IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

LOUIS G. ORSATTI, DDS, P.C.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CASE NO. 20-CV-00840-FB**
	§	
ALLSTATE INSURANCE COMPANY	§	
AND BLESSING SEFOFO WONYAKU,	§	
	§	
***Defendants*.**	§	
	§	
	§	

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED ORIGINAL COMPLAINT

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Pursuant to Rules 8 and 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Allstate Insurance Company ("Allstate") and adjuster Blessing Sefofo Wonyaku ("Wonyaku") hereby move to dismiss Plaintiff Louis G. Orsatti, DDS, P.C.'s ("Plaintiff") First Amended Original Complaint ("FAC"):

I. INTRODUCTION

This action arises out of the COVID-19 Pandemic and related orders by government officials requiring the closure of non-essential businesses as a precaution to prevent further spread of the disease. Plaintiff sues on the Property Coverages under its Commercial Package Policy issued by Allstate (the "Policy"). According to Plaintiff, although ***it was an essential business***, it could only operate its dental offices in the event of a dental emergency. (FAC at ¶ 10 & Ex. B.) Thus, Plaintiff alleges that "[t]he pandemic, consumer fear, and mitigation efforts undertaken caused 'direct physical loss' to Plaintiff's property" (*Id.* at ¶ 12.) Plaintiff alleges that these losses should be covered by its Allstate policy, but the claims were wrongfully denied. (*Id.* at ¶ 11.) Plaintiff alleges that the denial of this claim by Allstate constitutes a breach of contract (*Id.* at ¶¶ 29-30), violations of the Texas Insurance Code (*Id.* at ¶¶ 31-37), breach of the duty of good faith and fair dealing (*Id.* at ¶¶ 38-40); and conspiracy to deny the claim (*Id.* at ¶ 45). Plaintiff also alleges that Allstate insurance adjuster violated the Texas Insurance Code (*Id.* at ¶¶ 41-44) and conspired with Allstate to deny the claim (*Id.* at ¶ 45).

The FAC should be dismissed on multiple grounds. First, Plaintiff's FAC fails to meet the *Twombly/Iqbal* pleading standard and fails to state a claim under Rule 12(b)(6) because it fails to set forth facts sufficient to state a plausible claim for relief. Plaintiff's Policy provides property coverage. Specifically, the Policy insures Plaintiff against "direct physical loss" to the property, and provides certain ancillary coverages such as lost business income that results from a "direct

physical loss" to the property.[1] "Direct physical loss" means actual physical damage to and physical alteration of the property based both upon the plain language of the Policy and Texas and Fifth Circuit authority interpreting that phrase. Plaintiff fails to allege that type of loss. Instead, Plaintiff claims, in conclusory terms, that its property suffered "direct physical loss" as a result of "[t]he pandemic, consumer fear, and mitigation efforts." (*Id.* at ¶¶ 11 & 12). But other than referencing governmental closures of non-essential businesses – and acknowledging that Plaintiff was an exempted business – Plaintiff fails to explain what this supposed "direct physical loss" was, how it occurred, when it occurred, or the amount of the losses. The FAC therefore does not contain a plain statement showing that the pleader is entitled to relief as required under Rule 8 of the Federal Rules of Civil Procedure. *Bell Atlantic Corp. v. Twombly*, 540 U.S. 544, 555 (2007).

Second, the FAC also fails due to the plain language "virus exclusion" in Plaintiff's Policy. Even if Plaintiff specifically alleged "direct physical loss," if such loss "result[s] from any virus… that is capable of inducing physical distress, illness or disease," it is not covered. (Policy at 119.) Moreover, if any "action of civil authority" is "caused by" or "result[s] from any virus… that is capable of inducing physical distress, illness or disease," it is not covered. (*See id.*) Plaintiff claims that the consumer fear, stay at home orders, governmental closures, and business impact all "result[ed] from" the COVID-19 virus pandemic. Thus, Plaintiff's alleged damages and losses are excluded by the plain language of the Policy.

Plaintiff's claims against adjuster Ms. Wonyaku fail for the same reasons that its claims against Allstate fail. The claims against Ms. Wonyaku are based on Allstate's denial of coverage,

[1] Plaintiff attaches the Policy to its FAC, however, it is missing certain provisions. Thus, Defendants attach the full Policy as Exhibit 1 in the accompanying Appendix ("Appx.). Because Plaintiff references the Policy in its FAC and asserts it as the foundation for its claims, (*e.g.*, FAC, ¶¶ 7-14) the Court may consider the written Policy in connection with a Rule 12(b)(6) motion to dismiss without converting the motion into one for summary judgment. *Infra*, 9-10.

and it is alleged that Ms. Wonyaku was at all times acting in her official capacity for Allstate. Finally, Plaintiff cannot state a claim for conspiracy because: (1) it alleges that Ms. Wonyaku was acting in her official capacity for Allstate at all times and (2) Plaintiff's underlying claims fail. Thus, all of Plaintiff's claims should be dismissed.

