UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(NEWARK VICINAGE)

MANHATTAN PARTNERS, LLC, ET AL.	:	
Plaintiffs	:	Civil Action No. 2:20-cv-14342
v.	:	
AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY,	:	MOTION RETURN DATE: FEBRUARY 16, 2021
Defendant.	:	

DEFENDANT AMERICAN GUARANTY AND LIABILITY INSURANCE COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS
ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

I. INTRODUCTION ....p. 1

II. FACTUAL BACKGROUND ....p. 4

A. The Allegations of the Complaint ....p. 4

B. The AGLIC Policy ....p. 5

III. LEGAL STANDARD ....p. 8

A. Legal Standard For Rule 12(b)(6) Motion ....p. 8

B. Legal Standard For Interpreting Insurance Contracts ....p. 9

IV. ARGUMENT ....p. 11

A. There is No Direct Physical Loss Of or Damage To Any Covered Property ....p. 11

1. The Alleged Presence of the Virus Is Neither Direct Physical Damage To Property Nor Direct Physical Loss Of Property ....p. 12

2. The "Stay-at- Home" Orders Do Not Cause "Direct Physical Loss" of Property ....p. 17

3. Plaintiffs Cannot Show Any Suspension of Business Was Due To Direct Physical Loss of or Damage To Property .....p. 21

B. The Civil Authority Coverage Is Not Triggered Because There is No Prohibition of Access to the Insured Property ....p. 22

C. The Contamination Exclusion Also Bars Plaintiffs' Claims ....p. 24

CONCLUSION ....p. 27

TABLE OF AUTHORITIES

Page(s)

Cases

10E, LLC v. Travelers Indem. Co. of Connecticut,
No. 2:20-CV-04418-SVW-AS, 2020 WL 6749361 (C.D. Cal. Nov. 13, 2020)......................26

4431 Inc. v. Cincinnati Ins. Co.,
No. 5:20-CV-04396, 2020 WL 7075318 (E.D. Pa. Dec. 23, 2020).......................12, 16, 18, 22

Ashcroft v. Iqbal,
556 U.S. 662 (2009)...8, 9

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)...8, 9, 24

Bistrian v. Levi,
696 F.3d 352 (3d Cir. 2014)...8

Bldg. Materials Corp. of Am. v. Allstate Ins. Co.,
424 N.J. Super. 448 (App. Div. 2012) 11

Boulevard Carroll Entm't Group Inc. v. Fireman's Fund Ins. Co.,
No. CV2011771SDWLDW (D.N.J. Dec. 14, 2020) (slip op.) (Ex. B) .... *passim*

Bros. Inc. v. Liberty Mut. Fire Ins. Co.,
268 A.2d 611 (D.C. 1970) 20

Buck v. Hampton Twp. Sch. Dist.,
452 F.3d 256 (3d Cir. 2006)...9

Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.,
195 N.J. 231 (2008) 10

Cypress Point Condominium Ass'n, Inc. v. Adria Towers, L.L.C.,
226 N.J. 403 (2016) 10

Diesel Barbershop LLC, v. State Farm Lloyds,
No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020) 26

Dime Fitness, LLC v. Markel Ins. Co.,
No. 20-CA-5467, 2020 WL 6691467 (Fla. Cir. Ct. Nov. 10, 2020).......................................26

Flomerfelt v. Cardiello,
202 N.J. 432 (2010) 10

Fowler v. UPMC Shadyside,
578 F.3d 203 (3d Cir. 2009)..8

Gavrilides Management Co. LLC v. Michigan Ins. Co.,
2020 WL 4561979 (Mich. Cir. Ct. July 21, 2020)..26

GTE Corp. v. Allendale Mut. Ins. Co.,
258 F.Supp.2d 364 (D.N.J. 2003) 11

Handel v. Allstate Ins. Co.,
No. CV 20-3198, 2020 WL 6545893 (E.D. Pa. Nov. 6, 2020)....................................2, 12, 25

Heldor Indus., Inc. v. Atl. Mut. Ins. Co.,
229 N.J. Super. 390 (App. Div.1988) 11

Holiday Vill. E. Home Owners Ass'n, Inc. v. QBE INS Corp.,
830 F. Supp. 2d 24 (D.N.J. 2011), *aff'd*, 517 F. App'x 113 (3d Cir. 2013) 11

Horan v. Reliance Standard Life Ins. Co.,
No 12-7802 (JAP), 2014 WL 346615 (D.N.J. Jan. 30, 2014) 9

Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.,
No. 4:19-cv-00693-SAL, 2020 WL 886120 (D.S.C. Feb. 24, 2020).......................................20

Kessler Dental Assoc. v. Dentists Ins. Co.,
No. 2:20-CV-03376-JDW, 2020 WL 7181057..12, 13, 24, 26

Longobardi v. Chubb Ins. Co. of New Jersey,
121 N.J. 530 (1990) 10

Mac Property Group LLC v. Selective Fire & Cas. Ins. Co.,
No. CAM-L-2629-20 (N.J. Super. Nov. 5, 2020) (slip op.) (Ex. D) 3, 23

Maluabe LLC v. Greenwich Ins. Co.,
No. 20-22615-CIV, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020) 19

Mama Jo's Inc. v. Sparta Ins. Co.,
No. 18-12887, 2020 WL 4782369 (11th Cir. Aug. 18, 2020) 16

Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut,
No. 2:20-CV-04423-AB-SK, 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020) 26

Mattdogg, Inc. v. Philadelphia Ins. Co.,
No. MER-L-820-20 (N.J. Super. Nov. 17, 2020) (slip op.) (Ex. C) 3, 24, 25

Mauricio Martinez DMD, P.A. v. Allied Insur. Co. of America,
No. 220CV00401FTM66NPM, 2020 WL 524018 (M.D. Fla. Sept. 2, 2020).........................26

Michael Cetta, Inc. d/b/a Sparks Steak House v. Admiral Indemnity Co.,
No. 20 CIV. 4612 (JPC), 2020 WL 7321405 (S.D.N.Y. Dec. 11, 2020) 18, 22

Motorists Mut. Ins v. Hardinger,
131 Fed. App'x 823 (3d Cir. 2005)..14

Newchops Restaurant Comcast LLC v. Admiral Indem. Co.,
No. CV 20-1869, 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020) 18, 22

Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.,
17 F. Supp. 3d 323 (S.D.N.Y. 2014)..14, 19, 20, 26

Optical Services USA v. Franklin Mutual Insurance Co.,
No. BER-L- 3681-20, 2020 WL 5806576 (Aug. 13, 2020)..17

Oral Surgeons, P.C. v. The Cincinnati Ins. Co.,
No. 4-20-CV-222-CRW-SBJ, 2020 WL 5820552 (S.D. Iowa Sept. 29, 2020).......................19

Palmer Holdings & Investments, Inc. v. Integrity Ins. Co.,
No. 4:20-CV-154-JAJ, 2020 WL 7258857 (S.D. Iowa. Dec. 7, 2020)...................................19

