UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO: 1:20-cv-22981-MGC

ACTORS PLAYHOUSE PRODUCTIONS, INC., individually and on behalf of all others similarly situation,

Plaintiff,

vs.

SCOR SE and GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA,

Defendants.
______________________________________/

DEFENDANT GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA'S MOTION TO DISMISS THE COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

INTRODUCTION

Plaintiff in this putative class action, Actors Playhouse Productions, Inc. ("Plaintiff"), seeks insurance coverage for business interruption related to the COVID-19 pandemic from Defendants General Security Indemnity Company of Arizona (hereinafter, "GSINDA") and SCOR SE.[1]

Plaintiff's Complaint must be dismissed for several reasons:

(1) The insurance policy at issue is a Commercial Property policy that insures Plaintiff's property against direct physical loss or damage. The policy provides certain "Business Income" coverage, but for that coverage to apply, consistent with the property coverage being provided, there must be direct physical loss of or damage to the insured property.

[1] SCOR SE contemporaneously files its own separate Motion to Dismiss, which incorporates the arguments made herein.

Plaintiff's Complaint fails to sufficiently allege that fundamental predicate, nor under the circumstances alleged could it ever.

(2) The policy also provides certain Business Income coverage if a civil authority prohibits access to insured property because of direct physical damage to nearby property. Again, Plaintiff fails to allege direct physical damage to nearby property or that access to insured property has been prohibited because of such direct physical damage.

(3) Even if the policy's requirements discussed above had been met, the policy expressly excludes any losses caused directly or indirectly by any "biological and/or . . . pathogenic agent, material, product or substance," which includes viruses such as novel Coronavirus, also known as SARS-CoV-2.

(4) Similarly, the policy excludes coverage for any claim arising directly or indirectly out of a microorganism. SARS-CoV-2 is unquestionably a microorganism.

(5) Additionally, the policy contains pollution exclusions, which preclude coverage for any claim related to substances that pose a threat to human health. Here, Plaintiff's insurance claim arises out of SARS-CoV-2, which poses a threat to human health.

(6) Lastly, the Complaint fails to sufficiently allege causes of action for breach of contract, as Plaintiff provides no supporting facts to support its claims.

Accordingly, GSINDA's Motion to Dismiss should be granted.

I. FACTUAL BACKGROUND

A. THE POLICY

Plaintiff operates a performing arts theater named the "Miracle Theatre" located in Coral Gables, Florida. GSINDA issued a policy that insures the property on which the theater is located. Policy No. 20568-02904-1902, issued to Plaintiff, provides coverage for direct physical loss of or

damage to the properties located at 280 Miracle Mile, Coral Gables, Florida 33134 and 7121 NW 6th Ave, Miami, Florida 33150[2] (the "Property") effective for the policy period of May 8, 2019, to May 8, 2020 (the "Policy"). (Exhibit A).[3]

The Policy's insuring clause provides:

> **A. Coverage**
>
> We will pay for direct physical loss of or damage to Covered Property at the Premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

(Policy, Exhibit A, Form CP 00 10 10 12, at p. 1 of 16). "Covered Cause of Loss" is defined in the Policy as "direct physical loss unless the loss is excluded or limited in this policy." (Policy, Exhibit A, Form CP 10 30 10 12, at p. 1 of 10).

While the Policy does provide certain coverage for loss of "Business Income," the loss must also arise out of direct physical loss or damage to the insured property as identified in the "declarations" page of the Policy. With respect to business income, the Policy's "Business Income" coverage states, in part:

> **1. Business Income**
>
> * * *
>
> 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. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

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[2] The insured properties are identified on the Declarations of the Policy. Per the Policy's Declarations, Business Income coverage is only available for Location 1, which corresponds to the Miracle Theater located at 280 Miracle Mile, Coral Gables, Florida 33150. There is no Business Income coverage available for Location 2, identified in the Policy as 7121 NW 6th Ave, Miami, Florida 33150. It is unclear from Plaintiff's Complaint whether it is also seeking Business Income Coverage for Location 2, 7121 NW 6th Ave, Miami, Florida. GSINDA reserves its rights as to this issue in the event Plaintiff seeks Business Income for Location 2, but notes that coverage would be precluded for Location 2 on the same grounds at Location 1.

[3] The Policy is attached to the Complaint and reattached here for the Court's convenience.

(Policy, Exhibit A, Form CP 00 30 10 12, at p. 1 of 9) (emphasis added).

The Policy also provides certain coverage for "Extra Expense" which is defined, in part, as:

> **2. Extra Expense**
>
> * * *
>
> b. 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.

(Policy, Exhibit A, Form CP 00 30 10 12, at p. 1 of 9) (emphasis added). As noted above, "Business Income" and "Extra Expense" coverages are only provided during the "period of restoration" which is defined as:

> … 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.

(Policy, Exhibit A, Form CP 00 30 10 12, at p. 9 of 9) (emphasis added). In other words, the Policy does not provide coverage for business income and extra expense if the loss is caused by something other than direct physical loss or damage resulting from a covered cause of loss. And coverage is only provided for that time needed to repair, rebuild, or replace the damaged property.

The Policy provides certain "Civil Authority" coverage but, and again consistent with the fundamental principle of a property insurance policy, direct physical loss or damage to property is

required as the civil authority action must result from damage to property caused by a Covered Cause of Loss:

> **a. Civil Authority**
>
> In this Additional Coverage, Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.
>
> ***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 but are not more than one mile from the damaged property; 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 civil authority to have unimpeded access to the damaged property.
>
> Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.
>
> Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end:
>
> (1) Four consecutive weeks after the date of that action; or
>
> (2) When your Civil Authority Coverage for Business Income ends;
>
> whichever is later.

(Policy, Exhibit A, Form CP 00 30 10 12, at p. 2 of 9) (emphasis added).

The Policy contains an endorsement that modifies the Civil Authority coverage. However, none of those modifications change the basic coverage requirements of direct physical loss or damage to nearby property and a prohibition on access to the insured property because of such damage. The Policy modifies the Civil Authority extension as follows:

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> The following applies to the Additional Coverage – Civil Authority under the Business Income (And Extra Expense) Coverage Form, Business Income (Without Extra Expense) Coverage Form and Extra Expense Coverage Form:
>
> 1. The Additional Coverage – Civil Authority includes a requirement that the described premises are not more than one mile from the damaged property. With respect to described premises located in Florida, such one-mile radius does not apply.
> 2. The Additional Coverage – Civil Authority is limited to a coverage period of up to four weeks. With respect to described premises located in Florida, such four-week period is replaced by a three-week period.
> 3. Civil Authority coverage is subject to all other provisions of that Additional Coverage.

(Policy, Exhibit A, Form CP 01 25 02 12, at p. 2 of 3). Thus, among the requirements to trigger civil authority coverage, damage to property must prohibit access to the Property.

The Policy contains applicable exclusions, including the biological exclusion (Policy, Exhibit A, Form GSICP 1007 0517), an exclusion that precludes losses arising out of microorganisms (Policy, Exhibit A, Form GSICP 1004 0517), and broad pollution exclusions (Policy, Exhibit A, Form GSICP 1002 0517 pp. 1-2 of 3, and Form CP 10 30 10 12, at p. 4 of 10).

