UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:20-cv-21641-JG

CAFE INTERNATIONAL HOLDING COMPANY LLC,

Plaintiff,

v.

WESTCHESTER SURPLUS LINES INSURANCE COMPANY,

Defendant.

DEFENDANT WESTCHESTER SURPLUS LINES INSURANCE COMPANY'S MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO RULE 12(c) AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

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REQUEST FOR HEARING

Pursuant to Local Rule 7.1(b)(2), Defendant Westchester Surplus Lines Insurance Company ("Westchester") respectfully requests that the Court schedule a hearing on its motion for judgment on the pleadings to address the important and case-dispositive questions of law the motion presents to the Court. Westchester believes that oral argument—which would take approximately one hour with time split between the parties—would benefit both parties, aid the Court, and help efficiently resolve this dispute.

DEFENDANT WESTCHESTER SURPLUS LINES INSURANCE COMPANY'S MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO RULE 12(c)

Under Federal Rule of Civil Procedure 12(c), Defendant Westchester Surplus Lines Insurance Company ("Westchester") moves for judgment in its favor on all the claims filed against it by Plaintiff Cafe International Holding Company LLC ("Cafe International") in the Complaint.[1] The incorporated memorandum of law and pleadings on file in this action, as well as any argument presented at a hearing, support this motion.

MEMORANDUM OF LAW IN SUPPORT OF RULE 12(c) MOTION

Westchester issued a commercial property insurance policy to Cafe International that provides coverage where there is "direct physical loss of or damage to" Cafe International's restaurant. Cafe International contends that the policy also covers any economic losses it suffered because of the COVID-19 pandemic, despite no physical changes to the restaurant or to any other property. Cafe International's claim fails as a matter of law.

The Eleventh Circuit has held that, under Florida law, there is no direct physical loss of or damage to property unless the property has been materially altered. The mere temporary presence of an unwanted substance on the property is not enough. Here, Cafe International alleges no facts to establish whether, or in what way, the coronavirus was present at its restaurant. Furthermore, Cafe International does not allege that the virus changed the restaurant in any physical way. To the contrary, Cafe International has been allowed to offer delivery, pick-up, and takeout services throughout the pandemic, and it is well accepted that the virus can be removed from surfaces through ordinary cleaning methods.

Since the pandemic began, every court in the Southern District of Florida to have addressed

[1] Cafe International initially sued Westchester's indirect parent company, Chubb Limited, as well, but it has since voluntarily dismissed all claims against Chubb Limited. *See* ECF Nos. 33, 35.

the theory of coverage espoused by Cafe International has rejected it. Those courts, like courts around the nation, have endorsed "the nearly unanimous view that COVID-19 does not cause direct physical loss or damage to a property sufficient to trigger coverage." *Carrot Love, LLC v. Aspen Specialty Ins. Co.*, 2021 WL 124416, at *2 (S.D. Fla. Jan. 13, 2021) (Scola, Jr., J.); *see also, e.g.*, *15 Oz Fresh & Healthy Food LLC v. Underwriters at Lloyd's London*, 2021 WL 896216, at *3 (S.D. Fla. Feb. 22, 2021) (Singhal, J.) ("align[ing] itself with other courts that have granted motions to dismiss" COVID-19 claims); *AE Mgmt., LLC v. Ill. Union Ins. Co.*, 2021 WL 827192, at *4 (S.D. Fla. Mar. 4, 2021) (Scola, Jr., J.) (dismissing COVID-19 claims based on "numerous … cases issuing from state and federal courts throughout Florida"); *Café La Trova LLC v. Aspen Specialty Ins. Co.*, 2021 WL 602585, at *8–9 (S.D. Fla. Feb. 16, 2021) (Altonaga, J.) (presence of coronavirus at restaurant does not give rise to direct physical loss or damage); Ltr. Op. 2–4, *Manhattan Partners, LLC v. Am. Guar. & Liab. Ins. Co.*, No. 2:20-cv-14342, ECF No. 17 (D.N.J. Mar. 17, 2021) (same); *Robert E. Levy, D.M.D., LLC v. Hartford Fin. Servs. Grp. Inc.*, 2021 WL 598818, at *12 (E.D. Mo. Feb. 16, 2021) (dismissing COVID-19 claims filed against Westchester affiliate based on "great weight of authority"). As in those other failed cases, Cafe International's Complaint claims that the coronavirus temporarily rendered its restaurant unsafe, limited access to the restaurant, and impaired the restaurant's intended use. But even if such conclusory allegations were proven, they would not establish any "direct physical loss of or damage to" the property, as required by the policy. Cafe International cannot overcome this fundamental legal defect.

The COVID-19 pandemic is extraordinary, but the contract interpretation required in this case is not. Under the plain language of Cafe International's insurance policy and Eleventh Circuit authority, Westchester is entitled to judgment on the pleadings. The Court should dismiss the Complaint in its entirety with prejudice and enter judgment for Westchester.

