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CAUSE NO. DC-20-05751

LOMBARDI'S INC.; LOMBARDI'S FAMILY CONCEPTS, INC.; PENNE SNIDER, LLC; PENNE PRESTON, LLC; ALBERTO LOMBARDI INTERESTS, LLC; TAVERNA DOMAIN AUSTIN, LP; CAFÉ TOULOUSE RIVER OAKS DISTRICT; CAFÉ MONACO HPV, LLC; PENNE LAKEWOOD, LLC; TAVERNA BUCKHEAD, LP; TAVERNA AUSTIN, L.L.C.; TAVERNA FT. WORTH, LLC; TOULOUSE KNOX BISTRO, LLC; TAVERNA ARMSTRONG, L.L.C.; TOULOUSE DOMAIN AUSTIN, LP; BISTRO 31 LEGACY, LP; TAVERNA LEGACY, LP; TAVERNA BUCKHEAD, LP; AND LOMBARDI'S OF DESERT PASSAGE, INC. Plaintiffs, v. INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Defendant.	§ §	IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS A-14TH JUDICIAL DISTRICT

DEFENDANT INDEMNITY INSURANCE COMPANY OF NORTH AMERICA'S REPLY IN SUPPORT OF ITS AMENDED MOTION TO DISMISS PURSUANT TO RULE 91A

Defendant Indemnity Insurance Company of North America ("**Chubb**")[1] files this reply ("**Reply**") brief in support of its Amended Motion to Dismiss Pursuant to Rule 91a of the Texas Rules of Civil Procedure ("**Amended Motion**" or "**Am. Motion**"), and would show:

[1] Capitalized terms not otherwise defined herein shall have the meaning assigned to them in Chubb's Amended Motion.

Preliminary Statement

Plaintiffs' Response[2] provides no credible legal basis for avoiding dismissal of all claims Plaintiffs assert in their Amended Petition ("**Petition**"). A Rule 91a motion narrowly examines the facts alleged in a petition to determine whether the Plaintiffs' cause of action has any basis in law, and none of the arguments asserted in Plaintiffs' Response can cure their failure to plead a viable claim for coverage under the Policy.

Instead, Plaintiffs implausibly assert that two separate case-determinative exclusions should not apply even though they plainly do, unsuccessfully attempt to fabricate ambiguity in the Policy where none exists, and rest the entirety of their claims on allegations that are bare legal conclusions. Plaintiffs' causes of action have no basis in law and must be dismissed.

ARGUMENT

I. Plaintiffs' Breach of Contract Claim Has No Basis in Law And Must Be Dismissed.

Even accepting the factual allegations in Plaintiffs' Petition as true, they have not met their burden of alleging credible facts that would entitle them to coverage under the Policy. Since Plaintiffs' breach of contract cause of action has no basis in law, it must be dismissed.

A. Plaintiffs Have Not Plead "Direct Physical Loss of or Damage To" the Insured Property as Required for Coverage to Exist.

For Plaintiffs to succeed on their claim for business interruption coverage, their pleading must show—via actual factual allegations, not conclusory legal assertions—that their suspension of operations was "caused by direct physical loss of or damage to property" at their insured premises. Am. Motion Ex. A at p. 28 (¶ A.1). Plaintiffs' pleading is insufficient, as a matter of law, to meet the coverage threshold in the Policy for two reasons. First, Plaintiffs' pleading of

[2] As used herein, "Response" shall mean the Plaintiffs' Response in Opposition to Defendants' Amended Rule 91A Motion to Dismiss, as filed on October 8, 2020.

"direct physical loss of or damage" to their premises rests wholly on conclusory legal allegations—***not*** credible, specific factual allegations that would be entitled to be taken as true on a Rule 91a motion. Second, the Plaintiffs' theory that their partial loss of use of their restaurants (for dine-in services only, since take away and delivery were always allowed) constitutes "direct physical loss of or damage to" their premises *flatly ignores* the two modifying terms "direct" and "physical." The case law interpreting the import of these two modifying terms obliterates the Plaintiffs' equivalency argument between "direct physical loss" and "partial loss of use."

1. Conclusory Legal Allegations Are Insufficient.

Plaintiffs' allegations concerning the purported "direct physical loss of" their insured premises consist solely of conclusory legal assertions—not factual allegations that must be taken as true on a Rule 91a motion. These are Plaintiffs' only allegations of direct physical loss:

- The COVID-19 pandemic has caused a "direct physical ***loss of***" the Lombardi Plaintiffs' Insured Locations and has caused a suspension of operations. (Pet. ¶ 22.)
- The Insured Properties were directly and physically lost to Lombardi's as a result of the need to prevent the ongoing danger of the virus. (Pet. ¶ 92.)
- The fact the property cannot be used[3] because of the danger of exposure of the surfaces and air to the virus and the resulting danger to the public at minimum has resulted in a "direct and physical loss of the property." (Pet. ¶ 95.)

That's it. In 123 paragraphs, the Amended Petition makes no other allegations of any direct physical loss of or damage to the Lombardi restaurants.

All of the above statements are conclusions of law, not specific factual allegations of

[3] Plaintiffs disingenuously plead that their insured properties "cannot be used" due to the danger from Covid-19 and the shutdown orders (Pet. ¶ 95), but that allegation is contradicted by their own Petition and therefore has no basis in fact under Rule 91a. The Petition elsewhere acknowledges that the only prohibited use of the insured premises was for dine-in services, but that the restaurants were always allowed to "provide take out, delivery, or drive-through services." Pet. ¶¶ 47-48, 55. Rule 91a states that "[a] cause of action has no basis in fact if no reasonable person could believe the facts pleaded." Tex. R. Civ. P. 91a.1. Plaintiffs' allegation that their restaurants could not "be used" is contrary to fact, contradicted by their own pleading, and could not be believed by any reasonable person. Therefore, the Court should not accept that allegation as true on this Rule 91a motion.

damage or loss to the insured restaurants. *PPI Tech. Services, L.P. v. Liberty Mut. Ins. Co.*, 515 Fed. App'x. 310, 312 (5th Cir. (Tex.) 2013) (upholding district court's decision that the allegations of "property damage" and "physical injury to tangible property, including all resulting loss of use of the property" made in suit seeking insurance coverage were *legal* allegations, not "factual allegations of actual damage or loss to tangible property" that could trigger coverage).

