IN THE

United States Court of Appeals

For The

Eleventh Circuit

No. 21-10672

Rococo Steak, LLC,

Plaintiff-Appellant,

vs.

Aspen Specialty Insurance Company,

Defendant-Appellee.

On Appeal from the
United States District Court for the Middle District of Florida
District Court Case No. 8:20-cv-02481-VMC-SPF

BRIEF OF DEFENDANT-APPELLEE ASPEN SPECIALTY INSURANCE COMPANY

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AMENDED CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Eleventh Circuit Rules and Internal Operating Procedures, Defendant-Appellee Aspen Specialty Insurance Company ("Aspen"), through its undersigned attorneys, hereby certifies that the following is a complete list of persons and entities that have an interest in the outcome of this appeal:

1. Aspen American Insurance Company, parent company of appellee
2. Aspen Insurance Holdings Limited (AHL), parent company of Aspen (UK) Holdings Limited
3. Aspen Specialty Insurance Company, appellee
4. Aspen U.S. Holdings, Inc., parent company of Aspen American Insurance Company
5. Aspen (UK) Holdings Limited, parent company of Aspen U.S. Holdings, Inc.
6. Berk, William, counsel for appellee
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8. Betar, Patrick, counsel for appellee

9. Caledon Concept Partners Corp., owner of appellant
10. Conrad & Scherer, LLP, counsel for appellant
11. Covington, Hon. Virginia M. Hernandez, United States District Judge for the Middle District of Florida
12. Osber, Steven Harris, counsel for appellant
13. Roberts, Kyle S., counsel for appellant
14. Rococo Steak, LLC, appellant
15. Rognes, Chandler M., counsel for appellee
16. Seitz, Virginia, counsel for appellee
17. Sidley Austin LLP, counsel for appellee
18. Swindoll, Alan, counsel for appellee
19. Ostolaza, Yvette, counsel for appellee
20. Wechkin, Robin, counsel for appellee

CORPORATE DISCLOSURE STATEMENT

Aspen Specialty Insurance Company is a wholly owned subsidiary of Aspen American Insurance Company; Aspen American Insurance Company is a wholly owned subsidiary of Aspen U.S. Holdings, Inc.; Aspen U.S. Holdings, Inc. is a wholly owned subsidiary of Aspen (UK) Holdings Limited; and Aspen (UK) Holdings, Limited is a wholly owned

subsidiary of Aspen Insurance Holdings Limited. Certain preference shares and depositary shares of Aspen Insurance Holdings Limited are listed on the New York Stock Exchange under stock ticker symbol "AHL."

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee Aspen Specialty Insurance Company respectfully requests oral argument pursuant to 11th Cir. R. 28-1(c). This appeal involves the question whether, under Florida law, economic losses resulting from compliance with government closure orders issued to curb the spread of COVID-19 were caused by "direct physical loss of or damage to property"—a prerequisite for coverage under Plaintiff-Appellant Rococo Steak, LLC's property insurance policy. Resolution of this question involves the application of this Court's decision in *Mama Jo's v. Sparta Insurance*, 823 F. App'x 868 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 1737 (2021), to losses arising from partial closures in the COVID-19 context. The issue is of critical importance to the insurance market in Florida. Oral argument will be helpful to the Court's consideration of the important issues presented by this appeal.

TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT i
JURISDICTIONAL STATEMENT 1
STATEMENT OF THE ISSUES 1
STATEMENT OF THE CASE 2
I. Nature of the Case 2
II. Course of Proceedings and Decision Below 3
III. Statement of Relevant Facts 5
A. The Closure Orders 5
B. The Policy 6
IV. Standard of Review 8
SUMMARY OF THE ARGUMENT 9
ARGUMENT 14
I. Rococo Has Not Alleged a Loss Covered By Its Policy Under Florida Law 14
A. Rococo Failed to Plead Facts Showing That Its Alleged Losses Were Caused by Loss of or Damage to Property 15
B. Additional Policy Language Confirms that Rococo Has Not Alleged Direct Physical Loss or Damage 27
C. Rococo's Claims Under the Civil Authority Provision Fail for Additional Independent Reasons 29
D. Property Insurance Policies Were Not Designed to Address Losses From Global Pandemics or Other Highly Correlated Risks 31
II. Rococo's Contrary Arguments All Lack Merit 33
A. Rococo's Plain Meaning Argument is Inconsistent With the Governing Legal Framework and is Wrong 34
B. "Direct Physical Loss" Has a Meaning Distinct from "Direct Physical Damage," but That Meaning is not Loss of Use 35

C. Loss of Functionality or Suspected Contamination of Property, Without Tangible Harm, Does Not Constitute "Direct Physical Loss" 39
D. Neither The Absence of a Virus Exclusion Nor the Absence of a "Structural Alteration" Requirement Supports Coverage 45
E. Rococo Did Not Allege Tangible Harm 47
III. Rococo's Alleged Losses Are Excluded 52
A. The Loss of Use Exclusion 52
B. The Ordinance or Law Exclusion 54
IV. Certification to the Florida Supreme Court is Inappropriate 56
A. Rococo Fails to Satisfy this Court's Standard for Certification 57
B. Federal Courts Have Overwhelmingly Declined to Certify the Issues Presented 59
CONCLUSION 60

TABLE OF AUTHORITIES

Page(s)

Cases

Advance Cable Co., LLC v. Cincinnati Ins. Co.,
788 F.3d 743 (7th Cir. 2015) 34

Allen v. United Servs. Auto. Ass'n,
No. 3:13cv143-MCR/CJK, 2014 WL 1303650 (N.D. Fla. Mar. 30, 2014), *aff'd,* 790 F.3d 1274 (11th Cir. 2015) 15

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 8, 49

Atma Beauty, Inc. v. HDI Glob. Specialty SE,
No. 1:20-CV-21745, 2020 WL 7770398 (S.D. Fla. Dec. 30, 2020) 21

Bahama Bay II Condo. Ass'n, Inc. v. United Nat'l Ins. Co.,
374 F. Supp. 3d 1274 (M.D. Fla. 2019) 54

Baker v. Or. Mut. Ins. Co.,
No. 20-CV-05467-LB, 2021 WL 1145882 (N.D. Cal. Mar. 25, 2021) 49

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 49, 51

Blue Springs Dental Care, LLC v. Owners Ins. Co.,
488 F. Supp. 3d 867 (W.D. Mo. 2020) 39

Bluegrass, LLC v. State Auto. Mut. Ins. Co.,
No. 2:20-CV-414, 2021 WL 42050 (S.D. W. Va. Jan. 5, 2021) 43

Cafe Int'l Holdings Co., LLC v. Westchester Surplus Lines Ins. Co.,
No. 20-21641-CIV, 2021 WL 1803805 (S.D. Fla. May 4, 2021) 27, 30, 46

Catlin Dental, P.A. v. Cincinnati Indem. Co.,
No. 20-CV-004555, 2020 WL 8173333 (Fla. Cir. Ct. Dec. 11, 2020) 19, 48

Cole v. PRN Real Est. & Invs., Ltd.,
829 F. App'x 399 (11th Cir. 2020), *cert. denied,* 141 S. Ct. 1740 (2021) 56

DAB Dental, PLLC v. Main St. Am. Prot. Ins. Co.,
No. 20-CA-5504, 2020 WL 7137138 (Fla. Cir. Ct. Nov. 10, 2020) 19

Dickie Brennan & Co., Inc. v. Lexington Ins. Co.,
636 F.3d 683 (5th Cir. 2011) 21

Dime Fitness, LLC v. Markel Ins. Co.,
No. 20-CA-5467, 2020 WL 6691467 (Fla. Cir. Ct. Nov. 10, 2020) 19, 38

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) 60

Emerald Coast Rest., Inc. v. Aspen Specialty Ins. Co.,
No. 3:20cv5898, 2020 WL 7889061 (N.D. Fla. Dec. 18, 2020) 20

Ernie Haire Ford, Inc. v. Ford Motor Co.,
260 F.3d 1285 (11th Cir. 2001) 9, 14

Essex Ins. Co. v. BloomSouth Flooring Corp.,
562 F.3d 399 (1st Cir. 2009) 44

Garcia v. Fed. Ins. Co.,
473 F.3d 1131 (11th Cir. 2006) 15

Gen. Mills, Inc. v. Gold Medal Ins. Co.,
622 N.W.2d 147 (Minn. 2001) 44

Graspa Consulting, Inc. v. United Nat'l Ins. Co.,
No. 20-23245, 2021 WL 1540907 (S.D. Fla. Apr. 16, 2021) 17, 57

Gregory Packaging Inc. v. Travelers Prop. Cas. Co. of Am.,
No. 2:12-CV-4418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) 44

Harris v. United Auto. Ins. Gp.,
579 F.3d 1227 (11th Cir. 2009) 5, 52

Henry's La. Grill, Inc. v. Allied Ins. Co. of Am.,
495 F. Supp. 3d 1289 (N.D. Ga. 2020) 23, 37, 59

Hillcrest Optical, Inc. v. Cont'l Cas. Co.,
497 F. Supp. 3d 1203 (S.D. Ala. Oct. 21, 2020) 28, 60

Homeowners Choice Prop. & Cas. v. Miguel Maspons,
211 So. 3d 1067 (Fla. Dist. Ct. App. 2017) ..... *passim*

Horizon Dive Adventures, Inc. v. Tokio Marine Specialty Ins. Co.,
No. 20-CA-159-P (Fla. Cir. Ct. Oct. 8, 2020) 20

Hudson Ins. Co. v. Am. Elec. Corp.,
957 F.2d 826 (11th Cir. 1992) 14

Hughes v. Potomac Ins. Co. of D.C.,
199 Cal. App. 2d 239 (1962) 46

Isaac's Deli, Inc. v. State Auto Prop. & Cas. Ins. Co.,
No. 5:20-CV-06165, 2021 WL 1945713 (E.D. Pa. May 14, 2021) 55

In re Lentek Int'l, Inc.,
346 F. App'x 430 (11th Cir. 2009) 58

Mace Marine, Inc. v. Tokio Marine Specialty Ins. Co.,
No. 20-CA-120-P (Fla. Cir. Ct. Oct. 8, 2020) 20

Malaube, LLC v. Greenwich Ins. Co.,
No. 20-22615-Civ, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020) 20, 27, 36, 57

Mama Jo's, Inc. v. Sparta Ins. Co.,
No. 17-CV-23362-KMM, 2018 WL 3412974 (S.D. Fla. June 11, 2018), *aff'd*, 823 F. App'x 868 (11th Cir. 2020) 10

Mama Jo's v. Sparta Ins.,
823 F. App'x 868 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 1737 (2021) ..... *passim*

Manpower Inc. v. Ins. Co. of the State of Pa.,
No. 08C0085, 2009 WL 3738099 (E.D. Wisc. Nov. 3, 2009) 35

Marler v. Aspen Am. Ins. Co.,
No. 2:20-CV-00616, 2021 WL 1599193 (W.D. Wash. Apr. 23, 2021) 59

Motorists Mut. Ins. Co. v. Hardinger,
131 F. App'x 823 (3d Cir. 2005) 45

MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.,
187 Cal. App. 4th 766 (2010) 16

Mudpie v. Travelers Casualty Ins. Co. of Am.,
487 F. Supp. 3d 834 (N.D. Cal. 2020) 41, 42, 53

Murray v. State Farm Fire & Casualty,
509 S.E.2d 1 (W. Va. Ct. App. 1998) 42, 43

Nautilus Grp., Inc. v. Allianz Glob. Risks US,
No. C11-5281 BHS, 2012 WL 760940 (W.D. Wash. Mar. 8, 2012) 37

