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HIGHGATE HOTELS, L.P., 6 WEST 32ND STREET LLC, REPUBLIC MIDTOWN HOSPITALITY LLC, REPUBLIC ENTERPRISES LLC, and 17 W 32 ST OWNER LLC, Plaintiff, v. LIBERTY MUTUAL FIRE INSURANCE COMPANY, ALLIANZ GLOBAL RISKS US INSURANCE COMPANY, AMERCIAN GUARANTEE AND LIABILITY INSURANCE COMPANY, ENDURANCE SPECIALTY INSURANCE COMPANY, ACE AMERICAN INSURANCE COMPANY, THE PRINCETON EXCESS AND SURPLUS LINES INSURANCE COMPANY, QBE SPEIALTY INSURANCE COMPANY, MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA, and HOMELAND INSURANCE COMPANY OF NEW YORK, Defendants,	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION – BERGEN COUNTY DOCKET NO. **BER-L-2318-21** Civil Action **OPINION**

Argued: September 24, 2021
Decided: October 5, 2021

HONORABLE ROBERT C. WILSON, J.S.C.

Adam Gomez. Esq. appearing on behalf of plaintiff Highgate Hotels, L.P. (from Grant & Eisenhofer) and Cynthia Jordano, Esq. appearing on behalf of plaintiffs 6 West 32nd Street LLC, Republic Midtown Hospitality LLC, Republic Enterprises LLC, and 17 W 32 St Owner LLC (from Cohen Ziffer Frenchman & McKenna)

Rachel Hager, Esq. appearing on behalf of defendant Liberty Mutual Fire Insurance Company (from Finazzo Cossolini O'Leary Meola & Hager, LLC), Michael Hynes, Esq. appearing on behalf of defendant Allianz Global Risks US Insurance Company (from DLA Piper LLP), Susan Kennedy, Esq. appearing on behalf of defendant American Guarantee and Liability Insurance Company (from Wiggin and Dana LLP), Charles Jesuit, Esq. appearing on behalf of defendant Endurance Specialty Insurance Company (from Cozen O'Connor PC), Barbara Almeida, Esq. appearing on behalf of defendants Ace American Insurance Company and The Princeton Excess and Surplus Lines Insurance Company (from Clyde & Co LLP), Jonathan MacBride, Esq.

appearing on behalf of defendants QBE Specialty Insurance Company and Homeland Insurance Company of New York (from Zelle LLP), and Casey Boyle, Esq. appearing on behalf of defendant Mitsui Sumitomo Insurance Company of America (from Riker Danzig Scherer Hyland & Perretti LLP)

FACTUAL BACKGROUND

THIS MATER arises out of a dispute between plaintiffs Highgate Hotels, L.P. ("Highgate"), 6 West 32nd Street LLC, Republic Midtown Hospitality LLC, Republic Enterprises LLC, and 17 W 32 St Owner LLC (collectively the "Plaintiffs") and defendants Liberty Mutual Fire Insurance Company ("Liberty Mutual"), Allianz Global Risks US Insurance Company ("Allianz"), American Guarantee and Liability Insurance Company, Endurance Specialty Insurance Company, ACE American Insurance Company, QBE Specialty Insurance Company, Homeland Insurance Company of New York, and Mitsui Sumitomo Insurance Company of America ("MSI" and collectively with the other defendants the "Defendants") regarding a dispute over coverage of an insurance policy due to the Covid-19 Pandemic.

Plaintiffs own and operate various hotels in New York, Illinois, Hawaii, Nevada, Massachusetts, and California. To protect their properties Plaintiffs' purchased property and business income insurance from the various Defendants (the "Policy").

In March 2020, the states of Nevada, New York, California, Illinois, Massachusetts, and Hawaii all issued Executive Orders to protect against the spread of Covid-19. The Orders closed non-essential businesses and allowed essential businesses to remain open. In each state essential businesses were defined to include hotels. On March 19, 2020, Highgate submitted a business interruption claim to Defendants alleging Covid-19-related losses and on May 16, 2020, the other Plaintiffs separately provided Defendants with notice of their Covid-19 business interruption claims.

