UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MURIEL'S NEW ORLEANS, LLC.	*** NO.: 2:20-cv-02295**
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VERSUS	*** JUDGE NANNETTE JOLIVETTE BROWN**
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STATE FARM FIRE AND CASUALTY COMPANY	*** MAGISTRATE JUDGE MICHAEL NORTH**
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STATE FARM'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM

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I. INTRODUCTION

In *Muriel's New Orleans, LLC v. State Farm Fire and Casualty Co.*, 2021 WL 1614812 (E.D. La. Apr. 26, 2021), this Court identified numerous deficiencies in Plaintiff's original Petition for Damages, but nonetheless granted Plaintiff leave to replead. *Id.* at *12. Plaintiff has now filed its First Amended Complaint ("FAC"), but has failed to correct the deficiencies identified by this Court in its decision and still failed to state a cognizable claim against State Farm.

In the FAC, Plaintiff again sues State Farm for coverage of business interruption losses that Plaintiff allegedly sustained as a result of "the Proclamations issued by the City of New Orleans and State of Louisiana" forbidding restaurants "from allowing any on premises consumption of food or beverages." (FAC ¶¶ 30, 33, 36.) Plaintiff claims a breach of the Loss of Income and Extra Expense Endorsement (the "Endorsement") of its Businessowners Insurance Policy (the "Policy").[1] Plaintiff also asserts claims for declaratory relief and fraud.

Plaintiff's FAC fails to state a claim, as a matter of law, for the reasons already identified by this Court. In *Muriel's*, this Court held, as a matter of law, that State Farm's "Virus Exclusion unambiguously excludes coverage for losses resulting from COVID-19," including those due to government orders responding to the COVID-19 pandemic. 2021 WL 1614812, at *10. "[T]he excluded event – COVID-19 – remains part of the causal chain that resulted in Muriel's losses and coverage is barred by the Virus Exclusion." *Id.* The Court also found, as a matter of law, that Plaintiff's allegations of restricted use of its premises due to Louisiana government orders did not establish the requisite accidental direct physical loss to covered property. *Id.* at *7-9.

Moreover, other Louisiana federal courts have uniformly rejected, as a matter of law, claims

[1] Complete and true copies of Plaintiff's Policy Documents are at R. Doc. 12-3. Plaintiff's Policy Booklet (the "Policy") is found at bates-numbers SFFC 0002-0041. The Endorsement is found at SFFC 0094-0097. The Court may properly consider these documents on a motion to dismiss. *See* Point II *infra*.

that are nearly identical to those asserted by Plaintiff in the FAC. In *Q Clothier New Orleans LLC v. Twin City Fire Insurance Co.*, 2021 WL 1600247 (E.D. La. Apr. 23, 2021), Judge Lemelle granted judgment on the pleadings, as a matter of law, for the defendant insurer. As here, Q Clothier alleged business losses as a result of Louisiana government orders restricting non-essential business operations in order to minimize the spread of COVID-19. The court found that the Q Clothier failed to allege that "its property sustained physical and demonstrable alteration," as required by the policy and Louisiana law. *Id.* at *7. The court also held that the policy's virus exclusion barred coverage, as a matter of law, because the COVID-19 virus was in the chain of causation since the government orders, as here, were issued to reduce the spread of the virus. *Id.* at *7-9.

Likewise, in *Lafayette Bone & Joint Clinic, Inc. v. Transportation Insurance Co.*, 2021 WL 1740466 (W.D. La. May 3, 2021), Judge Cain dismissed similar claims, as a matter of law, holding that the alleged possible presence of COVID-19 at the plaintiff's premises and government COVID-19 orders do not cause direct physical loss to property. *Id.* at *2-4; *accord St. Pierre v. Transp. Ins. Co.*, 2021 WL 1709380, at *2-3 (W.D. La. Apr. 29, 2021) (Cain, J.). As the *Lafayette* court recognized, "courts within the Fifth Circuit have required a 'distinct, demonstrable, physical alteration of the property' to trigger coverage.'" 2021 WL 1740466, at *3 (citations omitted).

Consistent with these Louisiana federal district court rulings, federal district courts in Texas, Michigan, California, Florida, and Pennsylvania, and three Illinois Circuit Courts have each rejected, as a matter of law, claims against State Farm for alleged business interruption losses resulting from similar government COVID-19 orders. In *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353 (W.D. Tex. 2020), the court granted State Farm's motion to dismiss with prejudice, holding that the plaintiffs had not pled a "direct physical loss" as required by the Policy and that, in any event, the "plain language" of the Virus Exclusion barred the plaintiffs' claims. *Id.* at 360-62. Likewise, in *Turek Enterprises, Inc. v. State Farm Mutual Automobile Ins. Co.*, 484 F. Supp. 3d 492

(E.D. Mich. 2020), the court dismissed the plaintiff's claims with prejudice, ruling that the plaintiff's suspension of its business operations due to government COVID-19 orders did not constitute the requisite "direct physical loss" to property and also that the Policy's "plain, unambiguous" Virus Exclusion "negates coverage." *Id.* at 500-05. In *It's Nice, Inc. v. State Farm Fire & Casualty Co.*, No. 20-L-547 (Ill. Cir. Ct. DuPage Cnty. Sept. 29, 2020) (Transcript ("Tr.") and Order attached as Ex. 1 to State Farm's Reply Memorandum, R. Doc. 32-1), *Jaewook Lee, d/b/a Evanston Grill v. State Farm Fire & Casualty Co.*, 2021 WL 261545 (Ill. Cir. Ct. Cook Cnty. Jan. 13, 2021), and *A & G Gyros, Inc. d/b/a Windy City Gyros v. State Farm & Casualty Co.*, 2021 WL 2327279, at *2-6 (Ill. Cir. Ct. Cook Cnty. June 3, 2021), three Illinois circuit courts dismissed, as a matter of law, business interruption claims against State Farm, holding that the Virus Exclusion barred the plaintiff's claims and that COVID-19 government orders could not cause the "accidental direct physical loss to" property required for coverage. *It's Nice*, Tr. at 27-34, R. Doc. 32-1 at pp. 28-35; *Evanston*, 2021 WL 261545, at *3-6, *A & G Gyros*, 2021 WL 2327279, at *2-6; *see also Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, 2020 WL 7696080, at *3-4 (N.D. Cal. Dec. 28, 2020); *HealthNOW Med. Ctr., Inc. v. State Farm Gen. Ins. Co.*, 2020 WL 7260055, at *2 (N.D. Cal. Dec. 10, 2020); *Royal Palm Optical, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2021 WL 1220750, at *5 (S.D. Fla. Mar. 29, 2021); *Mareik, Inc. v. State Farm Fire & Cas. Co.*, 2021 WL 1940647, at *3-6 (E.D. Pa. May 5, 2021).

