IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Regina M. Rodriguez

Civil Action No. 1:21-cv-00127-RMR-NRN

THE WESTERN UNION COMPANY,
a Delaware corporation,

Plaintiff,

v.

ACE AMERICAN INSURANCE COMPANY,
a Pennsylvania corporation,

Defendant.

ORDER

Pending before the Court is Defendant Ace American Insurance Company's Motion to Dismiss Plaintiff's Complaint, ECF No. 17. For the reasons stated below, the motion is GRANTED.

I. JURISDICTION AND APPLICABLE LAW

This action is before the Court pursuant to diversity jurisdiction under 28 U.S.C. § 1332(a). Plaintiff The Western Union Company ("Western Union") is a Delaware corporation with its principal place of business in Denver, Colorado, and Defendant Ace American Insurance Company ("ACE") is incorporated under the laws of Pennsylvania with its principal place of business in Philadelphia, Pennsylvania. ECF No. 1 ¶¶ 3, 4; *see* 28 U.S.C. § 1332(c)(1) ("[A] corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where

it has its principal place of business . . . ."). Further, the amount in controversy exceeds $75,000. *See* ECF No. 1 ¶ 5.

Both parties have applied Colorado law to the motion at issue, and the Court agrees that Colorado law applies. A federal district court sitting in diversity must apply the choice of law rules of the state in which it sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.*, 582 F.3d 1131, 1143 (10th Cir. 2009). Therefore, the Court applies Colorado choice of law principles to this case. "Under Colorado choice-of-law rules, an insurance contract is governed by the law of the state with the most significant relationship to the insurance contract." *Berry & Murphy, P.C. v. Carolina Cas. Ins. Co.*, 586 F.3d 803, 808 (10th Cir. 2009). "Insurance policies generally are interpreted under the law of the state where the policy was issued." *Budd v. American Excess Ins. Co.*, 928 F.2d 344, 347 (10th Cir. 1991) (citing *Blue Cross of Western N.Y. v. Bukulmez*, 736 P.2d 834, 841 (Colo. 1987)). Here, the policy was issued to Western Union in Denver, Colorado via a broker also located in Denver, Colorado. ECF No. 1-1 at 1. Moreover, as stated, the parties, themselves, have applied Colorado law. *See* ECF No. 17 at 8; ECF No. 23 at 4; *see also, e.g.*, *MarkWest Hydrocarbon, Inc. v. Liberty Mut. Ins. Co.*, 558 F.3d 1184, 1190 (10th Cir. 2009) ("We assess the policy under Colorado law, which the parties agree govern their diversity contract dispute."). Therefore, the Court, sitting in diversity, applies Colorado law here.

II. BACKGROUND[1]

This action arises out of Western Union's insurance policy (the "Policy") that it purchased from Defendant ACE for coverage during the period of October 1, 2019 through October 1, 2020. *See* ECF No. 1-1 at 1, 7.[2] The Policy "insures against all risk of direct physical loss, damage, or destruction to property described [t]herein occurring during the term of insurance, except as . . . excluded." *Id.* at 18.

Plaintiff Western Union provides money transfer services, in which it derives revenue "from consideration paid by customers to transfer money." ECF No. 1 ¶ 10. Plaintiff alleges that, in response to the COVID-19 pandemic and in an effort to slow the spread of COVID-19, "governments worldwide imposed unprecedented directives prohibiting travel, requiring certain 'non-essential' or 'high risk' businesses to close, and requiring residents to remain in their homes unless performing 'essential' activities ('Closure Orders')." *Id.* ¶ 29. The Closure Orders went into effect in "numerous countries in which Western Union agents operate beginning in March 2020 and at other times thereafter during the policy period." *Id.* ¶ 30. For example, the State of Colorado

[1] The factual background stated herein is taken from Plaintiff's Complaint, from which the non-conclusory statements of fact are accepted as true for purposes of resolving this motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) ("[F]or the purpose of a motion to dismiss we must take all of the factual allegations in the complaint as true."); *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) ("In conducting our review [of a dismissal under Rule 12(b)(6)], we assume the truth of the plaintiff's well-pleaded factual allegations and view them in the light most favorable to the plaintiff.").

