UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

RAYMOND H NAHMAD DDS PA and R.H. NAHMAD EQUITIES LLC,	)	
Plaintiffs,	)	No.: 1:20-cv-22833-BB
v.	)	
HARTFORD CASUALTY INSURANCE COMPANY,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS UNDER RULE 12(b)(6)

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Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Southern District of Florida Local Rule 7.1, Defendant Hartford Casualty Insurance Company ("Hartford") respectfully moves to dismiss the Complaint of Plaintiffs Raymond H Nahmad DDS PA and RH Nahmad Equities LLC, ("Plaintiffs")[1] for failure to state a claim upon which relief can be granted.

I. INTRODUCTION

Plaintiffs, owners of a dental practice, seek to recover from Hartford for alleged losses caused by "the COVID-19 pandemic and the corresponding response by civil authorities to stop the spread of the outbreak". *See* Compl. ¶ 11. The Complaint alleges that "Plaintiff was forced to suspend or reduce his practice at Nahmad Dental DDS due to orders issued by the Governor of Florida and Mayor of Miami-Dade County that non-emergent or elective dental care be postponed indefinitely." *Id.* at ¶ 10. Plaintiffs request that Hartford "indemnify Plaintiff for business losses and extra expenses, and related losses resulting from actions taken by civil authorities to stop the human to human and surface to human spread of the COVID-19 outbreak." *See* Compl. ¶ 12. Plaintiffs seek to recover from their property insurer, Hartford Casualty, for these alleged losses. But the policy does not cover the losses for at least three independent reasons.

First, Plaintiffs' policy does not cover losses caused by a virus. The policy contains an exclusion that unambiguously excludes "loss or damage caused directly or indirectly by . . . [p]resence, growth, proliferation, spread or any activity of . . . virus." ("Virus Exclusion"), *see* Doc. 6, Ex. 1 at 135. "Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *See id.* The novel coronavirus (SARS-CoV-2) undisputedly is a virus, and Plaintiffs' alleged losses were "caused directly or indirectly" by it. Indeed, Plaintiffs repeatedly make clear that their losses arose from the response to "the COVID-19 pandemic" (*see* Compl. ¶ 11, 18) or "viral pandemic." *See* Compl. ¶

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

49. All of Plaintiffs' losses are caused directly or indirectly by the novel coronavirus and, therefore, are not covered under the policy.

Plaintiffs nonetheless attempt to avoid the Virus Exclusion by arguing that the cause of their losses is not the virus itself but governmental orders issued in response to the COVID-19 pandemic aimed at slowing the spread of the virus. That argument fails for at least two reasons: (1) the Virus Exclusion still applies to orders of civil authority because the virus only needs to be *one* cause of loss, not the sole cause of loss and (2) orders of civil authorities are not themselves "Covered Causes of Loss" under the terms of the policy and, thus, do not themselves trigger coverage for lost business income. Simply put, Plaintiffs cannot sidestep the plain fact that their alleged losses are caused by the novel coronavirus, an excluded peril.

Second, even if the Virus Exclusion did not apply (it does), Plaintiffs still would not be entitled to business income coverage because they do not allege any direct physical loss or damage to their property. The policy only provides business income coverage if Plaintiffs' operations are suspended because of "direct physical loss of or physical damage to property." *See* Doc. 6, Ex. 1 at 41. Plaintiffs expressly allege that they experienced *no* physical loss at all. *See* Compl. ¶ 30 (alleging no "actual presence of coronavirus in or on the Insured Premises.")

Third, again assuming that the Virus Exclusion does not apply, Plaintiffs are not entitled to "civil authority" coverage because they have not alleged any facts showing that property "in the immediate area" of the insured premises experienced "direct physical loss," which caused "access to [the] 'scheduled premises' [to be] specifically prohibited by order of a civil authority". *See* Doc. 6, Ex. 1 at 42. Indeed, Plaintiffs meet none of these requirements: (1) access to Plaintiffs' premises was allowed, not prohibited, (2) Plaintiffs do not allege any harm to any property, and (3) Plaintiffs admit the orders of civil authority were issued to limit the spread of coronavirus, not because of property damage. Civil authority coverage simply does not apply where, as here, the orders were issued because of fear of future harm, not existing property damage.

Hartford does not dispute that measures to slow the spread of the novel coronavirus have upended lives and resulted in broad disruption to the economy. But even the unprecedented fallout from a global pandemic does not provide a basis to override the plain terms of an insurance contract. Accordingly, Plaintiffs cannot state a claim for relief, and Hartford respectfully requests that the Court dismiss the Complaint in its entirety.

II. STATEMENT OF FACTS

A. The Policy

Hartford issued a Business Owner's Policy bearing No. 21 SBA VJ7288 to Plaintiffs with a policy period of December 4, 2019 to December 4, 2020 ("the Policy"). *See* Notice of Filing, Exhibit 1, ECF Doc. 6. The Policy provides that Hartford "will pay for direct physical loss of or physical damage to Covered Property . . . caused by or resulting from a Covered Cause of Loss." Doc. 6, Ex. 1 at 31. With respect to the additional coverage for business income, Hartford

> will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration." The suspension must be caused by direct physical loss of or physical damage to property at the "scheduled premises" . . . caused by or resulting from a Covered Cause of Loss.

