THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEFFREY E. KASHNER, DDS, MSD, Plaintiff, v. TRAVELERS INDEMNITY COMPANY OF AMERICA, Defendant.	No.: 2:20-cv-00625-RSM DEFENDANT THE TRAVELERS INDEMNITY COMPANY OF AMERICA'S MOTION TO DISMISS THE COMPLAINT **NOTE ON MOTION CALENDAR: October 2, 2020** **ORAL ARGUMENT REQUESTED**

I. INTRODUCTION AND RELIEF REQUESTED

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant The Travelers Indemnity Company of America ("Travelers") hereby moves the Court to dismiss all of Plaintiff Jeffrey E. Kashner, DDS MSD's claims, with prejudice, for failure to state a claim upon which relief may be granted.

The COVID-19 pandemic has affected the public and many businesses throughout the country in unprecedented ways. But these challenging and unfortunate circumstances do not create insurance coverage for losses that fall outside the terms of a policyholder's insurance

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contract.[1]

This proposed class action case alleges that an insurance policy issued by Travelers provides coverage for business income losses arising from the COVID-19 Pandemic. Plaintiff Jeffrey E. Kashner, DDS, MSD owns and operates a dentistry practice in Covington, Washington. (Complaint, ECF No. 1 ("Complaint"), ¶ 4). Plaintiff asserts claims for declaratory judgment and breach of contract, alleging that he is entitled to insurance coverage for claimed business income and extra expenses losses caused by a proclamation issued by Washington Governor Jay Inslee to slow the spread of the COVID-19 virus, under which "dentists including Plaintiff were prohibited from practicing dentistry but for urgent and emergency procedures." (*Id.*, ¶¶ 13, 14). But Plaintiff ignores the material terms of the insurance policy he purchased from Travelers—foremost among them an explicit exclusion of *any* type of property coverage, for *any* "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." (Policy, Exhibit A, p. 140 of 153).[2]

In addition to the case-dispositive virus exclusion, the Complaint should be dismissed for several additional reasons. *First*, the Complaint fails to allege facts that could establish Plaintiff's entitlement to any of the coverages under which he seeks to recover because it fails to plead the

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[1] The Judicial Panel on Multidistrict Litigation ("JPML") previously denied motions for centralization of all COVID-19 business interruption insurance cases to an industry-wide MDL in *In re COVID-19 Business Interruption Protection Ins. Litig.*, MDL NO. 2942 (ECF No. 772). This case, however, is among a group of cases being considered by the Judicial Panel on Multidistrict Litigation ("JPML") for potential consolidation and transfer pursuant to an order to show cause issued on August 17, 2020 in *In re Travelers COVID-19 Business Interruption Protection Ins. Litig.*, MDL No. 2965 (ECF No. 3). The JPML hearing will be held on September 24, 2020.

[2] Travelers issued to Plaintiff an insurance policy bearing policy number 680-7093H596-19-42 ("Policy"), a certified copy of which is attached hereto as Exhibit A. The Court may consider the Policy in reviewing this Motion to Dismiss because it is specifically referenced in Plaintiff's Complaint and Plaintiff's claims are based on the Policy. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010); *Bilstein Corp. of Am. v. Fed. Ins. Co.*, 168 F.3d 497 (9th Cir. 1999) (holding district court deciding Rule 12(b)(6) motion properly considered insurance policy "specifically referred to" in the complaint). All references to page numbers of the Policy correspond to the "Travelers Doc Mgmt." number that appears in the bottom margin, right-hand side of each page of Exhibit A.

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requisite "direct physical loss of or damage to property" at the insured premises. (Ex. A, pp. 17-18 of 153). Plaintiff does not allege that any of his business personal property was physically lost or damaged, or that there was any physical loss of or damage to either building in which he operates his dental practice. Plaintiff's position that alleged "loss of use" of his offices for non-emergency procedures constitutes "direct physical loss of . . . property" is incorrect as a matter of law.

Second, the Complaint fails to establish an entitlement to coverage under the Policy's Civil Authority coverage because it does not include factual allegations that, if true, would establish two essential requirements for that coverage: (1) "action of civil authority that prohibits access to the described [i.e., insured] premises"; and (2) the civil authority action is "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." (Ex. A, p. 30 of 153). Rather, none of the Orders prohibited access to Plaintiff's dental office, nor were any of the Orders issued "due to" direct physical loss of or damage to property at any location. To the contrary, the Complaint alleges, and the Orders confirm, that they were issued to mitigate the spread of the COVID-19 virus, not as a result of any damage to property. Moreover, the COVID-19 virus is an expressly excluded cause of loss under the virus exclusion.

Because the Complaint does not plead facts sufficient to support Plaintiff's entitlement to coverage under the Policy, his breach of contract claim fails as a matter of law, and he is not entitled to declaratory relief. And again, even if Plaintiff could have pled these factual requirements for coverage, Plaintiff's alleged losses—which clearly result from the Coronavirus—would still be *expressly excluded* by the virus exclusion. To the extent Plaintiff attempts to proceed on behalf of a proposed class, he cannot do so where his individual claims fail to state a claim. Accordingly, the Complaint should be dismissed in its entirety and with prejudice.

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II. PROCEDURAL HISTORY AND ALLEGED FACTS

A. This Lawsuit

Plaintiff operates a dentistry practice in Covington, Washington (the "Premises"). (Compl., ¶ 4.) Travelers issued the Policy to Plaintiff for the policy period beginning September 24, 2019 and ending September 24, 2020. (*Id.*, ¶ 7; Ex. A, p. 2 of 153). The Complaint seeks coverage under the Policy's Civil Authority, Business Income, Extra Expense, and Extended Business Income provisions. (*Id.*, ¶ 10).

