**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

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| LINDENWOOD FEMALE COLLEGE d/b/a LINDENWOOD UNIVERSITY, individually and on behalf of all others similarly situated, | ) | |
| Plaintiff, | ) | Case No. 4:20-cv-01503 |
| v. | ) | Hon. Henry E. Autrey |
| ZURICH AMERICAN INSURANCE COMPANY, | ) | |
| Defendant. | ) | |

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**DEFENDANT ZURICH AMERICAN INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

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## INTRODUCTION

Plaintiff Lindenwood University seeks coverage under its *property* insurance policy with Defendant Zurich American Insurance Company for business losses allegedly incurred as a result of the COVID-19 pandemic. Courts to date have dismissed more than 100 similar cases at the pleading stage, often with prejudice and without allowing the insured a single opportunity to amend. Four courts applying Missouri law have joined the ranks of judges across the country rejecting policyholder attempts to plead a plausible case for coverage under commercial property policies for pandemic-related business losses, including one from this Court and three from the Western District of Missouri, on grounds equally fatal to Lindenwood's claims here.[1]

Nothing differentiates Lindenwood's claims for breach of contract and declaratory judgment from the claims that courts around the country have denounced in unusually blunt terms. Some of those courts have gone so far as to describe insureds' arguments as "at best, nonsensical," "def[ying] common sense," "just simply nonsense," "exceed[ing] any reasonable bounds of possible [policy] construction," and "linguistic sophistry with illogical consequences."[2] Other courts have gone even further and invoked a state statute that provides for attorneys' fees and costs when a claim is "brought without substantial justification,"

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[1] *See Ballas Nails & Spa, LLC v. Travelers Cas. Ins. Co.*, 2021 WL 37984 (E.D. Mo. Jan. 5, 2021) (Perry, J.); *BBMS, LLC v. Cont'l Cas. Co.*, 2020 WL 7260035 (W.D. Mo. Nov. 30, 2020) (Phillips, C.J.); ECF No. 20, *NeCo, Inc. v. Owners Ins. Co.*, No. 2:20-cv-04211 (W.D. Mo. Dec. 2, 2020) (Bough, J.); *Zwillo V, Corp. v. Lexington Ins. Co.*, 2020 WL 7137110, at *1 (W.D. Mo. Dec. 2, 2020) (Ketchmark, J.).

[2] *See Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 2020 WL 5642483, at *2 (N.D. Cal. Sept. 22, 2020); *Henry's La. Grill, Inc. v. Allied Ins. Co. of Am.*, 2020 WL 5938755, at *4 (N.D. Ga. Oct. 6, 2020); Declaration of Bronwyn F. Pollock ("Pollock Decl.") Exs. 12, 13 [Order and Hr'g Tr. 20:10-18, *Gavrilides Mgmt. Co. v. Mich. Ins. Co.*, No. 20-258-CB (Mich. Cir. Ct. July 1, 2020)]; *S. Fla. Ent Assocs., Inc. v. Hartford Fire Ins. Co.*, 2020 WL 6864560, at *11 (S.D. Fla. Nov. 13, 2020); *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, 2020 WL 7490095, at *10 (N.D. Ohio Dec. 21, 2020); *Riverwalk Seafood Grill, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 81659, at *3 (N.D. Ill. Jan. 7, 2021); *HealthNOW Med. Ctr., Inc. v. State Farm Gen. Ins. Co.*, 2020 WL 7260055, at *2 (N.D. Cal. Dec. 10, 2020).

conditioned leave to amend on the insured being able to "do so consistent with its Rule 11 obligations," or warned counsel that the "theory of coverage appears frivolous."[3]

Lindenwood's complaint should be among those dismissed with prejudice for a host of reasons based on the plain language of Lindenwood's policy—as supported by overwhelming authority.

*First*, seven of the eight coverage provisions Lindenwood invokes require "direct physical loss of or damage to property," and the eighth requires "actual or imminent physical loss or damage." Missouri law, consistent with case law across the country, requires a physical or material loss or destruction of property; indeed, equating purely pecuniary damages based on loss of use without any accompanying physical force or alteration has been rejected by courts because that would negate the policy's insertion of the term "physical."

Lindenwood, however, does not identify any "physical" loss or damage to its property from COVID-19. Nor could it, because no matter whether Lindenwoood characterizes its cause of loss as the virus itself, the "imminent risk" of the virus, the "presence" of the virus, the COVID-19 orders themselves, the COVID-19 pandemic, or "droplets" or "aerosols" containing the virus, none are forces capable of having a "direct physical effect" that results in property damage, much less a total loss of property, as numerous courts have concluded in dismissing COVID-19 property-insurance cases, including those applying Missouri law. .

*Second*, the policy's "Contamination" exclusion precludes all coverage to the extent Lindenwood alleges losses based on the "actual presence" of the virus. Compl. ¶ 21. The policy excludes "Contamination," including the "inability to use or occupy property or any cost of

[3] *Border Chicken AZ LLC v. Nationwide Mut. Ins. Co.*, 2020 WL 6827742, at *6 (D. Ariz. Nov. 20, 2020); *HealthNOW*, 2020 WL 7260055, at *2; *Founder Inst. Inc. v. Hartford Fire Ins. Co.*, 2020 WL 6268539, at *1 (N.D. Cal. Oct. 22, 2020).

making property safe or suitable for use or occupancy" and expressly defines "Contamination" as "[a]ny condition of property due to the actual presence of any . . . virus." "COVID-19 is plainly a virus," and therefore, the Contamination exclusion "expressly excludes damage . . . and even loss of use of property caused by [the COVID-19] virus." *Zwillo*, 2020 WL 7137110, at *6. Multiple courts have found allegations like Lindenwood's to trigger similar exclusions to Zurich's Contamination exclusion.

*Third*, Lindenwood's request for "Civil or Military Authority" coverage fails for two additional reasons. First, the COVID-19 orders were not issued in "response" to "direct physical loss of or damage" to property "not owned, occupied, leased or rented by" Lindenwood, but instead to the threat that further spread of the virus posed to human health. *See BBMS*, 2020 WL 7260035, at *6. Second, the orders did not "prohibit access" to Lindenwood's campuses (*i.e.*, places of business), even if they limited its business operations. Multiple courts have reached these conclusions in COVID-19 property insurance cases.

For these and the additional reasons discussed below, the Court should dismiss Lindenwood's complaint with prejudice.[4]

## BACKGROUND

### I. Lindenwood's Allegations

Lindenwood is a private college. Zurich issued Lindenwood a property-insurance policy for the period July 1, 2019, to July 1, 2020, covering Lindenwood's main campuses in Saint Charles, Missouri, a second campus in Belleville, Illinois, and its smaller locations throughout Missouri. Compl. Ex. A, ECF 1-1, ("Policy") at 16[5]; *see also* Compl. at ¶¶ 16, 55. Lindenwood

[4] For the convenience of the Court, Zurich has compiled the more than 100 orders dismissing COVID-19 property insurance cases like this one in an exhibit to this Motion. *See* Pollock Decl. Ex. 14.

