IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Case No.: 1:21-cv-00309-CCE-JLW

NOVANT HEALTH, INC.,

Plaintiff,

v.

AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY,

Defendant.

NOVANT'S OPPOSITION TO ZURICH'S MOTION TO DISMISS

I. Introduction

The Court should deny Zurich's motion for two independent reasons. First, Zurich's position is based on an erroneous interpretation of the policy, which would require the Court to rewrite the language. Second, Zurich's arguments ignore Novant's specific allegations, contrary to the motion to dismiss standard.

As to the first problem, Zurich's principal argument is about the loss or damage requirement. The starting point is the policy; it covers "physical loss of or damage to" property. Zurich asks this Court to rewrite the policy to artificially limit "physical loss of or damage to" to only "an actual, demonstrable, and tangible alteration to the physical structure of property." In contrast, Novant asks the Court to apply the language as written; the loss or damage requirement is satisfied when Novant is unable to use property for its intended use directly resulting from an external cause.

The second problem with Zurich's argument is that Zurich ignores Novant's allegations, which are accepted as true on a motion to dismiss. Novant alleged that the presence of COVID-19 resulted in Novant's inability to use its property for its intended purpose. In addition, Novant alleged that the presence of COVID-19 damaged property, both surfaces and air, by making them unsafe for humans. At this stage, those allegations are sufficient, and they will be borne out in discovery, which Zurich hopes to avoid.

Zurich's arguments about the contamination exclusion fare no better. It claims that exclusion bars coverage because "contamination" was initially defined to include virus. The original definition may well be where the analysis begins but is not where it ends. The Court should interpret the entire policy, not just parts of it. That is particularly relevant here because an endorsement removed the word virus from the definition of "contamination."

Accordingly, as further shown below, the Court should deny Zurich's motion.

II. Statement of Facts

Zurich drafted and sold an "all risks" insurance policy to Novant. Doc. 8 ¶¶ 53, 56. In March 2020, Novant began to incur significant losses and expenses due to COVID-19. *Id.* ¶¶ 72-83; *see also* § III.A.3 (detailing Novant's allegations). Novant reported its claim to Zurich, and Zurich denied coverage. *Id*. at ¶¶ 52, 153-168. This lawsuit followed. *Id.* ¶ 13.

III. Argument

A. Novant Alleged Physical Loss Or Damage.

Zurich argues that "direct physical loss of or damage to" property requires "an actual, demonstrable, and tangible alteration to the physical structure of property," and that Novant's complaint fails to allege that kind of alteration. Doc. 23 at 11. As shown below, Zurich is wrong for three reasons: (1) Zurich is collaterally estopped from making that argument because another court has already rejected it; (2) Zurich's interpretation is wrong on the merits, as already determined by another court; and (3) even if Zurich's interpretation was accepted, Novant's allegations satisfy Zurich's standard.

1. Collateral Estoppel Applies.

Zurich's argument is not being made on a clean slate. It has been made before, and after extensive briefing, a court rejected it. *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021). So collateral estoppel forecloses Zurich from relitigating that issue.[1]

For starters, Zurich and its affiliate Zurich American (the insurer in *Henderson*) are in privity. Zurich does not argue otherwise. In addition, the collateral estoppel elements are met.

[1] Collateral estoppel precludes "parties and parties in privity" from relitigating issues that are the "same" and were "raised and actually litigated," "material and relevant to the disposition of the prior action," and "necessary and essential to the resulting judgment." *Sykes v. Blue Cross & Blue Shield of N. Carolina*, 828 S.E.2d 489, 494–95 (N.C. 2019).

The issues are the same. The policies have the same "physical loss of or damage to property" requirement. In *Henderson*, the court was asked to rule that "direct physical loss" "require[s] some sort of tangible damage or permanent alteration of the property" Doc. 26-2 at 8. So too here. Doc. 23 at 12 (Zurich contending that "'direct physical loss' requires demonstrable and tangible change to an insured's property").

The issue was "raised and actually litigated." *See* Doc. 26-2 at 8-11; Doc. 26-3 at 8-13; Doc. 26-4 at 3-10; Doc. 26-5 at 4-15; Doc. 26-6 at 2-7; Doc. 26-7 at 2-10.

The issue was "material and relevant to the disposition of the prior action" and "necessary and essential to the resulting judgment." By granting summary judgment to the policyholder, *Henderson* rejected the same cramped interpretation Zurich advances here. 2021 WL 168422, at *10-12 (finding policy ambiguous and ruling language "must be construed liberally in favor of the insureds").

