NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

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 – CBLP ACTION **OPINION**

Decided: January 26, 2022

William M. Tambussi, Esquire, Sean P. O'Brien, Esquire, Brown & Connery, LLP, Counsel for Plaintiffs

Jordan M. Rand, Esquire, William A. Harvey, Esquire (pro hac vice), Klehr Harrison Harvey Branzburg LLP, Attorneys for Plaintiffs

Courtney E. Murphy, Esquire, Kevin Lahm, Esquire (pro hac vice), David Walker, Esquire (pro hac vice), Robert Arnold, Esquire (pro hac vice), Hinshaw & Culbertson, LLP, Counsel for Defendants, Certain Underwriters at Lloyds of London, HDI Global SE, General Security Indemnity Company of Arizona, Crum & Forster Specialty Insurance Company, Western World Insurance Company and Safety Specialty Insurance Company

Jonathan R. MacBride, Esquire, Meredith C. Schilling, Esquire, Matthew L. Gonzalez, Esquire (pro hac vice), Jennifer A. Hoffman, Esquire (pro hac vice), Zelle, LLP, Counsel for Defendants, Arch Specialty Insurance Company, Axis Surplus Insurance Company, Everest Indemnity Insurance and RSUI Indemnity Company

Sarah E. Kalman, Esquire, Michael P. O'Day, Esquire (pro hac vice), A. Neill Thupari, Esquire (pro hac vice), DLA Piper LLP (US), Counsel for Defendants, Aviva Insurance Limited, a Member of Certain Underwriters at Lloyd's of London

Peter E. Doyle, Esquire, Timothy M. Strong, Esquire (pro hac vice), Dickinson Wright PLLC, Counsel for Defendant, Evanston Insurance Company

Patricia M. Henrich, Esquire, Margaret M. Jenks, Esquire, Reilly, McDevitt & Henrich, P.C., Counsel for Defendant, Homeland Insurance Company of Delaware

Jeremiah L. O'Leary, Esquire, Finazzo Cossolini O'Leary, Counsel for Defendant, Ironshore Specialty Insurance Company

Robert M. Cavalier, Esquire, Lucas and Cavalier, LLC, Counsel for Defendant, Hallmark Specialty Insurance Company

STEVEN J. POLANSKY, P.J.Cv.

INTRODUCTION

Multiple defendants have filed the present Motion to Dismiss the Complaint pursuant to Rule 4:6-2.

Defendants, Arch Specialty Insurance Company, Axis Surplus Insurance Company, Everest Indemnity Insurance Company, Iron Shore Specialty Insurance Company, RSUI Indemnity Company, West Chester Surplus Lines Insurance Carrier, and Homeland Insurance Company of Delaware, have jointly filed a Motion to Dismiss the Complaint for failure to state a claim. Defendant Everest Insurance Company separately files a Motion to Dismiss the Complaint for Failure to State a Claim and joins in the motion filed by co-defendants.

Defendants Certain Underwriters at Lloyds of London (Unique Market Reference B123019AWS1637), HDI Global SE, General Security Indemnity Company of Arizona, Crum & Foster Specialty Insurance Company, Western World Insurance Company and Safety Specialty Insurance Company, identifying themselves as second layer excess insurers, also cross move to dismiss plaintiff's Second Amended Complaint for failure to state a claim upon which relief can be granted.

PLAINTIFF'S SECOND AMENDED COMPLAINT

Plaintiffs allege that they own or manage 21 hotel, resort and recreation destinations in multiple jurisdictions, including New Jersey. They assert a loss in excess of $10,000,000

allegedly resulting from the Covid-19 pandemic. The aggregate coverage available is alleged to be $500,000,000.

The properties at which losses are alleged to have occurred include the States of New Jersey, Pennsylvania, North Carolina, Maryland, Florida, Colorado and West Virginia. It is claimed that the policy of insurance issued by Hallmark Specialty Insurance Company is part of the lead primary layer of $10,000,000 in coverage.

