The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WADE K. MARLER, DDS, et al.,

Plaintiffs,

v.

ASPEN AMERICAN INSURANCE COMPANY,

Defendant.

Civil Action No. 2:20-cv-00616-BJR

[CONSOLIDATED]

DEFENDANT ASPEN AMERICAN INSURANCE COMPANY'S MOTION TO DISMISS CONSOLIDATED CLASS ACTION COMPLAINT AND TABARAIE COMPLAINT

Oral Argument Requested

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I. INTRODUCTION

This motion addresses two disputes – one class action brought by four dental practices (Class Plaintiffs) and one individual action brought by dentist Shokofeh Tabaraie, both against Aspen American Insurance Company, a property insurer. The Class Plaintiffs and Tabaraie (whom we refer to collectively as Plaintiffs) hold materially identical property insurance policies, issued by Aspen, that cover income lost as a result of "direct physical loss of or damage to" property. Aspen moves to dismiss because Plaintiffs have not pled and cannot plead facts showing that any property at issue sustained direct physical loss or damage.[1]

Plaintiffs, like thousands of businesses across the country, reduced operations in compliance with state executive orders issued in the face of the COVID-19 pandemic. Plaintiffs allege that they lost income as a result of this temporary reduction of operations, and have sued Aspen for breach of contract because Aspen denied coverage. But under the plain language of Plaintiffs' insurance policies, Aspen's denials were demonstrably correct.

The parties' disputes turn on the interpretation of the critical phrase "direct physical loss of or damage to" property. In that phrase, the term "physical" as a qualifier is key – and it is fatal to Plaintiffs' claims. Under Washington law, "physical" loss of or damage to property must be tangible and discernible. Plaintiffs plead no such loss or damage here: They allege no facts showing that insured property was altered or displaced in the physical sense required by their policies and Washington law. Plaintiffs' allegations instead show that they lost income by complying with COVID-19 closure orders, which temporarily prevented them (and other dentists statewide) from fully using their property as intended. Such loss of use is critically distinct from direct physical loss of or damage to property.

As the Court is doubtless aware, thousands of policyholders have filed complaints against property insurers in federal courts across the country in the wake of the pandemic, all seeking

[1] The four Class Plaintiffs are Wade K. Marler, Karla Aylen, Kathryn Jagow, and Ronald A. Mikkelson. Their respective complaints have been consolidated into one action under the *Marler* caption. The Class Plaintiffs filed a consolidated amended complaint on November 20, 2020. Dkt. 43. Tabaraie's case is also part of the consolidated *Marler* action, but Tabaraie filed a separate post-consolidation complaint on November 25, 2020. Dkt. 46. Aspen submits this brief in accordance with the Court's November 24, 2020 Order. Dkt. 45.

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coverage for business losses they incurred in complying with government closure orders. In the overwhelming majority of these cases – including all five cases brought against Aspen on which federal courts have ruled to date – courts have granted the insurers' motions to dismiss, holding that the policyholders did not and could not plead the direct physical property loss or damage required by their policies.

That COVID-19 precedent is fully applicable in the context of Washington insurance law. Washington courts have interpreted the requirement of direct physical loss or damage consistently with the law of other states, and have required either a discernible, tangible impact on property or permanent physical dispossession, such as through theft. Washington law thus leads to the same result courts across the country have reached. Property insurance policies do not cover COVID-19-related loss of income because that loss is not caused by identifiable physical damage to or physical loss of property – which, again, is distinct from the mere loss of *use* of property. The Court can and should dismiss Plaintiffs' complaints in their entirety for this reason alone. Express exclusions in Plaintiffs' policies also preclude coverage for Plaintiffs' losses and provide an independent basis for dismissal. Finally, Tabaraie's tort claims are fatally defective: Tabaraie fails to plead facts plausibly showing that Aspen's investigation into her insurance claim was in any way improper.

II. ASPEN'S EFFORTS TO STREAMLINE BRIEFING

In an effort to avoid repetitive or otherwise burdensome briefing, Aspen refers to and incorporates by reference at various points in this motion arguments made by other two other families of insurers who are briefing motions, on the same schedule as Aspen, in business interruption cases arising from the pandemic and pending before this Court. These other two insurer families are Hartford (Hartford Casualty Insurance Company, Hartford Fire Insurance Company and Sentinel Insurance Company), which is moving to dismiss and for judgment on the pleadings in Case No. 2:20-cv-00627-BJR, and CNA (Valley Forge Insurance, Transportation Insurance, and National Fire Insurance Company of Hartford), which is moving to dismiss in Cases No. 2:20-cv-00809-BJR and 3:20-cv-06155-BJR.

The purpose of Aspen's brief in this case is to address those instances in which aspects of Aspen's insurance policies or Plaintiffs' allegations differ from the policy language and allegations addressed by Hartford and CNA. Aspen also addresses three issues that are *not* addressed by other insurers: the "ordinance or law" and "acts or decisions" exclusions and the tort claims asserted by Tabaraie (but not by the Class Plaintiffs). Aspen understands that other insurers may adopt its arguments on these three issues.

