IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

THE ONE GROUP HOSPITALITY, INC.,	)	
	)	
Plaintiff,	)	
v.	)	No. 22-00285-CV-W-BP
	)	
EMPLOYERS INSURANCE COMPANY OF WAUSAU,	)	
	)	
	)	
Defendant.	)	

ORDER AND OPINION GRANTING DEFENDANT'S MOTION TO DISMISS

Plaintiff filed this suit in state court, seeking recovery under an insurance policy for losses and costs incurred in connection with COVID-19. Defendant removed the case to federal court, then filed a Motion to Dismiss for Failure to State a Claim pursuant to Rule 12(b)(6). The Court has considered the parties' arguments and concludes the Motion to Dismiss, (Doc. 17), should be **GRANTED**.

I. BACKGROUND

Plaintiff owns and operates restaurants around the world, including thirty-five in the United States. (Doc. 1-1, ¶ 2.) It purchased an "all risk" insurance policy ("the Policy") from Defendant. As a general matter, the Policy insures against "all risks of direct physical loss or damage, except as . . . excluded or limited" elsewhere in the Policy. (Doc. 1-3, p. 14, § I.C.)[1] The Policy also describes its scope as extending to any "covered loss," which is defined as "[a] loss to **covered property** caused by direct physical loss or damage insured by this Policy." (Doc. 1-3, p. 67, § VII.5.)

[1] All page numbers are those generated by the Court's CM/ECF system, which may be different from the document's original numbering. All terms in bold are bolded in the original.

The Policy includes (and Plaintiff references) several provisions that apply when the insured suffers "direct physical loss or damage" or a "covered loss," such as:

- "Leasehold Interest" coverage, which covers rent payments on leased premises that suffer a "covered loss." (Doc. 1-3, p. 44, § III.B.3.)
- "Time Element" coverage, which is a general provision related to the Policy's coverage for losses due to certain interruptions in Plaintiff's business caused by Plaintiff's or others' "physical loss or damage." (Doc. 1-3, p. 42, § III.A.) Time Element Coverage is extended to several specific instances of business interruption in § III.E of the Policy and those instances cited by Plaintiff are set forth below.
- "Attraction Property" coverage, which applies when Plaintiff suffers an interruption of business because another property Plaintiff relies on to attract customers suffers "physical loss or damage." (Doc. 1-3, p. 47, § III.E.1.)
- "Civil or Military Authority" coverage, which applies when a governmental body directs Plaintiff to close its business because a covered location suffers "physical loss or damage." (Doc. 1-3, pp. 47-48, § III.E.2.)
- "Contingent Time Element" coverage, which applies if a customer, supplier, contract manufacturer or contract service provider suffers "physical loss or damage." (Doc. 1-3, pp. 48-49, § III.E.4.)
- "Ingress/Egress" coverage, which applies if Plaintiff's business is interrupted because "ingress to or egress from" its business is prevented due to "physical loss or damage." (Doc. 1-3, p. 50, § III.E.8.)

All these coverages require that the relevant property (often, Plaintiff's business premises) suffer "physical loss or damage."

In addition to these coverage provisions, one exclusion (the "Contamination Exclusion") is relevant to the issues before the Court.[2] Under this exclusion, the Policy does not cover "**[c]ontamination**, and any cost due to **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy, unless as provided elsewhere in" the Policy, unless the contamination is caused by a "covered loss." (Doc. 1-3, p. 30, § II.C.4.) The Policy defines "contamination" as a condition "that results from a **contaminant**," (Doc. 1-3, p. 67, § VII.4), and "contaminant" is defined as "[a]ny foreign substance, impurity, pollutant, hazardous material, . . . virus, disease causing or illness causing agent, fungus, mold or mildew." (Doc. 1-3, p. 67, § VII.3.)

