UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUJAMCYN THEATERS LLC, Plaintiff, v. FEDERAL INSURANCE COMPANY and PACIFIC INDEMNITY COMPANY, Defendants.	CIVIL ACTION NO. 1:20-cv-06781-ALC-KNF ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF DEFENDANTS FEDERAL INSURANCE COMPANY AND PACIFIC INDEMNITY COMPANY FOR JUDGMENT ON THE PLEADINGS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(c)

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INTRODUCTION

The COVID-19 pandemic has created an unprecedented deleterious effect on the United States, including New York City. The silent spread and unsuspecting transmission of this dangerous and deadly disease, and governmental responses thereto, have created challenging circumstances for many New York businesses.

As a result of economic losses stemming from compliance with various state and local governmental restrictions aimed at reducing the risk of potential exposure to COVID-19, businesses across the country have filed lawsuits seeking coverage under first-party property insurance policies. While sympathetic to the challenges the COVID-19 pandemic has created for these businesses, courts in jurisdictions across the country have dismissed these claims for insurance coverage because these losses are not caused by "direct physical loss or damage" to the insured's property—a condition precedent to coverage under first party property insurance policies—but instead result from government shutdown orders. Just as other courts have held that these claims are not covered, so, too, should this Court deny Plaintiff's claim seeking the exact same coverage as those other businesses.

Plaintiff Jujamcyn Theaters, LLC ("Jujamcyn" or "Plaintiff"), is a company that owns and operates five Broadway theaters in New York City. Jujamyn has filed a Complaint seeking recovery of business income losses under the terms of a Customarq Series Entertainment Insurance Program policy issued by Federal Insurance Company ("Federal") and, separately, under the terms of a Property Insurance for the Performing Arts policy issued by Pacific Indemnity Company ("Pacific"). Plaintiff's Complaint asserts the following causes of action against both Federal and Pacific: (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing; and (3) declaratory judgment.

First, with respect to the claims under the Federal Policy, Plaintiff fails to plead a prima facie case for breach of contract because it did not (and cannot) allege: (i) that its losses were caused by "direct physical loss or damage" to its properties that would trigger coverage under the Federal Policy's Business Income and Extra Expenses coverage provisions; and (ii) the existence of a civil authority order prohibiting access to its properties (or any properties within the applicable 10 mile radius) that would trigger the Federal Policy's Civil Authority coverage grant. Courts across the country have decided—under nearly identical facts and substantially similar first party property policies—that a cause of action for breach of contract should be dismissed.

Second, with respect to the claims under the Pacific Policy, Pacific already has paid its full $250,000 "per loss" limit to Jujamcyn. Notwithstanding the fact that Pacific has already paid the limits of this policy, Plaintiff seeks a full policy limit for each of its five separate locations. The Pacific Policy defines the term "Limit of Insurance" as the most Pacific will pay for any one occurrence. Here, Plaintiff's loss is the result of a single occurrence, i.e., the government shutdown of certain businesses because of the COVID-19 pandemic. Accordingly, Plaintiff is entitled to a single $250,000 per loss Limit of Insurance, rather than a $250,000 per location Limit of Insurance as suggested by Plaintiff. This Court similarly should dismiss Plaintiff's demand and dismiss its claims under this policy.

Finally, Plaintiff's counts for declaratory judgment and breach of the implied covenant of good faith and fair dealing under both policies must be dismissed as duplicative. These claims arise out of the same facts and allegations as Plaintiff's breach of contract claims, which would otherwise provide Plaintiff with an adequate remedy at law.

For the reasons explained in greater depth below, Federal and Pacific respectfully request that this Court dismiss Plaintiff's claims under Rule 12(c).

FACTUAL BACKGROUND

A. The Federal Policy

Federal issued Customarq Series Entertainment Insurance Program policy No. 7944-46-01 (the "Federal Policy") to Jujamcyn, effective from May 1, 2019 to May 1, 2020. Ex. A to Complaint, ECF 1-1 to 1-10. Subject to its terms and conditions, the Federal Policy provides first-party property and time element coverages for five of Jujamcyn's locations in New York City.[1]

The Federal Policy's **Business Income and Extra Expense** coverage states:

> We will pay for the actual:
>
> - **business income** loss you incur due to the actual impairment of your operations; and
> - **extra expense** you incur due to the actual or potential impairment of your **operations,**
>
> during the **period of restoration,** not to exceed the applicable Limit Of Insurance for Business Income With Extra Expense shown in the Declarations.
>
> This actual or potential impairment of **operations** must be caused by or result from direct physical loss or damage by a **covered peril** to **property**, unless otherwise stated.

ECF 1-3, p.12.

The **Civil Authority** coverage provisions under the Federal Policy provide:

> We will pay for the actual:
>
> - **business income** loss; or
> - **extra expense**,
>
> you incur due to the actual impairment of your **operations** directly caused by the prohibition of access to:
>
> - your premises; or
> - a **dependent business premises**

[1] The Policy lists the following locations in New York City: (1) 246 West 44th Street; (2) 302 West 45th Street; (3) 219 West 48th Street; (4) 230 West 49th Street; and (5) 245 West 52nd Street. ECF 1-1, p. 15.

by a civil authority.

This prohibition of access by a civil authority must be the direct result of direct physical loss or damage to property away from such premises or such **dependent business premises** by a **covered peril**, provided such property is within:

- one mile; or
- [10 miles],

from such premises or **dependent business premises**, whichever is greater.

Id., pp. 14-15 (bolded terms appear in original, underlined terms added for emphasis).

Both of the above provisions in the Federal Policy require "direct physical loss or damage" to property as a condition precedent to coverage.

B. The Pacific Policy

Pacific issued Property Insurance for the Performing Arts Policy No. 7993-60-33 to Jujamcyn, effective May 1, 2019 to May 1, 2020 (the "Pacific Policy"). Ex. C to Complaint, ECF 1-12 to 1-13. The insuring agreement of the Performance Disruption Coverage provides:

We will pay for the actual:

- **business income** loss you incur due to the necessary cancellation, interruption or postponement of one or more of your performances, including the inability to open a new production as scheduled; and

- **extra expense** you incur due to the actual or potential cancellation, interruption postponement or other impairment of one or more of your performances,

not to exceed the applicable Limit of Insurance for Performance Disruption shown in the Declarations.

