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VALLEY HEALTH SYSTEM INC., VALLEY HOSPITAL FOUNDATION, INC., THE VALLEY HOSPITAL, INC., VALLEY HOME CARE, INC., VALLEY PHYSICIAN SERVICES, P.C. AND VALLEY PHYSICIAN SERVICES, P.C., N.Y., Plaintiff, v. ZURICH AMERICAN INSURANCE COMPANY, Defendants,	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION – BERGEN COUNTY DOCKET NO. **BER-L-1907-21** Civil Action **OPINION**

Argued: August 27, 2021
Decided: October 18, 2021

HONORABLE ROBERT C. WILSON, J.S.C.

Lynda A. Bennet, Esq. appearing on behalf of plaintiff (from Lowenstein Sandler LLP)

Edward M. Pinter, Esq. appearing on behalf of defendant (from Ford Marrin Esposito Witmeyer & Gleser, L.L.P.)

FACTUAL BACKGROUND

THIS MATER arises out of a dispute between plaintiffs Valley Health System Inc., Valley Hospital Foundation, Inc., The Valley Hospital, Inc., Valley Home Care, Inc., Valley Physician Services, P.C. and Valley Physician Services, P.C., N.Y. (collectively the "Plaintiffs") and defendant Zurich American Insurance Company (the "Defendant") regarding a dispute over coverage of an insurance policy due to the Covid-19 Pandemic.

Plaintiffs are healthcare providers that operate a hospital and other healthcare facilities throughout northern New Jersey and New York. Plaintiffs allege that they have suffered substantial financial losses because of the Covid-19 pandemic and the resulting actions and orders of federal, state, and local civil authorities. Plaintiffs claim they lost revenue because, in

accordance with CDC guidance, New Jersey issued orders to limit person-to-person contact to curb the further transmission of the coronavirus. These orders cancelled or postponed all elective surgeries or invasive procedures beginning on March 27, 2020, until they were permitted to resume on May 26, 2020.

Plaintiffs allege that their property has been damaged by the presence of the coronavirus at their locations and that a number of their employees and patients tested positive Covid-19. Plaintiffs submitted an insurance claim to Defendant for their alleged business interruption losses. Following an investigation, Defendant agreed to pay the limits of the Interruption by Communicable Disease coverage under the policy, which extends certain limited coverage for certain losses from a government order due to the threat of the spread of communicable disease, without a showing of direct physical loss or damage. Defendant denied coverage under all the other provisions of the policy. Plaintiffs allege that Defendant has breached its contract and seek a declaratory judgment for coverage under its insurance policy.

The Policy

Defendant issued a Zurich EDGE Healthcare property insurance policy to Plaintiffs (the "Policy"). The Policy had an effective date of March 20, 2020, and a termination date of March 20, 2021. Plaintiffs allege that they are entitled to coverage under the following sections of the Policy: Time Element Coverage; Extra Expense Coverage; Civil or Military Authority Coverage; Contingent Time Element Coverage; and Protection and Preservation of Property Coverage. Each of these sections, condition coverage on there being direct physical loss or damage.

For the reasons set forth below, all the Defendants' Motions to Dismiss are hereby **GRANTED**.

MOTION TO DISMISS STANDARD UNDER RULE 4:6-2(e)

In considering a motion to dismiss under Rule 4:6-2(e), the Court must search the pleading in depth and with liberality to determine whether a cause of action is suggested by the facts, Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). The Court must ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of a claim, opportunity being given to amend, if necessary. The essential test as set forth in Green v. Morgan Properties, 215 N.J. 431, 451 (2013), the Supreme Court decision governing a motion to dismiss is whether a cause of action is suggested by the facts. When addressing a motion to dismiss, the Court is permitted to review and consider documents identified in the pleadings. Myska v. New Jersey Manufacturers Insurance Co., 440 N.J. Super. 458, 42 (App. Div. 2015). Nevertheless, a pleading should be dismissed if it states no basis for relief and discovery would provide one. Camden County Energy Recovery Associates v. New Jersey Department of Environmental Protection, 320 N.J. Super. 59, 64-65, (App. Div. 1999) affirmed, 170 N.J. 246 (2001).

