DISTRICT COURT, CITY & COUNTY OF DENVER, STATE OF COLORADO **1437 Bannock Street** **Denver, Colorado 80202**	
Plaintiff: SPECTRUM RETIREMENT COMMUNITIES, LLC, et al. **v.** **Defendant:** CONTINENTAL CASUALTY COMPANY, an Illinois Corporation Authorized to Transact Insurance Business in Colorado	▲ **COURT USE ONLY** ▲ **Case No: 2021CV30695** **Courtroom: 409**

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT CONTINENTAL CASUALTY COMPANY'S C.R.C.P. 12(B)(5) MOTION FOR DISMISSAL

THIS MATTER is before the Court on *Defendant Continental Casualty Company's* ("CNA") *C.R.C.P. 12(b)(5) Motion for Dismissal* (hereinafter "Motion to Dismiss"), filed herein on April 27, 2021. A hearing on this Motion to Dismiss was held on October 29, 2021. The Court, having reviewed the Complaint, the Motion, Plaintiff's Response, Defendant's Reply, the Court's file, and the applicable legal authority, including all Supplemental Authority filed by the parties, finds, concludes and orders as follows:

I. Background Facts

Plaintiff, Spectrum Retirement Communities, LLC ("Spectrum"), owns, operates, and manages forty-three senior living and memory care communities across the country, serving about 3,800 residents. (Compl. ¶¶ 59-60.) Each community has individual units for rent, as well as communal facilities and several amenities geared towards socialization for their senior residents. (Compl. ¶ 61.)

Spectrum is the Name Insured on Policy No. 6073132948, held with Defendant insurance company, CNA. (Compl. ¶ 62.) The original policy was effective from August 15, 2019 to August 15, 2020, in exchange for a premium of over $1.3 million. (*Id.*) The policy was subsequently renewed in exchange for a premium of over $1.9 million for the policy period August 15, 2020 to August 15, 2021. (Compl. ¶ 63.) The coverage provided under both policies was substantially similar. (Compl. ¶ 66.) Collectively, these two policies are referred to as "the Policies."

The Policies both included all-risk real and personal property coverage limited at $225 million and $100 million respectively. (Compl. ¶ 68.) The Policies also included all-risk business

interruption (gross earnings) and extra expense coverage limited at $50 million and time limited to twenty-four months. (Compl. ¶ 69.) Both policies separately identify and provide Denial of Access by Civil Authority/Ingress-Egress coverage limited at $2.5 million. (Compl. ¶ 70.)

The relevant language of the Policies includes:

> **II. COVERAGE**
>
> Except as hereafter excluded and subject to the **LIMITS OF LIABILITY** in Section **I.4.** and all other policy provisions, this policy insures against risks of direct physical loss of or damage to property and/or interest described herein at covered **Locations**. Unless otherwise indicated, all items contained herein are part of and not addition to the **POLICY LIMIT** shown in Section **I.4.**

See Compl., Ex. 1 pg. 20.

> **A. PROPERTY**
>
> **1. COVERED PROPERTY AND RELATED INTERESTS**
>
> a. The interest of the Insured in all real and personal property owned or used by the Insured, or hereafter erected, installed, or acquired, including while in course of building, erection, installation, and assembly, and including interest in Improvements and Betterments. In the event of loss or damage, the Company agrees to accept and consider the Insured as sole and unconditional owner of Improvements and Betterments, notwithstanding any contracts or leases to the contrary.
>
> b. The interest of the Insured in the real and personal property of others in the Insured's care, custody and control, and the Insured's liability imposed by law or assumed by contract for physical loss or damage to such property.
>
> c. Personal property of the Insured's officers and employees while at Locations of the Insured, or within one thousand (1,000) feet thereof.
>
> For the purpose of coverage provided herein, personal property shall mean business personal property owned by the Insured or by officers and employees of the Insured which is usual to the occupancy of the Insured, including manuscripts, furniture, fixtures, equipment (including Electronic Data Processing Equipment) and supplies not otherwise excluded under this policy. Such property is covered while at

or within one thousand (1,000) feet of the Locations insured by this policy.

See Compl., Ex. 1 pg. 20.

1. BUSINESS INTERRUPTION (GROSS EARNINGS)

a. This policy covers against loss resulting from necessary interruption of business caused by direct physical loss or damage to covered property, except **Finished Stock**, by the peril(s) insured against and occurring during the term of this policy at covered **Locations** occupied by the Insured, subject to the sublimit specified in Section **I.4.** of this policy.

In the event of such physical loss or damage the Company shall be liable for the actual loss sustained by the Insured resulting directly from such interruption of business, but not exceeding the reduction in **Gross Earnings** as set forth below less charges and expenses as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property herein described as has been damaged or destroyed, commencing with the date of such damage or destruction and not limited by the date of expiration of this policy, but in no event to exceed the number of months specified in Section **I.5. TIME LIMITS** if a Business Interruption Period of Indemnity limit is specified.

See Compl., Ex. 1 pg. 21.

15. EXTRA EXPENSE

The company will pay for the reasonable and necessary extra expense, as hereinafter defined, incurred by the Insured in order to continue as nearly as practicable the **normal** operation of the Insured's business following direct physical loss of or damage to covered property by peril(s) insured against.

