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.	CIVIL ACTION NO. 2:20-cv-08161-SDW-LDW **MOTION DAY: April 5, 2021**

REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANT FEDERAL INSURANCE COMPANY'S MOTION FOR JUDGMENT ON THE PLEADINGS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(c)

Daren S. McNally (DM5551)
Barbara M. Almeida (BA7239)
Meghan C. Goodwin (MG3012)
Nicholas S. Pradaxay (NP0087)
CLYDE & CO US LLP
200 Campus Drive, Suite 300
Florham Park, New Jersey 07932
T: (973) 210-6700

Attorneys for Defendant,
Federal Insurance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

I. PRELIMINARY STATEMENT

Plaintiff Whitecaps Professional Baseball Corporation ("WPBC") has failed to present any persuasive authority or argument warranting a different result from this Court's previous order which granted Defendant Arch Insurance Company's ("Arch") Motion to Dismiss. Like 7th Inning Stretch LLC d/b/a Everett AquaSox ("7th Inning") and DeWine Seeds Silver Dollars Baseball, LLC ("DeWine"), WPBC has failed to allege sufficient facts to trigger coverage under the Policy issued by Defendant Federal Insurance Company ("Federal") to WPBC, which limits coverage to losses caused by or resulting from "direct physical loss or damage" to property. This Court should arrive at the same conclusion that it drew with respect to Arch's motion to dismiss by granting Federal's Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c).

WPBC's Opposition to Federal's Motion for Judgment on the Pleadings expressly admits that, given this Court's prior ruling on Arch's motion to dismiss with respect to the other Plaintiffs in this case, the Court may be inclined to dismiss the Amended Complaint as against Federal for the same reasons it granted Arch's motion to dismiss. Federal requests that the Court take WPBC at its word and grant Federal's Motion for Judgment on the Pleadings.

WPBC makes no attempt to argue the existence of any type of tangible damage to physical property and, instead, relies upon the allegation that it is "statistically certain" that the COVID-19 virus was present at its premises. This is not enough under Michigan law. WPBC cannot be permitted to circumvent the requirement to sufficiently plead some type of physical alteration to its property by relying on unsupported, conclusory allegations. Furthermore, to the extent that New Jersey law may be applicable, this Court has already found, in its ruling granting

Arch's motion to dismiss, that the purely economic losses caused by the COVID-19 pandemic do not support a showing that Plaintiffs' properties were physically damaged under New Jersey law.

WPBC has failed to provide any reason why this Court should not grant Federal's Motion for Judgment on the Pleadings for substantially the same reasons that this Court granted Arch's motion to dismiss. Accordingly, Federal respectfully requests that this Court oblige WPBC's request to expeditiously issue its decision granting Federal's Motion for Judgment on the Pleadings.

II. LEGAL ARGUMENT

A. WPBC Implicitly Concedes That This Court Should Dismiss The Causes of Action Against Federal

In its Opposition, WPBC admits that its alleged losses do not constitute "direct physical loss or damage" under the applicable law and invites this District Court to dismiss its causes of action against Federal. Indeed, WPBC's Opposition states: "[G]iven 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 [WPBC's] complaint on similar grounds." Plaintiff's Brief ("Pl.'s Br.") (Doc. 65) at 6. Furthermore, to the extent the Court disagrees with WPBC's contention that the applicable law warrants a different result than Arch's motion, WPBC expressly requests—multiple times—"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." *Id.* at 6, 14.

On this point, and this point only, Federal agrees with WPBC. This Court should arrive at the same conclusion that it made with respect to Arch's motion to dismiss. WPBC recognizes that any argument that its alleged losses constitute "direct physical loss or damage" under the Federal Policy will (and should) fail because this Court has already ruled to the contrary in its

January 19 Letter Opinion with respect to Arch's motion. *See* January 19 Letter Opinion ("Jan. 19 Letter Op.") (Doc. 54).

B. WPBC Cannot Avoid the Requirement of Pleading Actual and Tangible Alteration to Property In Order to Constitute "Direct Physical Loss or Damage" Under Michigan Law

WPBC alleges that it only needs to allege a "facially plausible" claim in order to survive a motion to dismiss. Pl.'s Br. (Doc. 65) at 9. Specifically, WPBC asserts that "under 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." *Id.* This allegation is not only a blatant misrepresentation of Michigan law, but WPBC's allegation that it is "statistically certain the virus is present" at its stadiums is *not* facially plausible to survive a motion to dismiss. First Amended Complaint ("Am. Compl.") (Doc. 30) at ¶ 31. Rather, based on the allegations of the Amended Complaint, WPBC's alleged losses are purely economic in nature and do not constitute, were not caused by, and did not result from any tangible physical alteration to property.