Like many retail operations, Plaintiff's operations (and revenues) were adversely affected by the COVID-19 pandemic, including by orders from governmental authorities to close or limit occupancy. Its Complaint[3] repeatedly asserts Plaintiff suffered "physical loss or damage," but provides few facts to support this conclusion. The few facts asserted can be grouped into the following categories:

- COVID typically spreads via droplets expelled when a person breathes, coughs, or sneezes. (*E.g.*, Doc. 1-1. ¶¶ 28, 31, 33, 39.) COVID can also spread via contact with an infected person or a contaminated surface. (*E.g.*, Doc. 1-1, ¶¶ 27, 32, 40.) Regardless, COVID is caused by a virus that has a physical existence. (*E.g.*, Doc. 1-1, ¶¶ 41, 58-59, 61.)
- The presence of the virus and the risk of spread makes (or made) it inappropriate for people to congregate in the numbers and manner they did before the virus existed, thus making it

[2] Defendant discusses two other exclusions, one for "[l]oss of market or loss of use" and the other for "[l]oss or damage from enforcement of any law or ordinance." (Doc. 18, pp. 33-35 (discussing §§ II.C.1.c and II.C.1.f of the Policy).) In light of the Court's analysis there is no need to discuss these provisions.

[3] Now that the case has been removed the Court will utilize federal nomenclature to refer to the pleadings.

unsafe for Plaintiff to operate its restaurants as it had in the past. (*E.g.*, Doc. 1-1, ¶¶ 36, 63.)

- Significant effort is required to clean the virus off surfaces or remove it from the air. (*E.g.*, Doc. 1-1, ¶¶ 48-50, 53.)
- Plaintiff suspended operations and incurred costs to clean or decontaminate its premises. (*E.g.* Doc. 1-1, ¶¶ 85, 90.)
- Governmental authorities issued orders restricting the number of customers who could be in Plaintiff's restaurants, and in some instances those orders prohibited in-person dining altogether. (*E.g.*. Doc. 1-1, ¶¶ 68-71.) These orders precluded access to or use of portions of Plaintiff's premises. (*E.g.*, Doc. 1-1 ¶ 93.)

Defendant denied Plaintiff's request for coverage under the Policy, prompting Plaintiff to file this suit. The Complaint asserts two counts. Count I seeks a declaration that Plaintiff's properties suffered physical loss or damage. Count I also seeks an Order requiring Defendant to pay Plaintiff for damage to its properties and for the business income it lost. Count II asserts a breach of contract claim and seeks similar relief.

Defendant requests dismissal, contending the Complaint does not allege facts plausibly demonstrating Plaintiff's properties suffered "physical loss or damage" as required for all theories of coverage it asserts. Defendant also contends Plaintiff's claims are barred by the Contamination Exclusion. Plaintiff argues its claims are legally viable. The Court resolves the parties' arguments below.

II. DISCUSSION

Under Rule 12(b)(6), the Court "must accept as true all of the complaint's factual allegations and view them in the light most favorable to the Plaintiff[ ]." *Stodghill v. Wellston*

School Dist., 512 F.3d 472, 476 (8th Cir. 2008); *see also Alexander v. Hedback*, 718 F.3d 762, 765 (8th Cir. 2013).

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. 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.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quotations and citations omitted). A claim is facially plausible if it allows the reasonable inference that the defendant is liable for the conduct alleged. *E.g.*, *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007); *Horras v. American Capital Strategies, Ltd.*, 729 F.3d 798, 801 (8th Cir. 2013).

The Policy provides that it shall be "construed in accordance with the laws of the State of New York," (Doc. 1-1, p. 15, § I.H), except with respect to properties in California, Florida, Illinois, Indiana, Maryland, Missouri, and Texas. Specific endorsements for those states remove the provision stating the Policy is governed by New York law. The parties agree (at least for purposes of Defendant's motion) that the laws of those jurisdictions apply with respect to properties in those states. (Doc. 18, pp. 14-15; Doc. 19, p. 14 n.5.)

A. "Physical Loss or Damage"

The Policy provisions Plaintiff invokes all require that property (typically, Plaintiff's business premises) to have suffered "physical loss or damage." Some provisions explicitly contain this requirement; others require there be a "covered loss" which, as explained earlier, the Policy defines as "physical loss or damage." Plaintiff argues its restaurants suffered physical loss or damage because (1) the virus that causes COVID-19 has (or had) a physical presence in the air and

on surfaces in the restaurants and (2) the presence of the virus and the governmental orders each independently impaired the function and use of the restaurants. However, caselaw from the relevant jurisdictions addressing identical claims related to COVID-19 demonstrate these facts do not constitute physical loss or damage.