In the event of such physical loss or damage, the Company shall be liable for such reasonable and necessary extra expense incurred for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property as has been damaged, commencing with the date of damage and not limited by the date of expiration of this policy, subject to the sublimit in Section **I.4.** of this policy.

See Compl., Ex. 1 pg. 25.

10. DENIAL OF ACCESS BY CIVIL AUTHORITY AND INGRESS-EGRESS

This policy is extended to cover for up to the time limit specified in Section **I.5.** but not exceeding the sublimit show in in section **I.4.** of this policy, the actual loss sustained:

a. During the period of time while access to the Insured's **Location** is prohibited by order of civil authority, but only when such order is given as a direct result of physical loss or damage to property of the type insured from a peril insured against occurring at or in the immediate vicinity of said **Location**; or

b. During the period of time when as a direct result of physical loss or damage to property of the type insured from a peril insured against, ingress to or egress from the Insured's **Location** is thereby physically prevented.

See Compl., Ex. 1 pg. 24.

On March 11, 2020, the World Health Organization ("WHO") declared the COVID-19 outbreak a pandemic. (Compl. ¶ 73.) President Donald Trump declared a national emergency on March 13, 2020, due to the outbreak of COVID-19 in the United States. (*Id.*) COVID-19 is a deadly communicable disease resulting from the SARS-CoV02 novel coronavirus. (Compl. ¶ 72.) The Center for Disease Control and Prevention ("CDC") considers senior citizens to be at a greater risk for requiring hospitalization, intensive care, ventilators, and death if infected with COVID-19. (*Id.*)

Across the country, including the states where each of the covered properties were located, governmental orders were issued requiring non-essential businesses to shut down, and certain essential businesses to stop certain activities, alter or not use certain physical spaces, and take other steps to prevent further spread of COVID-19. (Compl. ¶ 80.) As senior care facilities, Spectrum's properties were considered essential businesses. In his public health orders, Colorado Governor Jared Polis ordered senior care facilities to surveil and test for the virus and restrict access to their facilities. (Compl. ¶ 81.) Governor Polis also noted that "Covid-19 also physically contributes to property loss, contamination, and damage due to its propensity to attach to surfaces for prolonged periods of time." (Compl. ¶ 81; *see* Ex. 3 "4th Updated Public Health Order 20-24.")

While not forced to shut down entirely, under the applicable government orders, Spectrum was prevented from accepting all new move-ins, despite the existence of ready and willing new residents. (Compl. ¶ 90.) Only the residents who already resided in the facilities (the number of which inevitably decreased over time) or individuals who were employed by Spectrum could enter the premises. (Compl. ¶ 90.) Dining halls and other communal facilities were required to be shut down. (Compl. ¶ 92.) Spectrum made alterations to physical spaces within facilities, provided rent reductions since residents could no longer use common areas and amenities, and implemented new

health and safety measures such as obtaining Personal Protective Equipment ("PPE"), providing in-room dining, increasing resident care staffing, enhancing infection control, implementing sterilization procedures and equipment, and creating isolation areas in the community. (Compl. ¶¶ 88-89, 98.)

Spectrum's communities have both resident senior citizens and employees who provide care to those residents. (*Id.*) Of particular significance, Spectrum notes that residents and employees at each of their facilities tested positive for COVID-19, confirming the virus was physically present at all the covered properties. (Compl. ¶ 84.) Plaintiff has alleged that COVID-19's physical presence at the properties impaired the properties' functions for their ordinary and intended uses, causing Spectrum to lose significant income, and requiring steps be taken and costs incurred to physically restore facilities to a usable state. (Compl. ¶ 12.) This, Spectrum claims, amounts to direct physical loss of and/or damage to its properties. (Compl. ¶ 85.)

On August 14, 2020, Spectrum filed a claim with CNA for business interruption and extra expense coverage and for civil authority and ingress-egress coverage to recoup substantial, ongoing losses caused by COVID-19. (Compl. ¶ 128.) In letters dated August 31, 2020, and November 16, 2020, CNA denied Spectrum's claims. (Compl. ¶ 129, Exs. 4-5.) Spectrum asserts that its claim was wrongfully denied. (*Id.*)

On February 25, 2021, Spectrum initiated this litigation against CNA. Spectrum claims the Policies were contracts under which Spectrum agreed to pay premiums in exchange for losses covered by CNA. (Compl. ¶ 132.) Spectrum alleges that because it complied with all applicable provisions in the Policies, CNA breached its contractual obligation to provide coverage when it denied the claims. (Compl. ¶ 133.) Spectrum also claims statutory delay/denial and common law bad faith because it alleges the denial of owed benefits violates C.R.S. § 10-3-1115 and such denial was a breach of the duty of good faith and fair dealing. (Compl. ¶¶ 138, 145.)