Zurich only quibbles with the first prong (whether the issues are the same), saying that *Henderson* applied Ohio law and not North Carolina law. That does not matter. Both states apply the same interpretation principles, and Zurich identifies no differences. Both use words' ordinary meaning and commonly consult the dictionary. *See Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 146 S.E.2d 410, 416 (N.C. 1966); *United Ohio Ins. Co. v. Brooks*, 2012 WL 1099821, at *4 (Ohio Ct. App. 2012). Both find ambiguity when there are two reasonable interpretations and then construe ambiguities in favor of coverage. *Jamestown Mut.*, 146 S.E.2d at 416; *King v. Nationwide Ins. Co*., 519 N.E.2d 1380, 1383 (Ohio 1988).

Zurich also argues that the court should not apply collateral estoppel because the issue has not remained static since there are decisions for and against Zurich. Doc. 23 at 19. That is not an element of collateral estoppel. In any event, the issue has remained static: the language, arguments, and fundamental legal principles are the same.

2. Zurich's Interpretation Is Wrong.

i. The Policy Language is Contrary to Zurich's Interpretation.

The policy's time element provisions cover Novant's income losses. In particular, the policy covers losses resulting from "Suspension" "due to direct physical loss of or damage to Property." Doc. 26-1 at N-26 § 4.01.01. Novant has alleged losses resulting from suspension of its operations due to COVID-19 on its premises.[2] Zurich claims the policy does not cover Novant's losses because COVID-19 does not cause physical loss of or damage to property. Zurich is wrong. The policy supports Novant's interpretation (that COVID-19 causes physical loss of or damage to property) because of (a) a unique coverage for communicable disease and (b) the plain meaning of "direct physical loss of or damage to" property.

The starting point for evaluating Zurich's argument is the policy language, and not just the "loss of or damage to" language in isolation but in the context of the specific policy as a whole. In that regard, this Zurich policy is different from most others because it has a "special" coverage for Interruption by Communicable Disease, which provides

[2] Novant uses COVID-19 to refer to the coronavirus and the disease it causes, consistent with common parlance.

additional context missing from the vast majority of cases Zurich cites. Doc. 26-1 at N-45 § 5.02.35.

In that coverage, Zurich agreed to pay for the loss resulting from the suspension of Novant's business caused by a government order "regulating communicable diseases." *Id.* The provision also covers costs "incurred for the cleanup, removal and disposal of the actual not suspected presence of substances(s) causing the spread of such communicable disease." *Id.* Because the policy only covers "direct physical loss of or damage" to property (Doc. 26-1 at N-14), this express communicable disease coverage shows that communicable disease can cause "direct physical loss of or damage" to property. If communicable disease – like COVID-19 – could not cause loss of or damage to property, this "special" coverage would be superfluous because the general loss of or damage to requirement would not be satisfied.[3]

Based on similar communicable disease coverage, another court recognized a policy "expressly covers loss and damage caused by 'communicable disease.'" *Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, 500 F. Supp. 3d 565, 568 (N.D. Tex. May 5, 2021). *Cinemark* highlights the significance of this communicable disease coverage in evaluating the loss of or damage to requirement. Judge Mazzant expressly distinguished his prior decision granting a motion to dismiss in *Selery Fulfillment, Inc. v. Colony Ins.*

[3] The ramifications of the communicable-disease coverage are even broader because the coverage does not "apply to loss or damage that is payable under any other provision in this Policy." *Id.* This acknowledges that communicable disease can cause loss or damage, as required under other parts of the policy.

Co., recognizing that "Cinemark's Policy is much broader than the one in *Selery* and expressly covers loss and damage caused by 'communicable disease.'" *Id*. at 3.[4]

Zurich's position is also undermined by this policy's contamination exclusion. The policy originally defined contamination to include virus, which confirms that a virus causes direct physical loss of or damage to property. Otherwise, there would be no reason to try to exclude it. As shown in section III.B, Zurich ultimately removed the word virus from the contamination exclusion so that exclusion does not bar coverage. But the exclusion as originally drafted supports Novant's position.

Moreover, even if one was to ignore the communicable disease coverage and look at the "direct physical loss of or damage to" requirement in isolation, the plain meaning of that phrase is at odds with Zurich's position. Because the policy does not define those terms, the Court should apply the ordinary meaning of each word and consult dictionaries to do so. *Jamestown Mut.*, 146 S.E.2d at 416. Merriam-Webster gives these definitions:

- **Direct** (adj.) means or "characterized by close logical, causal, or consequential relationship." Merriam-Webster (Online ed. 2021).
- **Physical** (adj.) means "having material existence" or "perceptible especially through the senses and subject to the laws of nature." *Id*.
- **Loss** (n.) means "the partial or complete deterioration or absence of a physical capability or function," "the harm or privation resulting from losing or being separated from someone or something," or a "decrease in amount, magnitude, value, or degree." *Id.*

[4] To be clear, Novant's claim is not limited to the interruption by communicable disease coverage. Rather, Novant's argument is that this "special" coverage shows that COVID-19 causes physical loss or damage as required to trigger other coverages.