[5] All references to page numbers in the Policy refer to the ECF page number.

alleges that, as a result of the COVID-19 pandemic and ensuing COVID-19 government orders, the college "ceased normal operations and effectively closed its campus in mid-March 2020." *Id.* ¶¶ 17-19. It seeks first-party property-insurance coverage under the policy for "substantial losses" caused by COVID-19. *Id.* ¶ 24. Lindenwood alleges that "COVID-19 was and has been physically present on [its] campuses" and that "persons infected with COVID-19 have been present on [its] campuses and surrounding areas." *Id.* ¶ 21. It alleges that the "imminent risk of the presence of COVID-19" and "[t]he presence of COVID-19 on property and in the air at property effectively eliminates the utility and habitability of such property sufficient to constitute direct physical loss of or damage to property within the meaning of the Policy." *Id.* ¶ 22. On behalf of itself, two putative nationwide classes, and two subclasses, Lindenwood asserts causes of action for breach of contract and declaratory judgment based on eight coverage provisions. *Id.* ¶¶ 9-10, 89-102.

## II. Lindenwood's Property-Insurance Policy

The policy insures against "direct physical loss of or damage to Property . . . caused by a **Covered Cause of Loss**."[6] Policy at 30. A "Covered Cause of Loss" is defined as "[a]ll risks of direct physical loss of or damage from any cause unless excluded." *Id.* at 67. If an insured suffers direct physical loss or damage to covered property, the Policy also provides coverage for the business-income losses that result from the loss or damage during the time required to repair or replace the lost or damaged property (known as "Time Element" coverages):

> The Time Element loss must result from the necessary **Suspension** of the Insured's business activities at an Insured Location. The **Suspension** must be due to direct physical loss of or damage to Property (of the type insurable under this Policy other than **Finished Stock**) caused by a **Covered Cause of Loss** at the **Location** or as provided in Off Premises Storage for Property Under Construction Coverages.

[6] The Policy uses bold typeface to identify defined terms.

*Id.* at 30. The "Time Element" coverages apply only during the "Period of Liability," which the Policy defines in pertinent part as the time beginning when the "physical loss or damage" happens and ending when the "building and equipment could be repaired or replaced." *Id.* at 34.

Lindenwood seeks coverage under five "Time Element" provisions:

1. "**Gross Earnings**," which covers a loss of "Gross Earnings" as calculated per the Policy's terms (*id.* 3 at 31; *see also* Compl. ¶ 73);

2. "**Extended Period of Liability**," which applies only if there is "Gross Earnings" loss coverage and extends that coverage beyond the "Period of Liability" up to an additional year or until Lindenwood "could restore its business with due diligence, to the condition that would have existed had no direct physical loss or damage occurred" to the insured property, whichever occurs first (Policy at 31; *see also* Compl. ¶ 78);

3. "**Extra Expense**," which covers the reasonable and necessary additional costs needed to "resume and continue as nearly as practicable" Lindenwood's "normal business activities that otherwise would be necessarily suspended, due to direct physical loss of or damage caused by a **Covered Cause of Loss**" to the insured property (Policy at 32; *see also* Compl. ¶ 74);

4. "**Civil or Military Authority**," which covers loss "resulting from the necessary **Suspension** of the Insured's business activities" at its insured location "if the **Suspension** is caused by order of civil or military authority that prohibits access to the **Location**" and the order "result[s] from a civil authority's response to direct physical loss of or damage caused by a **Covered Cause of Loss** to property not owned, occupied, leased or rented by" Lindenwood (Policy at 37-38; *see also* Compl. ¶ 75); and

5. "**Ingress/Egress**," which covers loss "resulting from the necessary **Suspension** of [Lindenwood's] business activities" at an insured location if "ingress or egress" to that location by Lindenwood's "suppliers, customers or employees is prevented by physical obstruction due to direct physical loss of or damage caused by a **Covered Cause of Loss** to property not owned, occupied, leased or rented" by Lindenwood (Policy at 42; *see also* Compl. ¶ 76).

The remaining three coverages that Lindenwood invokes generally provide coverage for the protection and repair of property. They are as follows:

6. "**Decontamination Costs**," which covers the increased "cost of decontamination and/or removal" of "**Contaminated**" property, but only if the property is "**Contaminated** from direct physical loss of or damage caused by a **Covered Cause of Loss**" to the insured property and costs were incurred to "satisfy" an "in force" "law or ordinance regulating

**Contamination** due to the actual not suspected presence of **Contaminant(s)**" (Policy at 39-40; *see also* Compl. ¶ 77);

7. "**Expediting Costs**," which covers the "reasonable and necessary costs incurred to pay for the temporary repair of direct physical loss of or damage caused by a **Covered Cause of Loss**" to insured property and "to expedite the permanent repair or replacement of such damaged property" (Policy at 40; *see also* Compl. ¶ 78); and

8. "**Protection and Preservation of Property**," which covers the (i) "reasonable and necessary costs incurred for actions to temporarily protect or preserve" the insured property, provided that "such actions are necessary due to actual or imminent physical loss or damage due to a **Covered Cause of Loss**" to the insured property, and (ii) "Gross Earnings loss . . . sustained by the Insured" for a limited time "after the Insured first tak[es] reasonable action for the temporary protection and preservation of Covered Property." Policy at 45; Compl. ¶ 78.

Accordingly, all of the foregoing provisions require "direct physical loss of or damage to property" caused by a "Covered Cause of Loss" for coverage to be triggered, except for the "Protection and Preservation of Property" coverage, which is similar, but requires "actual or imminent physical loss or damage due to a Covered Cause of Loss."

The Policy excludes as a "Covered Cause of Loss" any loss or damage caused by, 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." Policy at 26, § 3.03.01.

> The Policy excludes the following unless it results from direct physical loss or damage not excluded by this Policy.
>
> **Contamination**, 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, except as provided by the Radioactive Contamination Coverage of this Policy.

*Id.* "Contamination" is defined to include "[a]ny condition of property due to the actual presence of any . . . virus" or "disease causing or illness causing agent." *Id.* at 67, § 7.09.

> **Contamination(Contaminated)** - Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, **Fungus**, mold or mildew. (*Id.*)

The Policy also contains exclusions for loss or damage that (1) "aris[es] from the enforcement of any law, ordinance, regulation, or rule regulating or restricting. . . occupancy, operation[,] or other use" of the insured property; (2) "aris[es] from delay, loss of market, or loss of use"; (3) is "[i]ndirect or remote"; and (4) "result[s] from the Insured's suspension of business activities, except to the extent provided by this Policy." *Id.* 26-28.