As an initial matter, WPBC's reliance upon *Salon XL Color & Design Group, LLC v. West Bend Mut. Ins. Co.*, No. 20-cv-11719, 2021 WL 391418 (E.D. Mich. Feb. 4, 2021) is misplaced and unpersuasive. The *Salon XL* decision fails to consider the requirement set forth in *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 575 (6th Cir. 2012) that losses caused by "direct physical loss or damage" under a first-party property insurance policy require "tangible damage to physical property" or the insured's premises to be "rendered uninhabitable or substantially unusable."

The *Salon XL* court's opinion, like WPBC's Opposition, does not discuss *any* allegations of physical alteration to property. Rather, the *Salon XL* court relied upon the misguided

conclusion that the phrase "direct physical loss or damage" was ambiguous and therefore was to be construed in favor of the insured. 2021 WL 391418, at *2. This conclusion, however, is the lone exception to the COVID-19 coverage litigation decisions cited in Federal's moving brief which have determined that "direct physical loss" is *unambiguous* and, in fact, requires *tangible damage to physical property* in order to trigger coverage under Michigan law. *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, 484 F. Supp. 3d 492, 502 (E.D. Mich. 2020) ("Based on the foregoing, 'direct physical loss to Covered Property' is an unambiguous term that plainly requires Plaintiff to demonstrate some tangible damage to Covered Property. Because Plaintiff has failed to state such damage, the complaint does not allege a Covered Cause of Loss."); *Kirsch v. Aspen Am. Ins. Co.*, No. 20-11930, 2020 WL 7338570, at *5-*6 (E.D. Mich. Dec. 14, 2020) (rejecting plaintiff's argument that the language of a policy which expressly limited coverage to "direct physical loss of [covered property]" was distinguishable from the policy language analyzed in *Universal Image* and *Turek*, and finding "the tangibility requirement implicit in the policy" foreclosed coverage for plaintiff's claim); *Gavrilides Mgmt. Co. v. Michigan Ins. Co.*, Case No. 20-258-CB (Mich. Cir. Ct. August 4, 2020) (Exhibit A to Certification of Daren S. McNally) (Doc. 64-3) at 21 ("[C]ommon rules of grammar would apply to make that phrase a short-cut way of saying 'direct physical loss of property or direct physical damage to property.' So, again, the plaintiff 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.").

Here, WPBC attempts to circumvent the requirement of alleging tangible damage to any property by emphasizing its allegations that the "actual and/or threatened presence of COVID-19" on its premises "resulted in physical loss or damage." Pl.'s Br. (Doc. 65) at 9. Even

assuming the allegation of COVID-19 being present on WPBC's premises as true, however, this would not be a sufficient pleading of "direct physical loss or damage" to property. As explained by the Eastern District of Michigan, "**[l]ike other viruses, COVID-19 injures people but does not seem to cause any lasting damage to physical property**." *Kirsch*, 2020 WL 7338570, at *6 (emphasis added). Thus, alleging the presence of the virus on or at certain property is not enough to defeat a motion to dismiss.

Indeed, other jurisdictions have similarly found that the alleged presence of the COVID-19 virus on the surface of an insured's property is an insufficient allegation of "direct physical loss or damage" because the virus' presence only requires routine cleaning and disinfection, rather than any repair or reconstruction of any insured properties. For example, in *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), the Western District of Texas reasoned:

> **Even assuming that the virus that causes COVID-19 was present at Plaintiffs' properties**, it would not constitute the direct physical loss or damage required to trigger coverage under the Policy because the virus can be eliminated. **The virus does not threaten the structures covered by property insurance policies**, and can be removed from surfaces with routine cleaning and disinfectant.

(emphasis added).

Similarly, in *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-CV-00401, 2020 WL 6436948, at *5 (S.D.W. Va. Nov. 2, 2020), the Southern District of West Virginia found that:

> [E]ven when present, **COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property**. Because routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover, and a covered "loss" is required to invoke the additional coverage for loss of business income under the Policy.