Questions of law are particularly suited for resolution through motion by the Court. Shields v. Ramslee Motors, 240 N.J. 479 (2020) and Badiali v. New Jersey Manufacturers Insurance Group, 220 N.J. 544, 555 (2015). Questions involving insurance coverage are always determined by the terms and conditions of a policy and the interpretation of an insurance contract is a question of law for the Court and can be often resolved by motions. Weedo v. Stone-E-Brink, Inc., 155 N.J. Super. 474, 479 (App. Div. 1977).

An insurance policy is a contract enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled. Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010). An insurance policy is interpreted by the Court in accordance with its plain and ordinary meaning. Memorial Properties, LLC v. Zurich American Insurance Co., 210 N.J. 412, 425

(2012). Courts cannot rewrite a policy's terms to find coverage where the policy plainly provides none. Pizzullo v. New Jersey Manufacturers Insurance Co., 196 N.J. 251, 270 (2008).

The plain language of a policy is unambiguous. Courts shall not engage in estranged construction to support the imposition of liability or write a better policy for the insured than the policy that was purchased. Oxford Realty Group Cedar v. Travelers Excess and Surplus Lines Co., 299 N.J. 196, 207 (2017). When the policy is clear and unambiguous, a Court is bound to enforce it. Longobardi v. Chubb Insurance Co., 121 N.J. 530, 537 (1990).

Lastly, a party seeking coverage under an insurance agreement bears the burden of demonstrating that the underlying claim falls within the coverage provisions of the insuring agreement. Hartford Accident and Indemnity Co. v. Aetna Life and Casualty Insurance Co., 98 N.J. 18. However, regarding exclusions of coverage under an insurance policy, the burden of proof is on an insured to prove that the exclusion applies. Generally, the insurance policy exclusions must be narrowly construed. The burden is on the insured to bring the case within the exclusion. Flomerfelt, supra, 202 N.J. at 442 (quoting American Motorist Insurance Co. v. LCA Sales Co., 155 N.J 29, 41 (1998). Where an exclusionary clause is involved, such clauses are narrowly tailored.

Indeed, it is the insurer's burden to establish the exclusion. Phribro Animal Health Corporation v. National Union Fire Insurance Co., 446 N.J. 419, 442-443 (App. Div. 2016). Courts must be careful, however, not to disregard the clear import and intent of a policy's exclusion. Far-fetched interpretations of a policy exclusion are insufficient to create ambiguity requiring coverage. Wear v. Selective Insurance Co., 455 N.J. Super. 440, 454 (App. Div. 2018).

Thus, in the absence of any ambiguity, Courts should not write for the insured a better policy of insurance than the one purchased, including the enforcement of an exclusion. Gibson v. Callahan, 158 N.J. 662, 670 (1999).

RULES OF LAW AND DECISION

New Jersey Interpretation of Insurance Policies

The interpretation of an insurance policy is a question of law. Sosa v. Mass. Bay Ins. Co., 458 N.J. Super. 639, 646 (App. Div. 2019). Under New Jersey law, "the basic rule is to determine the intention of the parties from the language of the policy, giving effect to all of its parts so as to accord a reasonable meaning to its terms." Stone v. Royal Ins. Co., 226 N.J Super. 246, 248 (App. Div. 1986). Courts read the contract as a whole "in a fair and common-sense manner." Cypress Point Condominium Ass'n, Inc. v. Adria Towers, L.L.C., 226 N.J. 403, 415 (2016). An insurance policy should be enforced as written when its terms are clear. Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010). Although New Jersey courts generally read policies in favor of the insured, they "should not write for the insured a better policy . . . than the one purchased." Port Auth. Of New York & New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226, 235 (3d Cir. 2002) (citing Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 116 N.J. 517 (1989)); President v. Jenkins, 180 N.J. 550, 562 (2004) ("If the policy terms are clear, courts should interpret the policy as written and avoid writing a better insurance policy than the one purchased.").

As such, courts interpret policy language according to its plain and ordinary meaning. Jenkins, 180 N.J. at 562. "Rules of construction favoring the insured cannot be employed to disregard the clear intent of the policy language." Stone, 211 N.J. Super. At 249. As stated by the New Jersey Supreme Court, "In attempting to discern the meaning of a provision in an insurance contract, the plain language is ordinarily the most direct route. If the language is clear, that is the end of the inquiry." Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008). A Court should not engage in a strained construction to find coverage. Longobardi v. Chubb Ins. Co. of New Jersey, 121 N.J. 530, 537 (1990). Exclusionary clauses

are presumptively valid and are enforced if they are specific, plain, clear, prominent, and not contrary to public policy. Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997).

