IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE K'S INC. and THE LAST RESORT-MOBILE LLC, individually and on behalf of all others similarly situated, Plaintiffs, v. WESTCHESTER SURPLUS LINES INSURANCE COMPANY, Defendant. **This Document Relates To: Both Actions**	CIVIL ACTION FILE NO. 1:20-cv-01724-WMR (Consolidated Action)

ORDER

This matter is before the Court on Defendant's Motion for Judgment on the Pleadings. [Doc. 90]. Having considered the Consolidated Amended Class Action Complaint, arguments of counsel, applicable law, and all appropriate matters of record, the Court hereby **GRANTS** the Motion for the reasons set forth herein.

I. BACKGROUND

A. The Parties and the Insurance Policy

Plaintiff The K's Inc. is a Massachusetts corporation that owns and operates Sissy K's, which is a nightclub, sports bar, and restaurant in Boston, Massachusetts. [Doc. 63, ¶¶ 1, 21]. Plaintiff The Last Resort-Mobile LLC is a limited liability

company, organized and existing under the laws of Alabama, that owns and operates Poindexter's, which is a bar and grill in Mobile, Alabama. [Doc. 63, ¶¶ 2, 22]. Defendant Westchester Surplus Lines Insurance Company ("Westchester") is a Georgia insurance company with its principal place of business in Alpharetta, Georgia. [Doc. 63, ¶ 23].

This action involves a dispute between the parties regarding loss coverage under the respective commercial insurance policies that Westchester issued to Plaintiffs. [Doc. 63 at ¶¶ 24-25]. The insurance policies at issue are substantially identical. Each policy is a kind of "all-risk" policy that provides coverage for "direct physical loss of or damage to Covered Property…caused by or resulting from any Covered Causes of Loss." [Doc. 63-1 (Exhibit A – The K's Inc. Policy) at 34; Doc. 63-2 (Exhibit B – The Last Resort-Mobile LLC Policy) at 24]. Specifically, a "Covered Cause of Loss" is any "direct physical loss unless the loss is excluded or limited in this policy." [Doc. 63-1 at 61; Doc. 63-2 at 54].

With respect to The K's Inc. Policy, the Covered Property is 6 Commercial Street, Boston, Massachusetts 02109—the location of Sissy K's. [Doc. 63 at ¶ 24; Doc. 63-1]. With respect to The Last Resort-Mobile LLC Policy, the Covered Property is 5955 Old Shell Road, Mobile, Alabama 36608—the location of Poindexters. [Doc. 63 at ¶ 25; Doc. 63-2].

There are several relevant coverage provisions in the Policies at issue in this case: Business Income, Extra Expense, Civil Authority, and Sue and Labor. [Doc. 63 at ¶¶ 29-30, 34-36, 38-39].

1. According to the "**Business Income**" coverage provision, Westchester agrees to "pay for the actual loss of Business Income" if business operations are necessarily suspended because of "direct physical loss of or damage to the property." [Doc. 63-1 at 50; Doc. 63-2 at 40].
2. The "**Extra Expense**" coverage provision provides that Westchester will pay for "necessary expenses" incurred by Plaintiffs during the "period of restoration" of their respective premises in the event of "direct physical loss or damage to" said premises. [Doc. 63-1 at 50-51; Doc. 63-2 at 40-41].
3. The "**Civil Authority**" coverage provision provides that Westchester will pay for "the actual loss of Business Income" sustained by Plaintiffs when "a Covered Cause of Loss causes damage to property other than property at" Plaintiffs' respective premises, provided (i) "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property," and (ii) "[t]he action of the civil authority is taken in response to dangerous

physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage[.]" [Doc. 63-1 at 51; Doc. 63-2 at 41].

4. Both the Business Income and Extra Expense provisions only provide coverage during the "period of restoration," which begins "(1) 72 hours after the time of *direct physical loss or damage* for Business Income Coverage; or (2) [i]mmediately after the time of *direct physical loss or damage* for Extra Expense Coverage" and ends on the earlier of "(1) [t]he date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) [t]he date when business is resumed at a new permanent location." (Emphasis added). [Doc. 63-1 at 58; Doc. 63-2 at 48].
5. The "**Sue and Labor**" provision—which appears not in the Policies' "Coverage" section, but in a separate section titled "Loss Conditions"—requires Plaintiffs to "[t]ake all reasonable steps to protect the Covered Property from further damage" and provides that Westchester will pay for expenses incurred in doing so if the harm results from a Covered Cause of Loss. [Doc. 63-1 at 54; Doc. 63-2 at 44].