Finally, Plaintiff has filed this FAC after Defendants filed their original motion to dismiss, but Plaintiff has failed to correct any of the issues detailed in that original motion. Thus, this Court should not allow leave to amend, again. Moreover, based upon the information provided about Plaintiff's loss, it appears that amendment of the FAC would be futile.

II. PROCEDURAL BACKGROUND AND RELEVANT FACTS

Plaintiff Louis G. Orsatti, DDS, P.C. ("Plaintiff") is a dental business in Bexar County, Texas. (FAC at ¶¶ 2 & 10.) Plaintiff is insured by Defendant Allstate Insurance Company ("Allstate") under Commercial Package insurance policy (Policy No. 648261793, attached as Exhibit 1 to the Appendix, (hereinafter the "Policy")), which covers the business and property located at 15303 Hueber Road Bld., 14, San Antonio, Texas 78248. The Policy period extends from January 16, 2020 to January 16, 2021. (Policy at 1.)

On June 19, 2020, Plaintiff filed an Original Petition against Allstate, as well as insurance adjuster Blessing Sefofo Wonyaku ("Wonyaku") in the 407th District Court for Bexar County, Texas Case no. 2020-CI-11203. Allstate timely removed this action.

Defendants filed a Motion to Dismiss the Original Petition on July 27, 2020. In response, Plaintiff filed a First Amended Original Complaint on August 4, 2020. The FAC does not, and cannot, correct the issues in the Original Petition.

Plaintiff alleges that, during the Policy term, it "has sustained and will sustain covered losses during the COVID-19 outbreak and subsequent Bexar County Order, State of Texas Order

and mandate from the American Dental Association." (*Id.* at ¶ 8.) Plaintiff alleges that due to these orders, it could only operate in the event of a dental emergency. (*Id.* at ¶ 10.) Plaintiff claims that Allstate wrongfully denied its claim for resultant business interruption. (*Id.* at ¶ 11, 18-21.)

Plaintiff alleges that Allstate's denial of the claim constituted a breach of contract (*Id.* at ¶¶ 29-30), violations of the Texas Insurance Code (*Id.* at ¶¶ 31-37), breach of the duty of good faith and fair dealing (*Id.* at ¶¶ 38-40), and conspiring with their insurance adjuster to deny the claim (*Id.* at ¶ 45). Plaintiff also alleges that Allstate insurance adjuster violated the Texas Insurance Code (*Id.* at ¶¶ 41-44) and "conspired" with Allstate to deny the claim (*Id.* at ¶ 45).

The Policy provides up to $250,000 of business income coverage in the event of a "Covered Cause of Loss" which is defined as "direct physical loss unless the loss is excluded or limited in this policy." (Policy at 35 "Covered Cause of Loss" "When Special is shown in the Declarations, Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy" and at 25 "Supplemental Declarations" "Business Income" coverage "SPECIAL" "Covered Causes of Loss.")

Under the "Business Income (and Extra Expense) Coverage Form", the Policy provides:

> 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 the property*** at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss… [Policy, at 94 (emphasis added).]

The "period of restoration" means:

> [t]he period of time that
> (a) Begins:
> (1) 72 hours after the time of ***direct physical loss or damage*** for Business Income Coverage; or
> (2) Immediately after the time of ***direct physical loss or damage*** for Extra Expense Coverage;

> caused by or resulting from any Covered Cause of Loss at the described premises; and
>
> (b) Ends on the earlier of:
>
> (1) The date when the property at the described premises ***should be repaired, rebuilt or replaced*** with reasonable speed and similar quality; or
>
> (2) The date ***when business is resumed at a new permanent location.***
>
> "Period of restoration" does not include any increased period required due to the enforcement of or compliance with any ordinance or law that:
>
> (1) Regulates the construction, use or repair, or requires the tearing down of any property; or
>
> (2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants".
>
> The expiration date of this policy will not cut short the "period restoration". [Policy, at 102 (emphasis added).]

