UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
(609) 989-2182

CHAMBERS OF
FREDA L. WOLFSON
CHIEF JUDGE

Clarkson S. Fisher Federal
Building & U.S. Courthouse
402 East State Street
Trenton, New Jersey 08608

LETTER ORDER

October 12, 2022

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RE: ***BPC Restaurant Management LLC v. AmGUARD Ins. Co.***
Civ. Action No. 22-02229 (FLW)

Counsel:

In this COVID-19 insurance coverage action, Defendant, AmGUARD Insurance Company ("AmGUARD"), moves to dismiss the Complaint filed by Plaintiff, BPC Restaurant Management LLC, d/b/a The Station Bar and Grill ("BPC" or "Plaintiff"), pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, Defendant's motion is granted and Plaintiff's Complaint is dismissed.

I. BACKGROUND AND PROCEDURAL HISTORY[1]

Plaintiff operates The Station Bar & Grill (the "Station") in Garwood, New Jersey. Compl. ¶ 17. The Station is a sit-down restaurant and bar offering a full menu of food and beverages. *Id.*

On April 27, 2019, Defendant issued Plaintiff an insurance policy (the "Policy") for the period of June 1, 2019 to June 1, 2020, which provides coverage for Plaintiff's commercial property, including, but not limited to, loss of the use of Plaintiff's building, personal property, and personal property of others under certain circumstances. *Id.* ¶¶ 6, 8; ECF No. 1, Ex. C at A55

[1] The facts recited in this section are derived from Plaintiff's Complaint (ECF No. 1, Ex. A ("Compl.")) and taken as true.

("Policy"). The Policy provides coverage for, *inter alia*, business income, extra expense, and civil authority relating to any "Covered Cause of Loss" under the Policy. Compl. ¶ 9.

The Policy provides "Business Income" coverage for "the actual loss of Business Income you sustain due to the necessary suspension of your 'operations' during the 'period of restoration.'." Policy at A9. It further requires that the "suspension" "must be caused by direct physical loss of or damage to property at the described premises". *Id.*

The Policy also provides "Extra Expense" coverage for "necessary Extra Expense you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or damage to property at the described premises." *Id.* at A11.

Further, the Policy contains a "Civil Authority" provision that states "[w]hen a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises," subject to certain enumerated requirements. *Id.* at A11-12.

Finally, any loss or damage covered by the Policy must be caused by or result from a "Covered Cause of Loss". *Id.* at A5, A9, A11. The Policy defines "Covered Cause of Loss" as "[r]isk[] of direct physical loss unless the loss is …[e]xcluded in Paragraph B. Exclusions in Section I". *Id.* at A6. The Policy excludes from coverage any "loss or damage caused directly or indirectly by…[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." *Id.* at A18, A21 ("Virus Exclusion"). This coverage exclusion provision for viruses also contains an anti-concurrent clause, which states that the exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Id.* at A18.

In March 2020, New Jersey Governor Philip D. Murphy declared a state of emergency and public health emergency in response to the 2019 novel coronavirus ("COVID-19") pandemic. Compl. ¶ 11. Thereafter, in March and April 2020, Governor Murphy issued various Executive Orders which, *inter alia*, limited the scope and hours of operations for restaurants. *Id.* ¶¶ 12-15. Due to the issuance of the Executive Orders, Plaintiff alleges that it "could not use [its] restaurant and bar space" and "suffered a substantial loss of business and income". *Id.* ¶ 18. Specifically, Plaintiff claims that because its business was closed to the public, it was limited to takeout service, forced to operate during reduced hours, and forced to lay off staff. *Id.*

On March 14, 2022, Plaintiff filed a one-count Complaint against Defendant in New Jersey State Court, seeking a declaration that Defendant must provide coverage for Plaintiff's losses under the Business Income, Extra Expense, and Civil Authority provisions of the Policy. *Id.* ¶¶ 33-34. On April 15, 2022, Defendant removed the action to this Court, pursuant to 28 U.S.C. § 1446, based on the diversity of the parties. ECF No. 1. On May 6, 2022, Defendant filed the present motion to dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6). ECF No. 5.

II. LEGAL STANDARD

On a motion to dismiss for failure to state a claim upon which relief can be granted, under Fed. R. Civ. P. 12(b)(6), "courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (quotations and citations omitted). "While a complaint attacked by a Rule motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotations and citations omitted).