"While Rule 91a requires courts to take all factual allegations in the pleadings as true, legal conclusions need not be taken as true." *Auzenne v. Great Lakes Reinsurance, PLC*, 497 S.W.3d 35, 39 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (affirming grant of Rule 91a motion to dismiss on standing grounds since plaintiff's "assertion that he has third-party beneficiary status is a legal conclusion the court is not required to take as true when evaluating his pleading"); *see also Vasquez v. Legend Nat. Gas III, LP*, 492 S.W.3d 448, 451 (Tex. App.—San Antonio 2016, pet. denied) ("although we take all of [plaintiff's] *factual* allegations as true, we need not afford the same deference to plaintiff's *legal* conclusions or *conclusory statements*") (emphasis in original); *Merrick v. Helter*, 500 S.W.3d 671, 673 (Tex. App.—Austin 2016, pet. denied) ("Our focus is the *facts* alleged by the claimant, not any legal conclusions the claimant asserts.") (emphasis in original). Because Plaintiffs do not allege *any* facts at all concerning physical loss or damage to their insured restaurants, their claim for coverage under the policy is groundless, their pleading has zero basis in law, and their cause of action against Chubb for breach of the policy should be dismissed. Tex. R. Civ. P. 91a.1; *Vandelay Hospitality Group LP d/b/a Hudson House v. Cincinnati Ins. Co.*, No. 3:20-CV-1348-D, 2020 WL 5946863, at *1 (N.D. Tex. Oct. 7, 2020) (granting motion to dismiss Covid-19 business interruption coverage breach of contract claim that failed to allege "direct physical loss or damage," since the allegations in the petition

were "factually conclusory and/or legal conclusions and are therefore inadequate to plead a plausible claim for breach of contract").

2. Plaintiffs Misconstrue "Direct Physical Loss."

Plaintiffs' theory that a partial loss of use of their restaurants constitutes "direct physical loss of or damage to" their premises *flatly ignores* the two modifying terms "direct" and "physical," according to a flood of recent case law. It matters not whether closures were compelled by compliance with governmental ordinances, as Plaintiffs alleged in their Original Petition, or instead were prompted by a civic-minded impulse to avoid the dangers of the coronavirus, as Plaintiffs' Amended Petition would now have it.[4] Plaintiffs simply do not allege the closures resulted from direct physical loss.

Texas courts have repeatedly held that "physical loss" means tangible or physical damage. *See de Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 723 (Tex. App.—Houston [14th Dist.] 2005, pet. filed) (holding "physical loss" means "tangible damage"); *Ross v. Hartford Lloyd Ins. Co.*, No. 4:18-CV-00541-O, 2019 WL 2929761, at *7 (N.D. Tex. July 4, 2019) (citing 10 Couch on Ins. § 148:46 and holding that the term "physical loss" "cannot fairly be construed to mean physical loss in the absence of physical damage").[5] In their Response, Plaintiffs cite zero

[4] The new narrative in Plaintiffs' Amended Petition that Plaintiffs ***voluntarily*** shut down in-person dining at their restaurants does not support Plaintiffs' entitlement to coverage under the Policy. The predicate for business interruption coverage is clear, and Plaintiffs have failed to plead allegations that meet the standard.

[5] Plaintiffs argue that some of the cases Chubb cites, such as the *de Laurentis* and *Ross* cases, are inapposite because the policy language in those cases included a different prepositional endpoint in the coverage provision, *i.e.*, "physical loss to" property rather than "physical loss of" property. If the prepositional distinction makes a difference, Plaintiffs do not coherently explain what it could be. Moreover, those courts' opinions interpret the phrase "physical loss" without apparent reliance or emphasis on the trailing preposition, and therefore these court decisions are duly persuasive. Plaintiffs make the same argument regarding *Rose's 1* (discussed *infra*), but that court opinion interpreted the sole phrase "direct physical loss" without any trailing preposition at all. In any event, Chubb also cites numerous cases interpreting "direct physical loss of" property that reach the identical conclusion that "direct physical loss" requires a tangible, harmful alteration to the insured property. *See 10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-AS, 2020 WL 5359653, at *4-5 (C.D. Cal. Sept. 2, 2020) (interpreting "direct physical loss of or damage to property" to mean "distinct, demonstrable physical alteration" and to exclude "losses from inability to use property"); *Mama Jo's Inc. v. Sparta Ins. Co.*, No. 18-12887, 2020 WL 4782369, at *8 (11th Cir. Aug. 18, 2020) (holding that "direct physical loss of or damage to" property requires tangible, physical loss or actual change in the

Texas court opinions suggesting or finding any other meaning for the words "physical loss," instead asking this court to break new legal ground on the strength of a sentence in a single secondary source Plaintiffs append to their Response.

Many other courts—including a Texas decision concerning a Covid-19 business interruption claim—have interpreted "direct physical loss" to require a physical intrusion onto the property that changes and causes damage to the property itself, as opposed to an economic loss from a reduction in business. *Diesel Barbershop, LLC et al. v. State Farm Lloyds*, No. 5:20-CV-461-DAE, Doc. No. 29 (Order Granting Defendant's Motion to Dismiss) at pp. 14-15 (W.D. Tex. Aug. 13, 2020) (dismissing coverage claim for Covid-19 business interruption for failing to allege any "direct physical loss" where insured failed to plead any "tangible injury" to its premises); *Gavrilides Management Co. v. Michigan Ins. Co.*. Case No. 20-258-CB, Doc. No. 23 (transcript of July 1, 2020 hearing) at 18:18-19:8; 20:5-18; 23:16-17 (Mich. Cir. Ct. August 4, 2020) (insured suffered no "direct physical loss of or damage to" its property as a result of the Covid-19 orders prohibiting in-person dining, as the plaintiff plead no tangible change or alteration to the physical integrity of its restaurant's premises).