1. New York Law

The Court starts with New York law, because that is the law applicable to most of Plaintiff's restaurants. In *10012 Holdings, Inc. v. Sentinel Insurance Co.*, the Second Circuit rejected the insured's argument that "physical loss" encompassed "circumstances where [the insured] is merely deprived of access to its business property." 21 F.4th 216, 220 (2d Cir. 2021). The court also held that closing or limiting access "because of possible human infection does not qualify as a 'risk of direct physical loss.'" *Id*. at 223. In reaching this conclusion, the Second Circuit discussed several cases Plaintiff relies on here – including, most notably, *Pepsico, Inc. v. Wintherhur International American Insurance Co.*, 24 A.D. 3d 743 (N.Y. App. Div. 2005) and *Port Authority of New York & New Jersey v. Affiliated FM Insurance Co.*, 311 F.3d 226 (3d Cir. 2002) – and found them distinguishable. *Id*. at 221-22. Later, the holding in *10012 Holdings* was endorsed by the New York Appellate Division, which also distinguished *Pepsico. See Consolidated Restaurant Ops., Inc. v. Westport Ins. Corp.*, 205 A.D. 3d 76, 84-86 (N.Y. App. Div. 2022).[4]

The Second Circuit has consistently relied on *10012 Holdings* to reject claims that the effects of, or responses to, COVID-19 constitute physical loss or damage. Generic allegations that the virus was, or likely to be, on surfaces in a property were held insufficient. *E.g., Kim-Chee LLC v. Philadelphia Indemnity Ins. Co.*, 2022 WL 258569, at *2 (2d Cir. Jan. 28, 2022); *see also*

[4] The Eighth Circuit has also endorsed the Second Circuit's decision in *10012 Holdings*. *Monday Restaurants v. Intrepid Ins. Co.*, 32 F.4th 656, 658 n.2 (8th Cir. 2022).

Mangia Rest. Corp. v. Utica First Ins. Co., 72 Misc.3d 408, 415-16 (2021).[5] Closure or lack of access to a business due to COVID-19 or governmental orders related to COVID-19 do not constitute physical loss or damage. *E.g., Buffalo Xerographix, Inc. v. Sentinel Ins. Co.*, 2022 WL 4241191, at *2 (2d Cir. Sep. 15, 2022); *BR Rest. Corp. v. Nationwide Mut. Ins. Co.*, 2022 WL 1052061, at *1 (2d Cir. Apr. 8, 2022); *Deer Mountain Inn LLC v. Union Ins. Co.*, 2022 WL 598976, at *1-2 (2d Cir. Mar. 1, 2022). The governmental orders themselves also do not constitute physical loss or damage. *E.g., SA Hospitality Grp., LLC v. Hartford Fire Ins. Co.*, 2022 WL 815683, at *2 (2d Cir. Mar. 18, 2022).

All the Policy provisions Plaintiff relies on require either physical loss or damage or "covered loss" (which itself requires physical loss or damage). Applying these holdings demonstrates the Complaint does not plausibly allege Plaintiff's properties suffered physical loss or damage as those terms have been interpreted and applied under New York law. Accordingly, Plaintiff has failed to state a claim with respect to claims to which New York law applies.[6]

2. California Law

The Ninth Circuit surveyed California decisions and concluded physical loss or damage "contemplates an actual change in insured property occasioned by accident or other fortuitous event directly upon the property causing it to be unsatisfactory. In other words, for loss to be

[5] This addresses Plaintiff's attempts to distinguish its claims from those asserted in the cases cited. Plaintiff describes the Complaint as alleging it suffered losses caused by the physical presence of COVID-19 on its property. This assertion is not clearly supported by the Complaint. Regardless, the cases from other jurisdictions discussed herein are similar (and often clearer) than the cases from New York establishing that the virus's mere presence does not qualify as physical loss or damage, so the Court will not repeat Plaintiff's argument for each jurisdiction. The only possible exception may be Missouri, which will be addressed in Part II.A.7 of this Order. Regardless, as will be discussed in Part II.B, even if the presence of the virus and the corresponding need to remove it qualified as physical loss or damage under any state's law, the Contamination Exclusion would apply.

