CAPRI HOLDINGS LIMITED, a British Virgin Islands Corporation, *Plaintiff*, v. ZURICH AMERICAN INSURANCE COMPANY, a New York Corporation, XL INSURANCE AMERICA, INC., a Delaware Corporation, MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA, a New York Corporation, LIBERTY MUTUAL FIRE INSURANCE COMPANY, a Wisconsin Corporation, ALLIANZ GLOBAL CORPORATE AND SPECIALTY SE, a German Corporation and AIG SPECIALTY INSURANCE COMPANY, an Illinois Corporation, *Defendants*.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY Docket No.: BER-L-002322-21 CIVIL ACTION

PLAINTIFF CAPRI HOLDINGS LIMITED'S BRIEF IN OPPOSITION TO DEFENDANT ZURICH'S, DEFENDANT LIBERTY'S AND DEFENDANT AIG'S MOTIONS TO DISMISS

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PRELIMINARY STATEMENT

The Insurers' motions to dismiss Capri's Third Amended Complaint ("TAC") must be denied as contrary to New Jersey law.[1] Under New Jersey's well-established (i) pleading standards (accepting pleaded facts as true, drawing all inferences in favor of the plaintiff, and granting motions to dismiss in only the "rarest" of instances); (ii) principles of insurance policy interpretation (giving effect to every word and interpreting ambiguities in favor of the policyholder); and (iii) caselaw providing that the presence of hazardous substances at an insured property (particularly in the air) constitutes physical loss of or damage to property, Capri's well-pleaded TAC should be sustained.[2] As set forth more fully below, Capri has sufficiently alleged "physical loss of or damage" to property to trigger insurance coverage under the Policies.

First, the Insurers' attempted insertion of a "structural alteration" requirement that is not in the Policies is inconsistent with the plain language of the Policies' "physical loss of or damage" coverage trigger, and Capri's reasonable expectations as supported by dictionary definitions of these undefined terms. See infra, Section II.A.

Second, New Jersey law expressly recognizes that "physical loss of or damage" to property does not require any permanent physical or structural alteration, finding coverage where property has been rendered uninhabitable or unusable for its intended purpose, particularly where

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[1] Zurich American Insurance Company ("Zurich"), XL Insurance America, Inc. ("XL"), Liberty Mutual Fire Insurance Company ("Liberty"), Allianz Global Corporate and Specialty SE ("Allianz"), and AIG Specialty Insurance Company ("AIG") are referred to collectively as the "Insurers." While each Insurer filed a motion to dismiss, XL, Liberty, Allianz and AIG all adopted the arguments contained in Zurich's brief. Capri replies to specific arguments made by XL and Allianz in their motions in a separate Opposition, submitted contemporaneously herewith. Mitsui Sumitomo Insurance Company of America ("Mitsui") also filed a motion to dismiss but Capri and Mitsui are negotiating a dismissal without prejudice, which is expected to be finalized shortly.

[2] Unless otherwise specified, citations to "D-Ex. _" are to exhibits attached to the Certification of John A. Mattoon, dated May 3, 2021. Unless otherwise specified, citations to "P-Ex. __" are to the exhibits attached to the Certification of Victor J. Herlinsky, Jr., submitted herewith. Capri's Third Amended Complaint, dated April 12, 2021 (D-Ex. A), is referred to as "TAC." All emphasis is added unless otherwise indicated.

harmful substances are involved, as is precisely the case here. Indeed, courts across the country applying the same rationale as New Jersey courts have likewise refused to adopt a structural alteration requirement where none exists in the policies. See infra, Section II.B.

Third, Capri has sufficiently alleged the presence of the SARS-CoV-2 virus (the "Coronavirus") at Capri's stores ("Stores"), causing physical loss of or damage to its property, with specific facts (including over 900 infected employees) supported by biostatistical and other studies (over forty of them appearing in peer-reviewed publications alone), and scientific analysis. (See, e.g., TAC ¶¶ 35, 38, 46-47, 99, 117-28, 135-40.) Insurers' characterization of such allegations as "conclusory" is both false and an inappropriate attempt to require evidence at the pleading stage when those fact-rich allegations must be taken as true on these motions to dismiss. See infra, Section II.C.

Fourth, apart from the presence of the virus at its premises, Capri has sufficiently alleged physical loss of its property due to Government Orders (defined herein), which two sister courts in New Jersey have already held to result in the suspension of business and constitute physical loss of or damage to property. See infra, Section II.D.

Fifth, the cases upon which Insurers rely do not appropriately apply New Jersey law or are otherwise factually or procedurally distinguishable. See infra, Section II.E.

Sixth, the Policies' "Period of Liability" provision does not modify or limit the "physical loss of or damage" liability trigger. As courts have made clear, that provision merely acts as a temporal period for the measure of business interruption; it does not incorporate a structural alteration requirement otherwise absent from the Policies. See infra, Section II.F.

Finally, Insurers' reliance on a "structural alteration" requirement is belied by the insurance industry's own conduct when they themselves: (1) sought coverage on toxic/hazardous

substance claims; (2) took the position there is no purported "physical tangible alteration" requirement; and (3) paid SARS claims without raising the arguments they now raise. See infra, Section II.G.

With respect to coverage under the other Time Element Coverages and Special Coverages, Insurers rely almost entirely on the flawed argument that Capri never sustained "physical loss of or damage" to property. In addition, they defy liberal pleading standards in New Jersey by suggesting – wrongly – that detailed factual allegations regarding Capri's 1,271 Stores around the world are required. See infra, Sections III-IV.

Accordingly, this Court should deny the Insurers' motions in their totality and sustain Capri's well-pleaded TAC.

STATEMENT OF FACTS

A. The All-Risk Policies

Capri has a significant presence in New Jersey, where it employs hundreds of New Jerseyians, and maintains a large corporate office (in East Rutherford), two warehouses, and 18 Stores. (TAC ¶ 2.) Capri purchased "all risk" commercial property insurance on the Zurich EDGE™ master policy for two policy periods—March 14, 2019 to March 14, 2020 (the "2019/2020 Policy Period") and March 14, 2020 to March 14, 2021 (the "2020/2021 Policy Period") (collectively, the "Policy Periods"), which provide $500 million in limits – $250 million for each policy period. When introduced in 2008, Zurich's CEO announced that the Zurich EDGE™ coverage form offered uniquely "broader coverage and greater flexibility" (TAC ¶ 53), and further claimed that "[t]he Zurich Edge policy is clearly written with all limits, sub-limits and other critical coverage issues incorporated within the policy declarations." (TAC ¶ 190.)

Zurich sold to Capri the Zurich Edge "All Risk" Commercial Property Policy, for the 2019/2020 Policy Period (the "2019/2020 Policy"), underwriting 100% of the 2019/2020 Policy's

$250 million limit. (D-Ex. J, at EDGE-D-101-B, 1 D; TAC ¶ 186.) The following year, Zurich sold Capri the same Zurich Edge "All Risk" Commercial Property Policy for the 2020/2021 Policy Period (the "2020/2021 Policy"), but this time issued the 2020/2021 Policy as part of a "quota share program."[3] The 2020/2021 Policy's $250 million limit is shared by and among Zurich (with 40%) and the other Insurers, which include XL, Liberty, Allianz, and AIG (who split the remaining 60% in varying amounts and with varying attachment points).[4] (D-Ex. K, at EDGE-D-101-B, 1 D.) Insurers' quota share policies adopt and incorporate the terms and conditions of the 2020/2021 Policy. (TAC ¶ 187.) The 2019/2020 and 2020/2021 Policies are identical in all material respects. Zurich and/or its affiliates drafted the Policies, which include the Zurich EDGE™ coverage form. (TAC ¶ 189.)

The Policies' insuring provisions provide: "This Policy Insures against direct physical loss of or damage caused by a **Covered Cause of Loss** to Covered Property, at an Insured Location described in Section II-2.01, all subject to the terms, conditions and exclusions stated in this Policy." (D-Exs. J, K at § 1.01.)

Covered Cause of Loss is defined as "All risks of direct physical loss of or damage caused from any cause unless excluded." (D-Exs. J, K at § 7.11.)

An "all-risk" policy is a "special type of insurance," as it provides broad coverage for all risks "unless the policy contains a specific provision expressly excluding the loss from coverage." Victory Peach Grp., Inc. v. Greater N.Y. Mut. Ins. Co., 310 N.J. Super. 82, 87 (App. Div. 1998). Simply put, "all-risk" insurance is the broadest type of property insurance sold, vastly broader than narrower "named perils" insurance, which covers losses caused by specified perils. Id.

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[3] Under a quota share program, the subscribing insurers "share premiums and losses in proportions fixed by the contract." See 14-102 Appleman on Insurance (2d ed.) § 102.3.

[4] Mitsui also shared in the remaining 60% of the limits under the 2020/2021 Policy.

1. The Policies Provide Coverage for Time Element Losses.

As a central component of coverage, Insurers agreed to pay for the "actual Time Element loss" Capri sustains, where such loss results from the "necessary **Suspension** of" Capri's business activities, so long as the suspension is due to "direct physical loss of or damage to" covered property. (D-Exs. J, K at § 4.01.01.) Suspension is defined in the Policies as the "slowdown or cessation of" Capri's business activities, or "[a]s respects rental income," where "a part or all of" Capri's property is "rendered untenantable." (D-Exs. J, K at § 7.69.)

The Period of Liability that applies to all Time Element Coverages, with limited exceptions, is the period "starting from the time of physical loss or damage *of the type insured against* and ending when with due diligence and dispatch the building and equipment could be repaired or replaced." The expiration of the Policies does not limit the Period of Liability. (D-Exs. J, K at § 4.03.01.01.) The Policies define the "Extended Period of Liability" as "[t]he date the Insured could *restore* its business with due diligence, to the condition that would have existed had no direct physical loss or damage occurred to the Insured's Covered Property[.]" (D-Exs. J, K at § 4.02.02.01.)

2. The Policies Provide Other Time Element Coverages.

The Policies provide other Time Element Coverages, which includes (1) Leasehold Interest coverage, and (2) Extra Expense coverage. (D-Exs. J, K at §§ 4.02.04., 4.02.03.) See infra, Section III.

3. The Policies Provide Several Special Coverages.

The Policies also include numerous Special Coverages. These include (1) Civil or Military Authority coverage; (2) Contingent Time Element coverage; (3) Protection and Preservation of Property coverage; and (4) Difference in Conditions/Difference in Limits, among others (D-Exs. J, K at §§ 5.02.03., 5.02.05., 5.02.23., 5.02.34.) See infra, Section IV.

B. Capri's Allegations of "Direct Physical Loss of or Damage" to Property

1. The Coronavirus was Present on Capri's Property.

On January 21, 2020, the first case of COVID-19, the disease caused by the Coronavirus, was identified in the United States. By the end of March 2020, government orders had issued across the country, shuttering non-essential businesses, schools, and places of worship in an effort to stop the spread of the deadly virus which had rendered indoor spaces, like Capri's Stores, uninhabitable and unfit for their normal purposes (the "Government Orders").

Individuals infected with the Coronavirus were present at Capri's Stores, where they spread the Coronavirus. (TAC ¶¶ 119, 126, 132, 222.) Considering the foot traffic and positivity rates in the areas where Capri operates its Stores, biostatistical analysis shows that it is statistically certain at many stores or near certain in others that customers and other individuals who visited Capri's Stores contracted and carried the Coronavirus before the Stores closed. (TAC ¶¶ 119, 127, 134-40.)[5] Moreover, Capri's own employees have tested positive for the Coronavirus—930 globally, 600 in the U.S., and over 29 in New Jersey—and, given the prevalence of asymptomatic cases of COVID-19, it is certain that additional employees were unknowingly contagious while working in Capri's Stores. (TAC ¶¶ 79-80, 99, 117-28, 133.)

a. The Coronavirus creates dangerous property conditions rendering property unsafe for retail operations.

Risk of infection by the Coronavirus, which causes COVID-19, is a serious threat to human health that renders objects, surfaces, and areas exposed to the virus dangerous and potentially fatal. (TAC ¶¶ 42-43, 100, 103, 114.) Infection by the Coronavirus occurs when someone is exposed to the virus through respiratory particles (*e.g.*, droplets and aerosols) expelled

[5] By way of example only, biostatistical analysis demonstrates that an expected 40.3 infected customers entered Capri's Jersey Gardens Store located in Elizabeth, New Jersey. (TAC ¶ 127.)

by an infected person. The infected respiratory particles can be inhaled out of the air or, to a lesser extent, transferred from objects or surfaces (*e.g.*, doorknobs) where people touch them and then touch their eyes, nose, or mouth. (TAC ¶¶ 86-87, 89-90, 97, 114.)

b. Airborne Coronavirus makes indoor air unsafe to breathe.

The presence of Coronavirus in the air, either through aerosols or droplets, is the primary transmission vector for the deadly virus.[6] Coronavirus can remain airborne in respiratory particles for "for indefinite periods unless removed by air currents or dilution ventilation." (TAC ¶¶ 91, 93.) Ventilation systems, however, can also be transmission vectors for the disease by spreading the airborne particles—studies have found Coronavirus in ceiling vent openings, vent exhaust filters, and ventilation ducts located up to 56 meters from an infected individual. (TAC ¶ 92.) Removing airborne Coronavirus particles cannot be achieved with surface cleaning; and, indeed, surface cleaning may cause virus particles to become airborne. (TAC ¶¶ 19, 24, 43, 115.) Making property exposed to Coronavirus safe thus requires, among other things, "making changes to air filtration systems." (TAC ¶¶ 94, 112.) But removing Coronavirus from the air is not possible as a practical matter and no amount of cleaning will prevent reintroduction of the virus when an infected person enters a public space. (TAC ¶¶ 19, 43, 115.)

c. Coronavirus makes objects and surfaces into fomites unsafe to touch.

Coronavirus fomites can remain infectious for days after exposure, depending on temperature and surface material. (TAC ¶¶ 97, 104.) Capri's Stores contain materials—like plastics, glass, metals, and fabrics—that have been documented as Coronavirus fomites. (TAC ¶¶ 98, 112-13.) Coronavirus can be transmitted by touching a fomite and then touching another

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[6] See TAC ¶ 83, n.39, citing Riddell, S., Goldie, S. Hill, A., *et al.*, The effect of temperature on persistence of SARS-CoV-2 on common surfaces, 17 Virology J. 145 (2020), https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7 (noting that "the primary spread of SARS-CoV-2 appears to be via aerosols and respiratory droplets").

object and surface, making it a fomite, too. (TAC ¶¶ 97-98, 102.) Even disturbing a fomite—like shaking a textile—can spread Coronavirus particles and create additional fomites. (TAC ¶ 98.)

d. Extraordinary measures are required to attempt to remove Coronavirus from property.

Coronavirus cannot be removed with ordinary cleaning. (TAC ¶¶ 24, 106.) As alleged, "the [Center for Disease Control and Prevention ("CDC")] has recently released guidance stating that there is little evidence to suggest that routine use of disinfectants can prevent the transmission of the Coronavirus from fomites in community settings." (TAC ¶ 106.) Indeed, "Coronavirus is '***much more resilient to cleaning*** than other respiratory viruses so tested.'" (TAC ¶ 107.)

Attempting to remove Coronavirus from surfaces requires specific protocols, which involves "harsh and abrasive chemicals" not routinely used. (TAC ¶ 24, 108, 110.) Use of these chemicals themselves caused additional physical loss of or damage to property at Capri's Stores. (TAC ¶ 24, 111-12.) Further, it is "challenging to accurately determine the efficacy of decontaminating agents and … if surface disinfection was even effective" given the microscopic nature of Coronavirus and some infectious respiratory particles. (TAC ¶¶ 39-41, 109.)

Nevertheless, and as directed by numerous Government Orders (discussed infra), Capri undertook extensive efforts to increase cleaning and filtration at its properties to attempt to disinfect them from Coronavirus, including "regularly and frequently cleaning any high-touch and frequently touched surfaces," "dramatically increasing cleaning frequency," and "making changes to air filtration systems." (TAC ¶¶ 112, 177.) Additionally, Capri was forced to undertake substantial modifications to its physical space and implement safety and health policies and procedures in its Stores. (TAC ¶¶ 44-45, 177.) Capri's mitigation in response to the presence of Coronavirus on its properties included providing PPE to employees, making hand sanitizer and

other disinfectants available to customers when the Stores were open at reduced capacity, upgrading HVAC filters, altering air circulation, redesigning interior spaces, installing physical barriers, and displaying signage to enforce physical distancing. (TAC ¶¶ 45, 112, 177, 224.) Capri also reduced hours of operation and capacity of its Stores when they were not otherwise completely closed. (TAC ¶¶ 177-78.)

2. Government Orders Responding to the Dangerous Property Conditions Created by Coronavirus Drastically Limited Capri's Use of its Property.

Government Orders required closure of Capri's Stores in essentially all U.S. states, including New Jersey, and in other countries, starting in March 2020. (TAC ¶¶ 149-52.) For instance, in New Jersey, Governor Murphy declared a state of emergency on March 9, 2020, in Executive Order No. 103. (TAC ¶ 156.)

On March 16, 2020, Governor Murphy issued Executive Order 104, which banned gatherings of more than 50 people, required businesses to close at 8:00 pm, and limited businesses' occupancy to under 50 people, "in accordance with CDC and DOH guidance." (TAC ¶ 157; Exec. Order No. 104, at 4 (Mar. 16, 2020), 52 N.J.R. 550(a) (Apr. 6, 2020).)

On March 21, 2020, Governor Murphy issued Executive Order 107, which directed all New Jersey residents to stay at home and mandated social distancing in all public settings. (TAC ¶ 158.) Executive Order 107 declared that "restricting the physical presence of individuals in office environments and work sites is critical to preventing future spread of COVID-19." (Id.; Exec. Order No. 107, at 3 (Mar. 21, 2020), 52 N.J.R. 554(a) (Apr. 6, 2020).) Accordingly, **Executive Order 107 ordered that "[t]he brick-and-mortar premises of all non-essential retail businesses must close to the public as long as this Order remains in effect."** (Id.; Exec. Order No. 107, at ¶ 6.) Capri's Stores were not "essential businesses" under Executive Order 107

and thus were ordered closed. (TAC ¶ 148.)[7]

Not until June 26, 2020 did Governor Murphy issue Executive Order 157 "permitting the limited reopening of retail establishments subject to limitations," while recognizing that indoor environments "present increased risks of transmission." (TAC ¶ 160; Exec. Order No. 157, at ¶ 1 (June 26, 2020), 52 N.J.R. 1455(a) (Aug. 3, 2020).)

By July 10, 2020, Capri re-opened all of its 18 New Jersey Stores. (TAC ¶ 173.) By October 7, 2020, Capri had reopened all then-existing Stores in the U.S. and globally. (TAC ¶¶ 172-76.) Reopening, however, did not entirely abate the injury to Capri's property, because Government Orders continued to impose restrictions on retail locations like Capri's Stores, including reduced hours, reduced capacity, and physical modifications. (TAC ¶¶ 177-78.)

Unfortunately, many of Capri's Stores were forced to re-close due to Coronavirus and COVID-19. (TAC ¶ 179.) As of April 10, 2021, "large numbers of Capri's Stores remained totally closed or open only for appointments or for pickup orders." (TAC ¶ 179.)

3. After Losing Over a Billion Dollars, Capri Made an Insurance Claim that Insurers Have Denied.

As a result of Coronavirus and COVID-19, Capri has suffered and continues to suffer catastrophic losses. (TAC ¶¶ 180, 308-11.) The "lion's share" of Capri's revenue comes from physical purchases at its Stores. (TAC ¶ 307.) Following the virus-induced Store closures and restrictions on operations, Capri's revenues have declined precipitously, impacting the jobs and livelihoods of the more than 17,000 people employed by Capri prior to the emergence of Coronavirus and COVID-19. (TAC ¶ 181.)

[7] Many other Government Orders issued by other states, including California, Florida, and Washington, recognized the effects that the Coronavirus had on property. (TAC ¶¶ 153, 165-70.)