BACKGROUND

I. THE POLICY

Westchester issued a commercial property insurance policy (the "Policy") to Cafe International—the owner and operator of IT Italy, a restaurant in Fort Lauderdale, Florida—for the policy period from November 29, 2019 to November 29, 2020. Compl. (ECF No. 1) ¶¶ 1, 19; Policy (ECF No. 1-1) at 2.[2] The Policy specifies what it covers and what it does not. Coverage is available only if Cafe International proves that a "Covered Cause of Loss" caused direct physical loss of or damage to the property. Policy (ECF No. 1-1) at 51–52. The Policy defines "Covered Cause of Loss" as "direct physical loss unless the loss is excluded or limited in this policy." *Id.* at 62.

The Policy provides three types of coverage relevant here: Business Income, Extra Expense, and Civil Authority. Each type of coverage is triggered only where there is (i) direct physical harm to property (ii) caused by or resulting from a Covered Cause of Loss.

a. Business Income and Extra Expense Coverage

The Business Income provision calls for Westchester to pay Cafe International for certain losses of income if Cafe International had to suspend operations due to (i) "direct physical loss of or damage to property at [Cafe International's insured] premises" (ii) caused by or resulting from a "Covered Cause of Loss." *Id.* at 51. Specifically, the Business Income provision states:

[2] This Court may consider the Policy and assume its contents are true for purposes of this motion because Cafe International attached the Policy to its Complaint, the Complaint relies extensively on the Policy, and the Policy forms the basis of Cafe International's insurance coverage claims. *See, e.g.*, Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."); *Int'l Vill. Ass'n, Inc. v. AmTrust N. Am., Inc.*, 2015 WL 3772443, at *1 n.2 (S.D. Fla. June 17, 2015) ("the Court may … review documents attached to a complaint or incorporated by reference" on dismissal motion). To facilitate the Court's review, this brief cites to the CM/ECF-stamped page numbers of the Policy, which Cafe International filed as an exhibit to the Complaint at ECF No. 1-1.

> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" **must be caused by direct physical loss of or damage to property at premises** which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

Id. (emphasis added).

The Extra Expense provision similarly requires "direct physical loss or damage to property" and applies "only if the Declarations show that Business Income Coverage applies at that premises." *Id.* In particular, the Extra Expense provision states:

> Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been **no direct physical loss or damage to property** caused by or resulting from a Covered Cause of Loss.
>
> We will pay Extra Expense (other than the expense to repair or replace property) to:
>
> (1) Avoid or minimize the "suspension" of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.
>
> (2) Minimize the "suspension" of business if you cannot continue "operations".
>
> We will also pay Extra Expense to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable under this Coverage Form.

Id. at 51–52 (emphasis added).

Both the Business Income and Extra Expense provisions only provide coverage during the "period of restoration." *See id.* Under the Policy:

> "Period of restoration" means the period of time that:
>
> a. Begins:
>
> (1) 72 hours after the time of **direct physical loss or damage** for Business Income Coverage; or

> (2) Immediately after the time of **direct physical loss or damage** for Extra Expense Coverage;
>
> caused by or resulting from any Covered Cause of Loss at the described premises; and
>
> b. Ends on the earlier of:
>
> (1) The date **when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality**; or
>
> (2) The date when business is resumed at a new permanent location.
>
> "Period of restoration" does **not** include any increased period required due to the enforcement of or compliance with any ordinance or law that:
>
> (1) **Regulates the construction, use or repair, or requires the tearing down, of any property**; or
>
> (2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants".

Id. at 59 (emphasis added).

b. Civil Authority Coverage

The Civil Authority provision affords coverage when government orders prohibit access to Cafe International's insured premises, but only if a Covered Cause of Loss causes "damage to property" other than Cafe International's restaurant. *Id.* at 52. Specifically, the Civil Authority provision provides:

> When a Covered Cause of Loss causes **damage to property other than property at the described premises**, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> (1) Access 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 … ; and
>
> (2) The 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 the action is

> taken to enable a civil authority to have unimpeded access to the **damaged property**.

Id. at 52, 79 (emphasis added).

II. CAFE INTERNATIONAL'S CLAIMED LOSSES

Cafe International filed suit on April 20, 2020, asserting six claims for breach of contract and declaratory judgment on the theory that it is entitled to Business Income, Extra Expense, and Civil Authority coverage from Westchester for certain losses Cafe International allegedly suffered during the coronavirus pandemic. Compl. (ECF No. 1). The Complaint alleges that, in March 2020, Cafe International was "forced to suspend business operations at [its] restaurant, as a result of COVID-19" and because civil authority orders allegedly "prohibit[ed] public access" to the restaurant. *See id.* ¶¶ 8, 39–41, 44, 46.