On April 26, 2021, Highgate filed a complaint asserting causes of action for declaratory judgment, breach of contract and bad faith, and seeking coverage under the Business Interruption and Extra Expense, Contingent Business Interruption and Extra Expense, Civil Authority, Ingress/Egress, Contagious Diseases, Cancellation of Bookings, and Attraction Properties coverage provisions of their policies. On June 14, 2021, the other Plaintiffs were added to the complaint alleging that these entities constitute additional named insured under their policies.

Plaintiffs allege that the Executive Orders issued by the various states impacted access to their insured properties and either totally or partially closed the properties down. The Complaint also alleges, without specificity, that, because of the Covid-19 pandemic, Plaintiffs' employees, customers, and/or vendors were exposed to, tested positive for, and were diagnosed with Covid-19. They also claim that the alleged presence of Covid-19 at their properties caused physical loss or damage to those premises.

The Liberty Mutual Policy

Liberty Mutual issued a policy to Highgate for the period from December 1, 2019, to December 1, 2020 (the "Liberty Policy"). The Liberty Policy provides for coverage against all risk of direct physical loss or damage to property. The Liberty Policy provides certain coverage and extensions of coverage under limited circumstances for certain business interruptions and extra expenses. These coverages also require a showing of loss or damage for the coverage to potentially apply. The Liberty Policy also provides extensions of coverage for interruption by civil or military authority, disruptions to ingress, egress, and loss to property that attracts business to a covered location. Under limited circumstances, extensions of coverage are provided for loss due to contagious disease and cancellation of bookings.

For the reasons set forth below, all the Defendants' Motions to Dismiss are hereby **GRANTED**.

MOTION TO DISMISS STANDARD UNDER RULE 4:6-2(e)

In considering a motion to dismiss under Rule 4:6-2(e), the Court must search the pleading in depth and with liberality to determine whether a cause of action is suggested by the facts, Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). The Court must ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of a claim, opportunity being given to amend, if necessary. The essential test as set forth in Green v. Morgan Properties, 215 N.J. 431, 451 (2013), the Supreme Court decision governing a motion to dismiss is whether a cause of action is suggested by the facts. When addressing a motion to dismiss, the Court is permitted to review and consider documents identified in the pleadings. Myska v. New Jersey Manufacturers Insurance Co., 440 N.J. Super. 458, 42 (App. Div. 2015). Nevertheless, a pleading should be dismissed if it states no basis for relief and discovery would provide one. Camden County Energy Recovery Associates v. New Jersey Department of Environmental Protection, 320 N.J. Super. 59, 64-65, (App. Div. 1999) affirmed, 170 N.J. 246 (2001).

Questions of law are particularly suited for resolution through motion by the Court. Shields v. Ramslee Motors, 240 N.J. 479 (2020) and Badiali v. New Jersey Manufacturers Insurance Group, 220 N.J. 544, 555 (2015). Questions involving insurance coverage are always determined by the terms and conditions of a policy and the interpretation of an insurance contract is a question of law for the Court and can be often resolved by motions. Weedo v. Stone-E-Brink, Inc., 155 N.J. Super. 474, 479 (App. Div. 1977).

An insurance policy is a contract enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled. Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010). An insurance policy is interpreted by the Court in accordance with its plain and ordinary meaning. Memorial Properties, LLC v. Zurich American Insurance Co., 210 N.J. 412, 425 (2012). Courts

cannot rewrite a policy's terms to find coverage where the policy plainly provides none. Pizzullo v. New Jersey Manufacturers Insurance Co., 196 N.J. 251, 270 (2008).

The plain language of a policy is unambiguous. Courts shall not engage in estranged construction to support the imposition of liability or write a better policy for the insured than the policy that was purchased. Oxford Realty Group Cedar v. Travelers Excess and Surplus Lines Co., 299 N.J. 196, 207 (2017). When the policy is clear and unambiguous, a Court is bound to enforce it. Longobardi v. Chubb Insurance Co., 121 N.J. 530, 537 (1990).

