ORDER PREPARED BY THE COURT

VALLEYBROOK COUNTRY CLUB, LLC, et al. Plaintiffs, vs. **HALLMARK SPECIALTY INSURANCE COMPANY, et al.,** Defendants.	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION CAMDEN COUNTY Docket No.: CAM-L-003124-20 Civil Action **ORDER**

Plaintiffs having filed the current Motion for Reconsideration, and for the reasons set forth in the attached Memorandum Decision, it is on this 6th day of April, 2022 **ORDERED** as follows:

1. Plaintiffs' Motion for Reconsideration is **DENIED**.

STEVEN J. POLANSKY, P.J.Cv.

VALLEYBROOK COUNTRY CLUB, LLC, et al. Plaintiffs, vs. **HALLMARK SPECIALTY INSURANCE COMPANY, et al.,** Defendants.	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION CAMDEN COUNTY Docket No.: CAM-L-003124-20 Civil Action **MEMORANDUM DECISION**

Decided: April 6, 2022

STEVEN J. POLANSKY, P.J.Cv.

Plaintiff moves for reconsideration of the Court Order dated January 26, 2022, as amended January 28, 2022. Those Orders were based upon a written decision of the Court issued January 26, 2022 which dismissed plaintiff's Complaint against defendants Evanston Insurance Company, Arch Specialty Insurance Company, AXIS Surplus Insurance Company, Everest Indemnity Insurance Company, Ironshore Specialty Insurance Company, RSUI Indemnity Company, Westchester Surplus Lines Insurance Carrier, Homeland Insurance Company of Delaware, Certain Underwriters at Lloyds of London (Unique Market Reference B123019AWS1637), HDI Global SE, General Security Indemnity Company of Arizona, Crum & Forster Specialty Insurance Company, Western World Insurance Company and Safety Specialty Insurance Company.

This is a suit involving a claim by plaintiffs under various insurance policies for losses allegedly sustained as a result of the Covid-19 pandemic. Plaintiffs allege they suffered a substantial reduction in business or were required to close as a result of the pandemic. It is

alleged that as a result of the pandemic, the insureds suffered a partial or total suspension of operations resulting in substantial loss of revenue. Amended Complaint at ¶91. It is further asserted that the suspension of operations by nearby attraction properties also caused such losses. Amended Complaint at ¶94. It is alleged that some properties experienced confirmed cases of Covid-19. Additionally, plaintiffs assert that larger public and corporate events were suspended, closed or cancelled. As a result, it is claimed that plaintiffs sustained a loss of revenue and other losses.

Plaintiffs' arguments essentially track the arguments made in opposition to the original motion to dismiss. Plaintiffs assert that they had a reasonable expectation of coverage, contrary to the finding of the Court. They further assert that their allegations are sufficient to allege physical loss or damage to the property. Plaintiffs claim that the civil authority coverage does not require there be actual physical damage or destruction, contrary to the Court's decision. They assert that the follow-the-form and full waiver provisions preclude the moving insurers on the original motion from asserting limitations in their policy of insurance on coverage, and exclusions contained in the policies. Finally, they assert that the Court did not sufficiently analyze language contained within the policy exclusions to the satisfaction of plaintiffs.

Defendants respond that the policy language is unambiguous, and that the Court properly determined that the Complaint fails to allege the required physical loss or damage in order to trigger coverage. Defendants argue that the Court further correctly concluded that the excess carriers may rely upon the perils insured and exclusionary provisions of their policies of insurance.

Plaintiffs assert that they are entitled to a liberal evaluation of their reconsideration motion based upon the recent decision in Lawson v. Dewar, 468 N.J. Super. 121 (App. Div.

2021). They argue that they need not establish that the Court expressed its decision based upon a palpably incorrect or irrational basis as required by Fusco v. Board of Education of Newark, 349 N.J. Super. 455, 462 (App. Div. 2002), cert. denied, 174 N.J. 544 (2002). That however does not change the fact that reconsideration is not appropriate merely because a litigant is dissatisfied with a decision of the Court or wishes to reargue a motion. Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010).

Plaintiffs assert that the Court erred in concluding that they did not have a reasonable expectation of coverage. This ignores the analysis in the Court's January 26, 2022 Opinion which found that under the clear and unambiguous terms of the policy of insurance, coverage was not provided for the loss alleged in the Complaint. Plaintiffs appear to focus upon only a single portion of the policy language, ignoring policy language which requires direct physical loss or damage to the property.

The Appellate Division in Katchen v. Geico, 457, N.J. Super. 600, 607 (App. Div. 2019), appeal dismissed 241 N.J. 354 (2020) explained:

> [A]n insured's reasonable expectations only matter when the Court finds the relevant language ambiguous. See Passaic Valley Sewerage Commissioners v. St. Paul Fire & Marine Ins. Co., 206 N.J. 596, 608 (2011). Because we do not find the language ambiguous, we need not consider plaintiffs claimed reasonable expectations.

The Court specifically rejected plaintiffs' argument that the policy language supported their assertion that coverage exists for loss of use without direct physical loss, damage or destruction to the property itself. The Court in its initial decision found no ambiguity, and nothing presented on this motion changes the Court's evaluation of the policy language. The test for determining whether an ambiguity exists is whether the phrasing of the policy of insurance is sufficiently confusing such that an average policy holder cannot make out the boundaries of

coverage. Nunn v. Franklin Mutual Ins. Co., 274 N.J. Super. 543, 548-49 (App. Div. 1994). A disagreement however between the insurer and the insured concerning interpretation of the policy language does not alone create an ambiguity. Aviation Charters, Inc. v. Avenco Ins. Co., 335 N.J. Super. 591, 594 (App. Div. 2000), aff'd as modified 170 N.J. 76 (2000).