There is No Direct Physical Loss of or Damage to any Covered Property

To state a viable claim for coverage, the insured bears the initial burden of demonstrating that its asserted claim falls within the basic scope of the coverage under the policy. Bldg. Materials Corp. of Am. v. Allstate Ins. Co., 424 N.J. Super. 448, 464 (App. Div. 2012); Weedo v. Stone-E-Brink, Inc., 81 N.J. 233, 249 (1979) (stating that a claim must be "cognizable under the general grant of coverage in the first instance in order to constitute a claim 'to which this insurance applies'"); Heldor Indus., Inc. v. Atl. Mut. Ins. Co., 229 N.J. Super. 390, 397 (App. Div. 1988) (holding that "there must first be a finding of physical damage to tangible property from which the consequential damages flow").

Plaintiffs do not meet their burden of showing that there is a direct physical loss or damage to their property. Plaintiffs plead general facts related to the pandemic and assert that they suffered direct physical loss or damage to their property, but they have not identified any property that was damaged, repaired, or required replacement. As such, Plaintiffs have failed to meet their threshold burden to demonstrate coverage, as the court is "not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986); Myska v. New Jersey Mfrs. Ins. Co., 2014 N.J. Super. Unpub. LEXIS 650 at *7 (Super. Ct., Bergen Cty. Mar. 21, 2014) aff'd in rel. part 440 N.J. Super. 458, 489-90 (App. Div. 2015) ("Courts considering motions to dismiss have long stressed that while they must accept 'all well-pleaded facts as true,' they 'need not credit a complaint's 'bald assertions' or 'legal conclusion'"); see also Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552, 535 A.2d 512 (App. Div. 1987); Lee v. Chin, 2020 N.J. Super. Unpub. LEXIS 2062 at *10 (Super. Ct., Bergen

Cty., Oct. 9, 2020) (a mere "unsupported legal conclusion . . . cannot [with]stand a motion to dismiss").

The legal conclusions made by Plaintiff stating that the Policy provides coverage for "all risks" of damage do not change the Policy's actual requirements for coverage. The burden on the insured to establish entitlement to coverage is not lessened because they claim coverage under an "all-risk" policy. Courts have rejected such arguments holding that:

> . . . in the insurance industry, "all-risks" does not mean "every risk." As Judge Friendly remarked . . . . "[t]he description of the policy as 'All Risks' is rather a misnomer since it contains fourteen lettered exclusions" . . . . Moreover, "[a] loss which does not properly fall within the coverage clause cannot be regarded as covered thereby merely because it is not within any of the specific exceptions . . . ." Consequently, the responsibility under a first-party 'all risks' policy must be determined by the terms and conditions of the contract.

Port Auth. of New York & New Jersey, 311 F.3d at 324; GTE Corp. v. Allendale Mut. Ins. Co., 258 F. Supp. 2d 364, 373 (D.N.J. 2003); Dressel v. Hartford Ins. Co. of the Midwest, 2021 U.S. Dist. LEXIS 54067 at *12 (E.D.N.Y. Mar. 22, 2021). Here, Plaintiffs do not allege direct physical loss or damage to property. Accordingly, their complaint is dismissed.

"The requirement that the loss be 'physical,' given the ordinary definition of that term is widely held to exclude alleged losses that are intangible or incorporeal, and thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." Port Auth. v. Affiliated FM Ins. Co., 245 F. Supp. 2d 563, 579 (D.N.J. 2001) (quoting 10A Couch on Ins. §148.46 (3d Ed. 2020)). Plaintiffs do not meet this requirement because they do not allege that the coronavirus caused physical alterations to property.

The U.S. District Court for the District of New York, applying New Jersey law, held that "Plaintiffs' general statements that the Covid-19 virus was on surfaces and in the air at their properties is insufficient to show property loss or damage." On plaintiffs' motion for reconsideration, the U.S. District Court of New Jersey affirmed that plaintiffs' pleadings were "want," and did not allege any facts supporting a showing that their properties were physically damaged. Manhattan Partners, LLC v. Am. Guar. & Liab. Ins. Co., 2021 U.S. Dist. LEXIS 100110 at *3-4 (D.N.J. May 24, 2021) (citing Port Authority, 311 F.3d at 235).

