UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:20-cv-21641-COOKE/GOODMAN

CAFE INTERNATIONAL HOLDING COMPANY LLC,

Plaintiff,

vs.

WESTCHESTER SUPRLUS LINES INSURANCE COMPANY,

Defendant.
_____/

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

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Plaintiff Cafe International Holding Company ("Cafe International") responds in opposition to the Motion for Judgment on the Pleadings of Defendant Westchester Surplus Lines Insurance Company ("Westchester"). *See* D.E. 58.

INTRODUCTION

Cafe International manages the IT! Italy restaurant in downtown Fort Lauderdale. To protect the restaurant and the operation of the restaurant business, Cafe International purchased an "all-risk" insurance policy from Westchester—with explicit, enhanced coverage for business interruption losses. Westchester is a subsidiary of Chubb Limited, an insurance conglomerate and one of the world's largest property insurers. Like other Chubb companies, Westchester issues property insurance policies comprised of a variety of standard forms and provisions. Many of these standardized provisions are drafted and copyrighted by the Insurance Services Office ("ISO"). As relevant here, Westchester has incorporated an ISO virus exclusion into some of its property insurance policies, but not all.

Cafe International's policy does not contain the ISO virus exclusion, or indeed any virus exclusion. Westchester nonetheless denied Cafe International's claim for the substantial losses it suffered when it was forced to suspend its business operations as a result of contamination by the coronavirus, related actions of various government authorities, and necessary physical alterations to its property undertaken to mitigate and contain coronavirus contamination. This suit arises from Westchester's breach of its contractual obligations to Cafe International, as well as tens of thousands of similarly situated policyholders.

Cafe International's Complaint alleges that the virus contaminated the IT! Italy restaurant, that Cafe International suffered loss of and damage to its property as a result, that certain actions

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of government authorities prohibited access to the restaurant, and that the restaurant consequently suffered a slowdown of business operations.

These allegations, which must be taken as true at this stage of the case, are sufficient to allege coverage under the Policy. Westchester argues otherwise only by challenging Plaintiff's factual allegations and mischaracterizing the applicable law. Westchester's factual contentions are plainly premature at this stage of the case. Indeed, courts in this district have repeatedly observed that fact-intensive contract-interpretation arguments like the ones raised by Westchester are better suited for summary judgment. Moreover, Westchester's legal arguments are out of step with Florida law. Westchester's core argument is that viral contamination of property is not covered absent *structural injury* to the property, but Florida courts have long rejected any structural-damage requirement for coverage under all-risk policies.

Finally, although Westchester cites to a number of recent cases concerning insurance coverage claims for coronavirus-related losses, those cases are distinguishable in several respects. Among other things, *no Florida case* has addressed the situation of an insurer that issues policies with disparate virus-coverage and virus-exclusion provisions, but proposes to treat all of its policies the same with respect to claims for coronavirus-related losses.

For these reasons and those discussed below, Westchester's motion should be denied.

FACTUAL BACKGROUND

Cafe International operates the IT! Italy restaurant in Fort Lauderdale, Florida. *See* Compl. ¶ 1. To protect the restaurant and income from the operation of the restaurant, Cafe International purchased an insurance policy from Westchester with the policy number FSF15184188001 ("the Policy"). *See id.* ¶ 2. The Policy has a coverage period of November 29, 2019 to November 29,

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2020.[1] The Policy is an "all-risk" policy, meaning that it covers ***all*** risks of "direct physical loss of or damage to" the restaurant unless the risk is specifically and expressly excluded. Consistent with the all-risk nature of the Policy, the Policy expressly defines the scope of coverage as "direct physical loss unless the loss is excluded or limited in this [P]olicy." D.E. 1-1 at 62.

The Policy also specifically provides Business Income, Extra Expense, and Civil Authority coverage. *See, e.g.*, Compl. ¶¶ 22–33. For example, pursuant to the Business Income provisions, Westchester promised "to pay for the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration.'" *See id.* ¶ 23. In effect, Westchester promised to pay for Cafe International's loss of net income when physical loss of or damage to the property causes a slowdown or cessation of Cafe International's business. *See id.* ¶ 26. The Civil Authority coverage is a promise to pay "for the actual loss of Business Income" and Extra Expense caused by an "action of civil authority that prohibits access" to the insured property when such action is taken in response to dangerous physical conditions at property near the policyholder's property. *See id.* ¶ 31. Significantly, although the Policy expressly excludes from coverage a variety of risks ranging from agricultural gases to a loss of utility services, the Policy does ***not*** contain any exclusions for losses related to viruses. *See id.* ¶ 35.

Since March 2020, the IT! Italy restaurant has suffered a suspension of its business operations because of contamination by the novel coronavirus, also known as SARS-CoV-2, and mandatory government orders prohibiting access to the restaurant. *See id.* ¶¶ 37–50. In the first instance, the restaurant was closed pursuant to mandatory government orders. After those orders were lifted and relaxed, the restaurant reopened, but it did so in a physically altered state: the

[1] The Policy was attached to the Complaint and assigned the docket number 1-1. Accordingly, all references to the Policy in this brief will be to D.E. 1-1.

restaurant was subject to repeated exposure and re-contamination by the coronavirus, and it was forced to make physical alterations to its property and operations to contain and mitigate this contamination.

It is well-settled and beyond reasonable dispute that the novel coronavirus is a physical entity. The virus is active and physically transmissible in airborne particles of various sizes, from larger respiratory droplets to microscopic "aerosols." These tiny viral particles can travel and linger in the air, accumulate in indoor spaces, remain active for several hours, and invade heating and air ventilation systems where they remain in circulation for even longer periods of time.[2] In addition, the virus also contaminates surfaces by attaching to them. The coronavirus remains detectable in the air for up to three hours and on common surfaces like plastic, metal and glass for days and even weeks.[3] Experts thus have suggested that business property owners upgrade HVAC systems to limit the circulation of viral particles that may exist within the system.[4]

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[2] *See* Dyani Lewis, *Mounting evidence suggests coronavirus is airborne—but health advice has not caught up*, NATURE (July 8, 2020), *available at* https://www.nature.com/articles/d41586-020-02058-1#:~:text=Converging%20lines%20of%20evidence%20indicate,air%20and%20accumulate%20over%20time; Neeltje van Doremalen, *et al.*, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, N. ENGL. J. MED. (Mar. 17, 2020), available at https://www.nejm.org/doi/full/10.1056/NEJMc2004973.