The Complaint also asserts a legal conclusion that the suspension of Cafe International's business operations resulted from "[t]he presence of COVID-19 caus[ing] direct physical loss of and/or damage to" Cafe International's restaurant. *Id.* ¶¶ 43, 45, 74, 84, 94. But the Complaint does not, and cannot, allege facts supporting this conclusory allegation. *See id.*

As for the civil authority orders, those orders did not prohibit access to Cafe International's restaurant; rather, the orders allowed the restaurant to remain open for providing delivery, pick-up, and takeout services and permitted employees, janitorial personnel, contractors, and delivery personnel to continue accessing the restaurant. *See id.* ¶¶ 39–41, 44, 46; *see also, e.g.*, State of Fla. Exec. Order No. 20-68, at 2–3 (Mar. 17, 2020) (imposing capacity limitations on restaurants but allowing them to stay open); State of Fla. Exec. Order No. 20-70, at 2 (Mar. 20, 2020) (requiring restaurants "to close on-premises service of customers" while permitting "such establishments [to] operate their kitchens for the purpose of providing delivery … , pick-up[,] or take out services" and allowing "employees, janitorial personnel, contractors[,] and delivery

personnel" to access such establishments); State of Fla. Exec. Order No. 20-71, at 4 (Mar. 20, 2020) (similar); Broward Cnty. Adm'r's Emergency Order 20-03, at 5 (Mar. 26, 2020) (same); Miami-Dade Cnty. Emergency Order 03-20 (Mar. 17, 2020) (same); State of Fla. Exec. Order No. 20-89, at 2 (Mar. 30, 2020) (ordering restricted public access to non-essential businesses and imposing social distancing measures on essential establishments); Miami-Dade Cnty. Emergency Order 07-20, at 2–3 (Mar. 19, 2020) (affirming that restaurants are essential businesses).[3]

Further, just as the Complaint fails to plead direct physical loss of or damage to Cafe International's restaurant, it also does not, and cannot, plausibly allege that any of the civil authority orders were issued in response to damage to any property away from the insured premises. *See generally* Compl. (ECF No. 1).

III. PROCEDURAL HISTORY

Westchester answered Cafe International's allegations on July 16, 2020. Answer (ECF No. 31). The pleadings in this case are therefore closed. *See, e.g., Lillian B. ex rel. Brown v. Gwinnett Cnty. Sch. Dist.*, 631 F. App'x 851, 853 (11th Cir. 2015) (pleadings closed after complaint and answer on file); *Hill v. Gaylord Ent.*, 2008 WL 783756, at *1 n.2 (S.D. Fla. Mar. 20, 2008) (same). Westchester now moves for judgment on the pleadings. *See* Fed. R. Civ. P. 12(c) (party may seek judgment on pleadings anytime "[a]fter the pleadings are closed" if "early enough not to delay trial"). Although limited discovery related to Cafe International has commenced, discovery is unnecessary given the fatal legal defects apparent on the face of the Complaint.

[3] As elaborated in Westchester's Motion for Judicial Notice filed contemporaneously with this motion, the Court may judicially notice these civil authority orders without converting Westchester's Rule 12(c) motion into a motion for summary judgment because the orders are matters of public record publically available on official government websites. *See, e.g., Halmos v. Bomardier Aerospace Corp.*, 404 F. App'x 376, 377 (11th Cir. 2010) (per curiam).

LEGAL STANDARD

Judgment on the pleadings should be granted for a defendant where "no issues of material fact exist, and [it] is entitled to judgment as a matter of law." *Slagle v. ITT Hartford*, 102 F.3d 494, 497 (11th Cir. 1996) (quotation marks omitted). The plaintiff must plead "'enough facts to state a claim to relief that is plausible on its face.'" *Ramey v. Interstate Fire & Cas. Co.*, 32 F. Supp. 3d 1199, 1203 (S.D. Fla. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). Conclusory allegations and legal conclusions "are not entitled to the assumption of truth," even if pleaded in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *see also Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003) ("[C]onclusory allegations, unwarranted factual deductions[,] or legal conclusions masquerading as facts will not prevent dismissal.").

Interpretation of an insurance contract is a matter of law for a court to decide. *Gulf Tampa Drydock Co. v. Great Atl. Ins. Co.*, 757 F.2d 1172, 1174 (11th Cir. 1985). "The scope and extent of insurance coverage is defined by the language and terms of the policy." *Roberts v. Fla. Laws. Mut. Ins. Co.*, 839 So. 2d 843, 845 (Fla. 4th DCA 2003).[4] "The well-settled rule [is] that a court shall not rewrite a contract of insurance extending the coverage afforded beyond that plainly set forth in the insurance contract." *Oceanus Mut. Underwriting Ass'n (Bermuda) Ltd. v. Fuentes*, 456 So. 2d 1230, 1232 (Fla. 3d DCA 1984) (internal quotation marks omitted). To that end, "[i]nsurance contracts must be construed in accordance with the plain language of the policy."

[4] Florida law applies to the substantive issues in this case. *See, e.g.*, *Rando v. Gov't Emps. Ins. Co.*, 556 F.3d 1173, 1176 (11th Cir. 2009); *Sparta Ins. Co. v. Colareta*, 990 F. Supp. 2d 1357, 1362–63 (S.D. Fla. 2014); *James River Ins. Co. v. Epic Hotel, LLC*, 2013 WL 12085984, at *3 (S.D. Fla. Jan. 9, 2013). And in applying Florida law, this Court must "adhere to decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise." *Davis v. Nat'l Med. Enters., Inc.*, 253 F.3d 1314, 1319 n.6 (11th Cir. 2001).