- **Damage** (n.) means the "loss or harm resulting from injury to person, property, or reputation" *Id*.

Because "every word" must "be given effect," "of" and "or" must also mean something. *Woods v. Nationwide Mut. Ins. Co.*, 246 S.E.2d 773, 777 (N.C. 1978). The conjunctive "or" means "loss" and "damage" must have distinct and separate meanings. *See Great Am. Ins. Co. v. Mesh Cafe, Inc*., 580 S.E.2d 431 (N.C. Ct. App. 2003) (finding language ambiguous and construing it in favor of coverage given that a "reasonable person could understand 'direct physical loss' to be an alternative to 'damage by a Covered Cause of Loss' because of the conjunction 'or'"); *Fountain Powerboat Indus., Inc. v. Reliance Ins. Co*., 119 F. Supp. 2d 552, 556-57 (E.D.N.C. 2000) (giving "loss" a separate meaning from "damage" because they were separated by "or").

The use of "loss *of*" is also significant. "Loss of" is broader than "loss to" or "damage to." *Henderson*, 2021 WL 168422, at *10 (crediting the argument that "physical loss of the real property means something different than damage to the real property"). Putting that all together, "direct physical loss" includes the partial or complete inability to occupy a property for its intended use that directly results from a material, external cause.

Indeed, applying similar dictionary definitions, a North Carolina court found the phrase meant "the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions." *See N. State Deli, LLC v. Cincinnati Ins. Co.*, 2020 WL 6281507, at *3 (N.C. Super. Oct. 9, 2020). It thus includes a "scenario where business owners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of

using or accessing their business property" like that caused by a government order or otherwise. *Id*.

Because North Carolina law governs, and the applicable contract interpretation principles yield the proper interpretation, there is no need to look to decisions from other states. But if the Court were to do so, there is ample authority supporting that conditions—like the presence of microscopic substances—can cause physical loss or damage even if they do not cause tangible, physical alteration. *See, e.g., Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding that asbestos can constitute "direct physical loss or damage" even though it did not require insured to close properties and did not "result in tangible injury to the physical structure of a building"); *Mellin v. N. Sec. Ins. Co., Inc*., 115 A.3d 799, 805 (N.H. 2015) (cat urine odor).

Consistent with that, courts have recognized that COVID-19 can constitute direct physical loss of or damage to property. *See Serendipitous, LLC/Melt v. Cincinnati Ins. Co*., 2021 WL 1816960 (N.D. Ala. May 6, 2021) (denying motion to dismiss because policyholder "alleged that they have been physically deprived of their property" and finding that even if COVID-19 had "not physically altered the restaurants' property," that did "not mean that coverage necessarily is not available for impacts to the property that are invisible to the naked eye"); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 7249624, at *10 (E.D. Va. Dec. 9, 2020) (denying motion to dismiss because direct physical loss could mean "the property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural, sources" and noting that "the facts of this

case are similar to those where courts found that asbestos, ammonia, odor from methamphetamine lab, or toxic gasses from drywall…constituted a direct physical loss").

In sum, wherever one looks to determine what "direct physical loss of or damage to" means—the policy, the dictionary, North Carolina law, or legal decisions in other jurisdictions—the answer is clear: The policy covers loss of or inability to use property for its intended use that is caused by an external substance regardless of any visible structural change.

ii. Zurich's Arguments Lack Merit.

Zurich's motion largely ignores the authority above, which is understandable since it does not ask the Court to apply the key words in the context of this policy as a whole and instead wants the Court to change them. It argues "direct physical loss of or damage to" requires "an actual, demonstrable, and tangible alteration to the physical structure of property." Doc. 23 at 11. That's not what the policy says, and the plain meaning of the terms tarnishes Zurich's gloss. Had Zurich wanted to limit coverage in that way, it could have done so. *See DENC, LLC v. Philadelphia Indem. Ins. Co.,* 421 F. Supp. 3d 224, 232 (M.D.N.C. 2019) (Eagles, J.) (had insurer intended a particular requirement, "it could have written the policy accordingly"). For instance, if Zurich wanted to ignore dictionary definitions, it could have included its own in the policy, a tactic it is not shy about since the policy here includes 60 definitions (including "Money" and "Operations"). Because Zurich did define those words, the Court should refuse to rewrite the contract. *See, e.g.*, *Mazza v. Med. Mut. Ins. Co. of N.C.*, 319 S.E.2d 217, 223 (1984) ("If [insurer] uses

'slippery' words in its policy, it is not the function of this Court 'to sprinkle sand upon the ice by strict construction' to assist [it].").