In response, CNA filed this motion to dismiss for failure to state a claim under Colorado Rule of Civil Procedure 12(b)(5). (Def.'s Mot. to Dismiss 1.) CNA asserts that Spectrum failed to state a claim because the Complaint did not allege any direct physical loss of or damage to property. According to CNA, COVID-19 and the resulting preventative public health orders cannot cause "physical loss" or "physical damage" to property. (*Id.*) CNA also argues that because Spectrum's facilities were deemed essential businesses and not required to close under public health orders, Spectrum merely suffered economic losses. (*Id.* at 2). According to CNA, economic losses are not "physical loss or damage to" property, and therefore are not covered. (*Id.*)

II. Legal Standard

A. Standard of Review

A motion to dismiss for failure to state a claim tests the sufficiency of a plaintiff's claim for relief. *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992). In Colorado, a motion under C.R.C.P. 12(b)(5) is disfavored and should only be granted when a complaint fails to state a plausible claim for relief. *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016); *Rector v. City and County of Denver*, 122 P.3d 1010, 1013 (Colo. App. 2005). In order to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim for relief that is plausible on its face." *Warne*, 373 P.3d at 589 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). If a plaintiff pleads factual content that allows the court to draw the inference that the defendant is liable for the misconduct alleged, the claim has facial plausibility. *Iqbal*, 556 U.S. at 678.

When addressing a motion to dismiss, the court must view the allegations in the complaint in the light most favorable to the plaintiff and accept all averments of material fact contained in the complaint as true. *Dunlap*, 829 P.2d at 1291; *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099 (Colo. 1995) (quoting *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 122-23 (Colo. 1992)); *Abu-Nantambu-El v. State*, 433 P.3d 101, 103 (Colo. App. 2018). The court is only permitted to consider the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the court may take judicial notice. *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006).

B. Insurance Policy Interpretation

When interpreting an insurance policy, a court applies standard principles of contract interpretation. *Cotter Corp. v. American Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 819 (Colo.2004) (quoting *Thompson v. Md. Cas. Co.*, 84 P.3d 496, 501 (Colo. 2004)). As with any other type of contract, the terms of the policy are construed by the court to promote the parties' intent. *Cary v. United of Omaha Life Ins. Co.*, 108 P.3d 288, 290 (Colo. 2005).

The court begins by giving words their plain and ordinary meaning, unless the intent of the parties, as expressed in the contract, indicates that an alternative interpretation is intended. *Chacon v. Am. Family Mut. Ins. Co.*, 788 P.2d 748, 750 (Colo. 1990). Dictionaries may be used to determine the plain and ordinary meaning of words. *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1091 (Colo. 1991). If a contract provision is clear and unambiguous based on its plain and ordinary meaning or the intent of the parties, the court should not rewrite or otherwise interpret the provision. *Chacon*, 788 P.2d at 750.

A contractual term is ambiguous "if it is susceptible on its face to more than one reasonable interpretation." *Am. Family Mut. Ins. Co. v. Hansen*, 375 P.3d 115, 120 (Colo. 2016) (quoting *USAA Cas. Ins. Co. v. Anglum*, 119 P.3d 1058, 1059 (Colo. 2005)). An ambiguous term is

construed in favor of the insured. *Thompson v. Maryland Cas. Co.*, 84 P.3d 496, 501-02 (Colo. 2004). However, courts will not force ambiguity in an insurance contract in order to resolve the claim against the insurer. *Martinez v. Hawkeye-Security Ins. Co.*, 576 P.2d 1017, 1019 (Colo. 1978). Absent such ambiguity, the court will not look beyond the four corners of the agreement to determine the meaning intended by the parties. *Hansen*, 375 P.3d at 117.

III. Analysis

Spectrum's claims for breach of contract, statutory delay/denial, and common law bad faith are well pled.

CNA argues there is no potential coverage for Spectrum's purported losses under its property insurance Policies because COVID-19 and the resulting public health orders did not cause "direct physical loss or damage" to covered property. Since purely economic losses are not covered under the Policies, CNA argues that Spectrum has failed to state a claim for breach of contract, statutory delay or denial, and common law bad faith. In response, Spectrum contends that COVID-19 caused a direct physical loss to its covered properties because the actual presence of COVID-19 in and on each of the covered properties made continued use of the properties dangerous.

As discussed in more detail below, the Court finds that because the Complaint plausibly alleges that COVID-19 was physically present on and in each of Spectrum's covered properties, making them unusable, inaccessible, and unduly dangerous to use, Spectrum has plausibly pled a direct physical loss. Subsequent health orders prevented the normal use of Spectrum's covered properties and limited the ability of people to enter and exit the properties in the same way as before the properties were contaminated. Spectrum has plausibly asserted claims for business interruption and civil authority coverage. While Spectrum has failed to state a claim ingress-egress coverage, it has plead sufficient claims for breach of contract, statutory denial/delay, and common law bad faith related to business interruption and civil authority coverage.

1. Spectrum has adequately alleged a "direct physical loss" under the Policies.

Spectrum argues its properties suffered direct physical loss from COVID-19 because the Colorado Supreme Court has previously held that "direct physical loss" does not require "tangible injury" or "direct physical loss." (Pl.'s Resp. to Def.'s Mot. to Dismiss 3.) Unlike similar suits filed elsewhere across the country, Spectrum's Complaint plausibly alleges that 1) COVID-19 was confirmed to be present in and on each of Spectrum's covered properties, and 2) the CNA Policies in question do not include virus exclusions. (*Id.* at 4.)

CNA conversely argues there was no direct physical loss because Spectrum's properties were not rendered uninhabitable and access was only temporarily restricted. (Def.'s Mot. to Dismiss ¶ 28-29.) CNA also argues the alleged losses do not fit into the coverage, so it is immaterial that there is no virus exclusion in the Policies. (Def.'s Reply in Supp. of Mot. to Dismiss

8-9.) CNA also argues that Spectrum's claims amount solely to economic loss, not property loss, and economic loss is not covered by the Policies. (Def.'s Mot. to Dismiss ¶ 3.)