Having met all conditions and requirements for coverage under the Policies, Capri notified Insurers on or about May 23, 2020 of these losses sustained as a result of Coronavirus and COVID-19 and the physical loss of or damage to property that they cause, and the accompanying Government Orders ("COVID Losses"). (TAC ¶¶ 185, 312.) On June 30, 2020, Insurers issued a preliminary denial, "without having performed any investigation and without Capri providing any information beyond what was stated in its notice correspondence." (TAC ¶ 314.) Finally, on January 14, 2021, Insurers issued a coverage letter denying coverage for Capri's claim on various grounds under the 2020/2021 Policy only. (TAC ¶ 326.) The January 14 letter stated that Capri's claim under the 2019/2020 Policy would be investigated separately; Insurers still have not issued a final decision. (TAC ¶¶ 334-35.)

Capri filed its initial complaint against Insurers on January 20, 2021. On April 12, 2021, Capri filed the TAC. The TAC alleges eleven causes of action, including nine counts for declaratory judgment (Counts 1-9); one count for damages against Zurich for breach of the 2019/2020 Policy (Count 10); and one count for damages against all Insurers for breach of the 2020/2021 Policy (Count 11). (TAC ¶¶ 336-403.)

LEGAL ARGUMENT

I. NEW JERSEY LEGAL STANDARDS

A. A Court Should Deny a Motion to Dismiss under Rule 4:6-2(e) where a Cause of Action is Suggested by the Facts Alleged, Which Must be Assumed as True, with all Inferences Drawn in Plaintiff's Favor

It is well-established under New Jersey law that Rule 4:6-2(e) motions to dismiss "should be granted in only the rarest of instances." Printing Mart–Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989). The Court must search the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim," and this review should be "at once painstaking and undertaken with a

generous and hospitable approach." Id. at 746; Main St. at Woolwich, LLC v. Ammons Supermarket, Inc., 451 N.J. Super. 135, 141 (App. Div. 2017); see R. 4:5-7 ("[N]o technical forms of pleading are required. All pleadings shall be liberally construed in the interest of justice.").

On a motion to dismiss, the Court must accept as true the facts alleged in the Complaint and draw all inferences in Plaintiff's favor. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005); Main Street, 451 N.J. Super. at 141. This rule applies to statistical analyses and facts cited from scientific sources. See Gov't Employees Ins. Co. v. Ningning He, No. 2:19-cv-09465-KM-JBC, 2019 U.S. Dist. LEXIS 187047, at *11 (D.N.J. Oct. 29, 2019)[8] (denying motion to dismiss because "it is statistically unlikely to the point of impossibility…that such a pattern would emerge [but for the fraud]"); In re Bayer Phillips Colon Health Probiotic Sales Practices Litig., No. 11–3017 (JLL), 2014 U.S. Dist. LEXIS 158233, at *21 (D.N.J. Nov. 6, 2014) (denying motion to dismiss because "the Amended Complaint allege[d] sufficient facts from several scientific sources which, if accepted as true, allow[ed] the Court to draw the reasonable inference that certain representations made by [the defendant were] . . . false or, at minimum, misleading").

A "court may consider documents specifically referenced in the complaint without converting the motion into one for summary judgment." Myska v. N.J. Mfrs. Ins. Co., 440 N.J. Super. 458, 482 (App. Div. 2015). Thus, the Court may consider not only the allegations in the complaint, but also "exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim. It is the existence of the fundament of a cause of action in those documents that is pivotal; the ability of the plaintiff to prove its allegations is not at issue." Banco Popular, 184 N.J. at 183.

[8] All unpublished decisions cited herein are attached in alphabetical order in the Appendix to Capri's Opposition.

B. Interpretation of Insurance Contracts under New Jersey Law[9]

Under New Jersey law, "insurance policies are contracts of adhesion," and they are thus subject to well-established, "special rules of interpretation." Gibson v. Callaghan, 158 N.J. 662, 669 (1999); Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co., 406 N.J. Super. 524, 538-40 (App. Div. 2009) (identifying and applying the fundamental principles of policy construction).

The "words of an insurance policy are to be given their plain, ordinary meaning," and all terms should be given meaning such that no words are without effect. Gibson, 158 N.J. at 670; Cypress Point Condo. Ass'n, Inc. v. Adria Towers, L.L.C., 226 N.J. 403, 415-16 (2016); Homesite Ins. Co. v. Hindman, 413 N.J. Super. 41, 47 (App. Div. 2010) ("We will not read one policy provision in isolation when doing so would render another provision meaningless."). Where a term is undefined, guidance may be found through analyzing relevant dictionary definitions and other courts' interpretations of the term at issue. Cypress Point, 226 N.J. at 425-26. Where there is no ambiguity, courts generally enforce a policy as written. Id. at 416.

However, a "fundamental" tenet of New Jersey law is that any ambiguities in an insurance policy must be interpreted in favor of the policyholder. Gibson, 158 N.J. at 670-71 (collecting cases); Wakefern, 406 N.J. Super. at 538. "[W]hile specific words may not be ambiguous, the

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[9] Zurich concedes "it does not appear that a conflict exists between New Jersey law and the laws of any other states in which Plaintiff has a facility," and that the Court should apply New Jersey law to the Insurers' Motions. Zurich MTD at 10 n.11. Zurich asserts, however, that if the Court were to find a conflict, a choice-of-law analysis would favor New York law based on the volume of Capri's corporate office space and the relative number of company stores. Id. In fact, New Jersey law should apply whether or not this Court finds a conflict of laws. All of the factors articulated in Pfizer, Inc. v. Employers Ins., 154 N.J. 187 (1998) and re-affirmed in Cont'l Ins. Co. v. Honeywell Int'l, Inc., 234 N.J. 23, 55-56 (2018), support application of New Jersey law. Plaintiff resides in New Jersey, where it has large corporate offices and more than a dozen Stores; the only policy with a Choice of Law provision (the Allianz Policy) selects New Jersey law; all of the Policies at issue were delivered to Capri's risk management office in New Jersey; and all of the claims were handled out of the same office. (TAC ¶ 2.) Thus, New Jersey's interests in protecting the reasonable expectations of its resident policyholders, the interests of commerce among the states, the parties' expectations as to which law would apply, and the interests of judicial administration in applying the same law to all Defendants (rather than applying New Jersey law with respect to Allianz and the law of some other state to the other Defendants), all favor application of New Jersey law.

context in which they are used may create an ambiguity." Cypress Point, 226 N.J. at 416. In addition, when construing an ambiguous clause, courts should consider "whether more precise language by the insurer, had such language been included in the policy, would have put the matter beyond reasonable question." Gibson, 158 N.J. at 670. In the end, if "the language of a policy supports two reasonable meanings, one favorable to the insurer and one favorable to the insured, the interpretation supporting coverage will be applied." Wakefern, 406 N.J. Super. at 538. Stated another way, an insurer only prevails if its proffered meaning is the ***only*** reasonable interpretation.

Importantly, courts will not write an exclusion into the policy to narrow coverage, especially where the insurer alone was responsible for drafting the policy. See, e.g., N.J. Trans. Corp. v. Certain Underwriters at Lloyd's London, 461 N.J. Super. 440, 463 (App. Div. 2019) (holding "court cannot make a new and better contract for [insurers] than they made for themselves"). Furthermore, "insurance policies must be construed to comport with the reasonable expectations of the insured." Gibson, 158 N.J. at 671. In some circumstances, even an unambiguous policy provision may be "interpreted contrary to its plain meaning so as to fulfill the reasonable expectations of the insured." Id.

Finally, while the policyholder bears the burden of bringing their claim within the basic terms of the policy, "clauses that extend coverage are to be viewed broadly and liberally." Gibson, 158 N.J. at 671; Wakefern, 406 N.J. Super. at 538-39. The burden then shifts to insurers to establish that an exclusion, which must be narrowly construed against the insurers, proscribes or limits coverage. Gibson, 158 N.J. at 671.

II. CAPRI HAS ADEQUATELY ALLEGED "DIRECT PHYSICAL LOSS OF OR DAMAGE" TO PROPERTY

Capri has sufficiently stated a claim for coverage under the Policies by alleging a "direct physical loss of or damage" to its insured properties, and the Insurers' arguments in their Motions

to Dismiss to the contrary are meritless.

A. "Physical Loss of or Damage" to Property, which is Not Defined in the Policies, Must be Given its Ordinary Meaning and Does Not Include a "Physical Alteration" Requirement

For Capri to state a claim for insurance coverage under the Policies, it must allege "direct physical loss of or damage" to property caused by a "**Covered Cause of Loss**," defined in the Policies as "[a]ll risks of direct physical loss of or damage from any cause unless excluded." (D-Exs. J, K, Section VII, §§ 1.01, 7.11.) The terms "physical," "loss" and "damage" are not defined in the Policies. (TAC ¶ 10.) As Insurers concede, when terms in an insurance policy are undefined, courts resort to ordinary meanings of the relevant phrases to arrive at an applicable definition.[10] Insurers' position, however, that "[a] simple textual and contextual reading of this language supports the conclusion that a physical tangible alteration is required"[11] is baseless, as it is inconsistent with the plain language of the Policies and contravenes New Jersey's principles of insurance contract interpretation.

The standard in New Jersey is clear – if the policyholder offers a reasonable interpretation of a disputed, undefined policy term that supports coverage, that interpretation prevails. It is not sufficient for the Insurers to offer an alternative interpretation, even if reasonable. Insurers, massive corporations that are experts in their own field of insurance, largely market and sell, as here, pre-printed policy forms. Insurers exclusively drafted the Policies; Capri did not draft any policy language. (TAC ¶ 189.) As a result, under New Jersey law, Insurers are accountable for their failure to define a key policy term. The terms must be given their ordinary meaning and to the extent the language is deemed ambiguous, it should be interpreted in favor of coverage.

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[10] See Zurich MTD at 18; Allianz MTD at 9; Liberty MTD at 13.

[11] See, e.g., Zurich MTD at 18.

Where terms in an insurance policy are undefined, courts take a "common-sense approach" to policy interpretation, which "often begins with an examination of dictionary definitions." See Cypress Point, 226 N.J. at 426; Studio 417, Inc. v. Cincinnati Ins. Co., 478 F. Supp. 3d 794, 800 (W.D. Mo. Aug. 12, 2020) (relying on dictionary definitions of "direct," "physical," and "loss" where relevant terms were left undefined in the policy); Ungarean, DMD v. CNA, No. GD-20-006544, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2, at *13 (Pa. Ct. Com. Pl. Mar. 25, 2021) (same).[12]

The following dictionary definitions make clear that the terms "physical," "loss," and "damage" do not require physical alteration and/or total destruction of property, as Insurers now contend,[13] and cover the loss of use and damage to Capri's property as alleged in the TAC.

First, the word "physical" is defined as:

- "[M]aterial, substantive, having an objective existence, as distinguished from imaginary or fictitious."[14]

Second, the word "loss" is defined as:

- "[T]he act of losing possession," or "the harm or privation resulting from loss or separation," and "the amount of an insured's financial detriment by death or damage that the insurer is liable for."[15]
- "Deprivation."[16]
- "[D]ecrease in amount, magnitude, or degree."[17]

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[12] See also Choctaw Nation of Okla. v. Lexington Ins. Co., No. CV-20-42, 2021 Okla. Dist. LEXIS 575, at *11-12 (Okla. Dist. Ct. Jan. 27, 2021) (same).

[13] See, e.g., Zurich MTD at 3; Allianz MTD at 12; Liberty MTD at 15.

[14] Physical, Black's Law Dictionary, https://thelawdictionary.org/physical/ (last visited May 12, 2021).

[15] See Serendipitous, LLC/MELT, et al. v. Cincinnati Ins. Co., No. 2:20-cv-00873, 2021 U.S. Dist. LEXIS 86998, at *11 (N.D. Ala. May 6, 2021) (citing Loss, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss (last visited May 12, 2021)).

[16] Loss, 2a, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss (last visited May 12, 2021).

[17] Loss, 5, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss (last visited May 12, 2021).

- "[H]aving less than before."[18]
- "[T]he state of no longer having something or as much of something."[19]

Finally, the word "damage" is defined as:

- "[L]oss or harm resulting from injury to person, property, or reputation."[20]
- "[T]o harm or spoil something."[21]
- "[P]hysical harm caused to something so that it is broken, spoiled or injured."[22]

Accordingly, the meaning of the phrase "physical loss of or damage" to property includes: (i) a "material" or "substantive" "deprivation" of property "**or**" (ii) a "material" or "substantive" "harm" to property. Thus, because of the use of the disjunctive "or," Capri can trigger coverage by alleging: (i) a material loss of use, or diminution of use, of its property "or" (ii) a material harm to its property. See, e.g., P-Ex. A, MacMiles, LLC v. Erie Ins. Exch., No. GD-20-7753, at p.14 (Pa. Ct. Com. Pl. May 25, 2021) (noting that, in the context of property insurance policies, "the most reasonable definition of 'loss' is one that focuses on the act of losing possession and/or deprivation of property instead of one that encompasses various forms of damage to property, i.e., destruction and ruin").

Here, Capri has alleged both. The presence of Coronavirus on Capri's premises (*i.e.*, the assault by the virus on the air and on fomites at its Stores) both harmed the property and physically damaged it so as to render it uninhabitable (satisfying the second prong) and deprived

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[18] Loss, 2, Macmillan Dictionary, https://www.macmillandictionary.com/us/dictionary/american/loss (last visited May 12, 2021).

[19] Loss, 1, Oxford Advanced Learner's Dictionary, https://www.oxfordlearnersdictionaries.com/us/definition/english/loss (last visited May 12, 2021).

[20] Damage, Merriam-Webster, https://www.merriam-webster.com/dictionary/damage (last visited May 12, 2021).

[21] Damage, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/damage (last visited May 12, 2021).

[22] Damage, 1, Macmillan Dictionary, https://www.macmillandictionary.com/us/dictionary/american/damage_1#:~:text=The%20plural%20form%20damages%20is,English%20dictionary%20from%20Macmillan%20Education. (last visited May 12, 2021).

Capri of its Stores or use of its Stores (satisfying the first prong). See infra, Section II.C. Separately, and as a third trigger for coverage, the Government Orders that shuttered Capri's Stores or dramatically limited capacity deprived Capri of the use of its Stores or greatly diminished Capri's use of its Stores. See infra, Section II.D.

As New Jersey courts have explained, when considering the meaning of "physical loss" the term "'physical' can mean more than material alteration or damage." Wakefern, 406 N.J. Super. at 541-42 (quoting Customized Distrib. Servs. v. Zurich Ins. Co., 373 N.J. Super. 480, 491 (App. Div. 2004)). Indeed, this phrase covers situations where a building is rendered "temporarily unusable." Id. at 545. This interpretation is supported by Insurers' own cited definition of "loss," which includes "'the act of losing possession: deprivation.'" (Zurich MTD at 18.) While Insurers refer to the definition of "loss" as deprivation, they promptly ignore it, instead arguing that Capri must demonstrate "physical[] change[s] [to] the structural integrity" of its property to recover,[23] thereby inserting a "structural alteration requirement" that is not contained anywhere within the Policies. **As the drafters of the Policies, however, the Insurers *could have* included a structural alteration requirement had they wanted it—*but they did not.* That omission is construed against Insurers, not Capri.**

Insurers' failure to give any effect to the term "loss," even though "loss" and "damage" are separated by the disjunctive in the Policies, violates the well-settled tenet of policy interpretation that each and every word in a policy must be given meaning. See, e.g., N.J. Transit, 461 N.J. Super. at 454 ("The court must give effect to the whole policy, not just one part of it.").[24]

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[23] See, e.g., Zurich MTD at 25.

[24] See In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig., MDL No. 2964, 2021 U.S. Dist. LEXIS 32351, at *37 (N.D. Ill. Feb. 22, 2021) ("The disjunctive 'or' in that phrase means that 'physical loss' must cover something different from 'physical damage.'"); Henderson Road Rest. Sys, Inc. v. Zurich Am. Ins. Co., No. 1:20 CV 1239, 2021 U.S. Dist. LEXIS 9521, at *26 (N.D. Ohio Jan. 19, 2021) ("[P]hysical loss *of* . . . property means something different than damage to the real property . . . [o]therwise why would both phrases appear side-by-

Indeed, numerous courts have properly rejected Insurers' narrow and flawed interpretation of this phrase, explaining that the failure to give separate meaning to the terms "loss" and "damage" would render one of the terms meaningless. See, e.g., Choctaw Nation, 2021 Okla. Dist. LEXIS 575, at *16 (noting "[t]he word loss is divested of any meaning under the Insurers' interpretation"); Serendipitous, 2021 U.S. Dist. LEXIS 86998, at *10 (defining word "loss" separate from "damage," and noting that failure to do so would render one of the phrases "superfluous"); Studio 417, 478 F. Supp. 3d at 800 (noting "Defendant conflates 'loss' and 'damage' in support of its argument that the Policies require a tangible, physical alteration. However, the Court must give meaning to both terms."); Derek Scott Williams PLLC v. Cincinnati Ins. Co., No. 1:20-cv-02806, 2021 U.S. Dist. LEXIS 37096, at *10 (N.D. Ill. Feb. 28, 2021) (requiring physical alteration "writes the term 'loss' out of the definition").[25]

Even if structural alteration to property was required – which it is not – courts have found that the presence of Coronavirus on property causes an alteration to said property. For example, in Cinemark Holdings, Inc. v. Factory Mut. Ins. Co., No. 4:21-cv-00011, 2021 U.S. Dist. LEXIS 90124, at *7 (E.D. Tex. May 5, 2021), the court, construing a complaint that, similar to the TAC, was packed with scientifically supported and richly detailed factual allegations concerning how Coronavirus damages property and linking such damage to the insured property, denied an insurer's motion for judgment on the pleadings, reasoning that the presence of Coronavirus on a policyholder's premises "actually damaged the property by changing the content of the air."[26]

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side separated by the disjunctive conjunction 'or'?"); Ungarean, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2, at *15 ("the concepts of 'loss' and 'damage' are separated by the disjunctive 'or,' and, therefore, the terms must mean something different from each other").

[25] See, e.g., P-Ex. A, MacMiles, No. GD-20-7753, at p.15 (noting that conflating the terms "loss" and "damage" to require "actual harm to Plaintiff's property in every instance" fails to "give effect to all of the insurance contract's terms and, again, render the phrase 'physical loss of' duplicative of the phrase 'direct physical . . . damage to.").

[26] Accord Goodwill Indus. of Orange Cty. Cal. v. Phil. Indem. Ins. Co., No. 30-2020-01169032, 2021 WL 476268, at *2 (Cal. Super. Ct. Jan. 28, 2021) (denying insurer's demurrer where policyholder alleged Coronavirus "physically alters the air and surfaces to which it attaches and causes them to be unsafe, deadly and dangerous").

Thus, Capri suffered a loss or deprivation of its properties caused by (i) the presence of the virus on its premises that rendered them uninhabitable and unfit for their intended use, and (ii) Government Orders that shuttered its doors or severely limited access to its Stores, causing Capri to lose the use – either in whole or in part – of its property. Capri suffered damage to its properties by the presence of the virus in its Stores that made the Stores uninhabitable, and the air and surfaces within them potentially lethal to customers and employees. Capri therefore has alleged three bases to satisfy the "physical loss of or damage" to property trigger for coverage. As a result, the Insurers' motions must be denied. See Kopp v. Newark Ins. Co., 204 N.J. Super. 415, 420 (App. Div. 1985) ("If the language of a policy will fairly support two meanings, an interpretation in support of coverage should be applied.").

B. New Jersey Courts, among others, have Found Physical Loss of or Damage to Property in the Absence of Structural Alteration, Particularly for Harmful Substance Claims Like Capri's

1. New Jersey Courts Do Not Require "Structural Alteration" to Trigger Coverage for Physical Loss of or Damage to Property.

In interpreting the phrase "physical loss of or damage" in first-party property policies, New Jersey case law is crystal clear that "'physical' can mean more than material alteration or damage." See Wakefern, 406 N.J. Super. at 541-42. As the District Court of New Jersey held, the seminal "Wakefern decision indicates that property's temporary and non-structural loss of function is recognized as direct physical loss or damage under New Jersey law." Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am., No. 2:12-cv-04418, 2014 U.S. Dist. LEXIS 165232, at *14-15 (D.N.J. Nov. 25, 2014). Thus, New Jersey courts have recognized that "loss of access, loss of use, and loss of functionality," are synonymous with physical loss of or damage to property. Wakefern, 406 N.J. Super. at 543.