Plaintiff alleges that, "[i]n light of [the COVID-19] pandemic," Washington Governor Jay Inslee issued an order under which "dentists including Plaintiff were prohibited from practicing dentistry but for urgent and emergency procedures." (*Id.*, ¶¶ 13, 14). Plaintiff maintains that the Premises "sustained direct physical loss and/or damages related to COVID-19 and/or [Governor Inslee's] proclamations and orders," and that "Plaintiff's property cannot be used for its intended purposes." (*Id.*, ¶¶ 15, 17).

In this action Plaintiff seeks a declaratory judgment that "the policy or policies cover the plaintiff's losses and expenses resulting from the interruption of the plaintiff's business by COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or other authorities." (*Id.*, Prayer for Relief, ¶ 1). Plaintiff also alleges a breach of contract claim, alleging that "[d]enying coverage for the claim is a breach of the insurance contract." (*Id.*, ¶ 41).

B. Governor Inslee's Proclamations

The Complaint cites Governor Inslee's "Stay Home, Stay Healthy" order as purportedly "requir[ing] the closure of all non-essential businesses, including Plaintiff's dental practice." (Compl., ¶ 13). Governor Inslee issued Proclamation 20-25, entitled "Stay Home – Stay Healthy" on March 23, 2020 as a result of an outbreak of "the COVID-19 disease," which is caused by "a virus that spreads easily from person to person which may result in serious illness

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or death." (Proclamation 20-25, attached hereto as Exhibit B, p. 1.[3] Proclamation 20-25 ordered that "[a]ll people in Washington State shall immediately cease leaving their home or place of residence except: (1) to conduct or participate in essential activities, and/or (2) for employment in essential business services." (*Id.*, ¶ 1). Proclamation 20-25 defined "Essential activities" to include "[e]ngaging in activities essential for the health and safety of family, household members and pets, including things such as seeking medical or behavioral health or emergency services and obtaining medical supplies or medication." (*Id.*, ¶ 1(a)(3)). The proclamation defined "[e]mployment in essential business services" as "an essential employee performing work for an essential business as identified in the 'Essential Critical Infrastructures Workers' list." (*Id.*, ¶ 1(b)). Included in Governor Inslee's list of "Essential Critical Infrastructures Workers" are "[h]ealth care providers and caregivers . . . e.g., . . . dentists." (Essential Critical Infrastructure Workers, attached hereto as Exhibit C, p. 1).

Further, Governor Inslee issued Proclamation 20-24, dated March 19, 2020 entitled "Restrictions on Non Urgent Medical Procedures." (Attached hereto as Exhibit D) Proclamation 20-24 was issued "[t]o curtail the spread of the COVID-19 pandemic in Washington State and to protect our health care workers as they provide health care services." (Ex. D, p. 1). To that end, Proclamation 20-24 prohibited, among other healthcare facilities, "dental, orthodontic, and endodontic offices in Washington State from providing health care services, procedures, and surgeries that, if delayed, are not anticipated to cause harm to the patient within the next three months . . . ." (*Id.*, p. 2). Excepted from this limited prohibition, however, were "treatment for patients with emergency/urgent needs" and "any surgery that if delayed or canceled would result

[3] The relevant proclamations issued by Governor Inslee can be properly considered on this motion to dismiss because they are referenced in and relied upon in the Complaint, and because the Court can take judicial notice of them under Fed. R. Evid. 201(b), (d). *See*, *e.g.*, *Bassidji v. Goe*, 413 F.3d 928, 930 (9th Cir. 2005) (interpreting and applying executive order in deciding appeal from decision on Rule 12(b)(6) motion to dismiss); *S.A. v. Trump*, 363 F. Supp. 3d 1048, 1061 n.36 (N.D. Cal. 2018) ("The court[, in deciding a motion to dismiss,] can take judicial notice of the Executive Order under the incorporation-by-reference doctrine because it is cited in the complaint, and as a matter of public record.") [citations omitted]).

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in the patient's condition worsening (for example, . . . dental care related to the relief of pain and management of infection.)" (*Id.*, pp. 2-3). Governor Inslee later clarified Proclamation 20-24 through the issuance of an "Interpretive Statement Related to Proclamation by the Governor 20-24, Restrictions on Non-Urgent Medical Procedures" on April 29, 2020. ("Interpretive Statement," attached hereto as Exhibit E). Governor Inslee's Interpretive Statement explained that "the Proclamation allows performance of all services considered to be 'emergent' or 'urgent' for which delay would result in worsening a life-threatening or debilitating prognosis" and directed that "[c]linicians should use clinical judgment to determine performance of procedures considered to be non-urgent or 'elective.'" (Ex. E, p. 1). The Interpretive Statement reiterated that "the Governor leaves assessment of harm up to the individual clinician," and provided various factors for clinicians to consider in deciding whether to perform a particular procedure for a particular patient during the pandemic. (*Id.*)

III. APPLICABLE LEGAL STANDARDS[4]

Under Washington law,[5] courts "construe insurance policies as contracts," "consider the

[4] To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a Complaint must contain sufficient factual matter, which, if accepted as true, "state[s] a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff "must plead more than labels and conclusions," and "[f]actual allegations must be enough to raise the right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "Where a Complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678. A court deciding a motion to dismiss under Rule 12(b)(6) must "accept as true all well-pleaded allegations of material fact, and construe them in the light most favorable to the non-moving party." *Daniels-Hall*, 629 F.3d at 998. Excepted from this presumption of truth are any "legal conclusions couched as factual allegations," *Griggs v. Am. Int'l Grp., Inc.*, 2014 WL 2573300, at *2 (W.D. Wash. June 9, 2014) (citing *Twombly*, 550 U.S. at 555), as well as "allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences," *Daniels-Hall*, 629 F.3d at 998.