Thus, for a complaint to survive a Rule 12(b)(6) motion to dismiss, it must contain sufficient factual allegations to "raise a right to relief above the speculative level", so that a claim "is plausible on its face." *Id.* at 555, 570; *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

To determine whether a plaintiff has met the facial plausibility standard under Twombly and Iqbal, courts within this Circuit engage in a three-step progression. *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010). First, the court must "outline the elements a plaintiff must plead to state a claim for relief." *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012). Next, the court "peel[s] away those allegations that are no more than conclusions and thus not entitled to the assumption of truth." *Id.* Finally, where "there are well-pleaded factual allegations, the court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

III. DISCUSSION

Defendant argues that the Complaint should be dismissed because the terms of the Policy do not cover the losses Plaintiff has alleged in the Complaint. ECF No. 5, Def. Br. at 8. Primarily, Defendant argues that because Plaintiff's losses were caused directly or indirectly by a virus, the Virus Exclusion bars recovery. *Id.* at 8-15. Even if the Virus Exclusion does not apply, Defendant argues that Plaintiff failed to plead that its losses were caused by "physical loss of or damage to property" that would trigger coverage, nor did Plaintiff sufficiently plead a viable claim under the Civil Authority provision of the Policy. *Id.* at 15-20; 20-23.

In opposition, Plaintiff contends that the Virus Exclusion does not bar coverage for its losses sustained during the COVID-19 pandemic for two reasons. First, Plaintiff asserts that Governor Murphy's Executive Orders were the proximate cause of its losses. ECF No. 7, Pl. Opp. Br. at 5-10. Second, Plaintiff contends that under the regulatory estoppel doctrine, the Virus Exclusion is unenforceable because its regulatory approval was obtained through fraud. *Id.* at 11-16. Aside from the Virus Exclusion, Plaintiff further contends that it sufficiently alleged that the Executive Orders caused a "physical loss of or damage to" its property and that therefore, it is entitled to coverage under the Business Income, Extra Expense, and Civil Authority provisions. *Id*. at 16-26; 26-30.

In considering the present motion, this Court does not write on a blank slate. Since the outbreak of the pandemic, this Court and other various New Jersey federal district and state courts have analyzed substantially similar insurance disputes to the one at issue here.[2] A recent opinion I issued in such a case considered an insurance coverage claim with substantially similar facts and issues as in the instant case.

In *Mark Daniel Hospitality LLC v. AmGUARD Insurance Co.*, a New Jersey restaurant sought a declaration that provisions of its insurance policy, nearly identical to the ones here, provided coverage for its losses related to the COVID-19 pandemic. No. 20-6772 (FLW), 2022 WL 2168245 (D.N.J. June 16, 2022). Specifically, plaintiff argued that (1) Governor Murphy's Executive Orders, rather than the virus itself, were the proximate cause of its losses and (2) regulatory estoppel barred application of the Virus Exclusion. *Id.* at *9. That case, as does this one, turned on whether the Virus Exclusion in the parties' insurance policy barred recovery for plaintiff's losses. *Id.* at *7. In granting defendant's motion to dismiss in *Mark Daniel*, I found that the Virus Exclusion applied to plaintiff's losses. *Id.* at *9. Because Governor Murphy's Executive Orders were in direct response to the COVID-19 pandemic and thus, making COVID-19 a contributing cause to plaintiff's losses, I found that the inclusion of an anti-concurrent clause and a Virus Exclusion in the insurance policy precluded recovery for any losses caused by COVID-19 or the Executive Orders. *Id.* at *9. I further found that regulatory estoppel did not apply because the insurance industry representations to regulators were consistent with defendant's position that the Virus Exclusion bars coverage due to disease-causing agents. *Id.* at *10.

Here, as in *Mark Daniel*, I find that Plaintiff has failed to state a claim for declaratory relief because the Virus Exclusion is enforceable and bars coverage for Plaintiff's claims.

A. Application of the Virus Exclusion to Plaintiff's Claim

Plaintiff offers two arguments in support of its position that the Virus Exclusion nevertheless does not apply. Neither, however, persuades me that this Court should depart from its prior decision in *Mark Daniel* or from a growing body of opinions reaching the same conclusion: that the Virus Exclusion precludes coverage.