B. THE INSURANCE CLAIM

Plaintiff submitted a claim seeking recovery for business income loss as a result of local and state orders related to COVID-19 (the "Claim"). (Doc. 1 ¶ 54). In the Complaint, Plaintiff alleges that "[t]he presence of COVID-19 caused direct physical loss of and/or damage to the insured premises." (*Id.* at ¶ 48). Plaintiff also alleges that "Civil Authority Actions" caused a suspension of business operations at the Property and prohibited access to the Property. (*Id.* at ¶¶ 40, 49). Specifically, Plaintiff points to governmental orders issued by the State of Florida, Miami-Dade County, and the City of Coral Gables. (*Id.* at ¶¶ 40-46). Notably, however, the Complaint is devoid of any allegations that Plaintiff (or its employees) was prevented from accessing the premises as a result of COVID-19 or any related governmental orders. Similarly, the Complaint fails to provide any description of the "direct physical loss and/or damage," but instead

gives an incomplete recitation of the various orders. All the referenced government measures were put in place to promote social distancing and slow the spread of COVID-19 by minimizing contact between residents. These orders were not issued as a result of any "direct physical loss of or damage" to property, as required under the Policy to trigger coverage. Moreover, the orders did not "prohibit access" to the Property, as they only restricted public access to the Property, and did not restrict Plaintiff, nor its employees, from entering the premises.

II. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint. *Jacobs v. Tempur-Pedic Int'l., Inc.*, 626 F.3d 1327, 1332-33 (11th Cir. 2010). A complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief," but must allege more than "labels and conclusions," "formulaic recitation of the elements of a cause of action," or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." Fed. R. Civ. P. 8(a)(2); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Courts are not required to accept the labels and legal conclusions in the complaint as true. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009).

To survive a motion to dismiss, a complaint must contain facts that, when assumed to be true, sufficiently "state a claim to relief that is *plausible on its face*." *Iqbal*, 556 U.S. at 678 (emphasis added). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.; see also Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) (explaining that "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal"). A complaint that does not "contain sufficient factual matter, accepted as true, to state a claim . . . plausible on its face" is subject to dismissal.

Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1289 (11th Cir. 2010) (citing *Twombly*, 550 U.S. at 570).

Moreover, "when the allegations of the complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558 (citation and quotations omitted).

III. ARGUMENT

A. PLAINTIFF'S COMPLAINT FAILS TO ALLEGE DIRECT PHYSICAL LOSS OF OR DAMAGE TO PROPERTY COVERED BY THE POLICY

The Complaint contains no plausible allegations that the Property has suffered "direct physical loss or damage." The Policy provides coverage for business income and extra expense losses if such losses are the result of "direct physical loss of or damage to" the insured Property. (Policy, Exhibit A, Form CP 00 30 10 12, at p. 1 of 9). Further, business income coverage and extra expense are only provided during the "period of restoration," which is the time it takes to repair, rebuild or replace the Property. (Policy, Exhibit A, Form CP 00 30 10 12, at p. 9 of 9). Here, there has been no direct physical loss or damage to the Property, as evidenced by the failure to identify anything to repair, rebuild or replace at the Property.

The plain language of the Policy "requires direct physical loss or damage to the properties in order to trigger payment" for a business income loss. *See Lubell & Rosen LLC v. Sentinel Ins. Co.*, No. 0:16-CV-60429-WPD, 2016 WL 8739330, at *4 (S.D. Fla. June 10, 2016). Florida law places the initial burden on an insured seeking to recover under an all-risk policy of proving that a loss occurred. *See S.O. Beach Corp. v. Great Am. Ins. Co. of N.Y.*, 305 F. Supp. 3d 1359, 1364 (S.D. Fla. 2018), *aff'd*, 791 F. App'x 106 (11th Cir. 2019). An insured's pleading must sufficiently allege that its losses are covered within a policy's insuring agreement. *See Timber Pines Plaza,*

LLC v. Kinsale Ins. Co., 192 F. Supp. 3d 1287, 1293 (M.D. Fla. 2016). "A complaint that does not 'contain sufficient factual matter, accepted as true, to state a claim . . . plausible on its face' is subject to dismissal." *Id*. at 1292 (quoting *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1289).

Accordingly, to recover for business income loss, Plaintiff must plead and then prove that it sustained damage to property that is insured by its Policy, that the damage was caused by a covered cause of loss, and that there was an interruption to its business that was caused by the property damage. *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co*., 958 F. Supp. 594, 602 (S.D. Fla. 1997); *cf. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Texpak Grp. N.V*., 906 So. 2d 300, 302 (Fla. 3d DCA 2005) (holding that business interruption and extra expense losses are covered "only if 'resulting from' damage or destruction of real or personal property caused by a covered peril."). In the Complaint, Plaintiff merely alleges that "[t]he presence of COVID-19 caused direct physical loss of and/or damage to the insured premises under the Policy by, among other things, damaging the property, denying access to the property, [and] preventing customers from physically occupying the property." (Doc. 1 ¶ 48). Plaintiff further alleges that COVID-19 "caus[ed] the property to be physically uninhabitable by customers and patients, caus[ed] its function to be nearly eliminated or destroyed, and/or caus[ed] suspension of business operations on the premises." (*Id*.).

Under the federal rules, pleading the bare elements of a claim is insufficient—Plaintiff "must include some supporting facts." *N.P.V. Realty Corp. v. Nationwide Mut. Ins. Co*., No. 8:11-CV-1121-T-17TBM, 2011 WL 4948542, at *4 (M.D. Fla. Oct. 17, 2011). Here, Plaintiff makes conclusory allegations that it has suffered direct physical damage, but the Complaint is devoid of any mention of what physical damage occurred, how the physical damage occurred, and when the physical damage occurred. Accordingly, none of Plaintiff's allegations, even if taken as true, state a plausible claim that Plaintiff has suffered a "direct physical loss or damage" as required to trigger

coverage under the Policy. *See Timber Pines Plaza, LLC v. Kinsale Ins. Co.*, No. 8:15-cv-1821-T-17TBM, 2016 WL 8943313, at *2 (M.D. Fla. Feb. 4, 2016) ("[I]t is not sufficient to plead that the Plaintiff has suffered damages in the form of 'direct physical damage to its property.'").

The phrase "direct physical loss or damage" "must be given its common meaning." *Rockhill Ins. Co. v. Northfield Ins. Co*., 297 F. Supp. 3d 1279, 1286 (M.D. Fla. 2017). This Court has concluded that "[a] direct physical loss 'contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.'" *Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 17-cv-23362-KMM, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018), *aff'd*, No. 18-12887, 2020 WL 4782369 (11th Cir. Aug. 18, 2020) (quoting *Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co*., 187 Cal. App. 4th 766, 779 (2010)). If the property can be cleaned and restored to its original function, no covered loss has been suffered. *Id.* ("cleaning is not considered direct physical loss"). The relevant inquiry is whether the structure continues to function. Indeed, "[t]he fact that the restaurant needed to be cleaned more frequently does not mean [the plaintiff] suffered a direct physical loss or damage." *Id.* Furthermore, as stated by the oft-cited Couch on Insurance, and as explicitly adopted by this Court:

> The requirement that the loss be "physical," given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.

Id. (quoting 10A Couch on Ins. § 148:46 (3d. Ed. West 1998)); *see also Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002) ("In ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure.").

