UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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

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

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

Attorneys for Defendant,
Federal Insurance Company

TABLE OF CONTENTS

Page

I. INTRODUCTION 1
II. STATEMENT OF FACTS 2
A. The Federal Policy 2
B. Plaintiffs' Amended Complaint and Alleged Losses 4
C. Arch's Motion to Dismiss 5
III. LEGAL STANDARD 6
IV. LEGAL ARGUMENT 7
A. Choice of Law 7
B. WPBC's Causes of Action for Breach of Contract and Declaratory Judgment Must Be Dismissed Because WPBC's Losses Do Not Constitute Direct Physical Loss or Damage to Covered Property 9
1. Direct Physical Loss or Damage – Michigan 10
2 Direct Physical Loss or Damage – New Jersey 13
3. Direct Physical Loss or Damage – Other Jurisdictions 18
C. There Is No Civil Authority Coverage Because There is No Direct Physical Loss of or Damage to Property 25
V. CONCLUSION 27

TABLE OF AUTHORITIES

Page

Cases

1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc., No. 2:20-CV-862, 2021 WL 147139 (W.D. Pa. Jan. 15, 2021) 23

10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd., No. 20 CIV. 4471 (LGS), 2020 WL 7360252 (S.D.N.Y. Dec. 15, 2020) 23

10E, LLC v. Travelers Indemnity Co. of Connecticut et al., No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020) 20

Acorn Investment Co. v. Michigan Basic Prop. Ins. Ass'n, No. 284234, 2009 WL 2952677 (Mich. Ct. App. Sept.15, 2009) 10

Arthur Anderson LLP v. Fed. Ins. Co., 416 N.J. Super. 334, 3 A.3d 1279 (N.J. Super. App. Div. 2010) 17

ATCM Optical, Inc. v. Twin City Fire Ins. Co., 2021 WL 131282 (E.D. Pa. Jan. 14, 2021) 24

BA Lax, LLC v. Hartford Fire Ins. Co., 2021 WL 144248 (C.D. Cal. Jan. 12, 2021) 19

Bend Hotel Dev. Co., LLC v. Cincinnati Ins. Co., No. 20 C 4636, 2021 WL 271294 (N.D. Ill. Jan. 27, 2021) 22

Bluegrass, LLC v. State Auto. Mut. Ins. Co., No. 2:20-CV-00414, 2021 WL 42050 (S.D. W.V. Jan. 5, 2021) 25

Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co., No. CV2011771SDWLDW, 2020 WL 7338081 (D.N.J. Dec. 14, 2020) 17, 26, 27

Bradley Hotel Corp. v. Aspen Specialty Ins. Co., No. 20 C 4249, 2020 WL 7889047 (N.D. Ill. Dec. 22, 2020) 22

Carrot Love, LLC v. Aspen Specialty Ins. Co., 2021 WL 124416 (S.D. Fla. Jan. 13, 2021) 20

Clear Hearing Sols., LLC v. Cont'l Cas. Co., 2021 WL 131283 (E.D. Pa. Jan. 14, 2021) 23

Cont'l Ins. Co. v. Honeywell Int'l, Inc., 234 N.J. 23, 188 A.3d 297 (2018) 7

Cruz v. Beto, 405 U.S. 319 (1972) 6

DeMarco v. Stoddard, 223 N.J. 363, A.3d 367 (2015) 7

Diesel Barbershop, LLC v. State Farm Lloyds, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020) 12, 24

Digital Age Mktg. Grp., Inc. v. Sentinel Ins. Co. Ltd., 2021 WL 80535 (S.D. Fla. Jan. 8, 2021)..... 21

Dime Fitness, LLC v. Markel Ins. Co., No. 20-CA-5467, 2020 WL 6691467 (Fla.Cir.Ct. Nov. 10, 2020) 21

Drama Camp Prods., Inc. v. Mt. Hawley Ins. Co., No. 1:20-CV-266-JB-MU, 2020 WL 8018579 (S.D. Ala. Dec. 30, 2020)..... 18

El Novillo Restaurant v. Certain Underwriters at Lloyd's, No. 1:20-CV-21525-UU, 2020 WL 7251362 (S.D. Fla. Dec. 7, 2020) 21

Emerald Coast Restaurants, Inc. v. Aspen Specialty Ins. Co., No. 3:20CV5898-TKW-HTC, 2020 WL 7889061 (N.D. Fla. Dec. 18, 2020)..... 21

Fin Assocs. LP v. Hudson Specialty Ins. Co., 741 F. App'x. 85 (3d Cir. 2018)..... 7

Gavrilides Mgmt. Co. v. Michigan Ins. Co., Case No. 20-258-CB, (Mich. Cir. Ct. August 4, 2020)..... 11

Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am., 2014 WL 6675934 (D.N.J. Nov. 25, 2014)..... 13

Hackensack Riverkeeper, Inc. v. Del. Ostego Corp., 450 F.Supp.2d 467 (D.N.J. 2006) 6

Hillcrest Optical, Inc. v. Cont'l Cas. Co., 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020)..... 19

Hishon v. King & Spalding, 467 U.S. 69 (1984) 6

Home-Owners Ins. Co. v. Smith, 314 Mich. App. 68, 885 N.W.2d 324 (2016)..... 8

Indep. Rest. Grp. v. Certain Underwriters at Lloyd's, London, 2021 WL 131339 (E.D. Pa. Jan. 14, 2021)..... 24

Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020) 21

Island Hotel Properties, Inc. v. Fireman's Fund Ins. Co., 2021 WL 117898 (S.D. Fla. Jan. 11, 2021)..... 20

James Colgan v. Sentinel Ins. Co. Ltd., No. 4:20-cv-04780-HSG, 2021 WL 472964 (N.D. Cal. Jan. 26, 2021)..... 19

Karmel Davis & Assocs., Attorneys-at-Law, LLC v. The Hartford Financial Group, Inc., et al., No. 1:20-CV-02181-WMR, 2021 WL 420372 (N.D. Ga. Jan. 26, 2021)..... 21

KD Unlimited, Inc. v. Owners Ins. Co., No. 1:20-CV-2163, 2021 WL 81660 (N.D. Ga. January 5, 2021) 22

Kessler Dental Assocs., P.C. v. Dentists Ins. Co., 2020 WL 7181057 (E.D. Pa. Dec. 7, 2020)... 24

Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co., Ltd., 2021 WL 141180 (N.D. Cal. Jan. 13, 2021)..... 19

Kirsch v. Aspen Am. Ins. Co., No. 20-11930, 2020 WL 7338570 (E.D. Mich. Dec. 14, 2020)..... 12, 13, 26

Leksi, Inc. v. Fed. Ins. Co., 736 F. Supp. 1331 (D.N.J. 1990)..... 8

Long Affair Carpet and Rug, Inc. d/b/a Universal Carpet and La Carpet v. Liberty Mutual Insurance Company and Does 1-20, 2020 WL 6865774 (C.D. Cal. Nov. 12, 2020) 20

Mac Property Group LLC v. Selective Fire and Cas. Ins. Co., No. L-2629-20, 2020 WL 7422374 (N.J. Super. L. Nov. 05, 2020)..... 16, 17, 26

Malaube, LLC v. Greenwich Ins. Co., No. 20-22615-CIV, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020) 21

Management Co. LLC v. Michigan Ins. Co., No. 20-258-CB, 2020 WL 4561979 (Mich. Cir. Ct. July 21, 2020) 13

Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut, No. 2:20-CV-04423-AB-SK, 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020)..... 20

Mena Catering, Inc. v. Scottsdale Ins. Co., 2021 WL 86777 (S.D. Fla. Jan. 11, 2021)..... 20

Michael Cetta, Inc. d/b/a Sparks Steak House v. Admiral Indem. Co., Case No. 1:20-cv-04612-JPC, 2020 WL 7321405 (S.D.N.Y. Dec. 11, 2020)..... 23

Moody v. Hartford Fin. Grp., Inc., 2021 WL 135897 (E.D. Pa. Jan. 14, 2021)..... 24

Mortar & Pestle Corp. v. Atain Specialty Ins. Co., 2020 WL 7495180 (N.D. Cal. Dec. 21, 2020) 19

Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am., 2020 WL 552517 (N.D. Cal. Sept. 14, 2020).... 20

Musso & Frank Grill Co. Inc. v. Mitsui Sumitomo Ins. USA, No. 20STCV16681 (C.D. Cal. Nov. 9, 2020) 20

Newchops Rest. Comcast LLC v. Admiral Indem. Co., 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020)..... 24

