UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PATRICE BOURGIER, individually and on behalf of all others similarly situated, Plaintiff, v. HARTFORD CASUALTY INSURANCE COMPANY, Defendant.	)	No. 1:21-cv-21053-FAM

DEFENDANT HARTFORD CASUALTY INSURANCE COMPANY'S MOTION TO DISMISS UNDER RULE 12(b)(6) AND INCORPORATED MEMORANDUM OF LAW

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Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Southern District of Florida Local Rule 7.1, Defendant Hartford Casualty Insurance Company ("Hartford Casualty") respectfully moves to dismiss with prejudice the putative class action complaint ("Compl.") of Plaintiff Patrice Bourgier ("Plaintiff")[1] for failure to state a claim upon which relief can be granted.

I. INTRODUCTION

Plaintiff, the owner/operator of a salon, claims that it experienced losses as a result of the novel coronavirus and associated civil authority orders. *See* Compl. ¶¶ 76-77. Plaintiff seeks for its property insurer, Hartford Casualty, to cover its alleged virus-related losses. Plaintiff's losses are not covered for at least three reasons.

First, Plaintiff is not entitled to coverage because it does not allege direct physical loss or damage to property, a requirement for all forms of coverage it seeks. The presence of COVID-19 does not constitute direct physical loss or damage to property under binding Eleventh Circuit and Florida law. COVID-19 does not physically or tangibly alter property because it can be removed with the use of a simple disinfectant or the mere passage of time. More than 30 Florida courts, including this Court, have concluded that COVID-19 business interruption claims do not implicate direct physical loss or damage to property. This case is no different.

Second, Plaintiff is not entitled to Civil Authority coverage because it cannot meet any of the requirements of that coverage: (1) access to Plaintiff's premises was not prohibited; (2) Plaintiff does not allege any harm to any property in the immediate area of the scheduled premises; and (3) the governmental orders were issued to limit the future spread of coronavirus to people, not because of existing property damage. Again, numerous courts across the nation have rejected nearly identical civil authority claims.

Third, even if Plaintiff could trigger coverage (it cannot), the losses would be excluded. Plaintiff's policy contains an exclusion that expressly excludes virus-related losses. The "'Fungi', Wet Rot, Dry Rot, Bacteria And Virus" Exclusion (the "Virus Exclusion") provides that Hartford Casualty "will not pay for loss or damage caused directly or indirectly by . . . [p]resence, growth, proliferation, spread or any activity of [a] . . . virus." Exhibit A at 132. "This

[1] For the purposes of this Motion only, Hartford Casualty assumes, as it must, the truth of Plaintiff's well-pleaded allegations in the Complaint.

exclusion applies whether or not the loss event results in widespread damage or affects a substantial area." *Id*.

The coronavirus is a "virus" within the meaning of this exclusion, and the losses that Plaintiff seeks to recover were "caused directly or indirectly by" it. Indeed, Plaintiff alleges that "[a]s a result of the coronavirus, Patrice Bourgier has suffered a suspension of business operations, sustained losses of business income, and incurred extra expenses." Compl. ¶ 76. Thus, by its plain terms, the Virus Exclusion disposes of all of Plaintiff's claims. More than 30 courts have already held that the exact same Virus Exclusion bars coverage for COVID-19 business interruption claims.

Accordingly, Plaintiff's claims fail for multiple reasons. Where, as here, the named plaintiff's claims fail as a matter of law, the putative class action must be dismissed in its entirety.

II. STATEMENT OF FACTS

A. The Policy

Hartford Casualty issued a Business Owner's Policy bearing No. 21 SBA BM2718 to Plaintiff with a policy period of July 3, 2019 to July 3, 2020 ("the Policy"). A certified copy of the Policy is attached hereto as Exhibit A.[2] The Policy's Special Property Coverage Form provides that Hartford Casualty "will pay for direct physical loss of or physical damage to Covered Property . . . caused by or resulting from a Covered Cause of Loss." Ex. A at 31. With respect to the additional coverage for business income:

> [Hartford Casualty] 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 physical damage to property at the "scheduled premises" . . . caused by or resulting from a Covered Cause of Loss.

Ex. A at 40. The Policy defines "Covered Causes of Loss" as "risks of direct physical loss", unless the loss is excluded or limited in other Policy provisions. Ex. A at 32.

The Civil Authority coverage grant provides in pertinent part as follows:

> (1) This insurance is extended to apply to the actual loss of Business Income you sustain when access to your "scheduled premises" is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your "scheduled premises."

[2] The version of the Policy that Plaintiff attached to its Complaint is incomplete.

Ex. A at 41.

As noted, the Policy expressly excludes losses caused by a virus. The Virus Exclusion states that it applies to the aforementioned coverages provided in the Policy's Special Property Coverage Form. Ex. A at 132. The Virus Exclusion provides:

> [Hartford Casualty] will ***not pay*** for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:
>
> (1) ***Presence, growth, proliferation, spread or any activity of*** "fungi", wet rot, dry rot, bacteria or ***virus***.

Ex. A at 132 (emphasis added). The Virus Exclusion has two exceptions, neither of which applies here: (1) when the virus results from fire or lightning or (2) when the Policy's Limited Coverage for "'Fungi', Wet Rot, Dry Rot, Bacteria and Virus" ("Limited Coverage") applies to the loss. The Limited Coverage "only applies" if, among other conditions, the virus results from certain specified causes of loss not at issue here (*e.g.*, windstorm, hail, volcanic action) or from an equipment breakdown. *See* Ex. A at 133; *see also id.* at 55 (defining "specified cause of loss").