Under Colorado case law, "direct physical loss or damage" does not require evidence of "tangible injury" or "physical alteration" of property. *See Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 56 (Colo. 1968). In *Western Fire*, the Colorado Supreme Court held that direct physical loss occurred when the accumulation of gasoline around and under a church building seeped into the building's structure and made the further use of the building unsafe. 437 P.2d at 55. The Third Circuit similarly found that "when the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner." *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002). When sources unnoticeable to the naked eye are the alleged cause of reduction in property use to a substantial degree, *Port Authority's* analysis can be instructive. *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x. 823, 826 (3d Cir. 2005). Courts throughout the country have followed the same line of reasoning, finding that "physical loss" occurs when property is rendered unsafe, even without tangible or structural damage.[1]

Currently, there is no binding precedent regarding COVID-19 business interruption claims in Colorado courts. It is not decisive that the majority of courts across the country have found COVID-19 does not constitute "direct physical loss." This Court is bound by Colorado law and the specific policy language and the distinct factual allegations this case presents. Under the CNA Policies, the facts as alleged in the Complaint, and the binding precedent set forth in *Western Fire*, this Court finds the decisions of courts concluding that COVID-19 causes direct physical loss or damage to property to be more persuasive.

[1] *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799 (N.H. 2015) (finding urine odor constitutes physical loss); *Widder v. La. Citizens Prop Ins. Corp.*, 82 So. 3d 294 (La. App. 2011) (finding lead contamination constitutes physical loss); *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724 (N.J. App. Div. 2009) (finding electrical grid shutdown constitutes physical loss); *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 800 N.Y.S.2d (N.Y. Sup. Ct. 2005) (finding dust, soot, and smoke following 9/11 constitutes physical loss); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266 (Wash. App. 2002) (finding meth residue constitutes physical loss); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31496830, at *8-9 (D. Or. June 18, 2002) (finding mold constitutes physical loss); *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147 (finding pesticide adulteration constitutes physical loss); *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819 (Minn. 2000) (finding asbestos constitutes physical loss); *Bd. of Educ. v. Int'l Ins. Co.*, 720 N.E.2d 622 (Ill. App. 1999) (same); *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191 (N.D. 1998) (finding power outage constitutes physical loss); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998) (finding threat of rock fall constitutes physical loss); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600 (Fla. App. 1995) (finding death of bacteria colony in treatment plant constitutes physical loss); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332 (Or. App. 1993) (finding meth odor constitutes physical loss); *Adams-Arapahoe Joint School Dist. No. 28-J v. Cont'l Ins. Co.*, 891 F.2d 772 (10th Cir. 1989) (finding loss from a partially collapsed roof extended to the entire corroded area of the roof because the corrosion made the school unsafe and unusable); *Pillsbury Co. v. Underwriters of Lloyd's*, 705 F. Supp. 1396 (D. Minn. 1989) (finding difficulties in destroying organisms in its creamed corn constitutes physical loss); *Henri's Food Prods. Co. v. Homes Ins. Co.*, 474 F. Supp. 889 (E.D. Wis. 1979) (finding vaporized agricultural chemicals constitute physical loss); *Am. All. Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920 (6th Cir. 1957) (finding radioactive dust constitutes physical loss).

Most of the cases finding that COVID-19 does not constitute "direct physical loss or damage" require that there be a physical alteration of property to trigger business interruption coverage.[2] These cases are not conclusive to the analysis here because they depart from the binding precedent in *Western Fire* which makes clear that demonstrable or tangible physical alteration of property is not a requirement in Colorado to support a claim for "direct physical loss or damage." 437 P.2d at 56.

Courts which have found that COVID-19 does constitute a physical loss have utilized the physical contamination theory. *See SWB Yankees, LLC v. CNA Fin. Corp.* No. 20CV2155, 2021 WL 3468995, at *15 (Pa. Ct. Com. Pl. Aug. 4, 2021) (citing *Brown's Gym, Inc. v. The Cincinnati Ins. Co.*, No. 20CV3113, 2021 WL 3036545, at *19 (Pa. Ct. Com. Pl. July 13, 2021)). Under that theory, business interruption coverage applies to covered property contaminated by COVID-19 so long as 1) the coronavirus was actually present on or attached to surfaces on the covered property; and 2) its presence caused the insured premises to become uninhabitable, unusable, inaccessible, or unduly dangerous to use. *See SWB Yankees*, 2021 WL 3468995, at *15; *Brown's Gym, Inc. v. Cincinnati Ins. Co.*, 2021 WL 3036545, at *19; *Studio 417, Inc. v. Cincinnati Ins. Co.,* 478 F. Supp. 3d 794, 800 (W.D. Mo. 2020); *K.C. Hopps, Ltd. v. Cincinnati Ins. Co.*, 561 F. Supp. 3d 827, 836 (W.D. Mo. 2021). *Cf. Mudpie, Inc. v. Travelers Casualty Ins. Co.*, 487 F. Supp. 3d 834, 841 n.7 (N.D. Cal. 2020) ("Had Mudpie alleged the presence of COVID-19 in its store, the Court's conclusion about an intervening physical force would be different. SARS-CoV-2 – the coronavirus responsible for the COVID-19 pandemic, which is transmitted either through respiratory droplets or through aerosols which can remain suspended in the air for prolonged periods of time – is no less a 'physical force' than the 'accumulation of gasoline' in *Western Fire* or the 'ammonia release [which] physically transformed the air' in *Gregory Packaging.*" *See Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12:cv-04418(WHW)(CLW), 2014 WL 6775934, at *6 (D.N.J. Nov. 25, 2014)). The precedent set forth by the Colorado supreme court in *Western Fire* lends itself to adoption of the physical contamination theory for sources of loss undetectable by the naked eye.