NL Indus., Inc. v. Commercial Union Ins. Co., 65 F.3d 314 (3d Cir. 1995)..... 9

NL Indus., Inc. v. Commercial Union Ins. Companies, 926 F. Supp. 1213 (D.N.J. 2016)..... 7

O'Brien Sales & Mktg., Inc. v. Transportation Ins. Co., 2021 WL 105772 (N.D. Cal. Jan. 12, 2021)..... 19
Oheb v. Travelers Cas. Ins. Co., No. 2:20-CV-08478 (C.D. Cal. Dec. 30, 2020)..... 19
Oral Surgeons, P.C. v. Cincinnati Ins. Co., 2020 WL 5820552 (S.D. Iowa Sept. 29, 2020)..... 22
Pac. Indem. Co. v. Linn, 766 F.2d 754 (3d Cir.1985)..... 6
Palmdale Estates Inc. v. Blackboard Ins. Co., No. 3:20-CV-06158, 2021 WL 25048 (N.D. Cal. Jan. 4, 2021)..... 19
Pappy's Barber Shops, Inc. v. Farmers Grp., Inc., 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020) 20
Pennsylvania ex rel. Zimmerman v. Pepsico, Inc., 836 F.2d 173 (3d Cir. 1988) 6
Plan Check Downtown III, LLC v. Amguard Ins. Co., 2020 WL 5742712 (C.D. Cal. Sept. 10, 2020)..... 20
Port Authority of N.Y. and N.J. v. Affiliated FM Ins., 311 F.3d 226 (3d Cir. 2002)..... 14, 15
Promotional Headwear Int'l v. Cincinnati Ins. Co., 2020 WL 7078735 (D. Kan. Dec. 3, 2020) 22
Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am., 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020) 22
Riverside Dental of Rockford, Ltd. v. Cincinnati Ins. Co. , No. 1:20-cv-03768, 2021 WL 346423 (N.D. Cal. Jan. 19, 2021) 19
Robert Fountain Inc. v. Citizens Ins. Co. of America, No. 20-CV-05441-CRB, 2020 WL 7247207 (N.D. Cal. Dec. 9, 2020) 19
Rose's 1, LLC v. Erie Ins. Exchange, No. 2020 CA 002424 B, 2020 WL 4589206 (D.C.Super. Aug. 06, 2020) 25
Rowe v. Hoffman–La Roche, Inc., 189 N.J. 615, 917 A.2d 767 (2007)..... 7
Roy Johnson v. Hartford Fin. Services Group, No. 1:20-CV-02000, 2021 WL 37573 (N.D. Ga. Jan. 4, 2021) 22
Sandy Point Dental, PC v. Cincinnati Ins. Co., 2020 WL 5630465 (N.D. Ill. Sept. 21, 2020).... 22
Santo's Italian Café LLC dba Santosuossos Pizza Pasta Vino v. Acuity Ins. Co., 2020 WL 7490095 (N.D. Ohio Dec. 21, 2020)..... 23
Schrob v. Catterson, 948 F.2d 1402 (3d Cir. 1991)..... 6
Sikirica v. Nationwide Ins. Co., 416 F.3d 214 (3d Cir. 2005) 6

Sosa v. Massachusetts Bay Ins. Co., 458 N.J. Super. 639, 206 A.3d 1011 (App. Div. 2019) 8

State Farm Auto. Mut. Ins. Co. v. Estate of Simmons, 84 N.J. 28, 417 A.2d 488 (1980) 8, 9

Sultan Hajer v. Ohio Security Ins. Co., No. 6:20-CV-00283, 2020 WL 7211636 (E.D. Texas Dec. 7, 2020) 24

Tappo of Buffalo, LLC v. Erie Ins. Co., 2020 WL 7867553 (W.D.N.Y. December 29, 2020) 23

TAQ Willow Grove, LLC v. Twin City Fire Ins., 2021 WL 131555 (E.D. Pa. Jan. 14, 2021) 23

Terry Black's Barbecue v. State Auto. Mutual Ins. Co., No. 1:20-CV-665-RP, 2020 WL 7351246 (W.D. Tx. Dec. 14, 2020) 24

TJBC, Inc. v. Cincinnati Ins. Co., Inc., No. 20-CV-815-DWD, 2021 WL 243583 (S.D. Ill. Jan. 25, 2021) 22

Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co., No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020) 12, 26

Ultimate Hearing Sols. II, LLC v. Twin City Fire Ins. Co., 2021 WL 131556 (E.D. Pa. Jan. 14, 2021) 24

Uncork & Create LLC v. Cincinnati Ins. Co. et al., 2020 WL 6436948 (S.D. W.Va. Nov. 2, 2020) 25

Universal Image Prods., Inc. v. Fed. Ins. Co., 475 F. App'x 569 (6th Cir. 2012) 10, 11

Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co., 406 N.J. Super. 524, 968 A.2d 724 (App. Div. 2009) 16

Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co. et al., 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020) 20

Westport Ins. Corp. v. Bayer, 284 F.3d 489 (3d Cir.2002) 6

Zagafen Bala, LLC v. Twin City Fire Ins. Co., 2021 WL 131657 (E.D. Pa. Jan. 14, 2021) 23

Zimmerman v. Corbett, 873 F.3d 414 (3d Cir. 2017) 6

Zwillo V, Corp. v. Lexington Ins. Co., 2020 WL 7137110 (W.D. Mo. December 2, 2020) 23

Other Authorities

Federal Rule of Civil Procedure 1, 6, 27

I. INTRODUCTION

Defendant Federal Insurance Company ("Federal") requests this Court to grant this Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c) for substantially the same reasons that this Court granted Defendant Arch Insurance Company's ("Arch") Motion to Dismiss the causes of action brought by Plaintiffs 7th Inning Stretch LLC d/b/a Everett AquaSox ("7th Inning") and DeWine Seeds Silver Dollars Baseball, LLC ("DeWine").

The causes of action brought by Plaintiff Whitecaps Professional Baseball Corporation WPBC ("WPBC") against Federal for breach of contract and for a declaratory judgment that they are entitled to the full amount of coverage must fail because WPBC's purely economic losses caused by the COVID-19 virus do not constitute "direct physical loss or damage" to WPBC's property. Under applicable law, "direct physical loss or damage" requires an actual, tangible, physical alteration to the insured's property in order to trigger coverage under a first-party property insurance policy, which WPBC has failed to plead. Additionally, the COVID-19 virus has not rendered WPBC's premises uninhabitable or unusable, as access to its premises was never prohibited by any of the government orders issued to mitigate the spread of the COVID-19 virus. Furthermore, this Court dismissing WPBC's causes of action would not only be in accordance with this Court's previous decisions, but would also align with the vast majority of courts across the country which have found that business losses arising in some way from the COVID-19 pandemic are not covered by first-party property insurance policies which require policyholders to demonstrate their losses were caused by "direct physical loss or damage" to covered property.

Accordingly, this Court should dismiss WPBC's causes of action for breach of contract and for a declaratory judgment against Federal because Federal has not failed to meet its obligations under the Policy issued to WPBC, nor can WPBC demonstrate that its alleged losses are covered under the plain language of the Policy.

II. STATEMENT OF FACTS

A. The Federal Policy

Federal issued an insurance policy to WPBC bearing policy number 3579-42-58 EUC for the period from March 1, 2020 to March 1, 2021(the "Federal Policy" or "Policy"). First Amended Complaint ("Am. Compl."), Ex. D (Doc. 30-4, at 2). The Federal Policy includes a "Building and Personal Property" coverage part which provides:

> We will pay for the actual direct physical loss or damage to:
>
> - **building**; or
> - **personal property**,
>
> caused by or resulting from a peril not otherwise excluded, not to exceed the applicable Limit Of Insurance for Building Or Personal Property shown in the Declarations.

(Doc. 30-4, at 16).

The Federal Policy also contains a "Business Income with Extra Expense" coverage part which provides:

> We will pay for the actual:
>
> - **business income** loss you incur due to the actual impairment of your operations; and
> - **extra expense** you incur due to the actual or potential impairment of your **operations**,
>
> during the **period of restoration**, not to exceed the applicable Limit of Insurance for Business Income With Extra Expense shown in the Declarations.

> This actual or potential impairment of **operations** must be caused by or result from direct physical loss or damage by a **covered peril** to **property**, unless otherwise stated.

(Doc. 30-4, at 45).