B. Plaintiff's Allegations

Plaintiff alleges that "[b]eginning in March 2020, Plaintiff was forced to close the salon as a result of contamination by the coronavirus and related government orders." Compl. ¶14. Plaintiff asserts that it "suffered direct physical loss, direct physical damage, and actual loss to its property as a result of contamination by the coronavirus, and necessary physical restrictions and alterations undertaken to mitigate further property loss and damage." Compl. ¶ 39. "As a result of the coronavirus" and "Civil Authority Actions", Plaintiff alleges that "Patrice Bourgier has suffered a suspension of business operations, sustained losses of business income, and incurred extra expenses." Compl. ¶¶ 76-77. Plaintiff alleges that it was affected by the following governmental actions in Florida:

- "On March 19, 2020, Miami-Dade County issued Emergency Order 07-20, requiring the closure of all non-essential businesses, including but not limited to beauty salons." Compl. ¶ 67.
- On March 30, 2020, the Governor of Florida signed Executive Order 20-89, ordering Miami-Dade County, among other counties, "to restrict public access" to non-essential businesses." Compl. ¶ 68.

Plaintiff's Complaint asserts eight claims for relief. Counts I, III, V, and VII seek declaratory relief under 28 U.S.C. §§ 2201 and 2202 regarding Plaintiff's entitlement to coverage under the Business Income, Extra Expense, Civil Authority, Limited Coverage provisions of the Policy, respectively. Counts II, IV, VI, and VIII mirror the allegations in Counts I, III, V, and VII, respectively, seeking breach of contract claims under the same Policy provisions.

III. ARGUMENT

A. Governing Legal Standards

1. Motion to Dismiss

To survive a motion under Rule 12(b)(6), a complaint must contain facts sufficient to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A complaint that does not contain sufficient factual matter, accepted as true, to state a claim plausible on its face is subject to dismissal." *Houston Specialty Ins. Co. v. Vaughn,* 2016 WL 7386957, at *3 (M.D. Fla. Aug. 4, 2016) (quoting *Am. Dental Ass'n v. Cigna Corp*., 605 F.3d 1283, 1290 (11th Cir. 2010)). 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). The Eleventh Circuit has endorsed "a 'two-pronged approach' in applying these principles: 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, 'assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" *American Dental Ass'n v. Cigna Corp*., 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 679). "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989); *Houston Specialty Ins. Co. v. Vaughn,* 2016 WL 7386957, at *3 (M.D. Fla. Aug. 4, 2016) ("dismissal is warranted under Rule 12(b)(6) if, assuming the truth of the complaint's factual allegations, a dispositive legal issue precludes relief").

In determining whether Plaintiff's complaint fails to state a claim, the Court may consider the language of the Policy, because exhibits are part of a pleading "for all purposes." Fed. R. Civ. P. 10(c); *see also Solis–Ramirez v. U.S. Dep't of Justice,* 758 F.2d 1426, 1430 (11th Cir. 1985) ("Under Rule 10(c) Federal Rules of Civil Procedure, such attachments are considered part of the pleadings for all purposes, including a Rule 12(b)(6) motion."). To the extent the complaint's allegations conflict with the exhibit, the exhibit must control. *See Hoefling v. City of*

Miami, 811 F.3d 1271, 1277 (11th Cir. 2016) ("A district court can generally consider exhibits attached to a complaint in ruling on a motion to dismiss, and if the allegations of the complaint about a particular exhibit conflict with the contents of the exhibit itself, the exhibit controls.") (citing *Crenshaw v. Lister,* 556 F.3d 1283, 1292 (11th Cir. 2009)).

Courts in this circuit "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." *Goldberg v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.,* 143 F. Supp. 3d 1283, 1291 (S.D. Fla. 2015), *aff'd sub nom. Stettin v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 861 F.3d 1335 (11th Cir. 2017) (granting Rule 12(b)(6) motion to dismiss on the basis that the professional services exclusion unambiguously bars coverage); *see also Zodiac Grp., Inc. v. Axis Surplus Ins. Co*., 542 Fed. Appx. 844, 845 (11th Cir.2013) (affirming dismissal of complaint because the "plain language of the Policy precluded coverage" for the underlying claim); *MJCM, Inc. v. Hartford Cas. Ins. Co*., No. 8:09–CV–2275–T–17TBM, 2010 WL 1949585 (M.D. Fla. May 14, 2010) (granting motion to dismiss under Rule 12(b)(6) on breach of contract claim because the underlying lawsuit was not covered under the insurance policy at issue).

2. The Plain and Unambiguous Terms of the Policy Govern

Under Florida law,[3] interpretation of an insurance policy is a question of law for the court. *Tech. Coating Applicators, Inc. v. U.S. Fid. & Guar. Co*., 157 F.3d 843 (11th Cir. 1998); *Dimmitt Chevrolet, Inc. v. Se. Fid. Ins. Corp.,* 636 So. 2d 700, 701 (Fla. 1993). "[I]nsurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties." *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). "In construing an insurance policy, courts should read the policy as a whole, endeavoring to give every

[3] "The construction of insurance contracts is governed by substantive state law." *Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 412 F.3d 1224, 1227 (11th Cir. 2005) (quoting *Provau v. State Farm Mut. Auto. Ins. Co.*, 772 F.2d 817, 819 (11th Cir. 1985)). Florida applies the traditional rule of *lex loci contractus* to insurance contracts, such that "the law of the jurisdiction where the contract was executed governs the rights and liabilities of the parties in determining an issue of insurance coverage." *State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So. 2d 1160, 1163 (Fla. 2006) (citation omitted); s*ee also Gulf Tampa Drydock Co. v. Great Atl. Ins. Co*., 757 F.2d 1172, 1174 (11th Cir. 1985). The Policy was issued to Plaintiff in Florida covering its premises located in Florida. Therefore, Hartford Casualty assumes Florida law applies for purposes of this motion.