Plaintiffs assert they are entitled to coverage under the Hallmark policy for business interruption, extra expense, order of civil/military authority, contingent time element coverage, extended period of indemnity coverage, booking reservation interruption coverage, decontamination costs and professional fees. They claim that all other insurance policies follow the terms of the Hallmark policy.

The second amended complaint alleges in paragraph 88 that "Covid-19 is a highly contagious form of corona virus that spreads through respiratory droplets from infected individuals", and further alleges that "the virus can remain present for time periods ranging from several hours to multiple weeks" on contaminated surfaces. It is asserted that on January 31, 2020, President Donald Trump declared a public health emergency as a result of Covid-19. It is further alleged that on March 9, 2020, Governor Phil Murphy of New Jersey declared a State of Emergency and Public Health Emergency due to the pandemic. The New Jersey Stay-at-Home Order was issued March 21, 2020 by Governor Murphy banning all social gatherings and requiring the closure of all non-essential businesses until further notice.

The Complaint alleges that the other states involved issued either stay-at-home orders or closure orders between March 13, 2020 and April 7, 2020.

Plaintiffs allege that as a result of the pandemic and/or civil closure orders, they experienced a partial or total suspension of operations beginning March 16, 2020. Plaintiffs claim the following harm and damage was sustained:

> 98. The presence of the Covid-19 virus and/or the prospect of the Covid-19 virus is a risk of direct physical loss or damage and causes direct physical loss or damage to the Insured Properties.
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> 99. The Covid-19 virus is capable of directly physically harming or damaging the Insured Properties by causing a physical, tangible, alteration that can seriously and detrimentally affect, impair, damage, or alter a property's value, usefulness, or normal function, rendering a property non-functional for its normal occupancy or use.
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> 100. The presence of the Covid-19 virus physically alters a property and its existence on objects or surfaces renders a property unsafe or unusable for its normal purpose.
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> 101. The Covid-19 virus has caused a direct physical loss or damage to the Insured Properties and the Covid-19 virus establishes a risk of direct physical loss or damage to the Insured Properties.
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> 102. Insureds have sustained losses and extra expenses due to the necessary interruption of their business or the services provided because the ingress or egress to the Insured Properties has been prevented by the various Civil Closure Orders.
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> 103. The various Civil Closure Orders were issued as a direct result of the Covid-19 virus and they prevented the ingress and egress to the Insured Properties and were a direct result of a loss covered by the Policies.
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> 104. The Pandemic itself and the Civil Closure Orders caused many suppliers, attraction properties and customers of the Insureds to suspend or cease operations as well, resulting in considerable losses to the Insureds.
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> 105. By way of example and not by way of limitation, the closure of theme parks in Orlando, Florida caused substantial losses at the proximate Insured Properties.
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> 106. By way of further example and not by way of limitation, Plaintiff GFM derives fees based on a percentage of revenue generated

by the Insured Properties that it manages, the partial or total closure of which caused GFM to incur substantial losses.

107. By way of further example and not by way of limitation, NPA derives revenue based on the volume of products purchased by the Insured Properties, the suspension or cessation of operations at which caused NPA to sustain substantial losses.

108. By way of further example and not by way of limitation, many of the Insured Properties rely on university events, large public events, corporate events and other large gatherings at or proximate to the Insured Properties that were suspended, closed or cancelled, thereby causing the Insureds to sustain substantial losses.

109. Certain of the Insured Properties experienced confirmed cases of Covid-19.

INSURANCE POLICIES

All of the policies contain a participating company endorsement which is identical in each policy. The endorsement reads as follows:

> It is agreed this policy is a Participation policy. The participating Companies, hereafter 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 provided that:
>
> (1) The collective liability of Participating Companies shall not exceed the Program Limit of Liability or any appropriate Sub-Limit of Liability including Annual Aggregate Limits.
>
> (2) The liability of each of the Participating Companies shall not exceed the participation limit set against its name with the exception of loss adjustment and professional fees which cost shall be 100% assumed by the Companies on each applicable layer of insurance.
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> The designated lead/primary or controlling Company is: Hallmark Specialty Insurance Company.
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> If a Company is designated as a lead/primary or controlling Company, then that Company's insurance policy shall be the policy that an excess Company(ies) will follow in their excess insurance policy.