As such, the Policy does not provide free-floating protection against business interruptions. The Policy is for property insurance that insures specified business premises against physical loss or damage, and also provides certain protections for lost income that ***results*** from covered physical loss or damage to the property. Accordingly, the Policy's "Business Income Coverage" applies when there is a "Covered Cause of Loss," *i.e.*, "direct physical loss," and covers income for "the period of restoration", *i.e.*, the period beginning 72 hours *after* a direct physical loss or damage for Business Income or immediately after a direct physical loss or damage for Extra Expenses, and ends when the damaged business property is repaired, rebuilt or replaced, or when business resumes at a new location. (Policy at 25, 35, 94, 102.)

Plaintiff also has coverage when a "Covered Cause of Loss," *i.e.*, "direct physical loss," causes damage to an immediately surrounding property and civil authorities prevent access due to that direct physical loss. Specifically:

> When 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 and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

> (1) ***Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage***, and the described premises are within that area but not more than one mile from the damaged property; ***and***
> (2) The action of the civil authority is taken in response to ***dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss*** that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property. [Policy at 95.]

The Civil Authority Coverage thus requires: (1) Covered Cause of Loss," *i.e.*, direct physical loss"; (2) to a property other than Plaintiff's property; (3) that the action by civil authority prohibited *access* to Plaintiff's property as a result of that direct physical loss; and (4) that the civil authority took action in response to "dangerous physical conditions" resulting from "direct physical loss."

The FAC identifies no physical loss or damage of any kind, either to Plaintiff's own business premises or to any nearby business premises. There are no allegations that any property needs to be "repaired, rebuilt or replaced." Nor does it allege that "access" to Plaintiff's premises was prohibited; on the contrary, the Bexar County Order appended to Plaintiff's FAC specifically states that dentists are an "exempted business" for purposes of the Order and were not prohibited from operating. Thus, Plaintiff's FAC does not allege a "covered loss."

Additionally, the Policy contains a number of exclusions, incorporated into Plaintiff's FAC (Ex. E). As most relevant here, the Policy excludes coverage for damages "resulting from" "any virus." Specifically:

> A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
> B. We will not pay for loss or damage ***caused by or resulting from any virus***, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease. [Policy at 119.]

Thus, if Plaintiff's alleged "direct physical loss" "result[s] from any virus… that is capable of inducing physical distress, illness or disease," it is not covered. Moreover, if any "action of civil authority" is "caused by" or "result[s] from any virus… that is capable of inducing physical distress, illness or disease," it is not covered.

The Policy also excludes coverage for governmental actions unless there is damage from a Covered Cause of Loss," *i.e.*, direct physical loss." (Policy at 38 "[a]cts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.") The Policy further excludes coverage for "[t]he enforcement of or compliance with any ordinance or law: (1) regulating the construction, use or repair of any property….This exclusive, Ordinance Or Law, applies whether the loss results from: (a) An ordinance or law that is enforced even if the property is not damaged…." (Policy at 35.)

III. LEGAL STANDARDS FOR MOTIONS TO DISMISS

Federal Rule of Civil Procedure 8(a)(2) requires that a plaintiff plead facts showing that it is entitled to relief "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). *See also Anderson v. U.S. Dep't of Housing & Urban Dev.*, 554 F.3d 525, 528 (5th Cir. 2008) ("Where the complaint is devoid of facts that would put the defendant on notice as to what conduct supports the claims, the complaint fails to satisfy the requirement of notice pleading.") Further, Rule 12(b)(6) authorizes dismissal of a complaint when a plaintiff fails to adequately plead its claims. FED. R. CIV. P. 12(b)(6). "To survive a Rule 12(b)(6) motion, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'" *In re Katrina Canal Breaches Litig*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. at 570). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Massa v.*

Genentech Inc., No. H-11-70, 2012 WL 956192, at *5 (S.D. Tex. Mar. 19, 2012) (internal quotations omitted).

The Supreme Court has delineated a two-prong test for analyzing Rule 12(b)(6) motions. First, the reviewing court should disregard averments which constitute legal conclusions, conclusory allegations of fact, or unwarranted factual inferences. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."); *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005) (in ruling on a Rule 12(b)(6) motion, "conclusory allegations, unwarranted factual inferences, or legal conclusions" are not accepted as true). Second, the court should evaluate the remaining, well-pleaded facts to determine whether they give rise to a "plausible claim for relief." *Iqbal*, 556 U.S. at 678. "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.'" *Id*. (quoting *Twombly*, 550 U.S. at 557).

The Court may also consider and take judicial notice of the Policy, which is referenced in and attached to Plaintiff's FAC, and central to its claims. *See Walker v. Beaumont Indep. Sch. Dist*., 938 F.3d 724, 735 (5th Cir. 2019) ("When a defendant attaches documents to its motion that are referred to in the complaint and are central to the plaintiff's claims, the court may also properly consider those documents."); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007).