provision its full meaning and operative effect." *Gen. Star Indem. Co. v. W. Fla. Vill. Inn, Inc.,* 874 So. 2d 26, 30 (Fla. 2d DCA 2004). The court is not permitted "to rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *State Farm Mut. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986) (citations and quotations omitted). In order for a policy exclusion to be ambiguous, there must be a genuine inconsistency, uncertainty, or ambiguity in meaning. *Goldberg v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*., 143 F. Supp. 3d 1283, 1292 (S.D. Fla. 2015), *aff'd sub nom. Stettin v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 861 F.3d 1335 (11th Cir. 2017) (citation and quotations omitted). "If the insurer makes clear that it has excluded a particular coverage, however, the court is obliged to enforce the contract as written." *State Farm Fire & Casualty Ins. Co. v. Deni Associates of Florida, Inc.,* 678 So.2d 397, 401 (Fla. 4th DCA 1996), *approved*, 711 So. 2d 1135 (Fla. 1998). Where, as here, an exclusion applies to bar coverage, the court need not address coverage under other policy provisions. *See Lubell and Rosen LLC, v. Hartford Ins. Co., Ltd*., No. 0:16-cv-60429-WPD, 2016 WL 8739330, at *4 (S.D. Fla. June 10, 2016) (unnecessary to address whether there was physical loss or damage from noxious odors because such odors arose from a sewer backup, and the sewer water exclusion applied).

B. Plaintiff Does Not Allege Direct Physical Loss to Property, Which Removes Any Possibility of Coverage Under the Policy

Plaintiff's allegations do not meet the triggering language for coverage under the Policy. Plaintiff's Policy defines "Covered Causes of Loss" as "risks of direct physical loss", unless the loss is excluded or limited in other Policy provisions. Ex. A at 32. For coverage under any provision of the Policy, direct physical loss to property is required:

- **Business Income.** Plaintiff must demonstrate that the suspension of its business is "caused by direct physical loss of or physical damage to property at the 'scheduled premises'". *See* Ex. A at 40.
- **Extra Expense.** Extra Expense covers expenses Plaintiff "would not have incurred if there had been no direct physical loss or physical damage to property at the 'scheduled premises'". *See id* at 40.
- **Civil Authority.** Plaintiff must demonstrate that the order of civil authority was issued "as a direct result of a Covered Cause of Loss", a "risk[] of direct physical

loss" "to property in the immediate area of your 'scheduled premises'." *See* Ex. A at 41.

- **Limited Coverage**. The Limited Coverage applies if (1) the virus resulted from a specified cause of loss or an equipment breakdown, and (2) the virus causes loss or damage, defined as "[d]irect physical loss or direct physical damage to Covered Property". Ex. A at 133.

Plaintiff bears the burden to establish that its loss is covered under the Policy. "In Florida, the insured has the burden of proving facts that bring its claim within an insurance policy's affirmative grant of coverage." *Homeowners Choice Prop. & Cas. v. Maspons,* 211 So. 3d 1067, 1068 (Fla. 3d DCA 2017); *see also Mama Jo's*, 2020 WL 4782369, at *8 (citing *U.S. Liab. Ins. Co. v. Bove*, 347 So. 2d 678, 680 (Fla. 3rd DCA. 1977)); *Berkower v. USAA Cas. Ins. Co.,* No. 15-23947-CIV, 2017 WL 1250419, at *7 (S.D. Fla. Apr. 4, 2017) ("Under Florida law, an insured seeking to recover under an all-risks policy, such as the policy here, bears the burden of proving that a covered loss occurred at the insured property."). "[A]n 'all-risk' policy is not an 'all loss' policy, and thus does not extend coverage for every conceivable loss." *Sebo v. Am. Home Assurance Co*., 208 So. 3d 694, 696-97 (Fla. 2016) (citation omitted).

Plaintiff alleges that "[t]he presence of the coronavirus caused direct physical loss of and/or damage to the covered premises". Compl. ¶ 54. But the presence of a contaminant that can be easily removed through cleaning is not direct physical loss in the Eleventh Circuit.

In *Mama Jo's Inc. v. Sparta Ins. Co*., 823 Fed. Appx. 868, 879 (11th Cir. 2020), *cert. denied,* 2021 WL 1163753 (Mar. 29, 2021), the Eleventh Circuit ruled that the insured had failed to show any evidence of direct physical loss or damage based on the intrusion of construction debris on its premises. All that was necessary to remedy this debris was cleaning and painting; no removal or replacement of items was needed. *Id.* In *Mama Jo's*, this District ruled 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." No. 17-cv-23362-KMM, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018), *aff'd* 823 Fed. Appx. 868 (11th Cir. 2020). The court also denied Mama Jo's claim for expenses incurred to clean the premises, because "cleaning is not considered direct physical loss." *Id.* The Eleventh Circuit affirmed because an item or structure that merely needs to be cleaned has not suffered a "loss"

which is both "direct" and "physical." 823 Fed. Appx. at 879 (citing *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 573 (6th Cir. 2012) ("[C]leaning . . . expenses . . . are not tangible, physical losses, but economic losses.")).

Numerous courts in Florida have applied *Mama Jo's* to find no direct physical loss from the alleged presence of COVID-19. *See, e.g.*, *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, No. 8:20-CV-1416-T-02SPF, 2021 WL 22314, at *7 (M.D. Fla. Jan. 4, 2021) ("As in *Mama Jo's* and the cases thereafter, the necessity of cleaning the property to remove particles resting on the property does not mean the property suffered direct physical damage or loss."); *Island Hotel Props. v. Fireman's Fund Ins. Co*., No. 4:20-cv-10056-KMM, 2021 WL 117898, at *3 (S.D. Fla. Jan. 11, 2021) (plaintiff "fails to allege that the mere presence of COVID-19 particles on the doors, floors, and walls of the Properties renders them *physically altered*, just as the presence of dust or particulate construction debris on the interior surfaces of a building is not a physical alteration.") (emphasis in original); *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) ("COVID-19 is incapable of causing a tangible injury to property. COVID-19 is a virus that harms people, not structures."). Indeed, this Court succinctly explained why COVID-19 cannot cause direct physical loss or damage to property:

> Lastly, the deadly coronavirus is surely an order of magnitude more dangerous than construction debris. However, to the extent this argument is about the danger each poses while resting on surfaces, they are both eliminated in the same way—with Lysol and a rag. At this point in the pandemic, it is widely accepted that life can go on with hand sanitizer and disinfecting wipes. Indeed, Town Kitchen has continued to operate a take-out business from the very premise they argue has suffered direct physical loss. The Eleventh Circuit's holding in Mama Jo's did not rely on the danger or harmlessness of the debris at issue, it relied on what needs to be done to "repair" the problem. Because the "repairs" here consist of the routine disinfecting with which we are all familiar and cleaning costs are not tangible, physical losses but rather economic losses, the Court rejects the Plaintiff's "physical contamination" theory—and ultimately dismiss its complaint for failure to state a claim for breach of contract and a declaratory judgment.

Town Kitchen LLC v. Certain Underwriters at Lloyd's, London, No. 20-22832-CIV-MORENO, 2021 WL 768273, at *7 (S.D. Fla. Feb. 26, 2021). The same is true here.

Courts have also looked to the definition of the period of restoration in business income provisions to find no direct physical loss or damage to property. Plaintiff's Policy conditions Business Income coverage as only available during the Period of Restoration, which ends "when

the property should be repaired, rebuilt or replaced" or the insured resumes operations at a new, permanent location. Ex. A at 54. An opinion from this District reasoned that the terms "repair", "rebuild", and "replace" connote that physical damage and a physical change has occurred to the insured property such that it is "unsatisfactory for future use" in its present state. *Malaube, LLC v. Greenwich Ins. Co.,* No. 20-22615, 2020 WL 5051581, at *9 (S.D. Fla. Aug. 26, 2020) (citing *United Airlines, Inc. v. Ins. Co. of State of Pa.,* 385 F.Supp.2d 343, 349 (S.D.N.Y. 2005), *aff'd* 439 F.3d 128 (2d Cir. 2006) (policy language limiting coverage "for only such length of time [needed] to rebuild, repair or replace such part of the Insured Location(s) as has been damaged or destroyed" supports the notion that "physical damage is required before business interruption coverage is paid")). For Plaintiff's alleged contamination, there is nothing to repair, rebuild or replace. The only action needed, if any, is cleaning with household disinfectants, and the time required for such cleaning does not result in any period of restoration.

As to Plaintiff's argument that "the salon also made significant necessary physical alterations to its property to minimize, contain and mitigate coronavirus contamination", this fails to show direct physical loss or damage to property as well. Compl. ¶ 14. First, these alterations were not made for the purpose of preventing the spread of the virus on property, but to prevent its spread between humans. As this Court explained: "The harm from COVID-19 stems from having living, breathing human beings inside one's business—it is not damage done to the physical business itself, it is damage done to other living, breathing human beings. To the extent it *is* a physical harm, such as COVID-19 particles present on surfaces in the restaurant, those can be easily cleaned." *Town Kitchen*, 2021 WL 768273, at *7. Second, "Plaintiff's rearranging of furniture and installation of partitions cannot 'reasonably be described as repairing, rebuilding, or replacing.'" *Café La Trova LLC v. Aspen Spec. Ins. Co*., No. 20-22055-CIV-ALTONAGA /Goodman, 2021 WL 602585, at *9 (S.D. Fla. Feb. 16, 2021) (citing *Indep. Rest. Grp v. Certain Underwriters at Lloyd's, London*, No. cv 20-2365, 2021 WL 131339, at *7 (E.D. Pa. Jan. 14, 2021)); *see also El Novillo Rest. v. Certain Underwriters at Lloyd's*, *London*, No. 1:20-cv-21525, 2020 WL 7251362, at *6 (S.D. Fla. Dec. 7, 2020) (rejecting the plaintiffs' argument that "forced physical alterations" undertaken during COVID-19-related restaurant closure constitute physical damage to establish coverage under Business Income Coverage provision) (quotation marks omitted)).

Additionally, Plaintiff must demonstrate a suspension of operations for coverage under the Business Income or Limited Coverage provision. *See* Ex. A at 40, 133. Plaintiff does not allege that the presence of COVID-19 alone caused it to suspend its operations. Instead, Plaintiff alleges that "[b]eginning in March 2020, Plaintiff was forced to close the salon as a result of contamination by the coronavirus and related government orders. After the closure orders were lifted, the salon re-opened." Compl. ¶ 14. This allegation makes clear that Plaintiff only suspended its operations as a result of the closure orders; after the closure orders lifted, Plaintiff resumed operations notwithstanding the "risk of coronavirus contamination of its property so long as it continues to operate its business at all." Compl. ¶ 74. Like the plaintiff in *Town Kitchen,* Patrice Bourgier continued operating during the period it allegedly experienced direct physical loss or damage. While Plaintiff now complains that it suffered direct physical loss from "the constant risk of recontamination" (*see* Compl. ¶¶ 74, 70), that purported direct physical loss did not cause Plaintiff to suspend its operations.

Because Plaintiff cannot demonstrate direct physical loss or damage to property, it is not entitled to any coverage under the Policy.

C. Plaintiff Is Not Entitled To Civil Authority Coverage

As to Plaintiff's claim for Civil Authority coverage, *see* Compl. ¶¶ 145-147, the Complaint fails to establish that Plaintiff is entitled to recover under that provision either. For Civil Authority coverage, Plaintiff must demonstrate (1) a Covered Cause of Loss, *i.e.*, direct physical loss to property in the immediate area of its premises; (2) that access to its premises was specifically prohibited by the order of civil authority; and (3) the order of civil authority was taken directly in response to the physical damage or loss. *See* Ex. A at 41. Plaintiff can demonstrate none of these elements.