Doc. 6, Ex. 1 at 40. The Policy defines "Covered Causes of Loss" as "risks of direct physical loss", unless the loss is excluded or limited in other Policy provisions. Doc. 6, Ex. 1 at 32.

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

> (1) This insurance is extended to apply to the actual loss of Business Income you sustain when access to your "scheduled premises" is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your "scheduled premises."
>
> (2) The coverage for Business Income will begin 72 hours after the order of a civil authority and coverage will end at the earlier of:
> (a) When access is permitted to your "scheduled premises"; or
> (b) 30 consecutive days after the order of the civil authority.

Doc. 6, Ex. 1 at 41. The reference to "the direct result of a Covered Cause of Loss to property" requires that the civil authority order result from "risks of direct physical loss to property" that are covered under the Policy.

By endorsement, the Policy excludes loss or damage caused by a virus. The Virus Exclusion adds "the following exclusion" to Paragraph B.1 Exclusions. Doc. 6, Ex. 1 at 135. The Virus Exclusion provides:

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

Doc. 6, Ex. 1 at 135 (emphasis added). The exclusion has two exceptions that are not alleged to apply here.[2]

B. Plaintiffs' Allegations

Plaintiffs seek coverage for business income losses that they allegedly sustained in connection with the COVID-19 virus. Plaintiffs allege that "***the COVID-19 pandemic*** and the corresponding response by civil authorities ***to stop the spread of the outbreak*** triggers coverage, [and] has caused physical property loss and damage to the insured property". *See* Compl. ¶ 11 (emphasis added). Plaintiffs allege the following governmental actions:

- "On March 1, 2020, the Florida Surgeon General and State Health Officer declared that a Public Health Emergency exists in the State of Florida ***as a result of the COVID-19 pandemic.***" *Id.* ¶ 18 (emphasis added).
- "On March 16, 2020, the Centers for Disease Control and Prevention, and members of the national Coronavirus Task Force issued to the American public guidance, styled as '30 Days to Slow the Spread' for ***stopping the spread of COVID-19."*** *Id.* ¶ 7.

[2] The two exceptions are (1) when the virus results from fire or lightning or (2) when certain limited additional coverage is applicable. The limited coverage "only applies" if, among other conditions, the virus results from certain specified causes of loss not at issue here (*e.g.*, windstorm, hail, volcanic action) or from an equipment breakdown. *See* Doc. 6, Ex. 1 at 135.

- On March 20, 2020, "Florida Governor Ron DeSantis issued Executive Order 20-72, which specifically prohibited all dental offices from providing any medically unnecessary, non-urgent or non-emergency procedure or surgery." *See id.* ¶ 19.

Plaintiffs allege that since the issuance of Executive Order 20-72, "Plaintiff has been forced to suspend operations with a deleterious effect on business income." *Id.* ¶ 21.

The Complaint asserts two causes of action: (1) breach of contract; and (2) a declaration under Fla. Stat. § 86.021 that the Policy provides certain coverage.

III. STANDARD OF REVIEW – MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

To survive a motion under Rule 12(b)(6), a complaint must contain facts sufficient to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Dye v. United Services Auto. Ass'n*, 89 F.Supp.3d 1332, 1336 (S.D. Fla. 2015) ("only a complaint that states a plausible claim for relief survives a motion to dismiss." (quoting *Iqbal*, 556 U.S. at 679)). "[A] claim must fail if no construction of the factual allegations will support a cause of action." *Virga v. Progressive Am. Ins. Co.*, 215 F. Supp. 3d 1320, 1324 (S.D. Fla. 2016) (Bloom, J.) (quoting *Dye v. United Services Auto. Ass'n*, 89 F.Supp.3d 1332, 1336 (S.D. Fla. 2015)). Further, dismissal is warranted under Rule 12(b)(6) if, assuming the truth of the complaint's factual allegations, a dispositive legal issue precludes relief. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

On a motion to dismiss, the Court may properly consider documents attached to the motion without converting the motion into one for summary judgment if the documents are integral to the complaint and their authenticity is not challenged. *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997); *see also, e.g., Hekker v. Ideon Grp., Inc.*, No. 95–681–Civ–J–16, 1996 WL 578335, at *2 (M.D. Fla. Aug. 19, 1996) (citations omitted) ("[W]here documents are quoted in or are central to Plaintiffs' complaint, and the Plaintiff has failed to provide the entire document with the complaint, the defendant may submit, and the court may consider, those documents in connection with a motion to dismiss."); *Morette*

Co. v. S.-Owners Ins. Co., 301 F. Supp. 3d 1175, 1183 (N.D. Fla. 2017) (citing *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005)) (extrinsic document not physically attached to the complaint may be incorporated into it by reference if central to the complaint).