> In the event of a quota share participation program, the lead/primary or controlling Company in a quota share layer will be the Company that other participating Companies in the same layer shall follow in the event of a coverage or claim management dispute. Subject to reasonable recommendations by Participating quota share Companies, the lead/primary or controlling Company shall lead the claim management process. Participating quota share Companies agree to act in good faith with the lead/primary or controlling Company.

All of the policies at issue on this motion, with the exception of the RSUI policy, contain what plaintiff asserts is a full waiver provision. This provision provides in each of the policies:

> Unless not permitted by law, it is agreed that if there is a conflict in terms and/or conditions in the primary or lead policy and an excess policy, the lead or primary policy will take precedence over any terms and conditions in any excess policy(ies) attaching over the primary or lead policy. This clause does not apply to the perils insured as shown on the declarations of the excess policy(ies).

The lead or primary policy is the Hallmark Specialty Insurance Company policy.

The insurance arrangement is what is commonly called a quota share arrangement, with primary insurance carriers working conjunctively with excess insurance carriers covering a large risk. See Gill v. Clara Maass Medical Center, 450 N.J. Super. 368, 376 (App. Div. 2017); Chubb Custom Insurance Company v. Prudential Insurance Company of America, 195 N.J. 231, 235 (2008). Under these arrangements, the excess insurers can agree to follow the form of the primary insurance policy, but need not. See Houbigant v. Federal Insurance Company, 374 F.3d 192, 203 (3d Cir. 2004) (interpreting New Jersey law).

The insurance policy provision which plaintiff characterizes as a "Full Waiver clause" specifically provides that it "does not apply to the perils insured as shown on the declarations of the excess policy(ies)." The Court finds that this language clearly and unambiguously permits each excess insurer to modify the specific perils or risks of loss insured against by their

respective policies. Because of this, the Court concludes that this provision does not preclude application of the exclusions contained in the excess insurance policies.

HALLMARK SPECIALTY INSURANCE COMPANY POLICY

This policy provides coverage for the following:

8. INSURING AGREEMENT

This policy insures against all risks of direct physical loss, damage or destruction in the Coverage Territory to Covered Property and including general average, salvage and similar charges on shipments insured in this policy unless specifically excluded herein. This policy also insures time element loss in the Coverage Territory. Coverages specifically referenced herein are deemed to be examples of what this policy insures but does not limit the insurance provided by this policy.

14. COVERED PROPERTY:

This policy insures the following property for loss, damage or destruction, unless otherwise specifically excluded, while located in the Coverage Territory.

A. REAL PROPERTY of every kind and description whether above or below ground or water that is owned, used, leased, rented, borrowed, loaned, occupied or intended for use by an Insured in which an Insured may have an insurable interest including, but not limited to, the following and including the loss of use thereof. It is agreed and understood that the determination of insurable interest shall not be less than that allowed by law.

B. PERSONAL PROPERTY of every kind and description that is owned, used, leased, rented, borrowed, loaned, occupied or intended for use by an Insured in which an Insured may have an insurable interest including, but not limited to the following and including loss of use thereof. It is agreed and understood that the determination of insurable interest shall not be less than that allowed by law.

15. COVERAGE

This policy insures all risks of direct physical loss including but not limited to the following coverages outlined herein unless otherwise excluded. All insurance provided in this policy is subject to the Program Limit of Liability unless there is a specific Sub-limit of insurance for such coverage. It is agreed and understood that time element loss including but not limited to business interruption, extra expense and rental value are included when there is any loss, damage or destruction to Covered Property by a covered cause of loss whether or not the coverage outlined specifically refers to time element.

A. BUSINESS INTERRUPTION – GROSS EARNINGS

(1) Business Interruption means loss resulting from the necessary interruption or reduction of business operations or services conducted by an Insured and unless stated otherwise herein is caused by direct physical loss, damage or destruction to Covered Property or property of the type insured hereunder, by any of the covered causes of loss insured by this policy.