Additionally, the "Business Income with Extra Expense" coverage part contains an additional coverage provision for "Civil Authority," which provides:

> We will pay for the actual:
>
> - **business income** loss you incur due to the actual impairment of your operations; and
> - **extra expense** you incur due to the actual or potential impairment of your **operations**,
>
> directly caused by the prohibition of access to:
>
> - your premises; or
> - a **dependent business premises**,
>
> by a civil authority.
>
> This prohibition of access by a civil authority must be the direct result of direct physical loss or damage to property away from such premises or such **dependent business premises** by a **covered peril**, provided such property is within:
>
> - one mile; or
> - the applicable miles shown in the Declarations,
>
> from such premises or **dependent business premises**, whichever is greater.

(Doc. 30-4, at 48).

Based on the above, any coverage under the Federal Policy requires WPBC to demonstrate that its losses constitute, were caused by, or resulted from "direct physical loss or damage" to property. The Federal Policy does not define the phrase "direct physical loss or damage."

B. Plaintiffs' Amended Complaint and Alleged Losses

Plaintiffs 7th Inning, DeWine, and WPBC (collectively, "Plaintiffs" or the "Teams") filed their Original Complaint against Defendants Arch and Federal in this Court on July 2, 2020, and later filed their Amended Complaint on August 31, 2020. (Doc. 1, Doc. 30). Plaintiffs' Amended Complaint contains three causes of action: (1) breach of contract against Federal; (2) anticipatory breach of contract against Arch; and (3) declaratory judgment against all Defendants. Am. Compl., at Counts I, II, and III.

Plaintiffs' Amended Complaint alleges that, among other reasons, the "continuing concerns for the health and safety of players, employees, and fans related to the SARS-CoV-2 virus," and the "action and inaction by federal and state governments related to controlling the spread of the virus," caused the first-ever cessation of Minor League Baseball ("MiLB") in 2020. Am. Compl. at ¶ 2. WPBC, in particular, alleged that an Executive Order issued by Governor Gretchen Whitmer—which closed all non-essential Michigan businesses and ordered Michigan residents to stay home except for certain activities—forced it to close its stadium for baseball games. *Id*. at ¶ 28.

Plaintiffs' Amended Complaint alleges "[t]he nature of the virus, including its continuing, damaging, and invisible presence, and the measures required to mitigate its spread, constitute an actual and imminent threat, and direct physical loss or damage to the ballparks (as well as the areas surrounding them), and have contributed to cancellations of the Teams' MiLB games." *Id.* at ¶ 32. Plaintiffs also allege "[t]he governmental responses to the virus are a cause of direct physical loss or damage at the ballparks (as well as the areas surrounding them) and a cause of the Teams' business interruptions." *Id*. at ¶ 39.

Plaintiffs allegedly made timely claims for coverage with their respective insurers. *Id*. at ¶ 70. On May 18, 2020, Federal denied WPBC's claim for coverage on the grounds that there was "no evidence of direct physical loss or damage to building or personal property" and that "access to insured premises was not prohibited." *Id*. at ¶ 71. Plaintiffs brought this action against each of their respective insurers for breach of contract or anticipatory breach of contract and for a declaratory judgment that they are entitled to the full amount of coverage for which they paid premiums. *Id*. at ¶ 8.

C. Arch's Motion to Dismiss

On October 15, 2020, Arch filed a motion to dismiss with prejudice all claims against Arch asserted by 7th Inning and DeWine in the Second and Third Causes of Action. (Doc. 40). Arch argued, in pertinent part, "[a]lthough Plaintiffs allege that it is 'statistically certain the virus is present at the Teams' ballparks and/or nearby properties' and 'carried into each of the stadiums,' this is not an allegation that the ballparks or stadiums were actually physically contaminated by COVID-19 and that the physical contamination interrupted Plaintiffs' business operations." Arch's Brief ("Arch's Br.") (Doc. 40-1, at 31). On January 19, 2021, this District Court issued an Order granting Arch's motion to dismiss. (Doc. 55). In a corresponding letter opinion, this Court agreed with Arch's position, finding that "[e]ach of the coverage provisions Plaintiffs rely on specifically requires 'direct physical loss of or damage to property' to trigger coverage" and "Plaintiffs have not alleged any facts that support a showing that their properties were physically damaged." January 19 Letter Opinion ("Jan. 19 Letter Op.") (Doc. 54, at 3).

III. LEGAL STANDARD

Federal now brings this Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c) for substantially the same reasons that this Court granted Arch's Motion to Dismiss the causes of action brought by 7th Inning and DeWine. Indeed, the standard of review for a motion for judgment on the pleadings under Rule 12(c) is identical to that for a motion to dismiss under Rule 12(b)(6). *Zimmerman v. Corbett*, 873 F.3d 414, 417 (3d Cir. 2017). "Dismissal of a complaint pursuant to Rule 12(b)(6) is proper 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Hackensack Riverkeeper, Inc. v. Del. Ostego Corp.*, 450 F.Supp.2d 467, 484 (D.N.J. 2006) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). The allegations contained in the pleading are to be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). A party will also be "given the benefit of every favorable inference that can be drawn from those allegations." *Schrob v. Catterson*, 948 F.2d 1402, 1405 (3d Cir. 1991). However, the party must make factual allegations and cannot rely on "conclusory recitations of law." *Pennsylvania ex rel. Zimmerman v. Pepsico, Inc.*, 836 F.2d 173, 179 (3d Cir. 1988).

"Interpretation of an insurance policy is a question of law, and review is plenary." *Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 220 (3d Cir. 2005) (citing *Westport Ins. Corp. v. Bayer*, 284 F.3d 489, 496 (3d Cir.2002)). "In construing the policy, if the words of the policy are clear and unambiguous, the court must give them their plain and ordinary meaning." *Id.* (citing *Pac. Indem. Co. v. Linn*, 766 F.2d 754, 760–61 (3d Cir.1985)). "Ambiguous terms must be strictly construed against the insurer, but the policy language must not be tortured to create ambiguities where none exist." *Id.* (citing *Linn*, 766 F.2d at 760–61).

For the reasons set forth below, the plain language of the Federal Policy clearly and unambiguously demonstrates that WPBC is required to show its purported losses constitute, were caused by, or resulted from "direct physical loss or damage" to covered property, and WPBC has failed to do so.

IV. LEGAL ARGUMENT

A. Choice of Law

There is a potential issue of whether this District Court should apply Michigan law or New Jersey law to interpret the phrase "direct physical loss or damage" in a first-party property insurance policy. It is well-settled that, "[a] federal court exercising diversity jurisdiction generally applies the choice-of-law rules of the forum state[.]" *Fin Assocs. LP v. Hudson Specialty Ins. Co.*, 741 F. App'x. 85, 87 (3d Cir. 2018). "Before a choice-of-law question arises, though, there must actually be a conflict between the potentially applicable bodies of law." *NL Indus., Inc. v. Commercial Union Ins. Companies*, 926 F. Supp. 1213, 1218 (D.N.J. 2016). "A conflict of law requires a 'substantive difference" between the laws of the interested states." *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 234 N.J. 23, 46, 188 A.3d 297, 311 (2018) (quoting *DeMarco v. Stoddard*, 223 N.J. 363, 383, 125 A.3d 367, 378 (2015)). "A 'substantive difference' is one that 'is offensive or repugnant to the public policy of this State.'" *Id.* "If there is no actual conflict, then the choice-of-law question is inconsequential, and the forum state applies its own law to resolve the disputed issue." *Rowe v. Hoffman–La Roche, Inc.*, 189 N.J. 615, 621, 917 A.2d 767 (2007).

Here, the primary issue before the parties is one of contract interpretation. The potential conflict here is between the law of the state where WPBC's properties were insured under the Federal Policy, Michigan, and the forum state, New Jersey. (Doc. 30-4, at 2-4). The principles

of contract interpretation in Michigan and New Jersey, however, are very similar. For example, under Michigan law, "the construction and interpretation of an insurance contract is a question of law that [the court] reviews de novo." *Home-Owners Ins. Co. v. Smith*, 314 Mich. App. 68, 73, 885 N.W.2d 324, 326–27 (2016) (citations and internal quotations omitted). "The goal of contract interpretation [under Michigan law] is to first determine, and then enforce, the intent of the parties based on the plain language of the agreement," and "unless otherwise defined in the policy, its terms will be read and enforced according to their commonly used meaning." *Id.* (citations and internal quotations omitted).