To plead "physical loss of or damage" to property under New Jersey law, a plaintiff need only allege that its property has been rendered "uninhabitable and unusable." Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226, 236 (3d Cir. 2002). Once that has been alleged, the policyholder has demonstrated a "distinct loss." Id.

Significantly, New Jersey courts have held that a claim for physical loss of or damage to property arises where a policyholder alleges the presence of a hazardous substance at an insured property. See, e.g., Gregory Packaging, 2014 U.S. Dist. LEXIS 165232, at *16 (ammonia release "physically transformed the air" within the policyholder's facility, rendering it "unfit for occupancy until the ammonia could be dissipated"). This is so even if the dangerous substance does not "demonstrably alter[]" a building or its elements. Wakefern, 406 N.J. Super. at 545 (citing Port Authority, 311 F.3d at 235-36). Rather, physical loss occurs so long as the structure's "function was eliminated" through the presence of the dangerous substance. Id. (citing Port Authority, 311 F.3d at 235-36). This is precisely the effect of Coronavirus (especially when airborne) in indoor spaces.

2. New Jersey Law Developed Through *Port Authority*, *Wakefern*, and *Gregory Packaging* Holds that there is no Structural Alteration Requirement.

The rule enunciated by the Third Circuit in Port Authority, applying New York and New Jersey law, was adopted by New Jersey courts and set the standard as to what constitutes physical loss of or damage to property. Applying this rule, Capri's claims must be sustained.

In Port Authority, the policyholder sought coverage due to the presence of asbestos in the materials used to construct its buildings. See 311 F.3d at 230. At the close of discovery, the insurer moved for summary judgment, arguing that the policyholder had not demonstrated the existence of physical loss or damage at its locations. Id. at 232. In rendering its decision, the Third Circuit noted that courts had "concluded that asbestos contamination can constitute a direct,

physical and fortuitous loss under an 'all-risks' first party insurance policy." Id. at 234. Thus, the presence of a substance that presents a "health hazard" constitutes physical loss. Id.

Based on this reasoning, the Third Circuit enunciated the following rule:

> When the presence of large quantities of [a harmful substance] **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 [a harmful substance] 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.

Id. at 236.

Applying this rule, the court found that while the policyholder had established "that many of its structures used asbestos-containing substances," the "mere presence" of asbestos *inside the materials of the policyholder's buildings – i.e.*, not released into, or otherwise suspended in, the air in its buildings – did not render the buildings unsafe or uninhabitable. Id.

Capri's allegations bring it squarely within Port Authority's rule that physical loss of or damage to property occurs where, as here, Coronavirus is present in the air and on fixtures in its Stores "such as to make [them] uninhabitable and unusable." See infra, Section II.C. Moreover, Coronavirus is exponentially more dangerous and more deadly than airborne asbestos; the former killed almost 600,0000 Americans in a single year – a toll exponentially greater than the 2,500 American lives per year claimed by mesothelioma, an asbestos-related cancer. (See, e.g., TAC ¶ 22.) At this pleading stage, accepting Capri's allegations as true and drawing all inferences in Capri's favor, Capri has alleged physical loss of or damage to property within the rule of Port Authority.

The Appellate Division's ruling in Wakefern further rebuts Insurers' argument that a "structural alteration" is necessary to bring Capri within the ambit of coverage. In Wakefern, the policyholder (a grocery store chain) had purchased all-risk property coverage for its locations and its goods. See 406 N.J. Super. at 531. In August 2003, the electrical grid that supplied most of

the policyholder's stores was rendered completely inoperable, resulting in a loss of power at the policyholder's stores and spoiling its inventory. See id. at 532, 537.

The insurer denied the policyholder's claim, reasoning that the electrical grid had not suffered "physical damage," an undefined term in the policy. Id. at 538. After concluding that the undefined term was ambiguous, the court held that whether there was a "physical incident" that caused the electrical grid to fail was irrelevant, instead finding the electrical grid's "loss of function" was the relevant fact. See id. (noting "we look at the larger picture concerning the loss of function of the system as a whole"). The court then cited other authorities that had "accepted the view that 'damage' includes loss of function or value." Id. at 543 (collecting cases). Rejecting the insurer's argument that there was no coverage because "the blackout involved 'no physical damage'" to generators and the like, the court found in favor of the policyholder, reasoning that the electrical grid was rendered useless for several days. Id. at 544. The Insurers' arguments that Wakefern requires a "physical incident," and that physical damage does not include loss of use or function (Zurich MTD at 20), are misleading at best and unsupported by Wakefern.

Following in Wakefern's footsteps, the District of New Jersey in Gregory Packaging reiterated the rule that "[w]hile structural alteration provides the most obvious sign of physical damage, both New Jersey courts and the Third Circuit have also found that property can sustain physical loss or damage without experiencing structural alteration." Gregory Packaging, 2014 U.S. Dist. LEXIS 165232, at *13. In that case, a policyholder sought coverage for the release of ammonia in its facility's air that "resulted in the loss of property and an interruption of business." Id., at *5. In finding the existence of physical loss of or damage to covered property, the court held:

> In the present case, there is no genuine dispute that the ammonia release physically transformed the air within Gregory Packaging's facility so that it contained an unsafe amount of ammonia or that the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated. The Court finds that the ammonia discharge inflicted 'direct physical loss of or damage to' Gregory Packaging's facility, as that phrase would be construed under New Jersey law by the New Jersey Supreme Court, because the ammonia physically rendered the facility unusable for a period of time.

Id., at *17.

The Gregory Packaging Court specifically rejected the same "physical alteration" argument Insurers make here. Id., at *16 (rejecting insurer's interpretation of Port Authority as requiring "physical alteration," finding such an interpretation "contradicts the opinion's plain text."). Instead, the court held "property can be physically damaged, without undergoing structural alteration, when it loses its essential functionality." Id.

Gregory Packaging is on all fours here. Capri has alleged that Coronavirus was present in its Stores in both the air and on fixtures, and that its presence could not be eliminated through routine cleaning. (See, e.g., TAC ¶ 24.) As alleged, the presence of Coronavirus in the air and on fixtures made Capri's Stores "uninhabitable, unsafe, and unfit for their normal and intended uses," as the air in Capri's Stores was rendered potentially lethal to employees and customers alike. (See, e.g., TAC ¶¶ 24.) Accordingly, as in Gregory Packaging, Coronavirus had "physically transformed the air within" Capri's Stores, rendering them "unfit for occupancy" while Coronavirus was present. Gregory Packaging, 2014 U.S. Dist. LEXIS 165232, at *16-17; TAC ¶ 23.

3. Pre-COVID-19 Decisions from Other Jurisdictions Repeatedly Rejected the Insurers' "Structural Alteration" Requirement.

As noted by the Appellate Division in Wakefern, courts around the country have repeatedly rejected the "structural alteration" requirement now posited by Insurers. See Wakefern, 406 N.J. Super. at 542-43 (collecting cases finding "physical damage" includes "loss

of 'functionality'" even if property "remain[s] intact"). Indeed, federal courts around the country have repeatedly found that loss of functionality is consonant with physical loss or damage to property.[27] Likewise, numerous state courts (high courts and appellate courts alike) have held "physical loss" of property connotes property that was rendered unsafe or unusable, without a structural alteration requirement.[28]

4. Post-Emergence of COVID-19 Numerous Trial Courts have Found Physical Loss of or Damage to Property where the Policyholder Alleges Coronavirus on the Premises.

Insurers conveniently ignore numerous recent decisions applying the physical loss of or damage standard articulated above to COVID Losses and finding physical loss of or damage sufficiently alleged in complaints analogous to the TAC.

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[27] See, e.g., Motorists Mut. Ins. Co. v. Hardinger, 131 F. App'x 823, 826-27 (3d Cir. May 18, 2005) (presence of e-coli in well "reduced the use of the property to a substantial degree" under Pennsylvania law); Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399 (1st Cir. 2009) (chemical odors constituted physical loss under Massachusetts law); TRAVCO Ins. Co. v. Ward, 715 F. Supp. 2d 699, 709 (E.D. Va. 2010), aff'd, 504 F. App'x 251 (4th Cir. 2013) ("toxic gases" released by defective drywall constituted "direct physical loss" under Virginia law); Hampton Foods, Inc. v. Aetna Cas. & Sur. Co., 787 F.2d 349 (8th Cir. 1986) (risk of collapse constituted physical loss under Missouri law); Am. Alliance Ins. Co. v. Keleket X-Ray Corp., 248 F.2d 920 (6th Cir. 1957) (radium exposure constituted physical loss under Ohio law); Ore. Shakespeare Festival Ass'n v. Great Am. Ins. Co., No. 1:15-CV-01932, 2016 U.S. Dist. LEXIS 74450, at *3 (D. Or. June 7, 2016), vacated by stipulation of parties, 2017 U.S. Dist. LEXIS 33208 (D. Or. Mar. 6, 2017) ("poor air quality caused by the wildfire smoke" constituted "direct physical loss of or damage to" outdoor theater under Oregon law, where smoke rendered theater "uninhabitable" and "unusable for its intended purpose."); In re Chinese Mfg. Drywall Prods. Liab. Litig., 759 F. Supp. 2d 822, 832 (E.D. La. 2010) (release of sulfur gas from drywall constituted "physical loss" under Louisiana law because it prevented policyholders from "fully using and enjoying" the premises).

[28] See, e.g., W. Fire Ins. Co. v. First Presbyterian Church, 437 P.2d 52 (Colo. 1968) (gasoline fumes rendered church "uninhabitable, making further use of the building highly dangerous."); Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co., 615 N.W.2d 819 (Minn. 2000) (asbestos); Mellin v. N. Sec. Ins. Co., 115 A.3d 799 (N.H. 2015) (cat urine odor made insured property unrentable); Dundee Mut. Ins. Co. v. Marifjeren, 587 N.W.2d 191 (N.D. 1988) (power outage); Murray v. State Farm Fire & Cas. Co., 509 S.E.2d 1 (W. Va. 1998) (threat of rockfall constituted "direct physical loss," as home "became unsafe for habitation . . . when it became clear that rocks and boulders could come crashing down at any time"); Hughes v. Potomac Ins. Co., 199 Cal. App.2d 239 (Ct. App. 1962) (erosion of land beneath house); Azalea, Ltd. v. Am. States Ins. Co., 656 So.2d 600 (Fla. Ct. App. 1995) (chemicals in treatment plant); Bd. of Educ. v. Int'l Ins. Co., 720 N.E.2d 622 (Ill. Ct. Ap. 1999) (asbestos); Widder v. La. Citizens Prop. Ins. Corp., 82 So.3d 294 (La. Ct. App. 2011) (lead-paint dust in home constituted "direct physical loss," as home was "rendered unusable or uninhabitable"); Farmers Ins. Co. v. Trutanich, 858 P.2d 1332 (Or. Ct. App. 1993) (meth odor); Graff v. Allstate Ins. Co., 54 P.3d 1266 (Wash. Ct. App. 2002) (meth residue); Matzner v. Seaco Ins. Co., No. CIV. A. 96-0498-B, 1998 Mass. Super. LEXIS 407, at *13 (Mass. Super. Aug. 12, 1998) (carbon monoxide constituted "direct physical loss of or damage" under Massachusetts law).

As noted above, Cinemark Holdings denied an insurer's motion for judgment on the pleadings where the policyholder alleged – in a complaint remarkably similar in content to the TAC – that: (1) statistical modeling confirm Coronavirus was present at property; (2) large numbers of employees tested positive for COVID-19; (3) the presence of Coronavirus changes the property, including air and surfaces, into transmission mechanisms for Coronavirus; and (4) routine cleaning of fixtures and indoor air could not remove Coronavirus. Cinemark Holdings, 2021 U.S. Dist. LEXIS 90124, at *7 ("Cinemark alleges that COVID-19 was actually present and actually damaged the property by changing the content of the air."); see also (P-Ex. B; Plaintiffs' Second Amended Complaint and Demand for Jury Trial ("Cinemark SAC") at ¶¶ 72-73, 84, 91-92.) Capri has made all such allegations and more. See infra, Section II.C.

As discussed in Section II.C, infra, numerous courts have come to the same conclusion. Indeed, as indicated in the "Summary of Decisions" provided to the Insurers on March 11, 2021, in connection with Zurich's motion to transfer venue, numerous additional trial courts (both state and federal) have found that allegations regarding the various modes of transmission of Coronavirus, sick employees, and virus on the premises were sufficient to survive a motion to dismiss.[29] The Insurers tellingly ignore these cases.

5. Insurers' Reading of the Phrase "Physical Loss of or Damage" Makes it Ambiguous, Requiring it be Construed in Favor of Coverage.

Insurers' alternative interpretation of the phrase "physical loss of or damage" renders it ambiguous, requiring a construction in favor of coverage. In Wakefern, the Appellate Division held that the phrase "physical damage" was ambiguous and therefore must be construed against the insurer that drafted the policy in favor of coverage. Citing one of its prior decisions finding

[29] An updated summary of these decisions, incorporating additional decisions rendered since March 11, 2021, is submitted for the Court's review. See P-Ex. C.

this phrase ambiguous, the Wakefern court reiterated its prior warning to insurers regarding leaving the phrase "physical" undefined in future policies:

> In cases involving construction of the term 'physical loss' … we concluded that the term was ambiguous: 'Since 'physical' can mean more than material alteration or damage, it was incumbent on the insurer [Zurich] to clearly and specifically rule out coverage in the circumstances where it was not to be provided, something that did not occur here.'

406 N.J. Super. at 541-42 (quoting Customized Distribution, 373 N.J. Super. at 491). Insurers have not heeded this warning, leaving the phrase "physical loss of or damage" undefined.

Numerous courts around the country have likewise found the phrase "physical loss of or damage" to property to be ambiguous when it comes to Coronavirus and COVID-19. For example, in Choctaw Nation, the District Court of Oklahoma, echoing the admonition in Wakefern, found that despite "pleas and the known confusion surrounding the phrase 'direct physical loss,'" insurers have made no attempt to define the phrase within policies to avoid these disputes. 2021 Okla. Dist. LEXIS 575, at *6. In finding the phrase ambiguous, the Choctaw Nation court quoted a recent passage from the Eastern District of Virginia, where the court found that the "highly lethal virus" was akin to cases where the presence of "ammonia" or other harmful substances constituted "a direct physical loss":

> [i]t is plausible that a fortuitous 'direct physical loss' could mean that the property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural, sources. Here, while the Light Stream Spa was not structurally damaged, it is plausible that Plaintiff's [sic] experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus.

Id., at *8-9 (quoting Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co., No. 2:20-cv-265, 2020 U.S. Dist. LEXIS 231935, at *27-28 (E.D. Va. Dec. 9, 2020)). Accordingly, the court found in favor of coverage, reasoning that "Defendant Insurers could have avoided this outcome if they had defined direct physical loss or damage as they (and others before them) have argued it should

be interpreted. But Defendants did not do so." Id., at *9 (emphasis in original).[30]

The same result is warranted here: Zurich itself has received stern warnings from the Appellate Division regarding the consequences of leaving the key term "physical" undefined in its policies. See, e.g., Customized Distribution, 373 N.J. Super. at 491. However, almost twenty years later, Zurich continues to leave the phrase undefined in its EDGE™ policy form at issue here, preferring ambiguity so that the phrase may be used as a sword and a shield to further its (and its fellow subscribing Insurers') own interests. This Court should not permit Insurers to avoid accountability for such conduct. Where the language is ambiguous, and particularly where, as here, it has been left so intentionally by Insurers in defiance of repeated court admonitions, Capri is entitled to a construction in favor of coverage. See id.

All the foregoing principles of insurance policy interpretation in the context of COVID Losses was synthesized by the Allegheny Court of Common Pleas as follows:

> The interpretation of the phrase 'direct physical loss of or damage to property' is the key point of the parties' dispute. . . . [I]t is important to note that the terms, in addition to their ordinary, dictionary definitions, must be considered in the context of the insurance contract and the specific facts of this case. . . . [T]his Court reasonably determined that [insurer's] interpretation improperly conflates 'direct physical loss of' with 'direct physical . . . damage to' and ignores the fact that these two phrases are separated in the contract by the disjunctive 'or.' . . . [I]n the context of this insurance contract, the concepts of 'loss' and 'damage' are separated by the disjunctive 'or,' and, therefore, the terms must mean something different from each other. Accordingly, in this instance, the most reasonable definition of 'loss' is one that focuses on the act of losing possession and/or deprivation of property instead of one that encompasses various forms of damage to property, i.e., destruction and ruin. Applying this definition gives the term 'loss' meaning that is different from the term 'damage.'. . . [I]t is certainly reasonable to conclude that Plaintiff could suffer 'direct' and 'physical' loss of use of its property absent any harm to property. Here, Plaintiff's loss of use of its property was both 'direct' and 'physical.' The spread of COVID-19, and a desired limitation of the same, had a

[30] See also Scott Craven, 2021 WL 1115247, at *2 ("At a minimum, the Court concludes that the phrase 'direct physical loss of or damage to property' is ambiguous.... Under Missouri law, that ambiguity must be construed in Plaintiffs' favor and in favor of coverage."); P-Ex. A, MacMiles, LLC, No. GD-20-7753, at p.14 (determining that the term "'loss' reasonably encompasses the act of losing possession [and/or] deprivation, which includes the loss of use or property absent any harm to property.").

> close logical, causal, and/or consequential relationship to the ways in which Plaintiff materially utilized its property and physical space. [citing *In re Society*, 2021 U.S. Dist. LEXIS 32351, at *38-40 (stating that government shutdown orders and COVID-19 *directly* impacted the way businesses used physical space)]. Indeed, the spread of COVID-19 and social distancing measures . . . cause Plaintiff, and may other businesses, to physically limit the use of property and the number of people that could inhabit physical buildings at any given time. Thus, thehe [sic] spread of COVID-19 did not, as Defendant's [sic] contend, merely impose economic limitations. Any economic losses were secondary to the businesses' physical losses.

Ungarean, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2, at *12-18 (emphasis in original). Capri's TAC satisfies this standard.

C. Capri Sufficiently Pleads Physical Loss of or Damage Through Virus on the Premises

First, while Insurers characterize Capri's detailed allegations as "conclusory" or mere "legal conclusions" (while at the same time complaining that the TAC is verbose),[31] Capri in fact has alleged specific facts to demonstrate the virus's presence on its premises in great detail, with scientific and statistical support from dozens of studies from the world's top peer-reviewed scientific publications and from leading government agencies and health organizations such as the CDC and the World Health Organization. (See, e.g., TAC ¶¶ 89-104, 126-27, 135-40.)

Second, Insurers improperly apply a *proof* instead of *pleading* standard, arguing that Capri's TAC must be dismissed because Capri "cannot establish the presence of the Coronavirus at its Stores."[32] At the pleading stage, however, Capri is not required to *prove* its case – it is simply required to allege facts which, *accepted as true*, state a claim for coverage under the Policies. See, e.g., Printing Mart, 116 N.J. at 746 ("At this preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint."). By their arguments, the Insurers effectively concede that there are disputed facts

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[31] See Zurich MTD at 1 n.2.

[32] See Zurich MTD at 16.

that cannot be resolved by the Court on a motion to dismiss.