[6] The Court additionally observes Plaintiff has not identified any "Attraction Property" that experienced physical loss or damage. Plaintiff also has not identified any customers, suppliers, contract manufacturers or contract service providers that suffered physical loss or damage. This provides an independent reason to dismiss Plaintiff's claims for coverage under the "Attraction Property" and "Contingent Time Element" endorsements.

covered, there must be a distinct, demonstrable, physical alteration of the property." *Mudpie, Inc. v. Travelers Casualty Ins. Co. of Am.*, 15 F.4th 885, 891 (9th Cir. 2021) (cleaned up).[7] In subsequent cases, the Ninth Circuit made clear that the mere presence of infected individuals or the virus itself is insufficient. *E.g., Out West Rest. Grp., Inc. v. Affiliated FM Ins. Co.*, 2022 WL 4007998, at *2 (9th Cir. Sep. 2, 2022). The California Court of Appeals has reached a similar conclusion. *United Talent Agency v. Vigilant Ins. Co.*, 293 Cal. Rptr. 3d 65, 76-79 (Cal. Ct. App. 2022). The Ninth Circuit has also held that loss of use of property (for instance, due to governmental orders) does not itself constitute physical loss or damage. *E.g., Rialto Pockets, Inc. v. Beazley Underwriting Ltd.*, 2022 WL 1172134, at *2 (9th Cir. Apr. 20, 2022) (citing *Inns by the Sea v. California Mut. Ins. Co.*, 286 Cal. Rptr. 3d 576 (Cal. Ct. App. 2021)); *Baker v. Oregon Mut. Ins. Co.*, 2022 WL 807592, at *1 (9th Cir. Mar. 16, 2022) (citing *Inns by the Sea*).

Plaintiff relies on the California Court of Appeals decision in *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Insurance Co.*, which it describes as holding the physical presence of the virus constitutes physical loss or damage. (Doc. 19, pp. 22-23.) This interpretation of the case is too broad; the court specifically acknowledged and applied "the requirement an insured allege an external force acted on the insured property *causing a physical change in the condition of the property* to come within the coverage provision for 'direct physical loss or damage' . . . ." 296 Cal. Rptr. 3d 777, 786 (Cal. Ct. App. 2022) (emphasis supplied). The court allowed the plaintiff's claim to continue because the plaintiff alleged the virus "not only lives on surfaces but also bonds to surfaces through physicochemical reactions involving cells and surface proteins, *which transform the physical condition of the property*." *Id*. at 787 (emphasis supplied). The court was obligated to assume the truth of the allegations "even if improbable" and concluded the

[7] The Eighth Circuit has cited *Mudpie, Inc.* with approval. *Monday Restaurants*, 32 F.4th 656, 658 n.2.

assertion of "a distinct, demonstrable, physical alteration of the property" constituted an allegation of physical loss or damage. *Id*.

Construed in Plaintiff's favor, the Complaint alleges the virus was physically *present* in the air and on the surfaces in Plaintiff's properties. But in contrast to *Marina Pacific Hotel*, there are no allegations the virus physically *altered* Plaintiff's property. Moreover, as the California Court of Appeals observed, the pleading rules in federal court are different than those in California courts. Unlike this Court, the California Court of Appeals could not consider the plausibility of the plaintiff's allegation that the virus physically transformed the property it contacted. *Id*. at 788. For these reasons, *Marina Pacific Hotel* does not aid Plaintiff.

Based on the holdings of the Ninth Circuit and the California Court of Appeals, the Court concludes Plaintiff has not alleged COVID-19 caused "physical loss or damage" as that phrase is interpreted under California law. Therefore, its claims for coverage for its restaurants in California must be dismissed.

3. Florida

The Eleventh Circuit has interpreted "physical loss of or damage to" property under Florida law to require a tangible alteration of the property. "There is therefore no coverage for loss of use based on intangible and incorporeal harm to the property due to COVID-19 and the closure orders that were issued by state and local authorities even though the property was rendered temporarily unsuitable for its intended use." *SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, 32 F.4th 1347, 1358 (11th Cir. 2022). Moreover, "an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.' In other words, surfaces not tangibly altered or harmed can be cleaned without requiring repair." *Id*. at 1362 (quotation omitted).

