UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

7TH INNING STRETCH LLC D/B/A EVERETT AQUASOX; DEWINE SEEDS SILVER DOLLARS BASEBALL, LLC; WHITECAPS PROFESSIONAL BASEBALL CORPORATION, Plaintiffs, v. ARCH INSURANCE COMPANY; FEDERAL INSURANCE COMPANY Defendants.	Case No. 2:20-cv-08161-SDW-LDW **MOTION DAY: April 5, 2021**

OPPOSITION TO FEDERAL INSURANCE COMPANY'S MOTION FOR JUDGMENT ON THE PLEADINGS

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PRELIMINARY STATEMENT

Plaintiff Whitecaps Professional Baseball Corporation ("Whitecaps") is a small business that owns and operates a Minor League Baseball team. For many years, the Whitecaps have provided affordable summertime family entertainment for audiences in and around Grand Rapids, Michigan. Every year, the Whitecaps paid substantial premiums to Federal Insurance Company ("Federal") to protect the team from the economic consequences it would suffer if it was ever unable to engage in its business. In 2020, the Minor League Baseball season was cancelled due to a complex set of facts, including the coronavirus pandemic, the actual and/or threatened presence of the coronavirus at the Whitecaps' ballpark, governmental orders by Michigan governor Gretchen Whitmer directly prohibiting access to the Whitecaps' ballpark and nearby properties, and Major League Baseball not supplying players to the Whitecaps. These circumstances led to catastrophic losses for the Whitecaps. Nevertheless, when the Whitecaps turned to Federal for coverage, Federal denied coverage on the ground that the Whitecaps did not suffer "direct physical loss or damage to" insured property, forcing the Whitecaps to file the instant action to obtain the insurance coverage to which they are entitled. Federal now moves for judgment on the pleadings on this same ground.

Federal's motion should be denied because, under Michigan and New Jersey law, when an insured has alleged that the actual and/or threatened of presence of a dangerous substance renders property unusable for its intended function, the insured has adequately alleged physical loss or damage. This is consistent with cases across the country denying insurers' motions to dismiss similar claims. Indeed, in many of the cases Federal cites, the insured expressly did not allege the actual and/or threatened presence of the virus. And, notably, many of those cases also included an exclusion for viruses that is conspicuously absent from Federal's policy. Here, the

Whitecaps have clearly alleged that the actual and/or threatened presence of the virus rendered their ballparks unusable for their intended function and, thus, the Whitecaps have adequately alleged physical loss or damage.

The Whitecaps recognize, however, that given this Court's prior ruling on Defendant Arch Insurance Company's motion to dismiss with respect to the other Plaintiffs in this case, the Court may be inclined to dismiss the Whitecaps' complaint on similar grounds. The Whitecaps respectfully submit that recent case law, including a recent case applying Michigan law, coupled with the lack of an exclusion for viruses in the Federal policy, warrants a different result here. To the extent the Court disagrees, the Whitecaps respectfully request that the Court issue its decision expeditiously so that all Plaintiffs in this action can appeal to the Third Circuit and have their voices heard alongside other similar cases currently pending in that Court.

BACKGROUND

The Whitecaps are a Minor League Baseball team in Grand Rapids, Michigan. Compl. ¶ 11. Minor League Baseball ("MiLB") was a growing business through 2019, with tens of millions of fans attending games each year in the 160 MiLB ballparks throughout the country. *Id*. ¶ 1. Such attendance is essential because MiLB's business model, and the Whitecaps' primary source of revenue, relies on attracting fans to each ballpark to purchase tickets, merchandise, food, beverages, and use of other park amenities. *Id*. ¶¶ 4, 6, 45. But in 2020, the entire MiLB baseball season was cancelled. *Id*. ¶¶ 1, 2, 43. This first-ever cessation of Minor League Baseball is linked to a complicated set of facts, including the actual and/or threatened presence of the SARS-CoV-2 virus on insured property and the governmental responses to the pandemic. *Id*. ¶ 2. Cancellation of the MiLB season led to catastrophic financial losses for the Whitecaps. *Id*. ¶¶ 3, 48, 49, 51.