**LEGAL STANDARDS**

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient *factual matter*, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted) (emphasis added). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* "Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its *judicial experience and common sense*." *Id.* at 679 (emphasis added). Also, the court "must consider the complaint in its entirety," as well as "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

Under Missouri law, the "interpretation of an insurance policy is a question of law."[7] *Seaton v. Shelter Mut. Ins. Co.*, 574 S.W.3d 245, 247 (Mo. 2019). Courts must read an insurance

[7] "In a diversity action, the Court applies the substantive law of the state in which the district court sits," here, Missouri. *Urban Hotel Dev. Co. v. President Dev. Grp., L.C.*, 535 F.3d 874, 877 (8th Cir. 2008). Under Missouri's choice-of-law rules, "the first step in a choice of law analysis is to examine whether the different states' laws at issue actually conflict." *Nestlé Purina PetCare Co. v. Blue Buffalo Co. Ltd.*, 129 F. Supp. 3d 787, 790 (E.D. Mo. 2015). The laws of Missouri or Illinois could potentially apply here given that the locations of the insured risks (*i.e.*, Lindenwood's campuses), are in those states. In regard to Zurich's arguments here, however, no outcome determinative difference exists between the laws of Illinois and Missouri. Indeed, federal courts have dismissed COVID-19 property insurance cases brought under either state's laws. *See Sandy Point*, 2020 WL 5630465 (applying Illinois law); *BBMS*, 2020 WL 7260035 (applying Missouri law).

policy "as a whole and determine the intent of the parties, giving effect to that intent by enforcing the contract as written." *Mendota Ins. Co. v. Lawson*, 456 S.W.3d 898, 903 (Mo. Ct. App. 2015). The "clear and unambiguous language in an insurance policy should be given its plain meaning" (*St. Paul Fire & Marine Ins. Co. v. Lippincott*, 287 F.3d 703, 705 (8th Cir. 2002)) and "must be enforced as written" (*Seaton*, 574 S.W.3d at 247). Courts shall "not unreasonably distort the language of a policy or exercise inventive powers for the purpose of creating an ambiguity." *Eichholz v. Secura Supreme Ins. Co.*, 735 F.3d 822, 827 (8th Cir. 2013). "Mere disagreement over the interpretation . . . does not create an ambiguity." *Mendota*, 456 S.W. 3d at 903.

## ARGUMENT

### I. Lindenwood Has Not Stated And Cannot State A Claim For Breach Of Contract.

As the insured and the party alleging breach of contract, Lindenwood "bears the burden" of alleging that the "claimed loss or damage is covered under the policy." *Westchester Surplus Lines Ins. Co. v. Interstate Underground Warehouse & Storage, Inc.*, 946 F.3d 1008, 1010 (8th Cir. 2020). Lindenwood has not satisfied that burden.

#### A. Lindenwood Fails To Allege Physical Loss Of Or Damage To Property.

Under Missouri law, "property damage" must be "tangible, that is, a physical or material[] loss or destruction of property." *Lippincott*, 287 F.3d at 705. "There is no 'property damage' unless and until the [occurrence causes] 'physical injury to tangible property.'" *Id.* (citations omitted). In *Lippincott*, the Eighth Circuit, interpreting policy language similar to the language in Lindenwood's policy, held that damages that were solely "pecuniary in nature" were not "property damage." *Id.* at 706.

As for "direct physical loss," "[a] survey of cases, both from Missouri and elsewhere, confirms that the phrase requires some physical event or force on, in or affecting the property in

question and not mere 'loss of use,'" because a different interpretation "would render the word 'physical' a nullity." *BBMS*, 2020 WL 7260035, at *3; *accord Malaube, LLC v. Greenwich Ins. Co.*, 2020 WL 5051581, at *7 (S.D. Fla. Aug. 28, 2020) (because "'direct physical' modifies both 'loss' and 'damage' . . . any interruption in business must be caused by some *physical problem* with the covered property").

Nearly every court to have considered the issue—including Judge Perry of this Court—has concluded that insureds in COVID-19 property-insurance cases have failed to allege "direct physical loss" or "direct physical damage" to property.[8] For example, after analyzing Missouri

[8] *BBMS*, 2020 WL 7260035, at *4 ("[T]he weight of authority demonstrates that stay at home orders and the existence of COVID-19, alone, does not qualify as 'direct physical loss of or damage to' property."); *Tappo of Buffalo, LLC v. Erie Ins. Co.*, 2020 WL 7867553, at *4 (W.D.N.Y. Dec. 29, 2020) ("[T]his Court agrees with the overwhelming majority of courts to have considered this issue that plaintiffs cannot plausibly allege that this impact is the result of direct physical loss of or damage to covered property as required to establish coverage under their insurance policies."); *K D Unlimited Inc. v. Owners Ins. Co.*, 2021 WL 81660, at *4 (N.D. Ga. Jan. 5, 2021) ("Multiple courts have now considered and rejected [insureds'] loss of use theory in the COVID-19 business interruption context, finding that the ordinary meaning of 'physical loss of or damage to' requires a physical alternation or tangible change."); *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, 2020 WL 6562332, at *3 (N.D. Cal. Nov. 9, 2020) ("I will follow the overwhelming majority of courts that have determined that the mere threat of coronavirus cannot cause a 'direct physical loss of or damage to' covered property as required under the Policy."); *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405, at *8 (S.D.N.Y. Dec. 11, 2020) ("[N]early every court to address this issue has concluded that loss of use of a premises due to a governmental closure order does not trigger business income coverage premised on physical loss to property."); *Baker v. Or. Mut. Ins. Co.*, 2021 WL 24841, at *2 (N.D. Cal. Jan. 4, 2021) ("The majority view—including in this district—is that "direct physical loss" provisions, like the ones in the insurance contract here, do not cover lost business income or expenses resulting from closure orders like the one here."); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 2020 WL 6436948, at *4 (S.D. W. Va. Nov. 2, 2020) ("The majority of courts to address the issue, however, have found that COVID-19 and governmental orders closing businesses to slow the spread of the virus do not cause physical damage or physical loss to insured property."); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 2020 WL 7351246, at *6 nn.8, 9 (W.D. Tex. Dec. 14, 2020) ("The great majority of courts outside the Fifth Circuit also have held that COVID-19 and related civil authority shutdown orders do not constitute a direct physical loss of property under similar insurance policies. . . . Most courts that have addressed this issue have found that loss of use does not constitute direct physical loss."); *Pappy's*, 2020 WL 5500221, at *4 ("Most courts have rejected these claims, finding that

law, Judge Perry held that direct physical loss or damage required an "injury to property" or facts establishing that the "property was rendered unusable or the premises uninhabitable." *Ballas*, 2021 WL 37984, at *4. She dismissed the complaint because the insured "does not claim any injury to property. Nor does it assert facts showing that its property was actually contaminated by the coronavirus or that the presence of the virus itself on the premises rendered the property uninhabitable or unusable." *Id.* Judge Perry also reasoned that the insured's "contention that its losses were caused by the government closure orders themselves—without any claim that its property was physically affected—is not enough to show 'direct physical loss.'" *Id.*

Similarly, Western District of Missouri Chief Judge Phillips held that "events that do not have a direct physical effect on the insured property will not give rise to coverage, even if they interrupt business operations or deny access to the premises." *BBMS*, 2020 WL 7260035, at *4. She reasoned that "stay at home orders and the existence of COVID-19, alone, do[] not qualify as 'direct physical loss of or damage to' property." *Id.*; *see also NeCo, Inc. v. Owners Ins. Co.*, No. 2:20-cv-04211 (W.D. Mo. Dec. 2, 2020), ECF No. 20 ("Based upon the reasoning in [*BBMS*], the Complaint fails to state a claim for which relief can be granted."). Judge Ketchmark of the Western District of Missouri likewise interpreted "direct physical loss of or damage" to "require[] some form of physical damage to the insured property to effect coverage," which means a "physical alteration of property, or, put another way, a tangible impact that

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the government orders did not constitute direct physical loss or damage to property."); *Real Hosp. LLC v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 6503405, at *7 (S.D. Miss. Nov. 4, 2020) ("Most courts have rejected these claims and granted motions to dismiss based on the finding that the businesses' complete or partial closures due to government orders issued to slow the spread of COVID-19 do not constitute 'direct physical loss of or damage to property.'"); *see also* Pollock Decl. Ex. 14 (collecting 93 cases dismissing COVID-19 claims based on failure to allege "direct physical loss," "direct physical damage," or both).

physically alters property." *Zwillo*, 2020 WL 7137110, at *4. She held that a "simple deprivation of use" does not qualify. *Id.* at *5.