Plaintiff distinguishes *SA Palm Beach* by contending the insureds in that case "failed to allege that their losses were caused by the actual or threatened presence of COVID-19 on or within their property." (Doc. 19, p. 30-31.) The Court does not believe this purported distinction exists. *SA Palm Beach* was the consolidation of several cases, and in one of those cases the insured alleged "the presence of COVID-19 particles on physical property impaired [the] value, usefulness and or normal function" of its property. *Id*. at 1353 (cleaned up). Another insured in the case alleged COVID-19 damaged, and prevented access to, its property. *Id*. at 1354. Moreover, the Eleventh Circuit has consistently applied *SA Palm Beach* to other cases characterizing COVID-19's existence or effects as "damage," including cases with allegations even closer to those asserted by Plaintiff. *E.g., PF Sunset View, LLC v. Atlantic Specialty Ins. Co.*, 2022 WL 1788920, at *2 (11th Cir. June 2, 2022); *Frontier Dev., LLC v. Endurance Am. Specialty Ins. Co.*, 2022 WL 1763402, at *2-3 (11th Cir. June 1, 2022).

Apart from the Eleventh Circuit's decisions, the Florida Court of Appeals has held "because the ordinary meaning of 'physical' carries a tangible aspect, 'direct physical loss' requires some actual alteration to the insured property." *Commodore, Inc. v. Certain Underwriters at Lloyd's London*, 342 So. 3d 697, 702 (Fla. Dist. Ct. App. 2022). The court further explained that "loss of intended use alone does not constitute 'direct physical loss.' Instead, 'direct physical loss of or damage to property' requires actual, tangible alteration to the insured property for coverage to be triggered under the Policy." *Id*. at 704.

For these reasons, Plaintiff has not alleged its properties in Florida suffered physical loss or damage, and therefore has not stated a claim for coverage.

4. Illinois

In *Sandy Point Dental, P.C. v. Cincinnati Insurance Co.*, the Seventh Circuit analyzed Illinois law and concluded loss of use of property is insufficient to assert a claim, absent damage or alteration to the property; in other words, loss of use alone does not constitute physical damage or loss. 20 F.4th 327, 331-33 (7th Cir. 2021). In addition to holding the insured's complaint did not state a claim, the Seventh Circuit denied the insured leave to file an amended complaint that would allege the virus attaches itself to the premises. The Seventh Circuit explained "these allegations do not cure the deficiencies of the first amended complaint. Even if the virus was present *and* physically attached itself to Sandy Point's premises, Sandy Point does not allege that the virus *altered* the physical structures to which it attached, and there is no reason to think that it could have done so." *Id*. at 335; *see also Green Beginnings, LLC v. West Bend Mut. Ins. Co.*, 2022 WL 1700139, at *1 (7th Cir. May 27, 2022); *East Coast Entertainment of Durham, LLC v. Houston Cas. Co.*, 31 F.4th 547, 551 (7th Cir. 2022). Finally, the Seventh Circuit has held that under Illinois law, the governmental orders limiting access or use of property did not constitute "physical loss or damage." *E.g., Melcorp, Inc. v. West Am. Ins. Co.*, 2022 WL 2068256, at *2-3 (7th Cir. June 8, 2022) (collecting cases).[8]

For these reasons, Plaintiff has failed to state a claim under Illinois law.

5. Indiana

Relying on (among other authorities) a decision from the Indiana Court of Appeals, the Seventh Circuit held "a temporary denial of a plaintiff's preferred use of its property, absent some physical alteration, does not fall within the plain meaning of 'direct physical loss or damage.'"

[8] Another Seventh Circuit case relying on *Sandy Point* has been cited favorably by the Eighth Circuit. *Monday Restaurants*, 32 F.4th 656, 658 n.2 (citing *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.*, 19 F.4th 1002, 1004-05 (7th Cir. 2021)).

Circle Block Partners, LLC v. Fireman's Fund Ins. Co., 44 F.4th 1014, 1019 (7th Cir. 2022). The court rejected the insured's argument that damage was caused simply because the virus was allegedly physically present on the property. *Id*.

In the case *Circle Block Partners* relied on, the insured contended orders limiting occupancy of buildings constituted loss or damage. The Indiana Court of Appeals rejected the argument because the insured's "building did not suffer any damage or alteration. Rather, the building was unusable for its intended purpose because of an outside factor." *Indiana Repertory Theatre v. Cincinnati Cas. Co.*, 180 N.E. 3d 403, 410 (Ind. Ct. App. 2022). Providing further explanation, the court stated the insured "did not suffer physical loss or physical damage under the language of the Policy because the [building] . . . was not destroyed or altered in a physical way that would require restoration or relocation." *Id*.