[3] *See Persistence of coronaviruses on inanimate surfaces and their inactivation with biocidal agents*, Vol. 104, Kemp., G., et al., Journal of Hospital Infection, No. 3, March 2020, pages 246-251 (remains infectious from 2 hours to 28 days depending on conditions); see also https://www.ucsf.edu/news/2020/02/416671/how-new-coronavirus-spreads-and-progresses-and-why-one-test-may-not-be-enough (doorknobs and table tops can contain the virus); https://www.nytimes.com/2020/03/02/health/coronavirus-how-it-spreads.html (virus can remain on metal, glass and plastic for several days); Boris Pastorino, *et al*., *Prolonged Infectivity of SARS-CoV-2 in Fomites*, 26 Emerging Infectious Diseases 9 (Sept. 2020) (https://wwwnc.cdc.gov/eid/article/26/9/20-1788_article).

[4] Zeynep Tufeckci, *We Need to Talk About Ventilation*, THE ATLANTIC, July 30, 2020, available at https://www.theatlantic.com/health/archive/2020/07/why-arent-we-talking-more-aboutairbornetransmission/614737/.

Like many businesses, Cafe International's property contains various surfaces and equipment made of plastic, glass, and other materials on which the virus can remain active for hours and days. And the very nature of Cafe International's business—food service—requires frequent and close physical engagement between patrons and staff. Cafe International's property was therefore subject to physical contamination by the coronavirus.[5]

At present, there are no known ways to completely or permanently eliminate coronavirus contamination in occupied indoor spaces. Cleaning and disinfecting are, at best, temporary and short-lived solutions. So long as a property is occupied, there is a constant risk of recontamination of air and surfaces. Cafe International's only options are and have been (a) to contain and mitigate the contamination through physical and operational alterations that necessarily lead to a slowdown in business; or (b) to shut down entirely. The alternative—to continue its business unabated and without any alterations—would not only risk the safety of Cafe International's staff, Cafe International's customers, and the general public, but it would also expose the property to a near-certain risk of widespread and unmitigated physical contamination by the coronavirus.

ARGUMENT

I. It is Westchester's burden at this stage of the litigation to show that the policy unambiguously denies coverage.

In the context of a motion for judgment on the pleadings, the burden is squarely on the moving party. "It is axiomatic" that on a Rule 12(c) motion, the non-moving party's allegations "are assumed to be true and all contravening allegations in the movant's pleadings are taken to be false." 5C Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 1368 (3d ed.,

[5] Although Plaintiff rejects Westchester's suggestion that the allegations in its Complaint are "conclusory," Plaintiff provides this well-established scientific information about the virus's physical characteristics in response to Westchester's sweeping assertion that the insured property suffered no physical impact from the virus.

Oct. 2020 update). Accordingly, a "significant number of federal courts"—including this Court—have held that the standard applied to a Rule 12(c) motion "is identical to that used on a Rule 12(b)(6) motion[.]" *Id.* *See also Tsavaris v. Pfizer, Inc.*, 154 F. Supp. 3d 1327, 1332 (S.D. Fla. 2016); *ThunderWave, Inc. v. Carnival Corp.*, 954 F. Supp. 1562, 1564 (S.D. Fla. 1997).[6]

"Federal district courts have applied a fairly restrictive standard in ruling on motions for judgment on the pleadings." *Bryan Ashely Int'l, Inc. v. Shelby Williams Indus., Inc.*, 932 F. Supp. 290, 291 (S.D. Fla. 1996) (quotation omitted). "Because a Rule 12(c) motion would summarily extinguish litigation at the threshold and foreclose the opportunity for discovery and factual presentation, the Court must treat [such a] motion with the greatest of care and deny it if there are allegations in the complaint which, if provide, would provide a basis for recovery." *Baumann v. District of Columbia*, 744 F. Supp. 2d 216, 221 (D.D.C. 2010).[7]

In this case, additional rules of construction—specific to the insurance context—also apply. Namely, undefined terms in an insurance policy are interpreted liberally in favor of the insured. *See State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So.2d 1245, 1247 n.3 (Fla. 1986). Additionally, "[i]f the relevant policy language is susceptible to more than one reasonable interpretation . . . the insurance policy is considered ambiguous." *Taurus Holdings Inc. v. United States Fid. Co.*, 913 So. 2d 528, 532 (Fla. 2005) (quotation omitted). And in Florida, "[a]mbiguous policy provisions

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[6] Accordingly, a defendant's *factual* assertions are premature at this stage. Indeed, partly on this ground, several courts have denied as premature defendant insurers' motions to dismiss COVID-19 related coverage cases. *See Urogynecology Specialist of Florida LLC v. Sentinel Ins. Co.*, No. 20-cv-1174 (M.D. Fla. Sept. 24, 2020) (attached as Exhibit A); *Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, 2020 WL 5806576 (N.J. Super. Ct. Aug. 13, 2020) (the "*Optical Services* Order") (hearing transcript attached as Exhibit B).

[7] Westchester is incorrect in arguing that Plaintiff's allegations are insufficient at this stage of the litigation and in dismissing those allegations as "conclusory." Nevertheless, to the extent that the Court concludes that the Complaint's allegations are insufficient, Plaintiff respectfully requests an opportunity to amend its Complaint and supplement those allegations.

. . . should be construed liberally in favor of coverage of the insured and strictly against the insurer." *Dickson v. Econ. Premier Assur. Co.*, 36 So. 3d 789, 790 (Fla. Dist. Ct. App. 2010). Moreover, ambiguous "exclusionary clauses are construed even more strictly against the insurer than coverage clauses." *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000).

Westchester therefore misstates the applicable legal standard when it implies that Cafe International—the *non-moving* party—bears the burden at this stage of the case. *See* D.E. 58 at 9 ("As the insured, Cafe International bears the burden of proving that it is entitled to coverage under the Policy."). To be sure, the plaintiff policyholder bears the ultimate burden of proof *at trial*. But at this stage of the case, Rule 12(c) places the burden squarely on the *movant*. Therefore, it is *Westchester's* burden to demonstrate that even taking Cafe International's allegations as true, construing them in Cafe International's favor, and drawing all reasonable inferences in Cafe International's favor, the Policy *unambiguously* bars coverage for the losses claimed.

II. Westchester fails to meet its burden of showing that it is entitled to judgment as a matter of law.

Westchester does not and cannot meet its burden. Notably, Westchester does not—and cannot—contend that Cafe International has failed to allege any of the elements of its breach of contract and declaratory relief claims.[8] Rather, Westchester's motion centers on contractual-interpretation arguments. As outlined below, these arguments fail for several reasons.