The Evanston Insurance Company policy contains an exclusion for biological, radiological or chemical materials, as well as for organic pathogens. Both viruses and bacteria are included within the definition of organic pathogen. The Selective Fire and Casualty Insurance Company policy and the Arch Specialty Insurance Company policy both contain specific virus or bacteria exclusions.

CONTENTIONS

Defendants, Arch Specialty Insurance Company, Axis Surplus Insurance Company, Everest Indemnity Insurance Company, Iron Shore Specialty Insurance Company, RSUI Indemnity Company, West Chester Surplus Lines Insurance Carrier, and Homeland Insurance Company of Delaware, argue that their excess insurance policies do not provide coverage because plaintiffs do not allege that they sustained direct physical loss, damage or destruction to insured property. They claim that the Complaint does not allege that Covid-19 was present on the

insured property. They further assert that the extension of coverage for civil/military authority does not apply since any such orders were not issued as a direct result of a covered cause of loss insured by the policy. They assert there was no impairment of access, no causal nexus between the alleged damage and any civil authority order and further that there is no alleged loss caused to the allegedly impaired property.

Additionally, they argue that the Arch policy contains a virus exclusion, the RSUI policy contains an exclusion for pathogenic or poisonous biological or chemical materials, the Everest policy contains a chemical and biological exclusion as well as a pollution exclusion and contamination exclusion endorsement and the Everest policy contains a contaminant or pollutant exclusion. Finally, they assert that there is no booking reservation interruption coverage for the loss under the excess policies.

Defendant Evanston Insurance Company joins in the motion filed by other insurance carriers. Additionally, Evanston asserts its insurance policy contains a virus exclusion precluding coverage.

Defendants, Certain Underwriters at Lloyds of London (Unique Market Reference B123019AWS1637), HDI Global SE, General Security Indemnity Company of Arizona, Crum & Foster Specialty Insurance Company, Western World Insurance Company and Safety Specialty Insurance Company, identified as second layer excess insurers, also cross-move to dismiss the Complaint. Defendant Homeland Insurance Company of Delaware also moves to dismiss the Complaint.

Plaintiffs in opposition to the motion assert that all excess policies are follow-the-form policies and follow the terms of the lead Hallmark Insurance Company policy. They further

argue that the full waiver provision contained in the excess insurance policies precludes enforcement of the exclusions contained in these policies and therefore requires coverage.

Plaintiffs argue that it is the risk of direct physical loss, damage or destruction to covered property which is provided by the insurance policies, and that direct physical damage itself is not required. They further assert that loss of use without damage triggers coverage under the insurance policies.

ANALYSIS

The test for determining the adequacy of the pleading is whether a cause of action is suggested by the facts. Velantzas v. Colgate-Palmolive Corp., 109 N.J. 189 (1998). The court must search in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is conducted. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 772 (1989). The court in Printing Mart cautioned that a Rule 4:6-2(e) motion to dismiss "should be granted in only the rarest of instances." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 772 (1989); see also Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993). The Rule requires that plaintiffs must receive "every reasonable inference of fact ["and a reviewing court must search the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary."] Printing Mart, supra, 116 N.J. at 746 (quoting DiCristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). Every reasonable inference is therefore accorded to the plaintiff. Banco Popular North America v. Gandi, 184 N.J. 161, 165-166 (2005).

Policies of insurance are generally interpreted in favor of the insured and against the insurer. Salem Group v. Oliver, 128 N.J. 1 (1992). This in part is based upon the public policy of interpreting the insurance policy against the drafter. Werner Industries, Inc. v. First State Insurance Company, 112 N.J. 30 (1988). All ambiguities and uncertainties in the insurance policy are resolved in favor of the insured and against the insurer. Sparks v. St. Paul Insurance Company, 100 N.J. 325 (1985); Killeen Trucking, Inc. v. Great American Surplus Lines Insurance Company, 211 N.J. Super. 712 (App. Div. 1986).