Several courts have already found that neither SARS-CoV-2 and the disease it causes (COVID-19) nor the related governmental orders cause physical loss of or damage to property. The Western District of Texas granted an insurer's motion to dismiss, finding that an insured plaintiff failed to sufficiently allege a "direct physical loss" caused by COVID-19 or the related governmental orders. *See Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020).[4] Notably, the court found that the phrase "direct physical loss" requires "a distinct demonstrable physical alteration of the property" and rejected the insured's arguments that "direct physical loss" includes loss of use of property. *Id*. at *5 (citations omitted); *see also Inns by the Sea v. Ca. Mut. Ins. Co.*, No. 20CV001274 (Cal. Super. Ct. Aug. 6, 2020) (granting insurer's demurrer to insured's COVID-19 related complaint on the grounds that allegations failed to state sufficient facts to constitute a cause of action) (Order and Transcript attached hereto as Exhibit C). The Central District of California and a superior court in the District of Columbia held that the government-ordered closure of restaurants because of COVID-19 was not "direct physical loss" to trigger business income coverage. *See 10E, LLC v. Travelers Indem. Co.*, No. 2:20-CV-04418-SVW-AS, Dkt. 39 at *7 (C.D. Cal. Sept. 2, 2020) ("An insured cannot recover by attempting to artfully plead impairment to economically valuable use of property as physical loss or damage to property.") (A copy of this Amended Order is attached hereto as Exhibit D); *Rose's 1, LLC v. Erie Ins. Exch.*, No. 2020-CA-002424-B, 2020 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020).[5] In *Rose's* consistent with the case law cited herein, the court held that the governmental orders "did not have any effect on the material or tangible structure of the insured properties." *Id*. at *2.

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[4] A copy of this order is attached hereto as Exhibit B.
[5] A copy of this order is attached hereto as Exhibit E.

In the context of a lawsuit seeking injunctive relief against an insurer for business income coverage related to COVID-19, the Southern District of New York found that the virus and resulting disease does not cause physical loss or damage. *See* Teleconference, Order to Show Cause at 4-5*, Soc. Life Magazine, Inc. v. Sentinel Ins. Co. Ltd.,* No. 20-CV-3311-VEC (S.D.N.Y. May 14, 2020) (Transcript with oral findings attached hereto as Exhibit F). With regard to COVID-19, the court in *Soc. Life Magazine* aptly noted: "It damages lungs. It doesn't damage printing presses." (*Id.* at 4:25-5:4). Additionally, another court granted summary disposition in favor of an insurer, finding there was no coverage for the plaintiff's COVID-19 related business income loss, because there was no direct physical loss of or damage to property. *See* Hearing, Motion for Summary Disposition, *Gavrilides Mgmt. Co. v. Mich. Ins. Co.*, No. 20-000258-CB at 20:5-9 (Mich. Cir. Ct. July 1, 2020) (Transcript with Oral Findings attached hereto as Exhibit G) ("[P]laintiff just can't avoid the requirement that there has to be something that physically alters the integrity of the property. There has to be some tangible, i.e., physical damage to the property.").[6]

Plaintiff's allegations regarding any alleged loss of use or functionality of the Property also fail for several reasons. (*See* Doc. 1 ¶ 48). First, in *Mama Jo's*, this Court rejected the notion that loss of use equates to physical damage. *Mama Jo's*, 2018 WL 3412974, at *9. This decision was affirmed on August 18, 2020, by the Eleventh Circuit where the court found that

> A "loss" is the diminution of value of something . . ."Direct" and "physical" modify loss and impose the requirement that the damage be actual . . . With regard to the cleaning claim . . . "cleaning and painting" was all that was required. . . there was no need for removal or replacement of items at that time . . . We conclude that the

[6] GSINDA also refers the Court to Judge Torres's Report & Recommendations finding that under Florida law, a property must suffer actual damage, and the emergency closure orders impacting businesses did not cause actual damage. *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-cv-22615, Dkt. 20, pp. 19-20 (S.D. Fla. Aug. 26, 2020). There, Judge Torres has very recently issued a report and recommendation to grant the insurer's motion to dismiss the insured's COVID-19 related business income claim. GSINDA recognizes that this is not yet a final order, but it nevertheless provides a helpful interpretation of the caselaw cited herein. A copy of this Report & Recommendations is attached hereto as Exhibit H.

> district court correctly granted summary judgment on [the insured's] cleaning claim because, under Florida law, an item or structure that merely needs to be cleaned has not suffered a "loss" which is both "direct" and "physical."

Mama Jo's, 2020 WL 4782369, at *8 (citations and quotations omitted). The alleged presence of COVID-19 is like the presence of the road dust in *Mama Jo's*. If road dust on an insured's property that necessitates cleaning does not cause physical loss or damage, then a virus that is invisible to the naked eye, and which can also be treated effectively with cleaning, would also not cause such physical loss or damage.

Authorities from other jurisdictions also recognize the principal that mere loss of use does not equate to direct physical loss of or damage to property. *See Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) ("The words 'direct' and 'physical,' which modify the phrase 'loss or damage,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure."); *Roundabout Theatre Co. v. Continental Casualty Co.*, 302 A.D.2d 1, 7 (N.Y. App. Div. 2002) (rejecting insured's argument that "loss" should be read to include "loss of use" and holding there was no "direct physical loss or damage" after the insured's theatre became inaccessible because of a nearby street closure after a construction accident as the policy unambiguously required direct physical damage to the insured premises for coverage); *cf. Pentair Inc. v. Am. Guar. & Liab. Ins. Co*., 400 F. 3d 613, 615 (8th Cir. 2005) (finding the inability of an insured's suppliers to function after a power failure did not constitute physical loss or damage to the premises as adopting the insured's reasoning "would mean that direct physical loss or damage is established *whenever* property cannot be used for its intended purpose") (emphasis in original).

Plaintiff's remaining allegations concerning its "direct physical loss of or damage" are solely economic in nature and do not relate to any sort of physical damage and, therefore, are not

covered under the Policy. *See Bahama Bay II Condo. Ass'n, Inc v. United Nat'l Ins. Co.*, 374 F. Supp. 3d 1274, 1278 (M.D. Fla. 2019) ("cost of security guards and security fencing . . .is not property damage, or 'physical loss . . .' but is an economic loss. There is nothing in the Policy that covers economic loss."). Moreover, multiple courts have rejected similar strained interpretations of the phrase "direct physical loss of or damage" in the context of COVID-19 litigation. *See e.g. 10E, LLC,* No. 2:20-cv-04418-SVW-AS, Dkt. 39 (referring to the complaint as "artfully plead"); Exhibit F, Order to Show Cause at 15 ("[T]his kind of business interruption needs some damage to the property . . .You get an A for effort, you get a gold star for creativity, but this is just not what's covered under these insurance policies."); Exhibit G, Hearing for Summary Disposition at 20 ("[P]laintiff is saying that the physical requirement is met because people were physically restricted from dine-in services. But, that argument is just simply nonsense.").