Still other courts have squarely rejected Plaintiffs' central argument for coverage that "direct physical loss" should encompass "loss of use." For example, in *Malaube, LLC v. Greenwich Ins. Co.*, Case No. 20-22615-CIV, 2020 WL 5051581, at *9 (S.D. Fla. Aug 26, 2020),

property, as opposed to an economic loss such as a need for cleaning); *Malaube, LLC v. Greenwich Ins. Co*., Case No. 20-22615-CIV, 2020 WL 5051581, at *4 (S.D. Fla. Aug 26, 2020) (policy covering business interruption "caused by direct physical loss of or damage to property" did not cover the "pure economic losses" resulting from the Covid-19 shutdown orders in the absence of a demonstrable, tangible, and physical alteration of the insured property); *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, Civ. No. 1:20-CV-2939-TWT, 2020 WL 5938755, at *5 (N.D. Ga. Oct. 6, 2020) (interpreting "direct physical loss of or damage to" to require either complete destruction or repairable damage of insured premises); *Mark's Engine Co. No. 28 Restaurant, LLC v. Travelers Indemnity Co. of Conn.*, No. 2:20-CV-04423-AB-SK, 2020 WL 5938689, at *3 (C.D. Cal. Oct. 2, 2020) ("losses from inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase," which requires a "distinct, demonstrable, physical alteration" to the property, not just "detrimental economic impact").

the court rejected plaintiff's argument that Covid-19 orders prohibiting in-person dining qualified as "direct physical loss" because the orders rendered the restaurant facilities "uninhabitable or substantially unusable." The court held that "direct physical loss" requires demonstrable, tangible, and physical alteration of the insured property, rather than just economic losses. The court also held that the Covid-19 orders "permitted Plaintiff to continue its takeout and delivery services," so the orders "never made the restaurant uninhabitable or substantially unusable." *See also Mark's Engine Co. No. 28 Restaurant, LLC v. The Travelers Indemnity Co. of Conn.*, No. 2:20-CV-04423-AB-SK, 2020 WL 5938689, at *3 (C.D. Cal. Oct. 2, 2020) ("losses from inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase," which requires a "distinct, demonstrable, physical alteration" to the property, not just "detrimental economic impact"); *Rose's 1, LLC v. Erie Ins. Exchange*, Civil Case No. 2020 CA 002424 B, 2020 WL 4589206 (Sup. Ct. of D.C. Aug. 6, 2020) at p. 5 (rejecting argument that "direct physical loss" encompasses "loss of use," *i.e.*, the deprivation of use of the insured restaurants for in-person dining, because "the words 'direct' and 'physical' modify the word 'loss'"; therefore, the policy requires "a direct physical intrusion on to the insured property" and the local Covid-19 "orders were not such a direct physical intrusion" because they "did not have any effect on the material or tangible structure of the insured properties"); *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D.2d 1, 751 N.Y.S.2d 4 (N.Y.A.D. 1st Dept. 2002) (specifically repudiating the insured's assertion that the phrase "loss of" must include "loss of use of" the insured premises, since the policy's covered causes of loss required any loss to be "direct" and "physical," which "narrows the scope of coverage" to "losses involving physical damage to the insured's property"); *10E, LLC v. Travelers Indem. Co. of Connecticut*, Case 2:20-cv-04418-SVW-AS, 2020 WL 5095587, at *4 (C.D. Cal. Aug. 28, 2020), opinion amended and superseded,

No. 2:20-CV-04418-SVW-AS, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020) ("An insured cannot recover by attempting to artfully plead impairment to economically valuable use of property as physical loss or damage to property…. Plaintiff only plausibly alleges that in-person dining restrictions interfered with the use or value of its property—not that the restrictions caused direct physical loss or damage," as "Plaintiff remained in possession of its dining room, bar, flatware, and all of [its other restaurant] accoutrements").

Plaintiffs would distinguish the many cases cited above by suggesting that the businesses at issue shut down only due to governmental orders. Plaintiffs' Amended Petition alleges that their restaurant closures did not *solely* result from the orders mandating the temporary suspension of in-person dining only, but also purportedly out of a corporate motivation to avoid the "the danger of exposure… to the virus." Pet. ¶ 95. This feeble distinction simply does not change the analysis, because it does not alter the well-established legal meaning of "direct physical loss." *See Sandy Point Dental, PC v. Cincinnati Ins. Co.*, No. 20 CV 2160, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020) ("Direct physical loss… unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage," and "closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure" are not covered losses; "Plaintiff has not pled any facts showing physical alteration or structural degradation of the property" and "[n]othing about the property has been altered since March 2020. Plaintiff need not make any repairs or change any part of the building to continue its business.").