Netherlands Ins. Co. v. Main St. Ingredients, LLC,
745 F.3d 909 (8th Cir. 2014) 44

Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.,
17 F. Supp. 3d 323 (S.D.N.Y. 2014) 28

Pane Rustica, Inc. v. Greenwich Ins. Co.,
No. 8:20-CV-1783, 2021 WL 1087219 (M.D. Fla. Mar. 22, 2021) 21

Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.,
400 F.3d 613 (8th Cir. 2005) 21

PF Sunset View, LLC v. Atl. Specialty Ins. Co.,
No. 20-81224, 2021 WL 1341602 (S.D. Fla. Apr. 9, 2021) 19

Plan Check Downtown III, LLC v. AmGuard Ins. Co.,
485 F. Supp. 3d 1225 (C.D. Cal. 2020) 57

Posner v. Essex Ins. Co., Ltd.,
178 F.3d 1209 (11th Cir. 1999) 58

R.T.G. Furniture Corp. v. Hallmark Specialty Ins. Co.,
No. 8:20-CV-02323-T-30AEP, 2021 WL 686864 (M.D. Fla. Jan. 22, 2021) 17

Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.,
499 F. Supp. 3d 1178 (S.D. Fla. 2020) 30

Real Hosp. LLC v. Travelers Cas. Ins. Co. of Am.,
499 F. Supp. 3d 288 (S.D. Miss. 2020) 28, 32, 33, 38

Roundabout Theatre Co. v. Cont'l Cas. Co.,
751 N.Y.S.2d 4 (N.Y. App. Div. 2002) 22

S. Dental Birmingham LLC v. Cincinnati Ins. Co.,
No. 2:20-CV-681-AMM, 2021 WL 1217327 (N.D. Ala. Mar. 19, 2021) 18

S. Fla. ENT Assocs., Inc. v. Hartford Fire Ins. Co.,
No. 20-23677, 2020 WL 6864560 (S.D. Fla. Nov. 13, 2020) 34

Sabella v. Wisler,
377 P.2d 889 (Cal. 1963) 46

Sandy Point Dental, PC v. Cincinnati Ins. Co.,
488 F. Supp. 3d 690 (N.D. Ill. Sept. 21, 2020) 23, 28

Sapuppo v. Allstate Floridian Ins. Co.,
739 F.3d 678 (11th Cir. 2014) 29

Sentinel Mgmt. Co. v. N.H. Ins. Co.,
563 N.W.2d 296 (Minn. 1997) 45

Serendipitous, LLC/Melt v. Cincinnati Ins. Co.,
No. 2:20-CV-00873-MHH, 2021 WL 1816960 (N.D. Ala. May 6, 2021) 18

Siegle v. Progressive Consumers Ins. Co.,
819 So. 2d 732 (Fla. 2002) 45

Simon Mktg., Inc. Co., v. Gulf Ins. Co.,
149 Cal. App. 4th 616 (2007) 22

Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.,
465 F.3d 834 (8th Cir. 2006) 22

Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Conn.,
No. 05-1315-JE 2007 WL 464715 (D. Or. Feb. 7, 2007) 45

Statton v. Fla. Fed. Jud. Nominating Commc'n,
959 F.3d 1061 (11th Cir. 2020) 8

Studio 417, Inc. v. Cincinnati Ins. Co.,
478 F. Supp. 3d 794 (W.D. Mo. 2020) 39

Sun Cuisine, LLC v. Certain Underwriters at Lloyd's, London,
No. 1:20-CV-21827, 2020 WL 7699672 (S.D. Fla. Dec. 28, 2020) 21

Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.,
913 So. 2d 528 (Fla. 2005) 15

Town Kitchen LLC v. Certain Underwriters at Lloyd's, London,
– F. Supp. 3d –, 2021 WL 768273 (S.D. Fla. Feb. 26, 2021) ..... *passim*

Trans Caribbean Lines, Inc. v. Tracor Marine, Inc.,
748 F.2d 568 (11th Cir. 1984) 58, 59

Travelers Cas. & Surety Co. v. Stewart,
663 F. App'x 784 (11th Cir. 2016) 29

Trinity Indus., Inc. v. Ins. Co. of N. Am.,
916 F.2d 267 (5th Cir. 1990) 22

Uncork & Create LLC v. Cincinnati Ins. Co.,
498 F. Supp. 3d 878 (S.D. W.Va. 2020) 50

Uncork & Create LLC v. Cincinnati Ins. Co.,
No. 2:20-CV-00401, 2021 WL 966886 (S.D. W. Va. Mar. 15, 2021) 42, 60

United Air Lines, Inc. v. Ins. Co. of State of Pa.,
439 F.3d 128 (2d Cir. 2006) 21

Universal Image Prods., Inc. v. Fed. Ins. Co.,
475 F. App'x 569 (6th Cir. 2012) 16

Urogynecology Specialists of Fla., LLC v. Sentinel Ins. Co., Ltd.,
No. 6:20-CV-1174, 2020 WL 5939172 (M.D. Fla. Sept. 24, 2020) 26

Vazquez v. Citizens Prop. Ins. Corp.,
304 So. 3d 1280 (Fla. Dist. Ct. App. 2020) 10, 16, 57

Wade D. Marler DDC v. Aspen Am. Ins. Co.,
No. 2:20-CV-00616-BJR, 2021 WL 2184878 (W.D. Wash. May 28, 2021) 24

Webb Dental Assocs. DMD PA v. Cincinnati Indem. Co.,
No. 1:20-CV-250-AW-GRJ, 2021 WL 800113 (N.D. Fla. Jan. 15, 2021) 21

Weiss v. City of Gainesville, Fla.,
462 F. App'x 898 (11th Cir. 2012) 56

Statutes and Constitutions

Fla. Const. art. § 3(b)(6) 56

Fla. Stat. § 252.36(1)(a) & (b) 54

Other Authorities

Couch on Insurance § 148.46 (3d ed. 2019) 22

Nat'l Ass'n of Ins. Comm'rs, NAIC Statement on Congressional Action Relating to COVID-19 (Mar. 25, 2020) 31

Press Release, Am. Prop. Cas. Ins. Ass'n, APCIA Releases New Business Interruption Analysis (Apr. 6, 2020) 32

JURISDICTIONAL STATEMENT

The jurisdictional statement of Plaintiff-Appellant Rococo Steak, LLC ("Rococo") is complete and correct.

STATEMENT OF THE ISSUES

1. Does Rococo's property insurance policy—which requires "direct physical loss of or damage to property" as a prerequisite to coverage—insure against economic losses resulting from government closure orders issued during the COVID-19 pandemic?

2. Does the Loss of Use Exclusion in Rococo's insurance policy bar Rococo's claims for economic losses resulting from government closure orders issued during the COVID-19 pandemic that temporarily affected Rococo's ability to use its property for certain purposes?

3. Does the Ordinance or Law Exclusion in Rococo's insurance policy bar Rococo's claims for economic losses resulting from government closure orders issued during the COVID-19 pandemic that temporarily affected Rococo's ability to use its property for certain purposes?

4. Should this Court certify Rococo's proposed question to the Florida Supreme Court?

STATEMENT OF THE CASE

I. Nature of the Case

This dispute, between a restaurant and a property insurer, is one of thousands that have arisen nationwide as a result of governmental orders issued during the COVID-19 pandemic. Business owners like Rococo have made claims on their property insurance policies, seeking to recover lost income and expenses, and have filed lawsuits against insurers such as Aspen Specialty Insurance Company ("Aspen") when those claims were denied. The overwhelming majority of courts that have examined the issue—including over thirty federal and state courts in Florida—have determined as a matter of law that a property insurance policy requiring "direct physical loss of or damage to property" does not cover economic losses arising from mere loss of use. Instead, "physical" loss of or damage to property requires actual, tangible harm to property to trigger coverage.

Rococo has alleged no such physical loss or damage here. It alleges only that it lost income and incurred expenses as a result of executive orders issued by Florida's Governor requiring businesses to cease non-essential operations. App. 29–40 (hereafter "Compl.").

Finding such allegations legally insufficient, the District Court granted Aspen's motion to dismiss. This is Rococo's appeal from that order.

Below, Aspen argued in the alternative that two exclusions in Rococo's policy provide independent bases for dismissing Rococo's claims: a "loss of use" exclusion that bars coverage when loss of use is not caused by physical harm to the property, App. 82 § B.2.b; and an "ordinance or law" exclusion that bars coverage when an ordinance restricts the use of property in situations where no property has suffered physical harm, *id.* at 80 § B.1.a. (We refer hereafter to Rococo's insurance policy, at App. 41–131, as the "Policy.") Here, Aspen contends that these exclusions independently preclude coverage and support affirmance.

II. Course of Proceedings and Decision Below

On September 22, 2020, Rococo filed suit against Aspen in Pinellas County, Florida, alleging breach of contract and seeking declaratory relief. App. 29. On October 23, 2020, Aspen removed the action to the District Court for the Middle District of Florida pursuant to diversity jurisdiction. *Id.* at 9. On January 27, 2021, the District

Court granted Aspen's motion to dismiss. *Id.* at 706–24 (hereafter "Order").

The District Court held that Rococo's alleged losses were not covered under the Policy. Citing this Court's decision in *Mama Jo's v. Sparta Insurance*, 823 F. App'x 868 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 1737 (2021), the court held that "Rococo must allege 'actual, concrete damage' to its property to fall within the insurance policy." *Id.* at 716. It explained that Rococo's "purely economic" losses were not the result of "physical" loss or damage and, thus, were not covered under the Business Income or Extra Expense provisions, "which both require 'direct physical loss of or damage' to the insured property." *Id.* at 720. The District Court also explicitly rejected Rococo's argument that COVID-19 contaminated and physically altered its property, recognizing that this Court "has unambiguously held that 'an item or structure that merely needs to be cleaned has not suffered a "loss" which is both "direct" and "physical."'" *Id.* at 716–17 (quoting *Mama Jo's*, 823 F. App'x at 879).

The District Court separately rejected Rococo's claims under the Civil Authority provision of the Policy, holding that Rococo failed to

show "how other properties in the surrounding areas were 'damaged' by COVID-19," "how the actions of civil authority were authorized in response to 'dangerous physical conditions,'" and "how the actions of civil authority prohibited access to the restaurant," as Rococo was permitted to continue delivery and takeout services. *Id.* at 721–22.

The court did not address Aspen's arguments that Rococo's claims are independently barred by two Policy exclusions: the Loss of Use and Ordinance or Law Exclusions. As noted, Aspen urges these exclusions as alternative grounds for affirmance here. *See Harris v. United Auto. Ins. Gp.*, 579 F.3d 1227, 1232 (11th Cir. 2009).

III. Statement of Relevant Facts

A. *The Closure Orders*

In response to the outbreak of COVID-19, Florida's Governor issued orders requiring public health precautions, including a temporary prohibition of on-premises dining for restaurants (the "Closure Orders"). Compl. at App. 34 ¶¶ 40–42. The Closure Orders did not prohibit Rococo from continuing to provide takeout and delivery services. *See id.* at App. 35 ¶ 40.

B. *The Policy*

Rococo contends that the Policy's Business Income, Extra Expense, and Civil Authority coverages apply to its alleged losses, and asserts breach of contract and declaratory relief claims as to Aspen's denial of coverage under each provision. *Id.* at App. 30 ¶¶ 5–7; Rococo Br. 4. The Business Income and Extra Expense provisions require, as a predicate for coverage, that economic losses be caused by direct physical loss or damage:

- Business Income: "We will pay for the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration.' The 'suspension' *must be caused by direct physical loss of or damage to property* at the [insured] premises[.]"