1. Capri Has Sufficiently Pled the Presence of Virus on the Premises.

Capri's TAC sets out extensive allegations of the presence of the virus in its Stores. By way of example only, Capri has alleged that:

- "over 930 cases of COVID-19 infections [were] reported by Capri's employees" globally, including over 600 in the U.S. and over 29 in New Jersey (TAC ¶¶ 35, 38, 46-47, 117);

- given the high percentage of asymptomatic cases of COVID-19 (particularly in the early months of the emergence of Coronavirus and COVID-19 when "testing was limited and potentially thousands more people were infected than were reported") and the fact that asymptomatic individuals carry the same risk as those with symptoms, it is certain that additional employees were unknowingly contagious while working in Capri's Stores (TAC ¶¶ 99, 117-28, 133);

- given "the heavily-trafficked common areas in and around Capri's Stores, including its locations within New Jersey", and the exceptionally high positivity rates in cities, states, and countries where Capri maintains its Stores, a detailed biostatistical analysis taking into account the infection fatality rate from COVID-19 in New Jersey with the actual daily customer flow in Capri's Stores in New Jersey, demonstrates that it is statistically certain or near certain that customers and other individuals in Capri's Stores contracted and carried Coronavirus before the Stores closed (TAC ¶¶ 119, 127-28, 135-40);

- Coronavirus spreads via airborne transmission which involves "the spread of the infectious agent caused by the dissemination of droplet nuclei (aerosols) from, for example, exhaled breath," which remain suspended in the air for greater than three hours (TAC ¶ 92);[33] indeed, infectious respiratory particles produced "by the average person can travel almost 20 feet by sneezing" (TAC ¶ 90 n.51);

- HVAC systems can spread the virus indoors by dispersing aerosols through ventilation systems and vents located as much as 56 meters away (TAC ¶ 92 n.52);

- Coronavirus also spreads through fomite transmission when viral droplets "adhere[ ] to surfaces and objects, harming and physically changing" and altering those objects, rendering them unsafe for ordinary and customary use (TAC ¶¶ 97-98, 101-02); and

- Coronavirus cannot be removed or eliminated from surfaces via routine cleaning; and airborne respiratory droplets (the principal mode of transmission) cannot be removed by cleaning. (TAC ¶¶ 105-16.) Attempting to remove Coronavirus from surfaces requires

[33] See also TAC ¶ 83, n.39, citing Riddell, S., Goldie, S. Hill, A. et al., The effect of temperature on persistence of SARS-CoV-2 on common surfaces, 17 Virology J. 145 (2020), https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7 (noting "SARS-CoV-2 is able to remain infectious in airborne particles for greater than 3 [hours]").

use of "harsh and abrasive chemicals" which would themselves cause physical loss of or damage to Capri's property at its Stores. (TAC ¶ 24.)

Complaints alleging that employees contracted the virus have been held sufficient to constitute "physical loss of or damage to" property, as the presence of infected employees makes the presence of the virus certain. See, e.g., P-Ex. B, Cinemark SAC ¶ 84 (policyholder alleged that numerous employees tested positive for COVID-19); Serendipitous, 2021 U.S. Dist. LEXIS 86998, at *12 (allegations of sick employees sufficient to allege virus on premises); Blue Springs Dental Care, 488 F. Supp. 3d at 874 (allegations it was "likely customers, employees, and/or other visitors to the insured properties over the recent month were infected with the coronavirus" sufficient); Goodwill Industries, 2021 WL 476268, at *2 (policyholder allegations that "employees tested positive" sufficient to survive demurrer). In contrast, the lion's share of the cases relied upon by Insurers dismissed policyholder complaints lacking any allegations of infected employees or visitors on their properties.[34]

Capri's allegations include citations to biostatistical evidence and other scientific studies. (TAC ¶¶ 38, 126-28, 134-39.) Such allegations demonstrating the certainty or statistical certainty that Coronavirus was on the policyholder's premises have been found sufficient to plead the existence of physical loss of or damage. See, e.g., P-Ex. B, Cinemark SAC ¶¶ 91-92 (policyholder

[34] See, e.g., Uncork & Create LLC v. Cincinnati Ins. Co., No. 2:20-cv-00401, 2020 U.S. Dist. LEXIS 204152, at *13 (S.D. W. Va. Nov. 2, 2020) ("nor [does] the instant case[] involve actual allegations of employees or patrons with infections traced to the business."); Cafe Plaza de Mesilla Inc. v. Cont'l Cas. Co., No. 2:20-cv-354, 2021 U.S. Dist. LEXIS 29163, at *18 (D.N.M. Feb. 16, 2021) (finding "fatal to Plaintiff's Complaint that it does not allege COVID-19 was ever present on its premises or that any of its employees were infected by it"); Karmel Davis & Assocs. v. Hartford Fin. Servs. Grp., No. 1:20-cv-02181, 2021 U.S. Dist. LEXIS 22896, at *12 (N.D. Ga. Jan. 26, 2021) (failing to allege "employees or other people on the property were infected at the time"); Promotional Headwear Int'l v. Cincinnati Ins. Co., No. 20-cv-2211, 2020 U.S. Dist. LEXIS 228093, at *23 (D. Kan. Dec. 3, 2020) (no allegation that infected individuals were present on Plaintiff's property, or that 'employees or customers came into contact with someone who was infected before entering the property"); Johnson v. Hartford Fin. Servs. Grp., Inc., No. 1:20-cv-02000, 2021 WL 37573, at *5 (N.D. Ga. Jan. 4, 2021) (noting policyholder "does not point to any instance of an employee or patient contracting the virus where it was traced to the properties," nor allegations "that COVID-19 ever actually entered" premises).

alleged that "statistical modeling" and "positivity rates," confirmed "to a high degree of statistical certainty, that COVID-19 was and continues to be present at" its premises); P.F. Chang's China Bistro v. Certain Underwriters at Lloyd's of London, 2021 Cal. Super. LEXIS 11, at *2 (Cal. Super. Ct. Feb. 4, 2021) (policyholder alleged "the actual or potential presence of virus in the air (whether in droplet nuclei, aerosols, droplets, or otherwise) in the vicinity of P.F. Chang's restaurants or other qualifying buildings").

Capri's TAC alleges in detail (and with support from numerous studies) the various modes of transmission of Coronavirus, including respiratory,[35] airborne,[36] and fomite transmission.[37] Courts have sustained complaints alleging these various modes of transmission which, coupled with the highly contagious nature of COVID-19, demonstrate that the virus causes direct physical loss of or damage to property. See, e.g., Blue Springs Dental Care, 488 F. Supp. 3d at 874 (policyholders "explain[ed] how COVID-19 is physically transmitted by air and surfaces through droplets, aerosols, and fomites that remain infectious for extended periods of time."); Scott Craven, No. 20CY-CV06381, 2021 WL 1115247, at *2 (Mo. Cir. Ct. Mar. 9, 2021) (rejecting insurer's argument that allegations were "conclusory," where plaintiffs alleged effects that various modes of transmission of COVID-19, including fomite and airborne transmission, had on property); JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co., No. A-20-816628-B, 2020 Nev. Dist. LEXIS 1512, at *6 (Nev. Dist. Ct. Nov. 30, 2020) (policyholder alleged physical presence of virus and "known facts" about it, "including that it spreads through infected droplets" that attach to and cause harm to other objects).

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[35] See, e.g., TAC ¶ 90 (noting that "[r]espiratory particles produced by the average person can travel almost 20 feet by sneezing.").

[36] See, e.g., TAC ¶¶ 91-94 (noting that "tiny particles can remain suspended 'for indefinite periods unless removed by air currents or dilution ventilation.'").

[37] See, e.g., TAC ¶¶ 95-99 (noting that "[f]omite transmission has been demonstrated as highly efficient for viruses, both from object-to-hand and from hand-to-mouth.").

Capri has alleged that "no amount of routine surface cleaning could remove the aerosolized Coronavirus suspended in the air in Capri's Stores," and that Capri was required to physically alter its property to "protect it from physical loss of or damage . . . such as erecting barriers, altering air circulation, reconfiguring indoor spaces, disinfecting surfaces and materials, and providing PPE to employees." (TAC ¶¶ 39-45, 211.) Allegations regarding the efforts to prevent transmission of, and the difficulty of removing and cleaning, the virus from the policyholders' premises have been found sufficient to survive a motion to dismiss. See, e.g., P-Ex. B, Cinemark SAC ¶¶ 72-73 (policyholder alleged that presence of COVID-19 rendered its premises dangerous, and further alleged that routine cleaning of fixtures and indoor air could not remediate the virus's presence); P.F. Chang's, 2021 Cal. Super. LEXIS 11, at *2-3 (policyholder alleged "the necessity of modifying physical behaviors through the use of social distancing, avoiding confined indoor spaces, and/or not congregating in the same physical area as others, whether such practices were mandated by government order or not, in order to reduce or minimize the potential for viral transmission"); Ungarean, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2, at *17 ("Here, Plaintiff's loss of use of its property was both 'direct' and 'physical.' The spread of COVID-19, and a desired limitation of the same, had a close logical, causal, and/or consequential relationship to the ways in which Plaintiff materially utilized its property and physical space."); Goodwill Industries, 2021 WL 476268, at *2 (allegations that policyholder "was required to conduct 'additional cleaning and sanitization to respond to and remove the coronavirus and COVID-19 from physical surfaces in its insured premises and properties" were sufficient).

Capri has alleged that its Stores were rendered uninhabitable through the presence of Coronavirus on its premises, transforming its air and surfaces into lethal transmitters of the

virus.[38] Because airborne transmission is the key mode of transmission for Coronavirus, and cleaning of surfaces does nothing to remove Coronavirus from the air (and, in fact, may cause re-aerosolization of Coronavirus, rendering the premises even more dangerous),[39] the air and fixtures within Capri's Stores were physically transformed into virus spreading transmitters, rendering the Stores potentially lethal to any employee or customer who entered the premises. (TAC ¶¶ 18, 23, 116.) Such allegations that Coronavirus was present in the air and on fixtures within Capri's Stores, rendering the Stores uninhabitable and unfit for their intended use, are directly in line with case law finding physical loss of or damage to property. See, e.g., Gregory Packaging, 2014 U.S. Dist. LEXIS 165232, at *16-17 (finding physical loss of or damage to property where ammonia release "physically transformed the air" within the policyholder's facility, rendering it "unfit for occupancy until the ammonia could be dissipated"); P.F. Chang's, 2021 Cal. Super. LEXIS 11, at *2 (presence of "virus in the air" sufficient to state claim for physical loss of or damage to property); Scott Craven, 2021 WL 1115247, at *1 (allegations that "COVID-19 can remain in the air within a property for hours or days and traveling on indoor air currents – rendering the entire physical enclosure potentially dangerous," held sufficient to state a claim of physical loss of or damage to property).

Thus, Capri's allegations easily bring Capri within the ambit of coverage as enunciated in Port Authority, Wakefern and Gregory Packaging. Coronavirus is exponentially more deadly than toxins such as asbestos or ammonia. See TAC ¶ 22 (alleging that "risk of death attributable to asbestos exposure in the United States suggest approximately 2,479-2,597 deaths per year due

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[38] See TAC ¶¶ 18-19, 22-24, 35, 37-38, 42-43, 126 (alleging presence of Coronavirus in the air and on surfaces at Capri's Stores rendered them uninhabitable and unsafe for use).

[39] See, e.g., TAC ¶¶ 114-16 (alleging that "[t]he principal mode by which people are infected with [the Coronavirus] . . . is through exposure to respiratory droplets carrying infectious virus," and that "[a]erosolized Coronavirus particles and virions cannot be eliminated by routine surface cleaning").

to mesothelioma between 1999-2015, as compared to almost 600,000 deaths due to the Coronavirus over the past one year."). Indeed, as of the filing of Capri's TAC, in the ten countries with the largest number of Capri's Stores, there were a total of 1,090,487 deaths resulting from exposure to Coronavirus. (TAC ¶ 14.) Meanwhile, in 2017, there were a "reported 1846 single exposures to ammonia with 15 major adverse events *and no deaths*."[40] Accordingly, like the policyholders in Cinemark Holdings, Serendipitous, Ungarean, P.F. Chang's and Goodwill Industries – among others – Capri has sufficiently pled the existence of physical loss of or damage to property based on the presence of Coronavirus on its premises.

2. Insurers' Motions make Clear that they are Attempting to Impose a Heightened Pleading Standard on Capri.

Insurers repeatedly argue that Capri cannot "establish" that it suffered physical loss of or damage through the presence of Coronavirus at its Stores.[41] But Capri need not "establish" anything at this stage of the case, despite Insurers' improper attempt to impose a heightened pleading standard on Capri in contravention of New Jersey's liberal pleading standard. Indeed, "at this preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint." Printing Mart, 116 N.J. at 746. Instead, on a motion to dismiss courts "must assume the facts as asserted by plaintiff are true and give her the benefit of all inferences that may be drawn in her favor." See Gandi, 184 N.J. at 166.

Capri has certainly met this liberal pleading standard under New Jersey law. See Printing Mart, 116 N.J. at 746. Indeed, Insurers' arguments *disputing* facts demonstrate that the TAC

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[40] See Rana Prathap Padappayil, Judith Borger, Ammonia Toxicity, NCBI Bookshelf https://www.ncbi.nlm.nih.gov/books/NBK546677/ (last updated Feb. 6, 2021).

[41] See Allianz MTD at 12 ("Capri's allegations fail to establish these preconditions to coverage"); Liberty MTD at 14 ("Capri Fails to Meet Its Burden of Establishing Direct Physical Loss of or Damage to Covered Property"); Zurich MTD at 16 ("Plaintiff Cannot Establish the Presence of Coronavirus at Its Stores") and 17 (Capri cannot allege "as a provable fact" that Coronavirus was present at Capri's Stores).

cannot be dismissed at the pleading stage. For example, Allianz argues the TAC's "contradictory" allegations "establish that the virus, even if it existed at the property, ***never*** rendered any of [Capri's Stores] 'unfit for occupancy.'"[42] Allianz essentially is asking the Court to accept *Allianz's version of the facts as true*. Likewise, Zurich, citing one of Capri's numerous studies referenced in the TAC,[43] argues that Coronavirus can be easily removed from surfaces by "increasing the temperature" in a room.[44] Zurich suggests that Capri could have simply turned up the heat to 40 degrees Celsius in order for Coronavirus to dissipate in a few hours.[45] But Zurich makes this claim even though 40 degrees Celsius is ***104 degrees Fahrenheit***! Surely, no employee (let alone a customer) would be willing to even enter a store at that temperature. Putting aside Insurers' absurd proposed "remedy" that would have turned Capri's luxury stores into saunas, the same article specifically notes that fomite transmission is *not* the main transmitter of Coronavirus. Rather:

> [T]he transmission of [Coronavirus] appears to be primarily via aerosols and recent studies have shown that [Coronavirus] is able to remain infectious in airborne particles for greater than 3 [hours].[46]

As alleged in the TAC, "no amount of routine surface cleaning could remove the aerosolized Coronavirus suspended in the air at Capri's stores and boutiques, making that air and Capri's stores and boutiques dangerous and potentially lethal, thus rendering them uninhabitable,

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[42] See Allianz MTD at 31 (emphasis in original).

[43] See Zurich MTD at 14, n.15.

[44] Id. What Zurich does not tell the Court is that this article states Coronavirus lives on surfaces "between 1.7 and 2.7 days" at *room temperature*—certainly not creating a safe environment for anyone, as Coronavirus can be consistently reintroduced onto surfaces.

[45] See Zurich MTD at 14.

[46] Riddell, S., Goldie, S. Hill, A. et al., The effect of temperature on persistence of SARS-CoV-2 on common surfaces, 17 Virology J. 145 (2020), https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7, cited at TAC ¶ 83, n.39. It is important to note that this article also states that "[t]he role of fomites in the current pandemic is yet to be fully determined." See id. Additionally, Capri cited numerous other studies throughout the TAC which demonstrate that Coronavirus cannot be cleaned or removed with routine cleaning methods. In any event, Zurich's fact-intensive argument regarding the validity of certain studies demonstrates precisely why discovery is necessary here and dismissal at the pleading stage is inappropriate.

unsafe and unfit for their intended uses." (TAC ¶ 18.) Insurers nevertheless rely on a line of cases following Mama Jo's Inc. v. Sparta Ins., 823 F. App'x 868 (11th Cir. 2020), where, ***on a motion for summary judgment***, the court found that plain old dust on the policyholder's premises did not constitute physical loss of or damage to property because it was easily cleanable.

But this line of cases (reasoning that there is no physical loss where a substance can be removed from property with routine cleaning) should not be applied at the pleading stage where a complaint sets out detailed allegations – as does the TAC – that the surfaces contain *lethal* substances that *cannot be removed by routine cleaning* and that the *infected air cannot be cleaned at all*. (TAC ¶¶ 105-16.)[47] Such application would flout New Jersey pleading standards at this motion to dismiss stage.

In finding that the presence of Coronavirus constitutes physical loss, the Northern District of Alabama addressed this key distinction between Coronavirus and nonlethal, surface-only substances (*e.g.*, dust), making clear that Mama Jo's does not apply to the Coronavirus:

> But the restaurants have alleged that they had to close entirely when employees tested positive for COVID-19. That distinguishes this case from Mama Jo's. And the highly contagious nature of COVID-19 caused civil authorities to temporarily limit capacity in restaurants to prevent the spread of the physical but invisible virus in restaurants. Cleaning was only one precaution for COVID-19; physical distancing was another, and that distancing, allegedly by civil order and not by choice, deprived the restaurants of the use of their property, i.e. their tables and seating, while the temporary orders were in place.

See Serendipitous, 2021 U.S. Dist. LEXIS 86998, at *17 (noting "Mama Jo's, a summary judgment opinion, does not require dismissal of the complaint in this action.").

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[47] As noted, attempting to remove Coronavirus from surfaces requires "harsh and abrasive chemicals," which themselves cause physical loss of or damage to property. (TAC ¶ 24.) Thus, Capri suffers physical loss of or damage to its property when Coronavirus is present, and to remove it would only cause further loss of or damage to property—a situation far different from the removal of dust in Mama Jo's.

The reasoning in Serendipitous – not Mama Jo's – is directly on point with the circumstances before this Court where Capri has alleged, with support from scientific authorities and statistical analyses, the presence of Coronavirus on the surfaces and in the air of its Stores; and that Coronavirus, a highly contagious and lethal virus, cannot be removed from surfaces using routine cleaning and cannot be removed from the air. Accordingly, this case is far outside the ambit of Mama Jo's.

Finally, unlike in Mama Jo's, this is not a motion for summary judgment. Any dispute regarding the ability to feasibly clean Coronavirus from surfaces (let alone from the air) is a *factual* dispute, not a legal one, inappropriate for determination on a motion to dismiss. Such a determination may only be made after fact and expert discovery has been completed. See, e.g., Cajun Conti LLC v. Certain Underwriters at Lloyd's London, No. 2020-02558, 2020 WL 8484870, at *1 (La. Civ. Dist. Ct., Orleans Parish Nov. 4, 2020) (noting that "[w]hile Underwriters argues that the harms can be abated with simple household cleaning supplies, [the policyholder's] citation to studies that offer a contrary interpretation presents a genuine issue of material fact.").[48]

[48] Insurers also rely on two other surface cleaning decisions that are equally distinguishable, each decided after discovery closed and not on a motion to dismiss. See, e.g., Universal Image Prods. Inc. v. Fed. Ins. Co., 475 F. App'x 569 (6th Cir. 2012) (applying Michigan law; summary judgment stage); Mastellone v. Lightning Rod. Mut. Ins. Co., 884 N.E.2d 1130, 1144 (Ohio Ct. App. 2008) (applying Ohio law; motion for directed verdict). Indeed, Zurich's attempt to rely on these cases in the context of COVID-19 losses under a similar Zurich policy has already been rejected. See Henderson Road, 2021 U.S. Dist. LEXIS 9521, at *27-29 (rejecting Universal Image where policy expressly excluded "air, either inside or outside the structure" from definition of covered property; rejecting Mastellone where policy provided coverage for losses "only if that loss [was] physical loss *to* property" not "direct "physical loss *of* or damage to" property as in Zurich's policy).

D. Capri also has Sufficiently Pled Physical Loss of or Damage as a Result of Government Orders Shuttering or Limiting Access to its Property

1. Capri has Sufficiently Alleged Physical Loss of or Damage to Property as a Result of the Government Orders.

Separately from its allegations regarding virus on the premises, the TAC sets forth extensive allegations that Government Orders themselves caused a "physical loss of or damage" to Capri's property.[49] Capri has alleged, among other things:

- In early March 2020, state and local governments in every state where Capri operated its Stores (aside from Nebraska) issued State of Emergency Declarations, which suspended or severely limited business operations deemed to be "non-essential businesses" where people could potentially contract COVID-19 from others or from property itself. (TAC ¶¶ 148-49.) As a result of the Government Orders and the physical loss of or damage to its property, Capri's Stores in all three of its geographical operating areas were shuttered by mid-March 2020. (TAC ¶ 152.)