Here, Plaintiffs' entire lawsuit is premised on the Policy, and Plaintiffs repeatedly and explicitly reference the Policy in the Complaint. The Policy, therefore, is properly considered on a Rule 12(b)(6) motion.

IV. ARGUMENT

The Virus Exclusion unambiguously bars Plaintiffs' business interruption claim because Plaintiffs' losses are caused by a "viral pandemic." *See* Compl. ¶ 49. But, even if the Virus Exclusion did not apply (it does), Plaintiffs still would not be entitled to coverage because they admit (1) they experienced no physical loss at their property, and (2) they were not specifically prohibited from accessing their property.

A. The Virus Exclusion Bars Coverage

1. The Plain and Unambiguous Terms of the Virus Exclusion Govern

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

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

provision its full meaning and operative effect." *Gen. Star Indem. Co. v. W. Fla. Vill. Inn, Inc.*, 874 So. 2d 26, 30 (Fla. 2d DCA 2004). The court is not permitted "to rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *State Farm Mut. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986) (citations and quotations omitted). "If the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written." *Virga v. Progressive Am. Ins. Co.*, 215 F. Supp. 3d 1320, 1324 (S.D. Fla. 2016) (Bloom, J.) (quoting *Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc.*, 141 So.3d 147, 157 (Fla. 2013)). Where, as here, an exclusion applies to bar coverage, the Court need not address coverage under other policy provisions. *See Lubell and Rosen LLC, v. Sentinel Ins. Co.*, Ltd., No. 0:16-cv-60429-WPD, 2016 WL 8739330, at *4 (S.D. Fla. June 10, 2016) (unnecessary to address whether there was physical loss or damage from noxious odors because such odors arose from a sewer backup, and the sewer water exclusion applied).

2. The Virus Caused Plaintiffs' Loss

Under these well-established standards, the Virus Exclusion unambiguously bars coverage for Plaintiffs' claim. The Policy plainly provides that Hartford "will not pay for loss or damage caused directly or indirectly by . . . [the] presence, growth, proliferation, spread or any activity of . . . virus." Doc. 6, Ex. 1 at 135. This exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Id.* Here, the novel coronavirus "caused directly or indirectly" Plaintiffs' alleged losses.

Plaintiffs refer to COVID-19 as the "coronavirus" (s*ee* Compl. ¶ 30; 49 ("the global Coronavirus pandemic")) and "the virus". *See id.* ¶ 49 ("the virus" and "the viral pandemic"). Plaintiffs allege that "***the COVID-19 pandemic*** and the corresponding response by civil authorities ***to stop the spread of the outbreak*** triggers coverage, [and] has caused physical property loss and damage to the insured property". *See* Compl. ¶ 11 (emphasis added). Plaintiffs concede (as they must) that the orders of civil authority were issued to slow the spread of the virus. *See* Compl. ¶¶ 7, 18; *see also id.* ¶ 30 ("measures taken by Governor DeSantis ***to***

prevent the future spread of COVID-19) (emphasis added). The governmental orders Plaintiffs reference undisputedly exist solely to reduce or limit the spread of the virus and would not have been issued absent the coronavirus. Simply put, the coronavirus – a virus – caused Plaintiffs' alleged losses.

Plaintiffs attempt to argue that the Virus Exclusion only applies when the virus is actually present "in or on the Insured Premises." *See* Compl. ¶ 30. This argument is belied by the plain language of the Virus Exclusion, which applies not only to the presence or growth of a virus, but also to the "proliferation, ***spread or any activity*** of . . . virus." Doc. 6, Ex. 1 at 135 (emphasis added). Plaintiffs acknowledge the occurrence of "the spread of COVID-19" by using that phrase at least four times in the Complaint. *See* Compl. ¶¶ 7, 8, 11, 30. "[M]easures taken by Governor DeSantis to prevent the future spread of COVID-19" (*see* Compl. ¶ 30) are in fact caused by the spread of the COVID-19 virus, and the Virus Exclusion applies.

Florida courts do not hesitate to enforce policy provisions excluding coverage for viruses. In *Clarke v. State Farm Florida Insurance*, for example, the homeowner's policy at issue excluded from the definition of bodily injury coverage "communicable . . . virus . . . transmitted by any insured to any other person" and "the exposure of any such . . . virus by any insured to any other person." 123 So. 3d 583, 584 (Fla. 4th DCA 2012). The policyholder sought coverage when a third-party asserted a claim against him for the transmission of Herpes Simplex Virus. *Id.* at 583. The "claims fell outside the plain language that defined the scope of the policy's coverage" and, therefore, "the trial court correctly concluded that State Farm did not owe a duty of defense or indemnification." *Id.* at 584. There, like here, "the complaint alleged injuries expressly excluded by the policy." *Id.*[4]

