

**IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION**

**DIME FITNESS, LLC DBA: ANYTIME
FITNESS,**

Plaintiff,

CASE NO: 20-CA-5467

DIVISION: H

v.

MARKEL INSURANCE COMPANY,

Defendant.

ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

THIS MATTER came before the Court for telephonic hearing on November 2, 2020, on *Defendant, Markel Insurance Company's Motion to Dismiss Complaint*, filed August 20, 2020. On October 19, 2020, Plaintiff filed its *Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint and Supporting Memorandum*. On October 29, 2020, Defendant filed its *Reply in Support of Motion to Dismiss Complaint*. Having reviewed the Motion, Opposition, and Reply, considered the argument of counsel at the hearing, and analyzed the applicable legal authority, the Court finds as follows:

PROCEDURAL HISTORY

This action primarily seeks business income losses purportedly caused by the Governor's Executive Order which required the closure of certain businesses to address a public health crisis. The July 6, 2020, *Complaint and Demand for Jury Trial* presents two causes of action: (1) Breach of Contract and (2) Declaratory Judgment. Plaintiff, who operates a fitness center, contends that Defendant, its insurer, breached the subject policy of insurance (hereinafter "Policy") by denying coverage for Plaintiff's claimed loss under the Civil Authority Provision (hereinafter "Provision").¹ The Policy was attached to the Complaint. Plaintiff contends that Executive Order 20-71 (hereinafter "Executive Order"), issued March 20, 2020, was a civil authority which ordered the closure of all non-essential storefront businesses. Plaintiff further alleges that other businesses within a one mile radius were shut down due to the Executive Order. Plaintiff alleges that the Executive Order was in response to the state of emergency due to the threat of COVID-19.

Defendant denied Plaintiff's claim for the following reasons:

1. No direct physical loss of or damage to covered property
2. No covered cause of loss
3. Civil authority does not apply
4. Virus or bacteria exclusion²

¹ This Provision is found in Form MCP 1217 09 14 of the Policy.

² This explanation of denial was provided via a Coverage Disclaimer letter dated May 19, 2020, which was attached to the Complaint.

With respect to Plaintiff’s declaratory judgment claim, Plaintiff contends that the Policy is ambiguous and unclear, and as such, Plaintiff is in doubt of its rights under the Policy.

Similar to its coverage denial letter, Defendant contends that the Complaint should be dismissed for three reasons. First, the Civil Authority Provision requires direct physical loss to property and does not cover the purely economic losses alleged here. Second, the claim for coverage under the Civil Authority Provision fails because the action of civil authority—the Executive Order—was issued to address public health concerns surrounding COVID-19, not to address any property damage. Third, the allegations establish the applicability of the Policy’s Virus Exclusion (hereinafter “Exclusion” or “Virus Exclusion”).

APPLICABLE LEGAL AUTHORITY

Defendant alleges dismissal is appropriate for failure to state a cause of action pursuant to Florida Rule of Civil Procedure 1.140(b)(6). “A motion to dismiss is designed to test the sufficiency of a complaint, not to determine issues of fact.” *Lowery v. Lowery*, 654 So. 2d 1218, 1219 (Fla. 2d DCA 1995). As such, “[t]he material allegations of the complaint must be taken as true.” *Davison v. Iona-McGregor Fire Prot. & Rescue Dist.*, 674 So. 2d 858, 859 (Fla. 2d DCA 1996). However, “[a] party does not properly allege a cause of action by alleging in conclusive form, which tracks the language of the statute, acts which lack factual allegations and merely state bare legal conclusions.” *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So.2d 490, 501 (Fla. 3d DCA 1994) (disagreed with on other grounds in *Condo. Ass’n of La Mer Estates, Inc. v. Bank of New York Mellon Corp.*, 137 So. 3d 396 (Fla. 4th DCA 2014)). The Court is limited to a review of the four corners of the complaint, but such review includes any exhibits attached to it. *See Haslett v. Broward Health Imperial Point Med. Cnt*, 197 So. 3d 124, 127 (Fla. 4th DCA 2016). “[A] complaint should not be dismissed for failure to state a cause of action ‘unless the movant can establish beyond any doubt that the claimant could prove no set of facts whatever in support of his claim.’” *Meadows Community Ass’n, Inc. v. Russell-Tutty*, 928 So. 2d 1276, 1280 (Fla. 2d DCA 2006) (quoting *Ingalsbe v. Stewart Agency, Inc.*, 869 So. 2d 30, 35 (Fla. 4th DCA 2004)).