First, Plaintiff contends that the Virus Exclusion does not apply because its losses were not caused by the presence of COVID-19 in its business but rather, by Governor Murphy's Executive

[2] *See, e.g.*, *Elan Caterers, LLC v. Harleysville Ins. Co.*, No. 21-19497, 2022 WL 2341584 (D.N.J. June 29, 2022); *Eye Care Ctr. of N.J. v. Twin City Fire Ins. Co.*, 522 F. Supp. 3d 72 (D.N.J. 2021); *Beniak Enters., Inc. v. Indem. Ins. Co. of N. Am.*, 556 F. Supp. 3d 437 (D.N.J. 2021); *Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co.*, No. 20-11771, 2020 WL 7338081 (D.N.J. Dec. 14, 2020); *Del. Valley Plumbing Supply, Inc. v. Merchs. Mut. Ins. Co.*, 519 F. Supp. 3d 178 (D.N.J. 2021); *ABC Children's Dentistry, LLC v. Hartford Ins. Co.*, No. 20-10044, 2021 WL 4272767 (D.N.J. Sept. 21, 2021); *Z Bus. Prototypes LLC v. Twin City Fire Ins. Co.*, No. 20-10075, 2021 WL 3486897 (D.N.J. Aug. 9, 2021); *Arrowhead Health & Racquet Club, LLC v. Twin City Fire Ins. Co.*, No. 20-08968, 2021 WL 2525739 (D.N.J. June 21, 2021); *MAC Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co.*, 278 A.3d 272 (App. Div. 2022); *AC Ocean Walk, LLC v. Am. Guar. & Liab. Ins. Co.*, No. A-1824-21, 2022 WL 2254864 (App. Div. June 23, 2022); *Rockleigh Country Club v. Hartford Ins. Grp.*, No. A-1826-21, 2022 WL2204374 (App. Div. June 21, 2022). In each of these cases, the court found that the insurance policy at issue did not provide coverage to any COVID-19-related business losses.

Orders, which required the closure and limitation of certain aspects of Plaintiff's business. Pl. Opp. Br. at 5.

In support of its contention, Plaintiff invokes the New Jersey proximate cause doctrine, also known as the "Appleman Rule", which dictates that when an insurance policy uses an exclusion which bars coverage for losses caused by a particular peril, the exclusion applies only if the excluded peril was the efficient proximate cause of the loss. *Zurich Am. Ins. Co. v. Bldg. Corp*., 513 F. Supp. 2d 55, 70 (D.N.J. 2007) (quotations and citations omitted). Ultimately, the pertinent question is not where in the sequence the alleged cause of loss occurred, but what was the predominant cause that produced the loss. *See Franklin Packaging Co. v. Cal. Union Ins. Co*., 171 N.J. Super. 188, 191 (App. Div. 1979) (quotations and citations omitted).

Importantly, the parties may contract around the Appleman Rule, as did the parties here. Specifically, the Virus Exclusion states that losses caused "directly or *indirectly*" by a virus are excluded. Policy at A18, A21 (emphasis added). Further, the Policy contains an anti-concurrent clause which states that the Virus Exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss". *Id*. The inclusion of such a clause in an insurance policy negates the application of the New Jersey proximate cause doctrine. *See N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.*, 499 F. Supp. 3d 74, 80 (D.N.J. 2020); *Assurance Co. of Am., Inc. v. Jay-Mar, Inc.*, 38 F. Supp. 2d 349, 354 (D.N.J. 1999) (finding that exclusionary language designed to avoid the efficient proximate cause doctrine is enforceable under New Jersey law).

In *Mark Daniel*, I rejected substantially similar proximate cause arguments based on the plain reading of near-identical insurance policies containing both an anti-concurrent clause and a Virus Exclusion. 2022 WL 2168245, at *9. That same reasoning applies here.

