IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RESTAURANT GROUP MANAGEMENT, LLC;	)	
ATLANTA'S BEST PATIO, LLC f/k/a PEACH STATE RESTAURANTS, LLC d/b/a EINSTEIN'S;	)	**CASE NO: 1:20-cv-04782-TWT**
EAT AT JOE'S, LLC f/k/a POLITICAL CONCEPTS d/b/a JOE'S ON JUNIPER;	)	
NORTHLAKE ROXX, LLC d/b/a HUDSON GRILLE TUCKER;	)	
RESTAURANT 104, LLC f/k/a VIRGINIA-HIGHLANDS RESTAURANT, LLC d/b/a HUDSON GRILLE SANDY SPRINGS;	)	
RESTAURANT 101, LLC f/k/a ATLANTA SPORTS RESTAURANT, LLC d/b/a HUDSON GRILLE MIDTOWN;	)	
GREAT SPORTS, LLC d/b/a HUDSON GRILLE KENNESAW	)	
NORTH POINTE SPORTS, LLC d/b/a HUDSON GRILLE NORTH POINT;	)	
RESTAURANT 105, LLC f/k/a	)	

DOWNTOWN DINING, LLC d/b/a HUDSON GRILLE DOWNTON;	)
AMERICA'S BEST BAKERY, LLC f/k/a MYSTICAL PIZZA, LLC d/b/a METROTAINMENT BAKERY;	)
AMERICA'S BEST BAKERY LLC f/k/a MYSTICAL PIZZA, LLC d/b/a SUGAR SHACK;	)
Plaintiffs,	)
v.	)
ZURICH AMERICAN INSURANCE COMPANY,	)
Defendant.	)

DEFENDANT ZURICH AMERICAN INSURANCE COMPANY'S RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION

Pursuant to Local Rule 7.2(E), Defendant Zurich American Insurance Company ("Zurich") hereby submits the following Response to Plaintiffs' Motion for Reconsideration [D.E. 20].

I. MOTIONS FOR RECONSIDERATION CANNOT BE USED TO RE-ARGUE PRIOR POSITIONS OR TO PRESENT ARGUMENTS THAT COULD HAVE BEEN, BUT WERE NOT, PRESENTED EARLIER.

The standard for motions for reconsideration is a stringent one, and Plaintiffs fail to satisfy it. Motions for reconsiderations are not to be filed "as a matter of routine practice," but only when "absolutely necessary." N.D. Ga. Local Rule 7.2.; *In re MiMedx Grp., Inc. Sec. Litig.*, No. 1:13-CV-3074-TWT, 2014 WL 6775316, at *1 (N.D. Ga. Dec. 2, 2014). As this Court has explained:

> A party may move for reconsideration only when one of the following has occurred: an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice. Further, a party may not employ a motion for reconsideration as a vehicle to present new arguments or evidence that should have been raised earlier, introduce novel legal theories, or repackage familiar arguments to test whether the Court will change its mind.

Id., at *1 (internal quotes and citations omitted).

Here, Plaintiffs point to no intervening change in the controlling Georgia law. There is no evidence, old or new, that the Court ought to reconsider in ruling on Zurich's Motion to Dismiss. The Court's ruling was one that looked solely to

the allegations. Thus, the only question is whether the Court ought to correct a clear error or prevent a manifest injustice. As discussed with more specificity below, there is no clear error. There is also no manifest injustice here.[1] Rather, Plaintiffs impermissibly use their motion for reconsideration to rehash – with slight repackaging – the arguments that the Court already reviewed, and to reargue positions that the Court had no reason to even reach or address in its Order.

II. THE COURT PROPERLY APPLIED THE PLEADING STANDARDS AND DISMISSED THE CASE WITH PREJUDICE

Plaintiffs claim that dismissal with prejudice leaves them with "no remedy." Motion for Reconsideration, D.E. 20-1, at 6. This is incorrect. Plaintiffs' remedy, like any litigant's in the federal court system, is an appeal to the Eleventh Circuit. Plaintiffs have not explained why that remedy is inadequate or why they get to bypass it.

[1] In supporting what appears to be a manifest injustice argument, Plaintiffs emphasize the fact that federal courts have granted motions to dismiss more frequently than state courts in COVID-19 business interruption claims. Plaintiffs suggest that the they could, theoretically, fare better in state court based on the proffered statistical comparison of motions to dismiss results in federal versus state courts throughout the country. However, Plaintiffs are not without remedies in federal courts, as they have the right to appeal to the Eleventh Circuit. Moreover, to accept Plaintiffs' argument of manifest injustice, this Court would necessarily have to accept the premise that the federal judiciary is unfairly biased in favor of insurers and against insureds, and the insureds can only get fair and speedy recourse in state courts. Without minimizing the financial difficulties sustained by Plaintiffs and other businesses due to the pandemic, Plaintiffs' implication that they cannot get adequate justice in the federal court system is a stretch.