Papasan v. Allain,
478 U.S. 265 (1986)..13

Pappy's Barber Shops, Inc. v. Farmers Group, Inc.,
No. 20-CV-907-CAB-BLM, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020) 19

Phila. Parking Auth. v. Federal Ins. Co.,
385 F. Supp. 2d 280 (S.D.N.Y. 2005) (no coverage for losses at airport
parking lot due to national grounding of planes related to 9/11 attacks since no
direct physical loss or damage)..20

Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.,
311 F.3d 226 (3d Cir. 2002)..2, 10, 11, 14

President v. Jenkins,
180 N.J. 550 (2004) 10

Princeton Ins. Co. v. Chunmuang,
151 N.J. 80 (1997) 10, 27

Promotional Headwear Int'l v. Cincinnati Ins Co,
No. 20-CV-2211-JAR-GEB, 2020 WL 7078735 (D. Kan. Dec. 3, 2020)..............................16

Rose's 1, LLC et al. v. Erie Ins. Exchange,
No. 2020 CA 002424 B, 2020 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020).........................19

Roundabout Theatre Co. v. Continental Cas. Co.,
302 A.D.2d 1 (N.Y. App. Div. 1 Dept. 2002)....20

S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.,
No. H-06-4041, 2008 WL 450012 (S.D. Tex. Feb. 15, 2008)....20

Sandy Point Dental Inc. P.C. v. Cincinnati Ins. Co.,
No. 20 CV 2160, 2020 WL 5630465 (N.D. Ill. Sept. 21, 2020)....15

Ski Shawnee, Inc. v. Commonwealth Ins. Co.,
No. 3:09-CV-02391, 2010 WL 2696782 (M.D. Pa. July 6, 2010)....21

Sosa v. Mass. Bay Ins. Co.,
458 N.J. Super. 639 (App. Div. 2019)....9

Stone v. Royal Ins. Co.,
211 N.J. Super. 246 (App. Div. 1986)....10

In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.,
No. 16-cv-5073, 2017 WL 4810801 (E.D. Pa. Oct. 25, 2017)....8

Terry Black's Barbecue v. State Automobile Mut. Ins. Co.,
No. 1:20-CV-665-RP, 2020 WL 7351246 (W.D. Tex. Dec. 14, 2020)....18

Timber Pines Plaza, LLC v. Kinsale Ins. Co.,
No. 8:15-CV-1821-T-17TBM, 2016 WL 8943313 (M.D. Fla. Feb. 4, 2016)....13

Tobias v. United States,
No. 13-6471 (PGS), 2014 WL 6693721 (D.N.J. Nov. 26, 2014)....8

Toppers Salon & Health Spa, Inc. v. Travelers Property Cas. Co.,
No. 2:20-CV-03342-JDW, 2020 WL 7024287 (E.D. Pa. Nov. 30, 2020)....17, 26

Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.,
No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020)....26

Uncork & Create, LLC, v. Cincinnati Ins. Co.,
No. 2:20-CV-00401, 2020 WL 643694 (S.D. W. Va. Nov. 2, 2020)....15, 16

United Airlines, Inc. v. Ins. Co. of State of Pa.,
385 F. Supp. 2d 343 (S.D.N.Y. 2005), *aff'd,* 439 F.3d 128 (2d Cir. 2006)....20

Washington Constr. Co. v. Spinella,
8 N.J. 212 (1951)....21

Weedo v. Stone–E–Brick, Inc.,
81 N.J. 233 (1979)....11

West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Co.,
No. 2:20-CV-05663-VAP-DFMx, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020) 19

Zwillo Corp. v. Lexington Ins. Co.,
No. 4:20-00339-CV-RK, 2020 WL 7137110 (W.D. Mo. Dec. 2, 2020) 15

Defendant American Guaranty and Liability Insurance Company ("AGLIC") submits this memorandum of law in support of its Motion to Dismiss the Complaint filed by Plaintiffs (collectively referred to as the "Briad Group"[1]).

I. INTRODUCTION

Plaintiffs, which operate various hotels and restaurant franchises, seek coverage under a first-party property commercial insurance policy issued by AGLIC, for alleged business interruption losses that they purportedly sustained because of the COVID-19 pandemic and the resulting "Stay-at-Home" orders issued by various state and local governments, which restricted the activities of non-essential businesses, to curb the further transmission of the SARS-CoV-2 virus that causes COVID-19. ECF No. 2, ¶ 42. Plaintiffs' coverage claim fails as a matter of law because Plaintiffs cannot demonstrate any "direct physical loss of or damage to" any insured property, which is a prerequisite for any coverage under the policy at issue (the "Policy").

As the overwhelming majority of Courts, including this one, have held in dismissing similar claims for business interruption coverage with prejudice, the purely economic losses incurred by policyholders due to the COVID-19 Stay-At-Home orders simply do not constitute the "direct physical loss of or damage to" property required by the insuring clause of the Policy. *See, e.g., Boulevard Carroll Entm't Group Inc. v. Fireman's Fund Ins. Co.*, No. CV2011771SDWLDW (D.N.J. Dec. 14, 2020) (slip op. at 3) (Wigenton, U.S.D.J.) (Ex. B) ("Plaintiff pleads that by forcing him to close his business, the Stay-At-Home Orders caused

[1] Plaintiffs are 34 LLCs operating under the Briad Group trademark umbrella. ECF No. 2, ("Complaint") at ¶ 36. In Count II of their Complaint, Plaintiffs seek reformation of the Policy to list the LLCs as named insureds. AGLIC does not dispute that the LLCs should be considered insureds and will enter into a stipulation to that effect, mooting any reformation claim.

plaintiff to lose income and incur expenses. This is not enough").[2]

Plaintiffs' vague, conclusory assertion about the potential existence of the virus on surfaces, or in the air within, or in the vicinity of their premises, ECF No. 2, ¶ 61, does not save Plaintiffs' complaint. First, Plaintiffs' unsupported speculation about the presence of the virus at some unidentified premises at some unidentified time are insufficient under the federal pleading standards. Second, even if this Court could presume the presence of the virus at any or all of Plaintiffs' properties, Plaintiffs' claim would still fail as a matter of law. It is well-settled in the Third Circuit that the mere presence of a potentially toxic substance or the general threat of future damage from its presence does not equate to "direct physical loss or damage to" property as required under the insuring language of a property insurance policy. To meet its burden, a plaintiff is required to plead, and ultimately prove, some "distinct and demonstrable" existing damage to the insured property or show that the substance has rendered the property completely useless or uninhabitable. Here, Plaintiffs' premises are structurally unchanged by the virus and remain habitable and usable, albeit subject to some public health restrictions to prevent the spread of the virus; thus, Plaintiffs have no viable claim for coverage. *See, e.g., Handel v. Allstate Ins. Co.,* No. CV 20-3198, 2020 WL 6545893, at *3 (E.D. Pa. Nov. 6, 2020) (dismissing COVID-19 business interruption insurance claim relying on *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002)).