Aspen reserves its right to move to strike the Class Plaintiffs' class allegations, or to move to dismiss the class allegations on grounds of standing or personal jurisdiction. Aspen does not further raise these matters here in accordance with the Court's November 10, 2020 scheduling order, in which the Court directed the parties to brief only the issues of coverage and exclusion. Dkt. 42.

III. STATEMENT OF RELEVANT FACTS

Plaintiffs purchased property insurance policies from Aspen. Dkt. 43 ¶ 14; *see* Dkt. 46 ¶¶ 14, 16. These policies include what is titled the "Building, Blanket Dental Practice Personal Property and Income Coverage Part." Dkt. 43 ¶ 14; Dkt. 46 ¶ 17.[2] This part of the policies covers "direct physical damage" to specified property. Ex. A at 4; Ex. B at 4. "Damage" is in turn defined as "partial or total loss of or damage to" property. Ex. A at 22; Ex. B at 22. The policies also contain several exclusions, which preclude coverage even for losses that otherwise fall within their scope. Ex. A at 14-15; Ex. B at 14-15.

On March 19, 2020, after COVID-19 had spread through the United States, Governor Jay Inslee issued a proclamation prohibiting dentists and other specified healthcare providers from

[2] Marler's policy is attached as Exhibit A to the Declaration of Robin Wechkin. Because Plaintiffs allege that the policies provided to the three other Class Plaintiffs are "materially identical" to Marler's policy, Aspen does not attach those three policies. Dkt. 43 ¶ 18. Tabaraie's policy is attached as Exhibit B to the Wechkin Declaration. The policies are incorporated by reference into the respective complaints and hence are properly before the Court. *E.g.*, *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998) (insurance policy is incorporated by reference into complaint when plaintiff's claims are premised on the policy; court's consideration does not convert defendant's motion to dismiss into a motion for summary judgment), *superseded by statute on other grounds as stated in City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020). All further "Ex. _" citations in this brief refer to the exhibits to the Wechkin Declaration, using internal document pagination. "App. Ex. _" citations refer to the exhibits to the contemporaneously-filed Joint Statement and Appendix submitted collectively by numerous of the insurers litigating COVID-19 business interruption cases before this Court.

providing services save in emergencies. Dkt. 43 ¶ 44; Dkt. 46 ¶ 44. The purpose of the proclamation was to limit the spread of the coronavirus and to conserve personal protective equipment needed by healthcare workers. *Id.* On March 30, 2020, Governor Inslee issued a "Stay-at-Home Order" requiring Washington residents to stay in their homes except under specified circumstances. Dkt. 43 ¶ 50; Dkt. 46 ¶ 50.

The Class Plaintiffs allege that after these orders were issued, their properties became "unusable for its [sic] intended and insured purpose." Dkt. 43 ¶ 58. Tabaraie alleges the same, although she oddly refers to the property of a "Dr. Strelow." Dkt. 46 ¶ 58. Mirroring the relevant policy language, Plaintiffs also assert that their properties "sustained direct physical loss and/or direct physical property damage related to COVID-19 and/or the proclamations or orders." Dkt. 43 ¶ 60; Dkt. 46 ¶ 60. Plaintiffs do not, however, plead facts showing that their property was altered in any way, nor that they were permanently dispossessed of any real or personal property. Nor do Plaintiffs allege that the virus was present on their properties.

The Class Plaintiffs further allege that after they submitted insurance claims seeking coverage for economic losses, Aspen denied the claims "without meaningful investigation." Dkt. 43 ¶¶ 68-72. The Class Plaintiffs do not, however, assert any claim in which they challenge Aspen's investigation or other aspects of its claims-handling practices. Class Plaintiffs assert only two claims, one for breach of contract and one for declaratory relief. *Id.* ¶¶ 87-99.

Tabaraie further alleges that she submitted an insurance claim to Aspen on March 24, 2020; that she received an email acknowledging her claim on March 28, 2020; and that she received a letter denying coverage on the ground that her property did not "sustain[ ] direct physical damage" on May 12, 2020. Dkt. 46 ¶ 89; Ex. C (denial letter).[3] In addition to asserting claims for breach of contract and declaratory judgment (as the Class Plaintiffs do), Tabaraie asserts three tort claims – one for alleged failure to act in good faith, one for damages under the Consumer Protection Act (CPA) and one for a CPA injunction. *Id.* ¶¶ 114-34.

[3] Tabaraie cites and relies on both Aspen's denial letter and her claim submission. Dkt. 46 ¶¶ 82, 88, 91. Both documents are accordingly incorporated by reference into the complaint, just as her insurance policy is. *Supra* at 3 n.2.