[5] Washington law applies here. This Court, sitting in diversity jurisdiction, applies the choice of law rules of the forum state, i.e., Washington. *Terminal Freezers Inc. v. U.S. Fire Ins.*, 2008 WL 2544898, at *2 (W.D. Wash. June 23, 2008), *aff'd*, 345 F. App'x 305 (9th Cir. 2009). Courts in Washington apply the "most significant relationship" test provided in Restatement (Second) of Conflict of Laws § 188. *Id.* at *3. Application of Restatement § 188 to the instant case compels application of Washington law:

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policy as a whole, and . . . give it a 'fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.'" *Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d 733, 737 (Wash. 2005) (quoting *Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 951 P.2d 250 (Wash. 1998)). Terms defined in the policy must be "interpreted in accordance with that policy definition." *Black v. Nat'l Merit Ins. Co.*, 154 Wash. App. 674, 679–80 (2010) (footnote omitted). Undefined terms must be "given [their] plain, ordinary, and popular meaning." *Id.* (footnote omitted). And no term in the policy may be "render[ed] . . . meaningless or ineffective" under the court's interpretation of the policy. *Trident Seafoods Corp. v. Commonwealth Ins. Co.*, 850 F. Supp. 2d 1189, 1200–01 (W.D. Wash. 2012) (citing *Allstate Ins. Co. v. Huston*, 123 Wash. App. 530, 541–42 (2004) (rejecting interpretation that would render a clause in the insurance policy superfluous). "Most importantly, if the policy language is clear and unambiguous, [the court] must enforce it as written; [the court] may not modify it or create ambiguity where none exists." *Quadrant Corp.*, 110 P.3d at 737. "[A] clause is ambiguous only 'when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable.'" *Id.* (quoting *B & L Trucking*, 951 P.2d at 256). "Finally, in Washington the expectations of the insured cannot override the plain language of the contract." *Id.* "Where the policy's language does not provide coverage, [the court] may not rewrite the policy to do so." *Am. States Ins. Co. v. Delean's Tile & Marble, LLC*, 179 Wash. App. 27, 35 (2013).

IV. ARGUMENT

The facts alleged in the Complaint demonstrate that Plaintiff cannot establish entitlement to coverage under the Policy. Plaintiff seeks coverage for losses "relating to COVID-19 and/or

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the subject matter of the contract (the insured Premises) is located in Washington (Ex. A, p. 2 of 153; Compl., ¶ 4), and the Policy was issued through a Washington-based insurance agent, (Ex. A, p. 2 of 153). Accordingly, Washington law applies here. *Terminal Freezers Inc.*, 2008 WL 2544898, at *3; *see also Milgard Mfg., Inc. v. Illinois Union Ins. Co.*, 2011 WL 3298912, at *5-6 (W.D. Wash. Aug. 1, 2011) (noting that, when a policy insures property located in one state, Restatement (Second) of Conflict of Laws § 193 "treats the principal location of the insured risk as the most important factor in the choice-of-law determination").

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orders issued by Governor Inslee, other Governors, and/or other civil authorities . . . .” (Compl., ¶ 25; *see also id.*, ¶¶ 13-18, Prayer for Relief, ¶ 1). Yet the Policy contains exclusions for precisely the causes of loss alleged in the Complaint—foremost among them the exclusion of *any* type of property coverage, including Business Income, Extra Expense, and Civil Authority, for “loss or damage caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease.” (Ex. A, p. 140 of 153). The Policy also excludes losses caused by governmental orders. Based on the applicable exclusions alone, the Complaint should be dismissed with prejudice. Even if the Policy did not contain these exclusions, however, dismissal still would be appropriate because Plaintiff fails to plead facts that would satisfy the requirements of the Civil Authority, Business Income, Extra Expense, and Extended Business Income provisions.

A. Plaintiff’s Claims are Barred by the Virus Exclusion and Other Exclusions.

All of Plaintiff’s claims fail because the losses for which he seeks coverage were not caused by a Covered Cause of Loss. As the Policy makes clear, an *excluded* risk of loss is *not* a Covered Cause of Loss. (Ex. A, pp. 18-19 of 153). The Policy contains an endorsement entitled “EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA,” which states in plain terms:

> 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.

(Ex. A, p. 140 of 153 (emphasis added)). This exclusion expressly “applies to . . . forms or endorsements that cover business income, extra expense . . . or action of civil authority.” (*Id.*) Plaintiff’s claims fail because his alleged losses were caused by the Coronavirus,[6] a virus that

[6] *See*, *e.g.*, Compl., ¶¶ 13-14 (non-urgent dental procedures were prohibited “in light of [the COVID-19] pandemic”); *id.*, ¶ 21 (defining proposed classes as persons and entities “who suffered a suspension of their business at the covered premises related to COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or other civil authorities”); *id.*, ¶ 25 (alleged common issues involve “claims for coverage relating to COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or other civil authorities”); *id.*, Prayer for Relief, ¶ 1 (seeking declaration that the Policy “cover[s] the plaintiff’s losses and expenses resulting from the interruption of the plaintiff’s business by COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or other authorities”).

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induces the disease "COVID-19, which has been designated a worldwide pandemic." (Compl., ¶ 12).[7] Thus, as alleged by Plaintiff, the Coronavirus is a virus "that induces or is capable of inducing physical distress, illness or disease," which falls squarely within the virus exclusion. (Ex. A, p. 140 of 153). A virus is not a Covered Cause of Loss and therefore cannot give rise to coverage under the Civil Authority, Business Income, Extra Expense, or Extended Business Income provisions.[8]

Courts have recently held that virus exclusions precluded coverage for similar property insurance claims arising from the COVID-19 pandemic. In *Gavrilides Management Co. v. Michigan Ins. Co.*, a Michigan Circuit Court ruled that an identical virus exclusion applied to bar coverage for the insured restaurant's claim under Civil Authority coverage. (Case No. 20-258-CB, Mich. Cir. Ct. for Ingham County, Tr. of July 1, 2020 Hearing, pp. 20-21 (attached as Exhibit F hereto)). In so ruling, the court rejected the insured's argument that the exclusion was vague and did not apply to civil authority coverage, and concluded that the exclusion "supplies a completely workable, understandable, usable definition of the word virus." (*Id.*, p. 20:19-24) Here, as in *Gavrilides*, there is no question that the plain language of the virus exclusion bars coverage for Plaintiff's claim under the Policy. The Coronavirus is not a Covered Cause of Loss and therefore cannot give rise to any of the coverages under which Plaintiff seeks to recover.