- The Government Orders expressly recognized the effects that COVID-19 and the Coronavirus had on people *and* property. Executive Order 107, issued by Governor Murphy on March 21, 2020, was expressly issued to protect against fomite transmission of the Coronavirus, and directed businesses to employ the "frequent use of sanitizing products on common surfaces." (TAC ¶ 158.) Government orders in California,[50] Florida,[51] and Washington[52] likewise recognized the effects that the Coronavirus had on property.

- The Government Orders also recognized the pervasiveness of the Coronavirus in businesses' indoor air spaces. Many of the Government Orders required businesses to "[c]hange and/or upgrade HVAC filters as necessary to maximize fresh air," and to upgrade "HVAC air filtration and ventilation," recognizing that the Coronavirus transformed the air in and around Capri's Stores. (TAC ¶ 171.)

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[49] See TAC ¶¶ 148, 214 (alleging that Coronavirus caused direct physical loss of or damage to property throughout the countries where Capri's Stores are located, giving rise to the government orders that prohibited access to Capri's Stores).

[50] See TAC ¶ 165 (alleging that California's COVID-19 guidelines required businesses to "[f]requently disinfect commonly used surfaces, including shopping carts, baskets, conveyor belts, registers. . ." among other surfaces and objects).

[51] See TAC ¶¶ 166-70 (alleging that Executive Order 20-112 required businesses to "maintain appropriate social distancing and sanitation protocols.").

[52] See TAC ¶ 153 (alleging that Governor Inslee's order closing businesses in Washington recognized that COVID-19 was a "public disaster affecting . . . property;" and that state government agencies were working with local health officials "in alleviating the impacts to . . . property;" and that among its objectives was to "help preserve and maintain . . . property[.]").

- Even when Capri's Stores were permitted to open, they were only permitted to operate at limited capacity and with significant restrictions on the use of its physical space. (TAC ¶ 178.) On July 2, 2020, Governor Murphy issued Executive Order 157 permitting the limited reopening of retail businesses subject to restrictions such as a capacity limit of "50% of the stated maximum store capacity" and other workplace safeguards. (TAC ¶ 160 n.157.)

Thus, Capri has sufficiently alleged "physical loss of or damage to property" due to these Government Orders which deprived Capri of the use of its properties for their intended purposes or severely limited such use. This Court has found that such allegations – that government orders deprived policyholders of the use of their property – without more, could constitute physical loss of or damage to property. See Optical Servs. USA/JCI v. Franklin Mut. Ins. Co., No. BER-L-3681-20, 2020 N.J. Super. Unpub. LEXIS 1782 (N.J. Super. Ct. Bergen Cty. Law Div. Aug. 13, 2020). In Optical Services, Judge Beukas found that Governor Murphy's Executive Orders, which resulted in the suspension of a policyholder's business, constituted physical loss of or damage to property under Wakefern. *See* P-Ex. D, Transcript of Motion at 28:12-18, Optical Servs., 2020 N.J. Super. Unpub. LEXIS 1782 ("Optical Servs. Tr.")). In rejecting the insurer's argument that loss of use does not constitute physical loss of or damage, Judge Beukas held:

> The defendant argues that there is a plain meaning of 'direct physical loss' and the closure of plaintiffs' businesses does not qualify . . . for purposes of coverage. *This is a blanket statement unsupported by any common law in the State of New Jersey or by a blanket review of the policy language.* Moreover, there has been no discovery taken in this matter which would provide guidance to the Court with respect to a Motion to Dismiss.

See P-Ex. D, Optical Servs., Tr., at 26:8-18.

Insurers argue that Optical Services was decided at a time when there was no controlling legal authority, but that if it is "persuasive precedent," then New York law, and not New Jersey law, should apply.[53] But Insurers fail to mention that another New Jersey court recently denied

[53] See Zurich MTD at 30 n.26.

insurers' motions to dismiss on the very same basis. See, e.g., P-Ex. E, Westfield Area YMCA v. N. River Ins. Co., No. UNN-L-002584-20 (N.J. Super. Ct. Union Cty. Jan. 8, 2021); P-Ex. F, (Transcript of Motion, at 37:4-11, Westfield Area YMCA, No. UNN-L-002584-20 (N.J. Super. Ct. Union Cty. Jan. 8, 2021) ("Westfield Area YMCA Tr.")) (finding, under Wakefern, that government orders shutting down policyholders' premises may constitute "physical loss of or damage"). That the decision is known to Zurich is beyond dispute. Zurich's corporate affiliate is attempting to transfer the venue of another COVID-19 case under a Zurich EDGE™ policy from Union County to Hudson County, alleging that fashion brand Tory Burch forum shopped in Union County because of this decision.[54]

Optical Services and Westfield Area YMCA were both correctly decided and are consistent with established New Jersey law, as enunciated by the District Court of New Jersey in Gregory Packaging. The Government Orders recognized that lethal, highly contagious, and easily transmissible substances were in the air and on surfaces in indoor establishments, such as Capri's Stores – just like the ammonia released into the air in Gregory Packaging's facility – rendering those establishments uninhabitable and unfit for their intended use.[55] The Government Orders were issued to shutter those establishments or severely limit their use until the properties were again habitable, safe, and fit for their intended use. (TAC ¶¶ 154-71.) See Gregory Packaging, 2014 U.S. Dist. LEXIS 165232, at *16-17 (finding coverage where "the ammonia release physically transformed the air within Gregory Packaging's facility so that it contained an unsafe amount of ammonia," rendering the facility "unfit for occupancy until" dissipation); accord

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[54] See P-Ex. G, Reply in Further Support of Motion to Transfer Venue at p.8, *Tory Burch, LLC v. Zurich Am. Ins. Co.*, No. UNN-L-00829-21 (filed May 24, 2021, N.J. Super. Ct. Union Cty.) (noting that "there are a few outlier decisions denying an insurer's motion to dismiss—one of which was issued by Judge Walsh in Union County.").

[55] See, e.g., TAC ¶ 148 (alleging that "[s]tate and local governments across the nation and governments around the world recognized the unprecedented and mushrooming outbreaks of COVID-19 across the world and the Coronavirus's catastrophic impact through the direct physical loss of or damage to property and lives.").

Optical Services, 2020 WL 5806576. Accordingly, Capri's allegations regarding the loss of use of its property due to the Government Orders brings it within the ambit of coverage under well-settled New Jersey law.

Other courts across the country have reached the same conclusion that the Government Orders themselves blocked or restricted the *physical* use of policyholders' premises and so constituted physical loss of or damage to property.[56]

Significantly, courts also have recognized that whether government orders constitute physical loss of or damage to property is, at a minimum, a question of fact not appropriate for resolution at the motion to dismiss stage. See Queens Tower Rest., Inc. v. Cincinnati Fin. Corp., No. A 2001747, 2021 WL 456378, at *1 (Ohio Ct. Com. Pl., Hamilton Cnty. Jan. 7, 2021) (denying insurer's motion to dismiss and holding that whether "Covid-19 and/or Ohio's orders caused property damage is a question of fact."); Cajun Conti, 2020 WL 8484870, at *1 (finding

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[56] See, e.g., In re Society, 2021 U.S. Dist. LEXIS 32351, at *39 (holding "shutdown orders do impose a *physical* limit: the restaurants are limited from using much of their physical space"); Ungarean, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2, at *17 (holding "loss of use of its property was both 'direct' and 'physical,'" because the "spread of COVID-19, and a desired limitation of the same, had a close logical, causal, and/or consequential relationship to the ways in which [the policyholder] materially utilized its property and physical space"); Henderson Road, 2021 U.S. Dist. LEXIS 9521, at *36 (holding "the ordinary definitions of the undefined words in the Policy," meant the government orders constituted "direct physical loss of or damage to property at the premises."); P.F. Chang's, 2021 Cal. Super. LEXIS 11, at *3 (denying insurers' motion for judgment on the pleadings where "physical loss of or damage to" property was "met in one or more ways," including "government orders requiring that physical spaces" be shut down); Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Ins. Co., No. 20-2832, 2021 U.S. Dist. LEXIS 88041, at *28 (E.D. Pa. May 7, 2021) ("Plaintiff has plausibly alleged that a mandatory suspension of its in-person operations was a direct physical loss of or damage to property at the described premises."); Studio 417, 478 F. Supp. 3d at 798 (finding "physical loss" where "Closure Orders prohibited or significantly restricted access to Plaintiffs' premises."); N. State Deli, LLC v. Cincinnati Ins. Co., No. 20-CVS-02569, 2020 N.C. Super. LEXIS 38, at *7 (N.C. Super. Ct. Oct. 9, 2020) (finding "direct physical loss" where government decrees "resulted in the immediate loss of use and access" to premises); P-Ex. A, MacMiles, LLC, No. GD-20-7753, at p.15 (finding Governor's orders restricting use of premises constitutes physical loss of or damage to property); Serendipitous, 2021 U.S. Dist. LEXIS 86998, at *13 (finding allegations that "civil authorities determined that restaurants 'were so likely to have a presence of the COVID-19 virus that their operations needed to be restricted to prevent further spread of the virus,'" sufficient to withstand motion to dismiss); P-Ex. Y, Seifert v. IMT Ins. Co., Civ. No. 20-1102 (JRT/DTS), at pgs. 10-11 (D. Minn. June 2, 2021) (finding "direct physical loss" where executive orders "force[] a business to close because the property was deemed dangerous to use and its owner [is] thereby deprived of lawfully occupying and controlling the premises to provide services within it.")

whether "Orders prohibited access to the insured premises is also a genuine issue of material fact," reasoning "Orders restricted [customers'] presence in the building."); Hill & Stout PLLC v. Mut. of Enumclaw Ins. Co., No. 20-2-07925-1 SEA, 2020 WL 6784271, at *3 (Wash. Super. Ct. Spokane Cty. Nov. 13, 2020) (denying insurer's motion to dismiss because it failed to show "beyond doubt" that policyholder could "prove no set of facts" to justify recovery based on government orders).

2. To the Extent the Triggering Language is Ambiguous, a Finding in Favor of Coverage for Capri is Required.

As discussed in Section II.B.5, supra, many courts have found the phrase "physical loss of or damage" to be ambiguous, requiring a finding in favor of coverage, both before the emergence of Coronavirus, (see, e.g., Wakefern, 406 N.J. Super. at 541-42 (finding "physical damage" ambiguous) and after its emergence. See, e.g., Elegant Massage, 2020 U.S. Dist. LEXIS 231935, at *27 (finding phrase ambiguous and holding "while [the premises] was not structurally damaged, it is plausible that [the policyholder] experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible highly lethal virus."); Susan Spath Hegedus, 2021 U.S. Dist. LEXIS 88041, *27-28 (holding government orders constitute "physical loss of or damage" to policyholder's property, reasoning phrase "is ambiguous"); Hill & Stout, 2020 WL 6784271, at *3 (denying insurer's motion to dismiss, finding phrase "physical loss of" ambiguous in context of COVID-19 government shutdown orders).

Here, based on Insurers' arguments, the phrase "physical loss of or damage" is at least ambiguous with respect to Government Orders and, thus, Capri's claims for coverage based on these allegations cannot be dismissed. See N.J. Transit, 461 N.J. Super. at 454.

E. Insurers' Cases are Inapposite

Insurers cite three recent New Jersey trial court decisions to support their Motions to Dismiss, all of which are distinguishable. See Zurich MTD at 2 (citing (D-Ex. C) Mac Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., No. L-2629-20, 2020 N.J. Super. Unpub. LEXIS 2244 (N.J. Super. Ct. Nov. 5, 2020); (D-Ex. D) FAFB, LLC v. Blackboard Ins. Co., No. MER-L-892-20 (N.J. Super. Ct. Nov. 4, 2020); and (D-Ex. I) TMN, LLC, et al. v. Ohio Sec. Ins. Co., No. MER-L-821-20 (N.J. Super. Ct. Apr. 16, 2021).

First, the policies at issue in each case contained broad virus exclusions, not present here, that were fatal to the claims. See D-Ex. C, Mac Prop. Grp. LLC, 2020 N.J. Super. Unpub. LEXIS 2244, at *21; D-Ex. D, FAFB, LLC, No. MER-L-892-20 at p.11; D-Ex. I, TMN, LLC, No. MER-L-821-20 at p.8.

Second, none of the policyholders in these cases alleged the presence of Coronavirus on their premises. See P-Ex. H, (Complaint at ¶ 21, Mac. Prop. Grp. LLC, 2020 N.J. Super. Unpub. LEXIS 2244); P-Ex. I, (Complaint at ¶ 20, FAFB, LLC, No. MER-L-892-20); P-Ex. J, (Complaint at ¶ 20, TMN, LLC, No. MER-L-821-20). Finally, while these decisions found the government orders at issue did not constitute physical loss of or damage to property, they all cited to Wakefern for the proposition that "the direct physical damage to the electrical grid present in [Wakefern]" was absent here. See D-Ex. C, (Mac Property, 2020 N.J. Super. Unpub. LEXIS 2244, at *21); D-Ex. D, (Transcript at 6:15-24, FAFB, LLC, No. MER-L-892-20 ("FAFB, LLC Tr.")); D-Ex. I, (Transcript at 5:21-6:3, TMN, LLC, No. MER-L-821-20). However, as discussed above at Section II.B.2, this "direct physical damage" was *not* a prerequisite to coverage in Wakefern and, in any event, the TAC has ample allegations of physical loss of or damage to property.

Insurers' reliance on a series of unpublished, non-binding District of New Jersey letter opinions by a single Judge – adopting the identical reasoning for the proposition that neither the

governmental orders nor the presence of Coronavirus constituted physical loss of or damage to property – likewise is misplaced.[57] Despite citing to Port Authority, the court in each case ignores the Third Circuit's applicable rule enunciated therein, that the "presence of large quantities of [a harmful substance] in the air of a building [] such as to make the structure uninhabitable and unusable" constitutes physical loss of or damage, and instead imposes a "structural alteration" requirement in complete derogation of Port Authority, Wakefern, and Gregory Packaging.[58] Furthermore, none of the policyholders in these cases alleged the existence of the virus on the premises like Capri has.[59] Accordingly, these District of New Jersey cases are inapposite.

The bottom line is that Insurers cite no controlling authority in New Jersey overruling Optical Services or Westfield Area YMCA. Insurers also rely on a distinguishable hypothetical

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[57] See Zurich MTD at 2, citing Blvd. Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co., No. 20-11771, 2020 U.S. Dist. LEXIS 234659 (D.N.J. Dec. 14, 2020) (Wigenton, J.), appeal docketed, No. 21-1061, (3d Cir. Jan. 12, 2021); Arash Emami, M.D., P.C., Inc. v. CNA & Transp. Ins. Co., No. 2:20-cv-18792, 2021 U.S. Dist. LEXIS 60753 (D.N.J. Mar. 11, 2021) (Wigenton, J.); Manhattan Partners, LLC v. Am. Guar. & Liab. Ins. Co., No. 20-14342, 2021 U.S. Dist. LEXIS 50461 (D.N.J. Mar. 17, 2021) (Wigenton, J.); 7th Inning Stretch LLC v. Arch Ins. Co., No. 20-8161, 2021 U.S. Dist. LEXIS 58477 (D.N.J. Mar. 26, 2021) (Wigenton, J.), appeal docketed, No. 21-1644 (3d Cir. Apr. 2, 2021). The same District of New Jersey judge recently issued another decision granting an insurer's motion to dismiss on the same grounds. See Ralph Lauren Corp. v. Factory Mut. Ins. Co., No. 20-10167, 2021 U.S. Dist. LEXIS 90526 (D.N.J. May 12, 2021) (Wigenton, J.)).

[58] See Boulevard Carroll, 2020 U.S. Dist. LEXIS 234659, at *4 ("Here, Plaintiff has not alleged any facts that support a showing that its *property was physically damaged*."); Arash Emami, 2021 U.S. Dist. LEXIS 60753, at *4 (same); Manhattan Partners, 2021 U.S. Dist. LEXIS 50461, at *5 (same); 7th Inning Stretch, 2021 U.S. Dist. LEXIS 58477, at *4-5 ("Even if true, the presence of a virus that harms humans *but does not physically alter structures does not constitute coverable property loss or damage*."); Ralph Lauren, 2021 U.S. Dist. LEXIS 90526, at *7-8 ("Nor does the alleged 'presence' of the Virus in or around Plaintiff's stores equate to actual or imminent physical loss or damage of any sort. Consistent with other courts' contractual interpretations in similar COVID-19 related insurance disputes, Plaintiff's allegations are not enough.").

[59] See Boulevard Carroll, 2020 U.S. Dist. LEXIS 234659, at *4 (no allegations of virus on the premises, instead alleging that "by forcing him to close his business, the Stay-At-Home Orders caused Plaintiff to lose income and incur expenses."); Arash Emami, 2021 U.S. Dist. LEXIS 60753, at *4, n.4 (noting that policyholder alleged government orders caused physical loss or damage to its premises, and that policyholder further alleged, without any elaboration, that one of its employees contracted the virus); Manhattan Partners, 2021 U.S. Dist. LEXIS 50461, at *5 ("Plaintiffs' general statements that the COVID-19 virus was on surfaces and in the air at their properties is insufficient to show property loss or damage."); 7th Inning Stretch, 2021 U.S. Dist. LEXIS 58477, at *4 ("Plaintiff's general statements that it was 'statistically certain' that the COVID-19 virus was 'present' on its property 'for some period of time since their closures,' is also insufficient."); Ralph Lauren, 2021 U.S. Dist. LEXIS 90526, at *9 ("Notably, Plaintiff does not allege that any of its on-site customers or employees had COVID-19; nor does it provide any other basis to conclude that COVID-19 was present at one or more of its covered locations.").

posed in a footnote in Wakefern, where the court states it would have "reach[ed] a different result if, for example, a governmental agency had ordered that the power be shut off to conserve electricity." 406 N.J. Super. at 540 n.7. Defying all credulity, Zurich then claims that this is "***exactly what happened here***." (Zurich MTD at 21) (emphasis in original). Putting aside that this footnote in Wakefern is dicta, the reference in the footnote to a policy-based decision to "conserve electricity" is dramatically different from the government orders shuttering or restricting businesses to prevent the spread of a deadly virus *present in the air and on surfaces* at such businesses and rendering those properties uninhabitable – a virus that killed tens of thousands of New Jerseyans and hundreds of thousands of Americans.[60] Indeed, Judge Beukas in Optical Services recognized the unique nature of the Government Orders issued in response to COVID-19 and found the Wakefern decision *supported* the policyholder's argument that Governor Murphy's Executive Orders were issued in response to direct physical loss of or damage at other locations due to COVID-19 in the wake of a national health crisis. See P-Ex. D, Optical Servs. Tr., at 27-17:28-18.

Lacking any controlling New Jersey authority, Insurers rely on various cases from New York, citing Roundabout Theatre Co., Inc. v. Cont'l Cas. Co., 302 A.D.2d 1 (1st Dep't 2002) for the proposition that the Policies "do not cover 'loss of use'" of insured property. (Zurich MTD at 29, 32.) This reliance is misplaced because, as discussed supra, at footnote 9, New Jersey law,

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[60] Indeed, in posing the hypothetical, the Wakefern court cited to Source Food Tech., Inc. v. U.S. Fid. & Guar. Co., 465 F.3d 834 (8th Cir. 2006)—a decision that courts have repeatedly distinguished as irrelevant in the COVID-19 context. In that case, the policyholder's beef was not permitted to cross the Canadian border because of a trade embargo related to mad cow disease. Id. at 835. However, there was no evidence that the policyholder's beef was actually infected with the disease. Id. Accordingly, because "the beef product on the truck" was not "physically contaminated or damaged in any manner," the policyholder's claim did not fall within the ambit of "direct physical loss to property." Id. at 838. Consequently, the hypothetical in Wakefern, as well as the case cited by the Wakefern court, are completely distinguishable from the physical loss of or damage that Capri suffered at its Stores due to the presence of Coronavirus. See, e.g., Studio 417, 478 F. Supp. 3d at 802 (distinguishing Source Food as inapposite where the policyholders had alleged that the "highly contagious virus" was "likely ***on their premises*** and caused them to cease or suspend operations").

not New York law, controls here and supports coverage for "loss of use" of property. Further, Roundabout is not relevant because: (1) unlike Coronavirus, an external force that invaded and damaged Capri's Stores, no external force entered – let alone caused physical loss of or damage to – the Broadway theater in that case; and (2) the policy language construed in that case is different from and narrower than the Policies' triggering language here, which includes "loss *of*" (*i.e.*, "physical loss *of* or damage" to property).[61] See Henderson Road, 2021 U.S. Dist. LEXIS 9521, at *27-28 (distinguishing cases relied upon by the Insurers, reasoning that the policies in those cases "did not cover 'direct physical loss *of* or damage to' the premises") (emphasis in original). Because every word in a policy must have meaning, the use of the word "or" highlights that "loss" and "damage" are separate triggering events.