[2] Plaintiff attaches as an Exhibit to the Complaint the insurance policy at issue, which is also "central" to the claims, and the parties do not dispute the authenticity of this exhibit. *See Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521 (10th Cir. 2013) (quoting *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010)). Therefore, the Court may consider the policy without converting the present motion to a motion for summary judgment under Rule 12(d). Unless otherwise noted, the Court cites the page number of the ECF filing stamp, rather than the page number of the underlying document.

implemented a Public Health Order on March 25, 2020 "implementing stay at home requirements." *Id.* ¶ 32.

According to Plaintiff, "[t]he presence of the virus, the community spread of virus, the threat of virus, and the above-referenced Closure Orders have operated to prohibit access to insured properties and agent locations from which Western Union's business operates, as well as the immediate surrounding areas." *Id.* ¶ 55. Further, "Western Union incurred losses due to the interruption of its business during the policy period." *Id.* ¶ 56; *see also id.* ¶ 61 ("The Closure Orders – issued directly as a result of physical loss of or damage to property within five miles of the insured properties and agent locations – impaired access to the insured properties and agent locations during the policy period. As a result, Western Union suffered covered business interruption / time element losses."). On May 1, 2020, Plaintiff reported to its claims contact a "Notice of Loss," stating that it had suffered "Business Interruption and Time Element losses in connection with interruption of its business operations in relation to the novel coronavirus disease COVID-19." *Id.* ¶ 63. Defendant has not provided coverage. *See id.* ¶¶ 64–73.

On January 15, 2021, Plaintiff filed a Complaint in this Court, bringing claims against Defendant for (1) declaratory judgment "that [Defendant] is obligated, in accordance with the terms of the All-Risk Policy, to provide insurance coverage for the losses of Western Union in relation to its insured properties and agent locations up to the applicable limits of liability," (2) breach of insurance contract, and (3) statutory bad faith delay or denial of payment of a claim for insurance benefits pursuant to Colorado Revised

Statute §§ 10-3-1115 & 1116. *Id.* ¶¶ 76–91. In the Complaint, Plaintiff points to the following specific coverages to which it claims it is entitled:

- "Business interruption" coverage, *id.* ¶ 42 (citing ECF No. 1-1 at 19);
- "Extra expense" coverage," *id.* ¶ 43 (citing ECF No. 1-1 at 22); and
- "Time Element" coverage," including "contingent business interruption" coverage, "civil authority" coverage, and "ingress/egress" coverage, *id.* ¶¶ 44–47 (citing ECF No. 1-1 at 24–25).

Defendant filed the present motion to dismiss, which has been fully briefed. In addition, the parties filed Notices of Supplemental Authorities in further support of their briefing on the motion to dismiss. *See* ECF Nos. 31,[3] 33,[4] 35,[5] 38.[6] This matter is ripe for review.

III. LEGAL STANDARD

Defendants have moved to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Under Rule 12(b)(6), a defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "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.'" *Ashcroft*

[3] *See* ECF No. 31 (Defendant's Notice of Supplemental Authority) (citing *Sagome, Inc. v. The Cincinnati Ins. Co.*, No. 21-cv-0097-WJM-GPG, 2021 WL 4291016, at *3 (D. Colo. Sept. 21, 2021)).

[4] *See* ECF No. 33 (Plaintiff's Notice of Supplemental Authority) (citing *The Regents of the University of Colorado v. Factory Mut. Ins. Co.*, No. 2021CV30206, 2022 WL 245327 (Colo. Dist. Jan. 26, 2022).

[5] *See* ECF No. 35 (Defendant's Second Notice of Supplemental Authority) (citing *MNR LLC v. Ohio Sec. Ins. Co.*, No. 21-2078-JWB, 2022 WLW 444103 (D. Kan. Feb. 14, 2022)).

[6] *See* ECF No. 38 (Plaintiff's Second Notice of Supplemental Authority) (citing *Spectrum Retirement Communities, LLC, et al. v. Continental Cas. Co.*, No. 2021CV30695 (Colo. Dist. July 13, 2022)); *see also* ECF No. 38-1.

v. Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* "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.* "Although for the purposes of a motion to dismiss, [courts] must take all of the factual allegations in the complaint as true," *id.*, "[c]ourts are permitted to review 'documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the document's authenticity,'" *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521 (10th Cir. 2013) (quoting *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010)).