The court must enforce the clear and unambiguous terms of the policy of insurance. Erdo v. Torcon Construction Company, 275 N.J. Super. 117 (App. Div. 1994). The test for determining whether an ambiguity exists is whether the phrasing of the policy of insurance is sufficiently confusing such that the average policy-holder cannot make out the boundaries of coverage. Nunn v. Franklin Mutual Insurance Company, 274 N.J. Super. 543 (App. Div. 1994); Ryan v. State Health Benefits Commission, 260 N.J. Super. 359 (App. Div. 1992). A disagreement between the insurer and the insured concerning interpretation of the language of an insurance policy does not alone create an ambiguity. Aviation Charters, Inc. v. Avemco Insurance Co., 335 N.J. Super. 591 (App. Div. 2000), affirmed as modified 170 N.J. 76 (2000). A policy of insurance is ambiguous only where reasonably intelligent persons would differ regarding its meaning. Id. Where the insurance policy language is clear and unambiguous, the Court need not consider the claimed reasonable expectations of the insured. Katchen v. Government Employer's Ins. Co., 457 N.J. Super. 600, 607 (App. Div. 2019), appeal dismissed 241 N.J. 354 (2020); see Passaic Valley Sewerage Commissioners v. St. Paul Fire & Marine Ins. Co., 206 N.J. 596, 608 (2011).

Words utilized in the insurance policy are interpreted in accordance with their plain and ordinary meaning. Voorhees v. Preferred Mutual Insurance Company, 128 N.J. 165 (1992); Daus v. Marble, 270 N.J. Super. 241 (App. Div. 1994). Where the policy language will support two interpretations, only one of which will support a finding of coverage, the court will choose the interpretation favoring the insured and find that coverage exists. Meeker Sharkey Associates, Inc. v. National Union Fire Insurance Company of Pittsburgh, 208 N.J. Super. 354 (App. Div. 1986).

Defendants first argue that business interruption coverage does not apply because plaintiff does not allege direct physical loss or damage to covered property. They assert this is a pre-condition to any coverage under the insurance policy. Defendants assert that the virus exclusion bars coverage for the losses claimed. They further argue that there was no covered loss by order of civil authority, since the complaint does not allege governmental action taken as a result of damage to nearby property as a result of a covered cause of loss.

Plaintiffs argue in response that because they were unable to use their property for its intended purpose, they suffered direct physical loss or damage to property. Plaintiffs further assert they are entitled to coverage for order of civil authority because they were denied access to their property as a result of property damage. This property damage allegedly results from Executive Orders 103 and 107.

Governor Philip Murphy under Executive Order 103 declared a public health emergency, finding that the spread of COVID-19 within New Jersey constituted an imminent public health hazard. The Order authorized and empowered the State Director of Emergency Management, in conjunction with the Commissioner of the Department of Health, to take any emergency

measures they deemed necessary. This Executive Order did not order the closure of any business or other commercial establishment.

On March 21, 2020, the Governor issued Executive Order 107 instituting emergency measures in accordance with the public health emergency and state of emergency declared in Executive Order 103. That Order required that all New Jersey residents remain at home or at their place of residence unless they fell within one of nine enumerated exceptions set forth in the Order. That Order further prohibited gatherings of individuals at parties, celebrations or social events. The premises of all non-essential retail businesses were ordered to close to the public. Only essential retail businesses were permitted to remain open.

Plaintiffs claim that because the virus exclusion is an affirmative defense, it may not be considered by the court on a Rule 4:6-2 motion. Finally, plaintiffs argue that their reasonable expectations were that these types of losses would be covered.

Both parties cite to a litany of unreported decisions reaching conclusions either in their favor, or finding that motions to dismiss were premature. Both parties rely upon the New Jersey Appellate Division decision in Wakefern Food Corp. v. Liberty Mutual Fire Ins. Co., 406 N.J. Super. 524 (App. Div.), certif. denied 200 N.J. 209 (2009) to support their position.