Moreover, Plaintiffs' Response cites no Texas case law interpreting "direct physical loss of or damage to" in any contrary way. Indeed, the cases[6] cited actually undermine Plaintiffs'

[6] The other two cases cited—but not explained—by Plaintiffs in n.10 of their Response are inapposite, as they involved different fact patterns and were not issued under Texas law. *See Manpower Inc. v. Ins. Co. of Pennsylvania*, No. 08-C-0085, 2010 WL 3809695, at *1 (E.D. Wis. Sept. 24, 2010) (business's personal property was covered as "lost" under Wisconsin law after it became inaccessible due to the physical collapse of the business's building); *Blue Springs*

argument that "loss *of*" has no meaning unless it includes "temporary loss of one kind of use." Plaintiffs cite *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB (KSX), 2018 WL 3829767, at *4 (C.D. Cal. July 11, 2018) for this point, but that case supports Chubb's position. In *Total Intermodal*, which was decided under California law, a shipment of the insured's goods was accidentally directed to China, where the customs authorities took possession and refused to release the goods. The insured's policy—as here—covered "direct physical loss of or damage to" insured property. *Id.* There was no evidence that the goods being held by the Chinese customs authorities had sustained any damage, so coverage was not implicated on those grounds. *Id.* Therefore, the only dispute in that case—as here—was whether the insured had alleged the "direct physical **loss of**" their property to implicate its insurance coverage. *Id.* The Court reasoned that the "ordinary" meaning of the phrase "'loss of' property contemplates that the property is **misplaced and unrecoverable**," distinguishing that portion of the coverage provision from the latter half covering "damage to" the insured property, thus giving both phrases meaning. *Id.* (holding that the insured had established that its undamaged goods were "lost" within the meaning of the policy's coverage, since "the phrase 'loss of' includes the **permanent dispossession** of something") (emphasis added). This case helpfully illustrates how the coverage in Plaintiffs' Policy for "loss of" is distinct from "damage to"[7]—but Plaintiffs have alleged neither

Dental Care, LLC v. Owners Ins. Co., No. 20-CV-00383-SRB, 2020 WL 5637963, at *4 (W.D. Mo. Sept. 21, 2020) (finding plaintiff alleged "loss" under Missouri law where complaint pled that Covid-19 was physically present "on an around the insured property" and that plaintiff had to end or reduce operations "because of actual contamination by COVID-19" on their property). The Lombardi Plaintiffs make no such factual allegations in their Petition, and they cite no cases holding that the allegations they do make constitute "direct physical loss of" their property under Texas or any other state's law.

[7] Another court interpreting the phrase "direct physical loss of or damage to" under Georgia law rejected the insured's argument that "loss of" could mean the "loss of use" of their restaurant and instead found that the insurer's position that both prongs would necessitate damage to the insured property was not incongruous, since "loss is the 'disappearance of value' or 'the act of losing possession' by complete destruction, while damage is any other injury requiring repair. As an illustrative example, 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." *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, Civ. No. 1:20-CV-2939-TWT, 2020 WL 5938755, at *5 (N.D. Ga. Oct. 6, 2020).

prong and at least one is required for coverage to exist. Plaintiffs have not alleged, for example, that their restaurant's awning, oven, light fixtures, or serving dishes have been misplaced or are unrecoverable. They certainly have not alleged that they have permanently lost possession of the entirety of their sixteen restaurants. *See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-03213-JST, 2020 WL 5525171, at *4 (N.D. Cal. Sept. 14, 2020) (temporary closure of store due to Covid-19 was not a "direct physical loss of" the property since it was not a "permanent dispossession." "When the Stay at Home orders are lifted, Mudpie can regain possession of its storefront. Mudpie's physical storefront has not been 'misplaced' or become 'unrecoverable,' and neither has its inventory."). Plaintiffs simply have not alleged a "direct physical loss of" their insured property under the law of Texas or any other state. Therefore, their claim for business interruption[8] coverage has no basis in law and must be dismissed.

[8] Plaintiffs argue that the Policy's "period of restoration" provision is ambiguous and also that it should be read out of the policy since it conflicts with Plaintiffs' invented interpretation of "direct physical loss." Response at pp. 13-14. The Policy provides that the "period of restoration" ends once the damaged insured property "should be *repaired, rebuilt or replaced* with reasonable speed and similar quality," thus indicating that business interruption coverage applies only when the insured property is physically damaged or permanently lost, and therefore in need of repair, construction, or replacement. See Am. Motion Ex. A at p. 28 (¶ A.1) and p. 30 (¶ F.3). However, Plaintiffs fail to provide two conflicting reasonable interpretations for the term "period of restoration," so their ambiguity argument cannot be credited. *See Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713, 720 (Tex. App.—San Antonio 1994, writ denied). And courts never construe contracts by tossing out a provision as Plaintiffs urge here; rather, all provisions should be read together. Many other courts have found that the period of restoration provision comports with and supports their finding that "direct physical loss" requires some injury to the property. *See Malaube, LLC v. Greenwich Ins. Co*., Case No. 20-22615-CIV, 2020 WL 5051581, at *9 (S.D. Fla. Aug 26, 2020) ("constru[ing] 'direct physical loss or damage' to require actual harm" to the insured property "gives effect" and meaning to the policy's period of restoration provision); *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, Civ. No. 1:20-CV-2939-TWT, 2020 WL 5938755, at *5 (N.D. Ga. Oct. 6, 2020) (noting that "period of restoration" provision "aligns with an understanding that 'loss of' means total destruction while 'damage to' means some amount of harm or injury"); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-03213-JST, 2020 WL 5525171, at *4 (N.D. Cal. Sept. 14, 2020) ("period of restoration" provision indicates inapplicability of business income coverage, since "[t]he words 'rebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature" but "here, there is nothing to fix, replace, or even disinfect for Mudpie to regain occupancy of its property").

B. The "Causes of Loss – Special Form" Applies to Plaintiffs' Coverage Claim and Requires Plaintiffs' Loss or Damage to Result From "Direct Physical Loss."