- Extra Expense: "Extra Expense means necessary expense you incur during the 'period of restoration' that you would not have incurred if there had been no *direct physical loss or damage to property* caused by or resulting from a Covered Cause of Loss."

Policy at App. 114 §§ A.1, A.2.b (emphases added). Rococo's Building and Personal Property Coverage similarly includes coverage for "direct physical loss of or damage to" Rococo's building and certain business personal property (like furniture). *Id.* at App. 62 § A. Rococo did not assert a claim based on the latter provision.

The principal question presented here is whether Rococo's claimed economic losses were caused by "direct physical loss of or damage to" the insured property.

Rococo also seeks coverage under the Policy's Civil Authority provision. This provision requires, among other things, damage to property other than Rococo's insured property:

- "When a Covered Cause of Loss causes *damage to property* other than property at the [insured] premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense Caused by action of civil authority that *prohibits access* to the [insured] premises, provided that the following apply: (1) Access to the area immediately surrounding the damaged property is *prohibited by civil authority as a result of the damage*, and the [insured] premises are within that area but are not more than one mile from the damaged property; and (2) The 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[.]"

Id. at App. 115 § A.5.a. (emphases added).

Finally, the Policy contains exclusions, which preclude coverage even when a loss or cause of loss would otherwise come within the Policy's coverage:

- "We will not pay for loss or damage caused directly or indirectly by . . . . The enforcement of or compliance with any ordinance or law: (1) Regulating the construction, use or repair of any property; or (2) Requiring the tearing down of any property, including the cost of removing its debris."

- "We will not pay for loss or damage caused by or resulting from any of the following: . . . [d]elay, loss of use or loss of market."

Id. at App. 80 § B.1.a; *id.* at App. 81 § B.2.b. In the District Court, Aspen argued that these exclusions would independently preclude coverage and require dismissal of Rococo's claims. As noted, the District Court did not reach these exclusions.

IV. Standard of Review

This Court reviews *de novo* the District Court's decision granting Aspen's motion to dismiss. *Statton v. Fla. Fed. Jud. Nominating Commc'n,* 959 F.3d 1061, 1062 (11th Cir. 2020). While the Court must accept Rococo's factual allegations as true, a pleading that offers "labels and conclusions" and "naked assertions devoid of further factual enhancement" does not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rococo is required to plead facts supporting coverage under the Policy, rather than "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.*

Under Florida law, "the interpretation of an insurance contract, including resolution of any ambiguities contained therein, is a question of law to be decided by the court." *Mama Jo's,* 823 F. App'x at 878

(citing authorities). That interpretation is therefore also reviewed *de novo*.

SUMMARY OF THE ARGUMENT

The Policy's Business Income and Extra Expense provisions cover certain income losses and expenses caused by "direct physical loss of or damage to" covered property. The District Court held that Rococo had failed to plead facts establishing such loss or damage and dismissed the Complaint. This Court should affirm.

Florida law governs Rococo's breach of contract claims, which lie within this Court's diversity jurisdiction.[1] Under that jurisdiction, this Court interprets the law "the way it appears the state's highest court would." *Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1290 (11th Cir. 2001). If the state's highest court has not resolved an issue, the federal court looks to decisions of the state's intermediate appellate courts. *Id.*

[1] Because Rococo's breach of contract and declaratory judgment claims "are both contingent on whether Rococo's losses were covered by the insurance policy," the District Court properly addressed them simultaneously. Order at App. 714.

In *Mama Jo's*, this Court reviewed a district court decision holding that "direct physical loss or damage" under Florida law "contemplates an actual change in insured property . . . 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." *Mama Jo's, Inc. v. Sparta Ins. Co.,* No. 17-CV-23362-KMM, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) (citations omitted), *aff'd*, 823 F. App'x 868 (11th Cir. 2020). This Court affirmed, explaining that physical harm must be "actual" or "tangible." 823 F. App'x at 869. To reach that conclusion, the Court synthesized decisions by Florida's intermediate appellate courts bearing on the meaning of this policy language under Florida law. *Id.* (discussing *Homeowners Choice Prop. & Cas. v. Miguel Maspons*, 211 So. 3d 1067, 1069 (Fla. Dist. Ct. App. 2017), and *Vazquez v. Citizens Prop. Ins. Corp.*, 304 So. 3d 1280, 1284 (Fla. Dist. Ct. App. 2020)).

Rococo, however, primarily claims coverage for the loss of *use* of its property—not for income losses or expenses caused by direct physical loss of or damage to that property. Its contention that "direct physical loss of or damage to" property includes "loss of use" contradicts

the plain language of the Policy as well as this Court's interpretation of identical language in *Mama Jo's*. Rococo's interpretation is also inconsistent with the Policy's "period of restoration" clause, which restricts coverage to a period ending when damaged or lost property is repaired, rebuilt, or replaced. A property whose use has merely been restricted does not require repair, rebuilding, or replacement.

Like the District Court in this case, more than thirty state and federal trial courts in Florida, many applying *Mama Jo's*, have rejected claims for lost income arising from the COVID-19 pandemic. *See infra* at 16–21. Other state and federal courts interpreting the same policy language have reached the same conclusion.

Rococo waived appeal of its additional claim for coverage under the Civil Authority provision. Had it not, the Court should affirm dismissal of that claim because Rococo did not adequately plead either the required damage and dangerous physical conditions on third-party property or other elements required for coverage.

The holdings of the District Court and the numerous other courts applying *Mama Jo's* in the COVID-19 context are consistent with the nature and history of property insurance. As this country's insurance

commissioners—who obviously stand at a remove from industry interests—have explained, property insurance policies were not designed or priced to provide coverage against national or global pandemics. *Infra* at 31–33. Court rulings that would force insurers to nevertheless assume that burden would threaten insolvency across the industry and deprive policyholders of the coverage for which they actually contracted.

Rococo's claims contravene both this larger insurance framework and Florida insurance law specifically interpreting the phrase "direct physical loss of or damage to" property. In the face of that law, Rococo relies on out-of-state decisions holding that loss of use, without any tangible harm to property, is covered under property insurance policies. These decisions represent a minority position; none shows that Rococo is entitled to coverage under Florida law.

Rococo further argues that it is entitled to coverage because it has alleged that the virus was actually present on its property and that the virus physically altered its property and rendered it uninhabitable. Rococo has not in fact made such allegations; and even if it had, this Court has held that under Florida law, property "that merely needs to

be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'" *Mama Jo's*, 823 F. App'x at 879; *see infra* 49–51 (collecting decisions holding that impacts to property that can be addressed by cleaning do not constitute direct physical loss or damage).

This Court can affirm on any basis supported by the record. Below, Aspen demonstrated that Rococo's alleged losses come within two unambiguous Policy exclusions. The Loss of Use Exclusion bars coverage for business losses that result from loss of use alone, unaccompanied by property damage or loss; this exclusion both bars coverage here and confirms that the coverage provisions on which Rococo relies do not extend to loss of use. The Ordinance or Law Exclusion bars coverage for business losses caused by compliance with a law that restricts the use of property; this exclusion unambiguously extends to losses caused by the Closure Orders.

Finally, the Court should reject Rococo's request that it certify a proposed question to the Florida Supreme Court. Certification is unnecessary in light of existing Florida and Circuit court authority, which leave no substantial doubt about the correct answer here.

Additionally, resolution of the proposed question would not resolve this case.

This Court should affirm dismissal.

ARGUMENT

I. Rococo Has Not Alleged a Loss Covered By Its Policy Under Florida Law

The issues here involve insurance policy interpretation, which is a matter of state law. *Hudson Ins. Co. v. Am. Elec. Corp.*, 957 F.2d 826, 829 (11th Cir. 1992). Aspen filed its motion to dismiss based on the assumption that Florida law governs.[2]

On matters within its diversity jurisdiction, this Court decides substantive questions of state law "the way it appears the state's highest court would." *Ernie Haire Ford*, 260 F.3d at 1290. "Where the state's highest court has not spoken to an issue, a federal court must adhere to the decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise." *Id.* (internal quotation marks and citations omitted).

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[2] Below, Aspen reserved the choice of law question in the event the District Court denied its motion to dismiss. App. 505 n.8.

Under Florida law, unambiguous policy language is enforced as written and "construed according to [its] plain meaning." *Allen v. United Servs. Auto. Ass'n*, No. 3:13cv143-MCR/CJK, 2014 WL 1303650, at *6 (N.D. Fla. Mar. 30, 2014), *aff'd,* 790 F.3d 1274 (11th Cir. 2015); *Garcia v. Fed. Ins. Co.,* 473 F.3d 1131, 1135 (11th Cir. 2006) (citing *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005)). In Florida, as elsewhere, courts construe an insurance policy as a whole and attempt to give effect to each provision. *Mama Jo's*, 823 F. App'x at 878. The party claiming coverage bears the burden of establishing coverage. *Id.*

A. *Rococo Failed to Plead Facts Showing That Its Alleged Losses Were Caused by Loss of or Damage to Property*

Under the Business Income and Extra Expense provisions, Rococo was required to allege "direct physical loss of or damage to" property. *See supra* at 6. Rococo has not satisfied this requirement: It alleged only that it suffered economic losses as a result of the Closure Orders, which restricted Rococo's use of property by prohibiting on-premises dining.[3] Compl. at App. 35–36 ¶¶ 41, 46–47. Such a limit on use does

[3] Although Rococo's Building and Personal Property Coverage provision also provides coverage for "direct physical loss of or damage to" insured

not constitute "direct physical loss of or damage" to property, and thus is not a basis for coverage.

Applying Florida law, this Court has already considered the question whether income losses are covered where a policyholder cannot show the tangible harm required by a "direct physical loss of or damage" provision, and has concluded that they are not. In *Mama Jo's,* this Court examined two decisions in which Florida's intermediate appellate courts interpreted similar insurance policy language. It observed that in both cases, the state courts had interpreted the terms "direct" and "physical" to require "actual" harm. *Mama Jo's,* 823 F. App'x at 879 (discussing *Vazquez,* 304 So. 3d at 1284, and *Maspons*, 211 So. 3d at 1069). In determining what Florida courts would hold, this Court also cited law from other jurisdictions that likewise have concluded that a "direct physical loss" must be "*tangible*," and that a provision requiring such a loss mandates an *actual change* to covered property. *Id.* (citing *Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F.

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property at Rococo's restaurant, *supra* at 6, Rococo did not seek coverage under this provision, suggesting that Rococo did not view its economic losses as the result of direct physical property loss or damage.

App'x 569, 573 (6th Cir. 2012), and *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010)).

Rococo seeks to distinguish *Mama Jo's* on the ground that it was decided on a motion for summary judgment instead of a motion to dismiss (Rococo Br. 17), but courts have routinely held that the decision is equally applicable at the pleading stage where the plaintiff fails to allege "physical" damage or loss. A mere allegation that a loss is "physical," unsupported by facts constituting a physical loss, is insufficient to state a plausible claim for relief. *See, e.g., Graspa Consulting, Inc. v. United Nat'l Ins. Co.,* No. 20-23245, 2021 WL 1540907, at *9 n.7 (S.D. Fla. Apr. 16, 2021) ("The procedural posture is, of course, a distinguishing characteristic but the underlying rule that the Court relied on still applies because the meaning of 'direct physical loss or damage' requires actual harm under Florida law."); *Town Kitchen LLC v. Certain Underwriters at Lloyd's, London*, – F. Supp. 3d –, 2021 WL 768273, at *5 (S.D. Fla. Feb. 26, 2021) ("The Court understands the Plaintiff's objections, but they fall flat here. The Court should take the Eleventh Circuit's opinion at face value."); *R.T.G.*

Furniture Corp. v. Hallmark Specialty Ins. Co., No. 8:20-CV-02323-T-30AEP, 2021 WL 686864, at *3 (M.D. Fla. Jan. 22, 2021).