In the Wakefern Food Corp. case, the claim arose out of a failure in the North American electrical grid which caused a four-day electrical blackout over portions of the Northeastern United States and Eastern Canada. Wakefern suffered losses due to food spoilage during the power outage. The insurance policy issued by Liberty Mutual Fire Insurance Company contained a specific endorsement providing coverage for damage due to the loss of electrical power. The policy required that the interruption of coverage be caused by physical damage from a covered peril to any power house, generating plant, substation, power switching station, gas compressor

station, transformer, telephone exchange, transmission lines, connections or supply pipes which furnish electricity to a covered location.

The parties disputed whether the interruption of electrical power resulted in physical damage to the specified electrical equipment and property. The court there concluded that despite the differing explanations by experts as to why the power went out and why it remained out, ultimately the entire electrical system was incapable of producing electrical power for several days. The court's decision was based upon the specific language contained in the "Services Away Extension" which provided coverage for interruption of electrical service.

The Appellate Division in Arthur Anderson LLP v. Federal Ins. Co., 416 N.J. Super. 334 (App. Div. 2010) rejected a claim for business interruption losses alleged to have resulted from the September 11, 2001 attacks on the World Trade Center and the Pentagon. The insured asserted that it suffered a loss of earnings in excess of $200,000,000 as a result of these events. The court held that the insured could show no loss or damage to its real or personal property described in the policy, and concluded that the insured had no insurable interest in the World Trade Center property or the Pentagon. Based upon this analysis, the court rejected the business interruption claim.

The closest reported decision on point to this case interpreting New Jersey law is Port Authority of NY and NJ v. Affiliated FM Ins. Co., 311 F.3d 226 (3d Cir. 2002). That case involved a first-party claim alleging property damage as a result of the alleged existence or presence of friable asbestos in buildings owned by the insured. In analyzing these issues, the court noted the fundamental differences between third-party liability insurance policies and first-party insurance contracts, making decisions addressing coverage under third-party liability policies of limited benefit in addressing issues under a first-party property policy. Id. at 233.

Relying upon 10 Couch on Insurance § 148:46 (3d ed. 1998), the court determined that "physical damage to property means 'a distinct, demonstrable and physical alteration' of its structure". Id. at 235. The court concluded that the mere presence of asbestos was insufficient to establish distinct and demonstrable physical harm required to trigger first-party insurance coverage. Id.

The Third Circuit affirmed the finding of the trial court that "a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property" does not constitute physical loss or damage covered under the first-party property insurance policy. Port Authority of New York and New Jersey v. Affiliated FM Ins. Co., 245 F. Supp. 2d 563, 579 (D.N.J. 2001), affirmed 311 F.3d 226 (2002).

The mere presence of the Corona virus at or in the insured locations where general statements that the Corona virus exists on surfaces in the air at insured properties is insufficient to establish property damage. See Unmasked Management v. Century-National Insurance Company, 514 F.Supp. 3d 1217, 1225 (S.D. Cal. 2021). It is governmental orders which caused plaintiffs to be unable to fully utilize their property, not physical casualty to the property. Where the virus is present and can be removed or neutralized through routine cleaning of surfaces with standard household cleanings, such a need does not trigger the insurance coverage.

Where an insured's automobile dealership was inaccessible for a week due to a snow storm, the court concluded that even though the property itself sustained some roof damage which did not require a suspension of business, the language of the policy precluded coverage where it was the storm and road conditions which caused the closure of the business. Harry's Cadillac-Pontiac-GMC Truck Co., v. Motors Insurance Corp., 126 N.C. App. 698, 699-702; 486 S.E.2d 249, 251-252 (1997). A Federal District Court concluded that no covered loss of business income occurred as a result of a power outage without direct physical loss to insured property

caused by a covered peril, but did find covered loss due to direct physical damage to the computer system of the insured. Southeast Mental Health Center, Inc. v. Pacific Ins. Co., 439 F.Supp. 2d 831, 836-839 (W.D. Tenn 2006). The Oregon Court in Protection Mutual Ins. Co. v. Mitsubishi Silicon America Corp., 164 Ore.App. 385, 992 P.2d 479 (1999), review denied 330 Ore. 331, 6 P.3d 1100 (2000) found no business interruption coverage because flood was not a covered cause of loss for business interruption.