[4] Courts in other jurisdictions are in accord. *See, e.g.*, *Certain Underwriters at Lloyds of London v. Creagh*, 563 Fed. App'x 209, 211 (3d Cir. 2014) (policy's "microorganism exclusion" precluded coverage for the cost of remediating bacteria that escaped from a decomposed body at the insured's apartment building); *Lambi v. Am. Family Mut. Ins. Co.*, No. 4:11-CV-00906, 2012 WL 2049915, at *4-5 (W.D. Mo. June 6, 2012), *aff'd*, 498 F. App'x 655 (8th Cir. 2013) (communicable disease exclusion in homeowners' policy barred insurance coverage for virus claims); *Sentinel Ins. Co., Ltd. v. Monarch Med. Spa, Inc.*, 105 F. Supp. 3d 464, 472 (E.D. Pa.

No Florida court has published an opinion interpreting the Virus Exclusion or an exclusion with substantially the same language. However, a Michigan appellate court interpreted a nearly identical "'Fungus', Wet Rot, Dry Rot And Bacteria" exclusion and held that the plain language of the exclusion barred coverage for losses from wet rot. *Mich. Battery Equip., Inc. v. Emcasco Ins. Co.*, 892 N.W.2d 456, 460 (Mich. Ct. App. 2016). The court reasoned that "the policy plainly identifies the risks that [the insurer] was willing to, and did contract to cover, and unfortunately for [the insured], wet rot is not one of those risks." *Id*. This same reasoning applies here—the unambiguous Virus Exclusion bars coverage because "virus" is "not one of [the] risks" that Hartford agreed to cover, except in limited circumstances not alleged or present here.

That conclusion is in accord with a Michigan trial court ruling from July 1, 2020 addressing coverage for COVID-19 business income claims just like those at issue here. *Gavrilides Mgmt. Co., v. Michigan Ins. Co.*, Case No. 20-258-CB-C30 (Mich. Cir. Ct., Ingham County, July 1, 2020). The court in *Gavrilides* concluded that Gavrilides could not demonstrate any direct physical loss to its property but, even if it had, the unambiguous virus exclusion would bar coverage. *See* Doc. 6, Ex. 2 at 22 ("But, there is a virus exclusion that would also apply.").[5]

Courts applying Florida law routinely give unambiguous exclusions their straightforward application in analogous situations. *See, e.g.*, *Mt. Hawley Ins. Co. v. Adams Homes, LLC*, No. 3:13cv48-WS, 2014 WL 11512199, at *1 (N.D. Fla. Dec. 16, 2014) (pollution exclusion served as absolute bar to losses from sewage backup); *Harris v. Voyager Indem. Ins. Co.*, No. 8:05-cv-

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2015) (enforcing exclusion of coverage for "[i]njury or damage arising out of or related to the presence of, suspected presence of, or exposure to . . . bacteria" based on showing that Group A Streptococcus is a bacterium); *Alea London Ltd. v. Rudley*, No. Civ.A 03-CV-1575, 2004 WL 1563002, at *3 (E.D. Pa. July 13, 2004) (mold exclusion bars coverage for suit alleging mold contamination).

[5] Transcript of Oral Argument on Defendant's Motion for Summary Disposition, *Gavrilides Mgmt. Co. v. Mich. Ins. Co.*, Case No. 20-258-CB-C30, at 22-23 (Mich. Cir. Ct., Ingham County, July 1, 2020). The court has not yet issued a written order, but the transcript of the oral argument and decision from the bench is attached to Doc. 6 as Exhibit 2.

2011-T24-TBM, 2007 WL 42854, at *5 (M.D. Fla. Jan. 4, 2007) ("Mold, Mildew and Other Fungi Endorsement" through its unambiguous terms explicitly excludes damage caused directly or indirectly by mold); *Lubell and Rosen LLC, v. Sentinel Ins. Co., Ltd.*, No. 0:16-cv-60429-WPD, 2016 WL 8739330, at *4 (S.D. Fla. June 10, 2016) (plain language of the sewer water exclusion clearly excludes the water damage); *Berg v. N.Y. Life Ins. Co.*, 88 So. 2d 915 (Fla. 1956) (affirming denial of a life insurance claim where policy contained an exclusionary clause for claims resulting directly or indirectly from illness or disease and insured's arteriosclerosis was factor in death). This Court likewise should apply the plain terms of the Virus Exclusion and dismiss Plaintiffs' virus-related claims.