Applying the standard from these cases, it is clear that all of Lindenwood's claims fail because Lindenwood does not allege the requisite "direct physical loss of or damage to property," or in the case of "Protection and Preservation of Property" coverage, "actual or imminent physical loss or damage."

**1. The COVID-19 Orders *Themselves* Did Not Cause Physical Loss Of Or Damage To Property As A Matter of Law.**

Lindenwood's argument that the COVID-19 orders *themselves*, as opposed to the coronavirus, caused physical loss or damage is "just simply nonsense." *Compare* Compl. ¶¶ 22-23, 31, *with* Pollock Decl. Ex. 12 [*Gavrilides*, No. 20-258-CB, at 20:10-18], *and Franklin*, 2020 WL 5642483, at *2 (argument that "the loss is created by the Closure Orders rather than the virus, and therefore the Virus Exclusion does not apply" is "[n]onsense"). Another federal court that called the argument "curious" explained:

> Under the Plaintiffs' logic, a minute before the Governor issued the Order, the dining rooms [at the insured restaurant property] existed in one state. A minute later, the Governor issued the Order, and the restaurant underwent a direct physical change that left the dining rooms in a different state. This interpretation of the contractual language exceeds any reasonable bounds of possible construction, pushing the words individually and collectively beyond what any plain meaning can support.

*Henry's La. Grill*, 2020 WL 5938755, at *4; *BBMS*, 2020 WL 7260035, at *4 (insured's argument that losses caused by the government closure orders themselves—without any claim that its property was physically affected—is not enough to show 'direct physical loss').

Furthermore, "construing 'direct physical loss' or 'direct physical damage' to cover intangible losses, such as the economic losses [Lindenwood] seeks, would render large parts of the [policy's "Period of Liability"] definition nonsensical because intangible losses cannot be

repaired . . . or replaced." *Santo's*, 2020 WL 7490095, at *10. Specifically, the "Time Element" coverages apply only during the "Period of Liability," which by definition ends when "the building and equipment could be repaired or replaced." Policy at 34. As several courts have held, "[t]he words 'repair' and 'replace' contemplate physical damage to the insured premises as opposed to loss of use of it," and therefore mere economic losses occasioned by the COVID-19 orders (which are not forces even remotely capable of causing physical property loss or damage) are not covered. *Malaube*, 2020 WL 5051581, at *9; *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 5525171, at *4 (N.D. Cal. Sept. 14, 2020) ("The words 'repair' and 'replace' strongly suggest that the damage contemplated by the Policy is physical in nature."); *W. Coast Hotel Mgmt. v. Berkshire Hathaway Guard Ins. Cos.*, 2020 WL 6440037, at *3-4 (the language—"repaired, rebuilt, or replaced"—dooms an insured's assertion that lost income constituted "physical loss of or damage to property").

Further yet, the policy expressly forecloses coverage for mere "loss of use"—that is, coverage for purely economic losses untethered to any property loss or damage. Policy at 26, § 3.03.02.01 ("This Policy excludes . . . [l]oss or damage arising from . . . loss of use."), § 3.03.01.03 (excluding loss or damage "arising from the enforcement of any law, ordinance, regulation or rule regulating or restricting the . . . occupancy, operation or other use . . . of any property"). Several judges, including Judge Perry, have invoked "loss of use" exclusions in dismissing claims based solely on the COVID-19 orders:

> [T]o the extent [the insured] alleges that the government closure orders resulted in its inability to use its property and thus resulted in loss, the policy contains an exclusion stating that [the insurer] "will not pay for loss or damage caused by or resulting from . . . loss of use or loss of market." This separate provision for loss of use "suggests that the 'direct physical loss of . . . property' clause was not intended to encompass a loss where the property was rendered unusable without an intervening physical force." I agree with [the insurer] that construing the policy's requirement of "direct physical loss or damage" to include the mere loss

> of use of insured property with nothing more would negate the "loss of use" exclusion. "[T]he rules of construction . . . require a court to avoid construing a contract in a way which renders other terms and provisions meaningless."

*Ballas*, 2021 WL 37984, at *4 (quotation marks and citations omitted); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, 2020 WL 7495180, at *4 (N.D. Cal. Dec. 21, 2020) ("[T]he Policy expressly provides that 'loss of use' is not covered."); *Whiskey River on Vintage, Inc. v. Ill. Cas. Co.*, 2020 WL 7258575, at *18 (S.D. Iowa Nov. 30, 2020) ("[The policy] unambiguously states that Defendant will not pay for loss or damage resulting from a loss of use"); *Harvest Moon Distribs., LLC v. S.-Owners Ins. Co.*, 2020 WL 6018918, at *6 (M.D. Fla. Oct. 9, 2020) ("Plaintiff experienced 'loss of use' . . . which the Policy expressly excludes . . . ."). The Court should conclude the same here: The COVID-19 orders cause only economic losses from "loss of use" of property (which is expressly excluded in any event)—not "direct physical loss" or "direct physical damage" to property.

**2. The "Threat" Or "Presence" Of The Coronavirus Does Not Constitute Physical Loss Of Or Damage To Property As A Matter of Law.**

Lindenwood's conclusory and speculative allegations that the virus was "physically present on [its] campuses and surrounding areas" (Compl. ¶ 21) also are insufficient to establish the requisite property loss or damage. Numerous courts have rejected the precise argument Lindenwood advances here—*i.e.*, that the "threat" or "presence" of the coronavirus constitutes "direct physical loss" or "direct physical damage" to property. *See, e.g.*, *Uncork*, 2020 WL 6436948, at *5 ("[E]ven when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies . . . ."); *Water Sports Kauai*, 2020 WL 6562332, at *3 ("[T]he overwhelming majority of courts that have determined that the mere threat of coronavirus cannot cause a "direct physical loss of or damage to" covered property . . . .").

The holding of these courts is unsurprising. Drawing on their "common sense" (*see*

*Iqbal*, 556 U.S. at 679), courts have reasoned that the virus damages lungs and human health, not property. *See* Pollock Decl. Ex. 11 [Hr'g Tr. at 4:17-18, 4:25-5:4, 6:14-20, *Social Life*] (even if the "virus exists everywhere," it "damages lungs. . . . It doesn't damage the property."); *Uncork*, 2020 WL 6436948, at *5 ("[T]he pandemic impacts human health and human behavior, not physical structures."); *Johnson* v. *Hartford Fin. Servs. Grp., Inc.*, 2021 WL 37573, at *7 (N.D. Ga. Jan. 4, 2021) ("COVID 19 hurts people, not property."). Indeed, the "coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property." *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 2020 WL 5630465, at *3 (N.D. Ill. Sept. 21, 2020).