First, as discussed above, Plaintiff has not alleged any "direct physical loss" to property in the immediate area of its premises. In fact, Plaintiff identifies no specific property in its immediate area that supposedly suffered a direct physical loss, except to allege in a vague and conclusory manner that the governmental orders "were issued in response to dangerous physical conditions in the vicinity of the Patrice Bourgier salon". Compl. ¶ 75. *See 10E, LLC v. Travelers Indem. Co. of Conn.,* No. 2:20-cv-044118-SVW-AS, 2020 WL 5359653, at *6 (C.D. Cal. Sept. 2, 2020) (rejecting "vague, circuitous, and – at this stage – fatally conclusory allegations" that do "not describe particular property damage or articulate any facts connecting

the alleged property damage to restrictions on in-person dining."). The failure to allege direct physical loss alone is fatal to any claim for civil authority coverage. *See, e.g.*, *Café La Trova LLC v. Aspen Spec. Ins. Co*., No. 20-22055-CIV-ALTONAGA/Goodman, 2021 WL 602585, at *10 (S.D. Fla. Feb. 16, 2021) ("As several courts have found, there is no civil authority coverage in the absence of physical damage to surrounding properties.").

Second, Plaintiff cannot recover under the Civil Authority provision because access to its premises was not specifically prohibited. Ex. A at 41. Indeed, the Complaint does not allege that any government order specifically prohibited Plaintiff's owners or employees from setting foot inside their place of business, just that the orders required the closure of non-essential businesses, including beauty salons. *See* Compl. ¶¶ 66-67. Here, the law is clear: restrictions on use of the premises are insufficient to trigger civil authority coverage; a complete prohibition of access is required. *See Nahmad*, 2020 WL 6392841, at *9; *Food for Thought Caterers Corp. v. Sentinel Ins. Co., Ltd.*, No. 20-cv-3418 (JGK), 2021 WL 860345, at *6 (S.D.N.Y. Mar. 6, 2021) (holding that an order that required non-essential businesses to temporarily reduce their "in-person workforce at any work locations by 100%" did not "amount to a denial of access to the property" because the "owner of the property could continue to access the property despite the total reduction in the workforce"); *Clear Hearing Solutions, LLC v. Cont'l Cas. Co.*, No. 20-3454, 2021 WL 131283, at *10 (E.D. Pa. Jan. 14, 2021) (no denial of access where employees could enter to perform basic operations such as processing payroll or maintaining security); *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, No. 20-CV-907, 2020 WL 5500221, at *6 (S.D. Cal. Sept. 11, 2020) ("The government orders alleged in the complaint prohibit the operation of Plaintiff's business; they do not prohibit access to Plaintiffs' place of business."). Such decisions recognize, correctly, that the "most natural reading of 'access,' in this context, is physical access, not simply being closed to the public." *See 1210 McGavock St. Hosp. Partners, LLC v. Admiral Indem. Co.,* No. 3:20-cv-694, 2020 WL 7641184 at *10 (M.D. Tenn. Dec. 23, 2020).

Third, the orders of civil authority were not issued "as the direct result" of direct physical loss or damage to property. Florida courts have rejected similar civil authority claims because the COVID-19 orders were aimed at preventing a future harm to people, not existing property loss or damage. *See, e.g.*, *Dime Fitness, LLC v. Markel Ins. Co.,* No. 20-CA-5467, 2020 WL 6691467, at *4 (Fla. Cir. Ct. Nov. 10, 2020) (Governor DeSantis' "Executive Order was not

issued as a result of the purported damage here (i.e., lost business income). The Executive Order was issued in an effort to address public health concerns surrounding the COVID-19 pandemic."); *Pane Rustica, Inc. v. Greenwich Ins. Co*., No. 8:20-cv-1783-KKM-AAS, 2021 WL 1087219, at *4 (M.D. Fla. Mar. 22, 2021) (plaintiff's restaurants "were all shut down for the same reason: a government response to stop the spread of the COVID-19 virus."); *Digital Age,* 2021 WL 80535, at *5 ("Plaintiff has not sufficiently alleged that a Covered Cause of Loss to property … directly precipitated the orders of a civil authority…"); *see also Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.,* No. 20-CV-03213-JST, 2020 WL 5525171, at *7 (N.D. Cal. Sept. 14, 2020) ("Because the orders were preventative – and absent allegations of damage to adjacent property – the complaint does not establish the requisite causal link between prior property damage and the government's closure order.").

Thus, the governmental orders at issue here aimed at slowing the future spread of the coronavirus are insufficient to trigger civil authority coverage, and Plaintiff's civil authority claims fail as a matter of law.

D. The Virus Exclusion Bars Coverage for All of Plaintiff's Claims

Even if Plaintiff could show that it is entitled to any coverage under the Policy (it cannot), the Virus Exclusion unambiguously bars coverage for Plaintiff's claims. The Policy provides that Hartford Casualty "will not pay for loss or damage caused directly or indirectly by the ***presence***, growth, proliferation, spread or any activity of . . . virus." Ex. A at 132 (emphasis added). This exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Id.*

Plaintiff's allegations fall squarely within the exclusion. First, Plaintiff acknowledges that the novel coronavirus that causes COVID-19 is a virus. *See* Compl. ¶ 9. Second, Plaintiff repeatedly alleges the virus is the cause of its losses. In fact, the Complaint uses the word virus or coronavirus at least 140 times. Plaintiff alleges that it "was forced to close the salon as a result of contamination by the coronavirus and related government orders." Compl. ¶ 14. Further, Plaintiff specifically alleges that "[t]he presence of the coronavirus caused direct physical loss of and/or damage to the covered premises". Compl. ¶ 70. "Presence" of a virus is expressly excluded by the Virus Exclusion. Ex. A at 132 (excluding loss or damage "caused directly or indirectly by ***presence*** . . . [of] virus") (emphasis added). The language of the Virus Exclusion also provides that it applies where the loss event results in "widespread damage" or

"affects a substantial area." *See id.* Simply put, the Complaint makes clear that the coronavirus – a virus – has caused Plaintiff's alleged losses.