The Whitecaps prepared for these risks by purchasing business interruption insurance from Federal. *Id*. ¶¶ 7, 52. The policy Federal sold to the Whitecaps (the "Policy") is a commercial "all risk" first-party property policy covering "business income" losses arising from all risks unless specifically excluded. *See id*. ¶¶ 7, 66. As relevant here, the Policy covers:

- "[D]irect physical loss or damage to" insured property, *id*. ¶ 66;
- "**[B]usiness income** loss you incur due to the actual impairment of your **operations** … and … **extra expense** you incur due to the actual or potential impairment of your **operations** … during the **period of restoration** … caused by or result[ing] from direct physical loss or damage by a covered peril to property …," *id*. ¶ 67 (cleaned up)[1]; and
- "**[B]usiness income** loss you incur due to the actual impairment of your **operations** … and … **extra expense** you incur due to the actual or potential impairment of your **operations** … directly caused by the prohibition of access to … your premises … or … a dependent business premises … by a civil authority" as a "direct result of direct physical loss or damage to property away from such premises or such **dependent business premises** by a **covered peril**, provided such property is within … one mile," *id*. ¶ 69.

Notably, the Policy does not include any exclusion addressing loss caused by or relating to a "virus."

The Whitecaps purchased the Policy for a significant premium. But when the 2020 season was cancelled, and the Whitecaps' business income losses were near total, Federal failed to honor its obligations under the Policy. *Id*. ¶ 71. Instead, it denied coverage on the basis that there was "no evidence of direct physical loss or damage to building or personal property." *Id*. Accordingly, the Whitecaps were forced to bring this action against Federal for breach of contract and a declaratory judgment that it is entitled to the full amount of coverage under the Policy.

[1] Bolded terms are defined in the Policy. *Id*. at ¶ 67 notes 13-17.

PROCEDURAL HISTORY

Along with its co-Plaintiffs 7th Inning Stretch LLC d/b/a Everett Aquasox and Dewine Seeds Silver Dollars Baseball, LLC (the "Arch Insureds"), the Whitecaps filed the Complaint on August 31, 2020 (Dkt. 30). On October 14, 2020, Defendant Arch Insurance Company ("Arch") moved to dismiss the claims against it by the Arch Insureds (Dkt. 40) (the "Arch Motion"). In its supporting Memorandum of Law (Dkt. 40-1) (the "Arch Motion"), Arch argued that the Arch Insureds' had not sufficiently pleaded "direct physical loss of or damage to property" and that coverage was barred by an exclusion in the Arch policies. The Arch Insureds opposed (Dkt. 41) and Arch replied (Dkt. 48). On January 19, 2021 the Court granted the Arch Motion (Dkt. 54).

Plaintiffs wished to promptly appeal to the U.S. Court of Appeals for the Third Circuit from the Arch decision, but the Court's ruling was not a final order because the case was still pending as between the Whitecaps and Federal. The parties agreed to an expedited briefing schedule for this Motion (Dkt. 60, 61), which Magistrate Judge Wettre endorsed after a February 17, 2021 teleconference with the parties (Dkt. 63).

LEGAL STANDARDS

In ruling on a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), a court must apply the same standard as it would to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Therefore, the facts "must be taken as true and interpreted in the light most favorable to the plaintiffs, and all inferences must be drawn in favor of them." *McTernan v. City of York*, 577 F.3d 521, 526 (3d Cir. 2009). "A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts alleged is

improbable and that a recovery is very remote and unlikely." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 213 (3d Cir. 2009) (cleaned up).[2]

ARGUMENT

I. THE CORONAVIRUS CAN CAUSE PHYSICAL LOSS OR DAMAGE UNDER APPLICABLE LAW

Federal's assertion that the Whitecaps have failed to allege physical loss or damage under the Policy is inconsistent with the Whitecaps' factual allegations and both New Jersey and Michigan law.[3] Specifically, under recent Michigan law, an insured's allegation that the actual and/or threatened presence of COVID-19 on insured property resulted in physical loss or damage is sufficient to survive a motion to dismiss. *See Salon XL*, 2021 WL 391418. In *Salon XL*, which Federal conspicuously omits from its Motion, the court applied Michigan law, emphasized that a plaintiff need only allege a "facially plausible" claim to survive a Rule 12 motion, and found that an insured's allegation that COVID-19 caused physical loss or damage was sufficient to survive a motion to dismiss:

> Salon XL has plausibly alleged that the COVID-19 particles have infected their property, exposed their staff and patrons, and therefore Salon XL has been unable to use its property for its intended purpose. This is enough to survive a motion to dismiss when the Policy states that it will cover "direct physical loss or damage" that does not define "loss" or "damage" to exclude loss of use.