Plaintiffs assert that the Appellate decision in Customized Distribution Services v. Zurich Insurance Company, 373 N.J. Super. 480 (App. Div. 2004) supports a finding of coverage under these circumstances. That case involved a claim for coverage under a third-party liability insurance policy, not a first party property insurance policy. The underlying claim against the insured alleged that mis-rotation of stock had resulted in the claimant's property nearing its expiration date. The court there however found that the improper rotation of stock was a direct physical loss. Id. at 488. The court went on to explain that the underlying product which was the subject of the suit had changed, and that "such a change is the functional equivalent of damage of a material nature or an alteration in physical composition". Id. at 490. These circumstances differ substantially from those presented here, and further involve third-party liability insurance coverage as opposed to first-party property coverage.

Neither party cites to any reported New Jersey case specifically addressing a virus exclusion. Other courts have upheld exclusions barring coverage for losses caused by hazardous substances. See Certain Underwriters at Lloyd's of London v. Creagh, 563 F.Appx. 209, 211 (3d Cir. 2014) (finding loss allegedly caused by bacteria excluded); Sentinel Ins. Co. v. Monarch Med Spa, Inc., 105 F.Supp. 3d 464 (E.D.Pa. 2015) (enforcing exclusion for loss resulting from presence of or exposure to fungi, bacteria and viruses).

New Jersey Courts have enforced anti-concurrent causation provisions in first party property insurance cases where the policy contains clear and unambiguous language. Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 431 (App. Div. 2004) (finding that anti-sequential concurrent causation clause in the earth movement exclusion evidenced a clear intention to bar coverage for earth movement regardless of any other contributing cause). The Appellate Division in a case involving third party coverage applied the same doctrine to find coverage excluded for a claim involving the shooting of a patron at a nightclub where the policy excluded coverage for injury or damage arising out of or caused in whole or in part by an assault and/or battery. Stafford v. T.H.E. Ins. Co., 309 N.J. Super. 97, 104-105 (App. Div. 1998). That policy further excluded coverage where the underlying operative facts alleged constituted an assault or battery, regardless of the theory of liability asserted. Id.

Plaintiffs argue in their brief that it is improper for defendants to rely upon an exclusion from coverage on a Rule 4:6-2 motion. They cite no caselaw in support of that assertion. This argument ignores the fact that it is the plaintiff's Complaint which introduces a loss caused by virus as part of the allegations of the complaint. Paragraphs 82 and 83 of plaintiff's Second Amended Complaint assert that in January, 2020, the United States experienced its first reported case of Covid-19, a highly contagious form of Coronavirus. Paragraph 19 of the Complaint discusses the March 21, 2020 Executive Order 107 issued by Governor Murphy requesting residents to remain at home. The language of the order reflects that the restrictions are being imposed to prevent or reduce the spread of COVID-19, a highly contagious virus.

The Complaint itself places the involvement of a virus at issue. Governor Murphy's Executive Orders 103 and 107, the World Health Organization Declaration of a Global Pandemic and the President's Declaration of a National Emergency all reference the coronavirus

specifically identified as COVID-19. Plaintiff's Complaint in paragraph 21 alleges that as a result of these governmental actions, it was forced to suspend operations.

Plaintiff cannot ignore that its Complaint identifies the coronavirus as the cause of the government actions requiring the suspension of business operations. The allegations of the Complaint essentially are that a virus, specifically COVID-19, was the cause of the governmental action. Since the virus is alleged to be the cause of the governmental action, and the governmental action is asserted to be the cause of the loss, plaintiff cannot avoid the clear and unmistakable conclusion that the coronavirus was the cause of the alleged damage or loss. Under the anti-concurrent causation provision of the insurance policy, "such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

It therefore does not matter whether the closure of plaintiff's business as a result of governmental orders to prevent the spread of the coronavirus constitutes direct physical damage to covered property, nor whether civil authority coverage can be triggered, since the reason for the exercise of that civil authority was the virus.