Similarly, under New Jersey law, "[t]he interpretation of an insurance policy, like any contract, is a question of law, which [courts] review de novo" and "[i]n performing that interpretative task, [courts] look first to the plain language, and if it is unambiguous, [courts] will not strain to provide a better policy than the one obtained." *Sosa v. Massachusetts Bay Ins. Co.*, 458 N.J. Super. 639, 646, 206 A.3d 1011, 1016 (App. Div. 2019) (citations omitted).

Moreover, as discussed in further detail in Part IV.B, both Michigan law and New Jersey law have made very similar interpretations of the phrase "direct physical loss or damage" in first-party property insurance policies. Thus, there does not appear to be a "substantive difference" between the law of Michigan and New Jersey in determining the critical issue of this case.

However, in the event the Court finds that an actual conflict of law exists, New Jersey courts follow "the general rule that 'the law of the place of the contract ordinarily governs the choice of law because this rule will generally comport with the reasonable expectations of the parties governing the principal situs of the insured risk during the term of the policy and will furnish needed certainty and consistency in the selection of applicable law.'" *Leksi, Inc. v. Fed. Ins. Co.*, 736 F. Supp. 1331, 1332 (D.N.J. 1990) (quoting *State Farm Auto. Mut. Ins. Co. v.*

Estate of Simmons, 84 N.J. 28, 37, 417 A.2d 488, 492 (1980)). "[T]he law of the place of contracting should ordinarily be applied unless some other state has the 'dominant relationship' with the parties and issues." *NL Indus., Inc. v. Commercial Union Ins. Co.*, 65 F.3d 314, 319 (3d Cir. 1995).

Here, all the properties listed in the Federal Policy's "Premises Schedule" are located in Michigan. Thus, the "principal situs of the insured risk" is located in Michigan and New Jersey does not appear to have the "dominant relationship" with the claim at issue in this matter. Accordingly, this Court should apply Michigan law to interpret the phrase "direct physical loss or damage" under the Federal Policy. Notwithstanding, as set forth in more detail below, there is no coverage for WPBC's losses under the Federal Policy whether this Court applies Michigan or New Jersey law because WPBC's losses do not constitute "direct physical loss or damage" to property under the law of either state.

B. <u>WPBC's Causes of Action for Breach of Contract and Declaratory Judgment Must Be Dismissed Because WPBC's Losses Do Not Constitute Direct Physical Loss or Damage to Covered Property</u>

Plaintiffs' Amended Complaint alleges the COVID-19 virus, "including its continuing, damaging, and invisible presence, and the measures required to mitigate its spread, constitute an actual and imminent threat, and direct physical loss or damage to the ballparks . . . and have contributed to cancellations of the Teams' MiLB games." Am. Compl., at ¶ 32. WPBC's causes of action for breach of contract and for a declaratory judgment that they are entitled to the full amount of coverage under the Policy both stem from the allegation that Federal wrongfully denied coverage for WPBC's losses. *Id*. at ¶¶ 8, 106, 120.

However, **for any coverage to exist under the Federal Policy for the claim at issue, WPBC must demonstrate that its losses constitute, were caused by, or resulted from "direct**

physical loss or damage" to property. (Doc. 30-4, at 16, 45) (emphasis added). Therefore, WPBC's causes of action for breach of contract and declaratory judgment must fail because there is no coverage for WPBC's losses under the Federal Policy. Specifically, WPBC's losses do not constitute, were not caused by, and did not result from "direct physical loss or damage" under Michigan law. Moreover, courts applying Michigan law have both particularly found that purely economic losses caused by the COVID-19 virus do not constitute "direct physical loss or damage" under first-party property insurance policies.

1. Direct Physical Loss or Damage – Michigan

The interpretation of "direct physical loss or damage" to property under Michigan law has been discussed in detail by the Sixth Circuit. In *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 573 (6th Cir. 2012), the Sixth Circuit interpreted the phrase "direct physical loss or damage," which, at the time, had "little Michigan authority providing . . . insight into the meaning of the phrase." The Sixth Circuit, however, noted "[t]he Michigan Court of Appeals held that the word 'direct' indicates '"immediate" or "proximate" cause, as distinct from remote or incidental causes'" *Id*. (quoting *Acorn Investment Co. v. Michigan Basic Prop. Ins. Ass'n*, No. 284234, 2009 WL 2952677, at *2 (Mich. Ct. App. Sept.15, 2009)). The policyholder in *Universal Image* sought "coverage for cleaning and moving expenses, lost (undamaged) improvements attached to the [insured] building, as well as lost business income." *Id*. The court found that "[t]hese are not tangible, physical losses, but economic losses" and the lack of tangible damage required a denial of coverage under a policy which required "direct physical loss or damage" to property. *Id*. The court further noted that "even if Michigan were to adopt a more expansive definition of the phrase 'direct physical loss or damage,'" the policyholder

"failed to present a genuine issue of material fact regarding the uninhabitability or usability of the Evergreen building." *Id*. at 574.

Michigan courts have carried over the reasoning of *Universal Image* to the context of purely economic losses caused by the COVID-19 virus, and have found that such losses do not constitute "direct physical loss or damage" to property.

For example, in *Gavrilides Mgmt. Co. v. Michigan Ins. Co.*, Case No. 20-258-CB, (Mich. Cir. Ct. August 4, 2020) (Certification of Daren S. McNally ("McNally Certification"), **Exhibit A**, Transcript of July 1, 2020 Hearing, at 14:2-5, 18:10-21), the court noted the policy mandated that, for business interruption coverage to apply, the restaurant's "suspension of operations" "must be caused by direct physical loss of or damage to property" and the cause of the loss must be "direct physical loss." The policyholder argued that the government order that restricted dine-in business amounted to a physical loss because the order effectively blocked public entry to the property. *Id*. at 20:10-14. Judge Joyce Draganchuk rejected the argument, calling it "simply nonsense." *Id*. at 20:15. Instead, the court held that "direct physical loss of or damage to the property has to be something with material existence" and "that is tangible" or "alters the physical integrity of the property." *Id*. at 18:21-19:4. The *Gavrilides* court did not find "any physical loss of or damage to the property," and held that the lack of any alleged "direct physical loss" to the restaurant property definitively precluded coverage. *Id*. at 19:4-8; 19:14-16; 22:15-16; 23:5-15. Based on the similarities between the claims of the policyholder in *Gavrilides* and WPBC, this court should make a similar finding as the court in *Gavrilides*.

The Eastern District of Michigan has also explicitly adopted the reasoning of *Universal Image* that "direct physical loss or damage" requires some sort of tangible alteration to property, and have found that the purely economic losses caused by the COVID-19 virus are insufficient to

trigger coverage. In *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *5 (E.D. Mich. Sept. 3, 2020), the threshold question was whether the policyholder suffered an accidental "direct physical loss" to its premises. The *Turek* court, citing the Sixth Circuit's reasoning in *Universal Image*, adopted the reasoning that the "the only interpretation resembling the 'plain and ordinary meaning' of 'direct physical loss'" is one where the policyholder demonstrated some type of "tangible damage" to the insured property. *Id*. at *6-*7. The court further noted that while "some courts [had] found physical loss even without tangible destruction," it was more convinced by the other courts which found that "the line of cases requiring tangible injury to property [was] more persuasive." *Id*. at *7 (quoting *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020)).

Most recently, in *Kirsch v. Aspen Am. Ins. Co.*, No. 20-11930, 2020 WL 7338570, at *6 (E.D. Mich. Dec. 14, 2020) (quoting *Turek*, 2020 WL 5258484, at *7), the court found the plaintiff had "not 'alleged that COVID-19 particles attached to and damaged their property'" and had "not even attempted to establish that COVID-19 caused tangible, physical damage to the property itself." The *Kirsch* court further elaborated that "[l]ike other viruses, COVID-19 injures people but does not seem to cause any lasting damage to physical property. Because Plaintiff's claim, as pled, alleges only a temporary loss of use of Plaintiff's property, the tangibility requirement implicit in the policy forecloses a claim under the practice income provision." *Id*. The *Kirsch* court also rejected the plaintiff's argument that *Universal Image* was inapplicable, noting "the opinion's reasoning explaining why Michigan would adopt the majority approach to policy interpretation—requiring tangible damage—is still persuasive." *Id*. at *5. In a footnote, the court further noted that while "some courts have adopted a minority position, holding that

'physical loss' occurs when real property becomes 'uninhabitable' or substantially 'unusable,'" the court saw "no indication that Michigan court courts would adopt this minority view," and in fact, "the first Michigan court to consider this issue . . . also found that tangible damage was required under the plain meaning of such an insurance provision and it held that a COVID-19 damage claim would fail." *Id.* at *5, n.2 (citing *Management Co. LLC v. Michigan Ins. Co.*, No. 20-258-CB, 2020 WL 4561979, at *1 (Mich. Cir. Ct. July 21, 2020)).