Further invoking common sense, numerous courts have concluded that, if property merely needs to be cleaned—as would be the case if the COVID-19 virus were actually present at a property—that property has not suffered a "direct physical loss" or "direct physical damage." For example, a Kansas federal judge concluded that "even assuming that the virus physically attached to covered property, it did not constitute the direct, physical loss or damage required to trigger coverage because its presence can be eliminated." *Promotional Headwear Int'l v. The Cincinnati Ins. Co.*, 2020 WL 7078735, at *8 (D. Kan. Dec. 3, 2020). Similarly, a West Virginia federal judge concluded that, "even when present, COVID-19['s] . . . presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property." *Uncork*, 2020 WL 6436948, at *5. "Because routine cleaning . . . eliminates the virus on surfaces, there would be nothing for an insurer to cover," the judge concluded. *Id.*; *see also Malaube*, 2020 WL 5051581, at *8; *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London*, 2020 WL 5791583, at *3-4; *Mama Jo's, Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 879 (11th Cir. Aug. 18,

2020); *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x, 569, 573-74 n.8 (6th Cir. 2012) (concluding that "basic cleaning" "performed with hot water and Lysol" does not constitute physical loss or damage). As other federal courts have done, the court should therefore dismiss for failure to allege "direct physical loss or damage" because it is *undeniable* that the COVID-19 virus can be readily eradicated using standard household-cleaning products.[9]

Lastly, even entertaining the fiction that the "presence" of the coronavirus can cause property loss or damage, Lindenwood does not plausibly allege that the virus's presence rendered its campuses completely "unusable" or "uninhabitable." Indeed, Lindenwood makes only the conclusory allegation that "[t]he presence of COVID-19" and the "imminent risk of the presence of COVID-19 on property and in the air at property effectively eliminates the utility and habitability of such property." Compl. ¶ 22. But such a conclusory allegation does not satisfy Lindenwood's pleading obligations. Nor could Lindenwood plead such allegations consistent with its Rule 11 obligations because the civil authority orders recognize that educational institutions or facilities could continue to operate despite the pandemic. *See* Pollock Decl. Exs. 1, 3, 4. Lindenwood's complaint should therefore be dismissed. *See Ballas*, 2021 WL 37984, at *4 (dismissing for lack of any allegation that the "presence of the virus itself on the premises rendered the property uninhabitable or unusable.").[10]

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[9] Concurrent with this motion, Zurich has filed a request for judicial notice of this fact on the ground that it is not subject to "reasonable dispute." The Court may properly consider that fact in ruling on this motion to dismiss.

[10] Zurich anticipates that Lindenwood will cite Judge Bough's orders in *Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), *K.C. Hopps, Ltd v. Cincinnati Ins. Co., Inc.*, 2020 WL 6483108 (W.D. Mo. Aug. 12, 2020), and *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 2020 WL 5637963, at *6 (W.D. Mo. Sept. 21, 2020). Judge Bough is one of only a few federal judges across the country who have denied a motion to dismiss in COVID-19 property-insurance cases and, unlike in this case, the policies in those cases did not contain a virus exclusion or a loss of use exclusion. Further, multiple judges have disagreed with Judge Bough's reasoning—including another judge within his own district.

### B. Coverage Under The Policy Does Not Extend To Financial Losses Caused By The Virus.

Contrary to Lindenwood's assertions in its complaint (Compl. ¶¶ 62-65), the Policy's Contamination exclusion provides an independent basis to dismiss the entire case with prejudice.

#### 1. The Contamination Exclusion Precludes Coverage.

All the coverage provisions Lindenwood invokes require a "Covered Cause of Loss," which the Policy defines as "[a]ll risks of direct physical loss of or damage to property from any cause unless excluded." Policy at 67. The "Contamination Exclusion" excludes from coverage "**Contamination**, and any cost due to **Contamination** including the ability to use or occupy property or any cost of making property safe or suitable for use or occupancy." *Id*. at 26. The Policy defines "Contamination" as "[a]ny condition of [the] property due to the actual presence of any . . . virus [or] disease causing or illness causing agent." *Id*. at 67.

In a COVID-19 property-insurance case, a Western District of Missouri judge concluded that a "Pollution and Contamination Exclusion" similar to the one here precluded all coverage. *Zwillo*, 2020 WL 7137110, at *6-8. Like here, the policy excluded loss or damage, including "loss of use to property," caused by "Contaminants or Pollutants," which were defined to include viruses. *Id.* at *6. Accordingly, the judge concluded that because COVID-19 is "plainly a virus," the "provision in question expressly excludes damage or . . . loss of use of property caused" by the virus. *Id.* *6.

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*See, e.g.*, *Zwillo*, 2020 WL 7137110, at *8 ("respectfully disagree[ing] with those cases"); *Sandy Point*, 2020 WL 5630465, at *2 n.2; *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 5258484, at *7 (E.D. Mich. Sept. 3, 2020); *Uncork*, 2020 WL 6436948, at *4; *W. Coast Hotel*, 2020 WL 6440037, at *4 n.4; *Plan Check Downtown III, LLC v. Amguard Ins. Co.*, 2020 WL 5742712, at *7 n.8 (C.D. Cal. Sept. 10, 2020); *T&E Chi. LLC, v. Cincinnati Ins. Co.*, 2020 WL 6801845, at *4 (N.D. Ill. Nov. 19, 2020). Moreover, since Judge Bough issued those early decisions, most recently even he concluded that an insured seeking COVID-19 coverage "failed to state claim," adopting Chief Judge Phillips' reasoning in *BBMS*. ECF No. 20, *NeCo, Inc. v. Owners Ins. Co.*, No. 2:20-cv-04211 (W.D. Mo. Dec. 2, 2020) (Bough, J.).

Here, Lindenwood repeatedly alleges that the "presence" of the COVID-19 virus on its campuses "directly" resulted in its loss of business. *See* Compl. ¶ 21 ("COVID-19 have been present on Plaintiff's campuses and surrounding areas . . . .).[11] And it seeks coverage for the claimed inability to fully use its properties as a result, and the purported costs of making the properties safe or suitable for use.[12] Because the COVID-19 virus is clearly a "virus" or "disease causing or illness causing agent," Lindenwood's claims fall squarely within the Contamination exclusion. *See Zwillo*, 2020 WL 7137110, at *6-8.

Lindenwood cannot escape that conclusion by asserting that the policy does not "contain an exclusion for 'pandemics,' 'communicable disease,' or anything similar." Compl. ¶ 66. Such an argument "amounts to linguistic sophistry with illogical consequences," as an Illinois federal court concluded. *Riverwalk,* 2021 WL 81659, at *3. The court reasoned that the "mere existence of more explicit language cannot obligate the Court to conclude that the instant language is ambiguous. Otherwise, all contractual language would be ambiguous as language could always be more specific." *Id.* Several courts have concluded likewise. *See Newchops Rest. Comcast LLC v. Admiral Indem. Co.,* 2020 WL 7395153, at *9 (E.D. Pa. Dec. 17, 2020) ("The lack of a specific reference to a pandemic in the policy does not render the provision ambiguous.").[13] Furthermore, Lindenwood's argument strains common sense because no

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[11] *See also* Compl. ¶¶ 3, 17 ("[D]ue to the presence of COVID-19 on and near Plaintiff's insured property and surrounding areas, Plaintiff ceased normal operations and effectively closed its campus in mid-March 2020 . . . ."), 20, 22, 24.