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[2] *Id.* at n.2 (**collecting cases**). Indeed, the district courts within the Third Circuit have unanimously dismissed these claims on numerous grounds. *See ,e.g., infra*, pp. 12, 18-19 and 25-26. Further, a case tracker maintained by the University of Pennsylvania states that as of December 2, 2020, Courts across the country have dismissed over 75 such cases. An additional 137 cases were voluntarily dismissed by Plaintiffs, generally after a motion to dismiss was filed. *See* https://cclt.law.upenn.edu/2020/12/02/more-than-15-of-bi-cases-have-been-terminated-already-mostly-voluntarily.

The New Jersey Courts similarly have repeatedly rejected claims for Civil Authority coverage arising from the COVID-19 orders because, *inter alia*, these orders were not the result of any direct physical loss of or damage to property as required by the Policy to trigger coverage. *See, e.g. Mattdogg, Inc. v. Philadelphia Ins. Co.*, No. MER-L-820-20 (N.J. Super. Nov. 17, 2020) (slip op. at 8-9) (Ex. C); *Mac Property Group LLC v. Selective Fire & Cas. Ins. Co.*, No. CAM-L-2629-20 (N.J. Super. Nov. 5, 2020) (slip op. at 16) (Ex. D).

Lastly, even if Plaintiffs could demonstrate some direct physical loss of or damage to property due to the virus, there would still be no coverage for their claim because the Policy's "Contamination Exclusion" explicitly precludes coverage for loss due to "virus" and similar "disease causing or illness causing" substances. *See* Policy (Ex. A hereto) §§ 3.03.01.01, § 7.09[3]; *Boulevard Carroll Entm't Group Inc*, slip op. at 3, (enforcing similar exclusion holding that "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.")

In sum, while the COVID-19 pandemic and the resultant "Stay-at Home" orders meant to curb the further community spread of the virus have had an adverse economic impact on Plaintiffs' business operations, claims for such intangible economic damage simply are not within the scope of the property insurance policy issued by AGLIC. Accordingly, as Plaintiffs cannot state any claim for which relief may be granted and because no amendment can cure these deficiencies, this Court should dismiss the Complaint with prejudice.

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[3] With respect to insured property in Louisiana, this exclusion has been modified by a Louisiana Amendatory endorsement. That Louisiana Amendatory endorsement, however, is not at issue here because Plaintiffs do not claim any property damage in that state. Moreover, even if they had alleged a Louisiana loss, Plaintiffs still have not stated a viable claim because, as prerequisite, they cannot demonstrate any direct physical loss or damage.

II. FACTUAL BACKGROUND

A. The Allegations of the Complaint[4]

Plaintiffs, through various limited liability corporations, operate hotel and restaurant franchises in the United States under the T.G.I. Friday's, Wendy's, Zinburger, Marriott and Hilton brands. ECF No. 2, ¶¶ 49-50.

Plaintiffs allege that, starting in December 2019, the novel coronavirus, known as SARS-CoV-2, began spreading to humans in Wuhan, China, causing the disease known as COVID-19. *Id.* ¶ 54. Due to its highly contagious nature, the virus thereafter rapidly spread around the globe. *Id.* According to the Complaint, the virus is transmitted primarily via human-to-human interactions, but also may be transmitted to others through virus droplets landing on objects and surfaces from infected human carriers. *Id.* ¶¶ 56, 63. As a result of the COVID-19 outbreak spreading to the United States, the Center For Disease Control ("CDC") recommended, in late February 2020, that various preventive measures be implemented to help slow the spread of the virus to protect human health. *Id.* ¶ 59.

Plaintiffs claim that they suffered "a decrease in revenue as a result of the desire of patrons to avoid contracting the virus" at their locations, and because, in accordance with the CDC guidance, various state and local authorities in Pennsylvania, New Jersey and New York issued "Stay-At-Home" orders to limit person-to-person contact in order to curb the further transmission of the virus. *Id.* ¶ 66. These orders, *inter alia*, requested citizens work from home where possible, limited large gatherings and restricted non-essential in-person retail shopping. *Id.,* ¶ 68. Notably, hotels were considered essential businesses under these orders and were

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[4] The relevant allegations of the Complaint are set forth solely for the purposes of the present motion and are not admitted.

explicitly allowed to continue to operate. *See*, *e.g.,* Ex. E at 5 (New York Executive Orders and Guidance). Similarly, the orders specifically declared restaurants to be essential businesses, which were allowed to "operate their normal business hours" for take-out, delivery and drive-throughs, although there were limitations imposed on inside restaurant dining. ECF No. 2, ¶ 68 (New Jersey Executive Order 104); *see also* Ex. F (March 19, 2020 Pennsylvania Order) ("Businesses that offer carry-out, delivery, and drive-through food and beverage service may continue, so long as social distancing and other mitigation measures are employed to protect workers and patrons.")

Plaintiffs claim that they "experienced a significant loss of revenue" due to the COVID-19 outbreak and the resultant governmental orders. *Id.*¶ 81. The Complaint further includes the conclusory allegation that "[g]iven the nature of Plaintiff's various businesses, the spread of the Covid-19 virus led to physical loss and damage both within, and within the vicinity of, the various insured locations." *Id.* ¶ 60. This claim is based on the further conclusory allegation that the virus "existed on surfaces both found within the insureds' and surrounding premises, as well as in breathable air circulating within the insureds' and surrounding premises." *Id.* ¶ 61. Notably, Plaintiffs do not identify in the Complaint a single specific insured location (or indeed any relevant location) where the virus was ever actually detected at any time, let alone explain how the virus allegedly caused any "direct physical loss or damage" to any such property.

Plaintiffs submitted an insurance claim related to their alleged business interruption losses, which AGLIC denied on June 9, 2020. *Id.* ¶¶ 83. Plaintiffs have now instituted this breach of contract action alleging that AGLIC has breached the Policy by declining coverage.

B. The AGLIC Policy

AGLIC issued Policy No. ERP 0247816-01 to Plaintiffs, with an effective date of May 1,

2019. Ex. A. The Insuring Agreement of the Policy states that:

> This Policy insures against *direct physical loss of or damage* caused by a **Covered Cause of Loss**[5] to covered property, at an insured location … all subject to terms, conditions and exclusions stated in this Policy.

Policy, §1.01 (emphasis added).

The Policy also covers certain Time Element losses, *i.e.,* the loss of business income resulting from the suspension of the policyholder's business activities, subject to the policy terms and conditions. But, there is no business income coverage without the required direct physical loss of or damage to insured property. Specifically, the Business Interruption coverage provision states:

> The company will pay for the actual Time Element Loss the insured sustains, as provided in the Time Element Coverages, during the Period of Liability.[6] The Time Element loss must result from the necessary **Suspension** of the Insured's business activities at an Insured Location. The **Suspension** *must be due to direct physical loss of or damage to property (of the type insured under this Policy other than* ***Finished Stock****) caused by a* ***Covered Cause of Loss*** *at the* ***Location****.*

Id. §4.01.01 (emphasis added).