3. The Governmental Orders Aimed At Slowing the Spread of the Coronavirus Do Not Impact the Applicability of the Virus Exclusion

Plaintiffs attempt to plead around the Virus Exclusion by alleging that the cause of their loss is the governmental orders aimed at slowing the spread of the virus, not the virus itself. *See* Compl. ¶ 30. This argument fails for at least two reasons: (1) one cause of Plaintiffs' losses is the virus, and the plain language of the Policy excludes virus losses "regardless of any other cause or event that contributes concurrently or in any sequence to the loss" (*see* Doc. 6, Ex. 1 at 135), and (2) orders of civil authority are not direct physical loss or Covered Causes of Loss.

a. The Virus Is a Cause of Plaintiffs' Losses, Which Necessitates the Application of the Virus Exclusion

By its plain terms, the Virus Exclusion applies so long as the presence, growth, proliferation, spread or any activity of virus is one cause of loss; it need not be the sole cause of loss. The Policy provides that the Virus Exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *See* Doc. 6, Ex. 1 at 135. This language is referred to as an "anti-concurrent causation clause", and its purpose is to provide certainty to the parties as to coverage when there are multiple alleged causes of a loss. So long as one contributing cause is excluded, this anti-concurrent causation language ensures the loss is not covered. Therefore, even if the governmental orders could be considered a

concurrent cause of loss under the Policy (they cannot), the virus still constitutes at least one cause of the loss and the Virus Exclusion applies.

Florida courts recognize that such anti-concurrent causation clauses unambiguously exclude coverage where the excluded peril is one cause of the loss. *See Liberty Mut. Fire Ins. Co. v. Martinez*, 157 So. 3d 486, 487 n.1 (Fla. 5th DCA 2015) ("An anti-concurrent cause provision is a provision in a first-party insurance policy that provides that when a covered cause and noncovered cause combine to cause a loss, all losses directly and indirectly caused by those events are excluded from coverage."); *Sec. First Ins. Co. v. Czelusniak*, No. 3D19-589, 2020 WL 2463762, at *1 (Fla. 3d DCA May 13, 2020) (citing *Sebo v. Am. Home Assurance Co., Inc*., 208 So. 3d 694, 700 (Fla. 2016)) (plain language of anti-concurrent cause provision precludes recovery); *Hatch v. GeoVera Specialty Ins. Co.*, No. 6:17-cv-2142-Orl-41DCI, 2019 WL 2515926, at *4 n.4 (M.D. Fla. June 18, 2019) (enforcing anti-concurrent cause provision that prevents application of the concurrent cause doctrine and efficient proximate cause doctrines); *State Farm Fire & Cas. Co. v. Metro. Dade Cty.*, 639 So. 2d 63 (Fla. 3d DCA 1994) (finding anti-concurrent causation clause unambiguous and concluding losses were excluded).

Because the coronavirus undisputedly is *a* cause of Plaintiffs' losses, there is no coverage under the Policy.

b. Orders of Civil Authority Are Not Covered Causes of Loss

Notably, however, this is not a case where there are two causes of loss. The virus – "COVID-19" – is the only alleged Covered Cause of Loss. To be sure, Plaintiffs contend their losses were also caused by governmental orders. Plaintiffs ask this Court to find that "the COVID-19 pandemic and the corresponding response by civil authorities to stop the spread of the outbreak triggers coverage, [and] has caused physical property loss and damage to the insured property". *See* Compl. ¶ 11. Plaintiffs do not allege any covered direct physical loss that caused the civil authority orders to be issued, but argue that the orders caused physical loss and damage themselves. However, governmental orders are not a peril as they do not constitute a

"Covered Cause of Loss" under the Policy and, therefore, cannot trigger coverage under the Policy. *See* Doc. 6, Ex. 1 at 32, 41.

A district court applying Florida law addressed this issue directly and expressly rejected a policyholder's attempt to characterize an order of civil authority as a risk of direct physical loss. *See Prime Alliance Group, Ltd. v. Hartford Fire Ins. Co.*, No. 06-22535-CIV-UNGARO, 2007 WL 9703576 (S.D. Fla. Oct. 19, 2007). There, the policyholder suffered losses as a result of an order to evacuate issued in connection with Hurricane Frances making landfall. *Id*. at *1. The losses did not exceed the policy's deductible for "windstorm" but did exceed the "standard" deductible. *Id.* at *1-2. Thus, a key issue for the court was whether the cause of loss was a "windstorm" or another peril that would be subject to the standard deductible.

The policyholder asserted "that the windstorm deductible is inapplicable to their claim because their business interruption losses were caused not by a windstorm but by an order of civil authority, a separate peril." *Id.* at *3. The court rejected that argument: "No matter how much Plaintiffs would like to believe that interruption by civil or military authority is a separately listed named peril, the structure and language of the policy, when read as a whole, says otherwise." *Id.* at *4 (quotations omitted). The court concluded: "The order of civil authority cannot in any reasonable manner be construed as a 'peril'", where "perils insured against" included "all risk of direct physical loss." *Id*. at *1, *4.

