UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BENIAK ENTERPRISES, INC. d/b/a BENITO RISTORANTE, on behalf of itself and all others similarly situated, Plaintiff, v. CHUBB LTD. and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Defendants.	**Case No. 2:20-cv-05536-KM-JBC** **ORAL ARGUMENT REQUESTED** Motion Return Date: June 21, 2021

DEFENDANT INDEMNITY INSURANCE COMPANY OF NORTH AMERICA'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

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REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 78.1(b), Defendant Indemnity Insurance Company of North America ("IINA") respectfully requests that the Court schedule oral argument on its motion for judgment on the pleadings to address the important and case-dispositive questions of law the motion presents to the Court. IINA believes that oral argument—which would take approximately one hour with time split between the parties—would benefit both parties, aid the Court, and help efficiently resolve this dispute.

INTRODUCTION[1]

Defendant Indemnity Insurance Company of North America ("IINA") issued a commercial-property insurance policy to Beniak Enterprises, Inc. ("Beniak") that provides coverage when there is "direct physical loss of or damage to" Beniak's restaurant. Beniak contends that the policy covers any economic losses it allegedly suffered because of the COVID-19 pandemic, despite the absence of any tangible changes in Beniak's property itself. Beniak's claim fails as a matter of law.

The Third Circuit has held that, under New Jersey law, there is no "direct physical loss of or damage to" property unless the property is materially altered. Here, however, Beniak does not allege that the virus altered the restaurant in any tangible way. And while Beniak claims the pandemic rendered it unable to use its property for its intended use, Beniak concedes that the coronavirus was never present at its restaurant, and acknowledges that it has offered takeout and delivery services throughout the pandemic.

Since the pandemic began, every court in the District of New Jersey to have addressed Beniak's coverage theory has rejected it. Those courts, like courts in dozens of other jurisdictions around the nation, have endorsed the nearly unanimous view that COVID-19 does not cause direct physical loss of or damage

[1] Unless otherwise indicated, all emphasis is added and all quotation marks and citations are omitted.

to property sufficient to trigger coverage. *See, e.g.*, *7th Inning Stretch LLC v. Arch Ins. Co.*, 2021 WL 1153147, at *2 (D.N.J. Mar. 26, 2021) (granting insurer's Rule 12(c) motion in COVID-19–related insurance case because insured failed to allege that its property was physically damaged and thus policy "unambiguously" precluded coverage); *Boulevard Carroll Ent. Grp., Inc. v. Fireman's Fund Ins. Co.*, 2020 WL 7338081, at *2 n.2 (D.N.J. Dec. 14, 2020) (granting insurer's motion to dismiss COVID-19–related insurance claims and emphasizing that "numerous other federal courts have reached the same conclusion in suits involving similar policy terms"); *7th Inning Stretch LLC v. Arch Ins. Co.*, 2021 WL 800595, at *3 n.7 (D.N.J. Jan. 19, 2021) (similar); *Manhattan Partners, LLC v. Am. Guar. & Liab. Ins. Co.*, 2021 WL 1016113, at *2 n.4 (D.N.J. Mar. 17, 2021) (same); *Arash Emami, M.D., P.C., Inc. v. CNA & Transp. Ins. Co.*, 2021 WL 1137997, at *2 n.6 (D.N.J. Mar. 11, 2021) (same); *Kahn v. Penn. Nat'l Mut. Cas. Ins. Co.*, 2021 WL 422607, at *7 (M.D. Pa. Feb. 8, 2021) (dismissing complaint based on "unanimity among [court's] colleagues on this exact issue" and emphasizing that court "ha[s] yet to identify a decision within the Third Circuit that has reached a … contrary [result]"); *Robert E. Levy, D.M.D., LLC v. Hartford Fin. Servs. Grp. Inc.*, 2021 WL 598818, at *12 (E.D. Mo. Feb. 16, 2021) (dismissing COVID-19–related insurance claims filed against IINA affiliate based on "great weight of authority"). As in those other unsuccessful cases, Beniak's

Complaint merely claims that the coronavirus temporarily impaired the restaurant's intended use. But even if such conclusory allegations were proven, they do not establish any "direct physical loss of or damage to" the property, as required by the policy and New Jersey law. Beniak cannot overcome this fundamental legal defect.

Moreover, even assuming there is coverage (there is not), the policy's virus exclusion would unambiguously exclude it. The policy expressly bars coverage for any loss or damage caused by or resulting from any "virus … that induces or is capable of inducing physical distress, illness[,] or disease." The coronavirus undoubtedly qualifies. Beniak attempts to plead around the exclusion by conceding that the virus was never found in or on its property and instead claiming that its losses were caused by "precautionary measures" taken by the State of New Jersey "to prevent the spread of COVID-19 in the future." Compl. (ECF No. 1) ¶ 49. But, as the Honorable Chief Judge Freda Wolfson and other judges applying New Jersey law have already held, the virus exclusion applies equally to those allegations: by Beniak's own account, its alleged losses stem from orders issued in response to the coronavirus, and thus they were "caused by or resulting from" the virus. *See, e.g.*, *Quakerbridge Early Learning LLC v. Selective Ins. Co. of New England*, 2021 WL 1214758, at *4 (D.N.J. Mar. 31, 2021) (Shipp, J.) (denying coverage pursuant to virus exclusion because "COVID-19 is a highly contagious

and deadly virus … [and] the orders issued by Governor Murphy would not have been enacted but for the pandemic"); *Garmany of Red Bank, Inc. v. Harleysville Ins. Co.*, No. 20-8676, ECF No. 1-1 (July 11, 2020) (conceding "virus is not physically present at the Insured Premises" and alleging losses "caused by the issuance of" civil-authority orders promulgated "[i]n response to the COVID-19 pandemic"); *Garmany of Red Bank, Inc. v. Harleysville Ins. Co.*, 2021 WL 1040490, at *6 (D.N.J. Mar. 18, 2021) (Wolfson, C.J.) (dismissing complaint with prejudice because "[p]laintiff cannot show that the Executive Orders, and not the COVID-19 virus, were the proximate cause of its losses"); *see also Causeway Auto., LLC v. Zurich Am. Ins. Co.*, 2021 WL 486917, at *6 (D.N.J. Feb. 10, 2021) (Wolfson, C.J.) (dismissing similar complaint based on virus exclusion because "[t]he Executive Orders were issued for the sole reason of reducing the spread of the virus that causes COVID-19 and would not have been issued but for the presence of the virus in the State of New Jersey"); *Boulevard Carroll*, 2020 WL 7338081, at *2 (Wigenton, J.) (same, "[b]ecause the Stay-at-Home Orders were issued to mitigate the spread of the highly contagious novel coronavirus"); *Del. Valley Plumbing Supply, Inc. v. Merchants Mut. Ins. Co.*, 2021 WL 567994, at *3 (D.N.J. Feb. 16, 2021) (Hillman, J.) (similar); *Body Physics v. Nationwide Ins.*, 2021 WL 912815, at *6 (D.N.J. Mar. 10, 2021) (Bumb, J.) (dismissing complaint based on virus exclusion because "the but for cause of Plaintiff's alleged losses and