B. COVID-19 and the Closure Orders

On March 11, 2020, the World Health Organization declared the COVID-19 outbreak a global pandemic. [Doc. 63 at ¶ 42]. Shortly thereafter, civil authorities throughout the country, including those with jurisdiction over Plaintiffs' respective establishments, began issuing orders aimed at slowing the spread of COVID-19 (the "Closure Orders"). [*Id*. at ¶ 45].

On March 15, 2020, the City of Boston issued an order restricting capacity at restaurants, bars, and night clubs and requiring the same to close by eleven p.m. [Doc. 63 at ¶ 46]. That same day, the State of Massachusetts issued an order restricting large gatherings and prohibiting restaurants and bars from offering dine-in services. [*Id*. at ¶ 47]. Ultimately, on March 23, 2020, the State of Massachusetts issued an order requiring the closure of non-essential business, but encouraging bars and restaurants to continue offering takeout and delivery services. [*Id*. at ¶ 48; Doc. 91-2 (Mass. COVID-19 Order No. 13 (Mar. 23, 2020))]. On May 18, 2020, the State of Massachusetts began permitting businesses to reopen in accordance with Social Distancing, Hygiene Protocols, and other safety rules. [Doc. 63 at ¶ 48].

On March 19, 2020, the Alabama State Health Officer began issuing similar orders, regulating large gatherings and prohibiting on-premises consumption at restaurants and bars. This prohibition remained in effect until May 11, 2020, at

which time dining-in was permitted, subject to compliance with CDC and Alabama Department of Public Health guidelines. [Doc. 63 at ¶¶ 49-54].

These Closure Orders were issued to help contain the spread of COVID-19 throughout Alabama and Massachusetts, "requiring the suspension of business at a wide range of establishments" to do so. [Doc. 63 at ¶¶ 45, 56]. Because of COVID-19 and the Closure Orders, Plaintiffs claim that their respective Covered Properties were rendered unfit for their intended uses, thwarting Plaintiffs' businesses and ultimate business purposes. [*Id*. at ¶ 69]. For example, Plaintiffs allege that Sissy K's closed its restaurant from March 16, 2020, to June 23, 2020, because it had "no takeout capability" and was able to open only after altering its premises. [*Id*. at ¶ 62].

C. The Lawsuit

Because of the losses allegedly suffered, Plaintiffs sought coverage from Westchester under their respective Policies. The K's Inc. (d/b/a Sissy K's) attempted to submit a claim, but after being informed by its agent that Westchester would deny coverage, it was ultimately dissuaded from doing so. [Doc. 63 at ¶ 72]. The Last Resort-Mobile LLC (d/b/a Poindexters) did submit a claim, but Westchester denied Business Income and Extra Expense coverage due to the lack of evidence indicating "direct physical loss or damage to Covered Property." [*Id*. at ¶¶ 73-74; Doc. 63-3 (Exhibit C – Denial Letter)]. Moreover, Westchester denied Civil Authority coverage because "no evidence has been provided that would indicate that any direct

physical loss of or damage to other property within one mile of your premise[s] has occurred." [Doc. 63-3 at 4].

Plaintiff The K's Inc. filed its Class Action Complaint on April 22, 2020 [Doc. 1], which was amended and refiled on April 23, 2020 (the "Amended Class Action Complaint"). [Doc. 5]. On August 25, 2020, Plaintiff The Last Resort-Mobile LLC filed its own Class Action Complaint against Westchester. [*See* Case No. 1:20-cv-03519-WMR at Doc. 1]. On November 6, 2020, this Court entered an Order consolidating the two actions [Doc. 59], and Plaintiffs filed a Consolidated Amended Class Action Complaint on November 13, 2020. [Doc. 63]. Plaintiffs, individually and on behalf of the putative class, have asserted claims for breach of contract and declaratory judgment. [*Id*.]

In their Consolidated Amended Class Action Complaint, Plaintiffs allege that the "actual and immediate loss of the functionality [of] their Covered Property, and their loss of business income due to the COVID-19 pandemic rendering the Covered Property uninhabitable or unfit for its intended use, constitutes 'direct physical loss'…and is a Covered Cause of Loss under the Policy." [Doc. 63 at ¶ 69]. Specifically, Plaintiffs allege they have suffered "direct physical loss and damage" because the presence of COVID-19 "has impaired Plaintiffs' properties by making them unusable in the way that they had been used before." [*Id*. at ¶¶ 12-13]. Moreover, Plaintiffs allege the direct physical losses caused by COVID-19 have

caused the suspension of Plaintiffs' businesses and resulted in an actual loss of business income. [*Id*. at ¶ 69]. Plaintiffs also allege that the Closure Orders implicate the Civil Authority coverage provision, because "[t]he Closure Orders prohibited access to Plaintiffs'…Covered Property, and the area immediately surrounding Covered Property." [*Id*. at ¶ 70].

