UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SA HOSPITALITY GROUP, LLC;
1000 MADISON AVENUE LLC;
ASTORIA CAKES LLC;
CAFÉ FOCACCIA, INC.;
REALTEK LLC;
SA MIDTOWN LLC;
BAILEY'S RESTAURANT LLC;
SA SPECIAL EVENTS, INC.;
SASE LLC;
EIGHTY THIRD AND FIRST LLC;
265 LAFAYETTE RISTORANTE LLC;
FELICE GOLD STREET LLC;
SA 61ST MANAGEMENT LLC;
SA YORK AVE LLC;
SA THIRD AVE CAFÉ LLC;
SABF LLC;
FELICE CHAMBERS LLC;
and FELICE WATER STREET LLC, on behalf of themselves and all others similarly situated,

Plaintiffs,

—against—

HARTFORD FIRE INSURANCE COMPANY,

Defendant.

Civil Action No. 3:20-cv-01033-VLB

September 21, 2020

MEMORANDUM OF LAW IN SUPPORT OF
HARTFORD FIRE INSURANCE COMPANY'S MOTION TO DISMISS

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INTRODUCTION

This insurance coverage case involves a business interruption claim arising from the COVID 19 pandemic. By this motion, defendant Hartford Fire Insurance Company ("Hartford Fire") seeks to dismiss the Complaint because the underlying policy covers only "direct physical loss" or "physical damage" to property, which is not alleged to have occurred, and because in all events the policy expressly excludes coverage for losses caused by viruses.

The plaintiffs are a group of companies that operate New York restaurants (collectively, "SA Hospitality") and that together have one property insurance policy. SA Hospitality is invoking three aspects of its insurance coverage in this case: Business Income, Extra Expense, and Civil Authority. But the facts alleged in the Complaint do not trigger coverage under any of them, and would be barred in all events by the virus exclusion. The Court should therefore dismiss this case on multiple, independent grounds.

***First*, Business Income coverage and Extra Expense coverage are triggered only by a suspension of business caused by "direct physical loss of or physical damage to property at" SA Hospitality's premises. But no physical property damage or loss is alleged as the cause of the business suspension. Instead, SA Hospitality alleges that it had to close its businesses because of governmental "stay at home" orders. Those orders have everything to do with keeping people apart to slow the spread of the virus, and nothing to do with property damage. While SA Hospitality argues that the orders rendered it "unable to use [its] property," binding precedent from the Appellate Division in New York (whose law governs here) has rejected the argument that "loss of use" amounts to direct**

physical loss. That court and others have found that there is no direct physical loss where a business is forced to close for reasons *external* to the premises and unrelated to property damage. A growing chorus of cases across the country has agreed, specifically with respect to COVID-19 business interruption cases like this one.

***Second*, for SA Hospitality's Civil Authority claim, coverage is triggered only when "access to" its premises is "specifically prohibited by order of a civil authority as the direct result" of "direct physical loss or direct physical damage" in "the immediate area." Nothing like that is alleged to have happened, either. The governmental orders were not issued because of property damage in the "immediate area" of SA Hospitality's restaurants. Rather, they were issued to keep people apart to slow the spread of the virus.**

***Third*, even if SA Hospitality had alleged "direct physical loss or physical damage" to its property, or to property in the immediate area, the policy contains an unambiguous virus exclusion stating: "We will not pay for loss or damage caused by or resulting from any virus . . . ." This is a straightforward and independent ground to dismiss.**

SA Hospitality tries to argue around the virus exclusion by suggesting that only the government orders (not the virus) caused its losses, but this hairsplitting is inconsistent with the policy language and with New York law on causation.

Simply put, there is no coverage for SA Hospitality's claims. While the COVID-19 pandemic has impacted businesses in unprecedented ways, it cannot vitiate the terms of Hartford Fire's insurance contract to create coverage where

none exists. The policy does not insure SA Hospitality's income loss unless that income loss is tied to a direct physical loss or damage to property at its premises or nearby—and never when the losses result from a virus.

For all of these reasons and others appearing in the record, Hartford Fire respectfully requests that the Court dismiss SA Hospitality's claims with prejudice. Because SA Hospitality and its 17 subsidiaries are the only named plaintiffs in this putative class action, the case should be dismissed entirely.

BACKGROUND FACTS

SA Hospitality Group, LLC is a holding company in the restaurant business, and it purchased property insurance from Hartford Fire for itself and for 17 of its subsidiaries that are also plaintiffs in this case. (ECF 1 ("Compl.") ¶¶ 15-32, 34 (identifying the policy); Ex. A[1] (the "Policy"), at HFIC00010 (listing insureds under the Policy).) All of the plaintiffs have their principal places of business in New York. (Compl. ¶¶ 15–32.)