this case is the Coronavirus"); *In the Park Savoy Caterers LLC v. Selective Ins. Grp., Inc.*, 2021 WL 1138020, at *3–4 (D.N.J. Feb. 25, 2021) (Arleo, J.) (virus exclusion barred coverage since COVID-19 is the "predominate cause of plaintiffs' losses"). The virus exclusion likewise bars Beniak's claims as a matter of law.

The COVID-19 pandemic is extraordinary, but the contract interpretation required in this case is not. Under the plain language of Beniak's insurance policy and Third Circuit authority, IINA is entitled to judgment on the pleadings. The Court should dismiss the Complaint in its entirety with prejudice and enter judgment for IINA.

BACKGROUND

I. THE POLICY

IINA issued a commercial-property insurance policy (the "Policy") to Beniak—the owner of the Benito Ristorante in Union, New Jersey—for the policy period from August 1, 2019, to August 1, 2020.[2] Coverage is available only if a "Covered Cause of Loss" caused loss of property or damage to it. McNally Decl.,

[2] The Court may consider the Policy and assume its contents are true for purposes of this motion because the Complaint relies extensively upon the Policy, the Policy forms the basis of Beniak's insurance-coverage claims, and the Policy's authenticity is indisputable. *See Syndicate 1245 at Lloyd's v. Walnut Advisory Corp.*, 721 F. Supp. 2d 307, 314 (D.N.J. 2010) (court may consider "matters of public record[] and undisputedly authentic documents if the plaintiff's claims are based upon those documents"). The Policy is attached as Exhibit A to the Declaration of Daren S. McNally in Support of Defendant's Motion for Judgment on the Pleadings ("McNally Decl.") filed contemporaneously with this motion.

Ex. A, 40–41. The Policy defines "Covered Cause of Loss" as "direct physical loss unless the loss is excluded or limited in this policy." *Id.* at 85.

The Policy provides three types of coverage relevant here: Business Income, Extra Expense, and Civil Authority. Each type of coverage is triggered only where there is (i) physical harm to property (ii) caused by or resulting from a Covered Cause of Loss. The Policy also contains several exclusions, including a virus exclusion, that limit the coverage otherwise available under the Policy.

a. Business Income and Extra Expense Coverage

The Business Income provision calls for IINA to pay Beniak for certain losses if Beniak had to suspend operations due to (i) "direct physical loss of or damage to property at [Beniak's insured] premises" (ii) caused by or resulting from a "Covered Cause of Loss." *Id.* at 40. The provision specifically emphasizes that the suspension "**must be caused by direct physical loss of or damage to property**" at the insured premises, or else there can be no coverage. *Id.*

The Extra Expense provision similarly requires "direct physical loss or damage to property" and applies "only if the Declarations show that Business Income Coverage applies at that premises." *Id.* In particular, the provision states that IINA will pay for certain of Beniak's losses only if there is "**direct physical loss or damage to property** caused by or resulting from a Covered Cause of Loss." *Id.* at 40–41.

Both the Business Income and Extra Expense provisions only provide coverage during the "period of restoration." *See id.* And for both types of coverage, the definition of "period of restoration" is tied to and requires "direct physical loss or damage" to property. *Id.* For instance, the Policy specifies that, for Business Income coverage, the term "period of restoration" means "the period of time that … [b]egins … 72 hours after the time of **direct physical loss or damage**," and ends "on the earlier of" (i) "[t]he date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality," or (ii) "[t]he date when business is resumed at a new permanent location." *Id.* at 48.

b. Civil Authority Coverage

The Civil Authority provision affords coverage when government orders prohibit access to Beniak's insured premises, but only if a Covered Cause of Loss causes "damage to property" other than Beniak's restaurant. *Id.* at 41. Specifically, the Civil Authority provision states that IINA will pay for certain losses "caused by action of civil authority that prohibits access to the described premises," if, but only if, (i) "[a]ccess to the area immediately surrounding the **damaged property** is prohibited by civil authority **as a result of the damage**," (ii) the "described premises are within that area but are not more than one mile from the damaged property," and (iii) "[t]he action of civil authority is taken in

response to dangerous physical conditions resulting from **the damage** or continuation of the Covered Cause of Loss that caused **the damage**, or the action is taken to enable a civil authority to have unimpeded access to the **damaged property**." *Id.*

c. Virus Exclusion

The Policy's virus exclusion is clearly worded and applies to "all forms and endorsements that comprise" coverage under the Policy, including "business income, extra expense[,] [and] action of civil authority." *Id.* at 82. The exclusion states that IINA will not pay for loss or damage "caused by or resulting from" any "virus." *Id.* Specifically, the exclusion states that IINA "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." *Id.*

II. BENIAK'S CLAIMED LOSSES

Beniak filed suit on May 5, 2020, asserting seven causes of action for declaratory relief, breach of contract, and anticipatory breach of contract relating to Business Income, Extra Expense, and Civil Authority coverage from IINA for certain losses Beniak allegedly suffered during the coronavirus pandemic. Compl. (ECF No. 1).[3] The Complaint alleges that, in March 2020, Beniak was "unable to

[3] Beniak initially sued IINA's indirect parent company, Chubb Limited, as well, but it has since dismissed all claims against Chubb Limited. *See* ECF Nos. 17, 20.

operate in the ordinary course of business" due to "the COVID-19 pandemic and the corresponding response by civil authorities to stop the spread of the outbreak." *Id.* ¶¶ 8–9, 31–32.