That is, assuming, *arguendo*, that Governor Murphy's Executive Orders were "the last step in Plaintiff's loss", Pl. Opp. Br. at 10, COVID-19 is still a contributing cause to Plaintiff's losses as the Executive Orders were enacted in response to the COVID-19 pandemic. *See* Compl. ¶ 11. Therefore, COVID-19 is still a cause of Plaintiff's losses resulting from the closure and limitation of its business, because the Virus Exclusion applies even if a virus is an indirect cause, regardless of any other cause "that contributes concurrently or in any sequence". Policy at A18. Indeed, there is no requirement within the text of the Policy for the virus to have physically caused the loss, such as being physically present at the insured property, for the exclusion to apply. *See* Pl. Opp Br. at 5, 6, 7, 9, 10. Moreover, Plaintiff has not alleged any facts evidencing that the Virus Exclusion is ambiguous. *See, e.g., Eye Care Ctr.*, 522 F. Supp. 3d at 77; *N&S Rest.*, 499 F. Supp. 3d at 79-80 (rejecting similar arguments). Thus, contrary to the cases Plaintiff cites in support of its proximate cause argument,[3] a plain text reading of the Policy's Virus Exclusion and anti-concurrent clauses precludes coverage. *See, e.g.*, *JRJ Hosp., Inc. v. Twin City Fire Ins. Co.*, No. 20-13095, 2021 WL

[3] Plaintiff's reliance on *Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Insurance Co*., 538 F. Supp. 3d 457 (E.D. Pa. 2021), is misplaced because that case applied California law to interpret the insurance policy. Pl. Opp. Br. at 10. Under California law, unlike under New Jersey law, the efficient proximate cause doctrine prevents enforcement of broad anti-concurrent causation language. 538 F. Supp. 3d at 470.

3561356, at *6 (D.N.J. Aug. 12, 2021); *N&S Rest.*, 499 F. Supp. 3d at 80-81; *Garmany of Red Bank, Inc. v. Harleysville Ins. Co.*, No. 20-8676, 2021 WL 1040490, at *5 (D.N.J. Mar. 18, 2021).[4]

Next, Plaintiff argues that Defendant is barred from enforcing the Virus Exclusion based on the doctrine of regulatory estoppel and general public policy because insurance industry trade groups, Insurance Services Office, Inc. ("ISO") and the American Association of Insurance Services ("AAIS"), allegedly made misrepresentations to New Jersey state regulators to obtain regulatory approval for the exclusion. Compl. ¶¶ 21-28.

In *Mark Daniel*, I analyzed the same 2006 statements made by ISO and AAIS and concluded that plaintiff's regulatory estoppel argument was meritless and that plaintiff "failed to demonstrate any inconsistency between insurance industry representations to regulators and Defendant's interpretation of the Virus Exclusion". 2022 WL 2168245, at *10. I adopt the reasoning in *Mark Daniel* to find that regulatory estoppel does not apply.[5]

Here, Plaintiff has failed to allege any inconsistency between the industry statements and Defendant's interpretation of the Virus Exclusion.[6] To support its allegations, Plaintiff relies upon statements in two filings made by ISO and AAIS to regulators in 2006.[7] In these statements, ISO maintained that property policies did not cover disease-causing agents and presented an exclusion clarifying that position, and likewise here, Defendant's position is that the Virus Exclusion bars

[4] Regardless of whether the Virus Exclusion contains an anti-concurrent clause, courts in this district have consistently held that COVID-19 is the proximate cause of business losses resulting from the pandemic and they have consistently applied the Virus Exclusion to preclude coverage. *See J.G. Optical, Inc. v. Travelers Cos., Inc.*, No. 20-5744, 2021 WL 4260843, at *5 (D.N.J. Sept. 20, 2021) (compiling cases finding that COVID-19 was the proximate cause of the insured's losses).

[5] There is strong support for this conclusion as this Court and others in this district have analyzed the same industry statements and rejected identical allegations as the ones presented here. *See Mark Daniel*, 2022 WL 2168245, at *10 (summarizing cases rejecting regulatory estoppel claims with respect to the Virus Exclusion). Moreover, the New Jersey Appellate Division has also evaluated the same statements and reached the same conclusion as federal courts in rejecting near-identical regulatory estoppel arguments. *See MAC Prop. Grp.*, 278 A.3d at 291 (finding that plaintiff's regulatory estoppel arguments failed because defendants had not taken a position regarding the interpretation of the virus exclusions that is any different from insurance industry representations to regulators).