IV. ARGUMENT

A. Plaintiff Fails To Set Forth Sufficient Facts To State A Claim For Relief.

Plaintiff's claims all rest upon the allegation that it lost business income due to business interruptions caused by COVID-19 related governmental orders restricting its business operations and/or public decisions about frequenting its business related to "consumer fear." (*See, e.g.*, FAC

at ¶¶ 8-16.) Plaintiff claims that Allstate breached the Policy because it failed to provide coverage under the Business Income and Civil Authority Coverages. (*Id.* at ¶¶ 29-30.) Plaintiff alleges that, despite that the denial letter directly quoted from the Policy (*Id.* at Ex. E), Allstate engaged in unfair settlement practices by "misrepresenting" that the Policy requires "actual physical, tangible damage" for coverage. (*Id.* at ¶ 31.) Plaintiff claims that Allstate and Ms. Wonyaku failed to meet prompt payment and investigation obligations because Defendants failed to "investigate" Plaintiff's claim [although Plaintiff fails to allege any physical damage to investigate] which resulted in failure to pay Plaintiff's claim, and alleged wrongful denial of Plaintiff's claim as not covered under the Policy. (*Id.* at ¶¶ 32-37 & 41-44.) Plaintiff also alleges that Allstate breached the covenant of good faith and fair dealing because it denied Plaintiff's claim. (*Id.* at ¶¶ 38-40.) Finally, Plaintiff alleges that Allstate conspired with insurance adjuster Wonyaku to deny Plaintiff's claim. (*Id.* at ¶ 45.) Plaintiff's claims fail because the plain language of the Policy requires "direct physical loss" for any coverage, and Plaintiff has not and cannot establish one. Plaintiff's claims also fail because its Policy contains an exclusion for loss or damage "caused by or resulting from any virus." Finally, Plaintiff fails to state a claim for relief against Ms. Wonyaku. Thus, the FAC fails to state a claim on which relief can be granted, and must be dismissed under Rule 12(b)(6).

Interpretation of an insurance contract is a legal determination. *National Union Fire Ins. Co. v. Kasler Corp.*, 906 F.2d 196, 198 (5th Cir. 1990). "Where no ambiguity exists, it is the duty of the court to enforce the policy in accordance with its plain meaning." *Id.* (citing *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex.1984).) *See also Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003) ("If policy language is worded so that it can be given a definite or certain legal meaning, it is not ambiguous and we construe it as a matter of law.") The insured

initially bears the burden of establishing coverage under the policy and, if that is met, the insurer has the burden to prove an exclusion applies. *Gilbert Tex. Constr. L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010).

1. Plaintiff Cannot State A Claim Based Upon a Covered Loss Because It Has Not Alleged That it Sustained "Direct Physical Loss of or Damage to the Property."

There are two provisions upon which Plaintiff relies for potential coverage "Business Income Coverage" and "Civil Authority Coverage." (FAC at ¶¶ 12-17.) Under the "Business Income (and Extra Expense) Coverage Form", the Policy provides:

> 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 the property*** at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss… [Policy, at 94 (emphasis added).]

Thus, the Policy's "Business Income Coverage" applies when there is a "Covered Cause of Loss," *i.e.*, direct physical loss," and covers income for "the period of restoration", *i.e.*, the period beginning 72 hours *after* a direct physical loss or damage for Business Income or immediately after a direct physical loss or damage for Extra Expenses, and ends when the damaged business property is repaired, rebuilt or replaced, or when business resumes at a new location. (Policy at 25, 35, 94, 102.)

Plaintiff's "Civil Authority Coverage" similarly requires "direct physical loss":

> When 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 and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> (1) ***Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage,*** and the described premises are within that area but not more than one mile from the damaged property; ***and***

> **2. The action of the civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property. [Policy at 95.]**

The Civil Authority Coverage, thus, requires: (1) Covered Cause of Loss," *i.e.*, direct physical loss"; (2) to a property other than Plaintiff's property; (3) the action by civil authority prohibited access to Plaintiff's property as a result of direct physical loss; and (4) that the civil authority took action in response to "dangerous physical conditions" resulting from "direct physical loss." (Policy at 25, 35, 95.)