Lastly, a party seeking coverage under an insurance agreement bears the burden of demonstrating that the underlying claim falls within the coverage provisions of the insuring agreement. Hartford Accident and Indemnity Co. v. Aetna Life and Casualty Insurance Co., 98 N.J. 18. However, regarding exclusions of coverage under an insurance policy, the burden of proof is on an insured to prove that the exclusion applies. Generally, the insurance policy exclusions must be narrowly construed. The burden is on the insured to bring the case within the exclusion. Flomerfelt, supra, 202 N.J. at 442 (quoting American Motorist Insurance Co. v. LCA Sales Co., 155 N.J 29, 41 (1998). Where an exclusionary clause is involved, such clauses are narrowly tailored.

Indeed, it is the insurer's burden to establish the exclusion. Phribro Animal Health Corporation v. National Union Fire Insurance Co., 446 N.J. 419, 442-443 (App. Div. 2016). Courts must be careful, however, not to disregard the clear import and intent of a policy's exclusion. Far-fetched interpretations of a policy exclusion are insufficient to create ambiguity requiring coverage. Wear v. Selective Insurance Co., 455 N.J. Super. 440, 454 (App. Div. 2018).

Thus, in the absence of any ambiguity, Courts should not write for the insured a better policy of insurance than the one purchased, including the enforcement of an exclusion. Gibson v. Callahan, 158 N.J. 662, 670 (1999).

RULES OF LAW AND DECISION

Choice of Law

While Plaintiffs have commenced this action in New Jersey, New York has the most significant connection to this dispute and, therefore, New York law applies. See Lonza Inc. v. The Hartford Acc. And Indem. Co., 359 N.J. Super. 333, 346 (App. Div. 2003) ("In considering the state law to be applied to insurance contracts, the first step involves an analysis of Restatement §193.") Restatement §193 applies the principles of §188 for insurance contracts providing that:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles state in § 6 to the transaction and the parties, in which event the local law of the other state will be applied. (Restatement at §193).

Bell v. Merchants and Businessmen's Mut. Insurance Co., 214 N.J. Super. 557, 563 (App. Div. 1990).

Under Restatement Second §188, courts examine the principal location of the insured risk and must determine which state "has the most significant contacts with the parties and transaction." To determine the most significant contacts, New Jersey courts look to the following non-exclusive contacts listed in Restatement §188, which are: (1) the place of contracting; (2) the place of contract negotiation; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the parties' domicile, residence, nationality, place of incorporation and place of business. Garcia v. Prudential Life Insurance Co. of America, 2009 WL 5206016, at *5 (D.N.J. Dec. 29, 2009).

In addition, contained in the analysis under §193, the Restatement Second §6 identifies several other "general considerations" for analysis: (1) the needs of the interstate and international system; (2) the relevant policies of the forum; (3) the relevant policies of the other affected states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) the uniformity of result; and (7) the ease in the determination of an application of the law to be applied. Bell, supra, at 563. The New Jersey Supreme Court has consolidated the analysis in Restatement §6 to ask, simply, "whether application of the competing states' laws would advance the policy interests that the law was intended to promote." Continental Insurance Co. v. Honeywell International, Inc., 234 N.J. 23, 58 (2018).

Applying the contact considerations from the Restatement §188 to the instant case leads to the following conclusions: Highgate has its principal place of business in Texas and thus the policies and endorsements attached to the policies by the Defendants were delivered to Highgate in Texas; Plaintiffs have an interest in eighteen properties across six states with nine of those properties located in New York; four of the five named Plaintiffs also have their principal place of business in New York; and out of the nine Defendants, four are domiciled in New York. Thus, in applying the "more flexible approach" that "focuses on the state that has the most significant connections with the parties and the transactions," the strongest nexus between the parties and the insured risks is New York. Sensient Colors Inc. v. Allstate Insurance Co., 338 N.J. Super. 374, 388 (App. Div. 2006). On the other hand, none of the Plaintiffs are citizens of New Jersey and none of the insured properties are located in New Jersey. Other than the fact that two of the Defendants reside in New Jersey, New Jersey has no connection to the dispute.