Additionally, the Policy only provides coverage for business income and extra expense losses incurred during the "period of restoration" which begins with the "direct physical loss or damage" and ends on the earlier of "(1) The date when the property at the described premises should be repaired, rebuilt or replaced . . . or (2) The date when business is resumed at a new permanent location." (Policy, Exhibit A, Form CP 00 30 10 12, at p. 9 of 9). Thus, it follows that for there to be coverage under the Policy's business income or extra expense coverage, Plaintiff's loss must involve some physical damage to covered property that needs to be repaired, rebuilt, or replaced. As explained by the Southern District of New York, "the words 'repair' and 'replace' contemplate physical damage to the insured premises as opposed to loss of use of it." *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 332 (S.D.N.Y. 2014) (citations omitted); *see also Phila. Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 287 (S.D.N.Y. 2005) ("'Rebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature.").

Any other reading of the Policy to allow recovery for Plaintiff's Claim would render central contract terms superfluous. Under Florida law, "insurance contracts are construed according to their plain meaning." *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005). Further, "courts must not construe insurance policy provisions in isolation, but instead should read all terms in light of the policy as a whole, with every provision given its full meaning and operative effect." *Office Depot, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 734 F. Supp. 2d 1304, 1314 (S.D. Fla. 2010) (citations omitted). Courts may not "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138 (Fla. 1998). Thus, under the plain language of the Policy, coverage is only afforded for business income and extra expense losses if those losses are caused by direct physical loss or damage.

Accordingly, Plaintiff's Complaint fails to allege any facts that trigger coverage under the Policy and its claims fail as a matter of law.

B. PLAINTIFF HAS NOT PLED A VALID CIVIL AUTHORITY CLAIM

As the basis for its civil authority claim, Plaintiff points to governmental orders issued by the State of Florida, Miami-Dade County, and the City of Coral Gables. (Doc. 1 ¶¶ 40-46). On March 12, 2020, the City of Coral Gables declared a State of Emergency to "protect the health, safety, and welfare of the community" in response to COVID-19. (*Id*. at ¶41; Exhibit I, City of Coral Springs Declaration of State of Emergency). Throughout March and April 2020, the City of Coral Gables issued other Emergency Orders, which, among other things, encouraged individuals to stay at home except to conduct essential services, promoted social distancing measures, and enacted a curfew from 11 PM to 5 AM to help stop the spread of COVID-19. (Doc. 1 ¶ 4; Exhibit J, City of Coral Gables "Safer at Home" Emergency Order; Exhibit K, City of Coral Gables Emergency Curfew Order).

On March 17, 2020, Florida Governor Ron DeSantis issued Executive Order 20-68, which required bars, pubs and nightclubs to suspend the sale of alcoholic beverages, required restaurants to adhere to social distancing guidelines, and required beachgoers to practice social distancing. (Exhibit L, Florida Executive Order 20-68). On March 19, 2020, Miami-Dade County issued Executive Order 07-20, requiring the closure of non-essential businesses. (Doc. 1 ¶ 43; Exhibit M, Miami-Dade Emergency Order 07-20).[7] Theaters and playhouses were not deemed essential businesses. (*See id.*). On March 30, 2020, Governor DeSantis issued Executive Order 20-89, requiring Miami-Dade, Broward, Palm Beach, and Monroe Counites to restrict public access to non-essential businesses pursuant to the guidelines established by Miami-Dade County Emergency Order 07-20. (Doc. 1 ¶ 46; Exhibit N Florida Executive Order 20-89). On July 2, 2020, Miami-Dade County issued Executive Order 26-20, requiring the closure of auditoriums and playhouses. (Doc. 1 ¶ 45; Exhibit O, Miami-Dade Emergency Order 26-20). None of the above-referenced orders were issued as a result of any "direct physical loss of or damage" to property, nor did the orders "prohibit access" to the Property for Plaintiff or its employees.

Plaintiff's allegations fail to trigger the Policy's civil authority coverage. In Florida, the "policyholder bears the initial burden of proving that a loss occurred under the insuring agreement during the policy period." *Somethings Fishy Enter., Inc. v. Atl. Cas. Ins. Co.*, 415 F. Supp. 3d 1137, 1142 (S.D. Fla. 2019). The civil authority coverage requires direct physical loss or damage to property other than the insured property and further requires that access to the insured property is prohibited because of that damage.[8] Plaintiff's effort to obtain civil authority coverage fails

[7] These government orders are a matter of public record. When ruling on a motion to dismiss, a district court may consider evidence if its authenticity is a matter of public record. *See Myers v. Foremost Ins. Co.*, No. 8:15-CV-1363-MSS-JSS, 2015 WL 12830477, at *3 (M.D. Fla. Oct. 23, 2015) (citing *SFM Holdings, Ltd. v. Banc of Am. Secs., LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010)).

[8] Plaintiff may contend that the Policy's language does not require the damaged property to be near the insured premises. Even if this were true, Plaintiff's civil authority claim fails because it does not allege direct physical loss or damage to *any* property, near or far from the insured premises.

because the Complaint fails to allege (1) such physical damage, and (2) that access to the Property has been prohibited because of such damage.

In the Complaint, Plaintiff alleges that it has suffered direct physical loss of and damage to its Property because of:

> The presence of COVID-19 . . . damaging the property, denying access to the property, preventing customers and patients from physically occupying the property, causing the property to be physically uninhabitable by customers and patients, causing its function to be nearly eliminated or destroyed, and/or causing a suspension of business operations on the premises.

(Doc. 1 ¶ 48). Plaintiff then alleges that the subject government orders "prohibit[ed] access to the covered premises and the surrounding area . . . and caused a suspension of business operations on the covered premises," triggering the Policy's "Civil Authority" coverage. (Doc. 1 ¶¶ 49, 123). As noted above, the civil authority coverage requires that "a Covered Cause of Loss causes damage to property other than property at the described premises." (Policy, Exhibit A, Form CP 00 30 10 12, p. 2 of 9). A "Covered Cause of Loss" is defined as "direct physical loss." (Policy, Exhibit A, Form CP 10 30 10 12, at p. 1 of 10). Accordingly, the first requirement of the civil authority coverage is that there be direct physical loss that causes damage to property other than the insured property. Next, because of that damage to other property, a civil authority must prohibit access to the insured property. The action of the civil authority must also be "in response," or the result of, such direct physical loss. (Policy, Exhibit A, Form CP 00 30 10 12, at p. 2 of 9). In other words, because of direct physical loss that causes damage to other property, the civil authority must prohibit access to the insured location because the other property damage has created a dangerous condition. Plaintiff fails to allege these necessary elements. Instead, Plaintiff confusingly alleges that it was the presence of COVID-19 that denied access to the Property, without making any allegation of COVID-19 causing direct physical loss or damage to any other property. (Doc. 1 ¶ 48).

The plain language of the Policy makes clear that coverage requires damage to property other than the described premises *and* an order of civil authority, because of that damage to other property, prohibiting access to the insured's property. *See, e.g.*, *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686-87 (5th Cir. 2011) ("Civil authority coverage is intended to apply to situations where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property.").[9] As explained above, COVID-19 does not cause physical damage or loss to property, and therefore, Plaintiff cannot satisfy the conditions of the civil authority coverage extension. Beyond that shortcoming, there are two more reasons why Plaintiff cannot fulfill the conditions of the civil authority coverage extension: (1) access to the Property has not been "prohibited;" and (2) the subject government orders were not taken "in response" to damaged property.