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IV. ARGUMENT

A. Pleading Standards and Washington Rules of Insurance Policy Interpretation.

Aspen incorporates by reference the discussion of pleading standards and insurance policy interpretation in Sections III.A and III.B of the motion to dismiss filed by CNA.

B. Plaintiffs Fail To Alleged A Covered Loss Within The Scope Of Their Policies.

The Class Plaintiffs seek coverage under four provisions of the Policies: the practice income provision, the extended practice income provision, the extra expense provision, and the civil authority provision. Dkt. 43 ¶ 77. Tabaraie asserts that she is entitled to coverage under the practice income and civil authority provisions, along with "possibly other provisions." Dkt. 46 ¶¶ 84, 86. 87. Critically, all four provisions in play explicitly limit coverage to situations in which property has sustained "direct physical damage." *Infra* at 5-8. Under the practice income provisions and the extra expense provision, the insured's own property must have sustained direct physical damage. *Id.* Under the civil authority provision, physical damage to a different property must have led to the issuance of an order by a civil authority, and that order must have prohibited access to the policyholder's property. *Id.* at 8.

Plaintiffs allege no facts showing that any property sustained physical damage or was physically lost. Nor do they allege facts showing that their loss of income arose from any direct physical damage to or loss of property. That is fatal.

1. Plaintiffs Have Not Alleged A Loss Within The Practice Income Provision.

Aspen incorporates by reference the arguments addressing direct physical loss of or damage to property in Section I of the motion filed by Hartford. We briefly address below the few unique aspects of Plaintiffs' claims against Aspen.

The relevant language in Aspen's practice income provision is as follows:

> We will pay for the actual loss of practice income you sustain . . . *due to the necessary suspension* of your practice during the *period of restoration*. The suspension must be caused by *direct physical damage* to the building or blanket dental practice personal property at the [insured] premises caused by or resulting from a covered cause of loss . . . .

Ex. A at 6; Ex. B at 6 (emphases added). Incorporating the definition of "damage" – that is,

"partial or total loss of or damage to" – this provision makes clear that a multi-part causal chain is required to trigger coverage for lost income. Specifically, (1) a covered cause of loss (2) must cause direct physical loss of or damage to the policyholder's building or personal property, (3) which must in turn cause the necessary suspension of the policyholder's practice, (4) which must in turn cause the policyholder to lose practice income. Unless each step is satisfied, there is no coverage for lost income.[4]

Plaintiffs fail to plead the facts necessary to satisfy the second of these four causal links, direct physical loss of or damage to property. Indeed, Plaintiffs themselves claim that a covered cause of loss – allegedly, the closure orders – led *directly* to the suspension of operations, without the intervening loss of or damage to property required by their policies. Plaintiffs claim that "[a]s a result of the proclamations and orders, [they] were prohibited from operating their dental businesses except according to the terms of the proclamations and orders." Dkt. 43 ¶ 56; *see also* Dkt. 46 ¶ 56 (same substantive allegations in Tabaraie's complaint).

Because Plaintiffs cannot plead facts showing that they lost income as a result of physical property damage or loss, they seek to fill the gap with generalizations and conclusions. Plaintiffs contend that when "COVID-19 aerosolized or suspended droplets or particles" are in the air or on surfaces in "physical property," this makes the property "unsafe and unusable." Dkt. 43 ¶ 37; Dkt. 46 ¶ 37. Plaintiffs similarly assert that if infected people are on a property, the property becomes "unsafe and unusable." Dkt. 43 ¶ 41; Dkt. 46 ¶ 41. Plaintiffs also cite statistics related to the prevalence of COVID-19 in King County and in Washington. Dkt. 43 ¶¶ 33-36; Dkt. 46 ¶¶ 33-36.

None of this is sufficient as a pleading matter. Plaintiffs do not allege that droplets, particles or infected people were present on *their* properties. Plaintiffs decree as a general matter that the presence of droplets, particles or infected people on a property "causes direct physical damage to property and direct physical loss of property." But even if this conclusory legal

[4] In Aspen's policies, only the term "damage" appears in the coverage provision. *Supra* at 3. The term "loss" enters the equation by means of a definition: "Damage" is defined as "partial or total loss of or damage to" property. *Id.* This differs from the Hartford policies, in which both "damage" and "loss" appear in the coverage provision. This structural difference, however, has no practical or legal significance relevant to this motion. Coverage is predicated on direct physical damage to or loss of covered property under Aspen's policies just as it is under the Hartford policies.

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assertion satisfied the *Twombly*/*Iqbal* standard – and it does not – it would be irrelevant to the facts Plaintiffs allege. Again, neither the Class Plaintiffs nor Tabaraie allege that droplets, particles or infected people were present on their properties. Dkt. 43 ¶ 40; Dkt. 46 ¶ 40. Plaintiffs' generalizations about virus transmission and prevalence cannot cure this central pleading deficiency.[5]

2. Plaintiffs Have Not Alleged A Loss Within The Extended Practice Income Provision.

With respect to Plaintiffs' claims that they are entitled to coverage under the extended practice income provision in their policies, Aspen again incorporates by reference the arguments addressing the direct physical damage requirement in Section I of the motion filed by Hartford.