Plaintiffs' argument that there are no applicable causes of loss for the Policy's business income interruption coverage provision is demonstrably false. *See* Response p. 8. As explained in Chubb's Amended Motion (at pp. 12-13), the Policy's business income form requires that the claimed "loss or damage must be caused by or result from a Covered Cause of Loss" (Am. Motion Ex. A at p. 28 (¶ A.1)) and refers to the Declarations, where the "applicable Causes of Loss form" is specified (*id.* at p. 29 (¶ A.3)). The Supplemental Declarations (*id.* at pp. 31-46) set forth the "Covered Causes of Loss" for each coverage of the Commercial Property portion of the policy, including the "BLANKET GRP #2" schedule of locations, which are those included in the coverage for "BUS. INCOME BY VALUE" with a cumulative limit of insurance of $18,952,419.[9] *Id.* at p. 31. Each of the Plaintiffs' sixteen insured restaurant locations in "BLKT GRP 2" with coverage for "BUS INC OTHER THAN RENTAL" are separately listed in the "blanket schedule" of the Supplemental Declarations, and *each of these coverages individually designates* "SPECIAL" as the "Covered Causes of Loss." *See* Am. Motion, Ex. A at pp. 31-46 (highlighted Supplemental Declarations indicating each location included in the Blanket Group 2, Business Income coverage). The Policy provides that "[w]hen Special is shown in the Declarations, Covered Causes of Loss means **direct physical loss**...." Am. Motion Ex. A at p. 47 (¶ A) (emphasis added). As the Supplemental Declarations make clear, the Plaintiffs are not entitled to coverage unless they plead that their "loss or damage" was "caused by or result[ed] from" a "**direct physical loss**." Am. Motion Ex. A at pp. 28-29, 31-46, 47. Plaintiffs' failure to plead any direct physical loss means their breach of contract claim has no basis in law and must be dismissed.

[9] Plaintiffs plead (Pet. ¶ 11)—and confirm in in their Response (p. 8)—that this is the relevant limit for the business interruption coverage they claim.

To distract the Court from this plain reading of the Policy's designation of "SPECIAL" for each and every location in the Supplemental Declarations that is subject to the Business Income coverage in Blanket Group 2,[10] Plaintiffs feign confusion over how to read the Policy, ultimately urging the Court to conclude that there are no covered losses at all.[11] Plaintiffs *ignore* each of the sixteen specific entries in the Supplemental Declarations for business income coverage for their sixteen restaurants (all of which have "Special" listed in their "covered causes of loss" column) (*id.* at pp. 31-46) and instead pretend they can only read the rows associated with "specific features" of the restaurants, which pertain to the coverages for business personal property, awnings, and canopies. Response at p. 10. Wearing these blinders, Plaintiffs then assert that the "Special" covered causes of loss designation only applies to those rows relating to non-business income coverages, when in reality the "Special" designation applies to every *specific* location listed in the Supplemental Declarations for *all* coverages, including business income. Am. Motion Ex. A at pp. 31-46.

C. The Ordinance or Law Exclusion Applies and Bars Coverage Given the Affirmative Factual Allegations in Plaintiffs' Petition.

As demonstrated in Chubb's Amended Motion (pp. 12-13) and in Part I.B of its Reply, *supra*, the "Causes of Loss – Special Form" applies to Plaintiffs' business income interruption claim, and Plaintiffs' argument to the contrary (Response at pp. 7-10) is both unsupported and

[10] Plaintiffs even acknowledge in their Amended Petition that the business income coverage they seek only applies to the premises "for which a Business Income Limit Of Insurance is Shown in the Declarations." Pet. ¶ 10; Am. Motion Ex. A p. 28 (¶ A.1). Consistent with this coverage provision, the Supplemental Declarations list each of the sixteen restaurant locations that are subject to the "business income" limit of insurance for "Blanket Group 2."

[11] Plaintiffs' argument, which asserts there are *no* specified covered causes of loss in the Supplemental Declarations (which is flatly untrue, as the highlighting in Ex. A conclusively demonstrates) would actually upend the entire policy and make the business income coverage illusory, as there would be no covered causes of loss at all. *See* Response p. 8.

incorrect. Therefore, the Ordinance or Law exclusion, which appears on this same form, also applies. Am. Motion Ex. A at p. 47 (¶ B.1.a).

Under Rule 91a, "[a] cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them do not entitle the claimant to the relief sought." Tex. R. Civ. P. 91a.1. A pleading can be found to have no basis in law on two grounds—either by *failing* to allege sufficient facts to establish the necessary elements of a cause of action or by *affirmatively* alleging "additional facts that, if true, bar recovery." *Guillory v. Seaton, LLC*, 470 S.W.3d 237, 240 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). In the context of the Ordinance or Law exclusion, it is the latter; Plaintiffs affirmatively plead facts that establish the exclusion undoubtedly applies and foreclose any possibility of coverage.

The Ordinance or Law exclusion states that Chubb "will not pay for loss or damage caused directly or indirectly by" the "enforcement of or compliance with any ordinance or law regulating the … use… of any property," even if the loss "results from [a]n ordinance or law that is enforced even if the property has not been damaged," "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Am. Motion Ex. A at p. 47 (¶ B.1.a(1)(a)). Plaintiffs have affirmatively plead that their business interruption loss was caused by their compliance with government orders restricting their ability to operate their restaurants for dine-in services, even though their restaurants were not physically damaged.[12] Given Plaintiffs' affirmative allegations that squarely fit the parameters of the Ordinance or Law exclusion in the Policy, their coverage claim is excluded and their breach of contract claim has no basis in law.

[12] Pet. ¶¶ 47-48 and 55 (detailing the municipal orders regulating the use of the Lombardi's restaurants and prohibiting dine-in services). Though the Plaintiffs now claim they pre-emptively decided to close their restaurants' dine-in services "to prevent the ongoing danger of the virus," they concede that these "preventative measures align[ed] with various governmental directives" requiring them to take those actions. The Ordinance or Law exclusion of the Policy therefore applies to any resulting damages—regardless of Plaintiffs' mixed motives for the partial closures—since it states that such losses are "excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Am. Motion Ex. A p. 47 (¶ B.1).

Other than attempting to entirely disclaim the plain applicability of this form, Plaintiffs seek to avoid this exclusion by asserting that the governmental orders which temporarily shut down the Plaintiffs' in-restaurant dining in March 2020 were not an "ordinance or law," supposedly because they were neither enacted by a state legislature nor did they appear in a city code.[13] Plaintiffs' argument that the exclusion is inapplicable fails for two separate reasons.