[8] In Florida, the elements of a breach-of-contract claim are a valid contract, a material breach, and damages. *See Abbott Labs, Inc. v. Gen. Elec. Capital*, 765 So.2d 737, 740 (Fla. Dist. Ct. App. 2000). A claim for declaratory relief requires a substantial and continuing controversy that is not conjectural, hypothetical, or contingent. *See Malowney v. Fed. Collection Deposit Grp.*, 193 F.3d 1342, 1346–48 (11th Cir. 2019). Here, the Complaint alleges all the elements of both types of claims. *See In re Society Ins. Co. COVID-19 Business Interruption Protection Ins. Litig.*, 2021 WL 679109, at *6 (N.D. Ill. Feb. 22, 2021) (concluding, in part under other states' laws, that the plaintiffs in similar cases "adequately state[d]" claims for breach of contract and declaratory judgments).

First, in defiance of the applicable standard under Rule 12(c), Westchester challenges and mischaracterizes the factual allegations in the Complaint. For example, Westchester asserts that Cafe International's losses are purely economic, directly contradicting the allegations in the Complaint. These factual arguments are improper on a Rule 12(c) motion.

Second, Westchester's arguments misapply the governing law. Namely, Westchester suggests that "physical loss or damage" requires *structural* destruction or alteration of the insured property. *See* D.E. 58 at 13–15. But such a requirement is wholly unsupported by the Policy's plain language. And for at least twenty-five years, Florida courts have held that structural damage is *not* a requirement for coverage under all-risk policies. *See, e.g.*, *Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 250 F. Supp. 2d 1357, 1364 (M.D. Fla. 2003) (explaining that "under Florida law 'direct physical loss' includes more than losses that harm the structure of the covered property"), *aff'd*, 362 F.3d 1317 (11th Cir. 2004); *Azalea, Ltd. v. American States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995). Accordingly, no such requirement applies here.

Third, although Westchester cites to several cases concerning coronavirus-related coverage claims, those cases are distinguishable in several respects. For example, in many of the cases cited by Westchester, the plaintiffs expressly *disclaimed* or flatly failed to allege the physical contamination of the insured property by the virus. Here, the opposite is true. Equally important, *none* of Westchester's cited authorities contended with the distinctive facts at issue here: namely, the fact that Westchester issued *disparate* policies with *disparate* language related to virus coverage, but now proposes to treat both types of policies the same. Westchester's approach to interpreting the policies it issued is not only self-contradictory, but also inconsistent with bedrock principles of contract interpretation under Florida law.

A. Westchester mischaracterizes and improperly challenges Cafe International's allegations.

The Complaint expressly alleges that Cafe International suffered "direct physical loss of or damage to" the IT! Italy restaurant. *See, e.g.*, Compl. ¶¶ 74, 84, 94, 104. In defiance of the standard applicable to a Rule 12(c) motion, Westchester offers its own version of the facts. For example, Westchester argues that "the Complaint fails to plead direct physical loss of or damage to Cafe International's restaurant[.]" D.E. 58 at 7. Similarly, Westchester asserts that Cafe International "[a]lleges [n]o [p]hysical change" to the covered property, and suggests that its damages are "pure[ly] economic." *Id.* at 11, 12.

These assertions are not true and, as relevant here, not what the Complaint alleges. Cafe International is not claiming coverage for "purely economic" losses. In other words, Cafe International has not alleged a loss of business income due to a downturn in the economy or a reduction in demand for its food. Rather, Cafe International has clearly alleged losses *tethered to* the *physical* impact of the virus on its property. *See, e.g.*, Compl. ¶¶ 43 (alleging physical loss and damage due to presence of virus on the insured property), 45 (alleging suspension of business operations due to the presence of virus on the property), 74 (alleging physical loss and damage due to the virus, as well as a suspension of business operations). *See also Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 803 (W.D. Mo. 2020) ("Although Plaintiffs allege economic harm, that harm is *tethered to* their alleged physical loss caused by COVID-19 and the Closure Orders.") (emphasis added).[9]

To the extent that Westchester seeks to challenge the factual allegations in the Complaint, it cannot do so at this stage of the case. That is for at least two overlapping reasons. First, at this stage of the case, all material facts in the Complaint are accepted as true and must be viewed in the light most favorable to Cafe International. *See Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335

[9] The court's Order is attached as Exhibit C.

(11th Cir. 2014). And "[i]f a comparison of the averments in the competing pleadings reveals a material dispute of fact, judgment on the pleadings must be denied." *Id.*

Second, courts in this Circuit have repeatedly observed that contract-interpretation arguments—particularly those that are factually intensive—"'are more appropriate for summary judgment.'" *Geter v. Galardi S. Enters., Inc.*, 43 F. Supp. 3d 1322, 1328-29 (S.D. Fla. 2014) (quoting *McKissack v. Swire Pac. Holdings, Inc.*, No. 09–22086–CIV, 2011 WL 1233370, at *3 (S.D. Fla. Mar. 31, 2011)). *Accord, e.g.*, *Managed Care Solutions, Inc. v. Cmty. Health Sys., Inc.*, 2011 WL 6024572, at *8 (S.D. Fla. Dec. 2, 2011) ("A determination of the proper interpretation of the contract should be decided at the summary judgment stage, not in a ruling on a[ ] motion to dismiss."); *Ben-Yishay v. Mastercraft Dev., LLC*, 553 F. Supp. 2d 1360, 1373 (S.D. Fla. 2008).

B. Cafe International has adequately alleged "direct physical loss or damage."

In addition to challenging the factual allegations in the Complaint, Westchester advances one central legal argument: that Cafe International's allegations do not describe "direct physical loss of or damage to" property as that phrase must be understood in the context of the Policy. In effect, Westchester urges this Court to interpret the phrase to require *structural* injury or alteration to the insured property. *See* D.E. 58 at 12–15 (arguing that the physical contamination of a property by the coronavirus is insufficient for coverage). Because the phrase is undefined in the policy, it must be given its plain and ordinary meaning. *See, e.g., Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067, 1069 (Fla. Dist. Ct. App. 2017). And if the phrase is susceptible to more than one reasonable interpretation, this Court must give the phrase the meaning that is most favorable to coverage. *See, e.g., Dickson*, 36 So. 3d at 790. For the reasons outlined below, Cafe International has suffered and adequately alleged "direct physical loss or damage."

i. The plain meaning of "direct physical loss or damage" supports coverage here.