Rococo also relies on two decisions denying insurers' motions to dismiss COVID-19 business interruption claims under Alabama law. Rococo Br. 17–19 (citing *S. Dental Birmingham LLC v. Cincinnati Ins. Co.*, No. 2:20-CV-681-AMM, 2021 WL 1217327 (N.D. Ala. Mar. 19, 2021); *Serendipitous, LLC/Melt v. Cincinnati Ins. Co.*, No. 2:20-CV-00873-MHH, 2021 WL 1816960 (N.D. Ala. May 6, 2021)). These decisions purport to distinguish *Mama Jo's* on the ground that the restaurant in *Mama Jo's* remained open for business, while the Alabama businesses did not. *S. Dental*, 2021 WL 1217327, at *5; *Serendipitous*, 2021 WL 1816960, at *6. That distinction has no bearing here: Rococo remained open for takeout and delivery. More importantly, the distinction made in the Alabama district court decisions misses the central holding of *Mama Jo's*—that physical loss of or damage to property requires actual, tangible harm. As the Southern District of Florida recently explained:

> Plaintiffs minimize *Mama Jo's*, arguing, for example, that its reasoning rested more on the fact that the restaurant did not have to suspend operations than on the actual meaning of the terms "direct physical loss of or damage to coverage

> property." This distinction is unavailing. The Court addressed the plain meaning of the same terms at issue here and concluded that an item that merely has to be cleaned has not suffered a "loss" which is both "direct" and "physical." That reasoning applies equally here. True, the Eleventh Circuit went on to consider whether the district court potentially erred in concluding that the restaurant had not suspended its operations . . . [but] the Eleventh Circuit was clear in its assessment that—suspension or not—plaintiffs still could not prevail because they had not shown direct physical loss. . . . At most, Plaintiffs allege the possible undetected presence of COVID-19 in Plaintiffs' facilities, but that again does not allege any physical loss or damage to the property itself.

PF Sunset View, LLC v. Atl. Specialty Ins. Co., No. 20-81224, 2021 WL 1341602, at *3 (S.D. Fla. Apr. 9, 2021) (internal citations omitted).

Consistent with *Mama Jo's*, numerous courts applying Florida law have held that COVID-19 closure orders do not cause direct physical loss of or damage to property, and hence that income losses policyholders sustain as a result of those orders are not covered. This includes multiple Florida state courts, which have dismissed policyholder claims on this basis. *See, e.g., Catlin Dental, P.A. v. Cincinnati Indem. Co.,* No. 20-CV-004555, 2020 WL 8173333, at *5 (Fla. Cir. Ct. Dec. 11, 2020); *DAB Dental, PLLC v. Main St. Am. Prot. Ins. Co.,* No. 20-CA-5504, 2020 WL 7137138, at *4–5 (Fla. Cir. Ct. Nov. 10, 2020) (citing *Mama Jo's*, 823 F. App'x at 879); *Dime Fitness, LLC v.*

Markel Ins. Co., No. 20-CA-5467, 2020 WL 6691467, at *3 (Fla. Cir. Ct. Nov. 10, 2020) (same).[4]

Likewise, federal district courts in Florida have concluded in more than thirty cases that identical policy language requires tangible harm under Florida law. *See, e.g., Town Kitchen*, 2021 WL 768273, at *5 ("[T]he key difference between the Plaintiff's loss of use theory and something clearly covered—like a hurricane—is that the property did not change. The world around it did. And for the property to be useable again, no repair or change can be made to the property—the world must change."); *Malaube, LLC v. Greenwich Ins. Co.,* No. 20-22615-Civ, 2020 WL 5051581, at *5 (S.D. Fla. Aug. 26, 2020) (relying on *Mama Jo's* and rejecting argument that "physical loss does not require structural alteration and that a property's inability to operate with its intended purpose . . . falls within the insurance policy's coverage").[5]

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[4] *See also Horizon Dive Adventures, Inc. v. Tokio Marine Specialty Ins. Co.,* No. 20-CA-159-P (Fla. Cir. Ct. Oct. 8, 2020); *Mace Marine, Inc. v. Tokio Marine Specialty Ins. Co.,* No. 20-CA-120-P (Fla. Cir. Ct. Oct. 8, 2020), Attachments 1 and 2 hereto, respectively.

[5] In addition to those cited in text, other decisions in which Florida courts have rejected Rococo's position include *SA Palm Beach LLC v. Certain Underwriters at Lloyd's, London,*– F. Supp. 3d –, 2020 WL 7251643 (S.D. Fla. Dec. 9, 2020); *Emerald Coast Rest., Inc. v. Aspen Specialty Ins. Co.*, No. 3:20cv5898, 2020 WL 7889061 (N.D. Fla. Dec. 18,

The overwhelming majority of courts in other jurisdictions agree with courts in Florida. First, in claims arising outside the COVID-19 context, courts have repeatedly rejected claims for economic losses caused by government orders or other events that curtailed a policyholder's use of property without physically harming that property. *E.g.*, *Dickie Brennan & Co., Inc. v. Lexington Ins. Co.*, 636 F.3d 683, 685–86 (5th Cir. 2011) (business interruption losses incurred by New Orleans restaurants due to city's mandatory evacuation before hurricane were not caused by direct physical loss or damage); *United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 129 (2d Cir. 2006) (airline's lost earnings due to airport closures after September 11 attacks did not result from physical damage to property); *Pentair, Inc.*

2020); *Sun Cuisine, LLC v. Certain Underwriters at Lloyd's, London,* No. 1:20-CV-21827, 2020 WL 7699672 (S.D. Fla. Dec. 28, 2020); *Atma Beauty, Inc. v. HDI Glob. Specialty SE*, No. 1:20-CV-21745, 2020 WL 7770398 (S.D. Fla. Dec. 30, 2020); *Edison Kennedy, LLC v. Scottsdale Ins. Co.,* – F. Supp. 3d –, 2021 WL 22314 (M.D. Fla. Jan. 4, 2021); *Webb Dental Assocs. DMD PA v. Cincinnati Indem. Co.*, No. 1:20-CV-250-AW-GRJ, 2021 WL 800113 (N.D. Fla. Jan. 15, 2021); *15 Oz Fresh & Healthy Food LLC v. Underwriters at Lloyd's London*, – F. Supp. 3d –, 2021 WL 896216 (S.D. Fla. Feb. 22, 2021); *AE Mgmt. LLC v. Ill. Union Inc. Co.*,– F. Supp. 3d –, 2021 WL 827192 (S.D. Fla. Mar. 4, 2021); *Pane Rustica, Inc. v. Greenwich Ins. Co.*, No. 8:20-CV-1783, 2021 WL 1087219 (M.D. Fla. Mar. 22, 2021); *Royal Palm Optical, Inc. v. State Farm Mut. Auto. Ins. Co.*, – F. Supp. 3d –, 2021 WL 1220750 (S.D. Fla. Mar. 30, 2021).

v. Am. Guarantee & Liab. Ins. Co., 400 F.3d 613, 616 (8th Cir. 2005) (inability of insured's suppliers to function after power failure did not constitute physical loss or damage to insured; otherwise direct physical loss or damage would be "established whenever property cannot be used for its intended purpose"); *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) (closing border to beef products did not cause direct physical loss; a contrary result would render the word "physical" meaningless).[6]

These authorities are consistent with the leading insurance law treatise's treatment of the term "physical." *See* 10A *Couch on Insurance* § 148.46 (3d ed. 2019) ("The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal, and thereby to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property").

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[6] *See also, e.g.*, *Simon Mktg., Inc. Co., v. Gulf Ins. Co.*, 149 Cal. App. 4th 616, 623 (2007); *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 751 N.Y.S.2d 4, 8-9 (N.Y. App. Div. 2002); *Trinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 270-71 (5th Cir. 1990).

Courts in other jurisdictions examining similar policy language in the COVID-19 context have reached the same result, rejecting claims for income losses because they were not caused by tangible harm to property. *See, e.g., Michael Cetta, Inc. v. Admiral Indem. Co.*, – F. Supp. 3d –, 2020 WL 7321405, at *8 (S.D.N.Y. Dec. 11, 2020) ("[N]early every court to address this issue has concluded that loss of use of a premises due to a governmental closure order does not trigger business income coverage premised on physical loss to property."); *Henry's La. Grill, Inc. v. Allied Ins. Co. of Am.*, 495 F. Supp. 3d 1289, 1296 (N.D. Ga. 2020) (dismissing policyholder's claims and holding that closure orders "did not create a direct physical loss" of the dining rooms because "every physical element of the dining rooms—the floors, the ceilings, the plumbing, the HVAC, the tables, the chairs" was in exactly the same state before and after the orders were issued); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690, 694 (N.D. Ill. Sept. 21, 2020) ("[t]he coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property"; dismissing policyholder's claims); *Hajer v. Ohio Sec. Ins. Co.*, – F. Supp. 3d –, 2020 WL 7211636, at *3 (E.D. Tex. Dec. 7, 2020) (dismissing

policyholder's claims because "a regulation prohibiting people from patronizing a business is not a tangible alteration of any property").[7]

Without addressing this overwhelming authority, Rococo argues that "Florida appellate courts have not reached a consensus that structural alteration is required to show direct physical loss or damage *in the context of COVID-19*," and therefore its claims cannot be dismissed. Rococo Br. 14 (emphasis added). But as this Court explained in *Mama Jo's* and as numerous federal district courts and the Florida trial courts have rightly understood, Florida appellate courts have reached a consensus that "physical" loss or damage requires allegations of tangible harm, as shown above. Thus, to survive a motion to dismiss, Rococo was required to plead facts showing *tangible harm*—and it did not.

Attempting to create uncertainty about what constitutes tangible harm, Rococo relies on *Maspons,* in which the court held that "the

[7] Other courts throughout the country have reached the same result in cases against Aspen in particular. *E.g.*, *Berkseth-Rojas v. Aspen Am. Ins. Co.*, – F. Supp. 3d –, 2021 WL 101479 (N.D. Tex. Jan. 12, 2021); *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.*, – F. Supp. 3d –, 2020 WL 7889047 (N.D. Ill. Dec. 22, 2020); *Wade D. Marler DDC v. Aspen Am. Ins. Co.*, No. 2:20-CV-00616-BJR, 2021 WL 2184878 (W.D. Wash. May 28, 2021).

failure of [a] drain pipe to perform its function" as a result of a break "constituted a 'direct' and 'physical' loss to the property." 211 So. 3d at 1069. That has no bearing here; Rococo alleges no comparable tangible impact on its property.[8] Rococo's reliance on *Widdows v. State Farm Florida Insurance* is misplaced for the same reason. 920 So. 2d 149, 150 (Fla. Dist. Ct. App. 2006) (physical abnormality in a pipe caused by erosion or a sinkhole was "physical loss").