The matter is now before the Court on Defendant Westchester's Motion for Judgment on the Pleadings. [Doc. 90].

II. LEGAL STANDARD

"Judgment on the pleadings is appropriate when 'no issues of material fact exist, and the movant is entitled to judgment as a matter of law.'" *Slagle v. ITT Hartford*, 102 F.3d 494, 497 (11th Cir. 1996) (citation omitted). To warrant a judgment on the pleadings, it must appear beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Id*. "When reviewing a judgment on the pleadings, we accept the facts in the complaint as true and view them in the light most favorable to the nonmoving party." *Ortega v. Christian*, 85 F.3d 1521, 1524 (11th Cir. 1996) (citation omitted). However, conclusory allegations and legal conclusions are not entitled to the assumption of truth, even if pleaded in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

For purposes of a motion for judgment on the pleadings, the Court may consider "the substance of the pleadings" and "any judicially noticed facts."

Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1370 (11th Cir. 1998). In addition to the documents attached to the complaint, the Court may consider materials that are cited and referred to in the complaint, provided the materials are central to Plaintiffs' claims and the contents of those documents are not in dispute. *See Fin. Sec. Assur., Inc. v. Stephens, Inc*., 500 F.3d 1276, 1284 (11th Cir. 2007).

III. DISCUSSION

In Georgia, "[t]he law is well settled that federal courts sitting in diversity cases must apply the forum state's conflict of law rules in order to resolve substantive legal issues." *Johnson v. Occidental Fire & Cas. Co. of N. Carolina*, 954 F.2d 1581, 1583 (11th Cir. 1992). Under Georgia's *lex loci contractus* choice of law rule governing contracts, "an insurance policy is governed by the law of the state where the policy was issued and delivered to the named insured unless that other state's law is contrary to Georgia public policy." *Mt. Hawley Insurance Company v. East Perimeter Pointe Apartments, LP*, 409 F.Supp.3d 1319, 1326 (11th Cir. 2019). Here, the interpretation of the contracts (substantive issue) in this case is governed by Alabama and Massachusetts law.

Under Alabama and Massachusetts law, a policy of insurance whose terms provisions are unambiguous must be enforced in accordance with its terms. *High Voltage Eng'g Corp. v. Fed. Ins. Co.*, 981 F.2d 596, 600 (1st Cir. 1992) (applying Massachusetts law); *accord Robinson v. Liberty Mut. Ins. Co.*, 958 F.3d 1137, 1140

(11th Cir. 2020) (applying Alabama law). In this case, the plain and unambiguous terms of the respective Policies preclude Plaintiffs' claims for coverage.

A. Business Income and Extra Expense Provisions

In Counts I and III of the Consolidated Amended Class Action Complaint, Plaintiffs seek to recover for the alleged breach of the Business Income and Extra Expense coverage provisions of the Policies. [Doc. 63 at ¶¶ 88-97, 106-113]. Similarly, in Counts V and VII, Plaintiffs seek a declaration that their business-income losses and extra expenses incurred in connection with the COVID-19 pandemic and the Closure Orders are covered losses under these provisions of the Policies. [*Id*. at ¶¶ 122-128, 136-142]. To recover, however, Plaintiffs must plausibly show that the losses were due to a suspension of operations caused by "direct physical loss of or damage to property at the premises." [Doc. 63-1 at 50; Doc. 63-2 at 40].