On March 20, 2020, New York Governor Andrew Cuomo issued an Executive Order directing non-essential businesses "to reduce the in-person workforce at any work locations by 100%" in order to mitigate "community contact transmission of COVID-19." Executive Order, 9 NYCRR 8.202.8 (Mar. 20, 2020). SA Hospitality alleges that it operates restaurants (Compl. ¶ 15), and restaurants were deemed "essential" and allowed to stay open for take-out and delivery. (Ex. B at 2 (guidance from Empire State Development Corporation).) *See also* Executive Order, 9 NYCRR 8.202.6 (Mar. 18, 2020) (authorizing guidance). In

[1] **Citations in the form "Ex. __" refer to the exhibits to the accompanying declaration of Charles Michael, dated September 21, 2020.**

addition, employees of non-essential businesses could visit their premises "temporarily" for routine functions, "so long as they w[ould] not be in contact with other people." (Ex. C, at 3 (Question 13).)

SA Hospitality alleges that its restaurants were "forced to close due to the Closure Orders." (Compl. ¶ 63.) SA Hospitality then filed an insurance claim with Hartford Fire, which, on April 8, 2020, denied the claim. (*Id*. ¶ 61.)

On April 24, 2020, SA Hospitality filed a complaint in the Southern District of New York, seeking to represent a nationwide class of policyholders that "have suffered losses due to measures put in place by civil authorities to stop the spread of COVID-19" but that have been denied coverage. (Ex. D ¶¶ 70-21.)

On July 9, 2020, Hartford Fire moved to dismiss the New York case. (Ex. G.) On July 22, 2020, instead of opposing the motion, SA Hospitality voluntarily dismissed the case (Ex. H) and filed with this Court a new Complaint containing the same six counts based on the same facts as those in the New York complaint. (*Compare* Ex. D *with* Compl.)

As it did before the New York court, SA Hospitality seeks to represent a nationwide class of policyholders who "who have suffered losses due to measures put in place by civil authorities" to stop the spread of COVID-19. (Compl. ¶ 67.) And just like in the New York case, SA Hospitality is invoking three aspects of its insurance coverage: Business Income, Extra Expense, and Civil Authority.

The Business Income and Extra Expense coverage is set forth under a single provision whereby Hartford Fire agreed to "pay for the actual loss of

Business Income you sustain and the actual, necessary and reasonable Extra Expense you incur due to the necessary interruption of your business operations during the Period of Restoration due to direct physical loss of or direct physical damage to property caused by or resulting from a Covered Cause of Loss" at SA Hospitality's premises. (*Id.* ¶¶ 49, 82–98 (Counts I and II seeking "Business Income" coverage), 114–28 (Counts V and VI seeking "Extra Expense" coverage); Policy at HFIC00079 § A.)

The term "Covered Cause of Loss" is defined to mean "direct physical loss or direct physical damage that occurs during the Policy period and in the Coverage Territory," except where excluded or limited. (Compl. ¶ 56; Policy at HFIC00086 § A.)

Under the Civil Authority provision, there is "Additional Coverage" for "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 the insured premises. (Compl. ¶¶ 52, 99–113 (Counts III and IV seeking coverage under the Civil Authority provision); Policy at HFIC00065 § A.2.a.)

SA Hospitality's Complaint does not identify any particular property that was damaged or that suffered a physical loss. Instead, SA Hospitality alleges that it and all putative class members "have suffered a direct physical loss of their property because they have been unable to use their property for its intended purpose." (Compl. ¶ 59.)

Finally, SA Hospitality's complaint acknowledges that the policy includes a Virus Exclusion, as follows:

> **We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.**

(Compl. ¶ 58; Policy at HFIC00053 § B.) The Complaint argues that this exclusion is inapplicable because its losses were caused by the "stay at home" orders, and "not because coronavirus was found in or on Plaintiffs' insured property." (Compl. ¶ 60.)

DISCUSSION

I. GOVERNING STANDARDS

A. Standard for a Motion to Dismiss

The Court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While Rule 8 does not require detailed factual allegations, it demands more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Factual allegations must be enough to rise above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal citations omitted).

For purposes of a motion to dismiss, the Court may consider not only the complaint itself, but also "any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). Under this rule, courts commonly consider insurance policies in deciding motions to dismiss cases arising from those policies. *See, e.g.*, *No Hero Enters. B.V. v. Loretta Howard Gallery Inc*., 20 F. Supp. 3d 421, 423 n.1 (S.D.N.Y. 2014). Here, SA Hospitality invokes and liberally quotes the Policy (*see, e.g.*, Compl. ¶¶ 31, 49-55); hence it is appropriate for the Court to consider the Policy in ruling on this motion.

B. New York Law Applies

A federal court sitting in diversity applies the conflict of law rules of the forum state to determine which states' substantive law governs the dispute. *Klaxon Co. v. Stentor Co.*, 313 U.S. 487, 496 (1941). Under Connecticut's choice-of-law rules, contract cases are governed by the law of "the state that has the most significant relationship to the transaction and the parties." *Lumbermens Mut. Cas. Co. v. Dillon Co. Inc.*, No. 3:98-CV-2013 (EBB), 2000 WL 1336498, at *2 (D. Conn. Aug. 31, 2000), *aff'd,* 9 F. App'x 81 (2d Cir. 2001). In insurance cases, this test "mandates that, in the absence of extraordinary circumstances, the law of the state where the principal insured risk is located will apply." *Reichhold Chemicals, Inc. v. Hartford Accident & Indem. Co.*, 750 A.2d 1051, 1059 (Conn. 2000).