Courts have also rejected allegations that employees testing positive for Covid-19 constitutes direct physical loss or damage. See Unmasked Mgmt. v. Century-National Ins. Co., 2021 U.S. Dist. LEXIS 13372 at *15-16 (S.D. Cal. Jan. 22, 2021). Other courts, when confronted with similar unsupported allegations, have similarly held that the mere presence of coronavirus "did not constitute the direct, physical loss or damage required to trigger coverage because its presence can be eliminated by routine cleaning and disinfecting," and "an item or structure that merely needs to be cleaned has not suffered s 'loss' which is both 'direct' and 'physical.'" See, e.g., Tappo of Buffalo, LLC v. Erie Ins. Co., 2020 U.S. Dist. LEXIS 245436 at *11 (W.D.N.Y. Dec. 29, 2020).

Plaintiffs' approach has been rejected by many courts because the ordinary meaning of direct physical loss or damage requires physical alteration to property. Courts apply ordinary meanings to commonly understood words. President v. Jenkins, 180 N.J. at 562. A textual and contextual reading of the language supports the conclusion that a physical tangible alteration is required, and that the alleged presence of the virus is simply not enough. As one court recently noted in interpreting the language:

> Taking these words together according to their ordinary meanings, "physical loss of" property means material, perceptible destruction or deprivation of possession.

> "Physical damage to" means material, perceptible harm. In other words, the phrase intends a tangible loss of or harm to the insured property, in whole or in part. As the trigger for coverage, this policy language excludes financial or monetary losses resulting from the novel coronavirus . . . for the simple reason that the virus did not work any perceptible harm to the properties at issue, even if (construing the allegations in Plaintiff's favor) the virus may be found on surfaces there.

Ceres Enters. V. Travelers Ins. Co., 2021 U.S. Dist. LEXIS 30637 at *13-14 (N.D. Ohio Feb. 18, 2021).

Further, even if Plaintiffs had pled facts to establish the presence of the coronavirus at their healthcare facilities, courts have repeatedly held that the mere presence of the coronavirus does not constitute direct physical loss or damage. See e.g., Ralph Lauren Corp. v. Factory Mut. Ins. Co., 2021 U.S. Dist. LEXIS 90526 at *7-8 (D.N.J. May 12, 2021) ("Nor does the alleged "presence" of the [Covid-19] virus in or around Plaintiff's stores equate to actual or imminent physical loss or damage of any sort"); Dressel, 2021 U.S. Dist. LEXIS 54067 at *11-12. In doing so, these courts have noted that the virus can be eliminated with routine cleaning with household products and dissipates on its own. See Tappo of Buffalo, 2020 U.S. Dist. LEXIS 245436 at *11.

Courts applying New Jersey law, prior to the Covid-19 pandemic, had already rejected Plaintiffs' argument that the mere presence of a microscopic harmful substance constitutes direct physical loss of or damage to property. Rather, the insured must show that the functionality of the property itself was destroyed or eliminated because of a physical impact on the property. Port Authority, 311 F.3d 236. The U.S. District Court of New Jersey has also relied on Port Authority in holding that "Plaintiffs' general statements that the Covid-19 virus was on surfaces and in the air at their properties is insufficient to show property loss or damage." Manhattan

Partners, 2021 U.S. Dist. LEXIS 50461 at *5. So too here, Plaintiffs' business suffered, along with many others, but the physical structures did not suffer any physical impairment that made them physically unusable.

Plaintiffs cite multiple cases for their proposition that the presence of a hazardous substance constitutes physical loss. However, courts have addressed this issue and held that if "a sick person walked into one of Plaintiff's [stores] and left behind Covid-19 particulates on a countertop, it would strain credulity to say that the countertop was damaged or physically altered as a result." Unmasked Management, Inc. et al v. Century-National Ins. Co., 2021 U.S. Dist. LEXIS 13372 at *17 (S.D. Cal. Jan. 22, 2021); see also Michael Cetta, Inc. v. Admiral Indem. Co., 2020 U.S. Dist. LEXIS 233419 at *32 (S.D.N.Y. Dec. 11, 2020) (ruling that a plaintiff must demonstrate "direct physical loss of or damage to a property" and that the threat of Covid-19 did not meet this threshold).

