UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

SFDG LLC, *d/b/a* Shallowford Family Dental Group, *Plaintiff*, v. THE CINCINNATI INSURANCE COMPANY, *et al.*, *Defendants*.	)	Case No. 1:20-cv-237 Judge Atchley Magistrate Judge Steger

MEMORANDUM AND ORDER

Before the Court is a Motion to Dismiss for Failure to State a Claim [Doc. 29] filed by Defendants Cincinnati Casualty Company, Cincinnati Indemnity Company, and Cincinnati Insurance Company. Plaintiff SFDG, LLC responded in opposition [Doc. 33] and Defendants replied. [Doc. 35]. For the following reasons, Defendants' Motion to Dismiss [Doc. 29] is **GRANTED**.

I. FACTUAL BACKGROUND

This case arises out of Defendants' denial of Plaintiff's insurance claim for losses sustained due to COVID-19. [Doc. 1].[1]

A. The Policy

Plaintiff owns and operates a dentistry practice in Chattanooga, Tennessee. [Doc. 1 at ¶ 1]. In 2019, Plaintiff purchased a commercial property insurance policy from Defendants ("Policy")

[1] For consistency and ease of reference, record citations are to the CM/ECF-stamped document and page number, not to the internal pagination of any filed document. Where possible, citation is made to more specific subdivisions within a document.

which was in effect at the relevant time. [Docs. 1 at ¶ 21; 1-4]. The pertinent provisions of the Policy are as follows:

> **SECTION A. COVERAGE.**
>
> We will pay for direct "loss" to the Covered Property at the "premises" caused by or resulting from any Covered Cause of Loss.
>
> (3) Covered Cause of Loss: Covered Causes of Loss means direct "loss" unless the "loss" is excluded or limited in this Coverage Part.
>
> * * *
>
> (1) Business Income: 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 "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss.
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> (2) Extra Expense: We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain…during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.
>
> (3) Civil Authority: When a Covered Cause of Loss causes damage to property other than Covered Property at a "premises", we will pay for the actual loss of "Business Income" and necessary Extra Expense you sustain caused by action of a civil authority that prohibits access to the "premises", provided that both of the following apply:
>
> (a) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
>
> (b) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.
>
> **SECTION G. DEFINITIONS.**
>
> (8) "Loss" means accidental physical loss or accidental physical damage.
>
> (11) "Period of Restoration" means the period of time that (a) beings at the time of direct "loss" (b) ends on the earlier of:
>
> (1) The date when the property at the "premises" should be repaired, rebuilt, or replaced with reasonable speed and similar quality

(2) The date when business is resumed at a new permanent location.

[Doc. 1-4 at 24, 26, 39-40, 59-60].

B. COVID-19 Pandemic

In March 2020, the World Health Organization declared that the emerging threat from the coronavirus ("COVID-19") constituted a global pandemic. [*Id*. at ¶ 32]. Initial research on the virus and reports from the CDC indicated COVID-19 strains physically infect and can stay alive on surfaces for at least 17 days, a characteristic that renders property exposed to the virus potentially unsafe and dangerous. [*Id*. at ¶ 33]. While infected droplets and particles carrying COVID-19 strains may not be visible, they are physical objects that travel to other objects and cause harm. [*Id*. at ¶ 34].

To reduce the spread of COVID-19, Tennessee Governor Bill Lee issued several Executive Orders. On March 23, 2020, Governor Lee issued Executive Order No. 18, which stated "dental service providers in the State of Tennessee…shall not perform any non-emergency dental or oral procedures. Non-emergency dental or oral procedures include hygiene visits, cosmetic procedures, and other elective procedures…Emergency procedures for patients with acute dental or oral needs may still be performed." [Doc. 1-1 at 2]. The restrictions on dentistry practices remained in effect through May 6, 2020. [*Id*. at 5-6, 8]. Governor Lee also issued Executive Order No. 22, which stated "all persons in Tennessee are urged to stay at home except for when engaging in Essential Activity or Essential Services." [Doc. 1-2 at 1-2]. The restrictions on Tennesseans remained in effect through April 30, 2020. [*Id*.].