Similarly, the Policy covers "Extra Expense" incurred "*due to direct physical loss of or damage*" "caused by a **Covered Cause of Loss**." *Id.* §4.02.03 (emphasis added).[7]

The Policy also includes the following business interruption "Special Coverage," under which Plaintiffs have asserted claims, related to direct physical loss or damage to third-party property:

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[5] The Policy uses bold type for defined terms. Covered Cause of Loss is defined as "[a]ll risks of direct physical loss of or damage from any cause unless excluded." Policy, §7.11.

[6] The "Period of Liability" for insured building and equipment means "[t]he period starting from the time of physical loss or damage … and ending when with due diligence and dispatch the building and equipment could be repaired and replaced." *Id.* §4.03.01.01.

[7] "Extra Expense" is defined at "that amount spent to continue the Insured's business activities over and above the expenses the Insured would have normally incurred *had there been no direct physical loss of or damage* caused by a Covered Cause of Loss to Property of the type insurable under this Policy at a Location. *Id.* (emphasis added).

> CIVIL OR MILITARY AUTHORITY
>
> The Company will pay for the Actual Time Element loss sustained by the Insured, as provided by the Policy, resulting from the necessary **Suspension** of the Insured's business activities at an insured location if the **Suspension** is caused by order of a civil or military authority that prohibits access to the **Location**. *That order must result from a civil authority's response to a direct physical loss of or damage caused by a **Covered Cause of Loss** to property* not owned, occupied, leased or rented by the Insured under this Policy and located within the distance[8] of the Insured's location as stated in the Declarations.

Id. §5.02.03 (emphasis added).

The Civil Authority coverage, like all other coverages under the Policy, requires a threshold showing of direct physical loss or of damage to specified property.

The Policy also contains various relevant exclusions. Section 3.03 of the Policy sets forth exclusions which apply to all coverage parts under the Policy. Specifically, Section 3.03.01.01 states, in pertinent part:

> This Policy excludes the following unless it results from direct physical loss or damage not excluded by this Policy:
>
> **Contamination,** and any cost due to **Contamination**, including the inability to use or occupy the property, or any cost of making property safe or suitable for use or occupancy.

The term "Contamination" is defined in the Policy as "any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen, pathogenic organism, bacteria, *virus*, disease causing or illness causing agent, **Fungus,** mold or mildew." *Id.* §7.09 (emphasis in italics added).

The Policy also expressly excludes coverage for any "[l]oss or damage arising from delay, loss of market, or loss of use" and "[i]ndirect or remote loss or damage." *Id.* §3.03.02.01, §3.03.02.02. Moreover, Section 3.03.01.03 of the Policy excludes:

> Loss or damage arising from the enforcement of any law, ordinance, regulation or

[8] The Declarations require that any such third-party property be located within 5 miles of the insured premises. Policy, §2.03.08.

> rule regulating or restricting the construction, installation, repair, replacement, improvement, modification, demolition, occupancy, operation or other use, or removal including debris removal of any property.

III. LEGAL STANDARD

A. Legal Standard for Rule 12(b)(6) Motion

To state a viable claim, a plaintiff must allege more than "labels and conclusions," "formulaic recitation of the elements of a cause of action," or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." Fed. R. Civ. P. 8(a)(2); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Instead, a complaint must plead sufficient well-pleaded factual matter to raise a right to relief above the speculative level. *Iqbal*, 556 U.S. at 678. A "formulaic recitation of the elements" of a claim is insufficient. *Id.*

In determining whether a complaint sufficiently states a claim for relief, the Court applies a two-part test. First, the Court must "peel away those allegations that are no more than conclusions, and thus not entitled to the assumption of truth." *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2014); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009). Second, the Court must then determine whether any remaining well-pleaded facts alleged in the complaint are "sufficient to show that the Plaintiffs has a 'plausible claim for relief.'" *Fowler,* 578 F.3d at 211; *Tobias v. United States*, No. 13-6471 (PGS), 2014 WL 6693721, at *5–6 (D.N.J. Nov. 26, 2014). In making this determination, the Court may draw on its judicial experience and common sense. *Iqbal,* 556 U.S. at 679; *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, No. 16-cv-5073, 2017 WL 4810801, at *9 (E.D. Pa. Oct. 25, 2017).

A claim is plausible "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. A complaint does not show an entitlement to relief when the well-pleaded facts do not allow the court to infer more than the mere possibility of relief. *Id.* Moreover, "when the allegations of the complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly,* 550 U.S. at 558 (citations and quotations omitted).

When ruling on a motion to dismiss, the Court may consider documents that are attached to the complaint[9] and any "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case." *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006); Fed R. Civ. P. 10(c). As such, this Court may consider the Complaint, the Policy, and the "Stay-At-Home" orders, which Plaintiffs rely upon in the Complaint, as well as any similar matters of public record about which the Court can properly take judicial notice. Moreover, a court "need not accept allegations as true that are contradicted by the documents upon which a party's claims are based." *Horan v. Reliance Standard Life Ins. Co.,* No 12-7802 (JAP), 2014 WL 346615, at *4 (D.N.J. Jan. 30, 2014).

B. Legal Standard For Interpreting Insurance Contracts

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

[9] In the Complaint, Plaintiffs reference Exhibits A and B. No such exhibits, however, were in fact filed with the Court.

parts so as to accord a reasonable meaning to its terms." *Stone v. Royal Ins. Co.*, 211 N.J. Super. 246, 248 (App. Div. 1986). The Court should 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) (internal quotation marks and citations omitted).

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*, 311 F.3d at 235 (citing *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 116 N.J. 517, 562 A.2d 208, 214 (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, a court should interpret the policy language "according to its plain and ordinary meaning." *Id*. "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).

In an insurance coverage matter, where the well-pleaded factual allegations of a complaint, taken as true, clearly cannot state a claim for coverage under a policy, dismissal is

appropriate. *See Holiday Vill. E. Home Owners Ass'n, Inc. v. QBE INS Corp.*, 830 F. Supp. 2d 24, 28 (D.N.J. 2011), *aff'd*, 517 F. App'x 113 (3d Cir. 2013).

IV. ARGUMENT

A. There is No Direct Physical Loss of or Damage to Any Covered Property

To state a viable claim, 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–Brick, 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").[10]

Accordingly, Plaintiffs must plead a plausible claim setting forth the existence of "direct physical loss of or damage caused by a covered cause to covered property at an insured location." Further, to assert a claim for business interruption losses under the Time Element Coverage contained in the Policy, Plaintiffs must properly plead, and ultimately prove, that 1) they suffered a direct physical loss of or damage to insured property; 2) any claimed suspension

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[10] Plaintiffs may argue that this burden is somehow less with respect to an "All Risk" Policy. But, the Third Circuit has specifically rejected such arguments holding that:

> "all-risks" does not mean "every risk." As Judge Friendly stated ...."[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...."