While the subject government orders prevented Plaintiff from allowing customers into the Property for business purposes, no government order prevented Plaintiff itself, or its employees, from entering the Property. Although Florida courts do not appear to have considered the issue, numerous other courts have recognized that government orders that hamper access to insured property—but do not entirely *prohibit* it— are insufficient to trigger civil authority coverage. *See, e.g.*, *S. Hosp., Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1140 (10th Cir. 2004) (upholding denial of hotel operators' business income claim sustained when customers cancelled visits due to order grounding of flights after the 9/11 attacks); *Kean, Miller, Hawthorne, D'Armond McCowan & Jarman, LLP v. Nat'l Fire Ins. Co. of Hartford*, No. 06-770-C, 2007 WL 2489711, at *1 (M.D.

[9] The Western District of Texas recently relied on the *Dickie Brennan* opinion in holding that an identical civil authority provision was not triggered by a similar COVID-19 business income claim. *See Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *7 (W.D. Tex. Aug. 13, 2020).

La. Aug. 29, 2007) (holding civil authority provision was not triggered by Louisiana government orders prior to Hurricane Katrina advising residents to stay off the streets because advisories did not "prohibit access" to the insured premises); *By Dev. Inc. v. United Fire & Cas. Co.*, No. Civ. 04-5116, 2006 WL 694991, at *6 (D.S.D. Mar. 14, 2006) (finding road closures after wildfire did not prohibit access to insured's business); *54th St. Partners v. Fid. & Guar. Ins. Co.*, 305 A.2d 67, 67 (N.Y. Super. Ct. App. Div. 2003) (holding civil authority extension did not apply to lost business income claim due to city's diversion of vehicular and pedestrian traffic in the proximity of its restaurant, because access to the restaurant was not denied). Since the civil authority extension requires Plaintiff to show that access to its Property was "prohibited" by civil authority, and Plaintiff did not make any such allegations (nor indeed could it), the civil authority extension does not apply.

Second, the subject government orders were not issued "in response" to physical damage to other property. (*See* Policy, Exhibit A, Form CP 00 30 10 12, at p. 2 of 9). Rather, the orders were issued as precautionary measures to prevent the further spread of COVID-19 and promote social distancing. In such situations, the civil authority extension is not triggered. *See Syufy Enter. v. Home Ins. Co. of Ind.*, No. 94-0756 FMS, 1995 WL 129229 (N.D. Cal. Mar. 21, 1995). As detailed in *Syufy*, after the return of the Rodney King verdict and subsequent riots, three cities imposed dawn-to-dusk curfews. *Id.* at *1. An insured movie theater operator, who ran theaters in all three cities, brought a business interruption claim because it closed its theaters during these curfew periods. *Id.* The court concluded there was no civil authority coverage because not only did the civil orders not specifically prohibit individuals from entering the theaters, but the "requisite causal link between damage to adjacent property and denial of access to a Syufy theater [was] absent." *Id.* at *2. In other words, Syufy had closed its theaters as a "direct result of the city-wide curfews," not as a result of adjacent property damage. Furthermore, the court noted that even

though the curfews were imposed to "prevent" property damage, they were not the result of the damage itself. *Id.* at *2. Other courts have reached similar conclusions. *See United Airlines, Inc. v. Ins. Co. of State of Pa.*, 385 F. Supp. 2d 343, 353 (S.D.N.Y. 2005) (holding civil authority coverage did not apply to airport's business interruption claim arising from grounding of flights after the 9/11 attacks because the order to ground flights and bar access to the airport was "to prevent further attacks and as a matter of national security," not because of damage to the Pentagon); *City of Chi. v. Factory Mut. Ins. Co.*, No. 02-C-7023, 2004 WL 549447, at *4 (N.D. Ill. Mar. 18, 2004) ("The business interruption . . . was due to the ground stop order imposed by the FAA in order to prevent further terrorist attacks."); *cf. Prime All. Grp., Ltd. v. Hartford Fire Ins. Co.*, No. 06-22535-CIV-UNGARO, 2007 WL 9703576, at *4 (S.D. Fla. Oct. 19, 2007) ("[A] plain language reading of this section provides coverage when a peril—such as a windstorm—causes damage to property and, as a result, access to property is precluded by a civil authority order. The order of civil authority cannot in any reasonable manner be construed as a 'peril.'").

Plaintiff cannot establish that physical damage occurred due to COVID-19, nor can it establish that the government orders prohibited access to the Property. Moreover, these government orders were not taken "in response" to physical damage but were instead preventative measures issued for public health purposes. Accordingly, the Policy's civil authority coverage extension is not triggered.

C. COVERAGE IS BARRED BY THE BIOLOGICAL EXCLUSION

The Complaint must also be dismissed because Plaintiff's Claim is excluded from coverage by the plain language of the Policy. When resolving insurance coverage disputes, courts "routinely dismiss complaints for failure to state a claim when a review of the insurance policy and the underlying claim for which coverage is sought unambiguously reveals that the underlying claim is not covered." *Cammarota v. Penn-Am. Ins. Co.*, No. 17-CV-21605-Williams, 2017 WL 5956881,

at *2 (S.D. Fla. Nov. 13, 2017); *see also Arias-Bonello v. Progressive Select Ins. Co.*, No. 0:17-CV-60897-UU, 2017 WL 7792704, at *5 (S.D. Fla. Aug. 8, 2017) (dismissing putative class member's breach of contract claims because the claims were expressly excluded from the policy). Here, even if Plaintiff could demonstrate a claim within the Policy's coverage grants (which it cannot), coverage nonetheless is excluded for losses arising out of any "biological" and/or "pathogenic agent, material, product or substance" which includes viruses. Specifically, the Biological Exclusion provides:

> Notwithstanding any provision to the contrary within the Policy of which the Endorsement forms part (or within any other Endorsement which forms part of this policy).
>
> **A.** This Policy does not insure any loss, damage, cost or expense, whether real or alleged, that is caused, results from, is exacerbated or otherwise impacted by, either directly or indirectly, any of the following:
>
> * * *
>
> 2. **Biological Hazard** – including, but not limited to, any ***biological and/or*** poisonous or ***pathogenic agent***, ***material, product or substance***, whether engineered or ***naturally occurring***, ***that induces or is capable of inducing physical distress, illness, or disease***; . . .

(Policy, Exhibit A, Form GSICP 1007 0517) (emphasis added).

When a policy exclusion is plain and enforceable, it must be enforced as written. *See Taurus Holdings, Inc.*, 913 So. 2d at 532. Moreover, when interpreting insurance policies, courts "may consult references commonly relied upon to supply the accepted meanings of words." *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 292 (Fla. 2007) (citing dictionary definitions).

The Policy explicitly excludes coverage for "any loss" caused "directly or indirectly" by "biological and/or . . . pathogenic agent, material, product or substance." (Policy, Exhibit A, Form GSICP 1007 0517). First, there can be no question that SARS-CoV-2, which causes COVID-19,

is a virus.[10] As SARS-CoV-2 is a virus, it is also a "biological . . . agent, material, product or substance." *See, e.g.*, *Nat'l Cotton Council of Am. v. U.S. E.P.A.*, 553 F.3d 927, 928 (6th Cir. 2009) (citing http://www.epa.gov/pesticides/glossary defining viruses as "biological materials").[11] Further, dictionary definitions support that SARS-CoV-2 is "pathogenic."[12] This Court has previously recognized the applicability of a similar exclusion—one that excluded claims caused by "organic pathogens"—to pathogenic material capable of causing bodily injury. *See Endurance Am. Specialty Ins. Co. v. Savits-Daniel Travel Ctrs., Inc.*, 26 F. Supp. 3d 1296, 1303 n. 3 (S.D. Fla. 2014) (suggesting that exclusion for "organic pathogens" could apply to preclude coverage for a claim arising from inhalation of pepper spray, but the court did not know the specific contents of the subject spray to determine whether it was "organic").[13] Plaintiff's Claim was allegedly the result of "the presence of COVID-19." (Doc. 1 ¶ 50). Accordingly, the Claim as alleged is directly or indirectly caused by biological and/or pathogenic agents, material, products or substances, and is excluded from coverage under the Policy.