[6] Plaintiff, in support of its argument, relies on *Morton International, Inc. v. General Accident Insurance Co. of America*, 134 N.J. 1, 72-80 (1993), a case in which the New Jersey Supreme Court applied the regulatory estoppel doctrine to estop insurers from relying on an interpretation of a pollution exclusion clause that was inconsistent with, and broader than, previous industry representations to state regulators regarding the impact and scope of that clause. *See* Pl. Opp. Br at 11-12, 14-15. Specifically, *Morton* found that the insurance industry failed to "reveal[] the extent of the [restriction] in coverage intended by the pollution-exclusion clause," which stopped regulators from making "informed judgments concerning the rate and coverage issues implicated by the clause" and meant that "insureds [were not] aware that insurance coverage for environmental pollution would be sharply restricted." 134 N.J. at 79. Here, however, unlike the insurers' misrepresentations in *Morton*, the insurers' representations cited by Plaintiff do not contradict Defendant's position in this case. *See* Compl. ¶¶ 24-25.

[7] In 2006, for example, ISO explained to state regulators that "[w]hile property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic . . . raises the concern that insurers . . . may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent." Pl. Opp. Br., Ex. A at 11. And "[i]n light of these concerns," ISO "present[ed] an exclusion relating to contamination by disease-causing viruses". *Id*.

coverage due to disease-causing agents. Therefore, nothing Plaintiff raises here persuades me to depart from my prior ruling.

As to Plaintiff's claim that the Virus Exclusion violates "general public policy", I find no evidence to support this argument. Compl. ¶ 21. Plaintiff does not assert any specific allegations or cite to any case law supporting its view that the Virus Exclusion violates New Jersey public policy. Nevertheless, the New Jersey Supreme Court has held that public policy considerations apply only where an insurance policy's plain language has "genuine ambiguity" or "the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage". *MAC Prop. Grp.*, 278 A.3d at 282 (quoting *Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 224 N.J. 189, 200 (2016)); *see also State v. Signo Trading Int'l, Inc.*, 130 N.J. 51, 66 (1992) (citations omitted). Because the Virus Exclusion is unambiguous, as discussed below, nor can its plain language "fairly be read otherwise to provide []coverage", Plaintiff's public policy argument fails. *Count Basie Theatre Inc. v. Zurich Am. Ins. Co.*, No. 21-00615, 2021 WL 3732903, at *8 (D.N.J. Aug. 24, 2021). Moreover, courts in this district, when confronted with similar public policy arguments, have concluded that Virus Exclusions do not violate New Jersey public policy. *See Cedar Run Orthodontics, P.A. v. Sentinel Ins. Co., Ltd.*, No. 20-08156, 2021 WL 5083814, at *6 (D.N.J. Nov. 1, 2021); *Downs Ford, Inc. v. Zurich Am. Ins. Co.*, No. 20-08595, 2021 WL 1138141, at *8 (D.N.J. Mar. 25, 2021); *Causeway Auto., LLC v. Zurich Am. Ins. Co.*, No. 20-8393, 2021 WL 486917, at *8 (D.N.J. Feb. 10, 2021).

Accordingly, because COVID-19 was a cause of Plaintiff's losses and regulatory estoppel does not apply, I find that the Virus Exclusion bars coverage.

B. Allegations of Direct Physical Loss of or Damage to Plaintiff's Property

Next, Plaintiff argues that it suffered physical loss or damage that triggered coverage under the Business Income and Extra Expense provisions of the Policy. Pl. Opp. Br. at 24. I disagree. Even if the Virus Exclusion did not apply, Plaintiff would not be entitled to recovery for its loss of income stemming from its inability to operate as a sit-down restaurant bar, because it did not establish that such losses were caused by "direct physical loss or damage to" its property. Policy at A9, A11.

Again, there is a significant body of case law from New Jersey federal and state courts on whether Governor Murphy's COVID-19 Executive Orders trigger the Policy's coverage for "direct physical loss of or damage to" Plaintiff's property. *See, e.g., Cammie's Spectacular Salon v. Mid-Century Ins. Co.*, No. 20-12324, 2022 WL 488945, at *3 (D.N.J. Feb. 17, 2022); *Children's Place, Inc. v. Zurich Am. Ins. Co.*, No. 20-7980, 2021 WL 4237284, at *5 (D.N.J. Sept. 17, 2021); *Ralph Lauren Corp. v. Factory Mut. Ins. Co.*, No. 20-10167, 2021 WL 1904739, at *3 (D.N.J. May 12, 2021); *AC Ocean Walk*, 2022 WL 2254864, at *13; *Rockleigh Country Club*, 2022 WL 2204374, at *4; *MAC Prop. Grp.*, 278 A.3d. Substantially for the same reasons that these courts found no "direct physical loss of or damage to property" to trigger insurance policy coverage and for the reasons discussed below, I reach the same conclusion here.