(emphasis added). *See also Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. CV 20-10850-NMG, 2021 WL 858378, at *3 (D. Mass. Mar. 5, 2021) (citations omitted) ("The COVID-19 virus does not impact the structural integrity of property in the manner contemplated by the Policy and thus cannot constitute 'direct physical loss of or damage to' property. A virus is incapable of damaging physical structures because 'the virus harms human beings, not property.'"); *Rococo Steak, LLC v. Aspen Specialty Ins. Co.*, No. 8:20-CV-2481-VMC-SPF, 2021 WL 268478, at *4 (M.D. Fla. Jan. 27, 2021) (citations omitted) ("Rococo does not allege that COVID-19 required removal or replacement of any property or items in the insured restaurant. . . . Rather . . . the surfaces allegedly contaminated by COVID-19 seem to only require cleaning to fix."); *R.T.G. Furniture Corp. v. Hallmark Specialty Ins. Co.*, No. 8:20-CV-2323-T-30AEP, 2021 WL 686864, at *3 (M.D. Fla. Jan. 22, 2021) ("[E]ven assuming coronavirus was physically present on RTG's property, it is not tantamount to a 'direct physical loss of or damage to property.' COVID-19 impacts human health and human behavior. COVID-19 does not impact physical structures, other than to require additional cleaning and sanitizing of those structures.").

In short, WPBC cannot be permitted to avoid the requirement to sufficiently plead physical alteration to its properties by simply relying upon the insufficient and unsupported allegation that it is "statistically certain the [COVID-19] virus is present" at its stadiums and/or nearby properties. Am. Compl. (Doc. 30) at ¶ 31. Accordingly, this Court should dismiss the remaining causes of action against Federal on the grounds that WPBC has not plausibly alleged any "direct physical loss or damage" to its properties and/or nearby properties under Michigan law.

C. This Court Has Already Found WPBC's Alleged Losses Do Not Constitute "Direct Physical Loss or Damage" Under New Jersey Law

WPBC contends that certain "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," Pl.'s Br. (Doc. 65) at 10. This Court, however, has already disagreed with WPBC's interpretation of Third Circuit and New Jersey law. Indeed, in opposition to Arch's motion to dismiss, 7th Inning and DeWine attempted to argue the very same position—namely, that *Gregory Packaging*, *Port Authority of NY and NJ*, and *Wakefern* supported a finding that each had sufficiently pleaded "direct physical loss or damage" to survive a motion to dismiss. Plaintiffs' Response to Arch's Motion to Dismiss ("Pl.'s Resp.") (Doc. 41) at 19-21. This Court was unpersuaded by these arguments and explicitly ruled, "Plaintiffs have not alleged any facts that support a showing that their properties were physically damaged" under New Jersey law. January 19 Letter Opinion ("Jan. 19 Letter Op.") (Doc. 54) at 3.[1] Furthermore, WPBC has not differentiated its allegations against Federal from the other Plaintiffs' allegations against Arch in a manner that would warrant a different analysis by the Court. To the contrary, WPBC's allegations against Federal are nearly identical to the allegations made by 7th Inning and DeWine.

[1] With respect to this contention, Federal refers the Court to Federal's moving brief which distinguished *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014), *Port Authority of NY and NJ v. Affiliated FM Ins. Co.*, 311 F.3d 226, 230 (3d Cir. 2002), and *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 528 (App. Div. 2009), and discussed the inapplicability of these cases to WPBC's claim. *See* Federal's Moving Brief ("Federal's Br.") (Doc. 64-1, at 20-23). Particularly, Federal refers the Court to the New Jersey Superior Court's decision in *Mac Property Group LLC v. Selective Fire and Cas. Ins. Co.*, No. L-2629-20, 2020 WL 7422374, at *1 (N.J.Super. Nov. 05, 2020), which expressly found that "[t]he direct physical damage to the electrical grid present in *Wakefern Food Corp.* is absent in this case." *Id.*

Accordingly, this Court should not disturb the reasoning it has already applied in granting Arch's motion to dismiss. Instead, Federal respectfully requests that this Court apply the same analysis to WPBC's claims and rule-again-that WPBC has not alleged any facts that support a showing that its property was physically damaged.

III. CONCLUSION

Federal cannot provide coverage for WPBC's losses under the Policy because WPBC has not sufficiently pleaded that its losses constitute, were caused by, or resulted from "direct physical loss damage" to covered property under either Michigan or New Jersey law. Accordingly, Federal respectfully requests that this Court grant the present Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c).

Dated: March 11, 2021

Respectfully submitted,

By: s/ Daren S. McNally

Daren S. McNally (DM5551)
Barbara M. Almeida (BA7239)
Meghan C. Goodwin (MG3012)
Nicholas S. Pradaxay (NP0087)
CLYDE & CO US LLP
200 Campus Drive, Suite 300
Florham Park, New Jersey 07932
daren.mcnally@clydeco.us
barbara.almeida@clydeco.us
meghan.goodwin@clydeco.us
nicholas.pradaxay@clydeco.us
(973) 210-6700 (*phone*)

Attorneys for Defendant
Federal Insurance Company