Orders could be divorced from the reason they were issued (and they cannot), that still would not save Plaintiff's Complaint because two exclusions would preclude coverage. The Policy's Acts or Decisions exclusion excludes "loss or damage caused by or resulting from . . . *[a]cts or decisions*, including the failure to act or decide, *of any* person, group, organization or *governmental body*." (Doc. 14-1, at p. 45 of 174 (emphasis added)). Courts have held that similarly-worded Acts or Decisions exclusions are unambiguous and bar coverage for loss or damage caused by similar types of governmental orders.[13] *See, e.g., Jernigan v. Nationwide Mut. Ins. Co.*, 2006 WL 463521, at *10-11 (N.D. Cal. Feb. 27, 2006) (Acts or Decisions exclusion applied to loss caused by, among other acts or decisions, a 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 barred coverage where

[13] The Acts or Decisions and Ordinance or Law exclusions do not preclude Civil Authority coverage when the specific prerequisites for that coverage are satisfied. As discussed above, Plaintiff has not and cannot allege the prerequisites for such coverage.

"the real losses claimed herein resulted from refusal by the authorities to permit resumption of operations"). Similarly, the Ordinance or Law exclusion provides that "We will not pay for loss or damage caused directly or indirectly by . . . *[t]he enforcement of any ordinance or law . . . [r]egulating the* construction, *use* or repair *of any property*." (Doc. 1-2, at 38 (emphasis added).) As a New York appellate court has explained, this exclusion "clearly and unambiguously excludes coverage . . . for losses, including business income losses, caused by the enforcement of the law." *Ira Stier, DDS, P.C. v. Merchants Ins. Grp.*, 127 A.D.3d 922, 924 (N.Y. App. Div. 2015) (holding that, where dental practice could not operate due to ordinance requiring certificate of occupancy, Ordinance or Law exclusion precluded coverage for plaintiff's business income losses).

Third, both the virus exclusion and the Ordinance or Law exclusion render any other alleged causes of the loss irrelevant as a matter of law. The virus exclusion not only expressly applies to "loss or damage caused directly or indirectly by" a virus, it states that "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage." Doc. 1-2, at 36. Similarly, the Ordinance or Law exclusion not only expressly applies to "loss or damage caused directly or indirectly" by "enforcement of any ordinance or law . . . [r]egulating the … use . . . of any property," it also expressly states that "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage." *See T.H.E. Ins. Co.*, 455 F. Supp. 2d at 291-93 (holding that this clause "negates the efficient proximate cause doctrine" and "precludes coverage of a loss so long as a specifically enumerated exclusion contributed in some way to the loss"); *Gillin v. Universal Underwriters Ins. Co.*, No. CIV.A. 09-5855, 2011 WL 780744, at *7 (E.D. Pa. Mar. 4, 2011) (same result).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard D. Gable, Jr., certify that on July 27, 2020, I caused a true and correct copy of the foregoing to be served via ECF upon the following:

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