Plaintiff has not alleged a "direct physical loss" to either its own property or to any other property.[2] Instead, it alleges that "[t]he pandemic, consumer fear, and mitigation efforts undertaken caused 'direct physical loss' to Plaintiff's property and are clearly Covered Causes of Loss which has been broadly defined in property policies." (*Id.* at ¶ 12). Viewing the FAC in the light most favorable to Plaintiff, it appears to suggest that the lack of physical access to its property (although the Property was fully accessible as an essential health care business) was a "physical loss."[3] However, the plain language of the Policy makes it clear that physical alteration of property

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[2] Plaintiff fails to provide details about what specific other property address was damaged and how it was physically damaged, as well as fails to include an order specifically closing any such property as a result of "dangerous physical conditions." Instead Plaintiff alleges, in conclusory fashion, that "[t]he premises not more than one mile from Plaintiff's Property have suffered the same physical loss as Plaintiff has suffered." (FAC at ¶ 17.) These claims should be dismissed because, at best, the allegation is merely tracking the elements of a claim, which is insufficient. *See Twombly*, 550 U.S. at 555, 127 S.Ct. at 1964-65 (dismissing claim where allegations merely tracked conspiracy requirement). But even if Plaintiff were to specify the other property and the damages, there is no allegation that such damage prompted the governmental orders or that the resultant orders limited access to Plaintiff's property.

[3] The Bexar County Order (FAC at Ex. B) specifically identifies "dentists" as an Exempted Business. (FAC at Ex. B(1)(b)(i).) Moreover, the Order specifically states that "This exemption shall be viewed broadly to avoid any impacts to the delivery of healthcare." (*Id.*) Although Plaintiff claims that it could perform only "emergency" services, Plaintiff has not identified any

must be present. The Business Income Coverage, for example, not only uses the term "direct physical loss" or damage twice (both in the language itself and it in the reference to a "Covered Cause of Loss") but it only applies while the property is being "repaired, rebuilt or replaced" or when the physical damage is so great that the insured has to move the business. The Civil Authority Coverage similarly has multiple references to "direct physical loss" and applies when there is an order "taken in response to a dangerous physical condition" related to the "direct physical loss." In other words, the intent of this coverage is to apply when physical alteration of a nearby property requires safety restrictions on access to the insured property.

In Texas, it is generally understood that "the 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—for example, the car was undamaged before the collision dented the bumper." *N. Am. Shipbuilding, Inc. v. S. Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829, 833 (Tex. App.—Houston [1st Dist.]1996, no writ.)(quoting *Trinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 270–71 (5th Cir. 1990)). *See also Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co.*, 181 F. App'x 465, 470 (5th Cir. 2006) (interpreting "direct physical loss or damage" to mean "some physical manifestation of loss or damage."); *Mama Jo's Inc. v. Sparta Ins. Co.*, Case No. 18-12887 (11th Cir., Aug. 18, 2020) (upholding denial of business income coverage for restorative cleaning and painting because "under Florida law, an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'") (opinion attached to Appendix at Exhibit 3.)

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governmental order imposing such restrictions. The order states only that "elective" procedures are not exempt. So, while Plaintiff may have had to reschedule routine cleanings or cosmetic procedures, Plaintiff's "access" to its business premises was never prohibited. On that alone, the Civil Authority Coverage is inapplicable.

This Court very recently analyzed nearly identical policy language and found that the COVID-19 pandemic and resulting closure orders did not constitute a "direct physical loss." *Diesel Barbershop, et al. v. State Farm Lloyds*, Case No. 5:20-CV-461-DAE, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020). In that case, a group of barbershop businesses, deemed non-exempt and non-essential by the COVID-19 orders, sued State Farm for alleged wrongful denial of coverage for lost business income due the COVID-19 outbreak and related Texas and Bexar County Orders. *Id.* at *3. After reviewing the relevant case law on the issue, the Court dismissed for failure to allege a direct physical loss in circumstances materially identical to the situation presented here:

> Even so, the Court finds that the line of cases requiring tangible injury to property are more persuasive here and that the other cases are distinguishable. *See Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686 (5th Cir. 2011) (affirming summary judgment and holding that there was no coverage under the civil authority provision of the policy as plaintiffs "failed to demonstrate a nexus between any prior property damage and the evacuation order" when the city issued a mandatory evacuation order prior to the arrival of a hurricane and plaintiffs allegedly suffered business interruption losses); *United Air Lines, Inc. v. Ins. Co. of State of PA*, 439 F.3d 128, 134 (2d Cir. 2006) (determining that United could not show that its lost earnings resulted from physical damage to its property or from physical damage to an adjacent property when the government shut down the airport after the 9/11 terrorist attacks). For instance, unlike *Essex Ins. Co.*, COVID-19 does not produce a noxious odor that makes a business uninhabitable. It appears that within our Circuit, the loss needs to have been a "distinct, demonstrable physical alteration of the property." *Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co.*, 181 F. App'x 465, 470 (5th Cir. 2006) ("The requirement that the loss be "physical," given the ordinary definition of that term is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." (citation omitted)); *see also Ross v. Hartford Lloyd Ins. Co.*, 2019 WL 2929761, at *6–7 (N.D. Tex. July 4, 2019) ("direct physical loss" requires "a distinct, demonstrable, physical alteration of the property" (citing 10A Couch on Ins. § 148:46 (3d ed. 2010)).) Thus, the Court finds that Plaintiffs fail to plead a direct physical loss.