The first reported case to employ such rationale was *Studio 417, Inc. v. Cincinnati Ins. Co., supra*. The Cincinnati Insurance Company denied a hair salon's COVID-19-related business interruption claim on the basis that "direct physical loss requires actual, tangible, permanent, physical alteration of property." *Studio 417*, 478 F. Supp. 3d at 800. The hair salon's insurance policy did not define the words "direct," "physical," "loss," or "damage." *Id.* Citing the Third Circuit's rationale in *Port Authority*, the *Studio 417* trial court recognized that absent physical alteration, physical loss may occur when the property is uninhabitable or unusable for its intended purpose. *Id.* at 801. Because the salon pled 1) COVID-19 was present on the salon's premises, and

[2] *See Henry's La. Grill, Inc. v. Allied Ins. Co.*, 35 F.4th 1318, 1320 (11th Cir. 2022); *Terry Black's Barbeque v. State Auto. Mut. Ins. Co.*, 22 F.4th 450, 457 (5th Cir. 2022); *Memominee Indian Tribe of Wis. V. Lexington Ins. Co.*, 556 F. Supp. 3d 1084, 1100 (N.D. Cal. 2021); *Mudpie, Inc. v. Travelers Cas. Ins. Co.*, 15 F.4th 885, 891 (9th Cir. 2021); *O'Brien Sales & Mktg. v. Transp. Ins. Co.*, 512 F. Supp. 3d 1019, 1022 (N.D. Cal. 2021); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1143 (8th Cir. 2021); *Selane Prods. v. Cont'l Cas. Co.*, No. 21-55123, 2021 WL 4496471, at *1 (9th Cir. Oct. 1, 2021); *Woolworth LLC v. Cincinnati Ins. Co.*, 535 F. Supp. 3d 1149, 1154 (N.D. Ala. 2021).

2) the salon was unsafe and unusable, the trial court denied Cincinnati Insurance Company's motion to dismiss. *Id.* at 802.

In *Brown's Gym*, a gym specifically alleged that the virus was actually present on its covered properties, and all public access to the insured property was prohibited as a result. 2021 WL 3036545, at *1. Utilizing the physical contamination theory, as recognized in *Studio 417*, the trial court overruled the preliminary objections in the nature of a demurrer filed by the Cincinnati Insurance Company. *Id.*, at *25. Later citing the reasoning set forth in *Brown's Gym*, another Pennsylvania trial court denied defendant Continental Insurance Company's motion for judgment on the pleadings with regards to business interruption coverage. *SWB Yankees, supra*, 2021 WL3468995, at *31. Based on the plaintiff's averments that the coronavirus had a continuous presence on its covered property, rendering its property "unsafe" and "unfit for its intended use," the *SWB Yankees* trial court found that the plaintiff adequately alleged "physical loss or damage" to its property under the physical contamination theory. *Id.*, at *21.

In this case, Spectrum has adequately alleged direct physical loss or damage to its property under a physical contamination theory. In its Complaint, Spectrum specifically alleged that the virus was present in and on its covered properties, evidenced by the fact that employees and/or residents at each of the covered properties tested positive for the virus that causes COVID-19. Spectrum also sufficiently alleged that use of its property was unsafe and unfit for its intended use as a result of presence of the virus. Dining rooms and other common areas had to be shut down, residents were required to stay in their rooms, and guests and new potential residents were not allowed inside. Accordingly, under the physical contamination theory, COVID-19 plausibly amounted to physical loss or damage to Spectrum's covered properties. That is sufficient to survive a motion to dismiss.

Even without the benefit of the physical contamination theory, Spectrum also adequately alleged physical loss or damage to its property within the plain meaning of that phrase. In the Policies, the term "direct physical loss or damage" is not defined. The Court finds that the phrase "physical loss or damage" is susceptible to more than one reasonable interpretation. The dictionary defines "direct" to mean "stemming immediately from a source." *Direct*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/direct. "Physical" is defined as "having material existence…of or relating to material things." *Physical*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical. Meanwhile, "loss" is defined as "destruction, ruin" or "the act or fact of being unable to keep or maintain something." *Loss*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/loss. It is reasonable that from these definitions, the average purchaser of insurance might understand that "direct physical loss" applies to loss of use due to COVID-19 because the business loss occurred directly because of the presence of COVID in and on the properties, COVID is a virus, therefore having material existence even if its cannot be seen by the naked eye, and if COVID caused the inability of the Spectrum to use their spaces at full capacity, such circumstances could constitute an inability to keep or maintain something. *See Ungarean v. CNA*, No. GD-20-006544, 2021 WL 1164836, at *5 (Pa. Ct. Com. Pl. March 25, 2021). However, it is also reasonable that an average purchaser of

insurance might understand that "physical loss" requires an event altering the structure of the insured property. *See Sagome, Inc. v. Cincinnati Ins. Co.*, No. 21-CV-0097-WJM-GPG, 2021 WL 4291016, at *3 (D. Colo. Sept. 21, 2021). Under well-settled contract interpretation principles, because ambiguity exists as to whether the presence of COVID-19 constitutes physical loss, the term must be construed in favor of the plaintiff insured. *See Thompson v. Maryland Cas. Co.*, 84 P.3d 496, 501-02 (Colo. 2004).