Plaintiff claims there is "an ever-present risk that [] Plaintiff's property is contaminated and will continue to be contaminated" with COVID-19. [*Id*. at ¶ 37]. Plaintiff's dentistry practice is not a closed environment. [*Id*.]. People, including staff and patients, constantly cycle in and out of the office. [*Id*.]. Moreover, businesses like Plaintiff's are more susceptible to becoming

contaminated with COVID-19, as respiratory droplets and fomites are likely to be retained on the premises and remain viable for far longer than a facility with open-air ventilation. [*Id*.].

Due to the Executive Orders and the substantial threat of COVID-19, Plaintiff was forced to halt ordinary business operations. [*Id*. at ¶ 4]. Consequently, Plaintiff lost substantial revenue and had to furlough or lay off its employees. [*Id*.].

C. Plaintiff's Insurance Claim

In March 2020, believing that the Policy covered it for losses attributable to COVID-19, Plaintiff submitted a claim to Defendants. [*Id*. at ¶¶ 9, 42]. In June, Defendants sent Plaintiff a denial letter, emphasizing that "there must be direct physical loss or damage to Covered Property…in order for the claim to be covered" and "the fact of the pandemic, without more, is not direct physical loss or damage to the property." [Doc. 1-3 at 2, 5].

In August, Plaintiff filed this Complaint. [Doc. 1]. Plaintiff seeks coverage under the Business Income, Extra Expense, and Civil Authority provisions of the Policy for the losses it sustained due to COVID-19. Plaintiff claims "the continuous presence of the coronavirus on or around Plaintiff's premises rendered the premises unsafe and substantially unusable for its intended use and, therefore, caused physical property damage or loss under the Policy." [*Id*. at ¶¶ 8, 38]. Additionally, Plaintiff claims that the Executive Orders "prohibited the public from accessing Plaintiff's dentistry practice unless seeking an emergency service" which "constitutes physical loss so as to entitle it to coverage under the Policy." [*Id*. at ¶¶ 8, 40].

In response, Defendants filed the Motion to Dismiss [Doc. 29] now before the Court. Defendants contend that Plaintiff fails to state a claim for coverage under the Policy. [*Id*. at 2]. Specifically, Defendants claim that "physical loss or damage" is required for coverage; yet the

Complaint contains no factual allegations that establish physical loss or damage to the insured property. [Doc. 29-1].

II. STANDARD OF REVIEW

Rule 12(b)(6) provides that a defendant may move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), the Court "must construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claim that would entitle him to relief." *Engler v. Arnold*, 862 F.3d 571, 574-75 (6th Cir. 2017) (internal quotations omitted).

"The [plaintiff's] factual allegations, assumed to be true, must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007). "Mere labels and conclusions are not enough; the allegations must contain 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* at 575 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Further, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

"In evaluating a motion to dismiss, [the Court] 'may consider the complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the complaint and are central to the claims contained therein.'" *Ryniewicz v. Clarivate Analytics*, 803 F. App'x. 858, 863 (6th Cir. 2020) (quoting *Luis v. Zang*, 833 F.3d 619, 626 (6th Cir. 2016)). Therefore, the Court

may consider the Policy, the Executive Orders, and the Denial Letter that are attached as exhibits to the Complaint. [Docs. 1-1, 1-2, 1-3, 1-4].

III. ANALYSIS

In a diversity case, the court applies substantive state law to questions involving contract interpretation. *Mackey v. Judy's Foods, Inc.*, 867 F.2d 325, 328 (6th Cir. 1989). In this case, the parties agree that Tennessee law applies. [Docs. 29-1, 33]. Under Tennessee law, "questions regarding the extent of insurance coverage present issues of law involving the interpretation of contractual language." *Garrison v. Bickford*, 377 S.W.3d 659, 663 (Tenn. 2012) (citations omitted). Insurance policies must be construed "as a whole in a reasonable and logical manner." *Standard Fire Ins. Co. v. Chester O'Donley & Assocs., Inc.*, 972 S.W.2d 1, 7 (Tenn. Ct. App. 1998). The court should read an insurance policy as a layperson would read it. *Paul v. Ins. Co. of N. Am.*, 675 S.W.2d 481, 484 (Tenn. Ct. App. 1984). When the language of an insurance policy is clear and unambiguous, the court is bound to give effect to that language. *Clark v. Sputniks, LLC*, 368 S.W.3d 431, 441 (Tenn. 2012). The terms of an insurance policy must be "given their plain and ordinary meaning" *Id*.