Under the extended practice income, as under the practice income, direct physical damage is required:

> We will pay for the actual loss of practice income you incur during the period that:
>
> a. *Begins on the date property*, except finished stock, *is actually repaired, rebuilt or replaced* and your practice is resumed; and
> b. Ends on the earlier of:
> 1) The date you could restore your practice with reasonable speed, to the condition that would have existed if no direct physical damage happened; or
> 2) 12 consecutive months after the date determined in (1) above.
>
> *Loss of practice income must be caused by direct physical damage at the described premises* caused by or resulting from any covered cause of loss.

Ex. A at 7 (emphases added); Ex. B at 7 (same). As with the practice income provision, both the term "direct physical damage" and the restoration clause preclude coverage here. Plaintiffs do not allege that they lost income because of physical damage to or loss of their property, as those terms are interpreted under Washington law. Plaintiffs allege that they lost income because government closure orders prevented them from using the property as anticipated. Dkt. 43 ¶ 56; Dkt. 46 ¶ 56.

[5] Plaintiffs cannot cure this defect by amendment either. As Hartford has explained in its discussion of the direct physical damage or loss requirement, even an allegation that the coronavirus was present on property would not show that the property had been physically altered or that the policyholder had suffered its dispossession. A recent decision from the COVID-19 context dismissing a complaint against Aspen holds the same. *Carrot Love, LLC v. Aspen Specialty Ins. Co.*, 2021 WL 124416 (S.D. Fla. Jan. 13, 2021) (dismissing claim notwithstanding allegations that coronavirus was present on surfaces within the property).

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3. Plaintiffs Have Not Alleged A Loss Within The Extra Expense Provision.

With respect to Plaintiffs' claims that they are entitled to coverage under the extra expense provision in their policies, Aspen again incorporates by reference the arguments addressing the direct physical damage requirement in Section I of the motion filed by Hartford.

The extra expense provision in Plaintiffs' policies contains the same limitations discussed above:

> Extra expense means the extra expenses necessarily incurred by you during the *period of restoration* to continue normal services and operations which are interrupted due to damage by a covered cause of loss to the premises described . . .
>
> We will only pay for extra expenses that you incur within 12 consecutive months after the date of *direct physical damage* . . . .

Ex. A at 7 (emphases added); Ex. B at 7 (same). Once again, Plaintiffs have alleged no direct physical damage or loss and no property in need of restoration. Their alleged losses therefore fall outside of this provision too.

4. Plaintiffs Have Not Alleged A Loss Within The Civil Authority Provision.

With respect to Plaintiffs' claims that they are entitled to coverage under the civil authority provision in their policies, Aspen incorporates the arguments in Section III.C.2 of CNA's motion.

The civil authority provision in Plaintiffs' policies obligates Aspen to "pay for the actual loss of practice income . . . you sustain caused by action of civil authority that prohibits access to the [insured] premises due to *direct physical damage to property*, other than at the [insured] premises, caused by or resulting from any covered cause of loss." Ex. A at 10 (emphasis added); Ex. B at 10 (same). Plaintiffs fail to plead facts showing that they are entitled to coverage under this provision. *E.g.*, *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.*, 2020 WL 7889047 (N.D. Ill. Dec. 22, 2020) (dismissing claim against Aspen under civil authority coverage where plaintiff did not allege damage to property in its vicinity and access was not prohibited by COVID-19 orders).

5. Numerous Courts Have Dismissed COVID-19-Related Claims Against Aspen Under The Same Policy or Policies Similar To Those At Issue Here.

Multiple federal courts have now had occasion to adjudicate claims against Aspen in the

context of COVID-19 business interruption litigation, and to determine whether Aspen's policies provide coverage under one or more of the provisions just discussed. The policy language at issue in those cases is the same or substantially similar to the policy language at issue here. In every case in which a federal court has ruled on one of Aspen's motions to dismiss, that court has granted the motion. *Carrot Love*, 2021 WL 124416 (dismissing claim because plaintiff restaurant failed to plead facts showing direct physical loss of or damage to property, notwithstanding allegations that coronavirus was present on surfaces within the property); *Berkseth-Rojas DDS v. Aspen Am. Ins. Co.*, 2021 WL 101479 (N.D. Tex. Jan. 12, 2021) (dismissing claim because plaintiff dentist failed to plead facts showing that coronavirus was present on insured property and hence failed to show direct physical loss of or damage to insured property); *Bradley Hotel*, 2020 WL 7889047 (N.D. Ill. Dec. 22, 2020) (dismissing claim because plaintiff hotel failed to plead facts showing that insured property was physically altered); *Emerald Coast Restaurants v. Aspen Specialty Ins. Co.*, 2020 WL 7889061 (N.D. Fla. Dec. 18, 2020) (dismissing claim because plaintiff restaurant failed to show that economic losses were caused by direct physical loss of or damage to insured property); *Kirsch v. Aspen Am. Ins. Co.*, 2020 WL 7338570 (E.D. Mich. Dec. 14, 2020) (dismissing claim because plaintiff dentist failed to plead facts showing tangible damage to insured property). The Court should dismiss Plaintiffs' claims here for the same reasons.