The Policies include a period of restoration which provides that the coverage lasts, "for only such length of time as would be required with the exercise of due diligence and dispatch to rebuilt, repair, or replace such part of the property…commencing with the date of such damage…but in no event to exceed the number of months specified." (Compl., Ex. 1, p. 11.) The business interruption period of indemnity is twenty-four months. (*Id.* at p. 7.) CNA argues that even if COVID-19 amounts to a direct physical loss, business interruption and extra expense coverages apply only until such time as the damaged or destroyed property has been rebuilt, repaired, or replaced. (Def.'s Mot. to Dismiss ¶ 32.) Because the surfaces can be merely disinfected, CNA claims there is no required period of restoration during which Spectrum must rebuild, repair, or replace its "damaged" property. Numerous cases across the country support defendant's assertion that cleaning or disinfecting surfaces does not constitute "repair" or "rebuild." *See Woolworth LLC v. Cincinnati Ins. Co.*, 535 F. Supp. 3d 1149, 1152 (N.D. Ala. 2021); *Moody v. Hartford Fin. Grp., Inc.*, 513 F. Supp. 3d 496, 507 (E.D. Pa. 2021); *Hillcrest Optical Inc. v. Cont'l Cas. Co.*, 497 F. Supp. 3d 1203, 1212 (S.D. Ala. 2020). This is because the virus harms people, not property. *See SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, 32 F.4th 1347, 1356 (11th Cir. 2022); *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.*, 513 F. Supp. 3d 1163, 1171 (N.D. Cal. 2021); *7th Inning Stretch LLC v. Arch Ins. Co.*, No. 20-8161, 2021 WL 1153147, at *2 (D. N.J. 2021).

However, in *K.C. Hopps, Ltd., v. Cincinnati Ins. Co.*, 561 F. Supp. 3d 827, 838 (W.D. Mo. 2021), the court accepted the plaintiff's argument that the policy's period of restoration is not a definition of coverage, but instead describes a time period during which loss of business income may be recovered. The policy in *K.C. Hopps* did not state that the "physical loss" or "physical damage" must be permanent, so the court refused to read that limitation into the policy. *Id.* The court in *SWB Yankees* adopted the reasoning of *K.C. Hopps*, stating that defendants cannot avoid providing coverage that is otherwise available because the end point regarding the "period of restoration" may be, at times, more difficult to pinpoint in the context of a virus. 2021 WL 3468995, at *14 (citing *Ungarean*, 2021 WL 1164836, at *7). In that way, the period of restoration does not redefine or place substantive limits on the type of available coverage, but rather imposes a time limit on available coverage, which terminates when an insured's business is once again operating at normal capacity, or reasonably could be operating at normal capacity. *Ungarean*, 2021 WL 1164836, at *8. Changes to the premise's physical space, such as the installation of partitions, additional handwashing/sanitization stations, and the installations or renovation of ventilation systems, would undoubtedly constitute "repairs" or "rebuilding" of property. *Id.* A business could have also choose to "replace" or "rebuild" unused space due to social distancing protocols, build out new spaces, move to larger spaces, or rearrange existing spaces in order to increase the amount

of business they could safely handle. *Id.* The Court finds this analysis of the effect of the Policies' period of restoration to be persuasive.

In this case, the Policies do not state that "loss" or "damage" has to be permanent. Spectrum alleges it made numerous operational and physical changes and/or alterations in order to repair the loss from COVID-19. (Pl.'s Resp. to Def.'s Mot. to Dismiss 7.) These measures included obtaining PPE, switching to in-room dining, increasing resident care staffing, enhancing infection control, sterilization procedures, and creating isolation areas. Using the courts' analyses in *K.C. Hopps*, *SWB Yankees*, and *Ungarean*, Spectrum's actions in enhancing their infection control methods, instituting new sterilization protocols, and creating isolation areas amount to "repairs" and "rebuilding" of property. Because these "repairs" have been made, and Spectrum's properties were operating back at a normal capacity within the twenty-four-month limit placed on the coverage, Spectrum has sufficiently alleged a claim for business interruption coverage, despite the period of restoration language in the Policies.

Finally, Spectrum argues that the lack of a virus exclusion in the Policies suggests that direct physical loss from COVID-19 is included in the policy. (Pl.'s Resp. to Def.'s Mot. to Dismiss 3.) The Policies are "all-risk" policies. (Compl. Ex. 1, pg. 19.) "All-risk" policies provide coverage for all risks of loss, unless specifically excluded. *See Novell v. American Guar. and Liability Ins. Co.*, 15 P.3d 775 (Colo. 1999).

In 2006, the Insurance Services Offices, Inc. ("ISO") published a standard "virus exclusion" that insurers could choose to place in their policies if they intended not to cover loss by viral agents. (Compl., Ex. 2.) The standardized exclusion reads:

> We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness, or disease.