The Complaint also asserts the legal conclusion that Beniak suffered "direct physical loss of and damage to" its property because the COVID-19 pandemic allegedly rendered Beniak "unable to use [its] property for its intended purpose." *Id.* ¶ 44. But the Complaint does not, and cannot, allege facts demonstrating that Beniak's property itself was harmed.

As for the civil-authority orders, the Complaint alleges the legal conclusion that the orders "triggered the Civil Authority provision." *Id.* ¶ 111. Beniak does not contend, however, that any civil authority actually prohibited access to Beniak's restaurant. *See id.* ¶ 31 (acknowledging that restaurants were allowed to fulfill takeout and delivery orders); *see also, e.g.*, N.J. Exec. Order No. 104 ¶ 9 (Mar. 16, 2020) (declaring all restaurants could remain open within normal business hours for takeout and delivery services); N.J. Exec. Order No. 107 ¶ 8 (Mar. 21, 2020) (same).[4] Further, just as the Complaint fails to plead direct

[4] As elaborated in IINA's Request for Judicial Notice filed contemporaneously with this motion, the Court may judicially notice these civil-authority orders without converting IINA's Rule 12(c) motion into a motion for summary judgment because the orders are matters of public record available on official government websites. *See, e.g.*, *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000) (court may "take judicial notice of facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" including on

physical loss of or damage to Beniak's restaurant, it also does not, and cannot plausibly, allege that any of the civil-authority orders were issued in response to damage to property within one mile thereof.

Beniak acknowledges the Policy's virus exclusion, but contends that it does not bar coverage because Beniak's losses were "not caused by a 'virus'" or "because coronavirus was found in or on [Beniak's] insured property." Compl. (ECF No. 1) ¶ 49. The Complaint attempts to pivot around the exclusion with the allegation that Beniak's losses resulted from the State of New Jersey's "precautionary measures … to prevent the spread of COVID-19 in the future." *Id.*

III. PROCEDURAL HISTORY

IINA answered Beniak's allegations on September 9, 2020. Answer (ECF No. 8). The pleadings in this case are therefore closed. *See, e.g.*, *Mele v. Fed. Rsrv. Bank of N.Y.*, 359 F.3d 251, 253 n.1 (3d Cir. 2004) (pleadings closed after answer filed); *Sync Labs LLC v. Fusion-Mfg.*, 2013 WL 1163486, at *1 (D.N.J. Mar. 19, 2013) (same). IINA now moves for judgment on the pleadings. *See* Fed.

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a motion for judgment on the pleadings); *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (similar, motion to dismiss); *Liberty Int'l Underwriters Can. v. Scottsdale Ins. Co.*, 955 F. Supp. 2d 317, 324–25 (D.N.J. 2013) (in considering a motion for judgment on the pleadings, a court may judicially notice "a matter of public record that was filed in [government proceedings]"); *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405, at *3 (S.D.N.Y. Dec. 11, 2020) (judicially noticing COVID-19–related civil-authority orders on motion for dismissal).

R. Civ. P. 12(c) (party may seek judgment on the pleadings anytime "[a]fter the pleadings are closed" so long as it is "early enough not to delay trial"). Although limited discovery relating to Beniak's individual coverage claim has commenced, discovery in this case is unnecessary given the fatal legal defects apparent on the face of the Complaint.

LEGAL STANDARD

Judgment on the pleadings should be granted for a defendant where "'no material issue of fact remains to be resolved and [it] is entitled to judgment as a matter of law.'" *Bayer Chems. Corp. v. Albermarle Corp.*, 171 F. App'x 392, 397 (3d Cir. 2006) (quoting *Jablonski v. Pan Am. World Airways, Inc.*, 863 F.2d 289, 290 (3d Cir. 1988)). The plaintiff must plead "'enough facts to state a claim to relief that is plausible on its face.'" *21st Mortg. Corp. v. Chi. Title Ins. Co.*, 2018 WL 6716081, at *3 (D.N.J. Dec. 21, 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Conclusory allegations and legal conclusions "are not entitled to the assumption of truth," even if pleaded in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *accord DiCarlo v. St. Mary Hosp.*, 530 F.3d 255, 262–63 (3d Cir. 2008); *Syndicate 1245*, 721 F. Supp. 2d at 315.

Interpretation of an insurance policy is a matter of state law for a court to decide. *See Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 220 (3d Cir. 2005); *State Nat'l Ins. Co. v. Cnty. of Camden*, 10 F. Supp. 3d 568, 574 (D.N.J. 2014).

Under New Jersey law, insurance policies are interpreted according to their "plain, ordinary meaning." *Nav-Its, Inc. v. Selective Ins. Co. of Am.*, 183 N.J. 110, 118 (2005).[5] When the language of a policy is clear, as it is here, the policy must be interpreted and enforced according to its terms. *See President v. Jenkins*, 180 N.J. 550, 562 (2004); *James v. Fed. Ins. Co.*, 5 N.J. 21, 24 (1950). Further, "courts may not 'torture language of insurance policies to create ambiguity where none exists in order to impose liability.'" *Pine Belt Auto., Inc. v. Royal Indem. Co.*, 2009 WL 1025564, at *4 (D.N.J. Apr. 16, 2009) (quoting *Resol. Tr. Corp. v. Fid. & Deposit Co. of Md.*, 205 F.3d 615, 643 (3d Cir. 2000)), *aff'd*, 400 F. App'x 621 (3d Cir. 2010).

"[E]xclusions are presumptively valid and will be given effect if specific, plain, clear, prominent, and not contrary to public policy." *Princeton Ins. Co. v. Chunmuang*, 151 N.J. 80, 95 (1997). Courts therefore regularly grant motions for

[5] New Jersey law applies to the substantive issues in this case. *See Gen. Ceramics Inc. v. Firemen's Fund Ins. Cos.*, 66 F.3d 647, 652–55 (3d Cir. 1995) ("[a] federal court exercising diversity jurisdiction is to apply the choice-of-law rules of the forum state," and in insurance-coverage disputes, New Jersey applies "the law of the state which the parties understood was to be the primary location of the insured risk" unless "some other state has a more significant relationship … to the transaction and the parties"); *Vineland 820 N. Main Rd., LLC v. U.S. Liab. Ins. Co.*, 2018 WL 4693965, at *4 (D.N.J. Sept. 29, 2018) (New Jersey law applies where insured premises located in New Jersey and policy sold to New Jersey insured). And, because it is sitting in diversity, the Court "must give serious consideration to the decisions of the intermediate appellate courts in ascertaining and applying state law." *Robinson v. Jiffy Exec. Limousine Co.*, 4 F.3d 237, 242 (3d Cir. 1993).