Two courts in this District have already decided that the exact same Virus Exclusion at issue here bars coverage of COVID-19 business income losses. Judge Dimitrouleas dismissed such claims because, "[t]he unambiguous, reasonable reading of these provisions taken together is that the policy does not cover direct or indirect damage caused by a virus". *Digital Age Marketing Group, Inc. v. Twin City Ins. Co., Ltd.*, No. 20-61577-CIV-DIMITROULEAS, 2021 WL 80535, at *4 (S.D. Fla. January 8, 2021). Judge Bloom enforced the Virus Exclusion because there is "no basis for construing 'COVID-19' or the 'pandemic' as a non-virus for purposes of this exclusion." *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-CV-22833, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020).

In addition to *Nahmad* and *Digital Age*, ***twenty-nine*** other federal courts to date have ruled ***that the very same virus exclusion in the Policy at issue here*** precludes coverage for coronavirus-related claims. *See, e.g.*, *Westside Head & Neck v. Hartford Fin. Servs. Grp., Inc.*, No. 2:20-cv-06132, 2021 WL 1060230, at *3 (C.D. Cal. Mar. 19, 2021) ("[T]he Policy precludes the insured from recovering for loss or damage that is caused directly or indirectly by the presence, growth, proliferation, or spread of a virus."); *Robert E. Levy, D.M.D., LLC v. Hartford Fin. Servs. Grp. Inc.*, No. 4:20-cv-00643-SRC, 2021 WL 598818, at *5 (E.D. Mo. Feb. 16, 2021) ("Simply put, Plaintiffs allege their losses were caused by efforts to prevent the spread of COVID-19. The alleged losses fall squarely within the virus exclusion."); *Natty Greene's Brewing Co. v. Travelers Cas. Ins. Co. of Am.*, No. 1:20-CV-437, 2020 WL 7024882, at *4 (M.D.N.C. Nov. 30, 2020) (policies "unambiguously exclude coverage for loss or damage caused directly or indirectly by, or resulting from, any virus"); *Wilson v. Hartford Cas. Ins. Co.*, No. CV 20-3384, 2020 WL 5820800, at *9 (E.D. Pa. Sept. 30, 2020) (dismissing all of the plaintiff's COVID-19 claims with prejudice "since the virus exclusion and its exemptions are clear and unambiguous"); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 488 F. Supp. 3d 904, 907 (N.D. Cal. Sept. 22, 2020) (concluding that "the Virus Exclusion applies under its plain and unambiguous language" because the insured's "loss was caused directly or indirectly by the virus").[4]

[4] *See also French Laundry Partners, LP v. Hartford Fire Ins. Co.,* No. 20-cv-04540-JSC, 2021 WL 1640994 (N.D. Cal. Apr. 27, 2021); *Q Clothier New Orleans, LLC v. Twin City Fire Ins.*

Hartford Casualty's Virus Exclusion is not the only virus exclusion that has been enforced to bar coverage for COVID-19 business interruption claims. Florida courts have not hesitated to enforce other virus exclusions to bar coverage for COVID-19 cases. *See e.g., Pane Rustica, Inc. v. Greenwich Ins. Co.,* No. 8:20-cv-1783-KKM-AAS, 2021 WL 1087219, at *2 (M.D. Fla. Mar. 22, 2021) (finding exclusion applicable because the loss alleged in the complaint "stems from COVID-19"); *Mena Catering, Inc. v. Scottsdale Ins. Co.,* No. 1:20-cv-23661-BLOOM/Louis, 2021 WL 86777, at *9 (S.D. Fla. Jan. 11, 2021) ("the Complaint's allegations squarely reflect that Plaintiff's losses are "caused by or result[ ] from" COVID-19"); *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, No. 8:20-CV-1416-T-02SPF, 2021 WL 22314, at *8 (M.D. Fla. Jan. 4, 2021) (enforcing virus exclusion because "[t]he coronavirus is the peril that caused the government to enact orders restricting business."); *Martinez v. Allied Ins. Co. of Am.,* 483 F. Supp. 3d 1189, 1192 (M.D. Fla. 2020) (dismissing complaint with prejudice because the policy excludes losses caused "directly or indirectly" by any virus). [5]