Id. Many of the cases cited by CNA as authority for its motion to dismiss were dismissed because a virus exclusion was included in the policy barring coverage for COVID-19 business interruption claims. *See Monarch Casino & Resort, Inc. v. Affiliated FM Ins. Co.*, No. 20-cv-1470, 2021 WL 4260785, at *7 (D. Colo. Sept. 17, 2021); *Moody v. Hartford Fin. Grp., Inc.*, 513 F. Supp. 3d 496, 511 (E.D. Pa. 2021); *Nguyen v. Travelers Cas. Ins. Co.*, 541 F. Supp. 3d 1200, 1222 (W.D. Wash. 2021); *Northwell Health, Inc. v. Lexington Ins. Co.*, 550 F. Supp. 3d 108, 113 (S.D.N.Y. 2021). CNA argues that omitting an ISO exclusion does not increase the available coverage, and an insurance company's decision to forego the virus exclusion does not alter the limits the direct physical loss places on coverage. *See Kim-Chee LLC v. Phila. Indem. Ins. Co.*, 535 F. Supp. 3d 152, 163 (W.D.N.Y. 2021)

The policy at issue in *SWB Yankees* had no virus exclusion. The court relied on the maxim *unius est exclusion alterius*, a rule of interpretation, meaning "the mention of one thing implies the exclusion of another thing." *SWB Yankees*, 2021 WL 3468995, at *22. The fact that the business income and extra expense provisions in the policy drafted by CNA, Continental Insurance, and

Continental Casualty identified thirty exclusions from coverage, but not a virus exclusion, implies that virus-related damages were not intended to be similarly excluded from that same coverage. *Id*.

While the court in *Kim-Chee* notes that omitting an ISO exclusion does not increase the policy's available coverage, here, coverage is already inherent in these "all-risk" policies. CNA had the option to include ISO's standard language or other similar language in the Policies it offered to Spectrum, but chose not to. Indeed, there would be no need for a virus exclusion in an "all-risk" policy if "direct physical loss" did not include those losses caused by viruses. It would be superfluous to exclude certain losses if coverage was already barred under the terms of the policy. CNA's desire to exclude COVID-19 losses from coverage, even though CNA chose not to include a virus exclusion amongst thirty other exclusions, cannot be a basis for decreasing or limiting the Policies' available coverage.

As such, Spectrum has plausibly claimed that contamination of its properties by COVID-19 amounted to direct physical loss under CNA's business interruption provision, entitling Spectrum to coverage under the Policies. Accordingly, CNA's motion to dismiss is DENIED with regards to business interruption coverage.

2. <u>Spectrum has plausibly stated a claim for civil authority coverage</u>

Civil authority coverage insures against actual losses sustained when access to an insured's covered properties is prohibited by an order of civil authority as a result of physical loss or damage to the property. *See Biltrite Furniture, Inc. v. Ohio Sec. Ins. Co.*, 20-CV-656-JPS-JPS, 2021 WL 3056191, at *5 (E.D. Wis. July 20, 2021).

In *Southern Hosp., Inc. v. Zurich Am. Ins. Co.*, the plaintiff hotel group sued its insurance company for civil authority coverage because patrons were cancelling hotel reservations after the FAA cancelled all flights following 9/11. 393 F.3d 1137, 1138 (10th Cir. 2004). The court ruled that civil authority coverage requires a nexus between the civil authority order and the suspension of the insured's business. *Id.* at 1141. Because the FAA only stopped planes from flying, but did not require hotels to close down, the nexus was missing, and the civil authority provision of plaintiff's insurance policy did not apply. *Id.*

In this case, Spectrum has plausibly pled a direct connection between local government COVID-19 shutdown orders and the resulting limited use of the covered properties. Spectrum's Complaint asserted that public health orders placed stringent regulations on senior care facilities, including requirements to surveil and test for the virus, restrict access to the facilities, and refigure or repurpose interior areas. These restrictions and closures were the direct result of a highly contagious virus consuming the premises, making it extremely dangerous for the employees and residents within the building.

CNA argues that restricting access to the covered premises did not amount to prohibiting access. (Def.'s Reply in Supp. of Mot. to Dismiss 10.) Because residents, staff, and others continued to access the properties, and in some cases the properties were even required to remain open, CNA argues there is no coverage under the civil authority provision. (*Id.*)

Studio 417 also addressed coverage claims related to three restaurants forced to shut down dine-in services by public health orders. 478 F. Supp. 3d. at 798. The defendant insurance company argued that civil authority coverage required access to be completely prohibited by an order of civil authority, and by plaintiff's own admission, the closure orders allowed the restaurants to remain open for food preparation, take-out, and delivery. *Id.* at 803. However, the *Studio 417* court held that civil authority coverage was available to plaintiffs because of the health orders' prohibition of eating or drinking in the restaurants. *Id.* Similarly, the court in *N.Y. Botanical Garden v. Allied World Ins. Co.* held that defendant failed to establish that civil authority coverage only applies after a complete denial of access to the insured's property. 168 N.Y.S.3d 305 (Mem), 306 (App. Div. 2022).