The Policy unambiguously limits coverage to physical loss or damage to Plaintiff's commercial property. Each of the coverage provisions Plaintiff relies on specifically requires "direct physical loss of or damage to property" to trigger coverage. Policy at A9, A11. The Third

Circuit, in analyzing an insurance policy covering "physical loss or damage", held that physical damage to property means "'a distinct, demonstrable, and physical alteration' of its structure", such as from fire, water, or smoke, that "may demonstrably alter the components of a building and trigger coverage." *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co*., 311 F.3d 226, 235 (3d Cir. 2002). The burden is on the plaintiff to establish that its structure was physically damaged. *Id.* at 232.[8]

Here, Plaintiff has not met this burden as it fails to allege any facts that demonstrate at least some physical loss of, or damage to, its property. Instead, Plaintiff pleads that the Executive Orders limited access to its facility and its operations as a full sit-down bar and restaurant which caused Plaintiff to lose income and incur expenses. *See* Compl. ¶ 18. In that regard, the Executive Orders allowed restaurants, such as Plaintiff's business, to remain open with limitations and, in fact, Plaintiff was able to continue operating takeout services on its property. *See* Compl. ¶¶ 12-15, 18. Thus, Plaintiff's property remained inhabitable and usable, albeit with restrictions. Plaintiff's allegations that it was prevented from using its premises for its insured purpose is not sufficient to establish that it is entitled to coverage.

Plaintiff cites several out-of-circuit cases that reached the conclusion that government shutdown orders resulted in a physical loss. These cases lack persuasive value and are distinguishable from the present case.[9] Similarly, Plaintiff's reliance on several New Jersey state court decisions to support its argument that "physical loss" does not require that the insured structure be physically damaged is also misplaced.[10]

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[8] In *Port Authority*, the Third Circuit expressly stated that "[p]hysical damage to a building as an entity by sources unnoticeable to the naked eye must meet a higher threshold." 311 F.3d at 235. The Third Circuit noted that physical contamination of a building, without any structural alterations, such as "the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable," could constitute physical loss under New Jersey law. *Id.* at 236. But if the building continues to function and remain usable, then the building has not lost its utility and thus, the building owner has not suffered a loss. *Id.* Here, there is no allegation that Plaintiff shut down its business due to high concentrations of COVID-19 on its property. In fact, Plaintiff does not allege that COVID-19 was present on its premises at all. *See* Compl. ¶ 18.

[9] Plaintiff relies on *Elegant Massage, LLC v. State Farm Automobile Insurance Co*., 506 F. Supp. 3d 360 (E.D. Va. 2020) to demonstrate that courts have found that government orders resulted in physical loss. Pl. Opp. Br. at 21, 24. The court found that, under Virginia law, the required closure of plaintiff's business due to the threat of COVID-19 constituted a direct physical loss because the property was uninhabitable and inaccessible. 506 F. Supp. at 375-76. But that case is distinguishable. For instance, the court found that Virginia law was unclear whether broad anti-concurrent clauses, such as the one in the present case, are enforceable under Virginia law whereas the contrary applies under New Jersey law. *Id.* at 378. Moreover, other federal courts have labelled *Elegant Massage* as an "outlier" and have found it unpersuasive. *See, e.g., Bluegrass, LLC v. State Auto. Mut. Ins. Co*., 519 F. Supp. 3d 293, 299, (S.D.W. Va. 2021); *LJ New Haven LLC v. AmGUARD Ins. Co*., 511 F. Supp. 3d 145, 155 n.7 (D. Conn. 2020). Plaintiff's reliance on *North State Deli, LLC v. Cincinnati Insurance Co.*, No. 20-CVS-02569, 2020 WL 6281507 (N.C. Super. Oct. 9, 2020) is also misplaced as the North Carolina Court of Appeals overruled the lower court's finding that government orders restricting the insureds' use of their restaurants constituted "direct physical loss" triggering coverage. *North State Deli, LLC v. Cincinnati Ins. Co.*, 875 S.E.2d 590, 593 (N.C. Ct. App. 2022).