Plaintiff's arguments for not following these cases are unpersuasive. It contends the Seventh Circuit's ruling was based on its understanding of COVID-19 as not persistent, (Doc. 19, p. 32), but this is not a correct interpretation of the holding. In context, the court was contrasting COVID-19 with events or occurrences (such as termite infestations or asbestos fiber contamination) that, in addition to being *on* the property, actually *damage* the property. As the Seventh Circuit explained, termites and asbestos might be covered because they "generally involve persistent physical contamination *that requires repair or replacement*, rather than cleaning and disinfecting, to remediate." *Circle Block Partners*, 44 F.4th at 1020 (quotation omitted; emphasis supplied). With respect to *Indiana Repertory*, Plaintiff emphasizes that the Policy insures against "risk of" physical loss or damage. This observation does not affect the analysis when (as is the case here) no physical loss or damage – actual or potential – is alleged.

6. Maryland

In *GPL Enteprise, LLC v. Certain Underwriters at Lloyd's*, an insured alleged "as a result of the COVID-19 virus and [governmental orders], it had suffered direct physical harm, loss or damage to its premises." 276 A.3d 75, 80 (Md. Ct. App. 2022). The insurer denied the claim after "reason[ing] that neither the virus nor the Governor's order had caused 'direct physical loss of or damage to' [the insured's] restaurant, a necessary precondition for coverage under the policy." *Id*. The trial court dismissed the insured's claim. On appeal, the Maryland Court of Appeals stated "the central question is whether the Governor's order or the COVID-19 virus resulted in 'direct physical loss of or damage to' [the insured's] property." *Id*. at 83. The court then concluded the Governor's order had no tangible effect on the property; "[t]he physical condition of the insured property was exactly the same the day after the Governor issued the order as it was the day before. [The insured] lost one use of its property as the result of the legal prohibition on that use, not because of any actual or tangible harm or intrusion on the property itself." *Id*. at 654 (quotation omitted). The court then concluded COVID-19 itself also did not constitute physical loss or damage because there were no facts alleged "to establish that the Covid-19 virus somehow physically altered the structure of the restaurant so as to trigger coverage under the policy. Although the Virus can harm humans, it does not physically alter structures and therefore does not result in coverable property loss or damage." *Id*. at 654-55 (quotation omitted).[9]

Plaintiff contends *GPL Enterprise* is distinguishable, claiming the insured in that case simply did not sufficiently allege physical alteration of the property. (Doc. 19, p. 33.) However, as mentioned at several points in this Order, Plaintiff does not allege facts plausibly demonstrating

[9] The District of Maryland reached the same conclusion about Maryland law in several decisions decided before *GPL Enterprise* (and some of those decisions were cited by the Maryland Court of Appeals). *E.g., Cordish Cos., Inc. v. Affiliated FM Ins. Co.*, 573 F. Supp. 3d 977, 998-99 (D. Md. 2021); *Hamilton Jewelry, LLC v. Twin City Fire Ins. Co.*, 560 F. Supp. 3d 956, 967 (D. Md. 2021).

its properties were physically altered. Plaintiff has alleged the virus was on surfaces and in the air in its restaurants and needed to be removed – but Plaintiff has not alleged any facts demonstrating the virus changed, transformed, or damaged the property. The Court thus finds *GPL Enterprise* dictates dismissal of Plaintiff's claims under Maryland law.

7. Missouri

The Eighth Circuit interpreted Missouri law on this matter as requiring "some physicality to the [alleged] loss or damage of property–*e.g.,* a physical alteration, physical contamination, or physical destruction." *Planet Sub Holdings, Inc. v. State Auto Prop. & Cas. Ins. Co.*, 36 F.4th 772, 775 (8th Cir. 2022) (cleaned up); *see also Robert Levy, D.M.D., LLC v. Hartford Cas. Ins. Co.*, 2022 WL 2520570, at *1 (8th Cir. July 7, 2022); *Monday Restaurants*, 32 F.4th at 658. In the absence of a decision from the Missouri Supreme Court, this Court is bound by the Eighth Circuit's interpretations of Missouri law.