Plaintiffs argue that the "presence of COVID-19" was the direct physical loss of or damage to the premises that caused them to suspend their business operations. [Doc. 63 at ¶ 59]. According to both Alabama and Massachusetts law, however, this circumstance would not constitute a direct physical loss of or damage to property. A "direct physical loss of or damage to property" occurs only when there is some actual, tangible alteration to the property itself. *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, 497 F. Supp. 3d 1203, 1210-11 (S.D. Ala. 2020) (collecting Alabama Supreme

Court authority requiring "tangible alteration or disturbance to property to demonstrate physicality"); *Harvard St. Neighborhood Health Ctr., Inc. v. Hartford Fire Ins. Co.*, No. 14-13649-JCB, 2015 WL 13234578, at *8 (D. Mass. Sept. 22, 2015) (under Massachusetts law, intangible losses do not qualify as direct physical loss or damage, which requires a "physical or material existence"). In other words, the change to property must be a "physical" change. *See, e.g., Woolworth LLC v. Cincinnati Ins. Co.*, No. 2:20-CV-01084-CLM, 2021 WL 1424356, at *3 (N.D. Ala. Apr. 15, 2021) (in interpreting an insurance policy's Business Income provision, the phrases "direct physical loss" and "direct physical damage" are construed to mean perceptible, material injuries to property that must be repaired or replaced—not invisible viruses that can be wiped from the surface…. [T]he loss—not the cause of the loss—must be physical); *Kamakura, LLC v. Greater N.Y. Mut. Ins. Co.*, 525 F.Supp.3d 273, 280 (D. Mass. Mar. 9, 2021) ("[T]here must be a 'physical' loss of or damage to a tangible object, such as the structure of a building").

Here, the alleged "presence of COVID-19" cannot be regarded as a physical change to the Plaintiffs' respective premises, as it has not physically altered their properties. Although the virus is transmitted through the air and may adhere to surfaces briefly, there is no indication that it causes any sort of physical change to the property it touches. *See, e.g., Legal Sea Foods, LLC v. Strathmore Ins. Co.*, 523 F. Supp.3d 147, 152 (D. Mass. Mar. 5, 2021) ("The COVID-19 virus does not impact

the structural integrity of property in the manner contemplated by the Policy and thus cannot constitute 'direct physical loss of or damage to' property. A virus is incapable of damaging physical structures because 'the virus harms human beings, not property'"). The mere fact that the virus may be in the air or rest unseen on surfaces before it can be cleaned up with a disinfectant is not the kind of direct physical change contemplated by Alabama or Massachusetts law. *See Am. Food Sys., Inc. v. Fireman's Fund Ins. Co.*, 530 F. Supp.3d 74, 81 (D. Mass. Mar. 24, 2021) (finding that "the phrase 'direct physical loss' does not encompass a viral infestation").

Yet, even if it were covered, Plaintiffs have not plausibly alleged that COVID-19 was ever found on their properties. Instead, Plaintiffs merely alleges the presence of COVID-19, without showing that employees or other people on their respective properties were infected at the time they were on the premises or that any tests were performed at their properties that detected the virus on the premises. [*See* Doc. 63, generally]. This Court has previously observed that such "mere blanket allegations…are too generalized to support the conclusion that COVID-19 caused physical damage to Plaintiff's property." *Karmel Davis & Assocs., Attorneys-at-Law, LLC v. Hartford Fin. Servs. Grp., Inc.*, 515 F. Supp.3d 1351, 1357 (N.D. Ga. Jan. 26, 2021). Courts in Massachusetts have held likewise. S*ee Kamakura*, 525 F.Supp.3d at 284-85 (complaint failed to state a claim where it lacked any allegations

concerning the actual presence of the virus or the presence of individuals infected with COVID-19 at plaintiffs' properties); *SAS Int'l, Ltd. v. Gen. Star Indem. Co.*, 520 F.Supp.3d 140, 145 and n.7 (D. Mass. Feb. 19, 2021) (finding plaintiff's conclusory allegations insufficient to establish that "viral infestation" of COVID-19 caused "direct physical loss").

Plaintiffs also allege that the virus's presence "damage[d]…the air within the property," making the property "unsafe." [Doc. 63 at ¶ 12]. However, a plain reading of the Policies reveals that such a condition does not fall within the ambit of a covered loss. The respective Policies define "Covered Property" to encompass only physical structures, not "air." [Doc. 63-1 at 34; Doc. 63-2 at 24].