Zurich's reading also violates the rule that "every word and every provision is to be given effect." *See Woods*, 246 S.E.2d at 777. It gives no meaning to "loss of" independent from "damage to." *See N. State Deli*, 2020 WL 6281507, at *3 (recognizing insurer's interpretation ignored "or" and conflated "loss" and "damage", rendering one meaningless).

Zurich fares no better when it turns to case law. *Harry's* did not change the policy terms as Zurich requests here. *Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp*., 486 S.E.2d 249, 251 (N.C. Ct. App. 1997). The policyholder sought coverage when a snowstorm prevented access to its property. The court held that mere inaccessibility, without more, cannot constitute "direct physical loss." Novant's allegations are not so limited. It alleges actual loss and damage to its own property. *See* Doc. 8 ¶¶ 72-80. And *Harry's* involved a summary judgment motion, after discovery, which Zurich seeks to prohibit.

Similarly, Zurich misplaces its reliance on four COVID-related decisions. Doc. 23 at 11-12. Only one says it applies North Carolina law, and it is irrelevant. That court set aside the question of "whether the presence of the coronavirus would satisfy the policy's requirement for direct physical damage or loss." *Summit Hosp. Grp., Ltd. v. Cincinnati Ins. Co.*, 2021 WL 831013, *4 (E.D.N.C. Mar. 4, 2021). Because *Summit* avoided the question Zurich wants answered, *Summit* surely cannot provide the answer.

Zurich's other COVID cases apply other law, do not analyze policy terms, and instead simply follow a hodgepodge of other courts. *See Skillets, LLC v. Colony Ins. Co.*, 2021 WL 926211 (E.D. Va. Mar. 10, 2021); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 498 F. Supp. 3d 878 (S.D.W. Va. 2020); *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, 2021 WL 1400891 (D. Md. Apr. 14, 2021). Plus, those rulings did not address the communicable disease coverage in Zurich's policy and ignored that the policies cover "loss of" *or* "damage to" property. Finally, each decision is distinguishable for other reasons as well. *See Skillets,* 2021 WL 926211 (court was "cabined by Florida law" and so it was "not influence[d]" by a "well-reasoned" decision applying Virginia law that denied dismissal (citing *Elegant Massage,* 2020 WL 7249624)); *Uncork*, 498 F. Supp. 3d at 883 (wrongly relying on supposed facts outside the pleadings and noting that policyholder did not allege that "employees or patrons with infections" were "traced to the business"); *Bel Air Auto*, 2021 WL 1400891 (relying heavily on rulings involving general liability policies, which define "property damage," and, under Maryland law, not construing policy "most strongly against the insurer").

Even ignoring those differences, those cases would at most show a split of authority that demonstrate the phrase's ambiguity. *See Maddox v. Colonial Life & Acc. Ins. Co.*, 280 S.E.2d 907, 910 (1981) ("We feel the fact that the courts of other jurisdictions have reached conflicting interpretations emphasizes the ambiguity inherent in the phrase" in the insurance policy.); *St. Paul Fire & Marine Ins. Co. v. Freeman–White Assoc., Inc.,* 366 S.E.2d 480, 484 (N.C. 1988) (the "fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the

contract is, at best, ambiguous"). At best, Zurich's interpretation is just one of two reasonable readings. That would lead to an ambiguity to construe in favor of coverage. *Jamestown Mut.*, 146 S.E.2d at 416.[5]

3. Novant's Allegations Meet Either Standard.

As shown above, the Court should reject Zurich's interpretation of the "loss of or damage" requirement. But even if it does not, it should deny the motion regardless because Novant has plausibly alleged several ways in which COVID-19 caused direct physical loss of or damage to property. Zurich ignores Novant's specific allegations. The Court should not.

First, COVID-19 spreads through airborne transmission. Doc. 8 ¶¶ 30-32. The CDC has explained that when an infected person speaks, sneezes, or coughs, they release infected droplets into the air. *Id*. ¶ 30. These droplets can linger for hours and may be pulled into an air circulation system and spread to other areas. *Id*. ¶ 31.