Here, this District must apply the same principle under Michigan law that "direct physical loss or damage" requires some sort of tangible, physical alteration of the insured's property to trigger coverage under a first-party property insurance policy. Plaintiffs' conclusory allegations that the COVID-19 virus constitutes a "direct physical loss or damage to the ballparks" do not meet the standard set forth in *Universal Image, Gavrilides, Turek,* or *Kirsch,* which require some type of physical damage that is tangible or alters the physical integrity of the property. Accordingly, this Court should dismiss WPBC's causes of action for breach of contract and declaratory judgment under Michigan's principles of contract construction as well.

2. Direct Physical Loss or Damage – New Jersey

Similarly, even if this Court were to apply New Jersey law, WPBC's losses would not constitute "direct physical loss or damage" under the Federal Policy. This Court, in *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *1 (D.N.J. Nov. 25, 2014), opined on what is required to establish "direct physical loss of or damage" in order to obtain coverage under a first-party insurance policy under New Jersey law. The *Gregory Packaging* court noted:

> Several courts have construed the terms "physical damage" and "physical loss or damage" under New Jersey law to resolve insurance disputes. In doing so**, the Court of Appeals for the Third Circuit noted that "[in] ordering parlance**

> **and widely accepted definition, physical damage to property means "a distinct, demonstrable, and physical alteration" of its structure**." *Port Authority of N.Y. and N.J. v. Affiliated FM Ins.*, 311 F.3d 226, 235 (3d Cir. 2002). While structural alteration provides the most obvious sign of damage, both New Jersey courts and the Third Circuit have also found that property can sustain physical loss or damage without experiencing structural alteration.

Id. at *5 (emphasis added).

The court concluded that a property needed to be rendered "uninhabitable" in order to meet the "physical loss or damage" requirement in a policy in the absence of physical or structural alteration. *Id*. at *5-*6. Importantly, the court found, "[i]n other jurisdictions, courts considering non-structural property damage claims have found that **buildings rendered uninhabitable** by dangerous gases or bacteria suffered direct physical loss or damage." *Id*. at *6 (emphasis added).

In *Gregory Packaging*, there was an alleged explosion in the plant's refrigeration system causing a release of ammonia that rendered the plant uninhabitable. *Id*. at *2. The fire department then set up a "hot zone" and did not allow anyone in the building because of the levels of ammonia in the air and evacuated the area for a mile radius. *Id*. In finding that the ammonia discharge inflicted "direct physical loss or damage," the Court noted that the "ammonia release **physically transformed the air within Gregory Packaging's facility so that it contained an unsafe amount of ammonia or that the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated**." *Id*. at *6 (emphasis added).

There are many crucial distinctions between WPBC's claim and the *Gregory Packaging* case that preclude its application. As noted above, in *Gregory Packaging*, there was an alleged explosion in the plant's refrigeration system causing unsafe levels of ammonia to leak into the facility, which rendered the air quality toxic for human occupancy. Here, there was no such event

that physically transformed any part of WPBC's facilities, nor was the air in any of WPBC's facilities rendered toxic for human occupancy. Additionally, unlike in *Gregory Packaging*, where the fire department prohibited access to the premises until the ammonia physically dissipated from the air, the WPBC's facilities were never rendered unfit for occupancy by any federal, state or local authority at any point in time. Therefore, WPBC's premises were not "uninhabitable" under the standard set forth in *Gregory Packing*.

Similarly, in *Port Authority of NY and NJ v. Affiliated FM Ins. Co.*, the Third Circuit determined whether the presence of asbestos in a building was sufficient to trigger coverage under a first-party property insurance policy that requires "physical loss or damage." In arriving at its conclusion, the court noted that "**unless asbestos in a building was of such quantity and condition as to make the structure unusable**, **the expense of correcting the situation was not within the scope of a first party insurance policy covering 'physical loss or damage**.'" 311 F.3d 226, 230 (3d Cir. 2002) (emphasis added). The Third Circuit also carefully opined on the necessary standard to render a property "unusable":

> We agree with the District Court's articulation of the proper standard for "physical loss or damage" to the asbestos contamination. The requirement that the contamination reach such a level in order to come within coverage limitation establishes a reasonable and realistic standard for identifying physical loss or damage. **The effect of asbestos fibers in such quantity is comparable to that of fire, water or smoke on a structure's use and function**.

Id. at 236.

Here, no government orders mandated that WPBC's facilities were not to be occupied. Therefore, WPBC's facilities were by definition not "unusable" as required under the Third Circuit's decision in *Port Authority of NY and NJ*. Moreover, Plaintiffs' Complaint does not allege that COVID-19 was physically present at WPBC's facilities. Even if COVID-19 was physically present at WPBC's facilities, however, it is not comparable to fire, water, or smoke

damage to a property, which the Third Circuit described as the level of physical loss or damage required to trigger coverage under a first-party property insurance policy.

Further, in *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 529, 968 A.2d 724, 727 (App. Div. 2009), a supermarket's food was spoiled during a four-day blackout due to a physically damaged electrical grid that required the replacement of damaged pieces of equipment. In concluding that there was "physical damage," the New Jersey Appellate Division found that the "electrical grid was 'physically damaged' because, due to a physical incident or series of incidents, the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity." *Id.* at 540. No such physical damage requiring the replacement of equipment is present in WPBC's claim. Accordingly, the facts of this case are also inapplicable to WPBC's claim.

Courts applying New Jersey law have also specifically found that COVID-19-related business losses do not constitute "direct physical loss or damage" to an insured's property. In addition to this Court's correct finding in the current action that "Plaintiffs have not alleged any facts that support a showing that their properties were physically damaged," (Doc. 54, at 3), other courts applying New Jersey law have found that these purely economic losses are not enough to constitute "direct physical loss or damage" under a first-party property insurance policy.

For example, in *Mac Property Group LLC v. Selective Fire and Cas. Ins. Co.*, No. L-2629-20, 2020 WL 7422374, at *1 (N.J. Super. L. Nov. 05, 2020), the policyholders alleged they "sustained a loss of business income and incurred extra expense as a result of: (1) "Executive Order 103 issued by New Jersey Governor Philip D. Murphy on March 9, 2020;" (2) "The World Health Organization Declaration of a Global Pandemic on March 11, 2020 related to COVID-

19;" (3) "President Donald Trump's Declaration of a National Emergency as a Result of COVID-19 on March 13, 2020;" and (4) "Executive Order 107 issued by New Jersey Governor Philip D. Murphy on March 21, 2020." Particularly, the policyholders in *Mac Property*—like WPBC here—asserted that they "suffered direct physical loss and damage to property as a result of being unable to use their property for its intended purpose." *Id.* In addition to finding that a virus exclusion precluded the policyholders' claims, Judge Steven J. Polansky found that "[u]ltimately the decision here is specific to the policy language and facts at issue. Plaintiff points to no direct physical loss or damage to covered property. There is no direct physical loss or damage to property which resulted in the order of civil authority." *Id.* at *9. Further, the *Mac Property* court expressly found that "[t]he direct physical damage to the electrical grid present in *Wakefern Food Corp.* is absent in this case." *Id.*

In addition to the order dismissing the causes of action against Arch in this action, this Court has also cited the *Mac Property* decision to deny nearly identical claims for business losses caused by the COVID-19 virus. In *Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co.*, No. CV2011771SDWLDW, 2020 WL 7338081, at *2 (D.N.J. Dec. 14, 2020), this Court found that the policyholder had "failed to meet its burden to show that its claim falls 'within the basic terms of the insurance policy'" which "require 'direct physical loss or damage' to trigger the Policy." (quoting *Arthur Anderson LLP v. Fed. Ins. Co.*, 416 N.J. Super. 334, 347 3 A.3d 1279, 1287 (N.J. Super. App. Div. 2010)). Very similar to this Court's finding in Arch's motion to dismiss, this Court also found that the policyholder in *Boulevard Carroll* had "not alleged any facts that support a showing that its property was physically damaged," but rather, pled that "by forcing him to close his business," the stay-at-home orders caused the policyholder "to lose income and incur expenses." *Id.* This Court found that "[t]his is not enough." *Id.*

This Court should make the same correct decision it made in *Boulevard Carroll* and with respect to Arch's motion to dismiss. WPBC does not allege that its business was interrupted because its ballparks or stadiums were actually physically contaminated by the COVID-19 virus or that any property was physically lost. Rather, WPBC and the other Plaintiffs only allege that MiLB games and the 2020 MiLB season were cancelled because of the "nature of the virus," "the measures required to mitigate its spread," and the "governmental responses to the virus." Am. Compl. ¶¶ 32, 39. Although Plaintiffs allege that it is "statistically certain the virus is present at the Teams' ballparks and/or nearby properties" and "carried into each of the stadiums," *id*. ¶¶ 24, this is not enough to trigger coverage under the Federal Policy because such allegations are not sufficient to demonstrate that Plaintiffs' ballparks or stadiums were actually physically contaminated by COVID-19, nor do they demonstrate any type of actual, tangible, or physical alteration to their premises. Furthermore, Plaintiffs' Amended Complaint does not allege that their premises were rendered "unusable" or "uninhabitable" because of the COVID-19 virus.