Here, as in *Prime Alliance*, the entire structure and wording of the Special Property Coverage Form makes clear that Civil Authority is not a peril or a Covered Cause of Loss, but instead is an *extension* of coverage in certain well-defined and limited circumstances.[6] Thus, the Policy defines "Covered Cause of Loss" as "risks of direct physical loss" (unless the loss is otherwise excluded or limited by the terms of the Policy). Doc. 6, Ex. 1 at 32. The governmental orders that purportedly inhibit access to Plaintiffs' property are clearly not a "risk of direct physical loss". Rather, the orders are governmental measures taken to avoid or mitigate

[6] The provision states, "This insurance *is extended to apply* to the actual loss of Business Income you sustain. . . ." Doc. 6, Ex. 1 at 41 (emphasis added).

the effects of a transmissible virus to humans. *See* Compl. ¶ 12 ("actions taken by civil authorities to stop the human to human and surface to human spread of the COVID-19 outbreak").

The purpose of the Civil Authority coverage is to ***extend*** coverage to a specific situation that would not otherwise be covered under the Policy. The "extended" coverage applies *only* "when access to" Plaintiffs' scheduled premises "is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of" Plaintiffs' premises. Doc. 6, Ex. 1 at 41. That is, the Civil Authority provision applies when there is direct physical loss or damage to property ***other than Plaintiffs' property.***

Nothing in the Policy, however, suggests that this limited extension of coverage changes the scope of the definition of "Covered Cause of Loss". For example, nothing in the Civil Authority provision mentions, much less changes, the requirement that a Covered Cause of Loss must be a "risk of direct physical loss or damage." The "Special Property Coverage Form" provides "Coverage" only for "direct physical loss of or physical damage to Covered Property. . . ***caused by or resulting from a Covered Cause of Loss***," i.e., risks of direct physical loss, unless excluded or limited. *See* Doc. 6, Ex. 1 at 31, 32.

Not only is Plaintiffs' argument inconsistent with the plain wording of the policy, it would render policy provisions essentially meaningless, which Florida law does not allow. *See Arawak Aviation, Inc. v. Indem. Ins. Co. of N. Am.*, 285 F.3d 954, 957 (11th Cir. 2002) (declining to adopt the approach advanced by the insured which would render the exclusionary clause for wear and tear meaningless) (applying Florida law); *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 139 F. Supp. 2d 1374, 1382 (S.D. Fla. 2001), *aff'd*, 331 F.3d 844 (11th Cir. 2003) (rejecting insured's characterization of "physical loss" that would render the ensuing loss provision meaningless); *Premier Ins. Co. v. Adams*, 632 So.2d 1054, 1057 (Fla. 5th DCA 1994) ("[A]n interpretation which gives a reasonable meaning to all provisions of a contract is preferred to one which leaves a part useless or inexplicable.")

Treating a governmental order as a Covered Cause of Loss would render the "Additional Coverage" for "Civil Authority" superfluous. It would also eliminate the requirement that "Business Income" coverage be premised on the risk of direct physical loss.[7] Indeed, if a governmental order were itself a Covered Cause of Loss, there would be no need for an "***Additional*** Coverage" for "Civil Authority" that ***extends*** coverage; it would already exist under the Business Income coverage. *See* Doc. 6, Ex. 1 at 40.

Simply put, a civil authority order "cannot in any reasonable manner" be construed as a Covered Cause of Loss under the plain terms of the Policy. *See Prime Alliance*, 2007 WL 9703576, at *4. Thus, there is only one peril that has caused Plaintiffs' alleged losses – the coronavirus – and it is excluded. Accordingly, there is no coverage under the Policy for any of Plaintiffs' claims, and the Complaint should be dismissed in its entirety.

B. Plaintiffs Allege They Experienced No Direct Physical Loss to Their Property, Which Removes Any Possibility of Coverage Under the Policy

Even if the Virus Exclusion were not applicable (it is), dismissal would still be appropriate because Plaintiffs admit they experienced no direct physical loss or damage, a prerequisite to all forms of coverage under the Policy. To maintain a cause of action for business income losses, Plaintiffs are required to demonstrate, among other things, "direct physical loss of or physical damage to property at the 'scheduled premises'." *See, e.g.*, Doc. 6, Ex. 1 at 40. Likewise, for civil authority coverage, Plaintiffs must demonstrate, among other things, a "risk[] of direct physical loss" "to property in the immediate area of [the] 'scheduled premises'." *See, e.g.*, Doc. 6, Ex. 1 at 41.

[7] As Plaintiffs allege (*see* Compl. ¶ 5, 25) and as detailed above (*see* Statement of Facts), "Business Income" is an "Additional Coverage" in the Policy. It provides coverage for loss sustained during a suspension of Plaintiffs' operations, provided the suspension is "caused by direct physical loss of or physical damage to" Plaintiffs' covered property that is "caused by or resulting from a Covered Cause of Loss", *i.e.*, risks of direct physical loss. That is, if Plaintiffs' business is suspended because of what otherwise would be covered under the "Coverage" provision, Hartford will pay for those business income losses (subject to the Policy's other terms, conditions and limitations).