Here, all of the insured restaurants are New York limited liability companies with their principal places of business in New York. (Compl.¶¶ 15–32.) Accordingly, New York law applies.

C. Insurance Contracts Are Enforced as Written

Under New York law, the party seeking insurance coverage "bears the burden of showing that the insurance contract covers the loss." *Morgan Stanley Group Inc. v. New England Ins. Co*., 225 F.3d 270, 276 (2d Cir. 2000). In evaluating whether this burden has been met, courts apply the familiar standards to contracts generally. That is, "an insurance contract is interpreted to give effect to the intent of the parties as expressed in the clear language of the contract." *Village of Sylvan Beach v. Travelers Indem. Co.,* 55 F.3d 114, 115 (2d Cir. 1995). For purposes of policy exclusions, however, it is the insurance company which bears the burden of "establishing that the exclusions or exemptions apply in the particular case." *Seaboard Sur. Co. v. Gillette Co*., 476 N.E.2d 272, 275 (N.Y. 1984).

In evaluating whether these burdens have been met, courts apply the familiar standards to contracts generally. That is, "an insurance contract is interpreted to give effect to the intent of the parties as expressed in the clear language of the contract." *Village of Sylvan Beach v. Travelers Indem. Co.,* 55 F.3d 114, 115 (2d Cir. 1995); *see also Catucci v. Greenwich Ins. Co*., 830 N.Y.S.2d 281, 282 (N.Y. App. Div. 2007) (a policy exclusion that is "unambiguous" should be "accorded its plain and ordinary meaning" and enforced as written).

The enforcement of the plain meaning of contract language is essential to the functioning of the insurance industry. Insurers are in the business of pricing risk, and that would not be possible if courts could arbitrarily bind an insurer to "a risk that it did not contemplate and for which it has not been paid." *Dae Assocs., LLC v. AXA Art Ins. Corp.*, 70 N.Y.S.3d 500, 501 (N.Y. App. Div. 2018) (citation omitted). For the same reason, a court should "not make or vary the

contract of insurance to accomplish its notions of abstract justice or moral obligation." *Keyspan Gas East Corp. v Munich Reinsurance Am., Inc.*, 96 N.E.3d 209, 216 (N.Y. 2019).

II. SA HOSPITALITY HAS NOT ALLEGED FACTS TRIGGERING BUSINESS INCOME OR EXTRA EXPENSE COVERAGE

SA Hospitality has not alleged any losses from "direct physical loss of or damage to" property at its premises, and hence, under well-settled New York law, cannot state a claim for Business Income or Extra Expense coverage.

To trigger Business Income and Extra Expense coverage, SA Hospitality's suspension of operations must have been "*due to* direct physical loss of or direct physical damage to property" at its covered premises. (Compl. ¶ 49; Policy at HFIC00079 § A (emphasis added)). This is not what SA Hospitality alleges. Rather, SA Hospitality alleges that its restaurants were closed because of "measures put in place by civil authorities" which were "made to protect the health and safety of their residents from the human to human and surface to human spread of COVID-19." (Compl. ¶ 3, 9.)

None of this has anything to do with any physical property loss or damage at SA Hospitality's premises. In fact, the Complaint does not identify any particular property that was lost or damaged, relying instead on the allegation that SA Hospitality has "been unable to use [its] property for its intended purpose," (*Id.* ¶ 59; *see also id.* ¶ 68 ("loss or damage to property . . . includes the loss of use and occupancy").)

SA Hospitality cannot argue that the virus itself caused the physical loss or damage because the Complaint states that its alleged damages were incurred

"*not* because coronavirus was found in or on Plaintiffs' insured property" but instead because of the "stay at home" orders. (*Id.* ¶ 60 (emphasis added).) This admission is fatal to the Business Income and Extra Expense claims.

Judge Caproni recently denied a preliminary injunction sought by a magazine business that was likewise impacted by COVID-19. The magazine relied upon substantially identical policy language and substantially similar arguments to what SA Hospitality advances here. Judge Caproni concluded that "New York law is clear that this kind of business interruption [claim] needs some damage to the property" before there is coverage. *Social Life Magazine, Inc. v. Sentinel Ins. Co.*, No. 1:20-cv-03311-VEC (S.D.N.Y. May 14, 2020) (Ex. I at 15 (transcript)). Restricted *access* to the property from government orders without any property damage to the insured or nearby property was not enough. *Id*.