[5] Contrary to Zurich's contention, the period of restoration does not support its position. Doc. 23 at n.11. First, the period of restoration does not end upon repair or restoration. It ends when property "could be repaired and replaced *and* made ready for operations under the same or equivalent physical and operating conditions that existed prior to the damage." Doc. 26-1 at N-30 § 4.03.01.01. Plus, Zurich extended the period of liability until Novant "could restore its *business* with due diligence, to the condition that would have existed had no direct physical loss or damage occurred." *Id.* at N-28 § 4.02.02.01. Second, even if the period ended when Zurich says it does, "repair" and "replace" mean "to restore to a previous state." Merriam-Webster (Online ed. 2021). Novant undertook repairs and restorations like installing physical barriers, vacuum shrouds for surgical procedures, and remote triage stations. Doc. 8 ¶ 36. Third, the period of liability provision does not redefine the "direct physical loss of or damage to." It merely provides a temporal measure of losses. Quick repairs could limit Novant's losses but that would not mean there was no physical loss or damage. *Ungarean, DMD v. CNA*, 2021 WL 1164836, at *8 (Pa. Com. Pl. Mar. 25, 2021) ("The 'period of restoration' does not somehow redefine or place further substantive limits on types of available coverage.").

Second, the droplets "can land on surfaces and objects, where they can remain viable for hours or days, rendering the surface or object unsafe and dangerous for continued use, because they may infect another person who comes into contact with one of these surfaces or objects." *Id*. ¶ 32. And the presence of COVID-19 at Novant's locations is not theoretical. "[I]nfected individuals have presented at all Novant locations as patients, vendors, visitors, employees, or other guests." *Id*. ¶ 34. Given the nature of Novant's property, there was a "continuous reintroduction of COVID-19 to the property." *Id*. ¶ 45. Patients and employees have tested positive for COVID-19 at all testing centers and acute care locations. *Id*. ¶¶ 73, 75. These individuals released infected droplets into the air and on surfaces. *Id*. ¶¶ 76-79.

In these ways, COVID-19 "render[s] property unsafe for normal use." *Id*. ¶ 50. It causes a "loss of functionality and reliability of property" when it "transforms air and property into a dangerous and potentially deadly instrumentality." *Id*. ¶ 50.

In addition, due to the physical damage of COVID-19, governmental bodies issued orders prohibiting access to Novant locations and causing the necessary suspension of business activities. *Id*. ¶¶ 47-48.

All of the allegations described above – and ignored by Zurich – show that COVID-19 causes loss of and damage to property under either parties' interpretation because it makes the property "unsafe, unfit, and uninhabitable for ordinary functional use" and because it "causes a tangible alteration to that property." *Id*. ¶ 40. These allegations must be taken as true. *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 418 (4th Cir. 2015) ("we must assume all well-pled facts to be true and draw all

reasonable inferences in favor of the plaintiff"). Zurich moves to dismiss based on the opposite premise: that Novant's allegations are false. Consider Zurich's supposed "*fact*" that Novant can remove the virus with "routine cleaning." Doc. 23 at 12. Novant's allegations are to the contrary: given its operations, "cleaning and disinfecting" "does not repair or remediate the actual physical and tangible alteration to property caused by COVID-19," particularly "where attempts to remove COVID-19 from the property does not fully repair or remediate the physical damage and tangible alteration to property due to the continuous reintroduction of COVID-19 to the property." Doc. 8 ¶¶ 44-45. Zurich's attempt to dispute Novant's allegations violates Motions to Dismiss 101.

In sum, Novant's allegations meet either parties' interpretation of "direct physical loss of or damage to" property.[6]

B. The Contamination Exclusion Does Not Apply.

Zurich also argues that a contamination exclusion bars coverage. Exclusions are construed strictly against insurers. *Mazza*, 319 S.E.2d at 223. Zurich fails to meet its burden to show the contamination exclusion plainly bars coverage. *Id.* (construing ambiguity in favor of coverage and noting that if the policy is ambiguous, "the fault lies with" the insurer).

1. The Contamination Exclusion Does Not Apply To Viruses.

For background, the policy contains a standard form. *See* Doc. 26-1 at N-8–N-67. It also contains endorsements, which modify that form. *See* Doc. 26-1 at N-89–N-175.

[6] If Novant's complaint is somehow factually deficient, Novant requests leave to amend.

Zurich bases its argument on the contamination exclusion in the standard form. But, as shown below, Zurich ignores that an endorsement modified that exclusion so that it does not bar coverage here.

> The standard form provides that:
>
> 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 property or any cost of making property safe or suitable for use or occupancy…

Id. at N-23. The standard form defines "Contamination" as:

> **Contamination(Contaminated)** - Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, Fungus, mold or mildew.