According to legal and lay dictionaries, "direct" means "free from extraneous influence,"

and "characterized by close logical, causal, or consequential relationship." "Physical" means "of, relating to, or involving the material universe and its phenomena;" "relating to the physical sciences;" and "of, relating to, or involving material things." "Loss" means "an undesirable outcome of a risk," "the disappearance or diminution of value," "the failure to maintain possession of a thing," "deprivation" and "the act of losing possession." "Damage" means "loss or injury to person or property," and "any bad effect on something."[10] *See also Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d at 800 (citing dictionary to interpret the same phrase).

Critically, because the phrase uses the disjunctive "or," the Policy's all-risk coverage may be triggered ***either*** by "loss" ***or*** by "damage." *See id.* at 801 (explaining that if "physical loss" meant "physical damage," at least one of the two terms would be rendered superfluous). A federal district court recently considered the disjunctive nature of the phrase in a multi-district litigation case concerning business interruption coverage for coronavirus-related losses. *See Society Insurance*, 2021 WL 679109, at *8. The *Society Insurance* court's analysis is instructive.[11] The court noted that "[t]he disjunctive 'or' in the phrase means that 'physical loss' must cover something different from 'physical damage.'" *Id.* at *8. "It would be one thing if coverage were limited to direct physical 'damage.' But coverage extends to direct physical 'loss of' property as well. So the Plaintiffs need not plead or show a change to the property's physical characteristics." *Id*. *Accord North State Deli LLC, et al. v. Cincinnati Ins. Co., et al.*, No. 20-CVS-02569, at 7 (N.C.

[10] Direct (adjective), Black's Law Dictionary (11th ed. 2019); Direct (adjective), Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/direct; Physical, Black's Law Dictionary (11th ed. 2019); Loss, Black's Law Dictionary (11th ed. 2019); Loss, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/loss; Loss, Collins English Dictionary, https://www.collinsdictionary.com/us/dictionary/english/loss ("the fact of no longer having something or having less of it than before"); Damage, Black's Law Dictionary (11th ed. 2019).

[11] The court analyzed the standard policy language under the laws of Illinois, Minnesota, Wisconsin, and Tennessee, whose basic principles for interpreting insurance contracts are identical to those of Florida. The court's Order is attached as Exhibit D.

Sup. Ct. Oct. 9, 2020) (the "*North State Deli* Order").[12]

In any event, the Complaint alleges physical loss *and* damage, consistent with the plain meaning of these terms. *See, e.g.*, Compl. ¶¶ 43, 44, 45, 74. Cafe International has experienced a "loss": among other things, it has suffered "[a]n undesirable outcome of a risk," has sustained a "diminution of value" of its property, and has suffered a "failure to maintain possession" of its property. Cafe International has also suffered "damage", including the "bad effects" of the virus's contamination of the property.

Moreover, there is no reasonable dispute that this loss and damage was "physical." As noted above, the coronavirus itself is undeniably a physical and material entity, with a well-established a tendency to physically attach to and accumulate in property. *Cf. Sullivan v. Standard Fire Ins. Co.*, 956 A.2d 643, at *3 (Del. 2008) (concluding that mold contamination constitutes a "physical loss" and explaining that "[m]old spores and other bacteria . . . undoubtedly have a 'material existence,' even though they are not tangible or perceptible to the naked eye"); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. Civ. 98-434, 1999 WL 619100, at *6 (D. Or. Aug. 4, 1999) (explaining that "physical damage can occur at the molecular level and can be undetectable in a cursory inspection"). The effects of the virus on the property have plainly been physical, as well: not only did the virus physically attach to and accumulate on the property, but it forced necessary physical alterations to Cafe International's property and use of its property.

Again, the *Society Insurance* case is instructive. In ruling that the plaintiffs' loss due to the coronavirus was "physical," the court considered how a restaurant might mitigate against that loss. *See Society Insurance*, 2021 WL 679109 at *9. "If the restaurant could expand its *physical*

[12] The court's Order granting partial summary judgment to the policyholders is attached as Exhibit E. An earlier Order denying the insurers' motion to dismiss is attached as Exhibit F.

space, then the restaurant could serve more guests [while also keeping the property at a safe level of occupancy] and the loss would be mitigated (at least in part)." *Id.* Because the loss could conceivably be mitigated through *physical* alterations to the property, the court held that the loss "is physical—or, at the very least, a reasonable jury can make that finding." *Id.*

Finally, there is no reasonable dispute that Cafe International's loss and damage was "actual." *See Maspons*, 211 So.3d at 1069 (reasoning that loss and damage must be "actual"). In both its plain and legal uses, "actual" means "real" or "existing in fact," as opposed to being merely fictitious or conjectural.[13] That is also the meaning given to the word by Westchester, *see* D.E. 58 at 18 (contrasting "actual" with "just potential"), and by the court in *Maspons*, a case to which Westchester cites extensively, *see* 211 So.3d at 1069 (holding that "the failure of the drain pipe to perform its function constituted a 'direct' and 'physical' loss to the property"). Here, Westchester may dispute the *interpretation* of the Policy, but taking Cafe International's allegations as true, Westchester cannot assert that Cafe International's claimed loss or damage is not "actual."

ii. Westchester's interpretation of the Policy is out of step with its plain language.

Westchester's narrow interpretation of the phrase "direct physical loss or damage" is incorrect in several respects. First, it would require inserting additional terms that are notably *absent* from the Policy's plain language. For example, Westchester appears to contend that "direct physical loss or damage" requires structural injury to the covered property. *See* D.E. 58 at 12–15. But nothing in the phrase "direct physical loss or damage," or elsewhere in the Policy, requires structural alteration. Indeed, as outlined in more detail below, courts in Florida and elsewhere

[13] *See* Actual (adjective), Black's Law Dictionary (11th ed. 2019); Actual (adjective), Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/actual. *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (explaining that for Article III standing, a plaintiff must suffer an injury that is "actual or imminent," as opposed to "conjectural" or "hypothetical") (quotation omitted).

have repeatedly rejected the notion that "physical loss or damage" requires structural injury to the property.[14]

Second and relatedly, by arguing for a requirement of *structural* injury, Westchester conflates the distinct terms "loss" and "damage." But this requires *ignoring* the key word "or," in violation of the guiding principle that "[n]o word or part of an agreement is to be treated as a redundancy or surplusage if any meaning, reasonable and consistent with other parts, can be given to it." *Fla. Inv. Grp. 100, LLC v. Lafont*, 271 So. 3d 1, 5 (Fla. Dist. Ct. App. 2019) (internal quotation marks omitted). *Accord Twin City Fire Ins. Co. v. Leonel R. Plasencia, P.A.*, 2019 WL 7899222, at *3 (S.D. Fla. Sept. 30, 2019). In other words, even if "damage to" property required structural injury, the "direct physical loss of" property must mean something else. *See Landrum v. Allstate Ins. Co.*, 811 F. App'x 606, 609 (11th Cir. 2020) ("Use of the disjunctive 'or' in the policy 'indicates alternatives and requires that those alternatives be treated separately[.]") (quoting *Quindlen v. Prudential Ins. Co. of Am.*, 482 F.2d 876, 878 (5th Cir. 1973), and citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 116 (2012) ("Under the conjunctive/disjunctive canon, ... *or* creates alternatives."). *Accord Society Insurance*, 2021 WL 679109 at *8.