“A party may not maintain a claim for breach of contract where the plain language of the contract upon which the claim is based unambiguously establishes that the defendant did not breach the duty alleged in the complaint.” *Detwiler v. Bank of Central Fla.*, 736 So. 2d 757, 758 (Fla. 5th DCA 1999) (granting motion to dismiss finding that breach of contract claim failed as a matter of law), *cf. Consuegra v. Lloyd’s Underwriters at London*, 801 So. 2d 111, 112 (Fla. 2d DCA 2001) (finding that the contract in that case did not unambiguously establish that Lloyd’s did not breach the duty alleged in the complaint). The contract at issue here is a policy of insurance. Florida law provides that the construction of an insurance policy is a question of law for the court. *See generally U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 877 (Fla. 2007). Such policies must be “construed according to their plain meaning.” *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005). Moreover, “[i]n construing an insurance policy, courts should read the policy as a whole, endeavoring to give every provision its full meaning and operative effect.” *Gen. Star Indem. Co. v. West Fla. Village Inn, Inc.*, 874 So. 2d 26, 30 (Fla. 2d DCA 2004). “Indeed, a single policy provision should not be considered in isolation, but rather, the contract shall be construed according to the entirety of its terms as set forth in the policy and as amplified by the policy application, endorsements, or riders.” *Id.* (citing *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 166 (Fla. 2003)). Courts may not “rewrite contracts, add meaning that is not present, or otherwise reach results contrary

to the intentions of the parties.” *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138 (Fla. 1998) (quoting *State Farm Mutual Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986)). “Where no ambiguity exists, the policy shall be construed according to the plain language of the policy . . .” *Gen. Star Indem. Co.*, 874 So. 2d at 30. Policy language is considered ambiguous only if it “is susceptible to more than one reasonable interpretation, one providing coverage and another limiting coverage.” *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007).

CONCLUSIONS OF LAW

This Court is sympathetic to the plight of so many business owners in the wake of the COVID-19 pandemic. Yet, this Court cannot allow sympathy to cloud its review of the plain meaning of an insurance policy. Insurance companies cannot bear the burden of this crisis where, as here, the Policy does not provide for coverage of purely economic losses resulting from the COVID-19 pandemic. Taking as true the facts alleged in the Complaint, and considering such facts in conjunction with the plain language of the Policy, the Court must grant the motion to dismiss.

We start with the Civil Authority Provision as this was the basis for Plaintiff’s claim of loss. This Provision provides in relevant part as follows:

(6) Additional Coverages
(a) Civil Authority

In this Additional Coverage, Civil Authority, the described premises are premises to which this endorsement applies.

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for actual loss of Business Income you sustain and necessary Extra Expense you incur caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(i) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

(ii) The action of a civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or action is taken to enable civil authority to have unimpeded access to the damaged property.

The Provision provides that Defendant will pay for business income loss and extra expenses under certain circumstances. Breaking down each clause of the Provision creates a checklist for determining whether coverage extends to the factual circumstances presented here. The Provision begins, in relevant part, with the clause “[w]hen a Covered Cause of Loss causes damage . . .” Plaintiff ignores this introductory clause, skipping straight to the word “damage” and argues that the Civil Authority Provision does not require “direct physical loss” to trigger its application. Rather, Plaintiff contends that this Provision requires only “damage,” not physical damage. As Defendant aptly points

out in its Reply, this argument is based on an incomplete reading of the Provision. And just because the Civil Authority Provision provides for additional coverage above and beyond normal coverage does not mean that it is read in a vacuum siphoned off from the rest of the Policy.