Plaintiffs admit that they experienced no direct physical loss. *See* Compl. ¶ 30 (alleging no "actual presence of coronavirus in or on the Insured Premises.") Further, Plaintiffs do not raise a single allegation of "direct physical loss" to property "in the immediate area" of their premises. *See* Doc. 6, Ex. 1 at 41. Whether the COVID-19 virus could theoretically cause physical damage to property is entirely irrelevant; it undisputedly did not in this case. The virus was not present on Plaintiffs' property and there is no allegation it caused property loss or damage anywhere nearby. *See* Compl. ¶ 30.

Hartford is aware of only two courts in the country thus far that have addressed whether business income losses incurred because of COVID-19 were caused by direct physical loss or damage to property. In both instances, the courts concluded there was no physical loss or damage to property. In *Gavrilides Mgmt. Co., v. Michigan Ins. Co.*, Case No. 20-258-CB-C30 (Mich. Cir. Ct., Ingham County, July 1, 2020), noted above, the Court ruled that the insured—like Plaintiffs here—could not demonstrate direct physical loss to its property in the absence of any allegation that the virus was present on the premises. *See* Doc. 6, Ex. 2 at 19. Judge Caproni in the U.S. District Court for the Southern District of New York reached the same conclusion in ruling on a motion for preliminary injunction: "there is no damage to . . . property"; the coronavirus "damages lungs. It doesn't damage printing presses." *See* Doc. 6, Ex. 3, Transcript of Hearing on Mot. for Preliminary Inj., *Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd.*, No. 20-cv-3311, at 4-5 (S.D.N.Y. May 14, 2020).

For this additional reason, all of Plaintiffs' claims should be dismissed.

C. Plaintiffs Cannot Establish Entitlement To Civil Authority Coverage

Finally, to the extent Plaintiffs seek coverage under the civil authority provisions of the Policy, (*see* Compl. ¶¶ 32, 49) the Complaint fails to establish that Plaintiffs are entitled to recover under that provision either. Plaintiffs must demonstrate (1) a Covered Cause of Loss, *i.e.*, direct physical loss or direct physical damage to property in the immediate area of their premises, (2) that access to their premises was specifically prohibited by the order of civil

authority, and (3) the order of civil authority was taken directly in response to the physical damage or loss. *See* Doc. 6, Ex. 1 at 41. Plaintiffs can demonstrate none of these elements.

First, as discussed above, Plaintiffs have not alleged any physical damage, much less "direct physical loss," to property in the immediate area of its premises. That failure alone is fatal to any claim for civil authority coverage.

Second, Plaintiffs cannot recover under the civil authority provision because access to their premises was not specifically prohibited. *See* Doc. 6, Ex. 1 at 41. Plaintiffs allege that they were "forced to suspend or reduce his practice at Nahmad Dental DDS due to orders issued by the Governor of Florida and Mayor of Miami-Dade County that non-emergent or elective dental care be postponed indefinitely." Compl. ¶ 10. This allegation does not show that Plaintiffs and their employees were prohibited from accessing Plaintiffs' premises. Instead, it shows only that the order prevented Plaintiffs from performing certain dental procedures. A *reduction* in one's practice does not constitute a prohibition of access to the premises.

A limitation on access to premises is insufficient to trigger civil authority coverage; a complete prohibition of access is required. *See, e.g., S. Hospitality, Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1140 (10th Cir. 2004) (no civil authority coverage because the grounding of air traffic after 9/11 did not bar access to the plaintiff's hotel); *Commstop v. Travelers Indem. Co. of Conn.*, No. 11-1257, 2012 WL 1883461, at *9 (W.D. La. May 17, 2012) (insured "required to put forward evidence showing access to its convenience store was totally and completely prevented – *i.e.*, made impossible – by the road replacement program"); *Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, No. 3:09-cv-2391, 2010 WL 2696782, at *4-5 (M.D. Pa. July 6, 2010) ("[W]here the action of a civil authority merely hinders access to the covered premises, without completely prohibiting access, federal courts have held that such action is not covered"); *Kean, Miller, Hawthorne, D'Armond McCowan & Jarman, LLP v. Nat'l Fire Ins. Co. of Hartford*, 06-770-C, 2007 WL 2489711, at*3-4 (M.D. La. Aug. 29, 2007) (no civil authority coverage "unless the action of civil authority actually and completely prohibited access to the insured premises"—the government merely "asking" and "encouraging" people to stay home does not suffice);

Paradies Shops, Inc. v. Hartford Fire Ins. Co., 1:03-cv-3154, 2004 WL 5704715, at *5 (N.D. Ga. Dec. 15, 2004) (no civil authority coverage for owner of airport shop because access to airport stores was not "specifically prohibited" by the FAA's order that grounded flights after the September 11 terrorist attacks); *See 730 Bienville Partners, Ltd. v. Assurance Co. of Am.*, 67 F. App'x 248 (5th Cir. 2003) (unpublished) ("It is undisputed that the FAA did not forbid any person to access the [insured's] hotels" after the September 11 attacks).