Co., 2021 WL 1600247, No. 20-1470 (E.D. La. Apr. 23, 2021); *Stern & Eisenberg, P.C. v. Sentinel Ins. Co., Ltd.,* No. 20-11277 (RMB/KMW), 2021 WL 1422860 (D.N.J. Apr. 14, 2021); *Hilco, Inc. v. Hartford Fire Ins. Co.,* No. 1:20-CV-4514-LMM, 2021 WL 1540997 (N.D. Ga. Apr. 12, 2021); *Podiatry Foot & Ankle Inst. P.A. v. Hartford Ins. Co. of the Midwest,* Civ. No. 20-20057 (KM) (ESK), 2021 WL 1326975 (D.N.J. Apr. 9, 2021); *Coffey & McKenzie, LLC v. Twin City Fire Ins. Co.,* No. 2:20-cv-1671-BHH, 2021 WL 1310872 (D.S.C. Apr. 8, 2021); *J&H Landmark, Inc. v. Twin City Fire Ins. Co*., No. 5:20-333-DCR, 2021 WL 922057 (E.D. Ky. Mar. 10, 2021); *Pure Fitness LLC v. Twin City Fire Ins. Co*., 2:20-CV-775-RDP, 2021 WL 512242 (N.D. Ala. Feb. 11, 2021); *Protégé Restaurant Partners, LLC v. Sentinel Ins. Co*., Ltd., No. 20-cv-03674-BLF, 2021 WL 428653 (N.D. Cal. Feb. 8, 2021); *Eye Care Ctr. of NJ, PA v. Twin City Fire Ins. Co*., Civ. No. 20-05743 (KM) (ESK), 2021 WL 457890 (D.N.J. Feb. 8, 2021); *Colgan v. Sentinel Ins. Co., Ltd.,* No. 20-cv-04780-HSG, 2021 WL 472964 (N.D. Cal. Jan. 26, 2021); *Roundin3rd Sports Bar LLC v. Hartford, No.* 2:20-cv-05159-SVW-PLA, 2021 WL 647379 (C.D. Cal. Jan. 14, 2021); *ATCM Optical, Inc. v. Twin City Fire Ins. Co*., No. 20-4238, 2021 WL 131282 (E.D. Pa. Jan. 14, 2021); *Moody v. Hartford Fin. Serv. Group, Inc*., No. 20-2856, 2021 WL 135897 (E.D. Pa. Jan. 14, 2021); *TAQ Willow Grove, LLC v. Twin City Fire Ins. Co*., No. 20-3863, 2021 WL 131555 (E.D. Pa. Jan. 14, 2021); *Ultimate Hearing Solutions II, LLC v. Twin City Fire Ins. Co*., No. 20-2401, 2021 WL 131556 (E.D. Pa. Jan. 14, 2021); *Zagafen Bala, LLC v. Twin City Fire Ins. Co*., No. 20-3033, 2021 WL 131657 (E.D. Pa. Jan. 14, 2021); *Digital Age Mktg. Grp., Inc. v. Sentinel Ins. Co., Ltd*., No. 20-61577-CIV-DIMITROULEAS, 2021 WL 80535 (S.D. Fla. Jan. 8, 2021); *Barroso, Inc. v. Hartford Fire Ins. Co.,* No. 1:20-cv-00632-LMB-MSN (E.D. Va. Nov. 10, 2020), ECF No. 39; *Founder Inst. Inc. v. Hartford Fire Ins. Co.,* No. 20-cv-04466-VC, 2020 WL 6268539 (N.D. Cal. Oct. 22, 2020).

[5] Hartford Casualty is only aware of one court to date that has permitted a COVID-19 coverage complaint with a virus exclusion to be proceed beyond the motion to dismiss stage. *See*

The same is true here. Plaintiff's claims are barred by the unambiguous terms of the Virus Exclusion and the Complaint should be dismissed in its entirety.

E. Plaintiff Cannot Establish Entitlement To Any Limited Virus Coverage

The Virus Exclusion contains an exception for certain Limited Coverage. *See* Ex. A at 132. Plaintiff alleges that one subpart of the Limited Coverage (B.1.f) provides coverage if a suspension of operations is "necessary due to loss or damage to property caused by . . . virus". Compl. ¶ 171. That is wrong.

The Limited Coverage does not provide coverage based on a suspension of operations caused by virus alone. The Virus Exclusion bars loss or damage caused directly or indirectly by virus. To read the Limited Coverage as permitting the "presence of 'virus'" alone as sufficient to trigger the Limited Coverage would render a portion of the Virus Exclusion moot. That is not permissible under Florida law. *See Arawak Aviation, Inc. v. Indem. Ins. Co. of N. Am.*, 285 F.3d 954, 957 (11th Cir. 2002) (declining to adopt the approach advanced by the insured which would render the exclusionary clause for wear and tear meaningless).

In any event, Plaintiff has incorrectly isolated one subpart of the Limited Coverage from the rest of the virus endorsement. Subpart B.1.f of the Limited Coverage "does not provide standalone coverage, but instead is triggered when the other requirements of the Limited Virus provision are met." *Colgan v. Sentinel Ins. Co., Ltd.*, No. 20-cv-04780-HSG, 2021 WL 472964, at *4 (N.D. Cal. Jan. 26, 2021); *see also Q Clothier*, 2021 WL 1600247, at *9 ("the Time Element clause does not permit independent coverage for plaintiff's losses that are otherwise barred by the Policy, including the Virus Exclusion."). The Limited Coverage only applies if: (1) the virus "is the result of" a "'specified cause of loss' other than fire or lightning" or an "Equipment Breakdown Accident"; and (2) Plaintiff experiences "[d]irect physical loss or direct

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Urogynecology Spec. of Fla. LLC v. Sentinel Ins. Co., No. 6:20-cv-1174-Orl-22EJK, 2020 WL 5939172, at *4 (M.D. Fla. Sept. 24, 2020). That outlier decision rested largely on the court's misunderstanding as to whether the policy was in the record (it was), and unlike here, the motion to dismiss did not address direct physical loss or civil authority coverage. The *Founder* court distinguished *Urogynecology* stating, "that case did not cite anything—from the complaint or elsewhere—that would support a conclusion that a business shutdown due to a pandemic falls outside the scope of the virus exclusion." *Founder Institute Inc. v. Hartford Fire Ins. Co,* No. 20-cv-04466-VC (N.D. Cal. Oct. 22, 2020). No court has followed *Urogynecology* with respect to the virus exclusion in the seven months since it was issued.

physical damage to Covered Property caused by . . . virus." Ex. A at 133, subparts B.1.a and B.1.b.[6] Plaintiff cannot meet either requirement.