judgment on the pleadings where the complaint's allegations fall within a policy exclusion. *See, e.g.*, *Hanover Ins. Co. v. Urban Outfitters, Inc.*, 806 F.3d 761, 770 (3d Cir. 2015) (affirming grant of insurer's Rule 12(c) motion on ground that exclusion clearly barred coverage); *Minn. Lawyers Mut. Ins. Co. v. Ahrens*, 432 F. App'x 143, 151 (3d Cir. 2011) (same); *Princeton Inv. Partners, Ltd. v. RLI Ins. Co.*, 2018 WL 846917, at *6–10 (D.N.J. Feb. 9, 2018) (granting insurer's Rule 12(c) motion because exclusion unambiguously barred coverage); *Hanover Ins. Co. v. Retrofitness, LLC*, 2017 WL 4330366, at *8 (D.N.J. Sept. 29, 2017) (same).

As the insured, Beniak bears the burden of proving that it is entitled to coverage under the Policy. *See, e.g.*, *Boulevard Carroll*, 2020 WL 7338081, at *2. In contrast, IINA bears the burden of proving that a policy exclusion precludes coverage. *See, e.g.*, *Body Physics*, 2021 WL 912815, at *3. As explained below, even if the well-pleaded allegations in the Complaint are taken as true, Beniak is not entitled to coverage, and in any event, the virus exclusion bars coverage as a matter of law.

ARGUMENT

I. BENIAK'S BUSINESS INCOME AND EXTRA EXPENSE CLAIMS FAIL BECAUSE BENIAK DOES NOT ALLEGE DIRECT PHYSICAL LOSS OF OR DAMAGE TO ITS PROPERTY

Beniak's Policy provides Business Income and Extra Expense coverage only when there is "direct physical loss of or damage to" the insured property. McNally

Decl., Ex. A, 40. Yet Beniak does not allege any direct physical loss or damage that would trigger such coverage. Beniak merely offers non-specific conclusory allegations that government orders issued in response to the pandemic caused "physical property loss and damage to the insured property" because Beniak was "unable to use [the insured] property for its intended purpose." Compl. (ECF No. 1) ¶¶ 8, 44, 86, 96. Courts within the Third Circuit—including every court to have considered the issue in this District—have held that such allegations are insufficient as a matter of law and dismissed similar coronavirus-related insurance claims on the pleadings for precisely that reason. *See, e.g.*, *Manhattan Partners*, 2021 WL 1016113, at *2 (dismissing New Jersey-law COVID-19 complaint where insured alleged that civil-authority orders "led to their business losses" and "fail[ed] to show the necessary loss of or damage to property required under the Policy's explicit terms"); *7th Inning*, 2021 WL 800595, at *3 (same, because "[p]laintiffs have not alleged any facts that support a showing that their properties were physically damaged" and instead pleaded only "that the Stay-At-Home Orders … forced the cessation of the minor league baseball season and caused [p]laintiffs to lose income and incur expenses"); *Boulevard Carroll*, 2020 WL 7338081, at *2 (allegations that plaintiff lost income and incurred expenses because civil-authority orders "forc[ed] him to close his business" were "not

enough" to proceed past the pleadings stage).[6] Using the same reasoning as those other courts, this Court should dismiss Beniak's Business Income and Extra Expense claims on the pleadings as well.

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[6] *See also, e.g.*, *Mac Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co.*, 2020 WL 7422374, at *9 (N.J. Super. L. Nov. 5, 2020) (insurer entitled to judgment as a matter of law where insured failed to plead any "direct physical loss or damage to property"); *Indep. Rest. Grp. v. Certain Underwriters at Lloyd's, London*, 2021 WL 131339, at *7 (E.D. Pa. Jan. 14, 2021) (no direct physical loss because the "presence of the virus would not render the property useless or uninhabitable or nearly eliminate or destroy its functionality"); *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, 2020 WL 7395153, at *5 (E.D. Pa. Dec. 17, 2020) ("[l]oss of utility is not structural or physical" and the "mere possibility of the presence of the virus" is insufficient to show the physical loss or damage required to trigger coverage); *4431, Inc. v. Cincinnati Ins. Cos.*, 2020 WL 7075318, at *12 (E.D. Pa. Dec. 3, 2020) (no physical loss of or damage to property where insureds pleaded "no allegations that any physical conditions of or on the covered premises have been altered in a way that has resulted in or affected [the insureds'] loss"); *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2020 WL 7024287, at *4 (E.D. Pa. Nov. 30, 2020) (no coverage because "there must be some sort of physical damage to the property that can be the subject of a repair, rebuilding, or replacement" and "[t]he Covid-19 pandemic does not fall within that definition"). IINA is aware of only one New Jersey court denying an insurer's motion to dismiss COVID-19–related insurance claims, and that court merely called the insured's physical-loss-or-damage argument "interesting" and declined to decide whether the argument had merit given the "early stage of the litigation." *See* Hrg. Tr. 28:16–29:8, 29:15–24, *Optical Servs. USA v. Franklin Mut. Ins. Co.*, 2020 WL 5806576 (N.J. Super. L. Aug. 13, 2020). Moreover, the decision was one of the first to adjudicate an insurer's motion to dismiss COVID-19–related insurance claims and since then, courts have resoundingly rejected the approach pondered by that court. *See, e.g.*, *1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc.*, 2021 WL 147139, at *4–6 (W.D. Pa. Jan. 15, 2021) (rebuffing insured's reliance upon *Optical Services* because a "growing body of case law [has] reject[ed] the contrived definition of 'direct physical loss of or damage to' that would provide coverage for economic losses unrelated to physical impact to the covered structure" pressed in that suit).

a. Beniak Alleges No Physical Change to the Property

The overwhelming authority supporting dismissal of Beniak's allegations follows inescapably from the Third Circuit's affirmation years ago that, under New Jersey law, direct physical loss or damage requires an actual, tangible alteration to property. *See Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235–36 (3d Cir. 2002) ("In ordinary parlance and widely accepted definition, physical damage to property means a distinct, demonstrable, and physical alteration of its structure."); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 245 F. Supp. 2d 563, 579 (D.N.J. 2001) ("[t]he requirement that the damage or loss be physical is central to the nature of coverage"), *aff'd*, 311 F.3d 226 (3d Cir. 2002). Because "direct physical" modifies both "loss" and "damage," New Jersey law requires that for there to be a covered loss, any interruption in business must be caused by some ***physical*** problem with the covered property. *Port Auth.*, 311 F.3d at 235–36 (citing 10 Couch on Insurance § 148:46 (3d ed. 1998)). The alleged loss or damage must be "actual"; pure economic harm untethered to any physical alteration to property is insufficient to trigger coverage. *7th Inning*, 2021 WL 800595, at *3 (loss of income and expenses "not enough"); *Boulevard Carroll*, 2020 WL 7338081, at *2 (same).