Other courts addressing COVID-19 business interruption insurance claims have almost uniformly ruled the same way, as indicated in the chart below:

No.	Date/Court	Plaintiff Type	Illustrative Quote / Citation
1	7/1/20, Michigan Circuit Ct.	Restaurant	"[T]here actually is no factual development that could change the fact that the complaint is complaining about the loss of access or use of the premised due to executive orders and the Covid-19 10 virus crisis. So, there's no factual development that could possibly change that or amendment to the complaint that could possibly change that those things do not constitute the direct physical damage or injury that's required under the policy." *Gavrilides Mgmt. Co. v. Michigan Ins. Co.*, Case No. 20-258-CB-C30 (Mich. Circuit Ct. July 1, 2020) (Ex. J at 23 (transcript); Ex. K (order incorporating grounds stated in transcript).)

No.	Date/Court	Plaintiff Type	Illustrative Quote / Citation
2	8/4/20, Cal. Super. Ct.	Hotels	"[W]hen the Governor ordered us all to shelter in place and businesses to close, it wasn't necessarily because there was COVID at your hotels. It was because there was a fear that COVID might arrive at your hotels, and there was a fear by having people move around the state, that that would cause us all to infect each other." *The Inns by the Sea v. Cal. Mut. Ins. Co.*, No. 20CV001274 (Super. Ct. Cal. Aug. 4, 2020) (Ex. L, at 5; *see also* Ex. M (Order dismissing case).)
3	8/6/20, D.C. Super. Ct	Restaurants	"[G]overnmental edicts that commanded individuals and businesses to take certain actions . . . did not effect any direct changes to the properties . . . [or] have any effect on the material or tangible structure of the insured properties." *Rose's 1 LLC v. Eerie Ins. Exchange*, No. 2020 CA 002424 B, 2020 WL 4589206, at *2 (D.C. Super. Aug. 6, 2020)
4	8/13/20, W.D. Tex.	Barbershops	"[T]he Court finds that the line of cases requiring tangible injury to property are more persuasive here and that the other cases are distinguishable." *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13 2020)
5	8/26/20, S.D. Fla.	Restaurant	"[Plaintiff's] loss must arise [from] actual damage. And it is not plausible how two government orders meet that threshold when the restaurant merely suffered economic losses—not anything tangible, actual, or physical." *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615, 2020 WL 5051581, at *8 (S.D. Fla. Aug. 26, 2020)
6	8/28/20, C.D. Cal.	Restaurant	"[N]othing in the [complaint] plausibly supports an inference that the virus physically altered Plaintiff's property, however much the public health response to the virus may have affected business conditions for Plaintiff's restaurant." *10E, LLC v. Travelers Indem. Co.*, No. 2:20-cv-04418, 2020 WL 5095587, at *5 (C.D. Cal. Aug. 28, 2020)

No.	Date/Court	Plaintiff Type	Illustrative Quote / Citation
7	9/3/20, E.D. Mich.	Chiropractic practice	""[A]ccidental direct physical loss to Covered Property' is an unambiguous term that plainly requires Plaintiff to demonstrate some tangible damage to Covered Property." *Turek Enters., Inc. v. State Farm Mut. Automobile Ins. Co.*, Case No. 20-11655, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020)
8	9/11/20, S.D. Cal.	Barbershops	"[L]osses from inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase." *Pappy's Barber Shops, Inc., et al. v. Farmers Group, Inc. et al.*, No. 20-CV-907-CAB-BLM, 2020 WL 5500221, at *1 (S.D. Cal. Sept. 11, 2020)
9	9/14/20, N.D. Cal.	Retail store	"Because Mudpie's complaint contains no allegations of a physical force which 'induced a detrimental change in the property's capabilities,' the Court finds that Mudpie has failed to establish a 'direct physical loss of property' under its insurance policy." *Mudpie, Inc. v. Travelers Cas. Ins. Co.*, 20-cv-03213, 2020 WL 5525171, at *5 (N.D. Cal. Sept. 14, 2020)[2]

All of these decisions are consistent with the leading New York case addressing the standard "direct physical loss" language in property insurance contracts, *Roundabout Theatre Co. v. Contin. Cas. Co.*, 751 N.Y.S.2d 4 (N.Y. App. Div. 2002). There, the scaffolding of a midtown Manhattan building collapsed, causing New York City to order the closure of certain surrounding blocks. A Broadway theater which was not itself damaged "became inaccessible to the public and . . . was forced to cancel 35 performances of *Cabaret*." *Id.* at 5.

[2] One court applying Missouri law has come out the other way, but its central conclusion—that "restricted access to Plaintiffs' premises" amounted to "direct physical loss"—is flatly inconsistent with New York law, as discussed below. *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-cv-03127, 2020 WL 4692385, at *6 n.6 (W.D. Mo. Aug. 12, 2020).

The trial court had interpreted the coverage language—"direct physical loss or damage to the property"—expansively to include "loss of use" of the property. *Id.* at 6. But the New York Appellate Division reversed, finding that the trial court had "completely ignore[d]" the policy's plain language, which was "limited to losses involving physical damage to the insured's property." *Id*. at 8. As the court explained: "The plain meaning of the words 'direct' and 'physical' narrow the scope of coverage and mandate the conclusion that losses resulting from off-site property damage do not constitute covered perils under the policy." *Id*. at 7.