Port Auth. of New York & New Jersey, 311 F.3d at 234; *GTE Corp. v. Allendale Mut. Ins. Co.,* 258 F.Supp.2d 364, 373 (D.N.J. 2003) ("all risk policies are not 'all loss' policies").

of business activities was due to such a direct physical loss of or damage to Insured Property; and 3) such direct physical loss of or damage resulted from a Covered Cause of Loss.

"The requirement that the loss be 'physical', given the ordinary definition of that term, is widely held to exclude 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." 10A Couch on Ins. §148:46 (3d Ed. 2020).

1. The Alleged Presence of the Virus is Neither Direct Physical Damage to Property Nor Direct Physical Loss of Property

The district courts within the Third Circuit have uniformly dismissed business interruption claims similar to the claim asserted by Plaintiffs in the instant case. *See, e.g.*, *Handel*, 2020 WL 6545893, at * 2 (no physical loss or damage because plaintiff's property remained inhabitable and plaintiff could not plausibly plead any physical damage to property); *4431 Inc. v. Cincinnati Ins. Co.,* No. 5:20-CV-04396, 2020 WL 7075318, at *12 (E.D. Pa. Dec. 23, 2020) (no coverage since there are no allegations that the covered premises have been physically altered and because Plaintiffs "maintain the ability to operate at their premises, albeit on a limited basis"); *Kessler Dental Assoc. v. Dentists Ins. Co.*, No. 2:20-CV-03376-JDW, 2020 WL 7181057, at * 4 (E.D. Pa. Dec. 7, 2020 (claim that enclosed buildings were susceptible to contamination and that Plaintiffs were forced to close their business were dismissed as there was no plausible claim of any actual damage, and structure was inhabitable and usable, albeit on a limited basis).

Here, Plaintiffs vaguely assert that "given the nature of their business", the presumed "existence" of the virus on surfaces or in the air "within or within the vicinity" of their premises led to "physical loss of or damage to" their property. ECF No. 2, ¶¶ 60-61. Such conclusory

allegations are clearly insufficient. Indeed, a 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); *Timber Pines Plaza, LLC v. Kinsale Ins. Co*., No. 8:15-CV-1821-T-17TBM, 2016 WL 8943313 (M.D. Fla. Feb. 4, 2016) (it is not sufficient to plead that the plaintiffs has suffered damages in the form of "direct physical damage to its property"); *Kessler,* 2020 WL 7181057, at * 4 (conclusory assertion that "Covid-19 caused direct physical loss of or damage to its business" is not entitled to the presumption of truth).

Plaintiffs' Complaint is noticeably devoid of any factual support for their bare-boned assertion. They do not identify even one insured location where the virus was alleged to be present, let alone set forth how any property was allegedly damaged.[11] Instead, the Complaint merely speculates about the potential existence of the virus within the general vicinity of Plaintiffs' premises, and then presumes damage, at every insured location based on nothing but the pervasive spread of the virus in the United States. Consequently, the Complaint fails to set forth a plausible claim for relief. Moreover, even if the Court could assume the "existence" of the virus on surfaces or in the air at any, or even all, insured locations, it is well-settled that the mere presence of the virus does not constitute the "direct physical loss of or damage to" property required for coverage as a matter of law.

In addition to the uniform decisions by district courts in this circuit on similar Covid-19 related claims, the Third Circuit, applying New Jersey law, has specifically rejected the arguments the Plaintiffs make here in the context of a microscopic toxic substance not visible to

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[11] While Plaintiffs reference in the Complaint certain newspaper articles and CDC documents, such documents merely set forth general information (which has been subject to change) about the SARS-CoV-2 virus and COVID-19, and do not even purport to set forth or address in any way the supposed presence of any virus at any Insured Location, let alone any specific property damage to any insured property.

the human eye, such as the virus. *See Port Auth.*, 311 F.3d at 236. In reaching this decision, the court looked at the "plain and ordinary meaning" of the relevant insuring clause. It held that "[i]n ordinary parlance and widely accepted definition, physical damage to property means a distinct, demonstrable, and physical alteration of its structure." *Id.* at 235. The court further noted that while "[f]ire, water, smoke and impact from another object are typical examples of physical damage from an outside source that *may* demonstrably alter components of a building and trigger coverage; Physical damage to a building as an entity by *sources unnoticeable to the naked eye must meet a higher threshold*." *Id.* at 236 (emphasis added).

The *Port Authority* court also addressed the term "physical loss" and again held that the mere presence of an alleged toxic substance, did not suffice to set forth a claim.

> When the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner. However, if asbestos is present in components of a structure, but is not in such form or quantity as to make the building *unusable*, the owner has not suffered a loss. The structure continues to function—it has not lost its utility. … *The mere presence of asbestos, or the general threat of future damage from that presence, lacks the distinct and demonstrable character necessary for first-party insurance coverage.*

Id. at 236 (emphasis added); *see also Motorists Mut. Ins v. Hardinger,* 131 Fed. App'x 823, 826-27 (3d Cir. 2005) (holding that, under *Port Authority* standard, the insured must show not only that a toxic substance was present, but also that the "functionality of the property was nearly eliminated or destroyed, or … made useless or uninhabitable"); *see also Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 330 (S.D.N.Y. 2014) (plaintiffs must show that the alleged substance has distinctly and demonstrably compromised the physical integrity of the premises or rendered the entire structure *uninhabitable or unusable* by the policyholder). Thus, under *Port Authority*, Plaintiffs cannot state a claim unless they can set forth a plausible claim that specific insured property suffered some distinct and demonstrable

tangible damage due to the virus or, alternatively, that the virus rendered the property completely useless or uninhabitable.

Outside the Third Circuit, the overwhelming majority of courts addressing business losses from government orders issued in response to COVID-19 have also dismissed those claims because the virus does not cause direct physical loss of or damage to property. S*ee, e.g., Sandy Point Dental Inc. P.C. v. Cincinnati Ins. Co*., No. 20 CV 2160, 2020 WL 5630465, at *3 (N.D. Ill. Sept. 21, 2020) ("The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property. Consequently, plaintiff has failed to plead a direct physical loss—a prerequisite for coverage."); *Uncork & Create, LLC, v. Cincinnati Ins. Co.,* No. 2:20-CV-00401, 2020 WL 643694, at *5 (S.D. W. Va. Nov. 2, 2020) ("even when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies); *Zwillo Corp. v. Lexington Ins. Co.,* No. 4:20-00339-CV-RK, 2020 WL 7137110, at *6 (W.D. Mo. Dec. 2, 2020) ("Whether the complaint is couched in terms of COVID-19's presence on the premises or of loss of use of premises due to the "Stay-At-Home" (or the virus itself), Plaintiff has failed to state a claim upon which relief may be granted").