In *Port Authority of New York & New Jersey v. Affiliated FM Insurance Co.*, 311 F.3d 226 (3d Cir. 2002), the owner of various facilities that had been built

using asbestos and thus contained asbestos products sought coverage under a policy that required direct physical loss or damage to property for expenses incurred in conjunction with the removal of asbestos-containing materials from its buildings. *Id.* at 230. The insured alleged that "physical damage has occurred in these structures as a result of the 'presence of asbestos,' [the] 'threat of release and reintrainment of asbestos fibers,' and the 'actual release and reintrainment of asbestos fibers.'" *Id.* Applying New Jersey law, the Third Circuit affirmed the district court's rejection of that argument, ruling that the insured had not suffered any physical loss or damage, because it had failed to show "a distinct, demonstrable, and physical alteration" of its property. *Id.* at 235. As the Third Circuit emphasized, the mere presence of the asbestos did not trigger coverage; only if such an unwanted substance "ma[d]e the structure uninhabitable and unusable" might there be direct physical loss. *Id.* at 236.

Other provisions in Beniak's Policy confirm that its property must tangibly change for there to be coverage. For instance, the Policy provides Business Income and Extra Expense coverage for Beniak's operations only during the "period of restoration," which ends when property is either "repaired, rebuilt[,] or replaced" or Beniak's business resumes at a "new permanent location." McNally Decl., Ex. A, 48. The Policy's use of "repaired, rebuilt[,] or replaced" is no accident; that language connotes physical harm because coverage is triggered only

if an actual, physical alteration in the insured property occurs. *See, e.g.*, *Zagafen Bala, LLC v. Twin City Fire Ins. Co.*, 2021 WL 131657, at *6 (E.D. Pa. Jan. 14, 2021) (in light of policy's period-of-restoration language, "there must be something to repair, rebuild, or replace—none of which exists for the loss of use suffered by the Plaintiffs"); *Toppers Salon*, 2020 WL 7024287, at *4 (period-of-restoration provision "make[s] clear that there must be some sort of physical damage to the property that can be the subject of a repair, rebuilding, or replacement"); *Indep. Rest. Grp.*, 2021 WL 131339, at *6 (refusing to "read[] the Policy to cover mere loss of use untethered to any physical condition of the property," as doing so would render period-of-restoration provision "superfluous or nonsensical"); *Kahn*, 2021 WL 422607, at *6 (conclusion that "physical loss must require some tangible issue with the physical structure of the business's premises … bolstered by" period-of-restoration language); *DeMoura v. Cont'l Cas. Co.*, 2021 WL 848840, at *5 (E.D.N.Y. Mar. 5, 2021) (period-of-restoration language confirms that direct physical loss of or damage to property "requires tangible harm to that property").

Beniak's claims fail because Beniak does not, and cannot plausibly, allege any direct physical loss of or damage to the insured property. Beniak's Complaint includes the conclusory assertion that it "suffered a direct physical loss of and damage to [its] property." Compl. (ECF No. 1) ¶ 44. But pleading "[t]hreadbare

recitals of the elements of a cause of action, supported by mere conclusory statements," is insufficient; the Complaint must include ***some*** supporting facts. *Guariglia v. Loc. 464A United Food & Com. Workers Union Welfare Serv. Ben. Fund*, 2013 WL 6188510, at *2 (D.N.J. Nov. 25, 2013). Just as in other cases dismissed on the pleadings, Beniak's Complaint nowhere asserts what physical damage occurred, how the physical damage occurred, when the physical damage occurred, and what, if anything, needs to be repaired, replaced, or rebuilt as a result. *See, e.g.*, *Manhattan Partners*, 2021 WL 1016113, at *2 (granting motion to dismiss COVID-19–related claims where insured failed to allege facts showing properties were physically damaged); *Mac Prop.*, 2020 WL 7422374, at *9 (same).

Acknowledging that the coronavirus has not been found in or on its insured property, Beniak instead suggests that there was direct physical loss of or damage to its restaurant because Beniak has been "unable to use [the] property for its intended purpose." Compl. (ECF No. 1) ¶¶ 44, 49.[7] But under the plain language of the Policy and black letter New Jersey law, the mere loss of functionality, without any tangible alteration in the property, is insufficient to establish direct

[7] From the outset of this lawsuit, Beniak has consistently conceded that its losses were "not because coronavirus was found in or on [its] insured property." Compl. (ECF No. 1) ¶ 49. And since then, Beniak has likewise admitted that "[c]oronavirus has *never* been present on or in [its restaurant]." Beniak's Responses to IINA's Interrogatory No. 6 (Mar. 2, 2021). Such a concession is fatal to Beniak's claims and demonstrate why the Complaint should be dismissed with prejudice.

physical loss or damage as a matter of law. *See Boulevard Carroll*, 2020 WL 7338081, at *2 (allegations that "by forcing him to close his business, the Stay-At-Home Orders caused Plaintiff to lose income and incur expenses" were "not enough" to establish coverage); *7th Inning*, 2021 WL 800595, at *3 (similar); *see also Zagafen Bala*, 2021 WL 131657, at *5 (same conclusion under Pennsylvania law); *Toppers Salon*, 2020 WL 7024287, at *4 (same); *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, 2020 WL 6545893, at *3 (E.D. Pa. Nov. 6, 2020) (same); *7th Inning*, 2021 WL 1153147, at *2 (granting Rule 12(c) motion for lack of physical loss of or damage to insured property, even where insured alleged "it was 'statistically certain' that the COVID-19 virus was 'present' on its property"). Indeed, New Jersey courts have dismissed complaints for lack of physical loss of or damage to property where the plaintiffs offered the exact same allegations Beniak offers here. *Compare, e.g.*, *Boulevard Carroll*, 2020 WL 7338081, at *1, *and 7th Inning*, 2021 WL 800595, at *1, *with* Compl. (ECF No. 1) ¶¶ 8–9, 44, 86, 96.