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[2] Federal's assertion that the Whitecaps **"must demonstrate that its losses constitute, were caused by, or resulted from 'direct physical loss or damage' to property"** (Mot. 9-10, emphasis in original) misapplies this well-established standard. The Whitecaps need not "demonstrate" any facts—they merely must identify allegations in the Complaint showing the "facial plausibility" of their claims. *See Salon XL Color & Design Group, LLC v. West Bend Mut. Ins. Co.*, No. 20-cv-11719, 2021 WL 391418, at *2 (E.D. Mich. Feb. 4, 2021) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

[3] Federal contends that the laws of New Jersey and Michigan are in harmony on basic principles of insurance policy interpretation, including with respect to what types of physical loss or damage can trigger an "all risk" insurance policy. Mot. 8.

Id. at *2 (quotations omitted).[4] Similarly, at least one New Jersey court has already denied an insurer's motion to dismiss a COVID-19-related insurance claim. *Optical Services USA/CI v. Franklin Mutual Insurance Co.*, No. BER-L-3681-20, at *28 (N.J. Super. Ct. Aug. 13, 2020) (Ex. C to Arch Opp., Dkt. 41-3) (policyholder need not plead "material alteration or damage" of property to survive motion to dismiss).

Numerous other cases from the Third Circuit and New Jersey make clear that the alleged actual and/or threatened presence of a dangerous substance rendering insured property unusable for its intended purpose is sufficient to allege physical loss or damage. The detailed discussion of these cases in the opposition to Arch's motion to dismiss is incorporated herein by reference. *See* Dkt. No. 41, Response to Defendant Arch Insurance Company's Motion to Dismiss ("Arch Opp.") at pp. 8, 10-12 (citing *Port Authority of New York & New Jersey v. Affiliated FM Insurance Co.*, 311 F.3d 226 (3d Cir. 2002) (coverage for asbestos fibers incapable of causing structural damage); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of America*, No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (physical loss or damage found despite no "structural alteration"); *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.*, 968 A.2d 724 (N.J. Super. Ct. App. Div. 2009) (coverage based on electrical grid's failure to provide power, despite absence of physical damage at insured location)).

In contrast, in the Michigan cases cited by Federal, the insured did not allege that the actual and/or threatened presence of the virus on insured premises rendered insured property unusable for its intended purpose. *See Turek v. Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*,

[4] The court ultimately ruled for the insurer on the basis of an exclusion for virus-related losses. *Id*. at *4. While the Whitecaps respectfully disagree with that court's analysis of the exclusion, it is immaterial here because Federal's policy does not contain any such exclusion.

No. 20-11655, 2020 WL 5258484, at *5 (E.D. Mich. Sept. 3, 2020) ("Importantly, Plaintiff is adamant that COVID-19 never entered its premises."); *Kirsch v. Aspen Am. Ins. Co.*, No. 20-11930, 2020 WL 7338570, at *1 (E.D. Mich. Dec. 14, 2020) ("The complaint does not allege any of the COVID-19 virus was present in the dental practice at the time of, or during, the mandated shutdown."); *Gavrilides Management Co. LLC v. Michigan Insurance Co.*, No. 20-258-CB, 2020 WL 4561979 (Mich. Cir. Ct. July 21, 2020) (*see* Dkt. No. 64-3, July 1, 2020 argument transcript, Ex. A to Mot., at p. 19) (plaintiff failed to allege that "COVID-19 entered the [property] through any employee or customer" or was ever "present" at the insured location).[5] The same is true of Federal's New Jersey cases. In *Mac Property Group LLC v. Selective Fire and Casualty Insurance Co.*, for example, the policyholder relied exclusively on the New Jersey governor's COVID-19-related orders and did not allege physical loss or damage at insured locations. No. L-2629-20, 2020 WL 7422374 (N.J. Super. L. Nov. 5, 2020). The court emphasized the absence of such allegations in its decision. *Id*. at *9. More importantly, the court's physical loss or damage discussion was *dicta* because the court based its holding on a policy exclusion relating to viruses. *Id*. at *8.