To avoid this outcome, Plaintiff attempts to redirect blame for his losses from the Coronavirus to the Orders imposed to mitigate its spread. (*E.g.*, Compl., ¶ 15 ("Plaintiff's property sustained direct physical loss and/or damages related to COVID-19 and/or the proclamations and orders."). This argument fails for several reasons. *First*, Plaintiff's own allegations demonstrate that the Orders are inextricably intertwined with and inseparable from

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[7] *See* Proclamation 20-25, Ex. B, p. 1 (describing "the COVID-19 disease" as being "caused by a virus that spreads easily from person to person which may result in serious illness or death and has been classified by the World Health Organization as a worldwide pandemic").

[8] To the extent Plaintiff seeks coverage under the Extended Business Income provision, that provision is a "business income" coverage. It simply extends the time period for which coverage is provided for a loss that is otherwise covered under the Business Income provision. (*See* Ex. A, p. 18 of 153).

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the reason they were issued: the Coronavirus. (*E.g.*, Compl., ¶ 13). Plaintiff cannot avoid application of the virus exclusion by recharacterizing his losses as being caused by the Orders, which were issued to prevent the spread of the virus and thus can hardly be divorced from the virus itself.

Second, Plaintiff's theory is also inconsistent with the language of the virus exclusion. The virus exclusion expressly applies to the Business Income, Extra Expense, and Civil Authority coverages, (Ex. A, p. 140 of 153), which only apply where, among other requirements, a business has been forced to suspend its operations. But a virus cannot, in and of itself, close a business; rather, some form of human intervention (such as by government order or business decision) is obviously required to cause a business income or extra expense loss. To adopt Plaintiff's theory that the Orders, divorced from their purpose, constitute a Covered Cause of Loss would render the virus exclusion "meaningless or ineffective," *Trident Seafoods Corp.*, 850 F. Supp. 2d at 1200–01, and effectively "rewrite the policy" to provide coverage for a loss excluded under the Policy's clear, unambiguous terms. *Am. States Ins. Co.*, 179 Wash. App. at 35. Washington law does not allow such a construction of the Policy.

Third, even on Plaintiff's alleged theory, it was the Coronavirus—an excluded peril—that allegedly set in motion the Orders, which allegedly culminated in Plaintiff's claimed losses. The Policy clearly provides that its exclusions preclude coverage in these circumstances, even if losses resulting from allegedly intervening separate "causes" might have otherwise been covered (which is not the case here, as discussed below).[9]

Several courts have held in recent COVID-19-related decisions that virus exclusions bar coverage for similar claims. In *Diesel Barbershop, LLC, et al. v. State Farm Lloyds*, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020), Judge David Ezra concluded that a similar virus exclusion

[9] *See* Ex. A, p. 74 of 153 (amending all exclusions in the Policy to provide that "[l]oss or damage will be considered to have been caused by an excluded event if the occurrence of that event[] . . . [i]nitiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence.").

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precluded coverage for business income losses resulting from the COVID-19 pandemic. Granting the insurer's motion to dismiss, the court rejected the same argument that Plaintiff puts forth in his Complaint here—that government orders issued to mitigate the spread of the virus were the cause of loss rather than the virus. The court explained that:

> 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)).[10] The plaintiff in *Gavrilides* similarly argued that the virus exclusion did not apply to business income losses because "the damage caused was really caused by actions of the civil authority to protect public health." *Gavrilides*, Ex. F, p. 21. The court flatly rejected plaintiff's theory, explaining that "the plaintiff has not supported that [the virus exclusion] doesn't apply . . . ." *Id.* Most recently, in *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, 2020 WL 5240218 (M.D. Fla. Sept. 2, 2020), the court granted an insurer's motion to dismiss, holding that a virus exclusion barred coverage for a COVID-19-related business interruption insurance claim made by a dental practice. The court explained that "[b]ecause [plaintiff'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." *Id.* at *2. Here, as in *Diesel Barbershop*, *Gavrilides*, and *Martinez*, there is no question that the plain language of the virus exclusion bars coverage.

Fourth, Plaintiff's theory also fails because, under the plain language of the Civil Authority provision, the Orders themselves cannot be the Covered Cause of Loss. The Civil

[10] The court also discussed at some length 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." *Id.* at *6.

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Authority provision states that "[t]he civil authority action must be 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." (Ex. A, p. 30 of 153). The Covered Cause of Loss must cause the direct physical loss or damage that results in the civil authority action. (*Id.*) Plaintiff's proposed interpretation, which appears to be that the "direct physical loss of or damage to property" was the loss of use of its premises allegedly caused by the Orders, (Compl., ¶¶ 15-17), reads the Civil Authority provision backwards. The physical loss or damage must cause the civil authority action, not vice versa. *See Prime All. Grp., Ltd. v. Hartford Fire Ins. Co.*, 2007 WL 9703576, at *4 (S.D. Fla. Oct. 19, 2007) ("The order of civil authority cannot in any reasonable manner be construed as a 'peril.'").

Finally, even if one were to assume that the Orders constitute a separate, direct cause of Plaintiff's losses (which they do not), Plaintiff's claims still fail because coverage would be precluded by two additional exclusions. The Policy's Ordinance or Law exclusion provides that "[w]e will not pay for loss or damage caused by . . . *[t]he enforcement of any ordinance or law . . . [r]egulating the* construction, *use* or repair *of any property*."[11] (Ex. A, p. 37 of 153, as modified by p. 74 of 153) (emphasis added). As a New York appellate court has explained, this exclusion "clearly and unambiguously excludes coverage for losses caused directly or indirectly by the enforcement of any ordinance or law regulating the . . . use . . . of any property" and "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

[11] With respect to all exclusions, an endorsement in the Policy specifies that "Loss or damage will be considered to have been caused by an excluded event if the occurrence of that event: **a.** Directly and solely results in loss or damage; or **b.** Initiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence." (Ex. A, p. 74 of 153).