The parties do not dispute that coverage under the Policy is contingent on Plaintiff sustaining direct physical loss or damage. [Docs. 1, 29-1, 33, 35]. Instead, the parties dispute whether the allegations in the Complaint establish "physical loss or damage" as required for coverage under the Policy. [*Id*.].

A. Interpretation

The parties have varying interpretations of the phrase "physical loss or damage." [Docs. 29-1, 33, 35]. Defendants claim that "physical loss or damage" is unambiguous, and the Court must apply these words their ordinary meaning. [Doc. 29-1 at 8]. Thus, Defendants claim that

"physical loss or damage" requires tangible alteration to the insured property. [*Id*. at 12-18]. Plaintiff contends that the Policy is ambiguous because it does not define "physical," "loss," or "damage" and that, under Tennessee law, the Court must interpret these terms "fairly and reasonably, giving the language its usual and ordinary meaning." [Doc. 33 at 9] (citing *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302, 306 (Tenn. 2007)). Plaintiff relies on several dictionaries to define these terms. [*Id*. at 9-10].

As a threshold matter, the Court finds that the Policy language is not ambiguous. *See Stonebridge Life Ins. Co. v. Horne*, 2012 WL 5870386, at *5 (Tenn. Ct. App. Nov. 21, 2012) (citing 16 *Williston on Contracts* § 49:17 (4th ed.) ("A policy term will not be found to be ambiguous simply because it is not defined within the policy, or because it has more than one meaning, or a broad meaning.")) The phrase "physical loss or damage" is merely comprised of common words that are unambiguous; therefore, the Court must give the terms their "plain and ordinary meaning." *Clark*, 368 S.W.3d at 441.

The Policy defines "loss" as "accidental physical loss or accidental physical damage." [Doc. 1-4 at 59]. However, the Policy does not further define "physical," "loss," or "damage." [*Id*.]. Because "[i]t is appropriate for a court to interpret undefined terms in an insurance policy by referring to their dictionary definitions," the Court will interpret "physical," "loss," and "damage" by referring to a dictionary. *Ernest v. USAA Cas. Inc. Co.*, 2009 803106, at *2 (E.D. Tenn. Mar. 25, 2009) (collecting cases).

"Physical" means "having material existence: perceptible, especially through the senses and subject to the laws of nature." [2] "Loss" is defined as "destruction, ruin." [3] "Damage" means

[2] *Physical*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/physical (last visited Aug. 27, 2021).

[3] *Loss*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/loss (last visited Aug. 27, 2021).

"loss or harm resulting from injury to person, property, or reputation." [4] Under the plain language of the Policy, the word "physical" modifies both "loss" and "damage". [Doc. 1-4 at 59] ("accidental *physical* loss or accidental *physical* damage.") (emphasis added). That is to say, any "loss" or "damage" to the insured property must be "physical" in nature.

Accordingly, reading the terms "physical," "loss," and "damage" together with their ordinary meanings in the context of the Policy, the Court concludes that the Policy provides coverage for material, perceptible harm to the insured property, whether in whole or in part. In other words, the Policy unambiguously requires some form of tangible harm to the insured property to invoke coverage.