Here, SA Hospitality is relying on *exactly* the loss-of-use argument that was squarely rejected in *Roundabout*: "Plaintiffs and all similarly situated Class members have suffered a direct physical loss of and damage to their property because they have been *unable to use their property* for its intended purpose." (Compl. ¶ 59 (emphasis added).)

The *Roundabout* case is not only exactly on point with respect to the Business Income and Extra Expense claims, but it is binding in federal court, because there is no "persuasive evidence that the New York Court of Appeals . . . would reach a different conclusion." *Pahuta v. Massey-Ferguson, Inc*., 170 F.3d 125, 134 (2d Cir. 1999).

***Roundabout* was applied by the court in another highly instructive case, *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co*., 17 F. Supp. 3d 323 (S.D.N.Y. 2014). In *Newman Myers*, power was preemptively shut off to certain areas of New York because of Hurricane Sandy, and the court concluded**

that the language about direct physical loss or physical damage did not cover a law firm that could not access its offices.

After summarizing the *Roundabout* case, the court explained: "The critical policy language here—'direct physical loss or damage'—similarly, and unambiguously, requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage." *Id*. at 331. The court continued: "The words 'direct' and 'physical,' which modify the phrase 'loss or damage,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure." *Id*.

The application of *Roundabout* and *Newman Myers* to the facts here is straightforward. SA Hospitality has not alleged that it was forced to close because of any particular damage to its property or even that the virus actually contaminated its property. Instead, just like the theater in *Roundabout* and the law firm in *Newman Myers*, SA Hospitality's real grievance is that it lost the *use* of its premises because of an issue that was "exogenous to the premises themselves," 17 F. Supp. 3d at 331—namely, the governmental orders and the underlying imperative for people to stay distant from one another to control the spread of COVID-19. This does not amount to direct physical loss or damage.

Finally, this conclusion finds confirmation in Policy language stating that Business Income coverage would extend through a "period of restoration," which ends when the property at the premises "should be *repaired, rebuilt or replaced*

with reasonable speed and similar quality." (Compl. ¶ 92; Policy at HFIC00079 § A; *id*. at HFIC00080 § A.5.a.(2)(a) (emphasis added).) Citing this same language, the court in one of the COVID-19 cases cited above explained that there was no coverage because "there is nothing to fix, replace, or even disinfect for [the plaintiff] to regain occupancy of its property." *Mudpie*, 2020 WL 5525171, at *4. This is exactly right. There is no property in need of repair here, either, meaning there is no coverage.

III. SA HOSPITALITY HAS NOT ALLEGED FACTS TO TRIGGER "ADDITIONAL COVERAGE" UNDER THE CIVIL AUTHORITY CLAUSE

Under the Civil Authority provision, SA Hospitality must allege facts to show that it suspended operations because:

- **"access" to its premises was "specifically prohibited by order of a civil authority";**

  and

- **that the order from a civil authority was "the direct result" of "direct physical loss or direct physical damage" to "property in the immediate area."**

(Compl. ¶¶ 53, 56; Policy at HFIC00065 § A.2.a, HFIC00086 § A.) SA Hospitality has not alleged facts that would trigger coverage under these requirements.

First, SA Hospitality has not alleged"direct physical loss" for all the reason discussed, either at its own premises or in the immediate area. Several of the cases cited above, finding no "direct physical loss" for purposes of business income clauses, concluded that civil authority clauses were not triggered, either. *Pappy's Barber Shops*, 2020 WL 5500221, at *6; *Diesel Barbershop,* 2020 WL 4724305, at *7; *Gavrilides Mgmt. Co. v. Michigan Ins. Co*., Case No. 20-258-CB-C30

(Mich. Circuit Ct. July 1, 2020) (Ex. J, at 22); *Social Life Magazine, Inc. v. Hartford Ins. Co.*, No. 1:20-cv-03311-VEC (S.D.N.Y. May 14, 2020) (Ex. I, at 12-14).

Second, the Complaint nowhere alleges that access to SA Hospitality's premises is "specifically prohibited." The SA Hospitality plaintiffs are in the restaurant business (Compl. ¶ 15), and thus *have been* allowed to operate take-out and delivery services. (Ex. B at 2.) And businesses in all sectors have been allowed access for routine functions, so long as the visitors were not "in contact with other people." (Ex. C at 3 (Question 13).)

Cases across the country recognize that policy language concerning "prohibited" access is not triggered where a policyholder's premises is only rendered less accessible. *See, e.g.*, *S. Hospitality, Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1139-41 (10th Cir. 2004) (grounding of flights after September 11th made it more difficult for customers to access plaintiff's hotels but did not "prohibit access"); *St. Paul Mercury Ins. Co. v. Magnolia Lady, Inc.*, No. 2:97-cv-153 BB, 1999 WL 33537191, at *3 (N.D. Miss. Nov. 4, 1999) (civil authority coverage not triggered by bridge closure that reduced casino-hotel's business by 80% but did not completely cut off access); *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-0756 FMS, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995) (curfews imposed during period of civil unrest did not specifically prohibit access to the policyholders' movie theaters).[3]