The main factor for analysis is the requirement that, for the presence of a contaminant to constitute a direct physical loss of or damage to property, the substance must permeate the premises to distinctly and demonstrably compromise its physical integrity or render it entirely uninhabitable for a distinct period of time. This threshold has not been met here. The government orders are what caused Plaintiffs to be unable to fully use their properties, however, it was not because of any physical casualty to the property itself. Thus, as a matter of law, the claim that a harmful substance is present is insufficient to establish direct physical loss or damage to property.

Plaintiffs do not allege any needed repair or replacement of any insured property. Where the virus is present it can be removed or neutralized through routine cleaning of surfaces with standard household cleaners. The need for such cleaning does not constitute property damage and does not trigger coverage. See Mama Jo's Inc. v. Sparta Ins., 823 Fed. App'x 868, 879 (11th

Cir. 2020) (an item or structure that merely needs to be cleaned has not suffered a "loss" which is both "direct" and "physical"). This lack of any needed repair or replacement of insured property is especially meaningful with respect to Plaintiffs' claim for Time Element losses under the Policy. This coverage only applies only for the Period of Liability, which is defined as "[t]he period starting from the time of physical loss or damage . . . and ending when with due diligence and dispatch [the insured property] could be repaired or replaced." Here, there is no Period of Liability, and hence no coverage, because there is no insured property that needed to be repaired or replaced because of physical loss or damage. See, e.g., Ceres, 2021 U.S. Dist. LEXIS 30637 at *14-15; Food for Thought Caterers Corp. v. Sentinel Ins. Co., 2021 U.S. Dist. LEXIS 42828 at *12 (S.D.N.Y. Mar. 6, 2021) (a requirement of direct and physical damage to the insured's property is "appropriate given that the policy only covered losses for the length of time required to rebuild, repair or replace the damaged property").

For the same reasons, Plaintiffs' claim for Extra Expense coverage fails. That provision provides coverage for "Extra Expenses incurred by the Insured . . . during the Period of Liability . . . . due to direct physical loss of or damage caused by a Covered Cause of Loss . . . ." To trigger this coverage, Plaintiffs must have incurred extra expenses that they would not have incurred if there had been no direct physical loss of or damage to property. As there has been no direct physical loss or damage to property due to the coronavirus, this coverage does not apply.

Plaintiffs also contend that they are entitled to "business interruption" coverage because their revenues decreased due to slowdown of their business caused by the executive orders. Such purely economic loss is not within the scope of the Policy, which responds only to actual physical loss or damage to property and the resulting consequences of such loss or damage. See TMN, LLC v. Ohio Security Ins. Co., No. MER-L-000821-20, slip op. at *6 (Super. Ct. Mercer Cty. Apr. 16, 2021) ("the allegations of limitations on its business operations arising from Covid-

19, do not amount to direct physical loss of or damage to covered property"). The Policy's exclusion for purely economic "loss of market" or "loss of use" is further textual support that the Policy covers loss arising only from "direct physical loss of or damage to" property. Plaintiffs' property exists in the same condition as it did the day prior to the date of any government order, and has suffered no discernable, physical damage because of a stay-at-home order. Consequently, Plaintiffs' allegations do not meet their burden of showing a "distinct and demonstrable" physical loss within the scope of the insuring clause. "When the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property," there is no coverage under a provision requiring physical loss or damage. Port Auth., 245 F. Supp. 2d at 579; Spottswood Co., Inc. v. Zurich Am. Ins. Co., No. 4:20-cv-10077 (S.D. Fla. June 14, 2021) ("[S]imply put, there is no way to plausibly allege the physical manifestation of economic headwinds caused by the Covid-19 pandemic").

Plaintiffs' claim for business interruption losses under the Time Element Coverage fails for another reason, as well. Not only must an insured demonstrate the existence of "direct physical loss of or damage to" insured property, but it also must demonstrate that the suspension of business was due to the direct physical loss or damage to insured property. Since their business activities were not suspended because of such claimed physical loss or damage, there is no business interruption coverage under the Policy. Plaintiffs' allegations demonstrate that any claimed closure or limitation of their business was not due to any physical damage to specific insured property, but, instead, was the result of prophylactic community-wide stay-at-home orders, which were issued to curb the person-to-person transmission of the virus that causes Covid-19.

Plaintiffs do not show the necessary causation required under the Policy, and, as a result, they have no claim for business interruption losses. See, e.g., Ski Shawnee, Inc. v.