The Court's conclusion is consistent with the holdings of numerous district courts in the Sixth Circuit interpreting similar, if not identical, insurance policy language. These courts have held that, to fulfill the requirement of direct physical loss or damage, there must be tangible alteration to the insured property. *See 1210 McGavock St. Hosp. Partners, LLC v. Admiral Indem. Co.*, 509 F. Supp. 3d 1032, 1042 (M.D. Tenn. 2020) (citing *Newchops Rest. Comcast, LLC v. Admiral Indem. Co.*, 507 F. Supp.3d 616 (E.D. Pa. 2020) (agreeing with *Newchops* court that "direct physical loss of or damage to" means that loss or damage to the insured property must be physical, affecting the structure of the property)); *Bridal Expressions LLC v. Owners Ins. Co.*, 2021 WL 1232399, at *4 (N.D. Ohio Mar. 23, 2021) ("[T]he court finds that the plain meaning of the words "physical" "loss" and "damage", and relevant case law confirms that tangible harm to property is necessary to trigger coverage under the Policy."); *Santo's Italian Café LLC v. Acuity Ins. Co.*, 508 F. Supp. 3d 186, 199 (N.D. Ohio 2020) (finding plaintiff "must demonstrate some type of tangible physical alteration in order to claim coverage for a 'direct physical loss of or

[4] *Damage*, Merriam-Webster, https://www.merriam-webster.com/dictionary/damage (last visited Aug. 27, 2021).

damage to' its premises"); *Family Tacos, LLC v. Auto Owners Ins. Co.*, 2021 WL 615307, at *8 (N.D. Ohio Feb. 17, 2021) (determining that "the ordinary and plain meaning of the phrase 'physical loss of or damage to' property "requires a tangible, material destruction or deprivation of possession"); *Ceres Enter., LLC v. Travelers Ins. Co.*, 2021 WL 634982, at *5 (N.D. Ohio Feb. 18, 2021) (finding the phrase 'direct physical loss of or damage to' property "intends a tangible loss of or harm to the insured property, in whole or in part"); *Chelsea Ventures, LLC v. Cincinnati Ins. Co.*, 2021 WL 2529821, at *4-5 (E.D. Mich. June 21, 2021) (finding "physical loss or damage" requires "tangible harm"); *Brown Jug, Inc. v. Cincinnati Ins. Co.*, 2021 WL 2163604, at *5 (E.D. Mich. May 27, 2021) (finding the phrase "accidental physical loss or accidental physical damage" requires the plaintiff to allege "tangible, physical losses"); *Bluegrass Oral Health Ctr., PLLC v. Cincinnati Ins. Co.*, 2021 WL 1069038 (W.D. Ky. Mar. 18, 2021); *Ryan P. Estes, D.M.D., M.S., P.S.C., v. Cincinnati Ins. Co.*, 2021 WL 2292473, at *6 (E.D. Ky. June 4, 2021); *Kirsch v. Aspen Am. Ins. Co.*, 507 F. Supp. 2d 835, 841 (E.D. Mich. 2020) (finding that "direct physical damage to the [covered property]" was limited to instances where tangible damage to the physical property has occurred.) [5]

The Court's conclusion that tangible harm is required to invoke coverage is further bolstered by other language in the Policy. Specifically, under the Business Income and Extra Expense provisions, Defendants agree to pay for losses sustained during the "period of

[5] Likewise, the vast majority of district courts in other circuits have reached the same conclusion when examining language identical to the Cincinnati policy at issue. *See Vandelay Hosp. Grp. LP v. Cincinnati Ins. Co.*, 2021 WL 2936066, at *6 (N.D. Tex. July 13, 2021); *Georgetown Dental, LLC v. Cincinnati Ins. Co.*, 2021 WL 1967180, at *7 (S.D. Ind. May 17, 2021); *Akridge Family Dental, Inc. v. Cincinnati Ins. Co.*, 2021 WL 2020605, at *4 (S.D. Ala. May 6, 2021); *B Street Grill & Bar LLC v. Cincinnati Ins. Co.*, 2021 WL 857361, at *5 (D. Ariz. Mar. 8, 2021); *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co.*, 2021 WL 778728, at *6 (N.D. Ga. Mar. 1, 2021); *Webb Dental Assocs. v. Cincinnati Indemnity Co.*, 2021 WL 800113, at *2 (N.D. Fla. Jan. 15, 2021); *T & E Chicago LLC v. Cincinnati Ins. Co.*, 501 F. Supp.3d 647, 651-52 (N.D. Ill. 2020); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690, 693 (N.D. Ill. 2020); *Promotional Headwear Int. v. Cincinnati Ins. Co.*, 504 F. Supp. 3d 1191, 1202 (D. Kan. 2020); *Uncork & Create, LLC v. Cincinnati Ins. Co.*, 498 F. Supp. 3d 878, 883-84 (S.D. W. Va. 2020).