First, Plaintiffs' cherry-picked definitions of "law" and "ordinance" are unduly narrow[14] and out of step with those words' regular meanings. Black's Law Dictionary defines "law" as, among other things, "the aggregate of legislation, judicial precedents, and accepted legal principles" and "the body of authoritative grounds of judicial and administrative action." LAW, Black's Law Dictionary (11th Ed. 2019). And "ordinance" is defined, among other things, as "an authoritative law or decree, esp., a municipal regulation." ORDINANCE, Black's Law Dictionary (11th Ed. 2019). The broad, unqualified use of the terms "law" and "ordinance" in the Policy, as demonstrated by these definitions, necessarily encompasses the state, county, and city orders and directives alleged in the Petition.[15]

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[13] Plaintiffs assert, without legal support, that "*only* the state legislatures are authorized to pass regulatory laws, and *only* the city councils may pass ordinances." *See* Response at pp. 6-7, 23. *None* of the long list of citations Plaintiffs append to this assertion support any part of their statement. *See, e.g.*, Tex. Const., Art. III, § 29 (requiring statutes enacted by the state legislature to contain the "enacting clause" of "Be it enacted by the Legislature of the State of Texas."). Similarly, the long list of Codes of Ordinances cited by Plaintiffs and attached as exhibits to their Response establish only that certain city councils are empowered to issue resolutions and ordinances, among other powers. None of the codes cited by Plaintiffs defines ordinance or states that the word "ordinance" can *only* mean a ruling passed by a city council.

[14] As just one illustrative example, Plaintiff's definition of "law" as used in the Policy to mean only statutes enacted by state legislatures would negate the authority of agency regulations, which "have the force and effect of law." *See Canyon Reg'l Water Auth. v. Guadalupe Blanco River Auth.*, 286 S.W.3d 397, 404 (Tex. App.—Corpus Christi 2008, no pet.).

[15] To the extent Plaintiffs' objection to the orders' qualification as a "law or ordinance" is premised on the idea that the County Judges issuing certain of the orders (*see* Pet. ¶¶ 47, 55) do not have legislative authority, that premise is legally incorrect. *See Galveston County, Tex. v. Quiroga*, 14-18-00648-CV, 2020 WL 62504, at *7 (Tex. App.—Houston [14th Dist.] Jan. 7, 2020, no pet.) ("The County Judge is the presiding officer of the Commissioners Court. The Commissioners Court has both a legislative, executive, and judicial function.") (internal citations omitted). *See* Response p. 11 (Plaintiffs assert, without citation to supporting law, that "laws and ordinances are formal legislative enactments.").

Second, the Ordinance or Law exclusion applies to the "***enforcement*** of or ***compliance*** with any ordinance or law…" Am. Motion Ex. A p. 47 (¶ B.1(a)) (emphasis added). Plaintiffs concede that "the directives issued in Texas [were] derived from authority in Texas Government Code Section 418.018(a)…" (Response p. 6). Thus, Plaintiffs' compliance with the Covid-19 orders and directives requiring their dine-in services to temporarily cease operation is *necessarily* compliance with the empowering state statute, which Plaintiffs concede to be law.[16] *See, e.g., United States v. Ferguson*, 1:07-CR-70, 2007 WL 4146319, at *5 (E.D. Tex. Nov. 16, 2007) (curfew imposed by county judge was proper, since "Judge Frank was empowered by law (Tex. Gov. Code § 418) to declare a curfew and restrict the movement of individuals in Jasper County, Texas."). Therefore, even if Plaintiffs' self-serving definition of "law" is accepted solely for purposes of argument, the Policy's exclusion of any damages caused by the insured's "compliance with any ordinance or law" is still implicated and still bars Plaintiffs' coverage claim.

D. Plaintiffs Have Not Plead Any of the Facts Necessary to Support a Coverage Claim Under the Civil Authority Provision.

To demonstrate Plaintiffs' supposed entitlement to coverage under the Policy's Civil Authority provision, Plaintiffs' Response purports to rely wholly on generic—*and legally inapposite*—statements made in an April 2020 governmental declaration that the Covid-19 virus was "physically causing property damage" in the region. Response p. 12. This is insufficient to avoid dismissal of its breach of contract claim for having no basis in law, as Rule 91a measures the viability of Plaintiffs' claim according to the factual allegations in its Petition and whether those allegations establish Plaintiffs' cause of action. Instead of acknowledging their own failure

[16] On its own, Texas Government Code Section 418 would accomplish nothing. The purpose of the statute is to empower local officials to enact and enforce measures of law that are deemed necessary in an emergency situation. *See Ferguson*, 2007 WL 4146319, at *5. This statutory authority was precisely what was invoked when the various Texas Covid-19 orders were issued.

to plead even a single fact—much less *all* of the necessary facts—to establish a right to the Civil Authority coverage in the Policy, Plaintiffs instead attempt to distract the court with a generic and legally conclusory[17] statement made by a public official, which is not actually a fact at all.

As explained in the Amended Motion (*see* Part II.D), Plaintiffs' claim for Civil Authority coverage has no basis in law and must be dismissed because Plaintiffs have failed to allege *any* of the predicate facts for that coverage. Plaintiffs have not alleged that a "direct physical loss" caused damage to other property within one mile of any of the insured restaurant premises, and they have not plead that any civil authority prohibited access[18] to their restaurant premises in response to the dangerous conditions posed by the nearby damage. Am. Motion Ex. A at p. 29 (¶ A.5). Incredibly, since Plaintiffs realize they have not and cannot plead damage within a mile of the insured premises, they instead contend that the "*entirety*" of each jurisdiction that issued Covid-19 orders "was the focal point of the 'damages.'" Response p. 12. This argument misses the coverage requirements of the Policy's Civil Authority provision by way more than a mile. Since Plaintiffs have plead *none* of the requisite facts necessary to entitle them to the Civil Authority coverage, their claim has no basis in law. *See Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, Civ. No. 1:20-CV-2939-TWT, 2020 WL 5938755, at *6 (N.D. Ga. Oct. 6, 2020) (rejecting insured's

[17] Only factual allegations—not legal conclusions or conclusory statements—should be taken as true for purposes of a Rule 91a motion to dismiss. *See City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 826 (Tex. App.—Austin 2014, no pet.) ("[A] legal conclusion need not be taken as true in evaluating the sufficiency of the pleadings.").