Plaintiff points to no direct physical loss or damage to covered property. There is no direct physical loss or damage to property which resulted in the order of civil authority. The direct physical damage to the electrical grid present in Wakefern Food Corp. is absent in this case. Such physical damage is also required to trigger coverage for loss of business and extra expense. The language of paragraph 15 in the lead policy provides that the loss is only covered "when there is any loss, damage or destruction to covered property by a covered cause of loss."

The Sixth, Eighth and Ninth Circuit Court of Appeals have addressed similar Covid-19 related issues in reported decisions. The Sixth Circuit addressed the issue in Santo's Italian Café,

LLC v. Acuity Insurance Company, 15 F.4th 398 (6th Cir. 2021). There the insured operated a restaurant. The State of Ohio issued an Order suspending all in-person dining at restaurants which had a substantial impact on the hospitality industry, similar to the industry impacted in the current case. There, as here, the policy provided that it would pay for direct physical loss or damage to covered property, and defined loss to apply to the risks of direct physical loss. Business interruption and extra expense coverage was provided "if the suspension was caused by direct physical loss or damage to property at the restaurant". The Court held that despite the presence of the Covid-19 virus, the restaurant itself had not been tangibly destroyed, explaining that a loss of use is not the same as a physical loss. Id. at 401. The Court concluded that direct physical loss or damage to property does not include the inability to use the property without there first being direct physical loss or damage to covered property. Id. at 405.

Other reported decisions have likewise required a distinct, demonstrable physical alteration to the property in order to trigger coverage from Covid-19. Mudpie, Inc. v. Travelers Casualty Ins. Co. of America, 15 F.4th 885 (9th Cir. 2021) (direct physical loss or damage to property requires physical alteration of property); Oral Surgeons, P.C. v. The Cincinnati Ins. Co., 2 F.4th 1141 (8th Cir. 2021) (holding that no coverage for mere loss of use where property has suffered no direct physical loss or harm). The Ninth Circuit in the Mudpie case was directly confronted with claims that orders issued by the City and County of San Francisco and the State of California required closure of the insured's business. Accepting this as true, the Court concluded that the loss of use of the premises due to the government closure order did not trigger business income coverage. Mudpie, 15 F.4th at 892. See also, Promotional Headwear International v. Cincinnati Ins. Co., 504 F. Supp. 3d 1191, 1200 (D.Kan. 2020) (holding actual or tangible harm to or intrusion on the property itself required); Michael Cetta, Inc. v. Admiral

Indemnity Co., 506 F. Supp. 3d 168, 179 (S.D.N.Y. 2020) (concluding that loss of use of the insured premises due to a government closure order does not trigger business income coverage without there first being direct physical loss to the insured property).

The gist of plaintiff's complaint is that the Covid-19 virus and the resulting civil closure orders caused business closures or otherwise rendered the insured properties unsafe for their usual and customary purposes. This court concludes consistent with the other courts which have addressed this issue that these circumstances do not constitute direct physical loss or damage triggering coverage under the insurance policies in the first instance.

Plaintiff points to no language in the insurance policy or declarations which created any reasonable expectation of coverage for the claimed loss. Reasonable expectations must be based upon the insurance contract itself, and not on an insured's subjective belief about what insurance should cover. Because the court finds the policy language and the virus exclusion to be clear and unambiguous, any expectation of coverage by the insureds is not reasonable.

CONCLUSION

The Court concludes that the Complaint fails to allege physical loss or damage to property which is a pre-condition to triggering coverage under the insurance policies at issue here. Such damage to property is a pre-condition to insurance coverage under the types of risks insured by the moving excess insurers. Additionally, the Court finds that the policies which contain a virus exclusion would preclude coverage even if the claims involved physical loss or damage to property. For these reasons, the motions to dismiss will be granted.