restoration." The "period of restoration" begins "at the time of direct 'loss'" and ends when "the property at the 'premises' should be **repaired, rebuilt or replaced** with reasonable speed and similar quality; or…when business is resumed at a **new permanent location**." [Doc. 1-4 at 59-60] (emphasis added). The words "repair," "rebuild," "replace," and "new permanent location" contemplate some tangible harm to the insured property. In other words, the Policy expressly anticipates coverage when there has been a tangible harm to the property that would require a repair, rebuilding, or replacement, or resumption of business at a new, permanent location. *See Bridal Expressions LLC*, 2021 WL 1232399, at *6 ("Applying the plain meaning of the words 'repair,' 'rebuild,' and 'replace' suggests that the coverage period will not begin until there is some tangible harm to property."); *MIKMAR, Inc. v. Westfield Ins. Co.*, 2021 WL 615304, at *5 (N.D. Ohio Feb. 17, 2021) ("A Period of Restoration ending with repair, rebuilding, or replacement makes sense following and contemplates a material (physical) loss, not a loss of use with no impact to the property's structure."); *1210 McGavock St. Hosp. Partners, LLC,* 509 F. Supp. 3d at 1042 (quoting *Newchops Rest. Comcast, LLC.*, 507 F. Supp. 3d at 624 ("[Period of restoration] is defined as ending 'when the property…should be repaired, rebuilt or replace.' This definition informs that the loss or damage to the property must be physical, affecting the structure of the property.")).

Finally, the Court's conclusion that "physical loss or damage" requires a tangible harm to the insured property is supported by a leading treatise on insurance law. 10A *Couch on Ins*. § 148:46 (3d ed. June 21, 2021 update). According to the treatise, insurance policy language requiring that loss or damage 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*.

Plaintiff cites to *Southeast Mental Health Ctr., Inc. v. Pac. Ins. Co.*, 439 F. Supp. 2d 831, 837 (W.D. Tenn. 2006) and urges the Court to conclude that "physical loss or damage" encompasses loss of access, use, and functionality of the insured property. [Doc. 33 at 11]. However, in *1210 McGavock St. Hosp. Partners, LLC*, a case involving whether an insurance policy provided coverage for losses attributable to COVID-19, the Middle District of Tennessee decided that *Southeast* was "unavailing" and rejected this exact argument. *1210 McGavock St. Hosp. Partners, LLC*, 509 F. Supp. 3d at 1042-43.

In *Southeast Mental Health Ctr., Inc.*, the plaintiff suffered business interruption and economic loss due to storm-related power outages. 439 F. Supp. 2d at 833. The plaintiff alleged that the power outage made it impossible for its clinic to conduct patient appointments; and that the power outage "damaged its pharmacy computer…which resulted in the loss of data from the computer." *Id*. The insurance policy at issue provided coverage for necessary suspension of business operations "caused by direct physical loss of or damage to the property at the [covered] premises." *Id*. at 836.

Although the power outage caused business interruption and thus economic loss, it was "undisputed that the electrical and telephone outages were caused by damage to power and utility lines that were not located on Plaintiff's property." *Id*. at 837. The *Southeast* court concluded, "the power outage therefore does not constitute 'direct physical loss of or damage to' Plaintiff's property." *Id*. In contrast, the *Southeast* court found "corruption of the pharmacy computer constitutes 'direct physical loss of or damage to property.'" *Id*. With regard to the pharmacy computer—a physical object located on the insured premises—the *Southeast* court held that the term "'physical damage'…includes loss of access, loss of use, and loss of functionality." *Id*. at 838

(quoting *Am. Guarantee & Liab. Ins. Co. v. Ingram Micro, Inc.*, 2000 WL 728789, at *2 (D. Ariz. Apr. 18, 2000)).