Plaintiffs argue that New Jersey law applies to the dispute based on the Liberty Policy's "Jurisdiction and Suit" provision, which states in part that the insurers shall submit to the

jurisdiction of any U.S. court of competent jurisdiction and that all matters arising hereunder shall be determined in accordance with the law and practice of such court. However, Plaintiffs mischaracterize this clause. The New Jersey Supreme Court has held that the provision has "been read by nearly every court that has considered [it] – as a consent to jurisdiction by the insurer and a prohibition against an insurer interfering with a forum initially chosen by the insured. The clause is no more expansive than that." Chubb Custom Insurance Co. v. Prudential Insurance Co. of America, 195 N.J. 231, 243 (2008); see also Dornoch Ltd. Ex rel. Underwriting Members of Llyod's Syndicate 1209 v. PBM Holdings, Inc., 666 F. Supp. 2d 366, 370 (S.D.N.Y. 2009) (holding that a service of suit clause "generally provides no more than a consent to jurisdiction"); Chesapeake Utilities Corp. v. Am. Home Assur. Co., 704 F. Supp. 551, 557-58 (D. Del. 1989) (same).

Similarly, the Liberty Policy's "Jurisdiction and Suit" provision provides for nothing more than Defendants' consent to the jurisdiction of this Court as selected by Plaintiffs. It cannot be read to also require the application of New Jersey law to the issue of the dispute. Rather, under New Jersey's choice of law analysis, New York has the most significant connections to the dispute. Therefore, New York law governs the issues disputed.

New York Interpretation of Insurance Policies

Under New York law, "insurance policies are, in essence, creatures of contract, and, accordingly, subject to principles of contract interpretation." Lantheus Med. Imaging, Inc. v. Zurich Am. Insurance Co., F. Supp. 2d 443, 452 (S.D.N.Y. 2015) (quoting Porco v. Lexingto Insurance Co., 679 F. Supp. 2d 432, 435 (S.D.N.Y. 2009)). The unambiguous language of insurance policies is to be afforded their plain and ordinary meaning. Allianz Insurance Co. v. Lerner, 416 F.3d 109, 113 (2d Cir. 2005) (quoting State of N.Y. v. Am. Mfrs. Ins. Co., 593 A.D.2d 152, 155 (3d Dep't 1993)). Where the policy's terms "are unambiguous and intelligible,

courts should enforce them as drafted" (Svensson v. Securian Life Ins. Co., 706 F. Supp 2d 521, 525 (S.D.N.Y. 2010) (citing Parks Real Estate Purchasing Group v. St. Paul Fire & Marine Ins. Co., 472 F.3d 33, 42 (2d Cir. 2006)), and "courts should not strain to superimpose an unnatural or unreasonable construction." United Cap. Corp. v. Travelers Indem. Co., 237 F. Supp. 2d 270, 274-75 (E.D.N.Y. 2002) (quoting Maurice Goldman & Sons, Inc. v. Hanover Ins. Co., 80 N.Y.2d 986, 986 (1992)).

The insureds have the initial burden of establishing coverage under the policy. Morgan Stanley Group. Inc. v. New Eng. Ins. Co., 225 F.3d 270, 276 (2d Cir. 2000). Only when the insureds meet their initial burden does the burden then shift to the insurer to prove that an exclusion operates to bar coverage. Ment Bros. Iron Works Co. v. Interstate Fire & Cas. Co., 702 F.3d 118, 121 (2d Cir. 2012).

Further, "the mere fact that a contractual term is undefined does not render it ambiguous per se." Century Sur. Co. v. Franchise Contrs., LLC, 2016 WL 1030134, at *6 (S.D.N.Y. Mar. 10, 2016) (quoting Cassoli v. Am. Med. & Life Ins. Co., 2015 WL 3490688, at *3 (S.D.N.Y. June 2, 2015)). Rather, where a contract does not define a particular term, "a body of state law or an established custom [may fill] in the gaps left by the drafters." Id., quoting Hugo Boss Fashions, Inc. v. Fed. Ins. Co., 252 F.3d 608, 617 (2d Cir. 2001)).

"Direct Physical Loss or Damage" Requires Physical Alteration to Plaintiffs' Property

Plaintiffs' allegations regarding the presence of Covid-19 at their locations are insufficient to establish direct physical loss or damage to property as a matter of law. In Share Harvey, DDS, PLLC v. Sentinel Insurance Co., Ltd., 2021 WL 1032459, at *8 (S.D.N.Y. Mar. 18, 2021), the Court confronted nearly identical allegations, namely that "physical loss or damage" was caused by "(1) the Covid-19 pandemic generally, (2) the government shutdown

orders, or (3) Covid-19 contamination on its premises." The Court found each of these allegations to be insufficient, holding that the Covid-19 pandemic and the government orders did not "physically damage" the insured's property and that the presence of the virus on the property does not constitute the requisite "physical loss or damage" standard. Id. at *8-9.