This coverage applies only when the actual or potential cancellation, interruption, postponement or impairment of your performance is caused by or results from a **covered occurrence**.

ECF 1-13, p. 20.

The Limit of Insurance for Performance Disruption shown in the Declarations of the Pacific Policy is $250,000 "each loss." ECF 1-12, p. 7. The Pacific Policy defines "Limits of Insurance" as "[t]he most we will pay in any one occurrence is the amount of loss, not to exceed the applicable Limit of Insurance shown in the Declarations." ECF 1-13, p. 22. Pacific has tendered $250,000, the maximum limit of liability, to Jujamcyn. Complaint, ECF 8 ¶ 76. Jujamcyn accepted Pacific's tender, but claimed that the $250,000 limit applies to each of its five locations.

C. Plaintiff's Complaint

On August 25, 2020, Jujamcyn filed a Complaint before this Court asserting causes of action against Federal and Pacific for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) declaratory judgment. ECF 8, Counts I-VI.

With respect to the Federal Policy, Plaintiff seeks coverage for Jujamcyn's business losses and damages as a result of the COVID-19 pandemic pursuant to the Federal Policy's Business Income and Extra Expense coverage provisions because governmental orders issued in New York deemed Plaintiff's business "non-essential," and mandated its closure. *Id.* ¶¶ 3-5, 26-32, 51, 55. Plaintiff claims "the presence of SARS-CoV-2 (the virus that causes COVID-19) in a building's airspace and on or around property constitutes 'direct physical loss or damage' to property" and "[b]ecause the SARS-CoV-2 virus … can linger in the air in buildings for several hours, the presence of the SARS-CoV-2 virus on or around property amounts to 'direct physical loss or damage' as that phrase is used in the Federal Policy." *Id.* ¶¶ 49, 52.

Plaintiff does not allege that SARS-CoV-2 was on or at any of its premises (or any particular premises) or that any such presence caused its business losses, but rather that the "[o]rders issued by the City and State of New York substantially impaired Jujamcyn's properties,

constituting 'direct physical loss or damage' to those properties." *Id.* ¶ 53. Plaintiff alleges the governmental orders intended to "flatten the curve" rendered Jujamcyn incapable of using its premises for their essential functions. *Id.* Plaintiff alleges "[a]s a result of the suspensions of its business operations, Jujamcyn sustained covered Business Income With Extra Expense losses as defined in the Federal Policy." *Id.* ¶ 51. Additionally, Plaintiff claims the various Executive Orders issued in New York City "substantially impaired Jujamcyn's properties, constituting … actions 'by a civil authority' as a 'direct result of direct physical loss or damage' as required to trigger Civil Authority coverage under the Federal Policy." *Id.* ¶ 53.

In late April/early May 2020, Plaintiff tendered Federal a notice of claim requesting business interruption and civil authority coverage under the Federal Policy. *Id.* ¶ 5. Plaintiff asserts Federal improperly denied Jujamcyn's coverage claims. *Id.* ¶¶ 55-57.

Separately, with respect to the Pacific Policy, although Pacific tendered $250,000—the full Limit of Insurance—Plaintiff alleges that it is entitled to the $250,000 limit for each of its five theaters. *Id.* ¶ 76. Plaintiff alleges that each of its five theaters sustained "business income loss" as a result of the "necessary cancellation, interruption or postponement of one or more of [its] performances" as a result of various orders of civil authority. *Id.* ¶¶ 80-100. Plaintiff alleges breach of contract, and breach of the implied covenant of good faith and fair dealing, and seeks a declaration that it is entitled to $250,000 for each of its five locations. *Id.* ¶¶ 125-145.

ARGUMENT

I. LEGAL STANDARD

A court considering a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) applies "[t]he same standard applicable to ... motions to dismiss [for

failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6)]." *Butnick v. Gen. Motors Corp.*, 472 F. App'x 80, 82 (2d Cir. 2012) (citation omitted)).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). For both Rule 12(b) and Rule 12(c) motions, "the district court must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor." *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001) (citation omitted). Nevertheless, the District Court need not accept as true "conclusions of law or unwarranted deductions of fact." *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir.1994) (citation omitted).

A District Court may properly dismiss the suit if it determines as a matter of law that no coverage exists. *David Lerner Assocs., Inc. v. Philadelphia Indem. Ins. Co.*, 934 F. Supp. 2d 533, 536 (E.D.N.Y.), *aff'd*, 542 F. App'x 89 (2d Cir. 2013) (granting motion to dismiss declaratory judgment and breach of contract claims because there was no duty to defend or indemnify).

II. JUJAMCYN HAS FAILED TO ALLEGE ANY "DIRECT PHYSICAL LOSS OR DAMAGE" TO ANY PROPERTY UNDER THE FEDERAL POLICY

Under New York law, "[t]o establish a prima facie case for breach of contract, a plaintiff must plead and prove: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from the breach."[2] *Nat'l Mkt. Share, Inc. v. Sterling Nat'l Bank*, 392 F.3d 520, 525 (2d Cir. 2004). "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Travelers Cas. & Sur. Co. v. Dormitory Auth.-State of New York*, 735 F. Supp. 2d 42, 56 (S.D.N.Y. 2010) (citation omitted).

[2] For the purposes of this motion, Defendants submit that New York law governs the interpretation of the policies, as Jujamcyn's principal address is listed as "246 W. 44th Street, New York, NY 10036" and all of its insured premises are located in New York. ECF 1-1,p. 1 and ECF 1-12, p.1.

When "interpreting [an] insurance policy, the ordinary rules of contractual interpretation apply." *Bridge Metal Indus., L.L.C. v. Travelers Indem. Co.*, 812 F. Supp. 2d 527, 535 (S.D.N.Y. 2011) *aff'd sub nom.* 559 F. App'x 15 (2d Cir. 2014) (citation omitted). "Where the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement." *U.S. Fid. & Guar. Co. v. Annunziata*, 67 N.Y.2d 229, 232 (N.Y. 1986) (citations and internal quotations omitted).