Federal's cases from other jurisdictions fare no better. Indeed, in many of these cases, the policyholder did not allege that the virus was actually or imminently present on insured property.[6] Moreover, Federal ignores cases from across the country that have denied insurers'

[5] Two other recent Michigan decisions are distinguishable for the same reason. *See Stanford Dental, PLLC v. Hanover Ins. Group et al.*, No. 20-cv-11384, 2021 WL 493322 (E.D. Mich. Feb. 10, 2021) (Plaintiff alleged that "there is no evidence at all that the [COVID-19] virus [] enter[ed its] property or that [its property] had to be de-contaminated" due to contamination from the virus.") (brackets in original); *Dye Salon, LLC v. Chubb Indemnity Ins. Co., et al.*, No. 20-cv-11801, 2021 WL 493288, at *2 (E.D. Mich. Feb. 10, 2021) (same).

[6] *See, e.g., Clear Hearing Sols., LLC v. Cont'l Cas. Co.*, No. 20-3454, 2021 WL 131283, at *7 (E.D. Pa. Jan. 14, 2021) (Mot. 23) (insured "expressly disclaims that the virus was on its

motions to dismiss similar claims. *See* Arch Opp. at 7-10. Even in the few months since the Arch Insureds' filed their opposition, numerous courts have ruled for policyholders in similar disputes. *See*, *e.g.*, *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, No. 20-cv-2806, -- WL – (N.D. Il. Feb. 28, 2021) ("[Insurer's] contention that the term direct loss requires physical damage to the insured's property runs afoul of these principles of construction"); *In re: Society Ins. Co. COVID-19 Business Interruption Protection Insurance Litigation*, No. 20 C 02005, 2021 WL 679109 (N.D. Ill. Feb. 22, 2021); *NeCo, Inc. v. Owners Ins. Co.*, No. 20-CV-04211-SRB, 2021 WL 601501, at *4 (W.D. Mo. Feb. 16, 2021) (complaint "plausibly alleges a direct physical loss based on the plain and ordinary meaning of the phrase") (quotation omitted); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, No. CV-20-932117 (Ohio Ct. Com. Pl. Cuyahoga Cty. Nov. 17, 2020) (policyholder "sufficiently contends that Plaintiffs' premises sustained physical loss or damage directly from the presence of physical Covid-19 particles"); *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, No. A-20-816628-B, 2020 WL

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property"); *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, No. 1:20-CV-01192, 2020 WL 7490095, at *2 (N.D. Ohio Dec. 21, 2020) (Mot. 23) (insured "does not allege that COVID-19 was actually found in or on its premises"); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, No. 1:20-CV-665-RP, 2020 WL 7351246, at *7 (W.D. Tex. Dec. 14, 2020) (Mot. 24) (insureds "do not allege that the virus that causes COVID-19 was ever present at either of their restaurants"); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, No. 4-20-CV-222-CRW-SBJ, 2020 WL 5820552, at *1 (S.D. Iowa Sept. 29, 2020) (Mot. 22) (insured "does not allege any such 'physical' or 'accidental' loss"); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-cv-461, 2020 WL 4724305, at *5 (W.D. Tex. Aug, 13, 2020) (Mot. 24) ("Plaintiffs also argue that it is not COVID-19 within Plaintiffs' Properties that caused the loss directly, but rather that it was the Orders that caused the direct physical loss …"); *Promotional Headware Int'l v. Cincinnati Ins. Co.*, No. 20-cv-2211, 2020 WL 7078735, at *8 (D. Kan. Dec. 3, 2020) (Mot. 22) ("Plaintiff … does not claim property damage due to the presence of COVID-19 in its buildings.").