Intent on attempting to convince this Court to embrace case-counting statistics and ignore the Policies' language, the allegations in the TAC and controlling New Jersey law, Insurers compile several other decisions in support of their argument regarding "physical loss of or damage" to property. However, none of the cases were decided by a New Jersey court, nor did they apply New Jersey law. Additionally, for the reasons set forth in P-Ex. K, all of these cases are inapplicable here. Finally, cases cited by Insures show the divergent court decisions on the interpretation of this undefined policy language, demonstrating that, at the very least, there is an ambiguity in the policy language which must be construed in Capri's favor. See, e.g., Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc., 181 N.J. 245, 270 (2004) (finding that phrase in insurance policy was "susceptible to multiple interpretations" based on the "divergent opinions across the country on the meaning of" the policy language at issue).

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[61] See (D-Exs. J, K, Section VII, §§ 1.01, 7.1); compare Roundabout Theatre, 302 A.D.2d at 1 (addressing "direct physical loss or damage" policy language).

F. "Period of Liability" Provision does not Affect Capri's Sufficiently Alleged Claim

Insurers' contention that the Policies' "Period of Liability" provision reinforces their improper reading of a "physical alteration" requirement into the "physical loss of or damage" coverage trigger or somehow provides a definition to this undefined trigger is baseless.[62] The "Period of Liability" provision is used to calculate damages *after liability has already been triggered* – it does not modify or condition the coverage trigger. It defines the recoverable period of liability as "starting from the time of physical loss or damage *of the type insured against* and ending when with due diligence and dispatch the building and equipment could be repaired or replaced." (D-Exs. J, K at § 4.03.01.01.) Further, the Policies define the "Extended Period of Liability" as "[t]he date the Insured could *restore* its business with due diligence, to the condition that would have existed had no direct physical loss or damage occurred to the Insured's Covered Property[.]" (D-Exs. J, K at § 4.02.02.01.) Both provisions do only what they are intended to do—provide a time limitation for purposes of measuring Capri's damages in the event it suffers physical loss of or damage to property (as it has here).

Insurers rely entirely on the use of the undefined words "repaired or replaced" to support their reading of the "physical loss of or damage to" policy language. The plain meaning of the terms "repair" and "replace" do not require physical alteration to property. Miriam Webster's Dictionary defines "repair" as: "to restore to a sound or healthy state."[63] Notably, this is the precise definition that Zurich cited, when it suited its interests, in support of its argument in the Texas Supreme Court that the costs to clean up dust from a policyholder's premises constituted

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[62] See Zurich MTD at 27-28; Liberty MTD at 23-24.

[63] Repair, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/repair (last visited May 24, 2021).

property damage.[64] Likewise, Miriam Webster's Dictionary defines "replace" as: "to restore to a former place or position."[65] Accordingly, these terms merely require the Period of Liability be measured in relation to the time it takes for the covered property to be restored either to its prior condition or to a "sound or healthy state" — e.g., put back to its intended use. See Wakefern, 406 N.J. Super. at 538 ("[if] the language of a policy supports two reasonable meanings, one favorable to the insurer and one favorable to the insured, the interpretation supporting coverage will be applied.").

Insurers' interpretation of the Period of Liability provision is insufficient to support a motion to dismiss. See P-Ex. F, Westfield Area YMCA Tr. at 37:16-22. Other courts addressing COVID-19 claims have found that a property policy's "'period of restoration'[66] does not require repairs, rebuilding, replacement, or relocation of Plaintiff's property in order for Plaintiff to be entitled to coverage," but "merely imposes a time limit on available coverage." Ungarean, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2, at *17-18; see also Henderson Road, 2021 U.S. Dist. LEXIS 9521 at *37 ("[A]pplying a plain reading of the definition of 'period of restoration,' . . . the period ended or will end on the dates the states' restrictions are lifted . . . ."); In re Society, 2021 U.S. Dist. LEXIS 32351, at *41-42 (period of restoration provision "describes a time period during which loss of business income will be covered, rather than an explicit definition of coverage,"

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[64] See P-Ex. L, Petition for Review of Petitioner, Zurich American Insurance Company, at *8, Zurich American Insurance Company v. Hughes Watters & Askanase, No. 06-0961, 2006 WL 3389749 (Tex., filed Nov. 6, 2006) ("Hughes Watters & Askanase, Zurich Petition") ("The term 'repair' means to [sic] 'to restore to a sound or healthy state.'"). For a discussion of this case, see infra, Section II.G.

[65] Replace, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/replace (last visited May 24, 2021).

[66] Period of Restoration is another common label for the time measurement period referred to in the Policies as the Period of Liability. For instance, the "period of restoration" provision in the Ungarean case was defined, in relevant part, as "the period of time that: [b]egins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and . . . [e]nds with the earlier of: (1) [t]he date when the property at the described premises should be repaired, rebuilt or replaced . . .; or (2) [t]he date when business is resumed at a new permanent location." Ungarean, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2, at *11-12.

with "nothing inherent in the meanings of" the words "repaired" or "replaced" that "would be inconsistent with characterizing the Plaintiffs' loss of their space due to the shutdown orders as a physical loss.").

In support of their argument, Insurers engage in additional case tallying[67] – but all of the courts in these cases expressly noted that the policyholders failed to adequately allege virus on the premises that could have caused "structural alteration" or damage to its property and, thus, there was nothing for the policyholders to repair or replace.[68]

G. Insurers' Reliance on a Structural Alteration Requirement Here is Contradicted by Their Prior Conduct

Insurers' present reliance on a "structural alteration" requirement that does not exist in the Policies is nothing more than an audacious litigation tactic to avoid coverage. When it has suited their interests, Insurers and their corporate affiliates have affirmatively argued that the presence of dangerous substances rendering property unsafe or unfit for its intended purpose constituted "physical loss of or damage" to covered properties – despite no physical alteration to the covered properties. Thus, Insurers understand that there is no physical alteration requirement in the phrase

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[67] Zurich MTD at 27-28; Allianz MTD at 32-33; Liberty MTD at 23-24.

[68] See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am., 487 F. Supp. 3d 834, 840, 842 (N.D. Cal. 2020) (noting policyholder did not allege "that the presence of the COVID-19 virus in its stores created a physical loss" and, thus, there was "nothing to fix, replace, or even disinfect" at the insured property); Food for Thought Caterers Corp. v. Sentinel Ins. Co., Ltd., No. 20-cv-3418, 2021 U.S. Dist. LEXIS 42828, at *19 (S.D.N.Y. Mar. 6, 2021) (finding that policyholder had failed to allege, with specific facts, that the Coronavirus was present on its premises); Clear Hearing Sols., LLC v. Cont'l Cas. Co., No. 20-3454, 2021 U.S. Dist. LEXIS 7273, at *20-21 (E.D. Pa. Jan. 24, 2021) (noting policyholder "expressly disclaims that the virus was on its property" and, thus, period of restoration could not begin or end because there was nothing "affecting the physical condition of its premises"); Ultimate Hearing Sols. II, LLC v. Twin City Fire Ins. Co., No. 20-2401, 2021 U.S. Dist. LEXIS 7266, at *16 (E.D. Pa. Jan. 14, 2021) (same, noting policyholder "expressly disclaims that the virus was on its property"); Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am., No. 2:20-cv-03342, 2020 U.S. Dist. LEXIS 223356, at *4 (E.D. Pa. Nov. 30, 2020) (noting policyholder "had to suspend operations at all of its locations" solely as a result of government orders); (D-Ex. D) FAFB, LLC Tr. at p.7 (policyholder did not allege presence of virus on the premises and relied solely on government orders); Woolworth LLC v. Cincinnati Ins. Co., No. 2:20-CV-01084, 2021 U.S. Dist. LEXIS 72942, at *8 n.1 (N.D. Ala. Apr. 15, 2021) (noting that, while policyholder alleged virus on the premises, it relied on the "conclusory allegation" that COVID-19 "caused direct physical loss and damage to Plaintiff requiring the suspension of operations at the Covered Property.").

"physical loss of or damage" to covered properties, or it is satisfied by the presence of dangerous substances rendering the property unfit or unsafe.

By way of example only, two corporate affiliates of XL, Indian Harbor Insurance Company ("Indian Harbor") and Greenwich Insurance Company ("Greenwich"), initiated an action against Factory Mutual Insurance Company ("FM") in 2006,[69] in which they sought a declaration that FM was obligated to provide coverage under an all risks property insurance policy for losses that a policyholder suffered due to a salmonella outbreak at its property. Indian Harbor and Greenwich alleged that the salmonella outbreak constituted physical loss of or damage to property and thus contended that "the FM Policy provides valid and collectible insurance."[70] Notably, Indian Harbor and Greenwich admitted the outbreak did not cause any "structural alteration" to the policyholder's property.[71]

Similarly, lead Insurer Zurich initiated an action to enforce its subrogation rights to coverage proceeds it paid to its policyholder on a general liability policy covering "physical injury or property damage" for property covered in dust and debris from a neighboring property.[72] Of critical importance in that case was whether the dust at the policyholder's premises constituted "actual physical injury or property damage" within the meaning of the economic loss rule under Texas law. In its brief to the Texas Supreme Court, Zurich argued that the dust covering its

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[69] See P-Ex. M, Amended Complaint for Declaratory Judgment, Indian Harbor Insurance Company, et al. v. Factory Mutual Insurance Company, No. 2:05-cv-04731-JG, (E.D. Pa., filed Mar. 9, 2006) (No. 22).

[70] See id., at ¶ 22; accord P-Ex. N, Opinion and Order at p.2, Indian Harbor Insurance Company, et al. v. Factory Mutual Insurance Company, No. 1:05-cv-02564-PKL (S.D.N.Y. Aug. 17, 2005) (No. 18) ("Plaintiffs jointly seek a declaration that an insurance policy issued by FM to [the policyholder] provides coverage for damages [the policyholder] sustained at its veterinary hospital.").

[71] The action was dismissed with prejudice by stipulation. See P-Ex. O, Stipulation of Dismissal with Prejudice and Without Costs, Indian Harbor Insurance Company, et al. v. Factory Mutual Insurance Company, No. 1:05-cv-02564-PKL (S.D.N.Y, July 5, 2006).

[72] See P-Ex. L, Hughes Watters & Askanase, Zurich Petition, 2006 WL 3389749.

policyholder's property constituted "physical injury" and "property damage," reasoning as follows:

> Certainly there is no doubt that spoiled food which had to be discarded constitutes property damage. The cost to clean the premises, furnishing, and equipment also constitutes property damage. Those efforts were necessary to restore the equipment to the condition it was in immediately before the occurrence.

See P-Ex. L, Hughes Watters & Askanase, Zurich Petition, 2006 WL 3389749, at *13-14.

Insurers' prior positions support coverage here. An outbreak of a dangerous or harmful substance at a policyholder's location which renders it unfit and unsafe for use (*e.g.*, Coronavirus or Salmonella) constitutes physical loss of or damage to property. Similarly, "the cost to clean the premises, furnishing, and equipment also constitutes property damage." See id., at *13. Indeed, Capri makes a far more compelling case for coverage because Coronavirus is far more injurious to property than dust.

Other insurers likewise have acknowledged that "a demonstrable structural damage or alteration to property" is not required to meet the threshold requirement of "physical loss or damage" in a first party property policy.[73] Accordingly, as XL and Zurich (among other insurers), have acknowledged, and as New Jersey courts have consistently held for years (as discussed herein), there is no structural alteration requirement—any occurrence that renders the property uninhabitable or unfit for its intended use is sufficient to constitute physical loss of or damage to property.[74]

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[73] See, e.g., P-Ex. P, Plaintiff Factory Mutual Insurance Company's Motion in Limine No. 5 Re Physical Loss or Damage at p.6, Factory Mutual Ins. Co. v. Federal Ins. Co., No. 1:17-cv-00760-GJF-LF (D.N.M, filed Nov. 19, 2019) (No. 127) ("FM Motion in Limine") (moving to preclude Federal Insurance Company from introducing any evidence that mold infestation of premises was "physical loss," reasoning that "loss of functionality or reliability under similar circumstances constitutes physical loss or damage.") (citing Port Authority; Gregory Packaging). Id., at p.3.

[74] These admissions by the Insurers are precisely why Capri requested pre-motion discovery with respect to "Related Claims," *i.e.*, the Insurers' communications regarding prior claims they have adjusted and covered in analogous circumstances (*e.g.*, the presence of airborne asbestos, ammonia, radon, or poisonous gas). See P-Ex. Q, Sills

In addition to conceding that there is no structural alteration requirement when it suits their interests, Insurers, such as a corporate affiliate of AIG, have *paid claims* and *provided coverage* for business interruption caused by other massive viral outbreaks – such as at least $16 million to the Mandarin Oriental hotel chain for the SARS virus in 2003. See, e.g., P-Ex. R, Mandarin Oriental Int'l Ltd., S.E.C. File No. 82-2955 (Nov. 19, 2003). AIG's prior payment of such a massive sum for another viral outbreak demonstrates why Capri needs discovery and why dismissal would be premature and unwarranted at the pleadings stage. Thus, contrary to Insurers' self-serving, post-hoc position regarding Capri's COVID-19 Losses, they have previously recognized that there is no physical or structural alteration requirement to physical loss of or damage to property.

III. CAPRI HAS PROPERLY ALLEGED CLAIMS FOR OTHER TIME ELEMENT COVERAGES (COUNTS 3 AND 4)

Insurers argue that Capri insufficiently pleads coverage under two other Time Element Coverages (Leasehold Interest coverage and Extra Expense Coverage) (Counts 3 and 4 of the TAC).[75] Insurers' arguments are easily dispensed with.

A. Capri has Properly Alleged Leasehold Interest Coverage

The Policies provide "Leasehold Interest" coverage for rent paid for a leased facility that is unusable. Specifically, Capri paid for coverage of "the actual Leasehold Interest loss incurred by [Capri] (as lessee) resulting from direct physical loss of or damage caused by a Covered Cause of Loss to a building (or structure) which is leased and not owned by [Capri]." (TAC ¶ 209.) In particular, Leasehold Interest coverage applies where the building (or structure) becomes wholly

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Cummis & Gross Letter to Judge O'Dwyer, Capri Holdings Ltd. v. Zurich American Ins. Co., et al., No. BER-L-2322 (N.J. Super. Ct., Bergen Cnty., filed May 11, 2021).

[75] See Liberty MTD at 25.

or partially untenantable or unusable and "the lease agreement requires a continuation of rent." (TAC ¶ 209.)

Insurers argue that Capri cannot state a claim for Leasehold Interest coverage under the Policies because it "requires direct physical loss of or damage to property to trigger coverage." (Zurich MTD at 12; see also Liberty MTD at 25.) For the reasons stated above, supra, Section II, Capri has pled facts sufficient to show physical loss of or damage to property.

Liberty additionally argues that, under the 2020/2021 Policy, "Plaintiff has failed to allege any actual lease interests that would fall within the Leasehold Interest coverage in the first instance" and thus that Capri fails to state a claim. (Liberty MTD at 25.) To the contrary, New Jersey law does not require Capri to plead with particularity the exact leases that are related to the claim for Leasehold Interest coverage. Capri pled physical loss of or damage to leased properties that rendered them wholly or partially untenantable or unusable (TAC ¶ 209), and the specific leases and rents at issue will be enumerated in discovery. Nevertheless, to the extent the Court requires, Capri is willing and able to amend the TAC with information specific to its leased properties.

B. Capri has Properly Alleged Extra Expense Coverage

The Policies provide "Extra Expense" coverage of "the reasonable and necessary Extra Expenses incurred by [Capri], during the Period of Liability, to resume and continue as nearly as practicable [Carpi's] normal business activities that otherwise would be necessarily suspended, due to 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." (TAC ¶ 211.)

In addition to Insurers' argument that the "direct physical loss of or damage to property" trigger must be met (Zurich MTD at 12), which Capri has satisfied (supra, Section II), Liberty additionally argues that, under the 2020/2021 Policy, "[Capri] has failed to allege any actual

expenses that would fall within the Extra Expense coverage." To the contrary, Capri alleged:

> As set forth herein, Capri incurred Extra Expenses to resume and continue as nearly as practicable its normal business activities that would otherwise be suspended due to direct physical loss of or damage caused by the Coronavirus and COVID-19, costs associated with altering its property to protect it from physical loss of or damage, as well as the safety of its occupants, such as erecting barriers, altering air circulation, reconfiguring indoor spaces, disinfecting surfaces and materials, and providing PPE to employees.

(TAC ¶ 211.) Capri's expenses incurred to resume business at its Stores as nearly as practicable following the emergence of Coronavirus and COVID-19 are further discussed in additional sections of the TAC. (See, e.g., TAC ¶¶ 44, 94, 112, 177-79.) Liberty's argument thus ignores the TAC's plain words and must be rejected.

IV. CAPRI HAS PROPERLY ALLEGED CLAIMS FOR SPECIAL COVERAGES (COUNTS 5-8)

Insurers argue that Capri's claims for coverage under four "Special Coverages" provided by the Policies (Civil or Military Authority, Contingent Time Element, Protection and Preservation of Property, and Difference in Conditions/Difference in Limits) (Counts 5-8) of the TAC) fail because Capri has not sufficiently alleged "direct physical loss [of] or damage to property to state a viable claim."[76] Again, Capri has satisfied that requirement. See supra, Section II. The additional arguments raised by Insurers with respect to the Special Coverages must also be rejected.

A. Capri has Properly Alleged Civil Authority Coverage

The Policies provide CIVIL OR MILITARY AUTHORITY coverage for:

> the actual Time Element loss sustained by the Insured, as provided by this Policy, resulting from the necessary Suspension of the Insured's business activities at an Insured Location if the Suspension is caused by order of civil or military authority that prohibits access to the Location. That order must result from a civil authority's response to direct physical loss of or damage caused by a Covered

[76] See Zurich MTD at 34; Liberty MTD at 27-30. The remaining Insurers do not address the Special Coverages in their motions, and instead incorporate Zurich's flawed arguments by reference.

> Cause of Loss to property not owned, occupied, leased or rented by the Insured or insured under this Policy and located within the distance of the Insured's Location as stated in the Declarations. [*i.e.*, within one mile]

(D-Exs. J, K at §§2.03.09, 5.02.03.) Put simply, the Policies provide coverage for Capri's losses resulting from the "slowdown or cessation" of Capri's "business activities" caused by the order of a Civil Authority that "prohibits access" to one or more of Capri's Stores, provided that such order results from the Civil Authority's response to *direct physical loss of or damage to third-party property* located within one mile of Capri's Stores unless expressly excluded under the Policies. Capri has properly pled all of the elements for this coverage, both for the periods when Capri's Stores were closed completely and for the periods when Capri's Stores were permitted to reopen with restrictions (including being limited to curbside service and capacity limitations inside its stores). (TAC ¶¶ 172-79.)

1. Capri, which has 1,271 Stores, was Not Required to Identify Every Third-Party Property Located within One Mile of its Stores or Every Government Order Impacting such Property.

Zurich and Liberty's argument that Capri was required to plead specific facts regarding specifically-identified third-party properties located within one mile of Capri's 1,271 Stores, and regarding the specific Government Orders issued with respect to such properties (Zurich MTD at 35-36; Liberty MTD at 27) defies pleading standards and common sense. See, e.g., Printing Mart, 116 N.J. at 746 (court is "not concerned with the ability of plaintiffs to prove the allegation contained in the complaint."). Capri's 1,271 stores are located in 35 countries, 43 states, and countless counties, cities and localities, many of which issued their own Government Orders impacting retail and other businesses. Literally thousands of third-party properties are located within one mile of such Stores. Proper pleading does not require such specificity, and all such information will be available to Insurers during discovery.