Under the plain and unambiguous language of the Business Income and Extra Expense and Civil Authority coverage grants of the Federal Policy, Jujamcyn must allege and prove there was "direct physical loss or damage" to property in order to obtain coverage. Jujamcyn has failed to do so, warranting dismissal of its Complaint.

A. UNDER NEW YORK LAW, JUJAMCYN'S LOSSES WERE NOT CAUSED BY "DIRECT PHYSICAL LOSS OR DAMAGE" AND, THEREFORE, DO NOT TRIGGER COVERAGE

The Business Income and Extra Expense provisions of the Federal Policy require that Jujamcyn's business income losses and extra expenses be "caused by or result from direct physical loss or damage" to certain property. ECF 1-3, p. 12. Specifically, the Business Income and Extra Expense provisions require the "actual or potential impairment of **operations** must be caused by or result from direct physical loss or damage by a **covered peril** to **property**[.]" The Civil Authority coverage is triggered only where a Civil Authority prohibits Jujamcyn from accessing its premises (or that of a dependent business) due to "direct physical loss or damage to property" within a 10 mile radius of its premises "by a **covered peril**[.]" *Id.*, pp. 12, 14-15.

Accordingly, Jujamcyn must allege, and later establish, "direct physical loss or damage" to property. None is alleged in the Complaint and none exists. Indeed, well-settled New York law holds that the "direct physical loss or damage" requirement is not met where a business is

forced to close as a result of existential threats that have not actually physically damaged the insured's premises.

In *Roundabout Theatre Co. v. Cont'l Cas. Co.*, a Broadway theater "became inaccessible to the public and . . . was forced to cancel 35 performances of [a musical]" due to a New York City order prohibiting access to the theatre as a result of the collapse of scaffolding of a nearby building. 302 A.D.2d 1 (1st Dep't 2002). Roundabout sought coverage under a first party property insurance policy, which provided coverage for "*all risks of direct physical loss or damage to the property*[.]" *Id.* (emphasis in original). The First Department found:

> [T]he language in the instant policy clearly and unambiguously provides coverage only where the insured's property suffers direct physical damage … [T]he only conclusion that can be drawn is that the business interruption coverage is limited to losses involving physical damage to the insured's property.

Id. at 6-7. The court found no coverage obligation existed because Roundabout did not suffer any direct physical loss or damage to its property. *See also Howard Stores Corp. v. Foremost Ins. Co.*, 82 A.D.2d 398, 400 (1st Dep't 1981), *aff'd*, 56 N.Y.2d 991 (1982) ("[p]lainly the policy in suit was not intended to include business interruption, if any, to these other stores where no physical damage occurred.").

Courts in this District, as well as the Second Circuit, similarly have ruled that coverage for business interruption losses under a first party property insurance policy—like the Federal Policy—requires tangible, physical damage to the insured's properties. Judge Engelmayer followed this approach in *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, in which he found that phrase "direct physical loss or damage" "unambiguously[] requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage." 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) (applying New York law).

In *Newman Myers*, power was shut off at the insured's premises following Hurricane Sandy, preventing access to the premises. *Id.* at 325. The court held,

> The words "direct" and "physical," which modify the phrase "loss or damage," ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure … [T]he Court is unaware of authority supporting, Newman Myers's argument that "direct physical loss or damage" should be read to include to extend to mere loss of use of a premises, where there has been no physical damage to such premises.

Id. at 331. The court noted "physical loss" is "widely held to exclude alleged losses that are intangible or incorporeal" and "business interruption policies generally require some physical damage to the insured's business in order to invoke coverage." *Id.* (citing Couch on Insurance, §§ 148:46, 167:15 (3rd ed. 2009)). Thus, because the insured premises did not sustain any flooding or physical damage and only economic loss from the insured's inability to access its office was alleged, no "direct physical loss or damage" was proven. *Id.* at 332-33. *See also United Airlines, Inc. v. Ins. Co. of State of Pa.*, 385 F. Supp. 2d 343 (S.D.N.Y. 2005), *aff'd sub nom. United Air Lines, Inc. v. Ins. Co. of State of PA*, 439 F.3d 128 (2d Cir. 2006) (finding that physical damage to insured's property, not just economic damage, was required to trigger business interruption coverage under the policy even though the term "physical" did not appear in the coverage grant because "[t]he inclusion of the modifier 'physical' before 'damages' . . . supports [defendant's] position that physical damage is required before business interruption coverage is paid."); *Philadelphia Parking Auth. v. Federal Ins. Co.*, 385 F.Supp.2d 280, 287-88 (S.D.N.Y. 2005) (holding economic damage claims by an insured operating a municipal airport's parking lot resulting from the federal government's nationwide grounding of commercial aircraft in wake of terrorist attacks were not covered "direct physical loss or damage" because "direct physical" modified both loss and damage, and "the interruption in business must be caused by

some physical problem with the covered property … which must be caused by a 'covered cause of loss'"); *Satispie, LLC v. Travelers Prop. Cas. Co. of Am.*, 448 F. Supp. 3d 287, 293 (W.D.N.Y. 2020) ("[u]nder New York law, the phrase 'risks of direct physical loss' … mean[s] 'some form of actual, physical damage' to the 'insured property'") (citations omitted).