Id. at N-61. Because the standard form defines Contamination as including "virus," Zurich argues the contamination exclusion bars coverage. But an endorsement removes "virus" from that definition.

That endorsement is titled "Amendatory Endorsement – Louisiana." *Id.* at N-115. It states it "**CHANGES THE POLICY**." *Id.* Part of the way it changes the policy is to modify the definition of "Contamination" as follows:

> **Contamination (Contaminated)** - Any condition of property due to the actual presence of any **Contaminant(s)**.
>
> **Contaminant(s)** - Any solid, liquid, gaseous, thermal or other irritant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste (including materials to be recycled, reconditioned or reclaimed), other hazardous substances, **Fungus** or **Spores**.

Id. at N-117. Thus, the endorsement removes the word "virus" from the definition of Contamination. So the contamination exclusion does not apply to viruses.

Zurich's position to the contrary again does not apply the language so much as change it. It contends the endorsement does not change the policy. Doc. 23 at 15. That is wrong. Doc. 26-1 at N-115 ("**THIS ENDORSEMENT CHANGES THE POLICY**."). Accepting Zurich's argument would require the Court to add a provision that limits the scope of the endorsement to properties in Louisiana. Doc. 23 at 14-15. The Court should refuse to do so. *See DENC*, 421 F. Supp. 3d at 234 (Eagles, J.) (It is not the court's "responsibility to rewrite the policy to protect the insurer.").

Zurich's request is particularly troubling because other endorsements limit their application to risks in one state. One endorsement states: "**THIS ENDORSEMENT CHANGES THE POLICY AND APPLIES TO THOSE RISKS IN CONNECTICUT**." Doc. 26-1 at N-92. Another states the same thing but for New York. *Id.* at N-140. Zurich even has another version of the Louisiana Amendatory Endorsement that states that it "only applies to locations in Louisiana." Doc. 8 ¶ 125. Under Zurich's position, these provisions are meaningless. The Court should reject Zurich's argument because "every word and every provision is to be given effect." *Woods*, 246 S.E.2d at 777.

The endorsement's title—"Amendatory Endorsement – Louisiana"—also does not help Zurich. In the abstract, one could question what to make of the "Louisiana" reference in the title even though the body of the endorsement does not mention it. Here, though, the policy provides the answer. Doc. 26-1 at N-57 ("titles of the various

paragraphs and endorsements are solely for reference and *shall not in any way* affect the provisions to which they relate" (emphasis added)). Thus, the title does not limit coverage. Given that, there is no basis to limit the endorsement.

Even ignoring the titles provision, there's an alternative explanation for the title: it simply indicates that Louisiana law required the provisions, and nothing in Louisiana (or any other state's) law prohibits Zurich from extending the benefits of Louisiana law nationwide as it did in the endorsement.

Not surprisingly, courts have agreed with Novant's position. *See John Akridge Co. v. Travelers Companies*, 837 F. Supp. 6 (D.D.C. 1993) (endorsement titled "Maryland Changes" modified policy and was not limited to risks in Maryland because "no language in the endorsement limits its application" to Maryland and because other endorsements used geographically limiting language, which showed that "had Travelers wished to limit its endorsement to insured property located in Maryland, it was more than capable of doing so"); *Arch Specialty Ins. Co. v. Cline*, 2012 WL 12823706 (W.D. Tenn. Dec. 4, 2012) (endorsement titled "New York Amendatory Endorsement" modified entire policy and was not limited to New York risks because endorsement "proclaim[ed] in bold, capital letters that '[t]his endorsement changes the policy'" and was not "limited to applicability solely in New York").

Zurich's decisions are inapt. Zurich cites two rulings limiting the endorsement to risks in Louisiana. But it does not rely on their reasoning, which makes sense because they are unpersuasive.

The *Firebird* court said the endorsement was "ultimately meaningless," contrary to North Carolina law prohibiting interpretations that make words meaningless. *Firebirds Intern., LLC v. Zurich American Ins. Co.*, 2021 WL 2007870 (Ill. Cir. Ct. Apr. 19, 2021). It also said that despite "including the endorsements, the [sic] Zurich elected not to change the 'Contamination' exclusion in the body of the policy." This statement is unintelligible. The premise of an endorsement is that it changes language in "the body of the policy." Otherwise, there would be no endorsements. Indeed, that's what the endorsement says: "**THIS ENDORSEMENT CHANGES THE POLICY**."

The *Manhattan Partners* court said that had "the parties intended to remove 'virus' from the Contamination provision, they could have done so with a general endorsement that was not limited to a single state." *Manhattan Partners, LLC v. Am. Guarantee & Liab. Ins. Co.*, 2021 WL 1016113 (D.N.J. Mar. 17, 2021). That just assumes the answer. As shown above, the endorsement is not limited to a single state.