Courts have rejected Plaintiffs' argument that invisible substances can cause damage even without causing a structural alteration to property. In New Jersey, courts construe "direct physical loss" to require physical loss or damage to property – either through (1) structural alteration to property or (2) sever physical contamination of the property, such as from the physical presence on the property of dangerous levels of asbestos or deadly fumes, causing the property to lose its essential function. See Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am., 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014). Notably, Plaintiffs allege neither a structural alteration, nor a severe physical contamination of the properties. The Court in Wakefern Food Corp. v. Liberty Mutual Fire Ins. Co., 406 N.J. Super. 524 (App. Div. 2009) also concluded that the relevant "physical damage" was to the power source and that "due to a physical incident," certain components of the electrical grid were "physically incapable of performing their essential function of providing electricity." Id. At 540. Therefore, for purposes of coverage, the Court found the existence of "physical damage" in that the power source collapsed." Id. At 544. Unlike in Wakefern, as courts in New Jersey and New York have held, no physical damage exists in the Covid-19 context. See, e.g., Capri Holdings, LTD v. Zurich Am. Ns. Co., No. BER-L-002322-21, at *64 (N.J. Law Div. Apr. 25, 2021); Northwell Health, Inc. v. Lexington Ins. Co., 2021 WL 3139991, at *6 (S.D.N.Y. July 26, 2021); Mac Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., 2020 WL 7422374, at *9 (N.J. Law Div. Nov. 5, 2020); Jenkinson's South, Inc. v. Westchester Surplus Lines Ins. Co., 2021 WL 2934875 (N.J. Law Div. July 2, 2021).

The Liberty Policy Does Not Provide Coverage for "Loss of Use"

Plaintiffs also employ a strained and parsed construction of the plain meaning of "direct physical loss or damage," arguing that the word "or" separating the word "loss" from "damage" should lead the Court to find that the term "direct physical loss" includes nonphysical loss in the form of the inability to utilize property. This ignores the overwhelming weight of case law holding that "physical modifies both "loss" and "damage." As determined by "nearly every court" addressing this same issue, "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. v. Admiral Indem. Co., 506 F. Supp. 3d 168, 179 (S.D.N.Y. 2020); see also OTG Mg. PHL LLC v. Emp'rs Ins. Co. of Wausau, 2021 WL 3783261, *at8 (D.N.J. Aug. 26, 2021) ("finding that physical loss or damage "requires 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."); Visconti Bus Serv., LLC v. Utica Nat'l Ins. Grp., 142 N.Y.S.3d 903, 910 (N.Y. Sup. Ct. Orange Cty. 2021); Mohawk Gaming Enterprises, LLC v. Affiliated FM Ins. Co., 2021 WL 1419782 (N.D.N.Y. Apr. 15, 2021); Jeffrey M. Dressel, D.D.S., P.C. v. Hartford Ins. Co. of the Midwest, Inc., 2021 WL 1091711, at *3 (E.D.N.Y. Mar. 22, 2021).

Courts have also repeatedly rejected the notion that government orders restricting operations can constitute physical loss or damage. See, e.g., United Airlines, Inc. v. Ins. Co. of State of Penn., 385 F. Supp. 2d 343 (S.D.N.Y. 2005); Michael Cetta, Inc., 506 F. Supp. 3d at 176-77; 10012 Holdings, Inc. v. Hartford Fire Ins. Co., 507 F. Supp. 3d 482 (S.D.N.Y. 2020). Because neither the "loss of use" of Plaintiffs' premises, nor the government orders allegedly prohibiting operations at such premises, constitute "physical loss or damage" to the insured properties, no coverage exists for Plaintiffs' claims.