C. Plaintiffs' Claims Are Foreclosed by Policy Exclusions.

Even if Plaintiffs' losses fell within the scope of the policies, express exclusions would preclude coverage. *Diamaco, Inc. v. Aetna Cas. & Sur. Co.*, 97 Wn. App. 335, 337 (1999) (insurer is not liable for excluded losses). Three policy exclusions unambiguously bar coverage here.

The "loss of use" exclusion. Aspen incorporates by reference the argument in Hartford's brief addressing the "loss of use" exclusion. Plaintiffs' policies provide that Aspen "will not pay for any damages caused by or resulting from . . . delay, *loss of use* or loss of market." *Supra* at 5; Ex. A at 15 (emphasis added); Ex. B at 15 (same). This clause unambiguously excludes coverage for "loss of use." And loss of use is plainly the basis of Plaintiffs' claims: Plaintiffs allege that they have been "unable to use their dental practices for their full insured purposes." Dkt. 43 ¶ 56; Dkt. 46 ¶ 56. Like the four coverage provisions discussed above, the loss of use exclusion makes

clear that an insured may not recover for lost income in the absence of direct physical damage to or loss of property.

The "ordinance or law" exclusion. Aspen's policies also contain an "ordinance or law" exclusion, which provides that Aspen "will not pay for damage caused directly or indirectly by . . . [t]he enforcement of any ordinance or law regulating the construction, use or repair of any property." Ex. A at 14; Ex. B at 14. As a New York State appellate court has explained, such exclusions "clearly and unambiguously exclude[ ] coverage for losses caused directly or indirectly by the enforcement of any ordinance or law regulating the . . . use . . . of any property." *Ira Stier, DDS, P.C. v. Merchants Ins. Grp.*, 127 A.D.3d 922, 924 (N.Y. App. Div. 2015) (applying exclusion where dental practice could not operate as the result of an ordinance requiring a certificate of occupancy). Specifically, "ordinance or law" exclusions bar coverage for "business income losses . . . caused by the enforcement of the law." *Id.* Those are, of course, precisely the losses Plaintiffs seek to recover here.

Governor Inslee's COVID-19 orders plainly qualify as ordinances or laws sufficient to trigger this exclusion. Each of the orders had or has the force of law, which is the test under the exclusion. *See, e.g., Wright v. State Farm Fire & Cas. Co.*, 555 F. App'x 575, 578 (6th Cir. 2014) ("Ordinances and laws are characterized by their being created and enforced by a governmental authority . . . . For example, Webster's Third defines an 'ordinance' as 'an authoritative decree or direction' or 'a public enactment, or law promulgated by governmental authority'"). Governor Inslee issued the COVID-19 orders pursuant to a statute granting emergency powers to the Governor, including the power to "proclaim a state of emergency" in response to a disaster that affects "life, health, property, or the public peace." RCW 43.06.010. After proclaiming a state of emergency, a Washington governor has the authority to issue orders prohibiting "such other activities as he or she reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace." RCW 43.06.220. Washington businesses face criminal liability if they fail to comply with orders issued under these statutes. RCW 43.06.220 (5) ("Any person willfully violating any provision of an order issued by the governor under this section is guilty of a gross misdemeanor.").

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Accordingly, if the Court concludes that Plaintiffs are entitled to coverage under Aspen's policies (which it should not do), Plaintiffs' alleged losses would fall within the scope of the ordinance or law exclusion. At least one federal court has already recognized the application of this exclusion in the COVID-19 context. *Newchops Rest. Comcast LLC v. Admiral Indemn. Co.*, 2020 WL 7395153, at *7 (E.D. Pa. Dec. 17, 2020) (under "unequivocal" language of the governmental order exclusion, no coverage for business losses caused by compliance with COVID-19 related orders that regulated the use of property and had the force of law; dismissing complaint with prejudice). The Court should do the same here.[6]

The "acts or decisions" exclusion. Plaintiffs' policies also provide that Aspen "will not pay for damage caused by or resulting from any of the following: . . . acts or decisions, including the failure to act or decide, of any entity." Ex. A at 16; Ex. B at 16. That exclusion applies here: Plaintiffs themselves allege that their losses were caused by the acts or decisions of Governor Inslee. Dkt. 43 ¶ 54 (Governor's orders "required [Plaintiffs] to close, suspend and/or curtail their businesses." Dkt. 46 ¶ 54 (same). On similar facts – including facts arising from the current pandemic – courts have applied the exclusion to preclude coverage.[7] The Court should do the same here.