The issue of whether the presence of SARS-CoV-2 constitutes "direct physical loss or damage" under New York law was recently considered by the Southern District of New York's Judge Caproni in *Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd.*, No. 1:20-CV-03311-VEC (S.D.N.Y. 2020) (Declaration of Daren S. McNally "McNally Decl."), Ex. A, transcript of May 14, 2020 Hearing. During a hearing for a preliminary injunction sought by the insured, Judge Caproni noted that "New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going." *Id*. at 15:12-14. Judge Caproni noted the *Roundabout* case created "a real problem for [plaintiff's] position" and rejected allegations—like those made by Jujamcyn in its Complaint—that the omnipresent nature of the virus constituted direct physical loss or damage to the insured's property. *Id*. at 4:10-5:4. Judge Caproni similarly rejected plaintiff's argument that COVID-19 was akin to a bacteria causing physical damage to a property, stating: "This is different. The virus is not specifically in your property that is causing damage. It is everywhere." *Id*. at 7:8-21; 7:22-24. Judge Caproni rejected plaintiff's contention that the presence of SARS-CoV-2 was equivalent to mold being present on physical surfaces which could be considered damage, noting, "[t]hat damages you. It doesn't damage property." *Id*. at 6:1-20. Judge Caproni denied the motion for a preliminary injunction. *Id.* at 15:17-19.

A straightforward application of the above-cited case law necessitates a finding that there is no "direct physical loss or damage" to Jujamcyn's premises. In this case, Jujamcyn has not alleged that SARS-CoV-2 actually contaminated its property or that it was forced to close

because of any particular "direct physical loss or damage" to its premises. Instead, Jujamcyn makes vague references in its Complaint that the "presence of … [COVID-19] in a building's airspace [and its ability to linger in air in buildings for several hours] on or around property constitutes 'direct physical loss or damage' to property." ECF 8 ¶¶ 49-52. Jujamcyn does not—because it cannot—allege the presence of COVID-19 on its premises caused "direct physical loss or damage" to its premises.[3]

Similar to the insureds in *Roundabout, Newman Myers, et al.*, Jujamcyn's claims for business interruption losses arise from the Executive Orders—which bear no relation to property damage—requiring people to stay socially distant from one another to control the spread of COVID-19. In alleging that "loss of use" and economic damages therefrom equate with "direct physical loss or damage" to its premises, Plaintiff attempts to side-step the unambiguous and well-established meaning of the phrase by offering a tortured, greatly expanded definition which all but eviscerates the words "direct" and "physical." Such a reading further renders the words "during a period of restoration" in the Federal Policy meaningless.[4]

Plaintiff's claim that such losses are covered also ignores the fact that Jujamcyn's premises were not closed because of any alleged tangible, permanent, or physical alteration to its property. Indeed, Jujamcyn concedes this fact in its Complaint, as its allegations supporting its contention of coverage are based on governmental orders prohibiting the use of all Broadway theatres to prevent the spread of COVID-19, rather than the demonstrated presence of COVID-

[3] Plaintiff makes a conclusory allegation that at least one Executive Order restricting operation of Jujamcyn's theaters was issued "after it was widely reported that an individual working at two different Broadway theaters—both within 10 miles of Jujamcyn's premises—tested positive" and Jujamcyn "knew of at least 7 individuals who perform in productions at, or who otherwise work or provide services at, Jujamcyn's theaters, who tested positive for COVID-19, SARS-CoV-2 or the antibodies." ECF 8 ¶ 28-29. Even assuming the above is true, Jujamcyn makes no allegations that the virus in fact physically damaged its premises.

[4] *Roundabout*, 751 N.Y.S.2d at 8; *Newman Myers*, 17 F. Supp. 3d at 332 ("[t]he words 'repair' and 'replace' [for 'period of restoration'] contemplate physical damage to the insured premises as opposed to loss of use of it."); *Phila. Parking Auth.*, 385 F. Supp. 2d at 287 ("'[r]ebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature.").

19 at or physical damage to its theatres. ECF 8 ¶¶ 25-28, 52-54. Plaintiff merely alleges solely economic losses that are not connected to any "direct physical loss or damage" to its property.

This Court should follow the reasoning applied by the other Courts in this District, as well at the well-reasoned decision of Judge Caproni in *Social Life*, and hold that economic losses resulting from closure of Jujamcyn's five theaters during the COVID-19 pandemic are not losses caused by "direct physical loss or damage" to property.

B. COURTS ACROSS THE COUNTRY HAVE HELD THAT BUSINESS INTERRUPTION LOSSES RESULTING FROM THE COVID-19 PANDEMIC ARE NOT CAUSED BY "DIRECT PHYSICAL LOSS OR DAMAGE" TO AN INSURED'S PROPERTY

The overwhelming majority of courts addressing similar claims seeking recovery for losses arising from government orders issued in response to COVID-19 have dismissed those claims because the coronavirus does not cause "direct physical loss or damage" to property.

For example, in *Gavrilides Management Co. LLC v. Michigan Ins. Co.*, the court noted that, for business interruption coverage to apply, the restaurant's "suspension of operations . . . must be caused by direct physical loss of or damage to property." Case No. 20-258-CB, Doc. No. 23 (Mich. Cir. Ct. July 1, 2020). McNally Decl., Ex. B, July 1, 2020 hearing transcript, at 18:10-21. The court rejected the insured's argument that the COVID-19-related government orders restricting business amounted to a physical loss because the order effectively blocked public entry to the property. *Id*. at 20:10-15. Instead, the court held that "direct physical loss of or damage to the property has to be something with material existence" or "[s]omething that is tangible" that "alters the physical integrity of the property." *Id*. at 18:24-19:4. The court found that plaintiff's claim—similar to Jujamcyn's claim here—did not establish "any physical loss of or damage to the property," and held that the lack of any alleged "direct physical loss" to the restaurant property definitively precluded coverage. *Id*. at 19:4-16; 22:15-16; 23:5-17.

In *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-03213-JST, 2020 WL 5525171 (N.D. Cal. Sept. 14, 2020), an insured retail store sought coverage under a comprehensive commercial liability and property insurance policy by alleging that its compliance with government closure orders constituted "direct physical loss or damage to property" because it "result[ed] in substantial loss to business income" and its storefront became "useless and/or uninhabitable[.]" *Id*. at *1, 6. In granting the insurer's motion to dismiss, the Court found that Mudpie failed to assert any "direct physical loss or damage" to property stemming from COVID-19 shutdown orders and specifically rejected Mudpie's argument that "loss of functionality, or access to, a property" equated with direct physical loss. *Id*. at *4, 6.