The Court finds that a plain reading of the Provision first requires a determination of whether a covered cause of loss caused damage. The term “covered cause of loss” is defined in the Policy as “risks of direct physical loss” unless the loss is excluded or limited.³ Thus, the Court must first determine whether there was a covered cause of loss, then whether the other requirements of the Civil Authority Provision are met, and if yes, whether the Virus or Bacteria Exclusion applies to exclude coverage.

Beginning with a determination of whether there was a covered cause of loss, the Court must evaluate whether the admittedly pure economic loss alleged here meets the Policy definition of a “covered cause of loss.” It does not. A “covered cause of loss” is a “risk of direct physical loss.” “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.” *Mama Jo’s, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018), *affirmed Mama Jo’s Inc. v. Sparta Ins. Co.*, 823 Fed.Appx. 868 (11th Cir. Aug. 18, 2020) (“*Mama Jo’s II*”) (citing others);⁴ *see also Infinity Exhibits, Inc. v. Lloyd’s London*, 2020 WL 5791583, at *3 (M.D. Fla. Sept. 28, 2020) (citing *Mama Jo’s II* for proposition that Florida law and the plain language of the policy require “actual, concrete damage”).⁵ The Policy’s Coverage Form further supports the need for direct physical loss by defining coverage as follows:

We will pay for *direct physical loss of or damage to* Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.⁶

(emphasis added). Thus, there is a consistent reference back to the defined term “Covered Cause of Loss” which similarly requires a direct physical loss.

Plaintiff does not allege a direct physical loss. The damage asserted here is business income loss, along with a vague reference to “damage” in the form of a denial of access to the premises. Therefore, this purely economic loss, as well as a lack of access, would not qualify as a covered cause of loss because no direct physical loss has been alleged. Persuasive authority for the Court’s analysis is found in the Middle District’s opinion in *Infinity* where the Court noted that plaintiff in that case “[was] not the first insured to seek coverage due to COVID-19 government shutdown orders under a policy that limits coverage to losses caused by direct physical loss or damage to the property.” Notably, the *Infinity* Court quoted the relevant policy language, and both the coverage clause and civil authority provision are nearly identical to those in the Policy at issue here. The *Infinity* Court further stated that “[c]ourts across the country have held that such coverage does not exist where, as here,

³ This definition is found in CP 10 30 06 07, Causes of Loss-Special Form.

⁴ The Court acknowledges that *Mama Jo’s* was decided on a motion for summary judgment.

⁵ In *Infinity*, the Court granted a motion to dismiss for failure to state a claim.

⁶ This is found in CP 00 10 06 07, Building and Personal Property Coverage Form.

policyholders fail to plead facts showing physical property damage.” *Infinity*, at *4 (citing *Turek Enter., Inc. v. State Farm Mutual Auto. Ins. Co.*, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020), *10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020), and *Malaube, LLC v. Greenwich Ins. Co.*, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020)).⁷ Because no physical property damage is alleged in this case, no covered cause of loss can be found. Moreover, for reasons explained below, the Court further finds that this loss is excluded by the Virus Exclusion, which provides a secondary reason why the “covered cause of loss” definition is not satisfied here.

The Court’s analysis continues with the next portion of the Provision. It reads “[w]hen a Covered Cause of Loss *causes damage to property other than property at the described premises . . .*” (emphasis added). The damage purportedly suffered at other properties (i.e., surrounding businesses similarly compelled to close in accordance with the Executive Order) is business income losses and denial of access. As noted above, Plaintiff contends that the Policy does not require “direct physical loss” but only “damage.” This Court finds that such an interpretation would require a divorce of the phrase “damage to property” from the preceding phrase “[w]hen a Covered Cause of Loss causes.” Such a separation is not conducive to a plain reading of the Policy. Moreover, a common sense reading of the Provision leads to the only reasonable interpretation that the phrase “damage to property other than property at the described premises” is referring to physical property, not intangible property such as money. A consideration of this phrase in the context of the larger Provision reinforces the plain reading that physical damage must occur to physical property. Plaintiff asserts that there was no contamination of COVID-19 at its, or surrounding, premises, let alone actual physical loss associated with COVID-19.