D. Tabaraie Fails To Plead Facts Plausibly Alleging A Bad Faith Claim.

Unlike the Class Plaintiffs, Tabaraie claims that Aspen breached its duty of good faith. Under Washington law, the question of whether an insurer has acted in good faith is distinct from the

[6] The lack of more numerous authorities on this issue in the COVID-19 context likely results from the fact that courts have overwhelmingly determined that policyholders cannot state a claim for lost income under the relevant coverage provisions, and therefore have had no occasion to reach the exclusion. *E.g.*, *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405, at *13 n.5 (S.D.N.Y. Dec. 11, 2020) ("Because the Court concludes that [plaintiff] fails to establish entitlement to coverage under the Policy, it need not reach the question of whether [the ordinance or law exclusion] would apply").

[7] *Whiskey River on Vintage, Inc. v. Illinois Cas. Co.*, 2020 WL 7258575, at *18-19 (S.D. Iowa Nov. 30, 2020) (in COVID-19 context, insurer entitled to declaratory relief of non-coverage under the acts or decisions exclusion, which "unambiguously states [the insurer] will not pay for any loss or damage caused by or resulting from the acts or decisions of a governmental body"); *Jernigan v. Nationwide Mut. Ins. Co.*, 2006 WL 463521, at *10-11 (N.D. Cal. Feb. 27, 2006) (acts or decisions exclusion applied to loss caused by town's "stop-work order"); *Cytopath Biopsy Lab., Inc. v. U.S. Fid. & Guar. Co.*, 774 N.Y.S.2d 710, 711 (N.Y. App. Div. 2004) (acts or decisions exclusion applied where authorities refused to permit resumption of operations); *Torres Hillsdale Country Cheese, L.L.C. v. Auto-Owners Ins. Co.*, 2013 WL 5450284, at *5–6 (Mich. Ct. App. Oct. 1, 2013) (unpublished) (acts or decisions exclusion applied where government order prohibited sale of cheese).

question of whether coverage exists under a policy. *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 279 (1998). As long as an insurer acts reasonably, however, it cannot be liable for bad faith – regardless of whether its coverage determination was correct. *Hanson v. State Farm Mut. Auto Ins. Co.*, 261 F. Supp. 3d 1110, 1117 (W.D. Wash. 2017) ("[B]oth bad faith and CPA violations turn on the reasonableness of the insurer's actions."). Where a policyholder fails to allege facts plausibly showing that the insurer acted unreasonably, the insurer is entitled to dismissal under Rule 12(b)(6). *Concept Dorssers v. Pac. Nw. Title Ins. Co., Inc.*, No. C09-1692-RSL, 2010 WL 1141462, at *3 (W.D. Wash. Mar. 19, 2010).

Tabaraie does not appear to allege that Aspen's coverage determination was unreasonable. Nor could she, given the copious case law in the COVID-19 context confirming that Aspen's coverage determination was correct. Instead, Tabaraie asserts that Aspen's actions in investigating her claim were unreasonable. That claim fails in the first instance because Tabaraie's own allegations show that the investigation she says Aspen should have undertaken would have been futile – and insurers are not required to take futile actions. Tabaraie also fails to plead facts showing that she incurred any harm as a result of Aspen's purportedly improper investigation. Tabaraie's bad faith claim fails for both of these reasons.

Duty to investigate. Under Washington law, "[c]laims by insureds against their insurers for bad faith are analyzed applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by any breach of duty." *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478 (2003). An insurer breaches its duty of good faith only if its actions are "unreasonable, frivolous, or unfounded." *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560 (1998). A bad faith claim is "not easy to establish, and an insured has a heavy burden to meet." *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 433 (2002).

The same principles apply where a policyholder claims that an insurer conducted an investigation in bad faith. "As long as the insurer acts honestly, bases its coverage decision on adequate information, and does not overemphasize its own interests," a bad-faith investigation claim will not lie. *Coventry*, 136 Wn.2d at 280. Critically, insurers have no duty under Washington law to undertake futile investigations. An insurer is "only required to fulfill its contractual and statutory

obligation[s]" in investigating a claim; the insurer is not required to "take other action inconsistent" with an insurance policy. *Id.* at 279-80; *see also Lake Shores Homeowners Ass'n v. Cont. Cas. Co.*, No. C18-1353-MJP, 2018 WL 9439866, at *6 (W.D. Wash. Dec. 14, 2018) (investigation is not unreasonable where "coverage is clearly precluded by the policy, or where the relevant facts are already known to the insurer such that investigation would be truly pointless"). Similarly, where an insurer is in possession of the information necessary to make a coverage determination, the insurer is not required to consider "every possible" additional fact related to the claim. *Hanson*, 261 F. Supp. 3d at 1117.