Here, too, Plaintiff's claims are barred by the clear language of the Policy and its Endorsement. Among other things, to establish a Covered Cause Of Loss to trigger coverage, the Policy requires "accidental direct physical loss to" Covered Property. (Policy at 3, R. Doc 12-3 at p. 5.) Yet Plaintiff's FAC does not allege that the insured property sustained any tangible physical damage, but repeats Plaintiff's earlier contention, rejected by this Court, that "loss of use" is a direct physical loss. (FAC ¶ 39.) Nor do Plaintiff's alleged losses due to "the civil orders restricting the use of its facility" (*id.* ¶ 3) constitute "accidental direct physical loss to" Covered Property.

Plaintiff's alleged business losses are economic losses unrelated to an accidental direct physical loss and, as such, are not covered under its Policy or the Endorsement. (Point III.B *infra*.)

Moreover, the Policy's Virus Exclusion bars coverage for "any loss which would not have occurred in the absence of ... Virus." (Policy at 5-6, R. Doc 12-3 at p. 7-8.) Plaintiff's factual allegations establish that this exclusion bars its claims. (Point III.A *infra*.) Under Louisiana law, "the insurer has the right to limit its contracted liability. When this limitation is expressed unambiguously in its coverage exclusions, courts will enforce the provisions as written." *Bossier Plaza Assocs. v. Nat'l Union Fire Ins. Co.*, 813 So. 2d 1114, 1119 (La. Ct. App. 2d. Cir. 2002). Here, the Policy's plain language broadly and unambiguously excludes coverage for losses that occur as a result of a virus. (Point III.A *infra*.) Accordingly, as this Court previously held, the Virus Exclusion applies and bars Plaintiff's claims. *Muriel's*, 2021 WL 1614812, at *10.

Plaintiff's new fraud claim also fails as a matter of law. Plaintiff's fraud claim simply repackages its previously asserted claim that State Farm should be estopped from enforcing the Virus Exclusion as written due to representations made by the "industry" to the Louisiana Department of Insurance. This Court correctly rejected Plaintiff's claim because the plain language of the Virus Exclusion is unambiguous and enforceable; thus, consideration of extrinsic representations made to the regulatory agency is neither warranted nor permitted. Further, Plaintiff has not adequately alleged misrepresentations or reliance and has no cognizable claim based on alleged statements made to the Louisiana Department of Insurance. (Point III.C *infra*.)

In addition, Plaintiff's allegations do not establish breach of the Endorsement's Civil Authority and Loss of Income provisions. Those provisions afford coverage for lost income under specific factual circumstances that are not present under Plaintiff's allegations. (Points III.D & E *infra*); *see also Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686-87 (5th Cir. 2011) (under Louisiana law, plaintiff was not entitled to civil authority coverage where plaintiff failed to

meet the necessary prerequisites). Coverage is also barred as a matter of law by the Policy's "Ordinance or Law," "Acts or Decisions," and "Consequential Loss" Exclusions. (Point III.F *infra*.) For these reasons, Plaintiff's FAC should be dismissed for failure to state a claim.

II. LEGAL STANDARD

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) should be granted where the complaint fails to state a valid claim for relief. "Although a court must accept the factual allegations in the pleadings as true, the plaintiff must plead enough facts to state a claim for relief that is plausible on its face." *RD Props. of Metairie, LLC v. Scottsdale Ins. Co.*, 2014 WL 12724664, at *3 (E.D. La. Mar. 7, 2014) (Brown, J.) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [its] claim." *RD Props.*, 2014 WL 12724664, at *4 (citation omitted). An insurance policy referenced in the complaint can be considered on a motion to dismiss. *Id.* Thus, the Court may properly consider the Policy and the government orders,[2] which are repeatedly referenced in Plaintiff's FAC. The government orders are also subject to judicial notice because they are matters of public record. *See, e.g., In re Katrina Canal Breaches Consol. Lit.*, 533 F. Supp. 2d 615, 632 (E.D. La. 2008).

III. PLAINTIFF FAILS TO STATE A CLAIM

Under Louisiana law, "[a]n insurance policy is a contract between the parties and should be construed by using the general rules of interpretation of contracts set forth in the Louisiana Civil

[2] *E.g.*, State of Louisiana Executive Department Proclamation Number JBE 2020 – 27 (Mar. 13, 2020) (Ex. D to First Motion to Dismiss, R. Doc. 12-6); Mayoral Proclamation to Promulgate Emergency Orders During the State of Emergency Due to COVID-19 (Mar. 16, 2020) (Ex. E; R. Doc. 12-7); Mayoral Proclamation to Further Promulgate Emergency Orders During the State of Emergency Due to COVID-19 (Apr. 15, 2020) (Ex. F; R. Doc. 12-8).

Code." *In re Katrina Canal Breaches, Litig.*, 495 F.3d 191, 206 (5th Cir. 2007) (internal quotations and citation omitted). As this Court has held, "[i]nterpretation of an insurance contract generally involves a question of law." *Burk Prop. Invs., LLC v. Illinois Union Ins. Co.*, 2020 WL 1864850, at *3 (E.D. La. Apr. 13, 2020) (Brown, J.) (citation omitted). "The Louisiana Civil Code provides that '[t]he judiciary's role in interpreting insurance contracts is to ascertain the common intent of the parties to the contract' by construing words and phrases 'using their plain, ordinary and generally prevailing meaning.'" *Wisznia Co. v. General Star Indem. Co.*, 759 F.3d 446, 448-49 (5th Cir. 2014) (citing La. Civ. Code Ann. arts. 2045, 2047). "If the policy wording at issue is clear and unambiguously expresses the parties' intent, the insurance contract must be enforced as written." *Cadwallader v. Allstate Ins. Co.*, 848 So. 2d 577, 580 (La. 2003).

To recover under an insurance policy, an insured has the initial burden of establishing coverage under the terms of the policy. *Bayle v. Allstate Ins. Co.*, 615 F.3d 350, 358-59 (5th Cir. 2010) (Louisiana law). If the insured proves coverage, then to avoid liability the insurer must establish that the loss is within an exclusion. *Id*. at 359. Under the plain language of the Policy, Plaintiff's claimed losses do not meet the Policy's terms of coverage and are subject to exclusions, including the Policy's Virus Exclusion. Plaintiff's claims should be dismissed as a matter of law.