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[10] To be sure, SARS-CoV-2 is a virus by any definition. Alexander E. Gorbalenya et al., *The species Severe acute respiratory syndrome-related coronavirus: classifying 2019-nCoV and naming it SARS-CoV-2*, 6 NATURE MICROBIOLOGY 526, 526 (March 2, 2020). Also, GSINDA takes this opportunity to note that this Court has repeatedly considered secondary sources such as scholarly articles at the motion to dismiss stage. *See Jones v. Santander Consumer USA Inc.*, No. 16-14012-CIV-ROSENBERG/LYNCH, 2016 WL 11570406, at *3 (S.D. Fla. Aug. 2, 2016) (listing secondary sources that conflict with argument in motion to dismiss); *Dapeer v. Neutrogena Corp.*, 95 F. Supp. 3d 1366, 1371 n. 1 (S.D. Fla. 2015) (incorporating numerous secondary sources cited in Rule 12(b)(6) motion to dismiss); *cf. Aldar Tobacco Grp., LLC v. Am. Cigarette Co.*, No. 08-62018-CIV-JORDAN, 2010 WL 11601994, at *1 (S.D. Fla. Dec. 29, 2010) (admonishing attorney for citing "zero cases, statutes, codes, or *secondary sources* in his motion to dismiss) (emphasis added). Ultimately, this Court has "complete discretion" to accept material beyond the pleadings when considering a motion to dismiss. *Cont'l Cas. Co. v. Hardin*, No. 8:16-cv-322-17GW, 2016 WL 11234458, at *11 (M.D. Fla. Dec. 5, 2016). Plaintiff has already referenced numerous such sources in its Complaint. The Court should exercise its discretion in this instance to best determine whether Plaintiff has adequately stated a claim for which relief can be granted.

[11] *See also Biological Agents*, OSHA (last accessed August 14, 2020), https://www.osha.gov/SLTC/biologicalagents/ (including COVID-19, Avian Flu, and SARS on a list of biological agents).

[12] *See Pathogen*, MERRIAM-WEBSTER (last accessed August 14, 2020, https://www.merriam-webster.com/dictionary/pathogen (defining "pathogen" as "a specific causative agent (such as bacterium or virus) of disease").

[13] GSINDA notes that the Biological Exclusion is broader than the exclusion in *Savits-Daniel* in that it excludes claims arising from both "engineered" and "naturally occurring" pathogenic material, as opposed to only "organic pathogens."

D. COVERAGE IS BARRED BY THE MOLD/MICROORGANISM EXCLUSION

In addition, the Policy also excludes coverage for losses arising out of microorganisms, which include viruses. Specifically, the exclusion provides:

> Notwithstanding any provision to the contrary within the Policy of which the Endorsement forms part (or within any other Endorsement which forms part of this policy), ***this Policy does not insure***:
>
> ***Any loss, damage, claim***, cost, expense or other sum directly or indirectly arising out of or relating to:
>
> > mold, mildew, fungus, spores or other ***microorganism of any type***, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health.
>
> This Exclusion applies regardless whether there is (i) any physical loss or damage to insured property; (ii) any insured peril or cause, whether or not contributing concurrently or in any sequence; (iii) any loss of use, occupancy, or functionality; or (iv) any action required, including but not limited to repair, replacement, removal, cleanup, abatement, disposal, relocation, or steps taken to address medical or legal concerns.
>
> This exclusion replaces and supersedes any provision in the policy that provides insurance, in whole or in part for these matters.

(Policy, Exhibit A, Form GSICP 1004 0517) (emphasis added). As set forth below, SARS-CoV-2, which causes COVID-19, is a microorganism. Therefore, the plain language of this exclusion bars Plaintiff's Claim, which directly or indirectly arises from SARS-CoV-2.

Florida law requires that this exclusion be applied as written. *See Taurus Holdings, Inc.*, 913 So. 2d at 532. Stated differently, when interpreting unambiguous policy terms, "there is no special construction or interpretation required, and the plain language of the policy will be given the meaning it clearly expresses." *Phila Indem. Ins. Co. v. Yachtsman's Inn Condo Ass'n, Inc.*, 595 F. Supp. 2d 1319, 1323 (S.D. Fla. 2009).

The only two jurisdictions to have substantively addressed similar microorganism exclusions, with one being a Florida circuit court, found the exclusion to be valid and enforceable. *See Certain Underwriters at Lloyd's of London Subscribing to Policy No. SMP 3791 v. Creagh*,

563 F. App'x 209, 211 (3d Cir. 2014) (holding that the district court correctly applied the microorganism exclusion to the plaintiff's claim); *Certain Underwriters at Lloyd's, London Subscribing to Policy No. W15F03160301 v. Houligan's Pub & Club, Inc.*, No. 2017-31808-CICI, 2019 WL 5611557, at *11 (Fla. 7th Cir. Ct. 2019) (concluding that "the Microorganism Exclusion bars coverage for the claims in this case").[14] In *Creagh*, the insured's claim arose after a tenant of its building died and the decomposition of the body damaged his apartment. *Creagh*, 563 F. App'x at 209. The United States District Court for the Eastern District of Pennsylvania held that the subject microorganism exclusion applied because the fluids that escaped the tenant's body and contaminated the unit contained bacteria, which are microorganisms. *See Certain Underwriters at Lloyd's London v. Creagh*, No. 12-571, 2013 WL 3213345, at *3 (E.D. Pa. June 26, 2013). The Third Circuit upheld the decision on appeal. *Creagh*, 563 F. App'x at 211.

A Florida circuit court similarly recognized the unambiguous nature and enforceability of microorganism exclusions in the *Houligan's* case. In *Houligan's*, an insured suffered damage when its building was flooded with sewage and waste following a hurricane. *Houligan's*, 2019 WL 5611557, at *1. In applying the microorganism exclusion to the plaintiff's claim, the *Houligan's* court stated:

> For better or worse, the parties bargained for an insurance policy that contains an extremely broad Microorganism Exclusion, one which supersedes and replaces any language in the Policy that might otherwise provide coverage for the loss in question. As noted, the exclusion applies even in the presence of an insured peril or cause that contributes concurrently to the insureds' loss. This Court must apply the Policy in a manner consistent with its plain language. Doing so leads the Court to conclude that the Microorganism Exclusion bars coverage for the claims in this case.

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[14] The Middle District of Florida recently granted an insurer's motion to dismiss an insured's COVID-19 related claim based on the applicability of a similar exclusion, which precluded coverage from "any virus, bacterium *or other microorganism* that induces or is capable of inducing physical distress, illness or disease." Order Granting Motion to Dismiss, *Martinez v. Allied Ins. Co. of Am.*, No. 2:20-cv-00401-FtM-66NPM at *5 (M.D. Fla. Sept. 2, 2020) (emphasis added). A copy of this order is attached hereto as Exhibit P.