Tabaraie asserts, "upon information and belief," that Aspen acted in bad faith by failing to investigate three matters: (1) the possible presence of the coronavirus in her dental office, (2) "the community spread of COVID-19 in the vicinity of [her] practice," and (3) the "timing, scope, or impact of governmental proclamations or closure orders that affect plaintiff's business or business property." Dkt 46 ¶¶ 68-70. With respect to the first two matters – the presence of the virus on Tabaraie's property and in the surrounding area – Tabaraie's own allegations show that any investigation would have been futile.

Tabaraie first submitted an insurance claim to Aspen on March 24, 2020, five days after Governor Inslee issued his March 19, 2020 order prohibiting non-emergency dental services. *Id.* ¶ 44. Notably, Tabaraie does not allege that the virus was ever on her property – not between March 19, 2020 and March 24, 2020, and not at any other time either. Tabaraie asserts generally that the coronavirus "remains stable and transmittable for up to three hours and up to two or three days on surfaces." *Id.* ¶ 24. But Governor Inslee's March 19, 2020 order was effective immediately, and Tabaraie does not allege that she or any other person was present in her dental office between March 19, 2020 and March 24, 2020. Under Tabaraie's own chronology, therefore, even an investigation immediately following her March 24, 2020 claim submission could not have led to the detection of the coronavirus on her property. Any virus that may have been present there would have dissipated before Tabaraie even submitted her claim to Aspen.

Aspen plainly did not act in bad faith in declining to investigate whether the coronavirus was present on Tabaraie's property where Tabaraie herself has never claimed that this was the case,

and where any virus would necessarily have dissipated before Aspen had an opportunity to visit the premises. Washington law, again, does not require insurers to conduct "truly pointless" investigations. *Lake Shores*, 2018 WL 9439866, at *6.

The investigation Tabaraie claims was required would not only have been futile as a factual matter, it would also have been unnecessary given the nature of Tabaraie's insurance claim and the coverage available under her policy. Governor Inslee's March 19, 2020 order included a provision stating that it would be in effect until May 18, 2020. App. Ex. 8. In submitting her insurance claim to Aspen, Tabaraie stated that her business had "been force[d] to shut down until May 18, 2020." Ex. D at 1. Tabaraie's submission thus made clear that she sought coverage for losses caused by the closure order – not by any possibility that the coronavirus was present on her property.

Aspen denied coverage on that basis: Closure orders may cause business losses, but they do not do so through direct physical loss of or damage to covered property. *Supra* at 5-6; Ex. C at 5-6 ("Coverage Analysis"). Given the limitation of the applicable policy provisions to direct physical loss of or damage to property, no facts emerging from an investigation of Tabaraie's property or the surrounding area would have altered Aspen's coverage determination. Policyholders do not state bad faith claims under these circumstances – where the insurer has made a reasonable coverage determination and where investigation would have had no impact on that determination. *See Capelouto v. Valley Forge Ins. Co.*, 98 Wn. App. 7, 19 (1999); *Lake Shores*, 2018 WL 9439867, at *6 (investigation would be futile "where coverage is clearly precluded by the terms of the policy").

Much the same is true of the third matter Tabaraie claims Aspen should have investigated – the "timing, scope, or impact" of the closure orders on her property and business. Dkt. No. 46 ¶ 70. Here too, investigation would have been both futile and unnecessary. No fact relevant to timing, scope or impact would have altered Aspen's good-faith determination that Tabaraie suffered no direct physical loss of or damage to property. And on March 24, 2020, when Tabaraie submitted her claim, the issues of timing, scope and impact were clear in any event: The March 19, 2020 closure order was to last two months, during which Tabaraie would be barred from providing all but emergency dental services. Because Tabaraie does not and cannot allege that any of the matters she faults Aspen for failing to investigate were relevant to the coverage decision she challenges,

Tabaraie has not plausibly pled facts sufficient to state a claim for bad-faith investigation.

Harm. Tabaraie's bad faith claim also fails because Tabaraie has pled no facts showing that she incurred harm as a result of Aspen's purportedly deficient investigation. "As an element of every bad faith or CPA action . . . an insured must establish it was harmed by the insurer's bad faith acts." *Coventry*, 136 Wn.2d at 276. The insured must plead (and ultimately prove) that it incurred harm beyond the denial of coverage as a result of the insurer's allegedly bad-faith investigation. *Id.* at 283; *see also, e.g., St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 132 (2008) (bad faith claimant "must prove actual harm," and claimant's damages "are limited to the amounts it has incurred as a result of the bad faith"); *Werlinger v. Clarendon Nat'l Ins. Co.*, 129 Wn. App. 804, 809-10 (2005).