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losses).[12] Similarly, coverage for losses purportedly caused by the Orders would also be precluded by the Policy's Acts or Decisions exclusion, which provides that "[w]e will not pay for loss or damage caused by. . . [a]cts or decisions . . . of any person, group, organization or governmental body." (Ex. A, p. 41 of 153, as modified by p. 74 of 153). Even if the Orders were the cause of Plaintiff's losses (which, again, they are not), they plainly fit within this exclusion, which applies where, as here, a loss is allegedly caused by a governmental decision.[13]

Plaintiff cannot establish a Covered Cause of Loss, regardless of whether his alleged losses resulted from the Coronavirus or the Orders. For that reason alone, all of his claims fail.

B. As a matter of law, Plaintiff is not entitled to Business Income, Extra Expense, or Extended Business Income Coverage because the Complaint fails to allege any "direct physical loss of or damage to property" at the Insured Premises.

The virus exclusion and other exclusions discussed above are dispositive. Plaintiff is also not entitled to Business Income, Extra Expense or Extended Business Income coverage because he has not—and cannot—plead facts that would establish "direct physical loss of or damage to property" at the insured premises. The Business Income and Extra Expense coverages provide:

> **a. Business Income**
>
> . . .
>
> (2) We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss. . . .
>
> . . .
>
> **b. Extra Expense**
>
> (1) Extra Expense means reasonable and necessary expenses you incur during the "period of restoration" that you would not have incurred if there had

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

[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 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*., No. 308824, 2013 WL 5450284, at *5–6 (Mich. Ct. App. Oct. 1, 2013) (unpublished) (acts or decisions exclusion applied where government order prohibited sale of cheese).

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> been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss.

(Ex. A, pp. 17-18 of 153 (underscores added)). The Policy's Extended Business Income coverage incorporates the requirement of "direct physical loss of or damage to" property insofar as the coverage is triggered only where there is a covered Business Income loss. (Ex. A, p. 18 of 153).[14]

The Complaint fails as a matter of law to plead any "direct physical loss of or damage to property at the described [i.e., insured] premises." Plaintiff attempts to satisfy the direct physical loss or damage requirement by alleging that "Plaintiff's property sustained direct physical loss and/or damages related to COVID-19 and/or the proclamations and orders" issued by Governor Inslee, and further alleges that "Plaintiff's property cannot be used for its intended purposes." (Compl., ¶¶ 15, 17).

Plaintiff's theory that an alleged loss of use of the insured Premises or a closure of his business allegedly required by the Orders constitutes "direct physical loss of or damage to property" is contrary to Washington law. A leading decision is *Villella v. Public Employees Mut. Ins. Co.*, 725 P.2d 957 (Wash. 1986) (en banc), in which a house on a hillside was damaged due to soil destabilization. *Id.* at 958. There were two different policies in effect at different times, and one of the questions presented was whether the loss occurred during the first policy period, during which the first policy insured "against loss or physical damage to the dwelling." *Id.* at

[14] To the extent that the Complaint seeks coverage under the Extended Business Income provision, this coverage does not apply in the absence of a covered loss under the Business Income provision. The grant of coverage in the Extended Business Income provision states that "[i]f the necessary 'suspension' of your 'operations' produces a Business Income loss payable under Paragraph **a.** Business Income above, we will also pay for the actual loss of Business Income you sustain during" a specific time period as specified in that provision. (Ex. A, p. 18 of 153 (emphasis added)). Under the clear and unambiguous language of this provision, if there was no Business Income loss payable under the Business Income provision, there is no coverage under the Extended Business Income provision. *See Courtenay, Hunter & Fontana, LLP v. Massachusetts Bay Ins. Co.*, Civ. A. No. 07-976, 2008 WL 3876421, at *3 (E.D. La. Aug. 19, 2008) (explaining that covered loss under Business Income provision is a "threshold requirement" for Extended Business Income coverage).

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959. The plaintiff argued "that the events leading to the damage were an ongoing process, part of which occurred during the time the first homeowners policy was in effect," and that there was coverage "[b]ecause the alleged soil destabilization occurred during the policy period" of the first policy. *Id.* at 960. The Washington Supreme Court held that there was no coverage under the first policy because "[t]here was no 'continuing process' of *damage* to the plaintiff's residence," and "[t]he residence itself sustained no damage" during the first policy period. *Id.* The Washington Supreme Court thus made clear in *Villella* that "physical damage" requires actual, tangible damage to property.

The Washington Court of Appeals subsequently applied *Villella* in *Fujii v. State Farm Fire & Cas. Co.*, 857 P.2d 1051 (Wash. Ct. App. 1993), which involved a landslide that occurred upslope from the Plaintiff's house and destabilized the slope. *Id.* at 1051. The plaintiffs argued that their homeowners' policy should provide coverage "because the landslide undermined the lateral support of the covered dwelling, and the loss of lateral support constituted a direct physical loss to the dwelling." *Id.* The insurer's experts agreed that "damage was likely to occur in the near future unless expensive preventive measures were taken," but "no physical damage had yet occurred." *Id.* The Washington Court of Appeals held that *Villella* was controlling and explained that there was no coverage because "it is undisputed that there was no discernible physical damage to the dwelling during the effective period of the policy," and "[u]nder the plain terms of the policy, coverage was triggered by direct physical loss to the dwelling." *Id.* at 1052 (emphasis added).

Similarly, in *Wolstein v. Yorkshire Ins. Co.*, 985 P.2d 400 (Wash. Ct. App. 1999), the Washington Court of Appeals interpreted the phrase "physical loss or damage" in a marine builder's risk insurance policy in a case arising from a claim concerning a delay in completing the construction of a yacht. *Id.* at 403. Under the hull risks coverage, the policy provided that "[t]his Policy insures against all risks of physical loss of or damage to the Vessel occurring during the currency of this Policy, except as hereinafter provided." *Id.* at 407 (emphasis added).