[12] *See also* Compl. ¶¶ 7, 23 ("Plaintiff's insured property was rendered unsuitable for its intended use . . . ."), ¶ 24, ¶ 31, ¶ 54 ("[Plaintiff] incur[red] increased costs to clean and decontaminate its property"), ¶71 ("Stay at Home Orders have caused Plaintiff to have lost the use of its premises . . . .").

[13] *See also Diesel Barbershop LLC v. State Farm Lloyds*, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020) ("[W]hile the Virus Exclusion could have been even more specifically worded, that alone does not make the exclusion "ambiguous."); *Franklin*, 2020 WL 7342687, at *3 ("[The argument that] the Policy could have referred explicitly to these risks or included a

meaningful difference exists between a "virus" or a "disease causing or illness causing agent" on the one hand, and a "pandemic" or "communicable disease" on the other. *See id.* at *9 ("[T]here is no real distinction between "virus" and "coronavirus pandemic.").[14]

The Court should join nearly every other federal court that has addressed virus exclusions in COVID-19 property-insurance cases and dismiss the complaint with prejudice based on the clear and unambiguous language in the Contamination exclusion.[15]

**2. The Louisiana Endorsement Does Not Apply To Lindenwood's Covered Properties, None of Which Are Located In Louisiana.**

No doubt understanding the dispositive nature of the Contamination exclusion, Lindenwood attempts to seek refuge in a *Louisiana*-specific endorsement—one of 31 state-specific amendatory endorsements attached to the policy, one which modifies the exclusion by "remov[ing] the word 'virus' from the definition of 'Contamination.'" Compl. ¶¶ 62-65

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specific exclusion 'targeted at pandemics[']' is unavailing. . . . Nothing in the Virus Exclusion indicates it is limited to viruses arising from the insured premises rather than a pandemic.").

[14] To conclude otherwise would be nonsensical, because it would be "akin to arguing that a coverage exclusion for damage caused by fire does not apply to damage caused by a very large fire." *W. Coast Hotel*, 2020 WL 6440037, at *6; *see also Boxed Foods Co. v. Cal.Cap. Ins. Co.*, 2020 WL 6271021, at *5 (N.D. Cal. Oct. 26, 2020), *as amended* (Oct. 27, 2020) ("[T]he Virus Exclusion is only subject to one reasonable interpretation: that coverage does not extend to any claim premised on virus-induced damage, regardless of the virus's magnitude.").

[15] *See, e.g.*, *Riverwalk*, 2021 WL 81659, at *3 ("[I]t is unsurprising that 'federal courts interpreting virtually identical Virus Exclusions have nearly unanimously determined that these exclusions bar coverage of similar claims.'" (quoting *N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.*, 2020 WL 6501722, at *4 (D.N.J. 2020) (collecting cases)); *Palmdale Estates, Inc. v. Blackboard Ins. Co.*, 2021 WL 25048, at *3 (N.D. Cal. Jan. 4, 2021) ("[T]he weight of authority—including authority in this district—is that the virus exclusion applies and bars [the insured's] claim for coverage."); *LJ New Haven LLC v. AmGUARD Ins. Co.*, 2020 WL 7495622, at *7 n.7 (D. Conn. Dec. 21, 2020) (recognizing the "weight of authority favoring application of the virus exclusion [in COVID-19 property insurance cases] when courts were presented with similar policy language and [have] analyzed the issue"); *Franklin*, 2020 WL 7342687, at *2 ("Confronted with the same or similar virus exclusion provisions, numerous courts have determined that these provisions exclude coverage for business losses related to COVID-19."); s*ee also* Pollock Decl. Ex. 14 (collecting 55 cases dismissing COVID-19 property-insurance cases based on a virus exclusion).

(emphasis omitted); Policy at 95-169. Lindenwood makes this argument even though its insured properties are located *only* in Missouri and Illinois, and none are in Louisiana. *See* Compl. ¶ 16. Lindenwood's argument reflects a fundamental misunderstanding of state-specific amendatory endorsements, which are routinely appended to insurance policies.

Under the McCarran-Ferguson Act, the federal government expressly cedes to the individual states the power to regulate "[t]he business of insurance, and every person engaged therein." 15 U.S.C. § 1012. States heavily regulate property insurance and often impose specific requirements for policies covering risks to property within their state, and those requirements vary state by state. *See, e.g.*, La. Rev. Stat. § 22:1311 (setting requirements for fire-insurance policies on any property "in this state"); Ga. Code Ann. § 33-32-1(a) (West) ("No policy of fire insurance *covering property located in this state* shall be made, issued, or delivered unless it conforms as to all provisions . . . .") (emphasis added). Insurance policies address those state-specific requirements in amendatory endorsements—essentially state-specific riders.

Given state regulation of insurance, courts generally have recognized that insurance policies include state-specific endorsements to comply with individual state regulatory requirements and therefore do not apply outside each respective state—and this principle has been specifically applied with respect to a Louisiana endorsement. *Menard v. Gibson Applied Tech. & Eng'g, Inc.*, 2017 WL 6610466, at *3 (E.D. La. Dec. 27, 2017) (refusing to expand the scope of a Louisiana amendatory endorsement "to the benefit of individuals like [the claimant] who are injured outside the state").[16] In each case, the court held that the *only* way to reconcile

[16] *See also Tomars v. United Fin. Cas. Co.*, 2015 WL 3772024, at *3 (D. Minn. June 17, 2015) (noting that a commercial general liability policy may "include a series of state-specific endorsements conforming its coverages to the requirements imposed by the insurance laws of the states in which particular [insured property is] located"); *Kamp v. Empire Fire & Marine Ins. Co.*, 2013 WL 310357, at *4-5 (D.S.C. Jan. 25, 2013) (acknowledging "structure" of policy

the multiple state endorsements attached to a given policy covering multi-state risks was to apply each state's endorsement *only* to risks in the particular state. This approach is consistent with Missouri law, which requires courts to examine "the policy as a whole" (*Mendota*, 456 S.W.3d at 904), and to "ascertain" and "then give effect" to the parties' intent (*Black & Veatch Corp. v. Wellington Syndicate*, 302 S.W.3d 114, 123 (Mo. Ct. App. 2009)).

The state-specific endorsements in Lindenwood's policy are the result of state-specific regulation of the insurance industry and do not evince an intent to apply Louisiana's endorsement to property outside Louisiana. Lindenwood's Policy contains 31 state-specific endorsements (each listed by state name), including the Louisiana Endorsement, along with amendatory endorsements of general application that omit mention of any specific state. *Compare, e.g.*, Policy at 175 (general application endorsement), *with id.* at 95-169 (state-specific endorsements). Unlike the endorsements of general application, the state-specific endorsements implement the requirements of each state's laws or regulations with respect to such issues as the cancellation or non-renewal of the policy, when suit must be brought, fraud, and in some cases, policy exclusions. The Missouri-specific endorsement, for example, modifies the Cancellation / Non-Renewal, Suit Against the Company, and other provisions. Policy at 139-40. The Louisiana Endorsement is the *only* one out of the 31 in Lindenwood's Policy that modifies the "Contamination" exclusion. *Id.* at 121-23.