Tabaraie alleges no cognizable harm flowing from the challenged investigation. The only harm Tabaraie posits is the purportedly wrongful denial of coverage – and under the authorities above, that is not enough.

Coventry illustrates the circumstances in which an insured may plead and prove cognizable harm apart from the denial of coverage. The policyholder in *Coventry*, believing the insurer's investigation was inadequate, undertook an investigation of its own and hired professionals to conduct it. 136 Wn.2d at 283. Although the insurer's coverage determination was ultimately found to have been correct, the insured was entitled to assert a bad faith claim to recover the expenses it incurred in conducting its investigation. *Id.* at 285. Tabaraie, by contrast, alleges no comparable expenses, nor any other harm purportedly caused by what she claims were deficiencies in Aspen's investigation. That is fatal.

E. Tabaraie Fails to Plead Facts Plausibly Alleging a CPA Claim.

Tabaraie asserts two claims under the CPA, one for damages and one for an injunction. These claims share the defects of Tabaraie's bad faith claim. Tabaraie fails to plead facts plausibly showing that Aspen took any improper action, that Tabaraie was harmed, or that any alleged harm was the result of Aspen's allegedly improper actions.

To state a CPA claim, a plaintiff must establish that (1) the defendant committed an unfair or deceptive act or practice; (2) the unfair or deceptive act or practice occurred in trade or commerce;

(3) the unfair or deceptive act or practice impacted the public interest; (4) the plaintiff suffered an injury to her business or property; and (5) the injury was caused by the unfair or deceptive act or practice. *Hangman Ridge Training Stables, Inc. v Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986); RCW 19.86.190. Tabaraie fails to plead facts sufficient to satisfy the first, fourth and fifth elements.

Deceptive act or practice. Tabaraie lists a number of purported "duties, regulations and standards" applicable to insurers, Dkt. 46 ¶¶ 93-100, but the sole purportedly improper action she identifies as a factual matter relates to Aspen's investigation. As discussed above, Tabaraie's own allegations defeat her contention that Aspen's investigation was improper, let alone unfair or deceptive. Tabaraie's allegations show that the investigation she claims Aspen should have undertaken would have been futile.

Injury. Tabaraie's allegation of injury is similarly defective. Tabaraie merely states in conclusory form that "Aspen's conduct caused injury to [Plaintiff's] 'business or property,' as those terms are defined for the purposes of the CPA." Dkt. 46 ¶ 127. Such a bare recital of elements is insufficient under controlling law. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Courts in this District accordingly dismiss CPA claims where plaintiffs make similarly conclusory allegations of injury. *Mary Lou Coppinger v. Allstate Ins. Co.*, No. C17-1756-JCC, 2018 WL 1121327, at *2 (W.D. Wash. Mar. 1, 2018) (rejecting allegation that "Defendant's Allstate's violations of the Washington Administrative Code and other unreasonable actions, as alleged herein, harmed [plaintiff]"; "[t]his is a conclusory statement that fails to present the Court with sufficient factual basis to conclude that relief may be warranted under the CPA"). Tabaraie's conclusory allegation of injury here is wholly inadequate.

Causation. Tabaraie finally fails to adequately allege that any challenged action by Aspen caused her to suffer any purported injury. To state a CPA claim, a "plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84 (2007). Tabaraie's allegations of causation are once again entirely conclusory: "Aspen's conduct caused injury to [Plaintiff's] 'business or property,' as those terms are defined for the purposes of the CPA." Dkt. 46 ¶ 127. This is insufficient. *Ass'n Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 79 F. Supp.

2d 1219, 1229 (W.D. Wash. 1999) (dismissing CPA claims where plaintiffs did not allege "an injury to their business or property causally related to the alleged or unfair act or practice"). Tabaraie lost business income because COVID-19 government orders required her to temporarily cease providing non-emergency dental services. Tabaraie pleads no facts showing that any action Aspen took or failed to take caused or increased this loss of income.

V. CONCLUSION

Plaintiffs' claims share the fatal defects of the claims asserted by policyholders across the country who lost business income when state and local governments issued closure orders in an attempt to halt the spread of COVID-19. Plaintiffs' situations plainly spark sympathy, but sympathy is not the same as coverage. The Court should dismiss the Plaintiffs' actions because neither the Class Plaintiffs nor Tabaraie have plausibly stated a claim on which relief may be granted. And because both the Class Plaintiffs and Tabaraie have already amended their complaints at least twice and cannot cure the defects in their claims through further amendment, the Court should dismiss both actions with prejudice. *Schreiber Distr. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986); Dkt. 1, Dkt. 6, Dkt. 25 (three prior complaints filed by Marler); *Tabaraie v. Aspen*, previous Case No. 2:20-cv-01035-MJR, Dkt. 1, Dkt. 23 (two prior complaints filed by Tabaraie).

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CERTIFICATE OF SERVICE

I certify that on this 15th day of January, 2021 I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties who have appeared in this case.

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