b. Beniak Does Not, and Cannot, Plead Any Facts Showing That the Civil-Authority Orders Caused Direct Physical Loss of or Damage to Property

The same principles dispose of Beniak's suggestion that it suffered direct physical loss of and damage to its property from the civil-authority orders issued to stop the spread of COVID-19. *See* Compl. (ECF No. 1) ¶¶ 86, 96. It is well

settled that prophylactic government orders issued to avoid future harm do not satisfy the "direct physical loss of or damage to property" requirement. *See, e.g.*, *Boulevard Carroll*, 2020 WL 7338081, at *2 (no coverage where plaintiff alleged that civil-authority orders caused it to lose income and incur expenses because orders "were issued to mitigate the spread of the highly contagious novel coronavirus" and plaintiff failed to allege facts showing physical damage); *7th Inning*, 2021 WL 800595, at *3 (same); *Downs Ford v. Zurich Am. Ins. Co.*, 2021 WL 1138141, at *4 (D.N.J. Mar. 25, 2021) (Martinotti, J.) (civil-authority orders "were issued as the direct result of COVID-19," not physical harm to property, and thus were "unable to trigger … Civil Authority coverage"); *Newchops*, 2020 WL 7395153, at *6 (no civil authority coverage where civil-authority orders intended to "mitigate the spread of COVID-19" were issued "in response to the COVID-19 health crisis, not damage to any property—the insureds' or another's"); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 844 (N.D. Cal. 2020) ("Because the orders were preventative … the complaint does not establish the requisite causal link between prior property damage and the government's closure order."); *Ballas Nails & Spa, LLC v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 37984, at *5 (E.D. Mo. Jan. 5, 2021) (similar); *Cafe Plaza de Mesilla Inc. v. Cont'l Cas. Co.*, 2021 WL 601880, at *7 (D.N.M. Feb. 16, 2021) ("Plaintiff has not plausibly alleged that the closure orders were issued for a purpose other than to

prevent the spread of COVID-19.").

For example, in *Newman Myers Kreines Gross, P.C. v. Great Northern Insurance Co.*, 17 F. Supp. 3d 323 (S.D.N.Y. 2014), the court held that "mere loss of use of a premises, where there has been no physical damage to such premises," is not encompassed by the policy term "direct physical loss or damage." *Id.* at 331.[8] There, a New York utility preemptively shut off power to preserve the integrity of the city's utility system in anticipation of hurricane-related flooding. *Id*. at 325. As a result of the power outage, the plaintiff could not access its property and alleged loss of business income and extra expense under its insurance policy with the defendant. *Id*. The plaintiff's property did not suffer any flooding or damage during the storm. *Id*. at 326. The court rejected the plaintiff's argument that "the policy term 'direct physical loss or damage' is met by the preemptive closure of its building in preparation for a coming storm," because there was no "compromise to the physical integrity of the workplace." *Id*. at 329–30.

The *Newman Myers* court also distinguished previous cases finding coverage where a closure order prevented access to a damaged property because those cases involved closure "due to either a physical change for the worse in the premises … or a newly discovered risk to [] its physical integrity." *Id*. at 330. Such

[8] Although *Newman Myers* involved New York law, the Third Circuit has said that there "appears to be no substantive difference in the law" of New York and New Jersey on the direct-physical-loss-or-damage issue. *Port Auth.*, 311 F.3d at 233.

characteristics are not presented by a "preemptive decision" to shut off power. *Id.* Because "[t]he critical policy language here—'direct physical loss or damage'—… unambiguously[] requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage," and the plaintiff could not show any loss or damage to its property as a result of the closure, the court held in favor of the insurer as a matter of law. *Id.* at 331.

The same reasoning equally applies to preclude coverage in this case. Indeed, courts in the Third Circuit and around the country have dismissed COVID-19–related insurance-coverage claims predicated on the impact of civil-authority orders for exactly that reason. *See supra* at 20–22 (collecting illustrative cases). This Court should likewise dismiss Beniak's Business Income and Extra Expense claims here.

II. BENIAK'S CIVIL AUTHORITY CLAIM FAILS BECAUSE BENIAK DOES NOT ALLEGE THAT ANY AUTHORITY PROHIBITED ACCESS DUE TO PHYSICAL DAMAGE TO PROPERTY

Like Business Income and Extra Expense coverage, Civil Authority coverage applies only if there is physical harm to some property within one mile of the insured premises, which Beniak does not plead. Nor has Beniak alleged that any civil-authority order actually prohibited access to Beniak's property. Accordingly, Beniak's assertion of Civil Authority coverage fails, too.

a. Beniak Does Not Allege That Access Was Prohibited Because of Offsite Property Damage

Under the Policy's Civil Authority provision, coverage arises only where the action of a civil authority prohibits access to the insured property due to damage to property within one mile thereof. McNally Decl., Ex. A, 41. That is, coverage requires that "[t]he action of civil authority [be] taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage." *Id.* But, as Beniak itself acknowledges, the orders cited by Beniak were issued "to mitigate the COVID-19 pandemic," ***not*** to respond to any property damage. Compl. (ECF No. 1) ¶¶ 78–79, 88, 105–06, 113, 120–21, 128; *see Mac Prop.*, 2020 WL 7422374, at *9 ("There is no direct physical loss or damage to property which resulted in the order of civil authority."); *Newchops*, 2020 WL 7395153, at *6 (no civil authority coverage because "[t]he shutdown orders and accompanying proclamations were in response to the COVID-19 health crisis, not damage to any property"); *TAQ Willow Grove, LLC v. Twin City Fire Ins.*, 2021 WL 131555, at *7 (E.D. Pa. Jan. 14, 2021) (rejecting insured's contention that "the orders were issued in response to a 'dangerous physical condition' of the property"); *Zagafen Bala*, 2021 WL 131657, at *7 (similar). Moreover, just as Beniak fails to allege direct physical loss or damage to its own property, nowhere does Beniak allege that the authorities' orders resulted from any damage to property elsewhere. Yet, to satisfy the insuring

agreement, Beniak must plead (and later prove) physical damage to property specifically *within one mile* of its insured premises, McNally Decl., Ex. A, 41, which Beniak does not even attempt to do.[9] Thus, no coverage exists under the Policy's Civil Authority provision as a matter of law. *See, e.g.*, *Boulevard Carroll*, 2020 WL 7338081, at *2 (no civil authority coverage where plaintiff failed to show government orders caused "direct physical loss"); *7th Inning*, 2021 WL 800595, at *3 (same); *Mac Prop.*, 2020 WL 7422374, at *9 (same); *Arash Emami*, 2021 WL 1137997, at *2 (same); *Indep. Rest. Grp.*, 2021 WL 131339, at *8 ("general allegations that the coronavirus is present nearby does not mean nearby property suffered 'direct physical loss' or 'damage' as those terms apply in the Policy"); *Toppers Salon*, 2020 WL 7024287, at *4 (similar).