As for the pleading standards, the Court did not decide facts. Rather, the Court held that Plaintiffs' conclusory and unsupported allegations were insufficient to trigger all but one of the coverages. Order, D.E. 18, at 10. The Court correctly held that merely pleading the presence of COVID-19 on the premises was insufficient to demonstrate "direct physical loss of or damage" to property.[2] *Id.*, at 13. Plaintiffs did not allege how the supposed presence of COVID-19 caused physical loss or damage or an actual change in the condition of the property (or the nearby properties for purposes of the Civil Authority coverage). While it is true that a court ought not to decide factual disputes on a motion to dismiss, it is equally true that "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003). The Court's analysis was correct and certainly did not constitute clear error. See *United States v. Battle*, 272 F. Supp. 2d 1354, 1358 (N.D. Ga. 2003) ("An error is not clear and obvious if the legal issues are at least arguable.") (internal citations omitted).

[2] Notably, the conclusion that COVID-19 was present on Plaintiffs' premises is completely negated by Plaintiffs' allegation that the Governor's order "did not allow business owners such as Plaintiffs to perform any testing to verify or disprove the presence of COVID-19 droplets in their stores." Complaint, at ¶ 45.

III. THE COURT CORRECTLY DECIDED THAT PLAINTIFFS FAILED TO PLAUSIBLY ALLEGE DIRECT PHYSICAL LOSS OF OR DAMAGE TO PROPERTY

Plaintiffs argue that the decision in *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306 (2003), is "outdated" and relies on older dictionary definitions, and that the Court should have followed the rationales advanced by a minority of out-of-state courts. As a threshold matter, Plaintiffs merely repackage and expand the very same arguments that they already presented to the Court and which the Court specifically rejected. Response to Motion to Dismiss, D.E. 13, at 18-22; Order, D.E. 18, at 13 (finding the line of cases requiring tangible injury to property more persuasive). To the extent Plaintiffs parse the *AFLAC* decision in a slightly more detailed fashion, there is no reason why those arguments could not have been presented in response to Zurich's Motion to Dismiss. Thus, the Court should reject Plaintiffs' repetitive and/or more expansive attempt to reargue their same position on the issue of whether the policy's "direct physical loss of or damage to property" requirement has been satisfied.

Even if the renewed and expanded argument is considered, Plaintiffs are wrong in their characterization of the *AFLAC* decision (which was not the only authority relied on by the Court) as an outdated, orphan case. The principles outlined in *AFLAC* which are at issue here have been relied on by other courts,

including the Eleventh Circuit, even prior to the current pandemic-related litigation. *See, e.g., 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, 823 Fed. App'x 868 (11th Cir. 2020), cert. denied, --- S. Ct. ---, 2021 WL 1163753 (U.S. Mar. 29, 2021); *Fountainbleau 2006, LLC v. U.S. Fire Ins. Co.*, 2010 WL 11597704 (N.D. Ga. Dec. 21, 2010).

Moreover, regardless of how Plaintiffs characterize *AFLAC*,[3] this Court must anticipate how the Georgia Supreme Court would decide this case. Without clear guidance from the state's highest court, this Court must rely on the decisions of the state's intermediate courts absent some persuasive indication that the state's highest court would decide the issue otherwise. Plaintiffs cite what is clearly a minority trend in out-of-state cases and do not offer any Georgia cases that may indicate any "cross-currents" in Georgia law at odds with *AFLAC*. Plaintiffs also fail to explain why the Georgia Supreme Court would depart from the majority view. *Phoenix Ins. Co.*, 2014 WL 12480022, at *5. Similarly, Plaintiffs' hyper-technical parsing of *AFLAC* and its purported reliance on "outdated" dictionary

[3] Notably, the notion that the key holding of AFLAC is dictum has been previously rejected. *Northeast Georgia Heart Center P.C. v. The Phoenix Ins. Co.*, 2014 WL 12480022, at *7 (N.D. Ga. May 23, 2014) ("*AFLAC*'s holding is not dictum. The court views the case's central holding as interpreting the words 'direct physical' as modifiers of both 'loss' and 'damage' to covered property. The *AFLAC* court's construction of this contractual provision is binding on this court.").