A. <u>Coverage For Plaintiff's Alleged Losses Is Barred By The Virus Exclusion</u>

Plaintiff's claims are barred by the Policy's Virus Exclusion, which states:

> **SECTION I – EXCLUSIONS**
> 1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
> …
> **j. Fungi, Virus or Bacteria**
> …

> (2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease; …. (Policy at 5-6 (¶ 1, j (2)).)

The heading for the exclusion conspicuously includes "Virus" in bold type. The Policy's table of contents also separately lists the "Fungi, Virus Or Bacteria" Exclusion. (Policy at 1, R. Doc 12-3 at p. 2.)

The Endorsement for "Loss of Income and Extra Expense," under which Plaintiff sues, expressly incorporates Section I of the Policy, which requires a Covered Cause Of Loss in order for there to be coverage. (Endorsement at 1, R. Doc 12-3 at p. 56.) Per the Policy's terms, Covered Cause Of Loss means ***both*** an "accidental direct physical loss to" Covered Property ***and*** that the loss is not excluded in the Policy's SECTION I – EXCLUSIONS. (Policy at 4, R. Doc 12-3 at p. 6.) The Policy contains the Virus Exclusion, among others. Since the "Loss of Income and Extra Expense" Endorsement requires a Covered Cause Of Loss (Endorsement at 1, R. Doc 12-3 at p. 56), and since there is no Covered Cause Of Loss because (*inter alia*) the Virus Exclusion applies, there is no coverage under the Endorsement.

The Virus Exclusion is unambiguous. As this Court has already held, the Virus Exclusion in State Farm's Policy "unambiguously excludes coverage for losses resulting from COVID-19." *Muriel's*, 2021 WL 1614812, at *10. "[T]he Closure Orders issued by … Governor Edwards are derivative of the COVID-19 outbreak." *Id.* "Stated differently, the Closures Orders were issued either concurrently, or in sequence with, the spread of COVID-19 across the State of Louisiana." *Id.* "Therefore, the excluded event – COVID-19 – remains part of the causal chain that resulted in Muriel's alleged losses and coverage is barred by the Virus Exclusion." *Id.*

Similarly, the *Q Clothier* court held, as a matter of Louisiana law, that the virus exclusion in the plaintiff's policy barred the claims for alleged business losses resulting from Louisiana governmental orders restricting business operations in order to minimize the spread of COVID-

19. 2021 WL 1600247, at *7. Under Louisiana law, an "'insurer has the right to limit its contracted liability'" and when such a limitation "'is expressed unambiguously in its coverages exclusions, courts will enforce the provisions as written.'" *Id.* (quoting *Bossier Plaza*, 813 So. 2d at 1119). The court thus gave effect to the virus exclusion and to policy language, similar to State Farm's, providing that the exclusion applied when a virus was in the chain of causation and caused the claimed losses either "directly or indirectly." *Id.* at *8 (citing cases).

By its terms, the State Farm's Virus Exclusion applies "to all losses where a virus is part of the causal chain." *Turek*, 484 F. Supp. 3d at 503. The lead-in language to the Exclusion provides that State Farm "do[es] not insure under any coverage for any loss which would not have occurred in the absence of one or more of the [listed] excluded events." (Policy at 5-6 (¶ 1, j (2)) , R. Doc 12-3 at p. 7-8.) It further states that State Farm does not "insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces or occurs as a result of any combination of these." (*Id.*) This "anti-concurrent causation clause" is "unambiguous and enforceable" and bars coverage for losses if virus is "in any sequence" in the chain of causation, even if there are also other causes. *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 351, 354 (5th Cir. 2007); *see also Muriel's*, 2021 WL 1614812, at *9-10.

Here, Plaintiff's allegations and the government orders they reference establish that a virus is in the chain of causation for its alleged losses, which are thus barred by the Policy's Virus Exclusion. Plaintiff, again, alleges that it "lost the functionality and use of its physical property as a direct result of the government decisions and actions, in the form of a civil order restricting the use of its facility for its sole function of serving food at public gatherings." (FAC ¶ 36; *see also* ¶ 29-

30, 33) (citing Governor's Proclamation (R. Doc. 12-6))). Yet the COVID-19 virus is plainly at the root of the government orders at issue. The Governor's Proclamation states that it was issued in response to "the worldwide outbreak of COVID-19 and the effects of its extreme risk of person-to-person transmission." (R. Doc. 12-6.) Likewise, the titles of City of New Orleans proclamations each state that they were promulgated as "Emergency Orders During The State of Emergency Due to COVID-19." (R. Doc. 12-7; R. Doc. 12-8.) Put simply, if there were no COVID-19 virus, there would be no government orders to prevent its spread.

Plaintiff argues that "State Farm's reliance on the virus exclusion is misplaced. Muriel's has not claimed damage from a virus on its property." (FAC ¶ 42.) Yet this Court has already held that "the text of the Virus Exclusion contains nothing about a contamination requirement." *Muriel's*, 2021 WL 1614812, at *10. Moreover, in enforcing an identically-worded State Farm Virus Exclusion, including its "lead-in" language, the *Diesel* court rejected the plaintiffs' argument "that the Virus Exclusion does not apply because COVID-19 was not present at the Properties," where, as here, "COVID-19 is in fact the reason for the Orders being issued and the underlying cause of Plaintiffs' alleged losses." 479 F. Supp. 3d at 361. And in *Turek*, the court enforced the identically-worded State Farm Virus Exclusion, despite the plaintiff being "adamant that COVID-19 never entered its premises," since the lead-in language "extends the Virus Exclusion to all losses where a virus is part of the causal chain." 484 F. Supp. 3d at 502.

These holdings are well-within the mainstream of federal district court COVID-19 coverage rulings. "'[F]ederal courts interpreting virtually identical Virus Exclusions have nearly unanimously determined that these exclusions bar coverage of similar claims.' These courts have dismissed claims where policyholders claimed their losses resulted either from the presence of the virus or from governmental order intended to slow the spread of the virus. These courts were right to dismiss these claims in the face of virus exclusions." *Riverwalk Seafood Grill Inc. v. Travelers*

Cas. Ins. Co., 2021 WL 81659, at *3 (N.D. Ill. Jan. 7, 2021) (citation omitted).[3]

Plaintiff tries to avoid the clear language of the Virus Exclusion by arguing that the Exclusion should have included the word "pandemic," which merely describes the virus's scope. (FAC ¶¶ 46, 59-62.) Plaintiff essentially contends that, even though virus-related losses are excluded, if there is too much virus (*i.e.*, a viral pandemic), then the exclusion is inapplicable unless it includes the word "pandemic" or "epidemic," which merely describe the virus's scope. (*Id.*) This contention is contrary to the express language of the Virus Exclusion, which provides that any loss that "occurs as a result of ... virus" is excluded. (Policy at 5-6 (¶ 1, j (2)), R. Doc 12-3 at p. 7-8.) The Virus Exclusion extends to viral pandemics because, by its terms, it applies "regardless of: … whether the event … involves isolated or widespread damage …." (*Id.*) "Whether a global pandemic or a single infection, the Virus Exclusion clearly and unambiguously applies, as courts applying similar virus exclusions to COVID-19 have consistently found." *Pez Seafood DTLA, LLC v. Travelers Indem. Co.*, 2021 WL 234355, at *7 (C.D. Cal. Jan. 21, 2021). There is no basis in the Policy language or the law for carving out an exception to the Virus Exclusion for losses resulting from a virus because the virus has reached pandemic status. COVID-19 is no less a virus because it is a pandemic.