In analyzing and determining the applicability of *Southeast*, the Middle District of Tennessee explained that, "loss of functionality was considered to be physical damage **only insofar as it related to a physical object located on the covered premises**." *1210 McGavock St. Hosp. Partners, LLC*, 509 F. Supp. 3d at 1043 (emphasis added). Thus, because the plaintiff in *1210 McGavock St.* merely alleged that the government's closure orders resulted in a loss of functionality and did not claim that any of the property located on the insured premises was physically damaged, the Middle District found that *Southeast* "[did] not come to the plaintiff's aid" and declined to conclude "a loss of functionality" constitutes "physical damage." *Id*.

The Court is persuaded by this assessment. Like the plaintiff in *1210 McGavock St.*, Plaintiff merely claims that the Executive Orders and "the ever-present risk that the Plaintiff's property is contaminated" resulted in "loss of access, use, and functionality of the dentistry office for its intended purpose, chairs and tables, dentistry equipment, [and] restrooms." [Doc. 1 at ¶¶ 8, 37, 38, 40; Doc. 33 at 11]. Plaintiff does not claim any of the property located on the insured premises was physically damaged. Thus, as *Southeast* stands for the proposition that a mere loss of use or functionality without physical change to the insured property does not amount to "physical damage", the Court finds *Southeast* is inapposite and declines to accept Plaintiff's interpretation.[6]

[6] *See also Georgetown Dental, LLC v. Cincinnati Ins. Co.*, 2021 WL 1967180, at *7-8 (S.D. Ind. May 17, 2021) ("The Court agrees—holding that 'loss' encompasses 'loss of use'—absent any demonstrable harm to a premises, ignores the Policy's demand of physical loss or damage."); *Promotional Headwear Int. v. Cincinnati Ins. Co.*, 504 F. Supp. 3d 1191, 1202 (D. Kan. 2020) (declining coverage under an identical insurance policy where plaintiff suffered "purely economic damages due to temporary loss of use, not a direct, physical change or intrusion onto the property."); *N.E. Georgia Heart Ctr. P.C. v. Phoenix Ins. Co.*, 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 the words 'direct' and 'physical' from the policy.")

Plaintiff also urges the Court to conclude that property sustains "physical loss" when it becomes "uninhabitable" or "substantially unusable", as well as when "a substance makes the further use of a building highly dangerous." [Doc. 33 at 12-14] (citing *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3rd Cir. 2002) ("When the presence of large quantities of asbestos in the air of a building is such as to make the structure unusable, then there has been a distinct [physical] loss to its owner."); *Prudential Prop. & Cas. Co. v. Lillard-Roberts*, 2002 WL 31495830, at *9 (D. Or. June 18, 2002) (holding that there may be a "direct physical loss" when property is "rendered uninhabitable by mold"); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (holding policyholder suffered "direct physical loss" when "the accumulation of gasoline around and under the [building caused] the premises to become so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous"); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 536 N.W.2d 296, 300 (Minn. Ct. App. 1997) ("although asbestos contamination does not result in tangible injury to the physical structure of a building a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants…constitut[ing] a direct, physical loss to property under an all-risk insurance policy."); *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 509 (1998) (holding policyholders suffered a "direct physical loss" when their homes were rendered uninhabitable due to the impending threat of rockfall); *Manpower, Inc. v. Ins. Co. of the State of Pennsylvania*, 2009 WL 3738099, at *7 (E.D. Wis. Nov. 3, 2009) (finding insured sustained a direct physical loss of its business personal property when a partial collapse of the building prevented it from using the property for its intended purpose.))