Planet Sub and *Monday Restaurants* pointed out the plaintiffs in those cases did not allege COVID-19 was physically present in their businesses, so the possibility of coverage due to "physical contamination" was not at issue. *Planet Sub*, 36 F.4th at 776; *Monday Rest.*, 32 F.4th at 658. In contrast, Plaintiff alleges it incurred costs associated with cleaning its premises, (Doc. 1-1, ¶ 85, 90), and argues it can recover those costs as well as any business losses associated with closing its restaurants so the restoration/cleaning could occur. Assuming *Planet Sub* means the presence of a substance that needs to be cleaned is sufficient to constitute physical loss or damage, the most Plaintiff could recover is the costs or losses incurred in connection with cleaning the properties (as opposed to costs and losses incurred because of governmental orders or the mere threat that customers would bring the virus into the restaurants). The Court need not consider this

issue because even if coverage could exist for this limited circumstance, as will be discussed in Part II.B below the Contamination Exclusion excludes recovery of those costs and losses.

8. Texas

In *Terry Black's Barbecue, LLC v. State Automobile Mutual Insurance Co.*, the Fifth Circuit cited several Texas state court decisions and concluded Texas law requires a physical or tangible alteration to the property for there to be property loss or damage. 22 F.4th 450, 456 (5th Cir. 2022). The court reinforced its conclusion by observing Texas courts "strive for uniformity in construing insurance provisions when the language is the same across jurisdictions," and pointed to numerous cases from other jurisdictions (some of which have been cited above) reaching the same interpretation. *Id*. at 457. The court concluded loss of use is insufficient to establish physical loss or damage.[10] The Fifth Circuit has twice reiterated this holding. *Ferrer & Poirot, GP v. Cincinnati Ins. Co.*, 36 F.4th 656, 658 (5th Cir. 2022); *Aggie Investments, LLC v. Continental Cas. Co.*, 2022 WL 257439, at *2 (5th Cir. Jan. 26, 2022). The Court's conclusion with respect to Texas law is therefore the same as for the other jurisdictions at issue.

B. The Contamination Exclusion

On several occasions, Plaintiff attempts to distinguish its claims from those asserted in some cases cited above by contending it alleged the virus was physically present in its restaurants. The Complaint does not clearly allege Plaintiff closed its restaurants due to the actual presence of the virus in its restaurants. Moreover, as discussed above, the mere presence of the virus in the premises does not constitute physical damage or loss absent an additional tangible effect on the property. Regardless, the Contamination Exclusion precludes coverage for the costs and damages associated with the virus's presence in Plaintiff's premises.

[10] The Eighth Circuit also has cited *Terry Black's Barbecue* with approval. *Monday Restaurants*, 32 F.4th 656, 658 n.2.

As stated earlier, the Contamination Exclusion provides the Policy does not cover "**[c]ontamination**, *and any cost due to* **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy, unless as provided elsewhere in" the Policy, unless the contamination "directly result[s] from a covered loss." (Doc. 1-3, p. 30, § II.C.4 (italics supplied).) The Policy defines "contamination" as a condition "that results from a **contaminant**," (Doc. 1-3, p. 67, § VII.4), and defines "contaminant" as "[a]ny foreign substance, impurity, pollutant, hazardous material, . . . virus, disease causing or illness causing agent, fungus, mold or mildew." (Doc. 1-3, p. 67, § VII.3.) Therefore, the virus that causes COVID-19 is a contaminant.

Plaintiff devotes little attention to this exclusion. (Doc. 19, p. 37.) First, it argues the exclusion only relates to "costs" and not to "loss" or "damage" caused by contamination. This is a strained interpretation that pays sole attention to the phrase "cost due to contamination" and ignores the blanket statement preceding that clause (and separated by a comma) stating the policy provides no coverage for "contamination." As explained by the Illinois Court of Appeals:

> The conjunctive "and" means "together with; in addition to; as well as." Read with the definition inserted for the word, the provision excludes from coverage "Contamination, [*together with, in addition to, as well as*] any cost due to Contamination." Furthermore, insertion of a comma after the first word "Contamination," indicates that "Contamination" itself is considered an independent exclusion not subject to qualification by any succeeding phrase.