Plaintiffs first argue that physical loss or damage is alleged, but then assert that it is unnecessary to establish actual physical damage, loss or destruction to plaintiff's property. This argument was rejected in the Court's original decision. Plaintiff's motion presents nothing more than a disagreement with the Court's interpretation of the policy language as requiring direct physical loss or damage. For example, plaintiff points to select words in paragraph 15 of the policy describing the general coverage provided. Plaintiff ignores the specific language under each coverage which requires that the loss be caused by direct physical loss, damage or destruction to covered property. Similar language is contained in the subsection regarding coverage for civil authority, which requires that any impairment of access be a direct result of a cause of loss insured under the policy. Similarly, coverage for attraction properties first requires as a condition physical loss or damage to the real or personal property of the attraction property.

The coverage discussed above must be distinguished from the booking, reservation interruption coverage under the Hallmark Specialty Insurance Company policy in the primary layer. The excess policies do not provide booking, reservation interruption coverage. The Hallmark Specialty Insurance Company coverage specifically provides coverage for contagious or infectious disease either at the insured location or any outbreak within a 15 mile radius of the insured location. This coverage, unlike the coverage at issue on these motions, specifically provides that coverage is afforded "regardless of whether caused by or resulting from loss, damage or destruction from a covered cause of loss".

The insurance policy must be interpreted as a whole, and not based upon select bits and pieces out of context with the entire provision. The court disagrees with plaintiff's policy interpretation, and further disagrees that plaintiff's interpretation of the policy is a reasonable interpretation based upon a full reading of the policy of insurance.

While plaintiff argues that direct physical loss or damage is alleged in the Complaint, a full reading of the Complaint does not suggest anything other than mere parroting of policy language without any support thereof. Even in a notice pleading state, plaintiff must provide some information in the pleadings which would suffice to trigger coverage.

Plaintiffs' pleadings are circuitous. For example, paragraph 128 cited in plaintiffs' reply brief highlights the circuitous nature of the allegations:

> "The Insureds have suffered direct physical losses, in the form of loss of use of the Insured Properties and/or have losses due to direct physical loss or damage and/to proximate and/or dependent properties, whether caused by the Covid-19 virus, the dangers inherent in the congregation of two or more people in a confined space during the Pandemic and/or the Civil Closure Orders, to which no policy exclusion applies".

Paragraph 99 of the Complaint asserts that the Covid-19 virus is "capable of directly physically harming or damaging the insured properties" but fails to allege that actual damage occurred. Paragraph 100 asserts that the Covid-19 virus exists on objects or surfaces and that it alters a property.

Two recent reported decisions have specifically held that Covid-19 does not impact the structural integrity of property, and does not constitute direct physical loss or damage to property. Associates in Periodontics, PLC v. Cincinnati Insurance Company, 540 F. Supp. 3d 441, 446 (D.Vt. 2021); Wellness Eatery La Jolla LLC v. Hanover Insurance Group, 517 F. Supp. 3d 1096, 1106 (S.D.Cap. 2021). These Courts specifically held that "a virus is incapable of

damaging physical structures because the virus harms human beings, not property". Id. The Fourth Circuit Court of Appeals recently explained that conclusory statements asserting that the Corona Virus impairs unidentified property is insufficient to survive a motion to dismiss. Brown Jug, Inc. v. Cincinnati Insurance Company, 27 F.4th 398 (6th Cir. 2022).[1] Accord Uncork & Create LLC v. Cincinnati Insurance Company, ___ F.4th _____ (4th Cir. 2022). The Brown Jug Court explained that not only must a claimant be able to assert that Covid-19 was present at the covered property, but they must also be able to assert that Covid-19 materially altered the property and identify specific damages for replacing that property which was damaged by Covid-19. No such allegations exist here other than the conclusory statements referenced earlier.

A careful reading of the Amended Complaint reflects that it is not seeking recovery for alleged damage to the property itself, but rather only for loss of use of the property because of the Pandemic. The Complaint does not seek recovery to repair or replace damaged property. Rather, it seeks damages for loss of use as a result of the closures or limitations resulting from the Pandemic.

The Court's original decision adequately addresses what plaintiffs characterize as a full waiver endorsement. The Court did not find that endorsement to preclude an insurance carrier from including its own terms and conditions of coverage. The Court adds that under Endorsement 2, the policy specifically provides "the participating Companies, hereinafter referred to as Insurer(s) or Company(ies), agree to pay on behalf of an Insured the amount recoverable in accordance with the terms and conditions of this policy…". {Emphasis added.} The participating and company endorsement specifically states that it is the terms and conditions of each specific excess policy which controls.

[1] Internal page designation not available at the time of this decision.

The Court does not find language indicating that the lead/primary or controlling company's insurance policy will be the policy that an excess company follows to change the meaning of that term. Typically, any payment under an excess policy follows once the primary policies have been exhausted. Nothing in the language contained in the endorsement suggests that this provision changes the perils insured or excluded.

With regard to plaintiffs' request that the Court address the various exclusions raised by defendants in the Motion to Dismiss, while the virus exclusion was addressed by the Court, it was unnecessary to address those exclusions given the Court's conclusion that the Complaint failed to allege a cause of action for which relief could be granted. The Court only decides those issues necessary for its determination and does not provide advisory opinions. The Court notes that the Arch Specialty Insurance policy contains a specific virus or bacteria exclusion which is clear and unambiguous. The Evanston Insurance Company contains a clear and unambiguous organic pathogen exclusion which defines organic pathogen to include a virus.

For the reasons set forth herein, plaintiffs' Motion for Reconsideration is DENIED.