definitions cannot substitute for a persuasive indication that the Georgia Supreme Court would adopt the minority view and rule differently from *AFLAC*.[4]

IV. PLAINTIFFS' SUMMARY OF THEIR PREVIOUS ARGUMENT REGARDING ILLUSORY COVERAGE IS NOT GROUNDS FOR RECONSIDERATION

It is important to note that, because of "Plaintiffs failure to plead sufficient facts regarding coverage of their claimed losses" (i.e., failure to show direct physical loss of or damage to property so as to trigger coverage under the Policy in the first instance), the Court did not even assess whether the Microorganism exclusion barred coverage. Order, D.E. 18, at 17. Therefore, there is simply no ruling of this Court on the Microorganism exclusion for this Court to reconsider.

[4] It bears noting that Plaintiffs' substantive attack on *AFLAC* plays fast and loose with the law. The *AFLAC* court relied on a 1985 dictionary, which Plaintiffs deem outdated, *only* for the definition of the word "direct." The court did not look to that dictionary to define the other terms, such as "physical", "loss" and "damage". The definition of "direct" is not materially at odds with the dictionary definition of "direct" cited in the cases Plaintiff relies on. *Compare AFLAC*, 581 S.E.2d 317, 319 (2003) ("'Direct' is defined as '[w]ithout intervening persons, conditions, or agencies; immediate [.]' American Heritage Dictionary, 2nd college ed. (abridged, Dell, 1985), p. 200."), *with North State Deli, LLC v. The Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507, at *3 (N.C.Super. Oct. 09, 2020) ("Merriam-Webster defines 'direct,' when used as an adjective, as 'characterized by close logical, causal, or consequential relationship,' as 'stemming immediately from a source,' or as 'proceeding from one point to another in time or space without deviation or interruption.' *Direct*, *Merriam-Webster* (Online ed. 2020)."). The North Carolina state court's decision in *North State Deli*, for example, turned on whether the terms "physical loss" and "physical damage" could be meaningfully read together. Thus, Plaintiffs lengthy attack on *AFLAC* and its interpretation of policy terms misses the mark.

Instead, relying on the sublimited Microorganisms coverage and the Declaration pages, Plaintiffs simply restate, in more general terms, the argument they made in the response to Zurich's Motion to Dismiss. *Compare* D.E. 20-1, at 10-11, with D.E. 13, at 13-18. Plaintiffs point to no clear error or intervening change in Georgia law, making this argument on reconsideration improper. In the event the Court reconsiders the issue (or assesses it for the first time, which it should not), Zurich fully addressed Plaintiffs' arguments in its Motion to Dismiss and the Reply, and relies on its position as stated therein. *See* D.E. 9-1, at 10-17; D.E. 15, at 6-12.

V. PLAINTIFFS' REQUEST FOR CERTIFICATION TO THE SUPREME COURT OF GEORGIA IS NOT PROPERLY BEFORE THIS COURT AND IS NOT WARRANTED

As the Court pointed out, Plaintiffs made a passing suggestion of certification to the Georgia Supreme Court in their Response to the Motion to Dismiss. The Court explained that, in addition to failing on the merits, Plaintiffs failed to comply with the Local Rule requiring that every motion must be accompanied by a memorandum. D.E. 18, at 15 n. 3; N.D. Ga. Local R. 7.1(A)(1).

Plaintiffs never filed a motion to certify a question. Rather, they use the Motion for Reconsideration as a vehicle to develop in more detail their argument for certification. This is not a proper use of a motion for reconsideration and

Plaintiffs have still failed to comply with the Local Rules. For this reason alone, the Court should decline to certify the question.

Even if the Court were to consider the procedurally-flawed request for certification (which it should not), the request ought to be denied. To date, six federal court decisions in Georgia have closely analyzed the claims for business interruption coverage arising out of the pandemic and, based on the same state court principles and precedent, all of them arrived at the same result as this Court.[5]