Somethings Fishy Enters., Inc. v. Atl. Cas. Ins. Co., 415 F. Supp. 3d 1137, 1142 (S.D. Fla. 2019) (Goodman, Mag. J.) (citing *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003)). "'[I]f a policy provision is clear and unambiguous, it should be enforced according to its terms.'" *Id.* (quoting *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005)).

As the insured, Cafe International bears the burden of proving that it is entitled to coverage under the Policy. *See, e.g.*, *S.O. Beach Corp. v. Great Am. Ins. Co. of N.Y.*, 305 F. Supp. 3d 1359, 1364 (S.D. Fla. 2018) (citing *Egan v. Wash. Gen. Ins. Corp.*, 240 So. 2d 875, 876 (Fla. 4th DCA 1970)), *aff'd*, 791 F. App'x 106 (11th Cir. 2019). Cafe International must plead sufficient facts (not merely legal conclusions) that, if proven, would establish that "'the plain language of the policy, as bargained for by the parties,'" provides coverage. *State Farm Fire & Cas. Co. v. Steinberg*, 393 F.3d 1226, 1230 (11th Cir. 2004) (quoting *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 33 (Fla. 2000)). As explained below, even if the well-pleaded factual allegations in the Complaint are taken as true, Cafe International is not entitled to coverage as a matter of law.

ARGUMENT

I. CAFE INTERNATIONAL'S BUSINESS INTERRUPTION AND EXTRA EXPENSE CLAIMS FAIL BECAUSE CAFE INTERNATIONAL DOES NOT ALLEGE DIRECT PHYSICAL LOSS OF OR DAMAGE TO ITS PROPERTY

Cafe International's Policy provides Business Income and Extra Expense coverage only when there is direct physical loss of or damage to the insured property. Policy (ECF No. 1-1) at 51. Yet Cafe International does not allege any direct physical loss or damage that would trigger coverage under the Policy. Cafe International merely offers non-specific conclusory allegations based on an apparent assumption that the coronavirus may have been present at Cafe International's restaurant at some unspecified time. And, even if Cafe International had specifically alleged the presence of the virus on the premises at a particular time, that would still

not constitute direct physical loss of or damage to the property.

Florida courts—including every court to have considered the issue in this District—have held that such allegations are insufficient as a matter of Florida law and dismissed analogous coronavirus-related insurance claims on the pleadings for precisely that reason, whether the insured alleged the virus was present or not. *See, e.g.*, *15 Oz Fresh & Healthy Food*, 2021 WL 896216, at *6 (holding that insured's "conclusory allegations" that virus's presence caused its losses were "insufficient," and that even assuming the virus was present, there was no coverage); *Town Kitchen LLC v. Certain Underwriters at Lloyd's, London*, 2021 WL 768273, at *7 (S.D. Fla. Feb. 26, 2021) (Moreno, J.) (rejecting insured's argument that coronavirus's presence constituted physical loss of or damage to property because "[a]t this point in the pandemic, it is widely accepted that life can go on with hand sanitizer and disinfecting wipes" and "cleaning costs are not tangible, physical losses" under Florida law); *Rococo Steak, LLC v. Aspen Specialty Ins. Co.*, 2021 WL 268478, at *4 (M.D. Fla. Jan. 27, 2021) (Covington, J.) (no physical loss of or damage to property even assuming the virus was present since "surfaces allegedly contaminated by COVID-19 seem to only require cleaning to fix"); *R.T.G. Furniture Corp. v. Hallmark Specialty Ins. Co.*, 2021 WL 686864, at *3 (M.D. Fla. Jan. 22, 2021) (Moody, Jr., J.) (concluding that "the mere presence of the coronavirus on [the insured's] property does not constitute physical damage or loss" because the virus's presence on property is merely "temporary"); *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, 2020 WL 6392841, at *8 & n.3 (S.D. Fla. Nov. 2, 2020) (Bloom, J.) (holding there was no physical loss of or damage to property where insured "allege[d] only pure economic losses without any corresponding physical components").[5] Using the same reasoning

[5] *See also, e.g., AE Mgmt.*, 2021 WL 827192, at *3 (endorsing "the nearly unanimous view that neither the government's orders nor COVID-19 caused direct physical loss of or damage to the [insureds'] property sufficient to trigger coverage"); *Graspa Consulting, Inc. v. United Nat'l Ins.*

as those other courts, this Court should dismiss Cafe International's claims on the pleadings as well.

a. Cafe International Alleges No Physical Change to the Property

The overwhelming authority supporting dismissal of Cafe International's allegations follows inescapably from the Eleventh Circuit's recent reaffirmation that, under Florida law, direct physical loss or damage requires an actual, tangible change to the property. *See Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 879 (11th Cir. 2020). "Because 'direct physical' modifies both 'loss' and 'damage,'" Florida law requires that for there to be a covered loss, "any interruption in business must be caused by some *physical problem* with the covered property." *Island Hotel*