To plead its claim for Civil Authority coverage, Capri:

- cited extensive factual, statistical, and scientific evidence demonstrating that Coronavirus and COVID-19 were pervasive and present everywhere that Capri operates (TAC ¶¶ 117-40);

- alleged that "nearby businesses within one mile of each Capri Store" suffered direct physical loss of or damage including "among other things, shopping malls, restaurants and metropolitan areas" and that Coronavirus was certain or virtually certain to be present at these nearby properties (TAC ¶¶ 34, 128);

- established the timeline of the spread and deadly toll of Coronavirus and COVID-19 throughout the world, the U.S. and everywhere Capri's Stores are located (TAC ¶¶ 14-15, 38, 73-75);

- alleged that "[s]tate and local governments across the nation and governments around the world" responded to this unprecedented crisis by issuing orders "suspending or severely limiting" businesses deemed "non-essential" including Capri's Stores, and that Capri's Stores were required to close by such orders (TAC ¶¶ 148-50, 153, 158, 169); and

- cited the text of governmental orders which were *expressly* issued to mitigate the ongoing damage to property, and additionally mandated specific steps to mitigate the risk of fomite transmission of COVID-19 as a condition of eventual reopening (Washington orders expressly cited, among their justifications, that the pervasiveness of COVID-19 was a "public disaster affecting . . . property;" that state government agencies were working with local health officials "in alleviating the impacts to . . . property;" and that among their objectives was to "help preserve and maintain . . . property[.]") (TAC ¶ 153); see also TAC ¶¶ 154-71 (reviewing the specific steps that governmental orders required to mitigate the risks of indoor transmission of COVID-19).

Indeed, Insurers' argument that specific properties and specific Government Orders are required to be identified at the pleading stage has been expressly rejected by other courts that have found orders of general applicability to be sufficient. See, e.g., Blue Springs Dental Care, 488 F. Supp. 3d at 877-78 (rejecting argument that "Civil Authority coverage only exists if the relevant order of civil authority is specific to the insured property and the property adjacent to it, rather than an order of general applicability" as unsupported by legal authority); McKinley Dev. Leasing Co. v. Westfield Ins. Co., No. 2020 CV 00815, 2021 Ohio Misc. LEXIS 17, at *11-12 (Ohio Ct. Com. Pl. Feb. 9, 2021) (rejecting argument that policyholder did "not point to any

particular property within one mile" and finding that government orders were issued "due to the physical presence of COVID-19" and designed to "protect employees and customers" from a "dangerous physical condition that damages the property surrounding [the policyholder's property]"); Treo Salon, Inc. v. W. Bend Mut. Ins. Co., No. 20-cv-1155, 2021 U.S. Dist. LEXIS 88577, at *4 (S.D. Ill. May 10, 2021) ("No governmental agency . . . had the tools and manpower to individually identify what particular business or building was a vector for the disease.").

Moreover, several courts have explicitly found that allegations of the pervasive nature of COVID-19, and the resulting need for governmental regulation, are sufficient to sustain Civil Authority coverage at the motion to dismiss stage. See, e.g., Serendipitous, 2021 U.S. Dist. LEXIS 86998, at *12-13 (accepting argument that government orders were issued because restaurants "were so likely to have a presence of COVID-19 virus that their operations needed to be restricted"); Pez Seafood v. Travelers Indem. Co., No. CV 20-4699, 2021 U.S. Dist. LEXIS 11507, at *14-15 (C.D. Cal. Jan. 20, 2021) (given the pervasive nature of COVID-19 "the Court can reasonably infer that the virus entered property within [the specified distance] of the restaurant" and at the motion to dismiss stage "the Court must also accept as true that the orders were caused, at least in part, by these losses."); Ungarean, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2, at *24-25 (finding that COVID-19 and governmental orders "forced businesses everywhere to physically limit the use of property and the number of people" that could occupy such property).

2. Insurers' Argument that the Government Orders were Purely "Prophylactic" and "Not in Response to A 'Dangerous Physical Condition'" is Squarely Contradicted by the Government Orders.

Insurers callously ignore the rapidly rising case counts and death tolls that motivated the Government Orders and make the ineffectual argument that the Government Orders were purely "prophylactic" and "not in response to a 'dangerous physical condition' that had already occurred." (Zurich MTD at 36; Liberty MTD at 27-28.) This argument is expressly contradicted

by the Orders themselves, which make clear that they were issued because of an ongoing public health crisis. For example, Governor Murphy's March 21, 2020 Order, which closed non-essential businesses including Capri's Stores, noted that as of that date there were "at least 890 positive cases of COVID-19 in New Jersey, with at least 11 cases having resulted in death" and cited the "rapidly rising incidence of COVID-19" as justification for "closing non-essential retail businesses [which] will strengthen New Jersey's efforts to slow the spread of COVID-19[.]"[77]

Zurich's two federal court decisions cited in support of its position, involving governmental orders halting airport operations after the September 11, 2001 terror attacks (Zurich MTD at 36), are contradicted by other state court decisions arising from that same national tragedy. See, e.g., US Airways, Inc. v. Commonwealth Ins. Co., 65 Va. Cir. 238 (Va. Cir. Ct. 2004) (finding civil authority coverage triggered by FAA order shutting down airports nationwide based on belief that such airports could be targeted as part of ongoing situation); see also US Airways, Inc. v. Commonwealth Ins. Co., 64 Va. Cir. 408 (Va. Cir. Ct. 2004) (finding Civil Authority coverage does not require physical property be damaged). Moreover, the spread of Coronavirus through exposures at retail stores and businesses in proximity to Capri's Stores was not merely a threat or a possibility in the absence of the Government Orders; it was an absolute certainty.

3. Governmental Orders Required the Closure of Capri's Stores and thus "Prohibit[ed] Access" to such Stores.

Zurich's final argument with respect to Civil Authority coverage is that "the orders at issue here did not prohibit access to Plaintiff's stores" and "can only be read to allege that Plaintiff was prohibited from operating its business at the premises under the government orders." (Zurich MTD at 36.) But the only access that mattered to Capri was access by customers and the

[77] Exec. Order No. 107 (Mar. 21, 2020), 52 N.J.R. 554(a) (Apr. 6, 2020); TAC ¶ 158.

employees who needed to serve them, and such access was prohibited by the Government Orders. To the extent that Zurich is arguing that there is no coverage unless the doors were physically barricaded, and *no one* was permitted to enter Capri's closed Stores for *any* purposes, such as an employee entering the premises to empty a refrigerator or perform maintenance, such argument is nonsensical. The Policies simply do not say "prohibit *all* access" like Zurich now argues. While one wonders how much insurance of this type Zurich would have sold had it explained the coverage that way in advance of accepting premiums, it is clear that Zurich's argument at a minimum suggests that the language is ambiguous and, accordingly, must be construed in favor of the policyholder. Gibson, 158 N.J. at 670-71 (a "fundamental" tenet of New Jersey law is that any ambiguities in insurance policies must be interpreted in favor of the policyholder). Insurers are not entitled to a more favorable policy than the policy Zurich wrote. See, e.g., N.J. Transit, 461 N.J. Super. at 463 (holding "court cannot make a new and better contract for [insurers] than they made for themselves").

Indeed, numerous courts have concluded that Civil Authority coverage provisions referring to orders "prohibiting access" to a property do not unambiguously require that *all* access of *any* kind be prohibited to a property. See, e.g., Pez Seafood, 2021 U.S. Dist. LEXIS 11507, at *17-18 (policy ambiguous because it did "not specify whether 'prohibits access' means the entire property must be closed off to all persons, or whether denying access to *some* of the premises to *some* people would be enough"); Ungarean, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2, at *26-28 (fact that dental practice was permitted to conduct emergency procedures did "not change the fact that an action of civil authority effectively prevented, or forbade by authority, citizens of the Commonwealth from accessing Plaintiff's business in any meaningful way for normal, non-emergency procedures" as policy at issue did "not clearly and unambiguously state that any such

prohibition must completely and totally bar all persons from any form of access").

A contrary holding would run afoul of the basic purpose of the Civil Authority coverage, which is "designed to provide business owners with coverage for lost business income in the event that their business operations are suspended." Ungarean, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2, at *27 (emphasis in original). Given this purpose, the phrase "prohibits access" logically applies to governmental restrictions on accessing premises "in a manner that would normally produce actual and regular business income" such as the prohibition on the dental practice performing routine procedures. Id. Thus, Capri has properly alleged "prohibited access" based on Government Orders that shuttered Capri's Stores or imposed significant restrictions upon reopening and thereby prevented Capri from producing "actual and regular business income." Id.

B. Capri has Properly Alleged Contingent Time Element Coverage

The Policies provide Contingent Time Element coverage if (1) third-party properties located within one mile of Capri's Stores that attract business to Capri's stores (*i.e.*, "Attraction Properties"), (2) the properties of Capri's direct customers, suppliers, etc. (*i.e.*, "Direct Dependent Time Element Locations"), or (3) the properties of third parties who are direct customers, suppliers, etc. to any Direct Dependent Time Element Location (*i.e.*, "Indirect Dependent Time Element Locations"), suffer direct physical loss of or damage to property unless expressly excluded under the Policies, and Capri suffers losses as a result. (TAC ¶¶ 215-18.)

As they argued in connection with Civil Authority coverage, Zurich and Liberty argue that Capri's Contingent Time Element coverage claims fail because Capri did not identify the specific third-party properties at issue, nor describe their relationship to Capri. (Zurich MTD at 37; Liberty MTD at 28-29.) Once again, Insurers' argument that Capri should have listed and described thousands of third-party properties in the TAC relevant to its 1,271 Stores is neither well-taken nor required under pleading standards. See R. 4:5-7 (noting that there are no "technical

forms of pleading" required, that pleadings must be "simple, concise and direct" and "liberally construed in the interest of justice."); Nostrame v. Santiago, 213 N.J. 109, 126-27 (2013) ("generous standard" for evaluating adequacy of pleadings in the context of a motion to dismiss examines "whether a cause of action is 'suggested' by the facts" after "search[ing] the complaint in depth and with liberality" to determine whether cause of action "may be gleaned even from an obscure statement.")

Capri pled specific facts meeting the elements of this coverage on a categorical basis. Specifically, Capri:

- alleged that COVID-19 was pervasive, and described its impacts on property throughout the regions where Capri's Stores, and where its Attraction Properties and Indirect Dependent Time Element Locations, operate (TAC ¶¶ 34-35, 113, 129);
- provided examples of properties "that attract customers to Capri's Stores, such as shopping malls, restaurants and metropolitan areas" (TAC ¶¶ 34, 219);
- cited statistical and other scientific evidence demonstrating that COVID-19 is actually present, or must be presumed to be present, everywhere, including at the Attraction Properties and Direct and Independent Business Locations (TAC ¶¶ 117-40); see also TAC ¶ 139 (citing 33.4% "positivity rate" in New Jersey in late March 2020, which "demonstrated the pervasiveness of Coronavirus in New Jersey by March 2020 and the certitude based on statistical modeling that Capri's 18 New Jersey retail Stores and their nearby Attraction Properties suffered from the presence of Coronavirus"); and
- alleged that as a result of the presence of COVID-19, its Attraction Properties and Direct and Independent Business Locations suffered direct physical loss of or damage to their properties and had to close as a result, leading to losses for Capri. (TAC ¶¶ 35, 129, 142, 152, 177, 179, 219-20.)

Capri is only required to provide a categorical description of facts, not thousand-item lists. *See* R. 4:5-7 (pleadings "shall" be "simple, concise and direct"). Insurers confuse fact pleading with discovery where detailed information of this type is appropriately sought. Counsel for Capri is prepared to produce during discovery a detailed list of the Attraction Properties relevant here. As such, Zurich and Liberty's argument rings hollow and should be denied.

C. Capri has Properly Alleged Protection and Preservation of Property Coverage

The Policies provide coverage for:

> [t]he reasonable and necessary costs incurred for actions to temporarily protect or preserve Covered Property; provided such actions are necessary due to actual or imminent physical loss or damage due to a **Covered Cause of Loss** to such Covered Property.

(D-Exs. J, K at § 5.02.23.) Here, Liberty and Zurich again rely on the alleged lack of physical loss of or damage to property (Zurich MTD at 38, Liberty MTD at 29), which Capri refutes above. See supra, Section II. Zurich alleges that the preventative measures taken by Capri "have done nothing to 'protect or preserve' such stores against any risk of physical alteration." (Zurich MTD at 38.) Because "physical alteration" is not required to establish physical loss of or damage to property, and Capri has established in any event that the presence of Coronavirus inside its Stores in the air and on surfaces does indeed cause "physical alteration," Zurich's argument regarding this coverage fails. See supra, Section II.

Here, the measures taken by Capri were designed to prevent a harmful condition present at Capri's properties (Coronavirus) from causing further damage. Specifically, Capri alleged that it: undertook costly measures necessary to protect Capri's Stores from further loss of or damage and to mitigate its damages. This included, among other things, altering its property to protect it from physical loss or damage, and taking measures to protect the safety of its employees and customers, including erecting barriers, altering air circulation, reconfiguring indoor spaces, disinfecting surfaces and materials, and providing PPE to employees. Additionally, during times of low or no occupancy at or traffic to the Capri Stores, to mitigate its losses and to protect its property, Capri incurred costs associated with security, fire monitoring, pest control, utilities and maintenance. (TAC ¶ 224.) As such, Capri's actions are no different from a policyholder installing a pump to remove radon gas, erecting a physical barrier or digging a trench to contain

the spread of a fire – all actions to "protect or preserve" property and necessary "due to actual or imminent physical loss or damage[.]" Accordingly, Capri has properly alleged a valid claim for Protection and Preservation of Property coverage.

D. Capri has Properly Alleged Difference in Conditions/Difference in Limits Coverage

Liberty's challenge to the Difference in Conditions/Difference in Limits Coverage once again confuses the pleading stage with discovery. This coverage applies when a "Specific Local Policy" – *i.e.*, a property-damage insurance policy issued in a foreign country covering Capri's Stores – does not provide coverage for a loss covered by the Policies "due to the difference in its terms" from those of the Policies. (TAC ¶ 295; D-Exs. J, K at § 5.02.34.)

As explained in detail in the TAC, the Policies are part of Capri's "International Insurance Program" which collectively provides "all risk" property insurance for Capri's Stores throughout the world. (TAC ¶¶ 291-98.)

Liberty complains, in essence, that Capri did not individually cite the multitude of insurance policies covering its stores in 34 foreign countries for two policy years, or discuss the details of their coverage. Such detailed pleading of facts that will be disclosed in discovery, however, is not required. New Jersey pleading rules require only a "simple, concise and direct" recitation of the facts, not dozens or hundreds of pages comparing the coverages of dozens of foreign insurance policies to the Policies. Capri satisfied these pleading standards and, thus, Capri has properly pled this coverage. See R. 4:5-7.

CONCLUSION

For the foregoing reasons, Plaintiff Capri respectfully requests that the Insurers' Motions to Dismiss be denied and that this Court award such and other further relief as this Court deems just and fair.

Dated: June 3, 2021

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CAPRI HOLDINGS LIMITED, a British Virgin Islands Corporation, *Plaintiff*, v. ZURICH AMERICAN INSURANCE COMPANY, a New York Corporation, XL INSURANCE AMERICA, INC., a Delaware Corporation, MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA, a New York Corporation, LIBERTY MUTUAL FIRE INSURANCE COMPANY, a Wisconsin Corporation, ALLIANZ GLOBAL CORPORATE AND SPECIALTY SE, a German Corporation and AIG SPECIALTY INSURANCE COMPANY, an Illinois Corporation, *Defendants*.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY Docket No.: BER-L-002322-21 CIVIL ACTION

PLAINTIFF CAPRI HOLDINGS LIMITED'S BRIEF IN OPPOSITION TO DEFENDANT XL'S AND DEFENDANT ALLIANZ'S MOTIONS TO DISMISS

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PRELIMINARY STATEMENT

Defendants XL Insurance America, Inc. ("XL") and Allianz Global Corporate and Specialty SE ("Allianz") each move to dismiss Capri's Third Amended Complaint ("TAC")[1] based upon separate ambiguous and inapplicable exclusions or purported exclusions that do not bar Capri's claims for coverage.[2]

First, XL's "microorganism" exclusion does not apply to Capri's claims because the Coronavirus (a non-living substance) is not a "microorganism" (a living organism); and the provision does not exclude *every* substance whose presence would pose an actual or potential threat to human health. See infra, Section I.

Second, Allianz's attempt to read an Infectious Disease / Notifiable Disease "exclusion" into the Policy cannot stand because no such exclusion exists. The Endorsement cited by Allianz plainly states that it relates to various non-United States policies, is a reinsurance agreement "by the Insurers," not Capri and nowhere states that it changes the terms of the Policies as is usual and customary for Endorsements that actually impact coverage. The Endorsement is not an exclusion as Allianz claims and it bears none of the required hallmarks of an "exclusion" (i.e., it is not labeled as an exclusion; it omits the industry-standard legend that it must be read carefully by the policyholder because it modifies the policy; and it fails to describe precisely what is excluded from coverage and how the exclusion works). In short, Allianz cannot meet its heavy burden of proving that an exclusion bars coverage in this "all risks" policy based on the language upon which it relies, and thus, such language cannot be used to dismiss Capri's claims. At best, the language is a title without more, in a Policy that unequivocally provides that titles are "solely for reference" and

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[1] Unless otherwise specified, citations to "P-Ex. __" are to the exhibits attached to the Certification of Victor J. Herlinsky, Jr., submitted herewith, and citations to "D-Ex. _" are to the exhibits attached to the Certification of John A. Mattoon, dated May 3, 2021 (the "Mattoon Cert."). Capri's Third Amended Complaint, dated April 12, 2021 (attached to the Mattoon Cert. as D-Ex. A), is referred to herein as "TAC." All emphasis herein is added unless otherwise indicated.

[2] Defendants XL and Allianz both incorporated by reference the entire argument section in Zurich's parallel motion to dismiss. For the convenience of the Court, Capri incorporates by reference, and does not repeat herein, the arguments and authorities contained in its parallel Opposition to the Insurers' Motion to Dismiss, filed on June 3, 2021.

"shall not in any way affect the provisions to which they relate" (D-Exs. J, K at § 6.21.) See infra, Section II.

Finally, Insurers[3] also identify the Policies' "Contamination" exclusion as a potential basis for barring coverage, but quickly retreat from this argument, claiming that "for purposes of this motion to dismiss," the Contamination exclusion need not be addressed.[4] Accordingly, this provision is not before the Court on Insurers' motions to dismiss. See infra, Section III.

STATEMENT OF FACTS

Capri incorporates by reference the Statement of Facts section contained in its parallel Opposition to Insurers' Motion to Dismiss, filed on June 3, 2021.

LEGAL ARGUMENT

I. THE MICROORGANISM EXCLUSION IN THE XL POLICY DOES NOT BAR COVERAGE

Defendant XL argues that the Microorganism Exclusion in the XL Policy bars coverage for Capri's losses because: (1) the Coronavirus is a microorganism; and (2) even if it is not a microorganism, it is a "substance whose presence poses an actual or potential threat to human health." (XL MTD at 4.) These arguments fail because: (1) the Coronavirus is *not* a microorganism; and (2) the Microorganism Exclusion does not bar coverage for *all* substances whose presence poses an actual or potential threat to human health. The XL Policy attaches Endorsement No. 8, which provides:

> Notwithstanding any provision(s) to the contrary within this policy or any endorsement(s) attached thereto, this policy does not insure any loss, damage, claim, cost, expense or other sum directly or indirectly arising out of or relating to:

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[3] XL, Allianz, Zurich American Insurance Company ("Zurich"), Mitsui Sumitomo Insurance Company of America ("Mitsui"), Liberty Mutual Fire Insurance Company ("Liberty"), and AIG Specialty Insurance Company ("AIG") are collectively referred to herein as the "Insurers."