[5] *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of America*, No. 1:20-CV-2939-TWT, 2020 WL 5938755 (N.D.Ga. Oct. 6, 2020) (case dismissed after Court turned to *AFLAC v. Chubb*, 260 Ga.App. 306 (2003), where the court defined "direct physical loss of or damage to" and concluded that "coverage is predicated upon a change in the insured property resulting from an external event rendering the insured property, initially in a satisfactory condition, unsatisfactory."); *Roy H. Johnson, DDS, et al. v. Hartford Fin. Svcs. Group, Inc., et al.*, No. 1:20-cv-02000-SDG, 2021 WL 37573 (N.D. Ga. Jan. 4, 2021) (case dismissed with prejudice because "direct physical loss of or damage to" under Georgia law contemplates actual change in insured property and courts have declined to expand the term to apply to loss-of-use without physical impact); *K.D. Unlimited, Inc d/b/a Artisan Gathering Salon v. Owners Ins. Co.*, No. 1:20-cv-02163-TWT, 2021 WL 81660 (N.D. Ga. Jan 5, 2021) (case dismissed because "direct physical loss of or damage to" requires tangible injury to property, and losses from an inability to use the property do not suffice; Plaintiff did not allege that the virus impacted its property, and even if it had, mere presence of virus particles on insured property is not enough, as they can be cleaned away); *Karmel Davis & Assocs., LLC v. The Hartford Fin. Svcs. Group, Inc.*, No. 1:20-cv-02181-WMR, 2021 WL 420372 (N.D. Ga. Jan. 26, 2021) (case dismissed with prejudice because "direct physical loss or physical damage to property" requires "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." There must be a physical change to property;

These decisions undermine Plaintiffs' unsupported conclusion that there exists a substantial doubt regarding the status of state law.

Moreover, expanding on their "passing suggestion" to refer a question to the Georgia Supreme Court regarding the interpretation of "direct physical loss of or damage to property," Plaintiffs now ask the Court to reconsider its denial of certification on *four* questions, three of which Plaintiffs have never even asked to certify before. D.E. 13, at 21-22; D.E. 20-1, 13-14. The Court cannot *re*consider requests to certify which were not presented to it, and the Court should reject Plaintiffs' use of a motion for reconsideration as a backdoor to certify questions of state law. Moreover, Plaintiffs have not explained how or why the three new

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virus does not physically change property and can be cleaned away, so is not the type of physical change to property Georgia law requires. Under Georgia law, losses from being unable to access insured property do not rise to "direct physical loss or physical damage to" property.); *Gilreath Family & Cosmetic Dentistry, Inc. d/b/a Gilreath Dental Assocs. v. Cincinnati Ins. Co*., No. 1:20-cv-02248-JPB, 2021 WL 778728 (N.D. Ga Mar. 2, 2021) (Court found that according to Georgia law, "direct physical loss" requires actual physical change of the insured property making it unsatisfactory and in need of repair. Plaintiff's failure to allege such actual, physical damage meant no Covered Cause of Loss, no coverage as a matter of law, all claims dismissed.); *Lemontree Academy, LLC v. Utica Mut. Ins. Co. and Republic Franklin Ins. Co.*, No. 3:20-cv-00126-CDL, 6 (M.D. Ga. Mar. 11, 2021) (case dismissed because, under Georgia law, "physical loss or damage" means "actual physical change in the 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."). In addition, the clear majority trend throughout the country is consistent with the Court's decision in this case.

questions involve substantial doubt regarding the status of state law. Other than two cites to two cases generally addressing policy interpretation principles and the prohibition on illusory coverage, Plaintiffs make no effort to explain what substantial doubt exists in Georgia state law relating to the language in Zurich's policy.

Simply put, Plaintiffs do not want to be in federal court. That alone is insufficient to certify questions to the Georgia Supreme Court where Plaintiffs have never properly moved to do so and, even overlooking the procedural shortcuts, have not provided a good basis for certification. *See Henry's Louisiana Grill*, 2020 WL 5938755, at *7 ("A dearth of Georgia Supreme Court decisions addressing a particular phrase cannot be sufficient cause—on its own—to certify a question to that court.").

WHEREFORE, Zurich respectfully requests that the Court deny Plaintiffs' Motion for Reconsideration.

Respectfully submitted, this 22nd day of April, 2021.

/s/Anthony W. Morris

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CERTIFICATE OF COMPLIANCE

Pursuant to Civil Local Rules of Practice for the United States District Court for the Northern District of Georgia, this is to certify that the foregoing **DEFENDANT ZURICH AMERICAN INSURANCE COMPANY'S RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION** complies with the font and point selections approved by the Court in Local Rule 5.1(C). The foregoing was prepared on computer using Times New Roman font (14 point).

Respectfully submitted, this 22nd day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **DEFENDANT ZURICH AMERICAN INSURANCE COMPANY'S RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION** with the Clerk of Court using the CM/ECF system and a true and correct copy of the foregoing was mailed via first class mail to the following attorneys of record:

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This 22nd day of April, 2021.

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