Co., 2021 WL 199980, at *9–10 (S.D. Fla. Jan. 20, 2021) (Williams, J.) (no physical loss or damage to property where plaintiff's business "merely suffered economic losses as opposed to anything tangible, actual, or physical"); *Digital Age Mktg. Grp., Inc. v. Sentinel Ins. Co.*, 2021 WL 80535, at *5 (S.D. Fla. Jan. 8, 2021) (Dimitrouleas, J.) (dismissing complaint because insured "failed to allege facts which would permit the Court to draw a plausible inference that the virus caused dire[c]t physical loss to [insured's] property under the terms of the Policy"); *Atma Beauty, Inc. v. HDI Glob. Specialty SE*, 2020 WL 7770398, at *3–4 (S.D. Fla. Dec. 30, 2020) (Gayles, J.) (concluding insured "fail[ed] to allege the Policy's threshold requirement for coverage: direct physical loss or damage to its property or any nearby property"); *SA Palm Beach LLC v. Certain Underwriters at Lloyd's, London*, 2020 WL 7251643, at *4–5 (S.D. Fla. Dec. 9, 2020) (Ungaro, J.) (concluding that complaint "f[ell] short of alleging that [insured's] property sustained any physical damage"); *El Novillo Rest. v. Certain Underwriters at Lloyd's, London*, 2020 WL 7251362, at *5–6 (S.D. Fla. Dec. 7, 2020) (Ungaro, J.) (same); *S. Fla. Ent Assocs., Inc. v. Hartford Fire Ins. Co.*, 2020 WL 6864560, at *10 (S.D. Fla. Nov. 13, 2020) (Torres, Mag. J.) (holding plaintiff failed to state claim because "loss must arise to actual damage" to be covered); *First Watch Rests., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 390945, at *3–4 (M.D. Fla. Feb. 4, 2021) (Covington, J.) (holding insured's "business losses due to COVID-19 orders [we]re economic losses, not the kind of physical loss or damage contemplated by the policy"); *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, 2021 WL 22314, at *5–6 (M.D. Fla. Jan. 4, 2021) (Jung, J.) (concluding insureds' failure to allege direct physical loss resulted in "no covered cause of loss per the terms of the policies"); *Prime Time Sports Grill, Inc. v. DTW 1991 Underwriting Ltd.*, 2020 WL 7398646, at *5–6 (M.D. Fla. Dec. 17, 2020) (Honeywell, J.) (holding insured did not suffer any "tangible damage" and therefore its loss did not fall within policy's scope); *Dime Fitness, LLC v. Markel Ins. Co.*, 2020 WL 6691467, at *4 (Fla. Cir. Ct. Nov. 10, 2020) (Battles, J.) ("[T]he plain reading [of the policy is] that physical damage must occur to physical property."); *DAB Dental PLLC v. Main St. Am. Prot. Ins. Co.*, 2020 WL 7137138, at *5 (Fla. Cir. Ct. Nov. 10, 2020) (Battles, J.) ("[B]ecause no direct physical loss or damage is alleged in this case, no covered cause of loss can be found.").

Props., Inc. v. Fireman's Fund Ins. Co., 2021 WL 117898, at *3 (S.D. Fla. Jan. 11, 2021) (Moore, C.J.) (internal quotation marks omitted) (dismissing COVID-19–related business interruption claim under *Mama Jo's*). The alleged loss or damage must be "actual"; pure economic harm untethered to any physical alteration to property is insufficient to trigger coverage. *See, e.g.*, *Homeowners Choice Prop. & Cas. v. Miguel Maspons*, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017) ("'Direct' and 'physical' modify loss and impose the requirement that the damage be actual."); *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) (Moore, C.J.) ("direct physical loss of or damage to property" requires "a distinct, demonstrable, physical alteration of the property" and does not include "alleged losses that are intangible or incorporeal" (quotation marks omitted)), *aff'd*, 823 F. App'x 868 (11th Cir. 2020).

In *Mama Jo's*, an insured restaurant owner—who had purchased a policy that likewise requires "direct physical loss of or damage to" property—sought coverage for lost business income and cleaning expenses arising from dust and debris coming from nearby roadway construction. 823 F. App'x at 871–72. The insured alleged that the nearby construction work caused physical damage by spitting "construction related debris and dust" onto the restaurant's "floors, walls, tables, chairs, and countertops." *Id.* at 872 (quotation marks omitted). Applying Florida law, the Eleventh Circuit affirmed summary judgment for the insurer, concluding that the insured could not recover as a matter of law because it had not shown any physical loss or damage. *Id.* at 879. The presence of debris and dust was insufficient. *See id.* As the Eleventh Circuit emphasized: "[U]nder Florida law, an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'" *Id.* (citing *Maspons*, 211 So. 3d at 1069; *Vazquez v. Citizens Prop. Ins. Corp.*, 304 So. 3d 1280, 1284–85 (Fla. 3d DCA 2020)).