Like chefs and staff being allowed in restaurants during the shutdown orders to cook food and facilitate pick-up and to-go orders, some residents and staff were allowed to be present in Spectrum's facilities. However, according to Spectrum's Complaint, no one else was allowed access, and staff had to follow strict procedures to be allowed entrance each day. The civil authority provisions in the Policies state coverage is provided for losses sustained "[d]uring the period of time while access to the Insured's Location is prohibited by order of civil authority…" In this case, access was prohibited to family members, new residents, and other guests. The complete exclusion of outsiders from the facilities left vacant rooms unoccupied and unrented despite ready and willing new residents. (Compl. ¶ 90.) In addition, similar to the prohibitions on dining spaces in *Studio 417*, access to common spaces within Spectrum's covered properties, such as the dining halls, were completely prohibited, even for those allowed in the building (*Id.* at ¶ 92.) The Policies do not state coverage is only available if there is a complete prohibition of access to covered properties. CNA fails to establish that there is no coverage where some restricted access to the property is allowed.

CNA also argues that the public health orders were meant to stop the spread of COVID-19, and not as a result of any physical loss of or damage to the property. *See O'Brien Sales & Mktg. v. Transp. Ins. Co.*, 512 F. Supp. 3d 1019, 1025 (N.D. Cal. 2021). At this stage of these proceedings, it does not matter whether the governmental orders were actually a result of COVID-19 being present in Spectrum's properties. Because this is a motion to dismiss, the facts contained in the pleadings are accepted as true. *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992). Spectrum claimed that the orders resulted from the presence of COVID-19 in and on its covered properties. It is plausible that because COVID-19 was present, a fact which is accepted as true as evidenced by the allegations that staff and residents tested positive, Spectrum was required by the government to have stricter regulations. That is sufficient to survive a motion to dismiss.

As such, Spectrum has plausibly claimed that public health orders following the contamination of its properties by COVID-19 entitled Spectrum to civil authority coverage. Accordingly, CNA's motion to dismiss is DENIED with regards to civil authority coverage.

3. Spectrum failed to state a claim for ingress and egress coverage

The ingress-egress provision covers losses when ingress to or egress from the insured's location is physically prevented as a result of the direct physical loss or damage to the property. *See Northwell Health, Inc. v. Lexington Ins. Co.*, 550 F. Supp. 3d. 108, 120 (S.D.N.Y. 2021). The Policies state they will cover actual loss sustained, "[d]uring the period of time when as a direct result of physical loss or damage…ingress to or egress from insured's location is physically prevented." (Compl. ¶ 121.)

Spectrum argues that public health orders expressly prohibited anyone other than employees from entering its facilities, entitling it to ingress-egress coverage. (Pl.'s Res. to Def.'s Mot. to Dismiss 21.) However, CNA counters that ingress to or egress from Spectrum's properties was never physically prevented. (Def.'s Mot. to Dismiss ¶ 37.)

In *Northwell Health*, the court held that ingress-egress coverage required a physical obstruction due to direct physical loss or damage caused by a covered cause of loss. 550 F. Supp. 3d at 108. The *Northwell* court rejected plaintiff's argument that the lockdown orders amounted to obstruction to its facilities, holding that government orders represent legal obstructions, not physical barriers preventing access to the buildings. *Id.* Similarly, in *K.C. Hopps*, the court held that COVID-19 constituted a direct physical loss, and stay-at-home orders limited plaintiff's operations, but access to the covered properties was still possible. 561 F. Supp. 3d at 843. The court ruled that because plaintiff could still unequivocally access his business, he was not eligible for ingress-egress coverage. *Id.*

Spectrum has plausibly alleged that COVID-19 and the resulting closure orders rendered Spectrum's premises unsafe for ingress and egress. And, no one was allowed to enter other than employees, residents were not allowed to leave, and even those who worked there could be prevented from ingress and egress if they were not tested. However, this is not a sufficient claim for ingress-egress coverage. As stated above, "physical" is defined as "having material existence…of or relating to material things." *Physical*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical. While the public health orders did prevent existing and potential residents, family members, and other visitors from coming in and out, there was nothing having "material existence" or "relating to a material thing" preventing people from coming and going. For example, no governmental actor constructed a fence outside the facility, chained the doors or put up caution tape. While COVID-19 itself is physical and material, that quality relates to the characterization of the resulting loss itself. That loss does not act as a physical prevention from ingress and egress. Holding so would remove the requirement of physicality in the relevant provision of the Policies. Like *K.C. Hopps*, even though the public health orders limited most people from accessing the nursing homes, Spectrum is not entitled to ingress-egress

coverage because access to its covered properties was physically possible, even if it was legally prohibited.

As such, Spectrum has failed to plausibly plead a claim that contamination of its properties by COVID-19 physically prevented ingress to and egress from the covered properties. Accordingly, CNA's motion to dismiss is GRANTED with regards to Spectrum's claims for ingress-egress coverage.

IV. Conclusion

For the foregoing reasons, the Court finds that Spectrum has plausibly alleged that it incurred direct physical loss and was entitled to business interruption and civil authority coverage. However, Spectrum failed to sufficiently allege facts which would entitle it to ingress-egress coverage under the Policies. Accordingly, CNA's Motion to Dismiss is DENIED with respect to business interruption and civil authority coverage, but CNA's Motion to Dismiss is GRANTED with respect to ingress-egress coverage.

This matter is now "at issue," and Plaintiff shall file and serve a Notice to Set the case for trial within fourteen (14) days of this Order.

SO ORDERED this 13th day of July, 2022

BY THE COURT:

Honorable Marie Avery Moses
Denver District Court Judge