Courts throughout the country similarly have dismissed claims for COVID-19 related business losses because there was no "direct physical loss or damage" to the insured's property:

Alabama

- "Plaintiff's loss of usability [of its office from COVID-19 related shutdowns] did not result from an immediate occurrence which tangibly altered its property - the Order did not immediately cause some sort of tangible alteration to Plaintiff's office." *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, No. 1:20-CV-275-JB-B, 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020).

California

- "[L]osses from the inability to use property do not amount to 'direct physical loss of or damage to property'" … Physical loss or damage occurs only when property undergoes a 'distinct, demonstrable, physical alteration.' … 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." *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-AS, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020).

- "Plaintiffs [argue that] 'direct physical loss of' … does not require a tangible damage or alteration to property and that loss of the ability to continue operating their business as a result of the government orders qualifies … Most courts have rejected these claims[.]" *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.,* No. 20-CV-907-CAB-BLM, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020).

- "[Plaintiff's] interpretation of 'physical loss of' would not require a tangible alteration to the property, but would 'include[] changes in what activities can

physically occur in the space that cause loss to the insured, without including changes to the property that have no physical manifestation.'" … [Plaintiff's] interpretation is not a reasonable one because it would be a sweeping expansion of insurance coverage without any manageable bounds." *Plan Check Downtown III, LLC v. Amguard Ins. Co.*, No. CV 20-6954-GW-SKX, 2020 WL 5742712 (C.D. Cal. Sept. 10, 2020).

- "[T]he proposition that 'direct physical loss of' encompasses deprivation of property without physical change in the condition of the property … would be without any "manageable bounds." …Plaintiff suffered no complete 'direct physical loss of' its property as it always had complete access to the premises even after the order was issued." *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04423-AB-SK, 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020).

- "G&G argues that it was 'deprived of the typical foot traffic, visibility, and ability to interface with clients that it ordinarily depends on[.]' However, G&G fails to allege that there was physical damage to the property and concedes that Coronavirus 'has never been detected at [its] property.'". *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, No. CV 20-3619 PSG (EX), 2020 WL 6156584 (C.D. Cal. Oct. 19, 2020).

- "[A] 'detrimental economic impact' alone [such as temporary loss of economically valuable use of insureds' hotels due to a decrease in patronage or the Executive Orders]—as Plaintiffs have alleged—is not compensable under a property insurance contract." *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Companies*, No. 220CV05663VAPDFMX, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020).

- Order granting defendant's demurrer after considering oral argument on whether allegations that COVID-19 related shutdown orders constituted "direct physical loss of or damage to property" under the policy. *The Inns by the Sea v. Cal. Mut. Ins. Co. et al.*, No. 20-cv-001274 (Cal. Sup. Ct., Monterey County Aug. 6, 2020). McNally Decl., Ex. C.

- "[Plaintiff] has not plausibly alleged a covered loss under the … policy." *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-cv-03461-MMC, ECF No. 30 (N.D. Cal. Sept. 11, 2020) (dismissal order). McNally Decl., Ex. D.

- "Numerous courts … consistently conclude that there needs to be some *physical* tangible injury (like a total deprivation of property) to support 'loss of property' or a *physical* alteration or active presence of a contaminant to support 'damage to' property." *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co. et al.*, No. 20-CV-03750-WHO, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020) (emphasis in original).

- "Plaintiff has alleged no facts suggesting Plaintiff's operations were suspended due to a physical alteration of insured property." *Musso & Frank Grill Co. Inc. v. Mitsui Sumitomo Ins. USA*, No. 20STCV16681 (C.D. Cal. Nov. 9, 2020). McNally Decl., Ex. E.

Florida

- "Plaintiff merely claims that two Florida Emergency Orders closed his indoor dining."… [I]t is not plausible how two government orders [establish loss arising to actual damage] … when the restaurant merely suffered economic losses – not anything tangible, actual, or physical." *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIV, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020).

- "Plaintiff argues that economic damage is synonymous with 'physical loss' and is therefore covered under the Policies. Plaintiff's argument is unpersuasive because … the plain language of the Policies reflect[s] that actual, concrete damage is necessary." *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000*, No. 8:20-CV-1605-T-30AEP, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020).

- "A 'loss' is the diminution of value of something, … [i.e.] the insureds' house or personal property. 'Direct' and 'physical' modify loss and impose the requirement that the damage be actual." *Mace Marine, Inc. v. Tokio Marine Specialty Ins. Co.*, No. 20-CA-120-P (Fla. Cir. Ct. Oct. 8, 2020). McNally Decl., Ex. F.

- "In [Plaintiff's] view, economic damages alone without any corresponding physical harms to the Covered Property is covered under the Policy" … The Court is unpersuaded." *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-CV-22833, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020).

- "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." *Dime Fitness, LLC v. Markel Ins. Co.*, No. 20-CA-5467 (Fla. Cir. Ct. Nov. 10, 2020). McNally Decl., Ex. G.

Georgia

- "[The Governor's Executive Order] did not represent an external event that changed the insured property" … [t]he only possible change was an increased public and private perception of the existing threat [of COVID-19], which cannot be deemed a physical change that rendered the property unsatisfactory." *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, No. 1:20-CV-2939-TWT, 2020 WL 5938755 (N.D. Ga. Oct. 6, 2020).

Illinois

- "'[D]irect physical loss'[] unambiguously requires some form of actual, physical damage to the insured premises" … Plaintiff simply cannot show any such loss as a result of either inability to access its own office or the presence of the virus on its physical surfaces" [because] "coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property." *Sandy Point*

Dental, PC v. Cincinnati Ins. Co., No. 20 CV 2160, 2020 WL 5630465 (N.D. Ill. Sept. 21, 2020).

- "[D]irect physical loss unambiguously requires … actual demonstrable harm of some form to the premises itself rather than … the closure of the premises for reasons extraneous to the premises itself or adverse business consequences that flow from [same]." *It's Nice, Inc., d/b/a Harold's Chicken Shack #82 v. State Farm Fire & Cas. Co.*, No. 20-L-547-2615 (Ill. Cir. Ct., Du Page County). McNally Decl., Ex. H.