Next, the Provision provides that the business income losses must be “caused by action of civil authority that prohibits access to the described premises.” The Executive Order is the purported civil authority. The allegations of the Complaint demonstrate this factor is met as the purported losses were caused by the Executive Order requiring the closure of businesses like that of Plaintiff. But two additional factors must be met. First, “access to the area immediately surrounding *damaged property* is prohibited by civil authority *as a result of the damage.*”⁸ Plaintiff contends that the “damaged property” is lost business income. There is no allegation of any physical damage to physical property. Moreover, the Executive Order was not issued as a result of the purported damage here (i.e., lost business income). The Executive Order was issued in an effort to address public health concerns surrounding the COVID-19 pandemic. Therefore, there is no damaged property to which access was denied, nor was the civil authority issued as a result of the alleged damage here.

Finally, the Civil Authority Provision requires that “the action of a civil authority [be] taken *in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage.*” Alternatively, the action of civil authority must be “taken to enable civil authority to have unimpeded access to the damaged property.” The latter is inapplicable here as there is no allegation that the Executive Order was taken to provide access to property. The former is also inapplicable as the Executive Order was not issued in response to a dangerous physical condition resulting from damage or the continuation of a covered cause of loss

⁷ *Turek*, *10E*, and *Malaube* were all decided on motions to dismiss.

⁸ This factor also requires that “the described premises are within that area but are not more than one mile from the damaged property.” The allegations satisfy this factor in that Plaintiff contends that surrounding businesses similarly were required to shut down.

that caused the damage. *See generally Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686-87 (5th Cir. 2011) (“[C]ivil authority coverage is intended to apply to situations where access to an insured’s property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured’s property.”) (citations omitted). Again, the Executive Order was issued to address a public health crisis. There was no damage to other property which caused the issuance of the Executive Order. Nor was the Executive Order issued in response to a dangerous physical condition that caused property damage.

Because the allegations of the Complaint demonstrate that multiple factors required for coverage under the Civil Authority Provision remain unmet, the Court finds that Plaintiff has failed to state a cause of action for breach of contract. *See Detwiler*, 736 So. 2d at 758. This Court’s analysis matches that of a growing body of cases addressing economic loss as a result of the COVID-19 pandemic, and the governmental directives aimed at slowing its spread. *See generally Infinity, Turek Enter., Inc., 10E, LLC and Malaube; see also Social Life Magazine, Inc. v. Sentinel Ins. Co.*, No. 20 Civ. 3311 (VEC) (S.D.N.Y. May 14, 2020) (similarly finding that New York law requires damage to property and explaining that “[coronavirus] damages lungs. It doesn’t damage printing presses.”). While these cases provide only persuasive authority, the Court finds value in considering how other courts are evaluating similar policy provisions in the context of COVID-19-related losses.⁹

Even if the Court assumes that Plaintiff has presented allegations sufficient to establish coverage under the Civil Authority Provision, the Court finds that the Virus or Bacteria Exclusion applies to exclude such coverage. That Exclusion reads:

- A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B. *We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.* However, this exclusion does not apply to loss or damage caused by or resulting from “fungus”, wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.

(emphasis added).¹⁰

Plaintiff contends that the Virus Exclusion is inapplicable because COVID-19 did not actually contaminate Plaintiff’s business. This is a narrow interpretation of the Exclusion which is not supported by a plain and reasonable reading of the language. Defendant contends that Plaintiff cannot avoid the Exclusion by alleging the virus did not contaminate the insured property or surrounding properties, but only caused the businesses to shut down due to civil authority.