IV. ANALYSIS

A. Declaratory Judgment and Breach of Contract Claims

Defendant primarily argues that Plaintiff is not entitled to coverage of its claimed losses here because all of the coverages to which Plaintiff claims entitlement only insure "direct physical loss, damage or destruction of property," as does the Policy, in general. *See* ECF No. 1-1 at 18 (defining the term "peril(s) insured against" as "all risk of direct physical loss, damage or destruction to property described herein occurring during the term of insurance, except as hereinafter excluded"). Defendant argues that, although the terms "direct physical loss, damage or destruction of property" are not defined in the Policy, courts considering similar terms in insurance policies in the context of claimed

losses related to COVID-19 have held that such losses are not covered. ECF No. 17 at 10–14. Therefore, Defendant argues that the Policy does not provide the coverage Plaintiff seeks under the business interruption, extra expenses, ingress/egress, civil authority, or contingent business interruption coverages. *See id.* at 15–17.

Plaintiff argues that it has sufficiently alleged "direct physical loss, damage or destruction of property" here to trigger coverage. ECF No. 23 at 4–15. Plaintiff further argues that the Colorado Supreme Court has held that "where conditions exist 'making further use of [a] building highly dangerous,' a 'direct physical loss' triggering coverage has occurred." *Id.* at 6–7 (quoting *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968)). *But see, e.g.*, *Tom's Urban Master LLC v. Federal Ins. Co.*, No. 20-cv-03407-PAB-SKC, 2022 WL 974654, at *3–7 (D. Colo. Mar. 31, 2022) (Brimmer, C.J.) (rejecting "plaintiff's argument that *Western Fire* requires a finding that plaintiff . . . suffered a direct physical loss" and finding "that plaintiff did not suffer a direct physical loss or damage"); *MNR LLC v. Ohio Sec. Ins. Co.*, No. 21-2078-JWB, 2022 WLW 444103, at *4–6 (D. Kan. Feb. 14, 2022) (applying Colorado law) (same); *Sagome, Inc. v. Cincinnati Ins. Co.*, No. 21-cv-0097-WJM-GPG, 2021 WL 4291016, at *2–3 (D. Colo. Sept. 21, 2021) (Martínez, J.) (same); *Holtzman Enters., Inc. v. Continental Cas. Co.*, No. 21-cv-01141-CMA-STV, 2021 WL 8153752, at *6–8, *11 (D. Colo. July 18, 2021) (Varholak, Mag. J.) (recommending the same).

Although the Court finds it likely that Plaintiff has not and cannot allege a "direct physical loss, damage or destruction of property" arising from the COVID-19 pandemic and related Closure Orders, the Court need not reach this issue, because, regardless of

whether the coverages under the Policy would apply in the first instance, the Pollution and Contamination Exclusions and Related Coverage Extensions with Sub-Limits Endorsement ("Pollution and Contamination Exclusion"), ECF No. 1-1 at 90–92, would bar coverage. *See, e.g.*, *Monarch Casino & Resort, Inc. v. Affiliated FM Ins. Co.*, No. 20-cv-1470, 2021 WL 4260785, at *5 (D. Colo. Sept. 17, 2021) (Rodriguez, J.) ("Even if the presence of COVID-19, coupled with government closures orders, *did* constitute physical loss or damage, those damages would still be excluded pursuant to the Contamination Exclusion, except as provided for by the Communicable Disease Exemptions.") (emphasis in original).

The Pollution and Contamination Exclusion provides that its exclusions and provisions "supersede any term, provision or endorsement to the contrary in this policy; and apply notwithstanding such term, provision or endorsement." ECF No. 1-1 at 90. It further provides that:

> This insurance does not apply to:
>
> . . .
>
> Loss or damage caused by, resulting from, contributed to, or made worse by actual, alleged or threatened release, discharge, escape or dispersal of Contaminants or Pollutants, all whether direct or indirect, proximate or remote, or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy.