Third, Westchester also appears to suggest that the words "rebuild," "repair," and "replace"—which form part of the definition of the "Period of restoration" in the Policy—support

[14] Westchester's motion also invokes other adjectives that are notably absent from the Policy, chiefly the word "tangible." Although some authorities have correctly rejected insurance claims for losses that are intangible in the sense that they were purely *economic*, there is no requirement in the Policy's plain language that claimed losses be "tangible." Nevertheless, assuming *arguendo* that the Policy contained such a requirement, the loss and damage to the IT! Italy restaurant *was* tangible in the same sense that it was "actual" and "physical." *See* Tangible (adjective), Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/tangible ("substantially real" or "material").

its strained interpretation of "physical loss or damage." *See* D.E. 58 at 5 (highlighting Policy language). But rather than supporting Westchester's arguments, the plain meaning of these words undermines them. "Restore" means, among other things, "to put back into existence or use," "to bring back or put back into a former or original state," "to renew," and "to put back again in possession of something." And "repair" means "[t]o restore to a sound or good condition . . ." or "[t]o renew, revive, or rebuild after loss, expenditure, exhaustion etc."[15] In sum, the "Period of restoration" plainly refers to the period of time until the business can physically be renewed, restored, or put back into use. Nothing in the definition of the "Period of restoration" supports Westchester's arguments that "physical loss or damage" must be structural or permanent.

If Westchester wanted to restrict coverage only to structural injury or permanent damage, it should have and could have done so in plain language. For example, Westchester could have simply added the words "structural" or "permanent" or "irreparable" to the Policy. Or it could have defined the term "direct physical loss or damage" as strictly and narrowly as it now urges this Court to do. But Westchester did not do so. And it cannot retroactively impose such limitations on the Policy's all-risk grant of coverage. As the Florida Supreme Court has explained, "[t]here is no reason why such [insurance] policies cannot be phrased so that the average person can clearly understand what he is buying." *Hartnett v. S. Ins. Co.*, 181 So.2d 524, 528 (Fla. 1965). And "so long as these contracts are drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied in it, the courts should and will construe them liberally in favor of the insured and strictly against the insurer to protect the buying public[.]" *Id*.

iii. Courts in Florida and elsewhere have long rejected a structural damage requirement for coverage under all-risk policies.

[15] Restore, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/restore; Repair (verb), Black's Law Dictionary (11th ed. 2019).

Consistent with the plain meaning of "physical loss or damage," courts in Florida and elsewhere have *rejected* a structural-injury requirement for coverage in all-risk policies. *See, e.g.*, *Azalea*, 656 So. 2d at 602. In *Azalea*, the court explained that this interpretation was "not supported by the facts or law." *Id.* Rather, the key fact in that case was that "[t]he facility could not operate or exist" based on the presence of an "unknown substance." *Id.* Subsequent cases have made clear that "under Florida law 'direct physical loss' includes more than losses that harm the structure of the covered property." *Three Palms Pointe*, 250 F. Supp. 2d at 1364. *See also Studio 417*, 478 F. Supp. 3d at 801–02 (citing cases under a variety of states' laws).

Mama Jo's, Inc. v. Sparta Ins. Co.,[16] a post-*Azalea* case that Westchester relies on extensively, must be considered in the context of *Azalea* and its progeny. In *Mama Jo's*, dust from nearby roadwork migrated into the plaintiff's restaurant. The restaurant continued to operate *without* meaningful alterations: it remained open, was able to serve the same number of customers as before, and even cleaned the dust and debris using the *same protocols* it had previously used. *See* 2020 WL 4782369, at *1. Nevertheless, the restaurant claimed coverage for its cleaning expenses and for an alleged loss of business income. But it neither alleged nor could prove any "physical loss or damage."

The insurer moved for summary judgment, and the district court granted the motion, concluding in relevant part that the cleaning expenses—without more—did not constitute "physical loss or damage." *See* 2018 WL 3412947, at *8. The district court noted that "[s]everal courts have held that 'physical loss' occurs when the property becomes 'uninhabitable' or substantially 'unusable.'" *Id.* at *9. But in *Mama Jo's*, "the restaurant was not 'uninhabitable' or

[16] 2018 WL 3412974, (S.D. Fla. Jun. 11, 2018), *aff'd*, 2020 WL 4782369 (11th Cir. Aug. 18, 2020).

'unusable.'" *Id.* The restaurant appealed, and the Eleventh Circuit affirmed, explaining that "an item or structure that *merely* needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'" 2020 WL 4782369, at *8 (emphasis added).

The key facts of *Mama Jo's* are distinguishable. Unlike in *Mama Jo's*, the Complaint does not "merely" allege that the restaurant property needed to be cleaned. Rather, the Complaint alleges that contamination by the virus rendered much of the property unsafe and unusable. And unlike the dust in *Mama Jo's*, the coronavirus is not a mere nuisance that can be permanently rectified with the same cleaning protocols that Cafe International used before. Rather, the coronavirus is a deadly biological threat that, when it attaches itself to property and accumulates in air, risks the life and safety of Cafe International's staff and patrons, and renders the property materially unusable. Finally, unlike in *Mama Jo's*, Westchester proposes to extinguish this case without the benefit of discovery. In *Mama Jo's*, the *facts* of the case—*e.g.*, facts about the policyholder's ability to use its property without physical alterations—were critical to the outcome.

The reasoning of *Mama Jo's*, moreover, undercuts Westchester's argument, because consistent with *Azalea* and *Three Palms Pointe*, *Mama Jo's* did *not* articulate a structural-injury requirement for coverage under all-risk policies. To be sure, *Mama Jo's* stands for the proposition that cleaning *standing alone* is not "physical loss or damage," and that the loss and damage must be "actual," as opposed to hypothetical. *See id.* (citing *Maspons*, 211 So.3d at 1069). But as noted above, Cafe International plainly alleges "actual" loss and damage. And *Mama Jo's* did not require—and could not have required, under *Azalea*—structural *damage* as a precondition for coverage under all-risk policies.