More specifically, Plaintiffs allege that Covid-19 spread throughout their properties and attached to and harmed the properties by changing the physical condition of the properties it invaded, impacting surfaces and the air, and rendering the properties dangerous and unusable. Both New York and New Jersey courts have rejected this argument. See, e.g., Tappo of Buffalo, LLC v. Erie Ins. Co., 2020 WL 7867553, at *4 (W.D.N.Y. Dec. 29, 2020) ("[E]ven assuming that the virus physically attached to covered property, as plaintiffs allege in the instant case, it did not constitute the direct, physical loss or damage required to trigger coverage because it's presence can be eliminated by routine cleaning and disinfecting."); Ralph Lauren Corp., supra, 2021 WL 1904739, at *3 n.6 ("Although the Virus can harm humans, it does not physically alter structures and therefore does not result in coverable property loss or damage.") Because Covid-19 does not "alter the characteristics" of property, "[t]he building itself remains unharmed by the virus." Kim-Chee LLC v. Philadelphia Indem. Ins. Co., 2021 WL 1600831, at *4.

Plaintiffs also wrongly interpret the holdings in Roundabout Theatre Co. Inc. v. Continental Casualty Co., 302 A.D.2d 1 (1st Dep't 2002) and Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co., 17 F. Supp. 3d 323 (S.D.N.Y. 2014), contending that the decisions relate to off-site property only, or support the position that physical loss or damage need not be tangible, structural, or even visible. Rather, New York courts have consistently relied upon Roundabout and Newman in determining that "physical loss or damage" unambiguously requires some form of actual, physical damage to the insured property and in dismissing Covid-19 business interruption claims. See, e.g., Deer Mountain Inn LLC v. Union Ins. Co., 2021 WL 2076218 (N.D.N.Y. May 24, 2021); Rye Ridge Corp. v. Cincinnati Ins. Co., 2021 WL 1600475, at *2 (S.D.N.Y. Apr. 23, 2021); 6593 Weighlock Drive, LLC v. Springhill SMC Corp., 71 Misc. 3d 1086, 1094-95 (N.Y. Sup. Ct. Onondaga Cty. 2021); Northwell Health, Inc, 2021 WL 3139991.

Plaintiffs Have Failed to State a Claim for Ingress/Egress Coverage because Ingress To, or Egress From, Their Properties was Not Impaired

In support of Plaintiffs' claim for Ingress/Egress coverage, they rely exclusively on a Pennsylvania state court decision stating that the government shutdown orders control "ingress and egress to and from . . . and the occupancy of premises . . .." Friends of Danny DeVito v. Wold, 227 A.2d 872 (Pa. 2020). Plaintiffs' reliance is misplaced. The decision in Friends of Danny DeVito has no relation to insurance coverage, let alone ingress/egress provisions. Ultimate Hearing Sols II, LLC v. Twin City Fire Ins. Co., 513 F. Supp. 3d 549, 560 (E.D. Pa. 2021); Hair Studio 1280, LLC v. Hartford Underwriters Ins. Co., 2021 WL 1945712 (E.D. Pa. May 14, 2021). As the court in Ultimate Hearing Solutions correctly concluded, the discussion in Friends of Danny DeVito of "a statute triggering executive authority for various natural disasters has no bearing on how the Court must construe the plain language of an insurance contract, and its discussion of the existence of the virus throughout the Commonwealth of Pennsylvania has no bearing on the application of property insurance . . .." Id. at 560.

There is no dispute that the Executive Orders exempted Plaintiffs' properties by denominating them as essential businesses and did not impair in any way ingress to or egress from Plaintiffs' hotels. The Executive Orders merely mitigated the spread of Covid-19 by providing guidelines for the flow and congregation of people. 6593 Weighlock Drive, LLC v. Springhill SMC Corp., 2021 WL 1419049, at *2, 6 (N.Y. Sup. Ct. Onondaga Cty. Apr. 13, 2021) (determining, in a case concerning a hotel's alleged Covid-19 business interruption losses, that even though the hotel was required to modify its business operations pursuant to the New York Executive Orders, those orders were merely intended to mitigate and slow the spread of Covid-19; they did not result in an impairment of access to the insured property); Office Sol. Grp., LLC v. Nat'l Fire ins. Co. of Hartford, 2021 WL 2403088, at *8 (S.D.N.Y. June 11, 2021) (finding

that the insureds "failed to plead that the Executive Orders prohibited access to its office"). The Executive Orders expressly permitted Plaintiffs' hotels to continue to operate. Thus, as there has been no impairment in the ingress to or egress from Plaintiffs' properties, their claims under the Ingress/Egress provisions fail as a matter of law.