[18] As explained in the Amended Motion (Part II.D at pp. 19-21), Plaintiffs concede that the relevant orders permitted Plaintiffs access to their insured premises at all times to provide take-out and delivery food services. Pet. ¶¶ 47-48, 55. While Plaintiffs assert that one of the Dallas orders "prohibit[ed] access and use of any premises operated as dine-in restaurants" (Pet. ¶ 48), that allegation of impaired access is contradicted by their own Petition and therefore has no basis in fact under Rule 91a. In fact, Plaintiffs acknowledge that the orders "allow[ed] operation" (and therefore access to and use of) the restaurants to provide "take-out services." *Id.* While Plaintiffs conspicuously fail to quote the city order that they claim "prohibit[ed] access," the order they do quote in the preceding paragraph specifically permits restaurants to "provide take out, delivery, or drive-through services." Pet. ¶ 48; *see also* Pet. ¶ 55. Rule 91a states that "[a] cause of action has no basis in fact if no reasonable person could believe the facts pleaded." Tex. R. Civ. P. 91a.1. Plaintiffs' allegation that they lost "access" to their premises is contrary to fact, contradicted by their own pleading, and could not be believed by any reasonable person. The Court should not accept the allegation as true on this Rule 91a motion.

claim for Civil Authority coverage predicated on the assertion that the Covid-19 virus was generally causing damage in the community, since the civil authority provision "contains several clear conditions precedent for coverage" and the insured had pleaded none of them); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, No. 20-CV-907-CAB-BLM, 2020 WL 5500221, at *6 (S.D. Cal. Sept. 11, 2020) (rejecting claim for civil authority coverage where none of the predicate requirements were alleged, and particularly noting that "[t]he government orders alleged in the complaint prohibit the *operation* of Plaintiff's business; they do not prohibit *access* to Plaintiffs' place of business"); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, No. 20 CV 2160, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020) (plaintiff not entitled to civil authority coverage where it was permitted to operate its business for limited purposes, so it failed to allege that it was prohibited from accessing its own premises).

Relatedly, Plaintiffs ask the court to give them a pass on pleading the requisite facts that would entitle Plaintiffs to the relief they seek, even though the sole basis on which a Rule 91a motion to dismiss may be judged is whether the Plaintiffs have pleaded allegations that demonstrate a cause of action with a basis in law. Plaintiffs suggest "there may be fact issues [as to] whether the surrounding properties indeed were damaged," though they have pleaded no such facts. Response p. 16. But Rule 91a measures the viability of Plaintiffs' claims by whether the *pleaded allegations* entitle Plaintiffs to the relief they seek. *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (dismissing petition on Rule 91a motion, since "[w]hether the dismissal standard is satisfied depends solely on the pleading of the cause of action"). Plaintiffs' suggestion that more facts may one day develop which could entitle them to relief—or that facts may already exist that they nonetheless neglected to plead—has no bearing here.

E. The Virus Exclusion Bars Coverage of Plaintiffs' Claim.

To avoid the fatal impact of the Policy's Virus Exclusion, Plaintiffs argue that it is impossible to tell what part of the policy the Virus Exclusion applies to. This claim has no merit and sorely strains Plaintiffs' credibility.

The Virus Exclusion states, off the top, that it "modifies insurance provided under" the Policy's "COMMERCIAL PROPERTY COVERAGE PART." Am. Motion Ex. A at p. 48. Even a cursory examination of the Business Income (and Extra Expense) Coverage Form upon which Plaintiffs seek coverage shows that it is identified, in its top right corner, as part of the "COMMERCIAL PROPERTY" coverage of the Policy.[19] Am. Motion Ex. A at p. 28.

Furthermore, the Virus Exclusion also provides that it "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**." Am. Motion Ex. A at p. 48 (¶ A) (emphasis added). Plaintiffs acknowledge all of this language (*see* Response at pp. 15-16), but then feign an inability to deduce whether the Virus Exclusion applies to the "Business Income (and Extra Expense)" coverage form. That position is simply not credible.

Plaintiffs next argue that the Virus Exclusion cannot apply because Plaintiffs do not allege the virus was ever present at their insured premises. Therefore, Plaintiffs assert, the virus itself could not have caused their business interruption loss. Response at pp. 16-17. This 'temporal

[19] The Policy only contains two coverage parts: Commercial Property and Commercial General Liability. *See* Am. Motion Ex. A at p. 26 (Common Policy Declarations, setting forth the premiums for the only two applicable coverage parts of the Policy). The Policy's Schedule of Forms and Endorsements groups each component of the Policy according to whether it is common to both parts (Property *and* General Liability) or is specific to either Property *or* General Liability. Am. Motion Ex. A at p. 27. Both the Virus Exclusion and the Business Income coverage forms are listed under the Commercial Property coverage part of the Policy on this schedule (*id.*). In addition, each of those forms are also identified as belonging to the "COMMERCIAL PROPERTY" coverage part in their headings (*id.* at pp. 28 and 48).

sequence,' chicken-or-the-egg argument does not improve Plaintiffs' coverage position, as the interruption of the Plaintiffs' business (whether motivated by their own pre-emptive decision or mandated by governmental orders) was still "caused by or result[ed] from" the Covid-19 outbreak.