b. Beniak Does Not, and Cannot, Allege That the Civil-Authority Orders Prohibited Access to Beniak's Property

Beniak's Civil Authority claim also fails for the separate reason that Beniak does not plead that any civil-authority orders actually prohibited access to Beniak's restaurant. Civil Authority coverage is triggered only if an action of a civil authority "prohibits access" to the insured premises. McNally Decl., Ex. A, 41. But no civil-authority order ever prohibited access to Beniak's restaurant. To the

[9] Indeed, Beniak recently conceded in sworn interrogatory responses that it "has no information relating to any damage to the property of others" whatsoever. *See generally* Beniak's Responses to IINA's Interrogatory No. 9 (Mar. 2, 2021).

contrary, the civil-authority orders at most temporarily restricted Beniak from serving food on-premises, while allowing the restaurant to provide takeout and delivery services and grant access to employees and staff. *See supra* at 9. For this additional reason, Beniak's Civil Authority claim fails as a matter of law. *See, e.g.*, *1 S.A.N.T.*, 2021 WL 147139, at *7 (no civil authority coverage for insured restaurant that was permitted to remain open for takeout and delivery services because "reduction to partial access does not suffice to trigger business income coverage under the Civil Authority provisions"); *4431, Inc.*, 2020 WL 7075318, at *13 (similar); *Indep. Rest. Grp.*, 2021 WL 131339, at *8 ("[W]hile orders barred the public from *dining* at the premises and, for a time, from ordering to-go food inside the premises, the public was never barred from accessing the premises to pick-up food."); *Clear Hearing Sols., LLC v. Cont'l Cas. Co.*, 2021 WL 131283, at *10 (E.D. Pa. Jan. 14, 2021) (similar); *1210 McGavock St. Hosp. Partners, LLC v. Admiral Indem. Co.*, 2020 WL 7641184, at *10 (M.D. Tenn. Dec. 23, 2020) (same); *Michael Cetta*, 2020 WL 7321405, at *12 (concluding that "[t]he fact that [the insured] could have continued to operate its restaurant in some capacity [wa]s fatal to [the insured's] claims for civil authority coverage").

III. THE POLICY'S VIRUS EXCLUSION BARS COVERAGE

Beniak's claims also fail for the independent reason that, even if Beniak were otherwise entitled to Business Income, Extra Expense, or Civil Authority

coverage, the Policy's virus exclusion would unambiguously exclude it here.

The virus exclusion expressly states that IINA will not pay for loss or damage caused by or resulting from any "virus … that induces or is capable of inducing physical distress, illness or disease." McNally Decl., Ex. A, 82. Courts should be careful to not disregard the "clear import and intent" of a policy's exclusion, avoiding "far-fetched" interpretations of its language. *Montville Twp. Bd. of Educ. v. Zurich Am. Ins. Co.*, 2017 WL 2380175, at *8 (D.N.J. June 1, 2017). Here, the exclusion contains "no ambiguity whatsoever," and Beniak does not allege otherwise. *Stafford v. T.H.E. Ins. Co.*, 309 N.J. Super. 97, 104 (App. Div. 1998); *see, e.g.*, *Quakerbridge*, 2021 WL 1214758, at *4 ("While the Court is sympathetic to the struggles Plaintiff and businesses throughout the country have faced during the COVID-19 pandemic, it may not ignore the plain language of the Policy, nor rewrite the contract for the benefit of either party."); *Eye Care Ctr. of N.J., PA v. Twin City Fire Ins. Co.*, 2021 WL 457890, at *3 (D.N.J. Feb. 8, 2021) (McNulty, J.) (concluding that "weight of authority" supports plain-text reading of virus exclusion to unambiguously bar coverage); *Chester C. Chianese DDS v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 1175344, at *3 (D.N.J. Mar. 27, 2021) (Shipp, J.) (dismissing insured's complaint in light of unambiguous virus exclusion in COVID-19 case); *Carpe Diem Spa, Inc. v. Travelers Cas. Ins. Co.*, 2021 WL 1153171, at *3 (D.N.J. Mar. 26, 2021) (Thompson, J.) (same); *Garmany*, 2021 WL

1040490, at *7 (same); *Dezine Six v. Fitchburg Mut. Ins. Co.*, 2021 WL 1138146, at *5 (D.N.J. Mar. 25, 2021) (Martinotti, J.) (same); *Body Physics*, 2021 WL 912815, at *5 (same); *Causeway*, 2021 WL 486917, at *5 (same); *Podiatry Foot & Ankle Inst. P.A. v. Hartford Ins. Co. of the Midwest*, 2021 WL 1326975, at *2–3 (D.N.J. Apr. 9, 2021) (McNulty, J.) (same); *Stern & Eisenberg, P.C. v. Sentinel Ins. Co.*, 2021 WL 1422860, at *5 (D.N.J. Apr. 14, 2021) (Bumb, J.) (same); *7th Inning*, 2021 WL 800595, at *3 (Wigenton, J.) (holding policy "clearly and explicitly exclude[d] coverage for damage, loss or expense arising from a virus").