This Court has already rejected Plaintiff's "argument that because the Policy does not explicitly exclude 'pandemics' …, the Policy provides coverage for Muriel's alleged losses." *Muriel's*, 2021 WL 1614812, at *10. To the contrary, the Court found that the "Virus Exclusion

[3] Plaintiff's reliance on *Henderson Road Restaurant Systems, Inc. v. Zurich American Ins. Co.*, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021), is misplaced. In that case, the policy at issue contained a materially different "microorganism" exclusion that the court concluded only excluded coverage for damage caused by microorganisms at the plaintiff's properties. *Id.* at *14-15. In contrast, as this Court held, nothing in the State Farm Policy requires contamination at the insured premises for the Virus Exclusion to apply. *Muriel's*, 2021 WL 1614812, at *10. Moreover, as this Court observed, *Henderson* is also distinguishable because the policy there covered "direct physical loss of or damage to property," which is different from policies like State Farm's that "provide[] coverage only for 'physical loss to property.'" *Id.* at *10 n.22; *see also* Point III.B *infra*.

unambiguously excludes coverage for losses resulting from COVID-19." *Id.* As in *Mareik*, "[t]hough the word 'pandemic' is not used in the Policy, there is no reasonable basis to find a 'pandemic exception' within the plain meaning of this express exclusion." 2021 WL 1940647, at *6. Such an argument "is 'akin to arguing that a coverage exclusion for damage caused by fire does not apply to damage caused by a very large fire.'" *West Coast Hotel Mgmt, LLC v. Berkshire Hathaway Guard Ins. Co.*, 498 F. Supp. 3d 1233, 1241 (C.D. Cal. 2020); *accord Garmany of Red Bank, Inc. v. Harleysville Ins. Co.*, 2021 WL 1040490, at *7 (D.N.J. Mar. 18, 2021).

In addition, Plaintiff again incorrectly asserts that it is entitled to coverage under the "resulting loss" clause in the Acts and Decisions Exclusion. (FAC ¶¶ 2, 27-28, 44.) That clause states that "[b]ut if accidental direct physical loss results from [excluded Acts or Decisions], we will pay for that resulting loss ***unless the resulting loss is itself one of the losses not insured in Section I of this coverage Form***." (Policy at 8, R. Doc 12-3 at p. 10 (emphasis added)). Plaintiff's claimed resulting loss is "one of the losses not insured in Section I" because that loss is barred by the Virus Exclusion. That result is confirmed by the introductory language for the Acts and Decisions Exclusion, which provides that State Farm does "not insure for loss described in Paragraphs 1. and 2. immediately above regardless of whether one or more of the following [*i.e.*, Acts and Decisions]: (a) directly or indirectly cause, contribute to aggravate the loss; or (b) occur before, at the same time, or after the loss or any other cause of the loss." (Policy at 8, R. Doc 12-3 at p. 10.) In other words, the "resulting loss" provision does not override the Virus Exclusion or provide coverage for resulting losses otherwise excluded under the Policy. The Policy's Virus Exclusion thus bars Plaintiff's claim.

B. <u>Even Without The Virus Exclusion, Plaintiff Does Not Allege Covered Losses</u>

Even without the Virus Exclusion, which expressly applies under all coverages, Plaintiff's claims fail for the separate reason that its allegations are insufficient to establish the required

"accidental direct physical loss to" Covered Property. (Policy at 3, R. Doc 12-3 at p. 5.) For a loss to be a Covered Cause Of Loss under the Policy, it must ***both*** constitute "accidental direct physical loss to" Covered Property ***and*** it must not be excluded. (*Id.* at 4, R. Doc. 12-3 at p. 6.) And the Policy Endorsement, under which Plaintiff sues, expressly conditions business interruption coverage on "accidental direct physical loss to" Covered Property. (Endorsement at 1.a., 2.a., 3b, R. Doc 12-3 at p. 56-57.)

Plaintiff's FAC does not allege "accidental direct physical loss to" property. Instead, Plaintiff' repeats its allegations that the restrictions imposed on its business by government orders "constitute a direct physical loss to covered property" and that "loss of use" is a direct physical loss. (FAC ¶¶ 35, 39; *see also* Petition ¶¶ 24, 26, R. Doc. 1-1 at pp. 4-5.) This Court rejected these allegations in holding that Plaintiff did "not sufficiently allege accidental direct physical loss to the covered property." *Muriel's*, 2021 WL 1614812, at *7-8. This Court found, as a matter of law, that Plaintiff's allegations of the restricted use of its premises due to Louisiana government orders did not establish the requisite direct physical loss to covered property. *Id.* at *7-9. The Court stated that "Muriel's does not allege any physical loss that manifested as a demonstrable physical alteration of its premises." *Id.* at *7. So, too, Plaintiff's FAC fails to allege any tangible physical damage to Plaintiff's property.

As the COVID-19 caselaw holds, "loss of use" unaccompanied by "accidental direct physical loss to" property is not covered under the Policy. *See Turek*, 484 F. Supp. 3d at 499-501; *Diesel*, 479 F. Supp. 3d at 359-60; *Royal Palm*, 2021 WL 1220750, at *5. The government orders, cited by Plaintiff, which are comprised of words on paper, did not cause the required "accidental direct physical loss to" Covered Property. As elsewhere, "[a]lthough Plaintiffs argue that the executive orders resulted in the inability to operate for a specific period of time, the executive orders did not physically change the insured properties. 'Every physical element of [its] rooms—

the floors, the ceilings, the plumbing, the HVAC, the tables, the chairs—underwent no physical change as a result of the [executive orders].'" *G&A Family Enters., LLC v. Am. Family Ins. Co.*, 2021 WL 1947180, at *5 (N.D. Ga. May 13, 2021) (citation omitted). Plaintiff's alleged economic losses are unaccompanied by direct physical loss to property and are not covered by the Policy or the Endorsement. *See Muriel's*, 2021 WL 1614812, at *7-9; *Q Clothier*, 2021 WL 1600247, at *7.