7258108, at *2-3 (Nev. Dist. Ct. Nov. 30, 2020) ("Complaint alleges the physical presence and known facts about the coronavirus, including that it spreads through infected droplets that 'are physical objects that attach to and cause harm to other objects'"); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624, at *15 (E.D. Va. Dec. 9, 2020) ("the phrase 'direct physical loss' has been subject to a spectrum of interpretations," including "impacts from intangible noxious gasses or toxic air particles that make the property uninhabitable or dangerous to use"); *Cherokee Nation v. Lexington Ins. Co.*, No. CV- 2020-150 (Cherokee Cty. Okla. Jan. 14, 2021) (granting summary judgment that "Plaintiffs have shown a plausible claim for fortuitous 'direct physical loss'"); *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 1:20 CV 1239, 2021 WL 168422, at *13 (N.D. Ohio Jan. 19, 2021).

II. THE WHITECAPS SUFFICIENTLY ALLEGE PHYSICAL LOSS OR DAMAGE

The Whitecaps' allegations directly align with the many cases where courts have denied insurers' motions to dismiss (or even affirmatively granted policyholders' motions for summary judgment), including in Michigan and New Jersey. These allegations, and the lack of a virus-related exclusion in Federal's policy, also distinguish the Whitecaps' allegations from most if not all of the cases Federal relies on. Specifically, the Whitecaps explicitly alleged that "[i]t is statistically certain the virus has been present at the [Whitecaps'] ballpark[] for some period of time since [its] closure[]" and that the "virus, including its continuing, damaging, and invisible presence … constitute … direct physical loss or damage to the ballparks (as well as the areas surrounding them)." *Id.* ¶¶ 23, 32. The Whitecaps incorporate by reference the various other allegations discussed in the Arch Insureds' opposition to the Arch Motion that further establish the sufficiency of its allegations of physical loss or damage. *See* Arch. Opp. 15-16.[7]

[7] For the same reason that the Whitecaps sufficiently allege direct physical loss or damage from coronavirus at their ballpark, they sufficiently allege facts that would trigger the Policy's civil

Accordingly, the Whitecaps have sufficiently alleged physical loss or damage, and Federal's Motion should be denied.

To the extent this Court is inclined to conclude that it has already resolved this issue in connection with Arch's Motion, the Whitecaps respectfully submit that the recent case law discussed above – specifically including a recent case applying Michigan law – coupled with the lack of an exclusion relating to viruses in Federal's Policy, warrants a different result here. However, to the extent the Court concludes that the issue in this motion has already been decided by the Court's ruling on the Arch Motion, the Whitecaps respectfully request that the Court rule expeditiously so that all plaintiffs in this action can appeal to the Third Circuit and be heard along with other COVID-19 related cases currently pending in that Court.

CONCLUSION

The Whitecaps respectfully request that the Court deny Federal's Motion in its entirety. In the event the Court grants the Motion, the Whitecaps respectfully request that the Court issue an order at its earliest possible convenience so that all Plaintiffs may expeditiously appeal to the Third Circuit.

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authority coverage. Compl. ¶ 28 (governmental orders issued based on coronavirus "forced [them] to close their stadiums for baseball games" and their "ballparks have been closed to the public for baseball since March 2020."); ¶¶ 32, 39, 50 *(*governmental responses to damage from COVID-19 have harmed the "areas surrounding [the ballpark]" and the "ballpark[] [is] within one mile of locations that have also suffered" damage.).

Simply put, because the Whitecaps' allegations of the actual and/or threatened presence of the coronavirus at an insured location could plausibly trigger basic business income coverage, their allegations of the actual and/or threatened presence of the coronavirus at other locations within the required radius resulting in civil authority orders sufficiently pleads civil authority coverage.

Date: March 4, 2021

Respectfully submitted,

By: */s/ Robin L. Cohen*

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, a true and correct copy of Plaintiffs' Response to Defendant Federal Insurance Company's Motion for Judgment on the Pleadings was filed with the Clerk of the United States District Court for the District of New Jersey via ECF, causing a true and correct copy of the foregoing document to be electronically served upon all counsel of record.

Dated: March 4, 2021 By: */s/ Orrie A. Levy*