Rococo's reliance on *Azalea v. American States Insurance* is likewise inapt. 656 So. 2d 600 (Fla. Dist. Ct. App. 1995). That case plainly involved a tangible harm to property: a bacteria colony (which in that context was desirable) was destroyed, and the property "could not operate or exist unless th[e] colony was replaced." *Id.* at 602. By contrast, Rococo alleges no tangible harm to insured property and thus

[8] Rococo also cites an Eastern District of Virginia decision holding that property rendered uninhabitable, inaccessible, or dangerous due to intangible causes has suffered "direct physical loss," citing *Maspons*. Rococo Br. 16–17 (citing *Elegant Message, LLC v. State Farm Mut. Auto. Ins. Co.*, – F. Supp. 3d –, 2020 WL 7249624, at *9 (E.D. Va. Dec. 9, 2020)). This outlier decision misunderstands *Maspons* and is inconsistent with *Mama Jo's*, which relied on *Maspons* to hold that a "direct physical" loss requires "actual" harm to property. 823 F. App'x at 879.

has not alleged "direct physical loss of or damage to" property under Florida law.

Rococo further relies on a Florida federal district court decision denying an insurer's motion to dismiss. Rococo Br. 19 (citing *Urogynecology Specialists of Fla., LLC v. Sentinel Ins. Co., Ltd.*, No. 6:20-CV-1174, 2020 WL 5939172 (M.D. Fla. Sept. 24, 2020)). But the insurer there moved to dismiss solely on the basis of the policy's virus exclusion. *Urogynecology Specialists*, 2020 WL 5939172, at *3. The court held only that the insurer failed to establish that the exclusion unambiguously applied, expressly noting that the record did not include portions of the relevant policy provision. *Id.* at *3–4. The court did not interpret the phrase "direct physical loss of or damage to" property.

In sum, under Florida law, and consistent with the overwhelming majority of courts to consider the question, the District Court correctly held that Rococo failed to state a claim for coverage because Rococo alleged no facts showing that its income losses and extra expenses were caused by "direct physical loss of or damage to" property.

B. *Additional Policy Language Confirms that Rococo Has Not Alleged Direct Physical Loss or Damage*

Other Policy language provides additional support for the District Court's interpretation of the "direct physical loss of or damage to" property requirement. The Policy limits coverage to the "period of restoration," which begins 72 hours after the loss or damage to property and ends when the property is "repaired, rebuilt or replaced." Policy at App. 122 § F.3. This language reinforces the point that a "direct physical" damage or loss requirement mandates tangible harm to property: Property that has sustained only intangible harm does not need to be repaired, rebuilt or replaced. *Malaube*, 2020 WL 5051581, at *9 (construing "'direct physical loss or damage' to require actual harm [] gives effect to the other provisions in the policy," particularly the "period of restoration," which ends on the "date when the property at the described premises should be repaired, rebuilt or replaced"); *Cafe Int'l Holdings Co., LLC v. Westchester Surplus Lines Ins. Co.,* No. 20-21641-CIV, 2021 WL 1803805, at *12 (S.D. Fla. May 4, 2021) (the "period of restoration" clause "is tied to the time when the property is 'repaired, rebuilt[,] or replaced'—a phrase that . . . plainly requires an actual, physical change in the insured property").

Courts in other jurisdictions have reached the same conclusion in both pre-COVID-19 and COVID-19-related cases. *See, e.g.*, *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 332 (S.D.N.Y. 2014) (use of "repair" and "replace" in period of restoration clause "contemplate[s] physical damage to the insured premises as opposed to loss of use of it"); *Bend Hotel Dev. Co. v. Cincinnati Ins. Co.*, – F. Supp. 3d –, 2021 WL 271294, at *3 (N.D. Ill. Jan. 27, 2021) (similar); *Sandy Point Dental*, 488 F. Supp. 3d at 693 (similar); *Real Hosp. LLC v. Travelers Cas. Ins. Co. of Am.,* 499 F. Supp. 3d 288, 295 (S.D. Miss. 2020) (similar); *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, 497 F. Supp. 3d 1203, 1213 (S.D. Ala. Oct. 21, 2020) (similar); *DeMoura v. Cont'l Cas. Co.*, – F. Supp. 3d –, 2021 WL 848840, at *5 (E.D.N.Y. Mar. 5, 2021) (similar). Indeed, if "direct physical loss of or damage to" property meant mere loss of use, this "would render[] [the period of restoration clause] entirely superfluous," as the "language strongly implies that the Policy was only intended to cover business losses sustained over a period when the property had some physical or structural issue that prevented the business from operating." *Kahn v.*

Pa. Nat'l Mut. Cas. Ins. Co., – F. Supp. 3d –, 2021 WL 422607, at *6 (M.D. Pa. Feb. 8, 2021).

C. *Rococo's Claims Under the Civil Authority Provision Fail for Additional Independent Reasons*

Rococo notes in the introductory section of its opening brief that the Policy provides Civil Authority coverage (Rococo Br. 4), but fails to substantively address the District Court's dismissal of its claim under that coverage. Rococo has thus waived its right to appeal that claim. *See Sapuppo v. Allstate Floridian Ins. Co.,* 739 F.3d 678, 680–81 (11th Cir. 2014) (failure to "devote even a small part of the[] opening brief to arguing the merits of the district court's alternative holdings" constituted waiver); *Travelers Cas. & Surety Co. v. Stewart,* 663 F. App'x 784, 787 (11th Cir. 2016) (appellant abandoned an issue when the opening brief contained only a descriptive reference to the district court's holding without further discussion) (collecting cases).

Regardless, the District Court correctly dismissed Rococo's claims under the Policy's Civil Authority provision. The provision requires that a third party's property suffer "damage" and that the insured's losses be "caused by action of civil authority that *prohibits* access to the [insured] premises … taken in response to dangerous physical

conditions resulting from the damage." Order at App. 721; *see also*, *e.g.*, *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, 499 F. Supp. 3d 1178, 1188 (S.D. Fla. 2020). Rococo fails to identify either damage or dangerous physical conditions at third-party property.

Likewise, as the District Court noted, Rococo "fail[ed] to show how the actions of civil authority prohibited access to the restaurant." Order at App. 721. Indeed, the record establishes the opposite: Rococo, along with its staff and customers, was permitted access to its property for takeout and delivery services. *Id.* at App. 721–22. As the District Court correctly noted, other courts in Florida have similarly held that access is not "prohibited" for purposes of civil authority coverage where a restaurant's customers can purchase delivery or takeout. *Id.* at App. 721; *see, e.g., El Novillo Rest. v. Certain Underwriters at Lloyd's, London*, – F. Supp. 3d –, 2020 WL 7251362, at *7 (S.D. Fla. Dec. 7, 2020) (closure orders "did not prohibit customer access to Plaintiffs' properties, but merely restricted access to indoor dining, while the restaurants remained open for delivery and takeout"); *Cafe Int'l Holdings*, 2021 WL 10803805, at *13 (similar).

Accordingly, assuming Rococo properly raised Civil Authority coverage, the Court should affirm dismissal of claims premised on this coverage.

D. *Property Insurance Policies Were Not Designed to Address Losses From Global Pandemics or Other Highly Correlated Risks*

The case law just surveyed is entirely consistent with the history and context of the coverages Rococo invokes here. The National Association of Insurance Commissioners has explained that policies insuring against "direct physical loss of or damage to property" "were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19," and that imposing coverage for such claims "would create substantial solvency risks for the sector, [and] significantly undermine the ability of insurers to pay other types of claims." *NAIC Statement on Congressional Action Relating to COVID-19*, Nat'l Ass'n of Ins. Comm'rs (Mar. 25, 2020), http://tinyurl.com/y59fdw4m. These policies instead provide coverage for losses resulting from wind, hail, fire, theft and vandalism, and other physical loss of and damage to property. Property insurance is valued and priced to cover this kind of non-correlated loss—meaning that the

events that trigger loss do not affect all or a large fraction of the insured population simultaneously. *See* Press Release, Am. Prop. Cas. Ins. Ass'n, APCIA Releases New Business Interruption Analysis (Apr. 6, 2020), available at https://www.apci.org/media/news-releases/release/60052/ ("APCIA Press Release"). By the same token, a key feature of such policies is that they cover property losses—not the kinds of general business or income losses that may be triggered by macro events affecting massive numbers of policyholders simultaneously around the nation or globe. *Real Hosp.,* 499 F. Supp. 3d at 294, n.9.

Pandemics are highly correlated risks and very difficult to insure without government intervention or participation in the market. The premiums charged for property insurance were not valued to address the world-wide correlated losses caused by the global pandemic. Extending policies drafted to cover "direct physical loss or damage to property" to cover business losses resulting from the COVID-19 pandemic both stretches the policy language beyond any reasonable reading and ignores the industry context in which property insurance policies are issued. APCIA Press Release, *supra*. Because property

insurers did not establish premiums with this extra-textual risk in mind, and because the closures resulting from the global pandemic are so widespread and costly, expanding property insurance to cover losses resulting from the pandemic would bankrupt the industry. *Id.* The consequences of an incorrect reading of the coverage language in property insurance policies would be catastrophic not only for the industry but also for policyholders, who are entitled to coverage for income losses caused by "direct physical loss of or damage to property," such as from theft, fire, wind, and hail—but who would be left unprotected if their insurers became insolvent.

For these reasons, the District Court correctly dismissed Rococo's claims for coverages of losses caused by the Closure Orders.

II. Rococo's Contrary Arguments All Lack Merit

Rococo makes a series of arguments that its economic losses are covered under the Policy. Below, we show that each of these arguments is wrong on its own terms. But as a preliminary matter, Rococo's arguments are inconsistent with the approach this Court uses to address issues of state law under its diversity jurisdiction. This Court does not write on a blank slate in ruling on state-law insurance issues.

It is guided instead by the rulings of Florida courts. As described above, Florida law governs this Court's interpretation of the Policy terms in dispute.

A. *Rococo's Plain Meaning Argument is Inconsistent With the Governing Legal Framework and is Wrong*

Rococo first argues that the dictionary definitions of "direct," "physical," "loss," and "damage" do not require tangible harm to property. Rococo Br. 11–14. But these dictionary definitions cannot be applied in isolation, as Rococo attempts to do. Most obviously, both loss and damage must be "physical" under the Policy, and the word "direct" serves a distinct purpose (ruling out indirect physical loss or damage).[9] Dictionary definitions cannot in any event supersede Florida law, which holds that "direct physical loss of or damage" requires tangible harm to property. *S. Fla. ENT Assocs., Inc. v. Hartford Fire Ins. Co.*, No. 20-23677, 2020 WL 6864560, at *11 (S.D. Fla. Nov. 13, 2020) (rejecting arguments based on dictionary definitions in light of existing Florida precedent construing the policy language); *supra* at 16–21.

[9] *See Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F.3d 743, 746 (7th Cir. 2015) ("common sense suggests that [the term 'direct'] is meant to exclude situations in which an intervening force plays some role in the damage").

Rococo also argues that because "physical" refers to something with a "material existence," it can refer to an event that prevents the use of property no less than to an event that destroys the property. Rococo Br. 12. But the term "physical" modifies "loss" and "damage"– not "property." The Policy plainly does not hold that *any* loss or damage to physical *property* is covered. Rococo provides no analysis—by means of the dictionary or otherwise—suggesting that the ordinary meaning of physical loss is merely the deprivation of use.[10] Nor could any reading of the Policy as a whole support that interpretation. The term "loss of use" appears only in a Policy exclusion—not in a coverage provision. *Infra* at 52–54.

B. *"Direct Physical Loss" Has a Meaning Distinct from "Direct Physical Damage," but That Meaning is not Loss of Use*

Rococo further argues that "physical loss" must extend to loss of use because otherwise "physical loss of" would have the same meaning

[10] *Manpower Inc. v. Insurance Co. of the State of Pennsylvania,* No. 08C0085, 2009 WL 3738099 (E.D. Wisc. Nov. 3, 2009), does not help Rococo. There, applying Washington law, the court held that the collapse of a building, which created a "physical barrier" between the insured and the insured's property, constituted a "physical loss." *Id.* at *6–7. Rococo has not pled a similar "physical" event here.

as "physical damage to"—which is contrary to principles of contract construction. Rococo Br. 20–21.