However, even if the Court were to adopt this more expansive definition of the phrase "physical loss", Plaintiff would still not be entitled to coverage under the Policy. First, Plaintiff

does not allege that COVID-19 was actually present on the insured property. [Doc. 1]. Plaintiff does not claim that an employee or patient tested positive for the virus, or that COVID-19 was present on its physical surfaces. Plaintiff merely alleges "there is an ever-present risk that the Plaintiff's property is contaminated and will continue to be contaminated" with COVID-19. [*Id.* at ¶ 37]. Thus, unlike the cases cited in support of its position, Plaintiff cannot establish that COVID-19 was actually present on the insured premises and made further use of the property highly dangerous.

Second, the Complaint does not plausibly allege that the insured property was uninhabitable or substantially unusable. As demonstrated above, Plaintiff cannot establish that the presence of COVID-19 rendered the insured property uninhabitable or substantially unusable. Further, Plaintiff cannot establish that the property was uninhabitable or substantially unusable due to the Executive Orders. The Executive Orders did not require dental offices like Plaintiff's to close completely. In fact, the Executive Orders expressly allowed Plaintiff to remain open to conduct emergency procedures, and employees were permitted to enter the building to perform their duties. Therefore, Plaintiff's dental office remained habitable and usable for business purposes, albeit in limited ways. *See Chelsea Ventures, LLC*, 2021 WL 2529821, at *7 (finding that civil orders did not render insured property substantially unusable because the orders merely limited, but did not prevent, plaintiff from conducting business operations); *ATCM Optical, Inc. v. Twin City Fire Ins. Co.*, 513 F. Supp. 3d 513, 521-22 (E.D. Pa. 2021) (holding that a complaint alleging an optician's office was permitted to remain open for emergency procedures failed to allege conditions that "completely or near completely precluded operation of the premise as intended.")

In conclusion, after conducting its own analysis of the Policy language and the relevant case law, the Court elects to follow the approach taken by the majority of courts that have considered similar, if not identical, insurance policy language in the context of COVID-19. Accordingly, the Court holds that the phrase "physical loss or damage" requires some tangible harm to the insured property in order to invoke coverage.

B. Plaintiff's Claims

Applying the "tangible harm" interpretation to the present action, the Court finds that Plaintiff has failed to plausibly allege "physical loss or damage" to its property by virtue of COVID-19 and the Executive Orders.

The vast majority of courts examining identical language under Cincinnati insurance policies have held that COVID-19 and related closure orders do not cause "physical loss or damage" to the insured property as required for coverage. *See 4431, Inc. v. Cincinnati Ins. Co.*, 504 F. Supp. 3d 368 (E.D. Pa. 2020); *Chelsea Ventures, LLC*, 2021 WL 2529821, at *7; *Ryan P. Estes, D.M.D., M.S., P.S.C.*, 2021 WL 2292473, at *6-8; *Brown Jug, Inc.*, 2021 WL 2163604, at *4-5; *Bluegrass Oral Health Ctr., PLLC.*, 2021 WL 1069038; *Kirsch*, 507 F. Supp. 2d at 841; *B. St. Grill & Bar LLC*, 2021 WL 857361, at *5; *Promotional Headwear*, 504 F. Supp. 3d at 1191, 1202-03; *Uncork & Create, LLC*, 498 F. Supp.3d at 883-84; *Gilreath Family & Cosmetic Dentistry, Inc.*, 2021 WL 778728, at *6; *T & E Chicago, LLC*, 501 F. Supp.3d 647; *Sandy Point Dental, PC*, 488 F. Supp. 3d at 694 ("The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property. Consequently. plaintiff has failed to plead a direct physical loss—a prerequisite for coverage."); *Georgetown Dental, LLC*, 2021 WL 1967180, at *8-9; *Seoul Taco Holdings, LLC v. Cincinnati Ins. Co.*, 2021 WL 1889866, at *6 (E.D. Mo. May 11, 2021); *Akridge Family Dental, Inc.*, 2021 WL 2020605, at *4.