Endurance American Specialty Insurance Company and American Guarantee and Liability Insurance Company both issued an insurance policy to Plaintiffs. These policies contain the same relevant provisions as the Liberty Policy. Therefore, Plaintiffs' claims against Endurance American Specialty Insurance Company and American Guarantee and Liability Insurance Company are dismissed for the reasons stated above.

Allianz Policy's Pollution and Contamination Exclusion Bars Coverage for Plaintiffs' Claims

Allianz issued a policy to Plaintiffs containing the same manuscript policy language contained in the Liberty Policy (the "Allianz Policy"). The Allianz Policy also excludes coverage for losses in connection with any kind of pollution or contamination, whether direct or indirect, arising from any cause whatsoever. The Allianz Policy specifically defines "pollution" and/or "contamination" to include "virus", such as the Covid-19 virus.

Plaintiffs allege that their purported damages were caused by the Covid-19 virus and the resulting Orders. Covid-19 is indisputably a virus. Mangia Rest. Corp. v. Utica First Ins. Co., 713847/2020, 2021 WL 17-5760, at *3-4 (Sup. Ct., Queens Cty., Mar. 30, 2021). The Allianz Policy's Pollution and Contamination Exclusion thus precludes coverage for any losses, damages, expenses, fines, penalties, and costs resulting from Covid-19 or any government order issued to curtail the spread of Covid-19.

Courts applying New York law have repeatedly dismissed near-identical cases based on similar exclusions. A court dismissed Covid-19 claims where the policy excluded losses caused

by the "release, discharge, escape or dispersal of pollutants or contaminants" and, like the Allianz Policy here, specifically defined "Pollutants" to include viruses. Sportime Clubs LLC v. Am. Home Assurance Co., No. 614493/2020 (Sup. Ct. Suffolk Cty. July 1, 2021). Similarly, a court found the policy at issue excluded coverage for Covid-19 where the policy "excludes coverage for pollutants on Plaintiff's premises" and defined "pollutants" as "any . . . material which causes or threatens to cause physical loss, physical damage, impurity to property, unwholesomeness, undesirability . . . loss of use of property, or which threatens human health or welfare." 10012 Holdings, Inc. v. Sentinel Ins. Co., 507 F. Supp. 3d 482, 488-89 (S.D.N.Y. Dec. 15, 2020).

New Jersey courts have reached the same result as those in New York. In Ralph Lauren Corp. the court held that the commercial property insurance policy excluded coverage for "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." Ralph Lauren Corp., supra, at *2. As with the Allianz Policy, "Contamination" was defined as "any condition or property due to the actual or suspected 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. Given this exclusion, the court found that "even if Plaintiff did plead the existence of actual or imminent 'physical loss or damage,' its claim fails under the Contamination Exclusion" – the same situation faced here. Id. at *4. The court continued, "[f]urthermore, because the Stay-at-Home Orders were issued to mitigate the spread of the highly contagious Virus, the relief Plaintiff seeks is tied inextricably to the suspected presence of the Virus and is not recoverable under the Policy." Id.; see also Sweetberry Holdings LLC v. Twin City Fire Ins. Co., 20-8200, 2021 WL 3030269, at *4 (D.N.J. July 19, 2021).

As numerous courts in New York and New Jersey have already held, the Allianz Policy's Pollution and Contamination Exclusion bars coverage for Plaintiffs' alleged Covid-19 related losses. Accordingly, Plaintiffs' claims should be dismissed with prejudice.

Additional Policies and Rules of Law

MSI issued a commercial property insurance policy for the policy period of December 1, 2019, to October 1, 2020 (the "MSI Policy"). The MSI Policy contains the same relevant provisions as the Liberty policy, except that MSI's participation in the layered property insurance program begins excess of $300,000,000.00. For the same reasons Plaintiffs' claims against Liberty Mutual are dismissed, Plaintiffs' claims against SMI for coverage fail as a matter of law.

Further, because the MSI Policy is an excess policy that begins affording coverage at an attachment point of $300,000,000.00, Plaintiffs' claims against MSI fail for the additional reason that Plaintiffs cannot establish coverage under the MSI Policy's Contagious Disease or Cancellation of Bookings Provisions. Those provisions are subject to program sublimits of $1,500,000.00 and $5,000,000.00, respectively, well below the MSI Policy's attachment point.