Id. at *5. *See also Rose's 1, LLC v. Erie Ins. Exchange*, Case No. 2020 CA 002424 B, 2020 WL 4589206, at *5 (D.C.Super. Aug. 06, 2020) (holding that the COVID-19 pandemic and related closure orders did not constitute "direct physical loss" to a D.C. restaurant.); *Gavrilides Mgmt. Co. v. Michigan Ins. Co.*, No. 20-258-CB, (Ingham County, MI Circuit Ct.), transcript of July 1, 2020 hearing, attached to the Appendix as Exhibit 2, pp. 20-23 (dismissing COVID-19 claims arising from government closure orders as a matter of law based on absence of direct physical loss and based on identical ISO virus exclusion).[4]

As cited above by this Court, just last year, the United States District Court for the Northern District of Texas analyzed nearly identical policy language, and observed that "'physical loss' under the Policy cannot fairly be construed to mean physical loss in the absence of physical damage." *Ross v. Hartford Lloyd Ins. Co.*, No. 4:18-CV-00541-O, 2019 WL 2929761, at *7 (N.D. Tex. July 4, 2019). The Court further noted the general rule that, "[t]he requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." *Id.* at *6 (emphasis in original) (quoting 10A Couch on Ins. § 148:46, Generally; "Physical" loss or damage).

[4] Plaintiff undoubtedly will cite *Studio 417, Inc. v. The Cincinnati Insurance Company*, Case No. 20-cv-03127 (W.D. Mo. August 12, 2020), where the Court denied a motion to dismiss a business income claim based on Plaintiffs' allegation that their business premises actually was contaminated with COVID-19. (Opinion, p. 11.) *Studio 417* is contrary to every other state or federal court decision that Allstate has been able to find dealing with business income and related coverages as applied to the COVID-19 pandemic. That said, *Studio 417* is also plainly distinguishable from the instant case. Unlike *Studio 417*, there is no allegation here that Plaintiffs' premises were actually contaminated with COVID-19, nor did the policy at issue in *Studio 417* contain a virus exclusion. *Infra.*, at pp. 15-18. So *Studio 417* is inapplicable in any event.

If Plaintiff closed its business as a result of governmental COVID-19 orders, it would not be a "suspension" of "operations" due to a "distinct, demonstrable, physical alteration" of Plaintiff's property, and thus, there would be no Business Income Coverage.[5] If Plaintiff sought to obtain Civil Authority Coverage, it would need to establish that the COVID-19 orders were issued as a result of "distinct, demonstrable, physical alteration" of another property and not, for example, as a result of governmental concern about the possible spread of a contagion from human-to-human contact. While Plaintiff may have suffered economic loss as a result of the pandemic and subsequent government closure orders intended to minimize spread of the disease, that by itself does not give rise to coverage unless it results from a "demonstrable physical alteration" to Plaintiff's property. The allegations of the FAC allege no physical alteration or damage whatsoever. Thus, Plaintiff cannot allege any covered loss and the FAC should be dismissed.

3. Coverage for Plaintiff's Alleged Losses is Barred by the Virus Exclusion.

Plaintiff's claims for relief, which are all based upon the COVID-19 pandemic and the various effects of that virus, are also barred by the Policy's Virus Exclusion, which states:

> A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
> B. We will not pay for loss or damage ***caused by or resulting from any virus***, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease. [Policy at 119.]

[5] It is unclear that Plaintiff was, in fact, closed as result of the COVID-19 pandemic or resulting orders. Plaintiff alleges that as of March 20, 2020, it "could no longer open" but it attaches orders establishing that it was in fact, an exempted business (FAC, Exhibit B, I(b)(i)) and was permitted to remain open except as to "elective" procedures. (FAC at Exhibit B and ¶ 10.) Plaintiff further alleges that it "will continue to suffer lost income even after the Orders are lifted due to fear of COVID-19." (FAC at ¶ 12.) If Plaintiff chose to close its doors, this would not constitute a covered cause of loss.