Commonwealth Ins. Co., 2010 U.S. Dist. LEXIS 67092 at *8-9 (M.D. Pa. July 6, 2010) ("Business Income" coverage "does not apply because the loss at issue due to the "suspension" of Plaintiff's "operations" was not the result of a "direct physical loss of or damage to property at the covered premises."); Pappy's Barber Shops, Inc. v. Farmers Group, Inc., 491 F. Supp. 3d 738, 740 (S.D. Cal. 2020) (even if Covid was present on the property, the government shutdown orders were the cause of the alleged loss).

Plaintiffs' Claims for Special Coverages Fail

Plaintiffs' claims for certain "special coverages" also fail because they too require a showing of direct physical loss or damage to property. To state a claim under the Policy's Civil Authority Coverage provision Plaintiffs must show (1) "an order of a civil . . . authority that prohibits access to the" insured property, and (2) that order results from "a civil authority's response to direct physical loss of or damage caused by a Covered Cause of Loss" to a third-party property within five miles of their locations. Plaintiffs do not demonstrate that the orders were the results of any "physical loss of or damage" to any identified third-party property within five miles of any insured premises. Plaintiffs merely assert that the executive orders were issued because of the physical presence of Covid-19 throughout the State of New Jersey and to curb the spread of the coronavirus in healthcare facilities. The mere alleged presence of the virus at third-party locations does not constitute the requisite direct physical loss or damage. There is no factual support for a claim that the virus caused direct physical loss or damage to any relevant property. See Mac Property Group, LLC v. Selective Fire & Cas. Ins. Co., 2020 N.J. Super. Unpub. LEXIS 2244 at *21 (Super. Ct. Camden Cty. Nov. 5, 2020) (holding that civil authority provision is not triggered where there is no direct physical loss or damage to property from the virus that resulted in the order of civil authority).

The stay-at-home orders were issued in response to a broad public health crisis and aimed at limiting person-to-person interactions to protect human health and lives by limiting the future transmission of the virus. They were not issued in response to any specific physical loss or damage to any identifiable property. See, e.g., N.J. Exec. Order Nos. 107, 109; Mattdogg, Inc. v. Philadelphia Ins. Co., 2020 N.J. Super. LEXIS 250 at *10 (Super. Ct. Mercer Cty. Nov. 17, 2020) (dismissing similar claims because "Plaintiff alleges no facts establishing any nexus between damage to nearby property and Governor Murphy's orders"); see also Spottswood Cos., Inc., No. 4:20-cv-10077 at 10 (finding that the public health orders "were in response to Covid-19 and do not involve a physical loss or damage of any sort"). Government orders causing income loss to a plaintiff is an unfortunate effect of the Covid-19 pandemic, but it is not necessarily a loss covered under a plain reading of the civil authority coverage. Moody v. Hartford Fin. Grp., Inc., 2021 U.S. Dist. LEXIS 7264 at *23-24 (E.D. Pa. Jan. 14, 2021).

Plaintiffs also seek Contingent Time Element coverage which applies where a policyholder must suspend its business activities at an insured location provided the suspension results from direct physical loss or damage. Plaintiffs' complaint is devoid of factual allegations setting forth when or how any purported loss or damage occurred at their properties, let alone any explanation of how any claimed damage resulted in a necessary suspension of Plaintiffs' business. To the extent that Plaintiffs makes a claim of physical loss or damage here, such claim rests solely on assertions about the alleged presence of the coronavirus at these locations or the ensuing governmental orders.

There is also no coverage under the Protection and Preservation of Property provision of the Policy. This provision also requires direct physical loss or damage. Plaintiffs make conclusory allegations that they are entitled to this coverage, but, where there is no physical loss or damage to the property, there can be no coverage under this provision.

The Contamination Exclusion Bars All Coverage

Each of the coverage parts under which Plaintiffs make their claims specifically requires that any direct physical loss or damage must be caused by a Covered Cause of Loss, which is defined as "[a]ll risks of direct physical loss of or damage from any cause unless excluded." Among the exclusions in the Policy is the Contamination Exclusion which states: "This Policy excludes the following unless it results from direct physical loss or damage not excluded by this Policy . . . Contamination, and cost due to Contamination including the ability to use or occupy property or any cost of making property safe or suitable for use or occupancy . . ." "Contamination" is further defined as "Any condition of property due to the actual presence of any . . . virus [or] disease causing or illness causing agent."