In addition to its use of the term "direct physical loss or damage," other aspects of Cafe

International's Policy confirm that the insured property must tangibly change for there to be coverage. For instance, the Policy provides Business Income and Extra Expense coverage for Cafe International's operations only during the "period of restoration," which ends when the property is either "repaired, rebuilt[,] or replaced" or Cafe International's business resumes at a "new permanent location." Policy (ECF No. 1-1) at 59. The Policy's use of "repaired, rebuilt[,] or replaced" is no accident; that language connotes physical harm because coverage is triggered only if an actual, physical change in the insured property occurs. *See, e.g.*, *Malaube, LLC v. Greenwich Ins. Co.*, 2020 WL 5051581, at *9 (S.D. Fla. Aug. 26, 2020) (Torres, Mag. J.) (construing "direct physical loss or damage" to require actual changes in property, to "give[] effect to the [period of restoration] provisions in the policy" as "Florida law requires"); *El Novillo*, 2020 WL 7251362, at *6 (similar).

Cafe International's claims fail because, just like the restaurant in *Mama Jo's*, Cafe International does not, and cannot, plausibly allege any direct physical loss of or damage to the insured property. Cafe International's Complaint includes the conclusory assertion that "COVID-19 caused direct physical loss of and/or damage to [Cafe International's] covered premises." Compl. (ECF No. 1) ¶ 43. But pleading the bare elements of a claim is insufficient; the Complaint "must include *some* supporting facts." *N.P.V. Realty Corp. v. Nationwide Mut. Ins. Co.*, 2011 WL 4948542, at *4 (M.D. Fla. Oct. 17, 2011). Yet, just as in other cases dismissed on the pleadings, Cafe International's Complaint "is devoid of any mention of what physical damage occurred, how the physical damage occurred, … when the physical damage occurred," and what, if anything, needs to be repaired, replaced, or rebuilt as a result. *See, e.g.*, *SA Palm Beach*, 2020 WL 7251643, at *1–3 (insured's allegation that it "suffered a direct physical loss of [its] property" because it has "been unable to use [its] property for its intended purpose" was insufficient to sustain claim); *15*

Oz Fresh & Healthy Food, 2021 WL 896216, at *5 (rejecting insured's loss-of-use argument as "unavailing"); *Sun Cuisine, LLC v. Certain Underwriters at Lloyd's London*, 2020 WL 7699672, at *3 (S.D. Fla. Dec. 28, 2020) (Gayles, J.) (rejecting plaintiff's argument that "loss of functionality or intended use constitutes physical loss or damage" because "it is not supported by the plain language of the Policy or Florida law"); *Town Kitchen*, 2021 WL 768273, at *4–5 (similar). Indeed, Florida courts have dismissed complaints for lack of physical loss of or damage to property where the plaintiffs offered the exact same allegations Cafe International asserts here. *Compare, e.g.*, *Rococo Steak*, 2021 WL 268478, at *2 (dismissing complaint alleging that COVID-19 damaged property, denied access to property, prevented customers from accessing property, rendered property physically uninhabitable, impaired property's function, and caused a suspension of business operations at property), *and Atma Beauty*, 2020 WL 7770398, at *4 (similar), *with* Compl. (ECF No. 1) ¶ 43 (asserting same allegations).

b. Cafe International Does Not, and Cannot, Plead Any Facts Showing That the Coronavirus Caused Direct Physical Loss of or Damage to Property

As the legion of cases dismissing coronavirus-related insurance coverage claims have correctly held, Cafe International cannot sustain a claim by alleging that the virus was present at its property. *See* Compl. (ECF No. 1) ¶¶ 38, 43, 45. To start, Cafe International pleads no facts explaining what it means by "presence"—i.e., "whether a person infected with COVID-19 had entered the [restaurant] … or whether COVID-19 was present on any particular surfaces of the [property]." *Island Hotel*, 2021 WL 117898, at *4.

In any event, the mere "presence" of a substance such as a virus does not constitute direct physical loss of or damage to a property, as a bevy of courts applying Florida law have held. *See, e.g.*, *Mama Jo's*, 823 F. App'x at 879 (citing, *e.g.*, *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 574 & n.8 (6th Cir. 2012) (contamination that can be resolved "with hot water

and 'Lysol type, cleaning, household cleaning things'" does not "constitute physical loss or damage")); *Town Kitchen*, 2021 WL 768273, at *7 (presence of virus does not constitute "direct physical loss of or damage to" property because "[t]he harm from COVID-19 stems from having living, breathing human beings inside one's business—it is not damage done to the physical business itself, it is damage done to other living, breathing human beings"); *Island Hotel*, 2021 WL 117898, at *4 (ordering dismissal with prejudice notwithstanding insured's allegation that virus was present at its properties); *Rococo Steak*, 2021 WL 268478, at *4 ("like the coating of dust and debris in *Mama Jo's*, … surfaces allegedly contaminated by COVID-19 seem to only require cleaning to fix" and so there is no physical loss of or damage to property); *R.T.G. Furniture*, 2021 WL 686864, at *3 ("[C]ommon sense tells us that COVID-19 is incapable of causing a tangible injury to property. COVID-19 is a virus that harms people, not structures. Discovery in this case would not alter this basic point."); *Catlin Dental, P.A. v. Cincinnati Indem. Co.*, 2020 WL 8173333, at *5 (Fla. Cir. Ct. Dec. 11, 2020) (Shenko, J.) (holding allegation that virus present insufficient because "routine cleaning … eliminates the virus on surfaces").