By its terms, the Virus Exclusion states that Chubb "will not pay for loss or damage caused by or resulting from any virus… that induces or is capable of inducing physical distress, illness or disease." Am. Motion Ex. A at p. 48 (¶ B). According to Plaintiffs' allegations, the ordinances temporarily limiting Plaintiffs' restaurant operations were issued in response to the virus, to mitigate risks to the public (Pet. ¶¶ 43-77, 96) by, in part, prohibiting dine-in use of restaurants (*id.* ¶¶ 47-48, 55). Plaintiffs also allege that they pre-emptively closed their restaurants to avoid the danger of the virus. Pet. ¶ 95.[20]

Plaintiffs' allegations demonstrate the applicability of the Virus Exclusion, even though they do not allege the virus was ever present at their restaurants, because Plaintiffs allege their business interruption was "caused by or result[ed] from" the virus. *Mark's Engine Co. No. 28 Restaurant, LLC v. The Travelers Indemnity Co. of Conn.*, No. 2:20-CV-04423-AB-SK, 2020 WL 5938689, at *5 (C.D. Cal. Oct. 2, 2020) (holding coverage claim for Covid-19 business interruption coverage was precluded by virus exclusion that "clearly and unequivocally exempts 'loss or damage caused by or resulting from any virus'" where complaint alleged (1) a business interruption following governmental orders concerning the risks of exposure to the virus and risks of physical damage to property from the virus, and (2) that the restaurant pre-emptively shut down due to concerns about the dangers of the virus); *Diesel Barbershop, LLC et al. v. State Farm*

[20] *See also* Response p. 5 ("The Lombardi Plaintiffs therefore implemented restrictions regarding physical use and access to their properties to prevent the ongoing danger of the virus. And although these preventative measures align with various governmental directives, they independently were necessary and implemented by the Lombardi Plaintiffs to mitigated the well-documented risk of property damage and danger to the public health.") (internal quotations and emphasis omitted).

Lloyds, No. 5:20-CV-461-DAE, Doc. No. 29 (Order Granting Defendant's Motion to Dismiss) at pp. 15, 17-18 (W.D. Tex. Aug. 13, 2020) (rejecting plaintiff's argument that virus exclusion could only apply if Covid-19 was alleged to be present at the insured property); *Turek Enterprises, Inc. v. State Farm Mutual Automobile Ins. Co.*, Case No. 20-11655, 2020 WL 5258484, at *2 (E.D. Mich. Sept 3, 2020) (rejecting plaintiffs' argument that the governmental orders—not the virus itself—caused their losses and therefore the virus exclusion did not apply, since the orders were expressly "issued to 'suppress the spread of COVID-19 and accompanying public health risks," so the "only reasonable conclusion is that the Order—and, by extension, Plaintiff's business interruption losses—would not have occurred but for COVID-19"); *Martinez v. Allied Ins. Co. of Am.*, Case No. 2:20-cv-00401FTM66NPM, 2020 WL 5240218, at *3 (M.D. Fla. Sept. 2, 2020) (dismissing breach of contract claim as non-viable in the face of the policy's virus exclusion, "[b]ecause Martinez's damages," *i.e.*, lost business income due to governmental orders limiting the services offered by his dental practice during the pandemic, "resulted from COVID-19, which is clearly a virus"); *Gavrilides Management Co. v. Michigan Ins. Co.*. Case No. 20-258-CB, Doc. No. 23 (transcript of July 1, 2020 hearing) at 20:19-21:18; 22:10-14; 23:16-17 (Mich. Cir. Ct. August 4, 2020) (rejecting plaintiff's argument that the virus exclusion did not apply to foreclose coverage, where their operational restrictions were undertaken in response to the virus).

II. Plaintiffs Concede That, if Their Breach of Contract Claim is Dismissed, Then Their Ancillary Remaining Claims Have No Basis in Law and Should Also Be Dismissed.

Plaintiffs concede, by failing to make any arguments contrary to those presented in Sections III and IV of Chubb's Amended Motion, that their claim for breach of the duty of good faith and fair dealing, their request for punitive damages, and their claim under the Texas Prompt Pay Act are all dependent upon their breach of contract claim—*i.e.*, that the remaining claims have no viability if there is no coverage under the Policy. Therefore, Plaintiffs admit that if their breach

of contract claim is dismissed for having no basis in law, then their remaining claims all necessarily have no basis in law and must be dismissed as well. S*ee, e.g., Charboneau v. Box*, No. 4:13-CV-678, 2017 WL 1159765, at *13 (E.D. Tex. Mar. 29, 2017) ("[A] plaintiff's failure to brief an argument in the plaintiff's response to a motion to dismiss generally results in waiver of such argument."); *Mayo v. Halliburton Co.*, No. CIV.A. H-10-1951, 2010 WL 4366908, at *5 (S.D. Tex. Oct. 26, 2010) (same); *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) ("case law interpreting Rule 12(b)(6) [is] instructive" on Rule 91a motions to dismiss); *Vandelay Hospitality Group LP d/b/a Hudson House v. Cincinnati Ins. Co.*, No. 3:20-CV-1348-D, 2020 WL 5946863, at *2 (N.D. Tex. Oct. 7, 2020) (dismissing all claims, because plaintiff "has not plausibly pleaded that it is entitled to policy benefits," and therefore "it has also failed to plausibly allege a claim for violations of the Texas Insurance Code" and "a breach of the duty of good faith and fair dealing").

Conclusion and Prayer

Chubb moves for a dismissal of all claims alleged against it with prejudice, and for all other relief to which it may be justly entitled, including its reasonable attorney fees associated with this Amended Motion, as provided by Rule 91a.7 of the Texas Rules of Civil Procedure.

Dated: October 12, 2020

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CERTIFICATE OF SERVICE

This pleading, Defendant Indemnity Insurance Company of North America's Reply in Support of its Amended Motion to Dismiss Pursuant to Rule 91a, has been served upon all counsel of record in compliance with Rules 21 and 21a of the Texas Rules of Civil Procedure on October 12, 2020

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