As this Court recognized, "'[t]he requirement that the loss be 'physical'" is "'widely held to exclude alleged losses that are intangible or incorporeal." *Muriel's*, 2021 WL 1614812, at *7 (quoting *Hartford Ins. Co. v. Miss. Valley Gas Co.*, 181 F. App'x 465, 470 (5th Cir. 2006)); *Q Clothier*, 2021 WL 1600247, at *5 (same). And as the *Lafayette* court explained, "courts within the Fifth Circuit have required a 'distinct, demonstrable, physical alteration of the property' to trigger coverage.'" 2021 WL 1740466, at *3 (citation omitted).

Applying these principles, many courts, in Louisiana and elsewhere, have rejected claims for alleged business losses arising out of government COVID-19 orders, like those alleged by Plaintiff here, for failure to allege an accidental direct physical loss to property. Louisiana courts have held that lost revenue incurred from non-essential business closures under Louisiana government orders "do[es] not amount to 'direct physical loss or damages' because they are purely economic in nature." *Q Clothier*, 2021 WL 1600247, at *6 (citing *Nite, Nite LLC v. Certain Underwriters at Lloyd's London*, No. 698068, Sec. 23 (19th JDC E. Baton Rouge Parish, Feb. 8, 2020) (granting summary judgment to defendant insurers) (Judgment and transcript attached as Ex. 1 to State Farm's Notice of Supplemental Authority, R. Doc. 62-1); *Cajun Conti v. Certain Underwriters at Lloyd's, London*, No. 2020-02558, Div. M, Sect. 13 (41st JDC Orleans Parish, Feb. 10, 2021) (judgment for insurer following bench trial; no appeal) (Judgment attached as Ex. 2 to State Farm's Notice of Supplemental Authority, R. Doc. 62-2)). Plaintiff's "damages merely reflect economic losses stemming from the government's order restricting access to its" covered property, and its

claims for insurance coverage fail, as a matter of law, because its property did not allegedly "sustain[] physical and demonstrable alteration." *Id.* at *7.

Likewise, *Nite, Nite* involved a claim for COVID-19 business interruption losses pursuant to an insurance policy governed by Louisiana law (though, unlike here, that policy did not also contain a virus exclusion). Judge Morvant granted summary judgment in favor of the defendant insurer because the plaintiff failed to show that it experienced any direct physical loss to property. The court held:

> I don't think that the governor's order or the virus itself constitutes damage to property so I don't think that there's coverage under the policy…. The basis of the summary judgment is, first of all, there's no property loss or no damage that occurred, only the shutdown order, and only economic impact without any damage of physical loss to property.

(R. Doc. 62-1 at pp. 21-22.) In so ruling, the Court made clear there was no evidence that COVID-19 caused direct physical loss to any property and that the damages asserted were purely economic:

> I look at this record and it's simply void of any evidence to establish any physical damage or any physical loss that was caused to any property. And I think everybody acknowledges, you know, COVID damages people not property. … And the policy defines covered c[ause] of loss to mean direct physical loss unless the loss is excluded or limited in the policy. And here, we don't have direct physical loss; rather, simply economic loss due to the shutdown.

(*Id.* at 23-24.) Accordingly, the court granted summary judgment for the defendant insurers and dismissed the case with prejudice. (*See id.*.)

Under the Louisiana government orders, Plaintiff's use of its properties for business purposes is restricted not because of "accidental direct physical loss to" Covered Property. Rather, the government orders are intended to minimize the spread of the COVID-19 virus. The point of these orders is to keep people away from each other, not away from damaged property. Despite the alleged widespread presence of the COVID-19 virus, certain businesses were closed, or remained open in whole or in part, under the orders ***based on the nature of the business – not*** because of accidental direct physical loss to the property. *See, e.g.*, Mayoral Proclamation at 3-4

(Mar. 16, 2020) (R. Doc. 12-7). In short, the FAC fails to identify an "accidental direct physical loss to" property caused by government orders. Plaintiff's alleged business losses are economic losses unaccompanied by "accidental direct physical loss to" property and, as such, are not covered under its Policy or the Endorsement. *See, e.g., Q Clothier*, 2021 WL 1600247, at *7.

C. Plaintiff's Fraud Claim Fails as a Matter of Law

To state a claim for fraud, Plaintiff must allege facts showing three elements: (1) State Farm made a misrepresentation of material fact; (2) State Farm made the misrepresentation with intent to deceive; and (3) Plaintiff justifiably relied on the misrepresentation and was consequently injured. *See* La. Civ. Code art. 1953; *see also D.H. Griffin Wrecking Co., Inc. v. 1031 Canal Dev., LLC*, 463 F. Supp. 3d 713, 725-26 (E.D. La. May 29, 2020). "In alleging fraud or mistake, a party must state ***with particularity*** the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b) (emphasis added). This "requires 'time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby.'" *D.H. Griffin Wrecking Co.*, 463 F. Supp. 3d at 726 (citations omitted). Plaintiff allegations of fraud do not meet these requirements and should be dismissed as a matter of law.

i. The Lack of the Word "Pandemic" Does Not Constitute Fraud, as a Matter of Law

Plaintiff alleges that State Farm "defrauded Muriel's by amending the State Farm policy to exclude coverage for pandemic events like SARS, without disclosing that exclusion in the Policy," FAC ¶ 6, and "by intentionally drafting the Policy to contain an exclusion it knew was not indicated in the words of the Policy." *Id.* at ¶ 51. By these allegations, Plaintiff improperly tries to transform its deficient breach-of-contract claim into a fraud claim, based on its contention, already rejected by this Court, that the word "virus" in the Virus Exclusion is ambiguous and does not convey that a viral pandemic is excluded. *See supra* at 10-11. Plaintiff does not and cannot plausibly allege

either fraudulent misrepresentation or omission or reasonable reliance by the Plaintiff on its claimed misunderstanding of the unambiguous language of the Virus Exclusion. *See id.*

ii. Plaintiff's Allegations of Misrepresentations to the Louisiana Department of Insurance Do Not State A Cause of Action for Fraud Against State Farm

Plaintiff's claim of fraud based on misrepresentation to the Louisiana Department of Insurance ("LDI") also fails. Plaintiff has not pled facts showing the circumstances under which it allegedly relied on the asserted misrepresentation to the LDI, and Plaintiff has not pled with particularity the circumstances under which State Farm supposedly made a misrepresentation.