Iowa

- "[V]irus-related closures of business do not amount to direct loss to property covered by the … policy." *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, No. 4-20-CV-222-CRW-SBJ, 2020 WL 5820552 (S.D. Iowa Sept. 29, 2020).

Michigan

- "Plaintiff [cannot establish] … that passive depreciation counts as a 'direct physical loss to Covered Property,'" … '[D]irect physical loss to Covered Property' is an unambiguous term that plainly requires Plaintiff to demonstrate some tangible damage to Covered Property." *Turek Enterprises, Inc., d/b/a Alcona Chiropractic v. State Farm Mut. Auto. Ins. Co. et al.*, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020).

Minnesota

- "Actual physical contamination of the insured property is still required [to establish 'direct physical loss']. Simply claiming 'mere loss of use or function' is not enough." … [Plaintiff] cannot allege facts showing his properties were actually contaminated by the coronavirus." *Seifert v. IMT Ins. Co.*, No. CV 20-1102 (JRT/DTS), 2020 WL 6120002 (D. Minn. Oct. 16, 2020).

Mississippi

- "When all of the provisions are read together it makes logical sense that the property that is insured, i.e., the building and/or personal property in or on the building, must first be lost or damaged before Business Income coverage kicks in." *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-CV-00087-KS-MTP, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020).

New Jersey

- "Plaintiff points to no direct physical loss or damage to covered property. There is no direct physical loss or damage to property [resulting] in the order of civil authority." *Mac Property Group LLC et al. v. Selective Fire and Cas. Ins. Co. et al.*, No. L-2629-20 (N.J. Sup. Ct. Nov. 5, 2020). McNally Decl., Ex. I.

- "[When] plaintiff's policy provides coverage only during a period of restoration [it] expressly assumes repair, rebuild or replacement of property" … [A] reasonable insured would understand a repair to become necessary upon a tangible alteration of property and not in context of a Government order imposing use restrictions." *FAFB*,

LLC v. Blackboard Ins. Co., No. L-892-20 (N.J. Sup. Ct. Oct. 30, 2020). McNally Decl., Ex. J, transcript of decision.

Oklahoma

- "Alleging a direct physical loss unambiguously requires a showing of tangible damage." … [Plaintiff] did not allege a 'direct physical loss' under the Policy because it only alleged an intangible loss[.]" *Goodwill Indus. of Cent. Oklahoma, Inc. v. Philadelphia Indem. Ins. Co.*, No. CV-20-511-R (W.D. Okla. Nov. 9, 2020). McNally Decl., Ex. K.

Texas

- "COVID-19 does not produce a noxious odor that makes a business uninhabitable … 'direct physical loss' requires 'a distinct, demonstrable, physical alteration of the property'… Thus, the Court finds that Plaintiffs fail to plead a direct physical loss." *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020) (internal citations omitted).

Washington, D.C.

- "[The closure] Orders did not effect any direct changes to the properties" … "Plaintiffs offer no evidence that COVID-19 was actually present on their insured properties at the time they were forced to close. And the mayor's orders did not have any effect on the material or tangible structure of the insured properties." *Rose's 1, LLC v. Erie Ins. Exchange*, No. 2020 CA 002424 B, 2020 WL 4589206 (D.C. Super. Aug. 06, 2020).

West Virginia

- "Property, including the physical location of [Plaintiff], is not physically damaged or rendered unusable or uninhabitable ... [T]he unambiguous terms of the Policy do not provide coverage for solely economic losses unaccompanied by physical property damage." *Uncork &Create LLC v. Cincinnati Ins. Co. et al.*, No. 2:20-cv-00401, 2020 WL 6436948 (S.D. W. Va. Nov. 2, 2020).

The crux of Jujamcyn's claim for coverage is that the mere presence of SARS-CoV-2, as well as government shutdown orders prohibiting patrons from accessing its theatres, constituted "direct physical loss or damage" to its premises under the Federal Policy. These claims for purely economic losses seek coverage for Jujamcyn's temporary loss of economic use rather than an actual, tangible, permanent or physical alteration to Plaintiff's premises. Here, although COVID-19 poses a risk to people gathered in proximity to one another, the virus does not physically damage property. Indeed, as the Court in *Uncork & Create* aptly put it: "No repairs

or remediation to the premises are necessary for its safe occupation . . . [T]he pandemic impacts human health and human behavior, not physical structures." 2020 WL 6436948, at *10. Thus, even if Jujamcyn somehow were able to demonstrate the actual presence of SARS-CoV-2 at its premises or any other premises, such proof still

> would not be sufficient to trigger coverage for physical damage or physical loss to property. Because routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover, and a covered 'loss' is required to invoke . . . coverage for loss of business income under the Policy.

Id. See also Malaube, 2020 WL 5051581, at *8 (property has not suffered loss or damage if it merely needs to be cleaned).

Accordingly, inasmuch as Jujamcyn cannot demonstrate "direct physical loss or damage" either to its own property or property within a ten mile radius, neither Business Income and Extra Expense coverage nor Civil Authority coverage are available because these coverages are triggered only when there is "direct physical loss or damage" to property.

C. THE FEDERAL POLICY'S CIVIL AUTHORITY COVERAGE PROVISION IS INAPPLICABLE BECAUSE PLAINTIFF HAS NOT ALLEGED A PROHIBITION OF ACCESS TO ITS PREMISES

Civil Authority coverage in the Federal Policy is triggered only where a Civil Authority (1) prohibits Jujamcyn from accessing its premises (or that of a dependent business) due to (2) direct physical loss or damage to property within a 10 mile radius Jujamcyn's premises. Numerous courts have held that governmental orders closing certain businesses during the COVID-19 pandemic do not constitute a "prohibition" of access to those premises.