Id. It defines "Contaminants or Pollutants" as follows:

> any material which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to bacteria, fungi, *virus* or hazardous substances as listed in the Federal Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976 and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency.

Id. at 92 (emphasis added). Defendant points out, and Plaintiff does not refute, that there is no dispute that COVID-19 is a virus. ECF No. 17 at 18. Therefore, "[l]oss or damaged caused by, resulting from, contributed to, or made worse by actual, alleged or threatened release, discharge, escape or dispersal of" COVID-19 is not covered. *See* ECF No. 1-1 at 90. Given that the exclusion applies even to loss or damage that was "contributed to" by a virus, any claimed loss resulting from the Closure Orders that arose in response to the COVID-19 pandemic would not be covered either, as the COVID-19 virus would have "contributed to" the Closure Orders and any loss resulting therefrom. *See id.*

Plaintiff argues that the Applicable State Amendatory Provisions – Benefit Level ("State Amendatory Endorsement"), which provides various "amendatory provisions" for 46 different states, "operates to broaden the coverage afforded under the Policy." ECF No. 23 at 18–19; ECF No. 1-1 at 101–116. In particular, Plaintiff points to the "Indiana Changes" listed in the State Amendatory Endorsement. *See* ECF No. 1-1 at 104. The "Indiana Changes" provide that:

> In this policy, the definition of "pollutants" is deleted and replaced by the following:
>
> "Pollutants" means any substance or material that is a solid, liquid, gaseous or thermal irritant or contaminant including but not limited to, smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste and any substances or materials identified in the Schedule. Waste includes materials to be recycled, reconditioned or reclaimed.

> The definition of "pollutants", applies whether or not the irritant or contaminant has any function in your business, operations, premises, site or location.

Id. According to Plaintiff, because this replacement definition of "pollutants" does not include the term "virus," it "operates to narrow the Policy's definition of 'Pollutants' by expressly removing the word 'virus.'" ECF No. 23 at 18. Plaintiff argues that the application of this provision is not limited to properties located in the State of Indiana, *id.* at 17, even though the State Amendatory Endorsement provides that:

> The following state amendatory provisions *may apply* to *specific locations* on the Schedule of Locations on file with the Company *based on their presence within the indicated jurisdictions in compliance with local statutes*. The *state-specific* conditions set forth in these state amendatory provisions are intended to amend the policy to conform to *state-specific* required minimum conditions and coverage. Where the policy form conditions and coverage are broader than that set forth in this endorsement, then this endorsement shall not apply to restrict or reduce the conditions and coverage provided by the policy form, as long as the policy form's broader conditions and coverage are permitted by applicable state law. *Accordingly*, the following exclusions, terms and conditions are hereby added to the policy and supersede any term or condition to the contrary in this policy unless such contrary term or condition is both lawful and less restrictive upon the Insured.

ECF No. 1-1 at 101 (emphasis added). Plaintiff notes that "courts regularly apply state-titled endorsements to the entire policy where there is no express geographical limitation within the provision." ECF No. 23 at 18 (citing *John Akridge Co. v. Travelers Cos.*, 837 F. Supp. 6, 8 (D.D.C. 1993)). Plaintiff further argues that, "[a]t worst, the presence of two conflicting endorsements creates an ambiguity, which must be construed against ACE and in favor of coverage, in the form of the narrower definition of 'Pollutants' found in the State Amendatory Endorsement that does not include 'virus.'" *Id.* at 19 (citing *Thompson v. Maryland Cas. Co.*, 84 P.3d 496, 502 (Colo. 2004)).

On the other hand, Defendant argues, first, that the State Amendatory Endorsement clearly has a geographical limitation where it states that it "may apply to specific locations." ECF No. 25 at 10–11. Second, the endorsement only applies as required by local law, and it has already been established that the Policy here is governed by Colorado law. *Id.* at 11.