Rococo is mistaken. While it is true that "loss" and "damage" have distinct meanings, that cannot override the policy requirement that both "loss" and "damage" be physical; nor can it override Florida law holding that "physical loss," like "physical damage," requires tangible harm. *See El Novillo*, 2020 WL 7251362, at *6 (citing *Mama Jo's* and *Malaube*). Income losses that result from COVID-19 closure orders are not caused by "physical loss"—*i.e.*, tangible harm—any more than they are caused by "physical damage." *See id.*

Law across the country is once again consistent. Numerous courts have rejected the argument that "physical loss" must extend to loss of use to have a meaning distinct from "physical damage." The Northern District of Illinois has recently explained that theft of property constitutes a physical loss distinct from physical damage:

> [Plaintiff] is correct that the phrases "direct physical loss" and "direct physical … damage" are best read so as not to completely overlap and thereby render one or the other superfluous. But it does not follow that mere loss of *use*—without any tangible alteration to the physical condition or location of property at the insured's premises—falls within the meaning of either phrase. Read naturally, the two phrases can be read to exclude loss of use without rendering either superfluous. To illustrate, consider a

> thief who attempts to steal a desktop computer. If the thief succeeds, the computer is "physical[ly] los[t]" but not necessarily "physical[ly] … damage[d]." If the thief cannot lift the computer, so instead of stealing it takes a hammer to its monitor in frustration, the computer would be "physical[ly] … damage[d]" but not "physical[ly] los[t]." Yet if the thief were only to change the password on the system so that employees could not log in, there would be neither "physical … damage" nor "physical loss," though the computer would be unusable for some while. The Business Income provision might cover the first two cases, but it does not cover the third.

Chief of Staff LLC v. Hiscox Ins. Co., – F. Supp. 3d –, 2021 WL 1208969, at *3 (N.D. Ill. Mar. 31, 2021) (emphasis and alterations in original).

Other courts have similarly noted that theft, displacement, or dispossession constitute physical loss distinct from physical damage. *E.g.*, *Equity Plan. Corp. v. Westfield Ins. Co.*, – F. Supp. 3d –, 2021 WL 766802, at *10 (N.D. Ohio Feb. 26, 2021); *Nautilus Grp., Inc. v. Allianz Glob. Risks US*, No. C11-5281 BHS, 2012 WL 760940, at *7 (W.D. Wash. Mar. 8, 2012) (reasonable person would understand insurance policy to "cover theft of covered personal property as 'physical loss'"). Still other courts have observed that the total destruction of property is a physical loss distinct from physical damage. *See Henry's La. Grill,* 495 F. Supp. 3d at 1295 ("[A] tornado that destroys the entirety of the

restaurant results in a 'loss of' the restaurant, while a tree falling on part of the kitchen would represent 'damage to' the restaurant.").

More generally, each court that has carefully considered the question in the COVID-19 context has agreed that "loss" and "damage" must have different meanings, but has simultaneously refused to allow policyholders to remove the restriction to "physical" loss to achieve that end. As one court explained, "Plaintiff insists the terms 'physical loss' and 'physical damage' must mean something different so that one is not rendered superfluous. The Court does not disagree, but the outcome is the same. Plaintiff was not physically, tangibly, materially deprived of their property, and therefore did not suffer a 'physical loss.'" *Fam. Tacos, LLC v. Auto Owners Ins. Co.*, – F. Supp. 3d –, 2021 WL 615307, at *6 (N.D. Ohio Feb. 17, 2021); *see also, e.g.*, *Real Hosp.*, 499 F. Supp. 3d at 294–95; *Dime Fitness,* 2020 WL 6691467, at *3 ("'Direct physical loss' has been defined by other courts—the consensus of which is that 'direct physical loss' requires a 'physical alteration of the property.'") (citing *Mama Jo's*, 823 F. App'x 868).

In arguing that "physical loss" must mean "loss of use," Rococo ignores this authority and cites a few contrary decisions from other

jurisdictions. Rococo Br. 20–22 & n.46 (citing *In re: Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, – F. Supp. 3d –, 2021 WL 679109, at *8 (N.D. Ill. Feb. 22, 2021); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867, 873 n.6 (W.D. Mo. 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 801 (W.D. Mo. 2020)). These decisions are not persuasive.[11] The courts do not grapple with, or even acknowledge, the many contrary decisions holding that "direct physical loss" encompasses theft, displacement, and total destruction—each of which, unlike loss of use, is premised on tangible harm to property.

C. *Loss of Functionality or Suspected Contamination of Property, Without Tangible Harm, Does Not Constitute "Direct Physical Loss"*

Instead of addressing the copious authority rejecting its position, Rococo argues that courts—none interpreting Florida law—have held

[11] Other Missouri courts have declined to follow *Studio 417* and *Blue Springs Dental Care*. *See, e.g., Zwillo V, Corp. v. Lexington Ins. Co.*, – F. Supp. 3d –, 2020 WL 7137110, at *8 (W.D. Mo. Dec. 2, 2020) ("To the extent this Court's ruling—finding the language in the policy plainly and unambiguously does not cover the claims—conflicts with *Studio 417* . . . and *Blue Springs Dental Care,* this Court respectfully disagrees with those cases"). Even the *Studio 417* court recognized that "there is case law in support of [the insurer's] position that physical tangible alteration is required to show a 'physical loss.'" 478 F. Supp. 3d at 801.

that both loss of functionality and infestation constitute "direct physical loss of property." Rococo Br. 21–24. This argument is wrong. The decisions Rococo cites are inapt or represent minority positions.

Functionality. As shown above in detail, loss of use does not constitute "physical loss" to property as a matter of law. Using the term "functionality" does not change the analysis.

Rococo relies on *Society Insurance*, but the court there, like Rococo itself, premised its conclusion on the view that "direct physical loss" must have a meaning distinct from "direct physical damage," without accounting for the meaning that has consistently been ascribed to "direct physical loss" both before and during the pandemic—theft, displacement, or permanent dispossession, each of which is a tangible harm. 2021 WL 679109, at *1, *6; *see supra* at 35–39. A court interpreting Florida law has already declined to follow *Society Insurance*. *See Town Kitchen*, 2021 WL 768273, at *5 ("this Court respectfully disagrees that such loss [of use] would be considered 'physical' under the Florida and Eleventh Circuit law").[12]

[12] Emerald cites *Elegant Message*, 2020 WL 7249624, at *6, *10, and *Henderson Road Restaurant System v. Zurich American Insurance*, – F. Supp. 3d –, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021), which held that

In arguing that loss of functionality constitutes "direct physical loss," Rococo also relies on *Mudpie v. Travelers Casualty Insurance Co. of America*, 487 F. Supp. 3d 834 (N.D. Cal. 2020), claiming that the court there implied that had COVID-19 been present, the policyholder's income losses would have been covered. Rococo Br. 28–29. Not so. In *Mudpie*, the court granted the insurer's motion to dismiss, holding that the policyholder failed to allege that it was permanently deprived of its storefront or that any intervening physical force beyond the closure orders caused its losses. 487 F. Supp. 3d at 839–40. *Mudpie* makes clear that some "physical force" is required; it does not hold that the presence of virus would be sufficient. *See id.* at 839–42.

"direct physical loss" might be expanded to include loss of use resulting from closure orders under Virginia and Ohio law respectively. By contrast, courts applying Florida law are virtually unanimous in holding that direct physical loss unambiguously requires tangible physical loss, not loss of use. *Supra* at 16–21. Outside of Florida too, courts decline to follow *Henderson Road* and *Elegant Massage*. *See*, *e.g.*, *Equity Plan.*, 2021 WL 766802, at *13 ("the Court respectfully disagrees with the *Henderson Road* court's determination that the policy language 'direct physical loss of or damage to' is ambiguous" under Ohio law); *Skillets, LLC v. Colony Ins. Co.*, – F. Supp. 3d –, 2021 WL 926211, at *6 (E.D. Va. Mar. 10, 2021) (interpreting Florida law and finding *Elegant Message* unpersuasive).

Courts applying California law have since rejected policyholders' attempts to misuse *Mudpie* in their favor, as Rococo does here, and have held that general allegations of the presence of COVID-19 are insufficient to state a claim under policies that require "direct physical loss of or damage" to property. *See, e.g., Out W. Rest. Grp. v. Affiliated FM Ins. Co.*, – F. Supp. 3d –, 2021 WL 1056627, at *4 (N.D. Cal. Mar. 19, 2021) ("The overwhelming majority of courts … have reasoned that the virus fails to cause physical alteration of property because temporary loss of use of property (if any) during a pandemic . . . does not qualify as physical loss or damage.") (collecting cases).

Rococo's pre-COVID-19 authorities also do not show that direct physical loss extends to mere loss of use. In *Murray v. State Farm Fire & Casualty*, 509 S.E.2d 1, 17 (W. Va. Ct. App. 1998), the court held that the future risk of physical damage to the property, from a rockfall that had previously destroyed two other homes, amounted to "physical loss" of an insured home under Virginia law. In contrast, Rococo alleges no future threat of physical harm to its property. Unsurprisingly, courts in the COVID-19 context have found this decision inapt. *See, e.g., Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-CV-00401, 2021 WL

966886, at *2 (S.D. W. Va. Mar. 15, 2021) (finding *Murray* to be factually distinguishable); *Bluegrass, LLC v. State Auto. Mut. Ins. Co.*, No. 2:20-CV-414, 2021 WL 42050, at *5 (S.D. W. Va. Jan. 5, 2021) ("The pleadings are devoid of any allegation that there has been a damage or alteration to the covered properties or even a *threat* of damage or alteration such [as] was present from the rockfalls in *Murray*.") (emphasis in original).

Infestation/Contamination. Rococo also argues that courts have held that infestation of property "by microscopic entities that are harmful to human health constitutes 'direct physical loss or damage.'" Rococo Br. 24. With this argument, Rococo again disregards *Mama Jo's*, which explicitly held that property that "merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'" 823 F. App'x at 879. That is dispositive of Rococo's infestation theory here—as multiple courts have held in applying *Mama Jo's* in the COVID-19 context. *Mena Catering, Inc. v. Scottsdale Ins. Co.*, – F. Supp. 3d –, 2021 WL 86777, at *7 (S.D. Fla. Jan. 8, 2021) (citing *Mama Jo's* and holding that "[t]here is no 'direct physical loss' where the alleged harm consists of the mere presence of the virus on the physical structure of the

premises"); *Skillets,* 2021 WL 926211, at *5–6 (citing *Mama Jo's* and holding that, under Florida law, the presence of COVID-19 did not constitute "direct physical loss"); *Café La Trova v. Aspen Specialty Ins. Co.*, – F. Supp. 3d –, 2021 WL 602585, at *8 (S.D. Fla. Feb. 16, 2021) (absent "evidence that COVID-19 physically damaged or altered the property, the virus's mere presence is insufficient to trigger coverage").