Courts have recently applied the same Contamination Exclusion to dismiss substantively identical allegations. Manhattan Partners, 2021 U.S. Dist. LEXIS 59461 at *5, n. 3 (same contamination exclusion "clearly and explicitly excludes coverage for damage, loss or expense arising from a virus"); Firebirds International, LLC v. Zurich Am. Ins. Co., Case No. 2020-CH-05360, slip op. at 7-9 (Ill. Cir., Cook Cty. Apr. 19, 2021) ("The plain language of the 'Contamination' exclusion is clear and unambiguous" and the applicability of the exclusion to claims arising from the coronavirus is "free from doubt"). New Jersey courts have routinely precluded coverage for similar claims arising from the Covid-19 pandemic and the associated stay-at-home orders. Blvd. Carroll Entm't Group, Inc. v. Fireman's Fund Ins. Co., 2020 U.S. Dist. LEXIS 234659 at *5 (D.N.J. Dec. 14, 2020) ("Because the Stay-At-Home Orders were issued to mitigate the spread of the highly contagious novel coronavirus, Plaintiff's losses are tied inextricably to that virus and are not covered by the Policy."); see also Ralph Lauren Corp., 2021 U.S. Dist. LEXIS 90562 at *7 ("[E]ven if Plaintiff did plead existence of actual or imminent "physical loss or damage," its claim fails under the Contamination Exclusion" . . .

"which would encompass the Virus that causes Covid-19"); Mattdogg, Inc., 2020 N.J. Super. LEXIS 250 at *10 ("Plaintiff's claims cannot survive the virus exclusion provision, which explains that Defendant will not pay for loss or damage caused by or resulting from any virus").

Plaintiffs argue that their claimed losses, while caused by a virus, are not subject to the Contamination Exclusion because Defendants could have, but did not, include a different "virus" exclusion in the Policy. However, Plaintiffs offer no explanation for why the Contamination Exclusion is inapplicable and a different virus exclusion is necessary. The Policy is unambiguous and excludes coverage for contamination caused by a virus. The argument that the Policy could contain some other virus exclusion is unavailing as the existing Policy already contains unambiguous virus exclusions and thus, excludes coverage for the damages claimed by Plaintiffs. See, e.g., Zwillow V v. Lexington Ins. Co., 2020 U.S. Dist. LEXIS 230672 at *17 (W.D. Mo. Dec. 2, 2020) (allegation that other insurance policies included different "virus-specific" language to exclude viruses did not create ambiguity).

Plaintiffs' contention that their claims are not subject to the Contamination Exclusion because Defendants could have, but did not, include a separate "pandemic" exclusion. Plaintiffs' contention that an exclusion specifically encompassing a virus would not encompass the Covid-19 pandemic ignores "the plain and unambiguous text of the Policy and is akin to arguing that a coverage exclusion for damage caused by fire does not apply to damage caused by a very large fire." W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos, 498 F. Supp. 3d 1233, 1242 (C.D. Cal. Oct. 27, 2020); Boxed Foods Co., LLC v. Cal. Cap. Ins. Co., 497 F. Supp. 3d 516, 523 (N.D. Cal. Oct. 26, 2020) (exclusion does not have to "specify the magnitude of an excluded cause"); Newchops Rest. Comcast LLC v. Admiral Indem. Co., 2020 U.S. Dist. LEXIS 238254 at *18-19 (E.D. Pa. Dec. 17, 2020) ("The lack of a specific reference to a pandemic in the policy does not render the [exclusion] ambiguous."). Accordingly, the Contamination

Exclusion is fatal to Plaintiffs' claims. To hold otherwise would rewrite the Policy's terms, contrary to the governing rules of contract interpretation. See Princeton Ins. Co., 151 N.J. at 95 (where an exclusion is "specific, plain, clear, prominent and not contrary to public policy," it is presumptively valid and should be applied by this Court to bar coverage).

Plaintiffs also assert that their losses are not subject to the Policy's Contamination Exclusion because a Louisiana-specific endorsement generally modified the Contamination Exclusion nationwide. This assertion does not comport with the language and structure of the Policy and is rejected. The U.S. District Court of New Jersey recently dismissed a complaint involving a Zurich EDGE policy form because the policy unambiguously limited its coverage to physical loss or damage to plaintiffs' commercial property and the allege presence of Covid-19 on surfaces and in the air at plaintiffs' properties was insufficient to show physical loss or damage. See Manhattan Partners, LLC, 2021 U.S. Dist. LEXIS 50461 at *5. That Court specifically held that the policy's Contamination Exclusion would also bar plaintiffs' claims, and rejected the same argument made here by Plaintiffs (i.e., that the Louisiana Amendatory Endorsement modified the entire policy) Id. at *6, n.3.