Indeed, courts in jurisdictions across the country have reached the same conclusion and recognized that "physical loss of or damage to" property can arise from a wide variety of risks and

harms in the absence of structural injury. *See, e.g., Customized Distrib. Servs. v. Zurich Ins. Co.*, 862 A.2d 560, 566 (N.J. App. Div. 2004) ("Since 'physical' can mean more than material alteration or damage, it was incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided[.]"). These risks and harms include the presence of unpleasant or noxious odors, *see, e.g., Farmers Ins. Co. of Or. v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993);[17] bacterial contamination of a water well, *see Motorists Mutual Ins. Co. v. Hardinger*, 131 F. App'x 823, 826 (3d Cir. 2005); the buildup of carbon monoxide, even though the chemical was harmless to the property itself, *see Matzner v. Seaco Ins. Co.*, 1998 WL 566658, at *3 (Mass. Super. Ct. Aug. 12, 1998);[18] and the release of ammonia, which rendered the insured premises unfit for occupancy, *see Gregory Packaging, Inc. v. Travelers Property Cas. Co. of Am.*, 2014 WL 6675934, at *3 (D. N.J. Nov. 25, 2014). The list goes on.[19]

These risks, harms and threats also include the novel coronavirus. To date, several courts examining identical policy language have correctly denied insurers' motions to dismiss and for summary judgment, and ruled that at least some losses related to the coronavirus are covered under all-risk insurance policies. *See, e.g., Society Insurance*, 2021 WL 679109 *8 (denying insurers'

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17 *See also Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009); *Mellin v. N. Sec. Ins. Co., Inc.*, 115 A.3d 799, 805 (N.H. 2015).

18 *See also Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968).

19 *See, e.g., General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (oats treated with unapproved pesticide but otherwise safe to consume); *Widder v. La. Citizens Prop. Ins. Co.*, 82 So. 3d 294, 296 (La. Ct. App. 2011) (lead dust); *Hughes v. Potomac Ins. Co. of D.C.*, 18 Cal. Rptr. 650, 655 (Ct. App. 1962) (landslide that rendered the house "useless to its owners" but left it structurally intact); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709 (E.D. VA. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) (gas from a drywall); *Murray v. State Farm Fire & Casualty Ins. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (threat of future rock fall from an abandoned rock quarry, even "in the absence of structural damage to the insured property"); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 230 (3d Cir. 2002) (asbestos); *U.S. Fidelity & Guar. Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 75 (Ill. 1991) (same).

motion to dismiss and for summary judgment, and concluding that plaintiffs had plausibly alleged "physical loss or damage"); *Wagner Shoes, LLC v. Auto-Owners Ins. Co.*, 2020 WL 7260032 (N.D. Ala. Dec. 8, 2020) (denying insurer's motion to dismiss); *Studio 417*, 478 F. Supp. 3d at 800–03; the *Optical Services* Order; *Blue Springs Dental Care*, 488 F. Supp. 3d 867, 873 (W.D. Mo. 2020); the *North State Deli* Order at 7; *Henderson Road Restaurants Systems, Inc. v. Zurich Am. Ins. Co.*, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021) (granting partial summary judgment to policyholder); *Humans & Resources, LLC v. Firstline Nat'l Ins. Co.*, 2021 WL 75775 (E.D. Pa. Jan. 8, 2021); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020).

iv. A holistic reading of the Policy supports coverage in this case.

Under well-settled Florida law, insurance contracts must be read as a whole. *See Talbott v. First Bank Florida, FSB*, 59 So.3d 243, 245 (Fla. Dist. Ct. App. 2011) ("A contract should be read as a whole."); *City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000) (explaining that courts must "read provisions of a contract harmoniously in order to give effect to all portions thereof"). And in an all-risk policy, the exclusionary provisions by definition concern risks that *would otherwise be covered*, in other words risks of "direct physical loss or damage." *See, e.g., Great Lakes Reinsurance (UK) PLC v. Kan-Do, Inc.*, 639 F. App'x 599, 603 (11th Cir. 2016) ("[E]xclusions in coverage are expressly intended to modify coverage clauses and to limit their scope.") (citations omitted). *Accord Allstate Ins. Co. v. Preferred Fin. Sols., Inc.*, 8 F. Supp. 3d 1039, 1053 (S.D. Ind. 2014). Otherwise, the exclusions would be superfluous, a result that is expressly disfavored under Florida law. *See Anderson*, 756 So.2d at 34.

Westchester's narrow interpretation of the scope of coverage is inconsistent with a holistic reading of the Policy: if the Policy provided coverage only for structural or permanent damage, as Westchester urges, it would render superfluous several of the exclusions. For example, the Policy

excludes risks related to "[t]he failure of power, communication, water or other utility service;" the "[p]resence, growth, proliferation, spread or any activity of 'fungus,' wet or dry rot or bacteria;" and "[s]moke, vapor or gas from agricultural smudging or industrial operations." D.E. 1-1 at 63. All of these are risks of "physical" loss or damage, but not of *structural injury*. Accordingly, Westchester's argument that the Policy covers *only* structural injury or structural damage would render many of the Policy's exclusions superfluous.

v. Westchester's reliance on distinguishable cases is misplaced.

Westchester's motion also relies on a handful of recent COVID-19-related cases that are inapposite for several reasons. First, in many of the cases cited by Westchester, the plaintiffs failed to allege physical loss or damage, and instead sought coverage based *solely* on government orders or *solely* on their economic losses, untethered to any physical loss or damage. *See, e.g.*, *Malaube, LLC v. Greenwich Ins. Co.*, 2020 WL 5051581, at *6–7 (S.D. Fla. Sept. 28, 2020) (citing at length *Studio 417*, but distinguishing it because the *Malaube* plaintiff failed to allege physical loss or damage); *Carrot Love, LLC v. Aspen Specialty Ins. Co.*, 2021 WL 124416, at *2 (S.D. Fla. Jan. 13, 2021) (noting that *economic* losses due to COVID-19 are not covered under all-risk policies). *Cf. Studio 417*, 478 F. Supp. 3d at 803 (explaining that all-risk policies cover economic harm when it is *tethered* to an underlying physical loss or damage). Here, in contrast, Cafe International has clearly alleged direct physical loss and damage. *See, e.g.*, Compl. ¶¶ 43, 45, 74.