In paragraph after paragraph, the Complaint alleges that the civil-authority orders were caused by or resulted from the coronavirus, which obviously qualifies as a virus capable of causing physical distress, illness, and disease. *See, e.g.*, Compl. (ECF No. 1) ¶¶ 3, 30, 78, 88, 105, 113, 120, 128. In fact, the words "virus," "coronavirus," and "COVID-19" appear more than *one hundred times* in the Complaint. According to the Complaint, COVID-19 is a "worldwide pandemic" constituting "a public health emergency of international concern" because of its "alarming levels of spread and severity," ease of transmission in both symptomatic and asymptomatic cases, and startling number of deaths. *Id.* ¶¶ 1, 21–30. It alleges that the State of New Jersey declared a public health emergency to "direct state resources to affected communities, and prohibit[] excessive price increases on goods and services," and subsequently issued a civil-

authority order to restrict travel and close non-essential businesses until further notice. *Id.* ¶ 31. The Complaint refers to these orders as the "corresponding response" to the COVID-19 pandemic intended "to stop the spread of the outbreak." *Id.* ¶ 8. Indeed, Beniak contends that the orders were "actions taken by civil authorities to stop the human to human and surface to human spread of the COVID-19 outbreak." *Id.* ¶ 9. The Complaint also alleges that the State of New Jersey's orders were "precautionary measures," intended "to prevent the spread of COVID-19 in the future." *Id.* ¶ 49. This is consistent with the language of the orders themselves, which were issued "in light of the dangers posed by COVID-19." N.J. Exec. Order No. 104 (Mar. 16, 2020); N.J. Exec. Order No. 107 (Mar. 21, 2020). In short, Beniak alleges that ***because of the coronavirus***, its on-premises food service was suspended. *E.g.*, Compl. (ECF No. 1) ¶¶ 32, 44.

Under Beniak's own allegations, its alleged losses were thus "caused by or resulting from" the virus and are therefore excluded under the virus exclusion, as the Honorable Chief Judge Wolfson and numerous other courts adjudicating similar COVID-19–related cases "have nearly unanimously determined." *N&S Rest., LLC v. Cumberland Mut. Fire Ins. Co.*, 2020 WL 6501722, at *4–7 (D.N.J. Nov. 5, 2020) (Kugler, J.); *see, e.g.*, *Body Physics*, 2021 WL 912815, at *6 (virus exclusion unambiguously barred coverage where insured's losses "occurred because of the COVID-19 pandemic and the Governor's orders, which themselves

were caused by the virus"); *7th Inning*, 2021 WL 800595, at *3 (virus exclusion barred coverage because civil-authority orders "were issued to mitigate the spread of the highly contagious novel coronavirus" and therefore insured's "losses [we]re inextricably tied to that virus and … not covered by the Polic[y]"); *Boulevard Carroll*, 2020 WL 7338081, at *2 (similar); *Causeway*, 2021 WL 486917, at *5 (same); *Garmany*, 2021 WL 1040490, at *6–7 (same); *Benamax Ice, LLC v. Merchant Mut. Ins. Co.*, 2021 WL 1171633, at *6 (D.N.J. Mar. 29, 2021) (Rodriguez, J.) (same); *Stern*, 2021 WL 1422860, at *5 (same); *Mac Prop.*, 2020 WL 7422374, at *9 (same); *Colby Rest. Grp., Inc. v. Utica Nat'l Ins. Grp.*, 2021 WL 1137994, at *5 (D.N.J. Mar. 12, 2021) (Bumb, J.) (same); *Del. Valley*, 2021 WL 567994, at *4 (same); *Carpe Diem Spa*, 2021 WL 1153171, at *3 (same); *Podiatry Foot & Ankle Inst.*, 2021 WL 1326975, at *2-3 (same); *Eye Care*, 2021 WL 457890, at *3–4 (same); *Park Savoy*, 2021 WL 1138020, at *2–3 (same); *Brian Handel*, 2020 WL 6545893, at *4 ("There is no other way to characterize COVID-19 than as a virus which causes physical illness and distress. Therefore, the virus exclusion unambiguously bars coverage for plaintiff's claims due to COVID-19.").

Beniak's theory seems to be that the orders, not the virus, caused its losses, but—as several courts have already recognized in the COVID-19 context—that argument is foreclosed by New Jersey law, because the orders themselves resulted

from the virus. *See, e.g.*, *7th Inning*, 2021 WL 800595, at *3 ("Because the Stay-at-Home Orders were issued to mitigate the spread of the highly contagious novel coronavirus, Plaintiffs' losses are tied inextricably to that virus and are not covered by the Policies."); *Causeway*, 2021 WL 486917, at *6 (virus exclusion barred coverage because "[t]he Executive Orders were issued for the sole reason of reducing the spread of the virus that causes COVID-19 and would not have been issued but for the presence of the virus in the State of New Jersey"); *Body Physics*, 2021 WL 912815, at *6 (similar); *Downs Ford*, 2021 WL 1138141, at *6 (same).

The New Jersey Appellate Division's decision in *Robert W. Hayman, Inc. v. Acme Carriers, Inc.*, 303 N.J. Super. 355 (App. Div. 1997), drives home the point. There, the plaintiff sustained a loss of 200 cases of shrimp because they were stolen by a truck driver transporting the load. *Id.* at 356. The plaintiff argued that its injury stemmed from the insured defendant's negligent supervision of its employee, the driver. The defendant's policy contained an exclusion for loss or damage "caused by or resulting from" fraudulent, dishonest, or criminal acts by the insured or any employee. *Id.* at 357. The plaintiff argued that the exclusion did not apply because the loss was caused by the negligent supervision of the defendant, not the employee's theft. The court observed, however, that the "negligent supervision [wa]s premised on [the defendant's] failure to protect the plaintiff's property and [wa]s intertwined with the theft of its shrimp." *Id.* at 359.

And because of the "inextricable intertwining of the theft and claimed loss, coverage under these circumstances would not be consistent with the reasonable expectation of the parties." *Id.* at 361.

Here, Beniak does not, and cannot, point to a separate cause other than the coronavirus and the governmental orders issued in response to that virus as the cause of its alleged losses. As in *Hayman*, the orders are thus "inextricably intertwined" with the virus, and the virus exclusion therefore unambiguously bars coverage in this case as a matter of law.

CONCLUSION

Third Circuit precedent applying well-established New Jersey law makes clear that there is no coverage in circumstances like those here. This Court should endorse the unanimous view of its sister courts in the District of New Jersey and hold that the coronavirus does not cause direct physical loss of or damage to property, and in any event, the virus exclusion unambiguously bars coverage as a matter of law. IINA respectfully requests that the Court grant its motion for judgment on the pleadings, dismiss the Complaint with prejudice, and enter judgment in IINA's favor on all of Beniak's claims.

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Respectfully submitted,

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