The out-of-state authorities on which Rococo relies are not contrary. Rococo Br. 23–25. The properties at issue in those cases had suffered actual contamination by physical agents—asbestos fibers, gas, odors. Critically, the contamination could not be eliminated by cleaning; it had a tangible, discernible effect on property that went beyond mere loss of use.[13] These decisions thus do not support the

[13] *See, e.g., Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 150, 152 (Minn. 2001) (contamination of oats by pesticide, which violated FDA regulations and required a halt of distribution, constituted a "direct physical loss" of insured property under Minnesota law); *Netherlands Ins. Co. v. Main St. Ingredients, LLC*, 745 F.3d 909, 914 (8th Cir. 2014) (losses from potential salmonella contamination were covered under a policy that defined "property damage" to explicitly *include* "loss of use of tangible property that is not physically injured"); *Gregory Packaging Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-4418, 2014 WL 6675934, at *6–7 (D.N.J. Nov. 25, 2014) (property contaminated with an unsafe amount of ammonia was unusable until the ammonia dissipated); *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 401, 405 (1st Cir. 2009) (under Massachusetts law,

position that the alleged presence of viral particles on insured property constitutes direct physical loss.

D. *Neither The Absence of a Virus Exclusion Nor the Absence of a "Structural Alteration" Requirement Supports Coverage*

Rococo next asserts that coverage exists by virtue of language *not* in the Policy, arguing that the *lack* of a "virus exclusion" shows that losses purportedly resulting from a virus are covered. Rococo Br. 8. But "the existence or nonexistence of an exclusionary provision in an insurance contract is not at all relevant until it has been concluded that the policy provides coverage for the insured's claimed loss." *El Novillo*, 2020 WL 7251362, at *4 (quoting *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 740 (Fla. 2002)). Here, as shown above, the Policy

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unwanted odor that permeated the building due to defectively installed carpet constituted "physical injury" to property); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 825-27 (3d Cir. 2005) (genuine issue of fact existed under Pennsylvania law as to whether water contaminated with e-coli bacteria constituted "direct physical loss" of the insured home); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Conn.*, No. 05-1315-JE 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) (insured furnace was "physical[ly] change[d]" due to release of lead particles, which the court found was "fairly characterized as a 'direct physical loss of or damage to' the furnace" under Oregon law); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300–01 (Minn. 1997) (property contaminated by a release of asbestos fibers constituted a "direct, physical loss" under Minnesota law).

does not cover the claimed loss, and as a matter of state law, exclusions (or the lack of exclusions) cannot create coverage where it does not otherwise exist. *See, e.g., Cafe Int'l Holdings*, 2021 WL 1803805, at *11 (rejecting argument that absence of a virus exclusion supports coverage; policyholder "conflates two separate questions: first, whether there is coverage, and second, if so, whether coverage is excluded by some other provision") (collecting authorities); *Café La Trova,* 2021 WL 602585, at *6 n.7 (rejecting similar argument and emphasizing that under Florida law, "[t]he Policy's exclusionary provisions plainly cannot be used to establish coverage in the first instance").

In a second failed attempt to create coverage through language *not* in the Policy, Rococo argues that coverage exists because a 1962 appellate decision from California signaled that direct physical loss does not invariably require "structural alteration," and Aspen did not thereafter rewrite its policies to substitute the term "structural alteration" for direct physical loss. Rococo Br. 7 (citing *Hughes v. Potomac Ins. Co. of D.C.*, 199 Cal. App. 2d 239 (1962), *disapproved on other grounds by Sabella v. Wisler*, 377 P.2d 889 (Cal. 1963), which found a "physical loss" under California law when an intact building

was rendered completely useless due to a nearby landslide). This is a non sequitur. Under *Mama Jo's* and a host of federal and state decisions from Florida that follow it, "direct physical loss" unambiguously requires tangible harm to property; just as unambiguously, an impact or alleged impact on property that can be addressed by cleaning does not constitute tangible harm. *Supra* at 49–51. Whether or not "structural alteration" is invariably required is not a question posed by this case. And the contention that Aspen somehow *created* coverage by failing to use the term "structural alteration" plainly cannot save Rococo's claims.

E. *Rococo Did Not Allege Tangible Harm*

Rococo next argues that it sufficiently pled "direct physical loss of or damage to" property by alleging that the virus altered the physical space and structures of its insured property. Rococo Br. 26–29. This argument fails for multiple reasons.

1. *Rococo Failed to Allege That COVID-19 Was Present At Its Restaurant; Nor Would Such Allegations State A Claim*

Rococo asserts that it pled that "COVID-19 was present at the [insured property] and it altered the very structure of the property surfaces . . . and the ambient air" (*id.* at 27), but the Complaint contains

no such allegations. It principally asserts that "[t]he presence of COVID-19 and the public health emergency it created have prompted actions by civil authorities" that resulted in damage to Rococo and others. Compl. at App. 34 ¶ 40. The Complaint contains one conclusory sentence alleging that:

> The presence of COVID-19 caused direct physical loss of and/or damage to the covered premises … by damaging the property, denying access to the property, preventing customers from physically occupying the property, causing the property to be physically uninhabitable by customers, causing its function to be nearly eliminated or destroyed, and/or causing a suspension of business operations[.]

Id. at App. 35 ¶ 44. This is not an allegation that COVID-19 was present at Rococo, let alone that "it altered the very structure of the property surfaces … and the ambient air," as Rococo asserts. The Complaint, at best, alleges that COVID-19 was present in Pinellas County, Florida. Alleging a pandemic is insufficient, even at the pleading stage, to assert that a virus is physically present at any particular location. *See Catlin Dental,* 2020 WL 8173333, at *5 ("Airborne particles and the mere presence of a virus in the community do not constitute direct physical loss to the property"); *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, – F. Supp. 3d –, 2020 WL

7078735, at *8 (D. Kan. Dec. 3, 2020) (rejecting assertion that the virus "likely" existed on property; "to accept Plaintiff's conclusory assertion would be to accept the proposition that any business located in a community with COVID-19 infections was likely contaminated with the virus."). Courts have rejected such speculative and conclusory allegations about the presence of the virus as insufficient to state a claim under *Twombly* and *Iqbal*. *See Island Hotel Props., Inc. v. Fireman's Fund Ins. Co.*, – F. Supp. 3d –, 2021 WL 117898, at *4 (S.D. Fla Jan. 11, 2021); *Baker v. Or. Mut. Ins. Co.*, No. 20-CV-05467-LB, 2021 WL 1145882, at *3 (N.D. Cal. Mar. 25, 2021) (allegations "that COVID-19 'intruded upon the property' and damaged it . . . [were] conclusory allegations [that] did not state a claim"); *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level …").

In any event, even a non-conclusory allegation that a virus is present on specific property does not state a claim for losses arising from tangible harm, and thus does not allege "direct physical loss of or damage to" property. As explained above, *Mama Jo's* is directly on point; it holds that "an item or structure that merely needs to be

cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'" Order at App. 717 (quoting *Mama Jo's*); *see also Mena Catering*, 2021 WL 86777, at *7; *Skillets,* 2021 WL 926211, at *5–6; *Café La Trova,* 2021 WL 602585, at *8. Courts outside of Florida agree. *See, e.g.*, *Uncork & Create LLC v. Cincinnati Ins. Co.*, 498 F. Supp. 3d 878, 883 (S.D. W.Va. 2020) (because the virus is susceptible to disinfection and cleaning, "even actual presence of the virus would not be sufficient to trigger coverage for physical loss or physical damage to the property"); *Indep. Rest. Grp. v. Certain Underwriters at Lloyd's, London*, – F. Supp. 3d –, 2021 WL 131339, at * (E.D. Pa. Jan. 14, 2021) ("contaminated surfaces can be cleaned and sanitized," and therefore "the virus would not render the property useless or uninhabitable or nearly eliminate or destroy its function"); *Promotional Headwear*, 2020 WL 7078735, at *8 ("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" through disinfection and cleaning); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, – F. Supp. 3d –, 2021 WL 972878, at *8 (W.D. Tex. Jan. 21, 2021) (similar).

2. *Rococo's Allegations Related to the Possible Presence of the Virus Do Not Create an Issue of Fact*

Finally, Rococo argues that the District Court effectively resolved a factual dispute about whether COVID-19 causes direct physical loss of or damage to property. Rococo Br. 30–33. Initially, as shown *supra* at 47–51, Rococo did not allege that COVID-19 was physically present on its premises. While Rococo *argues* that it alleged that "the particles of COVID-19 structurally alter[ed] property surfaces and ambient air" and that the virus cannot be wiped away (Rococo Br. 31), the Complaint does not contain those allegations.

In any event, an allegation that COVID-19 is present does not show tangible harm to property, *supra* at 43–44, and Rococo's Complaint is devoid of concrete allegations that would support a contrary result. To survive a motion to dismiss, Rococo must plead "sufficient factual matter, which, if accepted as true, would 'state a claim to relief that is plausible on its face.'" *Prime Time Sports Grill, Inc. v. DTW 1991 Underwriting Ltd.*, – F. Supp. 3d –, 2020 WL 7398646, at *6 n.8 (M.D. Fla. Dec. 17, 2020) (quoting *Twombly*, 550 U.S. at 555). Rococo has not done so, and all that remains is interpretation of an insurance contract which, under Florida law, "is a question of law

to be decided by the court." *Mama Jo's,* 823 F. App'x at 878 (citing authorities); *see also Prime Time,* 2020 WL 7398646, at *6 n.8.

III. Rococo's Alleged Losses Are Excluded

This Court may also affirm dismissal on the alternative ground that Rococo's losses fall within either of two unambiguous Policy exclusions. *See Harris*, 579 F.3d at 1232.

A. *The Loss of Use Exclusion*

The Policy excludes "loss or damage caused by or resulting from … [d]elay, *loss of use* or loss of market." Policy at App. 82 § B.2.b (emphasis added). This clause unambiguously excludes coverage for "loss of use," which is the basis for Rococo's claims. As discussed above, Rococo pled no facts showing that its property was physically lost or damaged, but instead alleged that the COVID-19 pandemic "den[ied] access to the property, prevent[ed] customers from physically occupying the property, caus[ed] the property to be physically uninhabitable by customers, caus[ed] its function to be nearly eliminated or destroyed, and/or caus[ed] a suspension of business operations at the premises." Compl. at App. 35 ¶ 44.

As multiple courts have held, the plain language of the Loss of Use exclusion bars claims like Rococo's. *See, e.g., Salon XL Color &*

Design Grp., LLC v. W. Bend Mut. Ins. Co., – F. Supp. 3d –, 2021 WL 391418, at *4 (E. D. Mich. Feb. 4, 2021) (consequential losses provision, which contains the loss of use exclusion, "unambiguously states that [the insurer] will not pay for loss or damage resulting from a loss of use," and thus precludes coverage for COVID-related losses); *Paul Glat MD, P.C. v. Nationwide Mut. Ins. Co.*, – F. Supp. 3d –, 2021 WL 1210000, at *6–7 (E.D. Pa. Mar. 31, 2021) ("unequivocal language" of loss of use exclusion "makes it clear" that the insurer will not "pay for any loss or damage caused by a loss of use"; exclusion bars coverage of COVID-related income losses).

Other courts have made the same observation, even when, having determined that no coverage exists, they do not reach the question of whether the exclusion independently bars coverage. "[C]onstruing the policy's requirement of 'direct physical loss or damage' to include the mere loss of use of insured property with nothing more would negate the 'loss of use' exclusion." *Ballas Nails & Spa, LLC v. Travelers Cas. Ins. Co. of Am.*, – F. Supp. 3d –, 2021 WL 37984, at *4 (E.D. Mo. Jan. 5, 2021); *see also, e.g., Mudpie,* 487 F. Supp. 3d at 842 (similar). The Loss of Use Exclusion in Rococo's Policy thus bars coverage and further

shows that loss of use does not constitute "direct physical loss of or damage to" property, as discussed above.