Thus, if Plaintiff's alleged "direct physical loss" "result[s] from any virus… that is capable of inducing physical distress, illness or disease," it is not covered. Moreover, if any "action of civil authority" is "caused by" or "result[s] from any virus… that is capable of inducing physical distress, illness or disease," it is not covered. These exclusions directly apply Plaintiff's alleged losses. (*See* FAC at ¶ 9 "This is the first pandemic ***caused by a coronavirus***."; at ¶ 12 "***The pandemic, consumer fear, and mitigation efforts undertaken*** caused 'direct physical loss' to Plaintiff's property"; at ¶ 12 "***The presence of the COVID-19 in Bexar County alone triggers coverage*** …"; ¶ 10 "The described ***purposes of the Orders are to…slow the spread of COVID-19***" (emphasis added.))

Just a few weeks ago, this Court found that nearly identical virus exclusions barred coverage for alleged loss of income related to the COVID-19 pandemic and closure of non-exempt businesses. *Diesel Barbershop, et al. v. State Farm Lloyds*, Case No. 5:20-CV-461-DAE, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020). As reasoned by the Court in that almost identical case:

> Guided by the plain language of the Policies, the Court finds that Plaintiffs have pleaded that COVID-19 is in fact the reason for the Orders being issued and the underlying cause of Plaintiffs' 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 Plaintiffs' businesses temporarily closing.

Id. at *6. The Court should follow similar reasoning and dismiss the FAC here.

Moreover, contrary to Plaintiff's allegations, there is no reason not to apply the exclusion here. Plaintiff alleges that Allstate "failed to give proper, advance notice and disclosure of the exclusions" (FAC at ¶ 23), but this exclusion is provided on its own separate page of the Policy

called "**EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA.**" (Policy at 119.) It is in bold and all capital letters. Additionally, Plaintiff is charged with knowledge of the contents of its Policy. *See Roland v. Transamerica Life Ins. Co.*, 570 F. Supp. 2d 871, 880 (N.D. Tex. 2008), aff'd, 337 F. App'x 389 (5th Cir. 2009) ("In Texas an insured has a duty to read the insurance policy and is charged with knowledge of its provisions.") (quoting *Hunton v. Guardian Life Ins. Co. of America*, 243 F.Supp.2d 686, 706 (S.D.Tex.2002).); *E.R. Dupuis Concrete Co. v. Penn Mut. Life Ins. Co.*, 137 S.W.3d 311, 317 (Tex. App.—Beaumont 2004, no pet.).

Plaintiff next argues that Allstate is "barred from relying on the exclusion as a result of regulatory and/or administrative estoppel." (FAC at ¶ 24.) However, "regulatory estoppel" is not recognized in Texas and "has been rejected by virtually every other state and federal court to address the issue." *SnyderGeneral Corp. v. Great Am. Ins. Co.*, 928 F. Supp. 674, 682 (N.D. Tex. 1996), aff'd, 133 F.3d 373 (5th Cir. 1998); *see also Shaw v. Liberty Mut. Fire Ins. Co.*, 2016 WL 561409, at *5 (M.D. Fla. Feb. 12, 2016) (collecting cases). Plaintiff cannot avoid the exclusion here.

Plaintiff also claims that the exclusion is "vague and ambiguous", unconscionable, or contrary to some unspecified public policy[6], and "cannot be enforced as written." (*Id.* at ¶¶ 25.) However, courts have consistently upheld such exclusions, even in times of "crisis." For example, the Texas Supreme Court has given effect to a similarly-worded exclusion in a State Farm policy that barred coverage for mold. *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 753 (Tex. 2006). In *Fiess*, the court held that the exclusion, which stated "[w]e do not cover loss caused by ... rust, rot,

[6] As an insurer operating in Texas, all of Allstate's policy language, including this exclusion, was approved by the Texas Department of Insurance. *See Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 774-75 (Tex. 2014). If this exclusion were contrary to Texas public policy, one would presume that the Department of Insurance would not have approved it.

mold or other fungi," barred coverage for mold contamination caused by water damage that was otherwise covered by the policy. *Id.* The court further held that exclusions should be enforced, even in times of "crisis"

> For more than a century this Court has held that in construing insurance policies where the language is plain and unambiguous, courts must enforce the contract as made by the parties, and cannot make a new contract for them, nor change that which they have made under the guise of construction .... Texas courts must stick to what those policies say, and cannot adopt a different rule when a "crisis" arises.

Id. at 753 (quotation marks and citations omitted). *See also Gavrilides Mgmt. Co.*, *supra,* pp. 20-23 (holding identical ISO virus exclusion to be clear, unambiguous and enforceable in the context of COVID-19 business interruption claim); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 214 (5th Cir. 2007) (unambiguous water damage exclusions barred coverage for Hurricane Katrina).