Plaintiff also cannot plausibly claim that the presence of the virus rendered any location completely unusable or unfit for human occupancy. Countless facilities and locations throughout the nation have confirmed the presence of the virus – hospitals, nursing homes and other medical clinics being amongst them – yet the facilities continued to remain fully habitable and functional. Moreover, the very same "Stay-At-Home" orders that Plaintiffs cite in the Complaint specifically *allowed,* and indeed, encouraged, the continued operation of Plaintiffs' hotels and restaurants, regardless of the presence of the virus. *See, e.g*. Ex. E-G. Accordingly, Plaintiffs maintained the ability to use their premises as hotels and restaurants, at all times, regardless of the presence of

the virus, albeit subject to social distancing restrictions. *4431 Inc.,* 2020 WL 7075318, at *11 ("premises must be uninhabitable and unusable, or nearly as such, [thus] the ability to operate in almost any capacity, even on a limited basis, precludes coverage").

Tellingly, Plaintiffs do not allege any needed repair or replacement of any insured property. This is because, as the Center for Disease Control ("CDC") website cited by Plaintiffs, sets forth, the virus, even if present, not only degrades on its own in a relatively short period of time but also can be removed or neutralized through routine cleaning of surfaces with standard household cleaners.[12] The need for cleaning with standard household disinfectants is not property damage and does not trigger coverage. *Promotional Headwear Int'l v. Cincinnati Ins Co*, No. 20-CV-2211-JAR-GEB, 2020 WL 7078735, at *8 (D. Kan. Dec. 3, 2020)) ("even assuming that the virus physically attached to covered property, it did not constitute the direct, physical loss or damage required to trigger coverage because … routine cleaning and disinfecting can eliminate the virus on surfaces"); *Uncork & Create, LLC*, 2020 WL 6436948, at *5 ("Because routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover); *Mama Jo's Inc. v. Sparta Ins. Co.*, No. 18-12887, 2020 WL 4782369 at *8 (11th Cir. Aug. 18, 2020) ("an item or structure that merely needs to be cleaned has not suffered a "loss" which is both "direct" and "physical"); *Universal Image Prods. Ins.*, 475 Fed App'x 569, 574 n. 8 (6th Cir. 2012) (the need for basic cleaning with "hot water" and "Lysol type" products does not constitute physical loss or damage).

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[12] *See also Aerosol and Surface Stability of SARS-CoV-2 as Compared to SARS-CoV-1*, (https://www.nejm.org/doi/pdf/10.1056/NEJMc2004973?articleTools=true).

This lack of any needed repair or replacement of insured property is especially significant with respect to Plaintiffs' claim for business interruption coverage, because the Policy covers business interruption loss only when Suspension is due to direct physical loss of or damage to insured property. Policy, §4.01.01. Indeed, the business interruption coverage 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 and replaced.*" *Id.* § 4.03.01.01 (emphasis added). Here, there could be no Period of Liability, and hence no coverage, because there is no insured property that needed to be repaired or replaced because of any alleged temporary presence of the virus. *See, e.g. Toppers Salon & Health Spa, Inc. v. Travelers Property Cas. Co.*, No. 2:20-CV-03342-JDW, 2020 WL 7024287, at *4 (E.D. Pa. Nov. 30, 2020) (no business interruption coverage where there were no allegations of property subject to repair or replacement because of virus).[13]

2. The "Stay-At- Home" Orders Do Not Cause "Direct Physical Loss" of Property

The real crux of Plaintiffs' complaint appears to be their contention that they are entitled to "business interruption" coverage because their revenues have decreased due to the reduction in traffic to their properties, arising from the COVID-19 crisis and, specifically, the virus

[13] To prevent dismissal of its claim, Plaintiffs are likely to cite to the denial of a motion to dismiss a COVID-19 related claim by the New Jersey Superior Court in *Optical Services USA v. Franklin Mutual Insurance Co.*, No. BER-L- 3681-20, 2020 WL 5806576 (Aug. 13, 2020). That case was the first decided under New Jersey law and is now the outlier, even in New Jersey where the majority of Courts have declined to follow it and, instead, have dismissed COVID-19 business interruption claims. Moreover, *Optical Services* did not hold that coverage applied, but simply denied a motion to dismiss without discussing the multitude of decisions reaching the opposite conclusion. Further, even if the case could stand for the proposition that an allegation of the mere presence of the virus is sufficient to state a claim, this Court is bound by the contrary Third Circuit's decision in *Port Authority.* Accordingly, any reliance by Plaintiffs on this anomalous lower court decision is simply misplaced as Plaintiffs have not, and cannot, meet the high threshold set forth by the Third Circuit as a matter of law.

prevention measures imposed by the "Stay-At-Home" orders and adopted by the public at large. ECF No. 2, ¶ 66- 68. Such purely economic losses, which do not arise from any tangible physical damage to any insured property, simply are not within the scope of the Policy, which responds only to actual physical loss of or damage to property and the resulting consequences of such loss or damage (for example, a fire and the subsequent necessary business closure while any damage from such fire is being repaired). *See, e.g. Terry Black's Barbecue v. State Automobile Mut. Ins. Co.*, No. 1:20-CV-665-RP, 2020 WL 7351246, at * 5 (W.D. Tex. Dec. 14, 2020) ("property insurance coverage is triggered by some threshold concept of physical loss or damage to the covered property"). In short, the Policy does not cover "loss of market" or any purported "loss of use", §3.03.02.01, it only covers "direct physical loss of or damage to" insured property.

For this reason, this Court already has rejected an essentially identical "loss of income" claim for a business which was required to fully close under the COVID-19 "Stay-At-Home" orders (which is not true for either Plaintiffs' hotels or restaurants, which were allowed to operate with restrictions). *Boulevard Carroll Entm't Group Inc*, slip op. at 3. This Court's ruling is in accord with the decisions of the vast majority of courts across the country with respect to virtually identical claims. As the Southern District of New York recently stated:

> As a result of COVID-19 closure orders throughout the country, many businesses have brought lawsuits claiming entitlement to coverage under provisions materially similar to those at issue … here. And nearly every court to address this issue has concluded that loss of use of a premises due to a governmental closure order does not trigger business income coverage premised on physical loss to property.