⁹ Notably, *Infinity, Malaube*, and later-cited *Martinez* all apply Florida law.

¹⁰ This Exclusion is found in CP 01 40 07 06 Exclusion of Loss Due to Virus or Bacteria.

The Court initially notes that this Exclusion applies to the additional coverage provided in the Civil Authority Provision.¹¹ The Exclusion excludes coverage for damages “caused by or resulting from” a virus. To require that a virus “contaminate” or “infect” the physical business premises would add a requirement beyond the plain language, which reads more broadly. While the economic losses at issue here were suffered as a result of business closures required by the Executive Order, the Executive Order would not have been issued had COVID-19 not created a public health concern. The Executive Order was in direct response to the threat of COVID-19 and aimed at slowing its spread. *See generally Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 2020 WL 5642483, at *2 (N.D. Cal. Sept. 22, 2020) (considering the argument that the loss was created by the Closure Orders not the virus, and finding such argument to be “nonsense”); *see also Martinez v. Allied Ins. Co. of Am.*, Case No.: 2:20-cv-00401-FtM-66NPM (M.D. Fla. Sept. 2, 2020) (dismissing with prejudice upon finding that policy specifically excludes loss caused by a virus, therefore dentist failed to state a claim for breach of contract and declaratory judgment); *see generally Diesel Barbershop, LLC v. State Farm Lloyds*, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020) (“While the Orders technically forced the Properties to close to protect public health, the Orders only came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community.”). Given this, the economic loss was caused by or resulted from COVID-19—a virus. Therefore, this Court finds that the Virus Exclusion applies to exclude coverage.

Finally, Plaintiff argues that even if the Court finds that the Virus Exclusion applies, the loss is still covered under the concurrent causation theory. This argument is based on the proposition that the loss had two possible causes—COVID-19 and the Executive Order—and that as such, there is a factual issue for the trier of fact to resolve. Yet, as stated above, the Executive Order issued as *a result of* COVID-19. Because the Executive Order was dependent upon the existence of COVID-19, the concurrent causation rule does not apply here. *See Sebo v. Am. Home Assurance Co., Inc.*, 208 So. 3d 694 (Fla. 2016) (concluding that “when independent perils converge and no single cause can be considered the sole or proximate cause, it is appropriate to apply the concurring cause doctrine”).

Given the foregoing, the Court finds that a plain reading of the Policy contradicts Plaintiff’s claim of coverage. The language of the Civil Authority Provision leads to but one reasonable conclusion: the Policy does not cover the purely economic losses Plaintiff allegedly suffered as a result of its business closure required by the Executive Order which was issued to address a public health crisis caused by COVID-19. As such, the Court finds that Plaintiff has failed to state a cause of action for breach of contract—without coverage, there can be no breach. *See generally Ranieri v. Paincaire Holdings, Inc.*, 889 So. 2d 106 (Fla. 5th DCA 2004) (affirming order granting dismissal based on trial court’s interpretation of employment contract as unambiguous and such plain language contradictory to a claim for breach of contract).

Moreover, Plaintiff has failed to state a cause of action for declaratory relief because there is no basis for Plaintiff to be in doubt of its rights under the Policy where the plain language and law do not extend coverage for the alleged loss. The Policy, the Civil Authority Provision, and the Virus Exclusion are all clear and unambiguous, and none are subject to any other reasonable interpretation. Amendment would be futile. Dismissal with prejudice is warranted.

¹¹ The Exclusion “applies to all coverage under all forms and endorsements” of the Policy.

It is therefore **ORDERED AND ADJUDGED** that

1. *Defendant, Markel Insurance Company's Motion to Dismiss Complaint* is hereby **GRANTED** and Plaintiff's *Complaint and Demand for Jury Trial* is **DISMISSED WITH PREJUDICE**.
2. Plaintiff shall go hence without day.

DONE AND ORDERED on: _____.

Electronically Conformed 11/10/2020

Emmett L. Battles _____

**E. LAMAR BATTLES,
Circuit Court Judge**

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