Under the federal McCarran-Ferguson Act, the federal government expressly ceded to the states the power to regulate within their states "[t]he business of insurance, and every person engaged therein." 15 U.S.C. § 1012. The plain reading of the Policy demonstrates the difference between endorsements of general application and those with state-specific application. The Policy contains a set of state-specific endorsements including the "Amendatory Endorsement – Louisiana." This geographic identifier cannot be ignored. The reference is an essential and substantive term of the endorsement. The Court may not adopt an interpretation that would render the "Louisiana" designation meaningless. See Couch on Ins. § 18:20 (3d d.)

Courts have recognized that insurance policies often include state-specific endorsements to comply with individual state regulatory requirements and such endorsements do not apply outside each respective state. This principal has been specifically applied with respect to a Louisiana endorsement. Menard v. Gibson Applied Tech. & Eng'g, Inc., 2017 U.S. Dist. LEXIS 211799 at *8 (E.D. La. Dec. 27, 2017) (refusing to expand the scope of a Louisiana state amendatory endorsement "to the benefit of individuals like [the claimant] who are injured outside the state") see also Tomars v. United Fin. Cas. Co., 2015 U.S. Dist. LEXIS 78344 at *4 (D. Minn. June 17, 2015) (noting that the policy covering a fleet of vehicles across the country may "include a series of state-specific endorsements conforming its coverages to the requirements imposed by the insurance laws of the states in which particular vehicles are located"); Hartford Fire Ins. Co. v. Moda, LLC, No. X06-UWY-CV-20-6056095-S. slip. Op. at 10 (Conn. Super. Ct. June 15, 2021 ("It would make no sense" for New York-specific changes to virus exclusion to replace the policy's general virus exclusion with respect to non-New York losses). In each case, the court found that the only way to reconcile the multiple state endorsements in a given policy covering multi-state risks was to apply each state specific endorsement only to risks in that state. This is consistent with New Jersey law, which requires the Court to consider the instrument as a whole. See, e.g., Morrison v. Am. Int'l Ins. Co. of Am., 381 N.J. Super. 532, 541 (App. Div. 2005) (clauses "should be read in the context of the entire policy in order to determine whether harmony can be found"). Here, the Policy's tables of contents and the 31 state-specific amendatory endorsements themselves explicitly set forth the state to which each amendatory endorsement applies.

Plaintiffs' strained reading of the Policy and the Louisiana Amendatory Endorsement is not a reasonable interpretation. Under Plaintiffs' theory, each of the 31 state-specific endorsements would alter the Policy regardless of the location of the insured property. Such a

reading, however, would destroy the harmony of the Policy because many of the state-specific endorsements expressly conflict with each other. The Court would have to pick which of these conflicting state-specific endorsements to apply across the country, rendering the other terms meaningless. See Prather v. Am. Motorists Ins. Co., 2 N.J. 496, 502 (1949) ("Effect, if possible, will be given to all parts of the instrument, and the construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable."). The Court can only give effect to each of the state-specific endorsements by confining each to its identified state as intended.

Consistent with established principles of contract interpretation, the only way to properly harmonize the Policy as a whole, and the only reasonable interpretation that avoids needless surplusage, is to treat each state-specific endorsement as applying only to property located in that state. This understanding is also compelled by the bedrock constitutional principle that states may not regulate conduct outside their borders. See, e.g., BW of N. Am., Inc. v. Gore, 517 U.S. 559, 571-72 (1996). As the U.S. Supreme Court stated, "it is clear that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought regulate. There was no indication of any thought that a State could regulate activities carried on beyond its own borders." FTC v. Travelers Health Ass'n, 362 U.S. 293, 300 (1960). Because Plaintiffs seek to do just that by maintaining that the Louisiana Amendatory Endorsement applies to their properties in New York and New Jersey, Plaintiffs' interpretation of the Policy is rejected.

CONCLUSION

For the aforementioned reasons, Defendant's Motion to Dismiss is hereby **GRANTED**.