[10] Plaintiff's allegation that it was not aware of any presence of COVID-19 at its property distinguishes this case from *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.* and *Phibro Animal Health Corp. v. National Union Fire Insurance Co. of Pittsburgh* in which both cases the courts found evidence of physical damage to property. *See* Compl. ¶ 19; *see also* 406 N.J. Super. 524, 540 (App. Div. 2009) (finding that the electrical grid was "physically damaged" because "due to a physical incident or series of incidents, the grid and its component generators and transmission lines

Plaintiff further argues that the terms "loss" and "damage" as used in the Policy are ambiguous. Plaintiff suggests that the definition of "loss" could reasonably be interpreted to include "destruction", "ruin", or "deprivation" and thus, this Court should interpret these terms in favor of coverage. Pl. Opp. Br. at 24. However, policy terms are "not ambiguous merely because two conflicting interpretations of it are suggested by the litigants." *Powell v. Alemaz, Inc*., 335 N.J. Super. 33, 44 (App. Div. 2000). Plaintiff's proffered interpretations of these terms do not render them ambiguous or otherwise unclear. Here, as this Court and others have already found, the Virus Exclusion's language is unambiguous. *See, e.g., Causeway*, 2021 WL 486917, at *5 n.5 (compiling cases in which courts had found that terms of policies containing similar virus exclusions to be unambiguous) (citations omitted); *Invision Dev. Grp., LLC v. Cont'l Casualty Co.*, No. 21-5814, 2022 WL 2702960, at *8 (D.N.J. July 12, 2022) (rejecting similar arguments that terms within an insurance policy were ambiguous).[11]

C. Pleadings of Civil Authority Coverage

Finally, consistent with the findings of other courts in similar COVID-19-related insurance disputes, Plaintiff's claim for civil authority coverage pursuant to the Policy also fails.

New Jersey federal courts and the New Jersey Appellate Division have also considered whether similar insurance policies during the COVID-19 pandemic have met the requirements for civil authority coverage. *See, e.g., Causeway*, 2021 WL 486917, at *7; *Beniak*, 556 F. Supp. 3d at 444; *MAC Prop. Grp.*, 278 A.3d at 289. As these courts have made clear, Plaintiff would not be

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were physically incapable of performing their essential function of providing electricity"); 446 N.J. Super. 419, 438 (App. Div. 2016) (holding that physical injury means a "detrimental alteration" or "damage or harm to the physical condition of a thing" and thus, the stunted growth of broiler chickens "represent[ed] harm to the *physical* condition of the chickens") (emphasis added). Next, Plaintiff relies on a case from the New Jersey Appellate Division for the assertion that bottles that lost their economic value constituted "physical loss". Pl. Opp. Br. at 18 (citing *Customized Distribution Servs. v. Zurich Ins. Co.*, 373 N.J. Super. 480 (App. Div. 2004)). However, this case is easily distinguishable from the present matter. As an initial point, the court in *Customized Distribution* analyzed a completely different form of insurance policy, a liability insurance policy, than the property insurance policy in the present case. 373 N.J. Super. at 484. That case can further be distinguished because the court there found that the loss of value of bottled beverages that were expired constituted "physical loss" because the beverages had "turned sour or gone bad" in a "more tangible or material way". *Id.* 490-91. But here, Plaintiff does not allege that its property lost value, and Plaintiff continued to operate its business activities, albeit subject to limitations. *See* Compl. ¶ 18.

[11] Additionally, Plaintiff argues that the definition of "period of restoration" in the Policy does not support Defendant's position that the Policy requires a "physical" loss or damage to property. Pl. Opp. Br. at 25-26 (responding to Defendant's argument that the definition of "period of restoration" informs that the loss or damage to the property must be physical in order to obtain coverage); *see also* Def. Br. at 19. The "period of restoration" is the time period during which the insured's losses for Business Income coverage are measured under the Policy and is defined as ending on "[t]he date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or . . . [t]he date when business is resumed at a new permanent location." Policy at A33. Plaintiff contends that the definition's use of the language "repaired, rebuilt or replaced" does not mean that the Policy requires something physical to be repaired in order to obtain coverage. Pl. Opp. Br. at 25. Instead, it argues that a reasonable interpretation of the definition of "period of restoration" is that the period ended the date that the restrictions from Governor Murphy's Executive Orders were lifted. *Id.* at 26. I find this argument unpersuasive and inconsistent with a plain reading of the Policy. Finding coverage where there has been no physical damage to property that would require repairs, rebuilding, or replacement would render the "period of restoration" language in the contract "meaningless". *MAC Prop. Grp.*, 278 A.3d at 284 (citations omitted).

entitled to civil authority coverage on account of Governor Murphy's Executive Orders. I see no reason to depart from that consensus.