Second, several cases concerned policies that, unlike the Policy here, contained express virus exclusions including the ISO virus exclusion. *See, e.g., Edison Kennedy, LLC v. Scottsdale Ins. Co.*, 2021 WL 22314 (M.D. Fla. Jan. 4, 2021); *Mena Catering, Inc. v. Scottsdale Ins. Co.*, 2021 WL 86777 (S.D. Fla. Jan. 11, 2021). But here, there is no such exclusion. Indeed, one of the key facts of this case is that *despite* including a variety of ISO policy forms in Cafe International's Policy, *despite* incorporating a wide variety of exclusions into the Policy, and

despite incorporating the ISO virus exclusion in *other* policyholders' policies, Westchester elected *not* to adopt the ISO virus exclusion in Cafe International's Policy.[20]

Third, although a minority of the cases cited by Westchester bear partial similarity to the instant case—namely in that the plaintiff *did* allege physical loss and/or damage as distinct from pure economic losses, and the policy at issue did not contain a virus exclusion—in those cases, the courts appear to have ruled in favor of the insurer by applying a structural-injury requirement.[21] As noted above, there is *no such requirement* in Florida. Therefore, to the extent that a few courts in Florida have applied such a requirement in the COVID-19 context, Cafe International respectfully submits that those cases were wrongly decided.

For one thing, the structural-injury requirement articulated in those cases is impossible to square with *Azalea* and its progeny. *Compare Prime Time Sports Grill, Inc. v. Dtw 1991 Underwriting Ltd.*, 2020 WL 7398646, at *6 (M.D. Fla. Dec. 17, 2020) (requiring "tangible *damage* to a property for a 'direct physical *loss*' to exist") (emphasis added) *with Three Palms Pointe*, 250 F. Supp. 2d at 1364 ("[U]nder Florida law 'direct physical loss' includes more than losses that harm the structure of the covered property[.]"). For another, as noted above, a structural-injury requirement is impossible to square with the plain language of Cafe International's Policy, which clearly provide coverage for *both* "loss" *and* "damage."

C. Westchester is unlike most other insurers in having issued policies with disparate exclusionary language concerning viruses, and it cannot now argue for treating both types of policies the same.

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[20] The ISO is a company that, among other things, drafts standardized policy forms for use in insurance policies. For example, the form in the Policy describing the scope of coverage as "direct physical loss or damage" is an ISO form. *See* D.E. 1-1 at 62.

[21] *See, e.g., Rococo Steak, LLC v. Aspen Specialty Ins. Co.*, 2020 WL 268478, at *4 (M.D. Fla. Jan. 27, 2021).

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There is one additional and crucial respect in which this case is distinct from ***all*** the cases cited by Westchester. Unlike the insurers in the authorities cited by Westchester—indeed, unlike most insurers of which Plaintiff is aware—Westchester routinely issued policies containing the ISO virus exclusion, as well as policies lacking the virus exclusion. In other words, Westchester issued *two different types* of policies, which clearly provided different treatment for virus-related risks and losses. Cafe International's Policy is among the Westchester-issued policies that lack the ISO virus exclusion. Now, despite issuing two different policies with differing virus-coverage language, Westchester's interpretation of Cafe International's Policy effectively proposes to treat both types of policies the same.

The ISO drafted the virus exclusion at issue in the aftermath of the SARS epidemic, which was itself caused by a type of coronavirus. *See* Compl. ¶ 34. This endorsement, titled Exclusion of Loss due to Virus or Bacteria and identified by the code CP 01 40 07 06, was expressly drafted to exclude virus-related losses from coverage under all-risk insurance policies.[22] In other words, absent such a virus exclusion, virus-related losses are generally covered. Otherwise, the entire endorsement would be superfluous.

Here, although Westchester has issued policies to certain policyholders incorporating the ISO virus exclusion, it has <u>*not*</u> done so in the policies issued to Cafe International and other similarly situated policyholders. That fact is pivotal to this case. Among other things, it clearly indicates that Westchester understood "direct physical loss or damage" to at least possibly cover virus-related losses. Otherwise, there would be no need to exclude virus-related losses from all-

[22] The ISO's circular explaining the need for the endorsement is attached as Exhibit G. Cafe International does *not* adopt wholesale the reasoning in the circular. But Westchester's *failure* to incorporate the ISO or any other virus exclusion forecloses its argument that it intended to exclude virus-related losses from coverage.

risk policies, and the ISO virus exclusion would be superfluous in the policies in which it was incorporated, something disfavored by the law of Florida and most other states. *See Anderson*, 756 So.2d at 34. Put differently, the Westchester policies with the virus exclusion *must* have a different scope of coverage than those without the virus exclusion. After all, all-risk policies like Cafe International's Policy define the scope of coverage as "direct physical loss *unless the loss is excluded or limited*." D.E. 1-1 at 62 (emphasis added).

Indeed, the Florida Supreme Court has recognized that where an exclusion form is available and an insurer elects not to adopt it, that itself is an argument in favor of coverage. *See U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871, 884 (Fla. 2007) (discussing, among other things, an ISO endorsement form). Therefore, having chosen not to adopt a virus exclusion in the Policy, Westchester cannot now seek to deny coverage for Cafe International's virus-related losses. *Cf. Container Corp. v. Am. v. Maryland Cas. Co.*, 707 So.2d 733, 736 (Fla. 1998) ("Had Maryland wished to limit Container's coverage . . . it could have done so by clear policy language.").

Notably, several courts across the country have expressly *relied* on the ISO virus exclusion to deny coverage for coronavirus-related losses. *See, e.g., 1210 McGavock Street Hospitality Partners, LLC v. Admiral Indem. Co.*, 2020 WL 7641184, at *5 (M.D. Tenn. Dec. 23, 2020); *Quakerbridge Learning LLC v. Selective Ins. Co. of New England, et al.*, 2021 WL 1214758, at *4 (D.N.J. Mar. 31, 2021); *Border Chicken AZ LLC v. Nationwide Mut. Ins. Co.*, 2020 WL 6827742, at *4 (D. Ariz. Nov. 20, 2020); *Pez Seafood DTLA, LLC v. Travelers Indem. Co.*, 2021 WL 234355, at *7 (C.D. Cal. Jan. 20, 2021). These cases confirm the obvious: that the ISO virus exclusion alters the scope of coverage—restricting coverage where it would otherwise exist—and that policies containing the exclusion provide narrower coverage than policies lacking the exclusion.