Michael Cetta, Inc. d/b/a Sparks Steak House v. Admiral Indemnity Co., No. 20 CIV. 4612 (JPC), 2020 WL 7321405, at *8 (S.D.N.Y. Dec. 11, 2020) (collecting cases); *see also 4431 Inc.*, 2020 WL 7075318, at * 12 ("Plaintiffs' loss of business income as a result of COVID-19 and the Governor's Orders does not constitute direct physical loss under the Policies"); *Newchops*

Restaurant Comcast LLC v. Admiral Indem. Co., No. CV 20-1869, 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020) (economic losses from closure orders are not physical loss or damage under the Policy); *West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Co*., No. 2:20-CV-05663-VAP-DFMx, 2020 WL 6440037, at *4 (C.D. Cal. Oct. 27, 2020)("detrimental economic impact alone … is not compensable under a property insurance contract"); *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.,* No. 20-CV-907-CAB-BLM, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020) ("Plaintiffs are not the first policyholders to argue in court that government orders forcing their business to stop operating as a result of the COVID-19 pandemic triggers insurance … most courts have rejected these claims finding that the government orders did not constitute direct physical loss or damage to property."); *Palmer Holdings & Investments, Inc. v. Integrity Ins. Co*., No. 4:20-CV-154-JAJ, 2020 WL 7258857, at *10 (S.D. Iowa. Dec. 7, 2020); *Maluabe LLC v. Greenwich Ins. Co*., No. 20-22615-CIV, 2020 WL 5051581, at *7 (S.D. Fla. Aug. 26, 2020); *Rose's 1, LLC et al. v. Erie Ins. Exchange,* No. 2020 CA 002424 B, 2020 WL 4589206, at *2 (D.C. Super. Ct. Aug. 6, 2020); *Oral Surgeons, P.C. v. The Cincinnati Ins. Co.*, No. 4-20-CV-222-CRW-SBJ, 2020 WL 5820552 (S.D. Iowa Sept. 29, 2020).

These holdings are consistent with the holdings of numerous other courts that previously considered substantially the same argument in other contexts. Where the cause of the suspension is a generalized external or extrinsic force, which merely limits access to the property, courts have routinely held that coverage has not been triggered because there has been no direct physical loss or damage to insured property. *See, e.g., Newman Meyers Kreines Gross Harris, P.C. v. Great N. Ins. Co.,* 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) (widespread power outages due to Superstorm Sandy that rendered office space inaccessible). As the *Newman* Court noted:

> The words "direct" and "physical" which modify the phrase "loss or damage" ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced

> closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure."

Id.; see also United Airlines, Inc. v. Ins. Co. of State of Pa., 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005), *aff'd,* 439 F.3d 128 (2d Cir. 2006) ("The inclusion of the modifier 'physical' before 'damages' . . . supports [defendant's] position that physical damage is required before business interruption coverage is paid."); *Phila. Parking Auth. v. Federal Ins. Co.,* 385 F. Supp. 2d 280 (S.D.N.Y. 2005) (no coverage for losses at airport parking lot due to national grounding of planes related to 9/11 attacks since no direct physical loss or damage); *Roundabout Theatre Co. v. Continental Cas. Co.*, 302 A.D.2d 1, 7 (N.Y. App. Div. 1 Dept. 2002) (no "direct physical loss" as a result of the city-mandated closure which denied insured access to its property); *Bros. Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611, 613 (D.C. 1970) (business fall off resulting from the imposition of a government curfew following the assassination of Martin Luther King, Jr. which prohibited operation of the premises after 5:30 PM was not a "direct loss"). Similarly, there is no coverage for community-wide orders meant to *prevent potential future* harm or injury. *See, e.g., S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.,* No. H-06-4041, 2008 WL 450012, at *10 (S.D. Tex. Feb. 15, 2008) ("[b]ecause the mandatory evacuation order for Wharton County was issued due to the anticipated threat of damage to the county and not due to property damage that had occurred in Florida and the Gulf of Mexico, [the insured's] business [income] losses are not covered by [the] policy."); *Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, No. 4:19-cv-00693-SAL, 2020 WL 886120, at *8 (D.S.C. Feb. 24, 2020) (same).

As these cases make clear, "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. *See* 10A Couch on Ins. § 148:46 (3d Ed. 2020). To hold otherwise would effectively treat the words "direct" and

"physical" in the policy's insuring agreement as meaningless surplusage, which the Court cannot do. *See Washington Constr. Co. v. Spinella*, 8 N.J. 212, 217 (1951) (stating that "all parts of the writing and every word of it will, if possible, be given effect" by a court).

3. Plaintiffs Cannot Show Any Suspension of Business Was Due to Direct Physical Loss of or Damage to Property

Plaintiffs' claim for business interruption losses under the Time Element Coverage suffers from another insurmountable and fatal deficiency. 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 of or damage to insured property. Thus, even if Plaintiffs could argue some plausible physical loss or damage, if 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 of their business was not due to any damage to specific insured property, but, instead, was the result of prophylactic community-wide "Stay-At-Home" orders, which were issued in order to curb the person-to-person transmission of the virus that causes COVID-19. ECF No. 2, ¶ 66. Plaintiffs cannot, therefore, show the necessary causation required by the Time Element Coverage and, as a result, they have no plausible claim for business interruption losses. *See, e.g., Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, No. 3:09-CV-02391, 2010 WL 2696782, at *4 (M.D. Pa. July 6, 2010) ("Business Income" coverage "does not apply because the loss at issue from the "suspension" of Plaintiff's "operations" was not the result of a "direct physical loss of or damage to property at the covered premises.").

B. The Civil Authority Coverage is Not Triggered Because There is No Prohibition of Access to the Insured Property.

To state a claim under the Civil Authority Coverage provision of the Policy, § 5.02.03, Plaintiffs must show (1) "an order of a civil … authority that prohibits[14] access to the" insured property, and (2) that such access was prohibited as the result of physical loss or damage caused by a covered cause of loss to a third-party property within five miles of its locations.

First, it simply cannot be disputed that the "Stay-At-Home" orders did not, and do not, prohibit access to Plaintiffs' properties. Hotels were explicitly designated as "essential businesses" under the relevant orders and were specifically allowed to continue to fully operate as hotels during the pandemic. Further, plaintiffs and customers were also specifically allowed to access Plaintiffs' restaurants for take-out, drive-through, and pick-up orders, even though inside dining was subject to limitation. Thus, by its own terms, the Civil Authority provision is inapplicable. *See 4431, Inc.,* 2020 WL 7075318, at *13 ("plaintiff's ability to continue limited takeout and delivery operations at the premises precludes coverage under the civil authority provision; a prohibition of access to the premises, which is a prerequisite to coverage, is not present"); *Michael Cetta, Inc. d/b/a Sparks Steak House.*, 2020 WL 7321405, at *12 ("[t]he fact that Sparks could have continued to operate its restaurant in some capacity is fatal to Sparks' claims for civil authority coverage").[15]

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[14] Prohibit is commonly defined as "to forbid by authority." https://www.merriam-webster.com/dictionary/prohibit.

[15] It should also be noted that mere regulation of use of property by governmental authorities, as opposed to prohibition of access, would not be covered due to exclusion for "loss or damage arising from the enforcement of any law, ordinance, or rule regulating or restricting … use … of any property." Policy, § 3.03.01.03. *See Newchops*, 2020 WL 7395153, at * 8 (holding the COVID-19 shutdown orders regulating the use of the insured properties are not a covered cause of loss under the Civil Authority provisions.)