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[3] The Complaint refers to government orders nationwide (Compl. ¶ 62), but the only ones relevant here are those in New York, where SA Hospitality is located. (*Id*. ¶¶ 15–34). This is so despite SA Hospitality bringing the case as a putative class action, because SA Hospitality cannot state a claim based on the circumstances of absent class members. Rather, it "is axiomatic that a putative

Third, even if access were considered "prohibited," that was not the "direct result" of damage to "property in the immediate area." There is no allegation here about damaged property in or around the SA Hospitality restaurants. The access restrictions are concededly about keeping people distant from one another, so as "to prevent the spread of COVID-19." (Compl. ¶¶ 3, 59, 62.) The order closing non-essential businesses refers explicitly to a concern for "community contact transmission of COVID-19." Executive Order, 9 NYCRR 8.202.8 (Mar. 20, 2020). It does not mandate that people avoid any particular damaged property.

Courts routinely reject civil authority claims where orders of civil authority are aimed at fear of future harm, not existing property loss or damage. The Second Circuit's decision in *United Air Lines, Inc. v. Ins. Co. of State of PA*, 439 F.3d 128 (2d Cir. 2006) is instructive. There, United Air Lines sought recovery for losses caused by the temporary shutdown of Reagan Washington National Airport following the September 11, 2001 terrorist attacks. United invoked a similar clause, providing coverage where access "is prohibited by order of civil authority as a direct result of damage to adjacent premises." *Id*. at 129. According to United, the shutdown was due to damage at the Pentagon nearby. The Second Circuit found there was no coverage because the government's "decision to halt operations at the Airport indefinitely was based on fears of future attacks," not about the fact that the Pentagon was damaged. *Id*. at 134.

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class representative must be able to individually state a claim against defendants, even though he or she purports to act on behalf of a class." *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig*., 272 F. Supp. 2d 243, 255 (S.D.N.Y. 2003).

Just as in *United,* the "order of a civil authority" at issue here has everything to do with protecting human life by controlling when and how people assemble in particular places, and nothing to do with any damaged property. No damaged property is identified in the Complaint. The Court should follow *United* and conclude that SA Hospitality has not alleged facts that would trigger coverage under the Civil Authority Clause. *See also*, *e.g.*, *Paradies Shops, Inc. v. Hartford Fire Ins. Co*., No. 1:03-cv-3154-JEC, 2004 WL 5704715, at *1-2, *6 (N.D. Ga. Dec. 15, 2004) (holding that there was no coverage in part because the FAA's order that grounded planes after September 11th was not a "direct result" of property damage); *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp*., No. H-06-4041, 2008 WL 450012, at *10 (S.D. Tex. Feb. 15, 2008) (evacuation of county before hurricane making landfall was "due to" fear of future damage rather than existing damage). Counts III and IV, therefore, should be dismissed, too.

IV. THE VIRUS EXCLUSION IS AN INDEPENDENT GROUND TO DISMISS

Even if SA Hospitality had alleged facts falling within the relevant coverage language of the Policy (it did not), the claims still fail. All of SA Hospitality's losses are caused by a virus, and the Policy excludes losses caused by a virus.

A. The Court Should Enforce the Unambiguous Virus Exclusion

The Policy includes a straightforward virus exclusion: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (Compl. ¶ 58; Policy at HFIC00053 § B.) SA Hospitality's allegations fall squarely within that language.

The Complaint refers throughout to the "novel virus, SARS-CoV-2" responsible for the COVID-19 disease, with symptoms ranging from "fever" and "cough" to "severe respiratory failure." (Compl. ¶¶ 37, 39.) Thus, in the words of the Policy, this case involves a "virus" that "is capable of inducing physical distress, illness or disease." (*Id.* ¶ 58; Policy at HFIC00053 § B.)

And equally clear is that SA Hospitality's loss was "caused by or result[ed] from" that virus. (*Id.*) SA Hospitality concedes that the losses "incurred by Plaintiffs and other members of the Class" were suffered "in connection with . . . Orders *intended to mitigate the COVID-19 pandemic*." (Compl. ¶ 127 (emphasis added).) In other words, there would be no losses without the virus.[4] The Court should therefore enforce the virus exclusion as written.

B. The Governmental Workforce Reduction Orders Do Not Take This Case Outside the Virus Exclusion

SA Hospitality attempts to avoid the virus exclusion by arguing that *only* the governmental "stay at home" orders (and not the virus) should be considered the "efficient proximate cause" of its loss. (Compl. ¶ 60.) This is wrong on multiple grounds.

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[4] SA Hospitality's New York complaint was even more clear that it was seeking "losses *due to the COVID-19 pandemic*" (Ex. D ¶ 68 (emphasis added); *see also id.* ¶ 60 ("No insurer intends to cover any losses caused by the COVID-19 pandemic.")), but after seeing Hartford Fire's motion to dismiss, it altered this language. (Ex. N at 37, 38, 40 (redline).) The Court may "accept the facts described in the original complaint as true" when a plaintiff tries this sort of gambit, *Colliton v. Cravath, Swaine & Moore, L.L.P.*, 08 Civ. 400, 2008 WL 4386764, at *6 (S.D.N.Y. Sept. 24, 2008), but, even the revised Complaint here cannot plead around the fact that the pandemic gave rise to the government order affecting SA Hospitality. (Compl. ¶ 127.) And that order on its face was issued "to facilitate the most timely and effective response to the COVID-19 emergency disaster." Executive Order, 9 NYCRR 8.202.8 (Mar. 20, 2020).