This Court may consider the plain language of this exclusion which is directly referenced in Plaintiff's FAC and contradicts Plaintiff's allegations that it suffered a "covered loss." *See Jackson v. Alexander*, 465 F.2d 1389, 1390 (10th Cir. 1972) (court need not consider or accept as true "allegations of fact that are at variance with the express terms of an instrument attached to the complaint as an exhibit and made a part thereof."); § 1327 Exhibits as Part of the Pleadings, 5A Fed. Prac. & Proc. Civ. § 1327 (4th ed.) ("It appears to be well settled that when a disparity exists between the written instrument annexed to the pleadings and the allegations in the pleadings, the terms of the written instrument will control, particularly when it is the instrument being relied upon by the party who made it an exhibit."). Because Plaintiff's claims are barred by the Virus Exclusion, the FAC should be dismissed.

4. Plaintiff fails to assert claims against Ms. Wonyaku.

As also detailed in Defendant's Notice of Removal and Opposition to Plaintiff's Motion to Remand (which arguments are further incorporated here), Plaintiff fails to assert claims against

insurance adjuster, Ms. Wonyaku. Although Plaintiff spends several paragraphs describing in conclusory fashion Ms. Wonyaku's actions on behalf of Allstate, Plaintiff fails to allege any specific wrongful conduct. Plaintiff alleges that Ms. Wonyaku violated Insurance Code Sections 542.003(b)(5) and 541 because she denied Plaintiff's claim as uncovered and misrepresented coverage of the claim because she signed the denial letter and instead it should have been covered. (*See* FAC at ¶¶ 41-44.) Plaintiff also alleges that Ms. Wonyaku "conspired" with Allstate – her employer – to deny its claim based upon the same alleged conduct. (*See id.* at ¶45.) All these allegations are based upon the denial itself and should be dismissed for the reasons set forth above.

5. Plaintiff Fails to Allege a "Civil Conspiracy."

Plaintiff's claim for conspiracy also fails because "agents of a corporation cannot form a conspiracy while acting in their corporate capacity." *Texas-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 138 (Tex. App.—Texarkana 2000, no pet.) *See also Crouch v. Trinque*, 262 S.W.3d 417, 427 (Tex. App.—Eastland 2008, no pet.) ("Employees or agents of a principal acting within the course and scope of their employment or agency relationship cannot enter into a conspiracy with each other so long as they are not acting outside their capacity as an employee or agent or are not acting for a personal purpose of their own….") According to Plaintiff, Ms. Wonyaku "was at all pertinent times the agent of Allstate, through both actual and apparent authority." (FAC at ¶ 42, incorporated by reference into the conspiracy claim.) Thus, there can be no civil conspiracy.

Moreover, in Texas "civil conspiracy is a theory of vicarious liability and not an independent tort." *Agar Corp., Inc. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 141 (Tex. 2019), reh'g denied (Sept. 6, 2019). If the underlying alleged "unlawful" acts or claims fail, then the claim for conspiracy also fails. *See id.*; *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 640 (5th Cir. 2007) ("Under Texas law, civil conspiracy is a derivative tort. If a plaintiff fails to state a separate underlying claim on which the court may grant relief, then a claim for civil conspiracy

necessarily fails."); *Collins v. Garcia*, No. 1-19-CV-1097-LY, 2020 WL 2733953, at *8 (W.D. Tex. May 26, 2020). Thus, Plaintiff's conspiracy claim fails because its other claims also fail.

B. Plaintiff Should Not be Granted Leave to Amend.

Plaintiff should not be granted leave to amend, unless it can demonstrate that amendment would not be futile, which it cannot do here. *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 872–73 (5th Cir. 2000) ("It is within the district court's discretion to deny a motion to amend if it is futile."); *Briggs v. Mississippi*, 331 F.3d 499, 508 (5th Cir. 2003) An amendment is futile if "the amended complaint would fail to state a claim upon which relief could be granted." *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 873 (5th Cir. 2000). Plaintiff filed this FAC after receiving Defendants' original Motion to Dismiss. Yet, Plaintiff failed to correct any of those fatal defects. Further, as detailed above, Plaintiff has not and cannot assert a covered loss or a non-excluded loss, and the FAC should be dismissed without leave to amend.

V. CONCLUSION

For all the reasons set forth above, the FAC should be dismissed with prejudice in its entirety, without leave to amend.

Dated: August 24, 2020

Respectfully submitted

By: */s/ Leanna M. Anderson*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 24, 2020 I caused the foregoing document to be served by ECF on counsel for Plaintiff:

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