Id. at *11. Significantly, the *Houligan's* court looked to the Center for Disease Control's website and dictionary definitions to find that E. Coli and enterococcus, both of which were present in the sewage and waster, are bacteria, and thus, microorganisms that cause an actual or potential threat to human health. *Id*. The decision in *Houligan's* provides a legal roadmap for this Court because SARS-CoV-2 is a microorganism that poses an actual or potential threat to human health, and any claim arising out of SARS-CoV-2 or COVID-19, regardless of whether physical damage occurred, is therefore excluded from coverage.

Secondary sources, like those relied upon by the *Houligan's* court, support a determination that SARS-CoV-2 is a microorganism. No less than the foremost U.S. governmental authorities in the fight against COVID-19—the U.S. Department of Health and Human Services, National Institutes of Health and National Institute of Allergy and Infectious Diseases—defined microorganism as "microscopic organisms, including bacteria, viruses, fungi, plants, and animals."[15] This is consistent with the findings of other governmental agencies.[16] Adding additional support, scientific journals and textbooks also state that viruses are microorganisms.[17] Non-scientific sources such as Encyclopedia Britannica, for instance, list the following "major groups of microorganism": bacteria, archaea, fungi, algae, protozoa, and viruses.[18] Lastly, the Western District of Texas recently applied a "Fungi, Virus or Bacteria" policy exclusion, which excluded coverage for claims arising from "[v]irus, bacteria *or other microorganism*," to preclude

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[15] *Understanding Microbes in Sickness and in Health*, U.S. DEP'T OF HEALTH & HUMAN SERVS., NAT'L INST. OF HEALTH 47 (Jan. 2006) (Attached hereto as Exhibit Q).

[16] *What is a Microorganism?* NAT'L PARK SERV., U.S. DEP'T OF INTERIOR, 2 (April 2014), https://www.nps.gov/common/uploads/teachers/lessonplans/What%20is%20a%20Microorganism%20Activity%20Guide2.pdf (listing viruses as one of the five categories of microorganisms).

[17] *See, e.g.*, Wendy Keenleyside, MICROBIOLOGY: CANADIAN EDITION, § 1.3 (June 23, 2019) ("Viruses are acellular microorganisms."); Kathryn Nixdorff, et al., *Critical Aspects of Biotechnology in Relation to Proliferation*, 150 NATO SCI. SERIES II: MATHEMATICS PHYSICS & CHEMISTRY, 33, 33 (2004) ("Viruses are microorganisms").

[18] *See Types of Microorganisms*, ENCYCLOPEDIA BRITANNICA (last visited May 6, 2020), https://www.britannica.com/science/microbiology/Types-of-microorganisms.

coverage for a COVID-19 business interruption claim. *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *3 (W.D. Tex. Aug. 13, 2020).

As a result, the plain language of the Policy unambiguously excludes coverage for the Plaintiff's Claim and Plaintiff's Complaint should be dismissed.

E. COVERAGE IS BARRED BY THE POLLUTION/CONTAMINATION EXCLUSIONS

The Policy also contains two exclusions for contaminants and contamination that bar coverage for the claims in the Complaint. First, the Policy contains the Seepage and/or Pollution and/or Contamination Exclusion, which provides:

> SEEPAGE AND/OR POLLUTION AND/OR CONTAMINATION EXCLUSION
>
> Notwithstanding any provisions to the contrary within the Policy of which this Endorsement forms part (or within any other Endorsement which forms part of this Policy), this Policy does not insure:
>
> (a) any loss, damage, cost or expense, or
>
> (b) any increase in insured loss, damage, cost or expense, or
>
> (c) any loss, damage, cost, expense, fine or penalty, which is incurred, sustained or imposed by order, direction, instructions or request of, or by any agreement with, any court, government agency or any public, civil or military authority, or threat thereof, (and whether or not as a result of public or private litigation.)
>
> which arises from any kind of seepage or any kind of pollution and/or contamination, or threat thereof, whether or not caused by or resulting from a peril insured, or from steps or measures taken in connection with the avoidance, prevention, abatement, mitigation, remediation, clean-up or removal of such seepage or pollution and/or contamination or threat thereof.
>
> The term 'any kind of seepage or any kind of pollution and/or contamination' as used in this Endorsement includes (but not limited to):
>
> (a) seepage of, or pollution and/or contamination by, anything, including but not limited to, any material designated as 'hazardous material' by the United States Environmental Protection Agency or as 'hazardous material' by the United States Department of Transportation, or defined as a 'toxic substance' by the Canadian Environmental Protection Act for the purposes of Part II of that Act, or any substance designated or defined as toxic, dangerous, hazardous or deleterious to persons or the environment under any Federal, State, Provincial, Municipal or other law, ordinance or regulation; and

(b) the presence, existence, or release of anything which endangers or threatens to endanger the health, safety or welfare of persons or the environment.

(Policy, Exhibit A, Form GSICP 1002 0517, at pp. 1-2).[19] The Policy also contains the following exclusion:

2. We will not pay for loss or damage caused by or resulting from any of the following:

* * *

l. Discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss." But if the discharge, dispersal, seepage, migration, release or escape of "pollutants" results in a "specified cause of loss", we will pay for the loss or damage caused by that "specified cause of loss."

(Policy, Exhibit A, Form CP 10 30 10 12, at p. 4 of 10). The term "pollutant" is defined, in part, as "any solid, liquid gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." (Policy, Exhibit A, Form CP 00 30 10 12, at p. 9 of 9). Under the plain language of either of these exclusions (collectively, the "Pollution Exclusions"), and Florida law, coverage for the Claim is excluded.

The Florida Supreme Court has recognized that pollution exclusions extend beyond merely "environmental or industrial pollution." *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138 (Fla. 1998) (holding that claim arising from an ammonia spill fell within a pollution exclusion). Instead, the plain language of pollution exclusions should be enforced as written and courts should not "place limitations upon the plain language of a policy exclusion simply because [they] may think it should have been written that way." *Id.* at 1139. This includes the term "contaminant," which the Florida Supreme Court held to be unambiguous. *Id.*

[19] Notably, the "pollutant/contamination" exclusion applies "[n]otwithstanding any provision to the contrary" and it does not replace or supersede any similar provisions.