Third, Plaintiffs admit the orders of civil authority were not issued "as the direct result" of direct physical loss or damage. Rather, Plaintiffs expressly allege that the orders were issued "to stop the spread of the outbreak" (*see* Compl. ¶ 11) and "to prevent the future spread of COVID-19 and to conserve dwindling personal protective equipment". *See* Compl. ¶ 30. In other words, Plaintiffs allege the orders were issued to prevent or limit the *future* spread of the coronavirus, not as a result of direct physical loss or direct physical damage caused by the virus.

Courts routinely reject civil authority claims where the orders of civil authority are aimed at fear of future harm, not existing property loss or damage. In *United Air Lines v. Insurance Company of the State of Pennsylvania*, 439 F.3d 128, 134 (2d Cir. 2006), for example, the court held that any prohibition of access to premises at Reagan National Airport after the September 11 attacks was not covered by civil authority insurance, because the government's "decision to halt operations at the Airport indefinitely was based on fears of future attacks," rather than a response to existing property damage at the nearby Pentagon. Numerous other courts have reached the same conclusion. *See, e.g., Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, No. 4:19-CV-00693, 2020 WL 886120, at *4 (D.S.C. Feb. 24, 2020) ("[T]he phrase 'because of,' by its plain terms, necessitates the existence of property damage or destruction *at the time the civil authority order is issued*." (emphasis added)); *Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, No. 1:03-CV-3154, 2004 WL 5704715, at *7 (N.D. Ga. Dec. 15, 2004) ("[T]he Court finds that an order like Order Two that is designed to prevent, protect against, or avoid future damage is not a 'direct result' of already existing property loss or damage."); *Cleland Simpson Co. v. Fireman's Ins. Co.*, 11 Pa.D. & C.2d 607 (Ct. of Com. Pl. 1957), *aff'd without*

opinion, 140 A.2d 41 (Pa. 1958) (finding no coverage when the civil authority order closing business was issued due to danger of fire, not due to the occurrence of any fire). Thus, the civil authority orders at issue here aimed at slowing the future spread of the coronavirus are insufficient to trigger civil authority coverage, and Plaintiffs' civil authority claims fail as a matter of law.

D. Plaintiffs' Breach of Contract Claim Fails Because There is No Coverage For Plaintiffs' Claims Under the Policy

To assert a breach of contract claim under Florida law, a Plaintiffs must prove by a preponderance of the evidence (1) the existence of a contract, (2) a material breach of the contract, and (3) damages resulting from the breach. *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009). As detailed above, there is no coverage under the Policy; therefore, the insurance contract has not been breached, and Plaintiffs' first cause of action must be dismissed.[8]

V. CONCLUSION

For all of the foregoing reasons and others appearing on the record, Hartford respectfully requests that this Court dismiss Plaintiffs' complaint in its entirety with prejudice.

Dated this 20th day of July 2020.

Respectfully submitted,

/s/ Tracy A. Jurgus
Tracy A. Jurgus, Esq.

[8] Even if Plaintiffs' claims were not subject to dismissal for lack of coverage (they are), the declaratory relief claim must be dismissed. An action for declaratory judgment should be dismissed where the breach of contract claim will provide complete relief on the issue. *See Virga v. Progressive Am. Ins. Co.*, 215 F. Supp. 3d 1320, 1323–24 (S.D. Fla. 2016) (Bloom, J.) ("declaratory relief is not available where the issue is whether an unambiguous contract has been breached."). Moreover, "a court must dismiss a claim for declaratory judgment if it is duplicative of a claim for breach of contract and, in effect, seeks adjudication on the merits of the breach of contract claim." *Ministerio Evangelistico Int'l v. United Specialty Ins. Co.*, 2017 WL 1363344, *1 (S.D. Fla. Apr. 5, 2017); *see also Remedios v. Nat'l Fire & Marine Ins. Co.*, 2019 WL 7956170, at *4 (S.D. Fla. Aug. 29, 2019) (dismissing a declaratory judgment claim that involved the same dispute as the breach of contract claim).

Florida Bar No.: 483737
BUTLER WEIHMULLER KATZ CRAIG LLP
80 S.W. 8th Street, Suite 3300
Miami, FL 33130
Phone: 786-532-2045
Email: tjurgus@butler.legal

Sarah D. Gordon
John J. Kavanagh
Caitlin R. Tharp
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Phone: 202-429-8005
Email: sgordon@steptoe.com
Pro Hac Vice Applications Forthcoming
Attorneys for Defendant, Hartford Casualty Insurance Company, Ltd.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished to:

Nicole S. Houman
Daniel M. Ilani
The Property People FL, P.A.
117 NE 1st Ave, Unit 15-104
Miami, FL 33132
service@PropertyPeopleLaw.com
Nicole@PropertyPeopleLaw.com
Danny@PropertyPeopleLaw.com
Attorneys for Plaintiff

Daniel S. Smith
Salomon Smith PLLC
1111 Brickell Avenue, Ste. 2200
Miami, FL 33131
Daniel@salomonsmith.com

by ECF and e-Service on July 20, 2020.

/s/ Tracy A. Jurgus
Tracy A. Jurgus