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The court concluded that under this policy language "the insured object must sustain actual damage or be physically lost to invoke hull risks coverage." *Id.* (emphasis added). The Court of Appeals further agreed with a Fifth Circuit decision 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)). The Fifth Circuit case relied upon in *Wolstein* gives an example of this: "[F]or example, the car was undamaged before the collision dented the bumper." *Trinity Indus.*, 916 F.2d at 271; *see also Borton & Sons, Inc. v. Travelers Ins. Co.*, 99 Wash. App. 1010, 2000 WL 60028 (Wash. Ct. App. Jan. 25, 2000) (unpublished) (court found no "direct physical loss" of physically undamaged apples, where insured claimed inability to sell the applies due to its sale of "inferior" apples stored in nearby building where there was a roof collapse, which allegedly eroded confidence in undamaged apples stored in an undamaged building).[15]

Villella, *Fujii*, and *Wolstein* are consistent with numerous cases nationwide holding that property insurance policies do not cover purely economic losses caused by a loss of use of property that has not been physically lost or damaged.[16] In keeping with this broad consensus,

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[15] Travelers acknowledges that *Borton* is a 2000 unpublished opinion from Washington's Court of Appeals, whereas a Washington rule, GR 14.1(a), permits citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. That said, though it may be followed by the federal court, GR 14.1 is not binding in federal court. *See Hanson v. MGM Resorts Int'l*, 2017 WL 3085694, at *3 n.1 (W.D. Wash. July 20, 2017).

[16] *See, e.g.*, *Pentair, Inc. v. American Guar. and Liab. Ins. Co.*, 400 F.3d 613, 617 (8th Cir. 2005) (Minnesota law) (rejecting argument that "mere loss of use or function of property constitutes 'direct physical loss or damage'" without demonstrable physical damage); *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 751 N.Y.S.2d 4, 7 (N.Y. App. Div. 2002) (rejecting insured's argument that loss of use of theater constituted "direct physical loss" of insured's property); *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.*, No. 2:12-CV-00245-WCO, 2014 WL 12480022, at *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

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multiple courts have found no coverage for COVID-19 business income losses on this ground:

- In *10E, LLC v. Travelers Indemnity Co. of Connecticut*, Case No. 2:20-cv-04418-SVW-AS (C.D. Cal. Sept. 2, 2020) (Ex. G hereto), the court granted a motion to dismiss filed by an affiliate of Travelers, rejecting the same argument Plaintiff makes here—that "'loss,' unlike 'damage,' encompasses temporary impaired use." *Id.* at 8. Specifically, the court held that an "insured cannot recover by attempting to artfully plead impairment to economically valuable use of property as physical loss or damage to property." *Id.* at 7. While "public health restrictions" limited the plaintiff's restaurant services to take-out and delivery, those restrictions did not "physically alter any of Plaintiff's property," precluding coverage under the policy. *Id.* at 8. Rather, the "[p]laintiff only plausibly alleges that in-person dining restrictions interfered with the use or value of its property – not that the restrictions caused direct physical loss or damage." *Id.* at 7. The court further explained that "[e]ven if the Policy covers 'permanent dispossession' in addition to physical alteration, that does not benefit Plaintiff here," because the plaintiff's complaint "does not allege that it was permanently dispossessed of any insured property," instead "Plaintiff remained in possession of its dining room, bar, flatware, and all of the accoutrements of its 'elegantly sophisticated surrounding.'" *Id.* at 8.
- In *Diesel Barbershop*, the court granted the insurer's motion to dismiss in a COVID-19 case because, among other reasons, the plaintiffs failed to plead "direct physical loss" because they did not allege "a distinct, demonstrable physical alteration of the property." *Diesel Barbershop*, 2020 WL 4724305, at *5.

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the words 'direct' and 'physical' from the policy."); *J. O. Emmerich & Assocs., Inc. v. State Auto Ins. Cos.*, No. 3:06CV00722-DPJ-JCS, 2007 WL 9775576, at *5 (S.D. Miss. Nov. 19, 2007) (where insured was denied access to computer data during power outage, this was not "direct physical loss of or damage to" property); *Harry's Cadillac-Pontiac-GMC Truck Co.*, 486 S.E.2d 249, 251 (N.C. App. 1997) (finding no "physical loss" sufficient to trigger business interruption coverage where customers could not access car dealership due to heavy snowstorm).

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- In *Gavrilides Mgmt.*, the Michigan Circuit Court dismissed a complaint filed by a restaurant seeking to recover for COVID-19-related business income losses. The court held 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." *Gavrilides Mgmt.*, Ex. F, p. 18–19. 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 (emphasis added).
- The District of Columbia Superior Court held that there was no "direct physical loss" caused by governmental orders limiting restaurant operations because the orders "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." *Rose's 1 LLC, et al. v. Erie Insurance Exchange*, 2020 WL 4589206, at *2 (D.C. Super. Ct. Aug. 6, 2020). The court further explained that the policy required that the loss "must be caused, without the intervention of other persons or conditions, by something pertaining to matter—in other words, a direct physical intrusion on to the insured property[,] [and] Mayor Bowser's orders were not such a direct physical intrusion." *Id.*
- In *Malaube, LLC v. Greenwich Ins. Co.*, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020), a federal magistrate judge issued a report and recommendation, recommending that the defendant's motion to dismiss should be granted. The plaintiff claimed that Florida government orders "caused a direct physical loss because they forced Plaintiff to close its indoor dining to mitigate the spread of COVID-19." *Id.* at *5. The court held that there was no coverage because the plaintiff "has not alleged any physical harm," and "the

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restaurant merely suffered economic losses – not anything tangible, actual, or physical." *Id.* at *7-8; *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, "an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical'").