Zurich's three other cases also do not apply. Unlike here, they do not mention any other endorsements that limit themselves to particular states or a "titles" provision. And they involve different circumstances. *Menard* involved the application of a statute as well as the rule that to confer a benefit on a third party, the benefit "must be clearly and fully spelled out." *Menard v. Gibson Applied Tech. & Eng'g, Inc*., 2017 WL 6610466 (E.D. La. Dec. 27, 2017). *Kamp* involved uninsured motorist coverage and does not analyze whether an endorsement would apply. *Kamp v. Empire Fire & Marine Ins. Co*., 2013 WL 310357 (D.S.C. Jan. 25, 2013). And Zurich only cites *Tomars* for the general proposition

that policies include endorsements to incorporate changes required by state law. *Tomars v. United Fin. Cas. Co.*, 2015 WL 3772024 (D. Minn. June 17, 2015).

At least, all of this demonstrates that Zurich does not meet its burden to show that the exclusion plainly bars coverage. *See Mazza*, 319 S.E.2d at 223.[7]

2. The Contamination Exclusion Does Not Apply To "Loss"

Even if one were to ignore the endorsement, the contamination exclusion in the original form still does not bar coverage. The provision "excludes" "Contamination and any cost due to **Contamination**." Doc. 26-1 at N-23. It does not exclude *loss* due to contamination, and Novant seeks coverage for loss.[8]

Two other parts of the policy support that distinction. First, other provisions exclude loss due to the excluded risks. For instance, the policy excludes "[l]oss or damage arising from delay, loss of market, or loss of use." *Id*. Zurich did not draft the contamination exclusion in the same manner. Second, the provision "excludes" "Contamination *and any cost due to Contamination*." *Id*. If the exclusion excluded all

[7] Zurich contends that Novant's interpretation would create conflicts among endorsements. Doc. 23 at n.13. There is no conflict because no other endorsement modifies the contamination exclusion or definitions. Moreover, any conflict would merely render conflicting endorsements ambiguous, requiring they be construed against Zurich. *See Drye v. Nationwide Mut. Ins. Co.*, 487 S.E.2d 148, 150 (N.C. App. Ct. 1997) (if clauses "are conflicting, the provision favorable to the insured" controls).

[8] The policy uses "cost" to refer to out-of-pocket expenditures, not income losses. For instance, the policy covers "the reasonable and necessary cost incurred for the cleanup, removal and disposal of" certain substances. Doc. 26-1 at N-45; *see also Thor Equities, LLC v. Factory Mut. Ins. Co.*, 2021 WL 1226983 (S.D.N.Y. Mar. 31, 2021) (costs are "affirmative outlays").

coverage that arose out of contamination, the "any cost due to Contamination" portion of the exclusion would be superfluous.

One court refused to apply this exclusion on this basis. *Thor*, 2021 WL 1226983 (rejecting argument "that the exclusion unambiguously forecloses recovery on Thor's losses due to contamination"). Another court denied a motion to dismiss in which the insurer argued the same contamination exclusion barred coverage. *See Cinemark*, 2021 WL 1851030 (denying insurer's Rule 12(c) motion); Cinemark Br. at 19-24, 2021 WL 1811901 (insurer arguing contamination exclusion applied).[9]

3. *Natty Greene* Does Not Apply.

Zurich relies on this Court's *Natty Greene* ruling and other decisions involving exclusions that use the word virus. Doc. 23 at 14, n.13. Those cases do not help Zurich. For instance, the exclusions in *Natty Greene* provided that the insurers "will not pay for loss or damage caused by or resulting from any virus." *Natty Greene's Brewing Co., LLC v. Travelers Cas. Ins. Co. of Am.*, 503 F. Supp. 3d 359 (M.D.N.C. 2020). Unlike the contamination exclusion, those exclusions (1) applied to viruses, (2) excluded "loss or damage," and (3) applied to the entire policy.

[9] Zurich says that the exclusion bars coverage for "any condition of the property due to contamination." Doc. 23 at 13 n.12. That is irrelevant. The exclusion still would not bar coverage for loss.

C. Coverage Is Available Under Other Applicable Provisions.

Zurich argues Novant did not sufficiently plead claims for civil authority, contingent time element, and ingress/egress coverages. Doc. 23 at 13-14. Zurich is wrong.