[4] See, e.g., Zurich MTD at 8; Allianz MTD at 36 n.10 (noting that it "is unnecessary for the Court to address" the Contamination exclusion); Liberty MTD at 3 n.2 (noting that the Contamination exclusion "would also serve as a complete bar to coverage," but that this exclusion is "not the basis of the instant Motion to Dismiss").

> Mold, mildew, fungus, mushroom, spores, or other microorganism of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health.[5]

The XL Policy does not define "microorganism" or even mention "virus" or "viruses." See id. Accordingly, this branch of its motion to dismiss must be analyzed under New Jersey principles of insurance contract interpretation, pursuant to which the motion should be denied.

A. Coronavirus is Not a "Microorganism"

Defendant XL's assertion that "[t]he COVID-19 virus constitutes a 'microorganism of any type, nature or description,'" is based on various sources that are not referenced anywhere in the Policy, such as the U.S. Department of Transportation's definition of "pathogen;" the definition for "biological agent" in a federal criminal statute; and select dictionaries. (XL MTD at 3-4.)[6] However, many other sources, including the Centers for Disease Control and Prevention ("CDC"), demonstrate that a virus is *not* a microorganism.

For example, the CDC's monthly, peer-reviewed journal, *Emerging Infectious Diseases*, explains that "[v]iruses occupy a unique position in biology. Although they possess some of the properties of living systems such as having a genome, they are actually nonliving infectious entities and should not be considered microorganisms." See Marc van Regenmortel & Brian Mahy, Emerging Issues in Virus Taxonomy, 10 Emerging Infectious Diseases 1, 8-13 (Jan. 2004), https://wwwnc.cdc.gov/eid/article/10/1/03-0279_article; see also Dictionary.com ("Because viruses

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[5] See Certification of Dan Millea, dated May 3, 2021, Ex. A, Endorsement No. 8.

[6] Even if the definition of "biological agent" in statutes that are nowhere referenced in the Policy was somehow relevant to the reasonable expectations of an insured (which it is not), the Policy would still be ambiguous as to whether a virus is a microorganism because under New Jersey law the definition of "biological agent" lists "virus" separately from "microorganism," not as an example or subset thereof. See, e.g., N.J.S.A. § 26:13-22 ("'Biological Agent' means: (1) any select agent that is a microorganism, virus, bacterium, fungus, rickettsia or toxin listed in Appendix A of Part 72 of Title 42 of the Code of Federal Regulations.").

aren't technically alive, they also aren't technically microorganisms."); [7] Biologyonline.com ("Viruses … although microscopic, are not considered microorganisms … because they are generally regarded as non-living."). [8] Many other sources, ranging from the Merriam-Webster Dictionary to Stedman's Medical Dictionary, define a "microorganism" as a microscopic organism, and define "organism" as a "living being" or "living individual." [9] Because most scientists consider viruses to be non-living, viruses clearly would not constitute a microscopic living being.

Thus, the Microorganism Exclusion does not apply at all. At best, XL's position creates an ambiguity as to whether the Microorganism Exclusion applies to viruses. Given the "fundamental" law in New Jersey that "ambiguities in an insurance policy are to be interpreted in favor of the insured," and that "exclusion clauses that proscribe or limit coverage … must be narrowly construed," XL falls well short of meeting its heavy burden to bring Capri's claim clearly and unambiguously within the Microorganism Exclusion. Gibson v. Callaghan, 158 N.J. 662, 669-71 (1999). If "the language of a policy supports two reasonable meanings, one favorable to the insurer and one favorable to the insured, the interpretation supporting coverage will be applied." Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co., 406 N.J. Super. 524, 538 (App. Div. 2009).

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[7] See https://www.dictionary.com/e/virus-vs-bacteria/ (last visited June 1, 2021).

[8] See https://www.biologyonline.com/dictionary/microorganism (last visited June 1, 2021).

[9] See, e.g., microorganism, Merriam-Webster, https://www.merriam-webster.com/dictionary/microorganism (last visited June 1, 2021) (defining "microorganism" to be "an organism (such as a bacterium or protozoan) of microscopic or ultramicroscopic size"); organism, Merriam-Webster, https://www.merriam-webster.com/dictionary/organism (last visited June 1, 2021) (defining "organism" to be "an individual constituted to carry on the activities of life by means of parts or organs more or less separate in function but mutually dependent : *a living being*"); Stedmans Medical Dictionary 552460 (defining "microorganism" to be "A microscopic organism (plant or animal)"); id. at 632490 (defining "organism" to be "Any living individual, whether plant or animal, considered as a whole."); see also organism, Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/organism (last visited June 1, 2021) ("A microorganism is a very small living thing which you can only see if you use a microscope."); microorganism, Biology Dictionary, https://biologydictionary.net/microorganism/ (last visited June 1, 2021) ("A microorganism is a living thing that is too small to be seen with the naked eye. Examples of microorganisms include bacteria, archaea, algae, protozoa, and microscopic animals such as the dust mite.").

B. The Microorganism Exclusion Does Not Bar Coverage for Any Substance Whose Presence Poses an Actual or Potential Threat to Human Health

XL also argues that it is "irrelevant" whether the Coronavirus is a "microorganism" because it is "clearly a 'substance whose presence poses an actual or potential threat to human health.'" (XL MTD at 3.) The full sentence upon which XL relies, however, does not support its position.

The XL Policy excludes losses from: "Mold, mildew, fungus, mushroom, spores or other microorganism of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health."[10] XL is asking this Court to rewrite the Microorganism Exclusion to strike the phrase "including but not limited to" and replace it with the word "or" to read: "Mold, mildew, fungus, mushroom, spores, ~~or~~ other microorganism of any type, nature, or description, ~~including but not limited to~~ or any substance whose presence poses an actual or potential threat to human health." However, "it is the function of a court to enforce [the insurance policy] as written and not to make a better contract for either of the parties." Cypress Point Condo Ass'n v. Adria Towers, L.L.C., 226 N.J. 403, 415 (2016).

Defendant XL's reading would impermissibly render meaningless the phrase "including, but not limited to," which connects "any substance" to "microorganism" as "a part" thereof, not as an independent, separate exclusion that can be read in isolation. See Black's Law Dictionary, Include (11th ed. 2019) ("To contain as a part of something. • The participle including typically indicates a partial list. …. [S]ome drafters use phrases such as including without limitation and including but not limited to – which mean the same thing."); Homesite Ins. Co. v. Hindman, 413 N.J. Super. 41, 47 (App. Div. 2010) ("We will not read one policy provision in isolation when doing so would render another provision meaningless."). Indeed, XL concedes that its reading of

[10] See Millea Cert., Ex. A, Endorsement No. 8.

the Microorganism Exclusion makes it "irrelevant" (*i.e.*, meaningless) whether the substance that causes the loss is a microorganism or not. (XL MTD at 4.) As such, its interpretation fails.

XL's overly broad reading also would sweep in and bar losses from "any and all substances that pose an actual or potential threat to human health" such as asbestos, ammonia, radioactive isotopes, or even explosives, all of which are clearly not microorganisms and no reasonable insured would consider them to be excluded by the Microorganism Exclusion. Such an expansive reading is clearly inconsistent with the requirements under New Jersey law that exclusion clauses be narrowly construed, policies interpreted to effectuate the reasonable expectations of the insured, and ambiguities resolved in favor of coverage. See, e.g., Wakefern, 406 N.J. Super. at 538-39; Gibson, 158 N.J. at 671.[11]

II. ENDORSEMENT 0002 DOES NOT BAR COVERAGE

Allianz argues that even if "Capri satisfied its initial burden to prove it is entitled to coverage," its "Infectious Disease / Notifiable Disease Exclusion" somehow "excludes all coverage for Capri's alleged losses." (Allianz MTD at 36.) But the Policy contains no such exclusion. Endorsement 0002, upon which Allianz relies, provides:[12]

> In respect of locations situated in Austria, Belgium, Canada, China, Czech Republic, Denmark, France, Germany, Greece, Hong Kong, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malaysia, Macau, Monaco, Netherlands, Norway,

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[11] Additionally, Defendant XL's reading of the Microorganism Exclusion violates the rules of construction known as ejusdem generis and noscitur a sociis, which provides that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace *only objects similar in nature* to those objects enumerated by the preceding specific words." Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 367 (2007) (emphasis in original); 11 Williston on Contracts § 32:10, Specific and general words; the Esjudem Generis Doctrine (4th ed.); 2 Couch on Ins. § 22:1, Principles of construction. Thus, the phrase "any substance" in the Microorganism Exclusion "is not a universal catch-all," that refers to any dangerous substance without regard to whether it is a microorganism. See Gallenthin, 191 N.J. at 367. Similarly, under the maxim of noscitur a sociis, "[w]ords of general and specific import take color from each other when associated together, and thus the word of general significance is modified by its associates of restricted sense." Sealed Air Corp. v. Royal Indem. Co., 404 N.J. Super. 363, 380-81 (App. Div. 2008) (exclusion for losses "arising out of, or in any way involving . . . the actual, alleged or threatened discharge, release, escape, seepage, migration or disposal of Pollutants" held not to bar coverage for securities claims predicated on drop in policyholder's stock due to misstatements regarding its potential liability for asbestos claims).

[12] See Certification of Timothy A. Carroll, dated May 3, 2021, Ex. A, Endorsement No. 0002.

> Poland, Portugal, Romania, Russian Federation, Singapore, Spain, South Korea, Sweden, Switzerland, Thailand, United Arab Emirates, United Kingdom, it is understood and agreed that Insurers will sign as a Reinsurance of Zurich Global Limited (and all subsidiary and affiliated companies of Zurich Group and their respective successors, and their representative companies worldwide) in respect of properties and interests where coverage is provided under local policies issued by Zurich Global Limited (and all subsidiary and affiliated companies of Zurich Group and their respective successors, and their representative companies worldwide). . . .
>
> It is hereby understood, noted and agreed by the Insurers that the **RISK DETAILS** section of this Contract is unaltered except for the following which is added under **'Conditions applicable to this Contract only'**
>
> No Cover for Infectious Disease / Notifiable Disease

The plain language of the endorsement states that it is an agreement *by the Insurers to provide reinsurance to Zurich*. It does not state that Capri agreed to any exclusion from coverage. And the Endorsement does not state that it modifies or changes the Policy. What's more, the quoted language in the endorsement is preceded by a list of international countries where it applies; that list does not include the United States. As a result, the language by its plain terms does not apply to Risks in the United States and it does not affect coverage for Capri.

Moreover, Allianz's position is defeated not only by what the language provides but also by what it *doesn't* provide. The endorsement bears none of the required elements of an enforceable exclusion. The language is not labeled as an exclusion and contains no exclusionary language to put the policyholder on notice. The Endorsement omits the industry standard legend: "This endorsement changes the policy…PLEASE READ THIS CAREFULLY" which signals to the policyholder that what follows is important and affects the scope of coverage. The language says almost nothing, clearly because it is a shorthand between carriers, and was not intended for the policyholder. Indeed, there is nothing in the endorsement that would give any reasonable policyholder notice that this endorsement applies to the policyholder and its coverage. In an "all risks" policy, such as Capri's, Allianz bears the heavy burden of proving that an exclusion to

coverage applies. Allianz cannot meet that burden based on Endorsement 0002. At best, the language is a title, without more, in a policy that explicitly states that headings do not dictate coverage under the policy. (D-Exs. J, K at § 6.21.); MDL Capital Mgmt., Inc. v. Fed. Ins. Co., 274 F. App'x 169, 171-72 (3d Cir. Apr. 2, 2008) (finding that title in policy "Broad Private Fund Exclusion," which was left undefined, was simply an "agreement to agree" and, thus, unenforceable to preclude coverage; policy also "made it clear that the titles were not intended to be used in interpreting the effect of the endorsements.").[13]

If Allianz had wanted to exclude coverage for losses from a virus, it could very easily have written an express exclusion for virus. It did not do so here. Gibson, 158 N.J. at 670 ("[C]ourts should consider whether more precise language by the insurer, had such language been included in the policy, 'would have put the matter beyond reasonable question.'"). Allianz cannot now ask the Court to rewrite the policy to include an exclusion that Allianz itself did not include. See, e.g., N.J. Transit Corp. v. Certain Underwriters at Lloyd's London, 461 N.J. Super. 440, 463 (App. Div. 2019) (a "court cannot make a new and better contract for [insurers] than they made for themselves"); MDL Capital, 274 F. App'x at 172 ("This Court cannot rewrite the parties' agreement in order to give effect to the parties' conflicting views of what the Exclusion was intended to accomplish.").

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[13] Moreover, even if the Court were to find that this Allianz text somehow excludes coverage for costs or losses caused by COVID-19 (the *disease* caused by Coronavirus), it would not exclude coverage for costs or losses caused by Coronavirus, the *virus* itself. In New Jersey, it is settled law, known as "Appleman's Rule," that an exclusion does not apply where a loss arises from a chain of causation in which either the first or the last cause in the chain is a covered cause. See Franklin Packaging Co. v. Cal. Union Ins. Co., 171 N.J. Super. 188, 192 (App. Div. 1979); see also Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc., 181 N.J. 245, 257 (2004). The Appellate Division summarized Appleman's Rule as follows in 2004: "[W]ith regard to sequential causes of loss our courts have determined that an insured deserves coverage where the included cause of loss is either the first or last step in the chain of causation which leads to the loss." Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 431 (App. Div. 2004). To avoid the operation of Appleman's Rule where a loss has more than one cause, New Jersey courts have been clear that an insurer must include an unambiguous anti-concurrent causation clause that provides that if a covered cause of loss combines with an excluded cause of loss to produce a loss, the loss is excluded. Id. Here, Allianz cannot deny that its one line text lacks such a clause and, for purposes of this motion, that the virus was either the first or the last cause in the chain leading to the COVID Losses.

Under the well-established New Jersey principles governing the interpretation of insurance policies, particularly the rules requiring that policies be construed in accordance with the reasonable expectations of the insured, that ambiguities be resolved in favor of the policyholder, and that exclusion clauses be construed narrowly (see, e.g., Wakefern), Endorsement 0002 is not an exclusion and cannot be construed to bar Capri's losses in this case.

III. DEFENDANT INSURERS HAVE NOT PROPERLY PLACED THE POLICIES' CONTAMINATION EXCLUSION BEFORE THE COURT ON THEIR MOTIONS TO DISMISS

In an apparent attempt to preserve the argument for a later date, Zurich, Liberty and Allianz assert that the Policies' Contamination Exclusion bars coverage, but then state that Capri's position relating to this exclusion need not be addressed in these motions. See Zurich MTD at 8 (arguing exclusion bars coverage, dismissively asserting "Plaintiff's position is wishful but incorrect," yet concluding "[n]evertheless, for purposes of this motion to dismiss, Plaintiff's argument does not need to be addressed"); Liberty MTD at 3 n.2 (asserting the Contamination exclusion "would also serve as a complete bar to coverage," but this exclusion is "not the basis of the instant Motion to Dismiss"); Allianz MTD at 36 n.10 (asserting exclusion applies, yet concluding "[i]t is unnecessary, at this point, for the Court to address this exclusion – or any of Capri's convoluted arguments about it, which seek to create an ambiguity where none exists – because Capri is not entitled to any coverage in the first place"). Accordingly, based upon Insurers' express representations that Capri's position relating to the Contamination Exclusion "does not need to be addressed" because it is "unnecessary, at this point, for the Court to address this exclusion," Capri considers this issue not properly before the Court for determination on any of Insurers' motions to

dismiss. While not a part of the Insurers' motions to dismiss, however, Capri is constrained to correct the record made by Insurers in their motions.

The Policies include an endorsement that deletes "virus" from the Policy's Contamination Exclusion (the "Virus Deletion Endorsement"). Insurers take the position that the Virus Deletion Endorsement is limited in geographic scope to Louisiana locations based solely upon the title of the endorsement that refers to "Louisiana." But that argument fails because the Zurich Edge Policy contains a clear and unambiguous provision stating that titles of endorsements "shall not in any way affect the provisions to which they relate" (the "Titles Provision"). MDL Capital, 274 F. App'x at 171 (noting that "the District Court overlooked the caution in the binder providing that the titles of the endorsements 'are for convenience only,'" and thus were "not intended to be used in interpreting the effect of the endorsements."); Schorr v. Schorr, 341 N.J. Super. 132, 138 (App. Div. 2001) (noting a provision "expressly provides that the parties intended the section headings for reference only and not to have any substantive bearing on the construction of the agreement," therefore finding "the fact that some of the obligations that [husband] wished to discharge were contained under the heading 'Equitable Distribution' is not dispositive on the issue of dischargeability"). Had Zurich wanted to limit the Virus Deletion Endorsement's geographic scope it could have done so in the terms and conditions just as it did in other state-titled endorsements (such as the New York and Connecticut Amendatory Endorsements).

Indeed, Insurers' position is undercut by Defendant Zurich's own conduct. In the Fall of 2020, Zurich sought and received approval for a revised Louisiana Amendatory Endorsement to the Zurich Edge Policy that now states: "**THIS ENDORSEMENT ONLY APPLIES TO LOCATIONS IN LOUISIANA**" (the "Modified Louisiana Endorsement"). This language is absent in the Virus Deletion Endorsement contained in the Capri Zurich Edge Policy. Zurich's

conduct after the fact in adding an express geographical limitation in the new Modified Louisiana Endorsement that is absent from the Virus Deletion Endorsement is either conclusive evidence that the Virus Deletion Endorsement as it appears in the Zurich Edge Policy unambiguously applies to the whole Policy or, at a minimum, concedes a prior ambiguity that must be resolved in favor of coverage for Capri. At a minimum, this revelation requires discovery into the circumstances behind why, subsequent to the emergence of the COVID Losses, Zurich added a Louisiana geographical limitation into a Virus Deletion Endorsement that had no such limitation, but yet failed to add such a geographical limitation to its Edge Policy's many other state-titled endorsements without such a limitation.

Finally, Insurers' reliance on the decision in Manhattan Partners (see Zurich MTD at 8; Allianz MTD at 36 n.10) highlights the grave harm caused when a court is not fully informed of all the controlling facts and authorities. Specifically, Defendant Zurich ***did not disclose the Titles Provision*** to the New Jersey District Court before that Court rendered its decision. Indeed, to the contrary, Zurich affirmatively argued in its reply brief that the titles of its state-titled endorsements can and ***should*** be used to interpret them (in direct contravention of the Titles Provision):

> [T]he Policy should be given its plain meaning and the "Louisiana" identifier of the endorsement cannot just be erased from the Endorsement as the Plaintiffs urge. Indeed, the Court may not adopt an interpretation that would render the "Louisiana" designation of the Endorsement to be meaningless surplusage. …
>
> But here, neither the designation "Louisiana", nor any of the other state-designations are ambiguous. On the contrary, they provide straight-forward clear information about the endorsements in the Policy.

See P-Ex. S, Defendant American Guaranty and Liability Insurance Company's Reply Memorandum of Law in Further Support of Defendant's Motion to Dismiss the Complaint at 8, 11, Manhattan Partners, LLC, et al. v. Am. Guar. & Liab. Ins. Co., No. 2:20-cv-14243-SDW, 2021 U.S. Dist. LEXIS 50461 (D.N.J. Mar. 17, 2021) (No. 16). In reliance on these arguments, the

court held that the Contamination Exclusion applied, based on the title of the endorsement. When the policyholder brought the Titles Provision and the Modified Louisiana Endorsement to the court's attention on a Rule 59(a) motion, the court failed to defend the holding on the endorsement, stating, "even if that analysis were removed, dismissal of the Complaint was still warranted" because of the court's holding on the coverage trigger. See Manhattan Partners, LLC v. Am. Guar. & Liab. Ins. Co., No. 20-14342 (SDW) (LDW), 2021 U.S. Dist. LEXIS 100110, at *4 (D.N.J. May 24, 2021).[14]

If the Insurers make further arguments in support of applying the Contamination Exclusion on reply, Capri respectfully requests the Court ignore such arguments or grant Capri leave to file a sur-reply to address such arguments to ensure a full and complete record on this issue.

CONCLUSION

For the foregoing reasons, Plaintiff Capri respectfully requests that Insurers' Motions to Dismiss be denied and that this Court award such and other further relief as this Court deems just and fair.

[14] All unpublished decisions cited herein are attached in alphabetical order in the Appendix to Capri's Opposition.

Dated: June 3, 2021

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