First, although Plaintiff conclusorily alleges that it "relied on the misrepresentation when entering the insurance contract" (FAC ¶ 65), Plaintiff does not allege any facts showing that it did so. Plaintiff's "formulaic recitation" of reliance is not sufficient to survive a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Rather, a plaintiff "must plead enough ***facts*** to state a claim for relief that is plausible on its face." *RD Props.*, 2014 WL 12724664, at *3 ((Brown, J.) (citation omitted; emphasis added). Here, the alleged misrepresentations were made to the LDI, ***not*** to Plaintiff. Plaintiff does not allege State Farm provided Plaintiff with the LDI filings or that Plaintiff otherwise knew of the LDI filings at the time of its claimed reliance.

Second, Plaintiff has not pled with sufficient particularity that ***State Farm*** made misrepresentations to the LDI. Plaintiff attaches documents related to rate filings with the LDI to its FAC and cites those documents in the FAC. Yet none of the documents indicates they were prepared or submitted by State Farm, nor do they make any reference to State Farm. To the contrary, the documents indicate the filings were submitted by the Property Insurance Association of Louisiana ("PIAL"). R. Doc. 66-1, p. 4; *see also id.* at p. 5 (letter from the PIAL). Plaintiff alleges no facts that would permit it to hold State Farm liable *for fraud* based on the PIAL's representations. There is also an absence of legal authority permitting a plaintiff to hold an insurer

liable for representations made by the PIAL. Moreover, though Plaintiff refers to PIAL in the FAC as "State Farm's representative" (FAC ¶ 48), Plaintiff provides no facts indicating that PIAL is State Farm's representative, and the documents Plaintiff cites reference only the PIAL, not State Farm. Plaintiff's contradictory and ambiguous allegations do not state a cause of action for fraud.

iii. Plaintiff's Claim of Fraud Based on Alleged Communications to the LDI Simply Reasserts Equitable Estoppel Claims Already Rejected by the Court

Plaintiff's claim of misrepresentation to the LDI improperly attempts to repackage its equitable estoppel claims as fraud claims. Its goal remains the same: that State Farm should be equitably estopped from enforcing the Virus Exclusion because of representations that were made to the LDI about the effect of the Virus Exclusion on insurance premiums. (FAC ¶¶45-65). Based on these alleged misrepresentations to the LDI, Plaintiff asserts that the Virus Exclusion should be rewritten by the Court as a contamination exclusion that would not apply to Muriel's claims because "[t]here is no claim that Muriel's was contaminated by the Covid-19 virus." (FAC ¶ 49.) In ruling on the original Petition, this Court emphatically rejected Plaintiff's argument:

> [T]he Court declines to rewrite the unambiguous Virus Exclusion as a "Pollution / Contamination Exclusion," as urged by Muriel's. In a somewhat convoluted argument, Muriel's contends that State Farm should be "equitably estopped" from arguing that the Virus Exclusion is not a "Pollution/Contamination Exclusion" because of representations made by "the industry" to the Louisiana Department of Insurance. ***The Court will not examine extrinsic evidence of the Policy at issue here because the Virus Exclusion is unambiguous and Louisiana law does not permit the introduction of parol evidence under these circumstances***.

Muriel's, 2021 WL 1614812, at *11 (emphasis added).

iv. The Louisiana Statute Governing the Contents of Filings with the LDI Do Not Create a Cause of Action in Favor of Plaintiff.

Plaintiff's allegations regarding representations allegedly made to the LDI fail to support a fraud claim even assuming *arguendo* that State Farm made any such representations as Plaintiff claims – which Plaintiff has failed to properly allege, for the reasons discussed above. Plaintiff

has no cause of action for damages based on representations to the LDI. The alleged representations discussed in the FAC were made in the context of a rate filing with the LDI. *See* R. Doc. 66-1 (FAC exhibits). Misrepresentations to the LDI that affect rates or premiums chargeable are prohibited by the Insurance Code. *See* La. R.S. 22:1474. The Insurance Commissioner is exclusively charged with enforcement of the Insurance Code. *See id.*; *see also Employers-Commercial Union Ins. Co. v. Bernard*, 303 So.2d 728, 731 (La. 1974).

Under Louisiana law, there is no civil cause of action for damages under a regulatory statute, such as the Insurance Code, unless the statute expressly creates such a cause of action. Thus, in *Taxicab Insurance Store, LLC v. American Service Ins. Co.*, 224 So. 3d 451 (La. App. 2017), the Louisiana Fourth Circuit Court of Appeal declined to recognize a civil cause of action by an insurance provider for loss of business alleged caused by a competitor's alleged selling of illegal policies at unapproved premium rates in violation of the Insurance Code. *Id.* at 455, 457. In so ruling, the Court stressed that the Insurance Commissioner is exclusively charged with the enforcement of the Insurance Code and that the Code does "not provide for a private right of action." *Id*. at 457. Similarly, in *Jones v. Americas Ins. Co.*, 226 So. 3d 537 (La. App. 2017), the Louisiana First Circuit Court of Appeal held that an insurer had no private right of action against an insured's claims appraiser for fraudulent endorsement of the insurer's check in violation of Insurance Code. *Id.* at 542. Likewise, in *Sonnier v. Toyota Motor Corp.*, 2018 WL 1721794 (La. App. Apr. 6, 2018), the Louisiana First Circuit Court of Appeal found that a tort victim had no private right of action against an insurer (State Farm) for alleged violation of a statute regulating how insurance companies brand titles after total loss claims, because that title statute was regulatory and exclusively enforced by the LDI and its Commissioner. *Id.* at *1.

Here, Plaintiff alleges that State Farm made misrepresentations in rate filings to the LDI. Such misrepresentations, if they occurred, would be a violation of La. R.S. 22:1474. But the

Insurance Code does not create a cause of action in favor of Plaintiff. Rather, the penalty would be determined and administered exclusively by the LDI and its Commissioner. Louisiana law does not permit Plaintiff to use the power of this Court to enforce insurance statutes and regulations. For all these reasons, Plaintiff's fraud claim should be dismissed as a matter of law.

D. The Policy's Civil Authority Provision Is Inapplicable

Plaintiff seeks coverage under the Civil Authority provision in an Endorsement to the Policy. (FAC ¶ 26.) Under the plain terms of the Policy and its Endorsement,[4] Plaintiff has not pled facts necessary to trigger this provision, which provides coverage for loss of income caused where damage to other ***property*** caused by a ***covered risk*** causes a civil authority to prohibit access to the insured property, causing loss of income to the insured. (Endorsement at 1, 4, R. Doc 12-3 at p. 56, 59.)