As in the cases described above, Plaintiff's Complaint fails to allege direct physical loss of or damage to property. The Complaint alleges no physical damage whatsoever, much less facts that could plausibly allege "discernible physical damage." *Fujii*, 857 P.2d at 1052. Plaintiff also does not allege that any property was physically lost, such as a theft or disappearance. Plaintiff alleges only that "Plaintiff's property sustained direct physical loss and/or damages related to COVID-19 and/or the proclamations and orders," and that "Plaintiff's property cannot be used for its intended purposes." (Compl., ¶¶ 15, 17). Even assuming the Orders required the complete closure of Plaintiff's dental practice (and they did not, as explained below), that would not constitute "direct physical loss of or damage to property" within the meaning of the Policy under Washington law.

In several respects, Plaintiff's position is also contrary to the basic principle of Washington law that courts must "consider the policy as a whole, and . . . give it a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance," *Quadrant Corp.*, 110 P.3d at 737 (internal quotation marks and citations omitted), ensuring that none of its terms are rendered "meaningless or ineffective," *Trident Seafoods Corp.*, 850 F. Supp. 2d at 1200–01. *First*, when the Policy covers a Business Income or Extra Expense loss, the time period for such coverage is the "period of restoration," (Ex. A, pp. 17-18 of 153), 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.*, p. 52 of 153 [emphasis added]). Courts have repeatedly recognized that this definition contemplates that Business Income coverage requires a *physical* change to insured property that can be repaired or

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replaced.[17] Here, Plaintiff does not allege any loss of or damage to property that can be repaired or replaced.

Second, the Policy, when 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." (Ex. A, p. 39 of 153). Construing the phrase "direct physical loss or damage" to encompass an alleged loss of use unaccompanied by a physical alteration of insured property would nullify the "loss of use" exclusion altogether. *Trident Seafoods Corp.*, 850 F. Supp. 2d at 1200–01 (noting rule of construction against interpreting policy in a way that would "render" any term "meaningless or ineffective"); *Allstate Ins. Co.*, 123 Wash. App. at 541–42 (rejecting interpretation that would render a clause in the insurance policy superfluous).[18]

Third, if, as Plaintiff maintains, the mere loss of use of its insured premises following a governmental order purportedly restricting its use constituted "direct physical loss of or damage to property," the Civil Authority provision, which is a "Coverage Extension" that extends the scope of the Business Income and Extra Expense coverages, would serve no purpose. If Plaintiff'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 and Extra Expense coverages. Thus, there would be no reason for the Policy to include the

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[17] *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 Co. v. Cont'l Cas. Co.*, 302 A.D.2d 1, 7-8 (N.Y. App. Div. 2002) (similar).

[18] 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.

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"Coverage Extension" for Civil Authority. Again, an insurance policy should not be construed in a manner that renders any of its provisions superfluous. *See Trident Seafoods Corp.*, 850 F. Supp. 2d at 1200–01; *Allstate Ins. Co.*, 123 Wash. App. at 541–42.

C. Plaintiff is not entitled to Civil Authority coverage.

Plaintiff also cannot establish an entitlement to Civil Authority coverage because the Orders neither "prohibit[ed] access" to the insured Premises nor were the Orders issued "due to" property damage at any location. The Civil Authority provision provides coverage for:

> the actual loss of Business Income you sustain and reasonable and necessary Extra Expense you incur caused by action of civil authority that prohibits access to the described premises. The civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises, that are within 100 miles of the described premises, caused by or resulting from a Covered Cause of Loss.

(Ex. A, p. 30 of 153) (emphasis added). This provision governs the circumstances under which the Policy would potentially provide coverage for a business income or extra expense loss resulting from a governmental order *if* the coverage's requirements are satisfied. In addition to the absence of any Covered Cause of Loss, Plaintiff fails to satisfy two additional requirements for Civil Authority coverage: (1) an "action of civil authority that *prohibits access* to the described premises"; and (2) the civil authority action must be "due to direct physical loss of or damage to property." *Id.*

First, the Orders did not "prohibit[] access" to the Premises. Courts uniformly hold that to "prohibit" access within the meaning of a civil authority provision requires that an order "completely prohibit[] access"—not "merely hinder[] access"—to implicate coverage.[19] Here, as

[19] *Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, No. 3:09-CV-02391, 2010 WL 2696782, at *5 (M.D. Pa. July 6, 2010); *see also Commstop, Inc. v. Travelers Indemn. Co. of Conn.*, No. cv-11-1257, 2012 WL 1883461, at *9 (W.D. La. 2012) (coverage only applies where access is "totally and completely prevented—i.e., made impossible" by the civil authority action); *Kean, Miller, Hawthorne, D'Armond McCowan & Jarman, LLP v. Nat'l Fire Ins. Co. of Hartford*, No. CIV. A. 06-770-C, 2007 WL 2489711, at *4 (M.D. La. Aug. 29, 2007) (no coverage when order "encouraged" residents to stay off streets before hurricane, because it did not "actually and completely prohibit access"); *By Dev., Inc. v. United Fire & Cas. Co.*, No. CIV. 04-5116, 2006 WL 694991, at *5 (D.S.D. Mar. 14, 2006), *aff'd*, 206 F. App'x 609 (8th Cir. 2006).

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the Orders make clear, Plaintiff has at all times been permitted to continue operating his dentistry practice, though he was required to limit the services provided to urgent or emergency procedures, i.e., those which, "if delayed," would be "anticipated to cause harm to the patient within the next three months."[20] Plaintiff's own allegations confirm that he was permitted to perform "urgent and emergency procedures." (Compl., ¶ 14). Governor Inslee's proclamations thus did not completely prevent access to Plaintiff's dental office, and therefore there is no coverage under the Civil Authority provision for that reason, in addition to the reasons discussed above.