Based on the foregoing, this Court should dismiss WPBC's causes of action for breach of contract and declaratory judgment in accordance with its recent decisions.

3. Direct Physical Loss or Damage – Other Jurisdictions

In addition to the courts applying Michigan law, or New Jersey law, which held that business losses incurred as a result of the COVID-19 virus do not constitute "direct physical loss or damage" to property, Federal refers the court to the numerous other jurisdictions and dozens of cases which have found same:

Alabama

- *Drama Camp Prods., Inc. v. Mt. Hawley Ins. Co.*, No. 1:20-CV-266-JB-MU, 2020 WL 8018579, at *6 (S.D. Ala. Dec. 30, 2020) ("It is apparent from the above that a 'direct

physical loss of property' contemplates the tangible alteration of property necessitating a party's absence to fix it or a party's beginning operations elsewhere.")

- *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020) ("Plaintiff's loss of usability [of its office from COVID-19 related shutdowns] did not result from an immediate occurrence which tangibly altered its property—the Order did not immediately cause some sort of tangible alteration to Plaintiff's office.")

California

- *James Colgan v. Sentinel Ins. Co. Ltd.*, No. 4:20-cv-04780-HSG, 2021 WL 472964, at *3 (N.D. Cal. Jan. 26, 2021) (holding that insured was unable to establish "direct physical loss or damage" to his property because the policy's definition of "period of restoration" required that the insured property to be repaired, rebuilt, or replaced in some manner)
- *Riverside Dental of Rockford, Ltd. v. Cincinnati Ins. Co.* , No. 1:20-cv-03768, 2021 WL 346423, at *5 (N.D. Cal. Jan. 19, 2021) ("Plaintiff's Business Income loss is not covered under the Civil Authority coverage provisions of the policy at issue in this case because the Governor's Orders did not prohibit access to plaintiff's dental office.")
- *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.*, Ltd., 2021 WL 141180, at *7 (N.D. Cal. Jan. 13, 2021) ("While the Court is sympathetic to the situation facing KBFA and other businesses, KBFA could not plausibly allege that its premises, or that nearby properties, have been physically damaged or lost due to COVID-19 or the Stay-at-Home Orders.")
- *O'Brien Sales & Mktg., Inc. v. Transportation Ins. Co.*, 2021 WL 105772, at *5 (N.D. Cal. Jan. 12, 2021) ("O'Brien has failed to plausibly allege coverage under the Business Income and Extra Expense provisions.")
- *BA Lax, LLC v. Hartford Fire Ins. Co.*, 2021 WL 144248, at *4 (C.D. Cal. Jan. 12, 2021) ("Here, there is no evidence—much less an allegation—of distinct, demonstrable, physical alteration, or permanent dispossession of property, at Plaintiffs' premises, at contiguous locations, or in the immediate area. Therefore, Plaintiffs cannot establish the Business Income, Extra Expense, Civil Authority, Ingress or Egress, or Ordinance or Law coverages.")
- *Palmdale Estates Inc. v. Blackboard Ins. Co.*, No. 3:20-CV-06158, 2021 WL 25048, at *2-*3 (N.D. Cal. Jan. 4, 2021) (adopting "the majority view" that closure orders due to COVID-19 do not plausibly constitute a direct physical loss of or damage to property.)
- *Oheb v. Travelers Cas. Ins. Co.*, No. 2:20-CV-08478 (C.D. Cal. Dec. 30, 2020) (citations omitted) (finding "a compensable direct physical loss requires 'some external force' to have acted upon the insured property to cause a physical change in the condition of the property," which was not plead.)
- *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, 2020 WL 7495180 (N.D. Cal. Dec. 21, 2020) (conclusory allegations that COVID-19 had "intruded upon" and "damaged" the insured property were insufficient to show that COVID-19 caused a "distinct, demonstrable, physical alteration" to the property or a "physical change in [its] condition.")
- *Robert Fountain Inc. v. Citizens Ins. Co. of America*, No. 20-CV-05441-CRB, 2020 WL 7247207, at *3 (N.D. Cal. Dec. 9, 2020) ("Business losses resulting from the temporary inability to access an unharmed property are not 'direct physical loss of or damage to' property.")

- *Long Affair Carpet and Rug, Inc. d/b/a Universal Carpet and La Carpet v. Liberty Mutual Insurance Company and Does 1-20*, 2020 WL 6865774 (C.D. Cal. Nov. 12, 2020) (no coverage under the policy because there was no physical damage to Plaintiff's business premises; it was merely "dispossessed of its storefronts")
- *Musso & Frank Grill Co. Inc. v. Mitsui Sumitomo Ins. USA,* No. 20STCV16681 (C.D. Cal. Nov. 9, 2020) ("Plaintiff has alleged no facts suggesting Plaintiff's operations were suspended due to a physical alteration of insured property.")
- *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co. et al.*, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020) ("Numerous courts … consistently conclude that there needs to be some physical tangible injury (like a total deprivation of property) to support 'loss of property' or a *physical* alteration or active presence of a contaminant to support 'damage to' property.") (emphasis in original)
- *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04423-AB-SK, 2020 WL 5938689, at *5 (C.D. Cal. Oct. 2, 2020) (finding "Plaintiff suffered no complete 'direct physical loss of' its property as it always had complete access to the premises even after the order was issued")
- *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 5525171 at *5 (N.D. Cal. Sept. 14, 2020) (dismissing complaint because it failed to assert any direct physical loss or damage to property stemming from COVID-19 shutdown orders)
- *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 2020 WL 5500221 at *6 (S.D. Cal. Sept. 11, 2020) (government's COVID-19 orders were not issued due to direct physical loss of or damage to property; nor did those orders prohibit access to plaintiffs' places of business)
- *Plan Check Downtown III, LLC v. Amguard Ins. Co.*, 2020 WL 5742712 at *7 (C.D. Cal. Sept. 10, 2020) (finding plaintiff's losses caused by incurred during the COVID-19 pandemic did not constitute "physical loss of or damage to" property)
- *10E, LLC v. Travelers Indemnity Co. of Connecticut et al.*, No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653, at *4-*5 (C.D. Cal. Sept. 2, 2020) (rejecting Plaintiff's argument that the presumed presence of COVID-19 on the insured property constituted "direct physical loss of or damage to property");

Florida

- *Carrot Love, LLC v. Aspen Specialty Ins. Co.*, 2021 WL 124416, at *2 (S.D. Fla. Jan. 13, 2021) (internal quotations and citations omitted) ("The Court is sympathetic to the Plaintiff's position, however, 'a growing number of state and federal courts in Florida and around the country have considered the issue and have almost uniformly held that economic losses resulting from … COVID-19 are not covered under 'all risk' policy language identical to that in this case[.]")
- *Island Hotel Properties, Inc. v. Fireman's Fund Ins. Co.*, 2021 WL 117898, at *3 (S.D. Fla. Jan. 11, 2021) ("Although Plaintiff references Emergency Directive 20-03—wherein the County acknowledged that COVID-19 can exist on surfaces—it 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.")
- *Mena Catering, Inc. v. Scottsdale Ins. Co.*, 2021 WL 86777, at *7 (S.D. Fla. Jan. 11, 2021) ("The Complaint fails to allege coverage under the Building and Personal Property

Coverage Form [and] there is likewise no coverage under those provisions because the Complaint fails to allege 'direct physical loss of or physical damage to' the property, a necessary component of coverage under those provisions.")