Even if access to Plaintiffs' premises had been prohibited by these orders, Plaintiffs cannot demonstrate that the orders were the result of any "physical loss of or damage" to any identified third-party property within five miles of any insured premises. Plaintiff's naked assertion, without any factual support, that "physical loss and damage existed … on surfaces within surrounding premises, as well as in the breathable air circulating" in such surrounding premises does not plausibly state any claim under the federal pleading standards. ECF No. 2, ¶ 61. Furthermore, as discussed above, the mere alleged presence of the virus at third-party locations does not constitute the requisite direct physical loss or damage. Simply put, there is no plausible support for any claim that the SARS-CoV-2 virus has caused direct physical loss or damage to any relevant third-party property. *See Mac Property Group, LLC*, slip op. at 16 (holding that civil authority provision is not triggered where there is no direct physical loss or damage to property from the virus which resulted in the order of civil authority).

Lastly, even the most cursory review of the Civil Authority orders demonstrates that these orders were not issued in "response" to any specific physical loss or damage to any identifiable property. Instead, they were issued in response to a broad public health crisis and aimed at limiting person-to person interactions in order to "flatten the curve" with respect to the COVID-19 cases so as to protect human health and lives by limiting the future transmission of the virus. *See* Ex. G, NJE107 (The "Whereas" clauses of the Order focus on the need for New Jersey to institute extreme "social mitigation measures" so as to limit person-to person transmission of a dangerous virus that can result in the loss of human life). Plaintiffs' cherry-picking of orders that make a cursory, unsupported reference to "property damage" does not alter

that reality or the undeniable impetus for the orders.[16] *See Baker v. Oregon Mut. Ins. Co.*, 2021 WL 24841, at *2 (N.D. Cal. Jan. 4, 2021) (holding that closure orders do not constitute physical loss or damage even when the mayors of San Francisco and Los Angeles stated that they issued the closure orders because the virus was "causing property loss or damage due to" its attachment to surfaces); *Mattdogg, Inc*., slip op. at 8-9, (dismissing similar claims since "Plaintiff alleges no facts establishing any nexus between damage to nearby property and Governor Murphy's orders"); *Kessler*, 2020 WL 7181057, at *4 (dismissing civil authority claim since, *inter alia*, the Pennsylvania COVID-19 orders were not due to damage to a nearby premise, but implemented "to help stop the spread of covid").

C. The Contamination Exclusion Also Bars Plaintiffs' Claims

Each of the coverage parts under which Plaintiffs make their claim specifically require that any direct physical loss or damage must be caused by a Covered Cause of Loss, which is defined as all risks of direct physical loss of or damage "unless excluded." Policy, § 7.11. Among the exclusions in the Policy, prominently set forth in the section explicitly labeled "Exclusions," is the Contamination Exclusion, Policy § 3.03.01.01, 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 . . ." *Id.* [17]

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[16] Such conclusory assertions are not entitled to any presumptive effect because (a) there is no scientific basis to conclude (or even a scientific theory) that a virus physically damages plaintiffs' property); thus, they cannot survive the *Twombly* plausibility standard any more than Plaintiffs' own conclusory allegations, and (b) the language of a civil order cannot substitute for or bind the Court's decision-making role.

[17] These exclusions apply to the Time Element Coverage, not only through the use of the term "Covered Cause of Loss", but also through §4.02.06, which incorporates all exclusions "set forth elsewhere in this Policy."

"Contamination" is further specifically defined in the Policy, in pertinent part, as "Any condition of property due to the actual presence of any . . . ***virus*** [or] disease causing or illness causing agent." *Id.* § 7.09 (emphasis added).

Plaintiffs allege that the SARS- CoV-2 virus is a "virus," making the exclusion applicable to their claim. ECF No. 2, ¶ 53 ("It is beyond cavil that the world is currently experiencing a global pandemic caused by a novel coronavirus (specifically SARS-CoV-2")). Plaintiffs further concede in their complaint that all their claimed losses are allegedly caused by the virus and the resultant Stay-at-Home orders. ECF No. 2, ¶ 60 ("the spread of the Covid-19 virus led to physical loss or damage both within and within the vicinity of the various insured locations"); ¶67 (claiming the civil authority orders were predicated, in part, on the effect of the presence of the virus within enclosed highly trafficked areas). Indeed, as this Court has previously held in enforcing a substantially similar virus exclusion, "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." *Boulevard Carroll Entm't Group Inc*, slip op. at 3.

Thus, Plaintiffs' claim falls squarely within the terms of the virus exclusion. Further, Plaintiffs, who inexplicably ignored the existence of this exclusion in their Complaint, have not set forth any reason why this exclusion should not be enforced by the Court as written to preclude coverage.

Indeed, an ever-growing number of courts, including this Court, have routinely enforced substantially identical exclusions to preclude coverage for claims arising from the COVID-19 pandemic and the associated Stay-At-Home Orders. *Id.; see also Mattdogg, Inc*., slip op. at 8, ("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"); *Handel,* 2020 WL

6545893, at *4 (exclusion that precluded coverage for loss caused by "any virus …or other microorganism capable of inducing physical distress, illness or disease" "unambiguously bars coverage for claims due to Covid-19"); *Toppers Salon & Health Spa*, 2020 WL 7024287, at * 3 (same); *Kessler Dental Associates, P.C.* , 2020 WL 7181057, at *3 (virus exclusion "applies to Covid-19, which is caused by a coronavirus that causes physical illness or distress"); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04423-AB-SK, 2020 WL 5938689, at *5 (C.D. Cal. Oct. 2, 2020) ("The virus provision clearly and unequivocally exempts "loss or damage caused by or resulting from any virus'"); *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co*., No. 20-11655, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020)("the Virus Exclusion bars coverage for any loss that would not have occurred but for some "[v]irus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness, or disease."); *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-AS, 2020 WL 6749361, at *3 (C.D. Cal. Nov. 13, 2020) (the virus exclusion forecloses coverage where loss or damage is "caused by or resulting from any virus"); *Dime Fitness, LLC v. Markel Ins. Co*., No. 20-CA-5467, 2020 WL 6691467, at *5 (Fla. Cir. Ct. Nov. 10, 2020) (dismissing claim based on exclusion which precludes coverage for damages "caused by or resulting from" a virus); *Diesel Barbershop LLC, v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020); *Mauricio Martinez DMD, P.A. v. Allied Insur. Co. of America,* No. 220CV00401FTM66NPM, 2020 WL 524018 (M.D. Fla. Sept. 2, 2020); *Gavrilides Management Co. LLC v. Michigan Ins. Co.*, 2020 WL 4561979 (Mich. Cir. Ct. July 21, 2020).

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).

V. CONCLUSION

For the reasons set forth above, Defendant American Guaranty and Liability Insurance Company respectfully requests that Plaintiffs' Complaint be dismissed with prejudice in its entirety since Plaintiffs have failed to state any cognizable claim, and any amendment of Plaintiffs' Complaint would be futile.

Date: January 7, 2020

Respectfully submitted,

/s/Susan M. Kennedy