The Court need not resolve whether the "Indiana Changes" apply to the entire Policy and to all "risk of direct physical loss, damage or destruction to property" insured thereunder because, even if the "Indiana Changes" did apply universally in the manner Plaintiff advocates, the definition of "Contaminants," which includes the term "virus," in the Pollution and Contamination Exclusion would remain intact. ECF No. 1-1 at 18; *see also* ECF No. 25 at 11 n.7. The "Indiana Changes" only operate to "delete and replace" the definition of "pollutants." *See* ECF No. 1-1 at 104. However, the Pollution and Contamination Exclusion contains a definition for "*Contaminants or* Pollutants." *Id.* at 92 (emphasis added). Even if the Indiana Changes operated to strike the definition of "Pollutants" in that exclusion, as Plaintiff argues, Courts should interpret contracts so that different words are not superfluous. *See* ECF No. 23 at 10–11 (quoting *Copper Mountain, Inc. v. Industrial Sys., Inc.*, 208 P.3d 692, 700 (Colo. 2009) ("We choose a construction of the contract that harmonizes provisions instead of rendering them superfluous."); *see also id.* at 11 (quoting *Northglenn Gunther Toody's, LLC v. HQ8-10410-10450 Melody Lane, LLC*, No. 16-cv-2427-WJM-KLM, 2018 WL 1762611, at *8 (D. Colo. Apr. 12, 2018) (Martínez, J.) ("Colorado courts strive to avoid any interpretation that would render contractual language meaningless or redundant."). Therefore, if "pollutant" takes on a

new meaning under the "Indiana Changes," the term "Contaminants" should not be interpreted as superfluous and would maintain its own meaning under the same definition stated under the Pollution and Contamination Exclusion, which includes "virus." *See* ECF No. 1-1 at 104. Such an application of the "Indiana Changes" would not render the contract ambiguous. *Cf.* ECF No. 23 at 19 (citing *Thompson*, 84 P.3d at 502). Therefore, the Pollution and Contamination Exclusion operates to bar coverage here, and Plaintiff's claims for declaratory judgment and breach of contract fail for at least this reason.

B. Statutory Bad Faith Claim

"It is settled law in Colorado that a bad faith claim must fail if . . . coverage was properly denied and the plaintiff's only claimed damages flow from the denial of coverage." *MarkWest Hydrocarbon*, 558 F.3d at 1193 (collecting cases from the Colorado Court of Appeals); *see also American Fam. Mut. Ins. Co. v. Hansen*, 375 P.3d 115, 117 (Colo. 2016) ("American Family's denial of Hansen's claim in reliance on the unambiguous insurance contract was reasonable, and American Family cannot be held liable under sections 10-3-1115 and -1116 for statutory bad faith."). Given that the Court finds that coverage was properly denied and that ACE did not breach its insurance contract with Western Union, Plaintiff's claim for statutory bad faith also fails as a matter of law and must be dismissed.

C. Dismissal With Prejudice

Although dismissal of an action is a harsh remedy, *see, e.g.*, *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009), and a court may liberally grant a litigant leave to cure pleading deficiencies, *see* Fed. R. Civ. P. 15(a)(2), "[a] dismissal with

prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile," *Knight v. Mooring Cap. Fund, LLC*, 749 F.3d 1180, 1190 (10th Cir. 2014) (quoting *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006)). "A proposed amendment is futile if the complaint, as amended, would be subject to dismissal." *United States ex rel. Barrick v. Parker-Migliorini Int'l, LLC*, 878 F.3d 1224, 1230 (10th Cir. 2017) (quotations and citation omitted).

Here, Plaintiffs' claims for insurance coverage premised on losses resulting from the COVID-19 pandemic and any related Closure Orders are barred by the Pollution and Contamination Exclusion. The Court finds that amendment of the Complaint would be futile to overcome this deficiency and therefore dismisses Plaintiffs' claims with prejudice. *See also* ECF No. 17 at 1 (defense counsel certifying that "she conferred with Plaintiff's counsel . . . and has determined that the deficiency in Plaintiff's Complaint is not correctable by amendment").

V. CONCLUSION

For the reasons stated above, Defendant Ace American Insurance Company's Motion to Dismiss Plaintiff's Complaint, ECF No. 17, is GRANTED, and Plaintiff's claims are DISMISSED WITH PREJUDICE.

DATED: August 24, 2022

BY THE COURT:

REGINA M. RODRIGUEZ
United States District Judge