"[C]ivil authority coverage is intended to apply to situations where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property." *Dickie Brennan*, 636 F.3d at 686-87 (Louisiana law) (citations omitted); *see Kean, Miller, Hawthorne, D'Armond McCowan & Jarman, LLP v. Nat'l Fire Ins. Co.*, 2007 WL 2489711, at *3 (M.D. La. Aug. 29, 2007) (Louisiana law); *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, 2008 WL 450012, at *9 (S.D. Tex. Feb. 15, 2008). Civil authority coverage "was designed to address the situation where damage occurs and the civil authority *subsequently* prohibits access." *Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP v. Chubb Corp.*, 2010 WL 4026375, at *3 (E.D. La. Oct. 12, 2010). For example, coverage might apply where a civil authority orders an insured building closed for safety

[4] The Endorsement expressly incorporates the provisions of the Property coverage provided in the Policy, stating: "The coverage provided by this endorsement is subject to the provisions of SECTION I — PROPERTY, except as provided below" and "All other policy provisions apply." (Endorsement at 1, 4; R. Doc. 12-3 at p. 56, 59.)

reasons while an adjacent building that was damaged by fire is being repaired. *See Syufy Enters. v. Home Ins. Co.*, 1995 WL 129229, at *2 n.1 (N.D. Cal. Mar. 21, 1995). Thus, a "causal link" must exist between prior actual damage to nearby premises "and the action by a civil authority." *S. Tex. Med. Clinics*, 2008 WL 450012, at *10. No such situation is alleged here.

Under State Farm's Endorsement, Civil Authority coverage requires (1) "damage to property other than property at the described premises"; (2) caused "by a Covered Cause Of Loss"[5]; and (3) "a civil authority … prohibits access to the described premises;" (4) "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property"; and (5) "[t]he action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause Of Loss that caused the damage, or … to enable a civil authority to have unimpeded access to the damaged property." (Endorsement ¶ 4 (p. 2), R. Doc 12-3 at p. 57). Plaintiff fails to allege facts to support these requirements.

Plaintiff does not allege damage to a nearby property. Moreover, even if Plaintiff could claim that a nearby property sustained the same purported loss-of-use-type "damage" that it alleges its property sustained, that is not "accidental direct physical loss" and is not caused by a "Covered Cause Of Loss" as required by the Civil Authority provision. Indeed, Plaintiff affirmatively alleges an excluded cause of loss: the COVID-19 virus. Plaintiff alleges it sustained losses "as a direct result of the … civil order[s]" that were issued to "reduce and limit the spread of COVID-19" and "mitigate the effects of COVID-19." (FAC ¶ 36; Ex. 1 to Pet. at 2, R. Doc. 1-1 at p. 11, Ex. 2 to Pet. at 2, R. Doc. 1-1 at p. 14.) Thus, the Virus Exclusion bars coverage under the Civil Authority

[5] *See* Policy, Section I – Covered Causes Of Loss (p. 4) (requiring "accidental direct physical loss" that is not "Excluded in SECTION I – EXCLUSIONS") (Policy at 4, R. Doc. 12-3 at p. 6.)

provision. (Point III.A *supra*.)

Plaintiff must also plead a prohibition on access to its property. As the court stated in a similar COVID-19 case, "the 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. The government orders alleged in the complaint prohibit the operation of Plaintiff's business; they do not prohibit access to Plaintiffs' place of business." *Pappy's Barber Shops, Inc. v. Framers Grp., Inc.*, 487 F. Supp. 3d 937, 945 (S.D. Cal. 2020). None of the Orders at issue precludes access to the insured premises, but rather expressly permit access. As Plaintiff admits, restaurants are permitted to provide "take-out or delivery services" and it was allowed to operate. (FAC ¶¶ 31, 34; *see* Ex. 2 to Pet. at 4, R. Doc. 1-1 at p. 16.)

Plaintiff fails to plead the requisite causal link between actual damage to nearby premises and the prohibition on access. Beyond not prohibiting access to the premises, the orders are intended to keep people away from each other, not away from dangerous conditions caused by damaged property. The orders were issued to limit person-to-person interaction to "prevent the spread" of the COVID-19 virus. *Muriel's*, 2021 WL 1614812, at *12. Certain businesses were closed, or remained open in whole or in part, under the orders based on the type of the business – ***not*** because of accidental direct physical loss to property. (*See* Exs. 1&2 to Pet., R. Doc. 1-1 at pp. 10-16; Point III.B *supra*.)

A causal relationship is also absent when civil action is taken due to fear of future harm, rather than prior actual physical damage. Thus, this Court and others have rejected, as a matter of law, civil authority claims based on COVID-19 government orders because the orders were issued to prevent future harm, not because of existing property damage. *See Muriel's*, 2021 WL 1614812, at *12; *Kirsch v. Aspen Am. Ins. Co.*, 2020 WL 7338570, at *7 (E.D. Mich. Dec. 14, 2020); *Mudpie, Inc. v. Travelers Cas. Ins. Co.*, 487 F. Supp. 3d 834, 844 (N.D. Cal. 2020). Because the

government orders were issued to limit the spread of COVID-19, and not because of prior "actual physical damage" to property, Plaintiff's alleged losses are not covered. *See Muriel's*, 2021 WL 1614812, at *12; *Dickie Brennan*, 636 F.3d at 687; *Jones, Walker*, 2010 WL 4026375, at *3.

Civil Authority coverage also requires that "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority … as a result of the damage" and that the insured premises are within that area and no more than a mile away from the damaged property. (Endorsement ¶ 4.a(1), R. Doc 12-3 at p. 57.) Plaintiff does not and cannot allege that these requirements are met. Plaintiff does not allege that physical barricades prevented access to the area, and the government orders at issue allow access to the area, including to grocery stores, pharmacies, banks, and gas stations, in the area. (Ex. 2 to Pet. at 3, R. Doc. 1-1 at p. 15.) In sum, Plaintiff has failed to allege the factual predicates required for coverage by the Civil Authority provision as a matter of law.

E. <u>The "Loss of Income" and "Extra Expense" Coverage Is Inapplicable</u>

Plaintiff alleges it is entitled to coverage under the Endorsement's Loss of Income and Extra Expense provisions. (FAC. ¶¶ 17, 24-25.) Plaintiff's FAC, however, does not allege facts showing that the specific conditions required for such coverage are met. First, such coverage is only available where there has been "accidental direct physical loss to property." (Endorsement at 1-2, R. Doc 12-3 at p. 56-57.) But as shown above, Plaintiff's allegations establish as a matter of law that there was no "accidental direct physical loss to property." (Point III.B, *supra*.)