The state-specific intent behind the state-specific amendatory endorsements is confirmed by the language in the amendatory endorsements. Under Lindenwood's theory—that the Louisiana endorsement applies to its covered property in Missouri and Illinois—the remaining 30 state-specific endorsements also would apply to its covered properties. Yet that would be

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whereby the main coverage form excluded coverage and state-specific endorsements added coverage when and to the extent required by an individual state).

impossible, because several state-specific endorsements conflict with each other.[17] And it is, of course, unreasonable to conclude that the parties intended to inject a host of conflicting provisions into their Policy. *See, e.g., Transit Cas. Co. v. Selective Ins. Co. of Se.*, 137 F.3d 540, 545 (8th Cir. 1998) ("In interpreting a contract under Missouri law, we attempt to harmonize the various provisions of a contract, and we read them to avoid a conflict."). Moreover, other state-specific endorsements use identical terms, and Lindenwood's theory would impermissibly render these terms redundant.[18] *See, e.g., Trs. of Clayton Terrace Subdivision v. 6 Clayton Terrace, LLC*, 585 S.W.3d 269, 280 (Mo. 2019) ("[E]ach term of a contract is construed to avoid rendering other terms meaningless."). Because it would be impossible for every state-specific endorsement to apply to Lindenwood's covered property, the only *reasonable* interpretation is that each state-specific endorsement is applicable only to property within that state—which means that the Louisiana Endorsement does *not* apply to Lindenwood's covered property, none of which is in Louisiana.

That interpretation also is compelled by the bedrock constitutional principle—grounded in the Commerce, Due Process, and Full Faith and Credit Clauses—that states may not regulate conduct outside their borders. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-72 (1996) (citing cases). As the U.S. Supreme Court explained sixty years ago, "it is clear that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought

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[17] For example, both Nebraska and West Virginia modify the Appraisal Provision of Section VI to operate differently from the Policy's Appraisal provision, while Louisiana deletes the Appraisal Provision entirely. *Compare* Policy at 61 (¶ 6.13.05), *with id.* at 144 (Neb. Endorsement ¶ 3), *id.* at166 (W. Va. Endorsement ¶ 1), *and id.* at 122 (La. Endorsement ¶ 6).

[18] For example, the Louisiana and Georgia endorsements make identical modifications to Section VI – General Policy Conditions, Loss Conditions, Suit Against the Company. Compare Policy at 122 (La. Endorsement ¶ 8), *with id.* at 111 (Ga. Endorsement ¶ 1).

that a State could regulate activities carried on beyond its own borders." *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 300 (1960). Because Lindenwood seeks to do just that by maintaining that the Louisiana endorsement applies to its campuses in Missouri and Illinois (Compl. ¶¶ 64-65), Lindenwood's unsupported interpretation of the Policy must be rejected.

Lindenwood's complaint attempts to cast doubt on the proper—and only reasonable and constitutionally permissible—reading of the policy. But its efforts must fail. First, Lindenwood suggests that the Court should apply the "Amendatory Endorsement – Louisiana" to its Missouri and Illinois properties, because elsewhere the policy states that "titles of the various endorsements are solely for reference and shall not in any way affect the provisions to which they relate." Compl. ¶ 65; Policy 39, § 6.21. But that proves Zurich's point: The state name in the title of the 31 state specific endorsements "references" the state of the insured property to which the endorsement applies. To ignore that reference would be absurd, as it would leave the parties without any guide for determining which of the 31 state-specific endorsements are applicable to insured property within a particular state. The Amendatory Endorsement's title references Louisiana for a reason, and should be interpreted accordingly. *See CB Com'l Real Estate Grp., Inc. v. Equity P'ships Corp.*, 917 S.W.2d 641, 646–47 (Mo. Ct. App. 1996) (interpretation "should not reach an absurd or unreasonable result").

Second, Lindenwood asserts that the Louisiana Endorsement "applies to the entire Policy," citing the language that "[t]his endorsement changes the policy." Compl. ¶ 64. But *every* one of the 31 state-specific endorsements contains that language, and, contrary to Lindenwood's assertion, the language says only that an endorsement "changes" the policy, not that it "applies to the entire" policy. The language is therefore consistent with the interpretation that each state-specific endorsement "changes" the policy with respect to insured property *within*

*that particular state*. As one court has put it, the "argument that the [endorsement] clearly applies to the entire Policy because it states, 'This Endorsement Changes the Policy,' is unconvincing. Not only is such language not within the language of the [endorsement] itself, but it appears in every endorsement . . . ." *See Evanston Ins. Co. v. Gaddis Corp.*, 145 F. Supp. 3d 1140, 1150 n.3 (S.D. Fla. 2015).[19]

**C. "Civil Or Military Authority" Coverage Fails For Additional Reasons.**

The Civil or Military Authority provision requires that the relevant civil authority orders have been issued in "response to direct physical loss of or damage caused by a **Covered Cause of Loss** to property not owned, occupied, leased or rented" by Lindenwood. Policy at 37-38. The provision therefore "contemplates a sequence of events where direct physical loss or damage to property occurs and then an order prohibiting access *because of that damage* issues." *Not Home Alone, Inc. v. Phila. Indem. Ins. Co.*, 2011 WL 13214381, at *6 (E.D. Tex. Mar. 30, 2011).

Numerous courts have dismissed COVID-19 claims for civil authority coverage because this required causal link between prior property loss or damage and the government's closure order was missing.[20] For example, Judge Perry of this Court found civil authority coverage inapplicable because, as the insured admitted, the Missouri COVID-19 orders were

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[19] It also makes no sense to apply the Louisiana-specific endorsement—which seeks to ensure compliance with Louisiana law—when that state's laws are not among the possible laws that could govern Lindenwood's policy. Indeed, Lindenwood's main campus in Missouri is the principal location of the insured risk and Lindenwood has filed suit in Missouri, thereby suggesting that Missouri law, the law of the forum, governs. *See, e.g., Axis Reins. Co. v. Telekenex, Inc.*, 913 F. Supp. 2d 793, 805 (N.D. Cal. 2012).

[20] *Whiskey River*, 2020 WL 7258575, at *12 (denying civil authority coverage because the civil authority order "was not issued in response to a dangerous physical condition" but rather "was issued to limit the spread of COVID-19"); *Palmer Holdings & Invests. Inc. v. Integrity Ins. Co*, 2020 WL 7258857, at *12 (S.D. Iowa Dec. 7, 2020) (finding civil authority coverage inapplicable because the insureds "have not alleged damage to another property" and "the proclamation was not issued in response to a dangerous physical condition that resulted from a Covered Cause of Loss" but "was issued to limit the spread of COVID-19."); Pollock Decl. Ex. 14 (collecting 31 cases).

"preventative" orders "issued to prevent the spread of the coronavirus." *Ballas*, 2021 WL 37984, at *5. They were therefore not issued "due to" property loss or damage within the required vicinity. *Id.* at *2, 5. A Western District of Missouri judge concluded the same, reasoning that "Plaintiff does not allege that any location other than its premises suffered direct physical loss or damage" and "that the [orders] were issued 'due to' that loss or damage." *BBMS*, 2020 WL 7260035, at *6; *accord Mudpie*, 2020 WL 5525171, at *7 ("Because the orders were preventative," the insured failed to "establish the requisite causal link between prior property damage and the . . . order.").