Cafe International nowhere alleges that the virus, even if present, physically altered the insured property itself. *See, e.g.*, *DAB Dental*, 2020 WL 7137138, at *4 (under Florida law, "the mere presence of COVID-19 on business premises does not constitute a direct physical loss of or damage to property"); *Catlin Dental*, 2020 WL 8173333, at *5 ("[a]irborne particles and the mere presence of a virus in the community do not constitute direct physical loss to the property"). And as numerous courts have recognized, any contamination by the virus can be resolved through ordinary cleaning methods. *See, e.g.*, *Rococo Steak*, 2021 WL 268478, at *4; *Catlin Dental*, 2020 WL 8173333, at *5. Thus, even if Cafe International had more specifically pleaded the virus's presence at its restaurant, it still could not allege any physical loss or damage to the property.

Indeed, policyholders' COVID-19–related claims have been consistently dismissed on the pleadings even when their complaints were *more* specific about the "presence" of the coronavirus on their properties than Cafe International has been. *See Mena Catering, Inc. v. Scottsdale Ins. Co.*, 2021 WL 86777, at *7 (S.D. Fla. Jan. 11, 2021) (Bloom, J.) (even though plaintiff alleged COVID-19 was present, there was still no direct physical loss because the alleged harm "consist[ed] of the mere presence of the virus on the physical structure of the premises" and plaintiff did not allege actual, physical damage); *Carrot Love*, 2021 WL 124416, at *1–2 (refusing "to depart from the nearly unanimous view that COVID-19"—even where allegedly present on "countertops, tables[,] and chairs" at insured's property—"does not cause direct physical loss or damage to a property sufficient to trigger coverage"); *R.T.G. Furniture*, 2021 WL 686864, at *3 ("[T]he mere presence of the coronavirus on [the insured's] property does not constitute physical damage or loss" because the virus's presence on property is merely "temporary."); *cf. Café La Trova*, 2021 WL 602585, at *8–9 (granting summary judgment for insurer because suspension of operations was not caused by physical loss of or damage to insured property, even where insured contended virus was likely present on premises and required it "to discard spoiled food, use chemicals to clean surfaces, and move furniture and install partitions, which resulted in broken chairs, scratched floors, and damage from drilling holes to affix partitions"). The Court should likewise dismiss Cafe International's Business Interruption and Extra Expense claims here.

II. CAFE INTERNATIONAL'S CIVIL AUTHORITY CLAIM FAILS BECAUSE CAFE INTERNATIONAL DOES NOT ALLEGE THAT ANY AUTHORITY PROHIBITED ACCESS DUE TO PHYSICAL DAMAGE TO PROPERTY

Like Business Interruption and Extra Expense coverage, Civil Authority coverage applies only if there is physical harm to some property away from the insured premises, which Cafe International does not plead. Nor has Cafe International alleged that any civil authority order actually prohibited access to Cafe International's property. Accordingly, Cafe International's

assertion of Civil Authority coverage fails, too.

a. Cafe International Does Not Allege That Access Was Prevented Because of Offsite Property Damage

Under the Policy's Civil Authority provision, coverage arises only where the action of a civil authority prohibits access to the insured property due to damage to property elsewhere. Policy (ECF No. 1-1) at 52, 79. That is, coverage requires that "[t]he action of civil authority [be] taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage." *Id.* at 52. But, as Cafe International itself alleges, the orders cited by Cafe International were "prompted" by "[t]he presence of COVID-19 and the public health emergency it has created," not because of any property damage. Compl. (ECF No. 1) ¶ 38. And just as Cafe International fails to allege direct physical loss or damage to its own restaurant, nowhere does Cafe International allege that the authorities' orders resulted from any damage to property elsewhere. Thus, no coverage exists under the Policy's Civil Authority provision as a matter of law. *See Nahmad*, 2020 WL 6392841, at *8 (no Civil Authority coverage where complaint alleged "no physical harm to any properties in the immediate area, only suspensions and closures in general due to government orders"); *AE Mgmt.*, 2021 WL 827192, at *4 (similar); *El Novillo*, 2020 WL 7251362, at *7 (same); *SA Palm Beach*, 2020 WL 7251643, at *6 (same); *Mena Catering*, 2021 WL 86777, at *7 (same); *15 Oz Fresh & Healthy Food*, 2021 WL 896216, at *7 (same); *Sun Cuisine*, 2020 WL 7699672, at *3 (no Civil Authority coverage where complaint did not allege "any actual or tangible physical harm to the covered property or another property in the immediate area"); *Atma Beauty*, 2020 WL 7770398, at *4 (same); *Edison Kennedy*, 2021 WL 22314, at *7 (dismissing case where insured restaurants sought coverage under Civil Authority provision and alleged other property had to be disinfected and cleaned due to COVID-19).