In *Social Life*, Judge Caproni considered similar allegations that the Executive Orders prohibited access to an insured's premises. McNally Decl., Ex. A at 12:23-13:10. Specifically, the plaintiff in *Social Life* argued the Executive Order's mandate of "reduc[ing] in-person

workforce at any work locations" effectively created a prohibition of access to the plaintiff's premises. *Id*. at 13:7-10. In response, Judge Caproni stated that such a mandate "doesn't mean the boss can't go to the work location" and "[t]here is nothing about the governor's order that prohibits a small business person or a big businessperson from going into their office[.]" *Id*. at 13:11-12; 13:17-19. *See also 54th Street Ltd. Partners, L.P. v. Fidelity & Guar. Ins. Co.*, 306 A.D.2d 67 (1st Dep't 2003) (although a civil authority diverted vehicular and pedestrian traffic, civil authority coverage was not triggered where the civil authority did not deny access to the restaurant).

In *Pappy's Barber Shops*, the District Court for the Southern District of California found no coverage existed for the plaintiffs' business losses under the civil authority provision of a policy that was similar to that of the Federal Policy. 2020 WL 5500221, at *6. The Court noted the complaint did not allege that any COVID-19 Civil Authority Orders prohibited Plaintiffs from accessing their business premises, but instead only alleged they were prohibited from operating their businesses at their premises. *Id.* The Court concluded,

> The Policy insures property, in this case Plaintiffs' property and physical places of business, and not Plaintiff's business itself. To that end, the civil authority coverage provision only provides coverage to the extent that access to Plaintiff's physical premises is prohibited, and not if Plaintiff's are simply prohibited from operating their business.

Id. *See also Henry's Louisiana Grill*, 2020 WL 5938755, at *15 (finding the civil authority's action did not prohibit access to the premises because "[t]he Governor's Executive Order had no substantive provisions limiting access to private businesses or their operations" and "the Order itself does not represent an action to prohibit access to the described premises.").

Here, the Executive Orders did not prohibit Jujamcyn from physically accessing its theatres, but rather, only prohibited Plaintiff from operating its business. Accordingly, inasmuch

as access to the insured's premises was not prohibited, Civil Authority coverage is not available under the Federal Policy. Plaintiff has failed to establish a prima facie case for breach of contract. This Court must dismiss Plaintiff's cause of action for breach of contract accordingly.

III. UNDER THE PACIFIC POLICY, PLAINTIFF'S CLAIM FAILS BECAUSE PACIFIC HAS ALREADY PAID ITS FULL LIMIT OF $250,000 UNDER THE PERFORMANCE DISRUPTION COVERAGE

Although Jujamcyn acknowledges that Pacific has paid $250,000 to Jujamcyn under the Performance Disruption coverage provision of the Pacific Policy, Jujamcyn incorrectly contends that it is entitled to a $250,000 "each loss" limit at each of its five properties. ECF 8 ¶ 75. The Pacific Policy contains a Performance Disruption coverage form, which provides:

> We will pay for the actual:
>
> - **business income** loss you incur due to the necessary cancellation, interruption or postponement of one of more of your performances, including the inability to open a new production as scheduled; and
>
> - **extra expense** you incur due to the actual or potential cancellation, interruption, postponement or other impairment of one or more of your performances,
>
> not to exceed the applicable Limit of Insurance for Performance Disruption shown in the Declarations.
>
> This coverage applies only when the actual or potential cancellation, interruption, postponement or impairment of your performance is caused by or results from a **covered occurrence**.

The term "**covered occurrence**" is defined in the Pacific Policy as "any unexpected circumstances beyond your control, except as listed under Exclusions." ECF 1-13, p.24. The Limit of Insurance for "Performance Disruption" shown on the Declarations is $250,000 "each loss." The phrase "Limits of Insurance" is defined in the Pacific Policy as: "The most we will pay in any one occurrence is the amount of loss, not to exceed the applicable Limit of Insurance shown in the Declarations." ECF 1-13, p. 22.

Here, there is but a single occurrence—the city-wide mandated shutdown of operations caused by the COVID-19 pandemic. *See, e.g., Chicago's Preschool Acad. of Learning, Inc. v. W. Bend Mut. Ins. Co.*, No. 20-CV-04044, 2020 WL 5702145, at *4 (N.D. Ill. Sept. 24, 2020) (court determined that the insured's alleged losses stemmed from "a single occurrence (the March 2020 shutdown of its operations caused by the COVID-19 pandemic)" and thus, it was entitled to only a single limit of coverage under a Communicable Disease coverage provision).

Pacific paid the $250,000 "each loss" limit, but Plaintiff has taken the position that the $250,000 "each loss" limit applies separately to each of its five theaters. ECF 8, ¶ 80. The $250,000 "each loss" limit can easily be contrasted with the limits of liability set forth in the Federal Policy issued to Jujamcyn. The Federal Policy identifies the five properties as "Premises 1" through "Premises 5" and identifies a "Limit of Insurance" of $5,000,000 for "Business Income with Extra Expense" for each of those properties. ECF 1-1 to 1-10. By contrast, the Pacific Policy does not contain separate declarations and limits for each theater but, instead, identifies a single $250,000 limit "each loss." If the Pacific Policy provided a separate limit of $250,000 to each of the five properties, the Pacific Policy would have identified the Limit of Liability as being "Per Location" or "Per Loss Per Location." *See, e.g., Gilbert/Robinson Inc. v. Sequoia Ins. Co.*, 655 S.W.2d 581, 587 (Mo. Ct. App. 1983) (finding flood coverage was available up to $25,000 per "loss" per location where the policy stated the insurer "shall not be liable for more than the limits stated in the schedule . . . these limits being maximum any one loss except for flood and earthquake which covered [sic] subject to a limit of $25,000 at any one location").

There is no doubt that the COVID-19 pandemic and resulting closure of Broadway constitutes a single "loss." Jujamcyn is not entitled to recover five separate loss limits for its five

theaters particularly where, as here, the Pacific Policy—as distinct from the Federal Policy—does not provide "per location" limits.

IV. PLAINTIFF'S CLAIMS FOR DECLARATORY JUDGMENT AND BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING MUST BE DISMISSED AS DUPLICATIVE OF THE BREACH OF CONTRACT CLAIMS

This court should dismiss Plaintiff's counts for breach of the implied covenant of good faith and fair dealing and declaratory judgment as duplicative because they arise out of the same facts and allegations as the breach of contract claims, which provides an adequate remedy at law.