1. Courts Across the Country Have Enforced Virus Exclusions In Cases Involving COVID-19 "Stay at Home" Orders

SA Hospitality position is inconsistent with decisions across the country enforcing the plan language of virus exclusions in COVID-19 cases.

First, in July a court in Michigan ruled that a similar virus exclusion would bar coverage for a restaurant's business interruption claims arising from the COVID-19 pandemic. *See Gavrilides Mgmt. Co. et al. vs. Michigan Ins. Co.*, Case No. 20-258-CB-C30 (Mich. Circuit Court, Ingham County). (Ex. J, at 10, 22-12).

Second, in August, a federal court in Texas concluded that a similar virus exclusion barred coverage for a barbershop's COVID-19 business income losses. *See Diesel Barbershop, LL. v. State Farm Lloyds*, No. 5:20-cv-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020). The court explained that "COVID is in fact the reason for the [Closure] Orders being issued and the underlying cause of Plaintiffs' alleged losses" and that "COVID-19 . . . was the primary root cause of Plaintiffs' businesses temporarily closing." *Id.* at *6.

Third, earlier this month, a federal court in Florida concluded that "the plain language" of a similar exclusion barred coverage for a dental practice because the "damages resulted from COVID-19, which is clearly a virus." *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of America*, No. 2:20-cv-00401, 2020 WL 5240218, at *2 (M.D. Fla. Sept. 2, 2020).

Finally, also earlier this month, a federal court in Michigan enforced a similar virus exclusion. *Turek Enters., Inc. v. State Farm Mut. Automobile Ins. Co*., Case No. 20-11655 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020). A chiropractic business tried to argue that its losses were caused by a governmental "stay at

home" order only (not the virus). *Id*. at *3, 4. But the court disagreed, finding that, because the order "expressly states that it was issued to 'suppress the spread of COVID-19,'" the "only reasonable conclusion" was that "the Plaintiff's business interruption losses . . . would not have occurred but for COVID-19." *Id*. at *8.

These decisions are correct, and the virus exclusion should be enforced here, as well.

2. The Language of the Virus Exclusion Expressly Contemplates That It Would Be Triggered in Connection with the Civil Authority Clause

SA Hospitality's attempt to artificially isolate the governmental action as the sole "efficient proximate cause" of its losses is flatly inconsistent with the plain language of the virus exclusion itself. That language contemplates *exactly* the causal sequence that SA Hospitality tries to argue falls outside the exclusion—namely, that a virus would cause a civil authority to act, creating a loss: "The exclusion set forth in Paragraph B [the virus exclusion] applies to all coverage under . . . forms or endorsements that cover . . . *action of civil authority*." (Policy at HFIC00053 § A (emphasis added).) This shows that the drafters contemplated that the virus exclusion would apply in connection with the "action of civil authority," which is precisely the circumstance here.

If SA Hospitality's reading of the policy were adopted—that is, if the action of a civil authority would supersede the virus as the sole "efficient proximate cause" of loss—the language quoted above would be rendered meaningless, in violation of the cardinal principle "that an insurance policy cannot be construed so as to render its terms meaningless or of no effect." *Sirignano v. Chicago Ins. Co*., 192 F. Supp. 2d 199, 204-05 (S.D.N.Y. 2002).

3. A Governmental "Stay at Home" Order Is Not a Covered Cause of Loss

Even if a governmental "stay at home" order could be considered the sole cause SA Hospitality's losses, there would still be no coverage because a government order is not a "Covered Cause of Loss"—that is, it is not "direct physical loss or direct physical damage that occurs during the Policy period and in the Coverage Territory." (Compl. ¶ 56; Policy at HFIC00086 § A.)

A federal district court in Florida rejected a similar attempt to characterize an order of civil authority, by itself, as a covered cause of loss (or covered "peril" in insurance parlance) separate from the cause of the order. *See Prime Alliance Group, Ltd. v. Hartford Fire Ins. Co*., No. 06-22535, 2007 WL 9703576 (S.D. Fla. Oct. 19, 2007). There, owners of a beach club tried to avoid a higher deductible for windstorm damage by arguing that the cause of their losses was *only* the evacuation order that *preceded* a hurricane, and not the hurricane. *Id.* at *3. The court rejected that argument, because, under the policy, "perils are natural events like floods and earthquakes that carry with them an inherent risk of direct physical loss to the insured." *Id*. at *4. By this definition, an "order of civil authority cannot in any reasonable manner be construed as a 'peril.'" *Id*.