Likewise, the majority of courts considering similar language have held that losses sustained due to the COVID-19 pandemic and government closure orders are not covered by insurance policies requiring "physical loss or damage." *See 1210 McGavock St. Hosp. Partners, LLC*, 509 F. Supp. 3d at 1043; *Bridal Expressions LLC*, 2021 WL 1232399, at *4; *Equity Planning Corp. v. Westfield Ins. Co.*, 2021 WL 766802 (N.D. Ohio Feb. 26, 2021) (Insured failed to allege "direct physical loss of or damage" to property due to shutdown orders during COVID-19 pandemic); *Santo's Italian Café LLC*, 508 F. Supp. 3d 186; *Family Tacos, LLC*, 2021 WL 615307, at *6; *Ceres Enter., LLC*, 2021 WL 634982, at *6.

Plaintiff cites to *Studio 417, Inc. v. Cincinnati Ins. Co.*, a case dealing with identical language in a Cincinnati policy for claims of lost business income due to COVID-19 and government closure orders. 478 F. Supp. 3d 794 (W.D. Mo. 2020). In *Studio 417*, the court held that the plaintiffs plausibly alleged a "direct physical loss" resulting from COVID-19. *Id*. at 800. The plaintiffs alleged that "COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable." *Id*. at 802. The court analogized the circumstances to other cases where "direct physical loss" occurred despite the lack of a physical alteration of property, and concluded that "direct physical loss" provided coverage for the loss of use of the insured premises due to COVID-19 restrictions. *Id*. at 801-802 (citing *Port Auth. of New York & New Jersey*, 311 F.3d at 236; *Prudential Prop. & Cas. Ins. Co.*, 2002 WL 31495830, at *8-9). The *Studio 417* court reasoned, despite the lack of actual destruction of or structural damage to the insured property, the claimed physical presence of COVID-19 on the premises and its physical adherence to the property rendered it unsafe and unusable, constituting a direct physical loss. *Id*. at 802.

Despite diligent and thorough research, the Court has not found a single case from the Sixth Circuit electing to follow *Studio 417*. Most notably, under similar circumstances, the Middle District of Tennessee expressly declined to follow *Studio 417*. *1210 McGavock St. Hosp. Partners, LLC*, 509 F. Supp. 3d at 1042-43. Moreover, as the *Studio 417* court correctly noted, "there is case law in support of [the] position that physical tangible alteration is required to show a 'physical loss.'" 478 F. Supp. 3d 794, 801. Indeed, the relevant case law from Tennessee and the Sixth Circuit holds that "physical loss" requires some tangible alteration to the insured property for coverage. *Supra* at 8-9.

Further, *Studio 417* is distinguishable from this case. Unlike in *Studio 417*, Plaintiff does not allege that COVID-19 was present on the insured premises. Instead, Plaintiff merely claims "there is an ever-present risk that [] Plaintiff's property is contaminated and will continue to be contaminated" with COVID-19. [Doc. 1 at ¶ 37]. Additionally, as demonstrated above, Tennessee law does not support the conclusion reached by the court in *Studio 417*— that "direct physical loss" can occur absent physical alteration to the insured property. *Supra* at 12. Under Tennessee law, mere loss of use or functionality without physical change to the insured property does not constitute "physical damage." *Id*.

The Court sympathizes with Plaintiff, as it has certainly suffered economic loss. Nevertheless, the plain language of the Policy and relevant case law requires the Court to find in Defendants' favor. The Court follows the majority approach, finding that Plaintiff has not sustained direct "physical loss or damage" to the insured property due to COVID-19 and the Executive Orders. Thus, because Plaintiff fails to allege direct "physical loss or damage" as required for coverage under the Policy, the Complaint must be dismissed for failure to state a claim.

IV. CONCLUSION

For the reasons above, Defendants' Motion to Dismiss [Doc. 29] is **GRANTED**, and Plaintiff's Complaint [Doc. 1] is **DISMISSED WITH PREJUDICE** pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The Clerk of Court shall enter judgment in favor of Defendants consistent with this Order.

SO ORDERED.

/s/ Charles E. Atchley Jr.
CHARLES E. ATCHLEY JR.
UNITED STATES DISTRICT JUDGE