The Civil Authority provision obliges Defendant to cover the loss of Business Income and necessary Extra Expenses when a Covered Cause of Loss damages property in the immediate area and civil authority action prohibits access to the covered property.[12] As previously stated, the Virus Exclusion excludes losses caused by COVID-19 from the definition of a Covered Cause of Loss. *See Beniak*, 556 F. Supp. 3d at 444; *Downs Ford*, 2021 WL 1138141, at *4.

I find that Plaintiff cannot sustain a claim for coverage under the Civil Authority provision of this policy.[13] First, Governor Murphy's Executive Orders limited, rather than prohibited, access to the property. *See MAC Prop. Grp.*, 278 A.3d at 289. Second, Plaintiff has failed to allege that COVID-19 caused "damage" to nearby property for the same reason it has failed to allege "physical loss of or damage to" its own property. Third, the Complaint is devoid of any allegations that the Executive Orders were enacted in response to "dangerous physical conditions" of nearby premises. Policy at A12. Rather, Plaintiff asks the Court to infer such facts based on statewide closure orders. Pl. Opp. Br. at 28. However, the Executive Orders were issued in response to COVID-19 to "minimize the devasting impact" of the virus within the state. *MAC Prop. Grp.*, 278 A.3d at 295; *see also Causeway*, 2021 WL 486917, at *6; *Downs Ford*, 2021 WL 1138141, at *4. And where the civil authority actions were taken preventatively, rather than in response to damage by a Covered Cause of Loss, civil authority coverage does not apply. *See*, *e.g.*, *Lansdale 329 Prop, LLC v. Hartford Underwriters Ins. Co.*, 537 F. Supp. 3d 780, 794 (E.D. Pa. 2021); *BSD-360, LLC v. Phil. Indem. Ins. Co.*, 580 F. Supp. 3d 92, 107-08 (E.D. Pa. 2022) (applying New Jersey law to deny coverage under a Civil Authority provision); *Hampshire House Corp. v. Fireman's Fund Ins. Co.*, 557 F. Supp. 3d 284, 298 (D. Mass. 2021).

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss is **GRANTED**. Plaintiff's Complaint is **DISMISSED**.

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[12] The Policy specifically requires that "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage" and that "[t]he action of 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". Policy at A12.

[13] Plaintiff cites to a decision by the New Jersey trial court, in *Optical Services USA v. Franklin Mutual Insurance Co.*, No. BER-L-3681-20, 2020 WL 5806576 (Law Div. Aug. 13, 2020), in which the court denied a motion to dismiss a claim for insurance coverage resulting from COVID-19-related government shutdown orders. Pl. Opp. Br. at 19. Applying New Jersey law, the court declined to find, absent further discovery, whether the loss of use of a business due to a government order constituted a direct physical loss or damage under the insurance policy. At the time of the decision, in August 2020, the court noted that there was "a lack of controlling legal authority" and plaintiff's theory of insurance coverage was "novel". Pl. Opp. Br., Ex. D at 28, 29. That is no longer the case. Moreover, the interpretation of an insurance contract is purely legal and does not require discovery. Plaintiff's other cited cases are similarly distinguishable and thus, unpersuasive. Plaintiff cites to two cases from the Western District of Missouri, in which both courts emphasized that the rulings are subject to further review based on "[s]ubsequent case law in the COVID-19 context" that "may be persuasive." *Studio 417, Inc. v. Cincinnati Ins. Co*., 478 F. Supp. 3d 794, 805 (W.D. Mo. 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867, 880 (W.D. Mo. 2020). Further, neither of the insurance policies at issue in these two cases contained a virus exclusion provision.

/s/ Freda L. Wolfson
Freda L. Wolfson
U.S. Chief District Judge