SARS-CoV-2, which causes COVID-19, undoubtedly qualifies as "contamination." This Court has recognized that "living organisms," "microbial populations," "microbial contaminants," and "indoor allergens" fit the ordinary definition of a "contaminant." *Nova Cas. Co. v. Waserstein*, 424 F. Supp. 2d 1325, 1334 (S.D. Fla. 2006), *cited with approval in James River Ins. Co. v. Epic Hotel, LLC*, No. 11:cv-24292-UU, 2013 WL 12085984, at *4-5 (S.D. Fla. Jan. 9, 2013). In *Nova*, this Court reasoned that these substances "infected the plaintiffs' bodies or made them impure by contact, thereby fitting the ordinary meaning of a 'contaminant,' and having an effect commonly known as 'contamination.'" *Id.* Relatedly, this Court has enforced a pollution exclusion to exclude coverage for a claim arising from "viral contaminants" and "harmful microbe[s]" found in an insured's swimming pool, from which a guest alleged that he contracted the Coxsackie virus. *See First Specialty Ins. Corp. v. GRS Mgmt. Assocs., Inc.*, No. 08-81356-CIV, 2009 WL 2524613, at *4-5 (S.D. Fla. Aug. 17, 2009); *see also James River Ins. Co.*, 2013 WL 12085984, at *4 (applying pollution exclusion to bar coverage for claims arising from Legionnaire bacteria). Other courts have reached analogous conclusions. *See, e.g.*, *U.S. Fire Ins. Co. v. City of Warren*, 87 F. App'x 485, 487, 490 (6th Cir. 2003) (applying pollution exclusion to sewage water that was alleged to contain "pathogens, carcinogens, and disease carrying organisms including but not limited to HIV viruses, *e. coli* bacteria, hepatitis (all strains), and other bacteria"); *Certain Underwriters at Lloyd's London v. B3, Inc.*, 262 P.3d 397, 400-401 (Okla. Ct. App. 2011) (holding a pollution exclusion applied to claim stemming from contaminated water alleged to contain, among other things, "bacteria (including E. Coli) [and] viruses").

The Policy's definitions of "contamination" and "pollutant" unambiguously encompass SARS-CoV-2 and the disease it causes. Just as this Court reasoned in *Nova*, SARS-CoV-2 is a virus that infects peoples' bodies, thereby fitting the ordinary meaning of "contaminant." *Nova Cas. Co.*, 424 F. Supp. 2d at 1334. Similarly, under pollution exclusions like the Policy's

"pollution exclusion," claims stemming from viruses are precluded from coverage, as demonstrated by this Court's decision in *First Specialty Ins. Corp*. *See* 2009 WL 2524613, at *4-5. SARS-CoV-2 has been "designated or defined" as "dangerous" by both Federal and State ordinances or regulations. Indeed, the U.S. Department of Health and Human Services has determined that the "SARS coronavirus" is a "biological agent . . . and toxin" with "the potential to pose a severe threat to public health and safety." 42 C.F.R. § 73.3(a) & (b) (2017). Moreover, in the subject executive orders issued by Governor DeSantis, the Governor stated that he is "responsible for meeting the *dangers* presented to this state and its people by [COVID-19]." (Exhibit L (emphasis added)). Thus, SARS-CoV-2 has been defined as dangerous to human health by both the federal government and government of Florida.

Having established that SARS-CoV-2 would qualify as a contaminant under the Policy and Florida law, the Pollution Exclusions clearly apply, given that they exclude coverage for claims "arising from" or "resulting from" contamination. (Policy, Exhibit A, Form GSICP 1002 0517, pp. 1-2). Causation phrases such as these are broadly construed. *See Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005) (holding that causation phrase "arising out of" is broader than "caused by" as used in an exclusion). Accordingly, the Claim as alleged arose from or resulted from SARS-CoV-2 and is excluded from coverage under the Policy.

F. COUNTS II, IV, AND VI FAIL TO ALLEGE GSINDA HAS BREACHED THE POLICY

Plaintiff has not stated valid claims for breach of contract. To sufficiently plead a claim for breach of contract under Florida law, a plaintiff "must assert the existence of a contract, a breach of such contract, and damages resulting from such breach." *Cruz v. Underwriters at Lloyd's London*, No. 8:14-CV-1539-T-33TBM, 2014 WL 3809179, at *2 (M.D. Fla. Aug. 1, 2014). While

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Plaintiff's 133-paragraph Complaint sets forth an expansive background facts section, it fails to allege specific facts supporting its claims of breach in Counts II, IV, and VI.

Plaintiff alleges that GSINDA has "refused performance under the Policy . . .by denying coverage," that GSINDA is "in breach of the Policy," and conclusory alleges that its losses trigger the Policy's business income, civil authority, and extra expense coverages. (Doc. 1 ¶¶ 90, 92, 110, 112, 130, 132). However, Plaintiff fails to include necessary factual information to support these claims. These allegations are wholly conclusory and must, therefore, be dismissed. *See Whitney Nat. Bank v. SDC Communities, Inc.*, No. 809CV01788EAKTBM, 2010 WL 1270264, at *3 (M.D. Fla. Apr. 1, 2010) (dismissing claims for breach of contract because plaintiff failed to allege sufficient factual information to support its claims); *see also Timber Pines Plaza*, 2016 WL 8943313, at *2 ("To be clear, it is not sufficient under *Iqbal* to merely plead that the Defendant breached the Policy by failing to pay the benefits owed under the Policy.").

Moreover, even if Plaintiff's allegations are considered true, GSINDA has not breached the Policy because there is no coverage for Plaintiff's Claim. Accordingly, Plaintiff has failed to sufficiently plead that that coverage is provided by the Policy, as the express language of the Policy expressly contradicts Plaintiff's allegations that its losses are covered under the Policy. *See* Exhibit P, Order Granting Motion to Dismiss at *5 ("Because, as a matter of law, the plain language of the insurance policy excludes coverage of [the insured's] purported damages, the breach of contract claim . . . is dismissed."); *see also Cruz,* 2014 WL 3809179, at *4 (finding that plaintiff failed to sufficiently plead that its loss was covered under a policy, since the express language of an exclusion contradicted plaintiff's allegations that its claim was covered).

Accordingly Counts II, IV and VI for breach of contract must be dismissed.

IV. CONCLUSION

Plaintiff has failed to satisfy its burden to plead facts that could give rise to a covered claim. Plaintiff's allegations, even if taken as true, cannot constitute facts that sufficiently demonstrate it has suffered any direct physical loss of or damage to its Property, because COVID-19 does not cause physical loss or damage to property. For the same reason, Plaintiff's allegations cannot state a claim for Civil Authority coverage, because there is no physical loss or damage to other property, and the government closure orders were not issued in response to any physical loss or damage to other property. Further, even if Plaintiff could allege a covered loss under the insuring agreements, its claims are unambiguously excluded under the Policy. Finally, because Plaintiff cannot plead a covered claim under the Policy, it cannot assert its breach of contract causes of action.

Thus, for the foregoing reasons, GSINDA respectfully requests the Court dismiss Plaintiff's Complaint with prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed this **3rd** day of September, 2020, using the Court's CM/ECF filing system and served via email to: **Steven C. Marks, Aaron S. Podhurst, Lea P. Bucciero, Matthew P. Weinshall, Kristina M. Infante, Pablo Rojas,** Podhurst Orseck, P.A., One Southeast 3rd Avenue, Suite 2300, Miami, Florida 33131, smarks@podhurst.com, apodhurst@podhurst.com, lbucciero@Podhurst.com, mweinshall@podhurst.com, kinfante@podhurst.com, projas@podhurst.com; **Stephen N. Zack, Bruce Weil, James Lee, Marshall Dore Louis, David Boies, Nick Gravante, Alex Boies,** Boies Schiller Flexner, LLP, 100 Southeast 2nd Street, Suite 2800, Miami, Florida 33131, szack@bsfllp.com, bweil@bsfllp.com, jlee@bsfllp.com, mlouis@bsfllp.com, dboies@bsfllp.com, ngravante@bsfllp.com, aboies@bfsllp.com.

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