Firebirds Int'l, LLC v. Zurich Am. Ins. Co., 2022 WL 1604438, at *6 (Ill. Ct. App. May 20, 2022) (cleaned up; remaining alterations and emphasis in original); *see also Out West*, 2022 WL 4007998 at *2; *Stant USA Corp. v. Factory Mut. Ins. Co.*, 2022 WL 326493, at *6 & n.5 (S.D. Ind. Feb. 3, 2022); *Cordish Cos*, 573 F. Supp. at 1005; *Lindenwood Female Coll. v. Zurich Am. Ins. Co.*, 569 F. Supp. 3d 970, 977 (E.D. Mo. 2021).

Plaintiff relies on the same argument discussed above to alternatively contend the exclusion is vague and relies on the Southern District of New York's decision in *Thor Equities, LLC v. Factory Mutual Insurance Co*. There, the court conceded (as discussed above), "the first two words of the exclusion—'contamination, and'— . . . could reasonably be read to encompass more than just 'any costs due to contamination.'" 531 F. Supp. 3d 802, 808 (S.D.N.Y. 2021). Nonetheless, the court determined the phrase did not "unambiguously foreclose[ ] recovery [for] losses due to contamination, and thus the Court cannot conclude that there is no reasonable basis for a difference of opinion" because elsewhere the policy differentiated between "cost" and "loss." *Id*.

But as discussed above, courts have interpreted the same phrase *Thor Equities* determined was ambiguous. Moreover, several courts have rejected that court's analysis, including courts in New York, Illinois, Maryland, and Missouri. *E.g., Chef's Warehouse, Inc. v. Liberty Mut. Ins. Co.*, 2022 WL 3097093, at *8 (S.D.N.Y. May 2, 2022); *Cordish Cos.*, 573 F. Supp. 3d at 1005; *Firebirds Int'l*, 2022 WL 1604438 at *6 n.4;[11] *see also Rockhurst Univ. v. Factory Mut. Ins. Co.*, 582 F. Supp. 3d 633, 638-39 (W.D. Mo. 2022) (rejecting similar argument without citing *Thor Equities*). The Court agrees with these decisions and does not find the provision ambiguous. The provision begins by precluding coverage for "contamination." The words following the comma after that first word – as indicated by the first word, "and" – add to and do not limit the scope of the exclusion effectuated by the declaration that the Policy does not cover "contamination."[12]

[11] *See also Dana Inc. v. Zurich Am. Ins. Co.*, 2022 WL 2452381, at *3 n.4 (6th Cir. July 6, 2022) (applying Ohio law); *Ralph Lauren Corp. v. Factory Mut. Ins. Co.*, 2021 WL 1904739, at *4 n.8 (D.N.J. May 12, 2021); *ITT Inc. v. Factory Mut. Ins. Co.*, 2022 WL 1471245, at *13 (D. Conn. May 10, 2022).

[12] Plaintiff also cites a decision from the Middle District of Florida, but there the court observed certain relevant provisions of the insurance policy had not been provided by the parties and further determined there was a lack of law on the subject to permit a ruling. *Urogynecology Specialist of FL LLC v. Sentinel Ins. Co.*, 489 F. Supp.3d 1297, 1302-03 (M.D. Fla. 2020). These observations are not applicable in the present case.

Finally, Plaintiff points to the Contamination Exclusion's statement that coverage is excluded "except as provided elsewhere in" the Policy. However, this presupposes that the contamination "directly result[ed] *from* a covered loss." (Doc. 1-3, p. 30, ¶ II.C.4 (emphasis supplied).) In other words, contamination itself is not a covered loss, and the Policy provides for costs and losses related to contamination only if the contamination is caused by a covered loss. For the reasons stated earlier, there is no covered loss – much less a covered loss that caused the contamination.

The Policy excludes coverage for "contamination, and any cost due to contamination," and further defines "contamination" to include viruses. Therefore, the Policy excludes coverage for Plaintiff's claims arising from COVID-19.

III. CONCLUSION

The Motion to Dismiss, (Doc. 17), is **GRANTED**.

IT IS SO ORDERED.

/s/ Beth Phillips
BETH PHILLIPS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

DATE: September 29, 2022