"Even where an actual controversy has been established, a court must still decide whether it will exercise its discretion to entertain a request for declaratory judgment." *Amusement Indus., Inc. v. Stern*, 693 F. Supp. 2d 301, 311 (S.D.N.Y. 2010). When a cause of action for declaratory judgment is duplicative of the legal issues resolved in other causes of action set forth in a complaint, dismissal of the duplicative declaratory judgment claim by the District Court is warranted. *Sofi Classic S.A. de C.V. v. Hurowitz*, 444 F. Supp. 2d 231, 249–50 (S.D.N.Y. 2006) (dismissing as duplicative plaintiffs' declaratory judgment claim which sought "resolution of legal issues that will … be resolved in the course of the litigation of the other causes of action").

It is well-settled in New York that "[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract." *Apple Records v. Capitol Records*, 137 A.D.2d 50, 53 (1st Dep't 1988) (internal citations omitted). This District Court has routinely dismissed counts for declaratory relief when such counts are duplicative of counts for breach of contract.[5]

[5] *See Fleisher v. Phoenix Life Ins. Co.*, 858 F. Supp. 2d 290, 301-02 (S.D.N.Y. 2012) ("the declarations Plaintiffs seek involve conduct so similar to that covered by their express breach of contract claim that entertaining the declaratory judgment claim would not satisfy such criteria"); *Camofi Master LDC v. Coll. P'ship, Inc.*, 452 F. Supp. 2d 462, 480 (S.D.N.Y. 2006) (dismissing a declaratory judgment sought by a party because it was duplicative of the adjudication of its breach of contract claim); *Intellectual Capital Partner v. Inst. Credit Partners LLC*, 2009 WL 1974392, at *6 (S.D.N.Y. July 8, 2009) (finding "declaratory relief would serve no useful purpose as the legal issues

Likewise, courts applying New York law find causes of action for breach of the implied covenant of good faith and fair dealing are duplicative of a count for breach of contract if they arise out of the same facts and/or allegations. *Fasolino Foods Co. v. Banca Nazionale del Lavoro*, 961 F.2d 1052, 1056 (2d Cir. 1992) (noting "[u]nder New York law, parties to an express contract are bound by an implied duty of good faith, 'but breach of that duty is merely a breach of the underlying contract'") (citations omitted).[6]

Here, the factual and legal allegations in Plaintiff's causes of action for breach of contract are replicated in Plaintiff's "separate" counts for declaratory judgment and breach of the implied covenant of good faith and fair dealing, as all seek damages for events arising from the same subject matter. Indeed, Plaintiff's count for breach of contract against Federal alleges that Federal unreasonably denied coverage by claiming that Jujamcyn sustained no "physical loss or damage," and that it was not prohibited from accessing the insured premises by a civil authority. ECF 8 ¶¶ 107-08. Plaintiff's breach of contract count against Pacific alleges that Pacific unreasonably stated that Jujamcyn sustained only one aggregate "loss" despite the Pacific Policy insuring five separate and distinct theaters. *Id.* ¶¶ 127-28.

Similarly, Plaintiff's count for declaratory judgment against Federal alleges that Federal improperly denied any obligation to cover any of Jujamcyn's losses under the Federal Policy and seeks a declaration that such losses are covered. *Id.* ¶¶ 120-21, 124. As to Pacific, Plaintiff alleges that Pacific improperly failed to pay $250,000 for each of its five theatres, and seeks a declaration that Pacific is obligated to do so. *Id.* ¶¶ 141-42.

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will be resolved by litigation of the breach of contract claim") (citations omitted); *Dolphin Direct Equity Partners, LP v. Interactive Motorsports & Entm't Corp.*, 2009 WL 577916, at *11 (S.D.N.Y. March 2, 2009) ("[b]ecause this Court has already analyzed the parties' rights and obligations under the [contracts] in connection with Plaintiffs' breach of contract claims, a declaratory judgment on the same issues would be superfluous.") (citations omitted).

[6] *See also Jordan v. Verizon Corp.*, 2008 WL 5209989, at *7 (S.D.N.Y. Dec. 10, 2008) ("raising both claims in a single complaint is redundant, and courts confronted with such complaints under New York law regularly dismiss any freestanding claim for breach of the covenant of fair dealing.").

Finally, Plaintiff's counts for breach of the implied covenant of good faith and fair dealing also rely on allegations purporting Plaintiff sustained damages as a result of Federal and Pacific's alleged failure to meet their obligations to cover Jujamcyn's losses under the provisions of both policies. *Id.* ¶¶ 111, 114-15, 132, 135-36.

The allegations of the Complaint demonstrate that Plaintiff's counts for breach of contract, declaratory judgment, and breach of the implied covenant of good faith and fair dealing are resolved by the same factual and legal determination of whether Federal is obligated to provide coverage under the relevant provisions of its Policy and whether Pacific must pay its policy limit for each location. Plaintiff's counts for breach of contract—if established—provide Jujamcyn with an adequate remedy at law, warranting dismissal of these duplicative claims.[7]

V. CONCLUSION

Federal and Pacific recognize the terribly unfortunate circumstances that the COVID-19 pandemic has caused for Plaintiff and sympathize with the losses that Plaintiff has incurred as a result thereof. Federal, however, cannot provide coverage for such losses when the plain language of the Federal Policy does not permit it to do so. Separately, Pacific has already paid its full $250,000 "per loss" limit to Jujamcyn pursuant to the terms of the Pacific Policy. Accordingly, Defendants' motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) should be granted. Furthermore, given that it will be impossible for Plaintiffs to cure the deficiencies in its Complaint, any leave to amend should be denied.

[7] Federal respectfully requests that this Court deny any request by Plaintiff for leave to amend the Complaint given that any such request would be futile because Plaintiff would not be able to allege that the losses it suffered were the result of "direct physical loss or damage" as required by the Federal Policy.

Dated: November 17, 2020

Respectfully submitted,

By: s/ Daren S. McNally

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