Plaintiffs further allege that not being able fully to utilize their premises because of the threat or alleged presence of COVID-19 constitutes a direct physical loss of or damage to their Covered Properties. [Doc. 63, ¶¶ 11, 14-16, 31, 61]. This allegation likewise falls short. Under both Alabama and Massachusetts law, the mere loss of use of property does not amount to 'direct physical loss of or damage to' that property within the ordinary and popular meaning of the phrase." *See, e.g., Drama Camp Prods., Inc. v. Mt. Hawley Ins. Co.*, No. 1:20-CV-266-JB-MU, 2020 WL 8018579, at *4-5 (S.D. Ala. Dec. 30, 2020); *Hillcrest Optical*, 497 F. Supp. 3d at 1211-12; *Vervaine Corp. v. Strathmore Ins. Co.*, No. SUCV20201378BLS2, 2020 WL 8766370, at *3-4; *Am. Food Sys.*, 530 F. Supp.3d at 79 ("[C]onstruing the

language 'physical loss of' to cover the deprivation of a property's business *use* absent any tangible damage distorts the plain meaning of the Policy") (emphasis in original). Here, according to the Policies' plain terms, the loss of the property must be a "physical." *See Woolworth*, 2021 WL 1424356, at *3 (N.D. Ala. Apr. 15, 2021) ("[T]he court cannot tear the adjective 'physical' from the noun it modifies, 'loss'"); *Kamakura*, 525 F.Supp.3d at 280 ("[T]here must be a 'physical' loss of or damage to a tangible object, such as the structure of a building"). Where, as here, the Policies' language is unambiguous, "courts are not at liberty to rewrite policies to provide coverage not intended by the parties." *Johnson v. Allstate Ins. Co.*, 505 So. 2d 362, 365 (Ala. 1987); *accord Hakim v. Mass. Insurers' Insolvency Fund*, 424 Mass. 275, 281 (1997). As Plaintiffs have not plausibly alleged a physical loss of or damage to any property on their respective premises, Plaintiffs' loss of use theory cannot be maintained.[1]

[1] Several other courts have also considered and rejected similar "loss of use" allegations, particularly in the COVID-19 context. *See, e.g., Uncork and Create LLC v. Cincinnati Insurance Co.*, No. 2:20-cv-0041, 2020 WL 6436948 (S.D. W. Va. Nov. 2, 2020); *Raymond H Nahmad DDS PA v. Hartford Casualty Insurance Co.*, No. 1:20-cv-22833, 2020 WL 6392841, (S.D. Fla. Nov. 1, 2020); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's Known as Syndicate PEM 4000*, No. 8:20-cv-1605, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020); *Sandy Point Dental, PC v. Cincinnati Insurance Co.*, No. 20-cv-2160, 2020 WL 5630465 (N.D. Ill. Sept. 21, 2020); *Pappy's Barber Shops, Inc. v Farmers Group, Inc.*, No. 20-cv-907, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020); *10E, LLC v. Travelers Indemnity Co.*, No. 2:20-cv-04418, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020*); Malaube, LLC v. Greenwich Insurance Co.*, No. 20-22615, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020); *Diesel*

The same rationale applies to Plaintiffs' allegation that the Closure Orders caused a direct physical loss of or damage to their properties. Although the Closure Orders affected how Plaintiffs could use their respective properties, the Closure Orders themselves did not cause any actual, physical damage to property on the Plaintiffs' respective premises. In sum, the Policies do not provide coverage for solely economic losses unaccompanied by physical property loss or damage.

Because Plaintiffs were unable establish direct physical loss of or damage to property on their premises, Westchester is entitled to judgment as to Counts I, III, V, and VII of the Consolidated Amended Class Action Complaint.

B. Civil Authority Provision

In Count II, Plaintiffs seek to recover for the alleged breach of the Civil Authority provision of the Policies. [Doc. 63 at ¶¶ 98-105]. Similarly, in Count VI, Plaintiffs seek a declaration that their business-income losses and extra expenses incurred in connection with the COVID-19 pandemic and the Closure Orders are covered losses under this provision of the Policies. [*Id*. at ¶¶ 129-135]. Specifically, Plaintiffs allege that the Civil Authority provision provides coverage for the actual loss of business income they sustained and for the extra expenses they incurred during the period when the Closure Orders issued in response to the COVID-19

Barbershop, LLC v. State Farm Lloyds, No. 5:20-cv-461, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020).

pandemic prohibited access to their premises. [*Id*.] However, Plaintiffs have failed to allege any facts that would trigger Civil Authority coverage under the Policies.

Based on the unambiguous terms of the Policies' Civil Authority provision, the coverage applies only if there is a Covered Cause of Loss, meaning *a direct physical loss*, to property other than the property at the Plaintiffs' premises. [Doc. 63-1 at 51; Doc. 63-2 at 41]. Even then, there is coverage only if the civil authority order: (1) prohibits access to the area immediately surrounding the damaged property and the Plaintiffs' premises is located within that area but is not more than one mile from the damaged property; and (2) the action of civil authority is taken in response to dangerous physical conditions resulting from the damage or is taken to enable a civil authority to have unimpeded access to the damaged property. [*Id*.]