To be sure, Cafe International alleges that one of the civil authority orders it cites was "expressly issued in response to the *propensity* of COVID-19 … to 'physically caus[e] property damage.'" Compl. (ECF No. 1) ¶ 40 (emphasis added). But a civil authority order allegedly being issued in response to the "propensity" for property damage, as opposed to property damage that has *actually occurred*, does not trigger coverage under the plain language of the Policy's Civil Authority provision. *See* Policy (ECF No. 1-1) at 52. Moreover, as several courts adjudicating COVID-19–related insurance claims have already recognized, even if a civil authority order states that it was issued in response to *actual* (not just potential) property damage allegedly caused by COVID-19, such statements do not change the analysis. Like Cafe International's own naked allegations, such statements in civil authority orders merely provide "a conclusory legal conclusion" to which this Court need not and should not defer. *Island Hotel*, 2021 WL 117898, at *3. Rather, it is the well-settled principles of Florida law, interpreting the policy provisions at issue, that control here. *See, e.g., id.* (rejecting reliance on Florida order's assertion of property damage for this reason); *Digital Age Mktg. Grp.*, 2021 WL 80535, at *5 (similar); *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 2020 WL 7078735, at *7 n.66 (D. Kan. Dec. 3, 2020) (same, Kansas orders); *Baker v. Oregon Mut. Ins. Co.*, 2021 WL 24841, at *2 (N.D. Cal. Jan. 4, 2021) (same, California orders); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, 2020 WL 6440037, at *4 (C.D. Cal. Oct. 27, 2020) (same, California orders). In any event, the civil authority order referenced by Cafe International does not assert that the coronavirus caused any actual, tangible change in any property. To the contrary, as Cafe International tacitly acknowledges (Compl. (ECF No. 1) ¶ 40), the order claims that there is "property damage" solely because of the virus's supposed "proclivity to attach to surfaces for prolonged periods of time," Broward Cnty. Adm'r's Emergency Order 20-03, at 2 (Mar. 26, 2020), which, as explained, does

not suffice to establish direct physical loss or damage as a matter of Florida law, *see, e.g.*, *Digital Age Mktg. Grp.*, 2021 WL 80535, at *5; *Island Hotel*, 2021 WL 117898, at *3; *Rococo Steak*, 2021 WL 268478, at *4.

b. Cafe International Does Not, and Cannot, Plausibly Allege That the Civil Authority Orders Prohibited Access to Cafe International's Property

Cafe International's Civil Authority claim also fails for the separate reason that Cafe International does not plead that any civil authority orders actually prohibited access to Cafe International's restaurant. Civil Authority coverage is triggered only if an action of a civil authority "prohibits access" to the insured premises. Policy (ECF No. 1-1) at 52. But no civil authority action ever prohibited access to Cafe International's restaurant; at most, the civil authority orders temporarily restricted Cafe International from serving food on-premises, while allowing the restaurant to provide delivery, pick-up, and takeout services and give access to employees and staff. *See supra* at 6–7. For this additional reason, Cafe International's Civil Authority claim fails as a matter of law. *See, e.g.*, *Nahmad*, 2020 WL 6392841, at *8–9 (orders hindering access without completely barring access do not trigger Civil Authority coverage); *15 Oz Fresh & Healthy Food*, 2021 WL 896216, at *7 (no Civil Authority coverage where insured "d[id] not allege specific facts showing that it had *no* access to the restaurant as a result of the executive orders"); *Café La Trova*, 2021 WL 602585, at *11 (similar); *El Novillo*, 2020 WL 7251362, at *7 (same); *First Watch Rests.*, 2021 WL 390945, at *4 (same); *Rococo Steak*, 2021 WL 268478, at *6 (same); *Catlin Dental*, 2020 WL 8173333, at *6 (same); *Henry's La. Grill, Inc. v. Allied Ins. Co. of Am.*, 2020 WL 5938755, at *6 (N.D. Ga. Oct. 6, 2020) (same); *1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc.*, 2021 WL 147139, at *7 (W.D. Pa. Jan. 15, 2021) (same); *Clear Hearing Sols., LLC v. Cont'l Cas. Co.*, 2021 WL 131283, at *10 (E.D. Pa. Jan. 14, 2021) (restriction on public access insufficient to establish civil authority coverage); *1210 McGavock St.*

Hosp. Partners, LLC v. Admiral Indem. Co., 2020 WL 7641184, at *10 (M.D. Tenn. Dec. 23, 2020) (similar).

CONCLUSION

Eleventh Circuit case law interpreting well-established Florida law makes clear that there is no coverage in circumstances like those alleged here. This Court should endorse the unanimous view of its sister courts in the Southern District of Florida and hold that the coronavirus does not cause direct physical loss of or damage to property as a matter of law. Westchester respectfully requests that the Court grant its motion for judgment on the pleadings and enter judgment in Westchester's favor on all of Cafe International's claims.

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Respectfully submitted,

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