Equally important, at least one federal court has considered the implications of the availability of the ISO virus exclusion for policies that *lack* the exclusion. *See Society Insurance*, 2021 WL 679109 at n. 6 (noting the parties' dispute regarding "the implication of the absence of a virus or pandemic exclusion in the policy," as well as the existence of exclusions which "have been common in the industry since the SARS epidemic of 2003"). The *Society Insurance* court denied the insurers' motions to dismiss and for summary judgment, and suggested that there should be discovery regarding the insurers' use or non-use of the virus exclusion. *See id.* ("No doubt that this issue will be the proper subject of discovery, both factual and perhaps expert."). The court's analysis is instructive here. As in *Society Insurance*, this Court should reject Westchester's argument that "physical loss or damage" excludes all coronavirus-related losses. And just as the *Society Insurance* court observed that the ISO virus exclusion was a legitimate—indeed, an *important*—topic for discovery, Cafe International should be able to take discovery on Westchester's use and non-use of the ISO exclusion in its property insurance policies.[23]

D. Cafe International has sufficiently alleged coverage under the Civil Authority provisions.

Civil Authority coverage under the Policy arises where there is direct physical loss or damage to one or more properties within one mile of the insured property resulting in dangerous physical conditions and, in response, a government authority prohibits access to the insured property. Cafe International has successfully pleaded such a claim. Although the Civil Authority coverage also implicates the "physical loss" question addressed in the preceding section, there are independent points that must be addressed here.

[23] Consistent with the discovery timeline outlined in the Scheduling Order entered in this case, Plaintiff has sought discovery related to Westchester's use and non-use ISO virus exclusion. To date, Westchester has objected and refused to respond to all such discovery requests.

First, Westchester argues that "nowhere does Café International allege that the authorities' orders resulted from any damage to property elsewhere." D.E. 58 at 17. But this is directly contradicted by the Complaint, which alleges that "[t]he Civil Authority Actions . . . were issued in response to dangerous physical conditions[.]" Compl. ¶ 44. To the extent that Westchester argues that a policyholder must allege *with particularity* the locations at which the dangerous physical conditions manifested, that is a novel requirement with no foundation in any binding authority.

Second, Westchester argues that none of the government orders affecting Cafe International were in fact issued in response to property damage *anywhere*. Westchester's apparent reasoning is that the orders were intended to contain a public health emergency, and therefore *could not* have been concerned with property damage or dangerous physical conditions. *See* D.E. 58 at 17–18. This argument is unavailing. Simply put, to the extent that public health risks animated the government orders, those risks *included* risks posed by dangerous physical conditions at various properties, including in Fort Lauderdale, which was and remains a hotspot of coronavirus contamination. Namely, the orders were concerned with, among other things, the dangers posed by properties that were physically contaminated with the coronavirus. Moreover, there is nothing in the Policy indicating or even suggesting that a government order with *multiple* objectives—*e.g.*, responding to dangerous physical conditions *and* containing a public health emergency—cannot give rise to Civil Authority coverage.

Westchester's argument is also directly belied by the text of the government orders themselves. Indeed, at least one government order requiring the closure of the IT! Italy restaurant "was expressly issued in response to the propensity of COVID-19 and its disease-causing agent to physically caus[e] property damage." *Id.* ¶ 40 (citing Broward County Emergency Order 20-03)

(alteration in original). To circumvent the plain language of the Broward County Order, Westchester disparages it as "a conclusory legal conclusion[.]" D.E. 58 at 18 (quoting *Island Hotel Props., Inc. v. Fireman's Fund Ins. Co.*, 2021 WL 117898, at *3 (S.D. Fla. Jan. 11, 2021)). Westchester's apparent argument is that when determining the existence or lack thereof of Civil Authority coverage, it is appropriate to disregard government orders' own language, intent, goals, and scope if the orders are allegedly "conclusory." This is a novel proposition, and although a lone Florida case appears to support it, Cafe International respectfully submits that this proposition should be rejected. Nothing in the Policy supports the notion that Civil Authority Actions can be disregarded for allegedly being "conclusory." Westchester provides no reasoned analysis supporting the insertion of such a limitation into the Policy, and there is no binding authority mandating such a novel result. In any event, to the extent that Westchester is proposing to scrutinize the rationales behind government orders, Westchester is raising *factual* arguments that are premature on a Rule 12(c) motion. If Westchester wishes to present evidence of what the orders were concerned with—and especially if Westchester wishes to contend that the orders do not mean what they say—the appropriate stage for such arguments is summary judgment.

Second, Westchester argues that Civil Authority coverage is not available because the government orders at issue did not *entirely* prohibit access. *See* D.E. 58 at 19 (asserting that notwithstanding the government orders, Cafe International could provide take-out, delivery and pick-up food service). But by the plain and ordinary meaning of the word "prohibit," the government orders that forced the closure of the IT! Italy restaurant prohibited access to it.[24] Westchester cites to cases concerning different plaintiffs, subject to different orders, in counties

[24] *See* Prohibit, Black's Law Dictionary (11th ed. 2019) ("forbid by law" and "severely hinder").

other than Broward County concluding that orders requiring a closure of a business do not amount to a "prohibition" on access. But to the extent that those cases read Civil Authority provisions to require a *complete* prohibition on *any* access to the insured property, Cafe International respectfully submits that they were wrongly decided. The Policy's plain language refers to orders that "prohibit" access, not "*completely* prohibit" or "prohibit *any access.*" *See Studio 417*, 478 F. Supp. 3d at 804 (noting that policy does not require prohibition on "all access" or "any access").

CONCLUSION

Westchester's interpretation of the Policy is unreasonable and unsupported by Florida law going back to *Azalea*. Moreover, this case presents the unusual circumstance—not addressed in any of the authorities cited by Westchester—of an insurer that issued policies with plainly disparate virus coverage provisions, and is now proposing to treat all of its policyholders the same. At best, Westchester's arguments, along with Cafe International's response, point to multiple reasonable interpretations of the Policy, with Cafe International's view favoring coverage and Westchester's view barring coverage. Under such circumstances, Florida law compels adoption of the interpretation that favors coverage. *See, e.g.*, *Dickson*, 36 So. 3d at 790. Accordingly, this Court should deny Westchester's motion for judgment on the pleadings.

Respectfully submitted April 6, 2021.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 6th day of April, 2021 a true and correct copy of the foregoing was served via email and the Court's ECF system on counsel for Defendant: Steve J. Brodie, Esq., Carlton Fields, P.A., 100 S.E. 2nd Street, Suite 420, Miami, Fl 33131 and Daniel M. Petrocelli, Esq., O'Melveny & Myers, LLP, 7 Times Square, New York, NY 10036.

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