Loss of Income and Extra Expense coverage also expressly requires that the loss "must be caused by a Covered Cause Of Loss." (Endorsement at 1-2, R. Doc 12-3 at p. 56-57.) "Covered Cause Of Loss" requires ***both*** an "accidental direct physical loss to" property ***and*** that such loss is not excluded by the Policy. Plaintiff fails both tests. Not only has Plaintiff failed to plead "accidental direct physical loss to" any property, but coverage also is barred by the Policy's Virus

Exclusion, which provides that State Farm "do[es] not insure ***under any coverage*** for any loss which would not have occurred in the absence of … Virus." (Policy at 5-6; R. Doc. 12-3 at pp. 7-8 (emphasis added); *see* Point III.A, *supra*.)

Further, to the extent that Plaintiff alleges that its business was restricted or suspended by the government orders, that is not a covered loss. Those orders are not, and did not cause, the required "accidental direct physical loss to property." Moreover, under the Policy's "Acts or Decisions" Exclusion, "[c]onduct, acts or decisions … by a governmental body" do not constitute a covered loss, and if such acts and decisions "cause," "contribute to," or "aggravate" an excluded cause of loss (such as virus), the loss remains excluded. (Policy at 8; *see also* Point III.E *infra*.)

Loss of Income and Extra Expense coverage applies only to loss of income and extra expenses sustained due to a "necessary 'suspension' of [the insured's] 'operations' during the 'period of restoration.'" (Endorsement at 1, 4.) The "period of restoration" is defined as the period during which the property is "repaired, rebuilt or replaced with reasonable speed and similar quality" or until "business is resumed at a new permanent location." (*Id*.) Plaintiff does not allege a "period of restoration" meeting that definition. The FAC does not allege that any repairs, rebuilding or replacement of any part of the property were made, or that Plaintiff moved its businesses to a new permanent location. Loss of Income and Extra Expense coverage is not available for a suspension of operations where, as here, a shutdown is due to government orders.

F. <u>Additional Policy Exclusions Bar Plaintiff's Claims</u>

Coverage is also barred by the "Ordinance or Law," the "Acts or Decisions," and the "Consequential Loss" Exclusions. Each of these Exclusions takes the loss at issue outside the Policy's definition of Covered Cause Of Loss and bars coverage.

The "Ordinance or Law" Exclusion bars coverage for any loss due to "[t]he enforcement of any ordinance or law" "[r]egulating the ... use ... of any property," and "applies … even if the

property has not been damaged." (Policy, Exclusions ¶ 1.a (p. 5), R. Doc 12-3 at p. 7.) Under such an exclusion, "costs ... incurred due to the enforcement" of certain restrictions imposed by governmental officials on the "use" of property are "excluded." *Bahama Bay II Condo. Ass'n v. United Nat'l Ins. Co.*, 374 F. Supp. 3d 1274, 1281–82 (M.D. Fla. 2019); *see also Prytania Park Hotel v. Gen. Star Indem. Co.*, 896 F. Supp. 618, 623-24 (E.D. La. 1995) (applying Ordinance or Law Exclusion). Louisiana law grants the Governor authority to issue "[e]xecutive orders, proclamations, and regulations," which "shall have the force and effect of law." La. Rev. Stat. 29.724; *see also Spell v. Edwards*, 500 F. Supp. 3d 503, 507 & n.2 (M.D. La. 2020) (Governor's COVID-19 proclamations have "the force and effect of law" under La. Rev. Stat. 29.724). And because the Governor's orders and proclamations impose restrictions on the use of Plaintiff's property (FAC ¶¶ 3, 29-37), "[t]he 'Ordinance or Law' exclusion therefore precludes" Plaintiff "from seeking recovery of [its] business losses under the Policy." *Isaac's Deli, Inc. v. State Auto Prop. & Cas. Ins. Co.*, 2021 WL 1945713, at *5 (E.D. Pa. May 14, 2021); *see also Image Dental, LLC v. Citizens Ins. Co.*, 2021 WL 2399988, at *8 (N.D. Ill. June 11, 2021).

Similarly, the "Acts or Decisions" Exclusion bars coverage for any loss caused by "[c]onduct, acts or decisions … of any person, group, organization, or governmental body whether intentional, wrongful, negligent or without fault." (Policy, Exclusions ¶ 3.b (p. 8), R. Doc 12-3 at p. 10.) Thus, where a claimed loss is caused by the acts or decisions of a governmental authority, the loss is excluded from coverage. *See Cytopath Biopsy Lab., Inc. v. U.S. Fidelity & Guaranty Co.*, 774 N.Y.S.2d 710, 711 (App. Div. 2004) (applying "Acts or Decisions" exclusion); *Worldwide Sorbent Prods., Inc. v. Invensys Sys., Inc.*, 2014 WL 12597394, at *11 (E.D. Tex. July 31, 2014) (same). Here, because acts by Louisiana governmental officials allegedly caused Plaintiff's losses (FAC ¶¶ 3, 29-38), the Acts or Decisions Exclusion bars coverage.

Additionally, the "Consequential Loss" Exclusion bars coverage for "loss whether

consisting of, or directly and immediately caused by … [d]elay, loss of use or loss of market." (Policy, Exclusions ¶ 2.b (p. 6), R. Doc 12-3 at p. 8.) The Loss of Income and Extra Expense endorsement also excludes "any other consequential loss." (Endorsement, Exclusions, ¶ 2 (p. 3), R. Doc 12-3 at p. 58.) Courts have upheld similar consequential loss exclusions where an insured alleged that "its damages were caused by its inability to access" its property and "did not contend that its [property] had been physically damaged in any way." *Petroterminal de Panama, S.A. v. Houston Cas. Co.*, 114 F. Supp. 3d 152, 160 (S.D.N.Y. 2015), *aff'd*, 659 F. App'x 46 (2d Cir. 2016). Plaintiff alleges that it sustained lost profits "as a direct result of the … civil orders" which placed restrictions on the use of the restaurant. (FAC ¶¶ 3, 41.) Because Plaintiff has failed establish facts bringing its loss of income claims within the terms of the coverage provided by Loss of Income Endorsement, those claims are subject to, and barred by, the Policy's exclusion for loss caused by loss of use. *See Whiskey River on Vintage, Inc. v. Ill. Cas. Co.*, 2020 WL 7258575, at *18 (S.D. Iowa Nov. 30, 2020); *Petroterminal de Panama, S.A. v. Houston Cas. Co.*, 659 F. App'x 46, 51 (2d Cir. 2016).

IV. CONCLUSION

For the foregoing reasons, State Farm respectfully requests the Court to grant its motion to dismiss Plaintiff's First Amended Complaint for failure to state a claim.

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2021, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

David Strauss
DAVID A. STRAUSS