Therefore, even if Plaintiffs could otherwise establish a claim for coverage under the Contagious Diseases or Cancellation of Bookings provisions, which they cannot as previously stated, the MSI Policy sublimits prevent Plaintiffs' claim from triggering the excess coverage layer. See Ali v. Federal Ins. Co., 719 F.3d 83, 90-91 (2d Cir. 2013) (holding that "[c]overage under an excess policy thus is triggered when the liability limits of the underlying primary insurance policy have been exhausted" and explaining that "the very nature of excess insurance coverage is such that a predetermined amount of underlying primary coverage must be paid before the excess coverage is activated").

Both QBE Specialty Insurance Company and Homeland Insurance Company of New York are excess coverage providers. For same reasons Plaintiffs' claims against MSI are

dismissed, Plaintiffs' claims against QBE Specialty Insurance Company and Homeland Insurance Company of New York are dismissed, as well.

The Princeton Excess and Surplus Lines Insurance Company's policy contains the same relevant provisions as the Liberty Policy. Additionally, their policy is an excess policy, similar to that of MSI. Therefore, for the reasons stated above with respect to Plaintiffs' claims against Liberty Mutual and MSI, the claims against Princeton Excess and Surplus Lines Insurance Company are dismissed.

ACE American Insurance Company issued a policy to Plaintiffs for the period of December 1, 2019, to October 1, 2020. For the reasons stated above with respect to Liberty Mutual's Policy, Plaintiffs' claims are dismissed. Additionally, ACE American Insurance Company's Policy includes a "Biological Chemical or Nuclear Exclusion." This exclusion provides that the policy "does not insure against any loss, damage, cost or expense caused by or resulting from any of following regardless of any other cause or event distributing concurrently or in any sequence thereto: . . . The unlawful possession, use, release, discharge, dispersal or disposal of any chemical, bacteriological, viral, radioactive or similar agents or material regardless of who is responsible for the act . . . and regardless of any other cause or event contributing concurrently or in any other sequence thereto."

Plaintiffs' claim is precluded by the "Biological, Chemical or Nuclear Exclusion" because Covid-19 is a "chemical, bacteriological, viral, radioactive or similar" agent within the meaning of the exclusion. New Jersey courts have found exclusions substantially similar that bar claim for business losses caused by the Covid-19 pandemic. Jenkinson's South, Inc., supra, 2021 WL 2934875. Therefore, in addition to Plaintiffs failing to meet their burden to plead "direct physical loss or damage" to insured property and to establish coverage under the civil authority

and ingress/egress coverage extensions, the ACE American Insurance Company Policy's "Biological, Chemical or Nuclear Exclusion" precludes coverage for Plaintiffs' claims.

Plaintiffs' Claim for Contagious Disease Coverage is Not Ripe for Adjudication

Courts can only adjudicate live controversies. But as evidenced by their pleadings, Plaintiffs' claims for coverage under the Policy's Contagious Disease provisions are not currently a justiciable issue. While Plaintiffs submitted a claim on March 19, 2020, and a proof of loss on May 16, 2020, Defendants repeatedly advised Plaintiffs of the deficiencies in their claim submission, requested further information necessary to properly investigate their claims and had not denied Plaintiffs' claim for coverage under the Policy's Contagious Disease provision prior to Plaintiffs instituting this action.

Plaintiffs seek coverage under the Contagious Disease provisions based upon the effects of the Covid-19 pandemic on the nation's businesses. However, Defendants cannot possibly confirm coverage under this extension based solely upon broad generalizations of the effects of government orders on the general public. Rather, claims must be evaluated on their own merits utilizing detailed information on the relevant areas of inquiry, including the circumstances surrounding whether the properties were totally or partially closed. Plaintiffs have not yet provided the information necessary to evaluate their claims under the Contagious Disease extension. Therefore, Plaintiffs' claims regarding the Contagious Disease coverage should be dismissed without prejudice.

CONCLUSION

For the aforementioned reasons, Defendants' Motions to Dismiss is hereby **GRANTED**.