- *Digital Age Mktg. Grp., Inc. v. Sentinel Ins. Co. Ltd.*, 2021 WL 80535, at *5 (S.D. Fla. Jan. 8, 2021) ("Plaintiff here cannot demonstrate direct physical loss or damage to property. Mere "economic losses—not anything tangible, actual, or physical" do not suffice to demonstrate direct physical loss under Florida law.")
- *Emerald Coast Restaurants, Inc. v. Aspen Specialty Ins. Co.*, No. 3:20CV5898-TKW-HTC, 2020 WL 7889061, at *2 (N.D. Fla. Dec. 18, 2020) ("[A] growing number of state and federal courts in Florida and around the country have considered the issue and have almost uniformly held that economic losses resulting from state and local government orders closing businesses to slow the spread of COVID-19 are not covered under "all risk" policy language identical to that in this case because such losses were not caused by direct physical loss of or damage to the insured property. . . . The Court agrees with the reasoning in those cases, and for sake of brevity, the Court incorporates their reasoning into this Order.")
- *El Novillo Restaurant v. Certain Underwriters at Lloyd's*, No. 1:20-CV-21525-UU, 2020 WL 7251362, at *5-*6 (S.D. Fla. Dec. 7, 2020) (granting motion to dismiss based on the plaintiffs' deficient pleading and relying on the definition of "period of restoration" to support its finding that damage must be repaired or replaced.)
- *Dime Fitness, LLC v. Markel Ins. Co.*, No. 20-CA-5467, 2020 WL 6691467, at *3 (Fla.Cir.Ct. Nov. 10, 2020) ("Plaintiff does not allege a direct physical loss. The damage asserted here is business income loss, along with a vague reference to "damage" in the form of a denial of access to the premises. Therefore, this purely economic loss, as well as a lack of access, would not qualify as a covered cause of loss because no direct physical loss has been alleged.")
- *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000*, 2020 WL 5791583 at *5 (M.D. Fla. Sept. 28, 2020) ("[A]lthough the Court is sympathetic to Plaintiff and all insureds that experienced economic losses associated with COVID-19, there is simply no coverage under the policies if they require 'direct physical loss of or damage' to property")
- *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIV, 2020 WL 5051581, at *8 (S.D. Fla. Aug. 26, 2020) ("Plaintiff merely claims that two Florida Emergency Orders closed his indoor dining. But, for the reasons already stated, this cannot state a claim because the loss must arise to 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.")

Georgia

- *Karmel Davis & Assocs., Attorneys-at-Law, LLC v. The Hartford Financial Group, Inc., et al.*, No. 1:20-CV-02181-WMR, 2021 WL 420372, at *4 (N.D. Ga. Jan. 26, 2021) (holding that the policy's business income coverage provisions were inapplicable because a direct physical loss "must cause the suspension of operations," and occurs only when there is "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")

- *KD Unlimited, Inc. v. Owners Ins. Co.*, No. 1:20-CV-2163, 2021 WL 81660, at *4 (N.D. Ga. January 5, 2021) (the ordinary meaning of "physical loss of or damage to" requires a physical or tangible change, which COVID-19 does not cause, nor does the presence or suspected presence of COVID-19 cause such change)
- *Roy Johnson v. Hartford Fin. Services Group*, No. 1:20-CV-02000, 2021 WL 37573, at *5 (N.D. Ga. Jan. 4, 2021) (putative class action dismissed, finding that allegations that the highly communicable disease of COVID-19 "must be present" in the premises is not a sufficient allegation of any tangible alteration to a single physical edifice or piece of equipment located in or around the insured premises.)

Illinois

- *Bend Hotel Dev. Co., LLC v. Cincinnati Ins. Co.*, No. 20 C 4636, 2021 WL 271294, at *3 (N.D. Ill. Jan. 27, 2021) ("Plaintiff does not allege losses caused by viral contamination; and even if it did, the absence of such an exclusion does not inject ambiguity into the plain language of policy's express terms, which require direct physical loss or damage to the covered property.")
- *TJBC, Inc. v. Cincinnati Ins. Co., Inc.*, No. 20-CV-815-DWD, 2021 WL 243583, at *5 (S.D. Ill. Jan. 25, 2021) ("In sum, because Covid-19 does not cause tangible loss or damage to the physical dimension of Plaintiff's property, and Plaintiff has not alleged that Covid-19 physically altered the appearance, or some material dimension of its property, Plaintiff has failed to allege a direct physical loss necessary to trigger coverage under the policy.")
- *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.*, No. 20 C 4249, 2020 WL 7889047, at *4 (N.D. Ill. Dec. 22, 2020) ("The Policy here requires some sort of harm to the property.")
- *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 2020 WL 5630465 at *2 (N.D. Ill. Sept. 21, 2020) ("Plaintiff simply cannot show any [direct physical loss] as a result of either inability to access its own office or the presence of the virus on its physical surfaces…. [and] Plaintiff has not pled any facts showing physical alteration or structural degradation of the property")

Iowa

- *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2020 WL 5820552 (S.D. Iowa Sept. 29, 2020) ("[V]irus-related closures of business do not amount to direct loss to property covered by the … policy.")

Kansas

- *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 2020 WL 7078735 (D. Kan. Dec. 3, 2020) (finding the plaintiff's allegation that the virus "likely" contaminated its property "fail[ed] to raise a 'right of relief above the speculative level'" and "even assuming that the virus physically attached to covered property, it did not constitute the direct, physical loss or damage required to trigger coverage because its presence can be eliminated.")

Mississippi

- *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020) ("When all of the provisions are read together it makes logical sense that the

property that is insured, *i.e.*, the building and/or personal property in or on the building, must first be lost or damaged before Business Income coverage kicks in.")

Missouri

- *Zwillo V, Corp. v. Lexington Ins. Co.*, 2020 WL 7137110 (W.D. Mo. December 2, 2020) ("Whether the complaint is couched in terms of COVID-19's presence on the premises or of loss of use of premises due to the stay-at-home orders (or the virus itself), Plaintiff has failed to state a claim upon which relief may be granted because the policy does not cover the alleged claim.");

New York

- *Tappo of Buffalo, LLC v. Erie Ins. Co.*, 2020 WL 7867553 (W.D.N.Y. December 29, 2020) (holding that the impact of COVID-19 and state executive orders relating to COVID-19 are not the result of direct physical loss of or damage to covered property as required to establish coverage insurance policies)
- *10012 Holdings, Inc. v. Sentinel Ins. Co.*, Ltd., No. 20 CIV. 4471 (LGS), 2020 WL 7360252, at *3 (S.D.N.Y. Dec. 15, 2020) ("The Policy's "Extra Expense" coverage applies to expenses incurred during a period of restoration of the premises following a "direct physical loss or physical damage to" the covered property. Because, as described above, the Complaint does not allege a direct physical loss, the Complaint fails to state a claim for Extra Expense coverage.")
- *Michael Cetta, Inc. d/b/a Sparks Steak House v. Admiral Indem. Co.*, Case No. 1:20-cv-04612-JPC, 2020 WL 7321405, at *6 (S.D.N.Y. Dec. 11, 2020) ("[t]he plain meaning of the phrase 'direct physical loss of or damage to' therefore … connotes a negative alteration in the tangible condition of property.")

Ohio

- *Santo's Italian Café LLC dba Santosuossos Pizza Pasta Vino v. Acuity Ins. Co.*, 2020 WL 7490095 (N.D. Ohio Dec. 21, 2020) ("The Closure Orders simply did not create physical damage on [the insured's] premises" and were "not a physical intrusion on [the insured's] property.")

Pennsylvania

- *1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc.*, No. 2:20-CV-862, 2021 WL 147139, at *6 (W.D. Pa. Jan. 15, 2021) ("The Court holds that after reading the ordinary usage of the terms in the Policy, the language can be construed only as extending to events that physically impact the covered property.")
- *Clear Hearing Sols., LLC v. Cont'l Cas. Co.*, 2021 WL 131283, at *9 (E.D. Pa. Jan. 14, 2021) ("Clear Hearing has also not demonstrated any facts to show the existence of any direct physical loss of or damage to nearby property.")
- *TAQ Willow Grove, LLC v. Twin City Fire Ins.*, 2021 WL 131555, at *5 (E.D. Pa. Jan. 14, 2021) ("TAQ's Amended Complaint lacks any allegations about the existence of anything affecting the physical condition of its premises. Thus, its losses are a loss of use untethered from the physical condition of the property itself.")
- *Zagafen Bala, LLC v. Twin City Fire Ins. Co.*, 2021 WL 131657, at *7 (E.D. Pa. Jan. 14, 2021) ("The conditions that led to the limitations on the insured properties were not the

direct result of a 'risk[ ] of direct physical loss' to property in the immediate area of the insured property because no other property was rendered uninhabitable or unusable due to a physical condition of that property.")