Lindenwood attempts to meet the requirement by baldly alleging that "State and local governments implemented the Stay at Home Order due to the presence of COVID-19 on property" and that COVID-19 "has been present in the air and on surfaces on property surrounding Plaintiff's property." Compl. ¶¶ 21, 53. But Lindenwood does not identify that "property," or cite any order to support its allegations, much less an order that governed its campuses in Missouri or Illinois. Therefore, Lindenwood fails to "describe particular property damage or articulate any facts connecting the alleged property damage to [the civil authority order's] restrictions." *10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5359653, at *6 (C.D. Cal. Sept. 2, 2020). Nor could it. Missouri's and Illinois's COVID-19 orders were *not* issued in response to prior property loss or damage. Rather, they were issued in response to the unfolding coronavirus crisis and were preventative measures designed to stop the spread of the virus. Lindenwood readily admits as much elsewhere in its complaint. Compl. ¶ 36 ("[T]he purpose of [the 'stay at home' orders] was to mitigate and slow the spread of COVID-19").

The civil authority provision also requires that the relevant order "prohibit[] access to the Location." Policy at 37. Lindenwood identifies no order that forbade people from accessing its

campuses; if anything, the civil authority orders allowed Lindenwood to continue operating (Pollock Decl. Exs. 1-4), and the Complaint admits that people continued to access Lindenwood's campuses (Compl. ¶¶ 17-18, 24, 54). Lindenwood's failure is unsurprising because, "while coronavirus orders have limited [insureds'] operations, no [civil authority order] prohibits access to [insureds'] premises." *Sandy Point*, 2020 WL 5630465, at *3; *see also Pappy's Barber Shops, Inc. v. Farmers Grp.*, Inc., 2020 WL 5500221, at *6 (S.D. Cal. Sept. 11, 2020) ("civil authority coverage provision only provides coverage to the extent that access to Plaintiff's physical premises is prohibited, and not if Plaintiffs are simply prohibited from operating their business"); Pollock Decl. Ex. 14 (collecting 21 cases). Accordingly, like Judge Perry, the Court should conclude that Lindenwood did not "plead any facts" demonstrating that any relevant jurisdiction's COVID-19 orders "prohibited access to its business because of the condition of [other] properties." *Ballas*, 2021 WL 37984, at *5.[21]

**D. "Decontamination Costs" Coverage Fails For Additional Reasons.**

Coverage for Decontamination Costs exists only if a "law or ordinance regulating Contamination" required Lindenwood to incur an increased cost to decontaminate or remove property. Policy at 39-40. It only applies when there is an "actual not suspected presence of Contaminant(s)." *Id.* at 39. Lindenwood does not allege that any of the civil authority orders are "law[s] or ordinance[s] regulating Contamination," or that it had to "remove property" because of contamination. Moreover, its allegation that "Stay at Home orders governing [its] property required [it] to undertake additional cleaning and decontamination measures" (Compl. ¶ 54) falls far short of establishing that the orders were issued "due to the actual not suspected presence of Contaminant(s)" at Lindenwood's campuses. *See id.* Indeed, none of the orders

[21] Lindenwood's claim for "Ingress/Egress" coverage fails for similar reasons. *See Promotional Headwear*, 2020 WL 7078735, at *10 (denying Ingress/Egress coverage for the same reasons that civil authority coverage failed).

even mention Lindenwood, much less that the COVID-19 virus was *actually* present on its campuses and that Lindenwood must undertake decontamination measures to eradicate the virus from its premises. *See* Pollock Decl. Exs. 1-4.

**E. "Expediting Costs" Coverage Fails For Additional Reasons.**

The policy covers the "reasonable and necessary costs incurred to pay for the temporary repair of direct physical loss of or damage caused by a **Covered Cause of Loss** to Covered Property and to expedite the permanent repair or replacement of such damaged property." Policy at 40. Nowhere does Lindenwood allege that it had to "temporarily repair" or "permanently repair or replace" damaged property because of the virus—which is unsurprising because the virus does not damage property. Lindenwood alleges only that it incurred "added expense" "in the form of cleaning and sanitizing, implementing physical distancing measures and COVID-19 testing . . . [and] facilities changes (*e.g.*, installation of signage, plexiglass shields, etc.)." Compl. ¶ 7. But those are not "repair" or "replacement" costs; they are measures taken to protect the health and safety of persons on Lindenwood's campuses. *See Ghoman v. New Hampshire Ins. Co.*, 159 F. Supp. 2d 928, 932 (N.D. Tex. 2001) ("Obviously, an insured cannot recover repair or replacement costs unless and until he actually repairs or replaces the insured structure.").

**II. Lindenwood's "Declaratory Judgment" Claim Must Be Dismissed.**

"Dismissal of a claim for declaratory relief is appropriate where adjudication of a breach of contract claim would render the request for declaratory judgment moot or redundant." *NTD I, LLC v. Alliant Asset Mgmt. Co.*, 2017 WL 605324, at *7 (E.D. Mo. Feb. 15, 2017). Here, the Court would have to make the same determinations in adjudicating Lindenwood's breach-of-contract claim as it would have to make to adjudicate its declaratory-judgment claim—that is, whether Lindenwood "suffered losses due to COVID-19 covered by the Policy" and whether Zurich "is obligated to pay" but "has failed to pay . . . for those losses." Compl. ¶ 92. Thus, the

declaratory-judgment claim duplicates the breach-of-contract claim and should be dismissed. *Morningstar, LLC v. Hardee's Food Sys., Inc.*, 2009 WL 36406, at *4 (E.D. Mo. Jan. 6, 2009) (dismissing declaratory-judgment claim as "a needless waste of judicial resources"); *Vandelay Hosp. Grp. LP v. Cincinnati Ins. Co.*, 2020 WL 5946863, at *2-3 (N.D. Tex., Oct. 7, 2020) (dismissing declaratory-judgment claim in a COVID-19 insurance case as duplicative).

## III. Plaintiffs' Claims Should Be Dismissed With Prejudice.

Lindenwood will never be able to state a claim under any of the coverage provisions it invokes because it cannot avoid the legal conclusion that the virus does not cause "physical loss" or "physical damage" to property. Lindenwood also cannot allege facts that would overcome the Contamination exclusion's bar on coverage of losses due to the "actual presence" of a virus. Nor could Lindenwood ever allege entitlement to "Civil or Military Authority" coverage because the relevant civil authority orders did not "result" from a civil authority's "*response* to direct physical loss of or damage to property" and did not "prohibit" access to Lindenwood's property. Accordingly, the Court should dismiss with prejudice because "[n]o amount of artful pleading by [Lindenwood] can state a plausible claim." *Pappy's*, 2020 WL 5847570, at *1.

## CONCLUSION

The Court should dismiss Plaintiffs' complaint in its entirety and with prejudice.

Dated: January 14, 2021

By: */s/ Bronwyn F. Pollock*
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 14, 2021, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system to the following:

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