Novant plausibly alleged civil authority coverage. Government authorities issued many orders that prohibited access and caused suspensions of operations. Doc. 8 ¶¶ 47-49, 90-93. For example, Novant was forced to cancel thousands of procedures. Doc. 8 ¶ 49. Zurich asserts that Novant must identify the particulars about each government order and its effect. Doc. 23 at 16. Zurich cites nothing requiring that level of detail in a complaint, which would require thousands of allegations about Novant's 700 locations.

Similarly, Novant has plausibly alleged contingent time element and ingress or egress coverage. Doc. 8 ¶¶ 95-102. For contingent time element coverage, Novant alleged, as an example, that one of its suppliers in Wuhan, China "closed due to the presence of coronavirus on its property and in the region and loss or damage at its property." Doc. 8 ¶ 100. For ingress and egress, Novant alleged it suffered loss due to obstruction of ingress or egress. Doc. 8 ¶ 101.[10] This is sufficient.

D. Novant's Bad Faith Claims State a Plausible Claim of Relief.

Zurich argues Novant did not plausibly allege its bad faith claim. Not so. Novant alleged that Zurich misrepresented policy provisions and insisted on Novant's cooperation in a long and burdensome claims investigation with no intention of covering

[10] Regardless, Novant could amend to include more information about its 700 locations and its losses.

the claim. Doc. 8 ¶¶ 152-168. These facts sufficiently allege "a tortious act accompanied by 'some element of aggravation' to withstand" Zurich's motion to dismiss. *Dailey v. Integon Gen. Ins. Corp.*, 291 S.E.2d 331, 333 (N.C. Ct. App. 1982).

E. The Interruption By Communicable Disease Provision Is Ripe.

Zurich argues that one aspect of Novant's claim—the interruption by communicable disease coverage—is not ripe because Zurich has not decided whether to deny coverage. That is wrong on several fronts.

First, Zurich is wrong that Novant has not provided enough information. *See* Doc. 23-1, Ex. 5 (Novant's letter providing requested information and documents). Zurich made additional requests that largely sought information Novant had provided. *Compare* Doc. 23-1, Ex. 7 *with* Doc. 23-1, Ex. 5.

Second, Zurich's pre-suit actions speak louder than its post-suit words. The policy required that suit be filed within one year after loss or damage. Doc. 26-1 at N-55. Novant requested an extension. Zurich did not grant the request. See Exhibit A (Declaration of Rachel Hudgins). Now Zurich contends Novant should not have filed. Doc. 23 at 22-23.

Third, Zurich imposed that one-year deadline to file without conditions. So an incomplete investigation or failure to deny coverage cannot preclude suit.

Fourth, Zurich breached the contract by not paying Novant under this coverage. Doc. 8 ¶ 176. "Non-performance of a valid contract is a breach." *Sechrest v. Forest Furniture Co.*, 141 S.E.2d 292, 294 (N.C. 1965).

Fifth, Zurich provides no support for its novel theory under which an insurer could prevent suit by not denying coverage until after any limitations period expired.

Sixth, any alleged failure to cooperate by supposedly not providing requested information is a defense to Novant's claim. *See MacClure v. Accident & Cas. Ins. Co. of Winterthur, Switzerland*, 49 S.E.2d 742, 747 (N.C. 1948) ("What constitutes cooperation or lack thereof is usually a question of fact for the jury."). It is not a reason to dismiss.

IV. Conclusion

The Court should deny Zurich's motion because it is contrary to the policy language, the law, and the allegations in Novant's complaint.

Dated: June 28, 2021

/s/ Syed S. Ahmad

Syed S. Ahmad*
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500
Fax: (202) 862-3619
sahmad@HuntonAK.com

Lawrence J. Bracken II*
Rachel E. Hudgins*
600 Peachtree Street, N.E., Suite 410
Atlanta, GA 30308-2216
Telephone: 404-888-4035
lbracken@HuntonAK.com
rhudgins@HuntonAK.com

A. Todd Brown, Sr.
N.C. State Bar No.: 13806
One South at The Plaza, Suite 3500
101 South Tryon Street
Charlotte, NC 28280
Telephone: 704-378-4727
tbrown@HuntonAK.com

Casey L. Coffey*
333 SE 2nd Avenue, Suite 2400
Miami, FL 33131
Telephone: 305-810-2500
ccoffey@HuntonAK.com

**By Special Appearance*

Attorneys for Novant Health, Inc.

CERTIFICATION OF WORD COUNT

I certify that this brief does not exceed 6,250 words in compliance with Local Rule 7.3(d).

/s/ Syed S. Ahmad
Syed S. Ahmad

CERTIFICATE OF SERVICE

I certify that on June 28, 2021, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Syed S. Ahmad
Syed S. Ahmad