Just as COVID-19 did not cause direct physical loss to Plaintiffs' respective properties, the complaint does not plausibly allege that COVID-19 has caused direct physical loss to other property. By the Policies' own terms, the Civil Authority coverage does not apply in the absence of the requisite physical loss. Failure to meet this requirement alone warrants dismissal of any claim for coverage under the Civil Authority provision.

Furthermore, the Closure Orders did not specifically prohibit Plaintiffs from continuing to operate their establishments. Rather, the Orders specifically provided that restaurants and bars "may continue to offer food for take-out and by delivery."

[Doc. 91-1 (Mass. COVID-19 Order) at 3; Doc. 91-2 at 3 (similar); Doc. 91-3 (Ala. State Health Officer Order (Mar. 19, 2020)) at 4 (declaring that restaurants and similar establishments may continue to offer takeout and delivery)]. Thus, although Plaintiff The K's, Inc. alleges that its restaurant (Sissy K's) "shut down" as a result of the Closure Orders [Doc. 63 at ¶ 62], the explicit language of the Orders makes clear that it did so under its own volition. The relevant inquiry is not whether it was economically feasible for Sissy K's to continue its restaurant operations solely by carryout and delivery sales, but rather whether the Closure Orders prohibited access to its property. *Legal Sea Foods*, 523 F. Supp.3d at 154. Here, they clearly did not prohibit access. [Doc. 91-1 at 3; Doc. 91-2 at 3].

As no "direct property loss" to other property prompted the issuance of the Closure Orders, and because the Closure Orders did not prohibit access to the Plaintiff's properties, there can be no coverage under the Civil Authority provision of the Policies. Accordingly, Westchester is entitled to judgment on Counts II and VII of the Consolidated Amended Class Action Complaint.

C. Sue and Labor Provision

In Count IV, Plaintiffs seek to recover for an alleged breach of the Sue and Labor provision of the Policies. [Doc. 63 at ¶¶ 114-121]. Similarly, in Count VIII, Plaintiffs seek a declaration that the expenses they incurred to protect their Covered Properties from further damage caused by COVID-19 are covered losses under this

provision of the Policies. [*Id*. at ¶¶ 143-149]. To recover, however, Plaintiffs must plausibly allege a "direct physical loss or damage" to property and that the expenses they incurred were necessary to protect the property from further damage. [Doc. 63-1 at 54; Doc. 63-2 at 44].

The Sue and Labor provision—which appears in a section titled "Loss Conditions"—is not an additional form of insurance coverage; it is a list of conditions that are imposed on coverage. *Skillets LLC d/b/a Skillets Rest. v. Colony Ins. Co.*, 524 F. Supp.3d 484, 488 n.3 (E.D. Va. Mar. 10, 2021) (a sue and labor provision does not provide coverage, but merely "allows an insured to recoup costs incurred with respect to a covered loss") (citation omitted).

Because Plaintiffs have failed to allege any Covered Causes of Loss (direct physical loss) to which Westchester's obligations under this provision would attach, Plaintiffs' Sue and Labor claims necessarily fail. *See, e.g., Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 504 F. Supp.3d 1191, 1206 (D. Kansas Dec. 3, 2020) (sue and labor provision "is plainly not a coverage provision" and is inapplicable where policy did not otherwise provide coverage for insured's alleged losses); *Am. Home Assur. Co. v. Fore River Dock & Dredge, Inc.*, 321 F. Supp. 2d 209, 220-21 (D. Mass. 2004) (expenses incurred to mitigate damages not covered by policy are not recoverable under policy's sue and labor provision); *St. Paul Fire & Marine Ins. Co. v. Christiansen Marine, Inc.*, 893 So. 2d 1124, 1135 (Ala. 2004) (similar).

D. Class Claims

Because all of the claims of the named Plaintiffs fail, the putative class claims must also fail. Accordingly, the Consolidated Amended Class Action Complaint must be dismissed in its entirety.

IV. CONCLUSION

For the reasons set forth above, IT IS HEREBY ORDERED that Defendant Westchester Surplus Lines Insurance Company's Motions for Judgment on the Pleadings [Doc. 90] is **GRANTED**.

IT IS SO ORDERED, this 9th day of December, 2021.

William M. Ray II

WILLIAM M. RAY, II
UNITED STATES DISTRICT JUDGE