- *Indep. Rest. Grp. v. Certain Underwriters at Lloyd's, London*, 2021 WL 131339, at *5 (E.D. Pa. Jan. 14, 2021) (finding that "'direct physical loss of or damage to' property requires either a physical alteration of the property or its complete destruction, and neither are present in this case")
- *ATCM Optical, Inc. v. Twin City Fire Ins. Co.*, 2021 WL 131282, at *6 (E.D. Pa. Jan. 14, 2021) ("Omega could have provided emergency optical services at its insured properties under the Civil Authority Orders reveals that a prohibition on access to the properties—a prerequisite to coverage—is absent here and precludes coverage under the civil authority provision")
- *Moody v. Hartford Fin. Grp., Inc.*, 2021 WL 135897, at *8 (E.D. Pa. Jan. 14, 2021) ("The Court agrees that the orders were issued to respond to COVID-19…. These orders were issued to address the ongoing health crisis and the reality of people spreading COVID-19 to other people, not as a direct result of some 'direct physical loss.'")
- *Ultimate Hearing Sols. II, LLC v. Twin City Fire Ins. Co.*, 2021 WL 131556, at *7 (E.D. Pa. Jan. 14, 2021) ("If mere loss of use counted as 'direct physical loss of' property, the 'period of restoration' language would be rendered a nullity.")
- *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020) (determining that the plaintiffs' losses at issue did not constitute a "direct physical loss of or damage to property" that would trigger coverage under the policy's business income and civil authority coverage provisions because "the loss or damage to the property must be physical, affecting the structure of the property.")
- *Kessler Dental Assocs., P.C. v. Dentists Ins. Co.*, 2020 WL 7181057 (E.D. Pa. Dec. 7, 2020) (determining the policy's civil authority coverage was inapplicable because no there was no "direct physical loss or physical damage to other property, not more than one mile from the premises[.]")

Texas

- *Terry Black's Barbecue v. State Auto. Mutual Ins. Co.*, No. 1:20-CV-665-RP, 2020 WL 7351246, at *6 n.8 (W.D. Tx. Dec. 14, 2020) (finding insurer's language unambiguous and recommending the following of "the great majority of courts" in dismissing the suit because the civil authority orders at issue neither cause direct physical loss of property nor are caused by such direct physical loss.)
- *Sultan Hajer v. Ohio Security Ins. Co.*, No. 6:20-CV-00283, 2020 WL 7211636, at*2 (E.D. Texas Dec. 7, 2020) (a "physical loss" requires a 'distinct, demonstrable, physical alteration of the property,' which is not the case with a COVID-19 shut down.)
- *Diesel Barbershop, LLC v. State Farm Lloyds*, 2020 WL 4724305 at *7 (W.D. Tex. Aug. 13, 2020) ("While there is no doubt that the COVID-19 crisis severely affected Plaintiffs' businesses, State Farm cannot be held liable to pay business interruption insurance on these claims as there was no direct physical loss[.]")

Washington D.C.

- *Rose's 1, LLC v. Erie Ins. Exchange*, No. 2020 CA 002424 B, 2020 WL 4589206, at *2 (D.C.Super. Aug. 06, 2020) (holding that the relevant COVID-19 orders did not affect "any direct changes to the properties")

West Virginia

- *Bluegrass, LLC v. State Auto. Mut. Ins. Co.*, No. 2:20-CV-00414, 2021 WL 42050, at *5-*6 (S.D. W.V. Jan. 5, 2021) (granting motion to dismiss because prevalence of virus in the community and loss of use of the property did not constitute a "direct physical loss" of property necessary to trigger business interruption coverage.)
- *Uncork & Create LLC v. Cincinnati Ins. Co. et al.*, 2020 WL 6436948, at *5 (S.D. W.Va. Nov. 2, 2020) ("[T]he unambiguous terms of the Policy do not provide coverage for solely economic losses unaccompanied by physical property damage.")

This Court should reach the same decision it has made in previous cases, and dismiss WPBC's claim for coverage because it does not meet the threshold requirement of alleging and/or demonstrating "direct physical loss or damage."

C. There Is No Civil Authority Coverage Because There is No Direct Physical Loss of or Damage to Property

The Federal Policy also provides additional "Civil Authority" coverage, which provides that Federal will pay for "**business income** loss due to the actual impairment of [WPBC's] operations and "**extra expense**" that WPBC incurs "due to the actual or potential impairment of your operations" that were "directly caused by the prohibition of access to [WPBC's] premises" or "a dependent business premises" by a "civil authority." (Doc. 30-4, at 48). However, "[t]he prohibition of access by a civil authority **must be the direct result of direct physical loss or damage to property** away from such premises or such dependent business premises[.]" *Id.*

Just as WPBC does not (and cannot) allege that COVID-19 has caused direct physical loss or damage to covered property, WPBC does not (and cannot) allege that COVID-19 has caused "direct physical loss of or damage to property" at to any nearby properties. Furthermore, Plaintiffs' Amended Complaint does not allege that the Executive Order issued by Governor

Gretchen Whitmer prohibited access to WPBC's facilities, nor does it allege that the Executive Order was issued as "the direct result of direct physical loss or damage to property away from such premises or such dependent business premises." (Doc. 30-4, at 48).

Moreover, the previously discussed cases which found that COVID-19-related business losses do not constitute "direct physical loss or damage" under Michigan law also found that civil authority coverage provisions are inapplicable to such losses. For instance, the policy in *Kirsch* also contained a civil authority coverage provision which "prohibits access to the described premises due to **the direct physical damage to property**, other than at the described premises[.]" *Kirsch*, 2020 WL 7338570 at *7 (emphasis in original). However, the court found the allegations in the plaintiff's complaint "allege no **tangible** damage to other's property that would support a claim under the provision's language," and "[e]ven if Plaintiff were able to point to direct physical damage to other property due to COVID-19, he has also failed to state a nexus between prior property damage and the executive order." *Id.* (emphasis added); *see also Turek*, 2020 WL 5258484, at *9 * (finding an analysis under the policy's civil authority coverage section unnecessary because the plaintiff had failed to alleged "direct physical loss" to any property).

Similarly, the decisions issued by the New Jersey Superior Court and this District Court that found economic losses caused by the COVID-19 pandemic do not constitute "direct physical loss or damage" also did not find coverage despite the relevant policies containing a civil authority coverage part similar to the Federal Policy's "Civil Authority" coverage. *Mac Property Group,*, 2020 WL 7422374 at *9 ("There is no direct physical loss or damage to property which resulted in the order of civil authority."); *Boulevard Carroll*, 2020 WL 7338081, at *1 (finding no coverage under policy which covered "'the actual loss of business income and

extra expense you sustain due to the necessary suspension of your operations caused by action of civil authority that prohibits access to a location' provided that the prohibition of access 'arise[s] from direct physical loss or damage to property'").

Lastly, in the current action, this District Court also found no coverage under the insurance policies issued by Arch to 7th Inning and DeWine despite containing civil authority coverage provisions similar to the Federal Policy. *See* Jan. 19 Letter Op. (Doc. 54, at 3) (finding no coverage under policy provision which provided "coverage for earnings and extra expense to include loss sustained while access to 'covered locations' or a 'dependent location' is specifically denied by an order of civil authority. This order must be a result of direct physical loss of or damage to property."). This Court should find the same in the current motion and grant Federal's Motion for Judgment on the Pleadings because Federal has not breached its obligations under the Policy's Civil Authority coverage.

V. CONCLUSION

Federal cannot provide coverage for WPBC's losses under the Policy because WPBC's losses do not constitute, were caused by, or resulted from "direct physical loss damage" to covered property and/or nearby properties under either Michigan or New Jersey law. Thus, for the foregoing reasons, Federal's Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c) should be granted because WPBC has failed to state a claim upon which relief can be granted.

Dated: February 26, 2021

Respectfully submitted,

By: s/ Daren S. McNally

Daren S. McNally (DM5551)
Barbara M. Almeida (BA7239)

Meghan C. Goodwin (MG3012)
Nicholas S. Pradaxay (NP0087)

CLYDE & CO US LLP
200 Campus Drive, Suite 300
Florham Park, New Jersey 07932

daren.mcnally@clydeco.us
barbara.almeida@clydeco.us
meghan.goodwin@clydeco.us
nicholas.pradaxay@clydeco.us
(973) 210-6700 (*phone*)

Attorneys for Defendant
Federal Insurance Company