B. *The Ordinance or Law Exclusion*

Rococo's alleged losses also fall within the Ordinance or Law Exclusion, which excludes losses caused by the "enforcement of or compliance with any ordinance or law[] [r]egulating the construction, use or repair of any property[.]" Policy at App. 80 § B.1.a. The Closure Orders plainly qualify as ordinances or laws sufficient to trigger this exclusion. Governor DeSantis issued the Orders pursuant to a Florida statute granting the Governor power to assume control over emergency management functions, including the power to "issue executive orders, proclamations, and rules[, which] shall have the force and effect of law." Fla. Stat. § 252.36(1)(a) & (b).

Because Rococo's alleged losses resulted from compliance with the Closure Orders, this exclusion unambiguously bars coverage. *See Bahama Bay II Condo. Ass'n, Inc. v. United Nat'l Ins. Co.,* 374 F. Supp. 3d 1274, 1281 (M.D. Fla. 2019) ("even if the Policy did provide coverage for economic losses," plaintiff's claims for costs "incurred due to the enforcement of a county ordinance or law regulating the use or repair of

the property" were barred by ordinance or law exclusion). At least two federal courts have recognized that this exclusion independently precludes coverage in the COVID-19 context. *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, – F. Supp. 3d –, 2020 WL 7395153, at *7 (E.D. Pa. Dec. 17, 2020) (under "unequivocal" language of the governmental order exclusion, no coverage for business losses caused by compliance with COVID-19 related orders); *Isaac's Deli, Inc. v. State Auto Prop. & Cas. Ins. Co.*, No. 5:20-CV-06165, 2021 WL 1945713, at *5 (E.D. Pa. May 14, 2021) (similar).

A number of courts have also interpreted ordinance or law exclusions as further evidence of the policy's requirement for tangible, physical harm. *Ceres Enters., LLC v. Travelers Ins. Co.*, – F. Supp. 3d –, 2021 WL 634982, at *5 (N.D. Ohio Feb. 18, 2021) ("[W]here the loss arises from an ordinance or law . . . the policy does not provide coverage"); *Fam. Tacos*, 2021 WL 615307, at *5 (same); *MIKMAR, Inc. v. Westfield Ins. Co.*, – F. Supp. 3d –, 2021 WL 615304, at *5 (N.D. Oh. Feb. 17, 2021) (same). If the Court reaches the Ordinance or Law Exclusion, it should hold that the exclusion independently bars coverage.

IV. Certification to the Florida Supreme Court is Inappropriate

To certify a question of law to the Florida Supreme Court, this Court must first decide that there is no controlling precedent from that court and that the question at issue is determinative of the case. *See* Fla. Const. art. § 3(b)(6). The Court's certification decision is discretionary. *See Weiss v. City of Gainesville, Fla.*, 462 F. App'x 898, 908 (11th Cir. 2012).

This Court certifies a question to Florida's Supreme Court only where "'[it] maintain[s] more than "substantial doubt" as to how the issue before [it] would be resolved under Florida law.'" *Cole v. PRN Real Est. & Invs., Ltd.*, 829 F. App'x 399, 405 (11th Cir. 2020), *cert. denied,* 141 S. Ct. 1740 (2021) (citations omitted). No such substantial doubt exists here. This Court has already decided how the policy language at issue would be interpreted under Florida law in *Mama Jo's*, and overwhelming authority applying Florida law concurs with *Mama Jo's*. *Supra* at 16–21. Moreover, the legal question Rococo proposes for certification would not resolve this case. There is accordingly no basis for certification.

A. *Rococo Fails to Satisfy this Court's Standard for Certification*

Rococo requests that the Court certify the following question:

- Whether, under Florida law, an "all-risk" commercial insurance policy that provides coverage for business interruption losses caused by "direct physical loss of or damage to property" requires actual structural alteration, or whether the phrase "direct physical loss of" includes more than losses that harm the structure of the covered property?

Rococo Br. 34. This question does not satisfy this Court's standard for certification. Florida appellate courts have already provided clear precedent as to how the Florida Supreme Court would rule on the issue presented here. *See Maspons,* 211 So. 3d at 1069; *Vazquez,* 304 So. 3d at 1284–85.[14] This Court's ruling in *Mama Jo's* and the rulings of many federal district courts applying Florida law have confirmed the meaning of this Florida case law. *See, e.g., Malaube,* 2020 WL 5051581, at *7

[14] Although these decisions interpret policy language requiring "direct physical loss to property," rather than "of property," numerous courts have determined that this difference in prepositions is irrelevant and does not change the requirement of *physical* harm. *See Graspa,* 2021 WL 1540907, at *9 ("The reason this argument fails repeatedly is because, regardless of the two definitions, they both require something 'direct' and 'physical' in their relationship with property. Yet, there is nothing 'direct' or 'physical' with Plaintiff seeking to recover economic losses for periods of reduced operations."); *Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, 485 F. Supp. 3d 1225, 1231 (C.D. Cal. 2020).

("Florida's appellate courts are in agreement with this interpretation."); *Prime Time,* 2020 WL 7398646, at *5–6; *supra* at 16–21. Meanwhile, Florida trial courts have issued rulings on facts indistinguishable from those at issue here and held, citing *Mama Jo's*, that compliance with COVID-19 closures orders does not constitute direct physical damage or loss. *Supra* at 19–20. Where, as here, this Court has already spoken, and numerous state and federal courts confirm its view, certification is not warranted. *See Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209, 1217 n.8 (11th Cir. 1999) (certification inappropriate where Florida precedent and the Eleventh Circuit had addressed the scope of the relevant statute).

In addition, Rococo's proposed question is not "determinative of the cause," as this Court requires. *Trans Caribbean Lines, Inc. v. Tracor Marine, Inc.*, 748 F.2d 568, 571 (11th Cir. 1984). Aspen presented several alternative grounds for dismissal that the District Court did not resolve and that remain available on appeal. Proposed questions for certification covering only some grounds of dismissal—like Rococo's question here—are not "determinative." *See In re Lentek Int'l, Inc.*, 346 F. App'x 430, 432 n.1 (11th Cir. 2009) (denying motion to

certify question to the Florida Supreme Court where the resolution of the plaintiff's perceived ambiguity would not be outcome-determinative). This, too, is a sufficient ground for the Court to deny certification. *See Trans Caribbean Lines,* 748 F.2d at 571.

B. *Federal Courts Have Overwhelmingly Declined to Certify the Issues Presented*

There have been hundreds of COVID-19 business interruption cases in the federal courts since March 2020. In only one has a question been certified to a state supreme court. In all other instances, courts asked to certify questions to state supreme courts have declined to do so. *E.g.*, *Marler v. Aspen Am. Ins. Co.*, No. 2:20-CV-00616, 2021 WL 1599193, at *4–5 (W.D. Wash. Apr. 23, 2021) (declining to certify similar issue because the court "has at its command all the tools necessary to reach its decision" and certification would cause unnecessary delay and costs); *Henry's La. Grill,* 495 F. Supp. 3d at 1292, 1297 (similar); *Equity Plan.,* 2021 WL 766802, at *11 n.1, *13; *Ceres Enters.*, 2021 WL 634982, at *11–12; *Dakota Girls, LLC v. Phila. Indem. Ins. Co.*, – F. Supp. 3d –, 2021 WL 858489, at *5 n.5 (S.D. Ohio Mar. 8, 2021); *Brunswick Panini's, LLC v. Zurich Am. Ins. Co.*, – F. Supp. 3d –, 2021 WL 663675, at *10 (N.D. Ohio Feb. 19, 2021);

MIKMAR, 2021 WL 615304, at *11–12; *Fam. Tacos,* 2021 WL 615307, at *11–12.[15]

Rococo has not satisfied this Court's certification standards, and certification is unnecessary here.

CONCLUSION

For these reasons, the Court should affirm the decision below.

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[15] *See also Uncork & Create,* 2021 WL 966886, at *2 (certification unnecessary where "the policy language and the state law principles guiding its interpretation provide a robust analytical framework, which the Court utilized in concluding that the Plaintiff had failed to state a viable claim"); *Drama Camp Prods., Inc. v. Mt. Hawley Ins. Co.,* No. 1:20-CV-266-JB-MU, 2020 WL 8018579, at *4 (S.D. Ala. Dec. 30, 2020) ("[t]he Court is not persuaded that certification is necessary"); *Hillcrest Optical,* 2020 WL 6163142, at *4–5 (certification unnecessary even though there was "scant state-specific case law" addressing the issue); *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*,– F. Supp. 3d –, 2021 WL 1400891, at *7 (D. Md. Apr. 14, 2021) ("under the straightforward application of Maryland contract law as applied to insurance policies, Plaintiff [] does not have a claim to coverage . . . and no certification is necessary").

The single outlier is *Neuro-Communication Services v. Cincinnati Insurance*, in which the court certified to the Ohio Supreme Court a question regarding whether the presence of COVID-19 on property constitutes direct physical loss or damage. No. 4:20-CV-1275, 2021 WL 274318, at *1 (N.D. Ohio Jan. 19, 2021). That is not the question Rococo asks this Court to certify; indeed, Rococo has not adequately pled that the virus was present on its property, *supra* at 47–51. And as shown in text, other federal district courts in Ohio have uniformly declined to follow *Neuro-Communication Services*.

Dated: June 17, 2021

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I HEREBY CERTIFY that this document complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(5)-(7). This brief contains 12,807 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4, and was prepared in a proportionally spaced typeface using Century in 14 point font.

/s/ Yvette Ostolaza
Yvette Ostolaza

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 17, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel and parties of record.

/s/ Yvette Ostolaza
Yvette Ostolaza

Attachment 1

IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA

HORIZON DIVE ADVENTURES, INC. d/b/a Horizon Divers,
Plaintiff,

Case No. 20-CA-159-P

v.

TOKIO MARINE SPECIALTY INSURANCE COMPANY,
Defendant.
_____/

ORDER GRANTING DEFENDANT TOKIO MARINE SPECIALTY INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT WITHOUT PREJUDICE

THIS MATTER comes before the Court pursuant to Defendant Tokio Marine Specialty Insurance Company's Motion to Dismiss Plaintiff's Amended Complaint. The matter has been fully briefed, and hearing the parties' oral arguments on September 21, 2020, and the Court being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED

1. Defendant's Motion to Dismiss the First Amended Complaint is granted without prejudice to Amend. See, *Homeowners Choice Property & Casualty vs. Maspons,* 211 So.3d 1067 (3rd DCA 2017) "A "loss" is the diminution of value of something, and in this case, the 'something' is the insureds' house or personal property. "Direct" and "physical" modify loss and impose the requirement that the damage be actual." (Emphasis added)

2. Count III of the Complaint asserts a claim for bad faith, is dismissed as premature.

DONE AND ORDERED in Plantation Key, Monroe County, Florida this 8th day of October 2020.

Honorable Luis Garcia
Circuit Court Judge

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Attachment 2

IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA

MACE MARINE, INC., d/b/a Conch Republic Divers,
Plaintiff,

Case No. 20-CA-120-P

v.

TOKIO MARINE SPECIALTY INSURANCE COMPANY,
Defendant.
_____/

ORDER GRANTING DEFENDANT TOKIO MARINE SPECIALTY INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT WITHOUT PREJUDICE

THIS MATTER comes before the Court pursuant to Defendant Tokio Marine Specialty Insurance Company's Motion to Dismiss Plaintiff's Amended Complaint. The matter has been fully briefed, and hearing the parties' oral arguments on September 21, 2020, and the Court being otherwise fully advised in the premises, it is hereby

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2. Count III of the Complaint asserts a claim for bad faith, is dismissed as premature.

DONE AND ORDERED in Plantation Key, Monroe County, Florida this 8th day of October 2020.

Honorable Luis Garcia
Circuit Court Judge

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