*Second***,** Plaintiff's allegations also fail to satisfy the Policy's requirement that the civil authority order be "due to direct physical loss of or damage to property at locations, other than described premises, that are within 100 miles of the described premises." (Ex. A, p. 30 of 153). This provision requires "proof of 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) (emphasis added).[21] Here, Plaintiff concedes that the Orders were not issued "due to" any physical loss or damage to property, but rather "[i]n light of [the COVID-19] pandemic." (Compl., ¶ 13). The

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[20] Proclamation 20-25, Ex. B, ¶¶ 1 (permitting "essential businesses" to remain open); Essential Critical Infrastructure Workers, Ex. C, p. 1 (including, in list of essential businesses, "[h]ealth care providers and caregivers . . . e.g., . . . dentists"); Proclamation 20-24, Ex. D, p. 2 (prohibiting "dental[] . . . offices in Washington State from providing health care services, procedures, and surgeries that, if delayed, are not anticipated to cause harm to the patient within the next three months"); *id.*, pp. 2-3 (excepting from limited prohibition on dental services "treatment for patients with emergency/urgent needs" and "any surgery that if delayed or canceled would result in the patient's condition worsening (for example, . . . dental care related to the relief of pain and management of infection.)").

[21] *See also*, *e.g.*, *Not Home Alone, Inc.*, 2011 WL 13214381, at *6 (same); *S. Texas Med. Clinics, P.A.*, 2008 WL 450012, at *8-10 (same); *Magnolia Lady, Inc.*, 1999 WL 33537191, at *2 (N.D. Miss. Nov. 4, 1999) (same); *United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 134 (2d Cir. 2006) (civil authority coverage did not apply where "the government's subsequent decision to halt operations at the Airport indefinitely was based on fears of future attacks" on September 11, 2001, not because of property damage to adjacent property); *Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, 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'"); *Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, 2004 WL 5704715, at *7 (N.D. Ga. Dec. 15, 2004) (finding no coverage under civil authority provision where order issued after September 11th attacks "was issued as a result of the threat of additional terrorist acts," not due to existing property damage).

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Orders confirm that they were issued because of the spread of the virus causing the COVID-19 disease and a resulting "worldwide pandemic," which "significantly increase[ed] the threat of serious associated health risks statewide." (Ex. B, p. 1; Ex. D, p. 1). Plaintiff does not and cannot allege that the Orders were "due to direct physical loss of or damage to property," which is another independent reason why there is no Civil Authority coverage.[22] Thus, as a matter of law, Plaintiff is not entitled to Civil Authority coverage for this reason as well.

D. Plaintiff's declaratory judgment claim should be dismissed.

The declaratory judgment claim (Count One) should be dismissed because, for all of the reasons explained above, Plaintiff is not entitled to the relief he seeks. *See*, *e.g.*, *Terrell v. JPMorgan Chase Bank N.A.*, No. C14-930 MJP, 2014 WL 5449729, at *6 (W.D. Wash. Oct. 24, 2014), *aff'd*, 669 F. App'x 363 (9th Cir. 2016) ("Declaratory judgment is a remedy, not a cause of action. To obtain declaratory relief, Plaintiff must first adequately state an underlying claim. Because Plaintiff has failed to state any plausible claim, she is not entitled to declaratory relief[.]") (citations omitted). The declaratory judgment claim should also be dismissed as duplicative of the breach of contract claim (Count Two). The declarations sought are simply that there is coverage for the claimed losses, and that "Travelers is responsible for timely and fully paying all such losses." (Compl., ¶¶ 34-35 and Prayer for Relief). The declaratory judgment claim thus serves no useful purpose separate and apart from the breach of contract claim.[23]

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[22] *See*, *e.g.*, *Dickie Brennan*, 636 F.3d at 686 (no civil authority coverage because order was not "'due to' physical damage to property"); *United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 134 (2d Cir. 2006) (same); *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) (same); *Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, 2004 WL 5704715, at *7 (N.D. Ga. Dec. 15, 2004) (same); *South Texas Med. Clinics*, 2008 WL 450012, at *10 (same) *Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP v. Chubb Corp.*, 2010 WL 4026375, at *3 (E.D. La. Oct. 12, 2010) (granting summary judgment for insurer based on lack of causal link between hurricane evacuation order and any prior damage to property).

[23] *See*, *e.g.*, *Brunette v. Humane Soc'y of Ventura Cty.*, 40 F. App'x 594, 598 (9th Cir. 2002) (affirming dismissal of declaratory relief claim where "declaratory relief served no purpose beyond the remedies Brunette sought on her claims at law"); *Hovenkotter v. Safeco Corp.*, No. C09-218JLR, 2009 WL

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V. CONCLUSION

For all of the foregoing reasons, Travelers respectfully requests that the Court dismiss the Complaint, in its entirety, and with prejudice.[24]

DATED: September 9, 2020

Respectfully submitted,

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6698629, at *6 (W.D. Wash. Aug. 3, 2009) (dismissing declaratory judgment claim as duplicative of breach of contract claim); *Fosmire v. Progressive Max Ins. Co.*, No. C10-5291JLR, 2010 WL 3489595, at *5 (W.D. Wash. Aug. 31, 2010) (same).

[24] To the extent Plaintiff attempts to plead claims on behalf of a proposed class, (Compl., ¶¶ 20-30), those allegations cannot survive where Plaintiff's individual claims fail to state a claim. *See*, *e.g.*, *Boyle v. Madigan*, 492 F.2d 1180, 1182 (9th Cir. 1974) (putative class claims cannot properly be considered "where the named plaintiffs have failed to state a claim in themselves for the relief they seek"); *Kamath v. Robert Bosch LLC*, No. 2:13-CV-08540-CAS, 2014 WL 2916570, at *5 n.4 (C.D. Cal. June 26, 2014) ("[A]t the motion to dismiss stage, the Court only considers allegations pertaining to the named plaintiff because a putative class action cannot proceed unless the named plaintiff can state a claim for relief as to himself").

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2020, I electronically filled with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the person(s) listed below:

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