The Complaint is devoid of any factual allegations establishing that the virus is the "result of" a "specified cause of loss" or an "Equipment Breakdown Accident." In such instances, courts have declined to find the Limited Coverage applies. *See, e.g.*, *Ultimate Hearing Sols. II, LLC v. Twin City Fire Ins. Co.*, No. CV 20-2401, 2021 WL 131556, at *9 (E.D. Pa. Jan. 14, 2021) (plaintiff did not show the COVID-19 virus was caused by specified cause of loss); *Franklin*, 488 F. Supp. 3d at 909 ("Plaintiffs have not alleged that the virus was caused by any of the specified causes of loss"); *cf. Firenze Ventures, LLC v. Twin City Fire Ins. Co.*, No. 20-cv-4226, 2021 WL 1208991, at *4 (N.D. Ill. Mar. 31, 2021) (rejecting applicability of Limited Coverage to coronavirus claim because, among other reasons, virus was not the result of the particular specified cause of loss alleged).

Even if subpart B.1.f of the Limited Coverage provided standalone Time Element Coverage (it does not), Plaintiff's claim would fail because it cannot meet the requirements of B.1.f itself. First, subpart B.1.f requires that the "*loss which resulted in . . . virus* does not in itself necessitate a suspension of 'operations', but such suspension is necessary due to loss or damage to property caused by . . . virus." Ex. A at 133-34 (emphasis added). Here, there is no allegation that Plaintiff experienced any "loss which resulted in . . . virus." That is fatal to its claim. *See, e.g.*, *Robert E. Levy*, 2021 WL 598818, at *8 (plaintiff failed to state a claim under B.1.f. because it did not "allege any 'loss which resulted in a virus'"); *J&H Lanmark*, 2021 WL 922057, at *4 (observing that subpart B.1.f. requires a "loss which resulted in . . . virus," and reasoning that "[t]he only loss resulting in virus contemplated by the Policy is that under Section B.1.a. of the Virus Endorsement, which requires the virus to have been caused by a specified cause of loss other than fire or lightning or equipment breakdown").

Second, subpart B.1.f requires that the "suspension of 'operations' satisf[y] all the terms and conditions of the applicable Time Element Coverage", i.e., the Business Income and Extra

[6] "Specified cause of loss" is a defined term under the Policy, which means: "[f]ire; lightning; explosion, windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage." Ex. A at 55.

Expense coverages.[7] Ex. A at 133. Those coverages require, among other things, a showing of direct physical loss or damage. Plaintiff's allegations do not constitute direct physical loss or damage to property for all of the reasons explained in Section III.B above. *See also Firenze Ventures*, 2021 WL 1208991, at *5 (concluding the Time Element Coverage component of the Limited Coverage applies to the Business Income and Extra Expense coverages and that Plaintiff failed to demonstrate entitlement to B.1.f coverage).

Ignoring that it cannot meet any of the requirements for Limited Coverage, Plaintiff asserts that the Limited Coverage must be illusory. Plaintiff asserts that the Limited Coverage has "vague or internally inconsistent language" if it does not apply in Plaintiff's circumstance. Compl. ¶ 47. Plaintiff supports this argument by citing to *Dickson v. Econ. Premier Assur. Co*., 36 So. 3d 789 (Fla. Dist. Ct. App. 2010)[8], which states: "An insurance policy cannot grant rights in one paragraph and then retract the very same right in another paragraph called an 'exclusion.'" *Id.* at 790 (quoting *Tire Kingdom, Inc. v. First Southern Ins. Co*., 573 So.2d 885, 887 (Fla. 3d DCA 1990)). That is precisely the opposite of the situation here. The Policy excludes all coverage for viruses, but it has an exception to the exclusion – the Limited Coverage. As its name implies, the Limited Coverage provides certain limited coverage as an exception to the Virus Exclusion. Unlike *Dickson* or *Tire Kingdom*, the Limited Coverage is not rendered inapplicable by an exclusion; to the contrary, it is granting coverage where there otherwise would be none, if the conditions stated in the Limited Coverage exception are met. Nonetheless, courts have already ruled that the Limited Coverage is not illusory. *French Laundry Partners, LP v. Hartford Fire Ins. Co.*, No. 20-cv-04540-JSC, 2021 WL 1640994, at *3 (N.D. Cal. Apr. 27, 2021) (because the Limited Coverage provides the possibility of coverage in some

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[7] Civil Authority coverage is not a Time Element Coverage. *Firenze Ventures,* 2021 WL 1208991, at *5 ("By its express terms, the Time Element Coverage component of the Limited Coverage Provision applies only if there has been 'a suspension of operations.'… By contrast, Civil Authority coverage is pegged not to 'a suspension of operations,' but rather to the 'prohibit[ion]' of 'access' to the insured's premises.") (citations and internal quotation marks omitted).

[8] Plaintiff also cites to *First Mercury Ins. Co. v. Sudderth*, 620 Fed. App'x 826, 830 (11th Cir. 2015), but that is a case applying Georgia law. Plaintiff cites *Urogynecology Spec. of Fla. LLC v. Sentinel Ins. Co*., No. 20-cv-1174, 2020 WL 5939172 (M.D. Fla. Sep. 24, 2020), but that case is inapposite because it did not even address the Limited Coverage or any arguments regarding illusory coverage.

circumstances, it is not illusory); *Firenze Ventures,* 2021 WL 1208991, at *4 ("the court's interpretation of that policy language does not render illusory the Limited Coverage provision."); *Ultimate Hearing*, 2021 WL 131556, at *9 (rejecting the argument that the "Limited Virus Coverage" is "illusory").

Thus, even adopting Plaintiff's incorrect view of the Limited Coverage exception to the Virus Exclusion, the coverage does not apply.

IV. CONCLUSION

For all of the foregoing reasons and others appearing on the record, Hartford Casualty respectfully requests that this Court dismiss Plaintiff's complaint in its entirety with prejudice. Plaintiff has not stated any claim upon which relief can be granted.

Dated this 30th day of April 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing will be served upon all counsel of record via the Court's Electronic Filing System on April 30, 2021.

By: */s/ James M. Kaplan*
JAMES M. KAPLAN