This analysis is exactly on point here. The upshot is that whether SA Hospitality's losses were caused by a virus (which is specifically excluded) or governmental order (which is not a Covered Cause of Loss), there is no coverage.

4. The Efficient Proximate Cause Is Inapplicable and In all Events Unhelpful to SA Hospitality

SA Hospitality's reliance on the "efficient proximate cause" doctrine is fundamentally mistaken because that doctrine applies only where a contract

"excludes damage '*caused by*'" a specified event. The New York Court of Appeals has held that the language used here— "caused by *or resulting from*"—has a "broader" meaning. *Album Realty Corp. v. Am. Home Assur.*, 607 N.E.2d 804, 805 (N.Y. 1992) (citation omitted). *Id.* (emphasis added). The phrase "resulting from" merely "requires some causal relation or connection," which is why it is considered "more comprehensive" than "proximate cause." 7 Steve Plitt, et al., Couch on Insurance § 101:52 (3d ed. 1995); *see also* 2 Allan D. Windt, Insurance Claims & Disputes § 6:2 (6th ed. 2020) (an exclusion for "injuries 'caused by' a particular event should be applied more narrowly than an exclusion that is written to apply to injuries 'resulting from'" an event).

In the *Album Realty* case, a sprinkler head froze and ruptured, flooding the policyholder's home, and the New York Court of Appeals faced the question of whether the loss fell within an exclusion for "damage 'caused by' freezing" or was covered as water damage. 607 N.E.2d at 805. The Court of Appeals, applying the efficient proximate cause standards under New York law, held that a "reasonable business person would conclude in this case that plaintiff's loss was caused by water damage and would look no further." *Id.*

Importantly, the Court of Appeals contrasted the key phrase in the freezing exclusion— "caused by"—with the policy's "other exclusionary clauses, all of which use broader language, *i.e.*, 'caused by or resulting from . . . . " *Id.* at 805. The "broader" language is what is before the Court in this case, and why the Court should not be constrained by the doctrine of efficient proximate cause that SA Hospitality is advancing. *See also Loretto-Utica Properties Corp. v. Douglas*

***Co.*, 630 N.Y.S.2d 917, 919 (N.Y. Sup. Ct. 1995) ("The Court finds that the preamble in these clauses of '(W)e do not insure against 'loss' caused by or resulting from . . . ' to be of significant import. Such language serves to broaden the intent and scope of the exclusion wording rather than narrow it."); *accord Maroney v. New York Cent. Mut. Fire Ins. Co.*, 839 N.E.2d 886, 889 (N.Y. 2005) (holding, in the context of an insurance contract, that the "words 'arising out of' have 'broader significance . . . .and are ordinarily understood to mean originating from, incident to, or having connection with . . . .'") (citation omitted).**

In plain English, the suspension of SA Hospitality's business was *at least* a "result from"—that is, there is at least some causal connection to—the virus. As discussed, both of SA Hospitality's complaints concede as much. And the suspension of non-essential businesses was premised on the COVID-19 pandemic. *See* Executive Order, 9 NYCRR 8.202.8 (Mar. 20, 2020). The causal connection is clear, and the virus exclusion should be enforced as written.

Finally, even if the efficient proximate cause doctrine applied, it would not help SA Hospitality. The doctrine holds that when assessing "cause" in insurance contracts, courts should "follow the chain of causation so far, and so far only, as the parties" contemplated. *Album*, 607 N.E.2d at 805. An efficient proximate cause is one "that originally sets other events in motion," as to opposed to an "event that merely sets the stage for a later event." *Parks Real Estate Purchasing Group v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 48 (2d Cir. 2006) (alterations and citations omitted). Here, it was the virus that directly set in motion the government orders, as SA Hospitality concedes. (Compl. ¶¶ 46–48, 127.)

In the *Prime Alliance* case discussed above, the court concluded that the efficient proximate cause doctrine was inapplicable, but found that applying the doctrine would not help the plaintiff: "[T]he windstorm set in motion the order of civil authority, which in turn gave rise to the business interruption losses, making the windstorm the efficient proximate cause of Plaintiffs' losses." 2007 WL 9703576, at *5. This analysis is exactly right. The virus "set in motion the order of civil authority" and so SA Hospitality cannot escape the virus exclusion.

CONCLUSION

For the foregoing reasons and others appearing on the record, the Court should dismiss SA Hospitality's Complaint in its entirety with prejudice.

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Respectfully submitted,

STEPTOE & JOHNSON LLP

Sarah D. Gordon*
1330 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 429-3000
sgordon@steptoe.com

Charles Michael*
Meghan Newcomer*
1114 Avenue of the Americas
New York, New York 10036
(212) 506-3900
cmichael@steptoe.com
mnewcomer@steptoe.com
***pro hac vice* application forthcoming**

WIGGIN AND DANA LLP

By: *__/s/ Timothy A. Diemand__*
Timothy A. Diemand
20 Church Street,16th Floor
Hartford, Connecticut 06103
(860) 297-3738
tdiemand@wiggin.com

Counsel for Hartford Fire Insurance Company

15751\99\4811-2404-3980.v1